IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

WILLIAM J. CAMPBELL and MARJORIE CAMPBELL,

Defendants, Cross-Complainants, and Petitioners,

v.

SAN FRANCISCO COUNTY SUPERIOR COURT,

Respondent.

_____/

VISHAL GROVER, Individually and as Assignee, etc.; NRT WEST, INC., d/b/a COLDWELL BANKER RESIDENTIAL REAL ESTATE; and DAVID B. BELLINGS,

Real Parties in Interest.

_____/

Case no. A_____

San Francisco Superior Court
case no. CGC-13-533428

Honorable Ronald E. Quidachay,
Judge of the Superior Court

PETITION FOR WRIT OF MANDATE

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PETITION AND SUMMARY

TO THE HONORABLE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT:

Defendants and cross-complainants below, William and Marjorie Campbell ("the Campbells"), respectfully petition for a writ of mandate and an interim stay only if and when necessary. In anticipation of this petition, all parties stipulated this morning to continue the February 9, 2015, jury trial to April 27, 2015. (See verification at conclusion.) The Campbells will file a copy of the anticipated order with this Court as soon as possible.

This petition asks the Court to reinstate the Campbells' independent tort claims against a broker and agent (together, "Coldwell Banker") whom they retained for the sale of their home, but who also secretly represented their buyer and caused the Campbells substantial injury. When the buyer settled its own claims against Coldwell Banker, the respondent court erroneously dismissed all six of the Campbells' cross-claims against it on a motion under Section 877.6 of the Code of Civil Procedure (hereafter, "§ 877.6"). One did seek indemnity for any liability for the *buyer's* injury, and was thus properly dismissed. But the five other claims alleged fraud and related torts committed by Coldwell Banker against the Campbells, and causing injury unique to them. In brief:

(1) Coldwell Banker secretly represented the successful buyer, plaintiff Vishal Grover ("Grover"), for months prior to the sale contract.

(2) Even after disclosing the dual agency the day the contract was signed, and promising that a different agent would represent Grover for the upcoming contingency period, the same agent continued to represent Grover secretly.

(3) Coldwell Banker then fraudulently induced the Campbells to abandon another buyer with a similar offer, and who had no interest in construction projects at the residence that were essential to Grover. To keep the Grover/Campbell deal alive, and double its commission as a dual agent, Coldwell Banker had fraudulently understated the prospective construction costs to Grover.

(4) The foregoing conduct injured the Campbells in two primary ways. First, they parted with a large commission to a fiduciary who repeatedly betrayed them. Second, they incurred substantial (and ongoing) costs to defend this lawsuit by Grover. Coldwell Banker's misconduct was a substantial factor in causing it. Coldwell Banker created Grover's unrealistic expectations about his construction costs, and then manipulated the Campbells into their fateful decision to choose Grover as their buyer over a much safer alternative.

In sum, the respondent court erroneously dismissed valid tort claims for the Campbells' *own* injury at the hands of Coldwell Banker. The only claim subject to dismissal under § 877.6 was the Campbells' indemnity claims seeking apportionment of liability for the *buyer's* alleged injury.

Moreover, we now demonstrate why writ relief is appropriate given the procedural posture of the case as well as the issue presented. In brief: (1) The Campbells' appeal remedy is demonstrably inadequate. (2) The ruling below significant undermines California's policy favoring settlement. (3) The issue presented is purely legal, of first impression, framed by a narrow record consisting largely of a single pleading, and important to the bench, bar, and the general public frequently subject to dual agencies like the one that harmed the Campbells.

WHY WRIT RELIEF SHOULD BE GRANTED

A.

THE PARTIES STIPULATED TO A TRIAL CONTINUANCE TO FACILITATE THIS PETITION

Given the prejudice and waste threatened by an imminent jury trial without their tort claims, the Campbells promptly sought appropriate relief in the respondent court on January 27, 2015. They moved to postpone the trial then scheduled for February 9, 2015, in anticipation of this writ petition. (Exhibits Vol. 2 [hereafter, "Vol. 2"), Exs. 17-18) The court, by Presiding Judge John K. Stewart, set a shortened hearing date of February 5, 2015. (*Id.*, Ex. 19)

At the hearing this morning, the real parties in interest withdrew their opposition (*id.*, Ex. 20) and stipulated to continue the trial to April 27, 2015. (See verification at conclusion.) Accordingly, the Campbells

will request this Court to stay proceedings below beyond that date only if and when necessary to complete its disposition of this petition.

B.

THIS PETITION IS TIMELY

This petition is filed 22 days after the pertinent order below. It therefore satisfies the 20-day deadline under § 877.6 because of the two-day extension afforded by the electronic service of the pertinent order. (See *Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742, 746; Code Civ. Proc. § 1010.6, subd. (a)(4); and Rule of Court 2.251, subd. (h)(2).)

C.

