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.	B246606 (Los Angeles County Super. Ct. No. SC110477)

PETITIONERS' OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

When the buyer and the seller in a residential real estate transaction are each independently represented by a different salesperson from the same brokerage firm, does Civil Code section 2079.13, subdivision (b), make each salesperson (without their consent) the fiduciary of both the buyer and the seller, with the duties to provide undivided loyalty, confidentiality and counseling to both their own client and the opposing side?

INTRODUCTION[1]

The Court of Appeal held in this case, as a matter of first impression, that when the buyer and the seller in a California residential real estate transaction are each independently represented by a different salesperson from the same brokerage, each salesperson becomes a "dual agent" and the fiduciary to *both* the buyer and the seller under Civil Code section 2079.13, subdivision (b) ("section 2079.13(b)").[2] Salespersons and their clients have long enjoyed the freedom to *choose* dual agency. Dual agency at the

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[1] Real estate sales involve multiple agency relationships: (1) a salesperson, commonly known as a real estate agent or realtor, has an agency relationship with the client, i.e., the buyer or seller; (2) the broker with whom the salesperson is licensed or affiliated has an agency relationship with the salesperson's client; and (3) the salesperson has an agency relationship with the broker. As a result, references to "agent" and "principal" in real estate statutes and cases can be confusing. For clarity, we describe the participants in real estate sales as (1) salesperson, (2) broker, and (3) client (or buyer or seller), and generally avoid "real estate agent," "listing agent," or "selling agent."

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

salesperson level has proven workable where the interests of the buyer and seller are well-aligned. But the Court of Appeal's first-impression construction of section 2079.13(b) imposes dual agency, and its consequent dual fiduciary duties, by operation of law and without regard to the intentions or interests of the parties or their salespersons.

The Court of Appeal relied entirely on a single sentence buried in section 2079.13(b), a subsection that provides definitions for other statutes: "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." The Court of Appeal construed that sentence as imputing a broker's duties to buyers and sellers *downward* to salespersons, meaning that if salespersons from the same brokerage end up on opposite sides of a transaction, each salesperson owes fiduciary duties to both sides because the brokerage does.

But the Court of Appeal reached that decision in a vacuum. It never considered any alternative construction, the surrounding statutory language, standard agency-law principles, the legislative history, or the perverse public-policy implications of its adopted construction. That was a potentially catastrophic error.

As we shall demonstrate, the only logical and practical construction of that sentence—backed by the overall statutory context and language, settled agency law, the legislative history, *and* public policy—is that the Legislature merely intended to confirm that a principal-agent relationship

exists between brokers and their associate licensees and therefore an associate licensee's duties are imputed to the broker. Settled principles of statutory construction compel that conclusion.

Section 2079.13(b)'s plain language focuses on the relationship that an associate licensee has with a particular buyer or seller and then imputes "that duty" to the broker; the language does not focus on the broker's relationship and then impute those duties to the associate licensee. So, as the trial court correctly found, a salesperson's fiduciary duties to his/her client and *non*-fiduciary duties of honesty and fair dealing to a *non*-client are imputed to the broker. Viewed in the light of *all* of section 2079.13(b)'s language and the entire statutory scheme, the provision simply codifies settled law that associate licensees are *agents* of brokers—that is, the duties owed by each agent are imputed to the brokerage so the brokerage is responsible for any breach.

The Court of Appeal's construction, in contrast, assumes that the Legislature intended to depart radically from settled agency law by: (1) effectively imposing a heretofore unknown doctrine of respondeat *inferior* that imputes the broker's duties as principal *downward* to its agent-salespersons; and (2) *forcing* a salesperson and a non-principal buyer/seller into an agency relationship, even though settled agency law requires consent. Had the Legislature intended such a sea change in the law, it can be expected to have expressed that intent clearly and unambiguously. Its failure to do so, and its usage of language that is completely consistent with settled agency law, compels the adoption of Petitioners' construction. And,

legislative history confirms that the Legislature enacted the statutory scheme to require informational disclosures about *existing* agency law, not to announce a revolution in that law.

The Court of Appeal's construction further fails because, if upheld, it would create a public-policy nightmare:

- Buyers and sellers who chose to have the undivided loyalty of an exclusive salesperson would lose that choice midstream whenever the salesperson on the other side happened to be from the same brokerage—a frequent occurrence given the prevalence of large brokerages.

- Salespersons would have a duty to harm their original client by disclosing to the other side sensitive information about the client's motivations or the salesperson's personal beliefs. For example, a seller's salesperson would have to disclose to the buyer that the seller needs to close a sale quickly or that the seller has financial difficulties, and the buyer's salesperson would have to tell the seller that he thinks the seller is getting a bad deal.

- Because fiduciaries owe duties to research and investigate their clients' needs, and to counsel their clients, salespersons would have to ferret out sensitive information from, and provide counsel to, complete strangers—all against *everyone's* will. This case exemplifies the resulting perversity. Here, the Court of Appeal's construction would transform the seller's salesperson into the buyer's fiduciary (and would also make the buyer vicariously liable for the seller's salesperson's negligence to others), even though they met only once, exchanged only a few words, lived in

different countries, did not speak the same language, and the buyer had chosen his own exclusive salesperson.

- Salespersons would be forced into dual agency with buyers and sellers whose interests inherently conflict. Because compliance with fiduciary duties to one client will frequently entail a breach of fiduciary duties to the other, salespersons risk being sued no matter what they do. The Court of Appeal's construction would trigger a huge increase in litigation and a concomitant increase in insurance premiums. It could also cause large firms to avoid intra-firm transactions altogether, thereby excluding buyers and sellers from a huge portion of the market.

This chaotic public-policy disaster is not, and cannot be, what the Legislature intended. The Legislature merely intended to confirm that associate licensees are agents of their affiliate brokers and therefore are subject to settled agency law. This provides parties with abundant protection in intra-firm transactions: Each has the fiduciary protection of a chosen salesperson and non-fiduciary duties of honesty and good faith from the other party's salesperson, with ultimate liability shared by the common brokerage in the event of any breach by either salesperson. The Legislature simply did not intend that an independent salesperson should magically transform midstream into a dual-agent-fiduciary of a non-client—with all the resulting problems created thereby—simply because a salesperson from the same brokerage ends up on the other side.

The Court of Appeal's judgment must be reversed and Petitioners' construction upheld.

STATEMENT OF THE CASE

A. Buyer Horiike Retains A Coldwell Salesperson To Locate A Residential Property To Purchase.

In 2003, plaintiff Hiroshi Horiike retained Chizuko Namba, a salesperson for defendant Coldwell Banker Residential Brokerage Company ("Coldwell"), to locate a California home to purchase. (9RT 3332-3333.) Horiike resides in Hong Kong. (6RT 2542.) Horiike speaks Mandarin Chinese and Japanese; he cannot speak English fluently and reads only "very simple" English words. (6RT 2544.) Namba's first language is Japanese and she spoke with Horiike only in Japanese. (9RT 3332.)

Over the next four years, Horiike worked exclusively with Namba as his salesperson, viewing forty to fifty luxury homes with her for potential purchase. (9RT 3332-3333.)

B. The Buyer And His Salesperson Consummate A Sale With The Seller And The Seller's Salesperson, Another Coldwell Salesperson From A Different Office.

In 2007, salesperson Namba saw a listing for a Malibu residence that was exclusively listed by another Coldwell salesperson, Chris Cortazzo. (9RT 3333.) The owners had retained Cortazzo to sell their property; he listed it on a multiple listing service (MLS). (5RT 2193-2194.)

Namba was affiliated with Coldwell's Beverly Hills office. (9RT 3335.) Cortazzo was affiliated with Coldwell's Malibu West office. (8RT 3159-3160.)

Namba arranged for Cortazzo to show the property to Horiike. (9RT 3333.) In November 2007, accompanied by Tsutomo Yokoi (vice-president of Horiike's company), Namba and Horiike visited the property on one day only; this was the only time Horiike and the seller's salesperson, Cortazzo, ever met or spoke. (5RT 2275; 6RT 2562; 7RT 2823; 9RT 3337.) It was also the first time that the two Coldwell salespersons (Namba and Cortazzo) had ever met. (9RT 3335.)

Cortazzo did not speak Mandarin or Japanese. (6RT 2465.) He spoke only briefly with Horiike during the house tour. (5RT 2271-2272.) During the tour, Cortazzo handed Horiike the MLS listing sheet and a flyer describing the property. (7RT 2753; 9RT 3338.) Their brief conversations that one day, and those two documents, constitute the full extent of Cortazzo's direct contact with Horiike during the entire sales transaction. (5RT 2275.)

After their afternoon visit, Horiike, Yokoi and Namba privately discussed the property out of Cortazzo's presence. (8RT 3114.) They later returned to the home to see the night view. (8RT 3117.) Horiike, Namba and Yokoi drew up a purchase offer, and Horiike and Yokoi flew home to Hong Kong that evening. (6RT 2565-2567; 9RT 3343-3344.)

Escrow opened shortly thereafter and closed within a month. (5RT 2274, 2295-2296.) During escrow, Namba forwarded the ensuing sales-related documents to Horiike in Hong Kong. (9RT 3395.) Horiike had no communication with Cortazzo during escrow. (7RT 2824.)

C. The Home Size Is Described In Various Terms.

The City of Malibu uses a measurement called "Total Development Square Footage" (TDSF) to calculate and restrict the size of new home construction. (8RT 3059.)[3] As of 1998, Malibu's TDSF measurement included portions of a home's primary residential structure, along with guesthouse and garage. (8RT 3041.) But in 1998, the TDSF measurement did *not* include a hillside home's "daylighted" basement—i.e., habitable space partially built into a surrounding hillside. (8RT 3043, 3085.)

The 1998 building permit for the subject Malibu home represented that its TDSF was 11,050 square feet, including the attached guesthouse and garage. (8RT 3055; 1AA 150.)[4] But that measurement—in accordance with the then-current TDSF ordinance—did not include the home's entire "daylighted" basement level floor, although habitable. (5RT 2135; 8RT 3043, 3085; 1AA 150.) The permit did not reference any "living area" calculation. (*Ibid.*)

By 2007, Malibu had expanded the TDSF ordinance to include daylighted basement space and attached covered terraces. (8RT 3043, 3083, 3092.) By February 2007, Cortazzo had been provided a letter from the home's architect/builder stating that the home's size under the expanded

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[3] At all relevant times, Malibu has restricted TDSF for new home construction to 11,172 square feet. (8RT 3059.)

[4] The 11,050 figure was the total square footage of the guesthouse (746), garage (1080), and "SFR" (9224). (1AA 150.) "SFR" referenced only the main floor and second floor of the three-story home. (8RT 3053-3054, 3080, 3086.)

ordinance was now approximately 15,000 square feet. (1AA 174; 5RT 2231, 2234.)

The flyer that Cortazzo subsequently provided buyer Horiike in 2007 described the home as offering "approximately 15,000 sq. ft. of living areas." (1AA 166.) The buyer's expert acknowledged that there are numerous definitions for the term "living areas." (10RT 3689.) The experts agreed that the guesthouse and home's daylighted basement are "living areas" under any definition. (8RT 3042, 3083; 10RT 3656, 3702.) The buyer's expert measured the home's "total living area" at 12,349 square feet. (10RT 3655.) Defendants' expert measured its *as-built* "living areas" (*exclusive* of garages and covered terraces) at 14,186 square feet. (11RT 3965.) Adding in all 2007 TDSF space (i.e., garages and covered terraces), the home's as-built size measures 16,359 square feet. (*Ibid.*)

D. The Permit And Square-Footage Admonitions Delivered To The Buyer Go Unread.

Shortly after escrow opened, Cortazzo forwarded the 1998 building permit to Namba. (5RT 2294-2295.) Namba received the permit, read it, and faxed it to Yokoi and Horiike in Hong Kong. (9RT 3348, 3398; 8RT 3156.) Yokoi and Horiike received the faxed permit, and Horiike signed a receipt acknowledgment; however, he never actually read the permit. (2AA 203; 7RT 2743, 2745; 8RT 3132-3133.)[5]

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[5] Horiike expected Yokoi to review the permit during escrow to (continued...)

Cortazzo had, in writing, admonished earlier prospective buyers (the Lees) who inquired about the home's size to hire a specialist to verify the square footage. (5RT 2225-2226, 2239-2240; 1AA 173, 180.) Cortazzo delivered similar admonitions to Horiike. The MLS listing sheet that Cortazzo handed Horiike admonished that "Broker/Agent does not guarantee the accuracy of the square footage" and "Buyer is advised to independently verify the accuracy." (2AA 227; 7RT 2753.)

Horiike later signed an acknowledgment that he had received and understood a written advisory which admonished that "[r]epresentations regarding [square footage] . . . are often . . . based upon inaccurate or incomplete records," that "Brokers have not verified any such representations," and that "Broker recommends that Buyer hire an appraiser or licensed surveyor to investigate these matters." (2AA 225, 217 ¶2.) Despite signing the acknowledgment, Horiike never read the advisory or had it translated. (6RT 2571).

Horiike also acknowledged in writing a third advisory that "Broker . . . [s]hall not be responsible for verifying square footage . . . contained in . . . advertisements, flyers or other promotional material." (2AA 213; 6RT 2476-2477.) Horiike never read this advisory either. (7RT 2814.) In fact, Horiike never read *any* documents he received during the escrow period. (6RT 2563; 7RT 2745.)

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[5] (...continued)
ensure its content was consistent with what they had been told. (7RT 2746).

E. The Seller's Salesperson And The Buyer Never Agree To Any Agency Relationship Between Them.

Cortazzo represented the seller only. (6RT 2471-2472; 9RT 3388-3389.) He was never asked and never agreed to represent buyer Horiike. (6RT 2471-2472; 7RT 2823; 9RT 3388-3389.) Horiike admitted that he never asked Cortazzo to act as his real estate agent, and that he "had nothing to do with" Cortazzo and "only met him once." (7RT 2823.)

No sales or other document listed Cortazzo as an agent for Horiike or as a "dual agent." (See, e.g., 1AA 17-23 [purchase offers/agreements].) Horiike and the seller both signed a "Confirmation Real Estate Agency Relationships" form that identified *Coldwell* as the agent of both the buyer and seller; Cortazzo signed as the associate licensee for the seller's agent (the "listing agent") and Namba signed as the associate licensee for the buyer's agent (the "selling agent"). (1AA 154.) Horiike also signed a "Disclosure And Consent For Representation Of More Than One Buyer Or Seller" form that identified the potential dual agent as Coldwell (1AA 159), and a statutorily-required "Disclosure Regarding Real Estate Agency Relationships" form that also identified Coldwell as the agent. (1AA 156; Civ. Code, § 2079.16.)

Each side's broker expert testified at trial that, under California real estate standards, Cortazzo's lone client was the seller (9RT 3411, 3451; 10RT 3802) and only Namba was Horiike's "fiduciary" and thus owed duties to Horiike not owed by Cortazzo (9RT 3462; 10RT 3802). Defendants' expert further explained that industry ethical standards

prohibited Cortazzo from communicating directly with Horiike and required him to communicate through Namba. (10RT 3803.) Indeed, during escrow, Cortazzo transmitted all documents for Horiike's review through Namba. (5RT 2275).

F. The Buyer Sues Coldwell And The Seller's Salesperson (But Not His Own Salesperson), Claiming The Seller's Salesperson Falsely Represented The Home's Square Footage.

Several years after purchasing the property, Horiike filed a complaint against Coldwell and Cortazzo for intentional and negligent misrepresentation, breach of fiduciary duty, unfair business practices in violation of Business and Professions Code section 17200, and false advertising in violation of Business and Professions Code section 17500. (1AA 1-13.) During trial, he added a claim for intentional concealment. (12RT 4243-4244, 4279-4280.)

Horiike's claims each rested on the same allegations: Cortazzo misrepresented/concealed the home's actual square footage, causing Horiike to pay a higher price than warranted. (1AA 1-12.) Horiike alleged no wrongdoing by his own salesperson, Namba. (*Ibid.*)

G. The Trial Court Holds That The Seller's Salesperson Owed No Fiduciary Duty To The Buyer.

The trial court concluded that Cortazzo owed no fiduciary duty to the buyer. (12RT 4202.) It therefore granted nonsuit to Cortazzo on the fiduciary-duty claim. (*Ibid.*)

At trial, buyer Horiike stipulated that he was not seeking recovery against Coldwell based on any malfeasance of his own salesperson, Namba (2RT 1248-1249.) Without objection, the jury was so instructed. (12RT 4284.) The court therefore also instructed that Coldwell could be liable for breach of fiduciary duty only if the jury found that some Coldwell representative other than Cortazzo and Namba breached a fiduciary duty to Horiike. (*Ibid.*)

H. The Jury Finds For The Defendants On All Submitted Claims, Concluding There Was Neither Intentional Nor Negligent Misrepresentation; The Court Enters A Defense Judgment.

By special verdict, the jury ruled in favor of Coldwell and Cortazzo on the claims for intentional and negligent misrepresentation, intentional concealment, and breach of fiduciary duty (concerning Coldwell only). (2AA 233-238.)

Under the intentional misrepresentation count, the jury found that Cortazzo had not made a false representation of material fact. (2AA 233.) Under the negligent misrepresentation count, it found that Cortazzo *had*

made a misrepresentation of material fact but that he "honestly believed," and "had reasonable grounds for believing," the representation was true when he made it. (2AA 236.) The jury ruled against Horiike on the concealment count, finding that Cortazzo did not "intentionally fail to disclose an important or material fact that Hiroshi Horiike did not know and could not reasonably have discovered." (2AA 235.) The jury found that Coldwell did not breach its fiduciary duty to Horiike. (2AA 237-238.)

The trial court found that the inconsistent verdict findings on falsity were inconsequential because other unambiguous findings defeated the misrepresentation claims. (2AA 270-271, citing *Contreras v. Goldrich* (1992) 10 Cal.App.4th 1431, 1434.) The parties had stipulated that the trial court could rule on the two Business and Professions Code claims after the jury trial. (2AA 233.) The court concluded that "[t]he jury's findings of no actionable misrepresentation or concealment" mandated judgment for the defendants on those claims. (2AA 239:10-12.) It therefore entered judgment in favor of Coldwell and Cortazzo. (2AA 232-239.)

I. In A First-Impression Decision, The Court Of Appeal Reverses The Judgment, Holding Civil Code Section 2079.13, Subdivision (b), Makes The Seller's Salesperson A Fiduciary Of The Buyer, Owing The Non-Client Buyer The Highest Duties Of Trust And Confidence.

Horiike appealed, arguing the trial court erred in finding Cortazzo owed him no fiduciary duty. (Opn. 2, 6.) The Court of Appeal (Second Appellate District, Division Five) agreed, reversing the judgment and remanding for a new trial. (Opn. 2.)

The Court of Appeal held, as a matter of first impression, 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." (Opn. 2.) It therefore concluded that Cortazzo, the seller's salesperson, owed the buyer the same fiduciary duty that the buyer's salesperson (and thus Coldwell) owed the buyer. (Opn. 7-8.)

The Court of Appeal relied solely on statutory construction, concluding "[t]he duties of brokers and salespersons in real property transactions are regulated by a comprehensive statutory scheme" in Civil Code section 2079 et seq. (Opn. 7.) It predicated its holding entirely on its interpretation of section 2079.13(b). (Opn. 7-8.)

The Court concluded that because Cortazzo (the seller's salesperson) and Namba (the buyer's salesperson) were both associate licensees of Coldwell, Coldwell was a "dual agent" owing fiduciary duties to both the

buyer and the seller. (Opn. 7-8.) It then held that Cortazzo, under section 2079.13(b), owed not just the seller a fiduciary duty but also *the buyer*:

> Under Civil Code section 2079.13, subdivision (b), the duty that [the seller's salesperson] Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by [broker Coldwell]. [Coldwell] owed a fiduciary duty to [buyer] Horiike, and therefore, Cortazzo owed a fiduciary duty to Horiike.

(Opn. 8.) That is the entirety of the reasoning.

Based on this statutory construction, the Court of Appeal held that the trial court erred in granting nonsuit to Cortazzo on the fiduciary-duty claim and in instructing the jury that Coldwell could not be liable for breach of fiduciary duty based on his acts. (Opn. 8.) It concluded that even though—as the jury properly found on the non-fiduciary-duty-related claims—Cortazzo honestly believed, and had reasonable grounds for believing, his square-footage representations, and he lacked fraudulent intent and did not intentionally conceal anything, he still could be potentially liable for breach of fiduciary duty to the buyer. (Opn. 9-10.) It concluded that "the jury's findings do not resolve whether Cortazzo breached his fiduciary duty to Horiike" and therefore the defense judgment must be reversed and remanded for a new trial. (Opn. 10.)

THE SUBJECT STATUTE: CIVIL CODE § 2079.13(B)

Section 2079.13(b) is part of a statute that defines terms for purposes of sections 2079.14 to 2079.24.[6] The latter sections require real estate agents to provide buyers and sellers in residential real property transactions with forms disclosing broker representation. (See §§ 2079.14-2079.24.)

Section 2017.13(b) defines the term "associate licensee" as follows:

> "Associate licensee" means a person who is licensed as a real estate broker or salesperson [under Business and Professions Code section 10130, et seq] and 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.
>
> 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.

(§ 2079.13, subd. (b).)

The term "'[a]gent' means a person acting under provisions of [the general agency statutes] in a real property transaction, and includes a person who is licensed as a real estate broker under [Business and Professions

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[6] These statutes were originally enacted by a 1986 bill that became operative in 1988. (10A West's Ann. Civ. Code (2014 Supp.) §§ 2373-2382, Historical and Statutory Notes.) In 1995, the statutes were repealed and re-codified—without change—at their current location. (See 10 West's Ann. Civ. Code (2010) §§ 2079.14-2079.24, Historical and Statutory Notes.)

Accordingly, the 1986 bill's legislative history is the pertinent one. With their Petition for Review, Petitioners requested judicial notice of Legislative Intent Service materials for that bill. This Court granted the request. (7/16/2014 order.) We cite to those materials by their "RJN" bates page numbers.

Code section 10130 et seq.], and under whose license a listing is executed or an offer to purchase is obtained." (§ 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." (§ 2079.13, subd. (d).)

STANDARDS OF REVIEW

A. Review Is De Novo.

Statutory interpretation is a question of law that this Court reviews de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) If the Court of Appeal's decision rests on an erroneous construction of a statute, "its judgment is unsupported as a matter of law" and must be reversed. (*Id.* at pp. 432-433.)

B. Courts Must Give Statutes A Reasonable And Commonsense Interpretation, Consistent With The Legislature's Apparent Purpose, That Will Result In Sound Policy, Not Absurdity.

Statutory language cannot be viewed in a vacuum: Where language is disputed, "a court may not simply adopt a literal construction and end its inquiry," because legislative intent always "prevails over the words actually used." (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495.) The "'intent prevails over the letter, and the letter will, if possible, be so read as

to conform to the spirit of the act.'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.)

Courts must give statutory provisions "'a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.'" (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.)

Where statutory language "is unclear or contains a latent ambiguity," courts look "'to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' (Citations.)" (*People v. Leiva* (2013) 56 Cal.4th 498, 510-511.)

Courts "should avoid an interpretation that leads to anomalous or absurd consequences." (*Horwich, supra*, 21 Cal.4th at p. 280.) "[I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

LEGAL DISCUSSION

I. SETTLED PRINCIPLES OF AGENCY LAW ARE RELEVANT TO, AND SUPPORT, PETITIONERS' INTERPRETATION OF SECTION 2079.13(B).

The following principles of agency/real estate law are germane to interpreting section 2079.13(b). As demonstrated in section II below, they support Petitioners' construction.

A. There Are Two Types Of Real Estate Dual Agency: (1) The Same Salesperson Represents Both Sides, And (2) Different Salespersons From The Same Brokerage Represent Both Sides.

There are two types of dual agency in real estate transactions: (1) the same individual salesperson represents both the buyer and the seller; and (2) different salespersons from the same brokerage *firm* independently represent the buyer and the seller, i.e, "intra-firm transactions" where the firm itself is a dual agent but separate salespersons represent the buyer and the seller. (Pendergrass, *The Real Estate Consumer's Agency And Disclosure Act: The Case Against Dual Agency* (1996) 48 Ala. L.Rev. 277, 279, fn. 8 ["*Agency/Disclosure Act*"].)

This appeal concerns intra-firm transactions. These are uncharted waters in California. All prior dual-agency published decisions have addressed an individual salesperson representing both sides. (E.g.,

Assilzadeh v. California Federal Bank (2000) 82 Cal.App.4th 399, 405-406; *Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.App.4th 766, 769; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 178.)

B. Under Settled Agency Law, Salespersons Generally Owe Fiduciary Duties Solely To The Principal Buyer/Seller Who Retained Them And Owe *Non*-Fiduciary Duties To A Non-Principal Buyer/Seller.

Under settled agency law, agents owe a *fiduciary* duty to their *principal*, i.e., the party who retained them and controls their services: "Agency is 'the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.' (Rest.3d, Agency, § 1.01.)" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 410.)

Thus, in real estate transactions, the seller's salesperson and the buyer's salesperson owe their respective client a fiduciary duty "of utmost care, integrity, honesty, and loyalty." (§ 2079.16; accord, *Leko v. Cornerstone Building Inspection Service* (2001) 86 Cal.App.4th 1109, 1116.) But salespersons owe fiduciary duties *only* to their client (their principal), not to non-client buyers/sellers. (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1528; *Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756, 762.)

A salesperson who agrees to represent both the buyer and the seller has two principals and therefore is a dual agent owing fiduciary duties to both. (*Assilzadeh*, *supra*, 82 Cal.App.4th at p. 414.) Dual agency is only permissible with full disclosure and the consent of both sides. (*Brown v. FSR Brokerage*, *supra*, 62 Cal.App.4th at pp. 768-769.)

C. The Fiduciary Duties Owed To A Principal Buyer/Seller Are Far Broader And More Exacting Than The Non-Fiduciary Duties Owed To Non-Principals.

1. Fiduciary duties owed to principal buyers/sellers.

The fiduciary duties owed to principal buyers or sellers in a real estate transaction are sweeping: "'[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.'" (*Assilzadeh*, *supra*, 82 Cal.App.4th at pp. 414-415, citation omitted.)

A fiduciary real estate agent is "'charged with a duty of fullest disclosure of all material facts concerning the transaction that might affect

the principal's decision.'" (*Godfrey v. Steinpress*, *supra*, 28 Cal.App.3d at p. 178.) A fiduciary's failure to disclose "'a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary may constitute constructive fraud,'" a "'unique species of fraud applicable only to a fiduciary or confidential relationship.'" (*Assilzadeh*, *supra*, 82 Cal.App.4th at p. 415.) "'Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent.'" (*Ibid.*)

2. Non-fiduciary duties owed to non-principal buyers/sellers.

Brokers and salespersons owe *non*-fiduciary duties to any *non-principal* buyer or seller (i.e., the party on the other side of the transaction), under both statutory and common law. (*Holmes*, *supra*, 188 Cal.App.4th at p. 1528.) Those duties include the "[d]iligent exercise of reasonable skill and care in performance of the [salesperson's] duties," a duty "of honest and fair dealing and good faith," and a "duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties." (§ 2079.16.) "'California cases recognize a fundamental duty on the part of a realtor to deal honestly and fairly with all parties in the sale transaction.'" (*Holmes*, *supra*, 188 Cal.App.4th at p. 1523.)

In addition, salespersons representing or cooperating with sellers owe prospective buyers a duty "to conduct a reasonably competent and diligent visual inspection of the property" and disclose "all facts materially

affecting the value or desirability of that property that an investigation would reveal." (§ 2079, subd. (a).)

The non-fiduciary duties owed to non-principals are far less exacting than the fiduciary duties owed to principals. (*Michel, supra*, 156 Cal.App.4th at p. 762 [fiduciary duty greater than section 2079's "due care" standard; "a broker can be professionally competent under section 2079 without satisfying the greater duty of a trusted fiduciary"]; *Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25 [fiduciary duty "substantially more extensive than the *nonfiduciary* duty codified in section 2079"; emphasis in original].)

Consequently, elevating a salesperson's duty from non-fiduciary to fiduciary is a monumental change, substantially increasing responsibilities and liability exposure.

D. Under Settled Agency Law, An Agent's Duties Are Imputed Upward To The Principal (E.g., From Salesperson To Affiliated Broker), But A Principal's Duties Are Not Imputed Downward To The Agent.

Under long-established agency law, imputation flows one way only—from *agent to principal*, not principal to agent. All liabilities and duties that accrue to an agent accrue equally to the principal:

> An agent represents the principal for all purposes within the scope of the agent's actual or ostensible authority. Within that limit, all rights and liabilities that accrue to the agent

from transactions the agent enters into on his or her own account accrue to the principal.

(3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 130, p. 175.) The Legislature codified this rule long ago in section 2330.

There is no reciprocal doctrine that imputes a principal's duties/liabilities to its agents. An agent is not liable for the principal's nonperformance or breaches of duties: "*The relationship of principal and agent works the other way* – the principal is bound by the acts of the agent, if the agency covers the act in question." (*Ebner v. Sheehan* (1950) 99 Cal.App.2d 860, 863-864, emphasis added; accord, *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 929.)

Just as agents are not responsible for the *duties* imposed upon principals, agents are not responsible for their principal's *breaches* of those duties. There is no doctrine of respondeat *inferior*: "The [real estate] agent is only liable to third persons for his or her own wrongful acts or omissions. While a principal may be vicariously liable for the wrongful acts of an agent, . . . absent fault, an agent cannot be vicariously liable for the wrongful acts of the principal." (2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:36, p. 212; accord, Rest.3d Agency, § 7.01, com. d. ["An agent is not subject to liability for torts committed by the agent's principal that do not implicate the agent's own conduct; there is no principle of 'respondeat inferior."].)

The Legislature has expressly provided that the agency duties of a principal to a third party are *not* imputed by operation of law to that

principal's own agents: "A mere agent of an agent is not responsible as such to the principal of the latter." (§ 2022.) California cases uniformly reject "respondeat inferior." (E.g., *Godwin v. City of Bellflower* (1992) 5 Cal.App.4th 1625, 1631 [an agent cannot "be charged with knowledge of facts given to a principal," nor is there any "principle of agency law imputing the knowledge of one agent to all others"]; *Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, 1559-1560 [knowledge of principal cannot be imputed to agent].)

E. Under Settled Agency Law, The Creation Of An Agency Relationship Requires The Consent Of All Parties.

Under settled agency law, a real estate agent "cannot be burdened with [fiduciary] obligations against his or her will." (2 Miller & Starr, Cal. Real Estate, *supra*, § 3:5, at p. 16.) Creation of an agency relationship requires *consent*: Agency "arises when one person (a 'principal') *manifests assent to another person* (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent *manifests assent or otherwise consents so to act.*" (Rest.3d Agency, § 1.01, emphasis added; accord, *Naify v. Pacific Indemnity* (1938) 11 Cal.2d 5, 12 ["actual agency must rest on agreement or consent"]; *Rental Housing Owners Assoc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 91 ["mutual consent" required]; *Huong Que, Inc. v. Luu, supra*, 150 Cal.App.4th at p. 411 [agency relationship "requires the assent of both parties"].)

II. UNDER CONTROLLING STATUTORY-CONSTRUCTION STANDARDS, SECTION 2079.13(B) MERELY CODIFIES THE PRINCIPLE THAT ASSOCIATE LICENSEES ARE AGENTS OF BROKERS AND THEREFORE AN ASSOCIATE LICENSEE'S ACTS/DUTIES ARE IMPUTED TO THE BROKER; IT DOES NOT IMPUTE A BROKER'S DUTIES DOWNWARD TO ASSOCIATE LICENSEES.

A. The Most Reasonable Interpretation Of Section 2079.13(b)'s Plain Language Is That The Legislature Intended To Confirm That Associate Licensees Are Agents Of Brokers And Therefore Associate Licensees' Duties To Buyers And Sellers Are Imputed To Brokers.

In holding the seller's salesperson Cortazzo owed a fiduciary duty to buyer Horiike, a man whom Cortazzo met only once and whose language Cortazzo did not speak, the Court of Appeal relied entirely on section 2079.13(b)'s last sentence: "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."

Although the Court of Appeal never explained its reasoning, it apparently construed the "equivalent to the duty" sentence as meaning that an associate licensee owes whatever duties a broker owes to the buyer and the seller. But that is not what the sentence actually says.

Section 2079.13(b)'s last sentence does not focus on the *broker's* relationship with a buyer or seller and then impute those duties to the associate licensee. Rather, it focuses on the *associate licensee's* particular relationship with a buyer or seller and then imputes those duties to the broker. The sentence begins by stating, "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," and then states that "*that duty* is equivalent to the duty owed to *that party* by the broker . . . ." (Emphasis added.)

Under settled agency law, a salesperson or other agent owes a fiduciary duty only to *a principal* and owes *non*-fiduciary duties of honesty and fair dealing "to any buyer or seller who is not a principal." (See pp. 21-24, *ante*.) If an associate licensee agrees to be the *sole* salesperson for both the buyer and seller, then that salesperson has two principals and is a dual agent owing fiduciary duties to both. But where, as here, the buyer and seller each retain their own salesperson, each associate licensee/salesperson owes (a) a fiduciary duty to the principal buyer or seller who retained them, and (b) non-fiduciary duties to the non-client. However, if both associate licensees/salespersons are from the same brokerage, then the *brokerage* (and only the brokerage) would be a dual agent. The Court of Appeal's construction thus reads section 2079.13(b) as imputing the brokerage's dual fiduciary duties *downward* to both salespersons.

But if that were the Legislature's intent, it easily could have said so with unequivocal terms. The Legislature would have crafted the sentence to focus on *the broker's* "duty to any principal, or to any buyer or seller who is

not a principal." But the Legislature instead focused on the *associate licensee's* relationship and duties. Consequently, whenever separate salespersons from the same brokerage end up on opposite sides of a transaction, under the Court of Appeal's construction the statute effectively reads as follows as to the non-principal buyer/seller:

> When an associate licensee owes a *non*-fiduciary duty to the buyer or seller who is not a principal, *that non*-fiduciary duty is *equivalent* to the *fiduciary* duty owed by the broker to that party.

If the Legislature had meant to *change* the type of duty owed by the associate licensee by imputing the broker's duty downward, its use of the word "equivalent" makes no sense. Equivalent means that the duties on both sides of the equation are equal, not that one duty is transformed into a different one. (See, e.g., http:/www.meriam-webster.com/dictionary/equivalent ["having the same value, use, meaning etc"].) And if the Legislature had intend to impute duties downward from the broker, the statute's reference to the *associate licensee's* principal or non-principal was equally illogical because the germane question would be whether a buyer or seller was a principal or non-principal *of the broker*.

Nor does it make sense to assume that the Legislature intended, through such ambiguous terms, to diverge from settled agency law by *forcing* associate licensees to become fiduciaries of non-principal buyers/sellers without consent, and by imputing a broker-principal's duties *downward* to its associate licensee-agents. Although the sentence is not

crystal clear, the Court of Appeal's construction is illogical and renders portions nonsensical.

The most reasonable reading is that the Legislature merely intended to confirm that associate licensees and their brokers *are in an agency relationship*, and therefore whatever duty the associate licensee owes to a particular buyer or seller is imputed to the broker. Under this reasonable interpretation, the fiduciary duty that an associate licensee/salesperson owes "any principal" (any buyer or seller who retains them) is imputed to the broker, as are the non-fiduciary duties of honesty and fair dealing that an associate licensee/salesperson owes any "buyer or seller who is not a principal."

B. The Surrounding Statutory Language Supports Petitioners' Construction.

Statutory language cannot be viewed in isolation: "'The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.'" (*People v. Zambia* (2011) 51 Cal.4th 965, 972.) This rule applies even under the "plain meaning" rule. (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735; accord, *Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371 ["Statutory language which seems clear when considered in isolation may in fact be ambiguous or uncertain when considered in context."].)

Here, the surrounding language in section 2079.13(b) and in the entire statutory scheme in sections 2079.13 through 2079.24 supports Petitioners' construction of the "equivalent duty" sentence. Only Petitioners' construction harmonizes *all* the statutory language.

1. Section 2079.13(b), read as a whole, indicates that the Legislature simply codified that associate licensees and brokers are in an agency relationship.

Section 2079.13(b)'s last sentence—the "equivalent duty" sentence—must be read in the light of the language that precedes it.[7]

The sentence that immediately precedes the "equivalent duty" sentence states: "The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent." (§ 2079.13(b).)[8]

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[7] Statutory language must be interpreted in the light of other related provisions. (*People v. Zambia*, *supra*, 51 Cal.4th at pp. 976-978.) That is particularly true of an *immediately-preceding sentence*; even more so where, as here, that sentence makes a general pronouncement suggesting an interconnection. (E.g., *Bandt v. Board of Retirement, San Diego County Employees Retirement Assoc.* (2006) 136 Cal.App.4th 140, 154 [sentence's placement at end of provision suggested "it should be interpreted with reference to the preceding sentence"]; *Massey v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 674, 682-683 [construing provision in light of preceding sentence].)

