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FILED

AUG 11 2011

DEPARTMENT OF REAL ESTATE  
*[Signature]*

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

\*\*\*

In the Matter of the Accusation of ) No. H-5335 SAC  
 )  
BARRY VANCE MATHIS, )  
 )  
Respondent. )  
 )

ORDER SUSPENDING REAL ESTATE BROKER LICENSE  
(Continuing Education Course on Trust Fund Accounting and Handling)

TO: BARRY VANCE MATHIS ("Respondent"):

On March 11, 2011, in Case No. H-5335 SAC, Respondent's real estate broker license was suspended by the Department of Real Estate for sixty (60) days on the terms, conditions and restrictions set forth in Sections 10156.6 and 10156.7 of the Business and Professions Code (Code). Among those terms and conditions, the Order required Respondent to complete the continuing education course on trust fund account and handling specified in subdivision (a) of Section 10170.5 of the Business and Professions (hereinafter "the condition") within 120 days March 11, 2011, the effective date of the Order, and provided that if Respondent failed to satisfy this condition, the Commissioner may order suspension of the license until Respondent completes the condition.

1 As of July 11, 2011, Respondent has failed to submit proof satisfactory to the  
2 Commissioner of successfully completion of the condition.

3 NOW, THEREFORE, IT IS ORDERED under authority of Section 10156.7 of the  
4 Code that Respondent's real estate broker license and the exercise of any privileges thereunder is  
5 hereby suspended until such time as Respondent provides proof satisfactory to the Commissioner  
6 of compliance with the condition referred to above, or pending final determination made after  
7 hearing (see "Hearing Rights" set forth below).

8 IT IS FURTHER ORDERED that all license certificates and identification cards  
9 issued by the Department of Real Estate which are in the possession of Respondent be  
10 immediately surrendered by personal delivery or by mailing in the enclosed self-addressed,  
11 stamped envelope:

12 DEPARTMENT OF REAL ESTATE  
13 ATTN: Flag Section  
14 P. O. Box 187000  
Sacramento, CA 95818-7000

15 HEARING RIGHTS: You have the right to a hearing to contest the  
16 Commissioner's determination that you are not in compliance with this condition. If you desire a  
17 hearing, you must submit a written request. The request may be in any form, as long as it is in  
18 writing and indicates that you want a hearing. Unless a written request for a hearing, signed by  
19 or on behalf of you, is delivered or mailed to the Department, Legal Section, at 2201 Broadway,  
20 P. O. Box 187007, Sacramento, California 95818-7007, within twenty (20) days after the date  
21 that this Order was mailed to or served on you, the Department will not be obligated or required  
22 to provide you with a hearing.

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This Order shall be effective immediately.

DATED: August 8, 2011

BARBARA J. BIGBY  
Acting Real Estate Commissioner

William E. Moran

By WILLIAM E. MORAN  
Assistant Commissioner, Enforcement

FILED

FEB 18 2011

DEPARTMENT OF REAL ESTATE

K. Mar

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

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|                                    |   |                    |
|------------------------------------|---|--------------------|
| In the Matter of the Accusation of | ) |                    |
|                                    | ) | NO. H-5335 SAC     |
| BARRY VANCE MATHIS,                | ) |                    |
|                                    | ) | OAH No. 2010020920 |
| Respondent.                        | ) |                    |
| _____                              | ) |                    |

DECISION

The Proposed Decision dated January 13, 2011, 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.

Pursuant to Section 11517(c)(2)(c) of the Government Code, the following correction is made:

Page 1, the case number of the Proposed Decision should be corrected to:

“No. H-5335 SAC”

This Decision shall become effective at 12 o'clock noon on MAR 11 2011

IT IS SO ORDERED 2/17/11

JEFF DAVI  
Real Estate Commissioner

Barbara J. Bigby  
BY: Barbara J. Bigby  
Chief Deputy Commissioner

FILED

FEB 17 2011

DEPARTMENT OF REAL ESTATE

By H. Mar

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Case No. H-5335 *SC*

BARRY VANCE MATHIS

OAH No. 2010020920

Respondent.

**PROPOSED DECISION**

Administrative Law Judge Hannah H. Rose, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on December 2, 2010.

Richard K. Uno, Counsel, represented complainant Tricia D. Sommers, a Deputy Real Estate Commissioner, Department of Real Estate (Department), State of California.

Respondent Barry Vance Mathis was present and represented himself.

Evidence was received, and the matter was held open until December 17, 2010 for further documentary evidence relating to the cost of the Department's audit. An Invoice for \$7,106.00 was received from the Department and marked as Exhibit 5. On December 16, 2010, a conference call was initiated by this office to address the matter of Exhibit 5, which was provided post-hearing. Further argument regarding the invoice was heard at that time. The matter was submitted for decision on December 17, 2010.

**SUMMARY**

In this matter, the Department has proved that Barry Vance Mathis, a Real Estate Broker, is guilty of several technical trust fund accounting and handling violations of the Real Estate Law. Respondent admitted all of the violations and corrected the deficits to his practice. Because most of the violations are of a minor, technical nature, and it was not shown that any clients were harmed by these deviations and omissions, the public interest will not be threatened by suspending respondent's license for 60 days, stayed, requiring respondent to take an educational course in trust fund accounting and handling and to reimburse the reasonable costs of the Department's past and future audit.

## FACTUAL FINDINGS

1. Complainant filed the Accusation in her official capacity.

2. At hearing, the Accusation was amended to conform to proof of facts, without objection by respondent. The amendment added paragraph "6, subdivision (h)" to read: "Allowed persons not licensed by the Department, nor having a surety bond, to be a signatory on the trust account in violation of Section 2834 of the Regulations."

### *License History and Background*

3. Respondent is licensed under the Real Estate Law, Part 1 of Division 4, of the Business and Professions Code, as a real estate broker, doing business as Intero Real Estate Services (Intero). Respondent's license was issued on November 4, 2004. It was in full force and effect at all times relevant herein, and will expire on November 3, 2012, unless renewed. Respondent was also licensed as an officer of Mathis and Associates, Inc. on October 24, 2009, and that license will expire on October 23, 2013, unless renewed. He was first licensed as a real estate salesperson on October 21, 2000.

4. At all relevant times, in the city of Roseville, California, respondent acted as a real estate broker and conducted licensed activities within the meaning of section 10131, subdivision (d) of the Code. As a real estate broker, respondent conducts a property management business in which he manages 33 solely-owned properties for 27 different owners who had taken their properties off the sales market and rented them instead of selling them. At times relevant herein, respondent collected rents, advertised, screened tenants, made mortgage payments and was responsible for repairs related to these properties. In the course of his business, respondent accepted or received funds in trust from or on behalf of owners, lessees and others in connection with his property management activities, deposited or caused to be deposited those trust funds into a bank account that he managed, and from which he made disbursements of those trust funds.

### *Audit of Intero Real Estate Service*

5. On or about between August 27, 2009 and October 15, 2009, Rana Tarazi, an Auditor with the Department, conducted an audit of the banking books and records of Intero to determine whether respondent handled and accounted for trust funds in accordance with the Real Estate law and Regulations.<sup>1</sup> The audit covered the period from January 1, 2008 to August 31, 2009. The auditor reviewed records relating to residential property re-sales, property management activities and bank trust accounts. The auditor conducted an initial interview with respondent at which she described the audit scope. The auditor was provided with all documentation that she requested. Her work involved visiting respondent's place of business, selecting and reviewing a random sampling of documents for the time period reviewed, organizing and tabulating 333 pages of documents, creating a table of contents for the tabulated groups of documents, and preparing an Audit Report Transmittal memo for complainant. In the course of the audit, Ms. Tarazi compared respondent's selected

documentation with standard audit forms used by the Department. It was not determined how many hours were spent on-site examining respondent's books and records, in transit, or in the preparation of the documents, report and memo.

6. Respondent and his staff were cooperative throughout the audit. Except for an initial interview and an exit interview with respondent, Ms. Tarazi obtained requested records from respondent's bookkeeper during the audit. In her opinion, respondent made a good faith effort to do his job, but the form of his financial record-keeping did not meet the requirements of the Department sufficiently to provide the required information. As a result of the audit, the Department brought the underlying accusation and this hearing ensued.

7. The audit revealed that:

(a) Respondent maintained one bank account (Bank Account #1) at Mechanics Bank that he used to handle the finances related to his property management business. It was not designated as a "Trust Account."

(b) Respondent's wife was a designated signatory on Bank Account #1. She was neither licensed by the Department, nor did she have a fidelity bond.

(c) Respondent failed to maintain control records (i.e., a document setting forth all funds received and disbursed) for Bank Account #1 in the form of a columnar record in chronological order of all trust funds received, deposited and dispersed, as required by California Code of Regulations, title 10, section 2831.

(d) Respondent failed to maintain separate beneficiary records in Bank Account #1 for each transaction, to show the deposit amount, the disbursement amount, and the daily balance for each beneficiary. As of July 31, 2009, \$295.28 was unaccounted for in Bank Account #1, and there was no separate record to account for these funds.

(e) Respondent failed to reconcile the control record with the separate beneficiary records for each transaction in Bank Account #1 at least once each month, as required by California Code of Regulations, title 10, section 2831.2.

(f) When a monthly reconciliation was performed for Bank Account #1 as of July 31, 2008, there was a shortage of \$502.24 in the account.

(g) Respondent left a personal commission fee of \$1,929.60 in Bank Account #1 for more than 25 days, thereby commingling his personal funds with trust funds of his clients.

(h) Respondent failed to disclose to his clients that he charged property owners an additional \$5.00 per hour for time spent on repairs to the managed properties.

8. The auditor conducted an exit interview with respondent at the conclusion of her audit. At the interview, respondent acknowledged all of the findings of the Department, and immediately corrected some of the issues brought to his attention. The auditor testified that respondent corrected the status of Bank Account #1 to be a designated trust account, and that he removed his wife from the signature card on that account.

#### *Respondent's Testimony*

9. Respondent has been a licensed real estate broker for six years. Before that he was a licensed real estate salesperson for approximately four years. At the time of the audit, he was the broker of record for his solely-owned franchise, Intero Real Estate Services. His property management business is conducted under the name Mathis and Associates, Inc. Respondent developed his property management business when he had several clients who were unable to sell their homes in the current market, and needed to take them off the market and rent instead, in order to preserve the equity in the properties. He manages 33 properties for 27 separate owners in the Roseville, California area. Respondent collected rents, advertised, screened tenants, made mortgage payments and executed necessary repairs for his clients. The trust funds for his daily property management activities were handled through Bank Account #1. Since the time of the audit, respondent closed Intero Real Estate Services. He conducts his broker and property management business under Mathis and Associates, Inc., and he conducts residential re-sales with Keller Williams Realty.

10. Respondent admitted all of the charged allegations in the accusation. He believes that some of the allegations were based on a failure on the part of either the auditor to ask the right questions, or of his bookkeeper to know how to "punch the right button" in QuickBooks, his financial records system. Respondent feels that his bookkeeper did not understand specifically what information was being requested, and that some of the requested information was in fact available, though not provided. In setting up his property management business, respondent chose not to use the forms provided on the Department's website because they required manual entries. Instead, he hired an accountant, whom he believed was familiar with real estate law in California, to set up his bookkeeping system and to teach the system to his bookkeeper.

11. With respect to each specific charge, respondent testified as follows:

(a) Respondent admitted that Bank Account #1 was not set up as a trust account, but he corrected the deficiency and designated the account as a trust account as soon as he was informed of his error.

(b) Respondent admitted that his wife was a designated signatory on Bank Account #1 at the time of the audit, and that she was neither licensed nor



bonded. She was immediately removed as a designated signatory when respondent was informed of the Department's requirements.

(c) Respondent testified that he did maintain control records in a columnar form, as required by the Department, and that he could have provided the required record if *he* had been asked, but asserted that his bookkeeper did not understand which report to pull up in QuickBooks to provide that report. He admitted that the auditor did not receive the records in the form requested.

(d) Respondent testified that he did maintain separate beneficiary records for each transaction, as required by the Department, and that he could have provided the required record if *he* had been asked, but that his bookkeeper did not understand which report to pull up in QuickBooks to provide that report. He admitted that the Department's auditor did not receive the records in the form requested. Respondent acknowledged that \$295.28 was not accounted for, and he immediately undertook the reconciliation of this discrepancy. No clients were missing any funds that were owed to them or their accounts.

(e) Respondent believed that his bookkeeper had performed a monthly reconciliation of the account. When he was notified that she had not, respondent immediately attended to a monthly reconciliation.

(f) Respondent was greatly concerned about the apparent shortage of \$502.24 in Bank Account #1. He investigated the allegation, identified the property to which it related, spoke to the owner, and resolved the discrepancy. Respondent explained that the owner had been out of town when the tenant abandoned the property and left it in a state requiring emergency repairs to mitigate damage. Respondent was adamant that he did not take any money belonging to the client, and that the bookkeeping discrepancy was cleared up when it was brought to his attention.

(g) Respondent admitted that he had left a personal commission fee of \$1,929.60 in Bank Account #1 for more than 25 days, thereby commingling that fee with his client's trust funds. He has since undertaken to learn more and understands the need to be careful to not commingle personal and client trust funds in violation of California Code of Regulations, title 10, section 2835 and Business and Professions Code section 10176, subdivision (e).

(h) Respondent admitted that he did not include his hourly charge for time spent managing repairs to property owners in his contracts with the property owners. He explained that at the time the contracts had been entered into, he did not have a regular handyman working on repairs, and he had a different arrangement for making repairs. When he hired the handyman, he informed the owners of the changed system, and the \$5.00 per hour charge, but he did not amend their contracts. He has since changed his system to bill the

handyman, and pass the charge on to the owner without any overage for himself.

## LEGAL CONCLUSIONS

1. The burden of proof in this matter is on complainant to show by clear and convincing evidence to a reasonable certainty that respondent's license should be suspended or revoked. (See *Ettinger v. Board of Medial Quality Assurance* (1982) 135 Cal.App.3d 853, 855-6.)

### *Applicable Statutes and Regulations*

2. Business and Professions Code section 10145 requires a broker to hold real estate transaction funds belonging to others in trust. That section, in relevant part, provides:

(a) (1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

[¶]...[¶]

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

3. Business and Professions Code section 10177, subdivision (d), authorizes the suspension or revocation of the license of a real estate licensee for "willfully" disregarding or violating the Real Estate Laws or the Commissioner's Regulations.<sup>2</sup> The term "willfully," as used in this subdivision, means "done deliberately: not accidental or without purpose." (*Apollo Estates, Inc. v. Department of Real Estate* (1985) 174 Cal.App.3d 625, 639. See also *Manning v. Fox* (1984) 151 Cal.App.3d 531, 542 ["Section 10177, subdivision (d), is designed 'to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent, or unknowledgeable salesman.'"])

4. California Code of Regulations, title 10, section 2831, describes the trust fund records that a broker must maintain. It provides, in relevant part:

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

- (1) Date trust funds received
- (2) From whom trust funds received
- (3) Amount received
- (4) With respect to funds deposited in an account, date of said deposit.
- (5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.
- (6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.
- (7) Daily balance of said account.

(b) For each bank account which contains trust funds, a record of all trust funds received and disbursed shall be maintained in accordance with subdivision (a) or (c).

(c) Maintenance of journals of account cash receipts and disbursements, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles, shall constitute compliance with subdivision (a) provided that such journals, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

[¶]...[¶]

5. California Code of Regulations, title 10, section 2831.1 requires a broker to keep a separate record for each beneficiary or transaction, accounting for all funds that have been deposited in the broker's trust account. That section provides:

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

- (1) Date of deposit.
  - (2) Amount of deposit.
  - (3) Date of each related disbursement.
  - (4) Check number of each related disbursement.
  - (5) Amount of each related disbursement.
  - (6) If applicable, dates and amounts of interest earned and credited to the account.
  - (7) Balance after posting transactions on any date.
- (b) Maintenance of trust ledgers of separate beneficiaries or transactions, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles will constitute compliance with subdivision (a), provided that such ledgers, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

6. California Code of Regulations, title 10, section 2831.2 mandates that a broker must perform trust account reconciliations. That section provides:

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

7. California Code of Regulations, title 10, section 2832, subdivision (a), requires that trust funds must be deposited in a trust account in the name of the broker as trustee. That section provides:

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

8. California Code of Regulations, title 10, section 2832.1 provides that:

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

9. California Code of Regulations, title 10, section 2834, in relevant part, provides:

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

(1) a salesperson licensed to the broker.

(2) a person licensed as a broker who has entered into a written agreement pursuant to section 2726 with the broker.

(3) an unlicensed employee of the broker with fidelity bond coverage at least equal to the maximum amount of the trust funds to which the employee has access at any time.

[¶]...[¶]

10. California Code of Regulations, title 10, section 2835, in relevant part, provides:

“Commingling” as used in Section 10176(e) of the Code is prohibited except as specified in this section. For purposes of Section 10176(e), the following shall not constitute “commingling”

[¶]...[¶]

(b) The deposit into a trust account maintained in compliance with subdivision (d) of funds belonging in part to the broker's principal and in part to the broker when it is not reasonably practicable to separate such funds, provided the part of the funds belonging to the broker is disbursed not later than twenty-five days after their deposit and there is no dispute between the broker and the broker's principal as to the broker's portion of the funds. When the right of a broker to receive a portion of trust funds is disputed by the broker's principal, the disputed portion shall not be withdrawn until the dispute is finally settled.

[¶]...[¶]

11. Pursuant to Business and Professions Code section 10176, subdivision (e), the license for a real estate broker may be suspended or revoked for commingling with his own money or property the money or property of others that is received and held by him.

12. Pursuant to Business and Professions Code section 10176, subdivision (g), the license for a real estate broker may be suspended or revoked for:

The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of the licensee the full amount of the licensee's compensation, commission or profit under any agreement authorizing or employing the licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of the agreement, whether evidenced by documents in an escrow or by any other or different procedure.

13. Business and Professions Code section 10148, subdivision (b), states:

(b) The commissioner shall charge a real estate broker for the cost of any audit, if the commissioner has found, in a final desist and refrain order issued under Section 10086 or in a final decision following a disciplinary hearing held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting Section 10145.

*Cause for Discipline*

14. Cause for discipline of respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(a), 8, 10 and 11(a), and Legal Conclusions 2, 3 and 7, in that during the audit period, respondent failed to designate Bank Account #1 as a trust account.

15. Cause for discipline of respondent's license as a real estate broker was established pursuant to California Code of Regulations, title 10, section 2834, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(b), 8, 10 and 11(b), and Legal Conclusions 3 and 9, in that during the audit period, respondent's wife was a designated signatory on Bank Account #1, during which time she neither maintained a fidelity bond nor was she licensed by the Department.

16. Cause for discipline of respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2831, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(c), 8, 10 and 11(c), and Legal Conclusions 2, 3 and 4, in that during the audit period, respondent did not maintain a written control record of all trust funds received and disbursed that included all the information required by section 2831.

17. Cause for discipline of respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2831.1, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(d), 8, 10 and 11(d), and Legal Conclusions 2, 3 and 5, in that during the audit period, respondent failed to maintain separate beneficiary records in Bank Account #1 for each transaction, to show the deposit amount, the disbursement amount, and the daily balance for each beneficiary, as of July 31, 2009, \$295.28 was unaccounted for in Bank Account #1, and there was no separate record to account for these funds.

18. Cause for discipline of respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2831.2, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(e), 8, 10 and 11(e), and Legal Conclusions 2, 3 and 6, in that during the audit period, respondent failed to reconcile the balance of separate beneficiary or transaction records with the control records of the trust funds received and disbursed, at least once a month.

19. Cause for discipline of respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(f), 8, 10 and 11(f), and Legal Conclusions 2, 3 and 8, in that during the audit period there was a shortage of \$502.24 in Bank Account #1 as of July 31, 2008.

20. Cause for discipline of respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10176, subdivision (e) and California Code of Regulations, title 10, section 2835, in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(g), 8, 10 and 11(g), and Legal Conclusions 2, 3, 10 and 11, in that during the audit period respondent left a commission fee of \$1,929.60 in Bank Account #1 for more than 25 days.

21. Cause for discipline of respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10176, subdivision (g), in conjunction with Business and Professions Code section 10177, subdivision (d), by reason of Factual Findings 7(h), 8, 10 and 11(h), and Legal Conclusions 2, 3 and 12, in that respondent failed to fully disclose a \$5.00 per hour maintenance mark-up fee in property management agreements with owners or other documents signed by owners.

22. Complainant has established cause to discipline respondent's real estate broker's license by clear and convincing evidence. The trust fund violations were not of a serious nature and no clients were harmed by the largely technical violations. Respondent corrected all of the deficiencies identified by the Department's audit. Given the technical nature of the violations, that no clients were harmed by these violations, and that respondent promptly corrected them soon after notification, respondent's broker's license need not be revoked in order to protect the public. Counsel for complainant argued that respondent should be ordered to pay a monetary penalty in lieu of suspension of his license and that it would not be necessary to impose a restricted license to protect the public interest. Respondent will be required to pay for his past and a future audit pursuant to Business and Professions Code section 101048, subdivision (b). (Legal Conclusion 23.) No public protection purpose would be served by requiring an additional monetary penalty at this time.



## *Cost of Audit*

23. Complainant has established that the Department has incurred costs of an audit of respondent's financial books and records in accordance with the Department's laws and regulations by reason of Factual Findings 5 through 8. Pursuant to Business and Professions Code section 10148, subdivision (b), and California Code of Regulations, title 10, section 2930, the reasonable cost of the audit, set forth in a detailed invoice, shall be charged to respondent if it is found that the broker has violated Business and Professions Coded section 10145 or a regulation or rule of the commissioner interpreting that section. Pursuant to Factual Findings 5 through 8 and Legal Conclusions 14 and 16 through 19, respondent has violated section 10145 or a regulation interpreting that section.<sup>3</sup>

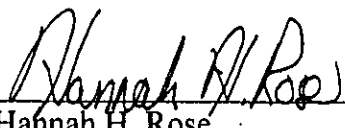
### ORDER

All licenses and licensing rights of Respondent under the Real Estate Law are suspended for a period of sixty (60) days from the effective date of this Decision; provided, however, that said suspension shall be stayed for one (1) year upon the following terms and conditions:

- a. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.
- b. The Commissioner may, if a final subsequent determination is made, after hearing or upon stipulation, that cause for disciplinary action occurred during the term of the suspension provided for in condition "a", vacate and set aside the stay order including any further stay imposed pursuant to Section 10175.2. Should no order vacating the stay be made pursuant to this condition, or conditions "c" and "d" below, the stay imposed herein shall become permanent.
- c. Respondent shall pay the Commissioner's reasonable cost for: (1) the audit which led to this disciplinary action and (2) a subsequent audit to determine if respondent has corrected the trust fund violations found in Legal Conclusions 14 and 16 through 19. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work, and per diem. Respondent shall pay such costs within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may, in his discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The vacation and the set aside of the stay shall remain in effect until payment is made in full, or until respondent enters into an agreement satisfactory to the Commissioner to provide for payment. Should no order vacating the stay be issued, either in accordance with this condition or condition "b" and "d" herein, the stay imposed herein shall become permanent.

d Respondent shall, within 120 days, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in subdivision (a) of Section 10170.5 of the Business and Professions Code. The Commissioner may, in his discretion, vacate and set aside the stay order, if proof is not timely submitted as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The vacation and the set aside of the stay shall remain in effect until the required proof is provided, or until respondent enters into an agreement satisfactory to the Commissioner to provide for course completion and proof thereof. Should no order vacating the stay be issued, either in accordance with this condition or conditions "b" and "c" herein, the stay imposed herein shall become permanent.

Dated: January 13, 2011

  
\_\_\_\_\_  
Hannah H. Rose  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>1</sup> California Code of Regulations, title 10, chapter 6.

<sup>2</sup> Business and Professions Code section 10177, in relevant part, provides:

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

[¶]...[¶]

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

<sup>3</sup> After hearing complainant submitted Exhibit 5, an invoice of cost of the audit of respondent's records relating to Bank Account #1. That exhibit contained none of the detail

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required by California Code of Regulations, title 10, section 2930, which states, in relevant part:

[¶]...[¶]

In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work, and per diem. Respondent shall pay such costs within 60 days of receiving an *invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities.* [Emphasis added.]

Therefore, this court cannot make a determination of the reasonableness of the costs.

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5 Telephone: (916) 227-2380  
6  
7

FILED

JAN 25 2010

DEPARTMENT OF REAL ESTATE

By K. Mar

8 BEFORE THE DEPARTMENT OF REAL ESTATE  
9 STATE OF CALIFORNIA

10 \* \* \*

11 In the Matter of the Accusation of )  
12 ) NO. H-5335 SAC  
13 BARRY VANCE MATHIS, )  
14 Respondent. ) ACCUSATION

15 The Complainant, TRICIA D. SOMMERS, a Deputy Real Estate Commissioner  
16 of the State of California, for Accusation against Respondent BARRY VANCE MATHIS  
17 (MATHIS), is informed and alleges as follows:

18 1

19 The Complainant makes this Accusation against Respondents in her official  
20 capacity.

21 2

22 MATHIS is presently licensed and/or has license rights under the Real Estate  
23 Law, Part 1 of Division 4 of the California Business and Professions Code (the Code) as a real  
24 estate broker dba Intero Real Estate Services.

25 3

26 At all times herein mentioned, Respondent engaged in the business of, acted in  
27 the capacity of, advertised, or assumed to act as a real estate broker within the State of

1 California within the meaning of Section 10131(d) of the Code, including the operation and  
2 conduct of a loan brokerage business with the public wherein, on behalf of others, for  
3 compensation or in expectation of compensation, and claimed, demanded, charged, received,  
4 collected or contracted for an advance fee, Respondent solicited lenders and borrowers for loans  
5 secured directly or collaterally by liens on real property, and wherein Respondent arranged  
6 negotiated, processed, and consummated such loans. Respondent also engaged in the business  
7 of, acted in the capacity of, advertised or assumed to act as a real estate broker in the State of  
8 California, within the meaning of Section 10131 (b) of the Code, including the operation and  
9 conduct of a property management business wherein Respondent leased, rented, or offered to  
10 lease or rent, solicited listings for lease or rent, collected rents from tenants or lessees, or  
11 performed other services for real property owners and tenants or lessees, and also within the  
12 meaning of Section 10131 (a) of the Code, including the operation and conduct of a residential  
13 resale brokerage wherein Respondent bought, sold, or offered to buy or sell, solicited or  
14 obtained listings of, and negotiated the purchase, sale or exchange of real property or business  
15 opportunities, all for or in expectation of compensation.

16 4

17 Beginning on August 27, 2009, and continuing intermittently through October  
18 15, 2009, an audit was conducted at MATHIS' main office located at 401 Vernon Street,  
19 Roseville, California, where the auditor examined records for the period of January 1, 2008  
20 through August 31, 2009 (the audit period).

21 5

22 While acting as a real estate broker as described in Paragraph 3, above, and  
23 within the audit period, MATHIS accepted or received funds in trust (trust funds) from or on  
24 behalf of owners, lessees and others in connection with the property management activities,  
25 deposited or caused to be deposited those funds into a bank account maintained by MATHIS,  
26 including The Mechanics Bank, 6200 Stanford Ranch, Suite 100, Rocklin, California 95677,  
27 Account No. 40956342, designated "Mathis and Associates Inc. dba Intero Real Estate Service

1 Property Management", (Bank Account #1), and thereafter from time to time made  
2 disbursement of said trust funds.

3 6

4 In the course of the activities described in Paragraph 3, in connection with the  
5 collection and disbursement of trust funds, MATHIS:

- 6 (a) Failed to designate Bank Account #1 as a trust account as required by  
7 Section 2832 of Chapter 6, Title 10, California Code of Regulations  
8 (Regulations);
- 9 (b) Failed to maintain control records for Bank Account #1 as required by  
10 Section 2831 of the Regulations;
- 11 (c) Failed to maintain separate records for Bank Account #1 as required by  
12 Section 2831.1 of the Regulations;
- 13 (d) Failed to reconcile the control record with the separate beneficiary  
14 records for Bank Account #1 at least once each month, as required under  
15 Section 2831.2 of the Regulations;
- 16 (e) A bank reconciliation was performed for Bank Account #1 and as of  
17 July 31, 2008, there was a shortage of \$502.24 in violation of Section  
18 2832.1 of the Regulations and Section 10145 of the Code;
- 19 (f) Left a commission fee of \$1,929.60 in Bank Account #1 for more than  
20 25 days, thereby commingling funds in violation of Section 2835 of the  
21 Regulations and Section 10176(e) of the Code and
- 22 (g) Failed to disclose the fact that he charged property owners an additional  
23 \$5.00 per hour for each hour spent on repairs, in violation of Section  
24 10176(g) of the Code.

25 ///

26 ///

27 ///

The acts and/or omissions of MATHIS as alleged above violate Sections 2831, 2831.1., 2831.2, 2832, 2832.1 and 2835 of the Regulations and of Sections 10145, 10176(e) and (g) of the Code and are grounds for discipline under Sections 10176(e) and (g) and 10177(d) of Code.

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 licenses and license rights of Respondents 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.

*Tricia D. Sommers*  
TRICIA D. SOMMERS  
Deputy Real Estate Commissioner

Dated at Sacramento, California,  
this 21<sup>st</sup> day of January, 2010.