

**FILED**

OCT 29 2013

DEPARTMENT OF REAL ESTATE

BY: 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of	)	CalBRE No. H-38753 LA
	)	OAH No. 2013050938
DAMIAN HERRERA,	)	
	)	
	)	
Respondent.	)	
_____	)	

DECISION

The Proposed Decision dated October 01, 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.

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 NOVEMBER 18, 2013.

IT IS SO ORDERED OCT 21 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 of

DAMIAN HERRERA,

Respondent.

Case No. H-38753 LA

OAH No. 2013050938

**PROPOSED DECISION**

Administrative Law Judge Jerry Smilowitz, State of California, Office of Administrative Hearings, heard this matter on September 10, 2013, in Los Angeles, California.

Amelia V. Vetrone, Staff Counsel, Bureau of Real Estate (Bureau), represented Complainant, Robin Trujillo, Deputy Real Estate Commissioner (Complainant).

Respondent Damian Herrera was represented by his attorney, Frank Buda, and was present at the hearing.

Oral and documentary evidence was received, and the matter was submitted for decision on September 10, 2013.

**FACTUAL FINDINGS**

1. Complainant acted solely in an official capacity for the Bureau in bringing this Accusation.
2. Respondent had been originally licensed as a real estate salesperson 1992. His broker license was issued on March 14, 1997, and is due to expire on January 13, 2017. Other than this Accusation, there has been no history of discipline or complaints received against Respondent.
3. On June 21, 2011, Respondent was convicted by a jury of committing identity theft, a misdemeanor, in violation of Penal Code section 530.5, subdivision (a). (*People v. Damian Herrera*, Los Angeles Superior Court, Case No. KA091497.)

4. The facts and circumstances underlying this conviction are as follows: Pawnbroker licenses are issued by the chief of police, the sheriff, or where appropriate, the police department of a municipality. Under the Financial Code, the licensing authority, here the Glendora Police Department, submits an application it receives for a pawnbroker license to the California Department of Justice (DOJ) which reviews the background of the applicant. If no comment is made by DOJ within 30 days, the license may be issued.

5. In March of 2010, Respondent, doing business as Ace Personal Loans, held a pawnbroker license issued by the Chief of Police of the City of Fontana in February of 2010 which was set to expire in February of 2012. Respondent's first pawnbroker license in Fontana had been issued in October of 2007.

6. On March 16, 2010, Respondent called Community Service Officer Peterson who was employed by the Glendora Police Department to process the applications for various city permits, including pawnbroker licenses. Respondent told Peterson he wanted to transfer his license from Fontana to Glendora in conjunction with the move of his office to Glendora. After dropping off the application (JUS 25 form), Respondent, over the next couple of weeks, had several telephone conversations with Peterson. He continually told her that a new application was not required for his move to Glendora since it was only a transfer of the existing license. Peterson was unfamiliar with the exact process involved and told Respondent she needed to check the guidelines with DOJ.

7. On April 23, 2010, Respondent resubmitted his application to Peterson. He marked the top of the application as a renewal, and not one for a new pawnbroker license.

8. Attached to the application was a purported printout of an email Respondent claimed to have received from Jane Alcala, a Criminal Identification Specialist with DOJ. This printout would later form the basis for Respondent's prosecution and subsequent conviction. It read in pertinent part:

Damian,

There is no fees for applying for a change of address. If your present business is closing because you are moving to a new location, you need to fill out a JUS 125 application (see attached) showing your new address. Please make sure all sections of the application is completed. At the top of the application indicate 'change of address only' and highlight. This needs to be turned into the law enforcement agency, who will then submit to DOJ.

9. Peterson submitted the entire application including the email to DOJ. Alcala called Peterson to advise that the application by Respondent had been rejected. Alcala informed Peterson that the email Respondent had attached to his application had been altered from the one she prepared and sent to Respondent. The original email written by Alcala read in pertinent part:

Damian,

There is no fees for applying for a change of address. If your present business is closing because you are moving to a new location, *within the same jurisdiction*, you need to fill out a JUS 125 application (see attached) showing your new address . . . . [Added emphasis.]

The difference between the two emails is that the one Respondent received from Ms. Alcala of DOJ included the words, "within the same jurisdiction," while these words were omitted from the email printout Respondent submitted with the application he gave to Peterson of the Glendora Police Department. The email was sent from Alcala's DOJ account, and not her personal account, thereby qualifying as an official communication from DOJ. The investigating officer would later conclude that the email submitted with Respondent's application had been tampered with so as to make it appear that DOJ had concluded that Respondent's planned move did not require a new application.

10. Alcala had not spoken directly to Respondent by phone or email and had sent him only the one email. Based upon the guidelines, she was of the opinion that, unless Respondent moved from one location to another in the same city limits as his current license, he could not transfer his license to another city. All of the financial documents provided by Respondent listed his business address in Fontana.

11. Respondent later met with Detective Lee of the Glendora Police Department. Respondent told the detective that he did not know why the crucial words were missing from the printout of the email he submitted, and that the omission was just a clerical error. He denied changing anything in the email. Detective Peterson found this hard to believe because the omitted words were from the middle of the message as opposed to the end or beginning.

12. Detective Lee told Respondent his belief that Respondent submitted his application as a renewal to avoid paying the DOJ fees associated with a new license (\$195) and the fees for posting new surety bonds, adding that Respondent could "easily apply for the new license with no problems as he has a clear criminal history and no recorded problems with DOJ." Respondent said that he had a checkbook with him and was prepared to pay the \$195 application fee. He gave a check to Peterson, but it was never deposited.<sup>1</sup>

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<sup>1</sup> Respondent objected to Complainant's Exhibit 3B on the grounds of relevancy. That exhibit is the transcript of the preliminary hearing conducted by a criminal court in this matter. Respondent argued that the evidence presented before the court at the preliminary hearing may not have been the same evidence used at trial to convict him. Complainant responded that the jury was allowed to read the preliminary transcript and that it was helpful in explaining a motive for Respondent's acts. There is nothing in the record indicating that the jury even had the transcript, and being allowed to read it would have been most unusual. The

13. Following the jury's guilty verdict, the Court, on June 21, 2011, suspended the imposition of sentence, placed Respondent on summary probation, ordered him to serve 20 days in jail or perform, in lieu of jail, 18 days of Caltrans service, and pay fines. The Court further ordered Respondent not to apply for a new pawnbroker's license while he was on probation, and not to renew any existing license he then held.

14. Less than seven months later, on January 6, 2012, the trial court found that Respondent had successfully completed all terms and conditions of his probation, and that the matter was prohibiting him from finding gainful employment. The Court ordered early termination of Respondent's probation.

15. On March 20, 2013, a court, pursuant to Penal Code section 1203.4, ordered that the verdict be set aside and vacated; a plea of not guilty entered, and dismissed the complaint.

16. At the hearing and in his written response to the Bureau, Respondent continued to insist that he did not know that the email printout was different than what he received from DOJ. He explained that, wanting to turn the email into a Word document he could save as his own record, he moved his mouse to copy the message with 3 - 4 crawls. Later, he deleted the email. He never intended the saved email to be submitted to the Glendora Police Department. This latter statement is contrary to Detective Lee's incident report where the detective states that Respondent admitted attaching the email to his application. Respondent stated at the hearing that he was taking responsibility just for submitting the email.

17. Respondent has Stage 4 cancer which impairs his ability to communicate. His medical coverage is through the Citrus Valley Association of Realtors. He is an active member in that Association.

18. Respondent submitted as evidence two written character references, both dated in September of 2011 and addressed to J. David Meade, Deputy Commissioner with the Los Angeles Enforcement Office of the Bureau. Both letters were on pages bearing the letterhead and logo of ReMax Masters. Sharon Bowler, Broker/Associate Manager, noted that Respondent subscribes and abides by a Code of Ethics that "establishes a higher obligation than that mandated by law." She has known him for many years, commenting that "his integrity and honor, as well as his character, speaks highly of him." Mark S. Peterson, Broker Associate and General Manager, had worked with Respondent for eight years, and personally knew him for the last 15 years. Mr. Peterson states that he, Peterson, has "only witnessed the highest of ethical standards and clients that have been pleased with [Respondent's] representation."

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objection is sustained. Regardless, there is evidence elsewhere that offers an explanation on why Respondent may have knowingly submitted an altered email.

19. Respondent maintained that he had performed 150-160 transactions with his real estate licenses, and handled numerous deposits with no history of complaints or discipline. He still has a valid pawnbroker license in the City of Fontana, as well as a Federal Firearm license which he obtained two years ago.

20. Complainant did not offer any evidence in connection with her request for cost recovery.

## CONCLUSIONS OF LAW AND DISCUSSION

1. Respondent's conviction of identity theft is substantially related to the qualifications, functions or duties of a licensee, pursuant to California Code of Regulations (CCR), title 10, section 2910, subdivision (a)(4). Cause exists under Business and Professions Code sections 490 and 10177, subdivision (b), to revoke Respondent's broker license, as set forth in Factual Findings 3 - 12.

2. Respondent adamantly insists that he committed no wrongdoing and had no intent to deceive either DOJ or the Glendora Police Department. The California Supreme Court, in *Hall v. Committee of Bar Examiners of the State Bar of California* (1979) 25 Cal.3d 730, 744-745, held that a Bar applicant's good faith denial of prior charges demonstrates only an unwillingness to perform an artificial act of contrition for his own advantage. However, this finding in *Hall* was also predicated on other considerations in the record, including character evidence, respect for the judicial process, honoring of the terms of discipline, and not engaging in further improper behavior.

3. The issue is whether, notwithstanding Respondent's protestation of innocence, he now presents a threat to the public. Applying the applicable criteria for evaluating rehabilitation in CCR, title 10, section 2912, many of them are in Respondent's favor. The conviction occurred more than two years ago. Except for the present conviction, his record as either a sales person or broker licensee has been unblemished since 1992. He obtained early termination of his probation from the trial court less than seven months following pronouncement of the sentence. A court dismissed the complaint pursuant to Penal Code section 1203.4. His character references attest to his good character. Since the conviction, he has not reoffended. His conduct in submitting his application for a pawn broker license involved dishonesty. However, there is nothing else in the record suggesting that Respondent's offense is anything other than singular and highly unlikely to reoccur. His medical coverage is through a voluntary trade association of realtors. With a restricted license, his standing in the association and his eligibility for coverage would be affected were he to do anything that would jeopardize his license.

4. The issuance of a restricted license would be sufficient to protect the public interest.

ORDER

All licenses and licensing rights of Respondent Damian Herrera under the Real Estate Law are revoked; provided, however, a restricted real estate broker 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 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. 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.

3. 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 one year has elapsed from the effective date of this Decision.

4. 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 the Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

5. Complainant's request for cost recovery is denied.

Dated: October 1, 2013

  
JERRY SMILOWITZ  
Administrative Law Judge  
Office of Administrative Hearings