

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of Accusation of:

JAMES LEE ELLINGWOOD,

Respondent.

Case No. H-8487 SF

OAH No. N2003090095

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on January 8, 2004.

David B. Seals, Counsel, represented complainant Les R. Bettencourt, a Deputy Real Estate Commissioner of the State of California.

Phillip M. Adleson, Attorney at Law, 577 Salmar Avenue, Second Floor, Campbell, California 95008, represented respondent James Lee Ellingwood, who was present.

The matter was submitted on January 8, 2004.

FACTUAL FINDINGS

1. Complainant Les R. Bettencourt made and filed the accusation in his capacity as a Deputy Real Estate Commissioner of the State of California.

2. Respondent James Lee Ellingwood (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, as a real estate broker doing business as Excel Financial.

3. At all times relevant to this proceeding respondent engaged in the business of and acted in the capacity of a real estate broker in the State of California within the meaning of section 10131(d) of the Business and Professions Code, by soliciting borrowers or lenders for or negotiating loans or collecting payments or performing

services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

4. At all times relevant to this proceeding, respondent accepted or received funds in trust (trust funds) from and on behalf of his principals placing them in a bank account and at times thereafter disbursing them.

5. From June 3, 2002, through April 28, 2003, the Department performed an investigative audit of respondent's records and bank records as they pertained to his activities as a real estate broker for the period of January 1, 2001, through March 31, 2003.

Undisputed Audit Findings

6. Respondent maintained one bank account for trust funds at the Bank of the West, 1010 S. First Street, San Jose. As of March 31, 2003, the adjusted balance of the trust account (James Ellingwood dba Excel Financial Trust Account) was -\$9,532.50, and the trust fund accountability was \$27,128.54, leaving a trust fund shortage of \$36,661.04.

7. Respondent did not timely file the annual reports due May 31, 2001, and May 31, 2002, as required by section 10232.2 of the Business and Professions Code.

8. Respondent did not timely file the quarterly trust fund status reports due April 30, July 31 and October 31 for the calendar years of 2000 and 2001, as required by section 10232.25 of the Business and Professions Code.

9. As of March 31, 2003, respondent had \$7,813.94 of his own funds in the trust account for longer than 25 days in violation of subdivision (e) of section 10176 of the Business and Professions Code and section 2835 of title 10 of the California Code of Regulations.

10. Respondent failed to reconcile the balance of all separate beneficiary records with the balance of the control record on a monthly basis as required by section 2831.2 of title 10 of the California Code of Regulations.

11. For the period covered by the audit, respondent failed to obtain signatures of investors on lender purchaser disclosure statements and to retain copies of the signed lender purchaser disclosure statements as required by section 10232.4 of the Business and Professions Code for three loans.

Prior Discipline

12. Effective November 1, 1993, in Accusation No. H-6762 SF, the Real Estate Commissioner ordered the suspension of the real estate licenses and licensing rights of respondent for his violation of section 2831.2 of title 10 of the California Code of Regulations in conjunction with section 10177(d) of the Business and Professions Code.

Other Matters

13. Respondent does not dispute any of the audit findings or violations. Following the former disciplinary action, he switched from manual accounting system to a software system called Golden Omega. The software worked well until the second quarter of 1999 when the beneficiary records could not be reconciled. Respondent made attempts to have Golden Omega fix the problem, but they could not. Respondent stopped filing the required reports with the Department because he thought he could resolve the problem. In addition, respondent believed that he could not file a report if he could not reconcile the beneficiary accounts.

What respondent did not do was notify the Department of his reconciliation problems or of his failure to file the reports. Instead, respondent remained silent until the Department contacted him in August of 2001 inquiring about the missing reports.

14. Respondent believes that he has resolved all of the problems found in the Department's audit. The trust account was balanced in May of 2003. At that time, all excess broker funds were removed from the trust fund and monies were deposited to make up for the shortage. The source of the shortage has been discovered and resolved. The annual reports and quarterly trust fund status reports for the period in question have been filed with the Department.

15. The Department has not yet conducted a second audit to ensure that the corrections made by respondent are to its satisfaction.

16. There were no financial losses to borrowers or lenders by reason of respondent's conduct.

17. Respondent has revised his procedures for ensuring that he receives and retains a signed lender purchaser disclosure statement. He will no longer fund a loan without the signed statement in his possession.

18. Since July of 2003 respondent has filed all quarterly reports timely.

19. Complainant does not seek to revoke respondent's broker license. Rather he seeks a disciplinary order that will ensure that respondent will undertake all necessary steps to fully comply with the Department's rules and regulations in the future.

Respondent concedes that things got away from him, concedes the violations, and is willing to pay the costs of all audits. He believes that the financial aspects of this case are a huge financial incentive to him to comply with Department rules and regulations.

LEGAL CONCLUSIONS

1. Under subdivision (d) of Business and Professions Code section 10177 the Commissioner may suspend or revoke the license of a real estate licensee who has violated the Real Estate Law (Part 1 (commencing with section 10000)) or Chapter 1 (commencing with section 11000) of Part 2 of 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. By reason of the matters set forth in Factual Findings 6 through 8, and 9 through 11, it was established that respondent violated sections 10145, 10232.2, 10232.25, and 10232.4 of the Business and Professions Code, and sections 2831.2 and 2835 of the California Code of Regulations. Cause for discipline exists under Business and Professions Code section 10177, subdivision (d).

2. Under subdivision (e) of Business and Professions Code section 10176 the Commissioner may suspend or revoke the license of a real estate licensee who has commingled with his own money or property the money or property of another which is received and held by him. By reason of the matters set forth in Factual Finding 9, it was established that respondent had commingled his own money with that of his clients held in trust. Cause for discipline exists under Business and Professions Code section 10176, subdivision (e).

3. All matters set forth in the Factual Findings were considered in determining that the public will be adequately protected by the following order which imposes a stayed two year suspension, with an actual suspension of 30 days, and which requires respondent to pay the costs of the audit at issue in this proceeding and a subsequent audit.

ORDER

All licenses and licensing rights of respondent are suspended for two years from the effective date of this Decision; provided, however, that the suspension shall be stayed upon the following terms and conditions:

1. Respondent's license and license rights shall be actually suspended for a period of 30 days. Respondent may, pursuant to section


10175.2, petition the Commissioner to pay a monetary penalty and thereby further stay imposition of the term of the actual suspension.

2. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.

3. The Commissioner may, if a final subsequent determination is made, after hearing or upon stipulation, that cause for disciplinary action occurred during the term of the suspension provided for in condition "1," vacate and set aside the stay order including any further stay imposed pursuant to section 10175.2. Should no order vacating the stay be made pursuant to this condition or condition "4" below, the stay imposed herein shall become permanent.

4. Pursuant to section 10148 of the Business and Professions Code, respondent shall pay the Commissioner's reasonable cost for: a) the audit which led to this disciplinary action, and b) a subsequent audit to determine if respondent has corrected the trust fund violation(s) found in paragraphs 1 and 2 of the Legal Conclusions. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work and per diem. Respondent shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may, in his discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between the respondent and the Commissioner. The vacation and the set aside of the stay shall remain in effect until payment is made in full, or until respondent enters into an agreement satisfactory to the Commissioner to provide for payment. Should no order vacating the stay be issued, either in accordance with this condition or condition "3," the stay imposed herein shall become permanent.

DATED: February 17, 2004



MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings

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

FILED
OCT 29 2003

DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of

JAMES LEE ELLINGWOOD

} *Shelly Ely*
Case No. H-8487 SF
OAH No. N-2003090095

Respondent

**FIRST CONTINUED
NOTICE OF HEARING ON ACCUSATION**

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at **THE OFFICE OF ADMINISTRATIVE HEARINGS, THE ELIHU HARRIS STATE BUILDING, 1515 CLAY STREET, SUITE 206, OAKLAND, CALIFORNIA 94612** on **THURSDAY -- JANUARY 8, 2004**, at the hour of **9:00 AM**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: OCTOBER 29, 2003

By *David B. Seals*
DAVID B. SEALS,, Counsel *(S.E.)*

FILED
SEP 10 2003

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By Shelly Coy

In the Matter of the Accusation of

JAMES LEE ELLINGWOOD,

}

Case No. H-8487 SF

OAH No. N2003090095

Respondent

NOTICE OF HEARING ON ACCUSATION

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DEPARTMENT OF REAL ESTATE

Dated: SEPTEMBER 10, 2003

By David B. Seals
DAVID B. SEALS, Counsel (S.E.)

file

1 DAVID B. SEALS, Counsel (SBN 69378)
2 Department of Real Estate
3 P. O. Box 187000
4 Sacramento, CA 95818-7000
5 Telephone: (916) 227-0789
6 -or- (916) 227-0792 (Direct)

FILED
AUG 08 2003

DEPARTMENT OF REAL ESTATE

By Jean Lunn

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12)
13 JAMES LEE ELLINGWOOD,)
14)
15 Respondent.)

NO. H-8487 SF
ACCUSATION

16 The Complainant, Les R. Bettencourt, a Deputy Real
17 Estate Commissioner of the State of California for cause of
18 Accusation against JAMES LEE ELLINGWOOD (hereinafter
19 "Respondent") is informed and alleges as follows:

20 I

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

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II

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 (hereinafter "Code"), as a real estate broker dba Excel Financial.

III

That at all times herein mentioned, Respondent, engaged in the business of, acted in the capacity of, advertised, or assumed to act as a real estate broker in the State of California within the meaning of Section 10131(d) of the Code, by soliciting borrowers or lenders for or negotiating loans or collecting payments or performing services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

IV

That at all times mentioned herein, Respondent accepted or received funds in trust (hereafter trust funds) from and on behalf of his principals placing them in bank accounts and at times thereafter made disbursements of such funds.

V

From June 3, 2002 through April 28, 2003 an investigative audit was performed by the Department of the records and bank records of the Respondent for the period from January 1, 2001 to March 31, 2003, as said records related to his activities as a real estate broker.

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VI

Respondent maintained one bank account into which trust funds were placed. The account was located at Bank of the West, 1010 S. First Street, San Jose, CA 95110. Account No. 004-001040 in the name of James Ellingwood dba Excel Financial Trust Account.

VII

The adjusted balance of account as of March 31, 2003 was a negative Nine Thousand Five Hundred Thirty-Two and 50/100 Dollars (-\$9,532.50) and the trust fund accountability in the account as of March 31, 2003 was Twenty-Seven Thousand One Hundred Twenty-Eight and 54/100 Dollars (\$27,128.54). Therefore, Respondent, as of March 31, 2003, had a trust fund shortage of Thirty-Six Thousand Six Hundred Sixty-One and 04/100 Dollars (\$36,661.04).

VIII

Respondent failed to timely file the annual reports due May 31, 2001 and May 31, 2002 as required by Section 10232.2 of the Code.

IX

Respondent failed to timely file the quarterly trust fund status reports due April 30, July 31, and October 31 of both 2000 and 2001 as required by Section 10232.25 of the Code.

X

As of March 31, 2003, Respondent had \$7,813.94 of his own funds in the trust account for longer than 25 days in violation of Section 10176(e) of the Code and Section 2835, Title

1 10, California Code of Regulations (hereinafter the
2 "Regulations").

3 XI

4 Respondent failed to reconcile the balance of all
5 separate beneficiary records with the balance of the control
6 record on a monthly basis for the account in violation of Section
7 2831.2 of the Regulations.

8 XII

9 During the period covered by the audit, Respondent
10 failed to obtain signatures of investors on lender purchaser
11 disclosure statements and/or retain copies of such signed lender
12 purchaser disclosure statements in violation of Section 10232.4
13 of the Code.

14 PRIOR DISCIPLINARY ACTION

15 XIII

16 Effective November 1, 1993, in Accusation No. H-6762
17 SF, the Real Estate Commissioner ordered the suspension of the
18 real estate licenses and license rights of Respondent for
19 violation of Section 2831.2 of the Regulations in conjunction
20 with Section 10177(d) of the Code.

21 XIV

22 The acts and/or omissions of Respondent described above
23 are grounds for the revocation or suspension of the licenses of
24 Respondent under Section 10176(e) of the Code and Section
25 10177(d) of the Code in conjunction with Sections 10145; 10232.2,
26 10232.25, and 10232.4 of the Code and Sections 2831.2 and 2835 of
27 the Regulations.

