

FILED

DEC 07 2012

DEPARTMENT OF REAL ESTATE

By D. Jones

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of	)	
	)	NO. H-5750 SAC
OMAR GALINDO,	)	
	)	OAH NO. 2012020596
Respondent.	)	
_____	)	

DECISION

The Proposed Decision dated November 6, 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.

This Decision shall become effective at 12 o'clock noon on DEC 27 2012

IT IS SO ORDERED 12/6/2012

REAL ESTATE COMMISSIONER


By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

OMAR GALINDO,

Respondent.

Case No. H-5750 SAC

OAH No. 2012020596

PROPOSED DECISION

This matter was heard before Rebecca M. Westmore, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 9, 2012, in Sacramento, California.

Truly A. Sughrue, Real Estate Counsel, represented complainant, Tricia D. Sommers, a Deputy Real Estate Commissioner for the Department of Real Estate (department).

Joshua A. Rosenthal, Attorney at Law, Medlin & Hargrave, P.C., represented respondent, Omar Galindo, who was present throughout the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on October 9, 2012.

FACTUAL FINDINGS

1. On August 19, 2003, the department issued Real Estate Salesperson License Number S01393429 to respondent. Respondent's salesperson license will expire on August 18, 2015, unless renewed. At all times referenced herein, respondent was a real estate salesperson in the employ of corporate real estate broker, Realty Alliance, Inc., d.b.a. Century 21 Alliance (Century 21). Orhan Tolu is the designated officer for Century 21.

2. On January 4, 2012, complainant made and filed the Accusation in her official capacity. Complainant seeks to discipline respondent's license on the grounds that he violated the department's regulations by: (1) entering into an exclusive listing agreement with the sellers of real property without specifying the beginning and end

dates of the agreement; (2) presenting a processing agreement to the sellers and buyers of the real property requesting compensation in the amount of \$6,150 at the close of escrow; and (3) attempting to collect the \$6,150 processing fee on behalf of his company, Tleco, Inc., (Tleco) an unlicensed entity.¹

3. Respondent timely filed a Notice of Defense to the Accusation, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et. seq.

Sale of 9757 Tundra Swan Circle, Elk Grove – October 2009

4. On October 14, 2009, respondent entered into an Exclusive Residential Listing Agreement (Listing Agreement) with Daniel and Dominga Barajas (sellers) whereby respondent would short sell their property located at 9757 Tundra Swan Circle in Elk Grove, California (Tundra Swan), in the amount of \$259,000, for a six percent broker commission. The Listing Agreement did not identify a beginning or end date for the agreement.

5. On April 6, 2010, Andy and Sarbjeet Bassi (buyers), by and through their real estate agent, Greg Christensen of Keller Williams Realty, presented a Residential Purchase Agreement and Joint Escrow Instructions (Purchase Agreement), to respondent, and offered to purchase Tundra Swan for \$205,000, provided that the short sale was approved by the lender and lien holders no later than July 6, 2010. The sellers accepted the offer on April 21, 2010.

6. On June 17, 2010, Bank of America (BoFA) declined the short sale “because the seller is not willing to contribute towards the loss.”

7. On July 12, 2010, BoFA accepted the short sale of the property in the amount of \$210,000, on the conditions that the total closing costs not exceed \$21,493, the maximum real estate commission is \$12,600, and that escrow close no later than August 31, 2010. BoFA also noted in its letter that “Any additional fees that were not approved on July 12, 2010 will not be covered by BAC Home Loans Servicing, LP and become the sole responsibility of either the agent, the buyer or the seller to pay at closing.”

¹ Tleco, Inc. was formed on September 1, 2005. Respondent was identified as the Chief Executive Officer, Secretary, Chief Financial Officer, and Director/Officer of the corporation. Tleco, Inc. was licensed by the department on October 4, 2010, and holds corporate broker license number C01523119, which will expire on October 3, 2014, unless renewed.

8. On July 12, 2010 at 8:12 p.m., respondent sent an email to buyers' agent enclosing the following counter offer:

Purchase price to be \$210,000

Closing costs approved by BOFA (\$300 Pest Inspection)
(\$1,135 Settlement/Escrow Fee) (\$932 Title Insurance) (\$50
Reconveyance Fee) (\$226 County Transfer Tax) (\$100 HOA
Transfer Fee)

Buyer to sign the processing fee and Affiliated Business
Disclosure

All other costs not on this counter shall be paid by buyer(s).

9. In addition, respondent attached to the email the processing agreement on behalf of Tleco, along with the affiliated business disclosure, and stated: "[o]nce we have all the following returned and executed I will forward the short sale approval in writing. The processing fee is being paid by BOFA. It is a credit from seller to buyer. It does not come out of your clients [sic] pocket. It is already approved by BOFA." In the processing agreement, Tleco agreed to process paperwork "to obtain a discounted mortgage payoff on behalf of Seller(s) and for the benefit of Buyer(s) in order for the mortgage company(s) to accept Buyer's offer" In addition, the Processing Agreement stated that "Because of Processor's services on behalf of Seller(s) and for the benefit of Buyer(s), Buyer(s) has/have the opportunity to purchase Property at a price below the total mortgage payoff and this would not be possible without Processor's administrative work and services performed on behalf of Seller(s) and for the benefit of Buyer(s). A provision of the Processing Agreement also stated that "The Processing Fee may be used at Seller's and or processors discretion to settle deficient amount(s) demanded by subordinated lien holders" In addition, the Processing Agreement stated "[a] 'Seller Credit' to Buyer equal to the 'Processing Fee' in the amount of \$6,150 ... is required by the Buyer in order for the Buyer to be willing to proceed. The Buyer(s) will pay the Processor \$6,150 ... as a non-recurring closing cost, to be included on the Final HUD-1, to be paid to Processor at the time of closing as a 'Processing Fee' or 'Buyer Discount Fee.'" Tleco's representative signed the Processing Agreement on July 12, 2010. The signatures of the buyers and sellers were undated.

10. At hearing, Mr. Bassi testified that he first learned of the processing fee agreement and affiliated business disclosure from his real estate agent on July 12, 2010, and believed that because of the "email traffic and potential back-up offers," he had to sign the documents in order to continue with his purchase of the property. He signed the processing fee agreement and affiliated business disclosure on July 13, 2010; however, he "never spoke with anyone from Tleco," and was "not aware of any services being performed by Tleco." Mr. Bassi confirmed that he never signed any

documents to counter the sellers' counter offer which included the \$6,150 processing fee, is unaware how the processing fee ultimately impacted his purchase of the property, and was never told that the processing fee agreement was rescinded.

11. On July 13, 2010, buyers accepted sellers' counter offer.

12. Escrow closed on the property on September 13, 2010. The Settlement Statement disclosed that a \$6,300 real estate broker commission was paid to Century 21, and a \$6,300 real estate broker commission was paid to Keller Williams Realty. There was no processing fee paid through escrow.

13. Kyle Jones has been a Special Investigator with the department for four years. His responsibilities include investigating violations of the real estate laws and regulations, as well as violations of the Business and Professions Code. He has been licensed as a real estate broker since 2006. In July 2010, he was assigned to investigate a consumer complaint against respondent. As part of his investigation, Mr. Jones contacted respondent's broker, Orhan Tolu, to discuss respondent's request for additional short sale fees, and to request copies of respondent's transaction files. According to Mr. Jones, Mr. Tolu was unaware of respondent's request for processing fees, and of the existence of Tleco. In a follow-up telephone conversation on July 19, 2010, Mr. Tolu advised Mr. Jones that the Tundra Swan short sale transaction was respondent's first attempt to collect a processing fee.

14. In a telephonic interview with respondent, Mr. Jones learned that Tleco was formed in 2005 to collect real estate commissions for respondent and his wife. According to respondent, he had consulted with counsel regarding the collection of additional compensation on short sales due to the additional work required to close the deal. Respondent admitted to Mr. Jones that he put together the Processing Fee Agreement, but asserted that he was unaware this activity required Tleco to be licensed. Respondent also indicated to Mr. Jones that the information regarding the processing fee was contained in the exclusive listing agreement which was provided to and approved by the sellers. However, a review of the "Compensation to Broker" section of the listing agreement reveals that the only fees identified were a six percent commission to respondent, and a three percent commission to "other brokers" participating in the sale. The only other possible reference could be in the "Additional Terms" section of the listing agreement which identifies: "1. short sale, sale and commission subject to lender approval. 2. sale to be 'as is.'" However, the words "short sale" do not convey to any degree that an additional fee of \$6,150 will be collected by respondent for selling Tundra Swan. In his Memorandum of Interview dated November 4, 2010, Mr. Jones noted that respondent "waived the fee as his fiduciary responsibility was to the seller and there was a complaint made about his total compensation."

15. At hearing, Mr. Jones explained that the department "stepped in" on July 16, 2010, and he learned later from Ken Dick of Keller Williams that the

processing fee agreement was ultimately “dropped.” After reviewing the closing documents, Mr. Jones confirmed that the processing fee was not collected at the close of escrow. Thereafter, Mr. Jones received a printout of BofA’s Equator Workstation Strategy Timeline identifying “all tasks” relating to this short sale transaction, and confirmed that between June 28, 2010 and September 14, 2010, respondent uploaded nine real estate documents to BofA, none of which were identified as the Processing Agreement. Mr. Jones believes that had respondent informed BofA of the processing fee, the department would not have continued its investigation on this issue; however he was unsure if the department would have pursued the transaction by Tleco as an unlicensed corporation.

16. Orhan Tolu has been a licensed real estate broker for 26 years, the designated officer for Century 21 for five years, and respondent’s broker for nine years. According to Mr. Tolu, as an independent contractor, respondent is compensated on a graduated commission percentage based on his gross sales. Century 21 does not maintain a policy regarding charging processing fees in addition to commissions, and he has never seen a processing fee charged for short sale transactions. According to Mr. Tolu, beginning and end dates are required on listing agreements, and respondent never asked him about charging a processing fee either during their weekly meetings, or when they spoke with each other outside of the meetings. Mr. Tolu first learned of the processing fee charged by Tleco when he was contacted by the department’s investigator in July 2010. At that time, he was unaware of the existence of Tleco. Mr. Tolu asserted that he advised Mr. Jones he would look into the matter, and told respondent they “would not allow outside fees without notifying the broker or lender.” Mr. Tolu described respondent as “a good agent” with “good character,” who has “served his clients interests all the time.”

17. Adam Herson is the Vice President and Unit Manager for BofA’s Simi Valley branch. His responsibilities include overseeing short sale complaints. Mr. Herson explained that the Equator Workstation software database system is BofA’s main platform for processing short sales. It also serves as a message center to allow real estate agents to work with BofA’s short sale negotiators by entering data into the system. According to Mr. Herson, when a customer requests to sell their home for less than what is owed on it, it is considered a short sale transaction. While BofA is not a party to the real estate transaction, they approve or decline the short sale requests and negotiate the release of the customer from the debt. Mr. Herson asserted that BofA does not permit the use of a processing fee, and the Offer Worksheet that was uploaded into Equator did not identify a processing fee. He also confirmed that the processing fee agreement and affiliate business disclosure documents were not uploaded to BofA’s Equator system during the Tundra Swan short sale transaction; however, both documents were located in BofA’s file. Mr. Herson is unaware how the documents got into BofA’s file, but asserted that while the documents could have been mailed or faxed to BofA, “it was highly atypical for this transaction.”

Respondent's Evidence

18. Respondent has been employed at Century 21 since 2003. He primarily focuses on short sale transactions, and conducts approximately 20 to 30 transactions annually. He confirmed that he established Tleco in September 2005 to facilitate his real estate business. Respondent has no prior discipline with the department.

19. Respondent was referred to the owners of Tundra Swan by a past client. Tundra Swan was tenant-occupied at that time. According to respondent, the sellers instructed him to leave the beginning and end dates blank on the listing agreement, because they did not know when their tenant was going to move out. At hearing, respondent submitted a completed listing agreement indicating a start date of October 19, 2010, and an end date of October 31, 2010, with the sellers' initials next to each date. Respondent posted the sale of Tundra Swan on the Multiple Listing Service on October 20, 2009. At hearing, respondent admitted that he provided the listing agreement with the beginning and end dates left blank to BofA as part of the short sale process. He is unaware of when the sellers initialed the listing agreement which includes beginning and end dates because there are no dates next to the sellers' initials.

20. In a letter dated November 7, 2010, sellers Mr. and Mrs. Barajas wrote:

We are writing this letter to clarify that my wife and I were fully informed and aware of the processing agreement prior to us entering into a listing contract with Omar Galindo and Century 21.

Mr. Galindo made us feel very comfortable through the entire process as he kept us informed of all events as they transpired. We feel extremely grateful that he was able to help us get our home sold and relieve us from the financial stress we were facing at the time.

Omar Galindo has earned our respect and appreciation as we will definitely use his services again in the future and have referred him to our friends and family.

21. Respondent admitted that the processing agreement was not in existence at the time the listing agreement was signed, and that he explained to the sellers that there may be junior liens, child support liens and Internal Revenue Service liens that "could slow down and prevent a closing." However, the sellers did not want to move forward with the processing agreement, so it was not part of the package he submitted to BofA. Later on in the transaction, sellers instructed respondent to "try and close" the transaction, so they revisited the processing agreement, and the sellers agreed to sign it on July 12, 2010. Thereafter, respondent

submitted it to the buyer's agent, Greg Christenson. According to respondent, he "received push back and questions from the buyer's agent," because Mr. Christenson "didn't understand it" and "didn't feel comfortable with it." When he relayed that to his clients, they told him not to move forward with it. However, he received the signed processing fee agreement the following day. On or about July 13 or 14, 2010, respondent told Mr. Christenson they would not proceed with the processing fee agreement. Their conversation was not memorialized in writing. Respondent could not recall if he checked with BofA regarding the processing fee, or if he submitted costs, or a fee request to BofA as part of the short sale process. However, respondent contends that he did not have an opportunity to submit the processing fee agreement to BofA because it was only in existence for 24 hours. According to respondent, he did not find out about the department's interest in this matter until late July when his employer approached him about it.

22. Respondent could not recall if Tleco was licensed at the time of the Tundra Swan short sale transaction, but admitted that he submitted the application to the department in June/July 2010, and that Tleco was officially licensed in October 2010. Respondent contends that Tleco provided services during the short sale transaction for Tundra Swan. According to respondent, Tleco gathered financial documents from the sellers, including their tax returns and paystubs, requested updated documents from the sellers, communicated with the lending institution, and "put together the short sale package." The work was performed by himself and his employee, Maria, who "gathered the documents and facilitated the file." Respondent asserted that his business costs incurred for this transaction "are difficult to ascertain."

Discussion

23. The evidence establishes that respondent entered into an exclusive listing agreement with the sellers of real property without specifying the beginning and end dates of the agreement (Factual Findings 4, 16 and 19.) While the listing agreement may ultimately have included beginning and end dates, there was a blank agreement contained in respondent's broker's file suggesting that it was in existence, albeit for an unknown period of time. Respondent's argument that he was instructed by his clients to leave the dates blank was not credible. As a licensee, it is respondent who is ultimately responsible for the real estate documents he completes.

24. The evidence also establishes that after receiving approval for the short sale from BofA respondent presented a processing agreement to the sellers and buyers of the real property requesting compensation in the amount of \$6,150 at the close of escrow. This fee was never disclosed to BofA, and was an attempt by respondent to collect additional fees for this transaction. (Factual Findings 7 through 10, 13 through 17, and 21.) Respondent's argument that he had no opportunity to present it to BofA because it was only in existence for 24 hours was not credible. Respondent's own clients stated in their letter dated November 7, 2010, that they were aware of the processing agreement before they entered into the listing agreement. (Factual Finding

20.) The listing agreement was signed on October 14, 2009. (Factual Finding 4), approximately nine months prior to BofA's approval of the short sale. (Factual Finding 7.)

25. In addition, BofA's approval of the short sale indicated that the total closing costs could not exceed \$21,493. After deducting the allowable commission of \$12,600, and the allowable costs for the termite inspection/repairs in the amount of \$300, the settlement/escrow fee in the amount of \$1,135, the title insurance fee in the amount of \$932, the reconveyance fee in the amount of \$50, the county transfer tax in the amount of \$226, and the HOA transfer fee in the amount of \$100, the balance remaining is \$6,150 - the amount of respondent's processing fee. This establishes that after BofA disclosed the conditions of its approval, respondent realized there was money available that had not been earmarked by BofA, thereby paving the way for him to send a processing agreement requesting a fee in the amount of \$6,150 to the buyers' agent at 8:12 p.m. on the day of BofA's approval. This conduct was an attempt to collect a fee to which respondent was not entitled, and was therefore fraudulent, dishonest, and misleading.

26. Finally, the evidence establishes that Tleco was not licensed by the department during the short sale transaction of Tundra Swan; however, respondent attempted to collect a \$6,150 processing fee on behalf of Tleco. (Factual Findings 2, 9, 10, 13, 14, 18 and 22.)

27. Respondent's conduct during this short sale transaction was nothing short of fraudulent, dishonest, misleading, and unprofessional. At hearing, he did not acknowledge that his conduct violated the real estate laws, or accept responsibility for his actions. Therefore, it cannot be determined with certainty that respondent will not engage in this conduct in the future, especially given that he primarily transacts short sales which are predominant in these difficult economic times. In mitigation, this is respondent's first disciplinary action by the department in his nine years of practice. In addition, respondent's clients were pleased with this short sale transaction, and respondent remains gainfully employed. However, no evidence of rehabilitation was presented by respondent. When all the facts and circumstances are weighed, and without any assurance that respondent knows what he did was wrong and will not attempt to do this again in the future, it would not be in the public interest to allow respondent to retain his real estate salesperson license, with or without restrictions.

LEGAL CONCLUSIONS

1. In an Accusation seeking to revoke, suspend, or otherwise discipline a professional license, the agency has the burden of proof to establish the allegations in the Accusation by "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App. 3d 853, 856.) As set forth below, complainant has met its burden that the real estate salesperson license issued to

respondent Galindo should be disciplined pursuant to Business and Professions Code sections 10176, subdivisions (a), (f) and (i), and 10177, subdivisions (g) and (j).

Substantial Misrepresentation, Claiming/Demanding Compensation, Fraud or Dishonest Dealing

2. Business and Professions Code section 10176, subdivisions (a), (f) and (i), provides that the commissioner may "... temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: (a) Making any substantial misrepresentation; ... (f) Claiming, demanding, or receiving a fee, compensation, or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where the agreement does not contain a definite, specified date of final and complete termination; ... and (i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

3. As set forth in Factual Findings 4, 16 and 19, the department has met its burden of establishing by clear and convincing evidence that respondent submitted an exclusive listing agreement on behalf of his clients which did not include beginning and end dates. Therefore, cause exists to discipline respondent's real estate salesperson license, pursuant to Business and Professions Code section 10176, subdivision (f).

4. As set forth in Factual Findings 7 through 10, 13 through 17, and 21, the department has met its burden of establishing by clear and convincing evidence that respondent attempted to collect \$6,150 in fees for processing the Tundra Swan short sale, in addition to his commission, and without disclosing it to Bank of America, and that respondent advised the buyers' agent that the processing fee had been approved by Bank of America when in fact it had not. Therefore, cause exists to discipline respondent's real estate salesperson license, pursuant to Business and Professions Code section 10176, subdivisions (a) and (i).

5. As set forth in Factual Findings 2, 9, 10, 13, 14, 18 and 22, the department has met its burden of establishing by clear and convincing evidence that respondent attempted to collect a processing fee on behalf of Tleco, an unlicensed entity. Therefore, cause exists to discipline respondent's real estate salesperson license, pursuant to Business and Professions Code section 10176, subdivisions (a) and (i).

Negligence, Incompetence, Fraud or Dishonest Dealing

6. Business and Professions Code section 10177, subdivisions (g) and (j), authorizes the commissioner to suspend or revoke the license of a real estate licensee ..., where the individual licensee ... has done any of the following:

[¶]...[¶]

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

[¶]...[¶]

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

[¶]...[¶]

7. As set forth in the Factual Findings as a whole, the department has met its burden of establishing by clear and convincing evidence that respondent engaged in fraudulent and dishonest dealings with the sellers, buyers, buyers' agent and lender regarding the processing fee and the role of Tleco in this short sale transaction. Therefore, cause exists to discipline respondent's real estate salesperson license, pursuant to Business and Professions Code section 10177, subdivision (j).

8. As discussed in Factual Finding 27, respondent's conduct in this transaction was fraudulent, dishonest, misleading and unprofessional. Respondent did not acknowledge that his actions violated the real estate laws, and he accepted no responsibility for his conduct. In addition, no evidence of rehabilitation was presented by respondent at hearing, and his employer provided minimal testimony regarding respondent's current behavior in light of this matter. Therefore, it would be contrary to the public interest, safety and welfare to permit respondent to retain his real estate salesperson license at this time, with or without restrictions.

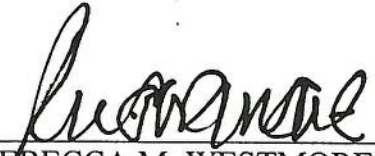
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ORDER

All licenses and licensing rights of respondent Omar Galindo, under the Real Estate Law are revoked.

DATED: November 6, 2012


REBECCA M. WESTMORE
Administrative Law Judge
Office of Administrative Hearings

RECEIVED
Dept of Real Estate

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SACRAMENTO LEGAL