

1 Department of Real Estate
P. O. Box 187000
2 Sacramento, CA 95818-7000
3 Telephone: (916) 227-0789

FILED

DEC 15 2004

DEPARTMENT OF REAL ESTATE

By *John Aronch*

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)

No. H-4045 SAC

13 MITCHELL S. PACKARD,)

STIPULATION AND AGREEMENT

15 Respondent.)

17 It is hereby stipulated by and between Respondent
18 MITCHELL S. PACKARD, (hereinafter "Respondent") and his
19 attorney of record, Louis A. Basile, and the Complainant,
20 acting by and through Michael B. Rich, Counsel for the
21 Department of Real Estate, as follows for the purpose of
22 settling and disposing of the Accusation filed on July 4, 2004,
23 in this matter (hereinafter "the Accusation"):

24 1. All issues which were to be contested and all
25 evidence which was to be presented by Complainant and
26 Respondents at a formal hearing on the Accusation, which
27 hearing was to be held in accordance with the provisions of the

H-4045 SAC

- 1 -

STIPULATION OF
MITCHELL S. PACKARD

1 Administrative Procedure Act (APA), shall instead and in place
2 thereof be submitted solely on the basis of the provisions of
3 this Stipulation and Agreement.

4 2. The Respondent has received, read and
5 understands the Statement to Respondent, the Discovery
6 Provisions of the APA, and the Accusation filed by the
7 Department of Real Estate in this proceeding.

8 3. On July 14, 2004, Respondent filed a Notice of
9 Defense pursuant to Section 11505 of the Government Code for
10 the purpose of requesting a hearing on the allegations in the
11 Accusation. Respondent hereby freely and voluntarily withdraws
12 said Notice of Defense. Respondent acknowledges that he
13 understands that by withdrawing said Notice of Defense
14 Respondent will thereby waive his right to require the
15 Commissioner to prove the allegations in the Accusation at a
16 contested hearing held in accordance with the provisions of the
17 APA and that Respondent will waive other rights afforded to him
18 in connection with the hearing such as the right to present
19 evidence in defense of the allegations in the Accusation and
20 the right to cross-examine witnesses.

21 4. This Stipulation is based on the factual
22 allegations contained in the Accusation. In the interests of
23 expedience and economy, Respondent chooses not to contest these
24 allegations, but to remain silent and understands that, as a
25 result thereof, these factual allegations, without being
26 admitted or denied, will serve as a prima facie basis for the
27 disciplinary action stipulated to herein. The Real Estate

1 Commissioner shall not be required to provide further evidence
2 to prove said factual allegations.

3 5. It is understood by the parties that the Real
4 Estate Commissioner may adopt the Stipulation and Agreement as
5 his decision in this matter, thereby imposing the penalty and
6 sanctions on Respondent's real estate license and license
7 rights as set forth in the "Order" below. In the event that
8 the Commissioner in his discretion does not adopt the
9 Stipulation and Agreement, it shall be void and of no effect,
10 and Respondent shall retain the right to a hearing and
11 proceeding on the Accusation under all the provisions of the
12 APA and shall not be bound by any admission or waiver made
13 herein.

14 6. The Order or any subsequent Order of the Real
15 Estate Commissioner made pursuant to this Stipulation and
16 Agreement shall not constitute an estoppel, merger or bar to
17 any further administrative or civil proceedings by the
18 Department of Real Estate with respect to any matters which
19 were not specifically alleged to be cause for accusation in
20 this proceeding.

21 7. Respondent understands that by agreeing to this
22 Stipulation and Agreement in Settlement, Respondent agrees to
23 pay, pursuant to Section 10148 of the Business and Professions
24 Code, the cost of the audit that led to this disciplinary action.
25 The amount of said costs is \$8,646.54.

26 8. Respondent has received, read, and understands
27 the "Notice Concerning Costs of Audits". Respondent further

1 understands that by agreeing to this Stipulation and Agreement
2 in Settlement, the findings set forth below in the DETERMINATION
3 OF ISSUES become final, and that the Commissioner may charge
4 Respondent for the costs of any subsequent audit conducted
5 pursuant to Section 10148 of the Business and Professions Code
6 to determine if the violations have been corrected. The maximum
7 costs of said audit will not exceed \$8,646.54.

8 DETERMINATION OF ISSUES

9 By reason of the foregoing stipulations, admissions
10 and waivers and solely for the purpose of settlement of the
11 pending Accusation without hearing, it is stipulated and agreed
12 that the following Determination of Issues shall be made:

13 I

14 The conduct of Respondent, as described in the
15 Accusation, constitutes cause for the suspension or revocation of
16 the real estate license and license rights of Respondent under
17 the provisions of: Sections 10165 and 10177(d) of the Business
18 and Professions Code in conjunction with Sections 10145, 10159.5,
19 and 10163 of the Code, and Sections 2715, 2731, 2831, 2831.2,
20 2832, 2832.1, and 2834 of Title 10, California Code of
21 Regulations.

22 ORDER

23 I

24 The real estate broker license and all license rights
25 of Respondent MITCHELL S. PACKARD under the Real Estate Law are
26 revoked; provided, however, a restricted real estate broker
27 license shall be issued to Respondent pursuant to Section

1 10156.5 of the Business and Professions Code if Respondent makes
2 application therefor and pays to the Department of Real Estate
3 the appropriate fee for the restricted license within ninety
4 (90) days from the effective date of this Decision. The
5 restricted license issued to Respondent shall be subject to all
6 of the provisions of Section 10156.7 of the Business and
7 Professions Code and to the following limitations, conditions
8 and restrictions imposed under authority of Section 10156.6 of
9 that Code:

10 1. The restricted license issued to Respondent may be
11 suspended prior to hearing by Order of the Real Estate
12 Commissioner in the event of Respondent's conviction or plea of
13 nolo contendere to a crime which is substantially related to
14 Respondent's fitness or capacity as a real estate licensee.

15 2. The restricted license issued to Respondent may be
16 suspended prior to hearing by Order of the Real Estate
17 Commissioner on evidence satisfactory to the Commissioner that
18 Respondent has violated any provision of the California Real
19 Estate Law, the Subdivided Lands Law, Regulations of the Real
20 Estate Commissioner or conditions attaching to the restricted
21 license.

22 3. Respondent shall not be eligible to apply for the
23 issuance of an unrestricted real estate license nor for the
24 removal of any of the conditions, limitations, or restrictions
25 of a restricted license until two (2) years have elapsed from
26 the effective date of this Decision.

27

1 4. Respondent shall, within nine (9) months from the
2 effective date of this Decision, present evidence satisfactory
3 to the Real Estate Commissioner that Respondent has, since the
4 most recent issuance of an original or renewal real estate
5 license, taken and successfully completed the continuing
6 education requirements of Article 2.5 of Chapter 3 of the Real
7 Estate Law for renewal of a real estate license. If Respondent
8 fails to satisfy this condition, the Commissioner may order the
9 suspension of the restricted license until Respondent presents
10 such evidence. The Commissioner shall afford Respondent the
11 opportunity for a hearing pursuant to the Administrative
12 Procedure Act to present such evidence.

13 5. Respondent shall, within six (6) months from the
14 effective date of this Decision, take and pass the Professional
15 Responsibility Examination administered by the Department
16 including the payment of the appropriate examination fee. If
17 Respondent fails to satisfy this condition, the Commissioner may
18 order suspension of Respondent's license until Respondent passes
19 the examination.

20 6. Pursuant to Section 10148 of the Business and
21 Professions Code, Respondent shall pay the Commissioner's
22 reasonable cost for: a) the audit which led to this disciplinary
23 action and, b) a subsequent audit to determine if Respondent has
24 corrected the trust fund violations found in Paragraph I of the
25 Determination of Issues. In calculating the amount of the
26 Commissioner's reasonable cost, the Commissioner may use the
27

1 estimated average hourly salary for all persons performing
2 audits of real estate brokers, and shall include an allocation
3 for travel time to and from the auditor's place of work.
4 Respondent shall pay such cost within sixty (60) days of
5 receiving an invoice from the Commissioner detailing the
6 activities performed during the audit and the amount of time
7 spent performing those activities. The Commissioner may suspend
8 the restricted license issued to Respondent pending a hearing
9 held in accordance with Section 11500, et seq., of the
10 Government Code, if payment is not timely made as provided for
11 herein, or as provided for in a subsequent agreement between the
12 Respondent and the Commissioner. The suspension shall remain in
13 effect until payment is made in full or until Respondent enters
14 into an agreement satisfactory to the Commissioner to provide
15 for payment, or until a decision providing otherwise is adopted
16 following a hearing held pursuant to this condition.

17 7. Respondent shall prior to the effective date of
18 the Decision and as a condition to be met prior to the issuance
19 of the restricted license provide evidence satisfactory to the
20 Commissioner that Respondent has cured the trust fund shortages
21 alleged in the Accusation.

22 8. Respondent shall, prior to and as a condition of
23 the issuance of the restricted license, submit proof
24 satisfactory to the Commissioner of having taken and
25 successfully completed the continuing education course on trust
26 fund accounting and handling specified in subdivision (a) of

27

1 Section 10170.5 of the Business and Professions Code. Proof of
2 satisfaction of this requirement includes evidence that
3 Respondent has successfully completed the trust fund account and
4 handling continuing education course within 120 days prior to
5 the effective date of the Decision in this matter.

6 9. Any restricted real estate broker license issued to
7 Respondent may be suspended or revoked for a violation by
8 Respondent of any of the conditions attaching to the restricted
9 license.

10
11
12 11/2/04
13 DATED

Michael B. Rich
14 MICHAEL B. RICH, Counsel
15 DEPARTMENT OF REAL ESTATE

16 * * *

17 I have read the Stipulation and Agreement and its
18 terms are understood by me and are agreeable and acceptable to
19 me. I understand that I am waiving rights given to me by the
20 California Administrative Procedure Act (including but not
21 limited to Sections 11506, 11508, 11509, and 11513 of the
22 Government Code), and I willingly, intelligently, and
23 voluntarily waive those rights, including the right of
24 requiring the Commissioner to prove the allegations in the
25 Accusation at a hearing at which I would have the right to
26 cross-examine witnesses against me, and to present evidence in
27

1 defense and mitigation of the charges.

2
3 10/19/04

4 DATED

MITCHELL S. PACKARD

Respondent

5
6 I have reviewed the Stipulation and Agreement as to
7 form and content and have advised my client accordingly.

8
9 10/21/04

10 DATED

LOUIS A. BASILE

Attorney for Respondent

11
12
13 * * *

14 The foregoing Stipulation and Agreement for
15 Settlement is hereby adopted by the Real Estate Commissioner as
16 his Decision and Order and shall become effective at 12 o'clock
17 noon on January 5, 2005.

18 IT IS SO ORDERED November 17, 2004.

19
20
21 JEFF DAVI
22 Real Estate Commissioner

23
24
25
26
27

1 MICHAEL B. RICH, Counsel
2 State Bar No. 84257
3 Department of Real Estate
4 P. O. Box 187007
5 Sacramento, CA 95818-7007
6
7 Telephone: (916) 227-0789
8

FILED
JUL 9 1 2004

DEPARTMENT OF REAL ESTATE

by Shelly Ely

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

11 In the Matter of the Accusation of)
12)
13 MITCHELL S. PACKARD,)
14)
15 Respondent.)

NO. H-4045 SAC

ACCUSATION

16 The Complainant, CHARLES W. KOENIG, a Deputy Real
17 Estate Commissioner of the State of California, for Causes of
18 Accusation against MITCHELL S. PACKARD, is informed and alleges
19 as follows:

FIRST CAUSE OF ACCUSATION

I

21 The Complainant, CHARLES W. KOENIG, a Deputy Real
22 Estate Commissioner of the State of California, makes this
23 Accusation against Respondents in his official capacity and not
24 otherwise.

II

26 At all times herein mentioned Respondent MITCHELL S.
27 PACKARD (hereinafter "Respondent") was and is licensed by the

1 Department of Real Estate (hereinafter "Department") as a real
2 estate broker.

3 III

4 Within the last three years and at all times herein
5 mentioned, Respondent engaged in the business of, acted in the
6 capacity of, advertised, or assumed to act as a real estate
7 broker within the State of California within the meaning of
8 Business and Professions Code Section 10131(b) (hereinafter "the
9 Code"), including the operation and conduct of a property
10 management business with the public wherein, on behalf of others,
11 for compensation or in expectation of compensation, Respondent
12 leased or rented, offered to lease or rent, and placed for rent,
13 and solicited listings of places for rent, and solicited for
14 prospective tenants of real property or improvements thereon, and
15 collected rents from real property or improvements thereon.

16 IV

17 Beginning in September of 2003, the Department
18 conducted an audit of the above business activities of Respondent
19 for the time period of April 6, 2002, through August 31, 2003.

20 V

21 In so acting as a real estate broker, as described in
22 Paragraph III above, Respondent accepted or received funds in
23 trust (hereinafter "trust funds") from or on behalf of owners and
24 tenants in connection with the leasing, renting, and collection
25 of rents on real property or improvements thereon, as alleged
26 herein, and thereafter from time to time made disbursements of
27 said funds.

VI

The aforesaid trust funds received or accepted by Respondent were deposited or caused to be deposited by Respondent into one or more bank accounts maintained by Respondent for the handling of trust funds, including but not necessarily limited to the following accounts maintained by Respondent:

- (a) Mitch Packard DBA Packard Real Estate, account number 238-003123 (hereinafter "Account #1) at Bank of the West, 150 West Lake Blvd, Tahoe City, California;
- (b) The Tavern Properties Partnership Trust Account, account number 238-011662 (hereinafter "Trust Account #1) at Bank of the West, 150 West Lake Blvd, Tahoe City, California;
- (c) The Tavern Properties Partnership Operating Account, account number 238-011654 (hereinafter "Account #2) at Bank of the West, 150 West Lake Blvd, Tahoe City, California;
- (d) Packard Realty, account number 06092-05752, (hereinafter "Account #3") at Bank of America, P. O. Box 37176, San Francisco, California; and,
- (e) Ray O'Neal Assoc., Inc. Merchant Account, account number 06090-01590, (hereinafter "Account #4") at Bank of America, P. O. Box 37176, San Francisco, California.

\\

\\

1 VII

2 In connection with the collection and disbursement of
3 trust funds, Respondent failed to deposit and maintain the trust
4 funds in a trust account or neutral escrow depository, or to
5 deliver them into the hands of the owners of the funds, as
6 required by Section 10145 of the Code, in such a manner that as
7 of August 31, 2003:

8 (a) There was a combined trust fund shortage in the
9 sum of \$17,784.10 in Account #1 and Account #3;
10 and,

11 (b) There was a combined trust fund shortage in the
12 sum of \$22,411.43 in Trust Account #1, Account #2
13 and Account #4.

14 VIII

15 Respondent failed to obtain the prior written consents
16 of the principals for the reduction of the aggregate balance of
17 trust funds in Trust Account #1, Account #1, Account #2, Account
18 # 3, and Account #4 to an amount less than the existing
19 aggregate trust fund liability to the owners of said funds
20 in conformance with Section 2832.1 of Chapter 6, Title 10,
21 California Code Regulations (hereinafter "Regulations").

22 IX

23 In connection with the receipt and disbursement of
24 trust funds as above alleged, and as set forth in Audit No. SC03-
25 0007 and SC03-0012, dated October 8, 2003, and accompanying
26 working papers and exhibits, Respondent:

27 \\\

- 1 (a) Failed to maintain a written control record of all
2 trust funds received and disbursed containing all
3 information required by Section 2831 of the
4 Regulations, including but not limited to
5 recordation of all deposits, recordation of dates
6 of receipt, and recordation of accurate dates of
7 deposit of trust funds for both Trust Account #1
8 and Account #1;
- 9 (b) Failed to reconcile the balance of records of
10 trust funds received and disbursed with the
11 balance of the records for each beneficiary or
12 transaction at least once a month for Trust
13 Account #1 and Account #1 as required by Section
14 2831.2 of the Regulations;
- 15 (c) Failed to designate Account #1 and Account #4, as
16 trust accounts in the name of the broker as
17 trustee and deposited client trust funds into
18 those accounts in violation of Section 2832 of the
19 Regulations;
- 20 (d) Permitted Raymond O'Neal, a person who held a
21 California real estate broker license, but who was
22 no longer employed or associated by Respondent, to
23 be a signatory on Trust Account #1 in violation of
24 Section 2834 of the Regulations; and,
- 25 (e) Permitted Mike Farwell, a person who held a
26 California real estate broker license, but who was
27 no longer employed or associated by Respondent, to

1 be a signatory on Trust Account #1 in violation of
2 Section 2834 of the Regulations.

3 X

4 The acts and/or omissions of Respondent as alleged
5 above constitute grounds for disciplinary action under the
6 following provisions:

- 7 (a) As to Paragraph VII(a) under Section 10145 of the
8 Code in conjunction with Section 10177(d) of the
9 Code;
- 10 (b) As to Paragraph VII(b) under Section 10145 of the
11 Code in conjunction with Section 10177(d) of the
12 Code;
- 13 (c) As to Paragraph VIII, under Section 10145 of the
14 Code and Section 2832.1 of the Regulations in
15 conjunction with Section 10177(d) of the Code;
- 16 (d) As to Paragraph IX(a), under Section 2831 of the
17 Regulations in conjunction with Section 10177(d)
18 of the Code;
- 19 (e) As to Paragraph IX(b), under Section 2831.2
20 of the Regulations in conjunction with Section
21 10177(d) of the Code;
- 22 (f) As Paragraph IX(c), under Section 2832 of the
23 Regulations in conjunction with Section 10177(d)
24 of the Code;
- 25 (g) As to Paragraph IX(d), under Section 2834 of the
26 Regulations in conjunction with Section 10177(d)
27 of the Code; and,

1 (h) As to Paragraph IX(e), under Section 2834 of the
2 Regulations in conjunction with Section 10177(d)
3 of the Code.

4 SECOND CAUSE OF ACCUSATION

5 XI

6 There is hereby incorporated in this Second, separate
7 and distinct, Cause of Accusation, all of the allegations
8 contained in Paragraphs I, II, III, and IV of the First Cause of
9 Accusation with the same force and effect as if herein fully set
10 forth.

11 XII

12 At all times herein mentioned and prior to September
13 22, 2003, Respondent failed to maintain on file with the Real
14 Estate Commissioner the address for his principal place of
15 business and/or the address of each branch business office for
16 his real estate brokerage activities.

17 XIII

18 At all times herein mentioned and prior to September
19 22, 2003, Respondent maintained more than one place of business
20 and failed to apply for and procure an additional license for
21 each branch office so maintained.

22 XIV

23 The facts alleged above are a violation of Section 2715
24 of the Regulations of the Real Estate Commissioner, Title 10,
25 Chapter 6, California Code of Regulations (hereafter the
26 "Regulations"), and/or Section 10163 of the Code and are grounds
27 for the suspension or revocation of Respondent's license under

1 the provisions of Section 10165 and/or Section 10177(d) of the
2 Code.

3 THIRD CAUSE OF ACTION

4 XV

5 There is hereby incorporated in this Third, separate
6 and distinct, Cause of Accusation, all of the allegations
7 contained in Paragraphs I, II, III, and IV of the First Cause of
8 Accusation with the same force and effect as if herein fully set
9 forth.

10 XVI

11 Respondent utilized and conducted his real estate
12 brokerage activities under the fictitious business name of
13 "Tavern Properties Partnership" and/or "Tavern Properties".

14 XVII

15 At no time did the Department issue a license to
16 Respondent under the fictitious business names recited in
17 Paragraph VIX, above.

18 XVIII

19 The facts as alleged in Paragraphs XVI and XVII, above,
20 are a violation of Section 2731 of the Regulations and/or Section
21 10159.5 of the Code and are grounds for the suspension or
22 revocation of Respondent's license under the provisions of
23 Section 10177(d) of the Code.

24 \\\

25 \\\

26 \\\

27 \\\

WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof a decision be rendered imposing disciplinary action against all license(s) and license rights of Respondent under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code), and for such other and further relief as may be proper under other provisions of law.

Charles W. Koenig
CHARLES W. KOENIG
Deputy Real Estate Commissioner

Dated at Sacramento,

this 18th day of May, 2004