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FILED

APR 03 2012

DEPARTMENT OF REAL ESTATE

By L. Jones

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOHN FILIGHERA & ASSOCIATES, INC., A Corporation, and JOHN FILIGHERA, Respondents.	No. H-2588 FR OAH No. 2011030700 <u>FIRST AMENDED ACCUSATION</u>

The Complainant, LUKE MARTIN, in his official capacity as Deputy Real Estate Commissioner of the State of California, for cause of Accusation against JOHN FILIGHERA & ASSOCIATES, INC., a corporation (hereinafter "JFAI") and JOHN FILIGHERA (hereinafter "FILIGHERA") (collectively "Respondents"), is informed and alleges as follows:

1

At all times herein mentioned, JFAI and FILIGHERA were and now are licensed and/or have license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) (hereinafter "the Code").

2

At all times herein mentioned, JFAI was and now is licensed by the Department of Real Estate of the State of California (herein "Department") as a corporate real estate broker and doing business under the fictitious business names First Nation and Raymond Douglas Realty by and through FILIGHERA as its designated officer-broker and is the alter ego of FILIGHERA.

3

At all times herein mentioned, FILIGHERA was and now is licensed by the Department as a real estate broker, individually and as designated officer-broker of JFAI and is the alter ego of JFAI. As the designated officer-broker, FILIGHERA was at all times mentioned herein responsible pursuant to Section 10159.2 of the Code, for the supervision of the activities of the officers, agents, real estate licensees, and employees of JFAI.

4

Whenever reference is made in an allegation in this Accusation to an act or omission of JFAI, such allegation shall be deemed to mean that FILIGHERA, the officers, directors, employees, agents and/or real estate licensees employed by or associated with JFAI, while acting within the course and scope of their authority and employment with JFAI, committed such act or omission in the furtherance of the business or operations of JFAI.

5

At all times herein mentioned, Respondents engaged in the business of, acted in the capacity of, advertised, or assumed to act as real estate brokers within the State of California within the meaning of Sections 10131(d) and 10131(e) of the Code, including the operation and conduct of a mortgage loan brokerage with the public wherein Respondents solicited institutional and private money lenders and private borrowers for loans secured directly or collaterally by liens on real property or a business opportunity, and wherein such loans were arranged, negotiated, processed, serviced, and consummated by Respondents on behalf of FILIGHERA and others and wherein promissory notes or interests therein were sold or purchased on behalf of another or others and by a lien on real property, including collecting payments thereon, and in addition, Respondents conducted in-house escrows and conducted residential real estate resale activities all for compensation or in the expectation of compensation.

6

Intermittently between April 20, 2010, and ending July 20, 2010, an audit was conducted at JFAI's main office located at 1010 Cass Street, Suite D-8, Monterey, California and at the Oakland District Office of the Department of Real Estate, 1515 Clay Street, Suite 702, Oakland, California wherein the Department's auditor examined records for the period July 1, 2007 through December 31, 2009 (hereinafter "audit period").

FIRST CAUSE OF ACTION
Audit Violations

7

Complainant incorporates each and every allegation in Paragraphs 1 through 6 by this reference as if fully set forth herein

8

In so acting as real estate brokers, Respondents accepted or received funds in trust (hereinafter "trust funds") from or on behalf of lenders, investors, borrowers and others in connection with the mortgage loan brokerage activities, loan servicing, in-house escrow services and resale activities described in Paragraph 5, above, and thereafter from time to time made disbursements of the trust funds.

9

The aforementioned trust funds accepted or received by Respondents were deposited or caused to be deposited by Respondents into one or more bank accounts (hereinafter "trust fund accounts") maintained by Respondents for the handling of trust funds, including, but not necessarily limited to, the following accounts maintained by Respondents at the Wells Fargo Bank, Portland, Oregon:

(a) The John Filighera & Associates, Inc., Loan Servicing Trust Account, account number XXXXXX9272 ("Trust #1");

(b) The John Filighera & Associates, Inc., Trust Account, account number XXXXX3779 ("Trust #2");

and at the Coast Commercial Bank, Capitola, California:

(c) The John Filighera and Associates Loan Servicing Trust, account number XXX3772 ("Trust #3"); and,

(d) The John Filighera and Associates Loan Servicing Trust Account, account number XXX0642 ("Trust #4").

10

In the course of the activities described in Paragraph 5, above, for the audit period:

(a) As of December 31, 2009, there was a cash shortage of $1,408.33 in Trust # 1. The trust fund shortage was due to a negative balance of $1,408.33 in the Loan XIII (Ceasar Segura) account. Further, there was no evidence presented to the auditor that written consent of every principal who was the owner of funds in Trust Account #1 was obtained by Respondents prior to each disbursement when such disbursement reduced the balance of funds in Trust #1 to an amount less than the aggregate trust liability of Respondents to the owners of the funds all in violation of Section 10145 of the Code and Section 2832.1 of Chapter 6, Title 10, California Code of Regulations (hereinafter "the Commissioner's Regulations");

(b) In three (3) private money loan transactions, FILIGHERA acted as the borrower (Loan # 131, Loan # 138 and Loan # 141). For loan #138 (the $100,000 Martin loan), the Deed of Trust was not recorded until approximately six (6) months after the loan was arranged. For Loan #141 (the $75,000 Briley loan), the Deed of Trust was not recorded until after the audit was conducted. Respondents failure to timely record the aforementioned deeds of trust resulted in a loss of priority to other liens executed after the aforementioned deeds of trust, but which were recorded prior to the recordation of the deeds of trust in violation of Section 10234 and Section 10177(g) of the Code;

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(c) In addition, for Loan #141 and Loan #138, Respondents disbursed the loan proceeds to FILIGHERA before the recording of the Deeds of Trusts, which were intended to secure repayment of the loans. Each disbursement is a separate violation of Section 10234 of the Code;

(d) JFAI arranged six (6) loans for a total principal balance of $419,000.00, wherein FILIGHERA acted as the borrower. Prior to any representation, solicitation, or presentation of a Lender/Purchaser Disclosure Statement (hereinafter "LPDS") JFAI failed to notify the Department of the intended loans in violation of Section 10231.2 of the Code. Further, JFAI failed to retain a fully executed copy of the LPDS for each loan for four (4) years in violation of Section 10231.2 of the Code;

(e) For Loan #131, Loan #138, and Loan #141 Respondents conducted in-house broker escrows. However, Respondents failed to maintain signed escrow instructions in each file. For each transaction, Respondents failed to have a clear accounting of the deposits and disbursements of the funds of all parties to the escrow. Each loan file's failure to contain the aforementioned escrow instructions and/or clear accountings constitute a separate violation of California Financial Code Section 17403.4 and Section 2950 and Section 2951 of the Commissioner's Regulations;

(f) Respondent's "Daily Cash Report" was inadequate as a *Record of All Trust Funds Received and Disbursed* for Trust Account #1 as, among other failures, it did not set forth from whom $34,000.00 was received by Respondents on July 9, 2007; it incorrectly described a July 21, 2008 disbursement on July 3, 2007; and Respondents failed to provide separate records for the "Z-Slush" account contained within Trust #1, each of which constitutes a separate violation of Section 2831 and Section 2831.1 of the Commissioners Regulations;

(g) For the Perez Institutional Loan (2037 Eddy Street, Marina, California) RESPONDENTS failed to maintain a copy of the Mortgage Loan Disclosure Statement which included the borrower's signatures in violation of Section 10240 and 10241 of the Code;

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(h) For two (2) salespersons licensed to Respondents (Mark Frederickson and Keith Prader), Respondents failed to retain the original salesperson license certificates at Respondents' main office and make the licenses available for inspection by the Department's Auditor, each of which constitutes a violation of Section 10160 of the Code and Section 2753 of the Commissioner's Regulations.

11

The acts and/or omissions of Respondents as alleged above violated Sections 2753, Sections 10145, 10160, 10231.2, 10234, 10240, 10241, 10176, 10177(g) of the Code; Section 17403.4 of the California Financial Code; and Sections 2753, 2831, 2831.1, 2832.1, 2950, and 2951 of the Commissioner's Regulations, each of which constitutes grounds for discipline under 10177(d) of the Code.

SECOND CAUSE OF ACTION
Bankruptcy Dismissal Due to FILIGHERA's Knowing and Fraudulent False Oaths and Failure to Disclose Information on Bankruptcy Schedules and Statement of Financial Affairs

12

Complainant incorporates each and every allegation contained in Paragraphs 1 through 11 by this reference as if fully set forth herein.

13

On or about July 3, 2008, FILIGHERA filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States District Court, San Jose Facility, case number 08-53549 MM. The case was converted to Chapter 7 on or about December 11, 2008.

14

The assigned bankruptcy trustee alleged in a related Adversary Proceeding, (Proceeding Number 09-05162) that FILIGHERA failed to disclose on his *Bankruptcy Schedules* and *Statement of Financial Affairs* (hereinafter "SOFA") the following:

(a) FILIGHERA failed to list on Schedules A and D the names of holders of deeds of trust against his various real properties;

(b) FILIGHERA on Schedule D failed to list a $95,000 secured debt for his helicopter;

(c) FILIGHERA on Schedule E failed to list unpaid property taxes for various properties that he owns;

(d) FILIGHERA on Schedule F failed to list a credit card company, his condominium association, two personal loans, and a law firm;

(e) FILIGHERA on Schedule G failed to list an automobile lease for his Mercedes Benz;

(f) FILIGHERA on Schedule H failed to list his spouse as a co-debtor for numerous obligations;

(g) FILIGHERA on Schedule H failed to list Tim A. as a co-debtor with respect to the secured debt for the helicopter;

(h) FILIGHERA on Schedule I failed to list his spouse's employment status;

(i) FILIGHERA on Schedule I failed to provide a breakdown of his rental and business income;

(j) FILIGHERA on Schedule J failed to list all of his expenses for his homes and his rental properties;

(k) FILIGHERA on the SOFA, question 3(a), failed to list pre-petition payments to creditors made by FILIGHERA within 90 days of the filing of his bankruptcy petition;

(l) FILIGHERA on the SOFA, question 16, failed to list his spouse; and

(m) FILIGHERA on his Form B22B failed to list his business and rental income.

(n) In violation of 11 U.S.C. § 727(a)(3), FILIGHERA failed to provide to the Trustee a list of all pre-petition loans in which FILIGHERA had been involved as the broker or servicing agent.

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(o) On Schedule B, filed July 3, 2008, FILIGHERA listed as an asset an account receivable of $30,000 owed by Pat Corrigan. At the initial chapter 7 Section 341 meeting of creditors, FILIGHERA testified under oath that Mr. Corrigan was his landlord and that he set off Mr. Corrigan's $30,000 account receivable against some unpaid rent that FILIGHERA owed to Mr. Corrigan. This setoff occurred postpetition, without court approval or notice to creditors and parties in interest.

(p) On Schedule B, FILIGHERA listed as an asset a ½ interest in a 1971 Bell Jet Ranger helicopter, valued at $100,000.

(q) At the initial chapter 7 Section 341 meeting of creditors FILIGHERA testified under oath that FILIGHERA transferred his interest in the helicopter referenced above, to the co-owner of the helicopter for $65,000. This transfer occurred post-petition, without court approval or notice to creditors and parties in interest.

(r) Creditor William Martin, M.D. filed a nondischargeability complaint against FILIGHERA. Dr. Martin alleges that FILIGHERA owes him, at a minimum, $100,000. Dr. Martin is not listed on Schedule D, Schedule F, or the list of creditors.

(s) Creditor Linda A. Briley, an elderly woman who lives in Comfort, Texas, filed a nondischargeability complaint against FILIGHERA. Mrs. Briley alleges that she is owed, at a minimum, $129,000 by FILIGHERA. Mrs. Briley is not listed on Schedule D, Schedule F, or the list of creditors.

15

On or about November 22, 2010, a trial was held on the Trustee's allegations in which FILIGHERA was afforded his due process rights including, but not limited to, his right to confront and to cross examine witnesses; to offer testimony and provide the court with evidence and arguments. On or about February 04, 2011, in a ten (10) page *Findings of Fact and Conclusions of Law Following Trial,* Charles Novack, United States Bankruptcy Judge made the following findings of fact, among others, that FILIGHERA knowingly and fraudulently made material false oaths and acted fraudulently when he omitted material information from his

Schedules. As a result, the judge denied FILIGHERA a discharge. On or about February 23, 2011, the court's order denying a discharge was entered.

16

The court, among other findings, made the following findings of fact and law:

(a) FILIGHERA repeatedly promised to file amendments to his schedules, SOFA, and Form B22B to correct the inaccuracies and omissions, but never did so. Therefore, the court found the inaccuracies and omissions on FILIGHERA'S Schedules, SOFA, and Form B22B were knowing and fraudulent.

(b) Creditor William M., M.D. filed a nondischargeability complaint against FILIGHERA. Dr. M. alleges that he is owed, at a minimum, $100,000. However, Dr. M. was not listed on FILIGHERA'S Schedule D, Schedule F, or *List of Creditors*.

(c) Creditor Linda A. B., an elderly woman who lives in Comfort, Texas, filed a nondischargeability complaint against FILIGHERA. Mrs. B. alleged that she is owed, at a minimum, $129,000. However, Mrs. B. was not listed on FILIGHERA'S Schedule D, Schedule F, or *List of Creditors*.

(d) The court found that as Dr. M. nor Mrs. B. were not included on the FILIGHERA'S *List of Creditors* an inference can be fairly drawn that there are inaccuracies and omissions on the list of creditors.

(e) The inaccuracies and omissions on FILIGHERA'S Petition, Schedules, SOFA, Form B22B and *List of Creditors*, were found to be substantial and material and that an inference can be fairly drawn that FILIGHERA'S failure to include Dr. M. and Mrs. B. on his Schedules, SOFA and *List of Creditors* was knowing and fraudulent.

(f) FILIGHERA did not disclose the dba "Raymond Douglas Realty" on his Petition, Schedules or SOFA.

(g) An inference can be fairly drawn that FILIGHERA'S failure to include the dba "Raymond Douglas Realty" on his Petition, Schedules, and SOFA was knowing and fraudulent.

(h) Three months after he filed his bankruptcy, FILIGHERA transferred his interest in the helicopter and received $65,000 in return. FILIGHERA did not request or receive court approval of this post-petition transfer. Following the sale, FILIGHERA deposited sales proceeds representing the liquidated value of FILIGHERA'S interest in the helicopter into his company's business account and spent the entire amount on bills and other expenditures. FILIGHERA did not request or receive court approval to spend the proceeds.

17

The acts and/or omissions of FILIGHERA in association with the Bankruptcy Court's findings as alleged above violate 10177(j) of the Code (Conduct of same or similar character which constitutes fraud or dishonest dealing) which constitutes grounds for discipline under Section 10177(d) of the Code.

THIRD CAUSE OF ACTION
Unregistered D.B.A.

18

Complainant incorporates each and every allegation in Paragraphs 1 through 17 by this reference as if fully set forth herein.

19

At all times relevant herein, FILIGHERA used the fictitious business names *Monterey Investing.com* and *Monterey Investing* in connection with a business for which a real estate license is required. These fictitious business names are not registered with the Department in violation of Section 10159.5 of the Code and Section 2731 of the Commissioner's Regulations which constitute grounds for discipline under Section 10177(d) of the Code.

FOURTH CAUSE OF ACTION
Lender Purchaser Disclosure Statement Violations

20

Complainant incorporates each and every allegation in Paragraphs 1 through 19 by this reference as if fully set forth herein.

21

In addition to the audit violations enumerated in the First Cause of Action above:

(a) For Loan #141, a loan secured by property located at 2983 Colton Road, Pebble Beach, California (hereinafter "Colton Road Property"), wherein FILIGHERA and Louise Filighera were the borrowers; FILIGHERA arranged for the private money loan; and appointed himself to service the loan. However, FILIGHERA failed to provide a complete Lender/Purchaser Disclosure Statement (DRE Form Number 851A) ("LPDS") to the private money lender. The LPDS for loan #141 stated that Loan #141 would be in second position. However, Loan #131, also a loan made to FILIGHERA on the Colton Road Property, had not been paid off and therefore Loan #131 was senior to Loan #141. Therefore, the LPDS for Loan #141 misrepresented Loan #141's security position. Respondents failed to provide the property information and fair market valuation of the Colton Road Property as required in Part 8 of the LPDS. The Note and Deed of Trust both were dated February 26, 2008, some 2 ½ months prior to the date the LPDS was signed on May 7, 2008. The date loan #141's loan funds were disbursed to FILIGHERA could not be determined. Each violation jointly and severally constitute separate violations of Sections 10232.5, 10176(a), 10176(b), 10176(c), 10177(h), 10176(i) and 10177(j) of the Code and Section 2845 of the Commissioner's Regulations and constitute cause to suspend or revoke all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) and of the Code.

(b) For Loan #138, a loan wherein FILIGHERA was the borrower and the broker who arraigned the loan and appointed himself the servicer of the loan, Respondents failed to provide a completed LPDS in that Part 2 failed to identify Respondents' role in the transaction and, as required in Part 8 of the LPDS, failed to include the property description; which was left blank. Each violation jointly and severally constitutes a separate violation of Section 10232.5 of the Code and Section 2845 of the Commissioner's Regulations and is cause to suspend or revoke all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) of the Code.

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(c) For Loan #133, Respondents used an outdated LPDS form. The fair market value of the property which was to secure Loan #133 was based upon a "Broker Price Opinion." However, Respondents failed to obtain written consent of the private money lender to provide a Broker Price Opinion in lieu of a formal appraisal. Further, Respondents failed to provide the private money lender with the objective data upon which the estimate of valuation was based. In addition, the lenders' signatures were dated August 20, 2007, some ten (10) days after the settlement date of the loan. Each violation jointly and severally constitutes a separate violation of Section 10232.5 of the Code and 2845 of the Commissioner's Regulations and constitutes cause to suspend or revoke all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) of the Code.

(d) For Loan #131, a loan secured by the Colton Road Property, wherein FILIGHERA and Louise Filighera were the borrowers and FILIGHERA arranged the private money loan and was the servicer of the loan, Respondents failed to provide a complete LPDS to the private money lender. Respondents failed to provide the property information as required in Part 8 of the LPDS and failed to obtain written consent of the lender to provide a Broker Price Opinion in lieu of a formal appraisal and failed to provide the objective data upon which the estimate of valuation was based. The LPDS for Loan #131was signed on July 22, 2007, by the lender; the Note and Deed of Trust were dated July 9, 2007, and the date of which the loan funds disbursed to FILIGHERA could not be determined. Each violation jointly and severally constitutes a separate violation of Section 10232.5 and 10177(h) of the Code and Section 2845 of the Commissioner's Regulations and constitutes cause to suspend or revoke all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) of the Code.

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FIFTH CAUSE OF ACTION
Constructive Fraud

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Complainant incorporates each and every allegation in Paragraphs 1 through 21, by this reference as if fully set forth herein.

23

Respondents failed to take all steps necessary to protect their clients' funds by failing to timely record deeds of trust that were intended to serve as security for the repayment of the private money loan proceeds; by failing to provide complete LPDS forms; by failing to obtain the written consent of the lender to provide a Brokers' Opinion in lieu of a formal appraisal; by failing to provide the objective data in support of the Brokers' Opinion; by failing to disclose to the private money lenders of his bankruptcy filings; and by FILIGHERA failure to disclose to the Bankruptcy Trustee the private money lenders in *List of Creditors*. Therefore, Respondents breached their duty to the aforementioned private money lenders. Respondents' acts constitute constructive fraud and jointly and severally constitute violations of Section 10176(a), 10176(b), 10176(c), 10176(i) and 10177(j) of the Code which is cause to suspend or revoke all licenses and license rights of Respondents under Section 10177(d) of the Code.

SIXTH CAUSE OF ACTION
Failure to Abide by Real Estate Threshold Reporting Requirements

24

Complainant incorporates each and every allegation in Paragraphs 1 through 24, by this reference as if fully set forth herein.

25

The audit of the Respondents' books and records determined that during July and August 2007, Respondents were servicing loans during the three month period July through September 2007 and arraigned four (4) private money loans with an aggregate principal balance of $892,000.00 and collected payments from borrowers amounting to $77,992.00, thus triggering the threshold reporting requirements of Section 10232(e) of the Code. However, Respondents failed to timely file the Department's "Threshold Notification Report" (DRE Form 853) in violation of Section 10232(e) of the Code which constitutes cause for suspension or revocation of all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) of the Code.

SEVENTH CAUSE OF ACTION
Failure to Supervise

26

Complainant incorporates each and every allegation in Paragraphs 1 through 26, inclusive by this reference as if fully set forth herein.

27

FILIGHERA, as the designated officer/broker of JFAI, was required to exercise reasonable supervision and control over the activities of JFAI. FILIGHERA failed to exercise reasonable supervision over the acts of JFAI in such a manner as to allow the acts and omissions as described above to occur; all in violation of Sections 10159.2 and 10177(h) of the Code which constitutes cause for suspension or revocation of all licenses and license rights of FILIGHERA under Section 10177(d) of the Code.

EIGHTH CAUSE OF ACTION
Negligence and/or Incompetence

28

Complainant incorporates each and every allegation in Paragraphs 1 through 28, by this reference as if fully set forth herein.

29

In the alternative, the acts and omissions of Respondents described herein above, jointly and severally, constitute negligence or incompetence in performing acts requiring a real estate license and violation of Section 10177 (g) and 10177(h) of the Code and which are cause for suspension or revocation of all licenses and license rights of FILIGHERA which constitutes cause for suspension or revocation of all licenses and license rights of FILIGHERA under Section 10177(d) of the Code.

COST RECOVERY

30

Section 10106 of the Code[1] provides, in pertinent part, that in any order issued in resolution of a disciplinary proceeding before the Department, the Commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

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[1] **10106.** (a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. (b) In the case of a disciplined licensee that is a corporation or a partnership, the order may be made against the licensed corporate entity or licensed partnership. (c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General. (d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). The finding of the administrative law judge with regard to costs shall not be reviewable by the commissioner to increase the cost award. The commissioner may reduce or eliminate the cost award, or remand to the administrative law judge where the proposed decision fails to make a finding on costs requested pursuant to subdivision (a). (e) Where an order for recovery of costs is made and timely payment is not made as directed in the commissioner's decision, the commissioner may enforce the order for repayment in any appropriate court. This right of enforcement shall be in addition to any other rights the commissioner may have as to any licentiate to pay costs. (f) In any action for recovery of costs, proof of the commissioner's decision shall be conclusive proof of the validity of the order of payment and the terms for payment. (g) (1) Except as provided in paragraph (2), the department shall not renew or reinstate the license of any licensee who has failed to pay all of the costs ordered under this section. (2) The department may, in its discretion, conditionally renew or reinstate for a maximum of one year the license of any licensee who demonstrates financial hardship and who enters into a formal agreement with the department to reimburse the department within that one-year period for the unpaid costs. (h) All costs recovered under this section shall be considered a reimbursement for costs incurred and shall be deposited in the Real Estate Fund to be available, notwithstanding Section 10451, upon appropriation by the Legislature. (i) Nothing in this section shall preclude the department from including the recovery of the costs of investigation and enforcement of a case in any stipulated settlement.

WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered revoking all licenses and license rights of JOHN FILIGHERA and JOHN FILIGHERA & ASSOCIATES, INC., under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), for the cost of investigation and enforcement as permitted by law, and for such other and further relief as may be proper under other provisions of law.

LUKE MARTIN
Deputy Real Estate Commissioner

Dated at Fresno, California,
this 29th day of March, 2012.

DISCOVERY DEMAND

Pursuant to Sections 11507.6, *et seq.* of the *Administrative Procedures Act*, the Department of Real Estate hereby makes demand for discovery pursuant to the guidelines set forth in the *Administrative Procedures Act*. Failure to provide Discovery to the Department of Real Estate may result in the exclusion of witnesses and documents at the hearing or other sanctions that the Office of Administrative Hearings deems appropriate.

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P. O. Box 187007
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FILED

FEB 1 1 2011

DEPARTMENT OF REAL ESTATE

By [signature]

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)) JOHN FILIGHERA & ASSOCIATES, INC.,) A Corporation, and JOHN FILIGHERA,)) Respondents.))	NO. H- 2588 FR ACCUSATION

The Complainant, LUKE MARTIN, in his official capacity as Deputy Real Estate Commissioner of the State of California, for cause of Accusation against JOHN FILIGHERA & ASSOCIATES, INC., a corporation (herein "JFAI") and JOHN FILIGHERA (herein "FILIGHERA"), (collectively "Respondents") is informed and alleges as follows:

THE RESPONDENTS

1

At all times herein mentioned, Respondents JFAI and FILIGHERA were and now are licensed and/or have license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) (herein "the Code").

2

At all times herein mentioned herein JFAI was and now is licensed by the Department of Real Estate of the State of California (herein "the Department") as a corporate real estate broker and doing business under the fictitious business names First Nation and Raymond Douglas Realty by and through FILIGHERA as its designated officer-broker.

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At all times herein mentioned, FILIGHERA was and now is licensed by the Department as a real estate broker, individually and as designated officer-broker of JFAI and is the alter ego of JFAI. As the designated officer-broker, FILIGHERA was at all times mentioned herein responsible pursuant to Section 10159.2 of the Code, for the supervision of the activities of the officers, agents, real estate licensees and employees of JFAI.

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Whenever reference is made in an allegation in this Accusation to an act or omission of JFAI, such allegation shall be deemed to mean that FILIGHERA, the officers, directors, employees, agents and/or real estate licensees employed by or associated with JFAI while acting within the course and scope of their authority and employment with JFAI committed such act or omission in the furtherance of the business or operations of JFAI.

5

At all times herein mentioned, Respondents engaged in the business of, acted in the capacity of, advertised, or assumed to act as real estate brokers within the State of California within the meaning of Sections 10131(d) and 10131(e) of the Code, including the operation and conduct of a mortgage loan brokerage with the public wherein Respondents solicited institutional and private money lenders and private borrowers for loans secured directly or collaterally by liens on real property or a business opportunity, and wherein such loans were arranged, negotiated, processed, serviced and consummated by Respondents on behalf of FILIGHERA and others and wherein promissory notes or interests therein were sold or purchased on behalf of another or others and by a lien on real property, including collecting payments thereon, and in addition, Respondents conducted in-house escrows and conducted residential real estate resale activities all for compensation or in the expectation of compensation.

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6

Intermittently between April 20, 2010 and ending July 20, 2010, an audit was conducted at JFAI's main office located 1010 Cass Street, Suite D-8, Monterey, California and at the Oakland District Office of the Department of Real Estate, 1515 Clay Street, Suite 702, Oakland, California wherein the Department's auditor examined records for the period July 1, 2007 through December 31, 2009 (the audit period).

FIRST CAUSE OF ACTION
Audit Violations

7

Each and every allegation in Paragraphs 1 through 6 above, is incorporated by this reference as if fully set forth herein

8.

In so acting as real estate brokers, Respondents accepted or received funds in trust (herein "trust funds") from or on behalf of lenders, investors, borrowers and others in connection with the mortgage loan brokerage activities, loan servicing, in-house escrow services and resale activities described in Paragraph 5, above, and thereafter from time to time made disbursements of the trust funds.

9

The aforementioned trust funds accepted or received by Respondents were deposited or caused to be deposited by Respondents into one or more bank accounts (herein "trust fund accounts") maintained by Respondents for the handling of trust funds, including, but not necessarily limited to, the following accounts maintained by Respondents at the Wells Fargo Bank, Portland, Oregon:

(a) The John Filighera & Associates, Inc., Loan Servicing Trust Account, account number XXXXXX9272 ("Trust #1");

(b) The John Filighera & Associates, Inc., Trust Account, account number XXXXX3779 ("Trust #2");

And at the Coast Commercial Bank, Capitola, California:

(c) The John Filighera and Associates Loan Servicing Trust, account number XXX3772 ("Trust #3"); and,

(d) The John Filighera and Associates Loan Servicing Trust Account, account number XXX0642 ("Trust #4").

10

In the course of the activities described in Paragraph 5, above, for the audit period:

(a) As of December 31, 2009, there was a cash shortage of $1,408.33 in Trust # 1. The trust fund shortage was due to a negative balance of $1,408.33 in the Loan XIII (Ceasar Segura) account. Further, there was no evidence presented to the auditor that the written consent of every principal who was the owner of funds in Trust Account #1 was obtained by Respondents prior to each disbursement when such disbursement reduced the balance of funds in Trust #1 to an amount less than the aggregate trust liability of Respondents to the owners of the funds all in violation of Section 10145 of the Code and Section 2832.1 of Chapter 6, Title 10, California Code of Regulations (hereinafter "the Commissioner's Regulations");

(b) In three (3) private investor loan transactions FILIGHERA acted as the borrower (Loan # 131, Loan # 138 and Loan # 141). For loan #138 (the $100,000 Martin Loan), the Deed of Trust was not recorded until approximately six (6) months after the loan was arranged. For Loan #141 (the $75,000 Briley loan), the Deed of Trust was not recorded until after the Audit was conducted. Failure to timely record the aforementioned deeds of trust resulted in a loss of priority to other subsequent liens executed after the aforementioned deeds of trust, but which were recorded prior to the recordation of the deeds of trust in violation of Section 10234 and Section 10177(g) of the Code;

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(c) In addition for Loan #141 and Loan #138 Respondents disbursed the loan funds to FILIGHERA before the recordation of the Deeds of Trust in violation of Section 10234 of the Code;

(d) JFAI arranged the six (6) loans for a total principal balance of $419,000, wherein FILIGHERA acted as the borrower. Prior to any representation, solicitation, or presentation of a Lender/Purchaser Disclosure Statement ("LPDS") JFAI failed to notify the Department of the intended loans in violation of Section 10231.2 of the Code. Further, JFAI failed to retain a fully executed copy of the LPDS for each loan for four (4) years in violation of Section 10231.2 of the Code;

(e) For Loan #131, Loan #138 and Loan #141 Respondents conducted in-house broker escrows. However, Respondents failed to maintain signed escrow instructions in each file and for each transaction failed to have a clear accounting of the deposits and disbursements of the funds of all parties to the escrow. Each failure to contain the aforementioned escrow instructions and/or clear accountings in the loan file constitutes a separate violation of California Financial Code Section 17403.4 and Section 2950 and Section 2951 of the Commissioner's Regulations;

(f) Respondent's "Daily Cash Report" was inadequate as a *Record of All Trust Funds Received and Disbursed* for Trust Account #1 as, among other failures it did not set forth from whom $34,000.00 was received by Respondents on July 9, 2007; it incorrectly described a July 21, 2008 disbursement on July 3, 2007; and Respondents failed to provide separate records for the "Z-Slush" account contained within Trust #1, each of which constitutes a separate violation of Section 2831 and Section 2831.1 of the Commissioner's Regulations;

(g) In the Perez Institutional Loan (2037 Eddy Street, Marina, California), Respondents failed to maintain a copy of the Mortgage Loan Disclosure Statement which included the borrower's signatures in violation of Section 10240 and 10241 of the Code;

(h) For two (2) salespersons licensed to Respondents (Mark Frederickson and Keith Prader), Respondents failed to retain the original salesperson license certificates at

Respondents' main office and make the licenses available for inspection by the Department's Auditor each of which constitutes a violation of Section 10160 of the Code and Section 2753 of the Commissioner's Regulations.

11

The acts and/or omissions of JFAI as alleged above violated Sections 2753, Sections 10145, 10160, 10231.2, 10234, 10240, 10241, 10176, 10177(g) of the Code ; Section 17403.4 of the California Financial Code; and Sections 2753, 2831, 2831.1, 2832.1 2950 and, 2951 of the Commissioner's Regulations each of which constitutes grounds for discipline under 10177(d) of the Code.

SECOND CAUSE OF ACTION
Lender Purchaser Disclosure Statement Violations

12

Each and every allegation in Paragraphs 1 through 11, inclusive, above are incorporated by this reference as if fully set forth herein.

13

In addition to the audit violations enumerated in the First Cause of Action above:

(a) For Loan #141, a loan secured by a property located at 2983 Colton Road, Pebble Beach, California, (hereinafter the "Colton Road Property") wherein FILIGHERA and Louise Filighera were the borrowers and FILIGHERA arranged the private money loan and was to be the servicer of the loan, Respondents failed to provide a complete Lender/Purchaser Disclosure Statement (DRE Form Number 851A) ("LPDS"). The LPDS for loan #141 indicated that Loan #141 would be in second position. However, Loan #131, also a loan made to FILIGHERA on the Colton Road Property, had not been paid off and was already recorded against the property; the LPDS for Loan #141 misrepresented Loan #141's security position. Respondents failed to provide the property information and fair market valuation of the Colton Road Property as required in Part 8 of the LPDS. The LPDS for Loan #141was signed on May 7, 2008 by the lender; the Note and Deed of Trust were both dated February 26, 2008 and the date of which the loan funds disbursed to FILIGHERA could not be determined. Each of these actions constitutes a separate violation of Sections 10232.5, 10176(a), 10176(b), 10176(c), 10176(i) and 10177((j) of the Code and Section 2845 of the Commissioner's Regulations and constitutes cause to suspend or revoke all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) and 10177(h) of the Code;

(b) For Loan #138, a loan wherein FILIGHERA was the borrower and the broker who arranged and serviced the loan, the Respondents failed to provide a fully complete Lender Purchaser Disclosure Statement ("LPDS"). Part 2 of the LPDS failed to identify Respondents' capacity in the transaction. Further, the information concerning the property description required in Part 8 of the LPDS was left blank. Each of these actions is a separate violation of Section 10232.5 of the Code and Section 2845 of the Commissioner's Regulations and constitutes cause to suspend or revoke all licenses and license rights FILIGHERA and JFAI under Section 10177(d) and 10177(h) of the Code;

(c) For Loan #133, Respondents used an outdated LPDS form. The fair market value of the property was based upon the "Broker Priced Opinion." Respondents failed to obtain the written consent of the lender to provide a Broker Opinion in lieu of a formal appraisal and failed to provide the objective data upon which the estimate of valuation was based. In addition the lenders signatures on the LPDS were dated August 20, 2007, some ten (10) days after the settlement date of the loan. Each of these actions is a separate violation of Section 10232.5 of the Code and Section 2845 of the Commissioner's Regulations and constitutes cause to suspend or revoke all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) and 10177(h) of the Code;

(c) For Loan #131 a loan secured by the Colton Road Property wherein FILIGHERA and Louise Filighera were the borrowers and FILIGHERA arranged the private money loan and serviced the loan, Respondents failed to provide a complete LPDS. Respondents failed to provide the property information as required in Part 8 of the LPDS and failed to obtain the written consent of the lender to provide a Broker Opinion in lieu of a formal appraisal and failed to provide the objective data upon which the estimate of valuation was based. The LPDS for Loan #131was signed on July 22, 2007 by the lender; the Note and Deed of Trust were dated July 9, 2007 and the date of which the loan funds disbursed to FILIGHERA could not be determined. Each of these actions is a separate violation of Section 10232.5 of the Code and 2845 of the Commissioner's Regulations and constitutes cause to suspend or revoke all licenses and license rights FILIGHERA and JFAI under Section 10177(d) and 10177(h) of the Code.

THIRD CAUSE OF ACTION
Constructive Fraud

14

Each and every allegation in Paragraphs 1 through 13, inclusive, above are incorporated by this reference as if fully set forth herein.

15

Respondents are fiduciaries to the private money lender (beneficiaries) and must act in the highest good faith and are obliged to treat the lender's funds in the same fashion as that imposed upon a trustee of the funds.

16

Respondents breached their duty to the aforementioned private money lenders by failing to take all steps necessary to protect their clients' funds, including, but not limited to, failure to timely record deeds of trust; failure to provide complete LPDS forms; failure to obtain the written consent of the lender to provide a Broker Opinion in lieu of a formal appraisal and failure to provide the objective data upon which the Broker Opinion was based; and therefore Respondents' acts constitute constructive fraud in violation of Section 10176(a), 10176(b), 10176(c), 10176(i) and 10177((j) of the Code and are causes to suspend or revoke all licenses and license rights of FILIGHERA and JFAI under Section 10177(d) and 10177(h) of the Code.

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FOURTH CAUSE OF ACTION
Failure to Abide by Real Estate Threshold Reporting Requirements

17

Each and every allegation in Paragraphs 1 through 16, inclusive, above, is incorporated by this reference as if fully set forth herein.

18

The audit of the Respondents FILIGHERA and JFAI'S books and records determined that during July and August 2007, Respondents FILIGHERA and JFAI'S were servicing loans wherein Respondents FILIGHERA and JFAI collected payments from borrowers amounting to $77,992.00 and during the three month period July through September 2007 arranged four (4) private money loans with an aggregate principal balance of $892,000.00 thus triggering the threshold reporting requirements of Section 10232(e) of the Code. However, Respondents failed to timely file the Department's "Threshold Notification Report" (DRE Form 853) in violation of Section 10232(e) of the Code which constitutes cause for suspension or revocation of all licenses and license rights of Respondents FILIGHERA and JFAI under Section 10177(d) and 10177(h) of the Code.

FOURTH CAUSE OF ACTION
Failure to Supervise

19

Each and every allegation in Paragraphs 1 through 18, inclusive, above, is incorporated by this reference as if fully set forth herein.

20

Respondent FILIGHERA, as the designated officer/broker of Respondent JFAI was required to exercise reasonable supervision and control over the activities of Respondent JFAI. Respondent FILIGHERA failed to exercise reasonable supervision over the acts of JFAI in such a manner as to allow the acts and omissions on the part of JFAI as described above to occur; all in violation of Section 10159.2 of the Code and which constitutes cause for suspension or revocation of all licenses and license rights of Respondent FILIGHERA under Section 10177(d) and 10177(h) of the Code.

THIRD CAUSE OF ACTION
Negligence and/or Incompetence

21

Each and every allegation in Paragraphs 1 through 20, inclusive, above are incorporated by this reference as if fully set forth herein.

22

In the alternative the acts and omissions of Respondents FILIGHERA and JFAI described above, jointly and severally, constitute negligence or incompetence in performing acts requiring a real estate license, and are cause for suspension or revocation of all licenses and license rights of Respondents FILIGHERA and JFAI.

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 Respondents 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.

L Martin

LUKE MARTIN
Deputy Real Estate Commissioner

Dated at Fresno, California
this 1st day of FEBRUARY, 2011.

DISCOVERY DEMAND:

Pursuant to Sections 11507.6, *et seq.* of the *Administrative Procedures Act*, the Department of Real Estate hereby makes demand for discovery pursuant to the guidelines set forth in the *Administrative Procedures Act*. Failure to provide Discovery to the Department of Real Estate may result in the exclusion of witnesses and documents at the hearing or other sanctions that the Office of Administrative Hearings deems appropriate.