BEFORE THE
REAL ESTATE AGENCY
STATE OF OREGON

IN THE MATTER OF: **DAN LEE BERREY , Licensee**	) **FINAL ORDER**)) OAH Case No. 1403688) Agency Case Nos. 2012-246; 2012-264, 2012-265, 2012-266; 2012-352; 2012-396; 2013-32

This matter came before the Real Estate Agency to consider the Proposed Order issued by Administrative Law Judge (ALJ) Joe Allen on March 23, 2015. Licensee filed exceptions to the Proposed Order through his attorney, Jill Foster on April 24, 2015, following an extension to the filing deadline.

Licensee's exceptions raised primarily arguments that were raised and considered at the hearing. The Commissioner has reviewed Licensee's exceptions but does not find them to be persuasive.

For the foregoing reasons, the Commissioner adopts the Proposed Order as the Final order.

ORDER

IT IS HEREBY ORDERED that the principal real estate broker license of Dan Lee Berrey is revoked, with said revocation to be effective the date of this order.

IT IS FURTHER ORDERED, that Dan Lee Berrey shall pay a civil penalty of $1,500.00. The civil penalty is due and payable as provided under ORS 183.745.

Dated this 17th day of June 2015.

Gene Bentley
Real Estate Commissioner

Date of Service: 6-18-2015

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days of the service of this order. Judicial review is pursuant to the provisions of ORS 183.482 to the Oregon Court of Appeals.

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
REAL ESTATE AGENCY

IN THE MATTER OF:	) **PROPOSED ORDER**
	)
	) OAH Case No.: 1403688
DAN LEE BERREY,	) Agency Case Nos.: 2012-246; 2012-264,
Appellant	) 265, 266; 2012-352; 2012-396; 2013-32
	)

HISTORY OF THE CASE

On March 25, 2014, the Real Estate Agency (REA or Agency) issued a Notice of Intent to Revoke (Notice) to Dan Lee Berrey (Appellant) alleging violations of statute and rule for professional real estate activity engaged in between 2003 and 2012 (the period in issue). On April 8, 2014, Appellant requested a hearing.

On May 13, 2014, the Agency referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. ALJ Allen convened a prehearing conference on June 10, 2014. Appellant appeared through counsel, David Leonard. Senior Assistant Attorney General (AAG) Raul Ramirez appeared on behalf of the Agency. The purpose of the prehearing conference was to establish issues for hearing as set a schedule for all prehearing procedures.

On July 30, 2014, REA issued an Amended Notice of Intent to Revoke (Amended Notice) to Appellant.

Pursuant to the scheduled established at the prehearing conference, REA filed a motion for partial summary determination on September 2, 2014. On September 23, 2014, Appellant filed a response to the motion. On October 22, 2014, the ALJ denied the motion in its entirety.

On November 10, 2014, Appellant filed a motion to dismiss. REA filed a response to that motion on November 24, 2014. The ALJ denied the motion on the record at the beginning of the in-person hearing.

A hearing was held on December 1 and 2, 2014, in Salem, Oregon. Appellant appeared with counsel, David Leonard and Jill Foster, and testified on his own behalf. Senior AAG Raul Ramirez represented REA. Testifying on behalf of REA were Steven Westfall, William MacHugh, Douglas Reed, J. Spencer Taylor, and Peter Bale. The evidentiary record closed at the conclusion of the proceedings on December 2, 2014. The parties filed simultaneous written closing briefs on January 9, 2015. The record closed upon receipt of the parties closing briefs.

ISSUES

1. Whether Appellant demonstrated incompetence or untrustworthiness in performing any act for which he was required to hold a real estate license. ORS 696.301(12).

2. Whether Appellant committed one or more acts of fraud or engaged in dishonest conduct substantially related to his fitness to conduct professional real estate activity in violation of ORS 696.301(14).[1]

3. Whether Appellant disbursed funds from a client trust account (CTA) or security deposit account (SDA) without sufficient funds in the ledger account to cover the disbursement. *Former* OAR 863-025-0025(3)(a) (4-15-2006 ed.) and *former* OAR 863-025-025(11) (8-15-2007).

4. Whether Appellant failed to sign on or more property management agreements (PMA) on behalf of the property management company. OAR 863-025-0020(6).[2]

5. Whether Appellant transferred funds between different owners' ledgers without proper authorization. OAR 863-025-0025(13).[3]

6. Whether Appellant failed to register a business name with the Agency prior to conducting professional real estate activity under a name other than his legal name. *Former* OAR 863-015-0095(1).[4]

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[1] The Amended Notice also asserts violation of *former* ORS 696.301(31) (2003) based on the same factual allegations. *Former* ORS 696.301 provided, in relevant part:

> The Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal or a license to an applicant who has done any of the following:
>
> (31) Committed an act or conduct substantially related to the applicant or licensee's fitness to conduct professional real estate activity, whether of the same or of a different character and whether or not in the course of professional real estate activity, that constitutes or demonstrates bad faith or dishonest or fraudulent dealings.

While the numbered sections differ, there are no material differences in the effective language between the current and former versions of the rule or the factual showing necessary to prove violation of either.

[2] The Amended Notice cites to former versions of this rule, including the 2009 and 2011 editions. Nonetheless, it does not appear either of these revisions contains alterations to the language of the cited section of the rule. Additionally, the Amended Notice cites to *former* OAR 863-0025-0020(6) (4-1-2007). This earlier edition of the rule contains some variance in language but no material differences in the operative language. This order addresses both the current and former sections of the applicable rule in the opinion below.

[3] Again, the Amended Notice cites to a former version of the rule (1-1-2009) for this allegation. Nonetheless, the current version of OAR 863-025-0025(13) is identical in all respects to the cited version of the rule.

7. Whether Appellant consistently failed to complete required account reconciliations for one or more SDAs. OAR 863-025-0025(21).[5]

8. Whether Appellant failed to provide property owners with notice that he may destroy records of property management activity performed after six years as required by OAR 863-025-0070(2)(b)(F).

9. Whether Appellant failed to disburse all obligated funds to an entitled party within 60 days of termination of a PMA. OAR 863-025-0070(2)(a).

10. Whether Appellant failed to disburse earned management fees from a CTA at least once each month. OAR 863-025-0025(15).[6]

11. Whether Appellant violated one or more of the affirmative duties owed to a property owner. *Former* ORS 696.890(3)(a),(c),(e), and (f).[7]

12. Whether Appellant failed to notify the Agency within 10 business days of closing a CTA in violation of *former* ORS 696.241(5).[8]

13. Whether Appellant engaged in professional real estate activity without an active license in violation of ORS 696.020(2).

14. Whether REA may revoke Appellant's real estate license. ORS 696.301(3),(12), and (14); ORS 696.396(2)(c)(B) and (C).[9]

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[4] The Amended Notice cites to two former versions of this rule, both of which contain identical language. Due to recent renumbering of certain administrative rules, the requirements of *former* OAR 863-015-0095(1) currently appear in OAR 863-014-0095(1). Because there is no allegation that Appellant violated the current version of the rule, only the former version is relevant and therefore cited by this order.

[5] The Amended Notice cites to three former versions of the applicable rule (4-15-2011, 9-1-2011, and 9-14-2012.) for this allegation. Nonetheless, the current version of OAR 863-025-0025(21) is identical in all respects to the cited versions of the rule. Therefore, this order makes no distinction between the current and former versions of this subsection of the administrative rule.

[6] The Amended Notice cites to *former* OAR 863-0025-0025(14) (11-15-2007). The applicable subsection of the rule has been renumbered in the present version to subsection (15). The earlier version of the applicable rule contains no material differences in the operative language from the present version.

[7] *Former* ORS 696.890(3) has been renumbered to ORS 696.890(4). Otherwise, there are no material differences between the former and current versions of this subsection of the statute.

[8] *Former* ORS 696.241(5) has been renumbered and now appears at ORS 696.241(6). The operative language of the relevant subsection was unchanged by this revision.

[9] The progressive discipline requirements of ORS 696.396 apply only to conduct occurring on or after January 1, 2006.

15. Whether REA may impose a civil penalty up to $1,500 against Appellant. ORS 696.990(4) and (9).

EVIDENTIARY RULING

Exhibits A1 through A67, offered by the Real Estate Agency, and Exhibits R1 through R50, offered by Appellant, were admitted into the record without objection.

FINDINGS OF FACT

1. REA has continuously licensed Appellant to engage in professional real estate activity from approximately 1977 until January 31, 2014. Beginning in or about 1977, Appellant obtained a sales license from REA. In 1981, REA issued an associate broker license to Appellant. Thereafter, in or about the mid-1980s, Appellant obtained a principal broker license from REA. Most recently, Appellant's license expired January 31, 2014. (Test. of Berrey.)

2. Appellant has been engaged in property investing and development for more than 25 years. Appellant obtained a real estate license because he believed it would assist in the acquisition and leasing of commercial properties in which he invested. (Test. of Berrey.)

3. Sometime in 2003, Appellant formed C.P. Management Co., a domestic corporation, which provided property management services under the dba, Certified Property Management (CPM). Thereafter, Appellant registered CPM with REA as a property management company in which he was the principal broker. Between 2003 and 2012, CPM operated with a staff of between as few as five and as many as eight employees. Appellant was the designated property manager at CPM. At one point, CPM employed another REA licensee, Becca Reel (Reel). (Test. of Berrey.)

4. During the period in issue, CPM provided property management services for the following properties, all located in Oregon: McKenna Estates (McKenna), Lakepointe Apartments (Lakepointe), Westec South Business Park (Westec), Candalaria South/Candalaria Crossing (Candalaria), and 340 Vista Ave. (Vista) (collectively, the properties in issue). Appellant held ownership interest in each of the properties in issue, either directly or through interest in other entities. (Test. of Berrey and Bale; Exs. A7 at 1, A10 at 1, A13 at 1, A20 at 1, and A23 at 1.)

5. During the period in issue, CPM charged property management fees for services rendered, on behalf of the owners of the properties in issue, from which it paid expenses and wages for its employees including Appellant. As part of the property management services provided, CPM collected security deposits and rents from tenants. CPM was responsible for paying all taxes and expenses on the properties in issue, subject to approval of the property owners. (Test. of Bale and Berrey.)

6. In January 2012, Appellant attempted to renew his principal broker license using the Agency's online renewal application. Appellant entered all necessary information, including

his credit card information for payment of the renewal fee. Unbeknownst to Appellant, the payment did not process. (Test. of Berrey.) On February 1, 2012, Appellant's license expired. On or about April 17, 2012, a third-party vendor advertising certain properties Appellant managed through CPM informed Appellant that his license was no longer valid. Appellant then realized his renewal application had not processed properly. That date, Appellant renewed his license via the Agency's website and paid the $230 renewal fee as well as a $30 late fee. (*Id.*; Ex. A32 at 2.)

7. On the Agency's renewal application, Question 14 reads, "During any period of time when your license has been inactive or expired, have you conducted professional real estate activity?" (Ex. A32 at 4.) Appellant answered "no" to this question. (*Id*; test of Berrey and Bale.)

8. Between February 1 and April 17, 2012, Appellant maintained multiple property advertisements for commercial lease opportunities on the multiple listing services (MLS), a services used by real estate professionals to advertise and locate commercial and residential properties for clients. (Test. of Bale and Berrey.)

9. Between July 5, 2012, and February 21, 2013, REA received multiple complaints related to Appellant's professional property management activities associated with the properties in issue.[10] REA initiated an investigation into the complaints and, upon completion of the investigation, issued the Notice in this matter. (Test. of Bale; Ex A1 at 1.)

Westec South Business Park

10. Appellant and others purchased Westec as a tenancy in common (TIC) on or about September 25, 2003. (Ex. A12; test. of Berrey.) Westec is a multi-unit commercial development project located in Eugene, Oregon. (Ex. A1 at 7.) The Westec TIC Agreement identifies the ownership interest of the respective interests of the cotenants as follows:

• Dan & Fran Berrey, Trustees*	22.2809%
• Keith Flicker, Trustee	5.7311%
• Arthur & Roseann Bobrowitz[11]	2.4884%
• George W. & Annette Courter Boyce	3.6458%
• James R. & Diane Duda[12]	11.8149%
• Steven H. & Kathleen S. Westfall	3.2729%
• Fernwood Investments, LLC	26.0254%
• Jeffery D. & Cynthia J. Raines, Trustees	4.0936%

[10] In addition to the properties in issue, the complaints contained allegations related to two additional properties (the Meridian and West Gate commercial investment projects). (Ex. A1 at 2.) However, the Amended Notice does not contain any allegations related to these properties. As such, they are not addressed in this order.

[11] Arthur Bobrowitz is Appellant's brother-in-law. (Test. of Berrey)

[12] James Duda is a cousin of Appellant's wife. (Test. of Berrey.)

- Douglas Reed 5.1171%
- Howard E. & Judith M. Pope, Trustees 4.0936%
- Burton L. & Carolyn K. Thompson 11.4363%

(Ex. A12 at 2; *denotes Appellant's ownership interest, directly or indirectly through other entities.)

11. The Westec TIC Agreement provided that each owner obtained voting interest commensurate to each owner's ownership interest. The agreement also provided that, unless otherwise specified, any decision related to the property required 51 percent of the cotenants to vote in favor. Additionally, the agreement specified certain action requiring the unanimous vote of the cotenants. Among these was the decision to hire or fire a property manager. (Ex. A12 at 10.) The agreement named the initial property manager as "Certified Property Management, Inc." (Ex. A12 at 4.)

12. On September 25, 2003, CPM and the Westec owners entered into a property management agreement (PMA) for the management of Westec. The Westec PMA specified the property management entity as "Certified Property Management Company." (Ex. A13 at 1.) Appellant signed the Westec PMA on behalf of the Westec owners. Reel signed on behalf of CPM. (Ex. A13 at 3.)

13. As of September 25, 2003, Appellant had not registered the name Certified Property Management Company with the Agency. (Test. of Bale.)

14. The Westec PMA required the property manager to keep all client funds in a client trust account separate from the funds of the property manager. The Westec PMA also required the property manager to maintain a minimum balance of $25,000 in the client trust account (CTA) to cover regular expenses of the property. (Test. of Bale; Ex. A13 at 1.)

15. After acquiring Westec, the escrow reserves available for tenant improvements and operating expenses were approximately $500,000. (Test. of Reed; Ex. R29 at 1.) In November 2003, Appellant sent an email the other owners stating, in part:

* * * * *

> Currently, we are receiving 1.2% on these funds while sitting in the checking account. (Not Insured)
> I would like to suggest that we place a portion of these funds into one of the following options:
>
> (Option A)
> Money Market Account at 1.8% (Not Insured)
> CD's * * * are currently not fixed and are paying around 1.5%
> 3 month: $96,250
> 6 month: $96,250
> 9 month: $96,250

1 Year: $96,250
Total: $385,000

This would leave $125,000 in the operating account.
Should be (sic) need to withdraw these funds, in order to complete the Tenant Improvements, we would pay a penalty.

(Option B)
Another option to consider[] is placing $100,000 into one of the investment projects I'm overseeing.
I would personally guarantee the funds and would pay an interest rate of 5%, with the note due in 12-months. It would be possible to have the note payable in 6-months at an interest rate of 4%.

This option would leave $125,000 in [the] operating account and $285,000 in CD's with the $100,000 in the form of a personally guaranteed note.

I would like to get these funds into either Option (A) or (B) sometime next week. Please let me know which option you would vote for.

* * * * *

Regards,
Dan Berrey, CCIM
Commercial Concepts, Inc.
541.549.6323

(Ex. R29 at 1 and 2.) Commercial Concepts, Inc. (CCI) is an entity Appellant used to organize and promote commercial investment projects. (Test. of Berrey.) Appellant also performed property management through CCI. (See, Ex A21 at 19.)[13]

16. Steven Westfall (Westfall) objected to extending loans to Appellant because he believed the funds should remain available for tenant improvements. Westfall was concerned about having sufficient funds on hand to develop the approximately 40 percent of the project that was vacant at the time. (Test. of Westfall.)

17. At least one owner, Doug Reed (Reed), advised Appellant that, if Option (B) were selected, he would like to see the $100,000 loan secured by Appellant's interest in Westec. (Test. of Reed; Ex. A54 at 2.) Appellant responded in an email indicating, "[e]veryone but Mr. Westfall voted for "B". You are the only one who requested that I secure my interest with a note." (Ex. A54 at 2.) Appellant went on to point out that, his net worth was in excess of $10 million and, therefore, Reed "should be well covered for the $100,000." (*Id.*) Appellant also

[13] Although the record is not clear on the extent of Appellant's professional real estate activity performed through CCI, a lease between The French Press and Candalaria identifies CCI as the broker entitled to commission upon execution of the lease. (Ex. A21.)

indicated that, because he had a conflict of interest in the vote, he was abstaining from voting on the proposed loan. (Ex. A54 at 2.)

18. Reed responded to Appellant's email and expressed, *inter alia*, his concerns about the need to have the escrow reserves available for future obligations of Westec, rather than using those funds to grant loans. (Test. of Reed; Ex. A54 at 1 and 2.) Appellant responded by assuring Reed that the recommendation was to grant a one-year loan limited to $100,000 and "leave $410,000 in a more liquid position" to address the obligations of Westec. (Ex. A54 at 1.)

19. The Westec owners eventually voted to extend a one-year loan to Appellant of $100,000. (Test. of Reed, Westfall, and Berrey.) Between November 2003 and April 2004, Appellant took two loans, of $200,000 and $283,000 respectively, from the Westec escrow reserves without express authorization from a majority of the owners.[14] (Test. of Reed and Westfall; *see also*, Ex. A60 generally.)

20. As part of the Agency's investigation in 2013, Peter Bale (Bale), an Agency Auditor-Investigator, reviewed ledgers of accounts for Westec. Bale found several instances where Appellant, as the property manager, made disbursements from Westec's CTA that resulted in a negative ledger balance. (Test. of Bale.) Specifically, Bale discovered 12 separate entries, dated December 2 and 23, 2009, showing disbursements from the Westec CTA resulting in a negative ledger balance. (Ex. A1 at 8 and 9; *see also*, Ex. A17, generally.)

21. In addition, during the investigation, Bale found that, in 2009, Appellant allowed the Westec CTA to fall below the $25,000 minimum balance required by the Westec PMA in at least 76 separate instances. (Test. of Bale; *see also*, Exs. A14 through A16 generally.)

22. Bale also reviewed the Westec General Ledger and found multiple instances where Appellant made payments, indicated as temporary loans, to CPM or CCI. Specifically, the ledger reflects the following credit entries and corresponding reference entries:[15]

- August 5, 2009, CCI: $6,400- Temp loan from Westec to []
- August 12, 2009, CPM: $17,000- Temp loan to SOU[16] to cover []
- September 24, 2009, CCI: $5,000- Temp loan to Bakery D'Amo[][17]
- September 25, 2009, CCI: $3,200- Temporary loan to cover per[]

[14] At hearing, Appellant argued he had majority approval. Nonetheless, he was only able to produce vague evidence of approval from owners Duda (11.82%) and Bobrowitz (2.49%). Together with Appellant's interest (22.28%), these interests (36.59%) do not equal a majority ownership. Based on the evidence in the record, I am not persuaded Appellant had approval from any other owner.

[15] Each ledger entry contains only a portion of the actual reference line. Missing text is denoted by [].

[16] SOU is an abbreviation for Candalaria South. (Test. of Berrey.)

[17] This entry refers to Bakery D'Amour, a business owned in part by Appellant. (Test. of Reed and Berrey.)

(Exs. A1 at 9 and A18 at 9, 10 and 12.)

23. Bale inquired about the payments made to CPM and CCI during August and September 2009. Appellant could not provide written authorization for these general ledger entries. (Ex. A1 at 9.)

The McKenna Estates

24. On or about July 25, 2006, Appellant and others acquired the McKenna Estates, a 144-unit residential apartment complex located at 3450 McKenna Dr., Eugene, Oregon, and entered into a TIC Agreement to hold the property as cotenants. (Test. of Berrey; Ex. A3 at 1.) The TIC Agreement identified the interests of the cotenants as follows:

• 340 Vista, LLC*	74.841%
• Richard H. and Barbara L. Whitt, Trustees	7.898%
• Steven H. and Kathleen S. Westfall	5.769%
• Clifton Raymond and Helen Hammer Chesbrough	3.508%
• Robert F. and Ingrid M. Cooley	4.615%
• William H. and Nancy M. MacHugh	3.369%

(Exs. A3 at 1 and A7 at 1; * denotes Appellant's ownership interest, directly or indirectly through other entities.)

25. The McKenna TIC Agreement provides that initial property management services would be provided by CPM for at least one year. The agreement required a unanimous vote of the cotenants to remove a property manager. (Ex. A3 at 5 and 6.)

26. On August 1, 2007, the McKenna owners and CPM entered into a PMA for the management of McKenna. The McKenna PMA required the property manager to avoid comingling receipts and revenues from McKenna with CPM's own funds. Instead, the property manager was required to place all McKenna funds in a CTA to be held in trust for the owners. (Ex. A7 at 1.)

27. The McKenna PMA required CPM to pay, out of the CTA, "all expenses connected with the management, operation and maintenance of the premises, as authorized herein, including the [property manager's] commission and compensation as provided * * * in this agreement[.]" (Ex. A7 at 2 and 3.) The McKenna PMA also specified CPM's compensation as "(10%) Ten Percent of Gross Revenues." (*Id* at 3.) The McKenna PMA also designated Appellant as the owners' representative in dealings with the property manager, also Appellant. Appellant signed the McKenna PMA on behalf of the owners. Pamela Lovegren (Lovegren), an employee of CPM signed on behalf of the property manager. (Ex. A7 at 3 and 4.) Lovegren was not licensed by the Agency to conduct professional real estate activities. (Test. of Berrey: Ex. A1 at 4.)

28. In purchasing McKenna, the cotenants used approximately $82,700, in tenant security deposits held in trust by the former owners, as partial financing. (Test. of Bale and

Berrey; *see also*, Ex. A1 at 2.) Approximately $51,000 of these funds represented refundable security deposits subject to claims by tenants upon move. The remaining $31,000 was non-refundable security deposits. (Test. of Bale.) Refundable deposits should be reflected on financial statements as liabilities of the owners. Non-refundable deposits are not considered liabilities. (Test. of Berrey.)

29. CPM used an SDA designated as the Housing Fund to hold tenant security deposits for multiple properties including McKenna and Lakepointe. (Test. of Bale and Berrey; *See*, Ex. A5.) CPM deposited new tenant security deposit funds into the Housing Fund and the McKenna general ledger account. Prior tenants' security deposits were never placed into either of those accounts. (Test. of Bale.)

30. Due to dissatisfaction among certain cotenants with CPM's management of McKenna, management of the property was transferred to Spencer Taylor (Taylor) with Taylor Real Estate and Management, LLC (Taylor Management), on or about April 12, 2012. (Test. of Westfall and Taylor; Ex. A1 at 4.) 340 Vista, LLC voted against replacing CPM.[18] Nonetheless, CPM conceded to the transfer of property management functions, at least temporarily, to prevent disruption to McKenna's operations. (Test. of Berrey.)

31. Taylor reviewed the McKenna ledgers and notified the owners of a deficit of $51,150 in tenant security deposits transferred CPM. Appellant advised Taylor that the shortfall was due to use, by the owners, of $82,700 in tenant security deposits to finance the purchase of McKenna. Appellant also claimed that owner draws had been reduced since acquisition to make up for the initial $82,700 and that the $51,150 shortage represented the outstanding balance of the $82,700. (Test. of Taylor; Ex. A53 at 6 and 7.)

32. As part of the Agency's investigation, Bale reviewed the records of all accounts for McKenna and found that, when a pre-acquisition tenant moved out, CPM transferred the amount of that tenant's security deposit from the Housing Fund to the McKenna owners' CTA. Thereafter, any refundable portion of the security deposit was paid to the tenant and the residual remained in the owners' CTA. (Test. of Bale; Ex. A4.)

33. Bale found no instances of deposits from owners' accounts to replenish the funds used from the tenant security deposits to finance the purchase of McKenna. (Test. of Bale; Ex. A5 1 through 18.)

34. In reviewing McKenna's general ledger for the Housing Fund, Bale discovered several instances where CPM recorded disbursements that resulted in a negative balance on the ledger. Specifically, the Housing Fund general ledger for McKenna showed approximately 117 entries between September 29, 2006 and April 25, 2008 where CPM recorded funds transfers for move outs resulting in a negative ledger balance. (Test. of Bale; Ex. A5 at 2 through 8.)

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[18] The record contains limited evidence indicating Appellant may have been divested of his voting rights in 340 Vista, LLC by other members. (Ex. A36 at 5 and 6.) However, this event, if valid, did not occur until at least January 16, 2013. (*Id.*)

35. During the investigation, Appellant asserted that the Housing Fund general ledger did not reflect a credit of $7,500 from overages after closing escrow on McKenna. Appellant claimed CPM placed those funds into the Housing Fund SDA but erroneously recorded the credit as a debit on the general ledger, on December 31, 2006. (Test. of Bale and Berrey; Ex. A5 at2.)

36. Bale reviewed the Housing Fund records and found no deposit for $7,500 after close of escrow.[19] (Test. of Bale.) Nonetheless, Bale pulled out the block of entries resulting in a negative balance between January 1, 2006 and April 25, 2008, reversed the asserted erroneous $7,500 debit, and found that the Housing Fund general ledger still reflected a negative balance after each entry for the stated period. (Test. of Bale; Exs. A1 at 3 and 4 and A6.)

37. REA's investigation also revealed that, on several occasions, CPM failed to pay management fees in accordance with the McKenna PMA. On at least 11 separate occasions between May 29, 2008 and January 30, 2012, CPM paid made disbursements, from one or more McKenna accounts, which did not comply with the PMA. (Ex. A1 at 5 and 6; test. of Bale.) Appellant, through CPM, paid management fees sporadically and often several months after the fees were earned. (Test. of Bale.)

38. Bale also discovered that, upon transferring management Taylor, CPM disbursed $65,695, from the Housing Fund to Taylor, for the balance of McKenna tenants' security deposits. However, the Housing Fund general ledger reflected a balance of $56,500 resulting in a negative balance of $9,195. Bale reversed the $7,500 debit and found the ledger still had a negative balance of $1,695.[20] (Ex. A5 at 18; test. of Bale.)

Candalaria South/Candalaria Crossing[21]

39. Candalaria South, LLC is a limited liability company registered in the state of Oregon. Candalaria South, LLC was organized on or about September 3, 2004. At the time of organization, Appellant was the sole member of Candalaria South, LLC. (Exs. R35 at 1 and R36.) On or about January 24, 2008, Appellant transferred a portion of his membership interest in Candalaria South, LLC to others. The new membership distributions thereafter are as follows:

- Douglas S. and Synova J. Reed 27.27%
- Kevin and Tracy Reed 18.18%
- Dan L. and Fran H. Berrey, Trustees* 54.55%

[19] It is unclear, from the record, where these funds ended up or if they were in fact dispersed from escrow. Nonetheless, it is sufficient to note that there is no evidence supporting Appellant's claim that $7,500 was ever placed into the Housing Fund during the period in issue.

[20] The record is unclear as to whether the $7,500 debit was actually entered in error. Nonetheless, REA permitted the assumption that it was in calculating the Housing Fund ledger balances in issue. This order does not challenge that assumption because the determination is irrelevant to a resolution of the issues.

[21] For simplicity, this order refers to the property in issue owned by Candalaria South, LLC as "Candalaria" unless a distinction is relevant to a particular finding or analysis. Otherwise, Candalaria is meant to include all property identified in Finding of Fact 40.

(Ex. R35 at 1, 2, and 14; * denotes Appellant's membership interest directly or through other entities.)

40. Candalaria South, LLC owns real property located at 2715-2735, 2725-2785, and 2795 Commercial Street SE, Salem Oregon 97302. (Ex. R34 at 1.) On or about May 16, 2008, Candalaria South, LLC registered the name Candalaria Crossing as an assumed business name with the Secretary of State. (Ex. R37 atl.) Candalaria Crossing occupies all or part of the Commercial Street SE property owned by Candalaria South, LLC.[22] (Test. of Berrey; see also, Ex. R38.)

41. In 2008, Appellant, on behalf of Candalaria South, LLC,[23] negotiated a commercial lease with The French Press coffee house. On December 1, 2008, a 10-year lease was executed in favor of The French Press (the lease). Page one of the lease identified the "landlord" as "Candalaria Crossing, LLC." (Ex. A21 at 1; test. of Bale.) Candalaria Crossing, LLC is not registered with the Secretary of State. (Test. of Bale.)

42. The lease required all payments for rent were to be made to, "Certified Property Management, Inc." (Ex. A21 at 4.) In addition, Provision 14.10 provides all notices and communications should be delivered to, "Landlord: Certified Property Management, Inc." (Ex. A21 at 16.) Provision 14.35 states, "Commercial Concepts, Inc., represents the Landlord in this lease." (Ex. A21 at 19.) That provision also provides for commissions to be paid to CCI. (*Id.*) Lovegren, an employee of CPM, signed the lease on behalf of the landlord. Mike Taylor signed on behalf of The French Press. (Ex. A21 at 20.)

43. Provision 14.2 of the lease is titled, Relationship of the Parties, and provides:

> The relationship of the parties to this Lease is that of landlord and tenant. Landlord is not a partner or joint venturer (sic) with Tenant in any respect or for any purpose in the conduct of Tenant's business or otherwise.

(Ex. A21 at 17.)

44. The French Press is an entity owned and operated by Mojo's House of Java, Inc., (Mojo's). Mojo's registered the assumed business name "The French Press" with the Secretary of State on August 14, 2008. (Ex. A22 at 6.)

45. Mojo's is a duly registered corporation authorized to conduct business in the State of Oregon. Mojo's has been registered with the Oregon Secretary of State since September 7, 2005. (Ex. R40 at 1.) Appellant and his wife, Fran Berrey, are the primary shareholders in

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[22] The record is unclear as to how much of real property located at 2715-2735, 2725-2785, and 2795 Commercial Street SE, Salem Oregon 97302 Candalaria Crossing occupies. Nonetheless, that determination is unnecessary for purposes of this order.

[23] The record is unclear whether Appellant negotiated this lease through CCI, CPM, or as a member of Candalaria South, LLC.

Mojo's. (Test. of Berrey.) Appellant is the secretary of the corporation and Fran Berrey is the president. (Ex. R40 at 1 and 2; test. of Berrey.)

46. On February 20, 2009, Candalaria South, LLC and CPM entered into a three-year PMA for the management of Candalaria. The Candalaria PMA stated CPM would be paid monthly property management fees equal to "(4%) Four Percent of Gross Revenues." (Ex. A20 at 1 through 3.) In addition, the Candalaria PMA provided for a commission to CPM equal to seven percent of the lease term for new leases and five percent of the lease term for renewed leases. The Candalaria PMA designated Appellant as the owner's representative in all dealings with CPM. (*Id.* at 3.)

47. Appellant signed the Candalaria PMA on behalf of the Candalaria South, LLC. Lovegren signed on behalf of CPM. (Ex. A20 at 4; test. of Bale.)

48. During the Agency's investigation, Appellant admitted to Bale that he did not disclose to the other members of Candalaria South, LLC that he and his spouse owned and operated The French Press through their interest in Mojo's. (Ex. A1 at 11; test. of Reed and Berrey.)

340 Vista

49. 340 Vista, LLC is a limited liability company registered in the state of Oregon. 340 Vista, LLC was organized on or about September 20, 1999. (Ex. R41 at 2.) The Class A voting interest of the individual members of 340 Vista, LLC are identified as follows:

• Berrey Family, LLC*	14.48%
• Van A. and Shu Ping Louie	24.25%
• Jack E. Noyes	24.25%
• Doug Reed	7.06%
• Kevin and Tracy Reed	5.22%
• Leon Clifford and Susan Grace Reed, Trustees	9.20%
• Earl C. and Carol M. Schroeder, Trustees	7.67%
• Richard H. and Barbara L. Whitt, Trustees	7.87%

(Ex. R41 at 4 and 5; * denotes Appellant's membership interest, directly or indirectly through other entities.)

50. 340 Vista, LLC owns certain real property located at 340 Vista Ave. SE, Salem, Oregon. (Test. of Berrey; Ex. R41 at 1.) Sometime after formation of 340 Vista, LLC, Appellant and others formed a tenancy in common to hold the 340 Vista property. Through the 340 Vista TIC Agreement, Appellant held 49.94 percent of the interest in 340 Vista. William MacHugh held 10.58 percent of the interest.[24] Merilee F Stavem, Larry and Jan Pfennig were also cotenant in 340 Vista. (Test. of MacHugh; see also Ex. A50 at 4.)

[24] Although certain evidence in the record alludes to the existence of a TIC Agreement related to 340 Vista, that agreement is not in evidence. Accordingly, the ownership interests for 340 Vista, LLC shown

51. On July 1, 2009, 340 Vista, LLC[25] and CPM entered into a PMA for management of 340 Vista. (Ex. A23; test. of Bale.) The 340 Vista PMA provides CPM shall be paid monthly property management fees equal to "(5%) Five Percent of Gross Revenue." (Ex. A23 at 3.) In addition, the 340 Vista PMA states CPM shall be entitled to a commission of "(7%) of the lease term" for new leases and "for procuring a renewal to any lease now or hereafter existing (5%) of the renewal option." (*Id.*)

52. The 340 Vista PMA granted the property manager certain enumerated authority and powers including, "[t]o pay out of the clients trust account * * * all expenses connected with the management and maintenance of the premises, as authorized herein * * *[.]" (Ex. A23 at 2.)

53. Lovegren signed the 340 Vista PMA on behalf of CPM. Appellant signed on behalf of 340 Vista, LLC. (Ex. A23 at 4.)

54. As to all times relevant to this order, the Oregon Department of Justice (DOJ) leased the entirety of 340 Vista. (Test. of Berrey.)

55. For tax years 2006 through 2008, CPM paid the property taxes for 340 Vista after the due date. CPM paid the 2006 property taxes for 340 Vista in June 2010, the 2007 property taxes in November 2010, and the 2008 property taxes in June 2012. For each of these tax years, a majority of the members of 340 Vista, LLC voted to defer paying the property taxes because CPM would be unable to disburse owner draws if the property taxes were paid on time. (Test. of Berrey and MacHugh.)

56. The failure to pay property taxes on the dates due resulted in penalties to the owner, 340 Vista, LLC, which passed to the individual members, including Appellant, according to their membership interests. Each owner was aware of this. Only William MacHugh (MacHugh) objected to deferring payment of property taxes. (Test. of Berrey and MacHugh.)

57. For tax years 2009 through 2012, CPM did not pay property taxes due during the time it managed 340 Vista. Sometime in 2011, MacHugh learned that CPM was not paying the property taxes for 340 Vista. He contacted Appellant who informed him that the other property owners voted to defer tax payments in order to continue to receive owner distributions. (Test. of MacHugh.) The resulting delinquent taxes and penalties exceeded $200,000. MacHugh eventually paid this delinquency through a loan he extended to the remaining owners in January 2013. (Test. of Berrey and MacHugh; Ex. A49 at 1.)

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above are derived solely from Ex. R41 (Third Restated Operating Agreement of 340Vista, LLC dated July 29, 2006). In addition, the ownership interest of the remaining tenants in common is not stated in the record.

[25] In the PMA, the property owner is identified as "340 Vista TIC." (Ex. A23 at 1.) For clarity, both entities are referred to herein as 340 Vista, LLC.

58. On or about January 16, 2013, the members of 340 Vista, LLC, with the exception of Appellant, voted to revoke all rights of Appellant related to 340 Vista. The members also voted to terminate the 340 Vista PMA with CPM. (Test. of MacHugh; Ex. A50.) CPM ceased providing management services to 340 Vista sometime before January 31, 2013. (Test. of Berrey.)

59. At the time the 340 Vista PMA was terminated, DOJ and CPM were negotiating a renewal of the lease. As of January 31, 2013, DOJ had not signed the lease renewal because it was still negotiating certain terms, including the owners' obligation to bring the property taxes current. The prior lease with DOJ included monthly payments allocated to property taxes, which DOJ paid to CPM each month. (Test. of Berrey and MacHugh.) Appellant informed the other owners that a lease renewal with DOJ could not be signed until the property taxes were paid in full. (Test. of Berrey.)

60. In December 2012, Appellant, through CPM, paid himself a partial commission of $18,500[26] for renewal of the DOJ lease that was still under negotiation. (Test. of MacHugh, Bale, and Berrey.) Upon learning of this payment, MacHugh disputed Appellant's entitlement to a commission because DOJ had not yet signed the lease and was negotiating over HVAC and property tax issues. (Test. of MacHugh; Exs. A1 at 11 and 12 and A24.)

61. During REA's investigation, Bale questioned Appellant about the propriety of the disbursement for commission on an unsigned lease. (Test. of Bale.) Appellant stated that he believed he was entitled to the commission once the lease renewal was procured. Appellant indicated he believed that the renewal was procured when approval was obtained from both parties. He further indicated that both parties approved the renewal terms and a signed lease was just a formality. (Test. of Berrey.)

62. At the time of hearing, DOJ had not signed the lease renewal for 340 Vista. (Test. of MacHugh.)

Lakepointe Apartments

63. On or about July 10, 2006, Appellant and others acquired the Lakepointe Apartments,[27] a residential apartment complex in Lincoln City, Oregon, and entered into a TIC Agreement to hold the property as cotenants. (Test. of Berrey; Ex. A10 at 1 and 2.) The TIC Agreement identified the interests of the cotenants as follows:

- Dan L. and Fran H. Berrey, Trustees* 2.500%
- Leon Clifford and Susan Grace Reed, Trustees 20.655%
- Earl C. and Carol M. Schroeder, Trustees 13.905%

[26] Upon renewal of the lease, the full commission due to Appellant would have been approximately $322,000. (Test. of Berrey.)

[27] The record contains evidence indicating Appellant may have held partial interest in the subject property prior to July 2006. (See, Ex. A9.) The extent of this ownership is irrelevant to the issues raised by the Amended Notice and is therefore not addressed by this order.

• Richard H. and Barbara L. Whitt, Trustees	23.030%
• Steven H. and Kathleen S. Westfall	2.500%
• Alan N. and Faye Zimmer	4.590%
• Keith Flicker, Trustee	8.640%
• Lakepointe Voorhies, LLC	24.180%

(Ex. R19 at 2 and 3; * denotes Appellant's ownership interest directly or through other entities.)

64. On May 12, 2011, the Lakepointe owners and CPM entered into a PMA for the management of Lakepointe. (Ex. A10.) The Lakepointe PMA specifies CPM shall be paid management fees equal to "(10%) Ten Percent of Gross Revenues[]" on a monthly basis. (*Id.* at 3.) Appellant signed the Lakepointe PMA on behalf of the owners. Lovegren signed on behalf of CPM. (Ex. A10 at 4.)

65. As part of the Agency investigation, Bale reviewed account ledgers for Lakepointe and discovered several instances where CPM failed to pay management fees according to the stated monthly schedule. Specifically, Bale found at least 14 instances between February 28, 2011 and January 30, 2012 where the Lakepointe general ledger reflected entries for management fees paid months after they were due.[28] (Exs. A1 at 7 and A11 1 through 4.) Bale's review also revealed that for each month CPM did not disburse management fees timely, it did disburse owner draws exceeding $8,000. (Ex. A1 at 7.)

Reconciliation Audit.

66. On or about July 27, 2012, the Agency mailed to CPM a Mandatory Mail-In Audit for the Housing Fund.[29] (Test. of Bale; Exs. A1 at 12 and A25.) On or about August 20, 2012, in response to the Mail-In Audit, the Agency received a reconciliation of the Housing Fund for May 2012 from CPM. The reconciliation was incomplete and not signed by Appellant. CPM did not provide explanations for differences or discrepancies in the reconciliation. (Test. of Bale; Ex. A26.)

67. Based on the May 2012 reconciliation received from CPM, REA initiated a complaint and opened an additional investigation of Appellant/CPM, on November 7, 2012, that focused specifically on the Housing Fund. (Test. of Bale; Exs. A1 at 12 and A27.)

68. On November 7, 2012, Bale visited Appellant's office in Sisters, Oregon. Bale asked Appellant to produce monthly account reconciliations for the Housing Fund SDA. Appellant admitted that he was unaware he was required to reconcile this account on a monthly basis. Appellant was unable to produce any monthly reconciliations for 2012. (Test. of Bale and Berrey.)

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[28] These entries reflect management fees paid for the period November 2010 through June 2011. (Ex. A1 at7.)

[29] The audit specified the subject bank account as, "Security Dep-Client Trust Account-Property Management" held by US Bank and ending in account number 6983. (Ex. A25).

69. During his visit, Bale presented Appellant with a list of 13 CTAs the Agency had on record as belonging to or associated with CPM. The following day, Appellant provided Bale with a list of six of the identified CTAs closed between January 26, 2011 and June 8, 2011. Prior to this date, Appellant had not notified the Agency of the account closures. (Test. of Bale and Berrey; Ex. A31.)

70. On or about January 8, 2013, as part of the investigation into the Housing Fund, Bale requested Appellant, through CPM, perform and provide to REA three-way reconciliations of the SDA for each month in 2012. (Exs. A1 at 12 and A28.)

71. In response to Bale's request, CPM delivered reconciliation for each month of 2012 on or about January 17, 2013. The reconciliations were completed by CPM on January 16, 2013. The reconciliations were incomplete, failed to balance, and did not contain explanations of differences or discrepancies. (Exs. A1 at 12 and 13 and A29.)

CONCLUSIONS OF LAW

1. Appellant demonstrated incompetence or untrustworthiness in performing any act for which he was required to hold a real estate license.

2. Appellant committed one or more acts of fraud or engaged in dishonest conduct substantially related to his fitness to conduct professional real estate activity.

3. Appellant disbursed funds from a client trust account or security deposit account without sufficient funds in the ledger account to cover the disbursement.

4. Appellant failed to sign property management agreements on behalf of the property management company.

5. Appellant transferred funds between different owners' ledgers without proper authorization.

6. Appellant failed to register a business name with the Agency prior to conducting professional real estate activity under a name other than his legal name.

7. Appellant consistently failed to complete required account reconciliations for one or more security deposit accounts.

8. Appellant was not required under OAR 863-025-0070(2)(b)(F) to provide property owners with notice that he may destroy records of property management activity performed after six years because the property management agreement was not properly terminated.

9. Appellant was not required under OAR 863-025-0070(2)(a) to disburse all obligated funds to another party because the property management agreement was not properly terminated.

10. Appellant failed to disburse earned management fees from a client trust account at least once each month.

11. Appellant violated one or more of the affirmative duties a property manager owes to a property owner.

12. Appellant failed to notify the Agency within 10 business days of closing a client trust account.

13. Appellant engaged in professional real estate activity without an active license.

14. REA may revoke Appellant's real estate license.

15. REA may impose a civil penalty up to $1,500 against Appellant.

OPINION

The Agency alleges Appellant's Oregon Real Estate License should be revoked and that he should pay a civil penalty of up to $1,500 because he engaged in multiple violations of statutes and administrative rules. As the proponent of these positions, REA bears the burden of proof. ORS 183.450(2); *Harris v. SAIF,* 292 Or 683, 690 (1982). The Agency must establish by a preponderance of the evidence that it is entitled to revoke Appellant's license and take other proposed disciplinary action. ORS 183.450(2); *see also, Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in administrative hearings is a preponderance of the evidence). Proof by a preponderance of the evidence means the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

1. Application of ORS Chapter 696 and OAR Chapter 863 to Appellant's conduct.

As an initial matter, Appellant argues that his property management activities are exempt from the statutes and rules governing the conduct of real estate licensees by virtue of his status both as an owner of the subject properties and as a managing member of one or more limited liability companies (LLCs) engaged in the management of its own real estate. Appellant relies on an exemption from the relevant licensing requirements, found in ORS 696.030(27).

ORS 696.030 identifies exemptions to the statutory requirements found elsewhere in the chapter and provides, in part:

> ORS 696.010 to 696.375, 696.392, 696.395 to 696.430, 696.490, 696.600 to 696.785, 696.990 and 696.995 do not apply to:
>
> * * * * *

(27) An individual who is the sole member or a managing member of a domestic or foreign limited liability company duly registered and operating within this state under ORS chapter 63 and who is engaging in the acquisition, sale, exchange, lease, transfer or management of the real estate of the limited liability company.

a. Appellant's ownership interest in the subject properties.

Appellant, either directly or indirectly, held partial ownership interest in each of the subject properties. During the period in issue, Appellant held interest in a majority of the subject properties as a tenant in common with other owners. In addition, the evidence showed Appellant held this interest through no less than four separate legal entities.

At hearing, the evidence revealed Appellant held varying fractional interests in the subject properties as follows:

- McKenna Estates, 74.841% held through 340 Vista, LLC as a tenant in common with other owners (see 340 Vista, LLC below for Appellant's actual ownership interest in that entity);

- Lakepointe Apartments, 2.5% held through Berrey Family Trust[30] as a tenant in common with other owners;

- Westec Business Park,[31] 22.2809% held by "Dan & Fran Berrey, Trustees" (Ex. A12 at 1.) as tenants in common with other owners;

- Candalaria Crossing, an unidentified ownership percentage held individually as a member of Candalaria South, LLC (Ex. A19 at 1.); and

- 340 Vista, 14.48% held by Berrey Family, LLC[32] as a member of 340 Vista, LLC (Ex. R41 at 4.).

As to the Lakepointe and Westec properties, the evidence indicates Appellant held title as a trustee or co-trustee of a family trust, rather than an LLC. ORS 696.030(27) does not exempt individuals acting as trustees from the licensing or regulatory requirements. Therefore, with regard to the Lakepointe and Westec properties, Appellant's argument that he is exempt from the

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[30] Appellant is Trustee for Berrey Family Trust. (Test. of Berrey.)

[31] This property is also referred to in the record as Westec South Business Park (Exs. A12 at 1 and A13 at 1.). The individuals owners of this property are identified collectively in the record as Westec Investment Group (see, Exs. A14 and A15.).

[32] The record does not identify the membership interest held by Appellant in the Berrey Family, LLC entity. Nonetheless, a determination of his ownership interest is unnecessary for purposes of this order. Instead, it is sufficient to note that Appellant is not a direct member of 340 Vista, LLC but, rather, holds interest derivatively through a separate legal entity.

regulatory provisions of statute and administrative rule pursuant to ORS 696.030(27) are without merit.

With regard to the McKenna, Candalaria, and Vista properties, Appellant held interest either directly as a member of an LLC owning the subject property (Candalaria) or derivatively through one or more LLC's which held membership in other entities holding ownership interest in the properties (McKenna and Vista).

b. Whether Appellant qualifies as a sole member or a managing member of an LLC for purposes of statutory exemption.

To determine whether Appellant's proffered interpretation of ORS 696.030(27) is permissible, it is necessary to decide if the term "individual," as it is used in the statute, can extend to Appellant's actions on behalf of the entities through which he held membership in the LLCs that owned portions of the subject properties.

ORS Chapter 696 does not define the term "individual." Likewise, OAR Chapter 863, applicable to the conduct and licensing of real estate professionals, does not provide a definition for this term. As with all cases of statutory construction, this tribunal must look first to a statute's text and context to best ascertain the intent to the legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611 (1993), citing, *State v. Person*, 316 Or 585, 590 (1993). Words of common usage typically should be given their plain, natural, and ordinary meaning. *Id.*, citing. *State v. Langley*, 314 Or 247, 256 (1992). The legislature expressed no intent, within the text of the relevant statute, to provide a definition of the term "individual." Nor is the term "individual" a term or art subject to an alternate definition. Rather, "individual" is a term of common usage. Accordingly, it is necessary to look to the plain, natural, and ordinary meaning of the term to ascertain whether Appellant's statutory interpretation falls within the legislative intent encompassed by ORS 696.030(27).

The ordinary dictionary definitions of the term "individual" used as a noun include, in relevant part:

> **1:** a single or particular being or thing or group of beings or things: as **a:** a particular being or thing as distinguished from a class, species, or collection * * * (1) **:** a single human being as contrasted with a social group or institution * * * **b:** A particular person[.] *Webster's Third New Int'l Dictionary* 1152 (unabridged ed 1993; emphasis original.)

Applied to the context of ORS Chapter 696, the most appropriate definition to apply is one that recognizes an "individual" as a single human being or person, rather than a single entity, social group, or institution. The majority of the relevant statute regulates licensing as well as conduct of any person performing or seeking to perform professional real estate activity.[33] More specifically, the provisions subject to exemption in ORS 696.030(27) apply to conduct of single individuals, who would otherwise be subject to the licensing requirements of the statute.

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[33] ORS 696.375 to .495 apply to the administration of the Agency, rather than direct regulation of conduct of those engaged in professional real estate activities.

Further, use the singular terms "sole member" and "a managing member" imply intent to include within the exemption a single designated person, rather than multiple members of an LLC.

Applied to the facts of this case, the above definition presents difficulties for Appellant's suggested application of the statutory exemption with regard to at least two of the three remaining properties.

As noted above, the Vista property was wholly owned by 340 Vista, LLC during the period in issue. Nonetheless, Appellant was not a direct member of 340 Vista, LLC. Rather, Appellant held interest in 340 Vista, LLC through an entity designated as the Berrey Family, LLC. While Appellant was identified as the managing member of Berrey Family, LLC, the statutory exemption found in ORS 696.030(27) does not operate to exempt from regulation a managing member of a third party LLC holding membership in an LLC which then owns the subject real estate to be managed. Nothing in the text or context of the statute suggests the legislature intended such a convoluted result. To find the exemption applicable in such a circumstance would require applying a definition of the term "individual" other than that implied by common usage and accepted by this order.

As for the McKenna property, during the period in issue it was owned through a tenancy in common which included 340 Vista, LLC. Appellant does not directly own any interest in the McKenna property. Rather, as above, Appellant's only interest in the property derives through his membership in two interrelated LLCs. As identified above, Appellant is a member of Berrey Family, LLC, which in turn is a member of 340 Vista, LLC, which is a tenant in common with the individual owners of the McKenna property. Again, to find Appellant exempt under the provisions of ORS 696.030(27) would require adopting a unique definition of the term "individual" not identified in this order.

For the reasons identified above, I find the exemptions identified in ORS 696.030(27) are inapplicable to Appellant with regard to his professional real estate activities for the Lakepointe, Westec, Vista, and McKenna properties.

Finally, during the period in issue the Candalaria property was wholly owned by Candalaria South, LLC. According to a preponderance of the evidence at hearing, Appellant is the managing member of Candalaria South, LLC. As such, with regard to property management activities performed for the Candalaria property, Appellant would appear to fall within the exemption provided by ORS 696.030(27). Unfortunately, Appellant's decision to organize and operate, as a licensee, a separate entity identified as Commercial Property Management further complicated the analysis of the claimed exemption. The effect of Appellant's actions must be analyzed under the statutory scheme to determine the applicability of the exemption asserted.

c. *The effect of Appellant's voluntary status as a licensee and organization of CPM on the statutory exemption.*

Since approximately 1977, Appellant has held a license issued by the Agency. Beginning in 1977, Appellant obtained a real estate sales license. In or about 1981, Appellant obtained a license as an associate real estate broker. Sometime in the mid-1980's Appellant obtained a

principal real estate broker's license. Appellant maintained that license until January 31, 2014. At hearing, Appellant testified that he has been engaged in property investing and development for more than 25 years. Further, Appellant testified that, in relation to these investment activities, he obtained a real estate license because he believed it would assist in the leasing of commercial properties in which he invested.

In 2003, Appellant formed C.P. Management Co. That entity provided property management services under the dba, Certified Property Management (CPM). Appellant later registered CPM with the Agency as a property management company for which he was the principal property manager. During the period in issue, CPM employed between five and eight individuals at any given time. Appellant was the designated property manager at CPM. CPM provided property management for the McKenna, Lakepointe, Westec, Candalaria, and Vista properties. For these services, CPM charged property management fees from which it paid operating costs and wages for employees, including Appellant.

A review of ORS Chapter 696 reveals that a primary purpose of the statute is to regulate professional real estate activities within the state, including property management activities. The exemption claimed by Appellant applies to a sole member or managing member of an LLC who is directly engaged in the management of property owned by the LLC. That is not how Appellant elected to manage the property held by Candalaria South, LLC, or any other property in issue. Instead, Appellant formed a separate legal entity, registered that entity with the Agency, and performed professional property management functions through that entity. The evidence reveals he was acting as an employee of CPM, rather than as a managing member of the LLC(s), when he engaged in property management activities.[34]

Appellant did not act directly as a member of Candalaria South, LLC. Rather, he acted through CPM as a licensed broker and charged property management fees for his services. Accordingly, he is not entitled to the exemption provided by ORS 696.030(27).

2. Incompetence or untrustworthiness in performing any act for which Appellant was required to hold a real estate license.

Throughout the Amended Notice, REA alleges Appellant engaged in conduct during the period in issue that demonstrates incompetence and/or untrustworthiness in performing any act for which he was required to hold a license. REA also identifies the specific conduct, giving rise to the allegations of incompetence or untrustworthiness, as independent violations of administrative rules. Specifically, REA alleges Appellant demonstrated incompetence or untrustworthiness by:

[34] In addition, ORS 696.030(27) does not exempt an individual who is a managing member of an LLC from the requirements identified in ORS 696.890, which identifies, *inter alia*, the affirmative duties a real estate property manager owes to a property owner. Because this order determines the exemptions in ORS 696.030(27) are inapplicable to Appellant, it is unnecessary to analyze how, if at all, the omission of this provision impacts Appellant's argument.

- Providing a false or incorrect response on the April 17, 2012 application to renew his license;
- Disbursing funds from a CTA without sufficient credit balance to cover the disbursements;
- Allowing inconsistent provisions between a PMA and tenant lease agreements regarding custody of tenant security deposits;
- Making misleading statements to REA and others regarding tenant security deposits;
- Failing to maintain records of authorization for loans taken from Westec;
- Failing to keep a CTA balance at the minimum amount required by the PMA; and
- Failing to identify the proper landlord on the Candalaria lease with The French Press.

Each of the above violations is discussed in detail below. Accordingly, it is unnecessary to reiterate the analysis related to each allegation here. Rather, it is sufficient to note that this order finds, with the exception of allowing inconsistent provisions between a PMA and tenant leases, Appellant engaged in the conduct alleged above and that each instance constitutes a violation of administrative rule regulating professional real estate activity. Accordingly, it must be determined if such conduct also constitutes incompetence or untrustworthiness.

ORS 696.301[35] identifies grounds for discipline and provides, in part:

> Subject to ORS 696.396, the Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal of a license to an applicant who has done any of the following:
>
> * * * * *
>
> (12) Demonstrated incompetence or untrustworthiness in performing any act for which the licensee is required to hold a license.

During the period in issue, Appellant was engaged in professional property management as the principal broker of CPM. ORS 696.020(2) requires any person conducting professional real estate activity in this state to hold an active license issued by REA. ORS 696.010(14) includes within the meaning of professional real estate activity, actions for another and for compensation including leasing, offering to lease, engaging in management of rental real estate, and purporting to be engaged in the business of leasing real estate. ORS 696.010(15)(a) through (d), (h), (i). CPM engaged in the management of residential apartment complexes and commercial retail and office projects.

As discussed more fully below, Appellant's violation of each of the provisions of administrative rule related to each of the above allegations demonstrates a lack of basic

[35] *Former* ORS 696.301(31), also cited in the Amended Notice, provides substantially similar language to ORS 696.301(12). Because the showing required by REA to prove the alleged violation would be the same under either version of the statute, this order does not undertake an in-depth discussion of the alleged conduct under the former version. The relevant text of *former* ORS 696(31) is laid out in fn. 1 above.

competence and knowledge of the rules and regulations relating to professional real estate activity, specifically those applicable to property managers. In addition, Appellant's lack of candor related to tenant security deposits for McKenna, loan authorizations for more than $400,000 procured from Westec, and potential self-dealings related to The French Press demonstrate a lack of trustworthiness in dealing with clients (the property owners) and the Agency.

In addition, as discussed below, REA alleged and Appellant admitted that he failed perform any monthly reconciliations of a pooled SDA (the Housing Fund), as required by administrative rule, before asked to do so by REA in July 2012. While not specifically pled as incompetence in the Amended Notice, I find this conduct supportive of REA's allegation that Appellant lacked basic competence in performing professional real estate activities.

As such, I find the Agency has demonstrated Appellant's conduct during the period in issue demonstrates incompetence and untrustworthiness in performing any act for which Appellant is required to hold a real estate license.

3. Fraud or dishonest conduct substantially related to Appellant's fitness to conduct professional real estate activity.

ORS 696.301(14) also permits the REA to discipline a licensee who has:

> Committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the applicant or licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity.

Similarly, *former* ORS 696.301(31) (2003) provided REA could discipline any licensee who:

> Committed an act or conduct substantially related to the applicant or licensee's fitness to conduct professional real estate activity, whether of the same or of a different character and whether or not in the course of professional real estate activity, that constitutes or demonstrates bad faith or dishonest or fraudulent dealings.

As is evident from both the former and the current versions of the statutory provision above, the Agency may discipline a licensee who has engaged in fraudulent or dishonest conduct, whether or not in the conduct of professional real estate activity, which is substantially related to the licensee's fitness to conduct such activity.

The relevant question, therefore, is whether Appellant's conduct, as proven by REA, constitutes fraudulent or dishonest conduct substantially related to his fitness to conduct professional real estate activity. In this context, REA makes three allegations. Specifically, REA asserts Appellant (1) provided false statements on an application for license renewal; (2)

demanded a 10 percent ownership distribution to which he was not entitled; and (3) took unauthorized loans from a property that he managed.

a. Appellant's renewal application.

In January 2012, Appellant accessed the Agency's website in order to renew his real estate license, which was due to expire at the end of the month. Appellant entered the required information including his credit card information and submitted the application. Appellant believed the application was accepted and processed. Unfortunately, due to an unidentified error, with either the Agency's computer system or Appellant's, the application was not processed. On February 1, 2012, Appellant's real estate license expired. In April 2012, Appellant was alerted to the license expiration by a vendor attempting to post properties for lease on Appellant's behalf. On April 17, 2012, Appellant logged on to the Agency's website, completed a renewal application, and paid the renewal fee as well as a late fee.

In completing the renewal application on April 17, 2012, Appellant indicated he had not engaged in professional real estate activity during the period between expiration and renewal of his license. At hearing, REA submitted evidence that CPM, for which Appellant was the principal broker and only licensee, maintained several online postings offering properties for lease Pursuant to ORS 696.010(15)(d), this constitutes professional real estate activity. Further, the evidence indicated Appellant continued to operate CPM even if no commercial leases were executed during that period. Accordingly, Appellant's response on the renewal application was false.

At hearing, and in closing arguments, Appellant argued that his response "was correct to the extent that he had not * * * engaged in any real estate activities for property in which he did not hold * * * an ownership interest." [Appellant's] Written Closing Argument at 4. This argument relates directly to Appellant's claims, addressed more fully above, that he was not required to hold a license and is therefore not subject to regulation by REA pursuant to ORS 696.030(27). This order explicitly rejects those arguments. Further, I find Appellant's arguments are self-serving and disingenuous.

During the investigation of the complaints giving rise to the Amended Notice, at no time did Appellant assert he believed he did not require a license because of the statutory exemptions claimed at hearing. Further, he made no such assertions during the Agency's separate investigations into his management of the Housing Fund. Rather, the statutory exemption is a legal argument presented by counsel in the context of this proceeding. There is no evidence in the record to support the contention that Appellant held a good faith belief he was not required to hold a real estate license to engage in property management through CPM. His conduct of obtaining and maintain the license for over 30 years speaks contrary to his arguments at hearing.

I find Appellant engaged in dishonest conduct in his application for renewal of his license when he indicated he had not engaged in professional real estate activity while his license was expired. Appellant's lack of sincerity with the REA is directly related to his fitness to hold a real estate license and conduct professional real estate activity.

b. Appellant's demand for 10 percent ownership distribution.

Next, the Agency asserts Appellant engaged in fraudulent or dishonest conduct when he demanded a 10 percent ownership distribution in McKenna to which he was not entitled.

At hearing, the parties presented vague and inconsistent evidence surrounding the ownership distribution in question and Appellant's alleged entitlement to the distribution. The parties' evidence and arguments provide little clarity. Nonetheless, the burden rests with REA, rather than Appellant.

At hearing, the parties presented competing theories and arguments about the accounting methods used to determine the appropriateness of the distribution in issue. However, neither party presented clear evidence to indicate Appellant's proffered accounting methods were impermissible. Instead, Bale testified that Appellant's arguments in favor of his demand for the ownership distribution relied on using an accrual-basis accounting method rather than the previously used cash-flow-basis. Nonetheless, Bale also conceded that switching between the two methods, while irregular, was not impermissible.

The evidence in the record fails to establish that Appellant knew or believed he was not entitled to the ownership distribution at issue when he made the demand. Accordingly, I do not find Appellant engaged in fraud or dishonest conduct substantially related to his fitness to conduct professional real estate activity when he requested the 10 percent ownership distribution.

c. Taking unauthorized loans from Westec.

As a final allegation in this violation, the Agency asserts Appellant took two loans from Westec, totaling approximately $483,000, for which he did not have authorization from a majority of the owners. Appellant admits to disbursing the funds to himself through CPM but argues that a majority of the owners voted to extend both loans to him, as evidenced by certain email communications and promissory notes offered at hearing. I am not persuaded.

In November 2003, shortly after acquiring the property, Appellant approached the owners of Westec and proposed that they vote to extend a one-year loan to him of $100,000 to invest in one of the other projects Appellant managed. At least two owners objected to this loan, preferring to keep the Westec funds, amounting to approximately $500,000, available for tenant improvements. Appellant assured these owners that the remaining $400,000 would remain available for such improvements and the loan would be limited to $100,000 for one year with his personal guarantee. Eventually, the owners agreed to extent Appellant $100,000 for one year.

Prior to REA's investigation, several owners learned Appellant had not taken the $100,000 loan agreed upon. Instead, Appellant had taken a loan of $200,000 followed by a second loan of $283,000. As of 2012, a significant portion of these loans remained unpaid. The owners were unaware of any authorization for such loans. At hearing, at least two owners, Westfall and Reed, testified Appellant had never presented either of the loans in question to them for approval. In response, Appellant asserted he had majority approval and did not need

approval from either Westfall or Reed. Unfortunately, for Appellant, the evidence does not support his assertions.

At hearing, Appellant alleged that, after the initial vote to extend the $100,000 loan, the group amended the loan amount to $200,000. In addition, he asserted a majority of owners voted to extend a second loan of $283,000. Despite these assertions, Appellant was unable to present reliable evidence of which owners, constituting a majority, voted in favor of these loans. When pressed, Appellant indicated that owners Berrey Family Trust, Fernwood Investments, Bobrowitz, and Duda voted to extend the loans. Appellant asserted these owners comprised more than 60% interest in Westec.

Appellant's testimony is contrary to certain evidence, which draws his reliability in into question. Specifically, Appellant's tally of voting members includes himself through Berrey Family Trust. Yet, in communications to Reed, Appellant stated he was abstaining from the vote due to the obvious conflict of interest. (Ex. A54 at 2.) If he did in fact abstain, the asserted tally is inaccurate. If not, his representation to co-owner and client appears to have been disingenuous. The unresolved conflict casts shadows on Appellant's representations.

In addition, when asked to present documentary evidence of these loan approvals, Appellant was unable. At hearing, he presented vague emails from Bobrowitz and Duda indicating they recalled approval of the loans. However, he was unable to present any contemporaneous evidence of the vote, either directly or through voting owners. Oddly, the only owners who recalled these specific loan votes are related to Appellant. Again, this evidence is less than persuasive. Bale's notes of a meeting with Kelly Haverkate, on behalf of Fernwood Investments, revealed that she had no recollection of the details of any loans from Westec to Appellant. (Ex. A67.)

The Agency's evidence established Appellant took loans, totaling $483,000 from Westec without authorization. Westec was a property that Appellant provided property management services for through CPM. Appellant's acts of taking substantial loans from a client without authorization demonstrate dishonest conduct, at best. Further, because Appellant's conduct occurred in his capacity as a professional property manager and relate directly to his honesty and integrity in dealing with client funds, I find it is substantially related to his fitness to conduct professional real estate activity.

4. Disbursing funds from a CTA or SDA without sufficient funds in the ledger account to cover the disbursement.

REA also alleges Appellant, through CPM, disbursed funds from the McKenna SDA and Westec CTA without sufficient funds in the ledger account thus causing the ledger to reflect a negative account balance. At hearing, Appellant argued that, while the ledger might reflect a negative balance, it was his practice to ensure no check issued without sufficient funds in the account. Appellant further argued that CPM's accounting software posted certain credits at the beginning of each month but his staff never sent out checks until the accounts contained sufficient funds to cover those credits. Further, Appellant asserted that certain entries in the

McKenna SDA ledger failed to reflect a $7,500 deposit to that account from escrow overages refunded to the owners. (Test. of Berrey.) Appellant's arguments are unpersuasive.

At hearing, REA's investigator testified he reviewed, among others, the ledgers of accounts for Westec and McKenna. In reviewing McKenna's general ledger for the Housing Fund SDA, Bale discovered several instances where CPM recorded disbursements that resulted in a negative balance on the ledger. Specifically, the Housing Fund general ledger for McKenna revealed 117 entries between September 29, 2006 and April 25, 2008 where CPM disbursed funds for move outs resulting in a negative ledger balance. REA also found that, upon transferring management Taylor, Appellant disbursed the full balance due as reflected in the financial records. After this disbursement, the Housing Fund general ledger again reflected a negative balance. Finally, the investigator discovered 12 separate entries, dated December 2 or 23, 2009, showing disbursements from the Westec CTA resulting in a negative ledger balance.

OAR 863-025-0025 (12)[36] provides:

> A property manager must not disburse funds from a clients' trust account or security deposits account unless there are sufficient funds, as defined in OAR 863-025-0010, in the ledger account against which the disbursement is made.

Similarly, *former* OAR 863-025-0025(3) (2006) provided, in part:

> Financial dealings by a property manager under a property management agreement shall comply with the following:
>
> (a) A property manager shall not execute or issue a check from the client's trust account prior to the existence of a sufficient credit balance to cover the check in the owner's ledger or tenant's ledger account against which the check is executed or issued.

Appellant's argument that no check issued without sufficient funds and thus no overdraft occurred for the Housing Fund or Westec CTA misses the mark. That argument assumes the applicable rule applies to a bank account. However, the language of the rule, both present and former, addresses ledger accounts, rather than bank accounts. Appellant's argument assumes the terms bank account" and "ledger account" are synonymous. This is not necessarily the case. In accounting, the term ledger account refers to a specific record of transactions, maintained by a business, for a given account.[37] This differs from the bank account balance which may reflect the funds held by the bank in that account at a particular moment in time, regardless of outstanding transactions.

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[36] *Formerly* OAR 863-025-0025(11) from 2007 to 9-1-2011. Renumbering did not alter the operative language of this section.

[37] The term dates back to early accounting methods, which used books, or ledgers, to record all transactions of a business (i.e., general ledger containing entries of all transactions.).

This distinction is apparent in examining the Housing Fund ledger for McKenna. The Housing Fund is a pooled bank account. A pooled bank account is one in which funds for more than one property, or client, is held collectively. In this case, the Housing Fund is an SDA holding tenant security deposits for McKenna and Lakepointe. Reference to the bank account balance would not give an accurate representation of the balance held on behalf of the tenants of Lakepointe or McKenna independently. Rather, it would simply indicate the total on hand with the bank for both properties collectively. The individual ledger accounts, maintained by the property manager, are where one would turn to determine the balance of tenant security deposits held in the pooled account for either property. Appellant's argument regarding a lack of account overdrafts is thus unavailing as it fails to address the fact that monies in the Housing Fund held on behalf of Lakepointe tenants were likely funding the shortfall in McKenna's tenant security deposits which should have been present in that account.

In examining the text of the rule, it is apparent that the rule requires a property manager to verify the presence of sufficient funds in a CTA or SDA before disbursing funds from that account. Further, the rule requires that such verification be done by referring to the ledger account, or record of all transactions maintained by the property manager for that account, rather than the bank account, which may not reflect all outstanding debits and credits for the account. Appellant's proffered interpretation would permit a property manager to issue disbursements from an account so long as the balance of the bank account at the instant of disbursement, irrespective of outstanding transactions, reflects sufficient funds to cover the disbursement. That interpretation could produce absurd results. Accordingly, I decline the opportunity to adopt such an interpretation.

In addition, I find Appellant's arguments about accounting software technicalities implausible and inconsistent. The evidence in the record reflects several instances during September 29, 2006 and April 25, 2008 for the Housing Fund and in December 2009 for Westec when disbursements resulted in a negative ledger balance. Contrary to Appellant's explanation, these instances were not limited to the beginning of the month. Rather, for McKenna, the transactions occurred at random intervals throughout the months in issue. For Westec, the transactions occurred at the beginning and toward the end of the month in issue.

While transactions occurring on or near the first of the month might support Appellant's assertions, transactions occurring throughout the month belie such assertions. Perhaps more telling is the fact that Bale's investigation did not reveal that disbursements, causing similar negative balances in the Westec CTA, regularly occurred at the beginning of each month or even multiple months in 2009.

Finally, Appellant argued that the negative ledger balance for the McKenna account in the Housing Fund SDA did not reflect a $7,500 deposit to that account from escrow overages and instead that deposit was posted as a credit in the ledger. At hearing, the Agency's investigator testified that he reviewed the Housing Fund records and found no deposit for $7,500 after close of escrow. Nonetheless, based on Appellant's representations, the investigator recalculated the block of entries resulting in a negative ledger balance accounting for the claimed erroneous $7,500 debit. Upon recalculation, the investigator found that the Housing Fund general ledger still reflected a negative balance after each entry for the stated period. This

investigator applied this same method to the balance transferred to Taylor Management and found a negative balance remaining in the McKenna ledger of approximately $1,695.

During the period in issue, Appellant disbursed funds from the McKenna SDA on no less than 117 occasions and from the Westec CTA on 12 occasions without sufficient funds in the ledger account to cover the disbursements.

5. Failing to sign one or more PMAs on behalf of the property management company.

OAR 863-025-0020 identifies requirements for property management agreements and provides, in part:

(6) Only a property manager may negotiate and sign a property management agreement, except that a principal real estate broker engaging in the management of rental real estate may delegate such authority under OAR 863-025-0015(6) to a real estate licensee who is under the supervision and control of the principal real estate broker. [38]

Previously, *former* OAR 863-025-0020(4) (2006) provided:

> Only a property manager or a real estate broker may negotiate and sign a property management agreement made in the course of the property manager's property management activity.

In the Amended Notice, REA alleges Appellant failed to sign the PMAs, as the property manager, for McKenna, Candalaria, 340 Vista, and Lakepointe. Appellant argues the pertinent rule requires only that he sign the PMA without specification to where or in what capacity. I disagree with Appellant.

The evidence in the record demonstrates that, for each of the PMAs specified, Appellant signed on behalf of the property owners. Further, the evidence demonstrates that Lovegren, an employee of CPM who did not hold a real estate license during the relevant period, signed the PMAs on behalf of CPM. Further, in each of the PMAs, Appellant is designated as the owner's representative in dealings with CPM, also owned by Appellant.

A review of the operative language of the pertinent rule, regardless of which version is applicable, reveals a legislative intent that a licensed property manager or broker negotiate with

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[38] Between April 1, 2007 and June 15, 2010, the pertinent section of OAR 863-025-0020 read:

> (6) *A property manager must* negotiate and sign a property management agreement, except that a principal real estate broker engaging in the management of rental real estate may delegate such authority under OAR 863-025-0015(6) to a real estate licensee who is under the supervision and control of the principal real estate broker.

(Emphasis added.) The alteration of the italicized four words above in the versions of the rule effective since June 15, 2010 do not substantially affect the analysis of the facts in this matter.

the owner over the terms of a PMA. In this instance, it is difficult to fathom how Appellant could have complied with this requirement if he was acting as both the property owner and property manager. Assuming that he could and intended to represent such to the other owners, nothing prevented Appellant from affixing his signature to the PMAs in issue on behalf of the owners and CPM. Appellant did not do so. Rather, he signed indicating acceptance of the agreement on behalf of the owners and had an unlicensed employee, Lovegren, sign indicating acceptance on behalf of the property manager.

The relevant section of rule explicitly states that only a property manager may sign the PMA. By permitting an unlicensed employee to sign the PMAs for McKenna, Candalaria, 340 Vista, and Lakepointe, Appellant violated that rule.

6. Transferring funds between different owners' ledgers without proper authorization.

REA next asserts Appellant impermissibly transferred funds between different property owners' ledgers based upon Bale's discovery of at least four instances where Appellant made payments, indicated as temporary loans, to CPM or CCI from a Westec ledger account belonging to the owners. Specifically, the cash account ledger reflected credit entries between August 5 and September 25, 2009 totaling over $31,000. Bale found no written authorizations from the owners for these disbursements. Appellant was unable to produce any such authorization.

OAR 863-025-0025 identifies requirements of property managers in dealings with CTAs and SDAs and provides, in relevant part:

> (13) A property manager may only transfer funds from an owners' ledger account to one or more different owners' ledger accounts if:
>
> (a) Each of the affected owners authorizing the transfer have signed and dated an agreement authorizing such transfer that is separate from any property management agreements;
>
> (b) At the time of the transfer, the property manager enters the transfer information on each affected owners' ledger account, including but not limited to the amount of the transfer, date of the transfer and the source or destination of the transferred funds, as appropriate; and
>
> (c) The property manager gives each owner a separate monthly accounting on the transfer or includes the accounting of the transfer activity in the regular monthly report to the owner.

At hearing, Appellant argued that the disbursements in issue were not loans, but instead disbursements he was entitled to as an owner of Westec. Again, I find Appellant's self-serving explanation inconsistent with the evidence. The entries indicate that Appellant made each of the disbursements in question to either CCI or CPM, his own entities. In addition, the corresponding descriptions characterized each disbursement as a temporary loan. Three of the four

disbursements also specified the purpose of the loan was to fund, in some respect, one of Appellant's other properties or business ventures.

If, as Appellant asserts, the funds in question were properly disbursed to him as an owner, it is unclear why such disbursements were made to CCI or CPM, rather than to Appellant as an individual. Further, if Appellant disbursed the funds as income distribution of the owners, it is uncertain why he would have characterized each disbursement as a temporary loan to another business venture. Finally, if such funds were disbursed to Appellant in his capacity as an owner, one would expect to see disbursements to the remaining owners on or near the same date. The record reflects no such distributions.

The Agency established Appellant, through CPM, disbursed funds from a Westec ledger account to other property account ledgers, belonging to Appellant, on four separate occasions without written authorization from all Westec owners.

7. Failing to register a business name with the Agency prior to conducting professional real estate activity under a name other than Appellant's legal name.

Next, the Agency alleges that Appellant engaged in professional real estate activity under an unregistered name, other than his legal name, when he executed the Westec PMA and the lease with The French Press.

Former OAR 863-015-0095 governed the use of business names in the conduct of professional real estate activity and provided, in part:[39]

> (1) If a principal real estate broker or property manager wishes to conduct real estate business in a name other than the licensee's legal name, the principal broker or property manager must first register the business name with the Agency using an online application process available through the Agency's website. For the purposes of this rule, "business name" means an assumed name *or the name of a business entity, such as a corporation, partnership, limited liability company, or other business entity recognized by law.* A licensee must maintain the registered business name in active status with the Oregon Secretary of State's Corporation Division.

(Emphasis added.)

The Westec PMA, signed September 25, 2003, specified the property management entity as "Certified Property Management Company." The Agency asserts the use of the identifier "company" at the end of the dba gave a false impression to the public regarding the entity providing property management services under the PMA. I disagree.

In 2003, Appellant formed C.P. Management Co., a corporation registered in the State of Oregon. During the relevant period, C.P. Management, Co. provided property management

[39] Currently, this provision appears at OAR 863-014-0095.

services under the dba, Certified Property Management. Sometime after formation of C.P. Management Co., Appellant registered the CPM dba with the Agency.

As an identifier, the term "company" bears no legal significance. That term denotes no specific legal status of a business such as that implied by the identifiers "Inc." "LLC" or "LLP." Rather, the term "company" is a generic identifier referring to any collection of individuals working together for a specific purpose. As such, I do not find it to be the type of identifier that, when added to a business name, would tend to mislead the public about the identity of the entity providing services. *Former* OAR 863-015-0095(1) required Appellant to register the assumed business name or legal entity name, recognized by law, through which he intended to conduct professional real estate activities. Appellant did so. The addition of the term "company" did not add to or detract from that assumed name. There is no evidence in the record that the addition of the subject term constitutes or creates a business entity recognized by law. For purposes of this order, I find it does not.

Next, the Agency asserts the lease with The French Press, executed on December 1, 2008, identifies multiple entities as landlord and/or property manager, at least one of which is a business name not registered with the Agency. Appellant, through CPM, negotiated the lease. That lease, on page one, identifies the "landlord" as Candalaria Crossing, LLC. On or about May 16, 2008, Candalaria South, LLC, of which Appellant was the managing member, registered the name Candalaria Crossing as an assumed business name with the Secretary of State. Nonetheless, Appellant did not register that name with the Agency. Likewise, during the period in issue, Appellant did not register the name Candalaria Crossing, LLC with the Agency. Further, there is no record of such entity registered with the Secretary of State, either as a domestic or foreign limited liability company. In this instance, the Agency's arguments have merit.

Former OAR 863-015-0095(1) requires a licensee to register any name, other than his/her legal name, under which the licensee intends to conduct professional real estate activities and to maintain that name with the Secretary of State Corporations Division. This includes limited liability companies. At hearing, REA argued that, using an unregistered business name could cause confusion among property owners, tenants, and members of the public. The lease in issue is a prime example of this argument.

In addition to a non-existent legal entity, the lease identifies at least two other entities as the owner's agent. The lease identifies the landlord, for purposes of rent payments as well as notices and communications, at pages four and 16 respectively, as Certified Property Management, Inc. In addition, the lease identifies Commercial Concepts, Inc., as representing the landlord. As the Agency correctly argued at hearing, a lease agreement is a legal document binding on the identified parties. For purposes of identifying the property manager, the lease is not a model of drafting clarity. The identification of a non-existent limited liability company not only detracts from the clarity of the lease, it violates *former* OAR 863-015-0095(1).

During the period in issue, Appellant did not register the name Candalaria Crossing, LLC, with the REA or the Secretary of State. Pursuant to *former* ORS 696.010(15), professional real estate activity includes leasing real estate. Accordingly, when Appellant executed the lease

with The French Press in the name of Candalaria Crossing, LLC, he engaged in professional real estate activity in a name, other than his legal name, not registered with the Agency in violation of *former* OAR 863-015-0095(1).

8. Failing to complete required account reconciliations for one or more SDAs.

In addition to regulating how property managers handle CTAs, OAR 863-025-0025 also identifies requirements for managing SDAs and provides, in relevant part:

> (21) A property manager must reconcile each security deposits account within 30 calendar days of the bank statement date pursuant to the requirements contained in this section.
>
> (a) The reconciliation must have three components that are contained in a single reconciliation document:
>
> (A) The bank statement balance, adjusted for outstanding checks and other reconciling bank items;
>
> (B) The balance in the records of receipts and disbursements or the check register as of the date of the bank statement;
>
> (C) The sum of all positive balances of individual security deposits and fees held in the security deposits account.
>
> (b) The balances of each component in section (21)(a) of this rule must be equal to and reconciled with each other. If any adjustment is needed, the adjustment must be clearly identified and explained on the reconciliation document;
>
> (c) Outstanding checks must be listed by check number, issue date, payee and amount;
>
> (d) Within 30 calendar days of the date of the bank statement, the property manager must:
>
> (A) Complete the reconciliation document; and
>
> (B) Sign and date the reconciliation document, attesting to the accuracy and completeness of the reconciliation; and
>
> (e)The property manager must preserve and file in logical sequence the reconciliation document, bank statement, and all supporting documentation including, but not limited to, copies of the record of receipts and disbursements or check register and a listing of all balances of individual security deposits and fees as of the date of the bank statement.

REA asserts Appellant failed to reconcile the Housing Fund SDA for any month in 2012 in accordance with the records. At hearing, Appellant did not dispute this.

The evidence in the records shows that in July 2012, REA mailed a Mandatory Mail-In Audit for the Housing Fund to CPM. Appellant, through CPM responded to the audit in August 2012 with a reconciliation of the Housing Fund for May 2012 that was both incomplete and unsigned by Appellant. Appellant did not provide explanations for differences or discrepancies in the reconciliation. Thereafter, REA opened a separate investigation of Appellant and CPM that focused specifically on Appellant's management of the Housing Fund SDA.

During a visit to Appellant's office in November 2012, an Agency investigator requested that Appellant produce monthly account reconciliations for the Housing Fund. Appellant admitted to the investigator that he was unaware he was required to reconcile SDAs monthly. Appellant could not produce any monthly reconciliations for 2012. Thereafter, in January 2013, the investigator requested CPM perform three-way reconciliations of the SDA for all months of 2012.

In response to REA's request, CPM delivered reconciliations for each month of 2012 on January 17, 2013. CPM completed the reconciliations the day before delivered to REA. The reconciliations were incomplete, failed to balance, and did not contain explanations of differences or discrepancies.

OAR 863-025-0025(21) requires a property manager to reconcile all SDAs within 30 days of the bank statements. Appellant failed to do so for any month in 2012. In addition, subsection (b) of the pertinent section requires the reconciliation must balance and, if necessary, must identify any adjustments necessary. The rule also requires a property manager to sign the reconciliation and to retain copies of the reconciliation and supporting documentation. OAR 863-025-0025(21)(d) and (e). Appellant failed to comply with any section of this administrative rule for each month in 2012.

9. Failing to provide property owners with notice that Appellant may destroy records of property management activity performed after six years as required by OAR 863-025-0070(2)(b)(F).

OAR 863-025-0070 identifies requirements and timelines for termination of a PMA and transfer of property management activities and provides in relevant part:

> (2) Not later than 60 days after the effective date of the termination, the property manager must:
>
> * * * * *
>
> (b) Provide the owner with the following:
>
> * * * * *

(F) A notice the property manager may destroy the required records of the property management activity performed after six years.

The Agency alleges Appellant violated the above rule because he failed to provide notice to the owners that CPM may destroy property management records for McKenna within 60 days of the termination of the PMA. Because I find insufficient evidence in the record to support termination of the McKenna PMA as required by the McKenna TIC Agreement, I disagree with the Agency.

Under the terms of the McKenna TIC Agreement, CPM was designated as the property manager for McKenna. The McKenna TIC Agreement required a unanimous vote of the owners to remove a property manager. Appellant held interest in McKenna through 340 Vista, LLC. The evidence in the record reflects 340 Vista, LLC held 74.841 percent of the voting and equity interest in McKenna.

According to the evidence, in April 2012, certain McKenna owners became dissatisfied with Appellant's management of McKenna. As a result, these owners voted to transfer property management from CPM to Taylor Management. The best evidence in the record indicates 340 Vista, LLC voted against replacing CPM. That entity controlled over 74 percent of the interest in McKenna. As such, the decision to replace the property manager was not unanimous, and therefore not in compliance with the TIC Agreement's terms. Nonetheless, CPM conceded to the transfer, on at least a temporary basis, of property management functions to prevent disruption to McKenna's operations. However, CPM's concession to transfer of the property management functions, temporarily or otherwise, did not validate the termination of the PMA between McKenna and CPM. The record is devoid of evidence that the McKenna PMA was amended to permit a less than unanimous vote to remove the property manager. Likewise, there is no evidence in the record to show Appellant was divested of his voting or ownership rights in either McKenna or 340 Vista, LLC at the time the McKenna PMA was purportedly terminated.

For these reasons, the Agency failed to show the owners properly terminated the McKenna PMA on April 12, 2012. Accordingly, the Agency failed to show on what date, if ever, the 60-day period for Appellant to provide the notice required by OAR 863-025-0070(2)(b)(F) expired.

10. Failing to disburse all obligated funds to an entitled party within 60 days of termination of a PMA.

Similar to the allegation above, the Agency asserts Appellant violated OAR 863-025-0070(2)(a), which requires a property manager to disburse all obligated funds to the party or parties entitled to such funds within 60 days after termination of a PMA. The Agency asserts Appellant failed to disburse such funds within 60 days after termination of the McKenna PMA in April 2012.

As discussed more fully above, REA failed to prove, by a preponderance of the evidence, that the McKenna owners terminated the PMA by a unanimous vote. Because the McKenna TIC Agreement required such unanimity to replace the property manager, there is insufficient

evidence in the record to indicate the McKenna PMA was properly terminated. Accordingly, the REA failed to show Appellant was obligated, by OAR 863-025-0070(a), to disburse funds to any party within 60 days of the purported April 12, 2012 termination of the McKenna PMA.

11. Failing to disburse earned management fees from a CTA at least once each month.

Next, the Agency alleges Appellant failed to disburse, to himself as property manager, earned management fees in accordance with the administrative rule.

OAR 863-025-0025(15) provides:[40]

> A property manager must disburse earned management fees from the client's trust account *at least once each month unless a different schedule of disbursement is specified in the property management agreement*, and may only disburse such fees if sufficient funds are available.

The McKenna and Lakepointe PMAs required Appellant, through CPM, to pay property management fees on a monthly basis. There is no evidence in the record of any change to those or other terms in the two PMAs.

The evidence in the record reveals that, on several occasions, Appellant failed to pay management fees on a monthly basis. Specifically, the record shows that, on 11 occasions between May 29, 2008 and January 30, 2012, Appellant made disbursements for management fees from McKenna accounts, which did not comply with the PMA because they were made several months after the month in which they were earned. Moreover, the record reflects no less than 14 entries, between February 28, 2011 and January 30, 2012, in the Lakepointe general ledger showing Appellant paid management fees months after they were due. The record also indicates that for each month Appellant failed to disburse management fees timely, Appellant, through CPM, disbursed owner draws exceeding $8,000.

At hearing, Appellant argued that these deviations were permissible because he was not just a property manager but also an owner in both projects. In addition, Appellant argued that sufficient funds were not available to disburse property management fees during these months and therefore he was acting in the owners' best interest and in accordance with the cited rule. I find Appellant's arguments unpersuasive.

The text of the applicable rule requires a property manager to disburse funds on a specific interval. The rule permits an alternate schedule may be provided in the PMA. In addition, OAR 863-025-0025(15) permits a property manager to deviate from the monthly disbursement of management fees if sufficient funds are not available. No other exceptions are provided for failing to pay management fees monthly. Accordingly, Appellant's assertions that he was

[40] This provision appeared in *former* OAR 863-025-0025(14) from April 1, 2007 until January 1, 2009. The operative language has remained the same for all versions between April 1, 2007 and present, regardless of renumbering.

permitted to deviate from the monthly schedule required by the applicable rule and the McKenna and Lakepointe PMAs are without merit.

Likewise, the evidence does not support Appellant' assertions, at hearing, that during the months in which he failed to disburse management fees as required, there were insufficient funds to do so. At hearing, the Agency's investigator testified that, for each such month, he found disbursements to the owners in excess of $8,000. The investigator also testified that, according to the Agency's interpretation of OAR 863-025-0025(15), a determination of whether sufficient funds exist to disburse property management fees should be done prior to disbursing owner draws. The Agency explained that this is because property management fees are an operating expense of the property and such expenses are paid before owner income is distributed.

I find REA's interpretation of OAR 863-025-0025(15) in this matter is entitled to deference. *See, Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). (An agency's interpretation of its own validly promulgated administrative rule is entitled to deference unless "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law * * *.") Pursuant to *Don't Waste Oregon*, an agency's interpretation is erroneous and therefore not entitled to deference only if it is: (1) implausible; (2) inconsistent with the wording of the rule; (3) inconsistent with the context of the rule; or 4) inconsistent with any other source of law. 320 Or at 142. Here, the Agency's investigator testified that such an interpretation is consistent with generally accepted accounting principles. As such, I find REA's interpretation is plausible. Further, Appellant does not argue otherwise, and I find nothing in that interpretation that is inconsistent with the wording or context of the rule or any other source of law.

Appellant failed to disburse property management fees monthly as required by OAR 863-025-025(15) and the McKenna and Lakepointe PMAs on at least 25 occassions between May 29, 2008 and January 30, 2012.

12. Violating one or more of the affirmative duties a property manager owes to a property owner.

Next, the Agency alleges Appellant's conduct during the period in issue failed to adhere to the affirmative duties he owed to his clients as a property manager. *Former* ORS 696.890(3) identified affirmative duties a property manager owes to each property owner and provided, in relevant part:

> A real estate property manager owes the property owner the following affirmative duties:
>
> (a) To deal honestly and in good faith;
>
> * * * * *
>
> (c) To exercise reasonable care and diligence;

* * * * *

(e) To act in a fiduciary manner in all matters relating to trust funds;

(f) To be loyal to the owner by not taking action that is adverse or detrimental to the owner's interest[.]

The Agency asserts Appellant made misleading statements about McKenna tenant security deposits, failed to pay property taxes for 340 Vista, and took a partial commission for a lease when he was not entitled to do so. Each allegation is addressed below.

a. Misleading statements about tenant security deposits related to McKenna (ORS 696.890(3)(a)).

As discussed above, in April 2012, Taylor Management took over property management duties for McKenna. As part of this transition, Taylor reviewed the McKenna ledgers realized a deficit of $51,150 in tenant security deposits transferred from CPM. Taylor notified the owners, including Appellant, of this shortfall. In response, Appellant advised Taylor and the other owners that the shortage was due to the owners' use of $82,700 in tenant security deposits to finance the purchase of the property. He also asserted that draws for McKenna owners had been reduced during the period between acquisition and transfer to Taylor Management to make up for the initial $82,700. Appellant claimed that the $51,150 shortage represented the outstanding balance of the $82,700.

At hearing, the Agency presented reliable evidence that its investigator reviewed the records of all accounts for McKenna and found Appellant's statements regarding the tenant security deposits were untrue. The Agency demonstrated that, when a pre-acquisition McKenna tenant moved out, Appellant, through CPM, transferred the amount of that tenant's security deposit from the Housing Fund SDA to the McKenna owners' CTA. From there, any refundable portion of the security deposit was paid to the tenant and the residual remained in the owners' CTA. The evidence also showed that, in no instance were deposits made from owners' accounts to replenish the funds used from the tenant security deposits to finance the purchase of McKenna. The evidence revealed that, if in fact the owners' draws were reduced to the shortfall, the ledgers for the owners' CTA and the Housing Fund SDA would reflect transfers in amounts commensurate with the reductions in owners' draws. Finally, the evidence revealed that, because only $51,000 of the McKenna tenant security deposits were refundable, the purported reduction in owner draws should have reduced the balance significantly. Accordingly, the evidence demonstrated Appellant's statements regarding the $51,150 shortfall in McKenna security deposits were false.

The Agency correctly asserts Appellant violated former ORS 696.860(3)(a) by making false statements pertaining to the tenant security deposits because these statements were both dishonest and made without a good faith belief in the substance of the assertion. Rather, it appears Appellant made such statements in order to deflect responsibility for his failure to manage the McKenna tenant security deposits in a fiduciary manner.

b. Failure to pay property taxes for 340 Vista (ORS 696.890(3)(a)(c)(e).)

On July 1, 2009, 340 Vista, LLC and Appellant, through CPM, entered into a PMA for management of 340 Vista. The 340 Vista PMA granted Appellant, as property manager, authority and power which included paying all expenses from the owners' CTA.

The record reflects that, for tax years 2006 through 2008, Appellant paid the property taxes for 340 Vista after the due date, in most cases several years later. In addition, for tax years 2009 through 2012, Appellant did not pay property taxes due during the time his entity, CPM, managed 340 Vista.

The Agency asserts Appellant's failure to pay the property taxes from the 340 Vista owners' CTA in a timely manner violated his obligations to deal with owners honestly and in good faith, to exercise reasonable care and diligence, and to act in a fiduciary manner in all matters relating to trust funds.

The undisputed evidence in the record shows that, for the tax years 2006 through 2008, a majority of the members of 340 Vista, LLC voted to defer paying the property taxes because it would negatively impact their ability to take owner draws if the property taxes were timely paid. The evidence also indicates Appellant informed the property owners that the property taxes could be paid late but that doing so would result in penalties and interest. Only MacHugh objected to deferring payment of property taxes. Based on this evidence, Appellant asserts he violated no rule because he acted in accordance with a majority of the owners' wishes.

With respect to Appellant's honesty and good faith dealings in this matter, the Agency failed to show he acted either dishonestly or in bad faith when he notified the owners that draws would stop or be reduced if the property taxes were paid on time for 340 Vista. Likewise, the Agency failed to show Appellant failed to exercise reasonable care and diligence in withholding payment of the taxes. As the property manager, Appellant served the interests of his clients, in this instance the owners of 340 Vista. The evidence shows those owners voted to withhold payment of property taxes after Appellant informed them that doing so would cause penalties and interest to accrue. Ultimately, the penalties for those tax years exceeded $70,000. Nonetheless, Appellant's actions for tax years 2006 through 2008 were in accordance with the owners' informed instructions and thus not in violation of his duty to act with reasonable care and diligence.

Nonetheless, the same cannot be said for Appellant's alleged failure to act in a fiduciary manner in all matters relating to trust funds. A fiduciary relationship is one "in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships * * * require the highest duty of care." *Black's Law Dictionary*, 7th Ed. at 640 (1999). This definition includes the agent-principal relationship. (*Id.*) Accordingly, the property manager, as the agent of the owner, owes a property owner the highest duty of care. In the context of the applicable rule, Appellant, as the property manager, owed the remaining owners of 340 Vista the highest duty of care with regard to funds held in trust, including those allocated from the owners' CTA for property taxes.

In deciding to withhold property tax payments for 2006 through 2008, the evidence indicates Appellant, as an owner, cast a significant percentage of the voting interest in favor of deferring payment. This vote was self-serving and thus in violation of Appellant's obligation, as property manager, to act in a fiduciary manner toward the remaining owners. While Appellant was, as an owner, entitled to cast a vote, that entitlement is overshadowed by his legal obligation as a property manager to act in a fiduciary manner toward the remaining owners. Without the 49.94 percent[41] controlled by Appellant and that of MacHugh, the tally of votes cast in favor of deferring tax payments may not have constituted a majority.

The evidence pertaining to tax years 2009 through 2012 is less favorable to Appellant. The undisputed evidence reveals that Appellant again failed to pay property taxes for 340 Vista for this period. The evidence does not show, however, that a majority of the owners voted to defer tax payments for these years. Instead, a preponderance of the evidence indicates that Appellant did not present such a decision to every owner. The evidence also shows that, sometime in 2011, MacHugh learned that Appellant was not paying the property taxes and asked why this was not done. Appellant then claimed that enough of the other property owners voted to defer tax payments to permit Appellant to do so without every owner voting. This time, the resulting delinquent taxes and penalties exceeded $200,000. MacHugh eventually paid those delinquencies through a loan to the remaining owners in January 2013.

With regard to Appellant's failure to pay property taxes for 340 Vista during 2009 to 2012, I find Appellant failed to deal honestly and in good faith with all remaining property owners. Unlike the prior tax years, Appellant did not present each owner with the option to vote on the decision to defer tax payments. Rather, the evidence suggests that Appellant presented the option only to as many owners as was necessary to constitute a majority. This is particularly troubling considering that Appellant's voting interest at the time constituted over 49 percent. Accordingly, Appellant needed less than two percent of the ownership interest in order to constitute a majority. Any single remaining owner likely held at least that much interest. Appellant failed to act honestly, when he secreted, from at least one of the remaining owners, the decision again to defer payment of property taxes.

Likewise, Appellant's failure to pay property taxes for four consecutive tax years without a majority of the owner's approval demonstrates a failure to exercise reasonable care and diligence. This is particularly true in light to the fact that his prior withholding of property taxes cost the owners over $70,000 in penalties. As the property manager, Appellant was obligated to pay all expenses connected with the management and maintenance of the premises as authorized by the 340Vista PMA unless the property owners directed him otherwise. There is no evidence, other than Appellant's self-serving assertion, that a majority of the owners directed him not to pay the property taxes in issue.

Finally, Appellant's failure to pay the property taxes due for 2009 through 2012 demonstrate a failure to act in a fiduciary manner in all matters relating to trust funds. The analysis pertaining to tax years 2006 through 2008 above is applicable to Appellant's conduct

[41] Because the 340 Vista TIC Agreement is not in the record, it cannot be determined whether Appellant held interest individually, through 340 Vista, LLC, or through some other entity.

here, as well. However, in this case, Appellant's breach of his fiduciary duty is underscored by his failure to present the proposal to defer tax payments to all property owners.

First, the evidence does not support Appellant's assertions that a majority of the owners authorized the deferment. Accordingly, Appellant, as the property manager, failed to act with the highest duty of care owed to the property owner. This is evidenced by the added costs associated with Appellant's unilateral decision, to wit $200,000 in tax penalties. Second, assuming Appellant did obtain at least a majority of the voting interest to defer tax payments, his failure to present the proposal to all owners showed a disregard for fiduciary duty owed to those owners. Instead, Appellant's best argument indicates he cherry-picked the owners necessary to obtain a majority interest and disregarded the rest. This is not demonstrative of the highest duty of care afforded to those owners.

The Agency has demonstrated Appellant's failure to pay property taxes for 340 Vista during the period in issue violated ORS 696.890(3)(a),(c), and (e).

c. *Taking lease commission without signed lease from DOJ-340 Vista (ORS 696.890(3)(a)(c)(e)(f)).*

On July 1, 2009, 340 Vista, LLC and CPM entered into a PMA for management of 340 Vista. The 340 Vista PMA granted Appellant, as the property manager, the authority to pay management fees and commissions out of the owners CTA. The PMA provided Appellant, through CPM, would be paid monthly property management fees equal to five percent of gross revenues. The PMA also entitled Appellant, through CPM, to a commission of seven percent of the lease term for new leases and five percent for procuring a renewal lease. During the period in issue, the entirety of 340 Vista was occupied by DOJ.

In January 2013, the owners of 340 Vista (with the exception of Appellant) voted to revoke Appellant's rights related to 340 Vista. The members also voted to terminate the 340 Vista PMA with CPM.

At the time the 340 Vista PMA was terminated, DOJ and CPM were negotiating a renewal of the lease. The evidence in the record reveals that, as of January 31, 2013, DOJ had not signed the lease renewal because it was still negotiating certain terms, including the owners' obligation to bring the property taxes current. During the negotations, Appellant informed the other owners that a lease renewal with DOJ could not be signed until the property taxes were paid in full.

The evidence also reveals that, in December 2012, prior to termination of the 340 Vista PMA, Appellant paid himself $18,500 as partial commission for renewal of the DOJ lease. Upon learning of this payment, MacHugh disputed this payment because DOJ had not signed the lease. In response, and at hearing, Appellant stated that he believed he was entitled to the commission once the lease renewal was procured. Appellant argued that renewal was procured when approval was obtained from both parties. He asserted that both parties approved the renewal terms and, as such, a signed lease was just a formality. I am not persuaded by Appellant's arguments.

Appellant's argument that he believed the lease was "procured" as soon as he obtained preliminary assent from the parties strains credulity. This is especially true in light of the evidence that DOJ was still negotiating the terms of that renewal when he paid himself the partial commission. At hearing, Appellant was unable to explain what the effect of failed negotiations would be on the assent he presumably obtained from DOJ. Further, his actions do not support the assertion that he truly believed he was entitled to a commission for the lease renewal. According to the evidence at hearing, the five percent commission payable for renewal of the DOJ lease exceeded $320,000. Thus, if Appellant is to be believed, he was entitled to over $320,000 and yet elected to take only $18,500. Such magnanimous behavior was not explained at hearing.

The Agency established Appellant disbursed $18,500 to himself to which he was not entitled. He then asserted implausible and unreasonable arguments to justify his actions. In doing so, he failed to deal honestly and in good faith with the owners of 340 Vista. His actions also violated his obligation, as property manager, to exercise reasonable care and diligence and to act in a fiduciary manner in all matters relating to funds held in trust for the owners. Finally, Appellant's actions of taking trust funds to which he was not entitled were adverse to the owners' interests as those funds are the property of the owner to be used either for the management of 340 Vista or as income by the owner.

The evidence in the record reveals Appellant paid himself of a commission for an unexecuted lease renewal in violation of the affirmative duties a property manager owes to a property owner as enumerated in ORS 696.890(3)(a),(c),(e), and (f).

13. Appellant failed to notify the Agency within 10 business days of closing a CTA.

Former ORS 696.241(5) provided:[42]

> A licensed real estate property manager or principal real estate broker who closes a clients' trust account, or to whom ownership of a client's trust account is transferred as authorized by the agency by rule, shall notify the agency, within 10 business days after the date the account is closed or transferred, on a form approved by the agency.

In November 2012, an REA investigator presented Appellant with a list of 13 CTAs REA had on record as belonging to or associated with CPM. The following day, Appellant provided REA with a list of six of those CTAs that had closed between January 26, 2011 and June 8, 2011. The undisputed evidence revealed that Appellant had not notified REA of the account closures prior to November 2012.

At hearing, Appellant argued that the accounts identified were not true CTAs but rather partner operating accounts that he designated as CTAs to protect the monies belonging to the

[42] The legislature subsequently renumbered the relevant subsection of statute to ORS 696.241(6). The pertinent language remains unchanged in the current version of the statute.

various property owners in those accounts from creditors of CPM. Again, I am unpersuaded by Appellant's arguments.

OAR 863-025-010(4) provides:

> "Clients' Trust Account" means a federally insured bank account labeled as "Clients' Trust Account" on all bank records and checks that is established and maintained by a property manager, acting on behalf of an owner under a property management agreement, for depositing, holding and disbursing funds received by the property manager on behalf of an owner, including application fees and application screening fees

By his own arguments, Appellant admits that he designated the accounts in issue as CTAs for the purpose of holding funds received by CPM and belonging to the property owners. The fact that Appellant may have considered and treated these accounts as partner operating accounts is irrelevant. All six accounts met the definition of a CTA provided above. As such, Appellant was required, by *former* ORS 696.241(5), to notify the Agency within 10 business days of closing each account. Appellant failed to do so.

14. Appellant engaged in professional real estate activity without an active license.

ORS 696.020(2) prohibits any individual from engaging in professional real estate activity without an active license issued by the Agency.[43] Professional real estate activity is defined in ORS 696.010(14) which provides, in part:

> "Professional real estate activity" means any of the following actions, when engaged in for another and for compensation or with the intention or in the expectation or upon the promise of receiving or collecting compensation, by any person who:
>
> (a) Sells, exchanges, purchases, rents or leases real estate;
>
> (b) Offers to sell, exchange, purchase, rent or lease real estate;
>
> (c) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate;
>
> (d) Lists, offers, attempts or agrees to list real estate for sale;
>
> * * * * *

[43] ORS 696.020(2) reads:

> An individual may not engage in, carry on, advertise or purport to engage in or carry on professional real estate activity, or act in the capacity of a real estate licensee, within this state unless the individual holds an active license as provided for in this chapter.

(h) Engages in management of rental real estate;

(i) Purports to be engaged in the business of buying, selling, exchanging, renting or leasing real estate;

(j) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;

(k) Assists or directs in the negotiation or closing of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate[.]

In January 2012, Appellant attempted to renew his principal broker license using the Agency's online renewal application. Appellant entered all necessary information, including his credit card information for payment of the renewal fee. Unbeknownst to Appellant, the payment did not process. On February 1, 2012, Appellant's license expired.

Between February 1 and April 17, 2012, Appellant maintained multiple property advertisements for commercial lease opportunities on the multiple listing services (MLS), a services used by real estate professionals to advertise and locate commercial and residential properties for clients. In addition, Appellant continued to operate CPM, a property management company in which he was the only licensee through which he managed the properties in issue.

At hearing, Appellant argued that he reasonably believed his license was renewed in January 201. Further, Appellant argued that, because he did not sign any commercial leases during the period between February 1 and April 17, 2012, he did not engage in proferssional real estate activities. Both arguments lack merit.

First, the statute is silent on a party's intent with regard to the unlicensed practice of real estate. Rather, ORS 696.020(2) places a strict prohibition on an unlicensed individual engaging in professional real estate activities, including property management. With the exception of those exemptions found in ORS 363.030, no unlicensed person may conduct property management activities. A reasonable belief that one possesses a license is not an exemption to the licensing requirements or a justification to unlicensed practice found in ORS Chapter 696.

Next, as identified above, advertising real estate for lease and engaging in or purporting to be engaged in property management both fall within the definition of professional real estate activities. ORS 696.010(14)(d) and (h).

The evidence in the record demonstrates Appellant engaged in professional real estate activities without a valid license in violation of ORS 696.020(2) for 77 days between February 1 and April 17, 2012.

15. Revocation of Appellant's real estate license.

ORS 696.301 identifies grounds for discipline and provides, in relevant part:

Subject to ORS 696.396, the Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal of a license to an applicant who has done any of the following:

* * * * *

(3) Disregarded or violated any provision of ORS 659A.421, 696.010 to 696.495, 696.600 to 696.785 and 696.800 to 696.870 *or any rule of the Real Estate Agency.*[44]

* * * * *

(12) Demonstrated incompetence or untrustworthiness in performing any act for which the licensee is required to hold a license.

* * * * *

(14) Committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the applicant or licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity.

(Emphasis added.)

ORS 696.396 identifies the Agency's progressive discipline policy and provides, in part:

(1) The Real Estate Commissioner shall provide by rule for the progressive discipline of real estate licensees and an objective method for investigation of complaints alleging grounds for discipline under ORS 696.301.

(2) The rules adopted by the commissioner under this section:

* * * * *

(b) Must provide for progressive discipline designed and implemented to correct inappropriate behavior.

(c) May not authorize imposition of a suspension or a revocation of a real estate license unless the material facts establish a violation of a ground for discipline under ORS 696.301 that:

---

[44] Prior to 2005, this provision appeared at *former* ORS 696.301(27), which provided a licensee was subject to discipline if he/she "[v]iolated or disregarded any rule of the Real Estate Agency." Effective January 1, 2005, this provision was moved to (3) and violations of statutory provisions were added as grounds for discipline.

(A) Results in significant damage or injury;

(B) *Exhibits incompetence in the performance of professional real estate activity*;

(C) *Exhibits dishonesty or fraudulent conduct*[.]

(Emphasis added.)

In the Amended Notice, REA seeks to revoke Appellant's principal broker license. Appellant argues that, assuming REA has proven one or more allegations, revocation is inappropriate under ORS 696.369 because REA has not engaged in progressive discipline. I disagree.

As set forth above, ORS 696.396 requires REA to adopt rules for progressive discipline of licensee. The statute also prohibits REA from imposing suspension or revocation of a license unless the facts establish certain violations under ORS 696.301, including incompetence and/or dishonest or fraudulent conduct.

As set out in this order, the Agency has established, by a preponderance of the evidence, that Appellant: (1) engaged in incompetence and untrustworthiness in performing property management activities, (2) committed one or more acts of dishonest conduct related to his fitness to conduct property management, (3) violated one or more affirmative duties owed to his clients, and (4) engaged in unlicensed property management activity. In addition, the Agency established Appellant engaged in numerous violations of OAR Chapter 863 Division 25 through his professional real estate activities.

The language of ORS 696.301 grants REA discretion, subject to the provision of ORS 696.396, in determining appropriate discipline for violations of statutes and rules governing professional real estate activity. While ORS 696.396 does require REA to adopt rules for progressive discipline, it also provides criteria under which REA may exercise its discretion to suspend or revoke a license. In this matter, REA has established it is entitled to impose suspension or revocation pursuant to ORS 696.396(2)(c)(B) and (C) because Appellant's conduct constitutes incompetence and untrustworthiness and because he engaged in multiple acts of dishonest conduct. At hearing, REA asserted the extensive number and egregious nature of the violations warrant revocation, rather than suspension. Viewing the record in its entirety, I agree. Accordingly, I find REA has not abused its discretion in proposing revocation of Appellant's principal broker license.

16. Civil penalty.

ORS 696.990 identifies penalties for engaging in prohibited activity and provides, in relevant part:

> (4) Any person that violates ORS 696.020 (2) may be required by the Real Estate Commissioner to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner of:

(a) Not less than $100 nor more than $500 for the first offense of unlicensed professional real estate activity; and

(b) Not less than $500 nor more than $1,000 for the second and subsequent offenses of unlicensed professional real estate activity.

* * * * *

(9) For the purposes of subsection (4) of this section, any violation of ORS 696.020 (2) that results from a failure of a real estate licensee to renew a license within the time allowed by law constitutes a single offense of unlicensed professional real estate activity for each 30-day period after expiration of the license during which the individual engages in professional real estate activity. A civil penalty imposed for a violation of ORS 696.020 (2) that results from a failure of a real estate licensee to renew a license within the time allowed by law is not subject to the minimum dollar amounts specified in subsection (4) of this section.

As discussed above, Appellant engaged in unlicensed professional real estate activities for approximately 77 days. In the Amended Notice, REA seeks to assess a civil penalty for this conduct of $1,500. As provided by ORS 696.990(9), each 30-day period of unlicensed practice constitutes a separate instance of violation. Accordingly, REA may assess a civil penalty of $500 for the first violation occurring between February 1 and March 1, 2012. For the second violation, occurring between March 2 and April 17, 2012,[45] REA may assess an addition penalty of $1,000.

ORDER

I propose the Real Estate Agency issue the following order:

The Amended Notice of Intent to Revoke issued July 30, 2014 is MODIFIED as set forth above.

Based on the violations of statutes and administrative rules specified herein, the real estate principal broker license of Dan Lee Berrey is REVOKED;

Dan L. Berrey shall pay a civil penalty of $1,500.

Joe L. Allen
Senior Administrative Law Judge
Office of Administrative Hearings

[45] While this period exceeds 30-days, the Agency does not seek an additional penalty for the period exceeding 60 days.

NOTICE

This is the Administrative Law Judge's Proposed Order. If the Proposed Order is adverse to you, you have the right to file written exceptions and argument to be considered by the Real Estate Commissioner in issuing the Final Order. Your exceptions and argument must be received by the 20th day from the date of service. Send them to:

Denise Lewis
Oregon Real Estate Agency
1177 Center St. NE
Salem OR 97301-2505

The Real Estate Commissioner will issue a Final Order, which will explain your appeal rights.

CERTIFICATE OF MAILING

On March 23, 2015, I mailed the foregoing Proposed Order issued on this date in OAH Case No. 1403688.

By: First Class Mail

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