S218734

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

BRIEF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF/APPELLANT HIROSHI HORIIKE

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INTEREST OF *AMICUS CURIAE*

The National Association of Exclusive Buyer Agents ("NAEBA") is an independent alliance of real estate professionals who have dedicated their business lives to representing only buyers of real estate. NAEBA members do not list homes for sale, do not represent sellers, and do not enter into subagency agreements with sellers' brokers or their agents.

NAEBA believes that clients deserve undivided loyalty when making the largest financial decision of their lives. NAEBA members restrict themselves to one side of the real estate transaction so that they can give their undivided loyalty to homebuyers and avoid the conflicts of interest that come with representing persons on both sides of a transaction. Most of the predatory lending that led to foreclosures in the past decade could have been avoided if all homebuyers had agents legally obligated to protect their interests, because virtually all exclusive buying agents steered their clients clear of risky loans.

As this case demonstrates, few consumers fully understand the relationships between real estate brokers and their agents, or licensed associates, who list homes on behalf of sellers and show homes to potential buyers. Most buyers understand they should have a buyer agent, but very few realize that what they are offered by most brokers is not an exclusive buyer agent at all, but an associate working for a broker that represents both buyers

and sellers. Such brokers, known as dual agency brokers, are more than happy to represent both sides in a single transaction, because the practice allows them to earn two commissions on a single sale, at the consumer's unwitting expense.

Although dual agency is legal in California (as it is in most states), NAEBA believes that the ethics of such representation is questionable even when the buyer and seller give their informed consent. Unfortunately, buyers and sellers often sign disclosure forms without giving their informed consent, making the practice truly unethical. The language on the disclosure form is confusing, and generally goes unclarified by the real estate professionals who provide the form – along with piles of additional forms to be read and signed in a hurry.

Disclosed dual agency as currently practiced thus eliminates one of the essential protections provided under the common law of agency – that of informed consent. Buyers are rarely informed of the increased risks and reduced liability for the broker in these types of relationships. They are giving up protection without any commensurate reduction in fees.

NAEBA has a strong interest in this case because it would like to see more, not less, clarity in the home-buying industry. The law as it is written and as it was interpreted by the Court of Appeal properly sets forth the duties of the dual agent, although it does not go far enough, in *amicus*' opinion, in requiring real estate professionals to disclose the consequences of dual agency.

INTRODUCTION

Dual agency occurs when a single brokerage company, like petitioner Coldwell Banker Residential Brokerage Company ("Coldwell") contracts with both the buyer and the seller of a home, through its agents or associates. That is what happened here – Mr. Horiike found himself working with two associates from the same brokerage firm ("broker"). Dual agency is lawful, but as this case demonstrates, it raises difficult questions regarding the duty of loyalty that the broker and its associates owe the buyer and the seller.[1]

The real estate industry tolerates this uncertainty because dual agency is highly remunerative for brokers. When the buyer

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[1] California statutes employ the term "agent" to identify the broker – the "person who is licensed as a real estate broker … [and] under whose license a listing is executed or an offer to purchase is obtained." (Civ. Code, § 2079.13, subd. (a).)

The statute employs the term "associate licensees" to identify the persons we usually call "agents"; i.e,, persons who are "licensed under a broker or ha[ve] entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee." (*Id*., emphasis added.)

Historically, the National Association of Realtors ("NAR") has used the term "agent" to refer to the brokerage company. (E.g., NAR, *Agency Choices and Challenges* (1993), available at: http://www.naeba.info/files/1993%20NAR%20Agency%20Choices%20Challenges%20and%20Opportunities.pdf, last accessed March 18, 2015).)

To avoid the confusion engendered by multiple meanings of the word "agent," we use the terms "broker" to refer to the statutory agent and "associate" to refer to the brokers' licensees.

and seller are each represented exclusively by associates employed by different brokers, the commission that the seller pays to the listing broker – typically 5 to 6 percent – is evenly split between the two brokers. But when, as here, the buyer and seller are represented by associates who work for the same broker, the broker can make twice as much on a single sale, even after paying both of its associates.

Amicus believes that the Court of Appeal's interpretation of the Civil Code is correct. No other industry allows agents to work both sides of the fence without full disclosure and heightened responsibility. The Code reflects this by mandating disclosure and providing that, "[i]n a dual agency situation, the [broker] owes *both the Seller and the Buyer* … [a] fiduciary duty of utmost care, integrity, honesty and loyalty[.]" (Civ. Code § 2079.16, emphasis added.)

The statute in question, section 2079.13, subdivision (b), unambiguously and unremarkably provides that an associate acting as the agent of a dual broker owes both buyer and seller the same duty: "[w]hen an associate licensee owes a duty to any … buyer or seller … 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 § 2079.16, subd. (b).)

As Mr. Horiike argues and the Court of Appeal determined, the statute means what it says and says what it means. Only by torturing its language can it be read as ambiguous.

What is really at stake here is transparency, which is far too often lacking in the real estate industry. Even when agents

comply with statutory disclosure rules, most buyers and sellers remain unaware they are dealing with agents who have dual loyalties. Most people think that "their" "agent" – the associate helping them find a home – represents them exclusively. That is rarely the case.

In fact, until the 1980's, it was *never* the case, because the associate "helping" the buyer did not represent the buyer at all. He or she represented the seller under a system known as "subagency." While subagency is no longer common (although it remains legal in California), it has yet to be replaced with a system that in line with consumer expectations.

Individual buyers today can choose to work with an exclusive buyer agent, but few are aware there is any advantage to doing so, or that the associate provided by most brokerage firms is not their exclusive agent. Consumers rarely understand that they are contracting with the broker, not the associate, or that the broker and the associate may become dual agents if the buyer becomes interested in a property listed by the same broker – something that happens fairly often with large brokerage firms. The broker protects itself by having the buyer sign a disclosure form agreeing to dual agency. Although the buyer rarely (if ever) understands that he is signing away his right to an exclusive agent, the broker and its associates use the form to try and limit their liability if the buyer later sues for undisclosed defects or misrepresentations.

As this case demonstrates, real estate law is poorly understood by most consumers. Coldwell complains that the

Court of Appeal's interpretation of the statute will change the law and result in "chaos." But the Court changed nothing. It simply called public attention to a reality that has long gone ignored and unchallenged, thanks in part to the efforts of many real estate professionals to keep it that way.

ARGUMENT

THE COURT OF APPEAL CORRECTLY INTERPRETED CIVIL CODE § 2079.13, SUBDIVISION (b), WHICH PROPERLY AND UNAMBIGUOUSLY ASCRIBES DUAL FIDUCIARY DUTIES TO DUAL REAL ESTATE AGENTS.

A. The History of the Real Estate Industry Is Marred by Internal Conflicts and Consumer Confusion.

1. "Subagency" – which was the norm until recently – means that home *buyers* are not represented *at all*.

As a practical matter, consumers are dependent on real estate professionals when it comes to buying or selling a home, because most people rarely buy anything as expensive as a home, and have little experience assessing a home's value or understanding the costs associated with such a large transaction. Furthermore, realtors (i.e., members of the National Association of Realtors ("NAR")) have exclusive access to the multiple listing service ("MLS") through which the vast majority of homes are bought and sold throughout the nation. "In most communities, … a broker is not just a luxury, but almost a necessity if the home is to be sold for the highest potential price and in the shortest potential time." (J. Clark Pendergrass (1996) *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual*

Agency, 48 Ala. L. Rev. 277, 294, 299 n.88.)

An MLS is a members-only organization, usually owned and operated by a local association of brokers such as the California Association of Realtors ("CAR"), that exchanges information about properties for sale with other member-brokers. Members who list properties for sale with the local MLS agree to split their commission, usually 50/50, with any broker who procures a buyer. (*Id*. at p. 299 (1996), citing 1 Federal Trade Commission Staff Reports; Los Angeles Regional, The Residential Real Estate Brokerage Industry (Dec. 1983) ("FTC Report") at pp. 5, 7, 16-17, 107-42.)

Most people would probably be surprised to know that, until 1992, home buyers had no one representing them at all. The broker and associate who listed the home for sale represented the seller, of course, but *so did the associate working with potential buyers*, because he or she was actually working as a "subagent" or "cooperating agent" of the listing broker. Before NAR changed its rules in 1992, subagency was a condition of participating in the MLS system and of obtaining a share of the commission paid by the seller. (E.g., Mary Szto, *Dual Real Estate Agents and the Double Duty of Loyalty*, 41 Real Est. L.J. 22, 38 (2012) ["Until the 1990's listing agents, who were fiduciaries for the seller, required selling agents who worked with buyers, to be subagents, and therefore also fiduciaries of the seller."].)

As a result, "all of the agents involved in a transaction owed their allegiance to the seller, and buyers were unrepresented." (Matt Carter, *From subagency to non-agency: a*

history (Feb. 17, 2012), available at http://www.inman.com/2012/02/17/from-subagency-non-agency-a-history.) "This traditional listing/selling broker model – where the buyer typically went unrepresented in the transaction – was the norm." (Ann Morales Olazábal (2003) *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 Harv. J. on Legis. 65, 66.)

The FTC discovered and exposed this problem when it conducted an in-depth study of the real estate industry in the early 1980s. (FTC Report, *supra*.) The FTC found that "in most cases the unrepresented buyer believed that the licensee with whom he worked – the selling or cooperating agent he had 'engaged' and who had found the property for him – was actually his agent." (Olazábal, *supra*, 40 Harv. J. on Legis. at p. 72, citing FTC Report at p. 69.) Indeed, 74% of buyers – and more than 70% of sellers – surveyed by the FTC believed that the associate working with the buyer represented the buyer, when, in fact, he or she actually represented the seller. (*Ibid*.)

"Subagency" – which remains legal in California to this day – was good for the real estate industry because it allowed brokers and associates who worked with buyers to collect a share of the commissions paid by sellers without actually representing buyers in an agency capacity. It was not nearly as good for consumers. Because buyers were unrepresented, brokers owed them *no* fiduciary duties, so buyers had little recourse in court and were unlikely to be heard if they complained to real estate boards over alleged ethics or license violations. Subagency meant that listing

brokers, cooperating brokers, and their associates could work with both buyers and sellers with little fear that they would be accused of acting as undisclosed dual agents.

In 1992, NAR finally dropped the requirement that associates be subagents of the seller to participate in the MLS. (Olazábal, *supra*, 40 Harv. J. on Legis. at p. 74 (2003).) That opened the door to different types of agency, which only added to customer confusion. (*Id*. at p. 65; see *id*. at pp. 74-76 [discussing different types of agency in different states]; see also NAR, *Agency Choices and Challenges*, *supra*, www.naeba.com.)

2. Increased public awareness prompts legislative action.

The practice of subagency came under sharp scrutiny when the FTC Report was published, raising public awareness of the problems engendered by the system. (See, e.g., Royce de R. Barondes & V. Carlos Slawson, Jr. (2005) *Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents*, 84 Or. L. Rev. 681, 694; Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor* (1996) 24 Real Est. L.J. 291, 310.)

The legal system likewise took notice, and courts in different states began to find that real estate brokers and their

associates could be liable as agents of the buyer if they led buyers to believe they were being represented.[2]

In California, a Court of Appeal upheld the liability of an associate working with a seller based on the associate's negligent failure to disclose to the buyer that the home was subject to landslides. (*Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 102.) The *Easton* court concluded that the associate had breached his duty to conduct a reasonably competent and diligent inspection of the seller's home and to disclose to the prospective buyer all facts materially affecting the value or desirability of the property that such an investigation would reveal. (*Id*. at p. 102.)

The Court included language suggesting that brokers owed broad fiduciary duties to both buyers and sellers, observing that, "in some respects, the broker-buyer relationship is akin to the attorney-client relationship; the buyer, like the client, relies heavily on another's acquired skill and knowledge, first because of the complexity of the transaction and second because of his own dearth of experience." (*Id*. at p. 100.) After all, the Court reasoned, real estate brokers act in a fiduciary capacity:

> "Real estate brokers are often in a very commanding position with respect to both sellers and buyers of residential property. … [T]he buyer usually expects the broker to protect his interests. This trust and

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[2] In 1993, Edina Realty spent tens of millions to settle state and federal court suits claiming it had breached its duty to disclose its dual agency status, after a Minnesota state court found that Edina's disclosure statements – which met Minnesota's statutory requirements – were inadequate as a matter of common law. (See, e.g., Pendergrass, *supra*, 48 Ala. L. Rev. at pp. 297-298; Szto, *supra*, 41 Real Est. L.J. at pp. 43-44.)

> confidence derives from the potential value of the broker's service; houses are infrequently purchased and require a trained eye to determine value and fitness. In addition, financing is often complex. Unlike other commodities, houses are rarely purchased new and there are virtually no remedies for deficiencies in fitness."

(*Ibid*., quoting Comment, *A Reexamination of the Real Estate Broker-Buyer-Seller Relationship* (1972) 18 Wayne L.Rev. 1343.)[3]

CAR responded to the *Easton* decision by providing member-brokers with use disclosure forms designed to protect themselves and their associates from liability. (Lefcoe, *supra*, 39 Real Prop. Prob. & Tr. J. at p. 220.) CAR also asked the California Legislature to codify and limit real estate disclosure requirements. The Legislature did so. In 1986, it enacted a series of laws providing that various forms of agency, including subagency and dual agency, were lawful provided the consumer signed a disclosure form agreeing to them. (See Thomas J.

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[3] The *Easton* court relied in part on NAR's own Code of Ethics, which stated that a broker must not only "'avoid ... concealment of pertinent facts, but 'has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose.'" (*Easton, supra*, 152 Cal.App.3d at pp. 101-102 (quoting NAR, Interpretations of the Code of Ethics (7th ed. 1978) art. 9.) After the opinion issued, NAR removed the quoted language from the Code and replaced it with the statement that Realtors shall not be "obligated to discover latent defects in the property or to advise on matters outside the scope of their real estate license." (George Lefcoe (2004) *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All,"* 39 Real Prop. Prob. & Tr. J. 193, 222.)

Miceli, Katherine A. Pancak, C. F. Sirmans, *Evolving Property Condition Disclosure Duties: Caveat Procurator?* (2011) 39 Real Est. L.J. 464, 469.)

Unfortunately, the legislation proposed by CAR and similar associations and adopted by legislatures often did more to protect realtors than to help consumers, who remained (and remain) confused about their relationships with brokers and associates, especially in dual agency situations. "The dual agency disclosure statement that [many] jurisdictions require not only identifies which principal agents serve, but is a handy consent form for sellers and buyers to agree to a dual agency." (Szto, *supra,* 41 Real Est. L.J. at p. 42; see also Olazábal, *supra*, 40 Harv. J. on Legis. at p. 76 [the focus of reform "appears to be on reducing Realtor liability rather than improving the lot of the consumer."].)

In sum, the consent form serves to protect the broker rather than educate the consumer. Real estate "disclosure statements are bewildering, ignored or overlooked" during the often emotional and confusing process of buying a home. (*Supra*, 41 Real Est. L.J. at p. 68.)

> 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. … [E]ven trained consumers will have paper fatigue in reading every single page of the disclosure package, especially after an exhausting and possibly whirlwind home search. If a consumer asks the agent to explain the disclosure statement, the agent may be (1) similarly bewildered; (2) or wary of losing a client if the explanation is too clear.

(*Id*.) Dual agency forms are also produced too late, after the buyer has found a home he wants with the help of an associate has come to trust, and is unwilling or unable to replace.[4]

As NAR spokesman Walter Molony put it in 2008: "'[j]ust because something is legal doesn't necessarily make it ethical, or in the best interests of consumers or the industry.'" (Carter, *supra*, www.inman.com)

B. Coldwell and CAR Challenge the Court of Appeal's Opinion Not Because It Changes the Law – It Does Not – But Because It Publicizes the Inherent Perils of Dual Agency.

As this case and the response it has evoked illustrate, consumers in California remain confused about the roles that real estate brokers and associates play, even when they sign disclosure forms agreeing to various forms of "agency." The challenge mounted by Coldwell, with the support of CAR, suggests that realtors are eager to maintain the status quo, which lets them double their profits without any cost.

While real estate brokers and associates would like to avoid dual fiduciary responsibilities even when, as here, they are both acting as dual agents, the law does not allow them to.

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[4] There are conflicting studies over the use and efficacy of disclosure forms. (See Royce de R. Barondes & V. Carlos Slawson, Jr., *Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents* (2005) 84 Or. L. Rev. 681, 685 fn.14, 720 ["States generally now require some form of disclosure of the nature of agents' obligations in the sale of residential real estate. Our results support skepticism concerning the efficacy of those obligations."], footnote omitted.)

Civil Code section 2079.13 states that "dual agency" arises when "an agent [i.e., a broker under the statute] act[s], 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. (e).) That is unquestionably the situation here: Coldwell, the broker, was acting as dual agent for both the seller and the buyer through its associates, Cortozza and Namba.

Section 2079.16 requires brokers and associates in a dual agency situation to disclose that the broker owes fiduciary duties to both buyer and seller: "[i]n a dual agency situation, the agent [i.e., the broker] owes both the Seller *and* the Buyer … [a] fiduciary duty of utmost care, integrity, honesty and loyalty[.]" (Civ. Code § 2079.16, emphasis added.)

It is undisputed that Mr. Horiike signed a disclosure form stating, in keeping with section 2079.16, that, "[i]n a dual agency situation, the *agent* has the following affirmative obligations to both the Seller and the Buyer: [¶] … A fiduciary duty of utmost care, integrity, honesty, and loyalty in the dealings with either the Seller or the Buyer[.]" (1 AA 155 [exh. 344-1], emphasis added.) A consumer would naturally understand the term "agent" to refer to the associate or associates with whom he is actually working, rather than the broker, who remains an abstract entity. As we explain, Civil Code section 2079.13, subdivision (b), which addresses the role of the associate in a dual agency situation, confirms that the consumer's understanding actually reflects the law.

Section 2079.13, subdivision (b) unambiguously provides that an associate acting as the agent of a broker takes on the broker's duties when acting on behalf of the broker: "[w]hen 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 § 2079.16, subd. (b).) In other words, when the broker owes a fiduciary duty to both the buyer and the seller, so does the associate.

Unhappy with the Court of Appeal's clarification of the law, Coldwell protests that its straightforward reading of the statute is "catastrophic," "absurd," "disastrous," will result in "chaos," and create a "policy nightmare." (E.g., Opening Brief on Merits ("OBOM") 2, 38, 40, 42; Reply Brief on Merits ("RBOM") 1, 25, 33.) Why? According to Coldwell, affirmance will *harm buyers* by stripping them of their right to an exclusive agent [i.e., associate] and by forcing the associate engaged by the buyer to divulge the buyer's personal and confidential information to the seller. (E.g., OBOM 1-2, 4, 40, RBOM 2, 23-25, 26, 33.)

Indeed, Coldwell claims, the decision, if affirmed, will roll back the clock to the days of subagency, when "the biggest problem for buyers … was that MLS subagency agreements made brokers working with buyers the seller's agent, unbeknownst to buyers." (RBOM 24.) According to Coldwell, the panel's construction would "blind-side[]" buyers who choose an exclusive agent "by having that salesperson deemed an agent for the seller

– this time not because of MLS agreement but simply because the seller's salesperson was from the same brokerage." (RBOM 24.)

Nothing could be further from the truth. Buyers who choose to work with exclusive buyers agents, like the members of NAEBA, will *never* be deprived of an associate who owes them an undivided fiduciary duty. Buyers who work with associates who work with firms like Coldwell, which practices dual agency, may find themselves working with associates who owe dual fiduciary duties to both buyer and seller. That is not the same thing as the buyer being unrepresented, though it may put the associates in a difficult position.

Coldwell claims that associates will be forced to harm consumers by divulging all the confidential information the buyer or seller has shared if the buyer becomes interested in a property listed by the broker for whom "his" associate works. *Amicus* takes no position on this. Any practical difficulties are the price of dual agency, a practice that brokers seek to protect because it is extremely lucrative for them; indeed, brokers who are dual agents reap a double commission from the sale of every individual home (because each associate owes his broker a portion of his commission), to say nothing of the additional double commissions they obtain from affiliated title and escrow officers. (See Conrad G. Tuohey, *Kickbacks, Rebates and Tying Arrangements in Real Estate Transactions, The Federal Real*

Estate Settlement Act of 1974; Antitrust and Unfair Practices (1975) 2 Pepp. L. Rev. 309, 318-326.)[5]

Oddly, Coldwell cites Professor Szto for the proposition that dual agency works because, in a "common-sense world," "'the brokerage erects a "Chinese wall" to protect confidential information between the two agents.'" (OBOM 47, quoting Szto, *supra*, 41 Real Est. L.J. at p. 43.) But that is not what Professor Szto says at all. To the contrary, she is deeply critical of dual agency, because even with a "Chinese wall," "fiduciary duties, including the duty of loyalty are misunderstood and neglected" in "the haste of entering into a lucrative fee arrangement for the dual agent, and the allure of accessibility and time savings for consumers." (Szto, *supra*, 41 Real Est. L.J. at p. 44, footnote omitted.) As her article concludes, "[d]ual agency should be rare.

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[5] The U.S. Department of Housing and Urban Development ("HUD") recognized the troubles inherent in dual agency in 2013, and expressly precluded the use of dual agents when it promulgated guidelines for short-sale transactions. (See HUD letter of July 9, 2013, available at: http://portal.hud.gov/hudportal/documents/huddoc?id=13-23ml.pdf (last accessed March 18, 2015) at pp. 7-8 ["No party that is a signatory on the sales contract, including addenda, can serve in more than one capacity. To meet the PFS Addendum requirements, brokers and their agents may only represent the buyer or the seller, but not both parties; [t]he broker hired to sell the property may not share a business interest with the mortgagee…; and [a]ll doubts will be resolved in a manner to avoid a conflict of interest, the appearance of conflict, or self-dealing by any of the parties."].) After NAR protested, however, HUD lifted the ban on dual agency. (See http://www.realtor.org/articles/hud-removes-dual-agency-restrictions, last accessed March 18, 2015.)

When it is used, [it] demands [a] double duty of loyalty … [that] requires complete transparency in the negotiating process ….” (*Id*. at pp. 77-78.)

The only entities that stand to lose if the underlying decision is affirmed are brokers, who fear that opportunities for double-dipping will diminish if educated consumers and associates become fully aware of their legal rights and responsibilities and change their behavior to respond intelligently to the realities of dual agency.

Consumers and associates, on the other hand, stand only to gain from laws that, properly read, promote even-handed access to information about a piece of property, because symmetrical access generates increased sales and fairer prices for buyers and sellers alike. (Miceli et al., *supra*, 39 Real Est. L.J. at pp. 483-490.)

In sum, *amicus* urges the Court to affirm the Court of Appeal’s decision, which fully comports with the law, and changes nothing but the degree of public awareness regarding the dangers of dual agency. Accepting Coldwell’s interpretation of the law, by contrast, will alter the law to the detriment of consumers. Buyers and sellers will find themselves “represented” by brokers and associates working both sides of the fence to their own advantage, without owing their clients any duties commensurate with that advantage.

CONCLUSION

For the foregoing reasons and those set forth in Mr. Horiike’s brief, this Court should affirm the decision of the Court

of Appeal.

Respectfully submitted,

Dated: March 20, 2015 **BARNES & THORNBURG LLP**

By: _____
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CERTIFICATE OF BRIEF LENGTH COMPLIANCE

Pursuant to California Rule of Court 14(b), I hereby certify that this brief contains ____ words (including headings, footnotes, and quotations), on the basis of a count made by the word processing system used to prepare this brief.

Dated: March 20, 2015 **BARNES & THORNBURG LLP**

By: _____
L. Rachel Lerman
Attorneys for *Amicus Curiae*
National Association of Exclusive
Buyers Agents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 300, Los Angeles, California 90067. On March 20, 2015, I served the foregoing document described as: **BRIEF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF/APPELLANT** on the interested parties below, using the following means:

☒ **BY MESSENGER SERVICE** I served the document by placing it in an envelope or package addressed to the respective addresses of the parties stated above and providing them to a professional messenger service for service.

Further, I served the foregoing document on the interested parties below, using the following means:

☒ **BY OVERNIGHT DELIVERY** I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective address(es) of the party(ies) stated above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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Executed on March 20, 2015, at Los Angeles, California.

[Print Name of Person Executing Proof]	[Signature]