FILED

NOV 06 2014

BUREAU OF REAL ESTATE

By S. Black

BEFORE THE

BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:	
WILLIAM ANTHONY JAMES,	NO. H-5950 SAC
	STIPULATION AND AGREEMENT
Respondent	

It is hereby stipulated by and between WILLIAM ANTHONY JAMES ("Respondent"), and the Complainant, acting by and through Jason D. Lazark, Counsel for the Bureau of Real Estate ("the Bureau"), as follows for the purpose of settling and disposing of the Accusation filed on January 30, 2013, in this matter:

1. On February 19, 2014 and March 19, 2014, a formal hearing was held on the Accusation in accordance with the provisions of the Administrative Procedure Act ("APA") before Administrative Law Judge ("ALJ") Stephen J. Smith ("ALJ Smith") where, after evidence and testimony were received, the record was closed and the matter was submitted for decision.

2. On May 12, 2014, ALJ Smith issued a Proposed Decision.

3. On June 20, 2014, the Commissioner rejected the Proposed Decision.

4. The parties wish to settle this matter without further proceedings.

5. Respondent, pursuant to the limitations set forth below, hereby admits that the factual allegations in the Accusation filed in this proceeding are true and correct and the Commissioner shall not be required to provide further evidence to prove such allegations.

6. It is understood by the parties that the Commissioner may adopt the Stipulation and Agreement as his decision in this matter thereby imposing the penalty and sanctions on Respondent's real estate license and license rights as set forth in the below Order. In the event the Commissioner, in his discretion, does not adopt the Stipulation and Agreement, the Stipulation shall be void and of no effect. If that occurs, the Commissioner will proceed pursuant to California Government Code section 11517(c)(2)(e).

7. The Order or any subsequent Order of the Commissioner made pursuant to this Stipulation and Agreement shall not constitute an estoppel, merger or bar to any further administrative or civil proceedings by the Bureau with respect to any matters which were not specifically alleged to be causes for accusation in this proceeding as admitted or withdrawn.

8. Respondent further understands that by agreeing to this Stipulation and Agreement, Respondent agrees to pay, pursuant to Section 10106(a) of the California Business and Professions Code ("the Code"), investigative and enforcement costs which led to this disciplinary action. The amount of said cost, as modified by ALJ Smith, is $1,000.00.

DETERMINATION OF ISSUES

By reason of the foregoing stipulations, admissions, and waivers, and solely for the purpose of settlement of the pending Accusation without further proceedings, it is stipulated and agreed that the following Determination of Issues shall be made:

The acts and/or omissions of Respondent WILLIAM ANTHONY JAMES, as described in the Accusation, violated Sections 10130 (acting in the capacity of a broker without first obtaining a license), 10131 (performing services for borrowers in connection with loan secured by real property without first obtaining a broker license) and 10177(d) (willfully violating the real estate law) of the Code.

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ORDER

1. All licenses and licensing rights of Respondent WILLIAM ANTHONY JAMES under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to Section 10156.5 of the Code if Respondent makes application therefore and pays to the Bureau the appropriate fee for the restricted license within 90 days from the effective date of this Decision.

2. The restricted license issued to Respondent shall be subject to all of the provisions of Section 10156.7 of the Code as to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

(a) The restricted license issued to Respondent shall be suspended prior to hearing by Order of the Commissioner in the event of Respondent's conviction (including by plea of guilty or nolo contendere) to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee; and,

(b) The restricted license issued to Respondent shall be suspended prior to hearing by Order of the 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 notify the Commissioner in writing within 72 hours of any arrest by sending a certified letter to the Commissioner at the Bureau of Real Estate, Post Office Box 137000, Sacramento, CA 95813-7000. The letter shall set forth the date of Respondent's arrest, the crime for which Respondent was arrested and the name and address of the arresting law enforcement agency. Respondent's failure to timely file written notice shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of that license.

4. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for removal of any of the conditions, limitations or restrictions of a restricted license until one (1) year has elapsed from the effective date of this Decision.

5. Respondent shall, within nine (9) months from the effective date of this Decision, present evidence satisfactory to the 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, Respondent's real estate license shall automatically be suspended until Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for hearing pursuant to the APA to present such evidence.

6. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form approved by the Bureau which shall certify as follows:

(a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and,

(b) That the employing broker will carefully review all transaction documents prepared by the restricted licensee and otherwise exercise close supervision over the licensee's performance of acts for which a license is required.

7. Respondent shall pay the sum of $1,000 for the Commissioner's cost, pursuant to Section 10106(a) of the Code, of the investigation and enforcement which led to this disciplinary action. Said payment shall be in the form of a cashier's check or certified check made payable to the Bureau of Real Estate. Said check must be received by the Bureau prior to the effective date of the Order in this matter. All licenses and licensing rights of Respondent shall be indefinitely suspended unless or until payment is made in full.

10-7-14
DATED

JASON D. LAZARK, Counsel

* * *

I have read the Stipulation and Agreement. I understand that I am waiving rights given to me by the APA, (including but not limited to Sections 11521, and 11523 of the Government Code), and I willingly, intelligently, and voluntarily waive those rights, including the right to seek reconsideration and the right to seek judicial review of the Commissioner's Decision and Order by way of a writ of mandate.

Oct 2, 2014
DATED

WILLIAM ANTHONY JAMES
Respondent

* * *

The foregoing Stipulation and Agreement is hereby adopted as my Decision in this matter and shall become effective at 12 o'clock noon on NOV 27 2014.

IT IS SO ORDERED 10/23/2014.

REAL ESTATE COMMISSIONER

WAYNE S. BELL

FILED

JUN 30 2014

BUREAU OF REAL ESTATE

By L. Frost

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of WILLIAM ANTHONY JAMES, Respondent.	No. H-5950 SAC OAH No. 2013060854

NOTICE

TO: WILLIAM ANTHONY JAMES, Respondent.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated May 12, 2014, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated May 12, 2014, is attached for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on February 19, 2014, and March 19, 2014, and any written argument hereafter submitted on behalf of Respondent and Complainant.

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Written argument of Respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of February 19, 2014, and March 19, 2014, at the Sacramento office of the Bureau of Real Estate unless an extension of the time is granted for good cause shown.

Written argument of Complainant to be considered by me must be submitted within 15 days after receipt of the argument of Respondent at the Sacramento office of the Bureau of Real Estate unless an extension of the time is granted for good cause shown.

DATED: JUNE 20, 2014

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: WILLIAM ANTHONY JAMES, Real Estate Salesperson Licensee, Respondent.	Case No. H-5950 SAC OAH No. 2013060854

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on February 19 and March 19, 2013.

Jason D. Lazark, Counsel, represented the Bureau of Real Estate (the Bureau, formerly the Department of Real Estate, State of California.

William Anthony James appeared in pro per.

The matter was submitted on March 19, 2013.

FACTUAL FINDINGS

1. Tricia D. Sommers, acting in her official capacity only as a Deputy Real Estate Commissioner of the Bureau, made the charges and allegations contained in the Accusation and caused it to be filed on January 30, 2013. The Bureau has jurisdiction to suspend or revoke any real estate license issued in the State of California by the Bureau upon satisfactory proof that cause exists for the action.[1]

2. William Anthony James (respondent) timely filed a Notice of Defense to the Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.[2]

[1] Business and Professions (B&P) Code section 10175.

[2] Government Code section 11500, et. seq., B&P Code section 10100.

3. Respondent is currently licensed by the Bureau and has licensing rights as a real estate salesperson. Respondent also holds an individual Mortgage Loan Originator License Endorsement, number 356528.

4. The Bureau issued respondent a real estate salesperson license on October 20, 2006. Respondent did not have a real estate broker affiliation at the time his salesperson license was issued. Respondent's license was activated in the employ of First Priority Financial, Inc., on November 1, 2006. The Individual Mortgage Loan Originator Endorsement was approved and issued on November 15, 2010.

5. Respondent's association with real estate broker First Priority Financial, Inc. was terminated on September 9, 2011. The Individual Mortgage Loan Originator Endorsement was inactivated the same date, and was terminated for failure to renew on January 1, 2012.

6. Respondent reactivated his salesperson license in the employ of Excel Realty, Inc., Orangevale, California, on April 4, 2012. Respondent's Individual Mortgage Loan Originator License Endorsement was renewed, but was held in inactive status on April 19, 2012. The Bureau's official licensing records, as of February 27, 2013, show that respondent continues as a licensed salesperson with Excel Realty, Orangevale, CA, and the Individual Mortgage Loan Originator License continues in valid but inactive status.

7. The Bureau filed and served on respondent Desist and Refrain Order no. H-5951 (the Order) on January 30, 2013. There was no evidence that respondent has failed to comply with the Order. The Desist and Refrain Order was not offered in evidence.

8. Respondent's real estate salesperson license is in full force and effect and expires on October 14, 2014.

FAITH & INTEGRITY FINANCIAL SERVICES & INSURANCE, INC.

9. Respondent, doing business as a corporate licensee, Faith & Integrity Financial, was, at all times relevant to this matter, licensed as a Life Only Agent, Variable Contracts Agent, and as a Casualty, Accident and Health Agent by the Department of Insurance. The three licenses authorize respondent to sell life insurance, annuity contracts, health insurance, casualty, accident and indemnity insurance and pension plans in the State of California. The Department of Insurance issued respondent the licenses in 2005, and the licenses are due to expire in 2015. There is no history of disciplinary action against any of respondent's licenses by the Department of Insurance. The Department of Insurance license status and history shows that respondent, between 2005 and 2013, has become authorized to act as an agent for at least 28 life, casualty, annuity and health insurers in California, including Transamerica, Kaiser Permanente, Aetna, Blue Cross-Blue Shield and Anthem.

10. At all times relevant to this matter, respondent's primary business activity was acting as a financial advisor, financial services consultant and salesperson of financial

products, such as life insurance, annuities, securities investments and retirement and pension plans. Most of respondent's compensation came from sales of financial products, but he also received some income for fee for services for providing financial advice, counseling and consultation services. At all times relevant to this matter, respondent conducted his primary business activities as a financial planner and advisor, as well as a financial product salesperson, through and under the fictitious business name of Faith & Integrity Financial Services & Insurance, Inc. (Faith & Integrity Financial).

11. Faith & Integrity Financial is not and never has been licensed by the Department in any capacity. Faith & Integrity Financial does not and never has sold real estate, or serviced or engaged in the business of renegotiating or refinancing mortgage loans. Faith & Integrity Financial has never advertised to or solicited the public, offering to perform services related to assisting borrowers under existing loans secured by interests in real property. The extent of respondent's involvement in the real estate lending industry during the time under review in this matter was to occasionally assist a home buyer to obtain a mortgage when the purchase was brokered through Tekoa Loy, a licensed real estate broker, who worked alongside respondent during the time period under review in this matter. Neither respondent, nor his business, Faith & Integrity Financial, has ever advertised or held themselves out to the public, or solicited the public, offering to perform mortgage refinance or mortgage loan modification services.

OTHER LICENSES

12. The U.S. Securities and Exchange Commission (SEC) issued respondent Series 6 and 63 Securities Licenses in 2000, authorizing respondent to sell securities regulated by the SEC. Respondent's securities licenses were in full force and effect at all times relevant to this Decision.

TEKOA LOY AND FAITH & INTEGRITY REAL ESTATE

13. The Bureau issued Tekoa Loy Real Estate Broker license no. 01399714 in 2008. Ms. Loy conducts her real estate brokerage business under the fictitious business name of Faith & Integrity Real Estate. Ms. Loy's Real Estate Broker license is in full force and effect, and is due to expire in 2015. As of August 2013, Ms. Loy no longer actively uses her real estate broker's license. She is now a manager and agent employed full-time by Banker's Life and Casualty Insurance Company.

THE ALLEGATIONS

UNLICENSED REAL ESTATE BROKER ALLEGATIONS

14. The Bureau made several allegations within the First Cause of Action, one of which was repeated in the Second Cause of Action; that respondent operated and conducted a mortgage loan brokerage and/or a loan modification business with the public, where respondent solicited lenders and borrowers for, or negotiated loans or collected payments

and/or perform services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property, in expectation of compensation, within the meaning of section 10131, subdivision (d), but without the legally required real estate broker's license.

UNLAWFUL COLLECTION OF ADVANCE FEES, NO WRITTEN CONTRACT

15. The Bureau also alleged in the First Cause of Action of the Accusation that respondent violated B&P section 10131.2, by claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee in connection with employment undertaken to promote the sale or lease of real property or of a business opportunity by an advance fee listing, advertisement or other offering to sell, lease, exchange or rent real property or a business opportunity, or to obtain a loan or loans thereon.

UNLAWFUL RECEIPT OF ADVANCE FEES - UNLAWFUL LOAN MODIFICATION SERVICES

16. The Bureau also alleged that respondent, using the business name Faith & Integrity Financial Services & Insurance, Inc. claimed, demanded, charged, collected and/or received advance fees in connection with loan modification services, in violation of section 10085.6, and California Civil Code sections 2945.3 and 2945.4, for alleged loan modifications for the real estate loans secured by the Ellsworths' Antioch rental property and their primary residence in Yuba City.

REQUEST FOR FINANCIAL PLANNING ASSISTANCE, CHAPTER 1-2008

17. The relationship and transactions between respondent and Renée Ellsworth, the sole complainant, and her husband, Jeff, that led to the allegations in the Accusation dates back to 2008. Respondent and the Ellsworths were neighbors in 2008 in the Yuba City area. Their children played together and the families had some social interaction. The Ellsworths were aware that respondent was a financial industry professional planner and advisor. Ms. Ellsworth sought respondent out and asked him, on a date not clear in 2008, to help her and her husband to get control of their crushing personal and real estate debt, their spending habits, their savings and for assistance with financial planning for the future. Ms. Ellsworth told respondent she was in danger of losing their rental property in Antioch, and was concerned about their personal residence in Yuba City, due to excessive mortgage debt on both properties, with large first and second mortgages on both, combined with the effect of declining property values.

18. Respondent agreed to provide some advice to assist the Ellsworths, as they were "friends in distress," and he thought he could be of service. Respondent spent considerable time with the Ellsworths, meeting a number of times for lengthy periods with them gathering information and discussing their financial circumstances generally and specifically, including determining the nature and extent of their credit card debts, reviewing the adjustable rate real estate first and second mortgages on both their personal residence in

Yuba City and their rental home in Antioch, and reviewing their income and spending patterns. Ms. Ellsworth told respondent that she and her husband needed to get out of debt, control their spending and save for the future. A number of additional communications occurred through email and telephone calls as respondent gathered the financial information and assembled his recommendations.

19. Respondent composed a financial plan directed at guiding the Ellsworths forward out of debt and into saving for the future. He presented the plan to the Ellsworths with specific recommendations for debt reduction, spending control, and savings.

20. Respondent prepared a four page Financial Questionnaire dated March 24, 2008 (Exhibit A), as part of his financial evaluation process. This detailed analytical worksheet contained personal and family information, debts, estimated income, assets and liabilities information. It asked for information regarding savings plans for the college educations of the family's two children, and whether any expenses were expected for dependent adults in the future. A rating scale appears on the second page of the Questionnaire, asking the Ellsworths to rate their financial concerns and priorities. In a following section, the Ellsworths disclosed their Financial Goals and Priorities. First among these priorities was written, "1st to settle home in poss. foreclosure then get a plan to budget better & be financially secure with savings to fall back on." In the portion where the questionnaire asks "If you could fix anything with your current finances, what would you change or fix right now," Ms. Ellsworth wrote, "Our spending habits." Notes throughout the document reflect discussions on plans, large and small, to save more, spend less, and get finances and debts under control.

21. Respondent was not compensated for composing the financial plan and strategy for debt reduction, spending control and savings, nor did he receive any compensation for any of the numerous hours he spent meeting with, and communicating via numerous emails and phone calls with the Ellsworths, even though the advice and consultation he provided were the sorts of professional services for which he ordinarily charged clients through his company Faith & Integrity Financial. Ms. Loy and respondent invested many hours in researching and composing the financial plan and strategy he presented to the Ellsworths. Respondent told the Ellsworths that he hoped that they would be interested in some day purchasing a financial product from him, such as life insurance or a 401(k) or other pension plan, for which he would be later compensated through a commission for that purchase, and perhaps such income might partially compensate for the time that he was spending helping them with financial advice and working up a financial plan. Respondent did not make an issue of not being compensated, rationalizing his investment of time as helping friends. Ms. Ellsworth made no effort and no offer to pay respondent for his time, and did not express any interest in purchasing any financial product from respondent.

22. The Ellsworths missed a number of meetings scheduled with respondent without any notice, wasting a good deal of respondent's time. Ms. Ellsworth took advantage of respondent's advice and attempted to solve her own financial problems in her own way.

Contact fell off and finally ceased. Ms. Ellsworth agreed that she and her husband ignored the financial plan respondent constructed and presented, and particularly the spending restraints and discipline respondent suggested.

23. Respondent was more frustrated with the Ellsworths' cavalier attitude toward the work he invested and their reluctance to actually employ any of the agreed upon methodologies for debt reduction and spending control he presented than he was about not being compensated for the time he invested. Respondent intended to help friends solve a very serious financial problem, and was disappointed they did not take him or the value of his time seriously. Respondent correctly became convinced the Ellsworths were really not serious about controlling their extravagant spending or bringing their obligations under control. Respondent stopped trying to maintain contact with the Ellsworths late in 2008, and the lack of contact continued for two years, until January 2010.

24. Ms. Ellsworth took some advantage of the financial information and planning advice respondent provided her in 2008. She arranged her own mortgage loan modification with the lender on their Antioch rental property. Ms. Ellsworth arranged a modification of the Antioch property loan to an adjustable rate mortgage that had a monthly payment of $1900 per month. The modified loan had a three year "teaser" rate that carried a rate and payment adjustment that would occur three years from the time of the loan modification. The rate and payment was scheduled to adjust significantly upward in 2011. The Ellsworths rented the Antioch property to a tenant for a monthly rent of $2,000 per month.

FINANCIAL CRISIS REDUX 2010, IN EXTREMIS

25. Ms. Ellsworth telephoned respondent in late January 2010, describing herself as desperate, seeking respondent's financial and assistance and advice. She apologized repeatedly for not taking his previous advice seriously and "lacking focus." She told respondent she and her husband were considering whether they should file for bankruptcy. Respondent, understandably reluctant to spend any more time with the Ellsworths, initially declined. With much entreaty, more apologies and persistence, Ms. Ellsworth prevailed upon respondent to meet with her and her husband to discuss the possibility of again providing them financial advice and a road map to get out from under a crushing personal and mortgage debt problem now well north of a million dollars in total obligations. Ms. Ellsworth repeatedly promised respondent would be compensated "this time." Respondent agreed to meet the Ellsworths on January 23, 2010.

THE JANUARY 23, 2010 MEETING

26. The Ellsworths and respondent met on January 23, 2010, for almost three hours. Jeff and Renée Ellsworth were present, as was respondent and Ms. Loy, who worked with respondent at the time, to discuss the Ellsworths' financial situation.

27. The day before this first meeting, Ms. Ellsworth sent respondent a self-prepared, typed worksheet (the worksheet) as an email attachment that provided some of the

Ellsworths' personal financial information, including income, mortgage debt, credit card obligations and assets. The worksheet disclosed personal debts in excess of $1.1 million, composed primarily of first and second mortgages against their primary residence and their rental home in Antioch, almost $25,000 in current and overdue credit card debt, monthly obligations in excess of $5500 per month, and some not insignificant outstanding medical bills, all against what the worksheet stated was then approximately $6200 per month in income, and $20,000 in assets.

THE WORKSHEET

28. There are two copies of the worksheet in evidence. The first, appended to Respondent's Exhibit B, is a clean copy of the single page worksheet that Ms. Ellsworth sent to respondent as an email attachment in anticipation of the January 23, 2010 meeting. The second copy, appearing as part of the Bureau's Exhibit 4, at Bates pp. 8-9, has the same typed text worksheet on the first page, but also is covered with what appear to be Ms. Ellsworth's hand written notes, which continue on to the second page.

29. Many of these notes were proved through other evidence to be inaccurate regarding what respondent said during the meeting. Several of the notes have strong indications they were made at other times between the time the meeting was taking place on January 23, 2010, and the time Ms. Ellsworth filed her complaint with the Bureau on April 22, 2011. For example, there is a note toward the bottom of the first page with an asterisk next to it that states "no trust acct. with Tony." When asked during her testimony what this note meant, Ms. Ellsworth could not explain what the note meant, nor did she recall when or why it was written, but did confirm that it was written in her hand and appeared identical in handwriting to notes above and below it that were claimed to have been made at the same time. The only time the issue of a trust account came up was after Ms. Ellsworth had spoken to the Bureau's investigator after her complaint was filed, who raised the issue in conjunction with the Bureau's auditor, who was reviewing respondents and Ms. Loy's records to see if respondent had or used a broker's trust account. In addition, there is a note at the very top of the page that states "(notes f.m. speaking to Tony approx. 1/22/10-his answers)" the context of this note reflects that it was made well after the January 23 meeting, and likely close in time to when Ms. Ellsworth filed her complaint with the Bureau.

30. Especially suspect on the handwritten notes copy of the worksheet are the notes on the second page of the worksheet, Bates 9. This page of notes does not exist in the original, Exhibit B. Notes on the second page, such as "-mortgage modif.-kit $2000 and spread out" lacked any independent foundation that would confirm that these notes were made during or just after the meeting. Ms. Ellsworth's claim that the notes reflected what respondent told the Ellsworths during the meeting was not credible.

31. On the typed portion of the worksheet (both versions were identical in this respect), Ms. Ellsworth made a list of financial "Concerns" to be discussed with respondent during the January 23, 2010, meeting. Ms. Ellsworth's "Concerns" served as an agenda for the meeting. Ms. Ellsworth's "Concerns" were as follows:

- Refi @ 2014 for YC home
- Jeff's stock
- Ramifications of bankruptcy; i.e. credit, loans, etc.
- Want to buy existing business, when? How? Possible?
- Am I ineligible from anything w/ bankruptcy?
- Me only? Jeff has no credit
- Is consolidation better?
- Do any assets get taken away?
- Will I ever get rid of my 2nd?
- Will this interfere @ all w/ Scentsy?

THE MATTER OF COMPENSATION AND FIRST WARNING ABOUT LOAN MODIFICATION

32. During the course of the January 23 meeting, the whole range of the "Concerns" were discussed. The discussion was prefaced with Ms. Ellsworth's profuse apologies for missing meetings in 2008 and for failing to follow the financial plan respondent drafted for them in 2008. According to Ms. Loy, Ms. Ellsworth was in tears and begged respondent to help them.

33. Respondent mentioned that he was rather disappointed to have invested so much time in the Ellsworths in 2008 without them having taken his advice seriously or receiving any compensation, and that their failure to keep scheduled meetings several times wasted a great deal of his time. Ms. Ellsworth continued to apologize and promised that respondent would be compensated for his time if he decided to help them this time, as well as promising to follow any financial plan that he suggested. Respondent told the Ellsworths that he did not want to spend time with them as he had in the past and divert time away from activities that would provide him the opportunity to earn a living. The Ellsworths told respondent that they wanted to compensate him. Respondent told the Ellsworths that he wanted to be compensated for administrative and financial advisory time already invested in 2008, as well as administrative and financial advisory time to be provided in 2010 to work out a financial plan and to assist them. Ms. Ellsworth accepted. The matter of how much compensation would be paid, and when it was due was deferred. No written agreement spelling out the relative rights and obligations of the parties and how much compensation was to be paid for what services performed was ever drafted or signed by the parties.

BANKRUPTCY VERSUS COMPREHENSIVE FINANCIAL MANAGEMENT PLAN

34. Once respondent agreed to lend his assistance, the first topic of discussion was whether the Ellsworths should file bankruptcy. Respondent said that he thought he could help them avoid filing bankruptcy, but in order to do so, it would require the Ellsworths to exercise considerable financial discipline and spending self-control. He expressed his belief that he could assist them in getting their income and obligations under control, and that there were options for avoiding bankruptcy that he could explore with them, if the Ellsworths were willing to live within a budget and get control over their self-described extravagant spending habits. Respondent expressed his opinion that from a financial planning point of view, bankruptcy was never a good option. As noted on Ms. Ellsworth's list of "Concerns," the "ramifications of bankruptcy" were also discussed, including the impact of bankruptcy on credit and loans.

35. Respondent said that if the Ellsworths were not inclined to have respondent prepare, and for them to follow, a rigorous financial and spending management plan, he could refer them to a good bankruptcy attorney. Respondent gave Ms. Ellsworth contact information for a local attorney specializing in bankruptcy, and said he would make a referral for them if they wanted.

36. Upon Ms. Ellsworth's assurance that she and her husband were this time ready to be "more focused" and follow respondent's advice, respondent said that first he would have to gather and evaluate a considerable amount of financial information from the Ellsworths in order to advise them competently. The gathering process included, but was not limited to, inquiring of the Ellsworths regarding the status of their accounts, gathering information about their income and debts, and finding out from the Ellsworths creditors how deeply into debt trouble they actually were. Respondent said that once he received the financial information, he could better explain the Ellsworths' financial picture to them, and provide some guidance about a financial relief plan. Ms. Ellsworth agreed to provide the financial information respondent requested, and an agreement was made to meet again to review the information as soon as respondent had received it and had an opportunity to review it and work out a general approach.

REFUSAL TO UNDERTAKE MORTGAGE MODIFICATIONS

37. Respondent testified persuasively and credibly that he told the Ellsworths repeatedly during this first January 23, 2010 meeting that he would not and could not perform any loan modifications for the Ellsworths. Respondent said that his unwillingness to perform any loan modifications was not restricted to the Ellsworths; that he would not and could not offer or perform loan modifications for anyone. He made it clear that no part of any compensation that he might receive from the Ellsworths would be for performing any loan modification. Respondent's testimony regarding his advice to the Ellsworths about his unwillingness and inability to perform loan modifications for the Ellsworths, or anyone, was credibly corroborated by Ms. Loy, who was present throughout this meeting.

38. According to Ms. Loy, it appeared that Ms. Ellsworth understood what respondent told her about his inability and unwillingness to seek any loan modifications for the Ellsworths. Respondent did agree to provide advice and guidance opinion regarding recent changes in loan modification relief programs and how to best present her information to her lenders, to increase her chance for success. Respondent was aware that Ms. Ellsworth already had some successful personal experience with seeking and obtaining her own loan modifications in 2008. Respondent told the Ellsworths generally, before he had seen their detailed financial information, that they might consider one of the new mortgage debt relief programs, such as the Obama Administration's hardship loan modification program called HAMP. But he also said that he could not give any specific advice until after he had looked at their financial information, and researched what might be available to them.

39. Respondent's offer of a willingness to assist Ms. Ellsworth regarding any loan modification was limited to providing advice, strategy and analysis of financial information only. There was no credible or persuasive evidence that respondent contracted with, or agreed in any other fashion, with the Ellsworths to perform a modification of any of their four mortgage debt obligations. There was no credible or persuasive evidence that any money respondent received from the Ellsworths was to compensate him for agreeing to perform a loan modification. Respondent told Ms. Ellsworth during the meetings and on the phone that he would not perform a loan modification, for her or anyone else, because it was illegal for him to do so, based upon recent changes in the law. He also pointed out that he was not legally entitled to receive funds as compensation for undertaking a loan modification for a mortgage holder. He repeated what he understood the Ellsworths already knew, that his firm's business was that of financial planning and advisory, and selling financial, pension, securities, insurance and annuity products, and that submission and pursuit of any loan modification for them was not an included service for any compensation he might receive from them.

THE MORTGAGE MODIFICATION "KIT"

40. Ms. Ellsworth claimed in her testimony that respondent suggested during the January 23, 2010, first meeting that the Ellsworths consider purchasing a "mortgage modification kit," that would cost the Ellsworths $2000, paid over time. Ms. Ellsworth claimed respondent said the kit price was for respondent's services to seek and obtain a mortgage modification for her. Ms. Ellsworth agreed in her testimony that respondent did tell her and her husband during the January 23 first meeting that respondent could not perform loan modifications and could not charge them for pursuing a loan modification for them. But she also claimed that respondent told her there was "a way around" the problem through the purchase of a "loan modification kit." She claimed that respondent offered the Ellsworths the "kit" for a fee of $250 down to start the process, and a total fee of $2000 spread out over time. She claimed respondent said the kit was necessary because he could not "call it" a loan modification.

41. Respondent credibly denied he made such a statement and that Ms. Ellsworth's claim he made such a statement was false. Respondent's denial and counter

claim was corroborated by Ms. Loy's testimony, who firmly and quite credibly insisted that no such offer was made, nor did respondent make any such offer of a loan modification kit in the manner in which Ms. Ellsworth portrayed it. These claims are a misconstruction and misrepresentation of a warning respondent made about certain mortgage modification practices he had seen pop up in the industry after the law changed. He warned Ms. Ellsworth that she should be wary of the practices of certain persons offering to perform mortgage modifications by trying to sell a loan modification kit. Ms. Loy testified that respondent told the Ellsworths to watch out for those selling mortgage modification services by selling a kit, as the usual practice was to demand a portion of the fee in advance of performing any services, and then seeking the remainder of the common charge of approximately $2000 for each property in installments. He did not offer or suggest he could or would provide mortgage modification services through a kit, or in any other fashion, but Ms. Loy testified that respondent warned the Ellsworths of the existence of this practice, because some persons engaged in the mortgage modification business were using the kit practice to attempt to avoid the new legal requirements for modifications. Ms. Loy testified that respondent warned the Ellsworths to avoid it because it could get them into trouble or they might be paying for services in advance that were never provided. Ms. Loy confirmed that respondent repeatedly told Ms. Ellsworth quite bluntly, both at the first meeting, at a later meeting (below), and again over the phone that respondent did not and could not and would not perform a loan modification for the Ellsworths.

CREDIBILITY PROBLEMS

42. Ms. Ellsworth also testified fairly early in the case that respondent told her in his upstairs bedroom at some later and unidentified point in time, about several other people for whom he had obtained loan modifications, including one woman who saved enough money to have breast augmentation surgery. This testimony lacked credibility and was not persuasive. The claims made in this testimony lacked any foundation or context, leaving no other reasonable interpretation for the testimony besides the effort to deliver the cheap character defamation shot that it was. Ms. Ellsworth was unable to identify the date, time, or even time of year the comments were made. She was unable to identify any person she claimed respondent had bragged about helping to obtain a loan modification, or when the assistance she claimed he said he provided occurred.

"OTHER CONCERNS"

43. In the course of the January 23 meeting, after the general discussion about alternatives to bankruptcy, whether bankruptcy could result in the loss of any of their assets, and what damage bankruptcy might do to their credit was concluded, the remainder of the agenda items on Ms. Ellsworth's list of "Concerns" were discussed, some at considerable length.

44. Refinancing the mortgages for the Ellsworth primary residence in Yuba City was discussed, noting that an upward adjustment to the adjustable rate mortgage on the first loan against their primary residence was to occur in 2014. Mr. Ellsworth had recently been

laid off his job and had stock compensation available that could either be rolled over into a retirement plan or cashed out, so the options of how to best use this asset were discussed. The possibility of consolidation and potential renegotiation and compromise of the Ellsworths' substantial credit card and consumer debt was discussed, and respondent agreed to invest some time and make some calls to Ms. Ellsworth's credit card lenders to determine the status of their consumer debt. The details of what following a financial plan and a strict budget would mean toward paying off the second mortgages on both pieces of real property was a matter discussed, and agreed to be explored again after additional financial information to be provided by the Ellsworths to respondent and had been evaluated. Respondent reiterated his opinion that following a strict budget and spending restraint plan could help the Ellsworths solve their financial problems and manage their debts. The possibility of the Ellsworths purchasing a Crystal Creamery and Dairy franchise was discussed, as both Ellsworths were interested in pursuing a business opportunity. Some discussion took place about a separate arrangement with a separate fee for respondent's advice regarding how to invest Ms. Ellsworth's 401(k) retirement account. Finally, the matter of whether bankruptcy, debt consolidation, and following a financial plan might interfere with Ms. Ellsworth's business as a Scentsy representative, a matter of great concern to Ms. Ellsworth, was discussed. In all, the meeting was quite comprehensive in the range and number of financial subjects and concerns covered.

45. At the end of the meeting, it was still not entirely clear whether the Ellsworths were going to engage respondent's services to provide financial advice. The matter of how much compensation for any financial information, evaluation, or advice provided was not resolved at this meeting. The issue of the amount of compensation respondent was to receive for his administrative time and professional financial services, how that compensation was to be paid and when, was deferred.

46. Ms. Ellsworth sent respondent an email message January 25, 2010 in the evening. In it, she stated, "Yes, we would like to have you as our consultant." In the second paragraph, she wrote the following:

> On another note, I wanted to formally apologize for not following through the first time around. I know you spent a lot of time with me, so I do apologize. It was not that I did not trust you, we just were not totally focused on what we should have done then and are now forced to do, which is be committed. So moving forward it was not a total loss because were back!

47. At this point, after this January 25 email, it was orally understood between the parties that the Ellsworths would compensate respondent in an amount yet to be determined for his time required to gather, review and put together a rough financial plan, a budget and spending plan, and a list of advice regarding the topics on Ms. Ellsworth's list of "Concerns," for the Ellsworths' consideration.

THE FEBRUARY 4, 2010 MEETING

48. Ms. Ellsworth provided respondent enough financial information to permit a second meeting on February 4, 2010, again with Ms. Loy present and again lasting more than two hours. The meeting covered the same subjects as were covered in the January 23 meeting, with the exception of filing bankruptcy. In addition to the "Concerns" already noted above that were discussed at the January 23 meeting, respondent noted that it was part of his plan that the Ellsworths purchase some life insurance, and immediately call and make an appointment with his recommended CPA, Mr. Tidwell, to obtain assistance with tax-preparation, to obtain advice regarding any tax consequences that might stem from debt settlement, and for advice regarding setting up the business opportunity of which they inquired in the January 23 meeting. Respondent also wanted the Ellsworths to provide him information regarding medical obligations, and to sign a power of attorney in his favor to authorize him to receive information from the Ellsworths' creditors.

49. Compensation was discussed again. Ms. Ellsworth agreed to pay respondent a total of $500, with a check for $250 immediately, with a check dated February 4, and a post dated check for $250 to be held for a week so that Ms. Ellsworth could make sure that there were funds available to clear the check. Neither check was cashed until at least February 24, although Ms. Ellsworth's bank payment records in evidence suggest that one of these checks was not actually debited from her account until May.

50. These two checks were not earmarked for specific purposes and respondent understood the $500 to be compensation for administrative and professional time already spent in 2008 and in 2010 to date, as respondent repeatedly said and Ms. Loy confirmed in the January 23 and February 4 meetings. Ms. Ellsworth is of the opinion and claimed in her testimony that all of the funds were to pay for loan modifications, and that she intended to make a separate payment upon respondent giving her a separate billing for advice with how to invest her 401(k) plan assets. Her claim is only partly credible. At the time the checks were paid, respondent did not request nor did he seek compensation for loan modification services; in fact, he repeatedly told Ms. Ellsworth he would and could not perform such work and only wanted to be compensated for his administrative and professional time in 2008 and to date for putting together a financial plan and providing budget, credit counseling and spending plan advice, all confirmed by Ms. Loy, who was present and heard all the conversations. There was indeed an agreement for separate advice and a separate fee for the 401(k) advice. Ms. Ellsworth's claim that the initial $500 paid was for mortgage loan modification is, based upon an assessment of all the evidence, a later fabrication.

51. Later in time, Ms. Ellsworth paid respondent at least one more $250 check, in May 2010. It was still not clear whether this additional check was for further financial services rendered by respondent in the past and at the present, or for the separate advice regarding how to invest the 401(k) assets, which advice was indisputably provided.

ADVANCE FEES

52. Respondent's testimony, corroborated by Ms. Loy, was that all of the compensation respondent received was for past (2008) and present (2010, January to payment date) professional services rendered, including research and time spent assembling, evaluating and providing comprehensive financial advice and consultation presented first at the January 23 meeting, at the February 4 meeting and in numerous phone calls between respondent shortly after both meetings. Respondent and Ms. Loy calculated that at the time the first $500 had been received, respondent had spent at least 40 hours[3] working for the Ellsworths. Respondent's testimony was credible. It was not proved that any of the funds received from Ms. Ellsworth by respondent constituted any advance payment for loan modification services yet to be rendered. The compensation was received in arrears for services already rendered.

A COMPREHENSIVE FORWARD LOOKING FINANCIAL PLAN

53. Ms. Ellsworth concluded her January 25 email with a sentence that makes no sense unless respondent's report of the business arrangement between himself and the Ellsworths was accurate. Ms. Ellsworth wrote, "We are very excited to move forward and get through this. More so, I am excited for your plans for us afterwards." Respondent and Ms. Loy both credibly testified that this statement relates to the longer-term financial plan that respondent proposed and discussed with the Ellsworths, which included the purchase of life insurance, selecting appropriate options on Ms. Ellsworth's 401(k) plan, the possible purchase of the business opportunity, and general strategies for saving for future needs and college education expenses for their children. This plan, first discussed with the Ellsworths at the January 23 meeting, encompassed far more than mere relief from mortgage debt or consolidation of consumer obligations. Respondent's proposal was a multifaceted broad vision for the family's financial future, only a small part of which was short-term regarding the resolution of an immediate financial crisis.

UNILATERAL STOP PAYMENTS

54. Ms. Ellsworth claimed in her complaint to the Bureau that respondent ruined the Ellsworths' credit, in part because he advised them to stop making payments on their mortgages and credit cards during the January 23 meeting, and she followed the advice. Ms. Ellsworth testified to this effect during the evidentiary hearing. The claim and the testimony were not credible.

55. In support of her claim, A photocopy of a small scrap of paper that appears to be a Post-it note, appearing at Bates p. 7, was offered. The note contains Ms. Ellsworth's handwritten note that "February 1," she "started with Tony, no payments as of 2/1/10 to Chase, all ccs and GMAC with seconds." Ms. Ellsworth claimed the note reflected

[3] Eighteen meetings at approximately two hours each in 2008 and 2010, as well as numerous hours on the phone and exchanging of emails.

respondent's advice that she should stop paying all her credit card and mortgage payments. The undated, uncorroborated handwritten note, quintessentially self-serving, lacks foundation, any extrinsic corroboration and thus is of dubious evidentiary value. What Ms. Ellsworth said the note's contents represented was impeached by her own January 25 email, and again in her narrative statement in support of her complaint to the Bureau (Bates p. 3).

56. Respondent did not tell Ms. Ellsworth at any time to ever stop paying on any of her obligations, mortgage debt, credit card, or any other obligation, as credibly testified to by Ms. Loy. Respondent stated that such advice would have been directly contrary to all the other advice he was providing about budgeting, savings, spending restraint, all to preserve good credit and get out of debt, not repudiate it and perhaps be forced into bankruptcy or defaults and have to face collections actions. Both respondent and Ms. Loy testified that Ms. Ellsworth decided on her own to stop making payments.

57. Respondent and Ms. Loy later came to suspect that Ms. Ellsworth decided to stop making payments on the Antioch rental property mortgages as part of her own plan to save money on a property that she had already mentally written off as a lost cause, based on Ms. Ellsworth's casual comment to respondent and Ms. Loy very early on that she expected at best to have to try to buy the rental property back through a short sale, or, at worst, walk away and give the property back to the bank. Ms. Ellsworth initially tried to save the money she retained from receiving rent and not making the mortgage payments on the Antioch rental property for paying down her other more important debts, particularly her primary home mortgages, and to use to try to buy the rental property back herself in a short sale, if she could get GMAC to agree to it. After several months, after respondent realized Ms. Ellsworth was not paying on the Antioch rental property mortgages, and he asked what Ms. Ellsworth did with the payment and rent monies she retained. Ms. Ellsworth told respondent that she had managed to save approximately $1,500. When respondent asked where the rest of the money went, Ms. Ellsworth admitted that she and her husband had taken an expensive vacation to Hawaii, purchased a $20,000 car for cash, and purchased a hot tub. Respondent was upset because Ms. Ellsworth's desire to make these large ticket expenditures came up during discussions in the January 23 in February 4 meetings, and respondent strongly advised against doing so, as these were examples of exactly the sort of excessive spending that the Ellsworths needed to curtail in order to get out of debt.

58. Respondent objected during the evidentiary hearing to being prosecuted for trying to continue to help the Ellsworths create a savings plan and a budget, proposing spending discipline as a part of an overall plan to help the Ellsworths get out of debt, and then later he realized that the Ellsworths made these large ticket expenditures contrary to his advice. He complained that these expenditures made it clear that the Ellsworths had no intention of following the advice that he had given, and that Ms. Ellsworth had a separate and undisclosed agenda of her own. During the discussion on the record where respondent raised these objections, it became clear to respondent that he should have terminated the relationship immediately upon making this discovery.

59. The photocopy of the Post-it note with Ms. Ellsworth's handwriting (the original was not offered) suggests that Ms. Ellsworth stopped payments on her mortgages and credit cards in February 2010. But the January 25 email states that she had already stopped the payments before writing the email, as the language in the email regarding stopping payments on her credit cards and mortgage debt is all in the past tense. Yet in her written narrative statement in support of her complaint to the Bureau, Ms. Ellsworth wrote:

> [¶] ... [¶]
>
> A few days after our meeting [referring to the second, February 4, 2010, meeting at the Ellsworth home, discussed in the previous paragraph of the narrative], I spoke on the phone with Tony James and hesitantly asked, 'So we would stop making our mortgage and credit card payments now?' He stated yes and start saving the money I would have put toward those payments in cash in a safety deposit box so the banks could not trace. Before meeting with Tony and working with him, we had never been late on any mortgage or credit card payments.[4] So, abruptly stopping making payments was very hard for me and my husband as to that date, our credit scores were averaging about 750 points.[5]
>
> [¶] ... [¶]

60. And in the paragraph above the portion cited above, in her narrative complaint to the Bureau, Ms. Ellsworth wrote in the second sentence of the paragraph that begins beneath the two bullets,

> I have attached a copy of a list of directions from Tony that basically state paying the minimum on her credit cards ***until*** we stop making mortgage payments, start a life insurance policy with him now, fax documents to him, contact his source for potential business opportunity in signing a power of attorney for

[4] This statement appears to be highly implausible, considering that Ms. Ellsworth successfully obtained loan modifications for her mortgage debts based upon her pleas of financial hardship just two years before, in the heart of the economic downturn, at a time when she disclosed in other documentation in the record that her husband had been laid off and was jobless for more than a year, they were in desperate financial straits in 2008, prompting the first encounters with respondent for financial counseling, they had massive credit card debts and large outstanding medical bills, and were seriously considering bankruptcy, all hardly evidence of solvency, timely bill payments or solid credit standing.

[5] This statement is directly refuted by Ms. Ellsworth's statement in the January 23 list of "Concerns" that her husband has "zero credit."

him so that he may deal directly with our banks and debtors. (Emphasis added)[6]

61. Calling the handwritten document (Bates p. 6) a "list of directions" is a mischaracterization. The document is simply a single handwritten page of point by point memorandum notes of matters discussed during the February 4 meeting, with seven entries, dated at the top "Feb 4." As noted above, Point no. 1 states, "pay minimum on credit cards," directly contrary to Ms. Ellsworth's claim that respondent told her to stop payments on all debts. Ms. Ellsworth failed to address or explain the contradiction in her testimony. The "list of directions" referred to above was respondent's hand written memorandum of the February 4 meeting, and was written no earlier than that date, and most likely some time well afterward. According to the narrative statement claim above, the advice refers to some unidentified time well into the future when mortgage payments would stop, but the "list of directions" does not state that. The "list of directions" constitutes reliable documentation that respondent's financial advice and consultation for which he was to be compensated covered far more than merely advice upon how to deal with their mortgage debts.

62. Point no. 2 of the handwritten notes states, "401(k) wait till we stop paying." The note does not refer to what payment is to be stopped. Point no. 2 documents and further confirms that respondent did not advise Ms. Ellsworth to immediately stop all payments on all debt obligations in January or February 2010. Like Ms. Ellsworth's use of the word "until" in the portion of her narrative complaint quoted above, once again the future tense appears in this note, "wait till," clearly referring in both instances to an event that had not yet occurred.

63. Confirming this perception, there is in evidence a May 11, 2010, fax transmission from Ms. Ellsworth, on esurance letterhead, discussing her 401(k) investment elections, and making it clear that the matter of what to do with her 401(k) was still pending at that time. Ms. Ellsworth wrote to respondent:

> Good morning, so unfortunately I have not started my 401(k), I am pretty confused... I have attached a copy of the form for what you contribute & where, can you let me know what I am supposed to put where? Let me know the fee for this and I will send you a separate check. Thanks! Renée

64. Attached to this fax cover sheet with the note quoted above were two pages of investment election options. This fax communication confirms the fact that a separate check and fee for the 401(k) advice, discussed in the January 23 and February 4 meetings, was

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[6] Ms. Ellsworth told the Bureau in her narrative, filed with the Department April 22, 2011, that as of the time of the "list of directions," which was no sooner than February 4, and likely a good deal after, the stopping of payments was yet to occur, as reflected in Ms. Ellsworth's use of the word "until" to describe what was presented in the narrative as a future event.

forthcoming, that there were future professional services to be provided that were contemplated between the parties, and a separate professional fee for advice specifically for the 401(k) was to be paid. Second, there is no mention of Ms. Ellsworth's decision to stop payment on her credit cards and mortgages in January, even though the Feb 4 note, Point no. 2, appears to reflect that this matter was to be discussed in conjunction with making decisions about the 401(k). The fax cover sheet and the Feb 4 handwritten notes was typical of the lack of clarity, self-contradictory and ambiguous nature of the evidence that Ms. Ellsworth claims support her complaints against respondent.

PAYMENT HISTORY FOR MORTGAGES ON THE PRIMARY HOME

65. Tellingly, there is no evidence in this record that the first or second mortgages on the Ellsworths' primary Yuba City residence were ever in default during the period of time under review in this matter, through September 2010. There is no evidence that the Ellsworths failed to make or ever missed a payment on these two mortgages.

66. Ms. Loy testified credibly that respondent has never told any client, or any person for that matter, including the Ellsworths, to purposely quit making payments to any creditor, "**ever**." (Emphasis by witness in her testimony) Respondent credibly testified that he discovered well after the February 4 meeting that Ms. Ellsworth had decided on her own to stop her mortgage payments, at least on the Antioch rental home first and second mortgages.

67. Respondent became aware much later on in their relationship that Ms. Ellsworth was not paying on the Antioch property mortgages, despite his advice against not paying her creditors, because Ms. Ellsworth told him and Ms. Loy that the property was in default and she was facing foreclosure proceedings. In her complaint to the Bureau, Ms. Ellsworth confirmed respondent's lack of awareness about failure to pay on the Antioch rental property mortgages, when she complained that respondent was unaware that the property had gone into default and faulted him for failing to pay attention to the status of the mortgages on the rental property and failing to warn her that GMAC had issued a Notice of Default. Since the Notice of Default was not offered in evidence, and presumably was served upon Ms. Ellsworth as the mortgagee, it must be presumed that the Notice of Default was not served upon respondent, and that respondent had no notice that the default was impending or had taken place.[7]

68. As early as the January 23 meeting, respondent told Ms. Ellsworth that because she had obtained a loan modification in 2008 on the Antioch rental property, and the fact that she and her husband made too much money, that she was highly unlikely to be able to obtain a loan modification for the Antioch property in 2010, or to qualify for any of the hardship programs available for distressed mortgage debtors, such as the Obama

[7] Evidence Code section 412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Administration HAMP program. Respondent did tell Ms. Ellsworth during the January 23 and February 4 meetings that the newly enacted hardship relief programs were intended to assist distressed debtors already in foreclosure and in imminent danger of losing their homes, and that these programs were restricted to relief for owner occupied homes where the owner was in danger of losing their place to live.

69. Ms. Ellsworth failed to follow respondent's advice to immediately talk with the CPA about the tax ramifications of forgiveness of mortgage loan obligations, coupled with her lack of a ready and credit worthy short sale buyer at the time the property went into default. Almost all the harm she complained of in her complaint to the Bureau stemmed from Ms. Ellsworth consciously failing to pay the mortgage payments on the Antioch rental property, and the adverse tax consequences of the forgiveness of her mortgage obligations on that property due to her default and the lack of available resources for her to be able to repurchase the property at a short sale. GMAC did agree to permit the short sale well before the default became a foreclosure, and at a huge price discount ($160,000) to the outstanding mortgage obligations owed by the Ellsworths (in excess of $450,000), but Ms. Ellsworth did not have the funds to make the short sale purchase herself, nor to stake her cousin to the extra $10,000 required to make his offer ($150,000) to purchase the property at a short sale viable.

70. There is also an entry in the Feb. 4 notes, Point no. 4 on the sheet, that states, "start modification." The note does not say who is to start or perform the modification, or which of the four mortgage loans were being referenced. As noted above, Ms. Loy credibly stated in her testimony, respondent made it quite clear that he was not going to perform the modification, but would provide advice and information to assist Ms. Ellsworth in pursuing her own modification. There is no evidence of any effort of anyone to "start modification" until the writing of the two hardship letters each dated July 19, 2010 (below).

LACK OF A WRITTEN CONTRACT

71. Respondent did not have a written contract with the Ellsworths for the services that he provided and for which he received compensation. Respondent expressed acute but retrospective awareness of the fact that he made a huge mistake by not setting down in writing what it was he intended to do, and failing to specifically earmark compensation he received item by item for the services he had performed both in 2008 and in 2010, especially for those services performed before any action was actually taken on his multifaceted financial plan. Respondent agreed in his testimony that he told the Department's investigator and auditor that in his financial services business, because he offered such a broad range of financial products and services, he tended not to write down what it was he was agreeing to do for clients, because "it was never clear at the beginning what services the client would receive."

72. Respondent expressed realization in the course of the case that it was imprudent for him as a financial advisor providing a wide scope of services to rely upon the collective recollections of himself and any potentially aggrieved client, regarding the nature and extent of the mutual undertakings and obligations of each party. Much of the dispute in

this matter could have been avoided, had respondent not agreed orally with the Ellsworths to provide them the broad range of financial advice and consultation that he did, both in 2008 and in 2010. Even if Ms. Ellsworth's list of "Concerns" of January 23, and respondent's hand written February 4 notes of the meeting with the Ellsworths that Ms. Ellsworth called the "list of directions" could be considered together written memoranda of an oral contract between the parties, a meeting of the minds did not occur with respect to the core problem here; these memoranda fail to specify regarding how compensation was to be allocated to any of the broad range of services to be provided. Ms. Ellsworth's claims that respondent's business arrangements sought to "fly under the radar" were difficult to refute in the absence of a written agreement spelling out what the Ellsworths were supposed to pay for the services set forth in the January 23 and February 4 memoranda, and when they were supposed to pay. Although Ms. Ellsworth's accusatory claims about respondent's alleged misconduct and nefarious deeds proved to lack substance, respondent certainly did himself no favors in trying to disapprove her claims by failing to set down the agreements of the parties in writing, clearly spelling out what compensation was to be paid for each services he provided, and for failing to clearly spell out that none of the compensation he was to received was for him to seek any mortgage modification on behalf of the Ellsworths.

73. The Bureau faults respondent in the Accusation for not having a written contract, because a written contract is legally required if a Bureau licensee receives fees for performing loan modification services in advance of actually performing those loan modification services. Under the facts proved here, the allegation is circular. Although respondent realizes he could have and should have laid out his agreement with the Ellsworths in writing, which was, in retrospect, imprudent, it was not proved that respondent was legally required to have such a written agreement in place, because it was not proved that any of the compensation he received was for loan modification services that he had not yet performed. Since it was not proved that respondent agreed to perform any loan modification services for the Ellsworths, nor was it proved that any of the compensation he received was for loan modification services not yet performed, he was not legally required to have a written contract for the work he performed and the compensation he received.

74. An exchange of emails on April 29, 2010 between respondent and Ms. Ellsworth made it clear that a complete meeting of the minds had not yet occurred regarding how respondent was to be compensated for his work on behalf of the Ellsworths. Ms. Ellsworth's email reflects that there was an unresolved dispute between she and respondent regarding compensation, and respondent's expressed concern that he is again finding himself having invested considerable time without being adequately paid. At this point, when this email was written, respondent had received a total of $500 for his work in both 2008 and 2010 to the time of the writing of the email, which respondent and Ms. Loy calculated to be a total of at least 40 hours.

75. Ms. Ellsworth testified that respondent told her, prompting this email, that he was not particularly motivated to continue to work for the Ellsworths because he had been assured that he would receive sufficient compensation that would reflect how much time he spent, but he had not been paid. Respondent did not say how much he expected to have

received at this point, nor did he produce any itemized billings or notes providing details showing time spent and services rendered that would have gone a long way to resolving the disputes over compensation. This again was respondent's shortcoming in failing to generate time and billing statements or memoranda that could be commonly expected for a person performing professional or consulting services, and/or seeking to recover administrative time and costs invested.

76. Ms. Ellsworth stated in her email that it was her impression that, "when we met at our house a few months ago, the agreement was for two separate fees instead of consultant fees, one for the consolidation and one for the mortgage refi's."[8] Ms. Ellsworth further complained in her email that paying him $750 at this point, "is a lot of money." Ms. Ellsworth's bank records in evidence, noted above, reflect that only two of the checks for compensation for respondent had been actually debited from her account at the time of sending the email, and one of those had been post-dated almost a month. The third check, bringing the total to $750, was not cleared until May 21, well after this email.

77. Ms. Ellsworth complained in her email that her calls to respondent were only to check on progress and to see if something else needed to be done, and that "I did not really think that was consulting, since that is something I would do with any company when I wanted progress." Ms. Ellsworth continued in the email as follows:

> I am also relying on you as a financial advisor to foresee any possible problems with doing things like bankruptcies in short sales before we agreed to go a certain route. I realize you said check with the CPA, but if I knew it was a possible huge tax ramification it should be at the top of the list before anything else, unfortunately we are pretty ignorant in this area. So at any rate we definitely need a more clear fee schedule. All I ask is you put yourself in my shoes and know that a little money to you is actually a lot of money to us (do not forget the little people!) And be VERY CLEAR because I need that, I do not read between the lines. (Emphasis original)

78. Ms. Ellsworth first admits in this email that she hired respondent as her financial advisor, and then complains that, in that capacity, she expected him to "foresee" any possible problems with doing things like bankruptcies or short sales. Despite the fact that she admits in this email that respondent told her to see the CPA right away during the meetings on January 23 and February 4, 2010, Ms. Ellsworth acknowledges she did not do

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[8] Here Ms. Ellsworth admits respondent's testimony was accurate when he said he told her the Ellsworths would not be eligible for any loan modifications, hardship or otherwise, due to their income and recency of their 2008 loan modifications, and that her best bet was to pursue refinancing the existing loans. This statement also corroborates respondent's testimony that he never undertook to seek of perform any loan modifications for the Ellsworths.

so. Yet in the next sentence of the message, she claims ignorance regarding possible tax ramifications (presumably due to the income consequences of potential forgiveness of debt on a short sale), and implies that respondent is at fault for her current state of ignorance. There is no shortage of such incidents of scapegoating by Ms. Ellsworth in this record, and particularly so in the last half of her narrative statement in support of her complaint to the Bureau.

THE HARDSHIP REQUEST LETTER TO GMAC-YUBA CITY HOME

79. When respondent saw more details regarding the Ellsworths' income and debt obligations after Ms. Ellsworth sent him more financial information after the February 4 meeting, respondent predicted that Ms. Ellsworth would be unable to obtain a HAMP or other hardship modification of either of her mortgage loans because she and her husband had too much income and that they had obtained modifications of their loans quite recently, within the most recent two years. Ms. Ellsworth wanted to try for a hardship modification anyway, and she did. At Bates 13 in the Department's evidence is found a May 20, 2010, letter from GMAC Mortgage to the Ellsworths, regarding the mortgages on their primary residence. This letter advises the Ellsworths, in part, "Help may be available if you are having difficulty making your mortgage loan payments."

80. This letter was provided to the Bureau by Ms. Ellsworth in support of her complaints to the Bureau. What this letter does not say is far more important than what it does. The letter does not declare that the Ellsworths were in default on their mortgage obligation. The letter does not even suggest the Ellsworths had missed payments or that there existed an arrearage on their first and second mortgage obligations. The letter does not claim that GMAC has not received any due payment, or that any payment was late on either loan, as of the date of the writing of the letter. The letter only provides information regarding the availability of foreclosure relief programs, without making any mention of the Ellsworths not being current on their mortgage obligations to GMAC for their primary residence obligations. GMAC merely advises the Ellsworths about the existence of the "HAMP affordable modification program announced by President Obama to help homeowners."

81. Much controversy focused upon a letter dated July 19, 2010, found at Bureau's Exhibit 4, Bates page 15. The letter is a written request for an HAMP loan modification, or "any other assistance," addressed to GMAC Mortgage, seeking hardship cases assistance on the two mortgages encumbering the Ellsworths' primary Yuba City home. The letter was presented by the Bureau as evidence that respondent obligated himself to seek a loan modification for the Ellsworths in exchange for compensation paid before work to obtain the loan modification was performed. The letter failed to prove the point for which it was offered.

82. The first problem with the letter as evidence in support of the Bureau's contention is that it is inescapable that this July 19, 2010 letter, on its face, represents itself to have been written by Renée Ellsworth. It is also problematic that there is no clear and

persuasive evidence the letter was ever mailed to GMAC, as both Ms. Ellsworth and respondent seem to deny sending the letter, despite some ambiguous statements by respondent in 2012 to the Bureau's investigator and auditor where it appears that he told them he sent the letter to GMAC. Respondent and Ms. Ellsworth each appear to think the other person sent it, but no one seems to know with any reasonable level of assurance that the letter was actually mailed or that the letter was received by GMAC. There is no proof of mailing or other documentation that the letter was mailed, and no receipt, confirmation or other written documentation in this record that the letter was actually received. There is no evidence of a response or acknowledgment of receipt by GMAC. One of the Bureau's audit reports contains a hearsay comment without supporting facts or foundation, that GMAC denied the Ellsworths' hardship application in August 2010. Under the circumstances proved here, it can only be assumed that the issues with the Ellsworths' first and second mortgages on their primary residence in Yuba City for which the Ellsworths sought hardship relief in this July 19 letter were satisfactorily resolved, because at the time of the evidentiary hearing, it appeared that the Ellsworths still were living in the home, there was no evidence of a Notice of Default ever having been filed with respect to either of these two loans, and no evidence that a foreclosure proceeding had ever been commenced against the Ellsworths and these two loans. Accordingly, Ms. Ellsworth's complaints to the Bureau focused exclusively upon the consequences of the collapse of the first and second mortgages on their Antioch rental home.

83. The July 19, 2010, letter to GMAC sets forth details of the Ellsworths' personal financial circumstances and alleged financial hardship, and the reasons why Ms. Ellsworth believes she and her husband should be given a hardship loan modification. There was no evidence that any financial information was sent along with the letter, if the letter was sent. Respondent did not write the letter, but acknowledged that he assisted Ms. Ellsworth in its preparation, and advised her regarding what he thought should be in the letter in order to have a chance at gaining the bank's attention. There was no evidence that respondent ever saw the letter as it was being prepared, or in its final form before it was mailed, if it was mailed, as the discussion about what should be in the letter took place entirely over the telephone.

84. The Bureau focuses upon the fact that the last sentence of the letter concludes with a statement advising GMAC that, "We have retained the services of Tony James as our agent to help to discuss and navigate a modification. Our letter of authorization you should have in your files already. If not, his information is enclosed." Respondent's name and phone number was written at the bottom of the letter. Although this statement of agency is some evidence in support of the Bureau's claims that respondent performed some services for the Ellsworths in support of loan modification activity, the statement, alone or in conjunction with all the other evidence, does not rise to prove by clear and convincing evidence that respondent accepted advance fees to perform any loan modification for the Ellsworths.

85. Respondent acknowledged in his interview with the Department's investigator and auditor that this agency information at the foot of the letter makes it appear that he is

seeking a loan modification on behalf of the Ellsworths, and since he agreed that he consulted with and advised Ms. Ellsworth in the drafting of the letter, it can only be assumed that he approved the statement. But respondent pointed out that providing advice and assistance to Ms. Ellsworth in her drafting of the letter was a different matter than pursuing the loan modification on behalf of the Ellsworths. It is a distinction with a difference, and the letter itself, purporting to seek a loan modification by the borrower herself, and the remainder of the evidence better supports respondent's claim than the Bureau's.

86. Respondent did not deny assisting and advising Ms. Ellsworth in how to write and present the hardship modification request letter to GMAC. Despite ambiguous statements to the Bureau's investigator and the Bureau's auditor by respondent about the mailing of the letter, it was not proved by clear and convincing evidence that respondent did anything other than assist Ms. Ellsworth to write it.

87. Respondent explained that the agency paragraph was inserted in the letter to permit GMAC to talk with him on behalf of Ms. Ellsworth and answer any questions they might have regarding her application for the loan modification. There is no evidence in this record that respondent ever actually acted in the capacity of agent on behalf of the Ellsworths with respect to the hardship modification request reflected in the letter. There is no evidence that respondent ever spoke to GMAC representing himself to be the Ellsworths' agent to try to negotiate or advocate for modification of these loans. Respondent did acknowledge that he may have spoken to GMAC once briefly to ask about the status of their loans on the Antioch property, but that conversation did not relate to the primary Yuba City residence or its loans, and took place well before the writing of the letters. Respondent did not recall when or any specifics of what was discussed, and there was no other evidence or documentation of any such conversation. There is no information regarding when such conversations may have occurred, with whom they occurred, or the subject matter of the conversations, other than a sweepingly vague statement that the conversations may have involved the loans. Since GMAC was the lender for the mortgages on both the primary residence in Yuba City and those of the Antioch rental property, it cannot be determined that, if any such conversation occurred, which loans were discussed.

LETTER TO GMAC ANTIOCH LOANS

88. At Bates page 14 there appears a letter written and signed by both the Ellsworths, addressed to GMAC mortgage, seeking relief for the first and second mortgages on their Antioch, California rental property. The letter is dated July 19, 2010. However, this letter was signed by both Mr. and Mrs. Ellsworth on September 10, 2010, several weeks after Ms. Ellsworth claimed she terminated respondent's services. No one was able to explain why the letter was dated July 19, 2010, but not signed until September 10, 2010, another in the upwelling mountain of ambiguities in the evidence not satisfactorily explained.

89. There was no claim that respondent wrote this letter or assisted in its drafting, or that he submitted it. The text is similar to the July 19, 2010 letter to GMAC regarding the two mortgages on the Ellsworth primary Yuba City residence, and although it does not have

the same agency paragraph at its foot, it nevertheless refers to authorizing GMAC to speak to "our agent."

90. In this July 19/September 10 letter, both the Ellsworths jointly request a short sale on their Antioch rental property. The letter sets forth a number of circumstances claimed to be hardships preventing the Ellsworths from being able to afford to make payments on their first and second mortgages on the property. Ms. Ellsworth testified that she mailed the letter to GMAC asking for the short sale of the Antioch property. As set forth below, GMAC did respond to this letter, and did evaluate Ms. Ellsworth's presentation of her cousin as a potential short sale buyer, as set forth below.

FINANCIAL ANALYSIS FORM

91. At Bates pages 16 through 18, there appears a "Financial Analysis Form" (the Form) for the GMAC loan account with the same account number as the loan number disclosed in the letter seeking a short sale above for the Antioch property. The Bureau again contends that this Financial Analysis Form is further evidence that respondent accepted fees in advance of performing services in obtaining loan modifications for the Ellsworths. The contention lacks merit, as it fails to account for the fact that the only evidence of contact between respondent and GMAC regarding the Antioch rental property loans is above; a vague single telephone call that cannot be placed in time and may well have occurred before respondent received any compensation, and the Bureau failed to prove otherwise.

92. The Form is obviously incomplete. In the portion on page 2 "to be completed by interviewer," the Form discloses that the information was obtained by respondent in "a face-to-face interview" on February 19, 2010. On page 1, the Form states an affirmative answer to the question regarding whether the applicants have contacted a credit counseling agency for help, and the identity of the credit counselor's name is listed as respondent.

93. Respondent never denied that he agreed to provide credit counseling and debt strategy services to the Ellsworths, and expected to be compensated for that advice. Respondent did not deny that he completed portions of the Financial Analysis Form together with Ms. Ellsworth. The Form lacks what appear to be several pages, including, most importantly, the applicants' signature pages, and it also lacks dates on which the form was signed, if it ever was. There was no evidence that the Form was ever mailed or otherwise submitted to GMAC. The financial data disclosed on the pages that do exist is sporadically filled in, and it appears evident from the document itself that it was a worksheet that was never intended to be submitted.

FROM CRISIS TO COLLAPSE

94. Ms. Ellsworth's complaint to the Bureau, at Exhibit 4, Bates page 1, received April 22, 2011, is telling. On the face page portion of the Licensee/Subdivider Complaint completed by Ms. Ellsworth, she describes in the portion where the complainant is asked to describe her complaint as follows, "Tekoa James [sic] refused to complete short sale for my

property a few days before set foreclosure date. Tony James refuses to take responsibility for the loss of my home[9] and fees incurred." The focal point of Ms. Ellsworth's complaint to the Bureau here is Tekoa Loy's failure to successfully bring about the short sale of the Antioch property, and she faults respondent incidentally as stated, with no mention that respondent had been paid in advance to obtain loan modifications for her.

95. In her narrative statement in support of her complaint, Ms. Ellsworth both acknowledges that she fired respondent in August 2010, and that respondent returned all funds she had paid to him. She then proceeded to fault respondent and Ms. Loy for failing to inform her that GMAC had issued a Notice of Default on the Antioch rental property mortgages and scheduled a foreclosure sale for October 1, 2010. She alleged that neither respondent nor Ms. Loy had any idea that a foreclosure scale was scheduled until she told them about it. She stated as follows:

> Since I was now under immense pressure, I felt I had no choice but to continue with their company to perform the short sale only. I found a potential buyer for the short sale and gave the information to Tekoa Loy on approximately August 20, 2010. I was still under the impression that Tekoa Loy had the home listed and was actively pursuing other possible buyers due to our time restraints. In the end, on September 27, 2010, Tekoa informed me that the buyer could only qualify for $150,000, and the bank would not accept any less than $160,000, so she recommended I obtain another realtor in the Antioch area. This is four days before my set foreclosure date.
>
> In conclusion, contrary to what Tony James stated for loan modification with the bank putting all back fees on the back of the loan, the bank demanded the full $17,000 in back mortgages plus an additional $2,200 in fees with no modification to the loan. I negotiated myself with my creditors and paid them in full including the second mortgage for the Antioch property, $5,600. To my own ignorance and Tony James's neglect to advise me, I am still liable for the forgiven debt as taxable income. I have paid Tony James $1,000 for no services rendered, have horrible credit, paid an additional $8,800 in unnecessary fees and have a foreclosure on my record.

