

FILED

OCT 06 2011

DEPARTMENT OF REAL ESTATE

By L. Frost

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Application of

ZAKI SIWAN SKARIA,

Respondent.

No. H-1663 FR

In the Matter of the Accusation of

ZAKI SIWAN SKARIA,

Respondent.

No. H-5132 SAC

ORDER DENYING UNRESTRICTED LICENSE  
BUT GRANTING RIGHT TO A RESTRICTED LICENSE

On July 1, 2004, a Decision was rendered in Case No. H-1663 FR denying Respondent's application for a real estate salesperson license, but granting Respondent the right to the issuance of a restricted real estate salesperson license. A restricted real estate salesperson license was issued to Respondent on August 30, 2004. On September 23, 2009, a Decision was rendered in Case No. H-5132 SAC revoking Respondent's restricted real estate salesperson license effective October 13, 2009.

On May 26, 2011, Respondent petitioned for reinstatement and the removal of the restrictions from said real estate salesperson license, and the Attorney General of the State of

1 California has been given notice of the filing of said petition.

2 The burden of proving rehabilitation rests with the petitioner (*Feinstein v. State*  
3 *Bar* (1952) 39 Cal. 2d 541). A petitioner is required to show greater proof of honesty and  
4 integrity than an applicant for first time licensure. The proof must be sufficient to overcome the  
5 prior adverse judgment on the applicant's character (*Tardiff v. State Bar* (1980) 27 Cal. 3d 395).

6 I have considered Respondent's petition and the evidence and arguments in  
7 support thereof. Respondent has failed to demonstrate to my satisfaction that Respondent has  
8 undergone sufficient rehabilitation to issue Respondent an unrestricted real estate salesperson  
9 license at this time.

10 The Department has developed criteria in Section 2911 of Title 10, California  
11 Code of Regulations (Regulations) to assist in evaluating the rehabilitation of an applicant for  
12 reinstatement of a license. Among the criteria relevant in this proceeding are:

13 Regulation 2911(a) The passage of not less than two years since the most recent  
14 criminal conviction or act of the applicant that is a basis to deny the departmental action sought.  
15 (A longer period will be required if there is a history of acts or conduct substantially related to  
16 the qualifications, functions or duties of a licensee of the department.)

17 Considering that Respondent was convicted of a DUI, or like offense, four times  
18 between 1990 and 2001; and that he was again convicted of a DUI in 2008, insufficient time has  
19 passed to demonstrate that Respondent has completely overcome his historic abuse of alcohol or  
20 drugs while driving a vehicle.

21 Regulation 2911(c) Expungement of criminal convictions resulting from immoral  
22 or antisocial acts.

23 No information has been provided that Respondent's convictions have been  
24 expunged.

25 I am satisfied, however, that it will not be against the public interest to issue a  
26 restricted real estate salesperson license to Respondent.

27 ///

1                   A restricted real estate salesperson license shall be issued to Respondent pursuant  
2 to Section 10156.5 of the Business and Professions Code, if Respondent satisfies the following  
3 conditions prior to and as a condition of obtaining a restricted real estate salesperson license  
4 within twelve (12) months from the date of this Order:

5                   1.     Submits a completed application and pays the fee for a real estate  
6 salesperson license within the 12 month period following the date of this Order; and

7                   2.     Submits proof that Respondent has completed the continuing education  
8 requirements for renewal of the license sought. The continuing education courses must be  
9 completed either (i) within the 12 month period preceding the filing of the completed  
10 application, or (ii) within the 12 month period following the date of this Order.

11                   The restricted license issued to Respondent shall be subject to all of the provisions  
12 of Section 10156.7 of the Business and Professions Code and to the following limitations,  
13 conditions and restrictions imposed under authority of Section 10156.6 of that Code:

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

18                   B.     The restricted license issued to Respondent may be suspended prior to  
19 hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner  
20 that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands  
21 Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted  
22 license.

23                   C.     Respondent shall not be eligible to apply for the issuance of an  
24 unrestricted real estate license nor the removal of any of the limitations, conditions or restrictions  
25 of a restricted license until two (2) years have elapsed from the date of the issuance of the  
26 restricted license to Respondent.

27     ///

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

5 1. That the employing broker has read the Decision of the Commissioner  
6 which granted the right to a restricted license; and

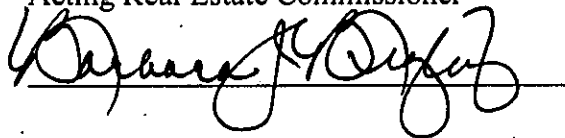
7 2. That the employing broker will exercise close supervision over the  
8 performance by the restricted licensee relating to activities for which a real estate license is  
9 required.

10 E. Respondent shall notify the Commissioner in writing within 72 hours of  
11 any arrest by sending a certified letter to the Commissioner at the Department of Real Estate,  
12 Post Office Box 187000, Sacramento, CA 95818-7000. The letter shall set forth the date of  
13 Respondent's arrest, the crime for which Respondent was arrested and the name and address of  
14 the arresting law enforcement agency. Respondent's failure to timely file written notice shall  
15 constitute an independent violation of the terms of the restricted license and shall be grounds for  
16 the suspension or revocation of that license.

17 This Order shall become effective at 12 o'clock noon on OCT 26 2011.

18 IT IS SO ORDERED 10/4/11

19 BARBARA J. BIGBY  
20 Acting Real Estate Commissioner

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FILED

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

SEP 23 2009

DEPARTMENT OF REAL ESTATE

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By R. Henry

In the Matter of the Accusation of

ZAKI SIWAN SKARIA,

Respondent.

NO. H-5132 SAC

OAH NO. 2009030661

DECISION

The Proposed Decision dated August 19, 2009, 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.

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

OCT 13 2009

IT IS SO ORDERED

9-23-09

JEFF DAVI  
Real Estate Commissioner

Barbara J. Bigby

BY: Barbara J. Bigby  
Chief Deputy Commissioner

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ZAKI SIWAN SKARIA,

Respondent..

Case No. H-5132 SAC

OAH No. 2009030661

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 30, 2009, in Sacramento, California.

Kenneth C. Espell, Counsel, represented Joe M. Carillo (complainant), a Deputy Real Estate Commissioner with the Department of Real Estate (Department).

Zaki Siwan Skaria (respondent) was present and was represented by Steven L. Simas, Attorney at Law.

Evidence was received on June 30, 2009. The record was left open so that respondent could submit a declaration, complainant could file an objection to the declaration, and both parties could file written closing arguments. On July 17, 2009, respondent filed a letter from Luky Maldonado, which was marked for identification as Exhibit D and admitted into evidence as administrative hearsay pursuant to Government Code section 11513, subdivision (d).<sup>1</sup> Complainant did not object to Exhibit D. On August 11, 2009, respondent filed his closing brief, which was marked for identification as Exhibit E. Also on August 11, 2009, complainant filed his closing brief, which was marked for identification as Exhibit 6. The record was closed, and the matter was submitted for decision on August 11, 2009.

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<sup>1</sup> Government Code section 11513, subdivision (d), provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

## FACTUAL FINDINGS

1. Complainant made and filed the Accusation in his official capacity.

2. On August 30, 2004, pursuant to the Decision in Department of Real Estate Case Number H-1663 FR (2004 Decision), respondent was issued a restricted real estate license. Respondent is currently licensed and has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) as a restricted real estate salesperson. Complainant seeks to revoke respondent's restricted real estate salesperson license based upon his driving under the influence (DUI) conviction described in Finding 5 below.

3. Respondent filed an application for a real estate salesperson license on September 6, 2002. A Statement of Issues was served, which sought to deny respondent's application based upon his prior DUI convictions. A hearing was held before an administrative law judge of the Office of Administrative Hearings on June 4, 2004. On June 18, 2004, the administrative law judge issued a proposed decision, which was adopted by the Department as its 2004 Decision on July 1, 2004, effective July 30, 2004.

4. As reflected in the 2004 Decision, respondent was convicted of three DUI's: (1) a March 13, 1995 DUI conviction; (2) a June 29, 1995 DUI conviction; and (3) a May 25, 2001 DUI conviction. The 2004 Decision also mentions a fourth DUI conviction that respondent suffered in 1990. Although the 2004 Decision found that these convictions established cause to deny respondent's real estate salesperson license application, it determined that, because respondent had offered sufficient proof of rehabilitation, it would not be contrary to the public interest to issue a restricted license to him. The 2004 Decision made clear, however, that respondent was:

approaching his last clear chance to avoid allowing his alcoholism, apparently in remission now, from destroying his health and career. He is now entering a zero tolerance environment with a restricted license. A future conviction for an alcohol related offense or an alcohol related incident involving licensed real estate practice may well spell the end of his opportunity to ever work again as a licensee in the mortgage lending business. (2004 Decision, Legal Conclusion 10.)

Paragraph 1 of the Order set forth in the 2004 Decision provides:

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. The Commissioner may, in his or her discretion, suspend the restricted license prior to

hearing upon receipt of notice by the Commissioner that respondent has been arrested for any public offense involving alcohol consumption involving driving or that is substantially related to the qualifications, functions or duties of a real estate licensee.

5. On March 5, 2008, in the Stanislaus County Superior Court, respondent, upon a plea of guilty, was convicted of violating Vehicle Code section 23152, subdivision (b), with an enhancement under Vehicle Code section 23578, driving under the influence with a blood alcohol level of .15 percent or higher, a misdemeanor. Imposition of sentence was suspended and respondent was placed on informal probation for 36 months. He was ordered to serve seven days in jail, to pay fines and fees, and to successfully complete a nine-month enhanced Drinking Drivers Program. He participated in a work release program for five days. His drivers license was suspended until March 2009. His probation is scheduled to end in March 2011.

6. The incident underlying respondent's March 5, 2008 conviction occurred on February 3, 2008. Respondent drank too much at a Super Bowl party. When he was stopped by police, his blood alcohol level was measured at .18 percent.

7. Respondent's personal and employment history is set forth in detail in the 2004 Decision. There is no reason to repeat it in full here. In summary, respondent immigrated to the United States in or about 1968. After college, he settled in Wisconsin, where he obtained both insurance and real estate licenses. He experienced marital problems and suffered his first four DUI convictions in Wisconsin. He moved to California in May 2002 to be closer to his family. He began working as a real estate salesperson in May 2008.

8. As reflected in the 2004 Decision, respondent, at the hearing in June 2004, recognized that he was an alcoholic. Even with this recognition, respondent admitted at the hearing in June 2009 that he continued to have a glass of wine or a cocktail at home up until the time of his 2008 DUI. According to respondent, the last time he drank was in August 2008.

9. Respondent asserted that he is complying with the terms of his 2008 conviction. On March 12, 2009, he completed the court-ordered nine-month Drinking Drivers Program offered by Safety Center Incorporated. In a letter dated July 15, 2009, Luky Maldonado, the Senior Vice President of Alcohol and Drug Programs at Safety Center Incorporated, stated that, while in the Drinking Drivers Program, respondent received alcohol and drug education/awareness and information about how alcohol and other drugs affect the human body overall. Ms. Maldonado opined that, based upon a review of respondent's files and personal progress notes, "it appears that he has benefited tremendously from the program."



10. Respondent also testified that he has become active in his church. He participates in drives the church sponsors to assist refugees, and helps translate for refugees. Because his church does not sponsor an Alcoholics Anonymous (AA) group, respondent does not participate in AA.

11. Michael Anderton is the owner and broker of New Destiny Real Estate and Loans. Mr. Anderton hired respondent approximately two years ago to work as a real estate agent and loan officer for New Destiny. Mr. Anderton described respondent as "very thorough," and complimented respondent's honesty and integrity. Respondent notified Mr. Anderton of his DUI arrest in 2008. Respondent also told Mr. Anderton about his DUI convictions in Wisconsin. Because Mr. Anderton considers respondent to be a "very professional realtor" and has never seen respondent drink while at work, Mr. Anderton is not concerned about respondent continuing to work for New Destiny. Mr. Anderton is willing to supervise respondent if the Department is willing to issue him a restricted license.

12. Barry Woerman has been a hospital administrator for 35 years. He has been respondent's friend for five years. He watches football and other sporting events with respondent at the same sports grill. He relies upon respondent for real estate and financial advice. Respondent told him about his 2008 arrest for DUI. According to Mr. Woerman, respondent was "embarrassed" by his conduct. It has been two to three years since Mr. Woerman has seen respondent drink alcohol. Mr. Woerman has never seen respondent "out of control" or drive under the influence.

13. Respondent submitted three letters of recommendation – from Stewart Heller, a teacher at Muncy Elementary School; David Johnston, President of Sign Design, Inc.; and Ken Martin, an insurance company executive. These letters were admitted as administrative hearsay pursuant to Government Code section 11513, subdivision (d), and considered to the extent permitted under that provision.

14. In California Code of Regulations, title 10, section 2912, the Department has set forth the criteria to be applied when reviewing whether a real estate license should be disciplined when the licensee has been convicted of a crime.<sup>2</sup>

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<sup>2</sup> California Code of Regulations, title 10, section 2912 provides:

Criteria of Rehabilitation (Revocation or Suspension).

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.)

(b) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the licensee.

15. Respondent was convicted of a DUI less than two years ago. He is scheduled to be on probation until March 2011. Although he has complied with the terms of his probation and has become more active in his church, he is not currently participating in AA.

Most importantly, the Department already gave respondent an opportunity to prove that he was rehabilitated and could work as a real estate salesperson without further DUI convictions. The 2004 Decision made clear that there would be "zero tolerance" if respondent was convicted of another DUI. Notwithstanding the clear warning in the 2004 Decision, respondent continued to drink. He drank to excess on February 3, 2008, and suffered his fifth DUI conviction. Because respondent continued to drink after he was placed on clear notice that a further DUI conviction might result in the revocation of his restricted license, respondent did not show he deserves of another opportunity. Consequently,

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- (c) Expungement of the conviction or convictions which culminated in the administrative proceeding to take disciplinary action.
  - (d) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
  - ~~(e)~~ Successful completion or early discharge from probation or parole.
  - (f) Abstinence from the use of controlled substances or alcohol for not less than two years if the criminal conviction was attributable in part to the use of a controlled substance or alcohol.
  - (g) Payment of any fine imposed in connection with the criminal conviction that is the basis for revocation or suspension of the license.
  - (h) Correction of business practices responsible in some degree for the crime or crimes of which the licensee was convicted.
  - (i) New and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction or convictions in question.
  - (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.

complainant proved by clear and convincing evidence that respondent's restricted real estate salesperson license should be revoked.

### LEGAL CONCLUSIONS

1. The burden of proof in this matter is on complainant to show by clear and convincing evidence to a reasonable certainty that respondent's license should be suspended or revoked. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-6.)

2. Pursuant to Business and Professions Code section 490, the Department "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."

3. Pursuant to Business and Professions Code section 10177, subdivision (b), the Department may discipline the license of a real estate licensee who has "[e]ntered 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..."

4. In California Code of Regulations, title 10, section 2910, the Department has set forth criteria for determining whether a conviction is substantially related to the qualifications, functions or duties of a licensee. Subdivision (a) of section 2910, in relevant part, provides that a conviction will be deemed to be substantially related if it evidences:

(10) Conduct which demonstrates a pattern of repeated and willful disregard of law.

(11) Two or more convictions involving the consumption or use of alcohol or drugs when at least one of the convictions involve driving and the use or consumption of alcohol or drugs.

5. Even though complainant alleged only one DUI conviction as the basis for license discipline in this case, because the alleged conviction is respondent's fifth DUI, the provisions of California Code of Regulations, title 10, section 2910, subdivisions (a)(10) and (11), apply. Given respondent's four previous DUI convictions, respondent's 2008 DUI "demonstrate[d] a pattern of repeated and willful disregard of law" and evidenced "[t]wo or more convictions involving the consumption or use of alcohol ... when at least one of the convictions involve driving and the use or consumption of alcohol." As the court explained in *Griffiths v. Superior Court (Medical Board of California)* (2002) 96 Cal.App.4th 757, 770, "Driving while under the influence of alcohol ... shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society." Consequently, respondent's 2008 DUI conviction is substantially related to the qualifications, functions, and duties of a real estate salesperson under California Code

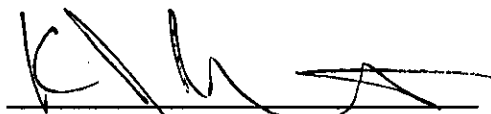
of Regulations, title 10, section 2910, subdivisions (a)(10) and (11), and establishes cause to discipline his restricted real estate salesperson license under Business and Professions Code sections 490 and 10177, subdivision (b).

6. As set forth in Finding 15, in the 2004 Decision, the Department gave respondent an opportunity to prove that he was rehabilitated and could work as a real estate salesperson without further DUI convictions. By drinking and driving, respondent failed to take proper advantage of the opportunity he was given. The evidence did not establish that giving respondent another opportunity is warranted. In order to protect the public interest, safety and welfare, respondent's restricted real estate salesperson license should be revoked.

### ORDER

All real estate licenses and license rights of respondent Zaki Siwan Skaria, including his restricted real estate sales person license, are hereby REVOKED.

DATED: August 19, 2009

  
KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings

FILED

JAN 20 2009

DEPARTMENT OF REAL ESTATE

By R. Henry

KENNETH C. ESPELL, Counsel (SBN 178757)  
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P. O. Box 187007  
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BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

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In the Matter of the Accusation of	)	H- 5132 SAC
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	)	
ZAKI SIWAN SKARIA,	)	<u>ACCUSATION</u>
	)	
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Respondent.	)	

The Complainant, JOE M. CARRILLO, in his official capacity as a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against ZAKI SIWAN SKARIA (hereinafter "Respondent"), is informed and alleges as follows:

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On or about August 30, 2004, pursuant to the Stipulation and Waiver in Department of Real Estate case number H-1663 FR, Respondent was issued a restricted real estate salesperson license. On or about August 29, 2008, having failed to timely apply for a license renewal, Respondent's license expired. However, Respondent retains a two-year license renewal right under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) (hereinafter "the Code") as a restricted real estate salesperson.

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On or about March 5, 2008, in the Stanislaus Superior Court, State of California, case number 1241715, Respondent was convicted of violating California Vehicle Code Section 23152(b) with a Vehicle Code Section 23578 enhancement (Driving Under the Influence of Alcohol with a BAL of 0.15% or Higher, with prior DUI Convictions), a misdemeanor which bears a substantial relationship under Section 2910, Title 10, California Code of Regulations (hereinafter "Regulations"), to the qualifications, functions, or duties of a real estate licensee.

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

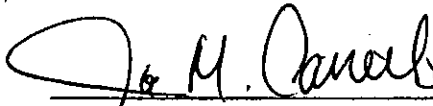
#### MATTERS IN AGGRAVATION

As stated in the Court's Proposed Decision in case number H-1663 FR, on or about May 25, 2001, in the Waukesha County Circuit Court, State of Wisconsin, Respondent was convicted of violating Wisconsin Statute 346.63(1) (a) (Driving Under the Influence of Alcohol); on or about June 29, 1995, in the Waukesha County Circuit Court, State of Wisconsin, Respondent was convicted of violating Wisconsin Statute 346.63(1) (a) (Driving Under the Influence of Alcohol); on or about March 13, 1995, in the Waukesha County Circuit Court, State of Wisconsin, Respondent was convicted of violating Wisconsin Statute 346.63(1) (a) (Driving Under the Influence of Alcohol); and, in May 1990 in the Waukesha County Circuit Court, State of Wisconsin, Respondent was convicted of driving under the influence of alcohol, all misdemeanors involving moral turpitude and which bear a substantial relationship under Section 2910 of the Regulations to the qualifications, functions, or duties of a real estate licensee.

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

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8           JOE M. CARRILLO  
9           Deputy Real Estate Commissioner

10          Dated at Sacramento, California,  
11 this 13 day of January, 2009.  
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