PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **ASHLEY C. L. BROWN,** **Member No. 210159,** A Member of the State Bar.	**Case No.: 14-O-03717-WKM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT (Bus. & Prof. Code, § 6007, subd. (c)(4).)**

Introduction

The Office of the Chief Trial Counsel of the State Bar of California (OCTC) charges respondent **ASHLEY C. L. BROWN** with five counts of misconduct involving a single real estate transaction in which respondent was both the escrow agent and the attorney for the seller. Specifically, respondent is charged with willfully violating: (1) rule 4-100(A) of the State Bar Rules of Professional Conduct[1] (failing to maintain the earnest money deposit (EMD) in a trust account); (2) section 6106 of Business and Professions Code[2] (moral turpitude – misappropriating almost all of the EMD); (3) section 6068, subdivision (a) (failing to comply with the law – breach of fiduciary duty); (4) rule 4-100(B)(3) (failing to account for the EMD); and (5) rule 4-100(B)(4) (failing to promptly refund the EMD to the buyers as requested after the transaction was cancelled).

[1] Unless otherwise noted, all future references to rules are to the State Bar Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to sections are to the Business and Professions Code.

As set forth *post*, the court finds that respondent is culpable on three of the five counts of charged misconduct. In addition, the court finds that respondent is culpable on two counts of *uncharged*, but proved misconduct, which the court considers only for purposes of aggravation.[3] (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [uncharged, but proved misconduct may not be used as an independent ground of discipline, but may be considered, in appropriate circumstances, for other purposes such as aggravation].)

In light of the fact that the multiple aggravating circumstances significantly out weigh the single mitigating circumstance, the court finds that the appropriate level of discipline for the serious found misconduct is disbarment. Because the court will recommend that respondent be disbarred, the court will order respondent's involuntary inactive enrollment pending the final disposition of this proceeding. (§ 6007, subd. (c)(4).)

Pertinent Procedural History

OCTC filed the notice of disciplinary charges (NDC) in this matter on January 20, 2015. Thereafter, respondent filed his response to the NDC on February 23, 2015.

This matter was originally assigned to State Bar Court Judge Patrice E. McElroy. However, effective May 20, 2015, the matter was reassigned to the undersigned State Bar Court Judge for all purposes.

On May 21, 2015, the parties filed a partial stipulation of facts and admission of documents. A four-day trial was held on June 16 through 19, 2015. Both parties filed post trial briefs, and the court took the matter under submission for decision on June 30, 2015.

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[3] "Aggravation" or "aggravating circumstances" are factors surrounding [an attorney's] misconduct that demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard. (Rules Proc. of State Bar, tit. IV, Stds. For Atty. Sanctions for Prof. Misconduct, std. 1.2(h) (all further references to standards are to this source).)

At trial, the State Bar was represented at trial by Deputy Trial Counsel Eli D. Morgenstern. Respondent was represented by attorney Jennifer K. Saunders of Haight, Brown & Bonesteel, LLP.

Findings of Fact and Conclusions of Law

The following findings of fact are based on respondent's response to the NDC, the parties' partial stipulation of facts, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on December 1, 2000, and has been a member of the State Bar of California since that time.

Case Number 14-O-03717 – the Barragan Matter

Facts

This case involves a real estate transaction in which Moises Barragan and Mirna Laros, a married couple who are referred to collectively as the Barragans, agreed to purchase a house from the Wall Street Asset Alliance Corporation (WSAAC). Respondent agreed to be the escrow agent for this transaction. The Barragans, who were first-time home purchasers, were represented by real estate agent Jenny Preciado and broker Dennis A. Rosas of Prudential California Realty Hacienda Heights, California. WSAAC and its president, Robert J. Schaefers, were respondent's clients previously. According to respondent, respondent had previously represented both WSAAC and Schaefers, and served as the escrow agent in about 12 real estate transactions, in which WSAAC sold properties using buy-sell agreements that were virtually identical to the one used in the WSAAC-Barragan transaction.

Respondent described the typical transaction, in which WSAAC would bid to purchase bank-owned or foreclosed properties from a website "auction.com," and then purchase and

immediately resell the properties with "simultaneous" or "concurrent" escrows. Such escrows are commonly used by a person selling property that he or she does not own, but has an option to purchase. The person exercises the option to purchase in one escrow and immediately resells it for a profit in a second escrow. Almost always, the person uses the money from the buyer in the second escrow to buy the property in the first escrow. Buying and selling properties using this method is an accepted and legal practice so long as no misrepresentations are made, the buyer in the first escrow is not an undisclosed agent of one of the parties, and the buy-sell agreement in the second escrow does not condition payment upon the delivery of title to the property. In a case meeting these conditions, the seller need not disclose to the buyer in the second escrow how title to the property was obtained or how much was paid for it. (3 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 6:1 (Definition of an escrow).)

