

Seeth

FILED

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

DEC 19 2018

DEPT. OF REAL ESTATE

By *[Signature]*

In the Matter of the Accusation of:)	DRE No. H-40518 LA
)	
MELVIN KIM BISH)	OAH No. 2017061212
)	
Respondent)	

DECISION

The Proposed Decision dated November 19, 2018, 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 January 8, 2019.

IT IS SO ORDERED December 14, 2018.

DANIEL SANDRI
ACTING REAL ESTATE COMMISSIONER

Daniel J. Sandri

BEFORE THE
DEPARTMENT OF REAL ESTATE¹
STATE OF CALIFORNIA

In the Matter of the Second Amended
Accusation of:

MELVIN KIM BISH,

Respondent.

Case No. H-40518 LA

OAH No. 2017061212

PROPOSED DECISION

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings, heard this matter on October 24, and October 25, 2018, in Los Angeles, California.

Steve Chu, Real Estate Counsel, represented complainant Maria Suarez, a Supervising Special Investigator of the State of California.

John R. Rydell II, Esq., of the law firm of Griffith & Thornburgh, represented respondent Melvin Kim Bish, who was present at the hearing.

Oral and documentary evidence was received. At the hearing, the Second Amended Accusation was amended by interlineation at complainant's request, without objection, as follows:

1. Paragraph 6, subsection (f), at line 26: the number "\$1,444.00" was inserted to replace "\$1,675.00," which was stricken.

2. Paragraph 8, line 18: "Drive" was inserted to replace "Street," which was stricken.

3. Paragraph 10: The following language was added after the first sentence: "On January 7, 2016, respondent withdrew \$880.05 from a trust account and put the money into his own account."

The record was closed and the matter was submitted for decision at the conclusion of the hearing.

¹ The Bureau of Real Estate became the Department of Real Estate on July 1, 2018.

FACTUAL FINDINGS

1. Complainant brought the Second Amended Accusation in her official capacity, seeking disciplinary action against respondent's real estate licenses and license rights under the Real Estate Law. The Second Amended Accusation charged respondent with violations found in an audit conducted by the Department of Real Estate (Department), the improper receipt of certain commission payments, and the unlawful commingling of funds.

2. Respondent was licensed as a real estate salesperson on July 19, 1971. On March 30, 2009, respondent obtained Real Estate Broker license number 00400281 (license). Based on the Department website, of which the Administrative Law Judge takes official notice, respondent's license is scheduled to expire on March 29, 2021.

Background

3. Respondent is a self-employed real estate broker operating in Santa Barbara, California. He does not employ any salespersons.

4. From 2013 to 2016, respondent acted as a property manager overseeing the rentals of up to three separate units for three different owners. Property management comprised a small amount of his real estate business. He did not solicit property management clients; his clients were friends from his church and elsewhere.

5. One of the three properties respondent managed was located at 272 Carlo Drive (Carlo property). The Carlo property was originally owned by respondent's close friend Marion Sanborn (Sanborn). Sometime in early 2013, Sanborn requested respondent to collect the rents from the Carlo property tenants, pay any bills associated with the property, and send her the net proceeds.

6. To accommodate Sanborn's request, respondent established a client trust account at Santa Barbara Bank & Trust (later absorbed by and referred to herein as Union Bank) to handle the Carlo property rent payments. The Union Bank account was the first client trust account that respondent had ever administered for his property management clients. In the past, respondent's usual practice for managing properties was for the property owner to collect the rent and then pay respondent's commission from the rent proceeds, thereby obviating the need to establish a trust account. Respondent eventually used the Union Bank trust account as the depository for the rents of two other properties he managed.

7. Respondent and Sanborn memorialized their arrangement for the Carlo property by executing a California Association of Realtors (C.A.R.) form document entitled "Commission Agreement," on March 10, 2013, along with a contemporaneous handwritten addendum prepared by Sanborn's son, an attorney. (Ex. 3², pp. 282-283.) Although

² Exhibit 3 is the audit report prepared by the Department. At hearing, respondent objected to the admission of certain portions of Exhibit 3. The Administrative Law Judge

respondent had told Sanborn's son that a C.A.R. form "Leasing Agreement" is typically used when a broker is to be paid by commission for leasing a property, Sanborn's son disagreed because the Carlo property had already been leased by another broker. Sanborn's son therefore proposed the Commission Agreement; respondent agreed, although he did not often use the Commission Agreement and was unfamiliar with its contents.

8. The Commission Agreement provided that respondent would manage the Carlo property on behalf of Sanborn pursuant to the terms of a handwritten addendum. That addendum stated as follows: "The parties hereto contemplate the commission to be paid from rent based on a month to month tenancy at 272 Carlo [Drive], Goleta, CA. The 5% commission payable to [respondent] shall be deducted from the actual monthly rent paid with the balance paid to Marion Sanborn." (Ex. 3, p. 283.)

9. Sometime in March 2014, the Carlo property tenants moved out. The property was in a state of disrepair, and respondent met with Sanborn, her daughter, Liz Hand (Hand), and Hand's husband, who was a contractor, to discuss the necessity and scope of renovation of the property. According to respondent, Sanborn and Hand wanted an extensive renovation to prepare the house for an eventual sale and asked respondent if he would supervise the construction. Respondent was willing to do so, and he agreed to waive his compensation if he retained the listing for the future sale of the property. Respondent testified that Sanborn and Hand agreed to the arrangement. No written document memorialized their agreement regarding respondent's compensation; respondent did not insist on a written agreement because he and Sanborn were "life-long friends." Respondent supervised the construction without receiving any compensation, and the requested renovation was completed in five weeks.

10. In May 2014, respondent found new tenants to rent the Carlo property. The term of the rental was from May 1, 2014 through April 30, 2015, at a monthly rent of \$2,800. (Ex. 3, p. 260.) Respondent and Sanborn did not sign either a "Lease Listing Agreement" or a "Commission Agreement" to document the payment of respondent's commissions for the new rental. Nor did the parties enter into any management agreement for the property. Nonetheless, respondent continued to collect the rents from the new tenants, deposit the funds in the Union Bank trust account, and deduct his commission of \$135 without objection from Sanborn.³

sustained respondent's objections to admitting the following pages of Exhibit 3: 29 (bottom portion of page reflecting notes of exit interview); 212 - 221; 222 (bottom portion of page reflecting e-mail to MacSanborn); 223 - 226; 232; 236 - 244; and 250 - 257. Accordingly, these pages have been excluded from evidence. Page 249 of Exhibit 3 is admitted as administrative hearsay. All other pages of Exhibit 3 are admitted.

³ Nothing in the record explains why respondent paid himself five percent of the net rental proceeds each month (\$135) instead of five percent of the "actual" rent paid each month (\$140), as set forth in the addendum.

11. Sanborn died in May of 2014, and soon thereafter Hand assumed responsibility for the Carlo property.⁴ On July 2, 2014, Hand requested respondent to deposit the net rent payment for the Carlo property for July "and subsequent months" to Hand's bank account after deducting his five percent commission, as he had previously done for Sanborn (Hand's mother). (Ex. 3, p. 228.) Respondent followed Hand's instructions.

12. On September 1, 2014, Hand informed respondent she was terminating the property management arrangement for the Carlo property and consequently would no longer require respondent's services after September 30, 2014. (Ex. 3, p. 249.) In response, respondent wrote Hand an email dated September 3, 2014, with the subject line stating that Sanborn "agreed to the one year lease commission and also to pay me for my time renovating the home." Respondent informed Hand that he would send her a "check for September rent once the tenant's check has cleared minus a fee of \$500 for all of the above." (Ex. 3, p. 222.) Respondent further explained his reasoning in a follow-up email dated September 16, 2014:

It is clear that [Sanborn] agreed to pay me for remodeling the [Carlo property]. For that I'm withholding \$500. It is also clear that she wanted to extend the commission agreement and have me re-rent the home when the remodeling was completed. I did lease the home for a year as requested. This was also verified by your brother when I asked him and [Sanborn] in church with Josh present; also, if they wanted me to send them the deposit or keep it in my trust account. [Sanborn's son] emphatically told me to keep it [in] my trust account which I have done. I'm withholding the balance of the 5% rental commission due but will only pay it out each month when the tenant verifies that the rent has been paid for that month per [the Carlo property] addendum.

(Ex. 3, p. 245.)

13. Per his email and contrary to Hand's instruction, respondent eventually withdrew from the Union Bank trust account a total of \$1,444, consisting of (a) \$500, withdrawn on September 23, 2014, as payment for supervising the Carlo property renovations, and (b) \$944 in commission payments, consisting of withdrawals of \$135 each month from October 2014 to February 2015 and \$269 at the end of February 2015, for the final two months of the Carlo property lease.

14. At some point, Hand complained of respondent's conduct to the Department. Hand has not filed a lawsuit or sought mediation or arbitration to recover the \$1,444 withdrawn by respondent. Hand did not testify at the hearing.

⁴ Complainant asserted that Hand inherited ownership of the Carlo property but offered no evidence establishing her ownership.

The Department's Audit

15. In response to Hand's complaint, on March 30, 2016, the Department initiated an audit of the books and records of respondent's property management business. The audit examination covered the period from January 1, 2014, to March 23, 2016. The Department issued the report of its audit findings on April 29, 2016.

16. Anna Hartoonian, Auditor III for the Department, conducted the audit. Ms. Hartoonian examined, among other things, respondent's bank statements, general ledger sheets, and separate beneficiary statements. Ms. Hartoonian focused on the transactions reflected in the two different client trust accounts used by respondent during the audit period: the Union Bank account, which respondent opened on April 2, 2013, and then closed on January 29, 2016; and the Wells Fargo Bank (Wells Fargo) account, which respondent opened on November 1, 2015. During the last 12 months of the audit period, respondent collected approximately \$51,194 of client trust funds in the two accounts. (Ex. 3, p. 7.)

17. (a) In response to the Department's request, respondent supplied both handwritten and computer-generated general ledger and individual account records, bank statements, bank records, and other information to Ms. Hartoonian. Respondent had prepared some of the records; respondent's part-time bookkeepers had prepared others.

(b) Respondent and his bookkeepers had started to use Quicken Books in 2013, although respondent also used handwritten records during that period. After 2014, respondent relied exclusively on Quicken Books for his record keeping. The parties dispute whether all of the Quicken Book records were provided to the auditor; Ms. Hartoonian said she had not received all of the records, while respondent insisted he had provided the computerized records and backup materials. Respondent supplied all of the computerized records for the audit period at the hearing.

18. (a) The Department audit found that the balance of trust funds in each of respondent's client trust accounts was less than the aggregate trust fund liabilities. Specifically, the audit found that as of January 29, 2016, there was a \$231 shortfall in the Union Bank account because of an over disbursement of funds and unearned fees. The audit found an \$80 shortfall in the Wells Fargo account because respondent had withdrawn more of his own funds than he had originally deposited. Respondent had withdrawn these funds from the client trust accounts without written consent by the owners of the trust funds.

(b) Respondent explained each of the shortfalls. With respect to the Union Bank account shortfall, respondent noted that the \$231 was comprised of \$100 paid to the gardener for the Carlo property that respondent had failed to record on the handwritten general ledger (but was noted on the computer-generated report for the Carlo property) and \$131 that he had mistakenly withdrawn. With respect to the Wells Fargo account shortfall, respondent acknowledged he mistakenly withdrew \$80 from the account, believing the funds were personal. Respondent re-deposited the funds after his bookkeeper pointed out his error.

but after the end of the Department's audit period. The Department's audit report noted and confirmed the \$80 deposit.

19. (a) The audit found that respondent failed to maintain a complete and accurate control record or general ledger reflecting the deposit and disbursement of trust funds. According to the audit findings, certain entries in respondent's general ledgers did not note the correct date of the transaction, and the ledgers did not always reflect an accurate running balance. For instance, respondent's computer-generated general ledger for the Wells Fargo account notes that respondent deposited \$1,500 into the account on November 25, 2015, although Wells Fargo's records reflect respondent deposited the funds on November 2, 2015. (Ex. E, p. 1; Ex. 3, p. 172.) Respondent also failed to account for two \$3 monthly bank charges (for November and December) on the 2015 Union Bank computerized general ledger, and to reconcile the account on the ledger, respondent erroneously recorded that he withdrew \$886.05 on the 2015 Union Bank general ledger when the Union Bank statement reflects that respondent withdrew \$880.05. (Ex. 3, pp. 80, 136.)

(b) Respondent testified that his failure to specify the correct date for the Wells Fargo deposit and to account for the \$6 in bank charges were unintentional mistakes.

20. (a) The audit found that respondent failed to maintain a complete and accurate separate record of all trust funds received and disbursed for each beneficiary. According to the audit, three commission payments for the Carlo property (each made after Hand severed her relationship with respondent), although recorded on the general ledger, were not listed on the handwritten individual Carlo property record. In addition, the handwritten individual account records for the Carlo property did not list the check numbers in several instances and omitted the dates of certain checks.

(b) Respondent did not dispute that the handwritten records for the individual Carlo property account contained certain inaccuracies. However, all but one of the computerized records for the Carlo property reflected the correct information. (Exhibits A and 9.) In one instance, one of the individual ledger sheets did not note the check number for the March and April 2015 commission payment for the Carlo property (Ex. D, pp. 1, 6.) but the other two ledger sheets provided accurate information.

21. (a) The audit found that respondent failed to maintain a monthly reconciliation of the separate beneficiary records with the control record of all trust funds received and disbursed in the required format. According to the audit findings, respondent's monthly reconciliation summaries failed to identify the bank account name and number, the date of the reconciliation, the account number or name of the principals, beneficiaries, or transactions, and the trust fund liabilities of the broker to each of the beneficiaries. (Ex. 3, pp. 109 - 132, 174 - 176.)

(b) Respondent did not dispute that the monthly reconciliation records he supplied to the auditor lacked certain required information.

22. The audit found that respondent had withdrawn \$1,444 in unearned fees and commissions from the Union Bank trust fund without written consent from Hand, the purported owner of the trust funds. As described more fully in Factual Findings 5 through 13 above, these fees and commissions were the subject of a contractual dispute between Hand and respondent regarding Hand's liability for certain written and oral agreements allegedly made regarding the management of the Carlo property. Respondent acknowledged he withdrew the funds based on his belief he was owed the funds because of agreements he had made with Sanborn and Hand and the work he had performed at their insistence.

23. None of the bookkeeping irregularities uncovered by the audit, except the \$1,444 arguably owed to Hand, deprived the owners of the trust funds of any monies owed to them or caused them any financial loss.

Receiving Commission Under Agreement Without Specified End Date

24. Respondent received his commission on the Carlo property based on an agreement without a specified end date. Neither the Commission Agreement nor its addendum indicated when respondent's right to receive commission payments would terminate. Only one section of the Commission Agreement referenced the length of the term, stating "Compensation is payable if Principal accepts offer on the above described property no later than ____." (Ex. 3, p. 282.) The section, however, was inapplicable to respondent's arrangement with Sanborn, as the Carlo property had already been leased when the Agreement was executed. In any event, respondent did not notice the provision regarding the end date, the parties never filled in the term, and the space was left blank.

25. Respondent's failure to specify an end date was not intentional. At the time, both respondent and Sanborn understood that respondent's commission payments would continue until the existing lease terminated. When respondent found new tenants for the Carlo property, Sanborn and then Hand continued respondent's property management services and continued to pay respondent under the terms of the Commission Agreement and handwritten addendum. It was respondent's understanding that those terms would apply either until the time the new tenants stopped paying rent or at the end of the lease, whichever came first.

26. Respondent paid his commissions out of the Union Bank trust account on a monthly basis, from October 2015 to February 2016, consistent with his understanding of the Commission Agreement, the addendum, and the representations of Sanborn and Hand. He testified he withdrew the last two months of his commissions at the end of February 2015 to be done with the account.

27. Complainant offered no evidence as to whether the tenants of the Carlo property defaulted on their rent obligations during the October 2015 to April 2016 period.

Commingling

28. Respondent commingled his own personal funds with his property management clients' funds in both the Union Bank and Wells Fargo client trust accounts as follows:

(a) Respondent deposited \$600 of his own personal funds into the Union Bank client trust account on May 27, 2014, to offset a rent check rejected for insufficient funds. On February 19, 2015, respondent withdrew \$500 of those funds from the Union Bank account.

(b) On November 2, 2015, respondent opened the Wells Fargo account with \$1,500 of his personal funds. He originally intended that the account would be for his personal use. However, approximately one month later, respondent decided to close the Union Bank client trust account and to make the already-opened Wells Fargo account a client trust account. He therefore transferred \$3,000 of client trust funds from Union Bank to the Wells Fargo account on December 29, 2015, commingling the trust funds with his personal funds.

(c) On January 7, 2016, respondent closed the Union Bank account and withdrew the remaining \$880.05 in client trust funds. Instead of transferring those client trust funds to the Wells Fargo account, respondent retained them as an offset against the \$1,500 he had deposited of his own personal funds in the Wells Fargo account on November 2, 2015.

29. Respondent testified he was unaware of the Department's prohibition of comingling personal funds with client trust funds. Respondent also acknowledged he should have deposited the \$880.05 of client trust funds into the Wells Fargo account and then withdrawn \$1,500 of his funds from the account.

30. The comingling of respondent's funds with the client trust funds did not harm respondent's clients. The comingling of respondent's funds in the Union Bank account also benefitted his clients as it ensured there were sufficient monies to offset the bounced rent check.

Mitigation/ Rehabilitation Evidence

31. Respondent is 73 years old and has been in the real estate business for almost fifty years. Respondent has no history of discipline by the Department.

32. During the period subject to the audit, respondent was taking care of his very ill wife. In a letter to the Department, respondent stated that her illness sent him "into a years long personal recession and period of depression that stopped [his] professional real estate and personal emotional momentum." (Ex. 3, p. 270.)

33. Respondent acknowledges that he failed to comply in a number of respects with the laws and regulations governing client trust accounts. He also took full responsibility for the shortcomings in his bookkeeping, although hired bookkeepers did some of the accounting.

34. Respondent is an active and well-respected member of his community. He won the Elks National 2012 Outstanding Youth Services Volunteer Award. Respondent was also a past trustee of the Santa Barbara Scholarship Foundation. He has served as president of the Rotary Club of Santa Barbara North, of which he has been a member for more than 25 years. Respondent has been a past member of the Santa Barbara Community College Continuing Education Advisory Counsel, a member of the Foundation for Santa Barbara Community College Real Estate Committee, and the National Foundation Scholarship chair for the Elks Lodge West Central Coast District. He also participated in the Elks Highway 154 Clean Up Crew. He currently is an active member of the Trinity Evangelical Lutheran church.

35. In a letter to the Department, respondent's pastor, Reverend Truls Person of the Trinity Lutheran Church wrote: "I know [respondent] to be honest, hard-working, intelligent, good-hearted, compassionate, faithful, sincere, generous, clear-thinking, sensible, and more. [Respondent] was my wife's and my realtor when we moved to Santa Barbara. Ever since we first worked with him, we have considered him to be a trusted friend. We can't say enough good about him. . . . I have no hesitation whatsoever recommending [respondent's] services to others. What's more, [respondent] has worked tirelessly for the church and for our members over the years in many different capacities. [¶ . . . ¶] I was not aware of the specifics of all the work that [respondent] had been doing and coordinating at the [Sanborn's] properties, but based on everything I know about respondent, I believe that he would have gone all out on [Sanborn's] behalf. [Respondent] told me he did that and more. Again, I am very familiar with [respondent]'s work, dedication, and reliability and I am confident that [respondent] would have intended to provide able and competent services on [Sanborn's] behalf. " (Ex. 3, p. 54.)

36. Respondent regrets his dispute with Hand. Although he believes he earned the money he withheld, respondent now believes he should have turned the other cheek "for religious reasons" and paid the funds when Hand demanded payment. Respondent recognizes his response to Hand was emotional. He and Hand's parents were extremely close, he had done the work they had asked of him, and, when Hand terminated their agreement without fair compensation, respondent believed Hand had betrayed and taken advantage of his long history and friendship with her parents.

37. Respondent no longer holds any client trust funds for any property management activity. He currently manages one property for a friend. That lease expires in five months, and his friend has prepaid respondent's commissions. Respondent does not intend to manage any other properties. He wants to focus exclusively on representing buyers and sellers of real estate.

Costs

38. Complainant presented evidence that the Department incurred \$3,282.12, consisting of 53 hours of auditor time, to audit respondent's books and records. (Ex. 5.)

39. Complainant presented evidence that the Department incurred a total of \$5,903 in investigation and enforcement costs. These costs consisted of \$697.50 for 11.35 hours of investigator and technician time and \$5,205.50 for 58.5 hours of attorney time. (Exs. 4, 6.)

LEGAL CONCLUSIONS

1. The burden of proof in this matter is on complainant to show by clear and convincing evidence to a reasonable certainty that respondent's license should be suspended or revoked. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-6.) Clear and convincing evidence "requires a finding of high probability;" it must be "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind. [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

Applicable Statutes and Regulations

2. Business and Professions Code³ section 10145 requires a broker to hold real estate transaction funds belonging to others in trust. That section, in relevant part, provides:

(a) (1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

[¶]...[¶]

(g) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds.

3. California Code of Regulations, title 10, section 2831⁶, describes the trust fund records that a broker must maintain:

³ Undesignated statutory references are to the Business and Professions Code.

(a) Every broker shall keep a record of all trust funds received, including uncashed checks held pursuant to instructions of his or her principal. This record, including records maintained under an automated data processing system, shall set forth in chronological sequence the following information in columnar form:

(1) Date trust funds received.

(2) From whom trust funds received.

(3) Amount received.

(4) With respect to funds deposited in an account, date of said deposit.

(5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.

(6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.

(7) Daily balance of said account.

(b) For each bank account which contains trust funds, a record of all trust funds received and disbursed shall be maintained in accordance with subdivision (a) or (c).

(c) Maintenance of journals of account cash receipts and disbursements, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles, shall constitute compliance with subdivision (a) provided that such journals, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

4. Regulation 2831.1 requires a broker to keep a separate record for each beneficiary or transaction, accounting for all funds that have been deposited in the broker's trust account. That section provides:

⁶ Undesignated regulatory references are to title 10 of the California Code of Regulations.

(a) A broker shall keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account and interest, if any, earned on the funds on deposit. This record shall include information sufficient to identify the transaction and the parties to the transaction. Each record shall set forth in chronological sequence the following information in columnar form:

- (1) Date of deposit.
- (2) Amount of deposit.
- (3) Date of each related disbursement.
- (4) Check number of each related disbursement.
- (5) Amount of each related disbursement.
- (6) If applicable, dates and amounts of interest earned and credited to the account.
- (7) Balance after posting transactions on any date.

(b) Maintenance of trust ledgers of separate beneficiaries or transactions, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles will constitute compliance with subdivision (a), provided that such ledgers, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

5. Regulation 2831.2 mandates that a broker must perform trust account reconciliations. The section provides:

The balance of all separate beneficiary or transaction records maintained pursuant to the provisions of Section 2831.1 must be reconciled with the record of all trust funds received and disbursed required by Section 2831, at least once a month, except in those months when the bank account did not have any activities. A record of the reconciliation must be maintained, and it must identify the bank account name and number, the date of the reconciliation, the account number or name of the

principals or beneficiaries or transactions, and the trust fund liabilities of the broker to each of the principals, beneficiaries or transactions.

6. Regulation 2832.1 provides that:

The written consent of every principal who is an owner of the funds in the account shall be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds.

7. Section 10176, subdivision (e), provides that a broker license may be suspended or revoked for commingling the broker's own money or property with the money or property of others received and held by him. Regulation 2835, in relevant part, provides:

"Commingling" as used in Section 10176(e) of the Code is prohibited except as specified in this section. For purposes of Section 10176(e), the following shall not constitute "commingling"

(a) The deposit into a trust account of reasonably sufficient funds, not to exceed \$200, to pay service charges or fees levied or assessed against the account by the bank or financial institution where the account is maintained.

(b) The deposit into a trust account maintained in compliance with subdivision (d) of funds belonging in part to the broker's principal and in part to the broker when it is not reasonably practicable to separate such funds, provided the part of the funds belonging to the broker is disbursed not later than twenty-five days after their deposit and there is no dispute between the broker and the broker's principal as to the broker's portion of the funds. When the right of a broker to receive a portion of trust funds is disputed by the broker's principal, the disputed portion shall not be withdrawn until the dispute is finally settled.
[¶] . . . [¶]

(d) The trust fund account into which the funds are deposited is maintained in accordance with the provisions of Section 10145 and the regulations of this article.

8. Section 10176, subdivision (f), provides that a broker license may be suspended or revoked for "claiming, demanding, or receiving a fee, compensation, or

commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where the agreement does not contain a definite, specified date of final and complete termination.” Acts described in Section 10131 include leasing a real estate property or collecting rents on a real estate property for others.

9. Section 10176, subdivision (i), provides that a broker license may be suspended or revoked for conduct that “constitutes fraud or dishonest dealing.”

10. Section 10177 authorizes the suspension or revocation of the license of a real estate licensee for the following conduct, in relevant part:

[¶ . . .]

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

[¶ . . .]

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

[¶ . . .]

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing.

The term “willfully,” as used in section 10177, subdivision (d), means “done deliberately: not accidental or without purpose.” (*Apollo Estates, Inc. v. Dep’t of Real Estate* (1985) 174 Cal.App.3d 625, 639. See also *Manning v. Fox* (1984) 151 Cal.App.3d 531, 542 [“Section 10177, subdivision (d), is designed to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent, or unknowledgeable salesman.”].)

Cause for Discipline

11. Cause for discipline of respondent’s license was established pursuant to section 10145 and Regulation 2832.1, in conjunction with section 10177, subdivisions (d) and (g), by reason of Factual Finding 18(a) and Legal Conclusions 2, 6, and 11, in that during the audit period, respondent negligently withdrew funds that reduced the balance in the Union Bank and Wells Fargo client trust accounts to amounts less than the existing

aggregate trust fund liabilities without the written consent of the owners of the funds in those accounts.

12. Cause for discipline of respondent's license was established pursuant to section 10145 and Regulation 2831, in conjunction with section 10177, subdivisions (d) and (g), by reason of Factual Finding 19(a) and Legal Conclusions 2, 3 and 11, in that during the audit period, respondent negligently failed to reflect when trust funds were received, deposited, and disbursed as well as to provide an accurate balance on the general ledger records.

13. Cause for discipline of respondent's license was not established pursuant to section 10145 and Regulation 2831.1, in conjunction with section 10177, subdivisions (d) and (g), by reason of Factual Finding 20 and Legal Conclusions 2, 4, and 11, in that during the audit period, the computerized records for the Carlo property kept by respondent contained the information required by Regulation 2831.1 and accurately reflected transactions noted on the Union Bank general ledger.

14. Cause for discipline of respondent's license was established pursuant to section 10145 and Regulation 2831.2, in conjunction with section 10177, subdivisions (d) and (g), by reason of Factual Finding 21(a) and Legal Conclusions 2, 5, and 11, in that during the audit period, respondent negligently failed to maintain monthly trust account reconciliations that included all of the information required by Regulation 2831.2.

15. Cause for discipline of respondent's license was established pursuant to section 10145, in conjunction with section 10177, subdivision (d), by reason of Factual Findings 5 through 13, and 22 and Legal Conclusions 2, 10, and 11, in that during the audit period, respondent withdrew \$1,444 from the Union Bank client trust account without Hand's consent. However, complainant did not establish cause for discipline pursuant to sections 10176, subdivision (i), and 10177, subdivision (j), because there was no evidence that respondent engaged in fraud or dishonest dealing. As explained in *Hogg v. Real Estate Com'r* (1942), 54 Cal.App.2d 712, 717 (*Hogg*),

"Dishonesty" necessarily includes the element of bad faith. As defined in the dictionaries and in judicial decisions, it means fraud, deception, betrayal, faithlessness. [Citations omitted] . . . As put by the court in *Alsup v. State*, 91 Tex. Cr. 224
"Dishonesty" denotes an absence of integrity; a disposition to cheat, deceive, or defraud; deceive and betray."

Respondent candidly disclosed his intention to withhold certain moneys from Hand and his good faith basis for doing so, i.e., that he had performed the work requested, found tenants for the Carlo property, and improved the value of the property. The issue of whether respondent is entitled to retain those funds is a question of law to be determined in an action to recover those funds. As the *Hogg* court explained in its decision reversing the Real Estate

Commissioner's decision to revoke the appellant's broker license for dishonesty because he in good faith had refused to return a prospective purchaser's down payment:

Stated another way, it cannot be held that appellant is guilty of "dishonesty" for refusing to pay back a sum of money which in good faith he claims he is entitled to retain. Whether or not the legal objections raised by appellant against refunding the down payment are well taken must be determined, of course, in an action which may be brought to recover that sum. They are not issues which may be here decided

(*Hogg, supra*, 54 Cal.App.2d at p. 718.)

16. Cause for discipline of respondent's license was established pursuant to section 10176, subdivision (f), by reason of Factual Findings 24 through 26 and Legal Conclusion 9, in that respondent demanded and obtained commissions based on the Commission Agreement and addendum, neither of which contained a definite, specified date of final and complete termination.

17. Cause for discipline of respondent's license was established pursuant to section 10176, subdivision (e), and Regulation 2835, by reason of Factual Finding 24 and Legal Conclusion 7 in that respondent commingled his personal funds with client trust funds in the Union Bank and Wells Fargo trust fund accounts, and none of the exceptions contained in Regulation 2835 apply.

Discipline

18. The purpose of disciplining a professional or occupational license is to protect the public, not to punish the licensee. (See, e.g. *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67; see, also, *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, and authorities cited therein.) Neither suspension nor revocation of respondent's license is necessary to protect the public interest.

(a) As set forth in Factual Findings 31 through 36, respondent has a nearly 50-year unblemished record working in the real estate business. He is a leader in his community. Respondent took responsibility for his own actions and did not shift blame, even though others did some of the actionable accounting work and at the time, he was under considerable personal stress taking care of his gravely sick wife. Respondent recognized that his actions regarding the Carlo property were driven by emotion, and he regrets the way he handled the dispute.

(b) The violations established by the audit as well as respondent's misuse of an agreement without a specified end date and his commingling of funds were technical and minor in nature. Respondent did not benefit from the violations, and his conduct resulted in no harm to respondent's clients or to the public. Although Hand did not receive funds she believed she was owed, Hand benefitted from respondent's work to improve and to

rent the Carlo property. Respondent has since closed his property management client trust accounts and has no interest in opening any others. He currently manages only one property, and the commissions have been pre-paid. (Factual Finding 37.) Recurrence therefore is highly unlikely.

(c) Under these circumstances, the public interest will not be threatened by leaving respondent's license intact, and issuing respondent a public reproof pursuant to section 495. Any further discipline of respondent's license would be unduly punitive.

Costs

19. Section 10148, subdivision (b), provides that the Department can recoup the costs of an audit from a licensee if it is determined, in a final decision following a disciplinary hearing, that the licensee has violated section 10145, or a regulation interpreting section 10145. Respondent is found to have violated section 10145 and Regulations 2831, 2831.2, and 2832.1. (Legal Conclusions 11, 12, 14, 16, and 17.) Therefore, the Department can recoup its audit costs from respondent.

20. The Department has established that its audit costs are \$3,282.12. (Factual Finding 38.) Recovery of those costs, given the number and nature of the violations found, is unreasonable. It is unduly punitive to require respondent to pay more than \$3,200 for an audit that uncovered a little more than \$300 in accounting irregularities and \$1,400 in disputed payments over the course of more than two years, particularly when respondent's business handled more than \$51,000 in funds just for the last year of the audit. Under these circumstances, the Administrative Law Judge finds it is reasonable to charge respondent \$650 for the audit.

21. The Department also has the right to collect the reasonable costs of the investigation and enforcement of the case where a licensee is found to have committed a violation of the Real Estate Law. (§ 1016, subd. (a).) Complainant has established that it incurred \$5,903 in investigation and enforcement costs and those costs are reasonable. (Factual Finding 39.)

22. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Supreme Court enumerated several factors that a licensing agency must consider in assessing costs. It must not assess the full costs of investigation and enforcement when to do so would unfairly penalize a respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty. The agency must also consider a respondent's subjective good faith belief in the merits of his or her position, whether the respondent has raised a colorable challenge to the discipline, or his or her ability to pay the assessed costs. The agency also may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation and prosecution to prove that a licensee engaged in relatively innocuous misconduct.

23. Respondent has demonstrated that a reduction of assessed costs is appropriate under *Zuckerman*. Respondent has used the hearing process to obtain dismissal of some of the alleged accounting violations and to avoid revocation or suspension of his licensing rights. Respondent had a subjective good faith in the merits of his position, namely the reasons he withheld the disputed monies from Hand. Complainant has also conducted a disproportionately large investigation and prosecution (nearly 123 hours costing over \$9,000) to uncover approximately \$300 in accounting discrepancies and \$1,444 in disputed payments. Accordingly, after consideration of the above factors, the costs of investigation and prosecution are reduced to \$1,000.

ORDER

1. Respondent Melvin Kim Bish is publicly reprovved for violating Business and Professions Code sections 10145, 10176, subdivisions (e) and (f), and 10177, subdivisions (d) and (g), along with California Code of Regulations 2831, 2831.2, 2832.1 and 2835.

2. Respondent shall pay \$650 in audit costs to the Department within six months of the effective date of this decision, unless other arrangements are agreed to between respondent and the Department.

3. Respondent shall pay \$1,000 to the Department for the cost of investigation and enforcement of this matter within six months of the effective date of this Decision, unless other arrangements are agreed to between respondent and the Department.

DATED: November 19, 2018

DocuSigned by:
Cindy F. Forman
CINDY F. FORMAN
Administrative Law Judge
Office of Administrative Hearings