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DEPARTMENT OF REAL ESTATE

DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

K. Meierholt

* * * * *

In the Matter of the Accusation of)	No. H-28384 LA
)	
)	L-2000030327
MULHEARN REALTORS and)	
BRUCE MULHEARN,)	
)	
)	
)	
)	
Respondent(s).)	
_____)	

DECISION

The Proposed Decision dated August 14, 2000, 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 October 4, 2000.

IT IS SO ORDERED September 12, 2000.

PAULA REDDISH ZINNEMANN
Real Estate Commissioner

Paula Reddish

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation Against:) Case No. H-28384 LA
)
MULHEARN REALTORS and) OAH No. L-2000030327
BRUCE MULHEARN,)
)
Respondents.)
_____)

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings, heard this matter at Los Angeles, California on July 13, 2000. Complainant was represented by Mr. James R. Peel, Staff Counsel, Department of Real Estate. Respondents appeared with their attorney, Mr. Carl M. Bergkvist.

Evidence was received, the case argued, and the matter submitted for decision on the hearing date. The Administrative Law Judge hereby makes his findings of fact, conclusions of law, and orders, as follows:

FINDINGS OF FACT

1. Complainant Thomas McCrady filed the Accusation in the above-captioned proceeding while acting in his capacity as a Deputy Real Estate Commissioner of the Department of Real Estate ("the Department"), State of California.
2. Respondent Bruce Mulhearn ("Mr. Mulhearn") is currently licensed as a real estate broker by the Department. His license, number 00270292, is due to expire September 5, 2001. Mr. Mulhearn is also licensed as the officer of Respondent Mulhearn Realtors. That Respondent is a corporation, and is licensed by the Department. It's license is due to expire September 25, 2000. Respondent Mulhearn Realtors has various branch office licenses.
3. Respondents have, in expectation of compensation, acted in the capacity of and engaged in the business of real estate brokers within California. In connection with such business and activities, Respondent Mulhearn Realtors has accepted or received funds from buyers and sellers of real estate, and then made disbursements of such funds. To further such

activities Respondent Mulhearn Realtors maintained two trust accounts at Pacific Business Bank in El Monte.

4. In October 1999 the Department conducted a routine audit of Respondent Mulhearn Realtors' books and records to determine if that company had been conducting its business in compliance with the Real Estate Law, and the Commissioner's Regulations. The period audited was for January 1, 1999 through August 31, 1999. The audit was conducted by Rose Bernyk, a Department Auditor, on October 7, 12 through 15, and 28, 1999.

5. The audit established the following:

(A) That as of August 31, 1999, Respondent Mulhearn Realtors had maintained an overage of \$45,390.92 in the firm's trust account number 1. That trust account is normally used to hold "earnest money" deposits and any property management funds.

(B) At the same time, there was a shortage of \$740.91 in the firm's trust account number 2. That trust account is an escrow trust account.

(C) The columnar record for trust account number 1 was missing the date funds were received and from whom they were received.

(D) Monthly reconciliations for the trust accounts had not been maintained for certain months during the audit period.

(E) A non-licensee was allowed to be a signatory on the trust accounts, and other persons, otherwise licensed, were allowed signatory authority without written authorization.

6. Respondent Mulhearn Realtors is a large concern, with ten branch offices. It employs approximately 475 sales agents; approximately twenty of those agents are brokers working as agents. During the eight-month audit period the firm closed some two thousand sales. The firm has four escrow units, which closed about 300 escrows during the audit period.

7. Regarding the shortage of \$740.91 in trust account number 2, it resulted from some \$175.00 of improper bank charges, and the fact that two checks had been posted as deposited, but had not actually been deposited. One of those checks, for \$500.00, was misplaced. It had been left in a tray where a courier could pick it up, but had fallen out of that tray without anyone realizing it. The check was located behind a file cabinet while the auditor was performing her tasks. The other check, for \$65.00 was returned "non-sufficient funds." This shortage has been cured; the bank in question has reversed its charges and the other funds made good.

8. The large overage in the other trust account resulted from the deposit of fire insurance proceeds, payable to Mulhearn Realtors, into the trust account. One of the firm's offices had been damaged in a fire, and insurance proceeds received. The firm's Chief Financial Officer perceived the funds to ultimately be for the benefit of those who will perform the repairs, and placed the money in the trust account. This overage was cured after the auditor made her report.

