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JUL - 3 2019

DEPT. OF REAL ESTATE

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BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of

No. H-41066 LA

DONALD JOHN SUTCLIFFE; FATHOM REALTY GROUP, INC; WILLIAM A. THOMAN, individually and as designated officer of TLQ Realty, Inc.; and TLQ REALTY INC.,

Respondent.

ORDER DENYING RECONSIDERATION

On May 6, 2019, a Decision revoking Respondent's real estate license was rendered in the above-entitled matter. Said Decision was to become effective on June 4, 2019 and was stayed by separate Order to July 5, 2019.

On June 17, 2019, Respondent petitioned for reconsideration of the Decision of May 6, 2019.

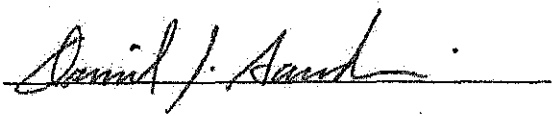
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I have given consideration to the petition of Respondent. I find no good cause to reconsider the Decision of May 6, 2019, and reconsideration is hereby denied.

IT IS SO ORDERED July 3, 2019.

Daniel J. Sandri
Acting Real Estate Commissioner



Sandri

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MAY 21 2019

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

DONALD JOHN SUTCLIFFE;
FATHOM REALTY GROUP, INC.;
WILLIAM A. THOMAN, individually
and as designated officer of TLQ
Realty, Inc.; and TLQ REALTY, INC.,

DRE NO. H-41066 LA

Respondents.

ORDER STAYING EFFECTIVE DATE

On May 6, 2019, a Decision was rendered in the above-entitled matter as to DONALD JOHN SUTCLIFFE (Respondent). This Decision was to become effective June 4, 2019.

IT IS HEREBY ORDERED that the effective date of June 4, 2019, is stayed for a period of 30 days to consider Respondent's petition for reconsideration.

The Decision of May 6, 2019, shall become effective at 12 o' clock noon on July 5, 2019.

DATED: May 21, 2019

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER

[Signature]

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

MAY 15 2019

In the Matter of the Accusation of:

DONALD JOHN SUTCLIFFE;
FATHOM REALTY GROUP, INC.;
WILLIAM A. THOMAN, individually and
as designated officer of TLQ Realty, Inc.;
and T LQ REALTY, INC.

Respondents

) DRE No. H-41066 LA

) OAH No. 2018080975

DEPT. OF REAL ESTATE

By 

DECISION

The Proposed Decision dated March 29, 2019, 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.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the

This Decision shall become effective at 12 o'clock noon on JUN 04 2019.

IT IS SO ORDERED May 6, 2019

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

DONALD JOHN SUTCLIFFE;
FATHOM REALTY GROUP, INC.;
WILLIAM A. THOMAN, individually and
as designated officer of TLQ Realty, Inc.;
and TLQ REALTY, INC.,

Respondents.

Case No. H-41066 LA

OAH No. 2018080975

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on February 11, 2019, in Los Angeles.

Diane Lee, Counsel, represented Maria Suarez (complainant).

Alex Sawchak, Esq., represented Donald Sutcliffe (respondent), who was present.

The record was held open after completion of the hearing for respondent to submit character reference letters and complainant to respond. The transpiring events occurring while the record was held open are described in the ALJ's order previously marked as exhibit 14. The record was closed and the matter submitted for decision on March 8, 2019.

Respondent's real estate salesperson license is subject to discipline for dishonest dealing in the way he obtained funds prematurely from escrow and unjustifiably refused to return them when demanded. He presented minimal evidence of rehabilitation, which was greatly outweighed by his poor attitude about the situation. Therefore, it was clearly and convincingly established that revocation of his license is warranted, but that his present financial difficulties support relief from his obligation to pay the costs of this case.

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FACTUAL FINDINGS

Parties and Jurisdiction

1. On June 4, 2018, complainant filed the Accusation in her official capacity as a Supervising Special Investigator of the Bureau of Real Estate, which became the Department of Real Estate (Department) on July 1, 2018. Respondent timely submitted a Notice of Defense, which contained a request for a hearing to contest the Accusation.

2. Respondent was issued a real estate salesperson license on October 20, 2010 (no. 01885652). His license is scheduled to expire on October 19, 2022, unless renewed.

3. From June 12, 2013, through the events alleged in the Accusation, respondent's sponsoring broker was Fathom Realty Group, Inc. (FRGI), who at the time was, and currently is, licensed by the Department as a corporate real estate broker.

Sale of Respondent's Private Residence

4. Respondent owns a private residence in a gated community located in La Quinta, California (the property).

5. From at least July 2015 through September 2015, respondent acted as the seller's agent, through his employing broker FRGI, in selling the property. Respondent acted as both licensee and principal/owner.

6. From at least July 2015 through September 2015, TLQ Realty, Inc. (TLQ), through real estate broker Billy Thoman, represented a retired married couple interested in purchasing the property, Stephen and Sherry S. (buyers).¹

7. A. The buyers lived in Northern California, but had sold their home for approximately \$1 million and were looking to move to La Quinta and purchase a home in the gated community where the property was located. For tax reasons, they wanted to buy a new home for \$1 million or less. The buyers looked at the property with Mr. Thoman, engaged in discussions with respondent, and ultimately decided to make an offer.

B. Respondent had decorated his home with several pieces of custom furniture that were purchased and installed by a professional decorator, and therefore designed specifically for the property. If they purchased the property, the buyers also wanted to buy the majority of the furnishings that went along with the home. However, the buyers' lender would not include the purchase price of the furnishings in a home loan to purchase the property. Also, folding the price of the furnishings into the property purchase price would have negative property tax consequences. Finally, the combined price of the property and

¹ Initials are used to protect the privacy of the potential buyers.

the furnishings would exceed \$1 million, which, as discussed above, the buyers wanted to avoid for other tax reasons.

8. To meet the concerns addressed above, and after much negotiation between the parties, the buyers agreed to purchase the property for \$998,330, and also pay all of the sales commissions outside of escrow to keep the purchase price of the property under \$1 million. The buyers also agreed to purchase the furnishings outside of escrow for the price of \$190,670.

9. A. The buyers tendered two separate Residential Purchase Agreement and Joint Escrow Instructions (RPA) to respondent on July 3, 2015. He accepted both.

B. The first RPA contained a total purchase price of \$1,189,000 for both the property and its furnishings. (Ex. 3.)

C. The second RPA contained a purchase price for the property of \$998,330. (Ex. 4.) The second RPA included Addendum No. 1 (ex. 4, p. 13), also dated July 3, 2015, which provided that the buyers would purchase the furnishings and would pay all of the sales commissions for \$190,670. Addendum No. 1 was intended to document that respondent would receive the total purchase amount specified in the first RPA, i.e., \$1,189,000, but that the total price was restructured as outlined in the second RPA. Addendum No. 1 provided:

1. The following furnishings to be included in the purchase price of the home per the conversation on 7/2/15: Great Room, Dining [sic] Room (excluding hutch), Kitchen, Patio (excluding large table and chairs), hallways, office, powder room, family room (excluding entertainment center), all electronics (excluding master bedroom pop-up televisions) & Golf Cart. A detailed Inventory is to be provided by Seller and presented to Buyer for approval within 48 hours of executing this agreement. These funds are to be deposited into Brokers Trust Fund account 48 hours prior to the Close of escrow. The funds will be issued to Seller once the confirmation of recording is received.

D. On July 14, 2015, respondent and the buyers signed Addendum No. 1.1, which provided:

This addendum is intended to clarify how the outside of escrow furnishings purchase proceeds are to be paid from TLQ Realty Trust funds (these funds of \$190,670 to be deposited by buyers 48 hours before COE) and paid to the seller as outlined in the \$1,189,000 Residential Purchase Agreement[.]

1. The following furnishing to be included in the purchase price of the home per the conversation of 7/21/15. Great Room, Dining Room (excluding hutch), Kitchen, Patio (excluding large table and chairs), hallways, office, powder room, family room (excluding entertainment center) and all electronics (excluding master bedroom pop-up TV's) and Club Car Golf Cart. A detailed photo inventory was provided on 7/10/15. The funds amount of \$190,670 to be deposited in TLQ Realty Broker Trust fund 48 hours prior to close of escrow.

The full amount of these funds to be released to seller upon confirmation of recording of title transfer to the buyers with the exception of \$5000 held back by the buyers broker until the seller has moved out and a final property condition verification is mutual[ly] agreed [upon].

10. Pursuant to Addendum No. 1.1, on August 5, 2015, the buyers wire transferred \$190,670 to TLQ's broker trust fund account.

11. On August 7, 2015, before escrow had closed, the buyers' agent, Mr. Thoman, prematurely disbursed \$185,670 of the buyers' trust funds to respondent (\$5,000 was held back until respondent vacated the property per Addendum No. 1.1). Mr. Thoman did so because respondent called him and advised it was "urgent" that the sale close on time. Mr. Thoman was out-of-town then and realized it was possible that if he authorized the disbursement as he intended, the proceeds might be transmitted a few hours after escrow officially closed. Because respondent impressed upon him the urgency of the funds being transferred on time, Mr. Thoman decided to authorize disbursement of the \$185,670 before escrow had closed. While the Accusation alleges that respondent used "duress" to get the premature disbursement, it was not established that he made any threats or otherwise put Mr. Thoman under duress.

12. Meanwhile, on July 31, 2015, the Internal Revenue Service (IRS) recorded a Notice of Federal Tax Lien (tax lien) for \$1,037,074.78 against the property with the Riverside County Recorder's Office. The tax lien was recorded by the IRS on behalf of the Canadian tax authority, which had a claim in that amount against respondent for business taxes incurred by him previously while he had resided in Canada.

13. The tax lien was discovered through the process of the buyers applying for title insurance in the course of escrow. The proposed title insurer would not cover the property due to the tax lien. Because title insurance could not be acquired, escrow could not close.

14. On August 10, 2015, the buyers first discovered the tax lien. When contacted by Mr. Thoman, respondent made assurances that he and a lawyer he retained would

negotiate with the IRS and clear the tax lien, which would allow the sale to go through within a few weeks. The parties agreed to extend the close of escrow to September 3, 2015.

15. Due to the large amount of the tax lien, complicated by the fact that the tax lien originated from another country, respondent was not able to get the IRS to remove the tax lien within a few weeks. In the interim, respondent had agreed to release the buyers' good faith deposit back to them, in the hopes that his gesture would keep them interested in purchasing the property when and if the tax lien was removed.

16. After escrow failed to close by September 3, 2015, the buyers lost confidence that the tax lien could be timely removed and the sale completed. They decided not to buy the property. On September 4 and 11, 2015, Mr. Thoman, on behalf of the buyers, issued demand letters to respondent for the return of the \$185,670 that was prematurely wired to him on August 7, 2015.

17. A. Respondent has at all times refused to refund the \$185,670 to the buyers.

B. When first contacted by Mr. Thoman for a refund after discovery of the tax lien, respondent blamed the buyers for not timely getting property insurance, which caused their lender to balk, and necessitated a slight extension of the escrow close. (Ex. 8, p. 2.)

C. When Mr. Thoman again pressed for a refund on September 11th, respondent said he could not return the money because "the IRS already knows about the funds," and he intimated the IRS would freeze the funds if returned. (Ex. 8, p. 4.) However, no evidence was presented indicating that was actually a risk of happening.

D. During the hearing, respondent testified that the sale of the property and furnishings were linked together initially. However, when the buyers needed to extend escrow to August 11, 2015 (ex. 5, p. 3), due to the aforementioned delay caused by their lender, the buyers agreed, as consideration for the extension, to unlink the purchases of the property and the furnishings, meaning the buyers agreed to purchase the furnishings regardless of purchasing the property.²

18. After it became clear to the buyers that respondent would not return the prematurely disbursed \$185,670, they filed a complaint with the Department concerning the involved licensees, including respondent. The buyers also filed a civil lawsuit against respondent, FRGI, Mr. Thoman, and TLQ. After protracted litigation and two mediations, insurance carriers representing the defendants, including respondent, agreed to pay the buyers \$185,670 as reimbursement for the prematurely disbursed funds, as well as at least

² Interestingly, Paul D. Bojic, Esq., the attorney who represented respondent in the dispute with the buyers, provided in his declaration (ex. J) a different explanation for the refusal to return the funds. However, inasmuch as Mr. Bojic's declaration was admitted only as administrative hearsay (Gov. Code, § 11513, subd. (d)), and the evidence does not explain or supplement respondent's testimony, and has little probative value, if any.

\$225,000 of attorneys' fees. The settlement agreement was made without any admission of wrongdoing. The civil case was dismissed.

19. A. Respondent has provided no reasonable excuse for refusing to return the \$185,670 after escrow was cancelled and the transaction terminated.

B. The transaction documents, combined with the persuasive testimony of Mr. Thoman and buyer Sherry S., clearly link together the purchase of the property and furnishings. Even respondent admitted the same in his initial testimony. Moreover, it would make no sense for the buyers to purchase the furnishings without purchasing the property, since the furnishings were custom-made or purchased specifically for the property.

C. Respondent unfairly blamed the buyers for the delay in the close of escrow. The delay was caused by their property insurer suffering a system-wide computer failure, which was not attributable to the buyers. It also was only one of four escrow extensions. (See ex. 5.) More importantly, the delay in the close of escrow had no bearing on the agreements made by the parties in the two RPAs and addenda.

D. Respondent's testimony during the hearing that the purchase of the property and furnishings became unlinked as a concession for his agreeing to extend the escrow close in August 2015 was self-serving, uncorroborated, and unpersuasive. In fact, the four addenda that extended the close of escrow four times for different reasons were admitted into evidence (ex. 5) and none of them contain any agreement concerning unlinking the two RPAs or otherwise any condition or consideration exchanged for an extension. Moreover, there would be no reason for the buyers to make such a drastic concession to merely extend the escrow close for a few days, particularly where respondent demonstrated an intense desire to sell the property to the buyers, and where the buyers would have no need for furnishings if the home for which the furnishings were designed were not part of the transaction. Finally, respondent's credibility is undercut by his testimony that a bicycle accident in March 2017 caused him a brain injury resulting in memory lapses of prior events.

20. Although respondent was negotiating with Canadian authorities over the \$1 million tax claim in 2015, it was not clearly and convincingly established that respondent knew the tax lien had been recorded against the property before agreeing to the RPAs or pressing Mr. Thoman for the premature release of the furnishing funds.

21. Respondent's refusal to return the furnishings funds created other problems for the buyers. They were unable to purchase a new home in La Quinta without the \$185,670 sent to respondent prematurely. They were forced to sell a secondary residence to free up money to finally purchase a new home in La Quinta, which was done while the litigation against respondent was pending and before the settlement.

Respondent's Evidence

22. Respondent has no prior record of discipline by the Department.

23. Respondent testified he has a good relationship with his son and that he tries to support his elderly mother suffering from dementia who lives in Canada.

24. Respondent still lives in the property. He has filed bankruptcy in California and is disputing the tax lien with the IRS and the Canadian tax authority. However, the tax lien is still in effect against the property.

25. Respondent testified he "cannot comment on" whether he has felt a change in attitude since the events in question. He also testified his honesty level has not changed since the events in question. When also asked on cross-examination if he owed the buyers anything, after a long pause, respondent said he "could not say."

26. Respondent submitted four character reference letters, which were admitted as administrative hearsay. The letters were vague and not revealing. Two of the authors have only known respondent since 2018, and one of the letters is from Mr. Bojic, the attorney representing respondent in the dispute with the buyers, whose objectivity is therefore questionable. The character reference letters did not explain or supplement much, if any, of respondent's testimony.

Costs

27. A. The Department incurred reasonable costs in the investigation and enforcement of this matter in the amount of \$2,960.05.

B. The Department's investigation costs total \$1,068.80, which were all incurred before January 10, 2019. The Department's enforcement costs total \$1,891.25, with \$712.00 incurred before January 10, 2019, and \$1,179.25 incurred after that date.

C. This case initially included three other parties, FRGI, TLQ, and Mr. Thoman. Those other parties resolved the matter as to them before January 10, 2019. The Department requests any costs incurred before January 10, 2019, to be the joint and several responsibility of respondent and the three other parties; and for respondent to be solely responsible for any costs incurred on and after January 10, 2019.

28. Respondent testified he has significant debts and is financially constrained by having to support his ailing mother in Canada. Respondent's testimony is supported by his pending bankruptcy and sizeable tax debt. He testified it would be a financial hardship for him to pay the Department's costs in this case.

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LEGAL CONCLUSIONS

Burden and Standard Proof

1. Complainant has the burden of proving cause for discipline against respondent by clear and convincing evidence to a reasonable certainty. (*The Grubb Co., Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, 1505.)

Cause for Discipline

2. A. The Real Estate Commissioner may suspend or revoke a real estate license “while a real estate licensee, in performing or attempting to perform any of the acts,” engages in “[a]ny other conduct, whether of the same or of a different character than specified in this section, which constitutes fraud or dishonest dealing. (Bus. & Prof. Code, § 10176, subd. (i).)³

B. Similarly, the Real Estate Commissioner may suspend or revoke a real estate license when the licensee has “[e]ngaged in any other conduct, whether of the same or of a different character than specified in this section, that constitutes fraud or dishonest dealing.” (§ 10177, subd. (j).)

3. A. In this case, respondent’s conduct is cause for discipline of his real estate salesperson license pursuant to sections 10176, subdivision (i), and 10177, subdivision (j), in that it was clearly and convincingly established that he, while acting as a real estate licensee, engaged in dishonest dealing with the prospective buyers of the property.

B. Respondent, who at the time was obviously facing financial difficulties, strenuously urged the buyers’ broker, Mr. Thoman, to release \$185,670 from escrow. Respondent only obtained those funds due to Mr. Thoman’s mistake of prematurely releasing those funds before escrow closed. Had Mr. Thoman observed the escrow terms, respondent would have never received the funds, because escrow would not have closed due to the discovery of the tax lien. Knowing that the funds he had received were for the purchase of his furnishings, but that the purchase of the furnishings was linked to the purchase of the property, respondent had no reasonable justification for failing to immediately return the \$185,670 to the buyers once escrow terminated and it was clear the buyers would not purchase the property. Respondent’s various excuses for not returning the funds were neither valid nor consistent, which in turn support the conclusion that he simply wanted to keep the funds. Under these circumstances, respondent engaged in dishonest dealing in the manner in which he obtained funds he was not entitled to, and by refusing to immediately return them once demand was made for them. (Factual Findings 4-21.)

C. Respondent argues he is not subject to discipline under section 10176, subdivision (i), because a real estate license is not needed to sell household furnishings, and

³ Further undesignated statutory references are to the Business and Professions Code.

therefore he was not engaged as a real estate licensee during the transaction. However, it is clear that the sale of the furnishings was linked to the sale of the property, which required a license. Moreover, respondent acted as both owner/principal and as a licensee on the transaction. All of his actions related to the transaction were tied to his license. Thus, it was clearly and convincingly established that respondent acted as a licensee while engaging in the acts constituting his dishonest dealing. In any event, there is no such limitation to discipline under section 10177, subdivision (j), so respondent is subject to discipline under that provision regardless of whether he was acting as a licensee at the times in question.

D. It was not clearly and convincingly established that respondent's conduct described above also constitutes fraud pursuant to sections 10176 and 10177. Though there are circumstances that would make a reasonable person suspicious of respondent's knowledge of the pendency of the tax lien relative to the sale of the property, it was not clearly and convincingly established that he actually knew the tax lien had been, or would be, recorded against the property before, during, or after consummation of the buyers' agreement to purchase the property and furnishings. (Factual Findings 4-21.)

Disposition

4. A. In this case, the cause for discipline established against respondent relates to dishonest dealing in the course of a real estate transaction. The statutes relating to the licensing of real estate professionals generally are designed to protect the public from dishonest, untruthful and/or disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) In *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402, the court observed that "the Legislature intended to insure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear."

B. Respondent's misconduct is concerning. He exhibited dishonesty in how he received and failed to return funds he was not entitled to have or keep. During the hearing, he was not candid about his reasons for not returning the funds. In fact, respondent denies any responsibility for his misconduct, and instead offers only excuses and blames others. Tellingly, in his testimony respondent could not say that his attitude has changed, that his level of honesty has improved, or he that owes the buyers anything (including a simple apology). Arguably the most important hallmark in predicting future conduct pertains to a change in attitude from that which existed at the time of the misconduct in question. (*Singh v. Davi* (2012) 211 Cal.App.4th 141, 149.) In this case, respondent has exhibited no change in attitude. Respondent presented a modicum of rehabilitation evidence, but much too meager to outweigh his poor attitude exhibited in this case. (Factual Findings 22-26.)

C. An administrative proceeding such as this is not meant to punish a licensee, but rather to protect the public. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Based on the above, revocation of respondent's license is warranted in the interests of public protection. (Factual Findings 1-26.)

5. A. Section 10106 provides, in part, that in any order issued in resolution of a disciplinary proceeding, the Real Estate Commissioner may request the administrative law judge to direct a licensee found to have violated the Real Estate Law to pay the reasonable costs of the investigation and enforcement of the action. In this case, respondent violated the Real Estate Law. He therefore is liable for the reasonable costs of the investigation and enforcement of this action in the amount of \$2,960.05. (Factual Finding 27.)

B. The Department requests that respondent be jointly and severally responsible with the other parties to this case for \$1,780.80 of the costs, and solely responsible for the remaining costs of \$1,179.25. Respondent does not object and the request appears warranted. (Factual Finding 27.)

C. However, respondent is financially distressed and unable to pay the costs. The revocation of his license will exacerbate that situation. Under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Court held that a reduction or elimination of costs may be warranted if a licensee will be financially unable to make cost payments. In this case, respondent should be required to pay the Department's costs if and when his real estate salesperson license is reinstated. (Factual Finding 28.)

ORDER

All licenses and licensing rights of respondent Donald John Sutcliffe under the Real Estate Law are revoked.

Respondent shall pay costs of the investigation and enforcement of this matter in the amount of \$2,960.05 to the Department of Real Estate; of that amount, he is jointly and severally responsible with the other parties named in this case for \$1,780.80, and solely responsible for \$1,179.25. However, respondent shall only be required to pay such costs to the Department of Real Estate if and when his real estate salesperson license is reinstated.

DATED: March 29, 2019

DocuSigned by:



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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings