

FILED

NOV 19 2013

BUREAU OF REAL ESTATE

By John Cezair

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of)	CalBRE No. H-38300 LA
)	
GARZA REALTY, INC.,)	OAH No. 2012090742
CARLOS ALFREDO ROMERO,)	
individually and as designated officer of)	
Garza Realty, Inc. and)	
CESAR EMILIO GARZA,)	
)	
Respondents.)	
)	

DECISION

The Proposed Decision dated October 9, 2013, 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 to the Proposed Decision:

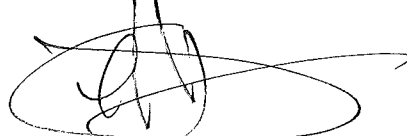
Page 2, Factual Findings 5a, line 3, "Romeo" is corrected to read "Romero".

Page 4, Factual Findings 13, line 4, "Romeo" is corrected to read "Romero".

This Decision shall become effective at 12 o'clock noon on
December 9, 2013.

IT IS SO ORDERED OCT 29 2013

REAL ESTATE COMMISSIONER



By: **JEFFREY MASON**
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

GARZA REALTY, INC.,
CARLOS ALFREDO ROMERO,
Individually and as designated officer of
GARZA REALTY, INC., and
CESAR EMILIO GARZA,

Respondents.

Case No. H-38300 LA

OAH No. 2012090742

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Los Angeles, California on June 25, 2013.

Lissete Garcia, Real Estate Counsel, represented the complainant Maria Suarez, Deputy Real Estate Commissioner, Department of Real Estate (Department),¹ State of California. Marisol Ocampo, Attorney at Law, represented Carlos Alfredo Romero in his individual capacity and in his capacity as designated officer of Garza Realty, Inc. (GRI). Joel A. Spivak, Attorney at Law, represented Cesar Emilio Garza.

At the outset of the hearing, counsel for complainant advised the Administrative Law Judge that the Department obtained a default judgment revoking the license and licensing rights of GRI. (See Default Judgment and Order *In the Matter of the Accusation of Garza Realty, Inc., et al*, case number H-38300 LA, effective October 11, 2012.) Consequently, the Factual Findings and Legal Conclusions in this Proposed Decision make no determination regarding the license and licensing rights of GRI as alleged in the entirety of the First Cause of Accusation and in portions of the Second Cause of Accusation and the Third Cause of Accusation. The Factual Findings and Legal Conclusions in this Proposed Decision determine the license and licensing rights of Carlos Alfredo Romero, individually and as designated officer of GRI, and of Cesar Emilio Garza only.

¹ Subsequent to the hearing in this matter, the Department of Real Estate was reorganized, and it is now the Bureau of Real Estate (Bureau) in the Department of Consumer Affairs.

Testimonial and documentary evidence were received, the case argued, and the matter submitted for decision on June 25, 2013. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

FACTUAL FINDINGS

1. Complainant made the Accusation in her official capacity as a Deputy Real Estate Commissioner of the State of California.

Licenses and Background

2. Cesar Emilio Garza (Garza) owns GRI, a California corporation formed October 2, 2008, to which the Department issued Corporate Real Estate Broker License number C/01856487 on December 29, 2008. The Department has revoked GRI's corporate real estate broker license effective October 11, 2012. Garza serves as GRI's director, president, chief operating officer, and chief financial officer. On January 15, 2009, Garza caused the filing of a Fictitious Business Name Statement indicating that GRI had commenced transacting business as Loan Modification Group (Loan Modification) in December 2008. Also on January 15, 2009, Garza filed an additional Fictitious Business Name Statement indicating his intent to commence transacting business as On Time Financial Center (On Time Financial). Neither Loan Modification nor On Time Financial is a real estate licensee.

3. The Department issued Real Estate Broker License number B/01205969 to Carlos Alfredo Romero (Romero) on January 24, 2002. Romero's real estate broker license is due to expire on January 23, 2014. Romero began serving as GRI's vice president on May 18, 2009, and he served as GRI's designated officer from June 3, 2009 to June 2, 2013.

4. The Department issued Real Estate Salesperson License number S/01746704 to Garza on April 19, 2006. Garza's real estate salesperson license is due to expire on December 6, 2014. GRI has served as Garza's employing broker since January 5, 2009.

Alleged Cause for Discipline

5a. As GRI's designated officer, Romero was responsible for GRI's day-to-day operations. Romero supervised GRI's four active, licensed real estate professionals to ensure their compliance with the laws and regulations governing their real estate activities. Romero, who supervised several other Department corporate licensees, spent two to three hours daily at GRI's office. Romero mandated that he review every file before any real estate transaction closed. In a typical month, one or two files were active at GRI. Romero additionally examined bank statements, commission disbursements, and escrow instructions.

5b. Romero distributed to GRI's licensed real estate professionals a 46-page document entitled *Real Estate Office Policy Manual with Model Office Procedure (Policy Manual)* and required, in return, a signed Acknowledgement of Receipt of Office Policy Manual. Garza, for example, signed an Acknowledgement of Receipt of Office Policy Manual on June 19, 2009. Section 5.9 of the *Policy Manual* states the following:

The payment by a principal to the Company prior to the performance of services is known as an Advance Fee. All Advance Fee arrangements must be pre-approved by the California Department of Real Estate. You may not propose or accept an Advance Fee without the express approval of your Manager and the prior written approval of the Advance Fee arrangement and materials by the California Department of Real Estate.

(Ex. C.)

5c. Romero regularly conducted one training and one informational meeting each month. Romero provided GRI's licensed real estate professionals with memoranda regarding developments in the real estate laws and regulations. Romero orally admonished GRI's licensed real estate professionals not to take any advance fees for loan modifications.

6. In May 2009, Garza indicated to Romero that he (Garza) wanted GRI to offer loan modification services. Romero advised Garza to submit an application to the Department for permission to so, but indicated to Garza that in the event the Department approved the application he intended to resign from GRI. Romero was uncomfortable offering loan modification services; he wanted to continue his focus on buying and selling real estate.

7. Romero assisted in the preparation a form Advance Fee Agreement for Loan Modification Services and a form Verified Accounting for Advance Fees, both of which legal counsel, acting on behalf of GRI doing business as Loan Modification, submitted to the Department for approval on June 30, 2009. The Department responded, by letter dated July 2, 2009, advising legal counsel that the advance fee agreement "cannot be used because it includes an unlicensed DBA, 'Loan Modification Group.'" (Ex. 14.)

8. On July 31, 2009, legal counsel, this time acting solely on behalf of GRI, re-submitted a completed form Advance Fee Agreement for Loan Modification Services along with a Verified Accounting for Advance Fees form to the Department. Romero did not assist in the preparation of these submissions. On August 11, 2009, the Department issued a letter acknowledging the submissions on behalf of GRI and stating that it "has no objection to the broker's use of the advance fee agreement and accounting format as submitted." (Ex. 14.)

9. On October 11, 2009, Senate Bill 94 prohibiting the demand and collection of any advance fee for loan modification or mortgage loan forbearance services became effective. On October 15, 2009, Romero distributed a memorandum to GRI's licensed real estate professionals, including Garza, advising that "effective Oct/11/2009 there is a law

(Senate Bill 94) that prohibits collecting or obtaining ADVANCE FEE for Loan Modifications.” (Ex. B.) (Emphasis in original.) The October 15, 2009 memorandum specifically enumerates “Loan Brokerage,” “Property Management,” and “Loan Modification with Advance Fee” as prohibited activities. (Ex. B). Garza acknowledged his receipt of the October 15, 2009 memorandum by affixing his signature to a copy and dating it October 20, 2009.

10. On October 19, 2009, Flor Santillan (Santillan), an individual holding no Department-issued real estate license, represented herself as a “Loan Consultant” for Loan Modification to Y.Z., a residential homeowner. Acting on behalf of Loan Modification, Santillan misrepresented and made false promises about loan forbearance and modification services for an advanced fee to the homeowner. Loan Modification received an advance payment of \$1,000 from the homeowner, which was not deposited into a trust account, for services Loan Modification failed to perform.

11. Santillan additionally represented herself as an “Agent” for On Time Financial to the homeowner. On behalf of Time Financial, Santillan offered the homeowner “Mortgage Loan Document Review(s) [and] Forensic Loan Audit(s) [.]” On Time Financial received fees totaling \$2,850 from the homeowner for services On Time Financial failed to perform.

12. The homeowner sought redress against Loan Modification in the Superior Court of California, Riverside County, in case number INS10001061. Pursuant to a Small Claims Settlement Agreement, on January 5, 2011, Garza wrote a check on behalf of GRI paying the homeowner \$2,850.

13. Romero had no knowledge of Santillan’s existence or of Santillan’s dealings with the homeowner. Garza retained Santillan, without Romero’s knowledge or approval, for \$250 knowing that she was not a Department licensee. Garza referred the homeowner to Santillan. Romeo had no knowledge of the settlement with the homeowner prior to the service of the Accusation in this matter. Upon receiving the Accusation, Romero confronted Garza, who admitted conducting the loan modification transaction with the homeowner through Santillan. Garza told Romero, “She accused me and I refunded the money.” Garza explained to Romero that “it was the right way” because “we didn’t perform for her.” Garza expressed his opinion to Romero that the transaction was outside the purview of Romero’s supervision.

14. Complainant has not produced clear and convincing evidence to a reasonable certainty establishing that Romero engaged in conduct involving the collection of advance fees in violation of the Real Estate Law. As set forth in Factual Finding 9, Romero affirmatively prohibited GRI and its licensed real estate professionals from collecting or obtaining advance fee for loan modification consistent with SB 94.

15. Complainant has not produced clear and convincing evidence to a reasonable certainty establishing that Romero employed or compensated an unlicensed individual to perform real estate activities requiring a license from the Department. As set forth in Factual Finding 13, Santillan's existence and involvement with the loan modification transaction with the homeowner were unknown to Romero until after the misconduct set forth in Factual Finding 10 already occurred.

16. Complainant has not produced clear and convincing evidence to a reasonable certainty establishing that the misconduct set forth in Factual Findings 10 resulted from Romero's failure to supervise reasonably GRI and its licensed real estate professionals. As set forth in Factual Findings 5, inclusive of subdivisions, and 9, Romero's active supervision of GRI and its licensed real estate professionals included prohibitions against collecting or obtaining advance fees for loan modifications.

17. Complainant has produced clear and convincing evidence to a reasonable certainty establishing that Garza engaged in conduct collecting or obtaining advance fees in violation of SB 94 as set forth in Factual Finding 10.

18. Complainant has produced clear and convincing evidence to a reasonable certainty establishing that Garza employed an unlicensed individual to perform activities requiring a real estate license from the Department.

Cost of Investigation and Prosecution

19. Complainant incurred costs of investigation and prosecution totaling \$3,893.50.

LEGAL CONCLUSIONS

1. Complainant bears the burden of proving by clear and convincing evidence to a reasonable certainty the allegations in the Accusation. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-6.) Clear and convincing evidence means the evidence is "so clear as to leave no substantial doubt" and is "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1190 [citing *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 332-333].)

Cause for Discipline

2. With respect to the Second Cause of Accusation as it pertains to Romero's license and licensing rights, cause does not exist to discipline Real Estate Broker License number B/01205969 pursuant to Business and Professions Code sections 10085, 10085.5, 10085.6, 10146, 10176, subdivisions (a), (b), and (i), 10177, subdivisions (d) and (g), and California Code of Regulations, title 10, section 2970, by reason of Factual Finding 14, in

that complainant has not produced clear and convincing evidence to a reasonable certainty establishing that Romero engaged in the prohibited conduct of collecting or obtaining advance fees for loan modification or forbearance.

3. With respect to the Second Cause of Accusation as it pertains to Garza's license and licensing rights, cause exists to discipline Real Estate Salesperson License number S/01746704 pursuant to Business and Professions Code sections 10085, 10085.5, 10085.6, 10146, 10176, subdivisions (a), (b), and (i), 10177, subdivisions (d) and (g), and California Code of Regulations, title 10, section 2970, by reason of Factual Finding 17, in that complainant has produced clear and convincing evidence to a reasonable certainty establishing that Garza engaged in the prohibited conduct of collecting or obtaining advance fees for loan modification and forbearance.

4. With respect to the Third Cause of Accusation as it pertains to Romero's license and licensing rights, cause does not exist to discipline Real Estate Broker License number B/01205969 pursuant to Business and Professions Code sections 10131, subdivision (d), 10131.2, 10137, 10177, subdivisions (d) and (g), by reason of Factual Finding 15, in that complainant has not produced clear and convincing evidence to a reasonable certainty establishing that Romero employed or compensated an unlicensed individual to perform activities requiring a real estate license from the Department.

5. With respect to the Third Cause of Accusation as it pertains to Garza's license and licensing rights, cause exists to discipline Real Estate Salesperson License number S/01746704 pursuant to Business and Professions Code sections 10131, subdivision (d), 10131.2, 10137, 10177, subdivisions (d) and (g), by reason of Factual Finding 18, in that Garza employed an unlicensed individual to perform activities requiring a real estate license from the Department.

6. With respect to the Fourth Cause of Accusation, which pertains to Romero's license and licensing rights, cause does not exist to discipline Real Estate Broker License number B/01205969 pursuant to Business and Professions Code sections 10159.2 and 10177, subdivisions (d), (g), and (h) and California Code of Regulations, title 10, section 2725, by reason of Factual Finding 16, in that complainant has not produced clear and convincing evidence to a reasonable certainty establishing Romero's failure to supervise reasonably the activities of GRI and its licensed real estate professionals.

Fitness for Continued Licensure

7. As cause exists to discipline Garza's real estate salesperson license and licensing rights, a determination must be made whether he is fit for continued licensure. Such a determination is to occur only after consideration of Garza's conduct and any evidence of justification, aggravation, or mitigation of his conduct. Garza, of course, is permitted to introduce evidence of rehabilitation. (See *Arneson v. Fox* (1980) 28 Cal.3d 440, 449; *Brandt v. Fox* (1979) 90 Cal.App.3d 737, 747).

8. Garza sought, without success, the Department's permission to use an unlicensed entity he created to collect advance fees for loan modifications. Thereafter, Garza compensated an unlicensed individual who affiliated herself with the unlicensed entity he created to nonetheless engage in the very conduct that he was without permission to engage in. As set forth in Factual Finding 13, Garza disregarded all prohibitions against collecting advance fees for loan modifications. Garza was evidently intent on engaging in conduct inimical to the public interest. He is unfit for continued licensure. Under these facts and circumstances, it would be contrary to the public interest to permit Garza to retain a real estate salesperson license, even on a restricted basis. The purpose of an administrative proceeding such as this is to protect the public. (See *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.)

Costs of Investigation and Prosecution

9. Cause does not exist for the Department to recoup from Romero its costs of investigation and prosecution pursuant to Business and Professions Code section 10106 in that, as set forth in Legal Conclusions 2, 4, and 6, complainant failed to produce clear and convincing evidence to a reasonable certainty that Romero committed violations of the Real Estate Laws. (Accord *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.App.4th 32, 45 [cost of investigation and prosecution may not be assessed when doing so penalizes a licensee who obtains dismissal of the charges alleged].)

10. Cause exists for the Department to recoup its costs of investigating and prosecuting the allegations pertaining to Garza pursuant to Business and Professions Code section 10106. The Department may not recoup from Garza, however, the entirety of the \$3,893.50 set forth in Factual Finding 18. A number of causes for discipline alleged in the Accusation did not involve Garza, was not established, or was subject to default judgment. The causes for disciplining Garza license and licensing rights, as set forth in Legal Conclusions 3 and 5, comprise one-half of the three causes actually litigated in an Accusation containing four causes of discipline. One-fourth of the Department's costs—\$973.37—is reasonably apportioned to the Department's investigation and prosecution of the allegations pertaining to Garza. (Accord *Slavin v. Fink* (1994) 25 Cal.App.4th 722 [recoverable costs apportioned to reflect claims on which a party prevailed].)

11. All factual and legal arguments contained in the Accusation and asserted at the June 25, 2013 hearing and in submissions and briefs not addressed herein are unsupported by the evidence, irrelevant, without merit, or constitute surplusage.

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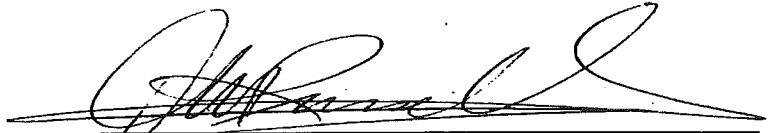
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ORDER

1. The Accusation against Carlos Alfredo Romero, individually and as designated officer of Garza Realty, Inc. is dismissed.
2. Real Estate Salesperson License number S/01746704 issued to Cesar Emilio Garza is revoked.
3. Should Cesar Emilio Garza successfully petition the Bureau for reinstatement of Real Estate Salesperson License number S/01746704, Cesar Emilio Garza shall reimburse the Department's costs of investigation and prosecution in the sum of \$973.37.

DATED: October 9, 2013



JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings