

FILED

NOV - 3 2020

DEPT. OF REAL ESTATE
Cal Selous

JUDITH B. VASAN, Counsel (SBN 278115)
Department of Real Estate
320 West 4th Street, Suite 350
Los Angeles, California 90013-1105
Telephone: (213) 576-6982
Direct: (213) 576-6904
Fax: (213) 576-6917
Attorney for Complainant

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation against)	No. H- 41812 LA
)	
MICHAEL GARY SMITH, doing business)	
as Newport American Properties,)	<u>ACCUSATION</u>
)	
Respondent.)	

The Complainant, Veronica Kilpatrick, a Supervising Special Investigator of the State of California, for cause of Accusation against MICHAEL GARY SMITH, doing business as Newport American Properties, ("Respondent") alleges as follows:

1.

The Complainant, Veronica Kilpatrick, a Supervising Special Investigator of the State of California, makes this Accusation in her official capacity.

2.

All references to the "Code" are to the California Business and Professions Code and all references to "Regulations" are to Title 10, Chapter 6, of the California Code of Regulations.

///

///

1 LICENSE HISTORY

2 3.

3 a. Respondent is presently licensed and/or has license rights under the Code as a
4 real estate broker, Department of Real Estate ("Department") license ID 00367250.

5 b. The Department originally issued Respondent's broker license on or about
6 March 13, 1975. Respondent's broker license is scheduled to expire on August 13, 2021, unless
7 renewed.

8 c. According to Department records to date, Respondent's main office address is
9 31739 Riverside Drive, Suite M, Lake Elsinore, California.

10 d. According to the Department's records to date, Respondent maintains the
11 fictitious business name "Newport American Properties" with the Department.

12 CAUSE FOR ACCUSATION

13 (AUDIT EXAMINATION – AUDIT NO. SD190001)

14 4.

15 At all times relevant herein Respondent was engaged in the business of a real
16 estate broker within the meaning of Section 10131(b) of the Code. Respondent's activities
17 included the leasing or renting of real property and the collection of rents and security deposits
18 for real property on behalf of others for compensation or in expectation of compensation.

19 5.

20 On or about November 26, 2019, the Department completed an audit
21 examination of the books and records of Respondent, doing business as Newport American
22 Properties, pertaining to the real estate activities described in Paragraph 4 above. The audit
23 examination covered the period of time from August 1, 2016, through June 30, 2019 ("audit
24 period"). The primary purpose of the examination was to determine Respondent's compliance
25 with the Real Estate Law. The audit examination revealed violations of the Code and the
26 Regulations as set forth in the following paragraphs, and more fully discussed in Audit No.
27 SD190001 and the exhibits and work papers attached to said audit report.

ACCUSATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

6.

During the audit, according to Respondent's son, Kelby Thomas Smith ("Smith"), who is licensed with the Department as a broker (license ID 01353448), Respondent could not be available during the entire audit examination due to his health condition. On August 29, 2019, Smith and Dan Carbajal (non-licensee), Smith's former assistant and bookkeeper, provided limited records and documents to the Department auditor.

7.

The Department obtained records from JPMorgan Chase Bank via subpoena on September 5, 2019. JPMorgan Chase Bank provided bank signature cards, bank statements, deposit tickets, cancelled checks, and miscellaneous documents for Bank Account 1 and Bank Account 3, as described below.

8.

At all times mentioned herein, and in connection with the property management activities described in Paragraph 4, above, Respondent accepted or received funds during the audit period, including funds in trust ("trust funds") from or on behalf of the owners of the properties managed by Respondent, and thereafter made deposits and/or disbursements of such funds. According to Smith, from December 2018 through April 2019, Smith handled Respondent's property management business, which consisted of approximately thirty-eight (38) properties for approximately thirty (30) owners. According to Smith, Respondent maintained two (2) bank accounts that handled trust funds in connection with Respondent's property management activity and one (1) general business account. The bank accounts are as follows:

Bank Account 1 ("BA1")

Bank: JPMorgan Chase Bank
Account Name: Michael G Smith DBA Newport American Properties
Account Number: xxxxx8767
Signatories: Michael G Smith, Linda M Cassidy

1 Purpose: BA1 was maintained for the handling of receipts and disbursements of
2 trust funds for multiple beneficiaries in connection with Respondent's property management
3 activity. BA1 was also used to pay for Respondent's personal and financial obligations.

4 Bank Account 2 ("BA2")

5 Bank: JPMorgan Chase Bank

6 Account Name: Michael G Smith DBA Newport American Properties

7 Account Number: xxxxx8759

8 Signatories: Michael G Smith, Linda M Cassidy

9 Purpose: BA2 was maintained for the handling of receipts and disbursements of
10 trust funds for multiple beneficiaries in connection with Respondent's property management
11 activity.

12 Bank Account 3 ("GA1")

13 Bank: JPMorgan Chase Bank

14 Account Name: Michael G Smith DBA Newport American Properties

15 Account Number: xxxxx6961

16 Signatories: Michael G Smith, Linda M Cassidy

17 Purpose: GA1 was maintained for the handling of receipts and disbursements of
18 funds in connection with Respondent's general business activity.

19 Violations

20 9.

21 The audit examination revealed violations of the Code and the Regulations, as
22 set forth in the following paragraphs, and more fully discussed in Audit No. SD190001 and the
23 exhibits and work papers attached to the audit report:

24 **(a) Handling of Trust Funds/Trust Fund Handling for Multiple Beneficiaries**
25 **(Code section 10145 and Regulations section 2832.1).** Based on the limited records provided,
26 as of June 28, 2019, there was a combined trust fund shortage of \$56,682.55 in BA1 and BA2.
27 The minimum combined shortage of \$56,682.55 in BA1 and BA2 was caused by unauthorized

1 disbursements, withdrawals, and conversion of trust funds totaling \$55,425.85 and a combined
2 minimum bank service charge totaling \$2,256.70. Based on the limited records provided,
3 Respondent transferred trust funds back and forth between BA1 and BA2. Respondent failed to
4 provide evidence that the owners of the trust funds had given their written consent to allow
5 Respondent to reduce the balance of the funds in BA1 and BA2 to an amount less than the
6 existing aggregate trust fund liabilities.

7 **(b) Handling of Trust Funds/Trust Fund Records to be Maintained (Code**
8 **section 10145 and Regulations section 2831).** Respondent failed to maintain records of all
9 trust funds received and disbursed (“control record”) for BA1 and BA2. Most of the deposit
10 tickets for BA1 obtained from JPMorgan Chase Bank via subpoena did not indicate the
11 property address and/or the tenant name. Most of the cancelled checks of BA1 obtained from
12 JPMorgan Chase Bank did not indicate the property address.

13 **(c) Handling of Trust Funds/Separate Record for Each Beneficiary of**
14 **Transaction (Code section 10145 and Regulations section 2831.1).** Respondent failed to
15 maintain separate records for BA1 and BA2.

16 **(d) Trust Account Reconciliation (Code section 10145 and Regulations**
17 **section 2831.2).** During the audit period, Respondent failed to perform and maintain a monthly
18 reconciliation comparing the balance of all separate beneficiary or transaction records (separate
19 records) to the balance of the record for all trust funds received and disbursed (control record)
20 for BA1 and BA2.

21 **(e) Trust Fund Handling / Trust Account Designation (Code section 10145**
22 **and Regulations section 2832).** According to the bank signature cards maintained at
23 JPMorgan Chase Bank, BA1 and BA2 were not designated as trust accounts.

24 ///

25 ///

26 ///

27

1 **(f) Handling of Trust Funds/Commingling/Mishandling of Trust Funds**
2 **(Code section 10145 and Regulations section 2832).**

3 (i) Respondent commingled trust funds with the company's general
4 business funds in GA1 by transferring and depositing trust funds back and forth from BA1 to
5 GA1.

6 (ii) Based on the records provided, Respondent commingled trust funds
7 with his personal funds in his personal bank accounts, referred to herein as "GA2" and "GA3."
8 According to Smith, GA2 (bank account ending in 6099) and GA3 (bank account ending in
9 6823) were Respondent's personal bank accounts. The bank statements for GA2 and GA3 were
10 not provided to the auditor. The complete bank account numbers for GA2 and GA3 are
11 unknown.

12 **(g) Conversion of Trust Funds/Fraud/Dishonest Dealing/Unauthorized**
13 **Disbursements/Mishandling of Trust Funds (Code section 10145 and Regulations section**

14 **2832).** As of June 28, 2019, at a minimum, Respondent made unauthorized disbursements and
15 converted trust funds totaling \$56,682.55 from BA1 and BA2. Respondent also used BA1 to
16 pay for his personal and financial obligations against the management fees earned and
17 collected.

18 Respondent issued checks payable to "Cash" from BA1, including but not limited to the
19 following examples:

<u>Date Cleared</u>	<u>Check No.</u>	<u>Amount</u>
2/23/2017	14254	\$1,000.00
7/18/2017	14657	\$500.00
11/10/2017	14958	\$500.00
2/14/2018	15209	\$500.00
6/8/2018	15456	\$2,000.00
8/14/2018	15590	\$500.00
10/4/2018	15706	\$1,000.00

1 ATM withdrawals were made to BA1, including but not limited to the following examples:

<u>Date</u>	<u>Amount</u>	<u>Date</u>	<u>Amount</u>
8/5/2016	\$400.00	9/21/2017	\$500.00
9/19/2016	\$300.00	11/20/2017	\$400.00
11/7/2016	\$500.00	12/18/2017	\$500.00
11/21/2016	\$500.00	1/2/2018	\$403.95
12/13/2016	\$500.00	3/7/2018	\$500.00
12/28/2016	\$500.00	5/30/2018	\$202.95
1/17/2017	\$300.00	6/4/2018	\$500.00
3/21/2017	\$202.95	7/6/2018	\$202.95
4/25/2017	\$500.00	8/13/2018	\$202.95
5/22/2017	\$500.00	9/14/2018	\$202.95
7/5/2017	\$500.00	11/7/2018	\$202.95

14 Respondent paid for personal expenses from BA1 with "card purchases," including by not
15 limited to the following examples:

<u>Date</u>	<u>Amount</u>	<u>Payee</u>
8/5/2016	\$288.93	Costco
8/29/2016	\$80.35	Arco
2/6/2017	\$95.88	Albertsons
3/3/2017	\$44.15	O'Reilly Auto Parts
5/22/2017	\$123.48	Ly Gas & Mini Market
8/7/2017	\$1136.39	Collision Pros
8/21/2017	\$383.80	Budget Tire
4/23/2018	\$353.34	Costco
8/6/2018	\$247.53	Barrons Furniture

1 Cassidy and Respondent issued payroll checks from BA1 payable to Cassidy, including but not
2 limited to the following examples:

<u>Date</u>	<u>Check No.</u>	<u>Amount</u>	<u>Check Signed By</u>
8/9/2016	13693	\$1,250.00	Linda Cassidy
9/7/2016	13782	\$1,270.00	Linda Cassidy
10/6/2016	13868	\$1,270.00	Linda Cassidy
11/4/2016	13944	\$1,270.00	Linda Cassidy
9/12/2017	14811	\$2,000.00	Michael Smith
10/2/2017	14817	\$1,500.00	Michael Smith
11/6/2017	15041	\$1,499.00	Michael Smith
12/11/2017	15041	\$1,474.00	Michael Smith
2/6/2018	15178	\$2,000.00	Michael Smith
6/12/2018	15461	\$2,000.00	Michael Smith

14 **(h) Unlicensed Fictitious Name (Code section 10159.5 and Regulations**
15 **section 2731).** Respondent used the unlicensed fictitious business names "NAP PM" and "NAP
16 PM Inc" in connection with his property management activity during the audit period without
17 first obtaining a license from the Department bearing the fictitious names.

18 **(i) Broker-Salesperson Relationship Agreements (Code section 10161.8).**
19 Respondent failed to retain a written broker-salesperson agreement with Linda Marie Cassidy
20 ("Cassidy"), a licensed broker (license ID 01792596). According to Cassidy, she was employed
21 by Respondent as a broker-associate during the audit period and until June 2018. Cassidy was a
22 signer on BA1 and BA2. Cassidy also signed property management agreements and lease
23 agreements during the audit period.

24 **(j) Salesperson and Broker Associate Retention and Termination (Code**
25 **section 10161.8).** Respondent failed to notify the Department of the employment and
26 termination of Cassidy as a broker-associate. According to Cassidy, she was employed by
27 Respondent as a broker-associate during the audit period and until June 2018.

1 **(k) Retention of Records (Code section 10148).** Respondent failed to provide
 2 all requested records for the audit examination, such as all bank signature cards, all bank
 3 statements, all deposit slips and tickets, all cancelled check of BA1 and BA3, bank statement
 4 for BA2 from August 2016 through December 2017, all rental agreements, and property
 5 management agreements. According to Respondent's son Smith, due to Respondent's health
 6 condition, Respondent was not available during the entire audit examination and was unable to
 7 provide records and information on the trust fund shortage. Cassidy denied having possession
 8 of any of the trust funds and property management records.

9 **(l) Broker Supervision (Regulations section 2725).** Respondent failed to
 10 exercise adequate supervision and control over the property management activity conducted by
 11 his licensees and employees to ensure compliance with the Real Estate Law and Regulations.

12 10.

13 Each of the foregoing violations in Paragraphs 9(a)-(l) above constitute cause
 14 for the suspension or revocation of the real estate license and/or license rights of Respondent
 15 under the provisions of Code sections 10176(e), 10176(i), 10177(d) and/or 10177(g).

16 COSTS

17 (AUDIT COSTS)

18 11.

19 Section 10148(b) of the Code, provides, in pertinent part, that the Real Estate
 20 Commissioner shall charge a real estate broker for the costs of any audit if the Commissioner
 21 has found in a final decision, following a disciplinary hearing, that the broker has violated
 22 Section 10145 of the Code or a regulation or rule of the Commissioner interpreting said Code
 23 section.

24 ///

25 ///

26 ///

27 ///

(INVESTIGATION AND ENFORCEMENT COSTS)

12.

Section 10106 of the Code, provides, in pertinent part, that in any order issued in resolution of a disciplinary proceeding before the Department, the Commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case.

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 the licenses and/or license rights of Respondent MICHAEL GARY SMITH, doing business as Newport American Properties, under the Real Estate Law, for the costs of investigation and enforcement as permitted by law, for the cost of the audit, and for such other and further relief as may be proper under other applicable provisions of law.

Dated at San Diego, California this 18 day of August, 2020.


Veronica Kilpatrick
Supervising Special Investigator

cc: MICHAEL GARY SMITH
Veronica Kilpatrick
Sacto.
Audits – Zaky Wanis