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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PAMELA McDONALD and KANYA COLEMAN,

Plaintiffs,

v.

COLDWELL BANKER REAL ESTATE CORPORATION, FIRST SHASTA REALTY; THOMAS GALLAGHER; RICHARD MATTIOLI; and DOES ONE THROUGH FIFTY,

Defendants.

Case No. C03-3598 JL

DEFENDANT COLDWELL BANKER REAL ESTATE CORP.'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES; DECLARATION OF JOHN A. SCHWIMMER

Date: August 3, 2005
Time: 9:30 a.m.
Place: Courtroom F

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INTRODUCTION

From the beginning of this lawsuit, Plaintiffs Pamela McDonald ("McDonald") and Kanya Coleman ("Coleman") (collectively "Plaintiffs") have asserted that defendant Coldwell Banker Real Estate Corp ("CBRE") is vicariously liable because defendants First Shasta Realty ("First Shasta"), Thomas Gallagher ("Gallagher"), and Richard Mattioli ("Mattioli") (collectively the "First Shasta Defendants") were the agents of CBRE. Plaintiffs' counsel expressly stated in open court that Plaintiffs were not pursuing any theory of "apparent agency."[1]

Yet, in their opposition to this motion for summary judgment, Plaintiffs purport to raise for the very first time, after the discovery cutoff has already passed, a theory of liability against CBRE based on "ostensible agency." Plaintiffs now claim that, even if the First Shasta Defendants were not in fact agents of CBRE, CBRE is still liable because Plaintiffs were led to believe that the First Shasta Defendants had authority to act on behalf of CBRE. Plaintiffs may not raise this theory for the first time in opposition to summary judgment at this late stage of the lawsuit (which is nearly two years old), particularly in view of the substantial prejudice to CBRE. Therefore, this court must disregard Plaintiffs' purported evidence and arguments based on a theory of ostensible authority. Moreover, even if this court considers this theory, Plaintiffs have not demonstrated a genuine issue of disputed fact, as this newly asserted theory conflicts with McDonald's sworn deposition testimony.

With respect to the theory of actual agency that Plaintiffs did plead, Plaintiffs' opposition ignores the plethora of cases cited by CBRE holding that there is no agency or vicarious liability for a franchisor in CBRE's position. Plaintiffs mention several requirements in the franchise relationship between CBRE and First Shasta, but they do

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[1] "Apparent agency" is another term for ostensible agency or authority. *See Mejia v. Community Hospital of San Bernardino,* 99 Cal. App. 4th 1448, 1453 (2002).

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not cite any authorities that hold such requirements are sufficient to give rise to vicarious liability. The franchise relationship undisputedly does not give CBRE control over the means and manner by which First Shasta conducts its day-to-day activities. Numerous cases cited in the moving papers hold that relationships with the very same features identified by Plaintiffs do not give rise to an agency relationship or vicarious liability and that summary judgment in favor of the franchisor is appropriate. This court should come to the same conclusion here and grant CBRE's motion for summary judgment.

I. PLAINTIFFS HAVE NOT RAISED ANY GENUINE ISSUE OF DISPUTED FACT THAT THE FIRST SHASTA DEFENDANTS WERE THE AGENTS OF CBRE

In their opposition, Plaintiffs identify several requirements imposed by CBRE in the franchise relationship, but fail to explain how these requirements amount to control over First Shasta's daily activities sufficient to impose vicarious liability under the applicable authorities. *See Cislaw v. Southland Corp.,* 4 Cal. App. 4th 1284, 1292 (1992) ("It is the right to control the means and manner in which a result is achieved that is significant in determining whether a principal-agency relationship exists."); *see also Kaplan v. Coldwell Banker Residential Affiliates, Inc.,* 59 Cal. App. 4th 741, 745-46 (1997) (emphasis added) ("A true principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business.") Plaintiffs also do not even attempt to demonstrate how any of the requirements they cite gave CBRE control over the "instrumentality" that caused Plaintiffs' alleged harm. *See Kerl v. Dennis Rasmussen, Inc.,* 273 Wis. 2d 106, 682 N.W. 2d 328, 341 (2004).

Indeed, numerous cases have held that the types of contract provisions cited by Plaintiffs are insufficient to overcome summary judgment on the issue of vicarious

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liability. For example, Plaintiffs quote extensively provisions from the Coldwell Banker Policy and Procedures Manual ("Policy Manual") that set forth standards for "office appearance." Such provisions are clearly intended to protect the goodwill of the "Coldwell Banker" marks that are to be used in association with those offices. For that reason, numerous decisions have granted summary judgment in favor of the franchisor even where the franchisee was required to comply with a policy manual and the franchise agreements imposed appearance standards. *See Cislaw, supra; Miller v. Piedmont Steam Co., Inc.,* 137 N.C. App. 520 (2000).[2]

Several of the Policy Manual provisions cited by Plaintiffs demonstrate that it is First Shasta, not CBRE, who controls First Shasta's day-to-day operations. For example, CBRE requires that First Shasta maintain full-time supervisors to oversee the operations of the office. These full-time supervisors are First Shasta employees and they are the ones, not CBRE, who oversee and supervise First Shasta's own day-to-day activities. (*See* Mattioli Decl., filed with moving papers, ¶¶ 6, 9, 11 and 12; First Shasta Office Manual, Exhibit C to moving papers.)[3] Notably, Plaintiffs have not proffered any evidence to dispute the declaration testimony of Mattioli, the owner of First Shasta, that he (not CBRE) supervises the daily operations of First Shasta and that CBRE does not control (a) how First Shasta decides to select clients, (b) the nature and substance of

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[2] Indeed, if Plaintiffs' argument were accepted that the obligation to comply with a policy manual gives rise to an agency relationship (Opposition, 6:9-12, 15:15-16; 17:6-8), then virtually all franchises would be agency relationships. There is no authority to support this proposition and copious authority to the contrary.

[3] Plaintiffs misstate that the Policy Manual dictates First Shasta's operating hours. There is no such provision in the Policy Manual. In any event, the Court of Appeal granted summary judgment in *Cislaw*, finding that there was no agency relationship, even though the franchise agreement at issue dictated the franchisee's operating hours. *See also Miller, supra; Coty v. U.S. Slicing Machine Co.,* 58 Ill. App. 3d 237 (1978). Moreover, operating hours have nothing to do with the alleged discriminatory acts at issue here and are not a sufficient basis to give rise to vicarious liability.

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communications between First Shasta and its clients, (c) the manner in which First Shasta chooses to communicate offers to purchase real estate, or (d) which homes First Shasta agents choose to show to its buyer clients. (Mattioli Decl., ¶¶ 6, 11.) These are the types of activities of which Plaintiffs complain, and the evidence is undisputed that CBRE has no control over them.

The other provisions in the Policy Manual cited by Plaintiffs clearly relate to protecting CBRE's goodwill in its marks and business and do not give rise to vicarious liability. *Cislaw,* 4 Cal. App. 4th at 1295. For example, CBRE's ability to control the location where its marks will be used and who will be the individual responsible to CBRE for implementing the franchise agreements (*i.e.,* "manager") goes to the heart of the franchise relationship. Such provisions do not mean that CBRE controls either the daily activities of First Shasta or the means and manner by which First Shasta conducts its daily business. *See McLaughlin v. Chicken Delight, Inc.,* 164 Conn. 317, 321 A.2d 456 (Sup. Ct. 1973) (summary judgment granted that franchisor had no vicarious liability even though franchise agreement limited location where franchise could operate); *Folsom v. Burger King Corp.,* 135 Wn. 2d 658, 958 P.2d 301 (Sup. Ct. 1998) (same); *McGuire v. Radisson Hotels, Int'l, Inc.,* 209 Ga. App. 740, 435 S.E. 2d 51 (1993) (right of franchisor to approve franchisee's manager does not give rise to vicarious liability); *Perry v. Burger King Corp.,* 924 F. Supp. 548 (S.D. N.Y. 1996) (same).[4]

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[4]Plaintiffs contend that CBRE prevents First Shasta from engaging in any activity with respect to commercial or industrial properties. That is not true. CBRE simply limits the types of activities in which First Shasta may engage with the use of the "Coldwell Banker" trademark. Indeed, the franchise agreement expressly provides that the First Shasta Defendants may engage in other businesses, including commercial or industrial real estate activities, so long as such business activities are conducted entirely separate from the "Coldwell Banker" franchise. *See* Franchise Agreements, Ex. A to moving papers, ¶ 6.6.

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The provisions cited by Plaintiffs requiring First Shasta to maintain books and records and pay a percentage of its revenues as royalties or advertising fees are basic, fundamental elements of a franchise relationship. Numerous cases hold that these type of provisions do not give rise to an agency relationship or vicarious liability. *See Cislaw, supra; Kaplan, supra; Kerl, supra; Miller, supra.*

Plaintiffs cite several "systems" described in the Policy Manual. (Opposition, 17:9-15.) But as the Policy Manual plainly reflects, those "systems" are simply tools made available to the franchisees to help them achieve success. None of the systems are mandatory, and Plaintiffs have not identified anything about them that constitutes control by CBRE over First Shasta's day-to-day activities.[5]

Plaintiffs cite CBRE's requirement that First Shasta purchase and maintain specified levels of insurance. Again, numerous cases hold that these types of insurance provisions do not give rise to an agency relationship or vicarious liability. *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 279-80 (Ct. App. N.C. 1987); *see also Miller, supra* ("We note that no agency relationship arises when one party requires another to maintain liability insurance."); *Kerl, supra.* Plaintiffs' false contention that the franchise agreement is terminable at will is unsupported by any evidence and is directly contrary to the express terms of the agreement. (*See* Ex. A to moving papers, ¶¶ 13.1-13.3.)

In sum, Plaintiffs have simply listed a number of miscellaneous provisions in the Policy Manual to try to contrive an issue of fact with respect to the issue of agency. Plaintiffs have failed to make any showing that these provisions amount to control by CBRE over First Shasta's day-to-day activities or give CBRE the ability to control the

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[5] None of the text on the pages in the Policy Manual cited by Plaintiffs is in bold type. (*See* Ex. A to Grigg Decl., 2-5/2-13.) As explained at the beginning of the Policy Manual, mandatory provisions that constitute "system standards" are in bold type. (*See* Ex. A to Grigg Decl., p. 1-2.)

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instrumentality of the alleged misconduct by the First Shasta Defendants. Indeed, Plaintiffs have not even attempted to distinguish the Georgia Court of Appeal's decision directing that summary judgment be granted that CBRE was not liable for the alleged discriminatory conduct of its franchisee. *Coldwell Banker Real Estate Corp. v. DeGraft-Hanson,* 166 Ga. App. 23, 596 S.E. 2d 408 (2004).

Plaintiffs do not cite any authority to support their naked contention that these provisions give rise to an agency relationship or vicarious liability. In contrast, CBRE has cited numerous authorities holding that summary judgment is appropriate even in the face of such provisions. This court should grant CBRE's motion for summary judgment.

II. PLAINTIFFS MAY NOT AVOID SUMMARY JUDGMENT BY NOW ARGUING THAT THE FIRST SHASTA DEFENDANTS HAD OSTENSIBLE AUTHORITY TO ACT FOR CBRE

A. Plaintiffs Cannot Assert New Legal Theories and Facts Not Previously Raised to Try to Avoid Summary Judgment.

In their opposition, Plaintiffs argue that the First Shasta Defendants had "ostensible authority" to act for CBRE and, therefore, CBRE is liable for any alleged discriminatory acts of the First Shasta Defendants. This theory of ostensible authority has never before been pleaded or raised in this lawsuit. Plaintiffs are not permitted to raise that theory now to try to defeat summary judgment.

Plaintiffs' complaint had scant allegations against CBRE. Plaintiffs alleged merely that First Shasta "is engaged in the business of transacting real estate with or on behalf of Coldwell Banker" and that Gallagher and Mattioli each was "a real estate broker and/or agent with co-defendants Coldwell Banker and First Shasta Realty." (Complaint ¶¶ 2-4.) The only other allegation against CBRE was a boilerplate allegation

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that all of the defendants actually were agents of one another. (Complaint, ¶ 5.) The complaint contains no allegation that CBRE did anything that led Plaintiffs to believe that the First Shasta Defendants had the authority to act on behalf of CBRE or any other element of a claim based on ostensible authority. *See Kaplan, supra,* 59 Cal. App. 4th at 747 (claim based on ostensible authority has three elements: (1) plaintiff reasonably believed in the purported agent's authority, (2) this belief was generated by some act or neglect of the principal sought to be charged, and (3) plaintiff was not guilty of negligence in relying on the agent's apparent authority).

Because the allegations in the complaint against CBRE were so scant, CBRE served interrogatories asking Plaintiffs to state all facts that supported their contentions that CBRE had engaged in any misconduct or had any liability for the alleged misconduct of the First Shasta Defendants. (*See* Exhibit D to moving papers.) In response, Plaintiffs described the alleged events involving the First Shasta Defendants that they contend constitute discrimination. The only mention of the basis for CBRE's alleged liability was the contention that the responses were given "assuming CBRE includes its agents and Franchisee First Shasta Realty, Thomas Gallagher and Richard Mattioli." (*See* Exhibit D to moving papers, 2:23-24.) In the last paragraph of the response, Plaintiffs also contended:

> "Defendant CBRE itself has a duty to refrain from discriminatory sales practices, and to take reasonable measures to ensure that its agents/Franchisees do not engage in such practices. Defendant CBRE failed in this duty, either by failing to properly monitor its agents' practices to make sure that such practices were consistent with CBRE non-discrimination guidelines, or by failing to have any such guidelines/oversight at all, thereby allowing its agents to engage in discriminatory practices without consequence."

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(*See* Exhibit D to moving papers, 6:5-9.) These responses clearly indicate that the only basis of Plaintiffs' claims against CBRE is that the First Shasta Defendants were in fact agents of CBRE. The responses say nothing about any claim that the First Shasta Defendants had ostensible authority to act on behalf of CBRE or any conduct by CBRE that reasonably caused Plaintiffs to so believe.

Consistent with those interrogatory responses, all of the Joint Case Management Statements filed with this court, filed on or about April 9, 2004, August 18, 2004, and January 28, 2005, make no mention in the "Brief Description of the Events Underlying This Action" of any theory of liability against CBRE. The only factual issue identified with respect to CBRE was, "Whether CBRE, or any agent or employee of CBRE, had any involvement in any of the events at issue in this lawsuit." (The Joint Case Management Statements are attached hereto collectively as Exhibit K.) None of these joint statements make any reference to the issue of ostensible authority or to any factual issue as to whether Plaintiffs reasonably believed that the First Shasta Defendants were acting on behalf of CBRE.

At the February 9, 2005 case management conference, Plaintiffs counsel, Mark TerBeek, confirmed in comments to the court that Plaintiffs were pursuing a theory of vicarious liability based only on actual agency. Mr. TerBeek stated expressly that

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Plaintiffs were not pursuing a theory of "apparent agency." (Schwimmer Decl., ¶ 3.)[6]

CBRE did not address any theory of ostensible authority in its summary judgment moving papers because the issue had never been raised in this lawsuit. For the same reason, in view of Plaintiffs' interrogatory responses and Mr. TerBeek's statement at the February 9, 2005 case management conference, CBRE did not seek any discovery with respect to the issue of ostensible authority. (Schwimmer Decl., ¶ 6.) Because the issue of actual agency does not involve any facts of which Plaintiffs had personal knowledge (the issue being whether CBRE had the right to control the daily activities of the First Shasta Defendants), CBRE's counsel did not ask Plaintiffs any questions at their depositions. In contrast, an element of the theory of ostensible authority is what Plaintiffs reasonably believed as a result of CBRE's conduct. *Kaplan, supra.* If the issue of ostensible authority had been tendered, CBRE's counsel certainly would have asked Plaintiffs questions concerning that issue at their depositions (Schwimmer Decl., ¶ 6), an examination that likely would have yielded more genuine and spontaneous responses than the attorney-crafted declarations that purport to track virtually verbatim the applicable language from the primary authority on which Plaintiffs' new claim of ostensible authority now relies. *Compare* McDonald Decl., ¶¶ 3-4, and Coleman Decl., ¶¶ 2-3, 5-6, with *Kaplan, 59 Cal. App. 4th at 744, 747-48.*

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[6] Attached hereto as Exhibit L is a true and correct copy of the handwritten notes of CBRE's counsel, John A. Schwimmer, taken at the February 9, 2005 case management conference. The applicable notation states verbatim, "Question re CBRE vicarious liability—not apparent agency." This refers to Mr. TerBeek's statement that Plaintiffs were not making any claim based on apparent agency. (Schwimmer Decl., ¶ 3.)

As soon as CBRE's counsel received Plaintiffs' summary judgment opposition, he instructed his assistant to contact the court to order a transcript of the February 9, 2005 case management conference. Unfortunately, the courtroom staff were just about to leave for two weeks for a judicial conference, so CBRE's counsel has not yet obtained a copy of the audio recording of the hearing. When it is received, it will be transcribed, and the transcript will be submitted to the court. (Schwimmer Decl., ¶ 4.)

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The discovery cutoff passed on June 9, 2005, nearly six weeks ago, and this case has been pending for nearly two years (the complaint was filed on August 1, 2003). (Schwimmer Decl., ¶ 5.) Where CBRE has not obtained any deposition testimony from Plaintiffs and never had a fair opportunity before Plaintiffs submitted their self-serving declarations to develop evidence with respect to this issue, CBRE clearly has been prejudiced by Plaintiffs' failure to raise this issue earlier.[7]

Under these circumstances, the authorities are clear that Plaintiffs may not rely on this new theory to oppose summary judgment. The Ninth Circuit decision in *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000), is right on point. In that case, the plaintiffs had alleged an age discrimination claim based only on disparate treatment. Yet, in opposing a motion for summary judgment, presented for the first time evidence and claims based on disparate impact.

The Ninth Circuit held that the plaintiff in *Coleman* could not rely on the newly-raised theory of disparate impact to oppose summary judgment. The court noted that the disparate impact theory involved entirely different evidence than the disparate treatment theory. The Ninth Circuit stated:

> "A complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations. * * * The lack of notice on this issue central to the cause of action makes it difficult, if not impossible, for [defendant] to know how to defend itself. After having focused on intentional discrimination in their

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[7] On summary judgment, a declaration may not purport to contradict previous deposition testimony to create an issue of fact. *See Cleveland v. Policy Management System Corp.*, 526 U.S. 795, 806-07 (1999), and cases cited therein. Because Plaintiffs did not raise this issue earlier, CBRE has been deprived of the opportunity to develop spontaneous deposition testimony that would "lock in" Plaintiffs' story and preclude them from seeking to create an issue of fact by later filing a contradictory, attorney drafted declaration.

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> complaint and during discovery, the [plaintiff] cannot turn around and surprise the company at the summary judgment stage on the theory that the allegation of disparate treatment in the complaint is sufficient to encompass a disparate impact theory of liability."

Coleman, 232 F.3d at 1292 (emphasis added). The Ninth Circuit concluded that because (1) the plaintiffs in *Coleman* had not given the defendants notice that they would be proceeding on a disparate impact theory, (2) the plaintiffs had raised that issue for the first time in opposition to summary judgment, and (3) the discovery cutoff had already passed, the plaintiffs would not be allowed to rely on that theory to oppose summary judgment. *Coleman,* 232 F.3d at 1294.

Similarly, here the issue of actual agency involves entirely different evidence (the details of the relationship between CBRE and First Shasta) than a theory of ostensible authority (conduct by CBRE that allegedly induced Plaintiffs to believe that the First Shasta Defendants were agents of CBRE). As in *Coleman,* Plaintiffs never previously gave any notice they intended to pursue an ostensible agency theory and raised the issue for the first time in opposition to a motion for summary judgment, after the discovery cutoff had passed. This court should apply the holding in *Coleman* and refuse to permit Plaintiffs to oppose summary judgment based on this new theory.

The Ninth Circuit's holding in *Coleman* is also supported by the Federal Rules of Civil Procedure. FRCP 37(c)(1) states in pertinent part:

> "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed."

FRCP 26(e)(1) requires a party who has previously served discovery responses to

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supplement those responses "if the party learns that in some material respect the information disclosed is incomplete or incorrect." FRCP 26(e)(2) similarly provides, "A party is under a duty seasonably to amend a prior response to an interrogatory ... if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrected information has not otherwise been made known to the other parties during the discovery process or in writing."

Because Plaintiffs never previously disclosed in their interrogatory responses or in any amendment of them that they were relying on a theory of ostensible authority, Plaintiffs are precluded now by FRCP 37(c)(1) from presenting any such evidence in opposition to this motion for summary judgment. Such preclusion is only fair and appropriate. The prejudice to CBRE from this last minute assertion of a new theory cannot otherwise be corrected. Therefore, this court should not consider any of Plaintiffs' purported evidence based on the newly asserted theory of ostensible authority.

B. Plaintiffs Have Not Raised Any Genuine Issue of Disputed Fact With Respect to Ostensible Authority.

While Plaintiffs do not have any right to present their newly asserted theory of ostensible authority, even if that defense is considered, Plaintiffs have not legitimately established any disputed issue of fact. The law is clear that a party cannot create an issue of fact by submitting a sham declaration that contradicts prior deposition or other sworn testimony. *Cleveland v. Policy Management System Corp.,* 526 U.S. 795, 806-07 (1999), and cases cited therein; *Block v. City of Los Angeles,* 253 F.3d 410, 419 n. 2 (9th Cir. 2000).

In her declaration, McDonald, the only plaintiff who has any standing to assert a

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claim[8], contends that she agreed to Coleman's recommendation to use Coldwell Banker "based on my knowledge of the company" and because McDonald believed that "Coldwell Banker First Shasta was part of this nationwide network of qualified Coldwell Banker agents who specialize in residential real estate." (McDonald Decl., ¶¶ 3-4.) But McDonald testified to the contrary at her deposition on examination by First Shasta's counsel, stating that she had no knowledge or interest about how Coleman chose First Shasta and that she had no interest in knowing that information:

> "Q. Did she [Coleman] tell you how she found or chose Coldwell Banker First Shasta Realty instead of some other brokerage to contact?
>
> "A. No.
>
> "Q. Did you ask?
>
> "A. No.
>
> "Q. Did you have any interest in knowing why she chose this brokerage instead of any number of other brokerages?
>
> "A. No."

(McDonald Depo., attached as Exhibit M, 89:1-10.) McDonald cannot now claim that she relied on Coldwell Banker's reputation in choosing First Shasta when she testified at her deposition that she had no knowledge of how First Shasta was chosen and that she did not "have any interest in knowing."

Before Plaintiffs' attorneys conjured up this new theory of ostensible authority, Plaintiffs' conduct also reflected that they did not have any belief that, when they interacted with the First Shasta Defendants, they were dealing with CBRE. Before filing

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[8] As discussed in Section III, below, the only claim alleged by Coleman is for violation of California Business & Professions Code § 17200, *et seq.* and, as a matter of law, such a claim cannot be based on vicarious liability. Therefore, Coleman has no claim against CBRE.

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this lawsuit, Plaintiffs filed a complaint for discrimination with the California Department of Fair Employment & Housing. Yet, that complaint for discrimination contained no allegations against CBRE. (*See* Exhibit I to moving papers.)

Similarly, McDonald clearly knew and understood the difference between a franchisor and a franchisee. Within days of her dealings with First Shasta that are the subject of this lawsuit, McDonald signed an acknowledgment with a different Coldwell Banker franchisee in the same locale, Coldwell Banker C&C Properties, in which she stated, "I understand that Coldwell C&C Properties is an independently owned and operated franchise of Coldwell Banker Real Estate Corporation." (*See* Exhibit F to moving papers.) In addition, Gallagher's very first communication with Coleman, as well as numerous later communications, contained the legend, "This office is independently owned and operated." (*See* Exhibit G to moving papers.) Plaintiffs' contention that Gallagher signed the Disclosure Regarding Agency Relationships for "Coldwell Banker" is simply not true. (Opposition, 11:10-12.) Gallagher signed on behalf of "Coldwell Banker First Shasta." (Exhibit B to McDonald Decl.) McDonald signed the very same form with Coldwell Banker C&C Properties (referenced in the Opposition at 11:8-10), the company she expressly acknowledged she knew was an independent franchise. (*See* Exhibit N hereto.)

The evidence Plaintiffs submit to support their ostensible authority theory is not sufficient to create an issue of fact. Both McDonald and Coleman submit conclusory allegations, in language that tracks the decision in *Kaplan* claiming that they relied on Coldwell Banker's national reputation in selecting First Shasta.[9] But the only evidence of this purported national reputation is an attorney declaration about statements

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[9] Concurrently with this reply brief, CBRE is filing its evidentiary objections to the declarations and exhibits proffered by Plaintiffs.

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currently contained on the CBRE website. There is no evidence that either of the Plaintiffs ever saw or heard those statements or what impact those statements had upon them. Moreover, the website referenced in the declaration of Plaintiffs' counsel expressly states on the home page, "Each office is independently owned and operated except offices owned and operated by NRT Incorporated." (*See* Exhibit E to Grigg Decl., p. 1.) The selective citation by Plaintiffs' counsel of certain quotations from the current CBRE website is not sufficient to establish a disputed issue of fact concerning alleged conduct by CBRE that allegedly influenced Plaintiffs before McDonald retained First Shasta in July 2002, a full three years ago. Therefore, even if this court were to consider Plaintiffs' newly asserted theory of ostensible authority (and it should not, for the reasons stated above), this court should still grant summary judgment in favor of CBRE.

III. PLAINTIFFS DO NOT EVEN ATTEMPT TO DISPUTE THAT THEY MAY NOT ASSERT A CLAIM FOR UNFAIR COMPETITION BASED ON VICARIOUS LIABILITY

In the moving papers, CBRE cited express California authority that holds that a claim under Business & Professions Code Section 17200, *et seq.,* cannot be predicated on vicarious liability. *See Emery v. Visa International Service Association,* 95 Cal. App. 4th 952, 960 (2002) ("A defendant's liability must be based on his personal participation in the unlawful practices and unbridled control over the practices that are found to violate § 17200 or § 17500.") At the very least, CBRE is entitled to partial summary judgment in its favor with respect to McDonald's claim based on these statutes.

Moreover, the only claim alleged by Coleman against CBRE is based on this statute. Therefore, summary judgment should be granted in favor of CBRE against Coleman.

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IV. CONCLUSION

For the reasons stated above, CBRE respectfully requests that this court grant its motion for summary judgment.

Respectfully submitted,

SUSSMAN SHANK LLP

By _____
John A. Schwimmer
Attorneys for Defendant Coldwell Banker Real Estate Corp.

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DECLARATION OF JOHN A. SCHWIMMER

I, JOHN A. SCHWIMMER, declare:

1. I am an attorney admitted to practice law in the States of California and Oregon and admitted to practice before this court. I am special counsel with the law firm of Sussman Shank LLP, attorneys of record for defendant Coldwell Banker Real Estate Corp. ("CBRE") in this action. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently thereto.

2. Attached hereto collectively as Exhibit K are true and correct copies of the Joint Case Management Statements filed in this matter on or about April 9, 2004, August 18, 2004, and February 28, 2005, respectively.

3. I attended the February 9, 2005 case management conference before this court. At that conference, I heard Plaintiffs' counsel, Mark TerBeek, state that the issue in the case with respect to CBRE was vicarious liability and that Plaintiffs were not proceeding on a theory of "apparent agency." Attached hereto as Exhibit L is a true and correct copy of my handwritten notes that I took contemporaneously while Mr. TerBeek was speaking at the case management conference. As I acknowledge my handwriting is difficult to read, the following sets forth verbatim the handwritten notes that I wrote while Mr. TerBeek was speaking:

> "Plaintiffs and First [Shasta] continuing to negotiate—don't know if will bear fruit—hopeful—First [Shasta] requested extension to respond to latest settlement proposal—would dispose of entire case; question re CBREC's vicarious liability—not apparent agency—Policy Manual governs how to market and use trademark, type of insurance, location of office, who is office manager; major dispute with CBRE whether level of control over operational activity—discovery plaintiffs want to set stage for CBRE summary judgment to explore from CBRE end; I withheld dump truck of

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discovery to facilitate settlement negotiations—if don't settle next 2 weeks I'll unleash discovery with PMK depos—raise now to either continue or seek a summary judgment briefing schedule"

4. I received Plaintiffs' opposition to CBRE's motion for summary judgment on Thursday, July 14, 2005. As soon as I realized that Plaintiffs were seeking to assert a new theory of ostensible authority and that Mr. TerBeek's statement at the February 9, 2005 case management conference was relevant, I instructed my assistant to obtain a transcript of that February 9, 2005 case management conference. When my assistant contacted the court staff, she was informed that Judge Larson's staff was about to leave for two weeks because of a judicial conference and, therefore, there would be a delay in sending us the audio recording of the hearing. As soon as we receive the audio recording, we will arrange to transcribe it and submit it to the court.

5. The discovery cutoff in this action expired on June 9, 2005, nearly six weeks ago. The complaint in this action was filed on August 1, 2003.

6. When I prepared CBRE's motion for summary judgment, I did not make any effort to address any theory of ostensible authority because the issue had never been raised in this lawsuit. For that same reason, I never pursued or propounded any discovery to Plaintiffs or anyone else with respect to the issue of ostensible authority. Because the issue that Plaintiffs actually pleaded, actual agency, does not involve any facts of which Plaintiffs had personal knowledge (because the issue is whether CBRE had the right to control the activities of the First Shasta Defendants), I did not ask Plaintiffs any questions at their depositions. If I had known that Plaintiffs were pursuing a claim against CBRE based on the theory of ostensible authority, I definitely would have asked Plaintiffs questions to try to establish the facts related to reliance on any acts or conduct of CBRE that allegedly caused them to believe that the First Shasta Defendants were agents of CBRE. Such a deposition examination likely would have

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yielded more genuine and spontaneous responses than the attorney-crafted declarations submitted in opposition to CBRE's motion for summary judgment. CBRE has suffered substantial prejudice as a result of Plaintiffs' effort to oppose summary judgment based on a theory that was never previously disclosed either in the pleadings or in discovery.

7. Attached hereto as Exhibit M is a true and correct copy of an excerpt from the transcript of the deposition of Pamela McDonald taken in this action.

8. Attached hereto as Exhibit N is a true and correct copy of a document entitled Disclosure Regarding Real Estate Agency Relationships, dated August 17, 2003, between McDonald and Coldwell Banker C&C, produced by Plaintiffs in discovery in this action.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration is executed on July 20, 2005 at Portland, Oregon.

John A. Schwimmer

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