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 PETITION FOR REHEARING AND REQUEST FOR A CLERICAL CORRECTION

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

Clifford Johnson,
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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

Reply = Appellant's Reply Brief

CD/decision = Court of Appeal Decision herein, filed January 30, 2006

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 petition, my Word 2000 processor reports a total count of 6,456 words.

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

February 13, 2006 _____

Clifford Johnson

I. SUMMARY

Johnson requests that the decision be amended to correct a clerical error, by deleting footnote 2 on page 2.

The decision reproduces the trial court's order and CB-Cendant's rationales without mentioning *any* of the points made in the Reply. These points again protest that neither the trial court's order nor CB-Cendant have ever mentioned any of Johnson's counter-points, *nor even the one and only falsehood on which the claim for fraud is based.* As a result, re ongoing deceptive advertising that for a decade has saturated the state and put life savings at risk, this court has succumbed to and perfected a fraudulent scheme of which it had plain notice.

Also as a result of the failure to address the only alleged fraud, the decision is entirely beside the point, and void for lack of due process, in violation of U.S. Const., 14th Amend. Else, if not void, the decision has by necessary implication resolved that state law precludes reasonable reliance on an advertiser's opinion having a basis in fact, i.e. that California does not follow Rest.2d Torts, § 539, cmt.c.

Cal. Rules of Court, rule 28(c)(2) obliges a party seeking supreme court review to first file a petition for rehearing in the appellate court, pointing out material omissions and uncertainties in its decision. This petition fulfills that obligation, and gives this a court a further chance to respond to reasons why, as it stands, the decision is against public policy. For the court's convenience, the petition reproduces the most significant portions of Johnson's hitherto unaddressed briefings.

II. REQUEST TO DELETE CLERICAL MISTAKE

Johnson requests that the decision be corrected by the deletion of footnote 2 on page 2, in whole or part, because it is a prejudicial clerical error. It states:

> Johnson also purports to appeal from the order denying his motion for summary judgment, which is not an appealable order. [Citation.] He makes no separate argument as to why the trial court improperly denied his motion for new trial.

Johnson made no motion for summary judgment, and so the first statement and citation is a clerical and confusing mistake, which prejudicially slights Johnson's procedural competence. In addition, at AB 17-21, 33 Johnson explained exactly how his motion for new trial had narrowed the issues to those on appeal, and so the second statement is inapposite.

III. THE DECISION IS VOID FOR LACK OF DUE PROCESS, ELSE IT HAS NECESSARILY DECIDED THAT CALIFORNIA DOES NOT FOLLOW REST.2D TORTS, § 539 CMT. C.

1. The Decision Entirely Omits The Only Relied-On Falsehood, And So Is Void For Lack Of Due Process, Or Else Has By Necessary Implication Decided A Legal Question Of Great Public Concern.

Herein, a question of great public concern has been directly raised and decided, apparently as a matter first impression, namely:

> Does California follow Rest.2d of Torts, § 539, cmt.c, which states that "a purchaser is justified in assuming that even his vendor's opinion has some basis in fact" ?

The decision doe not approach this question, but by necessary implication has decided it in the negative.

The court states the essential allegations are as follows (CD 2):

> Johnson alleged that he accepted Dodds' advice not obtain a soil inspection in reliance 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."

These are the allegations of reliance quoted in Johnson's opening brief, at AB 9. However, the decision throughout ignores the allegations that immediately follow, which specify the only contrary fact that gives rise to the liability for fraud, namely, that *no* national standards exist (AB 9):

> CB-Cendant's liability for fraud is alleged as arising from ([Complaint,] 1v74:25-75:5):
>
> > advertisements of nationally assured standards [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.

The decision makes no mention of the key and undisputed fact that, as a matter of strict policy, *no* national standards are assured, by any means, i.e. that advertisements puffing the reliable quality of services have *no* basis in fact. Instead, the decision addresses each advertisement as though alleged as a stand-alone fraud, falsely promising some particular sort of highly reliable quality. Rather than consider the triable reasonableness of Johnson's reliance on his induced belief in the existence of some sort of national standards, the decision pointlessly reiterates that the advertisements are either true, or else cannot be relied on for the truth of their foreseeable exaggerations; and its disparagement of concomitant

evidence is beside the point.[1] Weighed against the *only* alleged fraud – the imputed existence of *some* national standards -- how could the court possibly, let alone perfunctorily, dismiss advertising re ongoing "hallmark/traditions," etc.?

The logically total disregard of the only relied-on falsehood is conclusively shown by the court's two authorities, and its two informal citations. CD 5. The authorities are *Consumer Advocates v, Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1352, and *Gentry v. eBay Inc.* (2002) 99 Cal.App.4th 816. DCA 4. Johnson's Reply at 5 carefully pointed out that these cases were irrelevant, because they did not concern advertised opinions having *no* basis in fact. Moreover, he showed that each sort of control and known fact in those cases was particularly excluded re CB-Cendant. With the same thoroughness, the brief showed that the informal citations of All State and State Farm jingles were irrelevant. AB 17,20,33-34. The only on record authorities involving advertisements having no basis in fact, and thus the only relevant ones, are Johnson's: *Barcamerica*; Rest.3d Unfair Comp., § 33 cmt.c; and Rest.2d Torts, § 539 cmt.c.

The Reply at 5 pointed out that the inability of CB-Cendant and the court to cite even one instance of advertising having no basis in fact, whereas in total they cited *six* instances of advertising that did, showed just

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[1] In so doing, the decision omits the most telling statements, such as cb.com's calling prospective franchisee customers "*our* customers", and local offices/agents "Coldwell Banker offices/agents." And what of the chants of "guarantee, promise" in TV advertising? Other rebuttals are also omitted. See Reply 4, beginning: "The factual statements defended as true are false, as ordinarily understood…"; and Reply 10-11, re recollected TV ads detail added to Johnson's deposition in the 30-days allowed.

how distinctly corrupt is CB-Cendant's shameless policy of hyperbolic advertising, having no basis in fact.

The utter failure to address the only actually alleged fraud, despite Johnson's plainly and repeatedly pointing out the omission, renders the decision void for lack of due process, in violation of U.S. Const., 14th Amend. The due process requirement would be met merely by an amended decision simply stating that Johnson could not rely on the advertising having any basis in fact. The remainder of this petition assumes, arguendo, that the decision is not void, that somehow this minimal result is implied by the decision, even though its authorities and logic prove that the issue was never considered.

The separate statements of fact in the summary judgment motion, as unequivocally elaborated by the testimony of CB-Cendant managers, show it undisputed that CB-Cendant as a policy generates business for its franchisees, including Coldwell Banker offices, from which it garnishes royalties, through advertising that puffs the quality of the services they provide, without any meaningful controls over or knowledge of the quality of those customer services. Limited controls admitted pertain to other operations -- signage, royalties, sales volumes. CB-Cendant's upheld affirmative defense is that it does not matter that its advertising has no basis in fact, that Johnson could not justifiably rely it on it, period. By direct and necessary implication, the decision holds that Johnson could not justifiably have assumed that the franchisor's opinion had any basis in fact.

2. Synopsis Of The Case, As Submitted.

A synopsis of the case, as finally submitted, is provided by the following reproduction the entire text that Johnson delivered, essentially verbatim, at the oral hearing on January 25, 2006. (Johnson has requested

but not yet got the transcript. His prepared text and good faith are sufficient for the purposes of this presentation.)

"I did not request this hearing, but now I'm here, I would like to take five minutes to give fresh focus to what I see as the controlling question before this court. It is not the sub-question as to ostensible agency.

"At bar is only the fraud in advertising claim. It attacks the franchise marketing policies of Cendant Corporation, more than those of its subsidiary, Coldwell Banker. Cendant owns numerous franchises, and its general franchise marketing policies foreordained the injurious advertising of its Coldwell Banker mark.

"The appeal raises a question of law that in a fundamental sense governs the marketing of franchised services. It is the sort of simple and first question on which rests the overall integrity of many consumer protections.

"In this state, is it actionably fraudulent for a franchisor to advertise that services provided under one of its brands have some dependable quality, if the franchisor in fact does not control or monitor the quality of those services?

"In the opening brief, I showed that threshold issues may be readily disposed of. The complaint alone, with its cb.com Exhibit, sufficiently raises the question. The motion for new trial narrowed the issues, and eliminated evidential quibbles. And, as against the fraud in advertising claim, the trial court unambiguously upheld Cendant's defense, which affirmed the lack of meaningful controls and information, contending only that no reasonable person could legitimately rely on such advertising.

"Neither the trial court nor Cendant have acknowledged the one and only matter of fact on which the fraud is expressly based, namely, the touted and imputed existence of *some* – of *any* – basis in fact for the

advertised quality of customer services. For authority as to this being a triable matter of persuasive fact, my opening brief cited well established federal trademark law as set forth by the Ninth Circuit in *Barcamerica* [*Intern. v. Tyfield Importers* (9th Cir. 2002) 289 F.3d 589], and by the Restatement Third of Unfair Competition, section 33, comment c.

"And because Cendant's confessed lack of controls and information is the very antithesis of trademark law, my Reply attacked the affirmative defense as a matter for public outrage. My attack was overzealous. The trial court upheld this affirmative defense, and I dispute its decision respectfully.

"The complaint and my argument is of course based on the state's common law fraud standards. However, it appears that the particular point at bar has not been decided in this state. Rather than raising a matter for public outrage, the affirmative defense apparently raises a matter for public*ation*.

"My Reply added a third persuasive authority, the Restatement Second of Torts, section 539, comment c. After discounting reliance on exaggerated details in advertising, the comment adds, quote:

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

"In my opinion, the fundamental question presented to this court is whether California follows the Restatement on this specific point. And the only good reason I can see for Cendant having requested this hearing, is to address this further authority.

"That is all I have to volunteer. Does the Court have any questions for me to respond to?"

The court had no questions. CB-Cendant's oral argument did not mention the Restatement, and added nothing to its briefs. Johnson made no response, except to refer the court to his Reply.

3. The Court Has Necessarily Decided, But Omits To Say, That A Buyer Of Franchised Services Is Not Justified In Assuming That The Franchisor's Advertised Opinions Have Some Basis In Fact.

Johnson briefs plainly pointed out just how the complaint and the upheld affirmative defenses directly required that this court decide whether a purchaser of franchised services may be justified in assuming that even the franchisor's hyperbolic opinions as to the quality of those services has *some* basis in fact. This point summarizes the voluminous record on this point, which is reproduced at length as the next point.

The alleged advertising, including the cb.com text attached to and incorporated into the complaint itself, emphatically advise naïve prospective house buyers that they can safely rely on the professional and honest quality of real estate services provided under the Coldwell Banker mark. That the advertising with certitude puffs the quality of those services is neither disputed nor disputable.

It is particularly alleged that Johnson harmfully relied on these advertisements as having *some* basis in fact, i.e. as imputing the existence of some – of any - sort of national control or monitoring of the quality of the services provided under the national mark. Although this is the only induced belief on which the fraud is based, it is nowhere mentioned or addressed by CB-Cendant or any court.

That the advertisements have no basis in fact is not only undisputed, it is affirmed as a defense against direct liability. The beyond-our-ken independence of customer services is a matter of strict, official CB-Cendant policy. Johnson's full suite of supporting evidence is not really required to

prove or show the triability of this negative fact, but it does serve to squelch any doubt as to truly total scope of CB-Cendant's repudiation of controls and knowledge specifically re customer services. Most importantly, it concretizes the broad negative admission, enabling Johnson to show the factual and paradigmatic equivalence of his "naked licensing" authorities, *Barcamerica Intern. v. Tyfield Importers* (9th Cir. 2002) 289 F.3d 589 and Rest.3d Unfair Comp., § 33 cmt. c.

CB-Cendant affirms and admits that, as a strict corporate policy, it exercises no control over and insulates itself from information as to the quality of real estate services provided under its Coldwell Banker mark. Its defense is that this policy shields it from liability for any tortiously provided services, and that it sufficiently assures that customers are informed of this by the same "independently owned and operated" disclaimers that were found pervasively inconspicuous in *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741. However, even if it were comprehensible as repudiating an agency relationship, the disclaimer simply could not repudiate the existence of all knowledge of or control over local operations, nor does the court's decision suggest such a holding.

Independent agency does not imply that CB-Cendant's assurances as to the quality of services provided under its mark have no basis in fact. Market research may be performed by anyone, for anyone, on anyone. Nor does agency-independence imply a lack of contractual controls over the quality of customer services. Signage is obviously controlled, which of course is why the unqualified claim of independence is incredible on the face of the advertising. It is singularly over customer services that CB-Cendant has a strict policy of avoiding all control and knowledge, and the

advertising is attacked as fraudulent only insofar as it affirms and imputes otherwise, which it does in spades.

Thus, starkly and beyond cavil as to the evidence and contentions, the court is required to decide whether, under state law, a purchaser of franchised services is justified in assuming that even his franchisor's opinion has some basis in fact, as is generally affirmed by the Rest.2d Torts, § 539, cmt.c.

4. Johnson Plainly, Unambiguously, Cogently, And Thoroughly Set Forth, Distinguished, And Argued The Only Relied-On Falsehood, Citing Three Persuasive And Particular Authorities.

The one and only relied-on falsehood, and the false substance of the alleged advertising, is stated in plain English in the opening brief's one-page Summary, 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.

The statement of facts quoted the equivalent allegations, as follows: "Most importantly (Complaint, 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."

"…CB-Cendant's liability for fraud is alleged as arising from (Complaint; 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."

Point 4 of the argument began as follows (AB 33):

> 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.

To make their narrow and controlling substance as plain as possible, the brief for a second time then quoted "[t]he key allegations of falsity in fact are (Complaint, 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 brief then restressed "[t]he distinction between mere puffery, where *some* service standards exist, and fraud, where *no* such standards exist," and then reviewed a wealth of evidence showing the total lack of controls.

Finally, the third sub-point explained that the usage and promotion of brand standards where in fact no meaningful quality controls exists is called "naked licensing." Two key authorities were introduced, as follows.

"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.

Rest.3d Unfair Comp., § 33 cmt. c.

"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.[2]

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[2] 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

(continued)

"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.

"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).

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limited to the customer services provided by franchisees. Then again, these services are the substance of the business.

"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?"

Finally, the Reply Brief's first two points were:

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

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.

Under the second point, the direct authority for the tort of fraud in advertising was introduced, as follows:

> 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 a vendor's opinions, 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.

IV. THE COURT HAS NOT PERFORMED ITS "DUTY TO ASCERTAIN THE TRUE FACTS IN ORDER THAT IT MAY NOT…LEND ITS ASSISTANCE TO THE CONSUMMATION OR ENCOURAGEMENT OF WHAT PUBLIC POLICY FORBIDS."

1. The Decision Omits To Mention And Falls Absurdly Short Of The Heightened Duty Invoked By The Undeniable Public Interest.

The public policy issues raised by this appeal were unmistakably introduced in the Summary page of the opening brief (AB 23), as follows:

"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 opening brief (AB 17-18) recounts that, in moving for a new trial, Johnson introduced "a recent news report of a rapidly rising state backlog of consumer real estate complaints, containing judicially noticeable annual complaint statistics published by the state's Department of Real Estate (DRE) (3v497-499); and a DRE complaint form (3v500). 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.]

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

Re a fraudulent contract, *Lewis* at 148 held:

> The policy in favor of narrowing the issues in dispute, which normally confines the court to those made by the pleadings, and the policy of the parol evidence rule favoring the conclusiveness of integrated written agreements, both give way before the importance of discouraging illegal conduct.

Herein, the fraud in advertising is of far wider public concern than the contract in *Lewis*; and herein, the court is not asked to reach ordinarily barred issues, it is simply asked to address the issues that it is in any case bound to decide. By the omission of the issues it is bound to decide, the decision falls absurdly short of *Lewis'* standard. In addition, the affirmance of evidential exclusions at CD 6 – incidentally without addressing Johnson's rebuttals (see, e.g. n. 1 at 4) – directly repudiates the duty to admit such evidence, in the public interest.

As follows, the opening brief (AB 21-22) recounted the petition for a writ of mandate that Johnson had filed, seeking to "obviate prejudicial and inexpedient multiple trials…

"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.' "

This court having granted Johnson's motion that it take due notice of the petition for a writ of mandate, without further argument the opening brief prayed that the judgment "also be reversed on the public policy grounds shown in the petition for a writ of mandate" (AB 44).

Public policy concerns are also raised in Johnson's Reply, under the general caption: "The Affirmative Defenses Are A Matter For Public Outrage." These points are reproduced verbatim, as the next two points.

2. The Decision Approves CB-Cendant's Undisputed And Ongoing Naked Licensing Practice, Despite It Being A "Well Established" Form Of Deception, Under Federal Trademark Law.

By entirely failing to mention point B.1 of the Reply (11-12), the decision carelessly gives a green light to the "well established" deception of naked licensing, which is herein an undisputed fact, outrageously affirmed as a *defense*. That point is now reproduced.

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

3. By Failing To Ascertain The Meaning Of "Independent" From Dictionaries And From The Testimony Of Both Parties, The Decision Succumbs To And Perfects The Fraudulent Planting Of "Independently Operated" Disclaimers Targeting The Court.

By entirely failing to mention point B.2 of the Reply (13), the decision carelessly succumbs to and perfects the alleged scheme to inoculate the fraudulent advertising by pervasively inconspicuous usage of "independently operated" disclaimers, specifically targeting courts. That point is now reproduced.

"Throughout discovery, in the trial court, and at AB 41, Johnson pointed out that, in light of the above referenced, undisputable controls [re uniform signage et alia], 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."

The decision holds (CD 4) that, having read one such buried disclaimer, Johnson "could not reasonably have believed" that his so-called Coldwell Banker agents were agents of Coldwell Banker. Even without the contradictory usage of "Coldwell Banker/our office/agent" abbreviations which the court does not mention, the holding would now seem frivolous, in light of the obvious and actual falsity of independent operation, per dictionary definitions and per the actual usage of both parties.

4. The Decision Mistakenly Cites *Kaplan* As Authority For The Conclusive Effect Of The "Independently Operated" Disclaimer, Inadvertently Deciding An Important Matter Of First Impression.

At CD 4, in construing *Kaplan*, the decision states that (emphasis added) "[a] triable issue of fact existed *because* the plaintiff 'did not notice the small print disclaimer.' " The decision thus supposes that *Kaplan* decided that the disclaimer would have had a conclusive effect, had it been read. This is simply mistaken, as pointed out at AB 43-44:

> *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.
>
> *Kaplan* did not hold that the phrase, once read, would rule out ostensible agency. If it had, then that would be dicta.

The court's omission of the fact that Kaplan was "a Superior Court judge and sophisticated real estate investor" is also material. Even if the court *had* decided that the disclaimer would have given a *judge* fair warning of agency-independence, it would not follow that a naïve house buyer would have understood a legal nuance not even in Black's Law dictionary.

5. By Applying Stricter Standards To A Naïve First-Time Home Buyer Than *Kaplan* Applied To "A Superior Court Judge And Sophisticated Real Estate Investor," The Decision Conflicts With *Kaplan*, And By Omitting The Relevant Fact That Kaplan Was A Judge, The Decision Appears Biased And Ethically Tainted.

By applying far less forgiving standards to a naïve first-time buyer than *Kaplan* applied to a judge, and by failing to mention the relevant fact that Kaplan was a judge, the decision conflicts with *Kaplan*, and appears ethically tainted. For example, take footnote 4 (CD 4), which reads:

> Moreover, with respect to the discussion of ostensible agency above, several of the advertisements reiterate that Coldwell Banker offices are independently owned and operated.

Kaplan found the same disclaimers so universally inconspicuous as to render credible Kaplan's testimony as to not noticing them, through CB-Cendant's fault, despite Kaplan's having seen the signs that included them. The decision herein cites the disclaimers in support of the summary judgment, without finding them at all inconspicuous. This conflicts with and thoroughly undermines *Kaplan*.

Moreover, whereas Kaplan's testimony as to not having noticed the disclaimers was found sufficient to raise a triable fact, the decision herein omits even to mention Johnson's testimony as to the disclaimer having left no impression on him, and as to what his reasonable understanding of it would have been, when he read it. Reply 7.

V. CONCLUSION

As reported above, footnote 2 at page 2 of the decision is a clerical error, which this court should delete as a matter of course.

For the foregoing failure to mention or address the only allegedly relied-on fraud, the decision is void for lack of due process. To correct this, at a minimum, the decision should be amended to state that, under state law, Johnson could not rely on the advertising as having any basis in fact.

In addition, for the foregoing reasons, the decision should be set aside or else amended so as to address the omitted issues sufficiently to inform the supreme court of this court's opinion on the important matters of law raised by the complaint, argued by Johnson, and hitherto decided only by necessary implication.

Respectfully submitted,

February 13, 2006 _____

Clifford Johnson, petitioner in pro per

PROOF OF SERVICE

Johnson v. Coldwell-Banker Pacific Real Estate et al.

California Court of Appeal, Case No. A109721

I, Marcia Rosser, am over 18 years of age, am a citizen of the United States, am a resident of California, and am not a party to the above action. My mailing address is: 3364 22nd Street, San Francisco, CA 94110. On February 14, 2006, I posted by first class mail from a location in San Francisco, California, copies of:

APPELLANT'S PETITION FOR REHEARING AND REQUEST FOR A CLERICAL CORRECTION

I did so by placing the number of copies shown below in envelopes with pre-paid first-class postage, addressed as follows:

Harvey L. Roberts, Jr. (1 copy)
Graham & Roberts
P.O. Box 1090
Mendocino, CA 95460

Hon. Leonard LaCasse, c/o The Clerk, (1 copy)
Superior Court,
100 N. State Street, Room 107
P.O. Box 996
Ukiah, CA 95482

The Clerk (4 copies)
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

I hereby swear under penalty of perjury that the foregoing is true and correct.

Dated: February 14, 2006 _____

Marcia Rosser