

BEFORE THE BUREAU OF REAL ESTATE

FILED

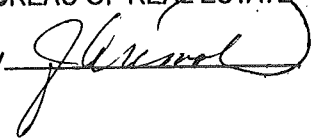
STATE OF CALIFORNIA

JUN 04 2014

BUREAU OF REAL ESTATE

In the Matter of the Accusation of) CalBRE No. H-38666 LA
) OAH No. 2013020938
JAMES MYRON SETTLE, individually,)
and doing business as Gibraltar Realty,)
)
Respondent.)
_____)

By



DECISION

The Proposed Decision dated April 25, 2014, 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:

Factual Findings, Page 8, 2nd paragraph of Paragraph No. 5, line 6, "...third parties without out sellers" is amended to read "...third parties without sellers".

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted license is granted to Respondent.

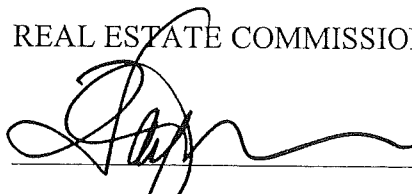
The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock
noon on JUN 25 2014.

IT IS SO ORDERED

6/2/2014

REAL ESTATE COMMISSIONER



WAYNE S. BELL

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

In the Matter of the Accusation Against:

JAMES MYRON SETTLE,
individually and doing
business as Gibraltar Realty,

Respondent.

Case No. H-38666 LA

OAH No. 2013020938

PROPOSED DECISION

On March 4, 2014, Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Los Angeles, California.

Cheryl D. Keily, Real Estate Counsel, Bureau of Real Estate (Bureau), represented complainant Robin Trujillo, Deputy Real Estate Commissioner, State of California. Frank M. Buda, Attorney at Law, represented respondent James Myron Settle individually and doing business as Gibraltar Realty.

At the outset of the hearing, counsel for complainant amended paragraph 11 of the Accusation to omit the word "Respondent" and to add the words "the owner's" so that line 16 of paragraph 11 reads, "On or about June 11, 2010, the owner's cancelled the". In addition, counsel for complainant amended paragraph 21 of the Accusation to omit a reference to Business and Professions Code section 10177, subdivision (j), on line 20 of paragraph 21.

Complainant seeks to discipline respondent's real estate broker license based on allegations that respondent violated provisions of the Real Estate Law prohibiting him from making misrepresentations, acting on behalf of more than one party in a transaction without the knowledge or consent of all parties to the transaction, taking secret or undisclosed compensation, and engaging in conduct constituting fraud or dishonest dealing or otherwise demonstrating his negligence and incompetence performing the functions for which he is licensed. Respondent presented evidence and arguments in support of his continued licensure.

The case was submitted for decision March 28, 2014.¹

¹ The record was held open until March 28, 2014, for submission of closing briefs consistent with a March 4, 2014 Post-Hearing Order. Complainant's *Closing Argument* by

FACTUAL FINDINGS

1. Complainant made the Accusation while acting in her official capacity.
2. The Department of Real Estate, now known as the Bureau of Real Estate (Bureau), issued a real estate salesperson license to respondent on December 16, 1980. On May 26, 2009, respondent was issued Real Estate Broker License number 00803898. Respondent's real estate broker license, which was in full force and effect at all relevant times, expires July 16, 2017.

Alleged Cause for Discipline

3. In 2001, Tiffani and Reginald Martin (sellers) acquired certain real estate property located at 8011 Canby Avenue, Reseda, California (property). Sellers resided at the property until 2005, when they began leasing the property. When sellers were no longer able to lease the property, they determined that without the rental revenues generated from the property, they were unable to make the mortgage payments on the property. Sellers therefore determined to short sale² the property to avoid any adverse consequence resulting from a mortgage foreclosure.
4. In connection with the short sale of the property, on January 22, 2010, respondent and sellers executed an Exclusive Authorization and Right to Sell agreement (the listing agreement). According to respondent, "My primary involvement was to oversee the process; if hiccups arise, just smooth it over." In relevant part, the listing agreement provides for a listing period commencing January 22, 2010, and ending December 22, 2010. The stated listing price is \$200,000 and real estate commissions are set at seven percent of the listing price. (Exhibit 5 at pages 12 through 14.) An accompanying Short Sale Listing Addendum provides that "Seller acknowledges that a short sale is subject to Lender approval. Lender is not obligated to accept a Short Sale." (Exhibit 5 at page 17.)
5. Sellers additionally signed, on January 22, 2010, a Disclosure and Consent for Representation of More Than One Buyer or Seller (January 22, 2010 Disclosure and Consent) to acknowledge reading and understanding the following disclosure regarding dual agency:

A real estate broker, whether a corporation, partnership or sole proprietorship, ("Broker") may represent more than one buyer or seller provided the Broker has made a disclosure and the principals have given their consent. This

Complainant is marked for identification only as Exhibit 12. *Respondent James Myron Settle's Closing Brief Pursuant to the Post-Hearing Order* is marked for identification only as Exhibit H.

² A short sale refers to the sale of property for a price less than the amount owed on the property.

multiple representation can occur through an individual licensed as a broker or through different associate licensees acting for the Broker. The associate[']s licensees may be working out of the same or different office locations.

Broker (individually or through its associate licensees) may be working with many prospective buyers at the same time. These prospective buyers may have an interest in, and make offers on, the same properties. Some of these properties may be listed with Broker and some may not. Broker will not limit or restrict any particular buyer from making an offer on any particular property whether or not Broker represents other buyers interested in the same property.

Broker (individually or through its associate licensees) may have listing on many properties at the same time. As a result Broker will attempt to find buyers for each of those listed properties. Some listed properties may appeal to the same prospective buyers. Some properties may attract more prospective buyers than others. Some of these prospective buyers may be represented by Broker and some may not. Broker will market all listed properties to all prospective buyers whether or not Broker has another or other listed properties that may appeal to the same prospective buyers.

Buyer and Seller understand that Broker may represent more than one buyer or seller and even both buyer and seller on the same transaction.

If Seller is represented by Broker, Seller acknowledges that Broker may represent prospective buyers of Seller's property and consents to Broker acting as a dual agent for both Seller and Buyer in that transaction.

(Exhibit 5 at page 18.)

6. Seller understood that respondent was responsible for listing, advertising, and showing the property. To facilitate respondent's execution of his responsibilities, sellers gave respondent the keys, garage opener, and parking pass associated with the property.

7. Also on January 22, 2010, sellers entered an agreement retaining The Mortgage Solution Network Inc. (TMSN) to "communicate and negotiate with . . . [their] Lender(s) in an effort to obtain Lender's approval of a property sale and 'short payment' of the liens on the property." (Exhibit 5 at page 7.)

8. On February 11, 2010, a prospective buyer, represented by Urvish Patel who worked for respondent's real estate brokerage firm—Gibraltar Realty, offered \$140,000 to purchase the property. With sellers' oral authorization, respondent affixed sellers' initials to and signed sellers' names on a form Residential Purchase Agreement and Joint Escrow Instructions memorializing the offer. (Exhibit 5 at pages 21 through 31, inclusive.) Sellers did not receive a copy of the purchase agreement from respondent. Sellers' lender, Bank of America, declined to accept this offer.

9. On March 19, 2010, another prospective buyer, also represented by Urvish Patel, offered \$162,500 to purchase the property. Without sellers' authorization, respondent affixed sellers' initials to, and signed sellers' names on a form Residential Purchase Agreement and Joint Escrow Instructions memorializing the offer. (Exhibit 5 at pages 32 through 6, inclusive, and Exhibit 11.) Sellers did not receive a copy of the purchase agreement from respondent. Bank of America declined to accept this offer.

10. Sellers assert that they were ignorant about any agent from Gibraltar Realty, respondent's real estate brokerage firm, representing the prospective buyers in the transactions set forth above in Factual Findings 8 and 9. In particular, sellers assert that they had no conversations with Urvish Patel, and that they were unaware of his representation of any prospective buyers.

11. TMSN's inability to obtain Bank of America's approval of the short sale offers set forth in Factual Findings 8 and 9 resulted in the sellers' June 11, 2010 termination of TMSN.

12. In May 2010, respondent introduced sellers to LDT Investments, Inc. (LDT),³ and respondent received a \$7,000 referral fee from LDT that was not disclosed to sellers. Respondent also gave Diana at LDT the keys, gate opener, and parking pass associated with the property on May 22, 2010. Sellers' claimed understanding is that LDT was interested in negotiating directly with Bank of America for its purchase of the property, and as a consequence, the property was taken off the market. Ten months elapsed and no short sale was consummated with LDT. During that 10-month period, respondent irregularly communicated with sellers who sought advice and updates from him regarding the short sale process. Sellers learned from Bank of America that it had no pending purchase offer from LDT. On April 15, 2011, seller filed a complaint with the Better Business Bureau (BBB) against LDT alleging LDT's "lack of effort to complete the short sale." (Exhibit 3 at page 3.) "They never followed through with task that B of A requested to get short sale completed." (Exhibit 3 at page 8.) LDT offered, and sellers accepted, a \$1,500 settlement to resolve that complaint. The settlement, to which respondent is a signatory, in pertinent part, provides the following:

Thank you for trusting LDT Investments Inc., to negotiate the short sale of your home Unfortunately, the employee working this short sale didn't communicate or follow up with you in the proper time frame. LDT Investments Inc. would like to apologize for the lack of customer service you encountered. . . . James Settle, from Gibraltar Realty, will now be negotiating the short sale of your home and you will also receive a compensation of \$1,500.00 for any distress you may have encountered due to this matter.

³ LDT's corporate real estate broker license number 01866131 was revoked October 6, 2011.

(Exhibit 3 at page 43.)

13. From April 2011 to September 2011, respondent communicated several times to sellers that he had a new buyer or buyers for the property, but he offered no supporting purchase agreements for the sellers' consideration. Nothing came to fruition.⁴ When sellers expressed their anxiety regarding the lengthy short sale process, respondent assured them that all was copasetic. On September 9, 2011, sellers notified respondent that they no longer required his services, and sellers requested that respondent return the keys, gate opener, and parking pass associated with the property to them. Respondent informed sellers that LDT had the keys, gate opener, and parking pass. Sellers claim that this was when they first learned that LDT was not just a prospective buyer interested in the property, but a broker representing them in the short sale of the property. Sellers, however, had no listing agreement or other brokerage agreement with LDT.

14. On September 10, 2011, sellers discovered for the first time that tenants occupied the property. The occupying tenants paid rent in the amount of \$1,100 each month to LDT in accordance with the terms of a rental agreement for the period April 1, 2011 to April 1, 2012. Sellers received no rental income from the occupying tenants. Sellers authorized no person or entity, including LDT, to rent the property. Sellers were unsuccessful evicting the occupying tenants from the property. Bank of America foreclosed on the property January 21, 2012. (Exhibit 6.)

Factors in Aggravation, Mitigation and Rehabilitation

15. Respondent testified that the purchase offer set forth in Factual Finding 8 was withdrawn because the prospective buyer was unable to secure financing. The purchase offer set forth in Factual Finding 9 was withdrawn because Bank of America received a counter-offer that the prospective buyer was unwilling to match. According to respondent, had the purchase offers been accepted, he would have provided sellers with the appropriate documents for their review and actual signatures. Respondent testified that with hind-sight he should not have signed sellers' names. He declared that he would never do so again.

16. Respondent learned about LDT from another broker. LDT was to "fast track the process and facilitate completion of the sale. [They were to] avoid a situation where offers were being rejected." Respondent testified that, contrary to sellers' claim, he "never represented that LDT itself would be a purchaser."

17. Respondent testified that he "had no agreement with LDT for compensation," but that he was paid a "referral fee" two weeks into the process, which he admitted he did not disclose to sellers. According to respondent, although he "didn't expect the \$7,000," he "believed it would be disclosed on the HUD closing documents."

⁴ See Factual Finding 19.

18. Respondent turned over the property's keys, gate opener, and parking pass to LDT because LDT needed access to the property to conduct an inspection and appraisal during the course of its active marketing of the property. Respondent specifically identified O.K.D. Investments, Inc. as one entity to which LDT marketed the property. A completed form Notice of Default Purchase Agreement dated October 10, 2010 indicates that "O.K.D. Investments, Inc./Omar Jimenez" offered \$180,000 to purchase the property. (Exhibit 11.) Another form Notice of Default Purchase Agreement dated January 19, 2011, indicates that "Omar Jimenez" offered \$145,000 to purchase the property. (Exhibit 11, Tab 3.) Initials and signatures purporting to belong to sellers appear on both of these documents.

19. According to respondent's testimony, once LDT was released he "scrambled to get an offer." For example, on June 23, 2011, a prospective buyer, represented by Vicky Menzies who worked for respondent's real estate brokerage firm—Gibraltar Realty, offered \$150,000 to purchase the property. (Exhibit 11, Tab 4.) Respondent testified that "to expedite the transaction," he obtained the sellers authorization to sign their names, which he did. Respondent explained that copies of this purchase agreement were not provided to sellers for their review because the offer was rejected. Respondent admitted that he "should have provided it whether or not it was accepted. It has been a learning experience."

20. Respondent learned from sellers that LDT had leased the property.

21. Respondent expressed his regrets over his handling of sellers' transaction. "I shouldn't have taken the short sale when I didn't know how to handle it." Respondent testified that he "should have followed the strict letter of the law" and that he "should have disclosed the fees and not depend on escrow to make the disclosure." He claimed, on cross-examination, that "the \$7,000 check didn't initially raise red flags" because he "thought it was an advance on [his] commission." "I just didn't connect the dots that this was something that wouldn't be disclosed outside of escrow." Respondent has not complied with LDT's demand for a refund of the \$7,000.

22. On cross-examination, respondent further admitted that his disclosure obligations in a short sale transaction are the same as in any other real estate purchase and sale transaction. He conceded that "a short sale transaction doesn't mean lesser obligations for the broker." Respondent admits that he should have retrieved the property's keys, gate opener, and parking pass from LDT when LDT disassociated from the transaction.

23. Respondent offered a letter of recommendation from one of his clients who praised respondent's integrity, honesty, and reliability. (Exhibit G.)

24. Respondent has no history of prior discipline.

Costs of Investigation and Prosecution

25. The Bureau incurred costs of investigation and prosecution totaling \$4,507.75.

26. Neither party offered evidence of respondent's finances or ability to make cost recovery payments.

LEGAL CONCLUSIONS

1. Complainant bears the burden of proving by clear and convincing evidence to a reasonable certainty that respondent's real estate broker license should be suspended or revoked. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.) 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].)

2. Business and Professions Code section 10176 authorizes complainant to suspend or revoke a license where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of the Real Estate Law, has been guilty of any of the following:

(a) Making any substantial misrepresentation.

[¶] . . . [¶]

(d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

[¶] . . . [¶]

(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission, or profit

[¶]

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

3. Business and Professions Code section 10177 further authorizes complainant to suspend or revoke the license of a real estate licensee, who has done any of the following:

(d) Willfully disregarded or violated the Real Estate Law . . . or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law

[¶] . . . [¶]

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

4. Business and Professions Code section 10142 provides the following regarding the delivery of agreements:

When a licensee prepares or has prepared an agreement authorizing or employing such licensee to perform any of the acts for which he is required to hold a license, or when such licensee secures the signature of any person to any contract pertaining to such services or transaction, he shall deliver a copy of the agreement to the person signing it at the time the signature is obtained.

Cause for Discipline

5. Discussion: The law imposes on a real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. In particular, a real estate licensee is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. This agency is fiduciary in nature and imposes high standards of good faith. As a consequence, an agent is under a duty to use reasonable care, but as a professional must use a higher degree of skill and diligence in conduct of his duties. (See *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, 64.)

Respondent incompetently discharged his fiduciary duties as a licensed person holding himself out, in general to the public and in particular to sellers, as having specialized skills and knowledge in the real estate field. Respondent turned over the keys, garage opener, and parking pass associated with sellers' property and then failed to account for them. (Factual Findings 12 and 13.) As a direct consequence of respondent's failure, the property was rented to third parties without sellers' knowledge or consent, thereby depriving sellers of the rental income derived from the property. (Factual Finding 14.)

At all relevant times, respondent was obligated to disclose to sellers all material information affecting the short-sale transaction for which they retained respondent. Such material information included the offers from prospective buyers set forth in Factual Findings 8 and 9, which respondent failed to disclose to sellers. Respondent additionally concealed from sellers that he accepted at least one prospective buyer's offer by signing their names without their knowledge or authorization. None of the documents to which respondent affixed sellers' signatures were provided to sellers in violation of the Real Estate Law. (See Legal Conclusion 4.)

Clear and convincing evidence establishes that LDT paid respondent a \$7,000 referral fee. The \$7,000 referral fee is an economic benefit derived from the short-sale transaction for which sellers retained respondent. As such, respondent was obligated to disclose the referral fee to sellers, and he admitted his failure to do so. (Factual Findings 12 and 21.)

Under the factual circumstances of this case, respondent's non-disclosure of the above material information to sellers is a misrepresentation of the nature of his agency, which in turn evinces his dishonest dealing with sellers. Such dishonesty contravenes the Real Estate Law, which, among other things, is intended to protect the public from real estate licensees, like respondent, who are dishonest and untruthful in their dealings. (See *Brown v. Gordon* (1966) 240 Cal.App.2d 659, 667.)

Credible evidence establishes that for a period of time LDT represented sellers' interest in connection with the short sale of the property. It was not established, however, that LDT did so without sellers' knowledge. Sellers' complaint to the BBB regarding LDT's lack of efforts to complete the short sale process indicates sellers' awareness of LDT, not just as a potential buyer, but also as a broker. A seller's dissatisfaction with a buyer typically does not result in a complaint with the BBB, which purpose is to serve as an intermediary between consumers and businesses and to address disputes against businesses. The terms of sellers' settlement with LDT is further evidence undermining sellers' claim regarding respondent's representation to them about LDT's role as a broker. The settlement terms specifically states, "Thank you for trusting LDT Investments Inc., to negotiate the short sale of your home." No competent evidence established otherwise.

6. Cause exists pursuant to Business and Professions Code section 10176, subdivision (a), to suspend or revoke Real Estate Broker License number 00803898 issued to respondent, in that, as set forth in Legal Conclusion 5, complainant has established by clear and convincing evidence that respondent is guilty of making substantial misrepresentations to sellers.

7. Cause exists pursuant to Business and Professions Code section 10176, subdivision (g), to suspend or revoke Real Estate Broker License number 00803898 issued to respondent, in that, as set forth in Legal Conclusion 5, complainant has established by clear and convincing evidence that respondent is guilty of obtaining a secret or undisclosed amount of compensation in connection with his representation of sellers.

8. Cause exists pursuant to Business and Professions Code section 10176, subdivision (i), to suspend or revoke Real Estate Broker License number 00803898 issued to respondent, in that, as set forth in Legal Conclusion 5, complainant has established by clear and convincing evidence that respondent is guilty of conduct constituting fraud or dishonest dealing.

9. Cause exists pursuant to Business and Professions Code sections 10142 and 10177, subdivision (d), to suspend or revoke Real Estate Broker License number 00803898 issued to respondent, in that, as set forth in Legal Conclusion 5, complainant has established by clear and convincing evidence that respondent willfully disregarded or violated the Real Estate Law or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law.

10. Cause exists pursuant to Business and Professions Code section 10177, subdivision (g), to suspend or revoke Real Estate Broker License number 00803898 issued to respondent, in that, as set forth in Legal Conclusion 5, complainant has established by clear and convincing evidence that respondent has demonstrated negligence or incompetence in performing an act for which he is required to hold a real estate license.

11. *Discussion:* Prior to any attempts to secure a buyer for sellers' property, respondent disclosed to sellers in a January 22, 2010 Disclosure and Consent that "Broker may represent more than one buyer or seller and even both buyer and seller on the same transaction." The January 22, 2010 Disclosure and Consent further disclosed that "If Seller is represented by Broker, Seller acknowledges that Broker may represent prospective buyers of Seller's property and consents to Broker acting as a dual agent for both Seller and Buyer in that transaction." Respondent's or his brokerage firm's representation of sellers and the prospective buyers set forth in Factual Findings 8 and 9 are consistent with the advance disclosures provided the January 22, 2010 Disclosure and Consent. Seller's lack of knowledge about a specific agent, namely Urvish Patel, is inconsequential.

12. Cause does not exist pursuant to Business and Professions Code section 10176, subdivision (d), to suspend or revoke Real Estate Broker License number 00803898 issued to respondent, in that, as set forth in Legal Conclusion 11, complainant has not established by clear and convincing evidence that respondent is guilty of acting for more than one party in a transaction without the knowledge or consent of all parties thereto.

Fitness for Continued Licensure

13. The determination whether a person is fit for continued licensure should be made only after consideration of the conduct of the licensee and consideration of any factors introduced in justification, aggravation or mitigation. "The Licensee, of course, should be permitted to introduce evidence of rehabilitation." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449; *Brandt v. Fox* (1979) 90 Cal.App.3d 737, 747). Respondent has the burden of establishing his rehabilitation. (Evid. Code, § 500.) Respondent has admitted to his incompetence and he has characterized his experience with sellers as "a learning experience." (Factual Findings 15 and 19.) To permit respondent, a thirty-five-year real estate licensee, to continue the unrestricted and unsupervised practice of real estate while he learns the profession is to put the public in harm's way. Respondent has not met his burden of establishing his rehabilitation at this time. The Order set forth below is necessary for public protection. (See *Camacho v. Youde* (1979) 95 Cal, App. 3d 161, 164 [indicating that the purpose of an administrative proceeding such as this is to protect the public].)

Cost Recovery

14. Business and Professions Code section 10106 authorizes the recovery of the Bureau's prehearing investigation and enforcement costs. The California Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, instructs that

the following factors should be considered when determining the reasonableness of recovery of prehearing investigation and enforcement costs.

The [Bureau] must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that regulation . . . does not deter . . . [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing. Thus, the [Bureau] must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a . . . [licensee] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The [Bureau] must consider the . . . [licensee's] "subjective good faith belief in the merits of his or her position" [Citation.] and whether the . . . [licensee] has raised a "colorable challenge" to the proposed discipline. [Citation.] Furthermore, as in the cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation [Citation], the [Bureau] must determine that the . . . [licensee] will be financially able to make later payments. Finally, the [Bureau] may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a . . . [licensee] engaged in relatively innocuous misconduct.

15. Section 10106 is silent on the apportionment of costs when all causes for discipline alleged in an accusation are not established. Civil cases addressing a prevailing party's recovery of attorney fees where apportionment is not covered by statutory or contractual clause are instructive. In *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, where a party prevailing on both a contract containing a fee clause and on a tort theory precluding fee recovery, the fees were allocated between the two causes of action. In *Slavin v. Fink* (1994) 25 Cal.App.4th 722, a similar allocation occurred where, as in this case, a party prevailed on some, but not all, of its claims.

16. Complainant was not successful establishing respondent's violation of Business and Professions Code section 10176, subdivision (d), as a cause for discipline. This unsuccessful allegation against respondent nonetheless required work, with attendant costs, that overlapped with the work performed and costs incurred on otherwise successful allegations. Without more specific evidence to determine a precise apportionment, the Bureau's costs of investigation and enforcement is apportioned equally among all six causes for discipline set forth in Legal Conclusions 6, 7, 8, 9, 10, and 12. The Bureau may therefore recoup \$3,756.46⁵ of its costs of investigation and enforcement.

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⁵ \$4,507.75 divided by six causes for discipline equals \$751.29 for each cause for discipline, and \$751.29 subtracted from \$4,507.75 equals \$3,756.46.

17. Under *Zuckerman, supra*, a determination must be made regarding respondent's financial ability to make future cost award payments. No evidence was offered at the hearing regarding respondent's ability to make cost recovery payments to the Bureau. Under the circumstances, the Bureau's request for cost recovery is granted.

18. All factual and legal arguments contained in the Accusation in this case and asserted during the March 4, 2014 hearing not addressed herein are unsupported by the evidence, irrelevant, without merit, or constitute surplusage.

ORDER

Real Estate Broker License number 00803898, and accompanying licensing rights, issued to respondent James Myron Settle, is hereby revoked; 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 therefor and pays to the Bureau 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 the respondent James Myron Settle 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. The restricted license issued to respondent James Myron Settle 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.
3. Respondent James Myron Settle 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 two years have elapsed from the effective date of this Decision.
4. Respondent James Myron Settle 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 the respondent present such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

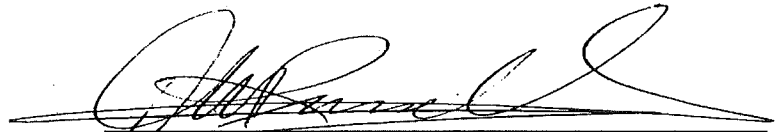
5. Respondent James Myron Settle shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Bureau which shall certify: transfer to a new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

(a) That the employing broker has read the Decision 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 James Myron Settle shall pay the Bureau its costs of investigation and enforcement in the amount of \$3,756.46.

Dated: April 25, 2014



JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings