

1 DEPARTMENT OF REAL ESTATE
2 P. O. Box 187007
3 Sacramento, CA 95818-7007
4 Telephone: (916) 227-0789

FILED

MAY 18 2009

DEPARTMENT OF REAL ESTATE

By *[Signature]*

8 BEFORE THE
9 DEPARTMENT OF REAL ESTATE
10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of	)	
	)	NO. H-9819 SF
13 BIRCHFIELD PROPERTY MANAGEMENT	)	
14 INCORPORATED and	)	<u>STIPULATION AND AGREEMENT</u>
15 J. KENNETH BIRCHFIELD,	)	<u>IN SETTLEMENT</u>
	)	<u>AND ORDER</u>
16 Respondents.	)	
17 _____		

18 It is hereby stipulated by and between Respondents BIRCHFIELD PROPERTY
19 MANAGEMENT, INCORPORATED (BPMI) and J. KENNETH BIRCHFIELD
20 (BIRCHFIELD) (jointly referred to as Respondents), acting by and through Frank Buda, Counsel
21 for the Respondents, and the Complainant, acting by and through John Van Driel, Counsel for
22 the Department of Real Estate (the Department), as follows for the purpose of settling and
23 disposing of the Accusation filed on December 20, 2006 in this matter:

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

1 shall instead and in place thereof be submitted solely on the basis of the provisions of this
2 Stipulation and Agreement in Settlement.

3 2. Respondents have received, read and understand the Statement to Respondent,
4 the Discovery Provisions of the APA, and the Accusation filed by the Department in this
5 proceeding.

6 3. A Notice of Defense was filed by Respondents on December 27, 2006,
7 pursuant to Section 11505 of the Government Code, for the purpose of requesting a hearing on
8 the allegations in the Accusation. Respondents hereby freely and voluntarily withdraw said
9 Notice of Defense. Respondents acknowledge that they understand that by withdrawing said
10 Notice of Defense they will thereby waive their right to require the Commissioner to prove the
11 allegations in the Accusation at a contested hearing held in accordance with the provisions of the
12 APA and that they will waive other rights afforded to them in connection with the hearing such
13 as the right to present evidence in defense of the allegations in the Accusation and the right to
14 cross-examine witnesses.

15 4. This Stipulation is based on the factual allegations contained in the Accusation.
16 In the interests of expedience and economy, Respondents choose not to contest these allegations,
17 but to remain silent, and understand that, as a result thereof, these factual allegations, without
18 being admitted or denied, will serve as a prima facie basis for the disciplinary action stipulated to
19 herein. The Real Estate Commissioner shall not be required to provide further evidence to prove
20 said factual allegations.

21 5. It is understood by the parties that the Real Estate Commissioner may adopt
22 the Stipulation and Agreement in Settlement as his decision in this matter thereby imposing the
23 penalty and sanctions on Respondents' real estate licenses and license rights as set forth in the
24 below "Order". In the event that the Commissioner in his discretion does not adopt the
25 Stipulation and Agreement in Settlement, it shall be void and of no effect, and Respondents shall
26 retain the right to a hearing and proceeding on the Accusation under all the provisions of the
27 APA and shall not be bound by any admission or waiver made herein.

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

7. Respondents understand that by agreeing to this Stipulation and Agreement in Settlement, Respondents jointly and severally agree to pay, pursuant to Section 10148 of the Business and Professions Code (the Code), the cost of the two audits which resulted in the determination that Respondents committed the trust account violation(s) found in Paragraph I, below, of the Determination of Issues. The amount of said costs is \$5,203.20.

8. Respondents further understand that by agreeing to this Stipulation and Agreement in Settlement, the findings set forth below in the Determination of Issues become final, and that the Commissioner may charge said Respondents, jointly and severally, for the costs of any audit conducted pursuant to Section 10148 of the Code to determine if the trust account violations found below in the Determination of Issues have been corrected. The maximum costs of said audit shall not exceed \$5,203.20.

DETERMINATION OF ISSUES

The acts and omissions of Respondents as described in the Accusation violated Sections 2715, 2831.2, 2832, and 2832.1 of Title 10, Chapter 6 of the California Code of Regulations (the Regulations) and Sections 10130 and 10145 of the Code and are grounds for the suspension or revocation of the licenses and license rights of Respondents under Section 10177(d) of the Code.

ORDER

1. All licenses and licensing rights of Respondents BPMI and BIRCHFIELD,
individually, under the Real Estate Law are suspended for a period of twenty (20) days from the
effective date of this Order. As to each Respondent, the twenty (20) day suspension shall be
stayed upon the following conditions.

1 (a) Each Respondent, pursuant to Section 10175.2 of the Code, must petition and
2 pay a monetary penalty at a rate of \$75.00 for each day of the suspension for a total monetary
3 penalty of \$1,500 for each Respondent, for a total of \$3,000 for both Respondents;

4 (b) Said payment shall be in the form of a cashier's check or certified check
5 made payable to the Recovery Account of the Real Estate Fund. Said check must be delivered
6 to the Department prior to the effective date of the Order in this matter.

7 (c) No further cause for disciplinary action against the real estate licenses of
8 each Respondent occurs within two (2) years from the effective date of the Decision in this
9 matter. A finding by the Commissioner of grounds for discipline against one of the
10 Respondents shall not be considered to be a finding of grounds for discipline against the other
11 Respondent without independent findings of grounds for discipline against both Respondents.

12 (c) If either Respondent fails to pay the monetary penalty as provided above
13 prior to the effective date of this Order, the stay of the suspension as to that Respondent shall be
14 vacated and the order of suspension shall be immediately executed.

15 (d) If either Respondent pays the monetary penalty and any other moneys due
16 under this Stipulation and Agreement in Settlement and if no further cause for disciplinary
17 action against the real estate license of that Respondent occurs within two (2) years from the
18 effective date of this Order, the entire stay hereby granted, as to that Respondent, shall become
19 permanent.

20 2. Pursuant to Section 10148 of the Code, Respondent BPML, shall, jointly and
21 severally with Respondent BIRCHFIELD, pay the sum of \$5,203.20 for the Commissioner's
22 cost of the two audits which led to this disciplinary action. Respondents shall pay such cost
23 within 60 days of receiving an invoice therefore from the Commissioner. The Commissioner
24 may indefinitely suspend all licenses and licensing rights of both Respondents pending a
25 hearing held in accordance with Section 11500, et seq., of the Government Code, if payment is
26 not timely made as provided for herein, or as provided for in a subsequent agreement between
27 Respondents and the Commissioner. The suspension shall remain in effect until payment is

1 made in full or until Respondents enter into an agreement satisfactory to the Commissioner to
2 provide for payment, or until a decision providing otherwise is adopted following a hearing
3 held pursuant to this condition.

4 3. Respondents, jointly and severally, shall pay the Commissioner's costs, not to
5 exceed \$5,203.20, of any audit conducted pursuant to Section 10148 of the Code to determine if
6 Respondents have corrected the violations described in Paragraph I of the Determination of
7 Issues, above, and any other violations found in either of the two audits which led to this
8 disciplinary action. In calculating the amount of the Commissioner's reasonable cost, the
9 Commissioner may use the estimated average hourly salary for all persons performing audits of
10 real estate brokers, and shall include an allocation for travel time to and from the auditor's place
11 of work. Respondents shall pay such cost within 60 days of receiving an invoice therefore from
12 the Commissioner detailing the activities performed during the audit and the amount of time
13 spent performing those activities. If Respondents fail to pay such cost within the 60 days, the
14 Commissioner may indefinitely suspend all licenses and licensing rights of Respondents under
15 the Real Estate Law until payment is made in full or until Respondents enter into an agreement
16 satisfactory to the Commissioner to provide for payment. Upon payment in full, the indefinite
17 suspension provided in this paragraph shall be stayed.

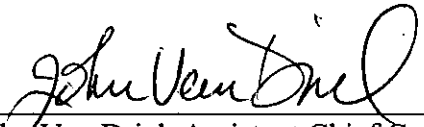
18 4. Respondent BIRCHFIELD shall, within six (6) months from the effective
19 date of this Order, take and pass the Professional Responsibility Examination administered by
20 the Department, including the payment of the appropriate examination fee. If Respondent
21 BIRCHFIELD fails to satisfy this condition, the Commissioner may order the suspension of all
22 licenses and licensing rights until Respondent BIRCHFIELD passes the examination.

23 5. Notwithstanding any other provision of this Order, all licenses and license
24 rights of Respondent BIRCHFIELD are indefinitely suspended unless or until he provides
25 proof satisfactory to the Commissioner that he has taken and successfully completed the
26 continuing education course on trust fund accounting and handling specified in Section
27 10170.5(a)(3) of the Code. Proof of satisfaction of this requirement includes evidence that

1 Respondent BIRCHFIELD has successfully completed the trust fund account and handling
2 continuing education course within 120 days prior to the effective date of this Order.

3 6. Respondents may signify acceptance and approval of the terms and
4 conditions of this Stipulation and Agreement by faxing a copy of its signature page, as actually
5 signed by Respondents, to the Department at the following telephone/fax number: Attention:
6 John Van Driel at (916) 227-9458. Respondents agree, acknowledge and understand that by
7 electronically sending to the Department a fax copy of Respondents' actual signature as they
8 appear on the Stipulation and Agreement, that receipt of the faxed copy by the Department
9 shall be as binding on Respondents as if the Department had received the original signed
10 Stipulation and Agreement.

11
12 5-4-09
13 DATED

14 
15 John Van Driel, Assistant Chief Counsel
16 DEPARTMENT OF REAL ESTATE

17 * * *

18 I have read the Stipulation and Agreement in Settlement and its terms are
19 understood by me and are agreeable and acceptable to me. I understand that I am waiving rights
20 given to me by the California APA (including but not limited to Sections 11506, 11508, 11509,
21 and 11513 of the Government Code), and I willingly, intelligently, and voluntarily waive those
22 rights, including the right of requiring the Commissioner to prove the allegations

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26 ///

27 ///

1 in the Accusation at a hearing at which I would have the right to cross-examine witnesses
2 against me and to present evidence in defense and mitigation of the charges.
3

4 APPROVED AS TO FORM AND CONTENT

5 Frank M. Buda 5/4/09
6 Frank Buda, Attorney Dated

7 BIRCHFIELD PROPERTY MANAGEMENT INCORPORATED,
8 Respondent

9 J. Kenneth Birchfield 5/4/09
10 By: J. Kenneth Birchfield Dated
11 Designated Officer

12 J. Kenneth Birchfield 5/4/09
13 J. Kenneth Birchfield, Respondent Dated

14 ***

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16
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18
19 The foregoing Stipulation and Agreement is hereby adopted by me as my Decision
20 in this matter and shall become effective at 12 o'clock noon on _____

21 IT IS SO ORDERED _____

22 JEFF DAVI.
23 Real Estate Commissioner
24
25
26
27

H-9819 SF

-7-

BIRCHFIELD

1 in the Accusation at a hearing at which I would have the right to cross-examine witnesses
2 against me and to present evidence in defense and mitigation of the charges.
3

4 APPROVED AS TO FORM AND CONTENT
5

6
7 Frank Buda, Attorney

Dated

8 BIRCHFIELD PROPERTY MANAGEMENT INCORPORATED,
9 Respondent

10 By:

11 J. Kenneth Birchfield
12 Designated Officer

Dated

13
14
15 J. Kenneth Birchfield, Respondent

Dated

16
17 * * *

18
19 The foregoing Stipulation and Agreement is hereby adopted by me as my Decision
20 in this matter and shall become effective at 12 o'clock noon on JUN - 8 2009

21 IT IS SO ORDERED

5-14-09

22
23 JEFF DAVI
24 Real Estate Commissioner

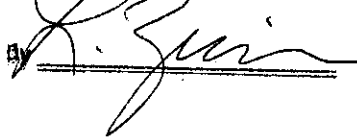
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27

1 DAVID B. SEALS, Counsel (SBN 69378)
2 Department of Real Estate
3 P. O. Box 187000
4 Sacramento, CA 95818-7000

5 Telephone: (916) 227-0789
6 -or- (916) 227-0792 (Direct)

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DEPARTMENT OF REAL ESTATE

By 

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

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11 In the Matter of the Accusation of	)	No. H-9819 SF
	)	
12 BIRCHFIELD PROPERTY MANAGEMENT	)	<u>ACCUSATION</u>
	)	
13 INCORPORATED AND	)	
	)	
14 J. KENNETH BIRCHFIELD,	)	
	)	
15 Respondents.	)	

16 The Complainant, E. J. Haberer II, a Deputy Real
17 Estate Commissioner of the State of California for cause of
18 Accusation against BIRCHFIELD PROPERTY MANAGEMENT INCORPORATED
19 (hereinafter "Respondent BPMI") and J. KENNETH BIRCHFIELD
20 (hereinafter "Respondent BIRCHFIELD "), is informed and alleges
21 as follows:

22 I

23 The Complainant, E. J. Haberer II, a Deputy Real
24 Estate Commissioner of the State of California, makes this
25 Accusation against Respondents in his official capacity.

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1 II

2 Respondent BPMI is licensed and/or has license rights
3 under the Real Estate Law, Part 1 of Division 4 of the
4 California Business and Professions Code (hereinafter "Code") as
5 a corporate real estate broker. However, for the period of May
6 17, 2001 to May 29, 2006, BPMI was not licensed by the
7 Department.

8 III

9 Respondent BIRCHFIELD is licensed and/or has license
10 rights under the Real Estate Law, Part 1 of Division 4 of the
11 Code as a real estate broker and as the designated officer of
12 Respondent BPMI.

13 IV

14 At various times mentioned herein, Respondents
15 BIRCHFIELD and BPMI engaged in the business of, acted in the
16 capacity of, advertised, or assumed to act as real estate
17 brokers within the State of California, within the meaning of
18 Sections 10131(a) and (b) of the Code by selling or offering to
19 sell, buying or offering to buy, soliciting prospective sellers
20 or purchasers of, soliciting or obtaining listings of, or
21 negotiating the purchase, sale or exchange of real property or a
22 business opportunity; and by leasing or renting or offering to
23 lease or rent, or placing for rent, or soliciting listings of
24 places for rent, or soliciting for prospective tenants, or
25 negotiating the sale, purchase or exchanges of leases on real
26 property, or a business opportunity, or collecting rents from

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1 real property, or improvements thereon, or from business
2 opportunities, all for or in expectation of compensation.

3 V

4 That at all times mentioned herein, Respondents
5 BIRCHFIELD and BPMI accepted or received funds in trust
6 (hereafter trust funds) from and on behalf of their principals
7 placing them in accounts and at times thereafter made
8 disbursements of such funds.

9 VI

10 From March 24, 2006 to May 18, 2006 two investigative
11 audits (#OK050109 and #OK050136) were conducted by the
12 Department of the records and bank records of Respondent
13 BIRCHFIELD for the period from January 1, 2005 to February 28,
14 2006, as said records related to his activities as a real estate
15 broker described above.

16 VII

17 Respondent BIRCHFIELD maintained six trust accounts
18 for his real estate activities, as follows:

19 "Trust #1" at Bank of America, Hayward Main Office,
20 P.O. Box 37176, San Francisco, CA 94137-0001 in the name of
21 BIRCHFIELD PROPERTY MANAGEMENT Inc Trust Account #1, Account No.
22 00148-15508.

23 "Trust #2" at Bank of America, Hayward Main Office,
24 P.O. Box 37176, San Francisco, CA 94137-0001 in the name of
25 BIRCHFIELD PROPERTY MANAGEMENT Inc Trust Account #2, Account No.
26 00140-15507.

27 ///

1 "Trust #3" at Bank of America, Hayward Main Office,
2 P.O. Box 37176, San Francisco, CA 94137-0001 in the name of
3 BIRCHFIELD PROPERTY MANAGEMENT Inc Trust Account #3, Account No.
4 00146-41621.

5 "Trust #4" at Bank of America, Hayward Main Office,
6 P.O. Box 37176, San Francisco, CA 94137-0001 in the name of
7 BIRCHFIELD PROPERTY MANAGEMENT Inc Trust Account #4, Account No.
8 00148-41620.

9 "Trust #5" at Bank of America, Hayward Main Office,
10 P.O. Box 37176, San Francisco, CA 94137-0001 in the name of
11 BIRCHFIELD PROPERTY MANAGEMENT Inc Trust Account #5, Account No.
12 00141-41619.

13 "Trust #6" at Bank of America, Hayward Main Office,
14 P.O. Box 37176, San Francisco, CA 94137-0001 in the name of
15 BIRCHFIELD PROPERTY MANAGEMENT Inc Trust Account #6, Account No.
16 00147-08503.

17 VIII

18 The adjusted balance of Trust #1 as of December 31,
19 2005 was Seventeen Thousand Nine Hundred Eighty and 61/100
20 Dollars (\$17,980.61) and the trust fund accountability in the
21 account as of December 31, 2005 was Twenty-Two Thousand Four
22 Hundred Twenty-Nine and 66/100 Dollars (\$22,429.66). Therefore,
23 Respondent, as of December 31, 2005, had a trust fund shortage
24 of Four Thousand Four Hundred Forty-Nine and 05/100 Dollars
25 (\$4,449.05).

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IX

The shortage in Trust #1 was caused by negative balances of (\$4,379.05), but the remainder (\$70.00) could not be identified.

X

The adjusted balance of Trust #2 as of December 31, 2005 was Forty-Three Thousand Three Hundred Twenty-Five and 88/100 Dollars (\$43,325.88) and the trust fund accountability in the account as of December 31, 2005 was Forty-Four Thousand Four Hundred Ninety-Nine and 91/100 Dollars (\$44,499.91). Therefore, Respondent, as of December 31, 2005, had a trust fund shortage of One Thousand One Hundred Seventy-Four and 03/100 Dollars (\$1,174.03).

XI

The shortage in Trust #2 was caused by negative balances of (\$994.63), but the remainder (\$179.40) could not be identified.

XII

Respondent BIRCHFIELD caused the disbursement of trust funds from Trust #1 and Trust #2 without the written consent of every principal who was an owner of the funds, causing the balance of the funds in the accounts to be an amount less than the existing aggregate trust fund liability of Respondent to all owners of said funds in violation of Section 10145 of the Code and Section 2832.1, Title 10, California Code of Regulations (hereinafter the "Regulations").

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1 XIII

2 For both Trust #1 and Trust #2 Respondent BIRCHFIELD
3 failed to reconcile the balance of all separate beneficiary
4 records with the balance of the record of all trust funds
5 received and disbursed on a monthly basis in violation of
6 Section 2831.2 of the Regulations.

7 XIV

8 During the period covered by the audit, Respondent
9 BIRCHFIELD failed to maintain Trust #1 through Trust #6 in the
10 name of the trustee in violation of Section 2832 of the
11 Regulations.

12 XV

13 During the period covered by the audit, Respondent
14 BIRCHFIELD maintained in excess of \$200 of his own funds in
15 Trust #2 in violation of Section 10176(e) of the Code in
16 conjunction with Section 2835 of the Regulations.

17 XVI

18 During the period from May 17, 2001 to May 29, 2006
19 Respondent BPMI performed acts for which a real estate license
20 is required without having such license in violation of Section
21 10130 of the Code.

22 XVII

23 Respondent allowed the acts discussed in Paragraph XVI
24 above to be performed by Respondent BPMI in violation of Section
25 10177(g).

26 ///

27 ///

XVIII

The acts and/or omissions of Respondent's as described above are grounds for the suspension or revocation of Respondent BIRCHFIELD'S licenses and license rights under Section 10176(e) of the Code and Section 10145 of the Code and Sections 2715, 2831.2, 2832, 2832.1, and 2835 of the Regulations in conjunction with Section 10177(d) of the Code and of Respondent BPMI'S licenses and license rights under Section 10130 of the Code in conjunction with Section 10177(d) of the 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.


E. J. HABERER II
Deputy Real Estate Commissioner

Dated at Oakland, California,
this 8th day of December, 2006.