

FILED
NOV 18 2014
BUREAU OF REAL ESTATE
By *L. Just*

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of	)	
BENJAMIN F. DIAZ,,	)	DRE No. H-2776 FR
Respondent.	)	OAH No. 2012110251

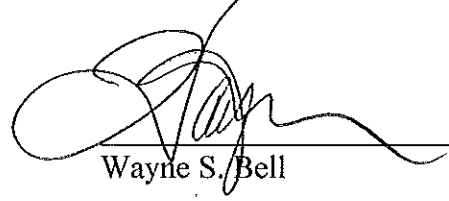
ORDER DENYING RECONSIDERATION

On September 26, 2014, a Decision was rendered in the above-entitled matter. The Decision was to become effective October 20, 2014, and was stayed by separate Order to November 19, 2014.

On October 16, 2014, Respondent petitioned for reconsideration of the Decision of September 26, 2014.

I have given due consideration to the petition of Respondent for reconsideration. I find no good cause to reconsider the Decision of September 26, 2014, and reconsideration is hereby denied. Therefore, the Decision of the Real Estate Commissioner of September 26, 2014, shall become effective at 12 o'clock noon on November 19, 2014.

IT IS HEREBY ORDERED 11/17/2014
REAL ESTATE COMMISSIONER


Wayne S. Bell

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FILED

OCT 16 2014

BUREAU OF REAL ESTATE

By L. Lust

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of

BENJAMIN F. DIAZ,

Respondent.

No. H-2776 FR

OAH No. 2012110251

ORDER STAYING EFFECTIVE DATE

On September 26, 2014, a Decision was rendered in the above-entitled matter to become effective on October 20, 2014 ("the Decision").

On October 16, 2014, Respondent requested a stay for the purpose of filing a petition for reconsideration of the Decision.

IT IS HEREBY ORDERED that the effective date of the Decision is stayed for a period of thirty (30) days, with a new effective date of 12 o'clock noon on November 19, 2014.

DATED: OCTOBER 16, 2014

REAL ESTATE COMMISSIONER



By: JEFFREY MASON
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

FILED
SEP 29 2014
BUREAU OF REAL ESTATE
By L. Frost

In the Matter of the Accusation of

BENJAMIN F. DIAZ,

Respondent.

NO. H-2776 FR

OAH NO. 2012110251

DECISION

The Proposed Decision dated August 21, 2014, 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.

The Decision revokes your real estate broker license and your mortgage loan originator endorsement to that license, but grants you the right to a restricted real estate salesperson license and a restricted mortgage loan originator endorsement.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on OCT 20 2014

IT IS SO ORDERED SEP 26 2014

REAL ESTATE COMMISSIONER


By: JEFFREY MASON
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BENJAMIN F. DIAZ,

Respondent.

Case No. H-2776 FR

OAH No. 2012110251

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, on July 23, 2014, in Fresno, California.

Annette E. Ferrante, Counsel, represented Brenda Smith (complainant), a Deputy Real Estate Commissioner with the Bureau of Real Estate (Bureau),¹ Department of Consumer Affairs, State of California.

Benjamin F. Diaz (respondent) appeared telephonically² on his own behalf.

Evidence and testimony were received, oral argument was heard, the record was closed, and the matter was submitted for decision on July 23, 2014.

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¹ On July 1, 2013, the Department of Real Estate became the Bureau of Real Estate within the Department of Consumer Affairs. The term "Bureau" as used herein includes the Department of Real Estate and all actions taken by the Department of Real Estate before it became the Bureau of Real Estate.

² Government Code section 11440.40 provides in relevant part that all or part of administrative hearings may be conducted by telephone if the parties agree and "each participant in the hearing has an opportunity to participate in and to hear the entire proceedings while it is taking place and to observe exhibits." These elements were satisfied in this case.

SUMMARY

Complainant seeks to revoke respondent's broker license for: (1) collecting advance fees for loan modification services prior to submitting an advance fee agreement to the Bureau for review; (2) continuing to collect advance fees for loan modification services after October 11, 2009; (3) failing to handle trust funds collected from borrowers in accordance with statutory and regulatory requirements; (4) engaging in conduct constituting negligence or incompetence in performing acts requiring a real estate license; (5) willful disregard or violation of Real Estate Law; and (6) making substantial misrepresentations, false promise likely to induce, and fraud or dishonest dealing.

When all the evidence is considered, complainant established by clear and convincing evidence that respondent's broker license should be revoked. But respondent provided sufficient evidence to establish that it would be consistent with public safety to grant him a restricted real estate salesperson license on the terms and conditions set forth below.

FACTUAL FINDINGS

1. Complainant made and filed the Accusation in her official capacity.
2. Respondent was originally licensed as a real estate broker on October 6, 1981. Respondent's broker license will expire on December 15, 2016, unless renewed or revoked. Respondent also holds individual and company mortgage loan originator license endorsements (license endorsement), approved as of April 26, 2012. At no time prior to April 26, 2012, did respondent have a license endorsement issued by the Bureau authorizing him to act as a mortgage loan originator.
3. Respondent is the sole owner of, and has been conducting business under the names "Benjamin's Real Estate" and "Central Mortgage." As will be discussed below respondent, doing business as Central Mortgage, offered loan modification services to residential borrowers, including soliciting borrowers for loan modifications, and negotiating the modifications with lenders on behalf of the borrowers.

Audit Violations

4. From January 12, 2011, and continuing intermittently until June 23, 2011, the Bureau conducted an audit of the accounting and records of respondent for the period of November 1, 2009, through May 1, 2011 (audit period). The purpose of the audit was to determine whether respondent handled and accounted for trust funds in accordance with the real estate law, specifically with regard to respondent's loan modification activities. The Bureau's auditor was Diana Brewster. Respondent provided Ms. Brewster bank statements, receipts, and mortgage loan files relating to mortgage loan activities over the audit period. Respondent indicated at that time that he was in the business of loan modification service activities, and provided approximately 155 files for review. Of the 155 loan modification

files, 104 were initiated prior to the passage of Senate Bill (SB) 94, and 51 after the passage of SB 94. This law took effect October 11, 2009. It prohibited real estate brokers from charging or collecting advance fees for loan modification services prior to completion of those services. (Bus. & Prof. Code, § 10085.6.)

Respondent acknowledged that he did not maintain a trust fund bank account. He also did not have an advance agreement approved by the Bureau. Respondent provided 52 loan modification files to the Bureau's Fresno District Office to be scanned and returned. Based upon her review of these files, Ms. Brewster determined that respondent had received \$48,295 in loan modification fees.

5. The Bureau alleges that respondent engaged in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of advance fees, which it contends constitute trust funds. Respondent contends that the real estate law would not apply to any loan modification services that he performed because he did all the work prior to his collection of such fees. And because such monies were collected for services rendered, respondent believes trust funds were not involved and therefore no trust fund violations can be found. Respondent's defense will be addressed in later Findings.

Post-October 10, 2009 Advance Fees

6. Respondent, while acting in the course and scope of a real estate broker, claimed, demanded, charged, collected and/or received advance fees in connection with loan modification services after October 10, 2009, as follows:

Borrower	Property	Advance Fee	Date Received
E. Villicana	940 90 th Ave. Oakland, CA	\$750	10/15/09
G. Bejines	1267 Cathay Dr. San Jose, CA	\$750	10/15/09
J. Garcia	1545 B St. Fresno, CA	\$750	10/25/09
J. Salinas	432 N. Hester Ave. Farmersville, CA	\$750	10/31/09
M. Ochoa	2510 N. Hermosa Ct. Visalia, CA	\$750	11/02/09
M. Zamora	1717 Custer Ave. Bakersfield, CA	\$750	11/02/09
L. Gomez	Delano, CA	\$550	11/02/09
A. Gonzales	317 San Pedro St. McFarland, CA	\$750	11/11/09
M. Jacobo	301 McMathew Ave. Farmersville, CA	\$750	11/11/09
M. Jacobo	301 McMathew Ave. Farmersville, CA	\$750	11/12/09

E. De Hogas	1574 Orob St. Hanford, CA	\$400	11/15/09
A. Lopez	13675 Ave. 42 Orosi, CA, and 16465 Hudson Ave. Woodville, CA	\$1300	12/01/09
R. Gonzalez	Lenore St. Hanford, CA	\$450	12/06/09
R. Santillan	Cedarwood St. Hanford, CA	\$750	12/20/09
M. Aponte	8334 Ora Belle Lane El Cajon, CA	\$750	12/29/09
C. Obeso	248 Pacific St. Shafter, CA	\$750	01/01/10
G. Barlanza	Unknown	\$200	01/07/10
E. Rendon	John Ct., Arvin, CA	\$350	01/08/10
J. Perez	601 E. Sierra St. Earlimart, CA	\$750	01/11/10
D. Arguello	9921 Estobaugh St. Lamont, CA	\$750	01/14/10
C. Hernandez	327 N. El Dorado Cir. Delano, CA	\$750	01/14/10
M. Caldera	706 Hayslett Ave. Bakersfield, CA	\$750	01/19/10
S. Guevara	15515 Avenue 330 Ivanhoe, CA	\$1550	01/23/10
J. Nance	752 Valencia Ave. Lemoore, CA	\$750	01/25/10
M. Valdovinos	1216 N. Park Ave. Visalia, CA	\$750	01/26/10
N. Aliu	10121 E. Glendon Cr. Santee, CA	\$750	01/28/10
A. Ayala	400 E. Stanislaus St. Avenal, CA	\$750	02/02/10
A. Sabedra	23411 Avenue 88 Terra Bella, CA	\$800	02/07/10
R. Gonzalez	16736 Road 168 Woodville, CA	\$750	02/11/10
F. Valenzuela	302 Mark Ave. Shafter, CA	\$750	02/24/11
R. Serda	5614 Sicily Ct. Bakersfield, CA	\$750	03/05/10
D. Martinez	1332 Oak Ave. Wasco, CA	\$750	03/05/10
S. Garcia	1208 El Camino Real	\$750	03/26/10

	Arvin, CA		
W. Lopez	8621 Butternut Ave. Bakersfield, CA	\$200	03/27/10
O. Candolfi	2090 W. Garden Ln. Porterville, CA	\$750	03/30/10
S. Beadle	3027 Virginia Ave. Bakersfield, CA	\$750	04/06/10
O. Castillo	414 N. Shasta Ave. Farmersville, CA	\$500	04/12/10
J. Toledo	416 Oswell St. Bakersfield, CA	\$750	05/05/10
J. Garcia	323 Olive St. Bakersfield, CA	\$750	05/10/10
R. Artia	860 S. Johnson Ave. El Cajon, CA	\$750	05/17/10
R. Ceballos	14008 Ave 64 Earlimart, CA	\$750	05/26/10
M. Rama	780 Ballentyne St. El Cajon, CA	\$750	05/28/10
F. Guliex	10416 Tatum St. Lamont, CA	\$1500	05/30/10
E. Nunez	10416 Tatum St. Lamont, CA	\$750	06/13/10
F. Navarro	14247 Eberle Rd. Bakersfield, CA	\$750	06/16/10
D. Garcia	3818 Brea Burn Dr. Bakersfield, CA	\$750	06/23/10
M. Paramo	2266 Cleo Ave. Porterville, CA	\$400	07/05/10
R. Hernandez	122 S. Milham Dr. Bakersfield, CA	\$750	07/05/10
J. Cisneros	2550 Flower St. Wasco, CA	\$750	09/28/10
R. Bailey	615 Hewlett St. Bakersfield, CA	\$750	11/12/10
D. Magallanes	1833 5 th Dr. Delano, CA	\$750	11/17/10
J. Rodarte	7601 Brett Ave. Lamont, CA	\$500	010/17/11
R. Martinez	1606 Palm Ave. National City, CA	\$750	02/21/11
J. Beltran	485 Klassen St. Shafter, CA	\$750	03/08/11
M. Gallegos	6571 Lowry St. Bakersfield, CA	\$750	04/09/11

I. Meza	956 W. Mammoth Pool Hanford, CA	\$750	05/14/11
M. Ayala	1920 Fern Tree Close Wasco, CA	\$750	05/18/11

7. In connection with the above activities and transactions, respondent received advance fees for loan modification services. Business and Professions Code section 10085 requires licensed brokers to submit their advance fee agreement, accounting format, and any advertising or promotional material to the Bureau for review. The broker cannot use the agreement or collect any fee in advance until a "no objection" letter is received from the Bureau. Respondent failed to submit the advance fee agreements and all materials used in obtaining the advance fee agreements to the Bureau prior to use, and without first obtaining a "No Objection Letter" as required by section 10085. (See also Cal. Code Regs., tit. 10, § 2970.)

8. In connection with the above activities and transactions (Finding 6), it was further established that respondent:

- a. collected advance fees, trust funds, from principals for providing loan modification services, and deposited those funds into respondent's general business bank account instead of immediately depositing said funds into a designated trust account or neutral escrow depository. (Bus. & Prof. Code, §§ 10145, 10146; Cal. Code Regs., tit. 10, § 2832, subd. (a).);
- b. collected advance fees, trust funds, from principals for providing loan modification services, and did not maintain and provide an accounting to those principals showing the services rendered, identification of the trust account into which the funds were deposited and details of how those funds were disbursed. (Bus. & Prof. Code, § 10146; Cal. Code Regs., tit. 10, § 2972.);
- c. failed to notify the Bureau by January 31, 2010, of respondent's loan arranging activities for properties containing one to four residential units. (Bus. & Prof. Code, §§ 10166.02, subd. (a)); and
- d. engaged in business as a mortgage loan originator, which includes but is not limited to the conduct of mortgage loan modification activities, and failed to obtain and maintain a real estate license endorsement identifying that respondent is a licensed mortgage loan originator. (Bus. & Prof. Code, §§ 10166.01, subd. (b)(1); 10166.02, subd. (b).)

Individual Cases

9. Rene Esquivel is the Bureau's special investigator who was assigned to this matter. He testified at hearing. Mr. Esquivel interviewed some of the individuals identified in Finding 6, and for whom respondent promised to perform loan modification services. Five individual cases are discussed below. One individual testified at hearing, four did not. Where these individuals did not testify, their hearsay statements were considered for the purpose of supplementing or explaining the circumstances around the mortgage loan modification services provided them by respondent. (See Gov. Code, § 11513, subd. (d).)

10. A.R. Gonzales. On November 11, 2009, Andres R. Gonzales contacted respondent in order to obtain loan modification services to save Mr. Gonzales's home in McFarland, California, from going into foreclosure. He subsequently met respondent at an office located in Bakersfield, California. Respondent promised Mr. Gonzales that he would be able to obtain an affordable loan modification for the property within four months. Mr. Gonzales agreed to pay respondent \$750 for the loan modification. Respondent collected \$750 from Mr. Gonzales on November 11, 2009. Respondent did not obtain a loan modification as promised. He did not provide Mr. Gonzales with an accounting for the advance fees, and he did not refund the advance fees collected when requested by Mr. Gonzales. Mr. Gonzales obtained a small claims court judgment against respondent in the amount of \$750, due and payable by October 27, 2011. Mr. Esquivel interviewed Mr. Gonzales on February 12, 2012. As of that date, respondent had not paid Mr. Gonzales the \$750.

Respondent acknowledged that he collected the \$750 fee from Mr. Gonzales for loan modification services. He explained that he charged the first \$750, as he did in all cases, at the time clients are provided with his assessment of whether they qualify for a loan modification. He averred that he has since refunded the \$750 fee to Mr. Gonzales, in or about November 2011.

11. I. Meza. On May 14, 2011, Irma Meza contacted respondent in order to obtain loan modification services to modify the home loan encumbering her property located in Hanford, California. She had been referred to respondent by a neighbor. She subsequently met respondent at his Bakersfield office. Respondent promised Ms. Meza that he would be able to obtain an affordable loan modification for the property within four months. Ms. Meza agreed to pay respondent \$750 for the loan modification. Respondent collected \$750 from Ms. Meza. Respondent did not provide Ms. Meza with an accounting for the advance fees, and he did not refund the advance fees collected when requested by her. Respondent told her that he had performed extensive work on her loan modification file.

Respondent acknowledged that he collected the \$750 fee from Ms. Meza for loan modification services. He indicated that he was successful in obtaining a loan modification for her. In support, he submitted a letter from GMAC Mortgage dated June 9, 2011, advising

Ms. Meza that her request for a loan modification "has been approved" subject to certain conditions.³

12. J. Beltran. On March 8, 2011, Jose Beltran contacted respondent in order to obtain loan modification services to modify the home loan encumbering his property located in Shafter, California. Mr. Beltran was delinquent on his mortgage payments. He had been referred to respondent by a friend. Mr. Beltran subsequently met respondent at Mr. Beltran's residence. Respondent promised Mr. Beltran that he would be able to obtain an affordable loan modification for the property within 60 days. Mr. Beltran agreed to pay respondent \$750 for the loan modification. Respondent collected \$750 from Mr. Beltran. Mr. Beltran did not believe respondent obtained a loan modification as promised. Respondent did not provide Mr. Beltran with an accounting for the advance fees, and he did not refund the advance fees collected when requested by Mr. Beltran. Respondent told him that he had performed extensive work on his loan modification file.

Respondent acknowledged that he collected the \$750 fee from Mr. Beltran for loan modification services. He averred that he was successful in obtaining a loan modification. In support, he submitted a letter from HFC dated April 8, 2011, advising Mr. Beltran that in response to his request for a loan modification, HFC was prepared to "offer you a Trial Period Plan," and that upon successful completion of the trial period, HFC "will provide you with a loan modification." Respondent characterized this offer of a trial period plan as a successful response to Mr. Beltran's request for a loan modification.

13. M. Gallegos. On April 9, 2011, Maribel Gallegos contacted respondent in order to obtain loan modification services to modify the home loan encumbering her property located in Bakersfield, California. Ms. Gallegos was referred to respondent by a coworker. Ms. Gallegos subsequently met respondent at her residence. Respondent promised Ms. Gallegos that he would be able to obtain an affordable loan modification for the property within 60 days. Ms. Gallegos agreed to pay respondent \$750 for the loan modification. Respondent collected \$750 from Ms. Gallegos. Respondent did not obtain a loan modification as promised. He did not provide Ms. Gallegos with an accounting for the advance fees, and he did not refund the advance fees collected when requested by Ms. Gallegos. Respondent told her that he had performed extensive work on her loan modification file.

Respondent acknowledged that he collected the \$750 fee from Ms. Gallegos for loan modification services. He explained that she had failed to tell him that she had lost her job, and therefore she could not qualify for a loan modification.

14. M. Ayala. On May 18, 2011, Maribel Ayala contacted respondent in order to obtain loan modification services to modify the home loan encumbering her Wasco home.

³ Ms. Meza was advised that GMAC's approval was subject to its receipt of: 1) Ms. Meza's contribution in the form of certified funds; 2) Ms. Meza's execution of a loan modification agreement; and 3) receipt of clear title.

She subsequently met respondent at her residence. Respondent promised Ms. Ayala that he would be able to obtain an affordable loan modification for the property within 60 days. Ms. Ayala agreed to pay respondent \$750 for the loan modification. Respondent collected \$750 from Ms. Ayala. He subsequently received an additional \$340 from Ms. Ayala to cover additional travel and time he spent on her case. Respondent did not obtain a loan modification as promised. He did not provide Ms. Ayala with an accounting for the advance fees, and he did not refund the advance fees collected when requested by Ms. Ayala. Ms. Ayala obtained a small claims court judgment against respondent in the amount of \$1,090, plus \$50 in court fees. Ms. Ayala testified at hearing. Respondent has yet to pay her any sum on the small claims court judgment. Ms. Ayala indicated that the lender advised her that her request for a loan modification was denied. She no longer owns the property. She explained that she opted for a short sale of the home.

Respondent's Testimony

15. Respondent provided loan modification services from December 2008. His usual practice was to charge \$1,500 for such services; \$750 collected as a deposit and \$750 collected as the balance due upon completion. In each case he and the homeowner executed an Acknowledgement of Real Estate Service/Contract. He did so under his fictitious business name, Central Mortgage LLC. For example, Ms. Ayala entered into such agreement with respondent on May 18, 2011. Under the terms of the agreement, Central Mortgage LLC was employed from that date and continuing for 120 days, "to renegotiate the existing loan or [sic] the best terms acceptable to the borrower." Other boilerplate language in the agreement indicated that the \$750 deposit was "for having prepared the necessary documents for a loan modification or forbearance." The last sentence of the agreement noted: "Borrower understands that Central Mortgage cannot guarantee Results and Also Understands that Negotiations will commence 3 days after borrowers [sic] authorization of this contract."

16. Respondent averred that the \$750 deposit he collected was for work already completed. He indicated that he would typically spend time doing a financial analysis and qualifying potential borrowers over the telephone prior to meeting them in person. Respondent used lender guidelines to do so. He suggested that he spent approximately 36 hours per client engaging in such analysis even before he met with them. Respondent often incurred travel expenses as well. Respondent explained that he is visually impaired and that he works best from his home office where his vision needs can be accommodated from his desktop computer. He contends that he did not need to place the \$750 deposits into a trust fund account because he believed that he was being paid for services rendered. He averred that this was true in every case where he entered into a loan modification services agreement.

17. Respondent admitted that he did not submit the materials he used in collecting advance fees to the Bureau for approval. He was not aware of that requirement. Respondent further acknowledged that he did not have a license endorsement issued by the Bureau authorizing him to act as a mortgage loan originator prior to April 26, 2012. He holds one now. Respondent explained that because of his disability, he was unable to access information about this requirement. For example, he noted that he could not access notice of

such requirement from the National Mortgage Licensing System (NMLS). He explained that he had web access issues with NMLS's website and was therefore not apprised of the need to have an endorsement. He mistakenly believed that he needed a license endorsement only if he was a loan originator.

Respondent has not provided loan modification services since the Bureau's audit. He does act as a mortgage loan originator in connection with FHA, conventional and "hard money" loans.

18. Respondent has worked as a real estate broker for 33 years. He has a history of license discipline. On December 23, 1998, in Case number H-1377 FR, the Real Estate Commissioner revoked respondent's real estate broker license, and granted him a restricted broker license after determining that he had engaged in fraud or dishonest dealing under Business and Professions Code section 10177, subdivision (j). Respondent successfully petitioned for reinstatement of his broker's license and was issued an unrestricted real estate broker license, effective December 16, 2004.

19. Respondent does not maintain a client trust account. He noted that he does not need one. He has no plans to do loan modifications in the future. At the time that he was interviewed by Mr. Esquivel on June 2, 2011, respondent indicated that he had completed 150 loan modifications and had achieved an 80 percent success rate. Respondent regarded offers of trial loan periods as successful outcomes. He was prepared to demonstrate that he was successful in obtaining loan modifications in most of the cases detailed in Finding 6.

Discussion

Advance Fees

20. Generally, one who performs real estate services must complete the work before collecting the fees. As noted earlier, one exception is where the broker has submitted an advance fee contract to the Bureau and received a No Objection Letter. This was not done here. The prohibition and restrictions placed on collecting advance fees have been in place for years to protect consumers from being victimized by real estate licensees taking upfront money in return for promised services that are not performed. (See Cal. Code Regs., tit. 10, §§ 2970, 2972.) By reason of the following matters and discussion, complainant has established by clear and convincing evidence that respondent collected advance fees for loan modification services.

21. First, respondent collected fees in advance and prior to services being performed. The language on the Acknowledgement of Real Estate Service/Contract used by Central Mortgage LLC looked ahead to services to be performed at a later date. For example, the agreement provided in part: "Central Mortgage LLC has been employed *from this date* and continuing for 120 days to renegotiate the existing loan ..." (Italics added.) The agreement further indicated that loan modification negotiations would commence three days after the agreement was executed.

22. Second, respondent did not establish that the loan modification services were provided in advance of his receipt of fees. Respondent produced no documentation of any comprehensive financial analysis, or other evidence that he qualified potential borrowers per lender guidelines prior to his receipt of advance fees. Respondent's suggestion that he spent an average of 36 hours in each case is simply not credible. Rather, it appears that he routinely accepted fees in advance of providing such services. Any advance work appears to have been minimal, particularly since he would need to obtain more information in most cases from the borrowers before engaging in such analysis.

23. Third, it does appear that respondent engaged in business practices that circumvented the real estate laws and allowed him to collect fees up front, without having to bother with any refunds, for loan modification activities. In this regard, *Nelson v. Department of Real Estate* (1984) 161 Cal.App.3d 939 is instructive. In *Nelson*, the First District Court of Appeal held that an agreement requiring the immediate payment of a fee for the preparation of a loan package constituted an advance fee. In that case, the Department of Real Estate filed an accusation against California Consolidated Financial Services, Inc. (CCFS), which was licensed as a real estate broker through its licensee, Allen Nelson. The court found that while the agreement separated the preparation fee from the percentage finder's fee, the borrowers did not hire CCFS simply to have their loan packages assembled. Rather, they wanted to obtain a loan and "were induced to pay advance preparation fees because CCFS promised to act as their exclusive agent in securing the loans." (*Id.* at p. 944.) Here, respondent collected a fee up front for renegotiating the existing loan on the best terms acceptable to the borrower. As was the case in *Nelson*, a fee was charged in advance for a service that could not be separated from the consumer's ultimate goal of obtaining a loan, or a loan modification in this case. The Court of Appeal observed:

Although the agreement breaks CCFS's fee down into components, i.e., a percentage finder's fee and a loan package preparation fee, these components nevertheless comprise a single overall fee which Spencer and Calvo agreed to pay for the sole purpose of soliciting lenders, making loan arrangements, and obtaining their loans. "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law." [Citation] The question of the violation of a statute is always determined with reference to the private rights of the parties to a transaction, and the result will not turn on the skill with which the parties have manipulated their transaction but on the significance of their acts in the terms of the provisions of the statute itself and of the public policy declared thereby. [Citation.]"

(*Id.* at p. 945.)

This case parallels *Nelson*, both in terms of facts and reasoning. Any information that respondent gathered from clients as part of his financial analysis and loan qualification

process was for the purpose of entering into negotiations on their behalf with lenders for loan modifications. Accordingly, respondent's Acknowledgement of Real Estate Service/Contract, in all appearances and effects, was a receipt for fees collected in advance for loan modification services.

24. The above matters have all been considered in finding that respondent engaged in loan modification activities through Central Mortgage LLC, and that the fees he collected as a deposit "for having prepared the necessary documents for a loan modification or forbearance" are properly considered and characterized as advance fees within the meaning of Business and Professions Code section 10026, subdivision (a).

Trust Funds

25. By virtue of the fact that respondent collected advance fees, such constituted trust funds for which an accounting was required. Respondent failed to deposit the advance fees into a designated trust account or neutral escrow depository. He did not maintain and provide an accounting to the principals showing the services rendered, identification of the trust account into which the funds were deposited, and details of how those funds were disbursed.

Fraud and/or Dishonest Dealing

26. It was not established that respondent made substantial misrepresentations to borrowers regarding his being authorized by the Department to perform loan modification services. Neither was it established that by promising to complete loan modification services within 30 to 60 days that he engaged in fraud or dishonest dealings. The Acknowledgement of Real Estate Service/Contract expressly noted that Central Mortgage LLC "cannot guarantee Results" and only promised that respondent would commence negotiations within three days, and continue to renegotiate the existing loan for a 120-day period.

Negligence and/or Incompetence

27. Respondent's belief that he did not require a license endorsement for those activities related to loan modifications, and his failure to submit material used in collection of advance fees to the Bureau, constituted negligence and/or incompetence in performing acts requiring a real estate license. A real estate broker is expected to understand and maintain currency with the laws governing licensed activity. Respondent was negligent and/or incompetent in not knowing this. The advance fees that respondent collected were trust funds that had to be placed in a trust account until respondent fully performed all the contracted services. Respondent failed to do so. He did not maintain and provide an accounting to the principals showing the services rendered, identification of the trust account into which the funds were deposited, and details of how those funds were disbursed. Such also constituted negligence and/or incompetence.

28. When all the evidence is considered, it would not be consistent with the public interest to allow respondent to retain his broker license. Respondent's failure to understand

and comply with applicable law and regulation demonstrates that he should not be allowed to retain his broker license at this time. Complainant noted that respondent was previously disciplined for engaging in fraud/dishonesty dealing, bringing into question whether he will hold himself accountable for and be subject to the Real Estate Law.

In this case, there was no showing that he engaged in intentional wrongdoing, fraud or dishonest dealing. He has not provided loan modification services since the time of the Bureau's audit, and has no intention of doing so in the future. Under these circumstances, it would be consistent with the public interest and safety to grant him a restricted salesperson license under the terms and conditions set forth below. A condition precedent to the issuance of any restricted salesperson license must be proof of payment and restitution of funds to Ms. Ayala and Mr. Gonzales per the two small claims court judgments in their favor.

Audit/Investigative Costs

29. Audit Costs. Business and Professions Code section 10148, subdivision (b), provides that the commissioner shall charge a real estate broker for the cost of any audit where the commissioner has found that the broker has violated section 10145 or a regulation or rule of the commissioner interpreting section 10145. Ms. Brewster expended 35 hours in connection with her audit, between May 3 and June 23, 2011. Her time billed included audit planning, review of records, travel time, reference organizing, and report writing. Ms. Brewster's time is billed at \$57 per hour⁴ for \$1,995 in total audit costs associated with this case. The Bureau is entitled to recover the audit costs detailed above.

30. Investigative Costs. Pursuant to Business and Professions Code section 10106, subdivision (a), complainant has requested costs of investigation and enforcement prior to hearing in the total sum of \$6,414.20. This amount is based on the cost of the time of Bureau Counsel Annette Ferrante (\$1,913.50), as well as the time of Bureau Special Investigator Rene Esquivel (\$4,501.20) spent on investigation and prosecution of this case. At hearing, complainant introduced a declaration signed by Ms. Ferrante whereby she declared that she spent 21.50 hours working on this matter. The declaration itemized the time she spent by date, type of activity, and amount of time spent, and specifies an hourly rate of \$89. Ms. Ferrante further attested that the Bureau's investigation staff spent a total of 72.60 hours in this matter at an hourly rate of \$62. Mr. Esquivel's time was itemized by date and type of activities; including letter/memo writing, telephone time, interview time, travel time, and deputy review. Mr. Esquivel's letter/memo writing comprised well over 40 hours, which appears rather high. Investigative costs should be adjusted downward for this reason.

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⁴ Business and Professions Code section 10148 provides that "the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers."

LEGAL CONCLUSIONS

1. Under Business and Professions Code section 10177, subdivision (d), a real estate license may be suspended or revoked when the licensee has "[w]illfully disregarded or violated the Real Estate Law (Part 1(commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2."

Business and Professions Code section 10166.051, subdivision (a), further provides that the commissioner may deny, suspend, revoke, restrict or decline to renew a mortgage loan originator license endorsement for "a violation of this article, or any rules or regulations adopted hereunder."

Trust Fund Violations

2. Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832, require that a broker place funds accepted on behalf of another into a trust account in the name of the broker, or in a fictitious business name if the broker is the holder of a license bearing such fictitious business name.

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

Any real estate broker who contracts for or collects an advance fee from any other person, hereinafter referred to as the "principal," shall deposit any such amount or amounts, when collected in a trust account with a bank or other recognized depository. Such funds are trust funds and not the funds of the agent. Amounts may be withdrawn therefrom for the benefit of the agent only when actually expended for the benefit of the principal or five days after the verified accounts mentioned hereinafter have been mailed to the principal.

4. California Code of Regulations, title 10, section 2972, provides:

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

- (a) The name of the agent.
- (b) The name of the principal.
- (c) Description of the services rendered or to be rendered.
- (d) Identification of the trust fund account into which the advance fee has been deposited.

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

- (1) In providing each of the services enumerated under (c) above.
- (2) Commissions paid to field agents and representatives.
- (3) Overhead costs and profit.

(g) In cases in which disbursements has been made for advertising, a copy of the advertisement, the name of the publication, the number of the advertisements actually published and the dates that they were carried.

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

5. Respondent failed to place advance fees entrusted to respondent into a trust fund account in the name of respondent as a trustee at a bank or other financial institution as required by Business and Professions Code section 10146. (See Findings 6, 8, 10 through 14, and 25.) This failure constitutes cause to discipline respondent's broker license under Business and Professions Code section 10177, subdivision (d). It also constitutes cause to discipline respondent's license endorsement under Business and Professions Code section 10166.051.

Advance Fee Violations

6. Business and Professions Code section 10130 provides:

It is unlawful for any person to engage in the business of, act in the capacity of, advertise as, or assume to act as a real estate broker or a real estate salesperson within this state without first obtaining a real estate license from the department, or to engage in the business of, act in the capacity of, advertise as, or assume to act as a mortgage loan originator within this state without having obtained a license endorsement.

7. Business and Professions Code section 10085, in relevant part, provides:

The commissioner may require that any or all materials used in obtaining advance fee agreements, including but not limited to the contract forms, letters or cards used to solicit prospective

sellers, and radio and television advertising be submitted to him or her at least 10 calendar days before they are used. Should the commissioner determine that any such matter, when used alone or with any other matter, would tend to mislead he or she may, within 10 calendar days of the date he or she receives same, order that it not be used, disseminated, nor published.

8. Business and Professions Code section 10085.6, subdivision (a)(1) provides:

(a) Notwithstanding any other provision of law, it shall be unlawful for any licensee who negotiates, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following:

(1) Claim, demand charge, collect, or receive any compensation until after the licensee has fully performed each and every service the licensee contracted to perform or represented that he, she, or it would perform

9. Respondent failed to obtain a license endorsement to act as a mortgage loan originator as required by Business and Professions Code section 10130. (See Findings 8, 10 through 14, and 17.)

10. Respondent failed to submit the advance fee agreements and all materials used in obtaining the advance fee agreements to the Bureau prior to use, without first obtaining a "No Objection Letter" as required by Business and Professions Code section 10085, and California Code of Regulations, title 10, section 2970. (See Findings 7, 10 through 14, and 17.)

11. Respondent collected advance fees related to loan modification services after October 10, 2009, in violation of Business and Professions Code section 10085.6. (See Findings 6, 10 through 14, and 20 through 24.)

12. The failures and matters set forth in Legal Conclusions 9 through 12 constitute cause to discipline respondent's broker license under Business and Professions Code section 10177, subdivision (d). They also constitute cause to discipline respondent's license endorsement under Business and Professions Code section 10166.051.

Notice Requirements

13. Business and Professions Code section 10166.02, subdivision (a) provides that a real estate broker who makes, arranges, or services loans secured by real property containing one to four residential units shall notify the Bureau by January 31, 2010, or within

30 days of commencing that activity. Respondent failed to notify the Bureau by January 31, 2010, of his loan arranging activities for properties containing one to four residential units. (See Finding 8.) This failure constitutes cause to discipline respondent's broker license under Business and Professions Code section 10177, subdivision (d). It also constitutes cause to discipline respondent's license endorsement under Business and Professions Code section 10166.051.

Fraud and/or Dishonest Dealing

14. Business and Professions Code section 10176 provides that the following are grounds for disciplinary action:

(a) Making any substantial misrepresentation.

[§] ... [§]

(b) Making any false promises of a character likely to influence, persuade, or induce.

[§] ... [§]

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

15. No cause for disciplinary action exists under Business and Professions Code section 10176, by reason of the matters set forth in Finding 26. It was not established that respondent engaged in substantial misrepresentation, fraud or dishonest dealing.

Negligence and/or Incompetence

16. Respondent demonstrated negligence or incompetence in performing acts for which he is required to hold a license. (See Finding 27.) Such constitutes cause to discipline respondent's broker license under Business and Professions Code section 10177, subdivision (g). This constitutes cause to discipline respondent's broker license under Business and Professions Code section 10177, subdivision (d). It also constitutes cause to discipline respondent's license endorsement under Business and Professions Code section 10166.051.

Audit and Investigation/Prosecution Costs

17. Pursuant to Business and Professions Code section 10148, subdivision (b), the commissioner shall charge a real estate broker for the cost of any audit where the commissioner has found that the broker has violated section 10145 or a regulation or rule of the commissioner interpreting section 10145. Audit costs associated with this case total \$1,995. The Bureau is entitled to recovery these audit costs from respondent. (See Finding 29.)

18. Pursuant to Business and Professions Code section 10106, subdivision (a), complainant has requested costs of investigation and enforcement prior to hearing in the total sum of \$6,414.20. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.* at p. 45.)

The matters set forth in Finding 30 have been considered in determining that the scope of the investigation was disproportionate to the alleged misconduct. Accordingly, reasonable costs of investigation and enforcement prior to hearing should be adjusted downward to from \$6,414.70 to \$4,000.

Appropriate Discipline.

19. The matters set forth in Findings 15 through 19, and 28 have been considered. Given respondent's violations of statutes and regulations, it would be contrary to the public interest to allow him to retain his broker license. Respondent's failure to understand and comply with applicable law and regulation demonstrates that he should not be allowed to retain his broker license at this time. Respondent was previously disciplined for engaging in fraud/dishonesty dealing, bringing into question whether he will hold himself accountable for and be subject to the Real Estate Law. However, there was no showing here that he engaged in intentional wrongdoing, fraud or dishonest dealing. He has not provided loan modification services since the time of the Bureau's audit and he has no intention of doing so in the future.

Given the above circumstances, it would be consistent with the public interest and safety to grant him a restricted salesperson license under the terms and conditions set forth below. A condition precedent to the issuance of any restricted salesperson license must be proof of payment and restitution of funds to Maribel Ayala and Gonzales per the two small claims court judgments in their favor.

ORDER

All licenses and licensing rights of respondent Benjamin F. Diaz under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), including his broker license, are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Bureau of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. Respondent may also make separate application for a restricted mortgage loan originator license endorsement. As a condition precedent to the issuance of any restricted licenses,

respondent shall submit documentation to the Bureau establishing that he has made full payment of funds due Maribel Ayala and Andres R. Gonzales per the small claims court judgments awarded in their favor.

The restricted licenses issued to respondent shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

1. The restricted licenses issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

2. The restricted licenses issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until four (4) years have elapsed from the effective date of this Decision.

4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Bureau of Real Estate which shall certify:

(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

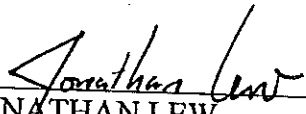
(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the respondent presents such evidence. The Commissioner shall afford respondent

the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Respondent shall pay \$1,995 to the Bureau as the cost of the audit pursuant to Business and Professions Code section 10148. Respondent shall pay an additional \$4,000 to the Bureau as the reasonable cost of investigation and enforcement of this case. He may pay these costs over time according to a payment plan acceptable to the Bureau of Real Estate, but such period shall not exceed four years.

DATED: August 21, 2014


JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings