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FILED

AUG 23 2018

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE
By *K. Kuyper*

In the Matter of the Accusation of	}	DRE No. H-12162 SF	
BRICK ROAD REAL ESTATE, INC. and		}	OAH No. 2018020437
JAVIER CORTEZ,			
Respondents.	}		

DECISION

The Proposed Decision dated July 25, 2018, 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.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision:

1. Page 1, Factual Findings, Line 1, is corrected to read as follows:
"Complainant Robin S. Tanner made the Accusation...";
2. Page 4, Legal Conclusions 5, Line 1, is corrected to read as follows:
"Business and Professions Code section 10177, subdivision (d) and (g)...".

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to Respondent, Javier Cortez. The Decision also revokes all licenses and licensing rights of Respondent, Brick Road Real Estate, Inc., under the Real Estate Law.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision.

If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 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 13 2018

IT IS SO ORDERED August 21, 2018

DANIEL J. SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BRICK ROAD REAL ESTATE, INC.
and JAVIER CORTEZ,

Respondents.

Case No. H-12162 SF

OAH No. 2018020437

PROPOSED DECISION

Administrative Law Judge Ruth S. Astle, State of California, Office of Administrative Hearings, heard this matter on June 5, 2018, in Oakland, California.

Megan Lee Olsen, Real Estate Counsel, represented complainant.

Respondent Javier Cortez was present and represented Brick Road Real Estate, Inc., and himself.

Submission of the matter was deferred to July 5, 2018 for receipt of further evidence. The Department completed an additional audit of documents submitted by respondent and filed an audit report marked as Exhibits 9 and 10, which were entered into evidence and considered. The matter was submitted for decision on July 5, 2018.

FACTUAL FINDINGS

1. Complainant Robin S. Tanner made the statement of issues in her official capacity as a Supervising Special Investigator for the State of California.
2. Respondent Javier Cortez (Cortez) is presently licensed under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code, as a real estate broker. He has been a real estate licensee since 2006. Respondent Brick Road Real Estate, Inc. (Brick Road), is presently licensed under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code, as a real estate broker corporation. Respondent Cortez was the designated officer at the time the corporation license was issued in 2014. There have been no prior disciplinary actions against respondent Cortez or respondent Brick Road.

3. At all times mentioned herein, respondents engaged in the business of, acted in the capacity of, advertised, or assumed to act as real estate brokers within the meaning of the law, including the operation and conduct of a property management business with the public wherein, on behalf of others, for compensation or in expectation of compensation, respondents leased or rented or offered to lease or rent, or negotiated the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collected rents from real property, or improvements thereon, or from business opportunities.

4. On July 12, 2016, and continuing intermittently through July 29, 2016, an audit was conducted at Brick Road's office located at 1817 Del Rio Dr., Lafayette, California, where the auditor examined records for the period of January 1, 2015, through May 31, 2016 (the audit period).

5. While acting as a real estate broker, and within the audit period, respondents accepted or received funds in trust from or on behalf of property owners, lessees and others in connection with property management activities, and deposited or caused to be deposited those funds into bank accounts maintained by respondents, at the following financial institutions as follows:

Bank Account #1 – First Republic Bank, 111 Pine Street, San Francisco, CA 94111, account number ending in 0701, entitled Javier Cortez (Javier Cortez, Broker)

Bank Account #2 – Chase Bank, P.O. Box 659754, San Antonio, TX 78265, account number ending in 9939, entitled Brick Road Real Estate, Inc.

Respondents made disbursement of the trust funds from time-to-time.

6. In the course of the broker activities, and in connection with the collection and disbursement of trust funds, it was determined that: a) Respondents failed to designate Bank Account #1 and Bank Account #2 as a trust fund account as required by law and regulations; b) caused, and suffered or permitted funds of others which were received and held by respondents to be commingled with broker funds in Bank Accounts #1 and #2, in violation of law; c) failed to maintain an accurate columnar record in chronological sequence of all trust funds received and disbursed (control record), containing all required information, for Bank Account #1 and #2, in violation of regulations; d) failed to maintain accurate separate records for each beneficiary of trust funds accepted or received and disbursed for Bank Accounts #1 and #2, in violation of law and regulations; e) failed to reconcile at least once a month, the balance of all separate beneficiary or transaction records for Bank Account #1 and #2, in violation of regulation; and f) failed to disclose its license number on the corporation website as required by law and regulations.

7. Respondent Cortez failed to exercise reasonable supervision and control over the property management activities of respondent Brick Road. In particular, respondent Cortez permitted, ratified and caused the conduct described in Factual Finding 6, above, to

occur, and failed to take reasonable steps, including the handling of trust funds, supervision of employees, and the implementation of policies, rules, and systems to ensure the compliance with real estate laws and rules and regulations.

Respondent's evidence

8. Respondent Cortez has never had a problem with any of the properties he manages or with the owners of those properties.

9. Respondent Cortez acknowledged that at the time of the audit, he was not properly handling the funds of his property management business. He corrected the failure to disclose his license number on the corporation website. This was verified by Department auditor Kon Naly. Also, during the period from February 2017 to November 2017 and from January 2018 to May 2018, Trust Account #1 was used to handle funds such as rents and security deposits. This account was properly designated as a trust account in the name of the broker.

As a result of the audit, respondent Cortez made changes in his business practices. However, he still did not have separate records for each beneficiary of the trust funds. Respondent Cortez agreed to submit updated and corrected records to the Department to demonstrate that the requirements of the law and rules and regulation have been met.

10. The updated and corrected records were reviewed by auditor Kon Naly. He determined that the Control Record and Separate Beneficiary Record for Trust Account #1 were incomplete and inconsistent. Various transactions were unrecorded. Therefore, the account could not be reconciled. The auditor could not determine whether the original violation of mixing broker funds with trust funds was corrected. Further, the control record for Bank Account #1 was incomplete and inconsistent. The separate beneficiary record for Trust Account #1 was inaccurate and inconsistent. Brick Road failed to provide evidence that they reconcile at least once a month the balance of all separate beneficiary records with the control records for Trust Account #1.

11. Respondent Cortez has a friend from his church help him with his record keeping. Even with his help, the records do not comply with the requirements of the law or rules and regulations.

Ultimate Finding

12. The testimony of the auditor was persuasive. Respondent Cortez is either unwilling or unable to comply with the requirements of the real estate law and rules and regulations for handling funds from third parties. The evidence established that the auditor was unable to reconcile the bank accounts. Although it was not established that any clients were deprived of funds, it was established that funds were transferred to respondent's personal account during the audit period. This constitutes commingling of client funds.

Costs

13. In connection with the investigation and prosecution of this Accusation, the Department has incurred expenses of \$6,195.31. These costs reflect \$4,721.56 in audit costs, \$828.50 in investigation costs and \$645.25 for legal services. The costs are supported by certifications signed by Northern Regional Audit Manager Michael J. Rivera, complainant Robin S. Tanner, and Real Estate Counsel III Megan Lee Olsen. These costs are deemed to be reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code sections 10145 and 10177, subdivision (d) and (g), in conjunction with California Code of Regulations, title 10, section 2832, authorize the Real Estate Commissioner to discipline a licensee who fails to deposit funds held on behalf of another into a trust account or escrow account. Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, 5, 6, and 12.
2. Business and Professions Code section 10145, subdivision (g), 10177, subdivision (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.1, authorizes the Real Estate Commissioner to discipline a licensee who fails to keep separate records regarding each beneficiary and each transaction of trust accounts. Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, 5, 6, and 12.
3. Business and Professions Code section 10177, subdivision (d) and (g), in conjunction with California Code of Regulations, title 10, section 2831.2, authorizes the Real Estate Commissioner to discipline a licensee who fails to reconcile the balance of trust accounts. Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, 5, 6, and 12.
4. Business and Professions Code section 10176, subdivision (e), authorizes the Real Estate Commissioner to discipline a licensee who commingles funds. Cause exists to suspend or revoke respondents' licenses for commingling funds, in light of the matters set forth in Findings 3, 4, 5, 6, and 12.
5. Business and Professions Code section 10176, in conjunction with California Code of Regulations, title 10, section 2831, authorizes the Real Estate Commissioner to discipline a licensee who fails to maintain an accurate columnar record in chronological sequence of all trust funds received and disbursed (Control Record). Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, 5, 6, and 12.

6. Business and Professions Code sections 10159.2 and 10177, subdivisions (d) (g) and (h), authorize the Real Estate Commissioner to discipline a licensee who fails to exercise reasonable control over the real estate activities being performed by a corporate licensee. Respondent Cortez, as the designated officer of Brick Road Real Estate, Inc., failed to exercise reasonable control of client trust funds. Cause exists to discipline respondent Cortez, in light of the matters set forth in Findings 7, and 12.

7. Respondents committed numerous violations of the laws governing the management of client trust funds. These violations were discovered during a random audit and not as the result of complaints from trust fund beneficiaries. The audit revealed that respondents failed to adhere to basic procedures for handling client funds that are well-known and required of all licensees. Respondents failed to deposit client funds into a trust account, commingled client funds with business funds, and failed to maintain proper records.

The evidence established that the violations were caused by ignorance or lack of diligence on the part of respondent Cortez rather than any dishonest or fraudulent intent. It was not established that any clients were deprived of funds.

Respondent Cortez acknowledged his wrongdoing. He acted to correct some of his business practices. However, he has not managed to correct all the violations. Cortez has not previously been disciplined by the Commissioner.

Given the pervasive nature of the violations, and the inability to correct the violations, revocation of Cortez's real estate broker license and of the corporate license is warranted for the protection of the public. It would not be against the public interest, however, to issue respondent Cortez a restricted real estate salesperson's license.

8. Business and Professions Code section 10148, subdivision (b), authorizes the Real Estate Commissioner to charge for the costs of an audit, if the licensee is found to have violated Business and Professions Code section 10145. Respondents shall be ordered to pay the costs of the audit.

Business and Professions Code section 10106 authorizes the Real Estate Commissioner to recover in disciplinary proceedings its reasonable costs of investigation and enforcement. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of costs sought pursuant to statutory provisions such as Business and Professions Code section 10106. These factors include: (a) whether the licensee has been successful at hearing in getting charges dismissed or reduced; (b) the licensee's subjective good faith belief in the merits of his position; (c) whether the licensee has raised a colorable challenge to the proposed discipline; (d) the financial ability of the licensee to pay; and (e) whether the scope of the investigation was appropriate in light of the alleged misconduct.

Taking these factors into consideration, no cause to reduce costs has been established. Respondents will be ordered to pay the Department's audit, investigation, and enforcement costs, totaling \$6,195.31, pursuant to Business and Professions Code sections 10148, subdivision (b), and 10106.

ORDER

Respondent Brick Road Real Estate, Inc.

All licenses and licensing rights of respondent Brick Road Real Estate, Inc., under the Real Estate Law are revoked.

Respondent Javier Cortez

All licenses and licensing rights of respondent Javier Cortez 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:

1. Conviction or Plea to a Crime

The restricted license issued to respondent 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.

2. Violation of Law

The restricted license issued to respondent 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.

3. Application for Unrestricted License

Respondent 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.

4. Notification to Employing Broker

Respondent 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.

5. Continuing Education Requirement

Respondent 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 respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

6. Professional Responsibility Condition

Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

7. Reporting Condition

Respondent shall report in writing to the Department of Real Estate as the Real Estate Commissioner shall direct by his Decision herein or by separate written order issued while the restricted license is in effect such information concerning respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate to protect the public interest.

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of respondent and

periodic summaries of salient information concerning each real estate transaction in which respondent engaged during the period covered by the report.

8. Cost Recovery

Respondents Brick Road Real Estate, Inc. and Javier Cortez shall pay the Department costs associated with the audit, investigation, and enforcement of this matter pursuant to Business and Professions Code section 10106, in the amount of \$6,195.31

DATED: July 25, 2018

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Ruth Astle
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RUTH S. ASTLE
Administrative Law Judge
Office of Administrative Hearings