FILED

AUG - 9 2013

BUREAU OF REAL ESTATE

By D. Contreras

BEFORE THE

BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	)	
	)	NO. H-2740 FR
JENNIFER MAM RAKAPHOUME,	)	
	)	OAH NO. 2012070747
Respondents.	)	
	)	

DECISION

The Proposed Decision dated July 15, 2013, 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.

This Decision shall become effective at 12 o'clock noon on AUG 29 2013.

IT IS SO ORDERED 8/7/2013.

REAL ESTATE COMMISSIONER

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

In the Matter of the First Amended Accusation Against: JENNIFER MAM RAKAPHOUME, Respondent.	Case No. H-2740 FR OAH No. 2012070747

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on May 29, 2013.

Mary F. Clarke, Counsel, represented the Bureau of Real Estate (formerly the Department of Real Estate until July 1, 2013), State of California.

Jennifer Mam Rakaphoume appeared in pro per.

The matter was submitted on May 29, 2013.

FACTUAL FINDINGS

1. Brenda Smith, acting in her official capacity only as a Deputy Real Estate Commissioner of the Department of Real Estate, Bureau of Consumer Affairs, State of California, made the charges and allegations contained in the Accusation and caused it to be filed on May 7, 2012. At the time the Accusation was filed, the Bureau of Real Estate, as it is now known after July 1, 2013, was the Department of Real Estate, and all references in the pleadings, evidence and records in this matter are to the Bureau of Real Estate's former name of the Department of Real Estate. Since it is the Bureau of Real Estate that will issue the final Decision in this matter, all further references here to the former Department of Real Estate will be to the Bureau of Real Estate (the Bureau). A First Amended Accusation was filed on August 4, 2012. The Bureau has jurisdiction to suspend or revoke any real estate license issued in the State of California by the Bureau upon satisfactory proof by clear and convincing evidence that cause exists for the action.[1]

[1] Business and Professions (B&P) Code section 10175.

2. Jennifer Mam Rakaphoume (respondent) timely filed a Notice of Defense to the Accusation. The Notice of Defense was deemed effective in response to the superseding First Amended Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

3. Respondent is currently licensed and has licensing rights through the Bureau as a real estate broker. The Bureau issued respondent a real estate salesperson's license on September 14, 2000. The Bureau issued respondent a real estate broker's license on February 2, 2005. Respondent's real estate broker's license has been continuously renewed since issuance, but expired on February 1, 2013, and had not been renewed as of the date of the evidentiary hearing.

4. Respondent's license history shows that, on a date not disclosed in the evidence, respondent was approved for and was issued an Individual Mortgage Loan Originator License Endorsement (the Endorsement). As of November 1, 2011, the Bureau's records showed that the Endorsement was approved, but inactive. Respondent testified that she thought obtaining the endorsement was a good idea at the time she applied for it, but that she has never made use of the endorsement.

5. There is no history of any previous disciplinary action by the Bureau against respondent.

BACKGROUND

6. Between a date not clear in late 2008 through the end of July, 2010, respondent actively engaged in the business of mortgage loan credit counseling, attempting to assist mortgage loan holders in obtaining refinancing, reinstatement or restructuring of mortgage loans secured by real property, in expectation of compensation. Respondent's services, for which she was compensated, were, "...services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property, ..." within the meaning of B&P Code section 10131, subdivision (d).

7. Respondent found herself in the business of providing mortgage loan credit counseling more circumstantially than as the result of a conscious business choice. Respondent became concerned over the "mortgage meltdown" an economic downturn in 2007 and 2008 and the rather large number of Fresno area homeowners facing foreclosure and default on their home loans. She began volunteering her services as a mortgage loan counselor through the Fresno Community Housing Council (CHC), a nonprofit public agency in Fresno. CHC was formed at the height of the housing crisis and "mortgage meltdown" to provide home mortgage loan advice and assistance to homeowners in default or near default on their home loans at no cost to the borrowers. Respondent and numerous other real estate licensees volunteered to provide their services as credit counselors and advisors.

8. Respondent received considerable professional training in mortgage loan credit advising and strategizing. Respondent's Exhibit A contains substantial documentation of the training she received that reflects respondent's expertise in providing mortgage loan credit and default counseling and advice. Respondent and the other counselors gathered information from distressed homeowners and attempted to connect them with free or low-cost services to help them restructure their loans with their lenders and avoid default and foreclosure. At a point of time not clear in the evidence, respondent was appointed full-time Interim Executive Director of CHC.

9. CHC had numerous management, structural and inadequacy of service problems for distressed homeowners not relevant to this Decision. Due to these problems and others, CHC underwent a massive restructuring in late 2008. A new full-time, permanent Executive Director was appointed, and respondent testified, corroborated by some of her witnesses, that respondent was "forced out" of the organization.

10. Respondent was forced to relocate to office space shared with others. Respondent tried to continue to provide the same range of mortgage loan credit and default counseling services to those distressed homeowners she had already been working with at the time she was separated from CHC. She offered these client homeowners the opportunity to finish what was started with her at CHC pro bono, as that was the initial arrangement. Some of these clients were dissatisfied with continuing to have to work through CHC, as there were so many clients at CHC that individuals often did not get the sort of attention to their mortgage loan difficulties and response to the urgency of their situations as they wanted. Having respondent providing individualized advice to such clients, but still working through the structure of CHC that was in the throes of restructuring turmoil, proved awkward and inefficient. Many clients referred to respondent wanted nothing more to do with CHC, and sought out respondent's help directly, away from any affiliation with CHC.

11. Respondent decided to offer her services to provide mortgage loan credit and default counseling to individual clients experiencing problems with their home mortgages for compensation, promising a level of personalized attention and service, including understanding of lender-specific requirements for seeking relief, not available through CHC or any of the other free services available in the community. Respondent parlayed her expertise learned at CHC and through the numerous training sessions she attended, and offered assistance to distressed homeowners by providing personalized counseling services, advice and strategies, assistance with making applications for hardship relief to lenders by distressed mortgage borrowers, including assembling all lender-required documentary support (each lender appeared to have different requirements for documentation of financial circumstances and claims of hardship), assistance with a planning a structured approach to applying to their lenders for relief, and "empowering" the client borrower by instructing the client on how to negotiate directly with their lender.

12. Respondent never advertised or promoted her services. She did not seek referrals from any other real estate professional, nor did she tell any other real estate professionals that she was providing such services. All of the persons with whom she

worked and provided counsel regarding their mortgage loans came to her through direct client to client referral.

13. Respondent started providing mortgage loan credit and default counseling services for compensation using her real estate broker's license by the middle of 2009. Respondent was forced out of business at the end of July 2010. She has not practiced as a real estate professional since that time.

ADVANCE FEES ALLEGATIONS

14. The Bureau alleged in Paragraph 6 and portions of Paragraphs 7 and 9 of the First Amended Accusation, that respondent, "claimed, demanded, charged, received and/or collected advance fees of 'about $1500'" from each of 32 listed clients in Paragraph 6, and the Aguilars (Paragraph 7) and Mr. Gonzalez (Paragraph 9). The Bureau alleged that as a result of respondent's receipt of these advance fees, respondent violated B&P Code sections 10085, 10085.5 and 10085.6, as well as California Code of Regulations (CCR), title 10, sections 2970 and 2972, for failing to submit her CDC Contract, and all related materials, to the Bureau for advance approval before she collected the advance fees. These allegations all hinge on proof of a factual condition precedent, that the compensation respondent received for providing mortgage loan credit and default counseling services constituted advance fees, within the meaning of B&P Code section 10026, where advance fees are defined by statute. If respondent did not collect advance fees, ipso facto, none of the materials that she used for receiving compensation for her mortgage loan credit and default counseling services, including her Credit Default Counseling contract (CDC) discussed below, were not required to be submitted to the Bureau for prior approval, and she was not required to account for compensation received for providing mortgage loan credit and default counseling services as trust funds.

RESPONDENT'S CDC CONTRACT

15. Respondent structured her mortgage loan credit and default counseling services business in order to make certain that every client understood that she was providing them only mortgage loan credit and default counseling services, and assistance with the assembly and submission of lender-specific required supporting documentation for submission to the client's lender. Respondent's CDC contract-specific services ended at assistance with putting together the application that would solicit the lender for an offer to modify or mitigate the client's mortgage loan obligations. Respondent structured her business on a solely fee-for-services in arrears basis. She made certain that she told every client seeking her mortgage loan credit and default counseling services, and wrote clearly in each of her CDC contracts, as well as in her Notice Regarding Payment of Fees and Right to Cancel (Fees Notice) given separately to each client, that she did not accept any fees or compensation under any circumstances in advance of performing the mortgage loan credit and default counseling services agreed upon between respondent and the client and as set forth in her CDC contract with that client.

16. Respondent was concerned that her activities and her CDC contract fully conformed with the advance fee requirements of the Bureau. She sought out a manner in which she could document for each client that her mortgage loan credit and default counseling services were to be paid for only after all services were rendered, and that she did not accept any fees in advance of performing services.

17. Respondent also took pains to point out to each individual client that if the client wanted her to negotiate on the client's behalf directly with the lender to obtain a particular modification or outcome, that those services were separate, and that negotiation was not part of her basic mortgage loan credit and default counseling services spelled out in subdivisions (a)-(c) on page 2 of her CDC contract. A separate agreement for an additional compensation would be required if the client wanted respondent to negotiate for them in an effort to obtain a particular modification or mitigation result. Respondent sought to make clear that her credit default counseling services did not include any negotiating with the lender on behalf of the client to obtain a loan modification or mitigation solution satisfactory to the client.

18. Respondent consulted with another real estate professional that offered her a contract that he told her had been reviewed by a lawyer and approved by the California Association of Realtors (CAR). Respondent modified the contract template she was provided to clarify some particularly important points she wish to emphasize with each individual client, the most important of which were to spell out that payment was not due for any service until the service was completely provided, that if the client wanted her to negotiate with the lender, that such services were separate, and not included in the mortgage loan credit and default counseling services, and would have to be arranged and compensated separately. Respondent also sought to emphasize that she made no promise of a successful outcome, any particular outcome or response from any lender, or any outcome or response from any lender that the client deemed satisfactory. She itemized and clearly spelled out just exactly what mortgage loan credit and default counseling services were to be provided for the compensation she charged. She also sought to make it crystal clear to all clients that she did not promise or guarantee a favorable response from the borrower's lender, or a successful loan restructuring or modification outcome for any person who sought her basic mortgage loan credit and default counseling services. Respondent determined that she would not provide any services to any client who had not executed her CDC contract. Respondent also drafted the Fees Notice that she separately provided each client at the time the client and respondent signed the CDC contract in order to reinforce with the client that she was not to be paid until the basic mortgage loan credit and default counseling services she had agreed to provide in the CDC contract with the client had been fully performed. The text of the Fees Notice is set forth in full below.

19. There is no evidence that respondent failed to follow through on her determination to have every mortgage loan credit and default counseling services relationship with every client fully documented regarding what she was and was not providing in services in exchange for compensation, and what she was not promising in terms of outcome. There is no evidence that respondent provided any mortgage loan credit

and default counseling services to any client for compensation who had not executed her CDC contract.

RESPONDENT'S CLIENT RECORDS AND CONVERSATION/CONTACT LOGS

20. Respondent's client files are meticulously documented, and the files for Mr. and Mrs. Aguilar, Mr. and Mrs. Gonzalez, DeAlba and Ibabao are no exception. Each client file has individualized worksheets in which the gathering and assembly of detailed financial income and expenditures information, assets and liabilities evaluations, property valuations gathered and reviewed, and, lender-specific requirements, options and strategy was discussed with each individual client. Each client file had a meticulously documented client conversation/contact log, carefully itemized with individual entries noting date and usually by time of every contact between respondent and any of her staff members and clients, lenders, or anyone else associated with assisting the client as part of respondent's credit default counseling services. These conversation/contact logs had a strong supporting foundation through respondent's and Mr. Amezcua's (a real estate salesperson licensee who worked with respondent for approximately 6 to 9 months during the period of time relevant to this Decision) explanatory testimony and independent corroboration of many of the events noted in these conversation/contact logs. This foundational testimony from respondent and Mr. Amezcua was that these writings were made in the regular course of respondents mortgage loan credit and default counseling services business, that the entries were made at or near the time of the act, condition or event that they reflected, and that both witnesses testified to the method of preparation of these records, making the foundation in the evidence for respondent's conversation/contact logs fit squarely within the provisions of Evidence Code section 1271. These individual notes in the client conversation/contact logs were both contemporaneous and accurate reflections of the substance of each interaction described in the note. For good reason, the Department's auditor treated the entries made in respondents conversation/contact logs as reliable sources of information and placed considerable reliance upon the accuracy of the entries made in these conversation/contact logs in conducting her audit (below), further validating the presumptive reliability and accuracy of the individual entries.

ACTUAL CDC CONTRACT TERMS

21. Paragraph 4 on page 1 of respondent's CDC contract provides, under the heading, "IMPORTANT NOTICES," the following:

4. "NOTICE REQUIRED BY CALIFORNIA LAW:

Jennifer Rakaphoume or anyone working for her cannot:

(1) Take any money from you or ask you for money until Jennifer Rakaphoume has completely finished doing everything he or she said he or she would do; and

(2) Ask you to sign or have you sign any lien, deed of trust, or deed.

22. Below that language at Paragraph 4, still on Page One, respondent's CDC contract continues with the following statements:

> RECITALS:
> REAL ESTATE SERVICE/DEFAULT COUNSELING SERVICE
> Kinds of services that I can perform for you:
>
> I can perform the following real estate services for you. As you specifically direct, I can prepare real estate/related mortgage documents/reports that you have selected. I can provide a broker price opinion/comparative market analysis. I can provide you general information associated with the current market value of a residential property.
> I will be:
>
> (i) Analyzing income and secured real estate debt;
>
> (ii) Examining the potential for restructuring mortgage payments; and
>
> (iii) Packaging required documentation for eligibility for loss mitigation alternatives ("modification agreement") with lenders or mortgage loan servicing companies ("lenders").

23. Respondent specifically identified three basic mortgage loan credit and default counseling services she would have to perform in order to earn her standard fee for a single first mortgage, which was $1,000. Respondent offered additional services for additional and separately stated fees, in the event the client wanted those services. For example, respondent would provide mortgage loan credit and default counseling services if the client had a second mortgage or equity line of credit subordinate to a first mortgage for an additional $500. She charged an additional $100 per loan if the client received an offer to restructure, refinance, or otherwise mitigate their loan debt, and the client wished to have respondent negotiate with the lender to attempt to close a deal or modify the offer in some fashion. Respondent also charged a fee of $500 if mortgage loan credit and default counseling services had been fully completed and performed and respondent had been fully paid, and, assuming the client did not receive an offer the client wish to accept, and the client wished at some later point in time to file another application on the same or a different loan.

24. Respondent's listing of credit default counseling services to be performed for each client are found toward the top of Page 2 of respondent's CDC contract, as follows:

> I will provide you the following services:
>
> (a) Analyze homeowner's current debt obligations and financial situation;

(b) Research potential loan modification options/loan mitigation alternatives;

(c) Present homeowner's package to lender *in conformance with lender's guidelines.*[2] (Italics added)

25. As footnoted above, there was evidence that each bank, mortgage company or lender had its own individual requirements for application and documentation required to support a "package" (application) for hardship modification, restructuring, or mitigation of loan loss to that lender. Respondent had developed and possessed considerable expertise by being familiar with the individual nuances and requirements of many individual lenders, and if she were not, she researched those requirements and discovered exactly what was required from that lender in order to submit an adequately documented and sufficient application "package" that would at least be considered by the lender and not immediately rejected due to technical insufficiency. Respondent's clients received the value of respondent's expertise by purchasing her mortgage loan credit and default counseling services (a)-(c) because respondent's expertise in knowing and responding to the lenders' individual requirements lowered the likelihood an application for relief would be rejected for technical reasons before a review of the merits, and save the client time, money and distress. In many instances, time was very much of the essence for a distressed borrower client already in receipt of a notice of default or facing a foreclosure.

26. As set forth above, respondent's mortgage loan credit and default counseling services (a)-(c) quoted above did not include representing the client in negotiation with the lender, seeking to obtain a satisfactory offer to modify or mitigate the client's loan, or making efforts to improve or change the terms of an offer received by the client in response to the submission of the application package.

27. Respondent's CDC contract contained the following caveat language, written beneath the listing of the mortgage loan credit and default counseling services she offered, as follows:

> You are paying me only for the service listed above and no others. It is unlawful for me to make any guarantee or promise to you unless it is written in this contract and unless I have a factual basis for making the guarantee or the promise.

28. Respondent's CDC contract provides another warning/caveat, at the top of page 3, as follows:

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[2] Lenders routinely rejected such application "packages" for documentary insufficiency, measuring the adequacy of the application against their own individual standards. Respondent's knowledge of the lender's individual requirements significantly lowered the likelihood an application for relief would be rejected for technical reasons before a review on the merits of the package.

3. *No Guarantee of Success*: Homeowner understands that counselor does not in any way guarantee success in obtaining a Modification Agreement and acknowledges that approval of a Modification Agreement is in the sole and absolute discretion of Lender. (Italics in original)

29. On page 3 of the CDC contract, respondent's itemized compensation provisions, entitled "*Fees,*" appear as follows:

> 4. *Homeowner Fee Agreement*: For and in consideration of the Services described herein, and in the Homeowner Fee Agreement ("Services"), said fees will be due and payable when such services have been rendered. Homeowner agrees to pay such fees immediately upon being invoiced by Counselor.
>
> You agree to pay me the following fees, costs and expenses:
>
> _____ [3] A flat fee in the total amount of **$1,000** One Thousand Dollars ($1,000) for services (a)-(c) on first lien as stated on Recital.
>
> _____ Additional fee of **$500** Five Hundred Dollars for each additional lien.
>
> _____ Repeat services for alternative hardship option. Additional fee of **$500** Five Hundred Dollars for each lien.
>
> _____ Service (d) is One Hundred Dollars ($100) for review of loss mitigation documents/agreements from lender.
>
> _____ ***Broker will confirm receipt of initial submission of financial hardship package. Any subsequent service communication from broker *is a courtesy and not part of paid services*. Homeowner (s) are advised and must maintain their own communication with servicer for final outcome of chosen hardship option.
>
> NOTICE: THE AMOUNT OR RATE OF FEES SPECIFIED IN THIS AGREEMENT FOR SERVICES IS NOT FIXED BY CALIFORNIA LAW. FEES ARE SET BY EACH BROKER INDIVIDUALLY AND ARE SUBJECT TO NEGOTIATION BETWEEN THE HOMEOWNER AND THE BROKER. **THIS IS NOT AN ADVANCE FEE AGREEMENT.** FEES ARE DUE AND PAYABLE ONLY AFTER SPECIFIED SERVICES HAVE BEEN COMPLETED AS DESCRIBED IN THE HOMEOWNER'S FEE

[3] Before each fee item was a space in the CDC contract for the borrower to initial to confirm that the provision initialed was explained to the borrower and that the borrower selected the particular service.

AGREEMENT. COUNSELOR UTILIZES PERSONNEL LICENSED BY THE CALIFORNIA BUREAU OF REAL ESTATE TO PERFORM SERVICES AND ENGAGE IN ACTIVITIES THAT REQUIRE A LICENSE. (Boldface, italics, underlining and all capitalization in the original)

30. Respondent's CDC contract itemizes respondent's mortgage loan credit and default counseling services to be provided on behalf of a client entering into a CDC contract with her, specific to the number of and types of mortgages, and whether respondent was to assemble documents, supporting materials in support of an application seeking hardship modification or mitigation in conformity with a lender's specific requirements, or whether she was providing post-offer counseling, strategizing and/or negotiation with the lender. Respondent's right to be compensated for performance of the specific types of mortgage loan credit and default counseling selected by the client and relative to the number of loans and stage of the proceeding in which respondent and the client found themselves was itemized in the *Homeowner's Fee Agreement* portion of the CDC contract. The CDC contract repeatedly states that those fees are due from the client only after all mortgage loan credit and default counseling services contracted for had been fully performed. Respondent's right to receive compensation for credit default counseling services (a)-(c) matured upon submission of an application to the client's lender, together with all required supporting documentation in a "package" in conformity with the lender's instructions and/or requirements.

31. Respondent's CDC contract incorporates the separate Fees Notice by reference. The Fees Notice also contained advice to the client of the client's right to cancel and to obtain a refund at any time before all services contracted for had been performed, should the client so desire. The Fees Notice, containing the right to cancel and to obtain a refund, was provided to every client with whom respondent worked as part of her CDC contract, including to Mr. and Mrs. Aguilar and Mr. and Mrs. Gonzales. The Fees Notice reads, in pertinent part, as follows:

> Jennifer Rakaphoume is a licensed California real estate broker. I do not charge advance fees for providing services in relationship to your financial hardship. My fee schedule allows for payment of fees only after services have been rendered to assist you with your situation. You may cancel your agreement with me at any time during the process. You are under no obligation to complete all services of the modification process with me. To cancel your agreement with me at any time, simply inform us in writing of your desire to do so. This may be done by mail or fax. In the event services have been provided for which I have not been paid, a bill for the services will be rendered and due within 30 days of receipt.
>
> [¶] ... [¶]
>
> Please feel free to contact us anytime you have questions regarding the process, your agreement or your property.

32. There are several of respondent's CDC contracts in evidence, one for each of the two complaining parties, Mr. and Mrs. Aguilar, and Mr. and Mrs. Gonzales, and more in the Bureau's auditor's working papers file for borrowers DeAnda and Ibabao. Each CDC contract is signed by all borrowers, and each page of each contract is initialed at the foot of every page by all borrowers in a space at the bottom of each page entitled "borrower initial" and "co-borrower initial." In addition, each CDC contract is also initialed at the appropriate places with respect to the number and types of loans for which the borrower was seeking to receive mortgage loan credit and default counseling and apply to their lender for relief, on page 3, Number Four, entitled *Homeowner Fee Agreement*. Each borrower was also provided a copy of the Fees Notice.

AUDIT AND FINDINGS

33. An auditor employed by the Bureau conducted an audit of respondent's books and records on various dates between December 14, 2010 and July 22, 2011. The audit was the product of a Request for Audit, written by the Bureau's assigned investigator, which states, in the "Reason(s) for Audit Request (Be Specific)" the following:

> The respondent collected the amount of $1500 in advance fees from Hector Gonzalez. The advance fees collected were used to pay for loan modification services. The respondent failed to obtain a loan modification on behalf of the complainant and the respondent refused to refund trust funds to the complainant after numerous requests. Please, examine respondent's books and records in order to confirm the collection of advance fees. In addition, review the respondent's trust fund handling and record keeping procedures to determine compliance with applicable trust fund requirements of the California Real Estate Law.

34. The Bureau's investigation was almost entirely completed at the time the audit was requested. The only additional evidence that was developed in this matter after the audit was requested was the evidence revealed by the auditor as the product of her audit. There was no evidence presented in this matter that appeared to have been developed after the time the audit was requested, other than, of course, the evidence revealed by the audit.

35. The auditor collected and reviewed a considerable volume of respondent's client documents and records, regarding perhaps as many as 48 of respondent's clients, but at least 35 clients, as well as all of respondent's client records pertaining to complainants Mr. and Mrs. Gonzales and Mr. and Mrs. Aguilar. Additional client records with respect to borrowers DeAnda and Ibabao were obtained and reviewed by the auditor, and are contained in the auditor's working papers. The auditor testified that she believed she had selected and included in her working papers a satisfactory representative sampling of all of respondent's mortgage loan credit and default counseling client records.

36. The auditor's Final Audit Report was issued dated July 22, 2011. The auditor conducted her audit as expressed in her "Audit Scope," where she stated:

This examination was performed in order to determine *whether*[4] Rakaphoume handled and accounted for trust funds in accordance with the Real Estate Law and the Commissioner's Regulations and to verify compliance with other provisions of the Real Estate Law and the Commissioner's Regulations. (italics added)

37. The Bureau's auditor considered, as part of her audit review, two rather detailed declarations provided by respondent, each with numerous attached supporting documents. One of respondent's declarations, with attached documentation and client records, detailed her activities on behalf of Mr. and Mrs. Aguilar, and the other declaration detailed her activities and attached her client records and documentation with respect to Mr. and Mrs. Gonzalez. The auditor examined all of respondent's documentation and client files with respect to her activities on behalf of both of those clients, as well as the records of the other clients selected at random, in reaching her Findings and Conclusions that appear in her Final Audit Report.

38. The auditor's report, in "Section III, FINDINGS," "Issue Number 2: Advance Fees," on Page Four, states, in the second to the last sentence of her Finding:

No determination was made as to whether Rakaphoume collected advance fees.[5] Further investigation is needed by the Bureau of Real Estate Enforcement Section.

39. The auditor's report, in "Section IV, CONCLUSIONS," the auditor repeated as follows with respect to the general advance fees issue;

No determination was made whether Rakaphoume collected advance fees. Further investigation is needed by the Bureau of Real Estate Enforcement section.

40. As noted above, there is no evidence in this record that the "further investigation" beyond the audit called for by the auditor to determine whether respondent charged and received advance fees took place. The auditor's Findings and Conclusions contained in her Final Audit Report were based upon the auditor having reviewed and considered all of the evidence that was ultimately presented in this matter. There was no additional evidence presented in this matter that was not reviewed by the auditor in making her Findings and Conclusions above.

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[4] Use of the term "whether" in auditing respondent's mortgage loan credit and default counseling client records is very significant.

[5] This language reflects the auditor's conclusion that she could not find sufficient evidence in what ultimately was all of the evidence presented in this matter to find or conclude that respondent charged and/or collected advance fees within the meaning of B&P code section 10026 from any client, including the two named sets of complainants.

41. The auditor thus concluded in her Final Audit Report that she was unable to find sufficient evidence to support the conclusion solicited in the Request for Audit, thereby confirming that there is not sufficient evidence in this record to sustain the allegations made in Paragraphs 6, 7 and 9 of the First Amended Accusation.

42. The auditor reviewed respondent's records covering the period June 1, 2009, to April 1, 2011. The auditor acknowledged that respondent was very cooperative and forthcoming in working with the auditor, producing her client list, bank records and documents for approximately 48 clients for whom respondent performed compensated services without hesitation or delay.

43. Respondent did not have a trust account. None of the fees she received for performing mortgage loan credit and default counseling services for clients pursuant to her CDC contracts with those clients were deposited into a trust account.

44. The Bureau's auditor did not dispute respondent's contention that, if she did not charge and receive advance fees, she was not required to have a trust account to receive those funds she received as compensation. The auditor confirmed in her testimony that she did not look for, nor did she find evidence that respondent had received trust funds, other than the advance fees alleged and at issue in this matter.

45. The Bureau's auditor acknowledged that, for each of respondent's clients that she reviewed, a fully executed CDC contract with signatures and all pages initialed was in place between the client(s) and respondent. The auditor confirmed that there existed for each individual client a detailed and itemized chronological conversation/contact log (referred to above), containing numerous entries for each client, reflecting dates, times, and details of each individual contact between respondent or her employees and the client, lenders, noteholders, or other persons relevant to the efforts to assist with the client's particular problem.

PARAGRAPH 6-ADVANCE FEES AND THE 32 LISTED CLIENTS

46. The auditor acknowledged in her testimony that it appeared, from her review of respondent's records, that respondent had entered into a fully executed CDC contract with each of the 32 clients listed in Paragraph 6 of the First Amended Accusation. Exhibit 7 contains respondent's sworn written statement regarding her mortgage loan credit and default counseling business activities with respect to these clients. The relevant portion of respondent's declaration reads as follows, which respondent reiterated in her testimony at the hearing:

[¶] ... [¶]

I have provided consulting services for property manager market analysis, loan default and foreclosure counseling and receive payments for services rendered.

[¶] ... [¶]

I do not guarantee the outcome and always provide HUD contact information and review alternative loss mitigation options that are free to each homeowner prior to signing any contract for my service. The contracts are signed only when the clients have agreed that the services have been performed and rendered. I do not imply, promise nor state the commitment to provide additional services beyond the contract.

[¶] ... [¶]

47. Respondent attached a spreadsheet containing itemized information for each of the clients whose names appear in Paragraph 6 of the First Amended Accusation to her declaration referred to above and contained in Exhibit 7. These documents contained a received note showing that the declaration and attachments, including the spreadsheet, were received by the Bureau on May 24, 2011. The spreadsheet lists 35 clients reflecting 36 different loans. Respondent had fully performed all mortgage loan credit and default counseling services for twenty two of these listed clients. There were three clients for which services were performed for free. Respondent had fully performed all of her obligations with respect to these listed before October 11, 2009. In no instance is there any evidence or indication that any of these 35 listed clients, 32 of whom are identified by first name and last initial in Paragraph 6 of the First Amended Accusation, were required to pay respondent in advance for services respondent had not yet provided, consistent with respondent's testimony to that effect and what respondent spelled out in her CDC contracts with each one.

48. The auditor confirmed in her testimony, consistent with her Findings and Conclusions in her Final Audit Report, that she did not find sufficient evidence to conclude respondent received advance fees from Mr. and Mrs. Gonzales, Mr. and Mrs. Aguilar, or for any of the clients listed in Paragraph 6 of the First Amended Accusation. In sum, the auditor's Final Audit Report and her testimony confirmed that the Bureau failed to prove that respondent received advance fees as alleged in Paragraphs 6, 7 and 9 of the First Amended Accusation.

49. The Bureau did not summon any one of the 32 borrowers named in Paragraph 6 of the First Amended Accusation to testify against respondent. Evidence Code section 412 provides that if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. In this instance, it is not that the evidence presented by the Bureau in support of the allegations in Paragraph 6 should be viewed with distrust, so much as since the Bureau did not produce any one of the 32 borrowers identified in Paragraph 6 to testify that respondent received payment from them before respondent performed mortgage loan credit and default counseling services called for the CDC contracts between the client borrower and respondent, it is fair to assume that no such evidence exists, as the Evidence Code provision requires the finder of fact to assume that if such stronger evidence existed, it would have been produced, or an explanation as to why it was not available, would have

been provided, which did not occur. It is also fair to assume that since there was no evidence that any of the 32 distressed borrowers/clients identified and listed in Paragraph 6 of the First Amended Accusation complained to the Bureau that respondent failed to complete her CDC contract obligations to them, or that they were dissatisfied with respondent's performance of her obligations as set forth in her CDC contracts before she received payment, that no such evidence exists.

50. Respondent credibly testified consistent with her declaration contained in Exhibit 7 that she did in fact completely perform all services called for in her CDC contract with each client before being paid. The Bureau's evidence failed to prove otherwise and failed to rebut or discredit respondent's credible testimony. Mr. Amezcua, who worked for respondent, corroborated respondent's testimony. Mr. Amezcua confirmed that no payment was due until all services set forth in the CDC contract had been performed, and testified that respondent was exceedingly careful in making sure that payment of fees was never requested until such time as all services selected by the client in the CDC contract between respondent and that client had been fully performed.

51. The fact that there is no evidence of any complaint to the Bureau made by any of the 32 client/borrowers named in Paragraph 6 of the First Amended Accusation, and the fact that the auditor could not find any evidence that respondent demanded and collected advance fees from any of these 32 client borrowers tends to corroborate both respondent's and Mr. Amezcua's testimony. Since Mr. and Mrs. Aguilar and Mr. and Mrs. Gonzalez do not appear on the Paragraph 6 list of the 32 borrowers, the interaction and relationship between respondent and the Aguilars and Mr. Gonzalez must be analyzed separately.

52. In sum, this record contains no evidence that respondent received advance fees from any or all of the 32 clients listed in Paragraph 6 of the First Amended Accusation. On the contrary, the only credible evidence in this record is that respondent only received compensation after she had performed all of the services for which the client had contracted in the CDC contract between respondent and that client. It is the Bureau's obligation to prove these allegations by clear and convincing evidence, as set forth in the Legal Conclusions below. The Bureau failed to do so. As acknowledged by the Bureau's auditor in her testimony and in her Findings and Conclusions of her Final Audit Report, clear and convincing evidence that respondent "demanded, charged and received" advance fees from the 32 listed clients, as alleged in Paragraph 6 of the First Amended Accusation, does not exist in this record.

PARAGRAPH 7-8 AGUILARS

53. Paragraph 7 of the First Amended Accusation alleges that on August 12, 2009, respondent and Mr. Amezcua met with the Arturo and Octavia Aguilar, "in order to provide them loan modification services to save Arturo and Octavia's home ... from being lost in foreclosure." The allegation continues by stating that respondent and Mr. Amezcua told the Aguilars that, "Respondent and Amezcua were licensed with the Bureau and authorized by the Bureau to perform loan modification services, "promising that the loan modification

would be complete within three (3) to six (6) months," when in fact Amezcua's salesperson's license was not under respondent's broker's license, and the Bureau had not authorized respondent and Amezcua to perform loan modification services as represented, further that respondent failed to provide the loan modification as promised. None of these allegations were persuasively proved by clear and convincing evidence, other than the fact that according to the Bureau's records, Mr. Amezcua's real estate salesperson's license was not "under" respondent's license when he worked for her.

54. There exists no factual basis in the evidence for the first portion of the allegations of Paragraph 7 of the First Amended Accusation. There was no evidence the Aguilars were ever in danger of losing their home in foreclosure. There was no factual basis in the evidence for the allegation that the Aguilars sought respondent's help, "to obtain a loan modification to avoid losing their home in foreclosure," and, in fact, the contrary was the case, which proved to be an insurmountable hurdle to the Aguilars obtaining a loan modification during the time that respondent was working with them.

55. The Aguilars were, at all times relevant to this matter, current with all of their payments and obligations on their home mortgage, were never in default, were never in danger of losing their home to foreclosure, and testified quite proudly that they never missed a payment and were never behind on their obligations. The term "distressed borrowers" never applied to the Aguilars. The Aguilars were not facing a notice of default, a foreclosure proceeding or an imminent foreclosure sale, never under any pressure to take any deal they could in order to obtain relief from their mortgage obligations, nor were they ever desperate, as were many other borrowers during this period of time. On the contrary, the Aguilars expressed interest in obtaining respondent's advice and assistance as a proactive and defensive strategy, in case they did encounter financial problems in the future. There is also a suggestion in the evidence that the Aguilars sought to take advantage of the chaotic environment surrounding the "mortgage meltdown" in order to obtain a rewrite of their mortgage obligations with their lender, seeking to have their lender agreed to reduce their principal obligation, and, accordingly, their monthly payments. Since the evidence is undisputed that the Aguilars rejected two different offers from their lender to be refinance the existing principal balance (below), it can only be assumed that their objective was seeking the reduction in the amount of principal they owed without paying anything additional on their outstanding principal balance.

56. Since the Aguilars were never "distressed homeowners" in any sense of the ordinary understanding of the meaning of the word, they were not subject to the sorts of pressures and often desperation that distressed homeowners facing foreclosure and potential loss of their homes experienced, contrary to the suggestion of the first portion of Paragraph 7 of the First Amended Accusation. All the evidence suggests that the relationship between respondent and the Aguilars was arm's length, seeking advice to assist in a proactive and anticipatory fashion to obtain a possible remedy that was not at all driven by borrowers in dire straits and desperation.

57. As referenced above, in the environment with respect to foreclosures and home mortgages that existed in the fall of 2009, thousands of applications for loan modification or restructuring were being received by lenders submitted by borrowers who were in default, were facing imminent foreclosure, were moderately to very behind in their payments, and were indeed "distressed borrowers" in dire straits and often desperate. Most of the loan assistance, modification or restructuring programs offered by banks and lenders during this period of time required the homeowner to be in some phase of default or foreclosure. None of the relief/assistance programs, such as HAMP or HARP, available in the fall of 2009, were arranged or structured to provide assistance to a homeowner still current on his or her payments or to consider borrowers like the Aguilars, who were not in default and were current on their payments, to be in need of a hardship loan modification or restructuring.

58. Paragraph 8 alleges that between August 12, 2009 and September 1, 2009, respondent and Mr. Amezcua, "collected advance fees for the loan modification for Arturo and Octavia in the amount of 'about $1,000,' prior to submission to the Bureau of any or all materials used to collect said advance fees and failed to provide an accounting for said advance fees ..." The allegations of Paragraph 8 were not proved, in that the allegations require as a condition precedent proof that the $1,000 collected by Mr. Amezcua and respondent constituted advance fees. It was not proved by clear and convincing evidence that the fees earned and collected by respondent from the Aguilars constituted advance fees.

59. Respondent did receive three payments of earned fees from the Aguilar's pursuant to an Installment Payment Plan between August 12, 2009 and September 1, 2009, a total of $1,000. The three separate payments were received on August 12, 2009, August 19, 2009 and September 1, 2009, pursuant to a Payment Plan for mortgage loan credit and default counseling services set forth in respondent's CDC contract with the Aguilars. Respondent contends that she was not required to submit her CDC contract or any of her other materials including the Fees Notice to the Bureau for prior approval before collecting the $1,000 from the Aguilars, nor was she required to account for the fees she received as trust funds, because she did not receive any payment before she had performed the services for which the payment was received. Respondent's contention has merit and is supported by the great weight of the documentary evidence in this matter, as well as the Findings and Conclusions of the Department's auditor in her Final Audit Report, where she confirmed in writing and then later in her testimony, that she could find no evidence that respondent received advance fees from the Aguilars or from Mr. Gonzalez.

60. The credible and persuasive evidence produced in this matter showed that what respondent collected from the Aguilars was compensation for credit default counseling services paid in arrears for services after they had been performed. In the one instance of the first of the three installment payments received from the Aguilars, a single payment of $500 that was made on August 12, 2009, it appears that an inadvertent error occurred due to the fact that respondent agreed to permit the Aguilars to pay for her mortgage loan credit and default counseling services on an Installment Payment Plan. Mr. Amezcua received a payment of $500 as the first installment of the Installment Payment Plan executed by the

Aguilars seven days before respondent submitted the application package requesting hardship relief to the Aguilars's lender on August 19, 2009. The receipt of the installment payment on August 12, 2009, appears, in reviewing all the evidence, to have been a unique event, and anomaly and a timing accident due to confusion surrounding respondent permitting the Aguilar's to enter into an Installment Payment Plan. Nevertheless, at the time the first installment payment was received, August 12, 2009, respondent had already performed all of the services for the Aguilars called for in the CDC contract under subdivisions (a) and (b), and that all that remained were the services called for in subdivision (c), which were completed on August 19, 2009.

61. The Factual Finding above concludes that the first installment payment made by the Aguilars was an anomalous and unique event, and not evidence of the receipt of advance fees, caused by confusion over the agreement by respondent to permit the Aguilars to make installment payments, largely because there is no other evidence in this rather voluminous record that the receipt of the first installment payment from the Aguilars reflected any evidence of the sort of structuring of services and payments prohibited by the latter portion of B&P code section 10026. The Department's auditor reviewed the Installment Payment Agreement with the Aguilars, as well as the CDC contract and Fees Notice, and was aware that the first installment payment was received a brief time before respondent submitted the application package to the Aguilars's lender, completing the services. She did not conclude that this information constituted evidence of respondent receiving advance fees from the Aguilars, or as evidence that respondent was engaged in a structuring of partial payment for partial services, as reflected in her Final Audit Report Findings and Conclusions, where she concluded that she could find no evidence that respondent received advance fees from any client, including the Aguilars. Respondent's CDC contract and separate Fees Notice, as set forth in detail above, provides in several places that full payment is due after all services are performed. None of respondent's business practices or her business documentation, which all the evidence shows she followed quite strictly and carefully, provide for structured services for structured payments. None of her business practices or documentation provides for the receipt of installment payments, and there is no evidence in this voluminous record that she permitted any other client to make installment payments. For reasons that are not entirely clear in this evidence, an exception was made for this single first installment payment made by the Aguilars, and, based on all the evidence in this matter, the most likely conclusion is that this single payment was the product of confusion, error, and accommodation. There is no evidence in this record that any of respondent's CDC contracts or her relationships with any of the clients, whether the Aguilars, Mr. Gonzalez, any of the 32 clients listed in Paragraph 6 of the First Amended Accusation, any of the 35 clients listed on respondent's spreadsheet referred to above that was provided to the Bureau's auditor, that respondent ever entered into any agreement or perform services for any client on the basis of structured receipt of partial payment for partial services rendered. There is no evidence that any other such payment ever occurred in any of respondent's other transactions, and had there been, there is no doubt that the Bureau's auditor's conclusions in her Final Audit Report Findings and Conclusions regarding whether there was evidence that respondent had ever collected advance fees would have been different than they were.

62. Respondent's fees and mortgage loan credit and default counseling services obligations to the Aguilars were set forth and defined in her CDC contract, signed by the Aguilars and initialed by them on every page, and in respondent's Fees Notice, provided to the Aguilars on August 12, 2009. The second installment payment of $250 was received after all services set forth in subdivisions (a)-(c) of respondent's CDC contract with the Aguilar's had been performed. The final payment of $250 was not made by the Aguilars until September 1, 2009, two weeks after respondent had performed all services that entitled her to full compensation.

HISTORY OF THE AGUILAR TRANSACTION

63. The Aguilars came to respondent's office for credit default counseling on August 12, 2009. The Aguilars first met Mr. Amezcua at a meeting at CHC, where Mr. Amezcua told the Aguilars that the CHC process was slow, that it was easy to get lost with the rapid turnover of persons assisting distressed borrowers and with the great number of people seeking assistance. Mr. Amezcua told the Aguilars that he was starting to work with respondent, who could provide more personal attention and well-informed advice for a borrower seeking to plan strategy to apply for hardship relief, individual tracking of the progress of each person's application for relief, and produce results faster than working through CHC. Mr. Amezcua was particularly helpful because he speaks Spanish. Mr. Amezcua showed the Aguilars respondent's individual tracking system written on a large whiteboard, how respondent use the individual conversations/contact logs to make certain that each contact with clients for the lender was documented in detail, noting the date and time each contact took place and a summary of the contact. Mr. Amezcua provided the Aguilars some preliminary credit default counseling based on respondent's brochure entitled "Homeowner's Checklist for Avoiding Foreclosure."

64. As noted above, the Aguilars were never distressed borrowers, and the fact that the Aguilars were never in default and never behind on their mortgage payments proved to be an insurmountable hurdle to obtaining the relief the Aguilars hoped to achieve during the period of time between August 2009 and July 2010 that respondent worked with them. It proved to be exceedingly difficult to make a case to the Aguilars's lender that the Aguilars were "distressed borrowers," in need of hardship relief, or were experiencing a hardship that should be accommodated by the lender, when the Aguilars were still current on their existing mortgage payments and apparently able to continue to make the mortgage payments they had agreed to in their original mortgage loan going forward in the future. The Aguilars's lender proved to be quite closed to being persuaded that a borrower current on existing mortgage payments, and unlikely to be in default at any time in the near future, was in need of or warranted hardship relief from those loan obligations. The lender's point of view, repeatedly expressed between August 2009 and July 2010, was that the Aguilars's circumstances warranted an offer to refinance the existing loan balance, but not to reduce it based on a claim of hardship that did not appear to have any compelling supporting evidence.

65. The Aguilars spoke with respondent and discussed whether respondent's individualized personal services, for which she would be compensated, would be of value to

the Aguilars, or whether they would be better off to continue pursuing the free assistance offered by the CHC and/or the Making Homes Affordable program identified by Mr. Amezcua and outlined in the brochure he gave the Aguilars during the first meeting. The Aguilars decided to hire respondent and use her services in order to guide and advise them in submitting an application on the basis of hardship to their lender, requesting modification of their mortgage loan. According to respondent's conversations/contact log for the Aguilar loan, all financial information was gathered from the Aguilars by Mr. Amezcua at the first office meeting on August 12, 2009. During this same August 12 meeting, options to obtain relief were presented, reviewed and discussed. The Aguilars decided to retain respondent to submit to their lender, Bank of America, an application and all necessary supporting documentation to claim a hardship and request a modification of their loan based upon that claim of hardship. The documentation required to support the claim of hardship was discussed, and the difficulties of obtaining a relief based upon hardship when the borrower was still current with payments was also discussed. Most, but not all of the supporting documentation, was gathered and assembled from the Aguilars at this first meeting after the Aguilars decided to retain respondent's services.

CDC CONTRACT, FEES NOTICE AND INSTALLMENT PAYMENT PLAN

66. The Aguilars signed and initialed respondent's CDC contract, and were provided the Fees Notice, right to cancel and obtain a refund, and a copy of the Installment Payment Plan on August 12, 2009. As set forth above, the Homeowner's Fee Agreement, with the Installment Payment Plan between respondent and the Aguilars, reflects a total amount due of $1,000, with payments having been made on August 13, 2009, August 19, 2009, and full payment made by September 1, 2009. The CDC contract, at Page 3, reflects the Fee Agreement between respondent and the Aguilars. CDC contract agreement shows that the Aguilars had one first mortgage sought to be modified, for which respondent had agreed to provide the services identified on page 2 of the contract in subdivisions (a)-(c). The CDC contract does not reflect any agreement to provide the strategy, negotiation and advocacy services set forth in subdivision (d) on page 2 of the CDC contract, or for respondent to be compensated for those services unless, at some later point in time, respondent and the Aguilars made a separate agreement to provide for the provision of those services and compensation. There was no evidence that such an agreement was ever reached.

67. Between August 12, 2009 and August 19, 2009, Mr. Amezcua and respondent finished what remained of the assembly of documentation to present a hardship application to the Bank of America, the Aguilars's mortgage lender. Respondent prepared a budget, a financial statement and drafted a hardship application to make the case for a hardship modification of the Aguilar loan to the Bank of America. Respondent reviewed property valuations with the Aguilars, and the income, assets and expense documentation that Mr. Amezcua had already assembled. Respondent submitted the Aguilar request for hardship loan mortgage modification and all supporting documentation to the Bank of America on August 19, 2009.

68. The CDC contract between the Aguilars and respondent, like all respondent's other CDC contracts, stated, at Page 3 of 5, in Part Four, "Fees," that respondent was entitled to receive as follows:

[¶] ... [¶]

... A flat fee in the total amount of **$1,000,** One Thousand Dollars for services (a) - (c) on first lien as stated on recital;

[¶] ... [¶]

69. "Services (a)-(c)" referred to above in the "Fees" provision on Page 3 of 5 of the CDC contract with the Aguilars, are set forth on Page 2 of 5, as follows:

> I will provide you the following services:
>
> (a) Analyze homeowner's current debt obligations and financial situation;
>
> (b) Research potential loan modification options/loss mitigation alternatives; and
>
> (c) Present homeowners package to lender in conformance with lenders guidelines.

70. Respondent's right to receive all of the $1,000 compensation from the Aguilars matured on August 19, 2009, just after respondent completed and submitted the August 19, 2009, hardship loan modification request for the Aguilars to the Bank of America. Respondent received partial compensation, on August 12, 2009, due to the Installment Payment Plan discussed in detail above. Respondent did not receive full compensation until September 1, 2009, well after she had fully performed all the credit default counseling services she agreed to perform in her CDC contract for the Aguilars.

71. Respondent's itemized conversation/contact log for the Aguilar loan reflects in meticulous detail the contacts between respondent, the Aguilars and representatives of Bank of America from August 12, 2009, forward. The log has numerous entries per page over four pages of handwritten and four pages of computer-generated notes. The conversation/contact log notes for the Aguilars tracks the gathering of information, research, strategizing and selection of an approach to the lender for gathering supporting documentation and making the case to the lender that an offer for hardship relief should be made to the Aguilars. The conversation/contact log also documents numerous contacts with various representatives of the Aguilars's lender by respondent, Mr. Amezcua and/or respondent's staff, following up on the bank's processing of the application, seeking confirmation that the application was sufficient and acceptable, and a response or reply from the bank.

72. The Aguilar conversation/contact notes document and confirm that respondent submitted the completed hardship modification request and all supporting documentation to the bank for processing on August 19, 2009. Another contact note, dated August 27, 2009, confirms that the bank received respondent's submission of the Aguilars's request for hardship loan modification and had begun the process of responding by assigning a mortgage loan representative to the request. A contact note dated September 29, 2009, reflects a status check on the Aguilar application by one of respondent's employees, with a response from the bank that the application was still "in review." Respondent's itemized conversation/contact log for the Aguilar loan documents an erratic, internally confused and inconsistent response pattern by a variety of bank representatives and Bureaus at Bank of America who provided inconsistent and often conflicting status information and appeared to be passing the hardship loan application packages back and forth from representative to representative, evidently due to lack of clarity of bank internal procedures regarding how to handle such modification requests. These Bank of America employees, who were rarely the same person from call to call, reported most frequently in response to inquiries from respondent and her staff about the status of the Aguilar loan modification submissions that the bank was "still actively reviewing the file," or "sent the file to a different Bureau," or "could not respond adequately at this time."

73. On two occasions, respondent's itemized conversation/contact log for the Aguilar loan notes that Bank of America offered the Aguilars the opportunity to refinance their mortgage loan, both of which offers were rejected by the Aguilars as unacceptable. Contrary to Mrs. Aguilar's testimony almost three years after the fact, where she denied contact from respondent's office communicating the offers to refinance from the bank, and denied rejecting those offers, Mr. Amezcua communicated the offers to Mrs. Aguilar by phone and her rejection of the retention alternatives are well documented in respondent's itemized conversation/contact log. Mrs. Aguilar made it clear she sought a hardship modification of their mortgage, and other alternatives were not acceptable, at least in 2009.

THE "ANSWER" TO THE AUGUST 19, 2009 APPLICATION

74. A contact note dated October 29, 2009, reflects a conversation between respondent and "Kevin" at Bank of America's Home Retention Bureau, rather bluntly stating that because the Aguilars were current on their loan, the bank refused to modify the loan, even on a hardship basis. He offered the Aguilars an opportunity to seek a refinance and see what sort of relief the Refinance Bureau at the bank could provide. He offered an opportunity to resubmit another hardship application, as the bank's consideration of such hardship claims was in flux, and provided some guidance regarding documentation needed to support a new application for hardship modification. This October 29, 2009, conversation with "Kevin" at Bank of America's Home Retention Bureau constituted the "answer" to respondent's August 19, 2009, application to modify the Aguilar loan on the basis of hardship to the bank with a resounding "No."

AFTER DENIAL OF FIRST APPLICATION CLAIMING HARDSHIP

75. Respondent told the Aguilars of the unfavorable outcome of the submission shortly after receiving the information set forth above. Respondent offered to try again and submit another hardship application, even though the CDC contract was fully performed by both parties, and all of the compensation the Aguilars had paid respondent had been fully earned and fully paid.

76. The Aguilars asked that respondent resubmit the application, and so she did. Respondent did not require the Aguilars to enter into a new CDC contract in October 2009, after the bank denied the first application, nor did she request any additional compensation to continue to assist the Aguilars, although, in retrospect, it must now look like she should have. It appears, from all the evidence, that respondent continuing to assist the Aguilars gratis after the banks denial of the first application she submitted for them was interpreted by the Aguilars as respondent promising to produce a loan modification satisfactory to the Aguilars, regardless of the time and energy required to produce such a result, when that was not the case. Failing to insist upon a new contract and more compensation appears to have fostered a misunderstanding of what respondent was to do for the Aguilars in exchange for her fee. It also permitted later reviewers to misunderstand and misinterpret the nature and the limits of respondent's services to be provided for her fee. Fortunately for respondent, the Bureau's auditor did not misinterpret her records and the evidence of what respondent did and did not promise to do in exchange for her fee.

77. Respondent also inquired whether the Aguilars wanted to perhaps look for other programs that might assist them, such as Bank of America's "second phase program" or the HAMP (Making Homes Affordable) program. The Aguilars rejected these options and asked respondent to continue to pursue the process as she had been doing.

78. All of respondent's CDC contract obligations with the Aguilar's were complete on or shortly after 1:20 p.m. on August 19, 2009, as set forth above and as reflected in the Aguilar loan itemized conversation/contact log in respondent's records. Respondent completed the tasks/promises set forth in parts (a)-(c) on page 2 of her CDC contract with the Aguilars at that time. Pursuant to the Payment Plan that respondent permitted the Aguilars to make with her, respondent received a second partial payment for her services from the Aguilars at 4:15 p.m. the same day the hardship modification request was submitted to the bank. At this point in time, 4:15 p.m. August 19, 2009, respondent was entitled to receive full payment of her $1,000 fee, as respondent's (a)-(c) services were complete, but she relaxed that payment obligation to accommodate the Aguilars and allowed them to pay the last portion of the fee well after all her services had been completed.

NEGOTIATION AND STRATEGY IF AN OFFER BY LENDER IS MADE

79. In what seems to have been a source of confusion at the hearing, the evidence revealed that services pursuant to subdivision (d) of respondent's CDC contract, "Review of loss mitigation documents/agreement from lender," were not required or performed, as the

Bank of America never made respondent and offer or produced loss mitigation documents/agreement that could be reviewed by respondent with the Aguilars. "Kevin," on behalf of the Bank of America, did offer the Aguilars on October 27, 2009, an opportunity to seek a refinance of their mortgage, an opportunity the Aguilar's rejected. The conversations/contact log shows that at least one other such offer to refinance was made to the Aguilars, and it was also rejected. The Aguilars were not interested in resolving their concerns with their mortgage through a refinance. But nevertheless, this was the bank's offer, and respondent did review the refinancing offers with the Aguilars, resulting in their rejection of those proposals. Respondent did not request compensation pursuant to subdivision (d) of her CDC contract with the Aguilars, even though she did receive and review the response from the bank with the Aguilars. Where the confusion came from was that this service was not included in the original services set forth in subdivisions (a)-(c) and was not required to be performed as part of the services required to earn the $1,000 fee.

ADDITIONAL APPLICATIONS

80. As noted above, respondent actually submitted four separate hardship mortgage modification requests to the Bank of America on behalf of the Aguilars, each with complete income, assets, and expenditure financial statements and hardship letters requesting hardship modification of the Aguilars's mortgage. Respondent submitted the first hardship modification request as detailed above on August 19, 2009. Respondent submitted another hardship modification request with updated financial and other information on October 27, 2009, after the August 19, 2009, submission had been unequivocally rejected by the bank. A third was made, again with updated documentary support, on May 14, 2010. Respondent's the conversations/contact log shows that respondent undertook considerable additional work on behalf of the Aguilars to make these additional submissions.

LAST APPLICATION

81. Respondent submitted the fourth and final hardship application to Bank of America for the Aguilars on July 22, 2010. This fourth and final submission was seminal in two respects. First, a new CDC contract was executed between the Aguilars and respondent for this fourth and final application. The July 22, 2010, CDC contract with respondent is the CDC contract attached to the Aguilars's formal complaint to the Bureau as evidence of the agreement between the Aguilars and respondent. These documents are found in Exhibit 4. The Aguilars did not attach the August 12, 2009, CDC contract between themselves and respondent. The August 12, 2009 CDC contract, the one upon which respondent was compensated, appeared to have been unknown to the Bureau until the Bureau's auditor obtained it during the audit.

82. The second and later July 22, 2010, CDC contract between respondent and the Aguilars was significant in that respondent fully performed all her obligations under the second and later CDC contract required in subdivisions (a)-(c) by July 22, 2010, and thus was entitled to full payment of another $1,000 fee. Respondent did not seek nor did she receive any payment for those fully performed services. Respondent never complained

throughout this process that she had earned another fee, but never received payment. In fact, the Aguilars received four hardship loan modification submissions to the bank, each with updated information and revised request letter, all of which had to be gathered, written and assembled and updated by respondent, taking her time and energy, for which the Aguilars paid only the price of one.

83. Second, shortly after the July 22, 2010, contract was signed and the fourth and final hardship application was submitted, respondent was forced to move her operations, and the Aguilars and respondent had no further contact with one another.

THE COMPLAINT TO THE BUREAU

84. None of the four applications for the Aguilars to the Bank of America by respondent resulted in an acceptable offer to the Aguilars from the bank of America for the sort of hardship relief loan modification the Aguilars sought. From their testimony and their written complaint to the Bureau, as well as Mrs. Aguilar's testimony about how others later assisted them to obtain an acceptable offer from the bank, after the Aguilars could no longer locate respondent after the end of July, 2010, it was evident that Mrs. Aguilar believed respondent was required to produce and offer to modify their loan acceptable to them, and that the Aguilars believed that they had purchased and were entitled to obtain a loan modification offer acceptable to them as a result of retaining and paying respondent to assist them. Regardless of all the explanations, the disclaimers and explanations in the CDC contract, the Fees Notice, and the verbal explanations, it was apparent that the Aguilars expected something other than what respondent promised, and time and this action have only exacerbated that expectation.

85. As noted above, respondent's CDC contract with the Aguilars describes the entire agreement between respondent and the Aguilars. The documentation signed by the Aguilars defeats any claim that the Aguilars were entitled in exchange for their payment to respondent to receive a hardship loan modification offer acceptable to them from the Bank of America.

86. As frustrating as the Aguilars found it in not being able to locate respondent after July 26, 2010, when she closed her office and the Aguilars could no longer contact her, respondent's contractual obligations were completed after the first complete submission of the request for hardship modification, on August 19, 2009. From that date forward, respondent owed the Aguilars nothing further in the way of services. Nevertheless, respondent performed a considerable amount of additional work for the Aguilars, albeit unsatisfactory to them because it did not result in an acceptable offer, all without additional compensation. The fact that the Aguilars evidently believed that respondent was required to continue to work for them for the better part of an additional year without any additional compensation did not create either a legal or a moral obligation on respondent's part to do so.

87. The Aguilars also expressed frustration and anger over the fact that later efforts by others succeeded where respondent had failed. To begin with, Mrs. Aguilar's

statements that the Aguilars obtained the hardship loan modification relief they were seeking as a result of some unnamed others' efforts constituted uncorroborated hearsay and was unsupported by any documentation confirming the nature of what sort of solution was obtained by this unnamed other person on behalf of the Aguilars. There was no evidence that there was any correlation between whatever solution the Aguilars ultimately obtained from their lender and what they told respondent to seek, or even that such solution was reasonably available from the lender during the time respondent worked with the Aguilars. Considering the explosive dynamics of the mortgage loan market during the time period under review, it cannot be just assumed that what the Aguilars obtained later was even possible for respondent to obtain between August 2009 and July 2010. Despite the fact that Bank of America offered refinance alternatives to the Aguilars that they rejected while respondent was still working for them, it is entirely possible that the Aguilars ultimately found a refinance, on the same or different terms as were offered to them earlier, to be acceptable. The point is, since there was no corroborating evidence to these rather vague claims, it was impossible to discern on the evidence presented.

88. Secondly, the Aguilar complaint assumes causation where there is only proof of correlation, most likely accidental, and maybe not even that. The implications in this aspect of the Aguilars's complaint; that some unnamed other person was able to obtain the unspecified satisfactory solution they thought they had purchased when they hired respondent is twofold: First, that had respondent done her job better, differently, or had continued to do her job, they would have been able to obtain whatever it was they sought (other than the vague use of the term "load modification," there was no evidence regarding the specifics of what it was the Aguilars sought with respect to their home loan) and, Secondly, that since respondent did not obtain the relief the Aguilars thought they were entitled to receive in exchange for the payment of their fees, and the later coming other person did, that the Aguilars are entitled to a refund of the fees they paid respondent. There is so much wrong with these contentions and implications that it is difficult to assess them individually, but collectively, none has any evidentiary support in this record.

89. There is simply no evidence that respondent's efforts before July 22, 2010, and the efforts of any other unidentified person after that date could have or should have resulted in a different response from the Bank of America than respondent was able to obtain during the period of time she was working with the Aguilars. The insinuation flowing from the claim that the Aguilars ultimately got what they wanted is not evidence, or even a reflection, of any error or omission on respondent's part while she was still working for the Aguilars. It is not possible on this evidence to draw any such conclusion.

90. Just a few of the vast number of variables that must be proved in order to support the contention advanced here include the fact that the Aguilars's personal and financial circumstances were changing over time, the lender's responsiveness to borrower applications for hardship relief was changing, the personnel working for the lender and responding to such applications were different, the lender standards by which such applications would be evaluated were changing, and so on. Most important is to consider that if the Aguilars did in fact achieve later what they could not achieve with respondent, the

only reasonable conclusion is that the lender changed its approach to denying applications for hardship when the borrower was still current with payments and not in default, since the Aguilars proudly testified that they were never in default and never behind in their payments. The problem with focusing upon the fact that some other person or organization was later in time able to obtain an offer from Bank of America to restructure the Aguilar loan based on hardship, where respondent was not successful, is the fact that the responsiveness and receptiveness of the bank to the request was in considerable flux, with the receptiveness of the bank to such requests evidently improving over time. The number of variables involved in obtaining what here must be assumed to be satisfactory response, since there is no actual evidence of that, in a different year, under constantly changing circumstances, during the midst of the upheaval of the "mortgage meltdown," is so vast that the contention amounts to nothing more than speculation.

91. A later application for relief to the lender (no evidence of what was submitted or the dates was provided) that were not the same (there was no evidence that the later application was the same as the earlier) during the period of time that respondent made the applications on behalf of the Aguilars, completely precludes the conclusion sought by the contention above; to wit, that had respondent kept trying or did a better or different kind of job for the Aguilars, they would have been able to obtain the relief they sought, and since they did not, that they were entitled to a refund of the fees they paid to respondent. The evidence presented in this matter totally fails to support such a conclusion.

92. The numerous entries in respondent's conversation/contact log for the Aguilar loan demonstrate in the almost one year that respondent was contacting the bank while pursuing one of the four applications, that almost never was the same person at the bank available respond to the requests and inquiries or to provide any continuity, and those who did respond to the inquiries provided often conflicting and inconsistent messages. These representatives told respondent and she documented in the log that the bank was still working out its own processes for how to deal with distressed homeowners first, and, since the Aguilars were not "distressed homeowners," they appeared to have no priority their lender. If in fact that others assisting the Aguilars later in time did indeed attain substantially similar relief as respondent applied for and on behalf of the Aguilar's before the end of July 2010, those others working with the Aguilars were likely to have been the accidental beneficiaries of a combination of respondent's work and/or finally reaching the right person at the bank at the right time, and the bank finally organizing itself in such fashion that it was more receptive to request to modify loans not in default and not in arrears for mortgage holders not facing foreclosure hardship.

93. Respondent's itemized conversation/ contact log shows that the four application submissions respondent made to the Aguilar's lender Bank of America seeking some sort of offer of hardship loan mitigation or modification over the course of just slightly less than one year were each rejected by the bank for the same reason, because the Aguilars remained current with their payments and did not go into default. Obviously that did not continue to be an impediment after respondent was out of the picture after July 26, 2010, and

the Aguilars sought other help, because the Aguilars insisted in their testimony that they always remained current on their payments and were never in default on their loan.

94. The point is, it is impossible to know the answer to any of these questions because there are too many variables, too little evidence, too much speculation, and too many things changed between the time respondent worked for the Aguilars and the later point in time when they claim to have obtained what they consider to be a satisfactory solution from their bank. The ultimate success of others in obtaining the offer for hardship restructuring sought by the Aguilars, appears to be far more coincidental than due to anyone coming after respondent providing assistance, or who possessed skills or abilities or diligence that were lacking in respondent, and may have had much more to do with later persons assisting the Aguilars getting lucky enough to finally contact a person at the bank interested in solving the problem. Thus, there is no persuasive evidence that respondent did or failed to do anything that could have or should have resulted in a different outcome than was received.

95. The claims set forth just above, as well as Mrs. Aguilar's strikingly inaccurate claim in her testimony that "Jennifer did nothing for us," are, in light of all the evidence, disingenuous. After August 19, 2009, respondent was effectively donating her services to the Aguilars, and quite evidently, respondent's continued service to the Aguilars was neither recognized nor appreciated. The fact that the Aguilars were not able to continue to avail themselves of respondent's continuing to provide them free services, or to be able to contact respondent long after the period in which respondent had fully performed her obligations and earned her fee, so that they could continue to demand those free services, is really not a matter actionable here, but did reflect adversely on Mrs. Aguilar's credibility.

96. Respondent's itemized conversation/contact log for the Aguilar loan shows contacts between respondent or her staff with Mrs. Aguilar on February 3, 2010, February 17, 2010, March 10, 2010, April 13, 2010, April 20, 2010, May 12, 2010, July 16, 2010 and an in-office meeting that took place on July 22, 2010, that soundly rebut Mrs. Aguilar's claim that "Jennifer did nothing for us." By July 22, 2010, it was clear that the last application submission had been rejected, for the same reasons as the earlier ones had been, because the Aguilars were current on their loan and were not in default.

THE SUCCESSFUL MODIFICATION IN 90 DAYS ALLEGATION (PARAGRAPHS 7 AND 9)

97. Paragraphs Seven and Nine of the First Amended Accusation allege that respondent promised Mrs. Aguilar and Mr. Gonzalez to obtain a refinanced or restructured loan within three to six months. The allegation was not persuasively proved, and, in fact, the converse of the allegation, that respondent made no such time-related promises to any client at any time, had much stronger and more persuasive evidentiary support. Further, the allegation is refuted by what Mrs. Aguilar said about this subject in her initial complaint, set forth at page 3 of Exhibit Four. Mrs. Aguilar wrote in her complaint (Exhibit 4, Page 3)

They stated it would be approx 3-6 months before we'd hear from Bank of America-during the waiting period we would taking in all current bank statements until Mr. Amezcua told us to hold onto them till requested.

98. "3-6 months before we'd hear" back from the bank is a much different matter than a promise to complete a loan modification within 3-6 months, as alleged. Paragraph 7 of the First Amended Accusation misquoted or misunderstood this portion of Mrs. Aguilar's complainant. The fact that Mrs. Aguilar and Mr. Gonzalez were both asked in their testimony to repeat the incorrect statements that appear in the allegations of Paragraphs 7 and 9 of the First Amended Accusation quoted above, and were not confronted with the conflicting statements in their original complaints to the Bureau made much earlier in time, does not make their later testimony persuasive. There was no such promise by respondent, Mr. Amezcua, or anyone else associated with respondent that worked with or spoke to the Aguilars or Mr. Gonzalez regarding a guaranteed successful outcome, or a particular period in time in which such a successful outcome would be obtained. Similarly, there was no persuasive evidence that respondent, or anyone working with her or for her, made any substantial misrepresentation, made any false promise or engaged in dishonest dealing. None of these allegations were proved.

99. Mrs. Aguilar's statement in her complaint to the Bureau does accurately reflect what Mr. Amezcua, at first, and respondent later, advised both regarding the expected time the bank was likely to take to give them a reply to their application from the time of the submission of the application to the lender. This advice had nothing to do with a promised or guaranteed offer or promised outcome from the bank within any particular period of time, but was merely a rough estimate of when Mrs. Aguilar might expect some kind of response from the bank to the application that they had just made.

100. Respondent providing her client a rough idea of how long it was expected for the lenders to reply to their application is not the same as the promises alleged in Paragraphs 7 and 9 of the First Amended Accusation. Respondent's comprehensive CDC contract and the separate Fees Notice made clear to all clients she dealt with, including the Aguilars and Mr. Gonzalez, what exactly she was promising to do and not do. There is no mention of any specific time period in which lender action could be expected or was promised in any of the documents contained in this voluminous record. There is no evidence that the Bureau's auditor saw any evidence of such a promise in any of the documents she reviewed. The CDC contract and the attached Fees Notice make quite clear that respondent did not promise any specific outcome, nor any favorable response within in any specific period of time. These allegations fail for lack of proof.

OTHER PARAGRAPH 7 ALLEGATIONS

101. Paragraph 7, lines 8 through 13, and Paragraph 9, lines 24-27, make a number of additional allegations, almost none of which were persuasively proved. These allegations are all linked to the allegations in Paragraph 7, lines 7-8, and Paragraph 9, lines 24-25, regarding the alleged promises by respondent and/or Mr. Amezcua that the Aguilar and

Gonzalez loan modifications would be successfully completed within 3 to 6 months, which, as set forth above, were not proved. The allegations identified here that failed all depended for supporting proof factual assumptions and allegations for which the proof failed, set forth just above, regarding the charges that respondent promised successful outcomes within 3-6 months.

102. The allegation regarding "lack of authorization by the Bureau to respondent and Amezcua to perform loan modification services 'as represented,'" hinges upon proof that respondent, and derivatively, Mr. Amezcua, unlawfully collected advance fees. Proof of those claims failed, as set forth in detail above and below.

103. Proof that respondent or Mr. Amezcua were engaged in unlicensed activity proved elusive to evaluate because of the over breath and vagueness of the allegation. Both respondent and Mr. Amezcua were properly licensed by the Bureau at the time under review in this matter, and since neither were involved in collecting advance fees, this allegation appeared to have failed in that respect. However, Mr. Amezcua's real estate salesperson's license was not registered with the Bureau as being supervised by respondent "under" her real estate broker's license during the fairly brief period of time Mr. Amezcua worked for respondent and was subject to her supervision while both were engaged in activities for which a real estate broker license is required. Since Mr. Amezcua cannot engage in those activities on his own as a real estate salesperson licensee, he must be supervised by a real estate broker, in this instance, respondent. The fact that respondent failed to enroll Mr. Amezcua under her real estate broker license during the brief period of time he worked for her was an inadvertent oversight and constitutes little more than a technical violation. No specific evidence was introduced in support of the allegation directly, but the fact that Mr. Amezcua's real estate salesperson license was never enrolled with the Bureau to be supervised by respondent is evident from respondent's certified license history contained in the Bureau's records of respondent's real estate broker license.

104. There was no evidence that respondent or Mr. Amezcua made any misrepresentation, substantial or otherwise, made any false promise, engaged in dishonest dealing of any sort, or were negligent in any fashion in the manner in which they dealt with the Aguilar or Gonzalez loans. These allegations, made in Paragraphs 7 and 9 of the First Amended Accusation, were not proved by clear and convincing evidence.

105. No evidence was offered regarding how respondent was allegedly negligent in her performance regarding either the Aguilar or Gonzalez loan modification efforts. No expert or other testimony from a real estate professional was offered regarding any applicable standard of care that respondent may have breached with respect to either of these two borrowers. Negligence may not simply be assumed because the borrowers did not obtain the loan modifications they sought or desired, or mistakenly believed they were entitled to. There must be clear and convincing competent evidence presented regarding what a reasonably skilled, trained and competent broker should have done or refrained from doing, coupled with proof that respondent failed to conform to that standard, in order to prove the negligence allegation. No such evidence was produced.

106. All of the evidence adduced in this matter, which was considerable, demonstrate that Mr. Amezcua and respondent dealt with the Aguilars in an attentive, concerned, skillful, ethical and competent fashion, and went considerably over, above and beyond their CDC obligations, and that respondent in particular behaved toward the Aguilars and Mr. Gonzalez up to and including July 26, 2010, in a competent, skillful, ethical and professional manner.

GONZALEZ-PARAGRAPH 9

107. The Gonzalez CDC contract with respondent was different than the Aguilar CDC contract in that Mr. Gonzalez had two loans, a first and a second mortgage, with the second an equity line of credit loan secured by his home. A profound difference between the two cases is the decision Mr. Gonzalez made during the course of respondent's assistance to file bankruptcy, which neutered all efforts respondent made for him, and effectively removed her completely from the process.

HISTORY AND BACKGROUND

108. Mr. Gonzalez was referred to respondent by one of respondent's previous clients. Mr. Gonzalez first contacted respondent on April 13, 2010. Mr. Gonzalez was already several months in arrears on his mortgage payments and had been in default on both his first and second mortgages for quite some time before he saw respondent. Mr. Gonzalez was also experiencing financial distress due to potential loss of his job. Respondent gathered information from Mr. Gonzalez over the phone and reviewed foreclosure processes, as well as Mr. Gonzalez's options for potential loan and credit mitigation, modification, refinance and possible exit options, if a foreclosure proceeded. Respondent provided Mr. Gonzalez with referrals to several nonprofit free counseling services available for him to contact for help. Mr. Gonzalez did not want to use the free counseling services, reminded respondent that he had been referred to her by a previous client who is very happy with the work that she did for that client, requested further assistance and asked to make an office appointment.

109. Mr. Gonzalez came to respondent's office on April 17, 2010. Respondent analyzed Mr. Gonzalez's current financial situation, his first and second loan debt obligations and other expenses and income, and discussed potential strategies and possible options. A major problem facing Mr. Gonzalez was the fact that his employment situation was not clear, as he thought he might lose his job by the middle of May. Mr. Gonzalez expressed his interest in pursuing personal bankruptcy, due to increasing debts, becoming further in arrears on his mortgage payments and possible job loss. He told respondent that he had already consulted with a bankruptcy attorney, and was considering authorizing the attorney to file for bankruptcy protection from his creditors. Respondent told Mr. Gonzalez that his bankruptcy would take precedence over any services she could provide, and that Mr. Gonzalez needed to follow the advice of his bankruptcy attorney. Respondent told Mr. Gonzalez that he could seek her assistance if the bankruptcy attorney agreed that she could be of service after Mr. Gonzalez talked to the bankruptcy attorney and the bankruptcy attorney approved using respondent's services.

RETENTION AND APPLICATION ON SECOND MORTGAGE

110. Mr. Gonzalez met with respondent again on April 28, 2010, and asked to retain respondent's services. Mr. Gonzalez assured respondent that the bankruptcy attorney was aware that he was meeting and working with respondent to put together an application to his lender, Wells Fargo Home Mortgage (WFHM), to attempt to obtain an offer from WFHM of a hardship restructuring or modification of his first and second mortgages. Respondent contacted WFHM, the lender on both his first and second loans, after Mr. Gonzalez authorized her to do so. The WFHM representative speaking with respondent suggested that the request for hardship restructuring of the second mortgage be processed first, especially when respondent told him that Mr. Gonzalez was considering filing bankruptcy. Respondent verbally submitted Mr. Gonzalez's application on his second mortgage to the WFHM representative, together with all necessary supporting documentation and information, the same day, April 28, 2010.

111. The following day, April 29, 2010, WFHM confirmed in writing receipt of Mr. Gonzalez's application, together with all supporting documentation, and that a file had been opened regarding Mr. Gonzalez's application on his second mortgage.

112. Mr. Gonzalez returned to respondent's office on April 30, 2010, so that he and respondent could call and discuss his application regarding the second mortgage with a WFHM representative. The WFHM representative indicated that WFHM was prepared to settle with Mr. Gonzalez on his second mortgage. Respondent gave Mr. Gonzalez instructions and notes on how to settle the second lien after the WFHM representative indicated the bank's willingness to settle Mr. Gonzalez's second mortgage debt. The WFHM representative added one additional requirement, that Mr. Gonzalez obtain the advice and consent of his bankruptcy attorney before settling the second mortgage, in order to not interfere with his bankruptcy filing.

113. Respondent deferred from this point forward to Mr. Gonzalez working with his bankruptcy attorney and WFHM to assess the offer and conclude the process.

FIRST MORTGAGE

114. Mr. Gonzalez returned to respondent's office on May 14, 2010, requesting respondent's help with his first mortgage. Mr. Gonzales updated respondent by advising that he permanently lost his job on May 12, 2010. Mr. Gonzalez also reported that he authorized his attorney to file for bankruptcy protection under Chapter 7 of the US Bankruptcy Act, and that the filing had already been made. Mr. Gonzalez wanted to continue working with respondent in an effort to obtain some sort of relief from WFHM on his first mortgage that would permit him to retain his home and avoid foreclosure, even though he was now numerous months in default and had no income with which to make payments or bring payments in default current.

115. Respondent agreed to help Mr. Gonzalez with his first mortgage, but made it clear that the bankruptcy filing may have created an insurmountable obstacle to what he hope to attain. Respondent prepared a budget for Mr. Gonzalez and his wife, complete with an income, expenditures, assets and liabilities financial statement, performed a property valuation and collected income and expenses documentation. All lender forms and verifications, and the request for hardship modification of the first mortgage, were assembled, tailored to meet the specific requirements of WFHM, signed, dated and completed, and the completed application and supporting documents were forwarded to WFHM on May 14, 2010. WFHM confirmed receipt of the application and supporting documents package for the Gonzalez first mortgage on May 21, 2010.

GONZALEZ CDC CONTRACT

116. Mr. and Mrs. Gonzalez and respondent entered into respondent's CDC contract on May 17, 2010, when Mr. Gonzalez's spouse signed the contract. Mr. Gonzalez signed the contract on May 14, 2010. The CDC contract between respondent and Mr. and Mrs. Gonzalez was identical to that signed by the Aguilars, above, with the exception that Mr. and Mrs. Gonzalez contracted for additional services for credit default counseling regarding their second mortgage for the additional fee of $500. As with the Aguilar contract, a flat fee in the total amount of $1,000 was due upon completion of services (a)-(c) on the first mortgage, as those services were listed on Page 2 of the five page contract. A second fee of $500 was due upon completion of the same services (a)-(c) addressed to filing an application seeking relief for the second mortgage. The same provision appears in this contract as in the Aguilar contract, at Paragraph 3 on Page 3 of the CDC contract, just above the Paragraph 4 "*Fee Agreement*" provision, the following language appears:

> 3. **No Guarantees of Success**. Homeowner understands the counselor does not in any way guarantee success in obtaining a modification agreement, and acknowledges that approval of a modification agreement is in the sole and absolute discretion of the lender. (Emphasis in original)

117. Mr. and Mrs. Gonzalez were also provided the Fee Notice, which again confirmed that respondent was not entitled to and did not charge advance fees for providing her services, and that respondent's entitlement to receive compensation allowed for payment of fees to respondent only after services had been rendered.

118. Mr. and Mrs. Gonzalez paid the $1500 fee, $1,000 for respondent's credit default counseling services on the first mortgage, and $500 for respondent's credit default counseling services on the second mortgage, on May 17, 2010. Respondent's credit default counseling services were completed for both mortgages, and her right to payment of $1,500, matured on May 14, 2010, when she completed services (a)-(c) for the first mortgage in accordance with her CDC contract with Mr. and Mrs. Gonzalez when she filed the application for relief together with all supporting documents with WFHM. Respondent received full payment for those completed services on May 17, 2010.

BANKRUPTCY FILING FATAL TO APPLICATION

119. Mr. Gonzalez's decision to file for bankruptcy protection proved to be an insurmountable obstacle to respondent being able to obtain any response except a denial from WFHM on the Gonzalez first mortgage. The concerns expressed earlier in the process by the WFHM representatives working with respondent earlier on the Gonzalez second mortgage proved to be prophetic; that pursuing bankruptcy protection would prove to create an insurmountable legal obstacle to pursuing a hardship loan modification. Respondent told Mr. Gonzalez that filing for bankruptcy would interfere with the application process and was likely to produce a denial by WFHM, but he and his attorney later decided that filing for bankruptcy was in Mr. Gonzalez's best interest, which had the effect of negating the services respondent had already performed for Mr. Gonzalez.

120. Respondent's conversation/contact log for the Gonzalez loan notes in considerable detail that on June 11, 2010, a representative from the WFHM Loss Mitigation Bureau called respondent and told her that, due to Mr. Gonzalez filing Chapter 7 bankruptcy, respondent's application on behalf of Mr. Gonzalez for his first mortgage was denied, because it could not be processed by WFHM's Loss Mitigation Department. The representative told respondent that all future contact regarding the Gonzalez first mortgage was required to take place through Wells Fargo's Bankruptcy Department. Representative specifically told respondent that all future communication regarding the Gonzalez first mortgage could only take place between Wells Fargo's attorneys and Mr. Gonzalez's bankruptcy attorney. No further communication was permitted with respondent.

121. Respondent called Mr. Gonzalez and reported the details of her conversation with the Wells Fargo representative. She told Mr. Gonzalez that Wells Fargo had barred her from any further participation in assisting him because of the bankruptcy filing. She told Mr. Gonzalez about Wells Fargo's requirement that all further communication must take place between Mr. Gonzalez's bankruptcy attorney and the attorneys working for the Wells Fargo Bankruptcy Department.

122. Wells Fargo sent Mr. and Mrs. Gonzalez a letter on July 16, 2010, setting forth options with respect to their first mortgage. Respondent was unable to assist because she had been barred by Wells Fargo due to the bankruptcy filing.

GONZALEZ COMPLAINT TO THE BUREAU AND TESTIMONY

123. Mr. Gonzalez insisted in his testimony that respondent "never performed any services for us." The great weight of the evidence, including considerable documentation obtained by the Bureau's auditor from respondent's files for Mr. Gonzalez, directly refutes this claim. Mr. Gonzalez's written complaint to the Bureau and his testimony omitted all of the information set forth above regarding how Mr. Gonzalez's bankruptcy filing barred respondent from doing anything further to assist Mr. Gonzalez with his first mortgage, and neglected to mention all of the efforts meticulously documented in respondent's conversation/contact log for the Gonzalez loans.

124. Mr. Gonzalez also testified that when he and his wife started receiving letters from the bank about imminent foreclosure and sale of his house, "he called the bank" himself and "Mrs. Morales at the bank helped" them obtain relief and "stopped the foreclosure sale." There was no evidence that the foreclosure sale was imminent during the time respondent worked with Mr. Gonzalez. There was also no evidence in this record as to when Mr. Gonzalez was discharged from bankruptcy and the impediment of the bankruptcy filing was lifted, allowing others to assist Mr. Gonzalez to obtain the relief he sought. Mr. Gonzalez received notice of the foreclosure sale no earlier than August, 2010, more than two months a month after all of respondent's services were completed and Mr. Gonzalez's filing bankruptcy had resulted in Wells Fargo barring her from any further participation with respect to Mr. Gonzalez's first mortgage. Mr. Gonzalez's complaint does not report anything about the bankruptcy, or about the role his decision to file bankruptcy played in producing the adverse outcome he complained of to the Bureau.

125. Exhibit 5 contains Mr. Gonzalez's November 7, 2011, initial complaint to the Bureau, together with a November 13, 2011 translation from the Spanish, in which the original complaint was written. This complaint and the issues it raises, as well as Mr. Gonzalez's testimony, lack date orientation. The one date that does occur in Mr. Gonzalez's original complaint letter to the Bureau is the date that he received the letter from Wells Fargo Home Loans that his home was going to be sold at a foreclosure sale, due to the fact that his payments were months in default, on August 25, 2010. The foreclosure notice was received more than two months after respondent had advised Mr. Gonzalez that because he had filed bankruptcy, his lender had excluded her from the process. Lost in the vagueness of this complaint and the lack of date orientation is the fact that respondent was barred from doing anything for Mr. Gonzalez after her submission of the application and supporting documents for Mr. Gonzalez's first mortgage on May 17, 2010, forward, and that she had already fully performed all of her contract obligations and earned her fees. The internal administrative shift at Wells Fargo of the Gonzalez first mortgage loan due to Mr. Gonzalez filing bankruptcy cast the die regarding Mr. Gonzalez his first mortgage, and at the same time foreclosed any continued participation by respondent. After June 11, 2010, when the Wells Fargo representative told respondent that she no longer could speak to Wells Fargo about the Gonzalez first mortgage, whether respondent could be found by Mr. Gonzalez and contacted for further assistance and information became irrelevant, due to the bank's actions in response to Mr. Gonzalez is bankruptcy filing, removing her from any sort of participation.

126. Mr. Gonzalez claimed in his complaint that he was informed by his lender that respondent "did not communicate" with her. That statement is only true with respect to the lender's representatives working in the Wells Fargo Bankruptcy Bureau. Respondent was not permitted to speak with the lender's representatives after June 11, 2010, and was never permitted to speak with any Wells Fargo Bankruptcy Bureau representatives. In that respect, and only in that respect, did respondent not communicate with Wells Fargo. Respondent did speak at considerable length and frequently with Wells Fargo Home Loan representatives working in the Loss Mitigation Bureau before Mr. Gonzalez irrevocably changed the landscape by filing bankruptcy. After Wells Fargo transferred the loan to the Bankruptcy Bureau, and respondent was told she could not and should not contact Bankruptcy Bureau

representatives, and that only contact from respondent's bankruptcy attorney would be permitted, she complied with the demands.

127. Mr. Gonzalez's complaint makes a statement that is simply not true with respect to the lender's representatives working in the WFHM Loss Mitigation Bureau. The record is exceptionally well documented with numerous interactions between respondent and WFHM Loss Mitigation Bureau representatives, first obtaining advice regarding Wells Fargo's requirements for the applications, and later following up after submission of the applications hoping to receive a reply.

128. At the end of his complaint letter, Mr. Gonzalez reiterated that "Jennifer never assisted us." That statement is simply not true, and is only modestly less disingenuous as the similar statement made by the Aguilars in their complaint. A more accurate statement would be that Mr. Gonzalez killed his own application by his decision to file bankruptcy, and respondent cannot be faulted for his making that decision. Like the similar statement made by the Aguilars, Mr. Gonzalez's complaint concluding statement misses an essential point; respondent's services had been fully performed and all of her CDC contract obligations toward Mr. and Mrs. Gonzalez were fully completed on May 17, 2010, with respect to both the first and second mortgages, and respondent no longer had any contractual or other obligation to continue to assist Mr. Gonzalez.

CREDIBILITY

129. Credibility played a secondary, but still essential role, in the making of the Factual Findings above. Respondent made an exceptionally credible and persuasive witness, not only because her sense of altruism in attempting to assist homeowners facing foreclosure proved to be genuine, but because her meticulous documentation and exceptionally detailed contemporaneous record keeping provided substantial independent evidentiary support for her statements. Respondent's consistent and uniform use of her CDC contract, her Notice of Payment of Fees and her meticulous, timely, documented, itemized, dated and timed conversation/contact logs for each loan with each client proved to be the most reliable, credible and persuasive evidence presented regarding respondent's interactions with clients and lenders in this matter. Respondent documented in exceptional detail each client record, which proved to provide the most reliable and credible evidence regarding what happened with respect to respondent's dealings with clients generally, as well as with respect to the Aguilar and Gonzalez loans specifically.

130. Mrs. Aguilar and Mr. Gonzalez were credible to a point in their testimony, but it appears evident that both Mrs. Aguilar and Mr. Gonzalez came to believe at some point, well after they executed CDC contracts with respondent and received the Fees Notices, that they had paid for and were entitled to receive nothing less than a successful loan modification, regardless of how much time and effort that outcome took. These beliefs stood in direct contrast to substantial and detailed documentation contained in respondent's CDC contract agreements they signed and respondent's clients records, all of which records demonstrate that they were mistaken in believing as they did regarding entitlement to a

particular outcome satisfactory to themselves, or were entitled to receive a refund. Respondent's CDC contract and Fees Notice clearly and unambiguously defined the terms of the agreement with each client, not just with the Aguilars and Mr. Gonzalez, but with all the clients, as confirmed by the Bureau's auditor's conclusion following her random sampling of respondent's client records. Respondent's client documentation clearly limited the scope of services respondent was providing and disclaimed assurances of a successful outcome in exchange for the fees received.

131. Mr. Amezcua testified convincingly and persuasively in support of respondent and strongly corroborated her testimony for the approximately six to nine month period of time in which he worked with respondent. Much of what Mr. Amezcua said in his testimony confirmed respondent's testimony regarding her business practices and her work with the Aguilars, as well as provided considerable additional support to respondent's several character witnesses that attested to her excellent reputation for honesty, integrity, fair dealing and diligence.

132. Mr. Amezcua confirmed in his testimony with emphasis and conviction, "absolutely we provided services before payment!" Mr. Amezcua confirmed that at no time during the period of time he worked with respondent was any compensation received until services had actually been performed for the client making the payment. He provided a solid foundation for respondent's client record keeping and documentation practices when he described how respondent taught him to perform the meticulous itemized documentation contained in respondent's conversation/contact logs each time a contact was made with a lender or a client, or any action was taken on any client's loan modification or mitigation request. He also confirmed that he was never employed by respondent in the capacity of a real estate salesperson under respondent's real estate broker license. He worked for respondent for approximately six to nine months. His employment relationship was limited to assisting respondent with documenting files, gathering supporting documents, making follow-up calls, obtaining and providing status updates with clients and lenders' representatives, and assisting in the gathering of documents for respondent to assemble into applications for submission to lenders.

133. At one point, Mr. Amezcua indicated that respondent had worked with as many as 170 clients for compensation in seeking loss mitigation or loan modification for distressed homeowners. It is reasonable to conclude from this evidence that, whether it as many as 170 clients, or as few as the 35 clients noted by the auditor (above), or the 32 clients listed in Paragraph 6 of the First Amended Accusation, the overwhelming majority of respondent's clients understood the limits of respondents credit default counseling and what they could reasonably expect. One of the respondent's clients so testified, and offered hearsay testimony that he had referred family members and friends as well, all of whom were well satisfied with respondent's limited credit default counseling services. This despite the fact that several of respondent's clients opted to be foreclosed upon or rejected the proposals made by their lenders in response to applications filed by respondent on their behalf. The fact that two of these clients, Mrs. Aguilar and Mr. Gonzalez, misunderstood or had

unreasonable expectations about what they had contracted for with respondent was not proved to constitute a basis for the legal or regulatory violations alleged.

EVIDENCE OF REHABILITATION

134. Rehabilitation is largely a moot point, considering the lack of proof of all but the most de minimis and technical of violations alleged in the First Amended Accusation, as set forth in the Factual Findings above. Nevertheless, some additional information regarding respondent's life, activities and her intentions, post August 1, 2010, are relevant to this consideration, as that uncontested evidence persuasively demonstrated that respondent is a person of good character and integrity, and poses no meaningful risk of harm to consumers of real estate brokerage services in her community.

135. Respondent has fully changed careers; but seeks to retain her real estate broker's license in order to assist family and friends with an occasional real estate transaction. Following the collapse of her business operations in late July, 2010, respondent was forced to move home with her parents for lack of funds and lack of income. Her parents supported her in returning to school to pursue a career in healthcare. She has achieved an exemplary record of scholastic achievement in earning two different Associate's degrees from Fresno City College, one in Phlebotomy, enabling her to work immediately in a medical laboratory or hospital, and another in Medical Technology. Respondent is aggressively pursuing the necessary background education to enter nursing school or become a physician assistant.

136. Respondent's Exhibit A documented, and several witnesses testified, as to respondent's exemplary character for honesty, truthfulness, reliability, and diligence, as well as the genuineness of her altruistic nature and desire to help others. Several other character witnesses wrote letters of reference attesting to respondent's unimpeachable honesty and integrity. Mr. Amezcua was one of those witnesses. The remainder of Exhibit A documents respondent's outstanding academic performance upon returning to school, including serial Dean's List Academic Honors performances at Fresno City College in pursuing education in medical technology and background science education directed toward obtaining respondent's advanced educational goals of pursuing a career in nursing or as a physician assistant. There are also certificates attesting to the fact that respondent has volunteered her time to assist disabled students while she was attending college. And, as noted above, there is considerable documentation in Exhibit A of numerous trainings and instruction in mortgage loan loss mitigation strategies and lender procedures for loan modification. Respondent is obviously quite bright, possesses exceptional skills for organization, an enviable reputation for honesty and integrity, and an altruistic nature now being directed fully at her goals of a career in hands-on patient healthcare, with real estate being limited to a part-time family and friend related avocation.

137. The sum total of this evidence reveals that respondent continuing as a real estate broker licensee poses no meaningful risk of harm or loss to any member of the public/potential real estate client due to any form of dishonest dealing or lack of integrity.

COSTS

138. The Bureau introduced a Certified Statement of Costs of Investigation (Investigation Costs Certification) and a second Certified Statement of Costs of Enforcement (Enforcement Costs Certification), which is actually a request for recovery of attorney's fees for the Bureau's counsel, in this matter, pursuant to the authority of B&P Code section 10106.

139. The Investigation Costs Certification sets forth the Bureau's claim of right to recover a total sum of $5,486.40[6] in costs expended in this matter for the services of three Bureau employed Special Investigators, one of whom performed the vast majority of the claimed reimbursable work ($5158.40 claimed for the one Special Investigator's work).

140. The Enforcement Costs certification seeks recovery of the Bureau's counsel's time of 24.81 hours at $89 per hour, for a total recovery sought of $2208.09. The total costs sought to be recovered from respondent are $7694.49. The Bureau did not seek to recover audit costs.

141. B&P Code section 10106 requires that the Bureau must prevail in the action in order to recover its costs of investigation and enforcement. The Bureau prevailed on only the most minimal and technical allegation, while respondent prevailed on all significant allegations central to the First Amended Accusation. An analysis of the details in the merits of the claims made in the itemized support for each of the Costs Certifications was not made, due to the fact that the Bureau's entitlement to recover costs is an exceedingly limited under these circumstances, therefore, the right to recover costs from respondent is accordingly limited, as set forth in the Legal Conclusions. Under the circumstances, the Bureau may recover the sum of $500 as costs, prorated due to the measure by which the Bureau prevailed in the action.

LEGAL CONCLUSIONS

1. "The burden of proof in administrative proceedings involving the revocation or suspension of a professional license is clear and convincing proof to a reasonable certainty."[7] "Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind."[8] The burden of proof is upon

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[6] There is an addition error on page 1 of Exhibit 14, the Cost Certification or the claim of $5486.00 appears. The correct some $5486.40 appears on the recovery costs work sheet on page 6 of Exhibit 14.

[7] *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 835, 842, *James v. Board of Dental Examiners* (1985) 172 Cal. App. 3d 1096, 1105, *Realty Projects v. Smith* (1973) 32 Cal.App.3d 204.

[8] *In Re David C.* (1984) 152 Cal.App. 3d 1189, 1208.

the Bureau to prove that legal cause exists to revoke or suspend respondents' licenses. This burden was applied to each and every factual and legal allegation contained in the First Amended Accusation, and in making the Factual Findings above and the Legal Conclusions that follow.

2. B&P code section 10177 provides that the commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

[¶] ... [¶]

(d) Willfully disregarded or violated the Real Estate Law ... or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law ...

[¶] ... [¶]

(g) Engaging in any conduct constituting negligence and incompetence in performing acts for which a license is required under the Real Estate Law.

[¶] ... [¶]

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

[¶] ... [¶]

ADVANCE FEES ALLEGATIONS (PARAGRAPHS SIX, EIGHT AND NINE)

3. In Paragraphs Six, Eight and Nine of the First Amended Accusation. In these Paragraphs, it is alleged that respondent's acceptance of advance fees without first having her CDC contract, Fees Notice and all associated advertising, solicitation and other materials used as part of collecting advance fees approved by the Bureau in advance, violated B&P Code sections 10085, 10085.5 and 10085.6, and CCR, title 10, sections 2970 and 2972 of the Commissioner's Regulations. These allegations were not proved by clear and convincing evidence, as set forth in the Factual Findings.

4. Section 10026 reads, in pertinent part, as follows:

(a) The term "advance fee," as used in this part, is a fee, regardless of the form, that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license, or for a listing, as that term is defined in

Section 10027, before fully completing the service the licensee contracted to perform or represented would be performed. Neither an advance fee nor the services to be performed shall be separated or divided into components for the purpose of avoiding the application of this division.

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

[¶] ... [¶]

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

[¶] ... [¶]

5. B&P Code section 10026 defines advance fees for the purposes of B&P Code sections 10085, 10085.5 and 10085.6, and CCR, title 10, sections 2970 and 2972 of the Commissioner's Regulations, which provisions make actionable failure to conform to the Bureau's requirements, if and only if advance fees have been received. The triggering event for the applicability of all of these provisions alleged in Paragraphs 6, 8 and 9 of the First Amended Accusation is thus proof by clear and convincing evidence that respondent received advance fees from any or all of the clients identified in these Paragraphs.

6. B&P code section 10085.6 provides a bit more guidance in the determination of what constitutes acceptance of advance fees in the italicized report portion of subdivision (a) (1), as follows:

(a) Notwithstanding any other provision of law, it shall be 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 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.

[¶] ... [¶]

SECTION 10085.6 JURISDICTIONAL DEFICITS

7. Most of the allegations of the First Amended Accusation charging violations of section 10085.6 fail for lack of jurisdiction. The actions for which jurisdiction failed took place before the effective date of the statute. The Bureau lacks jurisdiction to pursue an action against any respondent for violation of section 10085.6 where the acts and omissions alleged to have constituted the violation took place before the effective date of the statute. Therefore, a section 10085.6 action regarding the Aguilar matter fails for lack of jurisdiction, as it does with respect to 22 of the 32 identified borrowers set forth in Paragraph 6 of the First Amended Accusation. B&P Code section 10085.6 was enacted by the Legislature and added to the B&P Code by Stats.2009, c. 630 (S.B.94), Section 5. The effective date of B&P Code section 10085.6 was Oct. 11, 2009, well after the date that respondent entered into the CDC contract with the Aguilars and she had completed all of her services, entitling her to be compensated, all as set forth in the Factual Findings.

THE AUDIT CONFIRMS FAILURE OF PROOF OF RECEIPT OF ADVANCE FEES

8. The Bureau's auditor was engaged and instructed to carefully comb through all of respondent's client documents and records in order to "confirm" that respondent received advance fees from Mr. Gonzalez, the Aguilars and her other clients, as written in the Request for Audit quoted in the Factual Findings. The Bureau's auditor's Findings and Conclusions, set forth in her Final Audit Report, were precisely the opposite. The Bureau's auditor's Findings and Conclusions in her Final Audit Report alone are fatal to the advance fees and trust funds allegations in Paragraphs 6, 8 and 9 of the First Amended Accusation, in that they confirm that evidence that respondent received advance fees from any of the clients named in those accusatory Paragraphs does not exist in this record.

9. As set forth in the Factual Findings, there was no additional evidence presented in this matter beyond that which the Department's auditor reviewed and examined in performing her audit. In reaching her Final Audit Report Findings and Conclusions, the Bureau's auditor examined all of respondent's client files and all of the Bureau's investigation compiled with respect to the 32 clients listed in Paragraph 6 of the First Amended Accusation, as well as all of the Department's investigation and respondent's client files with respect to Mr. and Mrs. Aguilar and Mr. and Mrs. Gonzalez. The Request for Audit leading to the Final Audit Report came after the Bureau's investigation was complete, other than the audit. Additionally, the Bureau's auditor provided expert testimony quite credibly and persuasively in support of her audit, consistent with her Final Audit Report Findings and Conclusions, confirming that she was unable to find evidence that would "confirm," as requested, that respondent had received advance fees from any of her clients. The auditor applied a much lower standard of review and is required in this matter, and still was unable to find any evidence supporting the claim that respondent had received advance fees.

10. The auditor's inability, under the circumstances, to conclude that there was sufficient evidence to support an Audit Finding or Conclusion that respondent, "charged,

demanded, and received advance fees," from any of the clients identified in Paragraphs 6, 8 or 9 of the First Amended Accusation defeats the allegations. The Bureau's auditor's Final Audit Report Findings and Conclusions alone are fatal to the advance fees allegations in Paragraphs 6, 8 and 9 of the First Amended Accusation, and, coupled with the auditor's rather credible and persuasive expert testimony confirm that proof by clear and convincing evidence of the advance fees allegations in Paragraphs 6, 7 and 9 of the First Amended Accusation does not exist in this record.

11. Therefore, there does not exist a legal basis pursuant to B&P Code sections 10085, 10085.5, 10085.6 and CCR, title 10, sections 2970 and 2972 of the Regulations, in conjunction with B&P Code section 10177, subdivision (d) to impose disciplinary action upon respondent's real estate broker license.

FALSE PROMISES, MISREPRESENTATION, NEGLIGENCE AND DISHONEST DEALING ALLEGATIONS

12. B&P Code section 10176 provides that the commissioner may investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

(a) Making any substantial misrepresentation.

(b) Making any false promises of a character likely to influence, persuade, or induce.
[¶] ... [¶]

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

[¶] ... [¶]

13. As set forth in the Factual Findings, it was not proved that respondent, or anyone under her supervision or control, made any false promise of any sort to any client, including Mr. and Mrs. Aguilar and Mr. and Mrs. Gonzalez, or made any substantial misrepresentation, engaged in dishonest dealing or was negligent in any action or failure to act regarding her work for Mr. and Mrs. Aguilar and/or Mr. and Mrs. Gonzalez.

14. Legal cause does not exist pursuant to B&P Code sections 10130, 10176, subdivisions (a), (b), and (i) and/or B&P Code sections 10177, subdivision (g) and/or (j) and CCR, title 10, sections 2970 and 2972 of the Regulations, in conjunction with section 10177, subdivision (d), to impose disciplinary action upon respondent's real estate broker license.

Proof by clear and convincing evidence of the merits of any and all of these allegations failed, as set forth in the Factual Findings and Legal Conclusions above.

FAILURE TO HAVE MR. AMEZCUA'S SALESPERSON LICENSE UNDER RESPONDENT'S BROKER LICENSE

15. B&P Code section 10131, subdivision (d), provides in pertinent part:

> A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:
>
> [¶] ... [¶]
>
> (d) Solicits borrowers or lenders for or negotiates loans or 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.
>
> [¶] ... [¶]

16. As set forth in the Factual Findings, in 2009 and 2010 respondent was engaged in the business of a real estate brokerage, engaging in the activities set forth in section 10131, subdivision (d). At the same time, Mr. Amezcua was working for respondent for a brief period of approximately 6 to 9 months. Mr. Amezcua was indisputably licensed as a real estate salesperson at the time. However, Mr. Amezcua's real estate salesperson license was not recorded with the Bureau as being subject to respondent's supervision as his designated real estate broker. It was not clear in the evidence whether Mr. Amezcua's real estate salesperson license was designated to be supervised by any real estate broker at the time. As a real estate broker, respondent is obligated to supervise any salesperson licensee who works for her performing duties for which a real estate broker licenses required, and ensure that all real estate salespersons working for her as a real estate broker are duly reflected in the Bureau's records as subject to her supervision and authority. Respondent neglected to have Mr. Amezcua's real estate salesperson license registered with the Bureau as subject to her supervision. Therefore, she violated section 10131, subdivision (d) in that she permitted Mr. Amezcua to engage in activities for which a real estate broker license is required without her recording his license with the Bureau as subject to her supervision.

17. The violation is substantially mitigated because the evidence was undisputed that Mr. Amezcua worked under respondent's close supervision at all times that he was employed by respondent. The violation is technical rather than substantive, as the substantive purpose of the statute, to ensure that real estate salespersons are closely supervised by their real estate brokers, was more than satisfied based on the facts proved in this matter. There exists a legal basis to impose disciplinary action upon respondent's real

estate broker license pursuant to section 10131, subdivision (d) as that section interacts with section 10177, subdivision (d).

CONCLUSION-WHAT THIS CASE IS AND IS NOT

18. This case is entirely unique and anomalous. The unusual constellation of circumstances present in this matter should not be perceived to set any sort of precedent whatsoever, but must be viewed as an adjudication specific to the unique facts and circumstances presented in this matter, and nothing more than the failure of proof of the core allegations made in the First Amended Accusation, allegations that for which substantial evidentiary support could not be confirmed following a careful audit of all respondents client records by the Department's auditor. Respondent's CDC contract should not be seen as a model or a workable template for a real estate broker considering whether to structure relationships with credit default counseling clients working out loan modification, mitigation or other restructurings and intending to receive any sort of payment, whether in arrears or in advance of providing services. Respondent invested considerable effort in organizing her activities with her clients in order to not run afoul of the Bureau's advance fee requirements, but those efforts and her documents should not be viewed as ones to be emulated. Proof of the allegations failed not because respondent's CDC contract and documentations were necessarily an airtight solution to the advance fees problem or an approach to be copied, but rather due to the unique confluence of a dramatic failure of evidentiary support for the allegations, and respondent's exceptionally detailed and meticulous documentation of her client files, which provided a uniquely trustworthy and reliable view of the details of her working relationships with the clients named in this action.

COSTS

19. B&P Code section 10106 permits the Bureau to seek recovery of investigation and enforcement costs, provided the Bureau prevails in the action. The Bureau prevailed in only one, and the least significant of all of the allegations made. That violation was easily proved simply by reference to the Bureau's official records and respondent and Mr. Amezcua's acknowledgment, and required little investigation and effort to prove. As the Bureau did not prevail in the bulk of the action, the right to seek reimbursement of the bulk of the costs of investigation and enforcement proved in this matter did not arise.

20. Recovery of costs of investigation and enforcement must be assessed not only against section 10106's language, but also against the standards enunciated in *Zuckerman v. Board of Chiropractic Examiners* [9], which requires the consideration of the following factors in determining the amount of costs to be assessed:

- The board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a licensee who has committed some misconduct, but

[9] *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed.

- The board must consider the licensee's subjective good faith belief in the merits of his or her position.

- The board must consider whether the licensee has raised a colorable challenge to the proposed discipline.

- Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation, the board must determine that the licensee will be financially able to make later payments.

- Finally, the board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct.

21. Both section 10106 and *Zuckerman* require the Bureau to prevail in the action in order to raise the entitlement to seek reimbursement of investigative and enforcement costs. The right to seek reimbursement of costs in this matter is substantially diminished by the fact that respondent prevailed on most of the allegations in this matter. As set forth in the Factual Findings, the sum of $500 is a reasonable amount of costs to be recovered, as allocated by the proportion of the action in which the Bureau prevailed. A cost recovery Order in favor of the Bureau in this matter is legally warranted only to that extent. A legal basis therefore exists pursuant to B&P section 10106 and *Zuckerman* to order recovery of $500 as the allocated reasonable costs of investigation and enforcement in this action.

EVIDENCE OF REHABILITATION AND OUTCOME

22. The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners.[10] The primary purpose of professional licensing schemes is the protection of the public, and the prevention of future harm to consumers.[11] "The purpose of [the Real Estate License Law] is to protect the public by requiring and maintaining professional standards of conduct on the part of all persons licensed hereunder."[12] "These statutes are designed with the purpose of protecting the public

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[10] *Ettinger v. Board of Medical Quality Assurance,* (1980) 135 Cal.App.3d 853, 856,

[11] *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476, *In re Kelly* (1990) 52 Cal.3d 487, 496.

[12] Insurance Code section 1737 (a very similar licensing scheme to the Real Estate Law, with similar consumer protection goals and good character and integrity licensing requirements).

from fraud, misrepresentation, incompetence, and sharp practice.[13] The Legislature intended to insure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear."[14]

23. Proof of legal cause to revoke or suspend a license, even if minimal, such as exists in this matter, shifts the burden of producing evidence to the licensee to demonstrate good character and/or satisfactory rehabilitation in order to mitigate any potential penalty. Proof of legal cause to revoke or suspend respondent's real estate broker's license occurred only with respect to the most technical of the violations alleged in this matter. There was no evidence that any potential harm or loss was sustained by any of respondent's clients. As set forth in the subtitled portion of the Factual findings, respondent submitted substantial and persuasive evidence of her good character, trustworthiness and honesty, substantially demonstrating her fitness for continued licensure. In this instance, none of the salutary public purposes set forth in the authorities cited just above, setting forth the public purpose to remove the dishonest and those lacking in integrity from the roles of licensees, would be furthered by imposing anything other than a minimal penalty that reflects the gravity of the violation proved balanced against respondent substantial and persuasive evidence that respondent is a person of good character and integrity, and more than fit to continue as a real estate broker licensee.

ORDER

All licenses and license rights issued by the by the Bureau of Real Estate to respondent Jennifer Mam Rakaphoume are SUSPENDED for a period of thirty (30) consecutive calendar days from the effective date of this Decision, of which fifteen (15) days are stayed for a period of one (1) year, subject to the following terms and conditions:

1. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California; and

2. That no final subsequent determination be made, after hearing or upon stipulation, that cause for disciplinary action has occurred within one (1) year of the effective date of this Decision.

3. Respondent shall reimburse the Bureau for its costs of investigation and enforcement the sum of $500 within 60 days of the effective date of this Decision, or, on such other payment terms as the Bureau, in its discretion, shall determine based on respondent's financial condition.

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[13] *Harrington v. Bureau of Real Estate* (1989) 214 Cal.App. 3d 394, 402, Goldberg *v. Barger* (1974) 37 Cal.App.3d 987.

[14] *Id.*, *Ring v. Smith* (1970) 5 Cal.App. 3d 197, 205.

4. Upon the expiration of the one year period, if no further cause for disciplinary action has occurred, the stay shall become permanent, and respondent's real estate broker license shall be fully restored.

DATED: July 15, 2013

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings