

FILED

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DEPARTMENT OF REAL ESTATE

BY: CA

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BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of) NO. H-38731 LA
)
KENNETH BRIAN CLEAVER,) A C C U S A T I O N
)
Respondent.)
_____)

The Complainant, Maria Suarez, a Deputy Real Estate
Commissioner of the State of California, for cause of Accusation
against KENNETH BRIAN CLEAVER ("Respondent"), is informed and
alleges as follows:

1.

The Complainant, Maria Suarez, a Deputy Real Estate
Commissioner of the State of California, makes this Accusation
in her official capacity.

2.

From September 15, 1990, through the present,
Respondent has been licensed by the Department of Real Estate
("Department") as a real estate salesperson, Department License
ID 01088154. From January 7, 2010, through June 19, 2012,

1 Respondent was licensed under the employment of broker Robert
2 Scott McCutcheon.

3 3.

4 Fixed Rate Financial, Inc. ("Fixed Rate") is a
5 California corporation formed on or about April 21, 2008.
6 Respondent is the Chief Executive Officer and director of Fixed
7 Rate. Fixed Rate has never been licensed in any capacity by the
8 Department. Jason Allan Smith is an attorney licensed by the
9 California State Bar. Smith has never been licensed in any
10 capacity by the Department.
11

12 FIRST CAUSE OF ACCUSATION
13 (Advance Fee Violations)

14 4.

15 Business and Professions Code ("Code") section 10132
16 defines a real estate salesperson as a person who, for
17 compensation or in expectation of compensation, is employed by a
18 licensed real estate broker to do one or more of the acts set
19 forth in Code sections 10131, 10131.1, 10131.2, 10131.3,
20 10131.4, and 10131.6.

21 5.

22 Code section 10131, subdivision (d), defines a real
23 estate broker as a person who solicits borrowers or lenders for
24 or negotiates loans or collects payment or performs services for
25 borrowers or lenders or note owners in connection with loans
26 secured directly or collaterally by liens on real property or on
27 a business opportunity.
28

6.

On October 11, 2009, then Governor Arnold Schwarzenegger signed Senate Bill 94 (Calderon), and the legislation took effect immediately upon his signature. Thus, California law prohibited any person, including real estate licensees and attorneys, from demanding or collecting an advance fee from a consumer for loan modification or mortgage loan forbearance services affecting 1 - 4 unit residential dwellings.

7.

The following notice was prominently featured on the Department's website as of October 11, 2009:

"IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A "NO OBJECTION" LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU CAN NO LONGER ENTER INTO THESE AGREEMENTS EFFECTIVE AS OF OCTOBER 11, 2009, NOR CAN YOU COLLECT ANY ADVANCE FEES FOR SUCH SERVICES. Agreements entered into and advance fees collected prior to October 11, 2009 are not affected. Advance fees inadvertently collected after October 11, 2009 must be fully refunded. All real estate licensees should become familiar with the provisions of SB94 as there are substantial administrative and criminal penalties for violations."

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1 8.

2 Code section 10085.5 prohibits the collection of
3 advance fees for loan modification services. Code section
4 10085.5, subdivision (a) states:

5
6 "[I]t shall be unlawful for any person to
7 claim, demand, charge, receive, collect or
8 contract for an advance fee (1) for soliciting
9 lenders on behalf of borrowers or performing
10 services for borrowers in connection with loans
11 to be secured directly or collaterally by a lien
12 on real property, before the borrower becomes
13 obligated to complete the loan, or (2) for
14 performing any other activities for which a
15 license is required, unless the person is a
16 licensed real estate broker and has complied with
17 the provisions of this part.

13 9.

14
15 Further, Code section 10085.6, subdivision (a)
16 states:

17 "[N]otwithstanding any other provision of
18 law, it shall be unlawful for any licensee who
19 negotiates, attempts to negotiate, arranges,
20 attempts to arrange, or otherwise offers to
21 perform a mortgage loan modification or other
22 form of mortgage loan forbearance for a fee or
23 other compensation paid by the borrower to do any
24 of the following:

25 (1) claim, demand, charge, collect, or
26 receive any compensation until after the licensee
27 has fully performed each and every service the
28 licensee contracted to perform or represented
that he, she, or it would perform.

(2) Take any wage assignment, any lien of
any type on real or personal property, or other
security to secure payment or compensation.

(3) Take any power of attorney from the
borrower for any purpose.

10.

Within the three year period prior to the filing of this Accusation, Respondent, while doing business as Fixed Rate, solicited and offered loan modification, negotiation and foreclosure forbearance services to consumers through advertisements on television, radio, and/or the internet. Respondent entered into and participated in a plan or scheme with Jason Allan Smith to charge and collect advance fees from borrowers for loan modification, negotiation and foreclosure forbearance services, in spite of existing laws prohibiting such fees, with the intent to substantially benefit themselves.

11.

In furtherance of the plan and scheme described in Paragraph 10, Respondent engaged in fraud, dishonest dealing and made misrepresentations to borrowers in order to induce them to pay an advance fee for said services. Respondent promised borrowers that a licensed attorney would handle the loan modification and negotiations with the borrowers' lenders. Respondent claimed Fixed Rate had a 98 percent success rate of achieving loan modifications or a principal reduction for borrowers due to Fixed Rate's attorney. Respondent also recommended that borrowers fail to pay one or more mortgage payments to their lenders in order to improve the borrowers' chances of obtaining a loan modification. In a blatant attempt to circumvent existing laws prohibiting real estate brokers and attorneys from charging and collecting advance fees for loan modification services, Respondent had borrowers sign an agreement with Fixed Rate for "document preparation" and Jason

1 Allan Smith had borrowers sign a "professional services"
2 agreement. Nonetheless, Respondent instructed borrowers to pay
3 advance fees for loan modification and negotiation services
4 directly to Fixed Rate.

5 12.

6 On or around March 9, 2011, Respondent solicited loan
7 modification and negotiation services to borrowers Timothy and
8 Carolyn W. Respondent advised Timothy and Carolyn W. that it
9 would be easier to obtain a loan modification if their mortgage
10 was in arrears. Respondent charged and collected an advance fee
11 of \$3,200 from Timothy and Carolyn W. The advance fee was paid
12 directly to Fixed Rate's bank account. Respondent and Jason
13 Allan Smith failed to provide the services promised to Timothy
14 and Carolyn W. Respondent and Jason Allan Smith failed to
15 provide copies to Timothy and Carolyn W. of any agreement or
16 other document the borrowers were told to sign. Respondent and
17 Jason Allan Smith failed to provide any proof of any services
18 performed on behalf of Timothy and Carolyn W., aside from a list
19 of a few calls made by "Diana" from Jason Allan Smith's office
20 to Timothy and Carolyn W.'s lender inquiring as to whether the
21 lender had begun foreclosure proceedings. Respondent and Jason
22 Allan Smith refused to refund any of the advance fees paid by
23 Timothy and Carolyn W.

24 13.

25 On or around June 6, 2011, Respondent solicited loan
26 modification and negotiation services to borrowers Clayton and
27 Gayla R. Respondent charged and collected an advance fee of
28 \$3,650 from Clayton and Gayla R. The advance fee was paid by

1 cashier's check to Fixed Rate. Respondent and Jason Allan Smith
2 failed to provide the services promised to Clayton and Gayla R.
3 Respondent and Jason Allan Smith failed to provide any proof of
4 any services performed on behalf of Clayton and Gayla R.
5 Respondent and Jason Allan Smith refused to refund any of the
6 advance fees paid by Clayton and Gayla R.

7 14.

8 Respondent is Non-Exempt from License Requirements

9 Code section 10133(a) states that the acts described
10 in Code section 10131 are not acts for which a real estate
11 license is required if performed by:

12 "(3) An attorney at law in rendering legal services to
13 a client."

14 15.

15 Respondent, while doing business as his unlicensed
16 company, Fixed Rate, solicited and offered to perform loan
17 modifications and other services in connection with loan secured
18 directly or collaterally by a lien on real property. Respondent
19 collected advance fees for said services through Fixed Rate,
20 Respondent's unlicensed company. Respondent and Jason Allan
21 Smith had borrowers sign a "professional services" agreement as
22 a form of legal retainer for loan modification services in an
23 attempt to circumvent existing laws that restricted the charging
24 and collection of advance fees from borrowers prior to the
25 completion of loan modification services. Jason Allan Smith
26 never personally met with any of the borrowers mentioned in
27 Paragraphs 12 and 13 above. Jason Allan Smith never provided
28 any proof of completing any legal services for said borrowers

1 which would exempt Jason Allan Smith from licensing requirements
2 pursuant to Code section 10133(a).

3 16.

4 The conduct, acts and/or omissions of Respondent as
5 set forth in Paragraphs 3 through 15, above, are in violation of
6 Code sections 10085, 10085.5, and 10085.6 and constitute grounds
7 for the suspension or revocation of the license and license
8 rights of Respondent KENNETH BRIAN CLEAVER pursuant to Code
9 sections 10177(d) and/or 10177(g).

10 17.

11 Respondent's conduct, acts and/or omissions as set
12 forth in Paragraphs 3 through 15, above, constitute grounds for
13 the suspension or revocation of the license and license rights
14 of Respondent KENNETH BRIAN CLEAVER pursuant to Code sections
15 10176(a) (making any substantial misrepresentation), 10176(b)
16 (making any false promises of a character likely to influence,
17 persuade or induce), and 10176(i) (conduct...which constitutes
18 fraud or dishonest dealing).

19
20 SECOND CAUSE OF ACCUSATION
21 (Unlicensed Activity and Unlawful Compensation)

22 18.

23 There is hereby incorporated in this Second, separate,
24 Cause of Accusation, all of the allegations contained in
25 Paragraphs 1 through 17 above, with the same force and effect as
26 if herein fully set forth.

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19.

The activities described in Paragraphs 3 through 15, above, require a real estate license under Code sections 10131(d) and 10131.2. Respondent, while doing business as Fixed Rate, violated Code section 10130 by acting in the capacity of a real estate broker without first obtaining a real estate license from the Department. Respondent's activities were not done under the name or supervision of his employing broker at the time.

20.

Respondent's activities while doing business as Fixed Rate as described in Paragraphs 3 through 15, above, violated Code section 10137 for accepting compensation from any person other than the broker under whom Respondent was licensed at the time.

21.

The conduct, acts and/or omissions of Respondent as set forth in Paragraphs 19 and 20, above, are in violation of Code Sections 10136 and 10137 and constitute grounds for the suspension or revocation of the license and license rights of Respondent KENNETH BRIAN CLEAVER pursuant to Code sections 10177(d) and/or 10177(g).

22.

Code section 10106 provides, in pertinent part, that in any order issued in resolution of a disciplinary proceeding before the Department of Real Estate, the Commissioner may request the administrative law judge to direct a licensee found

1 to have committed a violation of this part to pay a sum not to
2 exceed the reasonable costs of the investigation and enforcement
3 of the case.

4 WHEREFORE, Complainant prays that a hearing be
5 conducted on the allegations of this Accusation and that upon
6 proof thereof, a decision be rendered imposing disciplinary
7 action against all licenses and/or license rights of Respondent
8 KENNETH BRIAN CLEAVER under the Real Estate Law (Part 1 of
9 Division 4 of the Business and Professions Code), for the costs
10 of investigation and enforcement as permitted by law, and for
11 such other and further relief as may be proper under other
12 provisions of law.

13 Dated at Los Angeles, California

14 this 22nd day of February, 2013.

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17 
18 MARIA SUAREZ
19 Deputy Real Estate Commissioner
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23 cc: Kenneth Brian Cleaver
24 Maria Suarez
25 Sacto
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