

FILED

FEB 20 2020

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE
By B. Nicholas

* * *

In the Matter of the Accusation of:)	DRE No. H-12195 SF
)	
CROSKEY REAL ESTATE, INC.)	OAH No. 2019071237
and WOLFGANG ALFRED CROSKEY,)	
)	
Respondents.)	

DECISION

The Proposed Decision dated January 10, 2020, 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 as to Respondents CROSKEY REAL ESTATE, INC. and WOLFGANG ALFRED CROSKEY.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department'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

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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 MAR 12 2020

IT IS SO ORDERED _____

2/19/20

SANDRA KNAU
ACTING REAL ESTATE COMMISSIONER



FILED

FEB 14 2020

DEPARTMENT OF REAL ESTATE
By B. Nichols

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

CROSKEY REAL ESTATE, INC., and

WOLFGANG ALFRED CROSKEY,

Respondents.

Case No. H12195 SF

OAH No. 2019071237

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on December 18, 2019, in Oakland, California.

Counsel Truly Sughrue represented complainant Robin S. Tanner, Supervising Special Investigator, State of California, Department of Real Estate.

Respondent Wolfgang Alfred Croskey represented himself and respondent Croskey Real Estate, Inc.

The record closed and the matter was submitted on December 18, 2019.

FACTUAL FINDINGS

1. On February 1, 2018, complainant Robin S. Tanner, acting in her official capacity as a Supervising Special Investigator, State of California, Department of Real Estate (Department), issued the accusation. Respondents Croskey Real Estate, Inc. (CREI) and Wolfgang Alfred Croskey (Croskey) timely filed notices of defense and this proceeding followed.

2. On September 18, 2015, the Department issued a real estate broker corporation license to CREI. That license was in effect at all relevant times and expired on September 17, 2019, unless renewed.

3. On September 14, 2005, the Department issued a real estate salesperson license to Croskey. On November 5, 2013, the Department terminated the salesperson license and issued a real estate broker license to Croskey. That license was in effect at all relevant times and will expire on November 4, 2021, unless renewed. Since September 18, 2015, and at all relevant times, Croskey was the designated broker officer of CREI.

4. At all relevant times, respondents engaged in the business of real estate brokers in the State of California, within the meaning of Business and Professions Code section 10131, subdivision (b), in the operation and conduct of a property management business with the public.¹

¹ All statutory references are to the Business and Professions Code unless otherwise stated.

2017 Audit

5. From April 11 through May 5, 2017, Department auditor Na Lin conducted an audit of the accounting and other records related to the property management activities of CREI for the period April 1, 2016, through March 31, 2017 (audit period). Respondents cooperated with the audit. Na issued a report dated October 31, 2017.

6. While acting as a real estate broker as described in Factual Finding 4, respondents accepted or received funds in trust (trust funds) from or on behalf of owners and tenants in connection with the leasing, renting, and collection of rents on real property or improvements thereon, and thereafter made disbursements of said trust funds. During the audit period, CREI managed 83 residential properties, one apartment complex, and seven commercial complexes for 94 owners. CREI collected approximately \$1.8 million in total annual trust funds.

7. Respondents deposited the trust funds received by CREI into three trust accounts CREI maintained for such a purpose. The three trust accounts are hereinafter referred to as "Trust Account 1," "Bank Account 1," and "Bank Account 2" and collectively as the "Three Accounts." Trust Account 1 was entitled "Croskey Real Estate Inc. dba Wolfgang Property Management Professional Trust Fund." Bank Account 1 was entitled "Croskey Real Estate Inc. dba Wolfgang Property Management." Bank Account 2 was entitled "Croskey Real Estate Inc."

8. The owners of the trust funds did not give their consent to allow CREI to reduce the balance of funds in Trust Account 1 and Bank Account 2 to an amount less than the existing aggregate trust fund liabilities.

9. In the course of its property management activities, CREI:

- a. caused, suffered, or permitted the combined balance of funds in Trust Account 1 and Bank Account 2 to be reduced to an amount that, as of February 28, 2017, was \$186,576.29 less than, and as of March 31, 2017, was \$5,537.01 less than, the combined aggregate liability of those accounts to all owners of such funds, in violation of section 10145 and California Code of Regulations, title 10, section 2832.1;
- b. converted approximately \$3,000 of trust funds to respondents' own use and benefit or to purposes not authorized by the rightful owners of said funds;
- c. failed to maintain an accurate columnar record in chronological sequence of all trust funds received into and disbursed from the Three Accounts, in violation of California Code of Regulations, title 10, section 2831;
- d. failed to keep accurate separate records for each beneficiary or transaction, accounting therein for all funds which were deposited into the Three Accounts, in violation of California Code of Regulations, title 10, section 2831.1;
- e. failed to reconcile the balance of separate beneficiary or transaction records with the control record of trust funds received and disbursed at least once a month, in violation of California Code of Regulations, title 10, section 2831.2;
- f. failed to deposit trust funds into one or more trust fund accounts in the name of CREI as trustee at a bank or other financial

institution, in conformance with section 10145 and California Code of Regulations, title 10, section 2832.

10. The auditor found that \$5,717.29 of the \$186,576.29 trust funds shortage was caused by negative account balances; at least \$2,947.20 was caused by Croskey using Bank Account 2 for personal and business expenses; and the remaining shortage of \$177,911.80 was "unidentified."

11. Croskey failed to exercise reasonable supervision over the acts of CREI such that he allowed these acts to occur.

Respondents' Evidence

12. Croskey testified at hearing. The business operated by CREI has been operated by his family for three generations. Property management became the focus of the business after the 2008 financial crisis and now accounts for approximately 75 percent of its income. Croskey took over operation of the business from his father in 2016. Croskey is the Chief Executive Officer of CREI. Croskey supervises four licensed salespersons, who are the only four employees of CREI.

13. Respondents do not dispute the factual allegations of the accusation. Croskey reports that he became aware of the \$186,576.29 shortage of trust funds after he received notice of the audit in early 2017. In mid-March 2017, Croskey deposited \$180,000 into Trust Account 1 to partially cover the shortage. He took out loans to make those deposits.

14. Croskey reports that he does not know what caused most of the \$186,576.29 shortage. He admits that approximately \$3,000 of the shortage was caused by his use of trust funds to pay for personal and business expenses. He

contends that CREI's bank issued debit cards for a trust account as well as a CREI business account and that he confused the two cards. He reports that he reviewed every lease and attempted to reconcile security deposits and owner reserves, but was unable to account for most of the missing funds. He attributes most of the shortage to ignorance of CREI's business software, failing to perform monthly reconciliations, and possibly double-refunding security deposits.

15. Prior to the audit, Croskey was primarily self-trained in the financial aspects of property management. He also admits that his bookkeeping was "sloppy."

16. Croskey reports that, after becoming aware of the shortage, he hired a certified public accountant firm to review CREI's bookkeeping and perform monthly reconciliations of the trust accounts. At hearing, Croskey submitted monthly reconciliations prepared by that firm for CREI from May 2017 through December 2019. Croskey also reports that he "tries to do" monthly reconciliations with the total ledger. He does not print or save an electronic copy of such reports, but they can be regenerated from the software used by CREI at any time.

17. Croskey has also ensured that no debit cards exist for the current trust account and there is now only one account. Since the audit Croskey also has joined a national property manager association. He has taken trainings from that association, including online and in-person classes. However, he "paused" that training when it required involvement of his peers, because he was embarrassed.

18. Respondents provided no other significant evidence of rehabilitation.

Costs

19. Complainant requests \$14,511.18 in investigation and enforcement costs, consisting of \$10,503.18 in audit costs, \$848.50 in other investigation costs, and \$3,159.50 in prosecution costs reflecting time spent on this matter by counsel for the Department. That request is supported by sworn statements that comply with the requirements of California Code of Regulations, title 1, section 1042. In the absence of any argument or evidence to the contrary, complainant is found to have reasonably incurred \$14,511.18 in the investigation and enforcement of this matter.

LEGAL CONCLUSIONS

Causes for Discipline (Respondent CREI)

1. The Department may discipline the license of a real estate licensee who willfully disregarded or violated the Real Estate Law or demonstrated negligence or incompetence in performing licensed activity. (§ 10177, subds. (d) & (g).) As set forth in Factual Finding 9, CREI violated numerous Real Estate laws. Those acts also constitute negligence or incompetence in performing licensed activity. Cause exists to discipline CREI's real estate broker corporation license under section 10177, subdivisions (d) and (g).

2. The Department may discipline the license of a real estate licensee who engages in any conduct that constitutes fraud or dishonest dealing. (§ 10176, subd. (i).) Fraud may be actual or constructive. (Civ. Code, § 1571.) CREI's relationship to its clients, the owners of the trust funds, is a fiduciary relationship. (See *Kane v. Mendenhall* (1936) 5 Cal.2d 749, 759.) Constructive fraud includes any act involving a breach of legal or equitable duty, trust or confidence that results in damage to

another, even though the conduct is not otherwise fraudulent. (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.) "Most acts by an agent in breach of his fiduciary duties constitute constructive fraud." (*Ibid.*) Fraudulent intent is not required. (*Ibid.*) CREI's conversion of approximately \$3,000 of trust funds to respondents' own use and benefit or to purposes not authorized by the rightful owners of said funds, as set forth in Factual Finding 9(b), was a breach of CREI's fiduciary duty to the owners of the trust funds, and constitutes constructive fraud. Cause exists to discipline CREI's real estate broker corporation license under section 10176, subdivision (i).

Cause for Discipline (Respondent Croskey)

3. The Department may discipline the license of a broker licensee who, as the officer designated by a corporate licensee, failed to exercise reasonable supervision and control of the activities of the corporate licensee. (§ 10177, subd. (h).) "Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage . . . the handling of trust funds." (Cal. Code Regs., tit. 10, § 2725, subd. (d).) Croskey was the designated broker officer of CREI and required to exercise reasonable supervision of its licensed activities. (Factual Finding 3.) CREI violated many provisions of the Real Estate Law over a significant period of time, including causing a \$186,576.29 shortage in trust funds it held for its clients. (Factual Findings 9(a).) Croskey failed to exercise reasonable supervision over the acts of CREI such that he allowed these acts to occur. (Factual Finding 11.) Cause exists to discipline Croskey's real estate broker license under section 10177, subdivision (h).

Determination of Discipline

4. Cause for discipline having been established, the remaining issue is what level of discipline is required to protect the public. (§ 10050.1 ["protection of the public shall be paramount"].) Rehabilitation factors include the time elapsed, correction of the responsible business practice, and subsequent misconduct.(Cal. Code Regs., tit. 10, § 2912.)

Neither respondent has a history of prior discipline. Croskey deposited \$180,000 to cover most of the shortage during the audit. Respondents hired a certified public accountant firm to perform monthly reconciliations, and provided evidence of new training and procedures designed to ensure future compliance with the Real Estate Law. However, less than three years ago, respondents violated many provisions of the Real Estate Law over a significant period of time and those violations included causing, suffering, or permitting a \$186,576.29 shortage in trust funds they held for the benefit of their clients. Further, respondents admitted converting approximately \$3,000 of those funds to their own use and did not explain what happened to most of the missing trust funds. Under these circumstances, respondents' rehabilitation evidence is insufficient to assure the Commissioner that they are safe to remain licensed, even on a restricted basis. Public protection requires revocation of respondents' licenses.

Costs

5. Pursuant to Business and Professions Code section 125.3, complainant may request an administrative law judge to order a licensee found to have violated the licensing act to pay an amount that does not exceed the reasonable costs of investigation and enforcement. Complainant proved reasonable costs of enforcement in the amount of \$14,511.18. (Factual Finding 19.)

6. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether costs should be assessed in the particular circumstances of each case. The Department must consider whether to do so will unfairly penalize the licensee who has committed misconduct, but who has used the hearing process to obtain a dismissal or a reduction in the severity of the discipline imposed, as well as whether the licensee will be financially able to pay the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Id.* at pp. 44–45.) Respondent failed to establish cause for a reduction of the cost award.

ORDER

Respondent CREI

1. All licenses and licensing rights of respondent Croskey Real Estate, Inc. under the Real Estate Law are revoked.

Respondent Croskey

2. All licenses and licensing rights of respondent Wolfgang Alfred Croskey under the Real Estate Law are revoked.

Both Respondents

3. Respondents Croskey Real Estate, Inc. and Wolfgang Alfred Croskey, jointly and severally, shall pay the Department of Real Estate \$14,511.18 for the reasonable costs of investigation and enforcement of this matter.

DATE: January 10, 2020

DocuSigned by:
Michael C. Starkey
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MICHAEL C. STARKEY
Administrative Law Judge
Office of Administrative Hearings