

1 by the Department of Real Estate ("Department") as a real estate
2 salesperson, Department License ID 01088154. From January 7,
3 2010, through June 19, 2012, Respondent was licensed under the
4 employment of broker Robert Scott McCutcheon.

5 3.

6 From November 15, 2006, through the present,
7 Respondent JASON ALLAN SMITH ("SMITH") has been licensed by the
8 Department as a real estate broker, Department License ID
9 01778833. Respondent SMITH is also an attorney licensed in
10 California, State Bar No. 237584.

11 4.

12 Fixed Rate Financial, Inc. ("Fixed Rate") is a
13 California corporation formed on or about April 21, 2008.
14 Respondent CLEAVER is the Chief Executive Officer and director
15 of Fixed Rate. Fixed Rate has never been licensed in any
16 capacity by the Department.

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18
19 FIRST CAUSE OF ACCUSATION
(Advance Fee Violations)

20 5.

21 Business and Professions Code ("Code") section 10132
22 defines a real estate salesperson as a person who, for
23 compensation or in expectation of compensation, is employed by a
24 licensed real estate broker to do one or more of the acts set
25 forth in Code sections 10131, 10131.1, 10131.2, 10131.3,
26 10131.4, and 10131.6.

1 6.

2 Code section 10131, subdivision (d), defines a real
3 estate broker as a person who solicits borrowers or lenders for
4 or negotiates loans or collects payment or performs services for
5 borrowers or lenders or note owners in connection with loans
6 secured directly or collaterally by liens on real property or on
7 a business opportunity.

8 7.

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

16 8.

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

19 "IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED
20 OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A "NO
21 OBJECTION" LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN
22 MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU
23 CAN NO LONGER ENTER INTO THESE AGREEMENTS EFFECTIVE AS OF
24 OCTOBER 11, 2009, NOR CAN YOU COLLECT ANY ADVANCE FEES FOR SUCH
25 SERVICES. Agreements entered into and advance fees collected
26 prior to October 11, 2009 are not affected. Advance fees
27 inadvertently collected after October 11, 2009 must be fully
28 refunded. All real estate licensees should become familiar with

1 the provisions of SB94 as there are substantial administrative
2 and criminal penalties for violations."

3 9.

4 Code section 10085.5 prohibits the collection of
5 advance fees for loan modification services. Code section
6 10085.5, subdivision (a) states:

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

15 10.

16
17 Further, Code section 10085.6, subdivision (a)
18 states:

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

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

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

1
2 (3) Take any power of attorney from the
3 borrower for any purpose.

4 11.

5 Within the three year period prior to the filing of
6 this Accusation, Respondents, while doing business in their own
7 name or a fictitious business name including, but not limited
8 to, Fixed Rate, solicited and offered loan modification,
9 negotiation and foreclosure forbearance services to consumers
10 through advertisements on television, radio, and/or the
11 internet. Respondents entered into and participated in a plan
12 or scheme to charge and collect advance fees from borrowers for
13 loan modification, negotiation and foreclosure forbearance
14 services, in spite of existing laws prohibiting such fees, with
15 the intent to substantially benefit themselves.

16 12.

17 In furtherance of the plan and scheme described in
18 Paragraph 11, Respondents engaged in fraud, dishonest dealing
19 and made misrepresentations to borrowers in order to induce them
20 to pay an advance fee for said services. Respondents promised
21 borrowers that a licensed attorney would handle the loan
22 modification and negotiations with the borrowers' lenders.
23 Respondents claimed Fixed Rate had a 98 percent success rate of
24 achieving loan modifications or a principal reduction for
25 borrowers due to Fixed Rate's attorney. Respondents also
26 recommended that borrowers fail to pay one or more mortgage
27 payments to their lenders in order to improve the borrowers'
28 chances of obtaining a loan modification. In a blatant attempt
to circumvent existing laws prohibiting real estate brokers and

1 attorneys from charging and collecting advance fees for loan
2 modification services, Respondents had borrowers sign an
3 agreement with Fixed Rate for "document preparation" and
4 Respondent SMITH had borrowers sign a "professional services"
5 agreement. Nonetheless, Respondent CLEAVER instructed borrowers
6 to pay advance fees for loan modification and negotiation
7 services directly to Fixed Rate.

8 13.

9 On or around March 9, 2011, Respondent CLEAVER
10 solicited loan modification and negotiation services to
11 borrowers Timothy and Carolyn W. in connection with a loan
12 secured directly or collaterally by a lien on real property
13 owned by Timothy and Carolyn W. Respondent CLEAVER advised
14 Timothy and Carolyn W. that it would be easier to obtain a loan
15 modification if their mortgage was in arrears. Respondents
16 charged and collected an advance fee of \$3,200 from Timothy and
17 Carolyn W. The advance fee was paid directly to Fixed Rate's
18 bank account. Additionally, Respondent SMITH attempted to
19 charge Timothy and Carolyn W. for appraisal services of their
20 property. Respondents failed to provide the services promised
21 to Timothy and Carolyn W. Respondents failed to provide copies
22 to Timothy and Carolyn W. of any agreement or other document the
23 borrowers were told to sign. Respondents failed to provide any
24 proof of any services performed on behalf of Timothy and Carolyn
25 W., aside from a list of a few calls made by "Diana" from
26 SMITH's office to Timothy and Carolyn W.'s lender inquiring as
27 to whether the lender had begun foreclosure proceedings.

1 Respondents refused to refund any of the advance fees paid by
2 Timothy and Carolyn W.

3 14.

4 On or around June 6, 2011, Respondent CLEAVER
5 solicited loan modification and negotiation services to
6 borrowers Clayton and Gayla R. Respondents charged and
7 collected an advance fee of \$3,650 from Clayton and Gayla R.
8 The advance fee was paid by cashier's check to Fixed Rate.
9 Clayton and Gayla R. were instructed to sign a Client
10 Authorization to Represent form which authorized SMITH to obtain
11 information about their mortgage from their lender. Clayton and
12 Gayla R. were also instructed to sign Professional Services
13 Agreements with SMITH to perform an analysis and review of their
14 mortgage and to negotiate a loan modification with their lender.
15 Respondents failed to provide the services promised to Clayton
16 and Gayla R. Respondents failed to provide any proof of any
17 services performed on behalf of Clayton and Gayla R.
18 Respondents refused to refund any of the advance fees paid by
19 Clayton and Gayla R.

20 15.

21 Respondents Are Non-Exempt from License Requirements

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

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

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16.

Respondent CLEAVER, while doing business as his
unlicensed company, Fixed Rate, solicited and offered to perform
loan modifications and other services in connection with loan
secured directly or collaterally by a lien on real property.
Respondent CLEAVER collected advance fees for said services
through Fixed Rate, Respondent CLEAVER's unlicensed company.
Respondents had borrowers sign a "professional services"
agreement as a form of legal retainer for loan modification
services in an attempt to circumvent existing laws that
restricted the charging and collection of advance fees from
borrowers prior to the completion of loan modification services.
Respondent SMITH never personally met with any of the borrowers
mentioned in Paragraphs 13 and 14 above. Respondent SMITH never
provided any proof of completing any legal services for said
borrowers which would exempt Respondent SMITH from licensing
requirements pursuant to Code section 10133(a).

17.

The conduct, acts and/or omissions of Respondents as
set forth in Paragraphs 3 through 16, above, are in violation of
Code sections 10085, 10085.5, and 10085.6 and constitute grounds
for the suspension or revocation of the licenses and license
rights of Respondents KENNETH BRIAN CLEAVER and JASON ALLAN
SMITH pursuant to Code sections 10177(d) and/or 10177(g).

18.

Respondents' conduct, acts and/or omissions as set
forth in Paragraphs 3 through 16, above, constitute grounds for

1 the suspension or revocation of the licenses and license rights
2 of Respondents KENNETH BRIAN CLEAVER and JASON ALLAN SMITH
3 pursuant to Code sections 10176(a) (making any substantial
4 misrepresentation), 10176(b) (making any false promises of a
5 character likely to influence, persuade or induce), and 10176(i)
6 (conduct...which constitutes fraud or dishonest dealing).

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8 SECOND CAUSE OF ACCUSATION
(Unlicensed Activity and Unlawful Compensation)

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10 19.

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

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16 20.

17 The activities described in Paragraphs 3 through 16,
18 above, require a real estate license under Code sections
19 10131(d) and 10131.2. Respondent CLEAVER, while doing business
20 as Fixed Rate, violated Code section 10130 by acting in the
21 capacity of a real estate broker without first obtaining a real
22 estate license from the Department. Respondent CLEAVER's
23 activities were not done under the name or supervision of his
employing broker at the time.

24
25 21.

26 Respondent CLEAVER's activities while doing business
27 as Fixed Rate as described in Paragraphs 3 through 16, above,
28 violated Code section 10137 for accepting compensation from any

1 person other than the broker under whom Respondent CLEAVER was
2 licensed at the time.

3 22.

4 The conduct, acts and/or omissions of Respondent
5 CLEAVER as set forth in Paragraphs 20 and 21, above, are in
6 violation of Code Sections 10130 and 10137 and constitute
7 grounds for the suspension or revocation of the license and
8 license rights of Respondent KENNETH BRIAN CLEAVER pursuant to
9 Code sections 10177(d) and/or 10177(g).

10 23.

11 Code section 10106 provides, in pertinent part, that
12 in any order issued in resolution of a disciplinary proceeding
13 before the Department of Real Estate, the Commissioner may
14 request the administrative law judge to direct a licensee found
15 to have committed a violation of this part to pay a sum not to
16 exceed the reasonable costs of the investigation and enforcement
17 of the case.

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

10 Dated at Los Angeles, California

11 this 22nd day of April, 2013.

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15 MARIA SUAREZ
16 Deputy Real Estate Commissioner
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19

20 cc: Kenneth Brian Cleaver
21 Jason Allan Smith
22 Maria Suarez
23 Sacto
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