

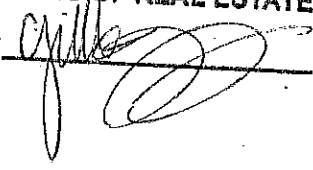
**FILED**

NOV 12 2015

BEFORE THE BUREAU OF REAL ESTATE

BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

By 

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In the Matter of the Accusation of )  
 POINT CENTER FINANCIAL, INC., a )  
 corporate real estate broker; NATIONAL )  
 FINANCIAL LENDING, INC., a corporate )  
 real estate broker; CALCOMM CAPITAL )  
 INC., a corporate real estate broker; and )  
 DAN JOE HARKEY, designated broker- )  
 officer of Point Center Financial, Inc., )  
 National Financial Lending, Inc., and )  
 CalComm Capital, Inc., )  
 Respondents. )

CalBRE No. H-39155 LA  
 OAH No. 2013120378

DECISION

The Proposed Decision dated October 1, 2015 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. The following corrections are made to the Decision pursuant to Government Code Section 11517, subdivision (c)(2)(A):

- 1) Page 6, Factual Finding No. 27b. "Report due March 31, 2013, for the fiscal years ending December 31, 2012..." is changed by interlineation to "Report due March 31, 2013, for the fiscal year ending December 31, 2012..."[emphasis added].
- 2) Page 11, Factual Finding No. 41. "Mr. Benice then transferred to \$302,500 to Respondent PCF..." is changed by interlineation to "Mr. Benice then transferred the \$302,500 to Respondent PCF"[emphasis added].
- 3) Page 27, Factual Finding No. 69b. "as described in factual finding 70a, stating that..." is changed by interlineation to "as described in factual finding 69a, stating that..." [emphasis added].

- 4) Page 34, Legal Conclusion No. 7. Business and Profession Code (“Code”) section 10177, subdivision (i) is deleted as this Code section was not pled as cause for discipline in the Third Amended Accusation. The inclusion of Code section 10177, subdivision (i) appears to have been a clerical error.
- 5) Page 35, Legal Conclusion No. 13, Code section 10177, subdivision (i) is deleted as this Code section was not pled as cause for discipline in the Third Amended Accusation.
- 6) Page 35, Legal Conclusion No. 18, Code section 10177, subdivision (i) is deleted as this Code section was not pled as cause for discipline in the Third Amended Accusation. The inclusion of Code section 10177, subdivision (i) appears to have been a clerical error.
- 7) Page 36, Legal Conclusion No. 23, Code section 10177, subdivision (i) is deleted as this Code was not pled as cause for discipline in the Third Amended Accusation. The inclusion of Code section 10177, subdivision (i) appears to have been a clerical error.
- 8) Page 37, Legal Conclusion No. 27. Code section 10177, subdivision (i) is deleted as this Code was not pled as cause for discipline in the Third Amended Accusation. The inclusion of Code section 10177, subdivision (i) appears to have been a clerical error.

The Decision suspends or revokes one or more real estate licenses. Pursuant to the Stipulation re Surrender of License by Point Center Financial, Inc., entered into between Howard B. Grobstein, Chapter 7 Trustee of the Bankruptcy Estate of Point Center Financial, Inc. (“Trustee”) and Complainant, the California Bureau of Real Estate (as noted in Factual Finding No. 2b, page 2 of the Decision) the revocation of the real estate license of POINT CENTER FINANCIAL, INC. (only) is stayed until the conclusion of the Trustee’s asset recovery efforts.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty 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.

This Decision shall become effective at 12 o'clock noon on DEC - 2 2015

IT IS SO ORDERED

11/5/2015

REAL ESTATE COMMISSIONER



WAYNE S. BELL

BEFORE THE  
BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Third Amended  
Accusation of:

POINT CENTER FINANCIAL, INC., a  
corporate real estate broker; NATIONAL  
FINANCIAL LENDING, INC.; a corporate  
real estate broker; CAL COMM CAPITAL,  
INC., a corporate real estate broker; DAN  
JOE HARKEY, designated broker-officer of  
Point Center Financial, Inc., National  
Financial Lending, Inc. and Cal Comm  
Capital, Inc.,

Respondents.

Case No. H-39155 LA

OAH No. 2013120378

**PROPOSED DECISION**

Irina Tentser, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on July 20 and 21, 2015, in Los Angeles, California.

Lissete Garcia, Counsel, represented Deputy Real Estate Commissioner Maria Suarez (Complainant) of the Bureau of Real Estate (Bureau).

Jeffrey S. Benice, Attorney at Law, appeared and represented Respondents National Financial Lending, Inc. (NFL), Cal Comm Capital, Inc. (Cal Comm), and Dan Joe Harkey (Harkey).

Howard B. Grobstein, Chapter 7 Trustee of Respondent Point Center Financial, Inc. (PCF), did not appear and was represented by John P. Reitman, Attorney at Law.<sup>1</sup>

Oral and documentary evidence was received. Complainant's Motion to Amend the Second Amended Accusation was granted by Order dated August 3, 2015. The record was left open until August 7, 2015 for Complainant to submit Respondents' most recent license history certifications and for Respondents NFL, Cal Comm, and Harkey to submit a closing

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<sup>1</sup> Based on the Stipulation entered into between Complainant and Respondent PCF, PCF chose not to be present during the hearing. (Ex. 27.)

brief. Complainant submitted the license history certifications on July 29, 2015, which were marked and admitted as Exhibit 29. Respondents NFL, Cal Comm, and Harkey's closing brief was filed on August 10, 2015, and was marked as Exhibit A. Complainant's response to Respondents NFL, Cal Comm, and Harkey's closing brief, which was due on August 14, 2015, was filed and marked as Exhibit 30. The record was closed on August 14, 2015.

The record was reopened by Order dated August 31, 2015 for Complainant to file a complete copy of the Third Amended Accusation by September 15, 2015. Complainant filed the Third Amended Accusation on September 4, 2015, which was marked and admitted as Exhibit 31.

The record was closed on September 15, 2015.

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. a. The Bureau's Accusation was filed on November 19, 2013.
- b. Maria Suarez made the Third Amended Accusation in her official capacity as a Deputy Real Estate Commissioner of the State of California.
2. a. Respondent PCF filed for bankruptcy on February 19, 2013. As a result, Mr. Reitman, counsel for the Chapter 7 Trustee of Respondent PCF, Mr. Grobstein, represented Respondent PCF in this matter.
- b. Respondent PCF and the Bureau entered into a July 16, 2015, Stipulation. Under the relevant terms of the Stipulation, the Bureau agreed to stay the revocation of Respondent PCF's real estate license until the conclusion of the Chapter 7 Trustee's asset recovery efforts if the instant Decision resulted in the revocation of Respondent PCF's license. In the alternative, if Respondent PCF's real estate license was not revoked, the Chapter 7 Trustee agreed to voluntarily surrender the license within 30 days of the conclusion of the trustee's asset recovery efforts that may be implicated by the license. As a result of the Stipulation, Respondent PCF's attorney, Mr. Reitman, and Respondent PCF were not present during the hearing in this matter.
3. a. At hearing, Respondents' NFL, Cal Comm, and Harkey, through their counsel, Mr. Benice, alleged that the hearing should be stayed because Respondent PCF filed for bankruptcy.
- b. The argument that the instant disciplinary hearing should be stayed, as described in factual finding 3a, is unpersuasive. The Bureau is not deprived of the power to proceed by Respondent PCF's bankruptcy, as proceedings to discipline a professional license come within the governmental regulatory powers exception to the automatic bankruptcy stay,

under section 362, subdivision (b)(4) of the Bankruptcy Code. (See, e.g., *Board of Governors of the Federal Reserve System v. MCorp Financial Inc.* (1991) 502 U.S. 32, 39-40; *Arizona Corporations Commissioner v. Knoell*, (D. Ariz. 1993) 160 B.R. 825, 826; *In re Thomassen*, (Bankr. 9<sup>th</sup> Cir. 1981) 15 B.R. 907, 909 [Medical Board of California not barred by the automatic stay from proceeding against a physician's license;] *Cooper v. State Bar of California* (1987) 43 Cal.3d 1016, at 1024, *In re Poule* (1988) 91 BR 83, 88 (9<sup>th</sup> Cir. BAP 1988), *Parker V. Contractors State License Bd.* (1986) 1987 Cal.App.3d 205, 207-215, and *In re McMullen* (2004) 386 F. 3d 320, 325-327. Accordingly, jurisdiction is established in this matter.

### *Background Information*

4. Respondent PCF's primary business was brokering loans funded by groups comprised of private party lenders. Broker's fees and loan servicing fees generated revenue for Respondent PCF. If loans went into default, Respondent PCF, as the loan servicer, foreclosed on the properties and then generally placed each foreclosed property into a separate LLC. Respondent PCF then acted as the property manager for the lenders and collected management fees.

5. Respondent PCF was successful in its business practices until 2007 when a high number of loans that it was servicing went into default. As a result, Respondent Harkey, as the owner and designated broker-officer of Respondent PCF, was entangled in a multitude of regulatory investigations and lawsuits. As a result of PCF's financial and legal troubles, Respondent Harkey began to transfer PCF's servicing and management functions to the other entities that Respondent Harkey owned and controlled, Respondents Cal Comm and NFL. The transfer of Respondent PCF's servicing and management functions to Respondents Cal Comm and NFL resulted in funds that would have been deposited into Respondent PCF trust accounts to be deposited into Respondents' Cal Comm and NFL trust accounts.

6. The genesis of the Bureau's disciplinary action against Respondent Harkey and the business entities he owned and controlled, including Respondents PCF, Cal Comm, and NFL, was based on the actions Respondents took as a result of the collapse of Respondent PCF's business, as described below in factual findings 7 and 8.

7. The catalyst for the chain of events that ultimately led to the instant proceeding was when, on February 12, 2012, the San Diego Superior Court entered a judgment against Respondent PCF in *Brewer Corporation v. Point Center Financial Inc.*, case no. 37-2007-00074230 (Brewer Judgment). Subsequently, the Brewer creditors, which included PCF investors, began taking actions to enforce their judgment.

8. Respondent Harkey believed that the collection actions taken by the Brewer creditors were illegal. As a result of his legal difficulties, the damage to his business reputation, and in an attempt to continue to conduct his business activities, Harkey and the entities he controlled, took deliberate actions to evade collection by third party judgment

creditors, including PCF investors. Those actions, as more fully described below, included, but were not limited to, (1) the execution of agreements transferring certain rights and resulting income streams that would otherwise have accrued to Respondent PCF to Respondents Cal Comm and NFL; (2) delaying the depositing of moneys meant for a trust account into his attorney's trust account; (3) failing to timely make required Bureau filings and reportings; and (4) failing to timely provide loan payments to borrowers in order to stay in business after the 2012 Brewer Judgment and after Respondent PCF declared bankruptcy on February 19, 2013.

9. The various business practices and actions of Respondents, including Respondent PCF, resulted in the Bureau filing its accusation against them in 2013. Thereafter, in 2014, the Bureau conducted an audit of Respondents PCF, NFL, and Cal Comm, which resulted in two amendments of the accusation. The specifics underlying the basis of the Bureau's disciplinary action against Respondents are described below.

#### *Activities under the Real Estate Law*

10. Respondents engaged in the business of making or arranging loans secured by deeds of trust on real property in California and other states, soliciting investors to invest in promissory notes secured by real property, and providing services in connection with those loans.

11. Respondents solicited borrowers and lenders (investors) for loans, negotiated the terms, and performed services for borrowers and lenders or note owners in connection with loans secured directly or collaterally by liens on real property pursuant to Business and Profession Code Section (Code) 10131, subdivision (d).<sup>2</sup>

12. Respondents sold, offered to sell, bought, offered to buy, exchanged and offered to exchange promissory notes secured directly or collaterally by liens on real property, and performed services for the holders thereof pursuant to Code Section 10131, subdivision (e).

13. Respondents made collections of payments in an aggregate amount of \$250,000 or more on behalf of owners of promissory notes secured directly or collaterally by liens on real property, owners of real property sales contracts, or both, pursuant to Code Section 10232, subdivision (a)(2).

14. Respondents became the servicing agents for notes or interests sold pursuant to a claim of exemption from securities qualification, upon which payments due during any three consecutive months in the aggregate exceeded \$125,000 or the number of persons entitled to the payments exceeded 120, pursuant to Code Section 10238, subdivision (b).

#### *Individuals and Entities*

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<sup>2</sup> All references to the "Code" are to California Business and Professions Code, unless otherwise indicated.

15. Respondent Harkey was licensed by the Bureau as the broker officer designated pursuant to Code section 10159.2<sup>3</sup> to be responsible for supervising the activities of Respondent PCF to ensure compliance with the Real Estate Law.

16. Respondent Harkey was licensed as an individual real estate broker between 1975 and 1995, license number 00454657. Respondent Harkey's individual broker license expired on or about May 16, 1995. Since the expiration of his individual license, Respondent Harkey has only been licensed to conduct real estate business as the designated broker officer of corporate brokers.

17. Respondent Harkey is the owner and designated broker of Respondents PCF, NFL, and Cal Comm.

18. Respondent PCF was licensed under the Real Estate Law, Part 1 of Division 4 of the Code, as a corporate real estate broker, license number 00745721 on September 7, 1979. PCF's license expired on September 6, 2015, unless it was renewed.

19. Respondent NFL is a California corporation licensed by the Bureau as a corporate real estate broker, license number 01212281 on September 28, 1996 and shall expire on October 26, 2016, unless renewed.

20. Respondent Cal Comm is a California corporation licensed by the Bureau as a corporate real estate broker, license number 01884416. Cal Comm was issued a real estate broker license on July 7, 2010 and shall expire on July 6, 2018, unless renewed.

21. Respondent Harkey is and was licensed, at all relevant times herein, by the Bureau as the corporate officer designated, pursuant to Code section 10159.2, to be responsible for supervising the activities of Respondents PCF, NFL, and Cal Comm, to ensure their compliance with the Real Estate Law.

22. Respondent Harkey's position as designated officer for PCF was cancelled on April 24, 2014, but he continues to hold the position of designated officer for Respondents NFL and Cal Comm.

23. Respondent Harkey was licensed as an individual real estate broker from May 16, 1975 through May 15, 1995, under license number 00454657.

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<sup>3</sup> Code section 10159.2 states, in relevant part, that the corporate officer in charge "shall be 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 provisions of this division, . . ."

24. National Financial Lending, LLC (NFL, LLC) is a limited liability company established in 2001. Respondent Harkey is the principal and managing member of NFL, LLC. NFL, LLC is not licensed by the Bureau in any capacity.

25. Point Center Mortgage Fund I, LLC (PCM, LLC) is a limited liability company established in 2005. Respondent Harkey is the principal, managing partner and agent for service of process of PCM, LLC. PCM, LLC is not licensed by the Bureau in any capacity.

#### *Late Filings*

##### A. Respondent PCF's late filings

26. On July 10, 1990, Respondent PCF notified the Bureau that it met the criteria for threshold broker reporting as set forth in Code section 10232<sup>4</sup>. On April 16, 1998, Respondent PCF notified the Bureau that it met the criteria for multi-lender broker reporting, as set forth in Code section 10238.

27. a. Based on its notifications, as described in factual finding 26, Respondent was required to provide specific reports to the Bureau, as described in factual findings 27b through 27d below. However, Respondent PCF did not submit the required reports.

b. Respondent PCF did not provide the required Annual Business Activity Report due March 31, 2013, for the fiscal years ending December 31, 2012, as required by Code sections 10232.2, subdivision (c) and 10238<sup>5</sup>, subdivision (p).

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<sup>4</sup> Code section 10232.2 requires that a real estate broker submit annual reports to the Bureau within 90 days after the end of the broker's fiscal year. As part of the annual report, Code section 10232.2, subdivision (a), requires that the broker submit "The report of a review by a licensed California independent public accountant of trust fund financial statements, conducted in accordance with generally accepted accounting practices, . . ." Code section 10232.2, subdivision (c), describes the required contents of the fiscal year annual report that must be reported by the broker. Code section 10232, subdivision (e), requires a real estate broker who meets the threshold criteria of Code section 10232, subdivision (a), or Code section 10232, subdivision (b), to notify the Bureau of this status in writing within 30 days of meeting that status. Code section 10236.5 requires real estate brokers to notify the Bureau when the broker no longer meets the threshold reporting requirements of Code section 10232.

<sup>5</sup> Code section 10238 requires that a real estate brokers who meets the multi-lender loan servicing criteria of Code section 10238, subdivision (b), notify the Bureau of this status in writing within 30 day of meeting that status. Code sections 10238, subdivision (o), and 10238, subdivision (p), require that a broker submit quarterly reports to the Bureau pursuant to Code section 10238, subdivision (k). Code section 10238, subdivision (a),

c. Respondent PCF did not provide the required Annual Trust Account Review Report due May 31, 2013, for the fiscal year ending December 31, 2012, as required by Code sections 10232.2, subdivision (a) and 10238, subdivision (o).

d. Respondent PCF did not provide the required quarterly reports for 2013 or thereafter, as required by Code sections 10232.25<sup>6</sup> and 10238, subdivision (k).

28. a. In addition, Respondent PCF did not timely report that it no longer met the required reporting criteria as required by Code section 10232, subdivision (e). Specifically, on July 21, 2013, PCF prepared a Corporate Resolution which stated that, effective July 21, Respondent Harkey, as the sole shareholder of PCF, would surrender PCF's license and that PCF would no longer be conducting business which required a real estate license. The July 21, 2013 Corporate Resolution was provided by Respondent PCF to the Bureau on April 24, 2014 as part of a Corporation Change Application form.

b. Contrary to the information provided by Respondent Harkey in the July 21, 2013 Corporate Resolution and the April 24, 2014 Corporate Change Application form, Respondent Harkey did not surrender PCF's license. Respondent PCF remains licensed as of the date of the instant Decision. As described in factual finding 22, Respondent Harkey was PCF's designated officer until April 24, 2014.

c. When Respondent PCF did eventually notify the Bureau that it no longer met the reporting criteria in April 2014, PCF failed to use the prescribed form, THRESHOLD NOTIFICATION § 10232 (RE 853), to notify the Bureau that it no longer met the criteria of Code section 10232, as required by California Code of Regulations, Title 10, Chapter 6, Regulation 2701, subdivision (c)<sup>7</sup> (Regulations)<sup>8</sup>.

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requires that a real estate broker notify the Bureau when the broker first meets and no longer meets the multi-lender servicing reporting requirements of Code section 10238.

<sup>6</sup> Code section 10232.25 requires that a real estate broker submit quarterly reports to the Bureau.

<sup>7</sup> Regulation 2710, subdivision (c), states: "Notice of changes in license information or status required to be submitted to the Bureau under provisions of the Real Estate Law and regulations of the Commissioner shall be given on forms prescribed by the Bureau not later than five days after the effective date of the change unless otherwise provided in the applicable statute or regulation."

<sup>8</sup> All references to "Regulations" are to the Regulations of the Real Estate Commissioner, Title 10, Chapter 6, California Code of Regulations, unless otherwise indicated.

B. Respondent Cal Comm's late filings

29. On January 29, 2014, Respondent Cal Comm sent a threshold notification (RE 853) to the Bureau which provided initial notification that: 1) in the past three months, Respondent Cal Comm negotiated any combination of two or more new loans and sales or exchanges of existing promissory notes and real property sales contracts for an aggregate amount of more than \$250,000 and 2) in the past six months, Respondent Cal Comm negotiated any combination of five or more new loans and sales or exchanges of existing promissory notes and real property sales contracts of an aggregate amount of more than \$500,000.

30. On June 26, 2014, Respondent Cal Comm sent a multi-lender transaction notice (RE 860) to the Bureau which provided original notice that Respondent Cal Comm met the reporting criteria pursuant to Code section 10238.

31. a. Respondent Cal Comm took over loan servicing for Respondent PCF pursuant to "Management Servicing Agreements" entered into between Respondents PCF and Cal Comm in March 2012 and backdated to August 2010. However, the Bureau was not notified that Respondent Cal Comm met the threshold criteria until February 3, 2014.

b. Based on factual finding 31a, Respondent Cal Comm failed to timely provide the required quarterly report for 2013, as required by Code sections 10232.25 and 10238, subdivision (k).

c. Based on factual finding 31a, Respondent Cal Comm failed to timely submit the Annual Business Activity Report or Annual Trust Account Review Report for the fiscal years ending in 2012 and 2013, as required by Code sections 10232.2, subdivision (c), 10232.2, subdivision (a), 10238, subdivision (o), and 10238, subdivision (p).

C. Respondent NFL's late filings

32. On January 29, 2014, Respondent NFL sent a threshold notification (RE 853) to the Bureau which provided initial notification that Respondent NFL collected loan payments in an aggregate amount of \$250,000 or more. However, as described in factual finding 33 and 34 below, NFL began collecting loan payments in 2012.

33. On November 1, 2012, Respondents NFL and PCF entered into a "Trust Accounting and Banking Agreement" (TSA). (Exhibit 25, pgs. 75-81.) In the TSA between Respondents NFL and PCF, Respondent PCF employed Respondent NFL to provide trust accounting and banking services for loans that were originated by PCF.

34. On July 17, 2012, Respondents NFL and PCF entered into a "Payment Services Agreement" (PSA). (Exhibit 25, pgs. 72-74.) Respondent NFL began to provide trust fund accounting and banking services for PCF on November 27, 2012.

35. a. Based on factual findings 32 through 34, Respondent NFL failed to timely provide the required quarterly report for 2012 and 2013, as required by Code sections 10232.25 and 10238, subdivision (k).

b. Based on factual finding 32 through 34, Respondent NFL failed to timely submit the Annual Business Activity Report or Annual Trust Account Review Report for the fiscal years ending in 2012 and 2013, as required by Code sections 10232.2, subdivision (c), 10232.2, subdivision (a), 10238, subdivision (o), and 10238, subdivision (p).

D. Respondents Harkey, Cal Comm. and NFL's Defenses To PCF's, Cal Comm's, and NFL's Late Filings

36. Respondents admit that they did not comply with the Bureau's filing regulations, as described in factual findings 26 through 35. Notwithstanding their admissions, they minimize the late filings as minor administrative errors which were subsequently remedied. Further, the blame for the late filings is deflected by Respondents to a myriad of excuses, including the complexity of Respondent PCF's ongoing bankruptcy proceedings, reduction in staff caused by Respondent PCF's February 2013 bankruptcy, preoccupation with defending against third parties' allegedly wrongful attempts to collect judgment by levying trust accounts, erroneous advice of counsel, and the mistaken belief that Respondent PCF's bankruptcy stay applied to any Bureau filing requirements.

37. a. Respondents' defenses, as described in factual finding 36, lack legal and factual justification. Respondents have failed to cite any legal authority for their argument that Respondent PCF's bankruptcy filing relieved Respondent PCF of the obligation to comply with Bureau filing requirements. As Bureau manager, Sylvia Yrigollen, testified at hearing, Respondent PCF was not absolved of the requirement to file reports with the Bureau notifying the Bureau of any material change by its bankruptcy, including that it was ceasing operation due to a bankruptcy.

b. Further, mistake of the law is not an excuse. As defined by cases, "mistake" means a reasonable mistake of fact or law. *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335; *Salazar v. Steelman* (1937) 22 Cal.App.2d 402. Whether a mistake of law is excusable depends on the reasonableness of the error and the justification for failing to determine the correct law. (*City of Ontario v. Superior Court, supra*). Here, Respondent PCF was notified by the Bureau by multiple correspondences dated April 8, 2013, May 7, 2013, June 8, 2013, July 8, 2013, August 12, 2013, October 9, 2013, November 12, 2013, December 9, 2013, April 8, 2014, May 12, 2014, June 10, 2014, July 9, 2014, August 11, 2014, September 9, 2014, November 7, 2014, and December 8, 2014, that it had failed to file required Bureau filings. (Exhibit 12, pgs. 184-223.) Despite the Bureau's notifications and the fact that Respondent PCF was on notice that the Bureau considered it delinquent in its filings, Respondent PCF presented no evidence at hearing of any reasonable steps that it took to attempt to notify the Bureau of PCF's bankruptcy and/or comply with the Bureau's filing regulations.

c. Moreover, the suggestion that Respondents made a mistake in failing to comply with the Bureau's regulatory filing regulations is not reasonable or credible based on the sophistication of the parties. Specifically, Respondent Harkey testified as to his extensive knowledge and experience with Real Estate Law. Indeed, Respondent Harkey testified that he had more than 43 years of experience in real estate, was familiar with Bureau filing requirements, taught educational seminars in real estate, and assisted in sponsoring and drafting relevant Real Estate Law code sections. In addition, Respondent Harkey testified that Respondent PCF employed in-house counsel, Dale Martin, an outside accounting consultant, and a knowledgeable and experienced Chief Financial Officer, Gwen Melanson, who contributed to the running of Respondents on a daily basis during the relevant time period.

d. Finally, PCF's bankruptcy does not excuse Respondents NFL and CAL Comm's lack of compliance with the Bureau's reporting requirements, as described in factual finding 29 through 35. Respondents NFL and Cal Comm were notified by the Bureau by multiple correspondences dated May 12, 2014, November 7, 2014, and December 8, 2014 that they had failed to file required Bureau filings. (Exhibit 12, pgs. 176-183.) As described in factual finding 37a through 37c, Respondent Harkey's hearing testimony that Respondents NFL and Cal Comm's late filings were based on simple error and his good faith reliance on Gwen Melanson to comply with filing requirements, is not persuasive or credible.

#### *The Bureau's Audit of Respondent PCF*

38. a. Lisa Kwong, a Bureau auditor, conducted an audit (Audit LA 130143) of Respondent PCF. As part of her audit, Ms. Kwong examined Respondent PCF's transactional and accounting books and records to determine whether there had been violations of the Real Estate Law [Code Section 10000 et seq.] At hearing, Ms. Kwong testified that she was assigned to examine Respondent PCF's books and records for the examination audit period beginning February 1, 2011 through January 31, 2014. During the examination, Ms. Kwong spoke with Respondent Harkey, PCF's Chief Financial Officer, Gwen Melanson, and PCF's Manager of Loan Servicing/Asset Manager, Rene Esparza.

b. On September 26, 2014, Ms. Kwong completed Audit Report Number LA 130143. (Exhibits 21 and 24.) Audit LA 130143 was prepared based on transactional and accounting source documents provided to Ms. Kwong by Respondent Harkey, Ms. Melanson, and Mr. Esparza. As detailed in her audit report and her hearing testimony, Ms. Kwong found the following relevant violations of Real Estate Law by Respondent PCF and its designated broker-officer, Respondent Harkey, as described below in factual findings 39 through 47.

A. Respondent PCF's Trust Fund Handling Violation – PCF trust funds deposited into attorney Jeffrey Benice's client trust account

39. On July 17, 2012, The Preserve, LLC, issued a loan payment to Respondent PCF in the form of a check made payable to PCF for \$302,575. The Preserve, LLC,

executed a promissory note for a principal amount of \$39 million payable to the individual, private investors that funded a loan made to Preserve, LLC. To secure the promissory note, PCF executed a deed of trust in favor of NFL, who was designated as the trustee for the benefit of the beneficiaries, the investors. The Preserve, LLC's loan payment was trust funds that belonged to investors. Respondent Harkey endorsed the Preserve, LLC check with an instruction that the funds were to be deposited into his attorney's, Jeffrey S. Benice, client trust account.<sup>9</sup> The funds were deposited into Mr. Benice's trust account on July 24, 2012.

40. Mr. Benice is not licensed by the Bureau and is not a signatory to any of Respondent PCF's trust account. Mr. Benice's client trust account is not a trust account maintained by Respondent PCF. No evidence was presented by Respondent PCF that those persons entitled to the loan payment funds instructed Respondent PCF or Respondent Harkey to deposit said funds into Mr. Benice's client trust account.

41. Mr. Benice then transferred to \$302,500 to Respondent PCF by wire transfers between August 2, 2012 and August 7, 2012, more than three business days following the receipt of the trust funds from The Preserve, LLC, in violation of Code section 10145<sup>10</sup>.

42. a. At hearing, Respondent Harkey admitted that he endorsed The Preserve, LLC \$302,500 loan payment to Mr. Benice's trust account. Respondent Harkey testified that he did so because the Preserve, LLC would not make the loan payment to PCF if Harkey did not agree to avoid the potential levy and seizure of the funds by third party judgment creditors of PCF. Respondent Harkey further testified that the \$302,500 payment represented a settlement payment and not a loan payment and was therefore not subject to the provisions of Code section 10145. No corroborating evidence supporting Respondent Harkey's self-serving testimony was provided. Accordingly, the deposit into Mr. Benice's trust account of PCF's funds was admittedly an attempt to evade what Respondent Harkey believed to be the unlawful collection of moneys by judgment sought against Respondent PCF by several plaintiffs, including PCF investors, as described in factual finding 7 and 8.

b. Based on factual finding 42a, Code section 10133, subdivision (a)(3)<sup>11</sup> is not an applicable defense to Respondent Harkey's and PCF's actions. Respondent PCF

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<sup>9</sup> Jeffrey S. Benice also acted as Respondents Harkey's, NFL's, and Cal Comm's counsel in the instant matter.

<sup>10</sup> Code section 10145, subdivision (a), states, in relevant part: "A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds . . . into a trust fund account maintained by the broker in a bank . . . . All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds."

<sup>11</sup> Code section 10133, subdivision (a)(3) exempts an attorney at law who is rendering legal services to a client from broker licensing requirements. However, the

was the broker handling the trust funds and was required to comply with Code section 10145. Code section 10133, subdivision (b) prohibits PCF from using the attorney exemption for the purpose of evading the provisions of trust fund handling under Code section 10145.

B. Respondent PCF's Trust Fund Handling Violations – Loan Payments

43. Respondent PCF received loan payments from borrowers, but failed to deposit said funds into Respondent PCF's trust account T/A 3 #5118 within three business days, in violation of Code section 10145 and Regulation 2832. (Exhibit 24, pgs. 268-281.) T/A 3 #5118 was opened on May 30, 2012, the same date the loan payments in question were deposited. (Exhibit 24, pgs. 39 and 268.)

44. a. Respondents admit the delay in distributing loan payoff funds described in factual finding 43. However, Respondents justify the delay as a valid attempt to evade the improper levy of funds by third party creditors. Specifically, their defense is that the delays were caused by the wrongful levies of Respondent PCF's trust accounts at Pacific Mercantile Bank in April – May 2012 by the third party creditors described in factual findings 7 and 8. (Exhibit H.)

b. As a result of the wrongful levies, Respondent PCF filed an action against Pacific Mercantile Bank and obtained a mandatory injunction in June 2012, compelling the bank to release the improperly offset funds. (Exhibit M.) The trust funds were restored on June 26, 2012. (Exhibit 21, Audit Report, pg. 9.) Ms. Melanson testified at hearing that she did not deposit the loan proceeds or make investor payments because of the possibility they might be wrongfully seized. Consequently, she intentionally held the checks to avoid judgment collection sought against PCF by several plaintiffs, including PCF investors, until new accounts were established and the dispute with Pacific Mercantile Bank was resolved. Respondents' use of the Pacific Mercantile Bank levy as a justification is unpersuasive.

45. a. Respondent PCF maintained a trust account T/A 1#5236, which was used to handle mortgage loan trust funds from November 2012 through July 2013, which was not in PCF's name as trustee as required by Code section 10145 and Regulation 2832<sup>12</sup>,

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exemption does not apply "to a person who uses or attempts to use them for the purpose of evading the provisions of [broker license requirements]." (Code § 10133, subd. (b).)

<sup>12</sup> Regulation Section 2832, subdivision (a), applies to trust fund handling and states that: "Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson."

but was in the name of "National Financial Lending, Inc. Broker Servicing Trust Account," (Exhibit 24, p. 35.)

b. Respondents admit that the transfer for PCF investors' funds to NFL's accounts was to evade third party creditors, as described in factual finding 45a. Their defense for their actions is that it was their fiduciary duty to protect investor funds from allegedly improper levy by third party creditors. Respondents provided no legal support at hearing for their defense of their admittedly intentional violation of Real Estate Law.

C. Respondent PCF and NFL - Trust Accounts Signor Dale Martin

46. a. Dale Martin, former general counsel of Respondent PCF, was a signatory on both NFL and PCF's broker servicing trust accounts. (Exhibit 24, pgs. 35-37.) Dale Martin is licensed as an individual broker by the Bureau. Mr. Martin is not licensed with any affiliation to PCF and/or NFL. Neither Respondent PCF, nor Respondent NFL maintained a written agreement with Dale Martin in accordance with Regulation 2726<sup>13</sup>.

b. Accordingly, based on factual finding 46a, Respondents Harkey, PCF, and NFL's actions of placing Mr. Martin as a signatory on the PCF and NFL trust accounts constitutes a violation of Code section 10145 and Regulation 2834<sup>14</sup>. 47.

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<sup>13</sup> Regulation 2726 (Broker-Salesman Relationship Agreements) states that: "Every real estate broker shall have a written agreement with each of his salesmen, whether licensed as a salesman or as a broker under a broker-salesman arrangement. The agreement shall be dated and signed by the parties and shall cover material aspects of the relationship between the parties, including the supervision of licensed activities, duties and compensation."

<sup>14</sup> Regulation Section 2834 provides, in relevant part:

"[¶] . . . [¶]

(b) Withdrawals may be made from the trust fund account of a corporate broker only upon the signature of:

(1) an officer through whom the corporation is licensed pursuant to section 10158 or 10211 of the Code; or

(2) one of the persons enumerated in paragraph (1), (2) or (3) of subdivision (a) above, provided that specific authorization in writing is given by the officer through whom the corporation is licensed and that the officer is an authorized signatory of the trust fund account.

(c) An arrangement under which a person enumerated in paragraph (1), (2) or (3) of subdivision (a) above is authorized to make withdrawals from a trust fund account of a broker shall not relieve an individual broker, or the broker-officer of a corporate broker licensee, from responsibility or liability as provided by law in handling trust funds in the broker's custody."

a. Respondents admit to the facts described in factual finding 46a. At hearing, Respondent Harkey testified that Dale Martin was added as signatory on both PCF's and NFL's trust accounts as a back-up measure to facilitate day-to-day business management in the event of Respondent Harkey's death and/or incapacity.

b. Respondents did not allege that Mr. Martin was employed by Respondent NFL and did not provide any reasonable legal justification for adding Mr. Martin to NFL's trust account. Respondents defended their actions of adding Mr. Martin as a signatory on the PCF account based on the argument that Mr. Martin was acting as PCF's counsel, was rendering legal services to his client, and was therefore exempt from license requirements under section 10133, subdivision (a)(3)<sup>15</sup>. Respondents provided no evidence to corroborate the argument that Mr. Martin was providing "legal services" to PCF by being added as a signatory on PCF's trust account.

c. Respondents' defense as to PCF is unpersuasive and lacks credibility. The totality of the evidence indicates that Mr. Martin was added as a signatory to PCF's and NFL's accounts in order to facilitate Respondents' admitted attempts to evade the collection of moneys by PCF's third party creditors. Specifically, the timing of the addition of Mr. Martin on the accounts is consistent with the time period that Respondents' were actively engaged in the evasion of judgment collection by third party creditors. Mr. Martin was added as a signatory to PCF's trust account on July 3, 2012 and to NFL's trust account on October 30, 2012 at Pacific Enterprise Bank, after the Brewer Judgment creditors served a Notice of Levy on Pacific Mercantile Bank on April 26, 2012. (Exhibit 24, pgs. 35-37.) Concurrently, Respondents' were engaged in the transfer of PCF functions and rights to Cal Comm and NFL through the execution of agreements in March 2012 (backdated to August 2010) and November 2012, as described in factual findings 31 and 33. Further, the administrative hearsay evidence of Dale Martin's March 15, 2012 e-mail communication to Respondent Harkey in which he states that the purpose of his actions was to "hold back the water" in the existing context supports the foregoing conclusion that the Real Estate Law was being violated by Respondents in an attempt to evade their party creditors. (Exhibit 15 at Exhibit C, pg. 32.)

d. Accordingly, even if Respondents' argument is viable that Dale Martin was providing legal services to Respondent PCF and was therefore a proper signatory on the PCF account because he was subject to the exemption under Code section 10133, subdivision (a)(3), it is inapplicable under Code section 10133, subdivision (b)<sup>16</sup>. Here, Code section

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<sup>15</sup> Section 10133, subdivision (a)(3), provides, "The acts described in Section 10131 [defining a Broker] are not acts for which a real estate license is required if performed by: . . . ¶ . . . (3) An attorney at law in rendering legal services to a client."

<sup>16</sup> Section 10133, subdivision (b) states: "The exemptions in subdivision (a) are not applicable to a person who uses or attempts to use them for the purpose of evading the provisions of this part."

10133, subdivision (b), renders the provisions of section 10133, subdivision (a)(3), inapplicable since Respondents were using or were attempting to use the addition of Dale Martin as a signatory to the PCF account for the purpose of evading Real Estate Law regulations.

D. Respondent PCF's Retention of Funds

48. a. Respondent PCF received a loan payoff of \$559,439 from borrower Larry J. Living Trust (Loan No. SF1766) on May 12, 2012 and disbursed said funds to lenders more than 25 days after receipt of the loan payoff funds in violation of Code sections 10145 and 10231.1<sup>17</sup>.

b. Respondents' admits to the delay described in factual finding 48a. Respondents' defense to the delay is described in factual findings 44a and 44b. Respondents' use of the Pacific Mercantile Bank levy as a justification is unpersuasive.

E. Respondent PCF's Retention of Records

49. Respondent PCF did not retain the following records for examination by Ms. Kwong, in violation of Code section 10148: (1) Cancelled checks for T/A 2 for the period from July 2012 through January 2013 and for T/A 3 for the period from May 2012 through August 2012; (2) Bank Statements, deposit records, and cancelled checks for T/A 5, T/A 7, and T/A 8; and (3) T/A 3, T/A 4, T/A 5, T/A 6, T/A 7, and T/A 8's bank signature cards and bank account records. (Exhibit 21 at Exhibit A, pgs. 6 – 7.)

50. a. Respondents' defense to the failure to retain records, described in factual finding 49, is essentially that PCF's bankruptcy absolved PCF of their responsibility to provide the responsive documents to Ms. Kwong. Further, Respondents allege that the original of PCF's relevant requested documents were taken by the trustee of PCF, Howard B. Grobstein, in August 2013. Finally, Respondents insist that the Bureau was at fault for not obtaining the responsive records because Ms. Kwong did not go to the storage facilities of PCF's bankruptcy trustee to locate the documents.

b. Respondents' arguments, as described in factual finding 50a, are unpersuasive. First, Respondents cite no legal authority for their assertion that they are absolved of their duty to retain records pursuant to Code section 10148 based on PCF's bankruptcy. Second, even if, arguably, bankruptcy absolved Respondent PCF of their responsibility under Code section 10148, the allegation that the responsive documents were

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<sup>17</sup> Section 10231.1 states: "No person in doing any of the acts set forth in subdivision (d) of Section 10131, subdivision (e) of Section 10131, and Section 10131.1 shall, as agent or principal, retain funds payable 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, except pursuant to a written agreement with the purchaser or lender."

provided by Respondent PCF to the bankruptcy trustee is in dispute and has not been established. (Exhibit 24 at pg. 220.) Finally, as Ms. Kwong testified at hearing, the Bureau has no obligation to assume the responsibility of the licensee to search and locate responsive documents. Rather, it is the duty of the licensee under Real Estate Law to provide responsive documents in response to a subpoena during the audit.

*The Bureau Audit of Respondent NFL*

51. a. In addition to auditing Respondent PCF, Ms. Kwong conducted an audit (Audit LA 130144) of Respondent NFL. As part of her audit, Ms. Kwong examined NFL's transactional and accounting books and records to determine whether there had been violations of the Real Estate Law [Code Section 10000 et seq.] At hearing, Ms. Kwong testified that she was assigned to examine NFL's books and records for the examination audit period beginning October 24, 2012 through January 31, 2014. During the examination, Ms. Kwong spoke with Respondent Harkey, PCF's Chief Financial Officer, Ms. Melanson, and Mr. Esparza.

b. On July 26, 2014, Ms. Kwong completed Audit Report Number LA 130144. (Exhibits 22 and 25.) Audit LA 130144 was prepared based on transactional and accounting source documents provided to Ms. Kwong by Respondent Harkey, Ms. Melanson, and Mr. Esparza. As detailed in her audit report and her hearing testimony, Ms. Kwong found the following relevant violations of Real Estate Law by Respondent NFL and its designated broker-officer, Respondent Harkey, as described below in factual findings 52 through 57.

A. Respondent NFL - Background Information

52. a. Respondent NFL did not negotiate mortgage loans during the audit period beginning October 24, 2012 through January 21, 2014. NFL handled loan services<sup>18</sup> for 16 loans that were originated by Respondent PCF. The total loan amount was \$12,263,200. Respondent NFL collected loan payments totaling approximately \$1,244,398.32 related to loans serviced annually. Additionally, Respondent NFL handled the trust fund accounting and banking services to 38 entities for Respondent PCF.

b. Respondent NFL sent a Threshold Notification on January 29, 2014, to notify the Bureau that NFL had met the threshold criteria.

c. Respondent NFL maintained the following single trust account pertaining to its loan servicing activities during the audit period: Trust Account 1 NFL T/A 1), Bank Name: Pacific Enterprise Bank, Account No.: XXXXXX5236, Account Name: National Financial Lending, Inc. Broker Servicing Trust Account, and Signatory: Dan Harkey.

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<sup>18</sup> Loan servicing is the process by which a company collects interest, principal and escrow payments from a borrower.

d. NFL T/A 1 was opened on October 30, 2012, and was used to deposit funds received from borrowers from Respondent NFL's loan servicing activities. Disbursements were made to investors from this account. As described in factual findings 46 and 47, prior to September 26, 2013, Dale Martin, was also a signatory on NFL T/A 1.

B. Respondent NFL's Violation - Authorization Required to Service Promissory Notes/Loan Servicing Agreements

53. a. Respondent NFL provided loan servicing for loans that were originated by Respondent PCF and did not maintain a written loan servicing agreement with each lender. As a result, Respondent NFL did not satisfy the requirements of paragraphs (1), (2), (4), and (5) of subdivision (k) of Code Section 10238. (Exhibit 25, pgs. 72-74, 110-115.)

b. Respondent NFL's actions, as described in factual finding 53a, constitute a violation of Code sections 10233 and 10238.

c. At hearing, Respondents admitted that Respondent NFL did not maintain a written loan servicing agreement with each lender, as described in factual finding 53a. Respondents' defense, however, is that a written loan servicing agreement between each lender and Respondent NFL was not required because Respondent PCF authorized Respondent NFL, through the parties' loan servicing and operating agreements, such as the Trust Account and Banking Agreement (TSA) and/or the Payment Services Agreement (PSA) between Respondents PCF and NFL, to engage in all appropriate servicing activities. (Exhibit 25, pgs. 72-81 and 110-115.)

d. Respondents' defense, as described in factual finding 53c, that the parties' loan servicing and operating agreements permitted Respondent NFL to violate Real Estate Law, as described in factual findings 53a and 53b, is unsupported by legal authority and is, therefore, unpersuasive.

C. Respondent NFL's Violation - Trust Fund Handling

54. a. On November 1, 2012, Respondents NFL and PCF entered into a TSA, as described in factual findings 33 and 53c. As part of the TSA terms, Respondent PCF employed Respondent NFL to provide trust accounting and banking services for loans that were originated by Respondent PCF for 38 entities.

b. On July 17, 2012, Respondents NFL and PCF entered into a PSA, as described in factual findings 34 and 53c. According to the PSA, Respondent PCF required the assistance of Respondent NFL to provide bill payment and other obligation paying services.

c. Respondent NFL began to provide trust fund accounting and banking services for Respondent PCF on November 27, 2012. Respondent NFL deposited trust funds

of PCF's lenders and investors into NFL T/A 1 without written authorization from the trust fund owners, in violation of Code section 10145 and Regulation 2823.

d. At hearing, Respondents admitted Respondent NFL did not maintain a written authorization with trust fund owners, as described in factual finding 54c. Respondents' defense, however, is that a written agreement between each trust fund owner and Respondent NFL was not required because Respondent PCF authorized Respondent NFL, through the parties loan servicing and operating agreements, such as the TSA and/or PSA between Respondents PCF and NFL, to engage in all appropriate servicing activities. (Exhibit 25, pgs. 72-81 and 110-115.) Consequently, Respondents argue that there was no deposit of trust funds without written authorization.

e. Respondents' defense, as described in factual finding 54d, that the parties' loan servicing and operating agreements permitted Respondent NFL to violate Real Estate Law, as described in factual findings 54a through 54c, is unsupported by legal authority and is, therefore, unpersuasive.

D. Respondent NFL's Violation - Threshold Criteria

55. a. In January 2013, Respondent NFL collected \$455,190.08 from borrowers on behalf of investors in its loan servicing authority, which exceeded the \$250,000 threshold qualifying amount for 2013. As a result, Respondent NFL was required to notify the Bureau within 30 days of qualification as a threshold broker. Respondent NFL, however, did not provide the Bureau with its Threshold Notification (Form RE 853), until January 29, 2014, in violation of Code section 10232, subdivision (e).

b. Respondents admit Respondent NFL's violation of the threshold notification regulation, as described in factual finding 55a. Respondents' defenses to the late filing, as described in factual findings 36 and 37, are unpersuasive.

E. Respondent NFL's Violation - Trust Funds Status Report

56. a. After meeting the threshold criteria, as described in factual finding 55a, Respondent NFL did not file a trust funds status report with the Bureau within 30 days after the end of the first three fiscal quarters of NFL's fiscal year, which ended on December 31, 2013, in violation of Code Section 10232.25.

b. Respondents admit Respondent NFL's violation of the trust fund status report regulation, as described in factual finding 56a. Respondents defenses to the late filing are unpersuasive, as described in factual findings 36 and 37.

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F. Respondent NFL's Violation - Business and Mailing Addresses of Licensees

57. a. According to NFL's trust account bank statement, Respondent NFL conducted business at 9828 Research Drive, Irvine, California 92656, in November and December 2013. However, Respondent NFL did not notify the Bureau of its address change until a Corporation Change Application was mailed to the Bureau on January 20, 2014.

b. Consequently, Respondent NFL failed to notify the Bureau in a timely manner, of the change of Respondent NFL's main place of business from 7 Argonaut to 9828 Research Drive, Irvine, California 92618, in violation of Code section 10162<sup>19</sup> and Regulation 2715<sup>20</sup>.

c. At hearing, Respondent Harkey admitted to Respondent NFL's late Bureau notification of the change of business and mailing address, as described in factual findings 57a and 57b. However, Respondent Harkey minimized the delay and deflected responsibility for his error, testifying that he initially attempted to notify the Bureau of the Respondent NFL's change of address in December 2013, but he failed to properly execute the form, resulting in the delay in submitting the change of address form to the Bureau.

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<sup>19</sup> Code section 10162 provides:

"Every licensed real estate broker shall have and maintain a definite place of business in the State of California which shall serve as his office for the transaction of business. This office shall be the place where his license is displayed and where personal consultations with clients are held.

No real estate license authorizes the licensee to do business except from the location stipulated in the real estate license as issued or as altered pursuant to Section 10161.8"

<sup>20</sup> Regulation 2715 provides, in relevant part:

"Every broker, except a broker acting in the capacity of a salesperson to another broker under written agreement, shall maintain on file with the commissioner the address of his principal place of business for brokerage activities, the address of each branch business office and his current mailing address, if different from the business address.

Every broker who is acting in the capacity of a salesperson to another broker under written agreement shall maintain on file with the commissioner the address of the business location where he expects to conduct most of the activities for which a license is required and his current mailing address.

A real estate salesperson shall maintain on file with the commissioner his current mailing address, and when applicable, the address of the principal business office of the broker to whom the salesperson is at the time licensed.

Whenever there is a change in the location or address of the principal place of business or of a branch office of a broker, he shall notify the commissioner thereof not later than the next business day following the change. . . ."

Accordingly, Respondent Harkey argues that the Bureau had actual knowledge of the move despite the fact that the change of address form was submitted untimely.

G. Conduct of Respondent Harkey As Respondent NFL's Designated Broker-Officer

58. a. Respondent Harkey was responsible, as the designated broker-officer by a corporate broker licensee, to exercise reasonable supervision and control over the licensed activities of Respondent NFL under Code Section 10159.2 and Regulation 2725 to ensure Respondent NFL's compliance with the Real Estate Law.

b. Respondent Harkey did not, however, exercise reasonable supervision and control over the NFL's licensed activities in accordance with Code Section 10159.2 and 2725 based on Respondent NFL's violations of Real Estate Law, as described in factual findings 52 through 57.

*The Bureau Audit of Respondent Cal Comm*

59. a. In addition to auditing Respondents PCF and NFL, Ms. Kwong conducted an audit (Audit LA 130145) of Respondent Cal Comm. As part of her audit, Ms. Kwong examined Cal Comm's transactional and accounting books and records to determine whether there had been violations of the Real Estate Law [Code Section 10000 et seq.] At hearing, Ms. Kwong testified that she was assigned to examine Respondent Cal Comm's books and records for the examination audit period beginning February 1, 2011 through January 31, 2014. During the examination, Ms. Kwong spoke with Respondent Harkey, PCF's Chief Financial Officer, Ms. Melanson, and Mr. Esparza.

b. On July 16, 2014, Ms. Kwong completed Audit Report Number LA 130145. (Exhibits 23 and 26.) Audit LA 130145 was prepared based on transactional and accounting source documents provided to Ms. Kwong by Respondent Harkey, Ms. Melanson, and Mr. Esparza. As detailed in her audit report and her hearing testimony, Ms. Kwong found the following relevant violations of Real Estate Law by Respondent Cal Comm and its designated broker-officer, Respondent Harkey, as described below in factual findings 60 through 65.

A. Respondent Cal Comm – Background Information

60. a. Respondent Cal Comm solicited borrowers and lenders, negotiated, and serviced private investor commercial loans for compensation. During the audit period, beginning February 1, 2011 through January 31, 2014, Respondent Cal Comm negotiated and serviced eight commercial private money loans totaling \$3,074,750. Five of the eight loans were funded by multi-investors with a total loan amount of \$1,324,750. Loan payments collected in connection with the loan servicing activity totaled approximately \$138,668.73.

b. During the audit time period, Respondent Cal Comm provided the trust fund accounting and banking services to 30 entities for Respondent PCF under a TSA between Respondents PCF and Cal Comm.

c. Respondent Cal Comm sent a Threshold Notification on January 29, 2014, to notify the Bureau that Respondent Cal Comm had met the threshold criteria, as described in factual findings 29 through 31.

d. Respondent Cal Comm maintained the following three trust accounts pertaining to its loan negotiation and servicing activities during the audit period:

1. Trust Account 1 (CAL COMM T/A 1)  
Bank Name: Pacific Enterprise Bank  
Account No.: XXXXXX3835  
Account Name: Cal Comm Capital, Inc., A California Corp  
Broker Servicing Trust Account  
Signatory: Dan Harkey

Cal Comm T/A 1 was opened on July 9, 2012, and was used to deposit funds received from borrowers for Cal Comm's Loan Servicing Activities. Disbursements were made to investors from this account.

2. Trust Account 2 (CAL COMM T/A 2)  
Bank Name: US Bank  
Account No: XXXXXX5126  
Account Name: Cal Comm Capital, Inc. Broker Servicing Trust Account  
Signatory: Dan Harkey

Cal Comm T/A 2 was opened on May 31, 2012, and was used to deposit funds received from borrowers, lenders, and title companies in connection with loan transactions. Disbursements were made to borrowers, lenders, and other parties from this account. Cal Comm T/A 2 was closed on August 1, 2012, and was replaced by Cal Comm T/A 1.

3. Trust Account 3 (CAL COMM T/A 3)  
Bank Name: Pacific Mercantile Bank  
Account No.: XXX4800  
Account Name: Cal Comm Capital, Inc. "Main Trust Account"  
Signatory: Dan Harkey

Cal Comm T/A 3 was opened on February 10, 2012, and was used to deposit funds received from borrowers, lenders and title companies in connection with loan transactions. Disbursements were made to borrowers, lenders, and other parties from this account. Cal Comm T/A 3 was closed on July 23, 2012 and was replaced by Cal Comm T/A 2 and Cal Comm T/A 1.

In the course of the activities described in factual findings 60a through 60d, and during the audit period described in 59a and 59b, Respondent Cal Comm acted in violation of the Code and the Regulations as follows:

B. Respondent Cal Comm's Violation - Trust Fund Handling

61. a. Respondent PCF employed Respondent Cal Comm to provide trust accounting and banking services for loans that were originated by Respondent PCF under the terms of the "Trust Accounting and Banking Agreement" between Respondent PCF and Cal Comm. Respondent Cal Comm started to provide the trust accounting and banking services for PCF in April, 2012.

b. Respondent Cal Comm provided trust fund accounting and banking services for 30 entities. Trust funds received related to those entities, including sales proceeds and funds from investors, were deposited into Cal Comm T/A 1.

c. During the audit period, trust funds from Respondent PCF, NFL, LLC (non-licensed entity), and PCF, LLC (non-licensed entity), were transferred or deposited and disbursed through Cal Comm T/A 1 and Cal Comm T/A 3.

d. NFL, LLC and PCF, LLC, with Respondent PCF as their manager, engaged in the business of making real estate investments in mortgage loan and deeds of trust collateralized by real properties.

e. Funds were transferred between entity trust accounts due to the lawsuit and judgment against Respondent PCF by Brewer Corporation, described in factual findings 7 and 8. Specifically, a notice of levy was served for \$1,416,715.97 on Pacific Mercantile Bank (PMB) on April 26, 2012. At the time, Respondent PCF maintained its trust and business accounts at PMB.

f. On May 16, 2012, Respondent PCF filed a lawsuit against PMB for wrongful seizure of trust funds. As previously noted in factual finding 44, on June 26, 2012, PMB restored trust funds to PCF's trust account TA/3 and directed Respondent PCF to close the account.

g. On February 19, 2013, Respondent PCF filed for Chapter 11 relief in the United States Bankruptcy Court, Central District of California, Santa Ana Division, Case No. 8:13-bk-11495. Subsequently, on June 14, 2013, the Brewer Corporation filed a motion to impose liability on NFL, LLC, despite the fact that Respondent PCF, not NFL, LLC, was the judgment debtor in PCF's bankruptcy case.

h. Funds from Respondent PCF, NFL, LLC, and PCF, LLC, were transferred and deposited into Cal Comm's T/A 1 to protect the funds for the aforementioned entities from wrongful seizure by the Brewer Corporation pursuant to their judgment against Respondent PCF.

i. As of August 6, 2013, Cal Comm's T/A 1 had an adjusted bank balance of \$3,280,578.49, consisting of trust funds held for 17 beneficiaries for which Respondent PCF negotiated and serviced their loans.

j. The trust funds of Respondent PCF, NFL, LLC, and PCF, LLC, were deposited into Cal Comm's T/A 1 without written authorization from trust fund owners, in violation of Code Section 10145.

k. At hearing, Respondents admitted that Respondent Cal Comm did not maintain a written authorization with trust fund owners, as described in factual finding 61j. Respondents' defense, however, is that a written agreement between each trust fund owner and Respondent Cal Comm was not required because Respondent PCF authorized Respondent Cal Comm, through the parties' loan servicing and operating agreements, such as the "Loan Servicing and Property Management Assistance Agreement" between Respondents PCF and Cal Comm, to engage in all appropriate servicing activities. (Exhibit A.) Consequently, Respondents argue that there was no deposit of trust funds without written authorization.

l. Respondents' defense, as described in factual finding 61k, that the loan servicing and operating agreements between Respondents PCF and Cal Comm permitted Respondent Cal Comm to violate Real Estate Law, as described in factual findings 61a through 61j, is unsupported by legal authority and is, therefore, unpersuasive.

C. Respondent Cal Comm's Violation - Authorization Required to Service Promissory Notes/Loan Servicing Agreements

62. a. Respondent Cal Comm provided loan servicing and property management services that were negotiated by Respondent PCF and did not maintain a written loan servicing agreement with each lender. As a result, Respondent Cal Comm did not satisfy the requirements of Code section 10238, subdivisions (k)(1), (2), (4), and (5)<sup>21</sup>.

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<sup>21</sup> Section 10238, subdivision (k)(1), (2) (4), and (5) describes the necessity and content of the agreement(s) and provide, in relevant part, that:

"[T]he notes or interests shall be sold subject to a written agreement that obligates a licensed real estate broker, . . ., to act as agent for the purchasers or lenders to service the note or notes and deed of trust, including the receipt and transmission of payments and the institution of foreclosure proceedings in the event of a default. A copy of this servicing agreement shall be delivered to each purchaser. The broker shall offer to the lenders or purchasers the services of the broker or one or more affiliates of the broker, or both, as servicing agent for each transaction conducted pursuant to this article. . . ."

b. Respondent Cal Comm's actions, as described in factual finding 62a, constitute a violation of Code sections 10233<sup>22</sup> and 10238.

c. At hearing, Respondents admitted that Respondent Cal Comm did not maintain a written loan servicing agreement with each lender, as described in factual finding 62a. Respondents' defense, however, is that a written loan servicing agreement between each lender and Respondent Cal Comm was not required because Respondent PCF authorized Respondent Cal Comm, through the parties' loan servicing and operating agreements, such as the "Loan Servicing and Property Management Assistance Agreement" between Respondents PCF and Cal Comm, to engage in all appropriate servicing activities. (Exhibit A.) Consequently, Respondents argue that there was no loan servicing without written authorization.

d. Respondents' defense, as described in factual finding 62c, that the parties loan servicing and operating agreements permitted Respondent Cal Comm to violate Real Estate Law, as described in factual findings 62a and 62b, is unsupported by legal authority and is, therefore, unpersuasive.

D. Respondent Cal Comm's Violation - Threshold Criteria

63. a. From May, 2013 through July, 2013, Respondent Cal Comm negotiated two loans in an aggregate amount of more than \$250,000, which exceeded the \$250,000 threshold qualifying amount for 2013. As a result, Respondent Cal Comm was required to notify the Bureau within 30 days of qualification as a threshold broker. Respondent Cal Comm, however, did not provide the Bureau with its Threshold Notification (Form RE 853), until January 29, 2014, in violation of Code section 10232, subdivision (b).

b. Respondents admit Respondent Cal Comm's violation of the threshold notification regulation, as described in factual finding 63a. Respondents' defenses to the late filing, as described in factual findings 36 and 37, are unpersuasive.

E. Respondent Cal Comm's Violation - Multi-Lender Transaction Notification

64. a. Respondent Cal Comm arranged loans secured by real property where there was more than one lender. Namely, on February 13, 2013, Respondent Cal Comm negotiated a \$200,000 multi-lender loan with four lenders secured by real property located at

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<sup>22</sup> Section 10233 provides, in relevant part, that "A real estate licensee who undertakes to service a promissory note secured directly or collaterally by a lien on real property or a real property sales contract shall comply with each of the following requirements: (a) The licensee shall have a written authorization from the borrower, the lender, or the owner of the note or contract, that is included with the terms of a written servicing agreement that satisfies the requirements of paragraph (1), (2), (4), and (5) of subdivision (k) of Section 10238. . . ."

11253 G Street, Hesperia, California 92345. As a result, Cal Comm was required to notify the Bureau of its multi-lender status within 30 days of February 13, 2013. However, Respondent Cal Comm did not send the Bureau a Multi-Lender Transaction Notice until June 26, 2014, in violation of Code section 10238, subdivision (a).

b. Respondents admit Respondent Cal Comm's violation of the multi-lender transaction notification, as described in factual finding 64a. Respondents defenses to the late filing are unpersuasive, as described in factual findings 36 and 37.

F. Respondent Cal Comm's Violation - Business and Mailing Addresses of Licensees

65. a. Respondent Cal Comm changed its main place of business from 7 Argonaut to 9828 Research Drive, Irvine, California 92618, by the action of the sole director and sole shareholder, Respondent Harkey, on November 15, 2013. (Exhibit 26, pgs. 12 and 21.)

b. The first Broker Change Application (RE 204A) for the change in Respondent Cal Comm's main office address was received by the Bureau on December 23, 2013. (Exhibit 9, pg. 8 - 9.) The December 23, 2013 Broker Change Application was not dated and was not signed by Respondent Harkey. The Bureau sent a letter to Respondent Cal Comm on February 11, 2014, requesting that Respondent Harkey to complete the Broker Change Application. The change of Respondent Cal Comm's main office address was effective February 11, 2014.

c. Consequently, Respondent Cal Comm failed to notify the Bureau in a timely manner of the change of Cal Comm's main place of business from 7 Argonaut to 9828 Research Drive, Irvine, California 92618, in violation of Code section 10162 and Regulation 2715.

d. At hearing, Respondent Harkey admitted to Respondent Cal Comm's late Bureau notification of the change of business and mailing address, as described in factual findings 65a through 65c. Respondent Harkey provided the same defenses to his late notification of Respondent Cal Comm's address change as to Respondent NFL's change of address delay, as described in factual finding 60 through 65.

G. Conduct of Respondent Harkey As Respondent Cal Comm's Designated Broker-Officer

66. a. Respondent Harkey was responsible, as the designated broker-officer by a corporate broker licensee, to exercise reasonable supervision and control over the

licensed activities of Respondent Cal Comm under Code Section 10159.2 to ensure Cal Comm's compliance with the Real Estate Law.<sup>23</sup>

b. Respondent Harkey did not, however, exercise reasonable supervision and control over the Respondent Cal Comm's licensed activities in accordance with Code Section 10159.2, based on Respondent NFL's violations of Real Estate Law, as described in factual findings 61 through 66a.

*Dishonest Dealing By Respondents*

A. Respondents' Harkey and PCF Diversion of Funds From PCF to Cal Comm and/or NFL Constitutes Dishonest Dealing

67. a. The Bureau's Third Amended Accusation alleges that Respondents Harkey and PCF engaged in dishonest dealing by diverting funds through their actions, as described in factual findings 26 through 66, from Respondent PCF to Respondent Cal Comm and/or Respondent NFL. (Exhibit 31, pgs. 41 – 43.) In response, Respondents argue that there is no basis for Bureau discipline in this matter because the evidence does not establish diversion of funds from Respondent PCF to Respondent Cal Comm and/or Respondent NFL.

b. Respondents support their argument by citing the hearing testimony of the Bureau's auditor, Ms. Kwong, who stated she did not find a diversion of funds by the entities during the course of her audits. Respondents' arguments are unpersuasive because they ask the Administrative Law Judge to adopt the narrow interpretation to diversion of funds applied by Ms. Kwong during her audit of Respondents PCF, NFL, and Cal Comm, and ignore the fact that Respondent PCF executed several agreements between Respondents PCF and NFL and Cal Comm, which allowed for the depositing of *future* funds meant for PCF accounts to be effectively diverted into NFL and Cal Comm accounts for the purpose of avoiding the Brewer Judgment creditors and the creditors in bankruptcy by PCF and Harkey, as described in factual findings 52 through 54, 60, and 61.

c. Respondents' arguments that their actions were justified because the transfers included moneys that were held in trust for the investors and that that they needed to distance themselves from PCF's legal troubles and increasingly negative marketplace reputation are unpersuasive defenses. Whether third party creditors' collection actions were illegal or whether Respondent Harkey had noble intentions is not at issue in this matter. The fact is that Respondent Harkey's belief that transferring assets out of the reach of the Brewer Judgment and creditors was essential to prevent improper collection actions does not negate his and Respondent PCF's fraudulent intent in making the transfer. Ultimately, Respondent Harkey's certainty that the Brewer Judgment creditors were pursuing unlawful collections

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<sup>23</sup> The Third Amended Accusation also alleges violation of Regulation 2725 by Respondent Harkey (Exhibit 31, pg. 41 at line 15.) The evidence presented by Complainant at hearing does not support the foregoing allegation.

against Respondent PCF and/or trust money of the investors does not provide a defense to his actions as the owner and designated broker agent of Respondents PCF, Cal Comm, and NFL, concerning transfers made to Cal Comm and/or NFL to ensure that funds designated for Respondent PCF went to Respondent Cal Comm and/or Respondent NFL.

B. Respondent Harkey's Backdating the "Management Assistance Agreements" Constitutes Dishonest Dealing

68. a. As described in factual findings 31 and 47, Respondent Harkey executed, on behalf of all parties, several "Management Assistance Agreements" transferring certain rights from Respondent PCF to Respondent NFL to Respondent CAL COMM. The "Management Assistance Agreements" were prepared and executed in March 2012. However, the Agreements were backdated to August 1, 2010.

b. The fact that the Agreements were intentionally backdated, as described in factual finding 68a, is not in dispute. However, the purpose for the backdating is contested, with Complainant alleging that the backdating was "an apparent attempt to avoid bankruptcy creditors" and Respondent Harkey testifying at hearing that the backdating was accomplished merely to be consistent with the time Respondent Cal Comm and NFL were created as entities. Respondents further argued that the backdating was permissible by established contract law.

c. The credible evidence, based on the totality of the circumstances, as described in factual findings 26 through 66, indicates that the backdating, while allowable under contract law, when not for a nefarious purpose, was initiated by Respondent Harkey as owner, controller, and corporate agent acting on behalf of Respondents PCF, Cal Comm, and NFL, for the purpose of evading third party creditors and, therefore, constitutes dishonest dealing by Respondents PCF, Cal Comm, and NFL.

*Respondent PCF's and Cal Comm's Refusal to Provide Investor/Lender Hugo R. with the Contact Information of Other Investors in the Keen Medical Group, Inc. Loan*

69. a. Hugo R. is an investor/lender with a 0.59% undivided interest in the Keen Medical Group, Inc. loan (Keen loan). The Keen loan was one of the loans serviced by Respondent PCF. On July 11, 2013, Hugo R. made a written request for a contact list of all the investors for the Keen loan and an accounting of all the fees charged by Respondent PCF. (Exhibit 17 at pg. 7.)

b. On July 24, 2013, Respondent PCF refused to provide the requested information, as described in factual finding 70a, stating that "Point Center does not provide contact information to other investors." (Exhibit 17 at p. 5.)

c. Respondent PCF's refusal to provide the requested investor contact information to Hugo R., as described in factual findings 70a and 70b, violated Code section 10238, subdivision (m)<sup>24</sup>.

d. Respondent PCF's violation of Code section 10238, subdivision (m), as described in factual findings 69a through 69c, constitutes a willful disregard of the Real Estate Law.

e. At hearing, Respondents Harkey and PCF disputed that Respondent PCF refused Hugo R.'s request, as described in factual findings 69a and 69b, on both factual and legal grounds. First, Respondents argued that Hugo R. had been provided with the contact information for the other Keen loan investors when Respondent PCF provided Hugo R. with the Lender Description to the Promissory Note for the Keen Medical Group, Inc. loan. (Exhibit OO at Exhibit A thereto, pg. 2.) However, the Lender Description does not include the addresses for the Keen loan investors. Second, Respondent Harkey testified that the contact information was not provided to Hugo R. because Hugo R. threatened to harass other investors if he did not get a preferential return of his original \$25,000 investment. No corroborating evidence was provided by Respondent Harkey to support the aforementioned hearsay testimony, which was disputed by Hugo R. during his hearing testimony. Finally, Respondent Harkey testified that there was no violation of Code section 10238, subdivision (m), because the Keen loan was exempted under Corporations Code section 25102. However, Corporations Code section 25102 is inapplicable as a defense here because it relates to the sale or offering of securities, not the servicing of the loan by Respondent PCF. Accordingly, Respondents defenses are unpersuasive.

#### *Respondents' Contentions and Matters in Mitigation and Rehabilitation*

70. Respondents, including Respondent PCF, provide no evidence in mitigation aside from their contentions that their violations of Real Estate Law, as described in factual findings 26 through 69, were "at best a description of minor administrative filing errors (subsequently remedied) that was caused by the complexity of PCF's ongoing bankruptcy proceedings (delay in making required regulatory filings); and defending against third parties' wrongful attempts to misappropriate investor funds through improper levies and bank offsets. (Trust fund transfers)." (Exhibit 30, pg. 9.) In addition, Respondents contend that the reliance on advice of counsel caused them to erroneously believe that Respondent PCF's bankruptcy stay applied to Bureau filing regulations.

71. Respondent provides no evidence in rehabilitation based on Respondents' contentions that there was no intent to violate Bureau regulations.

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<sup>24</sup> Section 10238, subdivision (m), requires that the broker or servicing agent "furnish any purchaser of a note or interest, upon request, with the names and addresses of the purchaser of the other note or interests in the loan."

72. Respondent Harkey called no witness from his community, his business associates (other than Ms. Melanson, who has benefited from Respondents' business practices), past clients, or trade association members to offer evidence to show Respondent Harkey's honesty and integrity as an upstanding real estate professional or law abiding person.

73. Except as set forth in this Decision, all other allegations in the Third Amended Accusation and all other contentions by the parties lack merit or constitute surplusage.

#### *Costs*

74. Pursuant to Business and Professions Code sections 10148, subdivision (b) and 10106, the Bureau is authorized to seek reimbursement of the reasonable costs of the audit, investigation, and enforcement at hearing from a licensee found to have committed a violation of the Real Estate Law. The Bureau submitted signed declarations and activity/cost detail for enforcement and prosecution of this case.

75. a. Bureau auditors spent 798.5 hours on this case at a cost of \$47,387.73. (Exhibit 19.) Bureau investigators and staff spent 246.80 hours investigating the case at a cost of \$15,456.40. (Exhibit 18.) Legal counsel spent 50.25 hours from August 13, 2014 to March 30, 2015, researching, interviewing, reviewing records, report writing, preparing evidence, and preparing this case for hearing at a cost of \$4,472.25. (Exhibit 20.) Per the declarations and cost detail, a total cost assessment of \$67,316.38 is reasonable for the tasks performed.

b. Respondent Harkey continues to operate and receive substantial income from his ownership and operation of Respondents NFL and Cal Comm. No evidence was presented at hearing by Respondents challenging the reasonableness of the Bureau's costs and/or asserting that they were financially unable to pay said costs.

#### *Ultimate Findings*

76. It would be against the public interest to permit Respondents PCF, Cal Comm, and NFL, to maintain their licenses and/or license rights as corporate real estate brokers.

77. It would be against the public interest to permit Respondent Harkey to maintain a real estate designated broker officer license and/or license rights.

### LEGAL CONCLUSION

#### *The Standard of Proof*

1. The standard of proof in an administrative disciplinary action that seeks the suspension or revocation of a real estate professional's license is "clear and convincing

evidence to a reasonable certainty.” (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.)

“Clear and convincing evidence” means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. “Clear and convincing evidence” is a higher standard of proof than proof by “a preponderance of the evidence.” (CACI 201) “Clear and convincing evidence” requires a finding of high probability for the propositions advanced in an accusation against a targeted respondent licensee. It must be so clear as to leave no substantial doubt and to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700.) And, the standard of proof known as clear and convincing evidence is required where particularly important individual interests or rights are at stake. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.)

The factual findings and legal conclusions, herein, rest upon proof by clear and convincing evidence to a reasonable certainty that shows Respondents’ acts and omissions warrant the disciplinary action.

*Applicable Statutes*

2. Code section 10177 states, in relevant part:

“The commissioner may suspend or revoke the license of a real estate licensee, delay the renewal of a license of a real estate licensee, or deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, delay the renewal of a license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation’s stock has done any of the following:

[¶] . . . [¶]

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) or Part 2.

[¶] . . . [¶]

(f) Acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, . . . .

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

(h) As a broker licensee, . . . as the officer designated by a corporate broker licensee,

failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

[¶] . . . [¶]

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing.

[¶] . . . [¶]

(p) violated Article 6 (commencing with Section 10237).”

3. Code section 10176 states, in relevant part:

“The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

(a) Making any substantial misrepresentation.

[¶] . . . [¶]

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.”

4. Code section 10232 states:

“a) Except as otherwise expressly provided, Sections 10232.2, 10232.25, 10233, and 10236.6 are applicable to every real estate broker who intends or reasonably expects in a successive 12 months to do any of the following:

(1) Negotiate a combination of 10 or more of the following transactions pursuant to subdivision (d) or (e) of Section 10131 or Section 10131.1 in an aggregate amount of more than one million dollars (\$1,000,000):

(A) Loans secured directly or collaterally by liens on real property or on business opportunities as agent for another or others.

(B) Sales or exchanges of real property sales contracts or promissory notes secured directly or collaterally by liens on real property or on business opportunities as agent for another or others.

(C) Sales or exchanges of real property sales contracts or promissory notes secured directly or collaterally by liens on real property as the owner of those notes or contracts.

(2) Make collections of payments in an aggregate amount of two hundred fifty thousand dollars (\$250,000) or more on behalf of owners of promissory notes secured directly or collaterally by liens on real property, owners of real property sales contracts, or both.

(3) Make collections of payments in an aggregate amount of two hundred fifty thousand dollars (\$250,000) or more on behalf of obligors of promissory notes secured directly or collaterally by liens on real property, lenders of real property sales contracts, or both.

Persons under common management, direction, or control in conducting the activities enumerated above shall be considered as one person for the purpose of applying the above criteria.

(b) The negotiation of a combination of two or more new loans and sales or exchanges of existing promissory notes and real property sales contracts of an aggregate amount of more than two hundred fifty thousand dollars (\$250,000) in any three successive months or a combination of five or more new loans and sales or exchanges of existing promissory notes and real property sales contracts of an aggregate amount of more than five hundred thousand dollars (\$500,000) in any successive six months shall create a rebuttable presumption that the broker intends to negotiate new loans and sales and exchanges of an aggregate amount that will meet the criteria of subdivision (a).

(c) In determining the applicability of Sections 10232.2, 10232.25, 10233, and 10236.6, loans or sales negotiated by a broker, or for which a broker collects payments or provides other servicing for the owner of the note or contract, shall not be counted in determining whether the broker meets the criteria of subdivisions (a) and (b) if any of the following apply:

(1) The lender or purchaser is any of the following:

(A) The Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, and the United States Department of Veterans Affairs.

(B) A bank or subsidiary thereof, bank holding company or subsidiary thereof, trust company, savings bank or savings and loan association or subsidiary thereof, savings bank or savings association holding company or subsidiary thereof, credit union, industrial bank or industrial loan company, finance lender, or insurer doing business under the authority of, and in accordance with, the laws of this state, any other state, or the United States relating to banks, trust companies, savings banks or savings associations, credit unions, industrial banks or industrial loan companies, commercial finance lenders, or insurers, as evidenced by a

license, certificate, or charter issued by the United States or a state, district, territory, or commonwealth of the United States.

(C) Trustees of a pension, profit-sharing, or welfare fund, if the pension, profit-sharing, or welfare fund has a net worth of not less than fifteen million dollars (\$15,000,000).

(D) A corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 or a wholly owned subsidiary of that corporation.

(E) A syndication or other combination of any of the entities specified in subparagraph (A), (B), (C), or (D) that is organized to purchase the promissory note.

(F) The California Housing Finance Agency or a local housing finance agency organized under the Health and Safety Code.

(G) A licensed residential mortgage lender or servicer acting under the authority of that license.

(H) An institutional investor that issues mortgage-backed securities, as specified in paragraph (11) of subdivision (i) of Section 50003 of the Financial Code.

(I) A licensed real estate broker selling all or part of the loan, the note, or the contract to a lender or purchaser specified in subparagraphs (A) to (H), inclusive.

(2) The loan or sale is negotiated, or the loan or contract is being serviced for the owner, under authority of a permit issued pursuant to applicable provisions of the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code).

(3) The transaction is subject to the requirements of Article 3 (commencing with Section 2956) of Chapter 2 of Title 14 of Part 4 of Division 3 of the Civil Code.

(d) If two or more real estate brokers who are not under common management, direction, or control cooperate in the negotiation of a loan or the sale or exchange of a promissory note or real property sales contract and share in the compensation for their services, the dollar amount of the transaction shall be allocated according to the ratio that the compensation received by each broker bears to the total compensation received by all brokers for their services in negotiating the loan or sale or exchange.

(e) A real estate broker who meets any of the criteria of subdivision (a) or (b) shall notify the department in writing within 30 days after that determination is made."

5. Code section 10236.5 requires that a real estate broker "... notify the department when he or she is no longer servicing or arranging loans subject to the reporting requirements of Section 10232."

6. Code section 10238 describes the form of the notice that must be provided by a real estate broker to the Bureau within 30 days of the broker's first transaction and within 30 days of any material change in the information required in the notice.

*Causes for Discipline*

A. Respondent Harkey

7. Cause exists under section 10177, subdivisions (d), (g), (h), (i), and (j), to discipline Respondent Harkey's real estate license and license rights, based on his acts as Respondents PCF, NFL, and Cal Comm's corporate broker agent, in failing to file required Bureau filings in a timely manner based on factual findings 26 through 37 and legal conclusions 1 and 2.

8. Cause exists under section 10177, subdivisions (d), (g), and (h), to discipline Respondent Harkey's real estate license and license rights, based on his acts and omissions as Respondent PCF's corporate broker agent, in failing to exercise reasonable supervision and control over the licensed activities of Respondent PCF and failing to ensure Respondent PCF's compliance with Real Estate Law based on factual findings 38 through 50 and legal conclusions 1 and 2.

9. Cause exists under section 10177, subdivisions (d), (g), and (h), to discipline Respondent Harkey's real estate license and license rights, based on his acts and omissions as Respondent NFL's corporate broker agent, in failing to exercise reasonable supervision and control over the licensed activities of Respondent NFL and failing to ensure Respondent NFL's compliance with Real Estate Law based on factual findings 51 through 58 and legal conclusions 1 and 2.

10. Cause exists under section 10177, subdivisions (d), (g), and (h), to discipline Respondent Harkey's real estate license and license rights, based on his acts and omissions as Respondent Cal Comm's corporate broker agent, in failing to exercise reasonable supervision and control over the licensed activities of Respondent Cal Comm and failing to ensure Respondent Cal Comm's compliance with Real Estate Law based on factual findings 59 through 66 and legal conclusions 1 and 2.

11. Cause exists under section 10177, subdivisions (g) and (j), to discipline Respondent Harkey's real estate license and license rights, based on his dishonest and negligent acts and omissions in diverting funds from Respondent PCF and/or Respondent NFL to avoid creditors in bankruptcy in violation of Real Estate Law based on factual finding 67 and legal conclusion 1 and 2.

12. Cause exists under section 10177, subdivision (f), to discipline Respondent Harkey's real estate license and license rights, based on his actions in diverting funds from Respondent PCF to Respondents Cal Comm and/or NFL to avoid creditors in bankruptcy, which constituted conduct by a controlling owner and officer that would have been grounds

to deny their applications for real estate licenses based on factual finding 67 and legal conclusions 1 and 2.

13. Cause exists under sections 10176, subdivisions (a) and (i) and 10177, subdivisions (d), (g), (i), and (j) to discipline Respondent Harkey's real estate license and license rights, based on his dishonest and fraudulent actions on behalf of all parties in executing backdated agreements in violation of Real Estate Law based on factual finding 68 and legal conclusions 1 through 3.

14. Cause exists under section 10177, subdivisions (d), (g), and (j), to discipline Respondent Harkey's real estate license and license rights, based on his actions on behalf of Respondent PCF in failing to furnish lists of investors to Hugo R. in violation of Real Estate Law based on factual finding 69 and legal conclusions 1 and 2.

B. Respondent PCF

15. Cause exists under code sections 10232, 10236.5, 10238, and 10177, subdivisions (d), (g), and (p) to discipline Respondent PCF's real estate license and license rights, based on its actions, acting by and through its corporate broker, owner, and officer Respondent Harkey in failing to file required Bureau filings in a timely manner based on factual findings 26 through 37 and legal conclusions 1, 2, and 4 through 6.

16. Cause exists under code section 10177, subdivisions (d) and (g) to discipline Respondent PCF real estate license based on its actions in violation of Real Estate Law based on factual findings 38 through 50 and legal conclusions 1 and 2.

17. Cause exists under code section 10177, subdivisions (g) and (j) to discipline Respondent PCF's real estate license and license rights, based on its dishonest and negligent actions in diverting funds from Respondent PCF to Respondents Cal Comm and NFL to avoid creditors in bankruptcy in violation of Real Estate Law based on factual finding 67 and legal conclusions 1 and 2.

18. Cause exists under sections 10176, subdivisions (a) and (i) and 10177, subdivisions (d), (g), (i), and (j) to discipline Respondent PCF's real estate license and license rights, based on its dishonest and fraudulent acts, by and through its corporate broker, owner, and officer Respondent Harkey, in executing backdated agreements in violation of Real Estate Law based on factual finding 68 and legal conclusions 1 through 3.

19. Cause exists under section 10177, subdivisions (d), (g), and (j), to discipline Respondent PCF's real estate license and license rights, based on its actions, by and through its corporate broker, owner, and officer Respondent Harkey in failing to furnish lists of investors to Hugo R. in violation of Real Estate Law based on factual finding 69 and legal conclusions 1 and 2.

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C. Respondent NFL

20. Cause exists under code sections 10232, 10236.5, 10238, and 10177, subdivisions (d), (g), and (p) to discipline Respondent NFL's real estate license and license rights, based on its actions, acting by and through its corporate broker, owner, and officer Respondent Harkey in failing to file required Bureau filings in a timely manner based on factual findings 26 through 37 and legal conclusions 1, 2, and 4 through 6.

21. Cause exists under code section 10177, subdivisions (d) and (g) to discipline Respondent NFL's real estate license based on its actions in violation of Real Estate Law based on factual findings 51 through 58 and legal conclusions 1 and 2.

22. Cause exists under section 10177, subdivision (f), to discipline Respondent NFL's real estate license and license rights, based on Respondent Harkey's actions as its corporate broker, owner and officer, in diverting funds from Respondent PCF to Respondents Cal Comm and NFL to avoid creditors in bankruptcy, which constituted conduct by a controlling owner and officer that would have been grounds to deny Respondent NFL's applications for a real estate license based on factual finding 67 and legal conclusions 1 and 2.

23. Cause exists under sections 10176, subdivisions (a) and (j) and 10177, subdivisions (d), (g), (i), and (j) to discipline Respondent NFL's real estate license and license rights, based on its dishonest and fraudulent acts, by and through its corporate broker, owner, and officer Respondent Harkey, in executing backdated agreements in violation of Real Estate Law based on factual finding 68 and legal conclusions 1 through 3.

D. Respondent Cal Comm

24. Cause exists under code sections 10232, 10236.5, 10238, and 10177, subdivisions (d), (g), and (p) to discipline Respondent NFL's real estate license and license rights, based on its actions, acting by and through its corporate broker, owner, and officer Respondent Harkey in failing to file required Bureau filings in a timely manner based on factual findings 26 through 37 and legal conclusions 1, 2, and 4 through 6.

25. Cause exists under code section 10177, subdivisions (d) and (g) to discipline Respondent NFL's real estate license based on its actions in violation of Real Estate Law based on factual findings 59 through 66 and legal conclusions 1 and 2.

26. Cause exists under section 10177, subdivision (f), to discipline Respondent NFL's real estate license and license rights, based on Respondent Harkey's actions as its corporate broker, owner and officer, in diverting funds from Respondent PCF to Respondents Cal Comm and NFL to avoid creditors in bankruptcy, which constituted conduct by a controlling owner and officer that would have been grounds to deny Respondent NFL's applications for a real estate license based on factual finding 67 and legal conclusions 1 and 2.

27. Cause exists under sections 10176, subdivisions (a) and (i) and 10177, subdivisions (d), (g), (i), and (j) to discipline Respondent NFL's real estate license and license rights, based on its dishonest and fraudulent acts, by and through its corporate broker, owner, and officer Respondent Harkey, in executing backdated agreements in violation of Real Estate Law based on factual finding 68 and legal conclusions 1 through 3.

#### *Measure of Discipline*

28. The purpose of an administrative adjudication proceeding, which contemplates the revocation or suspension of a professional or occupational license, is not to punish the individual licensee. The purpose of the agency action that results from the administrative adjudication proceeding is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Board of Medical Quality Assurance*, supra, 135 Cal.App.3d 583.)

Respondents serviced loans that totaled a substantial amount of money. Respondents' acts and omissions constituted denigration of the law's directive for real estate professionals. Respondent Harkey, acting on behalf of Respondents PCF, NFL, and Cal Comm, misinterpreted applicable statutes and regulations to meet his personal objectives of evading the Brewer judgment and bankruptcy creditors.

The Real Estate Law, and in particular Business and Professions Code section 10177, subdivision (d), has a purpose of providing concrete protection for the public not only from conniving real estate licensees but also from unformed, neglectful, or unknowledgeable real estate licensees. (*Manning v. Fox* (1984) 151 Cal.App.3d 531.)

#### *Inadequate Evidence of Remorse and Rehabilitation*

29. Respondent Harkey, individually and as corporate broker agent, owner, and officer of Respondents PCF, NFL, and Cal Comm, refused to acknowledge any wrongful conduct on his part at hearing. Not only did he deny violating Real Estate Law and engaging in dishonest dealing, but made statements deflecting responsibility in this matter.

Accordingly, the proper determination in this instance is that Respondent Harkey, individually and as broker agent, owner, and officer of Respondents PCF, NFL, and Cal Comm, failed to show a change in attitude from a proven disposition of willful violation of Real Estate Law.

Fully acknowledging the wrongfulness of past action is an essential step towards rehabilitation. Rather than shoulder responsibility in this matter, Respondent Harkey blames third party creditors and the Bureau for his and his companies Real Estate Law violations. Hence, Respondent Harkey has not taken even the essential first steps towards rehabilitation.

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Costs

30. The Commissioner has discretion to recoup audit costs after a final desist and refrain order or after a disciplinary hearing if the broker has been found to have violated Business and Professions Code section 10145 or any related regulation. (Bus. & Prof. Code, § 10148, subd. (b).) Additionally, the Commissioner may request the administrative law judge to direct a licensee found to have committed a violation of the Real Estate Law to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. (Bus. & Prof. Code, § 10106, subd. (a).)

31. *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, sets forth factors to be considered in determining a reasonable cost assessment for disciplined licensees. Factors to be considered include whether the licensee had a “subjective good faith belief” in the merits of his or her position, whether the licensee raised a “colorable challenge” to the proposed discipline, and the extent of the licensee’s financial ability to make later payments. Further, full costs may not be assessed when a “disproportionately large investigation” was conducted given the circumstances of the case. Finally, the Administrative Law Judge should consider the public interest in regulating the targeted conduct.

Based on factual findings 75 and 76 and legal conclusions 30, in conjunction with an analysis pursuant to the factors set forth in *Zuckerman*, a cost assessment of \$67,316.38 represents a reasonable amount to impose on Respondents. Respondents shall, jointly and severally, reimburse the Bureau in this amount.

**ORDER**

1. All licenses and licensing rights of Respondent Point Center Financial, Inc. under the Real Estate Law are revoked.

2. All licenses and licensing rights of Respondent National Financial Lending, Inc. under the Real Estate Law are revoked.

3. All licenses and licensing rights of Respondent Cal Comm Capital, Inc. under the Real Estate Law are revoked.

4. All licenses and licensing rights of Respondent Dan Joe Harkey under the Real Estate Law are revoked.

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5. Pursuant to Business and Professions Code sections 10148 and 10106, Respondents shall individually or collectively pay the Commissioner's reasonable cost for prosecution, investigation, and enforcement of this disciplinary action in the amount of \$67,316.38, pursuant to payment schedule acceptable to the Commissioner.

DATED: October 1, 2015

DocuSigned by:  
*Irina Tentser*  
ADD1484FB193489...

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Irina Tentser  
Administrative Law Judge  
Office of Administrative Hearings