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FILED

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BUREAU OF REAL ESTATE

By B. Nicholas

8 BEFORE THE BUREAU OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)

12 MERCED OLD 99 REALTY, INC.,)
13 RUSSELL CHARLES McGARRY JR.,)
14 JOHN HENRY SCHWALBACH III and)
ESTHER VALENCIA,)

15 Respondents.)

No. H-3143 FR

ACCUSATION

16 The Complainant, BRENDA SMITH, a Supervising Special Investigator of the
17 State of California, for cause of Accusation against MERCED OLD 99 REALTY, INC.
18 (MERCED 99), RUSSELL CHARLES McGARRY JR. (McGARRY), JOHN HENRY
19 SCHWALBACH III (SCHWALBACH), and ESTHER VALENCIA (VALENCIA) (collectively
20 "Respondents") is informed and alleges as follows:

21 PRELIMINARY ALLEGATIONS

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23 The Complainant, BRENDA SMITH, a Supervising Special Investigator of the
24 State of California, makes this Accusation in her official capacity.

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26 Respondents are presently licensed and/or has license rights under the Real
27 Estate Law, Part 1 of Division 4 of the Business and Professions Code (Code).

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2 At all times mentioned, MERCED 99 was and is licensed by the State of
3 California Bureau of Real Estate (Bureau) as a real estate broker corporation. McGARRY is an
4 officer, director, and 100 percent shareholder of MERCED 99.

5 4

6 At all times prior to January 6, 2016, Scot Anthony Levesque (Levesque) was
7 licensed by the Bureau as a restricted real estate broker, and as the designated broker officer of
8 MERCED 99. On or about January 6, 2016, an Order Suspending Restricted Real Estate
9 License was filed in case H-2710 FR, suspending Levesque's real estate broker license effective
10 immediately. On or about April 18, 2016, in case H-2968 FR, an Order Accepting Voluntary
11 Surrender of Levesque's real estate license was filed, effective May 9, 2016.

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13 On or about January 14, 2016, the Bureau mailed notices to McGARRY and
14 SCHWALBACH advising them that they were no longer in the employ of MERCED 99, due to
15 the suspension of Levesque. The Bureau is informed and believes that McGARRY and
16 SCHWALBACH learned of this action on or about January 18, 2016.

17 6

18 On or about March 2, 2016, the Bureau received a Corporate License
19 Application for MERCED 99, listing VALENCIA as the designated broker officer. No
20 licensing fee was received with the application. On or about April 15, 2016, the Bureau sent a
21 correspondence to MERCED 99 and VALENCIA requesting the \$300 licensing fee and the
22 Corporate Background Statement for each officer, director, or shareholder with a reportable
23 item. On or about May 18, 2016, the Bureau received the \$300 licensing fee for MERCED 99.
24 On or about May 27, 2016, MERCED 99's real estate corporate license was activated with
25 VALENCIA as the designated broker officer.

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At all times mentioned, VALENCIA was and is licensed by the Bureau individually as a real estate broker. At all times after May 27, 2016, VALENCIA was and is licensed as the designated broker officer of MERCED 99. As said designated officer-broker, VALENCIA was and is responsible pursuant to Section 10159.2 of the Code for the supervision of the activities of the officers, agents, real estate licensees, and employees of MERCED 99 for which a license is required.

At all times mentioned, McGARRY was and is licensed by the Bureau as a restricted real estate salesperson. At no time mentioned herein was McGARRY licensed by the Bureau as a real estate broker. McGARRY's real estate salesperson license was affiliated under the following brokers:

Start Date	End Date	Employing Broker
3/2/13	12/30/15	MERCED 99
1/1/16	2/28/16	No Broker Affiliation
2/29/16	10/16/16	VALENCIA
10/17/16	Present	MERCED 99

At all times mentioned, SCHWALBACH was and is licensed by the Bureau as a real estate salesperson. At no time mentioned herein was SCHWALBACH licensed by the Bureau as a real estate broker. SCHWALBACH's real estate salesperson license was affiliated under the following brokers:

Start Date	End Date	Employing Broker
9/26/13	12/30/15	MERCED 99
1/1/16	2/28/16	No Broker Affiliation
2/29/16	10/16/16	VALENCIA
10/17/16	Present	MERCED 99

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At all times mentioned, Respondents engaged in the business of, acted in the capacity of, advertised, or assumed to act as a real estate broker in the State of California, within the meaning of Section 10131(b) of the Code in the operation and conduct of a property management business with the public wherein, on behalf of others, for compensation or in expectation of compensation, Respondents leased or rented and offered to lease or rent, and placed for rent, and solicited listings of places for rent, and solicited for prospective tenants of real property or improvements thereon, and collected rents from real property or improvements thereon.

FIRST CAUSE OF ACTION

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Each and every allegation in Paragraphs 1 through 10, inclusive, above, are incorporated by this reference as if fully set forth herein.

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Between January 6, 2016 through May 27, 2016, McGARRY and/or SCHWALBACH, on behalf of MERCED 99, when MERCED 99 did not have an designated broker officer, willfully caused, suffered, permitted, and/or disregarded the real estate law by allowing MERCED 99 to perform the acts and conduct the real estate activities described in Paragraph 10, for compensation, including but not limited to the activities described in Paragraph 13.

13

Between January 1, 2016 through May 27, 2016, McGARRY and/or SCHWALBACH, on behalf of MERCED 99 and for compensation, during a period when MERCED 99 did not have an designated broker officer, solicited prospective tenants for, negotiated rental agreements for, and/or collected rents from real properties owned by another or others, including but not limited to the following:

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<u>PROPERTY OWNER</u>	<u>PROPERTY LOCATION</u>
Eduardo & Milagros D.	1700 Conestoga #A, Merced
Areena C.	1235 West 9 th Street, Merced
Paul R.	1873 Carter Way, Atwater
David K	2592 McElvaney, Merced
Shahani W.	1190 Evening Star Drive, Merced
Brenda P.	2055 Merced Avenue, Merced
Kumar Rejapuram R.	1393 Dynes, Merced
Ellen Court LLC	1502 Ellen, Merced

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In acting as described above, McGARRY, and/or SCHWALBACH willfully disregarded, and willfully caused, suffered, and/or permitted MERCED 99 to willfully disregard Sections 10130 and/or 10137 of the Code.

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The facts alleged in the First Cause of Action are grounds for the suspension or revocation of MERCED 99, McGARRY, and/or SCHWALBACH licenses and license rights pursuant to Sections 10130 and 10137 of the Code in conjunction with Sections 10177(d) and/or 10177(g) of the Code.

SECOND CAUSE OF ACTION

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Each and every allegation in Paragraphs 1 through 15, are incorporated by this reference as if fully set forth herein.

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On or about October 13, 2016, and continuing intermittently through April 24, 2017 an audit was conducted of the records of MERCED 99. The auditor herein examined the records for the period of October 1, 2015, through May 22, 2017.

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While acting as a real estate broker as described in Paragraph 10, MERCED 99 accepted or received funds in trust (trust funds) from or on behalf of owners and tenants in connection with the leasing, renting, and collection of rents on real property or improvements

1 thereon, as alleged herein, and thereafter from time-to-time made disbursements of said trust
2 funds.

3 19

4 The trust funds accepted or received by MERCED 99 as described in Paragraph
5 18 were deposited or caused to be deposited by MERCED 99 into trust accounts which were
6 maintained by MERCED 99 for the handling of trust funds, and thereafter from time-to-time
7 MERCED 99 made disbursements of said trust funds, identified as follows:

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ACCOUNT # 1	
9 Bank Name and Location:	Travis Credit Union, Merced
10 Account No.:	XXXXX6600
11 Entitled:	Merced Old 99 Realty Inc. Owners Rent Dept (Trust Funds)

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ACCOUNT # 2	
14 Bank Name and Location:	Travis Credit Union, Merced
15 Account No.:	XXXXX6900
16 Entitled:	Merced Old 99 Realty Inc. Security Deposit (Trust Funds)

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ACCOUNT # 3	
18 Bank Name and Location:	Travis Credit Union, Merced
19 Account No.:	XXXXX2353
20 Entitled:	Merced Old 99 Realty Inc. Security Deposit (Trust Funds)

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ACCOUNT # 4	
22 Bank Name and Location:	Travis Credit Union, Merced
23 Account No.:	XXXXX5068
24 Entitled:	Merced Old 99 Realty Inc. Owners Rent Dep (Trust Funds)

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In the course of the activities described in Paragraph 10, MERCED 99:

(a) allowed Nellie McGarry, an unlicensed individual, to appear as a signatory on Account #1, without first obtaining fidelity bond coverage at least equal to the maximum amount of the trust funds to which Nellie McGarry had access at any time, in violation of Section 10145 of the Code, and Section 2834 of the Regulations;

(b) failed to reconcile the balance of separate beneficiary or transaction records with the control record of trust funds received and disbursed at least once a month, and/or failed to maintain a record of such reconciliations for Account #1, 2, 3, and 4, as required by Section 2831.2 of the Regulations.

The facts alleged in the First Cause of Action are grounds for the suspension or revocation of Respondent's license and license rights under the following sections of the Code and Regulations:

As to Paragraph 10(a), under Sections 10177(d) and/or 10177(g) of the Code in conjunction with Section 10145 of the Code and Section 2834 of the Regulations; and

As to Paragraph 10(b), under Sections 10177(d) and/or 10177(g) of the Code in conjunction with Section 2831.2 of the Regulations.

THIRD CAUSE OF ACTION

Each and every allegation in Paragraphs 1 through 21, inclusive, is incorporated by this reference as if fully set forth herein.

At all times after May 27, 2016, Respondent VALENCIA failed to exercise reasonable supervision over the acts of MERCED 99 in such a manner as to allow the acts and events described in the Second Cause of Action to occur.

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The acts and/or omissions of VALENCIA as described in Paragraph 23, constitutes failure on the part of VALENCIA, as designated broker-officer for MERCED 99, to exercise reasonable supervision and control over the licensed activities of MERCED 99 as required by Section 10159.2 of the Code and Section 2725 of the Regulations.

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The facts described above as to the Third Cause of Action constitute cause for the suspension or revocation of the licenses and license rights of VALENCIA under Section 10177(g) and/or Section 10177(h) of the Code, and Section 10159.2 of the Code in conjunction with Section 10177(d) of the Code.

COST RECOVERY

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The acts and/or omissions of MERCED 99 and VALENCIA as alleged above, entitle the Bureau to reimbursement of the costs of its audit pursuant to Section 10148(b) (audit costs for trust fund handling violation) of the Code.

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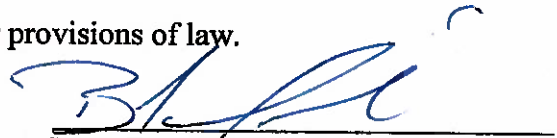
Section 10106 of the Code provides, in pertinent part, that in any order issued in resolution of a disciplinary proceeding before the Bureau, the Commissioner may request the Administrative Law Judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

PRIOR DISCIPLINARY ACTION

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Effective December 20, 2012, in Case No. H-2710 FR before the Bureau, the Real Estate Commissioner revoked the real estate salesperson license of McGARRY, for violation of Sections 10177(d) of the Code in conjunction with Sections 10130 and 10137 of the Code, but granted the right to a restricted real estate salesperson license, on terms, conditions, and restrictions set forth in the Order.

1 WHEREFORE, Complainant prays that a hearing be conducted on the allegations
2 of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary
3 action against all licenses and license rights of Respondents under the Code, for the cost of
4 investigation and enforcement as permitted by law, for the cost of the audit, and for such other
5 and further relief as may be proper under other provisions of law.

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7 BRENDA SMITH
8 Supervising Special Investigator

9 Dated at Fresno, California,

10 this 16 day of March, 2018.

11 DISCOVERY DEMAND

12 Pursuant to Sections 11507.6, *et seq.* of the *Government Code*, the Bureau of Real
13 Estate hereby makes demand for discovery pursuant to the guidelines set forth in the
14 *Administrative Procedure Act*. Failure to provide Discovery to the Bureau of Real Estate may
15 result in the exclusion of witnesses and documents at the hearing or other sanctions that the
16 Office of Administrative Hearings deems appropriate.