

1 ANDREW W. COUCH  
Attorney at Law  
2 14 Corporate Plaza Drive, Suite 120  
P.O. Box 8648  
3 Newport Beach, CA 92660  
Telephone: (949) 760-2596  
4 State Bar No. 76129

5 Attorney for Plaintiff Donald Enright  
6  
7

8 ORANGE COUNTY SUPERIOR COURT, CENTRAL JUSTICE DISTRICT  
9

10 DONALD ENRIGHT, an individual,

11 Plaintiff,

12 vs.

13 VIRGINIA DIANE PEYKOFF, an individual;  
and DOES 1 through 100, inclusive,

14 Defendants,  
15

) CASE NO. 30-2014-00760666  
-CU-BC-CJC

) ARBITRATION BRIEF SUBMITTED BY  
PLAINTIFF DONALD ENRIGHT

) Date: August 19-21, 2015  
Time: 9:30 a.m.  
Arbitrator: Craig Higgs, Esq.  
Judicate West, Santa Ana

16 Plaintiff Donald Enright ("Enright") submits the attached Arbitration Brief in  
17 connection with the arbitration of his dispute with Defendant Virginia Diane Peykoff  
18 ("Peykoff") over the payment of the real estate commission due Mr. Enright from the sale  
19 of the real property improved with a single family home located at 1731 Port Hemley  
20 Circle, Newport Beach, CA 92660 (the "Property"), under the Residential Listing  
21 Agreement (Exclusive Authorization and Right to Sell) dated February 1, 2014.

22 **Background:** Mr. Enright has been a real estate broker licensed by the State  
23 of California for 40 years. He has specialized in higher-end residential properties in the  
24 Newport Beach and Laguna Beach areas.

25 Since 1998, Mr. Enright has represented Mrs. Peykoff in approximately 75 real  
26 estate transactions. The only forms used in these transactions were the then current  
27 forms of the California Association of Realtors.

28 For approximately 10 years before Mr. Enright started representing Mrs.

1 Peykoff in real estate transactions, she had been engaged in the active buying, selling,  
2 and leasing of real estate using the services of another real estate broker. Mr. Enright  
3 learned of Mrs. Peykoff's past real estate transactions when she interviewed Mr. Enright  
4 before retaining his services. In that interview, Mrs. Peykoff told Mr. Enright of her  
5 dealings with the previous real estate broker, the reduced real estate commissions and  
6 commission rebates that she had negotiated with this previous real estate broker, and  
7 her expectation of similar negotiated real estate commissions and rebates in her dealings  
8 with Mr. Enright.

9           The approximately 75 real estate transactions in which Mr. Enright represented  
10 Mrs. Peykoff included the purchase or sale of approximately 40 single family homes and  
11 25 lease listings.

12           In each of these transactions, Mrs. Peykoff negotiated a reduction in the real  
13 estate commissions payable to Mr. Enright. In each of the purchase transactions, Mrs.  
14 Peykoff required a rebate of a portion of Mr. Enright's real estate commission back to  
15 her.

16           Mrs. Peykoff was very involved in the marketing of her properties for sale or  
17 lease. Often, Mrs. Peykoff would become concerned if one of her properties was on the  
18 market for sale for too long, because the Multiple Listing Service computer would report  
19 the number of days that the property was on the market for sale. Sometimes, Mrs.  
20 Peykoff would instruct Mr. Enright to mislead the MLS computer by withdrawing a listing  
21 for sale, to stop the computer's calculation of the number of days that the property had  
22 been on the market for sale. However, that would not end Mrs. Peykoff's efforts to sell  
23 the property.

24           Sometimes, if a property was on the market for sale for too long, Mrs. Peykoff  
25 would decide to "dual-track" the property by offering it for lease while still accepting offers  
26 for its purchase. Mrs. Peykoff would then list the property for lease with Mr. Enright. Mr.  
27 Enright would withdraw the sale listing from the MLS. If Mrs. Peykoff received an  
28 acceptable lease proposal, she would lease the property, and upon the expiration of the

1 lease would re-list if for sale. Sometimes, if Mrs. Peykoff did not receive an acceptable  
2 lease proposal, she would instruct Mr. Enright to resume his efforts to sell the property.  
3 Mr. Enright would reinstate the sale listing with the MLS, thereby re-starting the MLS  
4 computer's calculation of the number of days that the property was on the market.

5 **The Dispute:** In early 2014, Mrs. Peykoff entered into a Residential Listing  
6 Agreement (Exclusive Authorization and Right to Sell) dated February 1, 2014, by which  
7 she retained Mr. Enright to sell the Property.

8 By late May, 2014, the Property had not been sold. Mrs. Peykoff instructed Mr.  
9 Enright to take the Property out of the MLS for sale, because it had become stale. Mrs.  
10 Peykoff instructed Mr. Enright to list the Property for lease, while still entertaining offers  
11 for its purchase. Mrs. Peykoff told Mr. Enright that, if she received an acceptable  
12 proposal for the lease of the Property, she would lease the Property and then put the  
13 Property back on the market for sale at the end of the lease. However, if she received  
14 an acceptable offer for the purchase of the Property, she would sell it.

15 Mr. Enright prepared the Lease Listing Agreement dated June 1, 2014. Mr.  
16 Enright withdrew the sale listing from the MLS, and began to actively market the Property  
17 for lease.

18 Sometime in June, 2014, the relationship between Mr. Enright and Mrs.  
19 Peykoff became strained, because Mr. Enright had a dispute over a real estate  
20 commission with Mrs. Peykoff's son, Andrew Peykoff II.

21 By the middle of July, 2014, Mrs. Peykoff had not accepted any of the lease  
22 proposals submitted by Mr. Enright. Mrs. Peykoff told Mr. Enright that she had decided  
23 to take the Property off the market for sale and for lease. Mrs. Peykoff asked Mr. Enright  
24 to prepare a Cancellation of Listing the Lease Listing Agreement dated June 1, 2014.  
25 Mr. Enright agreed to cancel the Lease Listing Agreement on the Property because he  
26 did not have a lot of money invested in his efforts to lease the Property, and because he  
27 was trying to defuse the tension between Mrs. Peykoff and himself over his commission  
28 dispute with her son.

1           The Cancellation of Listing signed by Mrs. Peykoff and Mr. Enright refers to  
2 the "Lease Listing dated June 1, 2014". It does not refer to the Residential Listing  
3 Agreement (Exclusive Authorization and Right to Sell) dated February 1, 2014. Mr.  
4 Enright never agreed to the cancellation of the Residential Listing Agreement (Exclusive  
5 Authorization and Right to Sell).

6           Mrs. Peykoff asked Mr. Enright to agree to the cancellation of other lease  
7 listing agreements. Mr. Enright agreed to the cancellation of some of the lease listing  
8 agreements, but did not agree to the cancellation of other lease listing agreements.

9           Mrs. Peykoff never told Mr. Enright that she wanted to cancel the Residential  
10 Listing Agreement (Exclusive Authorization and Right to Sell) at any time.

11           On July 26, 2014, Mrs. Peykoff terminated Mr. Enright's agency, by sending  
12 him an email which said, in pertinent part, that: "I am no longer your client, and you are  
13 no longer my realtor." Mr. Enright acknowledges that Mrs. Peykoff, as his principal,  
14 always had the right to terminate his agency for any reason, or for no reason, and at any  
15 time. However, the termination of Mr. Enright's agency relationship with Mrs. Peykoff did  
16 not terminate the Residential Listing Agreement (Exclusive Authorization and Right to  
17 Sell) dated February 1, 2014. Mr. Enright still had a contractual right to the payment of  
18 a real estate commission under the circumstances set forth in that Residential Listing  
19 Agreement.

20           In early September, 2014, Mr. Enright received an email alert from the MLS,  
21 informing him that the Property had been listed for sale. Mr. Enright was confused by this  
22 notification, because the rules of the MLS prohibit two listings of the same property at the  
23 same time, and Mr. Enright still had a listing for the Property on the MLS. Mr. Enright  
24 contacted the MLS to ask about this email notification. While Mr. Enright was awaiting  
25 an explanation from the MLS, he received another email notification from the MLS,  
26 informing him that Mrs. Peykoff had accepted an offer for the purchase of the Property.  
27 Mr. Enright consulted with counsel, and Mr. Enright's counsel sent a letter to Mrs.  
28 Peykoff, dated September 25, 2014, reminding her that the Residential Listing

1 Agreement (Exclusive Authorization and Right to Sell) dated February 1, 2014, was still  
2 in effect, and that Mrs. Peykoff would owe Mr. Enright a commission upon the sale of the  
3 Property.

4 Mrs. Peykoff sold the Property for \$2,160,000.00, closing escrow on October  
5 31, 2014,

6 Paragraph 4A of the Residential Listing Agreement (Exclusive Authorization  
7 and Right to Sell) dated February 1, 2014, entitled "Compensation to Broker" provides,  
8 in pertinent part, that:

9 "Notice: The amount or rate of real estate commissions is not fixed by law.  
10 They are set by each Broker individually and may be negotiable between  
11 Seller and Broker (real estate commissions include all compensation and fees  
12 to Broker.)

13 A. Seller agrees to pay Broker as compensation for services irrespective of  
14 agency relationship(s) either 4.500 percent of the listing price (or if a purchase  
15 agreement is entered into, of the purchase price), or (blank), as follows:

16 (1) If during the Listing Period, or any extension, Broker, cooperating broker,  
17 Seller or any other person procures a ready, willing and able buyer(s) whose  
18 offer to purchase the Property on any price and terms is accepted by Seller,  
19 provided the Buyer completes the transaction or is prevented from doing so  
20 by Seller. (Broker is entitled to compensation whether any escrow resulting  
21 from such offer closes during or after the expiration of the Listing Period, or  
22 any extension.)"

23 The term of the Residential Listing Agreement (Exclusive Authorization and  
24 Right to Sell) was from February 1, 2014, through December 31, 2014. The Property was  
25 sold during the term of the Residential Listing Agreement (Exclusive Authorization and  
26 Right to Sell). Mrs. Peykoff agreed to pay Mr. Enright a real estate commission equal to  
27 4.5% of the sales price. The sales price of the Property was \$2,160,000.00.

28 Accordingly, Mrs. Peykoff owes a real estate commission of \$97,200.00 to Mr.  
Enright.

### LEGAL ANALYSIS

**1. Mrs. Peykoff signed a Residential Listing Agreement (Exclusive Authorization and Right to Sell). The Property was sold during the term of the Agreement. Accordingly, Mrs. Peykoff is obligated to pay the real estate**

1 **commission specified in the Agreement to Mr. Enright.**

2 *Civil Code* §1086(f)(1) defines an "exclusive right to sell listing". That section  
3 provides, in pertinent part, that "[a]n 'exclusive right to sell listing' is a listing whereby an  
4 owner grants to an agent, for a specified period of time, the exclusive right to sell or to  
5 find or obtain a buyer for the property, and the agent is entitled to the agreed  
6 compensation if during that period of time the property is sold, no matter who effected  
7 the sale, or the listing agent receives and presents to the owner any enforceable offer  
8 from a ready, able and willing buyer on terms authorized by the listing or accepted by the  
9 owner."

10 The Residential Listing Agreement (Exclusive Authorization and Right to Sell),  
11 Exhibit 1, meets that statutory definition of an exclusive right to sell listing. It began on  
12 February 1, 2014, and expired on December 31, 2014.

13 The Grant Deed signed by Mrs. Peykoff and recorded on October 31, 2014,  
14 establishes that Mrs. Peykoff sold the Property during the term of the Agreement. The  
15 sales price of the Property was \$2,160,000. In the Residential Listing Agreement  
16 (Exclusive Authorization and Right to Sell) signed by Mrs. Peykoff, she agreed to pay a  
17 real estate commission to Mr. Enright equal to 4.5% of the sales price. Therefore, Mrs.  
18 Peykoff owes Mr. Enright a real estate commission of \$97,200.

19 By employing Mr. Enright as a real estate broker to sell the Property, Mrs.  
20 Peykoff created an agency relationship between herself and Mr. Enright. It is undisputed  
21 that Mrs. Peykoff had the right to terminate that agency relationship at any time, without  
22 cause, But the termination of the agency relationship between Mrs. Peykoff and Mr.  
23 Enright did not affect Mrs. Peykoff's obligation to pay the agreed upon real estate  
24 commission to Mr. Enright.

25 This question was addressed by the California Supreme Court in *Blank v.*  
26 *Borden*, (1974) 11 Cal. 3d 963. In *Blank*, a property owner (Borden) retained the broker  
27 (Blank) to find a buyer for her property using "a printed form contract of the California  
28 Real Estate Association ... entitled 'Exclusive Authorization and Right to Sell', and by its

1 terms granted Blank the exclusive and irrevocable right to sell the property" during the  
2 term of the agreement." (page 966) During the term of the agreement, Borden orally  
3 notified Blank that the property was no longer for sale and that he had no further right to  
4 sell the property or collect a real estate commission. Blank then sued Borden for the  
5 payment of the real estate commission specified in the Exclusive Authorization and Right  
6 to Sell listing agreement. The trial court awarded Blank the amount of the commission  
7 based upon the listing price, plus interest, and Borden appealed.

8 The California Supreme Court affirmed the judgment for Blank, holding that:  
9 "[i]t has long been the law of this state that any right to compensation asserted  
10 by a real estate broker must be found within the four corners of his  
11 employment contract. [citations] ...

12 [the] parties to a broker's contract for the sale of real property are at liberty to  
13 make the compensation depend upon any lawful conditions they see fit to  
14 place therein....

15 [A] withdrawal-from-sale clause in such an exclusive-right-to-sell contract is  
16 lawful and enforceable, a claim for compensation under such a clause not  
17 being a claim for damages for breach of that contract by a claim for  
18 indebtedness under its specific terms." (page 969)

19 The California Supreme Court rejected Borden's contention that the payment  
20 of a commission after termination of the agency would be a void penalty.

21 "[T]he clause in question presents the owner with a true option or alternative:  
22 if, during the term of an exclusive-right-to-sell contract, the owner changes his  
23 mind and decides that he does not want to sell the subject property after all,  
24 he retains the power to terminate the agent's otherwise exclusive right through  
25 the payment of sum certain set forth in the contract." (page 970)

26 In the dispute between Mrs. Peykoff and Mr. Enright, Mrs. Peykoff agreed to  
27 pay Mr. Enright a real estate commission if the Property was sold during the term of the  
28 Residential Listing Agreement (Exclusive Authorization and Right to Sell). Mrs. Peykoff's  
29 termination of Mr. Enright's agency did not terminate Mrs. Peykoff's contractual obligation  
30 to pay a real estate commission to Mr. Enright under the circumstances listed in the  
31 Residential Purchase Agreement. Mr. Enright never agreed to cancel the Residential  
32 Listing Agreement or to waive his right to the payment of a real estate commission upon  
33 the sale of the Property during the term of the Residential Listing Agreement.

34 The fact that Mr. Enright did not participate in the sale of the Property has no

1 bearing upon his right to the real estate commission specified in the Residential Listing  
2 Agreement (Exclusive Authorization and Right to Sell). That question was addressed in  
3 *Century 21 Butler Realty, Inc., v. Vasquez* (1995) 41 Cal. App. 4th 888. In that case, the  
4 broker and the property owner (Vasquez) entered into an exclusive authorization listing  
5 agreement for the sale of Vasquez's property. Vasquez became unhappy with the  
6 broker's services, terminated the broker, and retained another broker who was  
7 successful in selling the property. Century 21 Butler Realty then sued Vasquez for the  
8 real estate commission due under the exclusive right to sell listing agreement. The trial  
9 court granted Vasquez's motion for summary judgment, but the Second Appellate District  
10 reversed.

11 In reaching that result, the Court held that:

12 "[a]n exclusive authorization to sell agreement may provide for compensation  
13 to the initial listing agent if the property is sold to anyone before the  
14 termination of the authorization agreement, regardless of who effected the  
15 sale." (page 891)

16 The Vasquezes "had the right to terminate the agency before the agreement  
17 expired, but doing so did not eviscerate Century 21's right to compensation.  
18 [citations] Under the agreement, Century 21 earns the compensation stated  
19 therein if the listed property is sold during the listing term. ... The Vasquezes  
20 breached the agreement when they refused to pay the commission stated  
21 therein upon the sale of the property. Century 21 earned its commission  
22 because the Vasquezes ... sold the property ... before the exclusive listing  
23 period expired." (page 892)

24 In the dispute between Mrs. Peykoff and Mr. Enright, the fact that Mrs. Peykoff  
25 did not utilize Mr. Enright's services in connection with the sale of the Property has no  
26 bearing upon Mrs. Peykoff's obligation to pay Mr. Enright a real estate commission under  
27 the Residential Listing Agreement. Mr. Enright still earned his real estate commission  
28 and Mrs. Peykoff became obligated to pay Mr. Enright the real estate commission when  
Mrs. Peykoff sold the Property during the term of the Residential Listing Agreement  
(Exclusive Authorization and Right to Sell).

**2. Mr. Enright's claim against Mrs. Peykoff became liquidated when the  
Grant Deed transferring the Property was recorded on October 31, 2014.  
Accordingly, Mrs. Peykoff also owes interest on the real estate commission she**



1 **owes Mr. Enright as of that date.**

2 *Civil Code* §3287(a) provides, in pertinent part, that: "[a] person who is entitled  
3 to recover damages certain, or capable of being made certain by calculation, and the  
4 right to recover is vested in the person upon a particular day, is entitled also to recover  
5 interest thereon from that day."

6 *Civil Code* §3289(b) provides that: "[i]f a contract entered into after January 1,  
7 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate  
8 of 10 percent per annum after a breach."

9 The real estate commission that Mrs. Peykoff owes to Mr. Enright is "capable  
10 of being made certain by calculation". That commission is \$97,200.00. It bears interest  
11 at the rate of 10 percent per annum, starting on November 1, 2014, the date after the  
12 breach of the Residential Listing Agreement (Exclusive Authorization and Right to Sell),  
13 by the sale of the Property without the payment of the commission to Mr. Enright. The  
14 commission will continue to accrue interest at the rate of \$26.63 per day until paid.

15 **3. Mr. Enright is entitled to recover the attorneys fees he has and will**  
16 **incur in the prosecution of his claims against Mrs. Peykoff for the payment of his**  
17 **real estate commission.**

18 Paragraph 15 of the Residential Listing Agreement (Exclusive Authorization  
19 and Right to Sell) states that: "[i]n any action, proceeding or arbitration between Owner  
20 and Broker regarding the obligation to pay compensation under this Agreement, the  
21 prevailing Owner or Broker shall be entitled to reasonable attorneys fees and costs from  
22 the non-prevailing Owner or Broker, except as provided in paragraph 19A." Paragraph  
23 19A of the Listing Agreement obligates the Owner (Mrs. Peykoff) and Broker (Mr.  
24 Enright) to submit any dispute to mediation before filing a lawsuit. It provides that, if  
25 either Owner or Broker refuses to mediate a dispute after a request has been made, then  
26 that party is not entitled to an award of attorneys fees. Mr. Enright asked Mrs. Peykoff to  
27 mediate this dispute, but she refused, prompting Mr. Enright to file Complaint in Case No.  
28 30-2014-00760666-CU-BC-CJC. The fact that Mrs. Peykoff ultimately agreed to

1 participate in a mediation of this dispute, after this lawsuit was filed and she was served,  
2 has no bearing upon Mr. Enright's right to an award of attorneys fees.

3 **CONCLUSION**

4 Mrs. Peykoff could unilaterally terminate Mr. Enright's agency at any time, but  
5 she could not unilaterally terminate her contractual obligation to pay Mr. Enright a real  
6 estate commission under the circumstances listed in the Residential Purchase  
7 Agreement (Exclusive Authorization and Right to Sell). Mrs. Peykoff sold the Property  
8 during the term of the Residential Listing Agreement for \$2,160,000 and therefore owes  
9 a real estate commission of \$97,200.00 to Mr. Enright.

10 Mrs. Peykoff also owes Mr. Enright interest on that amount at the rate of ten  
11 percent per annum, or \$26.63 per day, starting on November 1, 2014, through the date  
12 of the award.

13 Mr. Enright will move for an award of attorneys fees at the conclusion of the  
14 arbitration hearing.

15 Dated: August 17, 2015

16 \_\_\_\_\_  
17 Andrew W. Couch, Attorney for  
18 Plaintiff Donald Enright  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 COUNTY OF ORANGE ) ss.

4 I am employed in the County of Orange, State of California. I am over the age  
5 of 18 years, and am not a party to this action; my business address is 14 Corporate  
6 Plaza Drive, Suite 120, Newport Beach, CA 92660.

7 On August 17, 2015, I served the foregoing document described as follows:  
8 ARBITRATION BRIEF SUBMITTED BY PLAINTIFF DONALD ENRIGHT  
9 on the interested parties in this action, addressed as set forth below.

10 Gregory G. Brown, Esq. Attorneys for Defendant Virginia Diane  
11 Mark M. Higuchi, Esq. Peykoff  
12 Brown & Charbonneau, LLP  
13 420 Exchange, Suite 270  
14 Irvine, CA 92602  
15 tel: 714-505-3000  
16 fax: 714-505-3070  
17 octriallaw@gmail.com  
18 mhiguchi@bc-llp.com

19 Craig Higgs, Esq. Arbitrator  
20 Higgs, Fletcher & Mack  
21 401 West A Street  
22 Suite 2600  
23 San Diego, CA 92101-7910  
24 T: 619 236-1551  
25 F: 619 696-1410  
26 chiggs@higgslawcom

27 \_\_\_\_\_(BY MAIL) I am readily familiar with the firm's practice of collecting and processing  
28 correspondence for mailing. Under that practice, it would be deposited with the U.S.  
Postal Service on that same day with postage thereon fully prepaid, certified mail, return  
receipt requested, at Newport Beach, California, in the ordinary course of business. I am  
aware that on motion of the party served, service is presumed valid if postal cancellation  
date or postage meter date is more than one day after date of deposit for mailing as  
shown on this affidavit.

\_\_\_\_\_ (BY FACSIMILE SERVICE) I transmitted the document from fax number 949-760-  
0337 to the addressees at the fax numbers listed for them above. The fax machine I  
used complied with CRC 2008 and no error was reported by the machine.

XX (BY EMAIL) I transmitted the document to the addressees at the email addresses  
listed for them above, and no error was reported.

I certify under penalty of perjury of the laws of the State of California that the  
foregoing is true and correct. Executed on August 17, 2015, at Newport Beach,  
California.

27  
28 \_\_\_\_\_  
Andrew W. Couch