

FILED

MAR - 1 2013

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By K. Contreras

In the Matter of the Accusation of)	
)	NO. H-2659 FR
KEVIN SCOTT EANES,)	
KEVIN GEVORK POGOSYAN, and)	OAH NO. 2011100720
JONATHAN DUC NGUYEN,)	(As to KEVIN GEVORK POGOSYAN
)	and JONATHAN DUC NGUYEN, Only),
Respondents.)	
_____)	

DECISION

The Proposed Decision dated January 22, 2013, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

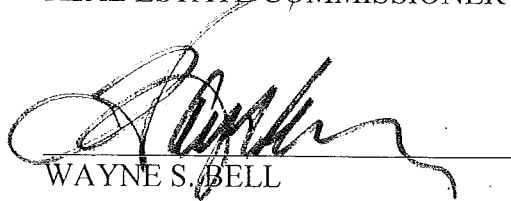
This Decision shall become effective at 12 o'clock noon on

MAR 29 2013

IT IS SO ORDERED

2/27/2013

REAL ESTATE COMMISSIONER


WAYNE S. BELL

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

KEVIN GEVORK POGOSYAN, and
JONATHAN DUC NGUYEN,

Respondents.

Case No. H-2659 FR

OAH No. 2011100720

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on December 19, 2012, in Fresno, California.

Mary F. Clarke, Counsel, Department of Real Estate (Department), represented Luke Martin, a Deputy Real Estate Commissioner of the State of California (complainant).

Kevin Gevork Pogosyan and Jonathan Duc Nguyen appeared on their own behalf.

Submission of the matter was deferred pending submission of reference letters in support of respondents. Reference letters were submitted on behalf of respondents Nguyen and Pogosyan on December 26 and 28, 2012, respectively, and marked collectively for identification for each respondent as Exhibits A and B. Complainant filed a response on January 18, 2013, that was marked as Exhibit 17 for identification. The record was thereafter closed, and the matter was submitted for decision on January 18, 2013.¹

FACTUAL FINDINGS

1. Complainant made and filed the Accusation in his official capacity on or about July 22, 2011.

The Accusation named Kevin Scott Eanes as an additional respondent. Mr. Eanes failed to file a Notice of Defense within the time required by Government Code section 11506. A Default Order was issued against him by the Department on December 13, 2012.

¹ The additional argument submitted by respondent Nguyen was nonresponsive and not considered. Other letters were considered as administrative hearsay, except for the letter by respondent Pogosyan.

2. Complainant seeks to discipline respondents' licenses on the grounds that respondent Pogosyan, as a real estate salesperson, failed to comply with real estate laws and regulations governing the handling of monies accepted, held or disbursed in trust; and that respondent Nguyen, as a real estate broker, violated the real estate laws and regulations regarding trust accounts by permitting the balance of monies held in trust to be reduced to amounts less than the trust liability resulting in a trust fund shortage, failing to maintain proper records of all trust funds received, and failing to provide an accounting to principals. Complainant further seeks discipline against respondent Nguyen's license for his alleged failure to supervise the activities of respondent Pogosyan in the above regards.

License History and Status

3. Respondent Pogosyan is presently licensed and/or has license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code² as a real estate broker. He was previously licensed by the Department as a real estate salesperson from September 20, 2001, through April 13, 2010. His broker license will expire on April 13, 2014, unless renewed or revoked.

4. Respondent Nguyen is presently licensed and/or has license rights under the Real Estate Law as a real estate broker. The broker license was originally issued on January 25, 2006. Respondent Nguyen operates under the DBA Arquest Mortgage Solutions, doing business as Arquest Realty Solutions. His broker license will expire on January 24, 2014, unless renewed or revoked.

5. At all times relevant, respondent Nguyen 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 section 10131, subdivision (b), including the operation and conduct of a property management business with the public, wherein respondent Nguyen leased or rented or offered to lease or rent, or placed for rent, or solicited listings for places for rent, or solicited for prospective tenants, 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.³

² Unless otherwise stated, all statutory references are to the California Business and Professions Code.

³ All references to acts or omissions of respondent Nguyen are deemed to mean that the officers, directors, employees, agents, and real estate licensees employed by or associated with respondent Nguyen engaged in such acts or omissions in furtherance of the business or operation of respondent Nguyen and while acting within the course and scope of their authority and employment.

Respondents' Business Relationships with Kevin Scott Eanes

6. Kevin Scott Eanes (Eanes) was licensed by the Department as a real estate broker from January 6, 2006, until December 9, 2009, when his broker license was revoked and he was issued a restricted real estate salesperson license. Eanes was not affiliated with any broker after December 9, 2009. On June 10, 2010, Eanes's restricted real estate salesperson license was suspended indefinitely.

From January 20, 2006, through December 8, 2009, Eanes operated and managed a property management business under the fictitious business name Frankian Property Management. Frankian Property Management's business address was located at 55 Shaw Avenue, Suite 208, in Clovis, California. In operating this business, Eanes accepted or received funds in trust from or on behalf of owners, tenants, and others in connection with the leasing, renting, and collection of rents on real property or improvements thereon. Trust funds accepted or received by Eanes were deposited or caused to be deposited by him into a trust fund account maintained by him at the Clovis, California branch of Westamerica Bank, designated as "Kevin Scott Eanes Frankian Property Management Trust Fund Account." (Trust #2.) Three individuals were listed as authorized signatories for Trust #2; Eanes and his parents, A. Eanes and D. Eanes. His parents are both real estate brokers. After Eanes's broker license was revoked on December 9, 2009, and after he was issued a restricted real estate salesperson license, he nevertheless continued to receive deposits into Trust #2, the details of which will be discussed below.

7. Eanes was the employing broker for respondent Pogosyan from June 25, 2008, through December 21, 2009. Respondent Pogosyan worked as a paid part time employee (subject to withholding and receiving an annual W-2) for Eanes. Respondent Pogosyan worked at the Clovis office location.

8. After Eanes was issued a restricted real estate salesperson license on December 9, 2009, there was no longer any licensee associated with the Frankian Property Management fictitious business name. Eanes and respondent Pogosyan anticipated that respondent Pogosyan would obtain his real estate broker license and take over as the broker for Frankian Property Management. However, they needed a broker to serve in this capacity over the interim period before respondent Pogosyan received his broker license. Eanes and respondent Pogosyan approached respondent Nguyen and inquired whether he would be interested in becoming the broker of record for the property management business for two months until respondent Pogosyan obtained his broker's license. Respondent Nguyen initially refused, but after further discussions with Eanes and respondent Pogosyan, he agreed to this arrangement.

9. Respondent Nguyen became the employing broker for respondent Pogosyan on December 22, 2009. On that same date, respondents Nguyen and Pogosyan set up a new trust account for the property management business (Trust #3). Respondents Nguyen and Pogosyan were the only signatories for Trust #3. On January 25, 2010, respondent Nguyen notified the Department that he was using the fictitious business name of "Franklin Property

Management" (FPM) and that it would be at the same Clovis branch office location as Frankian Property Management. Respondent Nguyen received from Eanes, as consideration for being the broker for FPM, a check for \$5,000 in December 2009, and a second check for \$5,000, two months later. Respondent Nguyen averred that the two checks were written from Frankian Property Management's operating account, and not the trust accounts.

10. Respondent Nguyen noted that he was aware that Eanes's broker license had been revoked. He understood that the Department had disciplined Eanes for trust fund shortages, but he accepted Eanes's explanation that the shortages were a result of bad accounting and/or computer errors. Respondent Nguyen agreed to the broker arrangement because he anticipated that he would be respondent Pogosyan's employing broker for only two months. Respondent Nguyen was not Eanes's employing broker, and he sought to further separate himself from Eanes by doing the following: 1) obtaining the Clovis location branch office license; 2) acquiring the Franklin Property Management fictitious business name; 3) appointing respondent Pogosyan as his salesperson to perform licensed acts at the Clovis branch office; and 4) opening the separate trust account (Trust #3) for the collection of all rents received from January 2010 forward.

11. Commencing January 1, 2010, the parties intended for all existing security deposits to remain in Trust #2, but all new tenant security deposits received after January 1, 2010, were to be deposited into Trust #3. Similarly, all rents received in 2010 were to be deposited into Trust #3. The lone exception was Section 8 Housing Authority rent monies which had been automatically deposited into Trust #2. The monthly rent monies from the Housing Authority were between \$4,000 and \$5,000. The plan was to have these funds transferred from Trust #2 to Trust #3, rather than make separate arrangements with the Housing Authority for the rent monies to be directly deposited into Trust #3. Respondents Nguyen and Pogosyan agreed that Eanes would serve as the bookkeeper for both Trust #2 and Trust #3. Eanes also continued to be the "owner" of the property management business. Respondent Pogosyan explained that while respondent Nguyen was his employing broker, Eanes was his employer. As the owner of the business, Eanes directed respondent Pogosyan as to whom the disbursements against Trust #3 should be made payable.

12. Over the period January through May 2010, total rents of about \$366,000 were deposited into Trust #3. This included \$18,000 to \$22,000 in Housing Authority rent monies that were transferred from Trust #2 to Trust #3. During that same period, total rents of about \$80,000 were deposited into Trust #2, including the Housing Authority rent monies that were being transferred to Trust #3.

Respondent Pogosyan was authorized to sign checks on the FPM Trust #3 account. Whenever Eanes asked him for a check on the Trust #3 account, he would sign for them. Respondent Pogosyan never questioned Eanes. Eanes would tell him to whom checks were to be made, and for how much. Respondent Pogosyan also signed blank checks from the Trust #3 account for use by Eanes. He did this in the event Eanes needed a check when respondent Pogosyan was out of the office. Respondent Pogosyan placed his full trust in

Eanes, knowing that Eanes was the bookkeeper for Trust #3, the owner of the property management business and his employer.

13. Respondent Pogosyan received his broker license on April 14, 2010. However, he never became the broker of record for Frankian Property Management or for FPM. Respondent Pogosyan explained that when people started coming into the Clovis property management office and demanding money, he realized that something was not right. As a result, he discontinued his employment with the property management business. Respondent Pogosyan did make the Clovis office his main address as a broker from April 14, 2010, to May 14, 2010. By May 14, 2010, respondents Pogosyan and Nguyen both disassociated themselves from Eanes's property management business. Prior to leaving Eanes's employ, respondent Pogosyan pre-signed a number of blank Trust #3 account checks for use by Eanes.

14. Respondent Nguyen ceased being respondent Pogosyan's employing broker on April 13, 2010. Respondent Nguyen never paid respondent Pogosyan any money or other compensation. Respondent Nguyen discontinued using the Franklin Property Management fictitious business name, and using the Clovis property management office, on April 25, 2010.⁴ He closed the Trust #3 account on July 2, 2010.

Audit Findings – Nguyen

15. Anthony L. Boiteux, Department Auditor III, performed an audit of the accounting and other records of respondent Nguyen in relation to both Frankian Property Management and FPM. The audit was performed intermittently from June 3, 2010, to April 19, 2011. The audit period was from January 1, 2010, to April 25, 2010, regarding respondent Nguyen's trust fund liability for trust funds accepted by him that ended up being deposited to Trust #2 on or after January 1, 2010.⁵ And the audit period was from January 1, 2010, to May 28, 2010, regarding respondent Nguyen's trust fund handling, accountability, balances, and record keeping for Trust #3. The purpose of the audit was to determine

⁴ By earlier verbal agreement, respondent Nguyen had extended his arrangement to be the employing broker by two additional months, but in no event was he to do so later than April 25, 2010.

⁵ There was an additional audit period from January 1, 2009, to May 28, 2010, regarding respondent Nguyen's potential trust fund liability for security deposits or rents that were received by Eanes before respondent Nguyen began operations at the Clovis location for the amount on hand in Trust #2 at the January 1, 2010 start date for FPM. On December 31, 2009, there was a minimum shortage in Trust #2 in the amount of \$95,925.24. At that time, the balance on hand in Trust #2 was between \$2,568.41 and \$16,643.65. Although Mr. Boiteux hinted at respondent Nguyen being liable for Trust #2 funds on hand as of January 1, 2010, the Accusation allegations respecting respondent Nguyen only referenced shortages in Trust #3.

whether respondent Nguyen handled and accounted for trust funds in accordance with the Real Estate Law.

Trust Fund Shortages

16. A real estate broker who accepts funds belonging to others is required to deposit all those funds that are not immediately placed into a neutral escrow depository into a trust fund account maintained by the broker. All funds deposited by the broker into a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person or persons entitled to the funds. Respondent Nguyen began to accept trust funds for the property management business at the Clovis location on January 1, 2010. From that date, all rents, security deposits and owner contributions that were collected at the Clovis location represented funds of others received in trust, and respondent Nguyen was responsible for handling these trust monies as described above.

Per the parties' agreement all trust funds accepted at the Clovis location from January 1, 2010 forward were to be deposited into Trust #3. Excluding the Housing Authority rent monies, \$31,429.07 was deposited into Trust #2 between January 1, 2010, and April 25, 2010. Respondent Nguyen was responsible for accepting these trust funds at the Clovis location, and thereafter depositing these funds into Trust #3, or into a neutral escrow depository or the hands of his principals. He failed to do so.

17. Mr. Boiteux made a comparison of respondent Nguyen's trust fund accountability to the amount of trust funds that were actually in Trust #3 on five different dates. His Trust #3 audit findings are summarized below:

<u>Date</u>	<u>Adjusted Bank Balance</u>	<u>Accountability</u>	<u>Trust #3 Shortage</u>
1/29/10	\$5,072.68	\$35,163.06	\$30,090.38
2/26/10	\$(15,955.83)	\$46,350.82	\$62,306.65
3/31/10	\$(32,925.87)	\$45,669.62	\$78,595.49
4/30/10	\$(6,862.57)	\$60,654.62	\$67,517.19
5/28/10	\$(940.32)	\$72,607.78	\$73,548.10

Mr. Boiteux determined that respondent Nguyen failed to maintain funds in Trust #3 in such a way that he had "ever worsening shortages month-after-month from 1-29-2010 to 5-28-2010, when his total shortage was \$72,607.78. That means that Nguyen disbursed as the responsible broker (under Pogosyan's signature) at least \$72,607.78 in an unauthorized manner to persons who were not entitled to said funds." These disbursements were not made in accordance with the instructions of the persons entitled to the funds.

18. Mr. Boiteux explained that a number of the Trust #3 checks that were cashed were made out to persons related to properties whose bookkeeping account balances were negative. The appropriate handling of this situation would have been to stop payment on checks written against properties with negative bookkeeping account balances, and to also recover the shortages comprised of funds that had been disbursed without authorization to persons not entitled to them. The records reviewed by Mr. Boiteux established that unauthorized disbursements were being made over the audit period to the owners whose properties did not have the funds available for such disbursements. Mr. Boiteux characterized such disbursement of trust monies to one property that were taken from a different property as “robbing Peter to pay Paul.” It was also established that respondent Nguyen failed to get the written consent of every principal who was an owner of the funds in Trust #3 prior to each disbursement where the disbursements reduced the balance of funds in Trust #3 to an amount less than the aggregate trust fund liability.

The above matters having been considered, it was established that respondent Nguyen caused, suffered or permitted the balance of funds in Trust #3 to be reduced to amounts less than the liability of FPM over the period between January and June 2010.

Trust Fund Recordkeeping and Reconciliations

19. California Code of Regulations, title 10, section 2831 provides that brokers are required to keep a record of all trust funds received, and that this record shall set forth in chronological sequence the following information: 1) date trust funds received; 2) from whom trust funds received; 3) amount received; 4) date of deposit of trust funds; 5) check number and date of disbursement of trust funds; 6) identity of other depository and date funds were forwarded; and 7) daily balance of trust account. Compliance with the above requirements may be done through maintenance of journal records, or through automated data processing systems, including computer systems and electronic storage. Mr. Boiteux determined that respondent Nguyen did not maintain an accurate record of all trust funds received and disbursed from Trust #3. Neither he nor the bookkeeper (Eanes) maintained records. Eanes had to reconstruct records for Trust #3 “months after the transactions occurred.” In no case did the total of all the balances from the separate property records for Trust #3 equal the adjusted bank balance. (See Finding 17.)

20. California Code of Regulations, title 10, section 2831.1 provides that brokers are required to keep a separate record for each beneficiary or transaction, accounting for all funds deposited in trust. The record must include information sufficient to identify the transaction and the parties to the transaction, and the other information described above in Finding 19, set forth in chronological sequence. Respondent Nguyen did not maintain accurate separate records for each property or principal or beneficiary. It was established that he did not maintain such records at all.

21. California Code of Regulations, title 10, section 2831.2 provides that the balance of all separate beneficiary or transaction records maintained by brokers must be reconciled with the record of all trust funds received and disbursed, at least once a month,

and that the record of reconciliation must be maintained. At no time did respondent Nguyen prepare or maintain a reconciliation of the balance of all of the separate records with the record of all Trust #3 funds received and disbursed.

22. As noted in Finding 16, the parties agreed that all trust funds accepted at the Clovis location from January 1, 2010 forward were to be deposited into Trust #3. Excluding the Housing Authority rent monies, \$31,429.07 was deposited into Trust #2 between January 1, 2010, and April 25, 2010. Respondent Nguyen was responsible for accepting these trust funds at the Clovis location, and depositing these funds into Trust #3, or into a neutral escrow depository or the hands of his principals. He was also responsible for transferring other funds on hand in Trust #2 on January 1, 2010, into Trust #3. This amounted to somewhere between \$2,568.41 and \$16,643.65. (See footnote 4.) He failed to do either. Accordingly, it was established that respondent Nguyen failed to place trust funds in the hands of a principal on whose behalf the funds were received, into a neutral escrow depository, or into the Trust #3 account in conformance with law. (See Bus. & Prof. Code, § 10145; Cal. Code Regs., tit. 10, § 2832.)

Supervision

23. Brokers are required to exercise reasonable supervision over the activities of their salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage the handling of trust funds. (Cal. Code Regs., tit. 10, §2725.) The mishandling and unauthorized disbursement of funds from Trust #3 occurred at a time when respondent Nguyen was responsible for exercising reasonable supervision over the activities of respondent Pogosyan. The Trust #3 fund shortages, the failure to maintain proper and separate recordkeeping, the failure to perform trust reconciliations and the mishandling of trust funds all occurred when he was responsible for supervising respondent Pogosyan. He was aware that Eanes was the owner and bookkeeper for both Frankian Property Management and FPM. He was aware that Eanes's broker license had been revoked. Rather than heighten his concern and/or scrutiny of how Trust #3 funds were being managed by Eanes, he simply accepted Eanes's explanation that past trust shortages were the result of bad accounting and/or computer errors. He engaged in minimal oversight of the activities of respondent Pogosyan and Eanes. His minimal supervision of respondent Pogosyan resulted in additional violations discussed below relating to respondent Pogosyan's pre-signing blank checks, and not making immediate delivery of all trust funds into a trust fund account, as required. As noted in Finding 17, respondent Nguyen allowed ever worsening Trust #3 shortages between January and June 2010, when the shortage had increased to \$72,607.78.

For all the above reasons, it was established that respondent Nguyen failed to exercise reasonable supervision over the acts of respondent Pogosyan.

Audit Findings - Pogosyan

24. Mr. Boiteux also performed an audit of respondent Pogosyan for the period January 1, 2009, to May 28, 2010. The audit was performed to determine whether respondent Pogosyan met his trust fund handling responsibilities as a real estate salesperson over this period. Respondents Pogosyan and Nguyen were the only signatories for Trust #3. Only respondent Pogosyan signed checks. As noted earlier, Eanes directed respondent Pogosyan as to all disbursements from Trust #3, and it was the policy for respondent Pogosyan to pre-sign Trust #3 checks which Eanes would subsequently fill-in and disburse. When respondent Pogosyan left the property management business, he gave approximately 10 pre-signed blank checks from Trust #3 to Eanes, so that he could continue to disburse funds from Trust #3 after respondent Pogosyan was gone.

Complainant contends that respondent Pogosyan's conduct in providing Eanes blank checks constituted misrepresentation, fraud or dishonest dealing. Complainant suggested there was a misrepresentation because anyone looking at the check would believe that respondent Pogosyan knew who the payee was and that he wrote the check to that payee. Complainant further argued that by signing a blank check, respondent Pogosyan was complicit and a partner in the "fraudulent acts of Eanes" and that he helped cause the Trust #3 shortages. Respondent Pogosyan regularly resorted to providing Eanes, the business owner and bookkeeper, with blank checks. It became a normal business practice to allow Eanes to make disbursements from Trust #3 when Pogosyan was not in the office to sign checks. Pogosyan trusted Eanes to make appropriate disbursements. He did so in good faith, knowing that Eanes was the owner of the property management business and the bookkeeper. He was also Pogosyan's employer. Under these circumstances, his providing Eanes with blank checks did not constitute misrepresentation, fraud or dishonest dealing. One normally assumes that the one signing a check is aware of who the payee is. However, it is not uncommon for one signing a check to delegate to another the responsibility for completing other information on the check – including the payee and the amount.

25. That is not to say that respondent Pogosyan acted properly. His providing blank checks to Eanes demonstrated negligence or incompetence in performing an act for which he was required to hold a license. This is particularly true with respect to his providing Eanes with the blank checks at the time he knew he was discontinuing his employment with Eanes. After respondent Pogosyan left his employment, 39 checks with his signature were negotiated after April 20, 2010. Approximately \$42,000 in checks signed by respondent Pogosyan was negotiated after he had left the property management business.

Respondent Pogosyan essentially enabled Eanes to disburse the balance of Trust #3 funds in any manner he saw fit. Respondent Pogosyan knew that because Eanes was not a signatory on that account, he could only disburse Trust #3 funds through use of the signed blank checks. There was no evidence that respondent Pogosyan consulted with his respondent Nguyen, his supervising broker, or otherwise gave him notice that this was occurring. Respondent Pogosyan acknowledged that he knew things were not right when he discontinued his employment. (See Finding 13.) Yet, he provided Eanes with the means to

worsen the Trust #3 shortages. For all these reasons, his conduct in providing Eanes with signed blank checks constituted negligence or incompetence.

26. As noted in Finding 16, excluding the Housing Authority rent monies, \$31,429.07 was deposited into Trust #2 between January 1, 2010, and April 25, 2010. This occurred while respondent Pogosyan was responsible for accepting rents at the Clovis location and depositing them in Trust #3. Apparently, both respondent Pogosyan and Eanes made deposits of collected rents into one or both of the two trust accounts.

A real estate salesperson who accepts trust funds from others on behalf of the broker under whom he is licensed is required to immediately deliver the funds to the broker or into the custody of the broker's principal, or shall deposit the funds into the broker's trust fund account. Where respondent Pogosyan collected rents that he handed to Eanes with a deposit slip for either Trust #2 or Trust #3, he was responsible for ensuring that he did not hand over any of such funds to Eanes. Deposits of \$31,429.07 were made into Trust #2 while respondent Pogosyan was working as the real estate salesperson. Over that period, respondent Pogosyan was unaware that any funds were being deposited into Trust #2, except for the Housing Authority rent. Under these circumstances, it was established that respondent Pogosyan failed to immediately deliver all trust funds to his broker, respondent Nguyen, or into the custody of his broker's principal or a neutral escrow depository or deposit the funds (\$31,429.07) into the Trust #3 account.

Cost of Audit

27. At hearing, complaint requested that respondent Nguyen be ordered to pay the cost of Mr. Boiteux's audit. As explained in the Legal Conclusions, a real estate broker found to have violated Business and Professions Code section 10145 may be charged the costs associated with any audit.

Respondent Pogosyan's Evidence

28. Respondent Pogosyan viewed himself as Eanes's employee, both for Frankien Property Management and for FPM. He worked part time between June 2008 and April 2010, four hours per day. Everything he did was under the direction of, and per instructions from Eanes. He believed that Eanes managed the properties in good faith, and he trusted that disbursements from Trust #3 were needed for the properties being managed. He signed blank checks for Eanes's use so that landlords could get paid from Trust #3 funds in his absence. Respondent Pogosyan noted that a property owner had complained in the past when she could not be paid in his absence. He planned to become the employing broker over Eanes, but after becoming licensed in April 2010, he determined not to become associated with the business. He did not want to be involved in a business at a time when people were "demanding" to be paid.

Respondent Pogosyan averred that deposits were made as soon as possible into Trust #3 to cover expenses. Most of monies received, were initially handled by a receptionist,

Jennifer Bandoni, or by respondent Pogosyan. He believed monies were all being deposited into Trust #3, but understands that Eanes also made deposits of monies received at the office. He cannot say whether Eanes deposited monies into Trust #2. Respondent Pogosyan never made sure that all rent monies went through him. He acknowledged that he was physically present in the office only part time. He never instructed Ms. Bandoni that only he should be making the deposits. He does not recall telling respondent Nguyen about his giving signed blank checks to Eanes. He knew that Eanes had been disciplined by the Department, and that the property management business needed a broker.

29. Respondent Pogosyan understood that respondent Nguyen was his supervising broker. However, he had worked for two years with Eanes, understood Eanes to be the owner of the business and he took his instructions from Eanes. During an interview with Department special investigator Kim Kesterson on February 9, 2011, respondent Pogosyan indicated that he "basically worked as an assistant at the office" and that respondent Nguyen only came to the office a handful of times, and never reviewed any files. Respondent Pogosyan has expressed sorrow for those individuals who lost money, and averred that he was not aware what was going on at the time. He trusted that Eanes was keeping the books correctly and he therefore signed checks for Eanes as requested.

30. Respondent Pogosyan is not working as a real estate broker at this time. He is helping with his family's automotive business. He wishes to return to real estate work, but wanted to first resolve this matter. He noted that he has learned a great deal from this experience, and if he has real estate salespersons under him he will spend a lot of time supervising them.

Respondent Nguyen's Evidence

31. Respondent Nguyen regrets ever becoming involved in the property management business. He had only intended to be the broker of record for two months. He knew that Eanes had been a broker and was the owner of the business. He understood that Eanes and respondent Pogosyan had worked together in the property management business and he determined not to interfere with their relationship. Initially, he declined to become involved as the broker of record for the property management business. In hindsight, he believes that the whole matter "was clearly a set-up" and that he "took the bait." He attributed his involvement to "stupidity and the lack of experience on my part." Respondent Nguyen noted that he did some research on Eanes and read the Stipulation and Agreement that Eanes had entered into with the Department. He viewed Eanes as the owner of the business. He assumed that Eanes was honest, not engaging in overspending, and trying to make it right with the Department. When he created the Trust #3 account, he understood that all Trust #2 monies would be transferred to the Trust #3 except existing security deposits and Housing Authority rent monies. He did not arrange for Housing Authority monies to be deposited into Trust #3 because he anticipated the arrangement would only be for two months. Respondent Nguyen did not believe that having Eanes remain as a signatory on Trust #2 would be an issue, and he did not consider taking over Trust #2. He acknowledged

receiving \$10,000 as consideration for being the broker for the four months he acted in this role.

32. Respondent Nguyen averred that he made regular visits to the Clovis business location, and also spoke with respondent Pogosyan over the telephone. He noted that he did not set up any systems or procedures because he only intended to be the broker for a short time. He assumed that Frankien Property Management already had policies and procedures in place. He monitored Trust #3 activities online through a software system (Yardi). He could monitor rental income and note the names, amounts and dates of checks. However, he had no ability to associate transactions with properties, or to track separate records for individual trust beneficiaries or transactions. He was unaware that any rent monies were being deposited into Trust #2. He understood that Eanes was not authorized to write checks, but he was also aware that Eanes was the owner of the property management business and the bookkeeper for Trust #3. The fact that the Trust #3 balance was declining did not seem unusual to him, because he understood that it was not comprised of security deposits.

33. Respondent Nguyen has no desire or intention of becoming involved in property management again. He views his involvement with Frankien Property Management and FPM as a mistake. It was a situation where he admits to a "loss of control" and where he became involved with someone he knew little about. He could not believe all this transpired in a few short months. He has no other record of discipline with the Department.

Respondent Nguyen conducts both residential sales and mortgages from his office, Arquest Mortgage Solutions (AMS) and Arquest Realty Solutions (ARS). There is no trust account affiliated with AMS or ARS. All trust funds are handled directly through escrow. He closes one to two escrows per month. Respondent Nguyen was cooperative with the Department's investigator and auditor. He has not made payment in restitution of any Trust #3 fund shortages. Also considered were character reference letters submitted on his behalf.

Discussion

34. Respondents Nguyen and Pogosyan were perhaps unwitting participants in Eanes's unauthorized and reckless management of trust funds maintained in connection with Frankien Property Management and FPM. It resulted in significant trust fund shortages. Regardless of their lesser roles or good intentions, respondents were responsible for what occurred.

Respondent Nguyen

35. Respondent Nguyen can be faulted for too quickly hiring out his broker license without assuming either the oversight or attendant responsibility. It is clear that Eanes sought to continue undeterred in improper trust fund practices. When his broker license was revoked, he arranged, in exchange for \$10,000, to have respondent Nguyen's name associated as supervising broker over the property management business. The change from Frankian Property Management to Franklin Property Management appears to have been in

name only. Eanes continued as the “owner” of the business. He continued to be the bookkeeper for both trust accounts. He continued as the employer over respondent Pogosyan. And respondent Nguyen was complicit in all these arrangements. The creation of the separate Trust #3 account was of legal, but of no other practical significance. Eanes readily made disbursements from Trust #3 with no oversight by respondent Nguyen. He was provided with signed blank checks. Respondent Nguyen determined not to interfere with the relationship already established between Eanes and respondent Pogosyan, even though he was respondent Pogosyan’s employing broker. He considered Eanes to be the owner of the business, notwithstanding his attempt to appear separated from Eanes. (See Finding 10.) His supervision of respondent Pogosyan had no impact whatsoever on how the property management business was conducted. He was unaware of his obligations under Business and Professions Code section 10145 and related regulations on how to handle and maintain funds held in trust. His lack of oversight and knowledge of proper handling of trust funds enabled the trust violations to occur. The agreement entered into between respondent Nguyen and Eanes was akin to a sham arrangement to bridge the two months anticipated for respondent Pogosyan to obtain his broker license. Respondent Nguyen was aware of Eanes’s past record of discipline, and the fact that it involved mismanagement of trust funds. Under all these circumstances, appropriate discipline requires no less than revocation of his real estate broker license.

Respondent Nguyen should, if he makes application for same, be issued a restricted real estate salesperson license. It would not be contrary to the public interest for him to continue in real estate practice in such capacity, under the supervision of an employing broker.

Respondent Pogosyan

36. Respondent Pogosyan is currently licensed as a real estate broker, but his actions are best viewed in context of his being a real estate salesperson at that time. As noted in Finding 28, he considered himself throughout as Eanes’s employee and everything he did was under the direction of, and per instructions from Eanes. He believed that Eanes managed the properties in good faith, and he trusted that disbursements from Trust #3 were needed for the properties being managed. He did not engage in misrepresentation, fraud or dishonest dealing. His conduct in signing and providing Eanes with blank checks did constitute professional negligence and/or incompetence. Such conduct occurred at the outset of respondent Pogosyan becoming a licensed real estate broker, and boded poorly regarding his readiness to assume and perform the greater responsibilities associated with real estate brokers. He exercised poor judgment as a Department licensee, particularly regarding his role in the management of client trust funds as Eanes’s employee, and his providing signed blank checks to Eanes before leaving his employ.

Respondent Pogosyan was forthright and cooperative during the Department’s investigation and audit. He was a salaried employee and he did not benefit financially from the arrangement between the parties. He chose to disassociate himself from the property management business when it became more apparent that Eanes was not properly managing

trust funds. He averred that he has learned a great deal from this experience, and has a good understanding of what his obligations are as a licensee.

37. The above matters have been considered in addition to letters submitted on respondent Pogosyan's behalf. His conduct in providing signed blank checks resulted in significant trust fund shortages. While his actions were not purposeful and while he alone among the three derived no economic benefit by Eanes's actions, his conduct demonstrated that he should not be practicing as a licensed real estate broker at this time. He should, if he makes application for same, be issued a restricted real estate salesperson license. With additional time and experience, the Department might give positive consideration to any future application by respondent Pogosyan for re-licensure as a real estate broker.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. A real estate broker is "a person who, for compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others: ... (b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase, exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities." (Bus. & Prof. Code, § 10131, subd, (b).)

2. A real estate broker who accepts funds belonging to others in connection with a transaction subject to the Real Estate Law is required to deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account are required to be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds. (Bus. & Prof. Code, § 10145, subd. (a)(1); Cal. Code Regs., tit. 10, § 2832.) The written consent of every principal who is an owner of the trust funds shall be obtained by a broker prior to each disbursement if such disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the trust funds. (Cal. Code Regs., tit. 10, § 2832.1.)

3. A real estate broker shall keep records of all trust funds received, and such records 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) date of deposit of trust funds; 5) check number and date of disbursement of trust funds; 6) identity of other depository and date funds were forwarded; and 7) daily balance of trust account. (Cal. Code Regs., tit. 10, § 2831.)

Real estate brokers must maintain a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account. (Cal. Code Regs., tit. 10, § 2831.1.) The balance of all separate beneficiary or transaction records so maintained must be reconciled with the record of all trust funds received and disbursed, at least once a month. (Cal. Code Regs., tit. 10, § 2831.2.)

4. The Department may impose discipline where a broker has "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." (Bus. & Prof. Code, § 10177, subd. (h).) This includes broker supervision of the handling of trust funds. (Cal. Code Regs., tit. 10, § 2725.)

5. A real estate salesperson who accepts trust funds from others on behalf of his or her broker "shall immediately deliver the funds to the broker or, if so directed by the broker, shall deliver the funds into the custody of the broker's principal or a neutral escrow depository or shall deposit the funds into the broker's trust fund account." (Bus. & Prof. Code, § 10145, subd. (c).)

6. Pursuant to section 10177, the Commissioner may suspend or revoke the license of a real estate licensee who has engaged in any of the following acts:

[¶]...[¶]

(d) Willfully disregarded or violated the Real Estate Law or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law.

[¶]...[¶]

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

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

Cause for Discipline

7. The Department met its burden of establishing legal cause for disciplinary action against respondents' licenses by clear and convincing evidence by reason of the matters set forth in Factual Findings 15 through 26.⁶

Respondent Nguyen

8. Cause for revocation of respondent Nguyen's real estate broker license exists pursuant to Business and Professions Code sections 10145, subdivision (a)(1); and California Code of Regulations, title 10, sections 2832.1, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of the matters set forth in Findings 16 through 18 (Violation of the Real Estate Law: failure to obtain principal's written consent prior to reducing trust fund below aggregate trust fund liability).

9. Cause for revocation of respondent Nguyen's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2831, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of the matters set forth in Finding 19 (Violation of the Real Estate Law: failure to keep a columnar record in chronological sequence of all trust funds received and disbursed).

10. Cause for revocation of respondent Nguyen's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2831.1, in conjunction with Business and Professions Code sections 10145 and 10177, subdivision (d), by reason of the matters set forth in Finding 20 (Violation of the Real Estate Law: failure to keep a separate record for all trust beneficiaries or transactions).

11. Cause for revocation of respondent Nguyen's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2831.2, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of the matters set forth in Finding 21 (Violation of the Real Estate Law: failure to conduct monthly reconciliation of trust balance of all separate beneficiary or transaction records).

12. Cause for revocation of respondent Nguyen's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2832, in conjunction with Business and Professions Code sections 10145 and 10177, subdivision (d), by reason of the matters set forth in Finding 22 (Violation of the Real Estate Law: failure to place trust funds into hands of a principal or into broker's trust fund).

13. Cause for revocation of respondent Nguyen's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2725, in conjunction with

⁶ The Department has the burden of proving the facts alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects v. Smith* (1973) 32 Cal.App.3d 204.)

section 10177, subdivisions (g) and (h), by reason of the matters set forth in Finding 23 (Violation of the Real Estate Law: failure to exercise reasonable supervision).

Respondent Pogosyan

14. No cause for revocation of respondent Pogosyan's individual real estate broker license exists pursuant to Business and Professions Code sections 10176, subdivision (a), or 10177, subdivision (j), by reason of the matters set forth in Finding 24. It was not established that respondent Pogosyan made any substantial misrepresentation, or that he engaged in fraud or dishonest dealing.

15. Cause for revocation of respondent Pogosyan's individual real estate broker license exists pursuant to Business and Professions Code section 10177, subdivision (g), by reason of Findings 25 and 26 (negligence or incompetence).

16. Cause for revocation of respondent Pogosyan's individual real estate broker license exists pursuant to Business and Professions Code sections 10145, subdivision (c) and 10177, subdivision (g), by reason of Finding 26 (delivery of trust funds to broker's trust fund; negligence or incompetence).

Disciplinary Considerations

17. The matters set forth in Findings 28 through 37 have been considered. Respondent Nguyen provided only minimal supervision over the activities of respondent Pogosyan and was wholly unaware of how trust funds in connection with the property management business were being handled by Eanes and respondent Pogosyan. He was unaware of his obligations under Business and Professions Code section 10145 and related regulations on how to handle and maintain funds held in trust. His lack of oversight and knowledge of proper handling of trust funds enabled the trust violations to occur. Respondent Nguyen was aware of Eanes's past record of discipline, and the fact that it involved mismanagement of trust funds. At hearing, he lacked insight into the gravity of the violations, and did not take full responsibility for his actions. Under all these circumstances, appropriate discipline requires no less than revocation of his real estate broker license. However, it would not be contrary to the public interest for him to continue in real estate practice as a real estate salesperson.

18. Respondent Pogosyan, at a time when he had just become licensed as a real estate broker, was unable to conform his conduct to the requirements of the Real Estate Law. His conduct in providing signed blank checks resulted in significant trust fund shortages. While his actions were not purposeful and while he derived no economic benefit by Eanes's actions, his conduct demonstrated that he should not be practicing as a licensed real estate broker at this time. He should, if he makes application for same, be issued a restricted real estate salesperson license.

Audit Costs

19. Business and Professions Code section 10148, subdivision (b), provides in relevant part that the commissioner “shall charge a real estate broker for the cost of any audit, if the commissioner has found, ...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 Section 10145.”

Respondent Nguyen has violated section 10145 (Legal Conclusions 8, 10 and 12) and cause exists to discipline his real estate broker license based on violations of section 10145. Respondent Nguyen is therefore required to reimburse the Department for the cost of Mr. Boiteux’s audit within 60 days of the Department’s mailing a notice of billing as a matter of law. (Bus. & Prof. Code, § 10148, subs. (b) and (c).)

As respondent Pogosyan was a real estate salesperson at the time he was audited, and was not being audited for his actions as a real estate broker, he is not liable for the costs of the audit relating to him.

Restitution

20. The Department also seeks restitution of trust fund shortages. While the Trust #3 fund shortages were substantial, the record did not allow for precise calculation of such amounts at this time. Respondent Nguyen complains that amounts sought by way of restitution were largely reconstructed after the fact based in part on documentation and information supplied by Eanes, and based upon other assumptions relating to security deposits and how Eanes mishandled the two trust accounts. Until such sums are fixed, or otherwise negotiated between the Department and respondents, no order of restitution is made at this time. Should respondents later apply for reinstatement of their real estate broker licenses, it would be proper for the Department to consider what amount in restitution would be fair, and to require payment of such amount as a precondition to reinstatement of their revoked real estate broker licenses.

ORDER

Respondent Jonathan Duc Nguyen

All licenses and licensing rights of Jonathan Duc Nguyen under the Real Estate Law are REVOKED, pursuant to Legal Conclusions 8 through 13, jointly and individually. However, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 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 Business and Professions Code section 10156.7 and to

the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

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 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. 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. Respondent shall, prior to and as a condition of the issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in Business and Professions Code section 10170.5,

subdivision (a). Proof of satisfaction of this requirement includes evidence that respondent has successfully completed the trust fund account and handling continuing education course within 120 days prior to the effective date of the Decision in this matter.

7. 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.
8. As to respondent Nguyen only, pursuant to Business and Professions Code section 10148, respondent Nguyen shall pay the Commissioner's reasonable cost for: a) the audit which led to this disciplinary action. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work and per diem. Respondent Nguyen shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may, in his discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent Nguyen and the Commissioner. The vacation and the set aside of the stay shall remain in effect until payment is made in full, or until respondent Nguyen enters into an agreement satisfactory to the Commissioner to provide for payment. Should no order vacating the stay be issued, the stay imposed herein shall become permanent.

Respondent Kevin Gevork Pogosyan

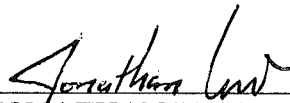
All licenses and licensing rights of Kevin Gevork Pogosyan under the Real Estate Law are REVOKED, pursuant to Legal Conclusions 15 and 16, jointly and individually. However, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 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 Business and Professions Code section 10156.7 and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

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 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. 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. Respondent shall, prior to and as a condition of the issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in Business and Professions Code section 10170.5, subdivision (a). Proof of satisfaction of this requirement includes evidence that respondent has successfully completed the trust fund account and handling continuing education course within 120 days prior to the effective date of the Decision in this matter.
7. 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.

DATED: January 22, 2013



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings