

FILED

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DEPT. OF REAL ESTATE

By

Adalberto

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation against

DRE No. H-05088 SD

MICHAEL J. ZAU, REALSMART, INC., and
BENHAM BRASHER VAN GAASBEEK, individually
and as designated officer for Realsmart, Inc.,

ACCUSATION

Respondents.

The Complainant, Veronica Kilpatrick, a Supervising Special Investigator for the Department of Real Estate¹ ("Department") of the State of California, makes this Accusation in her official capacity for cause of Accusation against MICHAEL J. ZAU, REALSMART, INC., and BENHAM BRASHER VAN GAASBEEK, individually, and as designated officer for Realsmart, Inc. (collectively "Respondents"), is informed and alleges as follows:

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¹ Between July 1, 2013 and July 1, 2018, the Department of Real Estate operated as the Bureau of Real Estate under the Department of Consumer Affairs.

1 1. All references to the "Code" are to the California Business and Professions Code
2 and all references to "Regulations" are to the Regulations of the Real Estate Commissioner,
3 Title 10, Chapter 6, California Code of Regulations.

4 2. Respondents are presently licensed and/or have license rights under the Real
5 Estate Law (Part 1 of Division 4 of the California Business and Professions Code).

6 3. From January 21, 2000, through the present, Respondent MICHAEL J. ZAU
7 ("ZAU") has been licensed by the Department as a real estate salesperson, License ID
8 01262164.

9 3. From September 29, 2006, through the present, Respondent REALSMART,
10 INC. ("RI") has been licensed by the Department as a corporate real estate broker, License ID
11 01770057.

12 4. RI is licensed to do business as "LOANsmart", "MANAGEsmart", and
13 "REALsmart".

14 5. Respondent BENHAM BRASHER VAN GAASBEEK ("VAN GAASBEEK")
15 is currently licensed by the Department as the designated officer for RI.

16 6. From August 16, 2006, through August 15, 2014, Respondent VAN
17 GAASBEEK was licensed by the Department as a real estate broker, License ID 01476996.

18 7. VAN GASBEEK's real estate broker license expired on August 15, 2014. The
19 Department retains jurisdiction pursuant to Code section 10103.

20 8. VAN GASBEEK was also formerly licensed as a real estate salesperson from
21 February 9, 2005 through August 15, 2006.

22 9. From on or about September 26, 2009, through the present, Respondent VAN
23 GAASBEEK has been licensed as the designated officer for Respondent RI, pursuant to section
24 10211 of the Code. As RI's designated officer, Respondent VAN GAASBEEK was, at all times

1 mentioned herein, responsible pursuant to Section 10159.2 of the Code for the supervision of
2 the activities of the officers, agents, real estate licensees, and employees of Respondent RI for
3 which a license is required.

4 10. Whenever reference is made in an allegation in this Accusation to an act or
5 omission of Respondent RI, such allegation shall be deemed to mean that the officers, directors,
6 employees, agents and/or real estate licensees employed by or associated with Respondent RI
7 committed such act or omission while engaged in the furtherance of the business or operations
8 of such corporate respondent and while acting within the course and scope of their authority and
9 employment.

10 CAUSE OF ACCUSATION

11 11. From February 11, 2014 through November 1, 2017, Respondent ZAU's real
12 estate license status was in a non-working status or "NBA," meaning "no broker affiliation."
13 During this period, ZAU could not perform acts for which a real estate license was required in
14 California.

15 12. On or about September 19, 2017, Respondent ZAU contacted P.M.² to solicit a
16 business opportunity. ZAU inquired whether P.M. would be interested in funding a mortgage
17 loan as an investment.

18 13. P.M. expressed interest in funding the private business purpose loan to be
19 secured by a trust deed for real property located at 3253 McKinley Street, San Diego,
20 California, a single family residence.

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24 ² Initials are used in place of individuals' full names to protect their privacy. Documents containing individuals' full names will be provided during the discovery phase of this case to Respondent(s) and/or their attorneys, after service of a timely and proper request for discovery on Complainant's counsel.

1 14. On or about September 18, 2017, a Business Purpose/Commercial Loan
2 Application for borrower Florate, Ltd. was signed by L.D.Y., acting on behalf of Florate, Ltd.
3 The loan amount was \$225,000. The loan originator's identifying information was left blank on
4 the loan application. The purpose of the loan was stated as: "cashout [sic] for home
5 improvements, pay property taxes."

6 15. On or about September 25, 2017, ZAU presented P.M. with a copy of the
7 proposed loan documents. P.M. found the documents to be incorrect and unacceptable for
8 various reasons, including, that the Business Purpose Certification indicated an incorrect
9 amount for the loan. The loan amount was incorrectly noted as \$200,000. P.M. also asked that
10 the Certification note that no part of the loan would be used for consumer purposes. The loan
11 documents indicated that RI was the broker although RI was unknown to P.M., who only dealt
12 with ZAU during the loan process.

13 16. ZAU promised P.M. that he would correct the loan documents. P.M. funded the
14 loan based on ZAU's promise to make the corrections to the documentation. P.M. wired
15 closing funds on September 26, 2017. The loan closed on September 26, 2017.

16 17. After the loan closed, P.M. did not receive the final loan documents, evidence of
17 insurance, or a refund check due to P.M.

18 18. After repeated requests for the documents and refund check, P.M. received the
19 loan documents on or about October 16, 2017. P.M. discovered that ZAU had not corrected the
20 loan documents as promised. P.M. still had not received proof of insurance, the Business
21 Purpose Certification form had not been corrected, and the language in the promissory note had
22 not been changed as P.M. had requested.

23 19. After close of escrow, ZAU received compensation of \$5,175 for the transaction.
24 RI received compensation of \$500 in connection with the loan.

1 20. According to Respondent VAN GAASBEEK, he discussed the transaction with
2 ZAU and was aware of ZAU's involvement with the transaction in September of 2017. VAN
3 GAASBEEK claims that he failed to sign the loan documents on behalf of RI as the broker
4 because VAN GASBEEK's last name was misspelled on the loan documents. VAN
5 GAASBEEK also acknowledged that he was aware that ZAU was not licensed under RI, as
6 ZAU's responsible broker, at the time of the transaction.

7 21. On November 2, 2017, Respondents ZAU and VAN GAASBEEK notified the
8 Department that ZAU's employment with RI commenced on that same day.

9 22. ZAU negotiated the loan and performed services for P.M., the lender, in
10 connection to the loan, which are activities that require a real estate broker license pursuant
11 Code section 10131, subdivision (d). ZAU received compensation for said activities. ZAU's
12 conduct, acts, and or omissions are in violation of Code sections 10130 and 10137, and
13 constitute cause for the suspension or revocation of the license and license rights of Respondent
14 ZAU under the following provisions of Code section 10177, subdivisions (d) and/or (g).

15 23. The conduct, acts, and/or omissions of Respondents ZAU and RI, including, but
16 not limited to, allowing ZAU to receive compensation for activities requiring a license while
17 ZAU's license was in NBA status, failing to make the corrections to the loan documents as
18 promised to P.M., failure to timely deliver the loan documents and refund check to P.M., and
19 failing to fully execute loan documents including escrow instructions and the loan application,
20 among others, constitutes cause for the suspension or revocation of the license and license rights
21 of Respondents ZAU and RI under the provisions of Code section 10176, subdivision (a), for
22 making any substantial misrepresentation; Code section 10176, subdivision (i), or Code section
23 10177, subdivision (j), for fraud or dishonest dealing; and/or Code section 10177, subdivision
24 (g), for negligence.

24. The conduct, acts and/or omissions of Respondents VAN GAASBEEK and RI, in allowing ZAU and RI to violate the Real Estate Law, as set forth above, constitutes a failure by Respondent VAN GAASBEEK to exercise the supervision and control over the activities of ZAU and RI, as required by Code section 10159.2, and constitutes cause to suspend or revoke the real estate license and license rights of Respondent VAN GASBEEK pursuant to Regulation 2725 and Code section 10177, subdivisions (h), (d), and/or (g).

Statutory Provisions

25. Code section 10130 provides:

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

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

26. Code section 10131 provides:

“A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

- (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.
- (b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.
- (c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.
- (d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection

1 with loans secured directly or collaterally by liens on real property or on a
2 business opportunity.

- 3 (e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to
4 exchange a real property sales contract, or a promissory note secured
5 directly or collaterally by a lien on real property or on a business
6 opportunity, and performs services for the holders thereof."

7 27. Code section 10137 provides:

8 "It is unlawful for any licensed real estate broker to retain, compensate,
9 directly or indirectly, any person for performing any of the acts within the scope
10 of this chapter who is not a licensed real estate broker, or a real estate salesperson
11 licensed under the responsible broker retaining or compensating him or her, or to
12 retain or compensate, directly or indirectly, any licensee for engaging in any
13 activity for which a mortgage loan originator license endorsement is required, if
14 that licensee does not hold a mortgage loan originator license endorsement;
15 provided, however, that a licensed real estate broker may pay a commission to a
16 broker of another state.

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

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

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

28. Code section 10211 provides:

"If the licensee is a corporation, the license issued to it entitles one officer
thereof, on behalf of the corporation, to engage in the business of real estate
broker without the payment of any further fee, such officer to be designated in the
application of the corporation for a license. For each officer other than the officer
so designated, through whom it engages in the business of real estate broker, the
appropriate original or renewal fee is to be paid in addition to the fee paid by the
corporation."

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1 29. Code section 10159.2 provides, in pertinent part, as follows:

2 “(a) The officer designated by a corporate broker licensee pursuant to
3 section 10211 shall be responsible for the supervision and control of the activities
4 conducted on behalf of the corporation by its officers and employees as necessary
5 to secure full compliance with the provisions of this division, including the
6 supervision of salespersons licensed to the corporation in the performance of acts
7 for which a real estate license is required.”

8 30. Regulation 2725 provides:

9 “A broker shall exercise reasonable supervision over the activities of his or
10 her salespersons. Reasonable supervision includes, as appropriate, the establishment
11 of policies, rules, procedures and systems to review, oversee, inspect and manage:

- 12 (a) Transactions requiring a real estate license.
13 (b) Documents which may have a material effect upon the rights or
14 obligations of a party to the transaction.
15 (c) Filing, storage and maintenance of such documents.
16 (d) The handling of trust funds.
17 (e) Advertising of any service for which a license is required.
18 (f) Familiarizing salespersons with the requirements of federal and state laws
19 relating to the prohibition of discrimination.
20 (g) Regular and consistent reports of licensed activities of salespersons.

21 The form and extent of such policies, rules, procedures and systems shall take into
22 consideration the number of salespersons employed and the number and location of
23 branch offices.

24 A broker shall establish a system for monitoring compliance with such policies,
25 rules, procedures and systems. A broker may use the services of brokers and
26 salespersons to assist in administering the provisions of this section so long as the
27 broker does not relinquish overall responsibility for supervision of the acts of
28 salespersons licensed to the broker.”

29 31. Code section 10176 provides, in pertinent part, as follows:

30 “The commissioner may, upon his or her own motion, and shall, upon the
31 verified complaint in writing of any person, investigate the actions of any person
32 engaged in the business or acting in the capacity of a real estate licensee within
33 this state, and he or she may temporarily suspend or permanently revoke a real
34 estate license at any time where the licensee, while a real estate licensee, in
35 performing or attempting to perform any of the acts within the scope of this
36 chapter has been guilty of any of the following:

- 37 (a) Making any substantial misrepresentation.
38 (i) Any other conduct whether of the same or a different character
39 than specified in this section, which constitutes fraud or dishonest
40 dealing.”

32. Code section 10177 provides, in pertinent part, as follows:

“The commissioner may suspend or revoke the license of a real estate licensee, delay the renewal of a license of a real estate licensee, or deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, delay the renewal of a license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation’s stock has done any of the following:

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

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

(h) As a broker licensee, 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.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing.”

Investigation and Enforcement Costs

33. Code section 10106 provides, in pertinent part, that in any order issued in resolution of a disciplinary proceeding before the Department of Real Estate, the Commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

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

7 Dated at San Diego, California this 14 day of August, 2019.

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10 VERONICA KILPATRICK
11 Supervising Special Investigator
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19 cc: Michael J. Zau
20 Realsmart, Inc.
21 Benham Brasher Van Gaasbeek
22 Sara Meadow Lypps
23 Veronica Kilpatrick
24 Sacto.