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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JENNIFER ALLERT, Plaintiff and Respondent, v. ROGER S. HANSON, Defendant and Appellant.	G055084 (Super. Ct. No. 30-2015-00786947) OPINION

Appeal from a judgment of the Superior Court of Orange County, Walter P. Schwarm, Judge. Affirmed.

Roger S. Hanson, in pro. per., for Defendant and Appellant.

Horwitz and Armstrong, John R. Armstrong and Vanoli V. Chander for Plaintiff and Respondent.

* * *

Plaintiff Jennifer Allert, a real estate agent, sued her former client, defendant Roger Hanson, for failing to pay her commission of $100,000 pursuant to a Single Party Compensation Agreement (SPCA) regarding the sale of a residential property. In sum, Hanson argued he was not required to pay the commission because the sale was not fully executed in the stated time. At trial, it was disputed whether Hanson agreed to a handwritten change extending the contractual period. The trial court ultimately determined that while Allert did not prove that Hanson agreed to the handwritten change, the contractual expiration date was not material based on the conduct of the parties. Further, the court found that Allert proved that Hanson, by his conduct, expressly waived his right to rely on the original time period. The court entered judgment in Allert's favor for $100,000 plus prejudgment interest.

On appeal, Hanson offers various arguments as to why the trial court erred, which we shall discuss in due course. We find no error and affirm the judgment.

I

FACTS

In January 2014, Hanson retained the services of Berkshire Hathaway Home Services (Berkshire) to sell a residential property in Laguna Beach. Allert signed on behalf of Berkshire. The SPCA is a standard California Association of Realtors form. According to the trial testimony of Jeffrey Loge, who was affiliated with Berkshire and worked with Allert on the sale of

Hanson's home, an SPCA "is an agreement that we use when a property most commonly is not listed with a broker, where there's not an exclusive right to sell the property. So in this case, where we bring a buyer to the seller and . . . the home is not listed on the open market, and so we complete an [SPCA] so that the seller understands by signing, that compensation would be owed upon the close of escrow of the property."

The SPCA stated that Hanson agreed to pay $100,000 in commission if he accepted an offer from specified buyers to purchase the property commencing on January 17, 2014, and ending on the interlineated date of February 7, 2014 (originally written as February 1), provided the buyers completed the transaction or were prevented from doing so by Hanson. Allert was, according to the express language of the SPCA, acting as an agent for both the buyer and seller.

The only other notable provision of this standard form was the signature dates. The dates were originally computer printed as January 17, 2014 for both Hanson and Allert, but were altered by hand to January 29 for Hanson, and initialed "R.H." Loge testified the change was because Hanson was originally going to come into the office on the 27th to sign, but did not do so until the 29th. Loge witnessed Hanson sign and put his initials next to the new date. Allert testified she signed the document herself on January 29.

According to the complaint and her testimony at trial, Allert had previously met with Hanson several times and has visited the property, which she described

as "severely neglected." Nonetheless, she found the buyers later specified in the SPCA based on the property's location. The buyers originally offered $1.8 million for the property. After several counteroffers, they agreed to buy the property for $2.675 million on an "as is" basis, with a 90-day escrow.

With regard to the ending date of the SPCA, Allert testified she did not recall the details of it changing from February 1 to February 7. She did recall a conversation about needing additional time to give the buyers time to counteroffer. Loge testified that the handwritten change to the date was made when Hanson was in the office. He witnessed Hanson change the date from February 1 to February 7 by handwriting in the "7." Loge testified the reason for the change was scheduling issues regarding one of the buyers, necessitating more time for negotiations. Hanson admitted he had an agreement with Allert before the SPCA expired, but testified he did not believe that Allert was his agent, nor did he execute or authorize a change to the expiration date.

Hanson never advised Allert that he believed the SPCA had expired. Hanson signed the third counteroffer, the one the buyers accepted, on February 4.

Allert continued to work on the sale after escrow was opened. She helped Hanson prepare relevant documents, reviewed all escrow related documents, and visited the home for appraisal and inspection purposes. Hanson did not question her presence or deny that she

was working as an agent on the sale. Escrow eventually closed.

For some reason, Allert's commission was not retained by escrow, and when Allert contacted Hanson after the sale closed about her commission, he refused to pay. He claimed Allert was not entitled to the commission since the sale took place after he believed the SPCA expired.

In August 2015, Allert filed a first amended complaint alleging causes of action for breach of contract, reformation, and declaratory relief. According to the statement of decision, Hanson's answer asserted that he did not retain Allert's real estate services, did not engage her or Berkshire to find a buyer, Allert did not disclose that she represented both seller and buyer, and that the SPCA was defective because Allert either "personally, or in a conspiracy to defraud, altered said date of February 1, 2014 to February 7, 2014." Hanson denied he owed Allert any commission.

The case went to bench trial in December 2016, and the matter was taken under submission on December 21. On December 27, Hanson, having apparently fired the attorney who represented him at trial, filed a motion "ex parte to establish that the instant record establishes that . . . Allert, has been the alterer of the original offer made on January 29, 2014 to give [Allert] $100,000 if she could accomplish sale of the property . . . by the close of business on February 1, 2014." On January 12, 2017, Hanson filed a brief that purported to prove his assertions. Not surprisingly, considering

the case was already under submission, there is no indication of a response by Allert or the court in the record.

On January 31, the court issued a memorandum of intended statement of decision. The court found that with respect to the alteration of the SPCA, Allert was required to prove the alteration was authorized by clear and convincing evidence. Addressing whether the SPCA was *admissible* at all given the question of authenticity, the court found "there is sufficient evidence to support a finding of authenticity. [Loge] testified that he saw [Hanson] alter the SPCA to change the date from February 1, 2014 to February 7, 2014. While [Hanson] disputes this testimony, it is sufficient under Evidence Code section 403[1] to show authenticity and supports the admissibility of [the SPCA]. Therefore, the court overrules [Hanson's] authenticity objection and admits [the document]."

As pertinent here, on the issue of the expiration date and the handwritten change to the SPCA, the court found that Allert had not met the clear and convincing evidence burden to show that Hanson had altered or agreed to alter the document. The court went on to find, however, "that the alteration of the expiration date was not a material alteration." The evidence showed that Hanson created an agency agreement with Berkshire through Allert, and in doing so, incorporated by law the implied covenant not to do anything

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[1] All further undesignated statutory references are to the Evidence Code.

that injured the other party's right to benefit from the agreement. "The expiration period was not a material term because this implied covenant required [Hanson] to pay [Allert's] commission since he received the the [sic] benefits of her services." The evidence was sufficient to prove Allert had found a buyer for Hanson's property and used Allert's services. After Hanson learned of the alteration to the SPCA, "he still acknowledged the agency relationship" when he signed the escrow instructions, and he continued to use Allert's services. Thus, the alteration of the expiration period was not a "material alteration" and "did not change the legal effect of the SPCA in light of the implied covenant."

The court also determined that Hanson waived the expiration period, as supported by Hanson's own testimony and numerous documents. "The evidence shows that [Hanson] accepted and retained the benefits and efforts of [Allert's] services to complete the sale and to facilitate the close of escrow. [Hanson] knew that [Allert] continued to negotiate on his behalf to consummate the sale, knew that [Allert] continued to provide services during escrow, and acknowledged the agency relationship on April 21, 2014." In sum, the court indicated its intent to award Allert $100,000 in damages for breach of contract, deny her request to reform the SPCA, and deny declaratory relief.

Hanson filed objections to the intended statement of decision, arguing that the court should reconsider the admissibility of the SPCA. Among other things, he accused Allert of "willful perjury" at trial. Hanson seemed to miss the import of the court's proposed

finding about the ultimate irrelevance of the purported alteration of the date on the SPCA to its decision.

Apparently pursuant to an order that is not separately listed in the record, the parties submitted briefs on the doctrine of unclean hands.

On June 9, the court issued its final statement of decision. It is identical to the intended statement of decision, except that it added a new section regarding unclean hands and prejudgment interest. With respect to unclean hands, the court found the evidence "insufficient to show that [Allert] was the individual who altered the SPCA." Thus, the court found there was not sufficient evidence to bar Allert from recovery based on an unclean hands defense. With respect to prejudgment interest, the court awarded it to Allert. The court entered judgment for $100,000 plus $31,260.27 in prejudgment interest. Hanson filed the instant appeal.

II

DISCUSSION

Hanson's Briefs

Hanson is an attorney representing himself. Unfortunately, his briefs fail to conform to the California Rules of Court[2] in numerous respects.

While his "summary of errors" the trial court purportedly committed includes eight separate alleged

[2] Subsequent references to rules are to the California Rules of Court.

errors, he has only five argument sections in his opening brief, ignoring the rule that separate headings are required for each point. We disregard any purported "error" not supported by argument and authority. (Rule 8.204(a)(1)(B); *Akins v. State of California* (1998) 61 Cal.App.4th 1, 17, fn. 9.) He also fails to include any discussion of the appropriate standard or standards of review applicable to the appeal.

The brief in no way complies with rule 8.204(a)(2)(C), which requires "'a summary of the significant facts limited to matters in the record.'" (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Indeed, Hanson does not provide any cogent summary of the underlying facts at all, but jumps immediately to the procedural history of the case. When he does discuss factual matters, sprinkled throughout his briefs, he certainly does not offer a fair summary of the evidence on both sides, which is required when challenging the sufficiency of the evidence – which, although we cannot be certain, Hanson appears to do so as to at least one of his arguments. (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.)

Even more significantly, the briefs are so poorly organized and written that they are just difficult to follow and to determine what legal argument is being offered. While we have done our best to parse Hanson's points, such as they are, any "argument" we miss or do not address here due to poor briefing is deemed waived. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 108-109; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

Motion to Strike Hanson's Reply Brief

Allert filed a motion to strike Hanson's reply brief for including irrelevant material, including references to documents in a motion to augment this court denied, and new legal arguments. Hanson opposes, not by addressing Allert's arguments, but by arguing Allert's own responsive brief was defective in numerous ways.

Allert's motion is granted to the extent it addresses matters outside the record, and to the extent it introduces new arguments not included in Hanson's opening brief. All such arguments are disregarded and deemed waived. (Rule 8.204(a)(1)(C); *Schubert v. Reynolds*, *supra*, 95 Cal.App.4th pp. 108-109; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) This includes, but is not limited to, the entirety of Arguments II and III in Hanson's reply brief.

Hanson's improperly offered motion to strike Allert's motion to strike is denied.

Appellant's Duty to Establish Error

We begin with the presumption that an order of the trial court is presumed correct and reversible error must be affirmatively shown by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error." (*Fundamental Investment ETC.*

Realty Fund v. Gradow (1994) 28 Cal.App.4th 966, 971.) The order of the "'lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.'" (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.)

Standards of Review

To the extent Hanson challenges the trial court's evidentiary rulings, such as the decision to admit the SPCA into evidence, we review for abuse of discretion. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) Hanson must "demonstrate the court's 'discretion was so abused that it resulted in a manifest miscarriage of justice.'" (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456, overruled on other grounds in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn.4.)

As to the trial court's factual findings, we review for substantial evidence. "When findings of fact are challenged in a civil appeal, we are bound by the familiar principle that 'the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We view the evidence most favorably to the prevailing party, giving it the benefit of every reasonable

inference and resolving all conflicts in its favor. [Citation.] Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.) We do not "reweigh the credibility of witnesses or resolve conflicts in the evidence." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) A party "raising a claim of insufficiency of the evidence assumes a 'daunting burden.' " (*Whiteley v. Philip Morris Inc*. (2004) 117 Cal.App.4th 635, 678.)

The Admissibility of the SPCA

Hanson first claims that he "proved"[3] that Allert altered the date on the SPCA, and the court erroneously "used the non-admitted" SPCA to rule that he breached the contract. He contends that he "was never a party" to the allegedly altered SPCA and therefore Allert could "never be a 'prevailing party' to a case where she was no longer in the case." As convoluted as this is, it all turns on whether the SPCA was properly admitted into evidence, an issue we review, as mentioned above, for abuse of discretion. (*Hernandez v. Paicius*, *supra*, 109 Cal.App.4th at p. 456.)

Under section 403, the proponent of a writing has the burden of producing evidence of its authenticity. The trial court, relying on Loge's testimony about

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[3] Much of his "proof" is simply citations to pages of the trial transcript, without quotations or pointing to specific facts. He frequently does this throughout his briefs, and again, it does not meet his burden to cite specific facts from the record.

witnessing Hanson alter the SPCA, ruled that although Hanson disputed Loge's account, this was sufficient evidence to admit it. We agree, and find no abuse of discretion.

Hanson relies on section 1402 to bolster his argument, but the trial court ultimately determined the alteration was not "material," a fact Hanson simply glosses over. Section 1402 only precludes the admissibility of altered documents when they are "material to the question in dispute." The materiality determination, too, is a proper exercise of the court's discretion (or, in the alternative, a factual determination supported by substantial evidence).

The trial court determined the alteration of the expiration date was not material because of the implied covenant not to injure the other party's rights under the agreement. Contracts do not exist to act as "gotchas!" and allow one party to enjoy its benefits while the other party does all or more of the expected work, yet can recover nothing. Thus, the covenant operates as a matter of law to ensure fairness. (See, e.g., *Torelli v. J.P. Enterprises, Inc.* (1997) 52 Cal.App.4th 1250, 1256-1257.)

Here, the implied covenant required Hanson to pay Allert's commission because he received the benefit of her services, rendering the expiration date immaterial. The evidence demonstrated that Allert procured a buyer, conducted the negotiations, and took all necessary steps to close the sale. Hanson knowingly used Allert's services after the expiration date of the SPCA,

indeed, he continued to do so after he learned of its alteration. He received the benefit of her services, and the trial court did not err in its determination that the expiration date, accordingly, was immaterial.

Hanson offers no legal authority or analysis as to how or why the court abused its discretion or lacked substantial evidence – he simply disagrees with the court's conclusion. Hanson has failed to meet his burden to establish error. (*Fundamental Investment ETC. Realty Fund v. Gradow*, *supra*, 28 Cal.App.4th at p. 971.)

The Import of Allert's Failure to Prove the Alteration was Authorized

According to Hanson, Allert's failure to prove, by clear and convincing evidence, that Hanson altered or authorized the alteration of the SPCA precludes the admissibility of the SPCA into evidence, and accordingly, Hanson should have prevailed at trial. Unfortunately, Hanson confuses the *admissibility* of the document as a threshold matter and the *use* of the document to prove Allert's case.

Hanson states that in the statement of decision, "the Court finds that [Allert] per . . . [section] 1402 'has not carried her burden of proof of showing that [Hanson] authorized the alteration by clear and convincing evidence, or by a preponderance of the evidence.' " (Underscoring omitted.) This quote misrepresents what the court stated, because it did not mention anything whatsoever about section 1402.

Further, because section 1402 only applies to "material" alterations, and the trial court subsequently concluded the alteration was not material, the court was under no obligation to strike the SPCA from evidence. Accordingly, Hanson's arguments that the SPCA was not before the court, or that Allert was not before the court, or that this case was not before the court, are hereby rejected.

Waiver of the Expiration Period

Hanson next argues the trial court improperly found he had waived the expiration period.[4] As this is a factual determination, we review it for substantial evidence. (*Oregel v. American Isuzu Motors, Inc.*, *supra*, 90 Cal.App.4th at p. 1100.)

As we noted above, the trial court concluded that by clear and convincing evidence, Hanson waived any expiration of the SPCA by accepting and retaining the benefits of Allert's services to facilitate the sale and close escrow. The trial court cited to five documents showing Hanson created an agency relationship with Berkshire, despite his testimony that he did not hire Allert to sell his house. Although Hanson testified that he understood the SPCA expired on February 1, thereafter, he signed two counteroffers, numerous disclosures,

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[4] In this section of his brief, Hanson, for some reason, discusses Allert's right to file claims for attorney fees under Civil Code section 1717. If this is an attempt to contest an attorney fee order, it fails. Hanson does not cite to an attorney fee award in the record, or offer any legal argument other than simply a bald-faced assertion that Allert had no right to attorney fees.

three time extensions, escrow instructions, and numerous other documents. Hanson testified he offered to pay Allert $75,000 in early April, before he was aware of the alleged alteration. Further, there was evidence that Allert helped Hanson close escrow by completing required documents, going to the property for inspections, and completing other tasks.

Hanson claims Allert manipulated him to her advantage because she held the listing on the buyer's home, but she could not do so unless she "could obtain the purchase" of Hanson's home. In any event, under the standards regarding substantial evidence, this is neither here nor there. He cites no legal authority to contest the court's determination that his actions waived the SPCA's expiration date. In sum, we find no error.

Unclean Hands

Hanson next argues the court should have ruled in his favor on the unclean hands defense. He offers no legal argument and no specific facts, again asserting that the SPCA was "stricken" from the lawsuit. The trial court found the evidence insufficient to establish unclean hands, and Hanson has failed to carry his burden to establish error. (*Fundamental Investment ETC. Realty Fund v. Gradow*, *supra*, 28 Cal.App.4th at p. 971.)

Confusion Over "Waiver"

In a separate argument related to the one regarding the court's finding of waiver of the expiration date, Hanson argues that before the trial court, he "asserted

that 19 items personally selected by the Court to show that [he] had 'waived' the previous rulings of the Court were, in fact and in law, governing escrows in California real estate sales, items that could not be waived." (Underscoring omitted.) To call this confusing is an understatement, but Hanson appears to be arguing that the court determined that by signing certain documents necessary to complete the sale, he had "waived" his right to contest the SPCA's expiration date. This is incorrect, however, and not reflected by the record. The court did not base its ruling on signing escrow documents, but on the sum total of his actions after he claimed the SPCA had expired.

Indeed, Hanson's own comments in this section indicate that he continued to work with and through Allert and Berkshire to complete the necessary documents to make sure the sale closed. This is not a legal issue, but a misunderstanding of the trial court's findings, and we need not consider it further.

III

DISPOSITION

The judgment is affirmed. Allert is entitled to her costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE –
CENTRAL JUSTICE CENTER

JENNIFER ALLERT, Plaintiff, v. ROGER S. HANSON, an individual; and DOES 1 to 10 inclusive Defendants.	30-2015-00786947 FINAL STATEMENT OF DECISION Hon. WALTER P. SCHWARM Dept. C19 (Filed Jun. 9, 2017)

In this document, the Court announces its Final Statement of Decision. This Final Statement of Decision will address "the principal controverted issues at trial. . . ." (Code Civ. Proc., § 632.)

STATEMENT OF CASE

On August 19, 2015, Plaintiff filed a First Amended Complaint alleging the following causes of action:

1. Breach of Contract;
2. Reformation; and
3. Declaratory Relief.

On November 30, 2015, Defendant filed an Answer to the First Amended Complaint. In general, Defendant's Answer asserted that (1) he did not retain Plaintiff's real estate services; (2) he did not engage Plaintiff or Plaintiff's firm to find a buyer for his property; (3) that Plaintiff did not represent that she represented both

Defendant and the buyer; (4) and, that Exhibit A attached to the First Amended Complaint was defective because "Plaintiff personally, or in a conspiracy to defraud, altered said date of February 1, 2014 to February 7, 2014." Essentially, Defendant's Answer denies that he owes Plaintiff a $100,000 commission.

LEGAL BACKGROUND

Roldan v. Callahan & Blaine (2013) 219 Cal.App.4th 87, 93-94 (*Roldan*) states:

> "First, the law effectively presumes that everyone who signs a contract has read it thoroughly, whether or not that is true. A basic rule of contract law is, '"in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it."' [Citation.] Moreover, courts must also presume parties understood the agreements they sign, and that the parties intended whatever the agreement objectively provides, whether or not they subjectively did: '"Where the parties have reduced their agreement to writing, their mutual intention is to be determined whenever possible, from the language of the writing alone." . . . "[T]he parties' expressed objective intent, not their unexpressed subjective intent, governs."' [Citation.] And finally, in perhaps the biggest legal fiction of all, we are required to presume that parties to a contract both know and have in mind '"all

> applicable laws in existence when an agreement is made . . . necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated."' [Citation.]"

" . . . [E]very contract has an implied covenant not to do anything which injures the right of the other party to receive the benefits of the agreement. [Citation.]" (*Torelli v. J.P. Enterprises, Inc.* (1997) 52 Cal.App.4th 1250, 1257 (*Torelli*).)

"'A broker is entitled to his commission for effecting a sale of real or personal property only when it affirmatively appears that the purchaser, as the result of the broker's efforts, was induced to buy the property, or that a prospective purchaser was ready, able, and willing to buy upon the terms and at the price specified by the owner.' [Citations.]" (*Wilson v. Roppolo* (1962) 207 Cal.App.2d 276, 280.) "Where the real estate broker brings the seller and buyer together and the negotiations continue beyond the expiration date of the commission agreement, the broker is still entitled to his commission." (*Id.*, at 281.) "'Where the broker does not have a listing contract, he must rely upon the promise to pay a commission contained in the contract between the parties, and where this agreement is the only written document providing for the payment of the commission, he is subject to the terms and conditions of the payment contained in the agreement.' [Citation.]" (*Torelli*, *supra*, at 1254.)

"Where the termination of the contract has been waived, however, a different result may be reached, and the broker may be allowed to recover his compensation although in the absence of conduct amounting to a waiver of the contract's termination he would not have been entitled to recover because his performance occurred after the brokerage relation had been dissolved. [¶] In a number of instances the view has been taken that where, after the apparent termination of a brokerage agreement, the broker has continued negotiations with a prospective purchaser, or his efforts to find such a purchaser, with the knowledge and consent of the principal, the termination of the contract will, particularly where it appears that the principal accepted and retained the benefits of the broker's efforts, be considered waived. [¶] He [appellant] waived the time limit in the contract, and the second instruction, given to the jury at the instance of appellees, of which appellant complains, correctly stated a familiar principle of the law that a party to a contract containing a limitation as to time for performance, who induces the other party after the expiration of the time to continue in the performance of the contract, will not be permitted to withhold the fruits of the contract because it was not performed within the specified time." (*Baker v. Curtis* (1951) 105 Cal.App.2d 663, 666-667 (*Baker*); internal quotation marks and internal citations omitted.)

"The promise to pay *the broker* a commission did not die with the expiration of the counteroffer *to the buyer*. When the seller signed the counteroffer, it became bound by an implied promise not to deprive the

broker of the benefits of the bargain to pay the commission." (*Torelli*, *supra*, at 1252; italics in original.) "On the other hand, the case law is clear that where seller, i.e., the party with whom the broker has the agreement to be paid a commission, is the *cause* of the loss of the sale, the broker *can* recover. In such an instance the seller *has* received the benefit of the broker's service." (*Id.*, at 1255; italics in original.)"

"If, under *Collins* and *Coulter*, a broker may recover when a sale is not consummated due to the seller's fault, it naturally follows that a broker may recover when a sale *is* consummated because the buyer and seller, having been brought together by the broker, entered into direct negotiations." (*Id.*, at 1256; italics in original.)

Civil Code section 1700 states, "The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." "An alteration for a written instrument made after delivery and without previous consent vitiates the obligation, at the option of the other party, if the alteration pertains to a material matter,—if it enlarges or diminishes the obligation, but not where it merely identifies the intended obligee. [Citation.]" (*Consolidated Loan Co. v. Harman* (1957) 150 Cal.App.2d 488, 491 (*Consolidated*).) "The test of materiality of the alteration is whether it changes the rights or duties of the parties or either of them. . . . The materiality of the change, however, does

not depend upon whether or not the party not consenting thereto will be benefited or injured by the change, but rather upon whether or not the change works any alteration in the meaning or legal effect of the contract." (*Ibid*; internal quotations marks and internal citations omitted.) "It has been stated that an alteration in the terms of an instrument was authorized by the party affected by it must be clear and convincing in order that such party may be bound thereby. [Citation.]" (*Arneson v. Webster* (1964) 226 Cal.App.2d 370, 376 (*Arneson*).)

PRELIMINARY ISSUES

A. Standard of Proof—Civil Code section 1700

Defendant cites *Arneson* and *Dozier v. National Borax Co*. (1917) 35 Cal.App. 612, 618 (*Dozier*) for the rule that Plaintiff must prove that Defendant authorized the alteration to the Single Party Compensation Agreement (SPCA; Exhibit No. 26) signed by Defendant on January 29, 2014, by clear and convincing evidence. Defendant's position is that Civil Code section 1700 operates to vitiate the SPCA if Plaintiff cannot prove that Defendant authorized the alteration to the SPCA. Plaintiff relies on Evidence Code section 115 and *Liodas v. Sahadi* (1977) 19 Cal.3d 278, and asserts that the standard of proof for determining whether Defendant authorized the alteration is a preponderance of the evidence.

Evidence Code section 115 states, in pertinent part, "Except as otherwise provided by law, the burden

of proof requires proof by a preponderance of the evidence." "'Law' includes constitutional, statutory, and decisional law." (Evid. Code, § 160; *In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1585.) "While it is clear that case law may, in some instances, suggest a higher burden of proof than preponderance of the evidence is required, we have stated as a general principle that 'judicial expressions purporting to require clear and convincing [or clear and satisfactory] evidence must be read in light of the statutory provision for proof by a preponderance of the evidence. . . . [Citations.] [Citation.]" (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 484.) The parties do not direct the court to any constitutional or statutory law that requires Plaintiff to prove authorization of an alteration by clear and convincing evidence. *Arneson*, as discussed above, found proof that a party authorized an alteration "must be clear and convincing" in its analysis of Civil Code section 1700.

Arneson relied on *Dozier* in finding that the clear and convincing evidence standard applied. *Dozier* stated, " . . . the proof that the alteration in the body and terms of the instrument was authorized by the party affected by it must be clear and conclusive in order that such party may be bound thereby. [Citation.]" (*Dozier*, *supra*, at p. 618.) *Dozier* cited *Walsh v. Hunt* (*Walsh*) (1898) 120 Cal. 46 in applying the "clear and conclusive" standard. In the court's review of *Walsh, Walsh* did not address the applicable standard of proof for determining whether a party authorized the alteration of a contract in the context of Civil Code section

1700. In a related situation, reformation requires the party seeking reformation to show by clear and convincing evidence that a written agreement does not express the true intention of the parties. (*Diktor v. David & Simon, Inc.* (*Diktor*) (2003) 106 Cal.App.4th 238, 253.)

Although *Arneson* did not significantly analyze the standard of proof as to authorization of an alteration in the context of Civil Code section 1700, the court is bound to follow *Arneson* since it expressly stated that the standard is clear and convincing evidence. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Despite the fact that only money is at issue, it seems appropriate to impose a higher standard of proof on the party seeking to rely on an altered document to demonstrate that the other party authorized the alteration. It appears that the purpose of Civil Code section 1700 is to protect the party that did not consent to the alteration. Where a party disputes his or her consent to an alteration of a written contract, it seems appropriate to impose a higher standard of proof to protect this party from an allegedly unauthorized alteration by the party seeking to enforce the contract. That is, a court should require proof of consent by clear and convincing evidence before enforcing an altered written contract against a party that disputes his or her consent to the alteration. Based on the above authority, the court finds that the standard of proof is clear and convincing evidence to show that Defendant authorized the alteration of the

expiration date from February 1, 2014 to February 7, 2014.

B. Admissibility of Exhibit No. 26

Relying on *Arneson*, Defendant contends that the standard of proof for the admissibility of an altered writing under Evidence Code section 1402 is clear and convincing evidence. *People v. Morris* (1991) 53 Cal.3d 152, 205 applied Evidence Code section 403 to the authentication of a document under Evidence Code section 1402. In applying Evidence Code section 403 to Exhibit No. 26, the court finds that there is sufficient evidence to support a finding of authenticity. Jeff Loge testified he saw Defendant alter the SPCA to change the date from February 1, 2014 to February 7, 2014. While Defendant disputes this testimony, it is sufficient under Evidence Code section 403 to show authenticity and supports the admissibility of Exhibit No. 26. Therefore, the court overrules Defendant's authenticity objection and admits Exhibit No. 26.

CAUSES OF ACTION

A. First Cause of Action—Breach of Contract

The three issues related to this cause of action are as follows: (1) Whether Defendant authorized the alteration to the SPCA (Exhibit No. 26)?; (2) Whether the alteration of the expiration date contained in the SPCA (Exhibit No. 26) was a material alteration that extinguished defendant's obligation to pay the commission to Plaintiff under Civil Code section 1700?; and (3)

Whether Defendant waived the expiration period contained in the SPCA based on his awareness of the expiration date and his continued use of Plaintiff's services as a real estate agent?

1. Whether Defendant Authorized the Alteration of the SPCA (Exhibit No. 26)?

The dispute as to this cause of action pertains to whether Defendant authorized the alteration of the SPCA (Exhibit No. 26). There is no dispute that the original expiration date contained in the SPCA was February 1, 2014. Sometime after the typewritten date of February 1, 2014 was inserted into the SPCA, there was an alteration to the SPCA where a "7" was handwritten over the typewritten number "1" to reflect an expiration date of February 7, 2014. Plaintiff claims that Defendant authorized the extension of the expiration date from February 1, 2014 to February 7, 2014. Defendant contends that he never authorized any extension or any alteration of the expiration date.

Loge testified that the SPCA was presented to Defendant on January 29, 2014. On that date, Loge saw Defendant sign the SPCA and place his initials on the date line next to his signature to reflect the signing date as January 29, 2014 instead of the preprinted date of January 17, 2014. Loge also saw Defendant change the expiration date from February 1, 2014 to February 7, 2014. According to Loge, Loge told Defendant that the potential Buyer may need more time, and Defendant suggested the extension to February 7,

2014. At trial, Loge was clear that these changes occurred on January 29, 2014, but that he did not know why Defendant did not initial the change to the expiration date.

Loge's deposition testimony showed several inconsistencies. First, at his deposition, Loge testified that he was present when Defendant changed the expiration date, but that the change occurred on February 4, 2014. He testified at deposition that he did not remember whether he or Defendant changed the expiration date. His deposition testimony also showed Defendant refused to initial the change to the expiration date because his signature was sufficient.

Plaintiff testified that the alteration to the expiration date occurred on January 29, 2014. Plaintiff remembered a conversation regarding the extension of the expiration period, but did not remember if Defendant changed the date. Plaintiff remembered Defendant signing the SPCA, but did not remember if the change was on the SPCA when Defendant signed it. On February 4, 2014, Plaintiff testified there was a discussion regarding the commission of $100,000. During this discussion, Defendant said he did not want to pay the full $100,000 commission. Plaintiff offered to pay Defendant's escrow fees in an attempt to reduce the commission. (Exhibit No. 35.) At a meeting on April 3, 2014, Plaintiff testified Defendant expressed surprise when he saw the alteration contained on the SPCA. Plaintiff told Jim Vermilya that there was an oversight with respect to having Defendant initial the alteration.

Defendant testified he signed the SPCA before it was altered. Defendant first learned of the alteration on April 3, 2014. Defendant denied altering the SPCA.

The court finds that Plaintiff has not carried her burden of proof of showing that Defendant authorized the alteration by clear and convincing evidence, or by a preponderance of evidence. First, Defendant's testimony was inconsistent with Plaintiff's testimony and Loge's testimony. Loge's memory is unreliable as shown by the discrepancies between his trial testimony and deposition testimony. Despite Plaintiff's testimony that there was a discussion regarding an extension on January 29, 2014, Plaintiff also testified that Defendant expressed surprise at seeing the alteration on April 3, 2014. Defendant's surprise tends to support the inference that he was unaware of the alteration. Although Plaintiff testified she and Defendant discussed the commission of $100,000 on February 4, 2014, this discussion did not pertain to extending the expiration period from February 1, 2014 to February 7, 2014. Finally, Defendant initialed the change to the date next to his signature. These initials support the inference that Defendant used his initials to indicate his assent to changes in the SPCA. The absence of his initials to the change in the expiration period supports the inference that he did not authorize the extension of the expiration period especially since he initialed the change to the date next to his signature.

2. Whether the Alteration of the Expiration Date Contained in the SPCA (Exhibit No. 26) was a Material Alteration that Extinguished Defendant's Obligation to Pay the Commission to Plaintiff under Civil Code section 1700?

The court finds that the alteration of the expiration date was not a material alteration within the meaning of Civil Code section 1700. As stated in *Roldan*, courts presume that (1) "everyone who signs a contract has read it thoroughly, whether or not that is true;" (2) "parties [understand] the agreements they sign, and that the parties intended whatever the agreement objectively provides, whether or not they subjectively did;" and (3) "that parties to a contract both know and have in mind '"all applicable laws in existence when an agreement is made . . . necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated."' [Citation.]" (*Roldan*, *supra*, at p. 93.)

Defendant testified that he had an agreement with Plaintiff as to the SPCA before it was altered. Defendant testified he did not believe that Plaintiff was his agent. After February 1, 2014, Defendant did not believe that Plaintiff or Loge were his agent because the SPCA had expired. Defendant was aware that the SPCA expired on February 1, 2014.

Here, the court finds that Defendant did not understand that he created an agency relationship with

Plaintiff based on the exhibits admitted into evidence. As stated in *Roldan*, the court must presume that he understood the agreements he signed. On January 29, 2014, Defendant signed the following documents:

a. The SPCA showing he was aware that Berkshire Hathaway Home Services (BH) was his broker and that BH was acting as the agent for both the buyer and the seller.(Exhibit No. 26.)

b. The "Disclosure Regarding Real Estate Agency Relationship" indicating that BH was his agent. (Exhibit No. 27.)

c. The "Disclosure and Consent for Representation of More Than One Buyer or Seller" giving consent for BH to represent Defendant and the Buyer. (Exhibit No. 28.)

d. The "Residential Purchase Agreement and Joint Escrow Instructions." Paragraph 23 of this agreement states, in pertinent part, "Seller or Buyer, or both, as applicable, agrees to pay compensation to Broker as specified in a separate written agreement between Broker and that Seller or Buyer. Compensation is payable upon Close of Escrow. . . ." (Exhibit No. 29.)

Further, on April 21, 2014, Defendant signed the "Supplemental Instructions and General Provisions." (Exhibit No. 39.) Paragraph 6 of this document provides, "Buyer and Seller are aware and acknowledge that Berkshire Hathaway HomeServices California

Properties/Jennifer Allert represents both the Buyer and Seller in said transaction. All parties agree to this dual agency." (Exhibt No. 39.)

Exhibit Nos. 26, 27, 28, 29, and 39 show that Defendant created an agency relationship with BH through Plaintiff, BH's representative. Into each of these agreements, the law incorporated the "implied covenant not to do anything which injures the right of the other party to receive the benefits of the agreement. [Citation.]" (*Torelli*, *supra*, at p. 1257; *Roldan*, *supra*, at p. 93.) When Defendant signed these agreements he became bound by this implied covenant. The expiration period was not a material term because this implied covenant required Defendant to pay Plaintiff's commission since he received the benefits of her services. (*Torelli*, *supra*, at p. 1252 ["The promise to pay *the broker* a commission did not die with the expiration of the counteroffer *to the buyer.* When the seller signed the counteroffer, it became bound by an implied promise not to deprive the broker of the benefits of the bargain to pay the commission."].)

The evidence was sufficient to show that Plaintiff procured a buyer for Defendant's property as shown by Exhibit No. 26, (the SPCA), Exhibit no. 29 (Residential Purchase Agreement and Joint Escrow Instructions that contained the offer from the buyers), Exhibit No. 37 (Counter Offer No. 1, signed by Defendant on January 29, 2014, from Defendant to the Buyers), Exhibit No. 36 (Counter Offer No. 2, signed by Defendant on February 4, 2014, from the Buyers to Defendant), and Exhibit No. 35 (Counter Offer No. 3, signed by Defendant

on February 4, 2014, from Defendant to the Buyers). Counter Offer No. 3 (Exhibit 35) shows that the Buyers accepted this Counter Offer. As to Exhibit Nos., 26, 29, 35, 36, and 37, Defendant used Plaintiff's services. Although Defendant was aware of the alteration on April 3, 2014, he still acknowledged the agency relationship when he signed Exhibit 39, the "Supplemental Instructions and General Provisions," on April 21, 2014.

On February 4, 2014, Defendant received the benefits of Plaintiff's services in that Plaintiff brought the Buyers listed in the SPCA and Defendant together to consummate the sale. Since the law incorporated this covenant into each of these agreements, the expiration period was not a material term because this implied covenant required Defendant not to injure "the right of the other party to receive the benefits of the agreement." (*Torelli*, *supra*, at p. 1257.) The expiration period was immaterial because the implied covenant required payment when Defendant continued to use Plaintiff's services to negotiate the sale of his property. Defendant's use of Plaintiff as his agent facilitated the sale and the close of escrow of the property. Once Defendant continued to use Plaintiff's services, the implied covenant controlled Defendant's obligation to pay Plaintiff her commission. Thus, since the implied covenant required payment in these circumstances, the alteration of the expiration period was not a material alteration within the meaning of Civil Code section 1700. That is, the alteration did not change the legal effect of the SPCA in light of the implied covenant.

3. Whether Defendant Waived the Expiration Period Contained in the SPCA Based on his Awareness of the Expiration Date and His Continued Use of Plaintiff's Services as a Real Estate Agent?

As stated in *Baker*, *supra*, at pp. 666-667, "in a number of instances the view has been taken that where, after the apparent termination of a brokerage agreement, the broker has continued negotiations with a prospective purchaser, or his efforts to find such a purchaser, with the knowledge and consent of the principal, the termination of the contract will, particularly where it appears that the principal accepted and retained the benefits of the broker's efforts, be considered waived." The burden is on the party asserting waiver to prove it by clear and convincing evidence. (*DRG/ Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60-61.)

The following evidence shows that Defendant waived the expiration period:

a. Exhibits 26, 27, 28, 29, and 39 show that Defendant created an agency relationship with BH despite Defendant's testimony that he did not hire Plaintiff to sell his home.

b. Defendant testified he understood that the expiration date was February 1, 2014.

c. On February 4, 2014, Defendant signed Counter Offer No. 2. (Exhibit No. 36.)

d. On February 4, 2014, Defendant signed Counter Offer No, 3. (Exhibit No. 35.)

e. Counter Offer No. 3 states, "Seller escrow fee to be paid by agent." (Exhibit No. 35.)

f. On February 11, 2014, Defendant signed the "Local Area Disclosures and Commission Disclosure." (Exhibit No. 42.)

g. On February 11, 2014, Defendant signed the "Lead-Based Paint and Lead-Based Paint Hazards Disclosure Acknowledgment and Addendum." (Exhibit No. 44.)

h. On February 11, 2014, Defendant signed the "Residential Earthquake Hazards Report." (Exhibit No. 45.)

i. On February 11, 2014, Defendant signed the "Carbon Monoxide Detector Notice." (Exhibit No. 46.)

j. On February 21, 2014, Defendant signed "Contingency Removal No. 1," (Exhibit No. 51.).

k. On February 21, 2014, Defendant signed Extension of Time Addendum #1. (Exhibit No. 32.)

l. On March 19, 2014, Defendant signed the "Natural Hazard Disclosure Statement. (Exhibit No. 43.)

m. On March 19, 2014, Defendant signed "Addendum." (Exhibit No. 47.)

n. On March 24, 2014, Defendant signed "Extension of Time Addendum #2." (Exhibit No. 33.)

o. On April 3, 2014, Defendant signed "Extension of Time Addendum #3." (Exhibit No, 34.)

p. On April 3, 2014, Defendant offered to pay $75,000.[1]

q. On April 15, 2014, Defendant signed "Contingency Removal No. Two." (Exhibit No. 50.)

r. On April 21, 2014, Defendant signed "Supplemental Instructions and General Provisions." (Exhibit No. 39.) Paragraph 6 states, "Buyer and Seller are aware and acknowledge that Berkshire Hathaway HomeServices California Properties/Jennifer Allert represents both the Buyer and Seller in said transaction. All parties agree to this dual agency."

s. Plaintiff facilitated the close of escrow by helping Defendant complete required disclosure documents, going to the property for inspection purposes, and helping to install smoke and carbon monoxide detectors at Defendant's property.

Therefore, based on the above evidence, the court finds, by clear and convincing evidence, that Defendant

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[1] The court finds that this $75,000 offer from Defendant was not an offer to compromise within the meaning of Evidence Code section 1152. Defendant testified he "gratuitously" offered to pay Plaintiff $75,000 before he was aware of the alteration. At the time of the offer, there was no dispute as to the alteration. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 481 fn. 3 [overruled on other grounds in *Riverisland Cola Storage. Inc. v. Fresno—Madera Production Credit Association* (2013) 55 Cal.4th 1169, 1182.) In any event, the exclusion of Defendant's $75,000 offer would not affect the court's conclusion as to waiver.

waived any expiration period. This evidence shows that Defendant accepted and retained the benefits and efforts of Plaintiff's services to complete the sale and to facilitate the close of escrow. Defendant knew that Plaintiff continued to negotiate on his behalf to consummate the sale, knew that Defendant continued to provide services during escrow, and acknowledged the agency relationship on April 21, 2014. (Exhibit No. 39.)

B. Second Cause of Action—Reformation

"Civil Code section 3399 states, "When, through fraud or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." "Civil Code section 3399 provides for reformation 'so far as it can be done without prejudice to rights acquired by third person, in good faith and for value. [Citation.)" (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 705.) "In correcting a contract subject to the statute of frauds, a court is not enforcing an oral contract, but is instead enforcing a written contract in accordance with the parties' actual agreement. To overcome the presumption that the writing is accurate, we have required clear and convincing evidence of a mistake before allowing reformation of a contract. [Citations.]" (*In re Estate of Duke* (2015) 61 Cal.4th 871, 889 (*Duke*); see also *Diktor*, *supra*, at p. 253.)

For the reasons stated above as to whether Defendant authorized the alteration of the SPCA (Exhibit No. 26), the court finds, by clear and convincing evidence, that Plaintiff has not demonstrated that the original SPCA with the expiration date of February 1, 2014 was inaccurate due to a mistake or fraud. According to Plaintiff's theory at trial, there was no mistake. Plaintiff testified she remembered a conversation regarding extending the expiration period that occurred on January 29, 2014. Plaintiff also presented the testimony of Jeff Loge who testified he saw Defendant alter the expiration period on January 29, 2014.

C. Third Cause of Action—Declaratory Relief

"We believe a comment is in order about the declaratory relief cause of action itself. The issues invoked in that cause of action already were fully engaged by other causes of action. Because they were, declaratory relief was unnecessary and superfluous [Citations.] 'The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues.' [Citations.]" (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 324.)

Here, Plaintiff's breach of contract cause of action resolved the declaratory relief cause of action. That is, a money judgment pursuant to the breach of contract

cause of action resolves the dispute. The declaratory relief cause of action does not add anything to Plaintiff's claims under the breach of contract cause of action.

UNCLEAN HANDS DEFENSE

The court interprets paragraph 25 of Defendant's Answer to the First Amended Complaint as raising the defense of unclean hands. Defendant asserts Plaintiff is not entitled to any relief because of Plaintiff's misconduct in altering the SPCA. *Matte Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 846 states,

> "The defense of unclean hands arises from the equitable maxim, He who comes into Equity must come with clean hands. While this equitable doctrine is a vehicle for affirmatively enforcing the requirements of conscience and good faith it cannot be distorted into a proceeding to try the general morals of the parties. The issue is not that the plaintiff's hands are dirty, but rather that the manner of dirtying renders inequitable the assertion of such rights against the defendant. The misconduct which brings the clean hands doctrine into operation must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants. Thus, there must be a direct relationship between the misconduct and the claimed injuries. Equity will grant

> relief when a plaintiff's conduct prejudicially affect[s] the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief" (Internal quotation marks and internal citations omitted.) The preponderance of the evidence applies to the defense of unclean hands. (*Ibid*)

Here, the court has considered the defense of unclean hands and finds that the evidence is insufficient to show that the Plaintiff was the individual who altered the SPCA. As discussed above, there was conflicting evidence as to who altered the SPCA. At trial, Mr. Loge testified he saw Defendant change the expiration date from February 1, 2014 to February 7, 2014. Defendant denied making this change. Although the court finds that Mr. Loge's memory is unreliable, this finding does not establish that Plaintiff altered the SPCA by a preponderance of the evidence. Thus, the court finds that the evidence is insufficient to show that Plaintiff engaged in misconduct necessary to trigger the unclean hands defense.

Further, even if the unclean hands defense applied, Plaintiff's alleged misconduct did not prejudicially affect Defendant's rights because Plaintiff was responsible for procuring a buyer for Defendant's property, and provided services to Defendant during the escrow period.

PREJUDGMENT INTEREST

Pursuant to Civil Code section 3289, subdivision (b), the court awards prejudgment interest. The Joint Stipulated Facts, filed on June 9, 2016, reflects that escrow closed on April 25, 2014, and that Defendant did not authorize the release of the $100,000 for payment of the commission. CACI No. 106 requires the court to accept the facts in a stipulation as true. Paragraph 23 of Exhibit No. 29 states, in pertinent part, "Seller or Buyer, or both, as applicable, agrees to pay compensation to Broker as specified in a separate written agreement between Broker and that Seller or Buyer. Compensation is payable upon Close of Escrow. . . ." (Exhibit No. 29.) Exhibit no. 54 shows that that [sic] the closing date was April 25, 2014. Exhibit no. 76 indicates that Defendant refused "to authorize any commission." Thus, the court awards prejudgment interest in the amount $31,260.27. The court used the calculation contained in Plaintiff's "Post-Decision Brief on the Amount of Prejudgment Interest to be Awarded," filed on June 5, 2017, except the court used 1141 days instead of 1142 days for its calculation.

CONCLUSION

The Court finds judgment for the Plaintiff as follows:

1. First Cause of Action—Breach of Contract
   a. Judgment for Plaintiff in the amount of $100,000 plus prejudgment interest in the amount of $31,287.67.

2. Second Cause of Action—Reformation
   a. The court denies Plaintiff's request to reform the SPCA. (Exhibit No. 26.)

3. Third Cause of Action—Declaratory Relief
   a. The court denies Plaintiff's request for Declaratory Relief because the court's judgment as to the First Cause of Action resolves any issues relating to declaratory relief.

Dated: June 9, 2017

/s/ Walter P. Schwarm
Walter P. Schwarm
Judge of the Superior Court

EXHIBIT – D-2

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 10/30/2017 TIME: 04:38:00 PM DEPT: C19

JUDICIAL OFFICER PRESIDING: Walter Schwarm
CLERK: Kimberley Gray
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **30-2015-00786947-CU-SC-CJC**
CASE INIT. DATE: 05/11/2015
CASE TITLE: **Allert vs. Hanson**
CASE CATEGORY: Civil – Unlimited
CASE TYPE: Breach of Contract/Warranty

EVENT ID/DOCUMENT ID: 72690119
EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party;

The Court, having taken the above-entitled matter under submission on 10/03/2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Plaintiff's motion for Fees and Supplemental Fees is GRANTED, but reduced.

Code of Civil Procedure section 1032, subdivision (b) states, "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Code of Civil Procedure section 1032, subdivision (a)(4) explains, in part "'Prevailing party' includes the party with a net monetary recovery. . . ." Code of Civil Procedure section 1033.5, subdivision (a)(10); provides "(a) The following items are allowable as costs under Section 1032: [¶] (10) Attorney's fees, when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law.

Civil Code section 1717 states, in relevant part, "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. [¶] (b)(1) . . . Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." Hsu v. Abarra (1995) 9 Cal.4th 863, at p. 877, provides, "But when one party obtains a 'simple, unqualified win, on the single contract claim presented by the action, the court may not invoke equitable considerations unrelated to litigation success, such as the parties' behavior during settlement negotiations or

discovery proceedings, except as expressly authorized by statute. (Citations.)"

(The Single Party Compensation Agreement (hereafter, SPCA and Exhibit no. 26) provides in part as to attorney fees, "in any action, proceeding, or arbitration between Seller and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs." In the court's Final Statement of Decision, filed on 6-9-17, the court stated at page 11, "On February 4, 2014, Defendant received the benefits of Plaintiff's services in that Plaintiff brought the Buyers listed in the SPCA and Defendant together to consummate the sale. Since the law incorporated this covenant into each of these agreements, the expiration period was not a material term because this implied covenant required Defendant not to injure "the right of the other party to receive the benefits of the agreement." (Torelli, supra, at p. 1257) The expiration period was immaterial because the implied covenant required payment when Defendant continued to use Plaintiff's services to negotiate the sale of his property. Defendant's use of Plaintiff as his agent facilitated the sale and the close of escrow of the property. Once Defendant continued to use Plaintiff's services, the implied covenant controlled Defendant's Obligation to pay Plaintiff her commission. Thus, since the implied covenant requited payment in these circumstances, the alteration of the expiration period was not a material alteration within the meaning of Civil Code section 1700. That is,

the alteration did not change the legal effect of the SPCA in light of the implied covenant."

Here, Defendant was not the prevailing party in this action pursuant to Civil Code section 1717 because Plaintiff received a net monetary recovery based on the court's finding as to the breach of contract cause of action based on the Single Party Compensation Agreement. The Single Party Compensation Agreement provided for attorney's fees.

A plaintiff who prevails in an action on a contract providing for reasonable attorney's fees is not precluded from being awarded these fees merely because the plaintiff has a contingency fee agreement with his or her attorney. (Nemecek & Cole v Horn. (2012) 208 Cal.App.4th 641, 651; Gonzales v. Personal Storage, Inc. (1997) 56 Cal.App.4th 464, 479-480.) A prevailing party entitled to contractual attorney fees may recover "reasonable" attorney fees as determined by the court. (Civ. Code, §1717; PLCM Group v. Drexler (Drexler) (2000) 22 Cal. 4th 1084, 1094-1095.) "Consistent with that purpose, the trial court has broad authority to determine the amount of a reasonable fee." (Drexler, supra, 22 Cal.4th at p. 1095).) Gorman v. Tessajara Development Corp. (2009) 178 Cal. App. 4th 44, 96-99, states, "As this court noted in Ajaxo Inc. v. E*Trade Group, Inc. (2005) 135 Cal.App.4th 21, 37 Cal.Rptr.3d 221, the burden is on the party seeking attorney fees to prove that the fees it seeks are reasonable. [Citation.] It is also plaintiffs' burden on appeal to prove that the court abused its discretion in awarding fees. [¶] We have quoted at length above in part III.A.(3)

(ante, beginning on p. 167) some of the California Supreme Court's guidance in awarding attorney fees. We emphasize the following. 'Thus, applying the lodestar approach to the determination of an award under Civil Code section 1717, the Court of Appeal in Sternwest Corp. v. Ash (1986) 183 Cal.App.3d 74, 77 . . . explained: "Section 1717 provides for the payment of a "reasonable" fee. After the trial court has performed the calculations [of the lodestar], it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the section 1717 award so that it is a reasonable figure."' [Citation.] 'A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.' [Citation.]" "The first step involves the lodestar figure-a calculation based on the number of hours reasonably expended multiplied by the lawyer's hourly rate." (EnPalm, LLC v. Teitler Family Trust (2008) 162 Cal. App. 4th 770, 774.)

Mr. Armstrong's Declaration demonstrates Plaintiff is seeking recovery for 678.90 hours of labor (7-1 Armstrong Decl., ¶ 13 and Exhibit no. 1), an amount which does not appear unreasonable given the litigation in the case. First, the court finds that a reasonable hourly rate is $375 based on Mr. Armstrong's 7-11-17 declaration, and his 10-23-15 declaration. Mr. Armstrong's 10-23-15 declaration was filed on 10-23-15, and states, "As a partner with HOROWITZ + ARMSTRONG, LLP, my hourly rate fluctuates between $350.00 per hour and $550.00 per hour based upon the complexity of the

matter and the type of work performed. As a fee arbitrator I have knowledge of the rates that other law firms and attorneys regularly charge clients in Orange County for business litigation, and from this experience know that my firm's rates are reasonable as compared to what other firms and attorneys charge for performing similar business litigation services." (10-23-15 Armstrong Decl., ¶ 11.) Although Defendant litigated this case, this case was not a complex case, and the court finds that an hourly rate of $375.00 is reasonable.

Plaintiff asserts that Plaintiff reasonably incurred 678.90 hours of services. (Plaintiff Jennifer Allerts Notice of Motion and Motion for Prevailing Party Determination and for contractual Attorney's Fees (filed on 7-11-17), 6:5-6.) Based on the reasonable hourly rate of $375, 678.90 x $375 = $254,587.50. After reviewing the invoices attached as Exhibit 2 to Mr. Armstrong's 7-11-17 declaration, the court reduces this amount by $20,062.50 for a total of $234,525.00. The court reduced the fees, in its discretion, based on various entries that that [sic] were vague, unsupported, or duplicative. For example, see the entries on 6-7-16, 6-8-16, and 2-3-17. Based on the totality of the requested fees, the court finds that the amount of $234,525.00 in attorney fees is reasonable.

Plaintiff is to give notice.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JENNIFER ALLERT, Plaintiff and Respondent, v. ROGER S. HANSON, Defendant and Appellant.	G055084 (Super. Ct. No. 30-2015-00786947) ORDER DENYING PETITION FOR REHEARING (Filed Mar. 22, 2019)

The petition for rehearing is DENIED.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.

Court of Appeal, Fourth Appellate District,
Division Three - No. G055084

S255039

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed May 15, 2019)

JENNIFER ALLERT, Plaintiff and Respondent,

v.

ROGER S. HANSON, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

JOHN R. ARMSTRONG, Bar No. 183912
SUSAN LEWIS, Bar No. 284933
HORWITZ + ARMSTRONG LLP
26475 RANCHO PKWY SOUTH
LAKE FOREST, CA 92630
TELEPHONE: (949) 540-6540
FACSIMILE: (949) 540-6583
Attorneys for Plaintiff Jennifer Allert

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

Jennifer Allert, **Plaintiff,** **vs.** **Roger Hanson, an individual; and Does 1-10, inclusive,** **Defendants.**	**Case No.: 30-2015-00786947-CU-BC-CJC** **(Unlimited Jurisdiction)** **Assigned to:** **Hon. David T. McEachen** **First Amended Complaint for:** **1. Breach of Contract;** **2. Reformation; or** **3. Declaratory relief** **(Amount demanded exceeds $100,000)**

Plaintiff, Jennifer Allert, is informed and believes, and so alleges as follows in support of her Complaint for damages against defendants Roger Hanson and Does 1-10, inclusive:

Jurisdiction and Venue

1. Plaintiff Jennifer Allert is and was at all times a licensed California real estate agent, whose real estate broker was Berkshire Hathaway Home Services (a d.b.a. of Pickford Real Estate, Inc.) [hereafter "Berkshire Hathaway"], an entity that is and was at licensed [sic] duly licensed by the California Department of Real Estate to sell real property in the State of California. Allert is and was at all times a resident of Orange County of California. All of the alleged acts and omissions that are the subject of this Complaint occurred in Orange County, California.

2. Defendant Roger Hanson is a licensed California attorney and personally participated in the acts and omissions complained of in this Complaint, all within Orange County, California.

3. Plaintiffs are presently unaware of the true names and capacities of defendants named as "Does 1 through 25, inclusive," and plaintiff will seek leave to amend this Complaint to allege their true names and capacities after they have been ascertained. Plaintiff is informed and believes, and so alleges that each of the defendants, named as "Doe" is or are in some manner responsible for the acts and omissions alleged below, and actually and proximately caused the various damages plaintiff seeks to recover.

4. Plaintiff is informed and believes, and so alleges that each of the defendants named as "Doe" was at all relevant times acting as the agent, partner, codeveloper, joint venture, principal/employee acting within the course and scope of employment,

co-conspirator, aider and abettor of each of the other defendants, and was or were at all times mentioned acting within the course and scope of such agency and employment. Defendant Roger Hanson and Does 1-20, inclusive shall be collectively referred to in this Complaint as "Defendants."

5. The events giving rise to this Complaint and the damages plaintiff Allert sustained all occurred in Orange County, California.

General Allegations

6. Defendant Roger Hanson retained Allert's real estate services by and through a real estate contract with Allert's broker, Berkshire Hathaway. A true and correct copy of this Agreement is attached and is incorporated as Exhibit "A" to this Complaint.

7. Plaintiff Allert met with defendant Hanson several times regarding representing him to find a potential buyer for realty defendant Hanson owned in Laguna Beach, namely, the property commonly known as 709 Kendall, Laguna Beach.

8. Plaintiff Allert found a buyer for home defendant Hanson owned in Laguna Beach, and so represented both defendant Hanson as the seller and the buyer and successfully negotiated agreement between Hanson and the buyer.

9. To help defendant Hanson, plaintiff Allert agreed, with her broker's permission, to take a flat $100,000 fee for selling defendant Hanson's multimillion Laguna Beach property at 709 Kendall.

10. However, when the sales transaction was placed in escrow, the escrow agent did not hold back plaintiff's agreed upon real estate commission, and so paid the full purchase price to defendant Hanson.

11. When plaintiff Allert contacted defendant Hanson about her commission, Hanson refused to pay the previously agreed upon $100,000 flat fee commission, claiming that she was not entitled to a commission since the sale closed after the date he believed his contract with plaintiff's broker expired, resulting in defendant Hanson pocketing the full $2,675,000 sales price.

12. Plaintiff Allert's broker assigned its contract with Hanson to plaintiff Allert, thereby conferring standing to plaintiff Allert to sue as both the real estate agent procuring the sale and as the broker.

First Cause of Action for
Breach of Contract against All Defendants

13. Plaintiff Allert adopts Paragraphs 1-12 above here.

14. Defendant Hanson and Berkshire Hathaway entered into a contract, according to the terms of which Defendant agreed, in exchange for valuable consideration, that he would pay Plaintiff's commission fee of $100,000.

15. Berkshire Hathaway assigned this contract to plaintiff before plaintiff filed suit seeking to recover Berkshire Hathaway's commission from the sale that her work as Berkshire Hathaway's agent

operated as the procuring cause of the sale of defendant's subject realty.

16. In reliance on the written promises made by Defendant that he would pay the contractually stated commission fee, Plaintiff provided real estate services and represented Defendant in the sale of his home.

17. Plaintiff and her assignor performed all of their obligations under the express written terms of the parties' agreement, a true and correct copy is attached as Exhibit "A" to this First Amended Complaint.

18. Defendant materially breached his oral contract with Plaintiff in that, among other things, he refused to pay the agreed discounted $100,000 earned commission fee.

19. Plaintiff was injured by defendants breach of and failure to perform their promises, including the failure to pay the agreed upon earned commission fee.

Second Cause of Action for Reformation against All Defendants

20. Plaintiff adopts Paragraphs 1-19 here.

21. Plaintiff and her assignor performed realtor services for Defendants and each of them and at the special request of Defendant.

22. Defendant knew that these services were being provided and promised to pay their reasonable value.

23. Defendant accepted, used, and enjoyed the services provided by Plaintiff and her assignor.

24. Any error or technical infirmity regarding the subject real estate commission was caused by Defendants and each of them or was the product of mutual mistake in that both parties wanted the sale to close and in fact closed the sale on Defendants' property at the price defendants' wanted under the terms and conditions of the written listing agreement.

25. Accordingly, the Court in equity and in good conscience should reform the parties agreement to make it lawfully and accurately state what it should have been, to the extent that any technical defect exists that arguably excused defendants and each of their performance under the parties' agreement.

Third Cause of Action for
Declaratory Relief against All Defendants

26. Plaintiff adopts Paragraphs 1-25 above here.

27. An actual controversy has arisen and now exists between Plaintiff and her assignor on the one hand, and with Defendants Hanson and Does 1-10 on the other hand.

28. Plaintiff contends that she and her assignor performed under the terms of the parties' agreement based on Defendant Hanson's representations that he would pay $100,000 from the sale of the house as her commission fee consistent with the parties written listing agreement describing the sale price of the home, the services to be

performed, and the commission to be paid should plaintiff and her assignor were [sic] the procuring cause of the sale, which they were for the sale price Defendant Hanson demanded.

29. Plaintiff found a buyer for Defendant's house, represented Defendant in the sale of his house, and actually did successfully negotiate a closing of the sale at the price Defendant wanted.

30. Because Plaintiff and her assignor fully performed all their obligations under the written listing agreement with Defendants and each of them, and because Defendants fail and refuse to pay any portion of the agreed commission for the sale of Defendants' former realty, unfortunately, plaintiff must now seek a judicial declaration from this honorable court to determine the rights, duties, and obligations of the parties based on the parties conduct concerning their agreement in that there is a present and actual controversy as to whether Defendant Hanson or Does 1-10 is required to pay Plaintiff the agreed $100,000 commission or the reasonable and fair value for her services since Defendant is claiming, among other things, that he does not owe Plaintiff her commission at all.

31. Because of the present controversy regarding the respective parties' rights, duties, and obligations under their agreement, Defendant seeks this Court's judicial determination of the respective parties' rights and duties to each other.

32. A judicial declaration is necessary and appropriate at this time under the circumstances so that Plaintiff and Defendant may ascertain what their

rights, duties, and obligations presently are to each other under their agreement.

Request for Judgment against Defendants

WHEREFORE, Plaintiff Jennifer Allert demands judgment be entered against Defendants Roger Hanson and Does 1-10, inclusive, and each of them, for the following:

First Cause of Action
(Breach of Contract)

1. For general damages according to proof in the amount in excess of the jurisdiction of this court, but no less than $100,000 under the parties' agreement or for $133,750 representing a 5% commission for finding a buyer who closed escrow on the sale of defendant Hanson's property at 709 Kendall, Laguna Beach, California;

2. Special damages according to proof;

3. For any and all other recoverable damages, including, without limitation, nominal, incidental, and consequential damages, expert investigation costs, and such other damages as may be recovered by proving the facts alleged above in this Complaint;

4. For cost of suit;

5. For prejudgment interest at the applicable legal rate of 10% per annum from the date escrow closed on the sale of Defendant's subject realty through time of entry of judgment;

6. For reasonable, contractual attorney's fees; and

7. For such further or other relief as the Court deems just and proper.

Second Cause of Action
(Reformation)

1. A judicial declaration to reform the parties agreement consistent with the actual terms of the agreement the parties agreed to consistent with equity and good conscious [sic], including a declaration concerning the amount of commission Plaintiff is due from Defendants and each of them under their agreement, including all other incidental, consequential, actual, and other recoverable damages according to the proof at trial;

2. For prejudgment interest as allowed by law at the legal rate of 10% per annum from the date suit was filed through entry of judgment;

3. For costs of suit incurred;

4. For contractual attorney's fees; and

5. For such further relief the Court deems just and proper.

Third Cause of Action
(Declaratory Relief)

1. For a judicial declaration that Defendant owes Plaintiff a commission fee under the terms of the agreement;

2. That Defendant Hanson and Does 1-10 are responsible for paying Plaintiff's fee of no less than $100,000 under their agreement, or $133,750, representing 5% of the sale price of the property, the lowest commission a licensed California realtor would take on such a transaction in representing both buyer and seller;

3. For prejudgment interest as allowed by law at the legal rate of 10% per annum from the date suit was filed through entry of judgment;

4. That Plaintiff Allert be awarded her costs of the suit;

5. For reasonable contractual attorney's fees under the parties' agreement; and

6. That Plaintiff Allert be awarded such other and further relief as the court may deem just and proper under the circumstances of the case.

Dated: August 19, 2015

HORWITZ + ARMSTRONG LLP

By: /s/ S. L.
John R. Armstrong,
Susan Lewis,
Attorneys for Plaintiff,
Jennifer Allert

EXHIBIT A

[LOGO] **SINGLE PARTY COMPENSATION AGREEMENT (C.A.R. Form SP, Revised 4/13)**

Roger Hanson ("Seller") and ***Berkshire Hathaway Home Services*** ("Broker") agree as follows, with regard to the real property in the City of ***Laguna Beach***, County of ***Orange***, California, described as follows: ***709 Kendall*** ("Property").

1. COMPENSATION TO BROKER:

Notice: The amount or rate of real estate commissions is not fixed by law. They are set by each Broker individually and may be negotiable between the Seller and Broker.

Seller agrees to pay Broker, irrespective of agency relationships, either ☐ _____ percent of the sales price or ☒ $ 100,000, as follows:

A. If Seller accepts an offer from, ***Olov Nasiell, Jenny Nasiell***, ("Buyer") to purchase or exchange the Property during the period commencing on (date) ***January 17, 2014*** and expiring at 11:59 P.M. on (date) ***February 7, 2014*** ("Compensation Period"), provided Buyer completes the transaction or is prevented from doing so by Seller.

B. Buyer includes any person or entity related to Buyer, or who in any manner acts in Buyer's behalf, including, if Buyer is a corporation or partnership, any person or entity in which Buyer has a legal or beneficial interest, or which has a legal or beneficial interest in Buyer.

C. Seller hereby irrevocably assigns to Broker the above compensation from Seller's funds and proceeds in escrow.

D. In event of an exchange, Broker will disclose if Broker is also collecting compensation from additional parties.

E. Seller warrants that Seller has no obligation to pay compensation to any other broker regarding the sale or exchange of Property to Buyer.

F. This Agreement shall remain binding, even if, during Compensation Period, Seller enters into a listing agreement with any broker to sell Property.

2. AGENCY RELATIONSHIPS:

A. If the Property includes residential property with one-to-four dwelling units, Broker shall give Seller an agency disclosure form prior to presenting an offer to purchase.

B. (Check one) In the transaction:

1. ☐ Broker will act as agent for Seller exclusively in any resulting transaction.

2. ☒ Broker will act as dual agent representing both Buyer and Seller in any resulting transaction.

3. ☐ Broker will act as agent for Buyer exclusively in any resulting transaction. Seller agrees and understands that all acts of Broker, even those that assist Seller in performing or completing any of

Seller's contractual or legal obligations, are intended for the benefit of Buyer exclusively. Seller is advised to seek real estate, legal, tax, insurance, and all other desired assistance from other appropriate professionals.

C. This Agreement does not require Broker to solicit offers on the Property from Buyer, nor does it authorize Broker to solicit offers from any other person or entity.

3. EQUAL HOUSING OPPORTUNITY: The Property is offered in compliance with federal, state, and local anti-discrimination laws.

4. APPLICABLE LAWS: Seller agrees to comply with all applicable federal, state, and local laws and regulations regarding sale of Property.

5. ATTORNEY FEES: In any action, proceeding, or arbitration between Seller and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney fees and costs.

6. OTHER TERMS AND CONDITIONS: _____
_____
_____
_____

7. ENTIRE CONTRACT: All prior discussions, negotiations, and agreements between the parties concerning the subject matter of this Agreement are superseded by this Agreement, which constitutes the entire contract and a complete and exclusive expression of their Agreement and may not be contradicted by evidence of any prior

agreement or contemporaneous oral agreement. This Agreement and any supplement, addendum, or modification, including any photocopy or facsimile, may be executed in counterparts.

Seller /s/ Roger Hanson Date ***01/~~21~~/2014***
Roger Hanson [29 R.N.]
Address ***709 Kendall***
City ***Laguna Niguel*** State ***ca*** Zip ***92651***
Seller _____ Date _____
Address _____
City _____ State ____ Zip _____
Real Estate
Broker (Firm) ***Berkshire Hathaway Home Services***
30812 South Coast Highway
Address ***Laguna Beach, CA 92651***
By /s/ Jennifer Allert Date ***01/~~17~~/2014***
Jennifer Allert [23]
Telephone ***(949) 212-8033*** Fax _____

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Los Angeles, California 90020

Reviewed by _____

Date _____

[LOGO]
Equal Housing
Opportunity

SP REVISED 4/13 (PAGE 1 OF 1)

SINGLE PARTY COMPENSATION AGREEMENT (SP PAGE 1 OF 1)

Agent:	**Jennifer Allert**
Broker:	**Berkshire Hathaway Home Services California Properties 30812 S. Coast Highway Laguna Beach, CA 92651**
Phone	**(949) 212-8033 Fax :**
Prepared using zipForm® software	

[Proof Of Service Omitted]

Roger S. Hanson
1616 N. Mountainview Place
Fullerton, CA 92831-1226
(714) 454-6619

In Persona Proper

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

JENNIFER ALLERT, Plaintiff, v. ROGER S. HANSON, et al, Defendants.	No. 30-2015-00786947-CU-BC-CJC **NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED COMPLAINT** Date: Nov. 17, 2015 Time: 1:30 P.M. Dept: C-21

(Filed Sept. 17, 2015)

To the Plaintiff Jennifer Allert and to her attorneys of record, John R. Armstrong and Susan Lewis:

PLEASE TAKE NOTICE that on Nov. 17, 2015 at 1:30 P.M. or as soon as counsel may be heard, in the above noted Dept. C-21 of the above entitled court, located at 700 Civic Center Drive West, Santa Ana, California, Roger S. Hanson, named defendant will, and does, demur to Plaintiff's First Amended Complaint on all causes of action.

GROUNDS

1. The Complaint is uncertain because Plaintiff's legal and factual allegations are ambiguous and unintelligible (C.C.P. 430.10(f)).

2. The Complaint fails to state facts sufficient to constitute a cause of action against this Plaintiff and does not aver facts to determine whether an alleged contract was created between Plaintiff, as an individual, or the entity employing Plaintiff, i.e. Berkshire Hathaway, and this defendant; a copy of said alleged agreement is attached to the First Amended Complaint as Exhibit A, and it is ambiguous and is unintelligible insofar as it purports to have the date of February 1 altered by a strike over appearing to be "7", said alteration is not initialed by either Plaintiff Allert or this Defendant, Roger S. Hanson; as such said alleged agreement Exhibit A is defective in not supporting a cause of action since all agreements in real estate matters must be in writing; said Exhibit A is therefore ambiguous and unintelligible (C.C.P. 430.10(f)) and is disingenuous.

3. As such, Exhibit A cannot ever support any claim that Plaintiff is entitled to any fee; attached to this demurrer as Exhibit 1 is a demand by counsel to Plaintiff to agree that Exhibit A is "Genuine"; Exhibit 2 herewith attached denies that Exhibit A is genuine and asserts it to be altered, thus "forged" by Plaintiff and her associates while Plaintiff was employed at Berkshire-Hathaway in Laguna Beach.

4. The First Amended Complaint is ambiguous and uncertain in that the title page 1 lists Does 1-10, inclusive", while page 2, lines 9-15, in paragraph 3, lists "Does 1-25, inclusive", while paragraph 4, page 2, asserts "Does 1-20".

5. The amount demanded in the First Amended Complaint is ambiguous and uncertain in that the initial page 1 asserts that the amount demanded "exceeds" $100,000; at page 3, line 13, paragraph 9, alleges that a "flat $100,000 was agreed, with her broker's permission" to be the "fee"; it is uncertain what percent of said $100,000 was to be received by Plaintiff vis-à-vis the office of Berkshire Hathaway; to a like averment at page 3, paragraph 11, $100,000 was claimed to be the agreed fee. In a parallel assertion, at page 4, paragraph 14, $100,000 is claimed to be agreed by Defendant Hanson to pay a "commission fee" of $100,000; at page 4, paragraph 18, it is asserted that the "agreed fee of $100,000 was 'discounted'", and it is ambiguous and uncertain whether an agreement was alleged to have been entered into at a higher figure which became discounted at an equally non-alleged percent of discount; the First Amended Complaint is ambiguous and unintelligible in this averment; at page 6, First Cause of Action, paragraph 1, it is ambiguous and uncertain in that Plaintiff seeks both "no less than $100,000 under the parties agreement or for $133,750, representing a 5% commission, where there is no showing that any written agreement was ever entered into for a 5% commission. At page 7, the First Amended Complaint asserts that the "applicable legal rate of interest is 10%",

but no written document is averred to have been entered into by Plaintiff, Plaintiff's employer, Berkshire Hathaway, and Defendant that such percentage would be applied and this was never set forth previously in writing.

At page 8, paragraph 2, it is ambiguous and uncertain in that Plaintiff asserts that a 5% of sales price is the lowest commission a licensed California realtor would take in representing both buyer and seller, while here no such written agreement was ever entered into and at no time did Plaintiff represent this defendant; at all times, Plaintiff represented the purchases of said real estate.

At page 3, paragraph 6, it is alleged that Defendant "retained" Berkshire Hathaway via Exhibit A to the First Amended Complaint. As a matter of law, Exhibit A was willfully altered by Plaintiff and her associates, including the manager of the Laguna Beach office, and her associate, one Jeff Loge. Plaintiff, at no time, represented Defendant Hanson, and Hanson repetitively rejected offers brought to Defendant by Plaintiff, who was then representing solely the purchasers of said property. At page 3, paragraph 11, it is averred that Defendant refused to pay solely because the "contract" had expired; in addition to the "contract" expiring, Plaintiff and her associates willfully forged and altered said Exhibit A by a strike over of the date of February 1 with the numeral "7", and neither Plaintiff nor this Defendant initialed this strike-over.

6. At page 3, paragraph 12, it is asserted that Plaintiff Allert's broker assigned its "contract", i.e. Exhibit A, to Plaintiff; no such written assignment is provided, nor is there support that such a defective Exhibit A could be assigned.

7. Plaintiff and her current counsel are using the U.S. Mails to mail known-to-be-false and altered documents (Exhibit A) in violations of the United States Code, a federal offense; thus the First Amended Complaint, containing Exhibit A, constitutes commission of a federal crime when it is mailed in an effort to falsely obtain money.

STANDARD ON DEMURRER

A party may demur to a pleading when any ground for objection appears on the face or from any matter, which a Court may take judicial notice (C.C.P. 430.10). The sole function of a demurrer is to test the legal sufficiency of the challenged pleading. (Beauchene v. Synanon Foundation Inc. (1979) 88 Cal.App.3d 342, 344, citing Whitcomb v. County of Yolo (1977) 73 Cal.App.3d 698, 702.) A demurrer is properly sustained when the complaint, taken as a whole and reading its parts in context, does not state facts sufficient to constitute a cause of action. (C.C.P. 430.10(e)) In reviewing the sufficiency of a complaint against a demurrer, courts consider all material facts properly pleading in a complaint as admitted but not contentions, deductions, or conclusions of fact or law. (Farmers Ins. Exchange v. Zerin (1997) 53 Cal.App.4th 445, 451 citing

Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) A defendant may also demur on grounds of uncertainty – where allegations are ambiguous or unintelligible (C.C.P. 430.10(f)).

CONCLUSION

In view of the aforesaid statements of facts and law, the demurrer to the First Amended Complaint should be sustained without leave to amend, since Exhibit "A", on its face, cannot be used to state a claim for money damages. Exhibit A is a willfully falsified document.

Dated: September 3, 2015

Respectfully submitted,

/s/ Roger S. Hanson
Roger S. Hanson

In Persona Proper

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 09/01/2015 TIME: 01:30:00 PM DEPT: C21

JUDICIAL OFFICER PRESIDING: David T. McEachen
CLERK: Kathy Peraza
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Mandi D Destra

CASE NO: **30-2015-00786947-CU-BC-CJC**
CASE INIT. DATE: 05/11/2015
CASE TITLE: **Allert vs. Hanson**
CASE CATEGORY: Civil – Unlimited
CASE TYPE: Breach of Contract/Warranty

EVENT ID/DOCUMENT ID: 72181367
EVENT TYPE: Demurrer to Complaint

APPEARANCES

There are no appearances by any party.

OFF CALENDAR.

SUPERIOR COURT OF
THE STATE OF CALIFORNIA

COUNTY OF ORANGE,
CENTRAL JUSTICE CENTER

JENNIFER ALLERT, Plaintiff, vs. ROGER HANSON, an individual; and DOES 1-10, inclusive, Defendants.	)	Case No. 30-2015-00786947- CU-BC-CJC

Deposition of:	JENNIFER ALLERT
Date & Time:	Monday, September 21, 2015 10:00 a.m.
Place:	1314 East Chapman Avenue Orange, California
Reporter:	Deene Lynn Jones, C.S.R., R.P.R. Certificate Number 6971

[LOGO] simpson deposition services

1314 E. Chapman Ave.
Orange, CA 92866
800-505-9994 714-997-3333

Certified Shorthand Reporters

* * *

[41] If you are representing me, you would like to get as much as I want for the house; correct?

A. Right.

Q. Jeff Loge representing the Nasiells would try to knock it down as much as he could; correct?

A. Yes.

Q. All right. And you recognize that is kind of a conflict of interest?

A. People – agents do it all the time.

Q. Well, maybe –

A. Again, my attentions [sic] were always to do the right thing. I felt –

Q. You don't see why that is a conflict of interest?

A. No. Agents do it all the time.

Q. Well, I hope not, ma'am. I hope not. But if you say they do it all the time – and I said – did that not bring on my so-called agreement to give you $100,000 if you got the 3,000,000? Wasn't that the basis of this agreement?

MR. ARMSTRONG: I'm going to object to that question as compound as phrased and confusing.

BY MR. HANSON:

Q. Let me start over again. As a result of this document, making this document, did I not say to you; "If you can give me the [42] 3,000,000 I will give you $100,000"?

A. We had that conversation.

Q. Okay.

A. I said I would try to get you what I could get you, yeah.

Q. All right. And there was a time limit where you are supposed to do that; correct?

A. Right. But it took you a while to come in the office to counter. That is why we needed to extend it.

Q. We're only talking about the 29th now.

A. Okay.

Q. We're talking about the 29th.

And take a look at Exhibit Number 4. Paragraph A, it has the date of February, strike over, 2014, correct? Is that correct?

A. Say that again.

Q. I say in Paragraph A – see A up there near the top?

A. Yes, I do.

Q. It has apparently the date of February 1st, 2014 with a strike over it; correct?

A. Yes.

Q. Okay.

A. That is not a strike. I don't know what you

* * *

[42] she could do some good to overcome the problem and secure my desired 3,000,000, I offered her $100,000 if she was successful, and that was the genesis of your

termed," quote, "'single party compensation agreement,'" which had a time span to allow her to secure my demand of $3,000,000."

Didn't I tell you that I was going to give you 100,000 if you could get the 3,000,000 for me?

A. Yeah, you said that.

Q. All right. Okay. And then I go on to say, "This time span was about to expire, and I agreed and initialed an extension, which Ms. Allert also executed.

"Once again, the extension expired, nullifying any written agreement to pay your office any commission at all."

Do you recognize that absent that strike over, this contract had expired?

MR. ARMSTRONG: Objection. Calls for a legal conclusion. No foundation that she has any legal training.

BY MR. HANSON:

Q. I go on and I say on Page Number 3, third paragraph, "When I sought to determine who did the alteration on the date of April 3rd, 2014, in your offices, both Ms. Allert and Mr. Loge told me they did not know who did it," which was the genesis for

* * *

Roger S. Hanson
1616 N. Mountainview Place
Fullerton, CA 92831-1226
(714) 454-6619

In Persona Proper

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

JENNIFER ALLERT, Plaintiff, v. ROGER ~~S.~~ HANSON, et al, Defendants.	No. 30-2015-00786947-CU-BC-CJC **ANSWER TO FIRST AMENDED COMPAINT** [sic] **(VERIFIED ANSWER); FIRST AMENDED COMPLAINT NOT VERIFIED**

Roger ~~S.~~ Hanson, Attorney at Law, appearing in persona proper, herewith answers the non-verified First Amended Complaint by this verified Answer; this Answer is not made by any so-called "Does", whom this defendant cannot identify, nor has the non-verified First Amended Complaint identified any, whether "Does 1-10" (Caption), "Does 1-25" (page 2, line 10), or "Does 1-20" (page 2, line 22) are involved.

Pages 1-2, First Amended Complaint, appear to reasonably aver correct allegations as to "General

Allegations"; at page 3, First Amended Complaint, Defendant replies in this Answer as follows:

6. Defendant did not, at any time, retain Plaintiff's real estate services via a real estate contract called "Exhibit A". Indeed, and in fact, Plaintiff at all times represented a prospective buyer, and brought repetitive offers on behalf of the buyer to Defendant.

7. Defendant was contacted by Plaintiff and had several meetings, but at no time did Defendant engage Plaintiff, or her firm, to find a buyer to 709 Kendall, Laguna Beach. In fact, Plaintiff never sought and never obtained a listing agreement with Plaintiff and her erstwhile employer, Berkshire Hathaway.

8. At no time did Plaintiff represent both Defendant Hanson as the seller and the prospective buyer, and Exhibit "A" was not the basis for the eventual sale of 709 Kendall. The above alleged "dual representation" is a willfully false allegation.

9. Paragraph 9 is willfully false, as Exhibit "A" had a specific condition that Plaintiff and or her firm would receive $100,000 if and only if they secured an offer for $3,000,000 for said premises. When placed under oath in her deposition of September 21, 2015, Plaintiff admitted this at page 41, line 16-page 42, lines 1-7; said Exhibit "A" had a mutually agreed time limit for 4, which Plaintiff was to perform and said time limit expired on February 1, 201~~5~~4. [R.H.] Plaintiff personally, or in a conspiracy to defraud, altered said date of February 1, 201~~5~~4 [R.H.] to February 7, 201~~5~~4 [R.H.] by striking the 1 and overriding it with a

7, doing so with fellow employees and/or the manager of the Laguna Beach office of Berkshire-Hathaway. At no time was the alteration initialed, and as such, the Exhibit "A" is defective and cannot be any valid agreement to pay any "commission" claimed by Plaintiff. At page 71, deposition, Plaintiff again admits while under oath that the basis, and sole basis, of Exhibit "A" was to define Plaintiff's obligations and fruits of her alleged representation to be $100,000, if and only if she secured $3,000,000 as to the selling price of 709 Kendall, and such did not occur. Copies of pages 41-42 and 71 are attached as Exhibits One to this verified Answer.

10. At paragraph 10, Plaintiff falsely accuses her escrow officer, one Melissa Margarette of Pickford Escrow Co., of not "holding back the agreed upon real estate commission", which is a willfully false allegation since no such agreement existed; Plaintiff and other cohorts at her erstwhile employment conspired to alter Exhibit "A" as set forth supra.

11. Paragraph 11 is partially correct, but omits the true nature of Exhibit "A" in that it fails to admit the real reason for Exhibit "A", i.e. Plaintiff was to receive $100,000 if any only if she secured an offer for $3,000,000 for said property, as she admitted at pages 41-42 and 71 of her deposition of September 21, 2015,

12. Defendant denies that Plaintiff's employer could "assign" Exhibit "A" to Plaintiff, and Defendant asserts that Berkshire Hathaway would not have done so had Plaintiff been truthful about the reason for

creating of Exhibit "A", which, in truth, and in fact, was legally void before it was assigned and thus could confer no standing to Plaintiff to sue "as both the real estate agent procuring the sale and as the broker".

FIRST CAUSE OF ACTION

14. Defendant denies the allegation of 14 based on the above answers to paragraph 6-12, inclusive.

15. This paragraph appears, on the surface, to be correct only insofar as the alleged assignment occurring prior to Plaintiff bringing suit against Defendant.

16. Plaintiff at no time represented Defendant in the sale of his home, and no written agreement of representation is in existence as far as is known to Defendant; Exhibit "A" has been willfully altered and/or forged by strikeover of February 1, 2015~~5~~4 [R.H.] by making it appear as February 7, 2015~~5~~4. [R.H.]

17. Plaintiff and her assignor did not perform all, or any, of their obligations under Exhibit "A" since no sale of $3,000,000 occurred under the admission that Exhibit "A" is a true and correct copy of the express written terms; said express terms provided $100,000 to Plaintiff if and only if she effected a sale of 709 Kendall for $3,000,000.

18. Defendant is unaware of any "oral contract", and such "oral contracts" are not enforceable in this or any real estate transaction.

19. Defendant denies any injury suffered by Plaintiff, as she was never entitled to $100,000, and if she never obtained it, she was left in the same position of being unable to secure relief in the expired and alteration of Exhibit "A".

SECOND CAUSE OF ACTION

14. Defendant denies that any true or honest realtor services were performed per the answers to 6-12 and 13-19, supra.

22. Defendant denies this allegation, save giving Plaintiff the opportunity to provide said services; there is no "reasonable values" of service, which were not performed, and which could not be compensated for because of failure of Exhibit "A" to be complied with. Defendant eventually learned that Plaintiff and her prior employer did not provide the services.

24. All of this paragraph is willfully false based on the answer set forth above in paragraph [sic] 6-11 and 13-23.

25. This plea for "equity" and to "reform" Exhibit "A" is vague and void as Plaintiff cannot seek "equity" and "reform" when she and her associates participate in falsifying Exhibit "A".

THIRD CAUSE OF ACTION

14. Defendant denies that any "actual controversy" exists, which can be dealt with by "equity" or "reformation".

15. Defendant denies in its entirety paragraph 28 based on the above answers in the first and second cause of action.

16. At no time did Plaintiff represent Defendant, and no such written agreement exists, and the sales price desired by Defendant was never obtained by Plaintiff and her co-conspirator in the creation and alteration of Exhibit "A".

30. This paragraph is willfully false as set forth in lines 1-2, and thus the remainder of paragraph 30 is null and void.

31. There can be no judicial determination to give "equity" or "reformation" of this fraudulent Exhibit "A", all as set forth supra in the responses to paragraphs in the first and second cause of action.

32. No judicial determination save to dismiss this law suit as alleging false averments is appropriate.

REQUEST FOR JUDGEMENT AGAINST DEFENDANTS

First Cause of Action

1. At page 6, item 1, there can be no damages whatsoever because pursuant to the deposition of

Jennifer Allert on September 21, 2015, at pages 41-42 and 71, Ms. Allert admitted, while under oath at said deposition, that the sole purpose of Exhibit "A" was to provide her employer with $100,000 if and only if the property was sold for $3,000,000. There is nothing on any document that provided a 5% commission of $133,750 for a contract now admitted to be not complied with.

2. There are no "special damages".

3. There are no damages here enumerated.

4. Costs of suit should be awarded to this defendant.

5. For a void contract, no interest is available.

6. No "contractual" attorney's fees can be awarded.

7. Exhibit "A" has been altered/forged by Plaintiff and her associates, so no relief is awarded.

Second Cause of Action

(Reformation)

1. This item is ridiculous as "reforming" a contract admitted to be void in the deposition of September 21, 2015 at pages 41-42 and 71 of Plaintiff is not possible in "equity" where Plaintiff and her associates have altered and forged said contract.

2. See Responses to First Cause of Action, supra.

3. See Responses to First Cause of Action, supra.

4. See Responses to First Cause of Action, supra.

5. See Responses to First Cause of Action, supra.

Third Cause of Action

(Declaratory Relief)

1. No such "commission fee" has been set forth in any alleged "agreement".

2. This request is obviously null and void as set forth in the First and Second Causes of Action.

3. References to the like responses in the First and Second Causes of Action show that no recovery is here possible.

WHEREFORE, by this verified answer, Defendant asserts that this suit be dismissed since Exhibit "A", before alteration cannot be enforced, and because of willful alteration and forgery, Defendant should be awarded all of his costs.

I declare the foregoing to be true and correct under the penalty of perjury this 28th day of November, 2015 at Fullerton, California.

Respectful submitted,

/s/ Roger S. Hanson
Roger S. Hanson

In Persona Proper

VERIFICATION

State of California,

County of Orange

I, the undersigned, being first sworn say:

I am the defendant in this action; the above ANSWER TO FIRST AMENDED COMPLAINT is true of my own knowledge, except as to the matters that are stated in it on my information and belief, and as to those matters, I believe it to be true.

Executed on November 28, 2015 at Fullerton, California.

I declare under penalty of perjury that the above is true and correct.

/s/ Roger S. Hanson
Roger S. Hanson

[Proof Of Service Omitted]

John R. Armstrong, Calif. Bar No. 183912
Vanoli V. Chander, Calif. Bar No. 302630
HORWITZ + ARMSTRONG APC
14 Orchard Road, Suite 200
Lake Forest, CA 92630
Telephone: (949) 540-6540
Facsimile: (949) 540-6578
Attorneys for Plaintiff
Jennifer Allert

SUPERIOR COURT OF CALIFORNIA

**COUNTY OF ORANGE –
CENTRAL JUSTICE CENTER**

JENNIFER ALLERT, Plaintiff, vs. ROGER HANSON, an individual, and DOES 1 through 10, inclusive Defendants.	Case No: 30-2015-00786947 Assigned for All Purposes to: Hon. Walter Schwarm **DECLARATION OF JOHN R. ARMSTRONG, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY'S FEES** Date: August ~~8~~ 15, 2016 Time: 9:00 a.m. Dept: C19 Date of Filing: May 11, 2015 Trial Date: November 29, 2016

DECLARATION OF JOHN R. ARMSTRONG

I am a partner with Horwitz + Armstrong, a professional law corporation, attorneys of record for plaintiff, Jennifer Allert, and make this declaration on behalf of Plaintiff's Motion for Attorney's Fees against defendant, Roger Hanson.

1. As the attorney of record for Plaintiff I have personal knowledge of all pleadings and documents filed in this action, and I have reviewed my client's file, which is kept at my office in the place where we keep client's files as our firm's business records before signing this declaration.

2. I have been a licensed California attorney since December 3, 1996, and a partner with Horowitz + Armstrong APC for the last 7 years. Previously, I was an equity partner specializing in business litigation with MURTAUGH, MEYER, NELSON & TREGLIA, LLP located in Irvine, California.

3. I attended law school at Creighton University and graduated in 1996. I am admitted to practice before all of the courts of the State of California, the Central District of California, the Southern District of California, the Northern District of California, the Eastern District of California, the Ninth Circuit Court of Appeals, the Second Circuit Court of Appeals, the Federal Circuit Court of Appeals, the United States Court of Federal Claims, and the United States Court of International Trade, and admitted to practice before the United States Supreme Court. I am also a fee

arbitration [sic] with the Orange County Bar Association, and have been so for more than 8 years.

4. I have represented individuals as well as corporate clients in all phases of litigation in both federal and state courts, including trial and appeals. I am a member of "Million Dollar Advocates Forum" reserved for attorneys obtaining judgments in excess of $1 million for a client.

5. I am familiar with the manner in which Horwitz + Armstrong APC attorneys record their time and prepare client invoices in the normal course and scope of business. These billing records are prepared at or around the time of the billing event and are recorded under specific case files assigned to each client and matter. In preparing this motion, I reviewed every entry that was billed since this case was filed and verified that the time was correctly billed.

6. I billed at the hourly rate of $500, which is low for my experience in the Orange County legal market.

7. Matthew Henderson, Esq. was admitted to the California bar in December 2010 and has continuously practiced as a litigator since that time. Mr. Henderson's hourly rate of $375 is reasonable, if not low for a litigation attorney with his experience in the Orange County legal market. Though this was Mr. Henderson's first trial by himself, he was and had been a valuable second chair trial counsel in several trials and arbitrations before the subject dispute.

8. Susan Lewis, Esq. was admitted to the California bar in December 2012, and has continuously practiced as a litigator since that time. Ms. Lewis's hourly rate of $375 is reasonable, if not low for a litigation attorney with her experience in the Orange County legal market.

9. I am a fee arbitrator for the Orange County Bar Association, and have presided over numerous fees disputes. Based on my experience, I am familiar with what other law firms of similar or smaller size charge for business litigation services. Based on my experience, many Orange County business litigation firms charge between $600-$1,000 an hour for partner time, and between $200-$400 an hour for associate, depending on the skill and experience of the associates.

10. Based on my knowledge and working with the attorneys performing services for plaintiff Allert, I believe that the hourly charged [sic] are reasonable given the experience of the attorneys who worked on her case.

11. Additionally, I believe that the number of hours incurred are reasonable because, as reflected by the billings, much of the fees, certainly more than half of the claimed legal fees, resulted from the over or relitigation of issues and defenses or resulted from Mr. Hanson's litigation tactics.

12. During the course of the litigation, Mr. Hanson repeatedly made disparaging remarks about my client to me, and threatened that he would make this

case so expensive that my client would spend more than what she was suing for.

13. He would make these comments to me in response to my efforts to resolve the claim for something less than the $100,000 earned commission. He rejected every settlement offer, including my client's statutory offer to compromise her claim, inclusive of costs, fees, damages and interest for $99,000 under Code of Civil Procedure, § 998, a true and correct copy of which is attached as **Exhibit 1**.

14. Attached as **Exhibit 2** are true and correct copies of Horwitz + Armstrong, APC's invoices from the commencement of this matter.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and this I executed this Declaration on July 11, 2017 at Lake Forest, California.

By /s/ John R. Armstrong
John R. Armstrong, Declarant

Horwitz + Armstrong
A Professional Law Corporation
14 Orchard, Suite 200
Lake Forest, CA 92630
(949) 540-6540

Invoice submitted to:
Jennifer Allert
30331 Benecia Avenue
Laguna Niguel, CA 92677

July 11, 2017
In Reference To: Broker Agreement (Sale of 709 Kendall, LB, CA)/Roger Hanson

Professional Services

	Hrs/Rate	Amount
4/16/2015 Research and draft of Complaint against Robert Hanson.	1.00 200.00/hr	200.00
Further drafting re Complaint.	3.50 375.00/hr	1,312.50
4/17/2015 Continued research and draft of Complaint against Robert Hanson.	1.70 200.00/hr	340.00
4/23/2015 Continued draft of Complaint against Robert Hanson.	0.20 200.00/hr	40.00
Communications with client re draft of Complaint.	0.10 375.00/hr	37.50
5/8/2015 Review of complaint docs and email communication to D. Rios re: same.	0.70 200.00/hr	140.00
Legal Services Rendered: prepare and file civil case summons cover sheet and summons.	1.20 200.00/hr	240.00

5/11/2015 Draft Summons for submission to One Legal re: filing of Complaint.	0.40 100.00/hr	40.00
Prepare and submit order to One Legal re: filing of Complaint, Civil Case Cover Sheet, and Summons.	0.50 100.00/hr	50.00
5/12/2015 Perform research via Westlaw re: service of process address for Complaint.	0.20 100.00/hr	20.00
* * *		
	Hrs/Rate	Amount
10/23/2015 Further draft and edit of motion to compel re: further discovery responses; further draft of supporting declarations re: same; further draft of separate statements re: same.	3.40 375.00/hr	1,275.00
10/26/2015 Follow up on filing to check hearing dates and departments; case management statement	0.80 375.00/hr	300.00
10/27/2015 Meeting re: client review of deposition; notice of errata sheet.	1.30 375.00/hr	487.50
11/1/2015 Research re: opposition to demurrer.	2.30 375.00/hr	862.50
11/2/2015 Research for and drafting opposition to demurrer.	5.80 375.00/hr	2,175.00

11/3/2015 Finalize opposition to demurrer for filing.	1.00 375.00/hr	375.00
Draft Opposition to Demurrer	4.50 500.00/hr	2,250.00
11/4/2015 Communication in office with Hanson re: discovery issues.	0.40 375.00/hr	150.00
11/5/2015 Objection to notice of deposition.	2.20 375.00/hr	825.00
11/6/2015 Schedule court call re: case management conference.	0.50 375.00/hr	187.50
11/9/2015 Court call for case management conference – continued to November 17; bates stamping and OCRing documents produced by defendant.	0.90 375.00/hr	337.50
11/12/2015 Review of documents produced by defendant.	0.30 375.00/hr	112.50
11/13/2015 Communications re: deposition dates.	0.20 375.00/hr	75.00
11/16/2015 Review of documents from defendant; check for tentative re: demurrer; drafting subpoena.	0.70 375.00/hr	262.50
11/17/2015 Communication re: tentative; prepare and appear for hearing on demurrer.	3.30 375.00/hr	1,237.50
11/18/2015 Review of documents produced by defendant.	0.60 375.00/hr	225.00

11/20/2015 review of documents produced by defendant	1.50 375.00/hr	562.50

* * *

	Hrs/Rate	Amount
11/23/2015 Review of documents; draft subpoena for escrow files; check for tentative ruling.	2.30 375.00/hr	862.50
11/24/2015 Attend hearing on motion to compel; review documents produced by Hanson.	4.20 375.00/hr	1,575.00
11/25/2015 Review of documents produced by Hanson	0.70 375.00/hr	262.50
11/30/2015 Communication with opposing counsel re; discovery issues and extensions; meet and confer letter; review of documents produced by Hanson.	5.10 375.00/hr	1,912.50
12/1/2015 Review of documents produced by Hanson.	2.10 375.00/hr	787.50
12/2/2015 Review of documents produced by Hanson; final revision and send meet and confer letter to Hanson.	0.50 375.00/hr	187.50
12/15/2015 Review of defendant's discovery responses.	0.10 375.00/hr	37.50
12/16/2015 Prepare for deposition of Jeff Loge.	1.00 375.00/hr	375.00

12/17/2015 Attend deposition of Jeff Loge and communication with client re: same.	2.70 375.00/hr	1,012.50
1/4/2016 Review of defendant's motion to nullify sanctions; drafting objection to motion.	2.40 375.00/hr	900.00
1/6/2016 Research and revise objection to motion to nullify sanctions.	2.00 375.00/hr	750.00
1/7/2016 Review of deposition of Jeff Loge.	0.50 375.00/hr	187.50
1/11/2016 Appear for Case Management Conference re: Met filing notice of ruling and posting of jury fees.	1.80 375.00/hr	675.00
Review and analysis of notice of ruling.	0.20 375.00/hr	75.00
1/12/2016 Verify court docket re: motion; communication with defendant; communication with client re: same.	0.60 375.00/hr	225.00
1/13/2016 Communication with client re: settlement and mediation.	0.30 375.00/hr	112.50
Communications with client re pre-trial settlement offer and further drafting re statutory section 998 settlement offer to compromise to serve on defendant Hanson.	1.50 500.00/hr	750.00

* * *

	Hrs/Rate	Amount
8/4/2016 Research and analysis of legal treatises re: trials and evidence for preparation of upcoming jury trial.	0.70 375.00/hr	262.50
9/20/2016 Review and analysis of file and records re: outlines of direct and cross-examination for trial.	0.60 375.00/hr	225.00
9/27/2016 Trial preparation and file review.	2.40 375.00/hr	900.00
9/29/2016 Telephone call with clerk re: trial schedule.	0.10 375.00/hr	37.50
9/30/2016 Trial preparation; draft objections re: defendants special jury instructions and verdict form.	6.20 375.00/hr	1,950.00
10/2/2016 Trial preparation.	5.00 375.00/hr	1,875.00
10/3/2016 Prepare for and attend trial.	9.00 375.00/hr	3,375.00
10/4/2016 Review and analysis of defendant's proposed special jury instruction re: single party compensation agreement.	0.20 375.00/hr	75.00
10/5/2016 Telephone call with client re: status.	0.20 375.00/hr	75.00
10/6/2016 Prepare for and attend hearing re: trial setting; round trip travel re: same; telephone call with clerk re: same.	1.30 375.00/hr	487.50

10/10/2016 Telephone call with George Piggott re: trial; trial preparation.	4.10 375.00/hr	1,537.50
10/11/2016 Prepare for and attend court re: trial.	2.30 375.00/hr	862.50
10/21/2016 Attend hearing re: trial setting; roundtrip travel re: same.	1.80 375.00/hr	675.00
11/8/2016 Review and analysis re: notice of appearance and production of documents.	0.40 375.00/hr	150.00
11/14/2016 Draft objections re: notice to appear; phone call with client re: trial; research and analysis of code of civil procedure re: same; review and analysis of file and re: trial preparation records.	2.60 375.00/hr	975.00
11/16/2016 Telephone call with opposing counsel re: ex parte; review ex parte filing re: same; further review and analysis of deposition transcripts re: trial preparation.	1.70 375.00/hr	637.50
11/17/2016 Prepare for and attend hearing re: defendant's ex parte application.	2.20 375.00/hr	825.00
* * *		
6/20/2017 Draft e-mail to Nationwide re: recording request for Abstract of Judgment	0.10 125.00/hr	12.50

6/21/2017 Complete draft interrogatories and production of documents for JDE.	0.80 375.00/hr	300.00
6/22/2017 Finalize Memorandum of Costs for filing.	0.10 375.00/hr	37.50
Draft Proof of Service; prepare and file Notice of Entry of Judgment with One Legal; serve Notice via mail to defendant; prepare and file Memorandum of Costs with One Legal; serve Memorandum of Costs via mail to defendant.	1.00 125.00/hr	125.00
6/23/2017 Draft Writ of Execution for bank levy, bank levy and instructions for Sheriff's Office for Wells Fargo	0.20 375.00/hr	75.00
Prepare and submit Writ to One Legal.	0.30 125.00/hr	37.50
6/26/2017 Draft Proof of Service; prepare mailing to Roger Hanson re: First Set of Judgment Debtor Interrogatories and First Set of Judgment Debtor Requests for Production.	0.50 125.00/hr	62.50

6/27/2017 Draft request to Orange County Sheriff's Department and research instructions re: bank levy.	0.20 125.00/hr	25.00
For professional services rendered	678.90	$263,735.00
Additional Charges:		
1/5/2015 Postage		0.70
Postage		0.70
5/12/2015 Attorneys' Service fees (Standard Process Fees/Summons & Complaint – Ref#2579978)		166.90
Costs advanced to One Legal LLC for filing Complaint/Summons with the Superior Court of California, Orange County (Invoice No. 8289747 dated 05/12/15)		456.26
6/5/2015 Costs advanced to One Legal LLC for filing Proof of Service with the Superior Court of California, Orange County (Invoice No. 8311873 dated 6/6/15)		9.95
9/17/2015 Federal Express (R Hanson, Fullerton, CA – Ref#774539122506)		22.11
10/8/2015 Nationwide Legal LLC (OCSC filing – Ntc; 1st Amended Complaint – Ref#2600246)		25.00
10/23/2016 Postage		5.75

10/26/2015 Costs advanced to One Legal LLC for filing Case Mgmt Stmt with the Superior Court of California, Orange County (Invoice No. 8529375 dated 10/26/15)	9.95

* * *

COURT OF APPEAL

STATE OF CALIFORNIA

4TH APPELLATE DISTRICT

DIVISION THREE

NO. G055084

JENNIFER ALLERT, Petitioner, v. ROGER S. HANSON, Respondent.	Below: Case No.: 30-2015-00786947-CU-BC-CJC Honorable Walter Schwarm Dept. C-19 Superior Court of Orange County Central Justice Center

OPENING BRIEF OF APPELLANT

Roger S. Hanson, Esq.
State Bar 37966
1616 N. Mountainview Place
Fullerton, CA 92831-1225
Phone: (714) 454-6619

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GENERAL SUMMARY OF FACTS AND LAW GOVERNING THIS APPEAL..... 2

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ARGUMENT I..... 8

BY TWO INDEPENDENT MEANS, THIS APPELLANT PROVED THAT RESPONDENT ALLERT ALTERED EXHIBIT A PRIOR TO ITS USE AS THE ALTERED CONTRACT IN THE SUIT FILED BY RESPONDENT VIA THE FIRM HORWITZ & ARMSTRONG. THE COURT, THE HONORABLE WALTER P. SCHWARM, ERRONEOUSLY IN VIOLATION OF EVIDENCE CODE 1402, USED THE NON-ADMITTED EXHIBIT A TO RULE THAT APPELLANT BREACHED SAID CONTRACT. APPELLANT WAS NEVER A PARTY TO THAT ALTERED EXHIBIT A AND RESPONDENT ALLERT COULD HERE NEVER BE A "PREVAILING PARTY" TO A CASE WHERE SHE WAS NO LONGER IN THE CASE NOR WAS HER ALTERED EXHIBIT A.

ARGUMENT II 15

THE TRIAL COURT ERRED IN ITS FINAL RULING OF JUNE 9, 2017 IN AWARDING JUDGMENT FOR RESPONDENT ON THE "FIRST CAUSE OF ACTION – BREACH OF CONTRACT".

ARGUMENT III..... 17

THE TRIAL COURT ERRED COMMENCING AT C.T.A. 281, LINE 5, IN THE COURT'S EMBARKATION ON A SO-CALLED "WAIVER" BY THIS APPELLANT OF THE KEY CONSEQUENCES OF THE EVIDENCE CODE 1402 RULING, WHICH HAD WASHED THIS RESPONDENT OUT OF THE CASE.

ARGUMENT IV 21

IN FACT AND IN LAW, APPELLANT ESTABLISHED THAT RESPONDENT ALLERT HAD ALTERED THE SPCA ENTERED INTO ON JANUARY 29, 2014, AND SUCH ALTERATION IS, PER SE, THE ESTABLISHMENT OF "UNCLEAN HANDS". AS SUCH, THIS TRIAL COURT, THE HONORABLE WALTER SCHWARM, ERRED IN NOT AWARDING JUDGMENT TO APPELLANT ON BOTH THE DATES OF JANUARY 31, 2017 AND, FINALLY, JUNE 9, 2017.

ARGUMENT V..... 22

THE TRIAL COURT ERRED IN THE COURT'S POST-TRIAL NON-NOTICED "WAIVER" PROCEDURE, WHERE THE COURT WRONGLY PLACED THE BURDEN ON APPELLANT TO SHOW THAT APPELLANT COULD NOT REFUSE TO EXECUTE SOME 19 ITEMS WHICH WERE NECESSARY TO CLOSE THE ESCROW; SAID CLOSURE OF ESCROW

BEING NECESSARY TO BOTH RESPONDENT AND TO THIS APPELLANT.

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[1] **4TH APPELLATE DISTRICT**

DIVISION THREE

NO. G055084

JENNIFER ALLERT, Petitioner, v. ROGER S. HANSON, Respondent.	Below: Case No.: 30-2015-00786947-CU-BC-CJC Honorable Walter Schwarm Dept. C-19 Superior Court of Orange County Central Justice Center

To the Honorable Presiding Justice and to the Honorable Associate Justices of the Court of Appeal, Fourth Appellate District, assigned to this case:

Appellant Roger S. Hanson hereby submits his Opening Brief on appeal from a decision in favor of the Respondent, Jennifer Allert, rendered in the Court of the Honorable Walter Schwarm, Superior Court of California for the County of Orange on June 9, 2017.

Dated: December 26, 2017

Respectfully submitted,

ROGER S. HANSON
Appellant/Defendant in Persona Proper

[2] GENERAL SUMMARY OF FACTS AND LAW GOVERNING THIS APPEAL

This is an appeal from the ruling of the Superior Court of Orange, the Honorable Walter P. Schwarm, made June 9, 2017. (C.T.A. 273-291) (C.T.A. 302-305).

Defendant/Appellant Roger S. Hanson (hereinafter "Appellant") filed an appeal to this court on June 15, 2017. (C.T.A. 292-294).

On August 19, 2015, Plaintiff/Respondent Jennifer Allert (hereinafter "Respondent"), represented by her law firm, Horwitz & Armstrong, filed "A First Amended Complaint" for breach of contract, plus two additional counts; these two counts never became an issue in this case, which is solely an issue of breach of contract before this court of appeal. (C.T.A. 59-70).

On September 17, 2015, Appellant filed a demurrer to the First Amended Complaint (C.T.A. 72-76),

which asserted that C.C.P. 430.10(f) required it to be granted due to, inter alia, ambiguity and uncertainty.

Appellant specifically called to the attention of Respondent and her counsel that the "Single Party Compensation Agreement" ("SPCA") had been altered by the placing of the number "7" over the original typed "1" on the SPCA, which had been prepared by the Respondent when she represented the Berkshire Hathaway home services firm doing business at 30812 South Coast Highway, Laguna Beach, California 92651. (See specifically C.T.A. 68).

The Trial Court, the Honorable Walter P. Schwarm, overruled the demurrer, and Appellant went to trial in the matter before Judge Schwarm without a jury due to Respondent declining a jury on the date of December 1, 2016. See R.T.A. 1-294, Volume 1 of 2, Volume 2 is R.T.A. 296-448.

[3] (Nota Bene: The cover page of R.T.A. Volume 2 of 2 contains erroneous attorneys as appearing in this case; Appellant believes this error not an impediment to his appeal, but it is to be mentioned.)

Jennifer Allert, Plaintiff and Respondent, was employed as a licensed real estate agent at the offices of Berkshire Hathaway in Laguna Beach, California.

On August 19, 2015, Respondent Allert, represented by the law firm of Horwitz & Armstrong, filed a "First Amended Complaint" for three counts of which solely the "breach of contract" count is of issue in this

appeal. See C.T.A. 59-69. Attached to this Complaint as "Exhibit A" was the SPCA (C.T.A. 68).

Appellant Hanson demurred to that First Amended Complaint (C.T.A. 72-80) within the provisions of C.C.P. 430.10(f), and provided extensive factual and legal reasons for such demurrer. (See Grounds, C.T.A. 73-76). The Horwitz & Armstrong firm sought to have Appellant admit the "genuineness" of the SPCA, but Appellant denied that request, noting that it had been altered by Respondent and her associates at Berkshire Hathaway (C.T.A. 77-79).

As will be set forth infra, Appellant asserts error in the Trial Court's refusal to grant this demurrer, the first of many errors committed by the Trial Court, the Honorable Walter P. Schwarm.

On December 21, 2016, the Court issued a Minute Order advising that he had "reviewed the closing briefs" and was "taking the matter under submission". (C.T.A. 81).

On December 27, 2016, Appellant filed his first of 4 motions that were directed to establishing that Respondent Allert had caused the alteration of Exhibit A to her suit filed August 19, 2015 (C.T.A. 82-101). Appellant's explanation showed how Respondent Allert had carried out her scheme to alter [4] the exhibit, and had concealed her alteration for nearly two months, i.e. from January 29, 2014 until April 3, 2014. This document contained Allert's testimony that she, Allert, had given a copy of her altered Exhibit A contract to her law firm, Horwitz & Armstrong, to enable them to

bring the suit of August 19, 2015 (C.T.A. 91-101), and that in order for Allert to sell the property owned by Olov and Jenny Nasiell, of which Berkshire Hathaway had the formal multiple listing at 5% on the $2,500,000 Nasiell residence, Allert had to secure Appellant's willingness to sell the 709 Kendall property owned by Appellant to the Nasiells (C.T.A. 96, line 15 – C.T.A. 98, line 13).

The Horwitz & Armstrong firm did not reply to, or oppose, this motion at any time. As will be shown infra, the "waiver" was purely another effort of the Court, with no basis for it.

On January 12, 2017, Appellant filed his second of the four documents (C.T.A. 102-119), Appellant noted the effort of counsel for Respondent Allert to only "suggest" to the Court how the Court might rule to help Allert, but no specific papers were filed by the Horwitz & Armstrong office to claim a "waiver".

Again, Appellant demonstrated how Respondent Allert had altered Exhibit A to her First Amended Complaint (C.T.A. 105, II – C.T.A 1-12, lines 1-2).

This document contained Berkshire Hathaway's licensed salesman Jeff Loge's efforts to help Allert's claim that Hanson had done the alteration on the date of January 29, 2014. (C.T.A. 112-115).

Finally, Allert's trial testimony was cited (C.T.A. 115, IV – C.T.A. 118). As will be established infra, this brief and portions of the perjury of both Jeff Loge and Respondent Allert were used by the Court, the

Honorable Walter S. [5] Schwarm in granting the Evidence Code 1402 matter, which wiped out of Court the key Exhibit A and the lawsuit of August 19, 2015.

The Horwitz & Armstrong firm never replied or objected to the contentions of this document filed on January 12, 2017 and served that date on this Plaintiff/Respondent.

On January 31, 2017, the Court issued its "Memorandum of Intended Decision" ("MOID"), which appears at C.T.A. 122-136. At C.T.A. 128-130, the Court ruled that Respondent had not carried her burden to show who altered the obvious altered Exhibit A of the August 19, 2015 suit, and as such, there was no "contract" for this Appellant to "breach", as will be addressed infra this brief.

On February 9, 2017, Appellant filed his third of the four documents dated December 27, 2016 (C.T.A. 82-101), January 12, 2017 (C.T.A. 102-136), February 9, 2017 (C.T.A. 161-172). See C.T.A. 137-159. Finally, at C.T.A. 161-172, Appellant set forth his position on the asserted non-existent judgment, which will be addressed infra this brief in detail as to repetitive errors of this Court, the Honorable Walter Schwarm.

On February 28, 2017, the Court issued a Minute Order granting respondent $100,000 plus interest at 10% (C.T.A. 173-177).

At C.T.A. 178, the [Proposed] Statement of Decision is set forth, which again repeated the Evidence Code 1402 ruling at C.T.A. 184-186.

Clearly, this document reaffirmed that this Plaintiff/Respondent had been wiped out of court, including her "Contract A", and thus, it will be shown, infra, that the Court, in its ruling, foreclosed Hanson from "breaching" a non-existent contract, which Appellant was not a party to.

The Horwitz & Armstrong firm did not file any appeal from the Evidence Code 1402 ruling, which washed Respondent out of court.

[6] On April 6, 2017, Appellant moved to reconsider the Memorandum of Intended Decision of January 31, 2017. Within this document, Appellant noted the Trial Court's apparent efforts to get a "cause of action for quantum meruit" added to the pleadings, which had long been set; see C.T.A. 199, line 18 – C.T.A. 200, lines 1-19). See also R.T.A. 400, lines 1-2.

No authority would appear to allow an allegedly neutral court to suggest adding a new pleading of "quantum meruit". If said pleading would have no effect on the case, there would have been no need to halt the trial for a few days to add it; ipso facto, this Court felt it would affect the case, and who would get the benefit??? Jennifer Allert or Roger S. Hanson?? It would appear this Court saw a means of giving money to this Plaintiff/Respondent.

Strangely, Allert's counsel rejected the offer, and the only question is what allows the judge to behave in this manner? (R.T.A. 1-4) (R.T.A. 40). Specifically, the Court at R.T.A. 1-4 so addressed.

This brief, infra, lists a host of highly questionable, but clearly evident rulings of this trial court, which were interwoven into rulings that this Appellant "breached the contract", and that allowed the Court to conclude that this Respondent was the "prevailing party" and thus, entitled to an award of $100,000 plus "interest" at 10%.

Appellant develops these errors in the several Arguments I, II, III, IV, V infra.

SUMMARY OF ERRORS COMMITTED BY THE TRIAL COURT

1. Failure to sustain the demurrer to the First Amended Complaint at C.T.A. 59-70; demurrer at C.T.A. 72-76 properly relied on C.C.P. 430.10(f).

2. Failure to rule in behalf of this Appellant that it had been established by the duality of Evidence Code 1402 and the immediate preceding [7] proof that Respondent Allert had altered the SPCA of January 29, 2014 between January 29 – April 3, 2014 since between these dates, said document was solely in her possession and never was returned to her after April 3, 2014; proof of this was:

(i) Shown at C.T.A. 82-101;

(ii) Shown at C.T.A. 102-119;

(iii) Shown at C.T.A. 137-159; and

(iv) Shown at C.T.A. 161-172.

3. Failure to recognize that the Court's ruling on the:

(i) [Proposed] Statement of Decision at C.T.A. 184-186;

(ii) The Ruling of January 31, 2017 containing the Evidence Code 1402 analysis at pages C.T.A. 128-130 of C.T.A. 122-136.

(iii) Final Statement of Decision of June 9, 2017 at C.T.A. 279-281 as to the consequences of the Evidence Code 1402 ruling washing this Respondent out of Court and thus there could be no ruling that this appellant "breached the contract" as set forth in the Final Statement of Decision of June 9, 2017. C.T.A. 273 at 279-281; "Breach of Contract" ruling at C.T.A. 289.

4. Failure to recognize that Respondent Allert testified that she, Allert, aided by her "mentor" at Berkshire Hathaway had personally helped Hanson to provide the required escrow documents.

5. Failure to show how the Court could conclude that Appellant "breached any contract" where:

(i) Due to the Evidence Code 1402 ruling, no contract existed in the case; and

(ii) This Appellant was <u>never</u> a party to the contract of Exhibit A in the suit at C.T.A. 59-70.

[8] Appellant repeatedly asked this Trial Court to set forth in writing how the Court so concluded. Here, see R.T.A. 421-448.

6. Failure to correctly rule that, as shown at the trial, Respondent used the services of this Appellant while concealing the fact that she had altered the originally unaltered SPCA.

7. Failure to recognize and properly rule that Respondent Allert had UNCLEAN HANDS AS ADMITTED BY ALLERT AT HER DEPOSITION OF SEPTEMBER 21, 2015 at pages 15-16; ERRONEOUS RULING at C.T.A. 287 THAT UNCLEAN HANDS HAD NOT BEEN ESTABLISHED, A DIAMETRICAL INCONGRUENT CONCLUSION TO THE RULING IN EVIDENCE CODE 1402 and the showing in items (2) and (3), supra.

8. Repeated refusals to set forth in writing reasons for all of the above errors, which here call for reversal within the commands of the California Supreme Court authority at C.T.A. 155-156 and Argument II at C.T.A. 149-153, 30 Cal.App.4th 4, 60-61 (1994). Here, see R.T.A. 421-448.

ARGUMENT I

BY TWO INDEPENDENT MEANS, THIS APPELLANT PROVED THAT RESPONDENT ALLERT ALTERED EXHIBIT A PRIOR TO ITS USE AS THE ALTERED CONTRACT IN THE SUIT FILED BY RESPONDENT VIA THE FIRM HORWITZ & ARMSTRONG. THE COURT, THE HONORABLE WALTER P. SCHWARM, ERRONEOUSLY IN VIOLATION OF EVIDENCE CODE 1402, USED THE NON-ADMITTED EXHIBIT A TO RULE THAT APPELLANT BREACHED SAID CONTRACT. APPELLANT WAS NEVER A PARTY TO THAT ALTERED EXHIBIT A AND RESPONDENT ALLERT COULD HERE NEVER BE A "PREVAILING PARTY" TO A CASE WHERE SHE WAS NO LONGER IN THE CASE NOR WAS HER ALTERED EXHIBIT A.

1. On August 19, 2015, Respondent Allert, represented by the law firm of Horwitz & Armstrong brought a First Amended Complaint for three [9] causes of which solely the initial "breach of contract" cause is of interest and of consequence in this appeal. (C.T.A. 59-70).

Of passing interest, that firm had filed its initial complaint on May 11, 2015, which contained three causes: (1) Breach of Contract; (2) Quantum Meruit, and (3) Declaratory Relief. This complaint was drafted by the firm's co-partner, John R. Armstrong, and it was

demurred to by this Appellant; that initial suit failed to have an "Exhibit A" attached; Appellant demurred to it, and prior to the hearing set before the Honorable David T. McEachen, Mr. Armstrong filed the First Amended Complaint to which Appellant again demurred to. (C.T.A. 72-80), citing as authority C.C.P. 1430[sic].10 (f).

The instant court, the Honorable Walter Schwarm failed to sustain the demurrer, and the Horwitz & Armstrong firm sought this Appellant to admit that the so-called Single Party Compensation Agreement (Exhibit A) was "genuine" (C.T.A. 77-79).

The initial establishment of Respondent Allert's alteration of Exhibit A was shown by Allert seeking this Appellant to make an offer to the firm of Berkshire Hathaway for which Appellant would sell the property at 709 Kendall. (C.T.A. 68).

Importantly, Allert was not a party to this contract, it being between Berkshire Hathaway and Appellant (C.T.A. 68).

Per the Exhibit before its alteration, it provided, as desired by Berkshire Hathaway, that the sale was to occur before 11:59 P.M. on February 1, 2014.

Respondent was later shown to want this to occur because she, as agent for Berkshire Hathaway, was the then not disclosed to Appellant listing agent for the sale of the private home of Olov and Jenny Nasiell at 1088 Del Mar, Laguna Beach, for a commission of 5% on the $2,500,000, valued home or $125,000. (C.T.A. 82,

lines 21-26; C.T.A. 84, lines 15-18). See R.T.A. 212-[10]294, passim, for Appellant's testimony being called by counsel to Respondent under 776 as to the extensive discussion of alteration of the original Exhibit A.

At the designated date of Saturday, February 1, 2014, for the appearance of Olov and Jenny Nasiell to appear at the Berkshire Hathaway office to determine if they were going to make an offer, they did not appear; Exhibit A thus expired, as admitted by Berkshire Hathaway Representative Jeff Loge in his deposition of December 17, 2015 at pages 52-53:

> Q. . . . Do you acknowledge that absent that alteration of that document, that the agreement had expired?
>
> MS. LEWIS: I'm going to object to that question as vague and confusing.
>
> Can you please rephrase?
>
> MR. HANSON: Q. I'm taking [sic] about document Number 2 or Number 5. Absent the alteration on it, the document had expired; isn't that correct?
>
> A. Absent the alteration, the document originally – February 1st.
>
> Q. Yeah, it expired February 1st; correct?
>
> A. (No audible response.)
>
> MS. BOYNTON: Yes or no.
>
> THE WITNESS: Yes.

> BY MR. HANSON: Q. Okay. So the only way you kept this thing alive would be to have that date changed; isn't that correct?
>
> A. Yes.
>
> Q. And you didn't feel that that was something that both Jennifer and I had to initial on that change?
>
> A. You signed the document with the change.
>
> Q. Listen to my question. Listen to my question. Recognizing, as you admitted, the document had expired, the only way you are going to get more life into it was to extend the date, alter the date on it; correct?
>
> A. Extend the date, correct.

[11] This brought on the alteration done by Respondent Allert between the dates January 29, 2014 and April 13, 2014, since at, and during said period, she and she alone, had personal custody of the initial and then unaltered Exhibit A.

Proof of her alteration was shown on April 3, 2014, when she produced said Exhibit in her quest to secure $100,000 instead of the $75,000 Appellant offered due to Loge's admission that he, Loge, had authority to give $2,700,000 for the purchase.

Appellant sets forth in the trial testimony how Appellant provided Allert doing the alteration, as has Appellant in the C.T.A. at 85-87 inclusive; C.T.A. 94-98 inclusive; C.T.A. 105-111 inclusive; Loge's trial

summary, C.T.A. 112-115; Respondent Allert's trial testimony at C.T.A. 115-118.

Thus, a prolix record establishes that Allert altered the Exhibit A between January 29, 2014 and April 3, 2014 because she never got possession of it after April 3, 2014.

2. The proof via the ruling via Evidence Code 1402 establishes that Allert, as the proponent via the Horwitz & Armstrong firm did the alteration.

3. It must overtly be shown what Evidence Code 1402 provides:

> The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

The consequence of the 1402 Evidence Code statute is shown in this Court's ruling at C.T.A. 122-136, and where at C.T.A. 128, lines 15 – C.I.A. 130, line 9, dated January 31, 2017:

[12] ***1. Whether Defendant Authorized the Alteration of SPCA (Exhibit No. 26?"***

The dispute as to this cause of action pertains to whether Defendant authorized the alteration of the SPCA (Exhibit No. 26). There is no dispute that the original expiration date contained in the SPCA was February 1, 2014. Sometime after the typewritten date of February 1, 2014 was inserted into the SPCA, there was an alteration to the SPCA where a "7" was handwritten over the typewritten "1" to reflect an expiration date of February 7, 2014. Plaintiff claimed Defendant authorized the extension of the expiration date from February 1, 2014 to February 7, 2014. Defendant contends that he never authorized any extension or any alteration of the expiration date.

Loge testified that the SPCA was presented to Defendant on January 29, 2014. On that date, Loge saw Defendant sign the SPCA and place his initials on the date line next to his signature to reflect the signing date of January 29, 2014 instead of the preprinted date of January 17, 2014. Loge also saw Defendant change the expiration date from February 1, 2014 to February 7. 2014. According to Loge, Loge told Defendant that the potential buyer may need more time, and Defendant suggested the extension to February 7, 2014. At trial, Loge was clear that these changes occurred on January 29, 2014, but that he did not know why Defendant did not initial the change to the expiration date.

Loge's deposition testimony showed several inconsistencies. First, at his deposition, Loge testified that he was present when Defendant changed the expiration date, but that the change occurred on February 4, 2014. He testified at deposition that he did not remember whether he or Defendant changed the expiration date. His deposition testimony also showed Defendant refused to initial the change to the expiration date because his signature was sufficient.

Plaintiff testified that the alteration to the expiration date occurred on January 29, 2014. Plaintiff remembered a conversation regarding the extension of the expiration [13] period, but did not remember if Defendant changed the date. Plaintiff remembered Defendant signing the SPCA, but did not remember if the change was on the SPCA when Defendant signed it. On February 4, 2014, Plaintiff testified there was a discussion regarding the commission of $100,000. During this discussion, Defendant said he did not want to pay the full $100,000 commission. Plaintiff offered to pay Defendant's escrow fees in an attempt to reduce the commission (Exhibit No. 35.) At a meeting on April 3, 2014, Plaintiff testified Defendant expressed surprise when he saw the alteration contained on the SPCA. Plaintiff told Jim Vermilya that there was an oversight with respect to having Defendant initial the alteration.

Defendant testified he signed the SPCA before it was altered. Defendant first learned

> of the alteration on April 3, 2014. Defendant denied altering the SPCA.
>
> The court finds that Plaintiff has not carried her burden of proof of showing that Defendant authorized the alteration by clear and convincing evidence, or by a preponderance of evidence. First, Defendant's testimony was inconsistent with Plaintiff's testimony and Loge's testimony. Loge's memory is unreliable as shown by the discrepancies between his trial testimony and deposition testimony. Despite Plaintiff's testimony that there was a discussion regarding an extension on January 29, 2014, Plaintiff also testified that Defendant expressed surprise at seeing the alteration on April 3, 2014. Defendant's surprise tends to support the inference that he was unaware of the alteration. Although Plaintiff testified she and Defendant discussed the commission of $100,000 on February 4, 2014, this discussion did not pertain to extending the expiration period from February 1, 2014 to February 7, 2014. Finally, Defendant initialed the change to the date next to his signature. These initials support the inference that Defendant used his initials to indicate his assent to changes in the SPCA. The absence of his initials to the change in the expiration period supports the inference that he did not authorize the extension of the expiration period especially since he initialed the change to the date next to his signature.

[14] In the Court's final ruling on June 9, 2014, this analysis is repeated at C.T.A. 279-281.

It is of importance that the Court elaborates at each position to conclude that Hanson did not do the alteration.

The consequence of this ruling is that the lawsuit of August 19, 2015 and its Exhibit A do not come into evidence, and this Respondent is out of court, as to the Exhibit A.

If this Exhibit A, the only contract, is out of court, it is impossible to conclude that this Appellant breached this contract to which Appellant was not a party to nor which contract remained in the case after the Evidence Code 1402 ruling!!!

This ruling by the trial court of and in itself requires reversal of this judgment of $100,000 plus prejudgment interest in the amount of $31,260.27 in favor of Plaintiff/Respondent and against Defendant/Appellant.

As is shown in the separate Argument IV in this brief, this Court's voluntarily [sic], but never asked for by either side, extensive discussion of "waiver" is further error.

At C.T.A. 130, this Court mysteriously seeks to allow this Respondent money in spite of the alteration under a "breach of contract" theory quoting Civil Code 1700, which itself is a parallel code provision that shows Allert should receive nothing.

Civil Code 1700 provides:

> The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act.

[15] Finally, this Trial Court continues in a non-noticed by either side "waiver" at C.T.A. 132-135.

The Court personally selected each and every one of these items and would have had to believe Appellant could waive each of them.

Indeed, each were required in order to close the sale and the escrow, and this Appellant set forth at R.T.A. 212-294, passim, that fact. This Court defied this response, claiming that Appellant had to show the Court that they could not be waived, and the Court would not "reopen the case" to allow Appellant to provide evidence that they could not be waived. Here see R.T.A. 392-448, passim.

ARGUMENT II

THE TRIAL COURT ERRED IN ITS FINAL RULING OF JUNE 9, 2017 IN AWARDING JUDGMENT FOR RESPONDENT ON THE "FIRST CAUSE OF ACTION – BREACH OF CONTRACT".

At C.T.A. 273-291 appears the "Final Statement of Decision" executed on June 9, 2017 by the Court, the

Honorable Walter P. Schwarm. At C.T.A. 274-276, the Court provides Legal Background, which seems to portend a coming ruling that this Appellant "breached the contract" that Appellant had with the Respondent, Ms. Allert.

Addressing Civil Code 1700 at 277-278, the Court asserts:

> *Arneson* relied on *Dozier* in finding that the clear and convincing evidence standard applied. *Dozier* stated, " . . . the proof that the alteration in the body and terms of the instrument was authorized by the party affected by it must be clear and conclusive in order that such party may be bound thereby. [Citation.]" (*Dozier, supra*, at p. 618.) *Dozier* cited *Walsh v. Hunt (Walsh)* (1898) 120 Cal.46 in applying the "clear and [16] conclusive" standard. In the court's review of *Walsh, Walsh* did not address the applicable standard of proof for determining whether a party authorized the alteration of a contract in the context of Civil Code section 1700. In a related situation, reformation requires the party seeking reformation to show by clear and convincing evidence that a written agreement does not express the true intention of the parties. (*Diktor v. David & Simon, Inc. (Diktor)* (2003) 106 Cal.App.4th 238, 253.)
>
> Although *Arneston* [sic] did not significantly analyze the standard of proof as to authorization of an alteration in the context of Civil Code section 1700, the court is bound to follow *Arneson* since it expressly stated that

the standard is clear and convincing evidence. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Despite the fact that only money is at issue, it seems appropriate to impose a higher standard of proof on the party seeking to rely on an altered document to demonstrate that the other party authorized the alteration. It appears that the purpose of Civil Code section 1700 is to protect the party that did not consent to the alteration. Where a party disputes his or her consent to an alteration of a written contract, it seems appropriate to impose a higher standard of proof to protect this party from an allegedly unauthorized alteration by the party seeking to enforce the contract. That is, a court should require proof of consent by clear and convincing evidence before enforcing an altered written contract against a party that disputes his or her consent to the alteration. Based on the above authority, the court finds that the standard of proof is clear and convincing evidence to show that Defendant authorized the alteration of the expiration date from February 1, 2014 to February 7, 2014.

It is of note that Civil Code 1700 provides:

The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent., extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act.

[17] Then the Court "admitted" Exhibit A, which became Exhibit 26 at trial. (C.T.A. 278, lines 14-23).

The Court then addresses the first cause of action – breach of contract (C.T.A. 279).

At C.T.A. 279, line 9, through C.T.A. 281, line 4, the Court finds that the Respondent per Evidence Code 1402 "has not carried her burden of proof of showing that Defendant authorized the alteration by clear and convincing evidence, or by a preponderance of evidence" (C.T.A. 280, lines 17-19).

As such, under Evidence Code 1402, which the Court there was addressing, the First Amended Complaint of Respondent filed August 19, 2015 and its Exhibit A at C.T.A. 67-68, were stricken from the case, and this raises the key error that the Court made in its finding that this Appellant "breached the contract", which contract was contained in the suit at C.T.A. 59-70.

At issue in this appeal is under what theory or legal reasoning did this Trial Court found [sic] that Appellant "breached the Exhibit A contract"?

ARGUMENT III

THE TRIAL COURT ERRED COMMENCING AT C.T.A. 281, LINE 5, IN THE COURT'S EMBARKATION ON A SO-CALLED "WAIVER" BY THIS APPELLANT OF THE KEY CONSEQUENCES OF THE EVIDENCE CODE 1402 RULING, WHICH HAD WASHED THIS RESPONDENT OUT OF THE CASE.

The Respondent in this case did not file any paper which the Respondent asserted that this Appellant had "waived" the results of the Evidence Code 1402 ruling.

[18] Indeed, the Evidence Code 1402 ruling washed this Respondent out of court and foreclosed her from filing claims for attorney fees under Civil Code 1717, which provides:

Civil Code §1717. Attorneys' Fees in Contract Actions.

> (a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)

(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section. Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and

> thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section. Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall [19] be allocated to the parties in the same proportion as the original funds are allocated.
>
> (c) In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes o: action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.

Plainly, no agreement existed between Respondent Allert and this Appellant that either party could receive attorney fees, and Respondent was out of court via the Evidence Code 1402 ruling.

But the Trial Court barged forward with a claim that items a,b,c,d at C.T.A. 281-282 and the 19 items

listed as a,b,c . . . q,r,s at C.T.A. 284-285 allowed the Trial Court to conclude at 285, line 18.

> "Therefore, based on the above evidence, the Court find [sic], by clear and convincing evidence, that Defendant waived any expiration period. This evidence shows that Defendant accepted and retained the benefits and efforts of Plaintiff's services to complete the sale and to facilitate the close of escrow. Defendant knew that Plaintiff continued to negotiate on his behalf to consummate the sale, knew that Defendant (SIC, Plaintiff??) continued to provide services during escrow and acknowledged the agency relationship on April 21, 2014 (Exhibit 39).

However, the true record is that this Respondent used this Appellant to her advantage commencing in the meeting of February 4, 2014 when Respondent Allert first disclosed that Berkshire Hathaway had the formal listing agreement for the sale of the Nasiell residence at 1088 Del Mar Avenue, Laguna Beach, at a 5% commission on the asserted $2,500,000 valued home. Respondent Allert disclosed that she could not sell that home to gain her expected share of the commission unless she, representing Berkshire Hathaway, [20] could obtain the purchase of 709 Kendall from Appellant, and the scheme evolved as set forth at R.T.A. 392-420.

It is there shown that the Trial Court rebuffed Appellant's contention that the above 4 and 19 items were items that Appellant was required to sign as a condition of escrow, and, of course, Respondent likewise

desired these items as Respondent could not secure her share of the commission for the sale of the Nasiell residence unless, and until, the escrow closed.

It is, therefore, of importance to address R.T.A. 392-420.

While the trial insisted that the "record" developed at trial must show the Court that these items could not be waived, the Court disallowed reopening of the case.

In fact, the record at this trial, as testified to by Respondent, establishes that Respondent had personally gone to this Appellant to have this Appellant sign the many items. At R.T.A. 105, lines 9-10, states:

> Q: Once the sale was consummated, what were your duties to Mr. Hanson during the escrow period?"
>
> Mr. Piggott: I'm going to object to that question as lacking in foundation, calling for a legal conclusion.
>
> The Court: Overruled. She's been a real estate agent for four years – Well, at this time now for years, so overruled.
>
> By Mr. Henderson:
>
> Q. You can answer.
>
> A. Okay. My duties include, once we go into escrow, the Seller's responsibility, there is certain timelines that everybody has to meet, Seller and Buyer, and the Seller has to disclose any information he knows about the

> property, so there's certain disclosures that the seller must fill out. And so we orchestrated that with Roger – Jeff and I orchestrated that with Roger.
>
> We actually thought we were doing a favor by driving up to his house, and being [sic] over all of the disclosures and go through everything in detail, and help him fill out the disclosure.
>
> [21] And the Buyer is to have his initial deposit into escrow within three days of agreement, and I make sure that everything meets their timelines, the Seller does, and Buyer does, and that everybody follows the timeline and does what they need to do. There's inspections, there's appraisals that I had to be there for on the property. I was there for the appraisals, the inspections.

Therefore, this Court wrongly asserted to Appellant that Appellant had to show the Court within the record that the some 19 items were required by the escrow.

Indeed, the record so showed, and the Court had heard this testimony from Allert. Which set forth Allert's requirement to have these items in the escrow.

ARGUMENT IV

IN FACT AND IN LAW APPELLANT ESTABLISHED THAT RESPONDENT ALLERT HAD ALTERED THE SPCA ENTERED INTO ON JANUARY 29, 2014, AND SUCH ALTERATION IS, PER SE, THE ESTABLISHMENT OF "UNCLEAN HANDS". AS SUCH, THIS TRIAL COURT THE HONORABLE WALTER SCHWARM, ERRED IN NOT AWARDING JUDGMENT TO APPELLANT ON BOTH THE DATES OF JANUARY 31, 2017 AND, FINALLY, JUNE 9, 2017.

Appellant sets forth this separate Argument IV to urge that the Trial Court erroneously refused to award judgment to Appellant on June 9, 2017.

This is based on the uncontested facts and law that the ruling in the Evidence Code 1402 matter at both C.T.A. 122-136, specifically at C.T.A. 273-291, specifically at C.T.A. 279-281, establishes that Respondent and her law firm's filing suit on August 19, 2015 at C.T.A. 59-70, which contained "Exhibit A" were stricken from this lawsuit.

[22] Secondly, of course, Appellant so proved by the discovery on April 3, 2014 that Respondent, who had sole and personal possession of the SPCA made January 29, 2014 between that date and April 3, 2014, thus, ipso facto, Appellant could not have made the alteration.

In essence, the Trial Court erred in not giving judgment in favor of Appellant against this Respondent.

Thus, Appellant could not alter the "Exhibit A" and did not.

Unclean hands are established per se.

ARGUMENT V

THE TRIAL COURT ERRED IN THE COURTS POST-TRIAL NON-NOTICED "WAIVER" PROCEDURE, WHERE THE COURT WRONGLY PLACED THE BURDEN ON APPELLANT TO SHOW THAT APPELLANT COULD NOT REFUSE TO EXECUTE SOME 19 ITEMS WHICH WERE NECESSARY TO CLOSE THE ESCROW; SAID CLOSURE OF ESCROW BEING NECESSARY TO BOTH RESPONDENT AND TO THIS APPELLANT.

At R.TA. 392, commences a lively confrontation between the Trial Court and Appellant (R.T.A. 392-420).

Appellant asserted that 19 items personally selected by the Court to show that Appellant had "waived" the previous rulings of the Court were, in fact and in law, governing escrows in California real estate sales, items that could not be waived.

The Court repetitively asserted that Appellant must show the Court from within the trial record that these items could not be waived.

Obviously, none of the items were overtly raised by either party at trial, and the Trial Court had full access to the trial record on the trial's computer, [23] and could have, and should have, recognized in selecting these 19 items that they could not be waived.

Indeed, until the appeal was taken, Appellant did not have access to the trial transcripts, and did not recall that, as it turns out, in fact, the record showed at two separate locations that Respondent Allert and her "mentor" at the Berkshire Hathaway office had taken responsibility to properly place these items in the escrow, for had they not done so, the escrow would have never closed.

Appellant's position was that Respondent and Jeff Loge had met with Hanson to ensure that these items were properly prepared.

Clearly, both Respondent and Appellant had the mutual need for these items to be placed in the escrow and neither side could "waive" these 19 items.

At R.T.A. 392, Appellant addressed the Court, claiming that the Court wrongly concluded that Appellant had "used the services" of the Respondent, when, in fact, the opposite was true.

At R.T.A. 393-394, Appellant explains in detail how Respondent used Appellant to achieve her ability, as agent for Berkshire Hathaway, to sell the listing of the Nasiell property at 1088 Del Mar for a major commission, and had she not convinced Appellant to sell

the property for $2,675,000, she would have achieved nothing. See R.T.A. 395, line 14 – R.T.A. 396, line 1-8.

The Court then made the first of his many demands on Appellant Hanson to have Appellant show the Court on the trial record why Hanson had to sign, execute, or otherwise agree to each of the items. See R.T.A. 396, line 9 – 14; lines 22-24; 396, line 1-5; 397, lines 20-22.

Hanson tried to explain to the Court that these items could not be waived (R.T.A. 397, lines 9-19) and asked the Court to make a finding for the record on appeal (R.T.A. 397, line 26 – R.T.A. 398, line 1).

[24] Again, the Court demanded Hanson to show a requirement (R.T.A. 398, lines 2-4):

> The Court: So, for example, I'm going back to the extensions that you granted. Where in the evidence does it show that you were required to grant those extensions?

Hanson specifically addressed typical inclusions in the escrow, which were mandated (R.T.A. 398, line 15 – 399, lines 1-24).

Strangely, the Court again addressed the desire of the Court to interrupt the trial and add a cause of action for "*quantum meruit*", which Appellant urges is not any business or concern of the court long after the pleadings had become fixed. Counsel for Respondent urged that Appellant had used Respondent, but the actual trial evidence showed the opposite (R.T.A. 404-405).

The Court then returned to the Court's contention that the trial record had to be the source of the 19 items that the trial selected in a post-trial waiver scheme. (R.T.A. 405, line 18 – R.T.A. 406):

> The Court: No. It has to be based – the Court is not reopening the trial, Mr. Hanson. It has to be based on the evidence that the Court heard in the trial. So, for example, let me – I know that you are familiar with criminal procedure just like I am. Right? So at the end of the evidence when a decision comes down – and maybe it comes down against the prosecution – the prosecution isn't allowed to reopen the case maybe to call another witness that can prove their case. Right?

The Court, for the umpteenth time, demanded that Appellant provide the evidentiary support. (R.T.A. 406, lines 24 – 26 – R.T.A. 407, lines 4-12):

> The Court: The Court is asking you to provide the evidentiary support for the findings you are asking the Court to make.
>
> [25] ***
>
> The Court: One moment. The Court has – just like a jury has to do, Mr. Hanson – And I think you know this – A Court has to make its decision based on the evidence presented in this courtroom. Right? So now you're trying to introduce something that wasn't provided in evidence. You are – both sides were given a chance to try this case in front of the court. And this escrow officer could have been called

> as a witness during the trial. For whatever reason the defense made a decision not to call the escrow officer.

Appellant again asked the Court to make the proper findings based on the evidence. (R.T.A. 408, lines 4-19):

> Mr. Hanson: I don't know about that, but these – these 19 items for the first time I saw it in your proposed matter. And the cases I cite there should require you to find facts that on that particular thing just as I believe you should find facts on the matter that I did not use Ms. Allert, Ms. Allert used me. That was evidence in this case. And I believe the Court should revise that particular thing that said that I used Ms. Allert. I did not use Ms. Allert. She used me. And I unbelievably was going to give her $100,000. I was happy to get the money. And I – I believe I'm a fair man. I thought, well after all, she did do some work on this thing. And I was going to give her the money. And then I find out all this time she is lying to me when she was trying to get me to do the deal for her. She was totally lying about altering the document that is concealed from me. I didn't find that out until after the 3rd of April.

Once again, the Court restricted Appellant to the trial record, even though the Court's "waiver" hearing was a post-trial selection of the 19 items, where, under the usually accepted findings, the Trial Court being the selector of these 19 items, the burden lies on the

shoulder of the Court; seemingly, the Court never saw this correctly. (R.T.A. 309, lines 9-18).

[26] In spite of the Evidence Code 1402 ruling, in this brief, pages 11-13, the Court mysteriously discusses whether Appellant had "authorized the alteration" (R.T.A. 410 in toto).

And, once again, the Court urged Appellant to show from the trial evidence that Appellant was required to sign the 19 items. (R.T.A. 411, lines 19-23; R.T.A. 413, lines 8-12):

> The Court: The Court is going to come back – I want to tell you, Mr. Hanson, the Court is open minded. If there is evidence in the record that shows that you were required to sign these documents, please bring it to my attention.
>
> The Court: Okay, so, again, I want to stress to you, Mr. Hanson, I am open to – but looking at the record again – reviewed this issue regarding waiver, but you will have to point me to particular areas in the transcript., All right?

Once again, the Court expressed dissatisfaction over the parties not acquiescing to the Court's desire to add a "*quantum meruit*" cause of action, which is, once again, no business of a neutral court long after the pleadings were filed and trial had began. (R.T.A. 413, lines 16-28).

And, with further waste of paper, the Court required Hanson to show the Court on the trial record where Hanson had to comply with the 19 items needed

to close the escrow. (R.T.A. 414, line 25 – R.T.A. 415, lines 1-3, lines 9-23; R.T.A. 416, lines 11-12; R.T.A. 417, lines 6-11; R.T.A. 418, lines 8-14; R.T.A. 419, lines 8-14; R.T.A. 419, line 26 – R.T.A. 420, lines 1-2).

> "The Court: And agree with you there. All I'm asking you to do is point me to the evidence that shows that you could refuse to answer them or sign them. I agree with you. I don't [27] think we're talking past each other. I'm just asking you to go a step further and point the Court to the evidentiary record that supports your position that you were required to sign them."

The bottom line in this repetitive demand of the Trial Court was to erroneously place on Appellant the showing that the record contained support for requiring Hanson to agree to all 19 items.

Finally, this record does so show, at R.T.A. 367 – 369, Respondent testifying that both Jeff Loge and she "assisted Mr. Hanson in connection with the many disclosures, explaining each one, trying to 'walk him through'". (R.T.A. 368, lines 3-16). See also R.T.A. 284 in toto.

The problem now appears whether the Court wrongly used the Court's "waiver" hearing to come to the conclusion that Respondent was the "prevailing party" by virtue of a non-explained and, in fact, erroneous belief that Appellant Hanson had "breached the contract" of Exhibit A, which was impossible since it was no longer in the case, and counsel to Respondent

had not established that Respondent was entitled to "attorney's fees" per Civil Code 1717.

CONCLUSION

For each and every one of the foregoing Arguments, facts, and extensive findings by the Court under Evidence Code 1402, the judgment for Respondent must be reversed and Appellant granted all of his costs.

Dated: December 26, 2017

Respectfully submitted,

ROGER S. HANSON, ESQ.
Appellant/Defendant in Persona Proper

[Certificates Omitted]

Case No. G055084

In the
Court of Appeal
of the
State of California

Fourth Appellate District, Division Three

ROGER S. HANSON

Defendant and Appellant,

vs.

JENNIFER ALLERT

Plaintiff and Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
THE COUNTY OF ORANGE
CASE NO. 30-2015-00786947-CU-BC-CJC
HON. WALTER SCHWARM, PRESIDING JUDGE

RESPONDENT'S BRIEF

*John R. Armstrong, Calif. Bar No. 183912
Vanoli V. Chander, Calif. Bar No. 320630
HORWITZ + ARMSTRONG APC
14 Orchard, Suite 200
Lake Forest, California 92630
Email: jarmstrong@horwitzarmstrong.com
Tel: 949.540.6540
Fax: 949.540.6578
**Lead Counsel for Respondent*

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[6] CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.20)

The following entities or persons have either:

(1) An ownership interest of 10 percent or more in the party or parties filing this certificate, or

(2) A financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves.

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, Rule 8.208(e)(3)).

Dated: March 30, 2018

HORWITZ + ARMSTRONG APC

By: /s/ Vanoli V. Chander

John R. Armstrong,

Vanoli V. Chander

Attorney for Respondent

[7] INTRODUCTION

Respondent here and plaintiff below Jennifer Allert ("Allert") is a licensed real estate agent, whose broker at the time of the subject sale was Berkshire Hathaway Home Services (d.b.a. of Pickford Real Estate, Inc.) ["Berkshire Hathaway"], which broker

assigned its contract with Roger Hanson to Allert. Allert found a qualified buyer to buy Roger Hanson's Laguna Beach estate property, which, before and up to the time of sale, was a distressed property. (Reporter's Transcript "RT" Vol.1, at 92:1248.)

Allert was able to get an above market price despite the condition of Hanson's property, because the buyer was a general contractor. After relatively short negotiations, Hanson agreed to sell his property to Allert's buyer for $2,675,000. (RT Vol.1, at 103:23-25.)

What would have been an ordinary real estate transaction changed when Appellant/Defendant Roger S. Hanson decided he did not want to pay the broker's agreed upon flat $100,000 commission, claiming that the term of the subject Real Estate Purchase contract expired since the single party purchase contract ("SPCA") was not fully executed within 3 calendars [sic] as stated in the typed SPCA terms.

[8] At trial, the parties disputed whether Hanson agreed to a handwritten change extending the completion date and whether Hanson waived his right to rely on the short contractual limitations period given that he continued using the Real Estate Broker's services for several months thereafter to close escrow with the buyer that the Broker provided Hanson—even if Hanson did not expressly consent to change the SPCA's completion date.

The trial court found that, to prove consent to an alteration to a contract, that plaintiff Allert had to prove Hanson's consent by clear and convincing

evidence. Allert argued that the preponderance of evidence standard should apply given that the California Evidence Code expressly provides that and given that the California Supreme Court has consistently held that this is the evidentiary standard for nearly all situations.

For example, California common law used to require fraud to be proved by clear and convincing evidence, which, in a line of cases, has since been disapproved in favor of application of the preponderance of evidence standard.

[9] Nonetheless, the trial court found that, while Allert did not prove by clear and convincing evidence that Hanson agreed to the handwritten change to the SPCA, she did prove by clear and convincing evidence that Hanson had by his conduct expressly *waived* his right to rely to [sic] on the original, short contractual limitations period in that he never timely informed the Broker that he viewed that the contract had expired, and continued using the Broker's services for several months to close escrow with the buyer that the Broker procured for Hanson.

Hanson claimed as a matter of defense that the hand-written alterations were fraudulent to void the entire transaction (even though he undisputedly closed escrow with Broker's buyer and that the Broker was the procuring cause of the sale that Hanson consented to.) (Respondent's Appendix "RA" Vol.1, at 25: 23-24.)

At trial, Appellant made much of the claim that Allert had allegedly altered the expiration date of the SPCA. This matter was dealt with extensively by the trial court. Hanson executed the SPCA on January 29, 2014, and thereafter signed a sales contract on February 4, 2014. Allert claimed that the brief delay in signing the sales contract [10] was due to Hanson cancelling the February 1, 2014 appointment to discuss the offer for his property, which Hanson disputed.

Nonetheless, Hanson never asserted that contractual limitations period until just before escrow closed several months later in response to his refusal to have the Broker's fees paid out of the escrow. The Broker decided to allow the real estate to close rather than risk litigation that the Broker "queered" Hanson's multimillion dollar sale.

That is, while Hanson secretly intended to rely on the SPCA's typed limitations period as of February 4, 2014, he never mentioned it until April of 2014.It is undisputed that Allert was the procuring cause of the sale for the Appellant's property and that Appellant continued utilizing Berkshire Hathaway's services and Allert well after the expiration of the contract. The Broker assigned the SPCA to Allert. (RT Vol. 1 at 115:19-26, 116:1-8; Trial Exhibit "Trial Ex." 62.)

To recap, the trial court found by clear and convincing evidence that Hanson waived his right to rely on the contract's original, typed contractual limitations provision, and so a Statement of Decision and

Judgment was entered for plaintiff Allert. (Clerk's Transcript "CT" Vol.1, at pp. 283-285; 285:18-23.)

[11] Given this factual finding, Hanson must persuade this court that "no reasonable judge" looking at the evidence could have reasonably concluded that Hanson waived the right to reply on the SPCA's contractual limitations period; however, Hanson's Appellant's Opening Brief fails to discuss facts in the record or applicable law to warrant reversal, requiring that the judgment below be affirmed.

STATEMENT OF FACTS

In California, a real estate agent or broker customarily gets 3% of the sales price as the selling agent and 3% of the sales price as both the buyer's and seller's agent. It is also customary that when an agent acts as the buyer's and seller's agent to take a slightly lower commission of 4-5% of the sale price.

Appellant Roger S. Hanson entered into a contract with Berkshire Hathaway and Allert regarding the sale of his property located at 709 Kendall, Laguna Beach, California. While Allert is no longer associated with Berkshire Hathaway, she continues to be a licensed real estate agent. (RT Vol.1, at 90:19-23; 91: 1-6.) Berkshire Hathaway and Appellant Roger S. Hanson entered into a contract entitled Single Party Compensation Agreement ("SPCA") (CT Vol.1, p. 68; RT Vol. 194:21-26; [12] 95:1-11.) The terms of the agreement provided for a commission fee of One Hundred Thousand Dollars ($100,000.00). The SPCA clearly

states that Berkshire Hathaway would be acting for both the seller and the buyers in this instance. (CT Vol. 1, at p. 68; RT Vol.1 94:21-26; 95:1-11.)

On or about January 29, 2014, the parties entered into a Disclosure and Consent for Representation of More Than One Buyer or Seller, indicating their consent for Allert to represent Appellant through her broker Berkshire Hathaway. Thereafter, Appellant entered into a Single Party Compensation Agreement with Berkshire Hathaway which stated that Appellant will pay the sum of $100,000 in commission once an offer from Olav and Jenny Nasiell is accepted by the Appellant. (CT Vol. 1, at p. 68; RT Vol.1 94:21-26; 95:1-11; Trial Ex. 26.)

The agreement's typed terms showed that it was set to expire on February 1, 2014. (CT Vol. 1, at p. 68; RT Vol.1 94:21-26; 95:1-11; Trial Ex. 26.) The SPCA was amended to extend the expiration date of the contract to February 7, 2014 to allow the parties additional time to negotiate the sale of the property. (RT Vol.1, at 124:14-23.) The escrow documents show that the typed term was extended—a contention [13] disputed by Appellant. Nevertheless, Appellant continued utilizing Respondent's services to finalize the sale of the property even after the contract's termination. Appellant never objected to the continued use of Respondent's services to consummate the sale of his property and he ratified the sale by closing escrow with the buyer identified by Allert. (RT Vol.1, at pp. 111-113; 117-122, 122.)

On February 4, 2014, Appellant accepted the Nasiell's offer to purchase the property for $2,675,000.00 with Berkshire Hathaway as the real estate broker and Allert as the realtor in consummating the sale. (RT Vol.1 at pp. 102-103.) The escrow on the sale closed on or about April 24, 2014. However, Appellant refused to pay the commission agreed and earned on the sale. (RT Vol.1, at p.113.)

On June 9, 2017, the court entered Judgment on the Final Statement of Decision. (CT Vol. 1, at pp. 273-289.) The Judgment awarded Respondent her $100,000 contractual commission, as well as accrued prejudgment interest, resulting in a $131,260.27 award to Respondent Allert against Appellant Hanson. (CT Vol. 2, at pp. 302-303.)

[14] **PROCEDURAL HISTORY**

On May 11, 2015, Respondent filed a Complaint in the Orange County Superior Court for (1) breach of contract; (2) quantum meruit; and (3) declaratory relief. (RB Vol.1, at 4-10.) Thereafter, on August 19, 2015 Respondent filed an amended Complaint and the Appellant filed his Answer on November 30, 2015. Appellants answer asserted (1) he did not retain Respondent's real estate services; (2) he did not engage Respondent on [sic] Respondent's firm to find a buyer for his property; (3) that Respondent did not represent that she represented both Appellant and the buyer; (4) and, that Exhibit A attached to the First Amended Complaint was defective, because "Plaintiff personally,

or in a conspiracy to defraud, altered said date of February 1, 2014 to February 7, 2014." (CT Vol.1, at 273:68-28, 274:1-3; Trial Ex. 26.)

The parties proceeded to a bench trial in December 2016. The trial court issued its Memorandum of Intended Decision on January 31, 2017. (CT Vol. 1, at p. 120.) On April 6, 2017 Appellant filed his Motion to Reconsider Memorandum of Intended Decision of January 31, 2017 (CT Vol.1, at p. 196.) On June 9, 2017 the final Statement of Decision and Judgment was filed. (CT Vol. 1, at p. 273.)

[15] **STANDARD OF REVIEW**

The abuse of discretion standard applies to cases, as here, when the issue on appeal is whether the trial court's evidentiary findings are correct and supported by applicable law. It must apply the facts the trial court found. It is said that in such situations, because the appellate court does not have the ability to "see" how the witnesses testified or how the evidence was actually presented at trial, the trial court's discretion in such matters will be affirmed unless the record shows that the trial court abused its discretion. This standard has been described in the cases that follow.

It has often been said that a court acts within its discretion whenever there is an "absence of arbitrary determination, capricious disposition or whimsical thinking." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573.) As long as the court acts within the "bounds of reason" (*ibid*.), the court does not abuse its discretion.

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal [16] quotation marks omitted); *see also In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 698 n.11 (9th Cir. 2011).

The abuse of discretion standard, however, is not an abstract test based on whether the Trial Court was totally irrational. Instead, the Court's discretion is grounded in the policy and purpose of the statutes or laws being applied. "[T]rial court discretion is not unlimited. 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]' (6 Witkin (2d ed. 1971) Appeal, § 244, p. 4235 . . .)" (*Westside Community for Independent Living v. Obledo* (1983) 33 Cal.3d 348, 355.) "[J]udicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion. [Citations.]" (*Horsford v. Board of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 393-394.)

As stated in *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, at pages 1297 to 1298: "The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing [17] the subject of [the] action. . . .' Action that transgresses the

confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law. [¶] The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred. . . . The pertinent question is whether the grounds given by the court . . . are consistent with the substantive law . . . and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under [the statute], read in light of the purposes and policy of the statute. (*Id.*, at pp. 1297-1298; see also *People v. Jacobs* (2007) 156 Cal.App.4th 728, 735-740.)

"The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a court's ruling under review. [1] The trial court's findings of facts are reviewed for [18] substantial evidence, [2] its conclusions of law are reviewed de novo, and [3] its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT APPELLANT HANSON WAIVED HIS RIGHT TO REPLY ON THE CONTRACT'S SHORT EXPIRATION PERIOD BY RETAINING AND ACCEPTING RESPONDENT'S SERVICES FOR MONTHS AFTER THE CONTRACT'S TYPED EXPIRATION DATE

It's an axiom of jurisprudence that, "[H]e who takes the benefit must bear the burden." (Code Civ. Proc., § 3521; see Code Civ. Proc., § 3519: "He who can and does not forbid that which is done on his behalf, is deemed to have bidden it"; and see Code Civ. Proc., § 3515: "He who consents to an act is not wronged by it.")

In *Estes v. Hotchkiss* (1923) 63 Cal.App.284, at 289, the Court held that " . . . attempted to avoid payment of the commission on the grounds that the writing of June 14, 1917, limited the right of the broker to recover his earned commission to the contingency that the [19] principals in the transaction would consummate their contract within 60 days. This might have been true if defendant, upon failure of the purchase to complete the purchase within that time, had refused to go on with the transaction; but this was not the case, and the *fact that he did go on with the negotiations with Estes and his associates must be held to have amounted to a waiver on his part of that condition in the broker's contract.*" (*Estes, supra*, 63 Cal.App. at 289 [emphasis added].)

Hanson argues that the SPCA's expiration date was February 1, 2014 and that he did not accept the

offer until February 4, 2018 [sic] – three days later. It is undisputed that Allert was the procuring cause of the sale and that Hanson *continued to use her services as a real estate agent after the expiration to close escrow.*

"Where the real estate broker brings the seller and the buyer together and the negotiations continue beyond the expiration date of the commission agreement, the broker is still entitled to his commission." (*Wilson v. Roppolo* (1962) 207 Cal.App.2d. 276, 281.) One cannot cheat a real estate agent out of her commission where the agent was the procuring cause of the sale and evidence presented shows [20] uninterrupted use of the agent's services through close of escrow with the buyer the agent brought to the seller.

Further, in *Baker v. Curtis* (1951) 105 Cal.App.2d. 663, at 669-670, the court held that the seller could not use the Statute of Frauds to defraud his realtor out of commission: "[T]he time limitation stated in such a contract may be waived and where, as here, the owner, after the time limited provided in the contract had expired, urged and encouraged the broker to continue his efforts to find a purchaser for the property, and the broker did so continue with the knowledge approval and encouragement of the owner, and, as a result of the broker's efforts, a purchaser to whom the owner sold the property was produced, under such circumstances the time limit in the [sic] must be considered as having been waived and the broker is entitled to his commission. To hold otherwise would in our opinion permit the use of the Statue of Frauds to perpetrate a

fraud." (*Baker, supra*, 105 Cal.App.2d. at 669-670; see *Umphray v. Hufschmidt* (1925) 73 Cal.App. 140, 144 [holding that, though contract expired on May 22, 1922, the seller waived the contract's expiration date when the seller was prepared to buy at the seller's offered price].)

[21] More recently, in *Torah v. J.P. Enterprises, Inc.* (1997) 52 Cal.App.4th 1250, the appellate court held that, when the agent is the procuring cause of the sale, there is a legal obligation to pay for the agent's services. This was followed by the trial court below and there was no abuse of discretion by the Honorable Judge Walter Schwarm.

Appellant accepted the offer procured by Allert on February 4, 2014 – three days after the expiration of the contract to receive his agreed-upon purchase price for his home from the buyers. Furthermore, Appellant allowed Allert to work on his behalf as his broker over the course of three months to consummate the sale.

As stated in *Baker, supra* at pp.666-667, In a number of instances the view has been taken where, after an apparent termination of a brokerage agreement the broker has continued negotiations with a prospective purchaser, or his efforts to find such a purchaser, with the knowledge and consent of the principle [sic], the termination of the contract will, particularly where it appears that the principal accepted and retained the benefits of the broker's efforts be considered waiver." The burden falls on the Appellant, who is asserting waiver to prove by clear and convincing evidence. (*DRF / Beverly Hills,* [22] *Ltd. v. Chopstix Dim Sum Café &*

Takeout III, Ltd. (1994) 30 Cal.App.4th 54, 60-61.) Here, the trial court held that Appellant waived any expiration period by clear and convincing evidence. (CT Vol.1, at 285: 18-19). ". . . . The court finds, by clear and convincing evidence, that Defendant waived any expiration burden. This evidence shows that Defendant accepted and retained the benefits and efforts of Plaintiff's services to complete the sale and to facilitate the close of escrow. Defendant knew that Plaintiff continued to negotiate on his behalf to consummate the sale, knew that Defendant continued to provide services during escrow, and acknowledged the agency relationship on April 21, 2014. (Exhibit No. 39.)" (CT Vol.1, at 285: 18-23.)

THE ALLEGED ALTERATION OF EXHIBIT "A" WAS NOT IRRELEVANT AND IMMATERIAL

Though Hanson complains mightily regarding his belief that he did not make hand-written changes to extend the contract's expiration date, this argument is irrelevant, because the trial court based its decision on the applicability of the doctrine of *waiver—the* trial court's decision and judgment was *not* based on the doctrines applicable to [23] modification or alterations of agreements. The trial court expressly found that Allert had failed to prove by clear and convincing evidence (assuming that this was the proper standard, which Allert disputes), that Hanson consented to the alleged modification of the typed agreement, so that was not the basis for the trial court's Statement of Decision and Judgment for Allert.

Setting aside the irrelevancy problems of Hanson challenging the wrong legal issue (one cannot appeal a *favorable* trial court ruling), Hanson's alteration argument is also immaterial in that the purported alteration was not a "material" alteration to the SPCA for any one or more of the following reasons.

"The intentional destruction, cancellation, or *material alteration* of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." (Civ. Code § 1700.) (emphasis added.)

"The test of materiality of the alteration is whether it changes the rights or duties of the parties, or either of them. The old rule was that [24] any change in a written contract, made by a party thereto without the knowledge or consent of an obligor thereon, discharged such obligor from liability thereunder. This rule has been much relaxed, and the rule in most jurisdictions now is that the change must be a *material change.* The materiality of the change, however, does not depend upon whether or not the party not consenting thereto will be benefited or injured by the change, but rather upon whether or not the *change works any alteration in the meaning or legal effect of the contract."* (*Consolidated Loan Co. v. Harman* (1957) 150 Cal.App.2d 488, 491.) (emphasis added.)

"Ratification, subsequent to the alteration, has as full effect as authority originally granted, and ratification may be shown by any conduct from which assent

can fairly be implied. Silence may be enough. It has been well said, The rule is just and supported by the authorities that, where a document has been altered and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it at once, or within a reasonable time after learning thereof, or they are bound by the document as altered." (*Id.* at 493-494.) Internal quotations omitted.)

[25] A material alteration in a real estate contract does not bar a broker's claim for commission if the altered contract is accepted by subsequent ratification. (*Leboire v. Black* (1948) 84 Cal.App.2d 260, 262.)

"Any change made in a document after its execution, which merely expresses what would otherwise be supplied by intendment is immaterial, and the document is in effect unaltered by it." (*Cavitt v. Raje* (1916) 29 Cal.App. 659, 661.)

The altered expiration date is immaterial because the change would have otherwise been supplied by intendment had no change occurred. Secondly, the extension of the expiration term by seven (7) days did not impact the parties' obligations. Neither the Appellant nor the Respondent performed any additional actions aside from following through with the sale of Appellant's home to the Nasiells. The effect of the alteration was to keep the status quo such that Appellant could complete the sale for the price demanded by him.

Even if the altered expiration date was considered "material," Appellant testified that he was aware of the change *before* escrow [26] closed. Appellant testified

that he knew that the SPCA expired on February 1, 2014 and made no efforts to speak with Respondent on this matter. Further, Appellant continued the transaction. He also admitted that on April 3, 2014, he noticed the change in the SPCA – well before the close of escrow on April 24, 2014. (RT Vol.1, at 253: 16-24.) Thus, the commission contract may have been voidable if Appellant took the position that he did not consent to the altered expiration term. However, Appellant went forward with the sale and closed escrow on the property well after becoming aware of this alleged alteration. Appellant ratified the SPCA by proceeding with the sale all the while alleging that the SPCA was altered.

Additionally, Appellant went to sign the Supplemental Instructions and General Provisions on April 21, 2014 which stated that the buyer and seller are aware and acknowledge that Allert represents both the buyer and the seller in this transaction.

Moreover, the expiration period of the SPCA was not material as there is an implied covenant requiring Appellant to pay Allert's commission as he received the benefit of her services. (*Torelli v. J.P.* [27] *Enterprises, Inc.* (1997) 52 Cal.App.4th 1250, 1252. ["The promise to pay the broker a commission did not die with the expiration of the counteroffer to the buyer. When the seller signed the counteroffer, it became bound by implied promise not to deprive the broker of the benefits of the bargain to pay the commission."].)

THE RECORD SHOWS THAT APPELLANT ENTERED INTO THE SPCA WITH THE BROKER, BERKSHIRE HATHAWAY, WHO ASSIGNED THE AGREEMENT TO RESPONDENT ALLERT

The record shows that Hanson entered into an agreement with Berkshire Hathaway to sell Hanson's Laguna Beach property. (CT Vol. 1, at p. 68; RT Vol.1 94:21-26; 95:1-11; Trial Ex. 26.) The record also shows that Berkshire Hathaway assigned its agreement with Hanson to Allert. (RT Vol. 1 at 115:19-26, 116:1-8; Trial Ex. 62.)

Hanson wrongly claims that he is not in "privity" of contract with Allert and that Allert was not a third-party beneficiary to his contract with Berkshire Hathaway to sell his property. Both of these arguments miss the mark. Hanson conceded he had a contract with Berkshire Hathaway, and there was no dispute at trial that Berkshire Hathaway [28] lawfully assigned its contract to Allert. Since Hanson failed to attack the assignment at trial, he cannot do so; much less attack the assignment for the first time in his anticipated Appellant's Reply Brief.

Simply put, there is no factual or legal basis for either of Hanson's "no privity"/third party beneficiary arguments, and so neither can be grounds for a reversal.

CONCLUSION

The record below indisputably showed that Respondent Jennifer Allert was the procuring cause of

the sale of Appellant Roger Hanson's multi-million dollar Laguna Beach property while Allert was working for her broker, Berkshire Hathaway. The record shows that Hanson entered into an agreement to pay Berkshire Hathaway a commission for $100,000 for this sale, but later refused to do [sic].

The record shows that Berkshire Hathaway assigned its right to Allert's earned sales commission to Allert before trial, and that Allert proved by clear and convincing evidence to the satisfaction of the trial judge below that Hanson waived his right to reply [sic] on the short, contractual limitations period by, among other things, never informing Berkshire Hathaway that he viewed the contract as terminated, going [29] forward with the seller Berkshire/Allert procured, and because of Hanson's continued use of Berkshire's services all the way through the close of escrow regarding the subject sale.

Appellant has failed to show that the trial court abused its discretion in making these factual findings.

Nor has Appellant Hanson asserted any other legitimate factual or legal basis showing he was denied a fair trial so as to warrant a reversal of the judgment. Accordingly, the judgment below should be affirmed and Respondent Allert should be awarded costs and fees consistent with the parties' agreement.

Dated: March 30, 2018

HORWITZ + ARMSTRONG APC

By: /s/ Vanoli V. Chander

John R. Armstrong,

Vanoli V. Chander

Attorney for Respondent

[Certificates Omitted]

COURT OF APPEAL

STATE OF CALIFORNIA

4TH APPELLATE DISTRICT

DIVISION THREE

NO. G055084

JENNIFER ALLERT, Plaintiff & Respondent, v. ROGER S. HANSON, Defendant & Appellant.	Below: Case No.: 30-2015-00786947-CU-BC-CJC Honorable Walter Schwarm Dept. C-19 Superior Court of Orange County Central Justice Center

CLOSING BRIEF OF APPELLANT

Roger S. Hanson, Esq.
State Bar 37966
1616 N. Mountainview Place
Fullerton, CA 92831-1225
Phone: (714) 454-6619

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SUPERIOR COURT ERRED IN ALL ASPECTS IN ITS RULING ON THE OCTOBER 30, 2017 MINUTE ORDER AS SET FORTH INFRA.

[ii] **ARGUMENT II 12**

THE ENTIRE SO-CALLED "LODESTAR" SCHEME INITIATED BY JOHN ARMSTRONG OF THE HORWITZ + ARMSTRONG FIRM ON OCTOBER 23, 2015 AND THE IMMEDIATE VIRTUALLY SIMULTANEOUS AWARD OF $254,587.50, LATER REDUCED TO $234,525 BY THE HONORABLE WALTER SCHWARM IS AND WAS PROCEDURALLY *AB INITIO* DEFECTIVE, SINCE THERE DID NOT EXIST BEFORE MR. ARMSTRONG MADE HIS FILING ON OCTOBER 23, 2015 A *WRITTEN CONTRACT* BETWEEN JENNIFER ALLERT AND ROGER S. HANSON ESTABLISHING THAT ALLERT WAS OWED MONEY BY ROGER S. HANSON. THE 6 CASES CITED BY THE COURT OF THE HONORABLE WALTER SCHWARM AT PAGE 2, FINAL PARAGRAPH, OCTOBER 30, 2017 MINUTE ORDER ESTABLISH THAT SUCH A WRITTEN CONTRACT MUST EXIST, AND IF SUCH CONTRACT DOES NOT EXIST, THE EFFORT OF MR. ARMSTRONG UNDER "LODESTAR" IS A NULLITY.

ARGUMENT III 15

THE TRIAL COURT FAILED AND REFUSED TO STATE AND ELABORATE ON ISSUES FOR WHICH THIS APPELLANT DEMANDED AND OR REQUESTED.

CONCLUSION 15

CERTIFICATE OF SERVICE .....FINAL PAGE

[iii] **TABLE OF AUTHORITIES**

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Sternwest Corp. v. Ash (1986)
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[1] **4TH APPELLATE DISTRICT**

DIVISION THREE

NO. G055084

JENNIFER ALLERT, Plaintiff & Respondent, ROGER S. HANSON, Defendant & Appellant.	Below: Case No.: 30-2015-00786947-CU-BC-CJC Honorable Walter Schwarm Dept. C-19 Superior Court of Orange County Central Justice Center

To the Honorable Presiding Justice and to the Honorable Associate Justices of the Court of Appeal, Fourth Appellate District, Division Three, assigned to this case:

Appellant Roger S. Hanson hereby submits his Closing Brief on appeal from a decision in favor of the Plaintiff and Respondent, Jennifer Allert, rendered in the Court of the Honorable Walter Schwarm, Superior Court of California, for the County of Orange, on June 9, 2017.

Dated: June ___, 2018

Respectfully submitted,

_____

ROGER S. HANSON, ESQ.
Defendant/Appellant in Persona Proper

[2] **SYNOPSIS OF THIS CLOSING BRIEF**

The brief filed by the law firm of Horwitz + Armstrong in behalf of the Plaintiff & Respondent Jennifer Allert on or about March 30, 2018 is sufficiently unusual in not responding to the Opening Brief of Roger S. Hanson, filed December 29, 2017, in that said brief fails to address the clearly defined issues of the Opening Brief, and thus requires a *dichotomy* in this Closing Brief.

That *dichotomy* in this Closing Brief will:

(1) Address the response to that March 30, 2018 brief; and

(2) Present thereafter the merits of the instant Closing Brief.

ADDRESS OF THE MARCH 30, 2018 BRIEF

Therefore, an examination of the March 30, 2018 brief filed electronically reveals the following:

At page 7, the said brief purports to claim that Plaintiff Jennifer Allert was cheated out of an "agreed flat $100,000 commission" when this Defendant, Roger S. Hanson, "decided he did not want to pay that commission" (Final Paragraph, page 7).

At page 9, initial paragraph, Plaintiff tries to avoid two proofs of the Opening Brief:

(a) That the grant by the Court under Evidence Code 1402 wiped Plaintiff and her firm out of the case; and

(b) Appellant proved, totally independently, and PRIOR to the Evidence Code 1402 ruling, that Ms. Allert had personally, or aided by her associate, Jeff Loge, at the Berkshire Hathaway Real Estate Office in Laguna Beach, altered the original SPCA document made by the Plaintiff on January 29, 2014.

[3] Neither of (a) and (b) was addressed in the March 30, 2018 brief by the Respondent.

It cannot be disputed that Plaintiff and Respondent Allert had personally prepared what was "Exhibit A", Trial Exhibit 26, as it was done on the facility of Berkshire Hathaway, and that document was, on January 29, 2014, taken into the sole custody of Ms. Allert, who retained it until the key date of April 3, 2014, when she, Ms. Allert, produced it when she responded to Hanson's offer to gratuitously give Allert $75,000.

Upon Hanson seeing, that day of April 3, 2014, this document, he immediately noted that it had been altered by the placing of a handwritten "7" atop the printed "1" to make the document purport to excuse the original expiration of that document on February 1, 2014 at 11:59 P.M.

Appellant has covered this history in his Opening Brief, and the March 30, 2018 Brief clearly ignores the demanded, and expected, response of a Brief that should have challenged the Opening Brief of December 29, 2017.

That Opening Brief showed that the Trial Court should have then granted judgment for Appellant

Hanson as explained at pages 12 and 13. Indeed, in said analysis by the Trial Court, the Honorable Walter Schwarm, the Court added the proof that Hanson did not know of the alteration by Ms. Allert, and Ms. Allert admitted that Hanson was *surprised* when he discovered the alteration on April 3, 2014.

The pages of the Introduction, 7-11, of the March 30, 2017 Brief ignores the fact that on June 9, 2017, the Trial Court awarded Judgment in the sum of $100,000.00 plus $31,260.27 interest to Allert. (C.T.A. Vol. 1, pages 290-291). That award to Ms. Allert on a "breach of contract" theory, where the only "contract" in the case had been altered by Allert and that altered contract was the sole contract in the First Amended Complaint. See Allert's Appendix [4] Volume One, where these documents are supplied by the Horwitz + Armstrong firm on behalf of Ms. Allert.

Plainly, Ms. Allert, once again, lost her suit in the June 9, 2017 ruling since Hanson, at no time, was a party to Exhibit A, Trial Exhibit 26, and therefore could not "breach" a contract that Hanson never had seen until the service of the First Amended Complaint. See "Answer to First Amended Complaint" (Verified Answer); First Amended Complaint, Not Verified (Tab 5) of the Appendix of Allert.

Stripped of its veneer, Respondent simply fails to address the allegations of the Opening Brief, and takes the position that Hanson continued to use the services of Ms. Allert, when in truth, the trial evidence showed that commencing February 4, 2014, Allert began using

Hanson while then concealing that she had altered the Trial Exhibit 26, i.e. Exhibit A to her First Amended Complaint.

The Brief of March 30, 2018 recommences with a Statement of Facts at page 11, and admits that "Berkshire Hathaway" and Appellant Roger S. Hanson entered into a contract entitled "Single Party Compensation Agreement" (SPCA) where $100,000 was to be given to Berkshire Hathaway if the sale of the Hanson residence occurred before 11:59 P.M. on February 1, 2014.

The Brief continues at the final paragraph of page 12 with this willfully false statement:

> "The SPCA was amended to extend the date of the contract to February 7, 2014 to allow the parties additional time to negotiate the sale of the property (RT Vol. 1, at 124: 14-23). The escrow documents show that the typed term was extended, a contention disputed by Appellant . . . "

[5] An examination of RT Vol. 1, page 124, lines 14-23, reveals that it is Ms. Allert, personally, who is making such a false claim, and in fact, her testimony is:

> Q. Going back to the alteration of the document of Exhibit 26, it is your testimony that it was an agreement to extend the expiration date to February 7th that was made on January 29; is that correct?
>
> A. Yes.

Q. And that was made to provide further time to present the counteroffer of $3 million Mr. Hanson was making to the Nasiells?

A. Yes. And for the Nasiells to respond to his offer.

Q. So the purpose was prospective, to allow time –

A. Yes.

PROCEDURAL HISTORY

Procedural history which shows history of the original Complaint being filed May 11, 2015, which had three causes: (1) Breach of Contract; (2) Quantum Meruit; and (3) Declaratory Relief. (Nota Bene: This May 11, 2015 suit was the product of co-partner John Armstrong). It was defective in that it had no "Exhibit A" attached.[1]

Then the Horwitz + Armstrong firm shifted to use of other counsel, where one "Susan Lewis", Bar No. 284933, now joined Mr. Armstrong, and the cause "Quantum Meruit" was abandoned, leaving only the key cause of "breach of contract".

[6] Hanson demurred, once again, to this First Amended Complaint in view of the obvious alteration of its "Exhibit A" by the handwritten "7" attempt to obliterate typed "1", but the Honorable Walter

[1] Hanson has asked the Clerk to the Honorable Walter Schwarm to produce the initial complaint, and she has verified that it had no "Exhibit A" attached to it.

Schwarm felt no problem existed in their use of an altered Exhibit A, and overruled the demurrer and Hanson answered.

The final paragraph of page 14 notes that:

> "On June 9, 2017, the Final Statement and Decision and Judgment was filed (CT. Vol. 1 at 273)".

This Brief fails to recognize the consequences of this June 9, 2017 decision, which is fatal to Allen.

Next, the March 30, 2018 brief addresses a STANDARD OF REVIEW at pages 15-18, which focuses on whether the Court at trial erred in its rulings, or abused its discretion.

This area is irrelevant since it is clear that:

(a) The Court erred in its June 9, 2017 order that Hanson "breached the contract"; and

(b) The Court began a "waiver" analysis on its own volition, and in fact, erred in its selection of some 19 items which could not be waived by Hanson.

Here, see Clerk's Transcript, Vol. 1, pages 178-195 [Proposed] Statement of Decision by Honorable Walter P. Schwarm; See pages 132-159, Response to Items Lines 16-21, Page 1 of Memorandum of Intended Decision concerning the error of the Court in the Court's selection of items, which could not be waived. See pages 161-172, Response of Roger S. Hanson to Counsel for Plaintiff's Request for "Interest" on a Non-Specified, Non-Existent Judgment; Motion to Require Findings by the Court.

Moving to pages 18-22 of the March 30, 2018 Brief, the Brief asserts:

> [7] "The Trial Court did not abuse its discretion by finding that Appellant Hanson waived his right to reply on the contract's short expiration period by retaining and accepting Respondent's services for months after the contract typed expiration date."

Here, this Brief asserts, wrongly, that Hanson continued to use Allert's services, while the trial proceedings showed the opposite, i.e. Allert, while *concealing* the fact that she had altered the SPCA, and that the SPCA between Berkshire Hathaway and Hanson had expired on February 1, 2014 at 11:59 P.M., made an admission on February 4, 2014, that she was the listing agent for the $2,500,000 home of Olov and Jenny Nasiell, but she could not sell it unless she could secure Hanson's agreement to sell 709 Kendall to the Nasiells.

At this time, Allert provided an abrupt elevation of the then existing $2,510,000 offer from the Nasiell's to $2,675,000, which Hanson accepted, Allert agreeing to pay Hanson's usual share of the escrow costs. Hanson was then told, on February 4, 2014, by Jeff Loge, Allert's associate salesman and her Berkshire Hathaway mentor, that he, Loge, was authorized to give $2,700,000, allowing Hanson to logically believe he had been cheated out of $25,000 ($2,700,000 - $2,675,000).

This conclusion reduced Hanson's planned gift/ gratuity to Berkshire Hathaway to $75,000 on April 3, 2014, bringing on the question by Allert why she was not given the $100,000 provided in the SPCA of January 29, 2014, Allert then producing the altered SPCA and Hanson learning, for the first time, of its alteration.

Here, see Hanson's Opening Brief at pages 12 and 13 and its ruling by the Court that the Evidence Code 1402 matter showed Hanson to be ignorant of the alteration by Allert. See pages 14, Civil Code 1700 fully supporting the "extinguish of all executory obligations of the contract (Trial Exhibit 26, Exhibit A) in his favor, against parties who do not consent to the act."

[8] Next, the March 30, 2018 Brief asserted at pages 22-26 that "the Alleged Alteration of Exhibit "A" was not irrelevant and immaterial", based on the false claim that Judge Schwarm embarked on his "own waiver", a matter not requested or moved for by the Plaintiff, and which was erroneously conducted due to the fact that the Court selected some 19 items which could not be waived. See Argument III, pages 17-21, Opening Brief of Hanson, and Argument V, pages 22-26.

The cite of the "Torelli case", once mentioned by Judge Schwarm, dealt with a NON-DISHONEST, NON-ALTERING OF DOCUMENTS IN A FORMAL LISTING AGREEMENT. At bar, here existed Allert's willful alteration of the SPCA and her giving it to the Horwitz + Armstrong firm to bring the suit, which

became erased via the 1402 ruling. Torelli v. J.P. Enterprises, Inc. (1997) 52 Cal.App.4th 1250, 1252 at pages 26-27, of the March 30, 2017 brief.

Finally, at pages 27-28, the March 20, 2018 [sic] Brief seeks affirmance of its Judgment against Hanson, and it must be noted by Hanson the following:

(a) This Brief does not address the merits of the Opening Brief, and the consequences of the 1402 ruling wiping Ms. Allert out of the case;

(b) This Brief does not discuss the independent proof that Allert had altered the SPCA, and this was "unclean hands", per se, as Allert admitted in her deposition at page 16; lines 3-9;

(c) This Brief does not recognize and address and admit that the June 9, 2017 Ruling of the Court was erroneous as Hanson could not "breach a contract" (Exhibit Trial 26) to which Hanson was never, never, never a signatory to, nor did it exist in the case after the 1402 ruling.

[9] (d) This Brief does not discuss the clear initial error of the Trial Court where said Court immediately awarded $234,587 in damages to Allert in defiance of the rule that it first must be shown that Allert was owed money via a written contract by Hanson before any filing by the Horwitz + Armstrong firm of a "Lodestar" scheme.

(e) This brief does not address that the Respondent had no right to file any document in this case after the June 9, 2017 ruling and thus,

the "Lodestar" scheme of Plaintiff was a nullity.

APPELLANT HANSON NOW ADDRESSES HIS POSITION ON THE MERITS OF HIS CLOSING BRIEF

Reference must be to the Opening Brief of Hanson filed December 29, 2017 and the there [sic] appearing proof that Allert had altered the January 29, 2014 SPCA while it was in her sole possession from January 29, 2014 to April 3, 2014.

This Closing Brief addresses the errors committed by Judge Schwarm in the October 30, 2017 Minute Order, which shows that the Lodestar scheme began by John Armstrong cannot be allowed since it was never, never proven that Allert was owed money by Hanson before John Armstrong made his filing on or about October 23, 2015, a filing that counsel Armstrong had no right to do.

It is ignored by the Trial Court that the some 6 cases cited in the third paragraph of page 2 of that Minute Order require the existence of a written contract between Allert and Hanson where it is shown Allert is owed such funds, and such a contract has never, never, never existed.

As per Civil Code 1717, Allert and her firm of Horwitz + Armstrong were not entitled to attorney fees as Plaintiff for Allert in that civil suit, which had "Exhibit A" attached to the First Amended Complaint.

[10] The erroneous initial grant by the court of Judge Schwarm reduced to $234,525 in the final paragraph of page 3 of the October 30, 2017 Minute Order, thus simply continued this gross error, and this error entitled. John Armstrong to pursue his demand that $250,000 be given to him, and if said amount was not going to be given to him, he was going to require the safe deposit boxes to be opened. See "Challenge to Minute Order of October 30, 2017 filed March 12, 2018 in the Supplement to the Clerk's Transcripts Volume 1 and 2, now of record where that March 13, 2018 filing contains the erroneous Minute Order of October 30, 2017.

ARGUMENT I

THE APPELLANT, ROGER S. HANSON, IS THE SUBJECT OF AN ORDER OF JUNE 9, 2017 WHICH GAVE THE PLAINTIFF ALLERT $131,260 FOR THE COURT'S RULING THAT APPELLANT "BREACHED THE CONTRACT" WHICH "CONTRACT" EXISTED AS THE ONLY POSSIBLE "CONTRACT" IN THIS CASE; APPELLANT COULD NOT HERE "BREACH A CONTRACT" UNDER THE FOLLOWING LEGAL AND FACTUAL CANOPIES: (A) UNDER EVIDENCE CODE 1402 THIS PLAINTIFF WAS NO LONGER IN LITIGATION IN THIS CASE, WHICH HER COUNSEL, HORWITZ + ARMSTRONG, HAD FILED ON OCTOBER 19, 2015 (SEE VOL. 1, C.T.A. PAGES 59-70); (B) THIS PLAINTIFF

SUPPLIED A WILLFULLY ALTERED "EXHIBIT A" TO HER FIRM, WHICH HAD NEVER BEEN SIGNED BY HANSON; (C) THE INSTANT SUPERIOR COURT ERRED IN ALL ASPECTS IN ITS RULING ON THE OCTOBER 30, 2017 MINUTE ORDER AS SET FORTH INFRA.

The Superior Court erroneously awarded a substantial judgment in favor of Jennifer Allert and against Roger S. Hanson in its evaluation of the "Lodestar" scheme initiated by John Armstrong in his filing a huge pleading, [11] which had been heralded in coming by a letter over the signature of Matthew S. Henderson. See Volume 2 of the Clerk's Transcript at pages 310-311, 312-319.

In fact, said threatening letter of March 23, 2017 was never filed, but eventually was filed by Mr. Armstrong on or about October 23, 2015. Said document was not included in this "Appendix" to the brief of March 20, 2018 [sic], filed by the Horwitz + Armstrong firm as can be verified by examination of said brief and its "Appendix".

It is of key importance that the June 9, 2017 order of this Court of the Honorable Walter P. Schwarm is and was defective in not establishing that Hanson "breached the contract" of Exhibit A since:

(a) Exhibit A was no longer in the Court after the Evidence Code 1402 ruling; and

(b) Hanson, at no time, was a signatory to the "Exhibit A" attached to the First Amended Complaint.

It thus follows that the June 9, 2017 ruling ended, once again, any possible positive result for Jennifer Allert and her law firm of Horwitz + Armstrong.

This record establishes that Allert, via her law firm, of Horwitz + Armstrong was never entitled to attorney's fees per California Civil Code 1717 since under that code, counsel to the Plaintiff, in a California civil suit, has no expectation of said fees (see Opening Brief, pages 17-20, of Hanson).

In a parallel analysis, it was never shown, nor could it ever be shown, that a written contract existed, before any attempted use of the "Lodestar" scheme, a written contract that provided that Jennifer Allert has [sic] owed any money by Roger S. Hanson.

[12] In view of this, the October 30, 2017 Minute Order of the Honorable Walter P. Schwarm erred in all key areas of said Minute Order, a copy of which is attached hereto as Exhibit 1.

Indeed, the some 6 authorities of paragraph 3 of page 2 of said Minute Order clearly establishes that a *written contract* must have existed between Allert and Hanson providing that Allert was owed any money by Hanson and such a contract has never been shown, does not exist, and has never, never existed.

The March 20, 2108 [sic] Brief of Horwitz + Armstrong does not challenge this clear proof that Allert

cannot prevail in the instant appeal now pending in the Court of Appeal, No. G055084, Allert v. Hanson.

The error of ruling on June 9, 2017 was followed by a filing on August 15, 2017 seeking "post-judgment interest".

This Court of Appeal is referred to C.T.A. Volume 2, pages 302-333, and the request for findings by the Superior Court.

Stripped of any facades urged in the March 20, 2018 [sic] Brief, it is clear that said Brief does not address and challenge the facts and law of the Opening Brief of December 29, 2017 of Hanson, and otherwise erroneously contends that Allert should prevail in this appeal.

ARGUMENT II

THE ENTIRE SO-CALLED "LODESTAR" SCHEME INITIATED BY JOHN ARMSTRONG OF THE HORWITZ + ARMSTRONG FIRM ON OCTOBER 23, 2015 AND THE IMMEDIATE VIRTUALLY SIMULTANEOUS AWARD OF $254587.50, LATER REDUCED TO $234,525 BY THE HONORABLE WALTER SCHWARM IS AND WAS PROCEDURALLY *AB INITIO* DEFECTIVE, SINCE THERE DID NOT EXIST BEFORE MR. ARMSTRONG MADE HIS FILING ON OCTOBER 23, 2015 A *WRITTEN CONTRACT* BETWEEN [13] **JENNIFER ALLERT AND ROGER S. HANSON ESTABLISHING**

THAT ALLERT WAS OWED MONEY BY ROGER S. HANSON. THE 6 CASES CITED BY THE COURT OF THE HONORABLE WALTER SCHWARM AT PAGE 2, FINAL PARAGRAPH, OCTOBER 30 2017 MINUTE ORDER ESTABLISH THAT SUCH A WRITTEN CONTRACT MUST EXIST AND IF SUCH CONTRACT DOES NOT EXIST, THE EFFORT OF MR. ARMSTRONG UNDER "LODESTAR" IS A NULLITY.

In this Argument, Roger S. Hanson establishes that the efforts of John Armstrong of Horwitz + Armstrong in his filing of October 25, 2015 was erroneous, and a nullity, *ab initio*.

Virtually, simultaneously, this filing caused the Court of the Honorable Walter Schwarm to award $254,587.50, which was eventually reduced to $234,525, also an initial error and a nullity.

Hanson has called this error to the attention of the Horwitz + Armstrong firm, and to the Court of Judge Walter Schwarm, but no relief has been recognized or given.

This existence error allowed the Horwitz firm to, under clear extortion, contend that this firm was owed $250,000 in fees that it demanded from Hanson, and admitted that the firm had seized an additional $75,000 by bank seizures, using a technique that the firm had the Orange County Sheriff file seizure warrants against some 6 bank accounts, where at least two

of said seizures were against banks where Hanson had never had accounts (Wells Fargo, Union Bank).

At banks where Hanson had accounts (CitiBank, some $50,000 seized, and U.S. Bank, $131,667.00 seized, and Chase, $131,667.00 in seizures), Hanson was charged $100.00 by his bank on each of these seizures.

Challenges were made by Hanson to the U.S. Bank seizure, and to the Chase Bank seizure, and the Horwitz + Armstrong firm did not even schedule an available hearing to counter return of the seizures, and the Orange County [14] Sheriff returned the money to each bank; with approval of the Court of Honorable Walter P. Schwarm, another attempt was allowed to be made at each institution, which failed since no funds then existed in these seizures.

The continued error allowed the Horwitz + Armstrong firm to demand and receive $250,000 in a cashier's check made payable to the firm's State Bar trust account, which allowed that firm to now hold, and still does hold, $325,000 of Hanson's money.

At no time has any seizure been approved for other than $131,667 plus minor costs, and thus, this firm has extracted at least $325,000 - $131,667 by use of threats to enter the safe deposit boxes of Hanson.

Like all services on all banks at all times, there was no advance allegation that the Horwitz + Armstrong firm knew funds existed at the bank.

An examination of the "Appendix" and brief of the March 30, 2018 filing fails to supply a copy of the October 23, 2015 filing of John Armstrong. Hanson here seeks to have that document filed, and it appears in the filing by the firm of Robinson & Robinson on September 20, 2017 entitled "Defendant Roger Hanson's Opposition to 1. Plaintiff Jennifer Allen's Motion for Prevailing Party Designation and for Contractual Attorney's Fees and 2. Plaintiff's Supplemental Motion for Contractual Attorney's Fees; Declarations of Gregory E. Robinson, Roger Hanson, and Barbara Dawson."

These seizures stemmed from the June 9, 2017 order of the Honorable Walter Schwarm that Hanson had "breached the contract", a clearly erroneous allegation that Hanson and Allert had entered into the contract of Exhibit "A" to the First Amended Complaint of that firm filed on May 11, 2015.

Hanson, however, was never a signatory to that contract, which was altered by Allert, prior to her the [sic] furnishing this contract to Horwitz + Armstrong, and thus Hanson could not "breach" the contract "Exhibit A".

[15] **ARGUMENT III**

THE TRIAL COURT FAILED AND REFUSED TO STATE AND ELABORATE ON ISSUES FOR WHICH THIS APPELLANT DEMANDED AND OR REQUESTED.

Pursuant to Miramar Hotel Corp. v. Frank B. Hall & Co. of California, 163 Cal.App.3d 1126, 210 Cal.Rptr.

114 (1985), Appellant asserts that refusal and failure to set forth findings by the by the [sic] Trial Court on the foregoing key issues requires reversal of this ruling in favor of the Plaintiff and Respondent Allert.

CONCLUSION

The appeal in this case must be resolved in favor of Appellant Roger S. Hanson, and Hanson be awarded his costs and the $325,000 taken by Allert and the Horwitz + Armstrong firm.

Dated: June ___, 2018

Respectfully submitted,

_____
ROGER S. HANSON, ESQ.
Appellant/Defendant in Persona Proper

[Certificates Omitted]

COURT OF APPEAL

STATE OF CALIFORNIA

4TH APPELLATE DISTRICT

DIVISION THREE

NO. G055084

JENNIFER ALLERT, Plaintiff & Respondent, v. ROGER S. HANSON, Defendant & Appellant.	Below: Case No.: 30-2015-00786947-CU-BC-CJC Honorable Walter Schwarm Dept. C-19 Superior Court of Orange County Central Justice Center

PETITION FOR REHEARING

Roger S. Hanson, Esq.
State Bar 37966
1616 N. Mountainview Place
Fullerton, CA 92831-1225
Phone: (714) 454-6619

[1] **4TH APPELLATE DISTRICT**

DIVISION THREE

NO. G055084

JENNIFER ALLERT, Plaintiff & Respondent, v. ROGER S. HANSON, Defendant & Appellant.	Below: Case No.: 30-2015-00786947-CU-BC-CJC Honorable Walter Schwarm Dept. C-19 Superior Court of Orange County Central Justice Center

To the Court of Appeal, Fourth Appellate District, Division Three, who presided at and ruled on this appeal on March 6, 2019.

Roger S. Hanson, Defendant and Appellant, petitions for rehearing in this case based on the following reasons and supplies facts and law to explain how the errors impacts [sic] disposition of this case.

(1) The Court of Appeal's decision contains a material omission or misstatement of fact in failing to recognize that the grant of Evidence Code 1402 removed Allert as a Plaintiff in this case; this error impacted the disposition of the case as it failed to recognize that Allert could do nothing thereafter such as filing motions for money due Allert.

(2) The Court of Appeal's decision is based on a material mistake of law since had the decision recognized

the Evidence Code 1402 motion being granted, proof that no money claims would thereafter be allowed.

[2] (3) The Court of Appeal lacked subject matter jurisdiction which can be raised at any time within the 15-day period from March 7 – March 22, 2019.

Hanson, in seeking rehearing, pursuant to Rule 8.268 California Rules of Court, next follows with the several omissions and misstatements of the Court of Appeal's decision of March 6, 2019.

A. THE COMMENCEMENT OF THE ACTIVITY BY JENNIFER ALLERT TO DEPRIVE HANSON OF DUE PROCESS OF LAW

1. On or about May 11, 2016, Allert used the law firm of Horwitz & Armstrong to bring suit against Hanson.

2. Said suit was personally prepared by John Armstrong, a partner of Horowitz & Armstrong, and alleged three causes of action.

(a) Breach of Contract

(b) Quantum Meruit

(c) Declaratory Relief

Said suit had no "Exhibit A" or Trial Exhibit 26 attached.

3. Said suit had one Susan Lewis as co-counsel, and was assigned to Honorable David T. McEachen.

4. Hanson demurred to said suit and prior to hearing on said demurrer, Allert's counsel filed a First Amended Complaint, which deleted a cause of action for Quantum Meruit, leaving in, inter alia, a cause of action for Breach of Contract.

5. This First Amended Complaint asserted that Allert and Hanson had agreed to Exhibit "A", which became Trial Exhibit 26, which was then attached to the First Amended Complaint.

[3] 6. At no time did Hanson agree to said Exhibit "A" (Trial Exhibit 26) and Hanson filed a Verified Answer, denying execution of said Exhibit.

7. Said Exhibit was altered by the hand printed number 7 being placed over the typed date of February 1, 2014 in said Exhibit.

8. California Evidence Code 1402 provides:

> The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

9. Counsel to Hanson filed an Evidence Code 1402 motion, which brought the following ruling from the Trial Court.

> ***1. Whether Defendant Authorized the Alteration of SPCA (Exhibit No. 26?"***
>
> The dispute as to this cause of action pertains to whether Defendant authorized the alteration of the SPCA (Exhibit No. 26). There is no dispute that the original expiration date contained in the SPCA was February 1, 2014. Sometime after the typewritten date of February 1, 2014 was inserted into the SPCA, there was an alteration to the SPCA where a "7" was handwritten over the typewritten "1" to reflect an expiration date of February 7, 2014. Plaintiff claimed Defendant authorized the extension of the expiration date from February 1, 2014 to February 7, 2014. Defendant contends that he never authorized any extension or any alteration of the expiration date.
>
> Loge testified that the SPCA was presented to Defendant on January 29, 2014. On that date, Loge saw Defendant sign the SPCA and place his initials on the date line next to his signature to reflect the signing date of January 29, 2014 [4] instead of the preprinted date of January 17, 2014. Loge also saw Defendant change the expiration date from February 1, 2014 to February 7. 2014. According to Loge, Loge told Defendant that the potential buyer may need more time, and Defendant suggested the extension to February 7, 2014. At trial, Loge was clear that these

changes occurred on January 29, 2014, but that he did not know why Defendant did not initial the change to the expiration date.

Loge's deposition testimony showed several inconsistencies. First, at his deposition, Loge testified that he was present when Defendant changed the expiration date, but that the change occurred on February 4, 2014. He testified at deposition that he did not remember whether he or Defendant changed the expiration date. His deposition testimony also showed Defendant refused to initial the change to the expiration date because his signature was sufficient.

Plaintiff testified that the alteration to the expiration date occurred on January 29, 2014. Plaintiff remembered a conversation regarding the extension of the expiration period, but did not remember if Defendant changed the date. Plaintiff remembered Defendant signing the SPCA, but did not remember if the change was on the SPCA when Defendant signed it. On February 4, 2014, Plaintiff testified there was a discussion regarding the commission of $100,000. During this discussion, Defendant said he did not want to pay the full $100,000 commission. Plaintiff offered to pay Defendant's escrow fees in an attempt to reduce the commission (Exhibit No. 35.) At a meeting on April 3, 2014, Plaintiff testified Defendant expressed surprise when he saw the alteration contained on the SPCA. Plaintiff told Jim Vermilya that there was an

oversight with respect to having Defendant initial the alteration.

Defendant testified he signed the SPCA before it was altered. Defendant first learned of the alteration on April 3, 2014. Defendant denied altering the SPCA.

The court finds that Plaintiff has not carried her burden of proof of showing that Defendant authorized the alteration by clear and convincing evidence, or by a preponderance of evidence. First, Defendant's testimony was inconsistent with Plaintiff's testimony and Loge's testimony. Loge's memory [5] is unreliable as shown by the discrepancies between his trial testimony and deposition testimony. Despite Plaintiff's testimony that there was a discussion regarding an extension on January 29, 2014, Plaintiff also testified that Defendant expressed surprise at seeing the alteration on April 3, 2014. Defendant's surprise tends to support the inference that he was unaware of the alteration. Although Plaintiff testified she and Defendant discussed the commission of $100,000 on February 4, 2014, this discussion did not pertain to extending the expiration period from February 1, 2014 to February 7, 2014. Finally, Defendant initialed the change to the date next to his signature. These initials support the inference that Defendant used his initials to indicate his assent to changes in the SPCA. The absence of his initials to the change in the expiration period supports the inference that he did not authorize the extension of the expiration period

especially since he initialed the change to the date next to his signature.

10. This ruling wiped the First Amended Complaint from the case, and this Plaintiff Jennifer Allert was thereafter not a litigant, and, inter alia, was ineligible to file motions where she sought money from Defendant Hanson, including the following written motions:

(a) A filing claim made by the Horowitz & Armstrong firm for $250,000 based on Allert's claim that Hanson had advanced such money to the State Bar Trust Account of Horowitz & Armstrong. [See Exhibit D-1]

(b) A filing claim made by the Horowitz & Armstrong firm for some $254,587.50 reduced by the Court to $234,525 (Minute Order of October 30, 2017). [See Exhibit D-2, reproduced in this Petition at App. 43]

(c) A so-called "Lodestar" cause of action for the amount of money set forth in the filing by John Armstrong, addressed n [sic] the filing by Robinson & Robinson September 20, 2017.

[6] 11. Prior to the seeking of $250,000 per item (a) of Paragraph 10, the Horowitz & Armstrong firm secured an order from the Orange County Sheriff to force the opening of Hanson's personal security boxes held at the U.S. Bank, said boxes containing rare coins, personal jewelry, and items of Hanson's deceased wife, who had passed away June 26, 2013; Hanson's daughter, Jennifer Sue Hanson-Evron was co-owner of the contents of said boxes and to prevent the drilling into said boxes, Hanson yielded to the demand of John

Armstrong to give their firm $250,000 to be placed in that firm's State Bar Attorney Trust Account, which was done, verified by Exhibit D-1 to this motion under Rule 8.268.

The decision of March 6, 2019 of the Court of Appeal did not recognize that the ruling under Evidence Code 1402 wiped Allert and her law firm out of this case.

This failure to so recognize was a material omission or misstatement within the provisions of grounds for seeking a rehearing as set forth supra in this Petition for Rehearing.

B. THE FAILURE TO INCLUDE THE KEY FACTS REGARDING THE GRANT OF EVIDENCE CODE 1402 MOTION

As a consequence of the grant of the Evidence Code 1402 motion, the suit brought by the Horowitz + Armstrong firm was denied admission into evidence. Therefore, this Plaintiff Jennifer Allert was wiped out of court.

As a consequence, Jennifer Allert could bring no further motions, where she sought money from Defendant Hanson.

This prohibition included the following:

[7] (a) No attorney's fees could be awarded to the Horwitz & Armstrong firm per Civil Code 1717.

(b) No attorney's fees would be available under the hugely itemized pleading filed by John Armstrong, which suffered, as well, as whether it provided fees expected from the Plaintiff Allert or was a contingency agreement.

(c) No provision for fees stemmed from the so-called "Lodestar" filing, which included the Trial Court's awarding of in excess of $254,587.50, which the Trial Court reduced to $234,525. [See Exhibit D-2] Here, see the extensive filing by the firm Robinson & Robinsion [sic] on or about September 20, 2017, the firm retained by Hanson to deal with the Horowitz & Armstrong claim under the "Lodestar" canopy. Said filing was defective in not recognizing that a pre-filing claim of money owed to Allert by Hanson had to exist, which here did not. See also "Declaration of John Armstrong, Esq. in Support for Plaintiff's Motion for Attorney Fees for an Appearance Before the Trial Court on August 8, 2018."

Once again, the Court of Appeal's decision of March 6, 2019 failed to recognize this key material omission or misstatement.

C. THE MATTER OF THE ERROR OF THE TRIAL COURT EMBARKING ON A "WAIVER" MATTER, THE COURT PERSONALLY SELECTING SOME 5 ITEMS PLUS ANOTHER 19 ITEMS WHICH THE COURT ERRONEOUSLY ASSERTED WERE ITEMS THAT HANSON WAIVED; INDEED, VIRTUALLY EACH AND EVERY ONE OF THESE 5 + 19 ITEMS WERE NECESSARY ITEMS, WHICH WERE MANDATORY IN [8] ANY SALE OF A RESIDENCE IN CALIFORNIA, WHICH HANSON COULD NOT WAIVE.

(a) Initially, the Trial Court asserted that although Hanson had never seen these items, Hanson could have called witnesses during this trial to establish inability to waive them, a mysterious contention since this effort by the trial court was post-trial.

(b) Eventually, it was shown that Allert and her counsel independently needed and desired that these items be addressed due to the desire to finalize the sale of the $2,500,000 Olov and Jenny Nasiel [sic] residence, Allert being in line for a 5% or $125,000 broker's fees.

The Court of Appeal decision at page 13, under confusion over "waiver" demonstrated failure to recognize that Hanson did not bear the responsibility to show that he could not waive these 5 + 19 items, as the rule is properly placed on the Trial Court to demonstrate that his selection of alleged items of waiver was correct.

Here, the Court of Appeal added yet another area that was not properly addressed in the March 6, 2019 Order, a material omission or misstatement of fact/ misstatement of law and a showing of lack of subject matter jurisdiction.

D. PROOF THAT ALLERT, LIKELY AIDED BY JEFF LOGE, HAD FALSIFIED AN ALTERED "EXHIBIT "A", TRIAL EXHIBIT 26, WHILE BOTH WERE EMPLOYED AS AGENTS AT BERKSHIRE HATHAWAY, LAGUNA BEACH.

The independent proof that Allert, likely aided by Jeff Loge, had placed the digit "7" atop the digit "1" at a time when only Allert had possession of Exhibit "A", Trial Exhibit 26, was shown by Hanson in his filing of several documents of which two of them are:

[9] (a) Notice of Motion and Ex Parte Motion to Establish Defendant Allert's Alteration of "Exhibit A", Trial Exhibit 26, Set for Hearing January 4, 2017

(b) Brief in Support of Proof that the Existing Current Record Establishes Jennifer Allert's Alteration of "Exhibit A", No. 26 at Trial, Set for January 17, 2014

Of interest, these two documents were "mentioned" in the ruling by the Court of Appeal at pages 4-5 of the opinion at final paragraph page 4 – top two lines, page 5 [in toto,] admitting that Allert did not respond to said two motions, thus suggesting the truth of said motions[, since no response was filed].

E. THE MATTER OF THE DAY LONG WAIT AT THE BERKSHIRE HATHAWAY OFFICE FOR FAILURE OF THE NASIELLS TO APPEAR ON SEPTEMBER 1, 2014

(a) In the deposition of Allert taken September 21, 2015, Allert admitted that it was failure of the Nasiells to appear and that Allert and Jeff Loge had taken Hanson to lunch at "Ruby's" on Pacific Coast Highway, Laguna Beach. [See Allert deposition at page 49, line 25-page 50 in toto.]

(b) At trial, counsel for Allert radically changed this admitted true fact to assert that Hanson had telephoned their office on that day, stating that Hanson would not be appearing that date of September 1, 2014.

(c) On that date of September 1, 2014, Jeff Loge testified in his deposition taken by Hanson that, indeed, there was an "all-day wait" for the Nasiells, but that occurred on a "different date", with inability to state what business relative to the sale of the Nasiells' residence would have been necessary to this alternate date.

[10] (d) Efforts of Hanson to require the Court to make various findings of fact were denied and did not occur, a violation which nullifies the transaction pursuant to Miramar Hotel v. Frank B. Hall, 163 Cal.App.3d 1126 (1985). [See Exhibit D-3.]

The Court of Appeal, in its order of March 6, 2019, failed to address the above matter, thus omitting a material omission or misstatement from this analysis of the true facts of this litigation.

F. THE CREATION OF TRIAL EXHIBIT 26, EXHIBIT "A", BY JENNIFER ALLERT, WHO ADMITTED THAT SHE HAD FURNISHED THAT FALSE ITEM TO THE FIRM OF HORWITZ & ARMSTRONG TO ALLOW THAT FIRM TO BRING THE "FIRST AMENDED COMPLAINT"

(a) While under oath, and being recalled by counsel to Hanson, Ms. Allert admitted that she had personally furnished the document to that firm; See ~~R.R.A.~~ [pages] 61-65 of the December 12, 2016 Transcript, the following occurred:

THE COURT: MS. ALLERT, YOU NEED TO BE RESWORN.

THE CLERK: DO YOU SOLEMNLY STATE THAT THE EVIDENCE YOU SHALL GIVE IN THE MATTER NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: YES.

JENNIFER ALLERT, RECALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED FURTHER AS FOLLOWS:

THE CLERK: YOU MAY TAKE THE WITNESS STAND.

THE COURT: OKAY. WHENEVER YOU ARE READY, MR. PIGGOTT.

[11] RE-CROSS EXAMINATION BY MR. PIGGOTT:

Q. MS. ALLERT, WOULD YOU LOOK AT EXHIBIT 64 IN THE EXHIBIT BOOK?

A. YES, I HAVE IT.

Q. YOU ARE FAMILIAR WITH IT?

A. YES.

Q. AND IF YOU'D LOOK AT EXHIBIT A ATTACHED TO IT.

A. YES, I SEE IT.

Q. YES. DID YOU FURNISH THIS DOCUMENT TO YOUR COUNSEL THAT THEN ATTACHED IT TO THE COMPLAINT?

A. DID I FURNISH IT?

Q. YES.

A. DID I GIVE IT TO HIM?

Q. YES.

A. YES.

Q. AND WHERE DID YOU GET IT FROM?

A. OUT OF THE FILES OF THE TRANSACTION.

Q. WHAT FILES WOULD THAT BE?

A. A FILE OF ALL OF THE PAPERWORK THAT WERE ENGAGED WITH THE TRANSACTION.

Q. DO YOU KNOW IF YOU GAVE THEM A COPY? DID YOU TAKE A COPY OUT OF THE FILE TO GIVE TO YOUR COUNSEL?

A. LOOKS LIKE A COPY.

Q. DID YOU MAKE THAT COPY FROM ANOTHER COPY OR FROM THE ORIGINAL?

A. HAD TO BE FROM AN ORIGINAL.

[12] Q. DID YOU HAVE THE ORIGINAL IN YOUR POSSESSION WHEN YOU GAVE A COPY OF THIS TO YOUR COUNSEL?

A. I DID NOT.

Q. SO THEN YOU COULDN'T HAVE MADE THIS FROM THE ORIGINAL, CORRECT?

A. ROGER HAS THE ORIGINAL.

Q. WHEN YOU SAY "ROGER," MR. HANSON?

A. MR. HANSON, YES.

Q. TOOK THE ORIGINAL OF THIS DOCUMENT, WHICH WE'VE MARKED AT EXHIBIT 26, AND HE TOOK THAT ON APRIL 3, CORRECT?

A. I BELIEVE SO. ON APRIL 3RD, YES,

Q. AND JUST TO BE SURE ON THIS ISSUE, MS. ALLERT, YOU PREVIOUSLY TESTIFIED, AS I UNDERSTAND IT, THAT YOU TOLD MR. HANSON THAT YOU NEEDED TO OBTAIN HIS AGREEMENT TO—FOR THE NASIELLS TO PURCHASE HIS PROPERTY IN ORDER FOR YOU TO OBTAIN A LISTING AGREEMENT FROM THE NASIELLS?

MR. HENDERSON: OBJECTION. ASSUMES FACTS NOT IN EVIDENCE. CALLS FOR SPECULATION.

THE COURT: OVERRULED.

THE WITNESS: REPEAT THE QUESTION.

BY MR: PIGGOTT:

Q. YES. LET'S START OUT: DID YOU NEED TO OBTAIN MR. HANSON'S AGREEMENT TO SELL THE PROPERTY TO THE NASIELLS IN ORDER TO OBTAIN A LISTING AGREEMENT FROM THE NASIELLS?

[13] MR. HENDERSON: OBJECTION. VAGUE.

THE COURT: OVERRULED.

THE WITNESS: NO, NOT NECESSARILY. OUR GOAL WAS TO GET INTO ESCROW WITH ROGER'S HOUSE AND GET HIM A PRICE THAT HE WANTED, AND THEN, OF COURSE, WE HAD TO GO AHEAD AND LIST THE NASIELLS' HOUSE AFTER WE GOT INTO ESCROW BECAUSE THEY DIDN'T WANT TWO MORTGAGES. THEY DIDN'T WANT TWO HOUSE PAYMENTS.

BY MR. PIGGOTT:

Q. SO WE WENT THROUGH THAT THE LISTING AGREEMENT THAT YOU OBTAINED, YOU OBTAINED ON FEBRUARY 10, CORRECT, FROM THE NASIELLS,

A. IF I REMEMBER CORRECTLY, YES, THE 10TH.

Q. AND THAT WAS AFTER MR. HANSON WENT UNDER CONTRACT --

A. YES.

Q. -- WITH THE NASIELLS --

A. YES.

Q. -- TO SELL HIS PROPERTY TO THEM?

A. YES.

THE COURT: I KNOW YOU'RE TRYING TO ANTICIPATE THE QUESTION, BUT WHEN YOU - - YOU'RE TALKING OVER MR. PIGGOTT, WHEN YOU REPEATEDLY ANSWER YES, AND IT MAKES IT CONFUSING FOR THE COURT REPORTER AND WE WANT TO MAKE SURE WE GET EVERYTHING DOWN.

SO JUST WAIT FOR MR. PIGGOTT TO FINISH ASKING HIS QUESTION AND THEN YOU ANSWER. THANK YOU, MS. ALLERT.

[14] BY MR. PIGGOTT:

Q. SO MS. ALLERT, DOES THAT REFRESH YOUR RECOLLECTION AND YOUR PREVIOUS TESTIMONY THAT IT WAS NECESSARY, OR THE NASIELLS WANTED YOU TO OBTAIN AN AGREEMENT WITH MR. HANSON TO PURCHASE HIS PROPERTY IN ORDER FOR THEM TO GIVE YOU A LISTING ON THEIR PROPERTY?

A. THEY WOULD NOT SELL THEIR HOUSE UNTIL THEY KNEW THEY WERE IN ESCROW WITH ROGER'S HOUSE, MR. HANSON'S HOUSE.

Q. SO THE ANSWER IS YES?

A. YES.

This key admission was not addressed in the March 6. 2019 Ruling by the Court of Appeal, the failure to cite a material omission or misstatement of fact/ mistake of law and lack of subject matter jurisdiction[,] which is being raised within 15-day envelope, March 6-March 21, 2019.

CONCLUSION

The Opinion of March 6, 2019 omits the foregoing list of key matters and instead focused[, in essence,] on claims of defective writing of [his trial] brief[s] by Roger S. Hanson.

Of and in itself, the failure to recognize that the finding under Evidence Code 1402[,] which eliminated Jennifer Allert from the case, which was not addressed in the March 26, 2019 opinion, must result in the grant of rehearing under Rule of Court 8.268.

The Court of Appeal's opinion of March 6, 2019 failed to recognize that refusal of the Trial Court to issue a Statement of Decision when requested by [15] Hanson is, and was, reversible error per Miramar Hotel v. Frank B. Hall, 163 Cal.App.3d 1126 (1985). [See Exhibit D-3]

The Court of Appeal's Opinion purported to allow a subjective mental belief on the Trial Court, which granted the Evidence Code 1402 motion that wiped

Allert out of this litigation. No such unrevealed mental intent on the Trial Court's grant of the Evidence Code 1402 is allowed, and no authority for such a claim is set forth in the March 6, 2019 Ruling.

Dated: March ___, 2019

Respectfully submitted,

ROGER S. HANSON, ESQ.
Defendant/Appellant
in Persona Proper

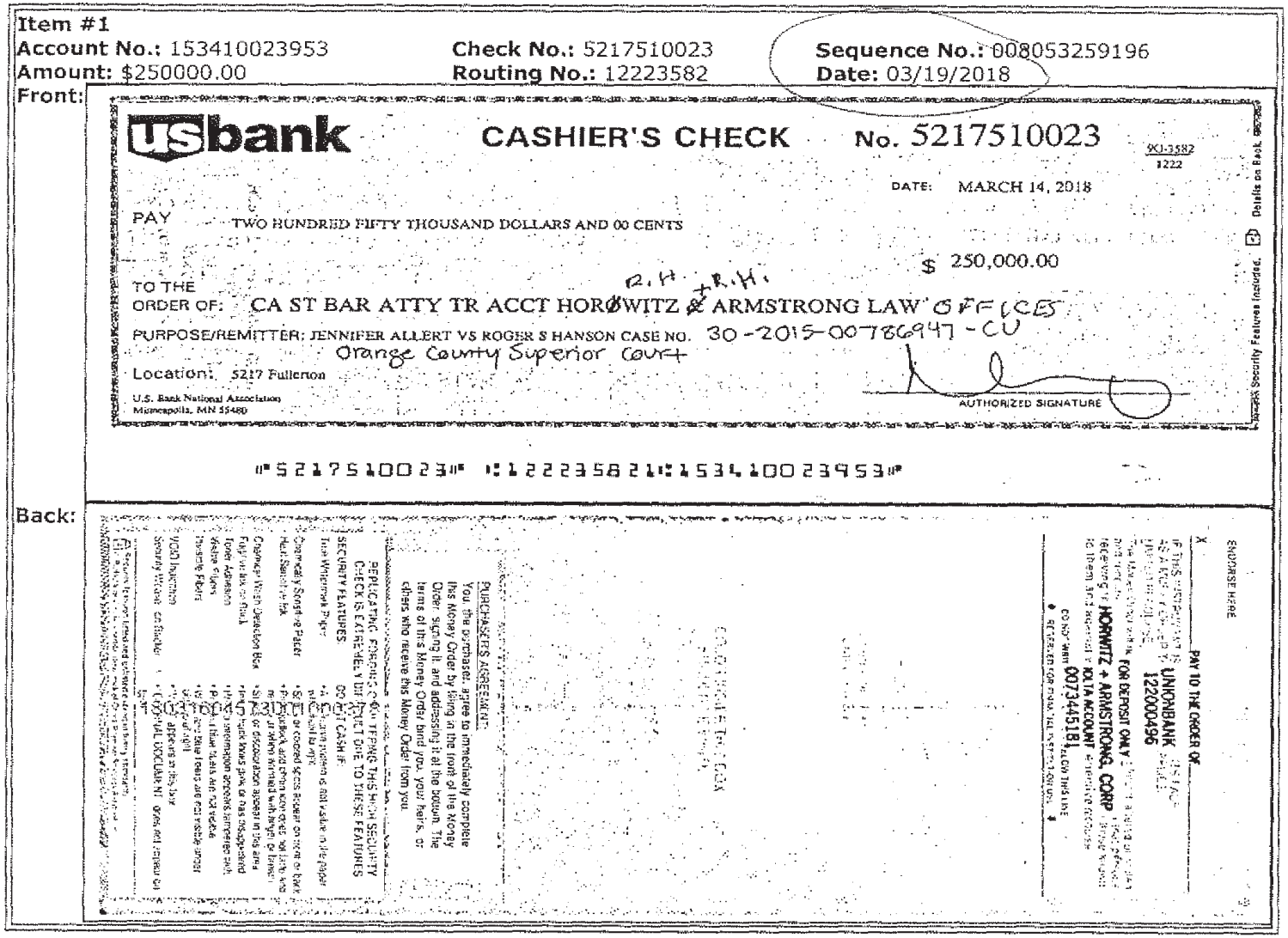
[Certificates Omitted]

EXHIBIT D-1

U.S. Bank Confidential Communication [LOGO]

Requested by: Adam Bateman

This check image contains confidential information. If you print this image, please store it in a secure place to avoid unauthorized usage of this information. Increased security awareness when discarding or destroying this document is recommended.



Item #1
Account No.: 153410023953
Amount: $250000.00
Check No.: 5217510023
Routing No.: 12223582
Sequence No.: 008053259196
Date: 03/19/2018

Front:

usbank

CASHIER'S CHECK No. 5217510023

DATE: MARCH 14, 2018

PAY TWO HUNDRED FIFTY THOUSAND DOLLARS AND 00 CENTS

$ 250,000.00

TO THE ORDER OF: CA ST BAR ATTY TR ACCT HOROWITZ & R.H. ARMSTRONG LAW OFFICES

PURPOSE/REMITTER: JENNIFER ALLERT VS ROGER S HANSON CASE NO. 30-2015-00786947-CU Orange County Superior Court

Location: 5217 Fullerton

U.S. Bank National Association
Minneapolis, MN 55480

AUTHORIZED SIGNATURE

⑈521751002 3⑈ ⑆122235821⑆153410023953⑈

Back:

PAY TO THE ORDER OF

FOR DEPOSIT ONLY HORWITZ + ARMSTRONG, CORP

UNIONBANK 122000496

007344181

ENDORSE HERE

PURCHASER'S AGREEMENT

You, the purchaser, agree to immediately complete this Money Order by filling in the front of the Money Order, signing it, and addressing it at the bottom. The terms of this Money Order bind you, your heirs, or others who receive this Money Order from you.

SECURITY FEATURES

DO NOT CASH IF:

[EXHIBIT – D-2 on App. 43 of this Appendix]

EXHIBIT – D-3

163 Cal.App.3d 1126 (1985)
210 Cal. Rptr. 114

MIRAMAR HOTEL CORP. et al.,
Cross-complainants and Appellants,

v.

FRANK B. HALL & CO. OF CALIFORNIA,
Cross-defendant and Respondent.

Docket No. B003103.

Court of Appeals of California,
Second District, Division One.

January 24, 1985.

COUNSEL

Gerald M. Siegel for Cross-complainants and Appellants.

Pettit & Martin, Theodore Russell and Lynne Bantle for Cross-defendant and Respondent.

OPINION

DALSIMER, J.

This case presents the question whether a trial court's failure to issue a statement or decision when there has been a timely request therefor is per se reversible error. We will conclude that it is.

After a two-day trial on appellants' cross-complaint, the matter was taken under submission by the court. On August 3, 1983, a minute order was entered, which reads in pertinent part: "MEMORANDUM OF DECISION AND STATEMENT OF DECISION (C.C.P. 632) [¶] In this matter, heretofore taken under submission as of August 2, 1983, the Court renders its decision as follows: [¶] The Court finds that the preponderance of evidence establishes the following: [¶] 1) Cross-Complainant did not justifiably rely on any representation or misrepresentation uttered by cross-defendant or its agents. [¶] 2) No implied or express contract to indemnify cross-complainant was ever created by the acts or statements of the respective parties or their agents. [¶] 3) The cross-complainant is not entitled to recover its attorney fees as damages or under any other theory presented." By its minute order the court provided that judgment be rendered in favor of respondent and ordered respondent to prepare the judgment.

On August 11, 1983, appellants filed a request for a formal statement of decision pursuant to Code of Civil Procedure section 632[1] (hereinafter section 632). The

[1] Code of Civil Procedure section 632 provides in pertinent part: "In superior . . . courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. Upon the request of any party appearing at the trial, made within 10 days after the court announces a tentative decision, . . . the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has

request sought a statement of decision as to certain principal controverted issues as well as various evidentiary factual issues. The record fails to disclose that any notice was taken by the court of appellants' request, and judgment was filed on September 28, 1983, without any formal statement of decision having been rendered.

The Legislature, by its enactment of section 632, and the Judicial Council, by its adoption of California Rules of Court, rule 232[2] (hereinafter rule 232), have created

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requested such a statement, any party may make proposals as to the content of the statement of decision."

[2] California Rules of Court, rule 232, provides in pertinent part as follows: "(a) On the trial of a question of fact by the court, the court shall announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk. Unless the announcement is made in open court in the presence of all parties who appeared at the trial, the clerk shall forthwith mail to all parties who appeared at the trial a copy of the minute entry or written tentative decision. [¶] The tentative decision shall not constitute a judgment and shall not be binding on the court. If the court subsequently modifies or changes its announced tentative decision, the clerk shall mail a copy of the modification or change to all parties who appeared at the trial. [¶] The court in its tentative decision may (1) state whether a statement of decision, if requested, will be prepared by the court or by a designated party, and (2) direct that the tentative decision shall be the statement of decision unless within ten days either party specifies controverted issues or makes proposals not covered in the tentative decision. [¶] (b) Any proposals as to the content of the statement of decision shall be made within 10 days of the date of request for a statement of decision. [¶] (c) If a statement of decision is requested, the court shall, within 15 days after the expiration of the time for proposals as to the content of the statement of decision, prepare and mail a proposed statement of decision and a proposed judgment to all parties who appeared at the trial,

a comprehensive method for informing the parties and ultimately the appellate courts of the factual and legal basis for the trial court's decision.

A statement of decision prepared in conformity to the established procedure may be vitally important to the litigants in framing the issues, if any, that need to be considered or reviewed on appeal. Parenthetically, such a statement may render obvious the futility of an appeal. Eventually, a careful issue identification and delineation may also be of considerable assistance to the appellate court.

Another equally important aspect of the orderly procedure ordained for eliciting and originating a statement of decision is the parties' opportunity to make proposals as to its content. Rule 232(b) provides that proposals as to the content of the statement of decision

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unless the court has designated a party to prepare the statement as provided by subdivision (a) or has, within 5 days after the request, notified a party to prepare the statement. A party who has been designated or notified to prepare the statement shall within 15 days after the expiration of the time for filing proposals as to the content of the statement, or within 15 days after notice, whichever is later, prepare, serve and submit to the court a proposed statement of decision and a proposed judgment. If the proposed statement of decision and judgment are not served and submitted within that time, any other party who appeared at the trial may: (1) prepare, serve and submit to the court a proposed statement of decision and judgment, or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived. [¶] (d) Any party affected by the judgment may, within 15 days after the proposed statement of decision and judgment have been served, serve and file objections to the proposed statement of decision or judgment."

shall be made within 10 days of the request for the statement. Rule 232(d) provides that any party affected by a proposed judgment may serve and file objections to the proposed statement of decision within 15 days after the proposed statement and judgment have been served.

(1) Although it bears the caption "STATEMENT OF DECISION," the minute order herein does not constitute such within the meaning of section 632 because it fails to explain "the factual and legal basis for [the court's] decision as to . . . the principal controverted issues at trial." Such an explanation is an essential element of a statement of decision. (See § 632; *People* v. *Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal. App.3d 509, 524-525 [206 Cal. Rptr. 164].)

By labeling the minute order a statement of decision and ignoring appellants' request for the issuance of such a statement, the trial court deprived appellants of an opportunity to make proposals and objections concerning the court's statement of decision. (Cf. *People* v. *Casa Blanca Convalescent Homes, Inc., supra,* 159 Cal. App.3d 509, 522-526 [memorandum of intended ruling adopted as statement of decision after request therefor; appellant given opportunity to file objections].) Such an opportunity is a key aspect of the process described in section 632 and rule 232.

Section 632 clearly specifies that the issuance of a statement of decision upon timely request therefor is mandatory. Because the trial court failed to issue such

a statement despite a timely request therefor, reversal is required.

We impose no substantial burden upon trial courts by insisting upon adherence to the legislative mandate as explicated by rule 232. The trial court is specifically authorized to designate a party to prepare the statement of decision (rules 232(a) and 232(c)) and thus is required only to review the statement and any objections thereto and to make or order to be made any corrections, additions, or deletions it deems necessary or appropriate.

Were we, conversely, to condone a total or even a material failure by trial courts to observe the prescribed procedure for revealing the basis for their respective decisions, we would be thrusting a quite substantial burden upon the litigants and also upon the appellate courts. At the outset of virtually every appeal of such a case, there would emerge a threshold question as to precisely what were the "principal controverted issues at trial." It is ineluctable that such a classification could most easily be made by the trial judge. More importantly, where a request for a statement of decision has been made and an inadequate statement or no statement whatsoever has been provided, then each appeal is inevitably based upon what is tantamount to a claim that the judgment is not supported by substantial evidence. This in turn requires both the litigants and the appellate court to conduct an examination of the entire record in order to properly review the trial court decision.

It thus becomes apparent that the legislative provision of section 632 as augmented by rule 232 is the most efficient and judicially economic manner of fulfilling the trial court function.

In issuing its statement of decision, the court need not address each question listed in appellants' request. All that is required is an explanation of the factual and legal basis for the court's decision regarding such principal controverted issues at trial as are listed in the request. (*People* v. *Casa Blanca Convalescent Homes, Inc., supra,* 159 Cal. App.3d 509, 525.)

The judgment is reversed, and the matter is remanded for the issuance of a statement of decision by the trial judge.

Lucas, J., concurred.

SPENCER, P.J.

With great reluctance, I concur in the result. Ordinarily, I consider a rule of per se reversibility inadvisable when, as in the instant matter, there is no substantial evidence to support a judgment for the appealing party and a reversal rectifies no miscarriage of justice. In the past, this court has used the harmless error standard to affirm a judgment notwithstanding the presence of the same procedural error present in the instant case.

However, it now appears the practice in the trial courts of issuing minute orders, such as that utilized in the case at bar, in lieu of complying with the requirements

of section 632 is on the increase. The far-reaching and burdensome effects of that practice mandate that it end immediately. Since I perceive no means of effecting that result other than per se reversal, I join with the majority.