

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MCAD and  
JOSUE AND CLARA GARCIA, et al.,<sup>1</sup>  
Complainants

v.

DOCKET NOS. 11 BPR 01091-  
01094, 01096, 01099, 01100-11102,  
01105, 01108, 01110, 01112, 01114-  
01117

DAVID ZAK, ZAK LAW OFFICES, P.C.,  
and LOAN MODIFICATION GROUP INC.  
Respondents  
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Appearances: Nadine Cohen, Todd Kaplan and Albert Zabin, Esqs. for Complainants  
Isaac Peres, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 5, 2011, Complainants filed charges of housing discrimination with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that they were targeted in regard to substandard mortgage loan modification services at inflated fees based on their national origin (Latino) in violation of M.G.L. c. 151B sections 4 (3B), 4 (4A), (7B) and c. 272, section 92A. Complainants charged that Respondents engaged in misleading marketing to Spanish and Portuguese speakers, made unrealistic guarantees about securing dramatic loan modifications, charged inflated fees for services, failed to obtain promised mortgage modifications, refused to provide legal representation as

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<sup>1</sup> Complainants are: Josue and Clara Garcia, Jose Alvarez, Edgar Bolivar and Mariela Castaneda, Nery Castro, Jose Chavez, Jose Diaz, Juan Guevera, Marlon Hernandez, Petronila Martinez, Ronaldo Gutierrez, Magdalena Morales, Gerardo and Blanca Ortiz, Saul and Estella Rivera, Lisandro Sermena, Carlos Solano and Magda Sanchez, Jose Vasquez, Jose Ventura and Elsa Rodriguez.

promised, made documents available only in English, failed to adequately translate documents, misrepresented the status of clients' cases, required additional fees when clients received foreclosure and eviction notices, refused to provide refunds, and engaged in threats, intimidation, and demeaning conduct.

A probable cause finding was issued on April 30, 2012. The case was certified to public hearing on March 19, 2013.

A public hearing was held on May 19, 22, 23, 27 and 29, 2014 and on July 2 and 3, 2014. The parties presented 175 joint exhibits. Complainant presented an additional 23 exhibits and Respondents presented an additional 10 exhibits.

Based on all the evidence I find to be both relevant and credible, as well as the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Respondent David Zak, at all relevant times, was a Massachusetts attorney who owned Respondent Zak Law Offices. In February of 2009, he and Elizabeth Reed founded the Loan Modification Group, a Massachusetts for-profit corporation with the purported goal of procuring loan modifications to home owners having difficulty making mortgage payments and at risk of losing their homes. Their partnership lasted for approximately one year.
2. Respondents Zak Law Offices and Loan Modification Group maintained offices in Revere and Needham, MA. The services and staff of the two entities were co-mingled. See Attachment A to Complainant's post-hearing brief, Bar Counsel v. David Zak, BBO File NoC3-2010-0015 (Board of Bar Overseers, April 8, 2014) at p.
9. Zak and Reed worked in Needham whereas their non-lawyer agents and

employees worked in Revere. Reed testified that she and Zak opened an office in Revere because of the “pretty large” Latino community in the area. Complainant’s Exhibit 10 at 41.<sup>2</sup> She said that Zak encouraged agents to solicit clients in the Latino community by calling them directly. *Id.* at 45. According to Reed, agents were paid \$1,500 per client. Complainant’s Exhibit 10 at 46; Day 6 at 1:13. She said that they targeted Latino homeowners because they were “hit the hardest” by the bursting housing bubble and because Zak expressed the view that they were “stupid people” and “easy targets.” Day 6 at 62, 148, 149.

3. In March of 2009, the federal government introduced the Home Affordable Modification Program (“HAMP”), a government program to compensate the servicers of mortgages for modifying loans to qualified borrowers for owner-occupied dwellings. Complainant’s Exhibit 7 at 6. The HAMP program created a “waterfall analysis” for changing the terms of a pre-existing mortgage on a step-by-step basis in order to reduce monthly mortgage payments to 31% or less of a homeowner’s gross monthly household income. Complainant’s Exhibit 7 at 25-26. The methodology first addressed a mortgage’s interest rate, then the term of the loan, and then the amount of unpaid principal. Complainant’s Exhibit 7 at 7-11.
4. Around the same time that HAMP loans were introduced, Zak began to air radio ads in Spanish and Portuguese, to advertise in Spanish and Portuguese publications, and to distribute fliers in Spanish and Portuguese offering loan modification services to home owners experiencing difficulty making mortgage payments. Day 6 at 0:47:28

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<sup>2</sup> Reed’s deposition testimony was submitted in lieu of live testimony because of her incarceration in connection with federal wire fraud and money laundering charges involving the sale of condominium units. See Complainant’s post-hearing brief, Attachment A, Bar Counsel v. David Zak, BBO File NoC3-2010-0015 (Board of Bar Overseers, April 8, 2014).

and 1:01:50. The radio and print ads were not run in English. Day 6 at 0:51:11, 1:02:20. Zak's advertising overstated the likelihood that consumers would save substantial sums in mortgage payments by purchasing Respondents' services. Joint Exhibit 4; Complainant Exhibit 7. The ads stated falsely that Zak was "the only lawyer in Massachusetts who has saved "hundreds of Latinos from foreclosure and cut their mortgage payments in half," that he was "lead attorney" in the only law firm in Massachusetts that has helped "hundreds" of Latinos stop foreclosures on their homes and receive permanent modifications under the "Obama Plan," that he sued banks in each loan modification case, that he was the only lawyer in Massachusetts who knew how to do a loan modification, that every client received a loan modification, and that he had a "secret formula" and "magic numbers" unknown to others for obtaining loan modifications from banks. Joint Exhibits 2-4, 46, 50; Complainant's Exhibit 7 at 32, 74; Complainant's Exhibit 10 at 46-47; Day 6 at 1:00:51. None of these statements were true. Complainant's Exhibit 10 at 46-47. Prior to February of 2009, Zak had never obtained a loan modification. Day 7 at 0:20:59.

5. Radio ads featured Zak speaking to a translator who would convey what Zak said into Spanish or Portuguese. Zak employee Johnny Palacios frequently performed the role of "interviewer" on radio infomercials, posing self-serving questions to Zak. The interviews were based on a script in which Zak asserted that he had helped Latinos stop foreclosures and get permanent modifications in hundreds of cases, could cut interest rates to 2%, and could reduce mortgage payments in half. Joint Exhibit 4.

Reed testified that after Zak started advertising on Spanish and Portuguese radio stations, the “phones just rang off the hook.” Complainant’s Exhibit 10 at 44-45.

6. Respondents’ clients, for the most part, did not speak or read English fluently, had little formal education, were ignorant of the judicial system, and were beset with financial problems.
7. Elisa Morales, who functioned as Respondents’ “Coordinator of the Latino Market,” was hired by Zak because of her extensive network of colleagues, friends, and family in the Latino community. Day 6 at 24:52; 36:29 and 37:02. Zak asked Morales to focus on recruiting agents and clients from the Latino community. Day 6 at 28:15 31:26. No agents spoke English as their first language. Day 6 at 37:40. Morales testified that Zak sought out Latino clients because he believed they were gullible in contrast to Caucasian clients who “knew too much” and black clients who “would sue him.” Day 6 at 2:23:00. Zak denied making these statements, but Morales was credible whereas Zak was not. Morales also testified credibly that Zak told Latino clients that it would be “mucho estúpido” of them not to hire him. Day 6 at 1:10:12.
8. Blanca Heredia worked for Zak as an office worker from March of 2009 to August of 2011. She testified that clients were given a seventy-page packet of materials relating to work that Zak’s office would do for them. The materials were all in English. Only if a client asked for a translation did Zak’s agents translate and explain the materials. Day 5 at 1:45:07. Clients signed English versions of a “non-guarantee agreement” and a “fee agreement” and only received Spanish language versions of documents if they made a specific request. Day 3 at 1:43:45, Day 4 at 2:26:00, Day 5 at 1:45:00, Day 6

at 2:05:00. Agents were instructed by Zak not to translate the documents line-by-line but to explain the main points. Day 3 at 1:48:30.

9. Beatrice Gomez, the daughter of Elisa Morales, began working for Zak in the spring of 2009. She was an agent who solicited clients within the Latino community and opened a Rhode Island office for Zak. Day 3 at 1:25:50, 1:28:30. According to Gomez, agents were not paid unless they recruited a minimum number of clients per month. Day 3 at 1:33:10. According to Gomez, Zak promised potential clients that he would reduce their interest rate to 2%. Day 3 at 1:54:00.
10. Gomez testified credibly that she often heard Zak make derogatory comments about Latinos outside of their presence. Day 3 at 2:06:07. According to Gomez, when Zak was in the presence of Latino clients, he was “cocky” and talked down to them. Day 3 at 2:15:20. Zak denied that he ever made disparaging or disrespectful remarks about Latinos, but his testimony is not credible. I credit that Zak made derogatory statements about the national origin of clients and treated them in a hostile and demeaning manner. Day 1 at 1:06; Day 2 at 3:00; Day 3 at 2:06, 3:14; Day 6 at 2:29, 2:35, 4:11:00; Complainant’s Exhibit 9 (Diaz Deposition at 52); Complainant Exhibit 10 at 148-49.
11. Marta Guerra began to work in Zak’s Revere office in October of 2009 as a member of his support staff. According to Guerra, virtually all of Respondents’ clients were Latinos.
12. Zak testified that over 75% of his clients received loan modifications but this claim is not substantiated by material produced during discovery. Zak testified that he spent

ten hours with each client but this assertion is also lacking in credibility and unsupported by evidence in the record.

13. In order to induce prospective clients to engage his services, Zak created a document he dubbed a “lender benefit analysis” which consisted of proposed reductions in a client’s overall loan, monthly payments, and interest rate. The document was a low-ball offer to a lender for purposes of opening negotiations, although clients assumed their loans would be modified as proposed. Day 3 at 0:07:44; Complainant’s Exhibit 7 at 27-29, 37, 47-48, 107. Zak did not warn clients that lenders typically rejected the proposed reductions in a lender benefit analysis.
14. Zak charged clients an initial fee of \$2,500 for a lender benefit analysis, a “prequalification” determination, and a loan audit report. Expert witness Kevin Costello<sup>3</sup> characterized the lender benefit analysis as “useless” in securing a loan modification, described the pre-qualification determination as a five-minute conversation for which lawyers do not generally charge a fee, and dismissed the loan audit report as mechanical work devoid of legal analysis. Complainant’s Exhibit 7 at 48, 52, 64, 68. According to Costello, charging a client \$2,500 for such work is “clearly excessive” because it doesn’t require legal expertise and doesn’t yield any tangible benefit for the borrower. Complainant’s Exhibit 7 at 71, 86.
15. Zak charged a second fee of \$2,500 or more for the preparation of a loan modification packet. Complainant’s Exhibit 7 at 65. Zak misled clients into believing that this fee also covered court action to stop foreclosures and/or file for bankruptcy but no such actions would be taken without additional payments.

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<sup>3</sup> Costello testified as an expert witness in *Bar Counsel v. David Zak*, BBO File NoC3-2010-0015 (Board of Bar Overseers, April 8, 2014). He did not testify at the MCAD public hearing.

16. In January of 2010, Zak terminated his business relationship with Elizabeth Reed. In early 2010, the Loan Modification Group ceased accepting new clients. After early 2010, Zak operated his business solely through Zak Law Office. Attachment A to Complainant's post-hearing brief, Bar Counsel v. David Zak, BBO File NoC3-2010-0015 (Board of Bar Overseers, April 8, 2014).
17. Eliza Parad, a community organizer with the Chelsea Collaborative from 2010 until 2013, worked with homeowners facing foreclosure. Parad maintained a list of people who complained about Zak. The list consisted of approximately sixty-five to seventy Latinos who said they were targeted by Zak for loan modifications through misleading marketing and false guarantees; were charged inflated fees; were given documents only in English; were subjected to threats, insults, and intimidation; and were not provided with promised services. Complainant Exhibit 13 at 2; Day 6 at 4:06:20.
18. The Massachusetts Attorney General's Office filed a lawsuit against Zak in February of 2011, alleging that he committed unfair and deceptive practices in violation of G.L. c. 93A in the advertising and operation of a loan modification business and in soliciting and accepting advance fees for foreclosure-related services. The lawsuit is based on complaints received from former clients. Zak was defaulted in the case for failure to produce documents. Day 7 at 0:28:40.
19. Zak is the subject of a disciplinary petition brought by the Board of Bar Overseers for alleged misrepresentations in advertisements, for excessive fees, for failing to explain services and documents, for failing to withdraw from client representation after being discharged, and for providing substandard services. Day 7 at 29:05; Exhibit A to Complainant's post-hearing brief, Bar Counsel v. David Zak, BBO File NoC3-2010-

0015 (Board of Bar Overseers, April 8, 2014). Following a ten-day hearing in April of 2014, a Special Hearing Officer issued a report finding that Zak targeted Spanish and Portuguese-speaking populations who spoke little English and had limited education and recommending that Zak be disbarred and provide restitution to clients.

20. As of July 9, 2014, the Loan Modification Scam Prevention Network, a national coalition of organizations seeking to stop foreclosure rescue scams, had received at least twelve complaints related to the Zak from persons who identified themselves as Hispanic or Latino, of whom nine were Massachusetts homeowners. Complainant's Exhibit 23.
21. Complainants Josue and Clara Garcia were born in El Salvador, do not speak or read English, and reside in East Boston. Day 1 at 27:44. They heard about Zak from a Spanish TV infomercial and on a Spanish-language radio station in which Zak claimed to work with the Latino community in regard to mortgage payments. Day 1 at 0:31:15. The Garcias held two mortgages which they sought to modify.<sup>4</sup> Day 5 at 0:17:05. According to Josue Garcia, Zak employee Lisette Nieto told them that they should stop making mortgage payments in order to improve the chances of obtaining a loan modification.<sup>5</sup> Day 1 at 0:34:15, 0:41:30. Joint Exhibit 30. Nieto required an up-front payment of \$6,000 from the Garcias. Day 1 at 40:15. Josue Garcia signed a fee agreement in English which Nieto explained in her own words did not translate word-for-word into Spanish. Day 1 at 0:45:00; Joint Exhibit 26. By October of 2010,

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<sup>4</sup> According to Josue Garcia, they were only seeking a modification on their second mortgage and were up-to-date on all payments, but according to Zak and Respondent's impeachment documents A & B, the Garcias were past due on both of their mortgages, wanted to modify the first mortgage, and wanted to wipe out the second one.

<sup>5</sup> According to the Federal Reserve Bank of Boston's "Servicer Performance in Processing HAMP Loan Modifications: A Survey of Massachusetts-Based Counseling Agencies" at pp. 1-3, HAMP borrowers must be delinquent or in imminent default to qualify for a loan modification.

the Garcias had not received a modification despite hiring Zak eleven months earlier and facing foreclosure. Zak offered to file for bankruptcy on their behalf at the cost of an additional \$3,000 but the Garcias paid another lawyer \$3,000 to file for bankruptcy. Day 1 at 1:02:00, 1:13:48. Zak blamed the lack of a modification on the Garcias firing him prematurely and failing to provide him with all necessary documents, but I do not credit his assertions. Day 5 at 0:25:30. Josue Garcia testified credibly that because of Zak, his relationship with his wife suffered, he had a hard time trusting people, he struggled to sleep, and he had to see his doctor. Day 1 at 1:16:00.

22. Complainants Carlos Solano and Magda Sanchez were born in Colombia, have limited communication skills in English, and owned a home in East Boston. They fell behind in their mortgage payments. Day 1 at 2:26. They heard a radio ad on a Spanish-language radio station for Zak's services and subsequently met with agent Johnny Palacios at Zak's Revere office on May 19, 2010. Day 1 at 2:45:00. Palacios said that a loan modification was one hundred percent guaranteed and that a "non-guarantee" form was just paperwork that had to be signed in order to start the process. Day 1 at 2:43:29-2:48:20; Joint Exhibits 101-102. Solano and Sanchez paid Zak a total of \$5,000 for a loan modification but instead of receiving one, they received a foreclosure notice. Day 1 at 2:52:40, 2:54:00; Joint Exhibit 105. In August of 2010, they met with Zak who said that in order to stop foreclosure, they would have to pay an additional \$3,000. Day 1 at 2:56:30. Zak's demeanor was aggressive, intimidating, and arrogant; he told Solano to leave the office if he wasn't satisfied. Day 1 at 2:58:40. Solano and Sanchez thereafter went to a real estate agent who arranged for a sale of their home. Day 1 at 3:01:01, 3:04:40; Joint Exhibit 100. Solano testified

credibly that the process of losing their house was very traumatic. Day 1 at 3:05:08. According to Zak, he was still working on a loan modification when he learned from the lender that Solano had sold his house. Day 6 at 5:21:00. Zak's testimony is not credible.

23. Complainant Magdalena Morales was born in Mexico, resides in Lynn, and speaks and reads English fluently. She learned about Zak from her friend Elisa Morales. She signed a fee retainer agreement and paid Zak \$5,000 for a loan modification based on a lender benefit analysis that looked "great" and based on promises that he would cut her mortgage payments in half. Day 1 at 3:52:00, 3:55:30. Rather than obtaining a better modification, Zak obtained a trial modification with the same terms as one she negotiated without his assistance. Day 1 at 3:55:00. Morales felt pressured to accept the modification against her wishes. Id. She subsequently received a better modification and made three trial payments. Day 1 at 3:59:28, 4:00:40. She states that on November 6, 2009, Zak told her to stop making payments until the bank gave her a permanent modification. Day 1 at 4:01:30. She followed his advice but learned on December 11, 2009 that she had been disqualified for a HAMP modification. Day 1 at 4:01:20. According to Morales, Zak became angry and accused her of misunderstanding his earlier instruction to stop paying because she didn't speak and read English and that "we Latinos didn't understand anything." Day 1 at 4:03:26. Zak testified that he "pleaded with her to continue to make trial payments until she received a permanent modification," but his testimony is not credible. Day 5 at 2:37:06; Day 6 at 5:25:00. Morales subsequently made arrangements on her own to pay her arrears and make monthly payments going forward, but she eventually had to

sell her house on a short sale.<sup>6</sup> Day 1 at 4:05:49; 4:18:40, Day 2 at 2:14:35; Joint Exhibits 21 & 24. Morales met with Zak on April 15, 2010 just before the scheduled foreclosure on her home and Zak demanded an additional \$5,000 to continue work on her case. Day 1 at 4:09:06. Morales told him he needed to finish her case for the money she already paid him. Day 1 at 4:09:08. Zak treated her remarks as terminating their relationship and ordered her out of his office. Day 1 at 4:10. Morales said she would complain to the Attorney General in response to which Zak laughed at her, said Latinos are stupid, and that no one would listen to her. Day 1 at 4:12:00, Day 2 at 2:21:35. Morales wrote to Zak to complain about being treated in a “disrespectful and abusive” manner and to inform him that she no longer wanted him to represent her. Joint Exhibits 23, 24 & 25. Zak responded by sending her a bill for \$10,350 in alleged legal services. Day 1 at 4:14:16. Morales testified that the stress she experienced in regard to her interactions with Zak caused her severe emotional distress and contributed to a Bell’s Palsy condition which she suffered from during and after her pregnancy. Day 1 at 4:04:15, 4:17:10.

24. Nery Castro was born in El Salvador and came to the United States in 1990 after completing high school. Day 2 at 02:17. He lives with wife and three children in Chelsea, MA in a home he purchased in 1990. Day 2 at 01:35:00. His first language is Spanish but he speaks and reads English and Portuguese. Day 2 at 02:42. Prior to meeting Zak, Castro had two mortgages on his house, on which he paid \$2,200 and \$200 respectively. Day 2 at 03:23:00. In 2009, he began to have difficulty making

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<sup>6</sup> A short sale involves: 1) the home owner selling the property for a purchase price that is less than the outstanding balance on the mortgage and 2) the lender agreeing to accept the sale price instead of foreclosing. See Federal Reserve Bank of Boston publication, “Servicer Performance in Processing HAMP Loan Modifications: A Survey of Massachusetts-Based Counseling Agencies” at p.5.

mortgage payments after his work hours were reduced. Day 2 at 03:45:00. He heard Portuguese language advertisements for Zak's services which claimed that Zak could secure interest rates of 2% and cut principal in half based on a "secret formula" and which cited successful modifications for Latino clients. Day 2 at 04:32, 08:18. Castro visited Zak's Revere office in the summer of 2009 when he was current on his payments. Day 2 at 09:42:00; 38:30. He stopped making payments on his mortgage per instructions from Beatriz Gomez and used the money to pay Zak a total of \$5,600. Day 2 at 0:10:19, 0:13:45, 0:17:00. He signed a fee agreement and a non-guarantee agreement but they were not explained to him and he did not read them. Joint Exhibits 126 & 127; Day 2 at 0:15:05. He was shown a lender benefit analysis proposing a monthly payment of \$641, an interest rate of 2%, and principal of \$211,797 and was told to expect a similar reduction. Joint Exhibit 128; Day 2 at 0:15:38. Castro learned in February or March of 2010 that his home was scheduled to be sold at a foreclosure auction. Day 2 at 0:18:32; Joint Exhibits 132, 133, & 136; Complainant's Exhibit 21 (Rebuttal Affidavit).<sup>7</sup> He was worried and disappointed. In the summer of 2010, Castro learned that the bank had offered a modification back in March of 2010 but that Zak never responded to the offer. Day 2 at 0:21:00; Joint Exhibits 136, 139; Respondent's Exhibit 10; Complainant Exhibit 21 at p. 3. Castro testified that he had to miss work in order to meet with Zak in July of 2010. He stated that Zak tried to cancel the meeting at the last minute and when Castro refused, Zak kept Castro waiting almost four hours. Day 2 at 0:23:15. According to Castro, Zak behaved in an angry and aggressive manner during the meeting, disparaged the modification offer

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<sup>7</sup> The rebuttal affidavit is signed under the pains and penalties of perjury and both sides stipulated to its admission.

from the bank, and offered to file for bankruptcy or arrange for a short sale for more money. Castro asserts that in September of 2010, he went to another attorney and paid an additional \$5,000 in order to obtain a loan modification. Day 2 at 0:33:00; Complainant's Exhibit 21 at p. 6-21; Kendra Stephenson, Esq. (Affidavit). Castro stated that he became "stressed out," couldn't laugh or sleep, didn't enjoy anything, and became nervous. Day 2 at 0:33:50. Zak testified that Castro "disappeared after their initial meeting and that he (Zak) obtained a loan modification for Castro. Day 6 at 4:56:03. I do not credit Zak's testimony.

25. Complainant Saul Rivera, born in El Salvador, owns a home in Somerville which he bought in 2005 and on which he holds three mortgages. Day 2 at 1:34:30. He has no formal education and speaks minimal English. He had an accident in 2007 and was out of work for five years. Day 2 at 1:37:30. He heard about Zak on a Spanish-language radio station stating that he had a great record assisting Latino people with their mortgage problems. Day 2 at 1:38:30. In early 2009 when Rivera was behind on his mortgage payments, he was told by Zak employee Blanca Heredia that Zak could cut his interest rate to 2% and his monthly payments to \$1,500 provided he did not pay his arrears because if he did so, the bank wouldn't grant him a modification. Day 2 at 1:42:47, 1:44:00. Rivera paid Zak \$5,000 in early 2009 and signed many documents that one translated for him. Day 2 at 1:48:20, 1:49:40, 1:50:45. He was shown a lender benefit analysis indicating that his interest rate would be reduced from 6.38.6% to 2%, his monthly payments would be reduced from \$2,563 to \$1,391, and his principal from \$409,961 to \$307,598. Day 2 at 1:51:30. After he paid Zak, he didn't hear from him for three months. When Rivera went to Zak's office, he saw only Latinos. Day 2 at

1:55. Zak behaved in an angry fashion and told him that “people” such as Rivera come to the United States thinking there is buried treasure. Day 2 at 1:57:00. Rivera testified that he did not get a loan modification until he went to another person and paid another \$1,500. Rivera states that his dealings with Zak made him so distraught and caused him so much stress that he wanted to drive his car off a cliff. He began to suffer from hypertension, marital problems, and become isolated from friends and family. Day 2 at 2:01:00, 2:05:00. Zak claims that his efforts procured a loan modification for Rivera, but I do not credit Zak’s testimony.

26. Complainant Marlon Hernandez was born in El Salvador and lives with his wife and their three children in Malden, MA in a house he bought in 2004. Spanish is his first language; he speaks and reads English in an “imperfect” manner. Day 2 at 2:53:30. Hernandez began to have trouble making mortgage payments as a result of receiving fewer hours of work at his second, part-time job. Complainant’s Exhibit 20 (Rebuttal Affidavit).<sup>8</sup> He heard about Zak through Spanish ads on radio and television. Zak claimed to have a formula to get banks to assent to favorable loan modifications. Day 2 at 2:33:21. In early 2009, he met with Elisa Morales at Zak’s Revere office. Hernandez was shown successful modifications that were allegedly obtained on behalf of other clients. Day 2 at 2:36:46. He decided to pay Zak’s fee of \$5,600, believing it covered all necessary actions leading to a loan modification, including court appearances. Day 2 at 2:44:00, 2:47:00. In April of 2009, Hernandez signed forms, none of which were translated into Spanish. Day 2 at 2:41:41, 2:47:13; Joint Exhibit 68. He proceeded to send all correspondence to Zak’s office. Day 2 at 2:48:40. In

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<sup>8</sup> The rebuttal affidavit is signed under the pains and penalties of perjury and both sides stipulated to its admission.

July of 2010, he received a letter from Zak stating that his work was concluded even though there was no modification. Day 2 at 2:50:12, 2:58:20; Day 6 at 5:14:30; Joint Exhibit 75. Hernandez met with Zak in August of 2010. Day 2 at 2:56:00. At the time only Latino individuals were in Zak's office. Hernandez heard Zak arguing in an abusive manner with an elderly woman who did not speak English. Day 2 at 2:56:20; 3:00:05. Zak sought to charge him more money for additional work on his mortgage situation, swore at Hernandez, referred to clients as "you people," and ended the meeting by saying, "I'm done with you." Day 2 at 2:59. Hernandez subsequently received notice that his lender was initiating foreclosure. Day 2 at 3:02:55. He paid another attorney more than \$ 2,000 to file for bankruptcy in order to stop the foreclosure and save his home. Day 2 at 3:04:40; Complainant's Exhibit 20. Hernandez felt gullible, paranoid, and guilty about his expenditures and almost separated from his wife. Day 2 at 3:05:13.

27. Complainant Ronaldo Gutierrez was born in Guatemala, has limited ability to speak English, and is unable to read English. Day 2 at 1:12:50. He hired Zak after hearing a Spanish language radio ad in August of 2009 because he was having difficulty paying a \$2,763 mortgage on his three-family home in Providence, Rhode Island. Day 2 at 1:15:30; Joint Exhibit 52. Zak charged him \$8,000 to save his house from foreclosure. Day 2 at 0:53:00; Joint Exhibit 50. The documents presented to Gutierrez were all in English and no one translated them into Spanish. Day 2 at 0:52:12. The lender benefit analysis proposed that his monthly mortgage payment of \$2,763 be reduced to \$435. Joint Exhibit 52. Gutierrez took money out of his 401K to pay Zak \$8,000. Day 2 at 1:20:00. Zak thereafter had an associate go to court in Rhode Island to attempt to halt

the foreclosure. Day 7 at 0:02:00. Zak returned \$4,000 of what he charged Gutierrez and told Gutierrez to continue paying the lender or else to file for bankruptcy. Day 2 at 1:29:40, 1:31:20. Gutierrez took the refund but stopped making mortgage payments and his house proceeded to foreclosure in late 2009. Joint Exhibit 56; Day 2 at 0:58:37, 1:01:05, 1:05:48. Gutierrez was evicted, became homeless, and had to live in his car. Day 2 at 1:13:54. Gutierrez felt ruined. Day 2 at 1:11:30, 1:14:49.

28. Jose Chavez was born in El Salvador where he received some university education and arrived in the U.S. in 1995. He testified that he only speaks and reads “some” English, although he works for the Massachusetts Department of Revenue where he handles English documents. Day 3 at 2:38:20. He bought a condominium around 2005.<sup>9</sup> In October of 2009, he met with Zak employee Edgar Pimentel who guaranteed that Chavez’s loan and monthly payments would be cut in half if Chavez paid Zak \$5,000. Day 3 at 2:48:30. Chavez hired Zak and signed fee and non-guarantee forms without reading, understanding them, or having them explained, and signed a blank lender benefit analysis. Day 3 at 2:49:30; Joint Exhibits 79-81. Chavez paid Zak \$5,000. Day 3 at 2:55:14. In or around March of 2010, Zak employee “Diego” instructed Chavez to pay \$887 to his lender. Day 3 at 32:57:12, 3:32:13. Chavez initially refused but then paid the money even though he was not shown the terms of the modification. Day 3 at 2:59:07. Chavez was told to call Citi Mortgage about the loan modification but he did not follow through. Day 3 at 3:33:53. Chavez thereafter received mail from the lender which he gave to Pimentel who said that Respondents would take care of it. Day 3 at 3:04:30, 3:44:14. In July of 2010, Chavez met with

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<sup>9</sup> His monthly payments were initially around \$1,300.00 but escalated to \$ 1,800; the principal on his mortgage was \$185,000. Day 3 at 2:44:30.

Zak along with another client. According to Chavez, they were treated disrespectfully. Day 3 at 3:11:40. Chavez learned that his house was going into foreclosure. Day 3 at 3:10:10; 3:42:00. Zak offered him three options: accept bankruptcy, accept a short sale, or pay an additional \$3,000 to have Zak stop the foreclosure. Day 3 at 3:15:20. Chavez refused to pay more money to Zak. Day 3 at 3:19:36. Chavez testified that Zak ordered him out of his office and called him ignorant. Chavez thereafter lost his condominium to foreclosure and was forced to move to a basement apartment infested with rats and cockroaches. Day 3 at 3:22:30. He states that he subsequently incurred health problems including depression, diabetes, and high cholesterol. Day 3 at 3:25:53. He states that he had to give away his possessions because he couldn't store them, costing him about \$25,000. Day 3 at 3:23:48, 3:28:14.

29. Juan Antonio Guevara was born in El Salvador in 1984. He has a high school education and speaks and reads English fluently. He owns a three-family home in Chelsea which he bought in 1999 and, prior to 2011, also owned a rental property in Haverhill. Day 3 at 4:14:30. Both properties together required monthly payments of approximately \$2,635. Joint Exhibit 151. After Guevara encountered problems making the mortgage payments, Elisa Morales came to his house and told him that Zak could secure a mortgage loan modification on both properties even though Haverhill was an investment property; alternatively Morales said that Zak could sue the bank or obtain a discharge in bankruptcy. Day 3 at 4:16:10. On February 24, 2009, Guevara signed a fee agreement to pay Zak \$5,600 for a loan modification on both properties. Joint Exhibit 150.<sup>10</sup> He was shown a lender benefit analysis which proposed cutting

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<sup>10</sup> Complainant testified that he paid Zak \$11,500 in accordance with Complainant's Exhibit 3 but that document merely sets forth Zak's price list for various services, not what he was charging Guevara. A

his mortgages from a total of \$337,000 to \$238,500; his interest rates on both loans to 4%, and his total monthly payments from \$2,639 to \$998. Joint Exhibit 151. Guevara thought that the fees covered all actions Zak would thereafter take in regard to the properties. Day 3 at 4:39:30. Subsequently, the lender did not offer a loan modification on either property. Day 3 at 4:32:00. In August of 2009, Guevara received a notice of foreclosure on his Chelsea home. Joint Exhibit 153. The lender agreed to suspend the foreclosure activity if Guevara paid \$1,299 monthly beginning in January of 2010. Respondent's Exhibit 1. According to Zak, these payments were pursuant to a Foreclosure Repayment Agreement which he negotiated with the lender. Respondent's Exhibit 1; Day 6 at 5:07:08. Complainant paid the first two installments but the lender thereafter denied a mortgage modification and instituted a foreclosure sale in 2010. Respondent's Exhibit 1; Joint Exhibits 157-158. In September of 2010, Zak demanded an additional \$3,000 in order to stop the foreclosure. Day 3 at 4:35:30, 4:39:20. Guevara met with Zak in the presence of another client who was also facing foreclosure and from whom Zak was also seeking an additional payment of \$3,000. Day 3 at 4:40 30, 4:45:30. Guevara refused to pay the extra money which caused Zak to become upset. Day 3 at 42:00. Guevara, on his own, arranged for a short sale of his Haverhill property and paid another attorney approximately \$3,000 to stop the foreclosure on his Chelsea home and arrange for a loan modification. Day 3 at 4:36:50; 4:46:30. Zak fought with the new attorney over representation of Guevara but refunded Guevara \$ 2,800. Day 3 at 4:43:30, 4:49:30. Guevara testified that his

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different version of the document (Joint Exhibit 150) contains the price list and, additionally, a handwritten notation that fees of \$5,600 were being charged to Guevara. I rely on the latter document (Joint Exhibit 150) rather than the former (Complainant's Exhibit 3) as the more accurate statement of Guevara's charges.

wife experienced nightmares as a result of their housing problems, lost sleep, and his children became less interested in school. Day 3 at 4:53:30.

30. Complainant Gerardo Ortiz was born in Guatemala. He speaks, reads, and writes some English but is not fluent. He came to the United States in 1989 with his wife Bianca. In early 2009, they had two mortgages on a home in Framingham. They heard about Zak from Elisa Morales who came to their house to sell life insurance. Day 4 at 0:06:50. At the time they were up-to-date on their mortgage payments but were experiencing financial difficulties. Day 4 at 0:14:20. In May of 2009, they signed documents read to them by Morales, including a “Non-Guarantee of Loan Modification Result.” Day 4 at 0:11:45; Joint Exhibits 57-59, 64. Despite translating the “Non-Guarantee of Loan Modification Result” form, Morales assured them that a loan modification was certain, that it would significantly lower their interest rate, and that they should stop making mortgage payments in order to qualify. Joint Exhibit 64; Day 4 at 0:9:42, 0:13:30. They stopped making mortgage payments after talking to Morales. Day 4 at 0:14:24. Zak charged them a total of \$5,600 for loan modification services. Day 4 at 15:54; Joint Exhibits 57, 64. On August 18, 2009, Zak wrote to Chase Home Finance to request a loan modification on behalf of Gerardo and Bianco Ortiz. Joint Exhibit 61. Chase responded by offering an undated trial “Forbearance Plan.” Joint Exhibit 63. The plan required three payments of \$2,151.55. *Id.* Ortiz did not make the proposed payments and thereafter received a notice of foreclosure in April of 2010. Day 4 at 0:17:20, 0:40:20; Day 7 at 0:09:30, 0:13:52; Joint Exhibits 65, 66; Respondent’s Exhibit 8. Zak thereafter charged another \$2,000 to postpone their foreclosure for several months and meet with a bankruptcy attorney. Day 4 at 0:50:30.

The lender foreclosed on the Ortiz's house in September of 2010, but prior to completing eviction proceedings, the lender approved a loan modification arranged by Greater Boston Legal Services which was \$400 less than the prior mortgage and which included insurance and taxes whereas the prior mortgage did not. Day 4 at 1:01:00. Ortiz demanded a refund from Zak but did not receive one. Joint Exhibit 64. Ortiz testified that this period was stressful for him, made him become "sick with his nerves," made his wife become sick, and caused his daughters to feel very bad. Day 4 at 0:59:09.

31. Complainant Jose Elmer Diaz was born in El Salvador and speaks English fluently. In December of 2009, at the suggestion of Lisette Nieto, he hired Zak to secure a mortgage modification on a house he owned in Hyde Park. Complainant's Exhibit 9 at 6 (Diaz Deposition). Nieto and Zak said the loan modification was guaranteed and Zak stated that he could cut Diaz's mortgage payments by half. Complainant's Exhibit 9 at 10, 56. At the time, Diaz was not behind on his mortgage payments, but he stopped paying them because Zak told him that the bank would not negotiate a modification if payments on a mortgage were up-to-date. Complainant's Exhibit 9 at 19-20. Diaz paid Zak \$5,600 for loan modification services. Id. at 16. In July of 2010, Zak informed Diaz that the only way he could save his house was to declare bankruptcy. Id. at 28, 35. Zak offered to get a bankruptcy attorney for Diaz for an additional \$2,000, but Diaz refused because he thought he had paid enough. Id. at 36, 40, 54. Diaz lost his house to foreclosure in August of 2010 despite Zak's efforts to stop the foreclosure sale. Id. at 42; Day 6 at 5:18:21. After foreclosure, Zak charged Diaz an additional \$2,500 to negotiate a one-year lease from the bank, but Zak was

unsuccessful in negotiating a lease. Id. at 43-44; Day 6 at 5:19:30. Several months later, Diaz went to an eviction proceeding in Housing Court, accompanied by Zak. According to Diaz, Zak behaved in a “ridiculous” and “stumbling” manner which angered the judge. Complainant’s Exhibit 9 at 44-45. Diaz thereafter represented himself in court on multiple occasions causing him to miss work. He remained in his house until September of 2012 on a rental basis. Id. at 49-50, 65. According to Diaz, Zak called Latino clients “stupid” and “morons.” Id. at 52. Diaz stated that he suffered a minor stroke in March or April of 2011 because of the stress of losing his house and thereafter lost a year of overtime income due to having to limit his work schedule. Id. at 59-65. He currently lives in a rental unit in Hyde Park with his wife and children.

32. Complainant Edgar Bolivar and Mariela Castaneda live in Dorchester with their three children. They were born in Colombia and do not speak English well. Complainant’s Exhibit 15.<sup>11</sup> When they fell behind on their mortgage payments on their Dorchester home, they responded to Zak’s advertisements on a Spanish language radio program. They went to Zak’s office in September of 2009 where Elisa Morales told them they were eligible for a HAMP modification. By the end of 2009 they completed paying Zak \$5,000 for his services. Complainant’s Exhibit 15; Joint Exhibit 106. In July of 2010, they received a notice from Zak stating that his office had submitted a HAMP application to their lender, that the lender had failed to respond with a loan modification, that the lender’s failure gave rise to potential consumer protection claims, and that Zak’s work was complete even though they had not received a modification. Joint Exhibit 113. The mortgage lender wrote to Castaneda two weeks

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<sup>11</sup> The testimony of Edgar Bolivar and Mariela Castaneda was submitted in written form in lieu of live testimony. The unsigned written testimony was not sworn under the pains and penalties of perjury. Because both sides stipulated to its admission, however, I will accept the statements into evidence.

later stating that the HAMP modification had been denied because of failure to provide requested documents. Joint Exhibit 14. According to Castaneda, Zak's office continued to work on their case but never obtained a HAMP modification, despite Zak's assertions that he did. Day 5 at 0:44:01; Complainant's Exhibit 15. Bolivar and Castaneda contacted the bank themselves and in January of 2011, they received a non-HAMP modification offer. Complainant's Exhibit 15; Respondent's Exhibit 3. In February of 2011, they met with Zak who said that he would try to get a better modification but on the next day he said that their modification was the best they could get and they should accept it. Complainant's Exhibit 15. Bolivar and Castaneda stated that they were treated disrespectfully and were forced to wait in Zak's office for long periods of time. They claim that Zak's treatment caused them to have difficulty sleeping, induced stress, and exacerbated Bolivar's blood pressure and depression.

33. Petronila Martinez was born in the Dominican Republic and speaks and reads some English. Complainant's Exhibit 16.<sup>12</sup> She owns a home in Hyde Park. She paid Zak \$2,500 for a mortgage modification on her home but did not receive one. In July of 2010, she received a foreclosure notice with an auction date of August 5, 2010. She went to Zak's office and was told that her only option was to file for bankruptcy. She went to a different attorney who was able to stop the foreclosure but she had to pay an additional \$7,000. She tried to get her money back from Zak but was unsuccessful. She claims that Zak treated her in a demeaning manner which caused her emotional distress but does not describe the nature of her distress.

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<sup>12</sup> The testimony of Petronila Martinez was submitted in written form in lieu of live testimony. The unsigned written testimony was not sworn under the pains and penalties of perjury. Because both sides stipulated to its admission, however, I will accept the statements into evidence.

34. Lisandro Sermeno was born in El Salvador and does not read or speak English.

Complainant's Exhibit 17.<sup>13</sup> According to Sermeno, he applied for a HAMP modification on his own in July of 2009, but in early September of 2009, went to Zak's office in response to Spanish-language radio ads stating that Zak could cut mortgage payments by fifty percent and met with Zak employee Evelyn Aguirre. Id. He states that he paid \$2,500 to start the process. Id. Sermeno signed a fee agreement and other documents in English and was not given a Spanish copy. Id. Shortly thereafter, Sermeno received a trial HAMP modification which he signed and accepted with an initial payment on September 23, 2009. Respondent's Exhibit 9. Sermeno states that the modification was the result of an application that he submitted before going to Zak and that Zak never performed any work on his case whereas Zak testified that he obtained the trial HAMP modification. Id. Day 7 at 0:17:05. Zak maintains that fax and phone records support his assertion, but he presented no such records into evidence. I discredit Zak's claim that his efforts resulted in Sermeno obtaining a trial modification. Sermeno does not claim emotional distress.

35. Joseph Ventura and Elsa Rodriguez were born in the Dominican Republic and their son Joseph was born in the U.S. Complainant's Exhibit 18.<sup>14</sup> The Ventura parents do not speak or read English well. They heard about Zak from Elisa Morales. They paid Zak \$11,600 to obtain modifications for mortgages on residential and rental property. According to Zak, he got them permanent modifications on both of their properties.

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<sup>13</sup>The testimony of Lisandro Sermeno was submitted in written form in lieu of live testimony. The unsigned written testimony was not sworn under the pains and penalties of perjury. Because both sides stipulated to its admission, however, I will accept the statements into evidence.

<sup>14</sup>The testimony of Joseph Ventura, Elsa Rodriguez, and Joseph Ventura was submitted in written form in lieu of live testimony. The unsigned written testimony was not sworn under the pains and penalties of perjury. Because both sides stipulated to its admission, however, I will accept the statements into evidence.

Day 7 at 0:05:40. This testimony is not credible. Ventura received a modification on his residential property only and the modification was only a trial HAMP modification. Respondent's Exhibit 7. In August of 2010, Ventura and Rodriguez received a foreclosure notice on their investment property. Zak sought to charge them an additional \$3,000 to file for bankruptcy on the rental property. The Venturas refused, communicated with the bank on their own, and obtained a modification for the investment property. Ventura and Rodriguez do not claim emotional distress.

36. Joseph Vazquez was born in El Salvador and owned a house in Lynn. Complainant's Exhibit 19.<sup>15</sup> He heard about Zak on Spanish language radio ads. He paid Zak \$5,000 for a loan modification. In March of 2010, he received a letter from his bank stating that his house was undergoing foreclosure which Zak postponed. Complainant's Exhibit 19. In May of 2010, Vasquez received a letter announcing an auction date of May 17, 2010. Id. Zak asked Vasquez for an additional \$3,000 to stop the foreclosure. Id. Vazquez paid Zak the additional \$3,000 and obtained another several-month postponement of the foreclosure. Day 5 at 0:11:27. In July of 2010, Vazquez received a letter from Zak stating that their business was concluded even though Zak had not obtained a loan modification. Complainant's Exhibit 19. Vazquez thereafter received another foreclosure letter from the bank and a new auction date of July 29, 2010. Id. Zak got another postponement but sought more money from Vazquez. Complainant's Exhibit 19. Vasquez learned in August of 2010 that he had been denied a modification. According to Zak, the modification was denied because a relative living at the house who contributed to household expenses would not provide

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<sup>15</sup> The testimony of Joseph Vasquez was submitted in written form in lieu of live testimony. The unsigned written testimony was not sworn under the pains and penalties of perjury. Because both sides stipulated to its admission, however, I will accept the statements into evidence.

financial data. Day 5 at 0:13:41. Zak testified that Vasquez thereafter elected not to pursue litigation. Id. Vasquez asked Zak to return the \$8,000 paid to him but Zak did not return the money. Vasquez subsequently hired a real estate broker who sold his home on a short sale. Vasquez states that his interactions with Zak caused him stress which impacted his relationship with his girlfriend and family, but he does not describe the nature of his emotional distress.

37. Jose Alvarez was born in El Salvador and does not speak or read English. He lives in a home in Revere which he has owned since 1996. Complainant's Exhibit 8 at 6 (Alvarez Deposition). In 2006, he purchased a two-family residence at 177 Webster Street in Chelsea for rental income and took two mortgages of \$336,000 and \$84,000 to finance the property. Complainant's Exhibit 8 at 8; Joint Exhibit 85, 90. Alvarez contacted Zak for loan modification services after hearing his advertisements on a Spanish-language radio station in April of 2009. Complainant's Exhibit 8 at 9. Alvarez met with Zak employee Evelyn Aguirre who said that Zak could get loan modifications for the mortgage on his Revere home and also for his Chelsea rental property at the cost of \$6,000 per property. Complainant's Exhibit 8 at 10-11. Alvarez signed fee agreements in English without understanding what they said or having them explained to him. Complainant's Exhibit 8 at 12-14. Alvarez received a trial HAMP modification for his house in Revere in May of 2010. Respondent's Exhibit 2. He fulfilled the terms of the trial modification and received a permanent modification. Id.; Complainant's Exhibit 8 at 23, 26. Alvarez denies receiving a repayment plan for his rental property in Chelsea and states that after the property went into foreclosure, Zak demanded an additional \$3,000 to stop foreclosure and

arrange for revised monthly payments. Joint Exhibit 86; Complainant's Exhibit 8 at 30-32. Zak acknowledged that he did not get a HAMP modification on the rental property, but testified that he secured a three-payment foreclosure repayment plan. Day 5 at 0:29:30. The lender agreed to new monthly payments of \$1,401.66, but subsequently cancelled the agreement due to Alvarez's non-payment and the property being non-owner occupied. Joint Exhibits 91, 95. Alvarez states that he sold the rental property on a short sale in or around December of 2010 without telling Zak. Complainant Exhibit 8 at 32, 34-35. Alvarez does not claim emotional distress.

### III. CONCLUSIONS OF LAW

G.L. c. 151B, sec. 4 (3B) makes it is unlawful for "any person whose business includes . . . engaging in residential real estate-related transactions to discriminate against any person in . . . making available such a transaction, or in the terms or conditions of such a . . . transaction because of [among other protected classifications] national origin." Prohibited real estate transactions include the provision of financial assistance for purchasing or maintaining a dwelling. See c. 151B, sec. 4 (3B) (1). Thus, Respondents are prohibited from providing loan modification services in a manner that discriminates based on national origin. Similarly, G.L. c. 151B, sec. 4 (4A) provides that no person may coerce, intimidate, threaten, or interfere with the exercise or enjoyment of such a right. Respondents are therefore prohibited as well from impeding Complainants' access to loan modification services through coercive techniques.

Complainants may establish a *prima facie* case that the above provisions have been violated by relying on direct evidence or indirect evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000).

Direct evidence is evidence that, “if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.” Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). In a direct evidence case, the Complainant does not have to adhere to the three-stage burden shifting paradigm because Complainants do not need the benefit of an inference. In such instances, a mixed-motive analysis is employed. *See* Wynn & Wynn, 431 Mass. at 666. Under a mixed-motive analysis, Complainants must first offer direct evidence that an impermissible reason played a motivating part in the employment decision. *Id.* at 670. Once Complainant offers such evidence, the burden of persuasion shifts to Respondents to show that they would have acted as they did even without the illegitimate motive. *Id.*

Complainants offered direct evidence of discrimination in the form of credible testimony by: 1) Elizabeth Reed that Zak expressed the view that Latinos were “stupid people” and “easy targets”; 2) by Elisa Morales that Zak sought out Latino clients because he believed they were gullible and said they would be “mucho estúpido” not to hire him; 3) by Beatrice Gomez that she often heard Zak make derogatory comments about Latinos outside of their presence and talked down to them; 4) by Magdalena Morales that Zak accused her of misunderstanding his instructions because she didn’t speak and read English, that he told her, “we Latinos didn’t understand anything,” that he laughed at her, and that he said Latinos were stupid and no one would listen to her; 5) by Saul Rivera that Zak said “people” such as Rivera come to the United States thinking there is buried treasure; by 6) Marlon Hernandez that Zak referred to Latino clients as “you people”; 7) by Jose Elmer Diaz that Zak called Latino clients “stupid” and

“morons.” The statements cited above are more than stray remarks because they go to the heart of the case. They establish that in regard to providing financial assistance for purchasing or maintaining a dwelling, Respondents preyed upon Complainants due to their national origin. See Wynn & Wynn, 431 Mass. 655, 667 (2000) *quoting Johansen v. NCT Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as “strong evidence” that “if believed, results in an inescapable, or at least highly probable inference that a forbidden bias was present in the workplace.”). I draw from Zak’s words the “highly probable inference” of bias under Chapter 151B, sections 4 (3B) and (4A). Wynn & Wynn, 431 Mass. at 667 *citing Johansen*, 30 Mass. App. Ct. at 300.

Indirect evidence likewise establishes the existence of national origin discrimination pursuant to G.L. c. 151B, sec. 4 (3B) and (4A). Under this approach, Complainants must show that they are members of a protected class, were targeted because of their national origin, were offered residential real estate-related transactions, and suffered adverse treatment resulting from the transactions. See G.L. c. 151B, sec. 4(3B) (1); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2001) (noting that elements of a prima facie case depend on specific facts of case). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as “not onerous,” requiring only that a qualified individual establish circumstances “which give rise to an inference of unlawful discrimination.” Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Regarding the first element of the prima facie case, Complainants are members of a protected class insofar as they were all born in Central and South America and speak Spanish or Portuguese as their primary languages. The second element is satisfied by

Respondents seeking out Latino homeowners for real-estate-related transactions by advertising in Spanish and Portuguese, by directly soliciting Latino clients, and employing Latino agents and support staff. Zak's advertisements consisted of radio ads on Spanish and Portuguese language radio stations, written ads in Spanish and Portuguese publications, and Spanish and Portuguese fliers. The ads featured Zak falsely claiming that he was the only lawyer in Massachusetts who saved hundreds of Latinos from foreclosure, obtained loan modifications for all clients, cut mortgage payments in half, had a "secret formula" for obtaining loan modifications from banks, sued banks in each loan modification case, and was the only lawyer in Massachusetts who knew how to do loan modifications. Latino sales associates conveyed the impression that they looked out for the interests of the Latino community when, in fact, their income depended on the number of clients they recruited.

Targeting is also established by the fact that Zak hired a "Coordinator of the Latino Market" within the Latino community in order to exploit networking opportunities. Zak's former partner Elisa Reed testified that she and Zak opened an office in Revere because of the "pretty large" Hispanic community in the area. I credit her assertion that she and Zak targeted Hispanic homeowners because they were "hit the hardest" by declining real estate values and because Zak thought they were "stupid people" and "easy targets." Scores of Latinos claimed they were targeted by Zak for loan modifications through misleading marketing and false guarantees.

Turning to the third element of the prima facie case, the proffered services offered by Respondents purported to dramatically cut the principal, interest, and monthly

payments on residential real estate mortgages. This type of assistance falls under the definition of residential real estate-related transactions set forth in c. 151B, sec. 4(3B).

The fourth element of the prima facie case is satisfied by substantial evidence that Respondents subjected Complainants to adverse treatment in the provision of residential real estate-related transactions. Clients were charged excessive fees for minimal, substandard work. Latino individuals with limited English language skills, little formal education, and serious financial problems were treated in a hostile and demeaning manner by Zak who talked down to them and behaved in a cocky and disrespectful manner to them. Zak's sales force encouraged clients to fall behind on their mortgage payments in order to enhance the likelihood of receiving loan modifications even though such action put them at risk of foreclosure and damaged their credit. Zak devised an official-looking but untenable "lender benefit analysis" to induce unrealistic expectations in clients about mortgage loan relief when, in fact, the document was only constituted "low-ball" offer that lenders routinely rejected.

Adverse treatment is also established by the exorbitant fees charged by Respondents for substandard service. Zak demanded that clients pay \$2,500 for initial work consisting of a "lender benefit analysis, a "prequalification analysis," and a "forensic audit report." He charged additional fees of \$2,500 or more for subsequent steps such as preparing a loan modification packet, attempting to stop foreclosure, or arranging for a short sale. Expert witness Kevin Costello, who testified at disciplinary proceedings against Zak before the Massachusetts Board of Bar Overseers, characterized Respondents' initial work product for which \$2,500 was charged as "rote mechanical work" that didn't require legal expertise and didn't yield tangible benefits for borrowers.

Costello estimated that the “prequalification analysis” required only a “five-minute conversation,” claimed that it was not something for which lawyers generally charge any fee, and described Zak’s “lender benefit analysis” as useless in securing a loan modification. Costello characterized the judicial complaints that Zak filed pursuant to G.L. c. 93A as “essentially worthless.”

The fees demanded by Zak were not only excessive in terms of time devoted to the purported tasks, they covered services that were available elsewhere for free or at lower rates. Credible evidence establishes that counselors affiliated with HUD and non-profit organizations obtained superior mortgage relief results at less or no cost

Information pertaining to Zak’s fee structure and covered services were not made clear to clients but rather were embedded in a seventy-page document that conveyed in English what Zak’s office would do for them. Sales agents explained the written materials in general, but not line-by-line. Agents did not, as a practice, provide Spanish or Portuguese versions of the fee agreement, the lender benefit analysis, and the non-guarantee agreement unless specifically requested by clients. The pace and tenor of client meetings were not receptive to obtaining precise translations. If a client did not ask, the documents were not translated. These circumstances constitute convincing evidence that Zak subjected Spanish and Portuguese-speaking populations to adverse treatment and fulfill the remaining element of a prima facie case.

Once a prima facie case is established, the burden shifts to Respondents to prove and that they were motivated by legitimate, non-discriminatory reason for their actions which supersedes any illegitimate motives. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000) (in direct case of discrimination

Respondents must show that legitimate reason, standing alone, would have caused it to make the same decision); Wheelock College v. MCAD, 371 Mass 130, 238 (1976); Chief Justice for Administration and Management of the Trial Court v MCAD, 439 Mass. 729 (2003) (in mixed motive case containing direct evidence of discrimination, Respondents must show that discriminatory animus was not a material and important ingredient in their actions).

Respondents' first defense is that the legal services provided to Complainants do not constitute a residential real estate transaction within the meaning of chapter 151B, section 4 (3B). While Respondents are correct that the services they provided were not real estate transactions per se, they were real estate *related* transactions such as applying for HAMP and non-HAMP loans, attempting to stop foreclosures and arranging for short sales. They, thus, fall within the listing of covered transactions. See c.151B, sec. 4 (3B). The services, moreover, were provided by Zak as the owner, proprietor, and manager of a law firm that was open to and accepted the patronage of the general public. As an attorney with a private legal office who advertised to the public, Zak operated a business which constituted a place of public accommodation as defined in M.G. L. c. 272 sec. 92A. See Stropicky v. Nathanson, 19 MDLR 39 (1997).

Zak next maintains that he submitted loan modification applications on behalf of all clients, obtained loan modifications for over 75% of his clients, spent approximately ten hours with each client, apprised clients of potentially negative outcomes by requiring that they sign a "non-guarantee agreement" and had them sign a written fee agreement. The claim of diligent and effective work is not supported by the record nor is the assertion that clients were duly warned about potential negative outcomes. Instead, the

evidence shows shoddy work and a non-guarantee acknowledgement drafted in English and refuted by Zak's sales agents who provided verbal assurances of positive outcomes. Whatever services were provided, moreover, superior mortgage-relief services were available free of charge from HUD and other non-profit housing counselors. That Zak provided deficient and expensive mortgage relief services to Latino clients is supported by the numerous complaints filed against Zak by Latino individuals who accused him of targeting them through misleading marketing and false guarantees.

Based on the foregoing, I conclude that Respondent's defenses were not credible but, rather, a cover-up for discrimination. See Wynn & Wynn v. MCAD, 431 Mass. at 666 citing Abramian, 432 Mass. at 117-118; Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Even if part of the reason why Zak targeted the Latino community was to connect with a large pool of individuals in need of mortgage loan assistance, such reason fails to account for Respondents' false advertising, shoddy work, and disrespectful treatment of Latino clients. These matters establish that Zak provided substandard service to Latino clients because of their national origin. He targeted Latino clients because he deemed them gullible consumers in contrast to Caucasian clients who he deemed to "know too much" and black clients who "would sue him." Accordingly, I conclude that Zak, as well as the companies he owned and controlled, engaged in discriminatory treatment of Latino clients in the provision of residential real estate-related transactions in violation of G.L. c. 151B, sec. 4(3B) and (4A).<sup>16</sup>

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<sup>16</sup> I decline to hold Respondents liable under G.L. c. 151B, sec. 4 (7B) because the advertising at issue involved the provision of mortgage loan services rather than the sale of real estate. I likewise decline to hold Respondents liable under G.L. c. 272, sec. 92A because Respondents' advertisements were not

#### IV. REMEDIES AND DAMAGES

##### A. Compensatory Damages

Chapter 151B provides for monetary restitution to make a victim whole, including the same types of compensatory remedies that a plaintiff could obtain in court. See Stonehill College, 441 Mass at 586-587 (Sossman, J. concurring) *citing* Bournewood Hosp., Inc. MCAD, 371 Mass. 303, 315-316 (1976). Based on the findings of fact I conclude that the following compensatory damages should be assessed:

1. Josue and Clara Garcia shall receive compensatory damages in the amount of \$9,000.
2. Carlos Solano and Magda Sanchez shall receive compensatory damages in the amount of \$5,000.
3. Magdalena Morales shall receive compensatory damages in the amount of \$5,000.
4. Nery Castro shall receive compensatory damages in the amount of \$10,600.
5. Saul and Estella Rivera shall receive compensatory damages in the amount of \$6,500.
6. Marlon Hernandez shall receive compensatory damages in the amount of \$7,600.
7. Ronaldo Gutierrez shall receive compensatory damages in the amount of \$4,000.
8. Jose Chavez shall receive compensatory damages in the amount of \$5,000.
9. Juan Antonio Guevara shall receive compensatory damages in the amount of \$5,600.
10. Gerardo Ortiz shall receive compensatory damages in the amount of \$7,600.

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intended to discourage the patronage of persons based on national origin but, rather, to procure the patronage of persons based on national origin.

11. Jose Diaz shall receive compensatory damages in the amount of \$8,100.
12. Edgar Bolivar and Mariela Castaneda shall receive compensatory damages in the amount of \$5,000.
13. Petronila Martinez shall receive compensatory damages in the amount of \$9,500.
14. Lisandro Sermeno shall receive compensatory damages in the amount of \$2,500.
15. Joseph Ventura and Elsa Rodriguez shall receive compensatory damages in the amount of \$11,600.
16. Joseph Vasquez shall receive compensatory damages in the amount of \$8,000.
17. Jose Alvarez shall receive compensatory damages in the amount of \$6,000 in regard to his rental property.

B. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass.

App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 at 576.

Based on the emotional distress conveyed by Complainants in their public hearing testimony, both verbally and non-verbally, and through the content of documentary evidence presented in lieu of live testimony (see part II, supra), I award the following emotional distress damages:

1. Josue and Clara Garcia shall receive emotional distress damages in the amount of \$8,000.
2. Carlos Solano and Magda Sanchez shall receive emotional distress damages in the amount of \$5,000.
3. Magdalena Morales shall receive emotional distress damages in the amount of \$12,000.
4. Nery Castro shall receive emotional distress damages in the amount of \$7,500.
5. Saul and Estella Rivera shall receive emotional distress damages in the amount of \$12,000.
6. Marlon Hernandez shall receive emotional distress damages in the amount of \$6,000.
7. Ronaldo Gutierrez shall receive emotional distress damages in the amount of 13,000.
8. Jose Chavez shall receive emotional distress damages in the amount of \$15,000.
9. Juan Antonio Guevara shall receive emotional distress damages in the amount of \$3,000.

10. Gerardo Ortiz shall receive emotional distress damages in the amount of \$4,500.

11. Jose Diaz shall receive emotional distress damages in the amount of \$15,000.

12. Edgar Bolivar and Mariela Castaneda shall receive emotional distress damages in the amount of \$6,000.

#### V. CIVIL PENALTY

Pursuant to G.L. c. 151B, section 5 (a), the Commission may, in addition to any other action which it takes under the section, assess a civil penalty against the Respondent in an amount of ten thousand dollars (\$10,000) dollars. The circumstances of this case warrant such penalty.

#### VI. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to:

- (1) Cease and desist from all acts of discrimination based on national origin;
- (2) Pay Complainants the sums set forth above plus interest on the back pay award at the rate of twelve per cent per annum starting on the date that Complainants filed their complaints through such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (3) Pay Complainants the sums set forth above in emotional distress damages with interest at the rate of twelve per cent per annum. Said interest shall be apportioned equally among the three complaints with the interest obligations commencing on the date that each of the three complaints was filed and

continuing until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

- (4) Pay to the Commonwealth of Massachusetts a civil penalty in the sum of \$10,000.00.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 28th day of April, 2015.

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Betty E. Waxman, Esq.,  
Hearing Officer