In October 2013, Schaefers told Preciado about the availability of a house for sale on South Murray Avenue in Azusa, California (Azusa property).[4] Preciado in turn told her clients, the Barragans, about it.

The Barragans looked at the Azusa property from the outside and liked it. Preciado told the Barragans that the purchase price was $270,000 and that a $30,000 EMD was required. She also told them that respondent would be the escrow agent. Despite their misgivings about the required $30,000 EMD, the Barragans decided to purchase the Azusa property.

On October 15, 2013, the Barragans signed a "WSAAC Offer Worksheet" (Worksheet). Only lines 1, 3, and 4 on the Worksheet were completed/filled in. On line 1, the date "October 15, 2013," was inserted. On line 3, the words "outside only" were inserted and the word "YES" was circled and initialed by the Barragans, indicating that they had inspected the property and

[4] Schaefers and Preciado had at least two shared business arrangements that were not disclosed to the Barragans. One arrangement was the Preciado/Schaefers joint venture, which was formed on October 1, 2013.

completed all their due diligence regarding the property's condition. On line 4, the word "YES" was circled and initialed by the Barragans to indicate that they accept the property "as is."

Notably, line 6 on the form, a space where the "Deposit Amount (Non-refundable)" was to be inserted, was *not* filled in. The nonrefundable deposit was described on the form as "5% of Total Purchase Price [due] upon execution of Loan Sale Agreement."

On October 18, 2013, the Barragans gave to respondent their signed Worksheet and the $30,000 EMD. They paid the EMD with a $30,000 cashier's check purchased from Wells Fargo Bank. The check was made payable to "Ashley CL Brown A Professional Law Corp." Respondent prepared and gave the Barragans a "Sales Receipt," acknowledging that, on October 18, 2013, "Ashley C. L. Brown, A Professional Law Corporation" received a $30,000 check from the Barragans as a "Deposit on Account."

Respondent deposited the $30,000 cashier's check into his client trust account (CTA) at Pacific Western Bank on October 18, 2013. That same day, respondent disbursed $5,000 of the Barragans' $30,000 EMD to Schaefers in his individual capacity (i.e., not as President of WSAAC) by issuing a $5,000 CTA check made payable to "Robert Schaefers" and giving it to Schaefers.[5] Respondent disbursed the $5,000 to Schaefers, even though he had not received any escrow instructions whatsoever, and even though the Barragans had not authorized it.

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[5] The bank records for respondent's CTA show that Pacific Western Bank paid the $5,000 CTA check to Schaefers with funds drawn from respondent's CTA October 18, 2013, which was before the $30,000 cashier's check had even been presented to Wells Fargo Bank for payment through the banking system. Even assuming, arguendo, that the Barragans authorized respondent to disburse $5,000 of the EMD to Schaefers, respondent's clearly violated rule 4-100(A) when he issued and gave the $5,000 CTA check to Schaefers on October 18, 2013, because Wells Fargo Bank had not paid Pacific Western Bank $30,000 and Pacific Western Bank had not actually credited respondent's CTA with the $30,000 it collected from Wells Fargo Bank. (*In the Matter of Robins* (Review Dept. 1991)1 Cal. State Bar Ct. Rptr. 708, 712; accord State Bar, Handbook of Client Trust Accounting for California Attorneys (2013 electronic ed.), § III, pp. 5-6.) Because the State Bar failed to charge this rule 4-100(A) violation, the court may consider it only for purposes of aggravation. (*In re Silverton* (2005) 36 Cal.4th 81, 93, fn. 4.)

Respondent did not seek the Barragans' permission to make the disbursement, nor did respondent tell the Barragans that he made the disbursement, even though he clearly had a fiduciary duty to disclose it to them.

Seven days later, on October 25, 2013, the Barragans and WSAAC executed a "Purchase Agreement With Joint Escrow Instructions" (Agreement), in which the Barragans agreed to purchase the Azusa property from WSAAC and in which WSAAC agreed to sell the Azusa property to the Barragans. Respondent signed an Escrow/Closing Agent Acknowledgement that is attached to the Agreement. That acknowledgment provides:

> Escrow/Closing Agent acknowledges receipt of a copy of this Agreement and [the] earnest money deposit in the amount of $30,000.00 and agrees to act as Escrow/Closing Agent subject to the terms and condition of this Agreement, [and] the terms of Escrow/Closing Agent's general provisions set forth in B....

Respondent denies drafting the Agreement, which was WSAAC'S form buy-sell agreement, but admits he reviewed it and completed it by typing in the buyers' names and address, the purchase price, etc. While the Agreement is lengthy (about 35 pages), only those portions relevant to this disciplinary proceeding are noted here.[6]

The Agreement listed a purchase price of $300,000: the EMD of $30,000, and net proceeds due of $270,000 ($300,000 less $30,000). The Agreement provided that escrow was to close on November 25, 2013, and contained concurrent closing conditions. The Barragans' concurrent closing conditions required that the Barragans deliver the net proceeds due of $270,000, plus their share of closing costs, either in cash or by wire transfer into escrow, along with the buyers' closing documents. WSAAC'S concurrent closing conditions required WSAAC to deliver a deed transferring the property to the buyers into escrow, along with the seller's

[6] Respondent admits that all of the escrows instruction are set forth in the Agreement.

closing documents. Because the closing conditions were concurrent, neither party could have compelled the other party to perform without first performing or tendering performance.

In the event that escrow did not close because of a default by one of the parties, the Agreement provided that the non-defaulting party could cancel escrow by providing written notice to the defaulting party and the escrow agent. In such an event, the defaulting party was required to pay all cancellation fees for the transaction and to be subject to the section of the Agreement dealing with dispute resolution. If the parties were not in default before the closing date, then either party could cancel the Agreement by written notice to the other party and the escrow agent. In such an event, the escrow/closing agent was required to return, to the buyers, the EMD, less the buyers' expenses and one-half of the escrow cancellation fees.

On the first page of the Agreement, the Agreement provides: "BUYER SHALL NOT BE ENTITLED TO A RETURN OF BUYER'S EARNEST MONEY DEPOSIT IF BUYER MATERIALLY BREACHES THIS AGREEMENT. That provision, however, was modified by section 11(A), which provided:

> THAT IF BUYER FAILS TO COMPLETE THIS PURCHASE BY REASON OF ANY DEFAULT OF BUYER, *AS DETERMINED BY SELLER IN ITS SOLE DISCRETION;* (1) SELLER SHALL BE RELEASED OF ANY OBLIGATION TO SELL THE PROPERTY TO THE BUYER, AND (2) ... SELLER SHALL RETAIN AS LIQUIDATED DAMAGES ... AN AMOUNT EQUAL TO THE EARNEST MONEY DEPOSIT (PROVIDED HOWEVER THE AMOUNT RETAINED SHALL BE NO MORE THAN THREE PERCENT (3%) OF THE TOTAL PURCHASE PRICE ....

(Italics added.)

Furthermore, section 11(D) purported to give the seller "THE RIGHT TO RETAIN OR SEEK THE RELEASE OF THE EARNEST MONEY DEPOSIT UNDER THIS SECTION 12

OR CANCEL THE TRANSACTION UNDER SECTIONS 6 OR 10 WITHOUT ANY FURTHER ACTION, CONSENT, OR DOCUMENT FROM BUYER."[7]

According to respondent, he believed that Schaefers got the Agreement from auction.com. The Agreement is convoluted, ambiguous, and contains a number of conflicting provisions. As the portions of sections 11(A) and 11(D) quoted *ante* suggest, the Agreement is about as one-side in favor of the seller (i.e., respondent's client WSAAC) as such an agreement could be. More notably, the Agreement falsely represented in at least three separate sections that WSAAC owned the Azusa property.[8]

During the escrow period (which was 30 days), respondent made two more partial disbursements of the $30,000 EMD. On November 6, 2013, respondent disbursed an additional $3,000 of the EMD to Schaefers by issuing and giving Schaefers a $3,000 CTA check. Then, on November 21, 2013, respondent again disbursed to Schaefers by a CTA check an additional amount of $2,200. Respondent made both of these disbursements to Schaefers after he received escrow instructions. As before, the Barragans did not authorize or know of these distributions.

Before November 25, 2013, the closing date, respondent and Preciado had a telephone conversation in which Preciado informed respondent that the Barragans did not intend to complete the transaction because the Azusa property was occupied and the Barragans could not provide the remaining funds in cash. Just like WSAAC did not own any of the properties in the 12 prior transactions, respondent clearly knew that WSAAC did not own the Azusa property and

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[7] Respondent argued that "12" was actually a typographical error and that it should be considered to mean "11." To the extent that this is even relevant to the court's discussion of the issue at hand, no authority has been presented by the respondent that an escrow agent is permitted to reform an agreement's terms without the express consent of the parties.

[8] For example, section 7(G)(3) provides: "the Property *was acquired* by Seller through foreclosure, trustee's sale pursuant to a power of sale under a deed of trust, power of sale under a mortgage, sheriff's sale or deed in lieu of foreclosure...." (Italics added.)

was going to purchase the property via a simultaneous escrow. Respondent's assertion at trial that he did not know whether WSAAC owned the Azusa property is disingenuous at best.

Just as Preciado told respondent in the telephone conversation, the Barragans did not deposit into escrow the net balance due of $270,000 or their respective share of the closing costs before November 25, 2013, the date for closing escrow. Similarly, WSAAC failed to deposit a deed conveying the Azusa property to the Barragans before November 25, 2013.

After November 25, 2013, Ms. Laros, who was becoming increasingly worried about the status of the Azuza property and the EMD, contacted Preciado. At first, Preciado advised Ms. Laros to be patient and wait. However, the Barragans had already given notice to their landlord that they were moving out of their apartment because they were buying a house. By December 23, 2013, the Barragans were tired of waiting and made an offer on another house. Thereafter, Ms. Laros began to call Schaefers, and then she began to call respondent directly. She called respondent three to four times per week, and left messages with respondent's secretary asking respondent to call her regarding the status of the EMD. Despite respondent receiving Ms. Laros's messages, respondent did not return Ms. Laros's calls.

On January 7, 2014, respondent made a fourth partial distribution of the $30,000 EMD, specifically, an additional $5,775 to Schaefers. The court finds that respondent's fourth distribution involved not only moral turpitude and dishonesty, but also corruption. Respondent knew since his telephone conversation with Preciado in November 2013 that the Barragans would not be completing the transaction. However, respondent later testified disingenuously that he did not know the Barragans wanted their $30,000 EMD refunded to them until Schaefers allegedly told him on January 8, 2014.

Nonetheless, on January 8, 2014, respondent sent a letter to the Barragans by email. In that letter, respondent acknowledged the Barragans' request for a refund of the EMD and

admitted that, with respect to the Azusa property, the purchaser (i.e., the Barragans) and the seller (i.e., WSAAC) "do not intend to consummate the relevant Purchase Agreement and hereby agree mutually to release each other from the any and all obligations, liabilities and claims arising from the execution of the Purchase Agreement and all other associated documents." Respondent asked the Barragans to sign the letter and return it to him to confirm their agreement to the cancellation of the Agreement and a mutual release of all claims. Unsure of the letter's meaning, the Barragans initially did not sign it and met with Preciado, who explained it to them.

On January 17, 2014, Preciado's broker, Mr. Rosas, sent respondent a fax instructing respondent to refund the $30,000 EMD to the Barragans "today." That same day, a meeting about the $30,000 EMD took place in respondent's office. Respondent, Schaefers, Preciado, and the Barragans were at that meeting. During the meeting, respondent and Schaefers asserted for the first time that the Barragans had breached the Agreement by failing to deposit the $270,000 in net proceeds due into escrow in cash or by wire transfer on November 25, 2013 and had declared a default.[9] Schaefers stated that, notwithstanding his claim of default against them, WSAAC would refund the Barragans' $30,000 EMD. The Barragans then agreed to sign respondent's January 8, 2014, letter. Schaefers then instructed respondent to issue a check to the Barragans for the undistributed portion of the $30,000 in his CTA.

Respondent, however, did not know how much of the $30,000 EMD remained in his CTA and had to call his bookkeeper to find out the amount. Respondent's bookkeeper erroneously told respondent that only $3,225 of the Barragans' $30,000 EMD remained in his CTA. In fact, on January 17, 2014, $11,025 of the $30,000 EMD was still in respondent's CTA.

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[9] Respondent's January 8, 2014, letter clearly rebuts respondent and Schaefers's contrived claim that the Barragans defaulted. To the extent respondent testified that he believes the Barragans defaulted, this claim is not credible. Paragraph 11(A) of the Agreement purports to give WSAAC the sole discretion to determine buyer's default is unconscionable and would be unenforceable.

Respondent gave the Barragans a CTA check in the amount of $3,225, but they did not look at the check before they and Preciado departed. When they got home, they were shocked to discover that the check was only $3,225, and not the full $30,000. Shortly after the January 17, 2014, meeting, Schaefers gave respondent $3,000 to give to the Barragans. Respondent deposited the $3,000 into his CTA and, on February 5, 2014, sent the Barragans a $3,000 cashier's check he purchased with funds in his CTA. At some point later, Schaefers himself also sent $250 directly to Mr. Barragan.

On August 18, 2014, the Barragans filed a lawsuit against respondent, his law office, WSAAC, Schaefers, and broker Rosas alleging conversion, fraud, breach of contract, breach of contract on escrow instructions, breach of fiduciary duty, and negligence. The lawsuit was ultimately settled in early 2015 for $33,000, of which respondent's legal malpractice carrier paid $15,000.

The Barragans paid $15,980 in attorney's fees and costs out of the $33,000 settlement proceeds. Thus, from the $33,000 settlement, the Barragans recovered only $17,020 ($33,000 less $15,980), in addition to the $6,475 ($3,225 plus $3,000 and $250) that respondent and Schaefers previously refunded to them. Even with the $33,000 settlement, the Barragans have not been made whole. They gave to respondent $30,000 and recovered only $23,495 ($17,020 plus $6,475). They are entitled to an additional $6,505 ($30,000 less $23,495) in order to be made whole.

Conclusions of Law

Count One (Rule 4-100(A) [Failure to Maintain Trust Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

Case law has established that "An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney." (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341.) An escrow agent is a limited agent and a fiduciary to all parties to the escrow. (*Summit Fin'l Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711.) Thus, an attorney who agrees to serve as an escrow agent must comply with rule 4-100(A) when fulfilling his escrow duties even if the attorney does not represent a party to the transaction. "An attorney violates [rule 4-100(A)] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]" (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.)

In California, the term "escrow"

> means any transaction in which one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument, *money*, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter.

(Fin. Code, § 17003, subd. (a), italics added.) Under section 17003, an escrow does not require a binding contract between parties or the delivery of escrow instructions. "The delivery that must occur is the initial deposit." (*Pasternak v. Boutris* (2002) 99 Cal.App.4th 907, 919.) As the court aptly noted in *Pasternak v. Boutris, supra*, 99 Cal.App.4th at page 920, the cases which provide that an escrow requires a binding contract between the parties or the delivery of escrow instructions predate section 17003.

The record is clear that escrow was opened on October 18, 2013, when the Barragans gave to respondent, and respondent accepted, the $30,000 EMD from the Barragans even though no signed buy-sell agreement between WSAAC and the Barragans existed, and even though no

escrow instructions had been delivered to respondent on October 18, 2013.[10] Thus, respondent had an absolute duty to hold the Barragans' $30,000 EMD in his CTA until he was authorized to disburse it under the terms of the Agreement, all parties jointly instructed him to disburse it, he obtained a court order directing him to disburse it, or he filed an interpleader action and deposited it into the registry of a court. Nothing in the escrow instructions he was given provided for or authorized him to do otherwise.

Respondent's claims that he believed that at least a portion the $30,000 EMD was nonrefundable under the terms of the Worksheet. Nothing in the Worksheet affects the $30,000 EMD much less establishes that it was nonrefundable. Moreover, even assuming that respondent honestly held a mistaken belief that a portion of the $30,000 EMD was nonrefundable, his mistaken belief would not be relevant to the charged violation of rule 4-100(A). (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332; *Worth v. State Bar, supra*, 17 Cal.3d at p. 341.)

Respondent testified that he believed that the $30,000 EMD was to be used by WSAAC to "facilitate" its purchase of the Azusa property and that section 11(D) of the Agreement authorized such a use. Respondent further testified that he released portions of the EMD in the previous WSAAC transactions for such a purpose and that no one complained. Again, even assuming that respondent honestly held such a mistaken belief, as noted *ante* an attorney's mistaken belief is irrelevant to a charged violations of rule 4-100(A).

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[10] Even assuming, arguendo, that the escrow was not opened on October 18, 2013, when the Barragans' delivered the $30,000 deposit to respondent, the result would have been the same under Civil Code section 1813, et seq. (deposits). When respondent accepted the $30,000 cashier's check and deposited it into his CTA, he was a voluntary depositary. (Civ. Code, § 1814.) As such, he had a duty to promptly inform the Barragans of any adverse claims Schaefers made towards the EMD (Civ. Code, § 1825) and was liable to the Barragans for any wrongful use of any portion of the $30,000 deposit (Civ. Code, § 1836). Furthermore, the results would have been the same under *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632, in which the review department held that "An attorney holding funds for a person who is not the attorney's client must comply with the same fiduciary duties in dealing with such funds as if the attorney-client relationship existed."

In sum, the record clearly establishes that the respondent willfully violated rule 4-100(A) when he disbursed portions of the EMD on October 18 and November 6 and 21, 2013, and on January 7 and May 22 and 28, 2014.

Count Two (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes cause for suspension or disbarment. Under the Agreement, respondent owed WSAAC and the Barragans a fiduciary duty to maintain the $30,000 EMD in his CTA until he was authorized to disburse it under the terms of the Agreement, all parties jointly instructed him to disburse it, he obtained a court order directing him to disburse it, or he filed an interpleader action and deposited it into the registry of a court. Nothing in the escrow instructions he was given provided for or authorized him to do otherwise.

Even though respondent's alleged mistaken beliefs to the contrary were not relevant to the charged violation of rule 4-100(A), they are relevant for purposes of determining that respondent's violations for rule 4-100(A) were willful misappropriations involving moral turpitude, dishonesty, or corruption. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9-11 [An honestly held belief in the justifiability of one's actions, even if objectively unreasonable, precludes a finding of moral turpitude and a section 6106 violation.].)

After carefully observing respondent testify, and considering, among other things, respondent's demeanor while testifying, the manner in which he testified, the character of his testimony, his interest in the outcome in this proceeding, his capacity to perceive, recollect, and communicate the matters on which he testified, and after reflecting on the record as a whole, the court finds that respondent's testimony regarding his beliefs that the $30,000 EMD was nonrefundable under the terms of the Worksheet and that he was authorized to release the EMD

for use in acquiring the Azusa property lacks credibility. (See, generally, Evid. Code, § 780, subd. (c); *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.)

The court finds that respondent did not hold an honest but mistaken belief that he was authorized to release any part of the $30,000 EMD on October 18, or November 6 or 21, 2013, or on January 7, 2014. Nothing in the Agreement even remotely suggests that respondent was authorized to release portions of the EMD to Schaefers when he did so. In short, the record clearly establishes that respondent deliberately breached his fiduciary duty to the Barragans when he disbursed portions of the $30,000 EMD totaling $15,975 on October 18 and November 6 and 21, 2013, and January 7, 2014, and that each disbursement was a willful misappropriation involving not only moral turpitude, but also dishonesty in willful violation of section 6106. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208 [an attorney's deliberate breach of a fiduciary duty involves moral turpitude as a matter of law].)

Based on respondent's credible testimony that he relied on his bookkeeper's erroneous statements on January 17, 2014, in which she told him only $3,225 of the $30,000 EMD remained in his client trust account, the court finds that respondent unknowingly made the improper disbursement to Schaefers on May 22 and 28, 2014. Accordingly, those disbursements did not involve dishonesty. Nonetheless, the record clearly establishes that respondent unknowingly disbursed a total of $7,800 of the $30,000 EMD from his CTA on May 22 and 28, 2014, because of his pervasive gross negligence and recklessness in complying with his fiduciary duties to properly handle and to keep accurate and compete records of his receipts and disbursements of trust funds. Accordingly, the court finds that the record clearly establishes that respondent's disbursements on May 22 and 28, 2014, were willful misappropriations involving moral turpitude in willful violation of section 6106. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010,

1020 [even an attorney's non-deliberate breach of a fiduciary duty involves moral turpitude if the breach occurred as a result of the attorney's gross negligence and recklessness].)

Count Three (§ 6068, subd. (a) [Attorney's Duty to Support Constitution and Laws of United States and California])

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. In count three, OCTC charges that respondent willfully violated his duty, under section 6068, subdivision (a), to obey the laws of this state by disbursing the $30,000 EMD to Schaefers in breach of the common law fiduciary duty. Even though the record establishes the misconduct charged in count three, the charged violation of section 6068, subdivision (a) is duplicative of the misconduct found *ante* in count two. Accordingly, count three is DISMISSED with prejudice.

Even though the charged violation of section 6068, subdivision (a) is duplicative, the court finds that the record clearly establishes that respondent is culpable of a proved, but uncharged, violation of section 6068, subdivision (a) because respondent deliberately violated his common law fiduciary duty of an escrow agent to communicate to the parties in escrow all knowledge acquired in the course of the agency regarding facts that might affect a party's decision regarding the transaction pending in escrow. (*Siegel v. Fidelity Nat'l Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1193-1194.) Respondent clearly violated his common law duty to disclose relevant facts regarding the escrow to the parties in willful violation of section 6068, subdivision (a) when he failed to promptly notify the Barragans of the partial disbursement of the $30,000 EMD on October 18 and November 6 and 21, 2013, and on January 7, 2014. Because these violations were not charged, the court relies on them only for purpose of aggravation.

Count Four (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

As noted *ante*, after December 23, 2013, Laros left many telephone messages for respondent asking him to call about the status of the EMD. Respondent admits both that he received Laros's messages and that he never responded to them. The record clearly establishes that respondent willfully violated rule 4-100(B)(3) because respondent never responded to Laros's messages by providing the Barragans with a formal written accounting of the $30,000 or by telling the Barragans what he did with it.

Count Five (Rule 4-100(B)(4) [Promptly Pay/Deliver Client Funds])

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, *as requested* by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive.

In count five, OCTC charges that respondent willfully violated rule 4-100(B)(4) because respondent failed to pay any portion of the remaining $23,775 to the Barragans. On April 1, 2014, respondent did not have $23,775 of the Barragans' $30,000 EMD in his CTA. On April 1, 2014, only $7,800 of the Barragans' EMD remained in respondent's CTA.

While the record fails to clearly establish that respondent violated rule 4-100(B)(4) when he failed to promptly pay the Barragans $23,775 after he received Mr. Barragan's April 1, 2014, letter, the record is clear that $7,800 remained in respondent's CTA and that respondent willfully violated that rule when he failed to promptly pay the Barragans the $7,800.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) The court finds the following with respect to aggravating circumstances.

Multiple Acts of Misconduct (Std. 1.5(b).)

Respondent's multiple acts of misconduct are an aggravating factor. Respondent's multiple acts involve six willful violations of rule 4-100(A), all of which rose to the level of misappropriations in violation of section 6106. Additionally, the record shows two counts of proved, but uncharged, misconduct, one for violating rule 4-100(A) by disbursing funds from the $30,000 cashier's check from his CTA before the check cleared, and one for violating section 6068, subdivision (a) by violating an escrow agent's common law fiduciary duty to promptly notify the parties to the escrow of relevant facts.

Significant Harm (Std. 1.5(j).)

Respondent's misconduct significantly harmed the Barragans to whom he owed fiduciary duties. The Barragans testified credibly as to the emotional harm and stress that respondent's misconduct inflicted on them. Further, they have still not been made whole. As noted *ante*, they need an additional $6,505 ($30,000 less $23,495) to be made whole. The court will include, in its discipline recommendation, that respondent be ordered to pay restitution to the Barragans in the amount of $6,505, together with 10 percent interest thereon per annum from January 17, 2014, until paid.

Lack of Insight and Remorse

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. Respondent fails to demonstrate any realistic recognition of or

remorse for his wrongdoings and, instead, continues to assert that he correctly relied on the terms of the Agreement. By now, respondent should realize he was wrong to do so.

On direct, respondent testified that, when he paid out each of the various portions of the Barragans' $30,000 EMD, which he deposited into and held in his CTA on the Barragans' behalf, he believed that he was not doing anything wrong and that he was not violating the fiduciary duties he owed the Barragans as the escrow agent. Most troubling is that, even now, almost two years later, respondent still believes that he was acting within "the expectations of the Barragans," which was, according to respondent, that he was authorized/allowed to release as he did the escrow funds that he released to Schaefers.

"The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) His continued insistence that his conduct was justified is "particularly troubling" because it suggests his conduct may recur. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

Mitigating Circumstances

The member bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.5.) The court finds the following with respect to mitigating circumstances.

No Prior Record of Discipline (Std. 1.6(a).)

The only mitigating circumstance respondent established by clear and convincing evidence was his lack of a prior record of discipline. The record establishes that he had almost 12 years of misconduct free practice before he began engaging in the present misconduct in October 2013. Respondent is entitled to significant mitigation for those 12 years of misconduct

free practice even though the present misconduct is very serious. (*In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 [attorney "entitled to full credit" for 10 years of discipline-free practice]; see also *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13, citing *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [and noting that the Supreme Court has repeatedly given mitigation for no prior record of discipline in cases involving serious misconduct].)

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047,

1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. The most severe sanction for the found misconduct is found in standard 2.1(a), which applies to respondent's four willful misappropriations which involved moral turpitude, dishonesty, and, in at least one instance, corruption. Standard 2.1(a) provides: "Disbarment is appropriate for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate."

The amount dishonestly misappropriated, $15,975, is by no means insignificantly small, and the single mitigating circumstance is by no means compelling. Accordingly, under standard 2.1(a), disbarment is the presumed sanction. "Multiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment. [Citations.]" (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45.) Further, *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, the attorney, while acting as the general partner in successful limited partnership, misappropriated almost $21,000 from one of the limited partners in breach of the fiduciary duty the attorney owed to the limited partner and then concealed the misappropriation for several years. The review department held that the attorney " 'violated " ' "the fundamental rule of [legal] ethics–that of common honesty–without which the profession is worse than valueless in the place it holds in the administration of justice" . . . .' " [Citation.]' [Citation.]" (In *In the Matter of McCarthy, supra*, 4 Cal. State Bar Ct. Rptr. at p. 385.) Like respondent, the attorney in *McCarthy* did not exhibit any remorse or recognition of his wrongdoing. The review department

recommended, and the Supreme Court imposed, on the attorney in *McCarthy* four years' stayed suspension and three years' probation on conditions, including a two-year actual suspension that would continue until the attorney paid restitution with interest and established his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.2(c)(1).

However, significant differences exist between *McCarthy* and the present proceeding. In *McCarthy*, the attorney used the misappropriated funds to pay creditors of the limited partnership. Furthermore, *McCarthy* involved a single misappropriation that resulted when the attorney failed to distribute almost $21,000 to the limited partner. The present case involves six separate misappropriations, four of which were deliberate and involved moral turpitude and dishonesty, and two of which involved moral turpitude based on respondent's gross negligence, totaling over $26,000. Moreover, the attorney in *McCarthy* had no prior record of discipline in more than 40 years of practice. Respondent has 12 years of misconduct free practice.

Moreover, misappropriation of funds held in trust has long been viewed as a particularly serious ethical violation because it breaches the fiduciary duty of loyalty, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) Therefore, "misappropriation of [trust] funds ... warrants disbarment unless the most compelling mitigating circumstances clearly predominate. [Citations.]" (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518.) This is true even in cases involving a single misappropriation by an attorney who has no prior record of discipline. (E.g., *In re Abbott* (1977) 19 Cal.3d 249, 253-254 [disbarment for misappropriation of $29,500 in a single client matter despite substantial mitigation for attorney's 13 years of discipline-free practice and for attorney undergoing treatment to address emotional problems]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129 [disbarment for single isolated misappropriation of less than $7,900 by attorney with no prior

record of discipline; attorney offered no mitigating evidence, never acknowledged the wrongfulness of his conduct, made no effort to reimburse the client, and displayed a lack of candor to State Bar].)

In the Matter of Wyshak (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70 supports disbarment even though it involved significantly greater misconduct. As the review department aptly held in that case:

> It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. [Citations.] A most significant factor to the hearing judge, and to us as well, is respondent's complete lack of insight, recognition, or remorse for any of his wrongdoing. To the present time, he accepts no responsibility for what happened and only seeks to blame others. Respondent's position would not be considered aggravating if it stemmed from an honest, but mistaken belief in his innocence [citation]; but the ... record we have reviewed does not give respondent any plausible basis for such a belief. An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness has been considered an aggravating factor. [Citations.] This factor makes disbarment appropriate despite the fact that respondent presented some mitigating evidence. Even if we were to credit respondent's explanation that he surrendered too much control to [Schaefers and Preciado], it serves as a grave risk to others who might be inclined to trust that such an experienced member of the bar would honestly discharge fiduciary duties. Respondent's repeated failure to discharge those duties on this record entitles the public to be protected by a formal reinstatement proceeding should he again seek to be licensed as an attorney.

(*In the Matter of Wyshak, supra*, 4 Cal. State Bar Ct. Rptr. at p. 83.)

The court finds that respondent's complete lack of insight into the wrongfulness of his actions is particularly disturbing since they involved the dishonest misappropriation of trust funds. Respondent's lack of insight establishes that respondent lacks an understanding of basic fiduciary law and suggests that the misconduct will recur. Moreover, the record establishes either that respondent does not understand his nondelegable duty to maintain accurate trust account records or that he deliberately disregarded that duty. Finally, the record provides no compelling reason for the court to depart from the presumed sanction of disbarment provided in standard 2.1(a). Accordingly, the court will recommend that respondent be disbarred.

RECOMMENDATIONS

Discipline

The court recommends that respondent **ASHLEY C. L. BROWN,** State Bar member number 210159, be disbarred from the practice of law in California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

The court further recommends that respondent **ASHLEY C. L. BROWN** be ordered to make restitution to Moises Barragan and Mirna Laros in the amount of $6,505 plus 10 percent interest per year from January 17, 2014. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

The court further recommends that respondent **ASHLEY C. L. BROWN** be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

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Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that **ASHLEY C. L. BROWN** be involuntarily enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 5.111(D)).

Dated: September 28, 2015

W. Kearse McGill

W. KEARSE McGILL
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on September 28, 2015, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT
(Bus. & Prof. Code, § 6007, subd. (c)(4).)

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

JENNIFER KAY SAUNDERS
HAIGHT BROWN ET AL LLP
555 S FLOWER ST 45TH FL
LOS ANGELES, CA 90071

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Eli D. Morgenstern, Enforcement, Los Angeles
Terrie Goldade, Office of Probation, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 28, 2015.

Julieta E. Gonzales
Case Administrator
State Bar Court