FILED
AUG - 5 2011
DEPARTMENT OF REAL ESTATE
By

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * * *

In the Matter of the Accusation of	)	No. H-36705 LA
	)	
SERGIO MARTINEZ,	)	L-2010080642
	)	
	)	
Respondent.	)	
	)	

DECISION

The Proposed Decision dated June 30, 2011, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following correction is made to the Proposed Decision:

Legal Conclusions, Page 5, paragraph No. 2, line 2, "and (f)" is corrected to read "and (j)".

This Decision shall become effective at 12 o'clock noon on August 25, 2011.

IT IS SO ORDERED 7/28, 2011.

BARBARA J. BIGBY
Acting Real Estate Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against: SERGIO MARTINEZ, Respondent.	Case No. H-36705 LA OAH No. 2010080642

PROPOSED DECISION

Administrative Law Judge Sophie C. Agopian, Office of Administrative Hearings, heard this matter on March 14, 2011, in Los Angeles, California.

Department of Real Estate (Department) Counsel Lissete Garcia represented Complainant Maria Suarez, Deputy Real Estate Commissioner.

Attorney at Law William C. Kersten represented respondent Sergio Martinez who was also present.

Testimonial and documentary evidence was presented at the hearing. The record was closed and the matter submitted for decision at the conclusion of the hearing on March 14, 2011.

FACTUAL FINDINGS

1. Complainant brought the Accusation in her official capacity on June 30, 2010. The Accusation alleges that respondent, while licensed as a real estate salesperson, violated various provisions of the Business and Professions Code by performing activities requiring a broker's license. Complainant specifically alleges that while respondent was employed by Sun Gold Coast, doing business as Century 21 Professionals, he solicited loan negotiation and modification services from a borrower and collected advance fees from the borrower without performing the services promised.

2. Respondent timely submitted a Notice of Defense on the Accusation and this hearing ensued.

3. Respondent has been licensed as a real estate salesperson since January 17, 2007. His license was due to expire on January 16, 2011. The evidence did not establish whether the license has been renewed.

4. From March 2007 through February 2009, respondent was employed as a real estate salesperson at Sun Gold Coast, doing business as Century 21 Professionals (Century 21).

5. In June 2008, respondent offered to assist Jose Gonzalez (Gonzalez) in obtaining loan modifications for mortgages on four properties owned by Gonzalez. Two of the properties were located in Hawthorne, one property was located in Los Angeles, and the other property, Gonzalez's home, was located in Lomita. Respondent did not provide Gonzalez with a written agreement regarding the terms of the loan modification services. However, Gonzalez understood that respondent required immediate payment to start the services.

6. Gonzalez paid respondent, at minimum, $4,000 in advance fees for the loan modification services for the properties. The fees were paid by check or by cash. Payments made by check included an August 28, 2008, payment of $500, a September 6, 2008, payment of $700, and a September 24, 2008, payment of $750. According to respondent, each payment was an advance fee for separate properties. Gonzalez also paid respondent $2,267 in cash, by depositing cash into respondent's bank account, for the loan modification on his Lomita property. Gonzalez paid such amount because respondent falsely represented that he had made a mortgage payment on Gonzalez's behalf for the Lomita property and that Gonzalez needed to reimburse him for the payment. Gonzalez later learned that a mortgage payment had not been made on the Lomita property. Respondent admitted that he collected the cash payment for the Lomita property as an advance fee for his loan modification services.

7. The precise amount of advance fees paid to respondent is in dispute because Gonzalez never received an accounting regarding the payments made or the services performed. Gonzalez contends that he paid additional sums in cash directly to respondent resulting in a total approximate amount of $13,000 in advance fees. Gonzalez did not, however, receive, request, nor submit as evidence, receipts or other records supporting the cash amounts he paid. He is therefore unable to establish such payments. Respondent stipulated that he received only the amount established by the documentary evidence, which is approximately $4,000.

8. Respondent failed to obtain loan modifications for any of the four properties. As a result, three of Gonzalez's properties were foreclosed upon. Gonzalez was, however, able to maintain his home in Lomita although he was never granted a loan modification.

9. On February 7, 2009, Gonzalez notified respondent's employer Century 21 of respondent's loan modification activities. On February 18, 2009, Vice President of Finance and Administration of Century 21 informed respondent that loan modification work is generally performed by a real estate broker and that only salespeople are employed by the company. After learning that respondent had been engaging in such activities, the company terminated him for cause. It informed Gonzalez on March 6, 2009, of respondent's

termination. The company also informed Gonzales that it was unaware, and did not approve, of respondent's conduct.

10. On March 30, 2009, Gonzalez filed a formal complaint with the Department regarding respondent's conduct in connection with the loan modifications. In addition to his own statement, the complaint included sworn statements by two other borrowers, Ofelia Ochoa and Manuel Lopez, who alleged, and also testified at the hearing, that respondent had also collected advance fees from them and failed to obtain the promised loan modifications.[1]

a. According to Ms. Ochoa's statement and testimony, respondent collected somewhere between $2,000 and $4,000 from her prior to her receiving or completing any paperwork to obtain the loan modification. She completed the paperwork, but her request for a modification was denied. Thereafter, respondent failed to return her calls.

b. Mr. Lopez similarly paid respondent $500 as a "start-up" cost and then paid an additional $3,546 to respondent based on respondent's false representation that the money was necessary to make a final payment on the mortgage to obtain the loan modification. Mr. Lopez confirmed with the bank that respondent did not make a payment on his mortgage. When Mr. Lopez inquired about this to respondent, respondent requested an additional $500 to complete the paperwork. Mr. Lopez complied and paid respondent an additional $500. When respondent requested more money, Mr. Lopez refused to pay. Respondent eventually obtained a loan modification for Lopez; however, Mr. Lopez was compelled to deny it because the payments were still too high for him. Mr. Lopez contends that he lost his home and his money as a result of respondent's conduct.

11. On September 20, 2009, the Department sent respondent a letter regarding his alleged collection of advance fees from borrowers and his loan modification activities. The Department noted in its letter that respondent did not submit an advance fee agreement for it to review. It therefore requested from respondent a copy of the advance fee agreement he was using in providing these services and other information regarding his involvement in collecting advance fees. Respondent admitted to collecting advance fees from Gonzales, but denied that he agreed to obtain loan modifications for Gonzalez. His statement to the Department was misleading because he later admitted in his testimony that he attempted to obtain loan modifications for all three borrowers including Gonzalez. Respondent was unable to provide an advance fee agreement to the Department because one did not exist.

12. Respondent's communications with all three borrowers were in Spanish because each of them has limited English skills. Respondent apparently took advantage of these borrowers because of their lack of understanding of the English language, their desperate situations, and their trust in him as a Spanish-speaking professional. Respondent's conduct with respect to people with such vulnerability is particularly egregious because it

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[1] The Accusation, however, alleges only respondent's conduct with respect to Gonzalez and not as to Ochoa or Lopez.

caused them to lose properties that they may have otherwise salvaged had they received appropriate and honest assistance with their loans.

13. As of the date of the hearing, none of the borrowers received an accounting of the payments they made or the services performed. Respondent has not refunded any money to any of the borrowers, including Gonzalez, although he has participated in some negotiations with Gonzalez regarding a refund.

14. Respondent admitted that he collected advance fees for the loan modification services he promised to all three borrowers and that he did so without his employer's knowledge. He contends that he started doing loan modifications prior to those reflected in the allegations to help his friends and family and that, with respect to the three borrowers mentioned herein, it was the first time he charged any one a fee for the services. He further contends that he attempted to obtain modifications of their loans, but was not successful only in meeting their expectations. For example, he testified that Gonzalez was not eligible for a modification because he did not have adequate proof of his current income. He further testified that he obtained a loan modification for Ochoa, but she declined it. Respondent denies ever requesting or collecting cash from any of the three borrowers, although it was established that respondent provided Gonzalez with access to his bank account so that Gonzalez could make a cash deposit directly into respondent's account. Thus, respondent's denial of ever receiving cash is not persuasive. Respondent further contends that he has tried to take responsibility for his actions after the events occurred, but that the borrowers have refused to give him the time he needs to refund their money. Respondent's contentions regarding his efforts to mitigate the damages and harm he has caused the borrowers are also unconvincing because it has been more than three years since he collected the fees and he has not paid the borrowers any money as of the hearing date.

LEGAL CONCLUSIONS

1. Business and Professions Code[2] section 10177 establishes grounds to suspend or revoke a real estate license when the licensee has engaged in the following conduct:

> (d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.
>
> [¶] ... [¶]
>
> (g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

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[2] All statutory references are to the Business and Professions Code unless otherwise indicated.

[¶] ... [¶]

(j) Engaged in any other conduct, whether of the same or different character than specified in this section, which constitutes fraud or dishonest dealing. ,

2. *First Cause for Discipline.* Cause exists to discipline respondent's license under Business and Professions Code section 10177, subdivisions (d), (g) and (f), because respondent violated section 10085.5, by collecting advance fees from borrowers, for activities that he never completed and was without a license to perform.

Section 10085.5 provides:

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

An "advance fee" pursuant to section 10026, subdivision (a), is "a fee, regardless of the form, that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license... before fully completing the service the licensee contracted to perform or represented would be performed." Pursuant to sections 10131, subdivision (d), and 10131.2, only licensed real estate brokers are permitted to collect advance fees in connection with some of the services they provide.

As set forth in Factual Findings 3 through 10, respondent charged and collected advance fees from the borrowers in exchange for providing loan modification services, which were never completed and which respondent was not licensed to provide. Respondent's conduct constitutes dishonest dealing within the meaning of section 10177, subdivision (j). Respondent also acted negligently and incompetently by offering and attempting to provide loan modification services when he was not licensed to do so.

3. *Second Cause for Discipline.* Cause further exists to discipline respondent's license under section 10130 because respondent engaged in the business, and acted in the capacity, of a real estate broker without having a real estate broker license. (Factual Findings 3 through 6.)

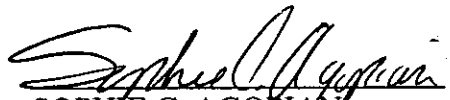
4. Respondent did not establish any mitigating or extenuating circumstances regarding his conduct. Respondent's contention that he is trying to resolve the matter with Gonzalez is not persuasive because more than three years have lapsed since he collected the advance fees from Gonzalez and as of the date of the hearing Gonzalez has not received any compensation from respondent. Respondent's dishonest dealings with particularly

vulnerable consumers establish that the public's interest will best be served if respondent's license is revoked.

ORDER

All licenses and licensing rights of respondent Sergio Martinez are hereby revoked.

DATED: June 30, 2011



SOPHIE C. AGOPIAN
Administrative Law Judge
Office of Administrative Hearings

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FILED
JUN 30 2010
DEPARTMENT OF REAL ESTATE
By

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * *

In the Matter of the Accusation of SERGIO MARTINEZ, Respondent.	No. H-36705 LA A C C U S A T I O N

The Complainant, Maria Suarez, a Deputy Real Estate Commissioner, for cause of Accusation against SERGIO MARTINEZ, is informed and alleges as follows:

1.

The Complainant, Maria Suarez, a Deputy Real Estate Commissioner of the State of California, makes this Accusation in her official capacity.

2.

At all times herein mentioned, Respondent SERGIO MARTINEZ ("Respondent"), was and still is licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code ("Code")) as a real estate

salesperson. Respondent was originally licensed by the Department of Real Estate ("Department") as a real estate salesperson on or about January 17, 2007. Respondent's real estate salesperson license will expire on January 16, 2011, unless renewed.

3.

From on or about March 3, 2008, through March 8, 2009, Respondent was licensed as a real estate salesperson under the employ of real estate broker Sun Gold Coast, Inc. doing business as Century 21 Professionals.

FIRST CAUSE OF ACCUSATION
(Advance Fee Violations/Dishonest Dealing)

4.

During an unknown period of time beginning no later than June, 2008, and continuing through January, 2009, Respondent engaged in the business of, acted in the capacity of, advertised or assumed to act as a real estate broker in the State of California, within the meaning of Code Sections 10131(d) and 10131.2, for or in expectation of compensation. Respondent represented borrowers in negotiating and modifying terms and obtaining mortgage loans, and collected advance fees within the meaning of Code Sections 10026 and 10131.2.

5.

In or around June, 2008, Respondent solicited his loan negotiation and modification services to J. Gonzalez ("Gonzalez"). On or about August 28, 2008, Gonzalez paid an advance fee of $500 to Respondent. Respondent failed to provide

any written agreement or contract to Gonzalez pertaining to the loan modification services to be provided by Respondent. The advance fee was collected for loan negotiation and modification services to be provided by Respondent with respect to a loan secured by real property located in the city of Hawthorne, California. On or about September 6, 2008, Gonzalez paid an additional advance fee of $700 to Respondent. On or about September 24, 2008, Gonzalez paid an additional advance fee of $750 to Respondent.

6.

On or about December 15, 2008, Gonzalez paid an advance fee of $2,267 to Respondent. The advance fee was collected for loan modification services to be provided by Respondent with respect to a loan secured by real property located in the city of Lomita, California.

7.

Respondent failed to perform the services promised or to obtain any loans for Gonzalez on more favorable terms.

8.

The conduct, acts and/or omissions of Respondent, as set forth in Paragraphs 5 through 7 above, in charging and collecting advance fees from prospective borrowers, was in violation of Code Section 10085.5, and constitutes grounds to discipline the licenses and license rights of Respondent pursuant to Code Sections 10177(d), 10177(j) and/or 10177(g).

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SECOND CAUSE OF ACCUSATION
(Unlicensed Activities)

9.

There is hereby incorporated in this second, separate Cause of Accusation, all of the allegations contained in Paragraphs 1 though 8 above, with the same force and effect as if herein fully set forth.

10.

The conduct, acts and/or omissions, as set forth in Paragraphs 5 through 7 above, in performing activities requiring a real estate broker license, is in violation of Code Section 10130 and constitutes grounds to revoke the real estate license and/or license rights of Respondent pursuant to Code Sections 10177(d) and/or 10177(g).

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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and/or license rights of Respondent SERGIO MARTINEZ, under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) and for such other and further relief as may be proper under other applicable provisions of law.

Dated at Los Angeles, California
this 29th day of June, 2010.

MARIA SUAREZ
Deputy Real Estate Commissioner

cc: Sergio Martinez
Robert Matilla
Maria Suarez
Sacto.