

FILED

SEP - 9 2010

DEPARTMENT OF REAL ESTATE

By K. Mar

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

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In the Matter of the Accusation of	)	
	)	Case No. H-10752 SF
BAR K, INC. and BARNEY JOE NG,	)	
	)	OAH No. 2009090025
Respondents.	)	
_____	)	

DECISION

The Proposed Decision dated August 5, 2010, 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.

The Decision suspends or revokes one or more real estate licenses, but also grants the right to restricted real estate licenses to Respondents.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

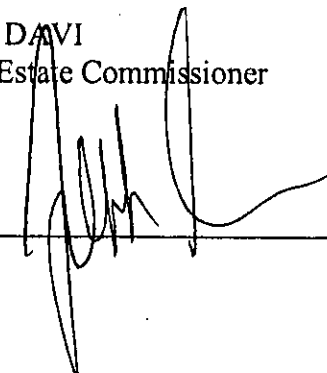
This Decision shall become effective at 12 o'clock noon on

SEP 30 2010

IT IS ORDERED

9/6/2010

JEFF DAVI  
Real Estate Commissioner

  
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BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

SEP - 8 2010

DEPARTMENT OF REAL ESTATE

By R. Mar

In the Matter of the Accusation of:

BAR K, INC. and  
BARNEY JOE NG,

Respondents.

No. H-10752 SF

OAH No. 2009090025

**PROPOSED DECISION**

On June 10, 2010, in Oakland, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter.

Richard K. Uno, Counsel, represented Complainant E. J. Haberer II, Deputy Real Estate Commissioner, Department of Real Estate, State of California.

David R. Medlin, Attorney at Law, Medlin & Hargrave, a Professional Corporation, One-Kaiser Plaza, Suite 1305, Oakland, California 94612, represented Respondent Bar K, Inc., and Respondent Barney Joe Ng. Respondent Barney Joe Ng, the designed officer for Respondent Bar K, Inc., was present during the hearing of this matter.

The record was held open to afford an opportunity to both Complainant and respondents to supplement the record with written closing arguments and, if necessary, reply briefs. On June 25, 2010, OAH received Complainant's "Closing Argument," which was marked as Exhibit "7," and received as argument. Also on June 25, 2010, OAH received Respondents' "Closing Brief," which was marked as Exhibit "E," and received as argument. On July 6, 2010, OAH received from Complainant his "Reply to Respondents' Closing Argument," which was marked as Exhibit "8." Also on July 6, 2010, OAH received "Respondents' Reply Brief," which was marked as Exhibit "F."

On July 6, 2010, the parties were deemed to have submitted the matter and the record closed.

**FACTUAL FINDINGS**

1. On August 10, 2009, Complainant E. J. Haberer II (Complainant), a Deputy Real Estate Commissioner of the State of California, in his official capacity, made the

Accusation against Respondent Bar K, Inc., and Respondent Barney Joe Ng. The Department filed the Accusation on August 11, 2009.<sup>1</sup>

*Respondent Barney Joe Ng*

2. Respondent Barney Joe Ng (Respondent Ng) is presently licensed and has license rights under the Real Estate Law (Part 1 of Division 4 of the California Business and Professions Code).

On an unknown date before January 1, 2007, the Commissioner issued Respondent Ng a real estate broker license (number 00464238). For a number of years, he has maintained a main office at 201 Lafayette Circle, Lafayette, California.

On an unknown date before January 1, 2007, the Department licensed Respondent Ng as the designated officer for Bar K, Inc., which had a main office at 201 Lafayette Circle, Lafayette, California.

Respondent Ng's designated officer status will expire on August 4, 2013.

*Respondent Bar K, Inc.*

3. On October 20, 1975, a corporate real estate broker license was issued to Respondent Bar K, Inc. (Respondent Bar K).

As of January 1, 2007, Respondent Ng was the designated officer for Respondent Bar K. The Department's records show Mr. Kelly William Ng to act as an additional officer for Respondent Bar K. (Respondent Ng and Mr. Kelly William Ng are brothers and each owns a 50 percent holding in the shares of Respondent Bar K.)

Department records show the initial main office and mailing address for Respondent Bar K to be 201 Lafayette Circle, Lafayette, California.

The license issued to Respondent Bar K will expire on August 4, 2013. (The additional officer license will expire on August 23, 2012.)

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<sup>1</sup> After OAH received the Accusation on August 31, 2009, the matter was originally set for hearing by Complainant on November 9, 2009. The matter was taken off the OAH hearing calendar by OAH's receipt of Respondents' Unopposed Motion for Continuance, dated September 9, 2009. By an Order Granting Continuance, dated September 16, 2009, the hearing was set for February 17, 2010. Complainant, through counsel, dispatched on September 17, 2009, a First Continued Notice of Hearing on Accusation setting the hearing date for February 17, 2010. On February 11, 2010, Respondent filed an Unopposed Motion for Continuance on grounds that a potential conflict necessitated a delay in the proceedings. An Order Granting Continuance, dated February 11, 2010, directed that the hearing date occur on June 10, 2010. A Second Continued Notice of Hearing, dated February 16, 2010, set the matter for hearing that commenced on June 10, 2010

### *Nature of Respondents' Business Pursuits*

4. During various periods of time pertinent to the following matters, Respondent Bar K, through its designated officer, agents and employees, engaged in the business of, acted in the capacity of, advertised, or assumed to act as a real estate broker in the State of California, within the meaning of Business and Professions Code section 10131, subdivision (d), by soliciting borrowers or lenders for or negotiating loans or collecting payments or performing services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity. Respondent Bar K and Respondent Ng engaged in mortgage loan brokerage operations and otherwise pursued the business of arranging, negotiating, processing and consummating loans, which were secured by real property. In particular, Respondent Bar K's business is limited to negotiating and servicing private investor loans and it solicits both borrowers and lenders.

Respondent Bar K has affiliations, or established business relations, with two limited liability company (LLCs), which act as lenders. One LLC to which Respondent Bar K was affiliated was R.E. Loans. The other affiliated LLC is Mortgage Fund '08. Both LLCs are California Finance Lenders.

Before 2008, R.E. Loans, LLC, acted as the primary lender for Respondent Bar K. But in 2008, it ceased to fund loans.

In late 2007, Mortgage Fund '08 was created. And in 2008 it began to act as Respondent Bar K's primary lender for new loans.

5. For the time covered by the Department's audit as described below, Respondent Bar K maintained three trust accounts to hold money belonging to consumers having contractual relationships with the subject corporate real estate broker. The trust accounts, which were all maintained at The Mechanics Bank in Walnut Creek, were identified as:

- a. Bar K Inc. Servicing Trust Account (Trust #1)
- b. Bar K Inc. Servicing Trust Account Two (Trust #2)
- c. Bar K Inc. Funding Trust Account (Trust #3)

Trust #1 was used for loan servicing of private lender/investor loans and loans made by Respondent Bar K's affiliated LLCs. Deposits into that account consisted of monthly payments and payoffs from borrowers. Disbursements from the trust account were remittances to lenders/investors and to Respondent Bar K for servicing fees. Beginning in October 2007, Trust #1 was used to only service loans that were exclusively funded by the LLCs affiliated with Respondent Bar K. Trust #1 only required on a check one signatory among the following persons: Respondent Ng, Mr. Kelly Ng, Mr. Walter Ng (the father of

the Ng brothers), Ms. Stephanie Kelly (a real estate broker associated with Respondent Bar K), and Ms. Carrie Johns (a real estate salesperson associated with Respondent Bar K.)

Trust #2 was used to service loans that were not solely attributable to Respondent Bar K's affiliated LLCs as the sole lender. This trust account was used to collect monthly payments and payoffs from borrowers for loans that had been negotiated under the corporate real estate broker license of Respondent Bar K. Disbursements from the account were remittances to lenders/investors and to Respondent Bar K for servicing fees. Trust #2 only required one signatory on a check among the following persons: Respondent Ng, Mr. Kelly Ng, Mr. Walter Ng, Ms. Stephanie Kelly, and Ms. Carrie Johns.

Trust #3 was used by Respondent Bar K to fund new loans. Money from investors, which was collected by Respondent Bar K, comprised the trust account. Also the trust account was used by Respondent Bar K for miscellaneous purposes, which were related to foreclosed properties. Disbursements consisted of electronic wire transfers to title companies to fund new loans as well as to pay property taxes, receivership fees, and bankruptcy fees related to foreclosed properties. Trust #3 only required one signatory on a check among the following persons: Respondent Ng, Mr. Kelly Ng, and Mr. Walter Ng.

*Auditor's Findings and Conclusions regarding Respondent Bar K*

6. Over the course of approximately seven business days beginning on June 30, 2008, and ending on July 9, 2008, Department auditor Michael J. Rivera (Auditor Rivera or Department auditor) performed an investigative examination (audit), on a sample basis, of the office records, loan files, bank statements including signature cards, trust fund ledgers, borrower account status reports and lender statements as maintained by Respondent Bar K. Also, as part of the investigative audit, the Department auditor interviewed Respondent Ng and the additional corporate officer, Mr. Kelly Ng. (Auditor Rivera conducted the audit examination of records of Respondent Bar K in the corporation's office at Lafayette, California, and at the Department's Oakland District Office at 1515 Clay Street, Oakland, California.) Although the direct handling of records associated with the business activities that pertained to the gathering of data and information ended on July 9, 2009, Auditor Rivera continued to study and analyze the data and information until late September 2009 when he completed an audit report.

Auditor Rivera selected the time span of January 1, 2007, through May 30, 2008, as the period he subjected to examination for the audit of respondents' performance of real estate broker activities, duties, functions and responsibilities. The paramount objective of the auditor's examination was to ascertain whether, in accordance with the California Real Estate Law and the Commissioner's Regulations, trust funds under the control of Respondent Bar K had been lawfully accounted for and handled through and by the corporate broker's officers, employees or agents.

7. During the audit examination, for the most part, Auditor Rivera met with Respondent Ng, and the alternative corporate officer, Mr. Kelly Ng, to gain explanations to

questions that arose during the course of the audit with regard to the records and operations of a licensed real estate corporation, Respondent Bar K.

8. On September 30, 2009, Auditor Rivera issued an audit report, which was reviewed and approved by Supervising Auditor Daniel J. Sandri. Audit Report No. OK 07-0247, which pertained to Respondent Bar K, contained four major sections titled "audit scope," "background," "findings," and "conclusions."

In the audit report, the Department auditor noted deficiencies, irregularities and unlawful acts as described in the seven numbered factual findings herein below. Respondent's unlawful acts were discovered to exist during the audit period between January 1, 2007, to May 30, 2008.

The audit report was reasonable and sound.

*Failure to Maintain Exact Real Estate Records-Lack of Copy of Back Side of Checks*

9. In the course of performing real estate broker services of collecting and disbursing trust funds, Respondent Bar K and Respondent Ng failed to retain entire copies of cancelled checks that were associated with Trust #1 and Trust #2. In particular, Respondent Bar K only maintained in its records copies of the front of supposed cancelled checks, while no copy of the back of checks existed in the records of Respondent Bar K, when the Department's auditor performed the audit of respondents' records.

Because of the lack of the rear side of checks, the Department's audit was thwarted and impaired. The auditor could not detect that the subject checks had been "cashed by the proper parties."

Violation of Business and Professions Code section 10148, subdivision (a), and California Code of Regulations, title 10, section 2831 occurred due to the failure of Respondent Bar K and Respondent Ng to retain in corporate broker's records copies of backs of checks used in conducting licensed activities of a real estate broker.

*Failure to Record Deeds of Trust in Name of Beneficiaries*

10. In connection with four loans, which are listed immediately below, Respondent Bar K and Respondent Ng failed to record deeds of trust in the respective names of lenders/beneficiaries before the date the loan funds were transmitted or delivered to respective borrowers.

During the course of acting as real estate brokers, Respondents employed an arrangement when a loan was funded with an investor's money whereby Respondent Bar K recorded the deed of trust in the name of its affiliated company-Gold Mountain Financial, which acted as an intermediary. At a later date an assignment of an applicable deed of trust was recorded in the name of the actual investor. The loans so affected are as follows:

<i>Loan No.</i>	<i>Date Funded</i>	<i>Date Assignment Recorded</i>
P0101	8/27/07	9/20/07
B0954	6/11/07	6/28/07
B0949	1/19/07	1/22/07
L0340	7/17/07	8/09/07

For Loan number P0101, the date of recording the assignment occurred 25 calendar days, or 19 business days, after the funding date.

For Loan number B0954, the date of recording the assignment occurred 18 calendar days, or 14 business days, after the funding date.

For Loan number B0949, the date of recording the assignment occurred four calendar days, or two business days, after the funding date.

And for Loan number L0340, the date of recording the assignment occurred 24 calendar days, or 18 business days, after the funding date.

Violations of Business and Professions Code section 10234, subdivision (a), and California Code of Regulations, title 10, section 2841.5 occurred due to the failure of Respondent Bar K and Respondent Ng to record deeds of trust in the name of lenders/beneficiaries before loan funds were transferred into the possession of borrowers.

*Failure to Provide Lender/Purchasers with Disclosure Statements in a Timely Manner*

11. In connection with certain loans described below in this factual finding, Respondent Bar K and Respondent Ng failed to secure from investor-lenders duly signed mortgage loan disclosure statements (disclosure statements) before the subject corporate real estate broker collected funds from the investor-lenders. In three instances, the collected loan funds were used to fund particular loans:

<i>Loan No.</i>	<i>Dates Funds Were Collected</i>	<i>Dates Disclosure Statement Signed by Investor Lenders</i>
B0954	06/08/07	07/28/07
B0949	01/10/08	01/24/08
L0340	08/11/07	08/11/07

For loan number B0954, 51 calendar days, or 36 business days, passed from the date Respondent Bar K collected \$250,000 from investor R. S.,<sup>2</sup> and the date the disclosure statement was signed.

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<sup>2</sup> Initials of investors are used to protect the privacy of the consumers.

For loan number B0949, six calendar days, or four business days, passed from the date Respondent Bar K collected \$75,000 from investor V.H., and the date the disclosure statement was signed.

For loan number L0340, 27 calendar days, or 20 business days, passed from the date Respondent Bar K collected \$200,000 from investor W. W., and the date the disclosure statement was signed.

In addition to respondents' failure to require the investor lenders to sign disclosure statements upon collecting loan funds from those individuals, Respondent secured respective signatures on disclosure statements after the dates that loans to borrowers were funded and escrow closed on related transactions.

Violations of Business and Professions Code section 10232.4, subdivision (a), occurred due to the failure of Respondent Bar K and Respondent Ng to provide disclosure statements to investor lenders, and to procure signatures on such disclosure statements, before collecting funds from the investor-lenders.

#### *Incomplete Income/Net Worth Statements*

12. In connection with certain loans described below in this factual finding, Respondent Bar K failed to obtain completed income/net worth statements from investors, who acknowledged by executing such statements that such investors had satisfied either the income or net worth qualifications for multi-lender loans in which they were part owners of particular investor quality promissory notes. In particular, the statements were not fully completed in that investors failed to enter a check mark in an applicable box on the Department's authorized pre-printed form. (Such form asks an investor to indicate by check mark either that the subject investment does not exceed 10 percent of such investor's net worth or that the investment does not exceed 10 percent of the investor's adjusted gross income.) The incomplete income/net worth statements pertained to the following list of investors in identified loans as follows:

Loan No.	Investor	Investment Amount
B0949	V.H.	\$75,000
L0340	W.W.	\$200,000
R0123-A	B.H.	\$930,000
R0123-A	I.L.	\$496,000

Violations of Business and Professions Code section 10238, subdivision (f), occurred due to the failure of Respondent Bar K and Respondent Ng failed to secure from investor lenders fully completed income/net worth statements.



### *Lack of Written Broker Evaluations*

13. In connection with certain loans described above in Factual Finding 11, Respondent failed to obtain independent appraisals, or to provide written real estate broker evaluations, regarding real property parcels that related to the subject loans.

Each of the three subject loans was a multi-lender loan. Contrary to Real Estate Law, the files for each loan did not include a written broker evaluation or an independent appraisal. The only written documents, which suggested a value for the respective real property, were disclosure statements that were delivered to lender investors.

Violations of Business and Professions Code section 10238, subdivision (h), occurred due to the failure of Respondent Bar K and Respondent Ng to procure either an independent appraisal or a written real estate broker evaluation for real property parcels that related to loans described above.

### *Inexact Funding Constituting Fraud or Dishonest Dealing-Failure of Available Interest Reserves*

14. In March 2008, which was a time that fell within the audited period (January 1, 2007, through May 30, 2008), Respondent Bar K negotiated and perfected a loan identified as Loan No. R0123-A. The loan amount was \$10 million and it existed as a multi-lender loan.

Loan No. R0123-A's borrower was Red Mountain Resorts, LLC. The subject transaction was a construction loan. And it was "partially funded" to the borrower at the close of escrow so as to facilitate a "construction draw schedule," which is reasonably deemed by the Department as being part of a construction project that is intended to develop a real property parcel.

The loan was secured by real property and was for a construction project known as Tuscany Hill Golf Resort in Copperopolis, California.

Loan No. R0123-A was created upon the renegotiation of Respondent Bar K's earlier Loan No. R0118, which was a \$4.5 million loan by the same borrower for the same real property parcel development. Many of the same investors in Loan No. R0123-A had participated in Loan No. R0118.

At the close of escrow for the loan transaction, Loan No. R0123-A was funded by various individual investors in the amount of \$6.2 million. Respondent Bar K's affiliated LLC called Mortgage Fund '08 was to contribute funds totaling \$3.8 million. From the amount of money tendered by Mortgage Fund '08, \$2.4 million was to be set aside as an interest payment reserve for the benefit of the borrower. Also from the funding contribution by Respondent Bar K \$1.4 million was to be used for construction draws by the borrower.

The funds collected for Loan No. R0123-A were used, in part, to pay the entirety of interest in arrears for Loan No. R0118, and also to pay loan fees to Respondent Bar K.

Although the loan had been negotiated in March 2008 and investors' funds had been obtained by Respondent Bar K for Loan No. R0123-A, by the close of escrow respondents had not perfected the contribution of \$3.8 million into the transaction. And as of April 30, 2008, Respondent Bar K's affiliated LLC, Mortgage Fund<sup>3</sup> '08, had an adjusted bank balance of \$1,207,750.91.

Under a contractual agreement with the borrowers, the investor lenders had specified as follows: "INTEREST RESERVE. \$2,400,000 of the \$3,800,000 covered by this Agreement shall be set aside as an interest reserve to cover a portion of the interest accruing under the Note. Lender shall fund and pay itself, on a monthly basis. . . ."

Respondent Bar K's accounts were insufficient to provide money to fund the interest reserve payments as specified in the agreement with the borrower.

At the time of the audit, Respondent's Bar K's Trust #2 was totally depleted of money, although it had disbursed interest payments to investors for Loan No. R0123-A from Trust #2. And in the past, Trust #2 had received transfers of funds from Mortgage Fund '08 as to make interest payments to investors on the subject extant loan.

Violations of Business and Professions Code section 10176, subdivision (i), occurred due to the failure of Respondent Bar K and Respondent Ng failed to set aside funds for interest payments that were specified in a contractual agreement on Loan No. R0123-A.

#### *Unlawful Acts of Respondent Ng*

15. During the time material to the matters mentioned in Factual Findings 9 through 14, Respondent Ng failed to exercise reasonable supervision over the activities of Respondent Bar K. Respondent Ng permitted, ratified and/or caused the unprofessional conduct that is described herein. And Respondent Ng failed to reasonably or adequately review, oversee, inspect and manage Respondent Bar K's personnel. Respondent Ng failed to establish reasonable policies, rules, procedures and systems for the review, oversight, inspection and management of other real estate licensees associated with Respondent Bar K.

16. Respondent Ng's failure to exercise reasonable supervision of activities within the scope of professional endeavors at the premises of Respondent Bar K involved negligence and incompetence.

#### *Respondents' Contentions and Matters in Mitigation*

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<sup>3</sup> During cross-examination, Mr. Kelly Ng acknowledged that he is a manager of Mortgage Fund '08, LLC, and that he and Mr. Walter Ng, his father, are the only owners of that LLC.

17. Mr. Kelly Ng offered testimonial evidence at the hearing of this matter.

Respondent Bar K began operations in 1974 or 1975. Mr. Kelly Ng has been vice-president of the corporate broker for about 35 years or 36 years.

Mr. Kelly Ng asserted at the hearing of this matter that at the time of Loan No. R0123-A for the Red Mountain Resorts project that as of April 30, 2008, Respondent Bar K's affiliated LLC, Mortgage Fund '08, only had an adjusted bank balance of \$1,207,750.91; but Mortgage Fund '08 had access to other sources of revenue. Mr. Kelly Ng claimed that the subject affiliated LLC had an "\$80 million fund" as well as other investor funds from new investors that amounted to \$1 million being presented to that LLC each day. He noted that scheduled loans, which had earlier been funded by the LLC, were being paid off so as to fulfill the needs of Mortgage Fund '08. But Mr. Kelly Ng presented no documentation in support of the claim that Mortgage Fund '08 had assets that exceeded the \$1.2 million bank balance, or that their assets were intended to guarantee the obligation of the LLC relative to Loan R0123-A.

Mr. Kelly Ng asserted that the individual lenders for Loan R0123-A were independently wealthy and that those individuals had the ability to guarantee the \$3.8 million obligation of Mortgage Fund '08. But Mr. Kelly Ng offered no affidavit or declaration from any of the independent investors of their willingness in March 2008 to act as surety to Mortgage Fund '08, or that those individuals intended to be obligated for the debt in an amount greater than the capital originally placed by them into the investment.

Mr. Kelly Ng noted that Respondent Bar K placed several hundreds of loans each year and that any single individual loan might have included about 10 investors. Hence numerous income/net worth statements were collected by Respondent Bar K. Mr. Kelly Ng claimed that the investors in the loans were well educated regarding the loans offered by respondents. Many of the investors, who were detected in the Department's audit, had many years of investing through Respondent Bar K.

18. Respondent Ng offered testimonial evidence at the hearing of this matter.

Since the inception of Respondent Bar K, Respondent Ng has been the corporate broker's president. At least, since 1976, Respondent Ng has been the designated broker for Respondent Bar K.

19. As to the loans negotiated under Respondent Bar K's corporate real estate broker's license, the lenders are primary Ng family members, employees of the real estate broker's office or long-term close acquaintances of the Ng family.

20. In 2007, Respondent Bar K negotiated 20 loans that totaled \$7.85 million. For the relevant portion of 2008, Respondent Bar K negotiated three loans that totaled \$10.3 million.

For the period covered by the Department's audit, and more specifically as of May 31, 2008, Respondent Bar K was servicing 80 loans that had principal amounts of approximately \$760 million.

21. As to Finding 9, the Department's auditor acknowledged that the Commissioner's regulations do not specifically require a real estate broker to retain a copy of the back side of checks. But Respondents offered no competent evidence in support of a contention that because neither the Real Estate law nor the Department's regulations expressly, or explicitly, set out a requirement that copies of the "backs of cancelled checks" must be retained in records of a real estate broker for three years from the close of a transactions that respondents had not violated the law. Respondents' contentions were without merit as determined below in the Legal Conclusions in this decision.

22. Regarding the matters detected by the audit, the Department received no complaints regarding respondents' mishandling of money extended through respondents' facilities for loan investment purposes.

23. With regard to the matter set out in Factual Finding 10, which pertains to respondents' failure to timely record deeds of trust in the name of lenders, Respondent Ng admitted the fact of the late recording. But the designated officer's explanation was unsatisfactory that Respondent Bar K's personnel recorded the deeds of trust in the name of Gold Mountain Financial in order to obtain specialized title insurance policy coverage. The purported quest of respondents to enhance the insurance protection of beneficiaries, who invested in projects offered by respondents, was not established by competent evidence.

Mr. Kelly Ng at the hearing of this matter asserted that the scheme used by respondents, and in particular Respondent Bar K, to record deeds of trust, was meant to best serve the investors' interests by securing title insurance under the name of Gold Mountain Financial. And that scheme, according to Mr. Kelly Ng, was created through the advice of the corporate real estate broker's in-house counsel, James Kroetch. Mr. Kelly Ng unconvincingly asserted that Mr. Kroetch advised that the corporate broker not use the names of individual investors as beneficiaries, because a title insurance company would only extend a CLTA standard policy for a project. But by using an institutional name, such as "Gold Mountain Financial, Inc.," a title insurance company would be in the position to offer an ALTA title insurance policy, which covered "off record items" including mechanics' liens and required the title company to actually perform a physical inspection of the subject real property parcel. Moreover, Mr. Ng asserted an ALTA title insurance policy allowed 120 percent coverage regarding the title insurance-oriented risks. But Mr. Kelly Ng offered neither written legal opinion from the corporate broker's attorney nor learned title insurance treatise writings or appellate court opinions that supported the benefits described by him.

24. As to the matters set out in Factual Finding 12, the four investors, who failed or neglected to check boxes on the Department's Income/Net Worth Statements, had long-term relationships with respondents and were each wealthy individuals.

25. With regard to the lack of written broker evaluations of real property as described in Factual Finding 13, before the subject transactions with lender investors had occurred Respondent Ng traveled to the site of the real property parcels and personally inspected the land and he exercised his experience in assigning values to each individual real property parcel. But he did not prepare a written evaluation of the subject parcels of real property. And he offered no evidence that he has been trained and licensed as a real property appraiser.

26. Complainant offered no competent evidence to show that Respondent Ng unreasonably or unlawfully used trust fund money as his personal use or as the money of Respondent Bar K. Also, during the course of the audit investigation, Mr. Rivera detected no act by respondents, or their agents and employees, regarding misappropriation or malfeasance in accounting of money belonging to investors or lenders.

27. And nearly all of the investors in loans studied by Auditor Rivera were either Respondent Bar K's employees, such as escrow officers and salesperson attached to the corporate broker's office, or were family members or close friends of the Ng brothers.

#### *Matters in Aggravation*

28. Mr. Kelly Ng was not believable when he asserted that the scheme, which involved respondents' failure to timely record deeds of trust in the name of the actual individual investors but rather employed an arrangement of first recording the investment in name of Gold Mountain Financial as an intermediary, brought no benefit to either Respondent Bar K or Gold Mountain Financial. Mr. Ng did not address the benefit that inured to Respondent Bar K or the affiliated intermediary from the "time value" for the use of the investors' money for the time period between the date investors put the funds into the possession of Respondent Bar K and the date the deed of trusts were recorded in the name of the actual beneficiaries.

Respondent Ng was not credible that the Red Mountain Resorts project (Loan R0123-A) met the Department's requirement specifying that "appraisal information" be delivered to investors. He unpersuasively noted the fair market value of \$20,000, under "Appraisal Information," which was set out in a disclosure statement, dated December 20, 2007, was proper under the provisions of the Real Estate Law.

Respondent Ng was not convincing in asserting that Loan No. R0123-A for Red Mountain Resorts, LLC, was not a construction loan. Respondent Ng unpersuasively claimed the loan proceeds were to meet the developer's needs to pay past debts owed to "architects, engineers and related fees" to complete the design phase. The Department's auditor, Mr. Rivera, was more credible in describing that the loan constituted a construction loan within the meaning of the Real Estate laws and the Department's regulations.

Respondent Ng was not believable that the arrangement to use Gold Mountain Financial as an intermediary for actual investors with regard to recording deeds of trust was in order to solely to benefit the investors by acquiring an enhanced title insurance coverage policy. Respondent Ng did not offered evidence to refute the Department's regulation that an intermediary/nominee may not be a licensee or controlled by a licensee.

Respondent Ng was not candid at the hearing when he asserted that Respondent Bar K's failure to provide disclosure statements to investors was excusable and caused no harm to the beneficiaries of the loans. Respondent Ng was not credible in attempting to excuse Respondent Bar K and himself from the directive of the Real Estate Law's requirement that disclosure statements be provided to lenders because of the strong working relationship that he held with the closely connected group of investors. But he offered insufficient support for the corporate real estate broker's breach of the law that exists to protect lenders by enabling investors to acquire critical information regarding a borrower, the affected real property and the terms comprising the loan.

Respondent Ng was not persuasive by his description of his skill and experience of acting as a real estate appraiser regarding two real estate parcels that were the subject of two loans that were offered as investments to consumers. Although Respondent Ng proclaimed that he personally visualized the two parcels so as to make appraisals of the fair market values of the land (one parcel he valued at \$10 million and the other parcel he valued at \$20 million) he offered no competent evidence that he transmitted supportive data regarding the appraisals to investor-lenders. (Respondent's argument regarding "oral broker evaluations" was not shown by competent legal authority to meet the requirements of the Real Estate law.)

Respondent Ng was not convincing upon asserting that Respondent Bar K had no duty to assure an interest reserve under Loan No. R0123-A with regard to the Red Mountain Resorts, LLC, project. He unpersuasively claimed that the loan was supported by wealthy investors who could provide money, if necessary, to satisfy interest reserve obligations. But, Respondent Ng's explanation highlights the intent of the part of respondents not to fund the interest reserve and supports Complainant's allegation that Mortgage Fund '08 purposefully failed to possess sufficient money to address the reserve interest contractual commitment.

Respondent Ng offered no competent evidence to establish the existence of a "sophisticated, experienced investor" exception to Real Estate Law requirements for the disclosure and completion of forms as described above.

29. The wrongful acts and omissions of respondents did not constitute simple mistakes or inconsequential technical violations. Rather the unlawful conduct shown by the evidence established respondents substantially departed from the standards expected of a licensed corporate real estate broker or the designated officer-broker of a real estate broker corporation.

*Other Matters*

30. Other than his brother- Mr. Kelly Ng, Respondent Ng did not call to the hearing of this matter as a witness any other licensed broker or real estate salesperson to offer evidence regarding Respondent Ng's business ethics, professionalism or commitment to the real estate laws of this state.

31. It would be against the public interest to permit Respondent Bar K to maintain a license and licensing rights as a corporate real estate broker without a period of suspension against that license.

32. It would be against the public interest to permit Respondent Ng to maintain a real estate designated officer license or a real estate broker license.

## LEGAL CONCLUSIONS

### *The Standard of Proof*

1. The standard of proof in an administrative disciplinary action that seeks the suspension or revocation of a real estate professional's license is "clear and convincing evidence to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.)

"Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. "Clear and convincing evidence" is a higher standard of proof than proof by "a preponderance of the evidence." (*CACI*<sup>4</sup> 201) "Clear and convincing evidence" requires a finding of high probability for the propositions advanced in an accusation against a targeted respondent licensee. It must be so clear as to leave no substantial doubt and to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700.) And, the standard of proof known as clear and convincing evidence is required where particularly important individual interests or rights are at stake. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.)

The Factual Findings and Legal Conclusions, herein, rest upon proof by clear and convincing evidence to a reasonable certainty that shows Respondents' acts and omissions warrant the disciplinary action is imposed upon respondents herein.

### *Statutory Authority - Violations of the Real Estate Law and Commissioner's Regulations*

2. Business and Professions Code section 10177, subdivision (d), establishes that the Department of Real Estate Commissioner may suspend or revoke the license of a real estate licensee, who has . . . , or may suspend or revoke the license of "a corporation . . . if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has . . . [w]illfully disregarded or violated the Real Estate Law

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<sup>4</sup> Judicial Council of California, Civil Jury Instructions.

... or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law. . . .”

The concept of “willful” is given broad meaning in the realm of administrative licensure disciplinary proceedings. “Willful” does not imply a malicious intent to do wrong or a consciousness of malfeasance on the part of a licensee to violate a rule, statute or standard of due care. The term “‘willful’ . . . does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: that the person knows what he is doing, intends to do what he is doing, and is a free agent. . . .” (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 12; *Apollo Estates, Inc. v. Department of Real Estate* (1985) 174 Cal.App.3d 625, 639; *Milner v. Fox* (1980) 102 Cal.App.3d 567, 573-575, fn. 9, and *Murrill v. State Board of Accountancy* (1950) 97 Cal.App.2d 709, 713.)

*Causes for Discipline: Respondent Bar K, Inc. and Respondent Barney Joe Ng*

3. California Code of Regulations, title 10, section 2831, sets forth the regulation that pertains to trust fund records that must be maintained by a real estate broker. The regulatory provision, in pertinent part, provides:

(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.*

[para] . . . [par.]  
(Emphasis added.)

Business and Professions Code section 10148, subdivision (a), prescribes

*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 broker license is required. The retention period shall run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After notice, the books, accounts, and records shall be made available for examination, inspection, and copying by the commissioner or his or her designated representative during regular business hours; and shall, upon the appearance of sufficient cause, be subject to audit without further notice, except that the audit shall not be harassing in nature.

Although not expressly required, or explicitly prescribed, in the Real Estate Law that copies of the back of cancelled checks be retained in a real estate broker's files and records, the same is an inherent requirement. The law's dictate that a real estate broker keep cancelled checks includes the reverse or back of all checks, or otherwise the cancellation of the check cannot be discerned by a Department auditor. Respondents' interpretation of the subject provision in the Real Estate Law is not correct and is contrary to the purpose of requiring retention of records for verification by the Department or other interested parties.

Cause exists for discipline against Respondent Bar K and Respondent Ng under California Code of Regulations, title 10, section 2831 and Business and Profession Code section 10148, subdivision (a), as those provisions interact with section 10177, subdivision (d), by reason of the matter set out in Factual Finding 9.

4. California Code of Regulations, title 10, section 2841.5 provides the Department's rules regarding the recordation of trust deeds in the situation of multiple lender loans. The regulation provides,

A real estate licensee who negotiates a promissory note secured by a trust deed on real property pursuant to Section 10238 of the Code shall cause the trust deed to be executed naming as beneficiaries the lenders or their nominee (who shall not be the licensee or the licensee's nominee) and shall cause the trust deed to be recorded, with the county recorder of the county in which the real property is located prior to the time that any funds are disbursed, except when the lender has given written authorization for prior release. If funds are released on the lenders' written authorization, the trust deed shall be recorded, or delivered to the lenders or beneficiaries with a written recommendation that it be recorded forthwith, within 10 days following release.

Business and Professions Code section 10234, subdivision (a), states, in pertinent part:

[E]very real estate licensee who negotiates a loan secured by a trust deed on real property *shall cause the trust deed to be recorded, naming as beneficiary the lender or his or her nominee (who shall not be the licensee or the licensee's nominee), with the county recorder* of the county in which the real property is located *prior to the time that any funds are disbursed*, except when the lender has given written authorization for prior release.

(Emphasis added.)

Respondents' practices of failing to timely record deeds of trust in the names of lenders frustrated the real estate law's objective of establishing priority of creditors in the event several loans are being secured by a particular parcel of real property. And respondents' conduct violated the concept of protecting the interest of the public who invests through real estate transactions in this state.

Cause exists for discipline against Respondent Bar K and Respondent Ng under California Code of Regulations, title 10, section 2841.5 and Business and Profession Code section 10234, subdivision (a), as those provisions interact with section 10177, subdivision (d), by reason of the matter set out in Factual Finding 10.

5. Business and Professions Code section 10232.4, subdivision (a), establishes

In making a solicitation to a particular person and in negotiating with that person to make a loan secured by real property or to purchase a real property sales contract or a note secured by a deed of trust, *a real estate broker shall deliver to the person solicited the applicable completed statement described in Section 10232.5 as early as practicable before he or she becomes obligated to make the loan or purchase and, . . . before the receipt by or on behalf of the broker of any funds from that person.* The statement shall be signed by the prospective lender or purchaser and by the real estate broker, or by a real estate salesperson licensed to the broker, on the broker's behalf. When so executed, an exact copy shall be given to the prospective lender or purchaser, and the broker shall retain a true copy of the executed statement for a period of three years.

(Emphasis added.)

Respondents' practices of failing to timely provide lenders with disclosure statements frustrated the real estate law's objective of affording investors, regardless of the affected persons' level of sophistication, with ample information so that such persons can make educated decisions before putting money into the hands of respondents.

Cause exists for discipline against Respondent Bar K and Respondent Ng under Business and Profession Code section 10232.4, subdivision (a), as that provision interacts with section 10177, subdivision (d), by reason of the matter set out in Factual Finding 11.

6. Business and Professions Code section 10237 directs that “[a]ny transaction that involves the sale of or offer to sell a series of notes secured directly by interests in one or more parcels of real property, or the sale of undivided interests in a note secured directly by one or more parcels of real property equivalent to a series transaction, shall comply with all of the provisions of this article [namely, Article 6 titled “Claim of Exemption from Securities Qualification” of Chapter 3 (Real Estate Regulation)].

Business and Professions Code section 10238, subdivision (f), requires

- (1) The notes or interests shall not be sold to more than 10 *persons, each of whom meets one or both of the qualifications of income or net worth set forth below and signs a statement, which shall be retained by the broker for four years, conforming to the following:*

Transaction

Identifier: \_\_\_\_\_

Name of Purchaser: \_\_\_\_\_

Date: \_\_\_\_\_

*Check either one of the following, if true:*

My investment in the transaction does not exceed 10% of my net worth, exclusive of home, furnishings, and automobiles.

My investment in the transaction does not exceed 10% of my adjusted gross income for federal income tax purposes for my last tax year or, in the alternative, as estimated for the current year.

\_\_\_\_\_  
Signature

(Emphasis added.)

Respondents’ practices of failing to assure that investors checked the block regarding the individuals’ net worth statements frustrated the real estate law’s objective of prompting investors to acknowledge that such persons were not overextending themselves financially by placing excessive personal assets into a single investment vehicle. Respondents failed to recognize the public protection goal of requiring real estate brokers to oversee that consumers

do not dangerously jeopardize themselves by relying on a single investment for prospective income.

Cause exists for discipline against Respondent Bar K and Respondent Ng under Business and Profession Code section 10238, subdivision (f), as that provision interacts with section 10177, subdivision (d), by reason of the matter set out in Factual Finding 12.

7. Business and Professions Code section 10238, subdivision (h), establishes,

(1) Except as provided in paragraph (2), the aggregate principal amount of the notes or interests sold, together with the unpaid principal amount of any encumbrances upon the real property senior thereto, shall not exceed the following percentages of the current market value of each parcel of the real property, as *determined in writing by the broker* or appraiser pursuant to Section 10232.6, plus the amount for which the payment of principal and interest in excess of the percentage of current market value is insured for the benefit of the holders of the notes or interests by an insurer admitted to do business in this state by the Insurance Commissioner . . . .

(2) The percentage amounts specified in paragraph (1) may be exceeded when and to the extent that the broker determines that the encumbrance of the property in excess of these percentages is reasonable and prudent considering all relevant factors pertaining to the real property. However, in no event shall the aggregate principal amount of the notes or interests sold, together with the unpaid principal amount of any encumbrances upon the property senior thereto, exceed 80 percent of the current fair market value of improved real property or 50 percent of the current fair market value of unimproved real property, except in the case of a single-family zoned lot or parcel as defined in paragraph (1), which shall not exceed 65 percent of the current fair market value of that lot or parcel, plus the amount insured as specified in paragraph (1). *A written statement shall be prepared by the broker that sets forth the material considerations and facts that the broker relies upon for his or her determination*, which shall be retained as a part of the broker's record of the transaction. Either a copy of the statement or the information contained therein shall be included in the disclosures required pursuant to subdivision (1).

(3) *A copy of the appraisal or the broker's evaluation, for each parcel of real property securing the notes or interests, shall be delivered to each purchaser.* The broker shall advise purchasers of their right to receive a copy. For purposes of this paragraph,

“appraisal” means a written estimate of value based upon the assembling, analyzing, and reconciling of facts and value indicators for the real property in question. *A broker shall not purport to make an appraisal unless the person so employed is qualified on the basis of special training, preparation, or experience.*

(4) For construction or rehabilitation loans, the term “current market value” may be deemed to be the value of the completed project if the following safeguards are met:

(A) An independent neutral third-party escrowholder is used for all deposits and disbursements.

(B) The loan is fully funded, with the entire loan amount to be deposited in escrow prior to recording of the deed or deeds of trust.

(C) A comprehensive, detailed, draw schedule is used to ensure proper and timely disbursements to allow for completion of the project.

(D) The disbursement draws from the escrow account are based on verification from an independent qualified person who certifies that the work completed to date meets the related codes and standards and that the draws were made in accordance with the construction contract and draw schedule. For purposes of this subparagraph, “independent qualified person” means a person who is not an employee, agent, or affiliate of the broker and who is a licensed architect, general contractor, structural engineer, or active local government building inspector acting in his or her official capacity.

(E) *An appraisal is completed by a qualified and licensed appraiser* in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP).

(Emphasis added.)

.....  
Business and Professions Code section 10238, subdivision (h)(3) prescribes that a copy of a written appraisal or broker’s evaluation shall be delivered to each investor, lender or purchaser. But the statute does not contemplate that a broker’s evaluation may be orally given. Permitting a real estate broker to make an oral evaluation, or appraisal, regarding real property would not protect a lender or buyer. Moreover an oral broker’s evaluation would not serve as a record in order to hold accountable a real estate broker.

Cause exists for discipline against Respondent Bar K and Respondent Ng under Business and Profession Code section 10238, subdivision (h), as that provision interacts with section 10177, subdivision (d), by reason of the matter set out in Factual Finding 13.

8. Business and Professions Code section 10176, subdivision (i), provides that the Commissioner "may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter, where such licensee has been guilty of . . . [a]ny other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562, sets out that "[a]s a general principle constructive fraud comprises any act, omission, or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud."

*In re Estate of Arbuckle* (1950) 98 Cal.App.2d 562, 569, states that constructive fraud usually arises "whenever trust and confidence is reposed by one person in the integrity and fidelity of another." The *Arbuckle* court noted that "The acts of an agent are judged with almost the same strictness as those of a trustee." (*Ibid.*). And that court added, "a violation of duty on the part of a trustee is treated as a fraud upon the beneficiary, and a violation of duty on the part of an agent should be treated in the same manner. . . ." (*Ibid.*)

Cause exists for discipline against Respondent Bar K under Business and Profession Code section 10176, subdivision (i), as that provision interacts with section 10177, subdivision (d), by reason of the matter set out in Factual Finding 14.

Also by reason of the fraud or dishonest dealings by Respondent Bar K's officers, employees, or agents while they respectively acted as agents of the subject corporate real estate broker and while acting under the ostensible authority of the subject corporate real estate broker, and by his own conduct, cause exists to discipline the officer real estate broker license issued to Respondent Ng, under Business and Professions Code section 10176, subdivision, subdivision (i), in conjunction with section 10177, subdivision (d), by reason of the matters set out in Factual Finding 14.

*Respondent Barney Joe Ng, solely*

9. California Code of Regulations, title 10, section 2725, provides the Department's rules regarding supervision by a real estate broker of licensees associated with the license of the real estate broker. The regulation prescribes, in pertinent part:

A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of

policies, rules, procedures and systems to review, oversee, inspect and manage: . . . transactions requiring a real estate license; . . . [d]ocuments which may have a material effect upon the rights or obligations of a party to the transaction

. . . [f]iling, storage and maintenance of such documents. .

. . [a]dvertising of any service for which a license is required. . . . [r]egular and consistent reports of licensed activities of salespersons. . . . A broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

Business and Professions Code section 10159.2 set forth,

(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.

(b) A corporate broker licensee that has procured additional licenses in accordance with Section 10158 through officer other than the officer designated pursuant to Section 10211 may, by appropriate resolution of its board of directors, assign supervisory responsibility over salespersons licensed to the corporation to its broker-officers.

(c) A certified copy of any resolution of the board of directors assigning supervisory responsibility over real estate salespersons licensed to the corporation shall be filed with the Real Estate Commissioner within five days after the adoption or modification thereof.

Business and Professions Code section 10177, subdivision (h), establishes that the Commissioner may suspend or revoke the license of a real estate licensee who has . . . [a]s 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.

Cause exists for disciplinary action against the license issued to Respondent Ng under California Code of Regulations, title 10, section 2725, and Business and Professions Code section 10159.2, in conjunction with section 10177, subdivisions (d) and (h), by reason of the matters set forth in the Legal Conclusions 3 through 8 and Factual Finding 15.

*Respondents' Irrelevant Arguments and Offers of Proof*

10. Administrative adjudication results in a decision that equates to agency action of specific application that determines a legal right or other legal interest of a particular person<sup>5</sup>. Contrary to the arguments and presentations by respondents, the initiation by Complainant of this administrative adjudication action established respondents' violation of real estate laws, which were designed to meet the elemental objective of administrative adjudication. Administrative adjudication has as its purpose the protection of the health, safety and welfare of the public. Moreover Respondents' arguments not specifically addressed in this decision are deemed to be without merit and are rejected.

*Measure of Discipline*

11. The purpose of an administrative adjudication proceeding, which contemplates the revocation or suspension of a professional or occupational license, is not to punish the individual licensee. The purpose of the agency action that results from the administrative adjudication proceeding is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Board of Medical Quality Assurance, supra*, 135 Cal.App.3d 583.)

Respondents negotiated many loans that totaled several millions of dollars. Respondents' acts and omissions constituted denigration of the law's directive for real estate professionals. Respondent misinterpreted applicable statutes and regulations to meet their personal objectives and to gain advantages in their favor. In many instances respondents devised their own rules that included a practice of providing untimely disclosure notices because investors supposedly had long-term dealings with respondents or the investors had ample money or financial resources.

The Real Estate Law, and in particular Business and Professions Code section 10177, subdivision (d), has a purpose of providing concrete protection for the public not only from conniving real estate licensees but also from uniformed, neglectful, or unknowledgeable real estate licensees. (*Manning v. Fox* (1984) 151 Cal.App.3d 531.)

A real estate licensee's misrepresentation, which may serve as the basis for disciplinary action, may be intentional or negligent. A discipline may spring in the instance

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<sup>5</sup> Government Code section 11405.50.



of where the licensee was not intentionally fraudulent or dishonest. The paramount concept in this matter is that a real estate licensee has a fundamental duty of full disclosure, fairness and honesty with regard to all parties to a transaction subject to the Real Estate Law. (*Norman I Drug Real Estate Investments v. Praszker* (1994) 22 Cal.App.4th 1814.)

*Cost Recovery*

12. Business and Professions Code section 10148, subdivision (b), prescribes

The commissioner shall charge a real estate broker for the cost of any audit, if the commissioner has found, in a final desist and refrain order issued under [s]ection 10086 or in a final decision following a disciplinary hearing held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting [s]ection 10145.

Respondents' violations fall within the meaning of the law applicable to the obligation of real estate licensees "handling of trust funds" as set out under Business and Professions Code section 10145 and the regulations and rules that interpret Business and Professions Code section 10145.

Although subdivision (c) of section 10148 of the Business and Professions Code sets forth that, "[i]n determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly costs for all persons performing audits of real estate brokers, the evidence offered at the hearing by the Department's auditor, Mr. Rivera, and the representations made by Complainant's counsel establish the reasonable costs of the audit that pertains to respondents herein to be \$8,884.33.

ORDER

1. All licenses and licensing rights of Respondent Bar K, Inc., under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code if Respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to Respondent shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

- i. The restricted license issued to Respondent Bar K, Inc., may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo contendere to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee.

- ii. Any restricted real estate license issued to Respondent Bar K, Inc., pursuant to this Decision shall be suspended for sixty (60) days from the date of issuance of said restricted license; however, the restricted licensee shall have the privilege to buy down thirty (30) days of the suspension period at the rate of \$100 per day pursuant to section 10175.2 of the Business and Professions Code. And upon the Department's timely receipt of the buy down payment, the remaining thirty (30) days of suspension shall be stayed.
- iii. The restricted license issued to Respondent Bar K, Inc., may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
- iv. Respondent Bar K, Inc., shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.

2. All licenses and licensing rights of Respondent Barney Joe Ng under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code if Respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to Respondent shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

- i. The restricted license issued to Respondent Barney Joe Ng may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo contendere to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee.
- ii. Any restricted real estate license issued to Respondent Barney Joe Ng pursuant to this Decision shall be suspended for sixty (60) days from the date of issuance of said restricted license; however, the restricted licensee shall have the privilege to buy down thirty (30) days of the suspension period at the rate of \$100 per day pursuant to section 10175.2 of the Business and Professions Code. And upon the Department's timely receipt of the buy down payment, the remaining thirty (30) days of suspension shall be stayed.
- iii. The restricted license issued to Respondent Barney Joe Ng may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Respondent has violated provisions of

the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

- iv. Respondent Barney Joe Ng shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.
- v. Respondent Barney Joe Ng shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:
  - (a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and
  - (b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.
- vi. Respondent Barney Joe Ng shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence. And Respondent Ng may possess the restricted real estate salesperson license on the condition that within one hundred twenty (120) days of the effective date of this decision he shall take and pass courses, to the satisfaction of the Department, on the topics of (i) trust fund handling by real estate licensees and (ii) ethics for real estate professional.

3. In accordance with Legal Conclusion 11, Respondent Bar K, Inc., and Respondent Barney Joe Ng are jointly and severally liable for the costs of the Department's audit in the amount of \$8,884.33. And during the period of the restricted licenses, respondents shall be jointly and severally liable for the costs of all audits so long as the costs shall not exceed more than \$10,000 over any 12-consecutive-month period.

4. Pursuant to section 10148 of the Business and Professions Code, respondents 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 violations found in paragraphs 3 through 8 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 time to and from the auditor's place of work. 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 suspend the restricted license issued to respondent pending a hearing held in accordance with section 11500, et seq., of the Government Code, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between the Respondent and the Commissioner. The suspension 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, or until a decision providing otherwise is adopted following a hearing held pursuant to this condition.

DATED: August 5, 2010



PERRY O. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings

FILED

AUG 11 2009

DEPARTMENT OF REAL ESTATE

By H. Mar

1 RICHARD K. UNO, Real Estate Counsel (SBN 98275)  
2 Department of Real Estate  
3 P. O. Box 187007  
4 Sacramento, CA 95818-7007  
5 Telephone: (916) 227-2380  
6  
7  
8

9 BEFORE THE DEPARTMENT OF REAL ESTATE  
10 STATE OF CALIFORNIA

11 \* \* \*

12 In the Matter of the Accusation of )  
13 ) NO. H-10752 SF  
14 BAR K, INC. and )  
15 BARNEY JOE NG, ) ACCUSATION  
16 Respondents. )  
17 )

18 The Complainant, E. J. HABERER, II, a Deputy Real Estate Commissioner of  
19 the State of California, for cause of Accusation against BAR K, INC., (BAR K) and BARNEY  
20 JOE NG, (NG), is informed and alleges as follows:

21 1

22 The Complainant makes this Accusation in his official capacity.

23 2

24 At all times mentioned herein Respondents were and now are licensed and/or  
25 have license rights under the Real Estate Law (Part 1 of Division 4 of the Business and  
26 Professions Code) ("the Code").

27 3

At all times mentioned, Respondent NG was licensed by the California  
Department of Real Estate ("Department") as a real estate broker.

1  
2 At all times herein mentioned Respondent BAR K was and is licensed by the  
3 Department as a corporate real estate broker by and through Respondent NG as designated  
4 officer-broker of Respondent BAR K to qualify said corporation and to act for said corporation  
5 as a real estate broker.

6  
7 At all times herein mentioned Respondents engaged in the business of, acted in  
8 the capacity of, advertised, or assumed to act as a real estate broker within the State of  
9 California within the meaning of Section 10131(d) of the Code, including the operation and  
10 conduct of a mortgage loan brokerage with the public wherein, on behalf of others, for  
11 compensation or in expectation of compensation, Respondents solicited lenders and borrowers  
12 for loans secured directly or collaterally by liens on real property, and wherein Respondents  
13 arranged, negotiated, processed, and consummated such loans.

14  
15 Whenever reference is made in an allegation in this Accusation to an act or  
16 omission of BAR K, such allegation shall be deemed to mean that the officers, directors,  
17 employees, agents and/or real estate licensees employed by or associated with BAR K  
18 committed such act or omission while engaged in the furtherance of the business or operations  
19 of such corporate respondent and while acting within the course and scope of their authority and  
20 employment.

21  
22 On approximately June 30, 2008 and intermittently through September 22, 2008,  
23 an investigative audit was performed by the Department of the records and bank records of  
24 Respondents BAR K (Audit #OK07-0237) for the period from January 1, 2007 through May 30,  
25 2008, as said records related to its activities as a real estate broker.

26 ///

27 ///

In so acting as a real estate broker, as described in Paragraph 5 and 6, above, Respondents accepted or received funds in trust ("trust funds") from or on behalf of lenders, investors, borrowers and others in connection with their mortgage loan brokerage activities and thereafter from time to time made disbursements of said trust funds.

Beginning June 30, 2008 and intermittently through July 9, 2008, the Department conducted an audit of Respondents' mortgage loan business for the period January 1, 2007 to May 30, 2008 as set forth in Audit No. OK 07-0247. During the course of mortgage loan activities described above, Respondents received and disbursed funds held in trust on behalf of others.

The following facts were ascertained concerning BAR K'S trust accounts:

- a. BAR K maintained three trust accounts at The Mechanics Bank, 1350 N. Main Street, Walnut Creek, CA 94596. Trust #1 was designated "Bar K Inc. Servicing Trust Account", No. 38001373. Trust #2 was designated "Bar K Inc. Servicing Trust Account 2", No. 38005344. Trust #3 was designated "Bar K Inc. Funding Trust Account", No. 38000148.
- b. Trust #1 was used for loan servicing of private lender/investor loans made by BAR K's affiliated LLC's. Deposits consisted of monthly payments and payoffs from borrowers. Disbursements were remittances to lenders/investors and for servicing fees. Trust #2 was used for loan servicing of lender/investor loans not entirely funded by BAR K's affiliated LLC's. Deposits consisted of monthly payments and payoffs from borrowers. Disbursements were remittances to lenders/investors and for servicing fees. Trust #3 was used for funding new loans. Deposits consisted of investor funds collected by BAR K. Disbursements were primarily money forwarded to the title company for new loan and miscellaneous disbursements.

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Between approximately January 1, 2007 and May 30, 2008, in connection with the collection and disbursement of said trust funds, Respondents failed to maintain all canceled checks for Trust #1 and Trust #2 for the audit period. BAR K maintained only copies of the front of checks and not the back. A review of the back of the checks could not be performed. The failure to maintain copies of the backs of checks was in violation of Section 2831 of the Regulations and Section 10148 of the Code.

12

In connection with the following loans, Respondents failed to record deeds of trust in the name of the lenders/beneficiaries prior to the loan funds being given to the borrower, as required by Section 2841.5 of the Regulations and Section 10234(a) of the Code.

Loan No.	Date Funded	Date Assign. Recorded
P0101	08/27/07	09/20/07
B0954	06/11/07	06/28/07
B0949	01/19/07	01/22/07
L0340	07/17/07	08/9/07

13

In connection with loans described below, Respondents failed to provide a mortgage loan disclosure statement (MLDS) before collecting the funds as required by Section 10232.4(a) of the Code.

Loan No.	Date MLDS Signed	Date Loan Funds Collected
B0954	07/28/07	06/08/07
B0949	01/24/08	01/19/08
L0340	08/11/07	07/16/07

14

In connection with the loans described below, Respondents failed to obtain completed income/net worth statements. Although the statements were signed by the respective



1 investors, the statements were not fully completed because the investor failed to check mark the  
2 appropriate box on the statement that their investment does not exceed 10% of their net worth or  
3 it does not exceed 10% of their adjusted gross income. This failure to obtain completed  
4 income/net worth statements is in violation of Section 10238(f) of the Code.

5	Loan No.	Investor	Amount
6	B0949	Vincent Hua	\$75,000
7	L0340	William Wilson	\$200,000
8	R0123-A	Bruce Horowitz	\$930,000
9	R0123A	Irene Lee	\$496,000

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11 In connection with the loans described above, Respondent Bar K failed to obtain  
12 or provide independent appraisals or written broker evaluations for the properties related to the  
13 loans described above, in violation of Section 10238(a) of the Code.

14 16

15 During the period from approximately January 1, 2007 through May 30, 2008,  
16 Respondent Bar K negotiated Loan R0123 including the solicitation of funds from investors.  
17 The borrower was Red Mountain Resorts LLC and the loan was secured by property which was  
18 to be developed into Tuscany Hill Gold Resort in Copperopolis, California. The amount for  
19 Loan R0123-A was \$10 million and was a multi lender loan. This loan was a renegotiation of  
20 Loan R0118, which was for \$4.5 million and involved many of the same investors. Loan  
21 R0123-A was funded by various investors in the amount of \$6.2 million. The remaining \$3.8  
22 million, of the total \$10 million loan amount, was to come from loan MF08. Out of the \$3.8  
23 million, \$2.4 million was to be set aside for the borrower's interest reserve payments.

24 17

25 A review of the operating account of MF08 revealed that on April 30, 2008, after  
26 the investors' funds were obtained, there was only \$1,207,750 in the account, less than the  
27 \$2,400,000 required to fund the interest reserve. Furthermore, Respondents' account had no

1 funds. The failure to set aside funds for interest payments as contracts were required to do work  
2 the terms of their agreement with the lenders, is in violation of Sections 10234(h) and 10238(h)  
3 of the Code.

4 21

5 The acts and omissions of Respondents described in the FIRST CAUSE OF  
6 ACTION, above, violate Sections of the Code (BPC) and Regulations (Reg.) and constituted  
7 grounds for disciplinary action under the provisions set out below:

<u>Paragraph</u>	<u>Violation</u>	<u>Grounds for Discipline</u>
11	Reg. 2831	BPC 10177(d)
	BPC 10148	
12	Reg. 2841.5	BPC 10177(d)
	BPC 10234(a)	
13	BPC 10232.4	BPC 10177(d)
14	BPC 10238(f)	BPC 10177(d)
15	BPC 10238(h)	BPC 10177(d)
16	16-17	BPC 10176(i) BPC 10177(d)

17 22

18 SECOND CAUSE OF ACTION

19 Complainant refers to Paragraphs 1 through 21, above, and incorporates the same  
20 herein by reference.

21 23

22 NG was the designated officer of BAR K, at all times mentioned herein. NG  
23 failed to maintain written policies and procedures regarding the management of BAR K, and  
24 otherwise failed to exercise reasonable control over BAR K in the performance for which a real  
25 estate license is required in violation of Section 2725 of the Regulations and Section 10159.2 of  
26 the Code. These acts and/or omissions are grounds for discipline under Section 10177(d) and  
27 (h) of the Code..

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



E. J. HABERER, II  
Deputy Real Estate Commissioner

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9 Dated at Oakland, California,  
10 this 10<sup>th</sup> day of August, 2009.

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