CIVIL A109721

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CIVIL A109721
(Superior Court No. CVG 0185465)

Clifford Johnson, *Plaintiff-Appellant,*
v.
Coldwell Banker Real Estate Corporation, Cendant Corporation,
Defendants-Respondents.

APPELLANT'S OPENING BRIEF

After decision of the California Superior Court for Mendocino County, by Hon. Leonard LaCasse, Ukiah Courthouse, Dept. E (Tel: 707-463-4481).

Clifford Johnson,
P.O. Box 1128
Gualala, CA 95445-1128
Tel: 707-884-4066
Appellant in propria persona.

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ABBREVIATIONS

cb.com = The coldwellbanker.com website. Attachment A shows three pages in evidence at 2v127-129. Their text is Exhibit B to the complaint, at 1v82-83. (Attachment A to the petition for a writ of mandate, at 14-16, shows these pages as of July 5, 2005.) Two further pages, at 2v130-131, describe CB-Pacific, Balter, and Dodds, as quoted in the complaint, at 1v74.

CB-Cendant = Cendant Corporation and its subsidiary, Coldwell Banker Real Estate Corporation

CB-Pacific = Coldwell Banker Pacific Real Estate (a Coldwell Banker franchise)

complaint = Third Amended Complaint For Damages, filed Oct. 15, 2002 (1v63-83)

Order = Order Ruling On Motion For Summary Judgment, filed Nov. 30, 2004 (3v427-429)

petition = Petition For A Writ Of Mandate, No. A109218, filed Feb. 15, 2005

REFERENCES TO THE RECORD

LvMMM[:NN] = Record, Volume L, page MMM [line NN]

RT1:M:N = Reporter's Transcript of summary judgment hearing, Nov. 19, 2004, page M, line N

RT2:M:N = Reporter's Transcript of new trial/costs hearing, Feb. 4, 2005, page M, line N

CERTIFICATE

I, Clifford Johnson, appellant herein, hereby declare that, for the below brief, my word processor reports a total count of 11,497 words.

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

July 8, 2005 _____

Clifford Johnson

I. APPEALABILITY AND TIMELINESS

The Notice Of Appeal states that the appeal is from (3v557-558):

> **1.** the Order Ruling On Motion For Summary Judgment, filed November 30, 2004, granting [] summary judgment to [respondents] Coldwell Banker Real Estate Corporation and Cendant Corporation ["CB-Cendant"]…;
>
> **2.** the Judgment By Court Under CCP §437c filed January 3, 2005;
>
> **3.** the Order on Plaintiff's Motion For New Trial Or For A Stay Of Proceedings, filed February 10, 2005, and served on Plaintiff by mail on February 16, 2005…;
>
> **4.** all and any subsequent verdicts, orders, and judgments, including the award of costs against plaintiff, if and insofar as they complete, render final, and/or enforce the aforesaid summary judgment.

At a February 4, 2005 hearing, the motion for new trial was denied, and the court refused to stay the award of CB-Cendant's costs. 3v535. In moving for the stay, Johnson argued that the summary judgment was not final because his claims against CB-Cendant, including his right to this appeal, would dissolve if the jury did not find the remaining defendant, Coldwell Banker Pacific Real Estate ("CB-Pacific"), at fault; and if it did, then equity would require a reallocation of CB-Cendant's costs. 3v515.

On March 9, 2005, the jury did find CB-Pacific at fault, for breach of fiduciary duty, and for intentional misrepresentation. 3v556. On March 16, 2005, within 30 days of the February 16 service by mail of the notice of entry of the summary judgment, Johnson filed the notice of appeal. The Judgment After Trial By Jury was entered March 21, 2005. 3v560.

If the summary judgment *was* final as to respondents, the appeal is timely under Cal. Rules of Court, rule 3(a) (1); else the latter judgment is final as to all parties, and the notice is timely under rule 2(a), (e).

II. STATEMENT OF THE CASE

1. Overview: Nature Of Action And Relief Sought.

In the purchase of his residence, plaintiff-appellant Johnson suffered six-figure economic damages on account of numerous defects that his so-called Coldwell Banker agent affirmatively concealed and prevented him from discovering. Johnson seeks those damages (minus $13,500 already awarded against CB-Pacific, attributable to non soil-related damages) from CB-Cendant, for fraud in advertising.

Johnson decisively relied on CB-Cendant advertisements including the website cb.com, extolling and promising the "honest and professional" qualities of real estate services assured since 1906, especially to protect "vulnerable" customers, by Coldwell Banker's founding "philosophy: the customer's best interest above all," and by the "tradition of integrity, exceptional service and customer satisfaction that became the company's hallmark." In fact, CB-Cendant's strict policy is to avoid even monitoring, let alone controlling, customer service, and to disown aggrieved customers, blaming them for their mistaken expectations of consideration.

But this advertising of course left Johnson in no doubt that he was receiving real estate services under some sort of reputable national standards. If a *Coldwell Banker* agent did not know the name of a soil inspector, or even how to find one, then his requests for a soil inspection must indeed -- as he was orally advised -- be an unheard of excess, despite the contrary advice he had noticed in one paragraph of one of many preprinted forms he had been given. So Johnson reasoned. In the "boondocks" of Gualala, he would not have trusted this overriding advice from some ungoverned local. But this is exactly what he was unwittingly doing, to his great cost.

The crux of the judgment appealed from is that somewhere in the above, undisputed conduct, Johnson acted unreasonably.

Johnson also seeks exemplary damages from CB-Cendant, having learned the hard way that the advertising reflects a long-fixed fraudulent scheme, callously continued through the very same policies that in 1997 *Kaplan*, *infra*, found culpably capable of misleading even a "sophisticated real estate investor and Superior Court judge." At bar is the mass-marketing of a rapidly rising number of utterly uncontrolled real estate agents to naïve house buyers, as honest and professional experts on whom they can safely rely.

2. Johnson Contests A Summary Judgment Against Fraud In Advertising, Granted On "Conclusive Disclaimer," "Matter Of Opinion," And "Lack Of Specificity" Grounds.

The Third Amended Complaint ("complaint"; 1v63-83) states three causes of action. Johnson abandoned the first claim, for breach of statutory duty, and all claims against individuals, to simplify trial. 3v370 n.1. The second claim alleges breach of fiduciary duty by CB-Pacific, for which CB-Cendant is liable only through ostensible agency. This claim is not put at issue. Reversal is sought only on the third claim, as against CB-Cendant, for fraud in advertising, warranting exemplary damages. As follows, Johnson contests a summary judgment re fraud in advertising, which, as narrowed by his motion for new trial, issued on three grounds.

Conclusive Disclaimer. Before addressing the fraud claim in its Order (Attachment C at 49-51), the court found no triable fact as to ostensible agency, which is a sub-issue on the fraud claim. It did so all because of an apparent disclaimer, quoted from cb.com (3v428-429):

> [O]stensible agency [i.e. the intended or careless creation of a belief in agency[1]] rests upon the plaintiff having seen the website[, which] says that there are "3,000 independently owned and operated real estate offices with over 75[,000] sales associates globally."…To find ostensible agency under these circumstances would basically subject franchisers to a presumption of agency.

Matter Of Opinion. In dismissing the fraud claim, the court ruled that the alleged advertising did not give rise to any actionable assurance of national standards, as follows (3v428-429):

> The complaint [otherwise] fails to state a cause of action for fraud [because it] allude[s] mostly to advertising matters, which any person would understand [are] matters of opinion analogous to "You're in good hands with All State" and "State Farm is there for you." These are similar types of hyperbolic statements that nobody can realistically use as a basis for a cause of action for intentional misrepresentation.

Against these two grounds, Johnson contends: that passive usage of a national trademark *per se* imputes distinguishing standards as a matter of persuasive fact; that the advertising positively promotes standards of customer service as assured by the "Coldwell Banker" mark; that *no* such standards exist as a matter of strict policy, rendering the advertising false in fact; that the controlling policies amount to a fraudulent scheme; and that this scheme is not legitimated by, but made outrageous by pervasively obscure injections of the phrase "independently owned and operated" into advertisements, so as to enable the post-facto repudiation of far more prominent, prevalent, and plain contrary messages, in rebuffing aggrieved franchise customers, and in court.

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[1] "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Civ. Code section 2300.

Lack Of Specificity. Finally, the court ruled (3v429):

> The motion for judgment on the pleadings is also granted as to the fraud cause of action for the reasons set forth in defendant's brief, i.e. that it is not pleaded with the requisite specificity.

Johnson contends, re the referenced reasons, that alleging fraud in corporate publications does not require naming the individuals who published them, to whom, when, and by what authority; that his allegations re cb.com are obviously sufficient per se and in all respects; and that his allegations re like advertising are well within established specificity requirements re fraud in advertising, the details having been duly filled in through discovery.

3. Summary Of Significant Facts

The finding of no triable fact as to the intentional creation of a false impression of agency affirmatively rested *solely* on the occurrence of the phrase "independently owned and operated" in the middle of the middle page of cb.com, as follows (2v128):

> Coldwell Banker Real Estate Corporation, a subsidiary of Cendant Corporation, has more than 3000 independently owned and operated residential and commercial real estate offices with over 75,000 sales associates globally.

The evidence as to the usage and effect of the purported disclaimer contrarily supports Johnson's allegations in the fraud claim, that the phrase is tactically employed, to disingenuously inflate and translate post-facto, as conclusive against liability, *per se*. As detailed below, by its above order, the court declined to address the literally opposite meaning of the very sentence in which that phrase appears, and declined to address showings that the unqualified phrase is obviously false.

The cb.com website alone, as quoted and exhibited in the complaint, constitutes particularly pled advertising admitted in evidence, sufficient to warrant reversal of the summary judgment. Other advertisements admitted

in evidence, and attested to as having particularly influenced Johnson's purchase decision, are: (a) the television advertisement "Moon Walk," especially apposite to Johnson's move to the country (2v134,223; 3v375-376);[2] (b) two instances of signage issued pursuant to forms fixed by CB-Cendant's Policy Manual, of exactly the ilk reproduced at *Kaplan* (2v115(¶1),147-148). In support of exemplary damage allegations, in evidence are the unchanged Policy Manual (2v179-182) and subsequent television advertisements (2v135-137), e.g. "I Am – Montage," featuring the Coldwell Banker logo, and a naïve house buyer made happy, to chants of "promise," "guarantee." 2v136.

On the other hand, there is evidence showing CB-Cendant's refusals to even consider Johnson's grievance, and the corporate policies that fixed this, including the ploy of relying wholly on the disclaimer to rebuff Johnson. In typical naked licensing cases, a trademark is defended by the showing of *any* meaningful control. In contrast, as detailed below, CB-Cendant's written policies disclose, and managers candidly concede, a total lack of knowledge and controls re customer service, instead affirming the defense that this is made clear by pervasively planted "independently owned and operated" disclaimers. The evidence shows that this disclaimer is inconspicuously placed, and is false on the face of the advertising, and false in fact, under the common meaning of the words.

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[2] A house on the moon is shown, with a "Coldwell Banker" sold sign. The script in full is: "No matter where people buy and sell homes, we'll be there. Coldwell Banker Real Estate. Our 90 years of experience goes a long way. Call 1-888-574-SOLD, for your Coldwell Banker office. Making Real Estate real easy."

CB-Cendant of course controls numerous franchisee operations, under the franchise contract. A fixed percentage of each buyer's fee must be remitted promptly upon closure. CB-Cendant controls national advertising exclusively, and requires that local advertising conform to templates. Its top counsel described "abandonment" as referring to a franchisee that "went independent, or went to another franchise." It is *only* and shocklingly the essence of the franchise – customer services – over which control is altogether avoided, despite cb.com's announcement that putting the customer *first* is the core philosophy and hallmark practice.

How the issues and evidence arose is detailed in the following case history.

4. Case History Through Denial Of New Trial (1v1-3v552).

(i) Preliminary Proceedings On The Pleadings.[3]

The action was filed April 5, 2001, against CB-Pacific, Dodds, and Balter. In April 2002, Johnson moved to join CB-Cendant. The motion was opposed on the ground that the new claims were insufficient. At a May 31, 2002 hearing, the Hon. Henderson allowed the ostensible agency and fraud in advertising claims, but disallowed an unfair business practices claim, without prejudice. 3v450,461-462(¶¶5,9),503-504; RT2:3:19-4:15.

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[3] Cal. Rules of Court, rule 5.1(b) (1)(B), (2) require that the record include all documents "necessary for proper consideration of the issues," and exclude all unnecessary documents and parts of documents. The issues herein are properly and most simply considered on the intrinsically complete record of the summary judgment and subsequent proceedings. Accordingly, earlier proceedings appear in the record only as reported, attested to, and exhibited in the later proceedings. The complaint itself appears at 1v63-83.

CB-Cendant then moved to strike the punitive damages paragraph, without leave to amend. In opposition filed August 12, 2002, Johnson again showed the sufficiency of the fraud claim, exhibiting the fraud in advertising boilerplate (West's), that he had filled in. 3v461-462(¶6,505-508. In reply, CB-Cendant acknowledged what had already been decided, that "Plaintiff's SAC [Second Amended Complaint] and PTAC [Proposed Third Amended Complaint] contain a cause of action for fraud." 3v462,511-512. The Hon. Henderson not only reaffirmed this, but allowed the amended punitive damages paragraph set forth in the Third Amended Complaint, filed October 15, 2002. 1v77.

(ii) The Fraud In Advertising Allegations.

Here is a resume of the allegations re fraud in advertising, as set forth in the complaint filed October 15, 2002, at 1v63-83.

(a) Knowing nothing of construction, real estate, or country life, in April 1999, as a naïve first-time home-buyer, Johnson bought his current residence, set on a steep slope at 45901 Pacific Woods, Gualala. 1v64:14-19,65:1,68:6-20.

(b) Johnson later discovered numerous undisclosed *soil-related* defects, including: garage floor subsidence; substandard and wasting fill; unpermitted and failing retaining walls above and below the house and driveway; unanchored foundations; a marginal septic system; and building and health code violations, including an illegal deck and a wholly impermissible garage. 1v65-66:6.

(c) Johnson also discovered an undisclosed defect not related to soil, namely, a longstanding driveway access dispute. 1v66:7-9.

(d) Bev Dodds, then and now a CB-Pacific realtor, acting as Johnson's real estate agent, and knowing that he was vulnerable and naïve, by numerous misrepresentations concealed the defects and prevented him

from discovering them, so as to induce him to buy the property. 1v68:21-73:10. Dodds and Lenny Balter, CB-Pacific's owner-broker, continued the fraud in rebuffing Johnson's initial post-purchase grievance. 1v73:11-13.

(e) Most importantly (1v67:1-7):

> The advice of Dodds included that plaintiff's request for a soil inspection was an unheard of excess, and that he could ignore the contrary advice given in one paragraph of one of many preprinted forms she had given him. Plaintiff's acceptance of this piece of advice was critical. In accepting it in the "boondocks" of Gualala, plaintiff consciously and justifiably relied on CB-Cendant's televised and internet publications, and other conduct, stating and imputing that national standards of customer service were assured by the "Coldwell Banker" trademark.

(f) CB-Cendant licenses the national "Coldwell Banker" trademark to real estate offices, including CB-Pacific, pursuant to a standard franchise agreement, under which it receives a cut of each buyer's fee, and retains exclusive control of national advertising. 1v64:4-7,67:5-16,75:18. CB-Cendant's liability for fraud is alleged as arising from (1v74:25-75:5):

> advertisements of nationally assured standards intended to obtain money from vulnerable first-time house buyers, including plaintiff, [which] were knowingly false, because CB-Cendant in fact had and has a strict corporate policy of absolutely *not* assuring national customer service standards, by setting none, by monitoring none, and by refusing to consider the merits of any customer grievance against affiliates and their officers, however plainly documented, and however outrageous.

The complaint further alleges that CB-Cendant "nakedly exploits the once meaningful Coldwell Banker trademark," amounting to "substantial frauds upon the local and national real estate markets, where individuals' life savings and peace of mind are at stake." 1v77:17-19.

(g) The allegations re advertising assured standards are now quoted in full, so as to rebut the dismissal for lack of specificity (1v74:9-25):

> …"coldwellbanker.com" contained the three pages reproduced as Exhibit B. …The first "About Us" page targets "first-time buyer[s]," such as plaintiff, by representations including that, as a first priority, CB-Cendant assures service by "honest and knowledgeable real estate people" who put "the customer's best interest above all," so continuing a long "tradition of integrity, exceptional service, and customer satisfaction that [are] the company's hallmark." Likewise, the third page states: "Our company was founded in 1906 on a commitment to professionalism and customer service that remains the core of our business philosophy."
>
> Elsewhere [2v130-131], the site calls its affiliates "our local offices," and reports that CB-Pacific is a designated "Coldwell Banker Premier Office." Under "Our Agent List," it reports: (a) that Dodds' is a "President's Circle Designee, top 5% at Coldwell Banker nationally," whose motto is "Care giving is an enormous component of real estate"; and (b) that Balter is a member of the "President's Circle," having "28 years in Real Estate, 18 years on the cost, 13 years as owner broker." The subject property was listed on the site, and plaintiff utilized the site in his house-hunting. Plaintiff was also influenced by like representations in the then current CB-Cendant televised advertising campaign.

The complaint also alleged that Johnson was influenced by "dominant 'Coldwell Banker' logos in all advertising, signage, correspondence, and business cards," per CB-Cendant specifications. 1v67:11-14.

(h) In support of exemplary damages, Johnson implicitly alleges the systemically obscure planting of the phrase "independently owned and operated" to avoid liability for inducing opposite beliefs, and the unabated continuation of the these policies, despite *Kaplan's* finding of likelihood to mislead[4]. It is manifested in the rejection of his grievance on the ground

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[4] At that time, Johnson did not take such explicit issue with the use of the disclaimer as he does now, for he could not conceive its effectiveness in a court of law, the Hon. Henderson having allowed the ostensible agency

(continued)

that the operations of affiliates were strictly independent, by the ongoing designation of CB-Pacific as a "Premier Coldwell Banker Office," and so forth, which persisted even while CB-Cendant refused to consider that grievance, taking no sides, and conceding that CB-Pacific might be at fault for fraud in an ongoing conflict which could even be putting the life of another CB-Pacific customer at risk. 1v75:8-76:5,77:4-16.

(iii) Resume Of Subsequent Proceedings Re Fraud In Advertising

On October 8, 2002, in Los Angeles, Johnson deposed Sinclair, Coldwell Banker's Affiliate Services Director, Western Region. Sinclair responded to Johnson's pre-litigation grievance, as alleged in the complaint. 1v62:8-11;65:16-66:5; 2v236. On October 22, 2003, in Parsippany, New Jersey, Johnson took deposed: Sertich, Coldwell Banker's Director of Public Relations, who issued a press release puffing cb.com; Morrison, a Cendant Vice-President and attorney, who declined Johnson's grievance, as alleged at 1v65:24-66:5; and Cardwell, an attorney in charge of legal services for Cendant's entire Real Estate Services Division, a top executive (a career sketch is at 1v195) whose department legitimated the advertising, affiliate, and (non-)customer policies herein at bar. 2v271,297,326, 3v468,478,480.

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and fraud claims to proceed, with a punitive damages prayer. Nevertheless, in the conduct alleged, the tactical employment of the disclaimer is implicit, and in the discovery shown below it became a keen issue, in which Johnson cannot help but take the position that it is facially false and vapid.

On August 16, 2004, CB-Cendant filed the motion for summary judgment. 1v2-95. Johnson filed opposition on October 29, 2004. 1v96-112, 2v113-366, 3v367-386. CB-Cendant filed a reply and objections to evidence on November 5, 2004. The reply reduced the motion against the fraud claim to a motion on the pleadings. 3v387-399.

On November 12, 2004, Johnson filed supplementary opposition. 3v400-410. The matter was submitted at a November 19, 2004 hearing. 3v411-426. RT1.

By the Order Ruling On Motion For Summary Judgment, filed November 30, 2004, the court granted the motion for summary judgment. The order upheld some of CB-Cendant's objections to Johnson's evidence, before citing new and extrinsic Allstate and State Farm advertising slogans, in ruling as set forth above. 3v427-429.

To respond to these new facts, and to eliminate spurious issues and uncertainties arising from the disallowance of evidence, on December 26, 2004 Johnson submitted a notice of intention to move for new trial, else for a stay of the trial of the remaining defendant, to enable him to promptly seek an extraordinary writ to compel a single, joint trial of all defendants. The motion and supporting papers did not contest any admissibility ruling, and cited no evidence against which an objection had been upheld. 3v435-438,440-512. CB-Cendant filed no opposition. 3v439.

The judgment was filed January 3, 2005. 3v439. On January 6, 2005, Johnson filed a motion to tax, strike, or stay the award of $7,109.74 for CB-Cendant's costs. Plaintiff contested $150 for jury fees (there having been no jury trial), and also argued that the award was premature, owing to equities resting on the outcome of the pending trial. 3v513-517. Opposition was filed January 17, 2005. 3v524-527. Plaintiff filed a reply January 21, 2005. 3v528-529.

The new trial, costs, and stay motions were heard February 4, 2005. At the end of the hearing, they were all entirely denied. RT2:10:7-11:20.

(iv) The Motion For Summary Judgment – Evidence.

The evidence in support of the motion for summary judgment comprised the franchise contract (1v32-62), the complaint, one page from each of Sinclair's and Dodds' depositions, and seven pages from Balter's deposition.[5] 1v85,87,95-101.

CB-Cendant's objections are itemized at 3v397-398. They are specifically ruled on at 3v427-428. The exhibits that Johnson introduced in opposition, *against which the court did not sustain an objection*, and therefore deemed admitted,[6] included: copies of all (text and images) cb.com web pages quoted in the complaint (2v126-131); a set of Coldwell Banker television advertisement scripts and descriptions, running from a year before Johnson's 1999 purchase, through 2003 (2v134-137); Dodds' "President Circle Award" (2v138); the script of a CB-Pacific radio advertisement broadcast by Balter (2v140); the published opinion in *Kaplan* (2v149-155); excerpts from Coldwell Banker's "Policy Manual"

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[5] The motion incredibly affirmed that throughout discovery Johnson had produced *no* evidence, such as the *Kaplan* plaintiff had. 1v16. Not until the reply did CB-Cendant object that Johnson's affidavits throughout the litigation, including his opposition affidavit, were fatally defective, for failure to explicitly state they were executed in California, even though they gave Johnson's California address. The Order upheld this objection in disallowing long accepted interrogatory responses, but exercised its discretion (if not compelled by due process) to accept a corrective affidavit (3v410), else it must have disallowed all items objected to.

[6] "The court is required to consider all the evidence set forth in the papers, except where objections are properly sustained." *Tchorbadjian v. Western Home Ins. Co.* (1995) 39 Cal.App.4th 1211, 121.

(2v158); Uniform Franchise Offering Circular excerpts (2v185-195); and a CB-Cendant press release entitled "Franchise Business Systems Report" (2v196-198).

An objection was upheld to all of the deposition excerpts introduced by Johnson. However, both the reply and the Order cite the excerpt of his own deposition, *relying* on his testimony at 2v221 as to having read the purported disclaimer in cb.com, so as to distinguish this case from *Kaplan*. 3v388-390,428-429. They both also cite the transcript at 2v223, as showing a total failure to recall any specific television advertisements. 2v392,428. But the cited page contains the annotation "MAN ON MOON," added within the 30 days allowed after receipt of the transcript, showing his recollection of the above-noted "Moon Walk" advertisement. Johnson's affidavit stated that the annotations were authentic. 1v114:18,115:3.

(v) The Motion For Summary Judgment – Issues.

The Order does not mention the parties' separate statements of facts. As follows, and referencing only admitted evidence, three of these facts encapsulate the issues. Fact 3 and Johnson's response are (1v99):

> **Fact 3.** CB PACIFIC ran its business independent of CENDANT/CB REC.
>
> DISPUTED. This broad statement is obviously false. The franchise agreement imposes voluminous and detailed constraints on the operations of CBPAC. [1v32-62, 2v158-154] All franchises operate with *degrees* of actual and apparent dependence on the franchisor, arising from the particular circumstances. For pertinent examples: [franchise contract/Policy Manual citations.]

Fact 9 is the *only* fact supported with proof as to Johnson having read "independently owned and operated." Exhibit B to the complaint (cb.com) is cited, and the court wholly relied on Johnson's testimony

admitting that he had read these pages, in summarily ruling out ostensible agency. Fact 9 and the response are (1v102):

> **Fact 9.** CENDANT/CB REC represents its franchisees have "independently owned and operated" businesses.
>
> DISPUTED. (i) The quoted representation is not consistently, prominently, or plainly made, and, even where the quoted phrase does appear, it is presented in a context that most emphatically induces the belief that "Coldwell Banker" offices operate pursuant to national standards of integrity and excellence. Moreover, CB-Cendant more emphatically and completely contrarily refers to its franchises simply as "our" offices, including CBPAC, and to its franchises real estate agents as "our" agents, including Dodds and Balter. [2v126-129]
>
> (ii) Even if it were prominently made, the quoted representation would be insufficient to discount ostensible agency. The representation is not: "Coldwell Banker Real Estate Corporation is not liable for the wrongful advice or services provided by any Coldwell Banker office or agent." The quoted disclaimer…cannot mean *all* real estate operations are independent.

Fact 24 was added by Johnson to show willfulness in the fostering of apparent agency:

> **Fact 24.** CB-Cendant has not changed its advertisements in response to the finding in *Kaplan*, as to its advertising signage policies giving rise to a triable fact as to its ostensible agency, even where the house buyer was a "sophisticated real estate investor and Superior Court judge." [2v155; 2v179-182]

This fact was not disputed. The Policy Manual (2v179-182) displays the same signage reproduced in *Kaplan* (2v155); and the court specifically did not sustain (3v427) the objection at 3v398 (item 4) to admitting a copy of *Kaplan* (2v149-155) as *evidence* of willful disregard.

In his memorandum, Johnson explained why the puffing of services provided by CB-Pacific qualified as common law fraud (3v380):

> Because CB-Cendant in fact receives no information as to the quality of customer services provided by franchises, its advertising to prospective customers, that the 'Coldwell Banker' trademark assures "honest and professional" services, being based on *no* information, is at best knowingly reckless, and so actionably fraudulent.

Re fraud in advertising, CB-Cendant's motion argued that Johnson had not in pleading or in discovery specified any particular television advertisements or signage that had influenced him, nor had he specified the individuals who had issued the cb.com advertisement, when, to whom, and under what authority. It also argued that Johnson had failed to specify a single matter of fact falsehood, by listing alleged statements that contributed to the fraud, and analyzing each as though Johnson alleged as a stand-alone falsehood. 1v18-20.

Johnson's opposition pointed out that he had in discovery identified television advertisements and signage that had influenced him, highlighting the above "Moon Walk" commercial, the perennial "Coldwell Banker period" format at Attachment B, and his testimony as to influential signage at 2v218-219. 3v374-376. He also showed that CB-Cendant's only specificity authority, *Tarman, infra*, had expressly excepted corporate publications, and presented an on-point fraud in advertising authority, *Boeken, infra*. 3v376-377. He also showed that he had clearly stated the factual falsehood on which his fraud claim was pinned: the existence of national standards of customer service as assured by the Coldwell Banker trademark. 3v79-382. He also noted that Coldwell Banker did not dispute the fact that it did not assure any standards of customer service, complete independence being a part of its defense. The dispute lay in whether the advertising culpably imputed such standards, as a matter of reasonably relied on fact. 3v382.

In reply, CB-Cendant argued the motion against the fraud claim on the pleadings alone, wherefore "the court may not consider…the opposing declarations. [Citation.]" CB-Cendant argued that no false matters of fact had been specifically alleged in cb.com, and that no other advertisements had been *alleged* with requisite specificity. 3v394-395; RT1:7:4-8:8,14:22-15:1. CB-Cendant argued that *Tarman's* corporate publications exception was dicta, and that therefore *Tarman* did apply to the corporate publications. 3v393. CB-Cendant argued that *Boeken* did not apply because it did not address a summary judgment, without addressing the logical equivalence or the authority Johnson provided thereon, *Rio Linda, infra*, at 3v377 n.1. 3v394. CB-Cendant also argued that the advertising re customer service was merely nonactionable "puffing." 3v.395:7.

(vi) The Motion For New Trial.

The new trial motion introduced corrective and new evidence. In denying the motion, the court did not disallow any of the new or corrective evidence, despite objections at the February 4, 2005 hearing (RT2:7:22-8:3,9:12-9:19,10:5-11).

The corrective evidence comprised a convenient set of topically captioned deposition highlights, overcoming the court's objection to the raw excerpts. 3v465-496.

The new evidence included, for demonstrative purposes only, web pages distinguishing the Allstate and State Farm jingles (3v501-502);[7] a recent news report of a rapidly rising state backlog of consumer real estate complaints, containing judicially noticeable annual complaint statistics

[7] The court overruled an objection that this was irregular. RT2:6:26-7:6,9:17-9:19,10:8.

published by the state's Department of Real Estate (DRE) (3v497-499); and a DRE complaint form (3v500). In addition, Johnson introduced excerpts of the preliminary proceedings before the Hon. Henderson.

Johnson's argument began by showing that the matters raised are of wide and pressing public concern, and then quoted the long settled rule that

> the court has both the power and the duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids. [Citations.] It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue…It is not too late to raise the issue on motion for new trial [or even on appeal] [citation]

Lewis & Queen v. N. M. Ball Sons (1957) 48 Cal.2d 141, 147-148.

To narrow the issues, Johnson did not contest *any* of the evidential exclusions, in moving for new trial. 3v452:1-3. Re fraud in advertising, he contested only the grounds for summary judgment contested again herein. In brief, the argument made in motion for new trial, re fraud in advertising claim, is essentially the same as this argument on appeal.

On the ground that the court had overlooked the controlling context, the motion (3v452) objected that the Order misstated that Johnson had read that "there are '3,000 independently owned and operated' offices." Johnson pointed out that he had read that:

> [CB-Cendant] has more than 3000 independently owned and operated residential and commercial real estate offices with over 75,000 sales associates globally.

Johnson noted that the *only* verb, "has," in conjunction with counts given to impress, contradicted and buried the purported disclaimer, and that the website as a whole rendered unqualified independence ludicrous.

The new trial motion (3v447) likewise objected that the Order had cited Johnson's testimony as to having read the pages that contained the purported disclaimer, but not as to it leaving no impression, or as to what it

would have meant to him, or as to the effect of extrinsic signage (2v217:19-2v218:1; 2v221-222:1-9 – again, hand annotations officially added):

> A. I had seen their signs all up the coast.
>
> Q. CB-Pacific?
>
> A. No, Coldwell Banker… I didn't notice the Pacific until a long time later. To me it was just oh, here's another Coldwell Banker.
>
> Q. At what time were you first aware CB-Pacific was a franchise of CBREC?
>
> A. After I bought the house.
>
> Q. …Do you recall reading that at the time you mentioned you accessed the internet site prior to your purchase of this property?
>
> A. As I said, I don't remember the details of what I read. But…this is in fact what I would have read. So I'm not going to quarrel with that.
>
> Q. Independently owned and operated, what does that mean to you?
>
> A. It means that the guys sort of make their own money. To me it means that they have opportunities for some kind of local incentives, but they obviously have to operate within a framework that defines Coldwell Banker Sales Associates…The emphasis is on the independently owned. That gives them the incentive to operate even above national standard minima.

The motion for new trial further argued that CB-Cendant's post-*Kaplan* persistence in placing vapid "independently owned and operated" disclaimers is a fraud on the court, devised to inoculate advertising intended to induce prospective franchisee customers to believe that they will be the customers of a well established national organization, and will receive services under nationally assured standards. To substantiate this insincerity, he pointed out how the head of legal services for Cendant's real estate group, Cardwell, after persistently testifying that he could not comprehend Johnson's assertion that the franchises were obviously *not*

independent, had ultimately testified that "independently operated" meant no more than that affiliates can "make the decision on their own to breach a [franchise] contract," 3v453,481.

At the hearing, Johnson stressed Cardwell's subsequent slip up, conceding that franchises are *obviously not* independent, by describing an abandonment as follows (3v482; 3v533; RT2:23-3:15; emphasis added):

> They just shut down their operations, took the signs down one day and *went independent or went to another franchise*.

Johnson's memorandum argued that, by finding the advertising to be matter of opinion hyperbole as to the quality of franchised services, the court itself implicitly accepted that there must be *some* knowledge of the services provided, on which the opinion was based. This seemed confirmed by the court's first-time recitation of Allstate and State Farm jingles. As Johnson demonstrated, these organizations certainly could (and apparently did) maintain service controls of specified sorts that his allegations and evidence particularly discounted re the Coldwell Banker mark. 3v455-456.

Johnson not only restressed his allegations that *no* such standards exist, but provided authority as to the applicable "naked licensing" standard of proof, *Barcamerica Intern. v. Tyfield Importers* (9th Cir. 2002) 289 F.3d 589. Johnson demonstrated that he could meet its stringent burden, by the wide selection of deposition highlights presented at 3v468-496, and by the policies set forth in the franchise agreement and Coldwell Banker "Policy Manual," re advertising, franchise relations, and customer satisfaction. 3v457-458.

Against the dismissal for failure to plead fraud with specificity, Johnson affirmed that the cb.com website, as quoted and exhibited in the complaint, sufficed *per se*. 3v455. If more were needed, as to the generally alleged national television advertisements, Johnson showed that he had

produced them in an exhibit that the court had admitted, that there were only one or two such advertisements in the critical time frame, that he had identified in his deposition and interrogatories one of them ("Moon Walk") as having particularly influenced him, and that all this far *exceeded* the pleading standards for fraud in advertising set forth and followed in *Boeken v. Philip Morris Inc.* (2004) 122 Cal.App.4th 684.

The only other specifics that CB-Cendant objected to as unalleged were the details as to what individuals issued the advertisements, to whom, when, and by what authority. As in opposing summary judgment, Johnson showed that CB-Cendant's only authority, *Tarman*, had expressly excepted corporate publications, and that *Boeken, supra,* so held re false advertising. Johnson also exhibited Wests's fraud in advertising boilerplate, which he had fully filled in, as he had done in opposing the preliminary and denied motions to dismiss. 3v448-449,465,509-510.

5. The Petition For A Writ Of Mandate.

On February 15, 2005, plaintiff filed a petition for a writ of mandate (No. A109218) in this court, alleging the following interest (at 3):

> The claims against CB-Pacific remain set for trial February 28, 2005. This petition is necessary to compel respondent to apply the above law, and so to jointly try the claims against CB-Cendant. Petitioner has a beneficial interest in the issuance of the writ, in that it will restore his substantial suit against CB-Cendant, and obviate prejudicial and inexpedient multiple trials.

Johnson's supporting memorandum argued (at 2):

> Where the conduct of joint tortfeasors is at bar, and contributory conduct a defense, the just allocation of fault and liability requires that the legal obligations of all parties be correctly instructed. Herein, the court's conclusive finding (3v429) that "any person would understand that" the advertisements "are matters of opinion…that nobody can realistically use as a basis for a cause of action," invidiously impeaches petitioner. It

> directly discredits petitioner's induced belief in national standards, which is the reason why he accepted oral advice as to the inapplicability of contrary advice in boilerplate forms, re soil and septic inspections. 1v67.

To show that the issues raised were of wide and pressing public concern, the petition introduced a verification that would enable this court to take judicial notice of the rapidly rising state backlog in consumer real estate complaints, shown at 3v499. To show the longstanding and ongoing cause for concern, he attached the current versions of the cb.com pages and Coldwell Banker signage that had influenced his purchase decision in 1998. The only change in the cb.com text was numerical, showing a rapid growth in the total number of Coldwell Banker real estate agents.

Attachment A at 14-16 of the petition for a writ of mandate shows the three pages of cb.com attached hereto in far clearer copy, not only as they appeared when the petition was filed, but as of July 5, 2005, as noted in the accompanying motion.

Attachment B to the petition, at 17-18, is a far clearer example of the "Call Coldwell Banker period" shell in Attachment B below (2v115:12-13), as it appeared in the local paper, the week that the petition was filed. The better copy, and a second page, actual size snippet, reveal just why the no "independently owned and operated disclaimer" is not visible below. Centered bottom, its microscopic size resulted in an exhibit label inadvertently shaving it off. Also pertinent is the boxed text, announcing CB-Pacific's frequent "Top Twenty" national Coldwell Banker rankings, under a caption "…#1 in Service…..again."

The writ was denied by order filed February 22, 2005.

6. The Trial And Judgment Against CB-Pacific (3v553-604).

On February 28, 2005, the trial of the claims against CB-Pacific began. The Minute Order re the final day is at 3v553-554. After

deliberating all day, at 3:08 p.m. on March 9, 2005, the jury came to the court with the question (3v553; emphasis in original):

> DOES THE JURY HAVE TO ONLY CONSIDER COLDWELL BANKERS BREACHED A REAL ESTATE AGENT'S DUTY TO ADVISE THE NAME OF A GEOLOGIST…OR CAN CONSIDER OTHER ISSUES SUCH AS EASEMENT…?

After another hour, by a general verdict, the jury found CB-Pacific at fault, for breach of fiduciary duty, and for intentional misrepresentation. It awarded Johnson $13,500 for economic damages, and $25,000 non-economic damages. 3v554,556. The Judgment After Trial By Jury was served and filed March 21, 2005.

On April 5, 2005, Johnson filed the memorandum of costs. 3v562. On April 26, 2005, CB-Pacific filed an amended[8] motion to tax costs. Pertinently, it opposed the costs of $7,190.74 awarded against Johnson to pay CB-Cendant's costs (3v566; Item 13), and costs paid to experts (3v566; Items 8a, 11), to develop soil-related (retaining walls and foundations) repair plans, which had been approved by the county, and exhibited at trial. At 3v590, Johnson's opposition exhibits the listing of costs for these repairs that he submitted to the jury. It includes $23,041.76 already paid to experts, for the repair plans, and construction costs of $125,799.92 for the retaining walls, and of $86,654.25 for the house foundations.

CB-Cendant's papers show that the amount paid to the experts was not in dispute, and was objected to only on the ground that *the jury had*

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[8] The first motion gave under a week's notice. Although filed less than ten court days before the hearing, all of Johnson's opposition was in fact filed within the time statutorily allowed after the first notice was filed.

rejected the award. 3v594-595. At the hearing on May 13, 2005, the court disallowed all these items, as shown by the final memorandum, at 3v604.

IV. ARGUMENT

1. Summary

For a decade, Cendant Corporation, a multinational diversified services franchisor that dominates the nation's real estate business, has nakedly licensed the nation's most venerable real estate brand, Coldwell Banker, while obscurely employing the phrase "independently owned and operated" to inoculate advertising that obviously induces prospective house buyers to mistakenly believe that Coldwell Banker agents provide services under standards set and assured by a reputable national organization.

Kaplan v. Coldwell Banker Residential Affiliates, Inc. (1997) 59 Cal.App.4th 741, in overturning a summary adjudication against ostensible agency, found that this advertising could carelessly or craftily have misled "a Superior Court judge and sophisticated real estate investor" into believing that his Coldwell Banker agent was an agent of Coldwell Banker. But *Kaplan* did not reach the core issue of direct fraud re quality control, and made no difference. Herein, eight years on, a Superior Court judge has found that the same advertising could *not* have likewise misled "a naïve first-time house buyer."

The following questions of law are raised, apparently as matters of first impression in the state, except insofar as *Kaplan* applies:

1. Is a franchisor's promotion of standards of service as assured by its trademark fraudulent, where *no* such standards are set, and the quality of services is not monitored? Of course. Even passive usage of a trademark imputes *some* such standards, as a matter of persuasive fact. *Barcamerica Intern. v. Tyfield Importers* (9th Cir. 2002) 289 F.3d 589.

2. In moving for a summary adjudication against such fraud in franchised trademark promotions, does the phrase "independently owned and operated," in an admittedly read promotion, *per se* meet the movant's initial burden of prima facie defense, and, if so, is it conclusive? No, and certainly not. The imputed and promoted distinctions rule out unqualified independence, rendering the phrase false and vapid on the face of the promotion.

The dismissal for lack of specificity in pleading raises no more than settled fraud in advertising particularity exceptions.

2. Preliminaries.

(i). Review Is De Novo, And The Admitted Evidence Is Reached.

On appeal "from the trial court's order granting Defendants summary judgment, [the court] independently examine[s] the record in order to determine whether triable issues of fact exist to reinstate the action." *Wiener v. Southcoast Childcare Centers* (2004) 32 Cal.4th 1138, 1142.

Although the part of the judgment appealed from was granted on the pleadings, the admitted evidence is reached. On de novo review, judgments are affirmed for any cause the record supports, and the record contains full argument on the substantial evidence. See, e.g., the separate statement of facts, at 1v104-108. Only in the reply did CB-Cendant reduce the motion to one on the pleadings, in a transparent attempt to finesse the specificity of the opposing evidence. See p.21.

The admitted evidence is also reached because the *fact* of ostensible agency, i.e. the culpable creation of a false impression of agency, was adjudicated on the evidence re the fiduciary claim, and is an integral part of the fraud in advertising claim. Ostensible agency is not *essential* to the fraud claim, because the sued on assurance of national standards is plain enough, regardless of apparent agency. Service standards may be assured by many means short of actual agency. A customer satisfaction form would suffice. As quoted at 36, *Kaplan* recognized this distinction. After finding that an induced belief in *some* standards would be natural, it added that Kaplan "might *also* think that Marsh was an ostensible agent."

However, apparent agency and the assurances of standards are inextricably intertwined, since they arise from the same sets of words and images. Moreover, the deceptive deployment of the phrase "independently owned and operated," to secure exactly the sort of summary adjudication that issued, is a key part of the alleged fraudulent scheme.

(ii) The Dismissal Was A Close Call That Begs Appellate Clarification.

In 2002, the Hon. Henderson overruled an objection that the fraud in advertising claim was insufficient, and denied a later motion to disallow only its prayer for punitive damages, in which CB-Cendant categorically conceded that it stated a claim for fraud. See p.12. The Hon. LaCasse's 2004 dismissal on the pleadings seems to conflict with these decisions, though new subpoints and slight amendments reconcile them, at law. Thus, the dismissal for insufficiency comes credibly close to violating Code Civ. Proc. section 1008, and so begs appellate clarification -- as do the trial court's final words on the matter (RT2:10:8-11):

> As to an error of law on the issue of ostensible agency, it's the best I can do. The appellate court will have to – you know – tell me about that.

(iii) The Collateral Verdict Indicates That This Appeal Is Not Barred, And That The Bulk Of Johnson's Damages Remain To Be Recovered.

If the jury had found *no* fault with CB-Pacific, the fraud claim would be moot, for it rests on injuries caused by actionably substandard services provided by CB-Pacific. It is therefore necessary that the record show the jury's findings of fault.

The record must also show the amount and substance of unawarded damages still obtainable from CB-Cendant, to set to rest possible doubts as to whether this appeal seeks a de minimus or collaterally barred shortfall. True, the fraud is arguably justiciable for nominal damages, owing to the public interest against false advertising. But this argument is tricky, since Bus. and Prof. code section 17200 plaintiffs must now show actual injury. To avoid it, the above excerpts of the record are selected to also show that the verdict is wholly consistent with the allegations of fraud against CB-Cendant, that the court refused to reassign CB-Cendant's $7,190.74 costs to CB-Pacific, and that this appeal represents Johnson's last chance to recover the large portion of his savings that the action always sought. See p.24.

Perhaps this court refused mandate mindful of the possibility of full recovery through the partial trial. Unfortunately, the circumstances that the petition sought to foreclose have come about. The small award of $13,500 for economic damages is consistent *only* with a finding that CB-Pacific not pay any soil-related damages, in light of those repairs exceeding $200,000. 3v590. It would be beyond reason to attribute such a large difference to any expert's bias. That the jury found against soil-related damages is further supported by the question that it asked the court, as to whether it could consider any damages beyond those that the advice of a geologist would have prevented. See p.24.

More concretely, a verdict must be construed as consistent with the law, where possible. Johnson's costs authority, *Stearman v. Centex Homes*, (2000) 78 Cal.App.4th 611, 625, held that just such undisputed pre-trial expert payments *must* be awarded where a defendant is found liable for repairs costs, wherefore it ordered payment of such a sum in full, *without remand*.[9] 3v591-592. Thus, the award of $13,500 for *all* of Johnson's economic damages necessarily implies that the jury did not find liability re the soil-related damages, else, the award *must* have exceeded $23,041.76, to comply with *Stearman*.

The petition alleged such a verdict likely, in light of: (a) CB-Pacific having given Johnson a standard form advising soil inspection; (b) Johnson having accepted the oral advice against a soil inspection, only because of CB-Cendant's trademark; and (c) the therefore ineluctable adjudication, that thereby Johnson acted as no reasonable person would.[10] Johnson was constrained to apologetically plead a "vulnerability" arising from his unreasonable belief in the publications of a third party, rather than the outrage of one doubly deceived by lockstep lies and terminological twists. See 3v582:20-3v583:10.

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[9] "Because the uncontradicted testimony established plaintiffs were billed $37,500 by professionals who investigated the problems in order to formulate an appropriate repair plan, it would serve no purpose to remand the issue for further consideration."

[10] The verdict would also be consistent with a finding that Johnson fabricated the oral advice. This seems improbable, given the verdict of intentional misrepresentation against CB-Pacific. But there was no special finding on this triable fact, and none may second-guess the jury's path to its general verdict. Johnson demonstrates simply that the claim against CB-Cendant is not moot or collaterally barred, in whole or part.

Despite this arguably harmful prejudice, the trial was otherwise fair, and Johnson fully accepts the jury's verdict. As alleged, "CB-Cendant's conduct is more oppressive and malicious at law than that of its co-defendants." 1v77:20-21. What matters is that Johnson *can* still recover his six-figure soil-related damages, but *only* from CB-Cendant. He stands square with Kaplan, who could recover nothing from a defunct franchisee.

(iv) The Complaint, With "cb.com," May Allow Quick Review, And Attachments A and B May Assist.

The contested part of the Order formally granted a motion *on the pleadings*, re fraud in advertising. 3v429; RT1:7. Accordingly, this court throughout should be mindful of the scope of the allegations, especially re the dispositive issue of advertising. In brief, if the advertising concerns the website cb.com, then it is "alleged" in full detail. The full text of the first three pages *is* Exhibit B of the complaint (1v82-83). Its deceptive content is alleged using words and phrases quoted from that text. 1v74:9-17. The deceptive content of two further cb.com pages is then quoted, particularly recommending CB-Pacific, Balter, and Dodds. 1v74;17-22. The description identifies them, and they are at 2v130-131.

In Johnson's opinion, the court need not look beyond the four corners of the complaint, with its cb.com exhibit, to resolve all the issues herein. Thus narrowed, the issues boil down to a simple question of law:

Is it credible that the text of cb.com could have induced a belief in the existence of nationally assured standards of customer service, as a matter of fact on which a naïve first-time house buyer, moving to the country, might reasonably rely?

As each point is reached, this court might most expediently first ask, where advertising is at issue, whether the point is made *based on cb.com alone*. The resulting set of positive answers should suffice. Accordingly,

pursuant to Cal. Rules of Court, rule 14(d), and in the style of *Kaplan,* Attachment A shows the three pages as they appear on the website, and in evidence at 2v127-129.

Attachment B (2v147) exemplifies the influential local advertising. It shows the "Call Coldwell Banker period" format, introduced and explained in the summary judgment proceeding. 2v115:12-13, RT1:14:3-14. The back page of the weekly Independent Coastal Observer perennially shows this "Display Shell" from CB-Cendant's "Ad Kit." Such a shell is in the Coldwell Banker Policy Manual, at 2v182. No "independently owned and operated disclaimer" is visible, for the reason noted at 22.

3. The Fraud In Advertising Allegations Are Specific Enough.

The Order dismisses the fraud claim for lack of specificity, "as set forth in defendant's brief." It is the Order that lacks specificity.

Is this what the court means (1v17)?

> In order to meet the specificity requirement in an action against a corporation, such as here, the plaintiff must allege the names of the persons who allegedly made the fraudulent representations, their authority to speak, to whom they spoke, and what they said or wrote and when it was said or written. *Tarman v. State Farm Mutual Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.

Johnson must again point out that in the next sentence *Tarman* recognized the corporate publication exception, where "defendant must necessarily possess full information concerning the fact."

Boeken v. Philip Morris Inc. (2005) 127 Cal.App.4th 1640 (*Boeken II*) is now Johnson's substantial-evidence-standards-re-fraud-in-advertising authority. It affirmed *Boeken I,* reprinting it in all pertinent parts. A petition for review is pending in the Supreme Court.. At the outset, it crushed CB-Cendant's *Tarman* tactic. At 1658-1659, it held that Philip Morris, the party seeking to show that no substantial evidence supported the

verdict had not performed its first duty, of fairly summarizing all of the evidence, the bulk of which it had contrived to avoid by turning a blind eye to the settled and simple standards that exceptionally govern re fraud *in advertising*. *Boeken* adduced that Philip Morris had adopted this tactic because it knew it had no argument against the standards, and no answer to the evidence.

Boeken sued Philip Morris over 1950s and 1960s advertising. It was enough to allege that its advertisements then targeted gullible youths such as Boeken, and had intentionally induced him to mistakenly believe that he could smoke without risk of addiction or harm to his health; and that he therefore smoked, became addicted, and suffered ever-worsening illnesses. *Boeken* found the verdict of fraud, and a large punitive damage sum, amply supported by substantial evidence.[11]

At 1660-1663, the court rejected the "contention that Boeken's fraud claim failed because he could not recall a particular advertisement that made him decide to smoke" (1660). The court recognized that recurrent exposure to images and messages, even if only seen in glimpses or heard in snatches, "results in 'associative learning'" (1661). A recollection of "being impressed by the ads" was not without weight (1662).

At 1666, the court reiterated that, under California law, whether reliance is reasonable is fact for the jury, and, at 1667, that vulnerable targets of intentional fraud may recover from those that exploit their gullibility, ignorance, or naiveté.

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[11] Deciding whether substantial evidence supports a verdict after trial is equivalent to deciding whether substantial evidence supports a trial in a summary judgment motion. *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 739-740.

Underpinning this, at 1660-1661, the court recognized that *intention may be reasonably inferred from the fact that advertising targets a certain population, and exposure to that advertising may be reasonably inferred from being a member of a targeted population*. In sum, the fraudulent advertising *campaign* was put at issue by an alleged intention to induce a specified mistaken belief, and the defendant was compelled to substantially produce the advertising that issued in the alleged period. Only then were the statements and messages identified that would have foreseeably induced the mistaken beliefs that smoking was not addictive and no risk to health.

Johnson's claim is structurally the same as *Boeken's*, re the induced belief that he was receiving services pursuant to standards somehow set by an established national organization, and re advertising targeting naïve first-time house buyers. Johnson's allegations re the advertising vastly exceed the specificity standards set forth in *Boeken II*, as is appropriate in light of relative recency.

Indeed, the complaint itself, with cb.com as Exhibit B, suffices to raise a triable fact as to a false publication, with incontestable specificity. Cb.com is alleged as having particularly influenced Johnson. It includes phrases that the complaint quotes, which allegedly target vulnerable first-time house buyers, and induce a belief in nationally assured standards of service. And the full text of the offending publication is incorporated.

In addition, although the complaint itself did not exactly specify the "like advertisements of nationally assured standards" alleged in "then current CB-Cendant televised advertising," this narrowed the possibilities to two terse television advertisements (2v134,135), and all details were filled in during discovery, as noted in disputing Fact 11. "Plaintiff's long-served trial exhibits include the alleged television advertisements. They are all extremely brief,..[2v134-137]" 1v105.

Finally, Johnson's detrimental reliance is plainly specified by the allegations of decisive reliance on his induced belief in nationally assured standards, in accepting CB-Pacific's advice re a soil inspection.

4. A Fraudulent Matter Of Fact Is Alleged And Is Triable.

(i) The Promotion Of Nationally Assured Standards Of Service, Where None Exist, Is An Actionably False Matter Of Fact.

The alleged advertising targeting plaintiff, on which he justifiably relied in believing in the existence of *some* national standards, on their face comprise glowing affirmations of nationally assured standards of customer service. The language of the order, in finding such advertising no more than matter-of-opinion hyperbole, overlooked the only message alleged as false, namely, that *some – any* -- standard(s) were assured. The motion for new trial eliminated all uncertainty, by making the distinction between *some* and *no* such standards, between some knowledge and none, its central thesis, as follows. 3v455-458.

The key allegations of falsity in fact are (1v75):

> CB-Cendant in fact had and has a strict corporate policy of absolutely *not* assuring national customer service standards, by setting none, by monitoring none, and by refusing to consider the merits of any customer grievance against affiliates and their officers, however plainly documented, and however outrageous.

The distinction between mere puffery, where *some* service standards exist, and fraud, where there are no service standards to puff, is illustrated by the Order's citing Allstate and State Farm jingles as "analogous." These jingles are far more modest than the best-interest-of-customer-above-all, hallmark-since-1906 advertising on cb.com, but the material difference is that Allstate and State Farm actually do (or hypothetically could) set *some* service standards. And, if they set none, then their advertising would be fraudulent too.

To demonstrate (rather than prove) the material difference, 3v501-502 shows two State Farm web pages, describing how, to become one of *its* "independent" agents, requires approval through interviews, background checks, and evaluations, and then the successful completion of nine-months of Intern Training. This entry-level course contrasts with the management-level acceptance of CB-Pacific's broker-owner Balter ("not sure if I filled out a questionnaire, or if it was just an interview"; 3v494). Dodds, who is advertised as "in top 5%" (2v131) of agents nationally, testified (2v487):

> Q Have you ever had any contacts with Coldwell Banker Central?
>
> A No.
>
> Q Have you ever been to any of their training classes?
>
> A I did go to a training class that was sponsored by Coldwell Banker once, yes… Four or five years ago -- four years, I guess.
>
> Q Are you familiar with any manual of policies and procedures generated by Coldwell Banker Central?
>
> A There may be one but, if so, I'm not familiar with it.

Organizations that provide a customer grievance procedure are also in stark contrast to CB-Cendant, with its policy of disowning customers the moment they complain. This irreconcilable difference impeaches the testimony of Sertich, Director of Public Relations, and author of the press release re coldwellbanker.com shown at 2v132-133 (3v475):

> Q. What factual basis is there, to your knowledge, for customer satisfaction being the company's hallmark?
>
> A. It's our culture.
>
> Q. ...You mean if a customer comes to you, you say we'll do anything for you?
>
> A. We don't deal with customers.

Only after two pages of objections, did Sertich admit the obvious -- that "our customers" on coldwellbanker.com means "Home buyers and sellers." Only after two more pages of the same objections, did she again admit the obvious -- that "Coldwell Banker sales associates" means "sales associates that are affiliated with Coldwell Banker affiliates." 3v476.

(ii) *Kaplan* Equivalently Held That Whether Coldwell Banker "Stood Behind" The Services Provided Under Its Name Was A Matter Of Fact, In Which Its Advertising Would Ordinarily Induce Belief.

Kaplan assessed the sum effect of Coldwell Banker's advertising campaigns and policies, albeit not of cb.com, finding that they would of course induce a belief that Coldwell Banker in *some* way "stood behind" the real estate services provided by its local offices, i.e. a belief in *some* standards of service being assured by Coldwell Banker (747-748):

> Here Coldwell Banker made no specific representations to appellant personally. It did, however, make representations to the public in general, upon which appellant relied. We understand why appellant, and members of the public generally, might believe that Coldwell Banker "stood behind" Marsh's realty company. The venerable name, Coldwell Banker, the advertising campaign, the logo… were and are designed to bring customers into Coldwell Banker franchises. As appellant stated at his deposition: Coldwell Banker's "outreach was successful. I believed they [the realtors] were Coldwell Banker. They do a good job of that."

Kaplan recognized that the induced belief that the services provided were subject to *some* sort of brand control was a reasonably relied on matter of fact. This is the *only* belief upon which Johnson bases his claim. The finding that the at least equivalent advertising in cb.com contains no more than hyperbolic opinion on which no reasonable person would base an action at law, completely misses this point, and is in conflict with *Kaplan's* preliminary finding re the induced belief that Coldwell Banker "stood behind" its realtors (at 747-748):

> Appellant, a sophisticated real estate investor and superior court judge, did not notice the small print disclaimer language. Instead, he relied on the large print and believed that he was dealing with Coldwell Banker, i.e., that Coldwell Banker "stood behind" Marsh. An ordinary reasonable person might also think that Marsh was an ostensible agent of Coldwell Banker. We obviously express no opinion on whether a trier of fact will so conclude or whether appellant was himself negligent. …[W]here, as here, the plaintiff introduces some evidence raising a triable issue of fact on an ostensible agency theory, such is sufficient to withstand summary judgment.

Herein, some evidence raises a triable issue of fact on a fraud theory, based not on an induced belief in the existence of the strongest form of consensual control, actual agency, but based on a belief in *any* meaningful control. This summary judgment must likewise be reversed.

To show that this lesser belief was reasonable in light of the hyperbolic advertising is no problem. Mere use of a national trademark imputes as much. *Barcemerica, infra*. A difficulty usually arises in proving that *no* meaningful controls are in effect, with respect to the rendered services. Remarkably, this is no problem either, herein, because it is a candid admission.

(iii) The Non-Existence Of National Standards Of Service Is A Fact Triable Under *Barcamerica's* Naked Licensing Standards.

Assured standards. Quality controls. Dependabilities. Distinctions. *Kaplan* adopted the phrase "stood behind," to the same effect. Herein, these words and phrases are but faces on the same coin. To lack one is to lack another. A complete lack of them is the allegedly falsified fact. A legal term for this negative, where trademarked services or products are at bar, is "naked licensing." In such cases:

> The ultimate issue is whether the control exercised by the licensor is sufficient under the circumstances to satisfy the public's expectation of quality assurance arising from the presence of the trademark on the licensee's goods or services.

Restatement (Third) of Unfair Competition § 33 cmt. c (1995).

Barcamerica – which promptly became hornbook law -- set forth the apposite standards of proof. For starters, the public's expectation of some sort of quality assurance is *presumed*, as a matter of law, from mere trademark use. Naked licensing is then shown through the methodical and logical disproof of all possible controls.[12]

Barcamerica found naked licensing, re the marketing of wine under a licensed trademark. It is immaterial that franchised services, rather than products, are at bar:

> What matters is that Barcamerica played no meaningful role in holding the wine to a standard of quality…The point is that customers are entitled to assume that the nature and quality of goods and services sold under the mark at all licensed outlets will be consistent and predictable. [Citation.]. And "it is well established that where a trademark owner engages in naked licensing, without any control over the quality of goods produced by the licensee, such a practice is inherently deceptive." [Citation.]

Barcamerica at 598.

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[12] Controls take multitude forms, and just *one* meaningful control is a sufficient defense. One clause in a contract is enough, with proof of practice. A postage-paid customer satisfaction form in every Coldwell Banker office would suffice, if reasonably attended. Naked licensing law addresses only total offenders – total, that is, within the defined sphere of operations. Johnson's allegations of utterly uncontrolled operations are limited to the customer services provided by franchisees. Then again, these services are the substance of the business.

This inherent deception of course becomes affirmative fraud in franchisor advertising that touts the quality of services assured by the trademark. This is consistent with the state's common law fraud standards, argued by Johnson in opposing summary judgment (3v380):

> Because CB-Cendant in fact receives no information as to the quality of customer services provided by franchises, its advertising to prospective customers, that the 'Coldwell Banker' trademark assures "honest and professional" services, being based on *no* information, is at best knowingly reckless, and so actionably fraudulent.

A franchise contract is examined for a lack of meaningful or practiced controls. Blanket indemnity provisions are another indicia of naked licensing. *Barcamerica*, at 596. CB-Cendant's franchise contract has blanket indemnity provisions (1v40), and but a two-sentence customer service clause (1v59), a right to investigate so obscure that top managers do not know of it (3v470,478-479,482,485).

A total lack of meaningful standards is all but conclusively shown where, as alleged herein, the franchisor is uninformed as to the quality of services provided. Subjective or conclusory substitutes for hard data do not cut the mustard (*Barcamerica* at 597-598):

> Barcamerica has failed to demonstrate any knowledge of or reliance on the actual quality controls used by [the franchisee], nor has it demonstrated any ongoing effort to monitor quality …[A]t the very least, one might have expected Barcamerica to sample on an annual basis, in some organized way, some adequate number of bottles.

Equivalent ignorance and uninvolvement is admitted in the testimony of CB-Cendant and CB-Pacific managers and agents, e.g. (3v469):

> Q. When Coldwell Banker, as you say, in 1981 began having independent contractors as offices, how did it preserve the tradition of integrity and honesty? Are those preserved in the franchise offices?

> A. It would be Coldwell Banker's hope that when a franchise is sold to an independent, those would be qualities that that broker would adhere to, too.
>
> Q. Yes. Hope. It would be everyone's hope. I am sure no one would disagree with that. I am talking about controls. Meaningful controls?
>
> A. No.
>
> Q. So there is no controls as to integrity and honesty of which you are aware. Is that true? Of independent -- the independent contractors.
>
> A. Right.

CB-Cendant's longstanding position on Johnson's case against CB-Pacific has always been that "we don't know what the right answer is" and that the franchisee's bald denial ("That's it.") is enough to justify unabated "Premier Coldwell Banker Office" rankings, and so forth. 3v484. But *Barcamerica* pierces the corporate sweethearts veil. Back-patting culture is not enough. At the very least one might have expected a customer satisfaction form in each office, like in car dealerships. One might even have taken it for granted that a "Premier Office" must maintain basic procedural and filing standards. One would be wrong. 3v488.

The deposition highlights are listed at 3v465-466, under captions including several that plainly address *Barcamerica's* standards, namely:

No Knowledge Of Customer Services
No Complaints/Investigations/Actions Re Customer Services
No Required Training Or Customer Satisfaction-Oriented Programs
Controls, Only Of Coldwell Banker Mark And Sales Volumes/Payments
No Local Contact Or Effect On Customer Services
coldwellbanker.com Not Read [by CB-Pacific realtors]
Procedures And Files
National Rankings Based Only On Dollar Sales
"Independently Owned And Operated"

This testimony is far from all. There are Johnson's charges of intentional misrepresentation, now established, in which CB-Cendant had no interest. The are CB-Cendant's written policies, in essence assuring that CB-Cendant knows nothing of, and in no way controls, the services that it promotes and profits from. The policy, and the form letter that disowns complaining customers and gently encourages the affiliate to try and settle, are at 2v:171, 184. At most, the same letter is sent twice. Not even one is sent if, as in Johnson's case, a suit has been filed against the affiliate. 3v471. Why is this not *more* cause to urge settlement, or to step in?

5. The "Conclusive Disclaimer" Ground Lacks Merit.

(i) In Any Trademarked Services Promotion, The Bald Assertion "Independently Operated" Is Facially False And Vapid.

In advertising that promotes a franchised trademark, no occurrence of the phrase "independently owned and operated" can, *per se*, meet a summary judgment movant's initial burden of discounting a reasonably induced belief that *some* standards are assured by the franchisor. To the legally savvy, the phrase might discount ostensible agency, "independent" being jargon for controls not in practice satisfying the criteria for "agency," another term of art. In the continuum of control, independence begins where agency ends. Only in this technical sense, does the phrase have meaning, and even this understanding can be buried by context.

What of the context herein? Here again is that one sentence, in the middle of cb.com, on which the court relied on in ruling out ostensible agency. As to what plaintiff actually read, Defendants introduced *only* this occurrence of the phrase. The underlining was added by CB-Cendant in quoting the phrase to the court (1v13:9), and the italics were added by Johnson, in quoting CB-Cendant's quotation to the court (3v452):

> Coldwell Banker Real Estate Corporation, a subsidiary of Cendant Corporation, *has* more than 3000 independently owned and operated residential and commercial real estate offices with over 75,000 sales associates globally.

The very sentence relied on encapsulates and exemplifies the inherent and intended contradiction. The phrase is merely adjectival, while *the main verb, "has," states the opposite*, in giving impressive *worldwide* numbers. In finding this disclaimer conclusive against ostensible agency, the court states that Johnson had read that "there are '3,000 independently owned and operated' offices." It has replaced the governing contradiction, "Coldwell Banker has," with "there are."

But even as an unqualified stand-alone sentence, the disclaimer could not conclusively rule out ostensible agency, not to the common man. And it could never trump the perception of standards – of dependable qualities -- without which a trademark is invalid:

> It is well-established that a 'trademark owner may grant a license and remain protected [only] provided quality control of the goods and services sold under the trademark by the licensee is maintained. [Citation.]

Barcamerica, supra, at 595.

A bald assertion of independent operation is simply false, according to both Webster's and Black's definitions of "independent."[13] Literally ludicrous, its systemic semi-semi-use evidences nothing but an irrelevant uncertainty, perfectly placed. CB-Cendant's Undisputed Fact 10 is the oxymoron that sums it up (1v10; emphasis added):

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[13] In full, Black's definition is: "**Independent.** Not dependent; not subject to control, restriction, modification, or limitation from a given outside source."

> CENDANT/CB REC *requires* that franchisees, in their advertisements, identify themselves as 'independent.'

But not all the time, and in vanishingly small print. 2v179,180; Attach. B.

Johnson particularly pressed Cardwell, the head of legal services for Cendant's entire real estate group, to reconcile "independently operated" with such clear controls. He professed an inability to perceive any conflict. He essentially agreed that whereas CB-Cendant would do nothing if a customer complained of an agent's intentional misrepresentations, it would come running if told the agent had put up a pink Coldwell Banker sign. The selective enforcement of contract terms did not conflict with his notion of independent operation. 3v330-342,348. Ultimately, he explained that what "independently operated" meant to him, was that franchisees are free to violate the terms of the franchise contract (3v481):

> Q. The statement that each franchise is independently operated does not mean that it conducts its most essential real estate functions such as accounting without constraints, is that true?
>
> A. [T]hey're not constrained from doing anything. If they choose to do something incorrectly, I can't stop them unless I decide to take action under the contract. So if, to use your example, they don't pay royalties in a timely manner, they're not constrained, in my opinion, from not paying them; they simply made the decision on their own to breach a contract.[14]

But being born of contract does not mean that operations are independent, in fact or at law. Tight contractual controls *can* create agency at law. As in *Kaplan*, at law independence/agency for liability purposes rests on contractual clauses and performance practice. And public policy of

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[14] Johnson does not dispute that the public would be fairly alerted by Cardwell's synonym: "Free To Violate Our Franchise Contract."

course can override: state code holds brokers automatically liable for the wrongs of their "independent" realtors.

A few pages later, prompted to explain an "abandonment," Cardwell ultimately slipped up, conceding that, as ordinarily understood, franchisees are obviously not "independent" (3v482; emphasis added):

> They just shut down their operations, took the signs down one day and *went independent* or went to another franchise.

National trademark promotions, simply because of the universally employed name/logo, presumptively pose agency. See *Tustin Community Hosp. v. Santa Ana Community Hosp*. (1979) 89 Cal.App.3d 889, 907 (cross-institutional use of name "prima facie potential for confusion"). The ten thousand "Coldwell Banker" signs that each adult has seen is singularly telling. In moving for a contrary summary judgment, the presumed exposure imposes the additional burden of showing the *overriding* clarity of an agency disclaimer. If a bald assertion of independence had weight against trademark-implied standards, it could at most raise a triable issue.

(ii) Ostensible Agency Herein Is Certainly Not Inconsistent With *Kaplan* Or *Cislaw*.

In light of the admittedly read "independently operated" phrase, the Order at 3 entirely discounts all plaintiff's evidence in opposition, stating that ostensible agency herein "certainly is inconsistent with what *Kaplan* itself says and the case of *Cislaw v. Southland* (1992) 4 Cal.App.4th 1284."

But *Kaplan* did not even reach the interpretation and weight of the "independently owned and operated" disclaimer. It did not need to, having found that phrase so pervasively inconspicuous as to explain its never having been noticed by a Superior Court judge and sophisticated real estate investor. This directly *supports* plaintiff's testimony that the phrase, as insinuated, had left no impression on him.

Thus *Kaplan* certainly did not hold that the phrase, once read, would rule out ostensible agency; and if it had, that holding would be dicta.

Cislaw decided *actual* agency, and so is off-point. However, at 1290, it recognized "formidable" evidence of ostensible agency, as follows:

> [M]ore importantly, there was "formidable evidence" establishing ostensible agency: Allied's vice-president referred to the franchise as a "branch office" and Allied's office as the "main office"; at both locations, phones were answered, "Allied Builders"; both the franchisor and the franchisee were doing business under the same name; []the franchisor and franchisee employed common advertising" ([*Kuchta* v. *Allied Builders Corp.* (1971)] 21 Cal.App.3d 541 at pp. 547-548.)

See p.10 above, for allegations of such formidable evidence, quoted from cb.com.

V. CONCLUSION

For the foregoing reasons, the summary judgment against the fraud in advertising claim should be reversed. It should also be reversed on the public policy grounds shown in the petition for a writ of mandate.

Respectfully submitted,

July 7, 2005 _____

Clifford Johnson, appellant in pro per