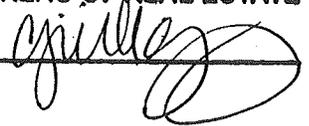


**FILED**

**OCT - 9 2014**

**BUREAU OF REAL ESTATE**

By 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

\*\*\*\*

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

DECISION

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

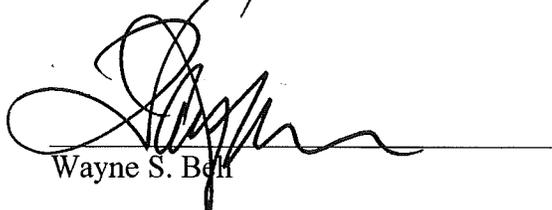
The Decision suspends or revokes one or more real estate licenses.

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

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

IT IS SO ORDERED 10/5/2014.

REAL ESTATE COMMISSIONER

  
Wayne S. Beh

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

In the Matter of the Accusation Against:

JASON ALLAN SMITH,

Respondent.

Case No. H-38731 LA

OAH No. 2013080491

**PROPOSED DECISION**

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

**FACTUAL FINDINGS**

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

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

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

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

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

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

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

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

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

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

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

### *Costs*

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

## DISCUSSION AND LEGAL CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

11. Code section 10085.6, subdivision (a)(1) provides that is unlawful for any licensee who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of loan forbearance for a fee or other compensation paid by the borrower to claim, demand, charge, collect or receive any compensation until after a licensee has fully performed each and every service the licensee contracted to perform or represented that he, she, or it would perform.

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

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

14. Code section 10176, subdivision (i) provides that any conduct which constitutes fraud or dishonest dealings constitutes cause for discipline.
15. Code section 10177, subdivision (d), provides that willful disregard or violation of the real estate law or regulations constitutes cause for discipline.
16. Code section 10177, subdivision (g), provides that demonstrated negligence or incompetence in performing an act which requires a real estate license is cause for discipline.
17. Code section 10177, subdivision (j), provides that any conduct that constitutes fraud or dishonest dealings constitutes cause for discipline.
18. Civil Code Section 2944.7 prohibits any person from accepting advance fees to negotiate, arrange, attempt to arrange or otherwise offer to perform a mortgage loan modification or other form of mortgage loan forbearance.
19. Code section 6106.3 provides that violation of Civil Code section 2944.7 is cause for discipline of an attorney.
20. Code section 10106, subdivision (a) provides that upon request, an administrative law judge may direct a licensee found to have committed a violation of the real estate law to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.
21. Cause exists to discipline Respondent's real estate broker license pursuant to Code section 10177, subdivision (f), because it was established by a preponderance of the evidence that Respondent was twice disciplined by the State Bar of California for accepting advance fees for loan modification negotiations in violation of Code section 2944.7 and Civil Code section 6106.3 in multiple transactions. The conduct underlying the discipline (accepting advance fees for loan modification negotiations) is conduct which constitutes grounds for discipline of a real estate licensee. (Factual Findings 5 and 6; Legal Conclusion 1, 8, 10 and 11.)
22. Cause exists to discipline Respondent's real estate broker license pursuant to Code section 10186.2, subdivision (a)(1)(c) and (b) because it was established by a preponderance of the evidence that Respondent was twice disciplined by the State Bar of California for conduct involving dishonest dealings and failed to report the discipline to the BRE. (Factual Findings 5, 6 and 7; Legal Conclusion 2.)
23. Cause exists to discipline Respondent's real estate broker license pursuant to Code sections 10085.5, 10085.6, 10133 and Civil Code section 2944.7 in conjunction with Code sections 10176, subdivisions (a), (b), (i) and (j), and 10177, subdivisions (d) and (g), because Respondent Smith accepted advance fees for loan modification negotiation services in willful disregard for the real estate law and was then negligent in his handling of the loan modification transactions of the Welches, the Reeds and Heather Thompson and

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

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

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

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

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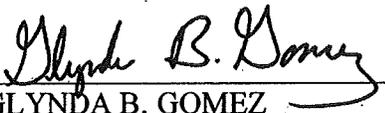
WHEREFORE, THE FOLLOWING ORDER is hereby made:

ORDER

1. All real estate licenses and licensing rights of Respondent Jason Allan Smith are hereby revoked.

2. Respondent Smith shall reimburse the Bureau of Real Estate for the reasonable costs of investigation and prosecution of this matter in the amount of \$4,754.34 within 90 days of the effective date of this Decision.

DATED: September 19, 2014

  
GLYNDA B. GOMEZ  
Administrative Law Judge  
Office of Administrative Hearings

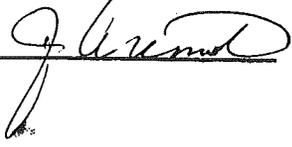
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**FILED**

JUN 06 2014

BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

\* \* \*

In the Matter of the Accusation of	)	CalBRE No. H-38731 LA
	)	
<u>KENNETH BRIAN CLEAVER</u> and	)	OAH No. 2013080491
<u>JASON ALLAN SMITH,</u>	)	
	)	
Respondents.	)	
	)	
	)	

ORDER ACCEPTING VOLUNTARY SURRENDER OF REAL ESTATE LICENSE

On August 7, 2013, a Second Amended Accusation was filed in this matter against Respondent KENNETH BRIAN CLEAVER.

On May 8, 2014, Respondent KENNETH BRIAN CLEAVER petitioned the Commissioner to voluntarily surrender his real estate salesperson license pursuant to Section 10100.2 of the Business and Professions Code.

IT IS HEREBY ORDERED that Respondent KENNETH BRIAN CLEAVER's petition for voluntary surrender of his real estate salesperson license is accepted as of the effective date of this Order as set forth below, based upon the understanding and

1 agreement expressed in Respondent's Declaration dated May 9,  
2 2014, (attached as Exhibit "A" hereto). Respondent's license  
3 certificate, pocket card and any branch office license  
4 certificate shall be sent to the below listed address so that  
5 they reach the Bureau on or before the effective date of this  
6 Order:

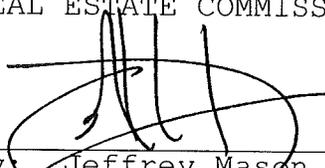
7  
8 Bureau of Real Estate  
9 Attn: Licensing Flag Section  
10 P.O. Box 137013  
11 Sacramento, CA 95813-7013

12 This Order shall become effective at 12 o'clock noon

13 on JUN 27 2014

14 DATED: MAY 23 2014

15 REAL ESTATE COMMISSIONER

16   
17 By: Jeffrey Mason  
18 Chief Deputy Commissioner

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BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

\* \* \*

In the Matter of the Accusation of	)	
	)	CalBRE No. H-38731 LA
<u>KENNETH BRIAN CLEAVER</u> and	)	
JASON ALLAN SMITH,	)	OAH No. 2013080491
	)	
	)	
Respondents.	)	
	)	
	)	
	)	

DECLARATION

My name is KENNETH BRIAN CLEAVER, and I am currently licensed as a real estate salesperson and/or have license rights with respect to said license. I am representing myself in this matter.

In lieu of proceeding in this matter in accordance with the provisions of the Administrative Procedure Act (Sections 11400 et seq., of the Government Code), I wish to voluntarily surrender my real estate license, issued by the

1 Bureau of Real Estate ("Bureau"), pursuant to Business and  
2 Professions Code Section 10100.2.

3 I understand that by so voluntarily surrendering my  
4 license, I may be relicensed as a broker or as a salesperson, or  
5 issued a mortgage loan originator endorsement, only by  
6 petitioning for reinstatement pursuant to Section 11522 of the  
7 Government Code. I also understand that by so voluntarily  
8 surrendering my real estate salesperson license, I agree to the  
9 following:

10 1. The filing of this Declaration shall be deemed as  
11 my petition for voluntary surrender.

12 2. It shall also be deemed to be an understanding and  
13 agreement by me that I waive all rights I have to require the  
14 Commissioner to prove the allegations contained in the Second  
15 Amended Accusation filed in this matter at a hearing held in  
16 accordance with the provisions of the Administrative Procedure  
17 Act (Government Code Sections 11400 et seq.), and that I also  
18 waive other rights afforded to me in connection with the hearing  
19 such as the right to discovery, the right to present evidence in  
20 defense of the allegations in the Second Amended Accusation and  
21 the right to cross-examine witnesses.

22 3. I further agree that upon acceptance by the  
23 Commissioner, as evidenced by an appropriate order, all  
24 affidavits and all relevant evidence obtained by the Bureau in

1 this matter prior to the Commissioner's acceptance, and all  
2 allegations contained in the Second Amended Accusation filed in  
3 the Bureau Case No. H-38731 LA, may be considered by the Bureau  
4 to be true and correct for the purpose of deciding whether to  
5 grant relicensure or reinstatement pursuant to Government Code  
6 Section 11522.

7 4. I freely and voluntarily surrender all my licenses  
8 and license rights under the Real Estate Law.

9 5. I agree that I am jointly and severally liable  
10 with Respondent Jason Allan Smith for restitution to all persons  
11 who have suffered monetary losses due to the acts alleged in the  
12 Second Amended Accusation. I agree to submit, within 30 days  
13 from signing this Declaration, proof satisfactory to the  
14 Commissioner of payment of restitution in the amount of \$3,650  
15 to Clayton Foster Reed; \$3,200 to Timothy Ray Welch; and  
16 \$4,487.85 to Heather J. Thompson. (1) I shall mail the  
17 payments by certified mail, return receipt requested, to the  
18 last addresses on file with or known to me for Clayton Foster  
19 Reed, Timothy Ray Welch, and Heather J. Thompson. (2) If the  
20 payment is returned by the Post Office marked "unable to  
21 deliver," I shall employ a locator service (that may be limited  
22 to or include or be limited to the Internet or other database  
23 retrieval search) to try and locate Clayton Foster Reed, Timothy  
24 Ray Welch, and Heather J. Thompson. Repayment shall then be

1 made to the address(es) recommended by the locator service. (3)  
2 If unable to effect repayment after using a locator service, I  
3 shall provide reasonable proof satisfactory to the Commissioner  
4 of its efforts to comply with the provisions of this paragraph.

5 (4) If the Commissioner determines that proof to be  
6 unsatisfactory, the Commissioner shall so advise me, and  
7 indicate what additional reasonable efforts should be made to  
8 make repayment to Clayton Foster Reed, Timothy Ray Welch, and  
9 Heather J. Thompson. (5) If the Commissioner determines that  
10 reasonable efforts have been made to locate Clayton Foster Reed,  
11 Timothy Ray Welch, and Heather J. Thompson without success, said  
12 payments shall escheat to the State of California. (6) All  
13 proofs of payments shall be submitted to Bureau Counsel Lissete  
14 Garcia, Attention: Legal Section, Bureau of Real Estate, 320 W.  
15 Fourth St., Suite 350, Los Angeles, California 90013-1105.

16 6. A copy of the Commissioner's Criteria of  
17 Rehabilitation is attached hereto. If and when a petition  
18 application is made for reinstatement of a surrendered license  
19 or endorsement, the Real Estate Commissioner will consider as  
20 one of the criteria of rehabilitation, whether or not  
21 restitution has been made to any person who has suffered  
22 monetary losses through "substantially related" acts or  
23 omissions of Respondent, whether or not such persons are named  
24 in the investigation file in this case.

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7. I am aware that if I petition for reinstatement in the future, payment of the Bureau's investigation and enforcement costs in this matter, which total \$4,227.29, will be a condition of reinstatement.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed May 9, 2014, at DANA POINT, California.

  
KENNETH BRIAN CLEAVER

J. FINE

**FILED**

**MAY 20 2014**

**BUREAU OF REAL ESTATE**

By *Norma Quinn*

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LISSETE GARCIA, Counsel (SBN 211552)  
Bureau of Real Estate  
320 West 4th Street, Suite 350  
Los Angeles, California 90013-1105

Telephone: (213) 576-6982  
Direct: (213) 576-6914  
Fax: (213) 576-6917

BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

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In the Matter of the Accusation of	)	CalBRE No. H-38731 LA
	)	OAH No. 2013080491
JASON ALLAN SMITH,	)	
	)	<u>THIRD AMENDED ACCUSATION</u>
	)	
Respondent.	)	
	)	

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

1.

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

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1 2.

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

5 3.

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

9 4.

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

13 5.

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

17 FIRST CAUSE OF ACCUSATION

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

19 6.

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

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

4 7.

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

15 8.

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

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13.

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

14.

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

15.

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

16.

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

“IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A “NO OBJECTION” LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU

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

7 17.

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

10  
11 “[I]t shall be unlawful for any person to claim, demand, charge,  
12 receive, collect or contract for an advance fee (1) for soliciting lenders on  
13 behalf of borrowers or performing services for borrowers in connection  
14 with loans to be secured directly or collaterally by a lien on real property,  
before the borrower becomes obligated to complete the loan, or (2) for  
performing any other activities for which a license is required, unless the  
person is a licensed real estate broker and has complied with the  
provisions of this part.”

15 18.

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

17 “[N]otwithstanding any other provision of law, it shall be unlawful  
18 for any licensee who negotiates, attempts to negotiate, arranges, attempts  
19 to arrange, or otherwise offers to perform a mortgage loan modification or  
other form of mortgage loan forbearance for a fee or other compensation  
paid by the borrower to do any of the following:

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

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

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

19.

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

11 20.

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

1 21.

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

14 22.

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

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

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

9 23.

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

19 24.

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

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

10 25.

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

23 ///

1 26.

2 Respondents Are Non-Exempt from License Requirements

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

8 27.

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

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28.

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

29.

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

30.

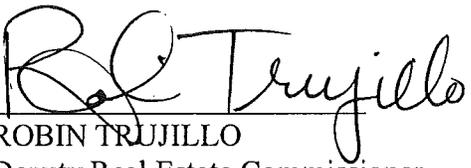
Code section 10106 provides, in pertinent part, that in any order issued in resolution of a disciplinary proceeding before the Bureau of Real Estate, the Commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed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

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

Dated at Los Angeles, California  
this 20 day of May, 2014.

  
ROBIN TRUJILLO  
Deputy Real Estate Commissioner

cc: Jason Allan Smith  
Robin Trujillo  
Sacto  
OAH

Sacks Flay

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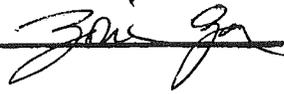
LISSETE GARCIA, Counsel (SBN 211552)  
Bureau of Real Estate  
320 West 4th Street, Suite 350  
Los Angeles, California 90013-1105

Telephone: (213) 576-6982  
Direct: (213) 576-6914  
Fax: (213) 576-6917

**FILED**

**AUG -7 2013**

**BUREAU OF REAL ESTATE**

By 

BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

\*\*\*

In the Matter of the Accusation of	)	DRE No. H-38731 LA
	)	
KENNETH BRIAN CLEAVER and	)	<u>SECOND AMENDED ACCUSATION</u>
JASON ALLAN SMITH,	)	
	)	
Respondents.	)	
	)	

This Second Amended Accusation amends the First Amended Accusation filed on April 23, 2013. The Complainant, Maria Suarez, a Deputy Real Estate Commissioner for the State of California, for cause of Accusation against KENNETH BRIAN CLEAVER and JASON ALLAN SMITH (collectively "Respondents"), 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.

From September 15, 1990, through the present, Respondent KENNETH BRIAN CLEAVER ("CLEAVER") has been licensed by the Bureau (formerly Department) of Real Estate ("BRE") as a real estate salesperson, BRE License ID 01088154. From January 7, 2010,

1 through June 19, 2012, Respondent was licensed under the employment of broker Robert Scott  
2 McCutcheon.

3 3.

4 From November 15, 2006, through the present, Respondent JASON ALLAN  
5 SMITH ("SMITH") has been licensed by the BRE as a real estate broker, BRE License ID  
6 01778833. Respondent SMITH is also an attorney licensed in California, State Bar No. 237584.

7 4.

8 Fixed Rate Financial, Inc. ("Fixed Rate") is a California corporation formed on or  
9 about April 21, 2008. Respondent CLEAVER is the Chief Executive Officer and director of  
10 Fixed Rate. Fixed Rate has never been licensed in any capacity by the BRE.

11 FIRST CAUSE OF ACCUSATION

12 (Advance Fee Violations)

13 5.

14 Business and Professions Code ("Code") section 10132 defines a real estate  
15 salesperson as a person who, for compensation or in expectation of compensation, is employed  
16 by a licensed real estate broker to do one or more of the acts set forth in Code sections 10131,  
17 10131.1, 10131.2, 10131.3, 10131.4, and 10131.6.

18 6.

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

23 ///

1 7.

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

7 8.

8 The following notice was prominently featured on the BRE's website as of  
9 October 11, 2009:

10 "IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED  
11 OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A "NO  
12 OBJECTION" LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN  
13 MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU  
14 CAN NO LONGER ENTER INTO THESE AGREEMENTS EFFECTIVE AS OF OCTOBER  
15 11, 2009, NOR CAN YOU COLLECT ANY ADVANCE FEES FOR SUCH SERVICES.  
16 Agreements entered into and advance fees collected prior to October 11, 2009 are not affected.  
17 Advance fees inadvertently collected after October 11, 2009 must be fully refunded. All real  
18 estate licensees should become familiar with the provisions of SB94 as there are substantial  
19 administrative and criminal penalties for violations."

20 9.

21 Code section 10085.5 prohibits the collection of advance fees for loan  
22 modification services. Code section 10085.5, subdivision (a) states:  
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1 them to pay an advance fee for said services. Respondents promised borrowers that a licensed  
2 attorney would handle the loan modification and negotiations with the borrowers' lenders.  
3 Respondents claimed Fixed Rate had a 98 percent success rate of achieving loan modifications or  
4 a principal reduction for borrowers due to Fixed Rate's attorney. Respondents also  
5 recommended that borrowers fail to pay one or more mortgage payments to their lenders in order  
6 to improve the borrowers' chances of obtaining a loan modification. In a blatant attempt to  
7 circumvent existing laws prohibiting real estate brokers and attorneys from charging and  
8 collecting advance fees for loan modification services, Respondents had borrowers sign an  
9 agreement with Fixed Rate for "document preparation" and Respondent SMITH had borrowers  
10 sign a "professional services" agreement. Nonetheless, Respondent CLEAVER instructed  
11 borrowers to pay advance fees for loan modification and negotiation services directly to Fixed  
12 Rate.

13 13.

14 On or around March 9, 2011, Respondent CLEAVER solicited loan modification  
15 and negotiation services to borrowers Timothy and Carolyn W. in connection with a loan secured  
16 directly or collaterally by a lien on real property owned by Timothy and Carolyn W. Respondent  
17 CLEAVER advised Timothy and Carolyn W. that it would be easier to obtain a loan  
18 modification if their mortgage was in arrears. Respondents charged and collected an advance fee  
19 of \$3,200 from Timothy and Carolyn W. The advance fee was paid directly to Fixed Rate's  
20 bank account. Additionally, Respondent SMITH attempted to charge Timothy and Carolyn W.  
21 for appraisal services of their property. Respondents failed to provide the services promised to  
22 Timothy and Carolyn W. Respondents failed to provide copies to Timothy and Carolyn W. of  
23 any agreement or other document the borrowers were told to sign. Respondents failed to provide  
24

1 any proof of any services performed on behalf of Timothy and Carolyn W., aside from a list of a  
2 few calls made by "Diana" from SMITH's office to Timothy and Carolyn W.'s lender inquiring  
3 as to whether the lender had begun foreclosure proceedings. Respondents refused to refund any  
4 of the advance fees paid by Timothy and Carolyn W.

5 14.

6 On or around June 6, 2011, Respondent CLEAVER solicited loan modification  
7 and negotiation services to borrowers Clayton and Gayla R. Respondents charged and collected  
8 an advance fee of \$3,650 from Clayton and Gayla R. The advance fee was paid by cashier's  
9 check to Fixed Rate. Clayton and Gayla R. were instructed to sign a Client Authorization to  
10 Represent form which authorized SMITH to obtain information about their mortgage from their  
11 lender. Clayton and Gayla R. were also instructed to sign Professional Services Agreements  
12 with SMITH to perform an analysis and review of their mortgage and to negotiate a loan  
13 modification with their lender. Respondents failed to provide the services promised to Clayton  
14 and Gayla R. Respondents failed to provide any proof of any services performed on behalf of  
15 Clayton and Gayla R. Respondents refused to refund any of the advance fees paid by Clayton  
16 and Gayla R.

17 15.

18 On or around February 29, 2012, Respondents CLEAVER and SMITH solicited  
19 loan modification, loss mitigation, and/or loan negotiation services to borrower Heather T.  
20 Respondents charged and collected an advance fee of \$3,650 from Heather T, which was paid by  
21 check made payable to Fixed Rate Financial, Inc. Respondents instructed Heather T. to sign  
22 "Professional Services Agreements" with SMITH as well as an "Agreement for Document  
23 Preparation" with Fixed Rate Financial, Inc. Respondents failed to provide the services  
24

1 promised to Heather T. Respondents failed to provide any proof of any services performed on  
2 behalf of Heather T. Respondents refused to refund any of the advance fees paid by Heather T.

3 16.

4 Respondents Are Non-Exempt from License Requirements

5 Code section 10133(a) states that the acts described in Code section 10131 are not  
6 acts for which a real estate license is required if performed by:

7 “(3) An attorney at law in rendering legal services to a client.”

8 17.

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

21 18.

22 The conduct, acts and/or omissions of Respondents as set forth in Paragraphs 3  
23 through 17, above, are in violation of Code sections 10085, 10085.5, and 10085.6 and constitute  
24

1 grounds for the suspension or revocation of the licenses and license rights of Respondents  
2 KENNETH BRIAN CLEAVER and JASON ALLAN SMITH pursuant to Code sections  
3 10177(d) and/or 10177(g).

4 19.

5 Respondents' conduct, acts and/or omissions as set forth in Paragraphs 3 through  
6 17, above, constitute grounds for the suspension or revocation of the licenses and license rights  
7 of Respondents KENNETH BRIAN CLEAVER and JASON ALLAN SMITH pursuant to Code  
8 sections 10176(a) (making any substantial misrepresentation), 10176(b) (making any false  
9 promises of a character likely to influence, persuade or induce), and 10176(i) (conduct...which  
10 constitutes fraud or dishonest dealing).

11 SECOND CAUSE OF ACCUSATION

12 (Unlicensed Activity and Unlawful Compensation)

13 20.

14 There is hereby incorporated in this Second, separate, Cause of Accusation, all of  
15 the allegations contained in Paragraphs 1 through 19 above, with the same force and effect as if  
16 herein fully set forth.

17 21.

18 The activities described in Paragraphs 3 through 17, above, require a real estate  
19 license under Code sections 10131(d) and 10131.2. Respondent CLEAVER, while doing  
20 business as Fixed Rate, violated Code section 10130 by acting in the capacity of a real estate  
21 broker without first obtaining a real estate license from the BRE. Respondent CLEAVER's  
22 activities were not done under the name or supervision of his employing broker at the time.  
23  
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1           WHEREFORE, Complainant prays that a hearing be conducted on the allegations  
2 of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary  
3 action against all licenses and/or license rights of Respondents KENNETH BRIAN CLEAVER  
4 and JASON ALLAN SMITH under the Real Estate Law (Part 1 of Division 4 of the Business  
5 and Professions Code), for the costs of investigation and enforcement as permitted by law, and  
6 for such other and further relief as may be proper under other provisions of law.

7 Dated at Los Angeles, California

8 this 10<sup>th</sup> day of August, 2013.

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12 MARIA SUAREZ  
13 Deputy Real Estate Commissioner  
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20 cc:   Kenneth Brian Cleaver  
21       Jason Allan Smith  
22       Maria Suarez  
23       Sacto  
24



1 by the Department of Real Estate ("Department") as a real estate  
2 salesperson, Department License ID 01088154. From January 7,  
3 2010, through June 19, 2012, Respondent was licensed under the  
4 employment of broker Robert Scott McCutcheon.

5  
6 3.

7 From November 15, 2006, through the present,  
8 Respondent JASON ALLAN SMITH ("SMITH") has been licensed by the  
9 Department as a real estate broker, Department License ID  
10 01778833. Respondent SMITH is also an attorney licensed in  
11 California, State Bar No. 237584.

12 4.

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

18  
19 FIRST CAUSE OF ACCUSATION  
(Advance Fee Violations)

20 5.

21 Business and Professions Code ("Code") section 10132  
22 defines a real estate salesperson as a person who, for  
23 compensation or in expectation of compensation, is employed by a  
24 licensed real estate broker to do one or more of the acts set  
25 forth in Code sections 10131, 10131.1, 10131.2, 10131.3,  
26 10131.4, and 10131.6.

1 6.

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

8 7.

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

16 8.

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

19 "IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED  
20 OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A "NO  
21 OBJECTION" LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN  
22 MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU  
23 CAN NO LONGER ENTER INTO THESE AGREEMENTS EFFECTIVE AS OF  
24 OCTOBER 11, 2009, NOR CAN YOU COLLECT ANY ADVANCE FEES FOR SUCH  
25 SERVICES. Agreements entered into and advance fees collected  
26 prior to October 11, 2009 are not affected. Advance fees  
27 inadvertently collected after October 11, 2009 must be fully  
28 refunded. All real estate licensees should become familiar with

1 the provisions of SB94 as there are substantial administrative  
2 and criminal penalties for violations."

3 9.

4 Code section 10085.5 prohibits the collection of  
5 advance fees for loan modification services. Code section  
6 10085.5, subdivision (a) states:

7  
8 "[I]t shall be unlawful for any person to  
9 claim, demand, charge, receive, collect or  
10 contract for an advance fee (1) for soliciting  
11 lenders on behalf of borrowers or performing  
12 services for borrowers in connection with loans  
13 to be secured directly or collaterally by a lien  
14 on real property, before the borrower becomes  
15 obligated to complete the loan, or (2) for  
16 performing any other activities for which a  
17 license is required, unless the person is a  
18 licensed real estate broker and has complied with  
19 the provisions of this part.

20 10.

21 Further, Code section 10085.6, subdivision (a)  
22 states:

23 "[N]otwithstanding any other provision of  
24 law, it shall be unlawful for any licensee who  
25 negotiates, attempts to negotiate, arranges,  
26 attempts to arrange, or otherwise offers to  
27 perform a mortgage loan modification or other  
28 form of mortgage loan forbearance for a fee or  
other compensation paid by the borrower to do any  
of the following:

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

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

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

4 11.

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

16 12.

17 In furtherance of the plan and scheme described in  
18 Paragraph 11, Respondents engaged in fraud, dishonest dealing  
19 and made misrepresentations to borrowers in order to induce them  
20 to pay an advance fee for said services. Respondents promised  
21 borrowers that a licensed attorney would handle the loan  
22 modification and negotiations with the borrowers' lenders.  
23 Respondents claimed Fixed Rate had a 98 percent success rate of  
24 achieving loan modifications or a principal reduction for  
25 borrowers due to Fixed Rate's attorney. Respondents also  
26 recommended that borrowers fail to pay one or more mortgage  
27 payments to their lenders in order to improve the borrowers'  
28 chances of obtaining a loan modification. In a blatant attempt  
to circumvent existing laws prohibiting real estate brokers and

1 attorneys from charging and collecting advance fees for loan  
2 modification services, Respondents had borrowers sign an  
3 agreement with Fixed Rate for "document preparation" and  
4 Respondent SMITH had borrowers sign a "professional services"  
5 agreement. Nonetheless, Respondent CLEAVER instructed borrowers  
6 to pay advance fees for loan modification and negotiation  
7 services directly to Fixed Rate.

8 13.

9 On or around March 9, 2011, Respondent CLEAVER  
10 solicited loan modification and negotiation services to  
11 borrowers Timothy and Carolyn W. in connection with a loan  
12 secured directly or collaterally by a lien on real property  
13 owned by Timothy and Carolyn W. Respondent CLEAVER advised  
14 Timothy and Carolyn W. that it would be easier to obtain a loan  
15 modification if their mortgage was in arrears. Respondents  
16 charged and collected an advance fee of \$3,200 from Timothy and  
17 Carolyn W. The advance fee was paid directly to Fixed Rate's  
18 bank account. Additionally, Respondent SMITH attempted to  
19 charge Timothy and Carolyn W. for appraisal services of their  
20 property. Respondents failed to provide the services promised  
21 to Timothy and Carolyn W. Respondents failed to provide copies  
22 to Timothy and Carolyn W. of any agreement or other document the  
23 borrowers were told to sign. Respondents failed to provide any  
24 proof of any services performed on behalf of Timothy and Carolyn  
25 W., aside from a list of a few calls made by "Diana" from  
26 SMITH's office to Timothy and Carolyn W.'s lender inquiring as  
27 to whether the lender had begun foreclosure proceedings.

28

1 Respondents refused to refund any of the advance fees paid by  
2 Timothy and Carolyn W.

3 14.

4 On or around June 6, 2011, Respondent CLEAVER  
5 solicited loan modification and negotiation services to  
6 borrowers Clayton and Gayla R. Respondents charged and  
7 collected an advance fee of \$3,650 from Clayton and Gayla R.  
8 The advance fee was paid by cashier's check to Fixed Rate.  
9 Clayton and Gayla R. were instructed to sign a Client  
10 Authorization to Represent form which authorized SMITH to obtain  
11 information about their mortgage from their lender. Clayton and  
12 Gayla R. were also instructed to sign Professional Services  
13 Agreements with SMITH to perform an analysis and review of their  
14 mortgage and to negotiate a loan modification with their lender.  
15 Respondents failed to provide the services promised to Clayton  
16 and Gayla R. Respondents failed to provide any proof of any  
17 services performed on behalf of Clayton and Gayla R.  
18 Respondents refused to refund any of the advance fees paid by  
19 Clayton and Gayla R.

20 15.

21 Respondents Are Non-Exempt from License Requirements

22 Code section 10133(a) states that the acts described  
23 in Code section 10131 are not acts for which a real estate  
24 license is required if performed by:

25 "(3) An attorney at law in rendering legal services to  
26 a client."

27 ///

28 ///

1 16.

2 Respondent CLEAVER, while doing business as his  
3 unlicensed company, Fixed Rate, solicited and offered to perform  
4 loan modifications and other services in connection with loan  
5 secured directly or collaterally by a lien on real property.  
6 Respondent CLEAVER collected advance fees for said services  
7 through Fixed Rate, Respondent CLEAVER's unlicensed company.  
8 Respondents had borrowers sign a "professional services"  
9 agreement as a form of legal retainer for loan modification  
10 services in an attempt to circumvent existing laws that  
11 restricted the charging and collection of advance fees from  
12 borrowers prior to the completion of loan modification services.  
13 Respondent SMITH never personally met with any of the borrowers  
14 mentioned in Paragraphs 13 and 14 above. Respondent SMITH never  
15 provided any proof of completing any legal services for said  
16 borrowers which would exempt Respondent SMITH from licensing  
17 requirements pursuant to Code section 10133(a).

18 17.

19 The conduct, acts and/or omissions of Respondents as  
20 set forth in Paragraphs 3 through 16, above, are in violation of  
21 Code sections 10085, 10085.5, and 10085.6 and constitute grounds  
22 for the suspension or revocation of the licenses and license  
23 rights of Respondents KENNETH BRIAN CLEAVER and JASON ALLAN  
24 SMITH pursuant to Code sections 10177(d) and/or 10177(g).

25 18.

26 Respondents' conduct, acts and/or omissions as set  
27 forth in Paragraphs 3 through 16, above, constitute grounds for  
28

1 the suspension or revocation of the licenses and license rights  
2 of Respondents KENNETH BRIAN CLEAVER and JASON ALLAN SMITH  
3 pursuant to Code sections 10176(a) (making any substantial  
4 misrepresentation), 10176(b) (making any false promises of a  
5 character likely to influence, persuade or induce), and 10176(i)  
6 (conduct...which constitutes fraud or dishonest dealing).

7  
8 SECOND CAUSE OF ACCUSATION  
(Unlicensed Activity and Unlawful Compensation)

9  
10 19.

11 There is hereby incorporated in this Second, separate,  
12 Cause of Accusation, all of the allegations contained in  
13 Paragraphs 1 through 17 above, with the same force and effect as  
14 if herein fully set forth.

15  
16 20.

17 The activities described in Paragraphs 3 through 16,  
18 above, require a real estate license under Code sections  
19 10131(d) and 10131.2. Respondent CLEAVER, while doing business  
20 as Fixed Rate, violated Code section 10130 by acting in the  
21 capacity of a real estate broker without first obtaining a real  
22 estate license from the Department. Respondent CLEAVER's  
23 activities were not done under the name or supervision of his  
24 employing broker at the time.

25  
26 21.

27 Respondent CLEAVER's activities while doing business  
28 as Fixed Rate as described in Paragraphs 3 through 16, above,  
violated Code section 10137 for accepting compensation from any

1 person other than the broker under whom Respondent CLEAVER was  
2 licensed at the time.

3 22.

4 The conduct, acts and/or omissions of Respondent  
5 CLEAVER as set forth in Paragraphs 20 and 21, above, are in  
6 violation of Code Sections 10130 and 10137 and constitute  
7 grounds for the suspension or revocation of the license and  
8 license rights of Respondent KENNETH BRIAN CLEAVER pursuant to  
9 Code sections 10177(d) and/or 10177(g).

10 23.

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

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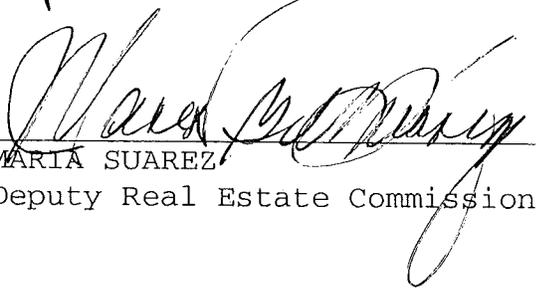
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1           WHEREFORE, Complainant prays that a hearing be  
2 conducted on the allegations of this Accusation and that upon  
3 proof thereof, a decision be rendered imposing disciplinary  
4 action against all licenses and/or license rights of Respondents  
5 KENNETH BRIAN CLEAVER and JASON ALLAN SMITH under the Real  
6 Estate Law (Part 1 of Division 4 of the Business and Professions  
7 Code), for the costs of investigation and enforcement as  
8 permitted by law, and for such other and further relief as may  
9 be proper under other provisions of law.

10 Dated at Los Angeles, California

11 this 22nd day of April, 2013.

12  
13  
14   
15 MARIA SUAREZ  
16 Deputy Real Estate Commissioner  
17  
18  
19

20 cc: Kenneth Brian Cleaver  
21 Jason Allan Smith  
22 Maria Suarez  
23 Sacto  
24  
25  
26  
27  
28



1 Respondent was licensed under the employment of broker Robert  
2 Scott McCutcheon.

3 3.

4 Fixed Rate Financial, Inc. ("Fixed Rate") is a  
5 California corporation formed on or about April 21, 2008.  
6 Respondent is the Chief Executive Officer and director of Fixed  
7 Rate. Fixed Rate has never been licensed in any capacity by the  
8 Department. Jason Allan Smith is an attorney licensed by the  
9 California State Bar. Smith has never been licensed in any  
10 capacity by the Department.  
11

12 FIRST CAUSE OF ACCUSATION  
13 (Advance Fee Violations)

14 4.

15 Business and Professions Code ("Code") section 10132  
16 defines a real estate salesperson as a person who, for  
17 compensation or in expectation of compensation, is employed by a  
18 licensed real estate broker to do one or more of the acts set  
19 forth in Code sections 10131, 10131.1, 10131.2, 10131.3,  
20 10131.4, and 10131.6.

21 5.

22 Code section 10131, subdivision (d), defines a real  
23 estate broker as a person who solicits borrowers or lenders for  
24 or negotiates loans or collects payment or performs services for  
25 borrowers or lenders or note owners in connection with loans  
26 secured directly or collaterally by liens on real property or on  
27 a business opportunity.  
28

1 6.

2 On October 11, 2009, then Governor Arnold  
3 Schwarzenegger signed Senate Bill 94 (Calderon), and the  
4 legislation took effect immediately upon his signature. Thus,  
5 California law prohibited any person, including real estate  
6 licensees and attorneys, from demanding or collecting an advance  
7 fee from a consumer for loan modification or mortgage loan  
8 forbearance services affecting 1 - 4 unit residential dwellings.

9 7.

10 The following notice was prominently featured on the  
11 Department's website as of October 11, 2009:

12 "IF YOU ARE A REAL ESTATE BROKER, OR THE DESIGNATED  
13 OFFICER OF A LICENSED CORPORATION, WHO HAS BEEN ISSUED A "NO  
14 OBJECTION" LETTER BY THE DEPARTMENT OF REAL ESTATE FOR LOAN  
15 MODIFICATION OR OTHER MORTGAGE LOAN FORBEARANCE SERVICES, YOU  
16 CAN NO LONGER ENTER INTO THESE AGREEMENTS EFFECTIVE AS OF  
17 OCTOBER 11, 2009, NOR CAN YOU COLLECT ANY ADVANCE FEES FOR SUCH  
18 SERVICES. Agreements entered into and advance fees collected  
19 prior to October 11, 2009 are not affected. Advance fees  
20 inadvertently collected after October 11, 2009 must be fully  
21 refunded. All real estate licensees should become familiar with  
22 the provisions of SB94 as there are substantial administrative  
23 and criminal penalties for violations."

24 ///

25 ///

26 ///

27 ///

28 ///

1 8.

2 Code section 10085.5 prohibits the collection of  
3 advance fees for loan modification services. Code section  
4 10085.5, subdivision (a) states:

5  
6 "[I]t shall be unlawful for any person to  
7 claim, demand, charge, receive, collect or  
8 contract for an advance fee (1) for soliciting  
9 lenders on behalf of borrowers or performing  
10 services for borrowers in connection with loans  
11 to be secured directly or collaterally by a lien  
12 on real property, before the borrower becomes  
13 obligated to complete the loan, or (2) for  
14 performing any other activities for which a  
15 license is required, unless the person is a  
16 licensed real estate broker and has complied with  
17 the provisions of this part.

18 9.

19 Further, Code section 10085.6, subdivision (a)  
20 states:

21 "[N]otwithstanding any other provision of  
22 law, it shall be unlawful for any licensee who  
23 negotiates, attempts to negotiate, arranges,  
24 attempts to arrange, or otherwise offers to  
25 perform a mortgage loan modification or other  
26 form of mortgage loan forbearance for a fee or  
27 other compensation paid by the borrower to do any  
28 of the following:

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

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

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

1 10.

2 Within the three year period prior to the filing of  
3 this Accusation, Respondent, while doing business as Fixed Rate,  
4 solicited and offered loan modification, negotiation and  
5 foreclosure forbearance services to consumers through  
6 advertisements on television, radio, and/or the internet.  
7 Respondent entered into and participated in a plan or scheme  
8 with Jason Allan Smith to charge and collect advance fees from  
9 borrowers for loan modification, negotiation and foreclosure  
10 forbearance services, in spite of existing laws prohibiting such  
11 fees, with the intent to substantially benefit themselves.

12 11.

13 In furtherance of the plan and scheme described in  
14 Paragraph 10, Respondent engaged in fraud, dishonest dealing and  
15 made misrepresentations to borrowers in order to induce them to  
16 pay an advance fee for said services. Respondent promised  
17 borrowers that a licensed attorney would handle the loan  
18 modification and negotiations with the borrowers' lenders.  
19 Respondent claimed Fixed Rate had a 98 percent success rate of  
20 achieving loan modifications or a principal reduction for  
21 borrowers due to Fixed Rate's attorney. Respondent also  
22 recommended that borrowers fail to pay one or more mortgage  
23 payments to their lenders in order to improve the borrowers'  
24 chances of obtaining a loan modification. In a blatant attempt  
25 to circumvent existing laws prohibiting real estate brokers and  
26 attorneys from charging and collecting advance fees for loan  
27 modification services, Respondent had borrowers sign an  
28 agreement with Fixed Rate for "document preparation" and Jason

1 Allan Smith had borrowers sign a "professional services"  
2 agreement. Nonetheless, Respondent instructed borrowers to pay  
3 advance fees for loan modification and negotiation services  
4 directly to Fixed Rate.

5 12.

6 On or around March 9, 2011, Respondent solicited loan  
7 modification and negotiation services to borrowers Timothy and  
8 Carolyn W. Respondent advised Timothy and Carolyn W. that it  
9 would be easier to obtain a loan modification if their mortgage  
10 was in arrears. Respondent charged and collected an advance fee  
11 of \$3,200 from Timothy and Carolyn W. The advance fee was paid  
12 directly to Fixed Rate's bank account. Respondent and Jason  
13 Allan Smith failed to provide the services promised to Timothy  
14 and Carolyn W. Respondent and Jason Allan Smith failed to  
15 provide copies to Timothy and Carolyn W. of any agreement or  
16 other document the borrowers were told to sign. Respondent and  
17 Jason Allan Smith failed to provide any proof of any services  
18 performed on behalf of Timothy and Carolyn W., aside from a list  
19 of a few calls made by "Diana" from Jason Allan Smith's office  
20 to Timothy and Carolyn W.'s lender inquiring as to whether the  
21 lender had begun foreclosure proceedings. Respondent and Jason  
22 Allan Smith refused to refund any of the advance fees paid by  
23 Timothy and Carolyn W.

24 13.

25 On or around June 6, 2011, Respondent solicited loan  
26 modification and negotiation services to borrowers Clayton and  
27 Gayla R. Respondent charged and collected an advance fee of  
28 \$3,650 from Clayton and Gayla R. The advance fee was paid by

1 cashier's check to Fixed Rate. Respondent and Jason Allan Smith  
2 failed to provide the services promised to Clayton and Gayla R.  
3 Respondent and Jason Allan Smith failed to provide any proof of  
4 any services performed on behalf of Clayton and Gayla R.  
5 Respondent and Jason Allan Smith refused to refund any of the  
6 advance fees paid by Clayton and Gayla R.

7 14.

8 Respondent is Non-Exempt from License Requirements

9 Code section 10133(a) states that the acts described  
10 in Code section 10131 are not acts for which a real estate  
11 license is required if performed by:

12 "(3) An attorney at law in rendering legal services to  
13 a client."

14 15.

15 Respondent, while doing business as his unlicensed  
16 company, Fixed Rate, solicited and offered to perform loan  
17 modifications and other services in connection with loan secured  
18 directly or collaterally by a lien on real property. Respondent  
19 collected advance fees for said services through Fixed Rate,  
20 Respondent's unlicensed company. Respondent and Jason Allan  
21 Smith had borrowers sign a "professional services" agreement as  
22 a form of legal retainer for loan modification services in an  
23 attempt to circumvent existing laws that restricted the charging  
24 and collection of advance fees from borrowers prior to the  
25 completion of loan modification services. Jason Allan Smith  
26 never personally met with any of the borrowers mentioned in  
27 Paragraphs 12 and 13 above. Jason Allan Smith never provided  
28 any proof of completing any legal services for said borrowers

1 which would exempt Jason Allan Smith from licensing requirements  
2 pursuant to Code section 10133(a).

3 16.

4 The conduct, acts and/or omissions of Respondent as  
5 set forth in Paragraphs 3 through 15, above, are in violation of  
6 Code sections 10085, 10085.5, and 10085.6 and constitute grounds  
7 for the suspension or revocation of the license and license  
8 rights of Respondent KENNETH BRIAN CLEAVER pursuant to Code  
9 sections 10177(d) and/or 10177(g).

10 17.

11 Respondent's conduct, acts and/or omissions as set  
12 forth in Paragraphs 3 through 15, above, constitute grounds for  
13 the suspension or revocation of the license and license rights  
14 of Respondent KENNETH BRIAN CLEAVER pursuant to Code sections  
15 10176(a) (making any substantial misrepresentation), 10176(b)  
16 (making any false promises of a character likely to influence,  
17 persuade or induce), and 10176(i) (conduct...which constitutes  
18 fraud or dishonest dealing).

19  
20 SECOND CAUSE OF ACCUSATION  
21 (Unlicensed Activity and Unlawful Compensation)

22 18.

23 There is hereby incorporated in this Second, separate,  
24 Cause of Accusation, all of the allegations contained in  
25 Paragraphs 1 through 17 above, with the same force and effect as  
26 if herein fully set forth.

27 ///

28 ///

1 19.

2 The activities described in Paragraphs 3 through 15,  
3 above, require a real estate license under Code sections  
4 10131(d) and 10131.2. Respondent, while doing business as Fixed  
5 Rate, violated Code section 10130 by acting in the capacity of a  
6 real estate broker without first obtaining a real estate license  
7 from the Department. Respondent's activities were not done  
8 under the name or supervision of his employing broker at the  
9 time.

10 20.

11 Respondent's activities while doing business as Fixed  
12 Rate as described in Paragraphs 3 through 15, above, violated  
13 Code section 10137 for accepting compensation from any person  
14 other than the broker under whom Respondent was licensed at the  
15 time.

16 21.

17 The conduct, acts and/or omissions of Respondent as  
18 set forth in Paragraphs 19 and 20, above, are in violation of  
19 Code Sections 10136 and 10137 and constitute grounds for the  
20 suspension or revocation of the license and license rights of  
21 Respondent KENNETH BRIAN CLEAVER pursuant to Code sections  
22 10177(d) and/or 10177(g).

23 22.

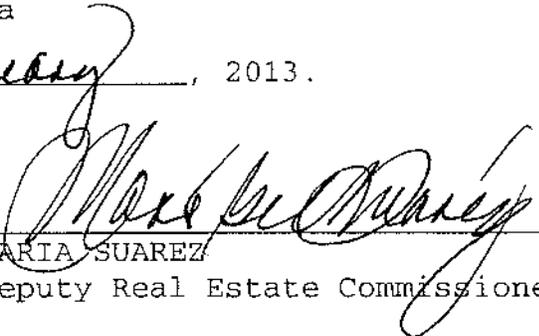
24 Code section 10106 provides, in pertinent part, that  
25 in any order issued in resolution of a disciplinary proceeding  
26 before the Department of Real Estate, the Commissioner may  
27 request the administrative law judge to direct a licensee found  
28

1 to have committed a violation of this part to pay a sum not to  
2 exceed the reasonable costs of the investigation and enforcement  
3 of the case.

4 WHEREFORE, Complainant prays that a hearing be  
5 conducted on the allegations of this Accusation and that upon  
6 proof thereof, a decision be rendered imposing disciplinary  
7 action against all licenses and/or license rights of Respondent  
8 KENNETH BRIAN CLEAVER under the Real Estate Law (Part 1 of  
9 Division 4 of the Business and Professions Code), for the costs  
10 of investigation and enforcement as permitted by law, and for  
11 such other and further relief as may be proper under other  
12 provisions of law.

13 Dated at Los Angeles, California

14 this 2<sup>nd</sup> day of February, 2013.

15  
16  
17   
18 MARIA SUAREZ  
19 Deputy Real Estate Commissioner  
20  
21  
22

23 cc: Kenneth Brian Cleaver  
24 Maria Suarez  
25 Sacto  
26  
27  
28