

COPY

Case No. A06-2284

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STATE OF MINNESOTA
IN SUPREME COURT

Wayne J. Kratzer,

Respondent,

vs.

Welsh Companies, LLC,

Appellant.

APPELLANT WELSH COMPANIES, LLC'S BRIEF

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STATEMENT OF THE ISSUE

Whether a claim under Minn. Stat. § 181.932, subd. 1(a), i.e. the Whistleblower Statute, can be based on alleged retaliation for reporting a purported violation of a common law duty that is not a “violation of any federal or state law or any rule adopted pursuant to law.”

The District Court held as a matter of law that Respondent Wayne J. Kratzer’s (“Mr. Kratzer”) alleged report was not actionable under the Whistleblower Statute because, *inter alia*, he failed to establish that the activities described in the alleged report, if true, would violate any federal or state law or rule adopted pursuant to law. (APP57)(Order and Mem., filed Oct. 25, 2005, at 21.) The Court of Appeals reversed, holding that Mr. Kratzer could pursue a Whistleblower Statute claim based on its conclusion that he had reported conduct that breached a dual agent’s common law duty to disclose information to the principal, which it construed to be a violation of a “state law or rule adopted pursuant to law.” (Court of Appeals Opinion (APP1-24) (“Op.”) at 8-13.)

Apposite Authority:

Minn. Stat. § 181.932, subd. 1(a)

Obst v. Microtron, Inc., 614 N.W.2d 196, 204 (Minn. 2000)

Hedglin v. City of Willmar, 582 N.W.2d 897, 902 (Minn. 1998)

Nichols v. Metro. Ctr. for Indep. Living, Inc., 50 F.3d 514, 517 (8th Cir. 1995)

STATEMENT OF THE CASE

Mr. Kratzer commenced this action against Welsh Companies, LLC (“Welsh”) in the Fourth Judicial District. Over the course of the litigation, Mr. Kratzer asserted various causes of action against Welsh including, *inter alia*, alleged violation of Minnesota Statutes section 181.932. (APP30-31)(Second Am. Compl. at ¶¶ 15-20.)¹

On October 28, 2005, the Honorable E. Anne McKinsey granted summary judgment in favor of Welsh as to all of Mr. Kratzer’s claims, including Mr. Kratzer’s claim against Welsh for violation of Minnesota Statutes section 181.932. (APP37-70)(Order and Mem. filed Oct. 28, 2005.) On August 7, 2006, the Honorable William R. Howard granted summary judgment in favor of Mr. Kratzer on Welsh’s counterclaims. (APP71-88)(Order and Mem. filed Aug. 7, 2006.) Thereafter, on August 9, 2006, judgment was entered on the August 7, 2006 Order. (APP89)(Am. Order for J., filed Sept. 11, 2006.) On September 11, 2006, the District Court amended its Order of August 7, 2006, so as to order entry of judgment pursuant to both the October 28, 2005 Order and the August 7, 2006 Order. (*Id.*)

Mr. Kratzer filed his Notice of Appeal on or about December 1, 2006. (APP90-91)(Notice of Appeal to Court of Appeals.) The sole issue raised by Mr. Kratzer in his appeal, and therefore the sole issue addressed by the Court of Appeals, was the District Court’s Order granting summary judgment and the corresponding entry of judgment on

¹ Kratzer also asserted a variety of other claims against Welsh. (APP31-35) Welsh successfully moved for summary judgment with respect to all of these claims. (APP37-70) Kratzer’s appeal has been limited to the viability of his claim for violation of the Whistleblower Statute against Welsh. (Appellant’s Br., filed Mar. 30, 2007, at 1 & 3.)

his Whistleblower claim against Welsh. (Op. at 6-17.) On April 15, 2008, the Court of Appeals filed an Opinion reversing the District Court, holding that in its view Mr. Kratzer “has made a showing sufficient for his whistle-blower claim to survive summary judgment.” (Id. at 17.)² On May 15, 2008, Welsh filed its Petition for Review in this matter. (Pet. for Review, dated May 15, 2008.) On June 25, 2008, the Supreme Court filed its Order granting Welsh’s Petition for Review. (Order, filed June 25, 2008.)

² Welsh cross-appealed the District Court’s Order granting summary judgment and the corresponding judgment entered thereon dismissing its counterclaims against Kratzer for trade secrets violations. (APP92)(Notice of Review, filed December 19, 2006.) The Court of Appeals reversed the District Court and ordered remand with respect to the trade secrets claims. (Op. at 17-24.) The Court of Appeals’ reversal and remand with respect to Welsh’s counterclaims for trade secret violations against Kratzer is not before the Supreme Court.

STATEMENT OF THE FACTS

This case involves a commercial real estate transaction between sophisticated parties who expressly consented to use Welsh as their dual agent. Mr. Kratzer claims he was terminated because, some two years after-the-fact, he allegedly reported a co-worker's failure to disclose to the seller the compensation Welsh had received from the buyer. The seller has never claimed this information should have been disclosed or that it did not provide knowing consent to the dual agency relationship due to a failure to disclose this information. Further, Welsh had no contractual obligation or common law duty to disclose this information. Finally, and most importantly for purposes of this appeal, a report alleging a failure to make such a disclosure would not implicate a "violation of any federal or state law or rule adopted pursuant to law."

A. The Principals Engaged Welsh To Serve As Their Dual Agent In The 2000 Park Square Transaction.

Mr. Kratzer was initially engaged by Welsh as a real estate agent pursuant to an independent contractor agreement on January 8, 1997. (APP39)(Order.) Thereafter, in early 2000, Mr. Kratzer became employed by Welsh on an at-will basis. (Id.)

Mr. Kratzer's claim of alleged "illegal conduct" revolves around transactions involving the sale of the Park Square Shopping Center ("Park Square"). The property was initially offered for sale by John Hancock Realty Income Fund-II Limited Partnership ("John Hancock") in 2000. (APP93, APP26)(Mr. Angleson Aff., ¶ 2; Am. Compl., ¶ 6.) Mr. Kratzer and Peter Rand were both Welsh brokers at the time. (APP108, APP199-200) Mr. Rand represented the seller, John Hancock, and both

Messrs. Kratzer and Rand represented the eventual buyer, WelshInvest, in connection with the 2000 Park Square transaction (“2000 Park Square Transaction”). (APP108, APP199-200)

The dual agency relationship was properly disclosed and consented to by John Hancock. Mr. Rand and Robert Angleson, Welsh’s president and Mr. Kratzer’s direct supervisor, both confirmed to Mr. Kratzer that John Hancock was fully informed of the dual agency and had “signed off” on the relationship as acceptable. (APP128-129)(Kratzer Dep. at 190:13-14, 195:3-7, 196:14-19.) The parties’ knowledge of and consent to the dual agency arrangement is expressly reflected in, *inter alia*, the terms of the Purchase and Sale Agreement executed by John Hancock and WelshInvest in connection with the 2000 Park Square Transaction. (APP108)(Purchase and Sale Agreement, ¶ 15.) Notably, this Purchase and Sale Agreement was based on a draft contract that John Hancock provided to Welsh, and specifically to Mr. Kratzer’s attention, for use with this transaction. (APP204-223) John Hancock’s own draft agreement reflected its expectation that Welsh would act as dual agent, and that the parties would be working with no broker other than Welsh. (APP216-217)(draft Purchase and Sale Agreement at ¶ 15.)

John Hancock is a highly experienced and sophisticated corporation that owned a division dedicated to investing and transacting in commercial property, and which was represented in the negotiations surrounding the 2000 Park Square Transaction by two investment managers, John Nagle and Kelly Loring. (APP226-227)(Rand Dep., 14-15.)(APP233-240)

The un rebutted evidence in the record establishes that Mr. Rand disclosed to John Hancock's representative, Kelly Loring, that Welsh would receive additional compensation from WelshInvest in the event WelshInvest purchased the property. (APP231)(Rand Dep. at 43:23-44:6.) However, the amount of the compensation that WelshInvest eventually decided on was not known by Welsh and Mr. Rand until after John Hancock and WelshInvest had agreed upon the purchase price. (APP229-230)(Rand Dep., at 34:5-36:18.)

Given their level of sophistication and experience, John Hancock and its representatives can be presumed to have fully understood the implications of a dual agency relationship. If John Hancock was interested in finding out more about the specific terms of the commission Welsh eventually received from WelshInvest, John Hancock and its representatives certainly had the wherewithal to have expressed their desire, if any, to know that information. John Hancock could have asked for information regarding Welsh's arrangements with the buyer, or conditioned its participation on particular restrictions as to what those terms could be. If John Hancock had done so, then Mr. Rand could have conferred with WelshInvest to determine whether WelshInvest would authorize him to disclose that information. Because John Hancock did not request information regarding the specific terms of the commission received from WelshInvest, and did not condition its agreement to the dual agency upon any restrictions to Welsh's fee arrangement with WelshInvest, it was reasonable and accurate for Messrs. Rand and Angleson to inform Mr. Kratzer that John Hancock had been fully informed of the dual agency and found it acceptable.

The un rebutted facts in the record demonstrate the decreased sale price that was ultimately agreed to in the 2000 Park Square Transaction was not driven by the commission that WelshInvest ultimately decided to pay to the broker. Rather, John Hancock had determined to divest its investments in real estate before year end 2000, and the Park Square property was the last piece of property in the fund that John Hancock had determined to close by year end. (APP225)(Rand Dep., 11-12.) Retail purchaser interest in the property was significantly decreased by the highly publicized instability of the Rainbow chain of stores, one of which was the anchor tenant of Park Square. (APP228)(Rand Dep., 25-26.) It was in this context that the John Hancock investment committee determined to reduce the asking price for Park Square. (APP232)(Rand Dep., 71-72.)

B. Welsh And Mr. Rand Did Not Have An Obligation To Disclose To John Hancock The Commission They Eventually Received From WelshInvest.

During his deposition, Mr. Kratzer was unable to identify any federal or state law or rule adopted pursuant to law that Welsh or Mr. Rand violated in connection with the 2000 Park Square Transaction. (APP128)(Mr. Kratzer Dep. at 189:21-190:9; 191:12-25.) Indeed, Mr. Kratzer has never produced any evidence or legal authority to establish that either Welsh or Mr. Rand ever had any obligation to disclose to John Hancock the compensation that WelshInvest eventually paid in connection with the transaction.

The un rebutted evidence conclusively establishes that John Hancock knew and understood that Welsh was serving as dual agent and provided its informed consent to the dual agency relationship. (APP128-129, APP108)(Kratzer Dep. 190:13-14, 195:3-7,

196:14-19; Purchase and Sale Agreement at ¶ 15.) Welsh and Mr. Rand were neither obligated to disclose to John Hancock the compensation they ultimately received from WelshInvest in connection with the 2000 Park Square Transaction, nor could the lack of a disclosure of such information prevent John Hancock from knowingly consenting to the dual agency relationship.

As noted above, John Hancock is an extremely sophisticated, savvy, and formidable business entity with enormous resources and, in particular, extensive involvement in the real estate market. Further, John Hancock was represented by two very able and experienced individuals as its representatives in the 2000 Park Square Transaction. (APP226-227, APP233-240) Welsh and Mr. Rand were entitled to deal with John Hancock and WelshInvest as highly experienced and sophisticated parties. It is undisputed these parties were each on notice that Welsh would serve as dual agent in the 2000 Park Square Transaction. Indeed, the parties contractually bound themselves to use Welsh as their dual agent to the exclusion of all others.

Mr. Kratzer has failed to provide any evidence to support a factual assertion that, absent disclosure of the commission eventually paid by WelshInvest, John Hancock could not have provided its informed consent to the dual agency arrangement. Indeed, Mr. Kratzer has failed to produce any evidence from any source on behalf of John Hancock indicating that it was not aware that WelshInvest would not pay the dual agent a commission, nor is there any evidence that that was a factor that John Hancock would have considered material in its decision to engage Welsh and Mr. Rand as the dual agent in the 2000 Park Square Transaction. On the contrary, the un rebutted evidence

establishes that Mr. Rand advised one of John Hancock's representatives, Ms. Loring, that if the property were sold to WelshInvest, then Welsh would be receiving a commission of some sort from WelshInvest. (APP231)(Rand Dep. at 43:23-44:6.)

Mr. Kratzer has not identified any contractual term among the various documents that would have been executed by the principals as part of the 2000 Park Square Transaction in which Welsh or Mr. Rand would have been obligated to disclose the compensation that was eventually paid by WelshInvest in connection with this transaction. There is nothing in the parties' Purchase and Sale Agreement. (APP96-119) Further, Mr. Kratzer has not identified any documents that were used in this transaction or in any similar transactions involving commercial real estate where such disclosures are required.

Moreover, as a practical matter, Welsh and Mr. Rand were not in a position to know, and therefore could not have disclosed, the compensation that would eventually be received from WelshInvest in connection with the 2000 Park Square Transaction. This was not known until after the parties had reached agreement on the terms of the transaction, including the purchase price that WelshInvest would pay to John Hancock to acquire the Park Square shopping center property. (APP229-230)(Rand Dep. at 34:5-36:18.) The decision to pay additional compensation to the broker was made by WelshInvest, and communicated to Welsh, after-the-fact. (Id.)

In 2002, Welsh was again engaged to broker a sale of Park Square ("2002 Park Square Transaction"). (APP27, APP201) Mr. Kratzer and Mr. Rand both represented the seller in connection with the 2002 Park Square Transaction. (Id.)

Mr. Kratzer claims that on February 27, 2002, Mr. Rand instructed him to exclude John Hancock from Welsh's efforts to market Park Square in 2002. (APP268-269)(Kratzer Aff., ¶ 11.) Mr. Kratzer further claims that he disregarded these alleged instructions and transmitted marketing information to John Hancock in 2002. (Id.) Thus, it is undisputed that John Hancock was given notice of the fact that the property had been put back on the market for sale in 2002 and that Welsh was representing the seller in connection with that sale. Notwithstanding such notice, John Hancock has never complained to Welsh regarding the dual agency relationship or any actions by Welsh as dual agent. Notably, at the time of his alleged "concern" over these transactions, Mr. Kratzer did not even bother to contact anyone at John Hancock to investigate whether John Hancock lacked any knowledge of material terms regarding Welsh's dual agency. (APP130)(Kratzer Dep. at 197:15-21.) Even after the completion of discovery in this case, Mr. Kratzer could provide no evidence that John Hancock was dismayed, upset, or otherwise concerned in any way by Welsh's handling of the sale of the property in either the 2000 Park Square Transaction or the 2002 Park Square Transaction.

C. Mr. Kratzer's Alleged "Report" Regarding Mr. Rand's Disclosures To John Hancock.

Mr. Kratzer claims that, in February 2002—some two years after the Park Square Transaction—he raised concerns that John Hancock was not properly informed that WelshInvest had paid Welsh a bonus. (APP269) Specifically, in an affidavit he submitted after he had been deposed and in opposition to Welsh's Motion for Summary Judgment, Mr. Kratzer makes a vague reference to a conversation he claims to have had

with Mr. Angleson in late February 2002 “regarding the transactions involving Park Square and what [Mr. Kratzer] believed was the illegality of the transactions.” (APP269)(Kratzer Aff. ¶ 13.) The allegations in the subsequent affidavit are meaningless because Mr. Kratzer provides no details regarding any of the facts or circumstances of this alleged conversation.

Furthermore, as the District Court correctly recognized, Mr. Kratzer’s statement in this affidavit contradicted his prior deposition testimony that he did not “report” this matter until September 6, 2002, and, therefore, “Mr. Kratzer’s contradictory and self-serving affidavit is insufficient to create a genuine issue of material fact.” (APP59)(Order at 23.)

Mr. Kratzer himself has been unable to identify any federal or state statute, law, or rule adopted pursuant to law that he believes was violated by either Welsh or Mr. Rand’s conduct in connection with these transactions involving Park Square. (APP128)(Kratzer Dep. at 189:21-190:9, 191:12-25.)

As a Welsh broker, Mr. Kratzer was obligated and expected to report to Welsh any potential conflicts of interest in connection with a real estate listing. (APP158)(Kratzer Dep., Ex. 3, ¶ 6.5.) The purpose of this requirement was to enable Welsh to “make a well-reasoned and fully informed decision concerning whether the listing should be accepted and, if so, what further action should be taken to ensure that the best interests of all [Welsh’s] customers are served.” (*Id.*) Notably, Mr. Kratzer never submitted a complaint or any other form of report regarding Mr. Rand’s handling of the Park Square transaction to Welsh’s human resources personnel, any professional associations, or any

law enforcement agencies. (APP124, APP131-132)(Kratzer Dep. at 101:14-18, 304:9-305:2, 305:25-306:13.)

It also bears noting that Mr. Kratzer received a commission of \$4,375 in connection with the 2000 Park Square Transaction. (APP199)(Kratzer Dep., Ex. 11.) Mr. Kratzer received \$11,634.81 in commissions from the 2002 Park Square Transaction. (APP201)(Kratzer Dep., Ex. 12.) Mr. Kratzer has never returned, nor even offered to return, any of the commissions he received in connection with either the 2000 Park Square Transaction or 2002 Park Square Transaction which he now claims to have involved "illegal conduct." (APP138)(Kratzer Dep., 198:4-16.)

D. Mr. Kratzer Was Terminated For Poor Performance.

In May of 2002, Welsh's president, Robert Angleson, informed Mr. Kratzer that certain terms and conditions of Mr. Kratzer's employment would be changed. (APP195-198)(Kratzer Dep., Exs. 7 & 8.) Mr. Angleson has provided unrebutted testimony that he imposed these changes to the terms and conditions of Mr. Kratzer's employment because, beginning in May of 2002, Mr. Kratzer would no longer be working with a Welsh partner. (APP275)(Angleson Dep., 13:6-15.) Mr. Kratzer did not make any "report" to Mr. Angleson of any concerns regarding the Park Square transactions prior to this time. (APP133)(Kratzer Dep., 312:2-9.) Indeed, Mr. Kratzer does not contend on appeal that these changes in the terms and conditions of his employment of which he was notified by Mr. Angleson in May 2002 constitute a violation of the Whistleblower Act.

Welsh subsequently terminated Mr. Kratzer on October 14, 2002, for poor performance. (APP93)

Mr. Kratzer was an at-will employee, and, therefore, Welsh had the right to terminate Mr. Kratzer at any time with or without cause. (APP57)(Order at 3.) Welsh measured the performance of brokers like Mr. Kratzer based on, among other things, the number of commissions and clients the broker brings into Welsh. (APP280)(Doyle Dep. at 74:20-75:3.)

During his employment as a Welsh broker, Mr. Kratzer procured only one commission on a transaction for Welsh (the sale of a Walgreen property by Catholic Charities) and only one new client (Butler, a client for which Welsh never did broker any real estate transaction). (APP125-126, APP127)(Kratzer Dep. at 136:7-137:12, 149:24-150:9, 152:17-20.) On October 14, 2002, Mr. Angleson notified Mr. Kratzer that his employment with Welsh was being terminated due to Mr. Kratzer's lack of focus and productivity as a broker. (APP279, APP120-122)(Doyle Dep. at 65:9-16; Angleson Aff., Exs. B-C.)

Notwithstanding his indisputably poor and unproductive performance as a broker, Mr. Kratzer has speculated that he was actually terminated as the result of a conversation he had with Dennis Doyle regarding the 2002 Park Square Transaction which Mr. Kratzer claims to have occurred in early September 2002. (APP270)(Kratzer Aff., ¶ 17.) However, Mr. Kratzer has provided no evidence to show that his conversation with Mr. Doyle had any causal relationship with his termination for poor performance. Indeed, all of the evidence in the record appears to establish the contrary. For example, it is uncontroverted that Mr. Doyle was not involved in Welsh's decision to terminate

Mr. Kratzer's employment. (APP277-279)(Doyle Dep. at 17:1-4, 18:19-21, 52:3-12, 66:14-19.)

Mr. Kratzer has provided no documentary evidence to establish his termination was motivated by retaliation. In fact, the contemporaneous documentation actually refutes Mr. Kratzer's claim of retaliatory termination. For example, on October 29, 2002, when Mr. Kratzer sent an e-mail to Mr. Doyle confirming a conversation they had, Mr. Kratzer made no mention or reference whatsoever to any conversation regarding the basis of or reasons for Mr. Kratzer's termination. (APP202-203)(Kratzer Dep., Ex. 14.) The only concerns that Mr. Kratzer raised related to the manner in which Mr. Kratzer's disassociation from Welsh would be viewed by a subsequent employer; Mr. Kratzer wanted his employment status amended to "voluntary resignation." (Id.)

SUMMARY OF THE ARGUMENT

The Whistleblower Act states, in relevant part, that “[a]n employer shall not discharge . . . an employee . . . because . . . the employee . . ., in good faith, reports a *violation or suspected violation of any federal or state law or rule adopted pursuant to law* to an employer or any governmental body or law enforcement official[.]” Minn. Stat. § 181.932, subd. 1(a)(emphasis added). By using this restrictive language, the Minnesota Legislature clearly intended to limit the types of reported activities that could be actionable under the Whistleblower Act. Accordingly, Minnesota courts have held that alleged reports of discouraged or disfavored activities, including breaches of the common law, cannot form the basis for actionable claims under the Whistleblower Act if those activities do not violate “any federal or state law or rule adopted pursuant to law.”

Mr. Kratzer claims he made a belated report to his employer some two years after-the-fact that Mr. Rand failed to disclose to John Hancock the terms of the commission that WelshInvest paid in connection with the 2000 Park Square Transaction. He has subsequently attempted to argue that the conduct described in this alleged report constitutes a violation of provisions contained in Minnesota Statutes Chapter 82, which deals with “Real Estate Brokers and Salespersons,” and the rules that have been promulgated with respect to these statutory provisions. Specifically, over the course of this litigation, Mr. Kratzer has sought to characterize Mr. Rand’s actions variously as a violation of the statutory disclosure requirements or, alternatively, fraudulent, deceptive, or dishonest practices. Mr. Kratzer’s arguments do not stand up. Ultimately, he has alleged a report that, at most, questions whether Mr. Rand satisfied a common law duty

of disclosures that a dual agent owes his principals to ensure they are on notice of the dual agency. Such a report does not fall within the protection of the Whistleblower Statute.

Accordingly, Mr. Kratzer cannot demonstrate that he reported activities which, even if true, were “violation[s] of any federal or state law or rule adopted pursuant to law,” and therefore his claim for violation of the Whistleblower Statute is barred as a matter of law.

ARGUMENT

In order to proceed with a claim for violation of the Whistleblower Act, the employee must demonstrate a prima facie case of retaliation by submitting evidence to establish “(1) *statutorily-protected conduct by the employee*; (2) adverse employment action by the employer; and (3) a causal connection between the two.” Hubbard v. United Press Int’l, Inc., 330 N.W.2d 428, 444 (Minn. 1983)(emphasis added).³ “The reported conduct must at least implicate a violation of law.” Obst v. Microtron, Inc., 614 N.W.2d 196, 200 (Minn. 2000). A good faith belief that such a statute or regulation exists is not enough; to be actionable a report must relate allegations which, “if proven, would constitute a violation of a law or a rule adopted pursuant to law.” Abraham v. County of Hennepin, 639 N.W.2d 342, 354-55 (Minn. 2002).

Kratzer’s allegations cannot constitute a “report” that could sustain a viable claim under the Whistleblower Act as a matter of law⁴ because the activities he claims to have reported do not violate “any federal or state law or rule adopted pursuant to law.” Minn.

³ Minnesota courts apply the “McDonnell Douglas” three-part analysis to retaliatory discharge claims asserted under the Whistleblower Act. Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). If the employee can meet his or her initial burden to establish a prima facie case, then the “employer has the burden of production to show a legitimate, non-discriminatory reason for the discharge.” Id. Finally, once the employer has met its burden in this regard, the burden then shifts back to the employee “to demonstrate that the employer’s proffered reason for discharge is pretextual.” Petroskey v. Lommen, Nelson, Cole & Stageberg, P.A., 847 F. Supp. 1437, 1447 (D. Minn. 1994)(applying Minn. Stat. § 181.932).

⁴ While the issue of whether an employee has made the requisite type of report is typically viewed as a question of fact, “this court may determine as a matter of law that certain conduct does not constitute a ‘report’.” Rothmeier v. Inv. Advisers, Inc., 556 N.W.2d 590, 593 (Minn. Ct. App. 1996)(citing Michaelson v. Minn. Mining & Mfg. Co., 474 N.W.2d 174, 180 (Minn. Ct. App. 1991), aff’d, 479 N.W.2d 58 (Minn. 1992)).

Stat. § 181.932, subd. 1(a). Indeed, Mr. Kratzer failed to establish that Mr. Rand or Welsh had *any* legal obligation to communicate information to John Hancock, the seller of the Park Square property, regarding the specifics of its commission arrangements with the buyer, WelshInvest.

More to the point, Mr. Kratzer cannot establish that Welsh or Mr. Rand violated “any federal or state law or rule adopted pursuant to law” with regard to the disclosure of and consent to the dual agency relationship in the 2000 Park Square Transaction. There are no Minnesota statutes or rules that imposed a requirement upon Welsh to disclose to John Hancock the specific terms relating to compensation it may receive from WelshInvest as part of the 2000 Park Square Transaction, in order to obtain John Hancock’s knowing consent to the dual agency relationship. Therefore, Mr. Kratzer does not have a basis upon which to assert a claim for violation of the Whistleblower Act against Welsh.⁵

⁵ Although not specifically raised in the Petition for Review granted by this Court, Welsh would note that Mr. Kratzer’s claim also fails because his alleged “report” is not statutorily protected because he already had a duty to report any conflicts of interest to Welsh and did not make any reports any “outside” authorities; he has not provided any evidence to establish a causal relationship between any “report” he made and the adverse employment decisions made by Welsh; and, lastly, the unrebutted evidence conclusively establishes that Welsh terminated Mr. Kratzer for legitimate grounds based on poor performance.

I. MINN. STAT. § 181.932, SUBD. 1, NARROWLY LIMITS ACTIONABLE CLAIMS TO REPORTS OF ACTUAL OR SUSPECTED VIOLATIONS OF “FEDERAL OR STATE LAW OR RULE ADOPTED PURSUANT TO LAW.”

The Whistleblower Statute protects employees who report actual or suspected violations of a “federal or state law or rule adopted pursuant to law.” Minn. Stat. § 181.932, subd. 1(a).

The language used by the Minnesota Legislature in the Whistleblower Statute must be viewed in the context of “the long-standing presumption of at-will employment.” Ring v. Sears, Roebuck & Co., 250 F. Supp. 2d 1130, 1134 (D. Minn. 2003)(applying Minnesota law). The Whistleblower Statute has modified—but has not eliminated—this policy of at-will employment to protect employees who “in good faith reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer” Id. (quoting Obst v. Microtron, Inc., 614 N.W.2d 196, 200 (Minn. 2000)); see also Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A., 586 N.W.2d 811, 814 (Minn. Ct. App. 1998)(Legislature did not enact Whistleblower Statute with “the intent . . . to obliterate employment at-will.”).

The Legislature’s specific incorporation of the phrase, “violation of any federal or state law or rule adopted pursuant to law,” reflects the intent to focus on conduct that has been clearly defined and proscribed by the legislatures and authorized agencies. This choice of language provides for a clear and direct connection between the reported conduct and the legislatively determined policies that are intended to be advanced and

promoted by the particular statutes and rules that are alleged to have been violated by the reported conduct.

Further, the fact that the Legislature expressly limited the protections of the Whistleblower Statute to reports of actual or suspected violations of a “federal or state law or rule adopted pursuant to law” also ensures clarity for employers as to the types of reported behavior which fall within its protections. Employers are entitled to know when there may be a potential statutory consequence implicated by its personnel-related decisions. At the same time, employees should not be encouraged and enabled to convert every adverse personnel decision into a claim for violation of the Whistleblower Statute.

The Court of Appeals’ decision in this case has judicially legislated and radically expanded the scope and application of the Whistleblower Statute to provide its protections for reports of conduct or activities that are not direct violations of any “federal or state law or rule adopted pursuant to law,” but could eventually be adjudicated to constitute breaches of common law obligations or infringements on common law rights. This expanded application of the Whistleblower Statute is at odds with the strict and purposeful limits imposed by the Legislature as reflected by the express terms of the statute.

“[A]ny statutory construction must begin with the language of the statute.” Hedglin v. City of Willmar, 582 N.W.2d 897, 901 (Minn. 1998)(interpreting Minn. Stat. § 181.932, subd. 1(a)). Statutory construction is a question of law. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998). When interpreting statutes, the Court must “ascertain and effectuate the intention of the Legislature.” Minn.

Stat. § 645.16 (2000). If the statute's words are free from ambiguity, the Court may not disregard them. Id.

The Whistleblower Statute is not intended to protect reports of actions that *do not* constitute violations of "federal or state law or rule adopted pursuant to law" no matter how repugnant or distasteful and inappropriate that alleged conduct might otherwise be. Hedglin, 582 N.W.2d at 902. The Court "will not supply that which the legislature purposely omits or inadvertently overlooks." Green Giant Co. v. Comm'r of Revenue, 534 N.W.2d 710, 712 (Minn. 1995); see also Ullom v. Indep. Sch. Dist. No. 112, 515 N.W.2d 615, 617 (Minn. Ct. App. 1994). This Court has declined to engraft terms that are contrary to the language of the statute and the intention of the Legislature. Homart Dev. Co. v. County of Hennepin, 538 N.W.2d 907, 910 (Minn. 1995); see also Dahlberg Hearing Sys., Inc. v. Comm'r of Revenue, 546 N.W.2d 739, 743 (Minn. 1996); Klemesten v. Stenberg Constr. Co., 424 N.W.2d 70, 72-73 (Minn. 1988); Moyer v. Int'l State Bank of Int'l Falls, Minn., 404 N.W.2d 274, 276 (Minn. 1987). Further, the principle of *expressio unius est exclusio alterius*, i.e., the expression of one thing indicates the exclusion of another, applies where the Legislature has used limited language and, notwithstanding the passage of time and ample opportunity to amend a statute to broaden its application, has not expanded the scope of the limited terms. See, e.g., Urban v. Am. Legion Dep't of Minn., 723 N.W.2d 1, 5 (Minn. 2006). Thus, even where the activities reported involve alleged conduct that is "reprehensible," the Whistleblower Statute will not be applied unless that conduct constitutes a direct

violation of a federal or state law or rule adopted pursuant to law. Hedglin, 582 N.W.2d at 902.

Minnesota courts and courts applying Minnesota law have recognized the carefully chosen wording of the statute, and have strictly interpreted the Whistleblower Statute to apply only to reports of activities that, if true, would constitute violations of a “federal or state law or rule adopted pursuant to law.” For example, the Minnesota Court of Appeals has held that reports of alleged violations of “an ordinance or resolution” will not constitute an actionable report under the statute. See, e.g., Phillips v. Minnesota, No. C1-99-604, 1999 WL 759987, at *9 (Minn. Ct. App. Sept. 14, 1999). Likewise, reporting actions that, at most, might constitute a breach of contract are not actionable under the Whistleblower Statute. See, e.g., Obst v. Microtron, Inc., 614 N.W.2d 196, 204-05 (Minn. 2000). “Protected charges must be made for the good faith purpose of exposing an *illegality*.” Ring v. Sears, Roebuck & Co., 250 F. Supp. 2d 1130, 1135 (D. Minn. 2003)(applying Minnesota law)(emphasis added).

Minnesota courts have also properly rejected Whistleblower Statute claims where the claimant “offers a convoluted explanation” as to the manner in which the reported activity violates a statute or rule. McCormick v. Banner Eng’g Corp., No. A05-1062, 2006 WL 330141, at *6 (Minn. Ct. App. Feb. 14, 2006). In order to be actionable under the Whistleblower Statute, the claimant must have made a report of activities that were direct violations of laws or rules adopted pursuant to law—not actions that might have some indirect repercussions that could eventually implicate some law or rule.

There are many examples and instances of “reports” that are not actionable because they fail to report conduct or activity that would constitute direct violations of federal or state laws or rules adopted pursuant to law. See, e.g., Hedglin, 582 N.W.2d at 902 (reports not protected by Whistleblower Act because “we find no statute or rule that is violated by such conduct”); Obst v. Microtron, Inc., 614 N.W.2d 196, 204 (Minn. 2000)(declining to extend whistleblower protection, in part, because alleged conduct “may have implicated a . . . breach of contract, [but] . . . did not implicate a violation of law.”); Burt v. Yanisch, No. A03-1843, 2004 WL 1827866, at *11 (Minn. Ct. App. Aug. 17, 2004)(reported cell phone “abuse” by state government employees did not implicate violation of any state law or rule); Cokley v. City of Otsego, 623 N.W.2d 625, 631-32 (Minn. Ct. App. 2001)(memoranda proposing changes to personnel policies did not implicate violations of laws); Bushard v. Indep. Sch. Dist. #833, No. C1-00-836, 2001 WL 32805, at *13-18 (Minn. Ct. App. Jan. 16, 2001)(claimant’s report that employer illegally retained interest earned on state grant money did not implicate violation of statute or rule); Whitbeck v. Webb, 1995 WL 536430, at *2 (Minn. Ct. App. Sept. 12, 1995)(party’s alleged whistleblower claims against former employer arose from alleged reports of supposedly unsecured loans that were made to insider’s “affiliates” out of corporate funds; it was held that the propriety of these loans turned on the internal management of the former employer and did not raise public interest concerns and, therefore, the Whistleblower Statute was inapplicable); Nichols v. Metro. Ctr. for Indep. Living, Inc., 50 F.3d 514, 517 (8th Cir. 1995)(conduct that may cause employer to lose “a government grant, a loan, contract, or other benefit does not break the law” and is “not a

‘violation of law’ within the meaning of [Minn. Stat.] § 181.932.”)(applying Minnesota law); Schaadt v. St. Jude Med. S.C., Inc., 2007 WL 978093, at *30 (D. Minn. Mar. 30, 2007)(claimant failed to show how reported activity would violate federal anti-kickback laws)(applying Minnesota law); Freeman v. Ace Tel. Ass’n, 404 F. Supp. 2d 1127, 1141 (D. Minn. 2005)(no whistleblower protection where claimant proffers no evidence “that withholding insurance premium overpayments is illegal”)(applying Minnesota law).

For purposes of the instant case, it is important to point out that “reports of conduct actionable only under the common law” cannot give rise to a claim under the Whistleblower Statute. See, e.g., Keckhafer v. Prudential Ins. Co. of Am., 2002 WL 31185866, at *8 (D. Minn. Oct. 1, 2002)(“The Court has found no case under Minnesota’s Whistleblower Act in which a plaintiff’s report of coworkers’ conduct that could be actionable in tort constituted a ‘report’ of a ‘violation or suspected violation of any federal or state law or rule adopted pursuant to law.’”)(applying Minnesota law).

Apart from being an improper interpretation of the statutory language, to treat reports of conduct that may be a breach of the common law the same under the Whistleblower Statute as alleged violations of a “state law or rule adopted pursuant to law” would also conflict with good public policy.

First, as noted, the Whistleblower Statute was intended only to modify, not “obliterate,” the long-standing common law presumption of at-will employment. Donahue, 586 N.W.2d at 814. Providing statutory protection of alleged reports of suspected violations of the common law would greatly expand the scope and application

of the Whistleblower Statute to the point of swallowing the general rule of at-will employment.

Second, expanding the scope of the statutory protections to include reports of alleged common law transgressions severs the connection with the legislative policymaking authority. The Whistleblower Statute protects employees from retaliation when they report actual or suspected violations of statutes or rules that promote legislative or regulatory mandates. There is no legislative or regulatory policy making or policy promoting connection with the common law.

Third, expanding the protections of the Whistleblower Statute to include protection of reports concerning alleged breaches of the common law would introduce considerable uncertainty for employers when called upon to make employment and personnel decisions. Rather than confining the scope of the statute to cover reports of actions and behaviors that have been clearly and specifically condemned in statutes enacted by the Legislature or in rules promulgated by authorized agencies, employers would also have to engage in a subjective, case-by-case analysis to derive the possible implication of common law rights and duties under the unique facts and circumstances of each situation. The potential scenarios of "suspected" breaches of a common law duty or infringement of a common law right are limitless. The scope and application of the common law is constantly evolving based on new circumstances and newly decided cases, whereas legislated statutes and promulgated rules adopted pursuant to law are fixed and clearly applicable at the time a report is made. Employers may not know that a

report has described a violation of the common law until after the case has been litigated and decided.

Thus, based on the plain terms of the statutory language and sound public policy, the scope and application of the Whistleblower Statute should not be extended beyond providing protection for reports of conduct that may violate a “federal or state law or rule adopted pursuant to law,” and should not protect reports of conduct that constitute no more than alleged breaches of the common law.

II. THE COURT OF APPEALS ERRONEOUSLY INTERPRETED MR. KRATZER’S REPORT TO IMPLICATE “ILLEGAL” ACTIVITY THAT COULD PROVIDE THE BASIS FOR AN ACTIONABLE CLAIM UNDER THE WHISTLEBLOWER STATUTE.

The transaction that gave rise to the alleged “report” in this case involved commercial property. Both the buyer and the seller were sophisticated and experienced business entities. Welsh and Mr. Rand’s duties and obligations as dual agent in this transaction were grounded in the common law of contracts and agency.

Under Minnesota law, Mr. Rand was required to disclose the dual agency and obtain consent from both parties to the dual agency relationship—which he, in fact, did. Mr. Rand had no obligation under Minnesota law to disclose to John Hancock, the sophisticated and experienced owner of the Park Square Shopping Center, the terms of any compensation arrangement Welsh may have had with WelshInvest, the prospective buyer of the subject property. However, even if there were some legitimate disagreement on this point, it would be a disagreement over what was required of Mr. Rand and Welsh to fulfill their contractual obligations and common law fiduciary duties as dual agent.

The Court of Appeals erroneously accepted Mr. Kratzer's argument that his report of "allegations that Rand's failure to disclose the WelshInvest fee agreement, under which WelshInvest would pay Rand additional compensation if he secured a lower sales price, was *illegal*." (Op. at 8)(emphasis added). The Court of Appeals improperly interpreted Mr. Rand's disclosure obligations under the common law, and then erroneously held that a report of this alleged failure to comply with the common law constituted a "violation" of "state law or a rule adopted pursuant to law." (*Id.* at 11-13.) The Court of Appeals' holding in this regard was simply wrong. The alleged failure to disclose information regarding the commission in the context of this dual agency relationship with these principals would not be "illegal." At most, it would raise the issue of whether Mr. Rand complied with his common law duty.

A. The Unrebutted Evidence Shows That The Dual Agency Relationship Was Known And Consented To By John Hancock.

Welsh's obligations to disclose and obtain consent to act as a dual agent in commercial real estate transactions arise from the common law of contracts and agency. Dual agency arrangements are permissible and do not violate public policy. PMH Props. v. Nichols, 263 N.W.2d 799, 801-02 (Minn. 1978)(citations collected); James E. Carlson, Inc. v. Babler, 174 N.W. 824, 824-25 (Minn. 1919); Wasser v. W. Land Sec., Inc., 107 N.W. 160, 162 (Minn. 1906)(citations collected). However, brokers have the common law duty to ensure they have disclosed the fact of the dual agency to the affected principals. See, e.g., Handy v. Garmaker, 324 N.W.2d 168, 171-73 (Minn. 1982);

Anderson v. Anderson, 197 N.W.2d 720, 724 (Minn. 1972); Bakke v. Keller, 19 N.W.2d 803, 810-811 (Minn. 1945).⁶

A dual agency relationship is inherently different than a traditional agency relationship. Consequently, Minnesota common law has focused on whether the fact of the dual agency has been properly disclosed to each of the principals, and has not required the dual agent to take further action to educate the principals as to the implications of the dual agency. Once the principals are put on notice of a dual agency relationship, then, by definition, they know the dual agent will be acting as a go between or a conduit of information regarding the transaction itself and material facts regarding the property that is the subject of the proposed transaction. They also can be presumed to know that the dual agent and the other principal may have an agreement as to terms of compensation. However, if they participate in a dual agency relationship, neither principal can reasonably expect the dual agent to disclose terms that may relate to the other principal's ultimate bargaining positions or financial motivations, such as its compensation arrangements with the dual agent, absent the express consent of that principal.

⁶ If an agent engages in dual representation without a principal's knowledge, the agency contract is voidable at the election of the ignorant principal, and the agent may not receive compensation for his services. Handy, 324 N.W.2d at 171; Anderson, 197 N.W.2d at 724; Tarnowski v. Resop, 51 N.W.2d 801, 802-03 (Minn. 1952); Olson v. Pettibone, 210 N.W.149, 150 (Minn. 1926); Webb v. Paxton, 32 N.W. 749, 750 (Minn. 1887). However, it must be noted that, under the common law, the availability of this relief *does not* mean that the agent has acted fraudulently, deceptively, or dishonestly. Handy, 324 N.W.2d at 172-73 (no requirement to show "intent to deceive" or "intentional fraud")(citations omitted).

Welsh's dual agency role was properly disclosed and consented to by John Hancock and WelshInvest in the 2000 Park Square Transaction. Indeed, the fact that the dual agency relationship was disclosed and expressly consented to by the principals is manifested by, *inter alia*, the terms of the Amended Purchase Agreement which expressly reflects their consent to the dual agency. (APP255) The Purchase Agreement expressly identifies Welsh as the dual agent and, further, provides that the parties will not use any other agent. John Hancock's knowledge and consent is dispositively reflected in the Amended Purchase Agreement that was based on John Hancock's own draft and executed by John Hancock's representative. Thus, the unrebutted evidence in the record establishes that John Hancock could and did knowingly consent as a sophisticated party involved in a commercial property transaction, to the dual agency relationship for purposes of the 2000 Park Square Transaction. (APP108) Moreover, the unrebutted evidence in the record shows that John Hancock's representative was put on notice that Welsh would receive a fee from the buyer, in the event that buyer was WelshInvest, as part of the 2000 Park Square Transaction. (APP231)(Rand Dep. at 43:23-44:6.)

John Hancock is a highly sophisticated commercial entity that owned a division dedicated to investing and transacting in a wide array of commercial property. (APP226-227, APP233-240.) John Hancock received notice of and consented to the dual agency arrangement, and John Hancock knew and understood that Welsh and its brokers would be receiving a commission of some sort from the eventual purchaser, WelshInvest, in connection with the 2000 Park Square Transaction. (APP255, APP231) There is no evidence that this presented any type of issue from John Hancock's perspective.

Given the fact that John Hancock received marketing information relating to the 2002 Park Square Transaction, John Hancock presumably would have voiced its disapproval or consternation at that time if, in fact, it felt there had been any impropriety or lack of disclosure on the part of Welsh or Mr. Rand. It did not do so.

Sophisticated and experienced entities such as John Hancock can be expected to know that dual agency relationships give rise to inherent conflicts of interest. Once such sophisticated and experienced entities are put on notice of the fact of a dual agency and consent to that arrangement, they are presumed to know and understand that the dual agent may well receive a commission from the other party. They do not need to be further informed as to the amount or terms of that commission arrangement with the other principal in order to be able to knowingly consent to the dual agency relationship. This essential truism was illustrated in Charles Dunn Co. Inc. v. Grund, 2002 WL 1398226 (Cal. Ct. App., 2d Dist. 2002),⁷ wherein the buyer of a commercial property claimed he had been entitled to disclosure of the specific commission arrangement between the seller and the dual agent. In Dunn, it was recognized that, once the dual agency was disclosed to both parties to the transaction, “it was self-evident that the seller would be paying [the dual agent] a commission” and that there was no “additional duty to disclose to [the buyer] the *amount* that would be paid by the seller.” Id. at *6 (emphasis added).

⁷ The opinion by the California Court of Appeals in Dunn was not certified for publication or ordered published. Id. As such, the case is nonprecedential. See Cal. R. Ct. 977(a) & (b) (2005); id. 8.1115(a) & (b) (2007). However, the California Court of Appeals’ affirmance of the District Court’s decision on this point is nonetheless illustrative of common limits to the disclosures typically made in transactions involving commercial property.

Thus, there is no reason to assume that sophisticated parties, such as John Hancock, must receive some additional disclosure beyond notice of the proposed dual agency in order to be able to knowingly consent to the dual agency. The principals can fairly and reasonably be expected to know and understand the unique aspects of a dual agency. There is no evidence to reach a contrary conclusion in this case.

B. The Court Of Appeals Erroneously Substituted Its Interpretation Of The Common Law In Place Of The Whistleblower Statute's Requirement Of A Violation Of "Federal Or State Law Or Rule Adopted Pursuant To Law."

While the Court of Appeals correctly recognized that a real estate broker owes a common law fiduciary duty to its principals, the Minnesota case law cited and relied upon by the Court of Appeals did not deal with the particular nature of dual agency relationships. (Op. at 11-12.) The Court of Appeals' conclusion that a sophisticated entity like John Hancock "could not give a knowing consent to the dual agency" failed to take into account the facts of this case and failed to deal with the unique aspects of dual agency relationships under the common law. Further, the Court of Appeals' conclusion was premised upon judicially-created requirements that do not appear in the unambiguous language of the rule which the Court of Appeals found to have been violated.

The Court of Appeals' focus on the alleged non-disclosure of the specifics of the "fee arrangement" between Welsh and WelshInvest is unavailing. The Court of Appeals held that the particulars of this fee arrangement had to be disclosed to John Hancock because, "under this fee arrangement, Rand's interests were directly contrary to John

Hancock's: Rand's commission increased if John Hancock's sale proceeds decreased. Thus, the agent was to gain if the principal was to lose." (Op. at 13.) But this is nothing more than the corresponding tension that exists in a dual agency relationship where the seller is paying the dual broker a percentage commission based on the sale price, i.e. the agent's commission from the seller increases as the buyer's purchase price increases. See, e.g., Charles Dunn Co., 2002 WL 1398226, at *6. These are intuitive and obvious factors that are likely to exist in dual agency situations. Id. If sophisticated principals want or need to know the specific details of these arrangements in order to consent to the dual agency, then they can make the disclosure of that information a condition of consenting to the dual agency.

After having been advised that Welsh would be receiving some compensation from WelshInvest in the event it was the purchaser of the Park Square Shopping Center, John Hancock did not inquire about the details of Welsh's compensation arrangement with WelshInvest, nor did it impose any condition that such information had to be disclosed as a condition of consenting to the dual agency. Further, there is no evidence that John Hancock's decisions regarding the ultimate sale price were affected in any way by the amount of the commission Welsh was to eventually receive from WelshInvest. John Hancock made its own independent decisions based on other unrelated factors to determine the ultimate sale price. Finally, John Hancock has never complained of a lack of disclosure or sought rescission of the transaction or disgorgement of any fees paid Welsh with respect to the 2000 Park Square Transaction.

Without addressing the unique aspects of a dual agency relationship, the Court of Appeals simply applied general agency principles to conclude that disclosure of the specifics of the compensation that WelshInvest eventually paid to Mr. Rand was information that should have been part of a “full and fair’ disclosure to the principal” and “requisite to effective consent by the principal.” (Op. at 12.)(quoting Restatement (3d) of Agency § 8.06 cmt. c (2006)). Thus, the Court of Appeals’ view as to Mr. Rand’s obligations to make disclosures to John Hancock in connection with the dual agency is derived entirely from its interpretation of the common law, and not from any specific requirements set forth by “federal or state law or rule adopted pursuant to law.” (Op. at 11-12.)

Indeed, the Court of Appeals *did not* conclude the Minnesota Legislature intended to codify its view of the common law requirements for obtaining informed consent to a dual agency. Instead, the Court of Appeals actually interpreted the statutory and regulatory provisions as *not* disturbing the dual agent’s common law duty, noting, for example, that “[t]here is no language in [Minnesota Statutes] chapter 82 that forbids a dual agent from making the disclosure that Rand was obligated to make under the common law.” (Op. at 12.)

Nonetheless, the Court of Appeals held that Mr. Rand violated Minnesota Rule 2805.2000, subpart 1.A., because he did not disclose to John Hancock the amount of the ultimate commission that was paid by WelshInvest. (Op. at 11-13.) Rule 2805.2000 relates to the scope of the Commissioner of Commerce’s general authority to deny, suspend, or revoke real estate licenses. Minn. Stat. § 82.35, subd. 1. This same statute

sets forth various procedural and due process requirements that apply with respect to orders for the denial, suspension, or revocation of a real estate license. *Id.* at § 82.35, subds. 2-10. The statute provides that the Commissioner “may” issue an order to deny, suspend, or revoke a real estate license “if” the Commissioner finds (1) the order is in the public interest, and (2) the applicant or licensee, *inter alia*, “has engaged in a fraudulent, deceptive, or dishonest practice.” *Id.* at § 82.35, subd. 1(b). Minnesota Rule 2805.2000, subpart 1.A., in turn, provides that certain “acts and practices constitute fraudulent, deceptive, or dishonest practices” that may be considered by the Commissioner include instances in which the applicant or licensee “act on behalf of more than one party to a transaction without the knowledge and consent of all parties.” Minn. R. 2805.2000, subp. 1.A.

The Court of Appeals notes that “[n]either party has cited, nor have we found, any cases construing the ‘*knowledge and consent*’ requirement.” (Op. at 11)(emphasis added). In fact, this is not a “requirement.” Instead, as noted, Rule 2805.2000, subpart 1.A. defines “acts and practices” that the Commissioner “may” consider in determining whether to deny, suspend, or revoke a real estate license. Minn. Stat. § 82.35, subd. 1(b). Moreover, Rule 2805.2000, subpart 1.A., does not set forth any specifics as to what is required of the agent or broker in order to comply with this “knowledge and consent requirement.”

The Court of Appeals ultimately held that, “[b]ecause Rand had failed to disclose the fee arrangement to John Hancock, we conclude that Rand ‘act[ed] on behalf of more than one party to [the] transaction without the knowledge and consent of’ John Hancock

in violation of Rule 2805.2000, subpart 1(A).” (Op. at 13.) In so doing, the Court of Appeals incorrectly treated Rule 2805.2000, subpart 1.A., as if it had set forth specific requirements that could be “violated” by an agent or broker. In fact, there was no “law or rule adopted pursuant to law” to violate. The Court of Appeals simply determined that Mr. Rand had a duty under the common law to disclose certain information to John Hancock, and then proceeded to apply its interpretation of the common law to hold that Mr. Kratzer’s alleged report of the breach of this common law duty met the definition of a “practice” that the Commissioner might consider in determining licensing matters.

The Court of Appeals’ opinion illustrates the dangerously expansive manner in which the Whistleblower Statute can be applied if claimants are permitted to seek its protections for reports of alleged breaches of common law duties or rights. When the actionable claims are limited to violations of law or rules adopted pursuant to law, then the Whistleblower Statute will promote the enforcement of clearly proscribed behavior imposed by the Legislature or by the authorized agencies, and employers will have certainty as to whether these statutory protections may be implicated by the reported conduct. If the actionable claims are extended to reports of alleged breaches of the common law, the Legislature’s intent to promote the policies embodied in its laws is severed, and the development of the actionable Whistleblower claims will exceed the Legislature’s control. Legislatures and authorized agencies, of course, determine what will be protected under “law or rule adopted pursuant to law.” In contrast, the common law develops independently from the legislative process. As a result, allowing reports of alleged breaches of the common law to be actionable will result in the expansion of the

scope of the Whistleblower Statute independent of legislative control. Moreover, employers will face instability and uncertainty because the reported conduct will not be known to have been an actionable “violation” until there has been a legal adjudication—such as in this case where the Court of Appeals interpreted the common law *for the first time* to require more than the disclosure of the fact of the dual agency, and then incorporated this new expression of the common law into the requirements of the rule, *more than five years after* Mr. Kratzer’s alleged report.

III. MR. KRATZER HAS FAILED TO IDENTIFY A “VIOLATION OF ANY FEDERAL OR STATE LAW OR RULE ADOPTED PURSUANT TO LAW” THAT WAS IMPLICATED BY HIS ALLEGED REPORT.

The fact of the matter is that Welsh and Mr. Rand satisfied all of their duties and responsibilities as dual agent in connection with the 2000 Park Square Transaction, including the requirement to disclose and obtain consent for the dual agency. The proposed dual agency was clearly known to the principals, and both John Hancock and WelshInvest expressly consented to the dual agency relationship. There is no evidence that Welsh failed to disclose all of the appropriate material information to both parties, and there is no evidence or authority that Welsh had any obligation to disclose to John Hancock the specifics of its commission arrangement with WelshInvest as part of the 2000 Park Square Transaction. More importantly, Mr. Kratzer’s report does not implicate a violation of a “law or rule adopted pursuant to law” contained in either the statutory disclosure requirements or the licensing provisions.

First, Minnesota’s statutorily mandated disclosure requirements do not apply to commercial real estate transactions. These requirements apply only to transactions

involving certain types of residential real estate, which typically involve consumers. In transactions involving commercial real estate, the parties are presumed to be sophisticated and experienced, and therefore such disclosures are not required. Even if applicable, the statutory requirements are limited to disclosure of “material facts” concerning the use and enjoyment of the subject property, and expressly prohibit the dual agent from disclosing confidential information relating to a party’s motivation such as its own internal costs and expenses—such as commissions—relating to the transaction.

Second, the Commissioner of Commerce’s authority to deny, suspend, or revoke real estate licenses for, *inter alia*, engaging in a “fraudulent, deceptive, or dishonest practice” was not implicated by Mr. Kratzer’s alleged report. The undisputed facts establish that John Hancock knew of and expressly consented to the dual representation. Therefore, Mr. Rand *did not* “act on behalf of more than one party to a transaction without the knowledge and consent of all parties.” If Mr. Rand should have disclosed more in order to ensure he obtained John Hancock’s knowing and informed consent, that would have to be based on his common law duty as a dual agent, rather than a requirement specified in the rules promulgated with respect to the Commissioner’s authority to issue orders concerning real estate licenses. Moreover, even if this particular rule was implicated by Mr. Kratzer’s alleged report, the alleged conduct would not be a violation of that rule, but instead would simply be information that the Commissioner may consider in making licensing decisions.

A. Mr. Kratzer's Alleged Report Does Not Implicate Violations Of Statutory Disclosure Requirements.

The specific "Disclosure Requirements" originally set forth in Minnesota Statutes Section 82.197 (statute in effect in 2000), and subsequently in Section 82.22 (the successor version of the statute), are expressly limited to imposing agency disclosure requirements that must be made in connection with the "sale and purchase of a *residential* real property transaction." Minn. Stat. § 82.197 (2000) & 82.22 (2006)(emphasis added).

This is not a technical distinction by any means. On the contrary, the Minnesota Legislature can be presumed to have intentionally limited these "Disclosure Requirements" to apply only to residential real estate transactions, and not to transactions involving commercial real estate. Indeed, it is worth noting that the Legislature limited such "Disclosure Requirements" even more narrowly to just a subset of residential properties (as opposed to transactions involving any sort of residential real estate). Specifically, the Legislature expressly defined "residential real property or residential real estate" in the definition section of Chapter 82, stating that those terms are intended to "mean[] property occupied by, or intended to be occupied by, one to four families as their residence." Minn. Stat. § 82.17, subd. 12 (2000) & § 82.17, subd. 21 (2006). Presumably, the Legislature recognized and understood that purchasers of residential real estate, who are typically individual consumers, cannot be presumed to have the same knowledge, experience, and level of sophistication as parties to transactions involving

commercial real estate, and therefore determined that certain disclosures would be required in transactions involving residential real estate.⁸

Thus, the statutory "Disclosure Requirements" are narrowly intended to apply only to transactions involving the sale or purchase of "residential real estate occupied by, or intended to be occupied by, one to four families as their residence." The Park Square Shopping Center is, of course, commercial property and, therefore, these disclosure requirements for the transactions including certain types of residential property did not apply to the 2000 Park Square Transaction. Indeed, the 2000 Park Square Transaction validates the Legislature's presumption that the parties to transactions involving commercial real estate are highly sophisticated and experienced, and are quite capable of fully evaluating the circumstances and effectively negotiating the terms of the transaction.

Even if these statutory "Disclosure Requirements" were to have applied to the 2000 Park Square Transaction, there is no evidence that Welsh or Mr. Rand failed to satisfy any of these disclosure requirements. As noted, it is undisputed that both John

⁸ Such a similar distinction has been drawn by the California Legislature, for example, which imposed certain disclosure requirements that applied to brokers and dual agents in transactions involving certain types of residential real estate, but not transactions involving commercial property because "a purchaser of commercial real estate is likely to be more experienced and sophisticated in his dealings in real estate and is usually represented by an agent who represents only the buyer's interests." Smith v. Rickard, 205 Cal. App. 3d 1354, 1360, 254 Cal. Rptr. 633, 636 (Cal. Ct. App., 2d Dist. 1988)(quoting Easton v. Strassburger, 152 Cal. App. 3d 90, 102 n.8, 199 Cal. Rptr. 383 (Cal. Ct. App., 1st Dist. 1984) & interpreting Cal. Civ. Code §§ 2079, *et seq.*) In all likelihood, it was for the same reasons that the "Disclosure Requirements" set forth by the Minnesota Legislature do not apply to transactions involving commercial property such as the 2000 Park Square transaction which, of course, involved highly sophisticated and experienced commercial entities such as John Hancock.

Hancock and WelshInvest knew about and expressly consented to the dual agency arrangement. Thus, Welsh and its brokers clearly satisfied the statutory requirements of notice and consent.

Beyond notice and consent, the statutory authority cited to and relied upon by Mr. Kratzer's counsel requires disclosure of "material facts" to the parties. In the consumer context, the "material facts" required to be disclosed by a dual agent are narrowly defined as information "which might reasonably affect the client's use and enjoyment of the property." Minn. Stat. § 82.22, subd. 4(2). The statutory definition of "material facts" *does not* include information or details regarding the fee arrangement between the dual agent and the other party to the transaction. *Id.* Instead, according to the "agency disclosure form" mandated by the statute, the dual agent is required to disclose only the *fact* of the dual representation. *Id.* at subd. 4.IV.

In fact, dual agents such as Welsh actually have an affirmative duty *not to disclose* certain information such as confidential information obtained from one party concerning price, terms, and motivation for pursuing a given transaction. Minn. Stat. §§ 82.21, subd. 1(b)(7) & subd. 2(b)(8), and 82.22, subd. 4.IV. Undoubtedly, information regarding internal costs and expenses, such as commissions, would fall within the category of confidential information about price, terms, and motivation for pursuing a transaction. Thus, Welsh had no obligation to communicate the commission arrangements it had with the buyer to the seller, and vice versa; and, indeed, Welsh would not be permitted to disclose this type of information to John Hancock without WelshInvest's consent.

The statute expressly precludes the limited statutory definition of “material facts” from being expanded through the application of common law. Minn. Stat. § 82.22 at subd. 3 (“Disclosures made in accordance with the requirements for disclosure of agency relationships set forth in this chapter are sufficient to satisfy common law disclosure requirements.”) However, the Court of Appeals’ holding erroneously expanded the common law disclosure requirements in a commercial transaction, which will likely involve sophisticated and experienced parties, so as to require *greater* disclosure than that which is imposed for a residential transaction, where the parties involved are likely to be consumers. (Op., 11-12.) This result is clearly in conflict with the Legislature’s definition of the “material facts” to be disclosed by dual agents as including only those “which might reasonably affect the client’s use and enjoyment of the property.” Minn. Stat. § 82.22, subd. 4(2).

Thus, the specific terms of Welsh’s commission arrangement with WelshInvest with regard to the 2000 Park Square Transaction do not constitute “material facts” that Welsh or its brokers were obligated to disclose to John Hancock. That information did not relate to the subject property or the subject matter of the parties’ transaction. On the contrary, as noted, WelshInvest’s agreement with Welsh regarding the commission most certainly falls within the category of “confidential information” relating to “price, terms, and motivation for pursuing a transaction” and, as such, could not have been disclosed to John Hancock absent express consent by WelshInvest.

B. The Commissioner's Authority To Deny, Suspend, Or Revoke License Does Not Constitute A "Rule Adopted Pursuant To Law" That Could Be Violated For Purposes Of The Whistleblower Act.

Rule 2805.2000, subpart 1.A., relates to the Commissioner's authority to deny, suspend, or revoke real estate licenses. Rule 2805.2000, subpart 1.A., provides absolutely no specific requirements that could be "violated" with respect to what the Court of Appeals inaccurately referred to as the "'knowledge and consent' requirement." (Op. at 11.) It simply provides that this is a "practice" that the Commissioner "may" consider in determining whether to issue an order to deny, suspend, or revoke real estate licenses. Thus, by definition, this is not a rule adopted pursuant to law that could be "violated" by either Welsh or Mr. Rand.

Mr. Rand's alleged "failure" to disclose the specifics of the commission arrangement to John Hancock would not have constituted a "violation" of Rule 2805.2000, subpart 1.A., so as to give rise to the basis for a Whistleblower Statute claim. Rule 2805.2000 does not set forth any particular requirements as to the manner and/or method by which a dual agent would ensure "the knowledge or consent of all parties."

In fact, as noted, Welsh and Mr. Rand had no statutory obligation to disclose this information. On the contrary, as explained in the previous subsection, even the "disclosure requirements" enacted by the Legislature with respect to less sophisticated parties engaged in the sale or purchase of residential real estate prohibit disclosure of "confidential information" to the other party vis-à-vis price, terms, or motivation for

pursuing the transaction, which would include commission arrangements between a party and the broker.

Furthermore, there is no evidence that non-disclosure of terms relating to the commission arrangement in a dual agency relationship is inherently “fraudulent, deceptive, or dishonest.” Indeed, even at common law, the failure to disclose and the availability of the right to rescission does not require or reflect a determination that the agent has acted fraudulently, deceptively, or dishonestly. See Handy, 324 N.W.2d at 172-73 (citing Anderson, 197 N.W.2d at 724; Olson, 210 N.W. 149, 150 (Minn. 1926)).

Finally, the rule at issue relates to the Commissioner’s authority to deny, suspend, or revoke real estate licenses. The Legislature has provided that the Commissioner *may* exercise this authority *if* he or she finds, *inter alia*, the applicant or licensee has “engaged in a fraudulent, deceptive, or dishonest practice,” which the agency has more specifically defined to be, *inter alia*, “act[ing] on behalf of more than one party to a transaction without the knowledge and consent of all parties.” Minn. Stat. § 82.35, subd.1(b); Minn. R. 2805.2000, subp. 1.A. Thus, this type of conduct would not be a “violation” of either the authorizing statute or the rule promulgated thereunder. Instead, this is conduct that can be considered by the Commissioner and can provide a basis for his or her decision to deny, suspend, or revoke a real estate agent or broker’s license.

Alleged reports of actions or omissions that relate to eligibility to participate in a governmental program or other regulated activity are not actionable. In Nichols v. Metropolitan Center for Independent Living, Inc., 50 F.3d 514 (8th Cir. 1995), an employee who urged her employer “not to take action that she believed would jeopardize

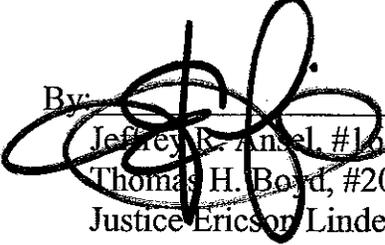
its eligibility for public funding” could not assert a claim under the Whistleblower Statute because “[a]n employer that takes action causing it to lose a government grant, loan, contract, or other benefit does not break the law.” Id. at 517 (interpreting Minn. Stat. § 181.932). The Court held that the claimant could not establish a legislated “mandate in the penal or regulatory sense of the word.” Id. In this case, as in Nichols, the “report” at issue concerned alleged conduct which, if true, may have eventually been considered with respect to the employer’s eligibility to participate in a regulated activity. Thus, as in Nichols, Mr. Kratzer’s alleged report of a supposed breach of the common law, that “may” be used for some other purpose, is not a sufficient basis upon which an actionable claim under the Whistleblower Statute may be premised.

CONCLUSION

For the above-stated reasons, Welsh respectfully requests the Court to reverse the Court of Appeals, and to affirm the District Court’s entry of judgment in favor of Welsh with respect to Mr. Kratzer’s claim for alleged retaliatory termination under the Whistleblower Statute.

Dated: July 25, 2008

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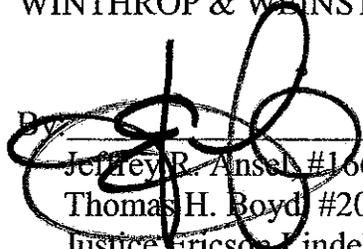
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CERTIFICATE OF COMPLIANCE

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, subdivision 3, the undersigned hereby certifies, as counsel for Appellant, that this brief complies with the type-volume limitation as there are 11,648 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2003.

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