FILED
AUG 2 3 1994
DEPARTMENT OF REAL ESTATE

By _____

BEFORE THE

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondents.	No. H-2598 SAC

ORDER DENYING RECONSIDERATION

On June 20, 1994, a Decision After Remand was rendered in the above-entitled matter. The Decision is to become effective August 26, 1994.

On July 26, 1994, Respondent petitioned for reconsideration of the Decision of June 20, 1994.

I have given due consideration to the petition of Respondent. I find no good cause to reconsider the Decision of June 20, 1994 and reconsideration is hereby denied.

IT IS HEREBY ORDERED August 22, 1994.

JOHN R. LIBERATOR
Interim Commissioner

John R. Liberator

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV. 8-72)

FILED
JUL 27 1994
DEPARTMENT OF REAL ESTATE
By Laurie A. Ryan

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondents.	No. H-2598 SAC

ORDER STAYING EFFECTIVE DATE

On June 20, 1994, a Decision After Remand was rendered in the above-entitled matter to become effective July 27, 1994.

IT IS HEREBY ORDERED that the effective date of the Decision of June 20, 1994 is stayed for a period of thirty (30) days.

The Decision of June 20, 1994 shall become effective at 12 o'clock noon on August 26, 1994.

DATED: July 27, 1994

JOHN R. LIBERATOR
Interim Commissioner

John R. Liberator

Department of Real Estate
P. O. Box 187000
Sacramento, CA 95818-7000

Telephone: (916) 227-0789

FILED
JUL - 7 1994
DEPARTMENT OF REAL ESTATE

By _____

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondent.	No. H-2598 SAC DECISION AFTER REMAND FROM THE SACRAMENTO COUNTY SUPERIOR COURT CASE NO. 372500.

On May 20, 1992, a Decision was rendered revoking the real estate broker licenses and license rights of JOSEPH F. CUNNINGHAM, JR. and SOCAL MORTGAGE CORPORATION (hereinafter "Respondents").

On June 12, 1992, Respondents petitioned for reconsideration of the Decision. On July 14, 1992, the Commissioner denied Respondents' Petition for Reconsideration.

On November 4, 1992, Respondents petitioned for a Writ of Administrative Mandamus to the Sacramento County Superior Court.

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On May 19, 1993, the Sacramento County Superior Court, filed a Statement of Decision setting aside the restitution order and ordering the case remanded to the Department of Real Estate for correction in the restitution order.

On August 2, 1993, the Commissioner rendered his Decision After Remand modifying the restitution order in conformance with the Sacramento County Superior Court's Statement of Decision dated May 19, 1993.

On September 8, 1993, Respondents made a motion in the Sacramento County Superior Court to vacate the judgment entered on June 10, 1993.

On October 6, 1993, the Sacramento County Superior Court rendered an order vacating its Judgment entered on June 10, 1993 and the Statement of Decision filed on May 19, 1993.

On October 6, 1993 the Sacramento County Superior Court filed a tentative Decision remanding the matter to the Department of Real Estate for consideration of ERISA preemption and for correction in the penalty determination.

I have reconsidered the Decision of August 2, 1993, based upon the Order and Tentative Decision dated October 6, 1993 of the Sacramento County Superior Court in Case No. 372500 remanding the matter to the Department of Real Estate for consideration of ERISA preemption and for correction in the penalty determination.

Except as hereinafter modified, the Findings of Fact, Determination of Issues and the Order contained in the Decision of May 20, 1992 as modified by the Decision After Remand of

August 2, 1993 shall remain in effect. I have added the following findings concerning Employment Retirement Income Security Act (hereinafter "ERISA") preemption and have modified the restitution order as follows:

ERISA PREEMPTION FINDINGS

Under ERISA, "any and all State laws" are preempted "insofar as they ... relate to any employee benefit plan" (29 U.S.C. Section 1144(a)). A law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan" Shaw vs. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). "Some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." Id. at 100 n. 21.

The California statutes which form the basis of the Department's accusation touch an area of law traditionally left to state regulation. See Metropolitan Life Ins. Co. vs. Massachusetts, 471 U.S. 724,740 (1985); Firestone Tire & Rubber Co. vs. Neusser, 810 F. 2d 550, 555 (6th Cir. 1987). BeneFax Corp. vs. Wright, 757 F. Supp. 800,804 (W. D. Ky. 1990) (state statutory scheme concerning licensing of third-party administrators of employee health benefit plans was not preempted by ERISA, in part, because the licensing statutes "represent a traditional area of state authority").

In addition, the California real estate licensing statutes do not "reach a relationship that is already regulated by ERISA." General American Life Ins. Co. vs. Castonguay, 984 F.2d 1518, 1522 (9th Cir. 1993). The relationship regulated here is

that between a real estate broker (who coincidentally may be an ERISA plan fiduciary) and his clients who have nothing to do with an ERISA plan. To the extent an ERISA plan has any connection to this proceeding, the plan was acting simply as an investor, not as a plan. See id. ("ERISA doesn't purport to regulate those relationships where a plan operates just like any other commercial entity.") cf. Shaw, 463 U.S. at 97 n. 17 (State law not preempted when it affects an employee benefit plan acting as an employer); Somners Drug Stores Co. Employee Profit Sharing Trust vs. Corrigan Enterprises, 793 F.2d 1456,1467 (5th Cir. 1986) (state law not preempted the extent it affects the plan acting as a shareholder), cert. denied, 479 U.S. 1034 (1987).

The state laws at issue in this case affect ERISA plans, if at all, in too tenuous, remote, and peripheral a manner to "relate to" and ERISA plan. See Firestone, 810 F.2d at 556. Other state laws of similarly general application have been held not to be preempted by ERISA due to their tenuous, remote, or peripheral effects on ERISA plans. See, e.g., Retirement Fund Trust of Plumbing, Etc. vs. Franchise Tax Bd., 909 F. 2d 1266,1281 (9th Cir. 1990); Aetna Life Ins. Co. vs. Borges, 869 F.2d 142,147 (2d Cir.), cert. denied, 493 U.S. 811 (1989); Firestone, 810 F.2d at 556; Rebaldo vs. Cuomo, 749 F.2d 133,138-39 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985); See also BeneFax, 757 F. Supp. at 804:

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> "The administrator licensing statutes apply to all persons acting as administrators in Kentucky without regard to whether such persons provide services exclusively to ERISA plans or non-ERISA plans or to persons who service both ERISA and non-ERISA plans. These statutes do not "relate to" ERISA employee benefit plans any more than licensing statutes for other individuals such as attorneys, physicians, chiropractors or accountants who may, in the course of their business service ERISA plans or who service ERISA plans exclusively."

California courts have described the test for ERISA preemption as involving the following factors:

> "Whether the state law in question concerns an area traditionally within the state's domain and authority; whether plaintiffs are complaining about something impinging on the administration of an employee benefit plan, such as its terms and conditions, funding, vesting, establishment, reporting, disclosure, enforcement, fairness, or distribution of benefits; and whether the controversy affects relations among the principal ERISA entities -- the employer, the plan participants and beneficiaries, the plan trustees and fiduciaries, and the plan itself -- rather than between one or more of these entities and outside parties who have only incidental connections with the plan. (Cites omitted.)" (Duffy vs. Cavalier (1989) 215 Cal.App.3d 1517,1528.)

The state real estate licensing laws at issue here affect an ERISA plan only due to the coincidence that an ERISA plan was to provide the funds for the loans to GIBA. This is not sufficient to merit a finding that the state laws, as applied to respondents CUNNINGHAM and SOCAL, "relate to" an ERISA plan and therefore the Department's disciplinary action against respondents CUNNINGHAM and SOCAL are not preempted by ERISA.

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MODIFIED ORDER

All real estate licenses and licensing rights of respondents JOSEPH F. CUNNINGHAM, JR. and SOCAL MORTGAGE CORPORATION under the Real Estate Law of the State of California are revoked pursuant to Determinations I through IV, inclusive, separately and severally for each of them. Reinstatement of any of the licenses or issuance of any real estate license to JOSEPH F. CUNNINGHAM, JR., or to any corporation or other entity in which he serves as designated broker shall not be considered until respondent JOSEPH F. CUNNINGHAM, JR. pays to the Recovery Account of the Real Estate Fund $60,000.00.

This Decision shall become effective at 12 o'clock noon on July 27th, 1994.

IT IS SO ORDERED June 20, 1994.

CLARK WALLACE
Real Estate Commissioner

John R Liberator

BY: John R. Liberator
Chief Deputy Commissioner

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV. 8-72)

85 34769

Department of Real Estate
P. O. Box 187000
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Telephone: (916) 227-0789

FILED
AUG 16 1993
DEPARTMENT OF REAL ESTATE

By Laurie A. Zaa

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondent.	No. H-2598 SAC DECISION AFTER REMAND FROM THE SACRAMENTO COUNTY SUPERIOR COURT CASE NO. 372500.

On May 20, 1992, a Decision was rendered revoking the real estate broker licenses and license rights of respondents JOSEPH F. CUNNINGHAM, JR. and SOCAL MORTGAGE CORPORATION.

On June 12, 1992, Respondents petitioned for reconsideration of the Decision. On July 14, 1992, the Commissioner denied Respondents' Petition for Reconsideration.

On November 4, 1992, Respondents petitioned for a Writ of Administrative Mandamus to the Sacramento County Superior Court.

On May 19, 1993, the Sacramento County Superior Court, filed a Statement of Decision setting aside the restitution Order and ordering this case remanded to the Department of Real Estate for correction in the restitution order.

I have modified the restitution order as follows:

ORDER

All real estate licenses and licensing rights of respondents JOSEPH F. CUNNINGHAM, JR. and SOCAL MORTGAGE CORPORATION under the Real Estate Law of the State of California are revoked pursuant to Determinations I through IV, inclusive, separately and severally for each of them. Reinstatement of any of the licenses or issuance of any real estate license to JOSEPH F. CUNNINGHAM, JR., or to any corporation or other entity in which he serves as designated broker shall not be considered until respondent JOSEPH F. CUNNINGHAM, JR. pays to the Recovery Account of the Real Estate Fund $60,000.00.

This Decision shall become effective at 12 o'clock noon on September 7, 1993.

IT IS SO ORDERED August 2, 1993.

CLARK WALLACE
Real Estate Commissioner

BY: John R. Liberator
Chief Deputy Commissioner

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV. 8-72)

FILED
JUL 15 1992
DEPARTMENT OF REAL ESTATE

By Laurie A. Zigas

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondent.	No. H-2598 SAC OAH No. N-36924

ORDER DENYING RECONSIDERATION

On May 20, 1992, a Decision was rendered in the above-entitled matter. The Decision is to become effective June 19, 1992.

On June 12, 1992, Respondent petitoned for reconsideration of the Decision of May 20, 1992.

I have given due consideration to the petition of Respondent. I find no good cause to reconsider the Decision of May 20, 1992 and reconsideration is hereby denied.

IT IS HEREBY ORDERED July 14, 1992.

CLARK WALLACE
Real Estate Commissioner

COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV. 8-72)

85 34769

FILED
JUN 16 1992
DEPARTMENT OF REAL ESTATE

By Laurie A. Zan

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondent.	No. H-2598 SAC OAH No. N-36924

ORDER STAYING EFFECTIVE DATE

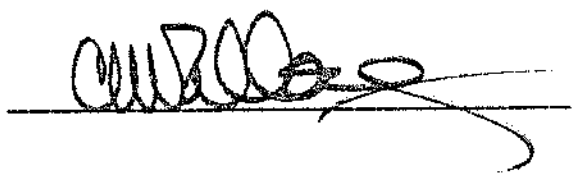
On May 20, 1992, a Decision was rendered in the above-entitled matter to become effective June 19, 1992.

IT IS HEREBY ORDERED that the effective date of the Decision of May 20, 1992 is stayed for a period of thirty (30) days.

The Decision of May 20, 1992 shall become effective at 12 o'clock noon on July 20, 1992.

DATED: 6/15/92

CLARK WALLACE
Real Estate Commissioner



COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV. 8-72)

85 34769

FILED
MAY 29 1992
DEPARTMENT OF REAL ESTATE

By Laurie A. Zian

BEFORE THE

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondent.	NO. H-2598 SAC N-36924

DECISION

The Proposed Decision dated April 29, 1992, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon on June 19, 1992.

IT IS SO ORDERED May 20, 1992.

CLARK WALLACE
Real Estate Commissioner

by: JOHN R. LIBERATOR
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
	)	Case No. H-2598 SAC
JOSEPH F. CUNNINGHAM, JR. and SOCAL MORTGAGE CORPORATION,	)	OAH No. N-36924
Respondents.	)	

PROPOSED DECISION

On February 13, June 17, December 18, 19 and 20, 1991 and March 31 and April 1, 1992, in Sacramento, California, Stephen J. Smith, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

David Peters, Counsel, Department of Real Estate, State of California, represented the complainant.

Joseph F. Cunningham, Jr., President and Sole Shareholder, Socal Mortgage Corporation, appeared in person and was represented by Timothy Stock, Attorney at Law.

Evidence was received, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

On August 3, 1990, Les R. Bettencourt, Deputy Real Estate Commissioner, Department of Real Estate ("the Department"), State of California, acting in his official capacity, made the charges and allegations contained in the Accusation and caused it to be filed. The Department is an

administrative agency empowered with jurisdiction to impose disciplinary action against any holder of a real estate license, issued by the State of California through the Department, provided cause for such disciplinary action is established by competent evidence, pursuant to the authority of Business and Professions Code section 10175.

Joseph F. Cunningham, Jr. timely filed a Notice of Defense to the Accusation pursuant to the authority of Government Code section 11506. The matter was set for an evidentiary hearing.

II

On January 15, 1986, the Department issued Mr. Cunningham a real estate broker's license. The license has been renewed and is due to expire on January 16, 1994. There is no record of disciplinary action against Joseph F. Cunningham, Jr. or his real estate broker's license by the Department.

On January 17, 1986, the Department issued a corporation real estate broker's license to Socal Mortgage Corporation. Mr. Cunningham was designated as the broker and corporate officer to qualify the corporation for the license. Branch licenses were issued for the corporation in 1986 and 1987 for Oakland, Laguna Hills, Orange and Burbank, California. By 1990, all branch licenses had expired or had been canceled. The corporation license has been renewed and is due to expire on January 16, 1994. There is no record of any disciplinary action by the Department against the corporation license, its designated officer or Mr. Cunningham.

III

Socal Mortgage Corporation ("Socal") is a closely-held California corporation founded by Mr. Cunningham in 1986. Mr. Cunningham is the President, Chief Executive Officer, sole shareholder and designated broker-officer of the corporation. Socal Mortgage Corporation operated in both Northern and Southern California between 1986 and 1990 as a mortgage broker and later in its existence, a financial services company. As of late 1990, the corporation had no assets and was no longer in operation. There was no evidence that Socal has been dissolved or has been liquidated. Socal apparently still exists, albeit as just a shell corporation.

IV

In late 1986, Socal and Mr. Cunningham acted as mortgage originators and mortgage brokers for Security Pacific Investment Managers ("SPIM"), the management arm of Security Pacific National Bank's ("SPNB") managed pension funds. At this

time, SPIM managed approximately $5.4 billion in pension assets entrusted to Security Pacific National Bank, of which approximately $140 million was set aside into a real estate debt fund, to be invested in income-producing notes secured by interests in real estate. SPIM had no funds of its own to invest. It acted in an exclusively managerial capacity toward the bank's pension trust funds.

During 1986 and most of 1987, SPIM did not have the capacity to originate or service loans secured by real estate. Therefore, SPIM had contracted out these functions to mortgage brokers to act as SPIM's agents in originating loans to be secured by real estate that SPIM, on behalf of SPNB's pension trust funds, would fund by making the loans. Servicing of these loans was usually accomplished by the mortgage broker or another company specializing in such services, if the broker transferred the servicing rights.

The primary agent for SPIM during 1986-87 for the origination of loans secured by real estate was First Transtate Corporation. A written agreement existed between First Transtate and SPIM, designating First Transtate as SPIM's agent in the origination of loans secured by real property. The agency agreement called for First Transtate to solicit, receive and cause to have completed applications for loans, to investigate creditworthiness of the borrower and the project, obtain appraisals and perform all "due diligence" required to present a complete loan application and investigation package to SPIM. First Transtate was compensated by SPIM directly by the payment of a finder's fee of usually one percent of the gross amount of the loan, if funded. The completed loan package was evaluated by SPIM's officers to determine whether to make the loan. If SPIM approved, SPIM caused loan funds to be disbursed from SPNB pension trust funds to fund the loan.

Terms of any potential real estate secured loan were proposed by First Transtate in the application to the potential borrower. However, there was no evidence that First Transtate had the authority to bind SPIM or SPNB to terms First Transtate had proposed to a potential borrower either SPIM or SPNB found unacceptable. First Transtate proposed terms such as interest rates and repayment periods in the origination of loans in accordance with what First Transtate believed the market would bear and what SPIM would be willing to approve.

V

Mr. Cunningham and Socal Mortgage Corporation brokered two large commercial loans through First Transtate on behalf of SPIM in early to mid-1986. In each transaction, Mr. Cunningham represented the potential borrower and received a fee for his services when the loan was funded. First Transtate performed its

loan origination functions pursuant to its agency contract and presented each completed loan package to SPIM for approval. Each loan was ultimately funded, and First Transtate was compensated by the receipt of a fee. The loans were placed with SPNB's managed pension funds, and presumably SPNB received the interest and principal payments received on the loans.

Mr. Cunningham wanted very much to become an exclusive agent of SPIM in the same capacity as First Transtate. To this end, Socal repeatedly sought a written agreement calling for Socal Mortgage Corporation to act as exclusive agent for SPIM in the origination of loans secured by interests in real estate. Mr. Cunningham repeatedly pressed SPIM to establish and confirm such a relationship.

From late 1986 through April or May 1987, Mr. Cunningham did act as a de facto agent of SPIM pursuant to an oral agreement with Harvey Spiro, an officer of SPIM. The oral agreement allowed Mr. Cunningham to act in the same capacity as did First Transtate during this period, originating and assembling applications for loans secured by real estate and presenting the completed packages to SPIM for review and potential funding. Pursuant to the oral agreement, Mr. Cunningham and Socal Mortgage Corporation presented two completed loan packages to SPIM that were ultimately funded. One loan was for an apartment complex and one was for a shopping center. Both loans exceeded $5 million. Mr. Cunningham and Socal Mortgage Corporation were compensated for services in originating and assembling these loan packages by the direct payment by SPIM to Socal Mortgage Corporation of a finder's fee based upon a percentage of the loan.

In April or May 1987, SPIM management was relieved by Richard Lindsay, who was assigned by SPNB to take better control of SPIM's lending activities. Mr. Cunningham immediately approached Mr. Lindsay regarding an exclusive agency status for Socal Mortgage Corporation to act as loan originator for SPIM. Mr. Lindsay rejected the request. However, in the interim, at Mr. Cunningham's request, Mr. Watson, a SPIM employee with no authority to bind or speak for SPIM or SPNB, had caused to be generated a form exclusive agency contract such as the one First Transtate had executed with SPIM, and mailed it to Mr. Cunningham for review. Mr. Cunningham reviewed the draft agreement, made changes, and returned it unsigned to SPIM. The agency contact was never finalized and was not signed by either Mr. Cunningham or an authorized agent for the bank. At the same time Mr. Lindsay was sharply curtailing the authority of any mortgage broker to act for SPIM and was pulling many agent-performed functions back in-house.

Mr. Cunningham was not willing to take an initial refusal by Mr. Lindsay as final, and continued to press SPIM to

become the exclusive agent for SPIM loan origination. In May or June 1987, it was discovered, partially through the report of Mr. Cunningham, that First Transtate had misappropriated significant amounts of funds from SPIM while acting as SPIM's exclusive agent. Mr. Lindsay immediately terminated the agreement with First Transtate. Mr. Cunningham again asked to step into this role. Mr. Lindsay again refused to name Socal Mortgage Corporation as SPIM's agent, and Mr. Lindsay bluntly spelled out to Mr. Cunningham the fact that no broker would ever again operate in an agency capacity for SPIM.

VI

In early 1987, Mr. Cunningham was approached by Meritor Financial, a mortgage broker representing GIBA, a general partnership, seeking four separate commercial loans to take out a construction loan the partnership had obtained to construct three structures on a single parcel of land in Los Angeles. GIBA was composed of four general partners, two of which operated businesses that would occupy two different buildings in the development. Arnold Schwartz was the managing general partner for GIBA, and he made most of the business decisions for the partnership. Although three actual structures were built, one building was actually divided in half by a wall, making four different premises. GIBA repeatedly expressed to Mr. Cunningham through Meritor that four separate loans were sought, one for each premises, with liability for each loan to be divided according to the partnership's relative interests in each of the premises, named Buildings A, B, C-1 and C-2.

The GIBA partnership agreement was complex in its partners' determination and division of ownership between the two that were to occupy space in the buildings, and the two that were not. This complexity resulted in difficulties in determining how title was to be held in the properties, which were to be the security for the loans. Further, the relative interests of the partners in each of the buildings changed a number of times during the pendency of the applications, resulting in difficulties ascertaining potential loan liabilities and titles.

Meritor approached Mr. Cunningham for the loans because Meritor believed Mr. Cunningham and Socal Mortgage Corporation had access to the funds SPIM managed. Mr. Cunningham represented to Meritor that he was the exclusive agent for SPIM for the origination and underwriting of real estate loans for SPIM on a number of occasions.

VII

On July 1, 1987, Mr. Cunningham and Socal Mortgage Corporation caused four separate "letters of intent" to be issued to each of the general partners of GIBA individually. Each

letter of intent spelled out a loan amount, terms of repayment, interest rate, and general terms and conditions of the proposed loans. Each letter of intent, referred to as a loan commitment in the letters as well, referred to Socal Mortgage Corporation as "lender", and stated that Socal Mortgage Corporation, by the terms of the letters, set forth its intent to issue to the four partners four commitments to make permanent loans, secured by the four premises.

Each letter of intent called for each borrower to make to Socal Mortgage Corporation as lender a "good faith deposit" in the sum of $15,000 for each loan, subject to the provisions of Paragraph 27 of the General Conditions set forth in the letters. Paragraph 27 of the General Conditions, identical in each of the four letters, stated as follows in its initial form, as issued by Mr. Cunningham:

> "Upon acceptance of the terms of this letter, SCMC shall receive from Borrower the sum of fifteen thousand dollars ($15,000) as a Good Faith Deposit. Said Good Faith Deposit is to be used by SCMC at its sole discretion for payment of review appraisal(s), credit reporting fee(s), transportation to and from the site, and any other expenses deemed necessary and reasonable by SCMC to determine the underwriting qualities of the loan herein contemplated. Upon funding of the loan, SCMC will account to the Borrower and refund any surplus held by SCMC. If, however, the underlying transaction is terminated, through no fault of the Lender, or if a commitment is issued by Lender under terms similar to the terms stipulated in this letter, and Borrower fails to accept said commitment or fails to accept the loan, any balance will be retained by SCMC as earned underwriting fee. Should SCMC decline to fund the loan herein contemplated, or offer Borrower terms for the financing which are materially adverse to the terms of the proposed loan, and Borrower declines to accept such adverse terms, then upon demand by Borrower, SCMC will refund to Borrower the Good Faith Deposit herein referred to less any portion already expended by SCMC."

Each of the letters of intent were ultimately executed by Mr. Cunningham on behalf of Socal Mortgage Corporation, and each of the GIBA partners for each of the loans in early August 1987. The finally executed version of each letter of intent had an addition to Paragraph 27 quoted above. The addition stated, "Lender agrees that those expenses enumerated above related to determination of the underwriting qualities of the loan shall not exceed $2500." This addition to each letter of intent was placed there at the demand of the GIBA partners and their broker,

Meritor. Each addition was initialled and made part of the original Paragraph 27s in each of the finally executed versions.

The "letters of intent" executed by each of the GIBA partners and Mr. Cunningham on behalf of Socal constituted written contracts. Mr. Cunningham bound himself in writing in each of the four documents, to use his best efforts to procure third-party funding for the four loans, subject to all of the terms and conditions set forth in the agreements.

No provision in any of the four letters of intent committed Socal Mortgage Corporation to use any of its own funds or funds available to it due to its own credit to actually fund any of the loans. None of the four letters of intent represented that Socal Mortgage Corporation was to act in the course of the loan transactions as a bank, savings institution, pension trust, insurance company, or to act under a written agency from a savings institution, as those terms are used in Business and Professions Code section 10133.1.

VIII

At the time the letters of intent were issued by Socal Mortgage Corporation and executed by Socal and the four GIBA partners, each of the four GIBA partners, Meritor and Socal Mortgage Corporation all understood that the expected source of the funds for the loans was the pool of pension trust funds held by SPNB and managed by SPIM. At no time during the pendency of the loan applications did any party contemplate that Socal Mortgage Corporation might be the source of the funds for the loans or fund the loans itself.

It was clear that Socal Mortgage Corporation did not have either the money or credit in the amount of the approximately $8 million required to fund all four loans, or even the approximately $2 million required to fund the smallest of the four loans during the time period the loan applications were pending. The borrowers and their broker looked to Socal Mortgage Corporation as the means by which access to the SPNB pension funds administered by SPIM could be gained. SPIM looked to Socal Mortgage Corporation as one of a number of mortgage brokers presenting completed loan application packages secured by real estate for its consideration and possible funding.

IX

Mr. Cunningham failed to advise Meritor and/or any of the GIBA partners of the facts that he was not the exclusive representative for SPIM for the origination of mortgage backed loans, or that he did not have the authority to commit SPIM to making any of the loans even if all terms contained in the four letters of intent were acceptable to all parties. Mr. Cunningham

was aware that Meritor and the GIBA partners believed he was the authorized agent of SPIM for the origination and underwriting of such loans, and that Socal had the ability to control and commit funding to the loans if the terms and conditions were agreeable between Socal and the GIBA partners. Mr. Cunningham allowed Meritor and GIBA to continue to deal with him under those mistaken beliefs. Although Mr. Cunningham was aware that Meritor and the GIBA partners held these mistaken beliefs, he did nothing to correct them. Mr. Cunningham continued to operate and attempted to press the loan applications forward as if he were the exclusive agent for SPIM he claimed to be and as if Socal could commit SPIM to fund the loans.

At no time did Mr. Cunningham or Socal Mortgage Corporation ever have the authority to commit SPIM or SPNB to a loan on terms proposed exclusively by Socal. Regardless of the terms and conditions of any loan proposed by Socal Mortgage Corporation and presented to SPIM, even at the time Socal may have been operating as an exclusive agent under an oral agreement, SPIM retained the right to alter the terms or to reject the application entirely and decline to fund the loan altogether for reasons exclusively its own and not subject to influence or change by Socal Mortgage Corporation, even if all terms proposed by Socal were otherwise acceptable. Each loan presented, whether by Socal or any other mortgage loan originator, was evaluated by SPIM, at first by employees of SPIM, and later by a loan committee, and a decision to fund or decline was made by SPIM officers, without Socal having the right to participate in or control the outcome of the decision. Socal never at any time had the authority or control necessary to cause the disbursement of funds to the loans, nor cause SPIM or SPNB to do so.

X

Mr. Cunningham made a number of inconsistent statements regarding his contentions that Socal was the lender on each of the four loans, that Socal had the ability to fund the four loans and that Socal had the authority to commit SPIM to fund the loans. Although he referred to himself as a mortgage broker regarding these transactions when he was interviewed by the Department's investigator prehearing, at hearing he adamantly insisted he was the lender and was not acting as a broker. Later in the hearing he opined that Socal had the ability to fund the loans itself, but later recanted that contention when pressed for details regarding Socal's financial abilities and/or credit that would enable Socal to fund such large loans.

Mr. Cunningham later suggested that the intention of the transaction was for the loans to each close escrow in the name of Socal as lender and source of the funds, with Socal to then sell out of escrow each of the loans to a "secondary lender"

such as SPIM. There was no presentation of any evidence to support the intention of any party to any of the loans that the loans were to be retained by Socal in escrow, and sold to a secondary lender. Although Paragraph 25(g) of the letters of intent technically provided Socal Mortgage Corporation the right to do so, the testimony of Meritor's representative, the SPIM representatives, both authorized and unauthorized, and of Mr. Schwartz on behalf of the borrowers make it clear that such was not their intention. All were looking to SPIM as the direct source of the funds and the party to issue the ultimate loan commitments.

Only Mr. Cunningham viewed the transaction as potentially intended to be secondarily funded via a sale of the loans out of escrow. There was no evidence presented regarding the identity of any secondary buyer, or that SPIM, if intended to be the secondary buyer, had any intention of purchasing the loan out of escrow. The totality of the evidence, particularly in light of Mr. Lindsay's repeated statements to Mr. Cunningham regarding SPIM's loan limitations and refusals to make Socal Mortgage Corporation SPIM's exclusive agent, lead inescapably to the conclusion that SPIM had no intention of purchasing the loan secondarily. In fact, Mr. Cunningham's own actions refute his contentions, as he submitted the completed loan applications to SPIM with the intent that SPIM review and approve the letters of intent and provide primary funding and original loan commitments before escrow was ever opened, and repeatedly intervened with SPIM in an attempt to obtain original commitments to fund the loans when it became apparent that SPIM was not producing the primary loan commitments Mr. Cunningham expected. Such direct refuting evidence leads only to the conclusion that Mr. Cunningham's testimony that Socal was to act as the lender, and then sell the loans out of escrow to a secondary lender was a later fabrication by Mr. Cunningham.

XI

In accordance with Paragraph 27 of each of the letters of intent by each of the GIBA partners, executed in early July 1987, each GIBA partner submitted a $15,000 "good faith deposit" with each letter of intent. Mr. Cunningham on behalf of Socal, received a total of $60,000 in good faith deposits from the GIBA partners. These deposits constituted advance fees within the meaning of Business and Professions Code sections 10026 and 10131.2. The fees were received and retained by Socal for the purpose expressed in each letter of intent of offsetting loan origination expenses.

Mr. Cunningham caused the entire $60,000 to be deposited to Socal Mortgage Corporation's general operating account and not to a trust account. By the end of the month the funds were received, all but $3,000 of the $60,000 had been spent

by Mr. Cunningham on unidentified operating expenses of Socal. The funds were never held in trust by Mr. Cunningham or Socal Mortgage Corporation, and an accounting for the expenditure of any of these funds was never provided to any GIBA partner, despite the provision in Paragraph 27 of each letter of intent that any such expenditures were to be limited to $2,500 per loan. Mr. Cunningham failed to produce any evidence that any of the advance fees were spent by himself or Socal Mortgage Corporation for the benefit of GIBA, even though the terms of Paragraph 27 require the deposit funds to be spent for underwriting expenses of these loans.

The letter of intent and its provisions, under which Socal collected the advance fees under the rubric "good faith deposit", had never been submitted to the Department for review and approval.

XII

On November 10, 1987, SPNB through SPIM made two loan commitments to two of the GIBA partners for loans secured by Buildings A and B, the first two buildings completed in the project. No loan commitments were ever made for the C-1 or C-2 buildings or for the other two GIBA partners. It is noteworthy that neither Socal Mortgage Corporation nor Mr. Cunningham made any loan commitment to any GIBA partner or the partnership for any of the four buildings.

Mr. Cunningham contended that he "caused" these two loan commitments to be made by SPIM, and that therefore Socal did commit on loans to the GIBA partners, in accordance with Paragraph 27 of the letters of intent. The contention is entirely lacking in merit and completely without any support in the evidence. He contended that the two commitments SPIM issued were substantially identical to his letters of intent, and that SPIM had "borrowed" his language to create the commitment letters. Other than that testimony, the contention was supported with only vague and conclusory assertions.

The two loan commitments SPIM actually issued required acceptance within ten working days. Each commitment proposed an interest rate one quarter of one percent in excess of that specified in the letters of intent. Each commitment required a personal guarantee from the GIBA partner/borrower and from that partner's business, up to and including the entire loan amount. The original letters of intent stipulated that any guarantee to be given by GIBA or any GIBA partner for any one of the four loans was to be limited to that partner's proportionate interest in the particular building.

The relative partnership interests of the GIBA partners and the manner in which title was to be held was constantly

changing during the pendency of the loan applications. The indecision on the part of GIBA regarding relative interests created substantial problems for Mr. Cunningham in trying to complete loan packages, because title and proportionate interests in the buildings changed so often. In September 1987, the GIBA partners sold an interest in one of the C buildings to an outside party that intended to operate his business in the building. This required a new round of title changes, readjustment of partnership proportionate interests and financial investigations of a new owner. This created much additional work for Mr. Cunningham, and presumably additional expense. GIBA never advised Mr. Cunningham that the sale was contemplated. The sale of the proposed security for a pending loan without advice to the broker raises questions of good faith on the part of the borrowers, particularly in light of the fact that it became apparent that the GIBA partners through Meritor were "shopping" for potential other loans during this same time period.

It may well be that what GIBA wanted in the way of loans and terms such as proportionate liability keyed to ownership interests and the like was not possible. SPNB certainly refused to issue a loan commitment in accordance with the letter of intent's stipulation that personal guarantees be limited to the proportionate interests of the partner taking out the loan, with one loan for each building and yet having no loan made in the name of GIBA, all as GIBA had demanded. However, no one told any of the GIBA partners that their demands were unreasonable or impossible, and all were led to believe that commitments were forthcoming within the parameters of the letters of intent.

XIII

The terms of the two loan commitments that were actually made to GIBA partners for the first two buildings contained terms materially adverse to the terms of the letters of intent to which the loan commitments corresponded. The interest rate change was not materially adverse to the letters of intent, contrary to the testimony of Mr. Schwartz, whose testimony was not entirely persuasive or credible. For example, Mr. Schwartz, a very experienced and sophisticated real estate developer, repeatedly denied his awareness of the fact that the letters of intent represented Socal as the lender, alleging he did not read the letters carefully. Although he may not have believed Socal was actually the lender, having knowledge that SPIM was to be the source of the funds, his testimony that he was unaware of the representation was not credible. Mr. Schwartz, on behalf of GIBA, agreed verbally to the rate change.

The change in the personal guarantee term was materially adverse to the terms set forth in the letters of intent. The GIBA partners to whom loans were actually committed

found themselves in the position that had they accepted the loans, they each would have been required to provide personal guarantees well in excess of what they had agreed to provide in the letters of intent, thus exposing themselves to potential liability in excess to that for which they had bargained.

At the time the first two commitments were made, construction was apparently not yet complete on buildings C-1 and C-2, and title was in the process of being changed. After the first two loan commitments were made containing the materially adverse personal guarantee terms, and the second commitment consolidating the first two loans was made as set forth below, the GIBA partners pulled out of the deal altogether. Mr. Cunningham contended that GIBA's premature repudiation of the relationship was the reason that the third and fourth commitments were not made.

The contention is without merit. SPNB and SPIM had placed a $5 million maximum cap on its lending on any single project, and the first two commitments together reached that limit. Mr. Cunningham was aware of the limit, and had been advised of it personally by Mr. Lindsay well in advance of the issuance of the commitments. Mr. Cunningham failed to communicate the existence of the loan limits to any of the GIBA partners, or his awareness of the fact that the limit would preclude the obtaining of financing from SPIM in the amount applied for in the letters of intent. By the time the two commitments were issued, Mr. Cunningham knew that all four loans could not be obtained in the amounts set forth in the four letters of intent from SPIM. The fact that the placement of the limitation on lending by SPIM precluded funding of approximately one third of the total loan amounts, and thus two of the four loans, made it clear that Mr. Cunningham and Socal Mortgage Corporation could not deliver the promised funding from SPIM in accordance with the letters of intent and its representations that it could commit SPIM to fund the loans. There was no evidence that Mr. Cunningham had any optional source of loan funding available that could have enabled him to perform in accordance with all four letters of intent.

There was an additional problem with the two loan commitments, creating a significant problem not amounting to the inclusion of a materially adverse term. The commitments issued required acceptance within ten working days. The commitments were apparently not actually received by the two effected GIBA partners until the limitation period had almost expired. Mr. Schwartz's testimony that the two commitments were not actually received by the two affected GIBA partners until the limitation period had fully expired was not credible. The testimony of Meritor's broker and the documentary evidence makes clear the fact that the commitments were not received in a timely fashion but not after the period to accept had expired. However, the

commitments arrived so late that they expired by their own terms before either of the partners to whom loans were offered could fully evaluate them and act. The fact that no request was made to SPIM or SPNB for an extension of the expiration is compelling evidence that the commitments were materially adverse to the original letters of intent and repugnant to the GIBA partner/borrowers to whom the commitments were made.

XIV

On December 9, 1987, SPNB through SPIM made a single consolidated loan commitment to all of the GIBA partners collectively, offering funding of a single loan to cover both Building A and B together. This commitment materially varied in numerous respects from the letters of intent and was rejected immediately. The new commitment was issued by SPIM after Mr. Cunningham had intervened with Mr. Lindsay to try to rectify the GIBA partner's problems with the first two commitments. Mr. Lindsay advised Mr. Cunningham again that the loan limit was $5 million, among other things. Mr. Cunningham called Mr. Schwartz and attempted to persuade him to accept the new, consolidated commitment. Mr. Cunningham told Mr. Schwartz that Mr. Schwartz was a "smart guy", and that Mr. Schwartz should persuade his partners to go along with the commitment and accept it. Mr. Cunningham did not relay Mr. Lindsay's comments to Mr. Schwartz that it was impossible to obtain funding in excess of $5 million from SPIM, and that there could be no commitment for a third or fourth loan.

The exchange between Mr. Cunningham, Mr. Lindsay and Mr. Schwartz is revealing. It confirms Mr. Cunningham's lack of authority to commit SPIM to anything or direct the flow of funds to any of the loans on the terms he "underwrote" to the GIBA partners. It also reflects Mr. Cunningham's lack of concern for the expressed needs and desires of the borrowers or the need to satisfy the requirements of the letters of intent he underwrote. It reveals Mr. Cunningham's diligent pursuit of loan funding and his fee even if what was ultimately produced in the way of a commitment was substantially different than what he represented he would produce.

XV

Upon the collapse of the transactions in mid-December 1987, the GIBA partners demanded a refund of their respective good faith deposits and an accounting. Mr. Cunningham refused the demand, claiming that the provisions of Paragraph 27 of each of the letters of intent gave him and Socal Mortgage Corporation the right to retain all of each deposit as earned underwriting fees. The basis of this claim is that Mr. Cunningham and Socal Mortgage Corporation's contention that it produced loan commitments to the GIBA partners not materially adverse to the

terms set forth in the letters of intent. The contention is entirely devoid of any evidentiary support and totally without merit. Mr. Cunningham continues to maintain this position and has to date refused to refund any of the deposits and has failed and refused to provide an accounting for the expenditure of the deposit/advance fee funds.

XVI

On June 5, 1991, the GIBA partners obtained a civil judgment for fraud and wrongful retention of the good faith deposits against Mr. Cunningham and Socal Mortgage Corporation in the Superior Court, County of Los Angeles, State of California. Mr. Cunningham and Socal Mortgage Corporation defaulted and failed to appear, allowing the judgment to be entered. The Superior Court assessed both compensatory and punitive damages against Mr. Cunningham and Socal Mortgage Corporation. No part of the judgment has been satisfied to date. Mr. Cunningham made it clear that he does not feel obligated to satisfy the judgment.

XVII

Mr. Cunningham was quite vague and less than candid when questioned under oath regarding his current activities for which a real estate broker's license is required. Having first denied that he was currently an officer-broker for another corporation, he later recanted and admitted that he is currently the designated officer for a real estate brokerage corporation with whom he shares office space. He supervises the licensed activities of two mortgage salespeople for the corporation in exchange for free office space. He seeks to retain his license in order to continue to work and "feed his family".

XVIII

Great consideration was given to the issue of penalty, and consideration of both aggravating and mitigating circumstances surrounding the subject loan transactions. In particular, considerable deliberation was addressed to the issue of whether to revoke the licenses outright or grant restricted license status. Restricted license status as an option was ultimately rejected due to the fact that the facts in aggravation, which were substantial, when weighed against the meager facts in mitigation, found aggravation to predominate by a substantial margin. Secondly, Mr. Cunningham's less than frank and credible hearing testimony, his obvious irritation with the Department's attempts to investigate his actions and ascertain his current licensed activities, and his role in the subject transactions do not recommend him as particularly amenable to the Department's supervision as a restricted license holder.

Mr. Cunningham is a well educated and sophisticated real estate broker with no previous history of disciplinary action against his license. He has apparently enjoyed success at brokering a number of large and complex real estate loans on commercial property. He provides the support for his family, and faces a civil judgment outstanding against him and his firm, as well as the obligation, as set forth ante, of repaying the good faith deposits he retained from the GIBA partners. These obligations will become substantially more difficult to meet without the ability to continue as a broker-licensee. Mr. Cuningham made much of his actions in conjunction with the F.B.I. to reveal the fraud and misappropriation by First Transtate and his efforts to "help Dick (Mr. Lindsay) in his transition" at SPIM. An evaluation of all the facts clearly reveals that Mr. Cunningham was far more motivated by opportunism than altruism, sensing an opportunity to displace First Transtate.

However, in aggravation, during the course of the GIBA loan transactions and his dealings with the Department Mr. Cunningham has demonstrated a disturbing disregard for the truth and readiness to manipulate others and the subject transactions in order to force a desired outcome. Mr. Cunningham continually misrepresented his authority to act on behalf of SPIM, and what that authority constituted, to Meritor and the SPIM partners. He allowed all other parties to labor under what he knew were misapprehensions of a significant dimension, not the least of which was the clear and reiterated knowledge that due to the loan limitations imposed by SPIM, it would be impossible for him to deliver as he had represented he could. His representations to the Department, both prehearing to the investigator and at the hearing itself were inconsistent and vague, and to some extent obvious fabrications. He has continually denied responsibility to the GIBA partners to account for the expenditure of the good faith deposits, and has defended that refusal with contentions and legal defenses that were tenuous at best. He has stubbornly refused to acknowledge responsibility or fault for his conduct in the transaction, and has repeatedly ignored the provisions of his own contracts, that limit his expenditures of the good faith deposits and require an accounting. The totality of the circumstances in aggravation, when weighed against the circumstances in mitigation, do not recommend a more lenient result.

DETERMINATION OF ISSUES

I

"The term 'advance fee' as used in this part is a fee claimed, demanded, charged, received, collected or contracted for ... soliciting borrowers or lenders for, or to negotiate loans on ... real estate". Business and Professions Code section 10026.

Mr. Cunningham, through Socal Mortgage Corporation, collected advance fees from each of the GIBA partners in the form of good faith deposits, within the meaning of Business and Professions Code sections 10026, as set forth in Finding XI. The good faith deposits collected from the GIBA partners were fees demanded, charged, contracted for and collected for the purpose of negotiating loans secured by interests in real property.

Business and Professions Code sections 10145 and 10146 require that a real estate broker who accepts advance fees from any person shall deposit the advance fees into a trust account with a bank or other neutral depository. These trust funds are not the funds of the broker and may be withdrawn and expended only for the benefit of the principal. Business and Professions Code section 10146 authorizes the Commissioner of the Department of Real Estate to promulgate regulations for the handling of advance fees, and states if a broker expends such trust funds in violation of those regulations, it shall be presumed that the broker has violated Penal Code sections 503 and 503(a) (theft by embezzlement).

The trust funds received by the broker (including advance fees) must be immediately deposited into the trust account maintained in the name of the broker and segregated from the broker's own funds or the funds of his firm. Business and Professions Code section 10145, Title 10, California Code of Regulations sections 2830 and 2832. Upon a reasonable time after the expenditure of trust funds for the benefit of the principal, the broker is required to furnish the principal with an accounting of the expenditure of the trust funds. Title 10, California Code of Regulations section 2972.

As set forth in Finding XI, Mr. Cunningham and Socal Mortgage Corporation violated the above provisions in the receipt and disbursements of the good faith deposits of the GIBA partners in conjunction with the four loans. The trust funds were not deposited into a trust account at a bank or neutral depository, in violation of Business and Professions Code sections 10145 and 10146 and Title 10, California Code of Regulations section 2830 and 2832. The trust funds were not held for the benefit of the principals, the GIBA partners, but were deposited into Socal's general operating account and were almost entirely spent by the end of August, 1987, just 20 days after receipt, in violation of Business and Professions Code sections 10145 and 10146 and Title 10, California Code of Regulations sections 2030, 2832 and 2972. Mr. Cunningham's activities with respect to the advance fees received from the GIBA partners constitutes presumptive embezzlement, pursuant to Business and Professions Code section 10146. The violations of these various provisions of the Real Estate Law and Regulations constitutes cause to impose disciplinary action upon the real estate broker's licenses issued to Mr. Cunningham and Socal Mortgage Corporation.

II

The provisions of Mr. Cunningham's letters of intent, submitted to each GIBA partner and containing the provisions of Paragraph 27, which authorized the collection of the advance fees in the form of good faith deposits, were never submitted to the Department in advance for review and approval. This failure violated Business and Professions Code section 10085 and Title 10, California Code of Regulations section 2970. These violations of the Real Estate Law and Regulations constitute cause to impose disciplinary action upon the real estate broker's licenses issued to Mr. Cunningham and Socal Mortgage Corporation.

III

Mr. Cunningham acknowledged that the facts as set forth in Finding XI were true, but defended himself and his firm on the basis that he and the firm were not required to comply with the advance fee and trust fund statutes and regulations because he and the firm were exempt in these loan transactions as lenders rather than real estate brokers. As lenders, Mr. Cunningham contended the Real Estate Law did not apply to him or his activities in receiving and retaining the good faith deposits/ advance fees. The four letters of intent at Paragraph 25(i) cite Civil Code section 11916.1 as the authority for Socal Mortgage Corporation to act as an "exempt lender". Civil Code section 11916.1 does not exist, but Civil Code section 1916.1 provides only for an exemption from the California usury law for a real estate broker acting as a lender. It provides no exemption from the requirements that a real estate broker acting as a lender and receiving advance fees comply with the Real Estate Law regarding those fees.

Socal Mortgage Corporation and Mr. Cunningham's contention that it acted as the lender in the loan transactions, thus exempting it from the requirements to comply with the statutes and regulations governing the receipt of advance fees by a real estate broker is entirely without merit. Mr. Cunningham and Socal Mortgage Corporation are not exempt from the requirements governing the conduct of real estate brokers with respect to advance fees unless he and the firm qualify for the lender exemptions set forth in Business and Professions Code section 10133.1. Mr. Cunningham failed to prove that he and his firm met any of the exceptions set forth in that statute. There is little doubt that Socal Mortgage Corporation is not a bank, savings institution, pension trust, insurance company, agricultural cooperative, credit union, and the like, all traditional direct sources of funds for the making of loans and all commonly understood to be lenders. The only possible exception that might have applied was that set forth in subparagraph (8) of that section, which provides that an exemption applies for any person acting pursuant to a written

authorization from a savings institution. There was neither proof that a written authorization existed (in fact the opposite was proved) or that SPIM and SPNB constituted "savings institutions" within the meaning of that subpart. The failure of proof that SPIM and/or SPNB constituted "savings institutions" within the meaning of the statute is highlighted by the fact that specific exemptions are made earlier in the same statute for "banks", "trust companies" and "pension trusts", reflecting the statute's intention that a bank and pension trust manager, such as SPNB and SPIM were, were not intended to be classified as savings institutions for the purposes of the exemption.

A lender is "one who lends". Webster's Third International Dictionary (1968) p. 1293. To lend is "to let out money for temporary use on condition that it be repaid with interest at an agreed time." Id. Black's Law Dictionary (1968) at page 1047 defines "lender" as "he from whom a thing is borrowed". Although the Real Estate Law does not specifically define "lender", in setting forth the exemptions for lenders in Business and Professions Code section 10133.1, it assumes the above definitions, which are in accord with the commonly understood meaning of the word. In determining the meaning of a statute, we look first to the plain meaning of the language used, giving effect to its 'plain meaning'". Tiernan v. Trustees of California State University (1982) 33 Cal.3d 211, 218-9. "Where the statute is clear, the 'plain meaning' rule applies. The Legislature is presumed to have meant what it said, and the plain meaning of the statute governs". Berry v. State of California (1992) 2 Cal.4th 688. There is little doubt that the plain meaning of the use of the word "lender" contained in section 10133.1 is the commonly understood meaning set forth above, and not the tortured hybrid Mr. Cunningham suggests.

A person must be licensed as a real estate broker if he solicits borrowers through express or implied representations that he will act as an agent in arranging a loan but in fact the loan is being made to the borrower from the broker's own funds. 2 Miller and Starr, California Real Estate 2d, (1989) section 4:35, p.269. "It is a common practice for licensed brokers to loan their own funds to the borrower and sell the loan to an investor at a later date. The broker uses his own funds because the borrower has an immediate need for the loan and cannot wait for the broker to locate a lender". 4 Miller and Starr, California Real Estate 2d (1989) section 10:28, p. 764. Business and Professions Code section 10240 requires that every real estate broker who negotiates a loan to be secured by an interest in real property shall cause to be delivered to the borrower a statement in writing containing the information contained in Business and Professions Code section 10241. Business and Professions Code section 10241 specifies the contents of the required statement, and includes, "(j) If the broker anticipates

that the loan to the borrower may be made wholly or in part from broker-controlled funds, a statement to that effect".

A real estate broker within the meaning of this part is a person, who, for a compensation, or in expectation of compensation, regardless of the form or time of payment, does or negotiates 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. Business and Professions Code section 10131. A real estate broker is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee to obtain a loan or loans on real property. Business and Professions Code section 10131.2.

A real estate broker may act as both a lender and a broker in the same transaction. However, acting as a lender does not exempt the broker from the provisions of the Real Estate Law governing the conduct of a broker, including the requirements governing the handling of advance fees. The only exemption from these broker conduct requirements for lenders are those set forth in Business and Professions Code section 10133.1. Mr. Cunningham and Socal Mortgage Corporation patently fail to qualify for any of the lender exemptions set forth in that statute.

In part, Mr. Cunningham's claim that he was the lender in these loan transactions and was thus exempt turns around his claim that Socal Mortgage Corporation could have funded the loans itself, or sold the loans out of escrow, having first taken title to the loans as lender. Even had this contention been credible and in keeping with the expectations of all the other parties involved, he and Socal Mortgage Corporation would still be subject to the Real Estate Law and be required to comply with the advance fee requirements with respect to the collection and expenditures of the good faith deposits. The provisions of law cited above make clear that even if Mr. Cunningham and Socal Mortgage Corporation acted as claimed, they still acted as real estate brokers, also acting in the role of lenders, and that there is no applicable exemption from the Real Estate Law that covers such dual activities. Regardless of what Mr. Cunningham called himself and Socal Mortgage Corporation, either publicly, privately or within the letters of intent, he and Socal Mortgage Corporation were real estate brokers within the meaning of sections 10131 and 10131.2, as set forth above.

Mr. Cunningham's contention that he was the "lender" in these four loan transactions is entirely devoid of factual support. His contention that he and his firm were the "lender" for these four loans is based upon the claims that Socal performed all origination and "underwriting" functions for these

loans, performed all of the "due diligence", was to retain servicing rights, and due to its exclusive agency relationship to SPIM, able to "cause" the loans to be made by SPIM. Curiously, much of the correspondence between Meritor and Socal introduced by Mr. Cunningham refutes his contention that he performed all the due diligence on the loans, as it is apparent from these exchanges that Meritor contributed substantially to the accomplishment of this task. Mr. Cunningham never defined what he meant by "underwriting", so it cannot be determined his use of this term meant that he or his firm intended to provide some sort of financial backing to the transactions. The evidence unequivocally suggests otherwise. If he meant that he and his firm gathered and confirmed the creditworthiness of the borrowers and the adequacy of the security, nothing involved in these functions would transmute a broker into a lender, as those terms are defined in the Real Estate Law.

Mr. Cunningham further claims he and Socal had the authority to "commit" SPIM to the making of the loans, a contention determined to be without merit or evidentiary support. Although it was clear that Mr. Cunningham desperately desired to have this authority, no mortgage broker working with SPIM and SPNB ever had such authority. All loans made were always subject to the discretionary approval of Mr. Spiro and his loan committee at SPIM, even in the darkest hours of SPIM's failure to exercise much control over its own funds. Comparison of Mr. Cunningham's firm's authority with that granted to First Transtate is inapposite and not helpful at all. Even with a written agency agreement in effect with SPIM and SPNB, it is quite apparent that First Transtate was still a mortgage broker and not an exempt lender, and thus also subject to the Real Estate Law governing the conduct of brokers. Linking Socal Mortgage Corporation's authority to act as a lender to that granted to First Transtate requires the same conclusion, that neither were "lenders" and both were brokers and subject to regulation.

The facts and circumstances surrounding the making of these loans, the legal and actual relationships between the parties, the expectations of the parties regarding the actual source of the funds for the loans, and the reality of the actions of each as set forth in the evidence adduced at the hearing mandate a conclusion that Mr. Cunningham and Socal Mortgage Corporation were not "lenders" on the GIBA transactions. Neither Mr. Cunningham nor Socal Mortgage Corporation intended to use its own funds to fund the loans, nor did either intend or have available any of its own funds or a line of credit from another source to provide the actual funds for the loans. Although Mr. Cunningham and Socal Mortgage Corporation had the authority to propose terms for the loans to SPIM, neither Mr. Cunningham nor Socal Mortgage Corporation had the authority to dictate or exercise final control over any term in any loan if SPIM did not approve. Therefore, SPIM had the ultimate discretion and control

of the loan terms and, most critically, the money. The risk of loss of the loan funding was entirely upon SPIM, and none of the risk of loss ever rested upon Socal Mortgage Corporation or Mr. Cunningham. Although Mr. Cunningham and Socal Mortgage Corporation could suggest the manner and means of funds disbursement, the ultimate authority for doing so rested in SPIM, who did have the authority to cause SPNB to disburse funds to fund loans. Although Socal Mortgage Corporation and Mr. Cunningham "set" "underwriting" criteria for the loans, they did so only within the larger framework of what would ultimately be acceptable to SPIM, rather than retaining the exclusive and ultimate discretion to set binding terms, conditions or criteria itself. Neither Socal Mortgage Corporation or Mr. Cunningham were to receive interest or principal payments on the loans, once funded, but were to be compensated for its role by the payment of a fee for services rendered by SPIM for the placement of its funds, the antithesis of how a lender is compensated for making a loan. Had Mr. Cunningham and Socal been the lender, as he claims, none of the loan packages would have been required to be submitted to any other entity for approval and action.

Although there was evidence that it is unusual in such large commercial loan transactions to have a broker involved on behalf of both the borrower and the lender, Mr. Cunningham's own testimony negated this as a possible supporting fact for his contentions. In his own previous loan transactions with SPIM, with respect to the Continental Inn, First Transtate served in the same capacity as did Mr. Cunningham claims Socal Mortgage Corporation did with respect to the GIBA loans, as mortgage broker-originator on behalf of SPIM, performing for a fee services SPIM did not or could not perform in-house. Nothing in the performance of those functions for the payment of a fee if the loan funded could transmute the broker into the alter-ego of the lender, as Mr. Cunningham suggests, or provide it with a status in derogation of the realities of its actual authority and responsibility. Even with an agency in place, oral or written, neither First Transtate nor Socal were able to exercise the ultimate discretion regarding the terms and conditions of any loan, the disbursement of funds or the discretion to accept or reject the making of the loan. The agency merely represented SPIM's desire to contract out on an exclusive basis the rights to assemble and broker the loans to SPIM for its review and determination regarding acceptance or rejection. There was no evidence that either agency delegated to either broker the authority or responsibility to deal with SPIM-managed funds as if the funds were the broker's own. In short, the claim to being the lender cannot be sustained without proof of the ultimate authority and discretion to control the money.

It was quite clear that even in the halcyon days of First Transtate's highest level of independence and discretion, the ultimate authority and discretion to control the funds and

their disbursement never left SPIM. By the time the GIBA transactions were pending, the fact that SPIM retained this discretion and authority had been repeatedly and pointedly emphasized to Mr. Cunningham, had he cared to listen. His failure to do so and his refusal to acknowledge the reality of the relationships caused damage to the GIBA partners when Mr. Cunningham retained the good faith deposits and refused to account for the expenditure of the funds.

IV

Based upon the above and the facts set forth in Findings VII through XV, inclusive, there existed and exists no legal or contractual basis for Mr. Cunningham's contention that he was entitled to retain the good faith deposits paid to Socal Mortgage Corporation by the GIBA partners. Mr. Cunningham repeatedly breached his own contracts by refusing to account for expenditures of those funds over and above the $2,500 limit he agreed to, and by his refusal to repay the deposits when it was obvious he could not deliver loan commitments in accordance with the letters of intent. Not only did Socal Mortgage Corporation fail to produce any loan commitment to any GIBA partner as a lender or otherwise, it failed to produce through SPIM any loan commitment not materially adverse to the terms and conditions set forth in the letters of intent. Both failures triggered the contractual right to refunds to the GIBA partners pursuant to Paragraph 27, subject to an accounting and deduction of expenditures for loan purposes up to and including $2,500. Mr. Cunningham's contractual claim to retain these funds as earned underwriting expenses requires a complete disregard of the realities of the transactions and is entirely without legal or evidentiary support.

By late September 1987, Mr. Cunningham was well aware that he could not produce loan commitments in accordance with the letters of intent he had issued. He was well aware that he did not have the authority to commit SPIM or SPNB to the terms and conditions of the letters of intent or cause the loans to fund, and had been specifically told so. He was also aware that he ultimately could not ever produce the loan funding in accordance with the letters of intent because SPIM and SPNB has set loan limits that would preclude the loans. He failed and refused to disclose any of these facts to the GIBA partners or their broker, allowed them to continue in the transactions under these misapprehensions, and when things began to unravel, he attempted to apply pressure to Mr. Schwartz to have him persuade his partners to accept a materially different commitment than Mr. Schwartz and his partners had been led to expect.

The totality of these circumstances, coupled with Mr. Cunningham's knowledge of the relationships and authorities of the parties, and the complete lack of any legal basis for him to

retain the good faith deposits or account for the funds, constitutes fraud and dishonest dealing within the meaning of Business and Professions Code sections 10176(i) and 10177(j).

Further, the acts and omissions of Mr. Cunningham and Socal Mortgage Corporation in withholding the advance fee deposits paid by the GIBA partners, and refusing to account for the expenditure of the funds, without legal or factual authority to do so, constituted breaches of the provisions of the four written contracts between Socal Mortgage Corporation and each of the GIBA partners, specifically Paragraph 27 of each, within the meaning of Government Code section 11519(d). The damages sustained by the GIBA partners were $15,000 each, less expenses that may be tied to the costs of producing each loan, up to a maximum of $2,500 per contract. Since Mr. Cunningham failed to document any such expenses, the damages are $15,000 each.

ORDER

All real estate licenses and licensing rights of respondents Joseph F. Cunningham, Jr. and Socal Mortgage Corporation under the Real Estate Law of the State of California are revoked pursuant to Determinations I through IV, inclusive, separately and severally for each of them. Reinstatement of any of the licenses or issuance of any real estate license to Joseph F. Cunningham, Jr., or to any corporation or other entity in which he serves as designated broker shall not be considered until Mr. Cunningham furnishes proof satisfactory to the Commissioner that he has made full restitution to each of the GIBA partners of each of the $15,000 advance fee deposits, together with an accounting for same, less any expenses up to and including $2,500 per advance fee deposit that can be identified specifically by written receipt satisfactory to the Commissioner to have been expenses specifically identifiable to the costs of producing those specific loans.

Dated: April 29 1992

Stephen J. Smith

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

DAVID A. PETERS, Counsel
Department of Real Estate
P. O. Box 187000
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FILED
AUG - 3 1990
DEPARTMENT OF REAL ESTATE

By Kathleen Contreras

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of JOSEPH F. CUNNINGHAM, JR., SOCAL MORTGAGE CORPORATION, Respondents.	NO. H-2598 SAC ACCUSATION

The Complainant, Les R. Bettencourt, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against JOSEPH F. CUNNINGHAM, JR. (hereinafter "Respondent CUNNINGHAM") and SOCAL MORTGAGE CORPORATION (hereinafter "Respondent SOCAL"), is informed and alleges as follows:

FIRST CAUSE OF ACCUSATION

I

The Complainant, Les R. Bettencourt, a Deputy Real Estate Commissioner of the State of California, makes this Accusation in his official capacity.

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II

Respondent CUNNINGHAM and Respondent SOCAL are presently licensed and/or have license rights under the Real Estate Law, Part 1 of Division 4 of the California Business and Professions Code (hereinafter "Code").

III

At all times herein mentioned, Respondent CUNNINGHAM was licensed as a real estate broker and as the designated broker-officer of Respondent SOCAL.

IV

At all times herein mentioned, Respondent SOCAL was licensed as a real estate broker corporation acting by and through Respondent CUNNINGHAM as its designated broker-officer.

V

During 1987, a general partnership composed of partners, Arnold Schwartz, Burton Goldrich, George Rudes, and Irving Meshwork, (hereinafter "GIBA") sought four (4) separate permanent loans to pay off existing construction loans on each of four (4) real properties owned by GIBA and described as follows:

1. 2305-2307 S. Santa Fe Avenue, Los Angeles, California (hereinafter "Building A").

2. 2309-2311 S. Santa Fe Avenue, Los Angeles, California (hereinafter "Building B").

3. 2313 S. Santa Fe Avenue, Los Angeles, California (hereinafter "Building C-1").

4. 2315 S. Santa Fe Avenue, Los Angeles, California (hereinafter "Building C-2").

VI

Beginning on or before August 5, 1987, Respondents CUNNINGHAM and SOCAL acted as a middleman between GIBA and Security Pacific National Bank (hereinafter "Security Pacific") in seeking to obtain loans for GIBA as described in Paragraph V, from Security Pacific.

The activities of Respondents CUNNINGHAM and SOCAL, acting for compensation, as a middleman between the borrower GIBA and the lender Security Pacific, were acts for which a real estate license is required.

VII

In connection with the licensed activities described in Paragraph VI, Respondents CUNNINGHAM and SOCAL engaged in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of advance fees within the meaning of Sections 10026 and 10131.2 (advance fees) of the Code as follows:

BORROWER	PROPERTY	DATE	ADVANCE FEE
GIBA	Building C-1	August 5, 1987	$15,000.00
GIBA	Building C-2	August 5, 1987	$15,000.00
GIBA	Building A	August 5, 1987	$15,000.00
GIBA	Building B	August 7, 1987	$15,000.00

Said advance fees were trust funds within the meaning of Sections 10145 and 10146 of the Code.

VIII

In connection with the collection and handling of said advance fees, Respondents CUNNINGHAM and SOCAL failed to cause

their advance fee contracts and materials to be submitted to the Department prior to use.

IX

Respondents CUNNINGHAM and SOCAL beginning on or about August 5, 1987 and continuing through the present, in connection with the trust funds described in Paragraph VII, acted in violation of the Code and Title 10, California Code of Regulations (hereinafter "Regulations") in that:

(a) Respondents CUNNINGHAM and SOCAL failed to deposit said trust funds into a trust account in Respondent CUNNINGHAM's or Respondent SOCAL's name at the bank or other financial institution.

(b) Respondents CUNNINGHAM and SOCAL failed to furnish a verified accounting of the receipt, deposit and disbursement of said trust funds to GIBA at the end of each calendar quarter and when the contract has been completely performed.

(c) Respondents CUNNINGHAM and SOCAL withdrew amounts from said trust funds for their own use or benefit and without expending such amounts withdrawn for the benefit of GIBA.

X

The facts alleged above are grounds for the suspension or revocation of the licenses of Respondents CUNNINGHAM and SOCAL under the following Sections of the Code and Regulations:

(a) As to Paragraph VIII, under Section 10177(d) of the Code in conjunction with Section 10085 of the Code and Sections 2970 of the Regulations, and

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(b) As to Paragraph IX, under Section 10177(d) of the Code in conjunction with Section 10145 and 10146 of the Code and Sections 2830, 2832, and 2972 of the Regulations.

SECOND CAUSE OF ACCUSATION

XI

There is hereby incorporated in this Second, separate and distinct Cause of Accusation, all of the allegations contained in Paragraphs I, II, III, IV, V, VI and VII, of the First Cause of Accusation with the same force and effect as if herein fully set forth.

XII

During July 1987, in connection with the activities described in Paragraph VI, Respondent SOCAL by and through Respondent CUNNINGHAM presented to GIBA four Letters of Intent to make loans to GIBA on the four properties described in Paragraph V. Each Letter of Intent provided for a "Good Faith Deposit" of $15,000.00 to be made by GIBA and specified the terms and conditions under which the "Good Faith Deposit" would be returned.

XIII

Included among the terms and conditions described in Paragraph XII were:

(1) That the "Good Faith Deposits" were refundable if the lender declined or failed to fund the loan.

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(2) That the "Good Faith Deposits" were refundable if the terms for financing offered by the lender were "materially adverse" to the terms of the proposed loan as contained in each of the Letters of Intent.

XIV

Respondent SOCAL by and through Respondent CUNNINGHAM caused GIBA to execute each of the Letters of Intent and to pay to Respondent SOCAL a $15,000.00 "Good Faith Deposit" for each of the four properties described in Paragraph VII.

XV

On or about December 9, 1987, in connection with the activities described in Paragraph VI, Security Pacific issued a loan commitment to GIBA on Building A and Building B. The terms of said loan commitment were "materially adverse" from the Letters of Intent covering Building A and Building B described in Paragraph XII, and was therefore unacceptable to and rejected by GIBA.

XVI

Beginning on or about August 5, 1987 and continuing thereafter, GIBA received no loan commitment from any lender for Building C-1 or Building C-2 described in Paragraph VII.

XVII

Beginning on or about December 9, 1987, Respondents CUNNINGHAM and SOCAL have refused to return all or any portion of the "Good Faith Deposits" (Advance Fees) as described in Paragraph VII despite GIBA not receiving a loan commitment or loan as specified under the terms of the Letters of Intent described in Paragraph XII.

XVIII

The facts alleged above in this Second Cause of Accusation are grounds for the suspension or revocation of the licenses of Respondents CUNNINGHAM and SOCAL under Section 10176(i) of the Code or in the alternative under Section 10177(j) of the Code.

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 the provisions of law.

Les R. Bettencourt

LES R. BETTENCOURT
Deputy Real Estate Commissioner

Dated at Sacramento, California
this 3rd day of August, 1990.