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 REPLY 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

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)

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

AB = Appellant's Opening Brief

RB = Respondents' Opposition Brief

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

CERTIFICATE

I, Clifford Johnson, appellant herein, hereby declare that, for the below brief, my word processor (Word 2003) reports a total count of 3,785 words.

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

August 31, 2005 _____

Clifford Johnson

I. SUMMARY

Respondents avoid the issues, misstate the facts, and affirm defenses that are a matter for public outrage.

They turn a blind eye to the crucial allegation that the mere existence of national standards of service is a persuasive fact. They suppress their promotion of this fact in their "Moon Walk" television advertisement, by introducing objections waived below, and in any case invalid.

To defend against the alleged deception, Respondents *affirm* that they do not control or monitor the quality of services provided under their Coldwell Banker trademark. This *defines* the "well established" deception of "naked licensing," per *Barcamerica*. Respondents see "no apparent" connection with *Barcamerica*, yet not one of their cases involve a total lack of controls and monitors re trademarked products or services. To more fully connect, at 4-5 Johnson adds Rest.2d Torts, § 539 cmt. c, to his authorities *Barcamerica* and Rest.3d Unfair Comp., § 33 cmt. c.

Respondents concede that Coldwell Banker franchises are obviously not independent, under the ordinary meaning of "independent." However, they continue to rest their *summary* defense on Johnson's having read this obviously untrue aside, which they bolster by misstating his testimony, by attacking his credibility, and by assigning him powers of divination. Respondents say they require conspicuous notice of independence, but do not try to explain why the notices remain inconspicuous, as *Kaplan* held.

Respondents concede that their main lack of specificity argument was wholly without merit, which the award in *Boeken* underscores.

II. ARGUMENT

A. Respondents Avoid The Issues And Misstate The Facts.

1. Respondents Avoid The Crucial Allegation, That The Mere Existence Of Nationally Assured Standards Of Service Is A Persuasive Fact.

Johnson stated the crucial question at the outset of his brief, at AB 2:

> [T]his 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.

At AB 33-40, Johnson spelled out with legal precision and completeness, the single and simple misrepresentation of fact on which he reasonably relied, namely, that he was receiving services under nationally assured standards, whereas no such standards existed.

Respondents feign inability to comprehend Johnson's simply stated reliance on the mere existence of national standards *per se*, demanding that he specify exactly *what* standards he was promised and found missing, to his disadvantage, i.e. (RB 12-13; emphasis in orig.):

> There is no better indication of the vague and non-specific nature of the complained of assertions than Johnson's own utter failure to articulate how he was misled by them, All he says, repeatedly, is that he thought the website's statements *implied* the existence of some sort of nationally assured standards. [AB cited.] What this means we are never told. We [] are never told what these purported "nationally assured standards" would be, or how [CB-Cendant] fell short of them.

The alleged *total* lack of national standards is perfectly plain, and not vague for the failure to list the infinitude of particular controls and monitors that do not exist. And Johnson has demonstrated that he can specifically prove the total lack, which is in any case conceded.

No business deal is wholly without risk. In buying his house, Johnson mistook the risk because he was assured that services provided under the Coldwell Banker trademark were subject to national standards. There are many controls that would almost certainly have precluded, and that could certainly have cured, the damages that Johnson suffered. Bear in mind CB-Cendant's assurances of honest services, and the verdict of intentional misrepresentation, based on evidence that CB-Cendant refused to consider. A particular control or set of controls just might not have saved Johnson. Johnson's complaint is that there were no controls whatsoever, and that CB-Cendant refuses information as to dishonest Coldwell Banker services, wherefore he was grossly deceived as to his degree of risk.

Respondents know well that dealing with a national corporation provides an added level of comfort and security, when doing business in a remote location, because of implied national standards. *This the persuasive point they themselves make in their "Moon Walk" advertisement* (AB 6). Herein, they pretend not to understand that the mere existence of nationally assured standards is a persuasive consideration, per se.

Respondents' strategy is to argue beside the point, and summarily dismiss the crucial question in the last paragraph of their brief (RB 19):

> Finally, any connection between any issue in this appeal and the discussion of "naked licensing" in *Barcamerica* [] is not apparent.

This evasion is one matter for public outrage, discussed at 11-12 below.

2. Respondents Avoid The Allegedly False Substance Of Their Factual Statements, And They Avoid The Conceded Allegation That Their Stated Opinions Had *No* Basis In Fact.

Respondents again work through the various statements attacked for affirming and imputing the existence of national standards, as though alleged as stand-alone misrepresentations. The statements divide into those defended as true, and those defended as non-actionable opinions. Under both categories, respondents fail to address the point that each statement affirms or imputes that franchised Coldwell Banker services are subject to some sort of national controls and/or monitoring.

The factual statements defended as true are false, as ordinarily understood. Respondents do not mention the misleading context, which Johnson oft elaborated, e.g. (3v378; see also 3v380, RT1 13:1-15, AB 39):

> Whereas CB-Cendant protests that it is simply true that Dodds is rated in the top 5% of Coldwell Banker sales associates, nationally, this truth is an intentional misrepresentation insofar as it contributes to a mistaken belief that Coldwell Banker monitors, inter alia, the level of customer services provided by Coldwell Banker agents nationally, and that Dodds scores high on an assessment that includes customer services.

The top national ranking is published without notice that it is based *wholly* on sales dollars, and takes no account of the quality of services provided. Read in the context of advertisements that puff the quality of services, it naturally imputes that the quality of those services is somehow monitored. The same is true of the persistent ranking of CB-Pacific as a "Premier Coldwell Banker Office," as pointed out at AB 11,39.

As for the statements deemed non-actionable opinion or puffery, Johnson has spelled out that they are actionably false only in that they *in fact* impute some basis in fact. After recognizing that exaggerations

expected in advertising generally discount reasonable reliance on the content of a vendor's opinion, Rest.2d Torts, § 539 cmt. c adds:

> However, a purchaser is justified in assuming that even his vendor's opinion has some basis in fact.

Respondents again offer authorities only re opinions having "some basis in fact." They first quote *Gentry v. eBay Inc.* (2002) 99 Cal.App.4th 816, 835, as holding that a "judgment as to quality, value, authenticity, or other matters of judgment" are not actionable. At bar was eBay's statement that a positive rating of a seller (reflecting prior customer satisfaction grades) on its web site was "worth it's weight in gold." eBay possessed a database correlating histories of positive grades with subsequent customer satisfaction ratings, per seller. These facts sufficed for the glowing opinion as to their "significance." eBay also removed sellers in the event of a substantiated extraordinary customer complaint, for which it provided a special procedure. Johnson has stressed that CB-Cendant's opinions would have been non-actionable, had they been based on any sort of customer satisfaction rating or complaint procedure. AB 26, 39.

As with the purportedly analogous State Farm and Allstate jingles, the multiplying citations render the extreme nature of the deception at bar ever more clear and convincing. *Consumer Advocates v, Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1352, 1361, involved publications puffing a direct product of the defendant. *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 301, 412 involved a publication puffing the city's own harbor. *Cook, Perkis & Liehe, Inc. v. Northern Calif. Collection Serve Inc.* (9th Cir. 1990) 911 F.2d 242, 245-6 puffed the lowness of prices that it set for its services, not the lowness of unknown prices set by a separate organization.

Johnson did not rely on the opinions for the truth of their exaggerations, but because a reputable national organization made them, in

such a fashion as to impute knowledge arising from controls and monitors. CB-Cendant's opinions and puffery as to the quality of customer services provided under its trademark impute known underlying facts, whereas it is now undisputed that CB-Cendant altogether avoids monitoring the quality of customer services provided under its trademark.

In addition, Johnson does not accept that all of the statements defended as opinions are not factual. Some are false in fact, e.g. (3v381):

> Because CB-Cendant in fact has a strict policy of not considering the merits of any customer grievance against a franchise, the chanting of "guarantee" and "promise" in the TV advertisement featuring a naïve house-buyer, is knowingly false.
>
> Because CB-Cendant in fact receives no information as to the quality of customer services provided by franchises, and in fact has a strict policy of not considering the merits of any customer grievance as to those services, it is false and misleading to call prospective home buyers "our customers."

