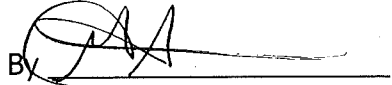


FILED

December 28, 2012

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE
By 

In the Matter of the Accusation of)
)
 LIS MORTGAGE CORPORATION and)
 BRIAN OLIVER CANADA)
)
 Respondents.)
 _____)

CASE NO. H-5327 SAC
OAH NO. 2011120690

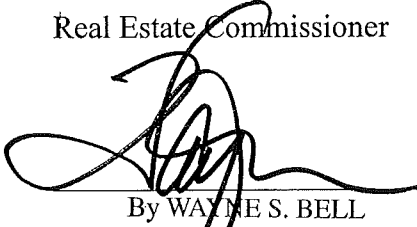
DECISION

The Proposed Decision dated November 30, 2012, 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 JAN 18 2013

IT IS SO ORDERED 12/19/2012

Real Estate Commissioner


By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Second Amended
Accusation Against:

LIS MORTGAGE CORPORATION,
A California Corporation,

and

BRIAN OLIVER CANADA,

Respondents.

Case No. H-5327 SAC

OAH No. 2011120690

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on August 29, 2012.

Michael B. Rich, Counsel, represented the Department of Real Estate (the Department), State of California.

There was no appearance by or on behalf of the LIS Mortgage Corporation, or Brian Oliver Canada.

The matter was submitted on August 29, 2012.

FACTUAL FINDINGS

1. Tricia D. Sommers, acting in her official capacity only as a Deputy Real Estate Commissioner of the Department, made the charges and allegations contained in the Accusation and caused it to be filed on January 6, 2010. The Department caused to be filed a First Amended Accusation on August 16, 2010, and a Second Amended Accusation on April 14, 2011. The Department has jurisdiction to suspend or revoke any real estate license issued in the State of California by the Department upon satisfactory proof that cause exists for the action.¹

¹ Business and Professions Code section 10175.

2. Brian Oliver Canada (respondent Canada) timely filed Notices of Defense to the Accusation on behalf of himself as an individual real estate broker, and on behalf of his closely held corporation, LIS Mortgage Corporation (respondent LIS, and collectively respondents). The Notices of Defense were deemed effective in response to the superseding First and Second Amended Accusations. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

3. Notice of the date, time and place of the evidentiary hearing on the Second Amended Accusation was duly given by counsel for the Department pursuant to Government Code sections 11505 and 11509. Respondents did not appear at the evidentiary hearing, and good cause did not exist for their collective failures to appear. The matters alleged in the Second Amended Accusation were adjudicated as defaults, pursuant to the provisions of Government Code section 11520.

4. Respondent Canada currently has licensing rights through the Department as a real estate broker. The Department issued respondent Canada a real estate broker's license on October 31, 1995. On that same date, respondent Canada added to his license an authorization to operate under a fictitious business name, Lending Information Services. Respondent Canada was previously licensed by the Department as a real estate salesperson beginning in 1994. Respondent Canada's real estate salesperson's license terminated as of October 30, 1995, simultaneous with the issuance of the real estate broker's license.

5. Respondent Canada's real estate broker license expired October 30, 2011, as did his fictitious business name authorization. On that same date, respondent Canada terminated his main office address. Respondent Canada had disclosed to the Department on behalf of himself and respondent LIS that his main office and business address was 9298 Madison Avenue, Orangeville, CA, 95662, as of October 1, 2010. Respondents' real estate broker's license has not been renewed.

6. At all times relevant to this Decision, respondent LIS was licensed or had license rights as a corporate real estate broker under a license issued by the Department. Respondent LIS is a closely held California Corporation for which respondent Canada is the President, Chief Executive Officer, and sole shareholder.

7. The Department first issued a corporate real estate broker's license to respondent LIS on July 14, 1999. The license was issued with Respondent Canada as the designated Responsible Managing Officer. Respondent LIS Corporation's real estate broker license expired July 13, 2011, as did respondent Canada's designated Responsible Managing Officer status. The license has not been renewed.

8. There is no history of any previous disciplinary action by the Department against respondent Canada, respondent LIS or any of respondent Canada's licenses or entities for which he was the designated officer or responsible managing licensee.

9. As the Responsible Managing Principal and individual real estate broker for the corporate brokerage license, at all times relevant to this Decision, respondent Canada was responsible for the supervision and control of all of the activities of the officers, agents, real estate licensees and employees of respondent LIS, and for the activities of the corporation for which a real estate license is required. Respondent Canada was also responsible to manage respondent LIS in compliance with the Real Estate Law, pursuant to Business and Professions Code sections 10159.2 and 10177, subdivision (h), as well as California Code of Regulations (CCR), title 10, section 2725.

10. At all times relevant to this Decision, respondent Canada, through LIS Mortgage Corporation, was actively engaged in the business of arranging, restructuring, and negotiating residential real estate mortgages secured by real property, in expectation of compensation.

11. Between the period of July 18, 2008 and May 8, 2009, respondents solicited borrowers and lenders, and negotiated loans secured directly or collaterally by liens on real property, where such loans were to be brokered, arranged, processed, renegotiated and consummated on behalf of others, and solicited and negotiated to perform services for borrowers in connection with loans secured directly or collaterally by liens on real property, including renegotiation of such loans, within the meaning of section 10131, subdivision (d) of the Business and Professions Code (B&P Code). In exchange for such services, respondents charged, received and collected, and provided written contracts for the collection and receipt of advance fees, from borrowers for services respondents were to perform in the future in expectation of compensation in 13 identified transactions set forth in full in an itemized list at page 4 of the Second Amended Accusation. Advance fees were collected from René and Marcella Zaragosa, Virgil M. Sterrett, Robert A. Ceccato, Antonio Moreno, Cloatille and Dewayne Lawson, Manuel A. Balderas, Robert C. Robinson, Joe and Hope Cornejo, and Vitaliy Khabatyuk, (the borrowers) for 13 the separate loan renegotiation transactions identified between July 18, 2008 and May 8, 2009. A written fee agreement was provided to the borrower(s) in 11 of the 13 transactions for which respondents demanded and received advance fees from the borrowers seeking to renegotiate their secured real estate loans. The total amount of advance fees respondents received for these 13 separate transactions totaled \$38,750.84.

12. The \$38,750.84 in fees collected by respondents from the borrowers in the 13 identified transactions itemized on page four of the Second Amended Accusation constituted advance fees within the meaning of sections 10026 and 10131.2 of the B&P Code. In addition, the advance fees collected from the borrowers as part of the 13 itemized transactions constituted trust funds, within the meaning of B&P Code sections 10145 and 10146.

13. Respondents provided all but two of the itemized and identified borrowers in the 13 subject transactions a written advance fee contract in connection with the collection, receipt and handling of the advance fees. The written advance fee contract provided by respondents to the identified borrowers had not been submitted to, reviewed and approved by

the Department prior to use, as required by B&P Code sections 10085 and 10085.5, as well as CCR, title 10 (the Department's Regulations), section 2970.

14. Respondents failed to deposit any of the advance fees/trust funds received and collected from the borrowers involved in the 13 identified transactions into a real estate broker's trust account. In addition, respondents dispersed the advance fees trust funds received from the borrowers to themselves and to other creditors without accounting for those disbursements to the borrowers. Respondents failed to provide the borrowers the required verified accounting of the advance fees trust funds receipts and disbursements, and particularly failed to provide the borrowers any accounting expressly representing the amounts of advanced fees trust funds received and disbursed, commissions paid, and disbursements for overhead and profit, all as required by B&P Code section 10146 and section 2972 of the Department's Regulations.

15. Between the period of July 18, 2008 and May 8, 2009, respondents made or ratified representations to the borrowers that respondents would, in exchange for the advance fees paid by the borrowers, contact the lenders holding the borrowers' trust deeds encumbering the borrowers' respective real properties and would negotiate with the borrowers' lenders for favorable loan modifications for the benefit of the borrowers, and to successfully negotiate on behalf of the borrowers for lower interest rates and payments. Respondents' representations to the borrowers included claims that respondents had attained a 95 per cent success rate in obtaining favorable renegotiation of interest rates to substantially lower rates than the existing rates paid by the borrowers, and similar claims of success at attaining significantly lower payments for borrowers. Respondents also told the borrowers to cease making their existing and due mortgage loan payments to their respective lenders in order to enhance borrowers' chance of successful renegotiation of their loans, to the significant financial harm of several of the borrowers. Respondents also promised to deliver to the borrowers' loan modification documents reflecting lower interest rates and/or payments negotiated on behalf of and obtained for the borrowers, and to achieve the claimed results and close the loans in two to three months.

16. Respondents made or ratified representations to the borrowers that were false and misleading and were made with no reasonable grounds, with the exercise of reasonable diligence, for believing the representations to be true. Respondents failed to contact the borrowers' lenders as promised, or failed to follow through with the promised renegotiations, after having made initial contact. Respondents failed to complete renegotiations as promised for any of the borrowers, failed to provide the services to borrowers promised, and failed to deliver the promised significantly reduced interest rates and monthly payments on borrowers' monthly loan payments. Respondents failed to return any part of the advance fees/trust funds collected from borrowers for services that were not performed. Respondents converted the advance fees/trust funds to their own use and benefit and for purposes not authorized by the borrowers, including, but not limited to, paying the business expenses of respondents.

17. The acts and omissions of respondents set forth above with respect to the named and identified borrowers constituted misrepresentations, fraud, and conducting mortgage renegotiation by deceit and dishonest dealing.

18. At all times relevant to this Decision, Ryan Alexander and Peggy Smith were not licensed by the Department as either a real estate broker or a real estate salesperson.

19. At all times relevant to this Decision, respondents employed Ryan Alexander and Peggy Smith to perform and engage in solicitation of borrowers for secured mortgage loan renegotiation and restructuring activities and compensated each for services for which a real estate license was required.

20. During the period July 18, 2008 through May 8, 2009, Peggy Smith solicited borrowers Renée and Marcella Zaragoza, Cloatille and Dewayne Lawson, Robert C. Robinson, Herman H. Barrick, Kenneth L. Hamilton, and Vitaliy Khabatyuk and negotiated loans, secured directly or collaterally by liens on real property and offered to broker, arrange, renegotiate, process and consummate on behalf of these named borrowers, and solicited and negotiated to perform renegotiation services on behalf of these borrowers in connection with the borrowers' loans secured directly or collaterally by liens on real property. Peggy Smith demanded, charged, received and collected advance fees from each of these named borrowers for services to be performed by respondents after the collection of the advance fees, in the expectation of compensation. In addition, Peggy Smith provided a written contract for such advance fees to each of these named borrowers, setting forth services to be performed by respondents in the future in exchange for the receipt of the advance fees.

21. During the period July 18, 2008 through January 7, 2009, Ryan Alexander solicited borrowers Renée and Marcella Zaragoza and Mark. L. Cottrell, and negotiated loans, secured directly or collaterally by liens on real property, and offered to broker, arrange, renegotiate, process and consummate on behalf of these named borrowers, and solicited and negotiated to perform renegotiation services on behalf of these borrowers in connection with the borrowers' loans secured directly or collaterally by liens on real property. Ryan Alexander demanded, charged, received and collected advance fees for each of these named borrowers for services to be performed after the collection of the advance fees, in the expectation of compensation. In addition, Ryan Alexander provided a written contract for such advance fees to each of these named borrowers, setting forth services to be performed in the future in exchange for the receipt of the advance fees.

22. Respondents employed and compensated, directly or indirectly, Peggy Smith and Ryan Alexander, to perform acts that require a real estate license, without having first required Peggy Smith and Ryan Alexander to obtain the required licenses from the Department.

23. Respondents accepted and received, as well as dispersed to others besides the borrowers, trust funds received in the form of the advance fees set forth above, on behalf of the identified borrowers. These trust funds received by respondents were deposited into a

commercial bank checking account maintained at Citibank by respondents from June 4, 2009 to the end of the period of licensure, with respondent Canada and Sheryl Canada as co-signatories. Sheryl Canada is not licensed as a real estate broker or salesperson, nor is she bonded. From July 2008 through June 4, 2009, respondents deposited the trust funds in a commercial bank checking account maintained at Bank of America under the name LIS Mortgage Corporation with the same signatories. Ms. Canada was neither licensed nor bonded during the period respondents maintained the second commercial checking account at Bank of America.

24. Between July 18, 2008 and May 2009, respondents received advance funds/trust funds on behalf of the borrowers set forth above, but failed to deposit and maintain the trust funds in a trust account or neutral escrow depository, and failed to deliver the trust funds into the hands of the borrower/owners of the funds. The advance fees/trust funds were deposited into the commercial bank checking accounts identified above. Respondents maintained and managed the trust funds received from those borrowers set forth above in such a fashion that on August 31, 2009, there was a trust fund shortage in respondents' Citibank and Bank of America bank accounts in the sum of \$27,985.08.

25. As set forth above, respondents failed to maintain the aggregate balance of the trust funds in respondents' bank accounts in a manner that exceeded the aggregate trust fund liability to the borrower/owners of the funds. Respondents failed to obtain the borrower/owners' written consent to disburse their trust funds or to approve disbursements from the trust funds that had the effect of reducing the aggregate trust fund balance to a point that the aggregate trust funds held on behalf of the borrower/owners was less than the aggregate trust fund liability to all of the borrower/ owners of the funds.

26. Between July 2008 and May 2009, respondents failed to designate as trust accounts in the name of respondents as broker and trustee the bank accounts maintained by respondents at Citibank and Bank of America referred to above. Respondents deposited client trust funds into commercial bank general checking accounts, and thus failed to deliver trust funds received from the borrower/owners set forth above into a designated trust bank account in the name of the real estate broker as trustee not later than three business days after receipt of those funds.

27. Between July 2008 and May 2009, respondents failed, with respect to the collection and disbursement of trust funds received from the borrowers/owners identified above, to maintain a control record for the trust funds received and disbursed that contained the information required by section 2831 of the Department's Regulations. Section 2831 requires a real estate broker receiving trust funds to maintain control records for trust funds received and disbursed in a columnar format, in chronological sequence, listing dates of receipt of funds, from whom funds were received, dates of disbursements, dates of deposits, identification of depository, and daily balances for all trust funds received. In addition, respondents failed to perform at least a once per month reconciliation of all of the separate individual beneficiary records, and failed to maintain a record of such reconciliations as required by section 2831.2 of the Department's Regulations.

28. In November 2008, respondents relocated the main office of respondent LIS to a different address than the address of record for respondent LIS on file with the Department. Respondents failed to advise the Department in a timely fashion of the move and of the existence of respondents' new principal place of business. Respondent LIS thus failed to maintain on file with the Department and the Real Estate Commissioner its current and accurate mailing address for its real estate brokerage activities after November 2008.

29. Between July 18 and July 22, 2008, respondents failed to provide to the Department's representative when requested, the transactional documents and transactional files for the two loan renegotiation transactions undertaken for Renée and Marcella Zaragoza for which respondents received advance fees/trust funds, as identified above. Respondents failed to retain the transactional documents in the transactional file for the two loan renegotiation transactions undertaken for Renée and Marcella Zaragoza for three years following the date of the transactions.

30. Between the period of June 16, 2009 and December 21, 2009, respondents solicited borrowers and lenders, and negotiated loans secured directly or collaterally by liens on real property, where such loans were to be brokered, arranged, processed, renegotiated and consummated on behalf of borrowers Herman H. Barrick and Kenneth L. Hamilton, and solicited and negotiated to perform services for those two borrowers in connection with loans secured directly or collaterally by liens on real property, including renegotiation of such loans, within the meaning of B&P Code section 10131, subdivision (d). In exchange for such services, respondents charged, received and collected advance fees from borrowers Barrick and Hamilton, and provided written contracts for collection and receipt of advance fees for services respondents were to perform in the future in expectation of compensation. Advance fees were collected from borrowers Barrick and Hamilton for loan renegotiation transactions on June 16, 2009 (Barrick) and December 21, 2009 (Hamilton). Written fee agreements were provided to borrowers Barrick and Hamilton for the transactions for which respondents demanded and received advance fees from the borrowers seeking to renegotiate their secured real estate loans. The total amount of advance fees respondents received for these two transactions totaled \$3,400.

31. The advance fees collected by respondents from borrowers Barrick and Hamilton constituted advance fees within the meaning of B&P Code section 10026. The advance fees collected from borrowers Barrick and Hamilton constituted trust funds within the meaning of B&P Code sections 10145 and 10146.

32. As set forth above, respondents provided borrowers Barrick and Hamilton a written advance fee contract. The written advance fee contract presented to the borrowers had not been submitted to, reviewed by or approved by the Department of Real Estate prior to use.

33. At all times relevant to this Decision, respondents failed, in connection with the advance fees collected from borrowers Barrick and Hamilton, to provide any accounting

to either borrower reflecting the amount of trust funds dispersed, the date of trust fund disbursement, commissions paid, and any overhead or profit deducted from the trust funds.

34. In connection with the solicitation of borrowers Barrick and Hamilton and the collection, receipt and handling of advance fees/trust funds from these borrowers, and in exchange for inducing the borrowers to pay the advance fees, respondents represented, directed and ratified representations to these two borrowers that: Respondents had a 100 per cent success rate in obtaining loan renegotiations because respondents only accepted borrowers who had met qualifications for loan modification; that respondents would be able to lower borrower Barrick's monthly loan payment to \$579 per month; that respondents would be able to lower borrower Hamilton's monthly loan payment to \$386 per month; and, that respondents would be able to complete the loan modifications within two to three months on average.

35. Respondents' representations to borrowers Barrick and Hamilton were false and misleading, those representations were made by respondents with no reasonable grounds for believing the representations were true, and that respondent should have known at the time through the exercise of reasonable diligence that the representations identified above to these two borrowers were false and misleading. In fact: respondents did not have a 100 per cent success rate in renegotiating loans; borrower Barrick did not meet the lender's qualifications for a loan modification; respondents would not and did not obtain loan modifications for either borrower; respondents would not and did not obtain lowered monthly loan payments in any amount for either of the two borrowers; and respondents would not and did not complete a loan modification for either borrower within any period of time. Respondents' representations, acts, and omissions with respect to borrowers Barrick and Hamilton constituted misrepresentation, fraud, deceit and dishonest dealing in activities for which a real estate broker's license was required.

36. At all times relevant to this Decision, respondent Canada was responsible, as the designated broker officer of respondent LIS, for the supervision and control of the activities conducted on behalf of respondent LIS by its officers and employees, including the activities of Peggy Smith and Ryan Alexander, unlicensed persons who were working for and on behalf of respondent LIS, and under the supervision and control of respondent Canada. Respondent Canada failed to exercise reasonable supervision and control over the loan services, mortgage brokering, and advance fee collection activities of the employees of respondent LIS Corporation, especially those of employees Peggy Smith and Ryan Alexander. In particular, respondent Canada permitted, ratified, and approved of the conduct set forth in the Factual Findings above engaged in by unlicensed employees Peggy Smith and Ryan Alexander. In addition, respondent Canada failed to take reasonable steps to ensure the proper handling of trust funds, proper trust fund record-keeping, proper review of trust fund records and accounts, proper retention of transactional documents, to make certain that no false representations were made to prospective borrowers or person seeking loan renegotiation or refinancing services, to ensure that proper quarterly accounting for advance fees was provided to the borrowers who paid the fees, and to ensure the implementation of

policies, rules, procedures and systems to ensure compliance by LIS Corporation and its employees with the Real Estate Law and the Department's Regulations.

37. Several of the aggrieved borrowers seeking to renegotiate their loans through respondents testified at the evidentiary hearing.

38. Mr. Robinson dealt with LIS employee Peggy Smith upon the assumption that she was licensed by the Department. Mr. Robinson was solicited by Peggy Smith by a telephone call because she evidently knew that his mortgage loan was in default and foreclosure proceedings had been commenced against him. When Mr. Robinson agreed to have LIS work to renegotiate his loan and obtain changes in his interest rate and payments, Mr. Robinson was told by Peggy Smith on behalf of respondent LIS to pay \$1800 "upfront" to "stop everything." He signed a contract for the advance fee payment with Peggy Smith and respondent Canada's wife, who was serving as respondent LIS' office manager. Mr. Robinson's lender was Chase Bank (Chase). Respondents promised to stop the foreclosure process and to renegotiate the loan contract with Chase. Respondents told Mr. Robinson to stop making payments so he could save money. Peggy Smith and respondent Canada's wife assured Mr. Robinson that respondents had a great success rate with Chase, and in 99 or 100 per cent of the instances in which they dealt with Chase on behalf of lenders, the loans were successfully renegotiated, rewritten and "payments oftentimes were cut in half."

39. Mr. Robinson ultimately paid respondents \$2800. Mr. Robinson noted that once he had paid respondents the full fee, all communication with him from respondents stopped. His phone calls were either placed on hold, refused, or if someone actually answered the phone, he was told that respondent Canada was "working on the transaction," but was not available to speak to Mr. Robinson.

40. Mr. Robinson later discovered that Chase had sold his loan to First Franklin, and, investigating further, he discovered that there was no evidence that respondents contacted either Chase or First Franklin regarding his loan or the foreclosure proceedings. Mr. Robinson was left to contact the new lender himself. First Franklin told Mr. Robinson he had to "get caught up" with his payments in order to get refinanced, which produced a considerable financial strain in light of the fact that he had already paid \$2800 to respondents to obtain assistance with this same problem.

41. At one point, Mr. Robinson attempted to negotiate with respondent Canada to withdraw from the transaction and obtain a refund of a portion of his fees which he believed were unearned. Mr. Robinson testified that respondent Canada agreed to return three fourths of the fees paid. Respondent Canada reneged and the return payment was never made.

42. Borrower Cloatelle Lawson was cold call solicited by Peggy Smith by telephone offering assistance with her loan with Bank of America. Ms. Lawson was in financial distress, owned her home subject to a mortgage, but hoped to reduce her loan payments and her interest rate.

43. Ms. Lawson paid \$2500 in advance fees to respondents and signed a written contract, in exchange for respondents' promises that respondents would obtain for Ms. Lawson a 50 per cent reduction in her payments and that the loan modification transaction would be completed within two to three weeks. Both Peggy Smith and respondent Canada assured her that respondents had a 98 to 99 per cent success rate in their efforts to renegotiate loans and obtain the reductions and payments promised to Ms. Lawson.

44. Like Mr. Robinson, respondents told Ms. Lawson to quit making her payments. After the fees were paid, communication with respondents became nearly impossible. Ms. Lawson called repeatedly to respondent's business offices and was consistently told that respondents were "working on it." Like Mr. Robinson, Ms. Lawson checked with her lender to find out what, if anything, respondents had done with regard to renegotiating her loan. She discovered that respondents had made an initial contact with her mortgage lender, but nothing else had been done or occurred, and the lender noted that the status of Ms. Lawson's loan restructuring was, "waiting to hear back" from respondents.

45. Ms. Lawson got far behind on her payments and, in order to keep her home, she was required to borrow money to bring her loan current. Like Mr. Robinson, she received no refund, nor any evident material benefit for the payment of her fees to respondents.

46. Mr. Barrick testified similarly to Mr. Robinson and Ms. Lawson. Respondents guaranteed Mr. Barrick they could obtain an interest rate reduced to two and a half per cent, due to hardship. Mr. Barrick paid \$2500 in advance to respondents and signed an advance fee contract. Unlike Mr. Robinson and Ms. Lawson, there was evidence that respondents did make some efforts to contact and negotiate with Mr. Barrick's lender, Chase. However, respondents were wholly unable to deliver what they had assured Mr. Barrick they could produce in a renegotiation with Chase Bank. Mr. Barrick received no refund of his advance fees paid, and, after numerous phone calls to respondents went unanswered, he went to respondents' offices to talk to respondents about why respondents had failed to keep their part of the bargain. He found respondents' offices closed and the doors locked, with evidence that respondents had closed the business and vacated the office space.

47. The Department's auditor testified regarding her interactions with respondent Canada and his staff during an audit performed in September and October 2009, at respondents' offices. The auditor confirmed that respondent Canada is the 100 per cent owner and designated broker-officer of respondent LIS during in the course of her interview. She pointed out to respondent Canada that the Real Estate Law and the Department's Regulations require that mortgage brokers retain copies of all transaction records for three years, following her request for loan files and transaction documents for the loans identified in the Factual Findings set forth above. Respondent Canada could not produce some of the files and transaction documents for some of the borrowers.

48. During the course of her audit, during conversation with respondent Canada, the auditor pointed out that the respondents had received a total of \$451,658 in advance fees

during the one year period of her audit that were placed into the Bank of America general checking account for LIS Mortgage. The auditor pointed out that the signature card on the checking account into which all the advance fees had been deposited reflected respondent Canada's unlicensed wife as a cosigner without any evidence that she was licensed or had been bonded. She also pointed out that the commercial bank checking account respondents were using to receive advance fees and disburse funds to pay business expenses was not a set up as a trust account, and that the advance fees funds received were trust funds that had not been received, sequestered and accounted for as trust funds. Respondent Canada acknowledged that there were no separate records per beneficiary for the trust funds received and that he had never done any accounting that produced individual accountability for each of the borrower-depositors into the bank account. When the auditor pointed out to respondent Canada that as of the time of her audit and reconciliation the account was \$27,985.08 short, respondent Canada told the auditor that the money had been spent on business bills and business expenses, and that the shortage had not been reconciled. Respondent Canada acknowledged that he had no consent forms from any beneficiaries to reduce the trust funds on hand to below the amount owed to the clients who had deposited the funds. He acknowledged that he had no control records and no separate accounting for any deposit received from any client who had paid respondent LIS fees for loan renegotiation services. The auditor also discussed the advance fee agreement that respondent Canada was using and the fact that the Department had not approved the use of this advance fee agreement. Respondent Canada agreed that up until April 3, 2009, the Department had not approved his contract, but as of April 3, 2009, he received a "No Objection" letter from the Department, approving the contract. Respondent Canada had no additional comments to make when he signed the audit summary report following the conclusion of the audit.

LEGAL CONCLUSIONS

1. "The burden of proof in administrative proceedings involving the revocation or suspension of a professional license is clear and convincing proof to a reasonable certainty."² "Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind."³ The burden of proof is upon the Department to prove that legal cause exists to revoke or suspend respondents' licenses. This burden was applied to each and every factual and legal allegation contained in the Second Amended Accusation, and in making the Factual Findings above and the Legal Conclusions that follow.

2. The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done

² *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 835, 842, *James v. Board of Dental Examiners* (1985) 172 Cal. App. 3d 1096, 1105, *Realty Projects v. Smith* (1973) 32 Cal.App.3d 204.

³ *In Re David C.* (1984) 152 Cal.App. 3d 1189, 1208.

any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

[¶] ... [¶]

(d) Willfully 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 2.⁴

[¶] ... [¶]

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

FIRST CAUSE OF ACTION

3(a). Respondents violated B&P Code sections 10085 and 10085.5, and therefore violated B&P Code section 10177, subdivision (d). As set forth in the Factual Findings, up to and including April, 2009, respondents demanded and received advance fees for soliciting lenders on behalf of borrowers, offering to perform loan renegotiation services for borrowers, using an advance fee agreement not approved by the Department, in violation of Department Regulation section 2970.

3(b). Respondents violated B&P Code section 10146, and therefore violated B&P Code section 10177, subdivision (d). As set forth in the Factual Findings, respondents received advance fees from borrowers, and such funds received constituted trust funds. Respondents failed to deposit the trust funds into a trust account as required by Department Regulation section 2972, and failed to provide the depositors of those trust funds with a verified accounting of all advanced fees trust funds collected and disbursed, identifying the name of the holder of the funds, the client/borrower's name, services rendered, trust account into which the funds were deposited, the amount of the advance fees received, amounts disbursed, commissions paid, overhead, costs and profits disbursed from the trust funds.

3(c). Respondents violated B&P Code section 10176, subdivision (a), and therefore B&P Code section 10177, subdivision (d), by making the substantial misrepresentations to the borrowers from whom respondents received advance fees, as set forth in the Factual Findings.

⁴ Business and Professions Code section 10177, subdivision (d).

3(d). Respondents violated B&P Code section 10176, subdivision (b), and therefore B&P Code section 10177, subdivision (d), by making false promises to the borrowers of a character likely to influence or induce the borrowers to pay advance fees for loan negotiation services not provided, as set forth in the Factual Findings.

3(e). Respondents violated B&P Code section 10176, subdivision (i), and therefore B&P Code section 10177, subdivision (d), by engaging in fraud and dishonest dealing by making the substantial misrepresentations and false promises of a character likely to influence or induce the borrowers to pay advance fees for loan negotiation services not provided, as set forth in the Factual Findings.

3(f). Respondents violated B&P Code section 10177, subdivision (g), and therefore B&P Code section 10177, subdivision (d), by demonstrating negligence and incompetence in performing acts for which respondents are required to hold licenses under the Real Estate Law, as set forth in the Factual Findings.

3(g). Respondents violated B&P Code section 10177, subdivision (j), and therefore B&P Code section 10177, subdivision (d), by engaging in fraudulent conduct and dishonest dealing, as set forth in the Legal Conclusions above and, as set forth in the Factual Findings.

4. Therefore, as a result of the Legal Conclusions set forth above, separate legal cause exists for each Legal Conclusion to revoke or suspend respondents' individual and corporate real estate broker licenses.

SECOND CAUSE OF ACTION

5. Respondents violated B&P Code section 10137, and therefore B&P Code section 10177, subdivision (d), by allowing unlicensed persons Peggy Smith and Ryan Alexander to perform acts for which each was required to hold a license under the Real Estate Law, as set forth in the Factual Findings. Respondents violated B&P Code section 10138, and therefore violated B&P Code section 10177, subdivision (d), by compensating Ms. Smith and Mr. Alexander for performing acts requiring a real estate license. Therefore, as a result of the Legal Conclusion set forth above, separate legal cause exists to revoke or suspend respondents' individual and corporate real estate broker's licenses.

THIRD CAUSE OF ACTION

6(a). Respondents violated B&P Code sections 10145 and 10146, and therefore B&P Code section 10177, subdivision (d), by failing to deposit advance fees received as trust funds into a trust account, and by failing to maintain the advance fees received as trust funds in a trust account or deliver those funds back to the borrowers. Respondents maintained those advance fees/trust funds received from the borrowers identified in the Factual Findings in a commercial bank account that, as of August 31, 2009, had a trust fund accounting shortage in the sum of \$27,985.08. The shortage was due to the fact that respondents used trust funds to pay respondents' business expenses, as set forth in the Factual Findings.

6(b). Respondents violated Department Regulation section 2832.1, and therefore B&P Code section 10177, subdivision (d), by failing to obtain prior written consent of the borrowers identified in the Factual Findings who paid respondents advance fees for mortgage loan renegotiation services, giving respondents permission to reduce the aggregate balance of trust funds held on behalf of the borrowers in respondents' commercial bank account to an amount less than the existing trust fund liability, resulting in the shortage set forth in Legal Conclusion a above, and as set forth in the Factual Findings.

6(c). Respondents violated B&P Code sections 10145 and 10146, and therefore B&P Code section 10177, subdivision (d), by failing to deposit advance fees received as trust funds into a trust account within three business days of receipt of those funds, in violation of Department Regulation 2832, as set forth in the Factual Findings.

6(d). Respondents violated Department Regulation section 2831, and therefore B&P Code section 10177, subdivision (d), by failing to maintain a control record for trust funds received and disbursed and containing the information required in section 2831, as set forth in the Factual Findings.

6(e). Respondents violated Department Regulation section 2831.2, and therefore B&P Code section 10177, subdivision (d), by failing to perform, at least once a month, a reconciliation of all the separate beneficiary records within the trust account, with control records, and failing to maintain a record of such account reconciliations as required by section 2831.2 of the Department's Regulations, as set forth in the Factual Findings.

6(f). Respondents violated Department Regulation section 2834, and therefore B&P Code section 10177, subdivision (d), by allowing Sheryl Canada, a person not licensed by the Department and not bonded, to be a signatory on commercial bank accounts maintained by respondents into which advance fees trust funds were deposited and disbursed as set forth in the Factual Findings.

7. Therefore, as a result of the Legal Conclusions set forth above, separate legal cause exists for each Legal Conclusion to revoke or suspend respondents' individual and corporate real estate broker licenses.

FOURTH CAUSE OF ACTION

8. Respondents violated Department Regulation section 2715, and therefore B&P Code section 10177, subdivision (d), by failing to maintain on file with the Department the address of respondents' current principal place of business and current mailing address, and for failing to timely update the Department as to respondents' new principal place of business and current mailing address following a move, as set forth in the Factual Findings. Therefore, separate legal cause exists to revoke or suspend respondents' individual and corporate real estate broker licenses.

FIFTH CAUSE OF ACTION

9. Respondents violated B&P Code section 10148, and therefore B&P Code section 10177, subdivision (d), by failing to maintain for three years copies of all transaction documents and records executed or obtained by the broker in connection with any transaction requiring a real estate license, and failing to make available such records to the Department's representative upon reasonable notice, as set forth in the Factual Findings. Therefore, separate legal cause exists to revoke or suspend respondents' individual and corporate real estate broker licenses.

SIXTH CAUSE OF ACTION

10(a). Respondents violated B&P sections 10085 and 10085.5, thereby violating B&P section 10177, subdivision (d), in that respondents provided to borrowers Barrick and Hamilton, identified in the Factual Findings before April, 2009, written advance fee contracts in conjunction with the requirement that the borrowers pay advance fees for mortgage renegotiation services not yet provided, that had not been submitted to, reviewed, and approved by the Department prior to use, as required by B&P sections 10085 and 10085.5, and Department Regulation section 2970.

10(b). Respondents violated B&P Code section 10146, and Department Regulation 2972, and therefore B&P Code section 10177, subdivision (d), by collecting advance fees and failing to deposit the advance fees received as trust funds into a trust account, and failing to provide borrowers Barrick and Hamilton verified accountings of those advance fee/trust funds collected and disbursed, containing the information required for such verified accountings of trust funds set forth in Department Regulation section 2972.

10(c). Respondents violated B&P Code section 10176, subdivision (a), and therefore B&P Code section 10177, subdivision (d), with respect to borrowers Barrick and Hamilton, by making substantial misrepresentations to these borrowers from whom respondents received advance fees, as set forth in the Factual Findings.

10(d). Respondents violated B&P Code section 10176, subdivision (b), and therefore B&P Code section 10177, subdivision (d), by making false promises to borrowers Barrick and Hamilton of a character likely to influence or induce the borrowers to pay advance fees for loan negotiation services not provided, as set forth in the Factual Findings.

10(e). Respondents violated B&P Code section 10176, subdivision (i), and therefore B&P Code section 10177, subdivision (d), by engaging in fraud and dishonest dealing by making the substantial misrepresentations and false promises of a character likely to influence or induce borrowers Barrick and Hamilton to pay advance fees for loan negotiation services not provided, as set forth in the Factual Findings.

10(f). Respondents violated B&P Code section 10177, subdivision (g), and therefore B&P Code section 10177, subdivision (d), by demonstrating negligence and incompetence in

performing acts on behalf of borrowers Barrick and Hamilton for which respondents are required to hold licenses under the Real Estate Law, as set forth in the Factual Findings.

10(g). Respondents violated B&P Code section 10177, subdivision (j), and therefore B&P Code section 10177, subdivision (d), by engaging in fraudulent conduct and dishonest dealing, as set forth in the Legal Conclusions above and, as set forth in the Factual Findings

11. Therefore, as a result of the Legal Conclusions set forth above, separate legal cause exists for each Legal Conclusion to revoke or suspend respondents' individual and corporate real estate broker licenses.

SEVENTH CAUSE OF ACTION

12. Respondent Canada violated B&P Code sections 10159.2 and Department's Regulation section 2725, and therefore B&P Code section 10177, subdivision (d), by failing to exercise reasonable supervision and control over all the activities conducted on behalf of respondents by respondents' officers, licensed and unlicensed salespersons and employees of respondent's in order to attain and assure compliance with the Real Estate Law, as set forth in the Factual Findings. Therefore, separate legal cause exists to revoke or suspend respondent Canada's individual real estate broker license

BAR ORDER

13. The Department served notice to respondents in the Accusation and the First Amended Accusation of its intention to seek a bar order against respondent Canada, pursuant to B&P Code section 10087. This allegation and its request for the specific relief of a bar order against respondent Canada was not repeated in the Second Amended Accusation.

14. B&P Code section 10087 provides as follows:

(a) In addition to acting pursuant to the authority provided under Sections 10086, 10176, and 10177, the commissioner may, after appropriate notice and opportunity for a hearing, by order, suspend, or bar from any position of employment, management, or control, for a period not exceeding 36 months, a real estate salesperson or real estate broker, or an unlicensed person issued an order under Section 10086, if the commissioner finds either of the following:

(1) That the suspension or bar is in the public interest and that the person has committed or caused a violation of this division or rule or order of the commissioner, which violation was either known or should have been known by the person committing or causing it or has caused material damage to the public.

[¶] ... [¶]

(b) Within 15 days from the date of a notice of intention to issue an order pursuant to subdivision (a), the person may request a hearing under the Administrative Procedure Act (Chapter 4.5 (commencing with Section 11400) of Division 3 of Title 2 of the Government Code). If no hearing is requested within 15 days after the mailing or service of that notice and none is ordered by the commissioner, the failure to request a hearing shall constitute a waiver of the right to a hearing.

(c) Upon receipt of a notice of intention to issue an order pursuant to this section, the person who is the subject of the proposed order is immediately prohibited from engaging in any business activity involving real estate that is subject to regulation under this division.

(d) Persons suspended or barred under this section are prohibited from participating in any business activity of a real estate salesperson or a real estate broker and from engaging in any real estate-related business activity on the premises where a real estate salesperson or real estate broker is conducting business. Persons suspended or barred under this section are also prohibited from participating in any real estate-related business activity of a finance lender, residential mortgage lender, bank, credit union, escrow company, title company, or underwritten title company.

15. Factual and legal cause appears to exist to issue the bar order sought by the Department in this matter, but this prayer/request for the specific relief of a bar order appears to have been deleted in the superseding the Second Amended Accusation. No mention was made at the evidentiary hearing whether the bar order was still sought or was being withdrawn. In the absence of additional evidence of intention, it can only be assumed on this record that the omission of this particular prayer/request for relief was intentional as a reflection that the relief is no longer sought. Therefore, no further finding is made on the propriety of entering such an order against respondent Canada, or whether respondent Canada has committed or caused such violations of the Real Estate Law and the Department's Regulations, as enumerated above, as would support the issuance of such a bar order.

16. There was no evidence presented in mitigation or justification of the violations proved. There is no evidence of any rehabilitation by any respondent in this record.

17. The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners.⁵ The primary purpose of professional licensing schemes is the protection of the public, and the prevention of future

⁵ *Ettinger v. Board of Medical Quality Assurance*, (1980) 135 Cal.App.3d 853, 856,

harm to consumers.⁶ “The purpose of [the Real Estate License Law] is to protect the public by requiring and maintaining professional standards of conduct on the part of all persons licensed hereunder.”⁷ “These statutes are designed with the purpose of protecting the public from fraud, misrepresentation, incompetence, and sharp practice.”⁸ The Legislature intended to insure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear.”⁹


18. The disposition of this matter is not in doubt. The Factual Findings and Legal Conclusions above reflect dishonesty, fraud, disreputable and incompetent practice by respondents. All licenses and license rights issued to respondents by the Department must be revoked.

ORDER

All licenses and licensing rights of Brian Oliver Canada under the Real Estate Law are REVOKED.

All licenses and licensing rights of LIS Mortgage Corporation, a California Corporation, under the Real Estate Law are REVOKED.

DATED: November 30, 2012


STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

⁶ *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476, *In re Kelly* (1990) 52 Cal.3d 487, 496.

⁷ Insurance Code section 1737 (a very similar licensing scheme to the Real Estate Law, with similar consumer protection goals and good character and integrity licensing requirements).

⁸ *Harrington v. Department of Real Estate* (1989) 214 Cal.App. 3d 394, 402, *Goldberg v. Barger* (1974) 37 Cal.App.3d 987.

⁹ *Id.*, *Ring v. Smith* (1970) 5 Cal.App. 3d 197, 205.