Case No. **S218734**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HIROSHI HORIIKE,
Plaintiff and Appellant,

vs.

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; LOS ANGELES COUNTY SUPERIOR COURT, NO. SC110477, THE HONORABLE JOHN H. REID

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California (CJAC or amicus)[1] welcomes the opportunity to address the principal issue this case presents:

> **When the buyer and 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 the fiduciary to both the buyer and the seller with the duty to provide undivided loyalty, confidentiality and counseling to both?**

The trial court answered "No" to this question, but the appellate court reversed, holding each sales agent was, besides their broker, a "dual agent" with fiduciary duties owed to *both* buyer and seller regardless of the parties' intentions and despite long-standing industry custom and practice to the contrary.

In reversing the trial court, the appellate opinion felt obliged by its reading of section 2079.13 to conclude that "[w]hen a broker is the dual agent of both the buyer

[1] By application accompanying this brief, CJAC asks the Court to accept it for filing.

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." *Horiike v. Coldwell Banker Residential Brokerage Company* (2014) 169 Cal.Rptr.3d 891, 893. Later, the appellate opinion provides this illation: "Under . . . section 2079.13, subdivision (b), the duty that Cortazzo [the seller's agent] owed to any principal, or to any *buyer who was not a principal*, was equivalent to the duty owed to that party by Coldwell Banker (CB). CB owed a fiduciary duty to Horiike [the buyer], and therefore, Cortazzo owed a fiduciary duty to Horiike." *Id.* at 897; italics added.

Accepting the appellate opinion's conclusion and the reasoning underlying it will substantially increase liability for real estate agents and significantly increase litigation and the price of real estate. This implicates the primary purpose of CJAC — to educate the public about ways to make our civil liability laws more fair, efficient, economical and certain. Our members who are businesses, professional associations and financial institutions regularly petition the government for redress of greivances when it comes to determining who owes how much to whom when the wrongful conduct of some is alleged to occasion injury to others. See, e.g., *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909; *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1; and *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312.

SALIENT FACTS AND PROCEEDINGS BELOW

The issue presented is limned by the facts and procedure giving rise to it.[2]

Hiroshi Horiike is a foreign national who resides in Hong Kong and speaks Japanese and Mandarin Chinese, but only limited English. In 2003, he retained Chizuko

[2] This summary of facts and procedure is taken from the appellate opinion.

Namba, a Japanese-speaking real estate salesperson in Los Angeles to help him find and buy a luxury residence in Malibu, California. Namba was affiliated with the Coldwell Banker (CB) real estate brokerage in Beverly Hills.

About four years and 40-50 homes later, Namba found a property on the multiple listings for which another agent, Chris Cortazzo, represented the seller. Cortazzo was associated with a different CB branch office in Malibu; he speaks English but not Chinese or Japanese. Namba (buyer Horiike's exclusive agent) arranged for Cortazzo (the seller's agent) to show the property to Horiike. During that showing, Cortazzo gave Horiike a flier stating that the property had "approximately 15,000 square feet of living area." He also sent to Namba a copy of the building permit showing "the total square footage of the property as 11,050 square feet." *Horiike v. Coldwell Banker Residential Brokerage Company* (2014) 225 Cal.App.4th 427, 430. Namba gave this information to Horiike, but Horiike did not read it.

Before the sale was consummated, buyer and seller signed a confirmation of the real estate agency relationships required by Civil Code section 2079.17.[3] Horiike also signed a form required by section 2079.16, which explained that a seller's agent acting under a licensing agreement with the seller "acts as an agent for the seller only and has a fiduciary duty in dealings with the seller." *Id.* at 431. Cortazzo, representing the seller, signed as an associate licensee for the agent CB.

A few years after the sale, Horiike asked Cortazzo to verify that the property had 15,000 square feet of living area, a request that was not answered. Suit followed by Horiike against Cortazzo and CB, but not Namba, for intentional and negligent

[3] All statutory references hereafter are to the Civil Code unless otherwise stated.

misrepresentation, breach of fiduciary duty, unfair business practices.

After the presentation of Horiike's case to the jury, Cortazzo moved for nonsuit on the cause of action for breach of fiduciary duty against him. The trial court granted the motion on the ground Cortazzo had no fiduciary duty to Horiike. Horiike stipulated that he was not seeking recovery for breach of fiduciary duty based on any action by Namba. Therefore, the court instructed the jury that in order to find CB liable for breach of fiduciary duty, the jury had to find some agent of CB other than Namba or Cortazzo had breached a fiduciary duty to Horiike. The court granted Horiike's request to submit an additional cause of action to the jury for intentional concealment against both defendants.

The jury returned a special verdict in favor of Cortazzo and CB, finding Cortazzo did not make a false representation of a material fact to Horiike, so there was no intentional misrepresentation. However, the jury made a contrary finding in considering the claim for negligent misrepresentation, finding that Cortazzo had made a false representation of material fact to Horiike. There was no liability for negligent misrepresentation, however, because the jury found Cortazzo honestly believed, and had reasonable grounds for believing, the representation was true when he made it. The jury found no concealment, because Cortazzo did not intentionally fail to disclose an important or material fact that Horiike did not know and could not reasonably have discovered. Lastly, the jury found that CB did not breach its fiduciary duty to Horiike.

The trial court determined the jury's findings resolved the remaining claims in favor of Cortazzo and CB. Therefore, on October 30, 2012, the court entered judgment in favor of Cortazzo and CB. Horiike filed a motion for a new trial on the

ground the verdict was internally inconsistent, which the court denied. Horiike filed a timely notice of appeal and the appellate court, as mentioned, reversed the trial court on the ground the seller's agent, as an associate licensee acting on behalf of CB, had the same fiduciary duty to the buyer as CB did.

> [Defendant's] motion for nonsuit should have been denied and the cause of action against the [seller's agent] 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 the [seller agent's] actions.

Id. at 435.

SUMMARY OF ARGUMENT

Well-settled decisional and statutory law provide that a principal-agent relationship exists between real estate brokers and their associate licensees (salespersons); and an associate licensee's duties are imputed to the brokers. Civil Code section 2079.13(b) codifies the law that associate licensees are agents of brokers, and the duties owed by each agent are imputed upward to the brokerage, which is responsible for any breach to a principal (buyer or seller). This is the essence of *respondeat superior*.

Plaintiff urges a construction upon section 2079.13 that would, whenever a buyer's salesperson deals with a seller's salesperson and both are affiliated with the same brokerage, turn agency law and the statute on its head. This quite common occurrence would, according to plaintiff, impute the broker's duties as principal downward to its agent-salespersons, a perverse form of *respondeat inferior* that knows no recognition in law. Plaintiff's interpretation forces a salesperson and a non-principal buyer or seller into an agency relationship by operation of law, dispensing with the

requirement of express consent. Further, this construction would convert the seller's salesperson into the buyer's fiduciary and make the buyer vicariously liable for the seller's salesperson's negligence to others. Salespersons would be forced into dual agency relationships with buyers and sellers whose interests conflict, subjecting salespersons to increased risk of liability and a corresponding increase in insurance premiums and the cost of housing.

The statutory interpretation urged by plaintiff runs counter to common sense, surrounding code sections dealing with the same subject, agency law principles and pertinent canons of statutory construction. It should be rejected and the appellate court's judgment adopting it should be reversed.

LEGAL DISCUSSION

I. THE MOST REASONABLE INTERPRETATION OF SECTION 2079.13(b) IS THAT IT CODIFIES WELL-ESTABLISHED AGENCY LAW THAT ASSOCIATE LICENSEES (SALESPERSONS) ARE AGENTS OF BROKERS AND THEIR DUTIES TO THEIR BUYERS AND SELLERS ARE IMPUTED TO THE BROKER, NOT THAT THE BROKER'S FIDUCIARY DUTIES TO ITS PRINCIPALS ARE IMPUTED TO ITS SALESPERSONS.

A. The Language of the Section 2079.13 is Ambiguous, Necessitating Resort to Extrinsic Aids and Canons of Construction to Ascertain its Most Sensible Meaning.

That the trial and appellate courts read the same statute and arrived at opposite conclusions as to its import is a strong indication its "plain" meaning is not a paragon of clarity, but ambiguous. The hang-up centers on the last sentence in section 2079.13(b) defining who is covered and how by the disclosure requirements applicable to various kinds of licensees representing buyers and sellers of real estate: "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."

One's attention is quickly drawn to the second part of the sentence and the phrase "is equivalent to the duty owed to that party by the broker for whom the associate licensee functions." Of what kinds of duties does this language refer? Fiduciary? Non-fiduciary? Both? How different are the two kinds of duties and why, if they are different, does or should it matter? What does the phrase "equivalent to" mean; and does it refer to *all* duties owed or only the respective duties, fiduciary and non-fiduciary, owed separately or individually by each "associate licensee (salesperson)" to each buyer or seller the salesperson represents? Who is an "associate licensee"?

The statutory sentence by itself obviously does not answer these questions, which means it is ambiguous (capable of more than one meaning) and we are confronted with the problem of ascertaining whether the Legislature, in approving this language, meant what it said and said what it meant.[4] What we have here, then, "is a contest between probabilities of meaning" that likely "seriously bother" the Court and, inter alia, help account for its grant of review. Felix Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 47 *COLUMB. L. REV.* 527, 528. When, as here, a statute's terms are unclear or ambiguous, 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,

[4] "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

" 'The question is," said Humpty Dumpty, "which is to be master—that's all." Lewis Carroll, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* (Gardner edit.1960) 269, original italics.

contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citation.]" *People v. Harrison* (2013) 57 Cal.4th 1211, 1221-1222.

B. The Purpose of the 1986 Act of which section 2079.13 is a Part is to Ensure Disclosure of Brokers' Agency Relationships, Codify Existing Agency Obligations and Clarify that Dual Agencies Require the Express Consent of the Parties to the Real Estate Transaction, not to Impose new Duties on Salespersons.

"[I]f the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the *purpose of the statute . . ..*" *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977; italics added. After all, "if a statute is to make sense, it must be read in the light of some assumed *purpose.* A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VAND. L. REV.* 395, 400 (italics added), reprinted in Singer, *STATUTES AND STATUTORY CONSTRUCTION* §48A:08, p. 639 (2000 ed.).

Plaintiff's view of the matter, which echoes that of the appellate opinion, is an interpretation of the pertinent statutory language, but it stretches credulity to call it "reasonable." That is because its conclusion is arrived at through a unique parsing of a single sentence in section 2079.13 that the Legislature, and the sponsor of the bill it approved, the California Association of Realtors, thought merely clarified "that a listing agent is not a dual agent solely by reason of being the selling agent, and expressly precludes a listing agent from acting as an agent for the buyer only." *Assembly Committee on Consumer Protection, Government Efficiency and Economic Development*, Analysis of SB 467, June 27, 1995. A related purpose of SB 467 was to "repeal and re-enact [existing]

provisions" of real estate law by giving them new section numbers. *Id.* These re-enacted provisions were identical to provisions originally enacted in 1986 to codify existing law as to agency relationships and not to create new liabilities. Petitioner's Request for Judicial Notice (RJN) 45, 53-54. See also 10 West's Ann. Civ. Code (2010) §§ 2079.14-2079.24.

1. The Codification of Agency Law by the 1986 Act Reflects that the Salesperson Owes a Fiduciary Duty Only to a Principal and Non-Fiduciary Duties to Non-Principals who are Buyers or Sellers.

Under settled agency law, a salesperson owes fiduciary duties only to his or her principal, not to non-principals. *Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1528. Of course, a salesperson who agrees to represent both buyer and seller (which did not occur here) with their express consent has two principals and is a dual agent who owes fiduciary duties to both. See, *e.g.*, *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 178. As the California Association of Realtors (CAR) explains:

> The salespersons each have a relationship with and owe fiduciary duties to their own . . . buyer or seller. The fiduciary duties are defined in § 2079.16. The salespersons also have a non-fiduciary duty to the buyer or seller with whom they are not in an individual relationship. The non-fiduciary duties are also defined in § 2079.16. The fiduciary duties of the salesperson to her principal and the broker to that same principal are identical. The persons to whom the salesperson and broker owe fiduciary duties may in fact be different.

Amicus Curiae Brief of CAR, Pp. 19-20.

The duties owed under agency law and codified in the 1986 Act run from agent to principal, not principal to agent. No reciprocal doctrine imputes a principal's duties to its agents. "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. 1011) § 3:36, p. 212. As defendant aptly puts it, "There is no doctrine of *respondeat inferior*." Opening Brief on the Merits (OBM), p. 26. An agent cannot be "charged with knowledge of facts given to a principal," nor does any "principle of agency law imput[e] the knowledge of one agent to all others." *Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, l559-1560.

When the 1986 Act became law, it was well settled that though real estate salespersons could not contract directly with a buyer/seller, but must obtain their commissions through their broker, salespersons could nonetheless have an "agency relationship" with a buyer or seller or both and the *broker* is vicariously responsible for the acts of the salesperson. The 1986 Act's use of the term "equivalent" in the last sentence of subsection (b) section 2079.13 recognizes that salespersons are agents of their clients and of their broker and owe the common law and statutory duties of real estate agents. The seller's salesperson and buyer's salesperson each indisputably owe their respective client a fiduciary duty;[5] but that obligation is *only* to their individual clients (principals) and not to non-client buyers or sellers. See, *e.g.*, *Holmes v. Summer*, *supra*, 188 Cal.App.4th at 1528.

[5] *Leko v. Cornerstone Building Inspection Service* (2001) 86 Cal.App.4th 1109, 1116.

2. Fiduciary Duties Owed by a Salesperson to His or Her Principal are Greater than the Non-Fiduciary Duties Owed to Others to the Sales Transaction.

Fiduciary duties a broker or salesperson owe a principal are broader than the non-fiduciary duties the salesperson owes to a non-principal buyer or seller. *Holmes, supra*, 188 Cal.App.4th at 1528. When it comes to non-fiduciary duties, "California cases recognize a fundamental duty on the part of a realtor to deal honestly and fairly with *all parties* in the sale transaction." *Id.* at 1523; italics added. A non-fiduciary duty a salesperson owes to seller or buyer who is not his or her principal is to "conduct a reasonably competent and diligent visual inspection of the property" and "disclose all facts affecting the value or desirability of that property that an investigation would reveal." § 2079 (a). This is in sharp contrast to the fiduciary duty a salesperson owes a client (principal), which includes the "fullest disclosure of *all material facts* concerning the transaction that *might affect the principal's decision*." *Godfrey v. Steinpress*, *supra*, 128 Cal.App.3d at 178; italics added.

Imposing fiduciary duties upon real estate salespersons to those who are not their principals solely because another salesperson affiliated with the same broker represents another party to the potential transaction is, then, a decision fraught with importance. Some mention in the legislative history, committee analyses accompanying the legislation, or letters from interests supporting or opposing the legislation would, one would think, be found to suggest the Legislature intended to enact plaintiff's spin on the statutory language. But there is nothing to support the gloss plaintiff and the appellate opinion place on section 2079.13.

C. Section 2079.13 Must be Read in Context with other Sections of the Act in Pari Materia with It and Doing So Makes Clear that Real Estate Salespersons with the Same Brokerage who are Representing a Buyer or Seller do not Owe Reciprocal Fiduciary Duties to a Non-Principal Buyer or Seller.

Section 2079.13(b) should not be read in isolation from other sections of the Civil Code having to do with the obligations of real estate brokers and agents to their principals and to non-principals. It is a well-settled "axiom of experience"[6] that "statutes in *pari materia* should be construed together so that all parts of the statutory scheme are given effect. [Citations]. Statutes are considered to be in *pari materia* when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object." *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091. After all, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse in the setting in which all appear, and which all collectively create." *Helvering v. Gregory* (2nd Cir. 1934) 69 F.2d 809, 810-811 (Hand, J).

Applying this canon of construction to the appellate opinion's parsing of section 2079.13(b) brings us to section 2079.22, which states "nothing in this article precludes a listing agent from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent." Neither the appellate opinion nor plaintiff attempt to reconcile or harmonize these two code sections; they simply ignore section 2079.22 as if it did not exist. Yet under plaintiff's construction of section 2079.13, section 2079.22 becomes a nullity whenever, as happened here, a single broker becomes involved in a residential real estate transaction involving two of

[6] *Boston Sand & Gravel Co. v. United States* (1928) 278 U.S. 41, 48 (Holmes, J.).

its salespersons, one representing the buyer and the other the seller. That occurrence, according to plaintiff's parsing of section 2079.13, converts the broker's affiliated license salespersons into dual agents who owe fiduciary duties to their non-principal parties on the other side of the transaction, an obvious conflict with section 2079.22.

Further, section 2022 provides that "a mere agent of an agent is not responsible as such to the principal of the latter." How does this section square with plaintiff's interpretation of section 2079.13(b), which makes the agent of the seller responsible to the buyer? It does not and cannot be reconciled other than by harmonizing them to hold that brokerages satisfy their dual-agency duties to buyers and sellers by ensuring each salesperson continues serving as the exclusive fiduciary of the buyer or seller who retained that salesperson. That construction leaves the brokerage with the duty to supervise its salespersons to prevent fiduciary breaches but provide the deep-pocket liability should a breach occur.

D. The Administrative Agency Charged with Enforcing the Laws on Real Estate Transactions Interprets the Law Differently from Plaintiff and Consistent with the Interpretation of Defendant.

In seeking to ascertain the meaning of section 2079.13, courts also look to how the administrative agency charged with interpreting and applying the statute understand it. "[T]he construction of a statute by officials charged with its administration . . . is entitled to great weight . . .." *Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269, citing to and quoting from *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 724. Here, the California Bureau of Real Estate makes clear its understanding that, contrary to plaintiff's take on the issue, the "dual agency" transaction giving rise to fiduciary responsibilities to buyer and seller alike applies to the *broker* but not the

salespersons unless the salesperson, with the consent of both buyer and seller, agrees to be the dual agent for both.

> Dual agency . . . commonly arises when two licensees associated with the same broker undertake to represent two or more parties to a . . . transaction. The real estate broker with whom the two licensees are associated is the dual agent of the principals to the transaction, and the salesperson and the broker associate licensees are the agents of the real estate broker. (Civil Code § 2079.13(b)). [¶] In any dual agency situation, the *broker* owes fiduciary duties to both principals . . .. [¶] [I]ndividually assigning salespersons or broker associates to the principals does not alter the fact that the real estate broker by whom the associate licensee is engaged is the dual agent of the principals to the transaction.[7]

Further, this Court recognizes that often the Legislature "supplies its own dictionary." Frankfurter, *supra* at 536. "That device does not always work. The definitions often themselves are ambiguous."[8] Or there may be indications from the statute under review that it uses words in a special way. "If [the Legislature] has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. . . [T]he usage of [the Legislature] simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops." *Boston Sand & Gravel Co.*, *supra*, 278 U.S. at 48. This guidance is especially pertinent when, as here, a variety of statutory sub-sections define a real estate "agent,"

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[7] *REFERENCE BOOK – A REAL ESTATE GUIDE: INFORMATION RELATING TO REAL ESTATE PRACTICE, LICENSING AND EXAMINATIONS* (State of Calif., Dept. Of Real Estate, 2010) 169-171; emphasis added.

[8] Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation* (1947) 47 *COLUMB. L. REV.* 1259, 1268.

"associate licensee" and "dual agent" and their relationships to each other. See, *e.g.*, §§ 2079.13(a), (b) and (d).

The opinion does not clarify the interrelationship of these various categorical definitions, but cites only 2079.13(b) and a commentary by Miller & Starr stating there is a "misunderstanding [by] 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." 225 Cal.App.4th at 435. From this, the opinion concocts a syllogistic rule: "[T]he duty that [the seller's agent] owed to any principal, or to any buyer who was not a principal, was equivalent to the duty owed to that party by CB [the broker]. CB owed a fiduciary duty to [the buyer], and therefore, [the seller's agent] owed a fiduciary duty to [the buyer]." *Id.* at 434.

The problem with the syllogism, however, is that its minor premise blurs two distinct duties – *i.e.*, the fiduciary duty owed the principal and the non-fiduciary duty owed non-principals – as if they are only one, a fiduciary duty. This assumption is both logically and legally incorrect. Logically it does not follow that because the broker (CB) owes a fiduciary duty to the principal (the buyer, Horiike), the broker's salesperson for the seller also owes a fiduciary duty to anyone other than the seller to whom the salesperson owes non-fiducicary duties. Legally, the duty the seller's salesperson (Cortazzo) owes the buyer Horiike is the statutory and common law non-fiduciary duty to "deal honestly and fairly with all parties in the sales transaction," which is much narrower than the fiduciary duty owed by the buyer's salesperson to the buyer and the seller's salesperson to the seller. It is only the broker as dual agent who owes a fiduciary

duty to both principals, buyer and seller.

Thus the appellate opinion and plaintiff rest their argument "for this novel view of the statute [section 2079.13]" on "empty logic, reflecting a formal syllogism" that is erroneous. *Romero v. Int'l. Terminal Operating Co.* (1959) 358 U.S. 354, 483.

E. Plaintiff's Reading of section 2079.13 is Contrary to its Purpose of Permitting Dual Representation by Brokers Provided there is Consent and Disclosure to the Parties, and, if Accepted, Would Produce Absurd Results.

Plaintiff's interpretation of section 2079.13 makes individual salespersons who separately represent buyers and sellers and are associated with the same broker into dual agents, each having fiduciary duties owed to each other's principal. If that construction is accepted by the Court it would defeat a principal purpose of the statute: to permit a broker or salesperson to act as a dual agent with express consent from both buyer and seller ensured by disclosure of that relationship to the principals.

That plaintiff's "spin" on section 2079.13 would make it virtually impossible for a seller's agent and a buyer's agent to represent their respective principals while in association with the same broker is obvious. See discussion on OBM, Pp. 38-46. By transforming each salesperson into the fiduciary of both the buyer and seller, each would have to disclose to both parties "all information that is material to [each] principal's interests." *Michel v. Palos Verdes Network Group, Inc.* (2007) 156 Cal.App.4th 756, 762. Salespersons affiliated with the same broker would have to investigate what the other salesperson know or should know. If the salesperson is representing the seller, he or she would have to disclose to the buyer that the seller is motivated to sell quickly because of a divorce or forced job relocation, the salesperson believes the

property is worth less than the listing price, the seller has financial difficulties and a myriad of other information. If the salesperson represents the buyer, according to plaintiff's reading of the law, the seller must be told by the buyer's agent that the buyer needs to close quickly, the buyer is desperate to sell, and so forth.

Moreover, these reciprocal obligations could arise mid-stream, as happened here, simply because a buyer's salesperson found a property for the principal that was represented by a salesperson for the seller associated with the same brokerage as the buyer's salesperson. This would effectively make off-limits properties for sale within the same affiliated brokerage. Reducing the availability of intra-brokerage transactions would limit market choices to buyers and sellers alike.

When confronted with these foreseeable and chaotic, anti-consumer consequences from the statutory construction plaintiff urges be adopted, he reveals his true objective: destruction of the principle of dual agency, quoting in support an opinion by a law review student comment about a non-California statute that "dual agency provides no meaningful agency at all, and . . . for consumers to attain meaningful representation in real estate transactions, dual agency must be prohibited entirely." Answer Brief on the Merits, p. 45, citing Comment, *The "Brokerage Relations" Additions to the Illinois Real Estate License Act: The Case fo the Legalized Conflict of Interest* (1998) 22 *S. ILL. U.L.J.* 725, 726.

Plaintiff, then, would have the Court, by accepting his interpretation of the 1986 Act that allows for dual agency representation by brokers or salesperson provided there is consent by, and disclosure to, the parties to the transaction, frustrate its implementation. But if plaintiff does not like the principle of dual agency in real estate

sales, he should turn to the Legislature for correction, not seek to destroy it by a strained construction of its terms. *Sharon v. Sharon* (1889) 79 Cal. 633, 700 (arguments from those who do "not like the law" are "better directed . . . to the legislature.").

CONCLUSION

"There is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward* (1929) 279 U.S. 337, 339 (Holmes, J.).

For this reason and the reasons aforementioned, the Court should reverse the Court of Appeal's judgment.

Dated: March 23, 2015

Respectfully submitted,

/s/

Fred J. Hiestand
Civil Justice Association of California

Counsel for *Amicus Curiae*

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 5,200 words.

Date: March 23, 2015

/s/
Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 3rd Avenue, Suite 1, Sacramento, CA 95817.

On March 23, 2015, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendants/Respondents in *Hiroshi Horiike v. Coldwell Banker Residential Brokerage Co., et al.,* S218734 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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Los Angeles, CA 90013
Appellate Court

Hon. John H. Reid
Judge, Los Angeles County Superior Court
1725 Main Street
Santa Monica, CA 90401
Trial Court

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Executed this 23rd day of March 2015 at Sacramento, California.

/s/
David Cooper