

FILED

OCT 28 2015

BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of

CARLOS MARTINEZ,
individually, and doing business
as Platinum Consulting Rental
Service,

Respondent.

CALBRE Case No. H-39561 LA
OAH Case No. 2014080752

DECISION AFTER REJECTION OF PROPOSED DECISION

The matter came on for hearing before Joseph D. Montoya, Administrative Law Judge of the Office of Administrative Hearings at Los Angeles, California, on March 10, 2015.

Cheryl D. Keily, Counsel, represented the Complainant.

Raymond Perez, Esq. represented the Respondent Carlos Martinez, who was also present.

Evidence was received but the matter was not submitted on the hearing date so that Complainant could submit further documentation regarding a contract utilized by Respondent, and so that the parties could submit post-hearing briefs. The matter was subsequently submitted on April 20, 2015.

1 On May 20, 2015, the Administrative Law Judge submitted a Proposed Decision
2 which I declined to adopt as the Decision of the Real Estate Commissioner. Pursuant to Section
3 11517(c) of the Government Code of the State of California, Respondent was served with a copy
4 of the Proposed Decision dated May 20, 2015, and with notice of my determination not to adopt
5 the Proposed Decision. Respondent was notified that the case would be decided by me upon the
6 record, including the transcript of proceedings held on March 10, 2015, and upon any written
7 argument offered by the parties.

8 Complainant's Argument After Rejection of Proposed Decision was submitted on
9 October 8, 2015. Respondent Carlos Martinez has not submitted any written argument.

10 I have given careful consideration to the record in this case, including the
11 transcript of proceedings of March 10, 2015.

12 FINDINGS OF FACT

13 The Findings of Fact in the Proposed Decision of the Administrative Law Judge,
14 dated May 20, 2015, are hereby adopted as a part of this Decision.

15 LEGAL CONCLUSIONS

16 I have determined that the Legal Conclusions in the Proposed Decision of the
17 Administrative Law Judge, dated May 20, 2015, are not appropriate with respect to Legal
18 Conclusions Nos. 5(A), 5(B), 5(C), 6, 16, 18(B), and 18(C) and they are not adopted as the Legal
19 Conclusions of the Real Estate Commissioner in this proceeding. All other Legal Conclusions in
20 the Proposed Decision of the Administrative Law Judge, dated May 20, 2015, are hereby
21 adopted. The Legal Conclusions Nos. 5, 6, and 16 in the Proposed Decision of the
22 Administrative Law Judge, dated May 20, 2015 shall be as follows:

23 ///

24 ///

1 5A. Business and Professions Code (“Code”) section 10167.16 provides:

2 “A person or corporation licensed pursuant to this article and not
3 engaging in acts for which a real estate license is required under Article 1
4 (commencing with Section 10130) of Part 1 of Division 4, shall be subject,
5 in addition to the provisions of this article [Article 2.3 of Chapter 3] to the
6 provisions of Chapter 1 (commencing with Section 10000) and Chapter 2
7 (commencing with Section 10050) of Part 1 of Division 4, and to Section
8 10450, 10452, 10453, and 10454.” (emphasis added).

9 5B. “Advance fee” as defined under Business and Professions Code section
10 10026 is included within Chapter 1 of Part 1 of Division 4 and is therefore applicable to persons
11 or corporations engaging in PRLS activities under a PRLS license issued pursuant to Article 2.3
12 of Chapter 3, Part 1 of Division 4.

13 5C. Respondent engaged in a PRLS business while licensed as a real estate
14 broker as allowed pursuant to Code sections 10167.2 and 10167.3(b).

15 6A. As a real estate broker, Respondent was required to comply with Code
16 sections 10026, 10145, and 10146 and the Regulations of the Real Estate Commissioner,
17 Regulations 2830 through 2836, Article 15 of Chapter 6, Title 10, California Code of
18 Regulations.

19 6B. Code section 10145(a)(1) provides, in pertinent part: “A real estate broker
20 who accepts funds belonging to others in connection with a transaction subject to this part shall
21 deposit all those funds that are not immediately placed into a neutral escrow depository or into
22 the hands of the broker’s principal, into a trust fund account...” (emphasis added).

23 6C. Code section 10146 provides, in pertinent part: “Any real estate broker who
24 contract for or collects an advance fee from any other person, hereinafter referred to as the

1 “principal,” shall deposit any such amount or amounts, when collected in a trust account with a
2 bank or other recognized depository.”

3 16. Respondent failed to comply with Code sections 10145 and 10146 and
4 Regulations 2831, 2831.1, 2832, and 2832.1.

5 ORDER

6 The real estate license and license rights of Respondent Carlos Martinez are
7 hereby revoked; however, however, a restricted real estate broker license shall be issued to
8 Respondent pursuant to Section 10156.5 of the Business and Professions Code if Respondent
9 makes application therefor and pays to the Bureau of Real Estate the appropriate fee for the
10 restricted license within 90 days from the effective date of this Decision. The restricted license
11 issued to Respondent shall be subject to all of the provisions of Section 10156.7 of the Business
12 and Professions Code and to the following limitations, conditions and restrictions imposed under
13 authority of Section 10156.6 of that Code:

14 1. The restricted license issued to Respondent may be suspended prior to hearing
15 by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo
16 contendere to a crime which is substantially related to Respondent's fitness or capacity as a real
17 estate licensee.

18 2. The restricted license issued to Respondent may be suspended prior to hearing
19 by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that
20 Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands
21 Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted
22 license.

1 3. Respondent shall not be eligible to apply for the issuance of an unrestricted real
2 estate license nor for the removal of any of the conditions, limitations or restrictions of a
3 restricted license until two (2) years have elapsed from the effective date of this Decision.

4 4. Respondent shall, within nine (9) months from the effective date of this
5 Decision and Order, present evidence satisfactory to the Commissioner that Respondent has,
6 since the most recent issuance of an original or renewal real estate license, taken and successfully
7 completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate
8 Law for renewal of a real estate license. If Respondent fails to satisfy this condition,
9 Respondent's real estate license shall automatically be suspended until Respondent presents
10 evidence satisfactory to the Commissioner of having taken and successfully completed the
11 continuing education requirements. Proof of completion of the continuing education courses
12 must be delivered to the Bureau of Real Estate, Flag Section at P.O. Box 137013, Sacramento,
13 CA 95813-7013.

14 5a. Respondent shall pay \$2,000 for the Commissioner's reasonable cost of the
15 investigation and enforcement which led to this disciplinary action. Said payment shall be in the
16 form of a cashier's check made payable to the Bureau of Real Estate. The investigative and
17 enforcement costs must be delivered to the Bureau of Real Estate, Flag Section at P.O. Box
18 137013, Sacramento, CA 95813-7013, , within 90 days from the effective date of this Decision
19 and Order.

20 5b. The Commissioner shall suspend Respondent's license pending a hearing
21 held in accordance with California Government Code Section 11500, et seq., if payment is not
22 timely made as provided for herein. The suspension shall remain in effect until payment is made
23 in full or until a decision providing otherwise is adopted following a hearing held pursuant to this
24 condition.

1 6. Any restricted real estate license issued to Respondent pursuant to this
2 Decision and Order shall be suspended for thirty (30) days from the date of issuance of said
3 restricted license; provided, however, that if Respondent petitions the Bureau, said suspension
4 (or a portion thereof) shall be stayed upon condition that:

5 a. Respondent pays a monetary penalty pursuant to section 10175.2 of the
6 Business and Professions Code at the rate of \$100 for each day of the suspension for a total
7 penalty of \$3,000.

8 b. Said payment shall be in the form of a cashier's check made payable to the
9 Bureau of Real Estate. Said check must be delivered to the Bureau of Real Estate, Flag Section
10 at P.O. Box 137013, Sacramento, CA 95813-7013, prior to the effective date of this Decision
11 and Order.

12 c. No further cause for disciplinary action against the real estate license of
13 Respondent occurs within two (2) years from the effective date of the Decision and Order in this
14 matter.

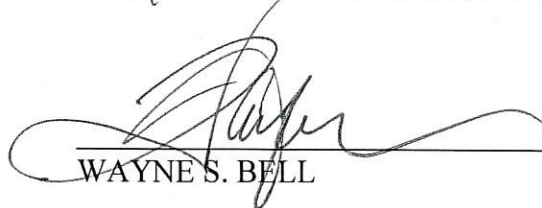
15 d. If Respondent fails to pay the monetary penalty in accordance with the terms
16 and conditions of this Decision and Order, the suspension shall go into effect automatically.
17 Respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money
18 paid to the Bureau under the terms of this Decision and Order.

19 e. If Respondent pays the monetary penalty and any other moneys due under this
20 Stipulation and Agreement and if no further cause for disciplinary action against the real estate
21 license of said Respondent occurs within two (2) years from the effective date of this Decision
22 and Order, the entire stay hereby granted pursuant to this Decision and Order as to Respondent
23 shall become permanent.
24

1 This Decision shall become effective at 12 o'clock noon on NOV 18 2015.

2 IT IS SO ORDERED 10/23/2015.

3 REAL ESTATE COMMISSIONER

4 
5 _____
6 WAYNE S. BELL

FILED

JUN 30 2015

BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of

CARLOS MARTINEZ,

Respondent.

No. H-39561 LA

OAH No. 2014080752

NOTICE

TO: CARLOS MARTINEZ, Respondent.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated May 20, 2015, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated May 20, 2015, is attached for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on March 10, 2015, any written argument hereafter submitted on behalf of Respondent and Complainant.

Written argument of Respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of March 10, 2015, at the


1 Los Angeles office of the Bureau of Real Estate unless an extension of the time is granted for
2 good cause shown.

3 Written argument of Complainant to be considered by me must be submitted
4 within 15 days after receipt of the argument of Respondent at the Los Angeles office of the
5 Bureau of Real Estate unless an extension of the time is granted for good cause shown.

6 DATED: _____

6/26/2015

7 REAL ESTATE COMMISSIONER

8 
9
10 WAYNE S. BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CARLOS MARTINEZ, individually and
doing business as Platinum Consulting Rental
Service,

Respondent.

Case No. H-39561 LA

OAH No. 2014080752

PROPOSED DECISION

The hearing in the above-captioned matter took place on March 10, 2015, at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings. Complainant was represented by Cheryl D. Keily, Counsel, Bureau of Real Estate. Respondent appeared with his attorney, Raymond Perez.

At the outset of the hearing, Complainant moved to amend the Accusation, to delete an allegation that Respondent failed to provide a customer with a refund. That motion was granted and it is now stated, at page 5, lines 5 and 6, that "Respondent provided Lorenzo C. with a refund of his payment."

Evidence was received but was not submitted on the hearing date so that Complainant could submit further documentation regarding a contract utilized by Respondent, and so that the parties could submit post-hearing briefs.

On March 20, 2015, Complainant submitted a declaration of custodian of records, which is received as exhibit 19. Respondent filed a written declaration regarding the declaration of custodian of records, on March 30, 2015. That declaration is received as exhibit C. Thereafter, Complainant submitted his written closing argument on April 10, 2015. That document is marked as exhibit 20 for identification. On April 20, 2015, Respondent submitted his written closing argument. Although the brief was due on April 17, 2015, there was no objection to it, and it is marked for identification as exhibit D.

The ALJ made numerous redactions of bank account numbers that were set out in the audit report that is attached to exhibit 5. That was not deemed practical for

exhibit 18, which will be sealed by a protective order. A protective order will issue concurrently with this Proposed Decision.

The matter was submitted for decision on April 20, 2015. The following factual findings, legal conclusions, and orders are hereby made by the ALJ.

FACTUAL FINDINGS

1. Complainant Howard Alston, Deputy Real Estate Commissioner, Bureau of Real Estate (Bureau), filed the Accusation in the above-captioned matter in his official capacity.

2. (A) Respondent Carlos Martinez is licensed as a real estate broker, holding license number B/01325720. He was first licensed as a broker in April 2008, by the Department of Real Estate (Department), the predecessor agency of the Bureau. Before being licensed as a broker, he had been licensed as a salesperson, beginning in January 2002. His broker's license will expire in April 2016, unless renewed.

(B) Respondent is authorized to use the fictitious business name Platinum Consulting Rental Services, but no others.

3. (A) Respondent operates a Prepaid Rental Listing Service (PRLS) under his fictitious business name. Essentially, he would obtain information about residential properties that were (or were shortly going to be) available for rent. For a fee, he would provide information about those properties to potential tenants. The prospective tenants were charged that fee, in advance, for the information about the rental properties.

(B) Complainant alleges that Respondent violated provisions of the Real Estate Law which control such activities. He alleges that Respondent had not obtained prior approval of the contract he used with the prospective tenants, and that he had refund provisions in his contract that are contrary to the applicable law. Respondent is accused, in five transactions, of failing to provide proper refunds, and of not supplying accurate information to the prospective tenants. Further, it is asserted that an audit revealed he had not been keeping tenants' funds in trust, and that a shortage exists. Numerous other violations were asserted in the audit, and in the Accusation.

4. After Respondent was served with the Accusation he filed a Notice of Defense that denied all of the allegations against him. This proceeding ensued, and all jurisdictional requirements have been met.

//

The Contract Form

5. In operating his PRLS business, Respondent used a standard contract (hereafter the contract). The contract was a preprinted form, with the name "Platinum Consulting Rentals" at the top. In bold print, the first part of the first full paragraph states that "Carlos Martinez DBA: Platinum Consulting Rentals is a prepaid rental listing service licensed by the California Department of Real Estate" (E.g., Ex. 7, at ex. 1 thereto.) The form has blanks to be filled out with the name of the prospective tenant (hereafter customer), their current address, and information about what sort of property they are interested in. There is considerable verbiage—the document is printed on 11 by 17 inch paper—and the bottom half contains information about the customer's right to a refund.

6. When Complainant filed the Accusation against Respondent, it was alleged that he had not obtained the Department's approval of his contract form. He testified that he had obtained such approval, but had lost the letter from the Department which gave approval. After the hearing, Complainant provided a declaration of custodian of records which shed further light on the matter. It was established that the main contract form used by Respondent, described above, had been approved by the Department in 2010. However, Respondent had not submitted the contract for approval; that had been done by Natalie Sue Rodriguez.

7. Ms. Rodriguez had submitted the contract for approval on August 10, 2010, and the Department wrote to her—at Respondent's address of record—on August 16, 2010. In its letter, the Department stated that the contract form was acceptable to the Department, but that all applicable licensing requirements would have to be complied with before the contract could be used in transactions with the public. At that time Ms. Rodriguez was not licensed by the Department.

8. (A) The Department's letter enclosed a one-page "addendum" which contained standard Department terms for PRLS contracts. According to the transmission letter and the addendum, acceptance of the contract form was predicated on the terms and conditions set out in the addendum. Among those was a condition that there be no other versions or variations of the accepted contract form, and that use of the form will be in accord with the letter and spirit of all applicable provisions of the Real Estate Law.

(B) At the end of the addendum, the following general disclaimer is found: "Department approval does not extend to matters material to approval which were not disclosed, to matters in violation of the law, or to matters which change subsequent to approval without resubmission in advance of offering such matters to the public for a fee." (Ex. 19, at p. 3 of ex. 3 thereto.)

(C) After the Accusation was filed, Respondent spoke to the custodian of records, Mark Tuter, who had sent the approval letter to Ms. Rodriguez in August

2010. Respondent told Tutera that he had taken over the PRLS business from Ms. Rodriguez, but had lost his approval letter.

9. (A) Respondent has been using an addendum of his own with the PRLS contract form described above. The addendum is on a single page, with the name "Platinum Consulting" on the top, along with Respondent's address and phone numbers. In large bold print the document is titled "90 day limited refund guarantee policy." The first part provides an acknowledgement that the customer has received information on at least three properties within that person's criteria.

(B) The second part contains language implying that the customer agrees to act in good faith toward "Platinum Consulting" by turning in applications and by receiving "updates twice a week to obtain 24 updates for a period of 90 days as reasonable documentations. This contractual agreement is final." Customers signed and initialed the addendum. (E.g., ex. 7, within ex. 1 thereto.)

10. Respondent's contract addendum was never submitted to the Department for approval. According to Mr. Tutera's declaration, it would not be approved, because he deems it to conflict with applicable law.

11. Respondent routinely used the addendum in his transactions with prospective tenants. The terms essentially required his customers to obtain 24 updates of his referrals before they could obtain a refund. That requirement is not found in the Real Estate Law.

Specific Transactions Alleged in the Accusation

The Transaction with Debra D.

12. On May 3, 2012, Debra D. executed Respondent's contract and the addendum, and she paid \$180 over to Respondent. The contract had a 90-day term.¹ Debra D. was given 10 potential locations, each shown on a print out of a Google map. She was also given a copy of Respondent's "Client Reminder Notice," which states that new updates (of listings) are available on Wednesday and Saturday in the afternoon. In bold print, the notice informs clients not to disturb tenants at the properties in question.

13. Debra D.'s declaration² stated that she met with a man named George at Respondent's place of business. Respondent did not have an employee named George. To the contrary, the contract signed by Debra D. identifies Chris Reyes as

¹ That was the term on all the contracts received in evidence.

² None of the tenant's testified at the hearing. Instead, their declarations were admitted under Government Code section 11514.

the agent; Chris R. is also named on another document, called an appointment form. Respondent's manager, Cathy Harris signed the contract along with Chris Reyes.

14. Debra D. claimed that through another real estate firm, she learned that the listings provided to her were nonexistent or not available. She implies that all 10 were in those categories. However, there is no other evidence as to which listings were allegedly bad and no evidence that she communicated this claim to Respondent at the time. The copies of the Google maps that she received and attached to her declaration have handwritten notes on four of the ten documents. Two say "like," while one says "hell no!" A fourth says "don't like—apt's in back." (Ex 7, in exhibit 1 thereto.) Debra D. claimed that she later found another rental without the assistance of Respondent's firm.

15. (A) Cathy Thomas testified on Respondent's behalf regarding this transaction, and others. She credibly testified that Debra D. had problems renting a property because she had a bankruptcy in her credit history, and did not have enough income. Further, her income raised red flags, as she was receiving social security disability and worker's compensation, but was working two "IHSS"—In Home Supportive Services—jobs. Thomas stated that when Debra D. wanted to obtain a refund, claiming she had found an apartment without Respondent's assistance, she provided a false rental agreement and a false utility bill. Notwithstanding that fact, Respondent tried to mail her a refund, but did not have a good address.

(B) Respondent, in a letter to the Bureau, or its predecessor, the Department, stated that the customer did not receive a refund because she did not obtain 24 listings. However, the detailed testimony of Cathy Thomas, who had direct dealings with the customers, is credited in this matter.

Keith T. Transaction

16. On October 27, 2012, Keith T. executed Respondent's contract and the addendum to it.³ He paid \$180 to Respondent's firm, and he received information on five locations, each set out on a printed Google map.

17. Within a few hours of signing the contract, the customer returned to Respondent's place of business and said he wanted to cancel the agreement; he said it wasn't for him. According to the customer, staff told him he ought to think it over, and that he could come back at another day to cancel.

18. On October 29, 2012, Keith T. returned to Respondent's offices and he filled out and signed a written refund request form. The refund form states that he would receive a letter regarding the status of his request. He was told by somebody in

³ Like Debra D., he produced a copy of an appointment form that identifies Chris R. as agent.

Respondent's office, at a later date, that he would have to wait 90 days—the length of the contract term—for a refund of his payment.

19. Respondent did not provide a refund to Keith T. In a letter to the Department about the matter, Respondent stated that the customer did not provide any documentation.

Kit H. Transaction

20. On December 19, 2012, Kit H. signed the standard Platinum Consulting contract and addendum, and she paid Respondent \$180 as his fee. She states in her declaration that she was provided with a list of five potential rental properties, and “instructed” not to disturb the tenants at any of the properties.

21. Kit H. also states in her declaration that of the five properties she was told about, two did not exist as actual addresses. She claims she called Platinum Consulting, was told to check out the other three, and was told she would have to obtain listings for consecutive weeks to get a refund. Thereafter, she stated she obtained five more listings. She went to at least two of them, and despite being instructed not to contact tenants, did so anyway. Each time the occupants stated that the properties were not for rent. Kit H. looked at three other properties, but did not deem them suitable.

22. Kit H. executed a refund request on April 16, 2013, after the term of the contract had run out. She attested in paragraph 4 of her declaration that she did not get a refund after finding a rental without Platinum Consulting's assistance. The customer was told that Platinum Consulting required the customer to provide a copy of the rental agreement on the new property as well as utility bills. Kit H. took the position that such was not required to do so by the contract, which is not the case under the contract, and even the law, which calls for reasonable documentation that someone has not moved or has found a location without the efforts of the PRLS firm.

23. The declaration of Kit H. (exhibit 9) contains 13 Google maps, each for a different location. Seven of them show a print date of December 19, 2012, the other six being dated December 20, 2012. Many have handwritten notes with details about the properties, such as notes about the square footage, what sort of appliance, interior appointments, or presence of a garage.

Mary L. Transaction

24. The account of Mary L.'s transaction is difficult to unravel, as the customer's claims are laid out in a three-page handwritten complaint, told in the third person. However, it can be discerned that Mary L. executed the standard contract on January 3, 2012, and it had a 90-day term. She also signed the contract addendum. She and her daughters spoke to Chris before signing the contract.

25. According to Mary L.'s declaration, she was told that she had to give a deposit of \$180, and she claims that Chris said that if she found a suitable house, she would get \$130 of her deposit back. She claimed that Chris told her that if she did not find any houses she liked, she would get all of her deposit back.

26. Mary L. was provided with documents for three locations. She was interested in one of the three, and went back to Respondent's offices, asking that Chris send a fax to the real estate agent handling the rental. She then, according to her declaration, asked how soon it would be before she got her \$130 back. According to her declaration, Cathy spoke up and said that there was no way there would be a refund, that they did not work for free.

27. Mary L. alleged that she then told Cathy that Chris had said there would be a refund if Platinum found her a house, which Cathy denied. The customer then lost interest in the house and wanted a full refund, which was denied.

28. Mary L. asserted that she made other efforts to obtain a refund, after she found a new home without Respondent's help. At some point she was told she had to show the rental agreement and utility bills for her new place. Supposedly there were numerous other conversations between Mary L. and Platinum Consulting staff. According to Mary L., she was told there would be a refund, but none was ever received.

29. As to Mary L.'s claims about what Chris told her at the outset of the transaction, a review of her copy of the contract, submitted to the Department in May 2012, shows that a reference to the \$50 non-refundable service fee is circled on the contract. Likewise, the provision that a potential tenant must document the claim they did not move, or moved into a home not found by Platinum Consulting, was marked in the margin and highlighted. That verbiage refers to the need to present a lease or utility bill. Finally, on the addendum form, the reference to the \$130 refund is circled as well. It is inferred that this was done while Chris was going over the contract before the contract was signed.

30. Respondent wrote a statement about the transaction that appears to have been transmitted by FAX to the Department on October 14, 2013. According to Respondent, Mary L. claimed to have found a place on her own, and Respondent or his staff stated she had to document that with a utility bill, and that she still had to collect new listings until she had received 24 of them, as set out in the contract addendum. He asserted that he tried to work something out, but she did not return any phone calls.

31. Cathy Thomas testified that she recalled Mary L. because she had good credit; two owners wanted her as a tenant. However, Mary L. could not or would not provide proof of income. Thomas testified that this customer's daughter translated

for her, as she did not speak English. This makes it likely that there was at least a misunderstanding, as Mary L. seemed to think she would not have to pay if Respondent found her a rental property. Thomas credibly described Mary L.'s efforts to extort a refund from Platinum Consulting by claiming she was injured on the business premises when that did not occur.

The Lorenzo C. Transaction

32. Complainant alleged that Lorenzo C. executed a contract with Respondent. No testimony, by declaration or otherwise, was provided by that customer. As noted in the preamble, the Accusation was amended to show that this customer received a refund.

The Audit

33. Respondent's PRLS business was audited in October and November 2013 by Bureau auditor Bitu Yazdani. The audit period was for February 1, 2011 through August 31, 2013. Ms. Yazdani testified at the hearing. In her report she found a number of violations, which can be summarized as follows.

34. (A) Respondent received fees from over 200 customers during the audit period; the fees totaled \$39,600. While \$50 of the \$180 fee was nonrefundable as a service fee, the balance of \$130 was potentially refundable. The auditor concluded that the larger portion of the fee was an advance fee that should have been held in trust.

(B) Respondent did not maintain a client trust account during the audit period. The entire \$180 fee was deposited into his general account, and used to fund operations of the business. If a refund was paid, it was paid out of the same general account. The auditor concluded that as a result, he was disbursing unearned fees.

(C) No trust account records, of the type required by the Bureau's regulations, were maintained for the fees received by Respondent. Furthermore, he was not performing monthly reconciliations of the separate records that the auditor concluded should be maintained for trust account fees.

(D) Since Respondent did not maintain proper trust account records, he did not retain such record for three years as would be required by Business and Professions Code section 10148.⁴ The auditor found that he should also have maintained records of all the apartments or homes that Respondent provided to the customers.

⁴ All further statutory citations are to the Business and Professions Code.

(E) There was no system in place whereby Respondent would and could monitor compliance with the Real Estate Law to the extent it pertained to his PRLS business. This was especially the case with regard to accounting for the advance fees paid in trust.

(F) The auditor concluded there was a trust account shortage of \$26,910. However, even if her analysis of the fees is correct, it is not clear that that number is accurate, in part because of the paucity of records. The calculation assumes that none of the potentially-refundable fee was earned, but it may well have been in many cases, including some of the particular transactions referenced above.

(G) The auditor found that the fictitious business names being used by Respondent—Platinum Consulting Rentals and Platinum Consulting—had not been approved by the Department or Bureau, which finding was correct.

35. The auditor concluded that Respondent had violated PRLS statutes and regulations in connection with the five transactions alleged in the Accusation and discussed above. Such conclusions are the subject of the findings above, and Legal Conclusions set out hereafter.

Costs

36. The Bureau has incurred investigation and enforcement costs in the amount of \$6,052.80, which appear reasonable on their face.

37. The Bureau has incurred costs of the audit in the amount of \$7,453.68.

Other Matters

38. The witnesses were all credible in their demeanor while testifying. If there were discrepancies between their testimony and prior statements, it did not appear that they were attempting to mislead the ALJ. The credibility of the customers who gave declarations suffered when some of their statements lacked detail, or where they complained about the leads they were given, but showed that they sometimes received more than five. Other aspects of their claims were credibly refuted by the testimony of Thomas.

39. Respondent has no prior record of discipline.

LEGAL CONCLUSIONS

1. The Department is vested with jurisdiction to proceed in this matter, based on Factual Findings 1 through 4, and Code sections 10100 and 10103.

2. An accusation against a real estate licensee must be proved by clear and convincing evidence. (*Realty Projects v. Smith* (1973) 32 Cal.App.3d 204.)

3. Section 10026 defines advance fees as follows:

(a) The term "advance fee," as used in this part, is a fee, regardless of the form, that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license, or for a listing, as that term is defined in Section 10027, before fully completing the service the licensee contracted to perform or represented would be performed. Neither an advance fee nor the services to be performed shall be separated or divided into components for the purpose of avoiding the application of this division.

(b) For the purposes of this section, the term "advance fee" *does not include*:

(1) "Security" as that term is used in Section 1950.5 of the Civil Code.

(2) A "screening fee" as that term is used in Section 1950.6 of the Civil Code.

(3) A fee that is claimed, demanded, charged, received, or collected for the purpose of advertising the sale, lease, or exchange of real estate, or of a business opportunity, in a newspaper of general circulation, any other written publication, or through electronic media comparable to any type of written publication, provided that the electronic media or the publication is not under the control or ownership of the broker.

(4) A fee earned for a specific service under a "limited service" contract. For purposes of this section, a "limited service" contract is a written agreement for real estate services described in subdivision (a), (b), or (c) of Section 10131, and pursuant to which such services are promoted, advertised, or presented as stand-alone services, to be performed on a task-by-task basis, and for which compensation is received as each separate, contracted-for task is completed. To qualify for this exclusion, all services performed pursuant to the contract must be described in subdivision (a), (b), or (c) of Section 10131.

(c) A contract between a real estate broker and a principal that requires payment of a commission to the broker after the contract is fully performed does not represent an agreement for an advance fee.

(d) This section does not exempt from regulation the charging or collecting of a fee under Section 1950.5 or 1950.6 of the Civil Code, but instead regulates fees that are not subject to those sections.

4. Section 10131, referenced in section 10026 in connection with limited service contracts (subd. (b)(4)) is also the statute that defines real estate brokers. The referenced subdivisions of section 10131 provide that:

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers (sic)⁵ of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

5. (A) It must be concluded that the fees collected by Respondent were not advance fees, based on section 10026, subdivision (b)(4), and section 10131, subdivision (b), based on Factual Findings 12, 16, 19, 21. Such activities have been specifically excepted from the advance fee statute.

⁵ According to Westlaw, from which the text was taken, the misspelling is found in the chaptered copy of the statute.

(B) Respondent argued that if the Legislature had wanted the potentially refundable fees held in trust, it could have provided such a rule. That argument gains some credence when it is noted that one does not have to be a real estate broker to obtain a license to engage in PRLS activities. (§10167, subd. (b); 10167.2, subd. (a) [unlawful to engage in PRLS activities unless "licensed in that capacity or as a real estate broker"]; see also §10167.3, subd. (a) [separate license required for each location operated by a person not a broker].) There is nothing in the PRLS statutes requiring non-broker licensees to maintain trust accounts, which supports the conclusion that the fees, which might be earned at the outset of the transaction if the first referral leads to a rental agreement, are not advance fees.

(C) The fact that a customer must specifically ask for a refund within 10 days after the end of the contract term supports the conclusion that the funds are not trust funds; the right to the refund can be lost by the passage of days. (§10167, subd. (b)(2).)

6. Based on Legal Conclusions 2 through 5, it is concluded that Respondent was not obligated to maintain a portion of the fee he received in trust, and he was therefore not obligated to comply with the various statutes and regulations pertaining to trust funds, such as section 10145, and California Code of Regulations (CCR), title 10, section 2831.

7. The foregoing do not resolve all of the issues in the case. It was undisputed that Respondent engaged in PRLS activities, which are generally governed by section 10167 et seq.

8. While Respondent's standard contract was not approved in his name, it did comply with the requirements of the law, based on Factual Findings 6 and 7. However, his addendum was not submitted for approval, and it should have been, as it formed part of his written contract with his customers. It is fundamental that where more than one document is used to memorialize an agreement, they are treated as one integrated contract. Therefore, Respondent violated section 10167.9, subdivision (c), based on Factual Findings 9 through 11.

9. The provision in Respondent's contract addendum to the effect that a customer had to turn in applications and receive 24 updates across the 90 day period of the contract does not comply with the law. Section 10167.9, subdivision (b), spells out when a customer is entitled to a refund. That includes proof that a customer did not move at all. Respondent's provision would require a customer to keep coming to his business even after deciding not to move. Therefore, use of the provision violated section 10167.9, subdivision (b).

10. (A) It was not established by clear and convincing evidence that Respondent failed to properly provide a refund of fees to any of the five customers identified in Factual Findings 12, 16, 20, 24, and 32.

(B) Debra D.'s assertions suffered by her vague claims that she learned that the 10 listings given to her were non-existent or unavailable, yet she had specific notes regarding four of them. She provided no documentation of where ended up renting, no documentation that she was working with another firm to find a place to live. At the same time, Thomas credibly attacked the customer's credibility and story.

(C) Keith T. was not entitled to a refund under the law. Section 10167.10 sets out the circumstances where a refund may be obtained, and simply changing one's mind about using the service is not a ground for a refund. If he had established that he had not moved, or found a place without Respondent's services, it would be different.

(D) Kit H. asserted she was given 10 leads, but her own declaration showed she had 13. It appears from the notes on the maps that she looked at many places; the details are not found on other Google maps in evidence. At bottom, her claim that she did not have to document that she found a rental without Respondent's services. Section 10167.10, subdivision (b)(2).

(E) As to the Mary L. transaction, Thomas testified credibly about that customer, indicating that the customer thought she was entitled to a full refund even if Respondent located a place for her to live. As noted in the findings, key provisions of the contract regarding refund were circled, indicating they were explained to her. Giving her the benefit of the doubt, it appears that something about the transaction was literally lost in the translation. In any event, she did not document grounds for a refund.

11. It was not established that Respondent made false, misleading and/or deceptive representations to his customers regarding listings for rental properties. It was not established to the requisite degree of proof that properties did not exist, or were unavailable for tenancy, or had not been confirmed for availability. This Conclusion is based on Factual Findings 12-14, 16, 21, 23, 29, and 32. The allegations made by the customers in their declarations were vague, at best. In the case of Kit H., who spoke to tenants in residence, such does not prove the property was unavailable. (See Factual Finding 21.) Ms. Thomas' testimony that a dispute between a landlord and tenant could lead to misstatements by existing tenants to potential ones, is credible. There could be other reasons a property might appear unavailable. For example, if a customer took two or three days to look at a lead, it might have been rented out during that time period. The record shows that in several cases, the customer had been given more than the three listings required by section 10167.10, subdivision (a)(1), in order for the licensee to retain at least the \$50 service fee. (E.g., Factual Findings 12, 23.)

12. It was established that Respondent acted without Bureau authorization when he used the fictitious names Platinum Consulting Rentals and Platinum

Consulting, in violation of section 10159.5 and CCR section 2731, based on Factual Findings 2(B), 9, and 15,

13. By violating portions of the PRLS statutes, Respondent is subject to discipline pursuant to section 10167.12, based on Legal Conclusion 9 and its factual predicates.

14. Respondent is subject to discipline pursuant to section 10177, subdivision (d), for his violations of the PRLS statutes and section 10159.5, based on Legal Conclusions 9 and 12, and their factual predicates.

15. The Bureau is entitled to recover costs of investigation and enforcement pursuant to section 10106, based on Legal Conclusions 9, 12, 13, and 14. Section 10106 is substantially similar to section 125.3, which pertains to costs for most agencies within the Department of Consumer Affairs. Case law interpreting section 125.3 allows a reduction in the costs awarded when an agency fails to sustain part of its case. (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.)⁶ Based on Legal Conclusions 3, 4, 5, 6, 10, and 11, that has occurred in this case, and the costs should be reduced to \$2,000.

16. Respondent shall not be obligated to pay the cost of the audit, as it was not established that he violated section 10145, based on Legal Conclusion 6.

17. All other allegations and charges, upon which findings have not been made, or legal conclusions drawn, are deemed unproven, or surplusage.

18. (A) The purpose of proceedings of this type are to protect the public, and not to punish errant licensees. (E.g., *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 784-786.) In this case it appears that revocation of the respondent's licenses is not necessary for the public protection.

(B) The violations actually established are for relatively minor transgressions, although use of the unapproved addendum, and delaying refunds based on its terms is a practice that must be curbed.

(C) A suspension should be sufficient to protect the public and to deter further violations by Respondent and other licensees. Therefore, the following order will issue.

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⁶ A Board "... may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation and prosecution to prove that a [licensee] engaged in relatively innocuous conduct." -(29 Cal.4th at 45.)

ORDER

1. All licenses and licensing rights of Respondent Carlos Martinez under the Real Estate Law are suspended for a period of fifteen (15) days from the effective date of this Decision, provided, however, that if Respondent petitions the Bureau, said suspension (or a portion thereof) shall be stayed upon condition that:

A. Respondent pays a monetary penalty pursuant to section 10175.2 of the Business and Professions Code at the rate of \$200 for each day of the suspension for a total penalty of \$3,000.

B. Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be received by the Bureau prior to the effective date of the Decision in this matter.

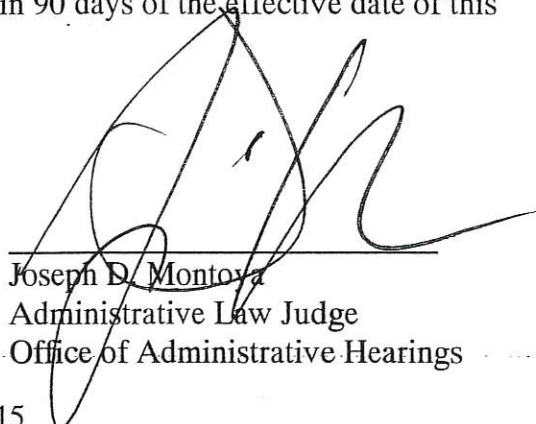
C. No further cause for disciplinary action against the real estate license of Respondent occurs within one year from the effective date of the Decision in this matter.

D. If Respondent fails to pay the monetary penalty in accordance with the terms and conditions of the Decision, the Commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension in which event the petitioning Respondent shall not be entitled to repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

E. If Respondent pays the monetary penalty and no further cause for disciplinary action against the real estate license of that Respondent occurs within one year from the effective date of the Decision, the stay(s) hereby granted shall become permanent. In this regard, continued use by Respondent of his contract addendum shall be deemed as cause for further discipline, as will further use of any fictitious name for which he has not been approved by the Bureau.

2. Respondent shall pay the Bureau its costs of enforcement and prosecution, in the amount of \$2,000, within 90 days of the effective date of this Decision.

May 20, 2015



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

Not Adopted