

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation of

THE CALIFORNIA CORPORATIONS
COMMISSIONER,

Complainant,

v.

PLATINUM COAST ESCROW, INC.; NAZIH
DANIEL SADEK, as an individual; SADEK,
INC.; QUICK LOAN FUNDING, INC.; and
LOYALTY FUNDING, INC.,

Respondents.

Case Nos. 963-1982; 603-8189; 603-
8736; and 603-D366

OAH No.: L2007100635

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated September 3, 2008, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on 12 December 2008.

IT IS SO ORDERED this 11th day of December 2008.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

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OF THE STATE OF CALIFORNIA**

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PROPOSED DECISION

This matter came on regularly for hearing on July 7, 8 and 9, 2008, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Preston DuFauchard, the California Corporations Commissioner, (Complainant or Commissioner), was represented by Blaine A. Noblett, Corporations Counsel and Judy L. Hartley, Senior Corporations Counsel.

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Respondent, Nazih Daniel Sadek (Respondent)¹ represented himself and Respondent, Platinum Coast Escrow, Inc. (PCE)² for part of the first day of hearing. The remainder of the time, Respondent and PCE were represented by Thomas J. Borchard, Attorney at Law.

On the first day of hearing, a special appearance was made by Dennis F. Fabozzi, Attorney at Law, on behalf of Wells Fargo Bank.

On May 27, 2008, the Commissioner summarily revoked the finance lenders law licenses of Respondents Sadek, Inc., Quick Loan Funding, Inc., and Loyalty Funding, Inc., for failure to submit annual reports pursuant to Financial Code section 22159. On June 5, 2008, as a result of those license revocations, Complainant dismissed without prejudice the First Amended Accusation and the Notice of Intention to Issue Orders Revoking the California Finance Lenders Law Licenses against those entities. Therefore, the matter proceeded against Respondents Sadek and PCE only. The operative pleading is the First Amended Accusation.

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¹ Respondent appeared on the first and third days of the hearing. Although Complainant had served him with a Notice to Appear pursuant to Government Code section 11450.50, Respondent did not appear on the second day. However, on the third day, Respondent produced a physician's note indicating that he had been unable to appear at the hearing the day before.

² On or about June 13, 2008, Complainant moved to strike PCE's Notice of Defense on grounds that it was prohibited from defending itself in a state court because its corporate status had been suspended pursuant to Revenue and Taxation Code section 23301. Because revival to active corporate status in time for the hearing would have entitled PCE to present a defense, the Administrative Law Judge deferred ruling on Complainant's motion until the first day of the hearing on the merits. PCE's corporate status had not been revived as of that day. The Administrative Law Judge granted the motion to strike PCE's notice of defense but indicated that he would consider a motion to permit PCE to defend itself if the reviver was obtained before the close of the evidence. Pursuant to the Administrative Law Judge's ruling, PCE was found to be in default and the matter proceeded by way of default prove up. PCE did not obtain the reviver before the close of the evidence on July 9, 2008.

Oral and documentary evidence was received. The record was held open to and including August 15, 2008, for the parties to submit closing and rebuttal briefs pursuant to a specified briefing schedule. The briefs were timely received. "Complainant California Corporations Commissioner's Closing Trial Brief" was marked as Complainant's Exhibit 46 for identification. "Respondents' Closing Brief" was marked as Respondents' Exhibit FFF for identification. "Complainant California Corporations Commissioner's Reply to Respondent's Closing Trial Brief" was marked as Complainant's Exhibit 47 for identification. "Respondents' Closing Reply Brief" was marked as Respondents' Exhibit GGG for identification. On August 15, 2008, the record was closed, and the matter was submitted for decision.

Complainant's Request for Official Notice of *Nguyen v. State of Nevada*, 116 Nev. 1171; 14 P.3d 515 (2000), is granted.

FACTUAL FINDINGS

The Administrative Law Judge makes the following factual findings:

1. At all relevant times, PCE was licensed by the Commissioner as an escrow agent pursuant to the California Escrow Law (Fin. Code, § 17000 et seq.). At all relevant times, Respondent was PCE's chief financial officer, director, and sole shareholder.

The Allegations Against Respondent Sadek

2. Respondent is a self-made individual. He was born in Lebanon in 1968, and was educated through the third grade. He moved to the United States in 1986, and worked in auto sales and finance until 2001. In or around 2000, he became the chief financial officer of a company named First National Credit. However, that position lasted only approximately 30 days. In 2001, he began working in the residential mortgage field, first working in "a net branch under a corporate hub," and later that year, by funding loans in his own company that subsequently became Quick Loan Funding, Inc. By June of 2002, he had obtained warehouse lines through which he obtained funds for real estate loans he later sold. Between 2002 and 2007, Quick Loan Funding, Inc. employed up to 1,000 individuals. Beginning in 2005, Respondent oversaw the operations and customer service aspects of Quick Loan Funding, Inc. He opened PCE in 2002, primarily for the purpose of handling escrows on almost 100 percent of the loans funded by Quick Loan Funding, Inc. Respondent had no escrow experience and had little involvement with PCE's operations over the years. He subsequently opened Loyalty Funding, Inc., but he no longer owns that entity. He also opened Sadek, Inc, a real estate agency licensed by the California Department of Real Estate.

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3. Respondent was the sole shareholder of Quick Loan Funding, Inc. and the recipient of the company's profits. In 2005, the company's most successful year, he realized profits of approximately \$40,000,000 in addition to his salary. 2004 and 2006 were also successful years, albeit not as profitable as 2005. Quick Loan Funding, Inc. terminated its loan activity in August 2007, and has not transacted business since that time.

4. In addition to PCE, Quick Loan Funding, Inc., Sadek, Inc. and Loyalty Funding, Inc., Respondent has purchased and still owns a restaurant in Newport Beach, California, a movie production company, and a 25 percent interest in an automobile company.³ His movie production business necessitated the creation of approximately six additional business entities.

5. Between 2005 and 2007, Respondent maintained approximately 50 business-related bank accounts and seven or eight personal bank accounts at the Wells Fargo Bank branch in Newport Coast, California. Around 2005, he maintained balances of between \$1,000,000 and \$20,000,000 in his personal accounts.

6. Respondent likes to gamble and has traveled extensively to Las Vegas to pursue that avocation. Near the end of 2004, he was detained at the Orange County Airport enroute to Las Vegas carrying \$70,000 in cash which he intended to use for gambling. It was at that point that he decided he would be better off obtaining lines of credit from the casinos at which he intended to play games of chance.

7. On March 4, 2005, Respondent applied for a line of credit from the Bellagio Hotel and Casino (the Bellagio) in Las Vegas. During the application process, the Bellagio was provided with two bank account numbers. One was a personal account held by Respondent. The other was an account ending with the numbers 8066. That account was PCE's trust account (trust account).

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³ Respondent did not elaborate on the nature of his automobile business.

8. Complainant alleges that Respondent provided the Bellagio with PCE's trust account number to secure his markers, thus violating the Escrow Law. Respondent denies having done so. He claims he did not know any of his many bank account numbers and that his financial information was obtained by the Bellagio and other casinos from other sources. In an attempt to resolve that issue before trial, counsel for the parties took the depositions of the persons designated "most knowledgeable" from the Bellagio, Wynn Las Vegas (the Wynn), the Venetian Hotel and Casino (the Venetian) and a company named Central Credit, LLC (Central Credit), an organization that maintains databases of information on individuals who apply for lines of credit and/or cash checks in Las Vegas casinos. Those depositions were of little assistance in resolving the issues presented in this case. They demonstrated a significant divergence in the casinos' respective policies with respect to how a credit applicant's financial information was obtained, although all of the casinos' persons most knowledgeable testified that the applicant was asked to check the application for accuracy before signing and submitting it for approval.

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9. The deposition testimony of Lynda Smith, the person most knowledgeable from the Bellagio, was the most troublesome in this regard. She never met or spoke with Respondent, and her testimony was based largely on what a former Bellagio employee said and did during the 2005 application process. Ms. Smith not only lacked personal knowledge, her testimony was based in large part on hearsay, and frequently, on multiple levels of hearsay. Those aspects of her testimony are not sufficiently reliable to support a factual finding⁴, and Respondent's hearsay, foundation and speculation objections⁵ to those aspects of her testimony are sustained.⁶

⁴ In his Reply Brief, Complainant correctly relies on Weil & Brown, *Cal. Civ. Practice Guide: Div. Pro. Before Trial* (The Rutter Group 2005), at p. 8E-20, § 8:475, for the proposition that that a person most knowledgeable who has been designated to testify on behalf of a corporate entity, may do so even if he/she lacks personal knowledge, provided he/she obtains that knowledge from those who possess it. However, the problem with Lynda Smith's testimony is described only two sections later. Section 8:477 contains the following Practice Pointer:

"The entity's duty to designate the 'most qualified' person to testify on its behalf may still work better in theory than in practice. It may be useful if all you need is to authenticate corporate records or proceedings. But it may not pin down exactly who knows what, or did what, within the organization. i.e., the witness designated as the 'most qualified' by the corporation may still come up with 'I don't know' or 'I'm not sure' answers at the deposition. In this event, you're going to have to take additional depositions to find out what you need to know! "Therefore, if the matter involved is critical to your case, *do not rely on the entity's duty to designate* the 'most qualified' officer or employee! It is better practice to do *your own investigation* or send out *interrogatories* asking who in the organization has knowledge of the *particular facts* you seek; and take that person's deposition." (Emphasis in text.)

In the instant case, much of the deponents' knowledge, and particularly that of Ms. Smith, was based on one or more levels of hearsay, and despite having had the opportunity to obtain information from individuals with first hand knowledge, Ms. Smith was unable to answer several key questions. Thus, the problem with Ms. Smith's testimony was not the propriety of her testifying as the Bellagio's person most knowledgeable. It was the reliability of her testimony.

⁵ Complainant also argues in his Reply Brief that the parties stipulated to the admissibility of the deposition excerpts. That position is incorrect. In a June 2, 2008 Pre-Hearing Conference, the Administrative Law Judge ordered the parties to prepare "a list of the identification and inclusive pages and lines of each deposition transcript he/she intends to introduce" and a separate list of objections to the testimony contained in the other party's designation. The purpose of that Order was to enable the Administrative Law Judge to consider the deposition excerpts as testimony, subject to all objections, rather than as documentary evidence. The parties' stipulation applied to documentary evidence only. It did not waive objections to testimony. In fact, each party

10. On July 3, 2008, the parties entered into a stipulation as to the truth of certain facts and the admissibility of Exhibits 1 through 45 and A through DDD. As to those exhibits, the parties stipulated as follows:

To the authenticity and admissibility of the following documents to be offered into evidence by the Commissioner and the Respondents in this matter. The Commissioner and the Respondents reserve the right to contest the relevance or weight to be accorded these documents, and this stipulation shall not limit either Respondents' or Complainant's rights to submit additional evidence.

11. Some of the exhibits covered by the above stipulation were also exhibits to one or more of the four depositions the parties took of the persons most knowledgeable. Because relevance was the only objection preserved by the stipulation, and because no relevance objections were raised, Exhibits 1 through 45 and A through DDD were admitted for all purposes. Many of the below findings were gleaned from those documents.

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served and filed a set of objections to the deposition testimony the other party offered.

⁶ Although Complainant relied heavily on Ms. Smith's deposition testimony, the weaknesses of her testimony was evidenced in Complainant's own closing brief in which, to avoid misrepresentations, Complainant was forced to use language such as, "she believed," "an unidentified member of the Bellagio's staff," and "She has no reason to believe that this policy was not followed in Sadek's case."

12. Ms. Smith testified that, to begin the application process, Respondent was referred to a credit clerk to whom he provided his name, date of birth, Social Security number, employer's name and address, bank name and location, and two bank account numbers, one of which was the trust account number. Not only is that testimony based on double hearsay and a lack of personal knowledge, the credibility of Ms. Smith's testimony in that regard is challenged by a document generated by the Bellagio as part of the application, which Respondent was required to sign. That document stated in part:

I give BELLAGIO and its representatives authorization to **obtain** and verify my financial information (including but not limited to account balance information) from any source, obtain my financial and employment history and exchange information with others about my financial and account experience with the BELLAGIO. . . .

[¶] . . . [¶]

Further, I authorize BELLAGIO to complete any of the following information on those markers: (1) name of payee, (2) a date, (3) **name, account number, and/or address of any of my banks and financial institutions**, (4) **electronic encoding of the above** and (5) as otherwise authorized by law. **The information inserted may be for any account from which I now or may in the future have the right to withdraw funds, regardless of whether that account now exists, and whether I provided the information on the account to BELLAGIO.** (Emphasis added.)

13. Among Complainant's exhibits is a "Marker Limit Request Form By Facsimile." On that form, Respondent is identified as the borrower, but the form is not filled out in his handwriting. A credit limit of \$500,000 is requested, and March 4, 2005, is marked as the date of his arrival. The form includes a space, on one line, for "Acct. # Business" and "Acct. # Personal." A bank account number is written (not in Respondent's handwriting) below each item. The business bank account number is that of the trust account. Although spaces are provided on the form for Respondent's Social Security number and his home address, that information is not filled in. "Quick Loan Funding" and "Owner" are written under "Business Name" and "Position" respectively, and an address and telephone number are provided for that entity.

14. Respondent does not recall giving any bank account numbers to anyone at the Bellagio. He believes the Bellagio received the trust account number from his private banker at the Wells Fargo Newport Coast branch after he told Bellagio personnel to telephone her to obtain his personal account number and to rate the account.

15. The evidence also includes two undated typewritten applications which Ms. Smith testified were composed based on information Respondent had provided to the credit clerk. However, the typewritten versions of the application (1) include a Social Security number for Respondent; (2) indicate that Respondent was the CFO of First National Credit;⁷ and (3) list his business address and telephone numbers as other than those on the handwritten application. In addition, the trust account is listed as the business account on the typewritten applications, but the personal account number is missing entirely from those applications. Despite the inaccuracy of Respondent's business information and the inclusion of his company's trust account number, Respondent's signature appears on the typewritten applications.

16. Ms. Smith testified that Respondent designated the trust account as the primary account for security against his line of credit with the Bellagio. That testimony was not credible for the following reasons. (1) Neither the handwritten application nor the typewritten applications contained an area in which a primary account could be designated. (2) No reason was offered for the absence of the personal bank account number on the typewritten applications. (3) Because of the other discrepancies between the handwritten application and the typewritten applications, a finding cannot be made that the omission of the personal bank account was made at Respondent's request, or even that, as Ms. Smith testified, the information on the typewritten applications came from the handwritten application based on information Respondent provided to the credit clerk.

⁷ Footnote 4 to Complainant's closing brief reads in part: "Respondent argues in his Opening Trial Brief that the Bellagio credit application contains numerous 'mistakes'; thus, implying that Sadek did not review or complete his credit application with the Bellagio. Specifically, Respondent points to the fact the hard copy of the credit application contains inaccurate employer information (First National Credit is listed as Sadek's employer). However, Sadek testified that he was in fact employed as First National Credit's C.F.O. during the period 2000 to 2001. He also testified that he likely gambled at the Bellagio in 2000 to 2001, though he had not established credit with the Bellagio at that time. Thus, it is possible that the Bellagio's computer system contained outdated employer information for Sadek, dating from a time when he gambled at the casino, but had not yet established a line of credit. . . . Why in the instant case the employer information Sadek provided to Ms. Jackson [the credit clerk] does not appear on the hard copy of his credit application remains unclear . . ." Complainant's argument further belies the credibility of Lynda Smith's deposition testimony. If the Bellagio used outdated employer information on the typewritten applications, then it did not obtain the information from the handwritten application, and Respondent did not provide the information to the credit clerk. Further, the Bellagio would have no need to keep Respondent's employer information on file if he did not have a line of credit with that casino. This makes the source of the incorrect information on the typewritten applications even more of a mystery.

17. On March 4, 2005, a Bellagio representative contacted Respondent's personal banker, Natalie Saati, at the Wells Fargo Bank Newport Coast branch. Ms. Saati rated both the personal bank account referenced in the handwritten application and the trust account. According to Ms. Saati, the average and current balance for the personal account was \$16,000,000. The Bellagio approved Respondent's application for a line of credit.

18. On October 18, 2005, Respondent signed three markers⁸, totaling \$1,010,000, against his line of credit. On or about November 7, 2005, Respondent refused to pay the amount of the markers. The markers were submitted for payment against PCE's trust account, but Respondent stopped payment on them.⁹ As of November 14, 2005, Bellagio casino host Jim Dunning had contacted Respondent's attorney to discuss payment of the markers. Even if he had been previously unaware that his company's trust account was listed as security against his line of credit, the appearance of the marker debits and their reversals on the trust account statement and his attorney's involvement in resolving the matter with the Bellagio, placed Respondent on notice, actual or constructive, that his trust account had been used for that purpose. It then became incumbent upon Respondent to ensure that the trust account number would not appear on any other credit line applications and would be removed as security against any and all extant lines of credit. No evidence was offered to show that Respondent took any such steps at that time.

19. Approximately 13 months later, on November 18, 2006, Respondent signed a marker for \$20,000 using his line of credit at the Bellagio. His debt in that amount was still outstanding when, on April 25, 2007, the Bellagio deposited the marker for payment from PCE's trust account.

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⁸ An individual with a line of credit at a casino signs a gaming marker in a certain amount to obtain playing chips in that same amount. That sum is charged against the line of credit. According to Nevada law, a marker is considered a check or draft. (*Nguyen v. State of Nevada, supra*, 116 Nev. at 1175-1176.) If, at the end of play, the player does not have sufficient chips to cover his/her marker, the player is afforded a certain length of time to settle the account. If he/she fails to do so, the marker can be, and in this case was, submitted for payment from the bank account listed on the player's credit line application.

⁹ According to a bank statement for the trust account, dated November 30, 2005, debits for "checks" in the sums of \$925,000, \$75,000 and \$10,000 were made on November 10, 2005. Those three checks totaled \$1,010,000.

20. PCE's trust account was protected by a fraud prevention feature named "Positive Pay." That online feature, offered as a service by Wells Fargo Bank, enabled account holders to approve or reject payment of checks deposited for payment against their accounts. Incoming checks were initially debited from the account. If the customer rejected a check via Positive Pay, the debit was reversed and the amount of the check was credited back to the account the following day. However, until the bank reversed the debit, funds in the amount of the check were not available to cover other incoming checks.

21. The Bellagio's \$20,000 marker was posted to PCE's trust account on April 27, 2007, and that amount was debited from the account on the same day. Using the Positive Pay feature, PCE's Escrow Manager, William Nelson (Nelson), recognized that the marker was not a proper source for payment from the trust account and rejected it. On April 30, 2007, the reversal of the \$20,000 debit was posted to the trust account.¹⁰ Between the time the debit was posted to the account and the time it was reversed, the \$20,000 represented by the Bellagio marker was not available for payment from the trust account. Had a legitimate check exceeding the account's balance between April 27 and April 30, 2007, been submitted for payment, it would have been returned due to insufficient funds.

22. Neither Respondent nor any of his agents at PCE took any steps to remove PCE's trust account number from his line of credit at the Bellagio after the Bellagio's marker was deposited into that account.

23. On June 24, 2005, Respondent procured a line of credit at the Wynn. Although he signed the application, the handwritten portions of the application are not in Respondent's handwriting. The evidence did not disclose who completed that portion of the application. PCE's trust account number is the only bank account number that appears on the application. It is listed under "Account # Business." An area for "Account # Personal" is blank. As with the other casinos, it was the custom and practice of the Wynn to ask a credit applicant to review the application for accuracy before submitting it for approval.

24. On November 17, 2006, Respondent signed a marker for \$500,000 using his line of credit at the Wynn. He signed another \$500,000 marker at the Wynn the following day. Respondent's \$1,000,000 debt to the Wynn was still outstanding when the Wynn deposited the two markers into PCE's trust account for payment. One of the markers was debited from the account on April 25, 2007. Using Positive Pay, Nelson recognized that the marker was an improper source for payment from the trust account, and he rejected it. The charge against the account was reversed the following day, April 26. The other marker was debited from the account on May 17, 2007. Using Positive Pay, Nelson rejected that marker also. The charge against the trust account was reversed the following day, May 18.

¹⁰ April 27, 2007 was a Friday. April 30, 2007 was a Monday.

25. Between April 25 and 26, 2007, and between May 17 and 18, 2007, \$500,000 of the funds from PCE's trust account were not available for payment to legitimate sources.

26. Neither Respondent nor any of his agents at PCE took any steps to have PCE's trust account number removed from his line of credit at the Wynn after either of the Wynn's markers was deposited into the account.¹¹

27. On January 19, 2007, Respondent signed two credit applications at the Venetian, one for \$1,000,000 and one for \$2,000,000. PCE's trust account number is the only bank account identified on the application for the \$2,000,000 line of credit. A different account number is listed on the other application. No evidence was offered to show that Respondent or any of his agents at PCE made any attempt to have the trust account number removed from the Venetian's records.

28. How the Bellagio, Wynn and Venetian casinos obtained the trust account number that appeared on their credit applications and markers was not proven. None of the trust fund account numbers written on the various applications were written in Respondent's handwriting. The depositions taken in this case established that the casinos share certain customer information with each other, but it was not established that such sharing occurred in this case. The deponents also testified that the casinos can, and frequently do, access customers' databases at Central Credit. However, in this case, Central Credit did not have the trust account number. Central Credit is therefore eliminated as the source of that information. It also does not appear that Respondent intentionally attempted to use trust account funds to pay his gambling debts. Although the three markers that were submitted for payment bore the trust account number, all three also bore Respondent's name and residence address rather than PCE's name and business address.

29. All of Respondent's credit lines in Las Vegas casinos are now closed.

¹¹ Respondent testified that, after he learned the Wynn had deposited two markers totaling \$1,000,000 into the trust account, he called his personal friend, Steve Wynn, the owner of the Wynn, to attempt to get the matter resolved. No evidence was offered to show that any such attempt was either successful or unsuccessful. In addition, it remains unclear why Respondent would have called the hotel's owner instead of the casino's credit department or the casino host who had attended to Respondent's gambling needs. Respondent's testimony in that regard was insufficiently credible to support a finding in his favor. It was also belied by the deposition testimony of David Sisk, the individual designated by the Wynn as its person most knowledgeable. Mr. Sisk testified that, to his knowledge, Respondent never contacted the Wynn to have the trust account number removed from the casino's records and, to his knowledge, the trust account number was never removed from those records.

The Allegations Against Respondent PCE

30. On April 4, 2007, Carol Stokes, a Corporation Examiner, performed a routine regulatory examination of PCE's records at its office in Costa Mesa, California. At the administrative hearing, Complainant proved the following facts as alleged in the First Amended Accusation:

II.

[¶] . . . [¶]

1. Unauthorized Disbursement of Trust Account Funds

On or about April 25, 2007, Sadek caused an unauthorized disbursement of trust funds to be made to Wynn Las Vegas in the amount of \$500,000.00 in violation of Financial Code section 17414, subdivision (a)(1), and California Code of Regulations, title 10, sections 1738 and 1738.2. The amount was debited from the trust account on April 25, 2007 and credited back with a posting date of April 26, 2007 and an effective date of April 25, 2007. The gambling marker was signed by Sadek and coded with the trust account information. Platinum Coast maintains a "Positive Pay" feature on its trust account, which enables the escrow manager to decline payment on checks presented for payment to the bank. In this instance, but for the "Positive Pay" feature, the bank would have paid Sadek's gambling marker with Platinum Coast trust account funds.

2. Unauthorized Disbursement of Trust Account Funds

On or about April 27, 2007, Sadek caused an unauthorized disbursement of trust funds to be made to the Bellagio in the amount of \$20,000.00 in violation of Financial Code section 17414, subdivision (a)(1), and California Code of Regulations, title 10, sections 1738 and 1738.2. The amount was debited from the trust account on April 27, 2007 and credited back with a posting date of April 30, 2007 and an effective date of April 27, 2007. The gambling marker was signed by Sadek and coded with the trust account information. Platinum Coast maintains a "Positive Pay" feature on its trust account, which enables the escrow manager to decline payment on checks presented for payment to the bank. In this instance, but for the "Positive Pay" feature, the bank would have paid Sadek's gambling marker with Platinum Coast trust account funds.

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3. Unauthorized Disbursement of Trust Account Funds

On or about May 17, 2007, Sadek again caused an unauthorized disbursement of trust funds to be made to Wynn Las Vegas in the amount of \$500,000.00 in violation of Financial Code section 17414, subdivision (a)(1), and California Code of Regulations, title 10, sections 1738 and 1738.2, when Wynn Las Vegas presented Sadek's gambling marker to the bank for payment a second time.^[12] The amount was debited from the trust account on May 17, 2007 and credited back with a posting date of May 18, 2007 and an effective date of May 17, 2007. The marker was signed by Sadek and coded with the trust account information. Platinum Coast maintains a "Positive Pay" feature on its trust account, which enables the escrow manager to decline payment on checks presented for payment to the bank. In this instance, but for the "Positive Pay" feature, the bank would have paid Sadek's gambling marker with Platinum Coast trust account funds.

III.

On May 15, 2007, during the Commissioner's examiner's routine regulatory examination of Platinum Coast it became apparent that [Miguel Angel] Vazquez, Platinum Coast's escrow accountant, had knowingly or recklessly disbursed or caused the disbursal of \$25,247.11 in trust funds over a period of approximately four months in violation of Financial Code section 17414, subdivision (a)(1), and California Code of Regulations, title 10, sections 1738 and 1738.2.

The Commissioner also learned that Platinum Coast's management had failed to properly notify the Department of Vazquez's hiring on June 5, 2005 in violation of California Code of Regulations, title 10, section 1726.

Each of the unauthorized disbursements of trust funds . . . also caused a shortage to exist in the trust account in violation of California Code of Regulations, title 10, section 1738.1. Platinum Coast has cured the trust account shortage created by the unauthorized disbursements . . .

[¶] . . . [¶]

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¹² The language of this allegation is somewhat misleading. The same marker was not presented for payment twice. Two separate markers, bearing disparate marker numbers, were separately presented for payment once.

12. Unauthorized Disbursement of Trust Account Funds

[¶] . . . [¶]

On or about October 10, 2007, the Commissioner filed his notice of intention to issue order barring Miguel Angel Vazquez from any position of employment, management or control of any escrow agent, accusation, and supporting documents, based upon the above, and Vazquez was personally served with those documents on October 10, 2007. The Commissioner has not received a hearing request from Vazquez and the time to request a hearing has expired. Pursuant to section 17423, subdivision (a)(1) of the Financial Code, Miguel Angel Vazquez is now barred from any position of employment, management or control of any escrow agent.

IV.

In addition to the violations cited above, the Commissioner's regulatory examination of Platinum Coast revealed other serious violations of the California Escrow Law, which Platinum Coast has subsequently rectified as described in more detail below at paragraphs 13-16.

13. Failure to Properly Reconcile the Trust Account

During the course of the routine regulatory examination it was revealed that Platinum Coast's trust reconciliation for March of 2007 contained many old, partially identified, uncorrected adjustments in violation of California Code of Regulations, title 10, section 1732.2, subdivision (a). A more detailed review of the March 2007 trust reconciliation disclosed adjustment inconsistencies, which rendered the reconciliation unreliable. After the Commissioner's examiner reported these discrepancies to Platinum Coast's management, Platinum Coast corrected its books and records issues to the satisfaction of the Commissioner.

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14. Record Accounting System Failure

On or about May 14, 2007, it was discovered that Platinum Coast's record accounting system had "crashed" on April 21, 2007 causing the loss of posted check and receipt information for the period of April 21, 2007 through May 8, 2007. Platinum Coast personnel eventually recovered the lost posted check and receipt data. When asked to provide a written explanation to the Commissioner as to what had occurred to cause the accounting system to fail, Platinum Coast's IT manager opined that a power failure caused the corruption of data within Platinum Coast's primary database for its Streamline ("SMS") application. Platinum Coast has assured the Commissioner that it has taken the necessary steps to prevent the loss of data from occurring again in the future.

15. Cancellation of Surety Bond

On May 25, 2007, the Commissioner's examiner received notification that Platinum Coast's insurer had cancelled its surety bond in violation of Financial Code section 17202. Although Platinum Coast had timely paid its annual surety bond premium on October 13, 2006, it had failed, however, to timely provide requested financial information to the bonding company thereby causing the cancellation of its surety bond effective May 25, 2007. Accordingly, on May 29, 2007, the Department issued an Order to Platinum Coast to Discontinue Escrow Activities Pursuant to Section 17415 of the California Financial Code ("Order"). The Order was personally served on Platinum Coast's escrow manager on May 30, 2007. On May 31, 2007, Platinum Coast obtained a new surety bond policy with a different bonding company with a May 30, 2007 effective date. The policy was then amended by rider to become effective as of May 25, 2007. In light of the foregoing, on May 31, 2007 the Department set aside its Order against Platinum Coast.

16. Failure to Meet Liquidity and Tangible Net Worth Requirements

A review of Platinum Coast's financial data revealed that the company did not meet its liquidity and tangible net worth requirements as of March 31, 2007 in violation of Financial Code section 17210. The Commissioner's examiner discovered a liquidity deficiency of \$143,923.11 and a tangible net worth deficiency of \$37,565.74. On June 11, 2007, Platinum Coast submitted to the Department evidence that it had cured both its liquidity and tangible net worth deficiencies as of May 31, 2007.

31. In total, the examiner found 156 adjustment items on the reconciliation. This was an unusually high number, the normal number of adjustments for similar examinations falling between 10 and 20. Many of the adjustments dated back to 2005. The examiner found this "disturbing" because it indicated to her that the account had not recently been reconciled and because older adjustments are more difficult to research.

32. The shortages attributable to Vazquez were checks Vazquez wrote against PCB's trust account and deposited into his personal bank account. Vazquez resigned from PCE suddenly on or about May 14, 2007, and PCE personnel filed a police report relating to the funds he had transferred from the PCE trust account into his personal account.

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following Legal Conclusions:

1. Cause exists to suspend or bar Respondent, Nazih Daniel Sadek, from any position of employment by, management of, or control of any escrow agent, pursuant to Financial Code section 17414, subdivision (a)(1) and California Code of Regulations, title 10, sections 1738 and 1738.2, for knowingly or recklessly disbursing or causing the disbursement of escrow funds otherwise than in accordance with escrow instructions, and for improperly paying out escrow funds, as set forth in Findings 2 and 5 through 26, and Legal Conclusions 8 through 44 .

2. Cause exists to revoke Platinum Coast Escrow, Inc.'s escrow agent license, pursuant to Financial Code section 17202, for failure to maintain a bond satisfactory to the Commissioner, as set forth in Finding 30, and Legal Conclusions 8 through 13, 51 and 55.

3. Cause exists to revoke Platinum Coast Escrow, Inc.'s escrow agent license, pursuant to Financial Code section 17210, for failure to meet liquidity and tangible net worth requirements, as set forth in Finding 30, and Legal Conclusions 8 through 13, 51 and 55.

4. Cause exists to revoke Platinum Coast Escrow, Inc.'s escrow agent license, pursuant to California Code of Regulations, title 10, section 1726, for failure to timely notify the Commissioner of Vazquez's employment, as set forth in Finding 30, and Legal Conclusions 8 through 13, 51 and 55.

5. Cause exists to revoke Platinum Coast Escrow, Inc.'s escrow agent license, pursuant to California Code of Regulations, title 10, section 1732.2, subdivision (a), for failure to timely reconcile escrow records, as set forth in Finding 30 and 31, and Legal Conclusions 8 through 13, 51 and 55.

6. Cause exists to revoke Platinum Coast Escrow, Inc.'s escrow agent license, pursuant to Financial Code section 17414, subdivision (a)(1), and California Code of Regulations, title 10, sections 1738, 1738.1 and 1738.2, for knowingly or recklessly disbursing or causing the disbursal of escrow funds otherwise than in accordance with escrow instructions, and for improperly paying out escrow funds, by virtue of the conduct of its principal, Nazih Daniel Sadek, as set forth in Findings 2, 5 through 26 and 30, and Legal Conclusions 8 through 13, 52 and 54.

7. Cause does not exist to revoke Platinum Coast Escrow, Inc.'s escrow agent license, pursuant to Financial Code section 17414, subdivision (a)(1), and California Code of Regulations, title 10, sections 1738, 1738.1 and 1738.2, for knowingly or recklessly disbursing or causing the disbursal of escrow funds otherwise than in accordance with escrow instructions, and for improperly paying out escrow funds, by virtue of the conduct of its agent, Miguel Angel Vazquez, as set forth in Finding 30 and 32, and Legal Conclusions 8 through 13, 52 and 53.

The Standard of Proof

8. The standard of proof in this case is a preponderance of the evidence. (Evid. Code, §115.)

9. In his Closing Reply Brief, Respondent argued that the standard of proof should be clear and convincing evidence to a reasonable certainty based on the following arguments:

In this case, the Department is not seeking to simply "revoke" an individuals [*sic*] vehicle salesperson license, or a food processing license . . . but rather **they [*sic*] are seeking to BAR Daniel Sadek from EVER holding any position of employment, management or control of an escrow agent.** There is a significant difference between a license revocation and a BAR from ever holding that position of employment, management or control. This alone would move the standard to Clear and Convincing. While Mr. Sadek may not be a doctor, veterinarian, or an architect, he is also not a food processor, a real estate sales person, or a car sales person. He owns (owned) and operated a very successful lending company (Quick Loan Funding) and a supporting escrow company (Platinum Coast Escrow) which employed over 700 individuals, with licenses to sell loans in a multiple of states (with MINIMAL issues). (Emphasis in text.)

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10. By that argument, Respondent asserts that it is the size of his former real estate loan company, Quick Loan Funding, Inc., with its large number of employees and licenses, that justifies the application of a clear and convincing evidence standard of proof with respect to his involvement with a different company (i.e., Platinum Coast Escrow, Inc.). Respondent offered no legal authority for that proposition, and the Administrative Law Judge has found no such authority. Respondent's argument is without merit.

11. In *Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318-319, the Court stated:

[C]ourts have drawn a clear distinction between professional licenses, such as veterinarians or psychologists, and nonprofessional occupational licenses. In *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894 (hereafter *San Benito Foods*), this court held that the preponderance of the evidence standard should be used in administrative proceedings to suspend or revoke a food processor's license. The court noted that a food processor's license could be obtained without meeting any educational or skill requirements. The only specific requirements for obtaining such a license were that the applicant show "character, responsibility, and *good faith*" and a sound financial status. (50 Cal.App.4th at p. 1894.) In contrast, in order to obtain a professional license, an applicant must ordinarily satisfy extensive educational and training requirements and pass a rigorous state-administered examination. (*Ibid.*) The court noted that this sharp distinction between professional licenses and nonprofessional licenses supported a distinction in the standards of proof applicable to proceedings to revoke these two different types of licenses. **"Because a professional license represents the licensee's fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license that he or she has expended so much effort in obtaining. It makes sense to require that a higher standard of proof be met in a proceeding to revoke or suspend such a license. The same cannot be said for a licensee's interest in retaining a food processor's license."** (*Ibid.*) (Bold Added.)

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12. No extensive education, training or examinations are required for an individual to procure an escrow agent's license. The requirements for that licensure are correctly set forth in footnote 2 of Complainant's closing trial brief, which reads as follows:

In order to obtain an escrow agent's license, an applicant must do each of the following: pay an application fee; join the Escrow Agent's Fidelity Corporation (if the escrows conducted are of the type specified in [Financial Code] section 17312(c)); obtain a Fidelity Bond (if the escrows conducted are not of the type specified in [Financial Code] section 17312(c)); meet the minimum financial requirements set forth in the Financial Code; obtain a surety bond; undergo a historical background check of the stockholders, directors, officers, and manager; ensure that the applicant employs an escrow manager with a minimum of five years experience, and sign an affidavit certifying that he or she has read and is familiar with the Escrow Law and regulations. (See [Financial Code] sections 17200, 17200.8, 17201, 17202, 17202.1, 17203, 17203.1, 17207, 17209, 17209.1, 17210, and 17320.)

13. In this case, Complainant is seeking to bar Respondent from the escrow industry as an individual in an unlicensed capacity, rather than as a licensee. Respondent has made no showing of education, training or examinations that would warrant a standard of proof higher than a preponderance of the evidence for this type of action. Further, during the administrative hearing, Respondent admitted that the escrow business was an area "beyond his expertise" (Respondent's term), and that he had very little to do with the business's day to day operations. With respect to PCE's escrow agent license, Respondent made no showing that obtaining that license for PCE required the kind of "extensive educational, training and testing requirements" referenced in *Mann v. Department of Motor Vehicles, supra*, that would justify the application of a clear and convincing evidence standard of proof, or that Respondent satisfied such requirements. Neither the law nor the facts justify the application of a clear and convincing standard of proof. However, even though the preponderance of the evidence standard applies in this case, the facts Complainant proved would have satisfied the clear and convincing evidence standard.

Analysis as to Respondent Sadek

14. In the First Amended Accusation, Complainant alleges that, by permitting the use of the PCE trust account as security against his lines of credit in various Las Vegas casinos, Respondent violated Financial Code section 17414, subdivision (a)(1) and California Code of Regulations, title 10, sections 1738 and 1738.2.

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15. Financial Code section 17414, subdivision (a) states in pertinent part:

(a) It is a violation for any person subject to this division or any director, stockholder, trustee, officer, agent, or employee of any such person to do any of the following:

(1) Knowingly or recklessly disburse or cause the disbursal of escrow funds otherwise than in accordance with escrow instructions, or knowingly or recklessly to direct, participate in, or aid or abet in a material way, any activity which constitutes theft or fraud in connection with any escrow transaction.

16. California Code of Regulations, title 10, section 1738, subdivision (a)

states:

All money deposited in such "trust" or "escrow" account shall be withdrawn, paid out, or transferred to other accounts only in accordance with the written escrow instructions of the principals to the escrow transaction or the escrow instructions transmitted electronically over the Internet executed by the principals to the escrow transaction or pursuant to order of a court of competent jurisdiction.

17. California Code of Regulations, title 10, section 1738.1 states:

An escrow agent shall not withdraw, pay out, or transfer monies from any particular escrow account in excess of the amount to the credit of such account at the time of such withdrawal, payment, or transfer.

18. California Code of Regulations, title 10, section 1738.2 states:

As escrow agent shall use documents or other property deposited in escrow only in accordance with the written instructions of the principals to the escrow transaction or the escrow instructions transmitted electronically over the Internet executed by the principals to the escrow transaction, or if not otherwise directed by the written or electronically executed instructions, in accordance with sound escrow practice, or pursuant to order of a court of competent jurisdiction.

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19. Respondent argues that Complainant failed to sustain his burden of proof in two ways:

(1) Complainant failed to prove that funds were actually disbursed from the trust account at any time as required by Financial Code section 17414, subdivision (a)(1). Respondent asserts that, although funds were "debited" from the account when the casinos submitted the markers for payment, those funds were never "paid" and never left the account because PCE personnel disapproved their payment using the account's Positive Pay feature.

(2) Complainant failed to prove that Respondent acted "knowingly or recklessly" in connection with the use of the trust account as security against his lines of credit.

20. Respondent's two defenses shall be addressed individually.

Funds Were Disbursed From the Trust Account When the Markers Were Submitted for Payment.

21. Respondent drew a distinction between the terms "debit" and "pay" but did not offer any definitions of those terms that might justify his distinctions.

22. In *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, the Court stated:

The fundamental goal of statutory construction is to ascertain the intent of the Legislature to effectuate the purpose of the law. To determine that intent, we must look first to the statutory language itself, giving words their usual and ordinary meaning. [Citations.] We are not authorized to insert qualifying provisions and exceptions which have not been included by the Legislature, and may not rewrite a statute to conform to an intention which does not appear in the statutory language. [Citations.] (*Id.* at 1582.)

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23. The definitions of words necessary to determine whether funds were actually disbursed from the trust account are not contained in the Financial Code. In *Brown v. State Department of Health* (1978) 86 Cal.App.3d 548, 554, the Court held that definitions from other codes are persuasive in determining legislative intent with respect to the term in question. In addition, dictionary definitions may be used where they do not conflict with the statute.¹³ With those rules in mind, we turn to the dictionary and the Commercial Code to resolve the issue.

24. Black's Law Dictionary offers the following six definitions:

Disbursement . . . To pay out, commonly from a fund. To make payment in settlement of a debt or account payable. (Emphasis added.) Black's Law Dict. (5th ed. 1979) p. 416, col. 2.)

Debit . . . A sum charged as due or owing. An entry made on the asset side of a ledger or account. The term is used in book-keeping to denote the left side of the ledger, or the charging of a person or an account with all that is supplied to or paid out for him or for the subject of the account. . . . (Emphasis added.) (*Id.* at p. 362, col. 2.)

Pay. "To discharge a debt by tender of payment due; to deliver to a creditor the value of a debt, either in money or in goods, for his acceptance. U.C.C. §§ 2-511, 3-604. To compensate for goods, services or labor." (*Id.* at p. 1016, col. 1.) (Emphasis added.)

Tender. "An offer of money. The act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition. . . ." (*Id.* at p. 1315, col. 2.) (Emphasis added.)

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¹³ That is certain which can be made certain by simple reference to the dictionary, and where, as here, the words used in the rule or regulation sought to be invalidated have meanings which do not conflict with the statute, an appellate tribunal will assume that they were used in the sense which complies with and does not violate the statute. (*Cozad v. Board of Chiropractic Examiners* (1957) 153 Cal.App.2d 249, 258.)

Draft. "A written order by the first party, called the drawer, instructing a second party, called the drawee (such as a bank), to pay money to a third party, called the payee. An order to pay a sum certain in money signed by a drawer, payable on demand or at a definite time, and to order or bearer. [Citation.] An unconditional order drawn by drawer on drawee to the order of the payee; same as a bill of exchange. [Citation.]" (*Id.* at 443, col. 1.) (Emphasis added.)

Check. "A draft drawn upon a bank and payable on demand, signed by the maker or drawer, containing an unconditional promise to pay a sum certain in money to the order of the payee. [Citations.] "The Federal Reserve Board defines a check as 'a draft or order upon a bank or banking house purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named or to him or his order or to bearer and payable instantly on demand.' It must contain the phrase 'pay to the order of.'" (*Id.* at p. 215, col. 2.)

25. Commercial Code section 3104, states in relevant part:

(a) Except as provided in subdivisions (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it is all of the following:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder.

(2) Is payable on demand or at a definite time.

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

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(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (1) a draft, other than a documentary draft, payable on demand and drawn on a bank, (2) a cashier's check or teller's check, or (3) a demand draft. An instrument may be a check even though it is described on its face by another term, such as "money order."

26. In *Nguyen v, State of Nevada, supra*, 116 Nev. at 1175-1176, the Court ruled that a gambling marker was a "check" for purposes of Nevada law, in that it "provided a mechanism for payment of a specific sum of money . . . to the order of these gaming establishments." No reason exists to define gambling markers differently under California law.

27. Respondent argues that no disbursement of trust funds was made from the account because, even though a debit was recorded and was on the books for between one and three days (depending on which of the three times a marker was submitted for payment), the bank never paid any money from the trust account. This is a tortured reading of Financial Code section 17414. The question is not whether the bank disbursed trust funds, but whether Respondent did. Respondent signed **markers** payable to certain Las Vegas casinos. Those **markers** constituted **checks** or **drafts**, which were **orders** to the bank and were payable on demand. Thus, the **markers** constituted a **tender of payment**, i.e., an offer of money in satisfaction of a debt that was due. Those **tenders of payment** resulted in the **markers** being submitted to the bank for **payment**, and those submissions resulted in **debits** being entered against the trust account. Until those **debits** were reversed, funds in the amount of the **debits** were not available for **disbursement** because they had already been **disbursed** by Respondent.

28. Pursuant to the above definitions, Respondent disbursed or caused to be **disbursed** PCE trust account funds by signing the gambling **markers** and, by offering them to the respective casinos as **tender of payment** of his gambling debts. His signature on the **markers** and his offering the **markers** to the respective casinos constituted Respondent's representation that **payment** was being made in the full amount shown on the **markers**. Each such **payment** constituted a **disbursement** of the trust account funds. (See Legal Conclusions 24, 25 and 26, above.)

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Respondent Acted intentionally and/or Recklessly in Connection With the Identification of the Trust Account as Security Against His Lines of Credit With Various Las Vegas Casinos, and His Disbursement of Trust Account Funds.

29. Under Financial Code section 17414, subdivision (a)(1), it is not enough for Respondent to have improperly disbursed or caused to be disbursed escrow funds. For that section to have been violated, he had to have acted "knowingly or recklessly."

30. Respondent argues that Complainant did not sustain his burden of proof in that Complainant failed to prove that Respondent knew the trust account was being used as security against his casino lines of credit. Therefore, Complainant could not prove that Respondent had acted knowingly or recklessly.

31. As with the issue concerning disbursement, the Financial Code does not define "knowingly" or "recklessly," and California case law is remarkably silent with respect to those definitions. Reference must therefore be made to other codes and resources to learn those definitions.

32. Penal Code section 7, subdivision (5) provides:

The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

33. "California case law has long held that the requirement of 'knowingly' is satisfied where the person involved has knowledge of the facts, though not of the law." (*Brown v. State Department of Health, supra*, 86 Cal.App.3d at 554.)

34. "Recklessly" is defined as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. [Citation.] . . . (Black's Law Dict. (5th ed. 1979) p. 1142 col. 2.)

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35. Respondent made his first application for a casino line of credit in 2005 at the Bellagio. It was on that application that the trust fund account number first appeared. Complainant did not prove that Respondent provided that account number to Bellagio personnel or, if he did, that he did so either knowingly or recklessly. As stated above, Complainant's evidence in that regard was based on a lack of personal knowledge and multiple levels of hearsay. Because of those factors, the evidence was insufficiently reliable to support a finding.

36. However, in or around November 2005, three markers from the Bellagio were submitted to Respondent's bank for payment of his gambling debts from the trust account. Stop payment orders were placed against the markers by either Respondent or other PCE personnel, and those actions were recorded on PCE's next bank statement. During the same month, Bellagio Casino Host Jim Dunning, discussed payment of the markers with Respondent's attorney. Those events provided Respondent with either actual or constructive knowledge that the PCE trust account was listed with the Bellagio as security against his line of credit with that casino.

37. In *Sime v. Malouf* (1949) 95 Cal.App.2d 82, the Court stated:

As to the claim of constructive knowledge, the issue was whether plaintiff had notice of facts sufficient to put a prudent man upon inquiry and if so, whether an inquiry, reasonably conducted, would have disclosed to him the true state of affairs. [Citations.] (*Id.* at 104.)

38. Charged with the knowledge that PCE's trust account was being used as security for his line of credit at the Bellagio, it was incumbent upon Respondent to ensure that the trust account number was removed from the Bellagio's records. It was also his duty to ensure it would not be placed on any other credit line applications and would be removed from all extant credit lines, including the credit line he had been granted by the Wynn in June of the same year. In conscious disregard for the type of consequences that had already occurred and stood to occur again with additional uses of the credit line, Respondent failed to take that step.

39. In November 2006, Respondent signed a marker at the Bellagio for \$20,000, with the knowledge that the PCE trust account had been designated as security against his credit line. On April 25, 2007, the Bellagio submitted Respondent's marker for \$20,000 to Respondent's bank for payment against the trust account funds, and \$20,000 was debited from the account at that time. Because he had acted in conscious disregard of the consequences, Respondent's disbursement of \$20,000 of PCE trust account funds was done recklessly. Respondent's escrow manager at PCE, William Nelson, rejected payment of the \$20,000 marker via the trust account Positive Pay feature.

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40. Thus, by April 25, 2007, the Bellagio had submitted four markers for payment against the PCE trust account. Yet, neither Respondent nor any of his agents at PCE took any steps to have the trust account number removed from the Bellagio's records.

41. In April and May of 2007, the Wynn submitted markers of \$500,000 each to Respondent's bank from the PCE trust account for payment of Respondent's gambling debt. Using the trust account's Positive Pay feature, Mr. Nelson, again declined payment on the markers. Respondent had signed those markers in November 2006, after the first three markers had been deposited for payment to the Bellagio. Because he had acted in conscious disregard of the consequences, Respondent's disbursement of an additional \$1,000,000 of PCE trust account funds was done recklessly.

42. Despite the knowledge that both the Bellagio and the Wynn had submitted markers for payment from the trust account, neither Respondent nor any of his agents at PCE took any steps to ensure that the CPE trust account number was removed from the Bellagio's or the Wynn's records.

43. In January 2007, Respondent signed two applications for a credit line at the Venetian. PCE's trust account number was listed as security on one of those applications. At that point, the Bellagio had already attempted to collect on three markers, Respondent had signed a fourth marker at the Bellagio, he had signed two additional markers at the Wynn, and he had done so with actual or constructive knowledge that his company's trust account was listed as security against his credit lines with those two casinos.

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44. By his testimony, Respondent left the impression that he was not concerned with the details of his various credit line applications, and that he signed them when asked without checking them for accuracy. At the time he signed the Bellagio application in 2005, his personal checking account held a balance of \$16,000,000. He was a wealthy man who could easily afford to pay his own gambling debts. He was credible in his testimony that he was not motivated to use other people's money (i.e., trust account funds) for that purpose. In addition, since PCE performed almost all of the escrows on the multitudinous loans generated by Quick Loan Funding, Inc., the potential loss of PCE's escrow agent license because of improper use of trust account funds would serve as a disincentive to deliberately list the trust account as security against casino lines of credit. It is therefore unlikely that Respondent deliberately chose to name PCE's trust account as security against those credit lines. He did, however, act recklessly in failing to carefully check the applications for accuracy after he learned that the 2005 application from the Bellagio listed the trust account, and he acted recklessly in failing to have the trust account number removed from the Bellagio's, Wynn's and Venetian's records. However, the violation of Financial Code section 17414 did not actually occur until Respondent signed the fourth marker at the Bellagio and the two markers at the Wynn, resulting in disbursement of trust account funds, with the knowledge that PCE's trust account was listed as security against his lines of credit at those two casinos.

Discipline Against Respondent

45. Financial Code section 17423, subdivision (a) states in pertinent part:

The commissioner may, after appropriate notice and opportunity for hearing, by order, censure or suspend for a period not exceeding 12 months, or bar from any position of employment, management, or control any escrow agent, or any other person, if the commissioner finds either of the following:

(1) That the censure, suspension, or bar is in the public interest and that the person has committed or caused a violation of this division or rule or order of the commissioner, which violation was either known or should have been known by the person committing or causing it or has caused material damage to the escrow agent or to the public.

46. Respondent argues that he should not be barred from the escrow industry because, among other things, no member of the public was injured as a result of his conduct. His argument is not well-taken. Actual harm to the public is not required in an administrative disciplinary proceeding. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1053, 236 Cal.Rptr. 526; *In re Kelley* (1990) 52 Cal.3d 487, 564.) Financial Code section 17423, subdivision (a)(1) is satisfied in that Respondent knew or should have known he was violating Financial Code section 17414 by signing markers against PCE's trust account.

47. The evidence did not establish that Respondent deliberately provided any casino with PCE's trust account number to be used as security against his casino lines of credit, and the evidence did not establish that Respondent disbursed trust account funds in a deliberate attempt to convert his clients' funds for his benefit. The evidence did establish, however, that (1) Respondent had little to do with the day-to-day operations of PCE, and (2) that he had a cavalier attitude toward signing applications for casino credit lines, allowing others to fill in the blanks and then signing them without checking them for accuracy despite the urgings of casino personnel that he do so. Those factors resulted in Respondent knowingly or recklessly disbursing or causing the disbursement of trust funds from PCE's trust account on three occasions (the 20,000 marker from the Bellagio and the two \$500,000 markers from the Wynn).

48. Although Respondent's conduct with respect to his use of PCE's trust account number to secure casino lines of credit was not malicious, once on notice that the trust account was listed on one or more lines of credit, his conduct in continuing to sign markers on those credit lines without ensuring the removal of the trust account number, resulted in the reckless disbursement of trust account funds.

49. Respondent has learned an important lesson that wealth does not always insulate an individual from responsibility. Regardless of whether he was the one to provide the Bellagio, Wynn and Venetian with the trust fund account number, Respondent is responsible for his reckless disbursement of trust account funds because (1) he failed to check the applications for accuracy, (2) he failed to ensure the removal of the trust account number from his lines of credit, and (3) he continued to sign markers with the knowledge that some markers had already been presented for payment against the trust account, and others could yet be presented because the trust account number remained on the casinos' records.

50. That does not mean, however, that a life-long ban from the escrow industry is warranted. The purpose of a disciplinary proceeding such as the one *sub judice* is not to punish the licensee, but rather to protect the public. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Discipline against Respondent's escrow officer's license is warranted for his reckless conduct. Albeit reckless, Respondent's actions were not ignobly motivated. A life-long ban would be overly-harsh and punitive. The public safety, welfare and interest should be adequately protected by a 12-month suspension, the maximum amount allowable by law.

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Analysis as to Respondent Platinum Coast Escrow

51. During the April 2007 routine regulatory examination at PCE, the examiner found numerous violations of the Escrow Law. Those violations are described in the factual findings, above, and need not be repeated here. Included in the violations were many old, partially identified and/or uncorrected adjustments in the trust reconciliation for March of 2007. Based on those findings, the examiner believed the trust account had not been regularly reconciled. In addition, various adjustment inconsistencies rendered the reconciliation unreliable.

52. Some of the violations the examiner discovered included the unauthorized disbursements from the trust account that had occurred as a result of Respondent's signing gambling markers written against that account. Other violations involved Vazquez's unauthorized withdrawals of trust account funds and his subsequent deposits of those funds into his own account. Although a corporation may be held liable for the wrongdoing of its officers, directors and employees (*Rob-Mac, Inc, v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793), the wrongdoing must be within the course and scope of their official duties. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141.)

It would seem to be too clear for argument that a corporation cannot be held responsible for the acts of its officers or agents which are clearly beyond their express or implied duties, in matters which are strictly personal to them, of no interest to the corporation and from which the corporation derives no benefit whatever. (*Dashew v. Dashew Business Machines, Inc.* (1963) 218 Cal.App.2d 711, 715.)

53. Vasquez's conversion of company trust funds was not a function of PCE's corporate business. Further, the evidence did not establish that anyone at PCE (other than Vazquez himself) knew that Vasquez was converting trust account funds until after Vazquez left the company. Vazquez's wrongdoing was strictly a personal matter to which no corporate liability should be attached.

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54. However, a different result is reached with respect to Respondent's disbursements from PCE's trust account to pay his gambling markers. Although, like Vazquez, his actions were strictly personal in nature and not related to PCE's business, PCE, through its officers, directors and employees, had a duty to protect its trust account. In April and May of 2007, using the Positive Pay feature, PCE's escrow manager, William Nelson, rejected three of Respondent's markers that had been deposited for payment from the trust account. He did so within the course and scope of his employment and in connection with PCE's business. However, Positive Pay was not a fail-safe tool, and Nelson or anyone else with authority to approve or disapprove checks deposited into the trust account for payment could fail to prevent another marker from being negotiated. Yet, neither Nelson nor anyone else from PCE took any steps to protect the company's trust account, such as contacting the casinos which had deposited the markers to rectify the matter and ensure against a recurrence. The duty to protect against a recurrence arose in October 2005, when stop payments were made on Bellagio markers totaling \$1,010,000. The failure to ensure against a recurrence resulted in the reckless disbursal of trust account funds totaling \$1,020,000 in 2007. That reckless disbursal is attributable to the corporation, and constitutes grounds for license discipline.

55. PCE is also responsible for the remaining violations. Because of its suspended corporate status at the time of the administrative hearing, PCE was unable to present a defense to those violations. Although Complainant concedes that many of the violations were corrected following the April 2007 routine regulatory examination, those corrections serve as mitigating, but not exculpatory factors. Those mitigating factors must be given little weight in light of the number, nature and age of the violations. Additionally, the suspension of PCE's corporate status is viewed as a factor in aggravation which offsets the mitigating factors.

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Discipline Against Platinum Coast Escrow

56. Although it is certainly apposite for a licensee to correct its violations of the Escrow Law, the causes for discipline in this case are based on the violations themselves. Those violations are numerous and varied. Together, they evidence a business that was not well-maintained or self-regulated. Although the violations were corrected after the examiner discovered them, the evidence did not demonstrate any positive changes in PCE's business practices.¹⁴ Thus, neither the corrections of the violations nor any other evidence instills confidence that the violations will not be repeated or that other violations will not occur. Public protection mandates the revocation of PCE's escrow agent license.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Respondent, Nazih Daniel Sadek, is suspended from any position of employment, management or control of any escrow agent for a period of 12 months from the effective date of this Order.

2. The escrow agent license of Respondent, Platinum Coast Escrow, Inc., is revoked.

DATED: September 3, 2008

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings

¹⁴ The lack of evidence showing changes made to PCE's business practices is not startling given that PCE's corporate status was suspended at the time of the hearing, and PCE was therefore precluded from offering any evidence in its defense. However, this Decision must be based solely upon the record. Improved business practices cannot be presumed, and the fact that PCE corrected the violations the examiner found does not support an inference that PCE corrected its business practices such that the risk of recurrence has been minimized.