THE LEGISLATURE AND COURTS FAVOR *PRETRIAL* WRIT REVIEW IN CASES LIKE THIS

Absent writ relief, both the Campbells and the courts — including this one — will be subjected to an incomplete, unfair, and hugely wasteful jury trial limited to Grover's claims against the Campbells. The Campbells' tort claims against Coldwell Banker, while legally distinct from the Grovers' claims, involve the same real estate transaction and many overlapping facts. As stated in *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 319:

> If an erroneous ruling creates a likelihood that two trials will be necessary rather than one, the court will issue a writ of mandate. . . . Without intervention by writ relief, the

> trial . . . would go forward while omitting significant legal issues that arise out the same facts, and which quite likely should be tried together.

In addition, *Maryland Casualty Co. v. Andreini & Co. of Southern California* (2000) 81 Cal.App.4th 1413 (rev. denied) well explains why *pretrial* writ review is important in a case like this one. First, the opinion quotes the Senate Judiciary Committee's analysis of the original Assembly bill leading to § 877.6:

> The State Bar asserts that since many settlements are made immediately before trial, it is imperative that the review of the court's determination occur expeditiously and before trial. The writ of mandate procedures are well suited and appear *preferable* to a direct appeal of the order which could result in an unacceptable risk of long trial delay and the incurrence of avoidable expenses should the court's determination not be upheld. [¶] The proponent also asserts that the current remedy, appellate review following judgment, thwarts the policy of the law to encourage settlements.

(*Id.* at 1422, quoting Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3712, p. 3, italics added by *Maryland Casualty*)

Maryland Casualty then quoted from the Senate Judiciary's analysis of the final bill (which differed from the original bill on an irrelevant issue). The Court stated: "The proposed statute was . . . based on the legislators' belief that '[t]he writ of mandate procedures

are ... *preferable* to a direct appeal of the order which could result in an unacceptable risk of long trial delay. It is also *preferable* to an appeal following judgment.... [¶] ... [T]he current remedy, appellate review following judgment, thwarts the policy of the law to encourage settlements.' " (*Id.* at 1423, quoting Sen. Com. on Judiciary, Analysis of Assem. Bill No. 232, (1983–1984), p. 3, italics added by *Maryland Casualty*)

Maryland Casualty concluded that, based on the statutory language and the legislative history, "the Legislature viewed a writ petition *before* trial as a *preferable* means of reviewing good faith settlement determinations . . . ." (*Id.*, original italics, bold added) (It then held that "section 877.6(e) does not foreclose postjudgment review." (*Id.*))

D.

PRETRIAL WRIT REVIEW MIGHT BE THE CAMPBELLS' *ONLY* APPELLATE REMEDY

Some courts have precluded a post-judgment appeal because pretrial writ review is so important to the policy of encouraging settlements. *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1135 (rev. denied), stated:

> [P]ermitting an aggrieved party to postpone review of the good-faith determination until after the balance of the claims were tried and a final judgment issued months or years later, would prevent the very finality and certainty

> that writ review was intended to promote. Years after the settlement, the settling tortfeasor could be dragged back into the action, necessitating a retrial of the plaintiff's claims.

Main Fiber then quoted as follows from the Assembly's Judiciary Committee:

> [I]f a settlement is approved but ultimately held, on appeal after the judgment, to have been in bad faith, the case will have to be re-tried to include the alleged tortfeasors who were improperly removed from the case. Appellate review delayed until after the judgment thus thwarts the policy of the law to encourage settlement.

(*Id.* at 1135-1136, quoting Assem. Com. on Judiciary, Analysis of Assem. Bill No. 232 (1983–1984 Reg. Sess.) as introduced, p. 2)

To the same effect is *O'Hearn v. Hillcrest Gym and Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 498-499, which adopted *Main Fiber*'s analysis and holding. *O'Hearn* explained that "[t]he rationale for prompt writ review is that it advances the strong policy of the law to encourage settlements." (*Id.* at 498))

In dicta, *Main Fiber* and *O'Hearn* recognized there may be a "possible exception" to the no-appeal rule where a writ petition was filed and summarily denied. But neither opinion contains a holding to that effect because no writ petition was filed in either case. (*Main Fiber, supra,* 73 Cal.App.4th 1130, 1137 fn. 4; *O'Hearn, supra*, 115 Cal.App.4th 491, 499 fn. 8) As *Maryland Casualty* explained: "In *Main*

Fiber, the court expressly declined to address the question before us, i.e., whether a nonsettling party, having previously sought but failed to obtain a writ, can challenge a determination of good faith on a postjudgment appeal." (*Maryland Casualty, supra,* 81 Cal.App.4th 1413, 1425 fn. 13)

E.

RELIEF IS NECESSARY TO VINDICATE CALIFORNIA'S POLICY FAVORING SETTLEMENTS

The ruling below thwarts California's strong policy favoring settlements. Indeed, the real parties in interest themselves appear to recognize that a *complete* settlement of this dispute can best be achieved by including the Campbells' claims against Coldwell Banker at a single bargaining table.

We previously reported this morning's stipulation to continue the jury trial to April 27, 2015, in anticipation of this petition. A similar stipulation was also filed earlier, on January 13, 2015, when the respondent court had not yet ruled on Grover's good faith settlement motion with Coldwell Banker. The parties stipulated then, in conjunction with a motion by Grover ((Vol. 2, Ex. 11), that the February 9, 2015, jury trial should not go forward if the Campbells' tort claims were held to survive a dismissal under § 877.6. The parties stipulated that a settlement conference should take place instead. (*Id.,* Ex. 10 at 322:22-28)

This case now stands in an identical posture. With the fate of the Campbells' tort claims against Coldwell Banker once again facing review, the parties have wisely stipulated to postpone the jury trial pending the outcome.

F.

THE LEGAL ISSUE PRESENTED STRONGLY SUPPORTS WRIT REVIEW

Finally, writ review is appropriate because the question presented is purely legal, of first impression, and important to the bench, bar and public as a whole. To begin with, the question "whether a determination of a good faith settlement applies to a party or claim is a question of law that [the Court] review[s] de novo." (*Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1270) And here, the issue is further subject to de novo review because it turns on the proper construction of the Campbells' pleadings. (See *Be v. Western Truck Exchange* (1997) 55 Cal.App.4th 1139, 1143 [independent review of issues of "application of the statute to undisputed facts"])

This important issue is also of first impression. As we demonstrate next, the separate rules on dual agency and good faith settlements are reasonably well settled. But there is no direct precedent on the intersection of those rules in a case like this one.

At the same time, though, the Campbells believe existing case law points inexorably to the correct result. Simply stated, dual agents should

not be able to escape liability for betraying one principal by the simple expedient of settling with the other. Indeed, the record below is sufficiently narrow, and the correct result sufficiently apparent, that the Court should consider not only a *Palma* notice but a "suggestive" one as the Supreme Court authorized in *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1238 *et seq.*

VERIFIED ALLEGATIONS AND PRAYER FOR RELIEF

A.

INTRODUCTION

As noted at the outset, the issue presented here turns on the proper construction of the Campbells' operative pleading against Coldwell Banker. (Vol. 1, Ex. 2) The respondent court held it sought no relief except "derivative damages" (*Id.*, Ex. 15) — that is, an apportionment of liability with Coldwell Banker, as alleged joint tortfeasors, for the injuries claimed by plaintiff Grover. Because the Campbells' pleading is therefore the crux of the matter, this petition need only briefly summarize their direct tort claims against Coldwell Banker that were dismissed below on the sole basis of § 877.6. Finally, the Campbells' allegations are presented as facts here because, under familiar rules of pleading and appellate review, their truth must be assumed for purposes of this petition. But the Campbells also supported

their allegations with evidence submitted in opposition to the good faith settlement motion. (Vol. 1, Ex. 8 and attachments)

B.

THE PARTIES

1. Petitioners William and Marjorie Campbell ("the Campbells") are defendants and cross-complainants below. They are beneficially interested in the subject matter of this petition as owners of a residence in San Francisco which they sold on or about February 12, 2012, to the YSG Family Trust (Vol. 1, Ex. 2, ¶ 1 at 18), and as the principals of the real estate broker and agent identified below.

2. The plaintiff below, real party in interest Vishal Grover "Grover"), brought this action both individually and as the assignee of the foregoing trust. (*Id.,* Ex. 1 & Ex. 2 at ¶ 3, p. 18) For simplicity's sake, however, we refer to him in both capacities simply as "Grover."

3. The defendants and cross-defendants below, and likewise real parties in interest here, were NRT West, Inc., d/b/a Coldwell Banker Residential Real Estate, which served as a real estate broker in the relevant transaction, and David B. Bellings, who served as a real estate agent with the corporate broker. (*Id.,* Ex. 2, ¶ 2) Unless the context requires otherwise, we refer to them together as "Coldwell Banker."

4. Bellings was a licensed real estate broker affiliated with Coldwell Banker (*Id.,* ¶ 2, p. 18) Notably, though, Grover's complaint alleged that Bellings also "at all material times held himself out as an

attorney. . . ." (Ex. 1, ¶ 7, p. 2) Grover's motion for good faith settlement added that Bellings was "a licensed attorney and member of the California Bar." (Vol. 1, Ex. --, p. 40:3) As verified at the conclusion, his State Bar number is 97415 and his status is reported as "active" from October 2005 to the present: that is, at all times relevant to this litigation.

5. The respondent is the San Francisco County Superior Court. The Honorable Ronald E. Quidachay heard the real parties' motion for good faith settlement and for dismissal of the Campbells' claims against Coldwell Banker. (Vol. 2, Ex. 15) The Honorable John K. Stewart heard the Campbells' ex parte application to postpone the jury trial in light of this writ petition. (Vol. 2, Ex. 19)

C.

PLAINTIFF GROVER'S COMPLAINT

6. Grover initiated this action by a complaint filed on or about August 8, 2013, naming both the Campbells and Coldwell Banker. (Vol. 1, Ex. 1) Although dual agents disloyal to one principal ordinarily satisfy the other, in this case Coldwell Banker schemed against both as alleged by the Campbells.

7. For present purposes, however, the only material fact about Grover's complaint is that it sought relief only for Grover's alleged injuries.

D.

