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**FILED**

JUL 26 2019

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

DEPT. OF REAL ESTATE  
By *Argul Hanner*

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In the Matter of the Accusation of:	)	DRE No. H-40892 LA
	)	
SCOTT JAMES WEIDENHAMMER,	)	OAH No. 2018020306
	)	
Respondent.	)	

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DECISION

The Proposed Decision dated April 8, 2019, 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 accusation herein filed on February 14, 2018, against SCOTT JAMES WEIDENHAMMER, is DISMISSED.

This Decision shall become effective at 12 o'clock noon on AUG 14 2019.

IT IS SO ORDERED July 25, 2019.

ACTING REAL ESTATE COMMISSIONER

*Daniel J. Sandri*  
DANIEL SANDRI

BEFORE THE  
DEPARTMENT OF REAL ESTATE<sup>1</sup>  
STATE OF CALIFORNIA

In the Matter of the Accusation of:

LANCE RICHARD HALL;

AMERICO MORTGAGE CORPORATION;

and

SCOTT JAMES WEIDENHAMMER,  
designated officer of Americo Mortgage  
Corporation,

Respondents.

Case No. H-40892 LA

OAH No. 2018020306

**PROPOSED DECISION**

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on February 4, 2019, in Los Angeles, California.

Julie L. To, Real Estate Counsel, represented Maria Suarez (complainant), a Supervising Special Investigator of the State of California.

Respondent Scott James Weidenhammer (respondent) was not present and not represented at the hearing.<sup>2</sup>

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<sup>1</sup> The Bureau of Real Estate became the Department of Real Estate (Department) on July 1, 2018.

<sup>2</sup> Respondents Americo Mortgage Corporation (Americo) and Lance Richard Hall are no longer parties to this proceeding. The Department revoked Americo's real estate broker license and accompanying license rights on May 14, 2018, pursuant to a Default Order entered on March 14, 2018. Lance Richard Hall executed a Stipulation and Agreement resolving the charges in the Second Amended Accusation; as of the date of the administrative hearing, the Stipulation and Agreement was pending for approval before the Commissioner of the Department.

At the administrative hearing, complainant submitted documentary evidence; no testimony was offered. The record was closed and the matter was deemed submitted on February 4, 2019.

On February 15, 2019, on her own motion, the Administrative Law Judge ordered the record in the matter to be reopened until March 12, 2019, for the submission of additional evidence to support the allegations in the Second Amended Accusation, and for briefing by complainant. Complainant timely filed a Post-Hearing Brief, marked for identification only as Exhibit 17, but did not file any new evidence.<sup>3</sup> In her Post-Hearing Brief, complainant withdrew the allegations contained in paragraph 41 of the Second Amended Accusation, which charge respondent with violating Business and Professions Code sections 10176, subdivision (i), and 10177, subdivision (j). (Ex. 17, p. 4, lines 13–14.)

The record was closed and the matter deemed submitted on March 12, 2019.

### SUMMARY

The Second Amended Accusation seeks to discipline respondent's real estate broker license based on his alleged violations of Business and Professions Code (Code) section 10137 (unlawful payment of compensation) in connection with payments allegedly made to respondent Lance Richard Hall, and sections 10176, subdivision (i), and 10177, subdivision (j) (engaging in conduct constituting fraud or dishonest dealing) in connection with the sale and transfer of certain residential property. Complainant subsequently withdrew the allegations specifically charging violations of Code sections 10176, subdivision (i), and 10177, subdivision (j), although complainant did not withdraw general allegations that respondent engaged in fraudulent or dishonest dealing. Complainant relied solely on respondent's deposition testimony in a civil proceeding and certain transactional documents to prove the allegations in the Second Amended Accusation. Complainant's evidence was insufficient to establish clearly and convincingly that respondent violated Code section 10137 or engaged in fraud or dishonest dealing.

### PRELIMINARY MATTERS

At the hearing, complainant requested that respondent's testimony in a deposition taken in the case of *Belden v. Hall*, case number 30-2016-00868146-CU-PN-CJC (Sup. Ct. Orange County) (*Belden*) be admitted into evidence as Exhibit 10. The Administrative Law Judge reserved ruling on complainant's request.

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<sup>3</sup> Complainant attached a copy of the Deed in Lieu of Foreclosure to the Post-Hearing Brief as Exhibit 17; however, the document had already been admitted into evidence as Exhibit 14 at the administrative hearing.

Respondent was deposed on November 11, 2016, and January 24, 2017, and the transcripts of those proceedings along with exhibits are contained in two volumes, marked as Exhibit 10 at the hearing. Each volume is signed by the court reporter who heard and transcribed the testimony, and the court reporters attested that their transcriptions were true and accurate. Respondent was not a party to the *Belden* litigation, and he was not represented by counsel at his deposition. He did not sign any declarations attesting to the accuracy of his testimony or submit any errata sheets. (Ex. 17, p. 11.) Nonetheless, respondent's statements during his deposition constitute party admissions because they have sufficient indicia of reliability in light of the court reporters' declarations. (Evid. Code, § 1220; Code Civ. Proc., § 2025.620; Gov. Code, § 11513, subd. (b).) Accordingly, complainant's request to admit the two deposition transcripts into evidence as Exhibit 10 is granted.<sup>4</sup>

## FACTUAL FINDINGS

### *Jurisdiction*

1. Complainant filed the Second Amended Accusation in her official capacity on February 14, 2018, seeking disciplinary action against respondent's real estate licenses and license rights under the Real Estate Law.
2. On February 14, 2018, complainant served respondent with the Second Amended Accusation, Statement to Respondent, Notice of Defense, and copies of discovery provisions of the Administrative Procedure Act, by regular United States (U.S.) mail and by certified mail at his then address of record at 25 Pacifica, Irvine, California (the Irvine address).
3. On March 6, 2018, respondent served a Notice of Defense, requesting a hearing. In the Notice of Defense, respondent lists his mailing address as the Irvine address.
4. On March 13, 2018, complainant served respondent, by U.S. mail at the Irvine address, with the Amended Notice of Hearing on Accusation, which noted a hearing date of July 31, 2018, at OAH offices in Los Angeles. On September 10, 2018, complainant served respondent, by U.S. mail at the Irvine address, with a Notice of Continued Hearing on Accusation (Notice of Continued Hearing), which noted a new hearing date of February 4, 2019, at OAH offices in Los Angeles. The Notice of Continued Hearing was returned to complainant by the U.S. Post Office as undeliverable; affixed to the returned envelope was a

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<sup>4</sup> The two volumes of deposition transcripts may not reflect the entirety of respondent's deposition testimony. Page 296 of Volume II of respondent's deposition testimony suggests that the attorneys for the parties and respondent contemplated at least an additional day of deposition testimony. (Ex. 10, Vol. II, p. 296.) Complainant's Post-Hearing Brief indicates that the Department does not possess any additional transcripts of respondent's deposition testimony, but does not state whether such transcripts exist. (Ex. 17, pp. 12-13.)

label identifying a forwarding address for respondent at 23101 Lake Center Drive, Suite 320, Lake Forest, California 92630-6819 (Lake Forest address). Complainant then served respondent with the Notice of Continued Hearing by U.S. mail at the Lake Forest address on September 28, 2018.

5. Respondent failed to appear at the February 4, 2019 hearing at the OAH Los Angeles offices, and he was not otherwise represented. Compliance with Government Code sections 11504 and 11509 having been established, this matter proceeded as a default against respondent pursuant to Government Code section 11520.

### *Background*

6. Respondent obtained a California real estate salesperson license on February 10, 1990. On May 6, 2006, respondent obtained California real estate broker license number 01064218 (REB license). Respondent also obtained a National Mortgage Loan Originator's endorsement on December 28, 2010. (Exhibit 2.) Respondent's REB license expired on December 16, 2018, and, as of the hearing date, had not been renewed.<sup>5</sup> While licensed, respondent was in the business of buying, rehabilitating, and flipping residential real estate. (Ex. 10, Vol. I, p. 19.) Respondent has no history of prior license discipline.

7. Respondent was the owner and designated officer of record of respondent Americo from September 8, 2006, until September 7, 2018. (Ex. 10, Vol. II, p. 213.) Americo was a mortgage brokerage and held a California corporate real estate broker license from September 8, 2006, until May 14, 2018, when its license was revoked.

8. Respondent also served as the Chief Executive Officer, Chief Financial Officer, and designated agent for process for Silver Rock Advisors, Inc. (Silver Rock), a California real estate advisory firm. Silver Rock was an active corporation as of March 23, 2017. (Ex. 7.)

9. On July 29, 2013, respondent Lance Richard Hall (Hall), a California real estate salesperson acting under a restricted license, entered into an Independent Contractor Agreement with the Realty One Group (ROG), a real estate broker. The contract acknowledged the agency relationship between Hall and ROG and made clear that ROG was the broker and transaction principal in any real estate transaction in which Hall participated. (Ex. 6.) By associating his real estate salesperson license with ROG, ROG became Hall's employing real estate broker of record, under which Hall was licensed to engage in certain real estate acts pursuant to California real estate law.

10. The Second Amended Accusation charges respondent with violations of Code sections 10137 (unlawful employment or payment of compensation) in connection with

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<sup>5</sup> Notwithstanding the expiration of respondent's REB license, respondent retains the right to renew his license for two years pursuant to Code section 10201. Accordingly, the Department retains jurisdiction over respondent pursuant to Code section 10103.

alleged unlawful payments he made to Hall, and 10176, subdivision (i), and 10177, subdivision (j) (engaging in conduct constituting fraud or dishonest dealing) in connection with the sale and transfer of a residential property. In the Post-Hearing Brief, complainant withdraws the allegations contained in paragraph 41 of the Second Amended Accusation, which charge respondent with violating Code sections 10176, subdivision (i), and 10177, subdivision (j). (Ex. 17, p. 4, lines 13 – 14.) However, complainant has not withdrawn her general allegation that respondent engaged in fraudulent or dishonest dealing. (Second Amended Accusation, ¶ 40.)

### *Respondent's Alleged Misconduct*

#### THE NEVADA TRANSACTION

11. On November 25, 2013, respondent, as Chief Executive Officer of Silver Rock, and Hall executed an Independent Contractor Agreement (Nevada Agreement). The Nevada Agreement provided that Hall would “receive any brokerage fee or commission earned and received during the term of [the Nevada] Agreement resulting from [Hall’s] solicitation, negotiating, and placing transactions by or on behalf of [Silver Rock], net of fees or expenses incurred by third party contractors,” pursuant to a compensation schedule set forth therein. (Ex. 8.) The compensation schedule stated that Hall would be paid “all net commissions earned for the acquisition and sale of” a certain Las Vegas, Nevada residential property and 30 percent of all net profits earned from the final sale of the Las Vegas property. (*Ibid.*) The Nevada Agreement makes no mention of ROG, and complainant offered no evidence as to ROG’s knowledge of the existence or terms of the agreement.

12. Within a month after signing the Nevada agreement, Americo opened escrow to purchase the Nevada property, based on Hall’s recommendation. Hall represented the seller in the transaction; Americo was represented by a separate Nevada real estate agent. (Ex. 10, Vol. I, pp. 19, 28; Vol. II, p. 133.) The purchase was financed in part by the seller. (*Id.*, Vol. I, p. 33.) There is no evidence as to whether the seller was a California resident at the time of the sale.

13. Respondent testified he paid a commission directly to Hall, a portion of which was paid through escrow and the remainder by a note payable at the close of escrow when the seller had been repaid. (Ex. 10, Vol. 1, pp. 28-29.) Respondent acknowledged that the commission was not a typical real estate commission; the commission was paid because Hall had represented the seller, located the property, and negotiated financing. (*Id.*, Vol. I, pp. 31-34.) Respondent was unable to recall the amount of his payment to Hall. (*Id.*, Vol. I, p. 27.) According to respondent, he made no other payments to Hall in connection with the Nevada property because there were never any profits associated with the property, and the property ultimately went into foreclosure. (*Id.*, Vol. I, pp. 26, 34.) As of January 24, 2017, respondent’s second day deposition of testimony, the Nevada property remained in foreclosure. (*Id.*, Vol. II, p. 137.)

14. According to respondent's deposition testimony, the Nevada purchase "started" in December 2013, and closed in February 2014. (Ex. 10, Vol. II, p. 133.) Respondent further testified that a portion of Hall's commissions was "paid up front," presumably upon the opening of escrow in December 2013, and the remainder when the respondent paid off the seller's loan, which respondent stated was either within one year or at an unspecified trigger point. (*Id.*, Vol. I, pp. 29, 32.)

15. Complainant offered no evidence documenting any commission payment or any other payments by respondent to Hall in connection with the Nevada property. At his deposition, respondent was not asked about the exact timing or nature of his payments to Hall respecting the Nevada property. As a result, the exact nature and dates of such payments are absent from the evidentiary record.

#### THE LAGUNA BEACH TRANSACTIONS

16. Sometime in September of 2014, Hall informed respondent about three residential properties that were for sale in Laguna Beach, California, referred to herein as Seaview, Thalia, and Seacliff. Respondent expressed interest in purchasing the three properties to remodel and then sell for a profit. The sale of Seaview included plans for remodeling.

17. In September 2014, respondent purchased the Thalia and Seacliff properties to remodel and sell. The purchase of each property closed in October 2014. (Ex. 10, Vol. I, pp. 35-36; Vol. II, pp. 133-134.) Hall represented respondent and earned commissions on the purchases. Complainant offered no evidence regarding the payee, nature, or amount of the commissions. Complainant also failed to offer any evidence documenting any other payment made by respondent or Americo to Hall in connection with these purchases.

18. On September 26, 2014, Americo purchased Seaview for \$1.3 million. (Ex. 10, Vol. II, p. 149.) The deed reflecting the purchase was recorded on October 8, 2014. Hall represented Americo in the purchase of Seaview. Complainant did not offer the purchase or escrow documents into evidence; it is therefore not known whether ROG was identified or paid as the broker for the purchase. According to respondent's deposition testimony, he paid Hall a commission through escrow on behalf of Americo. (*Id.*, Vol. I, p. 74.) Respondent, however, was not questioned as to whether such payment was made to Hall directly or to ROG, or whether respondent or Americo made any other payments to Hall.

19. Soon after the purchase of Seaview, Americo obtained loans totaling \$1,756,250 from five lenders that were secured by respondent's interest in Seaview and potential profits from its expected sale.

A. Three of the loans were recorded as Deeds of Trust and Assignment of Rents (DTARs): a \$1,031,250 loan from Anchor Loans, Inc. (Anchor Loans) on October 8, 2014; a \$350,000 loan from Financial Lifestyle Strategies Defined Benefit Plan (Financial

Lifestyle) on October 9, 2014; and a \$125,000 loan from Advantage Equities on October 15, 2014. (Ex. 10, Vol. I, p. 79, 80; Ex. 11.)

B. Respondent also obtained two loans totaling \$250,000 from ABD, LLC and the Giovinazzo Family Real Estate Investments, LLC (collectively, Giovinazzo Loans or Giovinazzo Lenders), which were reflected in two documents, each entitled "Deed of Trust, Assignment of Rents and Leases, Security Agreement And Fixture Filing" and dated October 7, 2014 (Deed of Trust). (Ex. 10, Vol. II, Dep. Exs. 21, 22<sup>6</sup>.) The two Deeds of Trust created first priority liens on Seaview. (*Id.*, Vol. II, Dep. Ex. 21, p. 3; Dep. Ex. 22, p. 3.) According to respondent, the proceeds for these two loans were not used for the construction at Seaview; rather, they were used for Americo's general administrative costs as well as for remodeling Thalia and Seachiff. (*Id.*, Vol. II, p. 281.) Respondent's deposition testimony regarding the recording of these two Deeds of Trust was inconsistent; he first testified he did not know if the Deeds of Trust had been recorded (*Id.*, Vol. II, p. 156), but he later testified the deeds were recorded at "some time" but he could not recall when. (*Id.*, Vol. II, p. 158.) Respondent further testified that he had expected that the note holders would have recorded the Deeds of Trust. (*Id.*, Vol. II, p. 284.) Complainant offered no evidence to support the assertion in the Post-Hearing Brief that the Deeds of Trust for the Giovinazzo Loans were not recorded. (Ex. 17, p. 9.)

C. None of the documentation for the five loans, other than the Deeds of Trust and DTARs securing the loans, was made a part of the evidentiary record. As a result, the terms of the loans, including respondent's repayment obligations and the timing of such obligations, are not known.

20. On October 14, 2014, after Americo's purchase of Seaview and its securing of financing, Hall and respondent executed an amendment to the Nevada Agreement (Amendment). (Ex. 9.) The Amendment makes clear it applies to all real estate transactions involving respondent and any of his companies, including Silver Rock and Americo. The Amendment provides that Hall will represent respondent in the purchase and re-sale of the three Laguna Beach properties, including Seaview. As compensation for finding the properties and representing respondent in the buy and sell transactions, Hall, in addition to his regular commission, would earn 30 percent of the net profits upon the sale of each of the properties. Hall also agreed to share with respondent 30 percent of the buy-side and supply-side commissions Hall received when respondent or any of his entities purchased or sold the properties. According to the Amendment, Hall would receive the exclusive listing for each of the properties for 30 days after purchase in order to procure a flip buyer before respondent began remodeling. If Hall could not locate a flip buyer, the property would be delisted and removed from the market to allow time for remodeling. After completion of the remodel, Hall would receive the exclusive listing agreement for each property at five percent

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<sup>6</sup> The exhibits accompanying and made a part of respondent's deposition transcripts are considered evidence in this proceeding if they were authenticated by respondent at his deposition. Respondent authenticated the Deeds of Trust for the Giovinazzo Loans. (Ex. 10, Vol. II, pp. 155-157.)



commission (four percent for Seacliff) for a period of 90 days with the possibility of time extensions. In addition, Hall would contribute "in raising capital dollars for the remodel of these acquired properties and contribute in the remodel efforts, as part of his participation in the net profits from the sale of these homes." Complainant did not offer any evidence regarding ROG's knowledge of the Amendment.

21. On October 20, 2014, Americo and ROG executed a residential listing agreement (RLA) for Seaview giving ROG the exclusive right to sell Seaview and listing a sales price of \$1,550,000 for the property. Respondent signed the RLA on behalf of Americo, and Hall signed as the agent for ROG. The RLA provides that ROG's commission for the sale of Seaview is 5 percent. (Ex. 12.) The Seller's Advisory accompanying the RLA provides that the seller "must affirmatively disclose to the buyer, in writing, any and all known facts that materially affect the value or desirability" of the property being sold, "whether or not asked about such matters by the buyer, any broker, or anyone else." (Ex. 12, p. 6.) There is no evidence in the record whether Hall or ROG was aware of any encumbrances on the Seaview property at the time the RLA was signed.

22. At some point after execution of the RLA, Everest Escrow, the escrow agent retained by Hall and ROG in connection with the sale of Seaview, requested title insurance for Seaview. In response, Tior Title prepared a Preliminary Report, with an effective date of December 11, 2014, identifying certain encumbrances on the property as exceptions to coverage. (Ex. 13.) Specifically, the Preliminary Report identifies the DTARs recorded by Anchor Loans, Financial Lifestyle, and Advantage Equities as encumbrances on the Seaview property, but the Preliminary Report does not include the Deeds of Trust reflecting the Giovinazzo Loans. The Preliminary Report notes that exceptions to coverage will also include unrecorded loans, and indicates that before providing coverage, the company requires the seller to certify before the close of escrow that there are no other unrecorded encumbrances against the property. Respondent testified he did not recall having any discussions with Hall about the Preliminary Report. (Ex. 10, Vol. I, p. 95.)

23. On December 23, 2014, respondent on behalf of Americo accepted a request to purchase and to remodel the Seaview property for \$1,850,000. The purchase price exceeded the amount of the liens against the property by \$93,750. (Ex. 10, Vol. I, p. 102, Dep. Ex. 13.) Hall represented both the buyers (Seaview Buyers) and Americo in the transaction; respondent did not act as a broker or agent in the sale. (*Id.*, Vol. I, p. 105.) According to his testimony, respondent paid commissions on the sale to Hall, although the Request to Purchase Agreement (Seaview Purchase Agreement)<sup>7</sup> lists ROG as both the listing agent and

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<sup>7</sup> The Post-Hearing Brief states a copy of the Seaview Purchase Agreement was not offered into evidence at the administrative hearing because the Seaview Buyers, who had included the Seaview Purchase Agreement as part of their consumer complaint package to the Department, had withdrawn their complaint package before the hearing. (Ex. 17, p. 8.) However, a copy of the Seaview Purchase Agreement was made an exhibit to respondent's deposition, and respondent authenticated the document. (Ex. 10, Vol. 1, p. 102.)

selling agent. (*Id.*, Vol. I, Ex. 13; p. 76.) No documentation was provided reflecting the dates, amounts, or any other details regarding these commission payments.

24. According to the Seaview Purchase Agreement, close of escrow was to occur on completion of Americo's remodel of Seaview, which was contemplated to be in 90 days. The Seaview Purchase Agreement also requires the seller to provide the buyers a Preliminary Report identifying encumbrances on the property and to disclose to the buyers "all matters known to Seller affecting title, whether of record or not within seven days after acceptance of the offer." (Ex. 10, Vol. I, Ex. 13.) Under the Seaview Purchase Agreement, failure to provide such information constitutes grounds for cancellation.

25. In the Addendum accompanying the Seaview Purchase Agreement, the Seaview Buyers acknowledge that Seaview is still under construction and that the remodel of the property has yet to be completed. The Addendum further provides that respondent will reduce the Seaview sales price by \$25,000 if the Seaview Buyers pay \$400,000, on a non-refundable basis, within 30 days of acceptance of the offer. The \$400,000 would consist of release of the \$100,000 the Seaview Buyers had already paid in escrow with the Thalia purchase (the purchase of which was cancelled) plus another \$300,000. The Addendum indicates that the \$100,000 payment would apply to the purchase price; the Addendum is silent as to whether the \$300,000 payment would apply to the purchase price. The Addendum also makes clear that the final closing date is flexible and is contingent on completion of the remodel so the buyers will be able to secure financing for the purchase.

26. Respondent did not inform the Seaview Buyers, and he had no recall as to whether he had informed Hall, about the Giovinazzo Loans. (Ex. 10, Vol. I, p. 99; Vol. II, p. 281.) However, respondent testified that it was his understanding that Hall knew about the Giovinazzo Loans. (Ex. 10, Vol. I, p. 99; Vol. II, pp. 158; 281.) There is no evidence that either Hall or the Seaview Buyers requested any information regarding any encumbrances on the Seaview property or whether the Preliminary Report was ever shared with the Seaview Buyers.

27. The Seaview Buyers wired \$325,000 to Americo in late January and February of 2015 for remodeling costs. (Ex. 10, Vol. I, p. 120; Vol. II, pp. 169-170.) The payments were made outside of escrow; however, it was respondent's expectation that the funds were considered part of the Seaview Buyers' down payment and would apply to the purchase price. (*Id.*, Vol. II, p. 268.) There is no allegation or any evidence that respondent or Americo misused the wired funds. In addition, no evidence was offered to support paragraph 25 of the Second Amended Accusation that the payments were made at respondent's request. The Second Amended Accusation cites to the Seaview Buyers' complaint in the *Beldin* litigation to support the allegation; allegations contained in a pleading, however, do not constitute evidence. (See *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 Cal.App.4th 220, 241, *as modified* (Dec. 21, 2006) ["allegations in a complaint do not . . . constitute evidence of the truth of the allegations made therein"].) In addition, the allegation is contradicted by respondent's deposition testimony that he did not have any communications with the Seaview Buyers either prior or subsequent to the opening of escrow for Seaview;

according to respondent's testimony, all communications between respondent and the Seaview Buyers, including the request for payments from the Seaview Buyers were handled by Hall. (Ex. 10, Vol. I, p. 90; Vol. II, pp. 171, 257.)

28. By the summer of 2015, the costs of remodeling Seaview were more than twice respondent's initial projections, and respondent concluded that Americo would have to invest more money than it had to close escrow. (Ex. 10, Vol. I, p. 56; Vol. II, pp. 161-162.) Respondent testified that even though Americo had met its payment obligations under the Giovinazzo Loans, the Giovinazzo Lenders recognized that Americo lacked adequate funds to complete the Seaview construction and indicated they wanted to call in the Giovinazzo Loans. (*Id.*, Vol. II, p. 287.) Americo did not have sufficient funds to repay the Giovinazzo Loans because it was already in foreclosure proceedings for the Thalia and Seacliff properties. (*Id.*, Vol. II, p. 284.)

29. Respondent testified that he resisted the Giovinazzo Lenders' efforts to foreclose on Seaview because he knew that foreclosure would put Americo in breach of his contract to sell the property to the Seaview Buyers. (Ex. 10., Vol. II, p. 279.) According to respondent, he ultimately came to believe he had no other option except foreclosure in light of the Giovinazzo Lenders' threats. (*Id.*, Vol. II, pp. 280-281; 288.) Rather than go through lengthy and costly foreclosure proceedings, which respondent believed would stop the Seaview remodeling indefinitely, respondent agreed to expedite foreclosure. Based on the Giovinazzo Lenders' stated intentions to work with the Seaview buyers to ensure completion of the project and to not impede construction, Americo consequently executed a Deed in Lieu of Foreclosure on July 17, 2015, to the Giovinazzo Lenders. (*Id.*, Vol. II, pp. 280, 288-289; Ex. 14.) Respondent testified he did not tell the buyers about the transfer, but he told Hall about the transfer immediately after it occurred. (*Id.*, Vol. II, pp. 288-289.)

30. Escrow never closed on Americo's sale of Seaview to the Seaview Buyers because of the transfer. As a result, no final Title Report was ever issued reflecting the encumbrances on the property. Respondent testified the final Title Report would have reflected the Giovinazzo Loans because he expected that the Deeds of Trust securing those loans would have been recorded by that time. (Ex. 10, Vol. II, p. 284.)

31. Complainant offered no evidence of any payments other than commissions that were made by respondent or Americo to Hall in connection with the Laguna Beach properties. There was no evidence that respondent paid Hall any profit participation payments with respect to sale of any of the three Laguna Beach properties. Respondent testified he did not earn any profits with respect to the three properties, and as of January 24, 2017, respondent's second day of deposition, the three Laguna Beach properties remained in foreclosure. (Ex. 10, Vol. II, p. 138)

32. Complainant offered no evidence that respondent's alleged failure to disclose the Giovinazzi Loans to Hall or to the Seaview Buyers somehow induced the Seaview Buyers to purchase the Seaview property or to pay respondent \$400,000 after escrow had opened. Nor did complainant offer evidence that the Seaview Buyers were in any way

harmful by respondent's actions. Complainant's allegation that the Seaview Buyers were forced to pay \$100,000 for a quitclaim deed for the property, with encumbrances, as a result of respondent's transfer of the Seaview property is likewise unsupported by any evidence adduced at the hearing. (Second Amended Accusation, ¶ 30.)

### Costs

33. The Department incurred \$8,533.60 in investigative costs and \$1,699.90 in enforcement costs in connection with this matter, a total of \$10,233.50. At hearing, complainant asserted that one third of the total costs, \$3,411.17, are allocable to respondent. The costs incurred are reasonable.

### LEGAL CONCLUSIONS

1. Complainant bears the burden of proving that the allegations in the Second Amended Accusation are true. (Evid. Code, § 115.) The standard of proof in an administrative action seeking to suspend or revoke a real estate license is clear and convincing evidence. (*The Grubb Co., Inc. v. Dept. of Real Estate* (2011) 194 Cal.App.4th 1494, 1505.) Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; it requires sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

2. Pursuant to Code section 10101, an accusation by the Department "shall be filed not later than three years from the occurrence of the alleged grounds for disciplinary action unless the acts or omissions with which the licensee is charged involves fraud, misrepresentation or a false promise in which case the accusation shall be filed within one year after the date of discovery by the aggrieved party of the fraud, misrepresentation or false promise or within three years after the occurrence thereof, whichever is later, except that in no case shall an accusation be filed later than 10 years from the occurrence of the alleged grounds for disciplinary action." Since the Second Amended Accusation in this case was filed on February 14, 2018, the statute operates to preclude non-fraud related grounds for disciplinary action that occurred prior to February 14, 2015.<sup>8</sup>

3. A California corporate real estate broker operates "only through and because of" the license of its designated officer." (*Amvest Mortgage Corp. v. Antt* (1997) 58 Cal.App.4th 1239, 11243.) "The designated officer/broker, not the corporate entity itself, is charged with the responsibility to assure corporate compliance with the real estate law." *Norman v. Dep't. of Real Estate* (1979) 93 Cal.App.3d 768, 776-77 ["Such a real estate broker must reasonably be charged with responsibility for the corporate compliance with the Real Estate Law, for otherwise with no such fixed responsibility, the statutory purpose would

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<sup>8</sup> The Second Amended Accusation was the first pleading to name respondent in the action.

be frustrated.” (internal citation omitted)].) Accordingly, as the designated officer of record for Americo, and at all relevant times its only employee, respondent is responsible for the Americo’s compliance with the Real Estate Law. (Factual Finding 7.)

*Alleged Violation of Section 10137*

4. The Second Amended Accusation alleges that respondent violated Code section 10137 because he, either directly or on behalf of Americo, paid unlawful compensation to Hall for certain real estate licensed activities while Hall was employed by or acting as the agent of ROG. (Second Amended Accusation, ¶ 36.) Specifically, complainant charges that “the issuance of compensation [for the performance of licensed activities] by [respondent] and the receipt of such compensation by Hall are in violation of Code section 10137.” (*Ibid.*) The Second Amended Accusation does not specify the nature, date, or amounts of the allegedly unlawful payments, but rests solely on the Nevada Agreement and the Amendment, along with respondent’s deposition testimony to support the charge. As set forth in Factual Findings 11 through 18, 20 through 21, 23, and 31, and Legal Conclusions 5 through 9, *infra*, complainant has not established by clear and convincing evidence that respondent violated Code section 10137 by making payments under either the Nevada Agreement or the Amendment.

5. Code Section 10137 provides as follows:

It is unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesperson licensed under the broker employing or compensating him or her, or to employ or compensate, directly or indirectly, any licensee for engaging in any activity for which a mortgage loan originator license endorsement is required, if that licensee does not hold a mortgage loan originator license endorsement; provided, however, that a licensed real estate broker may pay a commission to a broker of another state. No real estate salesperson shall be employed by or accept compensation for activity required a real estate license from any person other than the broker under whom he or she is at the time licensed. It is unlawful for any licensed real estate salesperson to pay any compensation for performing any of the acts within the scope of this chapter to any real estate licensee except through the broker under whom he or she is at the time licensed. For a violation of any of the provisions of this section, the commissioner may temporarily suspend or permanently revoke the license of the real estate licensee, in accordance with the provision of this part relating to hearings.

6. Code section 10131 provides that a California real estate license is required when selling or buying real estate, offering to buy or sell real estate, soliciting prospective sellers or buyers of real estate, negotiating the purchase and sale of real estate, soliciting financing, and negotiating loans in the State of California.

7. As a preliminary matter, entry into an agreement to pay compensation to a real estate salesperson working under another broker is not sufficient by itself to constitute a violation of Code section 10137. Under the express language of the statute, an individual is barred from compensating a real estate sales agent for real estate activities, not contracting with him or her to make a payment for such activities. In addition, the mere existence of the Nevada Agreement or the Amendment does not prove that any unlawful payments were in fact made.

#### NEVADA AGREEMENT

8. Respondent's admission that he paid Hall commissions pursuant to the Nevada Agreement is not sufficient to establish a violation of Code section 10137 on several grounds. First, complainant has not demonstrated the Department has jurisdiction over payments made with respect to real estate activities conducted in Nevada relating to a Nevada property. Second, complainant has failed to establish that any payments made by respondent (or Americo) to Hall in connection with the Nevada property occurred after February 14, 2015, three years before the filing of the Second Amended Accusation. (Code, § 10101.) As set forth in Factual Finding 14, Americo acquired the Nevada property in December 2013, and closed on the sale in February 2014. Respondent further testified that he paid Hall a commission for locating, and assisting with the financing of, the property in part at the outset, and then the remainder at an unspecified later date. Complainant offered no evidence to establish that the second payment occurred after February 14, 2015. Nor did complainant establish that respondent made any additional payments to Hall in connection with the property; as the property was placed in foreclosure and never re-sold, no profit participation payments were ever made. Thus, while respondent's payments to Hall in connection with the Nevada property appear to impermissible under California law, the evidence was insufficient to establish a violation of Code section 10137.

#### AMENDMENT – LAGUNA BEACH TRANSACTIONS

9. Respondent's alleged payments pursuant to the Amendment are likewise insufficient to establish a Code section 10137 violation. Respondent's admissions in his deposition testimony that he paid Hall commissions in connection with the purchase and sale of Seaview, as well as with the purchase of the other two Laguna Beach properties, do not clearly and convincingly demonstrate that respondent actually paid Hall instead of ROG or that such payments were unlawful. Respondent was never asked if the commissions were paid to ROG, and not Hall, and the only documentation pertaining to any of the subject transactions, i.e. the Seaview RLA and Seaview purchase documents, contradict respondent's statements by reflecting that ROG, not Hall, was to receive the commissions paid with respect to Seaview's sale. In addition, there is no allegation that any of the purchase and sale

commissions were paid outside of escrow, and escrow closed for each of the three properties in October 2014, outside of the three-year statute of limitations set forth in Code section 10101. Finally, as with the Nevada property, respondent did not earn any profits with respect to any of the Laguna Beach transactions, which all went into foreclosure; as a result, respondent did not pay any profit participation payments to Hall. Complainant offered no evidence showing that respondent made any other payments to Hall in connection with these properties.

### *Allegations of Fraud and Dishonest Dealing*

10. The Second Amended Accusation alleges that respondent engaged in fraudulent or dishonest dealing in connection with the sale and transfer of the Seaview property. (Second Amended Accusation, ¶ 40.) Paragraph 40 of the Second Amended Accusation states in its entirety as follows:

[Respondent has], while engaging in the business of or acting in the capacity of a REB, willfully disregarded the Real Estate Law by engaging in fraudulent or dishonest dealing. On or about December 23, 2014, [respondent] accepted the [Seaview] Buyers' offer to purchase the Seaview property, and accepted deposits from Buyers for said property. On July 17, 2015, [respondent] transferred the Seaview property to parties outside of the December 23, 2014 transaction.

11. Complainant's allegations are insufficient to form a basis for discipline of respondent's REB license. The due process requirements of Government Code section 11503 require that, in order to find respondent culpable for any violation, the statute or regulation allegedly violated must be specifically pleaded and proved. The allegations that referenced the statutory violations alleging fraudulent or dishonest dealing were withdrawn by complainant in her Post-Hearing Brief. (Factual Finding 10.) The Second Amended Accusation alleges no other statutory or regulatory violation based on fraud or dishonest dealing. No disciplinary action therefore may be imposed based upon this claim because the Second Amended Accusation fails to set forth any statutory or regulatory provision that prohibits the alleged dishonest or fraudulent conduct. In the absence of such pleading, there is no legal basis for concluding that respondent's conduct described in paragraph 40 of the Second Amended Accusation constitutes a basis for disciplinary action.

12. Even absent the requirements of Government Code section 11503, the evidentiary record is insufficient to establish that respondent engaged in fraudulent or dishonest dealing. (Factual Findings 16 through 32.) The Second Amended Accusation suggests that respondent's fraud was based on his acceptance of deposits from the Seaview Buyers without disclosing the existence of the Giovinazzi Loans. The elements of fraud based on mere nondisclosure of information by a property seller to a buyer are the following: "(1) Nondisclosure . . . of facts materially affecting the value or desirability of the property; (2) [The seller's] knowledge of such facts and of their being unknown to or beyond the reach

of the [buyer]; (3) [The seller's] intent to induce action by [the buyers]; (4) Inducement of the [buyers] to act by reason of the nondisclosure; and (5) Resulting damages." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 738.)

13. Complainant has failed to establish each of these fraud elements. Complainant offered no evidence that the existence of the Giovinazzi Loans "materially" affected the value or desirability of Seaview. The liens did not exceed the value of Seaview at the time escrow opened. (Compare *Holmes v. Summer* (2010) 188 Cal.App.4th 1510 [overencumbrance of property is a material fact as it is highly likely that escrow will never close].) Nor did complainant establish that Americo was delinquent on the terms of any of the Giovinazzi Loans. Complainant also offered no evidence to establish the Seaview Buyers' knowledge of the Giovinazzi Loans; although respondent testified he did not disclose the information to the Seaview Buyers, there is no evidence regarding the awareness of either Hall or the Seaview Buyers of the subject loans and no evidence to support complainant's claim that the loans were never recorded. (Factual Finding 19B.) Complainant also failed to establish that the Seaview Buyers' actions were induced by respondent's nondisclosure or that the Seaview Buyers suffered any damages as a result of respondent's nondisclosure. (Factual Finding 32.)

14. The evidentiary record is likewise insufficient to establish that respondent engaged in dishonest dealing. Although it is troubling that respondent did not disclose all of the liens on the Seaview property upon receiving the Seaview Buyers' Request to Purchase, complainant did not establish by clear and convincing evidence that respondent's failure to do so was done in bad faith. As noted in *Chodur v. Edmonds* (1985) 174 Cal.App.3d 565, 570, dishonest dealing involves "fraud, deception, betrayal, faithlessness; absence of integrity; a disposition to cheat, deceive, or defraud." "[D]ishonesty necessarily includes the element of bad faith ... [which] means fraud, deception, betrayal, faithlessness ... It denotes an absence of integrity." (*Id.* at p. 572.) Courts understand integrity to mean "soundness of moral principle and character, as shown by a person's dealing with others, in the making and performance of contracts in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others." (*In re Gordon* (1904) 142 Cal. 125, 132 quoting *In re Bauquier* [1891] 88 Cal. 307.)

15. Complainant did not establish by clear and convincing evidence that respondent acted in bad faith or without integrity. Respondent made no affirmative misrepresentations regarding the encumbered status of the property, and there is no evidence that at the time escrow was opened for the Seaview property and through June 2015, respondent expected that he would not be able to satisfy any encumbrances against the property from the proceeds from the sale. (Factual Finding 32.) There is also no evidence that respondent asked the Seaview Buyers to make nonrefundable payments after the opening of escrow or that he used those funds for improper purposes. (Factual Finding 27.) Thus, the evidence is insufficient to support complainant's claim that respondent's failure to disclose was due to bad faith and dishonesty instead of negligence or poor judgment.



16. Accordingly, based on Factual Findings 6 through 32 and Legal Conclusions 1 through 15, complainant has failed to demonstrate by clear and convincing evidence that respondent engaged in conduct warranting discipline.

ORDER

Complainant's Second Amended Accusation against respondent Scott James Weidenhammer, holder of real estate broker license number 01064218, is dismissed.

DATED: April 8, 2019

DocuSigned by:  
*Cindy Forman*  
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CINDY F. FORMAN  
Administrative Law Judge  
Office of Administrative Hearings