

FILED

JUL 25 2008

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By K. Contreras

* * *

In the Matter of the Accusation of)	
EUGENE BURGER MANAGEMENT,)	NO. H-10064 SF
CORPORATION, and,)	
EUGENE JAMES BURGER,)	OA# NO. N-2007070984
Respondents.)	

DECISION

The Proposed Decision dated June 25, 2008, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon
on August 14, 2008.

IT IS SO ORDERED 7/25/08

JEFF DAVI
Real Estate Commissioner

Barbara J. Bigby

BY: Barbara J. Bigby
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

EUGENE BURGER MANAGEMENT
CORPORATION and EUGENE JAMES
BURGER,

Respondents.

Case No. H-10064 SF

OAH No. 2007070984

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on May 29, 2008.

Staff Counsel Daniel E. Kehew represented complainant E. J. Haberer II, Deputy Real Estate Commissioner, State of California.

Michael J. M. Brook, Attorney at Law, Law Offices of Lanahan & Reilly, represented respondent Eugene Burger Management Corporation and respondent Eugene James Burger, who was present.

The matter was submitted on May 29, 2008.

FACTUAL FINDINGS

1. At all relevant times, respondent Eugene Burger Management Corporation (EBMC) and respondent Eugene James Burger (Burger) were licensed and/or had licensing rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code). EBMC is licensed as a corporate real estate broker, by and through Burger as designated officer. Burger is licensed as a real estate broker, individually and as designated broker-officer of EBMC.

2. E. J. Haberer II, acting in his official capacity as a Deputy Real Estate Commissioner of the State of California, filed an accusation against respondents following an audit EBMC's books and records. Respondents filed notices of defense.

The audit

3. John Leonard, an auditor for the Department of Real Estate (department), examined the accounting and other records of EBMC for the 12-month period of January 1 to December 31, 2005. Leonard's examination was limited to EBMC's property management activities. EBMC manages over 4,000 residential units and over 100,000 square feet of office/commercial space. It collects about \$5,000,000 in rents monthly, and charges its clients a management fee based upon a percentage of the rent collected. EBMC's main office is in Rohnert Park; during the audit period, it also maintained five licensed branch offices in California. EBMC maintains over 200 bank accounts that are used to hold real estate trust funds. EBMC has an ownership interest in some of the properties it manages. Leonard limited his examination to a sample of three bank accounts maintained by EBMC at City National Bank in San Francisco, which are identified in the audit as Bank #1, Bank #2, and Bank #3. Leonard did not review any properties in which EBMC had an ownership interest.

4. Bank #1, Bank #2, and Bank #3 were used for deposits and disbursements relating to property under EBMC's management.

Bank #1 was owned by "Eugene Burger Management Corp AAF BA Davis LLC DBA Davis Property Management Company." The initials "AAF" mean "as agent for." Bank #1 was used for deposits and disbursements related to the management of three apartment properties, comprising a total of 71 units, for one owner (the Davis Properties). The signatories on Bank #1 were Burger, his son Stephen L. Burger, Ronald E. Vaughn, Maureen Stroub, Lori E. Burger, and Jay Kacirk. Burger, Stephen L. Burger, and Jay Kacirk were (and are) licensed real estate brokers. Vaughn, Stroub, and Lori E. Burger are not licensed by the department. Two signatures were required to make withdrawals from the account.

Bank #2 was owned by "Eugene Burger Management Corp AAF Manfred Angstenberger 'Marin Royal Apartments'." Bank #2 was used for deposits and disbursements related to the management of a 49-unit apartment building for one owner (the Angstenberger Property). The signatories and signature requirements for Bank #2 were the same as for Bank #1.

Bank #3 was owned by "Eugene Burger Management Corp AAF Manfred Angstenberger 'Pine Lane Apartments'." The letters "TTEE" are printed on the face of checks drawn on Bank #3. Bank #3 was used for deposits and disbursements related to the management of a 23-unit apartment building for one owner. The signatories and signature requirements for Bank #3 were the same as for Banks #1 and #2.

Accountability

5. Leonard calculated the adjusted bank balance for Banks #1, #2, and #3 and calculated the beneficiaries' accountability for each account. For each account, the adjusted bank balance was equal to the identified accountability.

Trust fund records

6. Leonard found that EBMC's accounting records for Banks #1, #2, and #3 did not set forth the balance after posting transactions for each day, and did not identify the date trust funds were received, as required by section 2831 of the department's regulations.¹

7. Leonard found that EBMC did not maintain a separate record for each beneficiary or transaction as required by section 2831.1 of the department's regulations.²

8. Respondents do not contest these audit findings. However, Burger testified credibly that the failures to comply with department regulations were contrary to long-established policies of EBMC. (Finding 25.) Burger explained the circumstances under which the violations occurred and described the steps he has taken to prevent future violations. (Findings 25 & 26.)

Designation of trust accounts and trust fund handling

9. Leonard concluded that the designation "AAF" in the title of Banks #1, #2, and #3, and the imprint "TTEE" on the face of checks drawn on Bank #3, are not sufficient to identify the accounts as trust accounts under section 2832 of the department's regulations.³

¹ All references to the department's regulations are to title 10 of the California Code of Regulations. Section 2831 of the department's regulations states, in relevant part:

Every broker shall keep a record of all trust funds received This record . . . shall set forth in chronological sequence the following information in columnar form:

(1) Date trust funds received.

[¶] . . . [¶].

(7) Daily balance of said account.

² Section 2831.1 of the department's regulations provides, in relevant part, that 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 account This record shall include information sufficient to identify the transaction and the parties to the transaction."

10. Respondents dispute this audit finding. Burger testified that it was “absolutely” his understanding that the accounts were trust accounts, and he received assurances from the bank that the “AAF” designation was sufficient to create a trust account. It was stipulated at hearing that if David Lawrence, Senior Vice President and Manager at City National Bank, had appeared at hearing, he would have testified that the bank considers AAF accounts as accounts in which funds belong to the principal, and if presented with a demand from a creditor of EBMC, City National Bank would take the position that those funds cannot be reached because they are not the property of EBMC.

Burger’s intent to create trust accounts, and his understanding that Banks #1, #2, and #3 were trust accounts, is not questioned. Indeed, it may well be that, under civil law standards, the designation “AAF” is sufficient to create a trust account. In the case of licensed real estate activities, however, the department’s regulations require that trust accounts be maintained in the name of the broker “as trustee.” A clear and unambiguous designation of trust accounts is in the public’s interest. The evidence supports the audit finding.

11. Leonard found that, in certain instances, trust funds received by EBMC were not deposited into the bank within three business days, as required by section 2832 of the department’s regulations. Specifically, he found that on August 6, 2005, EBMC posted a batch of rents from tenants of a Kentfield property but did not deposit the money in Bank #1 until August 17, 2005; that on August 15, 2005, EBMC posted a batch of rents and security deposits from tenants of a Corte Madera property, but did not deposit the money in Bank #1 until August 24, 2005; and that on August 5, 2005, EBMC posted a batch of rents from tenants of a Mill Valley property, but did not deposit the money in Bank #1 until August 29, 2005.

Respondents do not contest this audit finding. However, Burger testified credibly that the failures to comply with department regulations were contrary to long-established company policies. (Finding 25.) Burger explained the circumstances under which the violations occurred and described the steps he has taken to prevent future violations. (Findings 25 & 26.)

³ Section 2832 of the department’s regulations provides that, to comply with Business and Professions Code section 10145, a broker “shall place funds accepted on behalf of another into the hands of the owner of the funds . . . 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 a fictitious name, as trustee at a bank . . . not later than three business days following receipt of the funds by the broker” Business and Professions Code section 10145 states that a broker who receives trust funds and does not place them into escrow or into the hands of the broker’s principal “shall deposit all those funds . . . into a trust fund account maintained by the broker in a bank”

Fidelity bond coverage

12. Leonard concluded that EBMC's insurance policies did not satisfy the fidelity bond requirements of section 2834 of the department's regulations.⁴ In essence, section 2834 provides that if an unlicensed employee is authorized to make a withdrawal from a trust account, the broker must maintain a fidelity bond equal to the maximum amount of trust funds to which the unlicensed employee has access. Three unlicensed employees (Lorie E. Burger, Stroub, and Vaughn) were signatories to Banks #1, #2, and #3. Although two signatures are required to make withdrawals from those accounts, and although all the checks Leonard reviewed bore the signature of a licensee, there was no requirement in the trust account documents that one of the signators must be licensed by the department.

Leonard found EBMC's insurance policies inadequate for two reasons. First, he found that the unlicensed employees who were signators to Banks #1, #2, and #3 also had access to eight other trust accounts, and that the sum of the balances in all eleven accounts was over \$2 million. Respondents' insurance policies had a maximum policy limit of \$850,000. The maximum amount of trust funds in Banks #1, #2, and #3 alone did not exceed the policy limits. Second, Leonard found that EBMC's insurance policies carried a deductible (\$2,500 before July 1, 2005, and \$1,000 after July 1). It is the department's position that a policy with a deductible does not comply with its regulation.

13. The accusation alleges that respondents "failed to secure fidelity bond coverage at least equal to the maximum amount of the trust funds within Banks #1, #2, and #3 to which unlicensed employees of [respondents] had access"

The evidence did not establish that the maximum amount of trust funds in Banks #1, #2, and #3 exceeded the limits of respondents' insurance policies; on the contrary, the evidence established that the maximum amount of trust funds in Banks #1, #2, and #3 did not exceed the limits of respondents' policies. It is true that unlicensed employees of respondents had access to eleven trust accounts and that the sum of the balances in all eleven accounts exceeded the limits of respondents' policies, but those facts are not alleged as cause

⁴ Section 2834 of the department's regulations states, in relevant part:

(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)

(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.

for discipline. The evidence also established that respondents' insurance policies carried a deductible and that, in the department's view, a policy with a deductible does not comply with the department's regulations. Those facts, however, are not alleged as cause for discipline.

Charges to the Davis Properties

14. Leonard concluded that respondents "overcharged" Bank #1 for janitorial expenses that should have been shared between Bank #1 and Bank #2. Based upon Leonard's finding, the accusation alleges that respondents violated section 2832.1 of the department's regulations because they "caused, suffered, or permitted the balance of funds in Bank #1 to be reduced to an amount that, as of October 31, 2005, was approximately \$996.00 less than the aggregate liability of Respondents to all owners of such funds, without the prior written consent of the owners"⁵

15. EBMC employed a janitor named Mejia to perform work at both the Davis Properties and the Angstenberger Property. Receipts and disbursements for the Davis Properties were handled through Bank #1, and receipts and disbursements for the Angstenberger Property were handled through Bank #2. It was respondents' practice to pay janitorial employees through a payroll account, and then reimburse the payroll account accordingly from Bank #1 or Bank #2.

The owners of the Davis Properties complained that they were overcharged for Mejia's accrued vacation time, part of which should have been attributed to the Angstenberger Property. Leonard found that EBMC paid Mejia \$4,704 from its payroll account. That sum included \$996 for 46 hours of accrued vacation time that Mejia had earned. In a later transaction, EBMC charged Bank #1 for the \$996 of accrued vacation time earned by Mejia. Leonard also found, however, that Mejia had earned some of that vacation time when he was working at the Angstenberger Property. Leonard concluded that the Davis Properties "were overcharged for the amount of vacation time Mejia earned while providing services to the Angstenberger properties." Leonard did not determine the amount that the Davis Properties were overcharged, but he believes that it was some percentage of \$996. Leonard candidly acknowledged that, if he were doing the audit again, he would have determined the amount of the overcharge and included it in his report.

⁵ Section 2832.1 of the department's regulations states:

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.

16. Burger acknowledged that there was a misallocation of expenses to Bank #1 for Mejia's accrued vacation time, and he testified that the misallocation has been rectified with the owners of the Davis Properties. The amount of the misallocation was not established by the evidence.

17. While the evidence establishes that there was a misallocation between Bank #1 and Bank #2, the evidence did not establish that the balance in Bank #1 was "approximately \$996.00" less than respondents' aggregate liability, as alleged in the accusation.

Retention of records

18. Leonard found that respondents failed to maintain copies of certain records and documents, as required by Business and Professions Code section 10148.⁶ Leonard found that respondents failed to maintain cancelled checks for Bank #1, #2, and #3. EBMC received reduced-size images of the face of cancelled checks with its statements. In Leonard's view, the reduced-size images were "inadequate for real estate accounts." The images supplied by the banks did not include the reverse side of the checks. Leonard also found that respondents did not retain all repair and maintenance invoices from the Davis Properties.

19. Respondents do not contest these audit findings. Burger testified that it was his belief that the bank maintained copies of both sides of cancelled checks and that EBMC could obtain copies if necessary. Now, Burger has made arrangements with the bank to receive a CD with copies of the front and back of all cancelled checks in an enlarged format. With respect to the maintenance records for the Davis Properties, Burger testified that EBMC gave the records to the new property manager when EBMC's services were terminated.

Broker-Salesperson agreements

20. Leonard concluded that respondents did not have signed written agreements for three salespersons, Suzette Beck, Stephen L. Burger, and Robert Ross, in violation of section 2726 of the department's regulations.⁷

21. Burger acknowledged that although an agreement with Beck had been prepared and signed by Burger, Beck had not signed it. She has now done so.

⁶ Business and Professions Code section 10148 states, in relevant part, that "[a] licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate license is required."

⁷ Section 2726 states, in relevant part, that "[e]very estate broker shall have a written agreement with each of his salesmen, whether licensed as a salesman or as a broker under a broker-salesman arrangement. The agreement shall be dated and signed by the parties"

22. Burger testified that, in 2005, neither Ross nor his son Stephen was performing licensed activities that required a written agreement. Ross was a property manager and Stephen, who is now EBMC's chief operating officer, was performing duties involving the company's corporate office structure. No contrary evidence was introduced. Ross and Stephen Burger are now performing duties that require written agreements, and those agreements have been prepared and signed.

Other evidence

23. Burger has been a licensed real estate broker since 1969. His license has never been disciplined. Burger met with Leonard when the audit began and instructed his staff to cooperate with Leonard. Burger did not withhold any records from Leonard and never instructed his staff to do so. Burger and his staff cooperated fully with Leonard.

24. Burger acknowledges that, as the designated broker for EBMC, he is responsible for oversight of EBMC's activities and compliance with department regulations. Burger exercises general supervision over EBMC's activities. He visits each of EBMC's offices at least once a month.

25. Rents from the properties that EBMC manages are either collected by a resident manager and transported to an EBMC office, or sent directly to an EBMC office. Since the mid-1980's, EBMC has had written policies in place stating that trust funds should be deposited into a trust account daily, and in any event not later than three days after receipt; that trust records should set forth a daily balance after posting; and that a separate record shall be maintained for each transaction or beneficiary.

Since 2004, EBMC has been installing Yardi Voyager, a sophisticated property management and accounting software. At the time of the audit, less than one-half of EBMC's accounts had been brought on to the Yardi system; now, about 90 percent of its accounts are on Yardi and all new accounts are set up in Yardi.

Burger testified that the untimely deposits identified by the audit were the responsibility of an account manager in one of EBMC's field offices. Burger stated that the moneys should have been timely deposited, and that the late deposits are a serious concern to him. He also stated, however, that those particular accounts were not yet on the Yardi system, and that the late deposits occurred during a chaotic time in which EBMC was moving its headquarters to Rohnert Park.

As to the failure to maintain adequate trust fund records, Burger testified that the accounting supervisor with the responsibility to maintain those records left the company shortly after August 2005. Burger stated that proper records were maintained before the tenure of that particular accounting supervisor, and are now being maintained again.

26. Burger testified to several steps he has taken to strengthen EBMC's trust fund accounting in light of the department's audit. Burger himself is exercising closer supervision

over the company's accounting procedures, and he is now assisted in those responsibilities by his son, Stephen. Management at EBMC has written to all employees reiterating EBMC's policies regarding the timely deposit of trust funds and the importance of maintaining trust fund records. Almost all of EBMC's accounts are now on Yardi, and its employees are regularly trained on the system. Burger has created a new position of executive vice-president and has hired Bill Miller, a certified public accountant with a master's degree in business administration, to fill the position. Miller will now be responsible for overseeing EBMC's accounting activities.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10177, subdivision (d), provides that the Real Estate Commissioner may suspend or revoke the license of a real estate licensee who has "violated the Real Estate Law . . . or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law"
2. Respondents failed to keep a columnar record in chronological sequence of all trust funds received and disbursed from Banks #1, #2, and #3 containing all the information required by section 2831 of the department's regulations. (Findings 6 & 8.)
3. Respondents failed to keep a separate record for each beneficiary or transaction, accounting for all funds that were deposited in Banks #1, #2, and #3 containing all the information required by section 2831.1 of the department's regulations. (Findings 7 & 8.)
4. Respondents failed to place trust funds entrusted to EBMC into the hands of a principal on whose behalf the funds were received, into a neutral depository, or into a trust fund in the name of respondent EBMC as trustee at a bank or other financial institution, in conformance with the requirements of Business and Professions Code section 10145 and section 2832, subdivision (a), of the department's regulations, in that: (1) respondents placed such funds in Banks #1, #2, and #3, accounts that are not in the name of respondent EBMC as trustee (Findings 9 & 10); and (2) respondents held certain trust fund receipts for more than three business days (Finding 11).
5. The accusation alleges that respondents "caused, suffered, or permitted the balance of funds in Bank #1 to be reduced to an amount that, as of October 31, 2005, was approximately \$996.00 less than the aggregate liability of Respondents to all owners of such funds, without the prior written consent of the owners" The evidence fails to support this allegation. (Findings 14, 15, 16 & 17.) No cause exists to suspend or revoke respondents' licenses for this alleged violation of section 2832.1 of the department's regulations.
6. The evidence did not establish that respondents failed to secure fidelity bond coverage at least equal to the maximum amount of the trust funds within Banks #1, #2, and

#3. (Findings 12 & 13.) No cause exists to suspend or revoke respondents' licenses for this alleged violation of section 2834, subdivision (a), of the department's regulations.

7. Respondents failed to have a written agreement in place covering the material aspects of the relationship between respondents and salesperson Suzette Beck, including supervision of such salesperson's licensed activities, duties, and compensation, in violation of section 2726 of the department's regulations. (Findings 20 & 21.) The evidence did not establish that respondents violated section 2726 by failing to have in place written agreements covering their relationship with Stephen L. Burger and Robert Ross. (Finding 22.)

8. Respondents failed to retain for three years, as required by Business and Professions Code section 10148, copies of documents executed by respondents or obtained by them in connection with transactions for which a real estate license is required. (Findings 18 & 19.)

9. By reason of the matters set forth in Legal Conclusions 2 through 4, 7, and 8, and each of them, cause exists to suspend or revoke respondents' licenses under Business and Professions Code section 10177, subdivision (d).

10. Respondent Burger failed to exercise reasonable supervision and control of the activities of respondent EBMC to permit the acts set forth in Legal Conclusions 2 through 4, 7, and 8 to occur. Cause exists to suspend or revoke respondent Burger's license under sections 10177, subdivision (h), and 10159.2 of the Business and Professions Code, as those sections relate to section 10177, subdivision (d), of the Code.

11. While the audit established numerous violations of statutes and department regulations, there is no evidence that any of respondents' clients or any members of the public were harmed by respondents' actions. There were no trust fund shortages. Although title to respondents' trust accounts did not contain the wording required by department regulation, it is plain that both Burger and the bank intended to create trust accounts and believed that they had done so. Burger has taken the audit seriously, and he has taken appropriate and responsible steps to strengthen EBMC's trust fund accounting system and the company's oversight of that system; some of the deficiencies noted by the audit have already been corrected. The department, however, must be assured that any deficiencies in respondents' trust fund accounting system have been corrected. To achieve that purpose, a short suspension of respondents' licenses is warranted, but the suspensions will be stayed subject to certain conditions, including a condition that respondents submit to and pay for a subsequent audit.

ORDER

1. All licenses and licensing rights of respondent Eugene Burger Management Corporation under the Real Estate Law are suspended for a period of five (5) days from the

effective date of this decision; provided, however, that said suspension shall be stayed for a period of one (1) year upon the following terms and conditions:

- a. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.
- b. 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 the stay order including any further stay imposed pursuant to Business and Professions Code section 10175.2. Should no order vacating the stay be made pursuant to this condition or condition 1c, below, the stay imposed herein shall become permanent.
- c. Pursuant to section 10148 of the Business and Professions Code, respondent 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 violations found in Legal Conclusions 2, 3, and 4, above. Respondent shall be entitled to a credit for any payments made to the department by respondent Burger for the same purposes. 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 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 1b, above, the stay imposed herein shall become permanent.

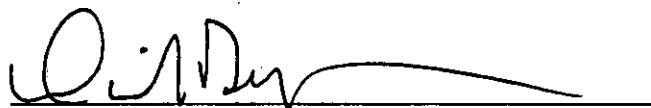
2. All licenses and licensing rights of respondent Eugene James Burger under the Real Estate Law are suspended for a period of five (5) days from the effective date of this decision; provided, however, that the suspension shall be stayed for a period of one (1) year upon the following terms and conditions:

- a. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.
- b. 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 the stay order including any further stay imposed pursuant to Business and Professions Code section 10175.2. Should no order vacating the stay be made pursuant to this condition or condition 1c, below, the stay imposed herein shall become permanent.

- c. Pursuant to section 10148 of the Business and Professions Code, respondent 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 violations found in Legal Conclusions 2, 3, and 4, above. Respondent shall be entitled to a credit for any payments made to the department by respondent Eugene Burger Management Corporation for the same purposes. 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 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 1b, above, the stay imposed herein shall become permanent.

DATED: June 25, 2008



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings

1 DANIEL E. KEHEW, Counsel (SBN 231550)
Department of Real Estate
2 P. O. Box 187007
Sacramento, CA 95818-7007

3 Telephone: (916) 227-0789
4 -or- (916) 227-0425 (Direct)

FILED
JUL - 6 2007

DEPARTMENT OF REAL ESTATE

By K. Contreras

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)
12 EUGENE BURGER MANAGEMENT) H-10064 SF
CORPORATION, and,)
13 EUGENE JAMES BURGER,) ACCUSATION
14 Respondents.)
15

16 The Complainant, E. J. HABERER II, a Deputy Real Estate
17 Commissioner of the State of California, for cause of Accusation
18 against EUGENE BURGER MANAGEMENT CORPORATION (herein "EBMC") and
19 EUGENE JAMES BURGER (herein "BURGER"), is informed and alleges as
20 follows:

21 I

22 Complainant, E. J. HABERER II, a Deputy Real Estate
23 Commissioner of the State of California, makes this Accusation
24 against Respondent in his official capacity and not otherwise.

25 II

26 At all times mentioned herein, Respondents EBMC and
27 BURGER (herein Respondents) were and now are licensed and/or have

1 license rights under the Real Estate Law, Part 1 of Division 4 of
2 the California Business and Professions Code (herein "the Code").

3 III

4 At all times herein mentioned, Respondent EBMC was and
5 now is licensed by the Department of Real Estate of the State of
6 California (herein "the Department") as a corporate real estate
7 broker by and through Respondent BURGER as designated officer-
8 broker of Respondent EBMC to qualify said corporation and to act
9 for said corporation as a real estate broker.

10 IV

11 At all times herein mentioned, Respondent BURGER was
12 and now is licensed by the Department as a real estate broker,
13 individually and as designated officer-broker of Respondent EBMC.
14 As said designated officer-broker, Respondent BURGER was at all
15 times mentioned herein responsible pursuant to Section 10159.2 of
16 the Code for the supervision of the activities of the officers,
17 agents, real estate licensees, and employees of Respondent EBMC
18 for which a license is required.

19 V

20 Whenever reference is made in a allegation in this
21 Accusation to an act or omission of Respondent EBMC, such
22 allegation shall be deemed to mean that the officers, directors,
23 employees, agents and/or real estate licensees employed by or
24 associated with Respondent EBMC committed such act or omission
25 while engaged in the furtherance of the business or operations
26 of Respondent EBMC and while acting within the course and scope
27 of their corporate authority and employment.

1 VI

2 At all times herein mentioned, Respondents EBMC and
3 BURGER engaged in the business of, acted in the capacity of,
4 advertised, or assumed to act as real estate brokers within the
5 meaning of Section 10131(b) of the Code, including the operation
6 and conduct of a property management business with the public
7 wherein, on behalf of others, for compensation or in expectation
8 of compensation, Respondents leased or rented and offered to
9 lease or rent, and placed for rent, and solicited listings of
10 places for rent, and solicited prospective tenants of real
11 property or improvements thereon, and collected rents from real
12 property or improvements thereon.

13 VII

14 In so acting as real estate brokers, as described in
15 Paragraph VI, above, Respondents EBMC and BURGER accepted or
16 received and disbursed funds in trust (herein "trust funds") on
17 behalf of owners and tenants in connection with the leasing,
18 renting, and collection of rents on real property or improvements
19 thereon, as alleged herein, and thereafter from time to time made
20 disbursements of said funds.

21 VIII

22 The aforesaid trust funds accepted or received by
23 Respondents were deposited or caused to be deposited by
24 Respondents EBMC and BURGER into one or more bank accounts
25 (herein "trust fund accounts") maintained by Respondents for
26 the handling of trust funds, including but not necessarily
27 limited to the following accounts maintained by Respondents

1 at the San Francisco, California, branch of City National
2 Bank:

3 (a) the "Eugene Burger Management Corp AAF BA Davis
4 LLC DBA Davis Property Mgmt Company", account number 432625613
5 (herein "Bank #1");

6 (b) the "Eugene Burger Management Corp AAF Manfred
7 Angstenberger 'Marin Royal Apartments'", account number 432729265
8 (herein "Bank #2"); and,

9 (c) the "Eugene Burger Management Corp AAF Manfred
10 Angstenberger 'Pine Lane Apartments'", account number 432729273
11 (herein "Bank #3").

12 IX

13 During the three year period next preceding the filing
14 of the original Accusation herein, in connection with the
15 collection and disbursement of said trust funds, Respondent EBMC
16 and BURGER:

17 (a) failed to keep a columnar record in chronological
18 sequence of all trust funds received and disbursed from Banks #1,
19 #2, and #3 containing all the information required by Section
20 2831 of Title 10, California Code of Regulations (herein "the
21 Regulations");

22 (b) failed to keep a separate record for each
23 beneficiary or transaction, accounting for all funds that were
24 deposited in Trusts #1, #2, and #3, containing all the
25 information required by Section 2831.1 of the Regulations;

26 (c) failed to place trust funds entrusted to
27 Respondent EBMC into the hands of a principal on whose behalf the

1 funds were received, into a neutral depository, or into a trust
2 fund account in the name of Respondent EBMC as trustee at a bank
3 or other financial institution, in conformance with the
4 requirements of Section 10145 of the Code and Section 2832(a) of
5 the Regulations in that:

6 (1) Respondents placed such funds in Banks #1,
7 #2, and #3, accounts that are not in the
8 name of Respondent EBMC as trustee.

9 (2) Respondents held certain trust fund receipts
10 for more than three business days; and,

11 (d) caused, suffered, or permitted the balance of
12 funds in Bank #1 to be reduced to an amount that, as of
13 October 31, 2005, was approximately \$966.00 less than the
14 aggregate liability of Respondents to all owners of such funds,
15 without the prior written consent of the owners of such funds,
16 in violation of Section 2832.1 of the Regulations.

17 X

18 During the three year period next preceding the filing
19 of the original Accusation herein in connection with the
20 collection and disbursement of said trust funds, Respondent EBMC
21 and BURGER failed to secure fidelity bond coverage at least equal
22 to the maximum amount of the trust funds within Banks #1, #2, and
23 #3 to which unlicensed employees of Respondents EBMC and BURGER
24 had access, in violation of Section 2834(a) of the Regulations.

25 XI

26 During the three year period next preceding the filing
27 of the original Accusation herein, Respondents EBMC and BURGER

1 failed to have written agreements in place covering the material
2 aspects of the relationship between Respondents EBMC and BURGER
3 and salespersons STEPHEN BURGER, ROBERT ROSS, and SUZETTE BECK,
4 including supervision of such salespersons' licensed activities,
5 duties, and compensation.

6 XII

7 During the three year period next preceding the filing
8 of the original Accusation herein, Respondents EBMC and BURGER
9 failed to retain for three (3) years, as required of Section
10 10148 of the Code, copies of all listings, deposit receipts,
11 canceled checks, trust records, or other documents executed by
12 Respondents or obtained by them in connection with transactions
13 for which a real estate license is required, specifically:

14 (a) copies of all cancelled checks drawn from
15 Banks #1, #2, and #3; and,

16 (b) repair and maintenance invoices from the
17 DAVIS PROPERTIES.

18 XIII

19 Respondent BURGER failed to exercise reasonable
20 supervision over the acts of Respondent EBMC in such a manner as
21 to allow the acts and events described in Paragraphs IX, X, XI,
22 and XII, above, to occur.

23 XIV

24 The facts alleged in Paragraphs IX, X, XI, and XII,
25 above, are grounds for the suspension or revocation of the
26 licenses and license rights of Respondents EBMC and BURGER under
27 the following provisions of the Code and/or Regulations:

1 (a) as to Paragraph IX(a) under Section 10145 of the
2 Code and Section 2831 of the Regulations in conjunction with
3 Section 10177(d) of the Code;

4 (b) as to Paragraph IX(b) under Section 10145 of the
5 Code and Section 2831.1 of the Regulations in conjunction with
6 Section 10177(d) of the Code;

7 (c) as to Paragraph IX(c) under Section 10145 of the
8 Code and Section 2832(a) of the Regulations in conjunction with
9 Section 10177(d) of the Code;

10 (d) as to Paragraph IX(d) under Section 10145 of the
11 Code and Section 2832.1 of the Regulations in conjunction with
12 Section 10177(d) of the Code;

13 (e) as to Paragraph X under Section 10145 of the Code
14 and Section 2834(a) of the Regulations in conjunction with
15 Section 10177(d) of the Code;

16 (f) as to Paragraph XI under Section 2726 of the
17 Regulations in conjunction with Section 10177(d) of the Code;
18 and,

19 (g) as to Paragraph XII under Section 10148 of the
20 Code in conjunction with Section 10177(d) of the Code.

21 XV

22 The facts alleged in Paragraph XIII, above, are
23 grounds for the suspension or revocation of the licenses and
24 license rights of Respondent BURGER under Section 10177(g)
25 and/or Section 10177(h) of the Code, and Section 10159.2 of the
26 Code in conjunction with Section 10177(d) of the Code.

27 \\\

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



10 _____
11 E. J. HABERER II
12 Deputy Real Estate Commissioner

13
14 Dated at Oakland, California
15 this 3rd day of July, 2007.
16
17
18
19
20
21
22
23
24
25
26
27