

FILED
OCT 26 2011

DEPARTMENT OF REAL ESTATE

By *A. Allison*

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)

JOSEPH ARNOLD DE NUNZIO,)

Respondent.)

) NO. H-5508 SAC

) OAH NO. 2011030397

DECISION

The Proposed Decision dated September 14, 2011, 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 11/17/11

IT IS SO ORDERED 10/26/11

BARBARA J. BIGBY
Acting Real Estate Commissioner

Wayne S. Bell
By WAYNE S. BELL
Chief Counsel

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

JOSEPH ARNOLD DENUNZIO,

Respondent.

Case No. H-5508 SAC

OAH No. 2011030397

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on August 25, 2011, in Sacramento, California.

Michael B. Rich, Real Estate Counsel, represented Tricia D. Sommers (complainant), Deputy Real Estate Commissioner of the State of California.

Joseph Arnold DeNunzio (respondent) represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on August 25, 2011.

SUMMARY

Complainant seeks to discipline respondent's broker license because respondent employed and compensated an unlicensed person to engage in activities for which a real estate broker license was required, including solicit and collect an advance fee from a client without respondent having obtained a "no objection" letter from the Department. Respondent failed to deposit the advance fee into a trust fund and also failed to perform the requisite accountings of trust funds. He commingled the trust funds with his own personal funds. Cause exists to discipline the broker license. The evidence demonstrated that respondent lacks insight into the impropriety of his actions. Therefore, the interests of public safety and welfare demand the outright revocation of respondent's broker license.

FACTUAL FINDINGS

1. On October 23, 1992, the Department of Real Estate (Department) issued Real Estate Broker License No. B00937550 (broker license) to respondent. From January 1, 2007, until August 6, 2009, respondent conducted licensed activities under the fictitious name Amex Financial Services. Beginning on September 2, 2010, he began conducting licensed activities under the fictitious name American Financial Services. He continues to conduct licensed activities under that fictitious name. The Department filed a Desist and Refrain Order on January 9, 2008, ordering respondent to desist and refrain from collecting advance fees without first complying with Business and Professions Code section 10085 and California Code of Regulations, title 10, section 2970. There is no other history of discipline of the broker license.

2. On November 23, 2010, complainant, acting solely in her official capacity as a Deputy Real Estate Commissioner of the State of California, filed an Accusation seeking to discipline the broker license based on the Department's investigation of respondent's licensed activities in response to a complaint from Warren A. Bain.

Warren Bain's Complaint

3. Mr. Bain owned a piece of vacant land located at 25661 Waldon Road in Menifee, California. He was interested in developing the property and sought a construction loan secured by the property to help fund his development. Kuka Moilo'o agreed to help Mr. Bain obtain a loan and introduced Mr. Bain to David Cook in December 2007. Mr. Cook identified himself as the Senior Vice President for Operations with Amex Financial Services. He told Mr. Bain that he (Mr. Cook) could obtain a construction loan and sent Mr. Bain a loan agreement to sign and return with a "commitment fee" in the amount of \$1,500. Mr. Bain signed and returned the loan agreement, and his bank wired \$1,500 to Wells Fargo Bank Account No. 0672-196011 in accordance with Mr. Cook's instructions.

Either Mr. Bain or Mr. Moilo'o called Mr. Cook for the status of the construction loan every couple of weeks. Mr. Cook repeatedly assured them that the loan should come through "any day now." In May 2008, Mr. Cook called Mr. Bain and said that the lender needed an updated appraisal for the property. Mr. Bain paid for an appraisal. In or around September 2008, Mr. Cook said he could get the loan done within 15 days if Mr. Bain paid an additional \$3,000. Mr. Bain gave the money to Mr. Moilo'o, who in turn gave the money to Mr. Cook in exchange for a receipt which stated:

\$3000.00 received from Kuka Molióo on behalf of Warren Bain for deposit on loan for MR. [sic] Bain's 10 acre parcel located in Menifee, CA. Deposit is non-refundable but shall be credited back to Mr. Bain when

loan funds through the efforts of MR. [sic] David J. Cook.

On January 23, 2009, Mr. Bain sent correspondence to Mr. Cook seeking the status of the loan. He received no response. In May 2009, Mr. Bain left a message on Mr. Cook's answering machine threatening to sue for fraud if Mr. Cook did not return the call. While Mr. Cook returned the call, he had not obtained a loan. Mr. Moilo'o eventually referred Mr. Bain to the Department to file a complaint, which he did on October 20, 2009.

Department's Investigation of the Complaint

4. The Department assigned Mr. Bain's complaint to Deputy Real Estate Commissioner Marcus Beltramo for investigation. As part of his investigation, Deputy Commissioner Beltramo interviewed Mr. Cook. Mr. Cook admitted that he acted as an independent consultant for Amex Financial Services in his dealings with Mr. Bain. Mr. Cook confirmed that respondent and his company, Amex Financial Services, worked with multiple lenders in an effort to obtain a construction loan for Mr. Bain. The only lender who was interested was Hard Money Placement, Inc. According to Mr. Cook, the loan never funded because Mr. Bain did not own the property that was to be used as collateral. Mr. Cook admitted that he collected a \$1,500 advance fee from Mr. Bain for respondent's efforts to obtain a loan.

5. Deputy Commissioner Beltramo checked the Department's records to determine whether Mr. Cook was licensed by the Department. Mr. Cook has never been licensed by the Department in any capacity. Deputy Commissioner Beltramo also checked the Department's records to determine whether respondent ever submitted advance fee contracts and/or advance fee advertising materials to the Department for approval. Respondent never submitted either type of document to the Department for approval and never received a "no objection" letter from the Department.

6. Deputy Commissioner Beltramo interviewed and exchanged correspondence with respondent. Respondent claimed that he did not broker a real estate loan for Mr. Bain, but admitted "our only contact with the borrower was to help him find a direct lender." Respondent wrote, "we only act as a salesperson for 3rd party lenders," "we represent and work as a salesperson only for 3rd party companies . . .," and "Joseph A. De Nunzio is the broker of record and will be entitled to all future commissions generated from this new loan."

7. Mr. Bain's complaint triggered a Department audit of respondent's accounting and other records related to his real estate activities. Department auditor Anthony Boiteux performed the audit intermittently from March 11 through September 22, 2010. The audit period was January 1, 2007, through April 13, 2010.

The purpose of the audit was to determine whether respondent handled and accounted for trust funds in accordance with the Real Estate Law and all applicable regulations.

8. Mr. Boiteux had a telephone conversation with respondent, during which respondent said he did not broker loans, but merely acted as a "conduit" between borrowers and lenders. Later in the same conversation, he described himself as a "consultant." He elaborated by explaining that he "puts packages together for borrowers to take to lenders." He also explained that he had several lenders and would find one that he thought would be willing to fund a loan on terms agreeable to his clients.

When Mr. Boiteux stated that it sounded like respondent was acting as a real estate broker, respondent replied that Mr. Boiteux was correct and that was why the Department required him to obtain his broker license. Respondent also admitted that he charged his clients for the work he performed to package the information necessary for obtaining a loan. He also said he received between one-half and two points from the lender after the loan funded.¹ When Mr. Boiteux explained that the Real Estate Law's definition of "broker" appeared to apply to respondent's activities, respondent stated, "Yes, I know. That is why you make [sic] me get a broker's license." Respondent admitted that he charged Mr. Bain \$1,500 to put together documents necessary to obtain a loan.

9. Respondent told Mr. Boiteux that he (respondent) did not collect trust funds from clients and therefore did not maintain any trust accounts for his real estate activities. Respondent said Mr. Bain's \$1,500 payment was deposited into Wells Fargo Bank Account No. 0672-196011 (Account No. 1), respondent's personal bank account. Account No. 1 was the only bank account he maintained for his real estate activities from January 1, 2007, through April 13, 2010. Respondent agreed to provide Mr. Boiteux with documentation of the deposit. When Mr. Boiteux did not receive the documentation after three months, he called respondent. Respondent said, "we're going to have to put the boxing gloves on" because he did not agree that the \$1,500 constituted trust funds. Instead, he characterized the funds as money charged for an "employment agreement." He elaborated by explaining that he charged Mr. Bain \$1,500 to "build a loan package" and that it was his practice to search for lenders for his clients. He then provided Mr. Boiteux with a list of several lenders he has used in the past. In the case of Mr. Bain, however, respondent explained that he could not find a lender because it was discovered that Mr. Bain did not own the property he intended to use as collateral for the loan.

10. At the hearing, respondent introduced a document dated December 7, 2007, entitled "Real Estate Loan Commitment Letter Terms and Conditions." The Commitment Letter was admitted into evidence, without objection. Respondent conceded that the Commitment Letter identified Amex Financial Services as the

¹ "One point" is the equivalent of one percent of the amount borrowed.

“Lender/Broker.” He explained that he had told Mr. Bain that Amex Financial Services was acting as the broker for the loan because he (respondent) did not want another broker to argue that it was the broker of record and therefore entitled to the “10 point” fee identified in the Commitment Letter.

Respondent also admitted that the Commitment Letter characterized the \$1,500 Mr. Bain had paid for respondent’s services as an “application fee.” Respondent explained that clients would sometimes decide not to accept the loan after he had expended a lot of time and effort to find a lender and he would not get paid. Therefore, he changed his practice to charge an advance fee to avoid losing money if clients opted not to accept the loan.

Advance Fee Violations

11. On December 7, 2007, respondent signed a Real Estate Loan Commitment Letter as the president and chief executive officer of Amex Financial Services. By doing so, he agreed to act as a real estate broker and find a lender who was willing to fund a construction loan to Mr. Bain on the terms and conditions specified in the Commitment Letter. (Factual Findings 6 through 10.) A cover letter forwarding the Commitment Letter to Mr. Bain included instructions that he sign and return the Commitment Letter and provide an advance fee of \$1,500. Instructions to wire the funds to Account No. 1 were also provided. While the cover letter was purportedly signed by William “Bill” Johnson, it was actually signed and sent by Mr. Cook. Respondent explained that “William ‘Bill’ Johnson” was a pen name used to describe Mr. Cook’s activities.

Respondent’s protestations that he was not acting as a broker in his dealings with Mr. Bain were belied by his own admissions and were not supported by any credible evidence. Therefore, he was not believed.

12. Respondent never received a “no objection” letter from the Department authorizing him to solicit or collect an advance fee. (Factual Finding 5.) Nonetheless, Mr. Cook solicited and collected an advance fee from Mr. Bain on respondent’s behalf in December 2007. (Factual Findings 3 and 4.) Respondent’s contention that the \$1,500 collected from Mr. Bain was not an “advance fee” was based on his narrow definition of an advance fee, which is contrary to law.

13. Respondent failed to deposit Mr. Bain’s advance fee into a trust account with a bank or other recognized depository. (Factual Finding 9.)

14. Respondent failed to provide Mr. Bain with quarterly verified accountings of the advance fee Mr. Bain had paid.

Trust Fund Violations

15. Respondent has never had a trust account for his real estate activities. Account No. 1 was respondent's personal account and not a trust account. (Factual Finding 9.)

16. At no time did respondent keep "control records" for trust funds he deposited into Account No. 1. "Control records" keep track of trust funds held by a broker by itemizing all funds received and disbursed. For trust funds received, the control records must show the date they were received, from whom they were received, and the amount received. For funds disbursed, the records must show the date of disbursement, the amount disbursed, the check number, and the name of the payee. For any trust funds not deposited in an account, the records must show the name of the depository and the date the funds were forwarded to the depository. The records must show a running total of all trust funds held.

17. At no time did respondent keep a "separate record" for each beneficiary or transaction related to the trust funds he received from and on behalf of his principal. A "separate record" contains information similar to a control record, except it pertains to a specific beneficiary. For funds received, the separate record shows the date and amount of each deposit. When funds are disbursed, the record shows the date, check number, and amount of each disbursement. If the account in which the trust funds are deposited earns interest, the separate record must show the dates and amounts of interest earned and credited to the account. The record must show the balance of trust funds held for the particular beneficiary after the posting of each transaction.

18. At no time did respondent reconcile the trust funds he held on behalf of his principals. A "reconciliation" involves the broker comparing the total amount of trust funds received during any given month with the total amount disbursed during that same month.

19. Respondent commingled trust funds with personal funds when Mr. Bain's bank wired the \$1,500 advance fee to Account No. 1. (Factual Finding 9.)

Unauthorized Employment

20. Respondent hired Mr. Cook to solicit prospective borrowers on behalf of respondent and Amex Financial Services. (Factual Findings 4 and 11.) Mr. Cook's duties included soliciting and collecting advance fees from borrowers who retained respondent and Amex Financial Services to broker loans secured by real property, activities which required him to maintain a real estate license. But he did not have a license. (Factual Finding 5.) Respondent compensated Mr. Cook on an independent contractor basis for employment tax purposes.

Evidence in Mitigation, Aggravation, and Rehabilitation

21. The Department is required to consider all competent evidence of rehabilitation when deciding whether a licensee's conduct warrants the imposition of discipline and, if so, what form of discipline is appropriate. (Bus. & Prof. Code, § 482.) Respondent was adamant in his testimony that he was not acting as a broker when he attempted to arrange a loan for Mr. Bain. But clear and convincing evidence established otherwise. (Factual Findings 3, 4, 6, and 8 through 11; see, *Batson v. Strehlow* (1968) 68 Cal.2d 662, 670. [The defendant's characterization of himself as a "broker" is highly significant to the analysis of whether he was acting as a "broker" or a mere "finder"]; *Rees v. Department of Real Estate* (1977) 76 Cal.App.3d 286, 295 [The "finder's" exception does not apply when the broker acts beyond simply introducing the two parties].) He was equally adamant that the \$1,500 Mr. Bain paid was not an "advance fee." Again, clear and convincing evidence established otherwise. (Factual Findings 4, 8, 9, and 11; see, Bus. & Prof. Code, § 10026, subd. (a).)

22. As discussed below, cause exists to discipline respondent's broker license. Complainant argued that the broker license should be revoked because respondent does not understand the Real Estate Law and poses a danger to the public. The evidence established that, at best, respondent is incapable of understanding the law. At worst, he is unwilling to follow the law. Either way, the only discipline supported by the evidence is an outright revocation of respondent's broker license. His continued insistence that he did not violate the Real Estate Law demonstrates his lack of insight into the duties and responsibilities of a real estate broker and that he cannot be trusted with a restricted license.

LEGAL CONCLUSIONS

I. *Applicable Law*

A. *Advance Fees*

1. A real estate broker who proposes to collect an advance fee is required to get the approval of the Real Estate Commissioner at least 10 days prior to advertising, promoting, soliciting, or negotiating an agreement calling for the payment of an advance fee. (Bus. & Prof. Code, § 10085; Cal. Code Regs., tit. 10, § 2970, subd. (a).)

2. Any advance fee collected must be deposited into a trust fund account. Business and Professions Code section 10146 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 agency only when actually expended for the benefit of the principal or five days after the verified amounts mentioned hereinafter have been mailed to the principal. . . .

3. Real estate brokers are required to provide an accounting of all advance fees received to each principal from whom the advance fee was received. Business and Professions Code section 10146 states, in relevant part:

. . . The commissioner may issue such rules and regulations as he or she deems necessary to regulate the method of accounting, and to accomplish the purpose of the provisions of this code relating to advance fees including, but not limited to, establishing forms for an determining information to be included in such accounting. Each principal shall be furnished a verified copy of such accountings at the end of each calendar quarter and when the contract has been completely performed by the licensee. The commissioner shall be furnished a verified copy of any account or all accounts on his or her demand therefor. . . .

The accounting must include the following:

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.

(Cal. Code Regs., tit. 10, § 2972.)

B. *Trust Fund Violations*

4. California Real Estate Law requires a real estate broker to maintain a trust fund account whenever that broker is going to receive funds belonging to others. Business and Professions Code section 10145, subdivision (a), provides:

(1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds. . . .

The trust fund account must be in the name of the broker or the fictitious business under which the broker is licensed. (Cal. Code Regs., tit. 10, § 2832, subd. (a).)

5. Real estate brokers are required to keep "control records" for their trust accounts.

Every broker shall keep a record of all trust funds received, including uncashed checks held pursuant to instructions of his or her principal. This record, including records maintained under an automated data processing system, shall set forth in chronological sequence the following information in columnar form:

- (1) Date trust funds received.
- (2) From whom trust funds received.
- (3) Amount received.
- (4) With respect to funds deposited in an account, date of said deposit.
- (5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.
- (6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.
- (7) Daily balance of said account. . . .

(Cal. Code Regs., tit. 10, § 2831, subd. (a).)

6. Real estate brokers are required to keep "separate beneficiary records" as well.

A broker shall keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account and interest, if any, earned on the funds on deposit. This record shall include information sufficient to identify the transaction and the parties to the transaction. Each record shall set forth in chronological sequence the following information in columnar form:

- (1) Date of deposit.

- (2) Amount of deposit.
- (3) Date of each related disbursement.
- (4) Check number of each related disbursement.
- (5) Amount of each related disbursement.
- (6) If applicable, dates and amounts of interest earned and credited to the account.
- (7) Balance after posting transactions on any date.

(Cal. Code Regs., tit. 10, § 2831.1, subd. (a).)²

7. Real estate brokers are required to reconcile their “separate beneficiary records” with their “control records” on at least a monthly basis. (Cal. Code Regs., tit. 10, § 2831.2.)

8. Real estate brokers may not commingle their own personal funds with trust funds. (Bus. & Prof. Code, § 10176, subd. (e).)

C. *Unlawful Employment*

9. At all times relevant to this action, Business and Professions Code section 10137 provided, in relevant part:

It is unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real

² The mere receipt of trust funds is the event that triggers the duty to maintain separate beneficiary records, not the actual deposit of those funds into a trust account. The governing statute requires “the broker [to] maintain a separate record of the receipt and disposition of all [trust funds,] including any interest earned on the funds.” (Bus. & Prof. Code, § 10145, subd. (g); see, *Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791, 796-797 [the courts look to the governing statute to help interpret administrative regulations].) Furthermore, California Code of Regulations, title 10 section 2831, subdivision (a), requires an accounting of “all trust funds received” (See, *Mautner v. Peralta* (1989) 215 Cal.App.3d 796, 804 [statutes relating to the same subject matter are construed together as constituting a single body of law].) Therefore, the duty to maintain separate beneficiary records applied to respondent even though he did not maintain a trust account.

estate salesman licensed under the broker employing or compensating him; provided, however, that a licensed real estate broker may pay a commission to a broker of another State. . . .³

II. *Cause for Discipline*

10. A broker license may be disciplined if the broker willfully disregarded or violated the Real Estate Law or any rules or regulations adopted pursuant to such law. (Bus. & Prof. Code, § 10177, subd. (d).) Cause exists to discipline respondent's broker license because he willfully disregarded or violated the Real Estate Law when he engaged in the following acts, each one of which constitutes separate cause:

a. Respondent collected an advance fee from Mr. Bain without having received a "no objection" letter from the Department (Factual Findings 11 and 12)), a violation of Business and Professions Code section 10085 and California Code of Regulations, title 10 section 2970, subdivision (a), as discussed in Legal Conclusion 1;

b. Respondent failed to deposit the advance fee Mr. Bain's bank wired into Account No. 1 into a trust account (Factual Finding 13), a violation of Business and Professions Code section 10146 as discussed in Legal Conclusion 2;

c. Respondent failed to provide Mr. Bain with quarterly verified accountings of the advance fee he had paid (Factual Finding 14), a violation of Business and Professions Code section 10146 and California Code of Regulations, title 10 section 2972 as discussed in Legal Conclusion 3;

d. Respondent did not maintain a trust account in his name or Amex Financial Service's name (Factual Finding 15), a violation of Business and Professions Code section 10145, subdivision (a)(1), and California Code of Regulations, title 10 section 2832, subdivision (a), as discussed in Legal Conclusion 4;

e. Respondent failed to keep control records for trust funds he received from Mr. Bain (Factual Finding 16), a violation of California Code of Regulations, title 10 section 2831, subdivision (a), as discussed in Legal Conclusion 5;

³ The subsequent amendments to the statute are irrelevant. (Stats. 2010, ch. 287 (S.B. 1137), § 1.)

f. Respondent failed to keep separate records for trust funds he received from Mr. Bain (Factual Finding 17), a violation of California Code of Regulations, title 10 section 2831.1, subdivision (a), as discussed in Legal Conclusion 6;

g. Respondent never reconciled the separate records with the control records (Factual Finding 18), a violation of California Code of Regulations, title 10 section 2831.2 as discussed in Legal Conclusion 7;

h. Respondent commingled trust funds with his personal funds when Mr. Bain's bank wired the \$1,500 advance fee into Account No. 1 (Factual Finding 19), a violation of Business and Professions Code section 10176, subdivision (e), as discussed in Legal Conclusion 8;

11. A broker license may be disciplined if the broker "demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license." (Bus. & Prof. Code, § 10177, subd. (g).) The acts which constitute respondent's willful disregard or violation of the Real Estate Law as discussed in Legal Conclusion 10 demonstrate that he was negligent or incompetent. Therefore, those acts, individually and collectively, constitute cause to discipline his license pursuant to Business and Professions Code section 10177, subdivision (g). (Factual Findings 11-19.)

12. A broker license may be disciplined pursuant to Business and Professions Code section 10176, subdivision (e), if the broker commingles his own personal funds with trust funds as discussed in Legal Conclusion 8. Cause exists to discipline respondent's license because he commingled trust funds with his own personal funds in Account No. 1. (Factual Finding 19.)


13. A broker license may be disciplined pursuant to Business and Professions Code section 10137 if the broker employs or compensates an unlicensed person for performing activities for which a license is required as discussed in Legal Conclusion 9. Cause exists to discipline respondent's license because he employed and compensated Mr. Cook to solicit prospective borrowers on behalf of respondent and assist them with obtaining a loan secured by real property. Mr. Cook also solicited and collected an advance fees. (Factual Finding 20.) A real estate license is required to perform such activities. (Bus. & Prof. Code, §§ 10131, subd. (d); 10131.2.) Mr. Cook has never been licensed by the Department. (Factual Finding 5.)

14. Cause exists to discipline respondent's broker license for the reasons discussed in Legal Conclusions 10 through 13, individually and collectively. When all of the evidence is considered, public safety demands that his broker license be revoked as explained in Factual Findings 21 and 22.

ORDER

All licenses and licensing rights of respondent Joseph Arnold DeNunzio under the Real Estate Law are REVOKED.

DATED: September 14, 2011


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

PLG

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FILED
NOV 23 2010
DEPARTMENT OF REAL ESTATE
By *L. Frost*

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of) NO. H-5508 SAC
12)
13 JOSEPH ARNOLD DE NUNZIO,) ACCUSATION
14)
15 Respondent.)
16)

17 The Complainant, TRICIA D. SOMMERS, a Deputy Real Estate Commissioner
18 of the State of California, for Accusation against Respondent JOSEPH ARNOLD DE NUNZIO
19 doing business under the fictitious name of AMERICAN FINANCIAL SERVICES and
20 formerly doing business under the fictitious name of AMEX FINANCIAL SERVICES, is
21 informed and alleges as follows:

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23 The Complainant, TRICIA D. SOMMERS, a Deputy Real Estate Commissioner
24 of the State of California, makes this Accusation against Respondents in her official capacity.

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Respondent JOSEPH ARNOLD DE NUNZIO (hereinafter "Respondent DE NUNZIO" or "Respondent") is presently licensed and/or has license rights under the Real Estate Law, Part 1 of Division 4 of the California Business and Professions Code (hereafter "the Code").

3

At all times herein mentioned, Respondent DE NUNZIO was and is licensed by the Department of Real Estate (hereinafter "the Department") as a real estate broker.

4

From on or about November 28, 2000, through and until on or about August 5, 2009, and at all times herein mentioned, Respondent DE NUNZIO was licensed by the Department as real estate broker under the fictitious business name of AMEX FINANCIAL SERVICES.

5

From on or about September 2, 2010, and at all times thereafter, Respondent DE NUNZIO was licensed by the Department as real estate broker under the fictitious business name of AMERICAN FINANCIAL SERVICES.

6

At all times herein mentioned, Respondent DE NUNZIO was the chief executive officer of, a director of, a principal stockholder of, and the agent for service of process for Amex Financial Corporation, a California corporation, which is located at and/or conducting business at 13210 Wells Fargo Drive in Groveland, California, which is also the main office address of record for Respondent DE NUNZIO, and therefore, said corporate entity was and is the alter ego of Respondent DE NUNZIO, and whenever a reference is made to, or if a motion is made to amend this Accusation to conform to proof and/or to reference, an act or omission or representation of Amex Financial Corporation, such allegation shall be deemed to mean that

///

1 Respondent DE NUNZIO was so acting, or failing to act, and/or speaking. At no time was
2 Amex Financial Corporation licensed by the Department as a real estate broker.

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4 At all times herein mentioned, Respondent DE NUNZIO engaged in the business
5 of, acted in the capacity of, advertised, or assumed to act as a real estate broker within the State
6 of California within the meaning of Section 10131(d) of the Code, including on behalf of others,
7 for compensation or in expectation of compensation, Respondent solicited borrowers or lenders
8 for or negotiated loans or collected payments or performed services for borrowers or lenders or
9 note owners in connection with loans secured directly or collaterally by liens on real property or
10 on a business opportunity.

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12 Within the three-year period prior to the filing of this Accusation and at all times
13 herein mentioned, in the course and scope of the activities described in Paragraph 7, above,
14 Respondent employed or compensated David J. Cook and William Johnson to solicit borrowers
15 and/or lenders, and/or to negotiate loans secured directly or collaterally by liens on real property,
16 wherein such loans were to be brokered, arranged, processed, and/or consummated on behalf of
17 others, and/or solicited and negotiated to perform services for borrowers in connection with
18 loans secured directly or collaterally by liens on real property or on a business opportunity,
19 pursuant to Section 10131(d) of the Code, wherein Respondent claimed, demanded, charged,
20 received, and collected, and provided a written contract for, advance fees from prospective
21 borrowers for services Respondent was to perform thereafter for or in expectation of
22 compensation, including, but not limited to, the following transaction:

23 Borrower	Property	Advance Fee	Date	Written Fee
			Collected	Agreement
24 Warren Bain	25661 Waldon Road	\$1,500.00	12/13/07	12/7/07
25	Menifee, California			

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2 At no time herein mentioned did the Department license either David J. Cook or
3 William Johnson as either a real estate broker or as a real estate salesperson.

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5 As set forth in Paragraphs 8 and 9, above, Respondent DE NUNZIO employed or
6 compensated David J. Cook and William Johnson in violation of Section 10137 of the Code
7 (unlawful for licensed broker to employ or compensate, directly or indirectly, an unlicensed
8 person to perform acts requiring a real estate license).

9
10 The fees described in Paragraph 8, above, constituted an "advance fee" within the
11 meaning of Section 10026 of the Code ("Advance Fee" is fee claimed, demanded, charged,
12 received, collected or contracted from principal for listing, for offer to sell or lease property or
13 business opportunity, for referral to brokers or salesmen, for soliciting borrowers or lenders, for
14 negotiating real estate loans) and Section 10131.2 of the Code (real estate broker is a person
15 who engages in business of claiming, demanding, charging, receiving, collecting or contracting
16 for advance fees in connection with any employment to promote sale, lease of real property or
17 business opportunity, or exchange or to obtain loans on real property). Said fees constituted
18 trust funds within the meaning of Section 10145 of the Code (broker accepts funds belonging to
19 others in connection with acts requiring a real estate license) and Section 10146 of the Code
20 (advance fees collected by broker are trust funds).

21
22 In connection with the collection, receipt, and handling of the advance fees as
23 described in Paragraph 8, above, Respondent provided to the borrowers a written advance fee
24 contract that had not been submitted to, reviewed, and approved by, the Department of Real
25 Estate prior to use as required by Sections 10085 and 10085.5 of the Code (unlawful to claim,
26 demand, receive advance fee for soliciting lenders on behalf of or performing services for
27 borrowers using an advance fee agreement not approved by Department) and by Chapter 6, Title

1 10, California Code of Regulations (hereinafter "Regulations"), Section 2970 (requiring
2 submission to commissioner for approval of all advance fee materials and agreements).

3 13

4 Within the three-year period prior to the filing of this Accusation, in connection
5 with the collection, receipt and handling of advance fees described in Paragraph 8, above,
6 Respondent DE NUNZIO failed to deposit said funds into a trust account in violation of Section
7 10145 of the Code (broker accepting funds belonging to others shall immediately place funds in
8 neutral escrow, into a trust fund account maintained by broker at a bank, or into hands of
9 broker's principal) and Section 10146 of the Code (broker shall deposit advance fees into trust
10 account).

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12 Within the three-year period prior to the filing of this Accusation, in connection
13 with the collection, receipt and handling of advance fees described in Paragraph 8, above,
14 Respondent DE NUNZIO deposited said trust funds into a bank account at Wells Fargo Bank,
15 Sonora Branch, account number 0672196011 (hereinafter "Account #1"), which was not
16 designated as a trust account in the name of the broker as trustee in violation of Section 2832 of
17 the Regulations (broker shall deposit trust funds into trust fund account at a bank or other
18 financial institution in the name of broker as trustee).

19 15

20 Respondent deposited the \$1,500.00 advance fee trust funds set forth in
21 Paragraph 8, above, belonging to Warren Bain into Account #1 in violation of Section 10176(e)
22 of the Code (broker commingling with his or her own money or property the money or other
23 property of others which is received and held by him or her).

24 16

25 Within the three-year period prior to the filing of this Accusation, in connection
26 with the collection, receipt and handling of advance fees described in Paragraph 8, above,
27 Respondent DE NUNZIO disbursed the advance fee trust funds to himself or others and failed

1 to provide to the borrower the required verified accounting of the advance fee trust funds and
2 failed to provide to the borrower any accounting whatsoever, and failed to account for the
3 amounts of trust funds disbursed, services rendered, the date of trust fund disbursement, the
4 commissions paid, agents' names, and overhead and profit in violation of Section 10146 of the
5 Code (principal shall be furnished quarterly verified accounting and at completion of contract)
6 and containing the information required by Section 2972 of the Regulations (accounting shall
7 include agent's name, principal's name, services rendered, identify trust account, advance
8 amount, commissions paid, overhead costs and profit).

9 17

10 Within the three-year period prior to the filing of this Accusation, in connection
11 with the collection and disbursement of trust funds, as alleged in Paragraphs 8, 11 and 14,
12 above, Respondent DE NUNZIO:

- 13 (a) Failed to keep a record of all trust funds received containing all of the
14 information required under Section 2831 of the Regulations (broker shall
15 keep record in chronological order and in columnar form of trust funds
16 received, date received, from whom received, amount, date of deposit,
17 check number, date of disbursement, daily balance of account) for
18 Account #1;
- 19 (b) Failed to maintain a separate record for each beneficiary containing all of
20 the information required under Section 2831.1 of the Regulations (broker
21 shall keep separate for each beneficiary of trust funds in chronological
22 order and in columnar form containing, date of deposit, amount, date of
23 disbursement, disbursement check number, disbursement amount,
24 balance after posting) for Account #1;
- 25 (c) Failed to perform, at least once a month, a reconciliation of all the
26 separate beneficiary records with the control record, and/or failed
27 to maintain a record of such reconciliations as required by Section 2831.2

1 of the Regulations (maintain balance of all separate beneficiary and
2 reconcile funds received with funds disbursed, etc.) for Account #1;

3 18

4 The acts and/or omissions of Respondent DE NUNZIO as alleged above
5 constitute cause for the suspension or revocation of the licenses and license rights of
6 Respondent under the following provisions:

- 7 (a) As alleged in Paragraph 10, above, under Section 10137 of the Code
8 (unlawful for licensed broker to employ or compensate, directly or
9 indirectly, an unlicensed person to perform acts requiring a real estate
10 license) in conjunction with Section 10177(d) of the Code (suspension or
11 revocation of license for willful disregard or violation of the Real Estate
12 Law, §§ 10000 et seq. and §§ 11000 et seq. of the Code, or of the
13 Regulations);
- 14 (b) As alleged in Paragraph 12, above, under Sections 10085 and 10085.5 of
15 the Code (unlawful to claim, demand, receive advance fee for soliciting
16 lenders on behalf of or performing services for borrowers using an
17 advance fee agreement not approved by Department) and Section 2970 of
18 the Regulations (requiring submission to commissioner for approval of all
19 advance fee materials and agreements) in conjunction with Section
20 10177(d) of the Code;
- 21 (c) As alleged in Paragraph 13, above, under Section 10145 of the Code
22 (broker accepting funds belonging to others shall deposit such funds not
23 immediately into hands of principal or into neutral escrow depository
24 shall deposit into a trust account maintained by broker in a bank until
25 disbursed in accordance with principal's instructions) in conjunction with
26 Section 10177(d) of the Code;
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- (d) As alleged in Paragraph 14, above, under Section 2832 of the Regulations (broker shall deposit trust funds into trust fund account at a bank or other financial institution in the name of broker as trustee) in conjunction with Section 10177(d) of the Code;
- (e) As alleged in Paragraph 15, above, under Section 10176(e) of the Code (broker commingling with his or her own money or property the money or other property of others which is received and held by him or her);
- (f) As alleged in Paragraph 16, above, under Section 10146 of the Code (principal shall be furnished quarterly verified accounting and at completion of contract) and Section 2972 of the Regulations (accounting shall include agent's name, principal's name, services rendered, identify trust account, advance amount, commissions paid, overhead costs and profit) in conjunction with Section 10177(d) of the Code;
- (g) As alleged in Paragraph 17(a), above, under Section 2831 of the Regulations (broker shall keep record in chronological order and in columnar form of trust funds received, date received, from whom received, amount, date of deposit, check number, date of disbursement, daily balance of account) in conjunction with Section 10177(d) of the Code;
- (h) As alleged in Paragraph 17(b), above, under Section 2831.1 of the Regulations (broker shall keep separate for each beneficiary of trust funds in chronological order and in columnar form containing, date of deposit, amount, date of disbursement, disbursement check number, disbursement amount, balance after posting) in conjunction with Section 10177(d) of the Code;
- (i) As alleged in Paragraph 17(c), above, under Section 2831.2 of the Regulations (maintain balance of all separate beneficiary and reconcile

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funds received with funds disbursed, etc.) in conjunction with Section 10177(d) of the Code; and/or,

(j) As alleged in Paragraphs 8 through 17, inclusive, above, under Section 10177(g) of the Code (demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license).

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



TRICIA D. SOMMERS
Deputy Real Estate Commissioner

Dated at Sacramento, California,
this 27th day of November, 2010.