

FILED

OCT 22 2013

BUREAU OF REAL ESTATE
By *L. Frost*

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
)
CHARLES NELSON MACKLEY,)
)
)
Respondent.)
_____)

NO. H-2754 FR
OAH NO. 2012070919

DECISION

The Proposed Decision dated September 17, 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 NOV 12 2013.

IT IS SO ORDERED OCT 21 2013

REAL ESTATE COMMISSIONER



Wayne S. ...

By: **JEFFREY MASON**
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
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In the Matter of the Accusation of:

CHARLES NELSON MACKLEY,

Respondent.

Case No. H-2754 FR

OAH No. 2012070919

PROPOSED DECISION

On August 26, 2013, in Sacramento, California, Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Annette E. Ferrante, Counsel, represented the complainant, Phillip Ihde, Deputy Real Estate Commissioner.

Charles Nelson Mackley (respondent), was present, and was represented by Steven C. Vondran, Attorney at Law.

Evidence was received. The matter was submitted and the record was closed on August 26, 2013.

FACTUAL FINDINGS

1. On May 23, 2012, Phillip Ihde filed the Accusation in his official capacity.
2. Respondent timely filed a Request for Hearing pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

3. On June 29, 1973, the Bureau of Real Estate (Bureau), formerly the Department of Real Estate,¹ issued real estate broker's license number 00316367 to respondent. As of January 1, 2008, respondent had the following fictitious business names registered with the Bureau: Real Estate Outlet; Mackley & Associates; Executive Financial Services; Real Property Management TriCounties & Real Estate; and The Real Estate Network.

4. On January 28, 2010, the Bureau began an audit of respondent's brokerage office, located at West Laurel Drive #69, Salinas, California. The audit was conducted intermittently to February 17, 2010, and cost the Bureau \$8,151.

5. The Bureau auditor, Jayendra Barbhaiya, examined a sample of respondent's accounting and banking records for the period January 1, 2008 to December 31, 2009 (audit period), to determine whether respondent handled accounting and trust funds in accordance with Real Estate Law and the Commissioner's Regulations.

Respondent's Business Activities

6. Mr. Barbhaiya determined that, during the audit period, respondent engaged in residential resale, loan modification, and property management activities as follows:

Residential Resale Activities. From January 1, 2009 to December 31, 2009, respondent closed approximately 89 listing transactions and 45 sales transactions with an aggregate value of approximately \$21.7 million.

Loan Modification/Renegotiation Activities. From April 14, 2009 to October 10, 2009, respondent collected advance fees of \$4,650 from six borrowers. Out of the six loan modification applications, respondent obtained loan modifications for two borrowers, and was unsuccessful in obtaining a loan modification for one borrower. The remaining three loan modifications were still in process. According to respondent, he stopped doing loan modification for new clients on October 10, 2009.

Property Management Activities. Respondent indicated to Mr. Barbhaiya that he was engaged in property management activities until August 31, 2009. Sigifredo Ponce, a licensed salesperson working under respondent's broker license, owned the property management business. Mr. Ponce subsequently obtained his own broker license in August 2009, and disassociated himself and his property management business from respondent. Effective September 1, 2009, Mr. Ponce engaged in property management activities under his broker license.

¹ Effective July 1, 2013, the Department of Real Estate became the Bureau of Real Estate under the Department of Consumer Affairs pursuant to the Governor's Reorganization Plan of 2012.

7. Mr. Barbhaiya determined that respondent maintained one trust account and five bank accounts, as follows:

TRUST ACCOUNT # 1	
Bank Name and Location:	Bank of America, 405 Main Street, Salinas, CA 93901
Account No. (Last 4 Digits):	4822
Entitled:	"Charles N. Mackley Sole Proprietor, dba Executive Financial Services Trust Account"
Signatories:	Charles N. Mackley (REB ²)
Purpose and Disposition of Account:	Used for deposits and disbursements of advance fees in connection with loan modifications.

BANK ACCOUNT # 1	
Bank Name and Location:	Bank of America, 800 Northridge Shopping Center, Salinas, CA 93906
Account No. (Last 4 Digits):	1212
Entitled:	"Real Property Management TriCounties LLC"
Signatories:	Adoracion Lopez (RES ³) Sigifredo G. Ponce (RES)
Purpose and Disposition of Account:	Used for deposits and disbursements related to property management activities for owners with last names starting with "A" through "F".

BANK ACCOUNT # 2	
Bank Name and Location:	Bank of America, 800 Northridge Shopping Center, Salinas, CA 93906
Account No. (Last 4 Digits):	1410
Entitled:	"Real Property Management TriCounties LLC"
Signatories:	Adoracion Lopez (RES) Sigifredo G. Ponce (RES)
Purpose:	Used for deposits and disbursements related to property management activities for owners with last names starting with "G" through "L".

² Real Estate Broker.

³ Real Estate Salesperson.

BANK ACCOUNT # 3	
Bank Name and Location:	Bank of America, 800 Northridge Shopping Center, Salinas, CA 93906
Account No. (Last 4 Digits):	1434
Entitled:	“Real Property Management TriCounties LLC”
Signatories:	Adoracion Lopez (RES) Sigifredo G. Ponce (RES)
Purpose	Used for deposits and disbursements related to property management activities for owners with last names starting with “M” through “Q”.

BANK ACCOUNT # 4	
Bank Name and Location:	Bank of America, 800 Northridge Shopping Center, Salinas, CA 93906
Account No. (Last 4 Digits):	1514
Entitled:	“Real Property Management TriCounties LLC”
Signatories:	Adoracion Lopez (RES) Sigifredo G. Ponce (RES)
Purpose	Used for deposits and disbursements related to property management activities for owners with last names starting with “R” through “Z”.

BANK ACCOUNT # 5	
Bank Name and Location:	Bank of America, 800 Northridge Shopping Center, Salinas, CA 93906
Account No. (Last 4 Digits):	8055
Entitled:	“Real Property Management TriCounties LLC”
Signatories:	Adoracion Lopez (RES) Sigifredo G. Ponce (RES)
Purpose	Used for deposits of rents received from the Housing Authority under the Section 8 program and disbursements to relevant bank accounts of the owners of the properties.

8. On November 25, 2009, Mr. Barbhaiya prepared a bank reconciliation for Trust Account #1. On August 31, 2009, Mr. Barbhaiya prepared bank reconciliations for Bank Account #'s 1, 2, 3, and 4. Respondent failed to provide a control record and separate beneficiary records for Bank Account #5, therefore, Mr. Barbhaiya was unable to perform a bank reconciliation for that account.

Failure to Designate Bank Accounts as Trust Accounts in Name of Broker

9. Mr. Barbhaiya determined that, during the audit period, respondent failed to properly designate Bank Account #'s 1, 2, 3, 4, and 5 as trust accounts in respondent's name or his fictitious business name, as trustee. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2832.)

Account Shortages

10. Trust Account #1. Mr. Barbhaiya found no shortages in Trust Account #1 during the audit period.

11. Bank Account #1. Mr. Barbhaiya determined that, during the audit period, a shortage of \$6,269.57 occurred. \$62.36 of the \$6,269.57 shortage was caused by a negative balance in the "Federico, Arthur and Dolores" account. The remaining shortage of \$6,207.21 could not be identified. Mr. Barbhaiya found that respondent failed to maintain separate records for unidentified and unaccounted funds. He further found that respondent provided no evidence that the owners of the trust funds gave their written consent to allow him to reduce the balance of the funds to an amount less than the existing aggregate account liabilities. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2832.1.)

12. Bank Account #2. Mr. Barbhaiya determined that, during the audit period, a shortage of \$987 occurred due to a negative balance in the "Hua, Jenifer" account. Mr. Barbhaiya found that respondent failed to maintain separate records for unidentified and unaccounted funds. He further found that respondent provided no evidence that the owners of the trust funds gave their written consent to allow him to reduce the balance of the funds to an amount less than the existing aggregate account liabilities. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2832.1.)

13. Bank Account #3. Mr. Barbhaiya determined that, during the audit period, a shortage of \$72.59 occurred, but he could not determine why. Mr. Barbhaiya found that respondent failed to maintain separate records for unidentified and unaccounted funds. He further found that respondent provided no evidence that the owners of the trust funds gave their written consent to allow him to reduce the balance of the funds to an amount less than the existing aggregate account liabilities. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2832.1.)

14. Bank Account #4. Mr. Barbhaiya found no shortages in Bank Account #4 during the audit period.

15. Bank Account #5. Mr. Barbhaiya could not determine whether there were shortages due to respondent's failure to provide a control record for this account.

Failure to Obtain Signatory Authority for Bank Accounts

16. Mr. Barbhaiya determined that, during the audit period, respondent was not designated as a signor for Bank Account #'s 1, 2, 3, 4, and 5. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2834.)

Failure to Maintain Records of All Trust Funds Received and Disbursed

17. Mr. Barbhaiya determined that, during the audit period, respondent's accounting records for Bank Account #'s 1 through 4 were inadequate as control records. Control records are all records of trust funds received and disbursed. The accounting records failed to set forth: (1) from whom trust funds were received; (2) with respect to trust funds received previously deposited into an account, check number of related disbursement; and (3) daily running balance of the account. With respect to Bank Account #5, respondent failed to maintain all records of trust funds received and disbursed. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2831.)

Failure to Maintain Separate Records for Each Beneficiary of Trust Funds

18. Mr. Barbhaiya determined that, during the audit period, respondent failed to maintain and complete accurate and separate records for each beneficiary of trust funds accepted or received for Bank Account #'s 1 through 4. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2831.1.) The accounting records did not set forth check numbers of each related disbursement and did not include information sufficient to identify the transactions and the parties to the transactions. Respondent also failed to maintain separate records for unidentified and unaccounted funds for Bank Account #'s 2 and 4. With respect to Bank Account #5, respondent failed to maintain any separate records for each beneficiary of trust funds accepted or received. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2831.1.)

19. Mr. Barbhaiya determined that, during the audit period, respondent failed to maintain a separate beneficiary record for unidentified deposits totaling \$4,170.32 in Bank Account #4 as of August 31, 2009. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2831.1.)

Failure to Perform and Maintain Bank Reconciliations

20. Mr. Barbhaiya determined that, during the audit period, respondent failed to perform and maintain reconciliations of the total of separate beneficiary records with a control record on at least a monthly basis for Trust Account #1 for the period of August 1, 2009 through December 31, 2009, and for Bank Accounts #1, #2, #3, and #4 for the period of January 1, 2009 through August 31, 2009. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2831.2.)

Failure to Deposit Trust Funds

21. Mr. Barbhaiya determined that, during the audit period, respondent failed to deposit trust funds in the amount of \$3,630.00 received from tenant M. Hale within three business days following receipt of the funds. (Bus. & Prof. Code §10145; Cal. Code of Regs., tit. 10, § 2832.)

Failure to Retain Copies of Cancelled Checks for Three Years

22. Mr. Barbhaiya determined that, during the audit period, respondent failed to retain for three years both front and back copies of all cancelled checks issued on Bank Accounts #1, #2, #3, #4 and #5. (Bus. & Prof. Code §10148.)

Collection and Retention of Unearned Fees

23. Mr. Barbhaiya determined that, during the audit period, respondent collected and retained unearned fees and/or compensation in the amount of \$30 in August 2009 from homeowner Badke in connection with payment for carpet cleaning services, and failed to disclose the collection of this compensation to the homeowner. (Bus. & Prof. Code §§ 10148, 10145, subd. (a)(1); and 10176, subd. (g).)

24. Mr. Barbhaiya determined that, during the audit period, respondent collected and retained unearned fees and/or compensation in the amount of \$150 in June 2009 from homeowner Patobannon in connection with payment for repair of stairs, and failed to disclose the collection of this compensation to the homeowner. (Bus. & Prof. Code §§ 10145, subd. (a)(1) and 10176, subd. (g).)

Failure to Retain and Make Available for Inspection Salesperson License Certificates

25. Mr. Barbhaiya determined that, during the audit period, respondent failed to retain and to make available for inspection by the Department's designated representative original salesperson license certificates of Buenaventura M. Batobato and Rosalie M. Laroco. (Bus. & Prof. Code §§ 10160; Cal. Code of Regs., tit. 10, § 2753.)

Failure to Record Trust Funds in Form of Earnest Money Deposit

26. Mr. Barbhaiya determined that, during the audit period, respondent failed to record trust funds in the form of an earnest money deposit in the amount of \$3,715.50 received from prospective buyers Jim and Donna L. and its disposition on a record of trust funds received and not placed in broker's trust account. (Bus. & Prof. Code § 10145; Cal. Code of Regs., tit. 10, § 2831, subd. (a)(6).)

27. Mr. Barbhaiya determined that, during the audit period, respondent misrepresented to the owners of the following properties that an earnest money deposit was obtained from the following buyers and was being held by respondent when the buyers made the offer on the properties, while the true facts were that respondent had received no funds from the buyers when the buyers made their offers on the properties. (Bus. & Prof. Code §§ 10176, subds. (a), (b), and (i); 10177, subds. (g) and (j).)

Buyer Name	Property Address	Earnest Money Deposit Amount
Rogelio H.	713 Jersey Drive	\$3,000
Jose T.	1914 Bradbury	\$1,000

Evidence in Mitigation, Aggravation, and Rehabilitation

28. Respondent is 79 years old. He has worked in the real estate business for 40 years with no complaints. He acknowledged that his role as a broker is to ensure that his agents comply with California Real Estate Law. He admitted to the truth of the charges in the Accusation.

29. Respondent is no longer engaged in property management activities. He allowed Mr. Ponce and Ms. Lopez to run the property management business under his real estate broker's license. He asserted that he was not aware of the shortages in the bank accounts because he did not check on them. He never asked Mr. Ponce and Ms. Lopez about the status of the accounts because they took care of the property management business and did everything themselves. He asserted that Mr. Ponce and Ms. Lopez told him that the shortages occurred because of bookkeeping errors, and that the errors were corrected in a few days. Respondent did not know how the shortages were corrected. He admitted that all of the record keeping, signatories, and shortages in the property management accounts were his responsibility, and that he "should have kept track." He allowed Mr. Ponce and Ms. Lopez to run the property management business for approximately a year and a half. Respondent asserted that he originally hired Mr. Ponce and Ms. Lopez as real estate salespersons. He agreed to be their broker for the property management business until Mr. Ponce obtained his broker's license so that Mr. Ponce could run the property management business on his own. In retrospect, respondent regretted his decision to be the broker for the property

management business. He was “just trying to be a nice guy” by “helping them out.” Respondent asserted that he did not profit from the property management business.

30. With regard to the real estate sales side of the business, respondent testified that his real estate salespersons Mr. Batobato and Ms. Laroco had difficulty in obtaining their real estate license certificates. He further testified that he could “look up” their licenses at the BRE. He did not seem to appreciate that the Bureau required him to retain the license certificates of his salespersons at his business office, for the purposes of inspection by the Bureau, and informing the Bureau and the public of who is working for him at any given time. In addition, with regard to receipt of the earnest money deposits from buyers Rogelio H. and Jose T., respondent testified that the deposits should have been reported on the trust fund records, in that each agent “has their own password,” and the information “should have been there.” Respondent asserted that the checks from the buyers were received at the time the offers were made, because his “salespersons would show [the checks] to [him].” However, the evidence established that the earnest money deposits were not provided by the buyers at the time the buyers’ offers were made. Therefore, respondent’s testimony was not credible in this regard.

31. Respondent maintains that to be reduced to a real estate salesperson at this point in his life “is impossible.” He asserted that too many people rely upon him for employment and support. He asserted that his age does not hamper his ability to engage in the real estate business. He maintained that he will never allow anyone to use his broker’s license to conduct any business. Respondent was straightforward and honest about his admission to the truth of the Bureau’s allegations. He admitted that he did not properly supervise and manage the property management business as he should have.

Respondent's Witnesses

32. Roger Campbell testified on respondent’s behalf. Mr. Campbell met respondent in 1995. They attended the same church in Salinas and began a friendship. In 2004, Mr. Campbell became the bishop of the congregation, and became responsible for the “spiritual and physical well-being” of the church. Mr. Campbell testified that he has had occasion to evaluate respondent’s character as a real estate broker. Mr. Campbell has a background in construction, and looked to respondent as a mentor in buying and renting properties in order build his own business. From 2010 to 2012, respondent handled six real estate transactions for Mr. Campbell. Respondent demonstrated a high level of professionalism and integrity in performing these transactions. Mr. Campbell stated that he had no reason to question respondent’s honesty and integrity. Mr. Campbell intends to do future real estate business with respondent.

33. Paul Stahlman testified on respondent’s behalf. He has known respondent since 1975. They also attended the same church, and interacted at church

social events. He has known respondent as a friend, father, and husband. He has not had any real estate dealings with respondent, but has known respondent to be honest, straightforward, prepared, and knowledgeable. He did not know the facts and circumstances of allegations against respondent in this matter, but if he needed to conduct real estate business, he would use respondent.

34. RJ Moyer testified on respondent's behalf. He moved into the same office complex as respondent approximately 10 years ago. Mr. Moyer stated that with respondent "having a real estate office, he patrols the area and walks around. He walked in one day and introduced himself." Mr. Moyer owns a loan business, and holds notary, insurance, and real estate salesperson licenses. Mr. Moyer began selling real estate under respondent's broker license. He has done this "on and off" for the past ten years. He has observed respondent as a dedicated worker, who "shows up almost seven days a week." Respondent has "beyond a passion for real estate," and has "an immense amount of knowledge." Mr. Moyer stated that respondent's business style and approach to real estate is "being ahead of the curve." At the time Mr. Moyer met respondent, respondent was a Real Estate Owned (REO) Specialist. Mr. Moyer admired that respondent was engaging in REO business before it became known in the real estate industry. Mr. Moyer stated that respondent "took me under his wing" and "threw me into the fire." Respondent's desk was directly behind Mr. Moyer, and respondent served as Mr. Moyer's "coach." Mr. Moyer described respondent as a great real estate teacher. Mr. Moyer received a policy and procedure manual from respondent, and stated that respondent is very meticulous about "doing it by the book." Mr. Moyer stated that there is no question about respondent's honesty and integrity, and that he is one of "the most transparent people that you will ever know." Respondent is a well-known real estate businessman in the Salinas and Monterey Peninsula area. Mr. Moyer did not indicate whether he knew of the facts and circumstances of the allegations in this case.

35. Marvin Cohen testified on respondent's behalf. Mr. Cohen has worked in the same office complex as respondent since 2002. Mr. Cohen has not engaged directly with respondent in real estate transactions, but his partner has. Mr. Cohen stated that there were no problems or incidents involving the transactions. Mr. Cohen stated that he and respondent are in their 70's. He has observed respondent giving "young people" an opportunity in the real estate business and helping them become good sales agents. He has observed respondent giving guidance to Mr. Ponce and Ms. Lopez. Mr. Cohen stated that respondent trusted Mr. Ponce and Ms. Lopez to the point that he did not supervise them "100 percent." Mr. Cohen had no doubts about respondent's competence as a broker.

36. The testimony of respondent's witnesses was compelling and credible, and in this regard, their testimony is given great weight. All have known respondent for a long period of time. With the exception of Mr. Stahlman, respondent's witnesses directly observed respondent in his business dealings as a real estate broker. His witnesses may not have known the true extent of the charges against respondent,

but despite the Bureau's case against respondent, his witnesses fully support respondent as a competent real estate broker who is well regarded in the community.

Character Reference Letters

37. Respondent submitted five character reference letters which were received in evidence and considered to the extent permitted by Government Code section 11513, subdivision (d).⁴ They are summarized as follows:

- a. Kenneth Anderson moved to Salinas in 1983, when he was an army officer working as the clinic chief at the Optometry Clinic at Fort Ord. He met respondent and his wife at that time. They attended the same church, and over the years, Mr. Anderson got to know respondent. Mr. Anderson described respondent as a person with high standards, and one who has a desire to do what is right and honest. Mr. Anderson developed a trusting relationship with respondent, and he would not hesitate in supporting respondent in any of his activities.
- b. Mel D. White, another fellow church member, has known respondent since 2000. Mr. White stated that respondent has always dealt with him honestly, that he considers respondent to be of good character, and that respondent has personal integrity.
- c. Roger Reinsch, another fellow church member, has known respondent since 1998. Mr. Reinsch stated that respondent has always been helpful in answering his mortgage questions, and that respondent educated his son on home buying. Mr. Reinsch has always found respondent to be of good character and positive integrity.
- d. Michael Laroco has been a realtor under respondent's broker's license. Mr. Laroco stated that respondent has been professional and ethical with all of the real estate transactions where Mr. Laroco has been the agent. Mr. Laroco did not indicate the number of real estate transactions he conducted with respondent.
- e. Sandy Haney, Chief Executive Officer of the Monterey County Association of Realtors (MCAR), stated that respondent has been a

⁴ Government Code section 11513, subdivision (d), provides, in pertinent part, that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions"

member of MCAR since 2005, and prior to their merger, respondent was a member of the Salinas Association of Realtors for many years. Ms. Haney stated that respondent is currently in good standing with MCAR, with no recorded ethics violations or unpaid financial obligations.

38. The character reference letters are also given considerable weight. Respondent's longtime personal friends and fellow church members attested to respondent's good character and honesty. The board of realtors attested to respondent's good standing in the real estate community. Mr. Laroco's letter is given less weight, in that he works for respondent, and has an interest in respondent retaining his broker's license.

Evidentiary Conclusions

39. Respondent, while operating as a real estate brokerage, was obliged to establish and maintain client trust accounts, in accordance with statutes and regulations which govern these accounts. Here, the evidence established that: 1) respondent allowed shortages in the accounts to occur; failed to maintain and complete accurate records of those accounts; 2) failed to perform reconciliations of those accounts; 3) failed to deposit trust funds; and 4) failed to retain for three years copies of cancelled checks; and collected and retained unearned fees.

On the real estate side of the business, the evidence further established that respondent: 1) failed to retain and make available for inspection the original salesperson license certificates for two salespersons; 2) failed to record trust funds in the form of an earnest money deposit; and 3) misrepresented to the owners of two properties that earnest money deposits were obtained from the buyers when, in fact, they were not.

The evidence also established that respondent failed to exercise reasonable supervision and control over the activities of his employees. Respondent admitted that, as the broker, he was responsible for the activities of the property management business. He acknowledged that he should have monitored the property management activities much closer. He testified that he made a mistake, and should not have agreed to be the broker for the property management business. However, he did not regret "helping out" Mr. Ponce and Ms. Lopez.

40. Respondent's failure to establish and maintain client trust accounts for the property management business and to use only licensed and bonded signatories on said accounts left his clients vulnerable to theft, attachment and mismanagement of their funds. As a result of respondent's failure to establish and maintain the client trust accounts, clients had no method of ascertaining their balances, the Bureau had no means of ascertaining whether a client's balance was correct and the Department had no means to reconcile the account. On two occasions Mr. Ponce and Ms. Lopez

collected and retained unearned fees for property maintenance repair without the homeowners' knowledge. Additionally, respondent's failure to provide the Bureau with salesperson license certificates prevented the Bureau and the public from obtaining information regarding salespersons employed by respondent.

Costs

41. Complainant has requested reimbursement for costs incurred by the Bureau in connection with prosecution and investigation of this matter, in the total amount of \$978.55. (\$885.55 for prosecution, and \$93 for investigation.) The investigation costs were calculated at 1.5 hours x \$62/hour, for a total of \$93. The total costs of prosecution and investigation were \$978.55. The costs were certified in the manner provided by Business and Professions Code section 10106. The time spent appears to be reasonable, and the activities claimed were necessary to the development and presentation of the case. Respondent did not present evidence regarding his ability to pay costs of prosecution and investigation.

42. In addition, complainant has requested \$8,151 for reimbursement of audit costs pursuant to Business and Professions Code section 10148, subdivision (b). In determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers. The audit costs were calculated at 143 hours x \$57/hour, for a total of \$8,151.

LEGAL CONCLUSIONS

1. As set forth in the Findings, respondent dba Real Estate Outlet, Mackley & Associates, Executive Financial Services, Real Property Management TriCounties & Real Estate, and The Real Estate Network, engaged in the business of a real estate broker within the meaning of Business and Professions (B&P) Code section 10131, subdivisions (a), (b), and (d), which provide in pertinent part:

A real estate broker within the meaning of this part is a person who, for a 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 others:

- (a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(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 or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

[¶] ... [¶]

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

2. B&P Code section 10131.2 provides:

A real estate broker ... is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee in connection with any employment undertaken to promote the sale or lease of real property or of a business opportunity by advance fee listing, advertisement or other offering to sell, lease, exchange or rent property or a business opportunity, or to obtain a loan or loans thereon.

3. B&P Code section 10177, subdivisions (d) and (g) provide in pertinent part:

The commissioner may suspend or revoke the license of a real estate licensee... who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

[¶] ... [¶]

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the

commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

[¶] ... [¶]

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

[¶] ... [¶]

4. B&P Code section 10145, subdivisions (a) and (g) provide in pertinent part:

- (a) (1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part 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. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

[¶] ... [¶]

- (g) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds.

5. B&P Code section 10148 provides in pertinent part:

- (a) A licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or obtained by him in connection with any transactions for which a real estate broker license is required ...
- (b) 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.

[¶] ... [¶]

6. B&P Code section 10176, subdivisions (a), (b), and (i), provide in pertinent part:

The commissioner may, upon his or her own motions, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

- (a) Making any substantial misrepresentation.
- (b) Making any false promises of a character likely to influence, persuade or induce.

[¶] ... [¶]

- (i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

Cause for Discipline

7. Cause for discipline of respondent's real estate broker license was established pursuant to B&P Code section 10177, subdivision (d), and/or 10177, subdivision (g), in conjunction with B&P Code section 10145, by reason of Findings 9 to 24, in that respondent, by and through the actions of Mr. Ponce and Ms. Lopez, willfully disregarded or violated the Real Estate Law as follows: failure to designate bank accounts as trust accounts in the name of the broker (Cal. Code Regs., tit. 10, §

2832⁵); causing shortages in account balances without prior written consent of the owner (Cal. Code Regs., tit. 10, § 2832.1⁶); failure to obtain signatory authority for

⁵ California Code of Regulations, title 10, section 2832, provides:

(a) Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson.

(b) Except as expressly provided by subdivision (d) of Section 10145 of the Code or by a regulation in this article, the account into which the trust funds are deposited shall not be an interest-bearing account for which prior written notice can by law or regulation be required by the financial institution as a condition to the withdrawal of funds.

(c) A check received from the offeror may be held uncashed by the broker until acceptance of the offer if:

(1) the check by its terms is not negotiable by the broker or if the offeror has given written instructions that the check shall not be deposited nor cashed until acceptance of the offer and

(2) the offeree is informed that the check is being so held before or at the time the offer is presented for acceptance.

(d) In these circumstances if the offeror's check was held by the broker in accordance with subdivision (c) until acceptance of the offer, the check shall be placed into a neutral escrow depository or the trust fund account, or into the hands of the offeree if offeror and offeree expressly so provide in writing, not later than three business days following acceptance of the offer unless the broker receives written authorization from the offeree to continue to hold the check.

(e) Notwithstanding the provisions of subdivisions (a) and (d), a real estate broker who is not licensed under the Escrow Law (Section 17000, et seq., of the Financial Code) when acting in the capacity of an escrow holder in a real estate purchase and sale, exchange or loan transaction in which the broker is performing acts for which a real estate license is required shall place all funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than the next business day following receipt of the funds by the broker or by the broker's salesperson.

bank accounts (Cal. Code Regs., tit. 10, § 2834⁷); failure to maintain control records (Cal. Code Regs., tit. 10, § 2831⁸); failure to maintain separate records for each

⁶ California Code of Regulations, title 10, section 2832.1, provides:

The written consent of every principal who is an owner of the funds in the account shall be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds.

⁷ CCR title 10, section 2834 provides:

(a) Withdrawals may be made from a trust fund account of an individual broker only upon the signature of the broker or one or more of the following persons if specifically authorized in writing by the broker:

- (1) a salesperson licensed to the broker.
- (2) a person licensed as a broker who has entered into a written agreement pursuant to section 2726 with the broker.
- (3) an unlicensed employee of the broker with fidelity bond coverage at least equal to the maximum amount of the trust funds to which the employee has access at any time.

¶¶ ... ¶¶

(c) An arrangement under which a person enumerated in paragraph (1), (2) or (3) of subdivision (a) above is authorized to make withdrawals from a trust fund account of a broker shall not relieve an individual broker, or the broker-officer of a corporate broker licensee, from responsibility or liability as provided by law in handling trust funds in the broker's custody.

⁸ CCR title 10, section 2831 provides in pertinent part:

(a) Every broker shall keep a record of all trust funds received, including uncashed checks held pursuant to instructions of his or her principal. This record, including records maintained under an automated data processing system, shall set forth in chronological sequence the following information in columnar form:

- (1) Date trust funds received.
- (2) From whom trust funds received.
- (3) Amount received.
- (4) With respect to funds deposited in an account, date of said deposit.
- (5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.

beneficiary of trust funds accepted or received (Cal. Code Regs., tit. 10, § 2831.1⁹); failure to maintain a separate beneficiary record for unidentified deposits (Cal. Code

(6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.

(7) Daily balance of (a) Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson.

[¶] ... [¶]

(c) A check received from the offeror may be held uncashed by the broker until acceptance of the offer if

(1) the check by its terms is not negotiable by the broker or if the offeror has given written instructions that the check shall not be deposited nor cashed until acceptance of the offer and

(2) the offeree is informed that the check is being so held before or at the time the offer is presented for acceptance.

(d) In these circumstances if the offeror's check was held by the broker in accordance with subdivision (c) until acceptance of the offer, the check shall be placed into a neutral escrow depository or the trust fund account, or into the hands of the offeree if offeror and offeree expressly so provide in writing, not later than three business days following acceptance of the offer unless the broker receives written authorization from the offeree to continue to hold the check.

⁹ CCR title 10, section 2831.1 provides:

(a) A broker shall keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account and interest, if any, earned on the funds on deposit. This record shall include information sufficient to identify the transaction and the parties to the transaction. Each record shall set forth in chronological sequence the following information in columnar form:

(1) Date of deposit.

(2) Amount of deposit.

(3) Date of each related disbursement.

(4) Check number of each related disbursement.

(5) Amount of each related disbursement.

(6) If applicable, dates and amounts of interest earned and credited to the account.

(7) Balance after posting transactions on any date.

Regs., tit. 10, § 2831.1); failure to perform and maintain monthly reconciliations (Cal. Code Regs., tit. 10, § 2831.2¹⁰); failure to deposit trust funds within three days of receipt (Cal. Code Regs., tit. 10, § 2832); failure to retain for three years copies of all cancelled checks (B&P Code section 10148); and collection and retention of unearned fees and/or compensation (B&P Code sections 10145, subdivision (a)(1) and 10176, subdivision (g)).

8. Cause for discipline of respondent's real estate broker license was established pursuant to B&P Code section 10177, subdivision (d), and/or 10177, subdivision (g), in conjunction with B&P Code section 10145, by reason of Findings 25 to 27, in that respondent, in his activities related to real estate sales, failed to retain and make available for inspection original salesperson license certificates of two salespersons (B&P Code sections 10160; Cal. Code Regs., tit. 10, § 2753¹¹); failed to

(b) Maintenance of trust ledgers of separate beneficiaries or transactions, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles will constitute compliance with subdivision (a), provided that such ledgers, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

¹⁰ CCR title 10, section 2831.2 provides:

The balance of all separate beneficiary or transaction records maintained pursuant to the provisions of Section 2831.1 must be reconciled with the record of all trust funds received and disbursed required by Section 2831, at least once a month, except in those months when the bank account did not have any activities. A record of the reconciliation must be maintained, and it must identify the bank account name and number, the date of the reconciliation, the account number or name of the principals or beneficiaries or transactions, and the trust fund liabilities of the broker to each of the principals, beneficiaries or transactions.

¹¹ CCR title 10, section 2753 provides:

The license certificate of a real estate salesperson licensee shall be retained at the main business office of the real estate broker to whom the salesperson is licensed. Upon the termination of employment of the salesperson, the broker shall return the license certificate to the salesperson within three business days following the termination.

record trust funds in the form of an earnest money deposit (Cal. Code Regs., tit. 10, § 2831, subdivision (a)(6)); and misrepresented to the owners of properties that an earnest money deposit was obtained from the buyers, when the deposit had not been obtained (B&P Code sections 10176, subdivisions (a), (b) and (i); and 10176, subdivision (j)).

Discipline

9. The purpose of discipline is not to punish the licensee, but to protect the public. Respondent placed his clients at risk by failing to set up Bank Account #'s 1 through 5 as trust accounts, which would be protected from liens and other attachments. He further jeopardized his clients by allowing his real estate salespersons sole access the accounts related to the property management business which held client funds. His failure to maintain trust accounts resulted in a situation where the Bureau was unable to ascertain which funds belonged to which client and whether there were sufficient funds in the account to cover obligations to each client. Respondent's failure to establish and maintain trust accounts placed his clients at risk.

10. In consideration of respondent's substantial and credible character evidence, respondent's long-standing reputation in the real estate community as a trusted and competent real estate broker, and respondent's abandonment of property management services—the primary source of the violations herein, revocation is not warranted in this case. A probationary license would serve to protect the public in this matter, in that there are terms or conditions that would serve to provide protection to the public. The period of probation would serve to emphasize to respondent his obligations to protect client trust funds and to properly characterize client funds as trust funds. It would also serve to remind respondent of his supervision responsibilities as a real estate broker.

Costs of Audit

11. Complainant maintains that respondent should be required to pay the cost of the audit conducted by Mr. Barbhaiya, which is \$8,151, within 60 days of the effective date of the proposed decision. Complainant also requests, as discipline, revocation of all licenses and licensing rights of respondent.

12. B&P Code section 10148, provides in pertinent part:

[¶] ... [¶]

(b) 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. (italics added)

(c) If a broker fails to pay for the cost of an audit as described in subdivision (b) within 60 days of mailing a notice of billing, the commissioner may suspend or revoke the broker's license or deny renewal of the broker's license. The suspension or denial shall remain in effect until the cost is paid or until the broker's right to renew a license has expired.

The commissioner may maintain an action for the recovery of the cost in any court of competent jurisdiction. In determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers.

13. Pursuant to B&P Code section 10148, subdivision (b), the Commissioner is mandated to charge respondent the cost of the audit in this matter. The B&P Code does not provide exceptions based on the broker's asserted inability to pay. Accordingly, imposition of audit costs in the sum of \$8,151 is warranted.

Costs of Investigation and Prosecution

14. Business and Professions Code section 10106 provides, in pertinent part, that the commissioner may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Subdivision (c), states:

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

15. As set forth in Finding 41, the reasonable costs of investigating and prosecuting this matter by the Bureau are \$978.55. *Zuckerman v. Board of*

Chiropractic Examiners (2002) 29 Cal.4th 32, identifies the factors to be considered in determining the reasonableness of costs pursuant to statutory provisions like Business and Professions Code section 10106. The factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced; the licensee's subjective good faith belief in the merits of his or her position; whether the licensee has raised a colorable challenge to the proposed discipline; the financial ability of the licensee to pay; and whether the scope of the investigation was appropriate to the alleged misconduct. In the Accusation against respondent, the causes for discipline were established. The Bureau is entitled to costs. Respondent admitted to the truth of the allegations, and thus, did not raise a colorable challenge to the proposed discipline. Moreover, respondent did not present evidence of his inability to pay costs.

16. Under all of the facts and circumstances, and balancing respondent's concerns against the Bureau's obligation to protect the public through licensing actions such as this one, assessment of costs in the amount of \$978.55, in bringing and prosecuting the Accusation is reasonable and appropriate.

ORDER

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

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

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of respondent and periodic summaries of salient information concerning each real estate transaction in which the respondent engaged during the period covered by the report.

6. Pursuant to Section 10148 of the Business and Professions Code, Respondent shall pay the Commissioner's reasonable cost for 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 time to and from the auditor's place of work. Respondent shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may suspend the restricted license issued to respondent pending a hearing held in accordance with Section 11500, et seq., of the Government Code, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between the Respondent and the Commissioner. The suspension shall remain in effect until payment is made in full or until Respondent enters into an agreement satisfactory to the Commissioner to provide for payment, or until a decision providing otherwise is adopted following a hearing held pursuant to this condition. Pursuant to Legal Conclusions 11 to 13, respondent shall pay to the Commissioner the sum of \$8,151, representing the costs of the audit conducted by the Bureau between January 1, 2008 and December 31, 2009.

7. 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 subdivision (a) of Section 10170.5 of the Business and Professions Code. 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.

8. Pursuant to Legal Conclusions 14 to 16, respondent shall pay to the Commissioner the sum of \$978.55, representing the costs of investigation and prosecution by the Bureau, in a manner as provided by the Bureau.

Dated: September 17, 2013



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings