

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE  
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CERTIFICATE OF MAILING

BLUE CROSS OF CALIFORNIA

vs.

CASE NO. RIC416632

KIRK MONTGOMERY

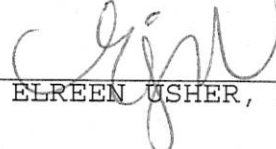
TO: ATKINSON, ANDELSON LOYA RUUD & ROMO  
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CERRITOS CA 90703

I certify that I am currently employed by the Superior Court of California, County of Riverside and I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the attached 02/17/11 on this date, by depositing said copy as stated above.

Court Executive Officer/Clerk

Dated: 02/22/11

by:

  
EILEEN USHER, Deputy Clerk

# **SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE**

TITLE: SANTA ANA UNIFIED SCHOOL DISTRICT v. MONTGOMERY, et al.	DATE & DEPT: 02/17/11      HA2	NUMBER: RIC416632
COUNSEL: Edward C. Ho, Esq. and Martin A. Hom, Esq. for plaintiffs Dale L. Gronemeier, Esq. for defendant Montgomery Elbie J. Hickambottom, Esq. for defendant Sirkegian	REPORTER: A. Barragan	
PROCEEDING: TENTATIVE DECISION		

This matter came on regularly for bench trial of its Phase II on January 31, 2011, and that trial concluded on February 16, 2011. Oral and documentary evidence was adduced and argued, and the matter was taken under submission as of this morning. After full consideration of same, this court decides as follows:

## **BREACH OF CONTRACT**

There are many legal ways for the contract at issue here to have been ratified by the District other than by Board resolution, some of which were argued by counsel, and Judge Kraetzer's findings in Phase I herein are based on the existence of a contract. However, his key finding was that this same contract imposed no legal duty on defendants to disclose commissions to their client (the District) in excess of \$60,000 per year. In spite of defendants' promise therein to use "all good faith efforts" in behalf of the plaintiff, Judge Kraetzer's ruling is the law of this case and this court cannot now do anything but follow it fairly and completely.

So a contract existed between the parties, as their subsequent actions confirmed. Based on the law of the case, that contract was not breached by defendants; the issue of the consequence of defendants' actions when during the term of that contract they asked Blue Cross to include commissions in a new proposal for employee health insurance is better dealt with under the tort of concealment than

Dallas Holmes, Judge (Ret.)  
E. Usher (cmg), Clerk  
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attempting yet again after several bench officers before me to parse the carefully convoluted wording of Section 3 of that contract to see if it was breached by defendants.

### **FIDUCIARY DUTY**

Uncontradicted expert testimony to the contrary notwithstanding, the fact that the District tried so hard to keep Mr. Montgomery from being a broker as a result of their consulting agreement with him gives the court pause when asked by the same District now to construct a fiduciary relationship owed to it out of what it argues must be a broker or agent relationship with Blue Cross. Whether either defendant was actually "transacting insurance" is cloudy under the California Insurance Code. Further, Judge Kraetzer concluded that as a matter of law, Mr. Montgomery was a consultant to the District, not a broker or agent.

### **CONCEALMENT**

An action for concealment or deceit lies for the "suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." Civil Code section 1710(3). Moreover, mere nondisclosure may be actionable where the facts are within the defendant's *exclusive knowledge*, "but even more obnoxious than failure to disclose is active concealment of material facts." 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 793 and 798, pp. 1149 and 1155. Further, "(a) duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts that are not accessible to the plaintiff." Witkin, *id.* at § 796, p. 1151.

The District claims it was harmed because defendants concealed information about the large commissions they were receiving from Blue Cross and other carriers

during the term of their employee benefits consultant contract with the District, which commissions could have been used to reduce premiums. The court finds that defendants disclosed some facts to plaintiff about such commissions, but intentionally failed to disclose other important facts, thereby making such disclosure deceptive. See, for example, exhibit 33 (the essence of concealment). The court further finds that defendants actively concealed their receipt of commissions from Blue Cross while knowing how important that fact was to plaintiff, or prevented plaintiff from discovering that fact. Compare exhibit 97 to exhibit 74, and see exhibit 75 and Mr. Montgomery's testimony on direct on the morning of February 15th. Mr. Montgomery snookered the District when he got it to accept Section 3 just as he had worded it from the outset, lied to its representatives by revising tables from Blue Cross to hide those commissions and then submitted those revisions to his client as Blue Cross documents, and then stonewalled when District representatives began to try to find out what he was making under that same Section 3. See exhibit 57. He did some very good work for the District in negotiating with carriers and keeping premiums down, but that does not cleanse him from the natural effects of what Judge Kraetzer called his conflict of interest. He may have tried to walk an ethical tightrope here, but the evidence shows he did not succeed.

Existence of a fiduciary relationship between the parties is not necessary to the tort of concealment when the above facts are shown. The nondisclosure is actionable here because of the relationship between the parties arising out of the transaction by which defendants became consultants to plaintiff. *Limandri v. Judkins* (1997) 52 Cal. App. 4th 326, 336-7; see also *Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal. App. 3d 285, 294.

The court further finds that the District did not know of the concealed facts, that defendants intended to deceive the District by concealing the facts, that the District reasonably relied on the defendants' deception, that the District was harmed, and that defendants' concealment was a substantial factor in causing that harm.

### **CONSTRUCTIVE TRUST**

This is an equitable device to compel the transfer of property from one wrongfully holding it to its rightful owner. See Civil Code sections 2223 and 2224. All that must be shown is that the property was acquired wrongfully and that defendants' keeping it would constitute unjust enrichment. *Calistoga Civic Club v. Calistoga* (1983) 143 Cal. App 3d 111, 116. The remedy can even be used when a contract between the parties turns out to be unenforceable, if there are concomitant circumstances showing unjust enrichment. 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 324, pp. 899-900.

The evidence must show the existence of specific, identifiable property (5 Witkin, Cal. Proc. (5th ed. 2008) Pleading, § 840, p. 256) which it does here. Counsel for defendants argued that commingling defeats a constructive trust, but cited no authority in that regard. The evidence at trial showed that at least the following sums were the result of the defendants' unjust enrichment, and a constructive trust is hereby imposed upon them:

Montgomery      \$1,266,794

Sirkegian        \$400,000

**NOTE:** The court throughout this decision refers to "defendants", a term expressly including Ms. Sirkegian. She played an integral part in negotiating and

implementing the entire transaction, and acted as much more than a mere typist or claims processor. See Exhibits 18, 85, 86, and 14.

In light of the above, this court orders judgment for plaintiff and against defendant Kirk Montgomery in the amount of \$2,000,000, and for plaintiff and against defendant Bridget Sirkegian in the amount of \$481,399.96. No punitive damages are awarded against either defendant. Interest and costs are to be set pursuant to post-trial proceedings.

This tentative decision will be the statement of decision unless either party specifies controverted issues or makes additional proposals in a timely manner pursuant to California Rule of Court 3.1590.