

File

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

APR 04 2019

DEPARTMENT OF REAL ESTATE
By *L. Lopez*

In the Matter of the Accusation of:)	DRE No. H-12248 SF
CASCO FINANCIAL, INC.,)	
THOMAS ELLIOTT MECKENSTOCK, and)	OAH No. 2018100881
JAMES RUDOLPH CASTELLANOS,)	
)	
<u>Respondents.</u>)	

DECISION

The Proposed Decision dated January 22, 2019, 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.

Pursuant to Section 11517(c)(2)(C) of the Government Code, the following corrections are made to the Proposed Decision:

1. Page 1, Introduction, Paragraph 3, Line 1, is corrected to read as follows:
"Elliott";
2. Page 2, Factual Findings 2, Line 1, is corrected to read as follows:
"Elliott";
3. Page 3, Footnote 5, Line 2, is corrected to read as follows:
"June 27, 2016";
4. Page 6, Factual Findings 22, Line 5, is corrected to read as follows:
"August 31, 2018".

Pursuant to Section 11517(c)(2)(B) of the Government Code, the following corrections are made to the Proposed Decision:

1. Page 10, Orders: Respondent Castellanos, Paragraph 5, is stricken.

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2. Page 11, Orders: Respondent CFI, Paragraph 4, is corrected to read as follows:
“Respondents Casco Financial, Inc. and James Rudolph Castellanos shall jointly and severally pay the Department costs associated with the investigation and enforcement of this matter pursuant to Section 10106 of the Business and Professions Code, in the amount of \$2,514.50.”

As to Thomas Elliott Meckenstock, the Accusation filed against Respondent is dismissed.

As to James Rudolph Castellanos, the Decision suspends or revokes one or more real estate licenses, but the right to a restricted broker license is granted to Respondent.

As to Casco Financial, Inc., the Decision suspends or revokes one or more real estate licenses, but the right to a restricted broker corporation license is granted to Respondent.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department'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.

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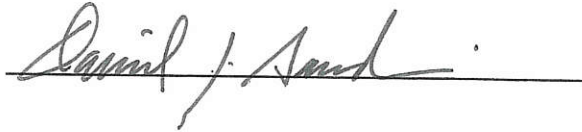
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This Decision shall become effective at 12 o'clock noon on APR 25 2019.

IT IS SO ORDERED April 3, 2019

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER



BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

CASCO FINANCIAL, INC.,
THOMAS ELLIOTT
MECKENSTOCK, and
JAMES RUDOLPH CASTELLANOS,

Respondents.

Case No. H-12248 SF

OAH No. 2018100881

PROPOSED DECISION

Administrative Law Judge Diane Schneider, State of California, Office of Administrative Hearings, heard this matter on December 20, 2018, in Oakland, California.

Complainant Robin S. Tanner, Supervising Special Investigator for the Department of Real Estate, State of California, was represented by Megan Lee Olsen, Counsel, Department of Real Estate.

Respondents Casco Financial, Inc., Thomas Elliot Meckenstock, and James Rudolph Castellanos were present and were represented by Ginger L. Sotelo, Attorney at Law, Pahl & McCay.

The matter was submitted for decision on December 20, 2018.

FACTUAL FINDINGS

1. Robin S. Tanner made the Accusation in her official capacity as a Supervising Special Investigator for the Department of Real Estate (Department) of the State of California.

License and disciplinary histories

2. Respondents Thomas Elliot Meckenstock, James Rudolph Castellanos, and Casco Financial, Inc. (CFI) are presently licensed and have licensing rights under the Real Estate Law.¹

3. At all times relevant to this proceeding, CFI was and is licensed by the Department as a real estate broker corporation. CFI's corporate license was issued, effective December 29, 2016, and will expire on December 28, 2020.

4. At all times relevant to this proceeding, Meckenstock was and is licensed by the Department as a restricted real estate broker.² Between December 29, 2016, and August 30, 2017, Meckenstock was the designated broker-officer of CFI. Pursuant to Business and Professions Code³ section 10159.2, as CFI's designated broker-officer, Meckenstock was responsible for supervising the activities of CFI's officers, agents, real estate licensees and employees of CFI for which a real estate license is required, in order to ensure CFI's compliance with real estate laws and regulations.

5. At all times relevant to this proceeding, Castellanos was and is licensed by the Department as a restricted real estate broker.⁴ Effective August 31, 2017, Castellanos was the designated broker-officer of CFI. Pursuant to section 10159.2, as CFI's designated

¹ The Real Estate Law is found at Business and Professions Code section 10000 et seq.

² Meckenstock was initially issued a broker license on July 20, 1984. Effective March 9, 1993, Chief Deputy Commissioner John R. Liberator revoked Meckenstock's broker license and granted him a right to a restricted broker license. The disciplinary order stemmed from Meckenstock's conviction for petty theft in 1991. (Pen. Code, § 484/488).

³ All statutory citations are to the Business and Professions Code unless otherwise indicated.

⁴ Castellanos was initially issued a salesperson license on March 11, 1978. On November 29, 1988, his salesperson license was terminated and he was issued a broker license. Effective May 24, 1993, Chief Deputy Commissioner Liberator revoked Castellanos's broker license and granted him a right to a restricted broker license. The disciplinary order stemmed from Castellanos's violation of real estate laws and regulations relating to salesperson employment and termination, review of instruments, control records, separate beneficiary records, and trust account reconciliation. (§§ 10168.8, 10177, subds. (d), (g) & (h); Cal. Code Regs., tit. 10, §§ 2725, 2831 & 2831.2.) Effective February 7, 2017, Real Estate Commissioner Wayne S. Bell reinstated Castellanos's unrestricted broker license.

broker-officer, Castellanos was responsible for supervising the activities of CFI's officers, agents, real estate licensees and employees of CFI for which a real estate license is required, in order to ensure CFI's compliance with real estate laws and regulations.

Failure to file background statement of information for Daniel Joseph Shaw

6. On April 30, 2014, in the Superior Court of California, County of Santa Clara, Daniel Joseph Shaw was convicted, upon his pleas of no contest, of two felony counts of grand theft, in violation of Penal Code section 484/487. Shaw's convictions for grand theft are substantially related to the qualifications, duties or functions of a licensee under California Code of Regulations, title 10, section 2910.

7. California Code of Regulations, title 10, section 2746, subdivision (a)(4), requires that at the time a designated officer files an application for a corporate real estate broker license, he or she must file a background statement of information (Form RE 212) for any officer, including a chief financial officer (CFO), who has been convicted of a substantially related crime, as specified in California Code of Regulations, title 10, section 2910.

8. Complainant alleges that Shaw was CFI's CFO. Complainant also alleges that by reason of Shaw's position as a CFO, Meckenstock and Castellanos were obligated to file a background statement of information (Form RE 212) disclosing Shaw's felony convictions with each application for a real estate broker corporation. As set forth below, these allegations were not proven.

9. On October 12, 2016, the Department received an application for a broker corporation license for CFI. The application was signed by Meckenstock on September 6, 2016, as the designated broker-officer; he listed his corporate officer title as Vice-President. Meckenstock certified that a corporation background statement was not needed for any officers or persons owning or controlling more than 10 percent of the corporation shares. Meckenstock acknowledges that he did not review the portion of the application that contained California Code of Regulation, title 10, section 2746, before he signed the certification.

10. On October 16, 2017, the Department received an application for a broker corporation license for CFI. The application was signed by Castellanos on October 6, 2017, as the designated broker-officer; he listed his corporate officer title as President.⁵ Castellanos certified that a corporation background statement was not needed for any officers or persons owning or controlling more than 10 percent of the corporation shares.

⁵ Castellanos explained that he is also the Treasurer and Secretary of CFI. A corporate document entitled "Unanimous Written Consent," dated June 16, 2016, corroborates his testimony.

EVIDENCE REGARDING SHAW'S ROLE AS CFO

11. Complainant submitted documents from the Secretary of State pertaining to CFI, including a Certificate of Status, CFI's Articles of Incorporation (filed on June 22, 2016), and Statements of Information dated October 1, 2016, and March 20, 2017. The Statement of Information, signed by Castellanos on October 1, 2016, as President, lists Daniel J. Shaw as CFI's CFO. This document was filed with the Secretary of State on October 26, 2016. The Statement of Information, signed on March 20, 2017, by Castellanos, as President, lists Castellanos as CFI's CFO. This document was filed with the Secretary of State on April 3, 2017.

12. Meckenstock credibly testified that when he signed the application for the broker corporation license on September 6, 2016, he had not seen the Statement of Information, filed with the Secretary of State, listing Shaw as CFO, and he did not have any reason to believe that Shaw was CFI's CFO. The Statement of Information listing Shaw as the CFO was signed by Castellanos on October 1, 2016, almost one month after Meckenstock submitted his real estate broker corporation application to the Department.

13. Castellanos is in charge of all of CFI's financial matters. Although the 2016 Statement of Information lists Shaw as the CFO, Castellanos credibly testified that this was an error; although Shaw worked for CFI performing document preparation, he never held the position of CFO. The 2016 Statement of Information also incorrectly lists a person named William Bel Biaggio as CFI's Secretary.

14. The Statement of Information, dated March 20, 2017, lists Castellanos as CFO; Shaw is not listed as an officer on this form. Thus, when Castellanos signed CFI's application for a broker corporation license about six months later, on October 6, 2017, he was not required to file a corporate background statement form for Shaw.

15. Castellanos did not read the Statement of Information before he signed it on October 1, 2016, and submitted it to the Secretary of State. He did not notice that Shaw was listed as the CFO and Biaggio was listed as the Secretary. According to Castellanos, Shaw and a woman named Jenn Guevara completed paperwork for CFI. Castellanos did not know if Guevara or Shaw completed this particular document. Shaw testified that he did so. The evidence as to which CFI staff completed this document was inconclusive.

16. Department Special Investigator Clarence Watmore interviewed Castellanos and Shaw on March 27, 2018, and Meckenstock on April 24, 2018. On the same dates as the interviews, Watmore summarized each interview in a two-paragraph memorandum. The memorandums have limited evidentiary value; they are summary in nature; at times were confusing; and, at other times, conflicted with persuasive testimony⁶ at hearing.

⁶ For example, in his memorandum regarding his interview with Shaw, Watmore wrote that Shaw stated he was CFI's CFO. At hearing, Castellanos persuasively testified that Shaw was not CFI's CFO. Shaw also denied making this statement to Watmore.

17. Watmore's testimony was also not persuasive because he testified to critical matters that were not contained in his memorandums; and at times, his testimony was not consistent. For example, he testified that when he interviewed Castellanos and Meckenstock, they "never denied" that Shaw was CFI's CFO. Later in his testimony, Watmore stated that during their interviews, Castellanos and Shaw affirmatively admitted that Shaw was CFI's CFO. Although the evidence was not clear as to what statements Castellanos and Meckenstock made to Watmore, based upon Castellanos's testimony, the statements regarding Shaw may have amounted to agreeing that Shaw had been *listed* as CFI's CFO.

ULTIMATE FINDINGS

18. The evidence offered to support the allegations that the applications for real estate broker corporation licenses submitted by Meckenstock and Castellanos violated applicable laws and regulations, lacked sufficient certainty and consistency to meet the clear and convincing evidence standard. This standard requires that the evidence be "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, citing *Sheehan v Sullivan* (1899) 126 Cal. 189, 193.)

19. As such, it is found that the evidence failed to establish that at the time Meckenstock signed CFI's application for a broker corporation license on September 6, 2016, he improperly certified that a corporate background statement was not required for any officers of CFI. It was also not established that, as the designated broker-officer of CFI, Meckenstock was obligated to file a corporate background statement for Shaw.

20. It is also found that the evidence failed to establish that at the time Castellanos signed CFI's application for a broker corporation license on October 6, 2017, he improperly certified that a corporate background statement was not required for any officers of CFI. For this reason, it was also not established that, as the designated broker-officer of CFI, Castellanos had a duty to file a corporate background statement for Shaw.

Failure to file business activity and trust fund reports

21. Complainant alleges that Castellanos and CFI failed to timely file fiscal reports with the Department. On May 3, 2017, CFI notified the Department that it met or expected to meet the threshold criteria for broker reporting status, pursuant to section 10232.⁷ As such, CFI was obligated under section 10232.2, subdivisions (a) and (c), respectively, to file an annual report of trust fund financial statement and an annual business activity report. Under section 10232.2, the reports must be filed within 90 days following the end of the fiscal year ending on December 31, 2017.

⁷ Section 10232 sets forth the circumstances which trigger a duty to file annual fiscal reports.

22. Castellanos assumed the role of broker-officer on August 31, 2017. The annual trust fund financial statement and annual business activity reports were due on March 31, 2018. Castellanos admits that he failed to timely file the reports on behalf of CFI. Castellanos filed an annual business activity report with the Department on September 28, 2018. He filed an annual trust fund financial statement on August 2, 2018. CFI's filings with the Department are now current.

Cost recovery

23. The Bureau reasonably incurred total costs in the amount of \$2,514.50 in its investigation and enforcement of this matter. Of this amount, \$1,001.50 was incurred in investigation costs and \$1,513 was incurred in attorney costs. In the absence of evidence to the contrary, these costs are found to be reasonable.

LEGAL CONCLUSIONS

1. It is complainant's burden to demonstrate the truth of the allegations by clear and convincing evidence to a reasonable certainty, and that the allegations constitute cause for discipline of respondents' licenses. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.)

First cause for discipline

2. Section 10177 authorizes the Commissioner to impose discipline on a licensee or a corporation where the licensee or corporate officer engages in misconduct. Complainant alleges that respondents violated section 10177, subdivision (a) (attempt to procure license by fraud), subdivision (d) (disregard or violation of real estate laws or regulations), and subdivision (g) (negligence or incompetence in performance of licensed activities).

California Code of Regulations, title 10, section 2746, subdivision (a)(4), provides that at the time a designated officer files an application for a corporate real estate broker license, the designated officer-broker must file a background statement of information for any officer who has been convicted of a crime substantially related to the qualifications, functions or duties of a licensee, as specified in California Code of Regulations, title 10, section 2910, and any person owning or controlling more than ten percent of the corporation shares. California Code of Regulations, title 10, section 2746, subdivision (b), requires that the designated officer-broker submit the information required in the background statement on Form RE 212.

3. Complainant alleges that Meckenstock violated the above-described statutes and regulation on September 6, 2016, when he signed an application for a broker corporation license as the designated broker-officer of CFI and certified that a corporate background statement was not required for any officers; and he did not file a corporate background statement (Form RE 212) for Shaw. Based on the matters set forth in Factual Findings

18-20, it was not established that Meckenstock failed to comply with California Code of Regulations, title 10, section 2746, subdivision (a)(4). Accordingly, cause was not established for discipline.

Second cause for discipline

4. Complainant also alleges that Castellanos violated the statutes and regulation contained in Legal Conclusion 2 when, on October 6, 2017, he signed an application for a broker corporation license as the designated broker-officer of CFI and certified that a corporate background statement was not required for any officers; and he did not file a corporate background statement (RE 212) for Shaw. Based on the matters set forth in Factual Findings 18-20, it was not established that Castellanos failed to comply with California Code of Regulations, title 10, section 2746, subdivision (a)(4). Accordingly, cause was not established for discipline.

Third cause for discipline

5. Pursuant to section 10232.2, a broker who meets the criteria under section 10232 shall file annual fiscal reports within 90 days after the end of the broker's fiscal year. Castellanos failed to timely file the required annual fiscal reports within 90 days after the fiscal year ending on December 31, 2017. (Factual Findings 21 and 22.) Section 10177, subdivisions (d) and (g), respectively, authorize the Commissioner to impose discipline on a licensee or a corporation where the licensee or corporate officer violates real estate laws or regulations or where the licensee demonstrated negligence or incompetence performing licensed activities. Accordingly, cause exists to discipline Castellanos's broker license under section 10177, subdivisions (d) and (g).

6. Based upon the matters set forth in Legal Conclusion 5, cause exists to discipline CFI's real estate corporate broker license.

7. Cause for discipline against Meckenstock for violating section 10232.2 does not exist because Meckenstock was no longer acting as CFI's broker-officer at the time CFI's financial statements were due.

Fourth cause for discipline

8. Pursuant to section 10159.2, subdivision (a), the designated broker-officer is responsible for the "supervision and control of the activities conducted on behalf of the corporation by its officers and employees." Section 10177, subdivision (h), provides that cause for disciplinary action exists against a designated broker-officer who fails to supervise and control the activities of the corporation. In the instant case, Meckenstock had a duty to supervise the corporate activities during the time he acted as the designated broker-officer for CFI. The acts alleged as a basis for Meckenstock's violation of 10159.2 pertain to his failure to file a background statement of information for Shaw with his application for a real estate broker corporation application for CFI. Based upon Legal Conclusion 3, insufficient

evidence was presented to substantiate this allegation. As such, it cannot be found that Meckenstock violated his duties under section 10159.2. Cause for discipline therefore does not exist under section 10177, subdivision (d), (g) or (h).

Fifth cause for discipline

9. Complainant also alleges that Castellanos violated the statute described in Legal Conclusion 8 because he failed to exercise reasonable supervision and control over CFI's activities during the time he acted as the designated broker-officer for CFI. The acts alleged as a basis for Castellanos's violation of 10159.2 pertain to his failure to file a background statement of information for Shaw and his failure to timely file fiscal reports. As explained in Legal Conclusion 4, insufficient evidence was presented to substantiate the first allegation.

10. As discussed in Legal Conclusion 5, however, Castellanos failed to timely file fiscal reports; and his failure to do so constitutes a violation of his duty to supervise the activities conducted on behalf of CFI by its officers and employees, as required by section 10159.2, subdivision (a). As such, cause for discipline exists under section 10177, subdivision (d), (g) and (h), and California Code of Regulations, tit. 10, section 2725, (duty to supervise).

Cost recovery

11. Business and Professions Code section 10106 provides that the Department 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 Department requests reimbursement of fees and costs in the amount of \$2,514.50 in its investigation and enforcement of this matter. The Department's fees and costs are reasonable. (Factual Finding 23.) Cause exists to impose costs on Castellanos and CFI, jointly and severally, pursuant to Legal Conclusions 5, 6, and 10.

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

13. Insofar as no cause for discipline was found against Meckenstock, cause for imposition of costs against Meckenstock does not exist.

Disciplinary determination

14. In determining the appropriate discipline, public safety is the Board's paramount concern. In the instant case, Castellanos failed to timely file annual fiscal reports on behalf of CFI with the Department, and in so doing, failed to exercise reasonable

supervision and control over CFI's activities. Castellanos was previously disciplined in 1993 for failing to comply with real estate laws and regulations. As a result, his broker license was restricted until February 7, 2017, when it was reinstated.

As CFI's broker-officer, Castellanos's lax compliance with filing fiscal documents is of concern. It is noted, however, that Castellanos has been practicing real estate since 1978; he takes responsibility for his errors; he ultimately filed the required reports; CFI's filings are current; and, there was no evidence that the public was harmed by his misconduct. In consideration of the record in its entirety, it is determined that public protection does not require the revocation of Castellanos's broker license or CFI's real estate corporate broker license. Instead, the licenses of Castellanos and CFI shall be restricted pursuant to the terms set forth below.

ORDERS

Respondent Meckenstock

The Accusation filed against respondent Thomas Elliott Meckenstock is dismissed by reason of Legal Conclusions 3, 7, and 8.

Respondent Castellanos

By reason of Legal Conclusions 5 and 10, jointly and individually, all licenses and licensing rights of James Rudolph Castellanos under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to Castellanos pursuant to Business and Professions Code section 10156.5 if Castellanos makes application therefor and pays to the Department 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 Castellanos 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:

1. The restricted license issued to Castellanos may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Castellanos's conviction or plea of nolo contendere to a crime which is substantially related to his fitness or capacity as a real estate licensee.
2. The restricted license issued to Castellanos may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Castellanos 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.

3. Castellanos 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.
4. Castellanos shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that he has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Castellanos fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.
5. Castellanos shall pay to the Department of Real Estate costs associated with its investigation and enforcement pursuant to Business and Professions Code section 10106 in the amount of \$2,514.50. These costs shall be paid in a payment plan approved by the Department.

Respondent CFI

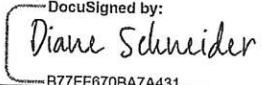
By reason of Legal Conclusion 6, all licenses and licensing rights of CFI under the Real Estate Law are revoked; provided, however, a restricted real estate broker corporation license shall be issued to CFI pursuant to Business and Professions Code section 10156.5 if CFI makes application therefor and pays to the Department 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 CFI 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:

1. The restricted license issued to CFI may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of CFI's conviction or plea of nolo contendere to a crime which is substantially related to its fitness or capacity as a real estate licensee.
2. The restricted license issued to CFI may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that CFI 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.

3. CFI 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.

4. CFI shall pay to the Department of Real Estate costs associated with its investigation and enforcement pursuant to Business and Professions Code section 10106 in the amount of \$2,514.50. These costs shall be paid in a payment plan approved by the Department.

DATED: January 22, 2019

DocuSigned by:

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DIANE SCHNEIDER
Administrative Law Judge
Office of Administrative Hearings