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MAY 30 2012

DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE BY:

STATE OF CALIFORNIA

In the Matter of the Accusation of)	DRE No. H-36971 LA
)	
WILSHIRE REALTORS INCORPORATED,)	OAH No. 2011010767
dba Wilshire Realtors and Wilshire Realty;)	
)	
WILLIAM LYNN BORLAND,)	
individually and as former designated officer)	
of Wilshire Realtors Incorporated; and)	
)	
WILLIAM LENARD SCHWARZ,)	
individually and as former designated officer)	
of Wilshire Realtors Incorporated,)	
)	
Respondents.)	
)	

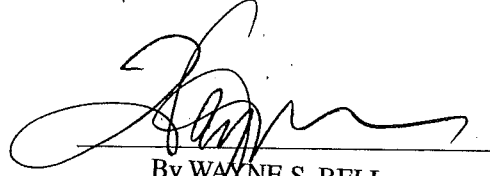
DECISION

The Proposed Decision dated April 22, 2012, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon on June 19, 2012.

IT IS SO ORDERED May 24, 2012.

Real Estate Commissioner



By WAYNE S. BELL
Chief Counsel

**BEFFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Case No. H-36971 LA

WILSHIRE REALTORS, INCORPORATED,
dba Wilshire Realtors and Wilshire Realty;

OAH No. 2011010767

WILLIAM LYNN BORLAND, Individually
and as former designated officer of Wilshire
Realtors, Incorporated;

WILLIAM LENARD SCHWARZ,
Individually and as designated officer of
Wilshire Realtors, Incorporated,

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on August 23, 2011, at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Complainant was represented by Lissete Garcia, Counsel, Department of Real Estate. Respondents William Schwarz and William Borland appeared and represented themselves and Respondent Wilshire Realtors, Incorporated.

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date. However, the record was reopened on September 22, 2011, so that the ALJ might receive documentary evidence pertaining to termination of the contract that was the subject of this proceeding. Respondents were given until October 6, 2011, to submit such documentation, if any, and Complainant was given until October 13, 2011, to respond.

Respondents submitted a one-page document on October 7, 2011, which appeared to be a written notice of cancellation of a sales and marketing agreement. It is identified for the record as Exhibit X.

On October 12, Complainant's counsel submitted a letter to the ALJ, pointing out that she had not received any submission from Respondents. OAH staff then faxed a copy of Exhibit X to her. Thereafter, on October 12, 2011, Ms. Garcia sent a second letter to the ALJ, objecting to Exhibit X as an unsigned letter, unauthenticated,

and constituting hearsay. Both of Ms. Garcia's letters of October 12, 2011, shall be received, collectively as Exhibit 7.

On October 28, 2011, Respondents submitted a written memorandum in response to Ms. Garcia's objection. However, that document was outside the appropriate time period, and though marked for identification as Exhibit Y, is not received.

The objection to Exhibit X must be sustained.

The matter is deemed submitted for decision as of October 13, 2011. The following factual findings, legal conclusions, and orders are hereby made by the ALJ.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. (A) Complainant Robin L. Trujillo, Deputy Real Estate Commissioner, Department of Real Estate (Department), filed the Accusation in the above-captioned matter in her official capacity.

(B) In the Accusation, Complainant seeks to discipline Respondents' licenses on the grounds that they allegedly entered into an advance fee agreement to sell condominiums without first having that agreement approved by the Department. It is also alleged that Respondents collected but did not account for advance fees, and that the individual Respondents failed to supervise the corporate Respondent.

2. Respondent Wilshire Realtors, Incorporated (Wilshire) was a corporation licensed as a real estate broker beginning in June 1997. It did business under the fictitious names Wilshire Realtors and Wilshire Realty. The corporation was dissolved in approximately May 2009.

3. (A) Respondent William Lynn Borland (Borland) is licensed by the Department as a real estate broker, and has been since May 1997. From June 6, 1997 to July 27, 2009, he was a designated broker for Wilshire, responsible for its compliance with the Real Estate Law.

(B) Respondent William Lenard Schwarz (Schwarz) is licensed by the Department as a real estate broker, and has been since January 1969. From September 1999 through October 6, 2008, Schwarz was a designated broker for Wilshire, responsible for its compliance with the Real Estate Law.

4. Respondents filed Notices of Defense, thereby denying the allegations and requesting a hearing on the Accusation. This proceeding ensued. All jurisdictional requirements have been met.

The Contract Between Wilshire and Yucca Group LLC

5. On May 1, 2005, Wilshire entered into a written contract with The Yucca Group LLC (Yucca), which was doing business as Metro Modern Development. Under that agreement, which was titled "Sales and Marketing Agreement,"¹ Wilshire was to market and sell residential condominiums in a building that Yucca intended to construct at 6735 Yucca Avenue, in Hollywood. The building was to have 54 condominium units. The partners in Yucca included persons knowledgeable in real estate development and sales. For example, one of the partners, Mr. Kiman, had been a real estate broker since at least 1996, and had, according to one press release, an ownership interest in numerous multi-family buildings and office buildings. His wife owned and operated a residential mortgage company. Another partner, Mr. Tauber, had been licensed as a sales agent in 1998, and had developed seven projects, those being single family homes.

6. (A) The agreement provided that an agency relationship was established between Yucca and Wilshire, ending upon the close of escrow of all units in the development, unless terminated sooner. After 180 days, either party could terminate the agreement. It was agreed that if the contract was terminated while Wilshire was negotiating sales, or while units were in escrow, then Wilshire would be recognized as the broker for such units.

(B) Wilshire agreed that it would perform a number of tasks for Yucca. For example, it would "serve in a supporting role in conjunction with the marketing agent for the property on certain aspects of marketing the units, including . . . advise on pricing strategy and inventory management, . . . review and advise on advertising, brochures, signs, direct mail, website design, public relations, . . . provide information on comparable and competitive sales prices, . . . advise on names, logos and distinctive marks used to identify the property, . . . advise on unit improvements and selection of finish materials . . . [and] improvements to common areas and amenities . . . [and] on decorating of models and sales offices . . ." (Ex. 5, pp. 26-27.)

(C) Wilshire also undertook other aspects of a marketing campaign for the development, agreeing to develop a "sales story" for the condominiums, and to mount a campaign to maximize sales before construction was complete. Wilshire would track and report on visitor traffic, and train sales agents in a number of areas, including sales and working with documentation.

¹ The agreement is found at pages 26 through 33 of the complaint document that is attached to the Notice of Intent to Introduce Declaration, Exhibit 5. Hereafter, other references to documents within Exhibit 5 will use the page numbers internal to that exhibit.

(D) Wilshire was to maintain a full time sales staff of one licensed agent and an administrative assistant, and to maintain scheduled office hours to market the condominiums. It would provide weekly sales reports, work with the escrow companies to close sales, and work with others acting on Yucca's behalf regarding the homeowners' association.

(E) Wilshire agreed that its sales efforts would "comply with applicable Condominium Laws, and the rules and regulations of the Department of Real Estate." (Ex. 5, p. 28.)

7. Yucca agreed to pay a number of expenses that would be associated with the marketing and sales campaign. For example, it would pay for telephone, office equipment and supplies, secretarial expenses, public relations, buyer gifts, utilities and cleaning.

8. (A) On the issue of compensation for Wilshire, the parties agreed that Wilshire would be paid a monthly fee of \$3,000, upon billing by Wilshire, effective with the commencement of the agreement. Wilshire agreed to credit 100 per cent of its monthly fees back to Yucca, against any commissions earned from closed escrows. A commission on a closed escrow was to be 1.75 percent, unless a cooperating broker were involved, in which case the commission would be 1.5 percent.²

(B) Yucca also agreed that it would pay a draw to the sales agent hired by Wilshire. The draw would be \$2,500 per month, against the sales commission due the agent. Yucca also agreed to pay the salary and benefits for an administrative assistant to be chosen by Wilshire. The draw to the sales agent would not be payable until the agent was engaged in full time work. When the parties entered into the October 2007 addendum that modified the commission rate due Wilshire, it was then agreed that a second sales agent would be added, and paid a draw by Yucca of \$3,500 per month until the close of the first escrow.

(C) The parties also agreed that if either party terminated the agreement, which either party could do 180 days after entering into the agreement, then "the monthly fee balances owed will be waived and no credit shall be due [Yucca] for any outstanding balances owed by [Wilshire] or sales agent." (Ex. 5, p. 29, at par. 6(i).)

(D) While it was implicit in the agreement that the total monthly fees might be less than any sales commission ultimately earned, there was no provision for a situation where the monthly fees exceeded the commission, unless the agreement was terminated.

² This compensation rate was slightly higher than that set forth in the original agreement, in that an increased rate was agreed to under an addendum dated October 26, 2007. (Compare Ex. 5, p. 29, par. 6 with p. 33.)

Performance of the Wilshire-Yucca Agreement

9. At the time that Wilshire entered into the agreement with Yucca, the project had not been constructed. Construction took much longer than the parties anticipated; ground was not broken until August 2006, and in an October 2006 marketing brochure, the developers indicated a "move-in" date of July 2007. (See Ex. V.) However, it does not appear that construction was completed at that projected date, given that escrow did not close on the first unit sold until late December 2007.

10. Wilshire performed services on behalf of Yucca during the period when the condominium building was under construction, and during part of that period monthly fees were paid to Wilshire, and draws were paid to a sales agent. The services provided were more than just attempting to sell units, and included services of the type described in Factual Finding 6. During this time, a sales agent was working on the project, as were Respondents Borland and Schwarz. Another sales person was added, apparently late in 2007.

11. Wilshire's efforts finally paid off in December 2007, as seven units were sold that month, escrow closing on all during the last week of that year. The total sales amounted to nearly 7 million dollars. Another escrow closed on January 28, 2008, and two more units closed escrow in the latter part of February 2008. The three 2008 sales had a gross value of approximately 2.3 million dollars. There is no evidence that Wilshire sold any other units in the development.

Payment of Fees and Commissions

12. By December 2007, Wilshire and its salespeople had received substantial payments for their services, totaling approximately \$100,000. Wilshire received \$36,000 in fees between April 2006 and April 2007. Another \$57,500 had been paid to Ms. Koeppel, the salesperson who had been on the project for months, and \$7,000 had been advanced to "Greg," apparently the second sales agent contemplated by the addendum to the Yucca-Wilshire agreement. As of December 18, 2007, Wilshire claimed that it was owed another \$2,024.15 for hourly wages to an individual named Dick Lemen, and for various supplies.

13. (A) Wilshire, through an e-mail by Respondent Borland to Mr. Kinman of Yucca, raised the issue of fees and commissions on December 18, 2007, before any of the escrows had closed. He referenced the figures set out in Factual Finding 12, above, noting also that Wilshire had not been paid its monthly payment during every month of the agreement.

(B) Borland told Kinman that Wilshire was then in a "large deficit cash flow position" and that of the \$3,000 it was receiving every month, \$2,000 was advanced to Ms. Koeppel. He further stated that "the problem all of us face in pulling

money out of sales is a result of the delay in closings beyond the original projections. The advances to keep the sales team working on the front lines have built-up higher than any of us would have predicted . . . both MMD [Yucca] and the sales team would be in a much better financial position if closings had started back in the spring.” (Ex. 5, pp. 52-53.)

14. In his December 18, 2007 e-mail, Borland went on to propose that the large balance of advances be paid off over time, as sales progressed. Specifically, he proposed payment “at a level of 60% of the commissions received on closings. In other words out of each \$1,000 of commissions on closings that \$400 be paid to [Yucca] and \$600 be paid to the sales team” (Ex. 5, p. 53.)

15. When the seven escrows closed later in December 2007, total sales commissions should have been \$100,325. Wilshire, after closing those seven escrows, credited Yucca with the amount of \$31,467.94, taking direct payment to itself in the amount of \$68,857.06. As can be seen, this does not appear to be the 60-40 split proposed by Borland in his December 18, 2007 e-mail, summarized in Factual Finding 14.

16. In early January 2008, one of the partners in Yucca, Mr. Weinberg, made it clear that he expected that Yucca receive the balance of the commissions due. However, on January 17, 2008, Mr. Kinman, as managing member of Yucca, made a counter offer to Wilshire, agreeing to the December 18, 2007 proposal, with the added terms that Wilshire would formally acknowledge the debt, that 40 percent of the future commissions due to Wilshire be paid to Yucca against the debt, that Borland and Schwarz personally guarantee the debt, and that there be a “probation period” of six months at which time all parties would assess the situation.

17. In response, on January 21, 2008, Respondent Schwarz wrote (by e-mail) to Kinman, stating that while they would agree to pay back “the draw” at a rate of 40 percent from future commissions, Borland and Schwartz would not guarantee the debt. The six month probation period was acceptable, and Schwartz reminded Kinman that under the original contract either side could terminate the agreement, as more than 180 days had passed since its execution.

18. On that same day, Kinman e-mailed Schwarz’s response to his partners, and he told them that he wanted to accept the deal: “I say we continue with them and not upset the whole deal and hope we are further in 6 months when we reconsider both brokers. I can see why they would not want to guarantee the repayment since they already gave up the money to Tisha [the salesperson] and would have to sweat it instead of her.” (Ex. 5, p. 43.)

19. While there is no direct evidence of acceptance by Yucca of Wilshire’s January 17 offer, it appears that an agreement was reached on such terms, in that calculations made by Mr. Weinberg in support of his complaint to the Department

reflect the 40 percent credits in connection with the three escrows that closed in January and February 2008. (Ex. 5, p. 21.)

20. At the hearing, Respondents asserted that they cancelled the agreement in May 2008. At about that time, Mr. Avishay, one of the four partners in Yucca, began demanding payment of the balance of the advances, then just over \$51,000. The parties could not come to an agreement however on how to resolve the matter.

The Civil Suit

21. Yucca, at Mr. Avishay's instance, filed a breach of contract case against Wilshire in the Los Angeles Superior Court. Borland and Schwartz, on the advice of their attorney, dissolved Wilshire rather than defend the suit. Yucca obtained a default judgment against the corporation, based on a breach of contract,³ on June 11, 2009, in the sum of \$52,055.26, which was based on the balance asserted on the advances—\$51,128.40—and court costs in the amount of \$926.86. Given that Wilshire had dissolved, Yucca has not been able to satisfy the judgment.

Respondents' Contentions

22. Respondents Borland and Schwarz did not dispute much of the evidence regarding the underlying transaction between Wilshire and Yucca. Rather, the bulk of their claims went to the legal effect of the underlying agreement, and their assertions that the Department's rules pertaining to advance fee agreements do not and should not apply to transactions such as theirs, which amount to long-term marketing agreements undertaken long before any commissions could realistically be expected to flow to the brokers. Respondents asserted that the viability of such marketing plans, typical in subdivision and development work, would be destroyed by Complainant's reading of the law.

23. In support of their position, Respondents offered testimony to support their contentions that other brokers use contracts similar to the Wilshire-Yucca agreement. They offered a copy of such an agreement, Exhibit K. However, it should be noted that in that contract, an addendum provided for advances, which were to be paid through the broker to the salespeople; the broker was not receiving the funds to its own account. That agreement also provided that if the contract was terminated by the owner of the development before closing escrow on the first house sold, then the broker would receive a consultation fee for every month prior to that date during which the broker had performed under the agreement.

³ Various other causes of action were abandoned at the time that Yucca sought the judgment against Wilshire.

24. Respondents point to a clean record for themselves and Wilshire. None of the Respondents has ever been disciplined, and prior to this event no complaints were lodged against them with the Department. They also note there have been no claims against their errors and omissions insurance, or any arbitrations with the local Board of Realtors. Because of the collapse of the real estate market generally, and development especially, Respondents Schwarz and Borland now confine their work to representing financial institutions in the sale of distress properties.

LEGAL CONCLUSIONS

1. The Department is vested with jurisdiction to proceed in this matter, based on Factual Findings 1 through 4, and Code sections 10100 and 10103.⁴

2. Section 10026 defines advance fees as follows:

(a) The term "advance fee," as used in this part, is 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.

(b) For the purposes of this section, the term "advance fee" does not include:

(1) "Security" as that term is used in Section 1950.5 of the Civil Code.

(2) A "screening fee" as that term is used in Section 1950.6 of the Civil Code.

(3) A fee that is claimed, demanded, charged, received, or collected for the purpose of advertising the sale, lease, or exchange of real estate, or of a business opportunity, in a newspaper of general circulation, any other written publication, or through electronic media comparable to any type of written publication, provided that the electronic media or the publication is not under the control or ownership of the broker.

⁴ All statutory citations shall be to the Business and Professions Code.

(4) A fee earned for a specific service under a "limited service" contract. For purposes of this section, a "limited service" contract is a written agreement for real estate services described in subdivision (a), (b), or (c) of Section 10131, and pursuant to which such services are promoted, advertised, or presented as stand-alone services, to be performed on a task-by-task basis, and for which compensation is received as each separate, contracted-for task is completed. To qualify for this exclusion, all services performed pursuant to the contract must be described in subdivision (a), (b), or (c) of Section 10131.

(c) A contract between a real estate broker and a principal that requires payment of a commission to the broker after the contract is fully performed does not represent an agreement for an advance fee.

(d) This section does not exempt from regulation the charging or collecting of a fee under Section 1950.5 or 1950.6 of the Civil Code, but instead regulates fees that are not subject to those sections.

3. Section 10131, referenced in section 10026 in connection with limited service contracts (subd. (b)(4)) is also the statute that defines real estate brokers. The referenced subdivisions of section 10131 provide that:

A real estate broker within the meaning of this part 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:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers (sic)⁵ of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

⁵ According to Westlaw, from which the text was taken, the misspelling is found in the chaptered copy of the statute.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

4. Advance fees are wholly prohibited in some circumstances, specifically in loan modification transactions. (§ 10085.6.) In circumstances where they may be received, the Legislature and the Commissioner have made clear that the transactions must follow certain paths. Hence section 10085 of the Real Estate Law provides that advanced fee contracts may be reviewed by the Commissioner, and California Code of Regulations (CCR), title 10, § 2970 requires that advance fee contracts be submitted to the Department for review.⁶

5. In construing section 10026, its purpose of protecting the public must be kept in mind. On that point, it is noted that a prior version of section 10026 was subjected to scrutiny by a Federal court in 2004. In *ForSaleByOwner.com Corp. v. Zinnemann* (E.D. Cal. 2004) 347 F.Supp.2d 868, at 878, the District Court spoke to the purpose of section 10026, based on a review of the legislative history. In footnote number 7, the court wrote:

The Court is aware of the legislative history generated when Section 10026 was amended in 1959. According to that history, consumers were then at the mercy of unscrupulous promoters who made false and fraudulent misrepresentations to property owners in order to exact payment for services rendered in connection with real property transactions. In deciding to restrict the use of advance fees in order to prohibit such behavior, the California Legislature noted that newspapers of general circulation had not been found to engage in the offending practices in question. See Cal. Stats. 1959, ch. 2117, at § 14, pp. 4942-43. Accordingly newspapers were given more credibility and an exemption from the advance fee restrictions was provided to them. . . .

6. Under all of the circumstances, the contract between Yucca and Wilshire must be considered an advance fee agreement. The record establishes that Wilshire “claimed, . . . charged, received, or collected” \$3,000 per month for services requiring a license, which the services described in Factual Findings 6(B) and (C) constitute. Among those activities that required a broker’s license was the solicitation of potential purchasers of real property, as well as the sales of properties. (§10131, subd. (a).) The fees were paid before the services were complete, as the contract contemplated the listing and eventual sale of all of the condominiums.

⁶ All further citations to the CCR shall be to title 10:

7. To be sure, it is not clear that all of the duties set out in the contract required a license. That is, to come up with a marketing "story" or to advise about the design of the condominiums with an eye to make them more marketable did not necessarily require a license. However, it is difficult if not impossible to separate the tasks involved. And, as noted during the hearing, real estate licensees representing sellers in the typical residential sale give advice that might be called marketing advice, including how to furnish a home to make it most attractive to the market.

8. It does not appear that the contract between Wilshire and Yucca comes within the exception for limited service contracts that is found in section 10026, subdivision (b)(4). While it can be concluded that a broker can be paid for certain broker activities, namely those set out in section 10131, subdivisions (a), (b), or (c), without running afoul of the statutes and regulations pertaining to advance fees, that did not happen here. The broker's services were not "promoted, advertised, or presented as stand-alone services, to be performed on a task-by-task basis, and for which compensation is received as each separate, contracted-for task is completed," as stated in the statutory exception. The tasks were overlapping and ongoing, building up to the sale of the condominiums. Given that 54 units were to be built, this was hardly a task-by-task transaction of the type contemplated by the exception. The monthly payments to Wilshire were not for particular stand-alone services. Rather, the payments were made, in part, so that Wilshire would solicit potential buyers and make sales of condominiums.

9. Based on Legal Conclusions 2 through 8, and their factual predicates, the Wilshire-Yucca agreement should have been submitted to the Department for review pursuant to CCR section 2970 and Code section 10085.

10. Given that the fees collected were advance fees, they should have been held in trust, and Respondent Wilshire should have accounted for the advance fees as required by Code section 10146. This Conclusion is based on Legal Conclusions 2 through 8, and their factual predicates.

11. The licenses of Respondents, and each of them, are subject to discipline pursuant to section 10085, based on Legal Conclusions 2 through 9, and their factual predicates.

12. The licenses of Respondents, and each of them, are subject to discipline pursuant to section 10177, subdivision (d), in that Respondents engaged in wilful violations of the Real Estate Law or the Commissioner's regulations, based on Legal Conclusions 2 through 11, and their factual predicates.

13. The licenses of Respondents, and each of them, are subject to discipline pursuant to section 10177, subdivision (g), in that Respondents acted negligently in failing to recognize and understand that Wilshire's agreement with Yucca constituted an advance fee contract.

14. It was not established that the Respondents engaged in fraud or dishonest dealing in this matter, and therefore cause does not exist to discipline their licenses pursuant to section 10176, subdivisions (a), (b), or (i).

15. Respondent Wilshire violated the Real Estate Law and Commissioner's regulations, based on Legal Conclusions 2 through 13. As a result, it has been established that Respondents Borland and Schwarz failed to exercise the required supervision and control over Wilshire's activities, in violation of section 10159.2.

16. (A) The purpose of proceedings of this type are to protect the public, and not to punish errant licensees. (E.g., *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 784-786.) In this case it appears that revocation of the individual respondent's licenses is not necessary for the public protection. The record establishes that they were dealing at arm's length with sophisticated developers who were also licensees; Respondents were not preying on the public saddled with mortgages putting their homes "underwater." There was substantial performance by Respondents under the contract. Yucca had, essentially, agreed to restructure the contract after the first units were sold, and it appears that further performance for all was hindered by the crash of the real estate market. Respondents otherwise have an unblemished record, and are no longer operating in the same area of real estate sales.

(B) To be sure, Respondents' defenses are not sufficient to absolve them of responsibility. The ALJ recognizes the logic of their argument to the effect that it would be difficult, if not impossible, for any brokerage to staff a housing development or a condominium project for a long term before construction is completed absent some sort of advance fee agreement. Nor is it a defense that others have engaged in similar conduct. That may bolster the analysis of the business necessity, but such does not override the law and the Commissioner's regulations. Instead, this is a matter for the Legislature or the Commissioner to take up through statutory amendment or rule-making by the Department, if they so choose.

(C) Because Wilshire has been dissolved, the reasoning above does not apply. Just as a deceased individual can not hold a license, a dissolved corporation can not so act. An order shall issue revoking the corporate license.

(D) Complainant's counsel asserted that a restitution order should issue, but that is not justified here. First, Yucca elected a remedy by pursuing the corporation. When Schwarz and Borland declined to become guarantors, Yucca did not insist on it, continuing to look to Wilshire for any compensation. The shield provided by a corporate structure has vitality in our law, and there is not sufficient cause to go around it in this case. Furthermore, under the parties agreement a termination by either party erased any balance owing by Wilshire on advances. The undersigned is disinclined to modify the parties' agreement further.

(E) Appropriate discipline in this case would be a suspension of Borland and Schwarz's licenses.

ORDER

1. The corporate broker's license held by Respondent Wilshire Realtors Incorporated is hereby revoked.

2. All licenses and licensing rights of Respondents William Lynn Borland and William Lenard Schwarz under the Real Estate Law are suspended for a period of thirty (30) days from the effective date of this order, provided, however, that if Respondents, or either of them petitions the Department, said suspensions (or a portion thereof) shall be stayed upon condition that:

A. A petitioning Respondent pays a monetary penalty pursuant to section 10175.2 of the Business and Professions Code at the rate of \$250 for each day of the suspension for a total penalty of \$7,500.

B. Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be received by the Department prior to the effective date of the Decision in this matter.

C. No further cause for disciplinary action against the real estate license of Respondents occurs within one year from the effective date of the Decision in this matter.

D. If a petitioning 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 petitioning Respondent shall not be entitled to repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

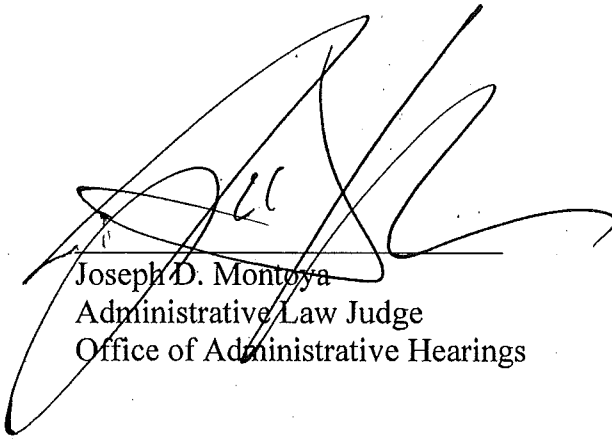
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E. If a petitioning Respondent pays the monetary penalty and no
further cause for disciplinary action against the real estate license of that Respondent
occurs within one year from the effective date of the Decision, the stay(s) hereby
granted shall become permanent.

April 22, 2012



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings