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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

) POST-ARBITRATION BRIEF
SUBMITTED BY PLAINTIFF DONALD
ENRIGHT

) Date: August 19-20, 2015
Time: 9:30 a.m.
Arbitrator: Craig Higgs, Esq.
Judicate West, Santa Ana

16 Plaintiff Donald Enright ("Enright") submits this Post-Arbitration Brief in support
17 of his claim to the payment of a \$97,200.00 real estate commission under the Residential
18 Listing Agreement (Exclusive Authorization and Right to Sell) dated February 1, 2014,
19 signed by Defendant Virginia Diane Peykoff ("Peykoff"), by which she, as the Seller,
20 agreed to pay Mr. Enright, as the Broker, a real estate commission under the
21 circumstances set forth in the Agreement that pertained to the property at 1731 Port
22 Hemley, Newport Beach, CA (the "Property").

23 **THE ARBITRATION HEARING**

24 The arbitration hearing took place on August 19 and 20, 2015. The arbitrator
25 took testimony from Mr. Enright, Mrs. Peykoff, and from non-party witness Stephanie
26 Lowe, a real estate sale agent affiliated with Villa Real Estate, the brokerage which sold
27 the Property.

28 At the end of the arbitration hearing, the arbitrator admitted into evidence the

1 following exhibits: 2, 3, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 32, 40, 41, 43, 47, 52,
2 53, 57, 58, 61, 62, 67, 68, 71, 73, 74, 76, 78, 79, 80, 84, 85, 86, 87, 88, 90, 91, 92, 95,
3 96, 97, 98, 99, 102, 104, 105, 106, 108, 112, 114, and 118.

4 The arbitrator asked the parties to include a discussion of the following
5 questions in their post-arbitration briefs:

6 1. What is the obligation of a broker to point out to his client, or former client,
7 a mistake of fact or law pertaining to the scope of the Cancellation of Listing form?

8 2. What fiduciary duties are owed to a broker to his client both before and after
9 the termination of the agency? Does the broker have a fiduciary duty to correct his
10 client's misapprehension?

11 3. What is the obligation of a broker, or a former broker, to point out to a client,
12 or former client, that there is still a contract for the payment of a commission?

13 4. What is the obligation of a broker to mitigate his damages, and when does
14 a broker suffer damages when his client breaches the Residential Listing Agreement?

15 Mr. Enright will respond to each of the Arbitrator's questions, and will address
16 the arguments made by Mrs. Peykoff in her Arbitration Brief and during the Arbitration
17 Hearing.

18 Much of the evidence in this case consists of emails exchanged between the
19 parties. As often occurs with such informal communications, each party was often
20 responding to an email from the other. Many of the emails refer to preceding emails.
21 Many of the sentences are no more than fragments. There is a general imprecision in the
22 parties' communications. That leaves many of the emails subject to interpretation.
23 Because of the large number of emails and because they are scattered throughout the
24 exhibits, Mr. Enright has prepared a chronological listing of the pertinent emails as
25 Exhibit 1 to this Post-Arbitration Brief

26 Dated: August 27, 2015

27 _____
28 Andrew W. Couch, Attorney for
Plaintiff Donald Enright

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1 try to rent the other two if you can. You've never had trouble doing so in the past so I
2 don't know what's happening here with the rentals."

3 Accordingly, it was logical for Mr. Enright to perceive Mrs. Peykoff's request
4 as one for a Cancellation of Listing form for the Lease Listing Agreement (Exhibit 104).

5 There is a reference in Mrs. Peykoff to the "sell" of the Property. However, for
6 the preceding two months, Mrs. Peykoff had been talking about leasing the property, and
7 had instructed Mr. Enright to take it out of the Multiple Listing Service as for sale.

8 Email dated 5/13/2014 4:23:39 P.M., from diane@niagarawater.com to
9 DonEnrightBroker@aol.com., subject Furniture Hemley: "Don, I'm paying may
10 lease now thought maybe I wouldn't need to Do you think I should empty it
11 **Maybe just lease?** Thanks" (Exhibit 40) (emphasis added)

12 Email dated 5/13/2014 4:45:41 P.M., from DonEnrightBroker@aol.com to
13 diane@niagarawater.com, subject: Furniture Hemley: "As we agreed I
14 reported it as back- up this morning In the meantime Jim Kline said he is
15 writing an offer and will either have it or not in two days (or sooner) (Buyer is
16 traveling) As to the lease - **I have a good family on hold (\$750,000 income
17 755 FICO) that will rent it as of June 1st for \$11,000 per month** - But that
18 might just have been bluster to get my attention. But they are definitely for real
19 as I have already checked them out You have all the latest information Your
20 call Don" (Exhibit 41) (emphasis added)

21 Email dated 5/22/2014 12:24:02 A.M. from diane@niagarawater.com: "Well
22 it didn't sell in six months There's another model like it for 2.295 but not as
23 new so it shouldn't sell either The big exp ones are selling I want the cash but
24 will set it sit a bit **then rent it I guess**" (Exhibit 44, Enright 000983, middle)
25 (emphasis added)

26 Email dated 5/22/2014, 12:32 AM from DonEnrightBroker@aol.com: "Do you
27 want me to put it back on at a lower price or withdraw it and reset the days on
28 the market clock (after 91 days) or **pull in a heavy tenant \$8500-\$9,000** Many
choices - hate to just do nothing" (Exhibit 44, middle) (emphasis added)

Email dated 5/25/2014, 7:43:57 P.M., from diane@niagarawater.com to
DonEnrightBroker@aol.com, subject port hemley: "Don The house has been
on the market for almost 7 months (June 6) Its stale ... nothing is for sale that
long in the port streets any time in the last year that I am aware of Please take
if off the market, release any contract we may have to sell it and remove the
sign. **If you have a tenant I would like to hear the offer of course.** However,
I will be out of town for 3 weeks starting on Friday. [¶] I will have the stager's
remove the furniture asap and I won't need to pay \$1400 for June. Sorry you
worked so long on this one and ended up with nothing, but I guess that's the
way it goes sometimes, some are easy some are difficult. I am disappointed
too but what can I say, the price was reduced several times equal to approx
\$200K with no luck Thanks Diane" (Exhibit 47) (emphasis added)

Email dated 6/11/2014, 10:31:32 P.M., from diane@niagarawater.com to
DonEnrightBroker@aol.com: "Ciao, Don **She sounds good As long as she**

1 **doesn't become a nuisance like 82 or 24 The house isn't brand new as**
2 **one might think. I don't know what the hold up is. The air cond shouldn't**
3 **take that long Decent blinds should go up pretty fast too. Not custom as**
4 **they take up to three months Whoever takes it needs to do so ASAP or**
5 **get an 11 mo lease I don't want it unavailable next July 1 it needs to be for**
6 **sale by then Thanks Don Diane" (Exhibit 58) (emphasis added)**

7
8 Email dated 6/16/2014, 8:51:37 A.M., from diane@niagarawater.com: "Hi Don
9 How's it going? Have you heard anything about eBay lately? If they want to
10 rent it at the summer rate that's fine but I'm selling it sept 1 What's the next
11 available condo in Irvine avail? 59? Probably **Did you sign up the tenant on**
12 **hemley? Will talk to you Thursday Thanks" (Exhibit 61, Enright 000852,**
13 **bottom) (emphasis added)**

14
15 Email dated 6/16/2014 3:19:35 P.M., from diane@niagarawater.com to
16 DonEnrightBroker@aol.com: "When is margate moving out what's the closing
17 \$ amount Also rams gate moving date I'm not tearing down that house **I've**
18 **decided If Henley is not leased by 7/1 please take it off every site its stale**
19 **Thanks" (Exhibit 61, Enright 000851, top) (emphasis added)**

20
21 Email dated 7/3/2014, 5:36:54 P.M., from diane@niagarawater.com to
22 DonEnrightBroker@aol.com, as it pertains to the Property: "Don I wanted you
23 to know I took the sign down on Hemley is on the right side of the house. I
24 don't want it on the market at all. **If this guy takes it from Ireland ok, if not,**
25 **then we forget it I guess he wants it perfect, so alex is waiting for two**
26 **more window coverings? I think they are done now." (Exhibit 68) (emphasis**
27 **added)**

28
29 Email dated 7/10/2014, 4:08:33 P.M. from diane@niagarawater.com to
30 DonEnrightBroker@aol.com: "Don **Whats the follow up on henley and the**
31 **guy in Ireland?" (Exhibit 73, Enright 000015) (emphasis added)**

32
33 Email dated 7/10/2014, 6:08:39 P.M. from diane@niagarawater.com to
34 DonEnrightBroker@aol.com, subject: hemley: "Ok thanks **If they have not**
35 **signed lease with CC first last and I thought you said 2 extra months**
36 **rent? No later than July 14, forget about them. I will let the house sit and**
37 **then decide what to do" (Exhibit 73, Enright 000017, top) (emphasis added)**

38
39 Email dated 7/14/2014 4:05:06 P.M., from diane@niagarawater.com to
40 DonEnrightBroker@aol.com: "**Well ... we've been in that price range for**
41 **years now I assume you were always through on your investigation but**
42 **was also quick to lease a property especially in the port streets. I am**
43 **thinking if there are no applicants to consider by this weekend, I will**
44 **have open house on a Saturday and lease it out by owner. I use to do**
45 **this all the time, years ago, I just have to get the fica scores and check**
46 **the past and of course the job etc. You didn't answer my question about**
47 **how I cancel the listing on port Hemley." (Exhibit 73, Enright 00018, top)**
48 **(emphasis added)**

49
50 In light of all of Mrs. Peykoff's many references to the leasing of the Property
51 in her previous emails, Mr. Enright's interpretation of her request, that he agree to the
52 cancellation of the Lease Listing Agreement (Exhibit 104), was reasonable.

1 The Cancellation of Listing form (Exhibit 74) is very straightforward. Like many
2 forms prepared by the California Association of Realtor, it has boxes to check and blanks
3 to be filled in. Mr. Enright checked the box on the second line from the top for "Lease
4 Listing" and filled in the blank for the date of the listing agreement on the third line from
5 the top, "June 1, 2014". Mr. Enright received no indication from Mrs. Peykoff that she
6 had not read the form, did not understand the form, or thought that the form included the
7 Residential Listing Agreement dated February 1, 2014 (Exhibit 2).

8 Accordingly, Mr. Enright did not breach any fiduciary duty to Mrs. Peykoff in
9 agreeing to the Cancellation of Listing form (Exhibit 74) which pertained to the Lease
10 Listing Agreement dated June 1, 2014 (Exhibit 104) .

11 If, in fact, Mrs. Peykoff misunderstood the Cancellation of Listing form (Exhibit
12 74) as including the Residential Listing Agreement dated February 1, 2014, (Exhibit 2),
13 Mr. Enright had no indication of that misunderstanding, and therefore no fiduciary duty
14 to correct a misunderstanding that he did not know existed, if in fact it did exist.

15 As far as Mr. Enright knew, Mrs. Peykoff wanted Mr. Enright to agree to the
16 cancellation of the Lease Listing Agreement dated June 1, 2014 (Exhibit 104), because
17 Mrs. Peykoff intended to "lease it out by owner" (Exhibit 73, Enright 000018, top), and
18 she did not want to have a commission dispute with Mr. Enright similar to her son's
19 commission dispute with Mr. Enright, which arose when Mrs. Peykoff's son sold a
20 property that was subject to a listing agreement with Mr. Enright.

21 **2. MR. ENRIGHT OWED MRS. PEYKOFF FIDUCIARY DUTIES AS LONG**
22 **AS HE WAS HER AGENT, BECAUSE HIS FIDUCIARY DUTIES AROSE FROM THEIR**
23 **AGENCY RELATIONSHIP. AS SOON AS MRS. PEYKOFF TERMINATED MR.**
24 **ENRIGHT'S AGENCY ON JULY 26, 2014, MR. ENRIGHT NO LONGER OWED TO**
25 **MRS. PEYKOFF ANY FIDUCIARY DUTIES.**

26 It is undisputed that Mr. Enright owed Mrs. Peykoff fiduciary duties as long as
27 he was her broker, because fiduciary duties arose from their agency relationship. "The
28 relationship between a broker and his principal is fiduciary in nature, and imposed upon

1 the broker the duty of acting in the highest good faith toward his principal." *Timmsen v.*
2 *Forest E. Olsen, Inc.*, (1970) 6 Cal. App. 3d 860, 871.

3 However, those fiduciary duties end upon the termination of the agency
4 relationship. In *Loughlin v. Idora Realty Co.*, (1968) 259 Cal. App. 2d 619, sellers sued
5 their real estate broker to recover secret profits earned by the broker when he arrange
6 to sell the seller's property to his mother-in-law, without disclosing to his clients, the
7 sellers, that the buyer was his mother-in-law. In discussing the duration of the agency
8 relationship and thus the broker's duties to his principals, the court stated that:

9 "When Turmany called Loughlin on September 5, he was still in an express
10 contractual relationship with plaintiffs under the earlier contract. On September
11 6, that contract having expired by its terms, the express relationship had
12 terminated. The telephone call on September 6, however, was apparently a
13 continuation of the call on September 5; there is no evidence that the parties
14 discussed or considered the materiality of the current calendar date; and the
subject discussed involved -- and produced -- a continuing principal-agent
relationship between them. It therefore appears that Turkmany's calls to
Loughlin on both dates were communications from a real estate agent to his
principal, and that his duties to plaintiffs on both occasions are to be defined
accordingly." *Loughlin*, *ibid*, page 628-629

15 The facts of this case stand in stark contrast to those of *Loughlin*. On July 26,
16 2014, Mrs. Peykoff set an email to Mr. Enright in which she stated: "Don To make myself
17 perfectly clear. Regardless of your thoughts of reasons WHY, I am no longer your client
18 and you are no longer my realtor." (Exhibit 86) Once Mrs. Peykoff terminated their
19 agency relationship, Mr. Enright no longer owed her any fiduciary duties.

20 The fiduciary duties owed by broker to his principal, based upon their agency
21 relationship and which terminate upon the termination of the agency relationship, differ
22 from the fiduciary duties owed by an attorney to his clients, which continue after the
23 termination of the attorney-client relationship. In *Styles v. Mumbert* (2008) 164 Cal. App.
24 4th 1163, the Sixth Appellate District held that: "an attorney continues to owe a former
25 client a fiduciary duty even after the termination of the relationship. [citation] ... These
26 duties continue after the termination of the relationship in order to protect the sanctity of
27 the confidential relationship between attorney and client." *Styles*, *ibid.*, page 1167.

28 The agency relationship between a broker and his principal is very different

1 from the relationship between and attorney and his client. There is no privilege which
2 holds that the communications between a broker and his principal are confidential and
3 immune from disclosure. Therefore, while an attorney's fiduciary duties owed to his
4 clients may extend past the termination of the attorney's employment, a broker's fiduciary
5 duties to his principal end with the termination of their agency relationship.

6 Mrs. Peykoff continued with her efforts to sever her agency relationships with
7 Mr. Enright. On July 31, 2014, Mrs. Peykoff sent an email to Mr. Enright: "please email
8 the cancellations on port westbourne and port margate. Please remove any listings you
9 have on any website. Your cooperation is greatly appreciated. Diane" (Exhibit 88). Mr.
10 Enright agreed to cancel the Lease Listing Agreements on these properties and sent the
11 signed Cancellation of Listing forms to Mrs. Peykoff. (Exhibit 90)

12 On August 5, 2014, Mrs. Peykoff's assistant sent an email to Mr. Enright: "Hi
13 Don, Diane has asked me to email you and ask you to please send cancellation of all
14 lease/listing agreements for the following properties asap Cape Andover Emerald Bay
15 All Gingerwoods 23 28 59 82 Lonetree Port Abbey Port Taggart All Roadrunner's 143
16 and 161 Villa Point, and any other active lease/listing agreements you have with her that
17 have not been mentioned in this email. Thank you for your cooperation. Paola Assistant
18 to V. Diane Peykoff" (Exhibit 91)

19 Mrs. Peykoff's clearly expressed intention to terminate her agency
20 relationships with Mr. Enright certainly indicates that she no longer considered him to be
21 her agent. Since Mr. Enright's fiduciary duties flowed from his agency relationship with
22 Mrs. Peykoff, Mrs. Peykoff's termination of that agency relationship also terminated Mr.
23 Enright's fiduciary duties to Mrs. Peykoff.

24 **3. ONCE MRS. PEYKOFF TERMINATED HER AGENCY RELATIONSHIP**
25 **WITH MR. ENRIGHT, HE BECAME AN ORDINARY CREDITOR OF HERS, WITH NO**
26 **SPECIAL DUTIES TO INFORM HER OF ANY FACTS.**

27 The Listing Period set forth in the Residential Listing Agreement (Exhibit 2)
28 was February 1, 2014, through December 31, 2014. When Mrs. Peykoff terminated Mr.

1 Enright's agency on July 26, 2014 (Exhibit 86), there was over five months remaining on
2 the Listing Period. Mr. Enright became an ordinary contract creditor of Mrs. Peykoff,
3 without any special disclosure obligations to her.

4 In *Blumenthal v. Goodall* (1891) 89 Cal 251, a broker sued his seller to recover
5 his commission after the seller refused to sell the property. The trial court entered
6 judgment for the seller, but the California Supreme Court reversed.

7 "It is a general principle of law that as between the principal and the agent, the
8 authority of the agent is revocable at any time ... But this *power* to revoke is
9 not to be confused with the *right* to revoke. ... [I]t by no means follows that
10 though possessing the power the principal has the right to exercise it without
11 liability, regardless of the contracts in the matter. It is entirely consistent with
the existence of the power that principal may agree that for a definite period
of time he will not exercise it, and for the violation of such agreement the
principal is as much liable as for the breach of any other contract." *Blumenthal*,
ibid., page 255.

12 Mrs. Peykoff had the power to revoke Mr. Enright's agency, but she didn't have
13 the right to terminate the Residential Listing Agreement (Exhibit 2), under which she was
14 contractually obligated to pay Mr. Enright a real estate commission under the listed
15 circumstances. Once Mrs. Peykoff terminated Mr. Enright's agency, he became an
16 ordinary contract creditor of Mrs. Peykoff, with no special obligation to disclose to her that
17 she was still obligated to pay him a real estate commission under the Residential Listing
18 Agreement. (Exhibit 2).

19 Mr. Enright testified during the arbitration hearing that he saw no need to hurry
20 to remind Mrs. Peykoff of her contractual obligations to pay him a real estate
21 commission under the Residential Listing Agreement, because she had told him that the
22 Property was off the market for sale and she had no intention of selling it.

23 Email dated 5/25/2014, 7:43:57 P.M., from diane@niagarawater.com
24 to DonEnrightBroker@aol.com, subject port hemley: **"Don The house has
25 been on the market for almost 7 months (June 6) Its stale ... nothing is
26 ver for sale that long in the port streets any time in the last year that I am
27 aware of Please take if off the market, release any contract we may have
28 to sell it and remove the sign. If you have a tenant I would like to hear the offer
of course. However, I will be out of town for 3 weeks starting on Friday. [¶] I
will have the stager's remove the furniture asap and I won't need to pay \$1400
for June. Sorry you worked so long on this one and ended up with nothing, but
I guess that's the way it goes sometimes, some are easy some are difficult. I
am disappointed too but what can I say, the price was reduced several times**

1 equal to approx \$200K with no luck Thanks Diane" (Exhibit 47) (emphasis
2 added)

3 Email dated 6/11/2014, 10:31:32 P.M., from diane@niagarawater.com to
4 DonEnrightBroker@aol.com: "Ciao, Don She sounds good As long as she
5 doesn't become a nuisance like 82 or 24 The house isn't brand new as one
6 might think. I don't know what the hold up is. The air cond shouldn't take that
7 long Decent blinds should go up pretty fast too. Not custom as they take up
8 to three months **Whoever takes it needs to do so ASAP or get an 11 mo
9 lease I don't want it unavailable next July 1 it needs to be for sale by then
10 Thanks Don Diane**" (Exhibit 58) (emphasis added)

11 Email dated 6/16/2014 3:19:35 P.M., from diane@niagarawater.com to
12 DonEnrightBroker@aol.com: "When is margate moving out what's the closing
13 \$ amount Also rams gate moving date I'm not tearing down that house I've
14 decided **If Henley is not leased by 7/1 please take it off every site its stale
15 Thanks**" (Exhibit 61, Enright 000851, top) (emphasis added)

16 Email dated 7/3/2014, 5:36:54 P.M., from diane@niagarawater.com to
17 DonEnrightBroker@aol.com, as it pertains to the Property: "Don I wanted you
18 to know I took the sign down on Hemley is on the right side of the house. **I
19 don't want it on the market at all.** If this guy takes it from Ireland ok, if not,
20 then we forget it I guess he wants it perfect, so alex is waiting for two more
21 window coverings? I think they are done now." (Exhibit 68) (emphasis added)

22 Email dated 7/10/2014, 6:08:39 P.M. from diane@niagarawater.com to
23 DonEnrightBroker@aol.com, subject: hemley: "Ok thanks If they have not
24 signed lease with CC first last and I thought you said 2 extra months rent? No
25 later than July 14, forget about them. **I will let the house sit and then decide
26 what to do**" (Exhibit 73, Enright 000017, top) (emphasis added)

27 Email dated 7/14/2014 4:05:06 P.M., from diane@niagarawater.com to
28 DonEnrightBroker@aol.com: "Well ... we've been in that price range for years
now I assume you were always through on your investigation but was also
quick to lease a property especially in the port streets. I am thinking if there
are no applicants to consider by this weekend, **I will have open house on a
Saturday and lease it out by owner.** I use to do this all the time, years ago,
I just have to get the fica scores and check the past and of course the job etc.
You didn't answer my question about how I cancel the listing on port Hemley."
(Exhibit 73, Enright 00018, top) (emphasis added)

29 There were no emails admitted into evidence, and no testimony at the
30 arbitration hearing, which provided Mr. Enright with any indication that Mrs. Peykoff
31 intended to list the Property for sale with another broker on August 8, 2014, less than two
32 weeks after Mrs. Peykoff terminated Mr. Enright's agency relationship.

33 Further, Mrs. Peykoff testified at the arbitration hearing that, when she listed
34 the Property for sale, she signed a Seller Instruction to Exclude Listing from the Multiple
35 Listing Service (Exhibit 96) by which she instructed the new broker, Villa Real Estate, not

1 to submit the listing for the sale of the Property to the Multiple Listing Service until
2 September 2, 2014, over three weeks after the Property had been listed for sale by Mrs.
3 Peykoff with Villa Real Estate. Had Mrs. Peykoff not instructed Villa Real Estate to delay
4 the reporting to the MLS of its listing of the Property for sale, Mr. Enright might have
5 learned of Mrs. Peykoff's breach of his Residential Listing Agreement (Exhibit 2) sooner,
6 and might have been able to take action, as Mrs. Peykoff's contract creditor, to enforce
7 his rights under his Residential Listing Agreement (Exhibit 2).

8 **4. ANY DUTY THAT MR. ENRIGHT HAD TO MITIGATE HIS DAMAGES**
9 **AROSE ONLY AFTER HE HAD SUFFERED DAMAGES AS THE RESULT OF MRS.**
10 **PEYKOFF'S BREACH OF THE RESIDENTIAL PURCHASE AGREEMENT (EXHIBIT**
11 **2). MR. ENRIGHT DID NOT SUFFER ANY DAMAGES UNTIL MRS. PEYKOFF SOLD**
12 **THE PROPERTY AND REFUSED TO PAY THE REAL ESTATE COMMISSION DUE**
13 **TO MR. ENRIGHT UNDER THE RESIDENTIAL LISTING AGREEMENT (EXHIBIT 2).**
14 **FURTHER, SINCE MRS. PEYKOFF FAILED TO PROVE THAT MR. ENRIGHT COULD**
15 **HAVE MITIGATED HIS DAMAGES, SHE HAS FAILED TO PROVE UP THIS**
16 **EQUITABLE DEFENSE.**

17 Mrs. Peykoff breached the Residential Purchase Agreement (Exhibit 2) when
18 she took the Property off the market for sale.

19 Email dated 5/25/2014, 7:43:57 P.M., from diane@niagarawater.com
20 to DonEnrightBroker@aol.com, subject port hemley: **"Don The house has**
21 **been on the market for almost 7 months (June 6) Its stale ... nothing is**
22 **for sale that long in the port streets any time in the last year that I am**
23 **aware of Please take it off the market,** release any contract we may have
24 to sell it and remove the sign. If you have a tenant I would like to hear the offer
25 of course. However, I will be out of town for 3 weeks starting on Friday. [¶] I
26 will have the stager's remove the furniture asap and I won't need to pay \$1400
27 for June. Sorry you worked so long on this one and ended up with nothing, but
28 I guess that's the way it goes sometimes, some are easy some are difficult. I
am disappointed too but what can I say, the price was reduced several times
equal to approx \$200K with no luck Thanks Diane" (Exhibit 47) (emphasis
added)

26 However, Mr. Enright believed that he had not yet suffered any damages,
27 because there was still seven months left in the Listing Period set forth in the Residential
28 Listing Agreement (Exhibit 2). Mrs. Peykoff had time to put the Property back on the

1 market after it had "cooled off", after it was no longer "stale", and before the Residential
2 Listing Agreement (Exhibit 2) expired. Mr. Enright would then have had time to sell the
3 Property and earn his commission under Paragraph 4A(1) instead of under Paragraph
4 4A(3).

5 Mr. Enright testified about Mrs. Peykoff's desire to "dual-track" the Property,
6 officially take it off the market for sale to re-start the calculation of the days on the market
7 by the MLS computer, while holding the Property out for rent. Mr. Enright introduced into
8 evidence his email dated May 22, 2014, describing that process. (Exhibit 44, middle)

9 Mr. Enright introduced into evidence two listing agreements between Mrs.
10 Peykoff and him for another property, a Lease Listing Agreement with a Listing Period
11 from March 3, 2008 through May 31, 2010 (Exhibit 52), and a Residential Listing
12 Agreement with an overlapping Listing Period from January 1, 2009 through December
13 31, 2009 (Exhibit 53) as evidence that Mrs. Peykoff had authorized this dual-tracking,
14 offering a property for sale and for lease at the same time.

15 There was no testimony that Mrs. Peykoff relied upon any reports made by Mr.
16 Enright to the Multiple Listing Service in forming any opinion about the status of the
17 Residential Listing Agreement (Exhibit 2).

18 There was no testimony that Mrs. Peykoff ever followed up on her instruction
19 to Mr. Enright, to "release any contract we may have to sell it".

20 There was no testimony that Mrs. Peykoff made any further request to Mr.
21 Enright, that he agree to the cancellation of any listing agreement between him and Mrs.
22 Peykoff, until mid-July, 2014.

23 Both Mrs. Peykoff and Mr. Enright testified that Mr. Enright had been
24 representing Mrs. Peykoff in real estate transactions for over 15 years. In light of their
25 long-standing relationship and in anticipation of future business with Mrs. Peykoff, it was
26 reasonable for Mr. Enright to permit Mrs. Peykoff to employ this dual-tracking method,
27 and even reasonable for Mr. Enright to locate a tenant for the Property, in the expectation
28 that Mrs. Peykoff would again use the services of Mr. Enright in the sale of the Property

1 after it had "cooled off" and was no longer "stale".

2 One of the cases cited by Mrs. Peykoff in her Arbitration Brief is *Vitagraph,*
3 *Inc., v. Liberty Theatres Co.* (1925) 197 Cal. 694. in which the plaintiff, a distributor of
4 "photo-plays", entered into a contract with the defendant, an exhibitor of photo-plays,
5 under which the plaintiff agreed to license the defendant to exhibit six photo-plays, one
6 a week for six weeks. The defendant exhibited and paid for the first two photo-plays, but
7 refused to exhibit or pay for the remaining photo-plays. The plaintiff sued and the trial
8 court entered judgment against the defendant. The California Supreme Court reversed,
9 holding that the damages were excessive, in that they included damages for photo-plays
10 that had never been tendered to the defendant. On the affirmative defense of the duty
11 to mitigate damages, the court held that "the burden of proof is upon the defendant to
12 prove the facts in mitigation of damages. ... this it did not do". *Vitagraph, Inc.*, page 699.

13 In the case at bar, Mrs. Peykoff offered speculation that, if Mr. Enright had
14 acted more promptly in enforcing his contract rights under the Residential Listing
15 Agreement (Exhibit 2), he could have mitigated his damages. But Mrs. Peykoff failed to
16 offer any evidence in support of her speculation.

17 Mr. Enright had no reason to assert his claims against Mrs. Peykoff in August,
18 2014, because several months remained on the Listing Period under the Residential
19 Listing Agreement (Exhibit 2). Further, Mrs. Peykoff had told him that she was taking the
20 Property off the market for sale because it was "stale", and she wanted it to "cool off".
21 Mr. Enright testified that he wanted time to pass after Mrs. Peykoff's termination of his
22 agency on July 26, 2014, in the hopes that Mrs. Peykoff would "cool off" and he could
23 repair his relationship with her. Mr. Enright also testified that he hoped he could resolve
24 his commission dispute with Mrs. Peykoff's son, and the resolution of that dispute would
25 permit a reconciliation between Mr. Enright and Mrs. Peykoff.

26 Mrs. Peykoff speculated that, if Mr. Enright had been more prompt in asserting
27 his claim to a commission after receiving the email notification from the MLS, in early
28 September, 2014, that the Property was again listed for sale, Mrs. Peykoff could have

1 made some arrangement under which Mr. Enright could have shared a commission with
2 Villa Real Estate, with which Mrs. Peykoff had listed the Property for sale on August 8,
3 2014, (Exhibit 95) and thereby mitigated his damages. But Mrs. Peykoff offered no
4 evidence in support of her speculation.

5 Mr. Enright testified that he did not immediately contact Mrs. Peykoff in early
6 September, 2014, to demand payment of his commission after he received the email
7 notification from the MLS that the Property was again listed for sale, because he thought
8 that the email notification was a mistake. He testified that his listing for the sale of the
9 Property was in withdrawn status, meaning that there was still a Residential Listing
10 Agreement between the broker and seller, but that the Property was not on the market
11 for sale. Mr. Enright testified that he contacted the MLS to report this mistake.

12 Mrs. Peykoff speculated that, if Mr. Enright had contacted Villa Real Estate in
13 mid-September, 2014, after Mr. Enright received an email notification from the MLS that
14 the Property was in escrow, Mr. Enright might have been able to share the commission
15 that was to be paid to Villa Real Estate and the other broker in the sale of the Property.
16 But Mrs. Peykoff offered no evidence in support of her speculation.

17 Mrs. Peykoff called as a witness at the arbitration hearing Stephanie Lowe, the
18 real estate sales agent for Villa Real Estate with which Mrs. Peykoff had listed the
19 Property for sale, but did not ask Mrs. Lowe any questions about the ability of Mr. Enright
20 to mitigate his damages by sharing in the commission paid to Villa Real Estate and the
21 other broker upon the sale of the Property.

22 Mr. Enright testified that, as soon as he learned that an escrow had been
23 opened for the sale of the Property in mid-September, 2014, he contacted his attorney.

24 Mrs. Peykoff testified that she received a letter from Mr. Enright's attorney on
25 or about September 26, 2014 (Exhibit 98), in which Mr. Enright demanded the payment
26 of the commission set forth in the Residential Listing Agreement (Exhibit 2). Mrs. Peykoff
27 offered no evidence that she took any action in response to this letter from Mr. Enright's
28 attorney.

1 In sum, since it was Mrs. Peykoff's burden to introduce evidence showing that
2 Mr. Enright could have mitigated his damages, and since Mrs. Peykoff failed to introduce
3 any such evidence, Mrs. Peykoff has not established that Mr. Enright could have
4 mitigated his damages. Accordingly, Mrs. Peykoff is not entitled to any reduction in the
5 damages awarded to Mr. Enright for her breach of the Residential Purchase Agreement
6 (Exhibit 2).

7 **Plaintiff's Case in Chief**

8 **5. MR. ENRIGHT IS ENTITLED TO THE PAYMENT OF A \$97,200.00 REAL**
9 **ESTATE COMMISSION UNDER THE RESIDENTIAL LISTING AGREEMENT**
10 **(EXCLUSIVE AUTHORIZATION AND RIGHT TO SELL) DATED FEBRUARY 1, 2014,**
11 **("RESIDENTIAL LISTING AGREEMENT") EXHIBIT 2, BECAUSE MRS. PEYKOFF**
12 **WITHDREW THE PROPERTY FROM THE MARKET FOR SALE.**

13 The Residential Listing Agreement was identified by both Mrs. Peykoff and Mr.
14 Enright, and admitted into evidence. The "Listing Period" is February 1, 2014, through
15 December 31, 2014. Paragraph 4 of the Residential Listing Agreement, entitled
16 "Compensation to Broker", states, in pertinent part, that:

17 "A. Seller agrees to pay to Broker as compensation for services irrespective
18 of agency relationship(s) either ■ 4.500 percent of the listing price (or if a
19 purchase agreement is entered into, of the purchase price) or [blank] AND
[blank] as follows:

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

24 OR (3) If, without Broker's prior written consent, the Property is withdrawn from
25 sale, conveyed, leased, rented, otherwise transferred, or made unmarketable
by a voluntary act of Seller during the Listing Period, or any extension.

26 The following facts are undisputed:

27 1. Mrs. Peykoff took the Property off the market for sale on July 3, 2014. "I
28 took the sign down on Hemley it is on the right side of the house. I don't want it on the

1 market at all. If this guy from Ireland takes it ok, if not, then we forget it." (Exhibit 68,
2 ENRIGHT 000757)

3 2. The Residential Listing Agreement specified a commission of 4.500 percent.
4 (Exhibit 2, Peykoff 000001).

5 3. The Property was sold for \$2,160,000.00. (Exhibit 97, Peykoff 000073)

6 4. The sale of the Property closed on October 31, 2014, which was during the
7 Listing Period. (Exhibit 99).

8 5. Mr. Enright did not provide written consent for Mrs. Peykoff's withdrawal of
9 the Property for sale.

10 Accordingly, all of the conditions under which Mrs. Peykoff is obligated to pay
11 a real estate commission to Mr. Enright upon the withdrawal of the Property from the
12 market for sale were satisfied.

13 The right of a broker under an exclusive right to sell listing agreement to the
14 payment of the agreed upon commission if the principal removes the property from the
15 market has long been recognized. "By the terms of the employment the commissions
16 became due 'in the event of withdrawing the sale of the property during the time.' The
17 claim to compensation under this provision of the contract is not, as respondent
18 suggests, damages for breach of the contract in withdrawing the land from sale. This
19 Hamilton had a right to do, and in such event he becomes indebted to the plaintiff for his
20 commissions." *Kimmell v. Skelly* (1900) 103 Cal. 555, 560.

21 Had the Property not been sold by Mrs. Peykoff during the Listing Period for
22 \$2,160,000.00, then Mr. Enright would have been entitled to the payment of a real estate
23 commission calculated using the listing price of \$2,370,000.00. However, since the
24 Property was sold during the Listing Period for \$2,160,000.00, the actual sales price of
25 the Property is used to calculate the amount of the real estate commission due to Mr.
26 Enright.

27 **6. MR. ENRIGHT IS ENTITLED TO THE PAYMENT OF A \$97,200.00 REAL**
28 **ESTATE COMMISSION UNDER THE RESIDENTIAL LISTING AGREEMENT**

1 **(EXCLUSIVE AUTHORIZATION AND RIGHT TO SELL) DATED FEBRUARY 1, 2014,**
2 **("RESIDENTIAL LISTING AGREEMENT") EXHIBIT 2, BECAUSE MRS. PEYKOFF**
3 **SOLD THE PROPERTY DURING THE LISTING PERIOD.**

4 The following facts are undisputed:

5 1. The Residential Listing Agreement was an Exclusive Authorization and
6 Right to Sell listing agreement, which obligated the Mrs. Peykoff to pay to Mr. Enright a
7 real estate commission if the Property was sold during the Listing Period by anyone,
8 regardless of Mr. Enright's involvement in the transaction. (Exhibit 2, Peykoff 00001)

9 2. The Residential Listing Agreement specified a Listing Period from February
10 1, 2014, through December 31, 2014. (Exhibit 2, Peykoff 00001)

11 3. The Residential Listing Agreement specified a commission of 4.500 percent
12 of the purchase price. (Exhibit 2, Peykoff 000001).

13 4. The Property was sold for \$2,160,000.00. (Exhibit 97, Peykoff 000073)

14 5. The sale of the Property closed on October 31, 2014, during the Listing
15 Period. (Exhibit 99).

16 The right of a broker under an exclusive right to sell listing agreement to the
17 payment of the agreed upon commission even if someone else sells the property has
18 long been recognized. "But a sale of the property, within the period limited by the
19 contract, by the defendant, brought about by any person other than the plaintiffs, without
20 their acquiescence or consent, could not operate to defeat the latter's right to the
21 maximum commissions provided for by said agreement." *Justy v. Erro* (1911) 103 Cal.
22 App. 519, 531.

23 **7. MR. ENRIGHT IS ENTITLED TO PAYMENT OF THE FULL AMOUNT OF**
24 **THE COMMISSION SET FORTH IN THE RESIDENTIAL LISTING AGREEMENT**
25 **(EXHIBIT 2), WITHOUT REDUCTION BASED UPON SPECULATION THAT HE MIGHT**
26 **HAVE HAD TO PAY A PORTION OF THE COMMISSION TO ANOTHER BROKER IF**
27 **MR. ENRIGHT HAD BEEN PERMITTED TO SELL THE PROPERTY.**

28 Mrs. Peykoff argued at the Arbitration Hearing that any commission paid to Mr.

1 Enright should be reduced by the amount that Mr. Enright would have paid to a
2 cooperating broker. This argument was apparently a reference to paragraph 4D of the
3 Residential Listing Agreement (Exhibit), which states that:

4 "D. Seller has been advised of Broker's policy regarding cooperation with, and
5 the amount of compensation offered to, other brokers. (1) Broker is authorized
6 to cooperate with and compensate brokers participating through the multiple
7 listing service(s) ("MLS") by offering to MLS brokers out of Broker's
8 compensation specified in 4A, either ■ 2.500 percent of the purchase price,
9 or [blank]. (2) Broker is authorized to cooperate with and compensate brokers
10 operating outside the MLS as per Broker's policy."

11 However, this argument ignores the fact that Mrs. Peykoff's liability for the
12 payment of the real estate commission arose not from the sale of the Property, but from
13 her withdrawal of the Property from the market for sale. There was no cooperating
14 broker. Mr. Enright did not pay any portion of his agreed upon commission to any
15 cooperating broker. Accordingly, Mr. Enright is entitled to the payment of the full 4.500
16 percent real estate commission as agreed by Mrs. Peykoff when she signed the
17 Residential Listing Agreement (Exhibit 2).

18 The Residential Listing Agreement (Exhibit 2) provides for the payment of a
19 4.500 percent real estate commission to Mr. Enright if the Property is withdrawn from
20 sale by Mrs. Peykoff. It does not provide for any reduction in that amount based upon
21 speculation that Mr. Enright might have shared the real estate commission with another
22 broker if Mrs. Peykoff had not withdrawn the Property from the market for sale and
23 instead permitted Mr. Enright to sell it.

24 In *Herz v. Clark's Market* (1960) 179 Cal. App. 2d 471, a broker sued his seller
25 to collect his commission after he found a buyer for the property but the seller refused
26 to sell. The trial court entered judgment for the broker, the seller appealed, and the First
27 Appellate District affirmed. "Since the sale did not go through because of appellant's
28 fault, there was a breach of the entire contract, and respondent then became entitled to
recover the whole commission." *Herz* *ibid.*, page 474.

If Mrs Peykoff did not want to pay the entire commission if she breached the
Residential Listing Agreement (Exhibit 2), she certainly had the ability to negotiate with

1 Mr. Enright for the payment of a lesser amount. However, having signed the Residential
2 Listing Agreement (Exhibit 2) which obligated her to pay the entire commission to Mr.
3 Enright under the conditions set forth in the Agreement, Mrs. Peykoff is obligated to pay
4 the entire commission specified in the Agreement to Mr. Enright.

5 In *Baumgartner v. Meek* (1954) 126 Cal. App. 2d 505, a broker sued his seller
6 to recover his real estate commission after the seller took the property off of the market.
7 The trial court entered judgment for the broker and the Third Appellate District affirmed.

8 "It has long been the law of this state that any right to compensation asserted
9 by a real estate broker must be found within the four corners of his
10 employment contract. [citations] By the same token, however, the parties to
11 a broker's contract for the sale of real property are at liberty to make the
12 compensation dependent upon any lawful conditions they see fit to place
13 therein. [citation] In short, it is the *contract* which governs the agent's
14 compensation, and that contract is strictly enforced according to its terms. ¶
15 It is equally well settled in this state that a withdrawal-from-sale clause in an
16 exclusive-right-to-sel contract is lawful and enforceable, a claim for
17 damages for breach but a claim of indebtedness under its specific terms." *Baumgartner*, *ibid.*,
18 pages 508-509.

19 Paragraph 4D merely obtains Mrs. Peykoff's permission for Mr. Enright to
20 share his real estate commission with other brokers. It permits the payment, out of Mr.
21 Enright's commission, of an amount equal to 2.500 percent of the purchase price if the
22 other broker is a member of the MLS, and to pay a portion of Mr. Enright's commission
23 to other brokers in accordance with Mr. Enright's policy. Its application is limited to
24 situations in which the Property is sold and there is a cooperating broker who is
25 representing the buyer in the transaction. Since Mr. Enright is claiming a real estate
26 commission based upon Mrs. Peykoff's withdrawal of Property from the market for sale,
27 and since there was no sale by Mr. Enright and no cooperating broker, Paragraph 4D has
28 no application to this dispute.

Accordingly, since Mrs. Peykoff withdrew the Property from sale during the
Listing Period set forth in the Residential Listing Agreement (Exhibit 2), Mr. Enright is
entitled to the payment of a real estate commission of \$97,200.00.

8. MR. ENRIGHT HAS PROVED UP ALL OF THE ELEMENTS OF HIS

1 **CLAIM FOR A QUANTUM MERUIT RECOVERY OF HIS REAL ESTATE**
2 **COMMISSION.**

3 In her Arbitration Brief, Mrs. Peykoff argues that Mr. Enright has failed to
4 introduce any evidence in support of his claim for quantum meruit, and therefore, that
5 claim must be denied. In support of that argument, Mrs. Peykoff misrepresents Mr.
6 Enright's discovery responses, and specifically the 1,777 pages of documents that he
7 produced in response to "Defendant Virginia Diane Peykoff's Demand for Production and
8 Inspection of Documents and Tangible Things to Plaintiff Donald Enright, Set One",
9 which was served by messenger on July 2, 2015.

10 Mrs. Peykoff also mischaracterizes the Residential Listing Agreement (Exhibit
11 2) that she signed, as not constituting evidence of the value of the services to be
12 performed by Mr. Enright. Mrs. Peykoff requested that Mr. Enright provide those services
13 by signing the Residential Listing Agreement (Exhibit 2). Mrs. Peykoff agreed that the
14 reasonable value of those services was a sum equal to 4.5 percent of the listing price of
15 the Property or the sales price of the Property under the circumstances set forth in the
16 Residential Listing Agreement (Exhibit 2). Mrs. Peykoff stipulated during the Arbitration
17 Hearing that Mr. Enright fully performed his requested services in marketing the Property
18 for sale. Accordingly, by both the act of Mrs. Peykoff in entering into the Residential
19 Listing Agreement (Exhibit 2) and the stipulation by Mrs. Peykoff at the Arbitration
20 Hearing, Mr. Enright has proved up the elements of his claim for quantum meruit.

21 In her Arbitration Brief, Mrs. Peykoff cites two cases in support of her argument
22 against a quantum meruit recovery that are not on point.

23 In *Ochs v. Pacificare of California* (2004) 115 Cal. App. 4th 782, a doctor
24 sought a quantum meruit recovery from a health insurance company for the reasonable
25 value of the services that he provided to its insured. The court held that quantum meruit
26 recovery is inappropriate where it would frustrate the law or public policy pertaining to the
27 delegated statutory obligations applicable to health insurance companies.

28 In *Hocker v. Glover* (1931) 113 Cal. App. 152, the plaintiff performed labor at

1 the request of the defendant's deceased. Judgment for the defendant was affirmed,
2 based upon a finding that "There appears to be a total absence of evidence on the
3 reasonable value of the labor performed." *Hocker*, *ibid.*, page 156.

4 In the case at bar, Mrs. Peykoff has not cited any public policy or law which
5 would defeat Mr. Enright's quantum meruit recovery. Mr. Enright has produced evidence
6 establishing the elements of his claim for a quantum meruit recovery. The Arbitrator
7 should award Mr. Enright his quantum meruit recovery, of the agreed-upon amount equal
8 to 4.5 percent of the sales price of the Property, or \$97,200.00

9 **9. MR ENRIGHT'S CLAIM AGAINST MRS. PEYKOFF BECAME**
10 **LIQUIDATED WHEN THE GRANT DEED BY WHICH MRS. PEYKOFF SOLD THE**
11 **PROPERTY WAS RECORDED ON OCTOBER 31, 2014 (EXHIBIT 99) ACCORDINGLY,**
12 **MRS. PEYKOFF ALSO OWES INTEREST IN THE \$97,200.00 REAL ESTATE**
13 **COMMISSION SHE OWES TO MR. ENRIGHT AS OF THAT DATE.**

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

18 *Civil Code* §3289(b) provides that: "[i]f a contract entered into after January 1,
19 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate
20 of 10 percent per annum after a breach."

21 The real estate commission that Mrs. Peykoff owes to Mr. Enright is "capable
22 of being made certain by calculation". That commission is \$97,200.00. It bears interest
23 at the rate of 10 percent per annum, starting on November 1, 2014, the date after the
24 breach of the Residential Listing Agreement (Exclusive Authorization and Right to Sell),
25 by the sale of the Property without the payment of the commission to Mr. Enright. The
26 commission will continue to accrue interest at the rate of \$26.63 per day until paid. The
27 Arbitrator should include an award of interest in his award of the real estate commission
28 to Mr. Enright.

1 **Mrs. Peykoff's Affirmative Defenses**

2 **11. IN HER ARBITRATION BRIEF, MRS. PEYKOFF ASSERTED NEW**
3 **ALLEGATIONS CONSTITUTING AFFIRMATIVE DEFENSES TO HER LIABILITY ON**
4 **THE COMMISSION CLAIMS MADE BY MR. ENRIGHT.**

5 In her arbitration brief, Mrs. Peykoff asserted seven affirmative defenses:

6 1. Breach of Fiduciary Duty, based upon the allegation that Mr. Enright
7 failed to disclose to Mrs. Peykoff that the Residential Listing Agreement
8 (Exhibit 2) was still in effect when Mrs. Peykoff and Mr. Enright agreed to
9 cancel the Lease Listing Agreement (Exhibit 104) [Peykoff Brief, page 12,
10 lines 8-10]

11 2. Breach of Fiduciary Duty, based upon the allegation that Mr. Enright
12 failed to disclose to Mrs. Peykoff that the Residential Listing Agreement was
13 still in effect after Mr. Enright learned that Mrs. Peykoff had listed the Property
14 for sale with a different real estate broker. [Peykoff Brief, page 13, lines 14-15]

15 3. Equitable Estoppel, based upon the allegation that Mr. Enright had
16 a duty to inform Mrs. Peykoff that the Residential Listing Agreement was still
17 in effect and his failure to perform this duty equitably estops Mr. Enright from
18 enforcing the Residential Listing Agreement. [Peykoff Brief, page 17, lines 9-
19 11]

20 4. Waiver, based upon the allegation that Mr. Enright's conduct in
21 presenting the Cancellation of Listing form to Mrs. Peykoff indicated that he
22 consented to the cancellation of all of his listing agreements on the Property,
23 and therefore Mr. Enright waived his right to enforce the Residential Listing
24 Agreement. [Peykoff Brief, page 17, lines 22-24]

25 5. Unilateral Mistake of Fact, based upon the allegation that Mrs.
26 Peykoff mistakenly believed that the Cancellation of Listing form cancelled the
27 Residential Listing Agreement, Mr. Enright knew or had reason to know of
28 Mrs. Peykoff's mistake of fact, but failed to disclose to Mrs. Peykoff her

1 mistake of fact in order to take advantage of her mistake of fact. [Peykoff Brief,
2 page 18, lines 13-25].

3 6. Failure to Mitigate Damages, based upon the allegation that Mr.
4 Enright learned of Mrs. Peykoff's breach of the Residential Listing Agreement
5 when he learned that she had listed the Property for sale with other real estate
6 brokers, but that he failed to mitigate his damages resulting from that breach
7 by immediately disclosing to Mrs. Peykoff that his Residential Listing
8 Agreement was still in effect before Mrs. Peykoff entered into a contract for
9 the sale of the Property which obligated her to pay commissions to the other
10 brokers. [Peykoff Brief, page 19, lines 6-12]

11 7. Unclean Hands, based upon the allegation that Mr. Enright breached
12 his fiduciary duty to Mrs. Peykoff in all of his dealings with her. [Peykoff Brief,
13 page 22, lines 4 to 9]

14 **12. MRS. PEYKOFF HAS THE BURDEN OF PROOF ON ALL OF HER**
15 **AFFIRMATIVE DEFENSES.**

16 All of Mrs. Peykoff's affirmative defenses constitute new matters that are
17 outside the allegations of the Complaint. Accordingly, Mrs. Peykoff has the burden of
18 proof on all of the elements of each of her affirmative defenses. If Mrs. Peykoff fails to
19 prove up any element of an affirmative defense, then that affirmative defense fails, and
20 it is not a bar to Mr. Enright's recovery on his claims.

21 In *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, the California
22 Supreme Court held that: "Code of Civil Procedure section 431.30, subdivision (b)
23 provides that an answer to the complaint 'shall contain' in addition to a 'general or
24 specific denial', of the complaint's allegations, '[a] statement of any new matter
25 constituting a defense.' It has long been held that '[i]f the *onus* of proof is thrown upon
26 the defendant, the matter to be proved by him is new matter.'" *Harris*, *ibid.*, page 239.

27 Specifically, each of Mrs. Peykoff's affirmative defenses is based upon her
28 interpretation of the often ambiguous emails exchanged between her and Mr. Enright.

1 If the Arbitrator does not adopt Mrs. Peykoff interpretation of the emails pertain to Mrs.
2 Peykoff's affirmative defense, then Mrs. Peykoff has failed to carry her burden of proof
3 as to that affirmative defense, and it is not a bar to Mr. Enright's recovery of his real
4 estate commission.

5 **13. MRS. PEYKOFF FAILED TO PROVE THAT MR. ENRIGHT BREACHED**
6 **ANY FIDUCIARY DUTY OWED TO HER WHICH WOULD DEFEAT MR. ENRIGHT'S**
7 **RIGHT TO HIS REAL ESTATE COMMISSION.**

8 In support of Mrs. Peykoff's affirmative defense, that Mr. Enright breached
9 fiduciary duties owed to her, Mrs. Peykoff has cited a number of appellate court decisions
10 for the proposition that a real estate broker owes fiduciary duties to his principal. That
11 proposition is undisputed. Unfortunately, all of the authorities cited by Mrs. Peykoff deal
12 with secret profits obtained by brokers at the expense of their principals, during the
13 existence of the agency relationship, and thus provide little assistance to the Arbitrator
14 in this case.

15 In *Salahutdin v. Valley of California, Inc.*, (1994) 24 Cal. App. 4th 555, the
16 broker breached his fiduciary duties to his clients, the buyers, by simply repeating the
17 representations about the property that had been made to him by the seller, without
18 independently verifying the accuracy of the representations and without telling his clients
19 that he had not independently verified the seller's representations.

20 In *Wyatt v. Union Mortgage Co.* (1979) 24 Cal. 3d 773, the broker failed to
21 disclose to the borrowers, who were persons of modest means and limited financial
22 experience, the terms of the loan set forth in the stack of documents that the broker
23 presented to the borrowers for their signature. Further, the broker misrepresented the
24 terms of the loan, which were highly unfavorable to the borrowers.

25 In *Warren v. Merrill* (2006) 143 Cal. App. 4th 96, a broker representing the
26 disabled buyer of a condominium failed to disclose to her client the buyer that her own
27 daughter would be buying the condominium using the disabled client's down payment.

28 In *Bate v. Marsteller* (1959) 175 Cal. App. 2d 573, brokers who were retained

1 by the seller to find a buyer for the property ended up buying 7/8 of the property
2 themselves, without disclosing that fact to the seller, and thus forfeited their right to the
3 commission paid to them on the sale.

4 In *Baird v. Madsen* (1943) 57 Cal. App. 2d 465, a broker sued to recover a real
5 estate commission that he claimed was due under an agency listing agreement for the
6 sale of 260 acres of a ranch. However, the trial court entered and the First Appellate
7 District affirmed a judgment finding that the broker never produced a buyer ready, willing,
8 and able to purchase the 260 acres under the terms of the agency listing agreement and
9 therefore had not earned the real estate commission.

10 In *Byrum v. Brand* (1990) 219 Cal. App. 3d 926, the plaintiff sued his former
11 investment advisor for recommending that he purchase an interest in a Hawaiian land
12 trust and misrepresenting key facts about the property. The Fourth Appellate District held
13 that the jury instructions on the cause of action for breach of fiduciary duty contained an
14 incorrect statement of the law on the plaintiff's burden of proof which was prejudicial
15 error, reversed the judgment for the defendant and remanded for a new trial on that
16 cause of action.

17 In *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, (1977) 67 Cal. App. 3d
18 19, the court held that, where it is alleged that the broker's fraud either induced the
19 client's agreement to the arbitration provision in their agreement or permeated the entire
20 agreement, the issue of the client's consent to the arbitration provision will be decided
21 by the court and not by an arbitrator.

22 In *Mary Pickford Co., v Bayly Bros., Inc.*, (1939) 12 Cal. 2d 501, was a
23 securities fraud action brought by a client against a real estate promoter. The court held
24 that there can be no constructive fraud without a fiduciary relationship.

25 None of these cases support Mrs. Peykoff's contention, that Mr. Enright owed
26 her a fiduciary duty to disclose to her that the Residential Listing Agreement (Exhibit 2)
27 was still in effect when Mr. Enright and Mrs. Peykoff agreed to the Cancellation of Listing
28 form (Exhibit 74) which cancelled the Lease Listing Agreement (Exhibit 104) The facts

1 supporting Mr. Enright's belief, that Mrs. Peykoff wanted him to agree to the cancellation
2 of the Lease Listing Agreement (Exhibit 104) are set forth above.

3 None of these cases support Mrs. Peykoff's contention, that Mr. Enright owed
4 her fiduciary duties even after she terminated his agency by email on July 26, 2014.
5 (Exhibit 86) Mr. Enright's fiduciary duties to Mrs. Peykoff arose from his agency
6 relationship with her. When she terminated that agency relationship, Mrs. Peykoff also
7 terminated Mr. Enright's fiduciary duties to her, as set forth above.

8 **14. RELIANCE IS AN ELEMENT OF THE AFFIRMATIVE DEFENSE OF**
9 **BREACH OF FIDUCIARY DUTY, AND BY JULY, 2014, MRS. PEYKOFF NO LONGER**
10 **RELIED UPON MR. ENRIGHT.**

11 In *Estate of Gump* (1991) 1 Cal. App. 4th 582, a testamentary trustee
12 appealed a trial court's order disallowing the bulk of its requested compensation, on the
13 grounds that the trustee had committed negligent and intentional breaches of trust and
14 fiduciary duty, intentional misconduct constituting actual, constructive, and statutory fraud
15 against the beneficiaries, and the will provisions which precluded the trustee from
16 claiming extraordinary compensation in defending against beneficiaries' claims arising
17 from maladministration. The court found that the trustee had failed to disclose to the
18 beneficiaries its failure to enforce the terms of a lease. However, the trial court also found
19 that the beneficiaries stopped relying upon the trustee after they discovered
20 discrepancies in the rent statements. The California Supreme Court held that "reliance
21 and injury remain elements of this statutory fraud. We have found no case nor has any
22 been cited to us in which trustee misconduct has been found fraudulent in the absence
23 of some reliance by an injury to the beneficiary. ...We therefore conclude that in the
24 absence of any reliance by the beneficiaries, there is no substantial evidence supporting
25 the trial court's finding of actual, constructive or statutory fraud by the trustee during the
26 ninth and tenth accounts. Absent such fraud, the trial court abused its discretion in
27 denying the trustee compensation for services rendered which were unconnected with
28 the lease property." *Estate of Gump*, *ibid.*, pages 602-603.

1 In the case at bar, Mrs. Peykoff's unease with Mr. Enright began not later than
2 late May, 2014, when a commission dispute arose between Mr. Enright and Mrs.
3 Peykoff's son, which was discussed in Mrs. Peykoff's email to Mr. Enright on May 26,
4 2014 (Exhibit 103). Mrs. Peykoff testified at the Arbitration Hearing that it continued in
5 June, 2014, when Mr. Enright sent her a copy of a letter that he had received from the
6 attorney for Mrs. Peykoff's son which made accusations against Mr. Enright. It continued
7 to July 14, 2014, when Mrs. Peykoff asked Mr. Enright by email to agree to the
8 cancellation of the Lease Listing Agreement on the Property. (Exhibit 73, Enright 000018
9 bottom to Enright 00019 top) Mrs. Peykoff's unease with Mr. Enright continued when,
10 later that same day, she again asked him by email to agree to the cancellation of the
11 Lease Listing Agreement on the Property. (Exhibit 73, Enright 000018 top)

12 On July 17, 2014, Mrs. Peykoff sent Mr. Enright two emails in which she spoke
13 of how his emails were causing her stress. (Exhibit 76, Enright 000702, bottom and
14 Enright 000700, top)

15 Mrs. Peykoff's unease with Mr. Enright continued to July 21, 2014, when she
16 sent him an email asking him to agree to the cancellation of the Lease Listing
17 Agreements on the Port Westbourne and Port Margate properties. (Exhibit 78) Mrs.
18 Peykoff then assigned the task of communicating with Mr. Enright to her assistant, who
19 sent him two emails, on July 21, 2014, and again on July 25, 2014, asking Mr. Enright
20 to agree to the cancellation of the Lease Listing Agreements on the Port Westbourne and
21 Port Margate properties. (Exhibits 80 and 79).

22 Mrs. Peykoff's unease with Mr. Enright culminated in her email to him on July
23 26, 2014, in which she complained that he was causing her stress, and stated "Don, to
24 make myself perfectly clear. Regardless of your thoughts of reasons WHY, I am no
25 longer your client and you are no longer my realtor." (Exhibit 86)

26 Mr. Enright does not concede that Mrs. Peykoff had any reason to doubt him,
27 or experience stress because of their interactions. But clearly she did. And thus Mrs.
28 Peykoff was in the same situation as the beneficiaries in *Estate of Gump*, *ibid.*, who

1 believed that they had reason to doubt the accuracy of the accounting provided to them
2 by the trustee after the eighth accounting, and thus could not rely upon the accuracy of
3 the ninth and tenth accounts. Since Mrs. Peykoff believed that she could no longer rely
4 upon Mr. Enright, and since reliance is an element of a claim for breach of fiduciary duty,
5 Mrs. Peykoff cannot assert as an affirmative defense her allegation that Mr. Enright
6 breached fiduciary duties to her, either in connection with the submission of the
7 Cancellation of Listing form (Exhibit 74) in mid-July, 2014, or in connection with his failure
8 to disclose to Mrs. Peykoff in early September, 2014, that she was still contractually
9 obligated to pay him a commission under the Residential Listing Agreement (Exhibit 2).

10 **15. NOT EVERY BREACH OF DUTY BY A REAL ESTATE BROKER**
11 **RESULTS IN THE FORFEITURE OF HIS REAL ESTATE COMMISSION.**

12 Mrs. Peykoff has argued that Mr. Enright's failure to remind her that she was
13 still bound by the Residential Listing Agreement (Exhibit 2) compels the decision that Mr.
14 Enright has forfeited his right to his real estate commission upon the sale of the Property
15 during the Listing Period, or its withdrawal from sale during the Listing Period. Mr. Enright
16 disputes this characterization of Mr. Enright's duties to Mrs. Peykoff as one of her
17 judgment creditors. Moreover, this is not a correct statement of the law.

18 In *Ziswasser v. Cole & Cowan* (1985) 164 Cal. App. 3d 417 (a case cited by
19 Mrs. Peykoff), a broker who was representing the seller in the sale of his business loaned
20 his commission to the buyer, to enable the buyer to gather sufficient funds for the down
21 payment. The broker did not disclose this fact to the seller, but made no effort to conceal
22 this fact, and disclosed it to others involved in the transaction, such as the lender. About
23 a year after the buyer completed his purchase, he began having difficulty in paying the
24 monthly installments due the seller. The buyer eventually defaulted and sought
25 bankruptcy relief. The seller then learned that the broker had loaned his commission to
26 the buyer, alleging that he would not have sold his business to the buyer if the broker had
27 disclosed to the seller that the buyer needed the loan of the broker's commission to be
28 able to pay the down payment. The trial court entered judgment for the seller, but the

1 Sixth Appellate District reversed.

2 The Court acknowledged that the broker was a fiduciary to the seller during
3 the term of his agency, and owed him "the duty to make full and complete disclosure to
4 him of *all* material facts which the agent knows and which *might* influence the principal
5 with respect to the transaction and his willingness to enter into it." *Ziswasser*, *ibid.*, page
6 421.

7 However, the Court held that "not all breaches of fiduciary duty deprive a
8 broker of compensation. The failure to disclose appears to have been inadvertent in this
9 case. There was no attempt made by defendant to conceal the loan. ... We find that
10 these facts do not warrant forfeiture of the broker's commission." *Ziswasser*, *ibid*, page
11 425.

12 If it is determined that Mr. Enright breached any fiduciary duty owed to Mrs.
13 Peykoff in agreeing to the Cancellation of Listing form (Exhibit 74) for the Lease Listing
14 Agreement (Exhibit 104), that breach was inadvertent, because Mr. Enright construed
15 Mrs. Peykoff's request to pertain to the Lease Listing Agreement as discussed above.

16 If it is determined that Mr. Enright breached any fiduciary duty owed to Mrs.
17 Peykoff in failing to notify her of her contractual obligation to pay him a commission under
18 the Residential Listing Agreement (Exhibit 2), after she terminated their agency
19 relationship, that breach was inadvertent, because Mr. Enright believed that he was an
20 ordinary creditor and did not owe Mrs. Peykoff any fiduciary duties after she fired him.

21 These inadvertent breaches of fiduciary duty, if in fact they were breaches, do
22 not support the forfeiture of Mr. Enright's commission.

23 **16. MRS. PEYKOFF HAS NOT PROVED THAT THE DOCTRINE OF**
24 **EQUITABLE ESTOPPEL CONSTITUTES AN AFFIRMATIVE DEFENSE THAT**
25 **DEFEATS MR. ENRIGHT'S RIGHT TO RECOVER HIS REAL ESTATE COMMISSION.**

26 "Mere silence on the part of a party will not create an estoppel, unless he was
27 under some obligation to speak, and a party invoking such estoppel must show that it
28 was the duty of the other to speak, and that he has not only been induced to act by

1 reason of such silence, but that the other had reasonable cause to believe that he would
2 so act. ... The doctrine of estoppel is to be applied strictly and must be established in
3 every particular." *Born v. Koop* (1962) 200 Cal. App. 2d 519, 531.

4 For Mrs. Peykoff to prevail on her equitable estoppel affirmative defense, the
5 Arbitrator must find that Mr. Enright had a duty to inform Mrs. Peykoff that her contractual
6 obligations under the Residential Listing Agreement (Exhibit 2) continued after she
7 terminated his agency on July 26, 2014. In this respect, this affirmative defense is just
8 a variation on Mrs. Peykoff's affirmative defense of breach of fiduciary duty, which has
9 been discussed at length above.

10 After Mrs. Peykoff terminated Mr. Enright's agency, he did not owe her any
11 fiduciary duties. Accordingly, Mr. Enright is not equitably estopped from asserting his
12 claim for a real estate commission under the Residential Listing Agreement (Exhibit 2).

13 **17. MRS. PEYKOFF HAS NOT PROVED THAT THE DOCTRINE OF**
14 **WAIVER CONSTITUTES AN AFFIRMATIVE DEFENSE THAT DEFEATS MR.**
15 **ENRIGHT'S RIGHT TO RECOVER HIS REAL ESTATE COMMISSION.**

16 Mrs. Peykoff has alleged that Mr. Enright's conduct in presenting the
17 Cancellation of Listing form (Exhibit 74) to Mrs. Peykoff indicated that he consented to
18 the cancellation of all of his listing agreements on the Property, and therefore Mr. Enright
19 waived his right to enforce the Residential Listing Agreement. [Peykoff Brief, page 17,
20 lines 22-24]

21 In *DRG/Beverly Hills, Ltd., v. Chopstix Dim Sum Café & Takeout III, Ltd.*
22 (1994) 30 Cal. App. 4th 54, concerned a dispute between a commercial landlord and its
23 tenant over alleged waivers by the tenant of contingencies in the lease. The court
24 discussed the doctrines of waiver and estoppel, and their requirements, and
25 distinguished them.

26 "The terms 'waiver' and 'estoppel' are sometimes used indiscriminately. They
27 are two distinct and different doctrines that rest up different legal principles.

28 Waiver refers to an act, or the consequences of the act, of one side. Waiver
is the intentional relinquishment of a known right after full disclosure of the

1 facts and depends upon the intention of one party only. Waiver does not
2 require any act or conduct by the other party.

3 Estoppel is applicable where the conduct of one side has induced the other
4 to take such a position that it would be injured if the first should be permitted
5 to repudiate its acts. [citations]

6 Four elements must ordinarily be proved to establish an equitable estoppel:
7 (1) The party to be estopped must know the facts; (2) he must intend that his
8 conduct be acted upon, or he must so act that the party asserting the estoppel
9 had the right to believe that it was so intended; (3) the party asserting the
10 estoppel must be ignorant of the true state of facts; and (4) he must rely upon
11 the conduct to his injury. [citation]" *DRG/Beverly Hills, Ltd.*, *ibid.*, page 59

12 "Waiver always rests upon intent. Waiver is the intentional relinquishment of
13 a known right after knowledge of the facts. [citations] The burden, moreover,
14 is on the party claiming a waiver of a right to prove it by clear and convincing
15 evidence that does not leave the matter to speculation, and 'doubtful cases
16 will be decided against a waiver'". *DRG/Beverly Hills, Ltd.*, *ibid.*, page 61

17 Mrs. Peykoff has offered no evidence that Mr. Enright intentionally relinquished
18 his right to collect a real estate commission under the Residential Listing Agreement
19 (Exhibit 2). Mrs. Peykoff has not presented any evidence of any conduct by Mr. Enright
20 from which an intent to waive his claim for a commission under the Residential Listing
21 Agreement could be inferred.

22 In *Rubin v. L.A. Fed. Sav. & Loan Ass'n* (1984) 159 Cal App. 3d 292, the
23 owner of a property brought an action against the lender on the trust deed loan
24 encumbering the property to enjoin enforcement of the due on sale clause in the loan
25 documents. The property owner alleged that the lender had waived the due on sale
26 clause by failing to enforce it over a 17 year period in which there were three transfers
27 of the property, and by accepting payments from the property owner for almost four years
28 before taking steps to enforce the clause.

"Although waiver is frequently said to be the intentional relinquishment of a
known right, waiver may also result from conduct 'which, according to its
natural import, is so inconsistent with the intent to enforce the right in question
as to induce a reasonable belief that such right has been relinquished. ... We
observe first that the court's finding of waiver here was not only based solely
on Los Angeles Federal's failure to initiate foreclosure proceedings but also
on its acceptance of the monthly payments from Rubin as they became due
over a substantial period of time without any reservation of rights and with full
knowledge that the property had been transferred to Rubin in 1978." *Rubin*,
ibid., pages 298-299.

1 Mrs. Peykoff has failed to offer any evidence that Mr. Enright accepted any
2 benefits as the result of his non-assertion of his claim to a real estate commission under
3 the Residential Listing Agreement (Exhibit 2) during the period from mid-July, 2014,
4 through mid-September, 2014. Accordingly, Mrs. Peykoff has failed to offer any evidence
5 of any behavior by Mr. Enright from which his intentional relinquishment of a known right
6 could be inferred. In short, Mrs. Peykoff has failed to offer any evidence which could
7 sustain a finding that Mr. Enright had waived his right to a commission under the
8 Residential Purchase Agreement (Exhibit 2).

9 **18. MRS. PEYKOFF HAS NOT PROVED THAT THE DOCTRINE OF**
10 **UNILATERAL MISTAKE OF FACT DEFEATS MR. ENRIGHT'S RIGHT TO RECOVER**
11 **HIS REAL ESTATE COMMISSION.**

12 5. Unilateral Mistake of Fact, based upon the allegation that Mrs. Peykoff
13 mistakenly believed that the Cancellation of Listing form cancelled the Residential Listing
14 Agreement, Mr. Enright knew or had reason to know of Mrs. Peykoff's mistake of fact,
15 but failed to disclose to Mrs. Peykoff her mistake of fact in order to take advantage of her
16 mistake of fact. [Peykoff Brief, page 18, lines 13-25].

17 In *M.F. Kemper Constr. Co. v. Los Angeles* (1951) 37 Cal. 2d 696, a
18 construction company brought an action against a city to cancel a bid that it had
19 submitted on public construction work. The construction company had made an error in
20 its bid, omitting \$301,769, and as a result submitted a bid for \$780,305. The construction
21 company discovered its mistake several hours after the bids were opened and
22 immediately notified the city of its mistake. The bids of the other three contractors were
23 \$1,049,592, \$1,183,000, and \$1,278,985. The trial court cancelled the bid, and the
24 California Supreme Court affirmed.

25 "The evidence clearly supports the conclusion that it would be unconscionable
26 to hold the company to its bid at the mistaken figure. The city had knowledge
27 before the bid was accepted that the company had made a clerical error which
28 resulted in the omission of an item amounting to nearly one third on the
amount intended to be bid, and under all the circumstances, it appears that it
would be unjust and unfair to permit the city to take advantage of the
company's mistake." *M.F. Kemper Constr. Co. ibid*, page 702.

1 If, in fact, Mrs. Peykoff was mistaken in her belief that the Cancellation of
2 Listing form (Exhibit 74) to which Mr. Enright agreed also included the Residential Listing
3 Agreement (Exhibit 2), any such mistaken belief was not so obvious that it should have
4 been apparent to Mr. Enright. Mrs. Peykoff did not communicate any such mistaken
5 belief to Mr. Enright at any time before the commencement of this litigation.

6 Mrs. Peykoff is an experienced real estate investor, who if fully capable of
7 reading the Cancellation of Listing form (Exhibit 74) that was agreed to by Mr. Enright
8 and forwarded to her. She testified that she remembered reading the portions of the
9 Cancellation of Listing form that identified the Property, and the check mark by
10 Paragraph 4, which stated that "Principal owes no compensation to Broker." Mrs. Peykoff
11 would have the Arbitrator believe that she failed to read the second line, which identifies
12 the listing being cancelled as the Lease Listing, and the third line, which sets forth the
13 date of the listing being cancelled as June 1, 2014.

14 Mrs. Peykoff has failed to establish that she labored under any mistaken belief
15 regarding the scope of the Cancellation of Listing form, and has failed to establish that
16 it would be unjust and unfair to enforce the Residential Purchase Agreement against her.

17 **19. MRS. PEYKOFF HAS NOT PROVED THAT THE DOCTRINE OF A**
18 **PLAINTIFF'S DUTY TO MITIGATE HIS DAMAGES DEFEATS OR REDUCES THE**
19 **REAL ESTATE COMMISSION PAYABLE TO MR. ENRIGHT.**

20 Mrs. Peykoff alleges that Mr. Enright failed to mitigate his damages by
21 disclosing to Mrs. Peykoff that his Residential Listing Agreement (Exhibit 2) was still in
22 effect before Mrs. Peykoff entered into a contract for the sale of the Property which
23 obligated her to pay commissions to the other brokers. [Peykoff Brief, page 19, lines 6-
24 12].

25 This allegation ignores the fact that Mrs. Peykoff told Mr. Enright that she was
26 going to let the Property sit for a bit and then rent it out (Exhibit 44, Enright 000983,
27 middle); "its stale ... please take it off the market" (Exhibit 47); any lease would have to
28 be for 11 months so that the Property would be available for sale by July 1, 2015 (Exhibit

1 58); "I don't want it on the market at all" (Exhibit 68); "I will let the house sit and then
2 decide what to do" (Exhibit 73, Enright 000017, top); and "Hemley is not for lease or sale"
3 (Exhibit 73, Enright 00018 bottom to 000019 top). Mr. Enright had no indication that Mrs.
4 Peykoff intended to sell the Property so soon after terminating his agency. He testified
5 that he thought he still had months left on his Residential Listing Agreement (Exhibit 2)
6 for this "stale" property to "cool off", for Mrs. Peykoff to "cool off", for Mr. Enright to
7 resolve his commission dispute with Mrs. Peykoff's son; and for Mr. Enright to patch up
8 his relationship with Mrs. Peykoff.

9 In short, Mrs. Peykoff failed to prove that Mr. Enright acted unreasonably in not
10 sooner asserting his claim for a commission under the Residential Listing Agreement
11 (Exhibit 2).

12 **20. MRS. PEYKOFF HAS NOT PROVED THAT THE DOCTRINE OF**
13 **UNCLEAN HANDS DEFEATS MR. ENRIGHT'S RIGHT TO COVER HIS REAL ESTATE**
14 **COMMISSION.**

15 Mrs. Peykoff's affirmative defense of unclean hands is just another variation
16 on her affirmative defense of breach of fiduciary duty. For the Arbitrator to find that Mr.
17 Enright's claim to a commission under the Residential Listing Agreement (Exhibit 2) is
18 barred by the doctrine of unclean hands, he must find that Mr. Enright knowingly
19 breached some fiduciary duty owed to Mrs. Peykoff.

20 In *Samuelson v. Ingraham* (1969) 272 Cal. App. 2d 804, Samuelson recorded
21 deeds purporting to transfer two parcels of real property to a third person for the purpose
22 of defrauding his creditors. An assignee of one of Samuelson's creditors filed suit to have
23 the transfers set aside. That action was assigned to Ingraham. Ingraham prevailed, and
24 the third party conveyed the two parcels to Ingraham. Ingraham then spent considerable
25 sums to repair the houses and pay past and current real property taxes. Ten years later,
26 Samuelson sued to quiet title. Judgment was entered for Ingraham, and First Appellate
27 District affirmed. "It is an undisputed equitable principle that those who seek the aid of
28 equity must sue in good faith. [citation] Any unconscionable conduct which relates to the

1 transaction may give rise to the defense of unclean hands and bar relief." *Samuelson*,
2 *ibid.*, page 807.

3 In *Aguayo v. Amaro* (2013) 213 Cal. App. 4th 1102, the plaintiff sued to quiet
4 title to real property under adverse possession. Judgment was entered for the defendant,
5 and affirmed by the Second Appellate District. The plaintiff had recorded a quitclaim
6 deed which purported to transfer the property from "Jesus Duran" to Jesus Aguayo and
7 Sofia Aguayo. "Jesus Duran" was the first and middle names of Jesus Aguayo. This
8 quitclaim deed was a wild deed, outside the chain of title. However, because of its
9 recordation, the County Tax Collector sent the real property tax bills to the plaintiff, which
10 she paid for six years before bringing the action to quiet title. The court held that the
11 plaintiff's recordation of the wild deed for the purpose of diverting the real property tax
12 bills to her for payment was the act which was the basis of the unclean hands defense.
13 "Not al wrongful conduct constitutes unclean hands. Only if the conduct is directly related
14 to the cause at issue can a defendant invoke the doctrine." *Aguayo*, *ibid.*, page 1110.

15 Since Mrs. Peykoff has not established that Mr. Enright breached an fiduciary
16 duty owed to her, she has not established that Mr. Enright engaged in any
17 unconscionable conduct which would bar his claim for a commission under the
18 Residential Listing Agreement (Exhibit 2).

19 **Conclusion**

20 On February 1,2014, Mrs. Peykoff entered into a Residential Listing
21 Agreement (Exclusive Authorization and Right to Sell) (Exhibit 2), under which she
22 agreed to pay Mr. Enright a real estate commission equal to 4.5 percent of the listing
23 price, or 4.5 percent of the selling price, under stated circumstances. Those
24 circumstances included any sale of the Property, by Mr. Enright or anyone else, during
25 the Listing Period, or the removal of the Property from the market during the Listing
26 Period.

27 Mrs. Peykoff both removed the Property from the market, and later sold the
28 Property, during the Listing Period. She sold the Property on October 31, 2014, for

1 \$2,160,000. Under the Residential Listing Agreement, she owes Mr. Enright a
2 commission of \$97,200.

3 Since that amount was liquidated as of October 31, 2014, Mrs. Peykoff also
4 owes Mr. Enright interest at the rate of ten percent, or \$26.63 per day, starting on
5 November 1, 2014.

6 Since Mr. Enright's services were performed at the request of Mrs. Peykoff,
7 and since she agreed that the reasonable value of those services was 4.5 percent of the
8 sales price of the Property, Mr. Enright has also proved up his claim for quantum meruit
9 for \$97,200.

10 Mrs. Peykoff had an absolute right to terminate Mr. Enright's agency on July
11 26, 2014. The termination of his agency terminated Mr. Enright's fiduciary duties to Mrs.
12 Peykoff. It did not terminate Mrs. Peykoff's contractual obligation to pay Mr. Enright a real
13 estate commission under the Residential Listing Agreement (Exhibit 2).

14 Mrs. Peykoff alleged a number of affirmative defenses, on which she had the
15 burden of proof. She failed to sustain her burdens of proof on each of the affirmative
16 defenses. Accordingly, there is no bar to the Arbitrator awarding Mr. Enright the relief to
17 which he is entitled, the real estate commission due him under the Residential Listing
18 Agreement (Exhibit 2), of \$97,200.,00

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

21 Dated: August 27, 2015

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23 Andrew W. Couch, Attorney for
24 Plaintiff Donald Enright
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**EXHIBIT 1
PERTINENT EMAILS BETWEEN
MRS. PEYKOFF AND MR. ENRIGHT**

Email dated 5/13/2014 4:23:39 P.M., from diane@niagarawater.com to DonEnrightBroker@aol.com., subject Furniture Hemley: "Don, I'm paying may lease now thought maybe I wouldn't need to Do you think I should empty it Maybe just lease? Thanks" (Exhibit 40)

Email dated 5/13/2014 4:45:41 P.M., from DonEnrightBroker@aol.com to diane@niagarawater.com, subject: Furniture Hemley: "As we agreed I reported it as back- up this morning In the meantime Jim Kline said he is writing an offer and will either have it or not in two days (or sooner) (Buyer is traveling) As to the lease - I have a good family on hold (\$750,000 income 755 FICO) that will rent it as of June 1st for \$11,000 per month - But that might just have been bluster to get my attention. But they are definitely for real as I have already checked them out You have all the latest information Your call Don" (Exhibit 41)

Email dated 5/19/2014, 11:05 AM, diane@niagarawater.com" Don it doesn't show pending its not on the list that Alex is still getting ... (I don't get any drips) it will be most interesting if the one on port Cardiff sells quickly since its not as good as Hemley. (not new) I haven't seen it except online. thanks" (Exhibit 43)

Email dated 5/19/2014 12:58:48 P.M., from DonEnrightBroker@aol.com, to diane@niagarawater.com, subject: hemley: "I reported it as 'contingent' to generate another offer or two if I put it in 'pending' that means we're ready to close and we don't want to talk to anybody else" (Exhibit 32, middle)

Email dated 5/22/2014 12:24:02 A.M. from diane@niagarawater.com: "Well it didn't sell in six months There's another model like it for 2.295 but not as new so it shouldn't sell either The big exp ones are selling I want the cash but will set it sit a bit then rent it I guess" (Exhibit 44, Enright 000983, middle)

Email dated 5/22/2014, 12:32 AM from DonEnrightBroker@aol.com: "Do you want me to put it back on at a lower price or withdraw it and reset the days on the market clock (after 91 days) or pull in a heavy tenant \$8500-\$9,000 Many choices - hate to just do nothing" (Exhibit 44, middle)

Email dated 5/22/2014 12:37:16 A.M, from diane@niagarawater.com: "I thought its already withdrawn. It doesn't show on the MLS list that Alex gets Diane Peykoff" (Exhibit 44, top)

Email dated 5/25/2014, 7:43:57 P.M., from diane@niagarawater.com to DonEnrightBroker@aol.com, subject port hemley: "Don The house has been on the market for almost 7 months (June 6) Its stale ... nothing is for sale that long in the port streets any time in the last year that I am aware of Please take if off the market, release any contract we may have to sell it and remove the sign. If you have a tenant I would like to hear the offer of course. However, I will be out of town for 3 weeks starting on Friday. [¶] I will have the stager's remove the furniture asap and I won't need to pay \$1400 for June. Sorry you worked so long on this one and ended up with nothing, but I guess that's the way it goes sometimes, some are easy some are difficult. I am disappointed too but what can I say, the price was reduced several times equal to approx \$200K with no luck Thanks Diane" (Exhibit 47)

Email dated 5/25/2014, 11:59:15 P.M., from DonEnrightBroker@aol.com., to

1 diane@niagarawater.com: "Ok I have begun the process and will finish it in the next 48
2 hours but just two questions what exactly is happening Diane? What the specific mention
of a 'contract' since we have never gone to that issue? Don" (Exhibit 102)

3 Email dated 5/26/2014, 6:32:45 A.M., from diane@niagarawater.com: "Don The reason
4 I mention a contract is I have no idea what I have signed as I just go with the 'flow' on all
5 this stuff I have to get more organized with our without help (assistant) As far as anything
6 happening nothing is happening except I am having trouble with thinking about my realtor
7 friend suing my son. Regardless of the reason I think you would have a tough time
8 digesting the fact I wanted to sue Stephanie which I would never do anyway. ¶ Andy
9 doesn't tell me since he doesn't want to worry or upset me so I have to hear it in a
"around and about way' You and I already discussed your feelings regarding 1413 and
port Nelson more than once. He contacted you about seeing something in cabo last
month for ten million but you wanted nothing to do with it and that's fine. I understand.
We have to make our own choices in life and live with the results of them. I've preached
this for years ... I'm not upset or angry Don I can't let myself be I'm just disappointed. I'll
be home later tonight For a few days anyway Thanks Diane" (Exhibit 103)

10 Email dated 6/11/2014, 10:31:32 P.M., from diane@niagarawater.com to
11 DonEnrightBroker@aol.com: "Ciao, Don She sounds good As long as she doesn't
12 become a nuisance like 82 or 24 The house isn't brand new as one might think. I don't
13 know what the hold up is. The air cond shouldn't take that long Decent blinds should go
up pretty fast too. Not custom as they take up to three months Whoever takes it needs
to do so ASAP or get an 11 mo lease I don't want it unavailable next July 1 it needs to
be for sale by then Thanks Don Diane" (Exhibit 58)

14 Email dated 6/16/2014, 8:51:37 A.M., from diane@niagarawater.com: "Hi Don How's it
15 going? Have you heard anything about eBay lately? If they want to rent it at the summer
16 rate that's fine but I'm selling it sept 1 What's the next available condo in Irvine avail? 59?
Probably Did you sign up the tenant on hemley? Will talk to you Thursday Thanks"
(Exhibit 61, Enright 000852, bottom)

17 Email dated 6/16/2014 3:19:35 P.M., from diane@niagarawater.com to
18 DonEnrightBroker@aol.com: "When is margate moving out what's the closing \$ amount
19 Also rams gate moving date I'm not tearing down that house I've decided If Henley is not
leased by 7/1 please take it off every site its stale Thanks" (Exhibit 61, Enright 000851,
top)

20 Email dated 7/3/2014, 5:36:54 P.M., from diane@niagarawater.com to
21 DonEnrightBroker@aol.com, as it pertains to the Property: "Don I wanted you to know
22 I took the sign down on Hemley is on the right side of the house. I don't want it on the
23 market at all. If this guy takes it from Ireland ok, if not, then we forget it I guess he wants
it perfect, so alex is waiting for two more window coverings? I think they are done now."
(Exhibit 68)

24 Email dated 7/10/2014, 4:08:33 P.M. from diane@niagarawater.com to
25 DonEnrightBroker@aol.com: "Don Whats the follow up on henley and the guy in
Ireland?" (Exhibit 73, Enright 000015)

26 Email dated 7/10/2014, 6:08:39 P.M. from diane@niagarawater.com to
27 DonEnrightBroker@aol.com, subject: hemley: "Ok thanks If they have not signed lease
28 with CC first last and I thought you said 2 extra months rent? No later than July 14, forget
about them. I will let the house sit and then decide what to do" (Exhibit 73, Enright
000017, top)

1 Email dated 7/14/2014, 9:00 A.M., from diane@niagarawater.com: "I'm not buying
2 anything else at this time I'll inform Kenny As for rents Time is being lost as this is move
3 in month for school Hemley is not for lease or sell as we discussed previously Do I need
4 to send you a letter of cancellation? I don't know the protocol on this Margate and port
5 westbourne was the rents you suggested I never knew until now that you didn't have
westbourne leased at \$7450 as discussed I lost no rents and had \$3500 'free money'
Remember? So forget Hemley and try to rent the other two if you can. You've never had
trouble doing so in the past so I don't know what's happening here with the rentals
Thanks Diane" (Exhibit 73, Enright 000018 bottom to Enright 000019 top)

6 Email dated 7/14/2014 4:05:06 P.M., from diane@niagarawater.com to
7 DonEnrightBroker@aol.com: "Well ... we've been in that price range for years now I
8 assume you were always through on your investigation but was also quick to lease a
9 property especially in the port streets. I am thinking if there are no applicants to consider
10 by this weekend, I will have open house on a Saturday and lease it out by owner. I use
11 to do this all the time, years ago, I just have to get the fica scores and check the past and
12 of course the job etc. You didn't answer my question about how I cancel the listing on
port Hemley." (Exhibit 73, Enright 00018, top)

13 Email dated 7/14/2014 4:25 PM, from DonEnrightBroker@aol.com to
14 diane@niagarawater.com: "Please find attached the proper form to sign and return to me
15 for my counter signature and delivery back to you. Don" (Exhibit 105, Peykoff 000017,
16 top)

17 Email dated 7/15/2014 11:23 AM, from diane@niagarawater.com to
18 DonEnrightBroker@aol.com: "Hi Don Please sign and send back to me for my Hemley
19 file Thanks Diane" (Exhibit 106, Enright 000717, bottom)

20 Email dated 7/17/2014 9:49:38 A.M., from diane@niagarawater.com: "Its not me Don Its
21 your change of 'something' attitude, response, maybe you have family issues of your
22 own, and I'm sorry if that's the case ... hopefully not. I have asked you three times about
23 westbourne vacating and this is now my final answer I guess. I also asked if he was
24 responsible for rents until it is leased with NO response. I have asked you twice about
25 Toby with ZERO response. that's fine, but not like you either ¶ You know I am leased
26 up on all properties and am no longer buying anything. So I guess I understand. You had
27 a tough time with Hemley no matter what I did to satisfy you and what it might still need
28 ... staging, air condition, repaint the color after being painted once, I think when I gave
up on you doing anything with it after 9 months your attitude changed. That's ok, you had
a lot of hours invested but I have over 2 million invested or close to it. I bout that house
on Ramsgate sight unseen and I think it was a mistake. Not your fault, but I should have
been more aggressive and it's the old story 'everyone wants it' so it must be good.
Location is great, house is unrepairable. I will overcome it, I just have no more money for
investments. No hard feelings Don, its all good. Thanks Diane" (Exhibit 76, Enright
000702, bottom)

29 Email dated 7/17/2014 11:18:01 A.M., from diane@niagarawater.com to
30 DonEnrightBroker@aol.com, subject: westbourne: "Don Some of this is not true or
31 exaggerated. Its too stressful for me As for Toby, no, the last I heard was he was in LV
32 but you didn't know yet if Kathe wanted him, you were going there for a visit. No, I didn't
33 ask for him back ... that's up to you if you want him or not, it's been a while now. If we are
34 going to give hemley a rest, of course it doesn't need a sign on it. If you have a buyer for
35 it, then bring the written offer. Have I ever NOT paid you anything I owed? There is no
36 way ramsgate can go with 'minor repairs' ask Alex. As for 234, I only looked at comps
37 that equal the house, not as a rental with no improvements in ten years if you are talking
38 about 238 with less square footage. Your buyer there wants it for 3.1 a year from now

1 Really? I'm surprised you brought me that offer. Unless your tenant wants to rent it again
2 for August (and I have to know asap) it is not for sale at 3.4. They can go find one equal
3 or better for less if that's the case. The relationship changed when you last left for LV and
4 returned with extra papers for me to sign since you were concerned about the
5 commissioner? Like I said, its all good, I don't like arguing so please stop sending me
6 angry emails. I have am not 'saying anything about you' it sounds more like you are
7 attacking me like a bulldog. Its totally unnecessary. Thanks Don Diane" (Exhibit 76,
8 Enright 00700 top)

9 Email dated 7/21/2014, 5:37:56 P.M., from diane@niagarawater.com to
10 DonEnrightBroker@aol.com, subject Rentals westbourne and margate: "Don Please
11 cancel the listing for lease on the above two homes Please send me the signed releases
12 Thank you Diane" (Exhibit 78)

13 Email dated 7/21/2014, 1:38:17 P.M., from peykoffassistant@zoho.com to
14 DonEnrightBroker@aol.com, subject Lease Agreement Cancellation: "Hi Don, I am the
15 Peykoff's Personal Assistant. I started working with them a few weeks ago. I have been
16 asked to please follow up on the Lease Agreement cancellations for Port Margate and
17 Port Westbourne. Please let me know when to expect it. You can send them to me if that
18 makes it easier. Thank you so much! Paola Assistant to V. Diane Peykoff" (Exhibit 80)

19 Email dated 7/21/2014 2:18:27 P.M., from peykoffassistant@zoho.com to
20 DonEnrightBroker@aol.com: Hi Don, I just talked to Diane, she is busy planning to go
21 out of town and I am helping her with all her emails. ¶ She has informed me that she no
22 longer has a contract with you on this property and that the property is no longer for
23 lease. ¶ Diane is not available for the next few weeks, Please contact me if I can be of
24 any service. Thank you! Paola Assistant to V. Diane Peykoff" (Exhibit 79)

25 Email dated 7/25/2014 10:14:05 A.M., from peykoffassistant@zoho.com, to
26 DonEnrightBroker@aol.com, subject: Port Margate Lease Offer: "Hi Don, Happy Friday!
27 I have not yet received our cancellation on the properties requested (Port Margate and
28 Port Westbourne) and as well as the missing page 1 and 6 of the lease for Port Abbey.
I am surprised since we requested it three times. Please send them as soon as you can.
Diane has been asking about them. ¶ Diane has informed me that you have sent her an
offer for Margate. She is stating that she will take your current offer with three months
rent in advance plus double security deposit due to the lower scores on their credit
report, lack of complete income forms (no company names on the pay stubs) and with
having 2 cats since we all know Cats can be 'destructive' as least as much as dogs and
there are two of them. Cat smells are quite lingering as well. She also needs a letter of
explanation as to why their credit is to bad. Let me know what the tenants decide. ¶
Again, Diane is traveling and all correspondence from her will come through me.
Sincerely, Paola Montenegro, Assistant to Peykoffs" (Exhibit 85)

29 Email dated 7/26/2014, 4:45:25 P.M., from diane@niagarawater.com to
30 DonEnrightBroker@aol.com, subject: Previous Emails and Requests: "Don It seems you
31 are purposely ignoring my request to direct your emails to my assistant at
32 peykoffassistant@zoho.com. I find this very frustrating as I am unavailable. DON,
33 PLEASE RESPOND TO PAOLA and her request as they come from me. ¶ AFTER THE
34 LAST LONG EMAIL WHICH CAUSED ME MUCH STRESS, I realized as the CLIENT
35 this was a most unusual email ... I can't imagine sending anything like this to a customer
36 of long standing. I cannot do business this way, so yes, I am no longer going to do
37 business with you. I realize that my tenants are seen as your tenants... I realize this after
38 you requested a two year extension on 161 Roadrunner which is not close to renewal.
¶ Almost a week ago I signed and sent you back the paperwork to cancel the leases on
port margate and port westbourne. (the one have an additional 11 months rent

1 commission on AFTER you agree in the lease to let them out of the lease for \$3500.)
2 You have not yet signed and returned both to me, you just have my signature. Paola has
3 requested this paperwork at least 3 or 4 times. Please sign and send the request ASAP
4 via email to peykoffassistant@zoho.com. ¶ Don To make myself perfectly clear.
5 Regardless of your thoughts of reasons WHY, I am no longer your client and you are no
6 longer my realtor. This has nothing to do with my 'son' as you indicated in your email
7 including letters that were not my concern. He can handle his own business and I am not
8 involved. I told you this months ago when I also said ... I would never 'sue' your daughter
9 (sorry if that was the wrong word on my part) and that I would not do so regardless of
10 what I disagreed about with her. Life is too short. ¶ AGAIN, please send the requested
11 documents to Paola and please do not send me any additional applications to lease or
12 purchase. I have no homes on the MLS at this time. Please take the vacant homes for
13 lease off the MLS if you have put them there. I haven't checked. Thank you Diane"
14 (Exhibit 86)

15 Email dated 7/31/2014, 5:52:40 P.M., from diane@niagarawater.com to
16 DonEnrightBroker@aol.com, subject: cancellations: "Don, For the 5-6th time please
17 email the cancellations on port westbourne and port margate. Please remove any listings
18 you have on any website. Your cooperation is greatly appreciated. Diane: (Exhibit 88)

19 Email dated 8/1/2014 4:37:53 P.M., from DonEnrightBroker@aol.com to
20 diane@niagarawater.com, transmitting the Cancellation of Listing forms for the Lease
21 Listing agreements on Port Margate and Port Westbourne.(Exhibit 90)

22 Email dated 8/5/2014 12:21:21 P.M., from peykoffassistant@zoho.com, to
23 DonEnrightBroker@aol.com, subject: Cancellation for all Leases: "Hi Don, Diane has
24 asked me to email you and ask you to please send cancellation of all lease/listing
25 agreements for the following properties asap: Cape Andover, Emerald Bay, All
26 Gingerwoods: 23, 28, 59, 82, Lonetree, Port Abbey, Port Taggart, All Roadrunner's : 143
27 and 161, Villa Point, and any other active lease/listing agreements you have with her that
28 have not been mentioned in this email. Thank you for your cooperation. Paola Assistant
to V. Diane Peykoff" (Exhibit 91)

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 28, 2015, I served the foregoing document described as follows:
8 POST-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 octrallaw@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 28, 2015, at Newport Beach,
California.

Andrew W. Couch