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# IN THE SUPREME COURT OF CALIFORNIA

**HIROSHI HORIIKE,**
*Plaintiff and Appellant,*

*v.*

**COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY et al.,**
*Defendants and Respondents.*

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

# ANSWER BRIEF ON THE MERITS

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# ANSWER BRIEF ON THE MERITS

## INTRODUCTION

When a brokerage firm represents both the buyer and the seller in a real estate transaction, it is a "dual agent" and owes fiduciary duties to both parties. In this case, defendant Coldwell Banker Residential Brokerage Company was a dual agent. The question presented is whether the two salespeople Coldwell Banker employed to represent the buyer and seller, respectively, were subject to the same fiduciary duties as Coldwell Banker. If they were, then the seller's salesperson breached that duty by misrepresenting to the buyer the size of the seller's house.

The language of the governing statute, agency law, professional commentary, legislative history, and common sense, all support the conclusion that when the broker is a dual agent, the broker's salespeople are indeed subject to the same fiduciary duties as the broker.

To begin with, the language of Civil Code section 2079.13, subdivision (b), is clear: "When an associate licensee [i.e., a salesperson] 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." This language unambiguously states that brokers and their salespeople owe the same duties to clients. If the broker owes fiduciary duties to both parties, then the broker's salespeople owe the same fiduciary duties.

The Court of Appeal interpreted the statute consistent with its plain meaning. The Legislature thereafter amended the statute in other respects but did not change the language at issue, thereby implicitly endorsing the court's interpretation.

From a policy perspective, equating the duty of the seller's salesperson with that of the broker makes sense. In a dual agency, the broker owes the buyer a duty to investigate and disclose facts that bear on the property's value or desirability. The salesperson who represents the seller is well positioned to help the broker satisfy that duty. Indeed, because a broker who represents both sides of a sales transaction has an inherent conflict of interest, the broker can satisfy its conflicting obligations only if complete disclosures are made by each of the salespeople the broker employs.

There is no merit to Coldwell Banker's position that the statute focuses on the salesperson's duties and imputes them back to the broker. That is not what the statute says, and it is not how real estate transactions work. Only a broker can enter into a contract with buyers or sellers, and the contract defines the scope of the broker's duties. Salespeople have no authority to enter into real estate contracts, and they have no duties to clients except those that flow from the broker. When Civil Code section 2079.13, subdivision (b), says that the salesperson's duties are equivalent to those of the broker for whom the salesperson works, it is necessarily referring to duties that originate with the broker.

There also is no merit to Coldwell Banker's position that construing the statute according to its plain meaning would be disruptive because it would thrust fiduciary duties on salespeople without their consent and would interfere with the undivided loyalty that Coldwell Banker claims salespeople owe their clients. Coldwell Banker raises the specter that salespeople will be obliged to violate their clients' trust by disclosing damaging information to the opposing side of the transaction. These concerns are unfounded and ignore how the real estate market actually operates today.

Under the statute, fiduciary duties are not thrust on salespeople. They arise only when the broker, the buyer, and the seller, all agree to a dual agency relationship. The disclosure form that buyers and sellers must sign before a dual agency can arise explains that in that type of relationship, the broker, acting *through* its salespeople, owes fiduciary duties to *both* parties. Thus, the

buyer and seller know they will not have the undivided loyalty of their respective salespeople.

Nor will salespeople working with sellers in dual agencies be obliged to disclose to buyers confidential information about the seller's negotiating strategy. The salesperson has a duty to disclose only the information that materially affects the value or desirability of the property. Negotiating strategy and other private concerns of the seller need not be disclosed. The obligation to investigate and disclose information that materially affects the value of property is not radically different from the statutory and common law duties salespeople representing sellers currently owe to buyers in the absence of any fiduciary relationship, i.e., where there is no dual agency.

In the final analysis, Coldwell Banker's position is that the public will be worse off if this Court enforces the plain meaning of section 2079.13, subdivision (b), because brokers will then find it more difficult to represent both sides in a real estate transaction. Coldwell Banker's assumption that dual agencies benefit the public is questionable. Consumer advocates have condemned the practice, which studies have shown results in higher prices. In adopting the legislation at issue, the Legislature itself observed that dual agency creates irreconcilable conflicts of interest that are ameliorated only in part by ensuring that the conflicts are disclosed to consumers.

When a broker like Coldwell Banker chooses to represent both parties to a sale, it must meet its fiduciary duties to both sides. And it can do so only if the salesperson best situated to fulfill those duties is also required to do so.

## STATEMENT OF FACTS

### A. Horiike searches for a home in Los Angeles.

Plaintiff Hiroshi Horiike lives in Hong Kong. (6 RT 2542-2543.) In 2003, he started looking for a home in Los Angeles. (6 RT 2544-2545.)

Horiike spoke fluent Mandarin and Japanese, but understood only simple English. (6 RT 2544.) Because of this language barrier, he worked exclusively with Chizuka Namba, a Japanese-speaking real estate saleswoman employed in Coldwell Banker's Beverly Hills office. (6 RT 2545; 9 RT 3332-3333, 3335.) Horiike, who grew up in a 300 square-foot-home, dreamed of someday owning a large custom home, and worked with Namba to find one. (6 RT 2547.)

Over a period of years, Namba showed Horiike 40-50 luxury homes in Beverly Hills, Bel Air, and Holmby Hills, but none were satisfactory. (6 RT 2545.) Then, Namba spotted a listing for a custom Malibu home owned by Mr. and Mrs. Denis Brown and thought Horiike should see it. (4 RT 1960; 9 RT 3333-3334.)

### B. The Browns' home is listed with Chris Cortazzo, a Coldwell Banker salesman.

Chris Cortazzo was the leading Coldwell Banker salesperson in the United States and internationally. (5 RT 2178.) He worked in one of the company's Malibu offices and specialized in selling Malibu property. (5 RT 2169, 2175; see exh. 12.) In 2006, Cortazzo

listed the Browns' property for sale on a multiple listing service (MLS). (5 RT 2169.)

The market value of a home is directly related to its size. (11 RT 3906.) Cortazzo had information from two public sources indicating that the Browns' house had less than 10,000 square feet of living area. First, he had a copy of the building permit for the house, which listed a single family residence of 9,224 square feet, a guest house of 746 square feet, a garage of 1,080 square feet, and a basement of unspecified size. (5 RT 2288-2289; 1 AA 150-151 [exh. 11].) Second, Cortazzo obtained public record information from the tax assessor's office, which indicated the house's living area was 9,434 square feet. (5 RT 2194, 2197; 9 RT 3312-3313; 10 RT 3813; 1 AA 153 [exh. 7].)

Denis Brown told Cortazzo that he believed his home was 15,000 square feet in size (7 RT 2790), but Brown provided no documentation to support this figure (5 RT 2231). Cortazzo nevertheless accepted the figure at face value, disregarded the public record information, and stated on the MLS form that the property had approximately "15,000 square feet of living area." (5 RT 2204, 2231; 1 AA 153 [exh. 12].) Cortazzo added the term "living area" on his own. (5 RT 2203.) Brown did not use the term "living areas" and had no idea what it meant.[1] (7 RT 2790.) Cortazzo

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[1] The term "living area" has no single definition (10 RT 3687-3688), but is generally understood to refer to the interior, habitable area of a home, including basements and attics, but excluding garages and open patios. (8 RT 3040; 9 RT 3431-3432; 10 RT 3634-3635; 11 RT 3917.) When the Browns built their home in 1998, Malibu did not include the bottom level in calculating size. (continued...)

then prepared a glossy one-page color flyer for the property, advertising that it "offers approximately 15,000 sq. ft. of living areas" (exh. 264), a claim supported by neither the public records nor Brown himself. The 15,000 square-foot-figure used in advertising the property was roughly 59 percent larger than the size of the home listed in the tax assessor's records.[2]

In February 2007, six months after the Browns put their property on the market, Mr. and Mrs. Lee agreed to purchase the home for $13.8 million. (5 RT 2222; 1 AA 169 [exh. 71].) After submitting their offer and a deposit check (5 RT 2223-2224), the Lees raised questions about the advertised size of the property and asked Cortazzo to send confirmation from the home's architect that the living area square footage represented on the MLS form was accurate. They also requested copies of the architectural plans and Coldwell Banker's "disclosure addendums." (1 AA 172, 177 [exhs. 73, 77].)

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(...continued)
Consequently, the building permit included only 9,979 square feet. (4 RT 1984; 8 RT 3038; 1 AA 150 [exh. 11] [building permit shows 11,050 square feet, including garages that totaled 1,080 square feet].) Malibu changed the rule in 2007, and basements thereafter were counted in measuring the maximum size of a home. (8 RT 3083.)

[2] Cortazzo included both the garages and open patios in his 15,000-square-foot measurement, inflating the size of the living area of the home by 2,651 square feet, or 59 percent above the size listed in the tax records.

Cortazzo gave the Lees the statutorily mandated disclosure form with the appropriate boxes checked.[3] (1 AA 178-180 [exh. 82].) In addition, under the heading "Agent's Inspection Disclosure," Cortazzo had his assistant handwrite: "Buyer is advised to hire a qualified specialist to verify the square footage of home. Broker does not guarantee or warrant square footage." (1 AA 180 [exh. 82-3]; 5 RT 2240.) Cortazzo added that the architectural plans had been requested but were not available. (1 AA 180 [exh. 82-3].)

Responding to the Lees' request for information about the home's size, Cortazzo obtained a letter from Carl Volante, the home's architect, stating the "size of the house, as defined by the current Malibu building department ordinance is approximately 15,000 square feet." (1 AA 152 [exh. 55].) Volante was referring to what Malibu calls "total development square feet," which includes every developed structure, including garages, open air terraces, and even trash bins. (5 RT 2111, 2113; 8 RT 3041, 3092.) Cortazzo knew that Volante was not referring to the *living area* of the home, the subject of the Lees' inquiry. (5 RT 2235-2236.) Cortazzo forwarded the architect's letter to the Lees without this explanation, and again cautioned in his cover letter that the Lees should "hire a qualified specialist to verify the square footage." (1 AA 173 [exh. 75].)

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[3] Civil Code section 1102.3 requires that prospective purchasers receive the disclosure form prescribed by Civil Code section 1102.6, which uses checklists to identify the features of the home and any significant defects.

When the Lees learned that the architectural plans were not forthcoming, they requested a six-day extension to inspect the property. (5 RT 2249-2250.) The sellers refused to grant the extension, and the Lees canceled the transaction. (5 RT 2251-2252.)

In July 2007, Cortazzo changed the MLS listing to state that the approximate square footage was "0/O.T.," by which he meant zero square feet and other comments. (5 RT 2213-2214.) The Browns lowered the asking price from $16.75 million to $14.995 million. (5 RT 2206.)

### C. Relying on Cortazzo's representations concerning the size of the living area in the Browns' home, Horiike decides to make an offer.

On November 1, 2007, four months after the Lees' sale fell through, Namba arranged for Cortazzo to show the Browns' home to Horiike and Tsutomu Yokoi, the Vice-President of Horiike's company. (8 RT 3111-3112, 3333-3337.) When Horiike arrived at the home, Cortazzo gave him a copy of the one-page color flyer advertising that the home had 15,000 square feet of living area. (9 RT 3337.) Cortazzo also mentioned that figure several times during Horiike's visit. (8 RT 3114-3115; 9 RT 3339.) Cortazzo, however, did not explain that the 15,000 square feet included two double car garages totaling 1,080 square feet (5 RT 2336), and a number of outside terraces and patios (6 RT 2553; 9 RT 3316-3318). Having visited many homes, Horiike understood that the term living area did not include garages and patios. (6 RT 2575.)

After spending an hour at the home (5 RT 2266), Horiike, Yokoi, and Namba met at a local coffee shop, where Yokoi translated for Horiike the main terms in Cortazzo's flyer. (6 RT 2550-2551.)

They returned to the property that evening . (3 RT 3117; 9 RT 3343.) On this second visit, Cortazzo emphasized again that the home had 15,000 square feet of living area, that under current Malibu codes no home that large could be built again,[4] and that no larger homes were on the market. (8 RT 3118.)

On the drive back to his hotel, Horiike decided to make an offer. (See 8 RT 3120; 9 RT 3343-3344.) Knowing that Coldwell Banker was a large, well-known American company, Horiike trusted the company and its employees. In particular, he trusted the information Cortazzo had provided about the property, including its size. (6 RT 2577; 8 RT 3019-3020.) Namba also trusted her fellow employee Cortazzo. Not only was he Coldwell Banker's most successful salesperson, he lectured other salespeople on how to do their jobs, and everyone in the company respected him. (5 RT 2178; 9 RT 3390.)

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[4] Malibu prohibits homes with more than 11,172 square feet of development space. (8 RT 3059.) In September 2004, Malibu amended its code to include basements in the calculation of total development square feet. (Exh. 56-2, 56-3.)

### D. Horiike signs forms required to make the offer and close the deal, including a "dual agent" form confirming Coldwell Banker's fiduciary duty to Horiike. None of the forms corrects Cortazzo's previous misrepresentations about the size of the home's living area.

Because he was scheduled to fly back to Hong Kong that evening, Namba prepared the necessary papers at the hotel. (9 RT 3344.) Twenty minutes before leaving for his flight, Horiike signed an eight-page offer and a four-page Buyer's Inspection Advisory. (6 RT 2565-2567; exhs. 195, 196.) Namba also gave Horiike the seven-page Disclosure Regarding Real Estate Relationships mandated by Civil Code section 2079.14.[5] (1 AA 155 [exh. 344]; see exh. 196-14, ¶ 27.A. [acknowledging receipt of the disclosure form].) The disclosure form explained that Coldwell Banker, identified as both the listing agent and the selling agent, represented both the seller and the buyer and was therefore acting as a "dual agent." (1 AA 155, 158 [exh. 344-1, 344-4].) Describing the obligations of a dual agent, the form stated:

> A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

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[5] "Listing agents and selling agents shall provide the seller and buyer in a real property transaction with a copy of the disclosure form specified in section 2079.16 . . . ." (Civ. Code, § 2079.14.)

> In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:
>
> (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in the dealings with either the Seller or the Buyer,
>
> (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

(1 AA 155 [exh. 344-1].)

The disclosure form said Coldwell Banker was acting as a dual agent for Horiike and the Browns "through one or more associate licensees" (1 AA 156 [exh. 344-2]), and identified Cortazzo as one of those licensees. Horiike signed the form as the buyer, and Cortazzo, as associate licensee, signed the form on Coldwell Banker's behalf. (*Ibid.*)

The portion of the form labeled "disclosure and consent for representation of more than one buyer or seller" (original formatting omitted) further explained the duties that Coldwell Banker and its associate licensees owed to both of the parties:

> A real estate broker, whether a corporation, partnership or sole proprietorship, ("Broker") may represent more than one buyer or seller provided the Broker has made a disclosure and the principals have given their consent. This multiple representation can occur through an individual licensed as a broker or through different associate licensees acting for the Broker. The associate licensees may be working out of the same or different office locations.
>
> . . . .

> Buyer and Seller understand that Broker may represent more than one buyer or seller and even both buyer and seller on the same transaction.
>
> . . . .
>
> In the event of dual agency, Seller and Buyer agree that . . . *Dual Agent [i.e., Coldwell Banker] is obligated to disclose known facts materially affecting the value or desirability of the property to both parties.*

(Exh. 344-5, emphasis added.)

Horiike did not have time to read the documents Namba gave him that evening. (6 RT 2563.) Because he trusted Namba, Horiike signed the documents where Namba said they needed to be signed to make an offer. (6 RT 2566; 9 RT 3390.) Following counter-offers, the parties agreed on a sales price of $12,250,000. (5 RT 2274.)

Horiike was in Hong Kong for the three weeks before escrow closed. (6 RT 2561-2562; see 5 RT 2295 [escrow period].) During that time, Cortazzo sent the documents he wanted Horiike to review or sign to Namba, who forwarded them to Horiike's assistant in Hong Kong. (8 RT 3127-3129; exhs. 189-2, 542.)[6]

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[6] During discovery, Horiike was unable to obtain all of Cortazzo's communications about the sale because Cortazzo claimed the computer hard drive in his office crashed and erased all of the pertinent e-mails. (5 RT 2168, 2187, 2189, 2303.) Only a few of the e-mails survived in paper form. (9 RT 3327.) Oddly, it wasn't until more than a year after Horiike filed this litigation that the manager of the Malibu office where Cortazzo worked heard about the alleged computer crash, even though Cortazzo claimed the crash affected the mainframe that serviced the office's computers. (5 RT 2187; 8 RT 3163; 1 AA 1.)

On November 18, 2007, Cortazzo sent Namba a package of 25 documents, among them the original building permit indicating the size of the home was 9,224 feet. (5 RT 2289; exh. 542-1, 542-45.)[7] Namba asked Horiike to sign a form confirming receipt of these documents before she forwarded the forms to Hong Kong. (5 RT 2293; 6 RT 2577; 7 RT 2739; 8 RT 3024-3025, 3125; 9 RT 3347-3348; exh. 189 [fax cover sheet]; 2 AA 203 [exh. 1064] [fax copy of receipt].) As requested, Horiike signed the receipt, and his assistant faxed it back to Namba the same day with the notation "[w]e understand that each report which you received is all right in its content." (Exh. 190.) The documents themselves arrived in Hong Kong a week later. (7 RT 2741; 8 RT 3132.)

Horiike's assistant believed that the home's building permit, along with permits for the electrical wiring, plumbing, and the pool, simply confirmed that the home had been built according to code, and he put them in a file without reading them or bringing them to Horiike's attention. (8 RT 3132-3133.) Neither Namba nor Cortazzo asked Horiike to review the permit, and neither alerted him to the fact that the home might be smaller than the advertised 15,000 square feet of living area.

The package of documents also contained a number of disclosure forms, including a Statewide Buyer's Rights and Duties form and a Transfer Disclosure Statement. (Exh. 542 [cover letter];

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[7] The transmittal letter was incorrectly dated October 18, 2007. (Exh. 542-1.) Since Horiike first visited the property on November 1, 2007, the letter must have been sent sometime in mid-November 2007. (See 6 RT 2529 [Cortazzo agrees there is an error in the date].)

2 AA 216-225 [exh. 265] [buyer's rights form]; exh. 1069 [disclosure statement].) The form that described buyer's rights and duties said "[r]epresentations regarding [square feet] made in a Multiple Listing Service, advertisements, and from property tax assessor records are often approximations, or based upon inaccurate or incomplete records" and "only an appraiser or land surveyor, as applicable, can reliably confirm square footage . . . ." (2 AA 217 [exh. 265-2].) On the Transfer Disclosure Statement, under the heading "Agent's Inspection Disclosure," Cortazzo handwrote "[s]ee attached Agent's Inspection Disclosure." (6 RT 2479, 2481-2482; exh. 1069.03.) The Agent's Inspection Disclosure form said, among other things, "[a]gent will not measure square footage of lot or improvements." (6 RT 2482-2483; 2 AA 206 [exh. 1080.2].)

None of the documents Cortazzo sent to Horiike contained the prominent handwritten warnings about the size of the property that Cortazzo had previously given to the Lees. In the Lees' transaction, Cortazzo handwrote on the Transfer Disclosure Statement: "Buyer is advised to hire a qualified specialist to verify the square footage of home. Broker does not guarantee or warrant square footage." (1 AA 180 [exh. 82-3].) He repeated that advice when he faxed the architect's letter to the Lees' saleswoman, writing on the fax transmittal "I suggest you hire a qualified specialist to verify the square footage." (1 AA 173 [exh. 75].)

In Horiike's case, the Transfer Disclosure Statement simply referred Horiike to a pre-printed form with numerous boilerplate warnings. Cortazzo did not alert Horiike to the possibility that what Cortazzo had told Horiike repeatedly about the property's living

area might be incorrect. And because Namba described the documents she sent Horiike as standard forms that simply required his signature, Horiike signed the documents without asking that they be translated. (6 RT 2571.)

Following the 17-day inspection period, during which time Namba had the property fully inspected for defects (5 RT 2295; 6 RT 2495-2496), escrow closed in December 2007 and Horiike became the owner. (4 RT 1960.)

### E. Horiike discovers that the property's living area is smaller than Cortazzo represented. Horiike files this action.

In May 2009, while preparing to do work on the property, Horiike discovered for the first time that the building permit indicated the size of the residence was 9,224 square feet. (6 RT 2578-2579; 7 RT 2704-2707; 9 RT 3355.) Namba asked Cortazzo and the manager of his Malibu office to explain the discrepancy between the advertised size (15,000 square feet of living area) and the publicly reported size (9,224 square feet) of the property. (9 RT 3354-3357.) When no explanation was forthcoming (9 RT 3355-3358), Horiike filed this action against Coldwell Banker and Cortazzo for negligent misrepresentation, breach of fiduciary duty, and related claims. (1 AA 1.)

## F. The trial court rejects Horiike's breach of fiduciary duty claim against Cortazzo, and the jury resolves the remaining claims in favor of Cortazzo and Coldwell Banker.

At the conclusion of trial, the court granted Cortazzo's motion for nonsuit on Horiike's breach of fiduciary duty claim, ruling as a matter of law that Cortazzo did not owe a fiduciary duty to Horiike. (11 RT 4092.) Because Horiike's counsel had previously stipulated that Horiike would not seek to hold Coldwell Banker liable based on Namba's conduct (2 RT 1248), and because the court erroneously concluded that Cortazzo owed Horiike no fiduciary duty, the court ruled that Coldwell Banker as a company could be found liable for breach of fiduciary duty only if an employee *other* than Namba or Cortazzo owed a fiduciary duty to Horiike and breached it. (12 RT 4265-4266, 4283.) Horiike's counsel, limited by the court's ruling that Cortazzo did not owe a fiduciary duty to Horiike, argued that Cortazzo's supervisor owed a fiduciary duty to Horiike and breached it by failing to provide Cortazzo with sufficient supervision and training. (12 RT 4330.) The jury disagreed and ruled in Coldwell Banker's favor on the breach of fiduciary duty claim.

With respect to Horiike's claims against Cortazzo for intentional misrepresentation, the jury found Cortazzo did not make any false representations of a material fact. (2 AA 233.) With respect to the negligent misrepresentation claim, however, the jury found that Cortazzo did make a false representation of an important or material fact (presumably about the size of the property), but had

reasonable grounds for his erroneous belief. (2 AA 236.) The jury resolved the remaining claims in favor of Coldwell Banker. (2 AA 233-239.)

Horiike appealed from the judgment for Cortazzo and Coldwell Banker. (2 AA 275.)

### G. The Court of Appeal reinstates Horiike's breach of fiduciary duty claims against Cortazzo and Coldwell Banker.

The Court of Appeal observed that the duties of brokers and salespersons are regulated by "a comprehensive statutory scheme. (Civ. Code, § 2079 et seq.)." (Typed opn. 7.) Under that scheme, an "agent" is a "licensed real estate broker 'under whose license a listing is executed or an offer to purchase is obtained.' (*Id.*, § 2079.13, subd.(a).)" (Typed opn. 7.) An "associate licensee" is a "licensed real estate broker or salesperson 'who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent . . . .' (*Id.*, subd. (b).)" (Typed opn. 7.) A "dual agent" is " 'an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.' (Civ. Code, § 2079.13, subd. (b).)" (Typed opn. 7.) Dual agents owe fiduciary duties to both parties. (Typed opn. 7.)

The court noted that the scope of a real estate salesperson's duties is defined by Civil Code section 2079.13, subdivision (b),[8] which provides:

> 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.

(Typed opn. 7.)

The parties did not dispute that Coldwell Banker acted as a dual agent of the Browns (sellers) and Horiike (buyer) and therefore owed fiduciary duties to both sides. (Typed opn. 7.) The parties also did not dispute that both Cortazzo and Namba worked for Coldwell Banker. (Typed opn. 2.) Given these facts, the court concluded:

> Under Civil Code section 2079.13, subdivision (b), the duty that Cortazzo owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by CB. CB owed a fiduciary duty to Horiike, and therefore, Cortazzo owed a fiduciary duty to Horiike. [¶] . . . [¶] The motion for nonsuit should have been denied and the cause of action against Cortazzo for breach of fiduciary duty submitted to the jury. The jury was also incorrectly instructed that CB could not be held liable for breach of fiduciary duty based on Cortazzo's actions.

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[8] Unless otherwise indicated, all citations are to the Civil Code.

(Typed opn. 8.)

The court held that Horiike was prejudiced by the trial court's ruling because the jury's findings on other claims did not resolve his claims against Cortazzo and Coldwell Banker for breach of fiduciary duty and the evidence supported the conclusion that "Cortazzo was aware of material information that he failed to provide Horiike." (Typed opn. 8-10.) In particular:

> Cortazzo knew the square footage of the property had been measured and reflected differently in different documents. When a potential purchaser [the Lees] sought to confirm the square footage, Cortazzo gave handwritten advice to have the square footage verified by a specialist. He subsequently changed the listing for the property to reflect that the square footage required explanation. He did not explain to Horiike that contradictory square footage measurements existed. A trier of fact could conclude that although Cortazzo did not intentionally conceal the information, Cortazzo breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage. He did not even provide the handwritten advice given to other potential purchasers to hire a specialist to verify the square footage.

(Typed opn. 10.)

The court reversed the judgment and remanded the case for a new trial on Horiike's breach of fiduciary duty claims against Cortazzo and Coldwell Banker.

## LEGAL ARGUMENT

### I. ON ITS FACE, CIVIL CODE SECTION 2079.13, SUBDIVISION (B) PROVIDES THAT SALESPEOPLE OWE THE SAME DUTIES TO CLIENTS AS THE BROKERS FOR WHOM THEY WORK.

Coldwell Banker relies largely on policy arguments to support its position that, despite its plain language, section 2079.13, subdivision (b), should not be construed to equate a salesperson's duty to clients with the duty owed by brokers. Coldwell Banker characterizes the Court of Appeal's opinion as a "revolution in [the] law" (OBOM 4) and a "public-policy nightmare" (*ibid.*) that threatens to unsettle the real estate profession. As we explain below, Coldwell Banker's hyperbole is unjustified and its arguments are misguided. More importantly, though, they distract from the main issue in this case, which is one of statutory interpretation.

This Court has explained its task when asked to interpret a statute:

> Our primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent. [Citation.] " ' "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible." ' "

(*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) Importantly, "[i]f the language of the statute

is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919.)

The words of section 2079.13, subdivision (b), are not ambiguous. The statute states:

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

(Civ. Code, § 2079.13, subd (b).) "Associate licensee" refers to "a person who is licensed as a real estate broker *or salesperson* . . . 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 . . . ." (*Ibid.*, emphasis added.)

On its face, this language equates the duties that a salesperson owes to clients with the duties owed by the broker for whom the salesperson works. Where, as here, the broker owes a fiduciary duty to both the buyer and seller, salespeople employed by the broker owe that same duty.

Digging deeper into the code leads to the same conclusion. Salespeople cannot operate on their own or enter into contracts with buyers and sellers; they can only operate as agents for brokers and accept money in the broker's name. (Bus. & Prof. Code, § 10132 ["A real estate salesman . . . is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker"]; *Venturi & Co. LLC v. Pacific Malibu*

*Development Corp.* (2009) 172 Cal.App.4th 1417, 1423 ["A sales license does not permit its holder to represent another unless the salesperson acts under a broker's authority"]; *Schaffter v. Creative Capital Leasing Group, LLC* (2008) 166 Cal.App.4th 745, 757 [" 'the salesman . . . is strictly the agent of the broker. He cannot contract in his own name [citations], nor accept compensation from any person other than the broker under whom he is licensed' "]; 2 Miller & Starr, Cal. Real Estate (3d ed. 2014) §§ 3:4, p. 3-15 [same], 4:31, p. 4-84 ["As a matter of law, a salesperson may only perform licensed activities as an employee under the supervision of a licensed broker"]; see Cal. Code Regs., tit. 10, § 2725 ["A broker shall exercise reasonable supervision over the activities of his or her salespersons"].)

Section 2079.13, subdivision (b), recognizes the dominant role played by brokers when it states "[t]he agent in the real property transaction [i.e., the broker] bears responsibility for his or her associate licensees [i.e., salespeople] who perform as agents of the agent."

Section 2079.16 defines the duty that "agents" owe buyers and sellers, and as Coldwell Banker recognizes, the term "agents" refers to brokers, not salespeople. (Civ. Code, § 2079.13, subd. (a) [" 'Agent' . . . includes a person who is licensed as a real estate broker . . . and under whose license a listing is executed"]; OBOM 32 [section 2079.13 uses the term "agent" to "mean[ ] *the broker*" (original emphasis)]; OBOM 33 [same]; see Civ. Code, § 2079.16 [defining the duties "agents" owe to buyers and sellers of real estate].)

Because the broker's contract defines what duties are owed to buyers and sellers, it makes sense that the duties of the salespeople who work as *agents* for the broker would be defined by the same contract. That is precisely what section 2079.13, subdivision (b), does when it states that the duty of the associate licensee or salesperson "is equivalent to the duty owed . . . by the broker for whom the associate licensee functions."

This logical interpretation of the statute—that the salesperson's duty is the same as the broker's duty—is endorsed by the two leading California treatises on real estate law. (2 Miller & Starr, Cal. Real Estate, *supra*, § 3:34, p. 3-149 ["A salesperson employed by a real estate broker, whether considered as an employee or an independent contractor by their agreement, owes the same fiduciary duties to the agent's principal that are owed by the agent"]; Greenwald & Bank, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2014) ¶ 2:139, p. 2-32.12 ["A 'dual agency' (or 'dual representation') arises where the same salesperson (or same brokerage firm, through different salespersons) represents both buyer and seller. In such cases, the broker (*and any salesperson acting on the broker's behalf*) is a *fiduciary* for *both* buyer and seller." (first emphasis added)]; see also Hayes, *The Practice of Dual Agency in California: Civil Code Sections 2373-2382* (1986) 21 U.S.F. L.Rev. 81, 93[9] (hereafter Hayes) ["[I]f seller A lists Blackacre with licensee B, who is associated with XYZ Realty, and buyer C is ultimately procured by licensee D, who is also associated

[9] In 1995, sections 2373-2382 were renumbered as sections 2079.13-2079.23. (Stats. 1995, ch. 428 (SB 467) § 2.)

with XYZ Realty, the law will not distinguish between B and D. They are both mere representatives of the one agent, XYZ Realty, who is the fiduciary of the seller by virtue of the listing contract."].)

To support its position that the statute does not mean what it says, Coldwell Banker relies on the mistaken assumption that "an agent's duties are imputed upward to the principal . . . ." (OBOM 24, original formatting omitted.) Starting with that assumption, it argues that section 2079.13, subdivision (b), should be read to focus on the *salesperson's* duty to buyers and sellers and to impute those duties back to the broker for whom the salesperson works. (OBOM 28-29.)

Coldwell Banker's interpretation of the statute departs not only from the statute's plain language, it turns the relationship between brokers and salespeople on its head. It is the broker, not the salesperson, who enters into a contractual relationship with the buyer or seller, and it is the broker's contract that defines the duty owed to the client. As an agent working *for* the broker, the salesperson assumes whatever duties his or her employer owes, not the other way around. Indeed, absent the broker's contract, the salesperson would not owe *any* duty to the client because a salesperson cannot independently enter into a contract to represent a buyer or seller of real estate. The cases that Coldwell Banker relies on to show that salespeople independently owed duties to buyers and sellers analyze the duty that *brokers* owed to buyers and sellers, not any independent duty owed by salespeople. In each case,

the salesperson merely assisted the broker to fulfill the broker's duty to the client.[10]

This reading of the statute lines up not only with the statutes that govern the relationship between real estate brokers and salespeople specifically (see *ante*, pp. 22-23), it also lines up with the rules that govern principal-agency relationships generally. When an agency is created, the principal assigns duties to the agent, and the agent "represents the principal for all purposes within the scope of the agent's actual or ostensible authority." (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 130, p. 175.) This basic understanding of how principal-agency relationships work is reflected in section 2079.13, subdivision (b).

Coldwell Banker is correct that "[t]here is no doctrine of respondeat *inferior*" (OBOM 25), because a principal's *liabilities* are not imposed on his or her agents. However, Horiike has never argued that Cortazzo is vicariously liable for the misconduct of Coldwell Banker. Quite the opposite, Horiike seeks to hold Coldwell Banker liable for the misconduct of Cortazzo. That claim involves a straightforward application of respondeat superior theory. (3 Witkin, Summary of Cal. Law, *supra*, Agency and Employment, § 165, p. 208 [under the doctrine of respondeat superior, the principal is liable for the torts of the agent or employee, committed while acting in the scope of employment].)

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[10] See OBOM 21-22, 27-28, citing *Holmes v. Summer* (2010) 188 Cal.App.4th 1510; *Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756; *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399 (*Assilzadeh*).

Finally, there is no merit to Coldwell Banker's position that section 2079.13, subdivision (b), only creates rules for dual agencies that arise when a single salesperson represents the buyer and the seller, and does not address cases where salespersons representing the buyer and the seller work for the same broker. (OBOM 34.) Coldwell Banker cites section 2079.13, subdivision (d), which uses the singular word "licensee" in defining "dual agent" as "an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction."

This argument fails because it relies on the wrong provision of the statute. Section 2079.16—the provision that defines the obligations of an "agent representing both seller and buyer" (capitalization and boldface omitted) for purposes of the required disclosure form—uses the plural word "licensees." The statute specifically contemplates cases where the licensees who represent the buyer and seller work for the same broker:

> A real estate agent, either acting directly or through *one or more associate licensees*, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer. [¶] In a dual agency situation, the agent has the following affirmative obligations . . . .

(Civ. Code, § 2079.16.) This wording appears in the disclosure form Horiike signed. (1 AA 156 [exh. 344-2].)

The statute and disclosure form both contemplate the situation here: a dual agency arising where the buyer's salesperson and the seller's salesperson work for the same broker. In that circumstance, section 2079.13, subdivision (b), provides that each

salesperson's duty "is equivalent to the duty" the broker owes to the buyer and seller. In the context of a dual agency, this plainly means that where the broker owes a fiduciary duty to both parties, so do its salespeople.

In short, the plain language of the statute, well-established agency law, and prominent treatises support the Court of Appeal's interpretation of the statute.

## II. THE LEGISLATURE HAS IMPLICITLY ENDORSED THE COURT OF APPEAL'S INTERPRETATION OF SECTION 2079.13.

" ' " 'There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts.' " ' " (*People v. Favor* (2012) 54 Cal.4th 868, 879.)

On August 15, 2014, section 2079.13 was amended to extend the disclosure requirements of the statute to commercial property. (Stats. 2014, ch. 200 (SB 1171).) In all other respects, the statute was left unchanged. While SB 1171 was introduced two months before the Court of Appeal issued its April 2014 published opinion in this case, the bill was amended twice in June 2014, adopted by the Assembly in July 2014, and adopted by the Senate in August 2014. (California Senate Bill No. 1171 (Prior Session Legislation), LegiScan: Bringing People to the Process <http://legiscan.com/CA/bill/SB1171/2013> [as of Dec. 24, 2014].)

The Legislature's reenactment of section 2079.13, subdivision (b), without change after the Court of Appeal issued its opinion gives rise to a presumption that the court construed the statute consistent with the Legislature's intent.

## III. PUBLIC POLICY SUPPORTS THE PLAIN MEANING INTERPRETATION OF SECTION 2079.13.

The plain meaning interpretation of section 2079.13 is consistent with the trend in the law toward providing greater protections for buyers of residential real estate. Until recently, buyers had few protections. As one article explains:

> Historically, real estate agents licensed by the state represented the seller because the seller legally contracted with the Broker to list the seller's home and to seek the highest possible price from a prospective buyer. Moreover, because the buyer typically did not contract with a broker to buy a home but merely asked the broker to show him the broker's listings, the buyer was not represented at all in the transaction.[11]

Even when buyers worked with a salesperson, the salesperson was considered a "sub-agent" of the seller's agent, who owed fiduciary duties exclusively to the seller, not the buyer. (Civ. Code, § 2351 ["A sub-agent, lawfully appointed, represents the principal in like manner with the original agent"]; *Steve Schmidt & Co. v. Berry*

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[11] Comment, *The "Brokerage Relations" Addition to the Illinois Real Estate License Act: The Case of the Legalized Conflict of Interest* (1998) 22 S. Ill. U. L.J. 725, 727 (hereafter Comment).

(1986) 183 Cal.App.3d 1299, 1312 ["Since the principal expressly authorized the use of sub-agents, the cooperating broker becomes the agent of the seller and the seller is the principal. ([Civ. Code,] § 2351.) Thus, there is a principal-agent relationship between the seller and the cooperating broker"].)

In the 1970's, the National Association of Realtors institutionalized the use of sub-agents through Multiple Listing Services, which guaranteed that fiduciary duties would be owed only to sellers:

> The National Association[ ] of Realtors required brokers to offer subagency to all member brokers when they placed a listed property in a multiple listing service. . . . [E]very licensed salesperson in the broker's company and every member of the multiple listing service became a subagent of the seller. Every broker in that chain owed the fiduciary duties of loyalty, disclosure and confidentiality to the seller.[12]

(See *Skopp v. Weaver* (1976) 16 Cal.3d 432, 439, fn. 8 ["Under the form of multiple listing agreement[s] employed in many areas, a broker on the multiple listing is by virtue of the agreement an agent of the seller"].)

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[12] Note, *The Illinois Real Estate "Designated Agency Amendment": A Minefield for Brokers* (1994) 27 J. Marshall L.Rev. 953, 962 (hereafter *Minefield for Brokers*); see *Derish v. San Mateo-Burlingame Bd. of Realtors* (1982) 136 Cal.App.3d 534, 539 ["the users of a MLS are not truly competitors. The ultimate purpose of the information exchange is the formation of a subagency relationship between the listing broker and the cooperating broker"].

In 1983, 66 percent of the homes sold in Los Angeles involved cooperating brokers who owed fiduciary duties only to the seller. (Note, *Sub-Agency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality* (1988) 61 So.Cal. L.Rev. 399, 401, fn. 1.)

Consumer objections eventually led to the demise of sub-agency relationships, with their one-sided fiduciary duties. (*Minefield for Brokers, supra,* 27 J. Marshall L.Rev. at p. 964.) Instead, brokers representing sellers began offering " 'cooperation and compensation' to other brokers who may assist in selling the property, rather than the previous mandatory offer of subagency only." (*Id.* at p. 965.) Consequently, "mandatory subagency with fiduciary duties extending only to sellers" ceased to be "the operative policy for the National Association of Realtors." (*Ibid.*; Greenwald & Bank, Cal. Practice Guide: Real Property Transactions, *supra,* ¶ 2:131, p. 2-32.10 ["most multiple listing services in California provide that a so-called 'cooperating broker' (i.e., the buyer's broker) is not a subagent of the seller"].) As a result, brokers and salespeople began to owe fiduciary duties to buyers. (See *Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 27 [Century 21 contracted as sole agent for the buyer].)

Buyers received additional protection in 1984, when the Court of Appeal in *Easton v. Strassburger* (1984) 152 Cal.App.3d 90 held that a *seller's* broker had a duty to the buyer to inspect the property and disclose material facts that affected its value. "[T]he duty of a real estate broker, representing the seller, to disclose facts . . .

includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal." (*Easton*, at p. 102, fn. omitted.)[13] As previously noted, this duty was codified with minor changes in section 2079.

Viewed against this backdrop of expanding protections for buyers, the fiduciary duty that the seller's salesperson owes to the buyer under section 2079.13, subdivision (b), when the broker is a dual agent does not represent a radical change in the law. On the contrary, as one commentator observed in 1986, even before the statute was enacted, "[i]t has become increasingly difficult to distinguish these expanded duties [of sellers' brokers] from those which would be expected of the broker who is, in fact, the buyer's fiduciary." (Hayes, *supra*, 21 U.S.F. L.Rev. at p. 96.) In its letter supporting the law currently under review, the California Association of Realtors agreed with this assessment: "In a growing body of law the duties of a real estate agent to the party which he or she does not represent in the transaction are evolving rapidly and approach to a significant degree the fiduciary duty which the agent owes to his or her principal." (RJN 52, original emphasis.) The

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[13] Prior to *Easton*, a seller's broker could be liable to the buyer for fraudulent concealment if he or she was aware of facts that materially affected the value of the property, and knew those facts were "not known to or within the reach of the diligent attention and observation of the buyer . . . ." (*Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 866.) *Easton* extended liability on negligence grounds based on the failure to conduct a reasonable inspection. (*Easton*, *supra*, 152 Cal.App.3d at p. 102.)

Court of Appeal's construction of section 2079.13, subdivision (b), is consistent with this trend.

From a public policy perspective, equating the duty of a salesperson with that of the broker for whom the salesperson works ensures that brokers will be able to satisfy their own obligations to clients. A broker that acts as a dual agent owes a fiduciary duty of utmost care, integrity, honesty, and loyalty to both sides of the transaction. (Civ. Code, § 2079.16.) But a broker acting as a dual agent also has an inherent conflict of interest. (2 Miller & Starr, Cal. Real Estate, *supra*, § 3:23, p. 3-89 ["An agent for two parties in the same transaction is inherently at risk of violating its fiduciary duties to act solely for the benefit of the principal, and not to act in any manner for personal benefit or otherwise adverse to or in conflict with the interests of the principal or to assume another agency in conflict with the first agency"]; Kroll, *Dual Agency in Residential Real Estate Brokerage: Conflict of Interest and Interests in Conflict* (1982) 12 Golden Gate U. L.Rev. 379, 404 ["Even when there is disclosure and consent to dual agency, the inherent conflict of interest is not resolved, only acknowledged"].) For example, if the broker has information that could depress the price of property, it faces a conflict between its duty to maximize the sales price to benefit the seller, and its duty to minimize the sales price to benefit the buyer.

Section 2079.13, subdivision (b), helps to mitigate the effects of the conflict of interest by ensuring that a broker acting as dual agent will be in a position to satisfy its fiduciary duties to both sides of the transaction. For example, as a fiduciary for the buyer, the

broker " ' "has a duty to learn the material facts that may affect the principal's decision. . . . This obligation requires investigation of facts not known to the agent . . . ." ' " (*Assilzadeh, supra,* 82 Cal.App.4th at pp. 414-415.) The salesperson who represents the seller, because of his or her personal relationship with the seller, will in some cases have more ready access to information about the property than the buyer's salesperson. (See *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 875 [referring to the selling broker's "likely superior knowledge of facts affecting the value of the property"].) By clarifying that the salesperson who represents the seller shares the broker's disclosure obligations, section 2079.13, subdivision (b), guarantees that any material information the seller's agent learns about the property will be shared with the buyer, thereby ensuring that the broker satisfies its own fiduciary duty to the buyer.

## IV. THE DUTIES THAT ARISE UNDER SECTION 2079.13 WILL NOT DISRUPT THE RELATIONSHIPS BETWEEN SALESPEOPLE AND THEIR CLIENTS.

### A. Salespeople do not owe "undivided loyalty" to clients.

Coldwell Banker argues that as a result of the Court of Appeal's opinion, "[b]uyers and sellers who chose to have the undivided loyalty of an exclusive salesperson would lose that choice midstream." (OBOM 4; see also OBOM 40 [referring to representatives who owe "undiluted loyalty"].)

Coldwell Banker's argument rests on a false premise. Even absent a fiduciary duty, salespeople do not owe undivided loyalty to their clients.

Buyers' and sellers' agents owe the other side of the transaction a duty of "honest and fair dealing and good faith," the "[d]iligent exercise of reasonable skill and care," 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." (Civ. Code, § 2079.16.) A salesperson representing the seller owes a duty to the buyer to visually inspect the property and disclose "all facts materially affecting the value or desirability of the property that an investigation would reveal." (Civ. Code, § 2079; see also *id.* § 2079.16.) A salesperson representing the buyer owes a similar duty to disclose material facts to the seller. (Civ. Code, § 2079.16.) Facts that could subjectively affect a buyer's decision also must be disclosed. (*Reed v. King* (1983) 145 Cal.App.3d 261, 263-264 [seller's agent must disclose fact that murder occurred on property]; *Alexander v. McKnight* (1992) 7 Cal.App.4th 973, 978 [seller's agent must disclose existence of neighborhood nuisance].) The doctrine of caveat emptor, which permitted agents to keep secrets from the buyer, no longer applies to California real estate transactions. (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 737; 1 Miller & Starr, Cal. Real Estate (3d ed. 2003) § 1:140, pp. 505-506.)

Given the "expansion of the real estate licensee's duties to third persons to disclose material facts, and the duty to exercise a duty of care to other persons in the transaction" (2 Miller & Starr,

Cal. Real Estate, *supra*, § 3:42, p. 3-193), the only practical difference between the fiduciary duty owed to a principal and the non-fiduciary duty owed to a third-party purchaser is the fiduciary duty by the seller's representative to investigate facts that may not be obvious from a brief visual inspection of the property (*id.* § 3:42, pp. 3-194 to 3-195). In a dual agency, the brokerage firm itself already owes that duty to the buyer. Section 2079.13, subdivision (b) and section 2079.16 make clear that in dual agencies, both salespeople are responsible for ensuring that their mutual employer, the broker, satisfies its duties to both of the firm's clients.

In this case, it would have been a simple matter for Cortazzo to satisfy his fiduciary duty to Horiike. He knew that public record documents indicated the living area of the Browns' home was only 9,434 square feet, but he did not flag this fact to make sure Horiike was aware of the discrepancy between the public record and the size of the property as Cortazzo advertised it. The discrepancy was a material fact and should have been disclosed, even if Cortazzo believed the public record was wrong. (9 RT 3450.) In the prior sales negotiation with the Lees, Cortazzo twice suggested that the Lees, to whom he owed no fiduciary duties, should hire a specialist to measure the property. He did not offer the same advice to Horiike. His earlier recommendation is evidence that he knew he had an obligation to make the same recommendation to Horiike, yet he chose to remain silent. (See *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 43.) Had Horiike hired a specialist to measure the property, he would have discovered that the advertised size was inaccurate, a discovery that

might have scuttled the deal and, at least, would have affected the selling price—and Cortazzo's commission.

### B. The plain meaning interpretation of section 2079.13 will not lead buyers and sellers to withhold confidential information from their agents.

Coldwell Banker argues that if this Court holds that a salesperson who represents a seller owes a fiduciary duty to the buyer, the salesperson will have to disclose "sensitive information about the [seller's] motivations," such as the seller's need to close the sale quickly because of financial obligations, or the fact the seller has already purchased another home. (OBOM 4, 40-43, 45.) Similarly, Coldwell Banker argues the buyer's representative would have to disclose confidential information, such as that the buyer needs to close quickly, or that the home is the only one suitably sized in the preferred school district. (OBOM 43.) As a result, clients will no longer be able to trust salespersons with sensitive information and will not be able to seek necessary guidance from their agents. (OBOM 40.)

If the problems Coldwell Banker identifies exist, it is because brokerage firms are permitted to act as dual agents, owing fiduciary duties to both buyer and seller. Even if the broker's fiduciary duties to the buyer and seller did not extend to its salespeople, the broker itself would have a fiduciary duty to share information to protect the interests of both of its clients. If it truly is not possible to fulfill these duties without destroying the confidential relationship

between buyers, sellers, and the broker, the problem lies with dual agency itself.

In fact, Coldwell Banker's argument that imposing dual agency at the salesperson level will destroy the confidential relationship between clients and their agents is not well taken for two reasons. First, it assumes a degree of conflict between buyers and sellers that does not exist. Buyers and sellers of residential property are not like opposing parties in a lawsuit. They have a mutual interest in reaching agreement on a fair market price. As one commentator observes:

> Legal analysts . . . have often been too quick to label as "adverse" those parties whose interests are more distinct than opposed. Such are the great majority of home buyers and sellers, whose declared intention is to come to a meeting of minds, not to deny each other's claims.

(Hayes, *supra*, 21 U.S.F. L.Rev. at p. 111; see also *Minefield for Brokers*, *supra*, 27 J. Marshall L.Rev. at p. 985 ["Buyers and sellers want to come to a 'meeting of the minds' rather than enter into combat"].)

Second, the type of information dual agents must disclose is more limited than Coldwell Banker claims. In a dual agency, the brokerage firm representing the seller owes a fiduciary duty to the buyer

> "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." However, neither agent is obligated to reveal to either party any confidential

> information obtained from the other party that does not involve the above-described duties.

(2 Miller & Starr, Cal. Real Estate, *supra*, § 3:29, pp. 3-125 to 3-126, emphasis added; *Assilzadeh*, *supra*, 82 Cal.App.4th at pp. 414-415; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 ["Undisclosed facts are material if they would have a significant and measurable effect on market value"].)

Furthermore, under the express terms of the statute, a broker acting as a dual agent may not disclose to the other party that the seller will accept a price less than the listing price or that the buyer will pay a price higher than initially offered. (Civ. Code, § 2079.16.) Since the principal issue dividing buyers and sellers usually will be price, clients can continue to discuss negotiating strategy with brokers and salespeople acting as dual agents without fear their confidences will be disclosed. In particular, salespeople working for the same brokerage firm but on opposite sides of a transaction would *not* have to disclose the type of confidential information Coldwell Banker identifies on pages 42-43 of its brief, such as the seller's financial difficulties or the buyer's interest in a home with the unique characteristics of the seller's property. None of those facts affect the *objective* value of the property, and none of those facts would have to be disclosed.

There accordingly is no basis for Coldwell Banker's concern that the relationship between buyers, sellers, and salespersons will be disrupted should a dual agency arise *after* the buyer and seller have disclosed confidential information to their respective salespeople. The type of confidential information Coldwell Banker

has in mind would remain confidential, as would the parties' negotiating strategy.

On the other hand, information that materially affects the value of property *should* be investigated and disclosed given that the brokerage firm, in its role as a dual agent, has a fiduciary duty to provide that information to the prospective buyer. The fact that information affecting the objective value of the property might come from the salesperson representing the seller would be no more disruptive to the transaction than if a manager higher up in the brokerage firm relayed the same information.

It is inherent in dual agencies that the brokerage firm owes fiduciary duties to *both* parties, which is the reason buyers and sellers must be told about dual agencies and given a choice whether to agree to the arrangement. When a seller is told that the firm for which his salesperson works owes fiduciary duties to the other side, and agrees to that arrangement, it should come as no surprise that the firm will pay more than lip service to its obligations and impart—either directly or through its salespeople—information about the property important to the other side of the transaction.

### C. Section 2079.13, like other statutes regulating real estate professionals, supplements the law of agency. Further, the statute is consistent with the principle that agencies arise from consent.

Coldwell Banker argues that the Court of Appeal's interpretation of section 2079.13 conflicts with the rule that "the

creation of an agency relationship requires the consent of all parties." (OBOM 26; see also OBOM 1, 45.) According to Coldwell Banker, the court's interpretation will "force salespersons into fiduciary relationships with parties they never chose to represent." (OBOM 45.)

As the Court of Appeal held in *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, however, "[r]eal estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Id.* at p. 755.) The duties imposed by regulatory statutes are often more expansive than the duties that arise from agency law and are not always based on consent:

> Often without realizing it, a real estate broker may act as the agent of either one or both of the principal parties at any given stage of the real estate transaction. For example, when a real estate broker who has a listing with the seller receives the deposit of the buyer for the purpose of placing it *in escrow*, he or she receives it as the *agent of the buyer*. A buyer's broker has been held to be the agent of the seller for the delivery of oral instructions to the escrow agent and a seller's agent has been held to be the agent of the buyer for the transmission of the offer to the seller.

(2 Miller & Starr, Cal. Real Estate, *supra*, § 3:7, p. 3-33; see Hayes, *supra,* 21 U.S.F. L.Rev. at p. 81, fn. 2 [" 'more sophisticated judicial opinions recognize that the realities of real estate brokerage do not fit neatly into agency formulas' "].)

The determination on whose behalf a broker or salesperson acts is frequently a legal issue, not a matter of a simple agreement

between the parties. (See, e.g., *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64 (*Montoya*) [employee of broker deemed agent of customer even though she was paid by the broker and had no written agency agreement with the customer]; *Wright v. Lowe* (1956) 140 Cal.App.2d 891, 896 [salesman representing seller deemed to be agent of buyer in transmitting buyer's offer because the offer differed materially from the listing price]; *Hale v. Wolfsen* (1969) 276 Cal.App.2d 285, 290 ["an agency relationship between appellant [a broker] and the [buyers] would not necessarily be inconsistent with the court's finding that appellant was also a subagent of [the seller], nor would the fact that [the seller] had another agent (Johnson) absolve appellant of her fiduciary responsibilities to [the seller] [citation]. *It is not necessary for a broker to meet the seller in order to become his agent*" (emphasis added)].)

We have previously discussed several statutory duties imposed on brokers that would not normally flow from the principal-agent relationship that exists between a broker and a client: the duty of the seller's and buyer's brokers to disclose to the other side facts "materially affecting the value or desirability of the property" (Civ. Code, § 2079.16); the duty of the selling broker to conduct a "reasonably competent and diligent visual inspection of the property" for the benefit of the buyer (*id.* § 2079); the duty that a cooperating broker as a sub-agent owes to the seller (*id.* § 2351 [a sub-agent represents the principal]; 2 Miller & Starr, Cal. Real Estate, *supra*, § 3:7, p. 3-34 ["While one might assume that the cooperating broker is the agent for the buyer and owes fidelity to

the buyer, the court may conclude that he or she is the subagent of the seller and not the agent for the buyer"]). Many of these duties would not arise under general principles of agency law. The duties that arise under section 2079.13, subdivision (b), are simply another set of statutory duties that real estate law requires salespeople to perform.

In any event, Coldwell Banker's position that a salesperson's duties under section 2079.13, subdivision (b), arise without consent is inaccurate. The duties arise from the contract voluntarily entered into by the broker and the client. By entering into the contract, the broker voluntarily assumes fiduciary duties to both parties. Under section 2079.13, subdivision (d), the broker's sales agents are simply helping the broker fulfill these voluntarily assumed duties.

Furthermore, Cortazzo signed the Disclosure Regarding Real Estate Agency Relationships form that indicated Coldwell Banker was acting as a dual agent "through one or more associate licensees" (1 AA 156 [exh. 344-2]), and identified Cortazzo as one of those licensees. The disclosure form identified Horiike as "Buyer," and Cortazzo signed the form on Coldwell Banker's behalf. (*Ibid.*) As an experienced licensed salesperson, Cortazzo would have been familiar with Coldwell Banker's responsibilities as dual agent, and would also have been familiar with his own responsibilities under the statute. By signing the form, he consented to perform those responsibilities, including his responsibility to help Coldwell Banker satisfy its fiduciary obligations to Horiike.

## D. The public is not well-served by dual agencies and would benefit if the practice were curtailed.

Coldwell Banker argues that forcing salespeople who represent sellers to work as fiduciaries for buyers would create chaos, trigger an explosion in litigation, and lead some brokerage firms to forsake intra-firm transactions altogether. (OBOM 46.) Consumers would be hurt, the argument goes, because buyers' agents would steer them away from homes listed by the agent's own firm. (*Ibid.*)

This is hyperbole, fueled by exaggerating the burden dual agency places on salespeople. As explained above, a salesperson representing the seller can satisfy his or her duty by investigating the property and disclosing facts that have a material bearing on its value. In dual agency situations, where the broker employs salespeople on both sides of the transaction, the broker is already subject to this duty. Sharing the duty with the salesperson who represents the seller is the best way to ensure that the broker fulfills its *own* fiduciary obligations to the buyer.

But even assuming large brokerage firms would begin backing away from dual agency transactions if this Court endorses the Court of Appeal's construction of section 2079.13, there is little to suggest consumers would suffer, and much to suggest they would benefit.

Criticism of dual agencies has come from all quarters. Consumer advocate Ralph Nader has criticized dual agency as " 'a maneuver for the big guys to have it both ways' " and called for

buyer brokers to make " 'the struggle against disclosed dual agency their number one priority.' " (*Minefield for Brokers*, *supra*, 27 J. Marshall L.Rev. at p. 978, fn. 166, quoting *Consumer Advocates Call for Revolutionary Real Estate Reforms* (Apr. 26, 1993) Real Estate Insider, at p. 3].) Another commentator has observed that "[f]rom the consumer's perspective, no form of dual or designated agency is particularly desirable . . . ." (Olazábal, *Redefining Realtor Relationships and Responsibilities: The Failure Of State Regulatory Responses* (2003) 40 Harv. J. on Legis. 65, 84 (hereafter Olazábal).) Consumer groups have lobbied against the practice. (Pendergrass, *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency* (1996) 48 Ala. L.Rev. 277, 279-280 (hereafter Pendergrass).) One especially harsh critic has concluded "dual agency provides no meaningful agency at all, and in order for consumers to attain meaningful representation in real estate transactions, dual agency must be prohibited entirely." (Comment, *supra*, 22 S. Ill. U. L.J. at p. 726.)

Studies show intra-firm transactions benefit brokerage firms but cost consumers money. Buyers pay higher prices because "agents who work for the same brokerage are less aggressive in negotiating for the buyer." (Szto, *Dual Real Estate Agents and the Double Duty of Loyalty* (2012) 41 Real Est. L.J. 22, 43 (hereafter Szto).) In one study involving medium-to-large homes, the magnitude of the price impact was 3.7 percent. (Barondes & Slawson, *Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents* (2005) 84 Or. L.Rev. 681, 705.) Thanks to higher prices, "[f]irms that do a high volume of intra-company sales have

the highest median net profit margins . . . ." (Olazábal, *supra*, 40 Harv. J. on Legis. at p. 85; see also Pendergrass, *supra*, 48 Ala. L.Rev. at p. 296 ["dual agency leaves consumers being underrepresented, receiving less service and less advice, and in the case of buyers, paying more"].)

Despite mandatory disclosure forms that require consumer consent, most consumers, particularly those in Horiike's position who are not well-versed in English, are not equipped to understand the significance of dual agency transactions, and generally will enter into the relationship by default. The Enrolled Bill Report on AB 1034 itself recognized that the disclosure forms drafted by the Legislature were "long and may be difficult for the layman to fully understand."[14] (RJN 83.)

The parties that benefit the most from the mandatory disclosure forms are the brokers themselves—not the public. Without adequate disclosure of dual agency, brokers are subject to liability to one or both principals. (2 Miller & Starr, Cal. Real

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[14] "It is understandable why disclosure statements are bewildering, ignored or overlooked. They are usually written in small print, buried among voluminous pages of form papers describing the property, often called the "disclosure package," and consumers are usually not trained to read the fine print. Most are written for readers with at least a 12th grade reading level, although half of American adults read at the eighth grade level or less. And even trained consumers will have paper fatigue in reading every single page of the disclosure package, especially after an exhausting and possibly whirlwind home search. . . . [¶] . . . [I]f the consumer is not given the disclosure statement until an offer to purchase is made, there is hardly any time for reflection or review." (Szto, *supra*, 41 Real Est. L.J. at pp. 68-69.)

Estate, *supra*, § 3:25, pp. 3-97 to 3-98.) The disclosure required by section 2079.16 was specifically designed to insulate brokers acting as dual agents from liability. (RJN 86 [Senate Rules Committee report states "[t]he California Association of Realtors (source) hopes that the bill would 'minimize or eliminate litigation which unfortunately is growing in this subject area' "]; see also RJN 45, 54, 60, 62, 74.) If brokerage firms are permitted to expand their practice of dual agency by the simple expedient of asking consumers to sign nearly unreadable disclosure forms, the least consumers can expect in return is that the brokers, through their salespeople, will fulfill their fiduciary responsibilities to both of their principals.

Finally, the concern Coldwell Banker expresses that buyers will be deprived of the full inventory of available homes if dual agency falls by the wayside is misplaced. Many firms represent *only* buyers, and they have access to all the homes on the market. If dual agency becomes less common, the number of these firms will likely increase. Even if a buyer chose to work with a full-service broker, nothing would prevent the buyer from working with salespeople from more than one firm, which would eliminate the possibility that buyers would lose the opportunity to see the homes listed by one of the brokers. Finally, many firms will likely be less concerned than Coldwell Banker apparently is about instructing the salespeople who represent sellers to investigate and disclose to potential buyers material facts about the listed property. So long as those disclosures occur, the potential liability about which Coldwell Banker expresses concern will not arise.

## V. LEGISLATIVE HISTORY SUPPORTS THE PLAIN MEANING INTERPRETATION OF SECTION 2079.13, SUBDIVISION (B).

"Where statutory language is clear and unambiguous, extrinsic indicia of intent should not be considered." (7 Witkin, Summary of Cal. Law (10th ed. 2005) Const. Law, § 128, p. 236; *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000 [same].) For the reasons discussed in section I above, section 2079.13, subdivision (b), is not ambiguous. Resort to legislative history is therefore unnecessary.

In the event the Court decides to review the legislative history, however, it supports the Court of Appeal's interpretation of the statute. According to two Senate Committee reports, one of the Legislature's goals was to "clarify and make known the law of agency in real property transactions . . . ." (RJN 45 [Senate Rules Committee report on AB 1034], 86 [Senate Rules Committee Report on AB 1034] [same].) Section three of the legislation says one of the relevant principles of agency law the statute should explain is 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 . . . ." (RJN 14 [AB 1034, § 3].)

Section 2079.13, subdivision (b), provides that explanation. It says that salespeople act as the agents of brokers and share the broker's duties. When the broker owes fiduciary duties to both parties, the associate licensees do as well. The language that appears in section 2079.13, subdivision (b), was featured

prominently in the committee reports that summarized the legislation (RJN 8 [Feb. 27, 1985 Legislative Counsel Digest], 15 [Legislative Counsel's Digest accompanying Chapter 785]).

Further, the Court of Appeal's construction of section 2079.13, subdivision (b), was anticipated in a letter that CAR itself submitted in support of the legislation. According to CAR's letter, the legislation "[c]larifies that salespersons (and other associate licensees) act as agents of brokers who in turn are agents of buyers or sellers *and owe equivalent duties to those of the brokers who employ them*." (RJN 53, emphasis added.) This is precisely what the statute states and what the Court of Appeal held it means.

Coldwell Banker argues that it could not have been the Legislature's intention to equate the duties of brokers and the salespeople they employ because that would expand the liability of salespeople, and legislative history shows the bill was not intended to create new liabilities. (OBOM 55-56.) Coldwell Banker cites four cases that allegedly establish that the duties of salespeople come first and are imputed to brokers, and no court held that a brokers' duties were imputed to salespeople. (*Ibid.*) None of the cases support that conclusion.

In *Montoya*, for example, the court held that a saleswoman was subject to the same fiduciary duty that her *broker* owed to clients. (*Montoya, supra,* 176 Cal.App.3d at p. 63.) "To find otherwise would allow brokers to partition *their* duties so completely that no individual employee would need to be licensed nor undertake the California common and statutory law duties *for real estate brokers*." (*Ibid.*, emphases added.) The court's analysis

underscores the fact that fiduciary duties to clients originated with brokers, not salespeople. To support its contrary position, Coldwell Banker quotes the court's observation that the saleswoman's "acts as agent were, in legal effect, [the broker's] acts as principal." (*Ibid.*) This merely describes the settled rule of respondeat superior under which a principal is liable for the negligent conduct of an agent in the scope of employment. Under this doctrine, the agent's *negligence* is imputed to the principal, not the agent's duties.

In *People v. Asuncion* (1984) 152 Cal.App.3d 422, the Court of Appeal held that a real estate salesman cannot make loans, only brokers can. Under the penal statute at issue, this meant that the salesman could be convicted of loansharking. In explaining the relationship between the broker and the salesperson, the court held: "[A] real estate salesman is an agent of his broker-employer as a matter of law, . . . [meaning] *he 'can act only for, on behalf of, and in place of the broker* under whom he is licensed, and . . . his acts are limited to those which he does and performs as an agent for such broker. [Citation.]' [Citations.]" (*Id.* at pp. 425-426, emphasis added.) The court's holding supports Horiike's position that a salesperson's duties originate with brokers, who fulfill those duties through their salespeople.

Coldwell Banker quotes *Grubb & Ellis Co. v. Spengler* (1983) 143 Cal.App.3d 890, 895 (OBOM 56), which again simply recites the rule of respondeat superior. And *Resnik v. Anderson & Miles* (1980) 109 Cal.App.3d 569, 572-573 (OBOM 56), the last case Coldwell Banker cites, once again holds that a salesperson acts as the broker's agent. (See also *Spengler*, at p. 895.) None of these cases,

nor any other of which we are aware, holds that duties to clients originate with salespeople and are then imputed to brokers. On the contrary, a salesperson's duties flow *from* the broker; they are not imposed *on* the broker.

The legislation did not alter the law. The fact that brokers and agents may not have understood their responsibilities under agency law is a different matter. "Many of the problems of agency in the marketplace result from the agent's ignorance of agency principles. However, the fact that the real estate agent is ignorant of his or her duties does not excuse malfeasance." (2 Miller & Starr, Cal. Real Estate, *supra*, § 3:23, pp. 3-93 to 3-94.)

There is no merit to Coldwell Banker's position that the legislative history shows that the Bill's sole purpose was to inform consumers which party *brokers* represented, not salespeople. (OBOM 56-58.) On the contrary, the Enrolled Bill Report quoted by Coldwell Banker refers to the disclosure obligations of "real estate licensees," which includes salespeople. (RJN 81; see Civ. Code, § 2079.13, subd. (b) [an " 'associate licensee' " includes a person "licensed *under* a broker" (emphasis added)].) The Enrolled Bill Report states that the legislation requires *licensees* to disclose whether they are acting as dual agents. (RJN 81.) And the disclosure form called for by the legislation requires that the consumer be informed that "[a] real estate agent, either acting directly *or through one or more associate licensees*, can legally be the agent of both the Seller and the Buyer . . . ." (Civ. Code, § 2079.16.) The form the parties signed here did just that. (1 AA 156 [exh. 344-2].) Coldwell Banker's position that the legislation was intended to

disclose only the broker's relationship to consumers, not the salespeople's relationships, is inaccurate.

Finally, although the committee reports do not specifically discuss salespeople from the same firm ending up on opposite sides of the transaction, neither do they discount that possibility. And the possibility of such dual representation is covered by the legislation itself, which states that brokers, acting directly "or through one or more associate licensees," can operate as dual agents. (Civ. Code, § 2079.16.)

Coldwell Banker's reliance on out-of-state legislation is both curious and unhelpful to its position. It points out that 32 states have enacted legislation 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.*" (OBOM 49, original emphasis.) These states presumably adopted this legislation because *without* it, salespeople, like the brokers for whom they work, would owe fiduciary duties to both sides. If the Legislature in California decides it is appropriate to de-link the duties salespeople owe to buyers and sellers from the duties owed by the brokers for whom they work, it can enact similar legislation here. But it has not yet done so, and the practice followed in sister states is not relevant.

Until the Legislature dictates otherwise, the relationship between brokers and salespeople in California is governed by the plain language of section 2079.13, subdivision (b), and settled principles of agency law. Both of these sources of law establish that the duties of salespeople are identical to those of the broker for

whom they work, and properly so. Given the inherent conflict of interest in dual agencies, brokers can satisfy their conflicting duties to clients only with the assistance of the salespeople working for both sides of the sales transaction.

## CONCLUSION

For all the foregoing reasons, the Court of Appeal's opinion should be affirmed.

December 29, 2014

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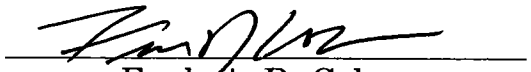
## CERTIFICATE OF WORD COUNT
## (Cal. Rules of Court, rule 8.520(c)(1).)

The text of this petition consists of 13,310 words as counted by the Microsoft Word version 2010 word processing program used to generate the petition.

Dated: December 29, 2014



Frederic D. Cohen

## PROOF OF SERVICE

## STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

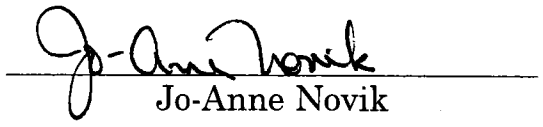
On December 29, 2014, I served true copies of the following document(s) described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on December 29, 2014, at Encino, California.



Jo-Anne Novik

## SERVICE LIST

***Horiike v. Coldwell Banker Residential Brokerage Company***
Supreme Court Case No. S218734

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