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FILED

SEP 10 2012

DEPARTMENT OF REAL ESTATE

By L. Just

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

No. H-10999 SF

JOEL PRADO VALENCIA and
ARLEEN CONNORS-DURAN,

OAH No. 2010091039

Respondents.

ORDER DENYING RECONSIDERATION

On July 20, 2012, a Decision was rendered in the above-entitled matter. The Decision was to become effective August 9, 2012.

On August 2, 2012, Respondent Arleen Connors-Duran petitioned for reconsideration of the Decision of July 20, 2012.

On August 6, 2012, Respondent Joel Prado Valencia petitioned for reconsideration of the Decision of July 20, 2012.

I have given due consideration to the petition of Respondents for reconsideration. I find no good cause to reconsider the Decision of July 20, 2012, and reconsideration is hereby denied. Therefore, the Decision of the Real Estate Commissioner of July 20, 2012, shall become effective at 12:00 noon on September 10, 2012.

IT IS HEREBY ORDERED

9/7/2012

Real Estate Commissioner

By:



FILED

AUG 06 2012

DEPARTMENT OF REAL ESTATE

By *[Signature]*

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

JOEL PRADO VALENCIA and
ARLEEN CONNORS-DURAN,

Respondents.

No. H-10999 SF

OAH No. 2010011039

ORDER STAYING EFFECTIVE DATE

On July 20, 2012, a Decision was rendered in the above-entitled matter to become effective August 9, 2012.

IT IS HEREBY ORDERED that the effective date of the Decision of the Real Estate Commissioner of July 20, 2012, is stayed for a period of thirty (30) days.

The Decision of the Real Estate Commissioner of July 20, 2012 shall become effective at 12 o'clock noon on September 10, 2012.

DATED: August 6, 2012

Real Estate Commissioner

[Signature]

By WAYNE S. BELL
Chief Counsel

FILED

JUL 20 2012

DEPARTMENT OF REAL ESTATE

By *[Signature]*

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
)
JOEL PRADO VALENCIA and)
ARLEEN CONNORS-DURAN,)
)
Respondents.)
_____)

NO. H-10999 SF
OAH NO. 2010091039

DECISION

The Proposed Decision dated June 14, 2012, 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.

This Decision shall become effective at 12 o'clock noon on AUG 09 2012

IT IS SO ORDERED 7/20/2012

Real Estate Commissioner

[Signature]

By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOEL PRADO VALENCIA and ARLEEN
CONNORS-DURAN,

Respondents.

Case No. H-10999 SF

OAH No. 2010091039

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on November 7-8, 2011, and March 13-14, and May 15, 2012.

Real Estate Counsel Jason D. Lazark represented complainant E. J. Haberer II, Deputy Real Estate Commissioner, State of California.

Respondent Joel Prado Valencia was self-represented.

Edgardo Gonzalez, Attorney at Law, represented respondent Arleen Connors-Duran, who was present.

The matter was submitted on May 15, 2012.

FACTUAL FINDINGS

1. At all times relevant to this proceeding, respondent Joel Prado Valencia was licensed by the State of California as a real estate broker. He was first licensed as a real estate salesperson in July 2003, and then licensed as a broker two months later. Respondent Valencia has no history of license discipline.

2. At all times relevant to this proceeding, respondent Arleen Connors-Duran was licensed by the State of California as a real estate salesperson. She was first licensed in 2005.

3. On September 13, 2010, complainant E. J. Haberer II, acting in his official capacity as a deputy real estate commissioner for the State of California, issued an accusation against respondents. The accusation alleged that respondents were subject to discipline on the ground that they had suffered a civil judgment for fraud in connection with a real estate

transaction, and that they committed fraud or dishonest dealing in the transaction. Respondents filed notices of defense. On July 11, 2011, following the Court of Appeal's decision in *The Grubb Company, Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, complainant issued a first amended accusation. The allegations in the first amended accusation are based on the same real estate transaction, but the civil judgment is not alleged as the cause for discipline. Instead, the pleading alleges the acts and omissions on which the civil judgment was based, and asserts that respondents engaged in fraud or dishonest dealing, and that respondent Valencia failed to properly supervise respondent Connors-Duran.

Sale of 855 Cañada Road

4. In January 2008, respondent Connors-Duran entered into a listing agreement with the owners of a single-family home located at 855 Cañada Road in Woodside. It was to be a short sale, as the property owners owed more to the lender, Washington Mutual (WaMu), than the property was worth. In the listing agreement, respondent and the owners set the sale price at \$1,275,000, and the broker's compensation at 7 percent, with 3.5 percent of that amount to be paid to a "cooperating broker," that is, a broker who brought the purchaser to the transaction. Because it was to be a short sale, respondent Connors-Duran knew that ultimately the sale price and the total commission would be set by WaMu, no matter what the listing agreement provided. Seven percent, however, was the commission that Connors-Duran hoped to obtain.

5. At the time of the listing, respondent Connors-Duran was employed by Valence Corporation, doing business as Intero Real Estate Services in San Jose, and respondent Valencia was the broker of record for Valence Corporation. Respondent Valencia was involved in the sale of 855 Cañada Road from the beginning, as he is with every transaction in his office. His involvement increased, however, when the lender became involved in the sale; at that point, respondent Valencia became (in his words) "extra diligent" in exercising his supervisory responsibilities.

6. Respondent Connors-Duran listed the property with a multiple listing service (MLS) in March 2008. On the MLS, respondent lowered the asking price to \$1,075,000, and stated that the commission to be paid to the purchaser's broker would be 2 percent; she did not state the total commission to be paid. Respondent Connors-Duran's hope was that, in negotiations with WaMu, she could prevail upon WaMu to approve a total commission of 6 or 7 percent, and that she would retain the balance of the commission that exceeded 2 percent. Respondent knew from prior experience – she had done 10 or 12 short sales – how much time, effort and expense a short sale required. It was her belief, supported by conversations with respondent Valencia, that she was not required to evenly split the total commission with the purchaser's broker.

7. At some time prior to April 28, 2008, respondent Connors-Duran received an offer on the property for an amount substantially less than the asking price; at hearing, respondent characterized it as a "lowball" offer. (The amount of the offer was not established by the evidence.) She sent the offer to WaMu for its review.

accept a commission of 1.5 percent; Shellito told her that he would. Respondent did not tell Shellito that she was seeking a total commission of more than 3 percent from WaMu.

14. On May 28 Shellito prepared, and on May 29 he submitted to respondent Connors-Duran, a full price offer in which he agreed to accept a commission of 1.5 percent. At the time Shellito made the offer, the MLS for the property stated, "Lender approved only 3% total commission."

15. When she received Shellito's offer, respondent Connors-Duran emailed WaMu and wrote, "I have a great offer well above your counter of \$1,035,000. This being the case I expect to get my full commission."

16. Respondent Connors-Duran and respondent Valencia talked frequently, if not daily, about the sale of 855 Cañada Road. It had become a high-profile transaction at Intero Real Estate Services, partly because it was a short sale and partly because Shellito's client was an attorney. Respondent Connors-Duran asked Valencia whether she was obligated to split her commission equally with the purchaser's broker. Respondent Valencia told her that a 50/50 split was not mandatory, that it was "her prerogative" to offer what she wanted to the purchaser's broker. He advised her, however, that she should be "more specific" in the MLS about the commission split, so that "no one could come back and say 'We want a higher commission.'"

17. On June 2, therefore, respondent Connors-Duran amended the MLS listing on 855 Cañada Road to state, "Lender approved only 3% total commission. If Lender approves higher commission, only 1.5% pd. to Selling Agent."

18. When Shellito had presented his offer just days earlier, he did so based on respondent Connors-Duran's oral representation, and upon respondents' written representation in the MLS, that the lender had approved only a 3 percent commission. He had never been informed that the lender might approve a higher commission, much less that the listing broker would retain all of the commission that exceeded 3 percent. Neither respondent Connors-Duran nor respondent Valencia informed Shellito of the June 2 change to the MLS. Respondent Valencia did not instruct respondent Connors-Duran to inform Shellito of the change. Since Shellito had already submitted the offer that respondent Connors-Duran solicited, it was unlikely that he would continue to review the MLS thereafter, and in fact he did not.

19. Between June 2 and June 19, in telephone conversations and in emails, respondent Connors-Duran continued to press WaMu for a higher commission.

On June 9, for example, respondent Connors-Duran sent an email to WaMu about the offer presented by Shellito:

Please be advised that due to not having a timely response on the offer that I e-mailed a week ago, we could possibly be

loosing [*sic*] the offer of \$1,075,000. The Buyer's Agent has unformed [*sic*] me that if we do not get confirmation of acceptance by Wed., 6/20/08, they will withdraw the offer.

Respondent's statement to WaMu was false: neither Shellito nor his client had ever threatened to withdraw the offer.

In her email, respondent went on to state,

I want to clarify that I am very adamant about getting paid my commission of 6%, which is 1% less than my contracted 7%. On 5/27/08 I e-mailed and wrote you regarding this matter Since I am getting you \$40,000 above your asking price I do not understand why I can't get paid accordingly I have discussed this with my broker and he concurs.

20. In a letter to respondent Connors-Duran dated June 19, 2008, and faxed to respondent that day, WaMu informed respondent that it accepted Shellito's offer, and that it would pay a commission of \$64,500, that is, 6 percent of the purchase price.

WaMu's June 19 letter to respondent Connors-Duran was a two-page document. On the first page, WaMu stated that it accepted the offer of \$1,075,000, with net proceeds to the bank of \$1,006,229.09, and then went on to list certain "conditions and stipulations." On the second page, WaMu stated expressly its approval of a commission of \$64,500.

21. On June 22, 2008, respondent Connors-Duran faxed to Shellito the first page of WaMu's June 19 letter. Respondent redacted all of the conditions and stipulations on the first page; as a result of the redactions, the entire bottom two-thirds of the first page was blank. At hearing, respondent testified that she redacted information that was confidential to the sellers. In fact none of the conditions and stipulations contains any confidential information.

Respondent Connors-Duran did not fax to Shellito the second page of WaMu's letter, the only page that stated WaMu's approval of a 6 percent commission. Having made the redactions to page one, there was no indication to Shellito that there was a second page to the bank's letter. At hearing in this proceeding, respondent Connors-Duran testified that she faxed both pages to Shellito, but her testimony on this point was not credible. In an earlier proceeding before the Silicon Valley Association of Realtors, when she was asked about the failure to send the second page to Shellito, respondent stated that "he should have asked for it."

At hearing, respondents asserted that Shellito should have discovered that WaMu had approved a 6 percent commission by looking at the approved purchase price and the net proceeds to be paid to WaMu, and "doing the math." In fact, however, the difference between \$1,075,000 and \$1,006,229.09 is approximately 9 percent, not 6 percent, and the

redacted letter that respondent Connors-Duran faxed to Shellito does not account for the difference between the sale price and the net proceeds to WaMu. Calculating the difference between the purchase price and the net proceeds to be paid to WaMu, therefore, would not have informed Shellito that WaMu had approved a total commission of 6 percent.

22. Prior to the close of escrow, respondent Connors-Duran and Shellito communicated frequently. Connors-Duran never informed Shellito that WaMu had approved a commission of 6 percent. Respondent Valencia never instructed Connors-Duran to inform Shellito that WaMu had approved a commission of 6 percent, and never did so himself.

23. Escrow on the transaction closed on July 11, 2008. When Shellito received the closing statements on or about July 12, he learned for the first time that the total commission on the transaction was 6 percent, not 3 percent.

24. Shellito immediately called respondent Valencia and, being unable to reach him, left voicemail messages for him. When he did not receive a return call from Valencia, Shellito contacted the chief executive officer of Intero, who informed respondent Valencia of a dispute concerning the commission on 855 Cañada Road.

25. Respondent Valencia told respondent Connors-Duran that she needed to get a legal opinion to see "if we have a legal obligation to pay Shellito." At some time later, respondent Connors-Duran told respondent Valencia that she had called the "legal hotline" of the California Association of Realtors, and received a favorable opinion. At hearing, respondent Valencia testified that he also had a lawyer review the file. In late August 2008, respondent Valencia informed Shellito that a lawyer had reviewed all of the documents pertaining to the transaction and "saw nothing wrong" with anything they had done.

26. Shellito filed a complaint against respondents with the Silicon Valley Association of Realtors (SILVAR).

In his written complaint, Shellito informed SILVAR that he had agreed to a 1.5 percent commission based on Connors-Duran's representation that the bank had "beat [her] down to a total commission of 3%," and that she had then concealed from him the fact that she obtained a total commission of 6 percent.

In a response signed by both respondents, respondents told SILVAR:

In summary, we, Joel Valencia and Arleen Connors-Duran, believe that we have not violated any code of ethics. The fact that our office was able to obtain a 6% commission was a first on a short sale of this type. It was a great accomplishment that deserves to be praised instead of admonished and tainted by allegations of running a scam. It took six (6) months of work to list and sell this property As many of you may know, when dealing with short sale listings, the work is often more than

double the average listing, and many times they foreclose and all our work goes unpaid. As the saying goes, "You win some and lose some". In this case we won, and rightfully we deserve the commission that was so diligently fought for.

Following a hearing before a SILVAR panel, SILVAR concluded that respondent Connors-Duran had violated certain provisions of the Code of Ethics of the California Association of Realtors, and had also violated MLS Rules and Regulations.¹ It ordered her to take an ethics class, which she has done, placed a warning in her file, and ordered her to pay a fine of \$1,000. It found no violations by respondent Valencia.

27. After the SILVAR hearing, Shellito asked respondents if it had ever occurred to them during the course of the transaction to simply inform him that WaMu had approved a total commission of 6 percent. Respondents gave Shellito a "blank stare" and did not answer his question.

28. After the SILVAR hearing, Shellito filed a civil complaint against both respondents in the Santa Clara County Superior Court, Small Claims Division. In that case, Shellito sought damages equal to 0.5 percent of the sales price of 855 Cañada Road. Even though WaMu had ultimately approved a commission of 6 percent, Shellito felt that he was entitled only to a 2 percent commission, the commission he would have received had the sellers accepted his first offer in April 2008. Shellito's refusal to inflate his claim beyond what he felt he was due is a mark of his honesty and integrity.

On July 9, 2009, the court entered judgment against both respondents, jointly and severally, in the amount of \$5,375 plus costs, an amount equal to 0.5 percent of the sales price. Respondent Connors-Duran testified that she and respondent Valencia were "in shock" when the court ruled against them. They appealed.

On September 25, 2009, after a trial de novo, the court again entered judgment against both respondents. Shellito requested that the court specify the reasons for its decision. On March 5, 2010, the court issued an order in which it stated, in relevant part, as follows:

Defendants/Appellants misrepresented to Plaintiff/Respondent that the total commission on the subject sale would be 3% of the sale price. Plaintiff/Respondent reasonably relied upon this representation when he agreed to accept a total commission of 1.5% of the sale price. In truth and in fact Defendants/

¹ At hearing, respondent Connors-Duran stated that SILVAR found only that she had violated the MLS Rules and Regulations, but that is not true. SILVAR also found that Connors-Duran violated Article 2 of its Code of Ethics, which prohibits a member from misrepresenting or concealing facts relating to a transaction, by failing to inform Shellito that WaMu had approved a total commission of 6 percent.

Appellants knew that the seller would agree to pay a total commission of 6% of the sale price. Instead of disclosing the truth to Plaintiff/Respondent, Defendants/Appellants deliberately covered up the truth so that escrow would close before Plaintiff/Respondent discovered what had really occurred. Had Defendants/Appellants disclosed the truth to Plaintiff/Respondent, he would have withdrawn from the transaction unless he was paid a commission of 2% of the sale price. [¶] Defendants/Appellants committed a fraud upon Plaintiff/Respondent. He is a victim of their misrepresentation and deceit.

29. Respondent Connors-Duran did not pay Shellito's judgment or any part of it. Respondent Valencia paid the judgment in full in July 2011. He testified that he intended to pay the judgment sooner, but he did not have Shellito's address. Respondent Valencia's testimony on this point is not believable. Prior to July 2011, respondent Valencia failed to pay the judgment despite various collection efforts by Shellito. In addition, Shellito's address is stated on numerous documents in the escrow file for 855 Cañada Road and, as a department licensee, Shellito's address is stated on the department's website.

Respondent Connors-Duran's evidence

30. Respondent Connors-Duran received an Associate of Arts degree from San Mateo College in 1982. She is not married. Respondent provides financial support for her mother when she can.

31. Respondent Valencia has been respondent Connors-Duran's broker of record since she was first licensed in 2005.

32. Looking back on the transaction, the SILVAR hearing and the court proceedings, respondent Connors-Duran testified that she still does not think she committed fraud or deceit, that she did anything unethical, or that she made any misrepresentations. If there is any fault to be found, respondent Connors-Duran believes that it lies with Shellito. She blames Shellito for not going back to the MLS listing after June 2, to discover the entry she made; for not requesting from her various documents that would have shown a 6 percent commission; and for failing to make various calculations which, she maintains, would have revealed to Shellito that WaMu had agreed to pay a 6 percent commission.

33. Sandra Diaz-Kelly is a licensed real estate salesperson who has worked with respondent Connors-Duran since 2008. She has found respondent to be very knowledgeable about short sales, and an "awesome" negotiator with lenders. Diaz-Kelly testified that she has never known respondent to misrepresent a commission paid by a lender, or to conceal important information. Other friends and clients also wrote letters of support for Connors-Duran. Neither Diaz-Kelly nor any of the other character references speak to the transaction concerning 855 Cañada Road.

Respondent Valencia's evidence

34. Respondent Valencia is married and has two young children.

35. Respondent is pursuing a career in law enforcement. He has been a commercial pilot since 2006 and he recently graduated at the top of his class from a police academy in the Bay Area. Respondent hopes to find an aviation position in law enforcement; if he can, he would like to stay involved in his real estate practice. Respondent testified that, because of his law enforcement ambitions, it is very important to him to maintain his reputation for honesty.

36. Respondent makes regular training available to his salespersons and emphasizes its importance. He testified that he insists on honesty and integrity in all of their transactions.

37. Respondent testified that real estate transactions, especially short sales, are very complicated and that mistakes often occur; he does not, however, acknowledge any mistakes that he or respondent Connors-Duran made in the course of the 855 Cañada Road transaction. Respondent denies any intent to defraud Shellito. Like respondent Connors-Duran, respondent Valencia blames Shellito for any issues regarding the commission: he stated that Shellito lacked knowledge about short sales; that he did not ask to review pertinent documents that would have revealed the 6 percent commission; that he lacked knowledge in "a lot of areas"; and that he had four or five opportunities to see that Connors-Duran had obtained a 6 percent commission, but did not make the calculations that he should have made. Respondent Valencia testified further that even if Shellito had discovered that WaMu had authorized a 6 percent commission, there was nothing he could have done about it because, at that point, they were "in contract."

LEGAL CONCLUSIONS

Standard of proof

1. The standard of proof applied in making the factual findings set forth above is clear and convincing evidence to a reasonable certainty.

Statute of limitations

2. Respondents contend that this proceeding is barred by the statute of limitations. In a disciplinary action against a real estate licensee, an accusation must 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

(Bus. & Prof. Code, § 10101.²) Respondents assert, correctly, that virtually all of the matters alleged as cause for discipline in the first amended accusation occurred more than three years before the first amended accusation was filed on July 11, 2011.

3. An amended pleading filed outside the statute of limitations may still be considered timely if it “relates back” to an original pleading that was timely filed. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600.) An amended-pleading relates back to the original pleading if it is based “on the same general set of facts”:

This rule is the result of a development which, in furtherance of the policy that cases should be decided on their merits, gradually broadened the right of a party to amend a pleading without incurring the bar of the statute of limitations.

(*Id.* at pp. 600-601.)

The courts take a broad view of what constitutes the same general set of facts. An amended pleading will not be barred simply because it is based on a new cause of action, a new legal theory, or because the facts proved under the original pleading would be insufficient to establish liability under the amended pleading. (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 936-940.) In *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, a widow’s complaint against the city alleged that city police officers had intentionally killed her husband, and that the city was liable for his death on a theory of respondeat superior. The plaintiff amended her complaint, after the statute of limitations had run, to allege that the city had negligently hired officers with a history of violence. The court allowed the amendment on the ground that it “recite[s] the same acts . . . as the gravamen of the action, and the recovery is sought in both counts to compensate plaintiff for the loss of her husband.” (*Id.* at p. 584.) In *Barnes v. Wilson* (1974) 40 Cal.App.3d 199, a wrongful death action, the plaintiffs alleged that the Golden Gloves Tavern negligently failed to inform the decedent of the presence of the assailant. In a fourth amended complaint, filed long after the statute of limitations had run, the plaintiffs substituted the Noyds for two Doe defendants and alleged that, as owners of another establishment, the Noyds had negligently served alcohol to the assailant. The court allowed the amendment on the ground that it “seeks to hold the Noyds responsible for the same occurrence and damage alleged in the original complaint.” (*Id.* at p. 205.)

4. In this case, complainant’s original accusation was filed on September 13, 2010, well within three years of all the grounds for discipline alleged in that pleading, and well within three years of all the matters alleged in the first amended accusation. The

² All statutory references are to the Business and Professions Code.

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

(Bus. & Prof. Code, § 10101.²) Respondents assert, correctly, that virtually all of the matters alleged as cause for discipline in the first amended accusation occurred more than three years before the first amended accusation was filed on July 11, 2011.

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² All statutory references are to the Business and Professions Code.

original accusation alleged that respondents had suffered a civil judgment for fraud in connection with the commission payable to Shellito upon the sale of 855 Cañada Road. It asserted that they were subject to discipline under section 10177.5, judgment of fraud in a civil action, and also under section 10176, subdivision (i), fraud or dishonest dealing.

On May 4, 2011, the Court of Appeal issued its decision in *The Grubb Company, Inc. v. Department of Real Estate, supra*, 194 Cal.App.4th 1494, which limited complainant's authority to impose discipline against licensees under section 10177.5.

On July 11, 2011, complainant filed the first amended accusation. The first amended accusation is also based upon fraud in connection with the commission payable to Shellito upon the sale of 855 Cañada Road. It maintained the legal theory that respondents are subject to discipline for fraud or dishonest dealing. The first amended accusation dropped the legal theory that respondents were subject to discipline because of an adverse civil judgment, and added a new theory that respondent Valencia was also subject to discipline for failing to supervise respondent Connors-Duran.

5. Citing *Herrera v. Department of Real Estate* (2001) 88 Cal.App.4th 776, respondents argue that the original accusation and the first amended accusation are not based on the same general set of facts. Their reliance on *Herrera* is misplaced. *Herrera* holds that, for the purpose of commencing the statute of limitations under section 10101, a conviction, a civil judgment, or a disciplinary action by a regulatory body are different "occurrences" than the acts or omissions that underlie them. There was no issue of relation back in *Herrera*.

6. In this case, the original accusation and the first amended accusation are both based on respondents' fraudulent conduct in connection with the commission payable to Shellito upon the sale of 855 Cañada Road. Both pleadings seek to discipline respondents' real estate licenses. Both pleadings are based in part upon the legal theory of fraud and dishonest dealing. It is true that other legal theories have changed: complainant has dropped the legal theory of a civil fraud judgment, and added a new theory of failure to supervise with respect to respondent Valencia. But, as the cases discussed above in Legal Conclusion 3 make clear, a change in legal theory does not prevent a later pleading from relating back. The issue is whether the pleadings concern the same general set of facts; if they do, then the fact that the later pleading advances a new legal theory is irrelevant.

7. It is true that the original accusation did not allege the specific acts or omissions that gave rise to the civil fraud judgment. But, by alleging section 10176, subdivision (i), as a separate, additional cause for discipline, the original accusation informed respondents that they were being charged with fraud or dishonest dealing in connection with Shellito's commission. The accusation was sufficient to put respondents on notice that they needed to be prepared to defend themselves against that charge.

8. The policy that cases should be decided on the merits applies with even greater force to professional licensing cases such as this, where the purpose is not to redress personal harm but to protect the public. For the reasons set forth above, it is determined that the

original accusation and the first amended accusation in this case are based on the same general set of facts. The first amended accusation relates back to complainant's original accusation, and is not barred by the statute of limitations.

Fraud or dishonest dealing

9. The commissioner may take disciplinary action against a licensee who engages in fraud or dishonest dealing. (§ 10176, subd. (i).) Honesty and a firm understanding of ethical business practices are essential qualities of a real estate licensee. (*Rhoades v. Savage* (1963) 219 Cal.App.2d 294, 299.) Honesty in a real estate transaction includes the obligation to disclose material facts:

One who makes a statement in the expectation that the facts states will be relied upon by another, and who withholds material facts and thereby creates a false understanding, is as guilty of untruthfulness as he would be if the facts he stated were untrue.

(*Ibid.*)

10. Respondent Connors-Duran induced Shellito to accept a 1.5 percent commission by telling him that WaMu had "beat her down" to a total commission of 3 percent. (Finding 13.) Even as she told Shellito that, she was negotiating with WaMu for a total commission higher than 3 percent. (Finding 11.) Respondent Connors-Duran did not inform Shellito of the June 2 amendment to the MLS. (Finding 18.) When WaMu agreed to a 6 percent commission, Connors-Duran did not disclose that fact to Shellito, and concealed the true commission from him. (Findings 21 & 22.) Respondent Connors-Duran did these things for personal financial gain. (Finding 6.) She committed fraud and dishonest dealing.

Respondent Connors-Duran argues that, when she told Shellito that WaMu would only pay a total commission of 3 percent, she was hoping that WaMu would pay more but did not know that it would. That may be true. But when she learned that WaMu would pay 6 percent, honesty compelled her to disclose that fact to Shellito. Instead of disclosing that fact to Shellito, respondent Connors-Duran concealed it from him.

Cause exists to take disciplinary action against respondent Connors-Duran's salesperson license pursuant to section 10176, subdivision (i).

11. Respondent Valencia knew that Shellito's May 28 offer was based in part on the MLS listing which stated "Lender approved only 3% total commission." (Findings 12, 14 & 16.) Respondent Valencia did not inform Shellito of the June 2 amendment to the MLS. (Findings 17 & 18.) When WaMu later approved a 6 percent commission, respondent Valencia did not disclose that fact to Shellito and did not instruct respondent Connors-Duran to disclose that fact to Shellito. (Finding 22.) Respondent Valencia committed fraud and dishonest dealing.

Cause exists to take disciplinary action against respondent Valencia's broker license pursuant to section 10176, subdivision (i).

Failure to supervise

12. The commissioner may take disciplinary action against a real estate broker who fails to exercise reasonable supervision over the activities of his salespersons. (§ 10177, subd. (h).)

13. Respondent Valencia did not exercise reasonable supervision over the activities of respondent Connors-Duran. He did not instruct Connors-Duran to inform Shellito of the June 2 amendment to the MLS listing. (Finding 18.) When WaMu approved a total commission of 6 percent, respondent Valencia did not direct respondent Connors-Duran to disclose that fact to Shellito. (Finding 22.)

Cause exists to take disciplinary action against respondent Valencia's broker license pursuant to section 10177, subdivision (h).

Disciplinary considerations

14. The purpose of license discipline is not to punish the licensee, but to protect the public from incompetence and lack of integrity among those practicing in a licensed profession. (*Murrill v. State Board of Accountancy* (1950) 97 Cal.App.2d 709, 712.) Thus the focus of license discipline is not to redress past harm, but to prevent future harm. (*Griffiths v. Superior Court* (2002) 94 Cal.App.4th 757, 772.)

15. From the beginning of the transaction, respondent Connors-Duran was determined to obtain a commission of 6 or 7 percent and keep the lion's share of the commission for herself. She committed fraud to make that happen. Even as she told Shellito that the lender would only approve a commission of 3 percent, respondent was pressuring the lender for a higher commission. When the lender finally agreed, respondent concealed that information from Shellito, a broker who was less sophisticated in short sales than she was. Despite adverse decisions from her local realtor association and the superior court, respondent still does not admit, and apparently does not recognize, that she did anything unethical. As respondent sees it, the blame lies with Shellito, the victim of her fraud, for not discovering it. Respondent's unpersuasive testimony that she sent Shellito the second page of WaMu's letter, in which the lender approved a 6 percent commission, is fresh evidence of her dishonesty. Respondent does not possess the integrity required of a real estate licensee. It would be contrary to the public interest to allow respondent Connors-Duran to retain her salesperson license, even on a restricted basis.

16. The discipline to be imposed on respondent Valencia's broker license is a closer question. The fraud on Shellito originated with respondent Connors-Duran, not respondent Valencia, and the evidence does not associate Valencia with Connors-Duran's


decision to withhold the critical page of WaMu's approval letter from Shellito. But, in addition to concealing material facts from Shellito himself, respondent Valencia did not supervise Connors-Duran in any meaningful way. He stood by and allowed her to perpetrate fraud; by proposing the June 2 amendment to the MLS, and not disclosing the amendment to Shellito, respondent Valencia facilitated the fraud. To maintain public confidence in real estate professionals, it is up to real estate brokers to conduct their business activities honestly and fairly, and to hold their salespersons to the same standards. There is no sound basis on which to conclude that respondent Valencia will do that if he is allowed to remain licensed. Respondent Valencia does not acknowledge any wrongdoing. He does not appreciate that his actions, or respondent Connors-Duran's actions, were dishonest in any way. Like respondent Connors-Duran, respondent Valencia blames Shellito for not discovering the information they chose not to disclose. Respondent Valencia's conception of fair and honest dealing is not consistent with the obligations of a real estate broker. It would be contrary to the public interest to allow respondent Valencia to retain his broker license, even on a restricted basis.

ORDER

1. All licenses and licensing rights of respondent Arleen Connors-Duran under the Real Estate Law are revoked.

2. All licenses and licensing rights of respondent Joel Prado Valencia under the Real Estate Law are revoked.

DATED: June 14, 2012



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings