APPENDIX

APPENDIX – TABLE OF CONTENTS

Appendix A – Memorandum, *Kleidman v. Hilton & Hyland Real Estate, Inc., et al.*, No. 22-55381 (9th Cir. Oct. 18, 2023)........................App.1

Appendix B – Order, *Kleidman v. Hilton & Hyland Real Estate, Inc., et al.*, No. 22-55381 (9th Cir. Jan. 24, 2024)...............................App.4

Appendix C – Order Affirming Bankruptcy Court's August 21, 2020 Judgment, March 31, 2021 Order Denying Motion to Reconsider Summary Judgment in Favor of Defendants, and April 5, 2021 Amended Judgment, *Kleidman v. Hilton & Hyland Real Estate, Inc.*, No., 2:21-cv-03287-JFW, (C.D. Cal. Jan. 21, 2022)...App. 5

Appendix D – Amended Findings of Fact and Conclusions of Law Re: Motion for Summary Judgment of Defendants Hilton & Hyland, Joshua Altman and Matthew Altman [Adv. Dkt. 248], *Kleidman v. Hilton & Hyland Real Estate, Inc., et al.,* Nos. 1:12-bk-11243-MB; 1:17-ap-01007-MB, (Bankr. C.D. Cal., Apr. 2, 2021)..App. 22

Appendix E – Portion of ¶7 in Declaration of Allan Wallace in Support of Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment, *Kleidman v. Hilton & Hyland Real Estate, Inc., et al.*, Nos. 1:12-bk-11243-MB; 1:17-ap-01007-MB (Bankr. C.D. Cal., Aug 20, 2020)..............................App. 58

Appendix F – Portion of Order Re: Evidentiary Objections Re: Motion for Summary Judgment of Defendants Hilton & Hyland, Joshua Altman and Matthew Altman, *Kleidman v. Hilton & Hyland Real Estate, Inc., et al.*, Nos. 1:12-bk-11243-MB; 1:17-ap-01007-MB (Bankr. C.D. Cal., Aug 20, 2020).... App.59

Appendix A
US Court of Appeals
for the Ninth Circuit

No. 22-55381

Peter Kleidman,
Plaintiff-Appellant
v.
Hilton & Hyland Real Estate, Inc., et al.
Defendants-Appellees

Filed October 18, 2023

MEMORANDUM
Before Hons. S.R. Thomas, McKeown, Hurwitz,
Circuit Judges

The Peter Kleidman appeals pro se from the district court's judgment affirming the bankruptcy court's summary judgment in his adversary proceeding alleging breach of fiduciary duty by real estate agents. We have jurisdiction under 28 U.S.C. § 158(d). We review de novo the district court's judgment in an appeal from the bankruptcy court, and apply the same de novo standard of review the district court used to review the bankruptcy court's summary judgment. *Suncrest Healthcare Ctr. LLC v. Omega Healthcare Invs., Inc. (In re Raintree Healthcare Corp.),* 431 F.3d 685, 687 (9th Cir. 2005). We affirm.

The bankruptcy court properly granted summary judgment because Kleidman failed to raise a genuine dispute of material fact as to whether defendants breached a fiduciary duty that they owed to Kleidman. *See Gutierrez v. Girardi,* 125 Cal. Rptr. 3d

210, 215 (Ct. App. 2011) (setting forth elements of a claim for breach of fiduciary duty); *Carleton v. Tortosa*, 17 Cal. Rptr. 2d 734, 740 (Ct. App. 1993) (explaining that a real estate broker's duty is defined by regulatory statutes and "the general law of agency, i.e., . . . the terms of the agreement between the parties"); *see also C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (discussing respective burdens of parties at summary judgment).

The district court did not abuse its discretion in overruling Kleidman's objection to the expert declaration of Allan Wallace submitted by defendants in support of their motion for summary judgment. *See* Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."); *Primiano v. Cook*, 598 F.3d 558, 563-64 (9th Cir. 2010) (setting forth standard of review and requirements for admitting expert testimony).

In his opening brief, Kleidman does not challenge—and has therefore forfeited review of—the district court's dismissal of his appeal from twelve additional bankruptcy court orders related to discovery disputes, motions to dismiss, and scheduling, on the ground that none of the issues he raised were properly before the district court. *See Nev. Dep't of Corr. v. Greene*, 648 F.3d 1014, 1020 (9th Cir. 2011) (concluding that a pro se appellant waived issues not supported by argument in opening brief); *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) (explaining that "[w]e review only issues which are argued specifically and distinctly in a party's opening brief" and "[w]e will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here,

a host of other issues are presented for review").

We do not consider any additional matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

Appendix B
US Court of Appeals
for the Ninth Circuit

No. 22-55381

Peter Kleidman,
Plaintiff-Appellant
v.
Hilton & Hyland Real Estate, Inc., et al.
Defendants-Appellees

Filed January 23, 2024

ORDER
Before Hons. S.R. Thomas, McKeown, Hurwitz,
Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Kleidman's petition for panel rehearing and petition for rehearing en banc
(Docket Entry No. 37) are denied.

No further filings will be entertained in this closed case.

Appendix C
US District Court
Central District of California

No. 2:21-cv-03287-JFW

Peter Kleidman,
Plaintiff
v.
Hilton & Hyland Real Estate, Inc. et al.,
Defendants

Filed January 21, 2022

Before: Hon. John F. Walter,
US District Judge

ORDER AFFIRMING BANKRUPTCY COURT'S AUGUST 21, 2020 JUDGMENT, MARCH 31, 2021 ORDER DENYING MOTION TO RECONSIDER SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, AND APRIL 5, 2021 AMENDED JUDGMENT

On April 16, 2021, Appellant Peter Brown Kleidman ("Appellant" or "Debtor") filed an appeal from the United States Bankruptcy Court's August 21, 2020 Judgment, March 31, 2021 Order Denying Motion to Reconsider Summary Judgment in Favor of Defendants, and April 5, 2021 Amended Judgment. On October 29, 2021, Appellant filed his Opening Brief. On November 29, 2021, Appellees Hilton & Hyland Real Estate, Inc., Joshua Altman, and Matthew Altman(collectively, "Appellees") filed their Brief. On December 27, 2021, Appellant filed a Reply Brief. Pursuant to Rule 78 of the Federal Rules

of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's January 10, 2021 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

The Bankruptcy Court's August 21, 2020 Judgment, March 31, 2021 Order Denying Motion to Reconsider Summary Judgment in Favor of Defendants, and April 5, 2021 Amended Judgment at issue on this appeal were entered in an adversary proceeding that was commenced on January 30, 2017, when Appellant filed his original Complaint against the Appellees. Since the commencement of the adversary proceeding, Appellant filed four different versions of his Complaint, conducted extensive discovery, and filed numerous motions. Indeed, the extraordinary number of motions filed by Appellant resulted in the Bankruptcy Court granting in part the Appellees' Motion for an Order Requiring Plaintiff to Seek Leave of Court Before Filing Any Further Motions ("Motion Requiring Leave"). At the time the Appellees filed their Motion Requiring Leave, Appellant had filed five motions for leave to amend his Complaint and fourteen discovery motions. In light of the extensive record in the adversary proceeding, the parties are well aware of the factual and procedural history of this matter and the Court will only discuss those facts necessary to resolve the instant appeal.

A. The Parties

Appellant is a sophisticated and experienced businessman who graduated from Cambridge

University with a Ph.D. in mathematics and worked for several years at Goldman Sachs, Bankers Trust, Dresdner Bank AG, ABN AMRO Bank and HSBC Bank, principally as a financial analyst. In the early 2000s, Appellant began purchasing real property in Southern California, including properties that he "flipped" for a profit. For example, Appellant purchased the property located at 21942 Pacific Coast Highway, Malibu, California for $2.9 million, renovated the property, and then sold it for approximately $13.4 million. Appellant also purchased the property located at 22420 Pacific Coast Highway, Malibu, California for $15.5 million, renovated the property, and then sold it for approximately $18.9 million.

Hilton & Hyland Real Estate, Inc. ("Hilton & Hyland") is a luxury real estate brokerage firm located in Beverly Hills, California. Joshua Altman and Matthew Altman (the "Altmans") were real estate agents with Hilton & Hyland until approximately 2015.

B. The Property

In 2006, Appellant purchased the property located at 9380 Sierra Mar Drive, Los Angeles, California (the "Property"), which is the subject of the adversary proceeding. In May 2010, the Property was appraised at $4.25 million. In 2011, Appellant signed a listing agreement with Sun Heritage Real Estate ("Sun Heritage"), and listed the Property for $4.2 million. In February 2012, Appellant obtained an appraisal that indicated that the current value of the Property was only $3.8 million, noting that the "[i]nterior finish does not match the quality of the basic construction," and advising that "[m]ost buyers of this home will look to remodel most of the interior with a new kitchen, bathrooms, flooring and HVAC"

because "[t]here is functional obsolescence not only associated with the pool and spa but with the interior improvements." As a result of the appraisal, Appellant reduced the price of the Property to $3.9 million. Although Appellant received multiple offers, they were insufficient to satisfy the existing liens and those offers were rejected by the secured lenders.

C. Bankruptcy

On February 8, 2012, Appellant filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Appellant's Bankruptcy Schedules valued the Property at $3.8 million. On October 18, 2012, Appellant amended his Bankruptcy Schedules and increased the valuation of the Property to $4.2 million. During the pendency of his bankruptcy, Appellant contacted multiple real estate agents about selling the Property, but he declined to retain any of them because they advised Appellant the Property could not be sold for more than the existing liens. Appellant Lavin (the "Listing Agents") at Hilton & Hyland because they advised Appellant that they believed that they could market and sell the Property and avoid a short sale. On December 1, 2012, Appellant and Hilton & Hyland entered into a Residential Listing Agreement ("RLA") to list the Property for $5,495,000. On January 24, 2013, Appellant filed an application to employ the Listing Agents and Hilton & Hyland to sell the Property (the "Employment Application") with the Bankruptcy Court. On January 30, 2013, the Bankruptcy Court approved the Employment Application.

Hilton & Hyland advertised the Property in The Los Angeles Times, the MLS Broker Caravan, and Christie's International Real Estate syndicates. The Listing Agents held "open houses" and showed the

Property eighteen times, including to developers and "flippers." The Listing Agents kept Appellant informed of the showings and buyer interest, and Appellant assisted Hilton & Hyland in marketing the Property by providing the Listing Agents with a property survey and floor plans for the then-existing house on the Property, which Appellant and the Listing Agents believed would be of interest to developers and flippers.

Appellant received multiple offers for the Property that were below the listing price, including an all cash offer of $5,000,000 by Bruce Makowsky ("Makowsky") on January 20, 2013. In light of the offers, Appellant determined that if he could sell the Property for $5,300,000, he would be able to cover all the liens, commissions, closing costs, and realize a small profit. As a result, Appellant countered all of the offers at $5,299,000. Although the potential buyers refused to accept Appellant's counteroffer of $5,299,999[1], Makowsky eventually agreed to purchase the Property for $5,300,000 with no contingencies. Appellant filed a motion seeking authority to sell the Property to Makowsky for $5,300,000 (the "Sale Motion") with the Bankruptcy Court. After a hearing, the Bankruptcy Court granted the Sale Motion and approved the sale of the Property to Makowsky. The sale closed on February 1, 2013. The bankruptcy estate received $122,644 after paying closing costs, liens, and commissions. At all times, Makowsky was represented by the Altmans, who were agents with Hilton & Hyland. Although the Altmans and the Listing Agents were all agents with Hilton & Hyland, the Listing Agents did not represent or work with Makowsky and the

[1] The next highest offer was $4,600,000.

Altmans did not represent or work with Appellant. Moreover, the fact that both parties to the transaction were represented by agents with Hilton & Hyland was disclosed to Appellant and Makowsky.

In May 2014, after extensive renovations to the interior and exterior of the Property, Makowsky sold the Property for $19,000,000.

In July 2016, the Bankruptcy Court entered a final decree and closed Appellant's bankruptcy case.

D. The Adversary Proceeding

On August 1, 2016, after Appellant learned that the Property has sold in May 2014 for $19,000,000, Appellant filed a Complaint against Appellees. Following a series of amendments, on January 19, 2018, Plaintiff filed his Third Amended Complaint ("TAC"), alleging claims for: (1) breach of fiduciary duty; (2) aiding and abetting breach of fiduciary duty; (3) breach of the duty of fairness; and (4) breach of the duty of care. On July 26, 2018, the Bankruptcy Court granted in part Appellees' Motion to Dismiss the TAC, and dismissed the claims for aiding and abetting breach of fiduciary duty and any claim based on the alleged duty by Appellees to "achieve as high a price as possible" for Appellant. As a result, Appellant's remaining claims were based on allegations that Appellees failed to disclose that: (1) a "fully-renovated version of the property would be valued in the region of $15 million" and that the valuation in the "flippers' pool" of buyers (versus buyers looking for a move-in ready house) was around $8,000,000 to $9,000,000; (2) that Appellees had a pre-existing agreement to represent Makowsky in the resale of the Property; and (3) that the Appellees had hoped to represent Makowsky in other transactions and, as a result, favored Makowsky's interests over those of Appellant.

On February 27, 2019, Appellees filed a Motion for Summary Judgment with respect to Appellant's remaining claims. After the Motion for Summary Judgment was fully briefed and after lengthy oral arguments by the parties, on August 20, 2020, the Bankruptcy Court granted Appellees' Motion for Summary Judgment and issued lengthy and detailed Findings of Facts and Conclusions of Law in support of its Order granting the Motion for Summary Judgment.[2] In its Order, the Bankruptcy Court concluded that: (1) Appellees did not breach any fiduciary duty to Appellant; (2) Appellant failed to present any evidence that Appellees breach any duty of care owed to him; (3) Appellant did not meet his burden of proving that he incurred any damages; and (4) judicial estoppel barred Appellant from complaining that the Property was not adequately marketed or that the sale price was unfair. On August 21, 2020, the Bankruptcy Court entered Judgment in favor of Appellees in the adversary proceeding.

On September 4, 2020, Appellant filed an Amended Motion for Relief under FRBP 9023, FRBP 7052, FRBP 9024 and LBR 9013-4 ("Motion to Reconsider"), arguing that he should be granted relief from the Bankruptcy Court's Summary Judgment Order. Specifically, Appellant argued that: (1) Appellant was not afforded due process because the Bankruptcy Court made factual findings and conclusions of law on certain matters that were not raised in the Motion for Summary Judgment, thereby depriving Appellant of an opportunity to

---

[2] The Bankruptcy Court also entered its Order re Evidentiary Objections related to Appellees' Motion for Summary Judgment.

respond[3]; (2) there was insufficient evidence to support certain Findings of Fact[4]; (3) the Bankruptcy Court made various errors of law.[5] On March 31, 2021, the Court issued a lengthy twenty-four page Order denying Appellant's Motion to Reconsider. In addition, on April 2, 2021, the Bankruptcy Court issued Amended Findings of Fact and Conclusions of Law clarifying certain issues raised by the parties. On April 5, 2021, the Bankruptcy Court entered an Amended Order granting Appellees' Motion for Summary Judgment and an Amended Judgment.

Appellant then filed this appeal.

II. Issues on Appeal

Appellant contends that the "main issues"[6] presented for review on appeal are:

1. Whether Appellees breached their duties to: (a) further Appellant's interests; (b) disclose their opinions on the value of the Property; (c) research and investigate the value of the Property; (d) counsel and advise Appellant; and (e) disclose the extent of their relationship with Makowsky and Makowsky's

---

[3] For example, Appellant took issue with the Bankruptcy Court's description of him as "a sophisticated and experienced businessman."

[4] For example, Appellant argued that the declarations and deposition testimony cited by the Bankruptcy Court did not support its Finding of Fact that the "Listing Agents kept Kleidman informed of the showings and buyer interest" because those declarations and deposition testimony did not expressly state that the Listing Agents were truthful in the information they gave to Appellant.

[5] For example, Appellant argued that the Bankruptcy Court incorrectly concluded that the doctrine of judicial estoppel applied.

[6] According to Appellant, there are also "numerous sub-issues" which are not identified. *See* Appellant's Opening Brief (Docket No. 19), 16:1-17.

real estate activities.

2. Whether Hilton & Hyland misrepresented its opinion on the value of the Property.

3. Whether judicial estoppel applies.

4. Whether Appellant should be allowed to amend his Complaint regarding fiduciary duty claims.

5. Whether Appellant "was afforded due process regarding Count 1" (sanctions for violation of 11 U.S.C. § 327(a) and Federal Rule of Bankruptcy Procedure 2014(a)).

6. Whether Count 7 (disgorgement) is collaterally estopped.

7. Whether Appellant should be allowed to amend Count 7 (disgorgement) to plead a different theory based on the same facts.

8. Whether "numerous discovery orders should be reversed or modified."

III. Legal Standards

The standard of review of bankruptcy court decisions by district courts is well-established, and uncontested by the parties. When reviewing decisions of a bankruptcy court, district courts apply standards of review applicable to the courts of appeals when reviewing district court decisions. *In re Baroff*, 105 F.3d 439, 441 (9th Cir.1997); *see also In re Fields*, 2010 WL 3341813, *2 (E.D. Cal. 2010) ("A district court's standard of review over a bankruptcy court's decision is identical to the standard used by circuit courts reviewing district court decisions.") (citation omitted).

On appeal, a district court may "affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." Federal Rules of Bankruptcy Procedure 8013. Generally, a district court reviews a bankruptcy court's factual findings "'under the

clearly erroneous standard and its conclusions of law de novo.'" *Acequia, Inc. v. Clinton* (*In re Acequia, Inc.*), 787 F.2d 1352, 1357 (9th Cir. 1986) (*quoting Ragsdale v. Haller*, 780 F.2d 794, 795 (9th Cir. 1986)). "Mixed questions of law and fact are reviewed de novo." *Beaupied v. Chang* (*In re Chang*), 163 F.3d 1138, 1140 (9th Cir.1998). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) *(quoting United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see also Savage v. Greene* (*In re Greene*), 583 F.3d 614, 618 (9th Cir. 2009). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

In addition, "[a] bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion." *In re Negrete*, 183 B.R. 195, 197 (9th Cir. B.A.P. 1995). "The abuse-of-discretion standard requires a reviewing court to conduct a two-step inquiry: (1) determine de novo whether the lower court identified the correct legal rule to apply to the relief requested and (2) ascertain whether the bankruptcy court's application of the legal standard was illogical, implausible or without support in inferences that may be drawn from the facts in the record. *In re Alarez*, 2018 WL 5099265 (C.D. Cal. Oct. 18, 2018) (internal citations omitted).

Moreover, a bankruptcy court's granting or denying a motion for summary judgment is reviewed

de novo. *Jones v. Royal Admin. Services, Inc.*, 887 F.3d 443, 447 (9th Cir. 2018); *Guerin v. Winston Indus., Inc.*, 316 F.3d 879, 882 (9th Cir. 2002). The district court, viewing the evidence in the light most favorable to the nonmoving party, must determine if there are any genuine issues of material fact and whether the bankruptcy court correctly applied the relevant substantive law. *See Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002). In addition the district court may affirm summary judgment "on any ground supported by the record." *Am. Federation of Musicians of U.S. & Canada v. Paramount Pictures Corp.*, 903 F.3d 968, 981 (9th Cir. 2018) (internal citations omitted). "Evidentiary rulings made in the context of summary judgment are reviewed for an abuse of discretion." *Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir. 2001).

Furthermore, a bankruptcy court's dismissal for failure to state a claim upon which relief can be granted is reviewed de novo. *Curtis v. Irwin Industries, Inc.*, 913 F.3d 1146 (9th Cir. 2019).

Finally, discovery rulings – including an order denying a discovery request, an order limiting the scope of discovery, an order cutting off discovery, and an order denying a request to reopen discovery – are reviewed for abuse of discretion. *Ingham v. United States*, 167 F3d 1240, 1246 (9th Cir. 1999); *see Dichter-Mad Family Partners, LLP v. United States*, 709 F3d 749, 751 (9th Cir. 2013) (holding that "broad discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant") (internal citations omitted).

IV. Discussion

In his appeal, Appellant argues that the Bankruptcy Court erred in granting Appellees' Motion for Summary Judgment and denying his Motion to Reconsider. Appellees argue that the Bankruptcy Court correctly decided the Motion for Summary Judgment and the Motion tor Reconsider. Appellees argue that the Bankruptcy Court gave Appellant more than ample opportunity over the course of several years to amend his claims and gather the necessary evidence to support his claims in discovery, and Appellant did not prevail simply because his case
lacked merit.

A. The Bankruptcy Court Did Not Err in Granting Appellees' Motion for Summary Judgment and Denying Appellant's Motion to Reconsider

In granting Appellees' Motion for Summary Judgment, the Bankruptcy Court entered exhaustive Findings of Facts and Conclusions of Law that were detailed, well reasoned, and fully
supported by the evidence and the law. The Bankruptcy Court also carefully considered only the admissible evidence submitted both in support of and in opposition to the Motion for Summary Judgment, as evidenced, in part, by the detailed rulings in the Bankruptcy Court's Order re: Evidentiary Objections. In addition, the Bankruptcy Court only granted Appellees' Motion for Summary Judgment after Appellant was given multiple opportunities to amend his Complaint, after Appellant was given ample opportunity to pursue the discovery he thought was necessary to prove his claims (including bringing more than a dozen discovery motions), after the Motion for Summary Judgment was fully briefed,

and after the Bankruptcy Court heard lengthy oral arguments. In addition, in denying Appellant's Motion to Reconsider, the Bankruptcy Court entered a twenty-four page Order explaining in even greater detail the basis for its decision granting Appellant's Motion for Summary Judgment. The Bankruptcy Court also entered Amended Findings of Fact and Conclusions of Law to clarify its decision.[7]

Having considered the arguments of the parties and having reviewed the entire record, the Court concludes that the Bankruptcy Court did not err in granting Appellees' Motion for Summary Judgment or denying Appellant's Motion to Reconsider. The Court concludes that the Bankruptcy Court's Amended Findings of Fact were fully supported by the evidence and that the Bankruptcy Court correctly applied the law to those facts. Indeed, the majority of Appellant's arguments on appeal are based on Appellant's misunderstanding of the relevant statutory and case law and lack of knowledge of legal procedure. For example, in his Statement of Genuine Issues in Opposition to Defendants' Motion for Summary Judgment, Plaintiff failed to respond to the majority of Appellees' material facts. Specifically, Appellant responded to only twenty-six of seventy-one material facts and only offered evidence that supported eight of his responses. In his other responses, Appellant simply stated that he did not need to "provide rebuttal evidence since the evidence cited does not prove the facts claims." Although the Bankruptcy Court explained to Appellant in detail the burden of

---

[7] In the Amended Findings of Fact and Conclusions of Law, the Bankruptcy Court changed some references to "Hilton & Hyland" to "Defendants" to clarify that those findings and conclusions applied to the Altmans as well as Hilton & Hyland.

proof and burden of persuasion on a motion for summary judgment, Appellant continued to argue to the Bankruptcy Court and in this appeal that he was not required to put forth evidence in support of his claims and in opposition to summary judgment.

Similarly, many of Appellant's arguments are based on a misunderstanding of the Bankruptcy Court's very clear and very detailed findings, including the Bankruptcy Court's findings on the fiduciary duty issue. For example, in his Motion to Reconsider, Appellant argued that the Bankruptcy Court erroneously concluded that the Altmans only owed a fiduciary duty to Makowsky and not Appellant. However, as the Bankruptcy Court explained, in relevant part, in its Order denying Appellant's Motion to Reconsider:

> Nothing in the Findings and Conclusions states that the Altmans owed fiduciary duties only to [Makowsky] or, conversely, that the Altmans owed no fiduciary duties to [Appellant]. Nor did [Appellees'] MSJ assert that the Altmans owed no fiduciary duties to [Appellant] or only owed duties to [Makowsky]. In other words, there was no dispute that [Appellees] owed a fiduciary duty to [Appellant]. Nothing in the Findings and Conclusion[s] holds that the Altmans did not owe a fiduciary duty to [Appellant].

The Bankruptcy Court explained that "[t]he principal disputes between the parties raised by the MSJ are the scope of the fiduciary duty owed" to Appellant by the Appelles, "and whether [Appellees] breached those duties." In addition, the Bankruptcy Court explained that Appellees had offered "voluminous supporting evidence that they did not breach any of their fiduciary duties to [Appellant], acted in good

faith towards him and made full and complete disclosure to him of all requisite facts" and Appellant failed to offer any admissible evidence to the contrary. In part, the Bankruptcy Court relied on the testimony of Alan D. Wallace ("Wallace"), Appellees' expert on the duty of care, who testified that "neither Hilton & Hyland, Joshua Altman nor Matthew Altman's conduct in connection with the listing and sale of [Appellant's] property during his Chapter 11 bankruptcy fell below the standard of care for real estate agents or brokers in this community." Wallace also testified that beyond disclosing the dual agency, "there was nothing further for [Appellees] to disclose to the seller about their relationship with the buyer at the time of the transaction." As the Bankruptcy Court noted, Appellant failed to offer any expert testimony to rebut Wallace's testimony and, as a result, Appellant failed to demonstrate that there were any genuine issues of fact for trial. As a result, the Bankruptcy Court "ultimately determined that [Appellees] did not breach any of their fiduciary duties to [Appellant]."

Accordingly, the Court concludes that the Bankruptcy Court did not err in granting Appellees' Motion for Summary Judgment or denying Appellant's Motion to Reconsider, and the Court affirms the Bankruptcy Court's rulings on these motions.

B. The Bankruptcy Court Did Not Err in Its Other Rulings

Although Appellant raises issues with twelve other orders entered by the Bankruptcy Court, including nine orders related to discovery disputes, two orders regarding motions to dismiss, and one scheduling order, Appellant failed to identify any of these orders in his Notice of Appeal in violation of

Federal Rule of Bankruptcy Procedure 8003(a)(3)(B) and failed to include any of the discovery orders, motions, or oppositions in the excerpts of the record. Because these orders were not identified in the Notice of Appeal or included in the excerpts of the record, it is virtually impossible for the Court to determine which orders or what issues Appellant has appealed. For example, in his Opening Brief, Appellant identifies the discovery orders that he argues are erroneous only as "#319," "#199," "#318," "#160," "#332," "#333," "#382," "#460," and "#315," which appear to refer to docket numbers on the Bankruptcy Docket. Appellant also argues that the deadline to amend the pleadings in the Bankruptcy Court's scheduling order was "too early," but fails to provide the Court with any basis to evaluate his argument, including failing to state if he sought leave from that deadline. With respect to the motions to dismiss, Appellant does not discuss specific orders granting Appellees' Motions to Dismiss, but, instead, argues that the dismissal of Count 1 violated his due process rights and that he should have been granted leave to amend Count 7. Accordingly, the Court concludes that none of these issues are properly before this Court on this appeal and Appellant's appeal of these orders is dismissed.

In addition, even if these orders were properly before this Court, orders that are not material to the judgment are not appealable. *See Baker v. Dykema Gossett, LLP*, 776 Fed. Appx. 485 (9th Cir. 2019); *see also* 15A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3905.1 n.29 ("'Orders that could not have affected the outcome, *i.e.*, orders not material to the judgment, are not appealable'" and "[a] ruling that could not have affected the judgment may be denied review for

reasons parallel to harmless error reasoning") (*quoting Nat'l Am. Ins. Co. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 540 (9th Cir.1996)). In this case, Appellant has failed to explain or demonstrate that a different resolution of the issues decided in these orders would have materially affect the outcome of Appellant's bankruptcy. As a result, these orders are not appealable. *See, e.g., Woodroffe v. Curtis*, 836 Fed. Appx. 636 (9th Cir. 2021) (in appealing the district court's order granting summary judgment in favor of the defendants, the plaintiff argued that he was denied discovery and the Ninth Circuit rejected that argument because the plaintiff had not "identified what discovery he was denied or how he was prejudiced").

Moreover, even if these orders were appealable, Appellant has failed to demonstrate that the Bankruptcy Court abused its discretion in making any of the rulings in its discovery or scheduling orders and, as a result, the Court affirms the Bankruptcy Court's decisions. *See, e.g., Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (holding that discovery rulings must be affirmed unless the plaintiff makes "the clearest showing" of "actual and substantial prejudice" from the denial of discovery). In addition, the Court affirms the Bankruptcy Court's rulings on Appellees'
Motions to Dismiss.

V. Conclusion

For all the foregoing reasons, the Bankruptcy Court's August 21, 2020 Judgment, March 31, 2021 Order Denying Motion to Reconsider Summary Judgment in Favor of Defendants, and April 5, 2021 Amended Judgment are **AFFIRMED**, and this appeal is dismissed with prejudice.

IT IS SO ORDERED.