[8] This language makes it clear that an associate licensee is *not* a sub-agent of the broker. "A sub-agent, lawfully appointed, represents the principal in like manner, with the original agent; *and the original agent is not responsible to third parties for the acts of the sub-agent.*" (§ 2351, emphasis added.) Section 2079.13, subdivision (o), confirms the point by specifying that a "subagent" is a person to whom agency powers are delegated under section 2349 et seq., and then stating "[h]owever, 'subagent' *does not include an associate licensee who is acting under the*

(continued...)

The term "the agent," as used in this sentence and throughout sections 2079.13 through 2079.24, is defined as the person *"under whose license* a listing is executed or an offer to purchase is obtained." (§ 2079.13, subd. (a), emphasis added.) In other words, "the agent" means *the broker*—the person or entity holding the real estate license under which an associate licensee operates. (See also § 2079.13(b) [defining "associate licensee" as a person "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"].)

Thus, when the Legislature stated that "[t]he agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent" (§ 2079.13(b)), the Legislature confirmed that associate licensees and brokers are in an agent-principal relationship and brokers are therefore responsible for their associate licensees. In this light, the next sentence (the "equivalent duty" sentence) logically reads that the broker, as the principal in the agency relationship with its associate licensees, is responsible for the associate licensee's duties—that the associate licensee's duties are imputed to the broker and the broker thus equally owes the associate licensee's duties. This interpretation, unlike the Court of Appeal's construction, tracks settled agency law. (See pp. 24-26, *ante*.)

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[8] (...continued)
supervision of the agent in a real property transaction." (Emphasis added.)

Further, by stating that associate licensees are "agents of the agent" (§ 2079.13(b)), and *not* subagents (see p. 31, fn. 8, *ante*), the Legislature indicated that it intended for section 2022 ("[a] mere agent of an agent is not responsible as such to the principal of the latter") to govern associate licensees. Under section 2022, the broker's agency relationship with a buyer/seller (the broker's principal) would not create/define an associate licensee's duties; rather, whatever relationship the associate licensee *directly has* with the buyer or seller defines the associate licensee's duties. (See *Kavanagh v. Wade* (1940) 42 Cal.App.2d 92, 97 [brokerage firm retained as agent by plaintiff's agent owed no duty to plaintiff, because it was merely an agent of an agent, not an authorized subagent]; § 2350 [a principal "has no connection" to any agent employed by the principal's agent without the principal's authorization].)

2. Sections 2079.13 to 2079.24 collectively show that the legislative purpose was to ensure buyers and sellers receive disclosures of the parties' *brokers*.

The plain language of sections 2079.13 to 2079.24 shows that the statutory scheme's purpose was to ensure that buyers and sellers received written notice as to whom *the brokers* in a transaction represent, not defining/disclosing the relationships of associate licensees.[9] As noted previously, the term "agent" refers to *the broker*—the person "under whose

[9] The legislative history explains the reason for that focus. (See § II.E.3.c below.)

license a listing is executed or an offer to purchase is obtained." (§ 2079.13, subdiv. (a).)[10]

Thus, when the statutes discuss disclosure of the buyer's or seller's relationship with the "agent," and refer to an "agent" representing both the buyer and seller, they solely address agency (and dual agency) *at the broker level*, not the associate-licensee level. Section 2079.13, subdivision (d), makes this clear by defining "dual agent" as "*an agent* [thus incorporating subdivision (a)'s "agent" definition] acting, either directly *or through an associate licensee*, as agent for both the seller and the buyer in a real property transaction." (Emphasis added.) This definition does not address associate licensees from the same brokerage who end up on opposite sides of a transaction. Indeed, the reference to the broker acting "either directly or through an associate *licensee*" (instead of the plural, *licensees*) indicates the Legislature only contemplated contexts where one associate licensee represents both buyer and seller, thus creating a dual agency at both the broker and associate-licensee levels—not contexts where the buyer and the seller have their own separate salesperson.

Only Petitioners' construction harmonizes all the statutory language.

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[10] When these statutes were enacted in 1986, the statutes regarding Multiple Listing Services already similarly defined "agent" (including listing and selling agents) as "one authorized by law to act in that capacity for that type of property" and "*licensed as a real estate broker.*" (§ 1086, subd. (d), emphasis added.)

C. The Court Of Appeal's Construction Must Be Rejected Because It Radically Diverges From Settled Agency Law And The Legislature Failed To Make It Crystal Clear That It Intended Such A Sea Change.

Petitioners' construction must prevail for another reason. The Court of Appeal's construction radically diverges from settled agency law in two respects: It reads section 2079.13(b) as imputing the broker's duties as principal downward to the salesperson as the broker's agent *and* forcing a fiduciary relationship on salespersons and their clients without consent. When the Legislature intends dramatic changes from settled law, it can be expected to make those changes crystal clear, as opposed to the Court of Appeal's contorted reading.

1. Where the Legislature intends to depart from settled law, it can be expected to express that intent unequivocally.

The general rule is that "[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language *clearly and unequivocally* discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter." (*Cal. Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297, emphasis added, internal quotation marks and citations omitted.) "Accordingly, 'there is a presumption that a statute does not, by implication,

repeal the common law. Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.'" (*Ibid.*, citations omitted.)

Thus, this Court has repeatedly recognized that the Legislature can be expected to make *crystal clear* any dramatic divergences from settled law—whether common law, statutory law, or a combination of both—and that a lack of clarity indicates the Legislature did *not* intend such changes. (E.g., *Cal. Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 299 [concluding statute did not change common law licensee liability]; *Greb v. Diamond Intern. Corp.* (2013) 56 Cal.4th 243, 262 ["[w]e would expect the Legislature to have made its intentions clear had it intended to adopt such an elaborate and litigation-intensive scheme"]; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719 ["[i]f such an unusual and drastic result was intended by [the statute], we would expect the Legislature to make that purpose abundantly clear"]; *Lonicki v. Sutter Health Cent.* (2008) 43 Cal.4th 201, 211 ["[h]ad the Legislature intended to take such a dramatic step, surely it would have . . . used clear and unambiguous language" instead of "the three ambiguous words 'shall be sufficient'"].)

2. The Court of Appeal's construction radically diverges from settled agency law by imputing a principal's duties downward to its agents.

The Court of Appeal's construction of section 2079.13(b) as imputing Coldwell's duties to the buyer and the seller downward to the salespersons is contrary to settled agency law.

As discussed above, under standard agency law, Coldwell could be held liable for any breaches of the fiduciary duties that Namba owed buyer Horiike and that Cortazzo owed the seller, but the fiduciary duties that Namba and Cortazzo each owed their respective client would not extend to Coldwell as principal and then down to the other salesperson. (See pp. 24-26, *ante*.) If the Legislature had intended to impose an unprecedented respondeat inferior regime, it surely would have done so in a much clearer fashion. Instead, it used language indicating that associate licensees are "mere agent[s] of an agent" under section 2022 and that standard respondeat superior rules apply. (See pp. 26, 33, *ante*.)

3. The Court of Appeal's construction radically diverges from settled agency law by forcing salespersons, buyers and sellers into non-consensual fiduciary relationships.

The Court of Appeal's construction dramatically diverges from settled agency law in another key respect: It forces salespersons, buyers, and sellers into fiduciary relationships without their consent.

Under standard agency law, Cortazzo could not be a fiduciary of Horiike because he and Horiike never agreed to an agency relationship; for the same reason, Namba could not be the seller's fiduciary. (See pp. 11-12, 26, *ante*.) The Court of Appeal's construction, however, *forces* Cortazzo and Namba—by operation of law—to become agents of a non-principal without their consent and *forces* the buyer and the seller to relinquish their choice of having an exclusive agent. That result is particularly perverse

here, given that Cortazzo and Horiike met only once, do not speak the same language, and live in different countries. This perversity is compounded by Horiike's admitted unwillingness to *read* the written materials that Cortazzo sent him via Namba during escrow.

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The Legislature did not even remotely make it clear that it intended to diverge from settled agency law by imputing brokers' duties downward and forcing associate licensees to become agents of buyers/sellers they never agreed to represent. Instead, under Petitioners' reasonable construction, section 2079.13(b) simply confirms that associate licensees are agents of brokers and thus *subject to* settled agency law. For this additional reason, Petitioners' construction must prevail.

D. The Legislature Did Not Intend The Court Of Appeal's Construction Because That Construction Would Cause A Public Policy Nightmare.

1. Where statutory language supports a construction that furthers sound policy and an alternative construction would create absurdity and mischief, the former must prevail.

Even if section 2079.13(b) could be reasonably read as supporting the Court of Appeal's construction, that would only create an ambiguity, as the language also supports Petitioners' interpretation.

When language is ambiguous, courts must consider the public policy impact of the competing constructions: "Where more than one statutory construction is arguably possible, our 'policy has long been to favor the construction *that leads to the more reasonable result*. . . . [O]ur task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and *to avoid a construction that would lead to unreasonable, impractical, or arbitrary results*." (*Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 290, emphasis added.)

The construction "that leads to the more reasonable result will be followed." (*Lungren*, *supra*, 45 Cal.3d at p. 735.) "'[A] reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers'" and that "'will result in wise policy'" must prevail over a construction that will cause "'mischief or absurdity.'" (*Renee J.*, *supra*, 26 Cal.4th at p. 744; accord, *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567 ["interpretation producing practical and workable results" must prevail over one "producing mischief or absurdity"].)[11]

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[11] The public-policy impact would be relevant even if section 2079.13(b) facially supported *only* the Court of Appeal's construction (which it doesn't): Statutory language "should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (*Horwich*, *supra*, 21 Cal.4th at p. 276; see *People v. Broussard* (1993) 5 Cal.4th 1067, 1072 [rejecting "plain meaning" reading that would "lead to 'absurd results'"]; *People v. Leiva*,

(continued...)

The Court of Appeal ignored public policy. As shown below, the absurd results and public-policy disaster that its construction would engender further compel the adoption of Petitioners' construction.

2. The Court of Appeal's construction would create absurd, disastrous results for prospective buyers/sellers.

Any buyer or seller in a real estate transaction benefits by having a representative exclusively in that party's corner who can bargain on that client's behalf, and maintain confidentiality, with undiluted loyalty. Where separate salespersons from the same brokerage are on each side, that goal is achieved by each salesperson independently representing, and serving as a fiduciary of, his/her separate client only. The Court of Appeal's construction destroys that structure by making each salesperson a dual agent with dual fiduciary duties, leaving consumers with representatives who have divided loyalties. It deprives consumers of their *choice* of an exclusive agent.

The Court of Appeal's construction also destroys buyers' and sellers' ability to share sensitive information with their salesperson in intra-firm transactions. By transforming each salesperson into the fiduciary of both the buyer and seller, the construction would require each salesperson to disclose to *both parties* "all information it possesses that is material to

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[11] (...continued)
supra, 56 Cal.4th at pp. 510-511 [consequences of "plain meaning" construction required construing legislative history/ostensible objectives].)

[each] principal's interests." (*Michel, supra,* 156 Cal.App.4th at p. 762.) Where a dual 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." (2 Miller & Starr, *supra,* Agency, § 3:16, p. 83.) "An agent who represents *both principals* must make a full and complete disclosure of all material facts to *both* parties regarding any matter that would affect *either* principal's decision to buy, and the price and terms of such purchase, even though the facts relate to confidential information of the other party." (*Ibid.*, emphasis in original, fn. omitted.)

Moreover, a fiduciary's disclosure duty is not limited to previously-known information. Fiduciaries must "'perform the necessary *research and investigation* in order to know those important matters that will affect the principal's decision'" and must "'*counsel and advise* the principal regarding the propriety and ramifications of the decision.'" (*Assilzadeh, supra,* 82 Cal.App.4th at pp. 414-415, emphasis added.) The Court of Appeal's construction would not only force salespersons in intra-firm transactions to disclose known information, it would force each salesperson to investigate what the other salesperson knows or should know.

The public-policy impact is particularly severe because dual agents must disclose everything other than the buyer's or the seller's ultimate position on price. (§ 2079.21 ["A dual agent shall not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller. A dual agent shall

not disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer."]; *ibid.* ["This section does not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information *other than price*" (emphasis added)].)

The Court of Appeal's construction thus creates a nightmare for buyers and sellers. Most transactions involve sensitive non-price information that buyers and sellers want their salesperson to keep confidential. Salespersons almost always possess information about their client's motivations and interests that can harm bargaining leverage if disclosed to the other side. Yet, the Court of Appeal's construction—by transforming each salesperson into a fiduciary of both parties—would force salespersons to make disclosures to the other side that would severely harm the principal-client.

For example, seller's salespersons in intra-firm transactions would have to harm the seller's interests by disclosing to the buyer that:

- the seller is highly motivated to sell quickly (e.g., because it already purchased another home or the seller needs to raise cash immediately because of a pending divorce);
- a comparable home is selling nearby for substantially less;
- the salesperson believes the property is worth less than the list price;
- the seller has financial difficulties;

- the seller is willing to throw in extras (e.g., furnishings) or make concessions on non-price terms (e.g., escrow periods, financing terms, contingencies, cost allocations).

Buyers and their salespersons would fare no better. The Court of Appeal's construction would force a buyer's salesperson to disclose to the seller that:

- the buyer needs to close quickly (e.g., to consummate an exchange sale under 26 U.S.C. § 1031);
- the home is the only suitably-sized one for the buyer in a preferred school district;
- the buyer is amenable to non-price concessions;
- the buyer has a history of extravagant expenditures;
- the salesperson believes the list price is too low.

This topsy-turvy world would flatly contradict the expectations of California consumers. When an individual (not a brokerage firm) is the dual agent, the risk of sharing sensitive information with the salesperson is obvious. But intra-firm transactions fundamentally differ. Horiike and the seller had each retained their own salesperson. They would be shocked by the notion that their salesperson was also the other side's agent. They would be equally shocked by the prospect of their being vicariously liable for negligence by the other side's salesperson—someone they never retained and likely a stranger. (See § 2338 ["a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency"]; *Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th

1134, 1140 [principal buyer/seller vicariously liable for salesperson's negligence].)

Worse, the Court of Appeal's construction would dangerously transform salespersons from exclusive agents into dual fiduciaries *midstream in the relationship* when buyers/sellers have likely imparted confidential information already. When a prospective buyer/seller retains a salesperson, no one knows who will end up on the other side. Yet, under the Court of Appeal's construction, if the other side ends up having a salesperson from the same brokerage, the exclusive agency transforms into a dual agency and the parties lose protection of any confidential non-price information shared with their salesperson. The buyer's or seller's only options are to: (1) agree to this nightmare; (2) forgo the sale or purchase they wanted to consummate; or (3) fire their salesperson and retain one from a different brokerage, which would force the seller to pay two listing commissions and force the buyer to pay out of pocket for a new salesperson with the original one being paid from the purchase proceeds.

The Court of Appeal's construction contravenes the expectations, interests, and needs of California buyers and sellers.

3. The Court of Appeal's construction would create absurd, disastrous results for brokerage firms/salespersons.

The Court of Appeal's construction, if upheld, would also be nightmarish and create chaos for brokerage firms and their salespersons, which would further harm consumers.

A fiduciary's failure to disclose any material fact that might affect """the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud."""" (*Assilzadeh*, *supra*, 82 Cal.App.4th at p. 415.) Thus, the Court of Appeal's construction would leave salespersons in intra-firm transactions owing inherently conflicting duties where they risk being sued no matter what they do. If a seller's salesperson failed to disclose to the buyer a material fact about the seller, the buyer might sue. But if the salesperson discloses that fact, the seller might sue. *Compliance* with fiduciary duties to one side will frequently constitute *breach* of fiduciary duties to the other. Salespersons would be "damned if they do, and damned if they don't."

Other compliance issues would abound under the Court of Appeal's construction. If both salespersons in intra-firm transactions were fiduciaries of both parties, each salesperson would have to *research and investigate* the important matters that will affect either party's decision and provide *counsel* to both parties. So, if Cortazzo was Horiike's fiduciary as the Court of Appeal held, Cortazzo needed to determine Horiike's needs and provide counsel—even though they had no prior relationship, speak different languages, and live in different countries.

The Court of Appeal's construction would force salespersons into fiduciary relationships with parties they never chose to represent. To avoid being sued for breach of fiduciary duty, each salesperson essentially would have to duplicate the other's services to someone who may be a complete stranger and be uncooperative. Salespersons would face double the

fiduciary duty and double the liability risk, all against their own will—and all utterly contrary to fundamental agency-law principles.

The Court of Appeal's construction also would subject salespersons to duties that are virtually impossible to follow without violating ethical rules. Salespersons are not supposed to directly contact individuals represented by another salesperson absent consent, or to provide substantive services to parties to exclusive representation agreements. (Nat. Assn. of Realtors, Code of Ethics and Standards of Practice (Jan. 2014) Standard of Practice 16-13.) Yet the Court of Appeal's construction would force salespersons to engage in such communications and services to avoid being sued for breach of fiduciary duty, even though by doing so they would risk suit for breaching ethical duties.

The chaos that would exist under the Court of Appeal's construction would trigger an explosion in litigation and liability exposure, and concomitant increases in insurance premiums. Transaction costs would rise, harming consumers. And some brokerage firms might forsake intra-firm transactions altogether, further harming consumers. Reducing the availability of intra-firm transactions would mean "buyers are limited in their market choices because they have fewer homes to choose from, and sellers are limited in their market exposure because their home is shown to fewer buyers, which translates into lower selling prices." (*Agency/Disclosure Act*, *supra*, 48 Ala. L.Rev. at p. 295.)

4. Petitioners' construction, in contrast, furthers sound public policy.

From a public-policy standpoint, Petitioners' construction is the soundest: Where different salespersons from the same brokerage represent the buyer and the seller, each salesperson owes a fiduciary duty exclusively to his/her respective client and owes non-fiduciary duties of honesty and fairness to the buyer/seller on the other side; and the brokerage firm must keep salespersons from breaching their duties and provide a deep pocket for any breach.

This balance furthers California public policy. It is also a standard, common-sense view of how intra-firm transactions should work:

> [B]ecause many brokerage firms dominate their marketplace with hundreds of listings, consumers cannot avoid using the services of licensees within the same brokerage. A seller or buyer may severely limit their choices of potential buyers or homes if they refuse dual agency in this scenario. In this situation *each agent is supposed to be the fiduciary of a different principal and the brokerage erects a "Chinese wall" to protect confidential information between the two agents.*

(Szto, *Dual Real Estate Agents And The Double Duty Of Loyalty* (2012) 41 Real Est. L.J. 22, 43, emphasis added, fn. omitted ["*Dual Agents*"].) The Court of Appeal's construction precludes this common-sense approach by transforming each exclusive salesperson into a dual agent owing dual fiduciary duties.

Petitioners' construction "leads to the more reasonable result" (*Lungren*, *supra*, 45 Cal.3d at p. 735) and "'will result in wise policy'" instead of "'mischief or absurdity'" (*Renee J.*, *supra*, 26 Cal.4th at p. 744). It must prevail.

5. The Court of Appeal's construction would make California a stand-alone outlier.

As the California Association of Realtors, Sotheby's International Realty, and the Civil Justice Association of California explained in their amici letters supporting review, Petitioners' construction comports with how brokerages and salespersons have always operated in California.[12] Adopting the Court of Appeal's construction would up-end California law and undermine California public policy. But it also would make California a stand-alone outlier on this issue.

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[12] The Court of Appeal emphasized the following language from Miller & Starr: "'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 . . . 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.'" (Opn. 8, quoting 2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:12, pp. 68-69.)

Miller & Starr cites no authority for this statement, and its meaning is unclear. The statement is a footnoted comment in a section stating that "each salesperson is an employee of the broker" and "the acts of the salesperson are the acts of the employing broker," and thus when salespersons from the same brokerage end up on opposite sides, the "*broker* thereby becomes a dual agent representing both parties." (*Id.* at p. 68, emphasis added.) The footnote does not construe section 2079.13(b). Nor does it say that *salespersons* are dual agents in this context or that a broker's duties/acts can ever be imputed downward to salespersons.

a. Statutes.

Only one state prohibits dual agency in real estate sales.[13] Among the remaining states, *thirty-two* have enacted legislation that expressly accommodates intra-firm transactions by providing for separate salespersons of the broker to represent the buyer and the seller *exclusively and owe fiduciary duties solely as to their respective client.*[14] Three states have enacted statutes that address intra-firm transactions and describe the

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[13] See Fla. Stat. Ann. § 475.278, subd. (1)(a). Florida instead allows for a "transaction broker," who can provide limited forms of representation to both parties but "does not represent either in a fiduciary capacity or as a single agent." (*Id.*, § 475.278, subd. (2).)

[14] See **Alaska**: Alaska Stat. §§ 08.88.600(d), 08.88.640(a), 08.88.640(b); **Colorado**: Colo. Rev. Stat. §§ 12-61-803(6)(a)-(c); **Connecticut**: Conn. Gen. Stat. § 20-325i; **Delaware**: Del. Code Ann. tit. 24, §§ 2933(c)(1), 2936(a); **Georgia**: Ga. Code Ann. §§ 10-6A-13(a)-(b); **Idaho**: Idaho Code §§ 54-2084(2)(d), 54-2088; **Illinois**: 225 Ill. Comp. Stat. 454 / 15-50; **Indiana**: Ind. Code §§ 25-34.1-10-6.5, 25-34.1-10-12.5, 25-34.1-10-12.5(a); **Iowa**: Iowa Code § 543B.59(1)-(2); **Kansas**: Kan. Stat. Ann. §§ 58-30,109(b)(1), 58-30,109(b)(4), 58-30,113; **Kentucky**: Ky. Rev. Stat. Ann. §§ 324.010(4), 324.121(1), 324.121(2); **Maine**: Me. Rev. Stat. tit. 32, §§ 13271, 13278; **Massachusetts**: Mass. Gen. Laws Ann., ch. 112 § 87AAA3/4, subd. (c); **Michigan**: Mich. Comp. Laws §§ 339.2517(11)(d), 339.2517(7), 339.2517(8); **Missouri**: Mo. Rev. Stat. §§ 339.710(11), 339.820; **Nebraska**: Neb. Rev. Stat. §§ 76-2413, 76-2427; **Nevada**: Nev. Rev. Stat. §§ 645.253, 645.252(1)(d)(1); **New Hampshire**: N.H. Rev. Stat. §§ 331-A:25-e, 331-A:2, subd. (I-b.), 331-A:2, subd. (IV-a.); **New Mexico**: N.M. Code R. §§ 16.61.1.7(R), 16.61.19.10(A)(3); **North Carolina**: 21 N.C. Admin Code 58A.0104(i)-(l); **North Dakota**: N.D. Cent. Code §§ 43-23-12.3, 43-23-06.1; **Ohio**: Ohio Rev. Code Ann. §§ 4735.51, 4735.53(B), 4735.53(C), 4735.70; **Oregon**: Or. Rev. Stat. §§ 696.815(4), 696.815(5); **Pennsylvania**: 63 Pa. Stat. §§ 455.606e(a)(1), 455.606e(b)(1); **Rhode Island**: R.I. Gen. Laws § 5-20.6-5(b)-(f); **South Carolina**: S.C. Code Ann. §§ 40-57-137(P)(1), 40-57-137(P)(2), 40-57-137(P)(4); **South Dakota**: S.D. Codified Laws § 36-21A-141.1; S.D. Admin. R., rules 20:69:16:03, 20:69:16:04; **Tennessee**: Tenn. Code. Ann. § 62-13-406(a); **Virginia**: Va. Ann. Code § 54.1-2139.1(A); **Washington**: Wash. Rev. Code § 18.86.020(2); **Wisconsin**: Wis. Stat. §§ 452.134, subds. (3)(a), (3)(b); 452.01, subd. (3w); **Wyoming**: Wyo. Stat. Ann. § 33-28-302, subds. (j), (n).

salespersons as dual agents but then specify that they owe *limited* duties not even remotely analogous to what the Court of Appeal imposed here.[15] The remaining fourteen states, including California, have disclosure legislation that does not specifically address what happens when salespersons from the same brokerage end up on opposite sides.[16]

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[15] See **Maryland**: Md. Code Ann., Bus. Occ. & Prof. §§ 17-530(a)(4) & (d) (any broker acting as dual agent shall assign separate affiliated salespersons to act as an "intra-company agent" for the buyer and seller respectively; although an intra-company agent is designated "to act as a dual agent," "[a]n intra-company agent representing the seller or buyer may provide the same services to the client as an exclusive agent for the seller or buyer, including advising the client as to price and negotiation strategy" and "may not disclose information that a seller or buyer in a real estate transaction requests to remain confidential"); **Minnesota**: Minn. Stat. § 82.67, subd. (3) (dual agency arises when "two salespersons licensed to the same broker each represent a party" but "confidential information about price, terms, and motivation for pursuing a transaction will be kept confidential" and salespersons cannot act exclusively for either party); **New York**: N.Y. Real Prop. Law § 443(4) (broker representing both parties may designate a separate sales agent to function "as the buyer's agent representing the interests of and advocating on behalf of the buyer" and a separate sales agent to do the same for the seller; however, a designated agent "cannot provide the full range of fiduciary duties to the buyer or seller" and "must explain that like the dual agent under whose supervision they function, they cannot provide undivided loyalty").

[16] Alabama, Arizona, Arkansas, Hawaii, Louisiana, Mississippi, Montana, New Jersey, Oklahoma, Texas, Utah, Vermont, and West Virginia permit dual agency but do not expressly address salespersons' duties in intra-firm transactions. (See Ala. Code § 34-27-85(a)–(b); Ariz. Admin. Code § R4-28-1101(F); Ark. Code Ann. § 17-42-108; Ark. Admin. Code § 076.00.1-8, subd. 8.3(a); Haw. Code R. § 16-99-3.1, subd. (g); La. Rev. Stat. Ann. § 9:3897; Miss. Admin. Code § 30-1601:4.2(B); Mont. Code Ann. §§ 37-51-314(5), 37-51-313(7), 37-51-313(8); N.J. Admin. Code § 11:5-6.9(h); 59 Okla. Stat. §§ 858-355.1, 858-353; Tex. Occ. Code Ann. § 1101.560; Utah Admin. Code §§ R162-2f-102(21), R162-2f-401a(4); Vt. Real Estate Com., Admin Rules, rule 4.4, subd. (c); W.Va. Code R. §§ 174-1-2, 174-1-22.)

No other jurisdiction employs California's statutory language. And, no other jurisdiction holds or decrees, as the Court of Appeal did, that salespersons from the same brokerage who end up on opposite sides are full fiduciaries of both parties.

b. Case law.

We have found only two cases addressing the duties owed by salespersons from the same brokerage who end up on opposite sides. Neither supports the Court of Appeal's construction, and one is directly contrary.

Moser. In *Moser v. Bertram* (1993) 115 N.M. 766 [858 P.2d 854], the New Mexico Supreme Court, applying standard agency law, held—contrary to the Court of Appeal's construction here—that even though the seller's salesperson and the buyer's salesperson worked for the same broker, the seller's salesperson was *not* a dual agent and did *not* owe a fiduciary duty to the prospective buyer. (*Ibid.*)

The Supreme Court rejected the buyer's argument that "'all salespeople employed by a given broker must be bound by all of the fiduciary relationships of that broker.'" (115 N.M. at p. 768 [858 P.2d at p. 856].) It recognized that under New Mexico law (as in California), a non-licensed salesperson must work under a broker and therefore the salesperson is an agent of the broker and the salesperson's fiduciary duty to his or her buyer/seller client extends up the command chain to the broker. (115 N.M. at pp. 767-768 [858 P.2d at pp. 855-856].) But it further recognized that, under "well-established agency law" such as the

Restatement, the fiduciary duties owed by one salesperson are not attributable to the other (even though imputed to the same broker) unless a basis exists to apply respondeat superior *to the salesperson.* (115 N.M. at p. 768 [858 P.2d at p. 856].)

Bazal. Horiike has cited only one case as purportedly supporting the Court of Appeal's construction, *Bazal v. Rhines* (Iowa Ct.App. 1999) 600 N.W.2d 327. *Bazal*'s reasoning provides Horiike no support.

In *Bazal*, a seller sued a buyer's realtor and his brokerage for failing to disclose a restrictive covenant limiting dog ownership, which purportedly caused the transaction not to close because the buyer had four dogs. (600 N.W.2d at p. 328.) Although the opinion cryptically refers to the buyer's realtor owing a fiduciary duty to the seller under a dual agency agreement (*id.* at p. 329), that language was not necessary to holding the buyer's realtor liable.

Instead, the appellate court emphasized that the buyer's realtor knew about the "dog clause" but "never informed *the* [*buyers*] about it, but should have." (600 N.W.2d at p. 329, emphasis added.) It further emphasized that realtors owe *non-fiduciary* ethical duties "to disclose material facts" to *all* parties and the buyer's realtor therefore should have disclosed the "dog clause" and the buyer's dog-space needs to *both* the buyer and the seller. (*Ibid.*)

Bazal did not consider the statutory question at issue here. Nor did it even consider an Iowa statute that allows brokers in intra-firm transactions

to designate the affiliated licensee on each side as an *exclusive* agent. (See Iowa Code, §§ 543B.59(1)-(2).) *Bazal* has little value here.

E. Legislative History Confirms That The Legislature Intended Petitioners' Construction.

1. The Court may consider the legislative history.

Courts can consider legislative history whenever statutory language "is unclear or contains a latent ambiguity." (*People v. Leiva*, *supra*, 56 Cal.4th at p. 510 [absurd consequences of facially unambiguous language created latent ambiguity].) Legislative history both "can be used to (1) identify the existence of a latent ambiguity and (2) resolve the ambiguity." (*Coburn v. Sievert*, *supra*, 133 Cal.App.4th at p. 1496, fn. 5; see *id.* at pp. 1499-1500 [staff analysis showed latent ambiguity].)

Whether section 2079.13(b) is considered unclear or just latently ambiguous, the legislative history for the 1986 bill enacting these statutes (see p. 17, fn. 6, *ante*) is relevant. That history supports Petitioners' construction.

2. Historical statutory notes confirm that the Legislature's purpose was to make clear that associate licensees are agents of their brokers.

This Court treats historical statutory notes as persuasively establishing legislative intent. (E.g., *People v. Tully* (2012) 54 Cal.4th 952, 1005; *People v. Wright* (2006) 40 Cal.4th 81, 97.)

The historical and statutory notes for the 1986 predecessor to section 2079.13 confirm that the Legislature intended to "[*m*]*ake clear* that associate real estate licensees act *as agents of brokers under whom they are licensed*, and who, in turn, are agents of buyers, sellers, or buyers and sellers in residential real property transactions covered by this act." (10A West's Ann. Civ. Code (2014 Supp.) Historical and Statutory Notes to former § 2373 [now § 2079.13], emphasis added.)

The goal, thus, was not to *diverge* from settled agency law but rather to make it clear that associate licensees are agents of their brokers and therefore settled agency law governs.

3. Other legislative history supports Petitioners' construction.

This Court routinely considers (a) legislative-committee and floor reports (e.g., *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 709; *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193); and (b) statements by a bill's sponsor or author to legislators or the governor (e.g., *Beeman v. Anthem Prescription Management LLC* (2013) 58 Cal.4th 329, 338; *People v. Arias* (2005) 45 Cal.4th 169, 182-183). Such legislative history further confirms Petitioners' construction.

a. The California Association of Realtors sponsored the bill, so its presumptive purpose was to protect realtor interests.

The California Association of Realtors (CAR) sponsored the 1986 bill. (RJN 43, 45, 52-54, 62, 73, 81) As CAR confirmed in its amici letter

supporting review here, it would be wholly illogical for CAR to have sponsored a bill codifying the Court of Appeal's construction. CAR exists to *protect* realtors, not subject them to chaos and enhanced liability.

b. The bill's purpose was to ensure disclosure of existing agency rules, not change them.

The legislative history *unequivocally* demonstrates that the Legislature enacted the statutes to ensure that real estate agents disclosed to prospective buyers and sellers the *existing* liability rules, not to change existing law. (RJN 45 ["the bill is not intended to create any new liability"], *ibid.* [the bill "is simply a 'disclosure' bill intended to inform the buyers and sellers in a real estate transaction of the possible agency relationships and the duties owed by a realtor under a particular arrangement"], 53 [the bill "attempts to enunciate existing law"], 54 [the bill "does not mandate sellers, buyers or real estate brokers to accept or function in any particular agency relationship, but maintains the options *now available* and the constraints *now applicable* under California law (primarily evolved by the courts) BUT WITH A COMPREHENSIVE DISCLOSURE to the parties, of those options and constraints," italics added].)

At the time of the 1986 bill, real estate salespersons were considered agents of brokers, making their duties and acts—in legal effect—the duties and acts of the brokers. (E.g., *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 63 [salesperson was an agent of employing broker; "her acts as agent were, in legal effect, his acts as principal"]; *People v. Asuncion* (1984) 152

Cal.App.3d 422, 425 ["a real estate salesman is an agent of his broker-employer"]; *Grubb & Ellis v. Spengler* (1983) 143 Cal.App.3d 890, 895 ["It seems clear that for purposes of the administration of the real estate law, the salesperson is the employee and agent of the broker"; for tort-liability purposes, "the California courts have held that a broker is liable under the doctrine of respondeat superior for the tortious acts of his salespeople during the course and scope of business because a salesperson is the agent of the broker"]; *Resnik v. Anderson & Miles* (1980) 109 Cal.App.3d 569, 572-573 [a real estate salesperson "is strictly the agent of the broker under whom he is licensed"; "a principal-agent relationship" exists].)

In 1986, no case had ever held, nor had any statute decreed, that a broker's duties could be imputed to salespersons. The law simply provided, in accordance with standard agency principles, that an associate licensee/salesperson's duties are imputed to the broker. Thus, the bill's purpose of merely enunciating—not changing—existing law confirms Petitioners' construction and repudiates the Court of Appeal's construction.

c. The bill ensured buyers and sellers received written disclosures regarding which *brokers* represented them.

The 1986 bill's purpose was to address misunderstandings and undisclosed agency regarding whom *brokers* represented. (RJN 53 [the bill "requires that there be a written (and acknowledged) confirmation of the agency relationship of any and all brokers involved in the transaction with each of the principals (seller and buyer)"], 54 [the bill "[i]nsures that both

buyer and seller will know (by a written confirmation) what the agency relationship of any and all brokers in the transaction, is to them"], 81-82 [the bill requires disclosures by the "real estate licensees"].) The bill was "not a measure to address the fundamental problem in dual agency relationships -- potential and sometimes unavoidable conflicts of interest" but rather was "simply a 'disclosure' bill . . . ." (RJN 45; accord, RJN 57, 61, 81-82, 105.)

At the time, standard MLS forms made, unbeknownst to most parties, a broker working with the buyer a subagent *of the seller*. (RJN 82.)[17] Thus, "[b]ecause of the manner in which real estate is marketed in California and the country as a whole, there is confusion among licensees and the public as to whom the agent represents. . . . In many transactions, the real estate agent(s) may represent only the seller or may unknowingly act as dual agent, while the seller is of the belief that the listing agent is his or her agent alone and the buyer has a similar belief about the cooperating or selling broker." (RJN 81-82; accord, RJN 61.) Buyers frequently confided crucial information to agents who had to disclose to the seller. (RJN 61.)

This undisclosed/unauthorized dual agency was problematic because brokers "may not represent both principals in a sales transaction without the express authorization of both parties." (RJN 44; accord RJN 57, 62, 81.)

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[17] See Szto, *Dual Agents*, *supra*, 41 Real Est. L.J. at pp. 38-40. This mandatory subagency practice ended in the 1990's, allowing brokers to exclusively represent buyers. (*Id.* at pp. 39-40.)

Transactions involving undisclosed dual agency are subject to rescission; parties were increasingly suing, undermining the finality of sales. (RJN 57, 62, 73, 81.) CAR sponsored the bill to "'minimize or eliminate litigation which unfortunately is growing in this subject area.'" (RJN 45; accord, RJN 62.)

d. The legislative history does not discuss intra-firm transactions.

The legislative history is also significant for what it doesn't say. There is no discussion about large/regional brokerage firms or associate licensees from the same brokerage ending up on opposite sides of a transaction. That issue was not on the Legislature's radar. Nor was there discussion about diverging from settled agency law. Had the Legislature intended the Court of Appeal's construction, not only could it be expected to have used clear statutory language, it also could be expected to have at least discussed the issue.

CONCLUSION

Settled principles of statutory construction compel the rejection of the Court of Appeal's construction of section 2079.13(b). Petitioners' interpretation is the only construction backed by the overall statutory language and context, logic, settled agency law, public policy and legislative history. The Court of Appeal's judgment must be reversed.

Dated: October 6, 2014 Respectfully submitted,

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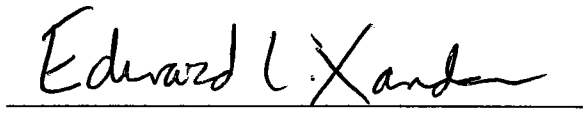
By: 
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.504(d)(1), that the **PETITIONERS' OPENING BRIEF ON THE MERITS** contains 13,831 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: October 6, 2014

Edward L. Xanders

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 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On October 6, 2014, I served the foregoing document described as: **PETITIONERS' OPENING BRIEF ON THE MERITS** on the parties in this action by serving:

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(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 at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on October 6, 2014, at Los Angeles, California.

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

Anita F. Cole