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DEPT. OF REAL ESTATE

By- 

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

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In the Matter of the Accusation of:)	DRE No. H-42666 LA
)	OAH No. 2024030157
ALEX JOAQUIN DUK,)	
Respondent.)	

DECISION

The Proposed Decision dated October 16, 2024, 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.

Pursuant to Government Code Section 11521, the Department 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 Department'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 - 3 2024.

IT IS SO ORDERED 11/7/2024

CHIKA SUNQUIST
REAL ESTATE COMMISSIONER



By: _____
Marcus L. McCarther
Chief Deputy Real Estate Commissioner

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation against:

ALEX JOAQUIN DUK,

Respondent.

Agency Case No. H-42666 LA

OAH No. 2024030157

PROPOSED DECISION

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 19 and 20, 2024.

Judith A. Buranday, Counsel, appeared on behalf of Jason Parsons (Complainant), a Supervising Special Investigator of the State of California, Department of Real Estate (Department).

John A. Kanewski, Attorney, Walsworth, LLP, appeared on behalf of Alex Joaquin Duk (Respondent), who was present throughout the hearing.

Testimonial and documentary evidence was received. The record was closed and the matter was submitted for decision at the conclusion of the hearing on September 20, 2024.

SUMMARY

Complainant seeks to suspend or revoke Respondent's licensing rights and licenses based on Respondent's dual real estate agent actions in the sale of a residential property. Complainant alleges that Respondent engaged in substantial misrepresentation, fraud or dishonest dealing, when he failed to provide or disclose an inspection report and information contained in the inspection report to buyers. Respondent had been present at the inspection and was aware of information in the inspection report, which found mold, water discoloration, and bubbling on the walls of the residential property, and which the previous buyers had discovered and informed Respondent of prior to backing out of the residential property sale. Complainant established through clear and convincing evidence the allegations that Respondent's misconduct constituted substantial misrepresentation, dishonest dealing, and fraud.

Respondent denied the allegations and presented evidence in mitigation. No evidence in rehabilitation was presented by Respondent. Based on the established allegations and Respondent's lack of rehabilitative evidence, revocation of Respondent's license is necessary to ensure public protection.

Jurisdictional Matters

1. Complainant made and filed the Accusation in his official capacity.
2. Respondent timely filed a Notice of Defense.
3. Respondent is presently licensed or has licensing rights under the Real Estate Law as set forth below. (Legal Conclusion 2.)

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4. The Department issued Respondent a conditional real estate salesperson license, license ID 01750024 on September 7, 2006. Respondent's license was suspended indefinitely on March 8, 2008 for failing to maintain education requirements pursuant to Business and Professions Code section 10153.4, subdivision (c). Respondent's salesperson license rights expired on September 6, 2010. On April 2, 2015, the Department reissued Respondent's salesperson license through examination. On April 1, 2019, Respondent's salesperson license expired. On June 25, 2019, Respondent's salesperson license was renewed. (All section references are to the Business and Professions Code unless otherwise noted.)

5. Respondent's license was in full force and effect at times relevant to the allegations set forth in the Accusation. Respondent's salesperson license expired on June 24, 2023. The Department retains jurisdiction over Respondent's lapsed license pursuant to section 10103. (Legal Conclusion 2.)

6. From June 25, 2019, through June 24, 2023, Respondent's broker was Blue Real Estate Inc., license ID 02080878. Blue Real Estate Inc. maintains the fictitious business names "Harcourts Beverly Hills," "Harcourts Blue Real Estate," and "Harcourts Plus" with the Department. (Exhibit 2.)

7. At all times relevant to the Accusation's allegations Respondent was engaged in real estate sales. (Legal Conclusion 11.)

8. All jurisdictional requirements have been met.

Background – Cangas Drive Transaction

9. This matter arises out of Respondent's real estate sales actions as the real estate salesperson agent of the residential property located at 5200 Cangas Drive,

Calabasas, California 91301 (the subject property). (§ 10131, subd. (a); Legal Conclusion 11.) Respondent is related to the sellers of the property (the sellers) through his personal and professional relationship with Deanna D'Egidio (Ms. D'Egidio), a real estate salesperson who also worked as a dual agent on the sale with Respondent, is the sister of one of the sellers, and the mother of Respondent's child. The subject property was listed for sale in early August 2020. On August 1 and 2, 2020, the subject home was shown to approximately 84 groups of potential buyers in 15-minute increments. The showing of the subject property was during the height of the COVID-19 pandemic and there were time restrictions on the amount of time potential buyers could view the home. The garage was full of the belongings of the sellers at the time the subject home was shown to potential buyers, including boxes and exercise equipment. Approximately 11 offers were received by sellers at or above the subject property asking price of \$1.3 million.

BUYERS ONE

10. The subject property was shown by Respondent and Ms. D'Egidio as a move-in ready home. Within a week of the subject property being listed for sale, the sellers accepted a 1.285 million all-cash offer made by Carmella Birenbaum (Ms. Birenbaum) and her husband, H.B. (Buyers One). (First and last name initials are used to protect the privacy of individuals.) Respondent represented both Buyers One and the sellers as a dual agent. Ms. Birenbaum credibly testified at hearing regarding the subject property and Buyers One interactions with Respondent. (Evid. Code, §§ 411, 780.)

11. Buyers One viewed the subject property for less than 30 minutes prior to submitting their accepted offer. During their viewing of the subject property, prior to submitting their accepted purchase offer, Buyers One observed what they believed to

be mold around the Heating, Ventilation, and Air Conditioning (HVAC) unit in the garage. By agreement, the subject property's purchase contingency period was seven days, with a short 10-day escrow.

12. During the seven-day contingency period, Respondent scheduled an inspection of the subject property without first obtaining Buyers One consent with a company he used in the past and recommended, Elite Group Inspection Professionals (Elite Inspection). (Exhibit 4, p. A50.) Buyers One were, "caught off guard," because Respondent did not ask them whether he should get an inspector and did not discuss Elite Inspection's inspection fee prior to scheduling an inspection of the subject home. As a result, Buyers' One did not use Elite Inspection to inspect the subject home. (*Ibid.*) Instead, concerned with health issues due to the visible possible mold around the HVAC, Buyers One hired their own preferred inspectors to check the plumbing, sewer line, and for the presence of mold.

13. Buyers One hired Nu Environmental, Inc. (Nu Environmental) to conduct the mold and water damage inspection. On August 9, 2020, an inspector from Nu Environmental conducted a mold and water damage inspection of the subject property. Respondent was present during the August 9, 2020 inspection by Nu Environmental. The inspection revealed various visible and non-visible issues including, but not limited to, mold around the HVAC unit and surrounding walls, high moisture content in the first-floor bathroom behind the vanity, visible water discoloration on the first-floor bathroom ceiling, high moisture content and musty odor in the first-floor bedroom exterior-facing wall, visible bubbling behind the paint in the second-floor bedroom, and potential moisture in the master bedroom shower (collectively referred to as "mold and moisture issues"). (Exhibit 6.)

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14. On August 9, 2020, Nu Environmental's Preliminary Inspection Report (Nu Environmental's Report) was provided to Buyers One. (Exhibit 6.) After reviewing the report, Buyers One e-mailed an August 9, 2020 dated letter to Respondent, which he received, detailing their "concerns" regarding the subject property after the August 9, 2020 mold inspection and an August 7, 2020 sewer inspection. (Exhibit 3.) As relevant to this matter, the August 9, 2020 letter stated:

NuEnvironmental, mold inspection 8/9/20

1. Visible mold around the HVAC unit, stand, and surrounding walls, requiring full HVAC dismantling, containment and abatement
2. High moisture content in the first floor bathroom wall behind the vanity, all the way up to and including the ceiling, as detected by infrared camera and moisture sensor
3. Visible water discoloration on the first floor bathroom ceiling
4. High moisture content and musty odor in the first floor bedroom exterior-facing wall, within the built-in cabinets, as detected by infrared camera and moisture sensor
5. Visible bubbling behind the paint in the "nursery," 2nd floor street-side bedroom, exterior-facing corner
6. Potential moisture in the master bedroom shower [1] . . .
[1]

[Buyers One] also observed issues with: venting, drywall, door closures, door hinges, the electrical panel, and the water heater. While most of the aforementioned items are non-issues at this time, **the visual presence of mold and moisture content, and the signs of work around the chimney and roof are our primary concern** - - the mold may have entered the venting system from the HVAC unit. A more detailed description and report from NuEnvironmental will follow. This is a major safety and health issue. [¶] . . . [¶]

At this time, as you [Respondent] are representing us as the buyer's broker, we [Buyers One] are looking for guidance and your [Respondent] advice on how to proceed. Time is of the essence in order for us to move forward.

(Ibid.) (Bold in original.)

15. The next day, on August 10, 2020, Ms. Birenbaum and Respondent exchanged text messages. During the message exchange, Ms. Birenbaum inquired about the possibility of the sellers giving credits to Buyers One on the purchase of the subject property. Respondent responded that the sellers would not issue any credits. (Exhibit 6, p. A52.) (Seller credits are when a portion of the purchase price is contributed by the seller towards the buyer's closing costs or other expenses.) Respondent further texted, "[t]he sellers were not aware of any issues with [the subject property] and there is a lot of good about the home as well. We can get a better understanding of the downstairs bathroom by tomorrow to ensure there is no active leak as I [Respondent] have gotten the contractor to open the wall up." *(Ibid.)*

Respondent then asked Ms. Birenbaum that if the "condition" of the subject home was "beyond [Buyers One] comfort level to please let [Respondent] know so we can move on." (*Ibid.*)

16. Ms. Birenbaum texted Respondent the following in response:

I appreciate everything you've [Respondent] done for us [Buyers One] but I think that the mold issue is beyond our comfort level[;] it's a health issue. We believed that [the subject property] was pretty much in move-in condition and with a mold issue it's not. Not only is this an additional cost but it's an unknown due to the various places where it is. I will send an email to the escrow company as well as to you [Respondent] officially. Thank you so much for your time and effort in trying to get this done, it was a difficult decision for us to make.

(Exhibit 4, pp. A52-A53.)

17. Respondent texted the following in response to Ms. Birenbaum's message:

I [Respondent] do not believe [t]here is an issue. The wall will be opened up and will prove that and if there are any issues it would be fixed by contractor. The garage is something that can be an expense of removing HVAC and replacing drywall. I don't believe it's a bigger issue than that. I understand your point and if you are not comfortable

with the uncertainty it's completely ok. I really wanted to make this happen for you [Buyers One].

(Exhibit 4, p. A53.)

18. Respondent also assured Buyers One that he would inform subsequent buyers of the subject property regarding the presence of mold and potential mold-related and water issues, texting:

... I do believe and acknowledge your concerns and know the sellers simply will not lower the price. ***This info will certainly be communicated to every potential buyer moving forward*** and the sellers are confident they will not have to make a concession on price lower than where the offer was accepted. Even if it's a crazy high number of say 20k, the highest offers received and still willing to engage the property would still [n]et the same as where we are today.

I don't feel the fix is as expensive in the garage and have seen several circumstances of similar issues where the Furnace is removed and the drywall/sheer wall is replaced to garage and the bathroom downstairs will be opened tomorrow and will show no active leak and dried out.

My opinion does not matter and in keeping my duty to you I want you to be comfortable moving forward and if it saves you the expense of paying for a home inspection then that's the least I can do.

(Exhibit 4, pp. A53-A54.) (Emphasis added.)

19. Later that day, on August 10, 2020, Ms. Birenbaum sent an email to Respondent and the escrow company cancelling the purchase of the subject property. The email clearly provided Buyers One's health concerns as the reason for the escrow cancellation. Ms. Birenbaum wrote in her notice of escrow cancellation email that "[a]fter several conversations with our broker [Respondent], we [Buyers One] have decided against going through with the purchase of [the subject property]. There are certain health hazards that have been discovered that unfortunately can not be overlooked." (Exhibit 5.) Respondent assured Buyers One he would inform future potential buyers of the subject property of the issues, including the mold and moisture issues, brought to Respondent's attention by the Nu Environmental inspection and report and Buyers One's communications with Respondent.

20. Respondent testified at hearing he did not pay attention during Nu Environmental's August 9, 2020 inspection and did not obtain a copy of the Nu Environmental Preliminary Inspection report. Respondent's claims that he was not aware of the various mold and moisture issues found in the subject property during the Nu Environmental August 9, 2020 inspection is not convincing. Ms. Birenbaum credibly testified Respondent was present throughout the inspection and heard the inspector discuss his findings during Nu Environmental's inspection. The weight of the credible evidence established Respondent's knowledge of the material information regarding defects in the subject property identified by Nu Environmental: Respondent was present at Nu Environmental inspection of the subject property on August 9, 2020; Buyers One's August 9, 2020 letter to Respondent detailed the mold and moisture issues; Buyers One and Respondent's August 10, 2020 text message exchange discussed the mold and moisture issues; and Buyers One's August 10, 2020 email

notice of cancellation of the purchase of the subject property cited health concerns. (Factual Findings 13-19.)

21. Even if Respondent's testimony that he did not receive a copy of the Nu Environmental Preliminary Inspection Report is credited, Respondent failure to obtain a copy of the inspection report and provide it to subsequent buyers of the subject property constitutes a willful breach and dereliction of his fiduciary duty under the relevant circumstances. Specifically, Respondent knew or should have known he had a duty to obtain a copy of the Nu Environmental's Report. The report contained material information about mold and moisture issues in the subject property. Respondent had a fiduciary duty to provide the report to buyers of the subject property if he acted as a dual agent to the buyers of the subject property, as Respondent did for Buyers Three. (Factual Finding 27)

Buyers Two

22. After Buyers One cancelled their purchase of the subject property, the sellers received and accepted an \$1.3 million offer from C.C. and I.C. (Buyers Two). An inspection of the home was conducted by another company, Cal Certified Specialists, on an unspecified date, and a copy of the 50-page Cal Certified Specialist inspection report (Cal Certified Specialist Inspection Report) was provided to Respondent. (Exhibit F.) The report stated, in relevant part, regarding the HVAC base, "Observations: . . . Dark stains were observed on the furnace base. Possible microbial growth. [Inspector] recommend[s] further evaluation by a specialist." (Exhibit F, pp. B289, B314.)

23. Respondent was aware the Cal Certified Specialist Inspection Report identified "possible microbial growth," and suggested the issue should be further evaluated by a specialist. That knowledge, in conjunction with Respondent's

knowledge that Nu Environmental found mold during their inspection, put Respondent on further notice of the material information of the mold and moisture issues in the subject property. Respondent had a duty to disclose the Cal Certified Specialist Report findings and report to any subsequent buyer he represented as a dual agent in a sale of the subject property.

24. Buyers Two did not go forward with the purchase and cancelled their escrow of the subject property.

Buyers Three

25. Buyers Three (Deborah Appel and her husband, J.H.) originally retained Respondent and Ms. D'Egidio to be their real estate agents around the time of the subject property's open house in early August 2020. Ms. Appel testified at hearing and submitted a complaint with supporting documents to the Department regarding the circumstances around their purchase of the subject property. (Exhibits 7-15.) According to Ms. Appel, Respondent told Buyers Three that if he represented both the buyer and seller on the sale, Buyers Three would have a better chance the sellers would accept their offer for the subject property. (Exhibit 7.) However, after Buyers Three submitted an offer, the sellers chose an offer from another buyer.

26. After Buyers One and Two cancelled their purchases, on August 17, 2020, Respondent informed Buyers Three that the subject property was available again. According to Ms. Appel, Respondent encouraged Buyers Three to lower their contingency period to seven days because there were competing offers on the subject property and Buyers Three's offer would be more attractive to the sellers with a short seven-day contingency period. (Exhibit 7.)

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27. Buyers Three's \$1.3 million offer with a seven-day contingency period was accepted by the sellers. By agreement, the subject property's purchase contingency period was seven days, with a short 45-day escrow. The purchase agreement listed Respondent as Buyer Three's dual real estate agent on the purchase of the subject home. (Exhibit 8, pp. A106, A115.)

28. Respondent represented to Buyers Three that the subject property had no material issues despite his knowledge of Buyers One cancelling the sale because of mold and moisture issues in the home. For example, on August 20, 2020, in a text message exchange with Buyers Three, Respondent referenced the positive results of Buyers One's sewer inspection of the subject property and omitted any mention of Nu Environmental's mold inspection and the mold and moisture issues in the subject home:

I [Respondent] was present for a sewer inspection and it went very well. Just didn't receive a written report from the buyer like we did their inspection report we have in hand. There was all cast iron under the house and the sewer line to street is in good condition. One small area close to the street with minor root intrusion which isn't uncommon with clay lines connecting to city. I'd suggest doing one just so you guys [Buyers Three] can see it as well but I'm certain it's in great shape!

(Exhibit 12, pp. A249-A250.)

29. Respondent suggested and arranged for his preferred inspection company that had been rejected by Buyers One, Elite Group, to inspect the subject

property on August 21, 2020. Respondent did not coordinate the scheduling of the inspection and notified Buyers Three of Elite Group's inspection while it was in progress. (Exhibit 12, p. A251.) Respondent was present at Elite Group's inspection and was aware of Buyers One's discovery of mold and moisture issues, as well as the Nu Environmental inspection report detailing those issues.

30. After Elite Group's inspection of the subject home, Buyers Three spoke to Elite Group's inspector on Respondent's phone. Respondent told Buyers Three that "everything looked great," there was "nothing major" in the home, and that "everything would be in [Elite Group's inspection] report." (Testimony of Ms. Appel.)

31. Elite Group's August 21, 2020 inspection report was provided to Buyers Three that evening. (Exhibit 10.) The 80-page inspection report did not mention mold or potential mold around the HVAC unit or moisture issues. Rather, the report stated that the platform or base of the HVAC had visible "worn/dirty" areas and recommended cleaning the base areas and sealing the base of the unit as part of preventative maintenance. (*Id.* at p. A207.)

32. By a Request For Repair form, dated August 25, 2020, Buyers Three requested that the sellers "[r]eplace insulation on condensation line connected to furnace." (Exhibit 11, p. A244.) Respondent represented to Buyers Three that the repair had been made but continued to fail to mention mold or moisture issues in the home to Buyers Three.

33. Respondent provided the Cal Certified Specialist Report, set forth in Factual Finding 22, to Buyers Three. According to Ms. Appel, however, Respondent did not go over the inspection report with Buyers Three. Despite the report indicating "possible microbial growth," and the suggestion by the inspector that the issue should

be further evaluated by a specialist, Respondent continued to willfully fail to obtain and provide a copy of the Nu Environmental's Report, which he knew contained material information regarding mold and moisture issues in the subject home to Buyers Three. Respondent also continued to willfully fail to inform Buyers Three of the email and text notifications to Respondent regarding mold and moisture in the subject home by Buyers One as the basis for their cancellation of the escrow.

34. Respondent's written disclosures to Buyers Three on the sale of the subject property made no mention of the material information regarding mold, water discoloration on the first-floor bathroom ceiling, or the visible bubbling in the second-floor bedroom, which Buyers One had informed Respondent of when they cancelled their purchase of the subject property. (Exhibits 7 and 9.) In Respondent's Agent Visual Inspection Disclosure (AVID) form, dated August 29, 2020, provided to Buyers Three, Respondent only disclosed "stains by furnace." (Exhibit 7, p. 105.) Respondent willfully failed to disclose the mold, water discoloration on the first-floor bathroom ceiling, or the visible bubbling in the second-floor bedroom to Buyers Three in the written disclosures (i.e., mold and moisture issues). Buyers Three relied on Respondent's disclosures and believed that any previous issues regarding condensation had been remediated.

35. Respondent failed to provide oral disclosures regarding the presence of mold or potential mold to Buyers Three.

36. Buyers Three would not have purchased the subject property if they had known the material information regarding the mold and moisture issue that resulted in Buyers One cancelling escrow. (Testimony of Ms. Appel; Exhibit 7.)

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37. Respondent received a real estate salesperson commission for acting as a dual agent on the sales transactions from both the sellers and Buyers Three. Respondent testified that his broker received \$59,000 in commission on the sale but did not provide the exact dollar amount he received in commission as the dual agent.

38. After escrow closed on October 5, 2020, Buyers Three discovered that the subject property had an unpermitted structure in the backyard. Around the same time, Buyers Three began to experience health issues, including headaches, dizziness, congestion, and extreme fatigue, which Ms. Appel attributed to the mold and moisture issues in the subject home at hearing. Concerned that Respondent had not been forthcoming during the sale of the subject property, Buyers Three contacted Buyers One to inquire about the circumstances of Buyers One cancelling their purchase of the subject property. Buyers One informed Buyers Three regarding their cancellation of escrow because of the presence of mold and moisture issues in the subject property. Buyers One further informed Buyers Three that they had notified Respondent about the presence of mold and moisture issues in the subject property when they cancelled their escrow.

39. Buyers Three hired Alpura Environmental Services, Inc. to conduct an inspection of the subject property. In its report, dated December 27, 2020, Alpura found high levels of mold spores in the first-floor bathroom, the HVAC stand in the garage, and the first-floor bedroom. (Exhibit 13.) Specifically, the Alpura report found mold and moisture issues in the same areas Buyers One had informed Respondent of mold and moisture. (Exhibit 14.) Buyers Three thereafter incurred mold remediation and repair costs to remove the mold and moisture issues from the subject property. (Exhibit 15.)

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40. On July 2, 2021, the Department received Buyers Three's complaint and supporting documents against Respondent based on his actions as their dual real estate agent on the subject property. (Exhibit 7.)

41. As of the date of the hearing, Respondent, Buyers Three, the sellers, and an inspection company are litigating a civil lawsuit regarding the subject property sales transaction.

Expert Hearing Testimony

42. S. Guy Puccio (Expert Puccio) credibly testified as an expert witness at hearing regarding the standard of care and fiduciary duties owed by dual real estate salesperson agent Department licensees, such as Respondent, to their clients on a real estate transaction. (Exhibit 16.) Expert Puccio has been a Department licensed real estate broker since 1962. His professional experience includes consultation, support litigation services; educational and lecturing services; specialized residential, land, and commercial real estate brokerage; atypical mortgage brokerage; review appraisals; and local government consulting and advocacy. Expert Puccio has testified as an expert witness about real estate property purchases and sales in state superior courts, federal district courts, and U.S. bankruptcy courts, and for the Department, between 150 and 200 times during his 60-year career. He holds an Associates of Arts degree in Real Estate, a Bachelor of Arts degree in Finance, and a Master of Arts Degree in Public Policy. (*Ibid.*)

43. Expert Puccio explained that a Department licensed dual real estate salesperson agent has a fiduciary duty to disclose material facts to his clients. According to the relevant standard of care, Respondent had a fiduciary duty as the dual agent for Buyers Three to disclose material information that Respondent knew or

should have known about the subject property. In this case, Expert Puccio opined that Respondent knew or should have known about the material information that there were mold and moisture issue in the subject property because he was present at the August 9, 2020 Nu Environmental inspection and had been informed of the mold and moisture issues by Buyers One when they cancelled their escrow. Respondent had a fiduciary duty as Buyers Three's dual agent to disclose those material facts to Buyers Three, which he failed to do without reasonable justification. As a result, Expert Puccio concluded Respondent violated the standard of care and breached his fiduciary duty to Buyers Three.

44. Expert Puccio further opined that under the circumstances, Respondent had a duty to obtain the Nu Environmental report and provide it to Buyers Three, have a discussion and inquire with the sellers regarding the mold and moisture issues, and disclose the mold and moisture issues on the written disclosures, such as the AVID. The facts establish those are all actions Respondent failed to take as Buyer Three's dual agent, thereby breaching his fiduciary duty. As Expert Puccio explained, the agency relationship obligated Respondent to disclose even the general possibilities of a mold and moisture condition, even if Respondent did not have specific knowledge that there were mold and moisture issues present at the subject property. Further, as the sellers' agent, Respondent was obligated to ensure the sellers addressed a known hazard, mold, in the written disclosures.

45. On cross-examination of Respondent's counsel, Expert Puccio, testified that oral disclosures of material information can also satisfy a dual agent's fiduciary duty to his clients. Specifically, oral disclosures of the subject property's mold and moisture issues to Buyers Three could have satisfied Respondent's fiduciary duty to Buyers Three. There is no credible evidence, however, to support Respondent's claims

that Respondent made oral disclosures to Buyers Three regarding the subject property's mold and moisture issues. Expert Puccio's opinion on oral disclosures underscores Respondent's failure to exert effort to provide disclosures to Buyers Three regarding the mold and moisture issues.

Respondent's Evidence and Testimony

46. Respondent denied concealing any material information regarding the subject property from Buyers Three. He claimed Buyers One were disingenuous in citing mold and moisture issues in the subject property as the basis for cancelling escrow, asserting the mold and moisture issue was used as a haggling tactic to reduce the price of the subject home by Buyers One. No credible corroborating evidence was presented to support Respondent's self-serving claims against Buyers One.

47. Respondent testified he was distracted and did not pay attention during Nu Environmental's inspection of the subject property and was not aware of mold and moisture issues based on his presence at the August 9, 2020 inspection. Respondent also asserts he did not know Nu Environmental's conclusions about the presence of mold and moisture in the subject home because he was not provided with the inspection report by Buyers One.

48. Respondent cites the absence of any reference to mold at the HVAC unit in the Elite Group's inspection report as a clear conflict with Nu Environmental's conclusion of mold at the subject property. (Exhibit H.) Respondent's argument is unsupported by the weight of the evidence and is irrelevant to the fiduciary duty owed by Respondent to Buyers Three to disclose the material information he was on notice of based on his presence at the August 9, 2020 Nu Environmental inspection and the

clear communication from Buyers One to Respondent about the mold and moisture issues at the time they cancelled escrow.

49. Respondent also argues Buyers Three were negligent in purchasing the subject home because they did not do their due diligence. In support of this unpersuasive argument, Respondent asserts Buyers Three were on notice of a potential problem with mold and moisture issues in the subject home because Respondent provided them with a copy of the Cal Certified inspection report, related to Buyer Two's cancelled escrow, which identified "possible microbial growth." (Exhibit H at p. Z3.) Respondent claims other documents provided to Buyers Three, also put them on notice of potential water and mold-related issues. As examples, Respondent argues that the sellers, in the Seller Property Questionnaire prepared, noted "that while they were unaware of any mold, the Sellers were aware of water intrusion issues." (*Id.*) Respondent cites the AVID, indicating "Stains by furnace," also put Buyers Three on notice. (*Id.* at p. Z4.) Respondent's arguments miss the point and fail to deflect responsibility for his actions as to Buyers Three. The issue here is not Buyers Three's alleged negligence, which was not established, but whether Respondent provided material information regarding the mold and mold issues gleaned from his role as a dual agent for Buyers One to Buyers Three, which the facts establish Respondent did not.

50. Respondent unconvincingly argues Ms. Appel's testimony and claims about the subject home transaction are false and financially motivated because of the pending civil lawsuit between the parties. (Evid. Code, § 708.)

51. Respondent's testimony and arguments are not credited and are legally and factually unpersuasive based on the weight of the credible evidence to the contrary. (Factual Findings 9-45, 56-57.)

52. Further, Respondent's self-serving claims at hearing that he provided oral disclosures regarding the presence of mold and potential mold to Buyers Three at the subject home during the contingency and escrow period of the purchase is not credited. In fact, Respondent's claims are contradicted by the weight of the credible evidence to the contrary, including the fact that none of the written disclosures for the sale of the subject property to Buyers Three make any reference or mention to the presence of mold or potential mold in the home. (Exhibit 9.) Further, Ms. Appel's hearing testimony, though minorly inconsistent, was consistent on the material issue that Respondent represented to Buyers Three that the subject home was in good condition and did not disclose the presence of mold or potential mold. (It is settled that 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 trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at pp. 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767).)

53. Notably, none of Respondent's text messages to Buyers Three mention Buyers One cancellation of the escrow, the prior Nu Environmental inspection and report, or Buyers One's citation of mold-related health issues as the reason for cancelling escrow. (Exhibit 12.)

54. Respondent's argument that Buyers Three were also somehow represented in the subject home sales transaction by another real estate agent, Adam Press, a friend and alleged relative of Ms. Appel, is irrelevant to the allegations against Respondent.

TESTIMONY OF DEANNA D'EGIDIO

55. Ms. D'Egidio testified at hearing in support of Respondent. Her testimony claiming Buyers One and Buyers Three are unscrupulous and were responsible for any issues related to the cancellation of escrow and sale, respectively, of the subject property is viewed with distrust and is afforded little evidentiary weight. Ms. D'Egidio's testimony is unreliable because it is motivated by clear personal, professional, and financial bias in favor of Respondent and the sellers. (Evid. Code, § 780, subd. (f).)

Discussion

MISREPRESENTATION AND DISHONEST DEALING

56. Respondent made substantial misrepresentations and engaged in dishonest dealing when he failed to inform Buyers Three of the mold and moisture issues discovered by Buyers One; failed to inform Buyers Three of Nu Environmental's August 9, 2020 inspection; and did not inquire, obtain and provide a copy of the Nu Environmental August 9, 2020 inspection report to Buyers Three. As a result, Buyers Three were not in possession of material information that would have better informed their decision to purchase the subject property. Following the misrepresentation regarding the mold and moisture issues, Respondent further failed to disclose information required under the written disclosures, and such nondisclosures were tantamount to dishonest dealing.

FRAUD

57. Respondent engaged in fraud because his actions involve the intentional and purposeful concealment of material facts to gain a sales advantage. Respondent assured Buyers One in writing he would inform subsequent buyers of the mold and

moisture issues. (Factual Finding 18.) Instead of fulfilling that fiduciary duty as a dual agent to Buyers Three, Respondent profited on the property transaction after willfully omitting material information to Buyers Three regarding the Buyers One discovery of mold and moisture issues.

MITIGATION

58. Respondent provided no reasonable justification for his failure to obtain the Nu Environmental inspection report and provide it to Buyers Three. Respondent's testimony and arguments indicate he either does not understand or willfully chose to ignore and violate his fiduciary duties as a dual agent to Buyers Three on the sale transaction. In either case, Respondent demonstrated no mitigating circumstances, no rehabilitation, and provides no assurance that he can be entrusted to perform his legal and ethical duties as a Department licensee when acting as an agent to public consumers in real estate transactions. Rehabilitation requires an acknowledgment of wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation."].)

59. Respondent has not taken any steps toward rehabilitation. He acknowledges no accountability or mistakes with respect to the acts underlying the allegations in this case and has taken no step to insure they will not recur.

Costs

60. Complainant seeks \$3,598.10 in enforcement costs for the time expended by complainant's counsel, and investigative costs in the amount \$5,008.09, for total costs of \$8,606.19. (Exhibits 17 and 18.) The costs are reasonable. Relevant factor

relating to the amount of reasonable costs to be ordered in this matter are discussed in the Legal Conclusions.

Paragraph 18 of Accusation

61. Complainant's Accusation included cause of actions for willful disregard of the Real Estate Law (Part 1 of Division 4 of the California Business and Professions Code), negligence and incompetence, pursuant to sections 10177, subdivisions (d) and (g), referencing a "Respondent NISSOU," who is not a party to this action. These charges seem to have been included in error against Respondent based on the reference to a respondent who is not a party to this action, "Respondent Nissou," and therefore, no findings are made as to these allegations in this Decision. (Exhibit 1, p. A36.)

62. Except as set forth in this Decision, all other allegations in the Accusation and all other contentions by the parties lack merit or constitute surplusage.

LEGAL CONCLUSIONS

Jurisdiction, Burden and Standard of Proof

1. Complainant has the burden of proving each of the grounds for discipline alleged against Respondent in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212 [the standard of proof applicable to proceedings for the discipline of a real estate license is clear and convincing evidence to a reasonable certainty].) "The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of

every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a *high probability* [citations]." (*In re Terry D.* (1978) 83 Cal. App.3d 890, 899; italics original.)

2. "The lapsing . . . of a license by operation of law or by order or decision of the department or a court of law, . . . shall not deprive the department of jurisdiction to proceed with any investigation of or action or disciplinary proceeding against such licensee, or to render a decision suspending or revoking such license." (§ 10103.)

3. "Protection of the public shall be the highest priority for the [Department] in exercising its . . . disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (§ 10050.1.)

Applicable Case Law

4. A real estate broker stands in a fiduciary relationship with his principal and owes the "same obligation of undivided service and loyalty" owed by a trustee to his beneficiary. (*Wyatt v. Union Mortgage Company* (1979) 24 Cal.3d 773, 782.) As a fiduciary, a broker is required to make a full and complete disclosure of all material facts that might influence his principal's decision to enter into a transaction. (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 414-415.) "The test of materiality is objective: whether a reasonable person in the principal's position would have acted differently had he known the undisclosed facts." (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1567.) A broker who represents both the buyer and the seller is a fiduciary of both. (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235.

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5. A real estate salesperson is a person licensed as such who is hired by a real estate broker to perform the broker's licensed duties on the broker's behalf. (§ 10016.) A real estate salesperson owes the same fiduciary duties as his employing broker. (*Mendoza v. Continental Sales Co., Inc.* (2006) 140 Cal.App.4th 1395, 1405-1406.)

6. Since 1986, California has enacted legislation addressing the practice of dual agency; situations where the same real estate salesperson, like Respondent in this case, represents both the buyer and seller in a real estate transaction. (*Horrike v. Coldwell Banker Residential Brokerage Co.* (2006) 1 Cal.5th 1024 (*Horrike*)). The relevant disclosure statute, Civil Code section 2079, establishes the legal duties of a real estate licensee to both the buyer and seller in a real estate transaction. The real estate licensee's duties apply to the subject property at issue in this matter. As stated by the appellate court in *Horrike*, "[Civil Code] [s]ection 2079 recognizes that an agent representing both the seller and the buyer has "[a] fiduciary duty of utmost care, integrity, honesty, and loyalty in the dealings with either Seller or the Buyer." (*Ibid.* ["AGENT REPRESENTING BOTH SELLER AND BUYER"].)"

7. In *Horrike*, the appellate court found that "a trier of fact could conclude that a [dual real estate] salesperson was aware of material information that he failed to provide to [buyer], including that the square footage of the property had been measured and reflected differently in different documents, even though he did not have fraudulent intent, and could find that salesperson, who did not provide [buyer] the handwritten advice given to other potential buyers to hire a specialist to verify the square footage, breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage." (*Horrike* at p. 1024.) Like the facts underlying *Horrike*, it was established in this matter Respondent was aware of

mold and moisture issues in the subject home and breached his fiduciary duty by failing to communicate all the material information he knew about those material issues to Buyers Three. (Factual Findings 9-45, 56-57.)

8. One of the arguments Respondent posits at hearing is that Buyers Three were negligent in doing their due diligence of the subject home. However, this argument is legally and factually unpersuasive. (Factual Finding 49.) First, Respondent's claims Buyers Three were negligent and did not perform their due diligence of the subject home prior to purchasing the home were not established by credible evidence. Second, even if Buyers Three were negligent in failing to perform due diligence, their diligence would not be relevant because the negligence of a party in discovering the falsity of a statement is not a defense to fraud. (See *Seeger v. Odell* (1941) 18 Cal.2d 409, 414) *Seeger* involved a real estate transaction induced by fraudulent misrepresentations. The *Seeger* court noted the above proposition of law, asserting that "[n]egligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent." (*Ibid.*) Thus, "[t]he fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery" (*Id.* at pp. 414-415.) Here, like in *Seeger*, the alleged failure of Buyers Three in discovering Respondent's false statements as to the mold and moisture issues in the subject home is not relevant.

9. The elements of a cause of action for fraud are (1) a fiduciary relationship, (2) nondisclosure (breach of fiduciary duty), (3) intent to deceive, and (4) reliance and resulting injury. (*Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 516, fn. 14.) A fiduciary may be liable for constructive fraud even though his conduct is not actually fraudulent. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562 (*Salahutdin*.) As the court in *Salahutdin* explained:

[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud.

(Ibid.)

10. Applying the foregoing legal principles to the established facts, Respondent committed both fraud and constructive fraud. (Factual Findings 9-45, 56-57.)

Applicable Statutes and Regulations

11. At times relevant to the Accusation, Respondent was engaged in real estate sales. (§ 10131, subd. (a).)

12. Civil Code section 2079 provides:

(a) It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective buyer of residential real property improved with one to four dwelling units or a manufactured home as defined in

Section 18007 of the Health and Safety Code, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective buyer all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer.

(b) It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to comply with this section and any regulations imposing standards of professional conduct adopted pursuant to Section 10080 of the Business and Professions Code with reference to Sections 10176 and 10177 of the Business and Professions Code.

13. A real estate licensee's license may be disciplined when a licensee makes any "substantial misrepresentation," and engages in "[a]ny other conduct, . . . , which constitutes fraud or dishonest dealing." (§§ 10176, subds. (a) and (i), 10177, subd. (j).)

14. A real estate licensee may be disciplined for willful disregard of the Real Estate Law, negligence or incompetence. (§ 10177, subds. (d) and (g).)

Causes for Discipline

15. Cause for discipline was established against Respondent's real estate salesperson license for making substantial representations regarding the subject

property's mold and moisture issues during his dual agent representation of Buyers Three in their purchase of the subject property, pursuant to section 10176, subdivision (a). (Factual Findings 9-45, 56; Legal Conclusions 1-13.)

16. Cause for discipline was established against Respondent's real estate salesperson license for engaging in conduct constituting dishonest dealing and fraud by intentionally failing to disclose material information to Buyers Three regarding the subject property's mold and moisture issues during his dual agent representation of Buyers Three in their purchase of the subject property, pursuant to sections 10176, subdivision (i), and 10177, subdivision (i). (Factual Findings 9-45, 56-57; Legal Conclusions 1-13.)

17. Cause for discipline was not established against Respondent's real estate salesperson license for willful disregard of Real Estate Law, negligence, or incompetence, pursuant to sections 10177, subdivisions (d) and (g). (Factual Findings 61-62; Legal Conclusion 14.)

Appropriate Discipline

18. Respondent evidence in mitigation has been considered and is found unpersuasive to justify Respondent's substantial misrepresentation, dishonest dealing, and fraud. (Factual Findings 9-58.) Respondent acknowledges no wrongdoing in this matter and presented no evidence in rehabilitation. (Factual Finding 59.) Under these circumstances, it would be inconsistent with the Department's duty to protect the public for Respondent to retain his real estate salesperson license.

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Costs of Investigation and Enforcement

19. Section 10106, which permits the award of costs, provides, in relevant part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. [1] . . . [1]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). The finding of the administrative law judge with regard to costs shall not be reviewable by the

commissioner to increase the cost award. The commissioner may reduce or eliminate the cost award, or remand to the administrative law judge where the proposed decision fails to make a finding on costs requested pursuant to subdivision (a).

20. The factors used to determine the reasonableness of the costs sought include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate considering the alleged misconduct. (*Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.)

21. Complainant requested that Respondent be ordered to pay the costs of the investigation and enforcement incurred up to the date of hearing in the total amount of \$8,606.19. (Factual Finding 60.) Under the circumstances, including the likely substantial amount of legal fees incurred by Respondent in defending against this license disciplinary action as well as ongoing civil litigation involving the same parties to this real estate transaction, repayment of the full amount sought by Complainant would be financially burdensome for Respondent. When all the relevant factors set forth in *Zuckerman* are considered and applied in this case, ordering Respondent to pay \$4,300 in costs is appropriate. The Department shall exercise its authority to determine and approve whether Respondent should be allowed to pay these costs pursuant to a reasonable payment plan.

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Motion to Dismiss

22. Respondent's motion to dismiss is moot based on the established allegations of substantial misrepresentation, dishonest dealing, and fraud. (Legal Conclusions 15-16.)

Motion to Dismiss - Laches Affirmative Defense

23. Respondent's motion to dismiss based on the affirmative defense of laches has been considered and is denied. (Exhibit H.) No persuasive factual and legal arguments established the Department engaged in any unreasonable delay in bringing the Accusation or violated the three-year statute of limitations for the Accusation's fraud cause of action. The July 6, 2023 Accusation was filed within two years of the Department receiving Buyers Three's July 2, 2021 complaint against Respondent. (Exhibit 7; Factual Finding 40.)

ORDER

1. All licenses and licensing rights of Respondent Alex Joaquin Duk under the Real Estate Law, including his real estate salesperson license, License Number 01750024, are revoked.

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2. Respondent Alex Joaquin Duk shall pay the Department's costs incurred in the prosecution and enforcement of this matter in the amount of \$4,300. The Department shall exercise its authority to determine and approve whether Respondent should be allowed to pay these costs pursuant to a reasonable payment plan.

DATE: 10/16/2024



IRINA TENTSER
Administrative Law Judge
Office of Administrative Hearings