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MAR 28 2011

DEPARTMENT OF REAL ESTATE

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

MITCHELL STARK PACKARD,

Respondent.

NO. H-5401 SAC

OAH NO. 2010070928

DECISION

The Proposed Decision dated February 18, 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.

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

IT IS SO ORDERED

3/25/11

JEFF DAVI
Real Estate Commissioner

[Signature]

BY: Barbara J. Bigby
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MITCHELL STARK PACKARD,

Respondent.

Case No. H-5401-SAC

OAH No. 2010070928

PROPOSED DECISION

Administrative Law Judge Linda A. Cabatic, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on January 19, 2011.

Kenneth C. Espell, Real Estate Counsel, represented Tricia D. Sommers (complainant), Deputy Real Estate Commissioner for the Department of Real Estate (department).

Respondent Mitchell Stark Packard was present and was represented by counsel, Louis A. Basile.

This matter arises as a result of the department's audit of respondent's trust accounts, in which it was determined that there were shortages in and comingling of, personal funds with trust funds. Evidence was received and the matter was submitted for decision on January 19, 2011.

FACTUAL FINDINGS

1. Respondent Mitchell Stark Packard received his real estate salesperson's license on November 9, 1976. On January 8, 1981, respondent received his broker's license. On January 5, 2005, respondent's broker's license was revoked with a right to a restricted license resulting from a Stipulation and Agreement. Respondent's restricted broker's license was issued on February 7, 2005, and expired on February 6, 2009. His restricted broker's license was renewed on February 7, 2009, and expires on February 6, 2013.

2. On May 26, 2010, as a result of the department's audit of respondent's trust accounts, complainant filed the Accusation against respondent, alleging there were shortages found in Trust #1 and that respondent comingled personal funds with trust funds deposited in Trust #1.

3. Respondent filed his Notice of Defense on June 17, 2010.

Prior Disciplinary Action

4. The Accusation filed in 2004 alleged several violations of the Business and Professions Code and departmental regulations relating to the proper maintenance, accounting and recording of funds deposited into or disbursed from trust accounts; resulting shortages in the accounts; and the failure to get written consent for the reduction of the aggregate balance of the various trust funds. As part of this Stipulation and Agreement, respondent agreed to take courses, including a course on trust fund accounting and handling pursuant to Business and Professions Code section 10170.5, subdivision (a).

2008 Audit

5. On June 25, 2008, Nada Daghlér, an experienced auditor with the department, met with respondent at his office located at 3600 North Lake Boulevard in Tahoe City, California, to explain the scope of the audit she was about to conduct. The purpose of the audit was to determine whether respondent handled and accounted for the trust funds in accordance with applicable Real Estate Laws and regulations. The audit covered the period of May 1, 2007, through and including May 31, 2008.

6. Ms. Daghlér examined and reviewed, on a sample basis, documents which consisted of various bank records, cancelled checks, deposit register, check register, invoices, sales files, and transaction records provided to her by respondent for the audit period.

7. Specifically, Ms. Daghlér examined the account entitled "Mitch Packard, DBA Packard Realty, Chinquapin Trust Account #1." This bank account consisted of funds for 70 short-term and long-term rentals¹ received by respondent for all rental activities and was located at the Bank of the West in Tahoe City, California. The funds included rental payments and security deposits from tenants and disbursements from this account for management fees to respondent, maintenance expenses for service providers, proceeds to owners and refunds to tenants. Respondent's management fee was 20 percent to 30 percent of the collected rents for short-term and long-term rental units.

8. Ms. Daghlér determined that as of May 31, 2008, respondent earned \$6,902.20 in commissions for the months of April and May 2008 that he did not disburse from the account. Respondent wrote a check to himself on June 25, 2008, in the amount of \$4,135.07, but did not cash the check. The difference between this check and his commission of \$6,902.02 was \$2,767.13. The \$2,767.13 remained in Trust Account #1 for more than 25 days and was used to cover certain expenses for certain owners.

¹ Short-term rentals are the units that are rented for 30 days or less and long-term rental units are rented for more than 30 days. Respondent managed 13 long term rentals and 64 short term rentals for 70 principals.

9. Ms. Daghler reviewed, organized and tabulated 317 pages of documents, creating a table of contents for the tabulated group of documents and preparing an Audit Report Transmittal memo for complainant. Ms. Daghler prepared a bank reconciliation for Trust Account #1 as of May 31, 2008. She compared the adjusted bank balance with the balance shown on the "Record of Trust Funds Received and Paid Out" and on the "Separate Records". The accountability for Trust Account #1 was determined from the "Separate Records" provided by respondent.

10. As a result of the bank reconciliation, Ms. Daghler concluded that there was a shortage in Trust Account #1 consisting of \$4,893.97. Her audit revealed that out of the 70 units managed by respondent for this account, five had negative balances, as well as the In-House Guest Ledger.

<u>Account Reference</u>	<u>Negative</u>
Unit #047	28.13
Unit #079	30.00
Unit #148	36.00
Unit #175	9.00
Unit #177	9.34
In House Guest Ledger	<u>4,781.50</u>
Total	\$4,893.97

11. Ms. Daghler determined that the shortages resulted from the fact that respondent left a portion of his commissions in the trust account to ensure that the trust account was not short overall. Since respondent left part of his commission in the trust account, she concluded that he was mixing his commissions in with his clients' trust accounts.

12. At the hearing, respondent stated that some of his clients leave \$500 in their accounts at all times and some do not. For those who do not, respondent pays invoices for them by loaning money to the account from his earned commissions to prevent the account from being short. These clients would then pay him back or cover the shortage with future rents. Respondent did not have anything in writing from his clients authorizing this arrangement, but rather verbal agreements from those clients who do not agree to leave funds in their accounts at all times.

13. Respondent stated he began the practice of loaning money to his clients in 2003 after the first audit of his accounts was conducted. Respondent stated he began this practice because the auditor of the 2003 audit recommended he loan money from his commissions to avoid any shortages. No documentation was provided to support the advice provided by the auditor. Further, in the "Dept. of Real Estate Declaration" respondent submitted to the department dated June 27, 2008, no mention was made of the auditor's advice.

14. Respondent explained the Guest Ledger was an accounting mechanism used for short term condominium rentals, hotels and motels. It showed what each guest owed and the income received. Payments made by guests were credited to the Guest Ledger and room charges were posted at the end of each day. The charges were debited from the In-House Guest Ledger account to the Room Charges Account. If payment was not received until the end of the stay when the guest checked out, a debit balance was created in the In-House Guest Ledger. Respondent stated the Ledger does not always balance out because credit card payments are dishonored or disputed, or checks bounce resulting in a deficit.

15. On May 31, 2008, the Guest Ledger had a debit balance of \$4,781.50. In order to "cover" the debit balance, respondent left a portion of his rental commissions earned in the trust account to ensure that the trust account was not short overall.

16. Respondent was in Palm Desert for two weeks in May and he neglected to write a check out of the trust account for the commissions he earned in April. He eventually wrote the check for his commissions earned for the months of April and May on June 25, 2008, in the amount of \$4,135.07, but left in the trust account enough money to cover the Guest Ledger and owner account shortages. Respondent stated he was not aware of the statutes governing trust accounts.

17. Respondent changed the way he handled the funds in Trust Account #1 in January of 2009. He no longer pays bills out of Trust Account #1, and has a short-term account and a long-term account.

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 Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.)

2. Business and Professions Code section 10177, subdivision (d) provides, in pertinent part:

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.

3. 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. Business and Professions Code section 10176, subdivision (e) provides:

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

[§. . . §]

(e) Commingling with his or her own money or property the money or other property of others which is received and held by him or her.

[§. . . §]

(See also, 10 Cal. Code Regs. § 2835 [prohibits commingling except as specified therein, none of which is found in this case].)

5. Business and Professions Code section 10145, subdivision (a) 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.

[¶ . . .]

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

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

7. Cause exists to discipline respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10177, subdivision (d), because respondent willfully disregarded or violated the Real Estate Laws and regulations regarding trust funds. (Findings 8, 9, 10, 11, 12, 13, 15, and 16; Legal Conclusion 2.) Respondent had taken a course in trust fund accounting and handling. In spite of this course and in spite of the statutes and regulations to the contrary, respondent failed to properly maintain the funds in Trust Account #1. The fact that respondent claimed he was not aware of the statutes does not excuse his conduct.

8. Cause exists to discipline respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10176, subdivision (e), because respondent commingled his own funds with those in the Trust Account #1 to avoid shortages. (Findings 10, 11, 12, 13, 14, 15, and 16; Legal Conclusion 4.) While respondent claimed he was advised to do so by an auditor for the department, his testimony is not credible.

9. Cause exists to discipline respondent's license as a real estate broker was established pursuant to Business and Professions Code section 10145, subdivision (a), and California Code of Regulations, title 10, section 2832.1, which requires the written authorization from an owner 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. Respondent did not have such written consent of the owners. (Finding 12; Legal Conclusions 5 and 6.)

Complainant established cause for discipline of respondent's real estate broker's license by clear and convincing evidence. Respondent has had his broker's license for thirty years with no apparent violations until the 2004 audit. While respondent claimed he was advised to loan money to his clients by an auditor for the department, his testimony is not credible and this is the second instance of problems with the manner in which he handles trust accounts.

The audit results were similar to the violations that resulted from the 2004 audit and respondent was previously required to attend a course on the proper handling of trust accounts. The trust fund violations, however, were not of such an egregious nature that requires respondent's broker's license be revoked in order to protect the public. Respondent managed the accounts in this manner in order to avoid shortages in Trust Account #1. No clients were harmed by these technical violations. Respondent corrected these violations in January 2009. It would therefore not be contrary to the public interest to impose the following disciplinary order.

ORDER

All restricted licenses and licensing rights of Respondent Mitchell Stark Packard under the Real Estate Law are revoked; provided, however, that the revocation is stayed and respondent's restricted license remains subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

a. 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.

b. 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 February 6, 2013.

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

d. Respondent shall as a condition of the continuance of his restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed the continuing education course on trust fund accounting and handling specified in subdivision (a) of Section 10170.5 of the Business and Professions Code. Proof of satisfaction of this requirement includes evidence that respondent has successfully completed

the trust fund account and handling continuing education course within 120 days of the effective date of the Decision in this matter or a date acceptable to the Commissioner.

Dated: February 18, 2011

A handwritten signature in cursive script, appearing to read "Linda A. Cabatic", is written over a horizontal line.

LINDA A. CABATIC
Administrative Law Judge
Office of Administrative Hearings

FILED

MAY 26 2010

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DEPARTMENT OF REAL ESTATE

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)

MITCHELL STARK PACKARD,)

Respondent.)

NO. H-5401 SAC

ACCUSATION

The Complainant, TRICIA D. SOMMERS, in her official capacity as Deputy Real Estate Commissioner of the State of California, for cause of Accusation against MITCHELL STARK PACKARD (hereinafter "PACKARD") is informed and alleges as follows:

1

Respondent PACKARD was and now is licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) (herein "the Code") as a restricted real estate broker and is doing business under the licensed fictitious business names Chinquapin, Packard Realty, Tahoe Marina Lodge and Tahoe Tavern Properties.

2

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

1 California within the meaning of Sections 10131(d) and 10131(e) of the Code, including the
2 operation and conduct of a property management business wherein PACKARD leased, rented, or
3 offered to lease or rent, solicited listings for lease or rent, collected rents from tenants or lessees,
4 or performed other services for real property owners and tenants or lessees and the conduct of a
5 residential resale brokerage business wherein Respondent bought, sold, or offered to buy or sell,
6 solicited or obtained listings of, and negotiated the purchase, sale or exchange of real property or
7 business opportunities all for or in expectation of compensation.

8 PRIOR DISCIPLINARY ACTION

9 3

10 On or about July 1, 2004, in DRE Case Number H-4045 SAC, the Department
11 filed an accusation against Respondent alleging, among other violations, violations relating to
12 trust account handling practices. On or about November 17, 2004 with an effective date of
13 January 5, 2005, PACKARD and the Department entered into a Stipulation settling the
14 aforementioned accusation wherein Respondent admitted to the violations alleged in the
15 Department's accusation and suffered disciplinary action which included the revocation of
16 Respondent's broker license with the right to apply for a restricted broker license and payment of
17 certain costs and assessments relating to the audit that resulted in the filing of the accusation.
18 On or about February 7, 2005, after making application to the Department, the Department issued
19 PACKARD a restricted real estate broker license.

20 CURRENT AUDIT

21 4

22 In so acting as a real estate broker, PACKARD during the course of the property
23 management and resale activities described in Paragraph 2, above, PACKARD received and
24 disbursed funds held in trust on behalf of others.

25 5

26 The aforementioned trust funds accepted or received by Respondent were
27 deposited or caused to be deposited by Respondent into one or more bank accounts (herein "trust

1 fund accounts") maintained by Respondent for the handling of trust funds, including but not
2 necessarily limited to the *Mitch Packard DBA Packard Realty, Chinquapin Trust Account # 1*,
3 Account No. 238-003123 at the Bank of the West, 150 West Lake Blvd., Tahoe City, CA 96145
4 ("Trust #1).

5 6

6 Beginning June 25, 2008 and continuing intermittently until June 27, 2008, an
7 audit was conducted at PACKARD's main office located at 3600 Northlake Blvd, Tahoe City,
8 California, wherein the auditor examined records for the period May 1, 2007 through May 31,
9 2008 (the audit period).

10 7

11 In the course of the activities described in Paragraph 2, above, for the audit
12 period:

13 (a) A bank account reconciliation was performed for Trust #1 and as of May 31,
14 2008, there was a shortage of \$4,893.97 in violation of Section 10145 of the
15 Code and Section 2831.1 of Chapter 6, Title 10, California Code of Regulations
16 (Regulations);

17 (b) Respondent comingled personal funds with trust funds deposited in Trust #1
18 when PACKARD failed to disburse funds belonging to him within 25 days after
19 deposit in violation of Section 10176(e) of the Code

20 8

21 The acts and/or omissions of PACKARD as alleged above violated Section
22 2831.1, of the Regulations and Sections 10145 and 10176(s) of the Code, and are grounds for
23 discipline under Sections 10176 and 10177(d) of the Code.

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Each and every allegation in Paragraphs 1 through 8, inclusive, above are incorporated by this reference as if fully set forth herein.

The acts and omissions of Respondent PACKARD as described herein constitute negligence or incompetence in performing acts requiring a real estate license, and are cause under Section 10177(g) of the Code for suspension or revocation of all licenses and license rights of Respondent PACKARD.


TRICIA D. SOMMERS
Deputy Real Estate Commissioner

this 10th