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FILED

SEP - 3 2008

DEPARTMENT OF REAL ESTATE

By K. Max

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
JOSEPH AHMAD HAYAT,)
Respondent.)

DRE No. H-3723 SD

OAH No. 2007110667

ORDER NUNC PRO TUNC MODIFYING DECISION AFTER REJECTION

It having been called to the attention of the Real Estate Commissioner that there are errors in the Decision After Rejection dated August 15, 2008, effective September 4, 2008, and good cause appearing therefore, the Decision After Rejection is amended as follows:

Paragraph 16 of the Conclusions of Law is amended to read as follows:

"16. Cause exists to revoke Hayat's real estate broker license under Business and Professions Code Sections 490 and 10177(b). In April 2006, Hayat suffered four convictions, each a felony, each involving moral turpitude, and each bearing a substantial relationship to the qualifications, functions, and duties of a real estate licensee, who is expected to be honest and forthright. The evidence of mitigation and rehabilitation is not sufficient to establish that it would be in the public interest to provide Hayat with the opportunity to obtain a restricted salesperson license.

This conclusion is based on all Factual Findings 2-10 and on all Legal Conclusions."

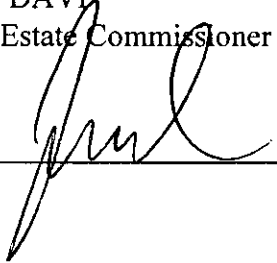
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This Order, nunc pro tunc to August 15, 2008, shall become effective at 12 o'clock noon on September 4, 2008.

IT IS SO ORDERED

9-3-08

JEFF DAVIS
Real Estate Commissioner


FILED

AUG 15 2008.

DEPARTMENT OF REAL ESTATE

By R. Henry

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of
JOSEPH AHMAD HAYAT,
Respondent..

DRE No. H-3723 SD

OAH No. N2007110667

DECISION AFTER REJECTION

This matter came on for hearing before James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, in San Diego, California, on February 21, 2008.

Truly Sughrue, Counsel, represented the Complainant. The Respondent, Joseph Ahmad Hayat, appeared in person and through Frank M. Buda, Attorney at Law.

Evidence was received, the record was closed, and the matter was submitted.

On March 11, 2008, the Administrative Law Judge rendered a Proposed Decision (hereinafter "the Proposed Decision") which the Real Estate Commissioner declined to adopt as his Decision herein. Pursuant to Section 11517 of the Government Code of the State of California, Respondent was served with notice of the Real Estate Commissioner's determination not to adopt the Proposed Decision along with a copy of the Proposed Decision. Respondent was notified that the case would be decided by the Real Estate Commissioner upon

1 the record, the transcript of proceedings held on February 21, 2008, and upon written argument
2 offered by Respondent and Complainant.

3 Written argument was submitted by Respondent and filed herein on May 29, 2008.

4 Written argument has been submitted on behalf of Complainant.

5 I have given careful consideration to the record in this case, including the transcript of
6 proceedings of February 21, 2008 and written argument offered by Respondent and
7 Complainant.

8 The following shall constitute the Decision of the Real Estate Commissioner in these
9 proceedings.

10 FINDINGS OF FACT

11 *Jurisdictional Matters*

12 1. On November 25, 2007, complainant Joseph Aui, a Deputy Real Estate
13 Commissioner, Department of Real Estate (the Department). State of California, signed the
14 accusation in his official capacity.

15 The accusation alleged that on June 22, 2006, respondent Joseph Abroad Hayat
16 (Hayat or Respondent) was convicted of two counts of violating Penal Code section 487,
17 subdivision (a) (grand theft) and two counts of violating Penal Code section 535 (mock
18 auctions), each conviction being a felony and each involving moral turpitude. The accusation
19 and other required jurisdictional documents were served on Hayat, who timely filed a notice
20 of defense. A supplemental notice of defense - objections was filed by counsel on Hayat's
21 behalf thereafter.

22 On February 21, 2008. the administrative record was opened. Jurisdictional
23 documents were presented. Sworn testimony and documentary evidence was received.
24 Closing arguments were given, the record was closed; and the matter was submitted.

25 *License History*

26 2. Hayat was licensed by the Department as a real estate salesperson in the mid-
27 1980s. His salesperson's license was suspended when he failed to meet certain educational

1 requirements. His salesperson's license was not disciplined by the Department for any
2 misconduct arising out of a real estate sales transaction or for any misconduct substantially
3 related to the qualifications, functions; or duties of a real estate licensee.

4 3. The Department issued Real Estate Broker License No. 01192559 to Hayat on
5 November 18, 2004, authorizing him to do business under the fictitious business name of
6 Community Homes & Mortgage. Hayat subsequently formed a corporation, Westpoint, Inc.,
7 which was licensed by the Department under the same broker's license, and which has done
8 business under the fictitious business names of Westpoint Mortgage Group and Westpoint
9 Mortgage Services. There is no history of the Department having imposed any discipline
10 against the broker's license issued to Hayat.

11 *Hayat's Convictions*

12 4. On April 26, 2006, following a four-day jury trial, Hayat was convicted of two
13 counts of violating Penal Code section 487, subdivision (a) (grand theft), each a felony, and
14 two counts of violating Penal Code section 535 (obtaining money through a mock auction),
15 each a felony, in the Superior Court of California, County of San Diego, in Case No. SCD
16 193 101 entitled *The People of the State of California, Plaintiff, vs. Joseph A. Hayat,*
17 *Defendant.*

18 On June 22, 2006, Hayat's motion to reduce the charges to misdemeanors under Penal
19 Code section 17, subdivision (b)(3) was denied. On Count 1, the court suspended imposition
20 of sentence and placed Hayat on three years formal probation. Conditions of probation
21 required Hayat to serve 11 days in custody (one day of credit was given for time served) to
22 be served on five consecutive weekends in the county jail, to provide 20 days of public
23 service, to pay fines and fees totaling approximately \$440, to make restitution in the
24 approximate amount of \$8,138, and to obey all laws. Summary probation was granted on
25 counts 2, 3, and 4, with Hayat being ordered to pay court security fees of \$60 for those
26 convictions. Hayat was ordered to have no contact with the victims. He was ordered to
27 refrain from selling any items on eBay or on any Internet auction system.

1 On June 21, 2006, Hayat tendered a cashier's check in full restitution to the victims
2 identified in the probation officer's report. He was given permission to travel to Georgia
3 before serving time in custody.

4 Probation was converted from a formal to an informal basis after 18 months of
5 successful probation. Probation is set to expire on June 21, 2009.

6 *Circumstances of the Offenses*

7 5. According to Hayat, in 2004 he owned a marketing business, CSS Services,
8 which possessed three predictive dialers.¹ When the new "do not call" law went into effect,
9 Hayat decided to sell two of his company's predictive dialers.

10 In July 2004, he put one of the predictive dialers up for sale on eBay.² The only bid
11 received was from Sheldon Toiv (Toiv), a buyer in New York. Hayat received Toiv's full
12 payment of \$3,500 for the predictive dialer, but for reasons Hayat claimed he did not
13 understand, Toiv never received the device. Hayat admitted that he did not follow up to
14 make certain that Toiv actually received the predictive dialer.

15 In September 2004, Hayat put another predictive dialer up for sale on eBay. Several
16 bids were received, the highest from Eran Hurvitz (Hurvitz), a buyer in Canada. Hayat
17 received Horvitz's full payment of \$4,237 for the predictive dialer, but for reasons Hayat
18 claimed he did not understand, Hurvitz never received the device. Hayat admitted that he
19 became upset with Hurvitz during the latter stages of the transaction and was uncertain of
20 the identity of the person to whom the device was delivered.

21 _____
22 ¹ A predictive dialer is a computerized system that automatically dials batches of telephone numbers for
23 connection to agents assigned to sales or other campaigns. Predictive dialers are widely used in call centers. A
24 predictive dialer uses a variety of algorithms to predict both the availability of agents and called party answers,
25 adjusting the calling process to the number of agents it predicts will be available when the calls it places are expected
26 to be answered. A predictive dialer monitors the answers to the calls it places, detecting how the calls it makes are
27 answered. It discards unanswered calls, busy numbers, disconnected lines, answers from fax machines, answering
28 machines and similar automated services, and only connects calls answered by people to waiting sales representatives.
29 Thus, it frees agents from the task of manually dialing telephone numbers and subsequently listening to ring tones,
30 unanswered or unsuccessful calls.

31 ² eBay is an Internet company that manages eBay.com, an online auction and shopping website on which
32 people and businesses buy and sell goods and services worldwide.

1 Hayat testified that at the time of the events giving rise to the allegations resulting in
2 his convictions, he thought he was engaged in business transactions. He conceded at the
3 disciplinary hearing that he had engaged in criminal conduct.

4 *Hayat's Evidence*

5 6. Hayat was born on December 25, 1969, in Kabul, Afghanistan. His father was
6 a civil engineer who came to the United States with his family in 1980 to work for the
7 United Nations. The Hayat family settled in San Diego.

8 Hayat graduated from Hoover High School in 1986. After high school, Hayat
9 attended San Diego City College for two years, and then San Diego State University for one
10 year with the goal of becoming an engineer.

11 Around 1990, Hayat went into business for himself, opening a New York Pizza
12 outlet. He worked hard and expanded his enterprise to three outlets. He sold his pizza
13 business in 1999 and went to work as the manager of a call center. After working at the call
14 center for several years, Hayat founded his own marketing business, CSS Services, which
15 had offices in Pacific Beach and employed about 30 persons. CSS Services was in business
16 from around 1999 through 2004.

17 7. Hayat was interested in real estate, obtained a broker's license, and started his
18 own business, Community Homes & Mortgage. When that enterprise proved successful, he
19 decided to expand his operation. Hayat formed a corporation; Westpoint, Inc., to minimize
20 financial and liability risks. Westpoint, Inc. engaged in the sales of property and in the
21 mortgage business. When the real estate market was doing well, Westpoint, Inc. employed
22 about a dozen real estate licensees. After the real estate market became depressed, Westpoint
23 ridded itself of its employees; Hayat now works by himself. Hayat estimated that he sold two
24 properties in 2007 and closed about 200 mortgage transactions.

25 Hayat testified that no consumer complaints were ever filed against his real estate
26 broker's license, and that he always attempted to protect his borrowers' interests.

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1 8. Hayat does not smoke tobacco, drink alcohol, or use illegal drugs. Hayat had
2 not been convicted of any crime before the convictions in April 2006. He has not been
3 arrested for or convicted of any crime since. Hayat expressed remorse for the conduct giving
4 rise to the April 2006 convictions, and assured the Department that similar conduct would
5 not reoccur. Hayat appeared sincere.

6 Following his April 2006 convictions, Hayat voluntarily became involved in the work
7 of the Afghan Community Islamic Center (ACIC), a nonprofit organization headquartered in
8 San Diego County dedicated to providing relief to Afghan refugees. According to Hayat,
9 there are approximately 5,000 Afghan refugees presently living in San Diego County, many
10 of whom cannot read or write English. Hayat spends several days a week working with
11 ACIC members, primarily providing transportation and translation services for Afghan
12 refugees, many of who are widows. Hayat disclosed the fact of his convictions to ACIC's
13 board of directors. Sayed Akbar Sadat, ACIC's administrator, wrote two letters confirming
14 the nature and extent of the volunteer services Hayat provides.

15 9. George Zeigler (Zeigler), Frank Lechtner (Lechner), and Samuel Mendoza
16 (Mendoza) testified about Hayat's good moral character. Each was recently made aware of
17 Hayat's convictions.

18 Zeigler's testimony was particularly impressive. Zeigler, who holds an MBA and a
19 real estate license, had known Hayat for several years. Hayat retained Zeigler to assist Hayat
20 in standardizing the procedures at Westpoint, to write a manual to document the procedures
21 that were to be followed, and to help establish controls to ensure loan officers remained in
22 compliance with the law and the office procedures. Zeigler emphasized that the tone and
23 content of the procedures Hayat asked him to formulate were directed towards disclosure
24 and protection of borrowers. Zeigler believed that the conception and execution of the
25 project demonstrated Hayat's commitment to honesty and fair play.

26 Lechner, a real estate licensee who worked for Hayat for one year as a mortgage loan
27 advisor, believed Hayat was a "very solid individual" who was "forthright" and "always

1 honest with me." Lechner never observed Hayat engage in any kind of dishonesty. Lechner
2 was particularly complimentary regarding the training and support Hayat provided to his
3 staff. Lechner believed Hayat was truly remorseful about his misconduct.

4 Mendoza is Hayat's friend. He believed Hayat was a truthful individual who was
5 genuinely remorseful for the actions giving rise to the convictions.

6 10. Numerous letters of reference were received attesting to Hayat's honesty,
7 integrity, and good moral character. The authors of these letters included Howard Antle, the
8 broker of record for Cabrillo Mortgage and Realty Services, Sadiza Noorzai, a general
9 marketing manager for Guardian National Security, Maricruz Hernandiz, a Century 21
10 salesperson, Gary Lee Jones, a real estate broker, Lailah Akhtari, a licensed real estate agent,
11 Tony Reed, a mortgage consultant, Terri Lopez, a real estate and loan agent, Richard
12 Lefford, a business acquaintance, Mike Gillard, Hayat's office building landlord, Rudy Pena,
13 a mortgage consultant, Robert deGowin, a friend, and Zaree Ayub, a registered dental
14 assistant and mother of Hayat's four-year-old son. These letters corroborated the testimony
15 of the witnesses identified in Factual Finding 9.

16 11. Hayat was certified as a graduate of the Realtor Institute on November 12,
17 1996, by the California Association of Realtors. He holds membership in that organization,
18 the National Association of Realtors, the San Diego Association of Realtors, and Sandicor.

19 12. Hayat provides emotional and financial support to his four-year-old son, who
20 lives with his (the child's) mother in San Diego County.

21 13. Hayat admitted that he "made a mistake" and that he "was not as vigilant and
22 attentive" as he should have been. He believed that the criminal prosecution has resulted in
23 his becoming a more responsible, stronger person. Hayat testified that the humiliation and
24 shame arising out of the fact of his conviction was far worse than having to pay a fine,
25 provide public service, or serve time in jail. He testified that he had some type of epiphany;
26 and that he now wants to be a source of positive change in the lives of others.

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1 14. Hayat testified that he wanted to retain his real estate license because "It's all I
2 know." Howard Antle, the broker of record at Cabrillo Mortgage & Realty Services, offered
3 to provide close supervision over Hayat if Hayat is permitted to retain a real estate license.

4 *Rehabilitation*

5 15. The Department developed criteria of rehabilitation, which are set forth in
6 California Code of Regulations, title 10, section 2912. Using these criteria: Almost two
7 years have passed since the date of respondent's substantially related conviction; Hayat made
8 restitution to the victims as soon as restitution was ordered; his formal probation was
9 reduced to summary probation as a result of his having complied with all terms and
10 conditions of probation including the payment of all fines, satisfaction of a public service
11 requirement, and spending ten days in custody; he does not use alcohol or controlled
12 substances and the convictions giving rise to this disciplinary action did not involve such
13 use; he no longer sells items or products on eBay or on any other kind of auction basis
14 [otherwise by auction]; he meets his parental responsibilities; he maintains a significant and
15 conscientious involvement with ACIC, a privately-sponsored program designed to provide
16 social benefits and ameliorate social problems among Afghan refugees residing in San Diego
17 County; and, most importantly, Hayat demonstrated a sincere change in attitude from that
18 which existed at the time of the commission of the criminal acts in question. This change in
19 attitude was evidenced by Hayat's testimony, testimony and letters from family members and
20 friends familiar with his conduct, and court records reflecting that Hayat was complying
21 with probation. Apart from the convictions giving rise to this disciplinary action, Hayat has
22 no other felony or misdemeanor convictions that reflect an inability to conform to societal
23 rules.

24 *Evaluation*

25 16. Hayat engaged in deceptive, theft-related offenses in July and September
26 2004, which resulted in four felony convictions in April 2006. The convictions involved
27 moral turpitude as a matter of law and as a matter of fact. The convictions are substantially

1 related to the qualifications, functions and duties of a real estate licensee, who must be of
2 good moral character. It was not established that Hayat's convictions involved a pattern of
3 continuing conduct but they seemed, instead, to be related to two incidental sales on eBay
4 that did not involve his clients or business customers.

5 Hayat had the burden to establish that he possesses sufficient moral character that he
6 should retain his license. Hayat's fairly recent convictions provide ample cause to revoke his
7 real estate broker's license.

8 This conclusion is reached based on the nature of the criminal convictions, Hayat's
9 explanation of the circumstances surrounding the offenses, and the evidence produced in
10 extenuation, mitigation, and rehabilitation.

11 CONCLUSIONS OF LAW

12 *Purpose of Disciplinary Action*

13 1. The object of an administrative proceeding aimed at revoking a real estate
14 license is to protect the public; that is, to determine whether a licensee has exercised his
15 privilege in derogation of the public interest, and to keep the regulated business clean and
16 wholesome. Such proceedings are not conducted for the primary purpose of punishing an
17 individual. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

18 *Burden and Standard of Proof*

19 2. In a disciplinary proceeding, the burden of proof is upon the party asserting
20 the affirmative. Guilt must be established to a reasonable certainty. Guilt cannot be based on
21 surmise or conjecture, suspicion or theoretical conclusions, or upon uncorroborated hearsay.
22 (*Small v. Smith, supra*, 16 Cal.App.3d at 457.)

23 3. In an administrative action seeking to impose discipline against the holder of
24 a professional license, the burden of proof is on complainant to establish the allegations by

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26 clear and convincing evidence and not by a mere preponderance of the evidence. (*Ettinger v.*
27 *Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

1 4. The key element of clear and convincing evidence is that it must establish a
2 high probability of the existence of the disputed fact, greater than proof by a preponderance
3 of the evidence. (*People v. Mabini* (2001) 92 Cal.App.4th 654. 662.)

4 *Applicable Statutes*

5 5. Business and Professions Code section 490 provides in part:

6 "A board may ... revoke a license on the ground that the licensee has been
7 convicted of a crime, if the crime is substantially related to the qualifications,
8 functions, or duties of the business or profession for which the license was
9 issued"

10 6. Business and Professions Code section 10177 provides in part:

11 "The commissioner may ... revoke the license of a real estate licensee ... who
12 has done any of the following ...:

13 (b) Entered a plea of guilty ... or been found guilty of, or been
14 convicted of, a felony, or a crime substantially related to the qualifications,
15 functions, or duties of a real estate licensee"

16 *Moral Turpitude*

17 7. "Moral turpitude" has been defined by many authorities as an act of baseness,
18 vileness or depravity in the private and social duties which a man owes to his fellowmen, or
19 to society in general. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 71.)

20 8. Our Supreme Court has defined moral turpitude broadly as a "general
21 readiness to do evil" which may, but does not necessarily, involve dishonesty. (*People v.*
22 *Gray* (2007)158 Cal.App.4th 635, 640-641 [grand theft and receiving stolen property
23 involve moral turpitude].)

24 9. Penal Code section 535 prohibits the false or fraudulent sale of property or
25 pretended property by auction or any of the practices known as mock auctions. The elements
26 of the offense require dishonesty, and a conviction of Penal Code section 535 necessarily
27 involves moral turpitude.

1 *Arneson v. Fox*

2 10. *Arneson v. Fox* (1980) 28 Cal.3d 440 stands for the proposition that in an
3 administrative disciplinary proceeding, an administrative agency may upon a final
4 conviction establish a reasonable and substantial relationship to licensed activities. An
5 applicant or licensee may introduce evidence of extenuating circumstances, as well as
6 evidence of rehabilitation, but an inquiry into the circumstances surrounding the offense
7 should not form the basis of impeaching a prior conviction. The conviction stands as
8 conclusive evidence of appellant's guilt of the offense charged.

9 *Substantial Relationship*

10 11. Business and Professions Code section 481 provides:

11 "Each board under the provisions of this code shall develop criteria to aid it,
12 when considering the denial, suspension or revocation of a license, to
13 determine whether a crime or act is substantially related to the qualifications,
14 functions, or duties of the business or profession it regulates."

15 12. The Department promulgated California Code of Regulations, title 10, section
16 2910, which states in part:

17 "(a) When considering whether a license should be ... revoked on the basis
18 of the conviction of a crime ... the crime or act shall be deemed to be substantially
19 related to the qualifications, functions or duties of a licensee of the Department
20 within the meaning of Sections ... 490 of the Code if it involves:

21 (1) The fraudulent taking, obtaining, appropriating or retaining of
22 funds or property belonging to another person.

23 (4) The employment of ... fraud, deceit, falsehood or
24 misrepresentation to achieve an end.

25 (8) Doing of any unlawful act with the intent of conferring a
26 financial or economic benefit upon the perpetrator
27

1 (c) If the crime or act is substantially related to the qualifications,
2 functions or duties of a licensee of the department, the context in which the crime or
3 acts were committed shall go only to the question of the weight to be accorded to the
4 crime or acts in considering the action to be taken with respect to the applicant or
5 licensee."

6 *Rehabilitation*

7 13. Business and Professions Code section 482 provides:

8 "Each board under the provisions of this code shall develop criteria to evaluate the
9 rehabilitation of a person when:

10 (b) Considering suspension or revocation of a license under Section 490.
11 Each board shall take into account all competent evidence of rehabilitation furnished
12 by the applicant or licensee."

13 14. California Code of Regulations, title 10, section 2912 sets forth the
14 Department's criteria of rehabilitation as required by Business and Professions Code section
15 482. The applicable criteria were discussed in Factual Finding 9.

16 15. The amount of evidence of rehabilitation varies according to the seriousness
17 of the misconduct at issue. The mere expression of remorse does not demonstrate
18 rehabilitation. A truer indication of rehabilitation involved sustained conduct over an
19 extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 987; 991.)

20 *Cause Exists to Impose Discipline*

21 16. Cause exists to revoke Hayat's real estate broker license under Business and
22 Professions Code sections 490 and 11710. In April 2006, Hayat suffered four convictions,
23 each a felony, each involving moral turpitude, and each bearing a substantial relationship to
24 the qualifications, functions, and duties of a real estate licensee, who is expected to be
25 honest and forthright. The evidence of mitigation and rehabilitation is not sufficient to
26 establish that it would be in the public interest to provide Hayat with the opportunity to
27 obtain a restricted salesperson license.

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This conclusion is based on all Factual Findings 2-10 and on all Legal Conclusions.

ORDER

All licenses and licensing rights of Respondent Joseph Ahmad Hayat under the Real Estate Law are revoked.

This Decision shall become effective at 12 o'clock noon on SEP - 4 2008

IT IS SO ORDERED 8/15/2008

JEFF DAVI
Real Estate Commissioner

William E. Moran

By William E. Moran
Assistant Commissioner
Enforcement

Hayat

FILED

APR 11 2008

DEPARTMENT OF REAL ESTATE

By *R. Henry*

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BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	
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)	
)	

NOTICE

TO: JOSEPH AHMAD HAYAT, Respondent, and FRANK M. BUDA, his Counsel.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated March 11, 2008, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated March 11, 2008, is attached 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 February 21,

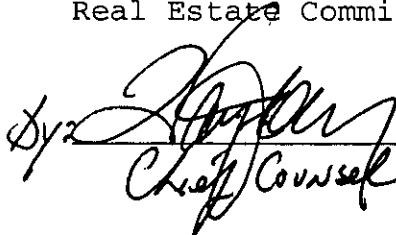
1 2008, and any written argument hereafter submitted on behalf of
2 Respondent and Complainant.

3 Written argument of Respondent to be considered by me
4 must be submitted within 15 days after receipt of the transcript
5 of the proceedings of February 21, 2008, at the Sacramento office
6 of the Department of Real Estate unless an extension of the time
7 is granted for good cause shown.

8 Written argument of Complainant to be considered by me
9 must be submitted within 15 days after receipt of the argument of
10 Respondent at the Sacramento office of the Department of Real
11 Estate unless an extension of the time is granted for good cause
12 shown.

13 DATED: 4/11/2008

14
15 JEFF DAVI
Real Estate Commissioner

16
17 
18 Chief Counsel

19 By WAYNE S. BELL
20 Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

JOSEPH AHMAD HAYAT,

Respondent.

Case No. H-3723 SD

OAH No. 2007110667

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 21, 2008, in San Diego, California.

Truly Sughrue, Counsel, represented complainant Joseph Aui, a Deputy Real Estate Commissioner, Department of Real Estate, State of California.

Frank M. Buda, Attorney at Law, represented respondent Joseph Ahmad Hayat, who was present throughout the administrative hearing.

The matter was submitted on February 21, 2008.

FACTUAL FINDINGS

Jurisdictional Matters

1. On November 25, 2007, complainant Joseph Aui, a Deputy Real Estate Commissioner, Department of Real Estate (the Department), State of California, signed the accusation in his official capacity.

The accusation alleged that on June 22, 2006, respondent Joseph Ahmad Hayat (Hayat or respondent) was convicted of two counts of violating Penal Code section 487, subdivision (a) (grand theft) and two counts of violating Penal Code section 535 (mock auctions), each conviction being a felony and each involving moral turpitude. The accusation and other required jurisdictional documents were served on Hayat, who timely filed a notice of defense. A supplemental notice of defense - objections was filed by counsel on Hayat's behalf thereafter.

On February 21, 2008, the administrative record was opened. Jurisdictional documents were presented. Sworn testimony and documentary evidence was received. Closing arguments were given, the record was closed, and the matter was submitted.

License History

2. Hayat was licensed by the Department as a real estate salesperson in the mid-1980s. His salesperson's license was suspended when he failed to meet certain educational requirements. His salesperson's license was not disciplined by the Department for any misconduct arising out of a real estate sales transaction or for any misconduct substantially related to the qualifications, functions, or duties of a real estate licensee.

3. The Department issued Real Estate Broker License No. 01192559 to Hayat on November 18, 2004, authorizing him to do business under the fictitious business name of Community Homes & Mortgage. Hayat subsequently formed a corporation, Westpoint, Inc., which was licensed by the Department under the same broker's license, and which has done business under the fictitious business names of Westpoint Mortgage Group and Westpoint Mortgage Services. There is no history of the Department having imposed any discipline against the broker's license issued to Hayat.

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4. On April 26, 2006, following a four-day jury trial, Hayat was convicted of two counts of violating Penal Code section 487, subdivision (a) (grand theft), each a felony, and two counts of violating Penal Code section 535 (obtaining money through a mock auction), each a felony, in the Superior Court of California, County of San Diego, in Case No. SCD193101 entitled *The People of the State of California, Plaintiff, vs. Joseph A. Hayat, Defendant*.

On June 22, 2006, Hayat's motion to reduce the charges to misdemeanors under Penal Code section 17, subdivision (b)(3) was denied. On Count 1, the court suspended imposition of sentence and placed Hayat on three years formal probation. Conditions of probation required Hayat to serve 11 days in custody (one day of credit was given for time served) to be served on five consecutive weekends in the county jail, to provide 20 days of public service, to pay fines and fees totaling approximately \$440, to make restitution in the approximate amount of \$8,138, and to obey all laws. Summary probation was granted on counts 2, 3, and 4, with Hayat being ordered to pay court security fees of \$60 for those convictions. Hayat was ordered to have no contact with the victims. He was ordered to refrain from selling any items on eBay or on any Internet auction system.

On June 22, 2006, Hayat tendered a cashier's check in full restitution to the victims identified in the probation officer's report. He was given permission to travel to Georgia before serving time in custody.

Probation was converted from a formal to an informal basis after 18 months of successful probation. Probation is set to expire on June 21, 2009.

Circumstances of the Offenses

5. According to Hayat, in 2004 he owned a marketing business, CSS Services, which possessed three predictive dialers.¹ When the new “do not call” law went into effect, Hayat decided to sell two of his company’s predictive dialers.

In July 2004, he put one of the predictive dialers up for sale on eBay.² The only bid received was from Sheldon Toiv (Toiv), a buyer in New York. Hayat received Toiv’s full payment of \$3,500 for the predictive dialer, but for reasons Hayat claimed he did not understand, Toiv never received the device. Hayat admitted that he did not follow up to make certain that Toiv actually received the predictive dialer.

In September 2004, Hayat put another predictive dialer up for sale on eBay. Several bids were received, the highest from Eran Hurvitz (Hurvitz), a buyer in Canada. Hayat received Hurvitz’s full payment of \$4,237 for the predictive dialer, but for reasons Hayat claimed he did not understand, Hurvitz never received the device. Hayat admitted that he became upset with Hurvitz during the latter stages of the transaction and was uncertain of the identity of the person to whom the device was delivered.

Hayat testified that at the time of the events giving rise to the allegations resulting in his convictions, he thought he was engaged in business transactions. He conceded at the disciplinary hearing that he had engaged in criminal conduct.

Hayat’s Evidence

6. Hayat was born on December 25, 1969, in Kabul, Afghanistan. His father was a civil engineer who came to the United States with his family in 1980 to work for the United Nations. The Hayat family settled in San Diego.

Hayat graduated from Hoover High School in 1986. After high school, Hayat attended San Diego City College for two years, and then San Diego State University for one year with the goal of becoming an engineer.

¹ A predictive dialer is a computerized system that automatically dials batches of telephone numbers for connection to agents assigned to sales or other campaigns. Predictive dialers are widely used in call centers. A predictive dialer uses a variety of algorithms to predict both the availability of agents and called party answers, adjusting the calling process to the number of agents it predicts will be available when the calls it places are expected to be answered. A predictive dialer monitors the answers to the calls it places, detecting how the calls it makes are answered. It discards unanswered calls, busy numbers, disconnected lines, answers from fax machines, answering machines and similar automated services, and only connects calls answered by people to waiting sales representatives. Thus, it frees agents from the task of manually dialing telephone numbers and subsequently listening to ring tones, unanswered or unsuccessful calls.

² eBay is an Internet company that manages eBay.com, an online auction and shopping website on which people and businesses buy and sell goods and services worldwide.

Around 1990, Hayat went into business for himself, opening a New York Pizza outlet. He worked hard and expanded his enterprise to three outlets. He sold his pizza business in 1999 and went to work as the manager of a call center. After working at the call center for several years, Hayat founded his own marketing business, CSS Services, which had offices in Pacific Beach and employed about 30 persons. CSS Services was in business from around 1999 through 2004.

7. Hayat was interested in real estate, obtained a broker's license, and started his own business, Community Homes & Mortgage. When that enterprise proved successful, he decided to expand his operation. Hayat formed a corporation, Westpoint, Inc., to minimize financial and liability risks. Westpoint, Inc. engaged in the sales of property and in the mortgage business. When the real estate market was doing well, Westpoint, Inc. employed about a dozen real estate licensees. After the real estate market became depressed, Westpoint ridded itself of its employees; Hayat now works by himself. Hayat estimated the he sold two properties in 2007 and closed about 200 mortgage transactions.

Hayat testified that no consumer complaints were ever filed against his real estate broker's license, and that he always attempted to protect his borrowers' interests.

8. Hayat does not smoke tobacco, drink alcohol, or use illegal drugs. Hayat had not been convicted of any crime before the convictions in April 2006. He has not been arrested for or convicted of any crime since. Hayat expressed remorse for the conduct giving rise to the April 2006 convictions, and assured the Department that similar conduct would not reoccur. Hayat appeared sincere.

Following his April 2006 convictions, Hayat voluntarily became involved in the work of the Afghan Community Islamic Center (ACIC), a nonprofit organization headquartered in San Diego County dedicated to providing relief to Afghan refugees. According to Hayat, there are approximately 5,000 Afghan refugees presently living in San Diego County, many of whom cannot read or write English. Hayat spends several days a week working with ACIC members, primarily providing transportation and translation services for Afghan refugees, many of who are widows. Hayat disclosed the fact of his convictions to ACIC's board of directors. Sayed Akbar Sadat, ACIC's administrator, wrote two letters confirming the nature and extent of the volunteer services Hayat provides.

9. George Zeigler (Zeigler), Frank Lechner (Lechner), and Samuel Mendoza (Mendoza) testified about Hayat's good moral character. Each was recently made aware of Hayat's convictions.

Zeigler's testimony was particularly impressive. Zeigler, who holds an MBA and a real estate license, had known Hayat for several years. Hayat retained Zeigler to assist Hayat in standardizing the procedures at Westpoint, to write a manual to document the procedures that were to be followed, and to help establish controls to ensure loan officers remained in compliance with the law and the office procedures. Zeigler emphasized that the tone and content of the procedures Hayat asked him to formulate were directed towards disclosure and

protection of borrowers. Zeigler believed that the conception and execution of the project demonstrated Hayat's commitment to honesty and fair play.

Lechner, a real estate licensee who worked for Hayat for one year as a mortgage loan advisor, believed Hayat was a "very solid individual" who was "forthright" and "always honest with me." Lechner never observed Hayat engage in any kind of dishonesty. Lechner was particularly complimentary regarding the training and support Hayat provided to his staff. Lechner believed Hayat was truly remorseful about his misconduct.

Mendoza is Hayat's friend. He believed Hayat was a truthful individual who was genuinely remorseful for the actions giving rise to the convictions.

10. Numerous letters of reference were received attesting to Hayat's honesty, integrity, and good moral character. The authors of these letters included Howard Antle, the broker of record for Cabrillo Mortgage and Realty Services, Sadiza Noorzai, a general marketing manager for Guardian National Security, Maricruz Hernandez, a Century 21 salesperson, Gary Lee Jones, a real estate broker, Lailah Akhtari, a licensed real estate agent, Tony Reed, a mortgage consultant, Terri Lopez, a real estate and loan agent, Richard Lefford, a business acquaintance, Mike Gillard, Hayat's office building landlord, Rudy Pena, a mortgage consultant, Robert deGowin, a friend, and Zaree Ayub, a registered dental assistant and mother of Hayat's four-year-old son. These letters corroborated the testimony of the witnesses identified in Factual Finding 9.

11. Hayat was certified as a graduate of the Realtor Institute on November 12, 1996, by the California Association of Realtors. He holds membership in that organization, the National Association of Realtors, the San Diego Association of Realtors, and Sandicor.

12. Hayat provides emotional and financial support to his four-year-old son, who lives with his (the child's) mother in San Diego County.

13. Hayat admitted that he "made a mistake" and that he "was not as vigilant and attentive" as he should have been. He believed that the criminal prosecution has resulted in his becoming a more responsible, stronger person. Hayat testified that the humiliation and shame arising out of the fact of his conviction was far worse than having to pay a fine, provide public service, or serve time in jail. He testified that he had some type of epiphany, and that he now wants to be a source of positive change in the lives of others.

14. Hayat testified that he wanted to retain his real estate license because "It's all I know." Howard Antle, the broker of record at Cabrillo Mortgage & Realty Services, offered to provide close supervision over Hayat if Hayat is permitted to retain a real estate license.

Rehabilitation

15. The Department developed criteria of rehabilitation, which are set forth in California Code of Regulations, title 10, section 2912. Using these criteria: Almost two years have passed since the date of respondent's substantially related conviction; Hayat made

restitution to the victims as soon as restitution was ordered; his formal probation was reduced to summary probation as a result of his having complied with all terms and conditions of probation including the payment of all fines, satisfaction of a public service requirement, and spending ten days in custody; he does not use alcohol or controlled substances and the convictions giving rise to this disciplinary action did not involve such use; he no longer sells items or products on eBay or on any other kind of auction basis [otherwise by auction]; he meets his parental responsibilities; he maintains a significant and conscientious involvement with ACIC, a privately-sponsored program designed to provide social benefits and ameliorate social problems among Afghan refugees residing in San Diego County; and, most importantly, Hayat demonstrated a sincere change in attitude from that which existed at the time of the commission of the criminal acts in question. This change in attitude was evidenced by Hayat's testimony, testimony and letters from family members and friends familiar with his conduct, and court records reflecting that Hayat was complying with probation. Apart from the convictions giving rise to this disciplinary action, Hayat has no other felony or misdemeanor convictions that reflect an inability to conform to societal rules.

Evaluation

16. Hayat engaged in deceptive, theft-related offenses in July and September 2004, which resulted in four felony convictions in April 2006. The convictions involved moral turpitude as a matter of law and as a matter of fact. The convictions are substantially related to the qualifications, functions and duties of a real estate licensee, who must be of good moral character. It was not established that Hayat's convictions involved a pattern of continuing conduct but they seemed, instead, to be related to two incidental sales on eBay that did not involve his clients or business customers.

Hayat had the burden to establish that he possesses sufficient moral character that he should retain his license. Hayat's fairly recent convictions provide ample cause to revoke his real estate broker's license, but the nature of the offenses and Hayat's evidence of his general integrity and good moral character justify affording him the opportunity to hold a restricted salesperson's license on condition that he be closely supervised.

This conclusion is reached based on the nature of the criminal convictions, Hayat's explanation of the circumstances surrounding the offenses, and the evidence produced in extenuation, mitigation, and rehabilitation.

LEGAL CONCLUSIONS

Purpose of Disciplinary Action

1. The object of an administrative proceeding aimed at revoking a real estate license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome. Such proceedings are not conducted for the primary purpose of punishing an individual. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

Burden and Standard of Proof

2. In a disciplinary proceeding, the burden of proof is upon the party asserting the affirmative. Guilt must be established to a reasonable certainty. Guilt cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or upon uncorroborated hearsay. (*Small v. Smith, supra*, 16 Cal.App.3d at 457.)

3. In an administrative action seeking to impose discipline against the holder of a professional license, the burden of proof is on complainant to establish the allegations by clear and convincing evidence and not by a mere preponderance of the evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

4. The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.)

Applicable Statutes

5. Business and Professions Code section 490 provides in part:

“A board may . . . revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued”

6. Business and Professions Code section 10177 provides in part:

“The commissioner may . . . revoke the license of a real estate licensee . . . who has done any of the following . . . :

...

(b) Entered a plea of guilty . . . or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee”

Moral Turpitude

7. “Moral turpitude” has been defined by many authorities as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general. (*Benninghoff v. Superior Court* (2006) 136 Cal. App. 4th 61, 71.)

8. Our Supreme Court has defined moral turpitude broadly as a “general readiness to do evil” which may, but does not necessarily, involve dishonesty. (*People v.*

Gray (2007)158 Cal.App.4th 635, 640-641 [grand theft and receiving stolen property involve moral turpitude].)

9. Penal Code section 535 prohibits the false or fraudulent sale of property or pretended property by auction or any of the practices known as mock auctions. The elements of the offense require dishonesty, and a conviction of Penal Code section 535 necessarily involves moral turpitude.

Arneson v. Fox

10. *Arneson v. Fox* (1980) 28 Cal.3d 440 stands for the proposition that in an administrative disciplinary proceeding, an administrative agency may upon a final conviction to establish a reasonable and substantial relationship to licensed activities. An applicant or licensee may introduce evidence of extenuating circumstances, as well as evidence of rehabilitation, but an inquiry into the circumstances surrounding the offense should not form the basis of impeaching a prior conviction. The conviction stands as conclusive evidence of appellant's guilt of the offense charged.

Substantial Relationship

11. Business and Professions Code section 481 provides:

“Each board under the provisions of this code shall develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates.”

12. The Department promulgated California Code of Regulations, title 10, section 2910, which states in part:

“(a) When considering whether a license should be . . . revoked on the basis of the conviction of a crime . . . the crime or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of Sections . . . 490 of the Code if it involves:

(1) The fraudulent taking, obtaining, appropriating or retaining of funds or property belonging to another person.

(4) The employment of . . . fraud, deceit, falsehood or misrepresentation to achieve an end.

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator

(c) If the crime or act is substantially related to the qualifications, functions or duties of a licensee of the department, the context in which the crime or acts were committed shall go only to the question of the weight to be accorded to the crime or acts in considering the action to be taken with respect to the applicant or licensee.”

Rehabilitation

13. Business and Professions Code section 482 provides:

“Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

(b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.”

14. California Code of Regulations, title 10, section 2912 sets forth the Department’s criteria of rehabilitation as required by Business and Professions Code section 482. The applicable criteria were discussed in Factual Finding 9.

15. The amount of evidence of rehabilitation varies according to the seriousness of the misconduct at issue. The mere expression of remorse does not demonstrate rehabilitation. A truer indication of rehabilitation involved sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 987, 991.)

Cause Exists to Impose Discipline

16. Cause exists to revoke Hayat’s real estate broker license under Business and Professions Code sections 490 and 11710. In April 2006, Hayat suffered four convictions, each a felony, each involving moral turpitude, and each bearing a substantial relationship to the qualifications, functions, and duties of a real estate licensee, who is expected to be honest and forthright. Notwithstanding Hayat’s fairly recent convictions, sufficient evidence in mitigation and substantial evidence in rehabilitation established that it would not be contrary to the public interest to provide Hayat with the opportunity to obtain a restricted salesperson license, subject to the condition that Hayat obey all laws, that he promptly report any arrests to the Department during probation, and that Hayat’s employing broker agree to exercise close supervision of Hayat’s licensed activities.

This conclusion is based on all Factual Findings 2-10 and on all Legal Conclusions.

ORDER

All licenses and licensing rights of Respondent Joseph Ahmad Hayat under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent under Business and Professions Code section 10156.5 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 Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under Business and Professions Code section 10156.6:

1. The restricted license issued to respondent may be suspended before a hearing by Order of the Real Estate Commissioner upon respondent's conviction of any crime which is substantially related to his fitness or capacity as a real estate licensee upon his plea of guilty, his plea of nolo contendere, or upon a jury verdict.

2. Respondent shall advise the Real Estate Commissioner in writing at the Commissioner's offices in Sacramento, California, of the issuance of any citation or of his arrest by any law enforcement agency in California or any other jurisdiction within 72 hours of the citation or arrest. Respondent shall disclose the date of the citation or arrest, the identity of the law enforcement agency issuing the citation or making the arrest, and the business address and telephone number of that law enforcement agency.

3. The restricted license issued to respondent may be suspended before 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 any of the conditions attaching to the restricted license.

4. - 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.

5. 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

not adopted

(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.

6. 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 respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

DATED: 3/11/08



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

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FILED
OCT 02 2007

DEPARTMENT OF REAL ESTATE

By *Cune Shan*

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12 JOSEPH AHMAD HAYAT,)
13 Respondent.)

No. H-3723 SD
ACCUSATION

14
15 The Complainant, JOSEPH AIU, a Deputy Real Estate
16 Commissioner of the State of California, for cause of Accusation
17 against JOSEPH AHMAD HAYAT (hereinafter "Respondent"), is
18 informed and alleges as follows:

19 I

20 The Complainant, JOSEPH AIU, a Deputy Real Estate
21 Commissioner of the State of California, makes this Accusation in
22 his official capacity.

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II

Respondent is presently licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) (Code) as a real estate broker.

III

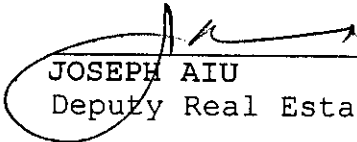
On or about June 22, 2006, in the Superior Court, County of San Diego, Respondent was convicted of a violation of two counts of Section 487(A) (Grand Theft) and two counts of Section 535 (Mock Auctions) of the California Penal Code, felonies and crimes involving moral turpitude which bear a substantial relationship under Section 2910, Title 10, California Code of Regulations, to the qualifications, functions, or duties of a real estate licensee.

IV

The facts alleged above constitute cause under Sections 490 and 10177(b) of the Code for suspension or revocation of all licenses and license rights of Respondent under the Real Estate Law.

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

8
9
10 
11 JOSEPH AIU
12 Deputy Real Estate Commissioner

13 Dated at San Diego, California,
14 this 20 day of September, 2007