[9] Considering the numerous other instances of mischaracterization, misrepresentations and scapegoating of respondent engaged in by Ms. Ellsworth in the evidence, it is difficult to conclude that her accusing Mr. James of being responsible for her losing "her home" is an inadvertent misuse of the words. The property that was lost was a rental property; Ms. Ellsworth never lost her home.

MS. LOY CLARIFIES THE FACTS

96. The factual inaccuracies in the claims and statements quoted above were straightened out by Ms. Loy in a credible and persuasive manner, with corroborating documentation to support her testimony. Ms. Loy began by pointing out that Ms. Ellsworth "did not follow the plan" that respondent took several hours to put together, and had she done so, the family could have been able to pay off their debts and retain both properties. She pointed out that Ms. Ellsworth tried to "have it both ways," by continuing to spend as she had before, making no particular effort to live within a budget and refusing to follow the financial discipline laid out in respondent's plan, and yet demanding an outcome that could only be attained if she and her husband restrained their spending and followed the plan, and yet complaining later that it was respondent and Ms. Loy's fault that there were adverse consequences.

97. Ms. Loy was present in the meetings from the outset, when Ms. Ellsworth first started discussing short selling the Antioch property as early as the January 23 meeting. Ms. Loy suggested putting the Antioch property on the market at that January 23 meeting, but Ms. Ellsworth refused to let Ms. Loy list the property and market it. Although she did not specifically say so at the time, it was apparent that Ms. Ellsworth hoped to be able to sell the property herself and save the commission. Ms. Loy repeatedly told Ms. Ellsworth that she was not a member of the multiple listing system (MLS) in Contra Costa County, and if she wanted the property to have an MLS audience, association needed to be made with a local realtor who was part of the Contra Costa County MLS system.

98. Ms. Loy denied ever offering to perform a short sale in the Antioch property for Ms. Ellsworth. There was no evidence Ms. Loy ever agreed to try to short sell the Antioch property until Ms. Ellsworth's efforts to market the property herself in June and July 2010, seeking her own short sale buyer, were unsuccessful, and she came to Ms. Loy, begging her to take on the property and try to short sell it for her after she received the Notice of Default from GMAC in August 2010.

99. When Ms. Ellsworth came to Ms. Loy asking her to try to short sell the property, she told Ms. Loy that she had received a Notice of Default and that there was already a foreclosure pending. This was the first notice to either Ms. Loy or respondent that the Antioch property was in default, as Ms. Ellsworth had terminated her dealings with respondent and Ms. Loy well before the Notice of Default was received. Ms. Loy was reluctant, but Ms. Ellsworth was crying and said she did not have any idea what else to do, and Ms. Loy finally agreed to try to short sell the property, but told Ms. Ellsworth that there was very little time and the chances of success were limited.

100. Shortly after that discussion, Ms. Ellsworth told Ms. Loy that her cousin would try to buy the property, but he had limited ability to financially qualify to make the purchase. Ms. Loy submitted Ms. Ellsworth's cousin's financial information to GMAC as a potential short sale buyer. By the time GMAC rejected Ms. Ellsworth's cousin as a potential short sale buyer, there was very little time left before the foreclosure scale was scheduled.

101. Ms. Ellsworth became angry and hostile toward Ms. Loy as the foreclosure loomed, and Ms. Loy testified she felt threatened by both Mr. and Ms. Ellsworth. Ms. Loy refused to go further in the transaction. She told Ms. Ellsworth that she needed to obtain the services of a local realtor who had MLS listing capabilities in the Contra Costa area. Evidently Ms. Ellsworth was unsuccessful in finding a buyer, and the property was foreclosed.

UNRELATED BLAMING, EVIDENCE CODE SECTION 352, AND RELATIVE CREDIBILITY

102. None of the above activities relating to the Notice of Default, attempted short sale of the Antioch rental property, and the foreclosure had anything to do with the allegations against respondent. All of these activities took place after Ms. Ellsworth acknowledged that she had terminated respondent's services. Therefore, it appears that the only possible purpose of these claims and this evidence was furtherance of Ms. Ellsworth's efforts to condemn respondent as at fault for all of the adverse consequences the Ellsworths encountered when the Antioch property was lost to default and foreclosure. This evidence was not considered relevant or material to any of the allegations, but was quite harmful to Ms. Ellsworth's credibility and enlightening regarding the motivation of her complaint to the Bureau. The fact that adverse consequences flowed from the loss of the Antioch rental property foreclosure was clear, but the causation Ms. Ellsworth claimed was due to respondent was actually her own.

RESPONDENT'S SHARE

103. None of the Findings above should be construed to find respondent was a wholly forthright and credible witness on his own behalf, or that he was wholly without fault in this matter. On the one hand, respondent's advice clearly conflicted with Ms. Ellsworth's own desires and proclivities. But much of the ambiguity of the business relationships and the evidence regarding what was supposed to be done, and for which fee, was largely his doing. There is considerable merit to the claim that respondent, in his effort to "help a friend in distress," found himself attempting to "fly beneath the radar" with the rather ambiguous financial advisory and debt counseling role he undertook in this matters. He was and is first and foremost a financial products salesman, and it was evident that he hoped to sell the Ellsworths a financial product such as life or health insurance or a pension plan for which he could expect a generous commission, and he acknowledged as much late in his testimony when he explained his calculation of the time value of his work product that he thought the Ellsworths disrespected and wasted. Ms. Ellsworth did request in at least two documented instances in this matter that respondent spell out what services were being provided for the fees she was paying, and respondent did not respond. Respondent failed to draft or enter into any kind of written agreement with the Ellsworths that would spell out what the rights and responsibilities were of each party, and failed to document specifically in receipts or other memoranda what services were provided for the compensation he received.

104. Respondent's conduct toward the Ellsworths was poor professional practice and imprudent, and respondent's imprudence created the impression that something was

altogether rotten about what happened and what was supposed to happen between January and August with these parties. The vast disparity between the relative expectations of the Ellsworths and respondent and Ms. Loy about what was supposed to happen was respondent's professional responsibility to clarify. He failed to bring clarity to the relationship and the obligations of the parties. This perception was quite evidently shared by the Bureau, resulting in this action, in spite of the weak, conflicting and ambiguous evidence that existed upon which the Bureau was forced to rely in an effort to support of the allegations in the Accusation. But imprudence and poor professional practice does not necessarily violate the law, and, in this instance, the proof of such violations was largely wanting.

CHARACTER EVIDENCE AND TERMINATION BY BROKER

105. Mr. Soldati, respondent's real estate broker for First Priority Financial, testified very briefly. After hearing this testimony, a portion of the testimony he offered regarding his termination of respondent's license relationship with his firm is excluded from consideration in this record, because the excluded portion of the testimony's prejudicial effect significantly exceeded its probative value.[10] The broker's testimony was primarily excluded because the broker made no effort to investigate the allegations against respondent before he summarily severed his relationship with respondent after being advised that the Bureau was investigating a complaint that claimed respondent was involved in loan modification activity. The broker testified that his entire business relies upon continuing good relationships with federal lending agencies, let those agencies absolutely prohibited anything that even remotely appears to be involved with loan modification, implying that even the existence of an incomplete investigation was a matter he wanted to distance himself from as quickly as possible. Since the broker made no effort of any sort to inquire into the underlying facts or circumstances, other than a rather brief and inconclusive phone call to respondent that did not constitute the admission that respondent was involved in loan modification activity the Bureau suggested, accomplished nothing other than to confirm that the Bureau was looking into the Ellsworth complaint. There appears to be no other purpose to offering this testimony regarding the phone call and the termination of the license arrangement between the broker and respondent besides an effort to portray respondent as a person of bad character, as nothing the broker said actually supported or contributed to the proof of any of the allegations. Furthermore, respondent quickly found another broker with whom he could lodge his license, Excel Realty, and the Bureau did not summon his broker at Excel Realty to testify.

106. Some of the broker's testimony did not fall within the exclusion. The broker confirmed that respondent used his salesperson's license to occasionally originate mortgage loans in the past, but respondent had been largely inactive between 2008 and the time he severed his relationship with respondent. During this time, respondent performed almost no work for the brokerage.

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[10] Evidence Code section 352, subdivision (b).

107. Ms. Loy was not only a percipient witness to the transactions at issue in this matter with the Ellsworth's, but she was also a character witness for respondent. Ms. Loy has substantial credentials of her own, being a licensed real estate broker with no record of disciplinary action against her, as well as an insurance professional and manager now employed by Banker's Life. She has known and worked with respondent for many years, and has always found him to be honorable, ethical, and a person of good character quite concerned about the welfare of his clients and the ethics of his practice. Her testimony was credible and persuasive.

MORTGAGE LOAN FORECLOSURE CONSULTANT-NO LOANS IN DEFAULT

108. At no point in time while the events set forth just above were taking place were the first and second mortgages on the Ellsworth primary residence in Yuba City in default. There was no evidence that the mortgages on the Ellsworth primary residence in Yuba City were in default at any time respondent was still involved with assisting the Ellsworths.

COSTS

109. The Bureau introduced a Cost Recovery: Declaration Regarding Investigative Costs (Investigative Costs Declaration-Exhibit 7) and a second Cost Recovery: Declaration Regarding Enforcement Costs (Enforcement Costs Declaration-Exhibit 8), which is actually a request for recovery of attorney's fees for the Bureau's counsel in this matter. Both Declarations were presumably filed pursuant to the authority of authority of B&P Code section 10106, but neither Declaration specifically says so.

110. Each Declaration refers to "Exhibit A." Neither Declaration specifies the total amount of costs sought to be recovered by that individual declarant. Reference is required to Exhibit A, without any guidance or direction. Exhibit A is simply a stapled together collection of individual timesheets for each of the persons the Bureau contends were involved in this case. The timesheets include time claimed for special investigator Deborah Burnett, whose role was never identified in the case, auditor Corina di Sonnaville, program technician Lucero Garcia, the Bureau's counsel (costs of enforcement), the Bureau's primary investigator, Ms. Nishimura, Office Technician Claudia Reichmuth, supervising special investigator Tricia Sommers and special investigator Mark Tutera.

111. At the close of the Bureau's evidence, counsel for the Bureau advised that there are two different sets of audit costs included in Exhibit A, and that the cost of the audit of Ms. Loy, which are the costs for the time of Ms. Di Sonnaville, included in Exhibit A, are not to be included in the cost claim. Counsel stated the total amount of investigative costs sought are $4,386.10, but provided no details regarding how those costs were calculated or how to include or exclude what appeared to be costs mixed together from two different cases and two different audits.

112. California Code of Regulations (CCR), title I, section 1042, requires that the Bureau present any cost recovery claim in a declaration containing specific facts sufficient to support findings regarding actual costs incurred, and the reasonableness of the costs sought to be recovered. Neither Declaration meets this requirement, and each require reference to the appended timesheets, which require the ALJ to try to ascertain which claimed costs apply and which do not. Both the Bureau's Costs Declarations are deficient and fail for the most part to meet the requirements of CCR, title 1, section 1042, subdivision (b).

113. Nevertheless, the cost for enforcement activity are reasonably easy to discern from the timesheets, in that counsel for the Bureau is the only attorney whose time is listed. Counsel seeks recovery of 3.75 hours at $89 per hour for a total cost of $333.75. These costs are presumptively reasonable and are recoverable.

114. The Bureau's primary investigator Ms. Nishimura's time occupies five pages of Exhibit A, and seeks recovery of 59.50 hours at a rate of between $62 and $80 per hour, for total costs sought of $3,887. The rate of $62 per hour is presumptively reasonable, but $80 per hour is not. Ms. Nishimura's time is the only investigative activity time within Exhibit A for which there exists a factual basis to consider recovery of the costs claimed.

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."[11] "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."[12] The burden of proof is upon the Bureau to prove that legal cause exists to revoke or suspend respondents' licenses. This burden was applied to each and every factual and legal allegation contained in the Accusation, and in making the Factual Findings above and the Legal Conclusions that follow.

FIRST CAUSE OF ACTION

2. The Bureau alleges in the First Cause of Action that respondent performed professional services requiring a real estate broker's license with respect to the Ellsworths' mortgage loans in expectation of compensation, within the meaning of section 10131, subdivision (d).

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[11] *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.

[12] *In Re David C.* (1984) 152 Cal.App. 3d 1189, 1208.

3. B&P Code section 10131 provides, in pertinent part, as follows:

> A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:
>
> [¶] ... [¶]
>
> (d) Solicits borrowers or lenders for or negotiates loans or collects payments *or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property* or on a business opportunity.
>
> [¶] ... [¶] (Emphasis added)

4. As detailed in the Factual Findings and the Legal Conclusions below, to a small extent in a much more comprehensive and larger offering, respondent did offer and performed some services for the Ellsworths "in connection with loans secured directly or collaterally by liens on real property." Those services where respondent provided counsel and advice about how Ms. Ellsworth should best proceed with trying to get her mortgages refinanced or modified, or otherwise extinguished through a short sale (Antioch rental property) and helping to draft at least one of the letters to GMAC where Ms. Ellsworth sought hardship relief for the mortgages securing their home, were part of the much more broad scope of part of the financial services and debt counseling he provided for which he expected to be and was compensated. Nevertheless, according to section 10131, subdivision (d) these mortgage loan related services were services reserved by section 10131, subdivision (d) as the exclusive province of a licensed real estate broker. Thus, to the extent that these brief and limited services respondent provided addressed advice and guidance with dealing with the Ellsworths' real estate secured mortgages, respondent violated section 10131, subdivision (d). As a result, there exists a legal basis for the imposition of a disciplinary sanction against respondent's real estate salesperson license, as provided by B&P Code sections 10130 and 10177, subdivision (d).

5. In mitigation, at all times when respondent was providing the advice and counsel regarding the Ellsworth real estate secured mortgages, he was working closely with Ms. Loy, who was and is a licensed real estate broker, even though she was not directly and formally supervising him, as respondent had never requested the Bureau to register his license with Ms. Loy as supervising broker. Additionally, it appears that the violation was entirely inadvertent. Although respondent could have and should have known better, there was no evidence that he intentionally violated the restrictions and limitations of real estate practice reserved exclusively to real estate brokers.

ADVANCE FEES ALLEGATIONS

6. The Bureau also alleged in the Accusation that respondent violated B&P section 10131.2, by charging and collecting advance fees in connection with employment undertaken regarding the Ellsworths' mortgage loans.

7. B&P section 10131.2 provides as follows:

> A real estate broker within the meaning of this part is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange or rent property or a business opportunity, or to obtain a loan or loans thereon.

8. The Bureau failed to prove that respondent fell within the meaning and requirements of B&P section 10131.2. The Bureau did prove that respondent claimed, demanded, charged, received, collected and orally contracted for the collection of an advance fee (below). But the Bureau failed to prove that the collection of the fees was in connection with any employment undertaken "to promote the sale or lease of real property," or of "a business opportunity opportunity by advance fee listing", or an "advertisement or other offering to sell, lease, exchange or rent property or a business opportunity," or "to ***obtain*** a loan or loans thereon. (Emphasis added). The subject loans under review in this matter already existed, and none of the facts of this case suggests that section 10131.2 applies or governs respondent's conduct proved in this matter.

ADVANCE FEES FOR LOAN MODIFICATIONS

9. The Bureau next alleged that respondent, using the business name Faith & Integrity Financial Services & Insurance, Inc. charged, collected and/or received advance fees in connection with loan modification services, in violation of section 10085.6, and California Civil Code sections 2945.3 and 2945.4, for alleged loan modifications for both of the Ellsworths' Antioch rental property and their primary residence in Yuba City.

10. Section 10026 reads, in pertinent part, as follows:

> (a) The term "advance fee," as used in this part, is a fee, regardless of the form, that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license, or for a listing, as that term is defined in Section 10027, before fully completing the service the licensee contracted to perform or represented would be performed. Neither an

advance fee nor the services to be performed shall be separated or divided into components for the purpose of avoiding the application of this division.

[¶] ... [¶]

11. B&P Code section 10085.6 provides a bit more guidance in the determination of what constitutes acceptance of advance fees as follows:

> (a) Notwithstanding any other provision of law, it shall be unlawful for any licensee who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following:
>
> *(1) Claim, demand, charge, collect, or receive any compensation until after the licensee has fully performed each and every service the licensee contracted to perform or represented that he, she, or it would perform.*
>
> [¶] ... [¶]

(Italics added.)

12. It was not proved that respondent violated B&P Code section 10085.6. As set forth in the Factual Findings, it was not proved that respondent, "negotiate[ed], attempt[ed] to negotiate, arrange[d], attempt[ed] to arrange, or otherwise offer[ed] to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee." Respondent did provide advice and consultation to Ms. Ellsworth in the pursuit of her own modifications, but section 10085.6 does not prohibit such conduct.

13. It was not disputed that respondent did not have a written contract with the Ellsworths spelling out the rights and obligations of the parties and the compensation to be received for specific services rendered. B&P Code section 10026 defines advance fees for the purposes of B&P Code sections 10085, 10085.5 and 10085.6, which provisions make actionable failure to conform to the Bureau's requirements, including having a written contract, if and only if advance fees have been received for loan modification services. The triggering event for the applicability of all of these provisions alleged in the First Cause of Action of the Accusation is thus proof by clear and convincing evidence that respondent received advance fees to perform loan modification(s) for the Ellsworths. This triggering event was not proved, as set forth above and below.

ALLEGED VIOLATION OF CIVIL CODE PROVISIONS-DID RESPONDENT ACT AS A FORECLOSURE CONSULTANT?

14. In order to trigger the charging allegations of Civil Code sections 2945.3 and 2945.4 alleged in the Accusation, it must first be concluded that respondent acted as a "foreclosure consultant," within the meaning of Civil Code section 2945.1, in his interactions with the Ellsworth set forth in the Factual Findings. If respondent's activities do not constitute acting as a foreclosure consultant, Civil Code sections 2945.3 and 2945.4 do not apply.

15. Civil Code section 2945.1 provides, in pertinent parts, that the following definitions apply to sections 2945, et. Seq.:

> (a) 'Foreclosure consultant' means any person who makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following:
>
> (1) Stop or postpone the foreclosure sale.
>
> (2) Obtain any forbearance from any beneficiary or mortgagee.
>
> (3) Assist the owner to exercise the right of reinstatement provided in Section 2924c.
>
> (4) Obtain any extension of the period within which the owner may reinstate his or her obligation.
>
> (5) Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a deed of trust or mortgage on a residence in foreclosure or contained that deed of trust or mortgage.
>
> (6) Assist the owner to obtain a loan or advance of funds.
>
> (7) Avoid or ameliorate the impairment of the owner's credit resulting from the recording of a notice of default or the conduct of a foreclosure sale.
>
> (8) Save the owner's residence from foreclosure.
>
> (9) Assist the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the

beneficiary, mortgagee, or trustee, the remaining proceeds from the foreclosure sale of the owner's residence.

[¶] ... [¶]

(e) "Service" means and includes, but is not limited to, any of the following:

(1) Debt, budget, or financial counseling of any type.

(2) Receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a residence in foreclosure.

(3) Contacting creditors on behalf of an owner of a residence in foreclosure.

(4) Arranging or attempting to arrange for an extension of the period within which the owner of a residence in foreclosure may cure his or her default and reinstate his or her obligation pursuant to Section 2924c.

(5) Arranging or attempting to arrange for any delay or postponement of the time of sale of the residence in foreclosure.

(6) Advising the filing of any document or assisting in any manner in the preparation of any document for filing with any bankruptcy court.

(7) Giving any advice, explanation, or instruction to an owner of a residence in foreclosure which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a lien on the residence in foreclosure, the full satisfaction of that obligation, or the postponement or avoidance of a sale of a residence in foreclosure pursuant to a power of sale contained in any deed of trust.

(8) Arranging or attempting to arrange for the payment by the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, of the remaining proceeds to which the owner is entitled from a foreclosure sale of the owner's residence in foreclosure. Arranging or attempting to arrange for the payment shall include any arrangement where the owner transfers or assigns the right to the remaining proceeds of a foreclosure sale to the foreclosure

consultant or any person designated by the foreclosure consultant, whether that transfer is effected by agreement, assignment, deed, power of attorney, or assignment of claim.

(9) Arranging or attempting to arrange an audit of any obligation secured by a lien on a residence in foreclosure.

(f) "Residence in foreclosure" means a residence in foreclosure as defined in Section 1695.1[13].

(g) "Owner" means a property owner as defined in Section 1695.1[14].

(h) "Contract" means any agreement, or any term thereof, between a foreclosure consultant and an owner for the rendition of any service as defined in subdivision (e).

16. The definition of "foreclosure consultant" set forth just above does not appear to include respondent. The statutory definition set forth in section 2945.1 sets forth two preconditions for a person to be found to be a foreclosure consultant; the fact that the property at issue must be the debtor's primary personal residence, and that the subject property is already in the process of foreclosure, which almost always means that a notice of default has been filed and served on the homeowner. This makes sense, for it is the receipt of a notice of default that typically triggers an anxious homeowner to seek the assistance of a person acting as a foreclosure consultant. Regardless of the panoramic scope of proscribed "services" enumerated under subdivision (e), in order to be actionable, any of those services provided must have been provided by a mortgage consultant, which requires a return back to the requirement that the property in question for which the loan modification services are offered/provided must be an owner occupied principal residence, and that the stage of the proceedings has advanced past the place where the notice of default has been filed in a foreclosure proceeding is imminent, none of which is true in this instance.

17. The definition of foreclosure consultant set forth above does not include only services respondent provided in this instance to the Ellsworths at the time he provided them. There was no evidence that the Ellsworths' primary Yuba City residence was ever in foreclosure, or that they had ever received a notice of default on their home during the time that respondent was working with them. The services that respondent provided, at the time that he provided them were best characterized as anticipatory and defensive; financial counseling and other advice and guidance, well in advance of, and prior to, any notice or advice to the Ellsworths their home was in danger of default or foreclosure.

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[13] Section 1695.1 provides that residence in foreclosure means an owner occupied home of one to four units-for all intents and purposes, the debtor's primary residence/home.

[14] *Id.* "Owner" is an owner-occupier.

18. Just to be clear, additional insight can be found in the express Legislative intent that led to the enactment of the entire statutory scheme, including sections 2945.1, 2945.3 and 2945.4, found at section 2945 itself. Section 2945 provides:

> (a) The Legislature finds and declares that ***homeowners whose residences are in foreclosure*** are subject to fraud, deception, harassment, and unfair dealing by foreclosure consultants ***from the time a Notice of Default is recorded pursuant to Section 2924 until the time surplus funds from any foreclosure sale are distributed to the homeowner or his or her successor. Foreclosure consultants represent that they can assist homeowners who have defaulted on obligations secured by their residences.*** These foreclosure consultants, however, often charge high fees, the payment of which is often secured by a deed of trust on the residence to be saved, and perform no service or essentially a worthless service. Homeowners, relying on the foreclosure consultants' promises of help, take no other action, are diverted from lawful businesses which could render beneficial services, and often lose their homes, sometimes to the foreclosure consultants who purchase homes at a fraction of their value before the sale. Vulnerable homeowners are increasingly relying on the services of foreclosure consultants who advise the homeowner that the foreclosure consultant can obtain the remaining funds from the foreclosure sale if the homeowner executes an assignment of the surplus, a deed, or a power of attorney in favor of the foreclosure consultant. This results in the homeowner paying an exorbitant fee for a service when the homeowner could have obtained the remaining funds from the trustee's sale from the trustee directly for minimal cost if the homeowner had consulted legal counsel or had sufficient time to receive notices from the trustee pursuant to Section 2924j regarding how and where to make a claim for excess proceeds.
>
> (b) The Legislature further finds and declares that foreclosure consultants have a significant impact on the economy of this state and on the welfare of its citizens.
>
> (c) The intent and purposes of this article are the following:
>
> (1) To require that foreclosure consultant service agreements be expressed in writing; to safeguard the public against deceit and financial hardship; to permit rescission of foreclosure consultation contracts; to prohibit representations that tend to

mislead; and to encourage fair dealing in the rendition of foreclosure services.

(2) The provisions of this article shall be liberally construed to effectuate this intent and to achieve these purposes.

(Emphasis added)

19. The Legislative intent underpinning the Legislative definition in section 2945.1, subdivision (a) of a "foreclosure consultant" is consistent with the analysis set forth above. Broad and liberal construction of these provisions notwithstanding, the expressed Legislative intent highlighted in the bold and italicized provisions above identify a specific type of borrower to be protected; a residential owner/occupier defending his/her own personal residence from an already pending foreclosure, and a specific stage in the process; a foreclosure already taking place after a notice of default has already been filed advising the homeowner that the foreclosure is imminent. At the time respondent provided his services to the Ellsworths, neither of these required conditions were met, as set forth in the Factual Findings.

20. Civil Code section 2945.4 provides, in pertinent part, that, "It shall be a violation for a foreclosure consultant to ..." Civil Code section 2945.4 provides, in pertinent part, that, "It shall be a violation for a foreclosure consultant to ..."

21. In order for an individual to violate sections 2945.3 and 2945.4, as the Bureau alleges that respondent did, the Bureau must prove by clear and convincing evidence that respondent was acting as a "foreclosure consultant" within the meaning of that term provided for in section 2945.1. As set forth above and in the Factual Findings, the Bureau failed to meet its burden and did not prove that respondent acted as a foreclosure consultant in his dealings with the Ellsworths.

THE REMAINING ALLEGATIONS

22. The remainder of the First Cause of Action concludes with a cluster of loosely interrelated allegations that depend upon satisfactory proof of the allegations that preceded them addressed above. The remaining allegations charge that respondent failed to deliver trust funds to his broker, or at the broker's directions into the hands of the broker's principal, into a neutral escrow depository, or into his broker's trust fund, in violation of B&P section 10145, subdivision (c). As set forth in the Factual Findings, these allegations depend for their viability upon proof that respondent received advance fees acting in the capacity of a foreclosure consultant that should have been then deposited into his broker's trust or into a neutral depository. Those allegations were not proved, and therefore, this allegation suffers the same fate. In Paragraph 9 of the First Cause of Action the Bureau, further alleges that respondent violated B&P Code section 10177, subdivision (d), by willfully disregarding or violating any portion of the Real Estate Law, in conjunction with section 10085.6, the unlawful collection of advance fees related to loan modifications, and B&P Code section

10177, subdivision (g), negligence or incompetence in performing acts for which a license is required, and/or B&P Code section 10177, subdivision (q), violation of Civil Code sections 2945.3 in 2945.4, for unlawful collection of advance fees related to loan modifications. As set forth above, it was not proved that respondent violated Civil Code section 2945.3 or 2945.4, or B&P section 10085.6, alleging unlawful collection of advance fees acting in the capacity of a foreclosure consultant. Further, there was no evidence that respondent was negligent or incompetent, despite Ms. Ellsworth's opinions to the contrary. Thus, as set forth above in the Legal Conclusions, and in the Factual Findings, none of these additional allegations were proved.

SECOND CAUSE OF ACTION-ACTING AS A REAL ESTATE BROKER

23. In the Second Cause of Action, the Department again, as in its first allegation of the First Cause of Action, that beginning in January 2010 respondent, in the course of real estate activities described in the First Cause of Action, without the knowledge and consent of his employing real estate broker and using the corporation business name Faith & Integrity Financial Services & Insurance Inc., solicited lenders and borrowers for or negotiated loans or collected payments and/or perform services for borrowers or lenders or note owners, in connection with loans secured directly or collaterally by liens on real property for or in expectation of compensation with respect to the Ellsworth's rental property in Antioch and their primary residence in Yuba City. It was alleged that in doing so, respondent engaged in the business and acted in the capacity of a real estate broker, as defined by B&P section 10131, subdivision (d).

24. As determined in the First Cause of Action above, respondent did, for a small segment of the services he provided the Ellsworths, act as a real estate broker without being licensed as such. Since this allegation is a repeat of the charge in the First Cause of Action, a separate and distinct legal cause for imposition of discipline is not proved.

COSTS RECOVERY

25. B&P Code section 10106 provides, in pertinent part, as follows:

> (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.
>
> [¶] ... [¶]
>
> (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.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). The finding of the administrative law judge with regard to costs shall not be reviewable by the commissioner to increase the cost award. The commissioner may reduce or eliminate the cost award, or remand to the administrative law judge where the proposed decision fails to make a finding on costs requested pursuant to subdivision (a).

[¶] ... [¶]

26. B&P Code section 10106 permits the Bureau to seek recovery of investigation and enforcement costs, provided the Bureau prevails in the action. The Bureau prevailed in only one, and the least significant of all of the allegations made. As the Bureau did not prevail in the bulk of the action, the right to seek reimbursement of the bulk of the costs of investigation and enforcement proved in this matter did not arise.

27. Recovery of costs of investigation and enforcement must be assessed not only against section 10106's language, but also against the standards enunciated in *Zuckerman v. Board of Chiropractic Examiners* [15], 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

[15] *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

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.

28. Both section 10106 and *Zuckerman* require the Bureau to prevail in the action in order to raise the entitlement to seek reimbursement of investigative and enforcement costs. Per the first tenet of the *Zuckerman* factors listed above, the Bureau's right to seek reimbursement of costs in this matter is substantially diminished by the fact that respondent prevailed on most of the allegations in this matter, and particularly upon the most serious charges.

29. As set forth in the Factual Findings, the Bureau's costs of enforcement are presumptively reasonable and modest under the circumstances. The Bureau may recover its costs of enforcement in the amount of $333.75.

30. As set forth in the Factual Findings, some of the Bureau's costs of investigation are unreasonable and may not be recovered. Further, those costs must be substantially reduced due to the fact that respondent prevailed on most of the allegations. Under the circumstances, a reasonable award of investigative costs amounts to $666.25, making the total amount of costs recoverable as part of the disciplinary order $1000.

EVIDENCE OF REHABILITATION AND OUTCOME

31. 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.[16] The primary purpose of professional licensing schemes is the protection of the public, and the prevention of future harm to consumers.[17] "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."[18] "These statutes are designed with the purpose of protecting the public

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[16] *Ettinger v. Board of Medical Quality Assurance,* (1980) 135 Cal.App.3d 853, 856,

[17] *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476, *In re Kelly* (1990) 52 Cal.3d 487, 496.

[18] 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).

from fraud, misrepresentation, incompetence, and sharp practice."[19] "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."[20]

32. Proof of legal cause to revoke or suspend a license shifts the burden of producing evidence to the licensee to demonstrate good character and/or satisfactory rehabilitation in order to mitigate any potential penalty. Facts in aggravation must be balanced against facts in mitigation and evidence of rehabilitation in order to reach an appropriate outcome. In this instance, proof of legal cause to revoke or suspend respondent's real estate salesperson's license occurred only with respect to the single allegation regarding performance of some professional financial services activities for which a broker's license was required.

33. In mitigation, that violation was a single instance with a single client where respondent's capacity was far from clear. There is no pattern of violations of a similar sort. There is no prior history of any violation of any of the licensing standards of not just the Bureau, but of the several licenses respondent holds from the Department of Insurance and the SEC. There was no evidence that respondent engaged the activity that resulted in the violations as a business practice or as part of his financial services business. Respondent did not solicit, seek out or hold himself out as willing and able to perform the services that resulted in the violation, but rather backed into the transaction by being persuaded by much entreaty to assist a friend. Respondent never represented himself to be a licensed real estate broker or willing and able to perform any service for which a real estate broker licenses required to the Ellsworths or anyone else. The violation appeared to be entirely inadvertent, and there was no evidence that respondent consciously intended to violate or avoid the requirements of the law. Rather, the violation occurred as respondent, ever the hopeful financial product salesperson, responded to the pleas of friends for financial counseling and assistance by offering a mixed palette of debt counseling and financial planning services that crossed the line and leaked into providing counseling and assistance services regarding the Ellsworths real estate loans for which a real estate broker license is required.

34. Sooner or later, there comes the time when, "the complexity of that banquet of consequences to which we must all sit down" is revealed.[21] That banquet of consequences occurred for Ms. Ellsworth in August and September 2010 with respect to her Antioch rental property. Despite respondent's repeated warnings in 2008 and again from January until the fateful time later in 2010, Ms. Ellsworth's catastrophically poor fiscal decisions, coupled with the inability or unwillingness to restrain her extravagant spending, crashed, with significant adverse financial consequences.

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[19] *Harrington v. Bureau of Real Estate* (1989) 214 Cal.App. 3d 394, 402, *Goldberg v. Barger* (1974) 37 Cal.App.3d 987.

[20] *Id., Ring v. Smith* (1970) 5 Cal.App. 3d 197, 205.

[21] Robert Louis Stevenson, Essay (1879), "Old Mortality."

35. Ms. Ellsworth's vehement recriminations and fervent effort to blame respondent for all of those consequences was disingenuous and reflected a profound lack of insight. There was no proof of causation between anything respondent said or did, or should have said or done, and the harm complained of by Ms. Ellsworth. In fact, there is no reason to disbelieve respondents and Ms. Loy's testimony that had Ms. Ellsworth followed the spending discipline and financial plan respondent laid out for the Ellsworths in 2008 and in 2010, the catastrophic consequences could have been avoided, as there appeared to be sufficient income to service the debts, large as they were, if spending were curtailed and respondent's budget followed. In particular, there was no evidence that anything respondent did or failed to do caused the Ellsworths to default on their Antioch property loans and experience the foreclosure and its consequences.

36. In what appeared to be a consistent pattern developing from respondent's first financial discussions with them in 2008, the Ellsworths, and Ms. Ellsworth in particular, sought the path of least resistance to solve their financial problems. As Ms. Ellsworth observed in her written narrative attached to her complaint to the Bureau, she did indeed find herself painted into a rather tight corner. In coming to respondent seeking help and advice in 2008, and again in 2010, she initially was willing to self-deprecatingly acknowledge that she and her husband were responsible for painting themselves into this rather tight corner, and begged respondent and Ms. Loy for help. None of the four mortgages were in default, and although the Ellsworth's had epic personal and mortgage debt, they were still paying their bills. In the ensuing few months, Ms. Ellsworth's double-barreled refusal to follow respondent's financial plan or exhibit any reasonable spending restraint placed her and her husband into a position where no amount of help respondent or Ms. Loy could provide could resolve the problem.

37. It appears that respondent's retrospective appraisal of what Ms. Ellsworth intended and had already decided to do with respect to the Antioch rental property, perhaps even before they first met on January 23, 2010, regardless of what he advised, has substantial evidentiary support in this record. The lack of evidence that Ms. Ellsworth failed to make payments on her first and second mortgages on her primary Yuba City home strongly suggests that, on the strength of her previously successful effort in doing so in 2008, Ms. Ellsworth had already decided to try to obtain a mortgage modification of one sort or another on the two notes on the Antioch rental property, before she ever met with respondent on January 23, and sought to use whatever information and assistance respondent could provide in order to help her bring about that objective. Whether respondent cooperated and agreed to perform the loan modification for her or not was immaterial, and when he declined, she proceeded with her backup plan; carry the property as long as possible without making payments, retaining the payments and the rents, and then try to short sell the property if it went into default, and try to buy it back in her own short sale with money she saved by not paying on the mortgages and keeping the rent. If that failed, she could just walk away from those mortgage obligations. Under either approach, Ms. Ellsworth would get out from under the mortgages on the Antioch property, as a positive cash flow on the property was about to come to an end because the three-year term of the adjustable rate mortgage was about to

ratchet upward significantly, producing a substantial increase in the monthly payment. If the plan to buy the property back herself upon the expected short sale succeeded, she would obtain a de facto loan modification through a new mortgage at the lower short sale purchase price, funded by using the money she saved by not paying on the existing mortgages in order to finance the repurchase.

38. Ms. Ellsworth's initial self-deprecating confessions of fault for failing to follow respondent's financial and spending advice in 2008 due to "lack of focus," repeated with more passion and intensity in January 2010, because the problem was much more acute, mutated and finally vanished completely by August and September 2010, when the consequences of Ms. Ellsworth's pursuit of her own fiscal agenda, coupled with her lack of financial discipline and restraint appeared full force. Under the circumstances, Ms. Ellsworth's efforts to blame respondent and Ms. Loy for the loss of the Antioch property and the cost and tax consequences that went with it reflect a complete rejection of her own primary role in creating the catastrophic consequences she experienced, and a striking lack of insight, disingenuousness and a steadfast refusal to accept any responsibility for a wholly self- inflicted disaster. Ms. Ellsworth's inability and/or unwillingness to rein in her extravagant spending habits and her persistent efforts to attempt to solve her financial problems by paying as little as possible or nothing for the professional services she needed to help her, where the product entirely of her own decisions, as is her steadfast refusal at this point to accept any of the responsibility for the adverse outcomes.

CHARACTER EVIDENCE

39. Respondent submitted some persuasive evidence of his good character for trustworthiness and honesty, through Ms. Loy, whose testimony was persuasive and credible. Respondent does not and has not engaged in the conduct that resulted in the adverse finding of violation above, except in the one single instance proved, and under the unusual and unlikely to be repeated conditions and circumstances of his relationship with the Ellsworths.

40. In sum, there is no persuasive evidence in this record that respondent is dishonest, a person lacking integrity, or poses any meaningful threat to engage in dishonest dealing or unethical conduct if he continues as a real estate salesperson licensee, subject to the supervision of a licensed real estate broker, should he decide to continue to engage in activities for which his salesperson license is required. The Bureau's contentions that respondent has stubbornly refused to acknowledge his unlawful behavior and presented himself as lacking in candor to the Bureau's investigator and auditor, as well as in the evidentiary hearing, is overstated. Respondent's claims that he did not engage in unlawful loan modification activities, accept unlawful advance fees or operate as a mortgage consultant, alleged by the Bureau to be evidence that respondent is dishonest and lacking in candor, were proved to be meritorious, and thus not evidence of dishonesty, lack of integrity or a lack of candor.

41. It appears from the evidence that respondent has substantially moved his business activities away from real estate as far back as 2008, and certainly into the present,

focusing much more on his insurance and financial planning business. He seeks to retain his license, but it was far from clear whether he actually intends to continue using it to work in the real estate business.

42. A mild disciplinary sanction is warranted for the violation. But in this instance, and under the circumstances proved, none of the salutary public purposes set forth in the authorities cited just above, setting forth the public purpose to exclude and remove the crooked and the dishonest, and those lacking in personal moral responsibility and integrity from the roles of licensees, would be furthered by outright revoking the license. A stayed revocation with the right to a restricted license, with reporting and supervision requirements, accurately reflects the gravity of the violation proved, and the lack of evidence that respondent poses any meaningful danger to consumers of real estate services or unfitness to continue as a real estate broker licensee.

ORDER

All licenses and license rights issued by the by the Bureau of Real Estate to respondent William Anthony James are REVOKED; provided, however, a Restricted Real Estate Salesperson license shall be issued to respondent pursuant to section 10156.5 of the B&P Code if respondent makes application therefor and pays to the Bureau of Real Estate the appropriate fee for the restricted license within 90 days of 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 B&P Code, and to the following limitations, conditions and restrictions, imposed pursuant to the authority of section 10156.6 of the B&P Code:

Not Adopted

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event that respondent is convicted by guilty plea, plea of nolo contendere, or verdict of a crime that is substantially related to respondent's fitness or capacity to hold the restricted license.

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 salesperson license, nor for the removal of any of the conditions, limitations or restrictions of an unrestricted licensee until one (1) year has 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 agrees to exercise close supervision over the performance of the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall reimburse the Bureau for its costs of investigation and enforcement the sum of $1,000 within 60 days of the effective date of this Decision, or, on such other payment terms as the Bureau, in its discretion, shall determine based on respondent's financial condition.

6. 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.

Not Adopted

DATED: May 12, 2014

Stephen J. Smith

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings