Supreme Court Case No. S218734

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

HIROSHI HORIIKE,

Plaintiff and Appellant,

v.

COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, a California Corporation, and CHRIS CORTAZZO, an individual,

Defendants and Respondents.

After A Decision By The Court Of Appeal
Second Appellate District, Division 5
2d Civil Case No. B246606
Los Angeles County Superior Case No. SC110477

ANSWER TO PETITION FOR REVIEW

THE LAW OFFICES OF DAVID W. MACEY, P.A.
David W. Macey, Esq., *pro hac vice pending* (Florida Bar No. 185612)
Lindsay M. Alter, Esq., *pro hac vice pending* (Florida Bar No. 103237)
135 San Lorenzo Avenue, Penthouse 830
Coral Gables, Florida 33146
Telephone: (305) 860-2563 // Facsimile: (305) 675-5841
dm@davidmacey.com

HIGGS, FLETCHER, & MACK LLP
Victor Pippins, Esq. (California Bar No. 251953)
401 West "A" Street Suite 2600
San Diego, California 92101
Telephone: (619) 243-4077 // Facsimile: (619) 696-1410
pippinsv@higgslaw.com

Attorneys for Plaintiff and Appellant Hiroshi Horiike

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Cases: **Page**

TABLE OF AUTHORITIES
(Continued)

Page

California Statutes:

TABLE OF AUTHORITIES
(Continued)

Page

Rules:

Other Authorities:

TABLE OF AUTHORITIES
(Continued)

Page

INTRODUCTION

In a unanimous decision, the Second District Court of Appeal has held that when a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting on behalf of the broker have the same fiduciary duty to the buyer and the seller as the broker. Far from being the outlier that Petitioners portray, the Court of Appeal's decision does no more than enforce the clear and unambiguous language of Civil Code section 2079,[1] a statutory provision that for over twenty-five years has protected consumers against the violation of fiduciary duties by real estate brokers and their salesmen. (Civ. Code, § 2079 et seq.)

Petitioners' disagreement with the Court of Appeal's ruling does not warrant review by this Court. Review by this Court is in order where it is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) There is no conflict in the law, despite the Petitioners' attempt to create one. Indeed, the court's thorough and carefully reasoned opinion is entirely consistent with settled law on the subject of dual agency.

Stripped of its rhetoric, Petitioners' grounds for review amount to a debate concerning the prudence of dual agency in the state of California. While lobbying the wisdom of dual agency may be appropriate in the

[1] All further statutory references are to the Civil Code unless otherwise indicated.

Legislature, review by this Court is not the proper venue. It would be a sea change in the law for courts to assume the mantle by circumventing the Legislature's clear and unambiguous statutory language. Indeed, to entertain Petitioners' claim "would require this court to not only run contra to established legal authority, but to indulge in the oft condemned practice of judicial legislation." (*People v. Rappard* (1972) 28 Cal.App.3d 302, 307 [104 Cal.Rptr. 535] (*Rappard*).)

In this case, the Court of Appeal simply corrected the trial court's erroneous application of established rules governing duties to purchasers of residential property. The petition identifies neither a conflict in existing law nor any important issues of law that need to be addressed. Thus, review should be denied.

STATEMENT OF THE CASE

A. Background

Defendant, Chris Cortazzo, is a salesperson for defendant, Coldwell Banker (CB). (Opinion ["Opn."], 2.) CB is a licensed real estate brokerage, and Cortazzo is a licensed real estate salesperson working under CB's brokerage license. (*Ibid.*) In 2006, the owners of a residential property in Malibu engaged Cortazzo to sell their property. (*Ibid.*) The building record listed that there was 9,434 square feet of "living area."[2] (1 Appellant's Appendix ["AA"] 13.)

In September 2006, Cortazzo listed the property for sale on a multiple listing service (MLS). (Opn. 2.) The listing service, consistent with the building record, reflected that the living area of the property was only 9,434 square feet. (*Ibid.*) Cortazzo, however, listed that the home "offers approximately 15,000 square feet of living areas." (*Id.* at pp. 2-3.) Additionally, Cortazzo prepared a flier for the property stating it "offers approximately 15,000 square feet of living areas." (*Id.* at p. 3.)

The Previous Transaction That Failed
As A Result of Square Footage Concerns

Prior to, Plaintiff, Hiroshi Horiike's purchase of the property, a couple made an offer to purchase the home. (Opn. 3.) The couple requested

[2] "Living area" is defined by the Malibu code as "the interior, habitable area of a dwelling unit," which includes basements and attics but not garages or accessory structures. (9 Reporter's Transcript ["R.T."] 3339-40.)

verification of the square footage of the living area. (*Ibid.*) In response, Cortazzo provided a letter from the original architect stating that the "total development" square footage of the house under a current Malibu building department ordinance was approximately 15,000 square feet. (*Ibid.*) Cortazzo was aware that the architect's letter did not address "living area" square footage. (5 R.T. 2235-36.)

Cortazzo suggested the couple hire a qualified specialist to verify the square footage. (Opn. 3.) The couple requested the architectural plans, but because they were not made available, the couple requested a six-day extension to inspect the property. (*Ibid.*) The sellers refused to grant the extension and the couple cancelled the transaction. (*Ibid.*)

After the failed transaction, Cortazzo curiously modified the MLS listing to read that the square footage was "0/O.T.," by which he meant zero square feet and other comments. (Opn. 3.)

Horiike's Purchase of the Property

Horiike contacted CB to assist him in finding a home in Southern California. (6 R.T. 2545.) Horiike began working with a CB salesperson, Chizuko Namba, to locate a residential property. (Opn. 3.) Namba saw Cortazzo's listing for the Malibu property and arranged for Cortazzo to show the property to Horiike. (*Ibid.*)

When they arrived at the property, Cortazzo presented Horiike with a printed flyer, prepared by and bearing the names of CB and Cortazzo,

expressing that the property measured 15,000 square feet of living area. (Opn. 3.) During the first tour of the property, Cortazzo stated on two occasions that the home had 15,000 square feet of living areas. (6 R.T. 2555.) Cortazzo stressed to Horiike that this conferred unique value on the property because the living area substantially exceeded the maximum square footage allowed by the City of Malibu zoning code for any new or remodeled residences. (*Ibid.*)

On a second visit to the property that night, Cortazzo repeated for a third time that day that the home measured 15,000 square feet of living area. (6 R.T. Vol. 2559.) Cortazzo again reiterated the unique value that this living area conferred on the property due to the change in Malibu's zoning code. (*Ibid.*)

Horiike "completely" trusted Cortazzo's representations because of his affiliation with CB and agreed to purchase the property for $13,250,000. (6 R.T. 2555-56.) Cortazzo sent a copy of the building permit to Namba. (Opn. 3.) Namba provided a copy of the permit to Horiike with other documents. (*Ibid.*)

The Parties Execute Disclosure Forms Acknowledging Their Duties Under California Law

Because CB was representing both the buyer and the seller in this transaction, the parties executed three disclosure forms memorializing the nature of CB's "dual agency" role, and thereby Cortazzo's concomitant

fiduciary duties to Horiike under the law. First, the parties signed a "Confirmation of the Real Estate Agency Relationships" form, as required by section 2079.17. (Opn. 3.) "The document explained that CB, as the listing agent and the selling agent, was the agent of *both* the buyer and the seller. Cortazzo signed the document as an associate licensee of the listing agent CB. Namba signed the document as an associate licensee of the selling agent CB." (*Ibid.*, italics added.)

Next, the parties executed a form required under section 2079.16 for the disclosure of three possible agency relationships. (Opn. 4.) Describing the obligations of an "Agent Representing Both Seller and Buyer," the form stated that:

> A real estate agent, either acting *directly or through one or more associate licensees*, can legally be the agent of *both* the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.
> In a *dual agency* situation, the agent has the following *affirmative obligations* to *both* the Seller and the Buyer:
> (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in the dealings with either the Seller or the Buyer,
> (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

(1 AA 11/156, italics added.) "Horiike signed the disclosure form as the buyer and Cortazzo as the associate licensee for the agent CB." (Opn. 4.)

Finally, the parties executed the "Disclosure and Consent for Representation of More than One Buyer or Seller," which specified in pertinent part, as follows:

> A real estate broker, whether a corporation, partnership or sole proprietorship, ("Broker") may represent more than one buyer or seller provided the Broker has made a disclosure and the principals have given their consent. This multiple representation can occur through an individual licensed as a broker *or through different associate licensees acting for the Broker*. The associate licensees *may be working out of the same or different office locations*.
>
> . . . .
>
> In the event of a *dual agency*, Seller and Buyer agree that . . . a Dual Agent is obligated to disclose known facts materially affecting the value or desirability of the property to *both* parties.

(1 AA 11/159, italics added.) The disclosure form listed CB as the broker. Cortazzo signed as an associate licensee on CB's behalf. (*Ibid.*)

By the execution of these agency disclosure documents, Horiike testified that he understood that his agents were "Coldwell Banker, *Mr. Cortazzo* and Ms. Namba." (6 R.T. 2562-63, italics added.) Cortazzo created and executed the disclosure forms, thereby directly and expressly acknowledging his and CB's fiduciary duties to Horiike.

Notably, Cortazzo never explained "to Horiike that contradictory square footage measurements existed." (Opn. 10.) Cortazzo "did not even provide the handwritten advice given to other potential purchasers to hire a

specialist to verify the square footage." (*Ibid.*) Additionally, Cortazzo never notified Namba that there was a square footage discrepancy.

The transaction closed on December 4, 2007. Cortazzo received $275,625 as his 5% commission for the sale. (5 R.T. 2286; 2 AA 27.) In addition to Cortazzo's and Namba's commissions, CB itself profited over $100,000 from the sale of the property. (5 R.T. 2286-87; 2 AA 28; 2 AA 29.)

Horiike Discovers That The Property Actually Has Less Than 10,000 Square Feet Of "Living Area"

In 2009, in preparation for work on the property, Horiike's assistant went to the Malibu City Planning Commission to inquire whether it would be permissible to add a sunroom to the already existing 15,000 square feet of living area in the home. As a result, Horiike learned for the first time that the permit actually reflected that the home was less than 10,000 square feet of living area. (9 R.T. 3355.)

Stunned to learn that the home Horiike purchased had roughly thirty-three percent (33%) less square feet of living area than Cortazzo had represented it to have, Horiike sought answers. "He asked Cortazzo to verify that the property had 15,000 square feet of living areas." (Opn. 4.) Cortazzo never responded. (9 R.T. 3557.)

At trial, Horiike's expert testified that the living areas of the home totaled 11,964 square feet. (Opn. 4-5.) The defense's expert testified that

the home's living areas totaled 14,186 square feet. (*Id.* at p. 5.) Horiike's expert testified that based upon her assessment of the value of the property, its estimated value on the date it was sold was between $8.1 to $8.2 million, a difference of roughly five million dollars from what Horiike paid. (10 R.T. 3656-57, 3677, 3678.)

B. Procedural History

Horiike filed a complaint against Cortazzo and CB alleging, inter alia, negligent misrepresentation and breach of fiduciary duty. (Opn. 5.) After the presentation of Horiike's case to the jury, Cortazzo moved for nonsuit on the cause of action for breach of fiduciary duty against him. (*Ibid.*) The trial court granted the motion on the grounds that Cortazzo had no fiduciary duty to Horiike. (*Ibid.*) In addition, the court instructed the jury that in order to find CB liable for breach of fiduciary duty, the jury had to find that some agent of CB, other than Namba or Cortazzo, had breached a fiduciary duty to Horiike. (*Ibid.*) Judgment was entered in favor of Cortazzo and CB, and Horiike appealed. (*Id.* at pp. 5-6.)

In a unanimous decision, the Court of Appeal reversed the judgment, holding that "Cortazzo, as an associate licensee acting on behalf of CB, had the same fiduciary duty to Horiike as CB." (Opn. 8.) The Court of Appeal reasoned that "[w]hen a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker." (*Id.*

at p. 2.) The Court of Appeal concluded that "the trial court incorrectly granted the nonsuit and erroneously instructed the jury." (*Ibid.*)

Petitioners' request for rehearing was denied.

ARGUMENT

The California Rules of Court limit this Court's jurisdiction to situations in which it is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The Petition for Review does not refer to the foregoing standard, nor does it directly analyze its elements.[3]

Nevertheless, the Petitioners contend that this Court should accept jurisdiction because: (1) the Court of Appeal's opinion "implicates important statewide public policy issues," and (2) this Court should resolve "the proper construction of civil code section 2079.13." (Petition for Review ["PR"] 13, 25.) However, the petition does not identify a conflict in existing law or any important issues of law that need to be addressed. Although the petition claims issues of first impression (*Id.* at pp. 9-12), first impression issues alone do not create a lack of uniformity or an unsettled important question of law.

The Petitioners describe the decision of the Court of Appeal as "deeply disruptive" to the real estate industry, thereby creating a special situation justifying review. (PR 3.) To describe the action of the Court of Appeal as "deeply disruptive" is dramatic, perhaps, but also misleading. In sober truth the decision did this and no more: It applied the existing duties

[3] The Rules further require that a "petition *must* explain how the case presents a ground for review under rule 8.500(b)." (Cal. Rules of Court, rule 8.504(b)(1), italics added.)

the law imposes on real estate agents and the proper contours of legal principles affecting fiduciaries to the specific facts of this case.

What the Court of Appeal rejected, and properly so, was an attempt to rewrite and misapply section 2079. The rewrite by the trial court and the Petitioners would afford salespersons the ability to take advantage of unwary buyers while evading any liability for doing so. The Court of Appeal properly rejected this unsupportable spin on dual agency. None of this suggests a legal issue for review.

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT IN THE CASE LAW

Petitioners concede at the outset of the petition that *Horiike* constitutes a matter of first impression. (PR 9-12.) This concession renders suspect the implication that review is necessary to establish uniformity of the law. (*Id.* at pp. 26-28.) Undeterred, Petitioners contend that the Court of Appeal's decision goes against "how brokerage firms always operated in California before this opinion." (*Id.* at p. 23.)

However, nowhere in their petition have Petitioners pointed to a single California case to establish this precedent. That is for good reason: The purported conflict in the case law urged by Petitioners to justify review simply does not exist. It is on this basis that the petition should be denied.

Notwithstanding, in an attempt to create conflict, Petitioners rely solely on the New Mexico case of *Moser v. Bertram* (1993) 115 N.M. 766

[858 P.2d 854] (*Moser*). (PR 27-28.) Although *Moser* is, indeed, from another jurisdiction and therefore not binding on this Court, *Moser* is also inapplicable to the instant case due to distinct factual differences.

While Petitioners quote various conclusions from the *Moser* Court's opinion, Petitioners conspicuously ignore the fact that the Court in *Moser* did not consider the intra-firm transaction in question a "dual agency" transaction. Therefore, it did not apply the heightened obligations that are owed in such a transaction to the agents:

> It is worth noting that *this case does not involve dual agency*. In a dual agency situation, one agent has fiduciary obligations to two principals with divergent interests, evoking conflict of interest concerns and *consequent disclosure requirements.*

(*Moser, supra,* 858 P.2d at p. 856, italics added.) This is very different from the instant transaction where the parties executed disclosure forms memorializing the nature of their duties as "dual agents" and where the language of the disclosures clarify that in California an intra-firm transaction is considered a "dual agency."

Interestingly, the *Moser* decision is completely at odds with the Petitioners' position on fiduciary duties. The Court in *Moser* did not conclude that a seller's salesperson never owes a fiduciary duty to the buyer in an intra-firm transaction. (*Moser, supra*, 858 P.2d at p. 856.) Instead, the Court clarified that where a seller's salesperson is at fault in "appointing,

supervising, or cooperating" with the other salesperson, the fiduciary duty of the buyer's salesperson can be "charged" to the seller's salesperson. (*Id.* at p. 856.)

Even under New Mexico law, Horiike would be entitled to a cause of action for breach of fiduciary duty against Cortazzo because Cortazzo failed to cooperate with his salesperson, Namba. The Court of Appeal found that "Cortazzo knew the square footage of the property had been measured and reflected differently in different documents." (Opn. 10.) In contrast to *Moser*, the Petitioners espouse a position in which a buyer is *never* owed a fiduciary duty by the seller's salesperson in an intra-firm transaction.

While New Mexico's construction is different from California's statutory scheme, which imposes a fiduciary duty as a consequence of the "dual agency" nature of the transaction, the result is the same. In both states, the wrongful conduct of a seller's salesperson in an intra-firm transaction gives rise to a breach of fiduciary duty cause of action. Indeed, that is exactly what took place in the instant case when Cortazzo deliberately failed to explain a known and material discrepancy in square footage to the buyer's agent, Namba.

Similarly, other jurisdictions that have broached this issue have also held that a buyer may avail himself of a cause of action for breach of fiduciary duty against the seller's salesperson in an intra-firm transaction,

albeit for different reasons.[4] California law is in line with these decisions and affords its consumers the same protections.

Yet the Petitioners encourage this Court to eliminate these protections, and in so doing, circumvent a clear statutory scheme that is in line with other jurisdictions that have addressed this issue. Petitioners point to no instance of lack of decisional uniformity in California or elsewhere. Therefore, review by this Honorable Court is unwarranted.

II. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO UNSETTLED IMPORTANT LEGAL ISSUE

The petition should be denied because there is no important issue of law to settle. Simply because a case is first to apply the law to a new factual scenario does not mean that Supreme Court review is necessary and proper. Although Petitioners argue that review is necessary to settle an "important question" of law, the Court of Appeal hardly left the law unsettled. (See generally, PR 25-34.)

---

[4] Analogously, in *Bazal v. Rhines* (Iowa Ct.App. 1999) 600 N.W. 2d 327, the sellers sued the buyer's agent for breach of fiduciary duty where the parties had executed a number of disclosure forms, thereby directly and expressly acknowledging their status and duties under the law. The court held that because both the seller's and buyer's agents worked for the same brokerage, there existed a dual agency. The court reasoned that by virtue of the parties executing the "Consensual Dual Agency Agreement," "Listing Agreement," and the "Agency Policy Disclosure and Acknowledgement" form, both the brokerage and the buyer's agent owed fiduciary duties to the sellers. (600 N.W. 2d at p. 329.)

Rather, in analyzing the duties owed by a salesperson acting for a dual agent, the Court of Appeal drew upon the plain language of the statute and applied that law to the specific facts before it. And contrary to Petitioner's assertions, the Court of Appeal opinion provides useful guidance to professionals by delineating the proper contours of legal principles affecting fiduciaries.

Indeed, to accept Petitioners' position would be to engraft upon an already comprehensive statutory scheme. (See, e.g., Opn. 7.) Petitioners are attempting to advance the incorrect notion that salespersons "can deal independently in [a] transaction even though they are negotiating with a different salesperson employed by the same broker who is representing the other party to the transaction." (Opn. 8, quoting 2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:12, p. 68, fns. omitted.)

The Court of Appeal, in holding that section 2079 authorizes that "Cortazzo, as an associate licensee acting on behalf of CB, had the same fiduciary duty to Horiike as CB," correctly applied existing law to the facts before it. (Opn. 8.) Because the court analyzed and decided the question in a manner consistent with both the law on the subject and the facts of this case, there is no need for this Court's review. Therefore, the petition should be denied.

III. REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEAL CORRECTLY APPLIED THE CLEAR AND UNAMBIGUOUS LANGUAGE OF CIVIL CODE SECTION 2079 TO THE FACTS OF THE INSTANT CASE

Once the petition's hyperbole is stripped away, the Petitioners' "grounds" for review by this Court amount to a single claim that the Court of Appeal erred in "construing section 2079.13, subdivision (b)." (PR 32.) As more fully described below, review is not necessary or warranted to interpret section 2079 because (1) the words are clear and unambiguous, and (2) the statutory scheme of section 2079 supports the Court of Appeal's holding.

A. The Petition Should Be Denied Because Section 2079 Is Clear And Unambiguous And There Is Thereby No Need For Construction

We begin our inquiry, as we must, with the language of the statute itself. (See *Wilcox v. Birthwhistle* (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d 727].) Because the language is clear and unambiguous, "there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

Section 2079.13, subdivision (b) defines an "associate licensee" as 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."

Section 2079.13(b) further states that "[t]he 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." (Italics added.)

By its unambiguous language, then, section 2079.13 expressly states that when a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and seller as the broker does. (Opn. 2.) The Court of Appeal, in making its decision, simply evaluated the clear and unambiguous language of the statute to the facts before it and correctly found that "Cortazzo, as an associate licensee acting on behalf of CB, had the same fiduciary duty to Horiike as CB." (*Id.* at p. 8.)

B. The Petition Should Be Denied Because The Statutory Scheme Of Section 2079 Supports The Court's Holding

The Court of Appeal's analysis and holding are not controversial. Rather, the Court of Appeal thoroughly analyzed the statutory scheme of section 2079 and followed the parameters of settled principles of law pertaining to dual agency. (Opn. 7-9.)

Indeed, the duties of brokers and salespersons in real property transactions are regulated by a comprehensive statutory scheme. (Civ. Code, § 2079 et seq.) Under this scheme, an "agent" is a licensed real estate broker "under whose license a listing is executed or an offer to purchase is obtained." (Civ. Code, § 2079.13, subd. (a).) "'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." (Civ. Code, § 2079.13, subd. (d).)

The California Legislature has expressly recognized the importance of full disclosure of dual agency. (See *Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399 [98 Cal.Rptr.2d 176].) Section 2079.14 mandates that the buyer and the seller be made aware of the obligations of their agents in different scenarios.[5] Section 2079.16 makes it clear that a dual agent's fiduciary duty, which is owed to *both* the buyer and the seller, is

[5] In the instant case, because CB was representing both the buyer and the seller in the transaction, the parties to the transaction executed three disclosure forms memorializing the nature of CB's "dual agency" role, and thereby Cortazzo's concomitant duties under the law.

distinguishable from any obligations owed by each agent. Lastly, section 2079.17 requires that the selling agent "disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a *dual agent* representing both the buyer and the seller." (Italics added.)

Furthermore, Petitioners acknowledge that CB acted as a dual agent in the transaction. (PR 7, 13, 20.) However, Petitioners attempt to distract this Court by arguing that "subdivision (b)'s reference to 'agent' actually refers to a person, something Coldwell is not." (*Id.* at p. 32, italics omitted.)

The concession that CB is a "dual agent" and subsequent denial that CB is an "agent" is, however, a *non sequitur*. Section 2079.13(d) clearly provides that a "'[d]ual agent' means an *agent*." (Italics added.) Petitioners argue that pursuant to section 2079.13(a), the definition for "agent" is "a person acting under [the general agency statutes] in a real property transaction, and includes a person who is licensed as a real estate broker." (PR 31, italics omitted.)

Noticeably absent from Petitioners' definition, however, is their omission of section 2079.13(a)'s definition, which states that it commences with the section of the Business and Professions Code regulating real estate transactions. Pursuant to that section, "'[p]erson' includes *corporation, company and firm*." (Bus. & Prof. Code, § 10006, italics added.)

Therefore, the Court of Appeal's holding is directly in line with the statutory scheme of section 2079. As the court properly concluded, "[u]nder Civil Code section 2079.13, subdivision (b), the duty that Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by CB. CB owed a fiduciary duty to Horiike, and therefore, Cortazzo owed a fiduciary duty to Horiike." (Opn. 8.)

IV. PETITIONERS' REMAINING PUBLIC POLICY ARGUMENTS ARE ILLUSORY AND IRRELEVANT TO THE QUESTION OF WHETHER THIS COURT SHOULD GRANT REVIEW

Petitioners' remaining arguments are raised for the first time in their petition. Petitioners did not present these arguments to the trial court or to the Court of Appeal. (See Cal. Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"]; see, e.g., *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726 [68 Cal.Rptr.3d 746, P.3d 1082].) Because Petitioners have failed to raise any "extremely significant issues of public policy and public interest" that would warrant this Court's departure from its ordinary policy, Petitioners are thereby barred from seeking review on these new issues. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 591 [110 Cal.Rptr.2d 809, 28 P.3d 860].)

Ostensibly, Petitioners are attempting to circumvent the Legislature by encouraging this Court to impose judicial legislation based upon unavailing policy arguments. That is not a role courts are suited for, nor a role that the Legislature has allotted to them. (See *Rappard, supra,* 28 Cal.App.3d at p. 307.) Naturally, policy arguments cannot replace sound textual construction. (See *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 645 [88 Cal.Rptr.3d 859, 200 P.3d 295] ["A mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language"].) Thus, as more fully described below, Petitioners' remaining arguments are irrelevant to the question of whether this Court should grant review and should thereby be denied.

A. Salespersons Are Not "Forced" To Become Fiduciaries Of Individuals That They Never Agreed To Represent

Despite Petitioners' assertion otherwise, the mandatory disclosure forms serve to codify long-accepted tenets of agency relationships. (See, e.g., PR 28-29.) This history is perhaps best expressed by Judge Epstein in *Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.App.4th 766, 768 [72 Cal.Rptr.2d 828] (plur. opn. of Epstein, J., italics added) (*Brown*):

> Common sense and ancient wisdom join the law in teaching that an agent is not permitted to simultaneously serve two principals whose interests conflict about the matter served—at least, *not without full disclosure and consent*

> *from both.* In the context of brokered real estate transactions, *this principle is codified in Civil Code section 2079.14 and 2079.15.*

Here, the mandatory disclosure forms created and executed by Cortazzo, serve as the "full disclosure and consent" of Cortazzo being a fiduciary to Horiike. By Cortazzo's execution of these agency disclosure documents, Cortazzo and CB directly and expressly acknowledged their status and duties under California law. Indeed, Horiike understood that *his agents were both Cortazzo and Namba*, because they *both* worked for CB.[6] (6 R.T. Vol. 2562-63.) By signing these documents, Cortazzo acknowledged his understanding that CB acted through him as a dual agent for both buyer and seller in this transaction. (1 AA 10.)

The very language of the disclosure forms belies the petition's repeated claim that there was no consent between the parties. This principle of "full disclosure" and "consent" is *codified* in section 2079.14 and section 2079.15. (*Brown*, *supra*, 62 Cal.App.4th at p. 768.) Cortazzo consented to

---

[6] Petitioners repeatedly state that "Horiike did not perceive the seller's salesperson Cortazzo to be his agent." (PR 20.) This is a distortion of the factual record, as Horiike stated that he understood that Cortazzo was *also* his agent because he worked for CB. (6 R.T. 2562-63.) Additionally, the fact that Cortazzo only met Horiike "on one day only" (PR 6) and that "Horiike speaks Mandarin Chinese" (PR 5) is irrelevant with regard to Cortazzo's duty under the law. (See generally *Hale v. Wolfsen* (1969) 276 Cal.App.2d 285 [81 Cal.Rptr. 23].)

the statutorily mandated fiduciary duty so that he could profit from the proceeds of the transaction.[7]

Thus, salespersons are not "forced" to become fiduciaries of individuals that they never agreed to represent. Indeed, disclosure preserves the salesperson's right to *choose* the agency relationship.[8] Here, Cortazzo chose to be Horiike's fiduciary when he created and executed the disclosure forms confirming that he was a dual agent in the transaction. "The disclosure does not relieve [Cortazzo] of the double burden of performing as a fiduciary on behalf of both parties." (Hayes, *The Practice of Dual Agency in California: Civil Code Sections 2373-2382* (1986) 21 U.S.F.L. Rev. 81, 88 (*The Practice of Dual Agency*).)

---

[7] A motivating factor that originally propelled this legislation was the fact that intra-company sales yield the greatest net profits for brokerages, thus prompting the potential for abuse. (See generally Olazabal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses* (2003) 40 Harv. J. on Legis. 65.) A listing broker may earn 20-40% of the commission owed his or her firm; selling brokers may earn 50-60%, while some brokerages pay higher commissions to their agents for in-house sales. (Gardiner et al., *The Impact of Dual Agency* (2007) 35 J. Real Estate Fin. & Econ. 39, 46.)

[8] Indeed, the California Association of Realtors, which sponsored the original bill, stated then that "[o]ne of the most important benefits of the agency disclosure legislation is that it preserves the agent's right to *choose* the agency relationships that best suits the agent's business." (Cal. Assoc. of Realtors Legal Dept., Agency Legislation Compliance Manual (1987) p. 6.)

B. The Opinion Upholds A Clear Statutory Scheme That Was Designed To Address "Intra-Firm" Transactions And Thereby Protect, Not Harm Consumers

Petitioners repeatedly contend that the "intra-firm transactions at issue here were not on the Legislature's radar." (PR 31.) Petitioners provide no evidence to support this assertion other than that the Legislature did not specifically use the term "intra-firm."[9] However, an examination of case law, statutes, and scholarly articles[10] prior to section 2079's enactment, proves otherwise.

Section 2079 was enacted in response to the growing confusion concerning "the extent and nature of . . . California real estate licensees' legal responsibilities" when "associated with the same real estate brokerage firm." (*The Practice of Dual Agency*, *supra*, 21 U.S.F.L. Rev. at pp. 81, 92.) Prior to its enactment, "the extent of duty owed by a real estate broker to a buyer who [was] not technically a principal [was] constantly expanding." (*Id.* at p. 91; see discussion *infra* Part IV.C.)

---

[9] Petitioners define "intra-firm" as when "different salespersons from the same real estate brokerage firm represent the buyer and the seller . . . where the firm itself is a dual agent but there are separate, independent salespersons." (PR 13, italics omitted.)

[10] "[S]alespersons 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 . . . . [I]f one salesperson obtains the listing and 'represents' the buyer, there is a dual agency because the employing broker is the agent for both the buyer and the seller." (Miller & Starr, Current Law of Cal. Real Estate (Supp. 1986) § 4:15, p. 42, italics added.)

Prior to section 2079's enactment, legal commentators analyzed the impact that it would have on intra-firm transactions, noting that:

> While the precise number of such "in-house" transactions cannot be ascertained, it is safe to assume, particularly in light of the current trend toward large brokerage offices, that the number is quite significant. The possibility of this nearly automatic classification of such transactions as involving *the practice of dual agency is a reality increasingly recognized by the larger brokerage companies.*

(*The Practice of Dual Agency*, *supra*, 21 U.S.F.L. Rev. at pp. 95-96, italics added.) Indeed, in the article, *The Practice of Dual Agency*, Hayes further described the anticipated "in-house" transaction affected by the legislation with facts directly analogous to the instant case.[11]

Thus, the notion that "intra-firm" transactions were not even on the Legislature's "radar" is not only inaccurate, but is also a gross misrepresentation. "Intra-firm" or "in-house" transactions were precisely why the Legislature introduced this legislation. The Legislature realized that there was the potential for abuse when huge conglomerate brokerage firms controlled the market because the consumer was not at arm's length. (See generally Grohman, *A Reassessment of the Selling Real Estate*

[11] Hayes describes the anticipated "in-house" transaction as where "seller A lists Blackacre with licensee B, who is associated with XYZ Realty, and buyer C is ultimately procured by licensee D, who is also associated with XYZ Realty, *the law will not distinguish between B and D.* They are both mere representatives of the one agent, XYZ Realty, who is the fiduciary of the seller by virtue of the listing contract." (*The Practice of Dual Agency*, *supra*, 21 U.S.F.L. Rev. at p. 93, italics added.)

Broker's Agency Relationship with the Purchaser (1987) 61 St. John's L. Rev. 560, 563 [The broker's obligation to consumers emanates "from the position of public trust which brokers occupy, and is supported by their virtual monopoly in real estate sales. As a result, the purchaser . . . is the least protected and most vulnerable party in a real estate transaction"]; see also *Richards Realty Co. v. Real Estate Com'r* (1956) 144 Cal.App.2d 357 [300 P.2d 893].)

Therefore, the opinion upholds a clear statutory scheme that was designed to address "intra-firm" transactions and thereby protect, not harm, consumers. As the California Supreme Court stated in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808 [94 Cal.Rptr. 796, 484 P.2d 964], "[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society."

C. The Opinion Upholds Existing Dual Fiduciary Duties Owed By Salespersons

Petitioners argue that, in drafting section 2079, "the Legislature intended to *preserve*, not change, existing agency law." (PR 25.) However, the concept that an agent may have dual fiduciary obligations when the other party already has an agent representing them is not a new one in California. (See, e.g., *Hale v. Wolfsen* (1969) 276 Cal.App.2d 285.) Indeed, a line of authority preceding section 2079's enactment supports this notion.

Prior to its enactment, the extent of duty owed by a salesperson to a buyer who was not technically a principal was constantly expanding. (*The Practice of Dual Agency, supra*, 21 U.S.F.L. Rev. at p. 91.) For instance, in *Lingsch v. Savage* (1963) 213 Cal.App.2d 729 [29 Cal.Rptr. 201], listing brokers and sellers were charged with the duty to disclose all material facts known to them and unknown to the buyer. The court expanded this duty, in *Reed v. King* (1983) 145 Cal.App.3d 261 [193 Cal.Rptr. 130], to include such intangible facts as the occurrence of murder on the premises some years earlier.

Likewise, in *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154 [180 Cal.Rptr. 95], a listing agent, who withheld a second pest-control inspection report from a buyer, was held to be the fiduciary of the buyer when the actual amount of termite infestation was greatly in excess of that which the agent had caused to be disclosed. The court, upholding the trial court's findings against the broker, cited earlier authority to support its conclusion that a real estate broker in California is expected to meet the same standard of loyalty and service toward his client that is imposed upon a trustee in favor of his beneficiary. (*Id.* at p. 178.) "In other words, the *broker* was found to be the *buyer's fiduciary*." (*The Practice of Dual Agency, supra*, 21 U.S.F.L. Rev. at p. 94, italics added.)

Thus, this line of authority undermines the Petitioners' contention that dual fiduciary obligations did not exist prior to the enactment of section

2079. Indeed, the opinion in the instant case upholds existing dual fiduciary duties owed by salespersons. (See, e.g., *Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155 [overturning a judgment nonsuiting the plaintiff who alleged, inter alia, breach of fiduciary duty on the part of the listing broker who also functioned as the fiduciary of the purchaser].)

D. Petitioners Are Attempting To Have This Court Circumvent The Legislative Process By Rewriting The Law Simply Because A Literal Interpretation *May* Produce Results Of Arguable Utility

Lastly, Petitioners urge the Court to ignore the plain meaning of the statute because they suggest it would produce absurd consequences. (PR 21-23.) To justify departing from a literal reading of a clearly worded statute, the results produced must be so unreasonable that the Legislature could not have intended them. (See *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 136 [119 Cal.Rptr.3d 437, 244 P.3d 1080].)

Section 2079 was enacted as part of legislation designed to protect consumers from salespersons with greater knowledge and bargaining power. (See *Smith v. Rickard* (1988) 205 Cal.App.3d 1354 [254 Cal.Rptr. 633].) The Legislature's purpose in enacting the statute was to provide real estate licensees with a comprehensive declaration of their duties and for consumers to be aware of the inherently conflicting duties in a dual agency situation. (Civ. Code, § 2079.12, subd. (a).) Although reasonable minds

may debate the wisdom of dual agency, decisions concerning its limitations are the Legislature's to make.

When statutory language is unambiguous, this Court must follow its plain meaning "whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature." (*People v. Weidert* (1985) 39 Cal.3d 836, 843 [218 Cal.Rptr. 57, 705 P.2d 380]; see also *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632 [59 Cal.Rptr.2d 671, 927 P.2d 1175].) The language of section 2079 is clear. It provides that the duty that Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by CB. (Opn. 7.) Petitioners "are not free to rewrite the law simply because a literal interpretation *may* produce results of arguable utility." (*In re D.B. v. D.B.* (2014) 58 Cal.4th 941, 948 [169 Cal.Rptr.3d 672, 320 P.3d 1136], italics added.)

This Court need not use its limited resources to interpret a statute based upon the Petitioners' intimation of unfavorable public policy concerns. Ultimately, the petition constitutes an improper effort to circumvent the Legislature by encouraging this Court to analyze the underlying policies of a clearly worded statute. The petition should be denied because none of the foregoing is grounds for Supreme Court review.

CONCLUSION

Petitioners have failed to show a lack of uniformity of decision or an unsettled important legal principle. Petitioners have not shown any basis for this Court to grant review. Review should be denied.

Dated: June 19, 2014

Respectfully submitted,

THE LAW OFFICES OF DAVID W. MACEY, P.A.
David W. Macey, Esq., *pro hac vice admission pending*
Lindsay M. Alter, Esq., *pro hac vice admission pending*

HIGGS, FLETCHER, & MACK LLP
Victor Pippins

By: _____
Victor Pippins

Attorneys for Plaintiff and Appellant Hiroshi Horiike

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby files, pursuant to California Rules of Court, rule 8.504(d)(1), that the **ANSWER TO PETITION FOR REVIEW** contains 6,822 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: June 19, 2014

Victor Pippins

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 401 West "A" Street, Suite 2600, San Diego, California 92101.

On June 19, 2014, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the parties in this action by serving:

Edward L. Xanders
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036
Appellate Counsel for Petitioners

Neil Gunny
Klinedinst PC
777 S. Figueroa Street, Suite 2800
Los Angeles, CA 90017
Appellate Counsel for Petitioners

Robert J. Shulkin
The Law Department
Coldwell Banker Residential Brokerage Co.
5161 California Avenue, Suite 250
Irvine, CA 92617
Co-Counsel for Petitioners

Hon. John H. Reid
Los Angeles County Superior Court
1725 Main Street
Santa Monica, California 90401-3299
[LASC Case No. SC110477]

Clerk of the Court
California Court of Appeal
Second Appellate District, Division 5
300 South Spring Street
Los Angeles, CA 90013
[Court of Appeal Case No. B 24606]

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postal meter is more than 1 day after date of deposit for mailing in affidavit.

Executed on June 19, 2014.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Victor Pippins