Appendix D
US Bankruptcy Court
Central District of California

Nos. 1:12-bk-11243-MB;
1:17-ap-01007-MB

Peter Kleidman,
Plaintiff
v.
Hilton & Hyland Real Estate, Inc. et al.,
Defendants

Filed April 2, 2021

Before: Hon. Martin R. Barash
US Bankruptcy Judge

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS HILTON & HYLAND, JOSHUA ALTMAN AND MATTHEW ALTMAN [ADV. DKT. 248]

Defendants Hilton & Hyland Real Estate, Inc., Joshua Altman and Matthew Altman (collectively, the "Defendants") filed their Motion for Summary Judgment (the "Motion") and Statement of Uncontroverted Facts and Conclusions of Law supported by the declarations of Joshua Altman, Matthew Altman, Dustin Cumming, Danelle Lavin, Bruce Makowksy, Aviv L. Tuchman, expert witness Allan Wallace, Branden Williams, Rayni Williams, William G. Willson, and a request for judicial notice. Adv. Dkt. 248 – 262. Peter Kleidman, the

reorganized debtor and plaintiff in the above-captioned adversary proceeding ("Kleidman") opposes the Motion based on his Opposition and Statement of Genuine Issues, supported by his own declaration, the declaration of Dan Rinsch and a request for judicial notice. Adv. Dkt. 348 – 350. The Defendants' reply papers are supported by the supplemental declaration of Aviv Tuchman. Adv. Dkt. 354. The Motion came on for hearing on May 9, 2019. Appearances were as noted in the record. Having considered the parties' papers filed in support of and in opposition to the Motion for Summary Judgment, oral arguments, as well as other pleadings and papers on file in this Adversary Proceeding and the main bankruptcy case, the Court now finds and concludes as follows:

UNCONTROVERTED FACTS

1. Kleidman is a sophisticated and experienced businessman. He graduated from Cambridge University with a Ph.D. in mathematics and thereafter worked for several years in New York City and London at Goldman Sachs, Bankers Trust, Dresdner Bank AG, ABN AMRO Bank and HSBC Bank, principally as a financial analyst. Declaration of Aviv L. Tuchman ("Tuchman Decl."), ¶ 19, Exh. P [Deposition of Peter Kleidman ("Kleidman Depo."], Adv. Dkt. 250-3 at 11-21.[8]

2. At some point in time, Kleidman began purchasing real properties in Southern California, including at least six properties, several of which he eventually "flipped" for a profit. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 22-23, 27-29, 33-36. Among the properties he purchased were 21942 Pacific Coast Highway, Malibu,

[8] All page citations refer to the ECF legend pagination.

California, which he purchased for $2.9 million and sold for approximately $13.4 million, and 22420 Pacific Coast Highway, Malibu, California, which he purchased for $15.5 million and sold for approximately $18.9 million. *Id.* Adv. Dkt. 250-3 at 70-73, 78.

3. In 2006, Kleidman sold the 21942 Pacific Coast Highway property for $13.4 million, and used the net sales proceeds to purchase two properties, including 9380 Sierra Mar Drive, Los Angeles, California, 90069 (the "Property"), the property at issue in this Adversary Proceeding. *Id.* Adv. Dkt. 250-3 at 22, 30, 78.

4. In or about May, 2010, Kleidman received an appraisal for the Property which valued it at $4.25 million, and was informed by the appraiser that the Property would need significant updating as it was "ugly and undesirable." Tuchman Decl., ¶ 16, Exh. M [Plaintiff's Amended Responses to Hilton & Hyland's RFAs, Set Two], Adv. Dkt. 250-2 at 56; Tuchman Decl., ¶ 19, Exh. P, Adv. Dkt. 250-3 at 97, 99, 177-183.

5. In 2011, Kleidman entered into a listing agreement with real estate broker Sun Heritage Real Estate, which listed the 9380 Sierra Mar Property on the MLS with a listing price of $4.2 million. *Id.* Adv. Dkt. 250-3 at 100, 184-194.

6. In or about February, 2012, Kleidman received an appraisal for the Property which valued it at $3.8 million and which stated that the "[i]nterior finish does not match the quality of the basic construction. . . . The interior walls are faux painted in dark, cave like colors. . . Most buyers of this home will look to remodel most of the interior with a new kitchen, bathrooms, flooring and HVAC. .. There is functional obsolescence not only associated with the pool and

spa but with the interior improvements." Declaration of William G. Willson, ¶ 3 and Exh. A [February 4, 2012 Appraisal] thereto, Adv. Dkt. 259 at 11. Kleidman knew in 2012 that it would be worth significantly more if it were renovated, but Kleidman was unable to renovate the Property at that time. Tuchman Decl., ¶ 14, Exh. K [Plaintiff's Amended Responses to Hilton & Hyland's RFAs, Set One], Adv. Dkt. 250-2 at 29; Tuchman Decl., ¶ 19, Exh. P, Adv. Dkt. 250-3 at 108-109 ("Q: And you also understood, because you received this appraisal and you knew independently that that house, 9380 Sierra Mar, is potentially – can be worth significantly more if it's renovated, right? A: Right. Q: Okay. Did you renovate it? A: No. Q: Could you renovate it in February of 2012? A: No.").

7. In 2012, Sun Heritage Real Estate relisted the Property on the MLS for $3.9 million. While listed at that price, Kleidman received purchase offers, however, Wells Fargo Bank would not accept any of the offers that were received. Tuchman Decl., ¶ 14, Exh. K, Adv. Dkt. 250-2 at 27-29.

8. Having lost money in the stock market and in other non-real estate investments, Kleidman was not able to maintain the mortgages on all of his investment real properties. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 68-69. As a result, Kleidman commenced this bankruptcy case on February 8, 2012. Case Dkt. 1.

9. Kleidman listed the value of the Property at $3.8 million on his Schedule A. Case Dkt. 1 at 20. Thereafter, Wells Fargo Bank filed a proof of claim for $512,937, secured by the Property, which Wells Fargo Bank stated was worth $4.2 million. POC #5. On or about October 18, 2012, Kleidman amended his Schedule A and listed the value of the Property

as $4.2 million. Case Dkt. 65 at 3.

10. Postpetition, Kleidman contacted multiple real estate agents about selling the Property, including Michael Eisenberg, Benjamin Bacal of Rodeo Realty, Inc., and Lee Wasser of Sotheby's International Realty. Like the agents at Sun Heritage Real Estate before them, all of them told Kleidman that the Property could not be sold for more than the total liens and recommended a short sale. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 53, 69-71, 112-116, 126; Declaration of Dustin Cumming ("Cumming Decl."), ¶ 6; Declaration of Danelle Lavin ("Lavin Decl."), ¶ 6.

11. In November 2012, Benjamin Bacal brought Bruce Makowsky ("Makowsky") to Kleidman as a prospective buyer of the Property. Kleidman knew that Makowsky wanted to buy the Property to flip it. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 113-115 ("A: [Bacal] actually brought me Makowsky in November of '12. Q: And you knew Makowsky was going to buy it to flip it? A: Yeah."); Declaration of Bruce Makowsky ("Makowsky Decl."), ¶¶ 4, 6.

12. Although multiple agents told him a short sale was his only option, Dustin Cumming, Aaron Kirman, and Danelle Lavin (formerly, Danelle Vance) at Defendant Hilton & Hyland, told Kleidman that they believed that the Property could be sold for more than the total liens and without a short sale. For that reason, he selected Mr. Kirman, Mr. Cumming, and Ms. Lavin (collectively, the "Listing Agents") at Hilton & Hyland to sell the Property Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 72-73, 103, 136; Cumming Decl., ¶ 6; Lavin Decl., ¶ 6.

13. On or about December 1, 2012, Kleidman and

Defendant Hilton & Hyland entered into a Residential Listing Agreement ("RLA") to list the Property for $5,495,000. Case Dkt. 99 at 5-6, 8, 24-32.

a. The RLA, at Paragraph 8, entitled "Broker's And Seller's Duties," provided that: "Seller is responsible for determining at what price to list and sell the Property." The RLA did not expressly require Defendant Hilton & Hyland to determine the value of the Property at the time it was listed.

b. The RLA, at Paragraph 10.C, entitled "Possible Dual Agency With Buyer," provided that in the event of a dual agency, "Seller understands and agrees that: ... Broker, without the prior written consent of Buyer, will not disclose to Seller that Buyer is willing to pay a price greater than the offered price."

c. The RLA, at Paragraph 10.D, further provided that: "Seller consents to Broker's representation of sellers and buyers of other properties before, during and after the end of this Agreement."

d. The RLA did not expressly require Defendant Hilton & Hyland to investigate what a fully renovated version of the Property would be worth.

14. In support of their Motion, the Defendants offer the declaration of their expert witness, Alan D. Wallace, regarding the applicable standard of care for real estate brokers under the facts of this case. Case Dkt. 354. Kleidman does not offer any expert testimony to rebut or otherwise respond to the Wallace Declaration or the opinions expressed therein.

15. The custom and practice in the industry is that the seller determines the price and that a real

estate agent or broker, in the absence of a specific agreement to do so, does not owe a duty to provide an opinion or make any determination as to a property's value or to opine or determine the value of a "fully renovated version" of the property. Expert Witness Declaration of Allan Wallace ("Wallace Decl."), ¶ 7(a).

16. On or about January 24, 2013, Kleidman filed in his bankruptcy case his *Application to Employ Hilton & Hyland, Aaron Kirman, Dustin Cumming as Real Estate Broker / Agents to Sell Estate Real Property* (the "Employment Application"). Case Dkt. 99. The only listing agents identified in the Employment Application were Aaron Kirman, Dustin Cumming and Danelle Vance. Defendants Joshua Altman and Matthew Altman were not identified as listing agents. Following a hearing on shortened notice, the Court approved the Employment Application on January 30, 2013. Case Dkt. 114.

17. Cumming provided Kleidman with comparable properties to review and asked him to decide on a listing price. Eventually, Kleidman told Cumming that he wanted to list the Property for $5,495,000, which was a figure Kleidman said he arrived at after consulting with his bankruptcy counsel and based on his own research. Cumming Decl., ¶ 7; Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 103-04.

18. Kleidman never asked Cumming or Lavin to opine on the value of the Property, or to determine the value of the Property, and neither of them formed an opinion as to its value. Neither of them believed that it was worth more than $5.3 million. Nor did they form an opinion as to what the value of a fully renovated version of the Property would be. Cumming Decl, ¶ 11; Lavin Decl., ¶ 9.

19. At the time that Kleidman determined the

listing price for the Property, and at the time he entered into the RLA, Kleidman:

a. Believed that the Property was "gothic," "very, very strange," "ugly," and "undesirable." Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250- 3 at 59, 99, 108, 146-49 & Exh. 39 ["Before" Photographs of Property] to the Kleidman Depo., Adv. Dkt. 250-4 at 9-21;

b. Believed that a fully renovated version of the Property might have a fair market value as high as $8.0 - $9.0 million. Tuchman Decl., ¶ 16, Exh. M, Adv. Dkt. 250-2 at 58;

c. Had been apprised by William Willson, a certified real estate appraiser, that the Property had "the potential to be a home worth significantly more if the interior is renovated with quality to match the construction." Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 108-09; Willson Decl., Exh. A;

d. Did not have any money to develop the Property. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 56-57, 109;

e. Knew there were different pools of buyers for the Property. *Id.* at 150 ("A: But there can be different pools of buyers. Q: But you knew that at the time. A: Right. Q: Okay. You knew at that time that there were different kinds of buyers out there, correct? A: Yes.");

f. Knew that, generally, if a property is renovated it can sell for more money and believed that if Makowsky bought the Property he would probably spend "several million" dollars to renovate it. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 64-65, 152.

20. Defendant Hilton & Hyland placed advertisements for the Property in The Los Angeles

Times, The MLS Broker Caravan, and Christie's International Real Estate syndicates.
After listing it on the MLS, the Listing Agents held "open houses" and showed the Property eighteen times, including to developers and flippers. The Listing Agents kept Kleidman informed of the showings and buyer interest, including from developers and flippers. Kleidman provided Lavin the survey and floor plans for the Property to be given to interested developers and flippers. Cumming Decl., ¶ 8; Lavin Decl., ¶ 7; Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 46-47, 90, 118-120, 237-240; Case Dkt. 100 [*Debtor's Motion for Order 1) Authorizing Sale of Real Property, etc.*], Declaration of Peter Kleidman at ¶ 5.

21. Defendant Hilton & Hyland and the Listing Agents did everything that Kleidman asked them to do during the listing and sale of the Property. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 91.

22. After the Property was listed on the MLS, Kleidman determined that a sale price of $5,300,000 would cover all of the liens plus commissions and closing costs and would leave him with a small amount of net proceeds. Kleidman received multiple offers for less than the listing price. Based on his own calculations, Kleidman countered the offers with a $5,299,999 purchase price. Tuchman Decl., ¶ 14, Exh. K, Adv. Dkt. 250-3 at 35:22-25; Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 121-22 and Exh. 29 [January 16, 2013 email chain] to the Kleidman Depo., Adv. Dkt.250-3 at 241-43; Cumming Decl., ¶ 8; Lavin Decl., ¶ 7.

23. Defendant Joshua Altman and Defendant Matthew Altman (collectively, the "Altman

Defendants") did not represent Kleidman in marketing and selling the Property. They were not his listing agents, they were not parties to the RLA, nor did Kleidman contact them or consult with them before he determined the listing price or entered into the RLA with Defendant Hilton & Hyland. Tuchman Decl., ¶ 17, Exh. N [Plaintiff's Amended Responses to Matthew Altman's Requests for Admissions, Set One] and Exh. O [Plaintiff's Amended Responses to Joshua Altman's Requests for Admissions, Set One], Adv. Dkt. 250-2 at 64-65, 73-74; Declaration of Joshua Altman ("J. Altman Decl."), ¶ 5; Declaration of Matthew Altman ("M. Altman"), ¶ 5.

24. During the sale of the Property, Kleidman did not speak with the Altman Defendants and had not heard of them until after the sale closed. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 268 ("Q: Okay. Did you ever pick up the phone and call either of the Altmans during this transaction? A: No. Q: Had you ever heard of them? A: No. Q: Okay. So the first time you heard of the Altmans was after the sale closed, right? A: Right").

25. Before filing this action, Kleidman never spoke with either of the Altman Defendants. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 40 ("Q: Did you ever in your life speak with Josh Altman? A: No. Q: Did you ever in your life speak with Matt Altman? A: No").

26. Once he saw the Property listing on the MLS, Joshua Altman sent it to potential buyers he thought would be interested, including Bruce Makowsky. He also reached out to Lavin to obtain more information about the listing. She informed him that the seller was in bankruptcy, he owed about $4.9 million in liens, that any sale would be subject to the bankruptcy court's approval, and that they had

multiple showings a day to developers and flippers. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 64; J. Altman Decl., ¶ 7 and Exh. 1 [January 18, 2013 email] thereto; Lavin Decl., ¶ 8.

27. Makowsky wanted to offer $5,000,000, which is the price he had decided on when he first saw the Property back in November 2012. On behalf of Makowsky, Joshua Altman submitted an all cash $5,000,000 purchase offer dated January 20, 2013 (the "Offer") to the Listing Agents, which disclosed that Hilton & Hyland was the buyer's broker. Case Dkt. 100, Declaration of Peter Kleidman at ¶ 7; J.Altman Decl., ¶¶ 7-8 and Exh. 1 thereto; Makowsky Decl. at ¶¶ 7-8.

28. The Listing Agents told Kleidman about the Makowsky offer for the Property and, because Kleidman knew Makowsky wanted to flip the Property, Kleidman emailed plans and surveys to Lavin to share with Makowsky. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 64-65 ("Q: Do you remember sending any plans to Danelle? A: Yes, I believe I did send her some. Q: Okay. Because you knew Makowsky wanted to flip the property. A: Right. Q: Okay. And you knew Makowsky was going to have to build and work hard to renovate that gothic property. A: Right"), 145 ("Q: Then the buyer renovated the property for the purpose of flipping it, right? A: Right. A: And you know he was going to flip it, right? A: I believed it. I didn't have firsthand knowledge. Q: Okay. You believed it based on all the circumstance surrounding the transaction and your knowledge of him, correct? A: Right. Q: Makowsky, right? A: Right."), 239-240.

29. Kleidman signed the Offer on January 21, 2013 and made counter offer number 1 for $5,299,000. Kleidman price because he believed that

the Property was worth around that amount and he was trying to get a price at which lienholders would be paid with something leftover for his bankruptcy estate. Nobody at Hilton & Hyland pushed him to offer that price. Case Dkt. 100, Declaration of Peter Kleidman, ¶ 7; Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 135, 137; J. Altman Decl., ¶ 9; Makowsky Decl., ¶ 8.

30. Kleidman and Makowsky exchanged counter offers number 2 and 3. Then Makowsky decided to offer $5,300,000 with no contingencies and as fast an escrow as possible and he sent counter offer number 4 dated January 23, 2013 with those terms and contingency removal number. 1, which Kleidman accepted. Case Dkt. 100, Declaration of Peter Kleidman, ¶¶ 7-9; J. Altman Decl., ¶¶ 10-11; Makowsky Decl., ¶ 8.

31. Defendant Hilton & Hyland provided Kleidman a Market Conditions Advisory ("MCA"), which he signed on or about January 24, 2013. The MCA provided, at Paragraph 3, under "Seller Considerations," as follows:

> As a Seller, you are responsible for determining the asking price for your property. ... All Sellers should be sure they are comfortable with the asking price they are setting and the price they are accepting. There is not, and cannot be, any guarantee that the price you decide to ask for your property, or the price at which you agree to sell your property is the highest available price obtainable for the property. It is solely your decision as to how much to ask for your property and at which price to sell your property.

32. Kleidman read and understood paragraph 3. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 130-31, Adv. Dkt. 250-4 at 6-7.

33. Kleidman received several purchase offers for the Property, which were all put through a countering process to get the best offer. Other than Makowsky's offer, the offers capped out at $4,600,000 or less. Case Dkt. 100, Declaration of Peter Kleidman, ¶¶ 5-6, Declaration of Dustin Cumming, ¶ 5; Cumming Decl., ¶¶ 8-9.

34. On January 25, 2013, Kleidman filed his *Motion for Order: (1) Authorizing Sale of Real Property Free and Clear of Liens, Encumbrances and Interests, etc.* (the "Sale Motion") by which he sought authority to sell the Property for $5.3 million to Makowsky. Case Dkt. 100. In support of the Sale Motion, Kleidman testified that:

a. Defendant Hilton & Hyland "put together a comprehensive marketing plan that resulted in the Property being shown 18 times with three offers received where we engaged in the countering process to get the best offer." *Id.* at 13, ¶ 5;

b. All but the Makowsky offers "capped out at $4.6 million which did not cover all the secured obligations. The current offer is the highest price, the cleanest and strongest offer and will clearly benefit the estate. It is an all cash offer with no contingencies . . . "*Id.* at 13-14, ¶¶ 6, 7;

c. He supported the sale after having "explored many options and realize that a sale at a price that covers my obligations is in both my best interest and the best interest of my bankruptcy estate and creditors. This is the best opportunity for everyone in my case. Thus it is my business judgment that the proffered sale is in the bests interests of the estate" and believed that the purchase price was "over market." *Id.*, at 15, ¶ 12.

35. Following a January 30, 2013, hearing on shortened notice, the Court approved the sale of the

Property to Makowsky pursuant to its sale order entered on January 31, 2013. Case Dkt. 117.

36. Sale of the Property closed on February 1, 2013. The estate received $122,644 in net proceeds from the sale. Tuchman Decl., ¶ 19, Exh. P [Kleidman Depo.], Adv. Dkt. 250-3 at 142-143 and Exh. 36 [Seller's Final Closing Statement] to the Kleidman Depo., Adv. Dkt. 250-4 at 8.

37. Neither Cumming nor Lavin represented Makowsky in the sale of the Property. Neither directly communicated with Makowsky in connection with the sale as all their communications were directed to the Altmans. Cumming Decl., ¶¶ 12-13; Lavin Decl., ¶¶ 10-11. Makowsky did not communicate with Cumming or Lavin or anyone else at Hilton & Hyland regarding the sale of the Property other than Joshua Altman. Makowsky Decl., ¶ 9; J. Altman Decl., ¶ 14; M. Altman Decl., ¶ 7.

38. Over the course of the year following the close of the sale, Makowsky spent millions of dollars to do a complete restoration and renovation of the Property. Makowsky Decl., ¶ 14; *Compare* "before" photographs, Tuchman Decl., ¶ 19, Exh. P, Exh. 39 to the Kleidman Depo. *with* "after" photographs, Exh. 40 to the Kleidman Depo., Adv. Dkt. 250-4 at 9-21, 22-30; Declaration of Rayni Williams ("R. Williams Decl."), ¶ 9 and Exh. 2 [Photographs of Property at 2014 listing] thereto.

39. Prior to his purchase of the Property, Makowsky did not discuss any of the particulars relating to his development plans for the Property, such as the dollar amount to be invested, the full extent of the renovations to be made, or when he expected it to be completed with the Altmans, Cumming, Lavin, or anyone else at Hilton & Hyland.

Makowsky Decl., ¶ 11; J. Altman Decl., ¶ 7; M. Altman Decl., ¶¶ 7, 10; Cumming Decl., ¶ 13; Lavin Decl., ¶ 11.

40. Prior to his purchase of the Property, Makowsky did not have any discussions with the Altmans, Cumming, Lavin or anyone else at Hilton & Hyland, regarding which real estate agents and brokerage he intended to enlist to resell the Property once the renovations were done. Makowsky Decl., ¶¶ 11-12; J. Altman Decl., ¶ 7; M. Altman Decl., ¶¶ 7, 10; Cumming Decl., ¶ 13; Lavin Decl., ¶ 11. Makowsky did not have any pre-existing agreement, arrangement or understanding that he would use Hilton & Hyland when he sold the Property and he did not even consider who he would use for his sale of the Property until his renovations were nearly completed in 2014. Makowsky Decl., ¶ 12. Hilton & Hyland, Cumming, Lavin and the Altmans had no hopes or expectations of representing Makowsky or his entities in other transactions based on his purchase of the Property from Kleidman. J. Altman Decl., ¶ 16; M. Altman Decl., ¶ 9; Cumming Decl., ¶¶ 12-13; Lavin Decl., ¶¶ 10-11.

41. Cumming and Lavin have never represented Makowsky, or his entities, in any real estate transaction. Other than Makowsky's purchase of the Property from Kleidman, Matthew Altman has not represented Makowsky, or any of his entities, in any real estate transaction. M. Altman Decl., ¶ 11; Cumming Decl., ¶ 12; Lavin Decl., ¶ 10.

42. Many months after Makowsky's purchase of the Property from Kleidman, Joshua Altman learned of an off-market property in Bel Air available for purchase. Joshua Altman shopped the opportunity to several potential buyers, including Makowsky, who was interested. Because Joshua Altman presented

the opportunity to Makowsky, he hired Joshua Altman as his agent to buy the Bel Air property. In July 2013, Makowsky acquired the Bel Air property. The only real estate transactions in which Makowsky, or his entities, were represented by Joshua Altman were his purchase of the Property from Kleidman in January 2013 and his purchase of the Bel Air property in July 2013. J. Altman Decl., ¶¶ 19-20; Makowsky Decl., ¶ 13.

43. As Makowsky's renovations to the Property were nearing completion in 2014, he contacted Bacal at Rodeo Realty, Inc. (who had first shown the Property to Makowsky in November 2012) to list the Property for sale. Makowsky told Bacal he wanted the Property colisted with Branden Williams and Rayni Williams of Hilton & Hyland. Makowsky had first met the Williams in mid-2013 regarding an unrelated real property being shown by the Williams. Makowsky was impressed during the showing of that property by the Williams' professionalism and aggressiveness. On February 3, 2014, Makowsky, on behalf of his entity 9380 Sierra Mar, LLC, entered into a Residential Listing Agreement with both Bacal, on behalf of Rodeo Realty, Inc., and the Williams, on behalf of Hilton & Hyland, to co-list the Property for $25,000,000. Hilton & Hyland's compensation under that agreement was to be 1.0% of the listing or purchase price. The Property was listed on the MLS and eventually sold for $19,000,000, which sale was recorded on May 7, 2014. Makowsky Decl., ¶¶ 14-16; Declaration of Branden Williams ("B. Williams Decl."), ¶ 6-9 and Exh. 1 [February 3, 2014 residential listing agreement] thereto; R. Williams Decl., ¶¶ 6-9.

44. Neither the Altmans nor the Listing Agents represented or acted as agents in the 2014 resale of

the Property. Nor did any of them receive compensation from that resale. Makowsky Decl., ¶ 13; J. Altman Decl., ¶ 18; M. Altman Decl., ¶ 11; Cumming Decl., ¶ 14; Lavin Decl., ¶ 11; B. Williams Decl., ¶ 8; R. Williams Decl., ¶ 8.

45. Defendant Hilton & Hyland had a duty to disclose to Kleidman that it was the broker representing both Kleidman and Makowsky on the sale of the Property. Hilton & Hyland made this disclosure to Kleidman and he consented to the dual agency. Tuchman Decl., ¶ 14, Exh. K, Adv. Dkt. 250-2 at 39; Tuchman Decl., ¶ 19, Exh. P, Adv. Dkt. 250-3 at 92.

46. The custom and practice in the industry is that even in a dual agency, a real estate agent or broker does not owe any duty to disclose to the seller whether it had represented the buyer in prior (sic) real estate transaction or to investigate and disclose what other real estate transactions the buyer was involved in or intended to be involved in. Wallace Decl., ¶ 7(b). Thus, the Defendants did not owe a duty to disclose whether it (sic) had represented Makowsky or one of his entities in any prior real estate transactions. Nor did either Hilton & Hyland or the Altmans have a duty to investigate and disclose what other real estate transactions Makowsky had been involved in or that he intended to be involved in as a developer.

47. When the sale of the Property from Kleidman to Makowsky closed, Kleidman was satisfied with the work and efforts of his Listing Agents and Hilton & Hyland and, following the close of escrow, sent them a thank you email praising their hard work and efforts. Tuchman Decl., ¶ 19, Exh. P, Adv. Dkt. 250-3 at 73; Cumming Decl., ¶ 14 and Exh. C [February 2, 2013 email] thereto; Lavin Decl., ¶ 12 and Exh. C

[same] thereto. 48. On or around July 1, 2016, Kleidman went online and saw that the Property had sold in May 2014 for $19 million. Based thereon, he "inferred that Hilton & Hyland helped Buyer get a below-market deal." Tuchman Decl., ¶ 10, Exh. G [Plaintiff's Responses to Hilton & Hyland's Interrogatories, Set One], Adv. Dkt. 250-1 at 207.

49. On July 22, 2016, this Court granted Kleidman's motion for entry of a final decree and closed his bankruptcy case on July 28, 2016. Case Dkt. 285, 287.

50. On August 1, 2016, Kleidman filed his complaint against Hilton & Hyland and the Altmans alleging various breaches of fiduciary duty. Kleidman acknowledges that he would not have sued the Defendants if he had not learned of the 2014 sale of the Property for $19 million. Tuchman Decl., ¶ 19, Exh. P, Adv. Dkt. 250-3 at 144-45. 51. To the extent required, should any of the foregoing findings of fact be deemed to be conclusions of law, they are hereby adopted as such.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b). Kleidman's claims for relief are non-core proceedings to which the parties have consented to the entry of final judgment by this Court. Adv. Dkt. 155 at 5.

2. Summary judgment should be granted when there are no genuine issues of material fact and when, as a matter of law, the moving party is entitled to prevail. Fed. R. Civ. P. 56(a) (made applicable in this adversary proceeding by Fed. R. Bankr. P. 7056). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to

secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) quoting Fed. R. Civ. P. 1. "The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

3. As movants, the Defendants have "'both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.'" *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1188 (9th Cir. 2016) quoting *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). They also bear the initial burden of production as to each material fact upon which they have the burden of persuasion at trial. *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

4. As to all matters on which Kleidman bears the ultimate burden of persuasion at trial, the Defendants "may discharge [their] initial burden by 'show[ing] that the nonmoving party does not have enough evidence of an essential element to carry [his] ultimate burden of persuasion at trial.'" *Id.* Alternatively, Defendants may satisfy their burden of production by producing "evidence negating an essential element of the nonmoving party's claim." *Nissan Fire & Marine*, 210 F.3d at 1102.

5. The operative complaint is Kleidman's Third Amended Complaint as limited by this Court's *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Third Amended Complaint* (the "Order"). Adv. Dkt. 88. The only remaining causes of action are breach of fiduciary duty, and a negligence cause of action which Kleidman has parsed into two

claims, one labeled as a breach of the duty of fairness claim and another labeled as a breach of the duty of care claim. Additionally, for the reasons stated in the Order, to the extent Kleidman bases either his breach of fiduciary duty claim or his negligence claim on an alleged "duty to achieve as high a price as possible" in the sale of the Property, those claims were dismissed. *Id.*

6. California law governs both causes of action. "A claim for breach of fiduciary duty requires the following elements be shown: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages." *Slaieh v. Simons*, 584 B.R. 28, 41 (C.D. Cal. 2018) (citing *Gutierrez v. Girardi,* 194 Cal. App. 4th 925, 932 (2011)). The elements of a negligence claim are "(1) a legal duty to use due care; (2) a breach of that duty; (3) a reasonably close causal connection between that breach and the resulting injury; and (4) actual loss or damage." *Carleton v. Tortosa,* 14 Cal. App. 4th 745, 754 (1993).

7. As a general rule, the plaintiff bears the burden of proof of all elements of his claims. Cal. Evid. Code § 500 ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"). However, in the context of a breach of fiduciary duty claim, once the principal establishes the existence of a fiduciary relationship and alleges a violation of the agent's fiduciary duties to him, the burden shifts to the agent to prove that he or she acted in good faith toward the principal and made full disclosure. *Jorgensen v. Beach'N' Bay Realty, Inc.*, 125 Cal. App. 3d 155, 162-63 (1981) (burden shifted to real estate agents once, in a dual agency, their seller client established a fiduciary relationship and alleged her

agents failed to disclose material facts regarding an agreement between the agents and the buyer) citing *Timmsen v. Forest E. Olson, Inc.*, 6 Cal. App. 3d 860, 871 (1970). Kleidman bears the ultimate burden of persuasion at trial on the first and third elements of his breach of fiduciary duty claim and all elements of his negligence claim. Defendants bear the burden of persuasion that they acted with good faith toward Kleidman and with full disclosure. Defendants' Motion also argues that Kleidman's claims for relief are barred by judicial estoppel. As an affirmative defense, Defendants bear the burden of persuasion on judicial estoppel.

8. Summary judgment is warranted:

> "[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a

> sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. 477 U.S. at 322-23. Because the Motion asserts that Defendants are entitled to judgment on both the breach of fiduciary duty claim and the negligence claim, Kleidman must make a sufficient showing to establish the existence of every element of those claims on which he has the burden of proof. "A complete failure of proof concerning an essential element" of Kleidman's claim "necessarily renders all other facts immaterial." *Id.*

9. Defendants' Motion does not merely argue that Kleidman cannot prove essential elements of his claims on which he has the burden of proof. Defendants also assert, and offer voluminous supporting evidence, that they did not breach any of their fiduciary duties to Kleidman, acted in good faith towards him and made full and complete disclosure to him of all requisite facts. Although Kleidman does not bear the burden of proof on these issues at trial, to defeat summary judgment he must produce sufficient evidence on the material issues to demonstrate that a genuine issue of fact exists.

10. Kleidman's evidence in opposition "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Legal arguments and assertions unsupported by evidence are insufficient to create a

genuine issue of fact. *Lane v. Dep't of Interior*, 523 F.3d 1128, 1140 (9th Cir. 2008) ("Lane has not provided evidence in her pleadings, depositions, answers to interrogatories, or affidavits to show willfulness or damages . . . Lane's allegations in her complaint and her attorney's statements at oral argument are insufficient to defeat a summary judgment motion."); *S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982) ("[A] party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda."). Similarly, Kleidman's repeated assertions that the testimony of Cumming and the Altmans is not credible does not satisfy his burden. *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir.1983) ("Neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment"); *Robinson v. Adams*, 847 F.2d 1315, 1316–17 (9th Cir. 1987) ("Robinson contends that he can survive a motion for summary judgment because some evidence in the record suggests that Orange County and the employees could have discovered he is Black. . . We do not believe that Robinson has produced sufficient evidence on the question of the knowledge by Orange County or the employees of his race for a jury to return a verdict in his favor.. . . All of these screeners declared that they were unaware of Robinson's race when they reviewed and rejected his applications. Although the credibility of the application screeners could be a triable issue, Robinson has produced no evidence that places their credibility in doubt. ... In light of this record, we conclude that there was no genuine dispute as to whether the application screeners were

aware of Robinson's race.").

11. To the extent Kleidman asserts that a fact is genuinely disputed, Rule 56 mandates that he support his assertions by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ... admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "A party opposing summary judgment must direct [the court's] attention to specific, triable facts." *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003). The Court is "not required to comb the record to find some reason to deny a motion for summary judgment." *Forsberg v. Pac. Northwest Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988).

12. The Court's own local rules place additional procedural requirements on the parties, requiring their citations to evidence regarding material facts to be presented in a specific format. As movants, the Defendants are required to file and lodge a statement of uncontroverted facts which "must identify each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission or other document relied upon to establish each such fact." LBR 7056-1(b)(2)(B). The Defendants' Statement of Uncontroverted Facts identifies 71 material facts on which they rely and identifies the evidence in support of each such fact. Adv. Dkt. 249. The local rules require Kleidman to file and lodge a statement of genuine issues which "must identify each material fact that is disputed and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission or other document relied upon to establish

the dispute and the existence of a genuine issue . . . " LBR 7056-1(c)(2)(B). Kleidman filed his Statement of Genuine Issues which responds to 26 of Defendants' 71 material facts; in each instance, Kleidman re-writes the Defendants' material fact and re-states the same evidence cited by the Defendants in support of the material fact. Adv. Dkt. 350. Kleidman offers citations to his own proffered evidence on only eight of his 26 responses. Adv. Dkt. 350, 12, 33, 34, 37, 38, 47, 48, 63. Kleidman's Statement of Genuine Issues fails to satisfy the requirements of either Rule 56(c) or LBR 7056-1(c). Thus, he has not identified any evidence which creates a genuine dispute about the vast majority of the Defendants' material facts.

13. In support of their Motion, the Defendants offer the declaration of their expert witness, Allan Wallace, on the applicable standard of care for real estate agents and brokers in California in the sale of real property, including the scope of a broker's fiduciary duties on certain issues in the absence of either statutory or contractual provisions defining the agent or broker's duties in connection with those issues. Adv. Dkt. 258. Specifically, Wallace opines on whether Hilton & Hyland the Defendants had a duty to determine the value of the Property, whether the Defendants had a duty to disclose prior transactions with Makowsky or to investigate what other real estate transactions Makowsky intended to be involved in. *Id.* Wallace also opines on whether the Defendants' conduct in this case falls below the standard of care for real estate agents or brokers in this community. *Id.* Wallace's expert testimony is relevant to Kleidman's breach of fiduciary duty claim as well as his negligence claim.

14. The production of Wallace's expert testimony on these issues creates an additional burden on

Kleidman to avoid summary judgment. Under California law, "[i]n negligence cases arising from the rendering of professional services, as a general rule the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the layperson's common knowledge includes the conduct required by the particular circumstances. . . When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." *Webster v. Claremont Yoga*, 26 Cal. App. 5th 284, 288–89 (2018); *Acinelli v. Torres*, 2019 WL 6825767, *6 (C.D. Cal., Apr. 22, 2019). This rule is equally applicable in federal actions in which a defendant moves for summary judgment under Rule 56 on a claim governed by California law: "when the defendant supports his motion for summary judgment with the declarations of experts, a plaintiff who has presented no expert evidence concerning the required standard of care has failed to make a sufficient showing that there are genuine factual issues for trial." *Hutchinson v. United States*, 838 F.2d 390, 393 (9th Cir. 1988). Kleidman offers no expert evidence to rebut the issues addressed by the Wallace declaration and therefore has not shown that there are any genuine issues for trial on those matters.

<u>Breach of Fiduciary Duty</u>

15. "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." *Ryan v. Real Estate of the Pacific, Inc.*, 32 Cal. App. 5th 637, 646 (2019) (citing *Carleton v. Tortosa*, 14 Cal.

App. 4th 745, 755 (1993); *Padgett v. Phariss*, 54 Cal. App. 4th 1270, 1279 (1997)).

> A "broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. (*Stiefel v. McKee* (1969) 1 Cal.App.3d 263, 266, 81 Cal.Rptr. 565; *Timmsen v. Forest E. Olson, Inc.* (1970) 6 Cal.App.3d 860, 871, 86 Cal.Rptr. 359; *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 180, 111 Cal.Rptr. 334.) 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [¶] ... [¶] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts

> not known to the agent and disclosure of all material facts that might reasonably be discovered.' (Miller & Starr, Real Estate Law 2d, Agency, § 3.17, pp. 94, 96–97, 99.)

Field v. Century 21 Klowden-Forness Realty, 63 Cal. App. 4th 18, 25–26 (1998). See also *Wyatt v. Union Mortg. Co.*, 24 Cal.3d 773, 782 (1979) ("A real estate licensee is 'charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision'").

16. Because an agency relationship fundamentally is a contractual relationship, a principal and his agent may modify and define the existence and extent of the agent's fiduciary duties to his principal. *Carleton*, 14 Cal. App. 4th at 755 (real estate agent did not owe principal duties which were expressly disclaimed in the listing agreement). See also, Miller & Starr, 2 Cal. Real Est. § 3:34 (4th ed. 2018) ("The extent of the duties of the agent are determined by the terms of the agreement between the parties and the contract can define, modify, and limit the terms of the agency and the agent's fiduciary duties. The terms of the contract between the principal and the agent may limit the scope of the agency and restrict the scope of the agent's fiduciary duties").

17. Hilton & Hyland The Defendants did not have a duty to determine the value of the Property. The RLA entered into by Kleidman and Hilton & Hyland did not require Hilton & Hyland to determine the value of the Property, to opine on the value of the Property or to determine the listing price for the Property. The RLA, at paragraph 8, expressly provides that Kleidman is responsible for determining the price to list the Property and to sell the Property. Case Dkt. 99 at 25. The custom and

practice in the industry is that the seller determines the price and that neither the agents nor the broker owe a duty to provide an opinion regarding value or to determine the value of the property. Wallace Decl., ¶ 7(a). Kleidman's Listing Agents, Cumming and Lavin, were not in possession of any facts which created a "independent duty to ascertain the true fair market value of the property." *Padgett*, 54 Cal. App. 4th at 1285. Kleidman failed to present any evidence creating a genuine dispute that Hilton & Hyland the Defendants did not have a duty to determine the value of the Property.

18. Kleidman did not rely on Hilton & Hyland the Defendants to opine on the value of the Property as he had hired a professional real estate appraiser to value the Property in 2010 (who valued the Property at $4.2 million), had listed the Property in 2012 with a different broker for $3.9 million and had valued the Property at $3.8 million in his Schedule A and $4.0 million in an amended Schedule A.

19. Hilton & Hyland The Defendants did not have a duty to determine what the value of the Property might be following millions of dollars of renovations, particularly in the absence of any evidence from Kleidman that he told Hilton & Hyland at the time of the RLA that he had the means to invest millions of dollars for such renovations. Kleidman failed to present any evidence creating a genuine dispute that Makowsky invested millions of dollars to renovate the Property. Kleidman failed to present any evidence creating a genuine dispute that Hilton & Hyland the Defendants did not have a duty to determine what the value of the Property might be following millions of dollars of renovations.

20. The $7.05 million appraisal of the Property as of January 23, 2013 offered by Kleidman in

opposition to the Motion does not change or expand the scope of duty owed by Hilton & Hyland to Kleidman regarding the value of the Property.

21. Hilton & Hyland had a duty to disclose to Kleidman that it represented both Kleidman and Makowsky and that the sale of the Property to Makowsky was a dual agency situation. Hilton & Hyland fully disclosed this fact to Kleidman and he understood that Makowsky's agents, the Altmans, were licensed with Hilton & Hyland. Hilton & Hyland did not breach its duty to disclose the dual agency to Kleidman. Kleidman failed to present any evidence creating a genuine dispute that Hilton & Hyland fully disclosed the dual agency to him and that he consented to the dual agency.

22. Neither Hilton & Hyland, nor the Altmans, had a duty to disclose to Kleidman whether they had previously represented Makowsky in any prior real estate transactions. Neither Kleidman's Listing Agents, Cumming and Lavin, nor the Altmans, had previously represented Makowsky in a real estate transaction prior to the sale of the Property from Kleidman to Makowsky. Kleidman failed to present any evidence creating a genuine dispute that Cumming, Lavin and the Altmans never previously represented Makowsky in any prior real estate transactions.

23. Neither Hilton & Hyland, nor the Altmans, had a duty to disclose to Kleidman what future real estate transactions Makowsky might be involved in.

24. There was no agreement – formal or informal -- between Makowsky and any of the Defendants that they would represent him on a future sale of the Property or other future real estate transactions involving Makowsky. Kleidman failed to present any evidence creating a genuine dispute that any such

agreement or understanding existed. Neither Kleidman's Listing Agents, Cumming and Lavin, nor the Altmans, represented Makowsky in the 2014 sale of the Property. Makowsky did not decide to co-list the Property for sale with both Rodeo Realty, Inc. and Hilton & Hyland until 2014.

25. The Defendants have established that they did not breach any fiduciary duty to Kleidman.

Negligence

26. Kleidman's negligence claims require a breach of the duty of care owed to Kleidman by the Defendants. For the foregoing reasons, Defendants did not breach any fiduciary
duties to Kleidman.

27. The Defendants did not breach any other duties to Kleidman and their conduct in connection with the sale of the Property did not fall below the standard of care for real estate agents and brokers, even in a dual agency.

28. Kleidman has failed to present any evidence that the Defendants breached any duty of care owed to Kleidman.

Causation / Damages

29. Kleidman's theory of damages is that, at the time of the sale, the Property was worth $7.05 million but only sold to Makowsky for $5.3 million and that he is entitled to recover the difference as lost profit. Under California law, to be recoverable, damages must be ascertainable within a reasonable degree of certainty. "'Damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.'" *Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209 Cal. App. 4th 1118, 1132 (2012) quoting *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 367-68 (1963). "Lost profit damages must not be

speculative" and "must be proven to be certain both as to their occurrence and their extent." *Sargon Enter., Inc. v. University of S. Cal.*, 55 Cal. 4th 747, 769, 773-774 (2012). The declaration of Daniel Rinsch preliminary opinion (which is not based on an inspection of the Property's interior or exterior prior to Makowsky's renovations) that the Property was worth $7.05 million may be relevant to the extent of his alleged damages. The Rinsch declaration, however, does not provide any evidence that Defendants caused the Property to not sell for that amount. Indeed, Kleidman fails to present any evidence that, but for the conduct of Defendants, he would have sold the Property for $7.05 million. Kleidman fails to present any evidence that Hilton & Hyland failed to properly market the Property or to rebut its evidence that it thoroughly marketed the Property. Kleidman fails to present any evidence to rebut Defendants' evidence showing that Makowsky's initial $5.0 million offer for the Property in 2012 was the same amount he previously offered for the Property when Kleidman was represented by a broker other than Hilton & Hyland. Kleidman's unsupported assertions that Defendants could have, or should have, located a buyer willing to pay $7.05 million are not evidence and are not sufficient to meet his burden to demonstrate the certainty that he actually incurred any damages.

Judicial Estoppel

30. "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). It is a "discretionary doctrine, applied on a case-by-case basis." *Ah Quin v.*

County of Kauai Dep't of Transp., 733 F.3d 267, 272 (9th Cir. 2013). Courts consider the following factors when analyzing the applicability of judicial estoppel: "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position [;] and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)).

31. Kleidman's current assertion that the Property was worth $7.05 million and that Hilton & Hyland failed to market the Property in a manner to achieve a sales price of $7.05 million are clearly inconsistent with his prior testimony under penalty of perjury in connection with the sale of the Property. Kleidman's declaration in support of his sale motion stated that Makowsky's $5.3 million offer was over the market value, fair and reasonable, and was the highest price exceeding the next highest offer by at least $700,000. Case Dkt. 100 at 13-14. Kleidman's declaration also stated that Hilton & Hyland's marketing plan was comprehensive, resulting in 18 showings and three received offers. Kleidman's declaration was not, as he argues, based on mistake or inadvertence, but upon his history of previously trying to sell the Property for a $3.9 million list price, his 2010 appraisal of the Property for $4.2 million and his valuation of the Property on the petition date at $3.8 million.

32. Kleidman successfully persuaded the Court of these facts, causing the Court to approve the sale to Makowsky as a good faith purchaser within the meaning of 11 U.S.C. § 363(m), the payment of

broker's commissions to Hilton & Hyland, and the realization of net sales proceeds for the bankruptcy estate. Case Dkt. 117.

33. Kleidman benefitted from the sale of the Property and his estate received the net sales proceeds which he used, in part, to confirm his chapter 11 plan and receive a discharge. Allowing him to profit by now declaring that his previous testimony under penalty of perjury was neither true nor accurate would be manifestly unfair. This is especially true in light of Kleidman's failure to produce any evidence demonstrating that but for Hilton & Hyland's conduct, Kleidman would have located his hypothetical buyer willing to purchase the Property for $7.05 million.

34. A debtor-in-possession's testimony in support of a successful sale motion does not per se preclude the debtor from later asserting that his broker breached its fiduciary duty to the debtor and the estate. On these facts, however, given Kleidman's previous attempts to sell the Property and prior appraisal of the Property and Kleidman's inability to produce evidence of any misconduct by Defendants, judicial estoppel bars Kleidman from asserting contrary positions as to marketing of the Property or the fairness of the purchase price paid by Makowsky.

Rule 56(d)

35. Rule 56(d) gives the Court discretion to allow Kleidman to take additional discovery to oppose the Motion. "The purpose of Rule 56(d) relief is to prevent the nonmoving party from being 'railroaded' by a summary judgment motion that is filed too soon after the start of a lawsuit for the nonmovant to properly oppose it without additional discovery." *Hollyway Cleaners & Laundry Co., Inc. v. Cent. Nat'l Ins. Co. of Omaha, Inc.,* 219 F. Supp. 3d 996, 1003

(C.D. Cal. 2016). In *Celotex Corp.*, the motion for summary judgment was filed one year after the action was commenced and the Supreme Court stated that "no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment." *Celotex Corp.*, 477 U.S. at 326. Here, the Defendants filed their Motion more than *two years* after Kleidman commenced this action; the Motion is not "premature." Additionally, Kleidman has had ample time to conduct discovery. The Court has heard at least fourteen discovery motions filed by Kleidman. Based on discovery requests that are the subject of those motions, Kleidman has propounded at least two sets of interrogatories on the Altmans, two sets of requests for production of documents on the Altmans and seven sets of requests for production for documents on Hilton & Hyland. Case Dkt. 26, 110, 112, 110, 126, 150, 185, 190, 193, 194, 212, 214, 238, 242. Exhibit T to the Defendants' Reply in support of the Motion indicates Kleidman has propounded at least nine sets of interrogatories on Hilton & Hyland. Case Dkt. 354.

36. A Rule 56(d) request requires specificity: "A party requesting a continuance pursuant to Rule [56(d)] must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment . . . Tatum's request for a continuance did not identify the specific facts that further discovery would have revealed or explain why those facts would have precluded summary judgment. . . Absent a showing by Tatum that additional discovery would have revealed specific facts precluding summary judgment, the district court did not abuse its discretion by denying Tatum's request for a

continuance." *Tatum v. City and Cty. of San Francisco*, 441 F.3d 1090, 1100-01 (9th Cir. 2006). Kleidman's declaration in support of his Opposition fails to address any of these issues.

37. In argument, Kleidman states that he wants to conduct discovery on whether Defendants really had no opinions as to the value of the Property. Adv. Dkt. 345 at 40. Such facts, however, are immaterial. Kleidman failed to offer any expert testimony to rebut Wallace's testimony that Defendants had no duty to provide an opinion as to value, even if they held such an opinion. Wallace, ¶ 7(a). See also *Padgett*, 54 Cal. App. 4th at 1285 (real estate agent had no "independent duty to ascertain the true fair market value of the property"). Kleidman also states that he wants to depose Cumming because he alleges Hilton & Hyland failed to designate Cumming in response to a Rule 30(b)(6) request. Adv. Dkt. 345 at 40. Kleidman's argument is without merit. Cumming was Kleidman's own listing agent on the sale of the Property. Cumming signed the RLA. Cumming was known to Kleidman since 2012, before the Property was sold. Kleidman has had ample opportunity to depose his own listing agent but apparently chose not to do so.

38. Kleidman's request to conduct further discovery is denied.

39. The Defendants are entitled to summary judgment as a matter of law on all of the remaining causes of action.

40. To the extent required, should any of the foregoing conclusions of law be deemed to be findings of fact, they are hereby adopted as such.

IT IS SO ORDERED.

Appendix E
US Bankruptcy Court
Central District of California

Nos. 1:12-bk-11243-MB;
1:17-ap-01007-MB

Peter Kleidman,
Plaintiff
v.
Hilton & Hyland Real Estate, Inc. et al.,
Defendants

Filed February 17, 2019

Before: Hon. Martin R. Barash
US Bankruptcy Judge

PORTION OF ¶7 IN DECLARATION OF ALLAN WALLACE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

[A] real estate agent or broker, even in the context of a dual agency, does not owe any duty to disclose to the seller whether it had represented the buyer in prior real estate transactions.

Appendix F
US Bankruptcy Court
Central District of California

Nos. 1:12-bk-11243-MB;
1:17-ap-01007-MB

Peter Kleidman,
Plaintiff
v.
Hilton & Hyland Real Estate, Inc. et al.,
Defendants

Filed August 20, 2020

Before: Hon. Martin R. Barash
US Bankruptcy Judge

PORTION OF ORDER RE: EVIDENTIARY OBJECTIONS RE: MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS HILTON & HYLAND, JOSHUA ALTMAN AND MATTHEW ALTMAN

Rulings on Specific Objections

¶ of Declaration	Evidentiary Objection	Ruling
Expert Declaration of Allan Wallace		
¶7 (in its entirety)	Lack of Foundation - FRE 602. Impermissible expert opinion on matters of law. …	Overruled. FRE 704(a) ("An opinion is not objection (sic) just because it embraces an ultimate issue").