

FILED

SEP 27 2017

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

By *[Signature]*

In the Matter of the Accusation against

SALVATORE MARCHIO,

Respondent.

) CalBRE No. H-40498 LA

) OAH No. 2017011013

DECISION

The Proposed Decision dated August 30, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision.

Legal Conclusion, page 7, paragraph 2, line 1, "...real estate broker include "solcit[ing]" is amended to read "...real estate broker include "solicit[ing]".

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

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. 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.

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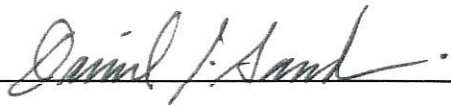
The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on ~~DEC 16~~ 2017.

IT IS SO ORDERED 9/21/17

WAYNE S. BELL

REAL ESTATE COMMISSIONER



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:

SALVATORE MARCHIO,

Respondent.

Case No. H-40498 LA

OAH No. 2017011013

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, heard this matter on July 10, 2017, in Los Angeles, California.

Lissete Garcia, Counsel, represented Maria Suarez (complainant), Supervising Special Investigator, the Bureau of Real Estate (Bureau).

Salvatore Marchio (respondent) represented himself.

Oral and documentary evidence was received. The record remained open until July 24, 2017, for respondent to submit a closing brief, and until July 31, 2017, for complainant to submit a reply brief, if any. On July 24, 2017, respondent's closing brief was received, marked as Exhibit B, and lodged. On July 31, 2017, complainant's reply brief was received, marked as Exhibit 14, and lodged. The record was closed and the matter submitted for decision on July 31, 2017.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Complainant filed the First Amended Accusation in her official capacity. Respondent timely filed a Notice of Defense and requested a hearing.
2. On February 17, 2004, the Bureau issued a real estate broker license number 01334403 to respondent. This license was in full force and effect during all relevant times herein and is scheduled to expire on February 18, 2020. From July 11, 2002, to February 16, 2004, respondent was licensed by the Department of Real Estate (predecessor to the Bureau) as a real estate salesperson. Respondent also holds a mortgage loan originator license

endorsement number 366055 under the National Mortgage Licensing System (NMLS).¹ No evidence of prior discipline against respondent's licenses was presented.

3. Respondent presently holds licensing rights under the Real Estate Law, Part 1 of Division 4, of the Business and Professions Code.

Respondent's Dealings with J.D.² and M.D.

4. J.D. and his wife, M.D., are the owners of a house located on Konocti Street in Rancho Cucamonga (Konocti Property). Through family connections, J.D. became friends with respondent and hired him to provide loan modification services relating to the Konocti Property.

5. Sometime between 2008 and 2009, on dates not established by the record, respondent helped J.D. and M.D. to obtain a loan modification (2009 loan modification) on the Konocti Property. Sometime between 2012 and 2013, on dates not established by the record, respondent helped J.D. and M.D. to obtain a second loan modification (2013 loan modification) on the Konocti Property. From 2013 to 2014, J.D. and M.D. obtained loan assistance through a state program, Keep Your Home California, in order to maintain their mortgage payment and avoid foreclosure. By 2015, however, J.D. and M.D. were struggling again with the mortgage payments on the Konocti Property and sought respondent's assistance in obtaining a third loan modification (2015 loan modification).

6. A. On February 5, 2015, J.D. and M.D. met with respondent and signed a Loan Modification Services Fee Agreement (Agreement). The Agreement is a five-page document with a logo for "iMPAX Solutions, LLC" (iMPAX) on the upper right hand corner on every page. It recites that the Agreement was made "by and between iMPAX Solutions, LLC (the "Loan Modification Servicer") and Principals [J.D. and M.D.] (the "Principal") for the mortgage loan modification services as described herein." (Exhibit 7, p. 6.)

B. Section A2 of the Agreement identifies the Konocti Property as the property for which the loan modification services were sought. Additionally, it identifies Ocwen Loan Servicing, LLC as the lender.

C. Section B1 of the Agreement requires J.D. and M.D. to pay a "Quality Control fee" of \$795 to iMPAX on the date that the Agreement is signed by J.D. and M.D., or within 14 days of the execution of the Agreement by both parties.

D. Section B2 of the Agreement describes the scope of iMPAX's services under the Agreement as consisting of two phases. In Phase I, iMPAX is to interview J.D.

¹ The Bureau uses the NMLS to manage all mortgage loan originator license endorsements.

² Initials are used to protect the privacy of the consumers.

and M.D. to gather and review information about any current loans on the Konocti Property, current market value for the property, and their income, assets, and ability to repay the loans. iMPAX is required to complete Phase I services by February 15, 2015, but "in no case later than 60 calendar days from the date [the] agreement is made." (*Id.* at p. 8.) In Phase II, iMPAX is to contact the lender to negotiate the loan modification, communicate regularly with the lender, help J.D. and M.D. to understand any modification terms proposed by the lender, and "successfully negotiate and/or accomplish a loan modification for [J.D. and M.D.]." (*Ibid.*) iMPAX is required to complete Phase II services by June 1, 2015, but "in no case later than 180 days from the date of Phase I." (*Ibid.*)

E. The signature block on the Agreement contains the names of J.D. and M.D. as "Principals" and respondent's name as "Designated Officer." The copy of the Agreement admitted into evidence does not contain any signatures. However, nothing in the Agreement states that it is only complete upon the execution of the agreement by both parties. Additionally, J.D. credibly testified at the hearing that both he and his wife signed the document on February 10, 2015, and returned the signed copy to respondent. J.D. never received a copy of the Agreement with respondent's signature because he trusted respondent implicitly based on their prior dealings.

F. During the same meeting, respondent also gave J.D. and M.D. an invoice dated February 5, 2017. The iMPAX logo also appears on the upper right hand corner of this invoice. The document is addressed to J.D. and M.D. at the Konocti Property and describes the services as "Mortgage Loan Modification Workout Total Fee, \$1,595.00." (Exhibit 7, p. 13.) It shows that an \$800 "Repeat Customer" discount is applied, which reduced the total due to \$795. The invoice describes the \$795 amount as the "1st initial payment to begin the process of loan modification and to prepare loan modification packet to be submitted to the lender for the 1st mortgage. This includes everything in Phase I & II which is explained in detail in the Loan Modification Services Fee Agreement Contract." (*Ibid.*) Additionally, the invoice requires all checks to be made payable to respondent.

7. A. iMPAX is a limited liability company registered with the Secretary of the State in California. On October 1, 2012, and June 16, 2014, respondent signed a Statement of Information with the Secretary of State certifying that he is the owner/Chief Executive Officer (CEO) of iMPAX.

B. The iMPAX name appears throughout the documents relating to the 2015 loan modification as "iMPAX Solutions LLC," "iMPAX Solutions," or "iMPAX Mortgage." However, respondent has never been licensed to use the fictitious business names "iMPAX Solutions LLC," "iMPAX Solutions," or "iMPAX Mortgage" to engage in acts requiring a real estate license. "iMPAX Solutions LLC," "iMPAX Solutions," or "iMPAX Mortgage" were not licensed by the Bureau in any capacity at all times relevant in this matter.

8. A. On February 10, 2015, J.D. met respondent again and wrote a check to him in the amount of \$795. The memo portion of the check stated, "Remod." J.D. testified credibly at the hearing that he gave the check to respondent only after respondent had

explained the terms of the February 5, 2015 invoice (described above) to him. He understood that the \$795 was the fee he had to pay for the 2015 loan modification.

B. Respondent cashed J.D.'s check in the amount of \$795 on February 17, 2015.

C. Notwithstanding the use of the term "Quality Control fee" in the Agreement, the \$795 constitutes an advance fee because respondent charged and collected the fee before he fully completed the 2015 loan modification.

9. Indeed, respondent did not provide any loan modification services to J.D. and M.D. in 2015 or anytime thereafter. J.D. called and emailed respondent numerous times between February 10, 2015, and September 9, 2015, to inquire after the progress of the 2015 loan modification, but he did not receive any responses.

10. A. On September 9, 2015, respondent sent an email message to J.D. which read as follows:

Sorry I haven't returned any of your calls but I have had an unfortunate/ unexpected death of my father. I've been out of country for the last (2) months arranging the funeral and addressing various financial and legal issues. This is the first time I've had to deal with the death of someone close and the time immediately after the death can be overwhelming, with grief and bereavement complicated by a seemingly endless number of tasks has made it difficult for me to focus on my own priorities. I apologize again for not returning any calls but my wife has my phone and I think she is using it or my delinquent step-daughter who is 13 yrs old I'm sure has her hand on it as well.

I will be back in New Jersey on 09/12/2015 & be back in California on 09/18/2015. In the meantime email me of what has happened so far with your lender/ property. . . .

(Exhibit 7, p. 5.)

B. Respondent's email message also contained several questions addressed to J.D. and M.D. regarding the couple's income and the current mortgage on the Konocti Property. J.D. sent the answers to these questions to respondent via email.

11. However, J.D. did not receive any responses from respondent. In January 2016, J.D. searched for respondent's name on the NMLS and discovered that he was working for Legendary Lending Inc. (Legendary) in the city of Newport Beach. From January 2016

to May 2016, J.D. called Legendary several times in an attempt to reach respondent, but J.D. was never able to reach respondent.

The Bureau's Investigation

12. On June 22, 2016, J.D. filed a complaint against respondent with the Bureau in which he described the events discussed above.

13. In a letter dated September 27, 2016, Fawn Piangenti (Piangenti), a Special Investigator with the Bureau, requested that respondent provide the complete loan transaction files relating to the Konocti Property by October 11, 2016.

14. A. In an undated letter,³ respondent wrote to Piangenti that he could not provide the requested loan transaction files. He explained:

As I mentioned to you per our discussion, I actually provided (2) complete loan modification for the property in question. Unfortunately I cannot provide a copy of the complete loan transaction file you requested since the 1st loan modification was completed in 08/2009 & 2nd loan modification was completed on 11/2013. I shred all completed loan modification files after 2 yrs. from completion date. I use Microsoft Office Access software in which I have enclosed a copy of the summary page which shows a breakdown of the completed loan modification they received compared to the loan they had currently.

(Exhibit 8, p. 2.)

B. Attached to this letter are two invoices. The first invoice is numbered 073, and a handwritten note beneath it states, "1st loan modification completed 08/2009." Invoice number 073 indicates that J.D. and M.D. had made a first payment for the 2009 loan modification on June 21, 2009, for \$750, and the second payment on August 7, 2009, for \$750. The second invoice is numbered 218, and a handwritten note beneath it states, "2nd loan modification completed 11/2013." Invoice number 218 indicates that J.D. and M.D. had made a first payment for the 2013 loan modification on March 9, 2012, for \$500, and a second payment on September 17, 2013, for \$1,250.

15. In connection with her investigation relating to the Konocti Property, Piangenti also conducted an inquiry into Legendary's relationship to respondent. Her

³ Although the letter was undated, the envelop in which the letter was sent indicate that the letter was mailed on October 7, 2016 and received by the Bureau on October 12, 2016.

investigation revealed that respondent was an independent contractor with Legendary for a short period of time and that Legendary had no knowledge of, and did not have any files relating to, the Konocti property.

16. On January 20, 2017, respondent refunded \$895 to J.D. and M.D.

Respondent's Testimony

17. Respondent is 49-years old. He received his undergraduate education at Rutgers University. Since July 2016, he has been employed with Pacific Loan Lending which provides residential loans and refinancing to homeowners.

18. A. At the hearing, respondent denied that \$795 he received from J.D. and M.D. was an advanced fee for the 2015 loan modification. He claimed that the money was an overdue payment for the 2013 loan modification. Respondent characterized J.D.'s complaint against him as a "miscommunication" and a "misunderstanding."

B. Respondent admitted that he had drafted the Agreement. He also admitted to preparing the February 5, 2015 invoice. However, respondent contested the validity of the Agreement because it does not contain his signature. Respondent testified that he does not recall meeting J.D. and M.D. on February 5, 2015. He also could not recall the circumstances under which he received the \$795 check from J.D.

C. Although he is the owner/CEO of iMPAX, respondent claimed that he set it up as a "shell company" and denied conducting any business as iMPAX.

D. Respondent admitted that he did not keep the \$795 he received from J.D. and M.D. in a separate trust account. He asserted that he was not required to deposit the money into a separate trust account because it is an overdue payment for the 2013 loan modification.

E. Respondent claimed that he did not keep any documents related to the 2015 loan modification for J.D. and M.D.'s because there was no agreement on his part to perform such services.

19. Respondent's testimony was implausible, disingenuous, and contradicted by other evidence in this case. Respondent claimed that the \$795 he received from J.D. and M.D. was an overdue payment for the 2013 loan modification. However, the February 5, 2015 invoice he provided to J.D. and M.D. clearly indicates that the \$795 was a fee for the 2015 loan modification. Additionally, respondent provided to the Bureau invoice number 218, which shows that that J.D. and M.D. had previously made two separate payments on March 9, 2012, and September 17, 2013, for the 2013 loan modification. When questioned about this invoice, respondent could not provide an explanation as to why there is an overdue payment when it appears that the 2013 loan modification was paid in full. Moreover, respondent did not explain why, if in fact the \$795 was an overdue payment for the 2013

loan modification, he would refund the payment to J.D. and M.D. after the Bureau had initiated its investigation. Respondent's inability to recall his February 5, 2015 meeting J.D. and M.D. and his receipt of the \$795 check further damaged his credibility. For the foregoing reasons, respondent's testimony is given little weight.

Cost Recovery

20. Complainant submitted evidence of the costs of investigation and enforcement of this matter, summarized as follows: 26.8 hours in investigation activities, by four Bureau employees at rates ranging from \$37 to \$80 per hour (subtotal \$1,698.55); and 32.75 hours of legal services at the rate of \$89 per hour (subtotal \$2,914.75). The total costs of investigation and enforcement are \$4,613.30.

21. Respondent's monthly income is approximately \$3,000. His expenses include approximately \$1,000 per month in rent and \$300 per month in car installment payments.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The standard of proof for the Bureau to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (*Realty Projects Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212.) Clear and convincing evidence requires proof that is so clear as to leave no substantial doubt and that is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487.)

Brokers and Mortgage Loan Originators Defined

2. The duties of a real estate broker include ^{"solicit[ing]"}~~solicit[ing]~~ borrowers or lenders for or negotiate[ing] loans or collect[ing] payments or perform[ing] services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity." (Bus. & Prof. Code, § 10130, subd. (d).)

3. Business and Professions Code section 10166.01, subdivision (b)(1), defines a mortgage loan originator as "an individual who takes a residential loan application or offers or negotiates terms of a residential mortgage loan application for compensation or gain."

4. Business and Professions Code section 10166.02, subdivision (b), provides:

No individual may engage in business as a mortgage loan originator under this article without first doing both of the following:

(1) Obtaining and maintaining a real estate license pursuant to Article 2 (commencing with Section 10150).

(2) Obtaining and maintaining a real estate license endorsement pursuant to this article identifying that individual as a licensed mortgage loan originator.

5. Based on these statutes, a broker cannot provide loan modification services without a mortgage loan originator license endorsement. Therefore, when respondent offered loan modification services to J.D. and M.D., he was acting in his capacity as both a real estate broker and a mortgage loan originator.

Validity of the Agreement

6. Respondent contended at the hearing and in his closing brief that the Agreement is invalid because it does not contain his signature. This argument is not persuasive.

7. Under the Agreement in this case, respondent, doing business through iMPAX, contracted with J.D. and M.D. to provide loan modification services for \$795. Thus, the Agreement contains all the essential elements of a contract, namely, "(1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration." (Civ. Code, § 1550; *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 53.)

8. Although the Agreement admitted into evidence does not contain the signatures of the parties, under California contract law, it is well settled that for a written contract to be valid, it need not necessarily be signed by the parties to be bound. (*Western Helicopter Operations v. Nelson* (1953) 118 Cal.App.2d 359, 367.) In a line of cases, courts have held that a contract not signed by all parties is valid unless it is shown, either by parole or express condition, that the contract was not intended to be complete until all parties had signed. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1365; *Angell v. Rowlands* (1978) 85 Cal.App.3d 536, 542, citing *Cavanaugh v. Casselman* (1891) 88 Cal. 543, 515.)

9. Here, the Agreement does not contain any express provision that it is operative only when signed by both parties. J.D. testified credibly that he signed the Agreement on February 10, 2015, returned the signed copy to respondent, and gave him a \$795 check as payment for the 2015 loan modification. Even though respondent may not have signed the Agreement, he accepted the \$795 payment from J.D. and M.D. Respondent also evidenced his acceptance of the Agreement when he wrote the September 9, 2015 email apologizing for his lack of response to J.D.'s phone calls and requesting additional income and mortgage information from J.D. Thus, respondent's conduct indicated that he had accepted the Agreement, and indeed, both parties acted in reliance on the Agreement. As the Court of Appeal held in *Dallman Supply Co. v. Smith-Blair, Inc.* (1951) 103 Cal.App.2d 129, 132, the

receipt and acceptance by one party of a contract that is signed only by the other party binds the acceptor, as well as the signer, to the terms of the contract. For the foregoing reasons, the Agreement in question is valid.

Causes for Discipline: Respondent's Real Estate Broker License

10. Cause exists, as set forth in Factual Findings 4 to 19, to discipline respondent's real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), and based on respondent's:

(a) contract for an advance fee for soliciting lenders on behalf of borrowers or performing services for borrowers in connection with loans to be secured directly or collaterally by lien on real property, before the borrower becomes obligated to complete the loan (in violation of Business and Professions Code section 10085.5);

(b) offer to perform a loan mortgage modification for an advance fee (in violation of Business and Professions Code section 10085.6);

(c) failure to deposit the advance fee collected from J.D. and M.D. into a trust account with a bank or other recognized depository (in violation of Business and Professions Code section 10146);

(d) failure to retain for three years copies of all listing, deposit receipts, canceled checks, trust records, and other documents executed by him or obtained by him in connection with any transactions for which a real estate broker license is required (in violation of Business and Professions Code section 10148);

(e) failure to apply for a fictitious business name license as the owner/CEO of iMPAX (in violation of Business and Professions Code section 10159.5); and

(f) doing business as iMPAX and performing activities for which a license is required under the Real Estate Law, without a fictitious name license (in violation of California Code of Regulations, title 10, section 2731).

11. Cause does not exist to discipline respondent's real estate broker license pursuant to Business and Professions Code section 10177, subdivision (d), in conjunction with Civil Code sections 2944.7 and 2945.4. Civil Code section 2944.7 prohibits any person from offering to perform a mortgage loan modification for an advance fee. Civil Code section 2945.4 prohibits a mortgage foreclosure consultant, as defined by Civil Code section 2945.1, from charging any compensation until after he has fully performed each and every service he has contracted to perform. However, pursuant to Business and Professions Code sections 10177, subdivision (d), the Bureau may suspend or revoke the license of a real estate licensee on the grounds that he "[w]illfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) of Part 2 or the rules and regulation of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1

(commencing with Section 11000) of Part 2.” The statute does not include violations of the Civil Code as grounds for discipline against the license. Therefore, respondent is not subject to discipline pursuant to Business and Professions Code section 10177, subdivision (d), based on any violations of the Civil Code.

Causes for Discipline: Respondent's Mortgage Loan Originator License Endorsement

12. Cause exists, as set forth in Factual Findings 4 to 19, to discipline respondent's mortgage loan originator license endorsement pursuant to Business and Professions Code section 10166.051, subdivision (b), for failure to meet the requirements of Business and Professions Code section 10166.05, subdivision (c). Business and Professions Code section 10166.05, subdivision (c), requires the endorsement holder to “demonstrate such financial responsibility, character, and general fitness as to command the confidence of the community and warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purpose of this article.” Here, respondent offered to perform a loan modification for J.D. and M.D. for an advance fee, failed to place the advance fee into a trust account, and failed to retain records of the 2015 loan modifications for three years. Moreover, respondent's denial, during the Bureau's investigation and at the hearing, that the \$795 payment he received from J.D. and M.D. was an advance fee for the 2015 loan modification was dishonest. Thus, respondent has not demonstrated character and fitness showing that he would operate honestly and fairly as a mortgage loan originator.

13. Cause exists, as set forth in Factual Findings 4 to 19, to discipline respondent's mortgage loan originator license endorsement pursuant to California Code of Regulations, title 10, section 2945.1, which provides that discipline against a real estate license may be cause for the revocation and/or suspension of the real estate licensee's mortgage loan originator license endorsement. As set forth in Legal Conclusion 10, respondent's real estate broker's license is subject to discipline, thereby establishing the cause for discipline against his mortgage loan originator license endorsement.

14. Cause does not exist to revoke or suspend respondent's mortgage loan originator license endorsement pursuant to Business and Professions Code section 10166.051, subdivision (a), which provides that the Bureau may suspend, revoke, or restrict a mortgage loan originator license endorsement for violations of Article 2.1 of the Real Estate Law (Bus. & Prof. Code §§ 10166.01 *et seq.*) or any rules or regulations adopted thereunder. The alleged violations contained in the First Amended Accusation did not fall under Article 2.1 of the Real Estate Law, relating to the secure and fair enforcement for mortgage license, or any rules or regulations adopted thereunder.

Degree of Discipline

15. In this case, respondent has violated several provisions of the Real Estate Law and the rules and regulations adopted thereunder. These violations occurred in connection with his offer to negotiate the terms of a residential mortgage loan application and therefore are primarily related to respondent's mortgage loan originator license endorsement.

Consequently, protection of the public interest requires the revocation of respondent's mortgage loan originator license endorsement.

16. With respect to respondent's real estate broker's license, respondent has been a real estate licensee for approximately 15 years, and there is no evidence of any prior discipline. Although the nature of the violations that respondent committed in this case is serious, he refunded the \$795 to J.D. and M.D. and paid them an additional \$100 as restitution. Under these circumstances, the public will be adequately protected if respondent is allowed to apply for a restricted salesperson license, as the license requires respondent to be supervised in his performance of activities that require the license, the respondent's supervisor must be notified of the decision in this matter, and the respondent's supervisor must exercise close supervision over respondent.

Cost Recovery

17. Under Code section 10106, the Bureau may recover costs "not to exceed the reasonable costs of the investigation and enforcement" of this matter. As set forth in Factual Finding 20, the costs of investigation and enforcement amount to \$4,613.30. These costs are reasonable.

18. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Code section 10106. In so doing, however, the Supreme Court directed the administrative law judge and the licensing agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, a licensing agency must not assess the full costs where it would unfairly penalize a licensee who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the licensing agency must consider a licensee's subjective good faith belief in the merits of his or her position and whether the licensee has raised a colorable challenge; the licensing agency must consider a licensee's ability to pay; and the licensing agency may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Id.* at p. 45.)

19. In this case, taking into account his monthly income of \$3,000, respondent has a limited ability to pay. Therefore, a 50 percent reduction from the actual costs is appropriate. The reasonable costs of investigation and enforcement will be reduced to \$2,306.65.

ORDER

All licenses and licensing rights of respondent Salvatore Machio under the Real Estate Law are revoked; provided however a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5, if respondent makes application therefore 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 Business and Professions Code section 10156.6:

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

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

4. Respondent shall obtain from his present broker, or 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.

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

6. Respondent shall, prior to and as a condition of the issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in subdivision (a) of Section 10170.5 of the Business and Professions Code. Proof of

satisfaction of this requirement includes evidence that respondent has successfully completed the trust fund account and handling continuing education course within 120 days prior to the effective date of the Decision in this matter.

7. Respondent shall pay costs of \$2,306.65 to the Real Estate Commissioner in the form of a cashier's check or certified check within 30 days of the effective date of this Decision, or on a payment plan by agreement with the Commissioner.

DATED: August 30, 2017

DocuSigned by:
Ji-Lan Zang
057B808F0CC014EC...

JI-LAN ZANG
Administrative Law Judge
Office of Administrative Hearings