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**FILED**

**MAY 20 2014**

**BUREAU OF REAL ESTATE**

By Norma Smith

8  
9 **BEFORE THE BUREAU OF REAL ESTATE**

10 **STATE OF CALIFORNIA**

11 \* \* \*

11 In the Matter of the Accusation of ) CalBRE No. H-38731 LA  
12 JASON ALLAN SMITH, ) OAH No. 2013080491  
13 ) THIRD AMENDED ACCUSATION  
14 Respondent. )  
15 \_\_\_\_\_ )

16 This Third Amended Accusation amends the Second Amended Accusation filed  
17 on August 7, 2013. The Complainant, Robin Trujillo, a Deputy Real Estate Commissioner for  
18 the State of California, for cause of Accusation against JASON ALLAN SMITH ("Respondent  
19 SMITH"), is informed and alleges as follows:

20 1.

21 The Complainant, Robin Trujillo, a Deputy Real Estate Commissioner of the  
22 State of California, makes this Accusation in her official capacity.

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24 ///

1 2.

2 All references to the "Code" are to the California Business and Professions Code  
3 and all references to "Regulations" are to the Regulations of the Real Estate Commissioner, Title  
4 10, Chapter 6, California Code of Regulations.

5 3.

6 From November 15, 2006, through the present, Respondent SMITH has been  
7 licensed by the Bureau of Real Estate ("Bureau") as a real estate broker, Bureau License ID  
8 01778833. Respondent SMITH is also a licensed attorney in California, State Bar No. 237584.

9 4.

10 From September 15, 1990, through May 9, 2014, Kenneth Brian Cleaver  
11 ("Cleaver") was licensed by the Bureau as a real estate salesperson, Bureau License ID  
12 01088154. Cleaver voluntarily surrendered his real estate salesperson license on May 9, 2014.

13 5.

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

17 FIRST CAUSE OF ACCUSATION

18 (Code Section 10177(f) – Discipline by Another State Agency)

19 6.

20 On or about October 8, 2013, the State Bar of California issued a Decision in  
21 Case Nos. 12-O-11922 (12-O-13518; 12-O-14571; 12-O-14867; 12-O-15060)-FDM, wherein  
22 Respondent SMITH's license to practice law was disciplined to an actual 90 day suspension, one  
23 year stayed suspension and two years probation. The violations committed by Respondent  
24

1 SMITH included Civil Code section 2944.7 and Business and Professions Code section 6106.3  
2 in the matters involving S. McDonald (Case No. 12-O-14571) and K. Shanks (Case No. 12-O-  
3 14867.)

4 7.

5 On or about December 13, 2013, the State Bar of California and Respondent  
6 SMITH reached a stipulated settlement judgment in Case Nos. 12-O-12556, et al. Respondent  
7 SMITH admitted to having violated Civil Code section 2944.7 and Business and Professions  
8 Code section 6106.3 in connection with the residential mortgage loan modification transactions  
9 for T. Welch (Case No. 12-O-12556); J. Sparks (Case No. 12-O-16864); E. Anjos (Case No. 12-  
10 O-18187); F. and C. Tercero (Case No. 13-O-16119); M. and C. Sult (Case No. 13-O-16463);  
11 and S. Frank (Case No. 13-O-17056). Respondent SMITH stipulated to discipline of three years  
12 stayed suspension, three years probation, two years actual suspension, and payment of restitution  
13 to 12 individuals. Respondent SMITH's suspension will remain in effect until he pays restitution  
14 in full. Respondent SMITH is currently not eligible to practice law in the State of California.

15 8.

16 The suspension of Respondent SMITH's license to practice law based on  
17 charging, collecting, or receiving advance fees for offering to negotiate or arrange a mortgage  
18 loan modification as set forth in Paragraphs 6 and 7, above, constitutes grounds to discipline the  
19 license and/or license rights of Respondent SMITH pursuant to Code section 10177(f).

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1 13.

2 Business and Professions Code ("Code") section 10132 defines a real estate  
3 salesperson as a person who, for compensation or in expectation of compensation, is employed  
4 by a licensed real estate broker to do one or more of the acts set forth in Code sections 10131,  
5 10131.1, 10131.2, 10131.3, 10131.4, and 10131.6.

6 14.

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

11 15.

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

17 16.

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

20 "IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED  
21 OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A "NO  
22 OBJECTION" LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN  
23 MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU  
24

1 CAN NO LONGER ENTER INTO THESE AGREEMENTS EFFECTIVE AS OF OCTOBER  
2 11, 2009, NOR CAN YOU COLLECT ANY ADVANCE FEES FOR SUCH SERVICES.  
3 Agreements entered into and advance fees collected prior to October 11, 2009 are not affected.  
4 Advance fees inadvertently collected after October 11, 2009 must be fully refunded. All real  
5 estate licensees should become familiar with the provisions of SB94 as there are substantial  
6 administrative and criminal penalties for violations.”

7 17.

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

10  
11 “[I]t shall be unlawful for any person to claim, demand, charge,  
12 receive, collect or contract for an advance fee (1) for soliciting lenders on  
13 behalf of borrowers or performing services for borrowers in connection  
14 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.”

15 18.

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

17 “[N]otwithstanding any other provision of law, it shall be unlawful  
18 for any licensee who negotiates, attempts to negotiate, arranges, attempts  
19 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:

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

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

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

19.

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

11                   20.

12                   In order to induce homeowners to pay an advance fee for services in connection  
13 with mortgage loan modifications, and in furtherance of the plan and scheme described above in  
14 Paragraph 19, Respondent SMITH and Cleaver engaged in fraud or dishonest dealing and made  
15 substantial misrepresentations to homeowners including, but not limited to, that a licensed  
16 attorney (Respondent SMITH) hired by Fixed Rate on their behalf would negotiate or arrange a  
17 loan modification for the homeowners. The homeowners were misled to believe that the  
18 advance fees that they paid to Fixed Rate would cover Respondent SMITH's fee. In a blatant  
19 attempt to circumvent existing laws prohibiting real estate brokers and attorneys from charging  
20 and collecting advance fees for loan modification services, CLEAVER had borrowers sign an  
21 agreement with Fixed Rate for “document preparation” and Respondent SMITH had borrowers  
22 sign a “professional services” agreement. Homeowners were instructed to pay advance fees for  
23 loan modification and negotiation services directly to Fixed Rate, an unlicensed entity.

1 21.

2 Fixed Rate claimed to have a 98 percent success rate of achieving loan  
3 modifications or a principal reduction for borrowers due to Fixed Rate's attorney. Respondent  
4 SMITH claimed to have represented thousands of homeowners in loan modifications. Some  
5 homeowners were advised not to pay one or more mortgage payments to their lenders in order to  
6 improve their chances of obtaining a loan modification. Once the homeowners paid their  
7 advance fee to Fixed Rate, Cleaver and Respondent SMITH failed to return the homeowners'  
8 calls or respond to their requests for status updates on their loan modifications. After  
9 homeowners began to complain about Cleaver and SMITH's collection of advance fees and lack  
10 of communication, Respondent SMITH denied having been paid by the homeowners (since the  
11 homeowners were instructed to pay Fixed Rate); denied having any affiliation with or working  
12 for Cleaver or Fixed Rate; or claimed that he (SMITH) had not been retained by the homeowners  
13 as their attorney to arrange a loan modification on their behalf.

14 22.

15 On or around March 9, 2011, Cleaver, while doing business as Fixed Rate,  
16 solicited loan modification and negotiation services to borrowers T. and C. Welch in connection  
17 with a loan secured directly or collaterally by a lien on real property owned by T. and C. Welch<sup>1</sup>.  
18 Cleaver advised T. and C. Welch that it would be easier to obtain a loan modification if their  
19 mortgage was in arrears. Between March and April, 2011, Cleaver and Respondent SMITH  
20 charged and collected advance fees totaling \$3,200 from T. and C. Welch. The advance fees  
21 were paid directly to Fixed Rate's bank account. Cleaver and Respondent SMITH had not  
22 provided any of the services promised at the time that they charged and collected advance fees

23  
24 <sup>1</sup> T. Welch is the same borrower noted in State Bar Case No. 12-O-12556 filed against Respondent SMITH, as described in Paragraph 7 of this Third Amended Accusation.



1 from the borrower. Additionally, Respondent SMITH attempted to charge T. and C. Welch for  
2 appraisal services of their property. Cleaver and Respondent SMITH failed to provide the  
3 services promised to T. and C. Welch. Cleaver and Respondent SMITH failed to provide copies  
4 to T. and C. Welch of any agreement or other document that T. and C. Welch were told to sign.  
5 Respondent SMITH failed to provide any proof of any services performed on behalf of T. and C.  
6 Welch, aside from a list of a few calls made by "Diana" from Respondent SMITH's office to T.  
7 and C. Welch's lender, allegedly inquiring as to whether the lender had begun foreclosure  
8 proceedings.

9 23.

10 On August 18, 2011, Respondent SMITH sent an email to T. Welch in response  
11 to T. Welch's complaint about the lack of communication and proof of services by Cleaver and  
12 SMITH. In his email, SMITH acknowledged receiving \$750 from Fixed Rate "for review and  
13 consultation, after you [T. Welch] asked me to work on your modification." SMITH claimed  
14 that he had yet to be paid for the actual negotiation of T. Welch's loan modification. Respondent  
15 SMITH claims that T. and C. Welch allegedly signed on September 12, 2011, a "Professional  
16 Services Agreement-1" and a "Client Authorization to Represent" allowing SMITH to represent  
17 them in negotiating or arranging a loan modification with their lender. Cleaver and Respondent  
18 SMITH acted in bad faith by refusing to refund any of the advance fees paid by T. and C. Welch.

19 24.

20 On or around June 6, 2011, Cleaver solicited loan modification and negotiation  
21 services to borrowers C. and G. Reed. On June 7, 2011, Cleaver and Respondent SMITH  
22 charged and collected an advance fee of \$3,650 from C. and G. Reed. The advance fee was paid  
23 by cashier's check to Fixed Rate. Cleaver and Respondent SMITH had not provided any of the  
24

1 services promised at the time that they charged and collected advance fees from the borrower. C.  
2 and G. Reed were instructed to sign a Client Authorization to Represent form which authorized  
3 SMITH to obtain information about their mortgage from their lender. C. and G. Reed were also  
4 instructed to sign Professional Services Agreements with SMITH to perform an analysis and  
5 review of their mortgage and to negotiate a loan modification with their lender. Cleaver and  
6 Respondent SMITH failed to provide the services promised to C. and G. Reed. Cleaver and  
7 Respondent SMITH failed to provide any proof of any services performed on behalf of C. and G.  
8 Reed. Cleaver and Respondent SMITH acted in bad faith by refusing to refund any of the  
9 advance fees paid by C. and G. Reed.

10 25.

11 On or around February 29, 2012, Cleaver solicited loan modification, loss  
12 mitigation, and/or loan negotiation services to borrower H. Thompson. On or about March 6,  
13 2012, Cleaver and Respondent SMITH charged and collected an advance fee of \$3,650 from H.  
14 Thompson, which was paid by check made payable to Fixed Rate Financial, Inc. Cleaver and  
15 Respondent SMITH had not provided any of the services promised at the time that they charged  
16 and collected advance fees from the borrower. Cleaver and Respondent SMITH instructed H.  
17 Thompson to sign "Professional Services Agreements" with SMITH as well as an "Agreement  
18 for Document Preparation" with Fixed Rate Financial, Inc. Cleaver and Respondent SMITH  
19 failed to provide the services promised to H. Thompson. Cleaver and Respondent SMITH failed  
20 to provide any proof of any services performed on behalf of H. Thompson. Cleaver and  
21 Respondent SMITH acted in bad faith by refusing to refund any of the advance fees paid by  
22 Heather T.

23 ///

1 26.

2 Respondents Are Non-Exempt from License Requirements

3 Code section 10133(a) states that the acts described in Code section 10131 are not  
4 acts for which a real estate license is required if performed by “(3) An attorney at law in  
5 rendering legal services to a client.” Code section 10133(b) provides that: “[T]he exemptions in  
6 subdivision (a) are not applicable to a person who uses or attempts to use them for the purpose of  
7 evading the provisions of this part.”

8 27.

9 Cleaver, while doing business as his unlicensed company, Fixed Rate, solicited  
10 and offered to perform loan modifications and other services in connection with loan secured  
11 directly or collaterally by a lien on real property. Cleaver collected advance fees for said  
12 services through Fixed Rate, Inc., Cleaver’s unlicensed company. Respondent SMITH had  
13 borrowers sign professional services agreements as a form of legal retainer for loan modification  
14 services in an attempt to circumvent existing laws that restricted the charging and collection of  
15 advance fees from borrowers prior to the completion of loan modification and foreclosure  
16 forbearance services. The only legal services that homeowners believed they were paying  
17 advance fees to Fixed Rate for were the negotiation or attempt to arrange a loan modification for  
18 the homeowner by Fixed Rate’s attorney (Respondent SMITH). Respondent SMITH never  
19 personally met with the borrowers mentioned above in Paragraphs 22 and 24. Respondent  
20 SMITH never provided any proof of completing any legal services for the borrowers mentioned  
21 in Paragraphs 22 through 25 which would exempt Respondent SMITH from licensing  
22 requirements pursuant to Code section 10133(a).

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1 28.

2 The conduct, acts and/or omissions of Respondent SMITH as set forth in  
3 Paragraphs 12 through 27, above, are in violation of Code sections 10085, 10085.5, and 10085.6  
4 and Civil Code section 2944.7 and constitute grounds for the suspension or revocation of the  
5 license and license rights of Respondent JASON ALLAN SMITH pursuant to Code sections  
6 10177(d) and/or 10177(g).

7 29.

8 Respondent SMITH's conduct, acts and/or omissions as set forth in Paragraphs 12  
9 through 27, above, constitute grounds for the suspension or revocation of the license and license  
10 rights of Respondent JASON ALLAN SMITH pursuant to Code sections 10176(a) (making any  
11 substantial misrepresentation), 10176(b) (making any false promises of a character likely to  
12 influence, persuade or induce), 10176(i) (conduct...which constitutes fraud or dishonest dealing)  
13 or 10177(j) (conduct, whether of the same or a different character than specified in this section,  
14 that constitutes fraud or dishonest dealing).

15 30.

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

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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 Respondent JASON ALLAN SMITH under the  
4 Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), for the costs of  
5 investigation and enforcement as permitted by law, and for such other and further relief as may  
6 be proper under other provisions of law.

7 Dated at Los Angeles, California

8 this 20 day of May, 2014.

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11 ROBIN TRUJILLO  
12 Deputy Real Estate Commissioner  
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19 cc: Jason Allan Smith  
20 Robin Trujillo  
21 Sacto  
22 OAH  
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