3. Johnson Testified That, Before Buying His Home, He Certainly Did Not Know That CB-Pacific Was Independently Operated; Nor Was He So Informed As A Matter Of Law.

In their statement of facts, respondents' (unnumbered) fourth caption at RB 5 announces that: "Johnson admits knowing that, before buying his home, he knew that Pacific was independently owned and operated." Besides the epistemological impossibility of knowing, and the unlikelihood of believing, an obvious falsehood, this misrepresents direct testimony.

Appearing below and in far lesser type than "Coldwell Banker" banners, the phrase "Pacific Real Estate" reads as a *descriptive* add-on. As quoted at AB 19, Johnson thus testified that when he bought the house he did not know even that "Coldwell Banker Pacific Real Estate" *existed*, let alone that it exclusively controlled customer services (2v217:22-2v218:1; 2v221-222:1-9; see also RT1 14:3-14):

> A. 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. 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 to the incentive to operate even above national standard minima.

At RB 5, 17, Respondents justify the misrepresentation of Johnson's testimony by pointing out that he admitted reading the three cb.com pages, in the middle of which appeared the sentence:

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

This admission obviously does not prove that Johnson knew even that his local office was a separate entity. CB-Pacific is not identified, nor is it said that *all* "Coldwell Banker" offices are independently owned and operated. Nor would that be true, for CB-Cendant also has many real estate offices that it *does* directly operate.[1]

Besides his testimony, Respondents avoid Johnson's supporting evidence as to what he knew when he bought the house. They dare not discuss even the sentence in which the "independently owned and

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[1] Not until 1981 was the Coldwell Banker license sold to non-agent offices. AB 38-39. See, e.g., the party in *Coldwell Banker Res. Brok. v. Superior Court* (2004) 117 Cal.App.4th 158.

operated" disclaimer was read, because its verb, "has," together with counts given to impress, directly contradicts and buries the merely adjectival aside. Nor do they discuss the conflicting content of the rest of cb.com, except to dismiss it as mere opinion. Nor, as discussed below, can or do they now dispute that, under the ordinary meaning of the word "independent," CB-Pacific does not operate as an independent.

Instead, at RB 17, implicitly conceding that Johnson might have failed to get the purported message, they argue that Johnson's having read the above phrase is conclusive per se, i.e.:

> As a matter of law, Johnson…was on notice that Pacific was an independently-owned-and-operated office.

To be a defense, this must mean that Johnson was narrowly informed that CB-Cendant in no way controls or knows the quality of services provided under its Coldwell Banker mark. He was not so informed, in fact or at law.

Respondents' own, supposedly conclusive contextual evidence and argument is beyond bounds of reason and sincerity. Having argued, with partial success, that the trial court should not forgive a pro per's universally defective declarations (3v387-390, RT1 5:25-27), they now argue (RB 18):

> [Johnson] insinuates that he didn't understand what "independent" means. The Court should reject this disingenuous argument out of hand. Johnson had advanced degrees from Oxford University and Sussex University in England. Proceeding *in propria persona*, he managed…to prevail at [] trial. And he [] demonstrates far more than a passing understanding of many sophisticated legal concepts.

Johnson has certainly not insinuated that he did not understand the word "independent." He did and does understand it. It is respondents who contend that dictionary definitions do not apply, disingenuously insinuating that the common usage of words is not the standard under which public advertisements must be written.

In any case, it is for the jury to decide whether Johnson's testimony is disingenuous. Johnson need not counter that his own evidence – the evidence that CB-Cendant adamantly refused to consider -- was so strong that even a stumbling first-timer prevailed at trial, by a vote of 12-0 re breach of fiduciary duty. 3v554. Nor need Johnson protest the citation of a curriculum vitae not in the appellate record. Respondents' arguing this contextual evidence, and at such a stretch, is self-defeating.

4. The Term That Requires "Conspicuous" Notices Of Independence Is Unperformed And Planted To Evade *Kaplan's* Findings That The Ongoing Notices Are Inconspicuous, And Set By The Policy Manual.

At RB 4-5, respondents again cite the oxymoronic clause *requiring* that franchises "conspicuously" identify themselves as *independent*. The clause is touted as conclusively proving CB-Cendant's intention "to prevent a client or anyone else thinking there was any agency relation between [CB-Cendant] and its franchises." However, franchise publications must conform to templates specified in CB-Cendant's Policy Manual, and the disclaimers are pervasively inconspicuous in these templates. *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741.

Respondents turn a blind eye to the fact that their templates dictate the inconspicuous and ongoing disclaimers in evidence. To affirm that these disclaimers are conspicuous would be frivolous. Respondents do, however, have the gall to affirm that CB-Cendant *requires* conspicuous independence notices, while making no effort to amend the vanishingly small type on the "Coldwell Banker, period" advertisement, attested to as influential at the time of the sale. 2v218-219. See also: 3v374-376; RT1 14:3-14; AB 16, Att. B 48. Petition, Att. B 17. Should the court wish, Johnson offers to provide a copy of the August 26, 2005 edition of this page, to show that it persists to this day.

In sum and substance, the franchise clause is an unpracticed plant, now cited in consummation of the scheme to avoid liability for profits made by contrarily inducing a mistaken belief in the existence of meaningful quality controls re customer services. By this device, CB-Cendant evades the showing that, *in practice*:

(a) CB-Cendant strictly requires that franchise advertising conform to templates that state the purportedly required message, if at all, obscurely and inconspicuously;

(b) CB-Cendant made no effort to clarify the templates after *Kaplan* (1998) found them so inconspicuous as to have credibly and culpably misled a sophisticated real estate investor and Superior Court judge; and

(c) CB-Cendant's own national advertising includes the disclaimer inconspicuously, in contexts that contradict and overwhelm it, including by calling franchises and their sales associates "Coldwell Banker" or "our" offices and agents, and prospective house buyers "our" customers.

5. Respondents Raise New Objections To The Evidence That Fully Specifies The Alleged Television Advertising. These Objections Were Waived Below, And Are Invalid.

Arguing lack of specificity re television advertisements, respondents for the first time object (a) that the handwritten "MAN ON MOON" reference to the "Moon Walk" advertisement at 2v134, which appears on the face of Johnson's deposition at 2v223, is inadmissible as improperly added, and (b) that the specifications given in his interrogatory responses at 2v206 are inadmissible because they conflict with Johnson's failure to recollect them in said deposition.

But in the "List of Documents/Excerpts" at 2v114, Johnson states that "the annotated edits are official," and the "List of Documents/Excerpts" is attested to as true and correct at 2v115. Had the

objection of impropriety been raised below, Johnson would have introduced the official cover letter, listing each correction, submitted within 30 days of receipt of the transcript. Johnson offers to do so now, if the court deems the objection not waived.

Respondents offers no authority for the disallowance of subsequently recollected information, in interrogatory replies. There is no contradiction in recollecting information, after due further consideration. Incidentally, the responses also issued within 30 days of Johnson's deposition. Compare the dates at 2v214, 215.

B. The Affirmative Defenses Are A Matter For Public Outrage.

1. Respondents Concede That They Do Not Control Or Monitor The Quality Of Services Under Their Coldwell Banker Mark, Outrageously Affirming The "Well Established" Deception Of Naked Licensing.

As quoted at AB 14, Respondents' purportedly undisputed fact 3, and Johnson's response, are as follows:

> 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…For pertinent examples: [franchise contract/Policy Manual citations.]

The citations include references to CB-Cendant's comprehensive control of franchise signage and advertising, discussed below.

However, it is undisputed that CB-Cendant in no way controls or monitors the quality of customer services provided by Coldwell Banker franchises. This sub-fact is not undisputed only by the above. The avoidance of any such controls or monitoring is attested to as the strict policy of CB-Cendant, by its responsible franchise relations, public relations, and legal managers, and it is confirmed by the terms of its Policy Manual and standard franchise contract. See AB 38-40.

Appellant's opening brief at 37 cited horn-book authorities showing that, even without affirmative puffery as to the quality of services assured thereunder, it is "well established" that the mere usage of a trademark is inherently and persuasively deceptive, if those services are in practice provided without any meaningful quality control(s).[2] Herein, respondents outrageously *affirm* such a total absence of quality controls, and they do so as a *defense* against the allegedly deceptive promotion of the Coldwell Banker mark, discounting glowing affirmations as to the quality of services assured under its trademark, as mere puffery.

In its final paragraph, at RB 19, CB-Cendant perfunctorily dismisses the authorities holding such practices deceptive, with a comment: "The case at bar, however, is not about the abandonment of a trademark." This ignores Johnson's explaining, at AB 38, how the attacked advertising – in that it expresses emphatic opinions with *no* knowledge of underlying facts - meet this state's common law fraud standards.

Besides, this case *is* about the abandonment of a trademark. It is about the abandonment of a trademark that *Kaplan* recognized as nationally "venerated." And it is about the exploitation of that now treacherous mark, to shake profits from naïve first-time house buyers put further at risk. And it is about a multinational corporation doing so with all the indignant innocence that it can conjure from one obviously obscure interjection of the phrase "independently owned and operated," and muster against a once naïve first time house-buyer.

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[2] Rest.3d of Unfair Comp. § 33 cmt. c (1995); *Barcamerica Intern. v. Tyfield Importers* (9th Cir. 2002) 289 F.3d 589, 598.

2. Respondents Concede That Coldwell Banker Franchises Are Obviously Not Independent, Under The Ordinary Meaning Of "Independent," Outrageously Resting Their Summary Defense On The Unambiguous Communication Of Some Overriding Meaning By An Untrue Aside.

Throughout discovery, in the trial court, and at AB 41, Johnson pointed out that, in light of the above referenced, undisputable controls, the

> bald assertion of independent operation is simply false, according to both Webster's and Black's definitions of "independent." In full, Black's definition is: "**Independent.** Not dependent; not subject to control, restriction, modification, or limitation from a given outside source."

As quoted at AB 20, the head of CB-Cendant's entire real estate litigation division used the word "independent" in its common sense, describing the abandonment of a Coldwell Banker franchise as a real estate outfit that "went independent, or went to another franchise."

In none of their papers have respondents ever disputed that the unqualified assertion of independent operation is obviously false, under the common meaning of the word "independent." Instead, as recounted at 8 above, they argue that Johnson is so intelligent that, as a matter of law, he divined that the obviously untrue assertion of independence certainly meant that Coldwell Banker did not control or monitor of the quality of services provided under its Coldwell Banker trademark.

Johnson contends that CB-Cendant's entire defense is frivolous, because it rests on his construing with certainty an overriding fact from an incidental occurrence of an obviously untrue assertion of unqualified independence.

3. Respondents Concede That Their Main Lack Of Specificity Argument Was Wholly Without Merit, Which The Award In *Boeken* Underscores.

Respondents have abandoned their leading authority and argument re lack of specificity, namely, *Tarmann v. State Farm Mutual Auto Ins. Co. (*1991) 2 Cal.App.4th 153, 157. They affirmed *Tarmann* as requiring that Johnson allege the names of those who published the fraudulent advertisements, their authority to do so, and so forth.

Conversely, Johnson showed that his fraud in advertising allegations were modeled on, but much more specific than, those found sufficiently specific in *Boeken v. Philip Morris Inc.* (2004) 122 Cal.App.4th 684, based on well-established law. The $50 million punitive damages award was reaffirmed after a rehearing in *Boeken v. Philip Morris Inc.* (April 1, 2005) 127 Cal.App.4th 1640, and confirmed by the Supreme Court denying review in *Boeken v. Philip Morris*, Case No. S133884 (Aug. 10, 2005).

In discussing *Boeken*, at RB 13-14, respondents now limit their lack of specificity objections to the issues discussed elsewhere, re the non-factual vagueness of the attack on statements in cb.com, and re the inadmissibility of Johnson's television advertisement specifications. See pp. 2-3, 10-11 above.

III. CONCLUSION

For the foregoing reasons, respondents' opposition lacks merit.

Respectfully submitted,

August 31, 2005 _____

Clifford Johnson, appellant in pro per