FILED

NOV - 3 2010

DEPARTMENT OF REAL ESTATE

By

BEFORE THE

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

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| In the Matter of the Order to Desist and Refrain Issued against: | ) | NO. H-4103 SD |
| LENDSURE FINANCIAL SERVICES, INC. | ) | OAH NO. 2010091094 |
| Respondent. | ) | |

DECISION

The Proposed Decision dated October 27, 2010, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon on NOV 24 2010.

IT IS SO ORDERED 11-3-2010.

JEFF DAVI
Real Estate Commissioner

BY: Barbara J. Bigby
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

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| In the Matter of the Order to Desist and Refrain Directed to:<br><br>LENDSURE FINANCIAL SERVICES, INC.<br><br>Respondent. | Case No. H-4103 SD<br><br>OAH No. 2010091094 |

## PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on October 21, 2010.

Truly Sughrue, Counsel, Department of Real Estate, State of California, appeared via teleconference from Sacramento and represented Jeff Davi, Real Estate Commissioner, State of California.

David E. Hertzel, Attorney at Law, represented the respondent LendSure Financial Services, Inc. James Anthony Konrath, LendSure's designated broker, was present throughout the administrative proceeding.

The matter was submitted on October 21, 2010.

## PRELIMINARY STATEMENT

The Department of Real Estate licensed LendSure Financial Services as a real estate broker corporation. In 2008, LendSure entered the loan modification business. In the course of its operations, LendSure collected advance fees from several homeowners without first submitting advance fee materials to the Real Estate Commissioner as required by law. LendSure's practice became known to the Real Estate Commissioner, who issued a Desist and Refrain Order that directed LendSure to discontinue its allegedly unlawful practices.

LendSure appealed and requested an administrative hearing after it was served with the Desist and Refrain Order. In the administrative hearing related to that appeal, LendSure contended that it did not collect advance fees, that it collected fees only after it had provided services and not in advance of providing those services, and that LendSure was not required

to submit any advance fee documents to the Real Estate Commissioner. LendSure further contended that the issuance of the Desist and Refrain Order was anomalous and unfair.

A preponderance of the evidence established that LendSure engaged in a loan modification business and that LendSure collected advance fees from clients without having first submitted advance fee materials to the Real Estate Commissioner. On this basis, the Desist and Refrain Order directed to LendSure is affirmed.

## FACTUAL FINDINGS

*Background Information*

1. The Department of Real Estate has licensed James Anthony Konrath as a real estate broker since 2002. Mr. Konrath has served as a licensed officer of Accredited Home Lenders, Inc., Accredited Home Capital, Inc., VRM Services IV, Inc., VRM Services V. Inc., LendSure Financial Services, Inc., and LKM Realty Corp. Mr. Konrath is very experienced in the fields of real estate sales, home loans, and loan modifications. Mr. Konrath was the designated broker for LendSure Financial Services, Inc. at all times relevant to this matter.

2. The Department of Real Estate licensed LendSure Financial Services as a real estate broker corporation on October 20, 2008. LendSure maintained an office in Rancho Bernardo, San Diego County, California. Mr. Konrath served as LendSure's Chairman of the Board, Vice President, and designated broker. Mr. Konrath's broker designation for LendSure was discontinued on April 12, 2010. LendSure's real estate broker's license expires on October 19, 2012.

LendSure continues to do business in California and other jurisdictions, acting as a lender and as an investment fund manager. LendSure offers loans secured by real property in California; however, it does not do so under a real estate license, but, instead, under a license issued by the California Department of Corporations. LendSure no longer engages in the loan modification business in California.

*Advance Fees*

3. Under Business and Professions Code section 10026, the term "advance fee" is defined as "a fee, regardless of the form, claimed, demanded, charged, received, or collected by a licensee from a principal before fully completing each and every service the licensee contracted to perform, or represented would be performed. . . ."

Under Business and Professions Code section 10085, the Real Estate Commissioner has the authority to require that all materials used in obtaining advance fee agreements be submitted for review at least 10 calendar days before they are used. By regulation, a person or entity proposing to collect an advance fee must submit to the Commissioner the advance fee agreement proposed for use not less than 10 calendar days before its use.

The statutes and regulations related to advance fees are set forth more fully in the Legal Conclusions.

4. Neither LendSure Financial Services, Inc., nor James Anthony Konrath, LendSure's designated officer, filed Advance Fee Contracts or Advance Fee Advertising with the Real Estate Commissioner or the Department of Real Estate.

*LendSure's Collection of Advance Fees*

5. Sometime in late 2008, when the frequency of home foreclosures increased, LendSure entered the loan modification business in California. LendSure began offering mortgage loan modification assistance to distressed homeowners. LendSure's program evolved with its experience in the field.

6. LendSure began its mortgage loan modification operation with "Program A," in which no fee was collected until a mortgage loan modification was completed in a manner satisfactory to the homeowner. Program A proved unsatisfactory to LendSure because homeowners did not always pay for the services that LendSure provided. According to Mr. Konrath, Program A "didn't work very well for us." LendSure sought a solution to this problem.

7. LendSure established "Program B" in early 2009. Under Program B, which was described as a "pay for service model," LendSure agreed to consult with the homeowner, to provide advice regarding the wisdom of a loan modification, and to put together a loan modification package, including an appraisal and credit report. The homeowner agreed to pay LendSure for LendSure's services rendered up to that point, according to Mr. Konrath, and had the option of having LendSure continue to provide services to include the delivery of the loan modification package to a lender and negotiating a loan modification. In practice, payment was provided by a homeowner at the first meeting with a LendSure employee or agent, usually by credit card or check, even though the credit card invoice might not be charged and the check might not be cashed until the homeowner provided LendSure with all required documents, a process that took several days to several months. In practice, no Program B homeowner ever requested only that a loan modification package be prepared. All Program B homeowners asked that LendSure also submit the loan modification package to the lender and negotiate with the lender. LendSure charged each Program B homeowner $1,595. Under the Program B agreement, if a loan was not modified within 120 days, the homeowner received a full refund. Program B proved to be somewhat cumbersome in practice and, according to Mr. Konrath, that necessitated the development of a new program.

8. Program C was very similar to Program B, except that the fee to be paid to LendSure for preparing the loan modification package (the "preparation fee") was in the amount of $849 and was nonrefundable. The fee for successfully negotiating a loan modification (the "success fee") became payable if a modified loan was obtained within 120 days of entering into the agreement.

9. Mr. Konrath testified that there were two parts to Program C and that payment for submission of the loan modification package and for negotiating a loan modification was not required at the outset; however, no homeowner ever paid just for document preparation.

10. Mr. Konrath testified there were "hundreds of accounts on which payment was not received" from homeowners and that the loan modification business was not profitable: "The fees collected were a fraction of the cost." He also testified that he and others reviewed existing law and consulted with an attorney, and he implied that he had concluded that LendSure's practices were legal and did not require the submission of advance fee materials to the Real Estate Commissioner. Mr. Konrath admitted that he did not determine if it was lawful to break up the loan modification process into two parts and that LendSure never contacted the Department of Real Estate to find out if the collection of a "preparation fee" was lawful. Mr. Konrath also reviewed a sample advance fee contract obtained from the Department of Real Estate's website[1] at the hearing, and he testified that LendSure's agreements substantially complied with the sample contract. Mr. Konrath did not testify that LendSure reviewed the sample before drafting its contracts or that LendSure relied in any fashion on the sample contract.

11. Caitlin K., a homeowner, signed an "Assistance Agreement" with LendSure on April 30, 2009. The agreement provided for the payment of a "preparation fee" of $895 and for the payment of a "success fee" of $1,400. Caitlin K. provided authorization for the use of her Visa credit card on April 30. LendSure sent an invoice in the amount of $895 to Visa on May 13, 2009, about the time Caitlin K. submitted the last of her paperwork. LendSure prepared a loan modification package for Caitlin K. and negotiated with her lender for several months, all to no avail. LendSure did not charge for the negotiations.

12. Jesse Hafen, a Senior Deputy Real Estate Commissioner, investigated LendSure's advance fee arrangements. Rick M., a homeowner, told Deputy Hafen that LendSure agreed to prepare a loan modification package and to negotiate a loan modification with his lender. Rick M. paid $1,595 for LendSure's services under Program B. Gina R., a homeowner, told Deputy Hafen that LendSure sold her one program, not two separate programs, and the program she purchased included both the preparation of loan modification documents and negotiations with her lender. Gina R. paid LendSure $1,595 for LendSure's services under Program B. Antonio L., a homeowner, told Deputy Hafen that he paid LendSure to renegotiate his mortgage and when he called LendSure to find out what was going on, the business was closed. Payment was made under Program B. These homeowner statements supplemented and explained direct evidence establishing that LendSure collected advance fees from customers for loan modifications.

13. Deputy Hafen was not aware of any homeowner complaints to the Department of Real Estate. He said that no one he interviewed complained of LendSure's practices.

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[1] The Department of Real Estate removed the sample advance fee contract from its website on or before October 18, 2010.

Gina R. told Deputy Hafen that LendSure fully refunded the $1,595 fee she paid. These matters would constitute evidence in mitigation and in rehabilitation if this matter involved a request to impose discipline; these matters are not relevant, however, to the propriety of a desist and refrain order.

*Jurisdictional Matters*

14. On April 25, 2010, Real Estate Commissioner Jeff Davi issued a Desist and Refrain Order directing LendSure Financial Services, Inc. to immediately desist and refrain from charging, demanding, claiming, collecting or receiving advance fees unless LendSure Financial Services, Inc. provided satisfactory evidence establishing that it was a real estate broker; that LendSure had an advance fee agreement that complied with California Code of Regulations, title 10, sections 2970 and 2972; that it placed all previously collected advance fees into a trust account in accordance with Business and Professions Code section 10146; that it provided an accounting to trust fund owner-beneficiaries in accordance with California Code of Regulations, title 5, section 2072; that it would comply with California law, as amended, prohibiting the collection of advance fees for loan modifications or for commercial loans except for residential properties containing five or more dwelling units; and that it would not charge or receive advance fees for loan modifications related to loans on residential property containing four or fewer dwelling units.

The Desist and Refrain Order was served on James Anthony Konrath on September 15, 2010.

On September 21, 2010, David E. Hertzel, LendSure's General Counsel, requested a hearing on the Desist and Refrain Order.

On September 30, 2010, the matter was set for an administrative hearing in San Diego to be conducted on October 21, 2010.

On October 21, 2010, the hearing commenced at 11:00 a.m. in the San Diego Regional Office of the Office of Administrative Hearings. Jurisdictional documents were presented; documentary evidence was produced; sworn testimony was received; official notice was taken; closing arguments were given; the record was closed; and the matter was submitted.

## LEGAL CONCLUSIONS

*Advance Fees*

1. Under Business and Professions Code section 10026:

> The term "advance fee"... is a fee, regardless of the form, claimed, demanded, charged, received, or collected by a

licensee from a principal before fully completing each and every service the licensee contracted to perform, or represented would be performed. . . .

*Real Estate Brokers and Advance Fees*

2. LendSure was engaged in the business of a real estate broker in that LendSure negotiated loans and performed services for homeowners in connection with loans secured by liens on real property (Bus. & Prof. Code, § 10131, subd. (d)) and engaged in the business of contracting for the collection of an advance fee in connection a loan for real property (Bus. & Prof. Code, § 10131.2).

3. Business and Professions Code section 10146 provides in part:

> Any real estate broker who contracts for or collects an advance fee from any other person . . . shall deposit any such amount . . . when collected in a trust account with a bank or other recognized depository. Such funds are trust funds and not the funds of the agent. Amounts may be withdrawn . . . for the benefit of the agent only when actually expended for the benefit of the principal or five days after the verified accounts mentioned hereinafter have been mailed to the principal . . .
>
> The commissioner may issue such rules and regulations as he . . . deems necessary to regulate the method of accounting, and to accomplish the purpose of the provisions of this code relating to advance fees including, but not limited to, establishing forms for and determining information to be included in such accountings . . .
>
> Where advance fees actually paid by or on behalf of any principal are not handled in accordance with the preceding paragraph, it shall be presumed that the agent has violated Sections 506 and 506a of the Penal Code. . . .

*The Real Estate Commissioner's Authority to Regulate the Form of Advance Fee Agreements*

4. Business and Professions Code section 10085 provides in part:

> The commissioner may require that . . . materials used in obtaining advance fee agreements . . . be submitted . . . at least 10 calendar days before they are used . . .
>
> The commissioner may determine the form of the advance fee agreements, and all material used in soliciting prospective

owners and sellers shall be used in the form and manner which he . . . determines is necessary to carry out the purposes and intent of this part. . . .

*Regulations Related to Advance Fee Agreements*

5. California Code of Regulations, title 10, section 2970 provides in part

(a) A person who proposes to collect an advance fee as defined in Section 10026 in the Code shall submit to the Commissioner not less than ten calendar days before publication or other use, all materials to be used in advertising, promoting, soliciting and negotiating an agreement calling for the payment of an advance fee including the form of advance fee agreement proposed for use. . . .

6. California Code of Regulations, title 10, section 2072 provides:

Each verified accounting . . . to the commissioner as required by Section 10146 of the Code shall include at least the following information:

(a) The name of the agent.

(b) The name of the principal.

(c) Description of the services rendered or to be rendered.

(d) Identification of the trust fund account into which the advance fee has been deposited.

(e) The amount of the advance fee collected.

(f) The amount allocated or disbursed from the advance fee for each of the following:

(1) In providing each of the services enumerated under (c) above.

(2) Commissions paid to field agents and representatives.

(3) Overhead costs and profit.

. . .

(h) In the case of an advance fee for the arrangement of a loan secured by a real property or a business opportunity, a list of the names and addresses of the persons to whom information pertaining to the principal's loan requirements were submitted and the dates of the submittal.

*Nelson v. Department of Real Estate*

7. A factual situation very similar to that presented in this matter was the subject of *Nelson v. Department of Real Estate* (1984) 161 Cal.App.3d 939.

In *Nelson*, two customers hired a licensed real estate broker to prepare a standard loan package, to act on their behalf as an advisor, and to review the details of a loan with any potential lender. The customers paid a $200 fee on entering into the contract, and they agreed to pay the real estate broker the balance due "on funding." The agreement separated the broker's fee into components, i.e., a percentage finder's fee and a loan package preparation fee. The appellate court concluded the fee comprised a single overall fee that the customers agreed to pay for the sole purpose of obtaining a loan. Regarding the arrangement in which the fee was divided into two parts, the appellate court noted, "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law." [¶] . . . [¶] "The question of the violation of a statute is not always determined with reference to the private rights of the parties to a transaction, and the result will not turn on the skill with which the parties have manipulated their transaction but on the significance of their acts in the terms." The appellate court concluded: "[I]n our view, the preparation fee clause fosters the harm that sections 10146 and 10026 seek to combat." (*Nelson v. Department of Real Estate*, at pp. 945-946.)

The factual presentation relating to LendSure's Programs B and C was virtually identical to that presented in *Nelson v. Department of Real Estate.*

*The Real Estate Commissioner's Authority to Issue a Desist and Refrain Order*

8 Business and Professions Code section 10086 provides in part:

(a) If the commissioner determines through an investigation that (1) a person has engaged or is engaging in an activity which is a violation of a provision of this part . . . or which is a violation of a regulation of the commissioner adopted for the purpose of implementing any provision of this part . . . the commissioner may direct the person to desist and refrain from such activity by issuance of an order specifying the nature of the activity and the factual and legal basis for his . . . determination. The respondent to whom the order is directed shall immediately,

upon receipt of the order, cease the activity described in the order.

(b) The respondent may, within 30 days after service of the order to desist and refrain, file a request for a hearing. . . .

(c) The administrative hearing shall be commenced by the commissioner within 30 days after receipt of respondent's request. [¶] . . . [¶] [I]f the commissioner does not render a decision within 15 days after receipt of the proposed decision following the hearing, the order shall be deemed rescinded. . . .

*Cause Exists to Affirm the Desist and Refrain Order*

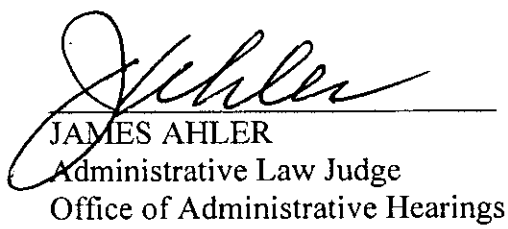
9. Cause exists to deny LendSure's appeal and to affirm the Desist and Refrain Order. LendSure agreed to negotiate loans and provide services to homeowners that related to loans secured by real property, and LendSure collected advance fees in connection with those activities. LendSure did not submit to the Real Estate Commissioner the materials it proposed to use in connection with the collection and disbursement of advance fees within 10 days of doing so as required by regulations enacted in accordance with the Real Estate Law. This conclusion is based on all factual findings and on all other legal conclusions.

ORDER

1. Respondent LendSure Financial Services, Inc.'s appeal is denied.

2. The Real Estate Commissioner's Order to Desist and Refrain is upheld and shall remain in effect.

DATED: 10/27/2010



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

DEPARTMENT OF REAL ESTATE
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Telephone: (916) 227-0789

FILED

APR 28 2010

DEPARTMENT OF REAL ESTATE

By

BEFORE THE STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

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| To: LENDSURE FINANCIAL SERVICES, INC. | NO. H-4103 SD<br>ORDER TO DESIST AND REFRAIN<br>(B&P Code Section 10086) |

The Commissioner (Commissioner) of the California Department of Real Estate (Department) caused an investigation to be made of the activities of LENDSURE FINANCIAL SERVICES INC. (LFS). Based on that investigation, the Commissioner has determined that LFS has engaged in acts or practices constituting violations of the California Business and Professions Code (Code) and/or Title 10, Chapter 6, California Code of Regulations (Regulations). Furthermore, based on the investigation, the Commissioner hereby issues the following Findings of Fact, Conclusions of Law, and Desist and Refrain Order under the authority of Section 10086 of the Code.

FINDINGS OF FACT

1. At all times mentioned, LFS was and is licensed by the Department as a real estate broker corporation. At all time mentioned James Anthony Konrath (Konrath) was licensed as the designated broker officer of LFS.

2. At all times mentioned, LFS engaged in the business of, acted in the capacity of, advertised, or assumed to act a real estate broker in the State of California, within the meaning of Section 10131(d) of the Code, including the operation and conduct of a mortgage loan brokerage and/or loan modification business with the public wherein LFS, acting by and through its employees and/or agents, solicited lenders and borrowers for or negotiated loans or collected payments and/or performed services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property for or in expectation of compensation.

3. On about May 29, 2009, Konrath, on behalf of LFS, informed Joseph Aiu, a Deputy Commissioner with the Department, that LFS had been performing loan modifications and soliciting borrowers to perform one or more of the following acts for another or others, for or in expectation of compensation: negotiate one or more loans for, or perform services for borrowers and/or lenders in connection with loans secured directly or collaterally by one or more liens on real property.

4. On about May 29, 2009, Konrath, on behalf of LFS, informed Joseph Aiu, a Deputy Commissioner with the Department, that LFS claimed, received, and collected advanced fees in amounts between $895 and $1595 from at least seven (7) borrowers, without having first submitted advanced fee materials to the Commissioner, including but not limited to:

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| Borrower | Property Address | Payment Date | Payment Amount |
|---|---|---|---|
| Jaime Raffone | 16217 Winecreek Road, San Diego | 3/6/09 | $1595 |
| Ericco Perrota | 2860-A Casey Street, San Diego | 2/25/09 | $1595 |
| Rick McClure | 6513 Puerto Drive, Rancho Murrieta | 3/12/09 | $1595 |
| Clementine Wamboye | 3789 Thermiac Gulf Way, Sacramento | 4/7/09 | $1595 |
| Gina Rawson | 46569 El Viento Seco Drive, Temecula | 5/5/09 | $1595 |
| Caitlin Kelley | 227 La mesa Avenue, Encinitas | 5/14/09 | $895 |
| Antonio Lopez | 3205 E. Levelglen Drive, West Covina | 5/16/09 | $895 |

CONCLUSIONS OF LAW

Based on the findings of fact contained in paragraphs 1 through 4:

5. LFS, acting by and/or through one or more agents, associates, affiliates, and/or co-conspirators, solicited one or more borrowers to perform services for those borrowers and/or those borrowers' lenders in connection with loans secured directly or collaterally by one or more liens on real property located within the State of California, and charged, demanded or collected advance fees for the services to be provided, which acts require a real estate broker license under Sections 10131(d) (real estate license required for enumerated acts) and 10131.2 (real estate broker license required to charge or collect an advance fee) of the Code.

6. LFS, acting by and/or through one or more agents, associates, affiliates, and/or co-conspirators, used a form of advance fee agreement which had not been provided to the Department for its prior review and consideration, in violation of Section 10085 of the Code

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(prior submission of advance fee materials required) and Section 2970 (details for prior submission of advance fee materials) of the Regulations.

DESIST AND REFRAIN ORDER

Based on the Findings of Fact and Conclusions of Law stated herein, LFS, whether doing business under its own name, or any other name or fictitious name, IS HEREBY ORDERED to:

1. Immediately desist and refrain from charging, demanding, claiming, collecting and/or receiving advance fees, as that term is defined in Section 10026 of the Code, for any of the services it offers to others, unless and until LFS demonstrates and provides evidence satisfactory to the Commissioner that it is properly licensed by the Department as a real estate broker, and that:

(a) LSF has an advance fee agreement which has been submitted to the Department and which is in compliance with Sections 2970 and 2972 of the Regulations;

(b) LSF has placed all previously collected advance fees into a trust account for that purpose and are in compliance with Section 10146 of the Code;

(c) LSF has provided an accounting to trust fund owner-beneficiaries pursuant to Section 2972 of the Regulations; and

(d) LSF is in compliance with California law, as amended effective as of October 11, 2009, with respect to loan modification and/or forbearance services. Under the amended law, advance fees for loan modification or other mortgage loan forbearance services can only be charged, demanded, or collected with reference to commercial loans and loans for residential properties containing five (5) or more dwelling units.

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2. Immediately desist and refrain from demanding, claiming, collecting and/or receiving advance fees, as that term is defined in Section 10026 of the Code, in any form, and under any conditions, with respect to the performance of loan modification or any other form of mortgage loan forbearance services in connection with loans on residential property containing four or fewer dwelling units.

DATED: 4/26/2010

JEFF DAVI
Real Estate Commissioner

By _____

**Notice:** Business and Professions Code Section 10139 provides that "Any person acting as a real estate broker or real estate salesperson without a license or who advertises using words indicating that he or she is a real estate broker without being so licensed shall be guilty of a public offense punishable by a fine not exceeding twenty thousand dollars ($20,000), or by imprisonment in the county jail for a term not to exceed six months, or by both fine and imprisonment; or if a corporation, be punished by a fine not exceeding sixty thousand dollars ($60,000)."

cc: LENDSURE FINANCIAL SERVICES INC.
11939 RANCHO BERNARDO ROAD #204
SAN DIEGO, CA 92128