THE CAMPBELLS' CROSS-COMPLAINT

8. The Campbells filed their operative pleading below, an amended cross-complaint against Coldwell Banker, on or about October 16, 2014. (Vol. 1, Ex. 2; hereafter, "the cross-complaint")

9. The cross-complaint did include one claim for indemnity properly subject to dismissal based on the good faith settlement between Grover and Coldwell Banker. The Sixth Cause of Action for Implied, Equitable or Comparative Indemnity (Vol. 1, Ex. 2, pp. 31-32) sought an appropriate contribution from Coldwell Banker, as an alleged joint tortfeasor, to compensate Grover for his own alleged injuries.

E.

THE CAMPBELLS' DIRECT TORT CLAIMS AGAINST COLDWELL BANKER

10. In all five previous causes of action, however, the Campbells expressly alleged injuries to themselves and sought relief against Coldwell Banker for their *own* damages. The first five causes of action were captioned as follows: "FIRST CAUSE OF ACTION (Breach of Fiduciary Duty)" (*id.* at 27); "SECOND CAUSE OF ACTION (Negligent Misrepresentation)" (*id.* at 29); "THIRD CAUSE OF ACTION (Negligence)" (*id.* at 30); "FOURTH CAUSE OF ACTION (Constructive Fraud)" (*id.*); and "FIFTH CAUSE OF ACTION (Fraud)" (*id.*).

11. The factual highlights of these tort claims can be summarized briefly. The facts center on real party in interest David B. Bellings ("Bellings"): a licensed real estate agent, an active member of the State Bar (¶ 4 *ante*, pp. 10-11), and the Coldwell Banker agent who obtained the original listing agreement with the Campbells in 2010. (Ex. 2, ¶ 6, & Vol. 2, Ex. 8, Attachment 17, at p. 290 [deposition of Mr. Grover, at internal p. 83])

12. Bellings learned in May or June of 2011 that Grover and his then wife (together, "Grover") might be interested in purchasing the Campbells' home but subject to an important condition at the heart of this dispute. "Grover had a desire to construct two significant new improvements to the home — a new roof deck to capture the view of San Francisco Bay and to create a level backyard, which would require the lowering of an existing retaining wall." (Ex. 2 at 19:2-5)

13. Bellings was not satisfied to continue representing the Campbells and, accordingly, to maintain appropriate distance with Grover. Instead, "Bellings thereafter acted as the agent of [Grover] . . . and became an active 'advocate' . . . to purchase the Property." (Ex. 2, ¶ 8) Nor was Bellings shy about doubling his commission as a dual agent. Illustrative is an ardently self-serving email he sent Grover:

> . . . I had one more thought on the representation issue. I also look at this from a doctrine of fairness. . . . Given our relationship in working together in finding you a home I do think it would be unfair to now not let me represent you

> when I have tried so hard and will continue to try hard to get you into this property if it ultimately makes sense for you. . . . Give or take 1/4 point, . . . I hope that . . . would not be enough to cut me out of part of a commission I certainly have worked hard on your behalf to earn. (Ex. 2 at 21-22)

14. Not surprisingly, then, "Bellings failed to disclose to the Campbells . . . the nature and extent of his relationship with the Grovers — i.e., that he was acting as an agent on their behalf. . . ." (Ex. 2, ¶ 13) It was not until December 31, 2011, only a few days before the Campbell/Grover contract was signed, that Bellings first disclosed that fact to the Campbells. (Vol. 2, at 205:12-13, citing Campbell depo., *id.*, attachment 19, at 306, internal p. 152)

15. Despite their belated disclosure of the dual agency prior to the sale contract, Coldwell Banker and Bellings proceeded to conceal from the Campbells a *continuing* dual agency on their part. At the time of the initial disclosure, "Bellings advised Campbell that another agent in the Coldwell Banker offices would handle the transaction on behalf of Grover to create an ethical wall and thus avoid any conflict of interest. This was untrue, since Bellings handled both sides of the transaction from beginning to end without notifying the Campbells." (Ex. 2, ¶ 19)

16. The most critical consequence for the Campbells was Bellings' manipulation of the transaction in pursuit of a double commission. Another couple, the Kleins, were actively pursuing a

contract through their own agent, and offering close to the same price Grover was. (Ex. 2, e.g., ¶¶ 16-17) Even more importantly, they had no interest in construction projects like those Grover required. (*Id.* at 26:5-6) In short, they were buyers just as qualified as Grover in all respects but much safer for the Campbells. The Kleins had no expectations at all about similar construction projects — let alone inflated expectations — that could prompt a lawsuit like Grover's.

17. Bellings manipulated the transaction to favor Grover in two primary ways. First, to maintain Grover's interest in the property, Bellings fraudulently understated the cost of the construction projects Grover was insisting on. (Ex. 2, ¶¶ 8-11, 13-14) In brief, Bellings concealed high cost estimates and misrepresented facts to the contrary. Second, Bellings exploited his confidential knowledge of the Kleins' offers, gained as the Campbells' agent (Ex. 2 at 23:7-8), to guide Grover's competing offers that ultimately succeeded. (*Id.*, ¶¶ 17-18)

18. As a direct and proximate result of Coldwell Banker and Bellings' conduct, Grover brought this lawsuit and named the Campbells as defendants, necessitating substantial defense costs and other injury. (*Id.*, ¶ 33) They were fraudulently wed to a buyer with inflated expectations about the construction costs he would incur.

19. Finally, the same course of conduct induced the Campbells to pay Coldwell Banker a $450,000 commission. (Vol. 2, Ex. 7 at 6:26-28) As the Campbells explained their damages claim below, in

opposition to the good faith settlement motion: "Under *Ziswasser v. Cole Cowen, Inc.* (1955) 164 CA3d, 417, 423, 425; a principal is entitled to recover, as minimal damages, the commission when the agent has committed fraud or bad faith by failing to disclose material facts." (*Id.* at 204:21-23)

F.

THE NEED FOR AN EXTRAORDINARY WRIT AND INTERIM STAY OF PROCEEDINGS

20. Grover and Coldwell Banker moved for a good faith settlement approval and dismissal of the Campbells' cross-complaint on January 6, 2015. (Vol. 1, Exs. 3-6) After opposition and reply (Exs. 7-9), the court granted the motion in full on January 14, 2015. (Exs. 14-15) No party requested an appearance to contest the tentative ruling. (Ex. 15 at 337:13) The Campbells' opposition had fully set forth their position.

21. For the foregoing reasons, as further explained elsewhere in this petition, an appeal does not afford the Campbells a plain, speedy and adequate remedy in the ordinary course of law. To wait for an appeal and its disposition would subject the Campbells (and the courts) to an incomplete, wasteful, and highly unfair jury trial limited to plaintiff Grover's claims against them. With a reinstatement of the Campbells' tort claims against Coldwell Banker and Bellings a likely outcome of such an appeal, the Campbells (and the courts) would suffer the prejudice of

a second jury trial on the same real estate transaction and many overlapping facts.

22. The issue presented also merits review and resolution on this petition because it is of first impression in California, and its speedy and proper resolution on this petition would benefit the bench and bar as a whole, and the general public exposed to dual agencies much like the one at issue here.

23. Finally, this petition should be granted because the respondent court's ruling below is an error of law also constituting an abuse of any discretion at issue in the decision, and in excess of the court's authority to dismiss cross-complaints under Section 877.6 of the Code of Civil Procedure.

G.

PRAYER FOR RELIEF

(1) For all the foregoing reasons, the Campbells respectfully request the Court to issue a writ of mandate vacating the order below to the extent it dismisses the entirety of their cross-complaint against Coldwell Banker and Bellings. The Court should direct respondent court to enter a new order in its place, limiting the dismissal to the Campbells' Sixth Cause of Action for Implied, Equitable or Comparative Indemnity. (Vol. 1, Ex. 2, pp. 31-32)

(2) In addition, but only if and when necessary, the Campbells will respectfully request the Court to stay proceedings below to the

extent necessary to complete its disposition of the petition beyond April 27, 2015, the date currently set by stipulation for a trial to begin.

(3) Finally, the Campbells respectfully request the Court to issue a *Palma* notice to the respondent court and the real parties in interest given the nature of the issue presented, and to include in the notice any expression of the Court's views on the merits that it deems advisable to communicate.

ARGUMENT ON THE MERITS:

THE CAMPBELLS HAVE EVERY RIGHT TO PURSUE THEIR OWN TORT CLAIMS AGAINST THEIR DISLOYAL BROKER, SEEKING REDRESS FOR THEIR OWN INJURIES

A.

INTRODUCTION

The only cross-claims barred by good faith settlements are those seeking indemnity or contribution from a joint tortfeasor, *i.e.*, from a co-defendant who allegedly harmed the same plaintiff. (*Post*, p. –) Here, while the Campbells did pursue such a cross-claim against Coldwell Banker, they also pursued direct claims against it for damages *they* suffered. Those cross-claims survive the good faith settlement between Grover and Coldwell Banker.

To explain why these cross-claims are not simply disguised indemnity claims, we discuss the fiduciary duties that a real estate

broker owes — particularly when acting as a dual agent, as here — and the direct claims that may be brought by sellers like the Campbells against their agents. A seller may sue for recovery of the commission paid, *even without suffering any other damages* such as a lower sale price. (*Post*, p. –) We then discuss that case law in the context of good faith settlements. (*Post*, p. –) But first we begin with the general principles of good faith settlements.

B.

GOOD FAITH SETTLEMENTS BY ALLEGED JOINT TORTFEASORS BAR ONLY CROSS-CLAIMS SEEKING TO SHARE LIABILITY FOR THE HARM SUFFERED BY THEIR COMMON PLAINTIFF

The law of good faith settlements concerns co-defendants' joint liability to the same plaintiff. The superior court must determine "whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability *for the plaintiff's injuries*." (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499; italics added) This inquiry furthers one objective of the statutory scheme: to ensure "equitable allocation of costs" among tortfeasors for the plaintiff's harm. (*Id.* at 498-499)

To encourage settlements, which is the other statutory objective (*id.*), a good faith settlement determination bars indemnity and contribution claims by a nonsettling defendant against a settling defendant. (Code Civ. Proc. §§ 877, subd. (b), 877.6, subd. (c);

Tech-Bilt, supra, 38 Cal.3d 488, 496; *Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1273))[1] The bar extends to claims that are "disguised or artfully pleaded" as "direct claims but which, in fact, seek to recover derivative damages." (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc*. (1998) 64 Cal.App.4th 955, 964, citing *Cal-Jones Properties v. Evans Pacific Corp*. (1989) 216 Cal.App.3d 324, 327-328) Derivative damages are those that "that the court would consider in determining the proportionate liability of the settling tortfeasor" to the plaintiff. (*Cal-Jones, supra,* 216 Cal.App.3d 324, 328; see also *Prince v. Pacific Gas & Elec. Co.* (2009) 45 Cal.4th 1151, 1158 [defining equitable indemnity as a "joint legal obligation to another for damages," cit. and internal quots. omitted])

In contrast, a nonsettling defendant's claims against the settling defendant that do not concern the "proportionate liability" or "joint legal obligation" to the plaintiff (*id.*) are *not* barred: "A claim by a joint tortfeasor seeking neither indemnity nor contribution and which the trial court would not contemplate in determining the proportionate ability of a settling tortfeasor is not a claim for indemnity and hence survives a good faith settlement under section 877.6." (*Cal-Jones, supra,* 216

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[1] Contribution is similar to indemnity, but "presupposes a common liability which is shared by the joint tortfeasors on a pro rata basis." (*Prince, supra,* 45 Cal.4th 1151, 1162, fn. 7, cit. and internal quots. omitted)

Cal.App.3d 324, 328; see also *Gackstetter, supra,* 135 Cal.App.4th 1257, 1274)

C.

IN DUAL AGENCY CASES, THE SELLER MAY RECOVER DAMAGES FOR THE BROKER'S FAILURE TO DISCLOSE THE DUAL AGENCY ITSELF, OR OTHER MATERIAL FACTS

We now explain why the Campbells' *direct* claims against Coldwell Banker are independent from their indemnity or contribution claims, and therefore not barred by the good faith settlement. We begin with the fiduciary duties Coldwell Banker owed to the Campbells, which give rise to their unique claims against him.

A broker must "act[] in the highest good faith towards his principal," and has the "same obligation of undivided service and loyalty" as a trustee does toward a beneficiary. (*Batson v. Strehlow* (1968) 68 Cal.2d 662, 674-675, cits. and internal quots. omitted) Among other duties, he must fully disclose "all material facts concerning the transaction that might affect the principal's decision." (*Id.*, cits. and internal quots. omitted; see also, e.g., *Sierra Pacific Industries v. Carter* (1980) 104 Cal.App.3d 579, 582) An agent's duties, including to make full disclosures, are rooted in both common law and statute. (See *Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.App.4th 766, 773-777)

Where, as here, a broker represents *both* the seller and buyer in a real estate transaction, the broker owes these same fiduciary duties,

including the disclosure requirements, to *both* principals. (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1311-1312 (rev. denied); *Sierra Pacific , supra,* 104 Cal.App.3d 579, 581) He must also inform both principals of the dual agency and obtain the consent of both. (*Sierra Pacific , supra,* 104 Cal.App.3d 579, 581-582)[2] The California Supreme Court recognized more than a century ago that dual agents have conflicting duties and stand in a position "conducive to bad faith and double dealing." (*Glenn v. Rice* (1917) 174 Cal. 269, 272; see also, e.g.*, William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1299 [referring to the "perils" assumed by brokers acting in a dual capacity])[3]

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[2] The Legislature requires a written disclosure stating in pertinent part: "In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer: (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer." (Civ. Code § 2079.16; see also *id.* § 2079.13, subd. (e) [defining dual agent]) The statutes applies to transactions involving residential property (up to four dwelling units), mobilehomes, and manufactured homes. (*Id.* § 2079.13, subd. (k))

The statutory provisions expressly state that agents are not relieved from liability for their common law duties, including "for any breach of a fiduciary duty or a duty of disclosure." (Civ. Code § 2079.24)

[3] As stated by a leading real estate treatise, the agents' duties to both sides of a real estate transaction "are, almost, by definition, completely contradictory." (3 Miller & Starr, Cal. Real Estate (3d ed. 2014) § 3:27)

To further the state's public policy of protecting parties to a real estate transaction, a broker may lose his commission by failing to disclose material facts to his principal. (*Baird v. Madsen* (1943) 57 Cal.App.2d 465, 476) This is true even if the seller does not suffer *any* damage in connection with the sale other than payment of the commission. (*Id.*) As this District explained:

> [A] real estate broker must act in good faith in the discharge of his duties as agent; that by misconduct, breach of conduct or wilful disregard, in a material respect, of an obligation imposed upon him by the law of agency he may forfeit his right to compensation. . . . The broker is bound to disclose to the principal any facts known to him which are material to the transaction . . .; and any concealment from the principal of material facts known to the agent . . . may operate to forfeit the right of the agent to compensation for his services, and *it matters not that there was no fraud meditated and no injury done*. (*Id.* at 475-476, internal cits. omitted; italics added)

This rule is firmly rooted in our state's public policy to protect sellers and buyers from harm. No injury is required because "[t]he rule is not intended to be remedial of actual wrong, but preventative of the possibility of it." (*Id.* at 476)[4]

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[4] Indeed, it is the broker who bears the burden of proof when his conduct is challenged. He must prove that he acted "with the utmost good faith toward the principal" and "made a full disclosure of all the fact relating to the acts under attack." (*Batson, supra,* 68 Cal.2d 662, 675)

Thus, for example, in *Sierra Pacific, supra*, 104 Cal.App.3d 579, a seller was entitled to recover the commission paid to a broker who did not disclose a material fact to the seller: that he sold the property to his daughter. The broker was liable "as a matter of law" for those damages in light of the breach of fiduciary duty, regardless of whether the seller lost any money on the sale price. (*Id.* at 582-583)

Sierra Pacific relied on *Baird, supra,* 57 Cal.App.2d 465, 475-476, and *Bate v. Marsteller* (1959) 175 Cal.App.2d 573, 583-584, in which this District also held that brokers were not entitled to their commissions because they failed to disclose material facts to the sellers. It did not matter that the sellers suffered no further damages. As held in *Bate*, even though the sale price "was the best available market price and the highest price obtainable for the property," the sellers "were damaged at least to the extent of the . . . commission paid . . . ." (*Id.*)

In addition to the penalties for failure to disclose material facts, a dual agent is also not entitled to his commission if one principal is unaware of the dual agency. (*Glenn, supra,* 174 Cal. 269, 272; *L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305-306) The California Supreme Court explained the public policy more than a century ago:

> The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful

> to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing." (*Glenn, supra,* 174 Cal. 269, 272)

Here, the Campbells argued in vain below that they seek restitution of the commission Coldwell Banker received because he failed to disclose material facts, including the Upscale project bids, and his initial concealment of his dual agency. These are precisely the type of independent claims allowed by the law case.

Some courts have stated that claims for repayment of the commission are limited to circumstances where the agent's conduct is in bad faith, fraudulent, or deceptive. (E.g., *Cal-Jones, supra,* 216 Cal.App.3d 324, 329) Assuming such conduct is required, the Campbells' cross-complaint alleges that Coldwell Banker engaged in bad faith and fraudulent conduct. (*Ante*, p. –) Supporting evidence was filed in support of their opposition to the motion for determination of a good faith settlement. (*Ante*, p. –)

Coldwell Banker claimed below that "[i]t is absolutely evident that if Plaintiff had never brought this lawsuit [the] Campbell[s] would

have zero claims to assert against either Coldwell Banker or Bellings [its agent]." (Vol. 2, Ex. 9 at 319:12-14]) To the contrary, the law is clear that, regardless of Grover's lawsuit, the Campbells could have filed an independent lawsuit against Coldwell Banker seeking compensatory damages, including the commission paid, and punitive damages for his fraudulent conduct.

D.

THE CAMPBELLS' DIRECT DAMAGES INCLUDE THE COST TO DEFEND THEMSELVES IN GROVER'S LAWSUIT CAUSED BY COLDWELL BANKER'S TORTIOUS CONDUCT

In their papers below, Grover and Coldwell Banker brushed aside the Campbells' complaint about being subjected to Grover's lawsuit rather than choosing another buyer, the Kleins, who posed no such risk because they had no interest in the types of construction projects Grover wanted. Suffice it to say, though, that Grover's lawsuit against the Campbells was a direct and natural consequence of Coldwell Banker's torts and fiduciary breaches against the Campbells — and a consequence *unique* to them. There is longstanding California case law that legal fees incurred in this type of situation are recoverable as damages from a tortfeasor who brought them about — much as medical fees incurred after an accident are recoverable from the relevant tortfeasor. The lead cases on this "tort of another" rule are *Prentice v.*

North Amer. Title Guar. Corp. (1963) 59 Cal.2d 618 and *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498.

E.

A SELLER-VICTIM'S DIRECT CLAIMS AGAINST A DUAL AGENT SURVIVE A GOOD FAITH SETTLEMENT WITH THE BUYER-VICTIM

Under the law governing good faith settlements, and a seller's right to pursue direct claims for damages against its broker, the Campbells' direct claims against Coldwell Banker survive the good faith settlement. They are "claim[s] that the trial court would not contemplate in determining the proportionate liability of" Coldwell Banker to Grover. (*Cal-Jones, supra,* 216 Cal.App.3d 324, 328)

Notably, *Cal-Jones* recognized that a seller's claim against his broker for damages, including return of the commission and punitive damages, may survive a good faith settlement determination. (*Id.* at 329) It explained that "a real estate broker may be required to forfeit his commission for breach of fiduciary duty where the broker acts in bad faith with intent to defraud or conceal." (*Id.* at 329, citing *Ziswasser v. Cole & Cowan, Inc.* (1985) 164 Cal.App.3d 417, 424-425)

There, however, no allegations or evidence of bad faith existed to support such a claim. (*Id.*) In fact, the sellers had allegedly made the *same* misrepresentation to the buyers as the dual agent. (*Id.* at 328) This joint misrepresentation to the buyers would seem to preclude any

showing of bad faith by the broker to the sellers. Without any bad faith allegations, the good faith settlement determination barred the sellers' entire cross-claim. Here, in contrast, there are bad faith allegations and evidence to support independent claims against Coldwell Banker that survive the good faith settlement determination.

The superior court determined that the amended cross-complaint merely sought "derivative damages." (Vol. 2, Ex. 15 at 337:21-22) The court cited *Gackstetter, supra*, 135 Cal.App.4th 1257, but that case did not involve a seller's unique claims against his real estate broker. Rather, it involved several lawsuits between beneficiaries of a trust, a trustee, and an attorney.

Indeed, citing *Gackstetter*, the Third District recently held that a seller's direct claims for damages against a real estate broker claims were not derivative. (*William L. Lyon & Associates, supra,* 204 Cal.App.4th 1294, 1315) The sellers' claims were against the broker in its "capacity *as the sellers' broker*" and "ar[o]se out of the duties owed to the [sellers] as clients of [broker] in their own right." (*Id.* at 1315, original italics) The claims other than the indemnity claims "were not merely derivative of the [buyers'] claims against [the broker]." (*Id.* at 1315)

While *Lyon* did not arise in the context of a good faith settlement, it applied the law from the good faith settlement cases because the broker had argued that the entire cross-complaint was a "disguised indemnity claim." (204 Cal.App.4th 1294, 1315) Coldwell

Banker claimed below that *Lyon* determined that the "seller stated direct claims" but not whether "those direct claims *sought to recover derivative damages*." (Vol. 2, Ex. 9 at 318:16-18, original italics]). The Court, however, expressly stated that the direct claims "were not merely derivative" of the indemnity claims (204 Cal.App.4th1294, 1315), and the Court undoubtedly contemplated non-derivative damages such as commissions.[5]

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[5] *Lyon* did not discuss the bad faith requirement raised in *Cal-Jones*, suggesting that the Third District might not require evidence of bad faith to support a commission claim in light of the public policies involved.

CONCLUSION

For all the foregoing reasons the Court should (1) entertain this petition; (2) stay proceedings below beyond the current trial date of April 27, 2015, if necessary to conclude the disposition of the petition; (3) on the merits, hold that a dual agent may not avoid liability to one principal by the simple expedient of settling with the other; and (4) issue a writ of mandate implementing that principle here.

DATED: February 5, 2015

Respectfully submitted,

BIEN & SUMMERS
SEDGWICK, LLP

By: /S/
ELLIOT L. BIEN

/S/
JOCELYN S. SPERLING
Attorneys for Defendants, Cross-Complainants and Petitioners, WILLIAM and MARJORIE CAMPBELL

VERIFICATION

The undersigned, Elliot L. Bien, declares:

1. I am an attorney at law duly admitted to practice in all courts of the State of California, and the principal in the law firm of Bien & Summers based in San Rafael, California.

2. I make this verification on the petitioners' behalf because their petition rests primarily on litigation filings and rulings below.

3. I have read the foregoing petition and am familiar with its contents. The factual allegations and other statements of facts it contains are true and correct based on my personal review of the relevant filings and rulings below; my information and belief regarding them, including a report by trial counsel of the parties' stipulation this morning to continue the jury trial; and my personal review of the California State Bar's official website concerning real party in interest David E. Bellings. (*Ante*, p. 12)

Executed under penalty of perjury at San Rafael, California on February 5, 2015.

/S/
ELLIOT L. BIEN

CERTIFICATE OF LENGTH OF PETITION

The undersigned, counsel for petitioners William and Marjorie Campbell, hereby certifies pursuant to Rule 8.204 (c), California Rules of Court, that the foregoing petition is proportionately spaced, has a 13-point typeface, and contains 6,637 words as computed by the word processing program (WordPerfect X5) used to prepare the document.

DATED: February 5, 2015

/S/
ELLIOT L. BIEN

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. On the date stated below I caused to be served:

PETITION FOR WRIT OF MANDATE and EXHIBITS TO PETITION FOR WRIT OF MANDATE (Vols. 1 and 2)

(1) by requesting the TrueFiling service to deliver electronic copies to the following counsel for plaintiff and real party in interest Vishal Grover; and defendants, cross-defendants and real parties in interest NRT West, Inc. d/b/a Coldwell Banker Residential Real Estate, and David B. Bellings, at the time I submitted the documents for filing by TrueFiling:

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Attorney for Real Party in Interest David Bellings, Defendant and Cross-Defendant Below

(2) by causing printed copies of the petition (without the exhibits) to be delivered in person in separate envelopes addressed as follows:

Clerk, San Francisco County Superior Court
for Hon. Ronald E. Quidachay
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San Francisco, CA 94102

Clerk, San Francisco County Superior Court
for Hon. John K. Stewart
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San Francisco, CA 94102

The foregoing is true and correct. Executed under penalty of perjury at San Rafael, California.

DATED: February 5, 2015

/S/
ELLIOT L. BIEN