

**FILED**

APR 30 2012

DEPARTMENT OF REAL ESTATE  
BY: \_\_\_\_\_

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of	)	DRE No. H-37126 LA
	)	
RYAN WILLIAM MARIER and	)	OAH No. 2011081204
<u>JAMES ERIC PATE,</u>	)	
	)	
Respondents.	)	
_____	)	

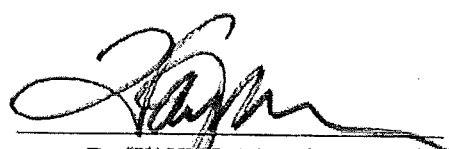
DECISION

The Proposed Decision dated March 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  
May 21, 2012.

IT IS SO ORDERED 4/22, 2012.

Real Estate Commissioner

  
By WAYNE S. BELL  
Chief Counsel

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

In the Matter of the Accusation and  
Supplemental Accusation Against:

JAMES ERIC PATE,

Respondent.

Case No. H-37126 LA

OAH No. 2011081204

**PROPOSED DECISION**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 28, 2012, in Los Angeles. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Lissete Garcia, Counsel, represented Maria Suarez, Deputy Real Estate Commissioner (Complainant), California Department of Real Estate (Department).

Edward O. Lear, Esq., represented James Eric Pate (Respondent), who was present.

**FACTUAL FINDINGS**

*Parties and Jurisdiction*

1. Complainant brought the Accusation and Supplemental Accusation in her official capacity. Respondent timely submitted a Notice of Defense, which contained a request for a hearing.

2. From October 5, 2000, through the present, Respondent has been licensed by the Department as a real estate salesperson (License No. S/01297379). From March 12, 2008, through November 10, 2009, Respondent was licensed under the employ of real estate broker Firstline Mortgage, Inc.

3. As discussed in more detail below, Respondent went into business with Ryan William Marier (Marier), who was licensed by the Department as a real estate broker during the relevant times. Mr. Marier was also named as a respondent in this matter, but his license was revoked by default due to his failure to respond timely to the initial Accusation. It was not established that Respondent was ever affiliated with Marier's broker license.

### *Respondent Goes into the Loan Modification Business*

4. Respondent and Mr. Marier were acquaintances who worked in the real estate field. In 2008, they decided to go into business together. Respondent had some prior experience in helping friends and clients with home loan modifications. At this time, the housing market was crashing and the demand for loan modification soared. So Respondent and Marier decided to start a company to provide loan modification services to homeowners.

5. On December 17, 2008, Respondent and Marier formed Pate, Marier and Associates, Inc. (PMAI), a California corporation. Respondent and Marier were the directors and officers of PMAI, and owned all of the corporation's stock. This was the parent company formed as an umbrella for all the various business ventures Respondent and Marier created.

6. On February 17, 2009, PMAI filed a fictitious business name statement with the Orange County Clerk-Recorder for use of the fictitious business name "NHA Group." This fictitious business name was intended for the loan modification business. However, over time, the loan modification business became known by several other business names, including National Home Assistance Group, Inc., National Home Assistance Group, NHA Group, National Home Assistance, and Pate, Marier and Associates. At no time had any of those business names or entities been licensed by the Department. Use of a fictitious business name for activities requiring the issuance of a real estate license requires the filing of an application for the use of such name with the Department in accordance with the provisions of Business and Professions Code section 10159.5.<sup>1</sup>

7. On January 20, 2009, Marier submitted to the Department an advance fee agreement and accounting format. On February 24, 2009, the Department issued a letter acknowledging receipt of that document and stating that the Department had no objection to it. However, the advance fee agreements actually used by PMAI in the loan modification business were different in material respects from the one submitted to the Department, and therefore were not approved by the Department prior to use as required by section 10085, and California Code of Regulations, title 10, section 2970 (Regulation).

8. From February 2009 through August 2009, Respondent and Marier, while using the unlicensed fictitious business names described above in Factual Finding No. 6, engaged in loan modification services. Respondent was primarily involved in the administrative affairs of the business, and Marier attended to the finances and operations. Neither of them was involved in actual loan modification work. They employed several individuals to perform the loan modification services, none of whom were licensed by the Department. In all, PMAI was involved in at least 258 loan modification transactions with consumers. Of that total, only two consumers are known to have submitted complaints to the Department, i.e., Wilfred J. Caron and Timothy Wayne Girard.

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<sup>1</sup> All further statutory references are to the Business and Professions Code.

9. On or about May 15, 2009, Wilfred J. Caron paid an advance fee of \$2,495 to National Home Assistance Group, Inc., (NHAGI) pursuant to an advance fee agreement for loan modification and negotiation services that had not been approved by the Department. In July 2009, NHAGI sent financial materials to Mr. Caron's primary lender and began negotiations to reduce the loan principal and interest rate of Mr. Caron's loan. Mr. Caron ultimately rejected a loan modification proposal made by his lender. Mr. Caron was not satisfied with NHAGI's services and he requested a full refund in September of 2009. NHAGI did not offer him a refund, but instead referred Mr. Caron to a real estate agent for purposes of arranging a short sale of his property. Mr. Caron entered into a short sale transaction with a willing buyer, but the sale was not consummated because the lender requested the sales price to be increased and the parties did not agree to do so. Mr. Caron decided to no longer pursue a short sale of his home. He has since retained the services of another loan modification business. It was not established that NHAGI failed to perform the loan modification and negotiation services promised to Mr. Caron. In fact, the advance fee agreement Mr. Caron signed indicated that the fee was deemed earned upon a loan modification offer from his lender or a short sale offer on his home, both of which occurred due to the efforts of NHAGI. Mr. Caron submitted his complaint to the Department in May 2010. He still owns his home.

10. On or about July 7, 2009, Timothy Wayne Girard paid an advance fee of \$2,090 to National Home Assistance Group (NHAG) pursuant to an advance fee agreement for loan modification and negotiation services for the first and second mortgages on his home. In September 2009, Mr. Girard's primary lender made a forbearance offer to Mr. Girard. The secondary lender delayed making an offer until the primary lender's position was solidified. Mr. Girard rejected the primary lender's offer. Several months later, NHAG notified Mr. Girard that the business was closing and that no further action would be taken on his file. It was not established that NHAG failed to perform the loan modification and negotiation services promised to Mr. Girard. The advance fee agreement Mr. Girard signed indicated the fee was deemed earned upon a loan modification offer from his lender, which occurred due to the efforts of NHAG. Mr. Girard submitted his complaint to the Department in September 2010. He still owns his home.

11. When Respondent and Marier established their loan modification business in late 2008, they did not think they needed any licenses additional to Marier's broker license to engage in that type of activity. By early 2009, when Legislature enacted laws regulating the loan modification business, Respondent and Marier decided to submit the proposed advance fee agreement to the Department to position themselves for the effective date of those laws in July 2009. However, by that time, Respondent and Marier realized the full extent of the new legislation and quickly realized that they would not be able to have all staff fully licensed and bonded in compliance with the new laws. By August 2009, Respondent and Marier stopped accepting new loan modification work and began closing their business. They tried to resolve the remaining open cases and transferred others to an attorney. They were required to pay the attorney a fee for accepting those cases, as well as transferring to him their pre-paid office lease in order for him to accept their open cases. By December of 2009, Respondent and Marier completely shut-down the loan modification business.

*The Audit of PMAI's Books and Records*

12. On September 6, 2011, the Department completed an examination of books and records in the possession of Marier, pertaining to the mortgage loan modification activities conducted by PMAI. The audit covered the period from November 13, 2008, through March 31, 2011.

13. The audit revealed that PMAI engaged in the business of, acted in the capacity of, advertised or assumed to act as real estate brokers in the State of California, within the meaning of section 10131, subdivision (d), including soliciting prospective borrowers or lenders for, or negotiating loans, or offering to perform services connected to loans secured directly or collaterally by liens on real property for another or others, for or in expectation of compensation.

14. PMAI was not licensed to engage in the loan modification activities described above. Respondent actively engaged with Marier in operating the unlicensed corporation, whose employees performed acts requiring a real estate license pursuant to section 10131, subdivision (d). Respondent should have known that such activity required a license. He was a licensed salesperson who had taken courses on the scope of activity requiring a license from the Department. He and Marier were well aware of recent legislation pointing to the Department as the regulator of loan modification activity. His partner Marier submitted an advance fee agreement to the Department in anticipation of the newly enacted laws. Most of the loan modification services transacted by PMAI occurred after Marier had submitted the advance fee agreement to the Department. Under these circumstances, Respondent should have known that a license was required to engage in such activity, or at the very least to contact the Department to ascertain whether that was the case.

15. The audit also revealed that PMAI accepted, received, deposited and/or disbursed funds, including funds in trust. Those trust funds, including the advance fees collected by PMAI while engaged in loan modification services, were not deposited in a trust account as required by section 10146. By conservative estimates, Respondent and Marier took in at least \$306,984 in service fees. The audit revealed total receipts of \$1.1 million, although the loan modification fees were comingled with funds from their other ventures.

*Mitigation*

16. Respondent has no prior history of discipline with the Department.

17. Shortly before the hearing, Respondent fully refunded Mr. Caron and Mr. Girard, including not just the return of their fees but also interest to date. It was not established that Respondent's acts caused any harm to either consumer. Though Mr. Caron and Mr. Girard were not satisfied with the loan modification offers they were given, it was not established that Respondent and Marier breached their contracts or took money for services that were not provided. It was not established that any other PMAI consumer was injured or abandoned by PMAI.

18. Respondent has not been involved in any loan modification activity since he and Marier terminated their loan modification business at the end of 2009. Though he still communicates with Marier, he is no longer involved in real estate with him.

19. Respondent submitted a number of character reference letters from colleagues in the real estate and business fields, former clients, friends and family members. All attest to Respondent generally having good character, integrity and honesty.

20. Respondent has been married for eight years and has three young sons. He and his family regularly attend church. Respondent participates in volunteer activity in his community through his church. He is currently employed by a Fortune 500 company as a manager in a unit involved in loan originations.

### LEGAL CONCLUSIONS

1. Cause was established for disciplinary action against Respondent pursuant to section 10177, subdivisions (d) and (g). Respondent, through the loan modification business he co-owned with Marier, collected advance fees from prospective borrowers pursuant to a written fee agreement, which was not submitted to the Department for review prior to use, in violation of section 10085 and Regulation 2970. In addition, Respondent failed to deposit the advance fees into a trust account in violation of section 10146. Therefore, Respondent violated the Real Estate Law in these regards (§ 10177, subd. (d)) and was negligent in carrying out acts requiring a real estate license by failing to ensure the proper advance fee forms were used, and by failing to properly deposit and account for advance fee trust funds in his possession (§ 10177, subd. (g)). (Factual Findings 1-15.)

2. Cause was established for disciplinary action against Respondent pursuant to sections 10137 and 10177, subdivision (d). Respondent was engaged in activities that required a real estate license under sections 10131, subdivision (d), and 10131.2. At the times that Respondent was engaged in the loan modification business with Marier, Respondent's real estate salesperson license was not affiliated with Marier's broker license. By splitting the proceeds of the PMAI business with Marier, and by accepting fees from consumers who retained the services of PMAI's loan modification business, Respondent received compensation for activities that required a real estate license from persons other than the broker under whom he was at the time licensed, in violation of section 10137.<sup>2</sup> (Factual Findings 1-15.)

3. Cause was established for disciplinary action against Respondent pursuant to sections 10137 and 10177, subdivisions (d) and (g), in that Respondent operated an unlicensed corporation, which Respondent should have known needed to be licensed to perform acts and conduct activity requiring a real estate license as described in section 10131, subdivision (d). (Factual Findings 1-15.)

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<sup>2</sup> The third cause for discipline in the Accusation was alleged only against Marier.

4. Cause was established for disciplinary action against Respondent pursuant to section 10177, subdivision (g), in that Respondent was negligent in aiding and abetting Mr. Marier to violate section 10130, which prohibits unlicensed real estate activity, when Respondent should have known that he, PMAI, and Marier were engaged in conduct for which a real estate license was required, but for which they were not licensed. However, it was not established that cause exists to discipline Respondent pursuant to section 10176, subdivision (i), in that it was not established that Respondent's conduct in this regard equated to fraud or dishonest dealing. (Factual Findings 1-15.)

5A. Since cause for discipline against Respondent's licensing rights has been established, the inquiry shifts to the degree of discipline warranted. Respondent's misconduct is considered moderately serious, in that he facilitated and actively engaged in unlicensed practice under circumstances when he should have known better. A number of important statutes and regulations were violated in the manner in which Respondent and his partner conducted business. Of concern is the fact that not long after submitting an advance fee agreement to the Department, Respondent and his partner abandoned that form and replaced it with one the Department had never seen before. Respondent and his partner benefitted substantially from the loan modification enterprise, in that the business took in at least \$300,000 in fees and probably much more.

5B. On the other hand, there is substantial mitigating evidence in this case to indicate that revocation is unwarranted and would be punitive. It was not established that Respondent engaged in fraud or dishonest dealing. It was not established that Respondent's business breached its contracts with any consumer. In fact, no actual injury to any consumer was established. Nonetheless, Respondent has made restitution on his own accord to the two consumers who complained to the Department about his business. Respondent has no prior record of discipline. Respondent and his partner took extensive efforts to wind down their loan modification business without abandoning their clients. Respondent has completely removed himself from loan modification activity. Other than his failed foray into loan modification in 2009, it appears that Respondent has otherwise conducted himself with integrity and honesty in his personal and professional life.

5C. Under these circumstances, a restricted salesperson license with appropriate conditions is warranted. Pursuant to Regulation 2930, subdivision 18(A), when a licensee has been compensated for performing unlicensed activity, the penalty shall include a suspension. The length of the suspension is calculated by assigning \$100 per day, and dividing \$100 into the total amount of unlicensed compensation, up to a maximum of \$10,000. Since Respondent and his partner received in excess of \$10,000 of compensation for their unlicensed activity, a 100 day suspension is warranted. However, pursuant to Regulation 2930, subdivision 18(A), Respondent shall be allowed to petition the Commissioner to convert the 100 day suspension into a \$10,000 monetary penalty. Other conditions shall include a three year period of restriction, reporting this discipline to his employing broker, being current on his continuing education requirements, and taking and passing the Professional Responsibility Examination to verify that Respondent has an understanding of the California Real Estate Law and its application. (Factual Findings 1-20.)

## ORDER

All licenses and licensing rights of Respondent James Eric Pate under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code if Respondent makes application therefore 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 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:

1. 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.

2. All licenses and licensing rights of Respondent under the Real Estate Law are suspended for a period of 100 days from the effective date of this Decision; provided, however, that if Respondent petitions, said suspension shall be stayed upon condition that:

A. Respondent pays a monetary penalty pursuant to section 10175.2 at the rate of \$100.00 for each day of the suspension for a total monetary penalty of \$10,000.

B. Said payment shall be in the form of a cashier's 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 Respondent occurs within one year from the effective date of the Decision in this matter.

D. 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 Department under the terms of this Decision.

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



3. 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.

4. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until three years have elapsed from the effective date of this Decision.

5. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license;  
and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

6. Respondent shall, within 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 2.5 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.

7. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If Respondent fails to satisfy this condition, the Commissioner may order suspension of Respondent's license until Respondent passes the examination.

DATED: March 22, 2012



ERIC SAWYER,  
Administrative Law Judge  
Office of Administrative Hearings