FILED

OCT 29 2012

DEPARTMENT OF REAL ESTATE
BY: Lana B. Dion

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * *

In the Matter of the Accusation of)	No. H-37522 LA
)	L-2011100501
PREMIERE LOAN SERVICES INC.,)	
NATHANIEL GENIS and ABRAHAM)	
PRATELLA, individually and as)	
former designated officers of)	
Premiere Loan Services, Inc.,)	
)	
Respondents.)	
)	

DECISION

The Proposed Decision dated September 6, 2012, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

Pursuant to Section 11517(c)(2) of the Government Code, the following correction is made to the Proposed Decision:

Page 1, Case No. "H-37552 LA" is corrected to read "H-37522 LA".

This Decision shall become effective at 12 o'clock noon on NOV 19 2012.

IT IS SO ORDERED 10/22/2012.

Real Estate Commissioner

By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against: PREMIERE LOAN SERVICES, INC., NATHANIELGENIS and ABRAHAM PRATELLA, individually and as former designated officers of Premiere Loan Services, Inc., Respondents.	Case No. H-37582 LA OAH Nos. 2011100501

PROPOSED DECISION

Administrative Law Judge Ralph B. Dash heard this matter in Los Angeles, California on July 11, 2012.

James A. Demus, Counsel, represented Complainant.

Courtney M. Coates, Attorney at Law, represented Nathaniel Genis (Respondent).[1]

The record was held open until August 7, 2012, for receipt of post hearing briefs. All briefs were timely filed. Complainant's brief was marked for identification as Exhibit 5. Respondent's brief was marked for identification as Exhibit B.

There is no dispute as to the facts of this case. The issue presented is one of law only. The parties stipulated that paragraphs 1, 2, 3, 5, 8, and 9 (through the word "perform" on page 4, line 11) of the Accusation could be deemed established without the presentation of evidence. Accordingly, the following Findings of Fact, except for Finding 7, are based entirely on that stipulation.

FINDINGS OF FACT

1. The Complainant, Robin Trujillo, a Deputy Real Estate Commissioner of the State of California, made the Accusation in her official capacity.

2. Premiere Loan Services, Inc. (Premiere) presently has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code (Code)) as a

[1] The Accusation has been resolved as to all other named Respondents.

corporate real estate broker. Premiere was initially licensed by the California Department of Real Estate (Department) on January 15, 2009.

3. Respondent is presently licensed and/or has license rights under the Real Estate Law as a real estate broker. He was the designated officer of Premiere from January 15, 2009 to February 17, 2010.

4. Respondent was responsible for the supervision and control of the activities conducted on behalf of Premiere and by its officers and employees (during the time he was its designated officer) as necessary to secure full compliance with the provisions of the Real Estate Law, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

5. On September 23, 2009, Jerry and Trenise Crosswhite (the Crosswhites) entered into an agreement with Premiere in which Premiere agreed to negotiate a modification of a loan secured by the Crosswhite's property located at 49259 Cochran Drive, Indio, California (agreement). As part of this agreement, the Crosswhites agreed to pay, in advance, $3,000 in fees to Premiere. Premiere received advance fee payment of $1,000 each from the Crosswhites on September 23, 2009, October 23, 2009, and November 23, 2009.

6. Effective October 11, 2009, Code section 10085.6 made it unlawful to collect any compensation for mortgage loan modification services until after the licensee has fully performed each and every service the licensee contracted to perform.

7. The agreement (part of Exhibit 4) required the broker to place the advance fee into a trust account. The agreement is broken down into three "phases," with each phase specifying the work to be performed before the advance fee is earned and becomes payable to the broker. Phase I is the "gathering information" section where the broker obtains information about the loan to be modified, the assets the borrower has, and the like. This phase was to be completed within 15 days of the signing of the contract and entitled the broker to 25 percent ($750) of the advance fee. Phase II is the preparation of the loan modification request, to be completed within 30 days of the contract date and, when completed, entitled the broker to an additional 35 percent ($1,050) of the advance fee. Phase III is the actual procurement of the modification agreement, to be completed within four months of the contract date and, upon successful completion, entitled the broker to the balance of the advance fee. If the broker did not fulfill his obligation under each phase, then the advance fee for that phase was to be refunded. Premiere did not obtain a loan modification for the Crosswhites. According to the complaint they filed (part of Exhibit 4) the Crosswhites asked Premiere to return their money after Chase Manhattan Bank notified them that the time period within which all loan modification documents had to be submitted

expired on May 10, 2010.[2] The Crosswhites attempted on several occasions to obtain a refund from Premiere, but were unable to do so.

CONCLUSIONS OF LAW

1. The Accusation alleges that it was unlawful for Respondent to accept any advance fee from the Crosswhites after Code section 10085.6 came into effect. In this matter, the agreement was entered into before the effective date of the Code section, and Complainant does not contend that Respondent's acceptance of the first installment of the advance fee, made with the signing of the agreement, was unlawful. Code section 10085.6, subdivision (a)(1), states:

> (a) Notwithstanding any other provision of law, it shall be unlawful for any licensee who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following:
>
> (1) Claim, demand, charge, collect, or receive any compensation until after the licensee has fully performed each and every service the licensee contracted to perform or represented that he, she, or it would perform.

2. Complainant contends that regardless of the lawfulness of the contract at the time it was made, it became unlawful for Respondent to collect any remaining portion of the advance fee after the statute became effective. Respondent contends that because the contract was lawful when it was made, Code section 10085.6 should not apply because that would "substantially impair the obligation" owing under the agreement in violation of California Constitution, Article 1, section 9[3] and United States Constitution Article 1, section 10 (collectively the contract clause) both of which generally prohibit the state from enacting any law impairing obligations owed under a contract.

3. The purpose of SB 94, Calderon, Chapter 630, Statutes of 2009, which enacted Code section 10085.6, was explained succinctly in a bill analysis from the California Senate Banking and Financial Institutions Committee in its discussion of currently pending legislation (AB 1950 (Davis) 2012) which proposes revisions to section 10085.6, revisions which are not relevant here. The analysis stated, in part:

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[2] Because Premiere did not even submit a completed loan modification application on the Crosswhite's behalf, the reasonable inference is that it did not earn any of the advance fee the Crosswhite's paid.

[3] Article 1, Section 9, provides: "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed."

> [Newly enacted Code section 10085.6] cracked down against unscrupulous individuals and businesses who were preying on troubled borrowers by charging them up-front, often nonrefundable fees, under the guise of helping the borrowers obtain loan modifications or other forms of mortgage forbearance from their lenders. All too frequently, these fees were charged for services that were never provided, leaving thousands of troubled borrowers worse off than they had been before seeking help. SB 94 addressed that problem, by prohibiting those who sought to charge borrowers a fee for helping negotiate a loan modification or other form of mortgage loan forbearance from collecting their fee until they performed all agreed-upon services.

4. Respondent's claim that the newly enacted statute impermissibly impaired his rights under the loan modification agreement, although appealing on its face, is not correct. As with any other word or phrase in the Constitution, the contract clause has been interpreted in a variety of ways. The following, taken from *Catawba Indian Tribe of South Carolina v. City of Rock Hill, SC* (4th Cir. 2007) 501 F.3d 368, 371, provides a good synopsis of how the courts have interpreted this constitutional provision:

> The Contract Clause states that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. Although the Clause is phrased in absolute terms, it is not interpreted "absolutely to prohibit the impairment of either government or private contracts." Balt. Teachers Union v. Mayor and City Council of Balt., 6 F.3d 1012, 1014 (4th Cir.1993); see Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428, 54 S.Ct. 231, 78 L.Ed. 413 (1934) (holding that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.").
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> The Supreme Court has formulated a three-part analysis to determine if the Contract Clause has been violated. First, a court must ask whether there has been an impairment of a contract. See U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (holding that "as a preliminary matter, [a] claim requires a determination that the [state action] has the effect of impairing a contractual obligation"). Second, a court must ask "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). Third, if the court finds a substantial impairment, it must ask "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers." Balt. Teachers, 6 F.3d at 1015. In short, then, a claimant must show (1) contractual impairment, (2) that is substantial, and (3) not a legitimate exercise of state power. See City of Charleston v. Pub. Serv. Comm's of W. Va., 57 F.3d 385, 391 (4th Cir.1995) ("Only if there is a contract, which has been substantially impaired, and there is no legitimate public purpose justifying the impairment, is there a violation of the Contract Clause.")

5. Respondent's argument fails each of the foregoing three tests. The first test is "contractual impairment." In order for a legislative action to impair a contract, the challenged action of the legislature must have altered the existing contract in such a manner as to impose a loss on the party claiming the impairment. (*Baker v. Baltimore County, Maryland* (D.Md.1980) 487 F.Supp. 461, 467.) See also, *Metropolitan St. Louis Sewer Dist. v. Ruckelshaus* (D.C.Mo.1984) 590 F.Supp. 385, 389-390 where the court noted, "[The new law] does not prevent user fees from being enacted; it does not prohibit MSD [Metropolitan Sewer District] from living up to its agreement; it does not change any of MSD's contractual obligations. It does proscribe the manner in which MSD can legally set user fees; it does increase the possibility that MSD will not be able to live up to its agreement. This is not, however, a change of obligations between the parties."

6. In this matter, Premiere, and therefore Respondent, is in a position analogous to MSD. No loss has been imposed on Respondent by newly enacted Code section 10085.6. It does not invalidate the agreement between Premier and the Crosswhite's. Rather, the new law merely prohibited Premier from collecting its fees *in advance of performing its services*, not from collecting them at all. Under the terms of the agreement, the Crosswhites were obligated to pay $3,000 to Premier for its successful completion of a loan modification. If Premiere was unsuccessful, the fees would have to be returned. Nothing in the new code section forbade Premiere from securing or attempting to secure a loan modification for the Crosswhites; nor did it prohibit Premiere from demanding payment of $3,000 for its services; nor did it release the Crosswhites from their obligation to pay that amount. Code section 10085.6 merely required Premiere to perform the requested service before it was paid.

7. The second test, that the "impairment" must be substantial, is not met here. As noted above, the only change in the contractual relationship of the parties made by the new code section is the timing of the payments the Crosswhites would owe to Premiere. That change in timing can hardly be deemed "substantial" since it does not change the actual obligations of either party to the contract.

8. The third test, regarding the state's legitimate exercise of its authority, is easily determined to be in Complainant's favor. When private contracts (as opposed to public contracts) are involved, the burden is on the party objecting to the state law to show that that law is neither reasonable nor necessary. (See, *In re Seltzer* (Bankr. D.Nev.1993) 159 B.R. 329, 332.) It is beyond dispute that the state, through the Department of Real Estate, has the authority to regulate transactions between real estate brokers and consumers. As the court stated in *Hackler v. Farm & Home Savings & Loan Ass'n* (W.D.Mo. 1934) 6 F.Supp. 610, 612, with respect to the regulation of certain corporations:

> [I]t is within the police power of the state to enact and enforce regulatory measures for the control, management, and direction of its corporate creatures. Such a power is inherent in any government. The chief object of such power is to promote the general welfare of the people. It would render such power nugatory and ineffective if the state should be unable to place appropriate

restraints upon the private rights of either persons or property. These are fundamental propositions that cannot be denied. Moreover, such reasonable regulatory measures of a police nature may be enacted and promulgated at such times as the Legislature may deem proper, and private rights must always be subject to the reasonable restraints thereof without being able to assert impingement upon contractual rights.

9. The burden of proving or disproving a valid state interest in the use of its regulatory power depends on the nature of the contractual relationship involved. If the challenged state law is alleged to have impaired a contractual relationship involving only private parties, the burden is on the party objecting to the state law to show that that law is neither reasonable nor necessary. (*NCAA v. Miller*, 795 F.Supp. (D.Nev.1992)1476.) Respondent has not met his burden. As set forth in Conclusion 3, the state had an overwhelming and appropriate interest in enacting Code section 10085.6, and Respondent has made no showing at all that this statute is neither reasonable nor necessary. Accordingly, when Respondent, on behalf of Premiere, accepted advance payments of $1,000 each on October 23, 2009 and November 23, 2009, as set forth in Finding 5, he violated the provisions of Code section 10085.6.

10. Having determined that Respondent violated the provisions of Code section 10085.6, it remains to be determined what license discipline, if any, is appropriate. A violation of Code section 10085.6 constitutes ground for license discipline under the provisions of Code section 10177, subdivision (d). The Department expects its licensees to obey the law. At the same time, it does not expect them to perform a constitutional analysis of a newly enacted statute before determining whether that statute applies to a given situation. The contract between Premiere and the Crosswhites was legal when signed. Similarly, it was lawful for Premiere to accept the Crosswhites first advance payment which was made, as set forth in Finding 5, on September 23, 2009. There is no evidence Respondent acted in bad faith towards the Crosswhites. As set forth in Finding 3, Respondent left Premiere shortly after Premiere was to have completed the loan modification process. In fact, as set forth in Finding 7, the Crosswhites dealt with Premiere for a long period after Respondent left. Respondent had not been associated with Premiere for at least three months before the Crosswhites first asked that their advance fee be refunded. On the other hand, Respondent was affiliated with Premiere as of the date by which Premiere had promised to secure the loan modification but failed to do so, the date when the Crosswhite's

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right to a refund matured under the agreement. Accordingly, it would be reasonable to require Respondent to refund the Crosswhite's money, but any discipline of Respondent's broker's license beyond a public reproval under the provisions of Code section 495 would be unduly punitive.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent is hereby reproved for his acceptance of advance fees, and his failure to refund all advance fees when due. As a condition of this reproval, Respondent shall pay Jerry and Trenise Crosswhite the sum of $3,000 within 30 days of the effective date of this Decision.

Date: September 6, 2012

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings