

**STATE OF VERMONT  
SECRETARY OF STATE  
OFFICE OF PROFESSIONAL REGULATION  
AUCTIONEERS**

**IN RE:** )  
**DAVID E. SWAINBANK** ) **Docket No: AU01-1205**  
**License No. 057-0002419** )

**STIPULATION AND CONSENT ORDER**

NOW COMES the State of Vermont, through State Prosecuting Attorney, Edward G. Adrian, and Respondent, David E. Swainbank, who stipulate and agree as follows:

**Board Authority**

1. The Administrative Law Officer appointed by the Secretary of State has jurisdiction to investigate complaints and discipline auctioneer licensees pursuant to 3 V.S.A. §§129, 129a, 814; 26 V.S.A. §§4602 to 4609; and the Administrative Rules of the Office of Professional Regulation.

**Statement of Facts**

2. Respondent, David E. Swainbank, is an auctioneer holding license number 057-0002419, issued in the State of Vermont. This license was originally issued on or about November 22, 2004 and is currently set to expire on September 30, 2008.
3. At all times relevant, Respondent was the owner of and an auctioneer for Col. David E. Swainbank Auctioneers (the "Company"), located in St. Albans, Vermont.
4. On or about September 27, 2005, the Respondent entered into a Consignment Agreement (the "Agreement") with J.H. to liquidate J.H.'s deceased mother's estate. The Agreement included terms pertaining to the "clean out" of J.H.'s mother's home (the "Home") and the sale of her personal and household belongings.
5. On or about September 27, 2005, the Respondent arrived at the Home, located in Bennington, Vermont, to inventory and remove all items from the residence ("Consignment #1"). One employee arrived with the Respondent and two additional employees arrived after completing another consignment job that the Respondent was handling in Bennington ("Consignment #2"). Upon their arrival, one of the additional employees was sent to the local convenience store to pick up boxes and packing material for use in removing the contents of the home.
6. By the end of the day on September 27, the Respondent and his employees had not inventoried and removed all items from the Home. The remaining items were packed in bulk, un-inventoried, and placed in a truck. The Respondent then provided J.H. with a list of

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items that had been inventoried that day and advised that he would have the remaining items inventoried the next day.

7. When J.H. arrived at the Respondent's place of business the next day, the Respondent did not have a completed list of the remaining inventory. J.H. received the completed list several days later.

8. On the list of inventoried items completed on September 27, 2005, one item is described as "1 LG BOX JEWELRY \* TO INVENTORY." There is no record that this item was individually inventoried.

9. On the list of items inventoried after September 27, 2005, one item is described as "66 boxes of Jewelry." There is no record that that these boxes were individually inventoried or what they contained.

10. Over the next few weeks, J.H. contacted the Respondent several times in an attempt to complete their transaction. During this period of time, the Respondent returned approximately ten (10) boxes of property that he indicated had not sold at auction or market. Of these ten boxes, J.H. discovered that four (4) of the boxes were not items removed from the Home. The four boxes belonged to other individuals and had different lot number tags attached to them. Additionally, the Respondent attempted to return a television set to J.H. which had not been owned by J.H.'s mother.

11. On or about December 3, 2005, J.H. met with the Respondent at the Respondent's place of business to settle the account and complete the transaction. At that time, the Respondent provided J.H. with a value breakdown of all the items sold at auction or market, with a total sale amount of \$936.50 for the items listed in the documents. The Respondent had originally estimated that the items in the lot would generate from \$8,000.00 to \$8,500.00 in revenue. J.H. then questioned the Respondent regarding the sale of an end stand, a coffee table, and two (2) televisions as these items had not been accounted for or returned. The Respondent advised that they had been sold and entered the amounts of the sales on the last sheet of the profit analysis. The Respondent assigned the sale amounts to the items without referencing any documentation or confirming that the items had been sold.

12. J.H. subsequently compared the sales list with the original inventory lists provided after the "clean out." Based on this comparison, J.H. generated a list of approximately twenty (20) items that had not been returned or recorded as sold. Over the next approximately two (2) months, the Respondent located and returned a number of the missing items, but was not able to locate all of the items on J.H.'s list.

13. To date, the following discrepancies are present with respect to the Respondent's completion of Consignment #1:

- a. Two boxes of clothing are missing or unaccounted for;
- b. One dark brown dresser is missing or unaccounted for;

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- c. The Respondent lists three (3) trunks as being sold; J.H. maintains there were only two (2) trunks in his mother's possession;
- d. The Respondent lists three (3) televisions as being sold; J.H. maintains that there were only two (2) televisions in his mother's possession;
- e. The Respondent lists two (2) corner stands as being sold; J.H. maintains that there was only corner stand in his mother's possession;
- f. The Respondent lists the balance of lot #22 as being sold; J.H. maintains that lot #22 was not a part of his consignment and should not have been included in his auction.

14. Finally, the Agreement provided that J.H. would pay a total of \$271.00 with respect to the U-Haul expenses pertaining to Consignment #1. However, a review of the rental contract between U-Haul and the Respondent reveals that the Respondent also used the rental truck to complete Consignment #2 and that a large percentage of the mileage accrued by the Respondent was attributable to the completion of Consignment #2. The Respondent paid a total of \$362.73 for his use of the rental truck from September 26, 2005 to September 28, 2005 with accrued mileage of 187 miles. Only approximately 20 of those miles are attributable to the completion of Consignment #1.

#### **Charges**

15. The above acts and/or circumstances constitute unprofessional conduct because the Respondent violated:

- i. 3 V.S.A. §129a(b)(2) (Failure to practice competently by reason of any cause on a single occasion or on multiple occasions may constitute unprofessional conduct. Failure to practice competently includes: failure to conform to the essential standards of acceptable and prevailing practice); and
- ii. 3 V.S.A. §129a(a)(3) (Failure to comply with the provisions of state statutes or rules governing the practice of the profession).

#### **Understandings**

16. This Stipulation is neither an admission of liability by the Respondent nor a concession by the State of Vermont that its charges are not well founded. To avoid delay, uncertainty, inconvenience, and expense of protracted litigation of the charges above the Parties reach a full and final Stipulation pursuant to these Understandings and the Order below.

17. The Respondent understands that the A.L.O. must review and accept the terms of the Order set forth below and that if the A.L.O. rejects all or any portion of the Order, then this entire document shall be null and void.

18. Respondent specifically waives any claims that any disclosures made to the A.L.O. during the A.L.O.'s review of this agreement have prejudiced his rights to a fair and impartial hearing in future hearings if this agreement is not accepted by the A.L.O.

19. Respondent has read and reviewed this entire document and agrees that it contains the entire agreement between the parties.

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20. Respondent is not under the influence of any drugs or alcohol at the time he signs this Stipulation and Consent Order.
21. Respondent voluntarily enters into this agreement after the opportunity to consult with legal counsel and has not been coerced by anyone into signing this Stipulation and Consent Order.
22. Respondent voluntarily waives his right to a contested hearing before the A.L.O. and waives any right to appeal from this Stipulation and Consent Order.

Respondent agrees that the A.L.O. may enter the Order set forth below.

### ORDER

Based on the stipulation above it is **ORDERED AND ADJUDGED** as follows:

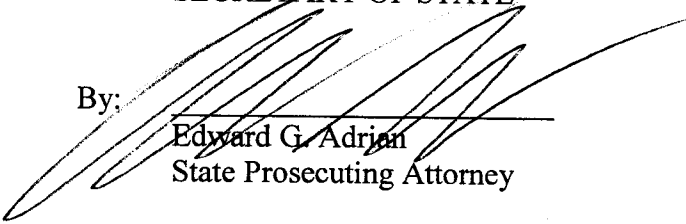
- A. The Administrative Law Officer hereby **CONDITIONS** the Respondent's Auctioneer license until such time as the Respondent successfully completes an auctioneer course or a refresher course with prior approval by the Director of Professional Regulation or his designee, and then submits written documentation (certificate of completion, etc.) to verify same to the satisfaction of the Director of Professional Regulation or his designee. This course shall be completed by June 1, 2008. Should the Respondent fail to complete the required auctioneer course by June 1, 2008, his Auctioneer license shall be **SUSPENDED** until such time as he completes the course.
- B. Notwithstanding any provision above, the Respondent must continue to meet all State of Vermont requirements for maintaining a license, license renewal and license reinstatement.
- C. This Stipulation and Consent Order is a matter of public record and may be reported to other licensing authorities as provided in 3 V.S.A. §129(a).
- D. This Stipulation and Consent Order will remain part of Respondent's licensing file and may be used for purposes of determining sanctions in any future disciplinary matter.

AGREED TO:

STATE OF VERMONT  
SECRETARY OF STATE

Dated: 10/16/07

By:

  
Edward G. Adrion  
State Prosecuting Attorney

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DAVID A. SWAINBANK  
RESPONDENT

Dated: 10-9-07

By:

David E. Swainbank  
David A. Swainbank  
E.

APPROVED AND SO ORDERED:

ADMINISTRATIVE LAW OFFICER

Dated: 10/17/07

By:

Thomas J. Lehner  
Thomas J. Lehner, Esq.

Date of Entry: ~~9/22/07~~

au.swainbank.stip

10/22/07

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