

S218734

**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 an Opinion by the Court of Appeal,
Second Appellate District, (Case No. B246606)

On Appeal from the Los Angeles County Superior Court,
(Case No. SC110477)

**APPLICATION OF CALIFORNIA ASSOCIATION OF REALTORS®
FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF
AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS**

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I. INTRODUCTION AND NATURE OF C.A.R.'S INTEREST

The California Association of REALTORS® (C.A.R.) respectfully requests leave, under Rule 8.520(f) of the California Rules of Court, to file the attached *amicus curiae* brief.

C.A.R. is a non-profit trade association representing the interests of approximately one hundred seventy five thousand (175,000) real estate brokers and salespersons licensed by the State of California. "The purpose of the [C.A.R.] is to serve its membership in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency,..."¹ (emphasis added). C.A.R. pursues this Mission in many ways, including advocating for legislation and writing *amicus* briefs on issues of statewide importance to REALTORS®.

The above-referenced case addresses how a real estate agent and a member of the public do and should interact. As members of C.A.R. assist the public in buying, selling, and managing residential real estate, the case potentially touches every C.A.R. member and every buyer and seller. C.A.R.'s staff interacts with real estate professionals nearly every day. There are staff employees who travel throughout the State to teach professional development and various other educational courses to members, staff attorneys who provide free one-on-one legal counseling to thousands of members per year via the association's legal hotline, and staff members who visit real estate firms and local associations of REALTORS® to obtain insights on public policy objectives. Because C.A.R. receives constant feedback from its members who have experiential knowledge, it has special understanding of the hands-on, day-to-day concerns of its members and the buyers and sellers they represent.

¹ C.A.R. Mission Statement. <http://www.car.org/aboutus/mission/>

C.A.R. has been in existence for 110 years representing the interests of real estate licensees. In the century plus that C.A.R. has been around it has collectively acquired the knowledge and experiences of its members and can put that information in context for this Court. Context is what is missing by reading the words of a statute in a vacuum: Context of how an industry worked nearly 30 years ago and how it works today. Accordingly, C.A.R. is in a unique position to provide this Court with information about the real estate industry and how a decision by this Court is likely to impact hundreds of thousands of California real estate transactions and the parties involved in those transactions².

II. IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTORS

No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or part, and no party or counsel for a party in the pending appeal made a monetary contribution intended to fund the preparation or submission of the brief. C.A.R. has entirely funded the preparation and submission of this proposed *amicus* brief without any monetary contribution from any other person or entity.

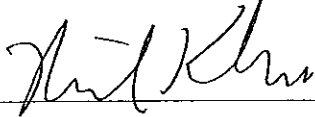
² 413,870 single family residential properties were sold in 2013. California Association of REALTORS® 2014 Annual Historical Data Summary, p. 4, California and U. S. Existing Single-Family Home Annual Median Sales Prices and Annual Sales Activity 1968-2013.
http://www.car.org/3550/pdf/econpdfs/2014_Annual_Historical_Data_summary.pdf

III. REQUEST FOR PERMISSION TO FILE AMICUS BRIEF

C.A.R. has read the Opinion below and Opening, Answering and Reply briefs and is familiar with the issues presented to this Court. C.A.R. sponsored the bill that led to the statute interpreted by the lower court and submitted a letter brief asking this Court to accept review. For the reasons stated above, C.A.R. respectfully requests that this Court accept the accompanying *amicus curiae* brief.

Respectfully submitted,

California Association of REALTORS®

By: _____

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii, iii, iv
I. THIS CASE IS ABOUT CONTEXT.....	1
II. HIRING A REAL ESTATE SALESPERSON IS NOT THE SAME AS BUYING A BURGER. IT IS ALL ABOUT THE RELATIONSHIP	3
III. REAL ESTATE BROKERAGE COMPANIES RECOGNIZE THE IMPORTANCE OF INDIVIDUAL SALESPERSONS AND THEIR SUCCESS TO THE SUCCESS OF THE BROKER'S BUSINESS.....	6
IV. CALIFORNIA LAW RECOGNIZES SALESPERSONS AS CAPABLE OF CREATING INDEPENDENT IDENTITIES AND RELATIONSHIPS ON THEIR OWN, AND SEPARATELY CREATING RELATIONSHIPS ON BEHALF OF A BROKER.....	9
V. SALESPERSONS ARE CAPABLE OF CREATING COMMON LAW AGENCY RELATIONSHIPS WITH A BUYER OR SELLER	11
VI. HORIIKE'S THEORY OF THE CASE IS UNWORKABLE.....	14
VII. CIVIL CODE §2079.13(b) CAN BE HARMONIZED WITH THE CONCEPT OF DIRECT SALESPERSON AGENCY.....	18
VIII. HORIIKE TAKES C.A.R.'S LANGUAGE SUPPORTING THE §2079 LEGISLATION OUT OF CONTEXT.....	20
IX. CONCLUSION.....	22

TABLE OF AUTHORITIES

Statutes

Business and Professions Code

Section 10032.....	fnnt 9, 11, 18, 19
Section 10130.....	18
Section 10131.....	fnnt 1
Section 10132.....	fnnt 1, 9, 19
Section 10137.....	15
Section 10159.....	10
Section 10177(h).....	15
Section 10178.....	15
Section 10179.....	15

California Code of Regulations

Section 2726.....	15
Section 2731.....	9
Section 2731(e)	9

Civil Code

Section 2079	fnnt 5, fnnt 6, 7, 13, 18, 19, 20, 21, 22
Section 2079.12(a)(4).....	fnnt 11
Section 2079.13	2, 18
Section 2079.13(a)	fnnt 1
Section 2079.13(b)	fnnt 1, 18, 19, 20, 21, 22
Section 2079.13(g)	fnnt 1

Section 2079.13(o)	ftnt 1
Section 2079.16	19, 20, 21
Section 2295.....	11, 19
Labor Code	
Section 3200.....	ftnt 9
Unemployment Insurance Code	
Section 650.....	ftnt 9, 11
Section 13000.....	ftnt 9
Section 13054.....	ftnt 9
26 USC Code	
Section 3508.....	11

Cases

<i>Copley Press, Inc. v. Superior Court</i> 39 Cal.4 th 1272, 1284-1285 (2006).....	18
<i>Garcia v. McCutchen</i> 16 Cal.4 th 469, 476 (1997).....	ftnt 10

Other Materials

Department of Real Estate, Spring <i>Real Estate Bulletin</i> Available at: http://dre.ca.gov/files/pdf/reb/rebspring_13.pdf	9
Keller Williams Mission Statement Available at: http://www.kw.com/kw/real-estate-careers.html	ftnt 7
Realtor Magazine, <i>Residential Franchise Roundup</i> Available at: http://realtormag.realtor.org/sites/realtormag.realtor.org/files/rmo_files/RMO-PDFs-docs/franchise_report/RM2013_ResidentialFranchiseRoundup.pdf	ftnt 4

2014 National Association of REALTORS® *Home Buyer and Seller Generational Trends*

Available at: <http://www.realtor.org/sites/default/files/reports/2014/2014-home-buyer-and-seller-generational-trends-report-full.pdf>.....ftnt 3

I.

THIS CASE IS ABOUT CONTEXT

If the members of this Court were to read only Horiike's Answering Brief, they would probably come away with the impression that this case is about disclosure of material facts. It is not. Horiike already tried that case in court . . . and lost. This case is about fiduciary duties. And before you can have a fiduciary duty, you first must have a fiduciary relationship.

C.A.R. readily acknowledges that real estate salespersons and brokers¹ who have an agency relationship with a seller owe a non-fiduciary duty to a buyer to disclose

¹ As has been pointed out in the Parties' briefs, the terminology in the real estate industry can be confusing. Real estate licensees can hold either a broker or a salesperson's license. A real estate broker can contract directly with a member of the public (Business & Professions Code §10131). A real estate salesperson must conduct business under the auspices of a real estate broker (Business & Professions Code §10132). But a real estate broker may also conduct business under the auspices of another real estate broker (Civil Code §2079.13(b)). The statute at issue in this case denotes a real estate broker under whose license real estate activity is conducted as an "agent" (Civil Code §2079.13(a)). Whether holding a broker or salesperson license, one who conducts licensed real estate activity through someone else's real estate broker license is called an "associate licensee" (Civil Code §2079.13(b)). Out in the field however, brokers, in any capacity, broker associate-licensees and salesperson associate-licensees are all often referred to as "agents." The statute at issue also refers to brokers under whose license a listing is taken as "listing agents" and brokers who work in cooperation with listing agents to find a buyer as "selling agents." (Civil Code §§2079.13(g) and (o)).

For purposes of this *amicus* brief, C.A.R. will refer to real estate licensees and members of the public doing business with them as follows: The broker under whose license the real estate activity is conducted will be referred to as broker. The associate-licensee who is working through the broker's license will be referred to as salesperson, whether that person is holding a broker or salesperson license. The word "agent" when used will generally refer to that word's common law meaning. C.A.R. will avoid the terms "listing agent" and "selling agent" altogether and will instead refer to those licensees as the "seller's salesperson" or

material facts that affect the value and desirability of the property being sold. But that is not relevant to this case. The issue here is whether a seller's salesperson owes fiduciary duties to a buyer merely because the broker for whom that salesperson works owes a fiduciary duty to the buyer. The overly-simplistic model that the broker's and salesperson's duties are the same is what is alleged by Horiike's interpretation of Civil Code 2079.13.²

That interpretation fails to take into account other statutes affecting the broker and salesperson relationship. That interpretation fails to take into account other, more prevailing, alternate interpretations that more closely coincide with the business as it is conducted and the reasonable expectations of buyers, sellers and real estate licensees. That interpretation fails to take into account the reality of how real estate brokerage businesses operated when the statute was enacted and now. Knowing the business practice back then is critical to understanding the purpose behind the legislation. Knowing the business practice now is essential to understanding the effect the court's interpretation can have on the industry and those who participate in it.

Fiduciary duties are about relationships. Here the specific relationships at issue are those between (1) an individual real estate salesperson and the buyer or seller client who affirmatively chooses to work with that salesperson; (2) an individual real estate salesperson and the buyer or seller who by circumstance is put in a position of having to work, through others, with that salesperson; and (3) a licensed real estate broker who has contractual, statutory and common law duties

"seller's broker" on the one hand or the "buyer's salesperson" or "buyer's broker" on the other. Buyers and sellers will be referred to as "buyer(s)" and "seller(s)" or, more generally, as "principal(s)."

² All further references to code sections are to the Civil Code unless otherwise noted.

to everyone else just mentioned. Yes, fiduciary duties are all about relationships; i.e., context.

There may not be much that C.A.R. agrees with in the Answering Brief, and there may not be much that Horiike will agree with in this *amicus* brief, but we both acknowledge that the Court must take context into account when interpreting statutory language (Answering Brief, p. 21). Horiike gives mere lip service to this core truth about the essential judicial function of statutory interpretation. C.A.R., on the other hand, asks this Court to take that duty seriously and consider the context of the voluntary and involuntary relationships that arise for buyers, sellers, salespersons and brokers in a real estate transaction. Context matters to them and it should matter to the Court as well. By taking context into account this Court can come to only one conclusion: A salesperson owes duties to all buyers and sellers in a real estate transaction in which the salesperson is providing services but only owes a fiduciary duty to the buyer or seller with whom the salesperson is in a direct, mutually consensual, relationship.

II.

HIRING A REAL ESTATE SALESPERSON IS NOT THE SAME AS BUYING A BURGER. IT IS ALL ABOUT THE RELATIONSHIP.

When you want a hamburger, you go to your favorite fast food joint. It does not matter who prepares the patty, as you expect the same thing whether you are in California, New York or anywhere in between. You are relying on the company. When you decide to buy or sell a home, things are a little different.

According to the National Association of REALTORS® (NAR), only 3% of buyers consider a salesperson's association with a particular firm to be one of the

most important factors when choosing the salesperson. Other factors are far more important, such as: The reputation of the salesperson; the honesty and trustworthiness of the salesperson; and the salesperson's listening ability and personality. The results for what factors sellers find most important are nearly identical. 2014 NAR Home Buyer and Seller Generational Trends, Exhibit 4-9 on p. 60 and Exhibit 7-7 on p. 107³.

This is not to say that in the overall scheme of things, the broker is unimportant. Real estate brokerage companies, some more than others, train and give resources and help to the salespeople who work for them, and use mass marketing and mass communications. But, real estate is still a people business involving personal relationships. People create relationships, end relationships, and mend relationships. And the people in the real estate business who are establishing these personal connections are the salespersons.

Relationships matter and those relationships begin with the real estate salesperson. Someone has to answer the phone call, respond to the text, reply to the email, see the house -- not just take a virtual tour, distinguish wants from needs, find out motivation, and meet the buyer or seller. And because for many principals buying and selling a home is more of a communal decision than an individual one, the salesperson often meets others who help the buyer or seller make the decision such as parents, children, spouses, partners, significant others, grandparents, grandchildren, friends, business partners and so on.

³ <http://www.realtor.org/sites/default/files/reports/2014/2014-home-buyer-and-seller-generational-trends-report-full.pdf>

Successful salespersons like Cortazzo, the individual Defendant in this case, become successful not because of some matrix or algorithm or fill-in-the-numbers program but because they look out for their clients, they keep confidences and they inspire trust and loyalty. If they do their job, clients return that trust and come back, time and time again, and refer the salesperson to others – the heart and soul of a real estate salesperson’s business. The most prolific real estate salespersons often create a team to help them help their clients. But make no mistake; the salesperson is the one with the relationship with the client, the one who gets the credit when things go right and the one who gets the first call when things go wrong.

Cortazzo and salespersons throughout California like him don’t just input “3 bedrooms,” “2 baths,” and “maximum price” into some field and expect a computer to find the ideal home in just the right neighborhood or establish the perfect price to buy or sell. No, real estate salespersons do more than plug numbers into a program; they plug into their client’s lives.

The best salespeople find out about motivations (someone wants to buy or sell or move for status reasons, security reasons, health reasons or financial reasons), learn secrets (pending divorce, job loss, anticipated monetary windfall or hardship), discover truths about buyers and sellers (job transfer mandates a quick sale, promotion means ability to pay more, buyer or seller is difficult to work with, a hard negotiator or a pushover, as well as prejudices and preferences) and use this information to help their client. Even salespeople who are not “top producers” come away with much of the same information. To many buyers and sellers venturing into one of the largest transactions in their lifetime, the real estate salesperson is the equivalent of a therapist, a bartender, a friend. Barriers come down and information flows. A company cannot do that, only an individual can.

III.

REAL ESTATE BROKERAGE COMPANIES RECOGNIZE THE IMPORTANCE OF INDIVIDUAL SALESPERSONS AND THEIR SUCCESS TO THE SUCCESS OF THE BROKER'S BUSINESS

It seems that real estate brokerage companies are becoming bigger and bigger.⁴ As this has happened, salesperson status has gained in importance rather than diminished. The larger the brokerage company, the more dependent the broker is on the business of salespersons to bring revenue into the business. Brokers therefore compete vigorously to attract and retain the top salespersons, and consequently offer the best compensation packages to the most productive salespersons. Even those lower on the salesperson productivity chain have benefitted from this trend.⁵

⁴ For example, in its 2013 "Residential Franchise Roundup," *Realtor Magazine* reported the number of U.S. salespersons and brokers in some of the top franchises as: 2,250 (Better Homes Realty); 8,000 (Better Homes and Gardens Real Estate); 82,000 (Coldwell Banker Real Estate LLC); and 83,126 (Keller Williams Realty Inc.).
http://realtormag.realtor.org/sites/realtormag.realtor.org/files/rmo_files/RMO-PDFs-docs/franchise_report/RM2013_ResidentialFranchiseRoundup.pdf

⁵ When §2079 was enacted, a typical broker-salesperson commission structure would most likely be close to a 50/50 split with the broker, with more experienced salespersons perhaps getting up to 60 to 70%. Today, many real estate salespersons keep the entire commission on a real estate sale and pay flat transaction fees to the broker. For those brokers who split compensation with salespersons, today even many inexperienced salespersons can get commission splits in excess of 75% in favor of the salesperson and more productive salespersons can command splits in the 90% range.

Salespersons have come to not only know their own importance in the industry but some have even begun to leverage that importance by creating brands of their own, today commonly known as teams or partnerships. These salespeople create their own businesses within the confines of the broker's business. They associate with other salespersons in the company. They directly hire transaction coordinators to facilitate paperwork. They even create subspecialties, such as foreclosure specialists, and buyer agents and seller agents within their own brands. C.A.R. has created new forms and modified existing forms in its extensive library to both recognize and reflect this trend.⁶ Thus, salespersons do and can create their own relationships.

When §2079 was adopted, salespersons engaged in many of the same activities they do now, such as advertising, promotion, meeting buyers and sellers and working out of their cars, out of their homes and away from the broker's office.

⁶ For example, 12 years after the §2079 legislation went into effect, in 1998, C.A.R. created a Personal Assistant Contract (C.A.R. Form PAC) that could be used directly between a salesperson and a licensed or non-licensed assistant. C.A.R. also created a Three Party Agreement (C.A.R. Form TPA) in 1998. The TPA documents the increasing complex relationship among the broker, the salesperson and others working on behalf of the salesperson. Having undergone few changes in the initial decade after their creation, those forms were revised twice in the last four years reflecting their increased importance in the industry. In 2012, C.A.R. created the Additional Agent Acknowledgment (C.A.R. Form AAA), recently modified in 2014, to reflect the fact that multiple salespersons acting as a team may be working for the same buyer or seller in a particular transaction. As these forms are not readily accessible to non-C.A.R. members, should this Court find it helpful, C.A.R. will gladly supplement this brief with copies of the most recent version of such forms as appendices. C.A.R. makes this offer, not for evidentiary purposes but merely to verify for the Court the forms' existence and thus the veracity of C.A.R.'s representations that changes are and have been occurring in the industry so that the Court is better able to put its decision into context.

Back then, though, it was typical for a salesperson to meet buyers and sellers at their broker's physical office to view, via computer terminal or bound books, the listings of available properties, to meet before carpooling to tour available homes, or to sign real estate forms. Today, buyers can be sent automated text messages when properties come on the market, sellers can be informed instantaneously when an offer has been written, navigation systems make it easy for buyers to find properties without getting lost, and with the advent and rise of electronic forms and paperless transactions, standard forms are routinely created, sent and signed via computer, tablet or mobile phone. Technology has made it easier for a salesperson to create a virtual and real individual presence both independent of and a part of the larger brokerage whole.

In 1986, a time of paper and ink, and brick and mortar, it was more evident that the buyer or seller was working with a salesperson that was part of broker. In 2015, the public can interact very little with the brokerage company itself. The salesperson is often the one that is driving the business and the broker can be an afterthought.

This reality that salespersons are independent profit centers on their own, contributing to the overall broker business, is not something that any honest real estate broker can deny (indeed, many successful brokers recognize it, and maximize it⁷). This reality that the broker presence was so much more visible then than it is now is indicative of what the legislation was directed at in 1986. This reality of the increasing importance of salespersons today is something that buyers

⁷ Mission Statement of the Keller Williams franchise. "... [R]eal estate is a local business driven by individual associates and their presence within their communities. ... [T]he agent, not the company is the brand, and that the company's primary role is to help agents build their own brand and grow their own businesses ..." <http://www.kw.com/kw/real-estate-careers.html>.

and sellers experience in their actual transactions and that experience can be forever altered should this Court affirm the decision of the Court of Appeal. This reality is something this Court should take into consideration when looking at the statute to be interpreted, in context.

IV.

CALIFORNIA LAW RECOGNIZES SALESPERSONS AS CAPABLE OF CREATING INDEPENDENT IDENTITIES AND RELATIONSHIPS ON THEIR OWN, AND SEPARATELY CREATING RELATIONSHIPS ON BEHALF OF A BROKER

Perhaps most indicative of this evolution in the industry is the recognition, and tacit approval, by both the legislature and the Bureau of Real Estate, the governmental body directly responsible for regulating brokers and salespersons.⁸ Prior to January 1, 2015, anyone holding a real estate salesperson license could only hold himself out to the public by his actual individual name (Business and Professions Code §10132), and not use a fictitious business name (10 California Code of Regulations, §2731) although, since September 2011, salespeople could use nicknames without violating the fictitious business name rules as long as the individual salesperson's name was properly disclosed (10 California Code of Regulations, §2731(e)). Fictitious business names were the sole purview of brokers.

In early 2013, the Department of Real Estate (DRE) openly acknowledged in its Spring *Real Estate Bulletin* that salesperson group identity had in fact become a

⁸ On July 1, 2013, the California Department of Real Estate was consolidated into the California Department of Consumer Affairs and became the Bureau of Real Estate.

reality in the marketplace and, accordingly, the DRE tried to set some parameters to address this reality (http://dre.ca.gov/files/pdf/reb/rebspring_13.pdf). The guidance was not sufficient for the marketplace and the legislature enacted a new law that specifically allowed salespersons to not only operate using a team or group name vis-à-vis members of the public but also to contractually agree with the broker for ownership and payment of fees associated with a fictitious business name (Business and Professions Code §§10159 et seq.).

The change in the law and regulatory body's tolerance of the practice is an explicit recognition that salespeople can interact with members of the public directly and as agents for the broker. This underscores the present-day context of the real estate business, of the rise in salesperson status, and the prominence and importance of the buyer and seller relationships with a salesperson.

This relationship with the buyer or seller who affirmatively chooses to work with the salesperson is stronger and more pertinent to the principal's fortunes and welfare than any relationship that conveniently, and wrongfully, might be attributed to the salesperson by nothing more than which broker the salesperson is working through. This relationship between a salesperson and a buyer or seller, this "true," voluntary and consensual agency is more worthy of recognition by the courts than a hypothetical, derivative, relationship imagined by someone after-the-fact looking for a scapegoat.

Petitioner's Reply Brief, at pages 8-10, gives authorities for the proposition that salespersons establish relationships with buyers and sellers. This proposition is strengthened by the fact that salespersons have the legal right to, and do, contract with a broker to operate as an independent contractor (Business and Professions

Code §10032⁹). As indicated in the code, independent contractor status is not limited to tax withholding purposes. Even before the aforesaid code section made explicit that salespersons may contract with a broker as an independent contractor, federal and State law already permitted salespersons to be treated as independent contractors for tax withholding purposes (26 USC 3508, Unemployment Insurance Code, §650). Given its subsequent enactment, Business and Professions Code §10032 must be interpreted to allow salespersons to be treated as independent contractors, and not employees, for other purposes as well; otherwise it would be superfluous. Given the statutory right of a salesperson to act as an independent contractor, it is even clearer that a salesperson is capable of establishing a direct relationship with a buyer or seller (in addition to creating a relationship between the buyer and seller with the broker pursuant to the licensing law).

V.

SALESPERSONS ARE CAPABLE OF CREATING COMMON LAW AGENCY RELATIONSHIPS WITH A BUYER OR SELLER

Since 1872, California law has defined an agent as "... one who represents another, called the principal, in dealing with third persons" (§2295). As independent contractors, salespersons, on their own behalf, have the ability to enter into legal relationships with buyers or sellers. When a buyer or seller chooses to work with a salesperson, and that salesperson is an independent contractor, a common law agency relationship is established.

⁹ Under §10032, which became effective in 1991, "... Characterization of a relationship as either "employer and employee" or "independent contractor" for statutory purposes, including, but not limited to, withholding taxes on wages and for purposes of unemployment compensation, shall be governed by Section 650 and Sections 13000 to 13054, inclusive, of the Unemployment Insurance Code. For purposes of workers compensation the characterization of the relationship shall be governed by Section 3200, and following, of the Labor Code..."

Agency is a two-way street. It not only imposes duties on the agent, it creates feelings of trust, confidence and loyalty by the principal in the agent. As discussed elsewhere in this brief, and specifically in Petitioner's Reply Brief, and in C.A.R.'s letter in support of the Petition for Review, buyers and sellers already believe they are entering into just such an agency relationship with their chosen salesperson. Their actions prove it. But don't just take our word for it. This court has to look no further than the Plaintiff and Appellant in this case, Horiike himself.

Horiike is the embodiment of what C.A.R. is arguing. Did Horiike start the process of buying a California home by calling Coldwell Banker and asking the broker to assign Horiike to any available agent willing to provide services to a rich client wanting to buy an expensive home? No. Horiike chose Namba. (9RT 3332-3333) When Horiike needed information, did he call Coldwell Banker or Cortazzo and ask his questions or seek advice? No. All contact was through Namba (... he worked exclusively with Chizuka Namba ... Answering Brief, p. 5). Horiike acted as if, and believed that, Namba was his agent and Cortazzo was not (7 RT 2823).

If we can presume that: Namba failed to adequately review the documents provided by Cortazzo clearly showing the discrepancy in square footage; Namba failed to determine if anything in the provided documents should be red-flagged for Horiike's attention; and Namba failed to identify if any of the documents addressed concerns shared by Horiike, such as square footage then, arguably, Namba breached an individual fiduciary duty to her direct client Horiike, (9RT 3348, 3398 and 8RT 3156). But did Horiike pursue Namba in court? No. In fact, quite the opposite is true. Horiike stipulated that Namba's conduct would not result in any liability to Coldwell Banker (2 RT 1248-1249).

Given the way most buyers and sellers choose their real estate professionals (see Section II, *supra*, pp. 3-4), Horiike is certainly not alone in this sentiment towards his chosen salesperson. In this two-way agency street, Horiike showed loyalty to the one real estate licensee whom he worked most closely with, whom he trusted, whom he confided in. He protected Namba just as he believed Namba was looking out for him. Was that same loyalty extended to Coldwell Banker, a §2079 statutory fiduciary of Horiike? No. Was that same loyalty extended to Cortazzo? No.

Why didn't Horiike pursue Namba? After all, if any real estate licensee breached a fiduciary duty to Horiike, for all of the reasons just stated, the strongest case could be made out against Namba. But Namba was specifically spared from any recovery that Horiike may have won via the courts. (2 RT 1248-1249) Was it from a sense of loyalty, a feeling of duty arising out of the time and effort they spent together, or a fear that shared confidences might be revealed? After all, "[o]ver a period of years, Namba showed Horiike 40-50 luxury homes ..." (Answering Brief, p. 5). Certainly some connection between the two must have been made over that extended period of time.

We'll never know for sure why Horiike spared Namba. But what this court can infer, and what C.A.R. knows from collectively shared experiences of real estate salespersons and brokers in the field, and what most brokers in the State will confirm, is that buyers and sellers are wont to pursue the one licensee that they have a relationship with and perceive as their own agent. Everyone else is fair game; let the lawyers sort it out. And, as the adage goes, perception is reality.

Horiike voluntarily agreed to work with Namba. Horiike chose to work with Namba; and by extension, Coldwell Banker. Horiike was forced to deal with Cortazzo because the seller voluntarily chose to work through Cortazzo. Horiike,

just like other buyers and sellers of residential real estate, both acted and believed that Namba was his agent and Cortazzo was not.

The lower court should not have read one sentence in a statute out of context to alter the reality of the agency relationship between a salesperson and a buyer or seller just because the broker's agency relationship changes midstream in the salesperson's working relationship with a particular buyer or seller. Salespersons have an agency relationship and a fiduciary duty to some real estate principals in a transaction and not others, even if the law imposes an agency relationship and corresponding fiduciary duty on the broker to all such principals.

VI.

HORIIKE'S THEORY OF THE CASE IS UNWORKABLE

The law has long held that a principal is responsible for wrongful acts committed by an agent. That is the basis behind *respondeat superior* and why fiduciary duties flow uphill. Petitioners Coldwell Banker and Cortazzo provided sound reasons why the opposite (*respondeat inferior*, as it were) should not be true and why liability and responsibility should not flow downhill from a broker to a salesperson. Horiike's theory of the case goes even further than that however.

According to Horiike, not only would there be uphill liability, and downhill liability, but there would also be lateral liability imposing responsibility on one salesperson for the acts of another salesperson. Essentially, in practice, Horiike would have this court hold one individual salesperson strictly liable for any wrongful or neglectful activity conducted by another salesperson under the name of the broker for whom the first salesperson also works. This Court should not

follow the path forged by Horiike as it would create a scenario where one would have liability and responsibility without any corresponding ability to control.

The reason it is acceptable to hold that a broker has fiduciary duties to a particular buyer or seller in a real estate transaction but a salesperson does not is because a broker, unlike a salesperson, has a way to fulfill those duties. A broker acts through its agents, the individual salespersons. A broker has a contractual, licensing and statutory relationship with those salespersons.

- A broker must have a contract with every salesperson doing business under the broker's license (10 California Code of Regulations §2726). By contrast, no salesperson is required to have a contractual relationship with any other salesperson working for the same broker.
- A broker has a statutory duty to oversee the activity of every salesperson doing business under the broker's license (Business and Professions Code §10177(h)). By contrast, no salesperson is statutorily obligated to oversee the work product of any other salesperson.
- A broker by law is the only licensee authorized to compensate salespersons working under that broker's license. By contrast, a salesperson is prohibited from compensating another salesperson for the performance of licensed activity (Business and Professions Code §10137).

Broker-salesperson contracts (see first bullet point above) define the duties and responsibilities of each. If a salesperson is not fulfilling those duties, and thereby putting the broker at risk, the relationship and the broker's affiliation with the salesperson can be terminated. If a salesperson's activity exposes a broker to potential disciplinary action by the BRE, the broker can end the relationship in order to preserve the licensing status of the broker. Such action is encouraged by the real estate law itself (Business and Professions Code §§10178 and 10179). If a

salesperson is not performing according to the broker's standards, the broker can use the compensation authority as both a carrot and a stick to compel proper behavior. By contrast, one salesperson has no authority over the actions of, or contractual relationship with, another salesperson.

Under Horiike's theory of the case, one salesperson can expose another salesperson to financial and disciplinary calamity. Unlike the broker, however, the salesperson is helpless to prevent the improper behavior of another salesperson.

Let's apply Horiike's theory to the actual case at hand, put it in context so to speak. The Court of Appeal suggested in its now depublished Opinion (169 Cal.Rptr.3d 891, 898) that Cortazzo's failure to give Horiike the same warning about square footage given to a previous prospective purchaser justifies the finding that a fiduciary duty exists. Just because one approach was used with one buyer does not mean another approach used with a different buyer is inadequate or tantamount to a breach. Indeed, by virtue of its verdict, the jury in this case seemed to think Cortazzo's disclosures were adequate.

But, for the sake of argument, let us assume that Cortazzo should have created a separate disclosure that specifically indicated the differing square footage estimates and in that same disclosure recommended that Horiike verify the square footage. How would Cortazzo communicate that additional disclosure to Horiike? All communications were routed through Namba, Horiike's chosen agent. Is there any reason to believe this separate disclosure document would have been given any more attention by Namba than the alternate square footage already provided by Cortazzo? Would the separate disclosure document be any more likely to be read than the forms provided by Cortazzo specifically counseling the buyer not to rely on estimates and to get his own inspections? Is there any reason to believe that Horiike himself, who is admittedly not fluent in English, would have

identified this particular disclosure as something particularly noteworthy? No, there is not. Cortazzo had no direct contact with Horiike by design. And unlike Coldwell Banker who can step in and take action if not satisfied with the services performed by Namba, there is nothing that Cortazzo could do about Namba's actions or inactions or Horiike's failure to read or have someone review for him the documents provided.

In this case, let us further assume that Cortazzo was given direct access to Horiike. Would that have mattered? The experts could not even agree on what was the true livable square footage. How could Cortazzo, who did not even speak the same language as Horiike, be expected to convey such fine distinctions to a buyer with whom he has no contact and no ability to communicate effectively? With Horiike's limited English comprehension, is there any reason to believe that Cortazzo could make Horiike understand the different ways to measure square footage? Clearly not, as this whole lawsuit is based on the brief communication between Cortazzo and Horiike on the one day they actually met.

Cortazzo must rely on Namba just as any other salesperson working exclusively with a seller must rely on the salesperson exclusively working with the buyer to help fulfill their duties. Treating the former as a fiduciary does not in any way make it more likely that the duties, fiduciary or non-fiduciary, to a consumer will be fulfilled.

Another reason Horiike's theory is unworkable is that changing a salesperson's agency status to match that of the broker (after a relationship and corresponding exchange of information has been established with a buyer or seller) would inexorably alter the relationship and expectations that has already arisen between a salesperson and a particular buyer or seller. C.A.R. has discussed these issues throughout the brief so far (See, for example, Section I, p. 2, Section II, pp. 3-5,

Section III, p. 8-9, Section IV, p. 10, and Section V, p. 14) and will not amplify here other than to support the arguments and illustrations so amply made by Petitioner Coldwell Banker in its Opening and Reply briefs.

VII.

CIVIL CODE §2079.13(b) CAN BE HARMONIZED WITH THE CONCEPT OF DIRECT SALESPERSON AGENCY

C.A.R. is aware, as is this Court, of the judicial rule of statutory construction that requires courts to try and give meaning to every part of a statute (*Copley Press, Inc. v Superior Court* (2006) 39 Cal.4th 1272, 1284-1285). Horiike argues in its Answering Brief that the only meaning that can be given to §2079.13(b) is that a salesperson owes the same duty to every buyer or seller in a transaction as the broker does.

If Horiike were right, and brokers and salespersons are to be treated as one and the same, then 2079.13 would fly in the face of the independent contractor acknowledgment in Business and Professions §10032 and the real estate law itself (Business and Professions Code §§10130 *et seq.*) which each recognize salespeople in their own right, both independent and as part of a whole. If Horiike were right, then section 2079.13(b) might be deemed incompatible with Business and Professions §10032 and one or the other might have to be stricken.

An alternative interpretation of the statutory language can be easily reconciled with the balance of §2079 *et seq* and other laws governing real estate licensing

activity.¹⁰ Civil Code §2079.13(b) means that the fiduciary duties owed by a salesperson to the buyer or seller with whom the individual salesperson has an agency relationship are those same duties the statute imposes on a broker. Thus, §2079.13 defines agency and duties for brokers but only duties and not agency for salespersons.

This view is compatible with the §2079 statutory scheme, the agency statute (§2295) and the legislation recognizing individual salesperson independent contractor status (Business and Professions Code §10032). This view appropriately balances: (1) a salesperson's independent contractor rights to establish their own relationships with individual buyers and sellers, with: (2) a salesperson's licensing status as an agent of a broker which simultaneously attributes to the broker (*respondeat superior*) the same agency status created between that salesperson and the specific buyer or seller with whom the salesperson voluntarily chooses to work. In other words, the salesperson's relationship vis-à-vis any particular buyer or seller has the same character, and same duties, that §2079 would impose on the broker if there were no in-house dual agency. So while a broker may have a dual agency, and owe corresponding duties to both buyer and seller who are represented by two different salespersons working through the broker, it is consistent with the statute to hold that the individual salespersons do not.

The salespersons each have a relationship with and owe fiduciary duties to their own chosen 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

¹⁰ "When two statutes touch upon the same subject, we must construe them in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage." *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.

§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 the broker owe fiduciary duties may in fact be different.

VIII.

HORIIKE TAKES C.A.R.'S LANGUAGE SUPPORTING THE §2079 LEGISLATION OUT OF CONTEXT

Starting on page 32 of the Answering Brief, Horiike partially quotes C.A.R.'s letter supporting the 2079 legislation (RJN 52) and then inaccurately uses the quote to imply that C.A.R. supports the Court of Appeal interpretation of 2079.13(b). C.A.R. does not support the Court of Appeals interpretation, as was evident by C.A.R. asking this Court to grant review requested by Petitioner Coldwell Banker.

The whole point of the §2079 legislation was to establish clarity of the relationships between a broker and a buyer and seller – not to usurp the relationship between a buyer or seller and the real estate salesperson with whom the buyer or seller made a conscious choice to work.

Horiike admits that “agent” means “broker” for purposes of §2079 (Answering Brief, p. 23) but seemingly misuses the term, “agent” in C.A.R.'s letter to mean, “salesperson.” Horiike consistently states that §2079 means what it says but conveniently changes the defined meaning of words in the statute to try and convince this Court that §2079 means what Horiike wants it to mean, not what the Legislature said.

If only Horiike would have read the above-mentioned letter further than the quoted language, Horiike would have discovered in the key bullet points that follow there exists reference after reference to “broker,” “broker” and “broker.” The heart and soul of §2079 is about brokers – broker relationships and duties – not salespersons and their relationships with buyers and sellers. Evidence of this is found in the form titled, “Disclosure of Agency Relationships” (§2079.16) itself which refers to the relationship between a buyer or seller or both and a broker (agent).

Another factor evidencing that the focus of the statute was on broker relationships is one of the stated reasons for the legislation in the first place: the lack of availability of insurance and the insecurity of the insurance industry which writes policies for the real estate industry.¹¹ Errors and Omissions insurance for real estate licensed activity is generally obtained by and written in the name of the broker.¹² The insurance crisis pending in the real estate brokerage community at the time of the enactment of the 2079 legislation directly impacted brokers and foretold the need of the legislation to address brokers.

Page 49 of the Answering Brief similarly misstates that C.A.R. supports the Appellate Court interpretation of §2079.13(b). Yes, salespersons are agents of the agent (broker) but that does not equate with a salesperson having the same relationship with a buyer or seller as the broker. In order to have a fiduciary duty one must first have a fiduciary relationship. The horse must come before the cart. That not-so-subtle nuance seems to be lost -- much as the distinction between broker and salesperson is forgotten or misunderstood by Horiike.

¹¹ See §2079.12(a)(4).

¹² The insurance policy’s declaration page, describing policy limits, deductibles, etc., usually only names the broker. However, salespersons, even those acting under contract as independent contractors, would normally fall within the insurance policy definition of “insureds.”

IX. CONCLUSION

This Court, by taking this case, has seized an opportunity to look at this case unfiltered and in context: Not just in context of one billionaire buyer suing a successful salesperson and the broker for whom that salesperson works; not just in the context of one sentence standing alone; but in the context of the ordinary, run-of-the-mill seller who selects a salesperson to trust with the sale of his home, and in the context of an ordinary, everyday buyer who chooses a salesperson to represent her in what may be the biggest single transaction in that person's life. In this context, the case impacts over 265,000 salespersons¹³ who in the real world have to meet clients, show property, negotiate deals and in good faith rely on their compatriots to do the same with the other buyer or seller for whom the first salesperson ordinarily has no tangible or real relationship, no ability to communicate, and no real ability to influence the latter salesperson's actions.

Civil Code §2079 addresses agency relationships created between a broker (not a salesperson) and a buyer or seller. Civil Code §2079.13(b) addresses the duties that a salesperson owes to that salesperson's chosen principal and those duties mirror the same duties that the broker would owe that same principal without extending the salesperson's agency relationships to others in the transaction.

Real estate salespersons are required by law to conduct licensed activity through a broker but are also independent contractors capable of establishing relationships with buyers and sellers they voluntarily represent. Horiike's own actions show that he chose to work with a particular salesperson, Namba, and never considered the other salesperson, Cortazzo, to be his agent.

¹³ <http://www.dre.ca.gov/Stats/2013-2014.html>

Every day, ordinary buyers and sellers choose to work with certain salespersons, and by extension, that salesperson's broker. Some salesperson relationships are mutually agreeable, consensual, and direct. Others are indirect and usually through the other buyer or seller's proxy, another real estate salesperson. When buyers and sellers choose individual salespersons who both happen to work through the same brokerage company that is coincidence, not consent.

When Horiike started working with Namba, he had no idea which salesperson or broker would be representing the seller of the property he ultimately chose to buy. When the seller in this case chose to work with Cortazzo, he had no idea whether the salesperson or broker representing the buyer would be from a Coldwell Banker office or any other brokerage company. That the eventual situation turned Coldwell Banker into a dual agent is mere happenstance and should not alter the expectations or agreement between a buyer or seller and each of their chosen real estate salespersons. To hold otherwise would create irreconcilable conflicts between the prior expectations of the parties toward their revealed confidences and the new forced duties that could be imposed by judicial fiat.

Fiduciary duties must be preceded by a consensual relationship. When buyers or sellers refer to "my" agent and "your" agent and when ordinary salespersons refer to buyers and sellers as "my" client and "your" client, they are not thinking of a statute, they are reflecting a common understanding about the way the business works and their perceptions about the type of agency relationship that exists between the salesperson and the corresponding buyer or seller.

This case is not about disclosure of material facts; it is about fiduciary duties. And before you can have fiduciary duties, you must have a fiduciary relationship. In

the real estate world, relationships begin with and are formed by real estate salespersons.

If any members of this Court are leaning toward adopting the interpretation of §2079 proposed by Horiike, and upholding the Court of Appeal decision, consider this question first: Whether you happen to be a buyer or seller in your next real estate transaction, after you have worked with your chosen salesperson, whether for a long or short period of time, and have shared confidences with that salesperson, if it just so happens that in the transaction you enter into both the buyer's salesperson and the seller's salesperson work for the same broker, how sure will you be that confidential information that you reveal to your salesperson (except for material facts about the property itself) won't be shared with the other principal or that principal's real estate salesperson and potentially used against you?

What are the reasonable expectations of the parties? The words of the statute cannot be considered in a vacuum but instead must be construed in the light of their relationship to the state of the law and the transactional realities that existed at the time the statute was enacted and in the marketplace today. The realities then speak to the purpose of the statute. The realities now speak to the potential harm to consumers in the real estate marketplace. In short, C.A.R. respectfully asks this Court to consider the case in context.

For all the reasons stated above, and in Petitioner's Opening and Reply briefs, the Opinion of the Court of Appeal should be reversed.

Date: March 11, 2015

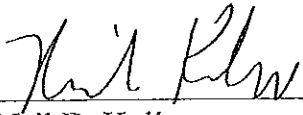
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court Rule 8.204(c)(1))

The text of this brief consists of 6,379 words (including footnotes, and excluding Table of Contents and Authorities) as counted by the Microsoft Office Word 2010 word-processing program used to generate this brief.

Dated: March 11, 2015

Respectfully submitted,

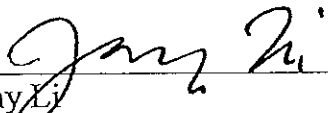
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On March 11, 2015, I served the within *amicus curiae* brief, addressed to the California Supreme Court from the California Association of REALTORS® regarding:

Horiike vs. Coldwell Banker Residential Brokerage Company et al.
Supreme Court Case No. S218734
Second Appellate District, Case No. B246606
Los Angeles County Superior Court Case No. SC110477

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Patricia Sellers

Patricia Sellers