

FILED

OCT 14 2015

BUREAU OF REAL ESTATE

By John Guik

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)	
)	
BAYPOINTE MANAGEMENT, INC., and)	CalBRE No. H-39738 LA
ROBERT JOSEPH CASH, individually and)	
as designated officer of)	OAH No. 2015041100
Baypointe Management Inc.,)	
)	
Respondents.)	

DECISION

The Proposed Decision dated September 2, 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.

Pursuant to Section 11517 (C) (2) of the Government Code, the following corrections are made:

Findings, Page 1, Paragraph 1, Line 1: "January 25" shall read: "January 24".

Findings, Page 1, Paragraph 1, Line 2: "November 4" shall read "November 14".

This Decision shall become effective at 12 o'clock noon on NOV 03 2015.

IT IS SO ORDERED 10/2/2015.

REAL ESTATE COMMISSIONER

Wayne Bell
WAYNE BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

BAYPOINTE MANAGEMENT, INC., and
ROBERT JOSEPH CASH, individually and
as designated officer of Baypointe
Management, Inc.,

Respondents.

Case No. H-39738 LA

OAH No. 2015041100

PROPOSED DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on August 24, 2015, in Los Angeles, California.

James R. Peel, Counsel for the Bureau of Real Estate (Bureau), appeared and represented complainant Maria Suarez, Deputy Real Estate Commissioner of the Bureau.

Respondent Robert Joseph Cash appeared and represented himself, individually and as the designated officer of Baypointe Management, Inc. (Baypointe), a corporation.

The record was closed and the matter was submitted for decision at the conclusion of the hearing.

FACTUAL FINDINGS

1. On January ²⁴~~25~~, 1995, the Bureau issued Salesperson License number 01192232 to respondent Cash. On November ~~14~~, 2006, the Bureau issued the same license number to respondent Cash as a Broker License. The license is valid and will expire on November 13, 2018, unless renewed.

2. On September 2, 2009, the Bureau issued Corporation License number 01870790 to Baypointe. Respondent Cash is the designated officer for Baypointe. The license is valid and will expire on September 1, 2017, unless renewed.

3. Complainant brought the Accusation in her official capacity. Respondents timely submitted Notices of Defense.

4. Baypointe negotiates and arranges hard-money loans for borrowers and private investors. On October 15, 2014, the Bureau commenced an examination of Baypointe's compliance with the real estate laws and regulations. During the audit period, Baypointe brokered approximately 17 single-lender business purpose loans with an aggregate loan amount of \$845,560. Baypointe did not maintain any trust accounts for its mortgage loan activities during the audit period.

5. During the audit period, Baypointe was required to file Form RE 854, a "Trust Fund Non-Accountability Report" (Trust Fund Report), with the Bureau. Because Baypointe's fiscal year begins on January 1st, the Trust Fund Report is due within 30 days after the end of each quarter of the calendar year.

(A) On October 25, 2013, respondent Cash completed, signed, and dated a Trust Fund Report on behalf of Baypointe for the quarter ending September 30, 2013. He then inserted the report in an envelope addressed to the Bureau, affixed sufficient postage, and deposited the envelope in the United States mail on the same day. On November 12, 2013, the Bureau mailed Baypointe a notice that its quarterly Trust Fund Report was delinquent. Cash disregarded the notice because he believed the Bureau had not yet received or processed the Trust Fund Report mailed on October 25, 2013. On December 9, 2013, the Bureau mailed Baypointe a second notice that its quarterly Trust Fund Report was delinquent. Respondents took no action in response to the second notice.

(B) On July 1, 2014, respondent Cash completed, signed, and dated a Trust Fund Report on behalf of Baypointe for the quarter ending June 30, 2014. On July 16, 2014, the Bureau mailed Baypointe a notice that its quarterly Trust Fund Report was incomplete because the form omitted information about the beginning and ending dates of the fiscal year. Respondent Cash had routinely filed Trust Fund Reports without inserting any data regarding the fiscal year. Upon receipt of the notice, respondent inserted the requested data on the same Trust Fund Report in his handwriting. He then inserted the amended Trust Fund Report in an envelope addressed to the Bureau, affixed sufficient postage, and deposited the envelope in the United States mail on the same day. On August 11, 2014 and September 9, 2014, the Bureau mailed Baypointe two separate notices that its quarterly Trust Fund Report for the quarter ending June 30, 2014 was delinquent. Respondents took no action in response to either notice.

(C) During the audit, respondent Cash furnished the Bureau's examiner with copies of the above-described Trust Fund Reports. Except as described above, Baypointe timely filed all other quarterly Trust Fund Reports during the audit period.

6. On June 30, 2014, Baypointe brokered a hard-money loan issued by Fairway America Fund VI, LLC (Fairway), a lender in Oregon. The borrower was located in Texas. Baypointe brokered a second Fairway loan to a borrower located in Kentucky. Both loans were secured by real property located in Tennessee. Fairway directed Baypointe to designate itself as the beneficiary of the Deeds of Trust and to execute and record an assignment of each deed of trust from Baypointe to Fairway. This structure, commonly known as "table

lending," provides the lender with certain advantages in the collection of defaulted loans. Respondent Cash knew that table lending is prohibited in California, but he was informed and believed that table lending is not prohibited in Tennessee. Respondent Cash caused deeds of trust to be prepared for both loans, designating Baypointe as the beneficiary of both deeds of trust. Respondent Cash recorded the deeds of trust concurrently with assignments of those deeds of trust from Baypointe to Fairway. During the audit, the examiner objected to the out-of-state table loans. Respondent Cash gave assurances that he would refrain from table lending, whether the transaction is in or out of the state of California. There is no evidence to show that Baypointe engaged in any table lending practices in the past year.

7. The Bureau has published Form RE 851A, a "Lender/Purchaser Disclosure Statement" (LPDS), to ensure that all disclosures to lenders comply with the real estate law. In lieu of completing the LPDS, Baypointe routinely sends a package of documents to investors that respondent Cash considers equally informative as, if not more informative than, the LPDS. With regard to six loans during the audit period, respondent Cash sent investors: (a) an executive loan summary detailing the property used to secure the loan, the loan amount, interest rate, loan term, loan to value, and fully amortized monthly payment; (b) a copy of the loan application; (c) the borrower's credit report; and (d) a full appraisal report. During the audit, the examiner objected to Baypointe's disclosure practices. Respondent Cash gave assurances that all future disclosures would be made on the LPDS. There is no evidence to show that Baypointe continued its unsatisfactory method of making disclosure to investors.

8. California law requires a broker to furnish a good faith estimate of the charges a borrower is likely to incur at the settlement of a mortgage loan transaction, including fees, commissions, costs, and expenses. To furnish the information, a broker is required to complete Form RE 883, a "Mortgage Loan Disclosure Statement" (MLDS). For all loan transactions brokered by Baypointe, respondent Cash generates an MLDS using commercial computer software. With regard to four loan transactions, respondent inserted all data relating to estimated costs of the subject loans, but inserted no license number in the designated field for licensing information for himself and Baypointe.

9. In her Accusation, complainant alleges that respondents willfully violated the following provisions of the Business and Professions Code (Code):

(A) Code section 10232.25, which provides that a qualifying real estate broker must file with the Bureau a Trust Fund Report as of the last day of the fiscal quarter within 30 days after the end of each of the first three fiscal quarters of the broker's fiscal year.

(B) Code section 10234, subdivision (a), which provides that every real estate licensee who negotiates a loan secured by a trust deed on real property shall cause the

trust deed to be recorded, naming as beneficiary the lender or the lender's nominee who shall not be the licensee or the licensee's nominee.¹

(C) Code section 10232.4, subdivision (a), which provides that, in making a solicitation to a particular person and in negotiating with that person to make a loan secured by real property, a real estate broker must deliver to the person a completed statement with 10 points of information set forth in Code Section 10232.5 before the person becomes obligated to make the loan or purchase. The Code does not prescribe the form by which the 10 points of information must be delivered.

(D) Code section 10236.4, subdivision (b), which provides that every licensed real estate broker is required to display his or her license number on all advertisements where there is a solicitation for borrowers or potential investors.

10. Complainant incurred prosecution costs in the amount of \$378.25 and investigation costs in the amount of \$1,377.05. These costs, totaling \$1,755.30, were supported by declarations and are reasonable considering the facts and circumstances of the case.

LEGAL CONCLUSIONS

11. Complainant has the burden of proving cause for discipline by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

12. The Bureau may discipline a real estate licensee who willfully disregards or violates any applicable law, rule, or regulation. (Code, § 10177, subd. (d).)

13. The Bureau may discipline a real estate licensee who has demonstrated negligence or incompetence in performing any act requiring a license. (Code, § 10177, subd. (g).)

14. The Bureau may discipline a broker licensee who, as the officer designated by a corporate broker licensee, fails to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required. (Code, §§ 10177, subd. (h), and 10159.2, subd. (a).)

15. In this case, complainant has failed to present clear and convincing evidence that respondents willfully violated Code section 10232.25. Respondent Cash credibly testified that he deposited the Trust Fund Reports in the United States mail in the regular course of his business within the time prescribed by Code section 10232.25. His testimony was corroborated by other Trust Fund Reports that were signed, dated, mailed, and received

¹ Statutory exceptions apply to the requirements of Section 10234, subdivision (a), in limited circumstances, which are inapplicable in this case.

by the Bureau. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of the mail. (Evid. Code, § 641.) Complainant's evidence that it has no record of the Trust Fund Report was sufficient to rebut the presumption that the report was received, but insufficient to show that respondent Cash willfully violated Code section 10232.25. Nonetheless, respondents demonstrated negligence and incompetence by failing to respond to four notices of delinquency.

16. Complainant has failed to present clear and convincing evidence that respondents willfully violated Code section 10236.4, subdivision (b). Because the MLDS is a form designed to provide borrowers with a good faith estimate of all costs in relation to a pending loan transaction, the MLDS is not an advertisement where there was a solicitation for borrowers or potential investors. Accordingly, omitting the broker's license number on the MLDS was not a violation of Code section 10236.4, subdivision (b). However, respondents demonstrated negligence and incompetence by failing to insert the license number in the applicable software field.

17. Complainant has failed to present clear and convincing evidence that respondents willfully violated Code section 10232.4, subdivision (a). The Code requires that 10 points of information be furnished, but does not prescribe the form by which the information must be provided. The evidence shows that respondents furnished information to borrowers, but complainant presented no evidence to show that the information was substantively insufficient. However, respondents demonstrated negligence and incompetence by failing to use a form designed to ensure compliance with the disclosure requirements, relying instead on respondent Cash's own assessment of the sufficiency of the disclosure.

18. Complainant has presented clear and convincing evidence that respondents violated Code section 10234, subdivision (a), by designating Baypointe, rather than the lender, as the beneficiary of a deed of trust. Although Fairway nominated Baypointe and respondents were the only nexus to California law, Code section 10234 expressly applies to California licensees and expressly prohibits a California licensee from serving as a nominee for a lender. However, complainant has failed to establish that the violation was willful under Code section 10177, subdivision (d). Nonetheless, respondents demonstrated negligence and incompetence by failing to recognize that California law applied to their actions as licensees, regardless of the location of the property securing the loan or the domicile of the parties to the transaction.

19. Respondent Cash committed all acts as the designated officer of Baypointe. In his authorized capacity, respondent Cash failed to exercise reasonable supervision and control over Baypointe's mortgage loan activities.

20. Cause does not exist to discipline respondents' licenses under Code section 10177, subdivision (d), because respondents did not willfully disregard or violate any applicable law, rule, or regulation. (Factual Findings 4-9.)

21. Cause exists to discipline respondents' licenses under Code section 10177, subdivision (g), because respondents demonstrated negligence and incompetence in performing acts requiring a license. (Factual Findings 4-9.)

22. Cause exists to discipline respondent Cash's license under Code section 10177, subdivision (h), because, as the officer designated by a corporate broker licensee, he failed to exercise reasonable supervision and control of Baypointe's activities, for which a real estate license was required.

23. Evidence of mitigation and rehabilitation has been considered. (Cal. Code Regs, tit. 10, § 2912.) Respondent Cash has corrected his disclosure practices and has not engaged in table lending transactions for out-of-state lenders in the past year. The acts of misconduct were procedural in nature and the severity of noncompliance was sufficiently moderate that probationary terms will suffice to protect the public.

24. Any licensee who violates the law may be assessed and ordered to pay the Bureau's reasonable costs incurred to investigate and prosecute the action. (Code, §10106.)

25. Proof of costs at the hearing may be made by declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented in the form and content prescribed by the regulations. (Cal. Code Regs., tit. 1, §1042, subd. (b).)

26. Complainant has presented satisfactory proof that reasonable costs were incurred in the amount of \$1,755.30 to investigate and enforce the case against respondents. (Factual Finding 10.) Accordingly, respondents are jointly and severally liable under Business and Professions Code section 10106 for the Bureau's costs in the amount of \$1,755.30, payable at the rate of \$146.28 per month commencing on the first day of the month following the effective date of this Decision and continuing each consecutive month thereafter until paid in full.

ORDER

All licenses and licensing rights of respondents Cash and Baypointe under the Real Estate Law are suspended for a period of 30 days from the effective date of this Decision; provided, however, that 30 days of said suspension shall be stayed for one year upon the following terms and conditions:

1. Respondents shall obey all laws, rules, and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California;

2. Respondents shall, jointly and severally, pay to the Bureau its costs of investigation and prosecution in the amount of \$1,755.30, payable at the rate of \$146.28 per month, commencing on the first day of the month following the effective date of this Decision and continuing each consecutive month thereafter until paid in full;

3. No final subsequent determination shall be made, after hearing or upon stipulation, that cause for disciplinary action occurred within one year of the effective date of this Decision. Should such a determination be made, the Commissioner may, in his discretion, vacate and set aside the stay order and reimpose all or a portion of the stayed suspension. Should no such determination be made, the stay imposed herein shall become permanent.

DATED: September 2, 2015

DocuSigned by:
Matthew Goldsby
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MATTHEW GOLDSBY
Administrative Law Judge
Office of Administrative Hearings