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BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

APR 12 2017

BUREAU OF REAL ESTATE

By B. Nicholas

In the Matter of the Accusation of

THERESE LEE SPEARS,

Respondent.

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CalBRE No. H-6376 SAC

OAH No. 2016040950

DECISION

The Proposed Decision dated March 6, 2017, 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.

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to Respondent.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on MAY 03 2017

IT IS SO ORDERED

4/11/2017

WAYNE S. BELL
REAL ESTATE COMMISSIONER



BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CATHY MACMULLIN,
ALI ANN L. ARTIS, and
THERESE LEE SPEARS,

Respondents.

Case No. H-6376 SAC

OAH No. 2016040950

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 28, 2016, and February 21, 2017, in Sacramento, California.

Jason Lazark, Counsel, represented Tricia D. Parkhurst (complainant), Supervising Special Investigator, Bureau of Real Estate (Bureau), Department of Consumer Affairs, State of California.

Therese Lee Spears (respondent) represented herself.¹

Evidence was received, the record was closed, and the matter was submitted for decision on February 21, 2017.

FACTUAL FINDINGS

1. Complainant made and filed the Accusation in her official capacity. Complainant seeks to discipline respondent's broker license based upon the alleged trust fund violations described below.
2. Respondent was originally licensed as a real estate salesperson on May 11, 1979. She was licensed as a broker on May 4, 1984. Respondent's broker license was in full

¹ Respondents Cathy MacMullin and Ali Ann L. Artis were defaulted by the Bureau prior to the hearing in this matter. They did not appear at the hearing.

force and effect at all times relevant to this matter. Respondent's broker license will expire on May 22, 2020, unless renewed or revoked.

Bureau's Audit

3. Niki Moore is the owner of American Property Management (APM), a property management company. Ms. Moore is not licensed by the Bureau. On August 15, 2014, respondent filed a notice with the Bureau to add APM to her broker license as a fictitious business name (DBA). Respondent's license certification history indicates that no action was taken on respondent's license record at that time, and that the information was "filed for reference purposes only." Respondent's license history indicates further that on September 16, 2014, APM was added to respondent's license as a DBA.

4. Corena de Sonnaville is an Auditor III employed by the Bureau. Between February 17 and June 30, 2015, Ms. de Sonnaville conducted an audit of respondent's property management activities regarding APM for the period of August 1, 2014, to January 31, 2015. When conducting the audit, Ms. de Sonnaville, on a sample basis, reviewed APM's: (1) bank signature cards; (2) bank statements; (3) registers; (4) invoices; (5) deposit records; (6) cancelled checks; (7) owner statements; (8) property management and lease agreements; (9) business operating bank account records; and (10) transaction files.

5. During the audit period, APM managed approximately 96 properties, with 165 units and 59 owners. APM collected approximately \$2.1 million in average annual trust funds. The trust funds collected by APM were deposited into two accounts at Umpqua Bank and one account at Tri Counties Bank² as follows:

(a) Trust Account #1. Trust Account #1 was maintained at Umpqua Bank for the receipt and disbursement of trust funds from APM's property management activities. Ms. Moore was the only signor on Trust Account #1. Tenants' rent and security deposit payments and owners' contributions were deposited into Trust Account #1. Security deposit disbursements, repair and maintenance bills, owner proceeds, and management fees were disbursed from Trust Account #1.

(b) Trust Account #2. Trust Account #2 was maintained at Tri Counties Bank for the receipt and disbursement of trust funds from APM's property management activities. Ms. Moore was the only signor on Trust Account #2. Tenants' rent and security deposit payments and owners' contributions were deposited into Trust Account #2. Security deposit disbursements, repair and maintenance bills, owner proceeds, and management fees were disbursed from Trust Account #2.

² APM's bank account was originally at North Valley Bank, but prior to the start of the audit, the account was purchased by Tri Counties Bank.

(c) Trust Account #3. Trust Account #3 was maintained at Umpqua Bank for the receipt and disbursement of trust funds from APM's property management activities relating to property owner JJ S Investments. Ms. Moore was the only signor on Trust Account #3. Tenants' rent and security deposit payments and owners' contributions were deposited into Trust Account #3. Security deposit disbursements, repair and maintenance bills, owner proceeds, and management fees were disbursed from Trust Account #3.

6. Ms. de Sonnaville prepared bank account reconciliations for Trust Accounts #1 and #2 and compared the combined adjusted bank balance to the balance of all the separate records for each beneficiary. She found that as of January 30, 2015, the combined accounts contained a shortage of \$46,934.33. Ms. de Sonnaville could not identify the cause of this shortage. Ms. de Sonnaville found no evidence that the owners of the trust funds in the accounts had given their written consent to allow the funds' balance to be an amount less than the existing aggregate trust fund liability.³

7. Respondent told Ms. de Sonnaville that, on or about August 1, 2014, she began working as the broker for APM. She was paid \$1,000 a month for her services. She was not a signor on any of the trust accounts. Ms. Moore conducted most of APM's property management activities, including collecting, depositing and disbursing trust funds, and negotiating leases on behalf of the property owners. Respondent's duties included processing rental applications, making phone calls, preparing rental contracts, and providing three-day notices. Respondent went to APM's office on Mondays and Tuesdays between 10:00 a.m. and 1:00 p.m., and she was available by telephone. Ms. Moore signed leases as the landlord, and respondent signed as the licensed real estate broker.

8. After auditing APM, Ms. de Sonnaville concluded that as of January 30, 2015:

(a) Respondent failed to maintain separate records for Trust Accounts #1 and #2. The records that were maintained failed to identify: (1) the dates of deposits; (2) amounts of deposits; (3) dates of disbursements; (4) check numbers of related disbursements; and (5) amounts of related disbursements.

(b) Funds that APM received as a security deposit for one of the properties were not deposited into a trust account within three business days. These funds were received on September 9, 2014, and were deposited into the trust account on September 24, 2014, 15 days after receipt.

³ Ms. de Sonnaville found that the adjusted bank balance for Trust Account #3 was equal to its liabilities.

(c) Respondent was not a signor on any of APM's Trust Accounts, and Ms. Moore was not licensed or covered by a fidelity bond. During the audit, Ms. Moore provided a bond in the amount of \$100,000.

(d) Respondent failed to reconcile at least once a month the sum of the separate records with the corresponding control records for Trust Accounts #1 and #2.

Respondent's Evidence

9. Niki Moore's Testimony. Ms. Moore testified that she has been the sole owner of APM since October 1, 2011. From August 2006 until September 30, 2011, Ms. Moore was the co-owner of APM with Katherine Wainwright. Prior to August 2006, Cathy MacMullin owned APM. Because Ms. Moore is not licensed by the Bureau, she retained a licensed real estate broker for APM. When Ms. Moore became the sole owner of APM in October 2011, Ms. MacMullin agreed to be its broker until Ms. Moore obtained her broker license. Ms. Moore twice failed the broker examination. In February 2014, Ms. MacMullin stopped working as APM's broker. From March to June 2014, Ali Ann L. Artis was APM's broker. As of August 2014, respondent became APM's broker. Ms. Moore met respondent through a mutual friend. Ms. Moore performed APM's property management duties with respondent's assistance. Ms. Moore testified that from the outset, respondent performed work relating to APM's rental agreements, rental applications, correspondence with tenants, communications with new owners, and property management agreements. On March 30, 2016, Ms. Moore received an Order to Desist and Refrain from the Bureau, which ordered her to immediately desist and refrain from performing any acts for which a real estate broker license is required.

10. Ms. Moore and respondent worked with accountant Larry Wood to determine the source of the shortage found by Ms. de Sonnaville. When Ms. Moore became the owner of APM, she taught herself to keep APM's books. She was not aware that she was required to perform monthly reconciliations. She has learned "a lot" from Mr. Wood about the correct method to keep APM's books, and has worked closely with him to reconcile its books. According to Ms. Moore, respondent has "some" involvement in the reconciliation process. Respondent met with Mr. Wood and knew what steps were being taken to determine the source of the shortage. Ms. Moore also testified that respondent was running APM's property management business. Ms. Moore performed the reconciliation for APM's accounts and bank statements for the current month, but respondent, working with a bookkeeper, had done it the previous month and did it the "majority" of the time.

11. On the second day of hearing, Ms. Moore testified about a letter prepared by Mr. Wood dated February 18, 2017, which in relevant part stated:

This is an update regarding the status of bookkeeping services that are in process for American Property Management. As you know, the Umpqua Bank trust account was not properly reconciled. We have prepared corrected bank reconciliations

and made accounting entries to adjust the trust general ledger Umpqua Bank cash balance to the bank reconciliation as of October 31, 2016. During this process we noted transactions that were not properly identified to a specific customer/owner. We posted entries to balance sheet accounts titled "Receivable from APM" and "Credits to reclassify." The entries we initially posted to the two balance sheet accounts have been investigated and corrected.

12. During her testimony, Ms. Moore also discussed a receivables register for APM for the period from November 30, 2011, through August 22, 2016, a "credits to reclassify" register for the period from December 2, 2011, through October 31, 2016, and a document she created entitled "\$46,934.33 Shortage from the BRE Audit." According to Ms. Moore, the actual shortage that Mr. Wood and Ms. Moore found in APM's trust accounts was \$52,268.28. Ms. Moore is working with Mr. Wood to correct all the errors and mistakes that were found. Ms. Moore testified that she had applied monies toward the shortage, leaving a balance still due of \$20,129.91. Ms. Moore did not bring to the hearing any bank statements, reconciliations or owner balances. Consequently, her testimony could not be checked or verified.

13. Respondent's Testimony. At the hearing, respondent stated that she agreed to be the broker for APM when she was in a "period of transition." She did not know Ms. Moore before she met with her to discuss becoming APM's broker. When she first started as APM's broker, she was "awed" and "overwhelmed" by its property management business. She acted more like Ms. Moore's employee than her employer. She did not receive or disburse any property management funds. Until the Bureau's audit was conducted, she had no knowledge of or "hands-on" experience with APM's books. When the audit was ongoing, respondent "familiarized" herself with the law regarding trust accounts. She became the trustee and a signor on APM's trust accounts.

14. Respondent has worked with Mr. Wood and Ms. Moore in an effort to determine and correct past mistakes to remedy the shortage in APM's trust accounts. Respondent asserted that Ms. Moore was not deliberately dishonest; she was just "unknowledgeable." During this process, respondent has gone from "ignorance to knowledge" and become "more professional." She is following the laws regarding what real estate work an unlicensed person is allowed and not allowed to do.

15. When respondent first started at APM, Ms. Moore was using QuickBooks to keep its books. With the approval of the Bureau, APM has gotten a new accounting system, AppFolio. But respondent conceded that APM had not started using AppFolio yet. According to respondent, before APM starts using AppFolio, they want to ensure that all its books have been fully reconciled. Ms. Moore is still making all accounting entries for APM into QuickBooks, because respondent does not know how to use QuickBooks. At the hearing, respondent was not certain how many properties APM is still managing or how much in annual trust funds it is still collecting.

16. Respondent testified that, before she began working with APM, she had done some property management work in the 1980's when she was first licensed as a broker. She conceded, however, that her experience with property management was "minimal." Although she had reconciled property management books in the past, she did not have any experience supervising employees. To renew her license, she took a property management course and realized the many errors APM had made.

17. Respondent testified that when she first became APM's broker, she had day-to-day involvement in the operations of APM. She performed work on APM's contracts with owners and leases with tenants, showed properties, lined up cleaning and repairs, and received complaints. But she did not have any responsibility over APM's trust accounts, receivables or disbursements. She recognized her "irresponsibility" in acting more like Ms. Moore's employee, rather than assuming her responsibility as a broker to supervise Ms. Moore. She admitted all the statutory and regulatory violations alleged in the Accusation.

18. Respondent is now more involved in APM's property management business. She works in APM's office four days a week, Monday through Thursday, 1:00 to 4:00 p.m. She interacts with tenants and owners, doing what she called APM's "now" business. She does APM's banking and pays its bills. Monthly reconciliations are now being performed and any mistakes or errors that are found are immediately corrected. Ms. Moore performed the most recent reconciliation, and respondent reviewed it to ensure there were no errors.

19. Respondent testified that Ms. Moore is now doing the accounting for "what she is responsible for." Ms. Moore is reconciling APM's records to address the shortage, and is working with Mr. Wood to identify and address the mistakes and errors in APM's trust accounts. Mr. Wood has been paid approximately \$20,000 to perform his accounting work. Ms. Moore is working 16-hour days to reconcile APM's books. Respondent conceded that she was "minimally" involved in this reconciliation process.

20. Respondent is still getting paid \$1,000 a month for her broker work at APM. Respondent's work for APM is not her only job. She is also a caregiver for people who need help. She provides services to them, such as going to the store. She also receives income from rental properties she owns. When she took the broker job with APM, she had just graduated from college with a B.S. in special education and elementary education. She continued to work on her master's degree while working at APM, and recently received her master's in educational leadership. She is seeking a job that will utilize her master's degree.

Discussion

21. Complainant established by clear and convincing evidence cause to discipline respondent's license. While respondent was the broker for APM, there was a shortage of at least \$46,934.33 in the combined balance of funds in Trust Accounts #1 and #2 without the prior written consent of the owners of the funds. Respondent: (1) failed to maintain separate records for each beneficiary or property of trust funds accepted or received for Trust Accounts #1 and #2; (2) failed to reconcile at least once a month the balance of all separate

beneficiary or transaction records with the balance of the control records for Trust Accounts #1 and #2; (3) allowed an unlicensed signor to serve as the authorized signor on Trust Accounts #1, #2, and #3, without providing for fidelity bond coverage; and (4) failed to place trust funds into the hands of a principal on whose behalf the funds were received, into a neutral escrow depository, or into a trust fund account at a bank or other financial institution in her name as trustee.

22. When all the evidence is considered, the Bureau established that it would be contrary to the public interest, safety and welfare to allow respondent to retain her broker license. The Bureau's highest priority is public protection. Respondent failed to exercise her duties and responsibilities as a broker in a competent and capable fashion. She was negligent in allowing Ms. Moore, who was unlicensed and unbonded, to have unsupervised control over APM's books and trust accounts. By failing to assume and exercise her broker duties and responsibilities over Ms. Moore, respondent left a vacuum that allowed the statutory and regulatory violations to occur and the shortage to arise. While respondent has made an effort to ensure that APM's books are now reconciled, during the hearing, it was clear that Ms. Moore has significantly more involvement in the reconciliation process than respondent. Respondent did not demonstrate that she has the knowledge, skills and abilities expected of a broker, and has assumed the level of supervision and control over Ms. Moore that a broker must exercise over an unlicensed person in her employ. Consequently, in order to ensure that the public is adequately protected, respondent's broker license must be revoked.

23. But the evidence did not establish that respondent should be prohibited from being a real estate licensee. At the hearing, respondent did not dispute the statutory or regulatory violations alleged in the Accusation. She testified in a candid and humble fashion. She took full responsibility for her lack of supervision over Ms. Moore during the audit period. She recognized her shortcomings as a broker during that time. There was no indication that she engaged in any intentional wrongdoing or was aware of any wrongdoing perpetrated by Ms. Moore. She is working to ensure that APM's books are reconciled, and the shortage is addressed. The public would be adequately protected if respondent were issued a restricted real estate salesperson license under the terms and conditions set forth below.

Costs

24. Audit Costs. At the hearing, complainant submitted a Certified Statement of Audit Costs, which requested that respondent be ordered to pay audit costs in the total amount of \$4,860.90. These total costs consist of Ms. de Sonnaville's time to conduct the audit, travel and per diem costs, and supervising auditor review costs. From a review of the certified statement, it appears that the time spent by the Bureau's auditor was appropriate in light of the scope and nature of the audit that was conducted, and that the amounts charged were reasonable. Respondent did not object to the audit costs.

25. Investigation and Enforcement Costs. Complainant has requested that respondent be ordered to pay investigation costs in the amount of \$1,707.50, and enforcement costs in the amount of \$961.20, for total costs of \$2,668.70. In support of these costs, complainant submitted a Certified Statement of Investigation Costs, and a Cost Recovery: Declaration Regarding Enforcement Costs. Attached to these documents were printouts that described the general tasks performed, the time spent on each task, and the hourly rate for the services in accordance with California Code of Regulations, title 1, section 1042. From a review of these documents, it appears that the time spent by the Bureau's investigators and counsel was appropriate in light of the allegations and legal issues in this matter, and that the amounts charged were reasonable. Respondent did not object to the investigation and enforcement costs.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10050.1 provides:

Protection of the public shall be the highest priority for the [Bureau] of Real Estate in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

2. Pursuant to Business and Professions Code section 10177, a real estate license may be disciplined when the licensee has:

(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.

[¶] ... [¶]

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

3. At the time when respondent's trust fund violations occurred, Business and Professions Code section 10145, in relevant part, provided:⁴

⁴ Business and Professions Code section 10145 was amended effective January 1, 2016.

(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.

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

Trust Fund Handling for Multiple Beneficiaries.

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.

5. When respondent was the broker for APM, there was a shortage of at least \$46,934.33 in the combined balance of funds in Trust Accounts #1 and #2 without the prior written consent of the owners of the funds, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1. (Findings 6, 12 and 21.)

6. California Code of Regulations, title 10, section 2831.1 provides:

Separate Record for Each Beneficiary or Transaction.

(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.

7. While respondent was the broker for APM, she failed to maintain separate records for each beneficiary or property of trust funds accepted or received for Trust Accounts #1 and #2, in violation of Business and Professions Code section 10145, subdivision (g), and California Code of Regulations, title 10, section 2831.1. (Findings 8 and 21.)

8. California Code of Regulations, title 10, section 2831.2 provides:

Trust Account Reconciliation.

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.

9. While respondent was the broker for APM, she failed to reconcile at least once a month the balance of all separate beneficiary or transaction records with the balance of the control records for Trust Accounts #1 and #2, in violation of Business and Professions Code section 10145, subdivision (g), and California Code of Regulations, title 10, section 2831.2. (Findings 8 and 21.)

10. California Code of Regulations, title 10, section 2834 provides:

Trust Account Withdrawals.

(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.

(b) Withdrawals may be made from the trust fund account of a corporate broker only upon the signature of:

(1) An officer through whom the corporation is licensed pursuant to section 10158 or 10211 of the Code; or

(2) One of the persons enumerated in paragraph (1), (2) or (3) of subdivision (a) above, provided that specific authorization in writing is given by the officer through whom the corporation is licensed and that the officer is an authorized signatory of the trust fund account.

(c) An arrangement under which a person enumerated in paragraph (1), (2) or (3) of subdivision (a) above is authorized to make withdrawals from a trust fund account of a broker shall not relieve an individual broker, or the broker-officer of a corporate broker licensee, from responsibility or liability as provided by law in handling trust funds in the broker's custody.

11. While respondent was the broker for APM, she allowed an unlicensed signor to serve as the authorized signor on Trust Accounts #1, #2, and #3, without providing for fidelity bond coverage, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2834. (Findings 8 and 21.)

12. California Code of Regulations, title 10, section 2832 provides:

Trust Fund Handling.

(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.

(b) Except as expressly provided by subdivision (d) of Section 10145 of the Code or by a regulation in this article, the account into which the trust funds are deposited shall not be an interest-bearing account for which prior written notice can by law or regulation be required by the financial institution as a condition to the withdrawal of funds.

(c) A check received from the offeror may be held uncashed by the broker until acceptance of the offer if

(1) the check by its terms is not negotiable by the broker or if the offeror has given written instructions that the check shall not be deposited nor cashed until acceptance of the offer and

(2) the offeree is informed that the check is being so held before or at the time the offer is presented for acceptance.

(d) In these circumstances if the offeror's check was held by the broker in accordance with subdivision (c) until acceptance of the offer, the check shall be placed into a neutral escrow depository or the trust fund account, or into the hands of the offeree if offeror and offeree expressly so provide in writing, not later than three business days following acceptance of the offer unless the broker receives written authorization from the offeree to continue to hold the check.

(e) Notwithstanding the provisions of subdivisions (a) and (d), a real estate broker who is not licensed under the Escrow Law (Section 17000, et seq., of the Financial Code) when acting in the capacity of an escrow holder in a real estate purchase and sale, exchange or loan transaction in which the broker is performing acts for which a real estate license is required shall place all 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 the next business day following receipt of the funds by the broker or by the broker's salesperson.

13. While respondent was the broker for APM, she failed to place trust funds into the hands of a principal on whose behalf the funds were received, into a neutral escrow depository, or into a trust fund account at a bank or other financial institution in her name as trustee, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832. (Findings 8 and 21.)

14. The violations described in Legal Conclusions 5, 7, 9, 11, and 13 establish that respondent willfully disregarded or violated the Real Estate Law and the Bureau's regulations, and was negligent and incompetent in performing her duties and responsibilities as the broker for APM. Consequently, complainant established cause to discipline respondent's broker license under Business and Professions Code section 10177, subdivisions (d) and (g).

15. As set forth in Findings 21 through 23, when all the evidence is considered, revoking respondent's broker license, and granting her a restricted salesperson license under the terms and conditions set forth below is appropriate to protect the public interest, safety and welfare.

16. Pursuant to Business and Profession Code section 10148, subdivision (b), the Bureau is entitled to reimbursement for the costs of its audit as follows:

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.

17. As set forth in Finding 24, complainant requested that respondent be ordered to pay audit costs in the total amount of \$4,860.90. This amount is reasonable. In accordance with Business and Professions Code section 10148, subdivision (b), respondent should be ordered to pay this amount.

18. Business and Professions Code section 10106 permits the award of investigation and enforcement costs, in relevant part, as follows:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, 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.

19. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered when determining the reasonableness of costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include: (a) whether the licensee has been successful at hearing in getting charges dismissed or reduced; (b) the licensee's subjective good faith belief in the merits of his or her position; (c) whether the licensee has raised a colorable challenge to the proposed discipline; (d) the financial ability of the licensee to pay; and (e) whether the scope of the investigation was appropriate in light of the alleged misconduct.

20. As set forth in Finding 25, complainant seeks a total of \$2,668.70 in investigation and enforcement costs. When all the *Zuckerman* factors are considered, the requested investigation and enforcement costs are reasonable. Consequently, respondent should be ordered to pay these costs in full to the Bureau.

ORDER

All licenses and licensing rights of respondent Therese Lee Spears under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Bureau of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent shall be subject to all of the provisions of 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:

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

2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.
4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Bureau of Real Estate which shall certify:
 - (a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and
 - (b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.
5. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.
6. Respondent shall, prior to and as a condition of the issuance of the restricted license, submit proof satisfactory to the Commissioner of having taken and successfully completed 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 prior to the effective date of the Decision in this matter.
7. Pursuant to Section 10148 of the Business and Professions Code, respondent shall pay the Commissioner's reasonable cost for: (a) the audit which led to this disciplinary action in the amount of \$4,860.90, and (b) a subsequent audit to determine if respondent has corrected the trust fund violations described in Legal Conclusions 5, 7, 9, 11, and 13. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use

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

8. Respondent shall pay investigation and enforcement costs to the Bureau in the amount of \$2,668.70. This amount may be paid in accordance with a reasonable payment plan approved by the Bureau or its designee.

DATED: March 6, 2017

DocuSigned by:

Karen Brandt

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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings