

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:) DRE No. H-12493 SF
OMNI PROPERTIES and DION) OAH No. 2020110429
CHENG,)
Respondents.)

DECISION

The Proposed Decision dated April 09, 2021, 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.

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 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 JUN 28 2021.

IT IS SO ORDERED 6.3.21.

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

File

FILED

JUN 07 2021

DEPARTMENT OF REAL ESTATE
By B. Nicholas

FILED

MAY 10 2021

DEPARTMENT OF REAL ESTATE
By B. Nicholas

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

In the Matter of the Accusation Against:

OMNI PROPERTIES, INC., and DION CHENG, Respondents.

Case No. H-12493 SF

OAH No. 2020110429

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on March 4, 2021, by videoconference.

Truly Sughrue, Real Estate Counsel, represented complainant Stephanie Yee, Supervising Special Investigator, Department of Real Estate (Department).

Wayne Burkamp, Attorney at Law, represented respondents Omni Properties, Inc., and Dion Cheng, who was present.

The record remained open for respondents to submit additional exhibits and for complainant to file a response. Respondents submitted two bank reconciliation statements, which were marked and admitted into evidence as Exhibit B. Complainant argued that little weight should be given to this exhibit, but did not object to its admission.

The record closed and the matter was submitted for decision on March 15, 2021.

FACTUAL FINDINGS

Background

1. Respondent Omni Properties, Inc., (Omni Properties) is licensed by the Department as a restricted real estate broker corporation. Its designated officer-broker is respondent Dion Cheng (Cheng). Cheng is licensed by the Department as a restricted real estate broker.

2. On October 15, 2020, complainant Stephanie Yee filed the accusation solely in her official capacity as a supervising special investigator for the Department. Respondents filed notices of defense.

3. Cheng was initially licensed as a real estate salesperson in 2005. He became a real estate broker in 2013. In 2017, he created Omni Properties. Omni Properties is primarily engaged in property management within the meaning of Business and Professions Code section 10131, subdivision (b). Respondent's wife, Rachel Enriquez-Wong, is also a licensed real estate broker and is affiliated with Omni Properties.

Prior Discipline/First Audit Findings

4. Respondents' licenses were restricted as the result of a prior disciplinary action in case no. H-12186 SF. An accusation in the prior matter was issued against respondents in December 2017. This accusation arose after a Department audit discovered several violations: the balance of three separate accounts used to hold

client trust funds was less than the aggregate liability (by \$852.92, \$2,134.30, and \$7,648.69); respondents failed to deposit funds into a client trust account; some client funds were held in an interest-bearing account; respondents used a fictitious business name that was not registered with the Department; and respondents failed to include license numbers on their website.

The parties entered into a stipulation and agreement which was adopted by the Real Estate Commissioner (Commissioner) and went into effect on May 10, 2018. Respondents chose not to contest the factual allegations in the accusation, agreed to the issuance of restricted licenses, agreed to pay for the initial audit, and agreed to pay for a future audit to determine whether the violations had been corrected. Cheng also agreed to take a course in trust fund handling and accounting.

Second Audit Findings

5. Pursuant to the stipulation and agreement, a follow up audit was conducted by Department auditor Sean Thee from April 2019 through March 2020, for the audit period of May 11, 2018, through February 28, 2019. Respondents cooperated fully in the audit. Omni Properties managed 74 residences for 55 different owners, and maintained two bank accounts for handling client trust funds. Thee's audit found violations involving both bank accounts.

Thee prepared a report and testified at hearing regarding his findings. Thee's findings were largely un rebutted and established the allegations in the accusation as follows:

a. the balance of funds in Account #1 as of January 31, 2019, was \$23,332.78 less than the aggregate liability of the account, in violation of Business and

Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1.

b. the balance of funds in Account #2 as of January 31, 2019, was \$4,415 less than the aggregate liability of the account, in violation of Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1.

c. respondents 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 for both accounts, and/or failed to maintain a record of performing such reconciliations, in violation of California Code of Regulations, title 10, section 2831.2.

d. respondents commingled respondents' own funds with the money of others held in trust, in violation of Business and Professions Code section 10176, subdivision (e).

e. respondents failed to immediately notify the Commissioner in writing when real estate salesperson Christina Villegas-Manahan and real estate broker Rachel Enriquez-Wong entered employment with Omni Properties, in violation of Business and Professions Code section 10161.8.

f. respondents failed to maintain a broker-licensee agreement with Rachel Enriquez-Wong, in violation of California Code of Regulations, title 10, section 2726.

6. With the assistance of respondents, Thee was able to determine the causes for all but approximately \$350 of the total shortage in one of the accounts, which were inadvertent errors. Thee found no evidence of any fraud on the part of respondents.

Thee documented three instances of commingling of funds. In November 2018, \$4,000 was accidentally deposited in respondents' broker business account. These funds were transferred to the correct client trust account in April 2019. From June 2018 through September 2019, \$1,002.82 in management fees was maintained in Account #2, in excess of the 25 days by which such funds must be disbursed. Throughout the audit period, respondents maintained approximately \$700 in the broker's fund in Account #2, in excess of the \$200 maximum allowed.

Thee also discovered that Rachel Enriquez-Wong was a signatory on the trust accounts, even though the Department had not been notified that she was affiliated with Omni Properties, and even though there was no broker-licensee agreement for her. In addition, a salesperson, Christina Villegas-Manahan, was employed by Omni Properties even though the Department's records reflected that she worked under Rachel Enriquez-Wong's broker license.

Thee explained that monthly reconciliations of the trust accounts were being performed by respondents' bookkeeper, but that the reconciliations were not compared with the record of all trust funds received and disbursed, as is required.

Respondents' Evidence

7. Cheng testified at hearing. His testimony was forthright and credible. Cheng became interested in real estate because he has family members in the profession. In 2012, Cheng began managing a few properties for clients, eventually developing a portfolio of 20 properties. In 2016, he acquired the portfolio of a property management company, about 50 properties. The initial audit took place shortly after this acquisition, and Cheng acknowledged that he made mistakes as he was learning the software used by the company he acquired. After additional errors

were discovered during the second audit, Cheng worked with the software manufacturer to change settings to help avoid future errors.

Respondents made additional changes after the initial audit, including implementing a system for monthly reconciliations of trust fund accounts. Respondents use a bookkeeper who worked for the company they acquired and is familiar with the properties and clients, and who is also employed by a large property management firm. Respondents trust her and have delegated tasks to her that Cheng previously performed. The bookkeeper performs monthly reconciliations, but Cheng acknowledged that he is not sure whether she does these reconciliations following the two-step process required by the Department's regulation.

Cheng explained two inadvertent errors that caused most of the shortage identified by Thee during the second audit: 1) two checks for the same \$9,408 commission were accidentally generated, one by Cheng and one by the bookkeeper; these funds were returned to the trust account 38 days later; and 2) a \$6,100 security deposit appeared on the general ledger twice. Respondents are no longer maintaining any broker's funds in the trust accounts, to prevent accidental commingling. Respondents have implemented a procedure to withdraw property management fees prior to sending distributions to owners each month as another way to prevent accidental commingling. Cheng has completed the trust fund handling course required by the 2018 stipulation and agreement.

In addition to property management, respondents also occasionally perform sales transactions. Cheng estimated that Omni Properties handled approximately four sales in the prior year.

Costs

8. In connection with the investigation and prosecution of this accusation, the Department has incurred expenses of \$5,369.50. These costs reflect \$881.50 in investigation costs and \$4,488 for legal services. The costs are supported by certifications by complainant Stephanie Yee and Real Estate Counsel Truly Sughrue, and are found to be reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10177, subdivisions (d) and (g), provides that the Commissioner may discipline the license of a licensee who violates the Real Estate Law (Bus. & Prof. Code, § 10000 et seq.) and related regulations. Business and Professions Code section 10176, subdivision (e), provides that the Commissioner may discipline the license of a licensee for commingling of funds. Business and Professions Code section 10145 sets forth the requirements for handling client funds. Business and Professions Code section 10161.8 provides that the Commissioner must be notified whenever a real estate salesperson or broker is retained to perform licensed activities.

California Code of Regulations, title 10, section 2832.1, provides that the balance of funds in a multiple beneficiary trust account cannot be less than the total aggregate liability without written consent of every principal who is owner of funds in the account. California Code of Regulations, title 10, section 2831.2, provides that trust account reconciliations must be performed monthly, and must be reconciled against the record of all trust funds received and disbursed. California Code of Regulations,

title 10, section 2726, provides that every real estate broker must have a written agreement with each salesperson.

Cause for discipline against respondent Omni Properties pursuant to these provisions was established in light of the audit findings set forth in Finding 5.

2. Business and Professions Code section 10159.2 provides that the designated officer of a corporate broker licensee shall be responsible for the supervision and control of activities conducted on behalf of the corporation. California Code of Regulations, title 10, section 2725, provides that brokers must exercise reasonable supervision over their salespersons. Business and Professions Code section 10177, subdivision (h), provides that the Commissioner may discipline the license of a broker or designated officer for failure to exercise reasonable supervision. Cause for discipline under these provisions, as they interact with Business and Professions Code section 10177, subdivisions (d) and (g), against respondent Dion Cheng's real estate broker license, was established in light of the matters set forth in Finding 5 and Legal Conclusion 1.

3. Cause for discipline having been established, the issue is what discipline is appropriate. An audit conducted pursuant to a stipulation and agreement uncovered similar violations, raising concerns about respondents' willingness and ability to abide by the statutes and regulations governing real estate licensees. Respondents' failure to perform adequate monthly reconciliations, commingling of funds, and failure to maintain adequate funds to cover aggregate liability created a risk of financial harm to respondents' clients. On the other hand, there was no evidence of actual harm to clients and no evidence of fraudulent intent. Respondents made changes to their business practices in response to the initial audit and additional changes after the second audit. The violations appeared to be inadvertent or due to a lack of

understanding of the relevant regulations and not willful. Respondent Cheng's testimony was forthright and he appears motivated to abide by the law and provide professional service to his clients.

Weighing the evidence, it is determined that permitting respondents to retain their restricted licenses and requiring them to undergo and pay for a third audit is the appropriate discipline and would not be against the public interest.

4. Business and Professions Code section 10106 authorizes the Department to recover in disciplinary proceedings its reasonable costs of investigation and enforcement. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of costs sought pursuant to statutory provisions such as 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 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.

Business and Professions Code 10148, subdivision (b), authorizes the Commissioner to charge a real estate broker audit costs in disciplinary proceedings involving violations of Business and Professions Code section 10145. Because respondents are already required to pay the costs of the second audit pursuant to the terms of the stipulation and agreement in case no. H-12186 SF, and because the costs of the second audit were not established, imposition of the costs of the second audit is not warranted as part of this proceeding.

ORDER

1. The restricted licenses issued to respondents Omni Properties, Inc., and Dion Cheng shall remain restricted, pursuant to the terms of the stipulation and agreement in case no. H-12186 SF, with the following modification: respondents 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 three years have elapsed from the effective date of this Decision.

2. Respondents shall pay the Department's costs associated with the investigation and enforcement of this action pursuant to Business and Professions Code section 10106, in the amount of \$5,369.50.

3. Respondents shall pay the reasonable costs for a third audit, to determine whether they have corrected the violations established in this action. Respondents shall pay these audit costs within 60 days of receiving an invoice.

DATE: 04/09/2021

Karen Reichmann

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings