

FILED

OCT 15 2014

BUREAU OF REAL ESTATE

By L. Frost

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of

No. H-11667 SF

WEST MANAGEMENT COMPANY, INC. and
DAVID ELIOT WEST,

OAH No. 2014041229

Respondents

ORDER STAYING EFFECTIVE DATE

On September 26, 2014, a Decision was rendered in the above-entitled matter to become effective on October 20, 2014 ("the Decision").

On October 14, 2014, Respondents requested a stay for the purpose of filing a petition for reconsideration of the Decision.

IT IS HEREBY ORDERED that the effective date of the Decision is stayed for a period of thirty (30) days, with a new effective date of 12 o'clock noon on November 19, 2014.

DATED: 10/15/2014

REAL ESTATE COMMISSIONER

Wayne S. Bell
WAYNE S. BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

FILED
SEP 29 2014

BUREAU OF REAL ESTATE

By *[Signature]*

In the Matter of the Accusation of

WEST MANAGEMENT COMPANY, INC.
and DAVID ELIOT WEST,

Respondents.

NO. H-11667 SF

OAH NO.2014041229

DECISION

The Proposed Decision dated August 20, 2014, 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 OCT 20 2014.

IT IS SO ORDERED SEP 26 2014

REAL ESTATE COMMISSIONER

[Signature]

By: JEFFREY MASON
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

WEST MANAGEMENT COMPANY, INC.,
and DAVID ELIOT WEST,

Respondents.

Case No. H-11667 SF

OAH No. 2014041229

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, on July 29, 2014, in Oakland, California.

Complainant Robin S. Tanner, Deputy Real Estate Commissioner of the State of California, was represented by Annette E. Ferrante, Counsel.

Respondent David Eliot West represented himself and West Management Company, Inc.¹

The matter was submitted for decision on July 29, 2014.

FACTUAL FINDINGS

Licenses

1. West Management Company, Inc. (WMCI) is licensed and has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) as a real estate broker corporation. WMCI's license has been renewed through July 14, 2016.

2. David Eliot West is licensed and has license rights under the Real Estate Law as a real estate broker. West is WMCI's designated officer broker and is responsible under Business and Professions Code section 10159.2 for the supervision of WMCI's officers, agents, real estate licensees and employees in the conduct of all activities for which a real

¹ Although on July 24, 2014, the Bureau of Real Estate had issued a default order against West Management Company, Inc., for failure to file a Notice of Defense, on West's motion at hearing, and without objection from complainant, the default was ordered set aside. West was permitted to appear on behalf of both himself and the corporation.

estate license is required. He is the corporation's only shareholder and corporate officer. West's license has been renewed through May 22, 2015.

3. At all times mentioned, respondents engaged in activities for which a real estate license is required under Business and Professions Code section 10131, subdivision (b). Respondents conducted a property management business in which they screened tenants, collected rents and paid expenses on behalf of property owners.

Audit

4. Between June 28 and July 9, 2012, the bureau conducted an audit of respondents' business activities. At the time of the audit, respondents managed 15 residential properties, four apartment complexes and three commercial properties for 20 owners.

5. The audit covered the period June 1, 2010, through May 31, 2012. During this period, respondents maintained 49 bank accounts to hold trust funds for their clients.² Respondents collected approximately \$675,000 in trust funds annually.

6. In or about May 2012, the bureau notified respondents it would be conducting an audit beginning June 28, 2012. On June 25, 2012, West wrote to the bureau requesting an extension of time because "In preparing for the audit, we discovered that \$80,000 is missing from one of the trust accounts." He attributed this to transfers from the trust account to other WMCI accounts by "a trusted WMC employee." West's request for more time to restore client funds and determine if this was an isolated situation was denied.

7. Four trust accounts were selected for examination. Two of these accounts were used for deposits and disbursements related to property at 12915-12929 San Pablo Avenue, Richmond. These accounts were chosen for examination because one of them, referenced in the audit report as "Bank Account #1," was the account which West had identified to the bureau as having an \$80,000 shortage. Of the four accounts examined, this was the only one in which a trust shortage was found.

8. As of February 29, 2012, Bank Account #1 had an adjusted balance of \$25,961.32 and an accountability of \$107,874.87, leaving a shortage of \$81,913.55. The shortage was caused by 22 unauthorized transfers from the account made between May 13 and October 21, 2011. Six of those transfers were disbursements totaling \$28,463.55 in September and October 2011 to the Internal Revenue Service for the benefit of WMCI. The rest were transfers into four bank accounts owned by respondents: two transfers totaling \$6,100 into an account for West's investment properties; two transfers totaling \$4,000 into

² During the audit period respondents had switched banks. Thus each property being managed at the time of the audit had two trust accounts related to it – an open account at Comerica Bank and a closed account at Summit Bank. Those latter accounts had been closed in April 2012.

West's personal account; seven transfers totaling \$19,650 into WMCI's operating account; and nine transfers totaling \$23,700 into the account of Lighthouse Repair and Maintenance, a company owned by West. None of the 22 transfers had been recorded on Bank Account #1's control record. Nor was a June 24, 2011 deposit of \$31,854.80 recorded on the control record.

9. West and WMCI's bookkeeper, Shannon Hunt, told the auditor that the unauthorized transfers were online transfers that had been made by WMCI's former employee, Juliette Johnson; that Johnson had worked for WMCI for about four years until she moved out of state in March 2012; that Johnson managed the accounting records and had online access to all of WMCI's accounts; and that WMCI had issued Johnson an American Express card, which was paid from the Lighthouse account, that she had used for personal expenses, including food, gas, hotels and airline tickets for herself and relatives.

West told the auditor that Johnson's explanation for the unauthorized transfers was that she made a mistake and thought Bank Account #1 was WMCI's operating account. However, Hunt said she did not believe this explanation, in part because none of the unauthorized transfers had been recorded on the account's control record. In addition, most of the accounting records for Bank Account #1 were missing; Hunt told the auditor she suspected Johnson had taken them.

West told the auditor he had been unaware of any of the transfers made from Bank Account #1 to other accounts and the IRS. He said he did not intend to file a police report against Johnson if the funds were returned, and that he was suing Summit Bank because he had a written agreement that withdrawals were permitted only with his signature, but these transfers had been made online.

10. The auditor met with West and Hunt and examined WMCI's books and records at respondents' main office at 120 Hamilton Place, Oakland. However, at the time of the audit this location was not shown in the bureau's records. According to those records, respondents had been doing business at 2840 Seventh Street, Berkeley, until May 8, 2011, when the address of record was changed to 15 Embarcadero Cove, Oakland. Hunt told the auditor that respondents had moved to the Embarcadero Cove address in 2009, and then to the Hamilton Place address in February 2012. Thus, respondents were operating at unlicensed locations from 2009 until May 2011, and again from February 2012 to July 11, 2012, when respondents' address of record was changed to the Hamilton Place location.

Respondents' evidence

11. West attributes the trust fund shortage to embezzlement by Johnson. To explain how that came about, he tells a complicated tale. In 2009, he learned that his bank, Summit Bank, was downsizing and changing its check-handling policies. WMCI, which processed over 1,500 checks per month, would no longer be able to bring checks into the bank for deposit. Instead, the bank was moving to a remote check-scanning process through a third-party vendor, "Software Earnings." The bank president suggested West obtain a

software program that would allow WMCI to post deposits both to the bank and to WMCI's accounting system in a single transaction. In December 2009, respondents began using Tops Software for this dual posting.

12. According to West, compatibility problems arose between Software Earnings and Tops, leading to significantly increased processing time for checks and to numerous errors, including some that caused WMCI to take collection actions against clients who were not in arrears. As a result, WMCI lost two major accounts and some smaller ones. The company had to downsize. Shannon Hunt, who had been WMCI's accounting manager, was terminated in October 2010. Juliette Johnson, who had been a property manager for some of the lost clients, took over as accounting manager. When she took over, the books were generally in good condition.

13. West asserts that he was focused on getting the business back on track and as a result did not pay much attention to the WMCI accounts. He said he continued to periodically review reports Johnson prepared for him, but did not cross-reference these with the bank statements. He trusted the records Johnson presented him because the account balances looked reasonable. As to Bank Account #1, West testified this was a "simple" account, with only one deposit and three or four disbursements per month. Because of that, he did not review the account in depth.

14. After Johnson left WMCI in March 2012, Shannon Hunt was rehired as the accounting manager. It was sometime after this that the trust fund shortage was discovered.

15. West asserts that the trust fund shortage was entirely the result of Johnson's embezzlement of funds from WMCI and from clients. How she did this beyond using the American Express card to charge personal expenses and then pay the card balance from the Lighthouse account, he does not know. It does not appear she wrote any checks to herself, but West theorizes Johnson may have "booked" checks to vendors that she had actually made payable to herself. He believes that her actions were such that he, or anyone, could not have easily detected what Johnson was doing.

As to the credit card, West said he only gave a cursory review to the monthly credit card statements. And although he did see some personal expenses Johnson had charged, she told him she would repay them. He never followed up to see if she had done so because he trusted her.

As to the payments to the IRS, West said that in 2011 he had received notice from the IRS regarding unpaid taxes. Johnson subsequently told him this was an error and that it had been corrected. West believes Johnson had "cooked the books" of WMCI business accounts to show that the taxes had been paid, and that when the IRS sent notice of nonpayment she transferred money from Bank Account #1 to cover those taxes.

Regarding the shortage in Bank Account #1, West said that Johnson hid that embezzlement from him by creating a fictitious CD and an overpayment of property taxes

benefiting the owner of the funds in that account. When the amounts of these two fictitious transactions were added to the balance in the account, the "cash balance" of the account appeared to West to be about what it should have been.

West presented no proof to support any of the foregoing assertions. He says this is in part because WMCI's "financial records are in disarray."

16. West contends that after the trust fund shortage was found, Johnson admitted that she had embezzled the money and agreed to pay it back. As proof of this, West presented a February 5, 2013 document entitled "Proposal" that he says was prepared by Johnson. But the document is not signed and contains no admissions of wrongdoing. It states, in its entirety:

1. Initial payment of a minimum of 10K by February 28, 2013.
2. Monthly payments in the amount of 2K. Due by the 20th.
3. Final payment (in full) no later than March 15th 2014.
4. Standard interest
5. No penalty for early payment.
6. To be guaranteed by myself and Bobby.

West testified that after Johnson failed to repay the \$81,913.55 as promised, he submitted a claim for the loss to his bonding company.

17. Although West testified that he submitted a claim to his bonding company only after Johnson failed to repay the funds, that claim was actually filed in November 2012, before the "Proposal" purportedly prepared by Johnson. In any case, as part of the claims process, the bonding company required West to file a police report. That was done in November 2012. The officer taking the report wrote, "Mr. West told me that he received a phone call from [Johnson]. [Johnson] stated to Mr. West, that she took the money and she would repay him the loss. [Johnson] also gave Mr. West a written statement saying she took the money and would repay him. I submitted the statement as evidence." That statement was not presented at this hearing.

18. West asserts Johnson subsequently admitted liability to the bonding company and entered into an agreement to repay the money. Again, no proof of this was presented other than West's testimony.

19. In May 2013, the bonding company paid the claim and the full amount of the trust fund shortage was subsequently paid to the benefit of the owners of Bank Account #1. In its letter accepting the claim, the bonding company wrote, "Please note that pursuant to the terms of the policy, we are entitled to any monies you receive from Juliette Johnson or on her behalf in connection with this matter." And West was subsequently notified that the bonding company had retained a debt collector "to pursue Ms. Juliette M. Johnson for the \$81,913.55 loss mentioned above."

20. West is not currently using his real estate license and WMCI is no longer in business. In December 2012 West entered into an agreement with three of his employees to form an employee-owned business, AYS Management, and transfer WMCI's assets to it. As part of that agreement, West was to be paid a biweekly salary for two years. He said his former employees reneged on that agreement and that he has filed suit against them.

West, who has been in the property management business for 40 years, does not want to lose his license. He would like the opportunity to continue to provide property management services for a limited number of clients.

Prior Disciplinary History

21. West's license has been disciplined twice before – in 1991 and in 2004.

22. In 1991, following an administrative hearing, West's license was revoked and he was issued a restricted real estate broker license because he had been convicted in 1989 of willful failure to make unemployment compensation contributions on behalf of his employees.

As reflected in the Real Estate Commissioner's 1991 decision, West attributed his nonpayment of unemployment contributions to a series of bad business judgments. He said that in 1986, his company switched accounting systems but when his controller went on medical leave, the person he promoted to handle the new system was not up to the task. By the time he switched back to the old system, his "books were in disarray and he was unable to provide his clients with an accurate accounting of the amounts in their trust accounts."

He was forced to hire additional staff and outside consultants to straighten out the books. In addition, some of his clients left him because of his inability to properly service them. As a result of the increased expenses, the departure of clients, and a downturn in the economy, the company's income decreased. Because of the state of the company's books, West could not determine how much rent had been collected and how much money was due the departing clients. He said he elected to pay the clients the full amount they would have been due had all rents been collected. This forced him to dip into operating accounts to cover shortfalls in trust accounts. And as a result of that, he found himself unable to pay state and federal taxes, including unemployment contributions. He was hit by a \$32,000 claim by the Employment Development Department and a claim by the IRS in excess of \$200,000.

23. In May 2002, an accusation was filed against West alleging cause for discipline because of shortages in two trust accounts in 2001. In January 2004, West entered into an agreement and stipulation to settle the matter. West withdrew his notice of defense, thereby waiving his right to contest the charges against him. He acknowledged that the factual allegations in the accusation, while neither admitted nor denied, served as a prima facie basis for the agreed-upon discipline. West's license was suspended for 120 days, with

90 of those days stayed for one year on specified terms and conditions, and the remaining 30 days stayed upon payment of a monetary penalty of \$3,000.

In a written statement prepared in 2002 in relation to the accusation against him, West asserted that problems with new accounting software his company was forced to switch to in 1999 left the company's "books in shambles" by the third quarter of 2000. In addition, West cited problems with the check-handling and processing system required by Mechanics Bank, where the company had its accounts, and in July 2000 switched banks. The result of all this was an error-ridden accounting system that required hours of time to reconstruct.

Discussion

24. West's contention that the trust fund shortage in Bank Account #1 resulted from the misdeeds of an employee, Johnson, is certainly plausible. There is some circumstantial evidence tending to show that Johnson was skimming some funds from WMCI (at least for personal expenses charged to the American Express card). And the matters set forth in Finding 19 seem to indicate that WMCI's bonding company found Johnson responsible for the entire \$81,913.55 loss.

But much remains missing, including a reasonable explanation how Johnson embezzled funds. Except for the payments to the IRS, which did not have any financial benefit for Johnson, all of the other transfers were made into various WMCI accounts. On their face, each of these transfers benefitted only West and/or WMCI. There is simply no evidence to show that once these funds were transferred into WMCI accounts they were later removed from those accounts by Johnson or for her benefit. This paucity of evidence places some doubt on the veracity of the claims that the entire trust fund shortage was due to Johnson's embezzlement.

25. But even giving West the benefit of the doubt that it was solely employee embezzlement that caused the trust fund shortage does not absolve West from responsibility for the shortage. At the very best, throughout the entire period when the embezzlement supposedly occurred, West had his head firmly buried in the sand and did not exercise the type of supervision and control that is required of his position as designated corporate broker. West admittedly did not pay much attention to the WMCI accounts. He did not review original records, but relied solely upon reports generated by Johnson, trusting them because the balances "looked reasonable." West gave only a cursory review to monthly credit card bills and when he did find personal expenses had been charged, trusted that they would be repaid.

According to West's testimony, after he received notice from the IRS of unpaid taxes, Johnson told him this was an error that had been corrected. But West never followed up on this. Considering West's prior history with the IRS (Finding 22), one would expect he would have confirmed the truth of Johnson's statement. And had he done so, he likely would have discovered that no payments were made to the IRS from any of the WMCI operating accounts.

Most troubling is West's testimony about Bank Account #1. This, he said, was a "simple" account that only had four or five transactions each month. And because of that, he did not review the account in depth. But the audit revealed that in the five months from May 13 to October 21, 2011, twenty-two unauthorized transfers were made from that account. This would have doubled the average number of transactions occurring in that account each month. This large increase in activity in a "simple" account would have been easily apparent had West been maintaining a reasonable level of care and supervision.

26. West's claims that accounting and banking changes led to the situation that eventually resulted in a trust fund shortage in Bank Account #1 are remarkably similar to the claims he made in 1991 and again in 2002, as reflected in Findings 22 and 23. Three times now, West has told convoluted stories about changes in accounting systems or banking relationships that caused problems in the company, resulting in the company's records being in "disarray" or "shambles," leading in turn to trust fund shortages.

27. The evidence showed that between May and October 2011, when numerous unauthorized transfers were made from one of the trust accounts maintained by WMCI, West failed to exercise reasonable supervision and control over the activities of the company and its employees. This failure demonstrated that West was negligent or incompetent in carrying out the responsibilities of a designated officer broker imposed upon him by Business and Professions Code section 10159.2, and that he therefore willfully disregarded or violated the Real Estate Law.

Costs

28. The Bureau of Real Estate has incurred costs of \$7,517.10 in the investigation and enforcement of this matter. This amount consists of time spent on the case by an auditor (79 hours - \$4,503), investigators (24.3 hours - \$1,506.60), a supervising investigator (4.5 hours - \$306) and an attorney (13.5 hours - \$1,201.50). These costs are found to be reasonable.

LEGAL CONCLUSIONS

On the First Cause of Action

1. Respondents WMCI and West caused or permitted the trust funds in Bank Account #1 to be reduced to an amount less than the existing aggregate liability to the owners of those funds without the written prior consent of those owners, thereby violating Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1. In conjunction with the matters set forth in Finding 27, cause for disciplinary action against both respondents exists pursuant to Business and Professions Code sections 10177, subdivision (d) (willful disregard or violation of the Real Estate Law) and 10177, subdivision (g) (negligence or incompetence).

2. Complainant alleges that cause for disciplinary action against both respondents exists under Business and Professions Code section 10176, subdivision (i), for fraud or dishonest dealing. But it was not shown by clear and convincing evidence that either West or WMCI knowingly acted fraudulently or dishonestly. As set forth in Finding 24, except for the funds used to pay Johnson's personal expenses on the credit card, it does appear on the surface that the transfers from Bank Account #1 benefited West and/or WMCI. But as also set forth in that finding, even though there was no direct evidence presented showing that Johnson somehow took the funds from those accounts for her own benefit, there is circumstantial evidence tending to show that Johnson did take the funds and that the bonding company found this to be the case. That evidence raises enough doubt to preclude a clear and convincing showing of fraud or dishonesty on the part of West and WMCI. Therefore, and notwithstanding the matters set forth below in Legal Conclusion 6, no cause for discipline was established pursuant to section 10176, subdivision (i).

3. Respondents WMCI and West caused or permitted the trust funds in Bank Account #1 to be commingled with respondents' own funds in violation of California Code of Regulations, title 10, section 2835, resulting in cause for discipline pursuant to Business and Professions Code sections 10176, subdivision (e) (commingling), 10177, subdivision (d) (willful disregard or violation of the Real Estate Law or regulations), and 10177, subdivision (g) (negligence or incompetence).

4. By failing to record the 22 unauthorized transfers from and the June 24, 2011 deposit to Bank Account #1, respondents WMCI and West failed to maintain a record of all trust funds received and disbursed, thereby violating Business and Professions Code section 10145, subdivision (g), and California Code of Regulations, title 10, section 2831. Cause for disciplinary action against both respondents thereby exists pursuant to Business and Professions Code sections 10177, subdivision (d) (willful disregard or violation of the Real Estate Law or regulations), and 10177, subdivision (g) (negligence or incompetence).

5. As set forth in Finding 10, respondents WMCI and West violated California Code of Regulations, title 10, section 2715, by failing to keep their address of record on file with the commissioner. Cause for disciplinary action against both respondents thereby exists pursuant to Business and Professions Code sections 10177, subdivision (d) (willful disregard or violation of the Real Estate Law or regulations), and 10177, subdivision (g) (negligence or incompetence).

6. West contends that because he was unaware of and unable to detect Johnson's actions, and because neither he nor WMCI benefited from those actions, respondents cannot be held vicariously liable for the actions of an employee acting outside the legitimate scope of her authority. (For this proposition, West cites two out-of-state cases.) But there is in California the well-established rule of nondelegable duties of licensees, which holds that a licensee who "elects to operate his business through employees[,] must be responsible to the licensing authority for their conduct in the exercise of his license By virtue of the ownership of a . . . license such owner has a responsibility to see to it that the license is not

used in violation of law." (*Ford Dealers Association. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360).) (See also, *California Association of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 295-297; and *Camacho v. Youde* (1979) 95 Cal.App.3d 161.) Even though West may have been relying on Johnson to handle WMCI's books and records, as a licensee of the bureau he remained responsible for her actions under the rule of nondelegable duties of licensees.

On the Second Cause of Action

7. As set forth in Finding 27, respondent West failed to exercise reasonable supervision and control over the activities of WMCI and its employees, which failure constituted negligence or incompetence in carrying out the responsibilities of a designated officer broker. Cause for disciplinary action against West exists pursuant to Business and Professions Code sections 10177, subdivision (d) (willful disregard or violation of the Real Estate Law or regulations), 10177, subdivision (g) (negligence or incompetence), and 10177, subdivision (h) (failure to exercise reasonable supervision).

Disciplinary Considerations

8. The matters set forth in Findings 25 through 27 show that, at best, West was woefully negligent or incompetent in carrying out his responsibilities to supervise the activities of WMCI and its employees and that the circumstances that led to disciplinary action in this case were (at least as portrayed by West) remarkably similar to the circumstances that twice before led to disciplinary action. West's history of an inability to maintain proper trust fund accountability and oversight leads to the conclusion that he would not be a good candidate to retain his license, even on a restricted basis. Protection of the public interest demands outright revocation of the licenses held by West and WMCI.

Costs

9. Business and Professions Code section 10148, subdivision (b), provides that if a broker is found to have violated Business and Professions Code section 10145, the broker shall be charged for the cost of the audit. By reason of the matters set forth in Legal Conclusions 1 and 4, cause to order respondents to pay audit costs exists pursuant to section 10148, subdivision (b).

10. Business and Professions Code section 10106 provides that a licensee found to be in violation of the Real Estate Law may be ordered to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case. Cause exists under that section to require respondents to pay \$7,517.10, the reasonable costs of investigation and enforcement.

ORDER

1. All licenses and licensing rights of respondent West Management Company, Inc., under the Real Estate Law are revoked pursuant to Legal Conclusions 1, 3, 4 and 5.
2. All licenses and licensing rights of respondent David Eliot West under the Real Estate Law are revoked pursuant to Legal Conclusions 1, 3, 4, 5 and 7.
3. Respondents WMCI and West shall pay the cost of the audit.
4. Respondents WMCI and West shall pay investigation and enforcement costs of \$7,517.10.

DATED: August 20, 2014


MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings