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JUN 06 2017

BUREAU OF REAL ESTATE

By *Sybil Hanner*

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	CalBRE No. H-40362 LA
)	
YOUNG I KIM, and)	OAH No. 2016100226
DAVID INKI CHUNG)	
)	
Respondents.)	

DECISION

The Proposed Decision dated May 3, 2017, 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 salesperson license is granted to Respondents.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. 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 Sections 11521 and 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 26 2017.

IT IS SO ORDERED 6/1/17

WAYNE S BELL
REAL ESTATE COMMISSIONER

Daniel J. Sandri

By: DANIEL J. SANDRI
Chief Deputy Commissioner

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

In the Matter of the Accusation Against:

YOUNG I. KIM and
DAVID INKI CHUNG,

Respondents.

DRE No. H-40362 LA

OAH No. 2016100226

PROPOSED DECISION

This matter was heard on April 12, 13 and 14, 2017, in Los Angeles, California, by David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Complainant Veronica Kilpatrick, a Supervising Special Investigator of the Bureau of Real Estate (Bureau),¹ was represented by Lisette Garcia, Counsel for the Bureau. Respondents Young I. Kim and David Inki Chung were present during portions of the hearing and were represented by David Prince and Evan Clark, Attorneys at Law.

At the hearing, an oral protective order was issued to maintain the privacy and confidentiality of people engaged in real estate transactions that resulted in a complaint to the Bureau. The protective order seals exhibits and effects any transcript of the hearing. A written protective order is also issued.

Oral and documentary evidence was received. The matter was submitted for decision on April 14, 2017.

FACTUAL FINDINGS

1. Complainant brought the Accusation in her official capacity. Respondents requested a hearing, and this proceeding ensued. All jurisdictional requirements have been met.

2. Respondent Kim was licensed as a real estate salesperson by the Department on February 21, 2001, license identification 01302327. The license will expire February 20,

¹ After respondents were licensed, but before the Accusation was filed, the Department of Real Estate (Department) became the Bureau of Real Estate.

2017, unless renewed. Respondent Kim is licensed under the employment of respondent Chung.

3. Respondent Chung was licensed as a real estate salesperson by the Department from November 29, 1982, through April 12, 1990; thereafter he was licensed as a real estate broker, license identification 00676924. The license will expire April 12, 2018, unless renewed. Respondent Chung was licensed to do business as California Realty & Investment (CRI).

4. The allegations in the Accusation relate in part to acts in a real estate transaction by Michelle Kim, also known as Mi Young Kim, the wife of respondent Kim. Michelle Kim was licensed by the Department as a real estate salesperson from October 27, 1994, through August 5, 1998, when the license was revoked, based on conviction of a crime in 1997. It is alleged that Michelle Kim is also known as Michelle Young and Young Kim. The evidence did not support this allegation.

5. The allegations of the Accusation relate generally to the sale and resale of the real property located at 800 Linda Vista Ave., Pasadena, California (subject property).

6. The first sale of the subject property was a short sale, whereby owner J.Y. sold the property to buyer C.C. for a price (\$655,000) less than the amount owed by J.Y. on the mortgage loan issued by, and deed of trust held by, Wells Fargo Bank (Bank). The unpaid balance of the loan was \$840,000. The Bank approved the short sale under certain conditions discussed in more detail below. The grant deed for the first sale was signed May 21, 2014 and recorded May 27, 2014.

7. The second sale of the property, from C.C. to H.B. and J.B., husband and wife, closed June 2, 2014. This finding is based on J.Y.'s testimony and written complaint and attachments (ex. 6), and exhibits 8C through 8F, which were received as administrative hearsay.² The exhibits supplement and explain J.Y.'s testimony and written complaint. The attachments to J.Y.'s complaint included the grant deed for the second sale, signed May 28, 2014 and recorded June 2, 2014. The second sale was for more money than the first sale. The second sale price is in evidence only as administrative hearsay, with no admissible evidence for it to supplement or explain.

8. It is alleged that Michelle Kim solicited J.Y. for the first sale. The evidence did not support this allegation. Rather, J.Y. asked someone at his bank for assistance due to financial problems he was experiencing, and that person referred him to Michelle Kim. On

² The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (*Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.)

October 17, 2013, J.Y. entered into an exclusive listing agreement indicating that he was represented by respondent Kim, on behalf of CRI, for the sale of the subject property, with a listing price of \$499,000 and a sales commission of six percent.

9. J.Y. testified credibly that he never met respondents Kim or Chung throughout the first sale, and dealt exclusively with Michelle Kim in that transaction.

10. It is alleged that Michelle Kim opened the escrow for the first sale. There was insufficient evidence to support this allegation. Escrow opened by virtue of a residential purchase agreement and joint escrow instructions signed by J.Y. as seller and C.C. as buyer, both signatures dated October 21, 2013. The purchase price is \$650,000, later increased by addendum no. 2 to \$655,000 on March 24, 2014. The listing agent is CRI, signed by respondent Kim, and the selling agent is CRI, signed by respondent Chung. It is alleged that CRI acted as a dual broker for the buyer and seller. The residential purchase agreement and joint escrow instructions are not clear that CRI acted as a dual broker for the buyer and seller. However, a Short Sale Affidavit, described in more detail below, established that CRI acted as a dual broker for the buyer and seller. And, as noted in Finding 19, CRI and respondent Kim received commissions at the close of escrow.

11. On May 5, 2014, the Bank sent a letter to J.Y. approving the sale of the subject property for \$655,000 with certain conditions of the approval. The relevant condition was that any party may not receive any sale proceeds or any funds as a result of the transaction, except as specified in the letter. J.Y. signed each page of the letter, at the request of Michelle Kim.

12. The Bank provided a Short Sale Affidavit to be signed. It included many of the same conditions as the May 5, 2014 letter. The Short Sale Affidavit was signed on May 6, 2014, by J.Y., C.C., the escrow agent, respondent Kim as the seller's broker and listing agent, and respondent Chung as the buyer's broker/agent. In the Short Sale Affidavit the signatories certify and affirm under penalty of perjury that there were no agreements, understandings, or contracts related to the sale of the subject property that had not been disclosed to the Bank and that none of the signatories had knowledge of any offer to purchase the subject property for a higher purchase price than the purchase price contained in the purchase agreement dated October 21, 2013.

13. Michelle Kim provided an undated letter written in Korean to seller J.Y. The letter states, when translated, "I will personally be responsible to give you, [J.Y.], \$10,000 on the day you move out of 800 Linda Vista." (Ex. 6.) J.Y. testified and wrote in his complaint that Michelle Kim made this promise, on which J.Y. relied, in order to induce him to sign the listing agreement to sell the subject property.

14. Several portions of J.Y.'s testimony and documents were either contradictory, inconsistent or not well explained. For instance, J.Y. wrote in his complaint that Michelle Kim and her husband (respondent Kim) made the promise to pay \$10,000, yet J.Y. testified numerous times that he had no contact with respondent Kim until after the escrow closed and

respondent Kim came to his home several times. Further, J.Y. provided a check which he testified was written by Michelle Kim in his presence, dated October 31, 2013, for \$10,000. The check is on the account of Young Il Kim (respondent Kim) and Mi Young Kim, with a memo: 800 Linda Vista referral. Michelle Kim told J.Y. she could not write the check to him, as she would get in trouble.³ J.Y. had her write the check to his cousin, and then arranged to get the proceeds of the check for himself. J.Y. testified that Michelle Kim told him she would pay \$10,000 to get the listing, which was signed October 17, 2013, and \$10,000 as moving expenses. J.Y. stated he would need six months after close of escrow to move out of the subject property, and Michelle Kim agreed.

15. The escrow for the second sale was handled by Alpha Escrow. The documents received by the Bureau's investigator from Alpha Escrow were not accompanied by a declaration of the custodian of records, and a hearsay objection to those documents was sustained. The escrow documents, exhibits 8A through 8G, were received as administrative hearsay. Most of the allegations relating to the second sale are addressed only by evidence that is administrative hearsay and, therefore, cannot support a factual finding. In a few instances, the allegations were also supported by testimony from J.Y. or the Bureau's investigator, Jesse Hafen. Mr. Hafen completed the investigation, which was begun by Adrian Fernandez, who did not testify.

16. Mr. Hafen believed that respondent Kim was involved in the second sale of the subject property because of his email on May 21, 2014, requesting that an escrow be opened, as well as respondent Kim being listed on the block printed at the bottom of certain forms as the agent and CRI as the broker. The forms including this information block include the residential purchase agreement and joint escrow instructions, the buyer's inspection advisory, and counter offer no. 2. A separate counter offer no. two has a block at the bottom indicating Sarkis Arpajian was the agent, and there was sufficient evidence to establish that Mr. Arpajian functioned as the buyer's agent in the second sale. Other documents indicate that the second sale was a sale by owner without an agent. Based on the totality of the evidence, it was not established by clear and convincing evidence that respondent Kim and/or respondent Chung functioned as the seller's agent in the second sale.

17.A. The date of the residential purchase agreement and joint escrow instructions for the second sale, signed by C.C. as seller and H.B. as buyer, is May 8, 2014. Although this date is contained in a document that is in evidence as administrative hearsay, it was the subject of numerous questions posed to Mr. Hafen and J.Y. by respondents' counsel, and Mr. Hafen testified that the date of the document is May 8, 2014. Further, respondents' counsel contended in closing argument that respondents did not violate the Short Sale Affidavit, signed May 6, 2014, by virtue of their possible knowledge of a second offer to purchase, at a higher price, signed two days later, May 8, 2014.

³ A hearsay objection was raised, and sustained, to the statement attributed to Michelle Kim. The statement was received as administrative hearsay. However, as the statement is not recited here for the truth of the matter asserted, it is not hearsay.

17.B. The date of the second offer to purchase was established by competent and convincing evidence. In a contract action, the words used by the contracting parties are non-hearsay when used to show the essential elements of the contract. (See *State of Oregon v. Sup. Ct. (Lillard)* (1994) 24 CA4th 1550, 1555, fn. 1 [disapproved on other grounds in *Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 465, fn. 8].) Such evidence has been referred to as original evidence (*Jazayeri v. Mao* (2009) 174 Cal. App. 4th 301, 316, citing 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 31, p. 714, quoting *People v. Henry* (1948) 86 Cal.App.2d 785, 789) or as the operative facts forming an agreement and are not hearsay. (*People v. Jimenez* (1995) 38 Cal.App.4th 795, 802; *People v. Dell* (1991) 232 Cal.App.3d 248, 261–262.) The operative facts rule also applies in an action for fraud. (*Jazayeri v. Mao, supra*, 174 Cal. App. 4th at p. 316, citing 1 Witkin, *supra*, Hearsay, § 33, p. 715 [“In an action for ... deceit, the words spoken, written, or printed may be proved.”]; see *People v. Dell, supra*, 232 Cal.App.3d at p. 258.) Further, the date of the second offer to purchase was pleaded by complainant, testified to by Mr. Hafen, and relied upon by respondents’ counsel. An admission by a party that a hearsay document contains truthful information allows the information to be used as competent evidence. (*In re Sunset Bay Assocs.* (9th Cir. 1991) 944 F.2d 1503, 1513–14.) Briefs and arguments may constitute admissions by a party. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152, citing and quoting *De Rose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn. 3.) Statements of counsel in arguments, pleadings or briefs may bind the client. (See *Browne v. Superior Court* (1940) 16 Cal.2d 593, 599; 1 Witkin, Cal. Procedure (4th ed.) Attorneys, § 235 et seq.)

18. Most of the other allegations relating to the second sale are based solely on documents received in evidence as administrative hearsay without other evidence which the administrative hearsay can be used to supplement or explain. As a result, the following allegations of the Accusation were not established by clear and convincing evidence:

- a. The purchase price for the subject property was \$835,000.
- b. The purchase agreement did not list the agency relationship and was not signed by the selling or listing agents or brokers. (Further, there was insufficient evidence that there were any selling or listing agents or brokers. See Finding 16.)
- c. On May 21, 2014, Mi Young Kim, aka Michelle Young, sent an email to Alfa Escrow, Inc. requesting that escrow be opened for the sale of the subject property from C.C. to H.B., and that a copy of the purchase agreement was attached.
- d. A Short Form Deed of Trust and Assignment of Rents was dated May 20, 2014 and notarized on May 21, 2014. The Short Form Deed transferred title of the subject property from C.C. to H.B.
- e. On May 23, 2014, Alfa Escrow, Inc.’s Supplemental Escrow Instructions stated that the sale of the subject property from C.C. to H.B. was a For Sale By Owner transaction where the seller is representing him / herself without any broker involved on the seller’s side.

f. On May 24, 2014, the seller C.C. accepted H.B.'s Counter Offer No. 4.

g. On June 2, 2014, escrow closed on the sale of the subject property from seller C.C. to H.B. The purchase price was \$740,000. On June 2, 2014, C.C. signed instructions to pay a referral fee of \$10,000 to respondent Kim. The fee was then paid to Kun N. Kim, an unlicensed person.

19. On May 27, 2014, escrow closed on the short sale of the subject property from seller J.Y. to C.C. Respondent Chung instructed Central Escrow to pay respondent Kim \$32,395 of the \$39,300 commission owed to CRI.

20. Michelle Kim failed to pay the \$10,000 fee as promised to J.Y. to move from the subject property. J.Y. testified credibly that after the escrow for the first sale was closed he was contacted by a new owner, not C.C., and told to leave the subject property. J.Y. contacted Michelle Kim, who told him that, due to there being a new owner she was not able to provide six months for J.Y. to stay in the subject property.

21. It is alleged in the Accusation: "The resale of the subject property from C.C. to H.B. and related agreements, deeds, and proceeds, were not disclosed to the [Bank] or J.Y. by Respondents." (Ex. 1, Accusation, p. 6, ll. 17-19.) There was no evidence that respondents informed the Bank or J.Y. of the second sale and related documents. There was no evidence supporting the conclusion that respondents were required to disclose the second sale to the Bank. The Short Sale Affidavit, requiring disclosure of any existing agreements related to the sale of the subject property, was signed May 6, 2014. (Finding 12.) The offer to buy in the second sale transaction was signed two days later, May 8, 2014. However, Michelle Kim's October 2013 agreement to pay J.Y. to move from the subject property was the type of agreement that should have been disclosed to the Bank and was not, contrary to the representations made by respondents by signing the Short Sale Affidavit.

22. It is alleged in the Accusation that respondents failed to "retain copies of documents in connection with the aforementioned transactions," in violation of statute. (Ex. 1, Accusation, p. 8, ll. 1-5.) More specific allegations are discussed below. However, as noted above, it was not established that respondents acted as agents or performed activities requiring a license in the second sale. Therefore, the allegation is addressed as it relates to the first transaction only.

23.A. The Bureau received J.Y.'s complaint on April 27, 2015. It is alleged in the Accusation that, on May 13, 2015, the Bureau requested the transaction files for the short sale and resale of the subject property from respondent Chung. There was no evidence of such a request. Rather, there was a letter Mr. Fernandez wrote to respondent Kim dated July 21, 2015, requesting information about the sale of the subject property by J.Y. (Ex. 11.) Even though this letter is not included specifically in any allegation, it is part of a series of events addressing the Bureau's requests for documents and information from respondents, and their replies.

23.B. In response to the July 21, 2015 letter from Mr. Fernandez, respondents' attorney, Mr. Prince, wrote a letter dated August 10, 2015, in which he listed documents located by respondent Kim and answered questions posed in the letter from Mr. Fernandez. Mr. Prince's letter does not specifically state that documents are enclosed, however, below the signature it indicates that there were enclosures. Mr. Hafen could not recall whether he saw the listed documents in connection with the letter when he took the file over from Mr. Fernandez. In response to a written question from Mr. Fernandez requesting the number of offers received and submitted to the seller for review, Mr. Prince wrote, "Approximately five offers were received and submitted." In his review of the file, Mr. Hafen did not see documents relating to five offers; only the original offer and the addendum increasing the sale price, both from buyer C.C.

24.A. On December 28, 2015, the Bureau served a subpoena duces tecum on respondent Chung for copies of any and all offers on the subject property submitted by potential purchasers between September 10, 2013 and December 31, 2014.

24.B. Respondent Chung, through Mr. Prince, responded to the subpoena and provided some documents by letter dated January 22, 2015, which referred to enclosed documents numbered 0001-0041, but with no description of those documents. In the evidence offered at the hearing, complainant included four pages, numbered 0001 and 0015-0017. There was no evidence establishing the exact nature of the other numbered documents sent by Mr. Prince to Mr. Fernandez.

24.C. It is alleged in the Accusation that the documents provided by respondent Chung did not include several documents that had been provided by the escrow companies and the Bank to the Bureau in response to subpoenas for their transaction files for the short sale and resale of the subject property. Mr. Hafen testified that he reviewed the documents provided by respondents. However, and as noted above, Mr. Hafen did not recall if any documents were sent with Mr. Prince's first letter and, if so, what those documents comprised. Nor did Mr. Hafen identify the particular documents numbered 0001-0041 sent by Mr. Prince, and only four pages are in evidence. Mr. Hafen testified that there were fewer documents received from Mr. Prince in total than were received from the escrow companies and the Bank, and that he did not see five offers to buy, as represented by Mr. Prince.

25. There was insufficient evidence to prove the allegation that respondents failed to maintain required documents. First, there was no evidence or argument that respondents, as listing/seller agent and buyer agent, were required to receive and maintain all of the documents that were later produced by the escrow holder and the Bank. Second, the allegations relate to both sales, while the evidence is that respondent Kim was requested to produce documents related to the first sale only, and the subpoena also related to the first sale only. While respondents can be charged with the representations made by their counsel in briefs and arguments (*Mangini v. Aerojet-General Corp.*, *supra*, 230 Cal.App.3d at p. 1152), here Mr. Prince's representation of the existence of five offers is in a letter. Respondents did

not testify.⁴ Further, there was no explanation why, for an escrow lasting from October 2013 to May 2014, the Bureau subpoenaed offers only in the limited time period of October to December 2013.

26.A. It is alleged in the Accusation that the conduct, acts and/or omissions of respondents Kim and Chung constitute cause to suspend or revoke the real estate license and license rights of respondents under Code sections 10176, subdivision (a), substantial misrepresentation; 10176, subdivision (b), making false promises of a character likely to influence, persuade, or induce; 10177, subdivision (d), violation of the Real Estate Law; and 10177, subdivision (j), any other conduct that constitutes fraud or dishonest dealing.

26.B. It is alleged in the Accusation that respondent Chung failed to retain copies of documents in connection with the sales transactions in violation of Code section 10148, which constitutes cause to suspend or revoke his real estate license and license rights under Code sections 10177, subdivision (d), violation of the Real Estate Law, and/or 10177, subdivision (g), negligence or incompetence. It is alleged in the Accusation that respondent Chung he failed to exercise the supervision and control over the activities of his salespersons as required by Regulation 2725 and is cause to suspend or revoke his real estate license and license rights under Code sections 10177, subdivision (h), failure to exercise supervision; 10177, subdivision (d), violation of the Real Estate Law; and/or 10177, subdivision (g), negligence or incompetence.

27. Implicit in the contacts between J.Y. and Michelle Kim was the status of Michelle Kim as being licensed by the Bureau. Michelle Kim was not licensed by the Bureau at the time of those actions. There was insufficient evidence presented supporting the conclusion that respondent Kim or respondent Chung are liable for this circumstance under the allegations of substantial misrepresentation or making false promises of a character likely to influence, persuade, or induce. There was no direct evidence Michelle Kim was employed by either respondent. However, Michelle Kim's conduct constitutes fraud or dishonest dealing of respondent Kim and respondent Chung because they became the listing/seller's agent and buyer's agent, respectively, in a transaction whereby Michelle Kim was the only person to have contact with the seller, including activities requiring a license. With respect to Michelle Kim's promise to pay J.Y. on the day he moved from the subject property, the offer was to "personally be responsible to give [J.Y.]" \$10,000, and there was no evidence that either respondent was aware of or ratified that agreement. There was a check on a joint bank account; however this is not clear and convincing evidence that respondents Kim or Chung are responsible for Michelle Kim's payment to J.Y. Even an inference of respondents' knowledge and responsibility is not supported. It could, at best, be characterized as a suspicion.

⁴ Respondents were not present in the hearing room when complainant rested her case. Mr. Prince stated respondents were not going to testify. No notice had been served under Government Code section 11450.50 requiring respondents to appear to give testimony. Under these circumstances, the record closed without testimony from respondents.

28. As noted above, J.Y.'s testimony included inconsistencies and contradictions. However, J.Y. was consistent and believable in his testimony that he dealt with no one other than Michelle Kim as his representative in the first sale. There was no evidence contradicting J.Y.'s testimony. The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The testimony of "one credible witness may constitute substantial evidence." (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.) Discrepancies in a witness's testimony, or between that witness's testimony and that of others does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal App.3d 865, 879.) A fact finder may disbelieve any or all testimony of an impeached witness. (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671.)

29. It was not established that respondent Chung failed to retain copies of documents in connection with the sales transactions.

30. It was established that respondent Chung was negligent or incompetent, and failed to exercise supervision over the activities of his salesperson, respondent Kim, in the first sale of the property, which was accomplished with neither respondent Kim nor respondent Chung having had contact with the seller.

31. The Bureau submitted evidence of its costs of investigation (\$2,973.30) and enforcement (\$3,204), in the total amount of \$6,177.30. (Exs. 12 and 13.) These costs are reasonable.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. The standard of proof for the Bureau to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (*Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

2. The Accusation alleges that respondents have violated various statutes. Under Business and Professions Code⁵ section 10176, a real estate licensee may have his license disciplined for: subdivision (a), making any substantial misrepresentation; and subdivision (b), making false promises of a character likely to influence, persuade, or induce.

⁵ All further statutory references are to the Business and Professions Code.

3. Under section 10177, a real estate licensee may have his license disciplined for: subdivision (d), willfully violating or disregarding the Real Estate Law or regulations; subdivision (g), negligence or incompetence in performing an act requiring a license; subdivision (h), a broker failing to exercise reasonable supervision over the activities of his salesperson; and subdivision (j), engaging in "any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing."

4. Under California Code of Regulations, title 10, section 2725, a real estate broker shall exercise reasonable supervision over the activities of his salespersons, including, among other things, reviewing and managing transactions requiring a real estate license and documents which may have a material effect upon the rights or obligations of a party to the transaction. The broker shall establish a system for monitoring compliance.

5. Under section 10148, subdivision (a), a licensed real estate broker "shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required." The records shall be made available to the Bureau on reasonable notice. Under subdivision (e), the Bureau may discipline the license of a real estate broker or real estate salesperson who knowingly destroys, alters, conceals, mutilates, or falsifies any of the records that are required to be maintained by this section.

6. Respondents Kim and Chung did not make any substantial misrepresentation or false promises of a character likely to influence, persuade, or induce, as noted in Findings 4-21 and 26-28. There is no cause to impose discipline under section 10176, subdivisions (a) or (b).

7. Respondents Kim and Chung engaged in conduct that constitutes fraud or dishonest dealing, as noted in Findings 4-21 and 26-28. There is cause to impose discipline under section 10177, subdivision (d), willfully violating or disregarding the Real Estate Law or regulations, and subdivision (j), engaging in conduct that constitutes fraud or dishonest dealing.

8. It was not established that respondent Chung failed to retain documents in connection with the sales transactions, as noted in Findings 4-29. There is no cause to impose discipline under sections 10148 or 10176, subdivision (d), willfully violating or disregarding the Real Estate Law or regulations, and subdivision (j), engaging in conduct that constitutes fraud or dishonest dealing.

9. Respondent Chung failed to exercise the supervision over the activities of his salesperson as required by California Code of Regulations, title 10, section 2725, as noted in Findings 4-21 and 26-28. There is cause to impose discipline under section 10177, subdivision (d), willfully violating or disregarding the Real Estate Law or regulations, subdivision (g), negligence or incompetence in performing an act requiring a license, and

subdivision (h), failing to exercise reasonable supervision over the activities of his salesperson.

10. Respondents contend that Michelle Kim acted merely as a finder. Case law permits someone to act as a finder, introducing a buyer to a seller, without requiring the finder to be licensed by the Bureau. However, any action beyond this introduction, such as communicating with the parties or negotiating to consummate the transaction, would require the finder to be licensed. (See *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441; *Independent Cellular Telephone, Inc. v. Daniels & Associates* (1994) 863 F.Supp. 1109.) The purpose of the licensing requirements for real estate brokers is to protect the public from incompetent or untrustworthy practitioners. (*Salazar v. Interland, Inc.* (2007) 152 Cal.App.4th 1031.) Respondents permitted Michelle Kim to perform acts requiring a license and, as a result, respondents were compensated in the form of commissions from the first sale.

11. Various sources define or interpret dishonesty. As stated in *Small v. Smith* (1971) 16 Cal.App.3d 450, 456: "The term 'dishonesty' has been defined in the scope of real estate disciplinary proceedings as follows: 'Dishonesty' necessarily includes the element of bad faith. As defined in the dictionaries and in judicial decisions, it means fraud, deception, betrayal, faithlessness. (Citations.) As put by the court in *Alsup v. State*, 91 Tex.Cr.R. 224 (238 S.W. 667), 'Dishonesty' denotes an absence of integrity; a disposition to cheat, deceive, or defraud; deceive and betray.' (*Hogg v. Real Estate Commissioner, supra*, (1942) 54 Cal.App.2d 712, 717, 129 P.2d 709, 711- 712.) As so defined dishonesty in itself demonstrates unfitness to be a broker or at least to require discipline as authorized by the statute."

12. Under section 10106, the Bureau may request an order for the licensee to pay the reasonable cost of investigation and enforcement of the case. This cost is \$6,177.30, as set forth in Factual Finding 30. However, complainant failed to prove more than half of its allegations against respondents. Apportionment of costs is addressed in *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, where it was found that a licensing board "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 conduct." Apportionment may not be required under *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917, where even though some of the allegations were unproven, nevertheless they were part of the overall investigation and prosecution of the case, and it was not necessary to make a pro rata division of costs. The theory of apportionment has been upheld in civil cases involving the recovery of attorney fees by the prevailing party, where apportionment is not covered by the applicable statute or contract clause. For example, apportionment can take place where a party prevails on some, but not all, of its claims. (*Slavin v. Fink* (1994) 25 Cal.App.4th 722.) And where a party prevails on a cause based on a contract including a fee clause, as well as on a tort theory where the fees are not recoverable, the fees should be allocated between the two causes of action. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124.) Under all of the circumstances, including the failure to produce clear and

convincing evidence related to numerous allegations such as the second sale and retention of documents, the costs herein will be reduced by 30 percent, for a total of reasonable costs of \$4,324.11.

13. The appropriate level of discipline is also to be considered. The statutes relating to licensing of professions generally are designed to protect the public from dishonest, untruthful and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) Such proceedings are not for the primary purpose of punishing an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Rather, in issuing and disciplining licenses, a state agency is primarily concerned with protection of the public, maintaining the integrity and high standards of the profession, and preserving public confidence in licensure. (*Ibid.* See also, *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.) In the practice of a real estate licensee, “[h]onesty and integrity are deeply and daily involved in various aspects of the practice.” (*Golde v. Fox* (1979) 98 Cal.App.3d 167, 176). “The public exposing themselves to a real estate licensee has reason to believe that the licensee must have demonstrated a degree of honesty and integrity in order to have obtained such a license.” (*Id.* at 177-178.) In performing activities requiring a license, a real estate salesperson must be employed by a licensed real estate broker. (Section 10132.)

14. Respondent Kim permitted a sale to take place wherein he had no contact with the seller. Under all of the facts and circumstances, and to adequately protect the public safety and welfare, it is appropriate to revoke respondent Kim’s salesperson license and allow him to receive a restricted salesperson license. Respondent Chung not only allowed respondent Kim to take the actions noted above, respondent Chung also served as the buyer’s agent in the transaction and failed to properly supervise respondent Kim. Respondent Chung, under his broker license, has the additional responsibility to properly supervise other licensees and here allowed respondent Kim’s wife, a non-licensee, to perform acts requiring a license and he profited from her unlicensed activity. Under all of the facts and circumstances, and to adequately protect the public safety and welfare, it is appropriate to revoke respondent Chung’s broker’s license and allow him to receive a restricted salesperson license.

ORDER

Respondent Young I. Kim

1. All licenses and licensing rights of respondent Young I. Kim under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent Kim pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Bureau 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 Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

a. 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.

b. 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.

c. 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 two years have elapsed from the effective date of this Decision.

2. Respondent 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 of Real Estate which shall certify:

a. That the employing broker has read the Decision of the Commissioner 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.

3. 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.

4. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Bureau including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

5. Respondent Kim is jointly and severally responsible with respondent Chung, and shall pay the cost of investigation and enforcement of the case in the amount of \$4,324.11 on a schedule acceptable to the Bureau.

Respondent David Inki Chung

1. All licenses and licensing rights of respondent David Inki Chung under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent Chung pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Bureau 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 Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

a. 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.

b. 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.

c. 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 two years have elapsed from the effective date of this Decision.

2. Respondent 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 of Real Estate which shall certify:

a. That the employing broker has read the Decision of the Commissioner 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.

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3. 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.

4. Respondent shall, within six months from the effective date of this Decision,
take and pass the Professional Responsibility Examination administered by the Bureau
including the payment of the appropriate examination fee. If respondent fails to satisfy this
condition, the Commissioner may order suspension of respondent's license until respondent
passes the examination.

5. Respondent Chung is jointly and severally responsible with respondent Kim,
and shall pay the cost of investigation and enforcement of the case in the amount of
\$4,324.11 on a schedule acceptable to the Bureau.

DATED: May 3, 2017

DocuSigned by:
David Rosenman
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DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings