

FILED

AUG 25 2010

DEPARTMENT OF REAL ESTATE

By *[Signature]*

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	)	
	)	No. H-10770 SF
FIRST BLACKHAWK FINANCIAL	)	
CORPORATION and	)	OAH Case No. 2009110769
MICHAEL SCOTT SMITH,	)	
	)	
Respondents.	)	

DECISION AFTER REJECTION

This matter was heard before Jill Schlichtmann, Administrative Law Judge of the Office of Administrative Hearings, State of California, on February 18, 2010.

E. J. Haberer II, in his official capacity as a Deputy Real Estate Commissioner of the State of California, made the Accusation against Respondent. Complainant signed the Accusation on October 13, 2009.

Truly Sughrue, Counsel, represented the Complainant.

Respondent Michael Scott Smith was present at the hearing and appeared in pro per.

Evidence was received, the hearing was closed, and the matter was submitted on February 18, 2010.

1 On April 21, 2010, I declined to adopt the Proposed Decision and gave notice of
2 my intention to proceed under Section 11517(c) of the Government Code by deciding the case
3 on the administrative record and written argument from the parties. Pursuant to Section
4 11517(c) of the Government Code of the State of California, Respondent SMITH was served
5 with notice of my determination not to adopt the Proposed Decision of the Administrative Law
6 Judge along with a copy of said Proposed Decision. Respondent SMITH was notified that I
7 would decide the case upon the record, the transcript of proceedings held on February 18, 2010,
8 and upon any written argument offered by Respondent SMITH and Complainant. On June 1,
9 2010, Respondent SMITH submitted his written argument.

10 I have given careful consideration to the record in this case including the
11 transcript of the proceedings of February 18, 2010.

12 The following shall constitute the Decision of the Real Estate Commissioner in
13 this proceeding.

14 FACTUAL FINDINGS

15 1. First Blackhawk Financial Corporation (FBFC) failed to file a notice of
16 defense. FBFC was served twice with the accusation and accompanying documents by certified
17 mail and regular mail to the address on file with the Department. Complainant moved to
18 proceed as a default hearing. The motion was granted and the matter proceeded as a default
19 hearing against FBFC pursuant to sections 11505 and 11520 of the Government Code and
20 section 2715 of Title 10 of the California Code of Regulations. Respondent SMITH filed a
21 Notice of Defense and represented himself at hearing.

22 2. Complainant moved at hearing to amend the accusation to replace the
23 letters "CFI" on line six of page three with the letters "FBFC" and to replace the words "4145
24 Blackhawk Plaza Circle, Suite 201, Danville" with the words "5000 Executive Parkway, Suite
25 425, San Ramon." There was no objection to the amendment. The amendment was granted
26 pursuant to Government Code section 11507.

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1 3. E. J. Haberer II made this accusation in his official capacity as a
2 Deputy Real Estate Commissioner of the State of California.

3 4. FBFC is a corporation licensed by the department to act as a corporate
4 real estate broker. FBFC was originally licensed on October 6, 1992. The license expired
5 on October 5, 2008, but was renewed on February 3, 2009. The license is due to expire on
6 February 2, 2013.

7 5. Respondent SMITH was originally licensed as a real estate
8 salesperson on April 30, 2001. He was licensed as a real estate broker on June 28, 2004.
9 Respondent SMITH was designated as the broker/officer for FBFC on March 26, 2008.
10 Respondent SMITH 's broker license is set to expire on June 27, 2012.

11 6. In 2007, FBFC met the threshold broker criteria outlined in section
12 10232 of the Business and Professions Code and was required to file quarterly reports.
13 Once a broker meets the threshold reporting requirements, it must notify the Department if
14 it no longer meets those requirements. Because FBFC failed to file timely reports in early
15 2008, the mortgage lending section of the Department requested an audit of FBFC.

16 *Department Audit*

17 7. Robert Leonard performed the audit of FBFC. Leonard has been
18 employed by the Department for nine years. He currently holds the title of general auditor.
19 The parties stipulated to his qualifications as an auditor. The time period of the audit was
20 April 1, 2008, to October 31, 2008.

21 8. Leonard met with Greg Griffin, the founder of FBFC, to discuss the
22 audit on November 12, 2008, November 21, 2008, and January 29, 2009. Respondent
23 SMITH was present at the last two meetings.

24 9. Leonard was told that in light of the downturn in the economy, FBFC
25 was currently engaged only in limited activities, holding and distributing trust funds in
26 connection with servicing activities from previously arranged loans. Griffin advised
27 Leonard that FBFC was not arranging new loans at the time. Four salespersons, including

1 Griffin, were removed from FBFC's license on March 16, 2008, at the same time the former
2 designated officer-broker was removed. On March 26, 2008, Respondent SMITH was
3 added as the officer-broker for FBFC. During all times relevant herein, FBFC had a trust
4 account at the Heritage Bank in Danville.

5 10. On December 8, 2008, Leonard wrote a letter to Griffin requesting
6 bank statements for the trust account, a copy of the bank signature card in effect from April
7 1, 2008, to October 20, 2008, on the trust account, documentation of a withdrawal from the
8 trust account identifying the party making the withdrawal, and the loan transaction file
9 between borrower Evan Lochlin and lender Craig King. The trust account statements were
10 provided from March 2008 through October 2008. Neither the trust account signature card
11 nor the loan transaction file was produced.

12 11. FBFC did not close its trust account when it ceased taking on new
13 business. When Respondent SMITH became the officer-broker of FBFC, he did not sign
14 the bank signature card for the Heritage Bank trust account and was therefore unable to
15 exercise supervision over the handling of trust funds placed into the account.

16 12. On a date prior to March 1, 2008, a prior borrower, Evan Lochlin,
17 made a payment into the trust account to pay down a loan from Craig King. The amount of
18 the payment was \$44,873.60. Because FBFC was not supervising the account, Griffin and
19 Respondent SMITH were unaware of the deposit until the time of the audit. On July 30,
20 2008, Heritage Bank obtained a judgment against FBFC in the amount of \$754,737.30. On
21 October 20, 2008, Heritage Bank withdrew the money remaining in the trust account,
22 \$40,850.31, to partially satisfy its judgment against FBFC.

23 13. As established through the audit, Respondents failed to comply with
24 the following provisions of the Real Estate Law:

- 25 a. They failed to maintain trust funds in the Heritage Bank trust account in
26 such a manner that as of October 31, 2008, there was a shortage of
27 \$44,873.60 in violation of Business and Professions Code section 10145.

- 1 b. They failed to obtain prior written consent from each of the principals
2 for the reduction of the aggregate balance of trust funds to an amount
3 less than the aggregate trust fund liability as required by California
4 Code of Regulations, Title 10, section 2832.1.
- 5 c. They failed to maintain control records of all trust funds received and
6 disbursed as required by California Code of Regulations, Title 10,
7 section 2831.
- 8 d. They failed to maintain separate beneficiary or transaction records for
9 the trust account during the period of April 1, 2008, to October 20,
10 2008, as required by California Code of Regulations, Title 10, section
11 2831.1.
- 12 e. They failed to reconcile the control record with the separate
13 beneficiary as required by California Code of Regulations, Title 10,
14 section 2831.2.
- 15 f. They failed to remit funds deposited into the trust account by Lochlin
16 to the beneficiary within 25 days as required by Business and
17 Professions Code section 10231.1.
- 18 g. They failed to notify the Department within one business day of the
19 change of address as required by California Code of Regulations, Title
20 10, section 2715.
- 21 h. They failed to file the 2007 business activity report due March 31,
22 2008, as well as the 2007 annual trust account review report due May
23 31, 2008, as required by Business and Professions Code section
24 10232.2, subdivisions (a) and (c).

25 *Respondent Smith's Evidence*

26 14. FBFC founder, Greg Griffin, testified that following the downturn in
27 the economy, he decided to cease FBFC's operations. In March 2008, he asked his cousin,

1 Respondent SMITH, to act as designated officer-broker for FBFC in order to keep the
2 corporate license active. Griffin told Respondent SMITH that FBFC had ceased operations
3 and vacated its address. Respondent SMITH agreed to act as the broker for FBFC and
4 believed that all business operations had ceased. Respondent SMITH did not inspect the
5 business's records to confirm that all trust accounts had been properly closed. Respondent
6 SMITH was unaware that the trust account remained open and he was not made a signatory
7 to the account.

8 15. Several months prior, in November of 2007, Griffin had telephoned a
9 contact within the Department, Tom Pool, to advise him that FBFC would be forced to
10 suspend its business operation until the downturn in the economy stabilized. He wrote a
11 letter dated November 27, 2007, to Pool at the Department confirming this conversation
12 and advising that he would notify the Department when FBFC resumed its business
13 activities. Griffin believed that his letter served as adequate notice that the threshold was
14 no longer being met, releasing FBFC of the further reporting requirements.

15 16. Griffin testified that he was unaware that Lochlin had made the
16 deposit into the trust account until the time of the audit. When he discovered that the
17 deposit had been made and that Heritage Bank had withdrawn the funds, he demanded the
18 return of the money, and hired an attorney to take steps to have the money returned to the
19 trust account. Respondent SMITH provided a letter dated January 20, 2009, from an
20 attorney hired by Griffin to Heritage Bank demanding the return of the trust account
21 monies. On February 18, 2009, Heritage Bank sent FBFC a check in the amount of
22 \$40,890.28 made out to FBFC, representing the amount taken from the trust account plus
23 interest.

24 17. Respondent SMITH testified he first learned of the existence of the
25 trust account and the shortage in the account at his first meeting with Leonard. He did
26 nothing to cure the shortage in the trust account. Respondent SMITH admitted that he
27 never filed any threshold reports and did not know it was required of FBFC. He did not

1 any reporting requirements because he believed Griffin when he was told that there was no
2 ongoing business. Respondent SMITH did nothing to verify that any trust accounts had
3 been closed. He took no steps to ensure that the Department was properly notified of
4 FBFC's current status. He did not go through FBFC's mail and did not work at the San
5 Ramon or Danville offices during the time in question. He established no policies or
6 procedures for FBFC because he believed it had no ongoing business. Respondent SMITH
7 had no contract with FBFC and received no compensation for acting as the designated
8 officer-broker. Respondent SMITH understands that as the designated officer-broker he
9 took on responsibility to oversee the business. Respondent SMITH was aware that the
10 business moved after he became the designated officer-broker, however, he did not notify
11 the Department of the move.

12 *Matters in Mitigation*

13 18. Respondent SMITH has never had any actions taken against his
14 license by the department; nor has he ever had any action taken against him by a client.
15 Griffin testified that the lender, King, had been repaid, however no documents were offered
16 to corroborate this.

17 *Matters in Aggravation*

18 19. On June 10, 2003, the Department issued an Order to Desist and
19 Refrain against FBFC for violating Business and Professions Code sections 10229 and
20 10232.25 and section 2849.01 of title 10 of the California Code of Regulations.

21 LEGAL CONCLUSIONS

22 1. The standard of proof applied in this proceeding is clear and
23 convincing evidence.

24 *First Cause for Discipline: First Blackhawk Financial Corporation*

25 2. Pursuant to Business and Professions Code section 10177, subdivision
26 (d), the Commissioner may suspend or revoke a real estate license if the licensee has
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1 "[w]illfully disregarded or violated the Real Estate Law ... or the rules and regulations of
2 the commissioner for the administration and enforcement of the Real Estate Law."

3 4. Cause for license discipline under section 10177, subdivision (d),
4 exists by reason of Respondent FBFC's violation of California Code of Regulations, title 10
5 sections 2832.1 (failure to obtain consent from each principal for the reduction of the
6 aggregate balance of trust funds); 2831 (failure to maintain control record of all trust
7 funds); 2831.1 (failure to maintain separate beneficiary records; 2831.2 (failure to reconcile
8 control record with separate beneficiary); and 2715 (failure to notify the department within
9 one business day of opening new office); as set forth in Findings 6 through 17.

10 5. Cause for license discipline under section 10177, subdivision (d), also
11 exists by reason of FBFC's violation of Business and Professions Code sections 10145
12 (shortage in trust account); 10232.2, subdivision (a) (failure to file annual trust account
13 report); 10231.1 (failure to remit funds within 25 days) and 10232.2, subdivision (c)
14 (failure to file business activity report) as set forth in Findings 6 through 17.

15 6. Complainant did not present evidence to establish that FBFC was
16 required by Business and Professions Code section 10232.25 to file quarterly trust fund
17 reports for the first three quarters of 2008, since it does not appear that FBFC met the
18 threshold criteria in 2008.

19 7. The violations in this case are serious. Of all the duties and
20 responsibilities imposed on a real estate broker, none is more fundamental than the proper
21 handling and accounting of money received in trust. FBFC failed to monitor its trust
22 account resulting in a shortage of over \$44,000. In light of the series of violations against
23 respondent FBFC and the prior discipline imposed, the protection of the public compels the
24 revocation of FBFC's license.

25 *Second Cause for Discipline: Michael Scott Smith*

26 8. Pursuant to Business and Professions Code section 10159.2,
27 subdivision (a), a corporate officer in charge is responsible for the supervision and control

1 of the activities conducted on behalf of the corporation by its officers and employees, as
2 necessary to secure full compliance with the Real Estate Law.

3 9. Pursuant to Business and Professions Code section 10177, subdivision
4 (h), the Commissioner may discipline a broker licensee who, as the officer designated by a
5 corporate broker licensee, failed to exercise reasonable supervision and over the activities
6 of the corporation for which a real estate license is required. Cause for license discipline
7 exists by reason of respondent Smith's violation of this section, in conjunction with
8 Business and Professions Code section 10177, subdivision (d), as set forth in Findings 6
9 through 17.

10 10. Smith argues that he did not ignore his responsibility as the designated
11 officer-broker of FBFC, rather he was trying to help a family member and trusted Griffin's
12 word that the business had been properly shut down. However, he neglected to examine the
13 business's records to confirm that the bank accounts had been closed and the department
14 properly notified of FBFC's change in status. The role of the officer-broker is to monitor
15 the business and confirm that it is following any and all laws to which it is subject.
16 Although Smith claimed that no harm resulted from FBFC's failures to make appropriate
17 reports and maintain records, the borrower Lochlin and the lender King were deprived of
18 the \$44,873.60 payment that Lochlin deposited into the trust account sometime before
19 March 1, 2008, and the lender received sometime after the bank repaid the monies on
20 February 20, 2009. Had either the trust account been closed when FBFC stopped arranging
21 new loans and the department been properly notified, or the reporting requirements and
22 record keeping obligations been met, the deposit would not have sat in the account and then
23 been diverted by the bank. The reason these laws and regulations are in place is to avoid
24 this kind of mismanagement of the public's money.

25 11. In light of Smith's failure to exercise appropriate oversight as the
26 designated officer-broker of FBFC, public protection compels revocation of his broker
27 license. However, in light of his lack of prior license discipline and the special

1 circumstances of this case, the public will be adequately protected by the following order
2 which allows respondent Smith to retain a real estate salesperson license on a restricted
3 basis.

4 ORDER

5 I

6 All licenses and licensing rights of Respondent MICHAEL SCOTT SMITH
7 under the Real Estate Law are revoked by reason of Legal Conclusions 8 through 11;
8 provided, however, a restricted real estate salesperson license shall be issued to Respondent
9 pursuant to Business and Professions Code section 10156.5 if Respondent makes
10 application therefore and pays to the Department of Real Estate the appropriate fee for the
11 restricted license within 90 days from the effective date of this Decision. The restricted
12 license issued to Respondent shall be subject to all of the provisions of section 10156.7 of
13 the Business and Professions Code and to the following limitations, conditions and
14 restrictions imposed under authority of section 10156.6 of that Code:

15 1. The license shall not confer any property right in the privileges to be
16 exercised, and the Real Estate Commissioner may by appropriate order suspend the right to
17 exercise any privileges granted under this restricted license in the event of:

- 18 (a) The conviction of Respondent (including a plea of nolo contendere) of a
19 crime which is substantially related to Respondent's fitness or capacity
20 as a real estate licensee; or
21 (b) The receipt of evidence that Respondent has violated provisions of the
22 California Real Estate Law, the Subdivided Lands Law, Regulations of
23 the Real Estate Commissioner, or conditions attaching to this restricted
24 license.

25 2. Respondent shall not be eligible to apply for the issuance of an
26 unrestricted real estate license nor the removal of any of the conditions, limitations, or

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1 restrictions attaching to the restricted license until two (2) years have elapsed from the date of
2 issuance of the restricted license to Respondent.

3 3. With the application for license, or with the application for transfer to a
4 new employing broker, Respondent shall submit a statement signed by the prospective
5 employing real estate broker on a form approved by the Department which shall certify as
6 follows:

7 (a) That the employing broker has read the Decision which is the basis for
8 the issuance of the restricted license; and,

9 (b) That the employing broker will carefully review all transaction
10 documents prepared by the restricted licensee and otherwise exercise
11 close supervision over the licensee's performance of acts for which a
12 license is required.

13 4. Respondent shall, prior to and as a condition of the issuance of said
14 restricted license, submit proof satisfactory to the Commissioner of having taken and completed
15 the continuing education course on trust fund accounting and handling specified in Paragraph
16 (3) of subdivision (a) of Section 10170.5 of the Business and Professions Code from an
17 approved continuing education course provider. Said course may have been completed within
18 one hundred and twenty (120) days prior to the effective date of the order herein.

19 5. Respondent shall, within nine (9) months from the effective date of this
20 Order, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since
21 the most recent issuance of an original or renewal real estate license, taken and successfully
22 completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate
23 Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the
24 Commissioner may order the suspension of the restricted license until Respondent presents such
25 evidence. The Commissioner shall afford Respondent the opportunity for hearing pursuant to
26 the Administrative Procedure Act to present such evidence.

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1 6. Respondent shall, within six (6) months from the effective date of this
2 Order, take and pass the Professional Responsibility Examination administered by the
3 Department of Real Estate including the payment of the appropriate examination fee. If
4 respondent fails to satisfy this condition, the Commissioner may order suspension of
5 Respondent's license until respondent passes the examination.

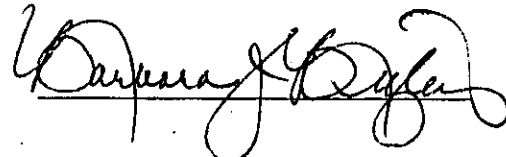
6 This Decision shall become effective at 12 o'clock noon on

SEP 15 2010

7 IT IS SO ORDERED

8/24/2010

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9 JEFF DAVI
Real Estate Commissioner

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12 BY: Barbara J. Bigby
13 Chief Deputy Commissioner
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FILED

APR 21 2010

DEPARTMENT OF REAL ESTATE

[Signature]

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

FIRST BLACKHAWK FINANCIAL
CORPORATION and
MICHAEL SCOTT SMITH,

Respondents.

No. H-10770 SF

OAH No. 2009110769

NOTICE

TO: MICHAEL SCOTT SMITH, Respondent.

YOU ARE HEREBY NOTIFIED that the Proposed Decision herein dated March 16, 2010, of the Administrative Law Judge is not adopted as the Decision of the Real Estate Commissioner. A copy of the Proposed Decision dated March 16, 2010, is attached for your information.

In accordance with Section 11517(c) of the Government Code of the State of California, the disposition of this case will be determined by me after consideration of the record herein including the transcript of the proceedings held on February 18, 2010, and any written argument hereafter submitted on behalf of Respondent and Complainant.

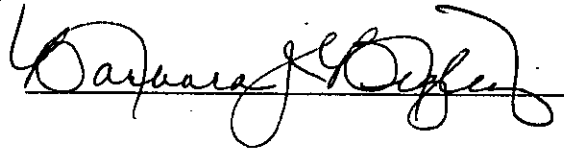
Written argument of Respondent to be considered by me must be submitted within 15 days after receipt of the transcript of the proceedings of February 18, 2010, at the

1 Sacramento office of the Department of Real Estate unless an extension of the time is granted for
2 good cause shown.

3 Written argument of Complainant to be considered by me must be submitted
4 within 15 days after receipt of the argument of Respondent at the Sacramento office of the
5 Department of Real Estate unless an extension of the time is granted for good cause shown.

6 DATED: 4/6/10

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8 JEFF DAVI
Real Estate Commissioner

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FILED

APR 21 2010

DEPARTMENT OF REAL ESTATE

By [Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

FIRST BLACKHAWK FINANCIAL
CORPORATION, and
MICHAEL SCOTT SMITH,

Respondents.

)
) NO. H-10770 SF

)
) OAH NO. 2009110769
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DECISION

The Proposed Decision dated March 16, 2010, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner as to Respondent FIRST BLACKHAWK FINANCIAL CORPORATION only.

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

MAY 12 2010

IT IS SO ORDERED

4/6/10

JEFF DAVI
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

FIRST BLACKHAWK FINANCIAL
CORPORATION, and
MICHAEL SCOTT SMITH,

Respondents.

Case No. H -10770 SF

OAH No. 2009110769

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on February 18, 2010.

Truly Sughrue, Counsel, represented complainant E. J. Haberer II, a Deputy Real Estate Commissioner of the State of California.

Respondent Michael Scott Smith was present and unrepresented. Respondent First Blackhawk Financial Corporation did not file a notice of defense and the hearing proceeded as a default against it.

The matter was submitted for decision on February 18, 2010.

FACTUAL FINDINGS

1. First Blackhawk Financial Corporation (FBFC) failed to file a notice of defense. FBFC was served twice with the accusation and accompanying documents by certified mail and regular mail to the address on file with the department. Complainant moved to proceed as a default hearing. The motion was granted and the matter proceeded as a default hearing against FBFC pursuant to sections 11505 and 11520 of the Government Code and section 2715 of title 10 of the California Code of Regulations. Respondent Smith filed a notice of defense and represented himself at hearing.

2. Complainant moved at hearing to amend the accusation to replace the letters "CFI" on line six of page three with the letters "FBFC" and to replace the words "4145 Blackhawk Plaza Circle, Suite 201, Danville" with the words "5000 Executive Parkway, Suite 425, San Ramon." There was no objection to the amendment. The amendment was granted pursuant to Government Code section 11507.

3. E. J. Haberer II made this accusation in his official capacity as a Deputy Real Estate Commissioner of the State of California.

4. FBFC is a corporation licensed by the department to act as a corporate real estate broker. FBFC was originally licensed on October 6, 1992. The license expired on October 5, 2008, but was renewed on February 3, 2009. The license is due to expire on February 2, 2013.

5. Respondent Smith was originally licensed as a real estate salesperson on April 30, 2001. He was licensed as a real estate broker on June 28, 2004. Smith was designated as the officer-broker for FBFC on March 26, 2008. Smith's broker license is set to expire on June 27, 2012.

6. In 2007, FBFC met the threshold broker criteria outlined in section 10232 of the Business and Professions Code and was required to file quarterly reports. Once a broker meets the threshold reporting requirements, it must notify the department if it no longer meets those requirements. Because FBFC failed to file timely reports in early 2008, the mortgage lending section of the department requested an audit of FBFC.

Department Audit

7. Robert Leonard performed the audit of FBFC. Leonard has been employed by the department for nine years. He currently holds the title of general auditor. The parties stipulated to his qualifications as an auditor. The time period of the audit was April 1, 2008, to October 31, 2008.

8. Leonard met with Greg Griffin, the founder of FBFC, to discuss the audit on November 12, 2008, November 21, 2008, and January 29, 2009. Respondent Smith was present at the last two meetings.

9. Leonard was told that in light of the downturn in the economy, FBFC was currently engaged only in limited activities, holding and distributing trust funds in connection with servicing activities from previously arranged loans. Griffin advised Leonard that FBFC was not arranging new loans at the time. Four salespersons, including Griffin, were removed from FBFC's license on March 16, 2008, at the same time the former designated officer-broker was removed. On March 26, 2008, respondent Smith was added as the officer-broker for FBFC. During all times relevant herein, FBFC had a trust account at the Heritage Bank in Danville.

10. On December 8, 2008, Leonard wrote a letter to Griffin requesting bank statements for the trust account, a copy of the bank signature card in effect from April 1, 2008, to October 20, 2008, on the trust account, documentation of a withdrawal from the trust account identifying the party making the withdrawal, and the loan transaction file between borrower Evan Lochlin and lender Craig King. The trust account statements were

provided from March 2008 through October 2008. Neither the trust account signature card nor the loan transaction file was produced.

11. FBFC did not close its trust account when it ceased taking on new business. When Smith became the officer-broker of FBFC, he did not sign the bank signature card for the Heritage Bank trust account and was therefore unable to exercise supervision over the handling of trust funds placed into the account.

12. On a date prior to March 1, 2008, a prior borrower, Evan Lochlin, made a payment into the trust account to pay down a loan from Craig King. The amount of the payment was \$44,873.60. Because FBFC was not supervising the account, Griffin and Smith were unaware of the deposit until the time of the audit. On July 30, 2008, Heritage Bank obtained a judgment against FBFC in the amount of \$754,737.30. On October 20, 2008, Heritage Bank withdrew the money remaining in the trust account, \$40,850.31, to partially satisfy its judgment against FBFC.

13. As established through the audit, respondents failed to comply with the following provisions of the Real Estate Law:

- a. They failed to maintain trust funds in the Heritage Bank trust account in such a manner that as of October 31, 2008, there was a shortage of \$44,873.60 in violation of Business and Professions Code section 10145.
- b. They failed to obtain prior written consent from each of the principals for the reduction of the aggregate balance of trust funds to an amount less than the aggregate trust fund liability as required by California Code of Regulations, title 10, section 2832.1.
- c. They failed to maintain control records of all trust funds received and disbursed as required by California Code of Regulations, title 10, section 2831.
- d. They failed to maintain separate beneficiary or transaction records for the trust account during the period of April 1, 2008, to October 20, 2008, as required by California Code of Regulations, title 10, section 2831.1.
- e. They failed to reconcile the control record with the separate beneficiary as required by California Code of Regulations, title 10, section 2831.2.
- f. They failed to remit funds deposited into the trust account by Lochlin to the beneficiary within 25 days as required by Business and Professions Code section 10231.1.
- g. They failed to notify the department within one business day of the change of address as required by California Code of Regulations, title 10, section 2715.

- h. They failed to file the 2007 business activity report due March 31, 2008, as well as the 2007 annual trust account review report due May 31, 2008, as required by Business and Professions Code section 10232.2, subdivisions (a) and (c).

Respondent Smith's Evidence

14. FBFC founder, Greg Griffin, testified that following the downturn in the economy, he decided to cease FBFC's operations. In March 2008, he asked his cousin, respondent Smith, to act as designated officer-broker for FBFC in order to keep the corporate license active. Griffin told Smith that FBFC had ceased operations and vacated its address. Smith agreed to act as the broker for FBFC and believed that all business operations had ceased. Smith did not inspect the business's records to confirm that all trust accounts had been properly closed. Smith was unaware that the trust account remained open and he was not made a signatory to the account.

15. Several months prior, in November of 2007, Griffin had telephoned a contact within the department, Tom Poole, to advise him that FBFC would be forced to suspend its business operation until the downturn in the economy stabilized. He wrote a letter dated November 27, 2007, to Poole at the department confirming this conversation and advising that he would notify the department when FBFC resumed its business activities. Griffin believed that his letter served as adequate notice that the threshold was no longer being met, releasing FBFC of the further reporting requirements.

16. Griffin testified that he was unaware that Lochlin had made the deposit into the trust account until the time of the audit. When he discovered that the deposit had been made and that Heritage Bank had withdrawn the funds, he demanded the return of the money, and hired an attorney to take steps to have the money returned to the trust account. Smith provided a letter dated January 20, 2009, from an attorney hired by Griffin to Heritage Bank demanding the return of the trust account monies. On February 18, 2009, Heritage Bank sent FBFC a check in the amount of \$40,890.28 made out to FBFC, representing the amount taken from the trust account plus interest.

17. Smith testified he first learned of the existence of the trust account and the shortage in account at his first meeting with Leonard. He did nothing to cure the shortage in the trust account. Smith admitted that he never filed any threshold reports and did not know it was required of FBFC. He did not inquire as to any reporting requirements because he believed Griffin when he was told that there was no ongoing business. Smith did nothing to verify that any trust accounts had been closed. He took no steps to ensure that the department was properly notified of FBFC's current status. He did not go through FBFC's mail and did not work at the San Ramon or Danville offices during the time in question. He established no policies or procedures for FBFC because he believed it had no ongoing business. Smith had no contract with FBFC and received no compensation for acting as the designated officer-broker. Smith understands that as the designated officer-broker he took on responsibility to oversee the business. Smith was aware that the business moved after he

became the designated officer-broker, however, he did not notify the department of the move.

Matters in Mitigation

18. Smith has never had any actions taken against his license by the department; nor has he ever had any action taken against him by a client. Griffin testified that the lender, King, had been repaid, however no documents were offered to corroborate this.

Matters in Aggravation

19. On June 10, 2003, the department issued an Order to Desist and Refrain against FBFC for violating Business and Professions Code sections 10229 and 10232.25 and section 2849.01 of title 10 of the California Code of Regulations.

LEGAL CONCLUSIONS

1. The standard of proof applied in this proceeding is clear and convincing evidence.

First Cause for Discipline: First Blackhawk Financial Corporation

2. Pursuant to Business and Professions Code section 10177, subdivision (d), the Commissioner may suspend or revoke a real estate license if the licensee has "[w]illfully disregarded or violated the Real Estate Law . . . or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law."¹

4. Cause for license discipline under section 10177, subdivision (d), exists by reason of respondent FBFC's violation of California Code of Regulations, title 10 sections 2832.1 (failure to obtain consent from each principal for the reduction of the aggregate balance of trust funds); 2831 (failure to maintain control record of all trust funds); 2831.1 (failure to maintain separate beneficiary records); 2831.2 (failure to reconcile control record with separate beneficiary); and 2715 (failure to notify the department within one business day of opening new office), as set forth in Findings 6 through 17.

5. Cause for license discipline under section 10177, subdivision (d), also exists by reason of FBFC's violation of Business and Professions Code sections 10145 (shortage in trust account); 10232.2, subdivision (a) (failure to file annual trust account report); 10231.1 (failure to remit funds within 25 days) and 10232.2, subdivision (c) (failure to file business activity report) as set forth in Findings 6 through 17.

6. Complainant did not present evidence to establish that FBFC was required by Business and Professions Code section 10232.25 to file quarterly trust fund reports for the

¹ The Real Estate Law is found at Business and Professions Code section 10000 et seq.

first three quarters of 2008, since it does not appear that FBFC met the threshold criteria in 2008.

7. The violations in this case are serious. Of all the duties and responsibilities imposed on a real estate broker, none is more fundamental than the proper handling and accounting of money received in trust. FBFC failed to monitor its trust account resulting in a shortage of over \$44,000. In light of the series of violations against respondent FBFC and the prior discipline imposed, the protection of the public compels the revocation of FBFC's license.

Second Cause for Discipline: Michael Scott Smith

8. Pursuant to Business and Professions Code section 10159.2, subdivision (a), a corporate officer in charge is responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees, as necessary to secure full compliance with the Real Estate Law.

9. Pursuant to Business and Professions Code section 10177, subdivision (h), the Commissioner may discipline a broker licensee who, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and over the activities of the corporation for which a real estate license is required. Cause for license discipline exists by reason of respondent Smith's violation of this section, in conjunction with Business and Professions Code section 10177, subdivision (d), as set forth in Findings 6 through 17.

10. Smith argues that he did not ignore his responsibility as the designated officer-broker of FBFC, rather he was trying to help a family member and trusted Griffin's word that the business had been properly shut down. However, he neglected to examine the business's records to confirm that the bank accounts had been closed and the department properly notified of FBFC's change in status. The role of the officer-broker is to monitor the business and confirm that it is following any and all laws to which it is subject. Although Smith claimed that no harm resulted from FBFC's failures to make appropriate reports and maintain records, the borrower Lochlin and the lender King were deprived of the \$44,873.60 payment that Lochlin deposited into the trust account sometime before March 1, 2008, and the lender received sometime after the bank repaid the monies on February 20, 2009. Had either the trust account been closed when FBFC stopped arranging new loans and the department been properly notified, or the reporting requirements and record keeping obligations been met, the deposit would not have sat in the account and then been diverted by the bank. The reason these laws and regulations are in place is to avoid this kind of mismanagement of the public's money.

11. In light of Smith's failure to exercise appropriate oversight as the designated officer-broker of FBFC, public protection compels revocation of his broker license. However, in light of his lack of prior license discipline and the special circumstances of this case, the public will be adequately protected by the following order which allows respondent Smith to retain a real estate salesperson license on a restricted basis.

ORDER

1. All licenses and licensing rights of First Blackhawk Financial Corporation under the Real Estate Law are revoked by reason of Legal Conclusions 2 through 7:

2. All licenses and licensing rights of respondent Michael Scott Smith under the Real Estate Law are revoked by reason of Legal Conclusions 8 through 11; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefore and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of section 10156.6 of that Code:

1. The restricted license issued to respondent Smith may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.
2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
3. Respondent shall within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.
4. Respondent shall, within six months from the effective date of this decision, take and pass the Professional Responsibility Examination administered by the Department of Real Estate including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

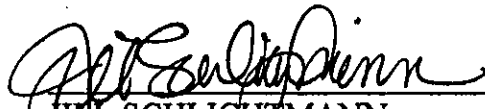
not adopted

*not
adjoined*

5. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license or for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.

DATED:

3/16/10



JILL SCHLICHTMANN

Administrative Law Judge

Office of Administrative Hearings

FILED

OCT 15 2009

DEPARTMENT OF REAL ESTATE

[Signature]

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5 Sacramento, CA 95818-7007
6
7 Telephone: (916) 227-0781

8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of:)
12) No. H-10770 SF
13 FIRST BLACKHAWK)
14 FINANCIAL CORPORATION, and) ACCUSATION
15 MICHAEL SCOTT SMITH,)
16 Respondents.)

17 The Complainant, E. J. Haberer II, a Deputy Real Estate Commissioner of the
18 State of California, for cause of Accusation against FIRST BLACKHAWK FINANCIAL
19 CORPORATION and MICHAEL SCOTT SMITH (hereinafter, collectively "Respondents"), is
20 informed and alleges as follows:

21 PRELIMINARY ALLEGATIONS

22 1

23 The Complainant, E. J. Haberer II, a Deputy Real Estate Commissioner of the
24 State of California, makes this Accusation in his official capacity.

25 2

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

At all times prior to October 5, 2008 and after February 3, 2009, FIRST BLACKHAWK FINANCIAL CORPORATION (hereinafter "FBFC") was and is licensed by the State of California Department of Real Estate (hereinafter "the Department") as a real estate broker corporation.

At all times mentioned, MICHAEL SCOTT SMITH (hereinafter "SMITH"), was and is licensed by the Department individually as a broker. At all times after March 26, 2008, SMITH was and is licensed by the Department as the designated officer-broker of FBFC. As said designated officer-broker, SMITH was and/or now is responsible pursuant to Section 10159.2 of the Code for the supervision of the activities of the officers, agents, real estate licensees and employees of FBFC for which a real estate license was and/or is required.

Whenever reference is made in an allegation in this Accusation to an act or omission of FBFC, such allegation shall be deemed to mean that the officers, directors, employees, agents and/or real estate licensees employed by or associated with FBFC committed such act or omission while engaged in the furtherance of the business or operations of such corporate Respondent, and while acting within the course and scope of their authority and employment.

At all times mentioned, Respondents engaged in the business of, acted in the capacity of, advertised or assumed to act as a real estate licensee in the State of California within the meaning of Section 10131(d) of the Code, including the operation and conduct of a mortgage loan brokerage business with the public wherein Respondents solicited lenders and borrowers for loans secured directly or collaterally by liens on real property or a business opportunity, and wherein such loans were arranged, negotiated, processed, and consummated by Respondents on behalf of others for compensation or in expectation of a compensation.

1 FIRST CAUSE OF ACTION

2 7

3 Each and every allegation in Paragraphs 1 through 6, inclusive, above, are
4 incorporated by this reference as if fully set forth herein.

5 8

6 Beginning April 1, 2008 through October 31, 2008, CFI maintained the
7 following trust fund accounts:

8 TITLE AND ACCOUNT NUMBERS

BANK

9 First Blackhawk Financial Corporation Loan
10 Servicing Trust Account
11 Account No. 1105219
(hereinafter "Trust #1")

Heritage Bank of Commerce
387 Diablo Road
Danville, CA 94526

12 9

13 In connection with the receipt and disbursement of trust funds, FBFC:

14 (a) Failed to deposit and maintain trust funds in Trust #1 in such manner that
15 as of October 31, 2008, there was a shortage of \$44,873.60 of trust funds.

16 (b) Failed to obtain prior written consent from each of the principals for the
17 reduction of the aggregate balance of trust funds in Trust #1 to an amount less than the existing
18 aggregate trust fund liability to the owners of said funds in violation of Section 2832.1 of Title
19 10 of the California Code of Regulations (hereinafter "the Regulations").

20 (c) Failed to maintain a written control record of all trust funds received and
21 disbursed, containing all information required by Section 2831 of the Regulations.

22 (d) Failed to maintain separate beneficiary or transaction records containing
23 all information required by Section 2831.1 of the Regulations.

24 (e) Failed to reconcile the balance of separate beneficiary or transaction
25 records with the control record of trust funds received and disbursed at least once a month,
26 and/or failed to maintain a record of such reconciliations for each account as required by Section
27 2831.2 of the Regulations.

FBFC was a threshold broker subject to the requirements of Section 10232 of the Code. From approximately March 31, 2008 to present, Respondent has failed to file certain reports regarding its business activity and the above trust accounts with the Department, including but not limited to:

REPORT	STATUTE	PERIOD(S)
(a) Business Activity Report RE 881	10232.2(c)	Year end 12/31/2007
(b) Quarterly Trust Fund Status Report RE 855	10232.25	1 st , 2 nd , and 3 rd quarters for 2008
(c) Annual Trust Account Review	10232.2(a)	Year end 12/31/2007

FBFC failed to notify the Commissioner within the next business day that FBFC had opened a new main office located at 4145 Blackhawk Plaza Circle, Suite 201, Danville, California as required by Section 2715 of the Regulations.

FBFC retained funds payable to the beneficiary according to the terms of a promissory note or real property sales contract secured directly or collaterally by a lien on real property, for a period longer than 25 days without a written agreement with the beneficiary, in violation of Section 10231.1 of the Code.

The facts alleged above are grounds for the suspension or revocation of Respondents' licenses and license rights under the following sections of the Code and Regulations:

(1) As to Paragraphs 9(a), under Section 10177(d) of the Code in conjunction with Section 10145 of the Code;

///

1 (2) As to Paragraph 9(b), under Section 10177(d) of the Code in conjunction
2 with Section 2832.1 of the Regulations;

3 (3) As to Paragraph 9(c), under Section 10177(d) of the Code in conjunction
4 with Section 2831 of the Regulations;

5 (4) As to Paragraph 9(d), under Section 10177(d) of the Code in conjunction
6 with Section 2831.1 of the Regulations;

7 (5) As to Paragraph 9(e), under Section 10177(d) of the Code in conjunction
8 with Section 2831.2 of the Regulations;

9 (6) As to Paragraph 10(a), under Section 10177(d) of the Code in conjunction
10 with Section 10232.2(c) of the Code;

11 (7) As to Paragraph 10(b), under Section 10177(d) of the Code in
12 conjunction with Section 10232.25 of the Code;

13 (8) As to Paragraph 10(c), under Section 10177(d) of the Code in conjunction
14 with Section 10232.2(a) of the Code;

15 (9) As to Paragraph 11, under Section 10177(d) of the Code in conjunction
16 with Section 2715 of the Regulations; and

17 (10) As to Paragraph 12, under Section 10177(d) of the Code in conjunction
18 with Section 10231.1 of the Code.

19 SECOND CAUSE OF ACTION

20 14

21 Each and every allegation in Paragraphs 1 through 13, inclusive, above, are
22 incorporated by this reference as if fully set forth herein.

23 15

24 SMITH failed to exercise reasonable supervision over the acts of FBFC in such a
25 manner as to allow the acts and events described in the First Cause of Action to occur.

26 ///

27 ///

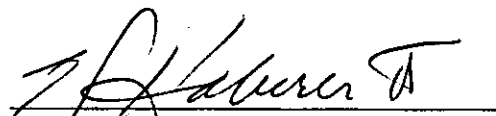
The acts and/or omissions of SMITH described in Paragraph 15 constitute failure on the part of SMITH, as designated broker-officer for FBFC, to exercise reasonable supervision and control over the licensed activities of FBFC required by Section 10159.2 of the Code.

The facts alleged in Paragraphs 15 and 16, are grounds from the suspension or revocation of the licenses and license rights of Respondent SMITH under Sections 10177(g) and/or 10177(h) of the Code, and Section 10177(d) of the Code in conjunction with Section 10159.2 of the Code.

PRIOR PROCEEDINGS

On or about June 10, 2003, in Case No. H-8340 SF, before the Department of Real Estate, the Real Estate Commissioner issued an Order to Desist and Refrain against FBFC for violation of Section 10229 and 10232.25 of the Code, and Section 2849.01 of the Regulations.

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.


E. J. HABERER II
Deputy Real Estate Commissioner

Dated at Oakland, California,
this 18th day of October, 2009