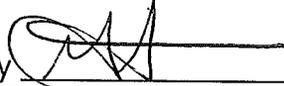


FILED

February 20, 2013

DEPARTMENT OF REAL ESTATE

By 

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	DRE No. H-4105 SD
)	
THE CHURCHILL REAL ESTATE)	OAH No.2012020052
GROUP, INC. a California Corporation, and)	
KEVIN CHARLES CHURCHILL,)	
)	
Respondent.)	
_____)	

DECISION

The Proposed Decision dated January 23, 2013, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

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

Factual Findings, Page 14, Paragraph 22, Line 2: "1176" shall read: "10176".

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

IT IS SO ORDERED 2/16/2013
Real Estate Commissioner


By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the First Amended
Accusation Against:

THE CHURCHILL REAL ESTATE
GROUP, INC., A California Corporation,
and KEVIN CHARLES CHURCHILL,

Respondents.

Case No. H-4105 SD

OAH No. 2012020052

PROPOSED DECISION

Carla Nasoff, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 13, 2012, in San Diego, California.

Michael B. Rich, Counsel, represented complainant Tricia D. Sommers, a Deputy Real Estate Commissioner, Department of Real Estate, State of California.

Steven E. Boehmer, Attorney at Law, represented The Churchill Real Estate Group, Inc., (hereinafter respondent Corporation) and Kevin Charles Churchill (hereinafter respondent). Respondent, Kevin Charles Churchill, was present throughout the administrative hearing.

The matter was submitted on December 21, 2012.

FACTUAL FINDINGS

Jurisdictional Matters

1. On March 1, 2012, complainant Tricia D. Sommers, a Deputy Real Estate Commissioner, Department of Real Estate (the Department), State of California, signed the First Amended Accusation in her official capacity. The First Amended Accusation differed from the initial accusation in that the full names of the witnesses were eliminated and a section for cost recovery was inserted. The First Amended Accusation and other required jurisdictional documents were served on respondents.

Respondents timely filed a notice of defense.

On December 13, 2012, the administrative record was opened. Jurisdictional documents were presented. Sworn testimony and documentary evidence were received. Closing written briefs were allowed to be submitted by December 18, 2012, and any objections to be filed by December 21, 2012. Respondents' closing brief was received on December 18, 2012. On December 21, 2012, the record was closed and the matter was submitted.

License History

2. Respondent was originally licensed as a real estate salesperson in 1997. He was originally licensed as a real estate broker in 2001. His broker license is due to expire on November 19, 2013. Respondent was also licensed as an officer of The Churchill Real Estate Group, Inc., from June 10, 2012, to August 22, 2015. The corporation license expires on August 22, 2015.

Timeline of Events

3. On May 7, 2007, respondents represented Sean and Susan P. (hereinafter Sean and Susan) in a sale and purchase of real property. Sean and Susan submitted an offer to purchase real property identified as 2435 Frankfort Street, San Diego, California (hereinafter the Frankfort property.) Sean and Susan submitted an earnest deposit of \$10,000. Sean and Susan's residence was located at 5328 West Falls View Drive in San Diego, California (hereinafter the West Falls property.) Respondent represented to Sean and Susan that their obligation to purchase the Frankfort property would be made contingent on the sale of their West Falls property.

On May 9, 2007, the sellers of the Frankfort property, John and Laura P. (hereinafter John and Laura), accepted Sean and Susan offer to purchase the Frankfort property with a signed written document entitled, Contingency for Sale or Purchase of Other Property. The purchase of the Frankfort property was contingent on the sale of the West Falls property.

On June 25, 2007, Keith Henderson, a real estate broker not affiliated with respondents, (hereinafter Henderson, submitted an offer to purchase the West Fall property. Henderson's obligation to purchase the West Falls property was contingent on Henderson obtaining approval of a loan for \$460,000. On June 25, 2007, Sean and Susan accepted Henderson's offer to purchase the West Falls property.

On July 8, 2007, Sean and Susan accepted an Addendum to the purchase agreement for the Frankfort property that reduced the purchase price, increased the earnest money deposit from \$10,000 to \$25,000 and required that Sean and Susan remove all contingencies by 4:00 p.m. on July 13, 2007. The total earnest money deposited by Sean and Susan was \$25,000. Sean and Susan signed a written Contingency Removal for their purchase of the Frankfort property with the understanding that respondent would not submit the Contingency Removal to sellers, John and Laura, prior to respondents' receipt of Henderson's

Contingency Removal confirming that Henderson had obtained a loan approval for the purchase of the West Falls property.

On July 15, 2007, respondent submitted Sean and Susan's signed written Contingency Removal to sellers, John and Laura. Respondents did not receive confirmation of Henderson obtaining a loan approval for the West Falls property.

In August 2007, the escrow for the purchase of the West Falls property was cancelled due to Henderson's inability to obtain a mortgage loan. The escrow for the purchase of the Frankfort property was cancelled. Sean and Susan were required to forfeit their \$25,000 earnest money that was deposited for the purchase of the Frankfort property.

The Complainant alleged three Causes for Discipline.

The First Cause for Discipline is based on the following provisions:

- Business and Professions Code section 10176 subdivision (a), (making substantial misrepresentation);
- Business and Professions Code section 10176 subdivision (b), (making any false promise likely to influence, persuade or induce);
- Business and Professions Code section 10176 subdivision (i), (fraud or dishonest dealing);
- Business and Professions Code section 10177 subdivision (g), (negligence/incompetence in performing an act for which one is required to hold a license.)

The Second Cause for Discipline is based on the following provisions:

- California Code of Regulations, title 10, section 2731 (a licensee shall not use a fictitious name in the conduct of any activity requiring a real estate license unless the licensee holds a license bearing that fictitious name);
- Business and Professions Code section 10159.5 (every person applying for a license desiring to have such license issued under a fictitious business name shall file with the application a certified copy of the fictitious business name statement filed with the county clerk);
- Business and Professions Code section 10177 subdivision (d) (suspension of license for willful disregard or violation of the Real Estate Law);
- Business and Professions Code section 10176 subdivision (f) (claiming, demanding or receiving fee, compensation or commission under any exclusive agreement authorizing employee to perform acts set forth under section 10131 for compensation where agreement does not contain definite specified date of final and complete termination.)

The Third Cause for Discipline is based on the following provisions:

- Business and Professions Code sections 1000 et. seq., (Respondent Churchill's failure to exercise reasonable supervision and control over the mortgage brokering activities of respondent Corporation);
- Business and Professions Code section 10159.2 (designated broker/officer responsible for supervision and control of activities conducted on behalf of corporation by officers, licensed salespersons and employees to secure compliance with the Real Estate Law);
- California Code of Regulations, title 10 section 2725 (broker shall exercise reasonable supervision over licensed employees, establish policies and procedures for compliance with Real Estate Law, supervise transactions requiring a real estate license, trust fund handling, etc.);
- Business and Professions Code section 10177 subdivision (d) (suspension or revocation of license for willful disregard or violation of the Real Estate Law);
- Business and Professions Code section 10177 subdivision (h) (suspension or revocation for broker or designated broker/officer who fails to exercise reasonable supervision of licensed employees or licensed activities of broker corporation.)

Kathryn Stanbra's Testimony

4. Kathryn Stanbra has been a special investigator with the Department for eight years. She has been a Deputy Commissioner since 2011. Part of her duties include conducting investigations. On March 4, 2008, Sean and Susan filed a complaint against respondents. Included in the complaint was a July 13, 2007 email from Sean to respondent that confirmed that the purchase of the Frankfort property was to be contingent on the sale of the West Falls property.

On July 8, 2007, a California Association of Realtors document entitled "Addendum" was made part of the Residential Purchase agreement between Sean and Susan (buyers) and John and Laura (sellers) regarding the Frankfort Property. The Addendum provided the following:

"All contingencies including loan contingency to be removed by 4 p.m. on Friday the 13th of July. Initial deposit to be increased by \$15,000, to a total of \$25,000 by 4 p.m. on Friday the 13th of July (2007). Property being conveyed strictly in 'as is.' Condition with only termite section, one being covered by seller. Should buyers not close in 21 days, buyers are to compensate seller the amount of \$350.00 per day for every calendar day, until such time as property closes." Both Sean and Susan signed the document.

On July 13, 2007 at 2:16 p.m. Sean sent an email to respondent regarding his concern regarding signing a document that would release contingencies. Sean wrote, "The only reason that we would lose our deposit is if we come back at this point and say we don't really want the property for some lame reason. Item 3 (of Contingency Release) appears to be

saying that I'm removing all contingencies including the selling of West Falls which is not what we want to do!!"

On July 13, 2007, at 2:21 p.m. respondent's transaction coordinator, Shannon Benjamin, responded by email and stated, "Correct. We will not send this (Contingency Removal) in to the other agent, (Vivian Adibi), until the buyer of W. Falls removes all his contingencies. Just trying to get this signed before the end of today so Kevin (respondent) can send it this weekend or when need be." (Exhibit 3)

On July 13, 2007, Sean and Susan signed the document entitled "Contingency Removal". A check box was marked that referenced in capital letters, "BUYER HEREBY REMOVES ANY AND ALL BUYER CONTINGENIES." (Exhibit 10, page 7)

On July 13, 2007, at 5:00 p.m. Laura and John signed the "Notice to Buyer to Perform."

On July 31, 2007, Henderson discovered that Countrywide denied his mortgage loan application.

On August 1, 2007, Henderson believed that, because of the subprime loan crash, he would not be able to qualify for a loan, and he cancelled the escrow.

On March 17, 2010, Ms. Stanbra interviewed Ms. Benjamin, respondent's assistant. Ms. Benjamin told Ms. Stanbra that respondent tried to close the two deals at the same time. Henderson told respondent that he was going to remove his loan contingency, but he never did. Ms. Benjamin told Ms. Stanbra that it was not typical for respondent to have a Contingency Removal signed prior to having the condition satisfied. Ms. Benjamin told Ms. Stanbra that respondent trusted Henderson because he was a licensed salesperson.

On March 24, 2010, Ms. Benjamin sent Ms. Stanbra a letter regarding her duties as respondent's assistant. Ms. Benjamin enclosed a copy of the June 13, 2007 email regarding the contingency removal instructions from Susan and Sean. Ms. Benjamin wrote, "The contingency removal would not be sent to the other agent on Frankfort until the buyer (Henderson) removed his contingencies. I was trying to get it signed before the weekend so that Kevin could send it to the Listing Agent . . . [T]hat was the last time I dealt with the contingency removal. I never supplied it (the signed contingency removal) to the listing agent . . ."

On March 30, 2010, respondent sent a letter to Ms. Stanbra. He wrote that Henderson was a licensee with ReMax and a single buyer acting as a principal for the West Fall property. Respondent represented that he had a conversation with Henderson, who assured respondent that he would fax the signed release of contingency. Respondent wrote, "Trusting a fellow licensee to understand his position in this and knowing where we all stood, I released our contingency to be forwarded. The next morning, I went to the office only to find his (Henderson's) contingency removal wasn't faxed over. I immediately called

him and voiced my concern. He then told me he wasn't able to get the loan rate he was promised . . . [W]ith regard to Shannon Kehl Benjamin, she is and has always been my assistant. She doesn't sign or negotiate contracts and never has." Ms. Stanbra testified that Ms. Benjamin was cooperative and appeared to be truthful.

On April 6, 2010, Ms. Stanbra prepared a memorandum of her interview with Sean and wrote, "Complainant stated he signed the Contingency Removal because Churchill promised not to send it until they had received Keith Henderson's Loan Contingency Removal . . . [C]hurchill told him (Sean) that Keith will sign this weekend and send it." Ms. Stanbra wrote that Sean believed that respondents failed to protect his interests.

Sean P's Testimony

5. Sean received his Bachelors of Science, in Economics. He works at Takeda Pharmaceuticals in the information technology (I.T.) department. He is married to Susan P. He listed the sale of their home on West Fall with respondent. Sean testified, "I didn't understand liquidated damages in 2007, but the consequence was that I lost \$25,000."

Sean testified that on July 13, 2007, he signed the contingency release documents for the Frankfort property with the understanding that respondent would not submit the contingency release documents unless the buyer for his West Fall residence, Henderson, removed his loan contingency. The contingency release documents were submitted on the Frankfort property; however, Henderson never removed his loan contingency. Sean signed the contingency release at work and faxed it to respondent. He testified, "I trusted Kevin completely." Sean had known respondent for ten years and considered him a friend. He believed that respondent had a good reputation and was an experienced broker. Sean felt confident in him.

Henderson never told Sean that he was preapproved for a loan. Sean testified, "I knew the ramifications of signing the contingency removal documents. I knew I had to release all contingencies by July 13, 2007, at 4 p.m. I did not call Churchill on July 13, 2007. I had no idea if the contingency had been removed on Westfall property. I signed the document that removed the contingency."

In August 2007, Sean terminated his contact with respondent because he no longer planned to sell his home.

Sean's testimony was credible. He presented as a pleasant gentleman who did not appear angry or frustrated despite the significant loss of his earnest money.

Shannon Kehl Benjamin's Testimony

6. Shannon Kehl Benjamin worked as respondent's assistant and transaction coordinator in 2007. Her duties included processing paperwork, obtaining disclosure packets,

and communicating with clients. Ms. Benjamin testified, "I never release the contingency release...(and) I didn't in this case. Kevin did."

Ms. Benjamin testified, "Keith Henderson verbally said he was going to send his contingency removal. He said so several times [K]eith Henderson told me in a telephone conversation that he would sign a full removal of all contingency and I communicated this to Churchill." Henderson told her three to four times that he would remove his contingency. She testified, "Mr. Henderson never told me obtaining a loan was problematic." Ms. Benjamin testified that it was respondent who submitted Sean and Susan's signed released of contingency. Respondent advised her to, "Make sure Henderson sends in his contingency release." Henderson never did. The first time Ms. Benjamin was aware that Henderson was not going to get a loan was on July 31, 2007. Ms. Benjamin testified, "Kevin trusted Henderson, and Henderson did not perform."

Ms. Benjamin appeared forthright and credible. Her testimony was consistent with the investigative reports prepared by Ms. Stanbra.

Vivian Adibi's Testimony

7. Vivian Adibi was the Associate Vice President of Prudential Dunn Realtors in 2007. She represented the sellers of the Frankfort property, John and Laura. On July 13, 2007 at 6 p.m., Ms. Adibi sent respondent a fax with the document entitled Notice to Buyer to Perform. Ms. Adibi testified, that on July 15, 2007 she received the contingency release from respondent on behalf of Sean and Susan. The deadline date for close of escrow was August 2, 2007. Ms. Adibi later became aware that Henderson had difficulty obtaining a loan. Ms. Adibi was aware that Sean and Susan would lose \$25,000 to her client and testified, "But I needed to fulfill my duties to my client."

Keith Henderson's Testimony

8. Keith Henderson received his real estate license in 2006. From 2006 to 2007, he sold one residence. In 2007, he made an offer on the West Fall property. He testified that he had been pre-qualified, but not pre-approved, for a mortgage loan at the time the offer was made. On July 9, 2007, escrow opened. From July 9 to 13, 2007, Henderson filled out stated income documents for a loan with Great Western Mortgage and discovered his FICO score was low. On July 20, 2007, Countrywide Financial began working on his loan to see if they could find a subprime loan based on his low FICO. On July 24, 2007, he continued to shop for a loan with Fair Home Lending. On July 31, 2007, Henderson discovered that Countrywide denied his loan application. On August 1, 2007, Henderson informed the sellers, "Because of the subprime loan crash, I was not able to qualify, and therefore must cancel escrow."

On July 31, 2007, Henderson signed two separate cancellations of the contract. One cancellation document stated that the contract was cancelled by "Mutual Agreement." (Box F was checked off on the cancellation of the contract.) However, Henderson signed a second

cancellation of the contract which stated the contract was cancelled based on paragraph 2 I of the Agreement. (Box E was checked off on the second cancellation of the contract.) Henderson said he was surprised he signed two different cancellation forms with two different reasons for the cancellation. Henderson testified that he did not recall any conversations he had with Ms. Benjamin. Henderson testified that on August 2, 2007, respondent told Henderson that his client's contingencies were removed and there was a "substantial loss"

Henderson knew respondent professionally, but never met him "face to face." He testified, "I never told anyone I had a loan, only a letter of pre-qualification . . . [O]n July 13, 2007, I don't believe I said to Mr. Churchill that I had a loan." When cross-examined, Henderson testified, "I see some mistakes were made on my behalf."

Henderson did not appear forthright in his testimony. He hesitated with his responses and appeared surprised by the existence of two documents submitted that were signed by him. He could not provide a sufficient explanation as to why he prepared two separate contract cancellations on July 31, 2007 regarding the West Falls property with two different reasons for the cancellation. Overall, Henderson was a novice real estate broker in 2007 with only one completed real estate transaction. He admitted that he made some mistakes.

Kevin Charles Churchill's Testimony

9. Respondent graduated from San Diego State University in 1990. From 1996 to 1999, he worked at Century 21 Realty in a mentoring program under the supervision of a real estate broker. From 1999 to 2003, he worked as a sales associate at One Source Realty. From 2003 to the present, he has been the owner and real estate broker of Churchill Real Estate Group. He devotes full time to residential sales. Respondent has never had a prior complaint against him or any prior disciplinary action against him or his corporation. Ms. Benjamin has been his transaction coordinator for the past ten years. He testified that it was his custom and practice to have his clients read the liquidated damage clause and to ask him any questions they may have.

Sean and Susan, respondent's clients, submitted an offer on Frankfort before West Fall sold. Respondent told his clients that he would not release their contingency until Henderson released his loan contingency. Respondent testified that at the time he made this statement, he believed it to be true and intended to carry out the promise. The contingency on the West Fall property was required to be removed by July 13, 2007.

On Friday July 13, 2007, respondent spoke on the phone with Henderson. Respondent testified, "I asked Henderson why his release (of Henderson's loan contingency) was not in my fax machine." Henderson replied that he would send it.

On July 13, 2007, respondent asked Ms. Benjamin to fax Sean and Susan the release of contingency and leave it in the office in-box. Respondent testified that he asked his

assistant to get the signed release of contingency because, "I was showing property and was not sure I would get back before 5 p.m." Respondent took full responsibility for Ms. Benjamin's conduct as she worked on his behalf and at his direction.

On Sunday July 15, 2007, between 10:00 a.m. and 11:00 a.m., respondent called Henderson to ask where was the signed release of his loan contingency. Respondent testified that Henderson told him, "I'll have it over to you today."

Respondent testified that on July 15, 2007, between 12:00 p.m. and 1 p.m., Henderson told him that he (Henderson) had difficulty "getting the fax machine to work." Respondent testified, "I trusted a fellow colleague."

Respondent testified that he did not receive consent or authority from his clients, Sean and Susan, to submit the release of their contingency. Respondent, however, submitted the release.

Respondent testified, "I was not expecting to be misled by Henderson." Respondent testified that he understood that he breached his fiduciary duty to his clients and testified, "We wouldn't be here today otherwise."

Respondent was poised, articulate, forthright, and answered questions without hesitation. He appeared pained and remorseful when he discussed the issue of his breach of the fiduciary duty owed to his client. He repeatedly testified that he would not have relied on Henderson's representation that he would sign and fax his contingency release if it were not for the fact that he was a fellow real estate colleague.

Evaluation

10. Respondent is a sixteen year licensed California real estate broker with no prior discipline or accusations. Respondent's testimony was supported by the documentation and investigative reports. Respondent candidly admitted at the administrative hearing that his conduct demonstrated a breach of his fiduciary duty to his clients when he submitted the release of contingency without their consent or authority. Respondent's misplaced trust in a fellow colleague subjected his clients to a significant risk, and his client's suffered the loss of their earnest money totaling \$25,000. Respondent took responsibility for his actions and did not deflect blame on his office personnel.

The evidence demonstrated that, at the time respondent made the representation to his clients that he would not release their signed Removal of Contingencies until he received Henderson's signed Removal of Loan Contingency, respondent intended to keep that promise. Only later, under a mistaken belief created in part by Henderson, did respondent send the Removal of Contingencies in violation of his fiduciary duty to his clients. Respondent's clients suffered severe consequences (loss of \$25,000 in earnest money) as a result of respondent's conduct.

Promises Made in Good Faith Do Not Constitute Fraud

11. The evidence did not establish that respondent committed fraud. Respondent did not make a knowingly false statement when he represented to his clients that he would not submit the contingency removal without receipt of Henderson's signed contingency removal. At the time respondent made the statement to his clients regarding the contingency, respondent believed it to be true and intended to carry out the promise. Respondent improperly relied on Henderson's representations that he would obtain a loan and release his contingencies. Respondent had no malicious intent at the time he made his promise to his clients to not remove the contingencies. The evidence did not establish that respondent influenced, persuaded or induced his clients to sign the release of contingency, but instead attempted to have all signed transaction documents ready once Henderson performed. Respondent believed that Henderson was going to obtain a loan and perform his obligation under the contract. By having all the contingencies signed and ready to be submitted, respondent believed he was being diligent in preparing to close the deal. However, respondent submitted his client's contingency removal without their consent or authority, and his clients suffered a significant loss. Respondent's actions were performed in good faith. He had nothing to gain by allegedly lying to his clients and having them lose their earnest deposit. His failure to perform on a promise made in good faith does not constitute fraud.

Breach of Fiduciary Duty

12. A fiduciary duty imposes a duty to act in good faith and in the best interest of one's clients. Respondent testified that he relied on Henderson's representations because Henderson was a real estate broker. Respondent testified that he handled this matter differently than his other transactions because he afforded Henderson a professional courtesy. Respondent testified that he would never have released his client's contingency, but for the fact that Henderson was a real estate licensee who made continued assurances that he would get a loan. Respondent believed he acted in good faith on behalf of his clients' best interest when he submitted his clients' contingency release because he believed that his fellow real estate agent would obtain the loan as represented. Respondent never before this incident, or since, has released contingencies without client consent. Respondent's decision to release the contingency was a serious mistake that caused severe detriment to his professional reputation and to his client's best interest. Although respondent received no advantage for cancelling the transaction, his breach of his fiduciary duty to his client resulted in a significant loss of his client's earnest money.

Respondent knew, or should have known, that many factors are taken into consideration in obtaining a mortgage loan, especially during the subprime loan crisis. Respondent's duty to his client was paramount and he should have protected their interest. Ms. Adibi, who represented John and Laura, testified that she protected her clients' interest and demanded respondent's clients' earnest money when respondent's clients failed to perform. Respondent should have put his client's interest ahead of any professional courtesy he granted to Henderson. The respondent knew the consequences in this matter could result in significant monetary lost. For the past sixteen years, respondent has known the

consequences of releasing a client's contingency and has never before or since released the contingency without client consent or authority. Respondent's actions were ultimately not in the best interest of his clients, and he breached his fiduciary duty.

LEGAL CONCLUSIONS

Purpose of an Administrative Disciplinary Action

1. The object of an administrative proceeding aimed at disciplining a license is to protect the public. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

Burden and Standard of Proof

2. In an administrative disciplinary proceeding, the burden of proof is on the party asserting the affirmative. (*Small v. Smith, supra*, 16 Cal.App.3d at 457.)

3. In an action seeking to impose discipline against the holder of a professional license, the burden of proof is on complainant to establish the charging allegations by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.)

Applicable Statutes

4. Business and Professions Code section 10176, subdivision (a), provides in part that the commissioner may temporarily suspend or permanently revoke a real estate license where the licensee, in performing or attempting to perform any of the acts within the scope of this chapter, has been guilty of making any substantial misrepresentation.

5. Business and Professions Code section 10176, subdivision (b), provides in part that the commissioner may temporarily suspend or permanently revoke a real estate license where the licensee, in performing or attempting to perform any of the acts within the scope of this chapter, has been guilty of making any false promises of a character likely to influence, persuade, or induce.

6. Business and Professions Code section 10176, subdivision (i), provides in part that the commissioner may temporarily suspend or permanently revoke a real estate license where the licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

7. Business and Professions Code section 10176, subdivision (f), provides in part that the commissioner may temporarily suspend or permanently revoke a real estate license where the licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of claiming, demanding or receiving a fee, compensation, or

commission under any exclusive agreement authorizing or employing a licensee to perform any acts for compensation or commission where the agreement does not contain a definite, specified date of final and complete termination.

8. Business and Professions Code section 10176, subdivision (g), provides in part that the commissioner may temporarily suspend or permanently revoke a real estate license where the licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of the claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission, or profit or the failure of a licensee to reveal to the employer of the licensee the full amount of the licensee's compensation, or profit under any agreement authorizing or employing the licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of the agreement, whether evidenced by documents in an escrow or by any other or different procedure.

9. Business and Professions Code section 10176, subdivision (j), provides in part that the commissioner may temporarily suspend or permanently revoke a real estate license where the licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of obtaining the signature of a prospective purchaser to an agreement which provides that the prospective purchaser shall either transact the purchasing, leasing, renting, or exchanging of a business opportunity property through the broker obtaining the signature, or pay a compensation to the broker if the property is purchased, leased, rented, or exchanged without the broker first having obtained the written authorization of the owner of the property concerned to offer the property for sale, lease, exchange, or rent.

10. Business and Professions Code section 10177, subdivision (g), provides in part that the commissioner may suspend or revoke the license of a real estate licensee who has demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

11. Business and Professions Code section 10177, subdivision (j), provides in part that the commissioner may suspend or revoke the license of a real estate licensee who has engaged in conduct that constitutes fraud or dishonest dealings.

12. Business and Professions Code section 10177, subdivision (h), provides in part the commissioner may suspend or revoke the license of a real estate licensee who has failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

13. Business and Professions Code section 10159.2, provides in part that the officer designated by a corporate broker licensee pursuant to Section 10211 shall be

responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

14. Business and Professions Code section 10159.5, provides in part that every person applying for a license under this chapter who desires to have such license issued under a fictitious business name shall file with his application a certified copy of his fictitious business name statement filed with the county clerk pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7.

15. Business and Professions Code section 10131 subdivision (a), provides in part that 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 sell or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

16. Business and Professions Code section 10156.5 subdivision (a) provides in part that the commissioner may issue a restricted license to a person who has been licensed and has been found by the commissioner after a hearing to have violated provision of Division 6 of this code were such violation would justify the suspension or revocation of the license.

17. Business and Professions Code section 10156.7 provides in part that a restricted license issued pursuant to Business and Professions Code section 10156.5 does not confer any property right in the privileges to be exercised and the hold of a restricted license does not have the right to the renewal of the license. The commissioner may without hearing issue an order suspending the licensee's right to further exercise any privileges granted under a restricted license pending final determination made after formal hearing. The suspension shall not be lifted until the suspended licensee has submitted the required evidence of course completion and the commissioner has given written notice to the licensee of the lifting of the suspension.

Applicable Regulations

18. California Code of Regulations, title 10, section 2725, provides in part that a broker shall exercise reasonable supervision of the activities of his or her salespersons.

19. California Code of Regulations, title 10, section 2731, provides in part that a licensee shall not use a fictitious name in the conduct of any activity for which a license is required under the Real Estate Law unless the licensee is the holder of a license bearing the fictitious name.

Mitigation and Rehabilitation

20. Respondent's breach of his fiduciary duty was an isolated incident. There have been no prior disciplines in the sixteen years respondent has been licensed. Respondent took responsibility for his own actions and did not shift blame to his office personnel. Sufficient time has elapsed since the incident that would indicate that a recurrence is unlikely. Respondent has admitted to his mistake and is remorseful.

Costs of Investigation and Enforcement

21. No detailed accounting was submitted regarding the time spent in the investigation and enforcement of this matter. Complainant's counsel withdrew his request for the recovery of costs. No costs are awarded.

First Cause for Discipline

22. Cause for discipline does not exist, by clear and convincing evidence, pursuant to Business and Professions Code section 1176 subdivision (a) (making a substantial misrepresentation); subdivision (b) (making a false promise of a character likely to influence, persuade or induce); subdivision (i) (any other conduct, whether of the same or a different character than specified in this section which constitutes fraud or dishonest dealings); section 10177 subdivision (j) (any other conduct, whether of the same or a different character than specified in this section which constitutes fraud or dishonest dealings.) Respondent did not engage in fraudulent activity. Respondent did not make a knowingly false statement when he represented to his clients that he would not submit the contingency removal without receipt of Henderson's signed contingency removal. At the time respondent made the statement to his clients regarding the contingency, respondent believed it to be true and intended to carry out the promise. The mere failure to perform a promise made in good faith does not constitute fraud.

Cause for discipline does exist, by clear and convincing evidence, pursuant to Business and Professions Code section 10177 subdivision (g) (demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license). Respondent knew, or should have known, to put his client's interest ahead of any professional courtesy he granted to Henderson. The respondent knew, or should have known, the consequences and risks of releasing his client's contingency in this matter. As a result of respondent's negligence in breaching his fiduciary duty, his clients suffered a loss of their earnest money.

Second Cause for Discipline

23. Cause for discipline does not exist, by clear and convincing evidence, as to the second cause for discipline as no evidence was submitted at the administrative hearing to support the second cause for discipline. There was no evidence submitted that respondent

used a fictitious name in the conduct of any activity or failed to file an application for a fictitious business name. There was no evidence submitted to support that respondent claimed, demanded or received fee, compensation or commission under any exclusive agreement authorizing an employee to perform acts for compensation where agreement did not contain definite specified date of final and complete termination.

Third Cause for Discipline

24. Cause for discipline does not exist, by clear and convincing evidence, as to the third cause for discipline as no evidence was submitted at the administrative hearing to support respondent failed to supervise and control the activities of his employees. Respondent took full responsibility for his actions and never deflected blame on his staff. Respondent sent the released contingencies. There was no evidence to suggest that respondent failed to exercise supervision of his employees.

In this case, it is appropriate to permit the respondent to apply for an unrestricted license pursuant to Business and Professions Code sections 10156.5 and 10156.7. Although generally respondent would 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, in this matter a one year license restriction is appropriate based on respondent's truly substantial progress toward rehabilitation. There have been no prior disciplines in the sixteen years respondent has been licensed. Respondent took responsibility for his own actions and did not shift blame to his office personnel. Sufficient time has elapsed since the incident that would indicate that a recurrence is unlikely. Respondent has admitted to his mistake and is remorseful. A one year restricted license is appropriate with specific terms and conditions.

ORDERS

All licenses and licensing rights of Respondent, Kevin Charles Churchill, and The Churchill Real Estate Group, Inc., under the Real Estate Law are revoked; provided, however, a **restricted** real estate broker license shall be issued to Respondents pursuant to Business and Profession Code section 10156.5 subdivision (a), if Respondents make an application and pay 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 Respondents 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, Kevin Charles Churchill, 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 Respondents 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. Respondents 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 one year has elapsed from the effective date of this Decision.

4. Respondent, Kevin Charles Churchill, 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.

5. Respondent, Kevin Charles Churchill, shall, within nine months from the effective date of this Decision, complete a course regarding fiduciary duties. The course shall be not less than 20 hours. Respondent shall obtain prior approval from the Department before enrolling in the course. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has successfully completed the course.

DATED: January 23, 2013


CARLA NASOFF
Administrative Law Judge
Office of Administrative Hearings