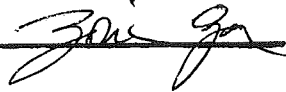


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**FILED**

**AUG -7 2013**

**BUREAU OF REAL ESTATE**

By 

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BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

\* \* \*

In the Matter of the Accusation of	)	DRE No. H-38731 LA
	)	
KENNETH BRIAN CLEAVER and	)	<u>SECOND AMENDED ACCUSATION</u>
JASON ALLAN SMITH,	)	
	)	
Respondents.	)	
_____	)	

This Second Amended Accusation amends the First Amended Accusation filed on April 23, 2013. The Complainant, Maria Suarez, a Deputy Real Estate Commissioner for the State of California, for cause of Accusation against KENNETH BRIAN CLEAVER and JASON ALLAN SMITH (collectively "Respondents"), 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 KENNETH BRIAN CLEAVER ("CLEAVER") has been licensed by the Bureau (formerly Department) of Real Estate ("BRE") as a real estate salesperson, BRE License ID 01088154. From January 7, 2010,

1 through June 19, 2012, Respondent was licensed under the employment of broker Robert Scott  
2 McCutcheon.

3 3.

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

7 4.

8 Fixed Rate Financial, Inc. ("Fixed Rate") is a California corporation formed on or  
9 about April 21, 2008. Respondent CLEAVER is the Chief Executive Officer and director of  
10 Fixed Rate. Fixed Rate has never been licensed in any capacity by the BRE.

11 FIRST CAUSE OF ACCUSATION

12 (Advance Fee Violations)

13 5.

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

18 6.

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

23 ///

1 7.

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

7 8.

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

10 "IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED  
11 OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A "NO  
12 OBJECTION" LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN  
13 MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU  
14 CAN NO LONGER ENTER INTO THESE AGREEMENTS EFFECTIVE AS OF OCTOBER  
15 11, 2009, NOR CAN YOU COLLECT ANY ADVANCE FEES FOR SUCH SERVICES.  
16 Agreements entered into and advance fees collected prior to October 11, 2009 are not affected.  
17 Advance fees inadvertently collected after October 11, 2009 must be fully refunded. All real  
18 estate licensees should become familiar with the provisions of SB94 as there are substantial  
19 administrative and criminal penalties for violations."

20 9.

21 Code section 10085.5 prohibits the collection of advance fees for loan  
22 modification services. Code section 10085.5, subdivision (a) states:  
23  
24

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

10.

Further, Code section 10085.6, subdivision (a) states:

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

(1) claim, demand, charge, collect, or 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.

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

11.

Within the three year period prior to the filing of this Accusation, Respondents, while doing business in their own name or a fictitious business name including, but not limited to, Fixed Rate, solicited and offered loan modification, negotiation and foreclosure forbearance services to consumers through advertisements on television, radio, and/or the internet.

Respondents entered into and participated in a plan or scheme 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.

12.

In furtherance of the plan and scheme described in Paragraph 11, Respondents engaged in fraud, dishonest dealing and made misrepresentations to borrowers in order to induce

1 them to pay an advance fee for said services. Respondents promised borrowers that a licensed  
2 attorney would handle the loan modification and negotiations with the borrowers' lenders.  
3 Respondents claimed Fixed Rate had a 98 percent success rate of achieving loan modifications or  
4 a principal reduction for borrowers due to Fixed Rate's attorney. Respondents also  
5 recommended that borrowers fail to pay one or more mortgage payments to their lenders in order  
6 to improve the borrowers' chances of obtaining a loan modification. In a blatant attempt to  
7 circumvent existing laws prohibiting real estate brokers and attorneys from charging and  
8 collecting advance fees for loan modification services, Respondents had borrowers sign an  
9 agreement with Fixed Rate for "document preparation" and Respondent SMITH had borrowers  
10 sign a "professional services" agreement. Nonetheless, Respondent CLEAVER instructed  
11 borrowers to pay advance fees for loan modification and negotiation services directly to Fixed  
12 Rate.

13 13.

14 On or around March 9, 2011, Respondent CLEAVER solicited loan modification  
15 and negotiation services to borrowers Timothy and Carolyn W. in connection with a loan secured  
16 directly or collaterally by a lien on real property owned by Timothy and Carolyn W. Respondent  
17 CLEAVER advised Timothy and Carolyn W. that it would be easier to obtain a loan  
18 modification if their mortgage was in arrears. Respondents charged and collected an advance fee  
19 of \$3,200 from Timothy and Carolyn W. The advance fee was paid directly to Fixed Rate's  
20 bank account. Additionally, Respondent SMITH attempted to charge Timothy and Carolyn W.  
21 for appraisal services of their property. Respondents failed to provide the services promised to  
22 Timothy and Carolyn W. Respondents failed to provide copies to Timothy and Carolyn W. of  
23 any agreement or other document the borrowers were told to sign. Respondents failed to provide  
24

1 any proof of any services performed on behalf of Timothy and Carolyn W., aside from a list of a  
2 few calls made by "Diana" from SMITH's office to Timothy and Carolyn W.'s lender inquiring  
3 as to whether the lender had begun foreclosure proceedings. Respondents refused to refund any  
4 of the advance fees paid by Timothy and Carolyn W.

5 14.

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

17 15.

18 On or around February 29, 2012, Respondents CLEAVER and SMITH solicited  
19 loan modification, loss mitigation, and/or loan negotiation services to borrower Heather T.  
20 Respondents charged and collected an advance fee of \$3,650 from Heather T, which was paid by  
21 check made payable to Fixed Rate Financial, Inc. Respondents instructed Heather T. to sign  
22 "Professional Services Agreements" with SMITH as well as an "Agreement for Document  
23 Preparation" with Fixed Rate Financial, Inc. Respondents failed to provide the services  
24

1 promised to Heather T. Respondents failed to provide any proof of any services performed on  
2 behalf of Heather T. Respondents refused to refund any of the advance fees paid by Heather T.

3 16.

4 Respondents Are Non-Exempt from License Requirements

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

7 “(3) An attorney at law in rendering legal services to a client.”

8 17.

9 Respondent CLEAVER, while doing business as his unlicensed company, Fixed  
10 Rate, solicited and offered to perform loan modifications and other services in connection with  
11 loan secured directly or collaterally by a lien on real property. Respondent CLEAVER collected  
12 advance fees for said services through Fixed Rate, Inc., Respondent CLEAVER’s unlicensed  
13 company. Respondents had borrowers sign professional services agreements as a form of legal  
14 retainer for loan modification services in an attempt to circumvent existing laws that restricted  
15 the charging and collection of advance fees from borrowers prior to the completion of loan  
16 modification and foreclosure forbearance services. Respondent SMITH never personally met  
17 with the borrowers mentioned in Paragraphs 13 and 14 above. Respondent SMITH never  
18 provided any proof of completing any legal services for the borrowers mentioned in Paragraphs  
19 13 through 15 which would exempt Respondent SMITH from licensing requirements pursuant to  
20 Code section 10133(a).

21 18.

22 The conduct, acts and/or omissions of Respondents as set forth in Paragraphs 3  
23 through 17, above, are in violation of Code sections 10085, 10085.5, and 10085.6 and constitute  
24

1 grounds for the suspension or revocation of the licenses and license rights of Respondents  
2 KENNETH BRIAN CLEAVER and JASON ALLAN SMITH pursuant to Code sections  
3 10177(d) and/or 10177(g).

4 19.

5 Respondents' conduct, acts and/or omissions as set forth in Paragraphs 3 through  
6 17, above, constitute grounds for the suspension or revocation of the licenses and license rights  
7 of Respondents KENNETH BRIAN CLEAVER and JASON ALLAN SMITH pursuant to Code  
8 sections 10176(a) (making any substantial misrepresentation), 10176(b) (making any false  
9 promises of a character likely to influence, persuade or induce), and 10176(i) (conduct...which  
10 constitutes fraud or dishonest dealing).

11 SECOND CAUSE OF ACCUSATION

12 (Unlicensed Activity and Unlawful Compensation)

13 20.

14 There is hereby incorporated in this Second, separate, Cause of Accusation, all of  
15 the allegations contained in Paragraphs 1 through 19 above, with the same force and effect as if  
16 herein fully set forth.

17 21.

18 The activities described in Paragraphs 3 through 17, above, require a real estate  
19 license under Code sections 10131(d) and 10131.2. Respondent CLEAVER, while doing  
20 business as Fixed Rate, violated Code section 10130 by acting in the capacity of a real estate  
21 broker without first obtaining a real estate license from the BRE. Respondent CLEAVER's  
22 activities were not done under the name or supervision of his employing broker at the time.  
23  
24



1 22.

2 Respondent CLEAVER's activities while doing business as Fixed Rate as  
3 described in Paragraphs 3 through 17, above, violated Code section 10137 for accepting  
4 compensation from any person other than the broker under whom Respondent CLEAVER was  
5 licensed at the time.

6 23.

7 The conduct, acts and/or omissions of Respondent CLEAVER as set forth in  
8 Paragraphs 21 and 22, above, are in violation of Code Sections 10130 and 10137 and constitute  
9 grounds for the suspension or revocation of the license and license rights of Respondent  
10 KENNETH BRIAN CLEAVER pursuant to Code sections 10177(d) and/or 10177(g).

11 24.

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

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23 ///

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

7 Dated at Los Angeles, California

8 this 10th day of August, 2013.

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10  
11   
12 MARIA SUAREZ  
13 Deputy Real Estate Commissioner  
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19  
20

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