



BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

COMMUNITY REAL ESTATE CENTER,  
INC., and BYRON BURTON ALVAREZ

Respondents.

Case No. H-4168 SAC

OAH No. N2005020399

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearing, State of California, on August 24, 2005, in Sacramento, California.

Truly Sughrue, Real Estate Counsel, represented Charles W. Koenig, a Deputy Real Estate Commissioner (complainant).

Thomas C. Lasken, Esq., represented Community Real Estate Center, Inc. (CREC) and Byron Burton Alvarez (Alvarez) (collectively, respondents).

Evidence was received, the hearing was closed, and the matter was submitted on August 24, 2005.

**FACTUAL FINDINGS**

1. On November 1, 2004, complainant, in his official capacity, made the Accusation, which was filed with the Department of Real Estate (Department) on December 8, 2004.
2. Respondents are currently licensed and have license rights under the Real Estate Law.<sup>1</sup> CREC was and is licensed by the Department as a real estate broker corporation. Alvarez was and is licensed by the Department as the designated broker officer of CREC. CREC does business as R.M. Property Management and Re/Max Real Estate

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<sup>1</sup> Part 1 of Division 4 of the Business and Professions Code.

Center. Alvarez is also licensed by the Department as the broker officer of Center Mortgage.Com, Inc., which does business as Center Mortgage.Com.

3. Respondents engage in activities on behalf of others for which a real estate license is required. Among their varied real estate activities, respondents, for or in expectation of compensation, lease or rent, offer to lease or rent, solicit prospective tenants, collect rents on, and/or manage certain real properties in California. In discharging these property management activities, respondents received and disbursed funds in trust on behalf of the owners of the managed properties. To this end, respondents maintained and deposited the trust funds in an account with Service 1<sup>st</sup> Bank entitled "Community Real Estate Center Inc. R.M. Property Management," Account No. 1101112 (Account No. 1).

4. On April 19, 20, and 21, 2004, Sharon Nation, an Auditor III with the Department, conducted an audit of CREC's resale and property management activities for the period of January 1, 2003 through March 31, 2004 (audit period). As part of the audit, Nation examined whether, during the audit period, CREC handled and accounted for trust funds in accordance with the Real Estate Law and the Commissioner's Regulations.<sup>2</sup>

5. On May 4, 2004, following the audit, during an exit interview, Nation presented Alvarez with a Non-Compliance Summary, which reported the following deficiencies:

- A. There was a shortage of \$7,875.15 in Account No. 1, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1.
- B. Account No. 1 was not designated as a trust account, in violation of California Code of Regulations, title 10, section 2832.
- C. CREC did not reconcile accounting records to banking records, in violation of California Code of Regulations, title 10, section 2831.2.
- D. Susie Mello (Mello) and Tanis Hernandez (Hernandez) were designated as signers on Account No. 1, although they were neither licensed nor bonded, in violation of California Code of Regulations, title 10, section 2834.<sup>3</sup>

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<sup>2</sup> California Code of Regulations, title 10, chapter 6.

<sup>3</sup> In the Non-Compliance Summary, Nation acknowledged that, by the conclusion of the audit, these women had been removed as signers on the account.

- E. CREC did not maintain a record of all trust funds received and paid, in violation of California Code of Regulations, title 10, section 2831.

Nation's final audit report identifying these deficiencies was dated July 22, 2004.

6. Nation determined that the shortage was \$7,875.15 by comparing the trust fund accountability to the bank account balance in Account No. 1 as of March 31, 2004. According to Nation, the trust fund accountability is the total dollar amount for which CREC was responsible to the managed property owners. By reviewing the managed property owners' balances, Nation determined that the trust fund accountability was \$30,036.79 as of March 31, 2004.

Nation added deposits in transit to, and deducted outstanding checks from the balance shown on the March 31, 2004 bank statement and determined that the balance in Account No. 1 as of March 31, 2004, was \$22,161.64.

Nation identified \$2,432.28 of the \$7,875.15 shortage to be the result of negative balances in certain owners' accounts, which occurred because more funds were disbursed from those accounts than the owners were due. Nation could not identify the cause of the remaining \$5,442.87 of the shortage.

7. On April 28, 2004, Alvarez made a deposit into Account No. 1 to cover the shortage found by Nation. Although Alvarez paid the full amount of the identified shortage, he disputed that there was any shortage in the account. Alvarez asserted that Nation had erred in two ways in finding a shortage: First, she failed to account for an overage that Tom Cameron (Cameron), Nation's current Team Supervisor and the prior DRE auditor of CREC's trust account, had found. Second, she deducted from the owners' accounts stale checks that were no longer negotiable.

8. With respect to the overage issue, Alvarez explained that, in 2000, Cameron audited CREC's trust account and found an overage of \$4,616.01. Cameron informed respondents that this amount was respondents' money. At that time, CREC's trust account was deposited in Pacific State Bank. In order to rectify this overage, Cameron told Alvarez to open a new account and transfer the reconciled balance to that new account, leaving the overage in the existing account to "season" for six months. In response to Cameron's directions, Alvarez transferred all the trust funds, except for the overage, into a new trust account at Service 1<sup>st</sup> Bank. He left the \$4,616.01 overage in Pacific State Bank for six months. On March 15, 2001, Alvarez withdrew that amount.

Other than checking account statements from Pacific State Bank, respondents offered no documents to establish Cameron's findings about the overage from the prior audit. The Department stipulated that, as part of its document retention policy, Cameron's prior audit had been destroyed. While Nation was conducting her audit, she was told that Cameron had

found an overage, and Nation mentioned this information to Cameron. Nation did not, however, ask Cameron whether he had told Alvarez to deduct the overage from CREC's trust account. Nation did not make any allowance for the overage in her audit. Cameron reviewed Nation's audit report as her Team Supervisor.

Respondents presented no documents to account for or explain whether or how the overage that Cameron had found related to or impacted the \$7,875.15 shortage that Nation identified.<sup>4</sup>

9. With respect to the stale checks issue, in determining the owners' balances, Nation posted to the owners' accounts checks totaling approximately \$4,571.98 that were disbursed more than six months earlier, but had never been cashed (stale checks). Respondents asserted that the policy of Service 1<sup>st</sup> Bank provides that it "normally" does "not accept checks for deposit ... that are more than 90 days old," and that, under the law of negotiable instruments, banks will not honor checks that are over six months old. Respondents contended that, because the stale checks were no longer negotiable, Nation should not have deducted them from the owners' balances.

Nation agreed that banks generally do not honor checks that are over six months old, but asserted that, sometimes, banks will cash a stale check. Nation explained that respondents did not have a system in place for tracking whether issued checks had cleared the bank or for determining whether the owners still owed the liabilities underlying stale checks. Nation contended that if the stale checks had not cleared the bank within six months, respondents should have cancelled those checks, reviewed and addressed the owners' underlying liabilities, and reissued replacement checks as appropriate, which respondents had not done. Instead, the stale checks remained unaddressed in Account No. 1.

Alvarez conceded that CREC did not have a policy for reviewing whether checks issued from Account No. 1 had been cashed or for dealing with stale checks. He asserted that Wilson & Co. (Wilson), the bookkeeping service CREC employed to perform its day-to-day bookkeeping, will be reviewing CREC's old checks.

Respondents offered no documents to account for or explain whether or to what extent the owners remained responsible for the liabilities underlying the stale checks.

10. Respondents did not obtain prior written consent from each of the principals for the reduction of the aggregate balance of trust funds in Account No. 1 to an amount less than the existing aggregate trust fund liability to the owners of the funds.

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<sup>4</sup> Alvarez explained that he had retained the services of Joseph Hanlon (Hanlon), a certified public accountant, to review the results of Nation's audit. According to Alvarez, Hanlon's review indicated that there was no shortage in Account No. 1. Hanlon did not testify during the hearing and the results of his review were not offered into evidence.

11. Nation determined that Account No. 1 was not designated as a trust account by looking solely at the account's signature card in effect at the time of the audit. That card did not reflect that the account was a trust fund in the name of Alvarez as trustee. Nation explained that the account must clearly be designated as a trust fund account to protect it from lien or attachment in the event that litigation is brought against Alvarez or CREC in their individual capacities.

Alvarez asserted that, when the account was first established at Service 1<sup>st</sup> Bank, the original signature card reflected that it was a trust account. Cameron was present when the account was opened, looked at the original signature card, and approved it. According to Alvarez, from time to time, as changes occurred in CREC's staff, the signature card for the account was updated to reflect those changes. Alvarez believed that, at some point, when the signature card was updated, bank staff inadvertently failed to continue to include on the card that Account No. 1 was a trust account. Alvarez asserted that, although the updated signature card failed to indicate that Account No. 1 was a trust account, Service 1<sup>st</sup> Bank still considered the account to be a trust account, as reflected in CREC's contract with the bank, entitled "Important Information About Your Account," effective October 1, 2003, which was addressed to:

[01] Community Real Estate Center  
[12] RM Property Management  
[05] C/O Wilson & Co  
Owner/Broker Trust Account...

Nation conceded that a signature card is not the sole determinant of an account's designation, and that, if she had known at the time she was conducting her audit that Service 1<sup>st</sup> Bank designated Account No. 1 as a trust account on CREC's account contract, it would have caused her to change her findings with respect to the designation of that account.

12. When Nation was conducting her audit, the signature card for Account No. 1 listed four persons as signers on the account: Alvarez, Bonnie De Jonge (De Jonge), Mello, and Hernandez. Both Alvarez and De Jonge were licensed by the Department. Mello and Hernandez were not licensed by the Department and were not covered under a fidelity bond. The account required two signatures for every withdrawal. According to Alvarez, CREC had a policy that one of the two signers had to be licensed by the Department.<sup>5</sup> On April 28, 2004, before Nation completed her audit report, respondents removed Mello and Hernandez as signers on Account No. 1 and replaced them with signers licensed by the Department.

13. California Code of Regulations, title 10, section 2831, sets forth the trust fund records that a broker must maintain, in relevant part, as follows:

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<sup>5</sup> Notwithstanding these requirements, some of the checks included in the audit report's supporting documents were signed by only one of the account signers. Two of those checks, Check No. 8138, dated March 3, 2004, for \$200.00, and Check No. 8139, dated March 3, 2004, for \$1,400.00, were signed solely by Mello.

### Trust Fund Records To Be Maintained.

(a) Every broker shall keep a record of all trust funds received, including uncashed checks held pursuant to instructions of his or her principal. This record, including records maintained under an automated data processing system, shall set forth in chronological sequence the following information in columnar form:

- (1) Date trust funds received.
- (2) From whom trust funds received.
- (3) Amount received.
- (4) With respect to funds deposited in an account, date of said deposit.
- (5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.
- (6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.
- (7) Daily balance of said account.

(b) For each bank account which contains trust funds, a record of all trust funds received and disbursed shall be maintained in accordance with subdivision (a) or (c).

(c) Maintenance of journals of account cash receipts and disbursements, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles, shall constitute compliance with subdivision (a) provided that such journals, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

Nation called the record of all trust funds received and disbursed, which a broker must maintain in accordance with section 2831, the "control record." During the audit, respondents did not provide to Nation a control record for Account No. 1.

De Jonge was CREC's property manager when Nation was conducting the audit. During April 2004, De Jonge was training Sonja Sassi (Sassi) to be her replacement. On May 1, 2004, Sassi officially replaced De Jonge as CREC's property manager. Nation asserted that she explained to De Jonge the nature and form of the control record that she was seeking, but never received from De Jonge a control record in the form she requested.

Before Nation issued her audit report, Sassi met with Nation for approximately four hours to obtain a clear understanding of the nature of the information that Nation was seeking. During that meeting, Nation showed Sassi a report of owners' balances upon which Nation was relying. Sassi told Nation that that report was incomplete because it showed only the amounts that the owners owed, but not what those amounts were for. Sassi asserted that, because Nation did not clearly explain to her what information she was seeking, Sassi was confused as to what Nation really wanted. Nation did not give to Sassi any booklets or other documentation to explain the reports that she was seeking. De Jonge told Sassi that she also had not received any written explanation from Nation as to what she was seeking.

CREC utilizes PROMAS computer software to maintain a record of all the trust funds it receives and disburses. PROMAS can generate approximately 35-40 different reports. Sassi asserted that PROMAS was capable of producing the type of control record that Nation was seeking. Respondents did not, however, offer into evidence a control record for Account No. 1 generated by PROMAS. Alvarez admitted that when CREC implemented PROMAS, he did not look to see if it could maintain and produce all the records necessary to meet the Department's reporting requirements.

14. California Code of Regulations, title 10, section 2831.2 mandates that a broker must perform trust account reconciliations as follows:

#### Trust Account Reconciliation.

The balance of all separate beneficiary or transaction records maintained pursuant to the provisions of Section 2831.1 must be reconciled with the record of all trust funds received and disbursed required by Section 2831, at least once a month, except in those months when the bank account did not have any activities. A record of the reconciliation must be maintained, and it must identify the bank account name and number, the date of the reconciliation, the account number or name of the principals or beneficiaries or transactions, and the trust fund liabilities of the broker to each of the principals, beneficiaries or transactions.<sup>6</sup>

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<sup>6</sup> California Code of Regulations, title 10, section 2831.1 provides:



In the audit, Nation found that, because CREC did not maintain a control record, it did not perform a monthly reconciliation of its accounting records in accordance with section 2831.2. Nation acknowledged that CREC could perform the reconciliation on its computer system. Nation asserted, however, that in order to comply with the regulation, CREC had to produce the computer generated reconciliation in the format required by the section 2831.2, which CREC did not do.

Both Alvarez and Sassi asserted that PROMAS was capable of generating a monthly reconciliation in the format required by section 2831.2, but that Nation never clearly explained what she wanted CREC to produce in order to show compliance with the regulation. Respondents also contended that, so long as the bank reconciliation and the individual owner records were available, the reconciliation could readily be performed. Nation explained that the reconciliation was a two-step process: first, the adjusted bank balance had to be reconciled with the control record; next, the control record had to be reconciled with the individual beneficiary statements. Nation found that respondents were not performing this two-step process during the audit period.

Alvarez confirmed that respondents are now reconciling their trust account in accordance with section 2831.2.

15. To cast doubt on the validity of the audit, respondents pointed to some mistakes in Nation's working papers: On Form RE 4801, entitled "Property Management Audit Program," in the "Summary" section, Nation mistakenly indicated that there were no non-compliance findings with respect to "Reg. 2831 Trust Fund Records to be Maintained," when, in fact, her audit report found non-compliance in this area. On Form RE 4960, entitled "WP - Bank Account Worksheet," in the "Compliance Summary (Trust Fund)" section, Nation indicated that a trust account was set up in the name of the broker, and that a monthly reconciliation of control records and separate records was maintained, when her audit report

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Separate Record for Each Beneficiary or Transaction.

(a) A broker shall keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account and interest, if any, earned on the funds on deposit. This record shall include information sufficient to identify the transaction and the parties to the transaction. Each record shall set forth in chronological sequence the following information in columnar form:

- (1) Date of deposit.
- (2) Amount of deposit.
- (3) Date of each related disbursement.
- (4) Check number of each related disbursement.
- (5) Amount of each related disbursement.
- (6) If applicable, dates and amounts of interest earned and credited to the account.
- (7) Balance after posting transactions on any date.

(b) Maintenance of trust ledgers of separate beneficiaries or transactions, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles will constitute compliance with subdivision (a), provided that such ledgers, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

found the opposite on both these issues. On WP Reference B-1.3, Nation stated that only one signature was required for withdrawals from Account No. 1, when, in reality, two signatures were required. On WP Reference D-4, Nation concluded that, "Review of the records revealed that trust funds were properly handled and accounted for." Nation's audit report concluded otherwise.

While these mistakes raise some concerns about the care that Nation took in conducting the audit, they are not sufficiently egregious, in themselves, to undermine the validity of Nation's audit conclusions.

16. Alvarez has been a real estate broker for 25 years. He owns both CREC and Center Mortgage.com. Center Mortgage.com conducts loan operations. Its annual loan volume is approximately \$35 million. CREC conducts both residential resale and property management operations. The annual sales volume from CREC's resale operations is \$450 million. Nation's audit found that CREC's property management operations managed approximately 26 properties for 25 principals. The average daily balance in Account No. 1, the property management account, is \$75,000.

CREC employs approximately 80 licensed agents and 15 support employees to conduct its residential resale operations. CREC employs a single property manager to conduct its property management operations.

The audit was instigated as an investigation in response to a complaint the Department had received with respect to the loan activities of Center Mortgage.com. Nation audited both the loan operations of Center Mortgage.com and the residential resale operations of CREC and found no non-compliance items in those operations. She found non-compliance items only with respect to CREC's property management business.

17. Respondents and their employees cooperated fully with Nation during the course of her audit. Nation described the non-compliance items she identified with respect to respondents' property management operations to be the result of negligence; she found no evidence of embezzlement or conversion. Nation acknowledged that respondents had corrected all the deficiencies that she found, including making a deposit into the trust account to cover the full amount of the identified shortage, eliminating unlicensed persons as signers on the account, and designating the account as a trust account. Respondents acted very promptly to make these corrections before the audit report was finalized. Respondents have retained the services of Wilson and Hanlon to ensure that all the deficiencies identified in the audit have been and will continue to be addressed and rectified.

## LEGAL CONCLUSIONS

1. The burden of proof in this matter is on complainant to show by clear and convincing evidence to a reasonable certainty that respondents' licenses should be suspended

or revoked. (See *Ettinger v. Board of Medial Quality Assurance* (1982) 135 Cal.App.3d 853, 855-6.)

2. Business and Professions Code section 10145 requires a broker to hold real estate transaction funds belonging to others in trust.<sup>7</sup>

Business and Professions Code section 10177, subdivision (d), authorizes the suspension or revocation of the license of a real estate licensee for “willfully” disregarding or violating the Real Estate Laws or the Commissioner’s Regulations.<sup>8</sup> Although, as set forth in Finding 17, Nation concluded that all the deficiencies that she found were the result of negligence, and not intentional misconduct, the term “willfully,” as used in this subdivision, means “done deliberately: not accidental or without purpose.” (*People v. Clem* (1974) 39 Cal.App.3d 539, 542. See *Apollo Estates, Inc. v. Department of Real Estate* (1985) 174 Cal.App.3d 625, 639. See also *Manning v. Fox* (1984) 151 Cal.App.3d 531, 542 [“Section 10177, subdivision (d), is designed ‘to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent, or unknowledgeable salesman.’”]).

Complainant met its burden of showing that, in contravention of Business and Professions Code section 10145, CREC failed to deposit and maintain trust funds in Account No. 1 such that, as of March 31, 2004, there was a shortage in that account. Although respondents’ contentions with respect to the overage deducted earlier and the application of stale checks to the owners’ accounts may raise some questions as to the amount of the shortage, respondents failed to produce sufficient evidence, particularly concerning the

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<sup>7</sup> Business and Professions Code section 10145, in relevant part, provides as follows:

(a) (1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

[¶]...[¶]

(g) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds.

<sup>8</sup> Business and Professions Code section 10177, in relevant part, provides:

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

[¶]...[¶]

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

deducted overage, to rebut Nation's findings with respect to the existence of a shortage. Pursuant to Business and Professions Code section 10159.2, Alvarez, as the designated broker officer of CREC, is responsible for this shortage.<sup>9</sup> Cause, therefore, exists to revoke or suspend respondents' licenses pursuant to Business and Professions Code section 10177, subdivision (d).

3. California Code of Regulations, title 10, section 2832.1 provides:

The written consent of every principal who is an owner of the funds in the account shall be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds.

CREC failed to obtain the prior written consent from each of the principals for the reduction of the aggregate balance of trust funds in Account No. 1 to an amount less than the existing aggregate trust fund liability to the owners of those funds. Pursuant to Business and Professions Code section 10159.2, Alvarez, as the designated broker officer of CREC, is responsible for this violation of section 2832.1. Cause, therefore, exists to revoke or suspend respondents' licenses pursuant to Business and Professions Code section 10177, subdivision (d).

4. California Code of Regulations, title 10, section 2834 provides that trust fund withdrawals may be made only by a properly authorized real estate licensee or a properly authorized unlicensed employee with adequate fidelity bond coverage.<sup>10</sup> CREC permitted

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<sup>9</sup> Business and Professions Code section 10159.2, in relevant part, provides:

(a) The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

<sup>10</sup> California Code of Regulations, title 10, section 2834 provides:

withdrawals to be made from Account No. 1 by unlicensed employees without adequate authority and fidelity bond coverage. Pursuant to Business and Professions Code section 10159.2, Alvarez, as the designated broker officer of CREC, is responsible for this violation of section 2834. Cause, therefore, exists to revoke or suspend respondents' licenses pursuant to Business and Professions Code section 10177, subdivision (d).

5. California Code of Regulations, title 10, section 2832 requires that trust funds must be deposited in a trust account in the name of the broker as trustee.<sup>11</sup> Given the findings set forth in Finding 11, complainant failed to establish cause to revoke or suspend respondents' licenses for failing to comply with section 2832.

6. As set forth in Finding 13, CREC failed to maintain a written control record of all trust funds received and disbursed, which contained all information required by California Code of Regulations, title 10, section 2831. Even if CREC's employees were confused by the guidance Nation gave them as to what information she was seeking, such confusion cannot excuse CREC's failure to maintain and produce a control record in the format required by section 2831. Pursuant to Business and Professions Code section 10159.2, Alvarez, as the designated broker officer of CREC, is responsible for this violation of section 2831. Cause, therefore, exists to revoke or suspend respondents' licenses pursuant to Business and Professions Code section 10177, subdivision (d).

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Trust Account Withdrawals.

(a) Withdrawals may be made from a trust fund account of an individual broker only upon the signature of the broker or one or more of the following persons if specifically authorized in writing by the broker:

(1) a salesperson licensed to the broker.

(2) a person licensed as a broker who has entered into a written agreement pursuant to Section 2726 with the broker.

(3) an unlicensed employee of the broker with fidelity bond coverage at least equal to the maximum amount of the trust funds to which the employee has access at any time.

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

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

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

(c) An arrangement under which a person enumerated in paragraph (1), (2) or (3) of subdivision (a) above is authorized to make withdrawals from a trust fund account of a broker shall not relieve an individual broker, nor the broker-officer of a corporate broker licensee, from responsibility or liability as provided by law in handling trust funds in the broker's custody.

<sup>11</sup> California Code of Regulations, title 10, section 2832, in relevant part, provides:

(a) Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson.

7. As set forth in Finding 14, CREC failed to reconcile the balance of separate beneficiary or transaction records with the control records of trust funds received and disbursed at least once a month, and failed to maintain a record of such reconciliations as required by California Code of Regulations, title 10, section 2831.2. The fact that CREC's employees may have been able to generate the requisite reconciliation reports from CREC's computer system if those employees had not been confused by the guidance provided by Nation does not excuse CREC's failure to perform the monthly reconciliations mandated by section 2831.2. Pursuant to Business and Professions Code section 10159.2, Alvarez, as the designated broker officer of CREC, is responsible for this violation of section 2831.2. Cause, therefore, exists to revoke or suspend respondents' licenses pursuant to Business and Professions Code section 10177, subdivision (d).

8. Business and Professions Code section 10177, subdivision (h), authorizes the suspension or revocation of the license of the officer designated by a corporate broker licensee for failing to exercise reasonable supervision and control over the licensed activities of the corporation.<sup>12</sup> The acts and omissions set forth in Legal Conclusions 2, 3, 4, 6 and 7 constitute failure on the part of Alvarez, as the designated broker officer of CREC, to exercise reasonable supervision and control over the licensed activities of CREC as required by Business and Professions Code section 10159.2. Cause, therefore, exists to revoke or suspend Alvarez's license pursuant to Business and Professions Code section 10177, subdivision (h).

9. Complainant established cause to revoke or suspend respondents' licenses. While the established trust fund violations are serious and compelled Department scrutiny, because all the deficiencies found in this matter were the result of negligence, and not intentional misconduct; respondents fully cooperated with the Department during the audit; Alvarez took immediate steps to correct all the deficiencies that were found and to put in place safeguards to insure that no further deficiencies would occur; respondents' failure to produce the required control records and reconciliations may have been exacerbated, at least to some degree, by miscommunications between CREC's staff and Nation; and Alvarez's property management operations are a very small part of his licensed businesses, which were

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<sup>12</sup> Business and Professions Code section 10177, in relevant part, provides:

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

[¶]...[¶]

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

otherwise found to be free from any deficiencies, the public interest and welfare would be adequately protected by the continued issuance of real estate licenses to CREC and Alvarez, subject to short suspensions.

## ORDER

1. All licenses and license rights of respondent Community Real Estate Center, Inc. are suspended for one (1) year from the effective date of this Decision; provided, however, that the suspension shall be stayed upon the following terms and conditions:

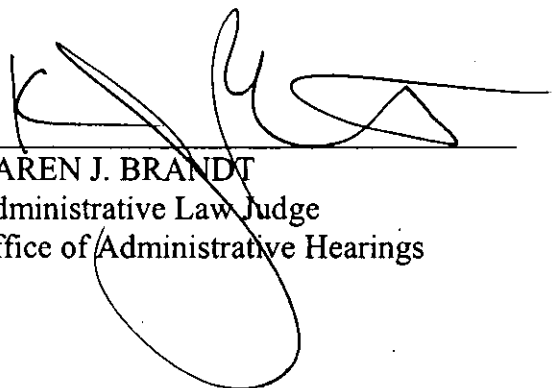
- a. Respondent CREC's license and license rights shall be actually suspended for a period of ten (10) days. Respondent CREC may, pursuant to Section 10175.2, petition the Commissioner to pay a monetary penalty and thereby further stay imposition of the term of the actual suspension.
- b. Respondent CREC shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.
- c. The Commissioner may, if a final subsequent determination is made, after hearing or upon stipulation, that cause for disciplinary action occurred during the term of the suspension provided for in condition "a," vacate and set aside the stay order including any further stay imposed pursuant to section 10175.2. Should no order vacating the stay be made pursuant to this condition or condition "d" below, the stay imposed herein shall become permanent.
- d. Pursuant to Section 10148 of the Business and Professions Code, respondent CREC shall pay the Commissioner's reasonable cost for: a) the audit which led to this disciplinary action and, b) a subsequent audit to determine if respondent has corrected the trust fund violation(s) found in paragraphs 2, 3, 4, 6 and 7 of the Legal Conclusions. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work and per diem. Respondent CREC shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may, in his discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The vacation and the set aside of the stay shall remain in effect until payment is made in full, or until respondent enters into an agreement satisfactory to the Commissioner to provide for payment. Should

no order vacating the stay be issued, either in accordance with this condition or condition "c," the stay imposed herein shall become permanent.

2. All licenses and license rights of respondent Byron Burton Alvarez are suspended for a period of ten (10) days from the effective date of this Decision; provided, however, that the suspension shall be stayed upon the following terms and conditions:

- a. Respondent Alvarez may, pursuant to Section 10175.2, petition the Commissioner to pay a monetary penalty and thereby stay imposition of the term of the suspension.
- b. Respondent Alvarez shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.
- c. The Commissioner may, if a final subsequent determination is made, after hearing or upon stipulation, that cause for disciplinary action occurred during the term of the suspension provided for herein, vacate and set aside any stay order imposed pursuant to section 10175.2. Should no order vacating the stay be made pursuant to this condition, the stay imposed herein shall become permanent.

DATED: 9/14/05

  
KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings



1 TRULY SUGHRUE, Counsel  
2 State Bar No. 223265  
3 Department of Real Estate  
4 P.O. Box 187007  
5 Sacramento, CA 95813-7007  
6  
7 Telephone: (916) 227-0781

FILED

DEC 08 2004

DEPARTMENT OF REAL ESTATE

By Jean Alvarez

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 \* \* \*

11 In the Matter of the Accusation of ) No. H- 4168 SAC  
12 )  
13 ) COMMUNITY REAL ESTATE CENTER ) ACCUSATION  
14 ) INC., AND BYRON BURTON )  
15 ) ALVAREZ, )  
16 ) Respondent. )

17 The Complainant, CHARLES W. KOENIG, a Deputy Real  
18 Estate Commissioner of the State of California, for cause of  
19 Accusation against COMMUNITY REAL ESTATE CENTER INC., AND BYRON  
20 BURTON ALVAREZ (herein "Respondents"), is informed and alleges as  
21 follows:

22 I

23 The Complainant, CHARLES W. KOENIG, a Deputy Real  
24 Estate Commissioner of the State of California, makes this  
25 Accusation in his official capacity.

26 \\\

27 \\\

II

1 Respondents are presently licensed and/or has license  
2 rights under the Real Estate Law (Part 1 of Division 4 of the  
3 Business and Professions Code) (herein "the Code").  
4

III

5  
6 At all times herein mentioned, COMMUNITY REAL ESTATE  
7 CENTER INC., (hereafter COMMUNITY) was and is licensed by the  
8 State of California Department of Real Estate (hereafter  
9 Department) as a real estate broker corporation.

IV

10  
11 At all times herein mentioned, Respondent BYRON BURTON  
12 ALVAREZ, (hereafter ALVAREZ) was and is licensed by the  
13 Department as the designated broker officer of COMMUNITY.

V

14  
15 At all times herein mentioned, Respondents engaged in  
16 activities on behalf of others for which a real estate license is  
17 required under Section 10131(b) of the Code, for or in  
18 expectation of compensation, and leased or rented, offered to  
19 lease or rent, solicited prospective tenants, collected rents on,  
20 and/or managed certain real properties in California.

VI

21  
22 Beginning in April 19, 2004, the Department conducted  
23 an audit of the above business activities of COMMUNITY for the  
24 time period of January 1, 2003 through March 31, 2004.

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VII

Beginning on or before January 1, 2003 through on or after March 31, 2004, COMMUNITY maintained the following trust fund account:

<u>TITLE AND ACCOUNT NUMBERS</u>	<u>BANK</u>
Community Real Estate Center RM Property Management Account No. 1101112 (hereinafter "Account #1")	Service 1 <sup>st</sup> Bank 60 W. 10 <sup>th</sup> Street Tracy, CA 95376

VIII

In connection with the receipt and disbursement of trust funds described in Paragraph VII above, COMMUNITY failed to deposit and maintain trust funds in Account #1 in such manner that as of March 31, 2004, there was a shortage of \$7,875.15 of trust funds.

IX

COMMUNITY failed to obtain prior written consent from each of the principals for the reduction of the aggregate balance of trust funds in Account #1 to an amount less than the existing aggregate trust fund liability to the owners of said funds in violation of Section 2832.1 of the Regulations.

X

In connection with the receipt and disbursement of trust funds described in Paragraph VII above, COMMUNITY permitted withdrawals to be made from Account #1 by someone other than a corporate officer, or a salesperson licensed to COMMUNITY and authorized in writing by COMMUNITY to withdraw

1 said funds, or an authorized unlicensed employee covered by a  
2 fidelity bond indemnifying COMMUNITY against loss in an amount  
3 sufficient to cover the maximum amount of funds to which the  
4 employee had access at any time, as required by Section 2834 of  
5 the Regulations.

6 XI

7 In connection with the receipt and disbursement of  
8 trust funds described in Paragraph VII above, COMMUNITY failed  
9 to deposit the trust funds into a trust account in the name of  
10 the broker as trustee in conformance with Section 10145 of the  
11 Code and Section 2832 of the Regulations.

12 XII

13 In connection with the receipt and disbursement of  
14 trust funds described in Paragraph VII above, COMMUNITY failed  
15 to maintain a written control record of all trust funds received  
16 and disbursed containing all information required by Section  
17 2831.

18 XIII

19 In connection with the receipt and disbursement of  
20 trust funds described in Paragraph VII above, COMMUNITY failed  
21 to reconcile the balance of separate beneficiary or transaction  
22 records with the control records of trust funds received and  
23 disbursed at least once a month, and/or failed to maintain a  
24 record of such reconciliations as requested by Section 2831.2 of  
25 the Regulations.

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XIV

The facts alleged above are grounds for the suspension or revocation of Respondents licenses and license rights under the following sections of the Code and Regulations:

(1) As to Paragraphs VIII, under Section 10177(d) of the Code in conjunction with Section 10145 of the Code;

(2) As to Paragraph IX, under Section 10177(d) of the Code in conjunction with Section 2832.1 of the Regulations;

(3) As to Paragraph X, under Section 10177(d) of the Code in conjunction with Section 2834 of the Regulations;

(4) As to Paragraph XI, under Section 10145 of the Code in conjunction with Section 2832 of the Regulations;

(5) As to Paragraph XII, under Section 10177(d) of the Code in conjunction with Section 2831 of the Regulations;

(6) As to Paragraph XIII, under Section 10177(d) of the Code in conjunction with Section 2831.2 of the Regulations.

In the alternative, the acts and/or omissions of ALVEREZ described above, constitute failure on the part of ALVEREZ, as designated broker-officer for COMMUNITY, to exercise reasonable supervision and control over the licensed activities of COMMUNITY required by Section 10159.2 of the Code, and is cause for the suspension or revocation of ALVEREZ'S license and/or license rights under Section 10177(h) of the Code.

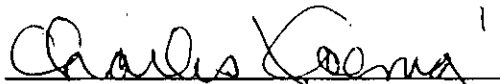
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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondents, under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), and for such other and further relief as may be proper under other provisions of law.

  
CHARLES W. KOENIG  
Deputy Real Estate Commissioner

Dated at Sacramento, California,  
this 1<sup>st</sup> day of November 2004