

FILED

MAY 11 2020

DEPARTMENT OF REAL ESTATE

By                     

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

\* \* \*

In the Matter of the Accusation of

TARA JAN DEVERS,

Respondent.

No. H-3246 FR

OAH No. 2019071054

STIPULATION AND AGREEMENT  
AND  
DECISION AFTER REJECTION

The Department of Real Estate (Department) filed an Accusation against TARA JAN DEVERS (Respondent), on June 10, 2019. Dena Coggins, Administrative Law Judge (ALJ), Office of Administrative hearings, State of California, heard this matter on October 16 and 17, 2019, in Fresno, California. Oral and documentary evidence was received. The record was held open to allow the parties to file closing briefs. Complainant filed its closing brief which was marked for identification and admitted. Respondent filed their closing brief which was marked for identification and admitted. The record was closed and the matter was submitted for decision on November 25, 2019.

On December 26, 2019, the ALJ issued a Proposed Decision which recommended the following:

1           1. All licenses and licensing rights of Respondent are revoked; provided,  
2 however, a restricted real estate salesperson license shall be issued pursuant to Section 10156.5  
3 of the Business and Professions Code (Code).

4           2. All licenses and licensing rights of Respondent are suspended for a period of  
5 sixty (60) days, provided, however, the suspension would be stayed upon terms and conditions  
6 imposed pursuant to Section 10175.2 of the Code.

7           On February 20, 2020, the Commissioner rejected the Proposed Decision of  
8 November 25, 2019.

9           The parties wish to settle this matter without further proceedings.

10           IT IS HEREBY STIPULATED by and between TARA JAN DEVERS  
11 (Respondent), represented by Bart Barringer, and the Complainant, acting by and through  
12 Megan Lee Olsen, Counsel for the Department of Real Estate (Department), as follows for the  
13 purpose of settling and disposing of the Accusation filed by Complainant.

14           1. It is understood by the parties that the Real Estate Commissioner  
15 (Commissioner) may adopt the Stipulation and Agreement (Stipulation) as her Decision in this  
16 matter, thereby imposing the penalty and sanctions on Respondent's real estate licenses and  
17 license rights as set forth in the "Decision and Order". In the event the Commissioner in her  
18 discretion does not adopt the Stipulation, it shall be void and of no effect; the Commissioner will  
19 review the transcript and the evidence in the case, and will then issue her Decision after  
20 Rejection as her Decision in this matter.

21           2. The Order or any subsequent Order of the Commissioner made pursuant to  
22 this Stipulation shall not constitute an estoppel, merger or bar to any further administrative or  
23 civil proceedings by the Department with respect to any matters which were not specifically  
24 alleged to be cause for Accusation in this proceeding.

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1                   3. Respondent understands that by agreeing to this Stipulation and Agreement,  
2 Respondent agrees to pay, pursuant to Sections 10106 of the Code, the cost of the investigation,  
3 and enforcement which resulted in the determination that Respondent committed the violations  
4 found in the Determination of Issues. The amount of said costs is \$7,568.25.

5                                   DETERMINATION OF ISSUES

6                   By reason of the foregoing stipulations, admissions and waivers, and solely for  
7 the purpose of settlement of the pending Accusation without a hearing, it is stipulated and  
8 agreed that the acts and/or omissions of Respondent, as described in the Accusation, constitute  
9 grounds for the suspension or revocation of the licenses and license rights of Respondent under  
10 the provisions of Sections 10177 (d) and 10177 (g) of the Code, in conjunction with Sections  
11 10130, 10137 and 10145 of the Code.

12                                   ORDER

13                   1. All real estate licenses and licensing rights of Respondent are revoked;  
14 provided, however, a restricted real estate salesperson license shall issue subject to the  
15 requirements of Section 10156.5 of the Code if within ninety (90) days of the effective date of  
16 the Order, Respondent makes application therefore and pays to the Department the appropriate  
17 fee for said license. The restricted license issued to Respondent shall be subject to all of the  
18 provisions of Section 10156.7 of the Code and to the following limitations, conditions, and  
19 restrictions imposed under authority of Section 10156.6 of said Code:

20                               (a) The restricted license issued to Respondent may be suspended  
21                                       prior to hearing by order of the Real Estate Commissioner in  
22                                       the event of Respondent's conviction or plea of nolo contendere  
23                                       to a crime that is substantially related to Respondent's fitness or  
24                                       capacity as a real estate licensee.

25                               (b) The restricted license issued to Respondent may be suspended  
26                                       prior to hearing by order of the Real Estate Commissioner on  
27                                       evidence satisfactory to the Commissioner that she has violated

1 provisions of the California Real Estate Law, the Subdivided  
2 Lands Law, Regulations of the Real Estate Commissioner or  
3 conditions attaching to the restricted license.

4 (c) Respondent shall not be eligible to apply for the issuance of  
5 an unrestricted real estate license nor the removal of any of  
6 the conditions, limitations, or restrictions attaching to the  
7 restricted license until three (3) years have elapsed from the  
8 date of issuance of the restricted license to Respondent.

9 2. With the application for license, or with the application for transfer to a new  
10 employing broker, Respondent shall submit a statement signed by the prospective employing  
11 real estate broker on a form approved by the Department which shall certify as follows:

- 12 (a) That the employing broker has read the Decision which is the  
13 basis for the issuance of the restricted license; and  
14 (b) That the employing broker will carefully review all transaction  
15 documents prepared by the restricted licensee and otherwise  
16 exercise close supervision over the licensee's performance of  
17 acts for which a license is required.

18 3. Respondent shall, within nine (9) months from the effective date of this  
19 Order, present evidence satisfactory to the Commissioner that Respondent has, since the most  
20 recent issuance of an original or renewal real estate license, taken and successfully completed  
21 the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for  
22 renewal of a real estate license. If Respondent fails to satisfy this condition, Respondent's real  
23 estate license shall automatically be suspended until respondent presents evidence satisfactory to  
24 the Commissioner of having taken and successfully completed the continuing education  
25 requirements. Proof of completion of the continuing education courses must be delivered to the  
26 Department of Real Estate, Flag Section at P.O. Box 137013, Sacramento, CA 95813-7013.

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1                   4. All licenses and licensing rights of Respondent are indefinitely suspended  
2 unless or until Respondent pays the sum of \$7,568.25 for the Commissioner's reasonable cost  
3 of the investigation and enforcement which led to this disciplinary action. Said payment shall  
4 be in the form of a cashier's check made payable to the Department of Real Estate. The  
5 investigative and enforcement costs must be delivered to the Department of Real Estate, Legal  
6 Section at P.O. Box 137007, Sacramento, CA 95813-7007, prior to the effective date of this  
7 Order.

8  
9       3/26/20  
10 DATED

  
MEGAN LEE OLSEN, Counsel  
Department of Real Estate

11  
12                   \* \* \*

13  
14                   I have read the Stipulation and Agreement and Decision After Rejection, have  
15 discussed it with my counsel, and its terms are understood by me and are agreeable and  
16 acceptable to me. I willingly and voluntarily agree to enter into this Stipulation.

17       March 19, 2020  
18 DATED

  
TARA JAN DEVERS  
Respondent

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20  
21                   *I have reviewed the Stipulation and Agreement and Decision After Rejection as*  
22 *to form and content and have advised my client accordingly.*

23  
24       3/19/20  
25 DATED

  
BART BARRINGER  
Attorney for Respondent

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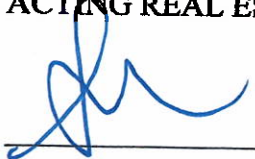
DECISION AND ORDER

The foregoing Stipulation and Agreement and Decision After Rejection is hereby adopted by the Real Estate Commissioner as her Decision and Order.

This Decision and Order shall become effective at 12 o'clock noon on  
**JUN 01 2020**

IT IS SO ORDERED 5/4/20

SANDRA KNAU  
ACTING REAL ESTATE COMMISSIONER



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FILED

FEB 20 2020

DEPARTMENT OF REAL ESTATE  
By Ry dew

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

\* \* \*

In the Matter of the Accusation of	)	DRE No. H-3246 FR
	)	
TARA JAN DEVERS,	)	OAH No. 2019071054
	)	
Respondent.	)	

NOTICE

TO: TARA JAN DEVERS, Respondent, and BART BARRINGER, her Counsel.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated December 26, 2019, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated December 26, 2019, is attached hereto for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on Thursday, October 17, 2019, and any written argument hereafter submitted on behalf of respondent and complainant.

Written argument of respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of Thursday, October 17, 2019, at the


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1 Sacramento office of the Department of Real Estate unless an extension of the time is granted for  
2 good cause shown.

3 Written argument of complainant to be considered by me must be submitted within  
4 15 days after receipt of the argument of respondent at the Sacramento Office of the Department of  
5 Real Estate unless an extension of the time is granted for good cause shown.

6 DATED: 2/20/20.

7 SANDRA KNAU  
8 ACTING REAL ESTATE COMMISSIONER

9   
10 \_\_\_\_\_



**FILED**

JAN 23 2020

**BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA**

DEPARTMENT OF REAL ESTATE

By                     

**In the Matter of the Accusation of:**

**TARA JAN DEVERS, Respondent**

**Case No. H-3246 FR**

**OAH No. 2019071054**

**PROPOSED DECISION**

Dena Coggins, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 16 and 17, 2019, in Fresno, California.

Megan Lee Olsen, Counsel for the Department of Real Estate (Department), represented Brenda Smith (complainant), a Supervising Special Investigator of the Department.

Bart Barringer, Attorney at Law, represented Tara Jan Devers (respondent), who was present at the hearing.

Oral and documentary evidence was received. The record was left open to allow the parties an opportunity to submit written closing arguments, which were timely submitted. Complainant's written closing argument was marked as Exhibit 19, and respondent's written closing argument was marked as Exhibit B. Complainant

submitted a timely reply to respondent's closing brief that was marked as Exhibit 20. The record was closed and the matter was submitted for decision on November 25, 2019.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On April 20, 2004, respondent was licensed as a real estate salesperson by the Department. Since that time, she has had license rights under Real Estate Law, Part 1 of Division 4 of the California Business and Professions Code. The license will expire on April 19, 2020, unless renewed or revoked. At no time has respondent been licensed as a real estate broker.

2. On June 7, 2019, complainant signed, and subsequently filed, the Accusation in her official capacity.<sup>1</sup> Complainant seeks to discipline respondent's license based on allegations that respondent violated the Business and Professions Code in her activities as a licensed real estate salesperson involving the purchase and sale of Bargain Cigarette, a store in Turlock, California, on July 20, 2016.

3. Respondent timely filed a Notice of Defense, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent

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<sup>1</sup> Complainant's unopposed request to amend the Accusation at page 3, line 6, from "Sections 10131" to "Sections 10130" was granted by the ALJ at the hearing.

adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### **Bargain Cigarette Transaction**

4. David Miller testified at the hearing. He is the owner of, and works at, Bargain Cigarette in Turlock, California. He purchased the store from Anita Myers and Kristann Nunes, the store's previous owners, on July 20, 2016.

5. In 2016, Mr. Miller became interested in purchasing Bargain Cigarette. Respondent was the listing agent for the store, and Mr. Miller decided to use respondent as his real estate agent for the purchase. Respondent met with Ms. Myers initially, then Ms. Myers and respondent, on numerous occasions regarding the sale and purchase of the store. Mr. Miller made an offer of \$200,000 to purchase Bargain Cigarette, and he asked respondent to convey the offer to Ms. Myers. Ms. Myers accepted the offer.

6. On June 18, 2016, Mr. Miller, Ms. Myers, and Ms. Nunes entered into a Business Purchase Agreement and Joint Escrow Instructions (Business Purchase Agreement). On the Business Purchase Agreement, the real estate broker, both for the selling firm and the listing firm, was listed as Powerhouse Realty, respondent's broker. The agreement was signed by all parties, including respondent. The agreement listed the purchase price offered as \$200,000. The close of escrow was to occur in 60 days or less after acceptance. Powerhouse Realty was listed as the agent of "both the Buyer and Seller." The Business Purchase Agreement further stated:

PAYMENT OF PURCHASE PRICE: Buyer represents that funds will be good when deposited with Escrow Holder.

A. INITIAL DEPOSIT: Deposit shall be in the amount of . . . .  
\$5,000.00. . . .

On the Business Purchase Agreement, the box was checked next to:

"Buyer Deposit with Agent: Buyer has given the deposit by personal check (or \_\_\_\_\_) to the agent submitting the offer (or to \_\_\_\_\_), made payable to ANITA MEYERS. The deposit shall be held uncashed until Acceptance and then deposited with Escrow Holder within 3 business days after Acceptance (or \_\_\_\_\_). Deposit checks given to agent shall be an original signed check and not a copy."

Additionally, the following appeared under "ADDITIONAL FINANCING TERMS:"

5,000 deposit payable to Anita Meyers to be held by the agent uncashed until otherwise directed by the buyer. Balance of funds will be deliver [s/c] to the agent on the day of closing, in certified funds payable to Anita Meyers. Buyer will pay all fee [s/c] associated with business licensing, permits, transfer of lease, utilities, etc.

Buyer will fund and take possession [s/c] day license received (tobacco)[.]

Under "ESCROW AND TITLE", no boxes were checked to indicate whether the buyer or seller was to pay escrow fees and no "Escrow Holder" was identified.

Under "OTHER TERMS AND CONDITIONS", the following appeared, in relevant part:

1. BUYER AND SELLER AGREE TO NOT USE AN ESCROW COMPANY, AND WILL TAKE RESPONSIBILITY FOR COMPLETING ALL NECESSARY STEPS TO PROPERLY TRANSFER THE STORE. THERE IS NO REAL PROPERTY.

[¶] . . . [¶]

5. NO ESCROW COMPANY IS BEING USED BY MUTUAL AGREEMENT, BUYER AND SELLER AGREE TO HOLD HARMLESS THE AGENT FOR AGREEMENTS MADE WITHOUT THE AGENT PRESENT.

7. On July 20, 2016, Mr. Miller, Ms. Myers, and Ms. Nunes signed the first Addendum (Addendum No. 1), which incorporated additional terms to the Business Purchase Agreement. Relevant terms and conditions appearing in Addendum No. 1 were as follows:

1. THE SELLER AND BUYER AGREE TO FINALIZE THE SALE OF THE BUSINESS ON JULY 20, 2016. THE BUYER WILL BY *[sic]* TWO CASHIER'S CHECKS PAY THE SUM OF \$150,000 PAYABLE TO ANITA MYERS IN THE AMOUNT

OF \$144,000 AND PAYABLE TO [RESPONDENT] IN THE AMOUNT OF \$6,000. . . .

2. THE BUYER AND SELLER WILL DO A [sic] INVENTORY ON JULY 31<sup>ST</sup>, AND BUYER WILL PAY THE REMAINING \$50,000 DUE TO ANITA MYERS ON JULY 31<sup>ST</sup> FOR THE INVENTORY. . . .

8. On July 20, 2016, Mr. Miller, Ms. Myers, and Ms. Nunes signed the second Addendum (Addendum No. 1B), which incorporated additional terms to the Business Purchase Agreement. Relevant terms and conditions appearing in Addendum No. 1B were as follows:

CONTINUED FROM ADDENDUM 1.

THE AGENT IN THIS TRANSACTION IS WORKING IN THE CAPACITY OF A FINDERS FEE IN THE AMOUNT OF 4% OF \$150,000 (\$6,000) AND IS PAYABLE DIRECTLY FROM THE BUYER ON BEHALF OF THE SELLER. ALTHOUGH THE AGENT PROCURED[sic] THE BUYER AND DRAFTED THE PURCHASE CONTRACT, THE AGENT HAS NOT BEEN DIRECTLY INVOLVED IN THE EXCHANGE OF INFORMATION BETWEEN THE SELLER AND BUYER. THE BUYER AND SELLER CHOSE TO NOT USE AN ESCROW COMPANY AND COMPLETE THE TRANSACTION BETWEEN THEMSELVES.

9. Mr. Miller gave a \$5,000 earnest money deposit to respondent in a check payable to Ms. Myers at the time the parties executed the agreement. Mr. Miller testified that respondent told him the deposit check would not be given to an escrow

company and that the parties would save money by not using the escrow company. Mr. Miller recalled that respondent held the check for two to three weeks before returning the check to him.

10. On June 20, 2016, the transaction closed, and Mr. Miller gave respondent a cashier's check for \$144,000 payable to Ms. Meyers for the sale of the business, and a cashier's check for \$6,000 payable to respondent, as compensation for her work on the transaction. Respondent did not have an operative compensation agreement at the time the sale closed.

11. In September 2018, Mr. Miller signed, and subsequently submitted, a complaint to the Department relating to respondent and the purchase of Bargain Cigarette. Mr. Miller asserted respondent "bypassed her broker" in her role in the transaction, among other allegations.

### **Witness Testimonies**

12. Ms. Myers testified at the hearing. She purchased Bargain Cigarette in January 2007. She has known respondent for about six years; respondent was a Bargain Cigarette customer. Ms. Myers hired respondent as her real estate agent to assist her in selling Bargain Cigarette. At the time, respondent informed Ms. Myers that this was her first sale of business transaction.

13. At the hearing, Ms. Myers recalled respondent returned Mr. Miller's \$5,000 deposit check less than a week after receiving the check from Mr. Miller. However, in an interview with Yolanda Chapman, a special investigator for the Department, on May 6, 2019, she stated that respondent held the uncashed deposit check until "the deal was finalized." At the hearing, respondent recalled after respondent returned the \$5,000 deposit check, the check was stored in Bargain

Cigarette's safe. Both Ms. Myers and Mr. Miller had access to the check while it was in the safe. Ms. Myers recalled respondent receiving advice by phone from someone at Powerhouse Realty about the use of an escrow company during the purchase, and that respondent never suggested to Ms. Myers and Mr. Miller that they should not use an escrow company for the transaction, but did tell them they would save money if they did not.

14. Christopher Colston is a licensed real estate broker who owns The Colston Company, doing business as Powerhouse Realty, a real estate brokerage. He is responsible for managing real estate agents. Respondent worked for Powerhouse Realty from 2014 to 2016, as an independent contractor real estate agent. During that time, Mr. Colston was respondent's supervising broker. Respondent was authorized to perform residential, commercial, and agricultural transactions.

15. Powerhouse Realty listed Bargain Cigarette in 2015; the listing expired in November 2015. There was no listing agreement for Bargain Cigarette in 2016. There were no documents in the brokerage's online transaction document management system regarding the sale of Bargain Cigarette. Mr. Colston was not aware of the Bargain Cigarette transaction until August 2018, he did not see any documentation regarding the sale until September 2018, and he was not aware that respondent did not use an escrow company for the transaction until that time. He knew in 2014, that respondent was taking a listing for the store and that the listing expired in 2015. When Mr. Colston contacted respondent following a call from Mr. Miller in August 2018, respondent admitted to Mr. Colston she received compensation for the sale outside of the brokerage, but that she believed she provided the brokerage with the portion of her compensation that the brokerage was entitled to receive. Mr. Colston did not



receive a check for the broker fees owed to his brokerage for the Bargain Cigarette transaction.

16. He explained that in normal real estate sales, an escrow company notifies Mr. Colston to sign off on a "commission demand" before the real estate agent of the brokerage is paid her commission. It is never the practice for a real estate agent of Powerhouse Realty to receive a commission check directly from the buyer and/or seller. There is no brokerage policy allowing their real estate agents to conduct a real estate transaction without an escrow company. Real estate agents are to report to Mr. Colston all real estate activities conducted as a real estate agent within three days and are required to upload transaction documents to the online transaction document management system or be subject to a monetary penalty.

17. Lorrie Mendonsa testified at the hearing. She has been a real estate agent for the last 14 years. She worked at Powerhouse Realty from January 2014 to about June 2015. Ms. Mendonsa testified about staff meetings in Summer 2016; however, her testimony was given little weight because it was unclear how she was aware of what occurred at those meetings when she was no longer employed at Powerhouse Realty.

### **Department's Investigation**

18. Investigator Chapman testified at the hearing. She has been in her position since 2013. Her job duties include investigating complaints against licensees, investigating real estate license applicants, interviewing witnesses, and preparing interview memoranda and investigative reports. Ms. Chapman was assigned to conduct an investigation of Mr. Miller's complaint against respondent. As part of her investigation, Ms. Chapman interviewed Mr. Miller, Ms. Meyers, Mr. Colston, and

respondent, then prepared memoranda detailing those interviews. Those interview memoranda were submitted at the hearing.

### **Respondent's Testimony**

19. Respondent testified at the hearing. Prior to working at Powerhouse Realty, she worked for another real estate broker, beginning in 2001, where she was a transaction coordinator, helping real estate agents with paperwork and processing files. She is currently a real estate salesperson at that same real estate brokerage. Other than Mr. Miller's complaint, respondent has not received a complaint against her since her license was issued.

20. Respondent had limited commercial real estate transaction experience prior to her work on the Bargain Cigarette purchase. Before agreeing to list Bargain Cigarette, respondent spoke with Mr. Colston, and he agreed that she could list the business. He helped respondent complete the paperwork to list the store and respondent purchased marketing materials to advertise the listing. Respondent listed Bargain Cigarette on the market in 2015, and the listing expired the same year. At no time did respondent enter any information or paperwork relating to Bargain Cigarette into Powerhouse Realty's computer transaction document management system. According to respondent, a software issue prevented her from doing so.

21. Respondent testified regarding the circumstances underlying the Bargain Cigarette transaction. According to respondent, she agreed to hold Mr. Miller's \$5,000 deposit check in the trust account at Powerhouse Realty. She was not aware she could not accept the deposit check from Mr. Miller, and she now understands that she made a mistake when she advised Mr. Miller to make the check payable to Ms. Myers instead of respondent's broker. Respondent acknowledged she made a mistake by accepting

the commission check from Mr. Miller payable to herself. Respondent testified she gave the check to the office manager at Powerhouse Realty two or three days after receiving it from Mr. Miller with other transaction sale documents. At that time, the office manager told respondent she needed to return the check. Respondent returned the check to Mr. Miller on the same day. She then advised Mr. Miller and Ms. Myers that the check should be given to an escrow company; they did not follow her advice. Respondent believed that the office manager was in charge of a "trust box" and that respondent could put items in the box, but she was uncertain what Mr. Colston did with the items in the box.

22. According to respondent, she spoke with Mr. Colston about working on the Bargain Cigarette transaction despite the listing being expired two days prior to the execution of the Business Purchase Agreement. Mr. Colston approved of her continuing to work on the transaction, but he directed her to get a signed compensation agreement. The parties never entered into a compensation agreement.

23. After the transaction closed on July 20, 2016, respondent purchased a cashier's check for the broker fee and left the check on Powerhouse Realty's office manager's desk along with the remaining transaction sale documents. She left her employment with Powerhouse Realty the same day. While working for Powerhouse Realty, she always received her commission checks from the title company.

## **Discussion**

24. Respondent was the real estate licensee responsible for the purchase and sale of Bargain Cigarette in July 2016. She acted as a real estate broker in the purchase and sale of Bargain Cigarette when she offered to buy the business on behalf of Mr. Miller and negotiated the purchase and sale of the business, which is evident by the

agreement, addendums, and other transaction-related documents she prepared for the transaction. Despite language in the agreement that she was receiving a finder fee, she was acting as a dual agent representing both the buyer and sellers as a real estate agent. Although Mr. Colston was aware of the Bargain Cigarette listing in 2016, he persuasively testified that he was unaware respondent continued to work on the transaction following the expired listing. She did not provide any of the transaction documents in Powerhouse Realty's document management system and despite purchasing a cashier's check for the broker's fee, the evidence did not establish that Powerhouse Realty ever received the cashier's check for their portion of her commission. The evidence established she was performing licensed activity without the authorization or knowledge of her real estate broker.

25. It is undisputed that respondent was compensated by the buyer, not the broker under whom she was at the time licensed, for performing the Bargain Cigarette transaction. It is also undisputed that respondent received the \$5,000 deposit check from Mr. Miller, and did not place those funds in a neutral escrow depository, into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in California. The evidence established that she instead held onto the check for some time before returning the check to the parties. Respondent willfully disregarded or violated the Real Estate Law and demonstrated negligence or incompetence as to these transaction issues. Accordingly, complainant established numerous causes for discipline of respondent's license.

26. However, respondent understood the gravity of her misconduct. She readily admitted to making mistakes in the Bargain Cigarette transaction and did not attempt to shift blame to anyone. She took responsibility for failing to comply with the Real Estate Law and admitted to being insufficiently aware of her duties in a business

opportunity transaction. She did not have experience in business opportunity sales/purchases, although, that does not excuse her conduct. Also, she has not received any other complaint against her for her work as a real estate salesperson. Therefore, while her license is subject to discipline, it would not be inconsistent with the public safety and welfare to permit her to retain a restricted license for three years that will be subject to certain probationary terms and conditions.

### **Costs of Investigation and Enforcement**

27. Pursuant to Business and Professions Code section 10106, complainant has requested reimbursement of the costs incurred for the investigation and enforcement of this matter, in the amount of \$7,568.25. Specifically, the Department incurred \$2,514.25, in enforcement/prosecution costs, and \$5,054 in investigation costs. The costs of investigation and enforcement are supported by a Certified Statement of Costs by Ms. Olsen, dated October 14, 2019, and Certified Statement of Investigation Costs by complainant, dated June 26, 2019. Both statements are accompanied by documents describing the general tasks performed, the time spent on each task, the hourly pay rate, and the method of calculating the costs.

28. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Court identified the factors to be considered in determining the reasonableness of costs pursuant to statutory provisions. The factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct.

In this case, all of the charges were established. Respondent did not show a subjective good faith belief in the merits of her position. Respondent raised no persuasive challenge to the proposed discipline and she did not establish an inability to pay the costs of investigation and enforcement. Additionally, the scope of the investigation was appropriate to the alleged misconduct. Under all of the facts and circumstances, assessment of the costs requested by the Department is reasonable and the tasks completed were necessary to the investigation and enforcement of the case.

### LEGAL CONCLUSIONS

1. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) And must do so by producing clear and convincing evidence to a reasonable certainty in support of those allegations. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212 [discussing the appropriate standard of proof in license discipline proceedings].) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

2. Business and Professions Code section 10130 states:

It is unlawful for any person to engage in the business of, act in the capacity of, advertise as, or assume to act as a real estate broker or a real estate salesperson within this state without first obtaining a real estate license from the department, or to engage in the business of, act in the

capacity of, advertise as, or assume to act as a mortgage loan originator within this state without having obtained a license endorsement.

The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his or her counsel, deputies, or assistants may assist in presenting the law or facts at the trial.

3. Business and Professions Code section 10131 states, in relevant 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:

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

4. Business and Professions Code section 10177 sets forth grounds in which the commissioner may suspend or revoke the license of a real estate licensee. Those grounds for discipline include the following:

(d) Willfully disregard[ing] or violat[ing] the Real Estate Law (Part 1 (commencing with Section 10000) or Chapter 1

(commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

[¶] . . . [¶]

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

5. As set forth in Factual Findings 5 through 8, 14, 15, and 24, respondent willfully disregarded or violated the Real Estate Law and demonstrated negligence or incompetence in performing an act for which she is required to hold a license when she engaged in unlicensed real estate activity, in violation of Business and Professions Code section 10130. Therefore, complainant met her burden of establishing cause for disciplinary action against respondent's license by clear and convincing evidence. Consequently, cause exists to discipline respondent's license under Business and Professions Code section 10177, subdivisions (d) and (g).

6. Business and Professions Code section 10137 relates to the unlawful retention or payment of compensation. That section provides the following:

It is unlawful for any licensed real estate broker to retain, compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesperson licensed under the responsible broker retraining or compensating him or her, or to retain or



compensate, directly or indirectly, any licensee for engaging in any activity for which a mortgage loan originator license endorsement is required, if that licensee does not hold a mortgage loan originator license endorsement; provided, however, that licensed real estate broker may pay a commission to a broker of another state.

No real estate salesperson shall accept compensation for activity requiring a real estate license from any person other than the broker under whom he or she is at the time licensed.

It is unlawful for any licensed real estate salesperson to pay any compensation for performing any of the acts within the scope of this chapter to any real estate licensee except through the broker under whom he or she is at the time licensed. A licensee may enter into an agreement with another licensee to share that compensation provided that any compensation is paid through the responsible broker.

For a violation of any of the provisions of this section, the commissioner may temporarily suspend or permanently revoke the license of the real estate licensee, in accordance with the provisions of this part relating to hearings.

7. As set forth in Factual Findings 10 and 25, respondent willfully disregarded or violated the Real Estate Law and demonstrated negligence or incompetence in performing an act for which she is required to hold a license when

she unlawfully retained compensation for her work on the Bargain Cigarette transaction, in violation of Business and Professions Code section 10137. Therefore, complainant met her burden of establishing cause for disciplinary action against respondent's license by clear and convincing evidence. Consequently, cause exists to discipline respondent's license under Business and Professions Code section 10177, subdivisions (d) and (g).

8. Business and Professions Code section 10145, subdivision (a)(1) states:

A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository, or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

9. As set forth in Factual Findings 9, 21, and 25, respondent willfully disregarded or violated the Real Estate Law and demonstrated negligence or incompetence in performing an act for which she is required to hold a license when she accepted the \$5,000 deposit check from the buyer of Bargain Cigarette and failed to properly deposit those funds, in violation of Business and Professions Code section 10145. Therefore, complainant met her burden of establishing cause for disciplinary action against respondent's license by clear and convincing evidence. Consequently,

cause exists to discipline respondent's license under Business and Professions Code section 10177, subdivisions (d) and (g).

10. Although respondent's license is subject to discipline, the evidence showed that the public interest would be adequately protected if she is allowed to retain her license on a restricted basis.

### **Investigation and Enforcement Costs**

11. As set forth in Factual Findings 27 and 28, complainant reasonably incurred investigation and enforcement costs totaling \$7,568.25. Accordingly, assessment of costs in the amount of \$7,568.25 against respondent is reasonable and appropriate.

### **ORDER**

All licenses and licensing rights of respondent Tara Jan Devers under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's

conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

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

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

4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Cost Recovery. Within 30 days of the final decision in this matter, respondent shall pay the Department of Real Estate the amount of \$7,568.25, as reimbursement for the costs of investigation and enforcement of this matter or enter into a payment plan approved by the Department.

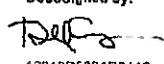
7. Unlicensed Activity - License Suspension with Right to Petition to Pay Monetary Penalty. All licenses and licensing rights of respondent under the Real Estate Law are suspended for a period of sixty (60) days from the effective date of this Decision; provided, however, that if respondent petitions, said suspension (or a portion thereof) shall be stayed upon conditions that:

1. Respondent pays a monetary penalty pursuant to Section 10175.2 of the Business and Professions Code at the rate of \$100 for each day of the suspension for a total monetary penalty of \$6,000.
2. Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said

check must be received by the Department prior to the effective date of the Decision in this matter.

3. No further cause for disciplinary action against the real estate license of respondent occurs within one year from the effective date of the Decision in this matter.
4. If respondent fails to pay the monetary penalty in accordance with the terms and conditions of the Decision, the Commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension in which event the respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.
5. If respondent pays the monetary penalty and if no further cause for disciplinary action against the real estate license of respondent occurs within one year from the effective date of the Decision, the stay hereby granted shall become permanent.

DATE: December 26, 2019

DocuSigned by:  
  
10B1BD502AB344C

DENA COGGINS

Administrative Law Judge

Office of Administrative Hearings