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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRISTINE PETRIKAS IRELAND et al., Plaintiffs and Respondents, v. CHARLES DUNN COMPANY, INC. et al., Defendants and Appellants.	B271384 (Los Angeles County Super. Ct. No. BC588007)

APPEAL from a judgment of the Superior Court for Los Angeles County, Debre Katz Weintraub, Judge. Reversed.

Ryan & Associates, Ellen S. Kornblum, Gregory R. Ryan; Gilchrist & Rutter and Frank Gooch III for Defendants and Appellants Charles Dunn Company, Inc. and Hamid Soroudi.

Baker Hostetler, Michael R. Matthias, Blythe G. Kochsiek and Tom Warren for Plaintiffs and Respondents.

Defendants Charles Dunn Company, Inc. (CDC) and Hamid Soroudi appeal from the trial court's order denying in part their motion to compel arbitration of all claims alleged against them by plaintiffs Christine Petrikas Ireland (Ireland), as an individual and as trustee of the Petrikas Family Bypass Trust and the Petrikas Family Survivor Trust (the Trusts will be referred to collectively as the Petrikas Trusts); Petrikas Family Limited Partnership (the Petrikas Partnership); and 14426 Palmdale Road, LLC (the Palmdale LLC). CDC was the real estate broker for plaintiffs in various real estate transactions, and Soroudi, one of CDC's real estate agents, acted as plaintiffs' agent in most of those transactions.

All of plaintiffs' claims against CDC and Soroudi[1] arise from those transactions, all but one of which were memorialized in purchase agreements containing arbitration clauses, and all transactions purported to be part of tax-deferred exchanges under 26 United States

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[1] There are several defendants who are not parties to this appeal. Defendants Rohit Mehta, Xenon Investment Corp., Hollywood Carlton Properties, LLC, and Loren Properties LLC (collectively, the Mehta defendants) were parties to all but one of the transactions at issue. Defendant Frank Akef & Co., Inc. (Akef) was plaintiffs' accountant and tax advisor with regard to the transactions. Defendant Metro Exchange, Incorporated (Metro Exchange) is a "qualified intermediary exchange accommodator" that provides services in connection with tax-deferred exchanges; Frank Akef is alleged to be an owner and principal of Metro Exchange. Some of plaintiffs' claims are alleged only against CDC and Soroudi (or CDC alone), other claims are alleged against CDC, Soroudi, and the Mehta defendants, and the remainder are alleged against only Akef or Metro Exchange.

Code section 1031 (1031 exchanges).[2] The trial court found that plaintiffs' claims against CDC and Soroudi that relate to the 1031 exchanges are not subject to arbitration because those claims are based on CDC and Soroudi's provision of tax advice, which the court found went above and beyond the normal duties of a real estate broker or agent and were governed by a separate agreement (the Commission Agreement) that did not contain an arbitration provision.

We conclude that the Commission Agreement does not apply to most of plaintiffs' claims and does not override the arbitration provisions in the purchase agreements, which govern all of the claims against CDC and Soroudi. Accordingly, we reverse the trial court's order and direct the court to enter a new order granting CDC and Soroudi's motion to compel arbitration in its entirety.

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[2] A 1031 exchange allows an owner of investment property to defer the payment of capital gains taxes when selling the property if the owner purchases one or more like-kind properties in compliance with certain rules. Those rules include time limits for identifying and closing on the purchase of the replacement property (45 days from closing on sale of original property to identify replacement properties, and180 days to close on the purchase of those properties), limitations on the identification of replacement properties, and requirements regarding the use of a qualified intermediary to act as the middleman in the exchange. (See 26 U.S.C. § 1031; Treas. Reg. § 1.1031(k)-1.)

BACKGROUND[3]

A. *First Purported 1031 Exchange*

On November 3, 2010, Julius C. Petrikas, acting as general partner of the Petrikas Partnership, entered into a listing agreement with CDC for the sale of an apartment building the Partnership owned located at 123 California Avenue in Santa Monica (the 123 California property). Three weeks later, Petrikas, as general partner of the Petrikas Partnership, and Rohit Mehta, on behalf of "Xenon Investment Corporation, or Assignee" entered into a written purchase agreement for the 123 California property. That agreement had an addendum that included the following statement: "Buyer and Seller shall cooperate with each other in 1031 tax deferred exchanges at no additional cost or liability to the cooperating party." The agreement also included an arbitration provision that stated in relevant part: "Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration. Buyer and Seller also agree to arbitrate any dispute or claims with Broker(s), who, in writing, agree to such arbitration prior to, or within a reasonable time after, the dispute or claim is presented to the Broker." Soroudi was the real estate agent for Xenon in the transaction; a different CDC agent was the Petrikas Partnership's listing agent.

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[3] Our discussion of the facts is based upon the allegations of the first amended complaint, which we accept as true for purposes of this appeal, and the documents submitted in connection with CDC/Soroudi's motion to compel arbitration.

A month later, Petrikas died in an airplane accident, and his widow, Ireland, became the general partner of the Petrikas Partnership. The sale of the 123 California property closed three months later, on March 4, 2011.[4] Because the sale of the 123 California property was intended to be a part of a 1031 exchange, the net proceeds from the sale were deposited with Metro Exchange as the qualified intermediary for the 1031 exchange.

On March 21, 2011, Ireland executed a document entitled "Commission Agreement" on behalf of the Petrikas Partnership. The Commission Agreement stated in its entirety: "In consideration for procuring properties that are suitable as replacement properties for Buyer's 1031 tax deferred exchange, analyzing their financial information and advising the Buyer, the undersigned Buyer agrees to pay a commission of three [*sic*] (3%) of sales price (the 'Commission') to Charles Dunn Company ('CDC') if Buyer purchases any of the below list of properties. The Commission is due and payable at closing. In the event that CDC receives a commission from Seller, then Buyer shall pay CDC the difference between three percent (3%) of sales price and the commission received by CDC from Seller. [¶] **List of Properties** [¶] 1. 112 California Ave., Montebello, CA 90640, Walgreens as tenant. [¶] 2. 14426 Palmdale Rd., Victorville, CA 92392, CVS as tenant."

On April 15, 2011, Ireland formally identified to Metro Exchange two replacement properties for which she had executed purchase

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[4] Before the sale closed, Xenon transferred its right to purchase the 123 California property to VTM Apartments, LLC.

agreements: (1) 14426 Palmdale Road, Victorville, California, with CVS as tenant (the Palmdale property); and (2) 2525 West Florida Avenue, Hemet, California, with Smart & Final as tenant (the Smart & Final property).

The purchase of the Palmdale property went forward.[5] The purchase of the Smart & Final property, however, did not. Instead, on June 15, 2011, CDC prepared on behalf of the Petrikas Partnership a letter of intent to Mehta to purchase as additional replacement properties two properties in Santa Clarita (the Walnut properties) for an aggregate price of $5 million, and to lease back those properties to Mehta-related entities. On June 30, Ireland entered into two purchase agreements for the Walnut properties for an aggregate price of $5.1 million. In both purchase agreements, the buyer was identified as "Christine Petrikas [i.e., Ireland] or Assignee." The seller of one of the properties was Hollywood Carlton Properties, LLC, and the seller of the other was Xenon Investment Corp.; Mehta signed the agreements on behalf of both entities. Both agreements included arbitration provisions that were identical to the arbitration provision in the purchase agreement for the 123 California property.

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[5] The Palmdale property was purchased by a Petrikas-related entity, the Palmdale LLC, on July 26, 2011. The seller of the Palmdale property paid CDC a commission of 1.5 percent of the purchase price; therefore, in accordance with the Commission Agreement, the Palmdale LLC paid CDC a commission of 1.5 percent.

The sale of the Walnut properties closed on July 11, 2011. CDC and Soroudi represented both Ireland and the Mehta-related entities in the sale.

The Petrikas Partnership[6] then entered into leases with Mehta-related entities to lease back the Walnut properties. The terms of those leases included that Mehta and/or the Mehta-related entities would be responsible to pay all expenses and costs related to maintaining the Walnut properties, including all costs of renovation and capital improvements, and were responsible, at their sole expense, to keep the Walnut properties' premises, utility installations, and alterations in good order, condition, and repair, regardless whether the need for repair arose from any prior use or age of the premises or equipment.

B. *Second Purported 1031 Exchange*

Three years after the Petrikas Partnership's purchase and lease-back of the Walnut properties, Mehta wrote to Soroudi that the properties had a lot of deferred capital improvements/maintenance that needed to be done, and that the cost to complete those improvements was approximately $300,000. He contended that under the leases he was obligated only to maintain the properties, not to improve them, and said that if Ireland was not willing to spend the money to improve the

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[6] We note that the purchase agreements state that Ireland or her assignee was the purchaser of the Walnut properties. The first amended complaint, without any explanation, states that the Petrikas Partnership purchased the properties. The record does not include the closing documents, which would indicate who the actual purchaser was. We will assume that the complaint is accurate for the purposes of this appeal.

properties, he wanted to terminate the leases. Soroudi forwarded Mehta's concerns to Ireland that same day. The next day, the Petrikas Partnership agreed to sell the Walnut properties to Mehta-related entities for a combined price of $5.5 million. Ireland signed the purchase agreement on behalf of the Petrikas Partnership as seller, and Mehta signed the agreement on his own behalf. CDC and Soroudi represented both the buyer and the seller. The agreement included an arbitration provision identical to the provisions in the previous purchase agreements. The sale/purchase closed on August 29, 2014, two days after Ireland signed the purchase agreement.

The Petrikas Partnership's August 2014 sale of the Walnut properties was purported to be part of a 1031 exchange. On December 22, 2014 and January 13, 2015, Soroudi presented to Ireland three potential replacement properties. On February 19, 2015, Soroudi, on behalf of the Petrikas Trusts, formally identified a property located at 5307-5315 Colodny Drive, Agoura Hills, California (the Colodny property) as the replacement property for the Walnut properties in the 1031 exchange. That same day, Soroudi wrote to Ireland and told her that Mehta agreed to sell the Colodny property so long as Ireland agreed to master lease it back to him, to allow Mehta to continue to manage the property, and to give Mehta an option to purchase the property back in one to three years for the same purchase price without payment of closing costs or escrows.

That same day, the Petrikas Partnership entered into a purchase agreement with Loren Properties, LLC for the Colodny property.[7] Ireland signed the agreement on behalf of the Petrikas Partnership and Mehta signed on behalf of Loren Properties, LLC; CDC and Soroudi represented both the buyer and the seller. The agreement included an arbitration provision that was virtually identical to the arbitration provisions in the previous purchase agreements. The sale of the Colodny property closed on February 24, 2015.

C. *The Instant Lawsuit*

Ireland, on her own behalf and as trustee of the Petrikas Trusts and the Petrikas Partnership, and the Palmdale LLC filed the instant lawsuit on July 13, 2015. The operative first amended complaint alleges 20 causes of action, 14 of which are alleged against CDC and Soroudi (some of which also are alleged against the Mehta defendants), and one cause of action, for negligent supervision, against only CDC. We are concerned here only with the claims alleged against CDC and Soroudi.

In essence, plaintiffs assert that CDC and Soroudi encouraged and advised plaintiffs to engage in 1031 exchanges that were unnecessary, failed to follow the correct procedures for 1031 exchanges, and made

[7] We note that the complaint alleges that the agreement was between the Petrikas Trusts and Loren Properties, but the purchase agreement states that the buyer was the Petrikas Partnership.

misrepresentations and/or omissions of material facts regarding the transactions involved in the 1031 exchanges.

For example, in the first cause of action for breach of fiduciary duty, plaintiffs allege that CDC and Soroudi breached their fiduciary duties by (1) failing to investigate and/or disclose material facts that would have affected the Petrikas Partnership's decision to engage in 1031 exchanges in connection with the sale of the 123 California property (i.e., that due to Mr. Petrikas' death, the tax basis of the property would be stepped-up, and thus there was no need for the Petrikas Partnership to engage in a 1031 exchange to defer taxes); (2) preparing the letter of intent regarding the purchase of the Walnut properties more than 45 days after the close of the sale of the 123 California property, so that the properties did not qualify for a 1031 exchange; (3) failing to disclose that the letter of intent indicated a purchase price for the Walnut properties of $5 million, but the Petrikas Partnership actually paid $5.1 million; (4) failing to discuss or negotiate with Ireland the condition that the Palmdale LLC, as buyer of the Palmdale property, would be required to pay a 1.5 percent commission to CDC; (5) advising Ireland that the Petrikas Partnership was responsible for repair, maintenance, renovation, and capital improvement costs associated with the Walnut properties, in contradiction to the leases for those properties, thereby forcing the Petrikas Partnership to sell the Walnut properties; and (6) failing to investigate and disclose material facts that affected the Petrikas Partnership's decision to engage in a 1031 exchange in connection with the sale of the Walnut properties (i.e., insignificant taxes were owed on

the sale, the replacement properties were not timely identified, and the purchase did not qualify as a 1031 exchange because buyer of the replacement property -- the Petrikas Trusts -- was different than the seller of the relinquished property).

In the second cause of action for constructive fraud, plaintiffs allege that CDC and Soroudi knew or should have known, and failed to disclose to Ireland, that (1) there was no rationale for the Petrikas Partnership to engage in a 1031 exchange in connection with the sale of the 123 California property; (2) it was to the Petrikas Partnership's detriment to purchase the Walnut properties rather than the Smart & Final property because the Walnut properties were not timely identified and therefore did not qualify for a 1031 exchange; (3) the letter of intent for the purchase of the Walnut properties indicated an aggregate purchase price of $5 million, rather than the $5.1 million that the Petrikas Partnership paid for the properties; (4) the condition requiring the Palmdale LLC, as the buyer of the Palmdale property, to pay a commission to CDC was an unusual condition; (5) the Petrikas Partnership was not required under the terms of the leases for the Walnut properties to pay the costs of repair, maintenance, renovation, or capital improvements; and (6) there was no rationale for the Petrikas Partnership to engage in a 1031 exchange in connection with the sale of the Walnut properties, and, in any case, the Colodny property was not qualified to be a part of the 1031 exchange, and the Petrikas Trusts were ineligible to purchase the Colodny property as part of the 1031 exchange.

In the third cause of action for fraud, plaintiffs allege that Soroudi and CDC knew that the statements, representations, promises, and omissions alleged in previous causes of action were false and misleading, or they had no reasonable basis to believe they were true, and they made the statements, representations, promises, and omissions with the intent to deceive and defraud plaintiffs. Plaintiffs allege that, in reasonable and justifiable reliance on the statements, representations, promises, and omissions, they were induced to (a) engage in a 1031 exchange in connection with the sale of the 123 California property; (b) purchase the Walnut properties instead of the Smart & Final property; (c) pay an increased and inflated purchase price for the Walnut properties; (d) pay commissions, as buyer, for the purchase of the Palmdale property; (e) sell the Walnut properties to avoid paying improvement costs that the Petrikas Partnership was not obligated to pay; (f) sell the Walnut properties at a deflated price; (g) engage in a 1031 exchange in connection with the sale of the Walnut properties; and (h) purchase the Colodny property, ensuring a loss of $650,000.

The fourth cause of action for conspiracy to defraud alleges that CDC and Soroudi engaged in a conspiracy with the Mehta defendants to breach the fiduciary duties owed to plaintiffs and to commit fraud for the purpose of inducing plaintiffs to enter into the various transactions.

The fifth, sixth, and seventh causes of action allege violations of securities laws in connection with the sale of the Walnut properties and purchase of the Colodny property.

In the eighth cause of action for restitution, plaintiffs allege that CDC, Soroudi, and the Mehta defendants have been unjustly enriched at plaintiffs' expense, having received commissions, fees, sales proceeds and other compensation in connection with the various transactions that would not have been available had the true facts been disclosed. Plaintiffs seek restitution of those items, as well as rescission of the sale of the Walnut properties and the purchase of the Colodny property.

In the ninth cause of action for rescission and damages based on misrepresentation, plaintiffs allege that CDC, Soroudi, and the Mehta defendants made misrepresentations and failed to disclose material facts regarding the terms of the leases for the Walnut properties with the intent to induce plaintiffs to sell the Walnut properties and purchase the Colodny property.

The tenth cause of action for declaratory relief relates to plaintiffs' asserted right to rescind the sale of the Walnut properties and the purchase of the Colodny property and to the return of commissions, escrow expenses, and other damages in connection with the sale and purchase.

The eleventh cause of action for negligent supervision alleges that CDC knew or should have known that Soroudi was not competent to and/or failed to competently discharge the responsibilities and duties entrusted to a licensed real estate sales broker and/or agent, and that CDC breached its duty to properly supervise and oversee Soroudi's activities.

In the twelfth cause of action for negligence, plaintiffs allege that, by advising and assisting plaintiffs with regard to the various

transactions, CDC and Soroudi failed to conform their conduct to the minimum standard of care owed to them.

The thirteenth cause of action for breach of contract is based upon the Commission Agreement. It simply quotes from the Agreement as to what CDC and Soroudi agreed to do, states that plaintiffs have performed all terms, conditions, and covenants to be performed by them, and asserts that CDC and Soroudi breached the Commission Agreement "[a]s alleged herein"; it does not specify exactly how the Agreement was breached.

The fourteenth cause of action for undue influence (Civ. Code, § 1575) alleges that CDC and Soroudi exercised undue influence over plaintiffs and took advantage of plaintiffs' trust, confidence and weaknesses in executing the various transactions.

Finally, the fifteenth cause of action for violation of Business and Professions Code section 17200, et seq. alleges that "[o]ver the course of their business dealings with Plaintiffs in the Transactions, [CDC, Soroudi, and the Mehta defendants] violated California's unfair competition law . . . by . . . committing unlawful, unfair and/or fraudulent acts, and by making certain false statements, representations, promises, and omissions, all as set forth above, for the purpose of inducing Plaintiffs to enter into the Transactions."

D. *The Motion to Compel Arbitration*

CDC and Soroudi moved to compel arbitration of all of the claims alleged against them, citing the arbitration provisions in the purchase agreements related to the sale of the 123 California property, the

purchase and later sale of the Walnut properties, and the purchase of the Colodny property. They argued that all of the claims arise from those transactions and therefore are governed by the provision requiring arbitration of "any dispute or claim in Law or equity arising . . . out of this Agreement or any resulting transaction."

Plaintiffs opposed the motion on three grounds. First, they argued that the motion was premature and procedurally defective because CDC and Soroudi did not make a demand for arbitration before bringing the motion. Next, they argued that the arbitration provisions were unenforceable due to constructive fraud in the execution of the agreements because CDC/Soroudi failed to explain the provision to Ireland. Finally, they argued that the trial court should refuse to order arbitration under Code of Civil Procedure section 1281.2, subdivision (c), because their claims against Akef and Metro Exchange are not subject to any arbitration agreement, and compelling arbitration of the claims against CDC and Soroudi could result in conflicting rulings on common issues of law or fact.

At the initial hearing on the motion, the trial court did not hear argument and instead ordered the parties to brief two issues: (1) whether the disputes over the 1031 exchange services performed by CDC and Soroudi, which were the subjects of the Commission Agreement, come within the arbitration provisions of the purchase agreements; and (2) whether, in light of the answer to the first issue, any or all of the issues and claims pertaining to CDC and Soroudi should be stayed pending arbitration. The court set a briefing schedule and continued the hearing.

At the continued hearing, the trial court noted that the complaint alleges that, in connection with the purchase of the Palmdale property, Soroudi requested that the Petrikas Partnership execute the Commission Agreement, "which provided [that] in consideration for procuring properties that are suitable as replacement properties for the . . . 1031 tax deferred exchange[,] analyzing the financial information[, and] advising the Partnership[,] the under[signed] agrees to pay [a] commission. . . . [¶] Notably, the Commission Agreement does not contain an arbitration clause. Yet, it is the affirmative additional duties undertaken by [CDC] pursuant to this commission agreement over and above the normal duties as a real estate broker relative to the standard form real estate purchase agreement, which form the gist of plaintiffs' claims against [CDC] and Soroudi. [¶] This is because ordinarily a broker does not have a duty to give tax advice, which would include 1031 exchanges. [¶] See, for example and for guidance, . . . [*Carleton v. Tortosa* (1993)] 14 Cal.App.4th 745."

The court then examined the allegations of the complaint to determine "which allegations in the first amended complaint come within [the] scope of the arbitration agreement contained in the purchase agreement and which fall outside of the scope of the arbitration agreement . . . because they arise from the additional duties under taken outside of those relevant to the purchase agreement." The court found that most of the allegations were "based on the 1031 exchange" and therefore were not governed by the arbitration provisions in the purchase agreements, and granted the motion to compel arbitration only "as to claims that defendant secretly raised the

purchase price of the Walnut propert[ies] . . . [a]nd that Soroudi presented Mehta's demand for payment of three-hundred-thousand in capital improvements and maintenance regarding the Walnut properties, which [caused] plaintiff[s] to sell back to Mehta at a discount." In granting the motion to compel arbitration as to these limited claims, the court rejected plaintiffs' arguments that the motion was premature, that the arbitration provisions were unenforceable due to constructive fraud, and that the motion should be denied to avoid inconsistent rulings.

CDC and Soroudi timely filed a notice of appeal from the order denying in part their motion to compel arbitration.

DISCUSSION

On appeal, CDC and Soroudi argue that the trial court erred in finding that the claims alleged against them arise from tax advice CDC and Soroudi provided under the Commission Agreement, and therefore the claims are not governed by the arbitration provisions in the purchase agreements. We agree.

We begin with the trial court's finding that plaintiffs' 1031 exchange claims are based upon tax advice CDC and Soroudi provided under the Commission Agreement. We do not read the Commission Agreement as providing that CDC and Soroudi agreed to give tax advice to Ireland. Rather, that document simply reflects Ireland's agreement to compensate CDC and Soroudi for (1) finding two properties (identified in the Agreement) that might be suitable replacement properties for the Petrikas Partnership's 1031 exchange with regard to

the 123 California property; (2) analyzing those commercial properties' financial information; and (3) advising Ireland regarding those properties. The fact that the properties were to be part of a 1031 exchange -- admittedly, a tax-deferral device -- does not mean that in identifying and analyzing the properties and offering advice regarding their suitability, CDC and Soroudi were giving Ireland tax advice. They were doing what real estate brokers and agents generally do, i.e., provide information on prospective properties to their clients; in the case of a 1031 exchange, this information necessarily must include an analysis of whether the properties are suitable for the exchange.

Moreover, the Commission Agreement applied only to the possible purchase of two specific properties: the Palmdale property and the Smart & Final property. Plaintiffs' claims, however, are based upon the purchase and/or sale of several properties in addition to those identified properties. Thus, even if the Commission Agreement could be understood to impose a duty upon CDC and Soroudi to provide tax advice to Ireland, it has no relevance to the majority of plaintiffs' claims.

But regardless whether, as found by the trial court, plaintiffs' 1031 claims arise from tax advice CDC and Soroudi provided to Ireland (under the Commission Agreement or otherwise),[8] the court

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[8] The complaint alleges that CDC and Soroudi did give some kind of tax advice to Ireland, because it alleges that they advised her to engage in the second 1031 exchange. The decision to engage in the first 1031 exchange (for the 123 California property), however, appears to have been made by Julius Petrikas before his death; he signed the purchase agreement, which included an addendum referencing the 1031 exchange.

nevertheless erred in concluding that the arbitration provisions in the purchase agreements did not apply on the ground that giving tax advice goes beyond the duties imposed on a broker under the form purchase agreements used in the transactions at issue. In reaching this conclusion, the court relied upon *Carleton v. Tortosa*, *supra*, 14 Cal.App.4th 745, for the proposition that a real estate broker "ordinarily . . . does not have a duty to give tax advice, which would include 1031 exchanges." That case is inapposite.

In *Carleton v. Tortosa*, the client of a real estate broker brought a professional negligence action against the broker based upon the broker's failure to warn the client that his real estate transactions could have adverse tax consequences and his failure to structure the transactions as 1031 exchanges. (*Carleton v. Tortosa*, *supra*, 14 Cal.App.4th at p. 750.) The trial court granted the broker's motion for summary judgment, finding that the agreement between the broker and the client specifically excluded the provision of tax advice from the scope of the broker's duty to the client, and therefore the broker did not have an affirmative duty to provide tax advice or to structure the transactions in such a way as to reap the greatest tax benefit to the client. (*Ibid.*) The appellate court affirmed, holding that "a real estate broker's duty is derived from the agreement between the broker and client," and finding that the agreement in effect in that case "specified that [the broker] had no duty to recognize and advise [the client] regarding the potential tax consequences of his transactions." (*Id.* at

pp. 750-751.) The appellate court concluded that "this contractual provision did not violate public policy because the Legislature has determined that sellers and buyers of real estate should obtain tax advice from professionals other than real estate brokers." (*Id.* at p. 751.)

That a real estate broker has no *duty* to provide tax advice and cannot be held liable for failing to do so does not, however, answer the question presented in the present case: whether claims against a broker who *chooses* to give tax advice related to a transaction fall within the arbitration provision in the purchase agreement for that transaction. For that, we must look at the language of the arbitration provision, keeping in mind that "California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration. . . . This strong policy has resulted in the general rule that arbitration should be upheld 'unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute.'" (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686; accord, *Rice v. Downs* (2016) 248 Cal.App.4th 175, 185.)

The relevant language of the arbitration provision in each of the purchase agreements related to the 123 California property, the Walnut properties, and the Colodny property is identical (the only difference is that the Colodny property purchase agreement uses the term "The Parties" rather than "Buyer and Seller"): "Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through

mediation, shall be decided by neutral, binding arbitration. Buyer and Seller also agree to arbitrate any disputes or claims with Broker(s), who, in writing, agree to such arbitration prior to, or within a reasonable time after, the dispute or claim is presented to the Broker."

Thus, arbitration is required for "*any* dispute or claim . . . *arising* . . . *out of* this Agreement *or any resulting transaction*." (Italics added.) CDC and Soroudi contend that this language is extremely broad, and covers all of the claims alleged against them. We agree.

First, the use of the term "arising out of" generally has been broadly construed. Those words ""are ordinarily understood to mean "'originating from," "having its origin in," "growing out of" or "flowing from"' or in short, 'incident to, or having connection with.'"" (*Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 419.) We acknowledge that our colleagues in Division One held in *Rice v. Downs*, *supra*, 248 Cal.App.4th 175, that the term "arising out of" has a narrow scope in the context of an arbitration provision. The court observed that an arbitration provision requiring arbitration of a claim "arising from" or "arising out of" an agreement (as opposed to provisions requiring arbitration of claims arising out of *or related to* an agreement) generally is considered to cover only disputes relating to the interpretation and performance of the agreement. (*Id.* at pp. 186-187.) But there is a significant difference between the agreement in that case and the agreements in the present case. The agreement in *Rice v. Downs* had a jurisdiction provision governing claims "arising out of, under or in connection with this Agreement or the transactions

contemplated by this Agreement," while the arbitration provision governed only claims "arising out of this Agreement." (*Id.* at p. 180.) The court concluded that the difference in language between these two provisions must mean that the parties intended to arbitrate only a limited range of claims. (*Id.* at pp. 188-189.) There is no such difference in language in the present case, and therefore *Rice v. Downs* is distinguishable. But in any event, we respectfully disagree with the court's statement that an arbitration provision that governs only claims that "aris[e] out of" an agreement generally is limited to claims relating to the interpretation and performance of the agreement. As our colleagues in Division Five have observed, the Ninth Circuit cases upon which the *Rice v. Downs* court relied for this proposition have been rejected by other circuit courts, and it is "a distinctly minority rule." (*EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1329.)[9] Particularly in light of the strong public policy in favor of arbitration,

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[9] The court in *Rice v. Downs* cited to three Ninth Circuit cases: *Mediterranean Enterprises, Inc. v. Ssangyong Corp.* (9th Cir. 1983) 708 F.2d 1458 (*Mediterranean*); *Tracer Research Corp. v. National Environmental Services Co.* (9th Cir. 1994) 42 F.3d 1292 (*Tracer*); and *Cape Flattery Ltd. v. Titan Maritime, LLC* (9th Cir. 2011) 647 F.3d 914 (*Cape Flattery*). (*Rice v. Downs*, *supra*, 248 Cal.App.4th at p. 187.) The court in *EFund Capital Partners v. Pless*, *supra*, 150 Cal.App.4th 1311, which was decided several years before *Rice v. Downs*, addressed the first two, *Mediterranean* and *Tracer*. It noted that the court in *Mediterranean* had relied upon a Second Circuit case that the Second Circuit later limited to its precise facts, and that the court in *Tracer* had relied upon *Mediterranean*. The *EFund* court cited to cases from the Third, Fifth, Seventh, and Eleventh Circuits that rejected the Ninth Circuit's narrow interpretation. (*EFund*, *supra*, 150 Cal.App.4th at pp. 1326-1329.) In the third case that *Rice v. Downs* cited -- *Cape Flattery* -- the Ninth Circuit relied upon its previous cases, *Mediterranean* and *Tracer*, in interpreting the term "arising under this Agreement" narrowly.

we decline to follow the Ninth Circuit's rule and construe the broad term "arising out of" more narrowly in arbitration provisions than we would in other contexts.

Second, under the arbitration provisions at issue here, the dispute or claim need not arise from the purchase agreement itself; arbitration is required if the dispute or claim arises out of the *transaction*.

Without question, plaintiffs' allegations that CDC and Soroudi encouraged and advised plaintiffs to engage in 1031 exchanges that were unnecessary, failed to follow the correct procedures for 1031 exchanges, and made misrepresentations and/or omissions of material facts regarding the transactions involved in the 1031 exchanges are disputes or claims that arise out of the transactions that resulted from the purchase agreements related to the sale of the 123 California property, the purchase and later sale of the Walnut properties, and the purchase of the Colodny property.

Even plaintiffs' claims regarding the commissions paid under the Commission Agreement for the purchase of the Palmdale property can be found to be disputes arising out of the transaction resulting from the purchase agreement for the 123 California property. That purchase agreement expressly stated that the sale of the property was to be part of a 1031 exchange. The express purpose of the Commission Agreement was to compensate CDC and Soroudi for finding and analyzing properties that would be suitable to complete that 1031 exchange. While it did not include an arbitration provision, it also did not include an integration clause. Therefore, it did not supersede the arbitration provision of the 123 California property purchase agreement.

Accordingly, we conclude the claims regarding the commissions paid under the Commission Agreement are subject to arbitration under the purchase agreement. (*Coast Plaza Doctors Hospital v. Blue Cross of California*, *supra*, 83 Cal.App.4th at p. 686 ["arbitration should be upheld 'unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute'"].)

DISPOSITION

The order denying in part CDC and Soroudi's motion to compel arbitration is reversed. The trial court is directed on remand to vacate that order and enter a new order granting the motion in its entirety. CDC and Soroudi shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.