

FILED
FEB 27 2012

DEPARTMENT OF REAL ESTATE
By R. Mer

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of	)	
...	)	NO. H-4197 SD
RYAN EVERETT McGREGOR,	)	
	)	OAH NO. 2011060660
Respondent.	)	
_____	)	

DECISION

The Proposed Decision dated January 25, 2012, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime, but also grants the right to a restricted real estate salesperson license to respondent.

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

This Decision shall become effective at 12 o'clock noon on MAR 19 2012

IT IS SO ORDERED 2/27/12

BARBARA J. BIGBY
Acting Real Estate Commissioner

Barbara J. Bigby

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

RYAN EVERETT McGREGOR,

Respondent.

Case No. H-4197 SD

OAH No. 2011060660

PROPOSED DECISION

Agustin F. Lopez II, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 2, 2011, in San Diego, California.

Annette E. Ferrante, Counsel, represented complainant Joseph Aiu, a Deputy Real Estate Commissioner, Department of Real Estate, State of California (Department).

Ryan E. McGregor (Respondent) appeared and was present throughout the administrative hearing.

A. David Mongan, Esq., appeared and represented respondent throughout the administrative hearing.

On December 2, 2011, the administrative record was opened; documentary and testimonial evidence was received and argued.

The administrative hearing record was held open until December 23, 2011, to provide complainant with an opportunity to respond to respondent's hearing brief.

On December 23, 2011, the matter was submitted.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 25, 2005, respondent was licensed as a real estate salesperson. Respondent's license expired on May 24, 2009 and was subsequently renewed on February 27, 2010. Respondent's license expires February 26, 2014.

2. On May 20, 2011, complainant served respondent with the accusation containing the allegations in support of discipline in this matter.

3. On June 6, 2011, respondent filed his Notice of Defense contesting the allegations in the accusation.

4. On June 23, 2011, respondent was served with the Notice of Hearing for this proceeding.

5. Sufficient notice was provided by the Department to comply with constitutional due process requirements.

Basis for Discipline

6. On September 23, 2009, San Diego County Sheriff Deputies arrested respondent at his home in Santee, California, after responding to domestic violence call.

7. On October 1, 2010, respondent pled guilty to two counts of misdemeanor battery in violation of Penal Code section 242 before the San Diego County Superior Court. On item number 5 of respondent's criminal plea form, he stated "I admit that on the dates charged, I ☐ did use unlawful force or violence on another person."

8. On September 29, 2010, respondent submitted a Department of Real Estate Confidential Interview Information Statement (CIIS) where he described his background and provided specific detail regarding his convictions. Specifically, on the Conviction Detail Report (CDR) attachment to the CIIS respondent stated the following in the "details of crime" section of the CDR.

I hit my wife and stepdaughter, during an argument in our apartment. I committed the crime, my wife and stepdaughter were the victims. . . My wife and I had an argument that became a yelling match. She got up from the couch and stood over me, poking her finger at my face, yelling at me. I felt trapped. So I hit her. As I stood up she swung at me so I swung back, her then 17 year old daughter jumped on me from behind. They pinned me on the couch, I got them off of me and left the apartment.

9. Respondent provided more detail in the "explanation of crime" section directly following the "details of crime" section of the CDR¹ as follows.

¹ Also contained in the CIIS was the following notation related to an employment where he was dismissed in October 2007. Respondent stated, "I was dismissed from Barona. A co-worker and I were in a fight, and even though he provoked it and beat me up Barona policy terminated both of us."

My wife and I were having a verbal disagreement which was ranging on various topics that had been happening in the house. We were sitting on the couch and the disagreement had escalated to yelling. She got up and stood over me, yelling at me and poking her finger at my face. I felt trapped, and hit her. As I stood up she swung at me, so I swung back. . .

10. San Diego County Sheriff's Deputy, Stephen Walton, noted in the police report of the incident that he observed the injuries to the victims. Specifically, he noted "[respondent's wife] complained of pain to the back of her head from hitting the coffee table. [blank] complained of head pain and blurry vision. . . . Lakeside Fire Department transported [the victims] to Grossmont Hospital. . . . [Respondent's wife] had head pain and redness to her face. [blank] had head pain, blurry vision, and swelling above her left eye. Both were transported to the hospital."

11. The superior court imposed a three year suspended sentence, required respondent to pay \$714 in fines, imposed a restraining order for the benefit of the victims, and required him to comply with a domestic violence rehabilitation program (DVRP).

12. Respondent testified and explained his understanding of the actions constituting the battery on his wife. He stated the battery was an "open handed slap in the face," and that he did not recall punching his wife. In mitigation, he claimed his actions were in self-defense because his wife and stepdaughter had attacked him. He also confirmed that his wife and stepdaughter were taken to the hospital.

13. He further testified he has "roughly one year to go" with respect to completing his probation. He has paid all fines and fees, complied with the DVRP, and the restraining order has been lifted.

14. Complainant argued the foregoing comprises grounds for discipline in that it represents both a conviction and an act that is substantially related to the qualifications, functions, or duties of a licensee in accordance with California Code of Regulations, title 10, section 2910, subdivision (a)(8).

Rehabilitation/Mitigation

15. Respondent testified he is still married to his wife and that she requested the restraining order be lifted.

16. Respondent further indicated in the CIIS, "I have learned from my mistake and am making positive efforts in my life." Likewise, in the CDR he stated, ". . . I am learning to identify potentially problematic situations and work through them in a positive way." Specifically, respondent stated that he handles problematic situations by "staying calm, understanding when you need more time." He further stated he has been seeing a counselor to help with his marriage once a week for the two weeks prior to this hearing.

Supplemental Briefs

17. Respondent's attorney, Mr. Mongan, argued at the hearing and in respondent's brief that discipline was not appropriate because "simple battery," prohibited by Penal Code section 242, is not within the Department of Real Estate's list of crimes identified as substantially related to the qualifications, functions, or duties of a licensee. Specifically, that the conviction of simple battery does not contain an "intent" element and therefore the complainant cannot rely upon the conviction as a basis for proving respondent had the "intent" to do substantial injury to his wife and stepdaughter. (*Donaldson v. Department of Real Estate of State of Cal.* (2005) 134 Cal.App.4th 948.) Accordingly, despite multiple opportunities, Mr. Mongan, elected not to introduce more evidence relating to rehabilitation.

18. Mr. Mongan also objected to the victim statements in the police report as hearsay.

19. In complainant's Responsive Brief, the commissioner argued the following.

A battery is any willful and unlawful use of force or violence upon the person of another. Penal Code § 242. The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or injure another, or to acquire any advantage. Penal Code § 7. Therefore, Respondent had a purpose or willingness to use force or violence upon two individuals.

20. Complainant went on to argue, "It is the Department's position that any time there is a blow to the head rendering visible injuries there is a danger (threat) of inflicting substantial injury upon that person."

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.)

Applicable Statutes

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

A board may suspend or 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. A conviction within the meaning of this section means a plea . . . of guilty. . . .

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

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

. . .

(b) Entered a plea of guilty or nolo contendere to, 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, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information. . . .

Substantial Relationship

4. 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.

5. Licensing authorities do not enjoy unfettered discretion to determine on a case-by-case basis whether a given conviction is substantially related to the relevant professional qualifications. Business and Professions Code section 481 requires each licensing agency to develop criteria to aid it to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates. In response to this directive the Department adopted California Code of Regulations, title 10, section 2910. (*Donaldson v. Department of Real Estate of State of Cal.* (2005) 134 Cal.App.4th 948, 955-956.)

6. California Code of Regulations, title 10, section 2910 provides in part:

(a) When considering whether a license should be denied,

suspended or revoked on the basis of the conviction of a crime, or on the basis of an act described in Section 480(a)(2) or 480(a)(3) of the Code, 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 480 and 490 of the Code if it involves:

...

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or *with the intent or threat of doing substantial injury to the person or property of another*. (Emphasis added.)

7. Courts defer to an agency's interpretation of a regulation involving its area of expertise unless the interpretation flies in the face of the clear language and purpose of the interpretive provision. General rules of construction require a court to give meaning to each word and phrase and to avoid a construction that makes any part of a regulation superfluous. The Commissioner's principal responsibility is to enforce the licensing laws to achieve the maximum protection for the purchasers of real property and those persons dealing with real estate licensees. An overly restrictive construction of section 2910 would not provide maximum protection. (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 464-465.)

Rehabilitation

8. 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:

(a) Considering the denial of a license by the board under Section 480; or

(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.

9. California Code of Regulations, title 10, section 2912 sets 13 distinct criteria used by the Department to determine rehabilitation as required by Business and Professions Code section 482. The following is the pertinent criteria in this case:

The following criteria have been developed by the department pursuant to Section 482(b) of the Business and Professions Code for the purpose of evaluating the rehabilitation of a licensee against whom an administrative disciplinary

proceeding for revocation or suspension of the license has been initiated on account of a crime committed by the licensee.

(a) The passage of not less than two years from the most recent criminal conviction that is "substantially related" to the qualifications, functions or duties of a licensee of the department. (A longer period will be required if there is a history of criminal convictions or acts substantially related to the qualifications, functions or duties of a licensee of the department.)

...

(c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.

...

(e) Successful completion or early discharge from probation or parole.

...

(g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.

...

(j) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction.

(k) Completion of, or sustained enrollment in, formal educational or vocational training courses for economic self-improvement.

(l) Significant and conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(m) Change in attitude from that which existed at the time of the commission of the criminal acts in question as evidenced by any or all of the following:

(1) Testimony of applicant.

(2) Evidence from family members, friends or other

persons familiar with the licensee's previous conduct and with subsequent attitudes and behavioral patterns.

(3) Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.

(4) Evidence from psychiatrists, clinical psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances

(5) Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.

10. The amount of evidence required to establish 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 is presented if by sustained conduct over an extended period of time showing rehabilitation and fitness to practice. (*In re Menna* (1995) 11 Cal.4th 975, 987, 991.) Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of an applicant's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that an applicant for a professional license did not commit additional crimes while in prison or while on parole. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

11. In disciplinary administrative proceedings, the burden of proof is upon the party asserting the affirmative. Guilt must be established to a reasonable certainty, and it cannot be based on surmise or conjecture, suspicion or theoretical conclusions, or uncorroborated hearsay. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) The proper standard of proof in an administrative hearing to revoke or suspend a professional license is clear and convincing proof to a reasonable certainty and not a mere preponderance of the evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

Hearsay in Administrative Hearings

12. Hearsay evidence that would be admissible over objection in civil court is equally admissible in administrative proceedings. (*Stearns v. Fair Employment Practice Commission* (1971) 6 Cal.3d 205, 210.) Government Code section 115113, subdivision (d), makes hearsay evidence admissible in administrative hearings when "supplementing or explaining other evidence."

13. Government Code section 115113, subdivision (c), holds that as with other evidence under the California Administrative Practices Act, hearsay evidence must be relevant and the sort of evidence a responsible person would rely on in the conduct of serious affairs. A police report, even if unsworn, is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (*Lake v. Reed* (1997) 16 Cal.4th 448, 460-461.)

Evaluation

14. Respondent's argument that there is no grounds for discipline because simple battery is not an identified act or crime that is substantially related to the qualifications, functions or duties of a licensee is unpersuasive. Respondent's over reliance upon the holding of *Donaldson v. Department of Real Estate of State of Cal.* (2005) 134 Cal.App.4th 948 is likewise unpersuasive.

15. *Donaldson* involved an attempt by the Real Estate Commissioner to impose discipline upon a licensee based upon a conviction for sex with a minor in violation of Penal Code section 261.5, subdivision (c). The Commissioner argued that the licensee's conviction was substantially related to the qualifications, functions and duties of a licensee because it qualified as one of the crimes or acts listed in California Code of Regulations, title 10, Section 2910, subdivision (a)(5). Which at the time, read as follows:

(a) When considering whether a license should be denied, suspended, or revoked on the basis of the conviction of a crime, . . . the crime . . . shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of the Department within the meaning of sections 480 and 490 of the Code if it involves:

...

(5) Sexually related conduct causing physical harm or emotional distress to a person who is an observer or non-consenting participant in the conduct.

The Commissioner in the *Donaldson* case argued that the victim was a minor consequently she could not have legally consented and therefore was a "non-consenting" participant. The victim did not testify, nor was other evidence of consent presented.

The licensee in the *Donaldson* case counter-argued that the conviction for having sex with a minor did not meet the Department's criteria for a crime or act that was substantially related because there was a complete absence of evidence to support the claim the victim was a "non-consenting" participant. He argued, in essence, that the conviction for having sex with a minor (Penal Code § 261.5) does not contain a consent element, as a result the conviction alone could not be used as a substitute for independent evidence of non-consent. Additionally, the licensee highlighted the fact the only evidence relating to "consent" was the

licensee's own testimony that he believed the victim did not object and that she participated consensually. The court stated as follows:

... because consent could not have been litigated in the criminal case, the judgment in that case is silent, and cannot be made to speak, on that question. . . . In contrast, consent was highly relevant to the disciplinary charges against licensee because, under the plain terms of section 2910(a)(5), the absence of consent was a necessary element of those charges.

(*Donaldson v. Department of Real Estate of State of Cal.* (2005) 134 Cal.App.4th 948, 959-960.)

16. In the present instance, respondent's convictions are substantially related to the qualifications, functions and duties of a licensee in that they constituted a battery against someone with whom he had a relationship of trust and demonstrate a propensity to resort to violence in stressful situations. Real estate sales involve both relationships of trust and stressful conditions.

17. Respondent argues by analogy to *Donaldson* claiming that because a conviction for simple battery (Penal Code § 242) does not contain an "intent" element there is no basis for discipline here. This argument is flawed in that, unlike the absence of evidence presented in *Donaldson*, evidence independent of the conviction was presented to support the element of intent here.

Specifically, respondent admitted when he submitted his CIIS and CDR that he "hit" his wife and stepdaughter within the context of a verbal argument that had escalated to domestic violence. He further said, "she swung at me so I swung back." While testifying, he claimed to have "open-handed" slapped his wife and daughter instead of "hitting" them. Even absent the Commissioner's interpretation and argument that willful action suffices for purposes of satisfying the "intent" element of Section 2910 subdivision (a)(8), sufficient evidence exists by respondent's own admissions to support a finding that he intended to do his wife and stepdaughter substantial injury.

Respondent's distinction between an open-handed slap and a "hit" is immaterial, both can qualify as sufficient basis for intentional conduct for purposes of Section 2910, subdivision (a)(8), because he intended to "hit" or "slap" the victims. This was not an accident, nor did he prove he had no other option but to strike the victims.

Both acts have the potential to substantially injure another person. The responding Deputy observed "redness" to his wife's face and swelling above his stepdaughter's left eye. Even if the commissioner's position regarding injuries to the head is ignored, respondent did indeed cause injuries to the victim's head. Which by its very nature, allows for substantial injury given all the sensitive biological effects trauma in that area can cause. Here, such effects were caused because of the resulting redness and swelling suffered by the victims.

Consequently, the blows were done with sufficient force and volition to satisfy both the intent and substantial injury elements.

18. As a result, the complainant has provided sufficient evidence to support discipline in this matter.

19. Accordingly, the next inquiry is whether respondent provided sufficient evidence of rehabilitation. Respondent demonstrated some rehabilitation in that he has complied with the DVRP program, paid the fines imposed, and is seeking counseling for his marriage. However, the amount of evidence suggesting rehabilitation was not sufficient to eliminate the need for some discipline. Respondent's convictions are relatively recent and he is still on probation for another year. Likewise, there is no evidence of expungement of the convictions given their recent nature. Respondent also did not provide evidence regarding community service.

20. Consequently, discipline is justified for the protection of the public.

ORDER

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

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

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

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

4. Respondent shall submit with any application for license under an employing

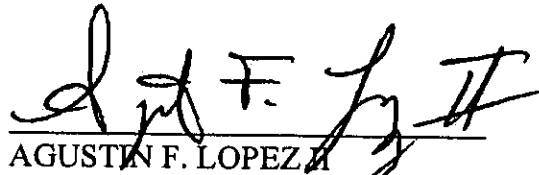
broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

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

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

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

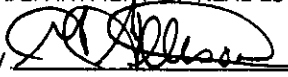
DATED: January 25, 2012


AGUSTIN F. LOPEZ
Administrative Law Judge
Office of Administrative Hearings

FILED

May 20, 2011

DEPARTMENT OF REAL ESTATE

By 

1 ANNETTE E. FERRANTE, Counsel (SBN 258842)
2 Department of Real Estate
3 P. O. Box 187007
Sacramento, CA 95818-7007

4 Telephone: (916) 227-0789
-or- (916) 227-0788 (Direct)
5 Fax: (916) 227-9458

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7
8 BEFORE THE
9 DEPARTMENT OF REAL ESTATE
10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of)
13 RYAN EVERETT McGREGOR,) H-4197 SD
14) ACCUSATION
15 Respondent.)

16 The Complainant, JOSEPH AIU, in his official capacity as a Deputy Real Estate
17 Commissioner of the State of California, for cause of Accusation against RYAN EVERETT
18 McGREGOR (hereinafter "Respondent"), is informed and alleges as follows:

19 1

20 Respondent is presently licensed and/or has license rights under the Real Estate
21 Law, Part 1 of Division 4 of the Business and Professions Code (hereinafter "the Code") as a
22 real estate salesperson.

23 2

24 On or about October 1, 2010, in the Superior Court of the State of California,
25 County of San Diego, Case No. C294643, Respondent was convicted of two counts of violation
26 of Section 242 of the California Penal Code (Battery), misdemeanors, and crimes which bear a
27

1 substantial relationship under Section 2910, Title 10, California Code of Regulations, to the
2 qualifications, functions or duties of a real estate licensee.

3 3

4 The facts alleged in Paragraph 2, above, constitute cause under Sections 490
5 (Conviction of Crime) and 10177(b) (Conviction of Crime Substantially Related to
6 Qualifications, Functions or Duties of Real Estate Licensee) of the Code for the suspension or
7 revocation of all licenses and license rights of Respondent under the Real Estate Law.

8 WHEREFORE, Complainant prays that a hearing be conducted on the allegations
9 of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary
10 action against all licenses and license rights of Respondent under the Code, and for such other
11 and further relief as may be proper under the provisions of law.

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15 
16 JOSEPH AIU
Deputy Real Estate Commissioner

17 Dated at San Diego, California,
18 this 14 day of May, 2011.