S218734

IN THE Supreme Court
OF THE STATE OF CALIFORNIA

==========

HIROSHI HORIIKE,

Plaintiff and Appellant,

vs.

COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, et al.,

Defendant and Respondent,

==========

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT • DIVISION FIVE • CASE NO. B246606

==========

BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS *AMICUS CURIAE*

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
C.R.C. Rule 8.208

The following application and brief are made by the Consumer Attorneys of California ("CAOC"). CAOC is a non-profit organization of attorneys and is not a party to this action. CAOC is not aware of any entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Dated: March 19, 2015

Respectfully submitted,

By: _____

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE:

The undersigned respectfully request permission to file a brief as *amicus curiae* in the matter of Hiroshi Horiike v. Coldwell Banker Residential Brokerage Company et al. (2014) 174 Cal.Rptr.3d 294 (hereafter Horiike) under Rule 8.520(t) in support of Plaintiff and Appellant, on behalf of Consumer Attorneys of California ("CAOC").

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. In particular, CAOC has participated as *amicus* in numerous important consumer and employee rights cases, including: Rose v. Bank of America, N.A. (2013) 57 Cal.4th 390; Aryeh v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185; Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004; Kwiksetv. Superior Court (2011) 51 Cal.4th 310; and In re Tobacco II Cases

(2009) 46 Cal.4th 298. CAOC has also participated as an *amicus* in many cases pending at the intermediate appellate level.

CAOC has a substantive and abiding interest in ensuring that consumers in California are treated fairly. This is particularly true in the area of real estate where, not too long ago, mortgage lenders, with the tacit consent of real estate agents, engaged in active deceptions and failed to disclose objectively material information to homeowners that led to wide-spread foreclosures and the near financial collapse of the banking industry from which California and the country are still recovering.

With respect to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. No party or counsel for a party, and indeed no person, save the authors themselves, has made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows.

Executed in Los Angeles, California, this 19th day of March, 2015.

Application for Leave to File Amicus Brief

Respectfully submitted,

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INTRODUCTION

Amicus curiae Consumer Attorneys of California ("CAOC") respectfully submits that the holding of Second Appellate District was proper and should in upheld by this Court. The issue in this case is whether the two salespeople defendant Coldwell Banker Residential Brokerage Company ("Coldwell Banker") employed to represent the buyer and seller were subject to the same fiduciary duties as the broker, Coldwell Banker. The Court of Appeal below agreed with Plaintiff Hiroshi Horiike ("Horiike") that the Coldwell Banker agents were subject to the same fiduciary duties and that the seller's salesperson, Chris Cortazzo, breached that duty by misrepresenting the square footage of the seller's house to Horiike. CAOC also agrees.

Purchasing a home "is one of the most daunting tasks that a modern consumer will undertake." (Mary Szto, Dual Real Estate Agents and the Double Duty of Loyalty, (2012) 41 Real Est. L.J. 22, 22.) As a result, an increasing number of buyers now rely on real estate agents to help them find an appropriate home. (Id. at 27.) It is also true that because consumers "do not buy and sell homes on a regular basis," their "learning curve is steep." (Id. at 27-28.)

Further complicating the matter are the "byzantine assortment of principal-agency relationships" between buyers, sellers and brokers that often leave "all parties confused." (George S. Jackson, Combating the Moral Hazard Problem in Real Estate Agencies: The Case for Double Down Buyer Broker

Clauses (2014) 43 No. 2 Real Est. Rev. J. 4.) Unfortunately, as a result of the confusion, "fiduciary duties imposed by law are oftentimes ignored by real estate brokers." (Id.) Indeed, "the top three issues that cause the most disputes in a real estate transaction are dual agency, disclosure, and breach of fiduciary duty." (Mary Szto, Dual Real Estate Agents and the Double Duty of Loyalty, (2012) 41 Real Est. L.J. 22, 22.)

The California Legislature has expressly recognized the "social as well as the economic value of homeownership." (Civ. Code § 1695(b).) Additionally, when consumers purchase a home, it is often the most significant purchase of their lives and represents a significant part of their personal wealth. (Mary Szto, Dual Real Estate Agents and the Double Duty of Loyalty, (2012) 41 Real Est. L.J. 22, 23.) As a result, these consumers are also at their most vulnerable to exploitation by real estate agents and brokers that do not fulfill their fiduciary duties to all parties. Requiring real estate agents and brokers with dual agency relationships to adhere to their "fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either Seller or Buyer" serves to protect all consumers in California. (Civ. Code, § 2079.16.) Therefore, the CAOC respectfully requests that this Court uphold the sound decision of the Second Appellate District.

LEGAL DISCUSSION

I. The Fiduciary Duty Imposed on Dual Agents Is Unambiguous and Should Be Interpreted in Light of its Purpose to Protect Consumers

The California Legislature has set forth a comprehensive statutory scheme to regulate the duties of brokers and salespersons in real property transactions. (Civ. Code, § 2079 et seq.) In this case, Coldwell Banker acted as the dual agent for both the buyer and the seller. "'Dual agent' means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction." (Id., § 2079.13, subd.(d).) As the agent, Coldwell Banker was responsible for both salespersons who were acting on behalf of the buyer and seller. "The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions." (Id., subd. (b).)

The duty owed is a fiduciary duty. "[A] broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. [Citations.]" (Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal.App.4th 18, 25.) "[A] dual agent has fiduciary duties to both the buyer and seller." (Assilzadeh v. California Federal Bank (2000) 82 Cal.App.4th 399, 414.)

This fiduciary duty was expressly stated in the disclosure forms signed by Horiike (buyer) and Cortazzo (seller's agent), which stated that a dual agent has a fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with either the seller or the buyer. (Id.)

The language of the statute setting forth Cortazzo's fiduciary duty to Horiike is not ambiguous:

> When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.

(Civ. Code, § 2079.13, subd (b).)

An "associate licensee" is a licensed real estate broker or salesperson "who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee." (Id.) As such, the statutory language unambiguously imposes a fiduciary duty on Cortazzo, the associate licensee, which he breached in his dealings with Horiike.

When construing a statute, the Court's primary function is to ascertain the Legislature's intent. (See, e.g., In re Harris (1993) 5 Cal.4th 813, 844; Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1037.) The Court "look[s] first to the words of the statute," giving "the

words their usual and ordinary meaning" and "construing them in light of the statute as a whole and the statute's purpose." (Pineda v. Williams-Sonoma Stores, Inc. (2011) 51 Cal.4th 524, 529-30 [citations omitted].) This Court thus does "'not construe statutes in isolation, but rather read[s] every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (Id. at 530 [citations omitted].) Further, the Court is "mindful of 'the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.'" (Id. (citation omitted.)) "When statutory language is clear, judicial construction is neither necessary nor proper." (Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 179 [citation omitted].) The Court simply "presume[s] the Legislature meant what it said and the plain meaning of the statute governs." (Pineda, supra, at 530.) "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (Id. [citation omitted.]) However, "[i]f the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (Kavanaugh v. West Sonoma County Union High School Dist. (2003) 29 Cal.4th 911, 919.)

Reading the statute to impose the same duty on the salesperson as on the broker is supported by the two leading California treatises on real estate law.

(See 2 Miller & Starr, Cal. Real Estate (3d ed. 2014) § 3:34, p. 3-149 ["A salesperson employed by a real estate broker, whether considered as an employee or an independent contractor by their agreement, owes the same fiduciary duties to the agent's principal that are owed by the agent"]; Greenwald & Bank, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2014) ¶ 2:139, p. 2-32.12 ["A 'dual agency' (or 'dual representation') arises where the same salesperson (or same brokerage firm, through different salespersons) represents both buyer and seller. In such cases, the broker (and any salesperson acting on the broker's behalf) is a fiduciary for both buyer and seller."])

Coldwell Banker asserts in its Brief that Horiike improperly cites to § 3:34 of the Starr & Miller treatise because it and other sections of that treatise were revised in October 2014 relying on the Second Appellate Court decision and note that it is currently before this Court on review. (Brief at p. 14, footnote 2.) However, § 3:34 does not reference the underlying Horiike decision at all. Further, although §§ 3:23, 3:27 and 3:36 do note the limitations of the Horiike decision, they do not excuse the type of dual agency deception that underlies this case. Indeed, the comment to § 3:23 at footnote 28 places blame for the salesperson confusion regarding their dual agency on the real estate industry's decision to treat its salepersons as independent contractors rather than employees:

> **Comment:** Salespersons commonly believe that there is no dual representation if one salesperson "represents" one party to the transaction and another salesperson employed by the same broker "represents" another party to the transaction. The real estate industry has sought to establish salespersons as "independent contractors" for tax purposes (see § 3:71), and this concept has enhanced the misunderstanding of salespersons that they can deal independently in the transaction even though they are negotiating with a different salesperson employed by the same broker who is representing the other party to the transaction.

(2 Miller & Starr, Cal. Real Estate (3d ed. 2014) § 3:23, footnote 28.)

Additionally, Coldwell Banker's insistence that these authorities cannot be used to support the position that salespersons can be dual agents belies that statutory definitions at Civ.Code § 2079.13(e) and (b), which by definition allow dual agency through an "associate licensee," including either "a real estate broker or salesperson." (Emphasis added.)

It is evident from the unambiguous language of Civ. Code, § 2079.13 that the California Legislature intended to impose a fiduciary duty not only on brokers but also on their salespersons who operated as agents for buyers and sellers. Here, where Coldwell Banker was the broker and its associate licensees were agents for both the buyer and seller the dual agency resulted. Therefore, the agents had fiduciary duties to both the buyer and the seller. This reading of the statute is the only interpretation that provides the intended consumer protections to individuals who are purchasing a home. These consumers are

often unfamiliar with the process of purchasing a home and, because buying a home happens so infrequently for the majority of consumers, they cannot be expected to understand the complexities and must rely on the representations of their agents during the process. (Mary Szto, Dual Real Estate Agents and the Double Duty of Loyalty, (2012) 41 Real Est. L.J. 22, 27-28.) Upholding the statutory fiduciary duties of the salespersons when they are in dual agency relationships with buyers and sellers is entirely consistent with the Legislature's intent and will best serve to protect California consumers who are buying and selling their homes.

II. Requiring Disclosure of All Material Facts Will Promote Transparency and Will Not Result in Any Alleged "Chaos"

In its Reply Brief on the Merits, Coldwell Banker argues that upholding the Second Appellate District's decision will "result in chaos" any time salespeople from the same brokerage are on opposite sides of a real estate transaction. (Brief at p. 25) Coldwell Banker continues its exaggerated portrayal of the purported consequences by arguing that upholding the ruling will cause "nightmares" for the real estate industry. (Id.) It continues its overreaching argument, citing a variety of cases in an effort to persuade this Court that agents would be required to disclose "all" information to every party without limit because "All means *all*." (Id. at p. 26 [emphasis in original].)

Coldwell Banker misses the point. Neither the case law nor the statutes

require disclosure of "all" information. What is required is disclosure of information *material* to the transaction and in the real estate context, "material" has been defined as information affecting the value or desirability of the property. (Shapiro v. Sutherland (1998) 64 Cal.App.4th 1534, 1544 ["In the context of a real estate transaction, '[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property ... and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]"]) Nevertheless, Petitioner appears to believe that by selectively italicizing "all" in the quoted language in its cited cases, it can ignore that disclose is indeed limited to material information. (See, Michel v. Palos Verdes Network Group, Inc. (2007) 156 Cal.App.4th 756, 762 ["A fiduciary must tell its principal of all information it possesses that is *material* to the principal's interests." (Emphasis added.)]; Roberts v. Lomanto (2003) 112 Cal.App.4th 1553, 1567 ["As noted, a real estate agent's fiduciary duty of disclosure extends to *all material facts*—that is, all facts that might affect the principal's willingness to enter into or complete a transaction." (Emphasis added.)]; Assilzadeh v. California Federal Bank, 82 Cal.App.4th at 414-15, quoting Field v. Century 21 Klowden-Forness Realty, 63 Cal.App.4th at 25 ["[A] broker's fiduciary duty to

his client requires the highest good faith and undivided service and loyalty. [Citations.] 'The broker as a fiduciary has a duty to learn the *material facts* that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose *material information* to the principal includes the duty to disclose reasonably obtainable material information.'" (Emphasis added.); Jorgensen v. Beach 'N' Bay Realty, Inc. (1981) 125 Cal.App.3d 155, 160 ["[Dual agents] had a further duty to disclose *all material facts* within their knowledge which might have affected [seller's] decision to accept the purchaser's offer."] ("All" emphasized in original, emphasis added.); Alhino v. Starr (1980), 112 Cal.App.3d 158, 169 ["A real estate licensee is 'charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. [Citations.]'" (Emphasis added.); Wilson v. Lewis (1980) 106 Cal.App.3d 802, 809 ["And a real estate agent undeniably owes a 'fiduciary obligation' to his principal 'to disclose *all material facts* which might affect her decision with regard to the transaction ....'" (Citations omitted, emphasis added.)])

Even Coldwell Banker's citation to Miller & Starr attempts to gloss over that it is material information that requires disclosure.

> 2 Miller & Starr, supra, § 3:29, p. 3-125 ["An agent owes a duty to disclose *all* material facts to the principal, and when the agent knows confidential information regarding one principal that is information material to the second principal, *there is no common law protection against the duty to disclose this information to the second principal*" (first italics in original, second added)].)

(Reply Brief at p. 27.)

In the instant case, the Coldwell Banker licencee failed to disclose the *material* fact that the square footage of the liveable space was substantial less than shown in the listing. This was information that should have been known by Cortazzo and was objectively material to the transaction. This is not a gray area. Further, while there may not be a "common law protection" against the requirement to fully disclose all material information, there are protections written into the statute. (See, Civ. Code § 2079.12.) Although Coldwell Banker acknowledges this statutory exception relating to price, it, nevertheless, persists in arguing that the Legislature could not have intended to require disclosure of all other "material facts." Clearly, the Legislature was aware of the possible conflicting duties and carved out a narrow statutory exception. (Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 195. ["Under the familiar rule of construction, *expressio unius est exclusio alterus*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. [Citation.] This rule, of course, is

inapplicable where its operation would contradict a discernible and contrary legislative intent."]) Further, when it enacted these consumer protections, the Legislature expressly stated that "[i]t is not the intent of the Legislature to modify or restrict existing duties owed by real estate licensees." (Civ. Code § 2079.12(b).) Therefore, it is clear that the Legislature fully understand and intended to require real estate agents to disclose all material facts in a transaction except those relating to the willingness of the buyer to pay more or the seller to accept less money.

In enacting Article 2, "Duty to Prospective Purchaser of Real Property," the California Legislature was clearly intent on protecting purchasers of real estate, such as Horiike, and was not focused on the possible conflicts such consumer protections might cause for brokers and their salespeople who choose to act as dual agents. It certainly will not cause "chaos" or "nightmares" for agents to fulfill their obligations to disclose all materials facts to their principals. Instead, it will create a transparent marketplace that will allow all parties to have confidence that they have the material information they need.

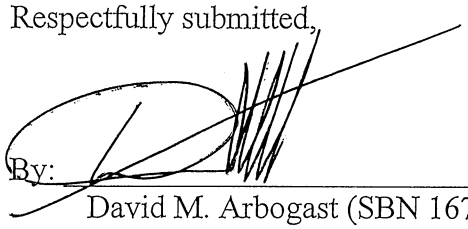
CONCLUSION

For the forgoing reasons, CAOC urges this Court to uphold the clear, unambiguous language of Civ. Code, § 2079 et seq., which imposes fiduciary

duties on brokers and their associate licensees. In a marketplace where dual agency is increasingly more common, this fiduciary duty serves to protect all consumers who are often making the single largest purchase of their lives.

Dated: March 19, 2015

Respectfully submitted,



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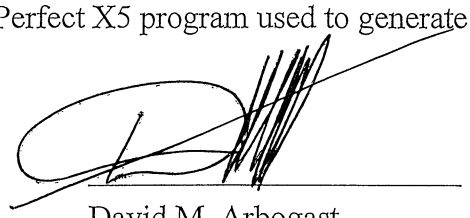
CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned counsel certifies that the text of this petition uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this petition consists of 2911 words as counted by the Corel WordPerfect X5 program used to generate this petition.

Dated: March 19, 2015



David M. Arbogast

DECLARATION OF SERVICE BY MAIL

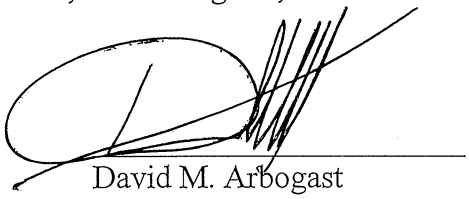
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 8117 W. Manchester Ave., Suite 530, Playa Del Rey, California 90293.

2. That on March 19, 2015, declarant served the **BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS AMICUS CURIAE** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of March, at Los Angeles, California.



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