

FILED

BEFORE THE BUREAU OF REAL ESTATE

DEC 04 2017

STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

By B. Nicholas

In the Matter of the Accusation of)	CalBRE No. H-6471 SAC
)	
THEODORE BEOTTGER HUTZ,)	OAH No. 2017030646
)	
Respondent.)	

DECISION

The Proposed Decision dated November 9, 2017, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The Decision suspends or revokes one or more real estate licenses.

Pursuant to Government Code Section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and

11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on DEC 26 2017.

IT IS SO ORDERED 12/1/17

WAYNE S. BELL
REAL ESTATE COMMISSIONER



Daniel J. Sandri

By: DANIEL J. SANDRI
Chief Deputy Commissioner

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

In the Matter of the Accusation Against:

THEODORE BEOTTGER HUTZ,

Respondent.

Case No. H-6471 SAC

OAH No. 2017030646

PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 15, 2017, in Sacramento, California.

Adriana Z. Badilas, Counsel for the Bureau of Real Estate (Bureau), represented complainant Tricia D. Parkhurst, Supervising Special Investigator of the Bureau, State of California.

Kresta Daly, Attorney at Law, represented Theodore Beottger Hutz (respondent), who was present at the hearing.

Evidence was received, and the record was held open for the receipt of written closing briefs. On August 15, 2017, OAH received respondent's closing brief, which was marked for identification as Exhibit I. Complainant's response brief was received on September 11, 2017, and marked for identification as Exhibit 9. Respondent's reply brief was received on October 6, 2017, and marked for identification as Exhibit J. The matter was submitted, and the record was closed on October 9, 2017.

FACTUAL FINDINGS

1. On October 4, 1985, the Bureau issued a real estate salesperson license to respondent.¹ On July 8, 1989, the Bureau issued real estate broker license B00899202 to respondent. Respondent's broker's license expires on December 1, 2017, unless renewed or revoked.

¹ Respondent's license history does not indicate whether his real estate salesperson license has expired or has been placed on inactive status. In this regard, it shall be considered active and in good standing.

2. On January 9, 2017, complainant made and filed the Accusation in her official capacity. Complainant seeks to discipline respondent's real estate licenses based upon his felony conviction described below and his failure to disclose his conviction to the Bureau within 30 days of his conviction.

3. Respondent timely filed a Notice of Defense. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

4. On February 21, 2017, Real Estate Commissioner Wayne S. Bell issued an "ORDER SUSPENDING REAL ESTATE LICENSE (Section 10186.1 of the California Business and Professions Code)" to respondent. The Order was issued pursuant to Business and Professions Code section 10186.1, subdivision (a), which provides, in part, that a license shall be suspended automatically during any time that the licensee is incarcerated after conviction of a felony.

5. At hearing, complainant moved to delete an alleged violation of Business and Professions Code section 10177, subdivision (j), fraud or dishonest dealing, in paragraph 3 of the Accusation. Respondent did not object, and complainant's motion to amend was granted. Paragraph 3 of the Accusation is amended as follows:

The facts alleged in Paragraphs 2, above, constitute cause under Sections 490 (conviction of a crime), Section 10177(b) (conviction of a crime) of the Code for the suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

Criminal Conviction

6. On September 12, 2016, in the United States District Court, Eastern District of California, Case No. CR-S-10-238-01, respondent was convicted, upon a plea of guilty, of violating Title 15 United States Code section 1,² Bid Rigging, a felony. Respondent was sentenced to five months in federal prison, and was ordered to pay \$76,670.30 in restitution. After release from imprisonment, respondent was placed on supervised release for a term of 24 months, with standard terms and conditions.

² Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. (15 U.S.C. § 1.) This is also known as the Sherman Antitrust Act.

7. On June 23, 2010, respondent entered into a Plea and Cooperation Agreement (plea agreement), wherein the government set forth the factual basis for respondent's guilty plea, as follows:

Beginning in or about February 2009 and continuing until in or about October 2009 (relevant period), defendant [respondent] participated in a conspiracy to rig bids at public real estate auctions held in San Joaquin County, California, located in the Eastern District of California. The primary purpose of this conspiracy was to suppress and restrain competition and obtain selected real estate offered at San Joaquin County public auctions at non-competitive prices. During the relevant period, defendant and his co-conspirators reached agreements not to bid against one another and to allocate properties among themselves. To carry out their agreements, defendant and his co-conspirators refrained from bidding or refrained from bidding up the price for auctioned properties. In many instances, defendant and his co-conspirators held private auctions, open only to members of the conspiracy, to rebid the property. Defendant and his co-conspirators distributed the proceeds of the private auctions as payoffs to the other, non-successful bidders in the private auction, based upon a predetermined formula agreed upon by the members of the conspiracy, for refraining from bidding on the property at the public auction.

During the relevant period, the business activities of defendant and co-conspirators were within the flow of, and substantially affected, interstate trade and commerce. For example, mortgage holders located in states other than California held mortgages, appointed trustees, and received proceeds from the public auctions that were subject to the bid-rigging agreement.

On page 3 of the plea agreement, respondent agreed that he was, in fact, guilty of the charges and that the factual basis for his guilty plea was true and accurate.

Respondent's Evidence

8. At hearing, respondent provided an explanation for the events that led to his conviction. Respondent testified that in 2009, he went through a devastating divorce, and was an "emotional basket case." He stopped working about the time of the real estate collapse. He began going to foreclosure sales as an opportunity to make money. Respondent knew the other bidders at the foreclosure sales, and they formed the San Joaquin Bidders Alliance. Respondent asserted that they were all knowledgeable and experienced in real estate and foreclosure sales. He became aware of "secondary auctions," where the group

would buy properties together, and divide the proceeds after the sales. He investigated the legality of the secondary sales, asking local lawyers about his activities. Respondent believed that the group engaged in legal conduct based upon his inquiries with local lawyers, who indicated that respondent's activities were not in violation of California law. He was not informed, and did not know that he was violating federal law. Respondent asserted that he would not have engaged in the secondary auctions had he known that he was violating the Sherman Antitrust Act.

9. Respondent explained that at the real estate foreclosure auction, the bank set the initial sales price for the property. If no one wanted to purchase the property at the bank's set price, the bank became the owner of the property. If respondent bought the property, he provided a cashier's check to the bank. The cashier's check was drawn on his own personal bank account, made payable to respondent, endorsed by respondent, and given to the bank. After the foreclosure auction, respondent and his business partners met at a coffee shop and discussed "buying out" the other partners. Respondent described this buyout as the "secondary auction." Respondent believed that the secondary auction was not dishonest, and that he "bid open and honestly for my own account." Respondent intended to openly disclose the secondary auction transactions to the Internal Revenue Service. Respondent conceded that the secondary auctions were private, and were open only to his partners. Respondent received a portion of the proceeds of sale in the secondary auctions. Respondent maintained records of the financial transactions to pay his taxes.

10. Respondent was contacted by law enforcement authorities in 2009 for violating the Sherman Antitrust Act. Respondent began meeting with government officials. He wanted to cooperate and be forthcoming, and provided all of his documents related to foreclosure auctions.

11. Prior to his conviction, respondent asserted that he made changes in his life. He finalized his divorce, and took significant time off, spending time "in Maui on the beach," and time with his children. Respondent remarried approximately one and a half years ago. He has two children and one stepdaughter. They all attend high school. Respondent has worked 60 to 70 community service hours required by his criminal probation in coaching swimming, water polo, and children's aquatics.

12. In 2016, respondent was convicted of one count in violation of the Sherman Antitrust Act, and was sentenced to serve five months in a federal prison facility in Taft, California. He was ordered to pay fines and restitution of \$76,000. He asserted that the payment of restitution was "a mystery to me," because the banks did not make any restitution claims. However, respondent was required to pay restitution as a condition of his plea agreement. Respondent asserted that he was fined \$250,000, which he promptly paid after selling his personal residence. He has completely paid all of his court fines and restitution.

13. Respondent is currently on informal probation. He will be on probation until May 2019.

14. Respondent is 62 years old. He obtained a bachelor's degree in Business Administration from the University of the Pacific in 1978, a master's degree in Family Counseling from California State University, Northridge in 1991, and holds a current contractor's license and notary public license. In 1996, respondent obtained his Certified Alcoholism and Drug Abuse Counselor certificate from the University of the Pacific. Respondent has attended numerous continuing education classes in real estate during his 30 year career, and has worked in the counseling field for approximately 10 years.

15. Respondent has been actively involved with Alcoholics Anonymous (AA) for over 30 years. He has attended an average of five meetings per week over that time. As an active member of AA, respondent has run meetings, organized men's retreats, and has been a sponsor.

16. Respondent moved from Stockton to Lodi to help his parents, who have health issues. He feels that his conviction put him in a position to do good, and it has been a "gift," in that he has been given an opportunity to give back, particularly in helping his parents.

17. Respondent denied failing to disclose his conviction to the Bureau within 30 days of his conviction. He asserted that he contacted Bureau Special Investigator Marcus Beltramo, and had an October 11, 2016 in-person interview with Mr. Beltramo regarding his conviction. Mr. Beltramo testified at hearing and confirmed the meeting wherein respondent disclosed his conviction. Mr. Beltramo stated that respondent was "very forthcoming with what information he had."

18. Steven Warner, a real estate broker and sales agent in Stockton, testified on respondent's behalf. Mr. Warner has transacted real estate for over 30 years in San Joaquin County, and has known respondent for over 40 years. Mr. Warner speaks with respondent three to five times per week, and knows of respondent's conviction and the circumstances. He affirmed that respondent has been actively involved with AA for over 30 years. Mr. Warner has engaged in over 20 real estate business deals with respondent over the years. He has had ample opportunity to assess respondent's character for honesty and truthfulness. Mr. Warner asserted that respondent has "always been above board and trustworthy."

19. Respondent submitted a signed letter from Wendy E. Reyes, United States Probation Officer, dated August 14, 2017, which was considered to the extent permitted by Government Code section 11513, subdivision (d).³ Officer Reyes confirmed that respondent was sentenced on September 12, 2016, in federal court for his conviction for violating Title 15 United States Code section 1, Bid Rigging, a Class C Felony. Officer Reyes also confirmed the terms of respondent's sentence. Special conditions of respondent's probation include: warrantless search, do not dispose of assets without approval, apply all monies

³ Government Code section 11513, subdivision (d), provides, in pertinent part, that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

received toward unpaid restitution, financial disclosure, do not open additional lines of credit without approval, and complete 300 hours of unpaid community service over the term of the supervised release.

20. Officer Reyes indicated that respondent began his term of supervised release on May 5, 2017. Respondent immediately started his community service hours at Horseshoe Bend Recreational Park, where he worked to remove fire brush. In May 2017, respondent completed 190 hours of manual labor at the park, and completed an additional 56 hours of manual labor at the park in June 2017. Respondent also performed 60 hours of community service providing swim and water polo coaching to youth group children at Bear Creek Aquatics in Stockton. Respondent completed his community service obligation of 300 hours in his first two months on supervision.

21. Regarding his financial obligations, Officer Reyes wrote that respondent paid his special assessment and restitution in full on December 5, 2016. All financial obligations owed by respondent have been paid.

22. Lastly, Officer Reyes wrote that respondent has complied with all terms and conditions of his supervised release as ordered by the court. Respondent's case has been identified as "low risk" through the use of the probation office's risk assessment tool. Officer Reyes further wrote:

Cases identified as such are transferred to an unsupervised caseload, as these cases are not thought to be in need of active supervision. This is based on characteristics such as the offender's lack of criminal history and his overall stability, including having a stable family environment, pro-social support, no drug or alcohol abuse issues, and financial stability. Given Mr. Hutz' performance on supervision, it appears unlikely that he will reoffend.

Officer Reyes' letter describes in detail respondent's exemplary efforts at complying with the terms of his supervised release, and is given great weight.

Substantial Relationship

23. A conspiracy is an "agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose." (Black's Law Dictionary (10th ed. 2014).) Respondent was convicted of a crime where, as stated in his plea agreement, he "participated in a conspiracy to rig bids at public real estate auctions . . ." Respondent entered into the plea agreement, acknowledging that he participated in the conspiracy by profiting from the proceeds of the real estate sales in the secondary auctions amongst his partners.

24. Complainant asserts that respondent's criminal conviction is substantially related to the qualifications, functions or duties of a real estate licensee, thus constituting a basis for discipline pursuant to Business and Professions Code section 10177, subdivision (b). California Code of Regulations, title 10, section 2910, sets forth the Criteria of Substantial Relationship. Complainant asserts that respondent's conviction involved: (1) the fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person; (2) the employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end; (3) doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another; and (4) conduct which demonstrates a pattern of repeated and willful disregard of the law. (Cal. Code Regs., tit. 10, § 2910, subds. (a)(1), (a)(4), (a)(8), & (a)(10).)

FRAUDULENT TAKING, OBTAINING, APPROPRIATING, OR RETAINING FUNDS (CAL. CODE REGS., TIT. 10, SUBD. (A)(1))

25. With respect to California Code of Regulations, title 10, section 2910, subdivision (a)(1), complainant asserts that a conspiracy to rig bids necessarily involves dishonesty and deceit, and the very nature of a conspiracy requires an agreement between two or more people for the purpose of committing an unlawful act. Complainant believes that respondent and his co-conspirators stole by taking advantage of a vulnerable and distressed real estate market. Respondent asserts that there was no fraud in the factual basis to his plea agreement.

26. Respondent's plea agreement specifically states that the "primary purpose of this conspiracy was to suppress and restrain competition and obtain selected real estate offered at San Joaquin county public auctions at non-competitive prices. During the relevant period, [respondent] and his co-conspirators reached agreements not to bid against one another and to allocate properties among themselves." "[Respondent] and his co-conspirators distributed the proceeds of the private auctions as payoffs to the other, non-successful bidders in the private auction." Respondent agreed that he engaged in such conduct. While the word "fraud" is not explicitly stated in the plea agreement, the evidence established that respondent acted in concert with others to "suppress and restrain competition," at the expense of the others who lawfully engaged in the public auctions. By his conduct, respondent engaged in false representations and/or concealment that should have been disclosed. The evidence established that respondent's conduct involved the fraudulent taking, obtaining, appropriating, or retaining funds belonging to others.

EMPLOYMENT OF BRIBERY, FRAUD, DECEIT, FALSEHOOD, OR MISREPRESENTATION (CAL. CODE REGS., TIT. 10, SUBD. (A)(4))

27. With respect to California Code of Regulations, title 10, section 2910, subdivision (a)(4), complainant asserts that respondent joined the conspiracy for his own financial interests. He testified at hearing that he engaged in "secondary auctions" because it was an opportunity to make money. Respondent asserts that there was no evidence of

bribery, fraud, deceit, falsehood or misrepresentations. Respondent consulted a lawyer and received assurances that his conduct was legal before engaging in the secondary auctions. Respondent asserts that he had no idea what he was doing was illegal.

28. The evidence established that, by his conduct, respondent employed fraud, deceit, and misrepresentation when engaging in illegal bid rigging, to achieve an end. Respondent's goal was to profit from the bid rigging scheme.

**UNLAWFUL ACT WITH INTENT OF CONFERRING FINANCIAL OR ECONOMIC BENEFIT
(CAL. CODE REGS., TIT. 10, SUBD. (A)(8))**

29. With respect to California Code of Regulations, title 10, section 2910, subdivision (a)(8), complainant asserts that respondent paid and received payoffs, and purchased 30 properties totaling \$6 million through the bid rigging auctions. In addition, respondent pled to distributing proceeds from private auctions as payoffs to himself and other co-conspirators. Such conduct showed that respondent committed an unlawful act with the intent of conferring a financial or economic benefit upon himself. Respondent asserts that he did not knowingly break the law. He did not engage in willful ignorance where he hoped his conduct was legal, but ignored warning signs to the contrary. Respondent again asserted that he consulted with a lawyer before joining the secondary auctions. Applying California Code of Regulations, title 10, section 2910, subdivision (a)(8), would bring about an "absurd result on these facts," according to respondent.

30. The evidence established that respondent engaged in an unlawful conspiracy of bid rigging in order to confer a financial benefit on himself. Respondent's assertion that he did not intend to knowingly break the law in this regard was not persuasive.

**CONDUCT WHICH DEMONSTRATES PATTERN OF REPEATED AND WILLFUL DISREGARD
OF LAW (CAL. CODE REGS., TIT. 10, SUBD. (A)(10))**

31. With respect to California Code of Regulations, title 10, section 2910, subdivision (a)(10), complainant asserts that respondent's participation in the conspiracy demonstrated a willful disregard of the law that occurred from February 2009 to October 2009. Respondent purchased 30 properties, establishing a pattern of repeated and willful disregard for the law. Respondent asserts that application of subdivision (a)(10) is "nonsensical." Respondent believed his conduct to be legal, and kept records of his transactions for tax purposes. Such conduct, respondent asserts, is indicative of a person who sought to follow the law.

32. Respondent pled to knowingly joining the conspiracy to engage in bid rigging. The evidence established that he engaged in a pattern of repeated and willful disregard for the law.

Failure to Report Conviction

33. Real estate licensees are required to report any convictions in writing to the Bureau within 30 days of the conviction. (Bus. & Prof. Code, § 10186.2.) Respondent was convicted on September 12, 2016. On October 6, 2016, respondent filed with the Bureau a Confidential Interview Information Statement disclosing his conviction, and attached a detailed letter of explanation and chronology of events leading to his conviction. The evidence established that respondent complied with the reporting requirement within 30 days of his conviction.

Discussion

34. The Bureau has developed guidelines for use in evaluating the rehabilitation of a licensee against whom an administrative disciplinary proceeding for revocation or suspension of the license has been initiated on account of a crime committed by the licensee. California Code of Regulations, title 16, section 2912, sets forth the Criteria for Rehabilitation for Revocation or Suspension of a real estate license. The relevant criteria are:

(a) The time that has elapsed since commission of the act(s) or offense(s):

(1) The passage of less than two years after the most recent criminal conviction or act of the licensee that is a cause of action in the Bureau's Accusation against the licensee is inadequate to demonstrate rehabilitation.

(2) Notwithstanding subdivision (a)(1), above, the two year period may be increased based upon consideration of the following:

(A) The nature and severity of the crime(s) and/or act(s) committed by the licensee.

[¶] . . . [¶]

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee, or escheat to the State of these monies or other properties if the victim(s) cannot be located.

(c) Expungement of the conviction(s) which culminated in the administrative proceeding to take disciplinary action.

[¶] . . . [¶]

(e) Successful completion or early discharge from probation or parole.

[¶] . . . [¶]

(g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.

(h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.

(i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.

(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

(k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.

(l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

(1) Testimony and/or other evidence of rehabilitation submitted by the licensee.

(2) Evidence from family members, friends and/or other persons familiar with the licensee's previous conduct and with subsequent attitudes and/or behavioral patterns.

(3) Evidence from probation or parole officers and/or law enforcement officials competent to testify as to licensee's social adjustments.

[¶] . . . [¶]

(5) Absence of subsequent felony convictions, misdemeanor convictions, or other conduct that provides grounds to discipline a real estate licensee, which reflect an inability to conform to societal rules when considered in light of the conduct in question.

35. Passage of Time Since Conviction. It has been one year since respondent's criminal conviction, although he entered into a plea agreement six years prior, in 2010. The nature of respondent's conviction was serious, because it involved bid rigging at public auctions. Respondent held a real estate broker's license and salesperson's license during the relevant period.

36. Payment of Restitution. Respondent promptly paid all restitution in the amount of \$76,670.30, and a fine of \$250,000. Respondent also paid a \$100 special assessment. Restitution was paid to various listed financial institutions identified by the court. All financial obligations imposed by the court have been paid in full.

37. Expungement of Conviction. Respondent presented no evidence to show that his conviction has been, or is in the process of being expunged, if allowed under the federal law. He testified that he was advised that a federal crime cannot be expunged.

38. Successful Completion or Early Discharge from Probation or Parole. On September 12, 2016, respondent was sentenced to serve five months in the custody of the Bureau of Prisons, followed by a 24-month term of supervised release. He began his term of supervised release on May 5, 2017, which is expected to be completed in May 2019. Officer Reyes has indicated that respondent's case "has been identified as 'low risk' through the probation office's risk assessment tool, and that such cases are transferred to an unsupervised caseload." However, Officer Reyes did not affirmatively state that this has happened yet.

39. Correction of Business Practices. Respondent has changed his business associations, and does not intend to engage in the same conduct that led to his conviction ever again. Respondent has been the owner and broker of Fortune Real Estate in Stockton since 1989. Respondent hopes to retain his real estate licenses in order to continue to engage in legitimate real estate transactions.

40. New and Different Social and Business Relationships. Respondent appears to engage in new and different social and business relationships from those which existed at the time of the commission of the acts that led to his criminal conviction. He moved from Stockton to Lodi. He does not do business with the individuals involved in the bid rigging conspiracy.

41. Stability of Family Life. Respondent is remarried, spends significant time with his children, moved from Stockton to Lodi to help his parents who are in poor health, and continues to be actively involved in AA in a leadership role.

42. Significant and Conscientious Involvement in the Community. Respondent completed 300 hours of community service in his first two months on supervised release. These community service hours were required by the court. Respondent presented very little evidence of significant and conscientious involvement in his community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

43. Change in Attitude. Respondent has acknowledged his wrongdoing, and takes full responsibility for his past behavior. He did not feel that what he was doing in 2009 was illegal, but has since learned that he violated the Sherman Antitrust Act. Had he known what he was doing was illegal, he would not have engaged in the bid rigging activity. It has been judicially recognized that rehabilitation requires an acknowledgment of wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Ca1.3d 933, 940 [Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation].) Respondent demonstrated some rehabilitation by recognizing the criminality of his conduct. Officer Reyes indicated that respondent is unlikely to reoffend. Mr. Warner, who testified on respondent's behalf, indicated that respondent has been trustworthy in his 20 business dealings with respondent. It appears from the evidence that respondent has learned a serious lesson here. His five-month sentence in federal prison has undoubtedly given him time to reflect on his criminal conduct. Respondent has demonstrated a change in attitude since his 2016 conviction.

44. Respondent demonstrated some rehabilitation since his conviction in 2016. However, it is well-established that rehabilitative efforts when a person is on criminal probation are accorded less weight, "[s]ince persons under the direct supervision of correctional authorities are required to behave in exemplary fashion. . ." (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Respondent will remain on supervised release until May 2019. Not enough time has elapsed in order for respondent to show sufficient rehabilitation. The public safety is served by revoking respondent's real estate licenses at this time.

Costs

45. Complainant has requested reimbursement for costs incurred by the Bureau in connection with prosecution and investigation of this matter, in the total amount of \$2,635.80. (\$1,246 for prosecution, and \$1,389.80 for investigation). The costs were certified in the manner provided by Business and Professions Code section 10106. The time spent appears to be reasonable, and the activities claimed were necessary to the development and presentation of the case. Complainant's request for costs is addressed further in the Legal Conclusions below.

///

LEGAL CONCLUSIONS

Applicable Law

1. Complainant has the burden of proving the grounds for discipline alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212.) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)
2. Business and Professions Code section 490, subdivision (a), provides that a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.
3. Business and Professions Code section 10177, subdivision (b), provides, in pertinent part, that the commissioner may suspend or revoke the license of a real estate licensee who has been convicted of a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee. Subdivision (d) provides for suspension or revocation if the licensee has willfully disregarded or violated the Real Estate Law or the rules or regulations of the commissioner.
4. Business and Professions Code section 10186.2 provides, in part:
 - (a)(1) A licensee shall report any of the following to the Bureau:
 - (A) The bringing of an indictment or information charging a felony against the licensee.
 - (B) The conviction of the licensee, including any verdict of guilty, or plea of guilty or no contest, of any felony or misdemeanor.
 - [¶] . . . [¶]
 - (2) The report required by this subdivision shall be made in writing within 30 days of the date of the bringing of the indictment or the charging of a felony, the conviction, or the disciplinary action.
5. As set forth in Findings 22 through 31, respondent's conviction is substantially related to the qualifications, functions, or duties of a real estate licensee, pursuant to California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (a)(4), (a)(8), and (a)(10) in that respondent engaged in a conspiracy to rig bids at public auctions for his own financial benefit.

Causes for Discipline

6. Cause for discipline of respondent's real estate licenses was established pursuant to Business and Professions Code sections 490 and 10177, subdivision (b), by reason of Findings 6, 7, and 22 through 31, in that in that respondent was convicted of a felony which is a crime substantially related to the qualifications, functions, or duties of a real estate licensee.

7. Cause for discipline of respondent's real estate licenses was not established pursuant to Business and Professions Code section 10186.2, by reason of Finding 32, in that respondent did inform the Bureau of his conviction on October 6, 2016, within the 30 day reporting requirement.

Conclusion

8. When all the evidence is considered, protection of the public requires that respondent's real estate licenses be revoked at this time.

Costs of Investigation and Prosecution

9. Business and Professions Code section 10106 provides, in pertinent part, that the commissioner may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Subdivision (c), states:

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

10. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

11. As set forth in Finding 44, complainant requested that respondent be ordered to pay the costs of the investigation and enforcement incurred up to the date of hearing in the

total amount of \$2,635.80. When all the relevant factors set forth in *Zuckerman* are considered, and balancing respondent's concerns against the Bureau's obligation to protect the public through licensing actions such as this one, assessment of costs in the amount of \$2,635.80, in bringing and prosecuting the Accusation is reasonable and appropriate.

ORDER

1. All licenses and licensing rights of respondent Theodore Beottger Hutz under the Real Estate Law are REVOKED.
2. Respondent shall pay to the Bureau costs associated with its investigation and enforcement pursuant to Business and Professions Code Section 10106 in the amount of \$2,635.80, if and when his license is reinstated.

DATED: November 9, 2017

DocuSigned by:

Danette C. Brown

ACEA0DD79CC44EF...

DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings