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APR 17 2024

NEVADA COMMISSION OF APPRAISERS

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1 KAEMPFER CROWELL
2 Lesley Miller, No. 7987
3 Ellsie Lucero, No. 15272
4 1980 Festival Plaza Drive, Suite 650
5 Las Vegas, Nevada 89135
6 Telephone: (702) 792-7000
7 Facsimile: (702) 796-7181
8 Email: lmiller@kcnvlaw.com
9 Email: ecastaneda@kcnvlaw.com

6 Attorneys for Thomas L. Witherby

7 STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY REAL
8 ESTATE DIVISION - APPRAISERS

9 STATE OF NEVADA

10 SHARATH CHANDRA, Administrator,
11 REAL ESTATE DIVISION,
12 DEPARTMENT OF BUSINESS AND
13 INDUSTRY, STATE OF NEVADA,

13 Petitioner,

14 vs.

15 THOMAS L. WITHERBY
16 (License No. A.0001528-CR),

17 Respondent.

Case No. 2020-492, AP21.045.S

**RESPONDENT'S OPPOSITION TO
MOTION TO DISMISS
RESPONDENT'S MOTION TO
RECONSIDER REVOCATION
ORDER**

18
19 Thomas Witherby ("Mr. Witherby"), by and through his attorneys
20 Lesley Miller and Ellsie Lucero of the law firm Kaempfer Crowell, hereby submits
21 this opposition to Petitioner Real Estate Division of the Department of Business and
22 Industry of the State of Nevada ("Division") Motion to Dismiss Respondent's
23 Motion to Reconsider Revocation Order. Mr. Witherby responds to the Motion to
24 Dismiss as follows:

1 **I. INTRODUCTION**

2 Mr. Witherby is not disputing the Commission’s authority to enter an
3 order against him based on default, and he is not disputing the procedural history of
4 this case leading up to this point. Mr. Witherby simply requests that the Commission
5 reconsider the severity of the penalties imposed in the Commission’s October 10,
6 2023 Order revoking his expired license and issuing over \$60,000 in fines pursuant
7 to its discretion to do so under NRS 645C.460(2). A reversal of the revocation and
8 a lesser fine would still serve the Commission’s objectives without depriving Mr.
9 Witherby of his ability to make a living in Florida. The severity of the discipline
10 imposed has caused Mr. Witherby substantial hardship and will undoubtedly do so
11 for the rest of his life.

12 **II. ARGUMENT**

13 **A. The Commission Has Jurisdiction to Reconsider the Severity of the**
14 **Discipline Imposed in the October 10, 2023 Order and Should**
15 **Consider Mr. Witherby’s Untimely Request in Light of the Lack of**
Prejudice to the Commission and Public and Significant Hardship
Mr. Witherby Has Suffered.

16 The Division has not provided a legal basis why it believes that the
17 Commission lacks jurisdiction to reconsider the severity of the discipline imposed
18 in the October 10, 2023 Order. If the Commission has the authority to enforce the
19 October 10, 2023 Order then it also has the authority to reconsider the severity of
20 the discipline it is enforcing. Moreover, under NRS 645C.525, a Commission order
21 revoking an appraiser license does not prohibit the Commission from continuing a
22 disciplinary proceeding against an appraiser:
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NRS 645C.525 Investigations, disciplinary proceedings, fines and penalties not affected by expiration, revocation or voluntary surrender of certificate, license or registration card. The expiration or revocation of a certificate, license or registration card by operation of law or by order or decision of the Commission or a court of competent jurisdiction, or the voluntary surrender of a certificate, license or registration card by a certified or licensed appraiser or registered intern does not:

1. Prohibit the Commission or Division from initiating or continuing an investigation of, or action or disciplinary proceeding against, the certified or licensed appraiser or registered intern as authorized pursuant to the provisions of this chapter or the regulations adopted pursuant thereto; or
2. Prevent the imposition or collection of any fine or penalty authorized pursuant to the provisions of this chapter or the regulations adopted pursuant thereto against the certified or licensed appraiser or registered intern.

Therefore, even after the Commission has filed a disciplinary order it can continue to consider a disciplinary action against an appraiser. Here, there is no prejudice to the Commission or public if the Commission considers Mr. Witherby's untimely request to reconsider the severity of the discipline in the October 10, 2023 Order. Mr. Witherby does not pose a threat to the public based on the allegations in the Division's complaint, and the severity of the discipline was only imposed because of a default not because he committed fraud or other misconduct. *See Ex. 1 to Mot. to Reconsider, Complaint; Ex. 4 to Mot. to Reconsider, October 10, 2023 Order.* Moreover, the significant harm Mr. Witherby has suffered warrants reconsideration for relief as will be explained below.

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B. The Commission Should Issue A Lesser Penalty Because It Has Discretion to Do So and Mr. Witherby Has Already Experienced Significant Harm.

Nevada law provides the Commission discretion to choose the severity of discipline imposed against an appraiser. Under NRS 645C.460(2), if the grounds for disciplinary action against an appraiser or intern exist, the Commission *may* do *one or more of the following*:

- (a) Revoke or suspend the appraiser’s or intern’s certificate, license or registration card.
- (b) Place conditions upon his or her certificate, license or registration card, or upon the reissuance of a certificate, license or registration card revoked pursuant to this section.
- (c) Deny the renewal of his or her certificate, license or registration card.
- (d) Impose a fine of not more than \$10,000 for each violation.

See NRS 645C.460(2) (emphasis added).

The Division points to the Commission’s deliberation regarding the discipline imposed in the October 10, 2023. A review of that deliberation process shows that it was based purely on Mr. Witherby’s failure to attend the October 3, 2023 hearing—not the actual alleged violations in the complaint:

TIMOTHY O’BRIEN: Got it. One last logistical question, and thank you for indulging with President Wright. Since Witherby has not shown up, and if we’re to choose to accept the factual allegations as true, and he was to appeal it at a later time, either through the courts or other items, he would have that avenue, but at this point, since he is not showing up, we have the option to just proceed as is, and take action on an absent respondent, correct?

CHRISTY STAFFEN: Correct.

See Ex. 5 to Mot. to Reconsider, Transcript at WIT00020:2–11.

1 Mr. Witherby is now cognizant of the importance of appearing before
2 the Commission and consequences of failing to do so. Unfortunately for him at the
3 time of the October 2023 hearing, counsel for his insurance did not timely provide
4 him a local attorney, and once an attorney was provided she strongly advised that he
5 not appear at the October 2023 hearing remotely, resulting in Mr. Witherby's failure
6 to appear. But Mr. Witherby is not here to dispute the Commission's rightful
7 authority to enter a default, just simply to ask for relief from the severity of the
8 discipline in light of the lack of harm to the public and significant harm Mr. Witherby
9 has suffered and continues to suffer.

10 **C. Mr. Witherby Has Suffered Significant Harm and Will Continue**
11 **to Do So For the Rest of His life Without Relief from the Severity**
12 **of the Discipline Imposed.**

13 As an initial matter, the district court never made a finding that Mr.
14 Witherby did not suffer harm. *See* Division Ex. D, Order Denying Stay. The
15 Division cannot genuinely argue Mr. Witherby's claim of harm is unsupported when
16 the purpose of the October 10, 2023 Order was to deprive Mr. Witherby of his ability
17 to work as an appraiser.

18 LARRY GANDY: Yes, President Wright, I understand, I
19 was able to review some of this, and unfortunately this person had an
20 opportunity at AARC, dropped the ball, revocation, the underlying case
21 itself is quality considerations for townhouses and competing. I
22 understand the revocation need, it sends an alert through the system
23 since he is licensed actively in Florida. **I certainly understand some**
24 **kind of punitive for maybe playing fast and loose saying, you were**
going to attend, start to engage, just not show up, disengage,
\$60,000 seems like a pretty heavy punitive burden when you're
going to send a ripple through a system on revocation. I would just
like to throw it out there for potential consideration to the other
Commissioners. I do agree in the revocation, if you don't defend, you
can't expect someone to defend for you. I certainly agree with the
Division's costs and maybe something punitive. Personally, I just have
a hard time with a accumulative of \$60,000, in addition to revocation,

1 because, that will affect ultimately ripple Florida's wealth. **I don't**
2 **know, maybe just consideration, we're trying to go through, that is**
3 **what the State wants, I get it. I'm just trying to balance it with the**
4 **actual, if we look at the actual underlying complaint.**

5 JOHN WRIGHT: Do you have a recommendation or
6 thought on what that punitive should be?

7 LARRY GANDY: You know, I think it should be
8 significant in my opinion, revocation to me is the ultimate significance.
9 I do believe the State is entitled to every one of those actual, and
10 reasonable, and customary costs that they outline, and I think there
11 should be something sense as fine punitive in nature for not engaging
12 in the system, and actually giving the perception, you're were going to
13 engage which that waste a lot of time. **How much for the six**
14 **allegations violations that he has been. I don't know, if we're**
15 **taking the life blood out, something reasonable, I don't know.**
16 **Maybe a \$1000 in violation, in addition to the cost.**

17 JOHN WRIGHT: **So the total cost would be roughly**
18 **\$10,000.**

19 LARRY GANDY: I mean, **I just feel like, to me 60,000**
20 **seems excessive. I mean, I know it's punitive in nature, that's not**
21 **engaging, engaging, I get it, but tempering with the fact that this is**
22 **going to send a shockwave, he's going to lose the ability to make a**
23 **living in Florida as well. Are we beating a dead horse when we go**
24 **at \$60,000, but I understand the premise. I agreed with the**
25 **violations, the factual allegations, and ultimately, I would like just to**
26 **hear what everybody else says, and if they say no, no, I get it. I**
27 **understand, thank you, sir.**

28 *See Ex. 8, Remainder of Transcript at WIT00025:12-27:12.*

29 Here, Mr. Witherby cannot get work as an appraiser in Florida due to
30 the Nevada revocation on his record. His Florida license will soon be revoked
31 altogether. Moreover, even when he has attempted to get a job in another field as an
32 insurance adjuster he cannot due to the Nevada revocation. On top of all of this, he
33 has a \$63,897.22 fine hanging over his head that he cannot afford, especially in light
34 of the fact that he cannot work to pay this off. For these reasons, Mr. Witherby has
35 suffered significant harm and will continue to do so for the rest of his life without
36 relief from the Commission.

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D. There Will Be No Harm to the Public if the Commission Lessens the Severity of the Discipline Imposed Against Mr. Witherby.

The Division only cites to the citizen’s complaint regarding their opinion that Mr. Witherby’s appraisal report was the worst they had ever seen but nothing more to show there was any harm to that citizen or the greater public. The Division does not address the substance of the actual allegations in the Division’s underlying complaint which even if taken as true did not cause harm to anyone.

The complaint alleges “[t]he Respondent’s Appraisal Report appraised for \$300,000 which was less than the Property sold for two years prior at \$310,000.” See Ex. 1 Mot. to Reconsider, Complaint at ¶ 13. Absent from the complaint is any allegation of harm as a result of the violations. See generally *id.* The appraisal report confirms the contract for the sale of the property was dated March 20, 2020 for a sale price of \$300,000. Ex. 2 to Mot. Reconsider, Appraisal Report at 1. Mr. Witherby’s appraisal of the property was for \$300,000 on March 31, 2020. *Id.* at 2. According to the appraisal report, “the intended use of this appraisal report is for the lender/client to evaluate the property that is the subject of this appraisal for a mortgage finance transaction.” *Id.* at 4. The appraisal report therefore did not cause any harm to any party to the sale of the property. Lastly, to be clear, Mr. Witherby does not have a disciplinary history. There was one case that was closed in 2017 due to insufficient evidence of a violation and another in 2018 that involved a letter of instruction to work on file issues. See Division Ex. G, Appraisal Case Analysis.

...
...

1 **E. The Commission Should Reverse the Revocation and Impose a**
2 **Lesser Fine Which Should Remedy Mr. Witherby's Alleged**
3 **Violations and Failure to Appear at the October 2023 Hearing.**

4 The Commission adopted the Division's recommendation completely
5 at the October 3, 2023 hearing, but the Division was directly adverse to Mr. Witherby
6 because it was prosecuting the action against him:

7 CHRISTY STAFFEN: We do. Christy Staffen, Appraisal
8 Program Officer. **The Division recommends that the Respondent's**
9 **license be revoked, and that he pay the cost and fees associated with**
10 **the investigation, as well as \$10, 000 per violation, for a total of**
11 **\$60,000.** Fines and fees are to be paid within 30 days of the effective
12 date of the order, and the division may institute debt collection
13 proceedings against the respondent for failure to timely pay the total
14 fine. Further, if collection goes through the State of Nevada then the
15 respondent shall also pay the costs associated with the collection.

16 *See Ex. 8, Remainder of Transcript at WIT00024:1-11.*

17 Surely, the result would have been different for Mr. Witherby if he and counsel had
18 been present. But even taking the allegations as true, the allegations do not warrant
19 such severe punishment resulting in a complete deprivation of Mr. Witherby's
20 livelihood.

21 Here, the revocation of Mr. Witherby's license was and is unnecessary
22 because as explained above he does not pose a threat to the public and his license
23 could not have been reinstated:

24 CHRISTAL KEEGAN: If I may clarify, his license is
 closed. He cannot reinstate it.

 CHRISTY STAFFEN: Okay.

 CHRISTAL KEEGAN: You get one year from your
 expiration date to reinstate. His license expired in 2022. He had until
 March of 2023 to reinstate it, renew it, pay it up, and he has not, so it is
 closed.

See Ex. 5 to Mot. to Reconsider, Transcript at WIT00020:16-22.

1 And, a fine of \$1000.00 per violation in addition to the Division's costs of \$3,987.22
2 should suffice to remedy the alleged violations in the Division's complaint in light
3 of the lack of harm to the complainant and public. Therefore, the Commission
4 should reverse the revocation and impose a reduced \$9, 987.22 fine.

5 **III. CONCLUSION**

6 For the reasons set forth above, Mr. Witherby requests that the
7 Commission deny the Division's Motion to Dismiss and grant Mr. Witherby's
8 Motion to Reconsider the October 10, 2023 Order.

9 KAEMPFER CROWELL

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12 Lesley Miller, No. 7987
13 Ellsie Lucero, No. 15272
14 1980 Festival Plaza Drive, Suite 650
15 Las Vegas, Nevada 89135

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24 Attorneys for Thomas L. Witherby

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CERTIFICATE OF SERVICE

I served the attached **RESPONDENT’S OPPOSITION TO MOTION TO DISMISS RESPONDENT’S MOTION TO RECONSIDER REVOCATION ORDER** and exhibits by placing a true copy of it in a sealed envelope with postage prepaid in the U.S. Mail and by electronic mail addressed to:

CHARVEZ FOGER, Deputy
Administrator
Deputy Attorney General
3300 West Sahara Avenue, Suite 350
Las Vegas, NV 89102
Cfoger@red.nv.gov

ZIWEI ZHENG, ESQ.
Deputy Attorney General
Nevada Bar No. 16351
555 East Washington Avenue
Las Vegas, NV 89101
zzheng@ag.nv.gov

CHRISTAL P. KEEGAN, ESQ.
Deputy Attorney General
Nevada Bar No. 12725
5420 Kietzke Lane, #202
Reno, Nevada 89511
ckeegan@ag.nv.gov

Attorneys for Real Estate Division

DATED April 17, 2024

s/ Kimberly Rupe
Kimberly Rupe
An employee of Kaempfer Crowell

EXHIBIT INDEX

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Exhibit 8 Additional Transcript from October 2, 2023 Hearing

EXHIBIT 8

Additional Transcript
from October 2, 2023 Hearing

1 JOHN WRIGHT: He accepted, he just didn't say 1
2 through 13, but he said all factual allegations. Just to
3 clarify, the motions are -- the factual allegations are
4 already in record. We already admitted all of the Bates
5 stamps, so they are already technically in record. We're
6 just making the motion as I understand it, to accept them
7 as presented by the State.

8 LARRY GANDY: They're proven.

9 SCOTT KRUEGER: All in favor?

10 JOHN WRIGHT: So any further discussion? All in
11 favor.

12 COMMISSION: Aye.

13 JOHN WRIGHT: Opposed? The motion carries
14 unanimously.

15 TIMOTHY O'BRIEN: President Wright, I'd like to
16 make a motion that we accept the violations of law in the
17 case NRED v. Thomas L. Witherby, License No. A.0001528-
18 CR, Case No. 2020-492, AP21.045.S.

19 JOHN WRIGHT: Do I have a second?

20 SCOTT KRUEGER: I will second.

21 JOHN WRIGHT: Any discussion? All in favor.

22 COMMISSION: Aye.

23 JOHN WRIGHT: Oppose? The motion carries
24 unanimously. I think the next step is, does the Division
25 have recommendations?

1 CHRISTY STAFFEN: We do. Christy Staffen,
2 Appraisal Program Officer. The Division recommends that
3 the Respondent's license be revoked, and that he pay the
4 cost and fees associated with the investigation, as well
5 as \$10, 000 per violation, for a total of \$60,000. Fines
6 and fees are to be paid within 30 days of the effective
7 date of the order, and the division may institute debt
8 collection proceedings against the respondent for failure
9 to timely pay the total fine. Further, if collection goes
10 through the State of Nevada then the respondent shall also
11 pay the costs associated with the collection.

12 TIMOTHY O'BRIEN: You mind stating into record
13 cost, is that your -- or is that Maria?

14 CHRISTY STAFFEN: Maria.

15 JOHN WRIGHT: Ms. Gallo, could you provide us
16 with costs.

17 MARIA GALLO: For the case, Thomas Witherby,
18 2020-492, the cost is \$3,897.22, and those are reasonable,
19 necessary, and actual.

20 JOHN WRIGHT: Thank you. So do I have a motion
21 regarding discipline.

22 TIMOTHY O'BRIEN: I'll make a motion, in the Case
23 v. Thomas L. Witherby, License No. A.0001528-CR, Case No.
24 2020-492, AP21.045.S. I motion that we approve the
25 recommended discipline which includes revocation of said

1 license, the fees of \$60,000, and the costs. Maria, I'm
2 sorry, you'll have to read them back for me, so I can put
3 in my motion.

4 MARIA GALLO: \$3,897.22.

5 TIMOTHY O'BRIEN: \$3,897.22 as reasonable, true,
6 and actual costs.

7 MARIA GALLO: To be payable when?

8 TIMOTHY O'BRIEN: to be payable within 180 days.

9 JOHN WRIGHT: Do I have a second?

10 SCOTT KREUGER: I will second.

11 JOHN WRIGHT: Any discussion?

12 LARRY GANDY: Yes, President Wright, I
13 understand, I was able to review some of this, and
14 unfortunately this person had an opportunity at AARC,
15 dropped the ball, revocation, the underlying case itself
16 is quality considerations for townhouses and competing. I
17 understand the revocation need, it sends an alert through
18 the system since he is licensed actively in Florida. I
19 certainly understand some kind of punitive for maybe
20 playing fast and loose saying, you were going to attend,
21 start to engage, just not show up, disengage, \$60,000
22 seems like a pretty heavy punitive burden when you're
23 going to send a ripple through a system on revocation. I
24 would just like to throw it out there for potential
25 consideration to the other Commissioners. I do agree in

1 the revocation, if you don't defend, you can't expect
2 someone to defend for you. I certainly agree with the
3 Division's costs and maybe something punitive.
4 Personally, I just have a hard time with a accumulative of
5 \$60,000, in addition to revocation, because, that will
6 affect ultimately ripple Florida's wealth. I don't know,
7 maybe just consideration, we're trying to go through, that
8 is what the State wants, I get it. I'm just trying to
9 balance it with the actual, if we look at the actual
10 underlying complaint.

11 JOHN WRIGHT: Do you have a recommendation or
12 thought on what that punitive should be?

13 LARRY GANDY: You know, I think it should be
14 significant in my opinion, revocation to me is the
15 ultimate significance. I do believe the State is entitled
16 to every one of those actual, and reasonable, and
17 customary costs that they outline, and I think there
18 should be something sense as fine punitive in nature for
19 not engaging in the system, and actually giving the
20 perception, you're were going to engage which that waste a
21 lot of time. How much for the six allegations violations
22 that he has been. I don't know, if we're taking the life
23 blood out, something reasonable, I don't know. Maybe a
24 \$1000 in violation, in addition to the cost.

25 JOHN WRIGHT: So the total cost would be roughly

1 \$10,000.

2 LARRY GANDY: I mean, I just feel like, to me
3 60,000 seems excessive. I mean, I know it's punitive in
4 nature, that's not engaging, engaging, I get it, but
5 tempering with the fact that this is going to send a
6 shockwave, he's going to lose the ability to make a living
7 in Florida as well. Are we beating a dead horse when we
8 go at \$60,000, but I understand the premise. I agreed
9 with the violations, the factual allegations, and
10 ultimately, I would like just to hear what everybody else
11 says, and if they say no, no, I get it. I understand,
12 thank you, sir.

13 TIMOTHY O'BRIEN: President Wright, if I may,
14 Commissioner Gandy, as always, very eloquent, and I think
15 important points that you put on record. I am concerned
16 that this particular respondent has wasted the time of
17 AARC, wasted the time of our staff in the last session, of
18 which we provided a last minute continuance. In this
19 session, the respondent has the ability to come back to
20 this Commission, and argue that fine if he wishes to, but
21 as of right now, this case is multiplied years old. This
22 is Case No. 2020, it has seemed to have gone through the
23 delay process everywhere through the process, and let us
24 not remember that there was someone damaged potentially in
25 the general public, and our goal is to protect the public

1 trust. So since the respondent, cannot even show up to
2 defend their work, they know that this happening, they
3 engaged their insurance company. This is to me is an
4 inappropriate fine, and if we are petitioned in the future
5 to reconsider it, I am open to the defendant coming, and
6 explaining through this process, but now this seems to be
7 just be a way of running from the complaint, and I believe
8 that the full amount is warranted and supported. That is
9 just my individual vote.

10 JOHN WRIGHT: Any other comments?

11 SCOTT KRUEGER: I would agree with that, and he
12 would have the opportunity to appeal this case, and come
13 back to us and argue lesser fines, if there are any.

14 JOHN WRIGHT: I agree. Commissioner, Ivey.

15 JOHN IVEY: I, you know, at first thought, I
16 thought \$60,000 was really unreasonable, but after further
17 reflection, I agree with Commissioner, O'Brien.

18 JOHN WRIGHT: Okay. I do, however, Commissioner
19 O'Brien, need you to modify your motion because you stated
20 the case number incorrectly. You stated it as AP21.45.S
21 instead of 20.45.S.

22 TIMOTHY O' BRIEN: Mine shows 21.

23 JOHN WRIGHT: On Witherby?

24 TIMOTHY O'BRIEN: Yes. Okay, then it's wrong on
25 the agenda?

1 CHRISTAL KEEGAN: It's AP20.

2 TIMOTHY O'BRIEN: Here it shows 21.

3 JOHN WRIGHT: To be clear, Page 2 of the Agenda
4 has AP20.45, the actual filing here is AP21.045, so we
5 have a slight typographical error on one of the items.

6 TIMOTHY O'BRIEN: Okay, do we have a source of
7 truth on that to see if I need to update my - so a moment
8 President Wright, we're obtaining source of truth here.

9 CHRISTAL KEEGAN: If the case is 2020, the AP is
10 going to be 20. Thank you for checking.

11 SCOTT KRUEGER: It is AP20.

12 TIMOTHY O'BRIEN: So the agenda itself is
13 correct, but it's my understanding then we would need to
14 update the document here before President Wright signs the
15 final disposition. So, per President Wright's request, I
16 hereby amend my motion in the case of NRED v. Thomas L.
17 Witherby, License No. A.0001528-CR, Case No. 2020-492
18 AP20.045.S, that we accept the Division's recommendations,
19 a revocation of licensure fines \$60,000, and the cost of
20 \$3,897.27 is provided by the division, which have been
21 stated.

22 JOHN WRIGHT: It's 3987.22, not .27.

23 TIMOTHY O'BRIEN: Alright. This is why
24 commercial guys are so smart. The residential guys, we're
25 are out. You also get paid by the word, as I understand

1 it, Commissioner, so we'll do it one more time. I hereby
2 amend my amended, amended, amended motion to, the case of
3 NRED v. Thomas L. Witherby, License No. A.0001528.CR, Case
4 No. 2020-492 AP20.045.S that we accept the recommendations
5 of the Division for revocation of license, fines in the
6 amount of \$60,000, and costs of \$3,897.22 as stated by
7 Division, which are stated to be reasonable, true, and
8 typical.

9 JOHN WRIGHT: And, that they need to be paid?

10 TIMOTHY O'BRIEN: That they need to be paid
11 within 180 days.

12 JOHN WRIGHT: Do I have a second?

13 SCOTT KRUEGER: I second that motion.

14 JOHN WRIGHT: Okay, any further discussion? All
15 in favor? Aye.

16 COMMISSION: Aye.

17 JOHN WRIGHT: Opposed? No. Motion carries 4:1,
18 and that ends item four on the Agenda. There is no item
19 five. There is no item six, so 6A is Discussion,
20 Discussion regarding the Administrator's Report.

21 CHARVEZ FOGER: Again Commissioners, for the
22 record Charvez Foger, Deputy Administrator for the
23 Division. I'm acting on behalf of the Administrator,
24 Sharath Chandra, who was in another meeting this morning.
25 Administrative Report, we continue to work with, on our