

FILED

JUN 12 2015

BUREAU OF REAL ESTATE

By S. Black

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	
)	No. H-11746 SF
MARIO BURNIAS,)	
)	OAH No. 2014090325
Respondent.)	

DECISION

The Proposed Decision dated April 7, 2015, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

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

Findings, Page 12, Paragraph 4, Line 13: "crime appear" shall read: "crime victim appear".

Findings, Page 14, Paragraph 2, Line 6: "believable" shall read: "unbelievable".

Findings, Page 14, Paragraph 2, Line 8: "ethically" shall read: "ethical".

Findings, Page 16, Paragraph 6, Line 12: "with holding" shall read: "withholding".

Findings, Page 20, Paragraph 3, Line 21: "department" shall read: "Bureau".

Findings, Page 22, Paragraph 4, Line 2: "Department of Consumer Affairs on behalf of the bureau" shall read: "Bureau of Real Estate".

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

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 Section 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 JUL 03 2015.

IT IS SO ORDERED

6/12/2015

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 of:

MARIO BURNIAS

Respondent.

Case No. H-11746 SF

OAH No. 2014090325

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter on March 12, 2015, in Oakland, California.

Attorney at Law Nelson McElmurry represented respondent Mario Burnias, who appeared at the hearing.

Bureau Legal Division Extern Emily Allyn along with Real Estate Counsel Richard Uno represented complainant Robin S. Tanner, Deputy Real Estate Commissioner, Bureau of Real Estate, Department of Consumer Affairs, State of California.

On March 12, 2015, the parties submitted the matter and the record closed for preparation of a proposed decision in this matter.

FACTUAL FINDINGS

1. On August 8, 2014, complainant Robin S. Tanner (complainant), in her capacity as Deputy Real Estate Commissioner, Bureau of Real Estate, Department of Consumer Affairs, State of California (the bureau), made and filed the Accusation against Mario Burnias (respondent). The bureau filed the Accusation on August 12, 2014.
2. Currently, respondent is licensed and has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) as a real estate broker and holds license number B01502042. The real estate broker license issued to respondent will expire on October 1, 2017, unless surrendered, revoked or renewed before that date.

Record of Criminal Convictions

A. CONVICTION - OCTOBER 2012/ SENTENCING - MAY 2013 GRAND THEFT

3. On October 30, 2012, under Case Number C 1121154, in the California Superior Court in and for the County of Santa Clara, respondent was convicted, on his plea of nolo contendere, of violating Penal Code sections 484/487, subdivision (a), (grand theft), a felony, and Corporations Code section 24501/25540, subdivision (b) (communication containing untrue statements and omissions of material facts), a felony.

On May 10, 2013, under Case Number C 1121154, at a "Probation and Sentencing" proceeding, when respondent demonstrated to the satisfaction of the superior court that he had made full restitution to the victim of his crimes through a final payment of restitution of \$58,000 to the crime victim, the court dismissed the felony count for unlawful communication of untrue statements or unlawfully making omissions of material facts. Also, at the probation and sentencing hearing, the superior court reduced the count of felony grand theft to a misdemeanor.

4. The facts and circumstances giving rise to respondent's October 2012 conviction, and May 2013 sentencing, for the offense of grand theft spring from respondent's acts and omissions that arose with regard to a real estate investment transaction that involved respondent accepting approximately \$88,000 from a woman, Anna Castenda, who was later viewed by law enforcement investigators as being a very unsophisticated investor.

In approximately 2008, respondent was the principal in a real estate development corporation called Pinnacle Development, Inc. (Pinnacle), which maintained an office on Quimby Road in San Jose, California. (The same office housed respondent's real estate broker's office. Also, respondent operated a franchise of a national real estate corporation known as Hilton Stanley Capital or HSC from the Quimby Road address in the late 1980s.) Through Pinnacle, respondent acquired distressed real estate parcels, refurbished the real property and attempted to sell the real property for a profit.

A report titled "Real Estate Fraud" dated November 9, 2010, by the Office of the District Attorney, County of Santa Clara, provides investigative findings and determinations that vividly describe the nature and extent of respondent's role in poorly managing business arrangements that led to substantial losses for persons involved along with respondent in a contemplated investment in a house located on Garfield Avenue in San Jose, California.

In 2005 or 2006, respondent's wife's mother, Esperanza Meorado, acquired the house on Garfield Avenue. The house was both small in size and very run down when it was purchased by respondent's mother-in-law. Respondent, however, perceived a potential to develop that Garfield Avenue house. He supposedly convinced his wife's mother to permit him to develop the house for resale.

Initially, respondent secured an investor named Nancy Chan. Hence, a portion of the real property was to be owned in joint tenancy with respondent, holding an interest as his sole and separate property, and Ms. Mejorado, holding an interest as her sole property, together holding 62.5 percent along with respondent for the property; while respondent planned for Ms. Chan was to hold an undivided 37.5 percent interest as her sole and separate property.

In approximately August 2008, Anna Castanda (the crime victim) attended an "investment" presentation at respondent's Quimby Road office. Respondent was the principal speaker, but his wife, Ruth Burnias, also made a presentation. The crime victim attended the presentation, which involved several other persons, and she joined the group of attendees to ride in a van to various real estate sites where respondent claimed were investment opportunities. Respondent showed the crime victim the Garfield Avenue home and he represented that the remodel of the house would be completed soon; that the property would be a good investment; and, that the investment would pay off "in good money." Initially, the crime victim declined to invest in the Garfield Avenue home project. But, in October 2008, respondent and his wife solicited the crime victim to come to the Quimby Road office with regard to making a short-term loan to a potential homebuyer and client of respondent. (The crime victim made the loan of \$12,000 on respondent's promise that he would personally repay \$13,000 to the crime victim, within a short passage of time.) At approximately the time that the original loan was due to be paid, respondent presented again the Garfield Avenue project investment opportunity and he advanced that the project would provide a very good return. The crime victim agreed to accept respondent's offer to invest in to the Garfield Avenue project based upon respondent's promise that she would earn a 25 percent interest return from her investment of \$88,000, which would be immediately paid upon the completion of the construction work. (She declined respondent's alternative offer that she would receive a 35 percent interest gain on her investment should she wait to collect the principal and interest when the house sold. Also, respondent had sought \$100,000, but the crime victim stated that the extent of her savings was the \$88,000, which respondent took from the crime victim.) The crime victim allowed her original loan principal (\$12,000) and the promised interest amount to be paid into Garfield Avenue project. On January 5, 2009, the crime victim gave respondent a cashier's check for \$75,000 for her investment into the Garfield Avenue project, so that her entire investment reached \$88,000.

At the time of her investment in the Garfield Avenue project during January 2009, respondent had no recorded interest in the deed for the property; rather the subject property was held entirely by respondent's mother-in-law, Ms. Mejorado. (Although a draft deed purported to show an interest in the Garfield Avenue property in the names of respondent, Ms. Chan, the crime victim and Ms. Mejorado, the Grant Deed documents were never properly recorded.)

When the crime victim made her investment in the supposed construction project, respondent told the victim that her money would be used to pay for completion of the actual remodeling construction of the house on Garfield Avenue. Rather, investigators with the Santa Clara County District Attorney's Office studied all of the bank accounts associated

with respondent to detect that crime victim's \$88,000 investment was not used towards the construction project, but rather her money was used to pay respondent's employees and real estate agents and to cover respondent's personal expenses.

After she had placed her savings with respondent as an investor in the Garfield Avenue house project, the crime victim traveled to the project site to view the construction's progress. Within time, the construction work on the house stopped and the project appeared to be abandoned. When the crime victim made an inquiry of respondent, he stated that the bank took the property. Respondent told the crime victim that he could not return her investment principal, because he did not have the money to pay her.

In October 2010, the crime victim filed a complaint regarding respondent with law enforcement agencies in Santa Clara County. A detailed investigation ensued. Findings, determinations and comments set out in the investigative report by law enforcement agents cast a poor light upon respondent's role as a real estate professional. The investigative findings and conclusions include the following:

[Respondent] is a licensed California real estate broker. His explanations did not sound as though [his statements were] coming from someone schooled in real estate. [The investigator] asked if [respondent was] ever [named] on the title to the Garfield property. He replied, no . . . but he was supposed to [have been named on the deed, according to respondent]. (page 5 of 8, in 11/9/10 report.)

Before beginning the Garfield project did [respondent] ever form an opinion about how much money it would take to [complete] the project? . . . [Respondent] sounded unsure, but seemed to guess at around \$350K or so (page 6 of 8, in 11/9/10 report.)

[Respondent] said he has never sold securities before, to his knowledge. He doesn't know what a security is In this Garfield transaction, [respondent] never had any communications with the Department of Corporations. [Respondent] didn't understand why [the investigator] would ask about securities (page 6 of 8, in 11/9/10 report.)

What did you tell (disclose to) [the crime victim] at the beginning of the investment idea? How was the investment described to her? [Respondent's] answer was vague. He told her that they were going to sell the property for about \$1.3 million and there was already a construction loan in place [¶] How does a real estate broker - such as yourself - predict with any degree of accuracy what a property will sell for several

months later, when you wouldn't know the future condition of the economy? [Respondent said,] we were just forecasting based on the comparables. (page 7 of 8, in 11/9/10 report.)

[Regarding the "worth" of the Garfield Avenue house, respondent told the investigators] about \$600,000, he's not sure. [Respondent] gave a confusing account of when [his mother-in-law] was supposed to have transferred title on the property – either at the time of the purchase or some time after construction had begun and the framing was up. [Respondent] continued a confusing explanation of whether he ever 'legally' acquired title to the property or not. [Respondent] agreed that the property was in [his mother-in-law's] name, and his name was not on title, but that he tried to get his name on title [Respondent] argued that both [investor Nancy Chan and the crime victim] had every opportunity to record the grant deed if they wanted to – although [respondent] was . . . the only person who held the original inked documents and the [R]ecorder's office doesn't accept copies (page 8 of 8, in 11/9/10 report.)

[The investigator asked] how would you think that you were on title if [the county recorder's office] sent [the rejected grant deed document] back to you? [Respondent said] because the construction loan is in [respondent's] name. [Respondent] said that when he [entered into] the construction loan and [the loan] was processed through a title company, the title company said [respondent] had to be on title to the property in order to get the loan (page 8 of 8, in 11/9/10 report.)

[The investigator] told [respondent] that [deed] doesn't look like that particular title transfer document was ever recorded. [Respondent] replied that he assumed that the title company [had] recorded it. (page 7 of 8, in 11/9/10 report.)

[Respondent] was so confusing, vague and stuttering when trying to explain key questionable issues in the case (page 7 of 8, in 11/9/10 report.)

[Respondent] said a grant deed was supposed to have been recorded to reflect [the crime victim's] 25% interest. For some reason [respondent's] staff did not record the grant deed. [Respondent] told [the crime victim] that she could (also) record the grant deed [Respondent] examined [the copy of unrecorded grant deed that was in the presence of the

investigator] and [he] could not understand why the county rejected [filing the grant deed].

[Respondent] did not deposit [the crime victim's] money into the Garfield account because [the funds were] purchase money for a 25% interest in the project. [The crime victim's investment] became his money.

By reason of the investigative findings, on November 5, 2011, the Santa Clara County District Attorney's Office determined that "the evidence shows that [respondent] either misrepresented material facts about the Garfield [Avenue] property investment to [the crime victim] or [he] used the position of trust he developed to use [the crime victim's] money for other than her intended purpose."

On November 23, 2011, a deputy district attorney filed in the Santa Clara County Superior Court a felony complaint against respondent. The felony complaint set out allegations under two felony counts. Count 1 in the felony complaint set out that respondent committed the crime of grand theft of personal property when he unlawfully took \$87,000 which was the property of the crime victim in violation of Penal Code sections 484/487, subdivision (a). The felony complaint's Count 2 alleged that respondent committed the crime of making "communications containing untrue statements and omissions of material facts" when respondent "sold" a security, namely "evidence of indebtedness," to wit, a 25% interest in a real estate development project as defined in Corporations Code section 25019, in violation of Corporations Code section 25401/ 25540, [subdivision] (b). The latter allegation set out in particular that respondent's communication to the crime victim "included an untrue statement of a material fact and omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Also, the felony complaint set out that the commission by respondent of the crime that was intended to take, damage or destroy property having a value exceeding \$65,000, necessitated an enhancement of an additional year in state prison under Penal Code section 12022.6, subdivision (a)(1).

Nearly one year after the filing of the felony complaint, respondent appeared, on October 30, 2012, at a superior court proceeding, which was captioned "disposition." At the October 2012 hearing, the superior court entered a note recording that respondent made a plea of nolo contendere to the above stated felonies. Despite the prospect of respondent spending several years in state prison by reason of the convictions for the above mentioned felonies, on October 30, 2012, the criminal court noted "[six] months [county jail] if restitution paid in full." Also, the superior court noted that use of EMP (the electronic monitoring program), that is an ankle bracelet with house detention, might be "possible" if respondent assured that restitution was timely paid in full to the crime victim. Further, the superior court judge wrote, "\$58,000 to victim by sentencing - [hence, the convictions] may be reduced to [misdemeanor as to count one, while [the court might order] dismissal of count two, namely the felony offenses under the Corporations Code regarding making false statements to a consumer, who is offered a "security." At the lower portion of the October

2012 minute order, the superior court set out "Count 1 [Felony] PC484/487, [subdivision] (a); Count 2 [Felony] CC 25401/25540 (b)." And, under the heading captioned "enhancement," the superior court set out "PC 12022.6, [subdivision] (a)(1)." (The superior court noted that \$58,000 was owed by respondent to the crime victim because before October 2012, respondent had paid \$30,000 to the crime victim. Hence, the \$88,000 debt to the consumer had been accordingly reduced.) On October 12, 2012, the superior court released respondent on his own recognizance, and set a date for a sentencing proceeding.

5. Seven months after respondent made his original plea to felony offenses, the court conducted a Probation and Sentencing hearing on May 10, 2013. As a result of the May 2013 proceeding, the superior court noted that respondent had paid the remaining debt of \$58,000 to the crime victim. And, at that proceeding, the superior court dismissed count two as well as the enhancement allegation as set out in the original felony complaint. Also, the superior court reduced from a felony to a misdemeanor the basis of respondent's conviction under Penal Code sections 484/487 (grand theft).

Further, on May 10, 2013, the superior court suspended imposition of sentence and placed respondent on court (informal) probation for two years under certain terms and conditions. As a condition of the probation, the superior court imposed upon respondent a six month jail term; but, the superior court allowed respondent to spend the term of confinement under "home detention," which involved him wearing an electronic ankle bracelet, that tracked his movements. Further, he was also imposed with a requirement that he inform a probation officer about his movements. Also as a term of probation, the superior court required respondent to pay to the county various fees, assessments and fines, in a total amount of \$150.

B. RECKLESS DRIVING CONVICTION - NOVEMBER 2013

6. On November 6, 2013, under Case Number C 1368346, in the California Superior Court in and for the County of Santa Clara, respondent was convicted, on his plea of nolo contendere, of violating Vehicle Code sections 23101, subdivision (a) (reckless driving), a misdemeanor.

7. The facts and circumstances of respondent's conduct that led to the conviction in November 2013 arose out of respondent's arrest on August 10, 2013. On the night of his arrest, after 11:00 p.m., a California Highway Patrol officer observed a vehicle, driven by respondent, traveling at speeds of approximately 80 miles per hour (mph) as it moved along US-101 in the fast lane. The CHP officer noted respondent's vehicle to move too close to vehicles immediately in front of his fast moving car, and his vehicle was "weaving in a serpentine manner [at] varying speeds from 75 mph to 80 mph." The CHP activated the patrol vehicle's red light, but respondent's vehicle "was very slow to yield." Only after traveling one mile did respondent's vehicle exit the freeway and come to a stop on Blossom Hill Road. After the CHP officer approached respondent's vehicle's open window, the law enforcement officer "smelled a distinct odor of an alcoholic beverage emitting from within the vehicle." Respondent's eyes were "red and watery," and he "continually looked away

from" the CHP officer. Respondent made an admission that he had consumed beer earlier during the evening. The officer observed an open can of beer on the floor of respondent's automobile. When asked to produce proof of insurance, respondent could not comply with the officer's request. During a field sobriety test, respondent failed to demonstrate sobriety. The officer took respondent's pulse and he detected that respondent's pulse was at 120 beats per minute. The officer further noted that respondent exhibited "dilated pupils with a slow reaction to light and [respondent showed] a dry mouth with chapped lips. The officer noted that with several indicia of impairment, along with the officer's observations of respondent's erratic driving, respondent was arrested for driving under the influence of a combination of alcohol and drugs. When the CHP officer asked him to submit to a drug recognition expert evaluation, respondent refused to comply. Nevertheless, the CHP officer concluded respondent to be under the influence of a combination of alcoholic beverage, a depressant and a stimulant drug. After respondent was transported to the CHP premises, he was administered, at approximately 12:40 a.m., alcohol breath tests, which showed respondent to have blood alcohol level readings of 0.042 and 0.044. Respondent was transported to the Santa Clara County Jail and booked for violations of Vehicle Code section 23152, subdivision (a) (driving under the influence of intoxicating substances), and Health and Safety Code section 11550, subdivision (a) (under the influence of drugs).

On October 18, 2013, a criminal complaint issued that alleged respondent's violation of Vehicle Code section 23103, subdivision (a) (driving a vehicle in a willful and wanton disregard for the safety of persons and property); section 23222, subdivision (a) (possession of an open container while driving); and, section 16028, subdivision (a), (failing to provide evidence of financial responsibility). A plea bargain resulted in respondent's conviction for misdemeanor reckless driving.

8. As a consequence of the November 2013 conviction, the superior court suspended sentencing respondent and placed him on court probation for a term of two years.

The terms and conditions of probation included a court order that respondent pay fines and fees in an amount of \$750. Also, the court imposed a five-day jail term upon respondent, but the court granted him credit for four days

Respondent's Background and Matters in Mitigation

9. Respondent is approximately 44 years of age.

10. Respondent has been licensed as a real estate broker since July 2005. The high point in his active real estate career seems to have occurred in approximately 2007/2008 when he employed at his real estate broker's office more than 20 real estate salespersons at the office on Quimby Road in San Jose. And, he served as an officer of an office called Hilton Stanley Capital from August 25, 2006 until August 14, 2012.

In respondent's early period of licensure, he was an officer with Mariposa Mortgage, Inc., from December 2, 2006, to July 31, 2007. He was an officer for Apprentice Enterprise, Inc., from October 16, 2006, until November 1, 2006.

On August 15, 2012, respondent used fictitious business names of Silicon Valley Realtors and Realty Executives-Silicon Valley. But, those business names were cancelled on July 13, 2013.

11. Respondent and his wife, Ruth Burnias, are in the process of a divorce, which was commenced in August 2013; but, the dissolution is not final because of a custody contest regarding the couple's young daughter. Respondent attributes the financial losses associated with his conviction to the end of his marriage.

12. Respondent is the father of two children, a son who is approximately 20 years old, and a daughter who is approximately seven years old. Respondent poignantly claims that he continues to strive to support both children, although his son is a college student at Westmount College, which is located in Santa Barbara.

Other Matter

13. At the hearing of the matter, respondent advanced, and complainant stipulated to the fact, that respondent personally lost from \$225,000 to \$250,000 in the Garfield Avenue project. However, in the late 2011 report made by the Santa Clara County District Attorney investigator, respondent told the law enforcement investigators that he had lost \$150,000 on the Garfield Avenue investment.

Matters in Rehabilitation

14. Respondent completed the home detention and ankle bracelet monitoring aspects of the punishment that were part of the probation that relates to respondent's conviction for grand theft.

15. Respondent has the support and admiration of many people with whom he associates.

He offered a single letter with the names of three supporters who claim respondent to exhibit skills as a real estate professional. The letter supports respondent's testimony that since approximately 2011, he has worked for a triumvirate of very substantial financial investors/real estate developers in the San Jose area. His work for the team of three investors, doing business as D.A.L. Properties, involves respondent acting as a real estate broker in very large real estate transactions. At the hearing, respondent presented a letter, dated October 16, 2014, signed by Tony Arreola, who is a principal in D.A.L. Properties. The letter conveys that that business owner associates with realtors who possess "high standard of integrity, community enhancement, and competence." And the letter states that

respondent has "always performed professionally" in his work to represent the business in locating buyers or tenants for buildings constructed by D.A.L. Properties.

The letter, which purports to show the signature of Tony Arreola, is not a reliable or credible statement of a witness regarding respondent's character for honesty or truthfulness. The letter writer shows no knowledge of respondent's past criminal conduct that involves, at a minimum, grand theft from a person associated with respondent in a real estate investment. And the letter's writer expresses no past interest or concern to have contacted any governmental entity regarding the outcome of respondent's criminal convictions. Moreover, the letter's writer has taken no action to make contact with the bureau regarding the status of any agency investigation or pending disciplinary action against respondent's real estate broker license.

16. At the hearing of this matter, respondent proclaimed that he has attained significant and conscientious involvement in community, religious or privately-sponsored programs designed to provide social benefits or to ameliorate social problems. Foremost among his charitable activities is respondent's participation in a non-profit organization called "Lift 360." Respondent's role has been to meet with television and movie actors to solicit those persons to give presentations to gatherings of underprivileged youth having Hispanic backgrounds. As of March 2015, respondent devotes approximately 20 hours each week to Lift 360.

Respondent also meets periodically with San Jose city politicians who are committed to solving youth gang problems. At the hearing, respondent alluded to an upcoming meeting with a San Jose city council woman to promote a non-profit organization created by the local elected official.

At the hearing, respondent showed a digital image of San Jose Mayor's Office commendation for the work of the organization that respondent volunteers time.

Matters that Suggest Respondent Is Not Fully Rehabilitated.

17. Only 15 months elapsed between the sentencing date for respondent's grand theft conviction and the date on which complainant issued the Accusation in this matter. And, only nine months had passed between the date of respondent's reckless driving conviction and the date of the Accusation.

18. As of the date of the hearing (March 12, 2015) in this matter, respondent remained subject to probation due to both the May 2013 conviction for grand theft as well as the November 2013 conviction for reckless driving.

19. Because he remains on probation due to past criminal convictions, respondent has not become eligible to petition, under Penal Code section 1203.4, for an order of expungement of the convictions, which have "culminated in the administrative proceeding to take disciplinary action" against respondent's license and licensing rights.

20. Respondent's term of probation due to his last conviction is scheduled to expire in November 2015. Hence, the bureau has not had sufficient time to assess respondent's progression towards rehabilitation.

21. To the hearing of this matter, respondent called no family member, friend or other person to offer testimony under oath as to such person's knowledge of respondent's past criminal conduct "and [respondent's] attitudes and behavioral patterns" as to his past misconduct.

And, at the hearing, no real estate professional offered any testimonial evidence regarding respondent's reputation in the real estate professionals' community of activities regarding his practice as a real estate licensee.

22. During the hearing of this matter, respondent engaged in impermissible collateral attacks against the actual basis that led to his convictions.

A. GRAND THEFT CONVICTION

Respondent's assertions, which were set out, on September 27, 2013, upon the bureau's "Conviction Detail Report (RE form 515D)," as well as made by him under oath at the hearing of this matter, were not believable that extenuating circumstances existed during 2008 and 2009 so as to indicate respondent's lack of culpability in the crimes perpetrated against the crime victim. Respondent's unpersuasive story turns upon his misleading assertion that:

I was one of three investors on a house that was to be remodeled and sold. The construction lender (private) foreclosed on the property in 2009 Because of the foreclosure, all investors lost their investment. One investor filed a complaint about me claiming she didn't feel she was properly advised of potential problems with the construction. I was not her agent or broker. We were acting as three independent investors.

Respondent's account of having a lack of involvement in a criminal enterprise, which injured an innocent victim, is wholly untrue and cannot be believed. Although reasonable inferences, as drawn from the evidence, are multiple as to respondent's participation in the criminal enterprise, only a few facts are set out below to highlight the defects in respondent's false story in an attempt to cast himself in a favorable light as inaccurately set forth on the Conviction Detail Report as well as during his false testimony at the hearing of this matter. Contrary to respondent's claims, salient aspects of complainant's evidence show respondent's testimony at the hearing of this matter to be patently untrue regarding his claim that he was not actively involved in grand theft and in making unlawful communications of untrue information regarding the marketing of a security and that his conduct adversely

affected the crime victim in a scheme to unlawfully take \$88,000 from the unsophisticated crime victim.

The Santa Clara County District Attorney office personnel not only interviewed the crime victim in depth but also those law enforcement officials engaged in recording the crime victim's telephone conversations with respondent. Those exchanges showed:

The crime victim was not a sophisticated investor. She owned her home, which had been purchased two decades in the past by her former husband, who exclusively negotiated the purchase and mortgage terms for that transaction. The crime victim, along with her son purchased a condominium, which was rented at the time of meeting respondent. Hence, the crime victim has had very limited experience with real estate transactions.

The crime victim's first language is Spanish. Although she can communicate in the English language, the crime victim is more at ease speaking Spanish. A Santa Clara County investigator noted that should the crime ^{victim} appear in the trial regarding the respondent's prosecution that a Spanish-English interpreter would be necessary to aid the crime victim's testimony.

In August 2009, the crime victim read in a Spanish language newspaper about seminars sponsored by respondent at his real estate broker's/investment development office. Contrary to respondent's claim that crime victim was a "close friend" of the wife of respondent, all accounts in the prosecutor's investigation show that the crime victim never met either respondent or his wife, Ruth Burnias, until August 2009.

Respondent's solicitations to crime victim indicated that he held himself out not as one of "three independent investors," but rather the law enforcement investigation established that respondent as being the principal promoter of an investment venture that offered interests in a project and that he had assured the crime victim a 25 percent interest return on her investment of \$88,000.

At the time of crime victim's transmission of her initial investment of \$12,000 with respondent in October 2008, the Garfield Avenue house had received two Notices of Default (September 2007 and May 2008) regarding an unpaid mortgage debt. Also the lender had caused to be filed a Notice of Trustee Sale on August 21, 2008. Further by the time in January 2009, that the crime victim placed \$75,000 into respondent's possession to constitute her investment of \$88,000 in the Garfield Avenue project, two additional Notices of Default (November 2008 and December 2008) existed for the Garfield Avenue project. And within a few months after making the entire investment, two Notices of Trustee Sale (March 2009 and August 2009) were filed by different lenders (Excel Lenders and Long Beach Lending) on the Garfield Avenue project. (Long Beach Lenders filed a Notice of Default on May 19, 2009.) And, finally on August 31, 2009, the Trustee Sale for the Garfield Avenue project occurred so that the deed was issued to Excel Lenders because of a mortgage debt on the property of \$475,000. Respondent never disclosed those dire impediments that affected the Garfield Avenue property.

23. Respondent's current version of his interactions with the crime victim are at odds with the determinations made by prosecutors that set out respondent's violation of Corporations Code sections 24501/25540. Those statutes, which underpinned respondent having entered, in October 2012, a plea to violations of the felony charges, reflect that nature of respondent's past criminal conduct and must be fully appreciated.

Corporations Code section 25401 provides, in pertinent part:

It is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to do any of the following:

(a) *Employ a device, scheme, or artifice to defraud.*

(b) *Make an untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.*

(c) Engage in an act, practice, or course of business that operates or would operate as *a fraud or deceit upon another person.*

(Emphasis added.)

Corporations Code section 25540, subdivision (b), provides:

Any person who willfully violates Section . . . 25401 . . . shall upon conviction be fined not more than ten million dollars (\$10,000,000), or imprisoned . . . for two, three, or five years, or be punished by both that fine and imprisonment.

On October 30, 2012, respondent entered a nolo contendere plea to violation of Corporations Code sections 25401/25540, subdivision (b). He faced a prison term of at least two years. Also, on the date of the plea, for which the superior court set a sentencing date, respondent also faced an enhancement penalty under Penal Code section 12022.6, subdivision (a)(1). The enhancement statute sets out:

(a) When any person takes . . . any property in the commission or attempted commission of a felony, with the intent to cause that taking . . . the court shall impose an additional term as follows:

(1) If the loss exceeds sixty-five thousand dollars (\$65,000), the court, in addition and consecutive to the

punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose *an additional term of one year.*

Thus, respondent faced a minimum of three years confinement in state prison for the felony conduct, which resulted in a serious financial injury being inflicted upon the crime victim. Hence, respondent was ^{not} believable when he set out in the Conviction Detail Report, and asserted at the hearing, that he “paid full restitution to the victim as [respondent] felt . . . ethically responsible” Rather, he made the full restitution so as to avoid years of prison confinement. Further, at the hearing, respondent’s unremorseful character and absence of proof of a change in attitude, which underscored his past criminality, were shown by his lack of concern, or ethically considerations, for the plight of the criminal victim when he sought to portray the crime victim as a scheming, greedy manipulator, who had supposedly lied to the law enforcement officers so as to make false charges against respondent.

B. RECKLESS DRIVING CONVICTION

24. Respondent’s account of the reckless driving incident and his conviction in November 2013, was not persuasive. Most importantly, respondent failed to acknowledge that the reckless driving misconduct, which involved his consumption of an alcoholic beverage, showed his pattern of disregarding the law in light of his grand theft conviction that occurred approximately three months before his August 2013 arrest for reckless driving.

Other Matters Showing Respondent’s Lack of Rehabilitation

25. By his demeanor while testifying, by the implausible nature and the character of portions of his testimony that were contradicted by complainant’s thorough and persuasive documentary evidence and compelling single witness, by the existence of his interest and motivation to exaggerate events in his past, and by his attitude towards the agency’s action, respondent showed that he is not a credible¹ or reliable witness.

26. On January 23, 2015, due to a delinquent state income tax obligation to the California State Franchise Tax Board, respondent’s real estate broker license was suspended by operation of law.

Respondent’s Failure to Report the Filing of a Felony Complaint and the Criminal Conviction

27. At the hearing of this matter, complainant offered as documentary evidence a License Certification, dated February 10, 2014, regarding real estate broker license number 01502042, as executed by the bureau’s Official Custodian of Records, Kimberly Davis, Special Investigator. The certification establishes that the bureau’s records do not include records pertaining to any written notice from respondent notifying the bureau either that

¹ California Government Code section 11425.50, subdivision (b), third sentence.

there had been "the bringing of . . . a method of charging a felony" against him, or that respondent had been convicted of a crime since the date for the last renewal application for license issued to him.

28. Respondent failed to timely report, in writing, to the bureau the fact of the November 23, 2011, felony complaint as filed against him by the Santa Clara County District Attorney's Office. And, respondent did not timely take the initiative to set out in writing to the bureau a report regarding the matter of his nolo contendere plea on October 30, 2012, to felony counts (grand theft and communications containing untrue statements/omissions of material facts). Nor did respondent timely set out in writing to the bureau the fact of the final disposition of the criminal case in May 2013, that resulted in a record of a misdemeanor conviction for grand theft.

Furthermore, respondent failed to timely send a letter in writing to the bureau informing the agency of his November 6, 2013 misdemeanor conviction for reckless driving.

29. At hearing of this matter, respondent falsely asserted that he gave proper notice to the bureau of the fact of his convictions. He unpersuasively stated that his comments on the bureau's Conviction Detail Report, dated September 27, 2013, was adequate to meet the obligation imposed on him by statute. Respondent is gravely in error.

Respondent's reasoning for his neglect in complying with the bureau's regulations was not compelling.

30. By his failure to report both the fact that he was subject to a felony complaint in November 2011, and that he had sustained a record of a felony conviction in October 2012, as well as the misdemeanor sentencing for grand theft in May 2013, and the misdemeanor conviction for reckless driving in November 2013, respondent violated the real estate laws and the regulations of the bureau.

Costs of Investigation and Prosecution

31. Deputy Real Estate Commissioner Tanner and Real Estate Counsel Uno, as the Commissioner's designees, through their respective declarations, established that before the commencement of the hearing in this matter complainant incurred costs of investigation for the Accusation against respondent in an amount of \$2,708.40.

In particular, Real Estate Counsel Uno showed that he recorded 9.6 hours in the preparation of the prosecution in this matter. He stated that the Legal Division bills his time at \$89 per hour. Hence, the costs of prosecution is in the amount of \$854.40

Deputy Real Estate Commissioner declared that three investigators were involved with the investigation of this matter. Two bureau employees, who hold the classification of Supervising Special Investigator, billed a total of 2.25 hours in this matter, and that their hourly rate is \$80 per hour. One special investigator, whose hourly rate is \$62 per hour,

devoted 27 hours to the investigation of this matter. Hence, the costs of investigation is set at \$1,854.

The reasonable and appropriate costs of investigation and prosecution are in an amount of \$2,708.40.

Factors Affecting the Commissioner's Recovery of Costs of Investigation and Enforcement

32. In determining the appropriateness of imposition of recovery of costs upon respondent, an analysis under the guidance of an important appellate court decision² is helpful.

Respondent did not advance a meritorious defense in the exercise of his rights to a hearing in this matter.

Respondent cannot be seen, under the facts set out above, to have committed slight or inconsequential misconduct; but, rather the offense of grand theft, which indicates respondent's involvement in a real estate scheme that involved him misleading or to withholding material facts in order to take a large amount of money from a woman, who had limited English language proficiency and who was not a knowledgeable investor.

The hearing did not result in respondent obtaining dismissal of charges, or the elimination of the bases alleged, supporting the imposition discipline as sought by complainant.

Respondent offered no competent, corroborating documentary evidence establishing that he is impaired by current dire financial condition. Nor did respondent offer any objective documentary evidence that his expenses are exceeded by his income in a way that he cannot pay for the incurred costs. At the hearing, however, respondent did not claim that he has significant financial limitations. Although he asserts that with his real estate license having been suspended in early 2015, because of a state income tax debt, he has made sufficient aspects from past years of money-making activities that he has encountered no grave financial hardships.

Respondent did not provide any evidence that over a period of a few years, he cannot pay the costs of investigation and prosecution through an installment plan, which is satisfactory to the department on behalf of the bureau.

Therefore, a substantial basis does not exist to warrant a reduction of the assessment against respondent for recovery of complainant's costs of investigation and enforcement. But, respondent should be given the opportunity to pay the department the costs of investigation and prosecution under an installment schedule.

² *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

33. It is, therefore, found that the appropriate and reasonable amount of costs to be recovered by the bureau from respondent are set at \$2,708.40.

LEGAL CONCLUSIONS

Standard of Proof

1. Proof by “clear and convincing evidence” is the standard of proof to be applied as to facts in dispute under the Accusation from which disciplinary action may result against the license and licensing rights held by respondent. (*The Grubb Company, Inc. v. Department of Real Estate* (2011) 194 Cal.App.th 1494, 1503-1504.)

A sound definition for the “clear and convincing evidence” standard of proof concept is set out in the Judicial Council of California Civil Jury Instructions (CACI), section 201. That section in CACI defines “clear and convincing evidence” as evidence that is “more likely true.” And, the cited CACI section proclaims that clear and convincing proof requires a higher burden of proof for which the party must persuade the trier of fact that it is “*highly probable that the fact is true.*” (CACI No. 201 (2014 edition.) (Emphasis added.) Moreover, the California Supreme Court enunciated approximately 115 years ago a view of the clear and convincing evidence standard. In *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, the supreme court prescribed a spectrum of formulations in framing the concept of “clear and convincing” evidence, which is sometimes expanded to “clear and convincing evidence to a reasonable certainty.” The state supreme court noted “clear and convincing evidence” may be expressed as such proof that:

‘Must be clear, satisfactory, and convincing;’ ‘clear and satisfactory;’ ‘clear and convincing;’ ‘very satisfactory;’ ‘strong and convincing;’ ‘clear, unequivocal, and convincing;’ ‘clear, explicit, and unequivocal;’ ‘*so clear as to leave no substantial doubt;*’ ‘*sufficiently strong to command the unhesitating assent of every reasonable mind.*’ (*Sheehan v. Sullivan, supra*, 126 Cal. 189, 193; cf. *In re Angelia P.* (1981) 28 Cal.3d 908, 919.)
(Emphasis added.)

Causes for Disciplinary Action

CRIMINAL CONVICTIONS

2. Business and Professions Code section 490 provides that the Commissioner “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”

Business and Professions Code section 10177, subdivision (b), establishes that “the commissioner may suspend or revoke the license of a real estate licensee . . . who has . . . been convicted of . . . a crime substantially related to the qualifications, functions, or duties of a real estate licensee”

Business and Professions Code section 10177, subdivision (d), establishes that the bureau may suspend or revoke a license of a real estate licensee because of “[w]illfully disregarded *or violated* the Real Estate Law . . . or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law” (Emphasis added.)

GRAND THEFT CONVICTION

3. California Code of Regulations, title 10, section 2910, sets forth criteria for determining whether a crime is substantially related to the qualifications, functions or duties of a real estate licensee.

That regulatory provision sets out substantial relationship to include subdivision (a)(1), that states “the fraudulent . . . retaining . . . property belonging to another person.” As shown by complainant’s evidence, respondent’s criminal acts of unlawfully taking \$87,000 from the crime victim fall within the meaning of the language of that regulation.

California Code of Regulations, title 10, section 2910, subdivision (a)(2), provides that substantial relationship exists upon “uttering of a false statement.” Respondent’s solicitations to the crime victim, which prompted the woman to “invest” \$87,000 with respondent, involved the uttering of a false statement.

California Code of Regulations, title 10, section 2910, subdivision (a)(4), states, “the employment of . . . fraud, deceit, falsehood or misrepresentation to achieve an end,” constitutes substantial relationship between respondent’s unlawful act and his licensed status. The nature of respondent’s crime of grand theft, under the facts and circumstances revealed through complainant’s evidence, shows that respondent employed fraud, deceit, falsehood and misrepresentation to achieve an end of taking \$87,000 from the crime victim.

California Code of Regulations, title 10, section 2910, subdivision (a)(7), provides that substantial relationship arises for “failing to comply with a statutory requirement that a license, permit or other entitlement be obtained from a duly constituted public authority before engaging in a business or course of conduct.” The Santa Clara County District Attorney’s investigation revealed that respondent offered a “security,” that is an interest in a real estate investment project, for which a permit or authorization was required to be issued to from the Department of Corporations (now renamed the Department of Business Oversight). Hence, when respondent procured \$87,000 from the crime victim and promised her a 25 percent interest return on the investment, he failed to comply with the statutes and regulations of the state agency before entering the “course of conduct” with the crime victim.

Further, a crime is deemed to be substantially related if it involves “[d]oing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator” (Cal. Code Regs., tit. 10, § 2910, subd. (a)(8)). When respondent committed the act of crime of grand theft, respondent’s conduct demonstrated a set of unlawful acts with the intent of doing substantial injury to confer a financial benefit upon himself.

Hence, the substantial relationship between the grand theft conviction and the qualifications, functions and duties of a real estate licensee is shown through Factual Findings 4, 5 and 22, as guided by California Code of Regulations, title 10, section 2910, subdivisions (a)(1), (a)(2), (a)(4), (a)(7) and (a)(8).

4. Cause exists for disciplinary action against the license issued to respondent under Business and Professions Code section 10177, subdivision (b) as it interacts with Code section 10177, subdivision (d), together with Business and Professions Code section 490, by reason of the matters set forth in Factual Finding 3 along with Legal Conclusions 2 and 3.

RECKLESS DRIVING CONVICTION

5. California Code of Regulations, title 10, section 2910, (a)(10), provides that substantial relationship exists due to a licensee’s conduct that “demonstrates a pattern of repeated and willful disregard of law.” When respondent consumed alcoholic beverages and operated a motor vehicle in a reckless manner, following his conviction for grand theft, his acts constituted conduct that demonstrated a pattern of repeated and willful disregard for law. Hence, the substantial relationship between the reckless driving conviction and the qualifications, functions and duties of a real estate licensee is shown through Factual Findings 3, 6, 7 and 24.

6. Cause exists for disciplinary action against the license issued to respondent under Business and Professions Code section 10177, subdivision (b) as it interacts with Code section 10177, subdivision (d), together with Business and Professions Code section 490, by reason of the matters set forth in Factual Finding 6 along with Legal Conclusions 2 and 5.

CRITERIA OF REHABILITATION

7. The bureau has developed more than a dozen criteria to be used to evaluate rehabilitation of a licensee who has committed a crime. (Cal. Code Regs., tit. 10, § 2912). These criteria attempt to gauge whether the applicant has changed so that a repeat of his criminal behavior is unlikely. And very important to this matter is that the evidence does not establish respondent has had a change in attitude or altered disposition and character that led him to commit the crimes described above. “Of the many criteria, arguably the most important in predicting future conduct is subdivision [(m) of California Code of Regulations, title 10, section 2912, namely]: ‘Change in attitude from that which existed at the time of [the commission of the criminal acts in question]’” (*Singh v. Davi* (2012) 211 Cal.App.4th 141, 149.)

Respondent's progress towards rehabilitation is impaired by his refusal to accept full responsibility for his past criminal conduct. Respondent was not credible at the hearing of this matter when he asserted that he was not culpable for the criminal act for which he experienced a grand theft conviction. Respondent's representations exist as a collateral attack against the bases of the facts upon which the superior court determined respondent to be guilty of the three distinct claims. The matters set out in Factual Findings 22 through 24 outline the aspects of respondent's collateral attack of the convictions in his record. In an administrative proceeding, a respondent cannot challenge the validity of a prior conviction. (*Garcia v. Superior Court* (1997) 14 Cal.4th 953; *People v. Coffey* (1967) 67 Cal. 2d 204.) "A final judgment of conviction is a fact; and, its effect cannot be nullified . . . either by [an] order of probation or by [a] later order dismissing the action after judgment." (*In re Phillips* (1941) 17 Cal.2d 55.) It has long been established that it is improper for a licensee to come before a licensing agency after a criminal conviction to attempt to impeach a plea of guilty or a no contest plea and a resulting conviction. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449-452.)

And, respondent's failure to accept personal responsibility for his misconduct is shown through his system of attempting to ignore the seriousness of his past criminal offenses.

Other Determinations

8. Because as of the date of the hearing in this matter respondent remained on probation, the ^{bureau} department had not had sufficient time to consider respondent's rehabilitation. In particular, respondent remained on probation from the conviction in September 2012 for the felony of being an accessory after the fact. *In re Gossage* (2000) 23 Cal.4th 1080, 1104-1105, establishes, among other things, that from the stand point of a licensing agency's regulatory oversight of licensees, rehabilitation of a licensee cannot begin to be accurately assessed until the licensee, who has been convicted of a crime, is beyond the restrictions of criminal probation and the prospect of incarceration no longer looms over the head of the licensee. In this matter, respondent will not be released from probation for the last criminal conviction until November 2015. Hence, a correct assessment of respondent's progress towards rehabilitation cannot take place until a point in the future. Therefore, now and into the immediate future, respondent cannot hold an unrestricted license as a real estate licensee

9. The matters pertaining to respondent's background, matters in mitigation, and matters in rehabilitation, as set forth in Findings 9 through 16, have been considered in making the following order.

10. As guided by California Code of Regulations, title 10, section 2912, respondent has not successfully attained the objectives of the criteria for rehabilitation following his record of convictions, as established by Factual Findings 17 to 26.

FAILURE TO NOTIFY BUREAU OF FELONY CHARGE OR CONVICTION

11. A real estate licensee must report "the bringing of an indictment or information charging a felony against the licensee." (Bus. & Prof. Code, § 10186.2, subd. (a)(1)(A).) In addition a licensee must report to the bureau the occurrence of a conviction of a felony or misdemeanor. (Bus. & Prof. Code, § 10186.2, subd. (a)(1)(B).) Further, the licensee's obligation to report must be initiated by the licensee within 30 days of the date of the bringing of the indictment or the charging of a felony or the conviction. (Bus. & Prof. Code, § 10186.2, subd. (a)(2).) The failure to make such report "[s]hall constitute a cause for discipline." (Bus. & Prof. Code, § 10186.2, subd. (b).)

California Code of Regulations, title 10, section 2910, subdivision (a)(6), sets forth that an act is deemed to be substantially related if it involves a licensee's conduct of "willfully violating or failing to comply with a provision of the Business and Professions Code of the State of California." Respondent's failure to comply with the requirement that he inform the bureau of any criminal conviction within 30 days of the date of the conviction constitutes a violation of the regulation.

12. Cause exists for disciplinary action against respondent's real estate broker license in accordance with Business and Professions Code sections 10177, subdivision (d), and 10186.2, subdivision (b), as those statutory provisions interact with Business and Professions Code 10186.2, subdivisions (a)(1)(A), (a)(1)(B), and (a)(2), along with California Code of Regulations, title 10, section 2910, subdivision (a)(6), by reason of Factual Findings 27 through 30, and Legal Conclusion 11.

Complainant's Recovery of Cost of Prosecution

13. Complainant has requested that respondent be ordered to pay the bureau's costs of investigation and prosecution.

Business and Professions Code section 10106, subdivision (a), prescribes that "in any order issued in resolution of a disciplinary proceeding before the bureau, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of . . . [law] . . . to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

Although not made directly applicable, through an appellate court decision, to administrative adjudication initiated on behalf of the Commissioner of Real Estate of the Department of Real Estate, the California Supreme Court's reasoning in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45-46, is persuasive. That supreme court decision should be considered in this matter with regard to the obligation of a licensing agency to fairly and conscientiously impose upon a licensee an order for recovery of costs against the affected individual. Scrutiny of certain factors, which pertain to the Commissioner's exercise of discretion to analyze or examine factors that might mitigate or

reduce costs of investigation and prosecution upon a licensee found to have engaged in unprofessional conduct, are set forth in Factual Finding 32.

The reasonable costs of investigation and prosecution as set forth in Findings 31 and 33 amount to \$2,708.40.

Ultimate Determination

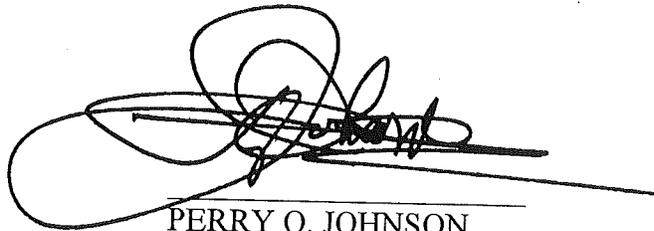
14. After an examination of the evidence in light of the controlling standard of proof, the Factual Findings and Order herein, are established to rest upon clear and convincing evidence to a reasonable certainty. Such proof establishes unlawful acts and omissions in the matters recorded herein that support complainant's allegations against respondent Mario Burnias. By clear and convincing proof, complainant showed that it would not be in the public interest to allow respondent to hold a real estate broker license, even on a restricted basis.

ORDER

1. All licenses and licensing rights (license number B 01502042) of respondent Mario Burnias under the Real Estate Law are revoked.

2. Within thirty days of the effective date of the decision, respondent Mario Burnias must pay \$2,708.40 to the Department of Consumer Affairs on behalf of the bureau, or he must sign an installment payment plan or agreement that is acceptable to the bureau's Commissioner. *Bureau of Real Estate*

DATED: April 7, 2015



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings