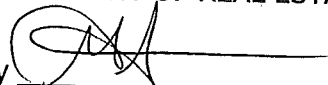


**FILED**

**February 21, 2013**

DEPARTMENT OF REAL ESTATE

By 

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

\*\*\*

In the Matter of the Accusation of	)	DRE No. H-2416 FR
	)	
PEOPLES MORTGAGE BANC and	)	OAH No. 2011120018
CONCETTA McBRIDE,	)	
	)	
Respondents.	)	
_____	)	

DECISION

The Proposed Decision dated January 2, 2013, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made:

Factual Findings, Page 1, Paragraph 1, Line 1: "Tricia D. Sommers, acting in her", is changed to read: "Joe Carrillo acting in his".

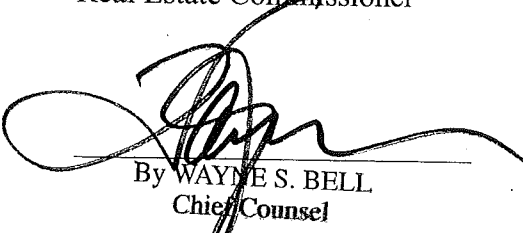
This Decision shall become effective at 12 o'clock noon on

MAR 14 2013

IT IS SO ORDERED

2/16/2013

Real Estate Commissioner



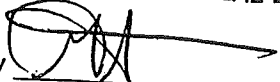
By WAYNE S. BELL  
Chief Counsel

**FILED**

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

February 12, 2013

DEPARTMENT OF REAL ESTATE

By  \_\_\_\_\_

In the Matter of the First Amended  
Accusation Against:

PEOPLE'S MORTGAGE BANC,  
A California Corporation,

and

CONCETTA MCBRIDE,

Respondents.

Case No. H-2416 FR

OAH No. 2011120018

**PROPOSED DECISION**

Administrative Law Judge Stephen J. Smith, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on November 1 and 2, 2012.

Michael B. Rich, Counsel, represented the Department of Real Estate (the Department), State of California.

Concetta McBride, also known as Tina McBride, appeared on behalf of herself and People's Mortgage Banc, both of whom were represented by Christopher Hansen attorney at law.

The matter was submitted on November 2, 2012.

**FACTUAL FINDINGS**

1. Tricia D. Sommers, acting in her official capacity only as a Deputy Real Estate Commissioner of the Department, made the charges and allegations contained in the Accusation and caused it to be filed on August 24, 2009. The Department caused to be filed a First Amended Accusation on June 18, 2012. The Department has jurisdiction to suspend

or revoke any real estate license issued in the State of California by the Department upon satisfactory proof by clear and convincing evidence that cause exists for the action.<sup>1</sup>

2. Concetta McBride, also known as Tina McBride (respondent McBride) timely filed Notices of Defense to the Accusation on behalf of herself as an individual real estate broker, and on behalf of her closely held California corporation, People's Mortgage Banc (respondent People's, and collectively, respondents). The Notices of Defense were deemed effective in response to the superseding First Amended Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

3. Respondent McBride currently has licensing rights through the Department as a real estate broker. The Department issued respondent McBride a real estate broker's license on November 9, 2005. Respondent McBride's real estate broker license expires November 8, 2013, unless renewed.

4. Respondent's license history shows that she is licensed as an officer of People's Mortgage Banc, beginning November 21, 2005, through January 2, 2015. Other entities for which she has been licensed as an officer have expired.

5. The Department originally issued respondent McBride a conditional real estate salesperson's license on March 6, 1995. Respondent McBride more or less continuously was licensed as a real estate salesperson by the Department until March 5, 2003, at which time she reported to the Department that her employing broker was changed to McBride Investments, Inc. On the same date, McBride Investments Inc. reported to the Department that it changed names to People's Mortgage Banc on March 5, 2003. Respondent McBride's real estate salesperson license was terminated when her real estate broker's license was issued.

6. At all times relevant to this Decision, respondent People's was licensed or had license rights as a corporate real estate broker under a license issued by the Department. Respondent People's is a closely held California corporation for which respondent McBride is the responsible corporate officer, and real estate broker licensee qualifying the corporation for the corporate license.

7. The Department first issued a corporate real estate broker's license to respondent People's on March 5, 2003. The license was issued with Michael Douglas Millet designated Responsible Managing Officer. Respondent McBride became the new designated responsible corporate officer on November 21, 2005. Respondent People's corporate real estate license expires January 2, 2015, the same date that respondent McBride's designation as Responsible Corporate Officer expires.

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<sup>1</sup> Business and Professions Code section 10175.

## THE MORTGAGE LOAN ORIGINATOR ENDORSEMENT

8. Respondent McBride applied on behalf of respondent People's to the Department for the issuance of a Company Mortgage Loan Originator License Endorsement (Originator License Endorsement). The Originator License Endorsement application shows that respondent McBride electronically signed the application on March 1, 2011. In signing the application, respondent McBride verified that all statements and disclosures she made in the application were true, correct and complete, under penalty of perjury.

9. On the strength of respondent McBride's statements, disclosures and declarations in the application, the Department approved and issued the Mortgage Loan Originator License Endorsement to respondents, with an effective date of January 11, 2011.

10. On the Originator License Endorsement application, a section requires the applicant to make disclosure of criminal, civil, and regulatory actions against the applicant or any of the applicant's principals. Specifically, in section (E), entitled "Regulatory Action Disclosure," the applicant is asked, "Is the entity or a control affiliate now the subject of any regulatory proceeding that could result in a 'yes' answer to any part of (C)?"

11. Respondent McBride answered "NO" on her application to the question posed by section (E). Section (C), referenced by section (E), calls for the applicant to disclose whether the entity or the control person or affiliate have made false statements or omissions, have been found to be dishonest, unfair, or unethical in the conduct of financial services, have been found involved in a violation of financial services related regulations or statutes, have been the cause of a financial services related business (which includes respondent People's) having its authorization to do business denied, suspended, revoked or restricted, have had an order by a regulatory agency made against the entity or the control person or affiliate in connection with a financial services related activity, or have been subject to denial, suspension, or revocation of the entity's or a control person or affiliate registration or license or been subject to an order restricting its activities. The manner in which the question in section (E) is phrased, with its cross reference to the questions posed in section (C) requires a "YES" response if the applicant has already been subject to such actions identified in section (C), or, is potentially subject to such adverse outcomes due to pending regulatory action against the applicant entity not yet resolved.

12. At the time respondent McBride made the disclosures on behalf of respondent People's, and declared them to be true and correct under penalty of perjury on the Originator License Endorsement application, respondent McBride (the applicant control person), and respondent People's (the applicant entity), were both subject to the first iteration of this accusatory regulatory action, which was filed and served on August 24, 2009, and was pending at the time. This pending regulatory action sought precisely the sorts of penalties and remedies against respondents as are identified in section (C) of the regulatory action disclosure. Due to the filing of the Department's accusatory action against both respondent People's and respondent McBride, seeking some of the remedies identified in section (C), both respondents were very much subject to the potential outcomes set forth in section (C) of

the regulatory action disclosure portion of the application. Thus, respondent McBride's "NO" answer to the question posed by section (E) of the Originator Endorsement license application was a material misstatement of fact and false.

13. In the Fourth Cause of Action, the Department has alleged at Paragraph 25, Page 9, of the First Amended Accusation that, in response to the Regulatory Disclosure section, at Question (K) of this application, the question is posed, "Are you now the subject of any regulatory action or proceeding that could result in a 'yes' answer to any part of I or J?" It was alleged that respondent answered no to this Question K, and thus concealed and failed to disclose the Accusation proceeding against respondent's pending here well before the filing of the application. The Department's Exhibit 9 is a copy of the subject application retrieved from the Nationwide Mortgage Licensing System and Registry, with whom the Department has a contract for the maintenance and retention of documents such as a copy of respondents Mortgage Loan Originator Endorsement application. Exhibit 9, in the portion that appears at Page six of eight, under Regulatory Action Disclosures, as referenced above, has with respect to the subdivision entitled "Financial Disclosure," three questions, under each of headings (H), (I) and (J). None of these financial disclosure questions (H), (I), or (J), appearing on Exhibit 9, respondent McBride's application, have anything to do with a pending regulatory proceeding. The questions that seek disclosure of pending regulatory actions or ones that have already occurred, are contained in subdivision (E) which relates back to subdivision (C), as set forth above. It is not known whether the allegation set forth at Paragraph 25 of the Fourth Cause of Action of the First Amended Accusation contains typographical errors, or whether the errors are substantive. In any event, no finding here is made upon them, because they appear on their face to be an error.

14. Nevertheless, respondent McBride's "NO" response on her Mortgage Loan Originator Endorsement application with respect to the question posed by subdivision (E) of the application, as that provision relates to and interacts with the questions posed by subdivision (C), were alleged to constitute material representations and false statements in Paragraph 27, found on the same page as Paragraph 27 of the First Amended Accusation, and these allegations are accurate and consistent with the application in evidence found at Exhibit 9.

15. There is no history of any previous disciplinary action by the Department against respondent McBride, respondent People's or any of respondent McBride's previous licenses or entities for which she was the designated officer or responsible managing licensee.

16. As the Responsible Corporate Officer and real estate broker for respondent People's corporate brokerage license, at all times relevant to this Decision, respondent McBride was responsible for the supervision and control of all of the activities of the officers, agents, real estate licensees and employees of respondent People's, and for the activities of the corporation for which a real estate license is required. Respondent McBride was also responsible to manage respondent People's activities for which a real estate license is required in compliance with the Real Estate Law, pursuant to Business and Professions

Code sections 10159.2 and 10177, subdivision (h), as well as California Code of Regulations (CCR), title 10, section 2725.

17. At all times relevant to this Decision, respondent McBride, individually and through respondent People's, was actively engaged in the business of arranging, negotiating, brokering and obtaining funding for mortgage loans secured by real property, in expectation of compensation. Respondent McBride has been exclusively in the business of arranging secured real estate mortgage loan throughout the entire period of her licensure, both as a real estate salesperson and as a real estate broker.

18. Between August 2006 and November 2006, respondent McBride owned and operated respondent People's using a staff of "between eight and 16." Respondent McBride's staff was composed of a malleable mix of Department licensees, unlicensed loan processors and support staff. Respondents were in the business of soliciting borrowers and lenders, and negotiating mortgage loans secured directly or collaterally by liens on real property in the Salinas and Monterey areas. In exchange for such services, respondents charged, received and collected compensation in the form of loan origination fees, points, and "yield spread premiums" paid by lending companies to respondents for origination of loans, as well as costs and fees for various processing tasks. Respondents brokered loans for a variety of lenders, such as companies specifically in the business of funding mortgage loans, banks, and other financial institutions seeking to place money in the secured residential real estate loan market.

#### THE THREE LOANS

19. Between August 2006 and November 2006, respondents originated three loans secured by residential real property for the same borrower, Vincente Hernandez. Respondent McBride received each of the initial residential mortgage loan applications from the borrower, reviewed them, and passed them along without comment to her staff for processing. She did not see or act upon any of the three applications after her initial review.

#### GLENN AVENUE

20. The first of the three loans that are the subject matter of this action relates to a single-family residence purchased by Mr. Hernandez located at 5 Glenn Avenue, Salinas, California (Glenn Avenue). Respondents received a completed loan application from Mr. Hernandez on August 14, 2006, seeking a loan in the amount of \$628,000. Respondent McBride's signature is on the loan application as receiving the application on behalf of respondent People's. On the application and supporting documents, Mr. Hernandez repeatedly declared that the purpose of the loan was to finance the purchase of this residence which he intended to occupy as his primary personal residence. As part of his application, Mr. Hernandez signed an Owner-Occupancy Disclosure, on respondent People's letterhead, in which Mr. Hernandez declared that "Borrower hereby acknowledges that they are financing this property to be owner occupied. Borrower will assume full responsibility for actions taken by the lender, if the property is found to be otherwise occupied." The purchase

contract for Mr. Hernandez's purchase of the Glenn Avenue property was completed on August 16, 2006. Respondents brokered and arranged financing for the loan from J.P. Morgan Chase Bank in the requested amount. Escrow closed, the loan funded and title transferred to Mr. Hernandez on September 18, 2006.

#### CHARTER OAK BOULEVARD

21. The second of the three loans under review in this matter related to a second single family residence purchased by Mr. Hernandez and financed by respondents located at 14617 Charter Oak Boulevard, Salinas, California (Charter Oak). Respondents received a completed loan application from Mr. Hernandez on August 14, 2006, seeking a loan in the amount of \$612,000. The data for this loan application was evidently copied verbatim from the application for the Glenn Avenue loan, changing only the amount of the loan and the name and address of the property for which the loan was sought, and was submitted on the same day. Respondent McBride testified that this duplication was actually part of a prequalifying process for Mr. Hernandez in an effort to save costs by not having to submit multiple applications. Respondent McBride's signature is on the loan application as receiving the application on behalf of respondent People's. On the application and supporting documents, Mr. Hernandez made similar statements as he did on the Glenn Avenue application. Mr. Hernandez declared that the purpose of the loan was to finance the purchase of an owner occupied home; to wit, Mr. Hernandez declared to respondents and to the prospective lenders from whom he and respondents were seeking the loan in writing that he intended to occupy the property as his personal residence. In addition, respondent signed an Owner-Occupancy Disclosure on People's Mortgage Banc letterhead in which Mr. Hernandez declared that "Borrower hereby acknowledges that they are financing this property to be owner occupied. Borrower will assume full responsibility for actions taken by the lender, if the property is found to be otherwise occupied." A purchase contract was completed on August 19, 2006. Respondents arranged financing for the loan from Greenpoint Mortgage Funding in the requested amount. Escrow closed, the loan funded and title transferred to Mr. Hernandez on September 21, 2006.

#### SPRUCE AVENUE

22. The third loan under review in this action regards a third single-family residence purchased by Mr. Hernandez and for which respondents arranged financing located at 540 Spruce Avenue, Pacific Grove, California. Respondents received a completed loan application from Mr. Hernandez on September 26, 2006, seeking a loan in the amount of \$629,000. Respondent McBride's signature is on the loan application as receiving the application on behalf of respondent People's. On the application and supporting documents, once again, Mr. Hernandez declared that the purpose of the loan was to finance his purchase of an owner occupied home; to wit, Mr. Hernandez declared to respondents and to the lender in writing that he intended to occupy the property as his personal residence. In addition, respondent signed an Owner-Occupancy Disclosure on People's Mortgage Banc letterhead in which Mr. Hernandez declared that "Borrower hereby acknowledges that they are financing this property to be owner occupied. Borrower will assume full responsibility for actions

taken by the lender, if the property is found to be otherwise occupied.” A purchase contract was completed on September 14, 2006. Respondents brokered and arranged financing for the loan from Fieldstone Mortgage Company in the requested amount. Escrow closed, the loan funded and title transferred to Mr. Hernandez on November 21, 2006.

#### MULTIPLE SUBSTANTIALLY SIMILAR LOANS-DISCLOSURES

23. Respondents failed to disclose to any of the three lenders, J.P. Morgan Chase Bank, Greenpoint Mortgage Funding, and Fieldstone Mortgage Company, that the same buyer, Mr. Hernandez, was nearly simultaneously purchasing each of the three single-family residential properties, and applying for loans in which in each one he declared himself to be intending to occupy each as his primary personal residence. It was obvious that at least one of these applications, and perhaps two, contained statements about primary personal residence that at least required further inquiry if not an alert regarding potential fraud. If it was clear that Mr. Hernandez sought to purchase one of the properties and was shopping among three, as suggested by respondent McBride in her testimony, in a very short period of time there would have been withdrawal of the two loan applications for properties Mr. Hernandez ultimately did not purchase. However, Mr. Hernandez went forward with each of the three purchases, and each of the three lenders funded the mortgage loans in the amounts requested in the applications in part upon Mr. Hernandez’s declarations that he intended to occupy each home that each lender funded as his primary personal residence. Respondents knew or should have known that this could not possibly have been the case.

#### NAVARRO LANDSCAPING

24. In one of the three sales and financing transaction set forth above, Mr. Hernandez insisted escrow include an exceptionally large payment to Navarro Landscaping and Design “for landscaping.” In the case of the Glenn Avenue property, the distribution from escrow to Navarro landscaping was \$26,500. There are no receipts and invoices to substantiate the disbursement, and despite respondent McBride’s claim that Navarro Landscaping was paid for landscaping work at the property, there is no evidence that any landscaping work was done by Navarro Landscaping on the Glenn Avenue property, at least not in the amount that would warrant a \$26,500 payment from escrow out of the loan proceeds. This matter has been pending since 2009, and went to trial in late 2012, more than three years later. The suspect nature of this large payment to Navarro Landscaping from the Glenn Avenue escrow has been at issue almost from the outset, as well as the unobvious implications that the payment reflects a larger course of suspected fraud in lending. Yet in all this time, to mid-November 2012, not an invoice, receipt, memorandum, contract, photograph or any credible witness has come forth to corroborate respondent McBride’s claim that the payment to Navarro Landscaping was legitimate and was made to compensate for actual work performed. Under these circumstances, the evidence raises the inevitable adverse inference, to wit, in light of the long standing claim that the payment was fraudulent and Mr. Navarro’s rather opaque presence in at least two of these loan transactions reflected some species of fraudulent conduct, no evidence to refute the adverse inference has ever been produced.



## BROKER COMPENSATION, FEES AND COSTS

25. The Glenn Avenue Final Closing Statement dated September 18, 2006, reflects disbursements from escrow to respondent McBride totaling \$38,131.93, consisting of \$34,400 entitled "Principal Balance", with interest at 12% from October 28, 2005, through September 18, 2006, and in the amount of \$3686.93. In addition, the Final Closing Statement reflects that respondent People's was paid from escrow a "Yield Spread Premium" of \$785, a processing fee of \$635, and a loan origination fee of \$9420. The Final Closing Statement contains an attachment with addenda, one of which reads as follows: "From Line 809-J.P. Morgan Chase Bank, N.A.,-The lender is paying a yield spread premium from JPMCBNA to broker in the amount of \$785, interest at 0.00%, 0.00 points to People's Mortgage Banc, through this escrow."

26. A Good Faith Estimate of closing costs dated August 14, 2006, for the Glenn Avenue property disclosed broker compensation in the amount of a Loan Origination Fee of \$9420, an Appraisal Fee of \$375, a "Mortgage Broker Commission/Fee of \$6280, a processing fee of \$485, an administration fee of \$150, and a "SCME fee" of \$845. The line item entry on the Good Faith Estimate of Closing Costs entitled "Mortgage Broker Commission/Fee" on the Good Faith Estimate of Closing Costs showed that this fee was paid to "the broker," whereas the other costs, including the origination fee, were "paid to others." The Good Faith Estimate was prepared by respondent People's through an employee, A.L. Francis, a Department salesperson licensee and was signed by Mr. Hernandez, the borrower.

27. On August 14, 2006, Mr. Hernandez completed the application for the loan to fund his purchase of the Glenn Avenue property. In the loan application, which was signed by respondent McBride as the interviewer/completer of the application, Mr. Hernandez agreed to a good faith estimate of new first mortgage closing costs of \$18,754.83. Mr. Hernandez also signed a partnership disclosure on respondent People's letterhead on the same date, August 14, 2006. In the partnership disclosure, Mr. Hernandez stated, "We hereby acknowledge that we have obtained financing on this property as a partnership. No straw borrower was used as we all have an interest in this property." Only Mr. Hernandez signed the statement. The identity of the partner was not disclosed. None of the financing documents, loan applications, or estimates of costs, or credit reports reflect credit inquiry for any person other than Mr. Hernandez.

28. On September 11, 2006, borrower Hernandez signed a Hold Harmless Agreement with respondent People's. In the Hold Harmless Agreement, the borrower acknowledged that he had fully read and understood and agreed with all representations, conditions, language and disclosures contained in the promissory note, deed of trust, and each and every loan document he signed with respect to the financing transaction for the Glenn Avenue property. In the same document, Mr. Hernandez signed his acknowledgment and agreement that respondent People's had performed in a satisfactory manner and had acquired a loan on terms totally acceptable to the borrower.

29. At the end of the day, Mr. Hernandez undertook monthly loan payments to purchase the Glenn Avenue property pursuant to a new first and second mortgage in the approximate amount of \$5300 per month. On his credit application, Mr. Hernandez as borrower claimed a monthly income of \$13,200, and \$50,000 in net assets.

30. The Final Closing Statements for the Hernandez loan to purchase the Glenn Avenue property under evaluation in this matter reflect closing costs considerably less than those disclosed in the Good-Faith Estimate. Although the Good-Faith Estimate does not disclose that the lender would be directly paying respondent People's a yield spread premium of \$785, it does disclose a payment would be made from the lender to the broker (respondent People's) for putting together the loan in the amount of \$6280 that did not appear as a payment to the broker in the Final Closing Statement. The other costs and fees such as loan origination fees were the same between the Good-Faith Estimate and the Final Closing Statement.

31. It was alleged that respondent's failure to disclose that respondents would receive a \$785 yield spread premium from the lender as part of its compensation for arranging this loan constituted the concealment of a material fact and a fraud upon the borrower. This allegation was not proved. The borrower agreed to pay closing costs in the Good-Faith Estimate considerably in excess of what were actually charged at the time of the loan closing. There was no evidence in this record to suggest that the borrower was unaware that respondents would receive the yield spread premium as part of their compensation for arranging the loan directly from the lender, or that if the borrower was not aware of it, that the borrower was somehow harmed because that fee was paid. At the time of the funding of the loan, the borrower paid considerably less in closing costs than he had agreed to in the Good-Faith Estimate, and the manner in which those costs were allocated and paid was not demonstrated in the evidence to have deceived or misled the borrower in any fashion, or to have had any material effect on the integrity of the loan or the disclosures made as part of its arrangement, funding or closing.

#### CHARTER OAK

32. The Final Closing Statement for the purchase of the Charter Oak property by Mr. Hernandez reflects that both a new first and second mortgage loan were required to close the sale. The second mortgage loan was initiated from Greenpoint Mortgage Funding, Inc., the same lender who funded the new first mortgage. The new second mortgage was funded in the amount of \$153,000. The Old Republic Title Company Buyer's Closing Statement notes that Greenpoint Mortgage Funding Inc. paid yield spread premiums of \$6885 and \$765 to People's Mortgage. A note on this Buyer's Closing Statement refers the reader to an Additional Charges Attachment, which reflects, among other items, that an additional \$9180 was paid to respondent People's for "broker points." The HUD Settlement Statement for the same transaction shows the same charges; that Greenpoint Mortgage Funding Inc. shall pay a yield spread premium of \$6885 and \$765 to respondent People's, and in an addenda entitled "Additional Charges Attachment," notes that respondent People's was paid \$9180 for broker points.

33. The borrower Mr. Hernandez applied for the loan to purchase the Charter Oaks property on August 14, 2006. As noted above, the application was received by respondent McBride. On the last page of the loan application, where Mr. Hernandez's and respondent McBride's signatures appear, "details of the transaction" are itemized. In this detail section, respondent McBride disclosed to borrower Hernandez that the approximate closing costs for the new first mortgage Mr. Hernandez sought through respondent People's would be \$16,592.55. On this application, Mr. Hernandez's base employment income was indicated to be \$14,987 per month. Respondent McBride did not offer any explanation why Mr. Hernandez's employment income was stated to be more than \$1500 per month higher on this second application for a single family owner occupied residence completed and signed on the same date as the application respondent McBride took from him to finance the Glenn Avenue property purchase. Evidently a second mortgage was contemplated from the time of the application in order to close the sale, as the disclosure section of the application reveals potential principal and interest payments for other financing required to finance the transaction. Based on the application, respondent McBride represented to the lender that Mr. Hernandez was prepared to undertake an estimated monthly payment of \$5464.66 in order to purchase the property and service the loans being applied for through the application.

34. Respondent People's, through its employee A.L. Francis, prepared and provided borrower Hernandez with a Good Faith Estimate of Closing Costs for this new loan dated the same day as the application, August 14, 2006. In this Good Faith Estimate of Closing Costs, Mr. Hernandez was advised that the loan required a loan origination fee of \$9180, a mortgage broker commission/fee of \$6120, a processing fee of \$485, and underwriting fee of \$250, and an administrative fee of \$150. Total estimated fees, commissions, costs and expenses for the new first loan were \$16,592.55. There was no information on this particular document regarding any yield spread premium that might be payable to the broker directly by the lender. There was no information on this document or any earlier document regarding the necessity of originating a second mortgage to close the sale

35. Borrower Hernandez was provided and signed a Buyer's Estimated Closing Statement on September 12, 2006 by respondent People's. In this Buyer's Estimated Closing Statement, Mr. Hernandez was advised that Greenpoint Mortgage Funding, Inc., shall pay a yield spread premium of \$6885 to respondent People's, as well as broker's points of \$9180. With respect to a new second loan being originated through Greenpoint Mortgage Funding, Inc., required to close the sale, Mr. Hernandez was advised that Greenpoint Mortgage Funding, Inc. will pay a yield spread premium of \$765 to respondent People's.

36. Once again, the First Amended Accusation alleges that the payment of the yield spread premiums to respondents constituted undisclosed compensation, was fraudulent, and reflected material misrepresentations to the borrower. These allegations were not proved. At the time of the original application and the presentation of the first Good Faith Estimate, the documentation does not appear to reflect contemplation of the necessity of taking out a new second mortgage in order to close the financing of the sale. By the time the Buyer's Estimated Closing Statement was signed by the borrower on September 12, 2006,

slightly less than four weeks later, the initiation and origination of a second mortgage had been arranged and was not only disclosed, but a separate cost structure was also itemized, including a second and much smaller yield spread premium payable to respondents from the lender, proportional to the much smaller second loan respondents helped originate to close the sale. There was no evidence that there was anything nefarious, misrepresentative or fraudulent about the manner in which respondents were compensated for the origination of the first and second loans required to close the Charter Oak sale. There was no evidence, either express or implied, that any material fact regarding the broker's compensation and the sources of payment for that compensation was concealed from the borrower, Mr. Hernandez, or that he misunderstood, was deceived or objected to the manner in which the compensation to respondents for assisting him in arranging the financing to purchase this property was arranged and disclosed.

#### SPRUCE

37. The Final Settlement Statement for borrower Hernandez for his purchase of his third residential property as his primary residence within 45 days, the Spruce Avenue property in Pacific Grove, also required a second loan to be originated through respondents in order to close the transaction. Respondents arranged the second mortgage with the same lender as the first mortgage, in the amount of \$111,000. The Final Settlement Statement for the transaction shows that respondent People's received an origination fee for the first loan of \$9435. The last entry on the Final Settlement Statement reflects a distribution of a "refund of initial deposit to escrow to José Manuel Navarro" in the amount of \$3000.

38. The Department did not allege that there were any undisclosed broker commissions, fees, costs, or expenses with respect to the Spruce Avenue loans. In Mr. Hernandez's application for this loan, completed, signed and received by respondent McBride on October 26, 2006, the lender was advised that Mr. Hernandez had \$12,987 per month in employment income, \$35,388 in liquid assets, and was proposing to undertake a total monthly expense to purchase the home, including first and second mortgages, hazard insurance and tax impounds of a total of \$5638.95.

39. Despite having in evidence the complete loan files from respondents for each of the three loans in question, there is a great deal about each of the loans that appear to be at best opaque, and leaves every impression that there were significant features of some of the loans that took place "off the books." For example, In the Glenn Avenue Final Settlement Statement, a disbursement was made to respondent McBride in a total of \$38,131.93, consisting of \$34,400, entitled "Principal Balance", with interest at 12 per cent from October 28, 2005, through September 18, 2006, in the amount of \$3686.93. There was no evidence produced regarding why respondent McBride was entitled to receive a principal balance payment or interest on that balance from this escrow. There was no evidence reflected in any of the loan documents regarding what respondent McBride contributed financially, and on what terms, that entitled her to receive interest on funds evidently hers for an 11 month period. None of the disclosures to the lender for the Glenn Avenue loan contain any reference to respondent McBride's participation in the loan or why she should receive a

disbursement of a principal balance plus interest from the proceeds of this loan. As noted above, there is a partnership declaration in the loan package signed only by Mr. Hernandez, but no disclosure as to the identity of the partner or the nature of the partnership. Based on these two pieces of evidence, certainly an inference arises that respondent McBride was engaging in some self-dealing with respect to this loan, becoming a financial partner in a loan she was arranging as broker. There was also no evidence why respondent McBride was entitled to receive the interest payments calculated at a far above market interest rate for lending short-term unsecured money.

40. The Lender Fraud Complaint, filed with the Department by the seller of the Glenn Avenue property, that precipitated the investigation resulting in this action against respondents, alleged that respondent moved money out of the subject escrows "off the books" by the use of "hidden addenda." It also alleged Mr. Navarro was a key player in looting the escrows of cash through false claims for work not performed, leaving the lenders to a depleted remedy in the event Mr. Hernandez was not successful in his intention to engage in "flipping" the properties quickly.

41. There are plenty of threads of evidence throughout this record that suggest the complainant's allegations have some substance, but not enough such that congealed to the point of proof by clear and convincing evidence. Nevertheless, the evidence that does exist that correlates to the claims made by the complainant, coupled with the sloppy and less than complete loan file records maintained by respondents for the subject loans, with the inexplicable and suspect movements of funds in and out of the subject escrows that actually can be ascertained, leave the distinct impression of dishonest dealings a form of lending fraud to facilitate quick flipping of residential properties financed with dishonest representations to the lenders accomplished by Mr. Hernandez, ably assisted by Mr. Navarro, in which respondent McBride was a passive, but fully informed and knowing participant.

42. Respondent's McBride's role in the dealings by Mr. Hernandez and Mr. Navarro with respect to the three properties under review here was one of lucrative negligence, one of ignoring or overlooking the obvious fraudulent misrepresentations to the lenders in favor of closing loans, regardless of disclosure irregularities. Respondent McBride's lack of attention to detail, patent neglect of her supervisory and oversight responsibilities as a real estate broker designee to review, catch, correct and/or prevent the very sorts of false or inaccurate disclosures that are the subject matter of this action that passed through her brokerage without any further notice. Shifting most all the work of completing loans without further review off to subordinates, and allowing those subordinates to sign for her and in her stead as broker, in order to facilitate moving loans along in volume, appears to have been respondent McBride's pattern and practice of how she operated respondent People's during 2006.

43. There was no evidence respondent McBride knew Mr. Hernandez before he was referred to her by a broker friend to help him apply for and close the loan for the Glenn Avenue property. Respondent McBride had nothing further to do with each loan transaction after she took the initial application information. In each instance, she passed the completed

applications on to her processing staff with instructions to find a suitable lender and get the loan funded without any further involvement. She acknowledged she allowed staff "to sign for me" without further review of the transactions. Respondent McBride's role was passive perhaps, but certainly not uninformed or unaware that Mr. Hernandez was affirmatively misrepresenting his borrower status and was defrauding the lenders, particularly so upon the third application within 45 days.

## CREDIBILITY

### 2009 WRITTEN STATEMENT TO DEPARTMENT

44. Respondent McBride wrote an explanatory letter to the Department received by the Department August 10, 2009, in response to a request to respondent McBride to respond to selected points raised by the complaint that led to this action mentioned above. In the explanatory letter, respondent McBride advised the Department that she initially did not question Mr. Hernandez's declarations that he intended to occupy the Glenn Avenue property as his primary residence. But when he came with the purchase contract for the second owner-occupied loan for the Charter Way property, she asked him about his occupancy claims. Respondent McBride wrote that Mr. Hernandez replied that he changed his mind, and intended to occupy the Charter Way property, and would "do a quick remodel," and sell Glenn Avenue and live in Charter Way. Respondent McBride wrote that it was "too late to change to a different lender [regarding the pending Glenn Avenue loan application] who had the 100 per cent non-owner program." She wrote, "Real estate agents get nasty especially when they have other offers." She wrote that Mr. Hernandez assured her that he would live in the Glenn Avenue house until it was sold and would not rent it. When Mr. Hernandez came in with the third contract, for the purchase of the Spruce Avenue property, respondent McBride wrote that she told him she "could not do the loan the way he wanted me to." She wrote that Mr. Hernandez replied as follows, "He threatened me with discrimination and told me he was going to live in this one because it was a better home." In closing her letter, respondent McBride advised the Department that she "made a mistake," "I should have stuck to my decision and not let anyone influence me. I know I am the one with the license, but under stressful conditions I made the wrong one. After all there were 100 per cent non owner occupied loans." She also advised the Department that she did not review any of the three loan applications before submission. She also advised Mr. Navarro "performed work for the sellers," but the remainder of her statement revealed she had no facts beyond possible hearsay to support this opinion, as she confirmed she had no idea what sort of work Mr. Navarro performed for the sellers or what he was paid.

### 2012 TESTIMONY

45. Respondent McBride backed away a good deal from her 2009 written statement to the Department in her evidentiary hearing testimony offered more than three years after the letter was written. Her approach to defending the allegations in her testimony reflected a pronounced change in approach from her earlier written statement. Most of her testimony was directed at efforts to disprove the allegations regarding undisclosed yield

spread premiums (which efforts were successful) and offering a variety of circumstantial evidence regarding Mr. Hernandez's purchase of the Glenn Avenue property that respondent McBride contends proves he did occupy the property as his residence, as well as offering some carefully crafted admissions of collateral points for which there was no evident defense.

46. Unlike her written statement, respondent McBride repeatedly testified that she had "no reason to doubt" the truth of Mr. Hernandez's claims that he intended to occupy the properties as his primary residence. She testified that she did not review the Spruce Avenue declarations by Mr. Hernandez regarding owner occupancy and that he sought the loan for purchase of a primary residence. She claimed that she "screwed up," by failing to review these declarations by Mr. Hernandez after the initial application and before the Spruce Avenue loan was processed and funded. She made no mention in her testimony regarding confronting Mr. Hernandez on his claims on the Spruce Avenue loan or of refusing to "do the loan" the way he requested, as she wrote in her 2009 statement. Also unlike her 2009 statement, she made no mention of being threatened by Mr. Hernandez with a discrimination claim if she persisted in pressing him about the obvious inconsistent representations made by Mr. Hernandez in his loan applications, nor did she mention any discussion with him at all about the obviously inconsistent applications. In a statement that caused serious harm to her credibility, respondent McBride testified the inconsistencies between her 2012 testimony in this matter and her 2009 letter to the Department could be explained by the fact that, "I did not review my files before I replied to the inquiry." That statement reflects at best, grossly negligent and unprofessional conduct, if true, but far more likely is the fact that the statement is false. Although there are good reasons to question both the credibility of respondent McBride's testimony and some of the statements in her letter, it appears that her explanations in the 2009 letter, even if written blindly without the benefit of a review of her three loan files upon which the inquiry was based, are far closer to the truth than was her testimony.

47. Respondent also acknowledged "screwing up" by failing to disclose the Department's pending action on her application for the Mortgage Loan Originator Endorsement license. She offered no other explanation for what appears to be an act of conscious dishonesty, nor did she express any remorse for her conduct.

48. Respondent repeatedly returned to her central explanatory theme that the errors, omissions and irregularities in the three loan applications were the product of her failure to review the applications during processing and at completion, and allowing her loan processors to "sign for me" documents without her oversight or review. She testified that she "meant" to review the Hernandez loans after she took the applications, but did not. She claimed at the time, "I was busy, overwhelmed." Respondent McBride thus softly and subtly sought to shift the blame for the false statements to lenders made in the Charter Oak and Spruce Avenue Hernandez loans to the fault of the unsupervised work of her processors, accepting responsibility only for the limited problem of her neglect in performing her responsibilities as corporate broker through her failure to review these applications. Respondent McBride also seem to be quietly surprised at the seriousness with which the Department pursued the action against her, as she evidently thought that these matters were

not particularly serious because there was no evident harm to either the lenders who funded the loans or to the borrower. At least two of the declarations by Mr. Hernandez submitted to respondent McBride supporting the loan applications under review here were false, a fact known to respondent at the time. She acknowledged that she did inform any of the three lenders regarding what she knew, and failed to provide any explanation why she did not do so, other than leaving the distinct impression that she did not think the problem was terribly important, because she did not think any of the lenders were harmed.

49. In sum, respondent McBride was manifestly unpersuasive and lacked credibility in many important particulars in her testimony. Were one to give full credence to her claims of total inattention and neglect during the period of time respondents originated the subject loans, at the very least, respondent McBride makes the case that she totally failed to faithfully discharge her duties and responsibilities as a corporate real estate broker required by the Real Estate Law.

#### EVIDENCE OF REHABILITATION

51. Respondent McBride directed and conformed her evidence of claimed rehabilitation toward the deficiencies in her conduct as broker for respondent People's that she was willing to acknowledge in her testimony. Her evidence of rehabilitation thus focused upon her updating herself in real estate law and changes in real estate lending practices post-Dodd-Frank, and her efforts to obtain continuing education from lenders and others to become more conversant with current lending practices and requirements. In so doing, she ignored the more central and weighty deficiencies raised by the adducing of proof on the more weighty allegations made in the First Amended Accusation, such as dishonesty on her Loan Originator Endorsement application, and her passive dishonesty and willingness to overlook and profit from Mr. Hernandez's false representations to lenders. Not an iota of evidence was offered that addressed the issue of how respondent McBride would handle another borrower making false representations on a loan application who sought to bully her when she called the matter out, since in her testimony she declined to mention or acknowledge her statements that partially acknowledged this problem in her 2009 letter.

52. Respondent did produce evidence of completion of several continuing courses. Some of these courses were offered by lenders, to provide familiarization with changes in laws and regulations governing residential mortgage lending practices since the real estate crash in 2008 and the implementation of Dodd-Frank. Respondent did not explain persuasively how these courses were taken in response to correcting the problems leading to this action, as opposed to education and familiarization required to keep up and remain solvent and competitive in a difficult and competitive industry undergoing great changes in lender practices and major revisions of the legal and regulatory environment in which respondents must conform to continue to practice. For example, respondent's claim that she no longer accepts applications for "stated income" loans as a fact in rehabilitation, and that she had to take courses in learning how to read W-2 forms and tax returns is not really rehabilitation, but a prudent response to a major change in the lender, legal and regulatory environment that requires such adjustments to stay in business.



53. Similarly, respondent McBride's claim that she has reduced her staff at respondent People's from 12-14 to two processors, offered as evidence of changed business practices from the time of the violations alleged, also fails to persuade. Respondents would be a truly remarkable residential mortgage broker to be able to continue in 2012 with the same number of staff as in 2006. Respondents operate in an industry that has undergone contraction of Biblical proportion. To attribute her reduction in staff as a rehabilitative response to this action, under the general conditions under which the industry has been required to operate in the past six years, without acknowledging the reductive effect of the force of economic circumstances in the industry, is nonsense. The fact that respondent has survived the downturn and can still employ two processors is itself remarkable, and hundreds of her peers have failed or been absorbed by stronger peers. The reduction in staff at respondent People's cannot be concluded to be a conscious change undertaken by respondent McBride in response to a genuine desire to change her business practices acknowledged to require reformation due to the allegations. To claim the circumstantial contraction of her business largely if not completely due to economic forces in the industry constitutes was simply disingenuous.

54. In suggesting another distinct effort at rehabilitation, respondent testified that, "I review every application now." It is ironic to claim that now doing, as the responsible broker, what she should have been doing all along, somehow constitutes rehabilitation.

55. Although candid in her acknowledgements in her testimony regarding areas in which she "screwed up" with these transactions, and the manner in which she operated respondent People's at the period of time under review, under close review, these acknowledgements are not persuasive. Respondent McBride's admissions of "screwing up" were carefully couched to control and limit potential liability. The confessions of "screwing up" regarding largely matters collateral to the central allegations of this matter, which constitute various forms of dishonest conduct and inattention to even the most basic responsibilities of a supervising broker, fail to reflect understanding the true gravity and scope of the misfeasance with which respondents were initiating and processing loans, and the see-no-evil manner in which respondent McBride was supervising activities for which she was responsible as supervising broker during this period of time. These carefully couched and constrained admissions constitute a different species of a common theme throughout these transactions, disingenuousness.

56. At all times relevant to this Decision, respondent McBride was responsible, as the designated broker officer of respondent People's, for the supervision and control of the activities conducted on behalf of respondent People's by its staff and employees, including the activities of the processors working on the three loans under review in this matter. Respondent McBride admitted she failed in most every material respect to exercise reasonable supervision and control over her mortgage brokering employees during the period under review. Respondent McBride permitted, ratified, and approved of the conduct of her processors who worked on the three loans under review set forth in the Factual Findings. There is no evidence in this record that circumstances have changed since the period under review, other than a significant passage of time in the bringing of this action, the significant

contraction in the number of persons respondent McBride supervises and the sea change in the mortgage brokering business, and respondent McBride's statement that she now reviews every application. There is no evidence from which it may be concluded that respondent McBride is rehabilitated, or that she could or should be found presently fit and suitable to supervise the activities of others in the regulated mortgage loan origination and funding business as a real estate broker.

## COSTS

57. The Department introduced two separate Certified Statements of Costs of investigation and enforcement of this matter, pursuant to the authority of newly enacted Business and Professions Code section 10106. In the first such Costs Certification, the Department claimed a total sum of \$398.90 in costs expended in this matter for the services of two Department-employed Special Investigators, one of whom performed the lion's share of the claimed reimbursable work. The first Costs Certification has an attachment itemizing the time spent by employee, date and task. The Costs Certification declares that the costs claimed are calculated, "by multiplying the time spent of [sic] each task by the hourly pay rate of the employee (determined by adding 5% to the classification's base salary, adding 38% to cover staff benefits and dividing by the average number of hours per month.) The Costs Certification stated that rate claimed for reimbursement for the employees' time did not include Department operational expenses.

58. There is no information in the first Costs Certification that provides any background information regarding the rate calculation and why the calculation was performed as it was, selecting the figures used. The statute requires that the costs claimed are presumed reasonable, unless challenged, and in this matter the costs claimed were challenged. Without more information, there are no facts or information from which a conclusion that the rate calculation and the figures used were reasonable under the circumstances. For example, there is no explanation for why five percent (or any per cent) needed to be added to the employee's base salary, or why 38 per cent was added for "staff benefits" (these ad-ons simply were not explained.) There was no explanation why the employee's salary was not a satisfactory basis for calculation of the rate.

59. The first Costs Certification contains an appended itemization of the tasks performed by the two Department employees showing the rate (as calculated above) for the employees' time at \$62 per hour. A few of the itemized task descriptions make sense, such as making and receiving telephone calls and writing reports and memoranda. These tasks are described with sufficient specificity to qualify as reasonable. However, most of the time claimed to be reimbursable and recoverable for each investigators' time resides in a description entitled, "Case General Support Time." There is no information in the itemization regarding what task(s) are encompassed by "Case General Support Time," or what this entry is supposed to mean. The task "Case General Support Time" is not self-explanatory, such as writing a report. Without some reasonable specificity, it cannot be concluded that the time spent for "Case General Support Time" is a reasonable and recoverable cost. For one investigator, such time was 4.00 of 4.75 hours claimed. For the

other, Case General Support Time was 11.10 of 19.30 hours claimed. Thus, 8.95 hours remain that can be characterized as reasonable as adequately described, and are recoverable. The rate, removing the added five and thirty eight percent figures, works out to roughly \$40 per hour. Total costs claimed and may be found reasonable with respect to the first Costs Certification thus total \$358.00.

60. A second and separate Costs Certification was submitted that claims and seeks reimbursement for itemized time and expense for the Department's legal staff to prosecute this matter. This attorney time Cost Certification seeks reimbursement in the amount of \$3501.15 for 43.25 hours of legal time at a rate of \$89 per hour. Curiously, the attached itemization of time spent reflects the total amount of attorney cost at \$3849.25, but this amount was not sought. There is no explanation in the cost certification or the itemization as to why the amount was reduced for the purposes of the claim.

61. This second Costs Certification has the same declarations regarding the manner in which the rate was calculated for the Department employed attorney's time, again adding five per cent to the attorney's base pay, and an additional 38 per cent on top of that for benefits. The second Costs Certification suffers from the same deficit as the first, in that there is no explanation regarding why these additional five and 38 per cent augmentations over and above the attorney's base pay were required to adequately reimburse the Department for the expenditure of the attorney's time spent in prosecuting the matter. Since there is no basis to conclude that these additional costs augmentations above reimbursement for the attorney's base pay were reasonable under the circumstances, they may not be passed along to the respondent in the form of recoverable costs without considerably more detailed explanation and proof that such augmentations were reasonable that was provided in the second costs certification. Removing the 43 per cent augmentation to the attorney's base pay, the rate that must be used to calculate reimbursable costs is \$55 per hour. Revise calculation for 43.25 hours of attorney time at \$55 per hour results in potentially reimbursable costs of \$2,378.75. Total potential reimbursable costs for both investigative and legal services are thus \$2,736.75.

## LEGAL CONCLUSIONS

1. "The burden of proof in administrative proceedings involving the revocation or suspension of a professional license is clear and convincing proof to a reasonable certainty."<sup>2</sup> "Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind."<sup>3</sup> The burden of proof is upon the Department to prove that legal cause exists to revoke or suspend respondents' licenses.

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<sup>2</sup> *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 835, 842, *James v. Board of Dental Examiners* (1985) 172 Cal. App. 3d 1096, 1105, *Realty Projects v. Smith* (1973) 32 Cal.App.3d 204.

<sup>3</sup> *In Re David C.* (1984) 152 Cal.App. 3d 1189, 1208.

This burden was applied to each and every factual and legal allegation contained in the First Amended Accusation, and in making the Factual Findings above and the Legal Conclusions that follow.

2. The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

[¶] ... [¶]

(d) Willfully disregarded or violated the Real Estate Law ... or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law ...

[¶] ... [¶]

(g) Engaging in any conduct constituting negligence and incompetence in performing acts for which a license is required under the Real Estate Law.

[¶] ... [¶]

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.<sup>4</sup>

3. B&P Code section 10176, subdivision (a), prohibits any holder of a real estate license from making any material misstatement of fact or substantial misrepresentation while performing acts for which a real estate license is required, and subdivision (i) of that same provision, prohibits any holder of a real estate license from engaging in any conduct involving fraud or dishonest dealing. Subdivision (c) of the same section prohibits any holder of a real estate licensee from engaging in a continuous course of conduct through real estate licensees involving flagrant misrepresentations or a continuous course of conduct constituting fraud.

#### FIRST CAUSE OF ACTION

4. Respondents violated B&P Code sections 10176, subdivision (i), engaging in conduct constituting dishonest dealing, and section 10177, subdivision (g) engaging in conduct constituting negligence and incompetence in performing acts for which a real estate license is required. As a result, respondents also violated B&P Code section 10177, subdivision (d). It was not proved by clear and convincing evidence that respondents

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<sup>4</sup> Business and Professions Code section 10177, in pertinent parts.

violated B&P section 10176, subdivision (a), in that it was not proved that respondents or anyone subject to respondents' authority and control, made a substantial misrepresentation with respect to the three loan transactions alleged in the First Cause of Action. It also was not proved that respondents violated B&P section 10176, subdivision (c) for engaging in a continued flagrant course of misrepresentation through real estate agents.

5. As set forth in the Factual Findings, respondents' role in the three loan transactions was by negligent failure to act and exercise her responsibilities as corporate real estate broker. Respondents made neither affirmative misrepresentations nor false statements, and did not induce any lender to do anything, contrary to the allegations of the First Cause of Action. But respondents did sit passively by while Mr. Hernandez misrepresented his intentions supporting the loans. By respondent McBride's own admissions, she was negligent and incompetent in processing the three subject loans, and she was aware of her duty at the time to refuse to proceed further. If the "process was too far along" as she put it, she was aware that it was her responsibility as the corporate broker to advise the lenders of the facts as she had them. Respondent acknowledged that she failed in her supervisory and oversight duties required by her license. Legal cause exists to revoke or suspend respondents' real estate broker's licenses.

## SECOND CAUSE OF ACTION

6. It was not proved that respondents violated B&P Code sections 10240, 10241, 10177, subdivision (d), 10176, subdivision (a), 10176, subdivision (i) or 10177, subdivision (g) with respect to compensation to be paid to the broker set forth on the Mortgage Loan Disclosure Statements provided the borrower on the Glenn Avenue and Charter Oak properties. As set forth above, it was not alleged that such a violation existed with respect to the Spruce Avenue property and loan. As set forth in the Factual Findings, the maximum that was proved regarding these Disclosures is that the Disclosures contained some harmless errors of unproved etiology. There was no proof that any of the statements in the Disclosures regarding the amount and form of compensation to be paid to respondents for originating the loans or additional compensation in the form of yield spread premiums were substantial misrepresentations, were fraudulent, intentionally false, part of a course of conduct involving dishonest dealing or otherwise the product of anything other than processing errors or changes in how the compensation was to be characterized. There was not enough evidence regarding how these errors came about to conclude the errors were the product of direct or vicarious broker negligence or incompetence.

## THIRD CAUSE OF ACTION

7. Respondent McBride violated B&P Code sections 10159.2 and Department Regulation, CCR, title 10, section 2725, and therefore B&P Code section 10177, subdivision (d), by failing to exercise reasonable supervision over the licensed employees and activities of respondent People's, and failing to establish policies and procedures to insure respondent People's loan origination, processing and closing procedures performed by herself and/or those under her supervision were fully in compliance with the Real Estate Law. As set forth

in the Factual Findings, respondent McBride acknowledged that with respect to the three loans under review in this matter, other than taking the application from the borrower in each instance, she paid no other attention to the loans as the loans were processed and funded. She also broadly acknowledged that she allowed others in her employ at respondent People's to "sign for her." Although it was not clear in the evidence, respondent McBride did not limit that comment to other licensees. Nor did she produce any evidence or documentation indicating that she had delegated her authority to any particular person(s) whose activities were subject to her oversight and supervision. It appears clear from the evidence that respondent McBride largely neglected her duties as corporate broker during the period of time under review in order to maximize throughput of loans through respondent People's. Therefore, separate legal cause exists to suspend or revoke respondent's real estate broker licenses.

#### FOURTH CAUSE OF ACTION

8. Respondent McBride violated B&P Code sections 10176, subdivision (i) and 10177, subdivision (j), by making a material misstatement of fact upon her application to the Department for a Mortgage Loan Originator license endorsement. As set forth in the Factual Findings, respondent falsely stated on the application that she was not then subject to a disciplinary action that could result in potential sanctions against her licenses. Also as set forth in the Factual Findings, respondent McBride was aware of her duty to disclose the pending action at the time she completed and signed the Loan Originator application under penalty of perjury, but failed to do so. Additionally, there is an abyss between acknowledging that submitting a loan originator license endorsement application containing a knowingly false statement was a "screw-up," which reflects more a sense of regret from suffering the consequences of getting caught in a lie, and expressions genuine contrition and remorse. The latter was strikingly absent from respondent's testimony when she was asked to acknowledge and explain the genesis of her false statement on this application. Therefore, separate legal cause exists to revoke or suspend respondents' individual and corporate real estate broker licenses.

9. In addition, legal cause exists to revoke the Mortgage Loan Originator license endorsement pursuant to B&P sections 10166.05, subdivision (c) and 10166.051, subdivision (b). The Originator Endorsement was issued on the strength of the assumed veracity and reliability of respondent McBride's disclosures and statements on the application, some of which were later found to be materially false. Respondent offered no apology or explanation for the false statements, other than a vague and general claim that she was "overwhelmed" and greatly stressed at the time she filed the application. Being in over one's head as a broker resulting in an inability to cope with the fiduciary duties and responsibilities of a position requiring the broker's license is a poor excuse for making false statements to the Department on an application for a license augmentation.

## COSTS

10. New B&P section 10106 finds itself introduced into a well-developed existing body of law that developed in response to shaping the permissible parameters of reimbursable investigation and enforcement costs engendered by its predecessor, B&P section 125.3. The California Supreme Court has weighed in on the matter and enunciated a set of standards by which such costs claims must be evaluated. The costs of investigation and enforcement were evaluated for reasonableness against the standards enunciated in *Zuckerman v. Board of Chiropractic Examiners*<sup>5</sup>, which requires the consideration of the following factors in determining the amount of costs to be assessed:

- The board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a licensee who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed.
- The board must consider the licensee's subjective good faith belief in the merits of his or her position.
- The board must consider whether the licensee has raised a colorable challenge to the proposed discipline.
- Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation, the board must determine that the licensee will be financially able to make later payments.
- Finally, the board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct.

11. The factors required by *Zuckerman*, as well as the standards set for adducing evidence and the requirements for proof of such costs claims set forth in CCR, title one, section 1042, particularly subdivision (b) (1), under all of the facts and circumstances, were used to evaluate and assess the reasonableness of the costs claims set forth in the Costs Factual Findings above.

12. The cost of the investigation and enforcement is not disproportionate to the work required to investigate and prove the violations. The violations are not trivial. Respondent had very little in the way of a colorable defense to the allegations in three of the four causes of action, but she prevailed on one cause of action which was significant and weighty, in that it alleged fraud in failing to disclose forms of compensation to the borrower.

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<sup>5</sup> *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

Thus, the cost claim must be reduced further to reflect that respondent prevailed in one of the four causes of action. There was no evidence regarding respondent's ability to repay a costs assessment. That is a matter to be undertaken between respondent McBride and the Department at some future point in time, in the event that the Department may wish to undertake a payment plan, in its discretion. The Department may, in its discretion, elect not to remove respondent's license from restricted status until the costs of been repaid.

13. Therefore, legal cause exists pursuant to B&P section 10106 to order recovery of reasonable costs of investigation and enforcement in this action. The Department prevailed on three of the four Causes of Action. As set forth in the Factual Findings, the reasonable costs of investigation and enforcement were \$2,736.75, before the adjustment required by *Zuckerman* to reflect the fact that respondent prevailed on one fourth of the allegations against her. That adjustment reduces the reasonable costs of investigation and enforcement that are reimbursable and recoverable from respondents to \$2052.56. Such costs are recoverable from respondents as part of the disciplinary Order below.

#### EVIDENCE OF REHABILITATION AND OUTCOME

14. Proof of legal cause to revoke or suspend a license shifts the burden of proof to the licensee. Proof of satisfactory rehabilitation, good character, trustworthiness and honesty are the means by which fitness for continued licensure is proved. Any such evidence is evaluated against the Department's nonexhaustive list of criteria, set forth at CCR, title 10, section 2912, against which a licensee's evidence of rehabilitation is to be weighed and evaluated when legal cause for revocation or suspension of the license has been proved. Respondent's evidence of rehabilitation, and the facts in aggravation and mitigation were carefully assessed against the Department's criteria.

15. "The length of this pattern of violation of the law requires a corresponding period of law abiding behavior and substantial evidence of well-documented rehabilitation."<sup>6</sup> "Of course, the more serious the misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be."<sup>7</sup> "Cases authorizing admission on the basis of rehabilitation commonly involve a substantial period of exemplary conduct following the applicant's misdeeds."<sup>8</sup> The authorities require "clear and convincing evidence" or a "compelling showing" of rehabilitation in such instances.<sup>9</sup> "... [D]ecisions already embrace the common sense notion that rehabilitation cannot be determined separate and apart from the offenses from which one claims to be rehabilitated."<sup>10</sup>

16. As set forth in the Factual Findings, respondent McBride's evidence of rehabilitation was incomplete and unpersuasive, and neither generated from nor responsive to

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<sup>6</sup> *In re Gossage* (2000) 23 Cal.4<sup>th</sup> 1080, 1098-1099, *In re Menna* (1995) 11 Cal.4<sup>th</sup> 975, 987.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, citing *Kwasnik v. State Bar* (1990) 50 Cal. 3d 1061, 1071-1072.

<sup>9</sup> *Id.*

<sup>10</sup> *Gossage*, p. 1098.



the concerns raised by the violations found above. A significant factor in evaluating evidence in aggravation, mitigation and rehabilitation is this significant period of time that passed from the events under review in this matter and the bringing of this action to evidentiary hearing almost six years later. In the interim, and in the absence of any other evidence to the contrary, it can only be assumed that respondent McBride has continued to operate respondent People's without any further violations of the Real Estate Law. Although that fact is indeed significant and was carefully considered here, on balance, it cannot be concluded that respondent McBride is even partially rehabilitated. In this instance, factors in aggravation are serious and cut to the heart of the fiduciary duty and requirements for holding a license as a real estate broker, which permits the holder to operate in a supervisory capacity and operate completely independently. Respondent McBride's complete neglect of her corporate real estate broker duties at the time the three loans under review or processed, and her dishonesty both on the Mortgage Loan Originator application and in her testimony responses to why she allowed what she knew to be fraudulent disclosures on loan applications to process through to her lenders are incompatible with the most fundamental ethical and fiduciary obligations of a real estate broker. Such conduct does not augur well for respondent McBride to continue in the independent and supervisory capacity authorized by a real estate broker license, despite the fact that the operative conduct is more than five years old.

17. The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners.<sup>11</sup> The primary purpose of professional licensing schemes is the protection of the public, and the prevention of future harm to consumers.<sup>12</sup> "The purpose of [the Real Estate License Law] is to protect the public by requiring and maintaining professional standards of conduct on the part of all persons licensed hereunder."<sup>13</sup> "These statutes are designed with the purpose of protecting the public from fraud, misrepresentation, incompetence, and sharp practice."<sup>14</sup> The Legislature intended to insure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear."<sup>15</sup>

18. Respondent McBride's dishonesty and her lack of insight and candor in acknowledging the honesty, disclosure and ethical issues raised by the allegations here relating to the three loans under review and her Mortgage Loan Originator application are the

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<sup>11</sup> *Ettinger v. Board of Medical Quality Assurance*, (1980) 135 Cal.App.3d 853, 856,

<sup>12</sup> *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476, *In re Kelly* (1990) 52 Cal.3d 487, 496.

<sup>13</sup> Insurance Code section 1737 (a very similar licensing scheme to the Real Estate Law, with similar consumer protection goals and good character and integrity licensing requirements).

<sup>14</sup> *Harrington v. Department of Real Estate* (1989) 214 Cal.App. 3d 394, 402, *Goldberg v. Barger* (1974) 37 Cal.App.3d 987.

<sup>15</sup> *Id.*, *Ring v. Smith* (1970) 5 Cal.App. 3d 197, 205.

turning point here. Respondent failed in her burden of proof to demonstrate that she is fit to continue as a real estate broker at the present time. Therefore, respondent McBride's real estate broker's license, the corporate real estate broker's license issued to respondent People's, and the Mortgage Loan Originator endorsement all must be revoked.

19. On the other hand, respondent McBride has a great deal of experience in the mortgage loan business, and the interim five to six year period without evidence of an additional violation of the Real Estate Law provides a reasonable basis to conclude that the public welfare would not be endangered if respondent McBride were permitted to continue to work in the industry as a licensee by being issued a restricted real estate salesperson's license, but subject to the supervision of another real estate broker, who would be required to certify to the Department that the broker is familiar with the facts and conclusions set forth in this Decision, and certifies a willingness to supervise respondent McBride's activities as a salesperson licensee in the mortgage loan business.

#### ORDER

All licenses and licensing rights of Respondent Concetta McBride under the Real Estate Law are REVOKED;

All real estate licenses and licensing rights issued by the Department of Real Estate to respondent People's Mortgage Banc, Inc., are REVOKED.

The Mortgage Loan Originator Endorsement, issued by the Department of Real Estate to respondent Concetta McBride is REVOKED.

Provided, however, a restricted real estate salesperson license shall be issued to Respondent McBride pursuant to Section 10156.5 of the Business and Professions Code if Respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to Respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

1. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo contendere to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee.

2. The restricted license issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Respondent has violated provisions of the California

Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two (2) years have elapsed from the effective date of this Decision.

4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If Respondent fails to satisfy this condition, the Commissioner may order suspension of Respondent's license until Respondent passes the examination.

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7. Respondent shall, within 90 days of the effective date of this decision, reimburse the department its recoverable costs of investigation and enforcement in the amount of \$2052.56, as set forth in the legal conclusions.

DATED: January 2, 2013



STEPHEN J. SMITH  
Administrative Law Judge  
Office of Administrative Hearings