

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY :
PROCEEDINGS AGAINST :
: FINAL DECISION AND ORDER
ERIBERTO MALACARA & CPAD GROUP : LS0401221REB
LLC D/B/A MORE HOMES REALTY, :
RESPONDENTS. :

Division of Enforcement case files, 00 REB 178, 00 REB 187 & 02 REB 213

The parties to this action for the purpose of Wis. Stats. sec. 227.53 are:

Eriberto Malacara
3015 17th St.
Racine, WI 53405

CPAD Group LLC d/b/a
More Homes Realty
1648 Douglas Ave.
Racine, WI 53404

Wisconsin Real Estate Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935

The parties in this matter agree to the terms and conditions of the attached Stipulation as the final disposition of this matter, subject to the approval of the Wisconsin Real Estate Board ("Board"). The Board has reviewed this Stipulation and considers it acceptable.

Accordingly, the Board in this matter adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. Eriberto Malacara ("Malacara"), date of birth 04/05/43, is licensed in the State of Wisconsin as a real estate broker having license #90-50013. This license was first granted to him on 11/04/99. Malacara's most recent address on file with the Department of Regulation and Licensing ("Department") is 3015 17th St., Racine, WI 53405.
2. Malacara is a member of CPAD Group, LLC, which was formed on or about June 23, 1999. The Articles of Incorporation for CPAD Group, LLC are attached as **Exhibit 1**, which is incorporated herein by reference.
3. Malacara is the real estate broker, President and "business representative" per sec. 452.01(3k), Wis. Stats., of CPAD Group, LLC d/b/a More Homes Realty, 1648 Douglas Ave., Racine, WI 53404. CPAD Group LLC d/b/a More Homes Realty is licensed as a real estate "business entity" per sec. 452.01(3j), Wis. Stats., having license #91-700369 which was first granted on 07/26/2000.

4. On January 1, 2003, Malacara's real estate broker's license expired and was not renewed until June 2, 2003. The Department contacted Malacara and verified that he was actively working as a real estate broker while his license was expired. Malacara erroneously believed that his license was not expired during this period. A copy of a list of commissions that Malacara was paid during the time his license was expired is attached as **Exhibit 2** and is incorporated herein by reference.

COUNT II

5. In June 2000, Federico Candelaria contacted Malacara and explained that he and his family were being evicted from their home and needed a place to move to as soon as possible. Candelaria told Malacara that he was interested in finding a house for-rent-to-own. Malacara agreed to help locate a home for Candelaria and his family.

6. Malacara performed an MLS search and on or about June 20, 2000, showed Candelaria the property located at 1728 Quincy St., Racine, WI. Malacara advised Candelaria that the paper work was not completed yet, but he thought that the house would be available for Candelaria to rent-to-own or on a land contract.

7. During the time Malacara showed Candelaria the 1728 Quincy St. property, the property was listed with ReMax Realty 100, 10303 W. Oklahoma Ave., Milwaukee, WI, and was a foreclosure owned by Green Tree Mortgage Services.

8. On or about June 29, 2000, Malacara drafted a Residential Offer To Purchase for David Namowicz/CPAD Group, LLC for the Quincy St. property, which was accepted on July 12, 2000. Namowicz is also a member of CPAD Group, LLC ("CPAD Group"). A copy of the Residential Offer To Purchase is attached as **Exhibit 3** and is incorporated herein by reference.

9. Candelaria had given notice to move out of his current home and was concerned about the availability of the Quincy St. property. Candelaria requested a meeting with Malacara and the owner of the property. On or about July 25, 2000, Malacara, Church, Candelaria and Candelaria's attorney met. Candelaria was told that Church had not yet closed on the property and was not interested in renting.

10. Candelaria was forced to find other accommodations.

11. At no time during these negotiations did Malacara disclose his interest in CPAD Group or complete a WB-36 Buyer Agency/Tenant Representation Agreement for Candelaria. Malacara believed he was acting as a volunteer for Candelaria and did not have to have any such agreement in writing.

12. Namowicz/CPAD Group intended to transfer its interest in the property to David A. Church, Malacara's brother-in-law. A copy of the Amendment To Offer To Purchase transferring its interest to Church on August 22, 2000 is attached as **Exhibit 4** and is incorporated herein by reference.

COUNT III

13. On or about July 23, 2003, an auditor with the Department of Regulation and Licensing conducted an audit of CPAD Group's real estate trust account and bookkeeping records. During the Department's audit the auditor discovered the following violations:

- a. Journal was attempted but was not done correctly;
- b. Ledgers were not maintained;
- c. Bank reconciliations were attempted but incomplete;
- d. Trial balances were not performed;
- e. Validations were not performed;

- f. Improper disbursement of trust funds; and
- g. Failure to notify the Department of the opening of a trust account and the closing of a trust account.

These discrepancies in the real estate trust account were detailed in Form 344, which was completed by the Department auditor and signed by Malacara on July 23, 2003. A copy of Form 344 is attached as **Exhibit 6** and is incorporated herein by reference. Copies of trust account checks to Verizon and Home Depot are attached as **Exhibit 7**, which is incorporated herein by reference.

- 14. The auditor discovered that Malacara's trust account has a shortage of \$6,302.47.
- 15. The auditor also noted several properties that showed a balance in the trust account after the transaction had closed.

CONCLUSIONS OF LAW

- 1. The Wisconsin Real Estate Board has jurisdiction to act in this matter pursuant to sec. 452.14, Wis. Stats.
- 2. The Wisconsin Real Estate Board is authorized to enter into the attached Stipulation pursuant to sec. 227.44(5), Wis. Stats.
- 3. Respondent **Eriberto Malacara** has violated:
 - a. Wis. Adm. Code sec. RL 24.17(3) and Wis. Stats. secs. 452.03, 452.12(5)(b), and 452.14(3)(L) by practicing real estate without having a valid Wisconsin real estate license from January 1, 2003, until June 2, 2003.
 - b. Wis. Adm. Code sec. RL 24.025(2) and Wis. Stats. secs. 452.135, 452.137(1), and 452.14(3)(L) by not completing a WB-36 Buyer Agency/Tenant Representation Agreement for Candelaria.
 - c. Wis. Adm. Code secs. RL 24.05(2) and RL 24.17(3) by not disclosing his interest in CPAD Group.
 - d. Wis. Adm. Code secs. RL 18.13(1), RL 18.13(2), RL 18.13(3), RL 18.13(4), RL 18.13(5), and RL 18.14 by failing to correctly enter Journal entries, by failing to complete ledger entries, and by failing to do required monthly account reconciliations, trial balances and validations.
 - e. Wis. Adm. Code sec. RL 18.09 and Wis. Stats. sec. 452.14(3)(i) by improperly disbursing trust funds not related to the sale of real estate (i.e. Verizon and Home Depot).
 - f. Wis. Adm. Code sec. RL 18.10, and Wis. Stats. secs. 452.14(3)(i) and 452.14(3)(L) by negligently commingling \$1,562.00 of business account funds with the CPAD Group trust account funds.
 - g. Wis. Adm. Code secs. RL 18.035(1) and RL 18.035(2), Wis. Stats. secs. 452.14(3)(i) and 452.14(3)(L) by failing to provide the Department with a written notice of the opening of a new trust account and the closing of an old trust account.
 - h. Wis. Adm. Code sec. RL 24.15 by issuing checks from the CPAD Group trust account which contains insufficient funds.
 - i. Wis. Stats. secs. 452.14(3)(h) and 452.14(3)(L) by failing to disburse trust funds.
- 4. Respondent **CPAD Group LLC d/b/a More Homes Realty** is subject to discipline as a business entity for the acts and omissions of Malacara as identified above pursuant to sec. 452.14(4) Wis. Stats.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the attached Stipulation is hereby accepted.

IT IS FURTHER ORDERED that Respondent **Eriberto Malacara's** real estate broker's license (#90-50013) be, and hereby is, **LIMITED** for a period of two years commencing ten (10) days from the date of this Order as follows:

Supervision Program. The supervision program shall include, and Respondent shall participate in, individual consultation meetings on at least a bi-weekly basis (once every two weeks) with a broker who must be approved by the Board for this Supervision Program. These meetings shall continue on at least a bi-weekly basis, without interruption, during the two-year period of limitation. Respondent shall commence involvement in the supervision program within 5 days of the date of the Final Decision and Order of the Board.

The approved supervising broker shall personally conduct the supervision consultation. This requirement for consultation sessions may be modified only upon written petition to the Real Estate Board supported by a written recommendation by the supervising broker expressly supporting the modifications sought. A denial of such petition for modification shall not be deemed a denial of the license under §§227.01(3) or 227.42, Wis. Stats., or ch. RL 1, Wis. Adm. Code, and shall not be subject to any right to further hearing or appeal.

During each supervision consultation Respondent shall provide to the supervising broker the original, full and complete copy of each document related to the listing, rental, purchase, sale, trade or other transfer of an interest in real estate or business assets, either drafted by Respondent or received by Respondent, during the immediate period of time predating the meeting and commencing with the most recent supervision consultation meeting. During the consultation meeting, the supervising broker shall closely examine each document drafted by Respondent to determine if it complies with the Wisconsin Statutes and Administrative Rules, and accepted real estate practice. The supervising broker shall make diligent inquiry of Respondent as to the intended purpose of each document to determine the real estate practice context within which the document is intended to be used. The supervising broker shall note on each document all comments, corrections and changes to the documents recommended by him/her. The Respondent shall immediately make changes and corrections to the documents as suggested by the supervising broker. In addition, where documents need to be resigned by a party to a transaction, Respondent shall immediately present the corrected document(s) to the necessary parties for signing. All documents prepared by Respondent shall be approved by the supervising broker prior to the submission of the document to any party for review or signature. The supervising broker shall note his/her approval of a document by initialing the document and placing the date of his/her approval next to his/her initials.

In respect to real estate documents drafted by others and received by Respondent in his real estate practice, the supervising broker shall closely examine each document and make diligent inquiry of Respondent as to the context within which the document is intended to be used. The supervising broker shall make comments and recommendations to Respondent as to whether Respondent should draft any responding or related documents, such as counter-offers, amendments, disclosures or notices. The additional documents to be drafted by Respondent shall be carefully reviewed by the supervising broker who made the recommendations prior to submission of the document to any party.

The supervising broker shall make a written, signed and dated report to the Real Estate Board on a once-a-month basis commencing 30 days after the date this Limitation went into effect. These reports shall continue for a period of 2 years (24 reports). Each report shall include a statement assessing the cooperation of Respondent with the supervision program stated above and shall state specifically how often each consultation session took place. The report shall include a compilation stating each date of consultation and the amount of time expended for each consultation. In addition, each report shall have attached to it a legible copy of each document reviewed by the supervising broker showing each comment, correction, approval or recommendation made by the supervising broker to the Respondent during the period of time the report covers.

Required Reporting by Supervising Brokers

In addition to the reports identified above, the supervising broker shall report immediately to the Department Monitor in the Department of Regulation and Licensing, Division of Enforcement by FAX or telephonic communication: any failure of Respondent to cooperate with the supervision consultations.

Required Reporting by Respondent

Respondent is responsible for compliance with all of the terms and conditions of this Final Decision and Order. It is the responsibility of Respondent to promptly notify the Department Monitor, of any suspected violations of any of the terms and conditions of this Order, including any failures of the supervising broker to conform to the terms and conditions of this Order.

Releases

Respondent shall provide and keep on file with the supervising broker current releases which comply with state and federal laws authorizing release of all consultation records and reports, and permitting the supervising broker to disclose and discuss the progress of Respondent's supervision and rehabilitation with the Board or any member thereof, or with any employee of the Department of Regulation and Licensing acting under the authority of the Board. Copies of these releases shall be filed simultaneously with the Department Monitor.

Petitions for Modification of Terms

Respondent may petition the Board for modification of the terms of this limited license. Any such petition shall be accompanied by a written recommendation from Respondent's supervising broker expressly supporting the specific modifications sought. Denial of the petition in whole or in part shall not be considered a denial of a license within the meaning of Sec. 227.01(3)(a), Stats., and Respondent shall not have a right to any further hearings or proceedings on any denial in whole or in part of the petition for modification of the limited license.

Expenses of Supervision and Monitoring

Respondent shall be responsible for all costs and expenses incurred in conjunction with the monitoring and supervision and any other expenses associated with compliance with the terms of this Order.

Change in Address or Work Status

Respondent shall report to the Board any change of employment status, residence, address or telephone number within five (5) days of the date of a change. Respondent may not change his approved supervising broker without prior written permission of the Real Estate Board.

Department Monitor

The Department Monitor is the individual designated by the Board as its agent to coordinate compliance with the terms of this Order, including receiving and coordinating all reports and petitions, and requesting additional monitoring and surveillance. The Department Monitor may be reached as follows:

Department Monitor
Department of Regulation Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
FAX (608) 266-2264
TEL. (608) 267-7139

IT IS FURTHER ORDERED, that Respondent **Eriberto Malacara** must successfully complete all educational requirements from the 36 hour pre-licensing real estate broker's course pursuant to §RL 25.02, Wis. Adm. Code at an educational institution approved by the Department of Regulation and Licensing, within six months of the date of this Order. Upon successful completion, Respondent **Eriberto Malacara** shall submit proof of the same to the Real Estate Board, P.O. Box 8935, Madison, WI 53708-8935, in the form of verification from the institution providing the education. None of the education completed pursuant to this requirement may be used to satisfy any continuing education requirements that are or may be instituted by the Board or the Department of Regulation and Licensing.

IT IS FURTHER ORDERED, that in the event Respondent **Eriberto Malacara** fails to successfully complete the educational requirements in the manner as set forth above his real estate broker's license shall be suspended without further hearing and without further Order of the Board, and said suspension shall continue until further Order of the Board or until he provides to the Department proof of completion of all said educational requirements for a real estate broker's license.

IT IS FURTHER ORDERED that Respondent **Eriberto Malacara** pay a **FORFEITURE** of **\$500.00**, within 30 days of the date of this Order. Payment shall be made by certified check or money order, payable to the Wisconsin Department of Regulation and Licensing and sent to: Department Monitor, Division of Enforcement, Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935.

IT IS FURTHER ORDERED that in the event Respondent **Eriberto Malacara** fails to pay the \$500.00 forfeiture within the time and in the manner as set forth above, then and in that event, and without further notice to the Respondent **Eriberto Malacara** his real estate salesperson's license shall be suspended without further hearing and without further Order of the Board, and said suspension shall continue until the full amount of said forfeiture has been paid to the Department of Regulation and Licensing and his failure to pay the forfeiture shall be considered a violation of this Order by the Board.

IT IS FURTHER ORDERED that Respondent **Eriberto Malacara** pay **PARTIAL COSTS** of this matter in the amount of **\$5000.00** within 30 days of the date of this Order. Payment shall be made by certified check or money order, payable to the Wisconsin Department of Regulation and Licensing and sent to: Department Monitor, Division of Enforcement, Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935.

IT IS FURTHER ORDERED that in the event Respondent **Eriberto Malacara** fails to pay the \$5000.00 in partial costs within the time and in the manner as set forth above, then and in that event, and without further notice to the Respondent **Eriberto Malacara** his real estate salesperson's license shall be suspended without further hearing and without further Order of the Board, and said suspension shall continue until the full amount of said costs have been paid to the Department of Regulation and Licensing and his failure to pay the costs shall be considered a violation of this Order by the Board.

IT IS FURTHER ORDERED that Respondent **CPAD Group LLC d/b/a More Homes** license #91-700369 be, and hereby is, **REPRIMANDED**.

IT IS FURTHER ORDERED that the violation of any of the terms of this Order shall be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Respondent's license; the Board in its discretion may in the alternative impose additional conditions and limitations or other discipline.

IT IS FURTHER ORDERED that files 00 REB 178, 00 REB 187 & 02 REB 213 be, and hereby are, closed.

Dated this 22nd day of January, 2003.

WISCONSIN REAL ESTATE BOARD

By: Richard Kollmansberger
A member of the Board