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State Bar Court of California Hearing Department San Francisco ACTUAL SUSPENSION		
<p>Counsel For The State Bar</p> <p>Robert A. Henderson Supervising Senior Trial Counsel 180 Howard St. San Francisco, CA 94105 (415) 538-2385</p> <p>Bar # 173205</p>	<p>Case Number(s): 14-O-05941-LMA 15-O-13271</p>	<p>For Court use only</p> <p style="text-align: center;">PUBLIC MATTER</p> <p style="text-align: center;">FILED</p> <p style="text-align: center;">APR - 5 2016</p> <p style="text-align: center;">STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO</p>
<p>In Pro Per Respondent</p> <p>Elias Francisco Portales 111 N. Market St., Suite 300 San Jose, CA 95128 (408) 357-4655</p> <p>Bar # 230402</p>	<p>Submitted to: Settlement Judge</p> <p>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING</p> <p>ACTUAL SUSPENSION</p> <p><input type="checkbox"/> PREVIOUS STIPULATION REJECTED</p>	
<p>In the Matter of: ELIAS FRANCISCO PORTALES</p> <p>Bar # 230402</p> <p>A Member of the State Bar of California (Respondent)</p>		

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

- (1) Respondent is a member of the State Bar of California, admitted **April 30, 2004**.
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.
- (3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **16** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".

- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."
- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):
- Until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 5.130, Rules of Procedure.
 - Costs are to be paid in equal amounts prior to February 1 for the following membership years: (Hardship, special circumstances or other good cause per rule 5.132, Rules of Procedure.) If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.
 - Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs".
 - Costs are entirely waived.

B. Aggravating Circumstances [Standards for Attorney Sanctions for Professional Misconduct, standards 1.2(h) & 1.5]. Facts supporting aggravating circumstances are required.

- (1) **Prior record of discipline**
- (a) State Bar Court case # of prior case **07-O-11534 - See attachment to stipulation at p. 11.**
 - (b) Date prior discipline effective **July 6, 2008**
 - (c) Rules of Professional Conduct/ State Bar Act violations: **Rule 3-110(A) [failure to perform] and 3-700(D)(2) [failure to refund unearned fees], Business and Professions Code section 6068(m).**
 - (d) Degree of prior discipline **18 month stayed suspension, 3 years of probation, no actual suspension from the practice of law.**
 - (e) If Respondent has two or more incidents of prior discipline, use space provided below.
- (2) **Intentional/Bad Faith/Dishonesty:** Respondent's misconduct was dishonest, intentional, or surrounded by, or followed by bad faith.
- (3) **Misrepresentation:** Respondent's misconduct was surrounded by, or followed by, misrepresentation. **See Attachment to Stipulation at p. 12.**
- (4) **Concealment:** Respondent's misconduct was surrounded by, or followed by, concealment.
- (5) **Overreaching:** Respondent's misconduct was surrounded by, or followed by, overreaching.
- (6) **Uncharged Violations:** Respondent's conduct involves uncharged violations of the Business and Professions Code, or the Rules of Professional Conduct.
- (7) **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

- (8) **Harm:** Respondent's misconduct harmed significantly a client, the public, or the administration of justice.
- (9) **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (10) **Candor/Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct, or to the State Bar during disciplinary investigations or proceedings.
- (11) **Multiple Acts:** Respondent's current misconduct evidences multiple acts of wrongdoing. See attachment to stipulation at p. 12.
- (12) **Pattern:** Respondent's current misconduct demonstrates a pattern of misconduct.
- (13) **Restitution:** Respondent failed to make restitution.
- (14) **Vulnerable Victim:** The victim(s) of Respondent's misconduct was/were highly vulnerable.
- (15) **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see standards 1.2(i) & 1.6]. Facts supporting mitigating circumstances are required.

- (1) **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not likely to recur.
- (2) **No Harm:** Respondent did not harm the client, the public, or the administration of justice.
- (3) **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct or to the State Bar during disciplinary investigations and proceedings.
- (4) **Remorse:** Respondent promptly took objective steps demonstrating spontaneous remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.
- (5) **Restitution:** Respondent paid \$ _____ on _____ in restitution to _____ without the threat or force of disciplinary, civil or criminal proceedings.
- (6) **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7) **Good Faith:** Respondent acted with a good faith belief that was honestly held and objectively reasonable.
- (8) **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical or mental disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and the difficulties or disabilities no longer pose a risk that Respondent will commit misconduct.

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- (9) **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.
- (10) **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11) **Good Character:** Respondent's extraordinarily good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.
- (12) **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.
- (13) **No mitigating circumstances** are involved.

Additional mitigating circumstances:

Pre-trial stipulation - See attachment to stipulation at p. 12.

D. Discipline:

- (1) **Stayed Suspension:**
- (a) Respondent must be suspended from the practice of law for a period of **one year**.
- i. and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1) Standards for Attorney Sanctions for Professional Misconduct.
- ii. and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii. and until Respondent does the following:
- (b) The above-referenced suspension is stayed.

- (2) **Probation:**

Respondent must be placed on probation for a period of **one year**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)

- (3) **Actual Suspension:**

- (a) Respondent must be actually suspended from the practice of law in the State of California for a period of **90-days**.
- i. and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and fitness to practice and present learning and ability in the general law pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct
- ii. and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii. and until Respondent does the following:

E. Additional Conditions of Probation:

- (1) If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and present learning and ability in the general law, pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct.
- (2) During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (3) Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
- (4) Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.
- (5) Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation.

- (6) Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the probation monitor.
- (7) Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.
- (8) Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.
 - No Ethics School recommended. Reason: .
- (9) Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (10) The following conditions are attached hereto and incorporated:

- Substance Abuse Conditions
- Law Office Management Conditions

Medical Conditions

Financial Conditions

F. Other Conditions Negotiated by the Parties:

- (1) **Multistate Professional Responsibility Examination:** Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) & (E), Rules of Procedure.**
- No MPRE recommended. Reason: .
- (2) **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (3) **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (4) **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension: .
- (5) **Other Conditions: Fee arbitration - See attachment to stipulation at p. 13-15.**

8. On January 31, 2012, Nelson sent an email to respondent asking when the Motion to Set Aside Default was set. Respondent replied that there would be an opposition to the motion, but did not directly address the issue.

9. On February 14, 2012, Nelson sent a text message to respondent asking about the Motion to Set Aside Default. Nelson reiterated his desire that the default be set aside. Respondent replied that they needed to settle as there was no defense to the lawsuit.

10. On March 1, 2012, Nelson sent a text message to respondent asking about the Motion to Set Aside Default. Nelson reiterated his desire that the default be set aside. Respondent replied that American Express had called about a settlement.

11. On March 2, 2012, Nelson sent an email to respondent reiterating his desire that the default be set aside.

12. On March 12, 2012, Nelson sent an email to respondent reiterating his desire that the default be set aside.

13. On March 13, 2012, Nelson sent an email to respondent, noting a lack of response to an earlier message. Nelson requested a response by March 14, 2012.

14. On March 13, 2012, respondent sent Nelson an email which stated: "I will send confirmation over tonight of the motion."

15. On March 13, 2012, respondent sent an email to Nelson stating that Nelson had told him that the case would settle. Respondent also stated that setting aside the default would only delay the process.

16. On March 16, 2012, respondent emailed opposing counsel regarding a Motion to Set Aside Default. Respondent asked whether opposing counsel preferred April 17 or April 24 for the hearing.

17. On March 19, 2012, opposing counsel emailed respondent regarding the proposed Motion to Set Aside Default. Opposing counsel stated: "April 24, 2012, on the condition that plaintiff is given timely and proper notice of the motion papers." Respondent received this email.

18. On March 20, 2012, respondent filed a Motion to Set Aside Default. The hearing on the Motion to Set Aside Default was set for April 19, 2012. Respondent did not serve opposing counsel with the Motion to Set Aside Default, nor did the proposed hearing date conform to the agreed upon date.

19. On April 5, 2012, the plaintiff filed an opposition to the motion, pointing out that respondent failed to provide proper notice. Thereafter respondent took his motion off calendar. Respondent did not reset the motion or file another Motion to Set Aside Default.

20. On April 9, 2012, Nelson sent a text message to respondent regarding the Motion to Set Aside Default. Nelson's message was: "Set aside tonmorrow [sic] right". Later the same day Nelson emailed respondent regarding the motion and stated: "Let me know if you need anything from me for tomorrow. . ."

21. On April 9, 2012, respondent sent Nelson an email regarding the Motion to Set Aside Default. Respondent stated: "we rescheduled the hearing as per the local rules we need them to agree to

the date. . . I accepted you as a client via trade and I cannot afford to be on the hook for your filing fees. When are exactly [sic] are you going to drop off that check?"

22. On April 29, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default, asking whether the default had been set aside. Respondent received this email.

23. On May 30, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default asking to be notified when the default had been set aside. Respondent received this email.

24. On June 3, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default asking to be notified when the default had been set aside. Respondent received this email.

25. On June 3, 2012, respondent emailed Nelson regarding his request for information on the Motion to Set Aside Default. Respondent stated that he had been out of the country and they should talk "first thing tomorrow morning."

26. On July 5, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default, asking "what is going on with that- You said you would not do it without that payment and I made that payment!" Respondent received this email.

27. On July 11, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default, asking "What is going on??? You never responded to my last email – paid you to do a set aside – what happened from the hearing???"

28. On July 11, 2012, respondent sent Nelson an email asking "What is the best number to reach you at?"

29. On August 15, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default, threatening to report respondent to the State Bar.

30. On August 16, 2012, respondent in an email to Nelson stated that he had rescheduled the hearing on the Motion to Set Aside Default because of "a technical issue." The August 16, 2012, claim of respondent's misrepresented that he had reset the motion. There was nothing pending before the court.

31. On October 15, 2012, respondent emailed opposing counsel in the American Express matter. Respondent proposed dates for a hearing on the Motion to Set Aside Default. Opposing counsel promptly responded that "The only available date would be 11/29 on the condition that plaintiff is served with timely and proper written notice of the motion papers. Plaintiff will oppose the motion."

32. On October 15, 2012, respondent emailed Nelson regarding the Motion to Set Aside Default, stating in part "at this point I have sent over potential dates for the hearing to set aside default." Subsequently respondent confirmed the date as November 29, 2012.

33. On October 15, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default, stating in part "There is no need to meet – just schedule that set aside as you promised a very long time ago – we need to get this set aside and they will be workable."

34. On October 17, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default, "Nothing on calendar.. I looked."

35. On October 31, 2012, respondent emailed Nelson, "I double checked with the court this morning the hearing is confirmed you can call them at 408-882-2430 if you want to check."

36. On November 28, 2012, Nelson emailed respondent "Huge day for all of us tomorrow – please call me after you are done to confirm your success on the set aside motion. This will make a difference if we get this loan or not – because we have to prove this has been set aside."

37. On November 29, 2012, Nelson emailed respondent regarding the Motion to Set Aside Default asking: "WHAT HAPPENED at the set aside???"

38. On November 29, 2012, respondent in an email to Nelson claimed that the hearing on the Motion to Set Aside Default was re-scheduled for December 27, 2012, because opposing counsel had "claimed they did not receive the notice in time." The November 29, 2012, claim of respondent's misrepresented the reason the hearing did not go forward. In fact the moving papers had not been filed.

39. On November 29, 2012, Nelson emailed respondent confirming the December 27, 2012 date for the Motion to Set Aside Default.

40. On December 27, 2012, Nelson emailed respondent and stated: "What do you mean you are out of the country???" You sent us an email stating we had a AMX hearing today? Please don't tell me that did not happen – this has been going on a year. ."

41. On January 15, 2013, Nelson emailed respondent asking for the file and reimbursement for the trade and cash paid.

42. On January 18, 2013, respondent emailed Nelson and stated: "I am more than happy to provide a refund of the IMS trade for the services related to the default judgment, . . .however I think it is important to note that it is in Daniel's best interest for me to refile the declaration I previously filed for the motion to set aside to be granted."

CONCLUSIONS OF LAW:

43. By failing to file a response to the complaint, failing to file an opposition to the Motion for Entry of Default, failing to properly file a Motion to Set Aside Default and failing to have the Motion to Set Aside Default heard, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of Rules of Professional Conduct, rule 3-110(A).

44. By failing to obtain Kottke's written consent to the payment of attorney's fees by Nelson, respondent willfully violated Rules of Professional Conduct, rule 3-310(F).

45. By failing to refund the unearned fees of \$3,000, respondent willfully violated Rules of Professional Conduct, rule 3-700(D)(2).

Case No. 15-O-13271 (Complainant: Sonia Garcia)

FACTS:

46. On February 13, 2015, Sonia Garcia ("Garcia") hired respondent to pursue an action against Bank of America based on the "Violation of Homeowners Bill of Civil Rights." Garcia paid \$1,500 for the legal services to be performed.

47. Respondent advised Garcia that prior to filing a lawsuit against Bank of America, she should reapply for a home loan modification with HUD, which she did.

48. Between February 13, 2015 and May 7, 2015, Garcia attempted to obtain information from respondent regarding the loan modification and the lawsuit to be filed by sending text messages and leaving voicemail messages with respondent. Respondent received these messages, but did not keep Garcia abreast of her matter and did not provide substantive responses to Garcia's inquiries over the course of her representation in the Bank of America matter.

49. On May 7, 2015, Garcia's application for a home loan modification was denied. She promptly notified respondent of the denial, terminated his services and demanded a full refund.

50. On October 11, 2015, respondent refunded the \$1,500.

CONCLUSIONS OF LAW:

51. By failing to substantively respond to Garcia's telephonic and text messages requesting information on the status of her matter, respondent failed to respond to a client's reasonable status inquiries in willful violation of Business and Professions Code section 6068(m).

52. By failing to refund the \$1,500 in advanced fees to Garcia until October 11, 2015, respondent failed to promptly refund unearned fees in willful violation of Rules of Profession Conduct, rule 3-700(D)(2).

DISMISSALS.

The parties respectfully request the Court to dismiss the following alleged violations in the interest of justice:

<u>Case No.</u>	<u>Count</u>	<u>Alleged Violation</u>
14-O-05941	Four	Moral Turpitude - Misrepresentation

AGGRAVATING CIRCUMSTANCES.

Prior Record of Discipline (Std. 1.5(a)): Effective July 6, 2008, respondent was disciplined in a single client matter, 07-O-11534, for failing to perform competently, failing to communicate with his client and failing to refund unearned fees. The Supreme Court Order imposed a fully stayed suspension of 18 months and three years of probation.

Misrepresentation (Std. 1.5(e)): Respondent misrepresented to Nelson the status of the Motion to Set Aside Default on several occasions.

Multiple Acts of Misconduct (Std. 1.5(b)): Respondent has violated multiple provisions of the State Bar Act and Rules of Professional Conduct in these two matters.

MITIGATING CIRCUMSTANCES.

Pretrial Stipulation: By entering into this pretrial stipulation, respondent has saved the State Bar and State Bar Court time and resources. Additionally, by entering into this stipulation respondent has acknowledged his wrongdoing and started taking steps to atone for his misconduct. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [where mitigative credit was given for entering into a stipulation as to facts and culpability].)

AUTHORITIES SUPPORTING DISCIPLINE.

The Standards for Attorney Sanctions for Professional Misconduct “set forth a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances.” (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.1. All further references to the Standards are to this source.) The Standards help fulfill the primary purposes of discipline, which include: protection of the public, the courts and the legal profession; maintenance of the highest professional standards; and preservation of public confidence in the legal profession. (See std. 1.1; *In re Morse* (1995) 11 Cal.4th 184, 205.)

Although not binding, the Standards are entitled to “great weight” and should be followed “whenever possible” in determining level of discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 92, quoting *In re Brown* (1995) 12 Cal.4th 205, 220 and *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Adherence to the Standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar attorney misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 190.) If a recommendation is at the high end or low end of a standard, an explanation must be given as to how the recommendation was reached. (Std. 1.1.) “Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure.” (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

In determining whether to impose a sanction greater or less than that specified in a given standard, in addition to the factors set forth in the specific standard, consideration is to be given to the primary purposes of discipline; the balancing of all aggravating and mitigating circumstances; the type of misconduct at issue; whether the client, public, legal system or profession was harmed; and the member’s willingness and ability to conform to ethical responsibilities in the future. (Stds. 1.7(b) and (c).)

The applicable standard is found in standard 2.5(b), which applies to respondent’s failure to perform and communicate and provides:

(b) Actual suspension is the presumed sanction for performance, communication, or withdrawal violations in multiple client matters, not demonstrating habitual disregard of client interests.

Respondent's misrepresentations to Nelson regarding the status of the litigation and his failure to perform are significant, occurred in the practice of law and actually harmed the client. For these reasons, respondent's misconduct is serious and warrants an actual suspension.

There is mitigation for a pretrial stipulation which is counterbalanced by the aggravating factors of multiple acts of misconduct, misrepresentation and a prior record of discipline. Although serious discipline is warranted, disbarment is not warranted.

Respondent's prior record of discipline is a serious aggravating factor. Standard 1.8(a) states: "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust." Here, respondent's prior misconduct is neither remote, nor minor. Therefore the discipline imposed should be greater than the stayed suspension previously imposed.

In *Gold v. State Bar* (1989) 49 Cal.3d 908, the Supreme Court imposed a 30-day actual suspension for an attorney that created a fraudulent disbursement schedule in a case that had been dismissed for failure to prosecute. Pursuant to the fraudulent disbursement schedule, the attorney provided his client \$907.25. The attorney created the fraudulent disbursement schedule in an effort to avoid telling his client that the case had been dismissed. The Supreme Court found significant mitigation for the attorney's payment of the \$907.25, which the Court found to be an effort to make the client whole. The Court also found the absence of a prior record of discipline for the attorney's 25 years in practice to be a strong mitigating factor.

Gold and the current matter are similar in that the attorney attempted to mislead the client. The current matter is more serious as respondent has a prior record of discipline and additional misconduct in another client matter. Therefore a greater level of discipline is warranted. On balance a 90 day actual suspension will adequately protect the public and the legal profession.

ADDITIONAL CONDITION OF PROBATION.

FEE ARBITRATION:

A. Respondent's Duty to Initiate and Participate in Fee Arbitration

Respondent must initiate fee arbitration within thirty (30) days from the effective date of this matter, including making any payment(s) and filing fees required by the organization conducting the fee arbitration to start the process. The fee arbitration will be for the \$3,000 in fees that Nelson paid respondent on behalf of Kottke. Respondent must not request more fees than have already been paid by Nelson on behalf of Kottke for the American Express matter.

Respondent must provide the Office of Probation with a copy of the conformed filing within forty-five (45) days from the effective date of this matter. Respondent must immediately provide the Office of Probation with any information requested regarding the fee arbitration to verify Respondent's compliance.

Respondent must fully and promptly participate in the fee arbitration as directed by the organization conducting the fee arbitration. Respondent will not be permitted to raise the statute of limitations as a defense to the fee arbitration. Respondent understands and agrees that the Office of Probation may contact the entity conducting the fee arbitration for information.

Respondent must accept binding arbitration on the arbitration request form. If the arbitration proceeds as non-binding, however, respondent must abide by the arbitration award and forego the right to file an action seeking a trial de novo in court to vacate the award.

B. Disputed Funds Must be Held in Trust by Respondent

Respondent must keep the disputed funds in a separate interest-bearing trust account (not an IOLTA). If Respondent has removed the disputed funds from trust, respondent must open a separate interest-bearing trust account and deposit the disputed funds into such account within fifteen (15) days from the effective date of discipline. Respondent must provide evidence, e.g. a copy of respondent's bank statement showing that the disputed funds have been placed in trust within thirty (30) days from the effective date of this matter, and a statement under penalty of perjury that the funds have remained in trust with each of respondent's quarterly and final reports.

C. Respondent's Duty to Comply with the Arbitration Award

Within fifteen (15) days after issuance of any arbitration award or judgment or agreement reflected in a stipulated award issued pursuant to a fee arbitration matter, respondent must provide a copy of said award, judgment or stipulated award to the Office of Probation.

Respondent must abide by any award, judgment or stipulated award of any such fee arbitrator and agrees to provide proof thereof to the Office of Probation within thirty (30) days after compliance with any such award, judgment or stipulated award. If the award, judgment or stipulated award does not set forth a deadline for any payment, respondent is to make full payment within thirty (30) days of the issuance of any such award, judgment or stipulated award. Respondent must provide proof thereof to the Office of Probation within thirty (30) days after payment.

To the extent that respondent has paid any fee arbitration award, judgment or stipulated award prior to the effective date of this matter, respondent will be given credit for such payment(s) provided satisfactory proof of such payment(s) is or has been provided to the Office of Probation.

D. Fee Arbitration Conditions can be Satisfied by Respondent's Full Payment to John Hsu

The Fee Arbitration Conditions can also be satisfied by respondent's full payment of \$3,000 in fees that Nelson paid respondent on behalf of Kottke, within thirty (30) days from the effective date of this matter. Satisfactory proof of payment must be received by the Office of Probation within forty-five (45) days from the effective date of this matter.

If the Client Security Fund ("CSF") has reimbursed Nelson or Kottke for any portion of the principal amount(s), respondent must also pay restitution to CSF in the amount(s) paid, plus applicable interest and costs. To the extent the CSF has paid only principal amounts, respondent will still be liable for interest payments to Nelson or Kottke. Any restitution to the CSF is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). Respondent must pay all

restitution to Nelson or Kottke before making payment to CSF. Satisfactory proof of payment(s) to CSF must be received by the Office of Probation within thirty (30) days of any payment.

E. Effect of Respondent's Failure to Comply with Fee Arbitration Conditions

Respondent understands that failure to strictly comply with these conditions regarding fee arbitration may result in this Court imposing additional discipline (with attendant costs) and conditions upon respondent, including ordering respondent to pay back the full amount of \$3,000 paid to respondent by Nelson or Kottke plus 10% interest from September 26, 2011.

COSTS OF DISCIPLINARY PROCEEDINGS.

Respondent acknowledges that the Office of Chief Trial Counsel has informed Respondent that as of March 21, 2016, the prosecution costs in this matter are \$5,000. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

EXCLUSION FROM MCLE CREDIT

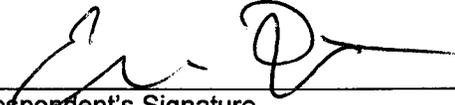
Pursuant to rule 3201, Respondent may not receive MCLE credit for completion of State Bar Ethics School, State Bar Client Trust Accounting School, and/or any other educational course(s) to be ordered as a condition of reproof or suspension. (Rules Proc. of State Bar, rule 3201.)

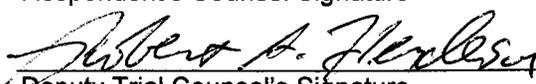
(Do not write above this line.)

In the Matter of: ELIAS FRANCISCO PORTALES	Case number(s): 14-O-05941-LMA [15-O-13271]
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SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Facts, Conclusions of Law, and Disposition.

3/21/16  Elias F. Portales
Date Respondent's Signature Print Name

3/21/16  Robert A. Henderson
Date Deputy Trial Counsel's Signature Print Name

(Do not write above this line.)

In the Matter of: ELIAS FRANCISCO PORTALES	Case Number(s): 14-O-05941-LMA [15-O-13271]
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ACTUAL SUSPENSION ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- All Hearing dates are vacated.

1. On p. 1, respondent's address zip code "95128" is deleted and substitute in its place: "95113."
2. On p. 14, the third subheading "D. Fee Arbitration Conditions," delete "John Hsu" and replace it with "Dan Nelson."

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 5.58(E) & (F), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

Date April 5, 2016 Pat E. McElroy
PAT E. MCELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on April 5, 2016, I deposited a true copy of the following document(s):

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION
AND ORDER APPROVING

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

ELIAS F. PORTALES
111 N MARKET ST # 300
SAN JOSE, CA 95113

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

ROBERT A. HENDERSON, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on April 5, 2016.



Mazie Yip
Case Administrator
State Bar Court