

1 I have given due consideration to the petition of Respondents. I find no good
2 cause to reconsider the Decision of September 10, 2015, and reconsideration is hereby denied.
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4 IT IS SO ORDERED

11/9/2015

5 Real Estate Commissioner

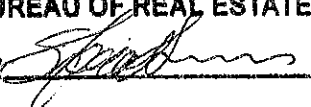
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FILED

OCT 01 2015

BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of	)	NO. H-39150 LA
	)	L-2014010149
WILLIAM KENNETH O'DANIEL, and	)	
MALIBU MORTGAGE INC.,	)	
	)	
Respondent(s).	)	

ORDER STAYING EFFECTIVE DATE

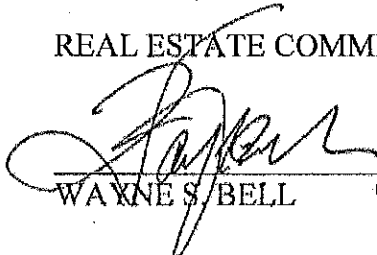
On September 10, 2015, a Decision was rendered in the above-entitled matter to become effective October 07, 2015.

IT IS HEREBY ORDERED that the effective date of the Decision of September 10, 2015, is stayed for a period of 30 days to allow Respondents WILLIAM KENNETH O'DANIEL and MALIBU MORTGAGE INC., to file a petition for reconsideration.

The Decision of September 10, 2015, shall become effective at 12 o' clock noon on November 9, 2015.

DATED: 9/30/2015.

REAL ESTATE COMMISSIONER


WAYNE S. BELL

FLAG

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

FILED

SEP 16 2015

BUREAU OF REAL ESTATE

By 

* * * *

In the Matter of the Accusation of

WILLIAM KENNETH O'DANIEL,
individually and as designated broker-
officer of Malibu Mortgage, Inc., and
MALIBU MORTGAGE INC., a
corporate real estate broker,

Respondents.

CalBRE No. H-39150 LA

OAH No. 2014010149

DECISION

The Proposed Decision dated August 13, 2015, 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.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty 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 OCT 07 2015.

IT IS SO ORDERED 9/10/2015.

REAL ESTATE COMMISSIONER


WAYNE BELL

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

In the Matter of the Accusation of

WILLIAM KENNETH O'DANIEL,
individually and as designated broker-officer
of Malibu Mortgage, Inc., and MALIBU
MORTGAGE, INC., a corporate real estate
broker,

Respondents.

Case No. H-39150 LA

OAH No. 2014010149

PROPOSED DECISION

This matter came on regularly for hearing on April 2, June 12, August 3, and August 5, 2015, at Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Maria Suarez (Complainant) was represented by Cheryl D. Keily, Real Estate Counsel.

Respondents, William Kenneth O'Daniel (Respondent) and Malibu Mortgage, Inc. (Malibu Mortgage), were represented by Lloyd J. Michelson, Attorney at Law.

During the hearing, Complainant amended the First Amended Accusation by striking Paragraph 12, and by striking "10176(a)" and "10176(g)" from Paragraphs 13 and 21.

During the hearing, the parties entered into the following stipulations:

a. The 1099 forms a lender prepared for Marvin Derrick and Ronald Shannon were sent to Respondent who, in turn, forwarded them to Marvin Derrick and Ronald Shannon, respectively.

b. Respondent accepted and paid all tax liability related to the 1099 forms prepared for Marvin Derrick and Ronald Shannon.

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c. All income referenced on the 1099 forms prepared for Marvin Derrick and Ronald Shannon was received by Respondent.

Oral and documentary evidence was received. The record was closed on August 5, 2015, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Maria Suarez made the Accusation and First Amended Accusation in her official capacity as a Deputy Real Estate Commissioner of the State of California.

2. Respondent was issued a license as a real estate broker by the Department of Real Estate¹ in 1996 after first being licensed as a real estate salesperson. Respondent's broker license will expire on April 28, 2016, unless renewed.

3. As of March 28, 2011, Malibu Mortgage, Inc. was a licensed corporate broker. From that date through March 27, 2015, Respondent was Malibu Mortgage's broker-officer pursuant to Business and Professions Code section 10159.2. As such, he was responsible for supervising Malibu Mortgage's activities to ensure compliance with the real estate law. The corporation's license and Respondent's license as the corporation's broker-officer expired on March 27, 2015. The Bureau maintains jurisdiction over this action pursuant to Business and Professions Code section 10103.

4. Since 1999, Respondent has conducted licensed activities using the licensed fictitious business name Malibu Mortgage, in addition to several other licensed fictitious business names. In 2001, Respondent formed Malibu Mortgage as a California corporation. He is Malibu Mortgage's president.

James Derrick

5. James Derrick (Derrick) is a physician. At all relevant times, he was also licensed by the Department as a real estate broker. Between August 8, 2007, and February 17, 2011, he was licensed to conduct real estate activities under the fictitious name Cornerstone Real Estate. Derrick has never originated a loan.

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¹ The Department of Real Estate (Department) has since become the Bureau of Real Estate (Bureau) within the Department of Consumer Affairs.

6. Derrick lived and worked in the Bakersfield area. Between 2003 and approximately 2006, Respondent assisted Derrick in approximately three personal real estate loan transactions. Derrick was not yet a real estate broker at that time, so Respondent received all of the commissions on those transactions. At one point after Derrick became licensed, he and Respondent discussed sharing the commission on a real estate loan for a hospital of which Derrick was a part owner. However, the hospital decided against expansion, and nothing further transpired with respect to that loan.

7. In approximately 2009, Derrick decided to move to Illinois. He believed it was necessary to maintain a business address in California for his real estate broker license, so he asked Respondent if he could keep his license at Malibu Mortgage. Respondent consented to that arrangement. At the administrative hearing, Respondent explained that, at the time, he "could use another business name." (Respondent's testimony.) He found the name Cornerstone Real Estate "useful" because "it was a different name to use" (Respondent's testimony), so he instructed Derrick to leave the Cornerstone Real Estate name unchanged and located at Respondent's address. In so doing, Derrick did not consent to Respondent's using Derrick's name or the name of Cornerstone Real Estate for his own purposes.

8. Thereafter, Derrick and Respondent agreed that they would evenly share the commission on any lead Derrick sent to Malibu Mortgage. Derrick never received or forwarded any leads.

9. In 2011, Derrick received a letter from an attorney stating that Respondent had been the broker/loan originator for a loan for the attorney's client, and that his client had been shorted \$3,687.95. The attorney claimed that Derrick and Howard G. Sears of Canyon Oaks Mortgage, Inc.² were also involved in the transaction. Derrick had not been involved in the transaction. Derrick telephoned Respondent who informed him that Derrick would receive a 1099 form, but that Respondent would accept the tax liability. The 1099 form reflected income to Derrick in the sum of \$79,312.50. When Derrick received the 1099 form, he saw it contained his Social Security number. He assumed Respondent must have taken it without his consent from one of the earlier loans Respondent had brokered for him. The accountants for Derrick and Respondent resolved the 1099 issue, and Derrick did not have to pay the taxes on the income reflected on the form. However, Derrick did incur an additional \$915 charge from his accountant for revising his tax return. Respondent did not reimburse Derrick for that expense.

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² According to the letter, the street address of Howard G. Sears and Canyon Oaks Mortgage, Inc. was identical to that of Respondent and Malibu Mortgage.

10. In September 2010, Respondent brokered a loan through Provident Funding for a couple refinancing their home in Bakersfield, California. Although his signature appears on the loan documents, he represented on those documents that the loan originator was Cornerstone Real Estate. He named Derrick as the broker. Respondent signed the documents as the loan originator and as the broker's representative. (Exhibit 6.) Derrick was unaware of that transaction at and around the time it occurred. Derrick never gave his consent to Respondent to use his name or his company name of Cornerstone Real Estate.

11. Also in September 2010, Respondent brokered another loan through Provident Funding for a couple refinancing their home in Santa Barbara, California. He listed Derrick and Cornerstone Real Estate as the loan originator, and Derrick as the broker. Respondent signed his name as the broker's representative. (Exhibit 7.) Derrick was unaware of that transaction at and around the time it occurred. Derrick never gave his consent to Respondent to use his name or the name of his company.

12. Unbeknownst to Provident Funding, Derrick and Cornerstone Realty were not the broker/originators on either of the loans referenced in Factual Findings 10 and 11, above. Although Derrick received a 1099, he did not perform any work in connection with those loans, and he received no income in connection with them.

13. Respondent does not believe he was approved by Provident Funding as a loan originator in 2010.

14. Respondent improperly used the name of Derrick and Cornerstone Real Estate without Derrick's knowledge or consent to obtain loans for his clients.

Ronald Shannon

15. Ronald Shannon (Shannon) is a retired teacher and a rancher. A licensed real estate salesperson since approximately 1978, he became licensed by the Department as a real estate broker in 2003.

16. Shannon met Respondent in 1999 or 2000 in connection with his attempts to secure a farm loan. Respondent assisted Shannon in acquiring that loan. They became friends.

17. In 2011, Shannon approached Respondent for assistance in refinancing two rental properties and a farm which he owned. At approximately that time, Shannon was studying to take the Nationwide Mortgage Licensing System (NMLS) examinations in order to acquire a loan originator endorsement on his broker license. He began going to Malibu Mortgage almost every day, mostly in the afternoons, intending to observe Respondent in order to learn to be a mortgage broker. However, Shannon got little benefit from doing so because he found Respondent's pace to be too fast for him to learn.

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18. Shannon received his loan originator endorsement in approximately 2011. He continued to go to Malibu Mortgage almost every day. He entered into an agreement with Respondent according to which Shannon would receive 100 percent of the commission on loans he brought into the office, and \$500 for loans on which he worked but did not generate. Although, at the administrative hearing, Shannon denied ever working on loan files at Malibu Mortgage, the evidence established that he did work there. He used his own laptop computer. The evidence did not establish that he ever used a computer owned by Respondent or Malibu Mortgage. His duties at Malibu Mortgage were more consistent with a loan processor and office manager than a mortgage broker. Respondent referred to Shannon as his "right-hand man." (Respondent's testimony.) Despite the fact that Respondent assisted Shannon getting approved with a number of lenders as a loan originator, Shannon never originated any loans with those or any other lenders. Provident Funding was one of the lenders that approved Shannon as a loan originator.

19. Included in Provident Funding's records are documents relating to three loans on properties located in Newbury Park, Camarillo, and Oxnard, California, respectively. Shannon is listed as the loan originator for all three loans, and the documents contain signatures purporting to be his. Shannon was not the loan originator for those loans, and the signatures are significantly different from his signatures on other documents signed during the same approximate time period and acknowledged by Shannon to be his.

20. Provident Funding's records also include documents relating to a fourth loan for a refinance on a property in Oak Park, California. Shannon is listed as the loan agent on those documents. The broker contact is listed as "Howard Howard." At the administrative hearing, the homeowners credibly testified that their mortgage broker for that transaction and for the original loan was Howard Sears. They had never met either Shannon or Respondent, and they did not know who Respondent and Shannon were.

21. In 2012, Provident Funding sent a 1099 form to Shannon reflecting income of \$28,512.50. Upon further inquiry, Shannon learned that the funds reflected on the 1099 form had been transferred to an account held by Respondent and Malibu Mortgage.

22. In 2013, Shannon received another 1099 form from Provident Funding, this one reflecting income of \$21,860. Upon further inquiry, he learned the funds reflected on the form related to four loans referenced in Factual Findings 19 and 20, above.

23. When Shannon protested to Respondent, Respondent agreed to accept the tax liability for the two 1099 forms. Shannon did not receive any of the income reflected on those forms. However, on January 12, 2012, Respondent wrote two checks to Shannon, one for \$1,273 and the other for \$1,340. The evidence did not establish the purpose of those two checks. It is not likely those funds constituted commission on a loan origination because Shannon did not bring any clients to Malibu Mortgage. Therefore, assuming he worked on three or four files as claimed by Respondent, Shannon would have received only \$500 per file, far less than the amount of the two January 12, 2012 checks, and grossly less than the amounts reflected on the 1099 forms.

24. Respondent does not believe he was approved by Provident Funding as a loan originator in 2011 and 2012.

25. Respondent improperly used Shannon's name without Shannon's knowledge or consent to obtain loans for his clients.

Factors in Aggravation

26. While he worked there, Shannon had keys to both the Malibu Mortgage office and to the main door of the building in which the office was housed. In approximately 2012, Shannon became ill, and Respondent decided not to offer any more loans for Shannon to work on. At that point, Shannon stopped working at the office, and office personnel helped take his belongings to his car. According to Respondent and one of his witnesses, Shannon also took some loan files on which he had worked. At the administrative hearing, Respondent testified that Shannon is welcome back at Malibu Mortgage, that Shannon still has the keys to the business, and that the locks have not been changed.

27. Respondent's testimony in that regard was not credible. Shannon has not been back to Malibu Mortgage since he left in approximately 2012. Since then, Malibu Mortgage changed locations from Calabasas to Thousand Oaks. His keys to the former location are no longer of service.

28. At the administrative hearing, Respondent testified as to how he would "trade loans around." By that he meant that a broker approved by a certain lender would originate a loan through that lender if the broker actually originating the loan was not approved by the lender. The approved broker's name would appear on the loan documents even though that broker neither originated the loan nor performed any work with respect to it.

29. Respondent's practice of "trading loans around" misled lenders into believing their loans were being originated by brokers they had approved when, in fact, they were not.

30. Provident Funding sent all three 1099 forms to Respondent who then forwarded them to Derrick and Shannon, respectively. However, Respondent did not pass through to Derrick or Shannon any of the income reflected on the forms. Respondent did not offer any explanation or justification for keeping the commissions and, at least initially, passing the tax liability through to Derrick and Shannon.

31. Respondent offered no evidence of rehabilitation or even remorse for his actions. He did not offer a plan to avoid similar occurrences in the future. He did offer several letters of recommendation in which the authors attested to his reliability and honesty. However, most of the letters did not reflect the authors' knowledge of the instant action, and none of them reflected the authors' knowledge of the underlying facts or allegations. Therefore, the letters are afforded limited weight.

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Costs

32. Complainant incurred investigation costs of \$3,911.45 and enforcement costs of \$5,660.40, in connection with this action. Those costs are found to be just and reasonable.

LEGAL CONCLUSIONS

1. Cause exists to discipline the real estate broker's licenses and license rights of Respondent, William Kenneth O'Daniel, and the real estate corporate broker license and license rights of Respondent, Malibu Mortgage, Inc., pursuant to Business and Professions Code sections 10176, subdivisions (g) and (i), and 10177, subdivision (j), for taking secret or undisclosed compensation, commission or profit, and for fraud or dishonest dealing, as set forth in Findings 2 through 30.

2. Cause exists to discipline the real estate broker's license and license rights of Respondent, William Kenneth O'Daniel, and the real estate corporate broker license and license rights of Respondent, Malibu Mortgage, Inc., pursuant to Business and Professions Code sections 10159.2, subdivision (a), and 10177, subdivision (h), for failure to adequately supervise the real estate activities of Malibu Mortgage and its agents and employees to ensure compliance with the Real Estate Law, as set forth in Findings 2 through 30.

3. Cause exists to grant Complainant's request for reimbursement of the costs of investigation and enforcement pursuant to Business and Professions Code section 10106, as set forth in Factual Finding 32.

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4. Business and Professions Code section 10176 states in relevant part:

The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: [¶] . . . [¶]

(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission, or profit or the failure of a licensee to reveal to the employer of the licensee the full amount of the licensee's compensation, commission, or profit under any agreement authorizing or employing the licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of the agreement, whether evidenced by documents in an escrow or by any other or different procedure. [¶] . . . [¶]

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

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5. Business and Professions Code section 10177 states in pertinent part:

The commissioner may suspend or revoke the license of a real estate licensee, delay the renewal of a license of a real estate licensee, or deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, delay the renewal of a license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following: [¶] . . . [¶]

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing.

6. Business and Professions Code section 10159.2, subdivision (a) states:

The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

7. Respondent surreptitiously used the names of Derrick and Shannon, and Derrick's company name, to originate loans from a lender by which he was not approved. He did so without the knowledge or consent of Derrick, Shannon, or the lender. He arranged to have the 1099 forms placed in Derrick's and Shannon's names, but he kept the income reflected on the forms, leaving Derrick and Shannon with only the tax liability.

8. In *Golde v. Fox* (1979) 98 Cal.App.3d 167, 176, the court stated:

The crime here, of course, does not relate to the technical or mechanical qualifications of a real estate licensee, but there is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of the practice.

9. In *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402, the Court stated:

Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee. If appellant's offenses reflect unfavorably on his honesty, it may be said he lacks the necessary qualifications to become a real estate salesperson. (Citation.) The Legislature intended to ensure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear. (Citations.)

10. In *Wettlin v. State Bar of California* (1944) 24 Cal.2d 862, 869, the court stated:

While letters of recommendation are admissible in proceedings of this character, neither such letters nor the testimony of witnesses as to the good character of petitioner, however numerous or laudatory, can overcome the direct and positive evidence as to petitioner's character.

11. Respondent argued that this case involves nothing more than a dispute between brokers over the amount of commission to which they are entitled. That argument was not persuasive. First, neither Derrick nor Shannon served as a mortgage broker on any of the loans for which they received 1099 forms. Secondly, Respondent kept all of the commissions while passing the tax liability through to Derrick and Shannon. It was not until Derrick and Shannon complained that Respondent agreed to pay the tax on the income, and even then, he did not share any commissions with them. Given the amount of the commissions involved, and the nature of Shannon's work at Malibu Mortgage, the two checks Respondent gave to Shannon cannot be viewed as shared commission.

12. Respondent offered no explanation or justification for his actions. He offered no plan to avoid a recurrence of the conduct that resulted in the filing of this action. He offered no remorse or any other evidence of rehabilitation. (See Cal. Code Regs., tit. 10, § 2912.)

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13. Although artificial acts of contrition are not required in an administrative disciplinary action (*Calaway v. State Bar* (1986) 41 Cal.3d 743, 747-748), remorse for one's conduct and the acceptance of responsibility are paramount in establishing rehabilitation. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

14. Rehabilitation is evaluated on the basis of two different scales. One is an internal, attitudinal scale and the other is an external objective scale. In other words, a respondent must present evidence both of a state of mind and a state of facts showing he has been rehabilitated. The state of mind demonstrating rehabilitation is one that has a mature, measured appreciation of the gravity of the misconduct and remorse for the harm caused. Acceptance of responsibility is a necessary prerequisite to establishing rehabilitation. The rehabilitative state of facts is demonstrated by a track record of conduct that convinces and assures the Board that the public would be safe in granting full privileges of licensure to a respondent. A respondent must establish a track record of reliable, responsible and consistently appropriate conduct.

15. In the face of Respondent's actions, the absence of justification for those actions, and the absence of rehabilitation evidence, Respondent's continued licensure, even on a restricted basis, presents an unacceptable risk to the public safety, welfare and interest. Respondent's license shall be revoked. By virtue of that revocation, the license of Respondent's company, Malibu Mortgage, Inc., must also be revoked.

ORDER

1. The real estate broker license and license rights of Respondent, William Kenneth O'Daniel, are revoked.

2. The corporate broker license and license rights of Respondent, Malibu Mortgage, Inc., are revoked.

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3. Respondents William Kenneth O'Daniel and Malibu Mortgage, Inc., jointly and severally, shall reimburse the Bureau its costs of investigation and enforcement in the sum of \$9,571.85 within 90 days of the effective date of this decision.

Dated: August 13, 2015


H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings