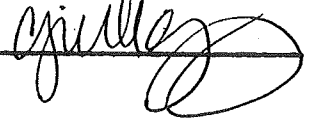


FILED

OCT - 9 2014

BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * * *

In the Matter of the Accusation of)	CalBRE No. H-38731 LA
)	
JASON ALLAN SMITH,)	OAH No. 2013080491
)	
Respondent.)	
_____)	

DECISION

The Proposed Decision dated September 19, 2014, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The Decision suspends or revokes one or more real estate licenses.

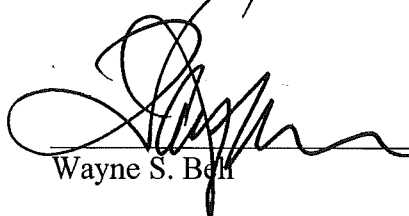
The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on OCT 29 2014.

IT IS SO ORDERED

10/5/2014

REAL ESTATE COMMISSIONER


Wayne S. Beh

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JASON ALLAN SMITH,

Respondent.

Case No. H-38731 LA

OAH No. 2013080491

PROPOSED DECISION

Glynda B. Gomez, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on August 18, 2014 in Los Angeles, California. Lissete Garcia, Real Estate Counsel, represented Complainant. Respondent Jason Allan Smith (Smith or Respondent Smith) did not appear and was not otherwise represented. Oral and documentary evidence was received, and argument was heard. The record was closed and the matter submitted on August 18, 2014.

FACTUAL FINDINGS

1. Robin Trujillo, Deputy Real Estate Commissioner (Complainant), filed the Third Amended Accusation in her official capacity.
2. The Bureau of Real Estate (BRE) issued real estate broker license number 01778833 to Respondent on November 15, 2006. Respondent is also a licensed attorney in California, State Bar No. 237584.
3. From September 15, 1990 through May 9, 2014, Kenneth Brian Cleaver (Cleaver) was licensed by the BRE as a real estate salesperson, license number 01088154. Cleaver voluntarily surrendered his real estate salesperson license on May 9, 2014. The license will expire on October 16, 2015.
4. Fixed Rate Financial, Inc. (Fixed Rate) is a California corporation formed on April 21, 2008. Cleaver is the Chief Executive Officer and a director of Fixed Rate. Fixed Rate has never been licensed in any capacity by the BRE.

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5. On October 8, 2013, the State Bar of California issued a Decision in Case Nos. 12-O-11922 (12-O-13518; 12-O-14571; 12-O-14867; 12-O-15060)-DFM. Pursuant to the decision, Respondent's license to practice law was disciplined by imposition of an actual 90 day suspension, one year stayed suspension and two years probation. The facts and circumstances underlying the discipline involved Respondent's taking advance fees for loan modifications in violation of Civil Code section 2944.7 (prohibition on advance fees agreements for loan modifications) and Business and Professions Code section 6106.3 (discipline of attorneys for violation of Civil Code section 2944.7).

6. On December 13, 2013, the State Bar of California issued a Decision in Case Nos. 12-O-12556, 12-O-16864, 12-O-18187, 13-O-16119, 13-O-16463 and 13-O-17056. Pursuant to the decision, Respondent's license to practice law was disciplined by imposition of a two year actual suspension, three year stayed suspension, three years probation, and payment of restitution. The facts and circumstances underlying the discipline also involved Respondent's taking of advance fees for loan modifications in violation of Civil Code section 2944.7 and Business and Professions Code section 6106.3.

7. Respondent failed to report the California State Bar's discipline set forth in factual findings 5 and 6 above, to the BRE.

8. Effective October 11, 2009, advance fee agreements for loan modifications and the collection of advance fees for loan modifications were no longer permitted under California law.

9. Respondent Smith had a business arrangement with Cleaver wherein Cleaver, doing business as Fixed Rate, obtained advance fees from customers for loan modifications. The advance fees obtained by Cleaver were for the preparation of documents by Cleaver as Fixed Rate and the payment of Respondent Smith to provide loan modification services. Smith received his payments from Cleaver before Smith started working on loan modifications.

