

**FILED**

BEFORE THE BUREAU OF REAL ESTATE

MAR 21 2016

STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

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By           *B. dew*          

In the Matter of the Accusation of	)	CalBRE No. H-2891 FR
	)	
HIRAM EARL KEMP,	)	OAH No. 2014070709
SHIRLEY LEE SULLIVAN-HABLE, and	)	
KEMP-HABLE INC., a Corporation,	)	
	)	
Respondents.	)	

DECISION

The Corrected Proposed Decision dated March 1, 2016, 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.

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to HIRAM EARL KEMP.

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted broker license is granted to Respondents SHIRLEY LEE SULLIVAN-HABLE, and KEMP-HABLE INC.

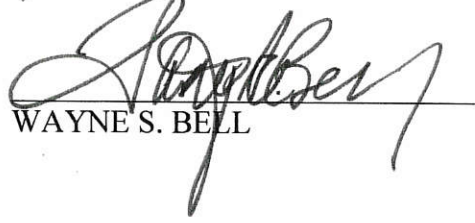
Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondents.

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This Decision shall become effective at 12 o'clock noon on APR 11 2016.

IT IS SO ORDERED 3/17/2016

REAL ESTATE COMMISSIONER

  
WAYNE S. BELL

BEFORE THE  
BUREAU OF REAL ESTATE  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

HIRAM EARL KEMP,  
SHIRLEY LEE SULLIVAN-HABLE, and  
KEMP-HABLE, INC., a Corporation,

Respondent.

Case No. H-02891 FR

OAH No. 2014070709

**CORRECTED PROPOSED DECISION**

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, on January 20 and 21, 2016, in Fresno, California.

Mary F. Clarke, Counsel, represented Brenda Smith (complainant), a Deputy Real Estate Commissioner with the Bureau of Real Estate (Bureau),<sup>1</sup> Department of Consumer Affairs, State of California.

Respondents Hiram Earl Kemp and Shirley Lee Sullivan-Hable appeared on their own behalf, and on behalf of Kemp-Hable, Inc.

Evidence was received, the record was closed, and the matter was submitted for decision on January 21, 2016. A Proposed Decision issued February 1, 2016. On February 10, 2016, the Bureau made request to reissue a corrected decision to include "findings and any discipline against Kemp-Hable, Inc."<sup>2</sup> No written opposition was received from

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<sup>1</sup> On July 1, 2013, the Department of Real Estate became the Bureau of Real Estate within the Department of Consumer Affairs. The term "Bureau" as used herein includes the Department of Real Estate and all actions taken by the Department of Real Estate before it became the Bureau of Real Estate.

<sup>2</sup> Government Code section 11517, subdivision (c)(2)(C) provides that an agency may: "Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision."

respondents regarding the request to reissue a corrected decision.<sup>3</sup> The correction made in this Corrected Proposed Decision adds respondent Kemp-Hable, Inc., a corporation, to part II of the Order relating to respondent Shirley Lee Sullivan-Hable. Footnotes 4 and 7 are also added to the Corrected Proposed Decision.

## FACTUAL FINDINGS

1. Complainant made and filed the Accusation in her official capacity.
2. On November 22, 2005, a real estate salesperson license was issued to Hiram Earl Kemp (respondent).<sup>4</sup> Respondent's license was in full force and effect at all times relevant to the charges set forth in the Accusation, and will expire on February 3, 2018, if not renewed.
3. On December 6, 2006, a real estate broker license was issued to Shirley Lee Sullivan-Hable. Ms. Hable's license was in full force and effect at all times relevant to the charges set forth in the Accusation, and will expire on December 15, 2018, if not renewed. Ms. Hable was previously licensed as a real estate salesperson. She and respondent are siblings. She is respondent's employing broker.
4. On March 6, 2006, a corporation license was issued to Kemp-Hable, Inc. Ms. Hable has been the designated officer for Kemp-Hable, Inc. from January 5, 2007. The corporation license will expire on May 5, 2018, as will Ms. Hable's status as designated corporate officer, if not renewed.
5. Complainant seeks to discipline respondents' licenses based upon their involvement in the listing and sale of certain residential property, alleging that they engaged in substantial misrepresentation, fraud or dishonest dealing, and negligence or incompetence. The parties' various contentions and specific conduct upon which these contentions are made are described below.

### *Background*

6. Starting in 1999, respondent began "flipping" houses – the practice of purchasing residential properties, making needed repairs/improvements, and selling the

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<sup>3</sup> By regulation, an agency may make application to the Office of Administrative Hearings to correct a mistake or clerical error, or make minor or technical changes in a proposed decision by filing a written request addressed to the presiding judge. "A party shall have a period of 10 days from the date the application is served to file written opposition." (Cal. Code Regs., tit. 1, § 1048, subd. (a)(2).)

<sup>4</sup> References made in the singular to "respondent" will refer to Hiram Earl Kemp, and references in the plural will include other respondents.

homes for a profit. He has engaged in this activity approximately 10 times. In late 2011, respondent purchased the property located at 1421 Teresa Street, Modesto, California (property), with the intention of flipping it. The property was in foreclosure and respondent paid approximately \$46,000 for the home. On September 14, 2011, he entered into an arrangement with Lonnie Chabino to perform 57 items of work detailed in a Work Order. Mr. Chabino performed this work. Respondent also arranged for a new roof to be installed, which was done.

7. On September 16, 2011, Dustin Pest Control performed an inspection of the property and prepared a "Complete Report" detailing inspection findings and recommendations. This report noted 13 items of concern, along with recommendations for repairing most items. For example, Item 1 indicated: "Dry rot has damaged the roof boxed eave and fascia." Dustin's recommendation for Item 1 was that a state licensed roofer or contractor inspect the entire roof, remove and replace all damage in the roof structure as far as damage extended, and make necessary repairs to ensure the roof was watertight. Dustin made similar recommendations for dry rot detected at the wood members of the patio roof, and for water damage/stains noted in the laundry room. For most other items Dustin provided a cost estimate for repairs that Dustin himself was willing to perform. The repairs to be performed by Dustin totaled \$2,965.

On December 7, 2011, Dustin performed a second inspection of the property and prepared a "Supplemental Report" detailing two additional inspection findings and recommendations listed as Items 14 and 15. The two items referenced dry rot damage to the window trim and siding at the front of the structure. Dustin then recommended removal and replacement of the damaged wood members for a total cost of \$335.

#### *Property Sale*

8. On December 15, 2011, respondent entered into a listing agreement with Kemp-Hable, Inc., for the sale of the property for a purchase price of \$89,900. Respondents caused the property to be entered into the Multiple Listing Service (MLS) wherein the property was described as follows: "Cute, updated home, New Roof w/3 year Roof Certification and Clear Pest."

9. "Clear pest" is a commonly used real estate term referring to a certification that a property is free and clear of pests and active infestation in visible areas. It generally refers to a written statement issued by a structural pest control company attesting to the absence or presence of wood-destroying pests or organisms. (See Bus. & Prof. Code, § 8519.) No such written statement was issued by Dustin or any other structural pest control company for the property. A clear pest report is required for buyers who are financing the property purchase through FHA or VA loans. Otherwise, a clear pest report is generally not needed in property transactions unless the parties require it as part of the real estate sales agreement.

10. Jurgen Paul Klaus desired to purchase a residence in Modesto, California. He engaged the services of Robert Featherstone and Exit Realty-Touchstone to be his real estate agent and broker, and to advise and guide him through this process. Mr. Featherstone downloaded the MLS data for the property, and provided this same information to Mr. Klaus in late January 2012. On January 26, 2012, Mr. Klaus made an offer through Mr. Featherstone to purchase the property for \$86,900. Mr. Klaus characterized the offer as being for the full asking price, minus a credit towards the purchase of an air conditioning unit. The offer was accepted by respondent that same day. Mr. Klaus made a down payment of \$17,380 and financed the balance of the purchase price. Escrow closed on or about February 24, 2012.

### *Misrepresentation*

11. Mr. Klaus filed a complaint with the Bureau on February 19, 2013. He passed away on November 25, 2014. Prior to his death, Mr. Klaus brought a civil action against respondents and Robert Featherstone in the Stanislaus County Superior Court, Case Number 2001075. The civil complaint alleged fraud, concealment, negligence and breach of fiduciary duty based on the same set of facts as this case. A Tentative Decision in that case was filed on September 12, 2014, and an Amended Judgment was entered on January 9, 2015. Mr. Klaus testified in that case on June 19 and 20, 2014. The transcript of his testimony was made a part of the record in this case. It was considered here and used to make factual findings after determining that the elements of Evidence Code section 1291 were satisfied in this case.<sup>5</sup>

12. When Mr. Klaus made the offer to purchase the property he did so in part reliance upon the MLS "Clear Pest" representation. He and Mr. Featherstone understood that there was a clear pest report. When Mr. Klaus asked Mr. Featherstone whether he should get his own home inspection, Mr. Featherstone stated: "Why spend \$450 when you have a clear pest report?" Mr. Klaus accordingly did not request an inspection of the property prior to close of escrow.

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<sup>5</sup> Evidence Code section 1291, subdivision (a) provides as follows:

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

Mr. Featherstone told Mr. Klaus that he would be asking for the clear pest report prior to escrow closing. Mr. Featherstone spoke with respondent about obtaining the pest report, and engaged in multiple email exchanges with respondents' transaction coordinator, Denise Ashlock. By February 10, 2012, Mr. Featherstone received the December 7, 2011 Dustin pest report. However, he never received the September 16, 2011 Dustin pest report prior to close of escrow on February 24, 2012.

13. Mr. Klaus and Mr. Featherstone were only made aware of minor property damage described in the December 7, 2011 Dustin supplemental pest report. Mr. Klaus indicated that he was willing to pay the total cost of \$335. When asked what the term "supplemental report" meant to him, Mr. Klaus observed: "So, to me, there was no indication of any other prior defect sort of things. So that to me was a clear pest report right there."

Due to the MLS "Clear Pest" representation, Mr. Klaus did not request or order a separate property inspection prior to close of escrow.

14. In March 2012, Mr. Klaus moved into the property. He became aware of Dustin's September 16, 2011 inspection when he observed a Dustin Pest Control sticker on the water heater. He contacted Dustin Pest Control and obtained a copy of the September 16, 2011 pest report. Mr. Klaus subsequently arranged for property inspections by Clark Pest Control in April 2012, and by Orkin Pest Control in April 2013. Clark Pest Control issued an inspection report and cost breakdown of recommended repairs which estimated total work to be performed on the property as costing \$13,030.

15. It was established that Mr. Klaus reasonably relied upon the "Clear Pest" statement in the MLS in deciding not to order an inspection of the property. Because he was not provided with the September 16, 2011 Dustin pest report, he was also unaware of material facts that would have better informed his decision to purchase the property. It was further established that respondents made a substantial misrepresentation when they included "Clear Pest" in the MLS description of the property. Respondents knew or should have known that a buyer would understand such term to mean the property was free and clear of pests and active infestation in visible areas. Prior to close of escrow, Mr. Klaus was only provided the December 7, 2011 supplemental pest report, and was never made aware of material facts relating to the dry rot and other concerns detailed in the earlier September 16, 2011 Dustin pest report.

Such conduct by respondents further demonstrated negligence or incompetence in performing an act for which respondents are required to be licensed.

#### *Non-disclosures*

16. On January 26, 2012, respondent and Mr. Klaus entered into a California Residential Purchase Agreement and Joint Escrow Instructions (Contract) for the purchase of

the property in the amount of \$86,900. Pursuant to paragraph 9A of the Contract, respondent agreed as follows:

Seller shall, within the time specified in paragraph 14A, DISCLOSE KNOWN MATERIAL FACTS AND DEFECTS affecting the Property, including known insurance claims within the past five years, and make any and all other disclosures required by law.

Paragraph 14A of the Contract specified that the seller had seven days after acceptance of the Contract "to Deliver to Buyer all Reports, disclosures and information for which Seller is responsible" under specified paragraphs of the Contract.

17. Respondents failed to disclose and/or deliver to Mr. Klaus the September 16, 2011 Dustin Pest Report, which respondent had received on or about September 20, 2011. Such failure constituted non-compliance with paragraphs 9A and 14A of the Contract. It also constituted dishonest dealing.

18. As part of the property transaction respondent provided Mr. Klaus with a form Seller Property Questionnaire (Questionnaire) dated February 1, 2012. The form is to be used by the seller to provide additional information when a Transfer Disclosure Statement (TDS) is completed, or when no TDS is required. Questionnaire section V(A)(10) asked whether respondent was aware of statutorily or contractually required or related "[m]aterial facts or defects affecting the Property not otherwise disclosed to the Buyer." Respondent checked the "No" box. Respondent explained in his response that the property was purchased from a bank and his answer was "based off time owned."

19. Questionnaire section V(M)(1) asked whether respondent was aware of the following:

1. Reports, inspections, disclosures, warranties, maintenance recommendations, estimates, studies, surveys or other documents, pertaining to (i) the condition or repair of the Property or any improvement on this Property in the past, now or proposed; or (ii) easements, encroachments or boundary disputes affecting the Property.
2. Any past or present known material facts or other significant items affecting the value or desirability of the Property not otherwise disclosed to Buyer.

Respondent checked the "No" box in response to these two questions.

20. Respondent disclosed neither the dry rot damage nor the existence of the September 16, 2011 Dustin Pest Report in response to the above referenced Questionnaire



sections. Such nondisclosure constituted non-compliance with Questionnaire sections V(A)(10) and V(M)(1), and paragraphs 9A and 14A of the Contract. It also constituted dishonest dealing.

*Respondents' Evidence and Testimony*

21. Respondent denied intentionally concealing any information from Mr. Klaus. He explained that office staff mistakenly placed the "Clear Pest" reference in the MLS description section instead of the MLS confidential section. He did not intend for the clear pest information to be directly accessible to the general public. Respondent explained why reference to clear pest was made. He intended to sell the property in the below \$100,000 market, making it eligible for FHA/VA buyers. Underwriters for FHA/VA loans require clear pest reports and his intention was to obtain such certification for any FHA/VA buyer. The "Clear Pest" reference in the MLS was intended as an inducement to attract FHA/VA buyers. Respondent acknowledged that he never had, and did not obtain a clear pest report for the property. Ms. Hable entered the listing information into the MLS, including the "Clear Pest" reference. She explained that sellers normally prefer buyers with conventional loans, and that many FHA/VA buyers were locked out during the market frenzy by investors to purchase properties under \$100,000. She never intended to mislead anyone, believing that a clear pest report would have been obtained in this case had the transaction involved a FHA/VA loan.

22. Mr. Klaus's offer came in as a conventional loan. Respondents noted that nothing in the Residential Purchase Agreement required a clear pest certification, and Mr. Klaus never asked for one. Respondent acknowledged that buyer requests for the pest control report were made prior to escrow and he believes that his transaction coordinator provided both Dustin pest control reports to Mr. Featherstone. Ms. Ashlock confirmed in her testimony that this was the case. However, the testimony of Mr. Featherstone and a review of emails and other documents from Ms. Ashlock were persuasive otherwise in that consistent reference was made throughout to a pest control *report*, in the singular.

The September 16, 2011 Dustin Report contained the most important information detailing the extent of the dry rot damage and recommended repairs. It was not provided until after the close of escrow, and then only because Mr. Klaus stumbled upon the Dustin label with that date affixed to a water heater. Respondents are licensed real estate professionals who were well aware of their duties to communicate fully and accurately regarding material facts involved in the sale of real property. Respondent knew of the 13 items of concern detailed in the September 16, 2011, Dustin Report. He averred that this same report was provided to Lonnie Chabino with instructions to make the needed repairs, and that he also arranged to have the roof replaced. Still, he provided only minimal documentation of these items having ever been addressed.

23. Respondent indicated that he honestly believed that the roofer had addressed all the dry rot issues relating to the roof, eaves and fascia. By the time that Dustin conducted the second inspection in December 2011, respondent assumed that all work related to the

first inspection had been completed. He paid approximately \$4,500 for the roofing work. He acknowledged, however, that “things look bad” and that a “perfect storm” of missteps and mistakes were made in this case. He acknowledged his failures to disclose matters required under the Contract, and also under the Seller’s Questionnaire.

*Discussion*

24. Misrepresentation or Dishonest Dealing. Respondents made a substantial misrepresentation when the property was listed on MLS as having a “Clear Pest.” In this case the MLS information on the property was readily migrated to, and made accessible to the general public on a website. It was reasonable to interpret the MLS representation as communicating that the property had a clear pest report. The language was clear. It was not equivocal or otherwise qualified or limited to FHA/VA purchasers. Mr. Klaus relied upon this representation. He came to believe that the December 7, 2011 Dustin report was the clear pest report, and never received the earlier Dustin complete report prior to escrow closing. Such matters led to his not ordering his own property inspection. Mr. Klaus was not in possession of material information that would have better informed his decision to purchase the property. Following the misrepresentation regarding clear pest, respondent further failed to disclose information required under the Contract and Seller’s Questionnaire, and such nondisclosures were tantamount to dishonest dealing.

25. Respondents, however, did not engage in fraud. Their actions involved no intentional or purposeful concealment of material facts to gain a sales advantage. They made no profit on this property transaction. Respondent did make other disclosures related to the property. Regarding the roof, for example, respondent twice made disclosures in the Seller’s Questionnaire regarding “Water-related and Mold Issues.” By answering “yes”, he indicated awareness and disclosed to Mr. Klaus the following:

- Water intrusion into any part of any physical structure on the Property; leaks from or in any appliance, pipe, slab or roof; standing water, drainage, flooding, underground water, moisture, water-related soil setting or slippage, on or affecting the property.
- Any problem with or infestation of mold, mildew, fungus, or spores, past or present, on or affecting the Property.

As part of his explanation to his “yes” response, respondent handwrote the following on the Seller’s Questionnaire: “When purchased, roof leaked, on inside of house showed signs of mold which was cleaned with bleach treated with kills primed and painted.” Respondent also made lead paint disclosures regarding the property.

26. In mitigation, respondent sought to contribute to the cost of the outstanding repairs identified in the Dustin pest reports. He sought a contribution from Mr. Featherstone for not asking for a clear pest as part of the Contract, and also from Mr. Klaus for choosing

to waive his rights to have a home inspection completed.<sup>6</sup> He offered to repair the dry rot at issue, and believes resolution of the matter was largely hindered by the much higher repair estimates obtained by Mr. Klaus from other pest control companies, and his insistence that respondent pay the higher amounts.

Respondents have no other history of complaints or discipline by the Bureau. Regarding the civil action involving the same property, judgment was entered in favor of respondents on all causes of action, including fraud based upon misrepresentation, and fraud based upon concealment. Respondents prevailed in that case and were awarded their costs.

27. Other Matters. Respondents recognize that they made errors in this property transaction. They have not used the “clear pest” reference again. This case was “the first and last time” that they entered such language on the MLS. Both respondent and Ms. Hable take great pride in their reputation for honesty and integrity within their community. Ms. Hable served as a dispatcher for the Stanislaus County Sheriff and Fire Departments for 25 years. She has taught at the Police Academy and at Modesto Junior College. She made an honest mistake. She intended only to attract FHA/VA buyers when she included the clear pest reference in the MLS. She had no other purpose for including the language.

Respondent is a retired Modesto Police Department law enforcement officer. He received the Department’s “Top Gun” award in 2011, given to the outstanding officer based upon a peer vote. He initially obtained his real estate salesperson license so that he could generate additional income. He is a single parent, and was responsible for raising six children at the time of the transaction in this case. Respondent denied engaging in purposeful misrepresentation or concealment, but acknowledged making mistakes and failing to disclose material facts relating to the property. He testified credibly to the events around the transaction. This case has impressed upon him the importance of making disclosures, and the consequences of failing to do so. Although he prevailed in the civil action, he has yet to recover the very considerable legal fees incurred.

28. It has been judicially recognized that rehabilitation requires an acknowledgment of wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 [“Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation.”].) Respondents have both taken the first steps toward rehabilitation. They acknowledged mistakes with respect to the acts underlying the allegations in this case, and have taken step to insure they will not recur. The amount of evidence required to establish rehabilitation varies according to the seriousness of the

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<sup>6</sup> The Tentative Decision in the civil action made reference to a “Buyer’s Inspection Advisory” that recommended a home inspection and an investigation of the entire property for wood destroying pests. The judge in the civil action determined: “[Mr. Klaus] chose not to inspect the Property despite all of the information available to him and his agent Featherstone which taken together should have put [Mr. Klaus] on notice of the need to conduct further investigations. Therefore, as discussed above [Mr. Klaus] cannot establish the legal requisite of actual and justifiable reliance.”

conduct at issue. (*In re Menna* (1995) 11 Cal.4th 975, 991.) Here respondents have met their burden of proof in this regard. They accepted responsibility related to the misrepresentation and non-disclosures made in this case.

When all the evidence is considered, it would not be contrary to the public interest to allow respondents to retain their licenses. They have no previous disciplinary history. In this case, there was no showing that respondents engaged in fraud or intentional wrongdoing. They have modified office practices relating to MLS listings, and presumably for needed disclosures. Under these circumstances, it would be consistent with the public interest and safety to grant respondent and Ms. Hable, respectively, a restricted salesperson license and a restricted broker license<sup>7</sup> under the terms and conditions set forth below.

### *Costs*

29. Complainant submitted Certified Statement of Costs, requesting that respondents be ordered to pay the reasonable costs of investigation and enforcement in this case pursuant to Business and Professions Code section 10106. In it, complainant sought \$8,835.48 in enforcement costs for the time expended by complainant's counsel, and investigative costs in the amount of \$3,914.24, for total costs of \$12,749.72.

In relevant part, Business and Professions Code section 10106, subdivision (c), provides that that investigative and enforcement costs that a respondent may be ordered to pay are those that are incurred by complainant "up to the date of the hearing." The costs sought by complainant are not unreasonable given the allegations in this matter and the work performed in the investigation and enforcement of this matter. Other factors relating to the amount of reasonable costs to be ordered in this case are discussed in the Legal Conclusions below.

## LEGAL CONCLUSIONS

1. Complainant has the burden of proving the grounds for discipline alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212.) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

2. Business and Professions Code section 10050.1 provides:

Protection of the public shall be the highest priority for the Department of Real Estate in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the

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<sup>7</sup> Such restricted broker license shall also extend to Kemp-Hable, Inc.

public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

*Applicable Law*

3. Pursuant to Business and Professions Code section 10176, a real estate license may be disciplined when a licensee has done any of the following:

(a) Making any substantial misrepresentation.

¶ ... ¶

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

4. Pursuant to Business and Professions Code section 10177, a real estate license may be disciplined when the licensee has done any of the following:

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

¶ ... ¶

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing.

*Causes for Discipline*

5. As set forth in Findings 11 through 15, respondents made a substantial misrepresentation with regard to the listing and sale of the Property. Complainant established cause to discipline respondents' licenses under Business and Professions Code section 10176, subdivision (a).

Such misrepresentation, however, did not constitute fraud or dishonest dealing, and therefore no cause exists to discipline respondents' licenses under Business and Professions Code sections 10176, subdivision (i), or 10177, subdivision (j).

6. As set forth in Findings 11 through 15, respondents demonstrated negligence or incompetence in performing an act for which they were required to hold a license. Complainant therefore established cause to discipline respondents' licenses under Business and Professions Code section 10177, subdivision (g).

7. As set forth in Findings 16 through 20, respondent's nondisclosures constituted dishonest dealing. Complainant therefore established cause to discipline respondent's license under Business and Professions Code section 10177, subdivision (j).

*Appropriate Discipline*

8. The matters set forth in Findings 21 through 28 have been considered. When all the evidence is considered, it would not be contrary to the public interest to allow respondents to retain their licenses. They have no previous disciplinary history. There was no showing that respondents engaged in fraud or intentional wrongdoing. They have modified office practices relating to MLS listings, and now appreciate the need for full and accurate disclosures. Under these circumstances, it would be consistent with the public interest and safety to grant respondent and Ms. Hable, respectively, a restricted salesperson license and a restricted broker license under the terms and conditions set forth below.

*Costs of Investigation and Enforcement*

9. Business and Professions Code section 10106, which permits the award of costs, in relevant part, provides:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

(b) In the case of a disciplined licensee that is a corporation or a partnership, the order may be made against the licensed corporate entity or licensed partnership.

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

10. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good

faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

11. As set forth in Finding 29, complainant requested that respondents be ordered to pay the costs of the investigation and enforcement incurred up to the date of hearing in the total amount of \$12,749.72. Respondents were successful in defending against Accusation allegations relating fraud, and dishonest dealing as it related to the clear pest MLS representation. They were successful in obtaining discipline short of license revocation. Respondents maintained subjective good faith belief in the merits of their position. Full payment of the full amount sought would be financially burdensome for them. They expended a substantial amount in legal fees to successfully defend the civil action involving the same parties to the transaction. When all the relevant factors set forth in *Zuckerman* are considered and applied in this case, ordering respondent to pay \$4,000 in costs is appropriate.

It is for the Bureau to determine and approve whether respondents should be allowed to pay these costs in accordance with a reasonable payment plan.

## ORDER

### I. *Respondent Hiram Earl Kemp*

All licenses and licensing rights of respondent Hiram Earl Kemp under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Bureau 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 Business and Professions Code section 10156.7 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 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 Bureau 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 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 pay \$4,000 to the Bureau as the reasonable cost of investigation and enforcement of this case. Respondents in this case are jointly and severally liable for these costs. It is for the Bureau to determine and approve whether respondents should be allowed to pay these costs in accordance with a reasonable payment plan, and any such period shall not exceed two years.

## II. *Respondents Shirley Lee Sullivan-Hable and Kemp-Hable, Inc.*

All licenses and licensing rights of respondents Shirley Lee Sullivan-Hable and Kemp-Hable, Inc. under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), including her broker license and corporation license, are revoked; provided, however, a restricted real estate broker license shall be issued to respondents pursuant to section 10156.5 of the Business and Professions Code if respondents make application therefor and pay to the Bureau of Real Estate the appropriate fee for the restricted licenses within 90 days from the effective date of this Decision. The restricted licenses issued to respondents 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 respondents may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent Shirley Lee Sullivan-Hable's conviction or plea of nolo contendere to a crime which is substantially related to respondents' fitness or capacity as a real estate licensee.

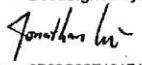
2. The restricted licenses issued to respondents may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondents have violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted licenses.

3. Respondents 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. Respondents shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent Shirley Lee Sullivan-Hable 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 Shirley Lee Sullivan-Hable fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until she presents such evidence. The Commissioner shall afford respondent Shirley Sullivan-Hable the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

5. Respondents shall pay \$4,000 to the Bureau as the reasonable cost of investigation and enforcement of this case. Respondents are jointly and severally liable for these costs. It is for the Bureau to determine and approve whether respondents should be allowed to pay these costs in accordance with a reasonable payment plan, and any such period shall not exceed two years.

DATED: March 1, 2016

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JONATHAN LEW  
Administrative Law Judge  
Office of Administrative Hearings