9. As to the matter of columnar records, the firm's computer-based accounting system did not print out a daily record showing the columnar information, unless specifically commanded to. However, the information was recorded within the system. The Respondent has since rectified this matter.

10. The trust accounts had not been reconciled because the corporation's accounting staff of five people had fallen behind in their work. This followed the emergence of significant problems in the firm's accounting system. The computer that stored and processed the information had "crashed" some time before the audit. The replacement system was not free of problems either. However, all of these problems had been resolved as of the hearing date.

11. (A) The non-licensee who was allowed to sign on the trust account was the firm's controller and Chief Financial Officer, Patrick Rayney. He has been employed by the firm for more than twenty years, and has been a signatory on the trust accounts for nineteen years. Neither he nor Mr. Mulhearn recognized that as a non-licensee he could not have signatory power over the trust accounts if not bonded. Prior audits by the Department had not revealed the problem or focused their attention on it.

(B) The managers of each of the corporation's branch offices, who were licensees, also had authority to write trust account checks. However, they did not have specific written authority to do so.

(C) Since the audit Mulhearn Realtors has obtained a \$300,000.00 fidelity bond for Mr. Rayney, to protect the firm's customers from any unexpected misconduct on his part. This amount was chosen although the average account balance is about \$55,000.00. The branch managers have been given specific written authority to sign on the trust account.

12. (A) Respondents were disciplined in 1991 by the Department. By stipulation, they agreed to settle an accusation, without a hearing. They were ordered suspended for thirty days, with the proviso that if they paid a fine of \$2,500.00, the suspension would be permanently stayed.

(B) The unrefuted evidence is that a former employee of the corporation, while conducting property management activities, collected trust funds interest. There was

also an issue concerning the use of a fictitious name. The parties had stipulated that the public was not harmed in the matter.¹

13. Mr. Mulhearn has been a real estate professional for forty years, licensed as a broker since 1964. He has numerous professional achievements, having been elected or appointed to important positions in several organizations that further the real estate business, and the sales profession. He has taken all steps reasonably necessary to cure the deficiencies revealed by the audit, and he has done so promptly upon notice from the auditor of those deficiencies. There was no harm to any customer of his firm as a result of these problems.

14. The Department's auditor, Mr. Mulhearn, and Mr. Rayney were all credible witnesses. This is based on their attitude and demeanor while testifying. Further, they were credible witnesses when the content of their testimony is considered, as it was internally consistent, and consistent with the evidence offered by other witnesses.

CONCLUSIONS OF LAW

1. Respondents Mulhearn Realtors and Bruce Mulhearn violated sections 10145(a) and 10176(e) of the Business and Professions Code (hereafter "Code"), and Title 10, California Code of Regulations ("CCR"), section 2835, by maintaining an overage in trust account number 1, based on Factual Findings 2 through 5(A).

2. Respondents Mulhearn Realtors and Bruce Mulhearn violated sections 10145(a) of the Code and CCR section 2832.1 by maintaining a shortage in trust account number 2, based on Factual Findings 2 through 4, and 5(B).

3. Respondents Mulhearn Realtors and Bruce Mulhearn violated CCR section 2831 in that the columnar record for trust account number 1 was missing required information, based on Factual Findings 2 through 4, and 5(C).

4. Respondents Mulhearn Realtors and Bruce Mulhearn violated CCR section 2831.2 by failing to maintain monthly reconciliations of the trust accounts 1 and 2, based on Factual Findings 2 through 4, and 5(D).

5. Respondents Mulhearn Realtors and Bruce Mulhearn violated CCR section 2834 by allowing a non-licensee to be a signatory on the trust accounts numbers 1 and 2, and by not maintaining written authorizations for other signatories, based on Factual Findings 2 through 4, and 5(E).

¹ Little more can be gleaned from the record, because the stipulated decision is not completely clear, referring as it does to an accusation not placed in evidence.

6. Respondent Mulhearn Realtors violated Code sections 10177(d) and 10177(g), by the violations of the Real Estate Law and Regulations, based on Conclusions of Law 1 through 5.

7. Respondent Bruce Mulhearn v violated Code sections 10177(d) and 10177(g), by the violations of the Real Estate Law and Regulations, based on Conclusions of Law 1 through 5.

8. There are mitigating facts and circumstances to consider in determining what discipline, if any to impose for the aforementioned violations, based on Factual Findings 6 through 11, and 13.

9. There is evidence of rehabilitation, based on Factual Findings 6 through 11, and 13.

Discussion and Rationale:²

The violations found did not cause any harm to a customer of the corporate Respondent, nor the public generally. The shortage of a few hundred dollars did not result from any misuse of client funds, but mainly resulted from the bookkeeping error of posting deposits that were not consummated. The overage was the result of treating some firm funds as trust funds when they were not. No doubt this problem was not found sooner because the firm had fallen behind in its task of performing monthly reconciliations of the trust accounts.

The violation for failing to maintain columnar records was barely sustained. There was evidence that the information was stored in the memory of the firm's computer, though not printed. This is certainly the most venal of the claims asserted in the proceeding, as it can readily be argued that maintaining the information in the computer is sufficient.

At the end of the hearing the Department's auditor raised the issue of whether the bond obtained for the firm's controller, who is not a licensee, is sufficient, as it contains a deductible of \$25,000.00. However, she could not point to a hard and fast rule to sustain that objection. Certainly the Respondents have showed that they will do what is necessary to retain their controller, and the undersigned is confident that any further problem that might exist will be resolved.

As found, Mr. Mulhearn was a credible witness, and his assertions that the problems resulted from untoward circumstances, or simple mistakes, are accepted. Mr. Mulhearn and his firm are very successful, handling millions of dollars of business every year. It is fairly

² The discussion that follows is within the ambit of Government Code section 11425.50(d), and is meant to provide a discussion of the evidence and authorities relied on, as well as a rationale for the decision. Evidence cited is not necessarily the only evidence relied upon in reaching the decision. To the extent discussed, this section augments credibility findings.

inferred that despite the negative findings herein the Respondents must generally operate in a professional manner, or they could not have sustained the growth of the firm and its business.

Complainant established that the Respondents were disciplined some nine years ago. That was given minimal weight in this matter. First, by entering into a stipulation, the Respondents then acknowledged responsibility for an employee's misfeasance. Second, the discipline imposed was relatively lenient, which indicates that the violations were not severe. Third, given the incomplete picture provided by the stipulated decision alone, it was difficult to make a direct connection between the conduct ten years ago, and more recently.

It is well-settled that the purpose of proceedings such as this is to protect the public, and not to punish the Respondent. (*E.g., Camacho v. Youde* (1979) 95 Cal. App. 3d 161, 164.) The violations here, having caused no harm, are unlikely to occur again. This assessment is based on Respondents' efforts to cure the deficiencies, and from the attitude conveyed by Mr. Mulhearn and Mr. Rayney during the hearing. A severe discipline order will tend to be punitive in nature, as hundreds of people will be affected by it. That is, nearly five hundred licensees will have their livelihoods affected, as will other staff employed by the firm. Thus it is not in the public interest to impose severe discipline, and the public welfare can be protected without such an order.

ORDER

All licenses and licensing rights of Respondents Bruce Mulhearn and Mulhearn Realtors under the Real Estate Law are suspended for a period of forty-five (45) days from the effective date of this Decision; provided, however, that if Respondent petitions, said suspension (or a portion thereof) shall be stayed upon condition that:

1. Respondent pays a monetary penalty pursuant to Section 10175.2 of the Business and Professions Code at the rate of \$100.00 for each day of the suspension for a total monetary penalty of \$ 4,500.

2. Said payment shall be in the form of a cashier's check or certified check made payable to the Recovery Account of the Real Estate Fund. Said check must be delivered to the Department prior to the effective date of the Decision in this matter.

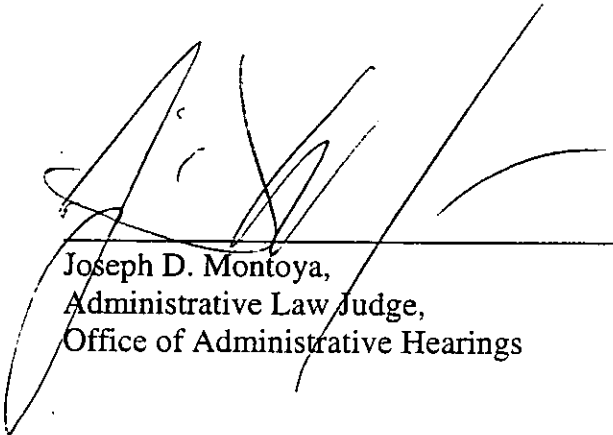
3. No further cause for disciplinary action against the real estate license of Respondent occurs within one year from the effective date of the Decision in this matter.

4. If Respondent fails to pay the monetary penalty in accordance with the terms and conditions of the Decision, the Commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension in which event the Respondent shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the Department under the terms of this Decision.

5. If Respondent pays the monetary penalty and if no further cause for disciplinary action against the real estate license of Respondent occurs within one year from the effective date of the Decision, the stay hereby granted shall become permanent.

6. Pursuant to Section 10148 of the Business and Professions Code, Respondent shall pay the Commissioner's reasonable cost for both (A) the audit that was conducted and which led to this disciplinary proceeding, and, (B) a subsequent audit to determine if Respondent has corrected the trust fund violation(s) found in paragraphs 1 through 5 of the Conclusions of Law. 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 costs, including mileage, time to and from the auditor's place of work and per diem. Respondent shall pay such cost within 45 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, in his discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between the Respondent and the Commissioner. The vacation and the set aside of the stay 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. Should no order vacating the stay be issued the stay imposed herein shall become permanent.

August 14, 2000



Joseph D. Montoya,
Administrative Law Judge,
Office of Administrative Hearings

Sacto

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED
MAY 30 2000
DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of

MULHEARN REALTORS and
BRUCE MULHEARN,

By *R. Medeiros*
Case No. H-28384 LA
OAH No. L-2000030327

Respondent

NOTICE OF HEARING ON ACCUSATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at Office of Administrative Hearings, 320 W. Fourth St., Ste. 630, Los Angeles on July 13, 2000

at the hour of 9:00 a.m., or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: May 30, 2000

By

James R. Peel

Counsel

cc: Mulhearn Realtors
Bruce Mulhearn
Sacto
Carl M. Bergkvist, Esq.
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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * * *

FILED
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DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of) Case No. H-28384 LA
) OAH No. L-2000030327
MULHEARN REALTORS,)
And BRUCE MULHEARN,)
Respondents.)

By *Laura B. [Signature]*

AMENDED NOTICE OF HEARING ON ACCUSATION

To the above-named Respondent(s):

You are hereby notified that a hearing will be held before the Department of Real Estate at Office of Administrative Hearings, 320 West Fourth Street, 6th Floor, Suite 630, Los Angeles, California, on JUNE 8, 2000, at the hour of 10:00 a.m. or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served upon you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

Dated: APR 13 2000

DEPARTMENT OF REAL ESTATE

By: *James R. Peel*
JAMES R. PEEL, Counsel

cc: Mulhearn Realtors
Bruce Mulhearn
Carl M. Bergkvist, Esq.
Sacto
OAH

SACTO

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of)
)
MULHEARN REALTORS)
and BRUCE MULHEARN,)
)
_____)
Respondents

Case No. H-28384 LA
OAH No. L-2000030327

FILED
MAR 21 2000
DEPARTMENT OF REAL ESTATE

NOTICE OF HEARING ON ACCUSATION

To the above-named Respondent(s):

By James R. Peel

You are hereby notified that a hearing will be held before the Department of Real Estate at the Office of Administrative Hearings, 320 West Fourth Street, Suite 630, Los Angeles, CA 90013-1105 on TUESDAY, May 23, 2000, at the hour of 9:00 A.M., or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: March 21, 2000

By James R. Peel
JAMES R. PEEL, Counsel

cc: Mulhearn Realtors
Carl M. Bergkvist, ESQ.
Sacto.
OAH

Just say

FILED
FEB 1 2000
DEPARTMENT OF REAL ESTATE

JAMES R. PEEL, Counsel (SBN 47055)
Department of Real Estate
320 West Fourth Street, Suite 350
Los Angeles, CA 90013

By *Laura B. Stone*

Telephone: (213) 576-6982
-or- (213) 576-6913 (Direct)

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of)	No. H-28384 LA
MULHEARN REALTORS)	<u>ACCUSATION</u>
And BRUCE MULHEARN,)	
Respondents.)	

The Complainant, Thomas Mc Crady, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against MULHEARN REALTORS and BRUCE MULHEARN, alleges as follows:

I

The Complainant, Thomas Mc Crady, acting in his official capacity as a Deputy Real Estate Commissioner of the State of California makes this Accusation against MULHEARN REALTORS and BRUCE MULHEARN.

II

MULHEARN REALTORS and BRUCE MULHEARN, (hereinafter referred to as respondents) are presently licensed and/or have license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code, hereinafter "Code").

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III

At all times herein mentioned, respondent MULHEARN REALTORS was licensed by the Department of Real Estate of the State of California as a corporate real estate broker, and respondent BRUCE MULHEARN was licensed as the designated broker officer of said corporation, and ordered, authorized or participated in the illegal conduct of respondent MULHEARN REALTORS, as alleged in this Accusation. Respondents were previously disciplined in Case No. H-24243 LA, effective August 6, 1991, whereby their real estate broker licenses were suspended for 30 days which suspension was stayed upon terms and conditions.

IV

At all times herein mentioned, respondent MULHEARN REALTORS, on behalf of others in expectation of compensation, engaged in the business, acted in the capacity of, advertised or assumed to act as a real estate broker in the State of California within the meaning of Section 10131(a) of the Code, including soliciting buyers and sellers and negotiating the sale of real property.

V

During 1999, in connection with the aforesaid real estate brokerage activities, Respondent MULHEARN REALTORS, accepted or received funds from buyers and sellers and thereafter made disbursements of such funds. Respondent maintained trust accounts No. 41-032928 (T/A 1) and No. 41-031913 (T/A 2), Pacific Business Bank, 3920 N. Peck Rd., El Monte.

1 VI

2 In connection with respondents' activities as a real
3 estate broker as described above, respondents MULHEARN REALTORS
4 and BRUCE MULHEARN, acted in violation of the Real Estate Law,
5 Business and Professions Code (hereinafter Code), and California
6 Code of Regulations (hereinafter Regulations), Title 10, Chapter
7 6, as follows:

8 1. Violated Sections 10145(a) and 10176(e) of the Code
9 and Regulation 2835 by maintaining as of August 31, 1999, an
10 overage in T/A 1 of \$45,390.92.

11 2. Violated Section 10145(a) of the Code and
12 Regulation 2832.1 by maintaining as of August 31, 1999, a
13 shortage in T/A 2 in the amount of \$740.91.

14 3. Violated Regulation 2831 in that the columnar
15 record for T/A 1 was missing the date funds were received and
16 from whom funds were received.

17 4. Violated Regulation 2831.2 by failing to maintain
18 monthly reconciliations for the trust accounts.

19 5. Violated Regulation 2834 by allowing non-licensees
20 to be signatories on the trust accounts. Other signatories did
21 not have written authorization to be signatories on the accounts.

22 VII

23 The conduct of respondent MULHEARN REALTORS, as alleged
24 above, subjects its real estate license and license rights to
25 suspension or revocation pursuant to Sections 10177(d) and
26 10177(g) of the Code.

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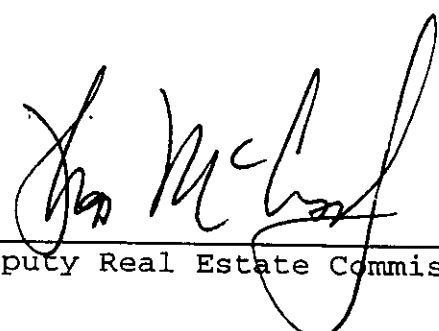
VIII

The conduct of respondent BRUCE MULHEARN, as alleged above, as the responsible broker, by allowing and permitting respondent MULHEARN REALTORS to engage in the conduct specified in Paragraph VI above, subjects his real estate license and license rights to suspension to revocation pursuant to Sections 10177(d) and 10177(h) 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 MULHEARN REALTORS and BRUCE MULHEARN, 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 applicable provisions of law.

Dated at Los Angeles, California

this 1st day of February, 2000.


Deputy Real Estate Commissioner

CC: Mulhearn Realtors
Bruce Mulhearn
Sacto.
JP
TM

lbo