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MAY 08 2017

BUREAU OF REAL ESTATE

By Zoni

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of)	CalBRE No. H-4834 SD
)	
ROSE MAXINE MARROTTE,)	OAH No. 2016110090
)	
Respondent.)	
_____)	

DECISION

The Proposed Decision dated March 29, 2017, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

Pursuant to Section 11517(c)(2) of the Government Code, the following corrections are made to the Proposed Decision.

Factual Findings, Page 5, Paragraph No. 15, Line 3, "Professions Code section 10148, subdivision 10148, subdivision (b)." is amended to read "Professions Code section 10148, subdivision (b)."

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

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

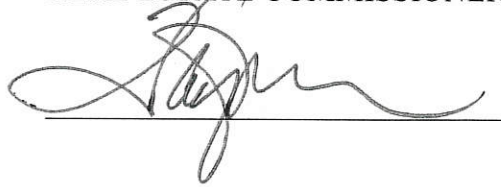
This Decision shall become effective at 12 o'clock noon on

MAY 30 2017

IT IS SO ORDERED

5/3/2017

WAYNE S. BELL
REAL ESTATE COMMISSIONER



A handwritten signature in cursive script, appearing to read 'Wayne S. Bell', is written over a horizontal line.

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ROSE MAXINE MARROTTE,

Respondent.

Case No. H-04834 SD

OAH No. 2016110090

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on March 9, 2017.

Judith B. Vasan, Staff Counsel, Bureau of Real Estate, represented complainant, Veronica Kilpatrick, Supervising Special Investigator, Bureau of Real Estate, Department of Consumer Affairs, State of California.

Rose Maxine Marrotte, respondent, represented herself.

The matter was submitted on March 9, 2017.

FACTUAL FINDINGS

Background

1. On July 7, 1976, the bureau issued respondent real estate broker license number B/00380794.
2. On November 23, 1994, pursuant to a Stipulation and Agreement in Settlement Order, the Commissioner suspended respondent's license for 30 days. The accusation underlying the disciplinary order alleged respondent failed to deposit rental checks to her broker trust account.
3. On April 14, 1998, pursuant to a Stipulation and Agreement, the Commissioner revoked respondent's license but authorized a restricted license under Business and Professions Code section 10156.7. One of the requirements of the restricted license was that respondent obey and comply with all rules and regulations of the

Commissioner. The underlying accusation alleged violations resulting from an audit, including: maintaining a trust account without adequate funds, failing to maintain adequate control records, failing to perform a monthly reconciliation, and failing to timely place funds in a trust account.

4. On May 12, 1998, the bureau issued respondent a restricted license.¹ The restricted license expired on May 11, 2014, was renewed on September 10, 2014, and will expire on September 9, 2018.

5. On September 15, 2016, complainant, in her official capacity, filed the accusation against respondent, alleging that following a bureau audit, she committed several violations of the Real Estate Law and regulations. Complainant requested the discipline of respondent's license and recovery of investigation, audit, and prosecution costs.

The Bureau's 2016 Audit

6. Goodwill Keraoru has been employed by the bureau as an auditor for the past 10 years. The bureau directed that he conduct an audit of respondent's records. Respondent performs property management for approximately 27 properties. Mr. Keraoru conducted an audit of respondent's records for the period of January 1, 2014, to August 31, 2015. On March 29, 2016, Mr. Keraoru prepared an audit report documenting his findings.

TRUST FUND SHORTAGE

7. Complainant alleged respondent violated Business and Professions Code section 10145 and California Code of Regulations, title 10, section 2832.1,² by allowing the funds in her trust fund account to fall to an amount less than the existing aggregate trust fund liability to the owners of the funds, without obtaining the prior written consent of the owners. Mr. Keraoru testified that respondent held a trust fund account for multiple beneficiaries that was used to deposit rents and security deposits collected from tenants. Mr. Keraoru prepared a bank reconciliation of the account as of August 31, 2015, and found a shortage of at least \$18,788.03 caused by unreimbursed bank charges of \$1,016.90 plus a shortage of \$17,771.13, the cause of which Mr. Keraoru could not identify because it occurred before the audit period.

¹ The disciplinary order permitted respondent to apply for an unrestricted license after two years. Respondent did not provide a clear explanation for why she never applied for an unrestricted license during the past 17 years.

² All future statutory references are to the Business and Professions Code. All further references to regulations are to Title 10 of the California Code of Regulations.

Respondent informed Mr. Keraoru that the shortage was caused when Palm Desert National Bank cashed fraudulent checks drawn on her account before the government closed down the bank. She told Mr. Keraoru that she would deposit the shortage amount into the trust account; however, Mr. Keraoru never received evidence that this had occurred.

Respondent testified about the shortage in her trust account. She said that she was the victim of fraud when someone forged checks to look like hers that were drawn from her account at Palm Desert National Bank. She said the bank did pay back a portion of the money, but an employee of respondent's stole this money. Respondent said she filed a police report regarding the incident, and she provided a case number, but not the actual report. Respondent said the government closed the bank before she could be repaid. She has been attempting to repay the trust fund but has suffered great financial loss as a result of the fraud. She owned several properties that were foreclosed on as a result.

MAINTENANCE OF CONTROL RECORD FOR TRUST FUND

8. Complainant alleged respondent violated Code Section 10145 and Regulation 2831 by failing to maintain an accurate control record of the deposit and disbursement of trust funds. Mr. Keraoru testified that respondent did not maintain a control record, which is record of trust funds received and disbursed for the trust account.

Respondent testified that she "depends" on other people to do her bookkeeping. She said she is sure that control records were present and cannot understand why they would not have been given to Mr. Keraoru. She said the property owners receive a statement each month. She said everything is maintained on a computer and she relies on others in her office to manage this process.

SEPARATE RECORDS FOR EACH BENEFICIARY

9. Complainant alleged respondent violated Code Section 10145 and Regulation 2831.1 by failing to maintain a separate record for each beneficiary of the trust funds or for each transaction. Mr. Keraoru said the records respondent provided were inaccurate or incomplete. Respondent provided him "owner's statements," but these did not reflect trust fund dates of deposit, check dates, check numbers issued for disbursements, and running daily balances.

Again, respondent said she is in the field the majority of the time and these records are handled by others in the office. However, she believes she properly maintained separate records for each of her accounts, and this is reflected in the operating statements that are mailed every month to the property owners.

MONTHLY TRUST FUND RECONCILIATION

10. Complainant alleged respondent violated Code Section 10145 and Regulation 2831.2 by failing to perform and maintain a monthly reconciliation of the separate record

with the control record of trust funds handled. Mr. Keraoru testified that a monthly reconciliation is a two-part process. The first is to perform a bank reconciliation to determine the true and adjusted bank balance of an account. The adjusted bank balance reflects deposits or withdrawals that have not yet been reflected in the bank balance. The reconciliation then requires this balance to be compared to the balances in the separate owner's accounts to ensure that the totals match. Mr. Keraoru said that respondent failed to perform any reconciliation.

Respondent believes that this is handled by her bookkeepers and done on the computer. Respondent said that when she began in the business, it was all done by hand. Now it is on the computer, and she admitted she is not very proficient with computers.

TRUST FUND DESIGNATION

11. Complainant alleged respondent violated Section 10145 and Regulation 2832 by failing to designate her trust fund account as a trust account in respondent's name as trustee. Mr. Keraoru said that the bank signature card dated December 8, 2010, did not show a designation of the account as a trust account with respondent listed as the trustee. Instead, the account was titled, "Deseret Rose Rentals and Property Management Inc." Mr. Keraoru said it is important to designate an account as a trust account because if the bank were to fail, the FDIC would then ensure that each beneficiary is compensated for any loss.

Respondent said that when she opened the account, the bank told her that she only had to put on her checks that it was a trust account.

UNREGISTERED FICTITIOUS BUSINESS NAMES

12. Complainant alleged respondent violated Section 10159.5 and Regulation 2731 by using fictitious business names after they were deactivated with the bureau. Mr. Keraoru found respondent used the names "Desert Rose Rentals and Property Management, Inc." and "Rose Real Estate." According to bureau records, respondent cancelled these fictitious names on May 12, 2014. These names were contained on documents created after this date.

Respondent said she thought these names were registered with the bureau. She said she cancelled the name "Rose Housekeeping," but did not think she cancelled the other names as well. She believes, but provided no evidence, that these names were included when she renewed her restricted license. Respondent submitted proof that she filed the two fictitious business names with the Riverside County Assessor on April 6, 2016. However, she had no evidence that this was ever submitted to the bureau.

FAILURE TO SUPERVISE

13. Finally, complainant alleged respondent violated Section 10177, subdivision (h), and Regulation 2725, by failing to exercise reasonable supervision over the activities of

the property management operation and over her employees to ensure compliance with the Real Estate Law and regulations. Mr. Keraoru said that based on the above findings, respondent failed to adequately supervise her real estate activities, employees, and procedures.

Respondent's Evidence

14. Throughout her testimony, respondent admitted that she relies on others to perform her bookkeeping, which is all handled electronically. She assumes that the computer program maintains all the required documents. She brought in a number of files and papers to demonstrate her accounting. Included in the documents she submitted were copies of the checks from Palm Desert National Bank from 2010 that she identified as being fraudulent. She submitted various statements and invoices for different properties she manages. Mr. Keraoru reviewed these documents and testified in rebuttal that none of the documents respondent submitted were the documents required under the Real Estate Law and regulations.

Respondent admitted that her prior license discipline also involved misconduct concerning a trust fund account. When it was noted that she has held a restricted license for almost 19 years, respondent was unsure why she never requested the issuance of an unrestricted license.

Cost Recovery

15. Complainant requested cost recovery against respondent pursuant to Business and Professions Code section 10106, and recovery of audit costs under Business and Professions Code section 10148, subdivision 10148, subdivision (b). The declaration of Jennifer Lin, Southern Regional Audit Manager, certified audit costs in the amount of \$6,215.24. A declaration prepared by complainant certified investigative costs in the amount of \$1,513.40. Complainant's counsel submitted a declaration for prosecution in the amount of \$1,797.80.

The certifications that were provided complied with the requirements of California Code of Regulations, title 1, section 1042, subdivision (b). The evidence established that the \$9,526.44 in total costs were reasonable.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The burden of proof is on the bureau. The standard of proof in an administrative action seeking to suspend or revoke a professional license is "clear and convincing evidence." (*Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence requires a finding of high probability, or evidence

so clear as to leave no substantial doubt; it requires sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Sup. Ct.* (2005) 130 Cal.App.4th 586, 594.)

Applicable Statutes and Regulations

PROVISION FOR LICENSE DISCIPLINE

2. Pursuant to Business and Professions Code section 10177, the Commissioner may suspend or revoke the license of a real estate licensee who has:

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

[¶] . . . [¶]

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

[¶] . . . [¶]

(k) Violated any of the terms, conditions, restrictions, and limitations contained in an order granting a restricted license.

THE REAL ESTATE LAW AND REGULATIONS

3. Business and Professions Code section 10159.2. subdivision (a), provides:

The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

4. Business and Professions Code section 10131, subdivision (b), defines a real estate broker as a person who for compensation or in expectation of compensation, among other things, collects rents from real property.

5. Business and Professions Code section 10145 provides:

(a)(1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

[¶] . . . [¶]

(g) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds.

6. Business and Professions Code section 10159.5, subdivision (a)(1), provides, "Every person applying for a license under this chapter who desires to have the license issued under a fictitious business name shall file with his or her application a certified copy of his or her fictitious business name statement filed with the county clerk."

7. California Code of Regulations, title 10, section 2831 provides:

(a) Every broker shall keep a record of all trust funds received, including uncashed checks held pursuant to instructions of his or her principal. This record, including records maintained under an automated data processing system, shall set forth in chronological sequence the following information in columnar form:

(1) Date trust funds received.

(2) From whom trust funds received.

(3) Amount received.

(4) With respect to funds deposited in an account, date of said deposit.

(5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.

(6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.

(7) Daily balance of said account.

(b) For each bank account which contains trust funds, a record of all trust funds received and disbursed shall be maintained in accordance with subdivision (a) or (c).

(c) Maintenance of journals of account cash receipts and disbursements, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles, shall constitute compliance with subdivision (a) provided that such journals, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

8. California Code of Regulations, title 10, section 2831.1 provides:

(a) A broker shall keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker's trust bank account and interest, if any, earned on the funds on deposit. This record shall include information sufficient to identify the transaction and the parties to the transaction. Each record shall set forth in chronological sequence the following information in columnar form:

(1) Date of deposit.

(2) Amount of deposit.

(3) Date of each related disbursement.

(4) Check number of each related disbursement.

(5) Amount of each related disbursement.

(6) If applicable, dates and amounts of interest earned and credited to the account.

(7) Balance after posting transactions on any date.

(b) Maintenance of trust ledgers of separate beneficiaries or transactions, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles will constitute compliance with subdivision (a), provided that such ledgers, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

9. California Code of Regulations, title 10, section 2831.2 provides:

The balance of all separate beneficiary or transaction records maintained pursuant to the provisions of Section 2831.1 must be reconciled with the record of all trust funds received and disbursed required by Section 2831, at least once a month, except in those months when the bank account did not have any activities. A record of the reconciliation must be maintained, and it must identify the bank account name and number, the date of the reconciliation, the account number or name of the principals or beneficiaries or transactions, and the trust fund liabilities of the broker to each of the principals, beneficiaries or transactions.

10. California Code of Regulations, title 10, section 2832, subdivision (a), provides:

Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson.

11. California Code of Regulations, title 10, section 2832.1 requires the written consent of every principal who is an owner of the funds in the account shall be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds.

12. California Code of Regulations, title 10, section 2731 provides:
- (a) A licensee shall not use a fictitious name in the conduct of any activity for which a license is required under the Real Estate Law unless the licensee is the holder of a license bearing the fictitious name.
 - (b) The Bureau shall issue a license required under the Real Estate Law only in the legal name of the licensee or in the fictitious business name of a broker who presents evidence of having complied with the provisions of Sections 17910 and 17917 of the Code.
13. California Code of Regulations, title 10, section 2725 provides:

A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

- (a) Transactions requiring a real estate license.
- (b) Documents which may have a material effect upon the rights or obligations of a party to the transaction.
- (c) Filing, storage and maintenance of such documents.
- (d) The handling of trust funds.
- (e) Advertising of any service for which a license is required.
- (f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.
- (g) Regular and consistent reports of licensed activities of salespersons.

The form and extent of such policies, rules, procedures and systems shall take into consideration the number of salespersons employed and the number and location of branch offices.

A broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker

does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

Evaluation

TRUST FUND BALANCE

14. Clear and convincing evidence established that respondent's trust fund account, as of August 31, 2015, was \$18,788.03 less than the aggregate trust fund liability to the beneficiaries of such funds. Although respondent credibly testified that she suffered a loss as result of fraud, this does not excuse her failure to maintain the minimum balance or obtain the written consent of the trust fund beneficiaries. Complainant established a violation of Code Section 10145 and Regulation 2832.1.

MAINTENANCE OF CONTROL RECORD FOR TRUST FUND

15. Clear and convincing evidence established that respondent failed to maintain accurate control records as required under Regulation 2831. Respondent presented no evidence that she maintained records containing all of the information required by regulation. To the extent respondent's records are managed by others, that does not obviate her responsibility to oversee the accuracy of the control records.

SEPARATE RECORDS FOR EACH BENEFICIARY

16. Clear and convincing evidence established respondent failed to maintain a separate record for each beneficiary of the trust funds as required by Regulation 2831.1. Respondent presented no evidence that she maintained records containing all of the information required by regulation. Instead, the "owners statement" she submitted did not contain all of the transaction information required by regulation.

MONTHLY TRUST FUND RECONCILIATION

17. Clear and convincing evidence established respondent failed to perform and maintain a monthly reconciliation of the separate record to the control record of trust funds handled as required under Regulation 2831.2. Respondent's belief that this was performed by the computer program was unsupported and reflected respondent's speculation, rather than a clear understanding of the regulatory requirements. One who is in control of a trust fund acts as a fiduciary for the person or entities whose funds are contained in the trust funds. Failing to perform and maintain monthly reconciliation to ensure proper balances breaches that fiduciary duty.

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TRUST FUND DESIGNATION

18. Clear and convincing evidence established respondent failed to designate the trust fund account as a trust account with her listed as the trustee in violation of Regulation 2832. Although respondent claimed she did not know she needed to do so, failing to designate the account as a trust fund account is a strict liability offense that has the potential to deprive those who have funds in the account from receiving reimbursement, in the event of a bank failure, from the FDIC.

FICTITIOUS BUSINESS NAMES

19. Clear and convincing evidence established respondent used two fictitious business names without registering them with the bureau as required by Code Section 10159.5 and Regulation 2731. Bureau records established that respondent cancelled these names in 2014, but used them on subsequent documents.

FAILURE TO SUPERVISE

20. Clear and convincing evidence established respondent failed to exercise reasonable supervision over the activities of her property management operation as required by Regulation 2725. Respondent's testimony clearly indicated that she completely delegated the accounting to her staff and had very little knowledge about the bureau's requirements.

Cause Exists to Discipline Respondent's License

21. Cause exists to suspend or revoke respondent's license under Code Section 10177, subdivision (d). Respondent violated the Real Estate Law and regulations as identified above.

22. Cause exists to discipline respondent's license under Code Section 10177, subdivision (g). Complainant submitted no expert testimony or evidence to establish that respondent's conduct fell below the standard of care.³ However, the evidence established that respondent demonstrated incompetence in performing her duties as a broker. The term "incompetency" generally indicates an absence of qualification, ability or fitness to perform a prescribed duty or function. (*Pollack v. Kinder* (1978) 85 Cal.App.3d 833, 837.) Incompetency is distinguishable from negligence, in that one may be competent or capable of performing a given duty but negligent in performing that duty. (*Id.*, at p. 838.) Based on respondent's testimony, she lacked the knowledge of how to properly account for and document funds she held in trust.

³ Expert opinion testimony is required to prove or disprove that a professional performed in accordance with the prevailing standard of care, except in cases where the negligence is obvious to laymen. (*Garibay v. Hemmat* (2008) 161 Cal. App. 4th 735, 741.)

23. Cause exists to discipline respondent's license under Code Section 10177, subdivision (h). Respondent failed to exercise reasonable supervision over the activities of her business.

24. Cause exists to discipline respondent's license under Code Section 10177, subdivision (k). One of the requirements of respondent's restricted license was that she obey and comply with all rules and regulations of the Real Estate Law. Respondent's violations constitute a violation of this subdivision.

Appropriate License Discipline

25. Administrative proceedings to revoke, suspend, or impose discipline on a professional license are noncriminal and nonpenal; they are not intended to punish the licensee, but rather to protect the public. (*Sulla v. Bd. of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1206.) "Protection of the public shall be the highest priority for the [bureau] in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Bus. & Prof. Code, § 10050.1.)

26. Respondent has been a broker for over 40 years. Her testimony was sincere and credible. However, it was evident that she lacked knowledge and understanding of the laws and regulations relating to maintaining trust accounts and relied almost entirely on her staff to perform these functions. As a broker, she is ultimately responsible for her business and ensuring that its licensed activity is operated in accordance with the Real Estate Law and regulations. Respondent's license was disciplined in 1997 for similar trust fund violations. She has held a restricted license since. Most concerning is that respondent failed to take any remedial action following the audit and service of the accusation. Even things as simple as registering her fictitious business names with the bureau or changing the bank signature card have not been completed. There was no evidence that the trust fund deficit has been replenished, or respondent is now performing the proper accounting. Instead of taking affirmative action following notice of the accusation, respondent continued to remain ignorant of the bureau's requirements and reliant on a faulty assumption that her bookkeeper and computer program performed all the required tasks.

27. There was no indication that any of the violations were malicious. However, the audit and accusation, in conjunction with the prior disciplinary history, should have prompted action by respondent to take appropriate remedial measures to ensure that these violations would not again occur. Not only has respondent failed to establish policies or procedures to ensure that these violations will not occur in the future, she has not even rectified the original violations. Given that respondent's license is already restricted, and her failure to implement any meaningful changes in how she conducts her business, revocation is the only discipline that can protect the public.

Cost Recovery

28. Business and Professions Code section 10106, subdivision (a), authorizes an administrative law judge to direct a licensee who has committed a violation to pay a sum not to exceed the reasonable costs of investigation and prosecution. Section 10148, subdivision (b), permits the commissioner to charge a real estate broker for the cost of any audit, if the commissioner has found in a disciplinary decision that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting Section 10145. The California Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that a regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5, which is similar to Business and Professions Code section 10106, did not violate due process. But it was incumbent on the board in that case to exercise discretion to reduce or eliminate cost awards in a manner such that costs imposed did not “deter [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing.”

The Supreme Court set forth five factors to consider in deciding whether to reduce or eliminate costs: Whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; whether the licensee had a “subjective” good faith belief in the merits of his or her position; whether the licensee raised a “colorable challenge” to the proposed discipline; whether the licensee had the financial ability to make payments; and whether the scope of the investigation was appropriate in light of the alleged misconduct. The reasoning of *Zuckerman* must be applied to Business and Professions Code section 10106 since the language in the cost recovery regulation at issue in *Zuckerman* and section 10106 are substantially the same.

Applying the *Zuckerman* criteria, respondent did not receive a reduction in the severity of the discipline imposed, although she had a good faith belief in her position. The scope of the investigation was appropriate in light of the alleged misconduct. Respondent will be unable to pay costs due to the deficiency in her trust account and revocation. Respondent is not ordered to pay costs at this time. However, as a condition for reinstatement or re-licensure, she is ordered to pay \$9,526.44, unless otherwise determined by the Commissioner.

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ORDER

All licenses and licensing rights of respondent Rose Maxine Marrotte under the Real Estate Law are revoked.

As a condition for applying for reinstatement or re-licensure, respondent is ordered to pay \$9,526.44 unless otherwise determined by the Commissioner.

DATED: March 29, 2017

DocuSigned by:



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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings