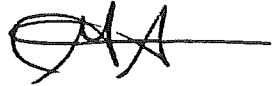


FILED

December 30, 2014

BUREAU OF REAL ESTATE

By 

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
TOPAZ FINANCIAL SERVICES)
INCORPORATED & ALDO JOHN GIGLIOTTI,)
Respondents.)
_____)

No. H-11695 SF
OAH No. 2014070097

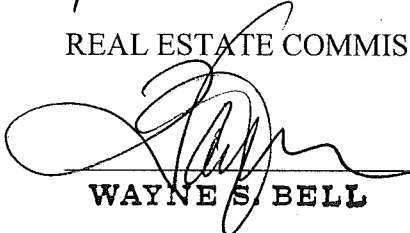
DECISION

The Proposed Decision dated December 4, 2014, 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 JAN 20 2015

IT IS SO ORDERED 12/22/2014

REAL ESTATE COMMISSIONER


WAYNE S. BELL

**BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation of:

**TOPAZ FINANCIAL SERVICES,
INCORPORATED and ALDO JOHN
GIGLIOTTI,**

Respondents.

Case No. H-11695 SF

OAH No. 2014070097

PROPOSED DECISION

Administrative Law Judge Adrienne J. Miller, State of California, Office of Administrative Hearings, heard this matter on September 29, 2014, in Oakland, California.

Jason D. Lazark, Counsel, represented complainant Tricia D. Parkhurst, a Deputy Real Estate Commissioner of the State of California.

Robert B. Jacobs, Attorney at Law, represented respondent Aldo John Gigliotti, who was present, and Topaz Financial Services, Incorporated. Gloria Tan, President of Topaz Financial Services, Incorporated was present.

The record remained open for the purpose of granting complainant time to file her written closing argument by October 20, 2014, respondents to file their written closing argument by October 31, 2014, and for complainant to file her reply to respondents' trial brief by October 31, 2014, and to file her reply brief November 7, 2014. On October 30, 2014, a letter from complainant was received and stated that complainant's written closing argument, which was submitted on October 20, 2014, would constitute complainant's reply to respondents' Trial Brief. All written briefs were timely received, identified and marked as exhibits as follows: Complainant's closing argument was marked as Exhibit 19, the October 30, 2014 letter marked as Exhibit 20, Complainant's Response to Respondents' Closing Brief was marked as Exhibit 21, Respondents' hearing brief was marked as Exhibit R, and Respondents' Closing Brief was marked as Exhibit S. On November 7, 2014, the matter was deemed submitted for decision and the record closed. Complainant filed a Response to Respondents' Closing Brief after the record closed; because it was untimely, it was not considered, but was marked for identification as Exhibit 22.

FACTUAL FINDINGS

1. On September 25, 2014, Tricia D. Parkhurst, a Deputy Real Estate Commissioner of the State of California, Bureau of Real Estate (bureau), in her official capacity, made the Second Amended Accusation against respondents Topaz Financial Services, Incorporated (Topaz), doing business as Abacus Realty, and Aldo John Gigliotti (Gigliotti).

Respondent Topaz's License History

2. Respondent Topaz is presently licensed as a corporate real estate broker. Respondent Topaz was originally licensed as of May 19, 2008 with Gigliotti as its designated officer. On September 16, 2008, Topaz informed the bureau that it was doing business as Abacus. Topaz holds company mortgage loan originator license endorsement number 388648, which was approved on December 5, 2011. On August 1, 2011, the Secretary of State suspended the corporate powers, rights and privileges of Topaz. On December 1, 2013, the Secretary of State reinstated the corporate powers, rights and privileges of Topaz. The corporate license was renewed on May 19, 2012, and is scheduled to expire on May 19, 2016.

Respondent Aldo John Gigliotti's License History

3. Respondent Gigliotti 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 real estate broker. Respondent Gigliotti also holds an individual mortgage loan originator license endorsement number 388605, which was approved on December 5, 2011. Gigliotti was originally licensed as a real estate broker on May 21, 1998. Gigliotti's broker license is scheduled to expire on May 20, 2018. Gigliotti is responsible for supervising the activities of the Topaz officers, agents, real estate licensees and employees for which a license is required. (Bus. & Prof. Code, § 10159.2, subd. (a).) Gigliotti's officer designation license is scheduled to expire on May 18, 2016.

Owner of Topaz

4. Gloria Tan (Tan) is the president and sole owner of Topaz and designated to handle a number of administrative matters, including matters relating to the corporate status of the corporation. Tan is not a licensed real estate salesperson or broker.

First Cause of Action – Conducting Business While Not in Good Standing (Topaz Only)

5. On August 1, 2011, the Franchise Tax Board mailed a Notice of Suspension or Forfeiture to Topaz and Tan addressed to "15 Saint Francis SQ, Daly City, CA 94015-4014 USA." The Notice stated the following:

Our records show that you did not resolve your tax delinquency within 60 days from the date of our last notice. *Therefore, the rights, powers, and privileges of this entity are suspended or forfeited as of the date of this notice.* We took this action because you did not pay an amount, or you did not file tax returns under Revenue and Taxation Code Sections 23301, 23301.5, and 23304.1(d). If your entity is exempt, we may revoke your exemption under Revenue and Taxation Code Section 23775.

An entity while under suspension or forfeiture cannot legally transact business, defend or initiate an action in court, protest assessments, or file a claim for refund of amounts paid. Additionally, you forfeited your right to use the entity name. If you do you not pay the balance due, or file the tax returns immediately, any contract you entered into can be voidable by the other party under Section 19719. We grant relief for Contract Voidability under Revenue and Taxation Code Section 23305.1.

[¶] . . . [¶]

(Italics added.)

6. Respondent Topaz was delinquent in filing taxes in 2008 and 2010.
7. The Secretary of State suspended Topaz's license in 2011. Topaz engaged in activities requiring a real estate license while its corporate status was suspended.
8. Respondent Topaz stipulated that it engaged in the business of, acted in the capacity of, advertised or assumed to act as real estate brokers in the State of California with in the meaning of Business and Professions Code section 10131, subdivision (d), including the operation and conducting a mortgage loan brokerage business with the public wherein they solicited lenders and borrowers for or negotiated loans or collected payment and/or performed services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property for or in expectation of compensation while the corporation was suspended, from August 1, 2011 to December 5, 2013.

Second Cause of Action – Misrepresentation (Gigliotti Only)

9. On May 3, 2012, Gigliotti filed the Officer Renewal Application (application) with the bureau to renew his designated broker officer status for Topaz. Gigliotti stated that Tan prepared the document.

10. In response to Question No. 17 of the application to wit: "Is the corporation currently in good standing with the Office of the Secretary of State?" Gigliotti answered "yes." When Gigliotti answered "yes" to Question No. 17, Topaz had already been suspended by the Secretary of State, as of August 1, 2011.

11. Before signing the application, Gigliotti asked Tan about the corporate status and Tan advised Gigliotti that the corporation was in good standing. On the strength of that representation, Gigliotti signed the application under penalty of perjury. Gigliotti relied solely on Tan's statement regarding the corporation's good standing. However, on the application at the end of Question 17, the following was added and in bold type: **"corporation taxes not filed."** Gigliotti does not recall what Tan told him about the taxes when he read this statement. However, Gigliotti did not independently check the corporate status with the Secretary of State after reading this typed statement on the application. Gigliotti did not check the corporate status on the Internet with the Secretary of State.

12. Gigliotti stated that the corporation did not receive the notice of suspension from the Franchise Tax Board because either the Franchise Tax Board failed to serve the notice, or because it got lost in the mail, or because the Post Office failed to properly process and deliver it, or if the notice was addressed to 15 St. Francis Boulevard that possibly the Post Office was confused about the correct recipient and never delivered it.

13. Gigliotti stated that Tan was incorrect about whether the corporation was in good standing at the time he renewed his application; however, she did not know it at the time. Gigliotti stated that Tan must have assumed that since she did not receive any notice of any problems with the corporation that it was in good standing. It was not until October 2013, that Tan and Gigliotti first learned that corporation had been suspended.

14. Gigliotti stated that the corporation's address has been changed to 15 St. Francis Square with both the bureau and the Secretary of State.

15. In the Articles of Incorporation, dated December 31, 2007, signed by Gigliotti, the corporation's initial agent is listed as "Gloria Tan, at 15 Saint Francis Square, Daly City, CA 94015."

16. In the Statement of Information with the Secretary of State, dated July 14, 2008, signed by Tan, the address for the corporation is listed three times as "15 St. Francis Blvd., Daly City, CA 94015." On February 7, 2012, the Statement of Information indicates that the corporation's address is 15 St. Francis Square, Daly City, CA 94015."

17. Gigliotti stated that prior to completing the application he knew there was a file containing corporate documents for Topaz but failed to review the file to determine if there were any letters or notifications from either the Secretary of State or the Franchise Tax Board.

18. Gigliotti believes that as the designated broker officer, who does not own or control 10 percent of the stock of the corporation, under Business and Professions Code section 10177, subdivision (d), he should not be subject to discipline.

19. Gigliotti believes that the corporation did not conduct business willfully in violation of real estate law since it was unaware that its corporate status was suspended.

Third Cause of Action – Failure to Supervise (Gigliotti Only)

20. On October 29, 2013, bureau investigator Lily Liu (Liu) conducted a Broker Office Survey (BOS) at the offices of Topaz and met with Gigliotti. During Liu's visit the office was open and handling business. Liu did not know if the business activities involved real estate or another type of business. During the survey Gigliotti stated that he did not own a percentage of Topaz and that Tan, the wife of Bernard S. Tan, a real estate salesperson in the office, was the 100 percent owner of the company. Gigliotti stated that Tan runs the office and handles all the administrative activities, including paying the office lease, hiring and supervising non-licensed employees, and handling of commission and payroll. Gigliotti stated that Tan does not supervise licensed activities. Gigliotti does not have an office, cubicle or computer at the corporation's office. When he is in the office he sits in the back area of the office, which is considered a break room for the employees and contains a printer.

21. Gigliotti advised Liu that he does not get paid for being the designated broker officer for the corporation. He advised Liu that he offered to be the designated broker officer because he was generous. Gigliotti stated that he was designated broker officer for others without compensation, in Nevada. Gigliotti told Liu that he supervised the loan process and he only spent more time in the office if there were more activities. He stated that the time he spent in the office depended on the volume, and he might not be in the office for a couple of weeks. Gigliotti estimates that he spent 10 hours per month at Topaz because of a lack of work. Gigliotti stated that he reviewed files before agents were paid. When Topaz asked Gigliotti to review a broker's demand, he did so through email. Gigliotti stated that sometimes Bernard Tan would do it too.

22. Gigliotti stated that there is an office policy manual and that Tan maintains the manual. There are six employees at Topaz of which three employees have real estate salespersons licenses.

23. Liu asked Gigliotti if he knew if Topaz was in good standing with the Secretary of State. Gigliotti stated that Topaz was not in good standing due to being suspended by the Franchise Tax Board. He advised Liu that Tan was in contact with her certified public accountant to get the matter resolved. Gigliotti stated that the corporation was in the process of correcting its status. Liu asked Gigliotti if he knew that Topaz was not allowed to do business while it was on suspended status with the Secretary of State. Gigliotti stated that he did not know about the company's status until recently. Gigliotti stated that he found out two weeks prior to the survey and he did not think that it was something he needed

to check out. Gigliotti was asked to fill out an RE 518a declaration. Gigliotti did not understand why he had to fill out a declaration when he felt that he had done nothing wrong. Gigliotti did not file an RE 518a declaration.

24. During the office survey Gigliotti told Liu that he believed Tan was having a return prepared and it "has been or will be submitted this week." When asked if Tan was the one who prepared the return, Gigliotti stated that Tan prepared it with his oversight. Gigliotti also stated that he met with Tan and her husband regarding the corporate status and that he did not know the process for a corporate revivor application but he believed "Gloria will drop off the return either tomorrow or on Friday, if Franchise Tax Board is open after Thanksgiving."

25. On November 26, 2013, in a telephone conversation with Liu, Gigliotti was asked if the corporation had remained open for business since the BOS on October 29, 2013. Gigliotti stated that office is open but not conducting any licensed activities but just handling some paperwork. When he was asked what paperwork had been handled during this time, Gigliotti stated it was the paperwork to make sure the files were complete and up to date.

26. On November 26, 2013, Lui checked the corporate status of Topaz on the Secretary of State's website and found that the corporation was still suspended.

27. On November 26, 2013, Lui also asked Gigliotti for the address of the corporation and he stated "15 St. Francis Boulevard." When asked about 15 St. Francis Square, he said the office is in a shopping center, and Square is the location address, while Boulevard, should be the recognized legal mailing address. Gigliotti believed that Square and Boulevard were synonymous. Gigliotti stated that he used both Square and Boulevard in his paperwork and contact with clients. Square refers to a location, which is more descriptive while Boulevard is the legal mailing address and it should be correct in the bureau's record.

28. On November 26, 2013, Gigliotti told Liu that he heard that the corporation's tax returns had been prepared by Tan with his oversight. Gigliotti stated that he did not know the process of bringing the corporation into compliance; however Tan was doing a "revivor."

29. Gigliotti states that he reviews all files prior to the close of any transaction and before anyone is paid. Gigliotti also stated that he communicates with the office nearly every day by phone or by email. He also stated that he is involved in Topaz's transactions from inception to conclusion. Gigliotti does not review transactional files before transactions are closed. Gigliotti maintains that Tan is the boss of the whole operation and reiterated that she is the 100 percent owner of the corporation; however Gigliotti continued to assert that she only handles non-licensed activities and that he supervises all licensed activities.

Evidence of Impeachment

30. The bureau submitted several applications completed and submitted by Gigliotti to the Nationwide Mortgage Licensing system & Registry (NMLS). NMLS is the legal system of record for licensing in all participating states, the District of Columbia, and U.S. Territories. In these jurisdictions, NMLS is the official and sole system for companies and individuals seeking to apply for, amend, renew, and surrender licenses managed in the NMLS on behalf of the jurisdiction's governmental agencies.

31. On January 6, 2014, Gigliotti completed an NMLS application on behalf of Topaz. The application contained several questions related to the background and status of Topaz. Specifically, section B of the application asks "[i]n the past 10 years, has any State of federal regulatory agency or foreign financial regulatory authority or self-regulatory organization (SOR) ever . . . (3) found the entity or a control affiliate to have been a cause of a financial services-related business having its authorization to do business denied, suspended, revoked or restricted? . . . (5) denied, suspended or revoked the entity's or a control affiliate's registration or license or otherwise, by order, prevented it from associating with a financial services-related business or restricted its activities?" Gigliotti answered "no" to questions 3 and 5, knowing at that time that Topaz had been suspended both by the Secretary of State and the Franchise Tax Board. Liu had informed Gigliotti of these two suspensions well before January 6, 2014.

32. Gigliotti testified that he did not consider the Secretary of State or the Franchise Tax Board to be "regulatory" agencies.

33. The Franchise Tax Board is a regulatory agency. (See, Rev. & Tax. Code §§ 19503 [rules and regulations of Franchise Tax Board], 19506 [appointment of deputies and assistants to proscribe regulations] and 7051 [authority of the board to proscribe, adopt and enforce regulations].)

34. The Secretary of State is a regulatory agency. (See, Gov. Code § 12180 et seq.)

Matters in Mitigation

35. Gigliotti has not had any disciplinary actions filed against his license since he was licensed as a broker in 1998. He is involved in his community as a past president of the Rotary Club and member of the Novato Chamber of Commerce, and served on Novato's Horseman's board. He has also been involved in the mounted sheriff's posse, the Downtown Novato Business Association and the Novato Junior Achievement League. He is also a member of the Real Estate Boards of Marin, San Mateo and Las Vegas. Gigliotti wants to maintain his skills as a real estate broker and thus he agreed to act as the designated broker for Topaz for no compensation. Gigliotti stated that he is responsible whether he is paid or not.

Costs

36. The bureau incurred \$2,513.50 in investigation costs and \$1,548.60 in legal fees in this matter. The total costs of investigation and enforcement are \$4,062.10. The costs of enforcement are supported by a declaration dated September 25, 2014, which is accompanied by a document describing the general tasks performed, the time spent on each task and the method of calculating the costs. The investigative costs are also supported by a declaration dated September 25, 2014, which is accompanied by a document describing the general tasks performed, the time spent on each task, and the method of calculating the costs. In the absence of evidence to the contrary, the bureau's costs are found to be reasonable.

LEGAL CONCLUSIONS

The Standard of Proof

1. The standard of proof in an administrative disciplinary action that seeks the suspension or revocation of a real estate professional's license is "clear and convincing evidence to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.)

"Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. Clear and convincing evidence is a higher standard of proof than proof by a preponderance of the evidence. Clear and convincing evidence requires a finding of high probability for the propositions advanced in an Accusation against a targeted licensee. It must be so clear as to leave no substantial doubt and to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700.)

Cause for Discipline Against Topaz

CONDUCTING BUSINESS WHILE NOT IN GOOD STANDING

2. Business and Professions Code¹ section 10177, subdivision (d), authorizes the commissioner to suspend or revoke the license of a real estate licensee who 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.

The concept of "willful" is given broad meaning in the realm of administrative licensure disciplinary proceedings. "Willful" does not imply a malicious intent to do wrong or a consciousness for malfeasance on the part of a licensee to violate a rule, statute or standard of due care. The term " 'willful' . . . does not necessarily imply anything blamable,

¹ All statutory references herein pertain to the Business and Professions Code unless otherwise specified.

or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent . . ." (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 12; see also: *Murrill v. State Board of Accountancy* (1950) 97 Cal.App.2d 709, 713; *Milner v. Fox* (1980) 102 Cal.App.3d 567, 573-575 fn. 9; *Apollo Estates, Inc. v. Department of Real Estate* (1985) 174 Cal.App.3d 625, 639.)

3. California Code of Regulations, title 10, section 2742, prohibits a licensed corporation from engaging in the business of a real estate broker while not in good legal standing with the Office of the Secretary of State.

It is undisputed that Topaz conducted business requiring a real estate license while it was not in good standing with the Secretary of State (Factual Findings 5 through 8.)

However, respondent Topaz argues that it is not subject to discipline under section 10177 because respondent Gigliotti is not an officer of the corporation and his name does not appear on Statement of Information filed with the Secretary of State as an officer, director or 10 percent shareholder of the corporation. Neither the Statements of Information nor Gigliotti's self-serving statement that he was not an officer of Topaz is a determining factor in the first cause of action. Rather, the applicable provisions of the Real Estate Law are controlling. Section 10158 requires that a licensed corporation designate a broker officer with the bureau. Topaz has designated Gigliotti since it was licensed in 2008. (Factual Finding 2.) The evidence shows that he has held himself out to the bureau as an officer of Topaz acting on behalf of Topaz at all times relevant to this case. Section 10211 holds that "[i]f the licensee is a corporation, the license issued to it entitles one officer thereof, on behalf of the corporation, to engage in the business of real estate broker without the payment of any further fee, such officer to be designated in the application of the corporation for license."

Gigliotti was acting as an officer of Topaz when he allowed Topaz to continue to operate while it was not in good standing with the Secretary of State, therefore Topaz is subject to discipline under section 10177.

In addition, Topaz argues that the public was not harmed because no contracts were voided because of the corporation's suspension, and therefore there is no need for discipline. However, the issue is not that the public was actually harmed but rather whether discipline is appropriate in order to protect the public from actual or potential harm. The focus is on whether Topaz and Gigliotti violated the Real Estate Law rather than whether parties were harmed. There is no dispute that Topaz violated the Real Estate Law when it continued to conduct business as usual for over two years while the corporation was suspended by the Secretary of State. Respondents admit to conducting business while their license was suspended. (Factual Finding 8.)

4. Section 10177, subdivision (g), authorizes the commissioner to suspend or revoke the license of a real estate licensee who demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

Topaz argues that it did not know that its corporate status was not in good standing because it did not receive the notice of suspension from the Secretary of State. However, Topaz knew that it had not filed its taxes and therefore Topaz was negligent in believing that its corporate status was in good standing. It is undisputed that Topaz knew that it had not filed its taxes when it allowed Gigliotti to file his Officer Renewal Application. (Factual Finding 9.)

Cause for disciplinary action exists under section 10177, subdivisions (d) and (g), by reason of the matters set forth in Factual Findings 5 through 8.

Cause for Discipline Against Gigliotti

MISREPRESENTATION

5. Section 10177, subdivision (a), authorizes the commissioner to suspend or revoke the license of a real estate licensee who has renewed a license for himself by misrepresentation or by making a material misstatement of fact in an application for a real estate license renewal.

Gigliotti made application to the bureau to serve as the designated broker officer of respondent Topaz. (Factual Finding 9.) He stated that the respondent Topaz was in good standing when he signed the application. (Factual Finding 10.) Gigliotti depended solely upon the oral representation of Tan, the owner of Topaz, without making an independent inquiry with the Secretary of State, even after seeing that within the answer to Question 17 in the application Tan had inserted an additional statement that the "corporation taxes not filed." (Factual Finding 11.) Any prudent person would have seen this as a "red flag" and queried how a corporation can be in good standing when its taxes have not been paid.

A real estate licensee's misrepresentations may be either intentional or negligent.

Respondents were negligent in not verifying that the corporation was in good standing, while both the corporation and Gigliotti were aware that the corporation's taxes had not been filed. A simple internet search on the Secretary of State's website would have verified the truth of Tan's statement that the corporation was in good standing. Gigliotti was not acting reasonably when he accepted Tan's response to whether the corporation was in good standing.

Gigliotti admits that he delegated his responsibility to complete the application to Tan who is unlicensed. (Factual Findings 9 through 11.)

Gigliotti was both careless and reckless in not verifying the corporation's good standing or reviewing the corporation's file containing corporate documents, letters and notifications, and submitted an application that contained a materially false statement. (Factual Findings 11 and 17.)

Gigliotti has several explanations as to why the corporation was unaware that the corporation was not in good standing. He states that either the Secretary of State did not mail the notice of suspension, the United States Postal Service did not mail it, or the Secretary of State sent the notice to a wrong address. (Factual Finding 12.)

Once again, Gigliotti reiterates that there should be no discipline because the public was not harmed and the misstatement in the application was just a technical error or an unfortunate mix-up. (Factual Finding 19.)

However, Gigliotti continued to misrepresent the corporate status of Topaz even after learning it was not in good standing when he filed several applications with the NMLS in January 2014, and answered "no" when asked if the corporation had ever been suspended by a regulatory agency. (Factual Finding 30.)

FAILURE TO SUPERVISE

6. Sections 10177, subdivision (g) (negligence) or subdivision (h) (failure to exercise reasonable supervision) in conjunction with 10177, subdivision (d) (willful disregard for the real estate law) authorizes the commissioner to suspend or revoke the license of a real estate licensee who 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.

Under Section 10177, subdivision (g), Gigliotti is subject to discipline for negligently allowing respondent Topaz to conduct real estate activities while the corporation was suspended by the Secretary of State. (Factual Findings 5 through 8, and 23.)

Respondents claim that their conduct did not fall below the standard of care of what a reasonable broker should have done under similar circumstances. Respondents also claim that because the bureau did not present expert testimony on the subject of the applicable standard of care then respondents cannot be disciplined. Testimony is not required where a question is 'resolvable by common knowledge.' (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 236; see also *Mavroudis v. Superior Court* (1980) 102 Cal.App.3d 594, 505.)

7. Section 10177, subdivision (h), prescribes the commissioner may suspend or revoke the license of a real estate licensee, who has "[a]s a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required."

8. Section 10159.2 states that as a designated officer broker, Gigliotti was responsible for supervising the activities of the officers, agents, real estate licensees and employees of Topaz for which a license is required.

9. California Code of Regulations, title 10, section 2725, sets out the bureau's rules regarding supervision by a real estate broker of licensees associated with the license of the real estate broker. The regulation prescribes, in pertinent part:

A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage: . . . transactions requiring a real estate license; . . . [d]ocuments which may have a material effect upon the rights or obligations of a party to the transaction. . . [f]iling, storage and maintenance of such documents . . . , [a]dvertising of any service for which a license is required . . . [r]egular and consistent reports of licensed activities of salespersons . . . A broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

Cause exists for disciplinary action against the license issued to Gigliotti under section 10177, subdivision (h), and California Code of Regulations, title 10, section 2725, in conjunction with section 10177, subdivision (d), by reason of the matters set forth in Factual Findings 20 through 29.

Measure of Discipline

10. The purpose of an administrative adjudication proceeding that contemplates the revocation or suspension of a professional or occupational license is not to punish the individual. The purpose of the agency action is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Board of Medical Quality Assurance, supra*, 135 Cal.App.3d 583.)

Both Topaz and Gigliotti were negligent in allowing the corporation to engage in real estate activity for over two years while its corporate status was not in good standing. Based upon their individual and joint failure to assure that the corporation was in good standing and their continual denial of their responsibility to provide the public with a valid licensed corporation that follows the rules and regulations of Real Estate Law, it is determined that both Topaz and Gigliotti should be disciplined.

Topaz knowingly conducted real estate business for over two years while its license was suspended by the Secretary of State. The license of Topaz should be suspended 30 days to protect the public from further actual or potential harm.

Gigliotti has been a licensed broker for over 16 years without any prior discipline. Gigliotti is also an active member of the business community. Based upon Gigliotti's past professional conduct, it is unlikely that Gigliotti will engage in future misrepresentations or fail to supervise the operation of Topaz. Accordingly, it is determined that public safety will not be imperiled if Gigliotti continues to hold his license as a real estate broker and as the designated officer broker of Topaz on a restricted basis.

Costs

11. Section 10106 provides, in pertinent part, that the bureau may request that the licensee be ordered to pay a sum not exceeding the reasonable costs of investigation and enforcement upon a finding that the licensee violated the Real Estate Law. The bureau requests reimbursement of fees and costs in the amount of \$4,062.10. The bureau's fees and costs were reasonable. (Factual Finding 36.)

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether costs should be assessed in the particular circumstances of each case. Respondent has not established a basis to reduce or eliminate the costs in this matter.

ORDER

Topaz Financial Services, Incorporated

1. All licenses and licensing rights of respondent Topaz Financial Services, Incorporated under the Real Estate Law are suspended for a period of 30 days from the effective date of this Decision; provided, however, that if respondent petitions, said suspension (or a portion thereof) shall be stayed upon condition that: Respondent Topaz Financial Services, Incorporated pays a monetary penalty pursuant to Section 10175.2 of the business and Professions Code at the rate of \$100 for each day of the suspension for a total monetary penalty of \$3,000. Said payment shall be in the form of a cashier's check for certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be received by the Bureau of Real Estate prior to the effective date of the Decision in this matter.

If respondent fails to pay the monetary penalty in accordance with the terms and conditions of the Decision, the commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension in which event the respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Bureau of Real Estate under the terms of this Decision.

If respondent pays the monetary penalty and if no further cause for disciplinary action against the real estate license of respondent occurs within in one year from the effective date of the Decision, the stay hereby granted shall become permanent.

Aldo John Gigliotti

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

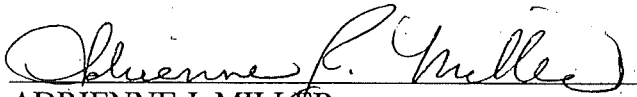
- a. The restricted license issued to respondent may be suspended prior to hearing by order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.
- b. The restricted license issued to respondent may be suspended prior to hearing by order of the Real Estate commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
- c. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license or for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.
- d. Respondent shall, within in nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 25 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If

respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

Costs

3. Respondents Aldo John Gigliotti and Topaz Financial Services, Incorporated are jointly and severally liable for payment of costs pursuant to Business and Professions Code section 10106 in the amount of \$4,062.10. Payment shall be made by certified or cashier's check made payable to the Bureau of Real Estate within 60 days from the effective date of the Decision.

DATED: 12-4-14


ADRIENNE J. MILLER
Administrative Law Judge
Office of Administrative Hearings