

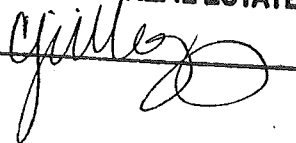
FILED

MAR 11 2015

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

BUREAU OF REAL ESTATE

By



In the Matter of the Accusation of

RICHARD DALE SARGENT,

Respondent.

CalBRE No. H-39039 LA

OAH No. 2014040711

DECISION

The Proposed Decision dated January 23, 2015, 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:

The language on Page 9, Paragraph 15, of the Proposed Decision, which reads ... "The present violations are of a minor nature." is stricken from the Commissioner's Decision.

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted license is granted to Respondent.

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 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

MAR 31 2015

IT IS SO ORDERED March 2, 2015

REAL ESTATE COMMISSIONER


WAYNE S. BELL

**BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

**GLOBAL VACATIONS MARKETING
CORP., doing business as Global Exchange
Vacation Club; and**

**RICHARD DALE SARGENT, individually
and as designated officer of
Global Vacations Marketing Corp.,**

Respondents.

BRE No. H-39039 LA

OAH No. 2014040711

PROPOSED DECISION

The hearing in this matter was before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on January 7 and 8, 2015. Maria Suarez (complainant) was represented by Amelia V. Vetrone, Counsel. Richard Sargent was present and was represented by Raymond J. Gaskill, Attorney at Law. The surrender of the real estate corporate broker's license of Global Vacations Marketing Corp. was accepted by the Real Estate Commissioner on October 14, 2013.

A Protective Order was issued January 8, 2015, and a Corrected Protective Order was issued January 13, 2015, to seal exhibit 4, audit work papers.

Evidence and stipulations were received and the matter was submitted for decision on January 8, 2015.

FACTUAL FINDINGS

1. Complainant filed the Accusation and First Amended Accusation solely in her official capacity as a Deputy Real Estate Commissioner of the Bureau of Real Estate (Bureau), State of California.
2. Respondent Richard Sargent (respondent) was originally licensed by the Department of Real Estate (Department), which subsequently became the Bureau, as a real

estate salesperson on January 25, 1986, and as a real estate broker on June 15, 1995, assigned broker license number B/00830714.

3. Global Vacations Marketing Corp. (GVMC) was licensed by the Department as a corporate real estate broker on May 8, 2001, with respondent as its designated officer. Respondent owns 100 percent of GVMC. GVMC's corporate real estate broker license expired on May 7, 2013. The surrender of the real estate corporate broker's license of Global Vacations Marketing Corp. was accepted by the Real Estate Commissioner on October 14, 2013. Pursuant to Business and Professions Code¹ section 10201, GVMC has a two-year right of renewal. Pursuant to Code section 10103, the Bureau retains jurisdiction.

4. Beginning May 8, 2001, GVMC registered the licensed fictitious business name Global Exchange Vacation Club (Club) with the Department.

5. GVMC marketed, sold and administered timeshare interests, designated as "points," at various sales offices and a headquarters office. Some of these activities required real estate licenses, as required under Code section 10131, subdivision (a). The points were owned by Global Exchange Development Corporation (Global Exchange), described as a Nevada corporation which was the developer of the Global Exchange Vacation Club, which is a different entity from the fictitious business name of Club. This is explained in more detail in Factual Findings 23 and 24. The Nevada corporation named Global Exchange Vacation Club is a "multi-location time-share plan with accommodations in [various] locations." (Public Reports A-10 and A-11 in exhibit 4.) After buyers purchased points, they could use them, under certain conditions, to take vacations at the various locations. Respondent owns 100 percent of Global Exchange.

6. On June 28, 2012, the Bureau completed an audit examination of the books and records of GVMC pertaining to its real estate sales activities covering the period from July 1, 2009, to February 29, 2012 (audit period). The audit report refers to several alleged violations of the Code and the California Code of Regulations.²

7. During the audit period, in connection with activities that require a Bureau license, GVMC received funds including, but not limited to, purchase money deposits that, under the Code, were received in trust (trust funds). The trust funds were deposited by GVMC in, and disbursed from, two general business bank accounts established by Global Exchange. No other funds were placed in these two accounts.

8. Complainant alleges that, during the audit period, GVMC did not follow certain requirements relating to trust funds. For example, it is alleged that GVMC: did not maintain a bank account designated or operated as a trust account, in violation of Code section 10145 and

¹ All statutory references are to the Business and Professions Code unless noted.

² All references to the California Code of Regulations are to title 10 and are noted as "Regulation."

Regulation 2832; did not maintain a separate record for each beneficiary of trust funds collected, in violation of Code section 10145 and Regulation 2831.1; did not perform a monthly reconciliation of the balance of all separate purchaser records with the record of all trust funds received and disbursed, in violation of Code section 10145 and Regulation 2831.2; and did not maintain a columnar record of the receipt and disbursement of trust funds, in violation of Code section 10145 and Regulations 2831. Complainant also alleged that GVMC permitted three unlicensed and unbonded individuals to be signatories on a general bank account used for the deposit of trust funds, in violation of Code section 10145 and regulation 2834. (See the Amended Accusation in exhibit 1.)

9. During the audit period, GVMC deposited trust funds into a specified general account (referred to as Bank Account #3 in the audit report), which was later replaced by another specified general account (referred to as Bank Account #1 in the audit report). These accounts were in the name of Global Exchange, the developer and also the owner/seller of the points. Respondent explained that all trust funds deposited into Bank Account #1 or Bank Account #3 were treated as funds in trust even if the accounts were not trust funds. A trust fund was not used because some down payments were deposited via use of credit cards, and the credit card processing companies required access to the accounts to deposit the trust funds and, sometimes, to collect the credit card processing fees. Respondent further explained that, because of this access by an outside entity, the accounts could not be set up as formal trust accounts in accordance with requirements of the Department or the Bureau. According to respondent this problem was experienced by many other timeshare businesses who handled their trust funds in a fashion similar to GVMC. Although Sargent testified that an official of the Department was aware of and tacitly approved this banking arrangement, such is not dispositive on the issue. The signatories on Bank Account #1 included respondent, his assistant, his wife and his daughter. Of these four, only respondent holds a real estate license. Funds from these two accounts were forwarded each week to an escrow company where escrows were opened to complete the sale of the points to the buyers. Some of the funds went to a separate bank account to be used for refunds of sales that had been cancelled.

10. Respondent learned, via the audit, that this bank account arrangement was in violation of applicable laws and regulations. He then deposited a bond for the benefit of buyers (exhibit A), pursuant to Code sections 11243 or 11244 and, as a result, was no longer required to deposit trust funds into a trust account. The amount of the bond was modified on occasion to cover increases in the amount of trust funds based on increased sales.

11. The records of the funds deposited in Accounts #1 and #3 were not in the form required by the Code sections and Regulations noted above. In most instances, the necessary information was routinely accessible, however was not in the required format. When respondent learned via the audit that the accounts were not in compliance, he had changes made in the recordkeeping procedures so that the information was in the required format.

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12. Complainant alleges that respondent employed and compensated Jeff Scott Peterson and Timothy Suggs as real estate salespersons even though the real estate licenses of Peterson and Suggs had been revoked by the Bureau prior to such employment and compensation, in violation of Code sections 10130 and 10137.³ Peterson and Suggs were apparently employed by GVMC, not by respondent. Respondent contends the employment of Peterson and Suggs did not result in any violations, for two reasons.

13. First, Peterson and Suggs were each appointed as officers of Global Exchange; Peterson on November 1, 2007, and Suggs on June 19, 2008. (See exhibits E and F.) Second, there was insufficient evidence that Peterson or Suggs engaged in activities for which a license was required.

14. Peterson was the manager of GVMC sales offices in Orange and San Dimas. Suggs was the manager of the GVMC sales office in Napa. As to Peterson, Complainant submitted compensation documents which, with the exception of the Lopes transaction, were insufficient to establish that Peterson was being paid for engaging in activities for which a license was required. Complainant submitted a worksheet regarding a sale of timeshare points to Lopes which indicated that Peterson was the financial consultant for the sale. Complainant also submitted a computerized sales report of sales transactions for the period including July 2009 into January 2010, which lists Peterson's employee number in a column titled "REP" for the Lopes transaction and others. Sargent testified that, in the usual sales transaction, an unlicensed employee would provide a tour and general information about the Global Exchange Vacation Club (the Nevada corporation), the vacation properties and other salient details. However, pricing, negotiations, sales, and other activities requiring a license would be handled by someone with a real estate license. There was sufficient evidence, as to the Lopes transaction only, that Peterson functioned in a capacity that might require a license. (As noted in Factual Finding 15, Peterson was not required to be licensed.) The evidence was insufficient as to the other transactions listed in the sales report and including Peterson's employee number because the sales report alone, without additional evidence, is not enough to establish what actions were performed by Peterson and, therefore, whether those actions required a license. The only evidence supporting the allegation against Suggs was the presence of his employee number for some transactions in the sales report. Similarly, this is insufficient evidence to establish what actions were performed by Suggs and, therefore, do not prove that those actions required a license.

³ There is some ambiguity to this allegation, and others. The Amended Accusation lists GVMC and Sargent as respondents, notes that GVMC's license expired May 7, 2013, and that the Commissioner accepted GVMC's voluntary surrender of its license on October 14, 2013. The majority of the allegations are made against respondents, in the plural. Due to its status as a corporation, GVMC's actions are not necessarily attributable to Sargent individually. Therefore, it is difficult to make factual findings specific to Sargent when the actions alleged were taken by GVMC, or it was alleged that GVMC failed to take action when required to do so. Nevertheless, Sargent submitted evidence, including his testimony, relating to each of the allegations.

15. With respect to the defense that Peterson and Suggs were corporate officers, respondent relies on Code section 10133, subdivision (a), an exemption from licensure for a corporate officer "with respect to real property owned or leased by the corporation . . . or in connection with the proposed purchase or leasing of real property by the corporation . . . if the acts are not performed by the officer or partner in expectation of special compensation." This exemption would apply here, as Peterson and Suggs were corporate officers of Global Exchange, the developer and owner/seller of the points.

16. Licensed real estate salesperson Maria Vertucci worked for GVMC. She completed paperwork when she was hired, including the Department form required to notify the Department when a licensed salesperson is working in the employ of a licensed broker. Sargent testified that he believed he had completed the form and it had been forwarded to the Department. The Department established that it had no records that Vertucci was licensed under GVMC's corporate broker license.

17. As part of a sales transaction for timeshare points, GVMC was required to provide the purchaser with the most recent version of the Public Report, a document designed, in part, to make disclosures to prospective buyers that are required by law. Prospective buyers were required to sign a receipt of the Public Report. As time passed, new information required amendment of the public reports, and once amended, prior public reports were no longer valid. Version A-10 of the Public Report was in effect as of September 5, 2008. Version A-11 of the Public Report was in effect as of March 15, 2010. In two sales transactions, dated April 22 and May 13, 2010, buyers signed receipts for the A-10 version of the Public Report, which had been further amended. Those buyers should have received the A-11 version of the Public Report.

18. A prior action by the Department against GVMC and respondent was based on allegations that GVMC and respondent failed to give a current public report to a timeshare buyer and, by doing so, that respondent failed to exercise reasonable supervision over his employees. In the settlement of that matter, GVMC and respondent did not admit the allegations but agreed that discipline could be imposed (see exhibit 7). The agreed discipline included that GVMC's license would be suspended for 60 days and that a monetary penalty of \$10,000 could be paid in lieu of the suspension. The agreed discipline included that respondent's license would be suspended until he provided proof of paying restitution in the amount of \$3,979.96 to the buyers, and that he would take certain courses and pass the Professional Responsibility Examination.

19. Respondent offered two reasons how the wrong public report may have been used. First, notice from the Department that an amended report was approved and issued was not immediate, and older versions of the report would have been used until notice was received and copies were made of a newer report. Second, buyer kits were sometimes returned when a sale was not completed, and it was common practice to re-use them, including the Public Report inside. GVMC has changed its practices such that it has better control of the Public Reports issued in the past and to be issued in the future, reducing the likelihood that the wrong report will be provided to a buyer.

20. Complainant alleges that respondent failed to pay assessments on timeshare interests held by the developer, in violation of Code section 11265. The audit report (exhibit 3) specifies that such non-payment is a violation of Code section 11265, subdivision (a)(4). This subdivision sets forth the following requirement for "multisite time-share plans": "All time-share interests in the time-share plan for which a public report has been issued including those time-share interests held by the developer of the time-share plan are interests subject to the payment of regular and special assessments."

21. Complainant contends that, for example, GVMC has not paid assessments for timeshare points held by GVMC due to foreclosure or surrenders of points previously sold to buyers. Respondent offers various contentions in defense, including that it had a subsidy agreement that created an exemption to the requirement to pay assessments. Complainant countered that a subsidy related only to some, but not all assessments. However, no violation was established under the evidence or the law. Code section 11265 sets forth various requirements, including the authority to levy certain assessments and the process required to levy certain assessments. The language quoted above in Factual Finding 20 provides the authority for the levy of regular and special assessments related "to time-share interests held by the developer." However, nothing in that section requires respondent, as a broker, to pay the assessments levied against the developer, here Global Exchange. Assessments on property, here points, owned by Global Exchange are the responsibility of Global Exchange to pay, not of respondent or GVMC as the broker.

22. Complainant alleges that respondent (Sargent individually, not in combination with GVMC) failed to exercise reasonable supervision over the activities of GVMC, and over his employees, to ensure compliance with the Real Estate Laws and the Commissioner's regulations. This was established as noted above in the instances where violations were proven by the evidence.

23. The final allegation is that, following GVMC's license surrender, respondent (referring to Sargent alone) has continued to perform activities for which a license is required using the name Club, without first registering the name with the Bureau. The theory is that GVMC had registered the Club name with the Department and that, after GVMC's license surrender, the Club name could not be used. Respondent contends that the entity now using the name Global Exchange Vacation Club is a California non-profit corporation that is a homeowners association. Respondent testified credibly that GVMC used the Club name from 2001 to 2003, when the first Public Report was issued and time-shares could therefore be sold. The homeowners association had been formed using the name Global Exchange Vacation Club because respondent liked the name. Thereafter, GVMC and respondent no longer used the Club name as a fictitious business name for GVMC, and he thought it had been cancelled with the Department.

24. The Public Reports in evidence include versions A-10 and A-11 (in exhibit 4). Both indicate that the applicant and developer is Global Exchange. Both indicate that Global Exchange Vacation Club was developed by Global Exchange and that Global Exchange Vacation Club is a time-share plan and is a non-profit corporation that owns timeshare interests

in various properties. When buyers purchase points, the buyers obtain voting and use rights. Based on this evidence, the use of the name Global Exchange Vacation Club in the Public Reports sufficiently informs the Department and the Bureau that it is an entity different from the fictitious business name registered by GVMC. The activities of the Global Exchange Vacation Club as of the formation of the non-profit corporation are not attributable to GVMC or respondent in the manner alleged in the Amended Accusation.

25. The cost of the audit was \$9,996.50, comprised of: 172 hours at the auditor's hourly rate of \$57 (subtotal \$9,804.00), plus \$192.50 for "review, revision and supervisory costs" (exhibit 6) with no indication of time spent or an hourly rate. The auditor's activities were adequately explained.

LEGAL CONCLUSIONS

1. The standard of proof to be used in these proceedings is "clear and convincing proof to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853; *Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531.) This means the burden rests on complainant to establish the charging allegations by proof that is clear, explicit and unequivocal—so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

2. There was insufficient evidence to establish cause for discipline against respondent's license for violating Code sections 10130 and 10137 by employing and compensating Jeff Scott Peterson and Timothy Suggs as real estate salespersons even though their real estate licenses had been revoked by the Department. As noted in Factual Findings 12 – 15, the evidence established Peterson's participation in one sale and was not sufficient to establish his participation in other sales, or Suggs' participation in any sales, to the extent that a license might be required. Peterson and Suggs were corporate officers of the owner/seller, Global Exchange, and were exempt from licensure under Code section 10133, subdivision (a).

3. Under Code sections 10130 and 10137, real estate salesperson Maria Vertucci was required to be licensed under a broker before she could perform actions for which the license was required and receive compensation from her broker. Respondent failed to assure that her license and employment information was properly sent to the Department, as set forth in Factual Finding 16.

4. Cause exists to impose discipline against respondent's license for violating Code sections 10130 and 10137, as set forth in Factual Finding 16 and Legal Conclusion 3.

5. Under Code section 10145, subdivision (a)(1), when a broker accepts funds from a buyer, such as a buyer of timeshare points here, the broker "shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository

in this state.” When the broker uses a trust fund account, there are requirements about who can be signatories, how the account must be set up, and how records of the trust funds must be kept. Here, when GVMC as broker received a down payment from a buyer, the money was deposited into an account maintained by Global Exchange, the owner/seller of the points. Global Exchange was the principal of the broker. GVMC and respondent did not need to place the funds in a trust fund account, as the funds were “placed into the hands of the broker’s principal,” in compliance with Code section 10145, subdivision (a)(1).

6. There was insufficient evidence to establish cause for discipline against respondent’s license for failing to place deposits collected from purchasers into a trust account in the name of the broker, for failing to maintain a separate record for each beneficiary of trust funds collected, for failing to perform a monthly reconciliation of the balance of all separate purchaser records with the record of all trust funds received and disbursed, for failing to maintain a columnar record of the receipt and disbursement of trust funds, or for permitting three unlicensed and unbonded individuals to be signatories on the general bank account used for the deposit of trust funds, for the reasons set forth in Factual Findings 7 – 11 and Legal Conclusion 5.

7. Under the circumstances of the sale of points herein, Code sections 11018.1, subdivision (a), 11234, and 11245, require the owner or owner’s broker to provide the current public report to a purchaser.

8. Cause exists to impose discipline against respondent’s license for Code sections 11018.1, subdivision (a), 11234, and 11245, for the reasons set forth in Factual Findings 17 – 19 and Legal Conclusion 7.

9. There was insufficient evidence to establish cause for discipline against respondent’s license for failing to pay assessments on timeshare interests held by the developer, for the reasons set forth in Factual Findings 20 and 21.

10. Under Code section 10159.2 and Regulation 2725, respondent as a broker and corporate officer is responsible to supervise and control the activities conducted by employees. Failure to do so may lead to discipline under Code sections 10177, subdivision (g), for negligence or incompetence, and 10177, subdivision (h), for failure to supervise.

11. Cause exists to impose discipline against respondent’s license under Code sections 10177, subdivisions (g) and (h), for violating Code section 10159.2 and Regulation 2725, for the reasons set forth in Factual Findings 16 – 19 and Legal Conclusions 3, 4, 7, 8 and 10.

12. There was insufficient evidence to establish cause for discipline against respondent’s license for conducting real estate activities using the fictitious business name Global Exchange Vacation Club. Respondent ceased using the fictitious business name when sales of points began. Unfortunately, due to possible subsequent confusion, respondent used the same name, Global Exchange Vacation Club, for the non-profit entity formed as a time share

club, as referenced in the Public Reports. (See Factual Findings 5, 23 and 24.) The evidence established that there were no activities requiring a license taken by the Club, as a fictitious business name of GVMC or under the direction of respondent in his capacity as a licensed broker.

13. If a real estate broker has violated Code section 10145 relating to the requirements of the receipt and deposit of trust funds, the broker may be charged the costs of the audit under the authority of Code section 10148, subdivision (b). As noted in Legal Conclusions 5 and 6, there was insufficient evidence to establish any violation of Code section 10145. There is no basis to impose the costs of the audit.

14. There are three violations against respondent supported by the evidence: (1) failure to inform the Department that Maria Vertucci was an employee; (2) failure to provide the current public report to a purchaser; and (3) failure to supervise and control the activities conducted by employees that resulted in violations (1) and (2).

15. Respondent's license was previously disciplined for a prior instance when a purchaser did not receive a current public report. That discipline was an order to pay restitution, to take courses and to pass an examination. The present violations are of a minor nature. Progressive discipline will protect the public by allowing respondent to apply for a restricted broker license that will include a short period of license suspension, to allow respondent sufficient time to assure the Bureau that the violations will not be repeated. Terms of the discipline are taken from Regulation 2930.

ORDER

All licenses and licensing rights of respondent Richard Dale Sargent under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Bureau 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 Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under authority of Business and Professions Code section 10156.6:

1. 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. 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

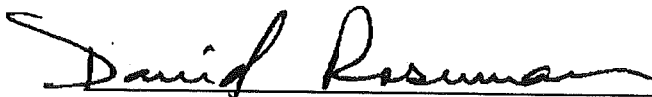
Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

3. 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. 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 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.

5. Any restricted real estate license issued to respondent pursuant to this Decision shall be suspended for five days from the date of issuance of said restricted license.

DATED: January 23, 2015.



DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings