

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

FILED

JAN 30 2017

BUREAU OF REAL ESTATE

By B. Nicholas

In the Matter of the Accusation of

FRANCISCO CALAMAYAN NERI,

) CalBRE No. H-6397 SAC

) OAH No. 2016060741

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Respondent.

DECISION

The Proposed Decision dated December 9, 2016, 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.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 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 FEB 20 2017

IT IS SO ORDERED

January 25, 2017
WAYNE S. BELL
REAL ESTATE COMMISSIONER



BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

FRANCISCO CALAMAYAN NERI,

Respondent.

Case No. H-6397 SAC

OAH No. 2016060741

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on November 15, 2016, in Sacramento, California.

Truly Sugrue, Real Estate Counsel, represented complainant Tricia Parkhurst, a Supervising Special Investigator of the State of California.

Respondent Francisco Calamayán Neri was properly served with the Accusation and Notice of Hearing in this matter. Neither he nor anyone acting on his behalf appeared at hearing. Respondent's default was entered, and this matter proceeded as a default proceeding pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on November 15, 2016.

SUMMARY

Complainant seeks to discipline respondent's real estate broker license based on his numerous violations of the Real Estate Law (Bus. & Prof. Code, § 10000 et seq.) and regulations adopted pursuant to it. Complainant established by clear and convincing evidence cause for discipline. No evidence of respondent's fitness for licensure as a real estate broker, even on a restricted basis, was introduced. Therefore, respondent's real estate broker license must be revoked.

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FACTUAL FINDINGS

Procedural History

1. The Bureau of Real Estate (Bureau) issued Real Estate Salesperson License Number S/01450620 to respondent on September 1, 2004. The license was subsequently converted into a Real Estate Broker License, effective August 7, 2006. The license expires August 16, 2019, unless renewed or revoked. There is no history of prior discipline of the license. At no time was the fictitious business entity "Advocates for Neighbors" affiliated with the license.

2. On May 16, 2016, complainant signed the Accusation solely in her official capacity. The gravamen of the Accusation is respondent's solicitation and collection of advance fees in connection with his agreement to provide loan modification and forbearance services between January 13, 2014, and May 15, 2015.

Submission of Proposed Advance Fee Agreements and Related Documents for Approval

3. On January 12, 2009, the Bureau received for its review and approval an advance fee agreement and related documents respondent intended to use to solicit and enter into contracts to provide loan modification and forbearance services to customers. Two weeks later, the Bureau sent respondent correspondence informing him he could not use his proposed documents because they did not contain certain information required by law.

4. On January 28, 2009, respondent submitted to the Bureau for its review and approval a revised advance fee agreement and related documents he intended to use to solicit and enter into contracts to provide loan modification and forbearance services to customers. The Bureau sent correspondence dated February 17, 2009, advising respondent it "has no objection to your use of the advance fee agreement and accounting format as submitted."

5. On October 12, 2009, the Bureau sent respondent correspondence advising that a new law regulating the collection of advance fees and the use of advance fee agreements in connection with the solicitation or performance of loan modification services went into effect the previous day. The letter warned:

Therefore, **EFFECTIVE October 11, 2009, YOU MAY NOT COLLECT ANY FURTHER ADVANCE FEES FROM A CONSUMER FOR THESE SERVICES AFFECTING ONE TO FOUR UNIT RESIDENTIAL PROPERTIES AND THE ADVANCE FEE CONTRACT FOR THOSE SERVICES IS NULL AND VOID.**

(Bolding and capitalization original.)

6. Respondent never submitted any proposed advance fee agreements or related documents he intended to use in soliciting and entering into contracts to provide loan modification and forbearance services to the Bureau for its review and approval after January 28, 2009. The Bureau never approved of respondent's use of any advance fee agreements or related documents in soliciting and entering into contracts to provide loan modification and forbearance services to customers after February 17, 2009.

Bureau's Audit of Respondent's Real Estate Activities

7. Between October 1 and December 24, 2015, Bosco Li, a General Auditor III employed by the Bureau, performed an audit of respondent's real estate activities during the time period of October 1, 2013, through December 31, 2015 (audit period). His audit consisted of reviewing bank statements, canceled checks, and loan files, and interviewing respondent. He also reviewed pertinent records maintained by the Bureau. He prepared an audit report containing his findings and conclusions, which was admitted into evidence at hearing. He also testified at hearing. Mr. Li discovered respondent engaged in the activities described below during the audit period.

Agreements to provide loan modification and forbearance services

8. Respondent, acting through the fictitious business entity Advocates for Neighbors, entered into contracts to provide loan modification and forbearance services to owners of single-family residences encumbered by home loans. Specifically:

a. On January 11, 2014, respondent entered into an agreement with Cipriano Maramba, whereby Mr. Maramba authorized respondent "to request, obtain and verify any and all mortgage loan information, including but not limited to, payoff, arrearage, and reinstatement amounts as well as financial history. The information obtained is to be used for the purpose of facilitating the resolution of my account" from Nation Star, the beneficiary under a deed of trust secured by Mr. Maramba's single-family residence. The agreement required Mr. Maramba to pay respondent the total sum of \$4,950, in installments, for negotiating a loan modification agreement with Nation Star. The first payment in the amount of \$2,000 was due and payable upon Mr. Maramba signing the agreement with respondent. The second and third payments of \$1,000 each were due and payable upon respondent's submission of a loan modification proposal to Nation Star and his subsequent negotiations over that proposal, respectively. The final payment of \$950 was due and payable once Nation Star agreed to a loan modification. Mr. Maramba paid respondent each installment on the date it was due, and paid a total sum of \$5,050 as of May 21, 2014.¹

¹ Mr. Li wrote in his audit report that Mr. Maramba paid respondent a total of \$5,550, including a \$500 payment on March 16, 2014. But the evidence established that payment was never made. Also, Mrs. Maramba explained at hearing that respondent demanded an additional \$100 for a business permit and gas money, and her husband included the additional amount in the final payment after respondent stated he was able to negotiate a loan modification.

Respondent, on the other hand, never contacted Nation Star to request a loan modification on behalf of Mr. Maramba.

b. On January 10, 2014, respondent entered into an agreement with Jamal Zumot, whereby Mr. Zumot authorized respondent "to request, obtain and verify any and all mortgage loan information, including but not limited to, payoff, arrearage, and reinstatement amounts as well as financial history. The information obtained is to be used for the purpose of facilitating the resolution of my account" from Ocwen Loan Servicing, the beneficiary under a deed of trust secured by Mr. Zumot's single-family residence. Pursuant to that agreement, Mr. Zumot paid respondent \$500 on January 10 and February 27, 2014. However, respondent did not successfully obtain a loan forbearance agreement for him until June 25 or July 25, 2014, after which he paid respondent an additional \$2,000 pursuant to their agreement.

c. On March 23, 2014, respondent entered into an agreement with Nader and Monica Ghattas, whereby Mr. and Mrs. Ghattas authorized respondent "to request, obtain and verify any and all mortgage loan information, including but not limited to, payoff, arrearage, and reinstatement amounts as well as financial history. The information obtained is to be used for the purpose of facilitating the resolution of my account" from SPS, the beneficiary under a deed of trust secured by Mr. and Mrs. Ghattas' single-family residence. Pursuant to that agreement, Mr. and Mrs. Ghattas paid respondent \$500 on March 23, 2014, \$560 on January 20, 2015, and \$500 on March 16 and April 13, 2015. However, respondent did not successfully obtain a loan modification for them until April 16, 2015, after which they paid him an additional \$1,680 pursuant to their agreement.

d. On July 14, 2014, respondent entered into an agreement with Raymond and Maria Parangan, whereby Mr. and Mrs. Parangan authorized respondent "to request, obtain and verify any and all mortgage loan information, including but not limited to, payoff, arrearage, and reinstatement amounts as well as financial history. The information obtained is to be used for the purpose of facilitating the resolution of my account" from Nation Star, the beneficiary under a deed of trust secured by Mr. and Mrs. Parangans' single-family residence. Pursuant to that agreement, Mr. and Mrs. Parangan paid respondent the total sum of \$4,500 between July 14, 2014, and January 26, 2015. However, respondent did not successfully obtain a loan modification for them until July 23, 2015.

Respondent's bank accounts

9. Respondent deposited each payment discussed in Factual Finding 8 into a bank account he maintained at Chase Bank under the names Francisco Neri or Priscilla Neri (Bank Account No. 1), except for Mr. and Mrs. Ghattas' final payment of \$680. That payment was deposited into a bank account he maintained at Bank of America under the names Francisco C. Neri, Priscilla Neri, and Eleanor Neri (Bank Account No. 2). Neither bank account was designated a trust account, and respondent admitted during an interview with Mr. Li that both were personal accounts. Respondent paid personal expenses with funds from both Bank Account Nos. 1 and 2.

10. Respondent failed to maintain written records of the payments discussed in Factual Finding 8, showing for each payment: 1) the date on which it was received, 2) from whom it was received, 3) the amount received, 4) the date it was deposited into Bank Account No. 1, 5) the check number and date of each disbursement from the account, and 6) the daily balance of the account. He also failed to maintain separate written records for Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan, showing for each of their respective payments: 1) the date of deposit into Account No. 1, 2) the amount of each deposit, 3) the date of any disbursement from the account, 4) the check number for any disbursement, 5) the amount of each disbursement, and 6) the account balance after each transaction.

11. At no time did respondent reconcile the written records described in Factual Finding 10. Nor did he maintain records of any such reconciliations. Furthermore, he never maintained and provided an accounting to Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, or Mr. and Mrs. Parangan showing the services he rendered to each under their respective agreements, identifying the trust account into which the respective advance fees were deposited, and providing details of how those fees were dispersed.

Reconciliation of Account No. 1

12. Mr. Li reconciled the funds in Account No. 1 as part of his audit. As of May 23, 2014, the account had a balance of \$600.05. However, respondent had received payments from Mr. Maramba, Mr. Zumot, and Mr. and Mrs. Ghattas totaling \$6,550 as of that date.² Therefore, there was a difference of \$5,949.95 between the total amount of money received and the account balance as of May 23, 2014. At no time did respondent produce any evidence that Mr. Maramba, Mr. Zumot, and Mr. and Mrs. Ghattas provided written consent to such shortage.

Discussion

Violation of the Real Estate Law and demonstrating negligence and/or incompetence

Advance fees

13. Respondent, acting within the course and scope of his real estate broker license, claimed, demanded, charged, received, and collected advance fees in connection with his agreements to provide loan modification and forbearance services in the total amount of \$12,610 during the audit period. Specifically, the agreement with Mr. Maramba required him to pay \$4,000 prior to respondent performing all the services required under their agreement. Mr. Maramba in fact paid a total of \$5,050, and respondent never contacted Nation Star to request a loan modification. Mr. Zumot's agreement required him to pay, and he paid, the total sum of \$1,000 prior to respondent performing all the services required

² Mr. Li mistakenly wrote in his report that Mr. Maramba had paid respondent only \$4,500 as of May 23, 2014. As discussed above, Mr. Maramba had paid \$5,050.

under their agreement. Mr. and Mrs. Ghattas' agreement required them to pay, and they paid, the total sum of \$2,060 prior to respondent performing all the services required under their agreement. Mr. and Mrs. Parangan's agreement required them to pay, and they paid, the total sum of \$4,500 prior to respondent performing all the services required under their agreement. Therefore, each of respondent's agreements to perform loan modification and forbearance services constituted an "advance fee agreement."

14. Respondent used materials to advertise, promote, solicit, and negotiate each of the advance fee agreements to provide loan modification or forbearance services discussed in Factual Findings 8 and 13. However, he failed to submit those materials to the Bureau and obtain a "no objection" letter prior to his using them.

Trust fund violations

15. The advance fees discussed in Factual Findings 8 and 13 constituted "trust funds," which respondent held in trust on behalf of each of the payees. But none of those trust funds was deposited into a trust account maintained at a bank in respondent's name. Instead, the entire sum was deposited into Bank Account No. 1, his personal account at Chase Bank.

16. Respondent failed to maintain "control records" showing for each advance fee collected: 1) the date of receipt, 2) from whom it was received, 3) the amount received, 4) the date it was deposited into Bank Account No. 1, 5) the check number and date of each disbursement, and 6) the daily account balance. He also failed to maintain "separate records" for Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan showing for each advance fee collected: 1) the date it was deposited into Bank Account No. 1, 2) the amount of the deposit, 3) the date of each disbursement, 4) the check number of each disbursement, and 5) the balance after posting each transaction.

17. Respondent never reconciled the separate records with the control records. Nor did he keep records of any such reconciliations. Furthermore, he did not maintain and provide an accounting to Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, or Mr. and Mrs. Parangan showing the services he rendered to each under their respective agreements, identifying the trust account into which their respective advance fees were deposited, and details of how those fees were dispersed.

18. Respondent commingled trust funds he held on behalf of Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan with his own personal funds in Bank Account No. 1. As of May 23, 2014, there was a shortage of trust funds in the amount of \$5,949.95. Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan never consented in writing to such shortage.

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Performing real estate activities through an unlicensed fictitious business entity

19. Respondent entered into advance fee agreements and performed loan modification and forbearance services for Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan through the fictitious business entity Advocates for Neighbors. That fictitious business entity was never affiliated with his real estate broker license.

20. Neither respondent nor anyone acting on his behalf introduced any evidence of his fitness for licensure as a real estate broker.

Summary

21. Complainant established by clear and convincing evidence cause to discipline respondent's real estate broker license based on his numerous violations of the Real Estate Law and regulations adopted pursuant to it for the reasons explained in the Legal Conclusions. When all the evidence is considered, respondent failed to introduce evidence of his fitness for licensure as a real estate broker, even on a restricted basis. Therefore, his license must be revoked.

Request for Costs of Audit

22. At hearing, complainant requested that respondent be ordered to pay the cost of Mr. Li's audit. Evidence of the cost of that audit — \$4,498.45 — was admitted, without objection. As explained in Legal Conclusions 31 and 32, respondent is required to pay such costs within 60 days of the Bureau's mailing a notice of billing.

Request for Costs of Investigation and Enforcement

23. Complainant requested costs of investigation and enforcement in the total amount of \$5,338.95 pursuant to Business and Professions Code section 10106. At hearing, complainant introduced, without objection, a Certified Statement of Investigation Costs, certifying under penalty of perjury that the Bureau incurred \$1,445.20 investigating respondent's real estate activities. Attached to the Certified Statement of Investigation Costs is a document entitled "Good Faith Estimate of Reasonable Costs For: 4-15-0618-002," which itemizes those costs by activity date, activity type, office, number of hours, hourly pay rate, and cost amount. Complainant also introduced, without objection, a Certified Statement of Costs certifying under penalty of perjury that the Bureau incurred costs of enforcement in the amount of \$3,893.75. Attached to the Certified Statement of Costs is a document entitled "Good Faith Estimate of Reasonable Costs For: 4-15-0618-002," which itemizes those costs by activity date, activity type, office, number of hours, hourly pay rate, and cost amount.

24. Respondent introduced no evidence that the amount of costs of investigation and enforcement requested by complainant is unreasonable, and he did not introduce any evidence of his inability to pay those costs. The entire amount of the costs of investigation

and enforcement requested by complainant is reasonable in light of the issues involved in this matter as discussed in Legal Conclusions 33 and 34 below.

LEGAL CONCLUSIONS

Applicable Standard/Burden of Proof

1. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation, and must do so by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) Cal.App.3d 204, 212 [the standard of proof applicable to proceedings for the discipline of real estate licenses is clear and convincing evidence to a reasonable certainty].) "The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a *high probability* [citations]." (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899; italics original.)

Applicable Law

2. The term "advance fee" is defined as follows:

[A] fee, regardless of the form, that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license, or for a listing, as that term is defined in Section 10027, before fully completing the service the licensee contracted to perform or represented would be performed. Neither an advance fee nor the services to be performed shall be separated or divided into components for the purpose of avoiding the application of this division.

(Bus. & Prof. Code, § 10026, subd. (a).)

3. It is illegal "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" without first obtaining a real estate broker license. (Bus. & Prof. Code, § 10130.) A "real estate broker" 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:

[¶] ... [¶]

(d) Solicits borrowers or lenders for or negotiates loans or

collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(Bus. & Prof. Code, § 10131.)

Additionally,

A real estate broker within the meaning of this part is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange or rent property or a business opportunity, or to obtain a loan or loans thereon.

(Bus. & Prof. Code, § 10131.2.)

4. A "foreclosure consultant" includes

[A]ny person who makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following:

- (1) Stop or postpone the foreclosure sale.
- (2) Obtain any forbearance from any beneficiary or mortgagee.
- (3) Assist the owner to exercise the right of reinstatement provided in Section 2924c.
- (4) Obtain any extension of the period within which the owner may reinstate his or her obligation.
- (5) Obtain any waiver of any acceleration clause contained in any promissory note or contract secured by a deed of trust or mortgage on a residence in foreclosure or contained that deed of trust or mortgage.
- (6) Assist the owner to obtain a loan or advance of funds.
- (7) Avoid or ameliorate the impairment of the owner's credit

resulting from the recording of a notice of default or the conduct of a foreclosure sale.

(8) Save the owner's residence from foreclosure.

(9) Assist the owner in obtaining from the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, the remaining proceeds from the foreclosure sale of the owner's residence.

(Civ. Code, § 2945.1, subd. (a).)

However, a "foreclosure consultant" does not include a person licensed as a real estate broker when he is acting in such capacity as defined in Business and Professions Code section 10131. (Civ. Code, § 2945.1, subd. (b)(3).)

5. Any person who intends to collect an advance fee must submit to the Bureau for review and approval all materials he intends to use to advertise, promote, solicit, or negotiate the advance fee agreement at least 10 days prior to using such materials. (Bus. & Prof. Code, § 10085; Cal. Code Regs., tit. 10, § 2970, subd. (a).)

6. However, it is illegal for any real estate licensee to "claim, demand, charge, collect, or receive any compensation" for negotiating, attempting to negotiate, arranging, attempting to arrange, or otherwise offering to perform loan modification or forbearance services "until after the licensee has fully performed each and every service the licensee contracted to perform or represented that he, she, or it would perform." (Bus. & Prof. Code § 10085.6, subd. (a)(1).) It is also illegal for a foreclosure consultant to engage in the same conduct. (Civ. Code, § 2945.4, subd. (a).)

7. A real estate broker who receives funds belonging to another while performing his licensed activities:

[S]hall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principle, into a trust fund account maintained by the broker in a bank or recognized depository in the state. All funds deposited by the broker in a trust fund account shall be maintained there until dispersed by the broker in accordance with instructions from the person entitled to the funds.

(Bus. & Prof. Code, § 10145, subd (a) (1); see, Cal. Code Regs., tit. 10, § 2832.)

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And when those funds constitute advance fees, the broker "shall deposit any such amount or amounts, when collected in a trust account with a bank or other recognized depository. Such funds are trust funds and not the funds of the [broker]." (Bus. & Prof. Code, § 10146.)

Furthermore,

The commissioner may issue such rules and regulations as he or she deems necessary to regulate the method of accounting, and to accomplish the purpose of the provisions of this code relating to advance fees including, but not limited to, establishing forms for and determining information to be included in such accountings. Each principal shall be furnished a verified copy of such accountings at the end of each calendar quarter and when the contract has been completely performed by the licensee. The Commissioner shall be furnished a verified copy of any account or all accounts on his or her demand therefor.

(Bus. & Prof. Code, § 10146.)

California Code of Regulations, title 10, section 2972, provides:

Each verified accounting to a principal or to the Commissioner as required by Section 10146 of the Code shall include at least the following information:

- (a) The name of the agent.
- (b) The name of the principal.
- (c) Description of the services rendered or to be rendered.
- (d) Identification of the trust fund account into which the advance fee has been deposited.
- (e) The amount of the advance fee collected.
- (f) The amount allocated or dispersed from the advance fee for each of the following:
 - (1) And providing each of the services enumerated under (c) above.
 - (2) Commissions paid to field agents and representatives.

(3) Overhead costs and profit.

8. A real estate broker is required to maintain "control records" of all trust funds received as follows:

(a) Every broker shall keep a record of all trust funds received, including uncashed checks held pursuant to the instructions of his or her principal. This record, including records maintained under an automated data processing system, shall set forth in chronological sequence the following information in colmunar form:

(1) Date trust funds received.

(2) From whom trust funds received.

(3) Amount received.

(4) With respect to funds deposited in an account, date of said deposit.

(5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.

(6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.

(7) Daily balance of said account.

(B) For each bank account which contains trust funds, a record of all trust funds received and disbursed shall be maintained in accordance with subdivision (a) or (c).

(Cal. Code Regs., tit. 10, § 2831.)

Additionally, the broker shall maintain "separate records" for each beneficiary on whose behalf he holds trust funds as follows:

A broker shall keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account and interest, if any, he earned on the funds on deposit. This record shall include information sufficient to identify the transaction and the parties to the transaction. Each record shall set forth in chronological sequence the following information in colmunar form:

- (1) Date of deposit.
- (2) Amount of deposit.
- (3) Date of each related disbursement.
- (4) Check number of each related disbursement.
- (5) Amount of each related disbursement.
- (6) If applicable, dates and amounts of interest earned and credited to the account.
- (7) Balance after posting transactions on any date.

(Cal. Code Regs., tit. 10, § 2831.1, subd. (a).)

The broker shall reconcile the separate records with the control records at least once a month, except for those months in which there are no trust fund activities, and he must maintain a record of such reconciliation. (Cal. Code Regs., tit. 10, § 2831.2.)

9. When a real estate broker holds trust funds on behalf of multiple principals,

The written consent of every principal who is an owner of the funds in the account shall be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds.

(Cal. Code Regs., tit. 10, § 2832.1.)

10. A real estate broker shall not perform real estate activities under the name of a fictitious business entity, unless such entity is affiliated with his real estate broker license. (Cal. Code Regs., tit. 10, § 2731, subd. (a).) A real estate broker seeking to conduct business under the name of a fictitious business entity "shall file with his or her application a certified copy of his or her fictitious business name statement filed with the county clerk pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7." (Bus. & Prof. Code, § 10159.5, subd. (a)(1).)

Cause for Discipline

11. A real estate license may be disciplined if the licensee has "willfully disregarded or violated the Real Estate Law ... or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law" (Bus. &

Prof. Code, § 10177, subd. (d).) Respondent violated Business and Professions Code section 10085.6 by demanding, charging, collecting, and receiving advance fees in connection with his agreements to provide loan modification and forbearance services to Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan prior to performing all the services he agreed to perform under the respective agreements. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to Business and Professions Code section 10085.6.

12. A real estate license may also be disciplined if the licensee has “demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.” (Bus. & Prof. Code, § 10177, subd. (g).) Respondent demonstrated negligence or incompetence in performing his real estate activities for the reasons explained in Legal Conclusion 11. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

13. A real estate license may also be disciplined if the licensee has “violated or failed to comply with Chapter 2 (commencing with Section 2920) of Title 14 of Part 4 of Division 3 of the Civil Code, related to mortgages.” (Bus. & Prof. Code, § 10177, subd. (q).) Complainant alleged respondent’s activities described in Legal Conclusion 11 violated Civil Code section 2945.4, subdivision (a), which prohibits foreclosure consultants from engaging in certain activities. But respondent was not acting as a “foreclosure consultant” when he engaged in those activities. (Civ. Code, § 2945.1, subd. (b)(3) [excluding licensed real estate brokers acting in such capacity from the definition of a foreclosure consultant].) Therefore, no cause exists to discipline respondent’s real estate broker license pursuant to Business and Professions Code section 10177, subdivision (q), as that statute relates to Civil Code section 2945.4.

14. Respondent violated Business and Professions Code section 10145, subdivision (a)(1), and California Code of Regulations, title 10, section 2832.1, on May 23, 2014, by allowing the balance of trust funds in Bank Account No. 1 to fall below his then existing aggregate trust fund liability to Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan without each of their written consent. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to Business and Professions Code section 10145, subdivision (a)(1), and California Code of Regulations, title 10, section 2832.1.

15. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 14. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

16. Respondent violated Business and Professions Code section 10085 and California Code of Regulations, title 10, section 2970, by using materials to advertise, promote, solicit, and negotiate the advance fee agreements he entered into with Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan without first

submitting those materials to the Bureau for review and approval. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to Business and Professions Code section 10085 and California Code of Regulations, title 10, section 2970.

17. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 16. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

18. Respondent violated Business and Professions Code sections 10145, subdivision (a)(1), and 10146 and California Code of Regulations, title 10, section 2832, by not immediately depositing the advance fees collected from Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan into a trust account maintained in his name at a bank or other financial institution. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to Business and Professions Code sections 10145, subdivision (a)(1), and 10146 and California Code of Regulations, title 10, section 2832.

19. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 18. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

20. Respondent violated Business and Professions Code section 10146 and California Code of Regulations, title 10, section 2972, by not performing the required accounting and providing copies of the same to Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to Business and Professions Code section 10146 and California Code of Regulations, title 10, section 2972.

21. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 20. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

22. Respondent violated California Code of Regulations, title 10, section 2831.1, by failing to maintain separate records of each advance fee he received from Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to California Code of Regulations, title 10, section 2831.1.

23. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 22. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

24. Respondent violated California Code of Regulations, title 10, section 2831, by failing to maintain control records of all advance fees he collected from Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to California Code of Regulations, title 10, section 2831.

25. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 24. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

26. Respondent violated California Code of Regulations, title 10, section 2831.2, by failing to reconcile his separate records with his control records. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to California Code of Regulations, title 10, section 2831.2.

27. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 26. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

28. Respondent violated Business and Professions Code section 10159.5, subdivision (a)(1), and California Code of Regulations, title 10, section 2731, by performing real estate activities under the fictitious business entity Advocates for Neighbors without affiliating that entity with his license. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to Business and Professions Code section 10159.5, subdivision (a)(1), and California Code of Regulations, title 10, section 2731.

29. Respondent demonstrated negligence or incompetence in performing his real estate activities described in Legal Conclusion 28. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10177, subdivision (g).

30. A real estate license may be disciplined if the licensee has commingled trust funds with his own personal funds. (Bus. & Prof. Code, § 10176, subd. (e).) Respondent commingled trust funds with his own personal funds when he deposited the advance fees he received from Mr. Maramba, Mr. Zumot, Mr. and Mrs. Ghattas, and Mr. and Mrs. Parangan

into Bank Account No. 1. Therefore, cause exists to discipline his real estate broker license pursuant to Business and Professions Code section 10176, subdivision (e).

Award of Costs of Audit

31. A real estate broker shall reimburse the Bureau for the cost of an audit after the Bureau issues a final decision finding that the broker violated Business and Professions Code section 10145 or any rule or regulation interpreting that statute:

(b) The commissioner shall charge a real estate broker for the cost of any audit, if the commissioner has found, in a final desist and refrain order issued under Section 10086 or in a final decision following a disciplinary hearing held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting Section 10145.

(c) If a broker fails to pay for the cost of an audit as described in subdivision (b) within 60 days of mailing a notice of billing, the commissioner may suspend or revoke the broker's license or deny renewal of the broker's license. The suspension or denial shall remain in effect until the cost is paid or until the broker's right to renew a license has expired.

The commissioner may maintain an action for the recovery of the cost in any court of competent jurisdiction. In determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers.

(Bus. & Prof. Code, § 10148.)

32. Cause exists to discipline respondent's real estate broker license for violating Business and Professions Code section 10145, subdivision (a) (1), and regulations interpreting that statute for the reasons explained in Legal Conclusions 18 and 19. Therefore, respondent is required to reimburse the Bureau the sum of \$4,498.45 for the cost of Mr. Li's audit within 60 days of the Bureau's mailing a notice of billing. (Factual Finding 22; Bus. & Prof. Code, § 10148, subds. (b) & (c).)

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Award of Costs of Investigation and Enforcement

33. Business and Professions Code section 10106 provides, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, 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.

[¶]...[¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

California Code of Regulations, title 1, section 1042, subdivision (b), states the following about cost recovery:

Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.* at p. 45.)

34. The evidence complainant introduced in support of her request for costs of investigation and enforcement constitutes prima facie evidence of the reasonableness of the costs incurred. (Factual Finding 23; Bus. & Prof. Code, § 10106, subd. (c); Cal. Code Regs., tit. 10, § 1042, subd. (b)(1), (2).) Respondent did not introduce any evidence to rebut such evidence. (Factual Finding 24.) Therefore, after considering the relevant evidence and the pertinent *Zuckerman* factors, the entire amount of costs of investigation and enforcement requested by complainant is reasonable. Consequently, complainant is awarded costs in the total sum of \$5,338.95 as set forth in the Order below.

ORDER

1. All licenses and licensing rights of respondent Francisco Calamayan Neri under the Real Estate Law are REVOKED.

2. Respondent shall reimburse the Bureau of Real Estate the sum of \$4,498.45 for the cost of Bosco Li's audit within 60 days of the Bureau of Real Estate's mailing a notice of billing.

3. Respondent shall reimburse the Bureau of Real Estate the sum of \$5,338.95 for costs incurred while investigating and enforcing this matter. Respondent may pay these costs according to a payment plan approved by the Bureau of Real Estate or its designee.

DATED: December 9, 2016

DocuSigned by:

Coren D. Wong

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COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings