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JAN 09 2020

DEPARTMENT OF REAL ESTATE

By *R. dew*

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:) DRE No. H-12355 SF
PETER CARL FOPPIANO,) OAH No. 2019040119
Respondent.)

ORDER DENYING RECONSIDERATION

On October 10, 2019, a Decision was rendered in the above-entitled matter. The Decision was to become effective on December 12, 2019, and was stayed by separate Order to January 14, 2020.

On December 09, 2019, Respondent petitioned for reconsideration of the Decision of October 10, 2019.

I have given due consideration to the petition of Respondent. I find no good cause to reconsider the Decision of October 10, 2019, and reconsideration is hereby denied.

IT IS SO ORDERED *1/7/20*

SANDRA KNAU
ACTING REAL ESTATE COMMISSIONER

Sandra Knaus

FILED

DEC 10 2019

DEPARTMENT OF REAL ESTATE

By pdw

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:) DRE NO. H-12355 SF
PETER CARL FOPPIANO,) OAH NO. 2019040119
Respondents.)

ORDER STAYING EFFECTIVE DATE

On October 10, 2019, a Decision was rendered in the above-entitled matter to become effective December 12, 2019.

IT IS HEREBY ORDERED that the effective date of December 12, 2019, is stayed for a period of 30 days to allow Respondent PETER CARL FOPPIANO to file a petition for reconsideration.

The Decision of October 10, 2019, shall become effective at 12 o'clock noon on January 14, 2020.

DATED: 12/10/19

SANDRA KNAU
ACTING REAL ESTATE COMMISSIONER

[Signature]

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NOV 12 2019

DEPARTMENT OF REAL ESTATE
By RJ dew

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:) DRE NO. H-12355 SF
PETER CARL FOPPIANO,)
Respondent.)

ORDER EXTENDING TIME

On October 10, 2019, a Decision was rendered in the above-entitled matter, ordering the revocation with right to a restricted license of Respondent PETER CARL FOPPIANO. Said Decision became effective November 12, 2019.

Said Decision provided that Respondent shall comply and complete all terms and conditions as set forth in the Decision dated October 10, 2019.

Good cause having been shown, the effective date of the Decision is extended to December 12, 2019.

This Order shall be effective immediately.

IT IS SO ORDERED November 12, 2019

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

OCT 22 2019

DEPARTMENT OF REAL ESTATE
By B. dew

* * *

In the Matter of the Accusation of:)	DRE No. H-12355 SF
)	
PETER CARL FOPPIANO,)	OAH No. 2019040119
)	
Respondent.)	

Pursuant to Government Code Section 11521, the Department 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 Department'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 NOV 12 2019.

IT IS SO ORDERED October 10, 2019

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER



**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

PETER CARL FOPPIANO, Respondent

Case No. H-12355 SF

OAH No. 2019040119

PROPOSED DECISION

Jill Schlichtmann, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on August 20, 2019, in Oakland, California.

Megan Lee Olsen, Counsel, represented complainant Robin S. Tanner, a Supervising Special Investigator with the Department of Real Estate.

William Paul Matz, Attorney at Law, represented respondent Peter Carl Foppiano, who was present.

The matter was submitted for decision on August 20, 2019.

FACTUAL FINDINGS

Introduction

1. Complainant Robin S. Tanner, acting in her official capacity as a Supervising Special Investigator with the Department of Real Estate (Department), filed the accusation against Peter Carl Foppiano (respondent).

2. The Department issued a conditional salesperson license to respondent on January 10, 1998. The Department issued a broker license to respondent on May 8, 2000. On July 21, 2000, respondent notified the Department that he was doing business as (DBA) Golden Bear Mortgage. On August 10, 2004, the Department added Golden Bear Financial as a DBA affiliated with respondent's license. On March 27, 2008, respondent added ARC Capital Investments as a DBA.

3. On April 17, 2009, an accusation was filed against respondent. The accusation alleged that an audit conducted of respondent's real estate activities for the time period of January 1, 2005, to December 31, 2007, revealed: a) respondent employed an individual who performed acts requiring a real estate license without notifying the Department; b) respondent failed to send to the Department an acknowledgement that he had read the Decision granting that employee a restricted license; c) respondent failed to have signed broker-salesperson agreements with eight of his salespersons; d) respondent failed to obtain and retain certain loan documents in connection with three loans; e) respondent failed to notify the Department of the termination of an employee; and f) respondent failed to exercise reasonable supervision over the activities of his salespersons.

On September 9, 2009, the accusation was resolved by a Stipulation and Agreement, which was adopted as an Order by the Real Estate Commissioner. The Order suspended respondent's license for 30 days, which was stayed upon the following conditions: a) payment of a penalty in the amount of \$2,250; and b) no final subsequent determination be made within two years. Respondent's license was suspended from November 23, 2009, until December 23, 2009.

4. On October 25, 2010, the Department added ARC Capital as a DBA. On December 28, 2010, an individual mortgage loan originator endorsement and a company mortgage loan originator endorsement were added to respondent's license.

5. On January 13, 2014, respondent notified the Department that he met the criteria for threshold broker reporting status as set forth in Business and Professions Code section 10232.

6. On June 30, 2017, respondent notified the Department that he met the criteria for multi-lender broker non-reporting status as set forth in Business and Professions Code section 10238.

7. Department auditor Robert Leonard conducted an audit of respondent's licensed real estate activities intermittently from March 28, 2017, through July 30, 2017. The audit period was July 1, 2015, through May 31, 2017. Respondent has worked as a mortgage loan originator since 2010. As of January 1, 2017, respondent took over as the broker of record for a property management business, SoCoPropMgt, Inc., dba Sonoma County Property Rentals, after its corporate real estate broker license was revoked effective December 28, 2016. The audit was prompted by the Department's enforcement division after the SoCoPropMgt, Inc.'s license was revoked.

8. During the audit period, respondent employed nine licensed real estate agents and one broker-associate. The auditor found violations of the Real Estate Law¹ as to both respondent's handling of Sonoma County Property Rentals and his mortgage loan broker activity, under name ARC Capital. Complainant filed the accusation on February 26, 2019; respondent filed a notice of defense and this hearing followed.

Audit Findings re Sonoma County Property Rentals

9. On November 12, 2016, the Board of Directors of Sonoma County Property Rentals, Inc., passed a resolution electing respondent as the president of the corporation; Christopher Sanchez, a restricted salesperson, as the chief executive officer and secretary; and Maria G. Rodriguez, who is unlicensed, as vice president, chief financial officer and treasurer.

10. On November 22, 2016, respondent filed a notice to add DBA Sonoma County Property Rentals to his license as of November 22, 2016. The Department requested additional information. Respondent resubmitted the application on December 29, 2016.

11. An assignment of property management agreements, dated January 3, 2017, assigned the property management agreements of SoCoPropMgt., Inc., to respondent. The property management business included 160 residential properties for 130 property owners and collected annual trust funds of approximately \$1,400,000.

¹ Business and Professions Code section 10000 et seq.

Property owners were charged management fees ranging from four and one-half percent to eight percent of collected rents.

12. On February 7, 2017, respondent again filed a notice with the Department to add DBA Sonoma County Property Rentals as of February 7, 2017. The Department added DBA Sonoma County Property Rentals on March 30, 2017.

13. Respondent conducted real estate activity using the fictitious business name "Sonoma County Property Rentals" prior to registering the name with the Department on March 30, 2017. On January 26 and February 6, 2017, the name Sonoma County Property Rentals was set forth as the broker in property management agreements. On March 6 and March 11, 2017, the name Sonoma County Property Rentals was set forth as the broker in lease agreements.

Respondent acknowledges that the company used the name Sonoma County Property Rentals on two leases and property management agreements prior to the name being registered with the Department. The transition from the prior business to respondent's business took longer than expected in some respects; these errors arose during the transition period.

14. Respondent maintained one bank account (Bank Account No. 1) to hold trust funds for Sonoma County Property Rentals during the audit period. The account name was "Sonoma County Property Rentals, Inc." The signatories on Bank Account No. 1 were respondent and Sanchez. Bank Account No. 1 was used for deposits and disbursements of trust funds related to the management of the residential properties. It included transfers of trust funds from the prior broker on December 29 and December 30, 2016, rent payments, security deposits, and owner contributions.

Disbursements included payments of proceeds to owners, management fees, return of security deposits, and payments of repair and maintenance expenses.

15. Bank Account No. 2 was used to compensate respondent and real estate salespersons employed by him in connection with property management activity. Bank Account No. 2 was named "Sonoma County Property Rentals, Inc." The signatories were respondent, Sanchez, and Rodriguez. Deposits included management fees transferred from Bank Account No. 1. Disbursements included management fees and commissions paid to respondent, Sanchez and salesperson Natricia Companey, and lease payments for the property management office.

Bank Account No. 1 should have been in the name of a registered fictitious business name or the name of a licensee as trustee. According to respondent, the bank refused to add his name as trustee because it was not a trust. Complainant acknowledges that some banks have this policy; however, this does not relieve the licensee from complying with the law.

Respondent acknowledges that because the bank refused to add his name to the account title as trustee, he allowed the account to be named "Sonoma County Property Rentals" in early January 2017 before the Department had added the fictitious name to his license, anticipating that the Department would soon register the name, since he had applied in November 2016. Respondent acknowledges that as of February 28, 2017, the trust account was named in the DBA while the registration of the DBA was pending; the DBA was added on March 30, 2017.

Respondent later came to understand that the Department required a corporate license; he submitted the paperwork for a corporate license in 2017. The Department

issued a corporate license in the name of Sonoma County Property Rentals, Inc., naming respondent as an officer on February 1, 2019.

16. An accountability was performed on Bank Account No. 1. As of February 28, 2017, there was \$577,998.80 in the trust fund and there was a shortage of \$2,214.84. The trust fund shortage was due to \$2,075 of trust funds accounted for in the records of Bank Account No. 1, while deposited in Bank Account No. 3, the trust fund account of revoked broker SoCoPropMgt, Inc., and \$139.84 in unidentified causes. On March 29, 2017, trust funds of \$2,075 were transferred from Bank Account No. 3 to Bank Account No. 1.

Respondent waited for a check to clear before closing Bank Account No. 3 and transferring the money to Bank Account No. 1. Respondent reports that the shortage of \$139.84 was caused by bank fees. Respondent did not obtain written permission from owners of trust funds in Bank Account No. 1 to allow the balance to drop below accountability.

17. Respondent maintained an accurate Control Record for the trust funds, but it was "not quite" in accordance with regulations, according to Leonard. The general ledger should record funds received and disbursed with a running balance each day. Respondent's software and/or accounting personnel did not produce one chronological and columnar record of all trust funds received and disbursed for Bank Account No. 1, with the balance posted after each day, and one columnar and separate record for each beneficiary or transaction with the balance posted each day, as required. Additionally, the accounting records for Bank Account No. 1 also contained entries for Bank Account No. 3 (the prior broker's bank account). Respondent maintained a record for each beneficiary for whom trust funds were

received and disbursed; however, there were entries from the prior broker, which made the records inaccurate.

Respondent continued the recordkeeping used by the prior entity when he took over the company. An audit performed on the prior entity did not find errors in the recordkeeping. When Leonard requested information, respondent provided a summary of the trust account activity; different formats of reports are available in the software used by respondent, App Folio. He understands that App Folio contains the appropriate records, but they may not have been produced to Leonard in the proper format. The issues concerning the entries from Bank Account No. 3 occurred in the midst of the transition of the business from SoCoPropMgt, Inc. to respondent.

Audit Findings re Mortgage Loan Origination Activities

18. During the audit period, respondent engaged in mortgage loan origination using the names Golden Bear Financial and Golden Bear Mortgage. The fictitious name ARC Capital was used in conducting mortgage loan activities from the Santa Rosa branch office. The ARC Capital mortgage loan business is owned by ARC Capital Investments, LLC. Respondent was compensated with 10 percent of the net commission for ARC Capital loans. In 2016, respondent negotiated nine institutional loans and 173 private interest loans, which included 31 multi-lender transactions.

19. As a threshold broker, beginning in January 2014, respondent was required to submit Quarterly Trust Fund reports within 30 days after the end of each of the broker's fiscal quarters, and an Annual Trust Account Review report within 90 days after the end of the broker's fiscal year (or by May 31 if the fiscal year ends between November 30 and February 28/29) to the Mortgage Lending Activities Section of the Department.

20. As of June 30, 2017, respondent notified the Department that he qualified as a broker who arranged one or more loans that were secured by real property containing one-to-four residential units. Respondent was required to submit an annual Business Activity Report online to the Real Estate Commissioner within 90 days after the end of the broker's fiscal year.

21. As of March 1, 2017, the following reports were delinquent: 2015 Business Activity Report; 2015 Third Quarter Trust Fund Status report; 2016 Trust Fund Account Review; and 2015 Business Activity Report.

22. Respondent's 2015 Business Activity Report was due March 31, 2016; it was submitted on April 3, 2017. The 2016 annual Business Activity Report was due March 31, 2017. On May 16, 2017, respondent notified Leonard that he was having difficulty filing the 2016 report online. The report was received June 26, 2017.

23. Respondent's Quarterly Trust Fund Status Report due April 30, 2016 was submitted on June 27, 2016. The Quarterly Trust Fund Status Report due July 31, 2016 was submitted on October 19, 2016. The Quarterly Trust Fund Status Report due October 31, 2016 was submitted on December 29, 2016.

24. Respondent failed to file a Multi-Lender Notice notifying the Real Estate Commissioner of his multi-lender loan activity within 30 days after the transaction. The loan, which was secured by a deed of trust on property located in Napa, was one of 31 multi-lender transactions arranged under respondent's broker license during 2016. The loan closed on October 28, 2016. Respondent did not notify the Commissioner of that multi-lender transaction by November 28, 2016.

25. Respondent believed that he had filed the multi-lender transaction notification on time, but was unable to locate a copy. He acknowledges that the other

required reports were not timely filed. He had difficulty filing them online, and showed Leonard screenshots of error reports on the Department's website when he tried to file them. The reports were late at that time, but were eventually filed.

26. Signed statements of investor qualifications were not present in three loan transaction files. Respondent concedes that he did not have investor qualification statements in the loan files cited by Leonard. Business and Professions Code section 10232.3, subdivision (b), states that a note or interest shall not be sold, unless the purchaser meets one or both of certain qualifications of income or net worth and signs a statement, which must be retained by the broker for four years. Respondent contends that investor statements are not required by this code section for loan originations, because it refers to notes or interest sold, rather than the origination of a note. The loans in question were loan originations. Respondent relied on the opinions of his investors, a former Department employee and his attorney in reaching this opinion. Leonard disagrees; he contends that loan origination is included in definition of the sale or offer to sell a note.

27. Leonard found a construction or rehabilitation loan in which the current market value was deemed to be the value of the completed project; however, the loan was not fully funded with the entire loan amount deposited in escrow prior to the recording of the deed of trust as required. Respondent acknowledges that \$15,000 was withheld by the lender; he reports that it was an origination loan.

28. ARC Capital had a website soliciting customers. A real estate license identification number was not disclosed on the ARC Capital website on May 5, 2017. Respondent reports that the website was being updated during the audit period and his license number was inadvertently removed. The website now contains his license number.

Audit, Investigation and Enforcement Costs

29. The Department incurred \$12,336.56 in audit costs.
30. Complainant certified that the Department incurred investigation costs in the amount of \$3,158. The amount of investigation costs is reasonable.
31. Counsel for complainant certified that the Department incurred enforcement costs in the amount of \$2,469.75. The amount of enforcement costs is reasonable.

LEGAL CONCLUSIONS

1. The burden of proof is on complainant and the standard of proof is clear and convincing evidence. (*Small v. Smith* (1971) 16 Cal.App.3d 450.)
2. Pursuant to Business and Professions Code section 10177, subdivision (d), the Commissioner is authorized to suspend or revoke the license of a real estate licensee who has willfully disregarded or violated the Real Estate Law, or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law.
3. Business and Professions Code section 10177, subdivision (g), authorizes the Commissioner to suspend or revoke the license of a real estate licensee who has demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

Property Management Activity Violations

4. Business and Professions Code section 10145 requires that a broker who accepts funds belonging to others in connection with a transaction shall deposit the funds that are not immediately disbursed into a trust fund account maintained by the broker in a bank. All funds deposited in the trust fund account must be maintained there until disbursed by the broker in accordance with instruction from the person or persons entitled to the funds. Respondent allowed Bank Account No. 1, a trust fund, to have a shortage of \$139.84, which violated section 10145. (Factual Finding 16.) Cause for discipline exists pursuant to Business and Professions Code sections 10177, subdivisions (d) and (g).

5. Business and Professions Code section 10145, in conjunction with California Code of Regulations, title 10, section 2832.1, provides that the written consent of every principal who is an owner of funds in a trust account shall be obtained by a real estate broker prior to each disbursement, if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds. As set forth in Factual Finding 16, respondent violated Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1. Cause exists to impose discipline pursuant to Business and Professions Code section 10177, subdivisions (d) and (g).

6. Business and Professions Code section 10145, in conjunction with California Code of Regulations, title 10, section 2832, provides that a trust fund account must be in the name of a holder of a license as trustee. Bank Account No. 1, a trust account, was held in the name of Sonoma County Property Rentals, Inc., beginning on January 1, 2017. The corporate license was not issued until February 1,

2019. The fictitious business name, Sonoma County Property Rentals, was not registered with the Department until March 30, 2017. (Factual Findings 14 and 15.) Respondent violated Business and Professions Code section 10145 in conjunction with California Code of Regulations, title 10, section 2832. Cause exists to impose discipline pursuant to Business and Professions Code section 10177, subdivisions (d) and (g).

7. California Code of Regulations, title 10, section 2731, prohibits a licensee from using a fictitious business name in the conduct of any activity for which a license is required unless the licensee is the holder of a license bearing the fictitious name. Respondent allowed Sanchez to sign two management agreements and two leases between January 1, 2017 and March 30, 2017, when the Department registered the name Sonoma County Property Management. (Factual Finding 13.) Respondent violated California Code of Regulations, title 10, section 2731. Cause for license discipline exists pursuant to Business and Professions Code section 10177, subdivisions (d) and (g).

8. California Code of Regulations, title 10, section 2831, requires a broker to keep an accurate columnar record of all trust funds received and disbursed as set forth in the regulation. Respondent did not provide the Department's auditor with a columnar record in chronological order of all trust funds received and disbursed containing all required information for Bank Account No. 1 in violation of California Code of Regulations, title 10, section 2831. (Factual Finding 17.) Cause for license discipline exists pursuant to Business and Professions Code section 10177, subdivisions (d) and (g).

9. California Code of Regulations, title 10, section 2831.1, requires a broker to maintain accurate separate records for each beneficiary of trust funds accepted or received and disbursed for Bank Account No. 1. Respondent did not provide the

Department's auditor with accurate separate records for each beneficiary in violation of California Code of Regulations, title 10, section 2831.1. (Factual Finding 17.) Cause for license discipline exists pursuant to Business and Professions Code section 10177, subdivisions (d) and (g).

Mortgage Loan Origination Activity Violations

10. Business and Professions Code section 10166.07 requires a broker who makes, arranges or services one or more loans in a calendar year that are secured by real property containing one to four residential units to file a Business Activity Report annually. As set forth in Factual Findings 20 through 22, respondent failed to timely file Business Activity Reports for the fiscal years 2015 and 2016. Cause for license discipline exists pursuant to Business and Professions Code sections 10166.07 and 10177, subdivisions (d) and (g).

11. Business and Professions Code sections 10232 and 10232.25, subdivision (d), requires a broker who meets certain thresholds to file quarterly threshold broker reports. Respondent notified the Department in 2014 that he had met the threshold requiring reporting. Respondent failed to timely file quarterly reports for the first, second and third quarter of 2016. (Factual Findings 19 and 23.) Cause for license discipline exists pursuant to Business and Professions Code sections 10232, 10232.25 and 10177, subdivisions (d) and (g).

12. Business and Professions Code section 10238, subdivisions (a) and (b), require a broker who is involved in multi-lender transactions to notify the Department within 30 days after the transaction. Respondent was the broker of record for a multi-lender transaction and he failed to file a notification with the Department within 30 days. (Factual Findings 6, 24 and 25.) Cause for license discipline exists pursuant to

Business and Professions Code sections 10238, subdivisions (a) and (b), and 10177, subdivisions (d) and (g).

13. Business and Professions Code sections 10232.3, subdivision (b), and 10238, subdivision (f), require a broker to retain signed statements of investor qualification in any transaction that involves the sale of or offer to sell a note secured directly by an interest in one or more parcels of real property. Respondent believed he was not subject to this requirement because he was arranging for or negotiating loans, rather than selling or offering to sell them. However, Business and Professions Code section 10239.2, subdivision (d), defines the sale of or offer to sell a note to include the act of negotiating and arranging the transaction. Respondent did not retain signed statements of investor qualifications for four loans. (Factual Finding 26.) Cause for license discipline exists pursuant to Business and Professions Code sections 10232.3, subdivision (b), 10238, subdivision (f), 10239.2, subdivision (d), and 10177, subdivisions (d) and (g).

14. Business and Professions Code section 10232.3, subdivision (a)(5)(A), requires that for construction or rehabilitation loans, where the amount withheld at the start of the project is \$100,000 or less, the term "current market value" may be deemed to be the value of the completed project if the loan is fully funded, with the entire loan amount to be deposited in escrow prior to recording of the deed of trust. A construction or rehabilitation loan in which the "current market value" was deemed to be the value of the completed project was not fully funded with the entire loan amount deposited in escrow prior to recording the deed of trust. Respondent acknowledged that the funds in the transaction were held by the investor. (Factual Finding 27.) Cause exists for license discipline pursuant to Business and Professions Code sections 10232.3, subdivision (a)(5)(A), and 10177, subdivisions (d) and (g).

15. Business and Professions Code section 10236.4, and California Code of Regulations, title 10, section 2772, require that a broker's license number shall be displayed on all solicitations, including websites. Respondent's license number was not displayed on the ARC Capital website on May 5, 2017. (Factual Finding 28.) Cause for license discipline exists pursuant to Business and Professions Code sections 10236.4 and 10177, subdivisions (d) and (g), in conjunction with California Code of Regulations, title 10, section 2772.

Costs

16. Business and Professions Code section 10148, subdivision (b), authorizes the Commissioner to request reimbursement for the cost of an audit if the licensee has been found to have committed trust fund handling violations. The cost of the audit was \$12,336.56. (Factual Finding 29.) Pursuant to Legal Conclusions 4, 5, 6, 8 and 9, respondent is liable to reimburse the Commissioner for the audit cost.

17. Business and Professions Code section 10106, authorizes the Commissioner to request reimbursement of the reasonable costs of the investigation and enforcement of an action when the licensee has been found to have violated the Real Estate Law. Respondent violated the Real Estate Law as set forth in Legal Conclusions 4 through 15. The reasonable costs of the investigation and enforcement is \$5,627.75. (Factual Findings 30 and 31.)

18. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Supreme Court enumerated several factors that a licensing agency must consider in assessing costs. It must not assess the full costs of investigation and enforcement when to do so would unfairly penalize a respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of

some charges or a reduction in the severity of the penalty. The agency must also consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge to the discipline or is unable to pay. Respondent has not established a basis to reduce the costs.

Level of Discipline

19. The purpose of disciplining a professional or occupational license is to protect the public, not to punish the licensee. (*Camacho v. Youde* (1975) 95 Cal.App.3d 161, 165; *Clerici v. Dept. of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1030-1031.)

20. The criteria used by the Department in evaluating a licensee's rehabilitation are set forth in California Code of Regulations, title 10, section 2912. These criteria include the amount of time that has elapsed since the misconduct; whether restitution has been paid to anyone suffering monetary losses; the correction of business practices; the creation of new business relationships; the stability of family life; the completion of or sustained enrollment in education or vocational training; significant and conscientious involvement in the community or church; and, a change in attitude from that which existed at the commission of the misconduct.

21. Respondent has been licensed for over 20 years. He suffered a 30-day suspension 10 years ago for issues involving the supervision of employees. There is no evidence of a monetary loss resulting from respondent's misconduct.

With regard to the property management business violations, the issues arose during a period of transition, when respondent was taking over a business after the revocation of the company's corporate license. Several of those violations have been corrected, including the name of Bank Account No. 1, the registration of the fictitious business name, the separation of trust funds between the former trust account and the

current trust account, and the shortage. It appears as though the software used by respondent, App Folio, keeps the trust fund records required, but they were not presented properly to the auditor.

With regard to the mortgage loan origination side of the business, respondent failed to: a) timely file required reports and notices; b) display the license number on the ARC Capital website, c) comply with Business and Professions Code section 10232.3, subdivision (a)(5)(A), requiring depositing the loan amount in escrow prior to recording of the deed of trust; and d) retain signed statements of investor qualifications as required. Respondent relied on advice of his investors, a former Department employee and his attorney in interpreting the statute requiring that he retain the statements. Although this interpretation was incorrect, the evidence did not establish that he intentionally failed to follow this law. None of the violations establish dishonest dealing. However, the number of violations raises a concern. Based on the number of violations established and the prior discipline, a period of oversight is warranted to protect the public. Revocation of respondent's license, stayed during a period of probation with appropriate conditions, including an educational component, will ensure that respondent carefully adheres to the law.

ORDER

All licenses and licensing rights of respondent Peter Carl Foppiano under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent

shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

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

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

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

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

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

6. Respondent shall report in writing to the Department of Real Estate as the Real Estate Commissioner shall direct by his or her Decision herein or by separate written order issued while the restricted license is in effect, such information concerning respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate to protect the public interest.

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of respondent and periodic summaries of salient information concerning each real estate transaction in which respondent engaged during the period covered by the report.

7. Pursuant to section 10148 of the Business and Professions Code, respondent shall pay the Commissioner's reasonable cost for: a) the audit which led to this disciplinary action in the amount of \$12,336.56, and, b) a subsequent audit to determine if respondent has corrected the trust fund violations found in Legal Conclusions 4, 5, 6, 8 and 9. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers and shall include an allocation for travel time to and from the auditor's place of work. Respondent shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may suspend the restricted license issued to respondent pending a

hearing held in accordance with section 11500, et seq., of the Government Code, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The suspension shall remain in effect until payment is made in full or until respondent enters into an agreement satisfactory to the Commissioner to provide for payment, or until a decision providing otherwise is adopted following a hearing held pursuant to this condition.

8. Respondent shall, prior to and as a condition of issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in subdivision (a) of section 10170.5 of the Business and Professions Code. Proof of satisfaction of this requirement includes evidence that respondent has successfully completed the trust fund account and handling continuing education course within 120 days prior to the effective date of the Decision in this matter.

9. Respondent shall pay to the Department of Real Estate costs associated with the investigation and enforcement of this matter in the amount of \$5,627.75, pursuant to Business and Professions Code section 10106. Respondent shall be permitted to pay these costs in a payment plan approved by the Department, with payments to be completed no later than six months prior to the end of the restriction on his license.

DATE: August 30, 2019

DocuSigned by:
Jill Schlichtmann
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JILL SCHLICHTMANN

Administrative Law Judge

Office of Administrative Hearings