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**FILED**

MAR 28 2014

BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

\* \* \*

|                                     |   |                        |
|-------------------------------------|---|------------------------|
| In the Matter of the Application of | ) | Cal BRE No. H-39011 LA |
|                                     | ) | OAH No. 2013090045     |
| ABELARDO SIMON DIAZ,                | ) |                        |
|                                     | ) |                        |
| Respondent.                         | ) |                        |
|                                     | ) |                        |

STIPULATION AND WAIVER

&

DECISION AFTER REJECTION

The California Bureau of Real Estate ("Bureau") filed a Statement of Issues against ABELARDO SIMON DIAZ ("Respondent") on August 22, 2013. On November 19, 2013, a hearing was held and evidence was received, the record was closed, and the matter was submitted.

1           On December 11, 2013, the Proposed Decision of the  
2 Administrative Law Judge ("ALJ") Gloria A. Barrios was issued,  
3 and determined, among other things, that Respondent's  
4 application for an unrestricted real estate salesperson license  
5 should be denied; provided, however, Respondent shall be issued  
6 a restricted license by the Real Estate Commissioner to act as a  
7 real estate salesperson; the license shall be immediately  
8 revoked, and the revocations shall be stayed on certain terms  
9 and conditions set forth in the Proposed Decision.

10           On February 5, 2014, the Commissioner rejected the  
11 Proposed Decision of December 11, 2013.

12           The parties wish to settle this matter without further  
13 proceedings.

14           IT IS HEREBY STIPULATED by and between Respondent,  
15 ABELARDO SIMON DIAZ, represented by attorney Eleanor Miller, and  
16 the Bureau, acting by and through Lissete Garcia, Counsel for  
17 the Bureau of Real Estate, as follows for the purpose of  
18 settling and disposing of the Statement of Issues filed by the  
19 Bureau.

20           1. It is understood by the parties that the Real  
21 Estate Commissioner may adopt the Stipulation and Waiver and  
22 Decision After Rejection as his decision in this matter, thereby  
23 imposing the restrictions on Respondent's application for a real



1 months on terms and conditions, including that he pay  
2 restitution, fines, and fees totaling \$200.00, and that he  
3 complete a 52-week domestic violence counseling program.  
4 Respondent completed the probation. On April 26, 2012, the  
5 conviction was set aside, reduced to a misdemeanor and dismissed  
6 pursuant to Penal Code section 1203.4.

7           4. On September 5, 2005, Respondent, then 26 years  
8 old, was living in Santa Monica, California. At the time he had  
9 a girlfriend. He was enraged when he suspected she was involved  
10 with another man. He repeatedly hit her and choked her.  
11 Respondent cut her with a box cutter and threatened to kill  
12 her. The girlfriend was able to telephone Respondent's father  
13 who told her to meet him at the Santa Monica Police station.  
14 The crime was reported to the police. At the time Respondent  
15 was not living with his girlfriend. They did not have any  
16 children together. The domestic incident did not involve drugs  
17 or alcohol.

18           5. On March 29, 2006, the restraining order issued  
19 against Respondent to stay away from the victim was lifted  
20 pursuant to the victim's request. After he was released from  
21 custody, Respondent completed a three-month program at the  
22 Pasadena Recovery Center, a residential treatment center to  
23 address his behavioral problems. On May 12, 2008, he completed

1 a 52-week domestic violence counseling program. Finally,  
2 Respondent voluntarily was treated at Hanbleceya, a residential  
3 treatment center for persons suffering from mental illness.  
4 Respondent was diagnosed in high school with depression.  
5 Respondent was prescribed anti-depressants shortly after he was  
6 arrested, but did not remain on anti-depressants long. He  
7 currently does not take medication for depression.

8 6. Respondent is currently a full time student at  
9 Santa Monica College. He has been employed in a variety of  
10 positions. In 2012, he was on staff at the Gracie Jiu-Jitsu  
11 Academy located in Beverly Hills, where he performed a number  
12 of different duties including marketing, customer relations,  
13 repairman, and taking inventory. Respondent also worked at  
14 Perry's Café in Santa Monica in 2012. He worked as a front  
15 desk receptionist at the Institute for Spine and Sports in  
16 Santa Monica. He was a General Manager at the Palisades Tennis  
17 Center in 2008-2009, in Pacific Palisades. He worked as a  
18 cashier at Whole Foods in 2007-2008, in El Segundo. Respondent  
19 was a pharmacy lead at the Hall Center, in Santa Monica, in  
20 2008, where he stocked supplies and rang up transactions.

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1           7. Three witnesses testified on Respondent's  
2 behalf. Veronica Norma Romaniuk, is 76-years old. She and her  
3 90 year-old husband are Respondent's neighbors in Santa Monica.  
4 They both have health problems. Ms. Romaniuk testified that  
5 Respondent performs errands and chores for her and her husband.  
6 She considers Respondent "sweet." She has known Respondent for  
7 eight years. Evelyn Lainez is a family friend. She testified  
8 that Respondent helped her during her two pregnancies when she  
9 was confined to her bed. He brought her water, groceries and  
10 built furniture for her. When Respondent was arrested, she  
11 bailed him out. In her opinion, Respondent is a great guy,  
12 helpful, trusting and a person of great character. Megan  
13 Linares is Respondent's current girlfriend. They have been  
14 together for more than one year. Ms. Linares has been diagnosed  
15 with thyroid cancer and chronic fatigue syndrome. Respondent  
16 takes care of her. He takes her to her doctor appointments and  
17 cancer treatments. She testified that Respondent is kind and  
18 honest. He cares about everybody and she loves him.

19           8. Respondent submitted supportive letters from  
20 people who confirm his trust-worthiness and the high level of  
21 respect they hold for him. The letters were from his friends,  
22 acquaintances, co-workers and former employers. Half of the  
23 persons knew the details of Respondent's conviction. Of note

1 is a letter from his English instructor at Santa Monica College  
2 who admires Respondent's drive and energy. Two physicians  
3 that care for Respondent's father, who suffers from diabetes  
4 and other ailments, also wrote letters of support commenting  
5 that Respondent is very involved in his father's care.  
6 Respondent has taken the required coursework to obtain his real  
7 estate salesperson's license. Respondent was contrite;  
8 sincere, and took responsibility for his misconduct.  
9 Respondent has learned from counseling and now is able to  
10 manage and control his anger.

11 LEGAL CONCLUSIONS

12 1. Respondent has the burden of proof in this matter  
13 because he applied for and was denied licensure by the Bureau,  
14 then appealed the denial.

15 The hearing on Respondent's appeal was held pursuant  
16 to a Statement of Issues filed by the Bureau. The Statement of  
17 Issues was created pursuant to the authority conferred by  
18 Government Code section 11504. A Statement of Issues is the  
19 appropriate initial pleading in matters where a respondent  
20 requests that an agency take some action regarding whether a  
21 right, authority, license or privilege should be granted, issued  
22 or renewed and the agency has refused to do so. Section 11504  
23 places the burden of proof upon the Respondent to establish why

1 the agency should grant the applied for right, authority,  
2 license or privilege.

3 This conclusion is supported by the decision in *McCoy*  
4 *v. Board of Retirement* (1986) 183 Cal. App. 3d 1044, where the  
5 Court of Appeal, in considering the issue of who has the burden  
6 of proof in an administering hearing, stated:

7 As in ordinary civil actions, the party  
8 asserting the affirmative at an administrative hearing  
9 has the burden of proof, including both the initial  
10 burden of going forward and the burden of persuasion  
11 by preponderance of the evidence....

12 Respondent is asserting the affirmative in this  
13 matter by claiming that he should be granted the applied-for-  
14 license. Therefore he has the burden of proof. The standard of  
15 proof is a preponderance of the evidence.

16 2. Business and Professions Code section 475,  
17 subdivision (a) provides:

18 a) Notwithstanding any other provisions of this code,  
19 the provisions of this division shall govern the denial of  
20 licenses on the grounds of:

21 [ ]...[ ]

22 (2) Conviction of a crime.

23

1           (3) Commission of any act involving dishonesty, fraud  
2 or deceit with the intent to substantially benefit himself or  
3 another, or substantially injure another.

4           3. Business and Professions Code section 480,  
5 subdivision (a) provides:

6           a) "A board may deny a license regulated by this code on  
7 the grounds that the applicant has one of the following:

8                   (1) "Been convicted of a crime. A  
9 conviction within the meaning of this section means a  
10 plea or verdict of guilty or a conviction following a  
11 plea of nolo contendere. Any action that a board is  
12 permitted to take following the establishment of a  
13 conviction may be taken when the time for appeal has  
14 elapsed, or the judgment of conviction has been affirmed  
15 on appeal, or when an order granting probation is made  
16 suspending the imposition of sentence, irrespective of  
17 a subsequent order under the provisions of Section  
18 1203.4 of the Penal Code.

19                   (2) "Done any act of dishonesty, fraud or  
20 deceit with the intent to substantially benefit himself  
21 or herself or another, or substantially injure  
22 another."

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1           The board may deny a license pursuant to this  
2 subdivision only if the crime or act is substantially related to  
3 the qualifications, functions or duties of the business or  
4 profession for which application is made.

5           4. Business and Professions Code section 10177  
6 provides:

7           The commissioner may suspend or revoke the license  
8 of a real estate licensee, or may deny the issuance of  
9 a license to an applicant, who has done any of the  
10 following, or may suspend or revoke the license of a  
11 corporation, or deny the issuance of a license to a  
12 corporation, if an officer, director, or person owning  
13 or controlling 10 percent or more of the corporation's  
14 stock has done any of the following:

15           [¶]...[¶]

16           (b) Entered a plea of guilty or nolo contendere  
17 to, or been found guilty of, or been convicted of, a  
18 felony or a crime involving moral turpitude, and the  
19 time for appeal has elapsed or the judgment of  
20 conviction has been affirmed on appeal, irrespective  
21 of an order granting probation following that  
22 conviction, suspending the imposition of sentence, or  
23 of a subsequent order under Section 1203.4 of the

1 Penal Code allowing that licensee to withdraw his or  
2 her plea of guilty and to enter a plea of not guilty,  
3 or dismissing the accusation or information.

4 5. The Bureau has issued regulations that specify the  
5 types of crimes that are "substantially related" to the  
6 qualifications, functions, or duties of an applicant for a Bureau  
7 license. Respondent's conviction for threatening with intent  
8 to terrorize is "substantially related" under California Code  
9 of Regulations, title 10 (CCR), section 2910, subdivision  
10 (a)(8), for doing an unlawful act with the intent or threat of  
11 doing substantial injury to the person.

12 6. Cause exists to deny Respondent's application for  
13 a real estate salesperson license pursuant to Business and  
14 Professions Code sections 475, subdivision (a)(2), 480,  
15 subdivision (a)(1), and 10177, subdivision (b), because  
16 Respondent has been convicted of a crime (threaten with intent  
17 to terrorize) that is substantially related to the  
18 qualifications, functions, or duties of a real estate  
19 salesperson. (Factual Findings 3-8.)

20 7. Cause exists to deny Respondent's application for  
21 a real estate salesperson license pursuant to Business and  
22 Professions Code sections 475, subdivision (a)(3), and 480,  
23

1 subdivision (a)(2), because Respondent has substantially  
2 injured another. (Factual Findings 3-8.)

3 8. Although cause for license denial exists, it is  
4 necessary to determine whether Respondent has been sufficiently  
5 rehabilitated to warrant a license. Criteria have been  
6 developed by the Bureau to evaluate the rehabilitation of an  
7 applicant who has committed a crime. These criteria, found at  
8 CCR section 2911, are summarized as follows:

9 Subdivision (a), passage of at least 2 years since  
10 the conviction or the underlying acts, or longer if there is a  
11 history of substantially related acts;

12 Subdivision (b), restitution;

13 Subdivision (c), expungement of the conviction;

14 Subdivision (d), expungement of the requirement to  
15 register as an offender;

16 Subdivision (e), completion of, or early discharge  
17 from, the criminal probation;

18 Subdivision (f), abstinence from drugs or alcohol that  
19 contributed to the crime;

20 Subdivision (g), payment of any criminal fines or  
21 penalties;

22 Subdivision (h), stability of family life;

23

24



1 *Examiners* (1989) 49 Cal.3d.933, 940.) The evidentiary  
2 significance of misconduct is greatly diminished by the  
3 passage of time and by the absence of similar, more recent  
4 misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d. 1061,  
5 1070.) Mere remorse does not demonstrate rehabilitation. A  
6 truer indication of rehabilitation is sustained conduct over  
7 an extended period of time. (*In re Menna* (1995) 11 Cal.4<sup>th</sup>  
8 975, 99.1) Respondent bears the particular burden of  
9 establishing rehabilitation sufficient to compel his  
10 licensure. (*In the Matter of Brown* (1993) 2 Cal. State Bar  
11 Ct. Rptr. 309.) "[O]verwhelming proof of reform' is  
12 necessary." (*In the Matter of Brown, supra*, 2 Cal. State  
13 Bar Ct. Rptr. At p. 315; *Feinstein v. State Bar* (1952) 39  
14 Ca. 2d 541, 547.)

15           10. Respondent's evidence of rehabilitation is  
16 formidable enough to grant a restricted license.  
17 Respondent's offense of threatening and harming someone he  
18 professed to love is indeed troubling. But Respondent has  
19 done much to address his anger issues and behavioral  
20 problems. He completed a court ordered 52-week domestic  
21 violence counseling program and a three-month program at the  
22 Pasadena Recovery Center, a residential treatment center.  
23 In addition, Respondent was treated at Hanbleceya, a

1 residential treatment center. Respondent completed  
2 probation and his conviction was set aside, reduced to a  
3 misdemeanor and dismissed pursuant to Penal Code section  
4 1203.4. It has been eight years since Respondent committed  
5 the threatening and illegal acts. It has been seven years  
6 since Respondent was convicted of these acts. There is no  
7 evidence that Respondent has engaged in any repeated act of  
8 violence. It is clear Respondent is supported by his family  
9 and many friends. Indeed, Respondent has an impressive  
10 record of many acts of good deeds including taking care of  
11 his diabetic father, elderly neighbors and others in need of  
12 help. Respondent was contrite, sincere, and has taken  
13 responsibility for his actions. He has carried his burden.

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1           2. Respondent shall not be eligible to apply for the  
2 issuance of an unrestricted real estate license nor the removal  
3 of any of the conditions, limitations, or restrictions attaching  
4 to the restricted license until two (2) years have elapsed from  
5 the effective date of this Decision.

6           3. With the application for license, or with the  
7 application for transfer to a new employing broker, Respondent  
8 shall submit a statement signed by the prospective employing  
9 real estate broker on form RE 552 (Rev. 4/88) approved by the  
10 Bureau of Real Estate which shall certify as follows:

11           (a) That the employing broker has read the Decision  
12 which is the basis for the issuance of the restricted license;  
13 and

14           (b) That the employing broker will carefully review  
15 all transaction documents prepared by the restricted licensee  
16 and otherwise exercise close supervision over the licensee's  
17 performance of acts for which a license is required.

18           4. Respondent shall notify the Commissioner in  
19 writing within 72 hours of any arrest by sending a certified  
20 letter to the Commissioner at the Bureau of Real Estate, Post  
21 Office Box 137013, Sacramento, CA 95813-7013. The letter shall  
22 set forth the date of Respondent's arrest, the crime for which  
23 Respondent was arrested, and the name and address of the

1 arresting law enforcement agency. Respondent's failure to  
2 timely file written notice shall constitute an independent  
3 violation of the terms of the restricted license and shall be  
4 grounds for the suspension or revocation of that license.

5 2/28/2014

6 DATED



7 LISSETE GARCIA, Counsel  
8 BUREAU OF REAL ESTATE

9 \* \* \*

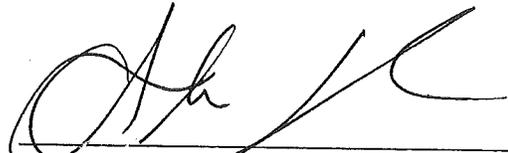
10 I have read the Stipulation and Waiver and Decision  
11 after Rejection, have discussed it with my counsel, and its  
12 terms are understood by me and are agreeable and acceptable to  
13 me. I willingly and voluntarily agree to enter into this  
14 Stipulation and Waiver and Decision after Rejection.

15 Respondent can signify acceptance and approval of the  
16 terms and conditions of this Stipulation and Waiver and Decision  
17 after Rejection by faxing a copy of the signature page, as  
18 actually signed by Respondent, to the Bureau at fax number (213)  
19 576-6917. Respondent agrees, acknowledges and understands that  
20 by electronically sending to the Bureau a fax copy of his actual  
21 signature as it appears on the Stipulation and Waiver and  
22 Decision After Rejection, that receipt of the faxed copy by the  
23 Bureau shall be as binding on Respondent as if the Bureau had  
24 received the original signed Stipulation and Waiver and Decision

1 After Rejection.

2 2/26/2014

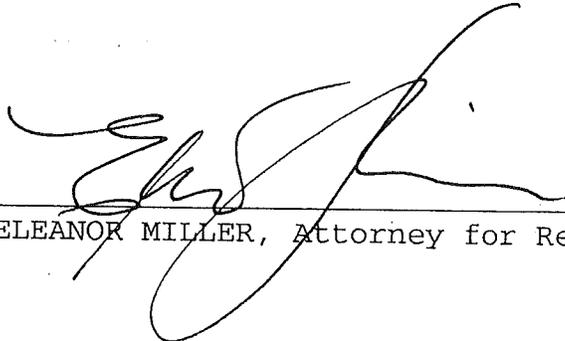
3 DATED



ABELARDO SIMON DIAZ  
Respondent

4 I have reviewed the Stipulation and Waiver and  
5 Decision after Rejection as to form and content and have advised  
6 my client accordingly.

7  
8 DATED: 02/26/2014



ELEANOR MILLER, Attorney for Respondent

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10 \* \* \*

11  
12 The foregoing Stipulation and Waiver and Decision  
13 After Rejection is hereby adopted as my Decision in this matter  
14 and shall become effective at 12 o'clock noon on  
15 APR 18 2014.

16 IT IS SO ORDERED 3/27/2014.

17  
18 REAL ESTATE COMMISSIONER



19  
20 WAYNE S. BELL