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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

OCT 08 2010

R. Devries

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

10 MARK HORN, on behalf of himself and all
11 others similarly situated,

12 Plaintiff,

13 and
14

15 COMMERCIAL LENDING CAPITAL, INC.,
16 a California corporation; SCOTT HUGH
17 OAKLEY, an individual and DOES 1 through
18 50,

19 Defendants.
20

Case No.

RC 10019819

CLASS ACTION COMPLAINT FOR
PUBLIC INJUNCTION

[CLASS ACTION]

21 I.

22 NATURE OF THE ACTION

23 1. This action is brought by Mark Horn ("Horn") on behalf of himself and a class of persons
24 who paid defendant Commercial Lending Capital, Inc. ("CLC"), a broker licensed by the Department
25 of Real Estate ("DRE), advance fees for the procurement of a real estate loan. California statutes and
26 regulations prohibit brokers from collecting advance fees unless the fee agreement is first approved by
27 the DRE and the funds collected are maintained in a trust account. CLC does not comply with either
28 condition. Horn seeks a public injunction prohibiting CLC from charging and collecting advance fees

VIA FAX

1 in the future.

2 **II.**
3 **JURISDICTION AND VENUE**

4 2. Defendants' primary place of business is in Riverside County. It operates throughout
5 the state of California.

6 **III.**
7 **PARTIES**

8 3. Plaintiff Mark Horn is an individual residing in Edmonds, WA.

9 4. Defendant Commercial Lending Capital, Inc. is a corporation duly formed under the
10 laws of California. Its principal place of business is 291 Corporate Terrace Dr., Corona, CA 92879.
11 Each of the transactions described herein were performed by CLC in Corona, CA. CLC is a real
12 estate broker that maintains DRE License No. 01769238.

13 5. Defendant Scott Hugh Oakley is an individual. He is a real estate broker and maintains
14 DRE license No. 01430210. He is the designated officer of CLC for purposes of licensure and CLC's
15 sole owner. Oakley maintains absolute authority and control over all aspects of CLC. He has set the
16 policies regarding the transactions described herein and receives a direct financial benefit as a result of
17 the violations set forth herein.

18 6. Plaintiff is unaware of the true names and capacities of defendants sued herein as
19 DOES 1 through 50, inclusive, and therefore sue those defendants by such fictitious names. Plaintiff
20 is informed and believes, and thereon alleges, that each of said fictitiously-named defendants is in
21 some manner responsible for the acts, omissions, injuries and/or damages alleged herein. Plaintiff
22 will amend this complaint to allege the true names and capacities of said fictitiously-named defendants
23 when the same have been ascertained.

24 7. Plaintiff is informed and believes, and thereon alleges, that at all times herein
25 mentioned, each of the defendants was the agent, employee, representative, partner, joint venturer,
26 and/or alter ego of each of the other defendants and, in doing the things alleged herein, was acting
27
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1 within the course and scope of such agency, employment, representation, on behalf of such
2 partnership or joint venture, and/or as such alter ego, with the authority, permission, consent, and/or
3 ratification of each of the other defendants. Specifically, CLC is Oakley's alter ego.

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5 **IV.**

6 **GENERAL ALLEGATIONS**

7 8. CLC holds itself out as "correspondent lender" and "partner with several of the nation's
8 leading financial institutions." According to its website, it has "spent years pre-negotiating discounted
9 rates/terms, implementing internal support staffs and obtaining programs that small Brokerage firms
10 would never have access to." CLC allegedly procures "cash out" loans for persons seeking to
11 refinance commercial property. It markets itself through a network of independent brokers and
12 through its website clcnationwide.com, *inter alia*.

13
14 9. Persons interested in obtaining loans through CLC provide preliminary information to
15 CLC to determine whether they are prequalified. If they meet prequalification conditions set by CLC,
16 CLC requests that the potential borrower execute a standard document called "Loan Terms and Fee
17 Agreement" ("Agreement.") The Agreement explains that the loan is conditionally approved subject
18 to certain conditions (e.g. appraisal.) Under the terms of the Agreement, the potential borrower is
19 required to pay, in advance of any services to be performed by CLC, an "Estimated Upfront Fee"
20 described as "3rd party appraisal deposits and preliminary environmental" and an "SMD Fee"
21 described as "non-refundable due diligence fee." Sometimes the fee is described as a "Flat Rate
22 Deposit to CLC." In all cases, the fees total thousands of dollars. The Agreement also contains a
23 provision requiring the borrower to pay a "cancellation fee" which is calculated as 3% of the loan
24 amount.

25
26 10. Unfortunately, CLC's true business is in collecting the advance fees and accordingly,
27 fails to procure loans in almost every case. The bulk of its revenues is derived from collecting
28 advance fees. When a potential borrower requests a refund of the advance fees after it becomes clear

1 that CLC cannot or will not procure an acceptable loan, CLC refuses to make a refund.

2 11. In November 2008, Horn was seeking to refinance a commercial property in Levelland,
3 Texas for the purpose of obtaining a \$350,000 cash out loan. A mortgage broker in Puyallup, WA,
4 Eric Scroggins, put him in contact with CLC. Horn submitted a loan application to CLC. In response,
5 CLC forward an Agreement (as described in paragraph 9) to Horn. The Agreement stated "Your loan
6 request is approved for the following loan program subject to the terms listed herein." It identified the
7 loan amount as \$384,000, the loan term as being a 5 year fixed, the number of points as 3, and an
8 interest rate of 7.75%. It also listed "Estimated Upfront Fees" which "includes 3rd party appraisal
9 deposit and preliminary environmental" in the amount \$3,800 and an "SMD Fee" described as a
10 "non-refundable due diligence fee" in the amount of \$2,400. The Agreement contained a cancellation
11 fee of 3% of the loan amount.
12

13 12. On November 28, 2008, Horn executed and returned the Agreement to CLC and wired
14 \$6,200 to CLC. As with most other potential borrowers, CLC was not able to procure an acceptable
15 loan for Horn. Instead, Horn was contacted directly by a lender (at the behest of CLC) that offered
16 him a loan for 11.99% over 2 years, with 9 points, plus other expenses. Horn declined to accept this
17 loan and requested a refund of his fees. CLC refused to provide a refund.
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19 13. The \$6,200 that Horn paid to CLC and the 3% cancellation fee were "advance fees" as
20 that term is defined in Cal. Bus. & Prof. Code § 10026 in that they were claimed, demanded, charged,
21 received, collected or contracted for as consideration for soliciting lenders and for negotiating loans on
22 real estate.

23 14. California law prohibits any broker from collecting advance fees unless the DRE
24 Commissioner first approves the form of agreement. See Bus. & Prof. Code § 10085 and 10
25 California Code of Regulations ("CCR") § 2970. CLC has never submitted to the Commissioner an
26 exemplar of the Agreement for approval. Had CLC submitted such materials, the DRE would not
27 have approved such for use because the Agreement does not meet the guidelines set forth by the DRE.
28

1 For example, the Agreement does not set forth a) a specific, complete description of the services to be
2 rendered, b) the date on which the fee shall become due and payable, and c) a definite date for full
3 performance of the services promised. See 10 CCR § 2970.

4 15. CLC has not deposited any advance fees collected from Horn or any other potential
5 borrower into a trust fund account, which violates Bus. & Prof. Code §§ 10145 and 10146. Instead,
6 CLC commingles said funds in its general operating accounts and immediately uses the funds for
7 general operating expenses prior to performing any work. CLC did not provide any verified
8 accountings to Horn regarding disbursements prior to CLC's use of the funds as required by CCR §
9 2972. Pursuant to Bus. & Prof. Code § 10146 and Penal Code §§ 506 and 506a, such funds are
10 deemed embezzled by CLC.
11

12 **V.**
13 **CLASS ALLEGATIONS**

14 16. Plaintiff brings this suit as a class action under California Code of Civil Procedure
15 Section 382 on behalf of the following class:

16 For the period October 7, 2006 through the date of trial, all persons who 1) executed a
17 Loan Terms and Fee Agreement Refinance Transaction with Commercial Lending
18 Capital, Inc. ("CLC") and paid it fees, including, but not limited to fees described as
19 SMD fees, estimated upfront fees, and flat rate deposit fees, 2) were unable to obtain a
20 loan through CLC, and 3) did not receive a refund of some or all of the fees.

21 17. Excluded from the class are Defendants herein, any person, firm, trust, corporation,
22 officer, director or other individual or entity in which any of the Defendants have a controlling
23 interest, and the legal representatives, heirs, successors-in-interest or assigns of any such excluded
24 party.

25 18. There are hundreds of class members who fall within the class definition and joinder of
26 all class members would be impracticable. Plaintiff's claims are typical of the claims of the members
27 of the class.

28 19. Plaintiff will fairly and adequately protect the interests of the members of the class and
Plaintiff has no interest which is contrary to or in conflict with class members they seek to represent.

1 Plaintiff has retained competent counsel experienced in class action litigation to further ensure such
2 protection and they intend to prosecute this action vigorously.

3 20. A class action is superior to other available methods for the fair and efficient
4 adjudication of this controversy, particularly given that the harm or injury suffered by individual class
5 members is relatively small, making individual claims highly impracticable, overly expensive and
6 inefficient. Plaintiff knows of no difficulty that will be encountered in the management of this
7 litigation that would preclude its maintenance as a class action.
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9 21. Common questions of law and fact exist as to all class members and predominate over
10 any questions affecting solely individual class members.

11 **VI.**
12 **CAUSES OF ACTION**
13 **FIRST CAUSE OF ACTION**
14 **Violation of Cal. Bus. & Prof. Code §17200**
15 **(Against All Defendants)**

16 22. Plaintiff incorporates by reference each of the preceding allegations as though fully set
17 forth herein.

18 23. The acts and practices of Defendants as alleged herein constitute unlawful and unfair
19 business acts and practices within the meaning of California Business & Professions Code Section
20 17200, et seq.

21 24. Defendants have engaged in unfair business practices and acts by wrongfully charging
22 its customers, including Plaintiff and the Class, advance fees in connection with their loan
23 procurement and negotiation services. Defendants' conduct outweighs any utility of such conduct
24 and such conduct offends public policy, is immoral, unscrupulous, unethical, deceitful and offensive,
25 and causes substantial injury to consumers, including Plaintiff and class members. Defendants'
26 conduct specifically violates public policies tethered to laws that were designed to protect consumers
27 from the type of conduct alleged against Defendants herein.

28 25. Defendants' practices are also unlawful in violation of California Bus. & Prof. Code §

1 10145 and 10146 and 10 C.C.R. 2970.

2 26. Defendants' unlawful and unfair acts and practices are ongoing and continue to the date
3 of this filing. Defendants have failed to publicly acknowledge the wrongful nature of their actions and
4 have not corrected their unfair practices.

5 27. As a direct and proximate result of these acts, Plaintiff and the members of the class
6 have suffered injury in fact and have lost money and property. Plaintiff brings this action pursuant to
7 Bus. & Prof. Code §§ 17203 and 17204 to enjoin Defendants' practices.
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10 **PRAYER FOR RELIEF**

11 Wherefore, Plaintiff requests the following relief in favor of himself and the class and against
12 Defendants as follows:

13 A. A determination that this case may be properly maintained as a class action;

14 B. A determination that Plaintiff is the proper representative of the class and that
15 Plaintiffs' Counsel, Krause, Kalfayan, Benink & Slavens, LLP and is proper counsel on behalf of the
16 class;

17 C. Equitable and injunctive relief temporarily, preliminarily, and permanently enjoining
18 Defendants from continuing to engage in the unlawful and unfair acts and practices alleged in this
19 action;
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21 D. A full accounting all of funds paid by members of the class;

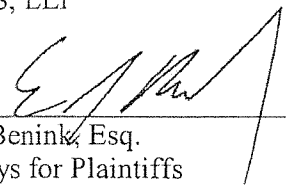
22 E. The expenses and disbursements incurred by Plaintiff in connection with this action,
23 including reasonable attorneys' fees as permitted by law;
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F. Such other relief as the Court deems just and proper.

Dated: October 7, 2010

KRAUSE KALFAYAN BENINK &
SLAVENS, LLP


Eric J. Benink Esq.
Attorneys for Plaintiffs