BEFORE THE

BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

FILED

FEB 19 2014

BUREAU OF REAL ESTATE

By K. Contreras

In the Matter of the Accusation of	)	
	)	
MARK JEFFREY LANIER,	)	
PREMIER REAL ESTATE, INC.,	)	NO. H-2764 FR
a Corporation, and	)	
BLAIN ARDEN DIERKES,	)	2012070751
	)	
Respondents.	)	
	)	

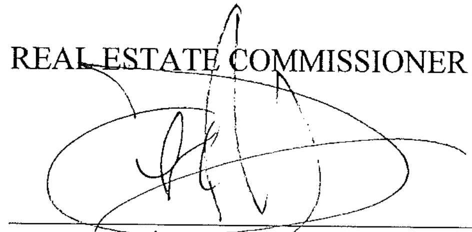
DECISION

The Proposed Decision dated May 14, 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 21 2014.

IT IS SO ORDERED FEB 18 2014.

REAL ESTATE COMMISSIONER



By: JEFFREY MASON
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against: MARK JEFFREY LANIER, PREMIER REAL ESTATE, INC., a Corporation, and BLAIN ARDEN DIERKES; Respondents.	Case No. H-2764 FR OAH No. 2012070751

PROPOSED DECISION

Administrative Law Judge Catherine B. Frink, Office of Administrative Hearings, State of California, heard this matter on March 13 and 14, 2013, in Fresno, California.

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

Steven R. Williams, Attorney at Law, represented Premier Real Estate, Inc. (Premier), Mark Jeffrey Lanier (respondent Lanier), and Blain Arden Dierkes (respondent Dierkes) (collectively respondents). Respondent Lanier and respondent Dierkes were present at the administrative hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on March 14, 2013.

FACTUAL FINDINGS

1. Complainant made and filed the Accusation in his official capacity on or about June 1, 2012.

2. Complainant seeks to discipline respondents' licenses on the grounds that respondent Lanier, as a real estate salesperson and as an agent of Premier, failed to comply with real estate laws and regulations governing the conduct of property management activities; and that respondent Dierkes, as a real estate broker, violated the real estate laws and regulations regarding trust accounts by failing to keep a separate record for each beneficiary or transaction for the trust account containing all information required by law,

and failing to reconcile, at least once a month, the balance of all separate beneficiary or transaction records with the record of all trust funds received and disbursed as required by law. Complainant further seeks discipline against respondent Dierkes' license for his alleged failure to supervise respondent Lanier's property management activities.

License History and Status

3. At all times pertinent, respondent Premier was licensed by the Department as a corporate real estate broker, with respondent Dierkes as designated broker-officer. As of January 1, 2009, respondent Premier operated under the following "DBAs": Premier Real Estate (PRE), and Premier Property Management (PPM). Respondent Premier's main office was located at 1126 East Leland Avenue, Tulare California. Respondent Premier also operated branch offices in Visalia, Porterville, Santa Cruz, Aptos, and Fresno. Premier's corporate license expired, and the DBAs were cancelled, as of September 16, 2011.

4. Respondent Dierkes is presently licensed and/or has license rights under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code[1] as a real estate broker. He was previously licensed by the Department as a real estate salesperson from June 8, 1989, through December 11, 1998. At all times pertinent, respondent Dierkes was licensed as a real estate broker individually and as designated broker-officer of Premier. His broker license will expire on December 10, 2014, unless renewed or revoked.

As the designated broker-officer of respondent Premier, respondent Dierkes was responsible for the supervision of the activities of the officers, agents, real estate licensees, and employees of respondent Premier for which a license is required, pursuant to section 10159.2.

5. Respondent Lanier is presently licensed and/or has license rights under the Real Estate Law as a real estate salesperson in the employ of respondent Dierkes beginning on January 6, 2010. Respondent Lanier was in the employ of respondent Premier from February 26, 2004, to January 5, 2010. His salesperson license will expire on February 25, 2016, unless renewed or revoked.

6. At all times relevant, respondents engaged in the business of, acted in the capacity of, advertised or assumed to act as a real estate licensees 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 respondents 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

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[1] Unless otherwise stated, all further statutory references are to the California Business and Professions Code.

property, or on a business opportunity, or collected rents from real property, or improvements thereon, or from business opportunities.[2]

Trust Fund Accounting

7. Business and Professions Code section 10145 provides that a real estate broker who accepts funds belonging to others in connection with a transaction 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 are required to be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds. The broker is further required to maintain a separate record of the receipt and disposition of all trust funds

8. California Code of Regulations, title 10 (10 CCR), 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 shall set forth in chronological sequence the following information: (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; and (7) Balance after posting transactions on any date.

9. 10 CCR 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.

10. In the course of acting as real estate licensees as described in Finding 6 above, respondents accepted or received funds in trust (trust funds) 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.

11. Trust funds accepted or received by respondents were deposited or caused to be deposited by respondents into one or more bank accounts (trust fund accounts) maintained by respondent Dierkes for the handling of trust funds at the Ontario, California, branch of Bank of America, including but not limited to "Blain Dierkes, Sole Prop DBA Premier Real Estate Property Management Trust Account" (Trust #1).

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

12. The parties stipulated that, between January 1, 2009, and July 30, 2010, in connection with the trust fund handling activities of respondent Premier, respondent Dierkes:

A. Failed to keep a separate record for each beneficiary or transaction for Trust #1 containing all the information required by Business and Professions Code section 10145 and 10 CCR section 2831.1.

B. Failed to reconcile at least once a month, the balance of all separate beneficiary or transaction records with the record of all trust funds received and disbursed for Trust #1, as required by 10 CCR section 2831.2

13. According to respondent Dierkes, his late father, Bruce Dierkes, oversaw and managed the property management division of respondent Premier, including the trust fund accounting related to property management.[3] Bruce Dierkes held a real estate salesperson license. Respondent Dierkes acknowledged that Bruce Dierkes became ill in 2010, and he stopped performing the trust fund reconciliations because he was sick. Respondent Dierkes did not intervene, because he believed his father might recover and resume his duties. Bruce Dierkes died in early 2011. The trust fund violations were uncovered during an inspection by Department Auditor Karan Dogra in September of 2011. Respondent Dierkes and/or his employees corrected the trust fund accounting record deficiencies, and notified the Department of the corrections.

14. At all times pertinent, respondent Lanier was employed in Premier's Fresno branch office. He is engaged in residential property management, and estimated that he manages between 30 and 40 properties at any given time.

The Patton Property

15. In 2004, Beverly Patton sought to purchase a house in Fresno, with the intention of renting the property and possibly living there in the future. Ms. Patton contacted respondent Lanier based upon the recommendation of her accountant, who was one of respondent Lanier's clients. Respondent Lanier acted as Ms. Patton's real estate agent for the purchase of the property located at 4695 West Stuart in Fresno (the Property). Ms. Patton was in the U.S. Army and did not reside in California. Ms. Patton's mother viewed the Property with respondent Lanier. Ms. Patton did not see the Property before she purchased it in October of 2004. Respondent Lanier informed Ms. Patton that respondent Premier had a property management service (i.e. PPM) and that he could manage the Property as a rental for her until she was ready to occupy the home after retirement. Respondent Lanier told Ms. Patton that, "not only would he personally look after the property, but he lived in the area and thus could easily keep an eye on it." Ms. Patton was persuaded to use respondents as her property manager based in part on respondent Lanier's assurances that he would "keep an eye on" the Property.

[3]According to respondent Dierkes, there were no trust fund accounts used for the real estate sales activities of respondent Premier.

16. Ms. Patton and respondent Lanier agreed that respondent Premier would arrange for and oversee gardening services for the Property. Ms. Patton was willing to pay for a gardener because she wanted the landscaping to be maintained in good condition. Ms. Patton also instructed respondent Lanier to have the heating, ventilation and air conditioning (HVAC) system serviced twice a year and to oversee any necessary repairs. Respondent Premier collected rent and deducted the management fee, gardener fee, and any other expenses before sending Ms. Patton a check for the balance. Although she and respondent Lanier had discussed having the HVAC system serviced twice a year, Ms. Patton was not regularly billed for this maintenance. The only time she paid for servicing of the HVAC system was in January of 2010, when the forced air heater in the attic was serviced by Charlie Arnold Plumbing, Heating and Air Conditioning. Respondent Lanier deducted the cost of the repair ($88) from the rent payment remitted to Ms. Patton in February 2010.

17. With respect to respondent Lanier's promise to "keep an eye on" the Property, Ms. Patton assumed respondent Lanier would check up on the gardener and make sure he was doing his job, by driving past the property, looking at the front yard, making sure the sprinklers came on, and "peek[ing] over the fence to see if the back yard was in good shape, without disturbing the tenants." Ms. Patton and respondent Lanier did not have any agreement or understanding regarding the frequency with which respondent Lanier would enter the Property to view or inspect the inside of the house, if ever.

Property Management Agreement between Ms. Patton and Respondent Premier

18. On October 14, 2004, Ms. Patton (Owner) entered into a property management agreement (Agreement) with Lanier, as an agent of respondent Premier, dba PPM (Broker), to manage the Property. Pursuant to the Agreement, respondent Lanier agreed to use due diligence in managing the Property, which included the authority and power to do the following:

> [¶]...[¶]
>
> B. RENTAL; LEASING: Initiate, sign, renew, modify or cancel rental agreements and leases for the Property, or any part thereof; collect and give receipts for rents, other fees, charges and security deposits. Any lease or rental agreement executed by Broker for Owner shall not exceed 1 year....
>
> C. TENANCY TERMINATION: Sign and serve in Owner's name notices that are required or appropriate; commence and prosecute actions to evict tenants; recover possession of the Property in Owner's name; recover rents and other sums due; and when expedient, settle, compromise and release claims, actions and suits and/or reinstate tenancies.

D. REPAIR; MAINTENANCE: Make, cause to be made, and/or supervise repairs, improvements, alterations, and decorations to the Property; purchase, and pay bills for, services and supplies….

[¶]…[¶]

F. CONTRACTS; SERVICES: Contract, hire, supervise and/or discharge firms and persons, including utilities, required for the operation and maintenance of the Property. Broker may perform any of the Broker's duties through attorneys, agents, employees, or independent contractors and, except for persons working in Broker's firm, shall not be responsible for their acts, omissions, defaults, negligence and/or costs of same.

G. EXPENSE PAYMENTS: Pay expenses and costs for the Property from Owner's funds held by Broker, unless otherwise directed by Owner….

H. SECURITY DEPOSITS: Receive security deposits from tenants….

[¶]…[¶]

19. The Agreement further provided that the Owner was to "[i]ndemnify, defend and hold harmless Broker, and all persons in Broker's firm, regardless of responsibility, from all costs, expenses, suits, liabilities, damages, attorney fees and claims of every type, including but not limited to those arising out of …damage to any real or personal property of any person, including Owner, for (i) any repairs performed by Owner or by others hired directly by Owner, or (ii) those relating to the management, leasing, rental, security deposits, or operation of the Property by Broker, or any person in Broker's firm, or the performance or exercise of any of the duties, powers or authorities granted to Broker." Owner agreed to pay Broker a management fee of seven percent of rents collected, as well as actual expenses of preparing the property for rental or lease. Paragraph 6.B. of the Agreement stated, in part, that "[t]his Agreement does not include providing on-site management services…representation before public agencies…[or] debt collection…." The term of the Agreement was for one year (October 14, 2004 to October 13, 2005), and provided that "[e]ither party may terminate this [Agreement] on at least 30 days written notice [blank] months after the original commencement date of this Agreement. After the exclusive term expires, this Agreement shall continue as a non-exclusive agreement that either party may terminate by giving at least 30 days written notice to the other."

Valdez Lease

20. On January 31, 2005, respondent Lanier, as an agent of respondent Premier dba PPM, acting on Ms. Patton's behalf, entered into a one year lease of the Property with George and Frankie Valdez, commencing on January 31, 2005, and due to terminate on or about January 31, 2006 (Valdez Lease). Mr. and Mrs. Valdez paid a security deposit of $1,200, which included a $200 "pet deposit." The Valdez Lease provided, in part, that "[a]ll or any portion of the security deposit may be used, as reasonably necessary, to (1) cure Tenant's default in payment of Rent...(ii) repair damage, excluding ordinary wear and tear, caused by Tenant or by a guest or licensee of Tenant; (iii) clean Premises, if necessary, upon termination of the tenancy; and (iv) replace or return personal property or appurtenances. SECURITY DEPOSIT SHALL NOT BE USED BY TENANT IN LIEU OF PAYMENT OF LAST MONTH'S RENT...." Paragraph 11 of the Valdez Lease addressed maintenance of the Property, and stated, in part, that "Tenant shall properly use, operate and safeguard Premises, including if applicable, any landscaping,...appliances, and all mechanical, electrical, gas and plumbing fixtures, and keep them and the Premises clean, sanitary and well ventilated....Tenant shall be charged for all repairs or replacements caused by Tenant, pets, guests or licensees of Tenant, excluding ordinary wear and tear...." Tenant agreed to water the garden, landscaping, trees, and shrubs; Landlord agreed to maintain the garden, landscaping, trees, and shrubs (i.e., to hire a gardener).

21. Respondent Lanier, and Mr. and Mrs. Valdez completed and signed a Move In/Move Out Inspection of the Property to show the condition of the Property at the time Mr. and Mrs. Valdez first occupied the Property, which was in satisfactory condition, except for some spots on the carpet in bedroom number one.

22. Respondent Lanier failed to have Mr. and Mrs. Valdez complete Paragraph 10 of the Valdez Lease, "CONDITION OF THE PREMISES." His failure constituted negligence in the performance of licensed activities, in that he did not completely and accurately complete this section of the Valdez Lease. However, the fact that respondent Lanier confirmed the condition of the property with Mr. and Mrs. Valdez by separately completing the Move In/Move Out Inspection form is considered as a factor in mitigation.

23. Mr. and Mrs. Valdez were an elderly couple, and their granddaughter, Lori Hardin, was frequently at the Property assisting with their care. Eventually, Ms. Hardin moved into the Property. After several months, respondent Lanier notified Ms. Patton that one of the renters had fallen on the aggregate flooring and wished to "get out of the lease." Ms. Patton agreed that Ms. Hardin could take over the lease.

Hardin Lease #1

24. On or about February 9, 2006, after Mr. and Mrs. Valdez vacated the Property, respondent Lanier, as an agent of respondent Premier dba PPM on Ms. Patton's behalf, entered into a new lease of the Property with Ms. Hardin (Harden Lease #1), which lease was

due to terminate on or about July 31, 2006. Respondent Lanier did not return any portion of the security deposit to Mr. and Mrs. Valdez, and he did not collect a new security deposit from Ms. Hardin; rather, the original $1,200 security deposit was "transferred" to the Harden Lease #1. Respondent Lanier failed to have Mr. and Mrs. Valdez complete and sign a second Move In/Move Out Inspection to show the condition of the Property upon their vacation, failed to have Ms. Harden complete and sign a new Move In/Move Out Inspection of the Property, and failed to have Ms. Hardin complete Paragraph 10 of the Lease, "CONDITION OF THE PREMISES," to show the condition of the Property at the time Ms. Hardin began occupying the Property. Respondent Lanier's failures, as set forth above, demonstrated negligence in the performance of licensed activities.

Hardin Lease #2

25. On September 10, 2006, Ms. Hardin's husband, Tom Hardin, and their three children moved onto the Property. Respondent Lanier, as an agent of respondent Premier dba PPM, on Ms. Patton's behalf, entered into a third lease of the Property, this time with Mr. and Mrs. Hardin, which lease was due to terminate on or about July 31, 2007 (Hardin Lease #2). Respondent Lanier failed to have Mr. and Ms. Hardin complete and sign a Move In/Move Out Inspection to show the condition of the Property when Mr. Hardin moved in, and failed to have them complete Paragraph 10 of the Lease, "CONDITION OF THE PREMISES," to show the condition of the Property at the time Mr. and Mrs. Hardin and their three children began occupying the Property. Respondent Lanier's failures, as set forth above, demonstrated negligence in the performance of licensed activities.

Other Lease Provisions

26. All three of the leases contain the following provisions:[4]

(a) Rent would be $1,195 per month, payable on the first of the month;
(b) the security deposit shall not be used for payment of last month's rent;
(c) tenant made an examination of the condition of the Premises;
(d) tenant shall properly use, operate and safeguard Premises, including appliances, electrical and plumbing fixtures, landscaping, and keep them clean and sanitary;
(e) tenant shall not make any repairs, alterations or improvements in or about the Premises;
(f) tenant shall not deduct from rent the cost of any repairs; and
(g) tenant shall clean and deliver the Premises in the same condition as it was when tenant occupied the premises and remove all debris.

[4] Although all three leases had a provision that stated "no animal or pet shall be kept on or about the Premises without Landlord's prior written consent," Mr. and Mrs. Valdez paid a $200 pet deposit as part of their security deposit, and Ms. Patton had actual knowledge of the fact that Ms. Hardin had two dogs on the Property. Ms. Patton did not object to the fact that her tenants had pets, and she never said to respondent Lanier that she would not rent to people with pets.

Ms. Patton's Visit to the Property

27. Ms. Patton saw the Property for the first time when she visited Fresno in December of 2005. Respondent Lanier arranged with Ms. Hardin for Ms. Patton to tour the Property. Ms. Patton spoke to Ms. Hardin at that time, and the Property appeared to be in good condition. Ms. Patton was aware of the fact that Ms. Hardin had two small dogs. This was Ms. Patton's only visit to the Property from the time of purchase until after July 1, 2010.

28. In February 2007, Ms. Patton notified respondent Lanier that she was deploying to Iraq. Ms. Patton arranged for her sister, Barbara Holt, to manager her affairs, and informed respondent Lanier to send all rent checks to Ms. Holt. Ms. Patton returned to the United States after a 15-month deployment, and thereafter resided in Hawaii. Ms. Patton claimed that, during that time, she "really relied on Mr. Lanier to keep a close eye on the property because [she] was in the Middle East, though [she] would be available by email."

Respondent Lanier's Visits to the Property

29. In 2005 or 2006, respondent Lanier notified Ms. Patton of various repairs that needed to be made on the Property, including sealing of the aggregate concrete floor. Ms. Patton did not recall any telephone calls regarding repairs after the first year or so that she owned the Property.

30. For the first two or three years of the property management agreement, respondent Lanier had occasion to be on the Property in connection with requests for repairs. After 2008, respondent Lanier did not receive any repair requests from the Hardins, and did not have occasion to enter the Property.[5] Respondent Lanier drove by the Property two or three times a month on the way to the grocery store, and he drove by once every quarter to do a "visual check" of the outside of the Property. He did not make separate arrangements with the Hardins to view the condition of the interior of the house, or to view the back yard.

31. Respondent Lanier testified that he "had workmen go onto the property on occasion," and he instructed them to advise him of concerns they observed. However, apart from the HVAC maintenance in January 2010, respondents produced no evidence that any repairs were performed on the property for which Ms. Patton was charged. On the contrary, respondents submitted Monthly Rental Statements from February 2007, June through

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[5] Respondent Lanier gave conflicting testimony about his visits to the Property to view the interior of the house. At various times during the hearing, he testified that no requests for repairs were made by the Hardins after Mr. Hardin moved into the Property in September of 2006 (which would mean that he had not been inside the property for nearly four years prior to June 2010); that he did not enter into the Property after Ms. Patton deployed to Iraq (in February 2007); that he did not enter into the Property after 2008; and that his last visit to the Property was in the summer of 2009. The facts set forth in Finding 30 above are based on respondent Lanier's letter to Department Special Investigator Winston Horn, dated January 9, 2012.

September 2007, and November 2007 through March 2010. Except for February 2010, each statement reflected that Ms. Patton was sent $1,031.35 (rent of $1,195, less $80 gardening fee and $83.65 management fee).[6] According to respondent Lanier, Charlie Arnold, owner of Charlie Arnold Plumbing, Heating and Air Conditioning, did not report any problems with the Property after he serviced the HVAC system.

Failure to Commence and Prosecute an Eviction Action in April 2010

32. Pursuant to the Agreement, respondent Lanier was authorized to act in Ms. Patton's name to sign and serve notices of termination of the tenancy, commence and prosecute actions to evict tenants, and recover rents and other sums due. Respondent Lanier was also authorized, "when expedient" to settle claims and reinstate tenancies.

33. Respondent Lanier testified that he was aware of the fact that Ms. Hardin had moved out of the Property in 2009 or 2010, and that she was not residing there in April 2010. He stated that Mr. Hardin was "late" paying the April rent, but because Mr. Hardin was a long-time tenant and had always paid on time before April 2010, he allowed Mr. Hardin to pay the rent three weeks late. However, respondents did not produce a Monthly Rental Statement for April 2010, showing that the rent for April was sent to Ms. Patton. Respondent Lanier's hearing testimony that Mr. Hardin paid the April 2010 rent was not credible, and was contradicted by his own prior written statement.

34. In a letter to Department Special Investigator Winston Horn, dated January 9, 2012, respondent Lanier wrote:

> A three-day notice was not given as the tenant, Mr. Hardin...explained to me that his hours at work had been cut back and he would be late with the rent. I said I would work with him as he had always paid the rent on time in the past and [he] said he would get it to me by the 15-20th of the month. Again, to this point he had always been a good an [*sic*] paying tenant. When the rent did not come in I spoke with Mr. Hardin and he said he was working on it and would have it to me in a day or two. He also stated he was having extreme financial difficulties due to work hours being cut, the economy and Child Support payment that had recently been levied against him. I trusted his word that he would get the payment to me as he had in the past. Come the first part of May and still unable to pay April and now May he stated he was going to have to move out of the property. I told him to give me a notice in writing to that effect, he never did. I called him several times only to get his voice mail and never a return call. I went by the property in

[6] The February 2010 statement reflected the $88 deduction for servicing the HVAC, which was arranged and paid for by respondent Lanier/PPM.

> May (approx. 15th-20th). Both Mr. & Mrs. Hardin were present and appeared to be working on moving out of the property. The garage door was open, garage was full of stuff and things were being moved to their cars. Soon after my arrival the tenants began to argue and fight with loud voice[s] and verbal assaults towards each other as to who should be doing what, who was responsible for the mess of the property and the rents. I stated that they both were on the lease and both were legally responsible for the care and condition of the property as well as rents and any damages and cleaning of the property. At which time Ms. Hardin became very verbally abusive towards me and stating that she has not lived at the property for quite some time. I reminded [her] that she was still on the lease, never had notified me of anything different and if she has 'moved out' why was she still there getting her belongings out of the property? At that time she became even more 'crazy' towards me and Mr. Hardin. For my own safety, I decided to leave [the] property at that time. I [drove] by several more times and no one was ever at the property, nor did they answer the door or return my calls. All communication had been cut at this time.
>
> [¶]...[¶]
>
> Ms. Patton was not notified until June 27th, 2010 as it was unclear until June 2010 that the tenants had totally abandoned the property and their responsibilities of the lease (any due payments being made). Once I felt this for sure and was able to enter the property and assess the condition and damage Ms. Patton was notified. During the time Ms. Patton did not inquire as to why no rent payments were made to her.

35. At hearing respondent Lanier stated that it was a "judgment call" whether to give a three-day notice to a tenant who is late with rent, and that his typical procedure is to give a three day notice within a week or two after a tenant has promised to pay rent by a certain date and has failed to do so. On direct examination, respondent Lanier stated that he did not give Mr. Hardin a three-day notice because Mr. Hardin had already given a 30-day notice and kept promising to pay the rent. However, Mr. Hardin never gave a written 30-day notice as required by Paragraph 2 of Hardin Lease #2, and he did not pay the April rent after being given an extension of time to do so. On cross-examination, respondent Lanier testified that he did give Mr. Hardin a three-day notice, but he "does not have a copy," and he did not know the date that he gave it to Mr. Hardin, except that it was "prior to the end of May." This testimony was not credible. Respondent Lanier demonstrated negligence in the conduct of his duties as a licensee by failing to commence and prosecute an eviction action against the Hardins after they failed to pay the April rent in a timely manner. Moreover, respondent Lanier was negligent in his failure to promptly contact Ms. Patton to notify her of the

nonpayment of rent in April 2010, and by failing to notify her of the problems with Mr. and Ms. Hardin moving out of the property in May 2010.

<u>Termination of the Property Management Agreement and Condition of the Property in June 2010</u>

36. Respondent Lanier testified that he believed the Hardins had moved out of the Property by mid-to-late June 2010. He posted a 24-hour Notice of Entry at the property, and no one responded. After he gained entry to the property, he saw debris left behind, evidence of animal damage, and the "filthy" condition of the property. Respondent stated that, in his experience, when properties are abandoned through foreclosure, they are often in "bad shape." As a property manager, he "had not seen but one or two [rental properties] in this bad/type of condition," because "renters have a deposit they want back, and they want a good referral for their next rental house."

37. On Sunday, June 27, 2010, respondent Lanier sent an email to Ms. Patton concerning the "Fresno Rental House" which stated, in relevant part:

> I just wanted to give you and [*sic*] update on the house and tenants. They have been such great tenants for the last 5 years, up until about the last two months. They were late in paying in April and said that they would get it to me, by April 25th [*sic*] the male tenant gave me a 30 day notice. He said that he and his ex-wife who were the tenants and trying to get back together when they leased the house together had now seperated [*sic*] and she moved out about a year or so before. She still had things in the house that needed to be taken and he said they were not his things to move out so I had to give her and him a 30 day notice since they still had things in the house and were somewhat still occupying the house and not completely out. She is now 'mostly' out and has not returned any phone calls over the last few weeks. There is still clothes and stuff in the garage but they are out of the house. There are also some things in the storage unit on the side of the house. My manager says if it is not worth over $500 dollars [*sic*] we can dispose of it, I am trying to make that determination.
>
> At this point I need to know how you would like to proceed with the house....get it ready to lease again? It needs a good cleaning as they did not do anything in their haste to leave, carpets cleaned (the front small bedroom might need replacement) and some paint and minor repairs after 5 years of tenant occupancy. You have their deposit of $1195 from when it was first leased and, of course that will not be refunded to them.

> I am sorry to send this unfortunate news to you....please let me know how you would like to proceed from here.

38. Ms. Patton responded to the above email on or about June 27 or 28, 2010, and stated:

> Got your message, but the e-mail bounces back.
>
> I talked to my sister and we ahve [*sic*] decided that she and her husband will get the house cleaned, painted and ready, and she will take over managing the property for me. She would like to meet with you on Thursday, July 1, and get the keys and discuss transferring the electrical, water, and what to do with the things of the former renters.
>
> Thanks for managing the property over the yrs.

39. At the request of Ms. Patton's sister, Barbara Holt, respondent Lanier met Ms. Holt at a Starbucks on June 30, 2010, and gave her the keys to the property.

40. After he received the June 27, 2010 email, respondent Lanier considered that Ms. Patton had immediately terminated the property management services of respondent Premier, despite the fact that the Agreement required 30 days written notice (Finding 19).

41. Ms. Patton terminated the Agreement prior to Ms. Holt viewing the Property. Her testimony at hearing that she terminated the Agreement because she was informed by Ms. Holt that the property was in worse shape than was indicated in respondent Lanier's email, and "how could [she] trust [respondent Lanier] when he misrepresented the condition so badly" was not credible and contrary to the evidence. While it is true that respondent Lanier did misrepresent the condition of the property in his email, that misrepresentation was not the cause of Ms. Patton's action in terminating the Agreement via return email, since she was unaware of the misrepresentation at the time she sent her email response. Apart from an anticipated discussion between Ms. Holt and respondent Lanier about what to do with the belongings of the former tenants, Ms. Patton's email made it clear that she expected Ms. Holt to assume all of the property management duties (i.e., the cleanup and preparation of the Property for rental). At hearing, Ms. Patton stated that she thought respondent Lanier's responsibilities after June 29, 2010 "were more than just turning over the keys," and she expected him to discuss needed repairs to the Property with Ms. Holt. This testimony was contrary to the plain language of the email, and Ms. Patton conceded that she never conveyed this belief to respondent Lanier.

42. Ms. Holt testified that Ms. Patton contacted her after receiving the email from respondent Lanier on June 27, 2010. Ms. Patton wanted Ms. Holt to look at the Property, see what needed to be done, and clean the house to prepare for rental. Ms. Patton asked Ms. Holt

to take over management of the Property, and she agreed.[7] Ms. Holt contacted respondent Lanier to arrange to pick up the keys to the Property. At a later date, Ms. Holt telephoned respondent Lanier to obtain contact information for the prior tenants. Ms. Holt did not have any other contact with respondents.

43. Ms. Holt and her husband went to the Property the day after she picked up the keys. She contacted Ms. Patton and confirmed there was damage to the house, backyard landscaping and play structure. The lawn in the back yard was completely dead, and there was a large circle where the Hardins had placed an above-ground pool. The side yard gate was padlocked shut, and Ms. Holt had to cut off the lock to open the gate. She noted trash left behind by the tenants, which included an old washing machine, a bed frame, broken toys and clothing. Pieces of the disassembled above-ground pool were in a shed in the back yard. The garage was full of the Hardins' belongings. Ms. Holt photographed the extensive damage existing throughout the Property, including the following: carpets and aggregate floors totally ruined due to canine urine; damage to at least two door locks; a large hole in the glass door of the pellet stove; torn or missing screens; disconnected smoke alarms; two toilets broken from the floor bolts; two doors and jambs irreparably chewed by the Hardins' dogs; backyard and wooden play swing and climbing structures severely chewed by the dogs; walls requiring repair due to canine urine; and damage requiring replacement of hardware and lighting fixtures throughout house. The property was "very filthy dirty," and the kitchen appliances were so dirty that they could not be cleaned, and required replacement.

44. In the January 9, 2012 letter to Special Investigator Horn, respondent Lanier described the condition of the Property in June 2010 as follows:

> The condition of the property when the tenants moved out (abandoned) of [*sic*] the property was very filthy dirty, lots of items left behind in the home and the garage was full of what looked like things the tenants did not want or did not have time or desire to get rid of in their hast[e] to move and leave the property. The home looked like it had not [had] a general cleaning by the tenants in quite some time. Other notable items include: a broken glass piece on the front of the wood-burning stove, dog scratch marks on the door jam on door from backyard to kitchen/dining room, dirty floors, carpets, windows. The tenant had at one time put up and [*sic*] outdoor portable swimming pool. The lawn was compromised by this and the back yard was messy from the dog(s).

[7] Ms. Holt testified that she believed Ms. Patton asked her to take over management of the Property after she saw the property. Regardless of when Ms. Patton made the request to Ms. Holt, it was clear from the Ms. Patton's email to respondent Lanier that she intended for Ms. Holt to become the property manager and that respondent Lanier's services were no longer required.

[¶]…[¶]

As for pet damage, I do not recall or I did not realize while I visited the property that the aggregate floor were urine stained. It does not show up as easily on aggregate as it does on wood or carpet. As for the room with carpet (front bedroom) it had some stains on it as was noted in the original walk-thru form. I did state…in my email to Ms. Patton that the carpet in the front room might need replacement. After all, it was now almost 12+years old, had original stains/damage when purchased and 5+ years of tenant use. I did not specifically point out the 'chew marks' as I felt they were included in 'minor repairs' that would be needed to the property.

An itemized list was not provided to the tenants as the deposit would have been "used up" with just the lack of rent for April and May 2010 that was never paid. The tenants never gave notice of terminating their lease nor a forwarding address. Furthermore, before an itemized list could be completed, Ms. Patton chose to no longer use Premier Property Management services and immediately transferred management to her sister, Ms. BJ Holt.

45. Ms. Patton did not contact respondent Lanier or anyone from PPM to obtain advice or assistance while conducting repairs to the Property.

46. Ms. Patton paid for the following repairs to the property, at a total cost of $23,367:

- Flooring removal and replacement $9,545
- Appliance, smoke alarm, pellet stove repair/replacement $2,153
- Painting $3,141
- Electrical, plumbing repair (including removal of illegal wiring) $992
- Replacement of windows, screens, doors, and hardware $3,661
- Landscape replacement $3,175
- Trash removal (separate from flooring $700

It is not clear how much of the repairs would be attributable to normal wear and tear after five years of occupancy, versus damage attributable to misuse by the Hardins. The above costs reflect labor costs charged by Ms. Holt and her husband, and a rate of $10 per hour. Licensed contractors were used to repair the pellet stove, replace the windows, and

replace the landscaping. Carpeting was replaced, as were the dishwasher and microwave oven. The appliances and carpet were from the original owners in 1999.

Respondents Premier and Lanier – Allegations of Negligence/Incompetence and/or False Promises

47. As a real estate license, respondent Lanier was Ms. Patton's fiduciary and was required to exercise due care in providing property management services, by acting in her best interest. A failure to exercise due diligence in managing the Property constitutes negligence in performing act(s) for which a license is required, within the meaning of Business and Professions Code section 10177, subdivision (g).

Failure to Visit the Property

48. Complainant alleged that respondent Lanier failed to "personally look after the property...and... keep an eye on it," contrary to his verbal assurances to Ms. Patton, and failed to use due diligence in managing the Property, contrary to the Agreement, in that he "ceased making visits to the Property when [Ms. Patton] was deployed to Iraq, in about February 2007." Respondent Lanier stopped making visits to the Property after 2008, because he was not notified of any repairs to be performed on the property, other than the servicing of the HVAC system in January 2010 (Findings 30-31). As set forth in Finding 17, Ms. Patton and respondent Lanier did not have any agreement or understanding regarding the frequency with which respondent Lanier would enter the Property to view or inspect the inside of the house, if ever. Therefore, respondent Lanier did not make any false promise to Ms. Patton by not making visits to inspect the inside of the house. Complainant did not establish that due diligence requires a property manager to inspect a property at any particular intervals, and the Agreement did not require respondent Lanier to inspect the Property, except for move in/move out inspections. Therefore, it was not established that respondent Lanier was negligent or incompetent when he did not visit the Property to inspect the inside of the house after 2008.

Failure to Supervise Gardener

49. Between about February 2007 and about March 2010, pursuant to the Agreement, respondent Lanier as an agent of respondent Premier dba PPM on Ms. Patton's behalf, hired Rene Lopez to mow both the front and back yards, paying him about $80 per month from the proceeds of the rent. Mr. Lopez was the gardener for respondent Lanier's personal residence, and he provided yard maintenance services for many of respondent Lanier's other property management clients. As part of respondent Lanier's promise to "keep an eye on" the Property, Ms. Patton reasonably expected that respondent Lanier would visually inspect the property to insure that the landscaping was being maintained. Respondent Lanier drove by the property at least five or six times a year, and confirmed that the front yard landscaping was being maintained. He did not get out of his car and peer over the fence to examine the condition of the back yard.

50. On a date not established by the evidence, but at least four months prior to June 27, 2010, the Hardins placed an above-ground swimming pool on the lawn in the back yard of the Property, and padlocked the side gate, preventing access to the back yard. Therefore, Mr. Lopez did not provide gardening services in the back yard of the Property for several months in 2010, despite the fact that he was paid to provide gardening services for both the front and back yard.[8] Mr. Lopez did not inform respondent Lanier that he no longer had access to the back yard. The Hardins did not maintain the back yard landscaping, and permitted the lawn and some of the plants to die.

51. Respondent Lanier failed to supervise the activities of Mr. Lopez, in that he did not independently check the condition of the back yard landscaping to confirm that Mr. Lopez was complying with the terms of his agreement to provide yard maintenance services. Instead, respondent Lanier relied on his "drive-by" visual inspections of the front of the property, his long working relationship with Mr. Lopez, and the lack of any complaints from the tenants about Mr. Lopez's work. While those matters are considered as factors in mitigation, respondent's conduct nevertheless constituted negligence in the performance of his duties as a real estate licensee. Furthermore, by failing to "keep an eye on" the Property by visually inspecting both the front and back yards, respondent Lanier made a false promise to Ms. Patton of a character likely to influence, persuade or induce, as set forth in Findings 15 through 17 above. If respondent Lanier had visually inspected the back yard at timely intervals, he would have discovered that the Hardins had installed the above-ground pool without authorization, and would have known that Mr. Lopez was not performing his gardening duties because of the locked gate, thereby potentially minimizing damage to the Property.

<u>Failure to Contract, Hire and Supervise Persons Required for Operation and Maintenance of the Property</u>

52. Complainant alleged that respondent "failed to contract, hire, and supervise persons required for the operation and maintenance of the Property, which failure caused and/or contributed to extensive damage to the Property," as set forth in Finding 43. However, it was not established that respondent Lanier was notified of any items requiring repair after 2008, except for the servicing of the HVAC system in January 2010. Consequently, except for respondent Lanier's failure to supervise the gardener (separately addressed in Findings 49-51 above), it was not established that respondent was negligent or incompetent, or that he made a false promise to Ms. Patton, by failing to contract, hire, or supervise maintenance personnel on the Property.

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[8] Respondents' contention that $80 per month for front and back yard gardening services was below market rate, and that Ms. Patton was not harmed by Mr. Lopez's failure to maintain the back yard for at least four months, is wholly without merit.

Failure to "Recover Rents" Due for April, May, and June 2010

53. When Ms. Patton read the email from respondent Lanier (Finding 37), she understood that, when Mr. Hardin was late paying the April rent, he gave Mr. Lanier a verbal 30-day notice, meaning that the property would be vacated by the end of May. When respondent Lanier stated in his email that he had to give the Hardins (and specifically Ms. Hardin, who was no longer residing with Mr. Hardin at the Property) a 30-day notice because some of her belongings had been left at the Property, it was not clear whether the 30-day notice was in writing. As their occupancy extended past the end of May (in that they still had belongings at the Property) Ms. Patton believed she was owed rent for June 2010.

54. As was set forth in Findings 38 through 41, Ms. Patton terminated the Agreement with respondent on or about June 28, 2010. She did not authorize respondent Lanier or anyone from PPM to file an action against the tenants to recover back rent and damages after June 28, 2010. Ms. Patton has not sought to recover back rent or reimbursement for damages from the Hardins, because she "has information that they are not in a financial condition to pay damages." She has not attempted to locate either Mr. or Ms. Hardin, or to determine whether either has the ability to pay damages.

55. In view of the fact that Ms. Patton terminated the Agreement with respondents, respondent Lanier was not responsible for a continuing failure to recover rents after June 28, 2010. However, respondent Lanier failed to promptly commence eviction proceedings against the Hardins (Findings 32 through 35). Had he acted promptly in issuing the three-day notice, he could have minimized the amount of time the Hardins remained on the property, thereby mitigating the loss to Ms. Patton. Respondent Lanier's failure to take action to recover rents due from the Hardins while the Agreement was still in effect constituted negligence.

Failure to Recover "Other Sums Due," i.e., Cost of Repairs to the Property

56. For the reasons set forth in Finding 54, respondents were not obligated after June 28, 2010 to recover the costs of repairs to the Property in order to restore it back to the same condition as it was when respondent Lanier first began managing the Property, because respondent Lanier was prevented from doing so by Ms. Pattons' termination of the Agreement. However, if respondent Lanier had acted promptly in issuing the three-day notice, he could have entered the Property in early May, while Mr. Hardin was still residing there. If he had acted with due diligence, he would have been able to identify the damage to the property while Mr. Hardin was still living there, and take action to recover the cost of repairs from the Hardins. Respondent Lanier's failure to exercise due diligence as set forth above constituted negligence.

Violations of Hardin Lease #2

57. Respondent Lanier permitted, facilitated, or otherwise allowed the Hardins to violate Lease #2, in the following respects:

A. The Hardins failed to make an examination of the condition of the Property, pursuant to Paragraph 10, "CONDITION OF THE PREMISES," because respondent Lanier did not require this examination when Mr. Hardin was added to the lease in September 2006 (Finding 25).

B. The Hardins made alterations or improvements to the Property in violation of Paragraph 16, "ALTERATIONS; REPAIRS," in that the Hardins put a large portable outdoor swimming pool in the backyard, which caused significant damage to the backyard landscaping. Respondent Lanier permitted the Hardins to make these alterations by his failure to supervise the gardener and to make regular visual inspections of the back yard. If he had acted with due diligence in this regard, he would have discovered the alteration.

C. The Hardins failed to pay rent in the amount of about $1,195 per month, beginning in April 2010, and continuing through about June 2010, in violation of Paragraph 3, "RENT." Respondent Lanier permitted the failure to pay rent by not commencing eviction proceedings in a timely manner.

D. The Hardins failed to deliver the Property in the same condition as it was when first occupied, failed to remove all debris, and failed to keep the Property clean and sanitary in that the Hardins abandoned the Property leaving it "very filthy dirty" and left behind a considerable amount of debris. Respondent Lanier allowed this conduct by the Hardins, in that he did not act promptly in issuing the three-day notice to the Hardins. Had he acted with due diligence, he could have entered the Property and ascertained the damage caused by the Hardins, and sought to have them complete cleaning before they vacated the property.

58. Respondent Lanier's conduct, as set forth in Finding 57, constituted negligence.

59. Complainant alleged that respondent Lanier permitted the Hardins to violate Lease #2 by allowing them to own and keep dogs on and about the Property. Although respondent Lanier failed to complete Paragraph 13, "PETS," on the Valdez Lease, Hardin Lease #1, and Hardin Lease #2, which stated that "no animal or pet shall be kept on or about the Premises without Landlord's prior written consent," the tenants had on file a $200 pet deposit, carried over from the Valdez Lease to both Hardin Lease #1 and Hardin Lease #2. Ms. Patton was aware of the fact that there were dogs on the property, and she did not object or require the tenants to remove the dogs. Therefore, it was not established that respondent Lanier allowed Mr. and Ms. Hardin to violate their lease by owning and keeping dogs on the property.[9]

[9] Respondent Lanier may have demonstrated negligence and/or incompetence by failing to fill in Paragraph 13 on the leases, but that failure was not alleged as a basis for disciplinary action in this matter.

60. There was no competent (i.e. nonhearsay) evidence that respondent Lanier authorized the Hardins to make pay for repairs and deduct the costs from the rent. None of the Monthly Rental Statements sent to Ms. Patton reflect that repair costs were deducted from rent checks submitted by the Hardins (Finding 31).

61. The evidence did not establish that respondent Lanier permitted or allowed the Hardins to use the security deposit for payment of the last month's rent, particularly given the fact that the security deposit was needed to pay for repairs to the property for damage caused by the Hardins.

62. The Hardins failed to properly use, operate and safeguard the Property, in violation of Paragraph 11, "MAINTENANCE," including appliances, and electrical and plumbing fixtures, in that the Hardins left the kitchen appliances "filthy beyond cleaning," and replacement of hardware and lighting fixtures were required throughout the house. However, it was not established that respondent Lanier permitted or allowed the Hardins to engage in this conduct, since he was unaware of it until he inspected the Property after the Hardins abandoned the Property in June 2010.

Respondent Dierkes – Failure to Supervise

63. Brokers are required to exercise reasonable supervision over the activities of their salespersons. And the officer designated by a corporate broker licensee is required to exercise reasonable supervision and control over the activities of the corporation for which a real estate license is required. (Bus. & Prof. Code, § 10177, subd. (h).)

64. The officer designated by a corporate broker licensee is responsible for the supervision and control of activities conducted on behalf of the corporation by its officers and employees, including the supervision of licensed salespersons. (Bus. & Prof. Code, § 10159.2, subd. (a).)

65. As set forth in 10 CCR section 2725, reasonable supervision includes the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage the following: (a) Transactions requiring a real estate license; (b) Documents which may have a material effect upon the rights or obligations of a party to the transaction; (c) Filing, storage and maintenance of such documents; (d) The handling of trust funds; (e) Advertising of any service for which a license is required; (f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination; (g) Regular and consistent reports of licensed activities of salespersons. 10 CCR section 2725 further states that "[a] broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker."

66. Respondent Lanier confirmed that respondent Dierkes's father Bruce Dierkes "ran the property management business" while respondent Dierkes "ran the real estate sales business." Although he was not a licensed real estate broker, Bruce Dierkes was respondent Lanier's "manager," and respondent Lanier discussed the situation with the Patton Property with Bruce Dierkes to obtain advice about how to proceed. Respondent Lanier did not seek advice from respondent Dierkes about the Patton Property during the period from April to June 2010. Respondent Dierkes did not become aware of the situation with the Patton Property until after respondent Lanier received photographs of the damage to the Property from Ms. Patton.

67. Respondent Lanier conceded that he made errors on the Valdez lease and the two Hardin leases, by leaving sections blank that should have been filled in (e.g. Paragraph 10, Condition of Premises; Paragraph 2 of Hardin Lease #1, term of the lease; Paragraph 11 of both Hardin leases, Maintenance; and Paragraph 13, Pets). Copies of all lease agreements and property management agreements were sent to the main office in Tulare, where respondent Dierkes was located. According to respondent Lanier, "no one ever got back to [him] with questions or corrections."

68. Respondent Dierkes stated that, except for the Santa Cruz office, he visited the branch offices of respondent Premier on a weekly basis. During his weekly visit to the Fresno office where respondent Lanier works, respondent Dierkes would "have discussions of what was happening, and review files." He typically discussed "what was happening in the market," and "what was selling and not selling." He also reviewed policies and procedures and addressed any problems agents were having.

69. Respondent Dierkes maintained contact with respondent Lanier by telephone and email in addition to weekly office visits. He communicated regularly with respondent Lanier concerning real estate sales. During the period that respondents managed the Patton Property, respondent Dierkes did not review leases or property management agreements. He discussed some property management issues with his father, and communicated concerns to him if they arose during his weekly office visits. However, he relied on his father's property management expertise and delegated supervision of the property management functions to him.

70. According to respondent Dierkes, it was the policy of PPM to serve a three-day notice if a tenant was late paying rent, and respondent Lanier did not comply with that policy on the Patton Property.

71. As set forth above, respondent Dierkes failed to exercise reasonable supervision over the acts of respondents Premier and Lanier. His failure to supervise was negligent.

Other Matters

72. Although respondent Premier's corporate license expired on September 16, 2011, respondent Dierkes has continued the operation of his real estate business as a broker under the DBAs Premier Real Estate and Premier Financial, with his main office in Tulare, and licensed branch offices in Visalia, Aptos, Porterville, and Fresno, California. Respondent Dierkes has been licensed by the Department for more than 20 years with no prior license discipline or other complaints.

73. Since his father's death, respondent Dierkes has taken over supervision of the property management functions of his business. Respondents have changed their practice as a result of respondent Lanier's experience with the Patton Property. Respondent Lanier testified that "we now try to visit properties at least once a year," for a formal inspection with 24-hour written notice to the tenant, in addition to informal inspections when coming onto the property for other reasons. Respondent Dierkes and respondent Lanier meet regularly to discuss property management issues as well as real estate sales matters, and respondent Dierkes reviews all property management agreements.

74. As a property manager, respondent Lanier handles 30 to 40 properties at any given time. Respondent Lanier has been licensed for nine years by the Department, and has had no other complaints or prior license discipline.

Costs of Investigation and Enforcement

75. The Department of Real Estate has incurred the following reasonable costs for the investigation and enforcement of this case, as substantiated by computerized timesheets:

Investigative Services			
Supervising Special Investigator:			
0.50 hours @ $80/hour	–	$ 40.00	
Special Investigator:			
15.20 hours @ $62/hour	–	$942.40	
			$ 982.40
Legal Services			
Real Estate Counsel:			
45.95 hours @ $89/hour	–		$4,089.55
		Total	$5,071.95

76. No evidence was offered regarding respondents' financial ability to pay a cost recovery award.

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).)

3. 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, and containing all the information required by section 10145 and 10 CCR section 2831.1. (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 officer designated by a corporate broker license is "responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees...including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required." (Bus. & Prof. Code, § 10159.2, subd. (a).) 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).) The activities constituting reasonable supervision by a broker are set forth in 10 CCR section 2725 (Finding 65).

5. Pursuant to section 10176, subdivision (b), the Commissioner may suspend or revoke the license of a real estate licensee for "[m]aking any false promise of a character likely to influence, persuade or induce."

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. Except as set forth in Legal Conclusion 10, the Department met its burden of establishing legal cause for disciplinary action against respondents' licenses by clear and convincing evidence.[10]

Respondents Premier and Lanier

8. Cause for discipline of respondent Premier's corporate real estate broker license and respondent Lanier's real estate salesperson license exists pursuant to section 10176, subdivision (b), by reason of Findings 15, 17, and 49 through 51 (making a false promise of a character likely to influence, persuade or induce).

9. Cause for discipline of respondent Premier's corporate real estate broker license and respondent Lanier's real estate salesperson license exists pursuant to section 10177, subdivision (g), by reason of Findings 22, 24, 25, 32 through 35, 49 through 51, and 55 through 58 (negligence or incompetence).

10. No cause for discipline of respondent Premier's corporate real estate broker license or respondent Lanier's real estate salesperson license was established pursuant to sections 10176, subdivision (b), and/or 10177, subdivision (g), by reason of the matters set forth in Findings 27, 48, 52, and 59 through 62.

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[10] 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.)

Respondent Dierkes

11. Cause for discipline of respondent Dierkes's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2831.1, in conjunction with sections 10145 and 10177, subdivision (d), by reason of the matters set forth in Finding 12.A (Violation of the Real Estate Law: failure to keep a separate record for all trust beneficiaries or transactions).

12. Cause for discipline of respondent Dierkes's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2831.2, in conjunction with section 10177, subdivision (d), by reason of the matters set forth in Finding 12.B (Violation of the Real Estate Law: failure to conduct monthly reconciliation of trust balance of all separate beneficiary or transaction records).

13. Cause for discipline of respondent Dierkes's real estate broker license exists pursuant to California Code of Regulations, title 10, section 2725, in conjunction with section 10177, subdivisions (g) and (h), by reason of the matters set forth in Findings 63 through 71 (Violation of the Real Estate Law: failure to exercise reasonable supervision; negligence or incompetence).

Disciplinary Considerations

14. Respondent Premier's license expired on September 16, 2011, and corporate operations were discontinued. Revocation of the license is appropriate under all of the facts and circumstances.

15. Evidence of mitigation, extenuation, and rehabilitation was considered in determining the appropriate level of discipline with respect to respondents Dierkes and Lanier. The problems that arose in the Patton matter appeared to be an isolated incident, which is not likely to reoccur. With appropriate additional training, respondent Lanier may continue in real estate practice as a real estate salesperson with a restricted real estate license, without harm to the public.

16. Respondent Dierkes's trust fund violations and his failure to exercise reasonable supervision arose out of his reliance on his father, who was not a real estate broker. After the death of his father, respondent Dierkes has taken full responsibility for supervision of the property management functions of the business, and has corrected all trust fund issues. Under the circumstances, respondent Dierkes may continue in real estate practice as a real estate broker with a restricted real estate license, without harm to the public.

Costs of Investigation and Enforcement

17. Complainant has requested that respondents be ordered to pay the Real Estate Commissioner the costs of investigation and enforcement of the case. Under Business and Professions Code section 10106, respondents may be ordered to pay the commissioner "a

sum not to exceed the reasonable costs of the investigation and enforcement of the case." The actual and reasonable costs of investigation and enforcement are $5,071.95 (Finding 75). The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 (*Zuckerman*) set forth the factors to be considered in determining the amount of any cost recovery award under a statute similar to Business and Professions Code section 10106. Those 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 respondents' case, they were successful in defending against some of the charges against them (Legal Conclusion 10). Therefore, the evidence supports a reduction of the amount of cost recovery under the *Zuckerman* factors. Accordingly, respondents shall be ordered to pay costs in the amount of $3,000. Respondents Lanier and Dierkes shall be jointly and severally liable for costs.

ORDER

Respondent Premier Real Estate, Inc.

All licenses and licensing rights of Premier Real Estate, Inc. under the Real Estate Law are REVOKED, pursuant to Legal Conclusions 7, 8 and 9, jointly and individually.

Respondent Blain Arden Dierkes

All licenses and licensing rights of Blain Arden Dierkes under the Real Estate Law are REVOKED, pursuant to Legal Conclusions 7, 11, 12, and 13, jointly and individually. However, a restricted real estate broker license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the 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, 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.

5. 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.

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

7. Pursuant to Business and Professions Code section 10148, respondent shall pay the Commissioner's reasonable cost for: a) the audit which led to this disciplinary action and, b) a subsequent audit to determine if respondent has corrected the trust fund violations found in paragraphs 11 and 12 of the Legal Conclusions. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel time to and from the auditor's place of work. Respondent shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities preformed 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.

Respondent Mark Jeffrey Lanier

All licenses and licensing rights of Mark Jeffrey Lanier under the Real Estate Law are REVOKED, pursuant to Legal Conclusions 7, 8, and 9, 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.

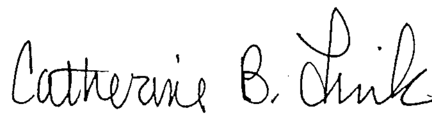
6. Respondent shall, prior to and as a condition of the issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed a three-hour continuing education course on property management. Proof of satisfaction of this requirement includes evidence that respondent has successfully completed the property management 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.

Costs

Respondents Blain Arden Dierkes and Mark Jeffrey Lanier shall pay to the Real Estate Commissioner costs associated with the investigation and enforcement of this case pursuant to Business and Professions Code section 10106 in the amount of $3,000, by reason of Legal Conclusion 17. Respondents Dierkes and Lanier shall be jointly and severally liable for payment of costs. Payment shall be made within 60 days of the effective date of this decision, unless the Commissioner, upon a request from respondents, allows payment to be made in installments. If the Commissioner allows payment to be made in installments, respondents shall pay each installment on or before the due date set forth in the installment payment schedule.

DATED: May 14, 2013.



CATHERINE B. FRINK
Administrative Law Judge
Office of Administrative Hearings