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FILED

MAY 15 2013

DEPARTMENT OF REAL ESTATE
BY: Cs

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

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To: FIXED RATE FINANCIAL, INC.; KENNETH BRIAN CLEAVER; and JASON ALLAN SMITH.	No. H-38872 LA ORDER TO DESIST AND REFRAIN (B&P Code Section 10086)

The Commissioner ("Commissioner") of the California Department of Real Estate ("Department") caused an investigation to be made of the activities of FIXED RATE FINANCIAL, INC. ("FIXED RATE"); BRIAN KENNETH CLEAVER ("CLEAVER"); and JASON ALLAN SMITH ("SMITH").

Based on that investigation the Commissioner has determined that FIXED RATE, CLEAVER, and SMITH have engaged in or are engaging in acts or attempting to engage in the business of, acting in the capacity of, and/or advertising or assuming to act as real estate brokers in the State of California within the meaning of Business and Professions Code Section 10131(d) (solicit borrowers for or negotiate loans or perform services for borrowers in connection with loans secured by liens on real property).

In addition, based on that investigation, the Commissioner has determined that FIXED RATE, CLEAVER, and SMITH have engaged in or are engaging in acts or are attempting to engage practices constituting violations of the California Business and Professions Code ("Code"). Based on the findings of that investigation, set forth below, the Commissioner hereby issues the following Findings of Fact, Conclusions of Law, and Desist and Refrain Order under the authority of Section 10086 of the Code.

FINDINGS OF FACT

1. From September 15, 1990, through the present, CLEAVER has been licensed by the Department as a real estate salesperson, Department License ID 01088154. From January 7, 2010, through June 19, 2012, CLEAVER was licensed under the employment of broker Robert Scott McCutcheon.

2. From November 15, 2006, through the present, JASON ALLAN SMITH ("SMITH") has been licensed as a real estate broker, License ID 01778833. SMITH is also an attorney licensed in California State Bar No. 237584.

3. FIXED RATE is a California corporation formed on or about April 21, 2008. CLEAVER is the Chief Executive Officer and director of FIXED RATE. FIXED RATE has never been licensed in any capacity by the Department.

4. Within the three year period prior to the filing of this Accusation, CLEAVER, while doing business as FIXED RATE, solicited and offered loan modification, negotiation and foreclosure forbearance services to consumers through advertisements on television, radio, and/or the internet. CLEAVER entered into and participated in a plan or scheme with SMITH to charge and collect advance fees from borrowers for loan modification, negotiation and foreclosure forbearance services, in spite of existing laws prohibiting such fees, with the intent to substantially benefit themselves.

5. In furtherance of the plan and scheme described in Paragraph 4, above, CLEAVER engaged in fraud, dishonest dealing and made misrepresentations to borrowers in order to induce them to pay an advance fee for said services. CLEAVER promised borrowers

that a licensed attorney would handle the loan modification and negotiations with the borrowers' lenders. CLEAVER claimed FIXED RATE had a 98 percent success rate of achieving loan modifications or a principal reduction for borrowers due to FIXED RATE's attorney. CLEAVER also recommended that borrowers fail to pay one or more mortgage payments to their lenders in order to improve the borrowers' chances of obtaining a loan modification. In a blatant attempt to circumvent existing laws prohibiting real estate brokers and attorneys from charging and collecting advance fees for loan modification services, CLEAVER had borrowers sign an agreement with FIXED RATE for "document preparation" and SMITH had borrowers sign a "professional services" agreement. Borrowers were instructed to pay advance fees for loan modification and negotiation services directly to FIXED RATE.

6. On or around March 9, 2011, CLEAVER solicited loan modification and negotiation services to borrowers Timothy and Carolyn W. CLEAVER advised Timothy and Carolyn W. that it would be easier to obtain a loan modification if their mortgage was in arrears. CLEAVER charged and collected an advance fee of $3,200 from Timothy and Carolyn W. The advance fee was paid directly to FIXED RATE's bank account. SMITH attempted to charge Timothy and Carolyn W. for appraisal services for their property. CLEAVER and SMITH failed to provide the services promised to Timothy and Carolyn W. CLEAVER and SMITH failed to provide copies to Timothy and Carolyn W. of any agreement or other document the borrowers were told to sign. CLEAVER and SMITH failed to provide any proof of any services performed on behalf of Timothy and Carolyn W. aside from a list of a few calls made by "Diana" from SMITH's office to Timothy and Carolyn W.'s lender inquiring as to whether the lender had begun foreclosure proceedings. CLEAVER and SMITH refused to refund any of the advance fees paid by Timothy and Carolyn W.

7. On or around June 6, 2011, CLEAVER solicited loan modification and negotiation services to borrowers Clayton and Gayla R. CLEAVER charged and collected an advance fee of $3,650 from Clayton and Gayla R. The advance fee was paid by cashier's check to FIXED RATE. Clayton and Gayla R. were instructed to sign a Client Authorization to

Represent form which authorized SMITH to obtain information about their mortgage from their lender. Clayton and Gayla R. were also instructed to sign Professional Services Agreements with SMITH to perform an analysis and review of their mortgage and to negotiate a loan modification with their lender. CLEAVER and SMITH failed to provide the services promised to Clayton and Gayla R. CLEAVER and SMITH failed to provide any proof of any services performed on behalf of Clayton and Gayla R. CLEAVER and SMITH refused to refund any of the advance fees paid by Clayton and Gayla R.

8. Code section 10133(a) states that the acts described in Code section 10131 are not acts for which a real estate license is required if performed by: "(3) [A]n attorney at law in rendering legal services to a client."

9. CLEAVER, while doing business as FIXED RATE, solicited and offered to perform loan modifications and other services in connection with loan secured directly or collaterally by a lien on real property. CLEAVER collected advance fees for said services through FIXED RATE. CLEAVER and SMITH had borrowers sign a "professional services" agreement as a form of legal retainer for loan modification services in an attempt to circumvent existing laws that restricted the charging and collection of advance fees from borrowers prior to the completion of loan modification services. SMITH never personally met with any of the borrowers mentioned in Paragraphs 5 and 6 above. SMITH never provided any proof of completing any legal services for said borrowers which would exempt SMITH from licensing requirements pursuant to Code section 10133(a).

CONCLUSIONS OF LAW

10. Based on the information contained in Paragraphs 1 through 9, above, FIXED RATE and CLEAVER violated Code section 10130 by engaging in activities requiring a real estate broker license without first obtaining a license from the Department.

11. Based on the information contained in Paragraphs 1 through 9, above, JASON ALLAN SMITH violated Code Sections 10085.5 and 10085.6 by claiming, demanding, charging or collecting advance fees for attempts to negotiate or perform mortgage loan

modification or forbearance services.

DESIST AND REFRAIN ORDER

Based upon the FINDINGS OF FACT and CONCLUSIONS OF LAW stated herein, IT IS HEREBY ORDERED THAT:

1. FIXED RATE FINANCIAL, INC. and KENNETH BRIAN CLEAVER, whether doing business in their own name or any other fictitious business name, immediately desist and refrain from performing any acts within the State of California for which a real estate broker license is required, and in particular, soliciting borrowers and/or performing services for borrowers or lenders in connection with loans secured directly or collaterally by one or more liens on real property, unless and until they obtain a real estate broker license issued by the Department.

2. JASON ALLAN SMITH IS ORDERED TO DESIST AND REFRAIN from collecting advance fees within the meaning of Code Sections 10085.5 and 10085.6.

AND FURTHERMORE, THAT JASON ALLAN SMITH IS ORDERED TO DESIST AND REFRAIN from collecting trust funds or advance fees as that term is defined in Code Section 10026, unless and until he provides evidence satisfactory to the Real Estate Commissioner and demonstrates that he has:

(1) a pre-approved advance fee agreement from the Department of Real Estate pursuant to Regulation 2970;

(2) placed all previously collected advance fees into a trust account for that purpose and are in compliance with Code Section 10146; and

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(3) provided an accounting to trust fund owner-beneficiaries pursuant to Regulation 2972.

DATED: May 6, 2013

REAL ESTATE COMMISSIONER

By: Jeffrey Mason
Chief Deputy Commissioner

Notice: Business and Professions Code Section 10139 provides that "Any person acting as a real estate broker or real estate salesperson without a license or who advertises using words indicating that he or she is a real estate broker without being so licensed shall be guilty of a public offense punishable by a fine not exceeding twenty thousand dollars ($20,000), or by imprisonment in the county jail for a term not to exceed six months, or by both fine and imprisonment; or if a corporation, be punished by a fine not exceeding sixty thousand dollars ($60,000)."

cc: Kenneth Brian Cleaver
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