10. In early 2011, Carolyn Welch heard Cleaver on a radio program discussing and promoting loan modifications. Carolyn Welch contacted Cleaver to retain his services for a loan modification. Cleaver told Carolyn Welch that she should let her mortgage become delinquent in order to have the best chance of obtaining a loan modification. Cleaver told Carolyn Welch that Fixed Rate had lawyers and professional negotiators to work on the modification and stated that Fixed Rate had a 98% success rate in negotiating loan modification. Carolyn and Timothy Welch (the Welches) transferred \$3,200 to Fixed Rate's bank account at Wells Fargo bank as payment for loan modification services for the loan on their home. The Welches signed a document preparation agreement for Fixed Rate and Cleaver's preparation of documents and a professional services agreement for Smith's loan modification and negotiation services. At the time of the payment, no work had been done on any loan modification for the Welches. The sum of \$3,650 was to be the entire cost of the loan modification including any legal and or negotiation services needed. On the advice of Cleaver, the Welches let their mortgage become delinquent by missing payments.

Respondent Smith did not obtain a loan modification for the Welches and did not undertake any efforts to obtain a loan modification. The only action undertaken was that one of Smith's assistants did contact the Welches' lender to ascertain whether their loan was in foreclosure. Respondent Smith told Timothy Welch that he had not been paid and that their loan modification needs were not his problem. In fact, Smith had already received \$750 in advance funds paid via Cleaver for negotiation of the loan modification. The Welches contacted Bank of America and were able to work out a payment arrangement to bring their mortgage current and avoid foreclosure. Bank of America also provided them with a loan modification request package without charge. Cleaver and Smith refused to return the Welches' funds.

11. On June 7, 2011, Clayton and Gayla Reed (the Reeds) paid Fixed Rate \$3,650, by cashier's check, for loan modification and negotiation services for a loan with Bank of America on real property located at 408 Hill Street, Capitola, California. The sum of \$3,650 was to be the entire cost of the loan modification including any negotiation or legal services needed. Cleaver had the Reeds sign an agreement for Fixed Rate's document preparation and a professional services agreement for Respondent Smith's negotiation and modification services. Mr. Reed corresponded with Cleaver and attempted to reach Respondent Smith for a year regarding the loan modification. Respondent Smith neither returned any communication nor returned funds. Two of Respondent Smith's assistants made a few telephone calls to Bank of America to ascertain whether or not the Reeds' property was in foreclosure. In April of 2012, Mr. Reed learned from Bank of America that neither Cleaver nor Respondent Smith had ever contacted Bank of America on the Reeds' behalf regarding the need for a loan modification. When Respondent Smith did finally contact Mr. Reed he insisted that he had never been retained or paid. In fact, Respondent Smith had already received advance funds via Cleaver for negotiation of the loan modification. Mr. Reed requested, but was not given, a refund from Cleaver and Smith.

12. In February of 2012, Heather Thompson had several discussions with Respondent Smith and Cleaver by telephone about her need for a loan modification and payment reduction on her loan with Bank of America for property located at 2877 Mar Vista Drive, Unit 200, Aptos, California. Ms. Thompson told Respondent Smith and Cleaver that she had already received one loan modification on the loan. Both Cleaver and Respondent Smith assured Ms. Thompson that they would be able to obtain the loan modification and payment reduction she desired. On March 26, 2012, she paid \$3,650 to Fixed Rate for the loan modification services promised by Cleaver and Respondent Smith. She also paid \$450 for an appraisal of her property at the direction of Cleaver and Respondent Smith. Not long after she paid Fixed Rate, she inquired with Cleaver and Respondent Smith about the progress on her loan modification and principal reduction. Cleaver advised her that a loan modification would be delayed because she had already received one modification and consequently, she would need to wait. When Ms. Thompson contacted Bank of America, she learned that neither Respondent Smith nor Cleaver had ever inquired about a loan modification or a principal reduction on her behalf. In July of 2012, Ms. Thompson

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requested a refund. However, Cleaver and Respondent Smith refused to refund her funds. Ms. Thompson obtained a small claims judgment against Respondent Smith in the amount of \$4,500 for the amount of her expended funds and court costs, but has not been able to collect on the judgment.

Costs

13. Complainant submitted a declaration of Bureau Supervising Special Investigator Guadalupe Felix which claimed 51 hours of investigative time by BRE Investigators Guadalupe Felix (.30 hours), Eleazor Galano (49.25 hours), Linda Kleb (.45 hours), Martin Luke (.20 hours), Kim Ngo (.60 hours) and Anthony Vo (.20 hours) and 1.87 hours of program technician time (.17 hours Cassandra Anderson and 1.70 hours Graciela F. Macias) for a total value of \$4,162.90 of Complainant's investigative time expenditures. Additionally, Complainant's attorney Lissette Garcia, provided a declaration regarding enforcement costs and attorney time. According to Garcia's declaration, she expended 41.60 hours conducting an initial review of the file, preparing the accusation, analyzing the case and preparing for hearing. Ms. Garcia's time was charged at an hourly rate of \$89 for a total of \$3,702.40 in attorney costs and such costs are deemed reasonable. Complainant also incurred \$1,116.33 in witness related costs including witness fees, travel costs for airfare, transportation and mileage for three witnesses and mileage. Accordingly, Complainant incurred \$8,981.63 in reasonable costs of investigation and prosecution of this matter.

DISCUSSION AND LEGAL CONCLUSIONS

1. Business and Professions Code (Code) section 10177, subdivision (f), provides that the Commissioner may suspend or revoke the license of a real estate licensee if the licensee conducted himself in a manner that would have warranted the denial of his application for a real estate license, or had a license issued by another California agency suspended or revoked for acts that if done by a real estate licensee would be grounds for the suspension or revocation of a California real estate license.

2. Code section 10186.2 provides that a real estate licensee is required to report to the BRE any disciplinary action taken by another licensing entity or authority against the licensee on any other license that the licensee holds. The report to the BRE must be made within 30 days of the imposition of the discipline. Failure to make a timely report is cause for discipline of a real estate license.

3. Code section 10130 provides that it is unlawful for any person to engage in the business of, act in the capacity of, advertise as, or assume to act as a real estate broker without first obtaining a real estate broker license from the BRE.

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4. Code section 10131, subdivision (d) provides that a real estate broker is a person who solicits, negotiates, collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

5. Code section 10131.2 provides that a real estate broker is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange or rent property of a business opportunity.

6. Code section 10133, subdivision (a)(3) provides that an attorney rendering legal services to a client is exempt from the requirement to obtain a real estate broker license for the acts set forth in Code section 10131.

7. Code section 10133, subdivision (b) provides that the attorney exemption does not apply if the exempt person uses or attempts to use the exemption to evade the provisions of the real estate law.

8. Code section 10026, provides that an advance fee, regardless of form, is a fee that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license.

9. Code section 10085 provides that the Commissioner may require that all advance fee agreements and materials be approved in advance of their usage.

10. Code section 10085.5, subdivision (a)(1) provides that it is unlawful for any person to claim, demand, charge, receive, collect, or contract for an advance fee for soliciting lenders on behalf of borrowers or performing services for borrowers in connection with loans to be secured directly or collaterally by real property, before the borrower is obligated to complete the loan.

11. Code section 10085.6, subdivision (a)(1) provides that is 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 loan forbearance for a fee or other compensation paid by the borrower to claim, demand, charge, collect or receive any compensation until after a licensee has fully performed each and every service the licensee contracted to perform or represented that he, she, or it would perform.

12. Code section 10176, subdivision (a), provides that the making of any substantial misrepresentation constitutes cause for discipline.

13. Code section 10176, subdivision (b) provides that the making of any false promises of a character likely to influence, persuade, or induce is cause for discipline.

14. Code section 10176, subdivision (i) provides that any conduct which constitutes fraud or dishonest dealings constitutes cause for discipline.

15. Code section 10177, subdivision (d), provides that willful disregard or violation of the real estate law or regulations constitutes cause for discipline.

16. Code section 10177, subdivision (g), provides that demonstrated negligence or incompetence in performing an act which requires a real estate license is cause for discipline.

17. Code section 10177, subdivision (j), provides that any conduct that constitutes fraud or dishonest dealings constitutes cause for discipline.

18. Civil Code Section 2944.7 prohibits any person from accepting advance fees to negotiate, arrange, attempt to arrange or otherwise offer to perform a mortgage loan modification or other form of mortgage loan forbearance.

19. Code section 6106.3 provides that violation of Civil Code section 2944.7 is cause for discipline of an attorney.

20. Code section 10106, subdivision (a) provides that upon request, an administrative law judge may direct a licensee found to have committed a violation of the real estate law to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

21. Cause exists to discipline Respondent's real estate broker license pursuant to Code section 10177, subdivision (f), because it was established by a preponderance of the evidence that Respondent was twice disciplined by the State Bar of California for accepting advance fees for loan modification negotiations in violation of Code section 2944.7 and Civil Code section 6106.3 in multiple transactions. The conduct underlying the discipline (accepting advance fees for loan modification negotiations) is conduct which constitutes grounds for discipline of a real estate licensee. (Factual Findings 5 and 6; Legal Conclusion 1, 8, 10 and 11.)

22. Cause exists to discipline Respondent's real estate broker license pursuant to Code section 10186.2, subdivision (a)(1)(c) and (b) because it was established by a preponderance of the evidence that Respondent was twice disciplined by the State Bar of California for conduct involving dishonest dealings and failed to report the discipline to the BRE. (Factual Findings 5, 6 and 7; Legal Conclusion 2.)

23. Cause exists to discipline Respondent's real estate broker license pursuant to Code sections 10085.5, 10085.6, 10133 and Civil Code section 2944.7 in conjunction with Code sections 10176, subdivisions (a), (b), (i) and (j), and 10177, subdivisions (d) and (g), because Respondent Smith accepted advance fees for loan modification negotiation services in willful disregard for the real estate law and was then negligent in his handling of the loan modification transactions of the Welches, the Reeds and Heather Thompson and

made substantial misrepresentations, false promises and engaged in dishonest dealings in the handling of the loan modifications for the Welches, the Reeds and Heather Thompson. (Factual Findings 2-12; Legal Conclusions 10-18.)

24. Respondent Smith is not exempt from the prohibition on accepting advance fees because of his status as an attorney. Code section 10133, subdivision (b) merely exempts him from the requirement of having a real estate broker's license for activities which otherwise would require a real estate broker's license. Moreover, Respondent Smith's activities were an attempt to circumvent the real estate law. By the language of Code Section 10133, subdivision (b), these actions are not subject to exemption. Moreover, as determined by the State Bar of California, Respondent Smith's conduct violated the loan modification advance fee prohibition of Code section 2944.7 and Civil Code section 6106.3. (Factual Findings 2-12; Legal Conclusions 6-7 and 18-19.)

25. The purpose of a disciplinary matter is to protect the public and not to punish the licensee. (*Handeland v. Department of Real Estate* (1976) 58 Cal.App.3d 513, 518; *Camacho v. Youde* (1979) 95 Cal.App.3d 161; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Respondent violated the real estate law by engaging in a scheme to circumvent the prohibitions on advance fee agreements and payments for loan modification negotiations. Respondent was twice disciplined by the State Bar of California for multiple instances of such conduct and failed to report the State Bar's discipline of his license to the BRE. Moreover, Respondent received funds with the understanding that he would undertake efforts to obtain loan modifications, but did not undertake any work and refused to return the advance fees he received for the work. Respondent's advance fee loan modification agreements violated the law in various aspects as set forth fully above. In this instance, the public can be protected only by the revocation of the Respondent's license.

26. Complainant is entitled to recovery of reasonable investigative and prosecution costs in the amount of \$8,981.63. (Factual Finding 13; Legal Conclusion 20). Because this action involved two Respondents, one of which surrendered his license in May of 2014, a proration of costs between the two Respondents is appropriate. Pursuant to stipulation and order, Cleaver has agreed and is obligated to pay \$4227.29 in costs to the BRE as a condition of reinstatement. Accordingly, Respondent Smith is responsible for the remaining \$4,754.34 in costs.

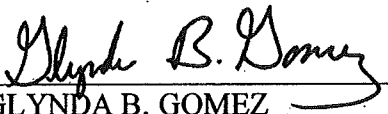
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WHEREFORE, THE FOLLOWING ORDER is hereby made:

ORDER

1. All real estate licenses and licensing rights of Respondent Jason Allan Smith are hereby revoked.
2. Respondent Smith shall reimburse the Bureau of Real Estate for the reasonable costs of investigation and prosecution of this matter in the amount of \$4,754.34 within 90 days of the effective date of this Decision.

DATED: September 19, 2014


GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings