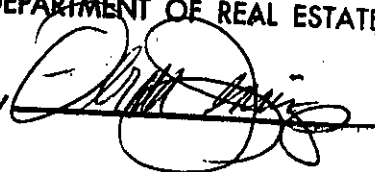


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FILED
FEB 23 2011
DEPARTMENT OF REAL ESTATE
By 

DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * * *

In the Matter of the Accusation of	)	No. H-36234 LA
	)	
	)	L-2010050846
	)	
AMERICAN UNITED LENDERS, INC.,	)	
and HARV HOLDEN WYMAN, as	)	
designated officer of American	)	
United Lenders, Inc., and	)	
CHRISTOPHER KARL MENNINGER,	)	
	)	
	)	
	)	
Respondents.	)	
	)	
	)	

DECISION

The Proposed Decision dated December 9, 2010, 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.

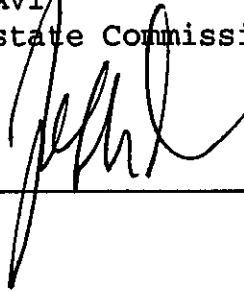
Pursuant to Section 11517(c)(2) of the Government Code of the State of California, the Proposed Decision, page 2, paragraph 5(B), "raid" is amended to read "rate"; page 5, paragraph 1, "salesperson's" is amended to read "salesperson" and "10776" is amended to read "10176"; paragraph 2, "10777" is amended to read "10177"; page 7, top paragraph, "every" is amended to read "ever"; paragraph 2, "American United Lending" is amended to read "American United Lenders, Inc."

This Decision shall become effective at 12
o'clock noon on MAR 15 2011.

IT IS SO ORDERED

1-26-2011.

JEFF DAVIS
Real Estate Commissioner

A handwritten signature in black ink, appearing to read 'Jeff Davis', is written over a horizontal line.

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

In the Matter of the Accusation Against:

Case No. H-36234 LA

AMERICAN UNITED LENDERS, INC., and
HARV HOLDEN WYMAN, as designated
officer of American United Lenders, Inc., and
CHRISTOPHER KARL MENNINGER,

OAH No. 2010050846

Respondents.

PROPOSED DECISION

The hearing in the above-captioned matter was held on November 8, 2010, at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Complainant was represented by James R. Peel, Counsel, Department of Real Estate. Respondent Christopher K. Menninger (Menninger) appeared with his attorney, Mark Nialis, Wildish & Nialis. Respondent Harv H. Wyman (Wyman) appeared and represented himself, and acted on behalf of Respondent American United Lenders, Inc. (American).

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date. The following factual findings, legal conclusions, and orders are hereby made by the ALJ.

FACTUAL FINDINGS

1. Complainant Robin L. Trujillo, Deputy Real Estate Commissioner, Department of Real Estate (Department), filed the Accusation in the above-captioned matter in her official capacity.

2. (A) Respondent American is a corporation licensed as a real estate broker beginning in March 1995. As of July 1, 2006, Respondent Wyman was the designated officer for the firm. American's license will expire in March 2011 unless renewed.

(B) Respondent Wyman was licensed as a real estate salesperson beginning in March 1989, and he became licensed as a real estate broker on September 11, 1990. His officer's license will expire in March 2011.¹

(C) Respondent Menninger was first licensed as a real estate salesperson in June 1983. He became affiliated with American on January 26, 2007, and his license remains with that firm. It will expire on March 17, 2011.

3. (A) Between September 2006 and October 2007, Respondents engaged in four transactions to refinance a condominium owned by Stuart Nelson and Delores Maggio Nelson (homeowners or borrowers) in Culver City, California. The borrowers are and were husband and wife, and at the time of the transactions Mr. Nelson was retired. In each case, Respondent Menninger met with those borrowers, and was the primary point of contact for American, and he assisted the borrowers in refinancing their property.

(B) The homeowners contacted Respondent Menninger prior to the first transaction because an agent from another firm had placed them in a negative amortization loan, and the homeowners wanted to change the type of loan they had against their property.

4. The closing dates for the four transactions in issue were September 12, 2006, February 6, 2007, June 14, 2007, and October 31, 2007.

5. (A) Although the first loan had as its purpose paying off the then-existing negative amortization loan, the four loan transactions also had the purpose of allowing the borrowers to obtain some cash against their property, without appreciably raising their mortgage or monthly payment on their mortgage, and without paying costly points and fees to obtain the loans. In order to do this, in each instance the homeowners borrowed slightly more money than they owed against the property. Such would not have appreciably allowed the homeowners to obtain money from their property. However, another source of funds existed, which was the "yield spread premium" (YSP) that was paid by the lender to the broker, American.

(B) The YSP was a fee paid by the lender to the broker for obtaining the loan. The higher the interest ~~paid~~ to be paid by the borrower, the more the lender would pay as YSP to the lender. In the circumstances of this case, the payment had aspects of a rebate.

¹ The license certification, page 2 of Exhibit 2, indicates that Wyman's broker's license expired in September 1998, and that he became the licensed officer of American in July 2006. Just what his license status was, if any, in the intervening period is not clear.

6. The YSP, or part of it, amounted to the compensation earned by the Respondents in the four transactions. The borrowers did not pay points or fees to obtain any of the loans. The YSP in each transaction averaged slightly more than \$9,000; the total for the four transactions was \$36,679.51. However, American and the other Respondents did not receive all of those monies; some of the funds paid fees associated with the transactions, and some benefited the borrowers.

7. (A) In each of the four transactions, some money flowed back to the borrowers, either directly, by checks payable to them, or by payment to third parties for the benefit of the borrowers.

(B) For example, in the third transaction (June 2007), the homeowners borrowed \$245,000, to pay off a loan of \$243,630.43. All the fees pertaining to the transaction, such as escrow fees, title insurance fees, and other expenses, were paid from the loan proceeds or by credits to the brokers, which related according to Respondents ultimately were paid from the YSP.² The closing statement shows that mortgage payments on the then-existing mortgage were paid, for a two-week period, in the amount of \$677, and \$1,807.08 was paid directly to the homeowners. The result of the transaction was that the indebtedness against their property had increased by approximately \$1,370, which amount was less than the mortgage payment and cash payment mentioned above. The borrowers had paid no fees or costs to obtain the loan, and the interest obligation had increased by approximately \$33.00 per month.³

(C) The homeowners did not receive a direct cash payment in each transaction. In the other transaction where cash was paid to the homeowners (February 2007), they received a check for \$115.58. In that transaction, payments on their mortgage were made, of approximately \$345, and their property taxes for the second half of 2006-2007 were also paid, in the amount of \$1,601.80. Again, they paid no fees or costs or points for the loan. Their indebtedness increased by \$252.63, in that they borrowed \$244,000 to pay off a loan of \$244,247.37. The newer loan had an interest charge of \$48.55 per day, less than the prior loan, which cost \$49.35 per day.

9. In the last of the four transactions—October 2007—the homeowner made a deposit of \$1,052 into escrow the only one of the transactions where that occurred. The purpose of the deposit is not clear from the record. The homeowners borrowed

² The four closing statements show credits to the brokers, but do not show YSP funds coming into the escrow. Whether the brokers made deposits to the escrow accounts or not is not disclosed from the record.

³ The Closing Statement that is part of Exhibit 6 shows that the escrow paid off interest on the existing loan at the rate of \$48.39 per day, and paid two weeks interest on the new loan, at the rate of \$49.50 per day. Thus, the interest obligation had increased by \$1.11 per day, or approximately \$33 per month.

\$245,000—the same amount borrowed in the June 2007 transaction—and paid off the existing loan of \$244,437. Property taxes of \$1,641 were paid from the escrow, for the first half of 2007-2008. Mortgage payments of \$1,602 were paid as well. The interest obligation increased by approximately \$24.00 per month.

10. (A) The first of the four transactions appears to have netted the least pecuniary benefit to the borrowers, in that there was no direct payment to them from escrow and no property taxes were paid. However, escrow payments against the then-existing loan were paid, of approximately \$2,130, and payments against the new loan of \$990 were made, totaling approximately \$3,120.

(B) In that first transaction, the homeowners borrowed \$245,000, and paid off their then-existing mortgage of \$243,401.54. As noted above, that was a negative amortization loan, which the homeowners were motivated to pay off.

11. It was not established, as alleged, that Respondent Menninger represented to the borrowers that they would receive money back from each transaction. There was no admissible evidence that such representations had been made, and as set forth above, the homeowners received direct payments in two of the four transactions, and obligations they owed, such as property taxes, were paid as well, either from the loan proceeds or by broker credits supported by the YSP.

12. It was not established, as alleged, that Respondent Menninger failed to obtain notarized signatures on certain documents, such as the deed of trust. Testimony to support this claim, by Mr. Nelson, was not credited. No documents were offered in evidence which established that non-notarized signatures had been utilized. Furthermore, each closing statement showed fees paid for notary services. Finally, it strains credulity to believe that the County Recorder would have recorded a deed of trust or other such document without a notarized signature. At the same time, if pertinent instruments were not recorded, then the lender would not have been protected, and the lack of recording of an earlier transaction would have garnered the attention of the title insurers involved in any subsequent transaction.

13. It was established that Respondent American did not maintain Mortgage Loan Disclosure Statements of the type required by the Department. Although Respondent American had generated Good Faith Estimate forms of the type required by federal law, it did not comply with the Real Estate Law in this regard.

14. Respondents American and Wyman have no prior record of discipline. It was not established that the homeowners were harmed by the failure of American to retain copies of the Mortgage Loan Disclosure Statements, if any had been generated.

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LEGAL CONCLUSIONS

1. Cause has not been established to discipline the real estate salesperson's license held by Respondent Menninger, or the broker's licenses held by Respondents American and Wyman for violations of Business and Professions Code sections ~~10276~~ ¹⁰²⁷⁷, subdivisions (a) or (i), in that it was not established, as alleged, that Menninger, as sales person, made misrepresentations to the borrowers, based on Factual Findings 3 through 12.

2. Cause has not been established to discipline the real estate salesperson's license held by Respondent Menninger, or the broker's licenses held by Respondents American and Wyman, for violations of Business and Professions Code sections ~~10277~~ ¹⁰²⁷⁷, subdivisions (d) or (g), in that it was not established, as alleged, that Menninger, as salesperson, failed to obtain notarized signatures on documents requiring same. This Conclusion is based on Factual Findings 3 through 12.

3. Respondent American violated Business and Professions Code section 10240, by failing to maintain copies of required documentation, the Mortgage Loan Disclosure Statements, based on Factual Findings 3 through 10, and 13. As such, Cause was established to discipline the corporate real estate broker's license held by American pursuant to Business and Professions Code section 10177, subdivision (d).

4. Respondent Wyman violated Business and Professions Code section 10240, by failing to cause American to maintain copies of required documentation, the Mortgage Loan Disclosure Statements, based on Factual Findings 3 through 10, and 13. As such, Cause was established to discipline the corporate real estate broker's license held by Wyman pursuant to Business and Professions Code section 10177, subdivision (d).

Discussion and Rationale⁴

It is settled that Complainant bears the burden of proving this case by clear and convincing evidence. (*Realty Concepts, Inc. v. Smith* (1973) 32 Cal.App.3d 204.) Complainant was therefore obligated to adduce evidence that was clear, explicit, and unequivocal—so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind. (*In Re Marriage of*

⁴ The section that follows is within the ambit of Government Code section 11425.50, subdivision (d), and meant to provide a discussion of legal issues raised as well as key evidence, and a rationale for the findings, conclusions, and proposed order. So far as stated, it is intended to augment credibility findings. However, the evidence and authorities referenced are not necessarily the only ones relied on in reaching the decision.

Weaver (1990) 224 Cal.App. 3d 278.) In the most important aspects of the case, Complainant failed to carry that burden of proof.

The key witness against Respondents, Mr. Nelson, could not establish any representations by Respondent Menninger, and he had never spoken to or otherwise communicated with Respondent Wyman. At the hearing, Mr. Nelson acknowledged that his wife had handled the four transactions, and was the person (among the two borrowers) with knowledge of what had occurred. The evidence was clear that Mr. Nelson had never had the knowledge necessary to prove the allegations of misrepresentation against Menninger. Further, if he had ever had any such knowledge, he could no longer remember the facts. It was obvious that Mr. Nelson's memory of these relatively recent events was simply not reliable, just as it was obvious that the witness, an 85-year-old veteran of the Second World War, was otherwise acting in good faith during the hearing. Although a written statement by his wife was received as "administrative hearsay," such hearsay could not support findings in this case in light of Respondent's objections, as there is no direct evidence to which the out-of-court statement can lend explanation, or which would be explained by the hearsay evidence.⁵

In any event, it is not clear that Complainant could have carried her burden of proof on the misrepresentation claims. Complainant alleged that Menninger represented that the borrowers would be receiving money back from each transaction. That allegation, vague to begin with, was hardly brought home by an allegation that the borrowers received no money back, "or very little money back." That is, even if such a representation was made, the receipt of any money, even a "little money" would make the representation true. In two of the transactions, a check was paid to the homeowners. Furthermore, the payment of ongoing obligations for the borrowers—over \$3,200 in property taxes alone—along with mortgage payments tends to have constituted "money back" to the borrowers.

On the issue of the alleged failure to have documents notarized, the only evidence to support that claim was Mr. Nelson's testimony, which given his lack of personal knowledge and poor memory, could not be credited. This became especially salient because it is reasonably inferred that none of the transactions could have been consummated without notarized documents such as deeds of trust. Further, as noted in the findings, the closing statements showed payment of notary fees and the costs of title insurance, further indicators that the allegation could not be supported, even if Mrs. Nelson had been available.

⁵ At one point during his direct testimony, Mr. Nelson attempted to read a statement, written by his wife, into the record as if it were his own. This was improper testimony, and could not be allowed. Mrs. Nelson, an invalid, did not appear at the hearing.

While the efficacy of the program offered by Respondents is questionable, nothing has been alleged along those lines. The fact that the four transactions did not get the borrowers any closer to paying off the loan against their home may not be of import to them; at their age, and owing over \$243,000 on the property when they first met with Mr. Menninger, it is unlikely that they could ever find a loan structure to allow them to pay off the mortgage. At bottom, they were able to get some money out of the property, while barely increasing the encumbrance on it, and without measurably increasing their monthly mortgage payments. In part this occurred because they did not have to pay any points or other costs associated with a refinancing, and in part because the broker utilized the YSP funds to offset costs and otherwise fuel the transactions.

Complainant did establish that Respondent American and its designated officer, Wyman, failed to maintain copies of disclosure statements required by the Department, a violation of the Real Estate Law. In the circumstances, the public can be protected from further failings if the importance of complying with record-keeping requirements is brought home to the Respondents. Therefore, their licenses should be suspended subject to section 10175.2.

ORDER

1. The Accusation against Respondent Christopher Karl Menninger is dismissed.

2. All licenses and licensing rights of Respondents American United Lending ^{ers Inc} and Harv Holden Wyman under the Real Estate Law are suspended for a period of thirty (30) days from the effective date of this order, provided, however, that if Respondents, or either of them petitions the Department, said suspensions (or a portion thereof) shall be stayed upon condition that:

A. A petitioning Respondent pays a monetary penalty pursuant to section 10175.2 of the Business and Professions Code at the rate of \$250 for each day of the suspension for a total penalty of \$7,500.

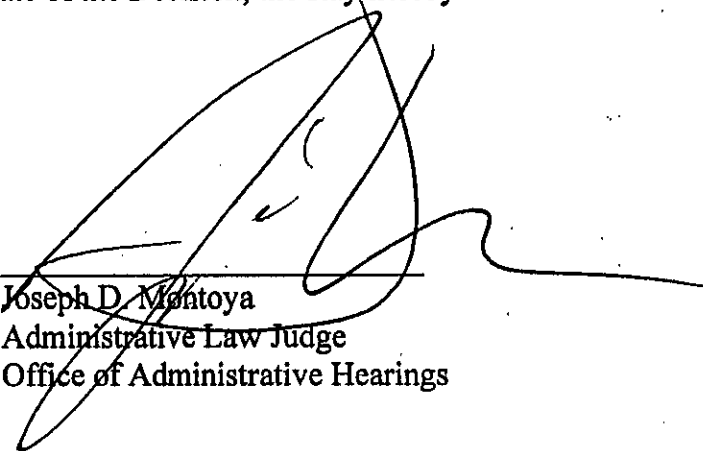
B. Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be received by the Department prior to the effective date of the Decision in this matter.

C. No further cause for disciplinary action against the real estate license of Respondents occurs within one year from the effective date of the Decision in this matter.

D. If a petitioning Respondent fails to pay the monetary penalty in
accordance with the terms and conditions of the Decision, the Commissioner may,
without a hearing, order the immediate execution of all or any part of the stayed
suspension in which event the petitioning Respondent shall not be entitled to
repayment nor credit, prorated or otherwise, for money paid to the Department under
the terms of this Decision.

E. If a petitioning Respondent pays the monetary penalty and no
further cause for disciplinary action against the real estate license of that Respondent
occurs within one year from the effective date of the Decision, the stay hereby
granted shall become permanent.

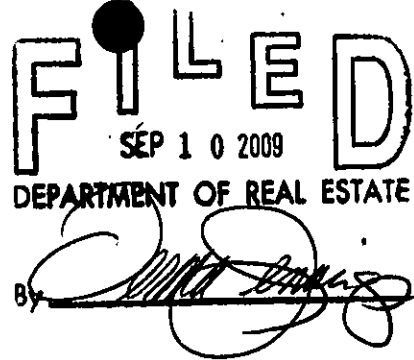
December 9, 2010



Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

SALVO

JAMES R. PEEL, Counsel (SBN 47055)
Department of Real Estate
320 West Fourth Street, Suite 350
Los Angeles, CA 90013-1105
Telephone: (213) 576-6982
-or- (213) 576-6913 (Direct)



BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	No. H-36234 LA
AMERICAN UNITED LENDERS, INC.,)	<u>A C C U S A T I O N</u>
and HARV HOLDEN WYMAN,)	
as designated officer of)	
American United Lenders, Inc.,)	
and CHRISTOPHER KARL MENNINGER,)	
Respondents)	

The Complainant, Robin L. Trujillo, a Deputy Real Estate Commissioner of the State of California, for cause of accusation against AMERICAN UNITED LENDERS, INC., HARV HOLDEN WYMAN, individually and as designated officer of American United Lenders, Inc., and CHRISTOPHER KARL MENNINGER, alleges as follows:

I

The Complainant, Robin L. Trujillo, acting in her official capacity as a Deputy Real Estate Commissioner of the State of California, makes this Accusation against AMERICAN UNITED LENDERS, INC., HARV HOLDEN WYMAN, individually and as

1 designated officer of American United Lenders, Inc., and
2 CHRISTOPHER KARL MENNINGER.

3 II

4 AMERICAN UNITED LENDERS, INC., HARV HOLDEN WYMAN,
5 individually and as designated officer of said corporation, and
6 CHRISTOPHER KARL MENNINGER (hereinafter referred to as
7 "Respondents"), are presently licensed and/or have license rights
8 under the Real Estate Law (Part 1 of Division 4 of the Business
9 and Professions Code, hereinafter Code).

10 III

11 At all times herein mentioned, Respondent AMERICAN
12 UNITED LENDERS, INC., was licensed as a real estate broker with
13 Respondent HARV HOLDEN WYMAN as its designated officer.

14 Respondent CHRISTOPHER KARL MENNINGER was licensed as a
15 real estate salesperson employed by Respondent AMERICAN UNITED
16 LENDERS, INC.

17 IV

18 At all times material herein, Respondents AMERICAN
19 UNITED LENDERS, INC., and HARV HOLDEN WYMAN, engaged in the
20 business of, acted in the capacity of, advertised or assumed to
21 act as a real estate broker in the State of California, within
22 the meaning of Section 10131(a) and (d) of the Code including
23 negotiating loans on real property.

24 V

25 During 2006 and 2007, Respondent MENNINGER for or in
26 expectation of compensation, refinanced a total of four times the
27 home loan on real property located at 5215 Sepulveda Blvd. 1-C,

1 Culver City, California ("Property") for the owners Dolores and
2 Stuart Nelson.

3 VI

4 Respondents AMERICAN UNITED LENDERS, INC. and HARV
5 HOLDEN WYMAN violated Code Sections 10240 and 10241 by failing to
6 maintain a copy of the owners Mortgage Loan Disclosure Statement
7 for each refinance signed by the owners and the broker or the
8 broker's representative and disclosing that the broker would be
9 receiving from the lender compensation in the form of a yield
10 spread premium.

11 VII

12 During each refinance transaction, Respondent MENNINGER
13 represented to the owners that they would be receiving money back
14 from the transaction. In fact, the owners received no money back
15 or very little money back from refinancing.

16 VIII

17 During each refinance transaction, certain documents
18 such as the deed of trust required notarized signatures of the
19 owners however Respondent MENNINGER neglected and failed to
20 obtain notarized signatures of the owners on these documents.

21 IX

22 The conduct of Respondents AMERICAN UNITED LENDERS,
23 INC., and HARV HOLDEN WYMAN, as alleged above, subjects their
24 real estate licenses and license rights to suspension or
25 revocation pursuant to Sections 10176(a), 10176(i), 10177(d)
26 and/or 10177(g) of the Code.
27

1 X

2 The conduct of Respondent HARV HOLDEN WYMAN, as alleged
3 above, subjects his real estate licenses and license rights to
4 suspension or revocation pursuant to Sections 10159.2, 10177(h),
5 10177(d), and/or 10177(g) of the Code.

6 XI

7 The conduct of Respondent CHRISTOPHER KARL MENNINGER,
8 as alleged above, subjects his real estate license to suspension
9 or revocation pursuant to Sections 10177(f), 10177(g), 10176(a)
10 and/or 10176(i) of the Code.

11 WHEREFORE, Complainant prays that a hearing be
12 conducted on the allegations of this Accusation and that upon
13 proof thereof, a decision be rendered imposing disciplinary
14 action against all licenses and license rights of Respondents
15 AMERICAN UNITED LENDERS, INC., HARV HOLDEN WYMAN, and CHRISTOPHER
16 KARL MENNINGER under the Real Estate Law (Part 1 of Division 4 of
17 the Business and Professions Code) and for such other and further
18 relief as may be proper under other applicable provisions of law.

19 Dated at Los Angeles, California

20 this 10 day of September, 2009.

21 
22

23 ROBIN L. TRUJILLO
Deputy Real Estate Commissioner

24 cc: American United Lenders, Inc.
25 Harv Holden Wyman
26 Christopher Karl Menninger
27 American United Lenders, Inc.
Robin L. Trujillo
Sacto.