FILED

MAY 20 2010

DEPARTMENT OF REAL ESTATE

By

BEFORE THE

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	)	
	)	NO. H-5234 SAC
OLEG ARTISHUK,	)	
	)	OAH NO. 2009091541
Respondent.	)	
	)	

DECISION

The Proposed Decision dated April 13, 2010, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted by me as the Decision of the Real Estate Commissioner in the above - entitled matter with the following correction:

On Page 1 of the Proposed Decision, the sentence right below the FACTUAL FINDINGS Background #1, the date of January 19, 2009 should be changed to **January 19, 2010.**

This Decision shall become effective at 12 o'clock noon on JUN 10 2010

IT IS SO ORDERED 5/19/10.

JEFF DAVI
Real Estate Commissioner

BY: Barbara J. Bigby
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:	Case No. H-5234- SAC
OLEG ARTISHUK	OAH No. 2009091541
Respondent.	

PROPOSED DECISION

Administrative Law Judge JoAnn Irwin Eshelman, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on January 19, 2010.

Truly Sughrue, Counsel, Department of Real Estate (Department), represented complainant.

Respondent Oleg Artishuk (respondent) appeared on his own behalf.

Oral and documentary evidence was received. The matter was submitted for decision and the record closed on January 19, 2010.

FACTUAL FINDINGS

Background

1. Respondent was initially licensed by the Department as a real estate salesperson on May 11, 2005. His salesperson license expired on May 10, 2009, and had not been renewed as of the January 19, ~~2009~~ 2010 hearing date.

2. On April 28, 2009, Dan and Caroline Billings each prepared a written complaint concerning a loan modification transaction initiated by respondent to modify the first and second mortgages on their home. They each complained that, when the loan modification did not occur, respondent failed to refund the advance fee, as he had "guaranteed." The Billings filed their written complaints and related documents with the Department on May 1, 2009. After receiving the Billings' complaints, the Department initiated an investigation into that transaction.

3. On June 24, 2009, complainant Joe M. Carillo, Deputy Real Estate Commissioner of the State of California, made the Accusation in his official capacity. The Accusation was filed on June 30, 2009. Respondent filed a Notice of Defense on September 17, 2009. The Office of Administrative Hearings received the Accusation on September 25, 2009. It was subsequently set for hearing before an administrative law judge.

4. On June 26, 2009, the Department prepared an Order to Desist and Refrain, pursuant to Business and Professions Code[1] section 10086. The Order directed respondent, "to immediately desist and refrain from charging, demanding, or collecting advance fees, as that term in (sic) defined in Section 10026 of the Code, for any of the services you offer to others, in any form, and particularly with respect to loan modification, loan refinance, principal reduction, foreclosure abatement or short sale services, unless and until you demonstrate and provide evidence satisfactory to the Commissioner that you are properly licensed by the Department as a real estate broker, and that you have:

(1) An advance fee agreement which has been submitted to the Department and which is in compliance with Sections 2970 and 2972 of the Regulations.

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

(3) Provided an accounting to trust fund owner-beneficiaries pursuant to Section 2972 of the Regulations."

As of the January 2010 hearing date, respondent had not submitted proof that he is licensed as a real estate broker, or proof of his compliance with any of the other three items.

Respondent's employment and independent contractor arrangements

5. On January 9, 2006, respondent's employing broker was Daniel Charles Brown. On October 4, 2008, respondent's employing broker changed to UMOC Lending, Inc., for which Mr. Brown was the broker of record. On October 7, 2008, respondent's employment with UMOC Lending, Inc. was "discontinued." From October 8, 2008, until the January 2010 hearing date, respondent had no employing broker and was not himself licensed as a real estate broker. There was no evidence that respondent qualified for any exemption from the real estate broker licensing requirements. Loan solicitation and loan modification services require a real estate broker's license under the real estate law of California.

[1] Any further statutory references are to the Business and Professions Code, unless otherwise noted.

6. In a declaration received pursuant to Government Code section 11514,[2] Mr. Brown indicated that he did not handle loan modifications through UMOC Lending, and had never given permission or authorized respondent, while he was an employee, to do so on behalf of UMOC Lending dba GreenTree Lending. Mr. Brown also stated that, "UMOC Lending has no affiliation, association or any kind of relationship with New Leaf Modification[3] or its activities... and no affiliation or business relationship with Second Chance Legal Services and or Second Chance Negotiations Inc."

7. Marc A. Caraska was listed as "Attorney" on the 2nd Chance Legal Services Attorney-Client Fee Agreement (Fee Agreement) which the Billings signed. In 2008, Mr. Caraska held a real estate broker's license issued by the Department, but 2nd Chance Legal Services was not an affiliated licensed corporation under his broker's license during that time. Respondent was never supervised by Mr. Caraska under his real estate broker's license.

8. On September 26, 2008, respondent, using the name GreenTree Mortgage, Inc.,[4] signed an Independent Affiliate Agreement (Affiliate Agreement) with 2nd Chance Negotiations, Inc. to "manage and operate an office that shall promote and sell the services provided by the Company [i.e., 2nd Chance Negotiations]." Respondent was deemed an independent contractor and not an employee of 2nd Chance Negotiations, Inc. Although the Affiliate Agreement did not describe the services to be sold, in Exhibit A, attached to the Affiliate Agreement, the parties defined the costs and commissions for first and second trust deed modifications.

9. The cover page attached to the Affiliate Agreement provided "Independent Affiliate Information" about respondent and his company, identified as "GreenTree Lending," and implied that the agreement was with 2nd Chance Legal Services because the cover page was on their stationery. Exhibit A also noted that, "Any refunds that are due to a client will be the sole responsibility of the affiliate. Clients will be referred back to the affiliate for any discussion regarding refunds. It is the policy of *2nd Chance Legal Services* that we offer no refunds for services." (Emphasis added.) It was unclear from the evidence why the Affiliate Agreement with 2nd Chance Negotiations, Inc. made reference to the refund practices of 2nd Chance Legal Services.[5] Notwithstanding the language in the

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[2] Government Code section 11514 provides that an affidavit, if properly noticed to the opposing party and absent that party's request to cross-examine the affiant, "shall be given the same effect as if the affiant had testified orally" once received in evidence.

[3] On September 24, 2008, respondent filed a Fictitious Business Name Statement to transact business under the name New Leaf Modifications.

[4] On December 26, 2006, respondent filed a Fictitious Business Name Statement to transact business under the names GreenTree Mortgage and GreenTree Enterprises.

[5] The street address and phone numbers for 2nd Chance Negotiations and 2nd Chance Legal Services are identical. Respondent testified that 2nd Chance Negotiations was the "parent" company for 2nd Chance Legal Services.

Affiliate Agreement, respondent testified that he considered himself to be an employee of 2nd Chance Legal Services.

10. On October 2, 2008, respondent signed an Account Executive Agreement (Executive Agreement) with 2nd Chance Negotiations, Inc. in which he agreed to act as an Agent and self-employed, independent contractor "to sell the Company's [i.e., 2nd Chance Negotiations, Inc.] services on behalf of the Company" for an agreed-upon commission. The Executive Agreement did not specify the nature of the services offered by 2nd Chance Negotiations.

11. For the period from January 1, 1975 until December 10, 2009, 2nd Chance Negotiations, Inc., 2nd Chance Legal Services, GreenTree Lending, and New Leaf Modifications did not hold any type of real estate license issued by the Department. There was also no evidence that respondent's companies, GreenTree Mortgage and/or GreenTree Enterprises, ever held any type of real estate license issued by the Department.

The Billings' Loan Modification Transaction

12. Sometime in October 2008, Caroline Billings set up an appointment with respondent after hearing his radio advertisement offering loan modification services through his company, GreenTree Lending. On October 11, 2008, Ms. Billings and her husband met with respondent at his office to discuss modifying the mortgage on their home at 9705 Splender Way in Sacramento. The Billings were seeking a loan modification because they were "upside down" on their mortgage, owing more than their home was worth at that time. They had never missed a mortgage payment and were not in default or facing foreclosure.

13. During the meeting, respondent represented that his company, GreenTree Lending, together with another company called 2nd Chance Legal Services, would attempt to eliminate the Billings' second mortgage and would modify the first mortgage by reducing principal and getting a lower interest rate. Respondent promised to save the Billings "a lot of money" by bringing down their payments from $2,600 per month to "hopefully $2,000 or less per month." He indicated that 2nd Chance Legal Services would be the lead negotiator, and, because it was "attorney-backed," had an 80 percent success rate in similar cases. Respondent emphasized the attorney involvement as a key factor which Mr. Billings understood "would be a good thing for me as a client." Although Mr.Caraska was listed as "Attorney, 2nd Chance Legal Services" on the Fee Agreement, Mr. Billings never met him and had no contact with him during the loan modification process.[6]

14. During the meeting, respondent assured the Billings that his services were "guaranteed." Respondent explained that, if GreenTree Lending and 2nd Chance Legal Services were not successful in getting the mortgages modified, the Billings would receive a

[6] Sometime after the loan modification process had failed, Mr. Billings called Mr. Caraska, who reported that he did not know respondent and was not connected to his company. Mr. Caraska refused to refund any money to Mr. Billings and directed him to file a complaint with the Department.

full refund of any fee paid for the modification services. The Billings asked about this guarantee several times and were repeatedly assured by respondent that their fee would be fully refunded and they "had nothing to lose." The Billings were hesitant, but decided to proceed based on the moneyback guarantee offered by respondent in both his advertisement and face-to-face presentation. In both his written complaint and in his testimony, Mr. Billings made clear that the moneyback guarantee was the sole reason he and his wife decided to proceed with the modification.

15. Later during the meeting, when the Billings reviewed the Fee Agreement, they asked respondent again about the refund guarantee. Section 5 of that document noted that, "...the fee outlined in paragraph 4 is non-refundable..." The Billings asked respondent about this language because it seemed to directly contradict his guarantee of a full refund. Respondent "again assured us that we would be getting all our money back if we didn't get our mortgage modified. [Respondent] said that part #5 in the contract [Fee Agreement] was only there to protect his company from clients who received a mortgage modification but then wanted to get an even better modification on their own. Again he promised that we had nothing to lose, if his company didn't modify our loan in 30-90 days we could easily get all our money back."

16. Respondent did not clearly explain the relationship between 2nd Chance Legal Services and himself. Mr. Billings testified that he believed that his agreement was with respondent, and that he did not understand "the specifics of the partnership between the attorney and respondent." At another point in his testimony, Mr. Billings indicated that he understood that he was "signing a contract with an attorney." Respondent also did not explain or discuss with the Billings the role of 2nd Chance Negotiations in the loan modification process. Mr. Billings "never got a straight answer regarding the difference between 2nd Chance Legal Services and 2nd Chance Negotiations." He found the similarity between the company names of 2nd Chance Legal Services and 2nd Chance Negotiations to be very confusing.

17. The Billings signed the Fee Agreement on October 11, 2008, and agreed to pay "a one-time fixed fee" of $3,581.[7] The Fee Agreement which they signed was for an advance fee since no loan modification services had yet been provided by respondent, GreenTree Lending and/or GreenTree Mortgage, 2nd Chance Negotiations and/or 2nd Chance Legal Services.

18. With the assistance of respondent, the Billings completed a number of other forms for the loan modification in October 2008, including a Borrower Financial Statement, Client Information Sheet, Client Authorization Form (to allow 2nd Chance Legal Services "to discuss and/or negotiate [the] loan"), Credit Card Authorization, Fee Waiver Request, Negotiation Cover Sheet, and the Hardship Letter. In addition, respondent gave the Billings

[7] The original fee quoted by respondent was $4,000. During the October 2008 meeting, respondent explained that this fee could be "waived" and reduced to $3,581 if the Billings provided a testimonial for future advertisements and marketing campaigns once their loan was modified.

a "Documents Needed" form, listing six more financial and mortgage documents required for the negotiation. Each of these forms was on 2nd Chance Legal Services stationery.

19. The Department never received nor approved any advance fee contracts or documents and/or advance fee advertising for loan modification transactions to be used by respondent. Likewise, there was no evidence that the Department received or approved such documents for use by "GreenTree Lending" and/or GreenTree Mortgage, New Leaf Modifications, 2nd Chance Negotiations and/or 2nd Chance Legal Services.

20. Neither respondent's company nor 2nd Chance Legal Services was successful in modifying the Billings' mortgage. Mr. Billings attempted unsuccessfully to contact respondent by phone numerous times over the course of several months to request the refund which respondent had guaranteed. Mr. Billings also requested a refund from 2nd Chance Legal Services and was told to talk to a manager, then referred back to respondent. Mr. Billings contacted his lender and learned that the lender had received "a couple phone calls and a packet," but that no other work had been done to modify his loan.

21. Mr. Billings never received a refund of the $3,581 advance fee which he paid in October 2008. His credit card company, American Express, investigated the matter and, based on their finding of fraud, fully refunded the fee which Mr. Billings had paid.[8]

22. Respondent testified that he was "new to the business" of loan modifications and "didn't know much." He just took the files and "figured things out" on his own. Respondent believed that he did not need to be licensed by the Department to perform the activities involved in the Billings loan modification transaction, and that his only role was to act as a referral source for 2nd Chance Legal Services. He claimed that Mr. Caraska told him that the Department had "no jurisdiction" over the operations of 2nd Chance Legal Services.

23. Respondent stated that he had "no intention to harm the Billings, take their money or to refuse a refund." He acknowledged that he made representations to the Billings about the success rate of 2nd Chance Legal Services and about the moneyback guarantee. However, he insisted that he made "no misrepresentations whatsoever" to the Billings. Respondent knew he had a responsibility to "act in the clients' best interests." He felt he had an ongoing obligation, but justified his inaction in the Billings transaction because he had "no information on the Billings and did not have their file."

24. Respondent's testimony was self-serving and not persuasive proof of the limited role he claimed to have in the Billings transaction. His statements about his responsibility to his clients and his alleged intention to "do no harm" to the Billings were

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[8] No objection was made to this hearsay evidence. It was received as administrative hearsay pursuant to Government Code section 11513, subdivision (d), to supplement and explain Mr. Billings' testimony about the refund of his fee. The evidence was not received for the truth of the matter asserted concerning a finding of fraud by the credit card company.

internally inconsistent and reflected an appalling lack of integrity and understanding of his fiduciary duties as an agent, whether real estate agent or otherwise. Because of these factors, respondent's testimony was given little weight.

Respondent's Handling of the Billings' Fee

25. On October 22, 2008, Mr. Billings paid the $3,581 fee via credit card to 2nd Chance Negotiations in Fair Oaks, California. There was no evidence offered to explain why the advance fee was paid to 2nd Chance Negotiations rather than 2nd Chance Legal Services. Respondent testified that he was paid "50 percent of the funds" received by 2nd Chance Legal Services.

26. In an audit conducted for the period from January 1, 2008, through January 31, 2009, Department auditor Penny Xue found that 2nd Chance Negotiations, Inc. maintained one bank account at American River Bank.[9] That account was used for advance fee deposits and for payment of all business expenses. The account was not designated as a trust account. Considering these facts, it is reasonable to conclude that the Billings advance fee was not deposited in a trust account with a bank or other recognized depository. Rather, it was deposited in and commingled with the general business account of 2nd Chance Negotiations, Inc. Therefore, respondent allowed, or at minimum, did not question the handling of the advance fee by 2nd Chance Negotiations, Inc. There was no evidence that respondent made any effort to arrange for the fee to be properly deposited in a trust account.

27. There was no evidence that respondent, GreenTree Lending and/or GreenTree Mortgage, New Leaf Modifications, 2nd Chance Negotiations and/or 2nd Chance Legal Services ever provided an accounting of the advance fee to the Billings.

Factors in Aggravation, Mitigation and Rehabilitation

28. In aggravation, respondent's violation of his fiduciary duties to the Billings was ongoing for many months and involved avoidance and evasion of their inquiries and requests for a refund. In mitigation, respondent has no prior record of discipline.

29. There was no evidence of rehabilitation as respondent clearly communicated in his testimony that he did not believe he had done anything wrong. Respondent has not yet accepted responsibility for his actions or for the harm that he caused to the Billings.

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[9] Ms. Xue's testimony by affidavit was received pursuant to the provisions of Government Code section 11514.

LEGAL CONCLUSIONS

Purpose of Disciplinary Action

1. The object of an administrative proceeding to discipline a professional license is to protect the public, that is, to determine whether a licensee has exercised his or her privilege in derogation of the public interest. A second purpose is to keep the regulated business clean and wholesome. Such proceedings are not conducted for the primary purpose of punishing an individual. (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457.)

Standard of Proof

2. In an action seeking to impose discipline against the holder of a professional license, the burden of proof is on complainant to establish the charging allegations by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 957.)

Jurisdiction

3. Pursuant to Section 10103, the Department retains jurisdiction, notwithstanding "the lapsing ... of a license by operation of law ... to proceed with any investigation of or action or disciplinary proceeding against such licensee, or to render a decision suspending or revoking such license." Although respondent's real estate salesperson's license expired on May 10, 2009, the Department has jurisdiction to render a decision suspending or revoking his license.

Licensing Violation

4. Section 10130 provides, in pertinent part, "It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department." [¶]

5. Section 10131 provides, in pertinent part, "A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others: [¶] (d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity." [¶]

6. Section 10131.2 provides, "A real estate broker within the meaning of this part is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business

opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange or rent property or a business opportunity, or to obtain a loan or loans thereon."

7. Section 10132 provides, "A real estate salesman within the meaning of this part is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts set forth in Sections 10131, 10131.1, 10131.2, 10131.3, 10131.4, and 10131.6."

8. Section 10177, subdivision (d), provides that the commissioner may suspend or revoke the license of a real estate licensee, who has, "Willfully disregarded or violated the Real Estate Law (Part 1 commencing with Section 10000 [licensing and disciplinary provisions]) ... or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2."

9. As set forth in Factual Findings 12 through 27, respondent acted as a real estate broker in that he solicited and performed services for the Billings in connection with two loans secured directly or collaterally by liens on their home at 9705 Splender Way in Sacramento. Respondent did so in expectation of compensation. He also charged, and arranged for the collection of, an advance fee for his services and the services of 2nd Chance Legal Services and/or 2nd Chance Negotiations, Inc. As set forth in Factual Findings 1, 4, and 5 through 11, respondent was not licensed as a real estate broker when he solicited and performed services for the Billings in their loan modification transaction. As set forth in Factual Findings 5 through 7, respondent was not working under the supervision of a real estate broker after October 7, 2008 and throughout the period when he was participating in the Billings loan modification transaction. However, respondent was licensed as a real estate salesperson during the period of the loan modification transaction. As a result of this conduct, respondent violated Section 10131, subdivision (d), as alleged by complainant.

Advance Fee Materials Violations

10. Section 10085 provides, in pertinent part, "The commissioner may require that any or all materials used in obtaining advance fee agreements, including but not limited to the contract forms, letters or cards used to solicit prospective sellers, and radio and television advertising be submitted to him or her 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 or she determines is necessary to carry out the purposes and intent of this part. [¶] Any violation of any of the provisions of this part or of the rules, regulations, orders or requirements of the commissioner thereunder shall constitute grounds for disciplinary action again a licensee, ..."

11. California Code of Regulations, title 10, section 2970, subdivision (a), requires that, "A person who proposes to collect an advance fee as defined in Section 10026 [10] 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." [¶] ... [¶]

12. As set forth in Factual Findings 12, 17, and 18, respondent used radio advertisements, contract forms and numerous other documents as materials to obtain an advance fee agreement. As set forth in Factual Finding 19, the Department never received nor approved the advance fee materials used by respondent and/or the entities with which he was associated. In failing to submit the advance fee materials for Department approval prior to use, respondent violated Section 10085, and California Code of Regulations, title 10, section 2970, subdivision (a), in conjunction with Section 10177, subdivision (d).

Trust Fund and Accounting Violations

13. Section 10146 provides, in pertinent part, "Any real estate broker who contracts for or collects an advance fee from any other person, hereinafter referred to as the 'principal,' shall deposit any such amount or amounts, when collected with a bank or other recognized depository. Such funds are trust funds and not the funds of the agent. ... [¶] ... Each principal shall be furnished a verified copy of such accountings at the end of each calendar quarter and when the contract has been completely performed by the licensee. ... [¶] 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 principal may recover treble damages for amounts so misapplied and shall be entitled to reasonable attorney's fees in any action brought to recover the same."

14. Section 10176 provides, in pertinent part, "The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: [¶] ...[¶] (e) Commingling with his or her own money or property the money or other property of others which is received and held by him or her." [¶] ...[¶]

15. California Code of Regulations, title 10, section 2972 describes the content required in each verified accounting to a principal. Subdivision (h) requires that, "In the case

[10] Section 10026 defines an advance fee 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. ... The term applies to a fee for ... soliciting borrowers or lenders for, or to negotiate loans on, business opportunities or real estate."

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."

16. As set forth in Factual Findings 25 through 27, respondent did not arrange for the Billings' advance fee to be placed in a trust account and did not provide or arrange for an accounting by any of the entities with which he was associated. Respondent's conduct is a violation of Section 10146 and California Code of Regulations, title 10, section 2972, in conjunction with Section 10177, subdivision (d).

17. As set forth in Factual Findings 25 and 26, the Billings advance fee was commingled with the general business funds of 2nd Chance Negotiations, Inc. and not with respondent's personal or business account funds. Therefore, there was no evidence that respondent violated Section 10176, subdivision (e).

Misrepresentation and Breach of Fiduciary Duty Violations

18. Section 10176 provides, in pertinent part, "The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: [¶] (a) Making any substantial misrepresentation. [¶] ... [¶] (i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

19. As set forth in Factual Findings 13 through 15, at the October 2008 meeting, respondent made repeated and substantial misrepresentations to the Billings about the likelihood that their loan modification would succeed and about a "guaranteed" refund if the modification failed. As set forth in Factual Findings 8, 9, and 15, the clear language of the Affiliate Agreement, Exhibit A, signed by respondent, and the Fee Agreement indicated that no refunds were permitted by 2nd Chance Legal Services. Respondent's conduct violated Section 10176, subdivision (a).[11]

20. It is well established law that real estate licensees have a fiduciary duty to their clients. In *Montoya v. McLeod* (1985) 176 Cal. App.3d 57, 64-65, the court described the duty drawing on statements made by many other courts.

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[11] Complainant alleged Section 10176, subdivision (c) as grounds for discipline where there is "a continued and flagrant course of misrepresentation or making of false promises through real estate agents or salespersons." The facts do not support reliance on this subdivision as a basis for discipline. The facts more appropriately fit the language of subdivisions (a) and (b). However, because subdivision (b) was not alleged, no cause for discipline was found under that subdivision.

The law imposes on a real estate agent 'the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary.' [Citations.]" (Batson v. Strehlow, supra., 68 Cal.2d 662, 674.) In particular, "a real estate licensee is 'charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. [Citations.]'" (Wyatt v. Union Mortgage Co., aa, 24 Cal.3d 773, 782, quoting Rattray v. Scudder (1946) 28 Cal.2d 214, 223 [169 P.2d 371, 164 A.L.R. 1356].) This agency is fiduciary in nature and imposes high standards of good faith. (Ward v. Taggart (1959) 51 Cal.2d 736, 741 [336 P.2d 534]; Ford v. Cournale (1973) 36 Cal.App.3d 172, 180 [111 Cal.Rptr. 334, 81 A.L.R.3d 704]; Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal.App.3d 860, 871 [86 Cal.Rptr. 359].) Additionally, an agent is under a duty to use reasonable care, but as a professional must use a higher degree of skill and diligence in the conduct of his duties. (Ibid. Brady v. Carman (1960) 179 Cal.App.2d 63, 68 [3 Cal.Rptr. 612].) Finally, real estate agents' ignorance of these duties does not excuse their malfeasance. (See Rhoades v. Savage (1963) 219 Cal.App.2d 294, 299 [32 Cal.Rptr. 885].)

21. Likewise any agent, acting on behalf of his principal, has a fiduciary duty and an "obligation of diligent and faithful service." (*Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal. App. 2d 690, 709.) "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. The very existence of such a relation precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation. [Citations.]" (*Ibid*, citing Estate of Cover (1922) 188 Cal. 133, 143 [204 P. 583]. See also Civ. Code § 2219; Vai v. Bank of America (1961) 56 Cal.2d 329, 337-338 [15 Cal.Rptr. 71, 364 P.2d 247]; Estate of Arbuckle (1950) 98 Cal.App.2d 562, 568-569 [220 P.2d 950, 23 A.L.R.2d 372]; Sime v. Malouf (1949) 95 Cal.App.2d 82, 98-99 [212 P.2d 946, 213 P.2d 788]; and Bacon v. Soule (1912) 19 Cal.App. 428, 434 [126 P. 384].)

22. As set forth in Factual Findings 1, 5 through 11, 12 through 24, and 25 through 27, respondent was acting as an agent for the Billings, as principals, during the loan modification transaction. As set forth in Legal Conclusion 9, respondent was also acting as a real estate broker (unlicensed) and was still licensed as a real estate agent during that transaction. Respondent's conduct in failing to ensure that the Billings' advance fee was placed in a trust account, as set forth in Legal Conclusion 16, and in failing to provide a refund as requested, breached his fiduciary duty to the Billings. Respondent's breach of his fiduciary duty to the Billings was dishonest dealing within the meaning of Section 10176,

subdivision (i) and constructive fraud, as described by the court in *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.)[12]

Cause for Discipline

23. As set forth in Legal Conclusions 9, 12, 16, 19 and 22, cause exists for discipline of respondent's real estate salesperson's license. As set forth in Legal Conclusion 2, the Department retains jurisdiction to discipline respondent's license even though it has lapsed.

Rehabilitation

24. The factors in aggravation, mitigation and rehabilitation, set forth in Factual Findings 28 and 29, have been considered. Respondent has failed to show that he has achieved substantial rehabilitation since these events took place. Respondent has violated many sections of the real estate law and seeks to excuse his misconduct based on his inexperience and misunderstanding of his role. Respondent's breach of his fiduciary duty to his clients, along with his failure to acknowledge his responsibility in these matters indicates that he cannot be trusted to perform with "high standards of good faith" required by the real estate profession. (*Montoya v. McLeod, supra*, 176 Cal. App.3d 57, 64-65, [citations].) Therefore, protection of the public requires that respondent's real estate salesperson's license be revoked.

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[12] In *Salahutdin v. Valley of California, Inc., supra*, 24 Cal.App.4th 555, 562, the court explained that "[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another *even though the conduct is not otherwise fraudulent*. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud *even though there is no fraudulent intent*." (2 Miller & Starr, *supra*, Agency, § 3:20 at pp. 120-121, fns. omitted.)

ORDER

1. All licenses and licensing rights of Respondent Oleg Artishuk under the Real Estate Law are REVOKED, pursuant to Legal Conclusions 9, 12, 16, 19 and 22, individually and collectively.

2. Complainant's exhibit 12 is sealed for all purposes except appeal in order to protect personal information of the Billings.

DATED: April 13, 2010

JOANN L. ESHELMAN
Administrative Law Judge
Office of Administrative Hearings

TRULY SUGHRUE, Counsel
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Department of Real Estate
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FILED

JUN 30 2009

DEPARTMENT OF REAL ESTATE

By

BEFORE THE

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of OLEG ARTISHUK Respondent.	NO. H-5234 SAC ACCUSATION

The Complainant, JOE CARILLO, a Deputy Real Estate Commissioner of the State of California, for Accusation against OLEG ARTISHUK (Respondent), is informed and alleges as follows:

1

The Complainant makes this Accusation in his official capacity.

2

At all times mentioned herein Respondent was and now is licensed by the State of California Department of Real Estate (the Department) or has license rights as a real estate salesperson.

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3

At all times mentioned herein, Respondent was employed by or acted on behalf of several unlicensed entities including, but not limited to, 2nd Chance Negotiations, Inc., Green Tree Lending, and New Leaf Modifications (hereafter referred to as "the related entities"). In his employment with or representation of the related entities, Respondent engaged in the business of, acted in the capacity of, advertised, or assumed to act as a real estate licensee within the State of California within the meaning of Section 10131(d) of the California Business and Professions Code (the Code), for or in expectation of compensation, in that Respondent solicited and/or performed services for borrowers in connection with loans secured directly or collaterally by liens on real property, for or in expectation of compensation and claimed, demanded, charged, received, collected or contracted for an advanced fee for such services.

4

In approximately October 2008, Respondent, acting on behalf of one or more of the related entities, solicited Daniel and Caroline Billings (Billings) to apply for a loan modification for the loan securing Billings real property located at 9705 Splender Way, Sacramento, CA. Respondent represented to Billings that he, through one or more of the related entities, would arrange a successful and beneficial modification of the Billings' current mortgage loan on their Splender Way property. Respondent requested Billings to sign a fee agreement, thereby charging Billings' credit card the amount of $3,581 payable to 2nd Chance Negotiations, Inc. Respondent also requested Billings to sign a "Borrower's Financial Statement, a Client Authorization form, and a Credit Card Authorization form. In reliance on Respondent's representations, Billings complied with Respondent's requests and signed all of the forms presented to them by Respondent.

5

After Billings signed the documents, Respondent requested them to sign, and paid the funds Respondent requested them to pay, neither Respondent nor any of the related entities obtained a successful and beneficial loan modification for Billings, as he represented he

would do. Neither Respondent nor any of the related entities ever accounted for any of the funds paid to them by Billings; and have denied Billings demand for a refund of the amount paid.

6

A person, including a business entity such as the related entities in this case, may not perform services for borrowers or lenders in connection with one or more liens secured by an interest in real property without first being licensed by the Department as a real estate broker. In addition, a licensed California real estate broker may not legally charge or accept an "advance fee" from a client or principal unless that broker first meets the requirements of Sections 10085 (have his or her "advance fee agreement" reviewed by the Department to make sure it meets the requirements of that section of the Code) and 10146 (all advance fees collected pursuant to a proper advance fee agreement must be deposited into a broker's trust account and treated as "trust funds"; and must be accounted for at the termination of the engagement) of the Code and Section 2970 of Title 10, Chapter 6 of the California Code of Regulations (the Regulations) . In this case, neither Respondent nor any of the related entities were licensed by the Department as real estate brokers, nor did they treat Billings funds as trust funds or provide an accounting at the termination of the engagement.

7

At all times mentioned herein, Respondent failed to submit to the Department any or all materials used in the advanced fee agreement presented to Billings, including but not limited to the contract form, any letters or cards used to solicit prospective sellers, and radio and television advertising, at least 10 calendar days before it was used in obtaining said advance fee agreement, as described in Paragraph 4, above, in violation of Section of 10085 of the Code and Section 2970 of the Regulations.

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8

At all times mentioned herein, Respondent collected an advance fee from Billings, as described in Paragraph 4, above, and failed to deposit such advanced fee, when collected, into a trust account with a bank or other recognized depository, in violation of Section 10146 of the Code.

9

At all times mentioned herein, Respondent commingled said trust funds with his own funds, in that he deposited said advanced fee, as described in Paragraph 3, above, into his general business account or the general business account of one or more of the related entities, in violation of Section 10176(e) of the Code.

10

At all times mentioned herein, Respondent failed to provide Billings with an accounting of said advance fee, in violation of Section 10146 of the Code and Section 2972 of the Regulations.

11

The facts alleged above are grounds for the suspension or revocation of the licenses and license rights of Respondent under the following provisions of the Code and/or the Regulations:

(a) As to Paragraphs 3 through 7, under Section 10085 of the Code, and Section 2970 of Regulations in conjunction with Section 10177(d) of the Code, and Section 10176(a),(c), and (i) or Section 10177(j) of the Code;

(b) As to Paragraph 8, under Section 10146 of the Code;

(c) As to Paragraph 9, under Section 10176(e) of the Code; and,

(d) As to Paragraph 10, under Section 10146 of the Code, and Section 2972 of the Regulations in conjunction with Section 10177(d) of the Code.

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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof a decision be rendered imposing disciplinary action against all licenses and license rights of Respondent under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) and for such other and further relief as may be proper under other applicable provisions of law.

JOE CARILLO
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 24 day of June, 2009.