

FILED

BEFORE THE BUREAU OF REAL ESTATE

DEC 19 2013

STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

By *[Signature]*

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|------------------------------------|---|-----------------------|
| In the Matter of the Accusation of |) | CalBRE No. H-38298 LA |
| |) | |
| JULIO MANUEL DONAIRE, |) | OAH No. 2012110670 |
| |) | |
| |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

DECISION

The Proposed Decision dated November 4, 2013, 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 corrections are made to the Proposed Decision:

1. Page 6, Paragraph numbered 19, line 2, Code section 10177, "subdivision (b)" is corrected to "subdivision (d)."

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

JAN 09 2014 This Decision shall become effective at 12 o'clock noon on _____.

IT IS SO ORDERED

12/19/2013

REAL ESTATE COMMISSIONER

[Signature]
WAYNE BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JULIO MANUEL DONAIRE,

Respondent.

DRE No. H-38298 LA

OAH No. 2012110670

PROPOSED DECISION

This matter was heard on October 21, 2013, in Los Angeles, California, by David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California. Julio Manuel Donaire (Respondent) was not present, despite having received proper notice of the hearing. Maria Suarez (Complainant), Deputy Real Estate Commissioner, was represented by Lisette Garcia, Counsel for the Bureau of Real Estate (Bureau).¹

Oral and documentary evidence was received. The matter was submitted for decision on October 21, 2013.

FACTUAL FINDINGS

1. Complainant brought the Accusation and the First Amended Accusation in her official capacity.
2. Respondent was licensed as a real estate salesperson by the Department on March 4, 1998. The salesperson license terminated on February 28, 2001. Beginning March 1, 2001, Respondent has been licensed as a real estate broker. That license expired on February 28, 2013.
3. Respondent was served by mail with the Accusation on July 26, 2012, at his address of record, 8360 Tampa Ave., Northridge, CA 91324. Respondent submitted a Notice of Defense on Accusation listing the same address. Notice of the hearing was served by mail on Respondent at the same address. Respondent was properly notified of the hearing. Respondent's failure to appear for the hearing is a default, discussed in more detail below.

¹ After the Accusation was filed, the Department of Real Estate (Department) became the Bureau of Real Estate.

4. On October 18, 2013, Respondent filed a Chapter 7 bankruptcy, and submitted to OAH and the Bureau a Notice of Bankruptcy Case Filing. (Exh. A.) As discussed in more detail below, the filing of a bankruptcy does not prevent the Bureau from proceeding with this disciplinary action.

5. At the hearing, through oral and documentary evidence, Complainant established that Respondent committed the acts and violations alleged in the First Amended Accusation, paragraphs 7 through 10, 12 through 14, and 16, set forth below.

“7. For an unknown period of time beginning no later than October 24, 2009, Respondent solicited and offered loan services to consumers including services to assist them in negotiating with lenders, foreclosure forbearance, or obtaining a loan modification. Respondent engaged in the business of claiming, demanding, charging receiving, collecting or contracting for the collection of advance fees, within the meaning of Code² Section 10026 for activities in connection to loans which were secured by liens on real property.

“8. On or about October 24, 2009, Respondent solicited and offered to assist borrowers Albert and Teresa H. with loan modification and negotiation services. On October 24, 2009, Respondent collected a \$1,000 advance fee from Albert and Teresa H. for loan modification and negotiation services in connection with a loan secured by a lien on real property. On October 8, 2010, Respondent collected another \$1,000 advance fee from Albert and Teresa H. for loan modification and negotiation services. Respondent failed to perform the loan modification and negotiation services that had been promised to Albert and Teresa H. Respondent failed to provide an accounting of any services done for Albert and Teresa H. or an accounting of the advance fees collected from Albert and Teresa H. Respondent refunded \$2,000 to Albert and Teresa H. on May 18, 2012, after Albert and Teresa H. made a complaint to the Department against Respondent.

“9. Respondent failed to comply with the requirements for handling of advance fees in violation of Code Section 10146 and Section 2972, Title 10, Chapter 6, California Code of Regulations.

“10. The conduct, acts and/or omissions of Respondent as set forth above are in violation of Code Sections 10085.6 and 10146 which constitutes grounds for the suspension or revocation of the license and license rights of Respondent pursuant to Code Sections 10177(d) and/or 10177(g).”

“12. The Department attempted to complete an audit examination of the books and records of Respondent pertaining to his real estate activities including real estate sales and loan modification and negotiation services, which require a real estate license, for the period from October 1, 2009 to April 30, 2012. The audit examination was initiated to determine whether Respondent handled and accounted for trust funds and performed his real

² Code references in the First Amended Accusation, and in this Proposed Decision, are to the Business and Professions Code, unless otherwise noted.

estate activities in accordance with the Code and Regulations. The audit examination was completed on July 5, 2012. The audit examination revealed violations of the Code and Regulations, as set forth in the following paragraphs, and more fully set forth in Audit Report LA 110237 and the exhibits and workpapers attached thereto.

“13. Respondent failed to maintain a trust account for the audit period ending April 30, 2012.

“14. In the course of activities described in Paragraphs 7 and 12, above, and during the examination period described in Paragraph 12, Respondent acted in violation of the Code and the Regulations in that Respondent:

“(a) Failed to maintain control records of the trust funds (advance fees collected) received and disbursed in connection with loan modification and negotiation services during the audit period, in violation of Code Section 10145 and Regulation 2831.

“(b) Collected advance fees from the principal for loan modification and negotiation services without first submitting and obtaining approval of an advance fee agreement and all related materials, in violation of Code Section 10085 and [Regulation] 2970.

“(c) Collected advance fees from a principal for loan modification and negotiation services and failed to deposit said advance fees into a trust account. Failed to maintain and provide a verified copy of accounting to a principal showing the name of the agent and the principal, services rendered, identification of the trust account into which the advance fees had been deposited, the amount of advance fees collected, details of how the funds were disbursed at the end of each calendar quarter, and when the contract had been completely performed by Respondent, in violation of Code Sections 10145 [and] 10146, and Regulations 2832 and 2972.

“(d) Solicited loan modification and negotiation services to borrowers Teresa and Albert H. and collected \$2,000 in advance fees for said services prior to fully performing the services promised to the borrowers, in violation of Code Section[s] 10145 and 10085.6.

“(e) Made misrepresentations to the sellers of real property that he received earnest money deposits from prospective purchasers at the time that offers were made on residential purchase agreements, when in fact, Respondent had not received the earnest money deposits, in violation of Code Section 10176(a).

“(f) Failed to retain records in connection with Respondent’s loan modification and negotiation activities as required pursuant to Code Section 10148.”

“16. The overall conduct of Respondent constitutes negligence or incompetence. This conduct and violations are cause for the suspension or revocation of the real estate license and license rights of Respondent pursuant to Code Section 10177(g).”

6. The Bureau submitted evidence of its costs of investigation (\$2,012) and enforcement (\$1,602), in the total amount of \$2,614. (Exhs. 10 and 11.) These costs are reasonable.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. The Bureau has jurisdiction over a licensee even after the license has expired, under Code sections 118 and 10103.

2. Respondent failed to appear at the hearing after receiving proper notice of the hearing. The Bureau can present evidence even if the Respondent does not appear. (Gov. Code, § 11520.)

3. The standard of proof for the Bureau to prevail on the First Amended Accusation is clear and convincing evidence to a reasonable certainty. (See, *Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

4. The filing of bankruptcy by Respondent results in an automatic stay of certain actions against him, under Title 11 United States Code section 362. Further, certain actions by a government agency to collect money are also stayed by the bankruptcy under Title 11 United States Code section 525. However, these two sections do not prevent a government licensing agency from exercising its police power or regulatory power to discipline a licensee for purposes of protecting the public. (*Parker v. Contractors State License Board* (1986) 187 Cal.App.3d 205, 208-209; *In re Thomassen* (Bankr. 9th Cir. 1981) 15 B.R. 907, 909; *In re Poule* (Bankr. 9th Cir. 1988) 91 BR 83; and *In re Wade* (9th Cir. 1991) 948 F.2d 1122.)

5. However, the Bureau may not recover its costs of investigation and prosecution, as those costs are in compensation of actual pecuniary loss, and are dischargeable in bankruptcy. (*In Re Taggart* (9th Cir. 2001) 249 F.3d 987.)

6. Under the circumstances of this case, when a real estate broker collects money from a client, he must deposit those funds into a trust account or into an interest bearing account, under Code section 10145. A real estate broker must keep particular records of funds received and placed in a trust account, under California Code of Regulations, title 10,³ section 2831, subdivision (a). Such records include, among other things, date and from whom received, amount, date of deposit, daily balance of account, and date of disbursement. Such information can be kept as electronic data.

7. There is cause to suspend or revoke Respondent's real estate brokers license pursuant to Code section 10145 and 10 CCR section 2831, because Respondent received money from clients and did not place the funds in a trust account, did not maintain the

³ All further references to the California Code of Regulations are to title 10, and are designated "10 CCR."

required records for a trust account and, in fact, did not have a trust account, as set forth in Factual Finding 5.

8. Advance fees, such as those charged to Albert and Theresa H., must be deposited into a trust account under Code section 10146. Under 10 CCR section 2832, the deposit must take place within three business days. Under 10 CCR section 2972, there are specific recordkeeping requirements for trust accounts containing advance fees.

9. There is cause to suspend or revoke Respondent's real estate brokers license pursuant to Code sections 10145 and 10146, and 10 CCR sections 2832 and 2972, because Respondent received advance fees from a client and did not place them in a trust account and did not maintain the required records for a trust account, as set forth in Factual Finding 5.

10. Before a broker collects advance fees for loan modification services, the broker is required, under Code sections 10145 and 10085 and 10 CCR section 2970, to get prior approval from the commissioner for use of the advance fee agreement and all written materials related to receiving advance fees.

11. There is cause to suspend or revoke Respondent's real estate brokers license pursuant to Code sections 10145 and 10085, and 10 CCR section 2970, because Respondent received advance fees from a client and did not first get approval for the agreement form and related materials, as set forth in Factual Finding 5.

12. Under Code section 10145 and 10085.6, a broker cannot collect advance fees for loan modification services. The loan modification services must be completed before any fees are charged.

13. There is cause to suspend or revoke Respondent's real estate brokers license pursuant to Code sections 10145 and 10085.6, because Respondent received advance fees from a client before completing loan modification services, as set forth in Factual Finding 5.

14. Under Code section 10176, subdivision (a), a real estate licensee may have his license disciplined for making any substantial misrepresentation.

15. There is cause to suspend or revoke Respondent's real estate brokers license pursuant to Code section 10176, subdivision (a), because Respondent made misrepresentations to sellers that he received deposits from prospective purchasers when the purchase offers were received, when in fact he had not received the deposits at that time, as set forth in Factual Finding 5.

16. Under Code section 10148, brokers must retain certain records concerning real estate transactions, and must make those records available for inspection and audit by representatives of the commissioner.

17. There is cause to suspend or revoke Respondent's real estate brokers license pursuant to Code section 10148, because Respondent did not maintain a trust account or have trust account records available for inspection and audit, as set forth in Factual Finding 5.

18. Under Code section 10177, a real estate licensee may have his license disciplined for willfully violating or disregarding the Real Estate Law or regulations (subd. (d)), or "negligence or incompetence in performing an act for which he or she is required to hold a license" (subd. (g)).

19. There is cause to suspend or revoke Respondent's real estate salesperson license pursuant to Code section 10177, subdivisions (b) and (g), because Respondent has violated the Real Estate Law and has been negligent or incompetent in the discharge of his licensed duties, as set forth in Factual Finding 5.

20. Under Code section 10106, the Bureau may request an order for the licensee to pay the reasonable cost of investigation and enforcement of the case. This cost is \$2,614, as set forth in Factual Finding 6.

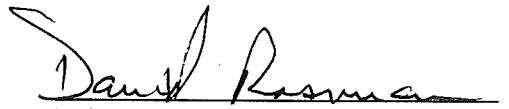
21. Due to Respondent's bankruptcy, and as set forth in Legal Conclusion 5, the Bureau may not recover its costs.

22. Under all of the facts and circumstances, and to adequately protect the public safety and welfare, it is appropriate to revoke Respondent's brokers license.

ORDER

The real estate brokers license and licensing rights of Respondent Julio Manuel Donaire are revoked.

DATED: November 4, 2013.


DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings