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MAY 03 2021

DEPT. OF REAL ESTATE

By *[Signature]*

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

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In the Matter of the Accusation of: LINH DUC PHAM, Respondent.	}	DRE No. H-41519 LA OAH No. 2019110554
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DECISION

The Proposed Decision dated March 01, 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.

The Decision suspends or revokes one or more real estate licenses.

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.

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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 02 2021

IT IS SO ORDERED 4.25.21

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

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

In the Matter of the Accusation Against:

LINH DUC PHAM, Respondent.

Agency Case No. H-41519 LA

OAH No. 2019110554

PROPOSED DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on February 8, 2021.

Julie To, Real Estate Counsel, Department of Real Estate (Department), represented complainant Maria Suarez, Supervising Special Investigator of the State of California. No one represented respondent Linh Duc Pham, who did not appear.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision at the conclusion of the hearing. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order revoking respondent's real estate broker license and licensing rights.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 2, 1983, the Department licensed respondent as a real estate salesperson. Respondent's real estate salesperson license expired on September 1, 1987.
2. On August 30, 1988, the Department issued real estate broker license number 00853731 to respondent. Respondent's broker license expired on August 29, 2020. Pursuant to Governor Newsom's Executive Order number N-71-20, the August 29, 2020 expiration date was extended to December 31, 2020.
3. Expiration of respondent's licenses does not deprive the Department of jurisdiction to proceed with this administrative disciplinary proceeding. (Bus. & Prof. Code, § 10103.)
4. On October 9, 2019, complainant, acting in an official capacity, filed an Accusation (dated October 4, 2019) alleging respondent was non-compliant with certain processes and requirements for handling and accounting for trust funds in violation of the Real Estate Law and promulgated regulations.
5. On October 29, 2019, respondent filed a Notice of Defense on Accusation (dated October 25, 2019) acknowledging receipt of the Accusation (among other documents) and requesting a hearing to present a defense or matters in mitigation or extenuation to the allegations in the Accusation.
6. The Department served respondent with a February 6, 2020 Notice of Hearing with information for a hearing scheduled to commence on May 14, 2020. After

that hearing date was continued multiple times, the Department again served respondent with a December 22, 2020 Notice and Order of Continued Videoconference or Telephonic Hearing, which contains information about this February 8, 2021 hearing.

7. All jurisdictional requirements are satisfied.
8. The hearing proceeded pursuant to Government Code section 11520, subdivision (a), which, in pertinent part, provides, "If the respondent . . . fails . . . to appear at the hearing, the agency may take action based upon the respondent's express admission or upon other evidence and affidavits may be used as evidence without any notice to respondent"

Respondent's Broker Escrow Activities

9. Respondent maintains and conducts broker escrow activities and transactions under the fictitious business name First Services Escrow. Respondent's business offices are in Garden Grove and Laguna Hills. Respondent employs seven licensed real estate salespersons.

10. Respondent represents both buyers and sellers in real estate transactions. Respondent provides escrow services to his clients. Respondent typically closes three broker escrow transactions each month. For the 12-month period ending June 30, 2018, respondent closed approximately 39 broker escrow transactions, in which he handled trust funds totaling approximately \$7.2 million. Respondent maintains two trust accounts (TA1 and TA2) for multiple beneficiaries with East West Bank in Westminster, California for receipts and disbursements of trust funds in connection with his broker escrow activities.

11. The Department received a consumer complaint about respondent, which triggered an audit examination of respondent's broker escrow activities and transactions for the audit period commencing on August 1, 2015 and ending on June 30, 2018.

The Department's Expert Witness' Unrebutted Testimony

12. The audit examination of respondent's broker escrow activities and transactions was assigned to Chambers Tse, a General Auditor III with four years' experience at the Department in that capacity. Tse's duties and responsibilities include auditing real estate activities to determine whether, among other things, trust funds are handled in accordance with the Real Estate Law and the promulgated regulations.

13. At the administrative hearing, Tse explained the audit process commences with an audit appointment letter scheduling the date and time for a site visit and requesting production of specified books and records. The site visit encompasses an audit interview and fieldwork consisting of review and examination of books and records. Tse explained fieldwork encompasses a process of reconciliation, which entails comparing bank records with general ledgers and separate ledgers "to make sure all receipts and disbursement are accounted for because everything should match." Separate ledgers' figures should add up to numbers in the general ledgers, which in turn should match bank records. Tse additionally explained how engaging in the process of reconciliation facilitates compliance testing. According to Tse, "Whatever is being disbursed must be done consistent with the rules and regulations set by the Department of Real Estate."

14. Tse commenced the audit examination of respondent's broker escrow activities and transactions on July 2, 2018, when he contacted respondent by phone

and scheduled an audit appointment for July 10, 2018. A confirmation letter requested respondent's production of specifically enumerated books and records for the audit period to the Department for examination. Tse received an incomplete books and records production from respondent consisting of "bits and pieces of documents," "limited bank statements," and "limited escrow files" for only a portion of the audit period. East West Bank submitted subpoenaed bank records for TA1 and TA2 to the Department. Based on examination of the documents available for the audit and discussions with respondent, Tse prepared an October 31, 2018 Audit Report (Exhibit 4) detailing how respondent's broker escrow activities and transactions violated the Real Estate Law.

15. Tse's un rebutted testimony explaining the October 31, 2018 Audit Report findings established respondent failed to maintain complete and accurate control records or separate records for examination. Without full and complete control records, i.e., all trust fund receipts and disbursements, a thorough reconstruction of respondent's broker escrow activities and transactions for the entire audit period was not possible. Tse was able to achieve only a "minimum reconstruction" for respondent's broker escrow activities and transactions based on bank statements, canceled checks, deposit receipts, and wire details obtained from subpoenaed East West Bank records. In addition, respondent failed to maintain and therefore could not provide for audit examination separate records, i.e., a running daily balance, for each beneficiary. Without complete and accurate separate records, Tse's audit examination was limited to bank statements, canceled checks, deposit receipts, and wire details subpoenaed from East West Bank, which provided insufficient information necessary to identify transactions.

16. The two trust accounts respondent maintained at East West Bank had shortages. TA2 had a minimum shortage in excess of \$400,000, as of June 19, 2017. This \$400,000 shortage was then carried over from TA2 to TA1, which had a minimum shortage in excess of \$800,000 on June 30, 2018. The shortages in both TA1 and TA2 caused minimum negative escrow balances, minimum bank charges, unauthorized disbursements, or unidentified disbursements with no related escrow number. Tse explained respondent "needed owner permission to carryover a negative balance because the trust money belonged to the owners." In the records he examined, Tse found no evidence of any owner granting respondent permission to carry a negative balance.

17. Tse's unrebutted testimony established respondent failed to perform and maintain a monthly reconciliation comparing the balance of all separate beneficiary or transaction records (separate records) to the balance of the record of all trust funds received and disbursed (control records) for either TA1 or TA2.

18. Tse's unrebutted testimony established respondent's books and records contain no documentation of buyers, sellers, or borrowers' signatures or initials acknowledging their receipt of loan escrow instructions or amended or supplemental escrow instructions. Tse explained without any such documentation the Department assumes respondent failed to deliver escrow instructions to buyers, sellers, or borrowers executing escrow documents. For the audit period, Tse found documentation of multiple closed or funded escrow accounts without accompanying signed or initialed escrow instructions or amended or supplemental escrow instructions.

19. Tse's unrebutted testimony established respondent's failure to provide all parties with written disclosure of his ownership interest in First Services Escrow, the

entity providing escrow services in connection with real estate transactions he brokered. Tse testified, "In loan escrow transactions, [respondent] had to put this [ownership] disclosure in bold face 10-point font somewhere in the escrow instructions." Respondent did not do this.

20. Tse's un rebutted testimony established the escrow files he examined revealed in at least four escrow transactions where respondent was "not a first party of the transaction for which First Services was the escrow." Tse explained respondent "could not be a third-party to the transaction; he needs to be a first party," meaning "the real estate broker representing either the buyer or the seller in the transaction." Purchase agreements or listing agreements in the escrow files Tse examined to identify who were related to the transactions showed respondent was neither the seller's nor the buyer's agent in the transaction. Rather, respondent only provided escrow services in connection with the transaction.

21. Tse's un rebutted testimony established respondent's conversion of trust funds. Respondent disbursed funds in excess of \$306,000 in cash, checks, or wire transfer to First Services without any identifiable escrow file or individual authorizing the disbursement. At the time of the disbursements, TA1 lacked enough funds, and consequently incurred multiple insufficient fund bank fees totaling at least \$256. Approximately \$10,400 of the funds disbursed from TA2 were used for payments to a life insurance company, wireless utility provider, and department store, all of which had no relation to any real estate transaction.

22. Tse's un rebutted testimony established respondent disbursed trust funds from TA1 in amounts different from the amounts reflected in final closing statements without any documented buyer or seller instructions authorizing the changed amounts.

Factors in Aggravation, Mitigation, and Rehabilitation

23. No evidence of mitigation, extenuation, or rehabilitation was offered at the hearing.

Costs

AUDIT COSTS

24. The Department incurred audit costs totaling \$10,493.30.

INVESTIGATION AND ENFORCEMENT COSTS

25. The Department incurred investigation and prosecution costs totaling 3,625.05.

26. No evidence of respondent's financial ability or inability to pay the Department's investigation and prosecution costs was offered at the hearing.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. A real estate broker who accepts funds belonging to others in connection with a real estate transaction is required to 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. All funds deposited by the broker in a trust account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds. (Bus & Prof. Code, § 10145, subd. (a)(1).)

2. "A licensed real estate broker shall retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required. The retention period shall run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After notice, the books, accounts, and records shall be made available for examination, inspection, and copying by the commissioner or his or her designated representative during regular business hours; and shall, upon the appearance of sufficient cause, be subject to audit without further notice, except that the audit shall not be harassing in nature." (Bus & Prof. Code, § 10148, subd. (a).)

3. California Code of Regulations, title 10, section 2831 requires every broker to keep a record of all trust funds received, including uncashed checks held pursuant to instructions of his or her principal.

4. California Code of Regulations, title 10, section 2831.1 requires a broker to 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.

5. California Code of Regulations, title 10, section 2831.2 requires monthly reconciliation of the balance of all separate beneficiary or transaction records maintained pursuant to the provisions of section 2831.1 with the record of all trust funds received and disbursed pursuant to section 2831. 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. California Code of Regulations, title 10, section 2832.1 requires a real estate broker to obtain the written consent of every principal who is an owner of the funds in the account 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. California Code of Regulations, title 10, section 2950 provides, "The following acts in handling of an escrow by a real estate broker exempted from the provisions of the Escrow Law (by Section 17006(a)(4) of the Financial Code) are prohibited and may be considered grounds for disciplinary action: [¶ . . . ¶] (c) Failing to deliver at the time of execution of any escrow instruction or amended or supplemental escrow instruction a copy thereof to all persons executing the same. (d) Failing to maintain books, records, and accounts in accordance with accepted principles of accounting and good business practice. [¶ . . . ¶] (g) Withdrawing or paying out any money deposited in such trustee account or escrow account without the written instruction of the party or parties paying the money into escrow. (h) Failing to advise all parties in writing if he has knowledge that any licensee acting as such in the transaction has any interest as a stockholder, officer, partner or owner of the agency holding the escrow."

8. California Code of Regulations, title 10, section 2951 provides, "The provisions of Sections 2831, 2831.1, 2831.2, 2832, 2832.1, 2834 and 2835 of these regulations shall apply to the handling of funds and the keeping of records by a real estate broker who is not licensed under the Escrow Law (Section 17000, et seq., of the Financial Code) when acting in the capacity of an escrow holder in a real estate purchase and sale, exchange or loan transaction in which the broker is performing acts for which a real estate license is required."

9. Financial Code section 17006, subdivision (a), provides in pertinent part, "This division does not apply to [¶ . . . ¶] (4) Any broker licensed by the Real Estate Commissioner while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required." Section 17006, subdivision (b), provides in pertinent part, "The exemption[] provided for in paragraph[] . . . (4) of subdivision (a) [is] personal to the person[] listed and [that] person[] shall not delegate any duties other than duties performed under the direct supervision of [that] person[]."

Authority to Discipline Respondent's Broker License and Licensing Rights

10. The Department has authority to suspend or revoke the license of a real estate broker who knowingly destroys, alters, conceals, mutilates, or falsifies any of the books, papers, writings, documents, or tangible objects that are required to be maintained in connection with any transaction for which a real estate broker license is required or that might have been sought in connection with an investigation, audit, or examination of a real estate licensee. (Bus. & Prof. Code, § 10148, subd. (e).)

11. The Department has authority to suspend temporarily or revoke permanently a real estate license where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of the Real Estate Law has been guilty of conduct constituting fraud or dishonest dealing. (Bus. & Prof. Code, § 10176, subd. (i).)

12. The Department has authority to suspend or revoke the license of a real estate licensee who has willfully disregarded or violated the Real Estate Law or

demonstrated negligence or incompetence in performing an act for which he is required to hold a license. (Bus. & Prof. Code, § 10177, subs. (d) and (g).)

Standard and Burden of Proof

13. Complainant bears the burden of proving by clear and convincing evidence to a reasonable certainty respondent engaged in conduct warranting discipline of respondent's real estate licenses and licensing rights. (See *The Grubb Co., Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, 1505.) Clear and convincing evidence means the evidence is "so clear as to leave no substantial doubt" and is "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1190 [citing *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 332-333].)

Cause Exists to Discipline Respondent's Broker License and Licensing Rights

14. As alleged in paragraph 25 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated Business and Professions Code section 10145, subdivision (a), and California Code of Regulations, title 10, sections 2832.1, 2950, subdivision (g), and 2951. TA1 had a minimum shortage in excess of \$800,000 as of June 30, 2018. TA2 had a minimum shortage in excess of \$400,000 as of June 19, 201. Respondent provided no record documenting any written instruction or consent from the owners of trust funds in TA1 and TA2 to carry a negative balance. (Factual Finding 16.)

15. As alleged in paragraph 26 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved

by clear and convincing evidence respondent violated Business and Professions Code section 10145 and California Code of Regulations, title 10, sections 2831, 2950, subdivision (d), and 2951. Respondent failed to maintain control records accurately reflecting all trust fund receipts and disbursements for TA1 and TA2. (Factual Finding 15.)

16. As alleged in paragraph 27 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated Business and Professions Code section 10145 and California Code of Regulations, title 10, sections 2831.1, 2950, subdivision (d), and 2951. Respondent provided limited records for audit examination, which precluded a full and complete reconstruction necessary to determine minimum accountability. (Factual Finding 15.)

17. As alleged in paragraph 28 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated Business and Professions Code section 10145 and California Code of Regulations, title 10, sections 2831.2, 2950, subdivision (d), and 2951. Respondent failed to perform and maintain a monthly reconciliation comparing the balance of all separate beneficiary or transaction records to the balance of the record of all trust funds received and disbursed for TA1 and TA2. (Factual Finding 17.)

18. As alleged in paragraph 29 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated California Code of Regulations, title 10, section 2950, subdivision (c). Respondent failed to maintain books and records documenting the signatures or initials of buyers, sellers, or borrowers to acknowledge

their receipt of loan escrow instructions or amended or supplemental escrow instructions. (Factual Finding 18.)

19. As alleged in paragraph 30 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated California Code of Regulations, title 10, section 2950, subdivision (h). Respondent failed to disclose in writing his ownership interest in First Services Escrow. (Factual Finding 19.)

20. As alleged in paragraph 31 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated Financial Code section 17006, subdivision (a)(4). Respondent was not exempt from the Escrow Law while engaging in escrow transactions to which he was neither a party nor an agent. (Factual Finding 20.)

21. As alleged in paragraph 32 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated Business and Professions Code sections 10145 and 10176, subdivision (i), and California Code of Regulations, title 10, section 2950, subdivision (g). Respondent converted trust funds by making unauthorized disbursements of trust funds to pay a department store, wireless utility provider, and life insurance carrier. (Factual Finding 21.)

22. As alleged in paragraph 33 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2950, subdivision (g). Respondent disbursed trust funds from TA1 in amounts different from the

amounts reflected in final closing statements without any documented buyer or seller instructions authorizing the changed amounts. (Factual Finding 22.)

23. As alleged in paragraph 34 of the Accusation, cause exists to discipline respondent's real estate broker license and licensing rights in that complainant proved by clear and convincing evidence respondent violated Business and Professions Code section 10148 and California Code of Regulations, title 10, section 2950, subdivision (e). Respondent failed to maintain, retain, and make available for examination complete books and records in connection with escrow activities. (Factual Findings 14 through 22.)

Level of Discipline

24. The determination of whether respondent is fit for continued licensure as a real estate broker should be made only after consideration of his conduct as a licensed real estate broker and consideration of any factors introduced in justification, aggravation, or mitigation. "The Licensee, of course, should be permitted to introduce evidence of rehabilitation." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449; *Brandt v. Fox* (1979) 90 Cal.App.3d 737, 747)

25. The un rebutted evidence establishes respondent's negligence or incompetence performing licensed activities. Among other things, respondent failed to maintain and retain complete books and records in connection with his broker escrow activities and transactions. Respondent failed to perform monthly reconciliation of trust books, records, and accounts. Respondent made unauthorized disbursements of trust funds to purchase services or goods unrelated to any real estate transaction. Respondent failed to disclose his ownership interest in First Services Escrow. Considering the absence of evidence of remediation or changed practices

implemented for handling trust or escrow accounts at First Services, consistent with the Real Estate Law, pursuant to Business and Professions Code sections 10148, subdivision (e), 10176, subdivision (i), and 10177, subdivisions (d) and (g), revocation of respondent's broker license and licensing rights is necessary for public protection.

Cost Recovery Award

AUDIT COSTS

26. Business and Professions Code section 10148, subdivision (b), authorizes recovery of the cost of an audit upon finding a broker has violated the requirements for handling trust funds set forth in Business and Profession Code section 10145.

27. Complainant proved respondent, a licensed real estate broker, violated the requirements for handling trust funds. The Department shall therefore recover its cost of audit totaling \$10,493.30.

INVESTIGATION AND ENFORCEMENT COSTS

28. Business and Professions Code section 10106 authorizes the recovery of the Department's prehearing investigation and enforcement costs.

29. Under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Department must exercise its discretion to reduce or eliminate cost so as to prevent cost award statutes from deterring licensees with potentially meritorious claims or defenses from exercising their right to a hearing. "Thus the [Department] must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a [licensee] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (*Ibid.*) The Department, in imposing costs in such

situations, must also consider the licensee's subjective good faith belief in the merits of his or her position and the Department must consider whether the licensee has raised a colorable defense. The Department must also consider the licensee's ability to make payment.

30. Considering the *Zuckerman* factors, especially respondent's failure to present any colorable defense to the allegations in the Accusation, the Department shall recover its investigation and enforcement costs totaling \$3,625.05.

ORDER

1. Real Estate Broker License number 00853731 and accompanying license rights issued to Linh Duc Pham under the Real Estate Law are revoked.

2. Linh Duc Pham shall pay the Department of Real Estate the cost of its audit examination of his broker escrow activities totaling \$10,493.30.

3. Linh Duc Pham shall pay the Department of Real Estate its costs of investigation and enforcement totaling \$3,625.05.

DATE: Mar 1, 2021

Jennifer M. Russell

Jennifer M. Russell (Mar 1, 2021 19:10 PST)

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings