

**FILED**

MAY - 2 2008

DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE  
BY: [Signature]

\* \* \* \* \*

In the Matter of the Accusation of )	No. H-34097 LA
)	
)	L-2008010580
MERVYN AUSTIN PHELAN,	)
)	)
)	)
Respondent.	)
_____)	)

DECISION

The Proposed Decision dated April 16, 2008, 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) of the Government Code, the following corrections are made:

Caption, page 1, "Case No.: H-34094 LA" is amended to read "Case No.: H-34097 LA".

Legal Conclusions, page 5, paragraph No. 6, line 2, "his real estate salesperson license" is amended to read "his real estate broker license".

The Decision suspends or revokes one or more real estate licenses on grounds of the conviction of a crime.

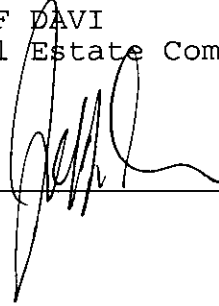
The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock  
noon on May 22, 2008.

IT IS SO ORDERED

4-30-08

JEFF DAVI  
Real Estate Commissioner



A handwritten signature in black ink, appearing to read 'Jeff Davi', is written over a horizontal line.

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation of:

MERVYN A. PHELAN,

Respondent.

Case No.: H-3409<sup>7</sup>4 LA

OAH No.: L2008010580

PROPOSED DECISION

This matter came on for hearing before Richard J. Lopez, Administrative Law Judge of the Office of Administrative Hearings, at Los Angeles, California, on April 1, 2008.

Cheryl Keily, Staff Counsel, represented the Complainant.

Respondent appeared in person and was represented by Gregory Grantham, Attorney at Law.

Oral and documentary evidence and evidence by way of official notice was received and the matter then argued and thereafter submitted.

The Administrative Law Judge now finds, concludes and orders as follows:

FACTUAL FINDINGS

*Parties*

1. The Complainant, Maria Suarez, a Deputy Real Estate Commissioner of the State of California, brought the Accusation in her official capacity.
2. Respondent Mervyn Austin Phelan is presently licensed and has license rights under the Real Estate Law (Part 1 of Division 4 of the California Business and Professions Code) as a real estate broker.

### *Criminal Conviction*

3. Over a period of time commencing in 1999 Respondent, as Chairman of the Board of Senior Care Industries, Inc. was involved in schemes to manipulate the stock prices of two companies: Senior Care Industries, Inc. and Freedom Surf, Inc. Eventually, the scheme was uncovered and Respondent and others were criminally prosecuted. Thereafter, on April 4, 2005, in the United States District Court, Southern District of New York, in Case No. S3 02 Cr. 1588, Respondent was convicted of violating 18 U.S.C. 371 (Conspiracy to Commit Securities and Wire Fraud), a felony; 15 U.S.C. 78j, subdivision (b) and 78 ff (Securities Fraud), a felony; 18 U.S.C. 371 (Conspiracy to Commit Securities and Wire Fraud), a felony; and 18 U.S.C. 371 (Securities Fraud), a felony. The underlying facts of these felonies involve moral turpitude. On October 3, 2006, the judgment of the District Court was affirmed by the United States Court of Appeals for the Second Circuit.

4. Respondent's conduct set forth in Finding 3 constitutes the fraudulent taking of funds belonging to others; the uttering of a false statement; the employment of deceit to achieve an end; and the doing of an unlawful act with the intent of conferring an economic benefit upon Respondent.

### *Rehabilitation*

5. As a result of the four felony convictions Respondent was sentenced to 36 months imprisonment to be followed by 36 months of supervised release; ordered to pay a fine of \$100,000; ordered to pay restitution (with other convicted defendants) of approximately \$280,000. Respondent did serve 12 months imprisonment – was released early from confinement – and is now on supervised release.

6. Respondent now lives with his wife in Solvang. With the approval of his probation officer he now works as a packager and originator of loans for pension funds. Respondent has been a long term licensee of the Department – a salesperson from approximately 1964, and a broker from 1970 – with no record of discipline.

7. Respondent is commended for his years of licensure without discipline. However, given the gravity of the 2005 conviction there is insufficient rehabilitation for continued licensure. In particular:

- The crime is recent.
- The conviction is yet to be expunged or otherwise abrogated.
- Respondent is still on supervised release and is yet to fulfill the conditions of his release including the full payment of the fine and the payment of restitution.

- Respondent has yet to take responsibility for the crime. He minimizes the severity of the offense.
- There was no evidence of involvement in community affairs or involvement in programs designed to provide social benefits or ameliorate social problems.
- There were no character letters or character witnesses. There was no evidence from his probation officer.

8. In the absence of a sustained period of rehabilitation, Respondent's recent conduct set forth in Finding 3 demonstrates that Respondent presently lacks the character trait of honesty which is necessary for continued licensure.

## LEGAL CONCLUSIONS

### *Applicable Statutes and Regulations*

1. Business and Professions Code section 490 provides in pertinent part:

A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions or duties of the business of profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. . . .

2. Business and Professions Code section 10177, subdivision (b) provides:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following. . . .

- (b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of

sentence, or of a subsequent order under section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

3. California Code of Regulations, title 10, section 2910, provides in part:

(a) When considering whether a license should be denied, suspended or revoked on the basis of the conviction of a crime, or on the basis of an act described in section 480, (a)(2) or 480, (a)(3) of the Code, the crime or act shall be deemed to be substantially related to the qualifications, functions or duties of a licensee of Department within the meaning of sections 480 and 490 of the Code if it involves:

(1) The fraudulent taking, obtaining, appropriating or retaining funds or property belonging to another person.

- - -

(2) Counterfeiting, forging or altering of an instrument or the uttering of a false statement.

- - -

(4) The employment of bribery, fraud, deceit, falsehood or misrepresentation to achieve an end.

- - -

(8) Doing of any unlawful act with the intent of conferring a financial or economic benefit upon the perpetrator or with the intent or threat of doing substantial injury to the person or property of another.

- - -

4. Cause exists for discipline of Respondent's license for violation of Business and Professions Code section 10177, subdivision (b), by reason of Finding 3.

5. The crime set forth in Finding 3, is substantially related to the qualifications, functions and duties of a real estate licensee pursuant to the California Code of Regulations, title 10, section 2910, subdivisions (a)(1)(2)(4) and (8) by reason of Finding 4.

6. Respondent's conviction for a substantially related crime, as set forth in Findings 3 and 4, constitutes grounds to discipline his real estate ~~salesperson~~ license pursuant to Business and Professions Code section 490. *broker*

*Penalty Considerations*


8. California Code of Regulations, title 10, section 2912, sets forth criteria of rehabilitation that have been developed by the Department, pursuant to Business and Professions Code section 482, subdivision (a), to evaluate the rehabilitation of a licensee who is subject to disciplinary action on account of a crime or act committed by the Respondent. Additionally, the public interest must be considered, in that the objective of an administrative proceeding relating to licensing is to protect the public. *Fahmy v. MBC* (1995) 38 Cal.App. 4<sup>th</sup> 810, 8171 *Ex Parte Brounsell* (1778) 2 Cowp. 829, 98 Eng. Rep. 1385.

9. Respondent's recent conviction is substantially related to his real estate license. Additionally, by reason of Finding 7, Respondent has yet to comply with the criteria of rehabilitation. Accordingly it would be against the public interest to now permit Respondent to act as a real estate broker. Respondent is encouraged to complete the rehabilitative process and, in the event of a petition for reinstatement, document same and provide full disclosure to the Department.

ORDER

All licenses and licensing rights of Respondent Mervyn Austin Phelan under the Real Estate Law are revoked.

Dated: April 16, 2008

  
RICHARD J. LOPEZ  
Administrative Law Judge  
Office of Administrative Hearings

RJL:rfm

ms  
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4 Los Angeles, California 90013-1105

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6 (Direct) (213) 576-5770

**FILED**

JUL - 6 2007

DEPARTMENT OF REAL ESTATE

BY: [Signature]

7  
8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 \* \* \*

11 In the Matter of the Accusation of ) No. H-34097 LA  
12 MERVYN AUSTIN PHELAN, ) A C C U S A T I O N  
13 Respondent. )  
14 )

15 The Complainant, Maria Suarez, a Deputy Real Estate  
16 Commissioner of the State of California, for cause of Accusation  
17 against MERVYN AUSTIN PHELAN, aka Mervyn A. Phelan, Sr.,  
18 ("Respondent") alleges as follows:

19 1.

20 The Complainant, Maria Suarez, a Deputy Real Estate  
21 Commissioner of the State of California, makes this Accusation  
22 in her official capacity.  
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2.

1  
2 Respondent is presently licensed and/or has license  
3 rights under the Real Estate Law, Part 1 of Division 4 of the  
4 California Business and Professions Code ("Code"), as a real  
5 estate broker.

6  
3.

7 (CRIMINAL CONVICTION)

8 On or about April 4, 2005, in the United States  
9 District Court, Southern District of New York, in Case No. S3 02  
10 Cr. 1588, Respondent was convicted of violating 18 U.S.C. 371  
11 (Conspiracy to Commit Securities and Wire Fraud), a felony; 15  
12 U.S.C. 78j(b) and 78 ff (Securities Fraud), a felony; 18 U.S.C.  
13 371 (Conspiracy to Commit Securities and Wire Fraud), a felony;  
14 and 18 U.S.C. 371 (Securities Fraud), a felony. The underlying  
15 facts of these crimes involve moral turpitude, which bear a  
16 substantial relationship under Section 2910, Title 10, Chapter  
17 6, California Code of Regulations to the qualifications,  
18 functions or duties of a real estate licensee.  
19

20  
4.

21 The crimes of which Respondent was convicted, as  
22 described in Paragraph 3, above, constitute cause under Sections  
23 490 and 10177(b) of the Code for the suspension or revocation of  
24 the license and license rights of Respondent under the Real  
25 Estate Law.

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27 ///

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

9 Dated at Los Angeles, California

10 this 28<sup>th</sup> day of June, 2007.

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14 Maria Suarez  
15 Deputy Real Estate Commissioner  
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25 cc: MERVYN AUSTIN PHELAN  
26 Maria Suarez  
27 Sacto.