

FILED

FEB 13 2013

DEPARTMENT OF REAL ESTATE

By L. Jove

1 Department of Real Estate
2 P.O. Box 187007
3 Sacramento, CA 95818-7007
4 Telephone: (916) 227-0781
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8 BEFORE THE DEPARTMENT OF REAL ESTATE
9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of
12 KIMBERLY ANN POIESZ,
13 Respondent.

No. H-5925 SAC

STIPULATION AND
AGREEMENT

14 It is hereby stipulated by and between KIMBERLY ANN POIESZ (Respondent)
15 and her attorney, Michael Thomas, and the Complainant, acting by and through Truly Sughruc,
16 Counsel for the Department of Real Estate (Department), as follows for the purpose of settling
17 and disposing the Accusation filed on December 10, 2012 in this matter:

18 1. All issues which were to be contested and all evidence which was to be
19 presented by Complainant and Respondent at a formal hearing on the Accusation, which hearing
20 was to be held in accordance with the provisions of the Administrative Procedure Act (APA),
21 shall instead and in place thereof be submitted solely on the basis of the provisions of this
22 Stipulation and Agreement.

23 2. Respondent has received, read, and understands the Statement to
24 Respondent, and the Discovery Provisions of the APA filed by the Department in this
25 proceeding.
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1 3. Respondent filed a Notice of Defense pursuant to Section 11505 of the
2 Government Code for the purpose of requesting a hearing on the allegations in the Accusation.
3 Respondent hereby freely and voluntarily withdraw said Notice of Defense. Respondent
4 acknowledges that Respondent understands that by withdrawing said Notice of Defense
5 Respondent will thereby waive Respondent's rights to require the Real Estate Commissioner
6 (Commissioner) to prove the allegations in the Accusation at a contested hearing held in
7 accordance with the provisions of the APA, and that Respondent will waive other rights afforded
8 to Respondent in connection with the hearing such as the right to present evidence in defense of
9 the allegations in the Accusation and the right to cross-examine witnesses.

10 4. This stipulation is based on the factual allegations contained in the
11 Accusation. In the interest of expediency and economy, Respondent chooses not to contest these
12 factual allegations, but to remain silent and understands that, as a result thereof, these factual
13 statements will serve as a prima facie basis for the "Determination of Issues" and "Order" set forth
14 below. The Commissioner shall not be required to provide further evidence to prove such
15 allegations.

16 5. This Stipulation and Respondent's decision not to contest the Accusation
17 are made for the purpose of reaching an agreed disposition of this proceeding and are expressly
18 limited to this proceeding and any other proceeding or case in which the Department, the state or
19 federal government, an agency of this state, or an agency of another state is involved.

20 6. Respondent understands that by agreeing to this Stipulation and
21 Agreement, Respondent agrees to pay, pursuant to Section 10148 of the California Business and
22 Professions Code (Code), the cost of the audit which resulted in the determination that
23 Respondent committed the trust fund violation(s) found in the Determination of Issues. The
24 amount of said costs is \$3,031.32.

25 7. Respondent further understands that by agreeing to this Stipulation and
26 Agreement in Settlement, the findings set forth below in the Determination Of Issues become
27 final, and that the Commissioner may charge said Respondent for the costs of any audit

1 conducted pursuant to Section 10148 of the Code to determine if the violations have been
2 corrected. The maximum costs of said audit shall not exceed \$3,031.32.

3 8. It is understood by the parties that the Commissioner may adopt the
4 Stipulation and Agreement as the Commissioner's decision in this matter thereby imposing the
5 penalty and sanctions on the real estate licenses and license rights of Respondent as set forth in
6 the below "Order". In the event that the Commissioner in the Commissioner's discretion does
7 not adopt the Stipulation and Agreement, it shall be void and of no effect, and Respondent shall
8 retain the right to a hearing and proceeding on the Accusation under all the provisions of the
9 APA and shall not be bound by any admission or waiver made herein.

10 9. The Order or any subsequent Order of the Commissioner made pursuant to
11 this Stipulation and Agreement shall not constitute an estoppel, merger or bar to any further
12 administrative or civil proceedings by the Department with respect to any matters which were not
13 specifically alleged to be causes for accusation in this proceeding.

14 * * *

15 DETERMINATION OF ISSUES

16 By reason of the foregoing stipulations and waivers and solely for the purpose of
17 settlement of the pending Accusation without a hearing, it is stipulated and agreed that the
18 following determination of issues shall be made:

19 I

20 The acts and omissions of Respondent as described in the Accusation are
21 grounds for the suspension or revocation of Respondent's licenses and license rights under the
22 following sections of the Code and Title 10 of the California Code of Regulations (Regulations):

23 (1) As to Paragraph 8(a) under Section 10177(d) of the Code in conjunction
24 with Section 10145 of the Code and Section 2832.1 of the Regulations;

25 (2) As to Paragraph 8(b), under Section 10177(d) of the Code in conjunction
26 with Section 2835 of the Regulations and Section 10176(e) of the Code;

1 (3) As to Paragraph 8(c), under Section 10177(d) of the Code in conjunction
2 with Section 2831.2 of the Regulations; and

3 (4) As to Paragraph 8(d), under Section 10177(d) of the Code in conjunction
4 with Section 2832 of the Regulations and Section 10145 of the Code.

5 * * *

6 ORDER

7 I

8 All licenses and licensing rights of Respondent under the Real Estate Law are
9 suspended for a period of thirty (30) days from the effective date of this Order; provided,
10 however, that:

11 1. Thirty (30) days of said suspension shall be stayed, upon the condition that Respondent
12 petition pursuant to Section 10175.2 of the Code and pays a monetary penalty pursuant to
13 Section 10175.2 of the Code at a rate of \$50 for each day of the suspension for a total
14 monetary penalty of \$1,500.

15 a) Said payment shall be in the form of a cashier's check or certified check made payable to
16 the Consumer Recovery Account of the Real Estate Fund. Said check must be delivered
17 to the Department prior to the effective date of the Order in this matter.

18 b) No further cause for disciplinary action against the Real Estate licenses of Respondent
19 occurs within two (2) years from the effective date of the decision in this matter.

20 c) If Respondent fails to pay the monetary penalty as provided above prior to the effective
21 date of this Order, the stay of the suspension shall be vacated as to that Respondent and
22 the order of suspension shall be immediately executed, under this Order, in which event
23 the said Respondent shall not be entitled to any repayment nor credit, prorated or
24 otherwise, for the money paid to the Department under the terms of this Order.

25 d) If Respondent pays the monetary penalty and any other moneys due under this Stipulation
26 and Agreement and if no further cause for disciplinary action against the real estate
27 license of said Respondent occurs within two (2) years from the effective date of this

1 Order, the entire stay hereby granted this Order, as to said Respondent only, shall become
2 permanent.

3 2. All licenses and licensing rights of Respondent are indefinitely suspended unless or until
4 Respondent provides proof satisfactory to the Commissioner, of having taken and successfully
5 completed the continuing education course on trust fund accounting and handling specified in
6 paragraph (3) of subdivision (a) of Section 10170.5 of the Code. Proof of satisfaction of this
7 requirement includes evidence that respondent has successfully completed the trust fund account
8 and handling continuing education course within 120 days prior to the effective date of the
9 Decision in this matter.

10 3. Pursuant to Section 10148 of the Code, Respondent shall pay the sum of \$3,031.32 for the
11 Commissioner's cost of the audit which led to this disciplinary action. Respondent shall pay such
12 cost within sixty (60) days of receiving an invoice therefor from the Commissioner. The
13 Commissioner may suspend the Respondent's license pending a hearing held in accordance with
14 Section 11500, et seq., of the Government Code, if payment is not timely made as provided for
15 herein, or as provided for in a subsequent agreement between the Respondent and the
16 Commissioner. The suspension shall remain in effect until payment is made in full or until
17 Respondent enters into an agreement satisfactory to the Commissioner to provide for payment, or
18 until a decision providing otherwise is adopted following a hearing held pursuant to this
19 condition.


20 4. Pursuant to Section 10148 of the Code, Respondent shall pay the Commissioner's
21 reasonable cost, not to exceed \$3,031.32, for an audit to determine if Respondent has corrected
22 the trust fund violation(s) found the Determination of Issues. In calculating the amount of the
23 Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary
24 for all persons performing audits of real estate brokers, and shall include an allocation for travel
25 time to and from the auditor's place of work. Respondent shall pay such cost within sixty (60)
26 days of receiving an invoice therefor from the Commissioner detailing the activities performed
27 during the audit and the amount of time spent performing those activities. The Commissioner

1 may suspend Respondent's license pending a hearing held in accordance with Section 11500, et
2 seq., of the Government Code, if payment is not timely made as provided for herein, or as
3 provided for in a subsequent agreement between Respondent and the Commissioner. The
4 suspension shall remain in effect until payment is made in full or until Respondent enters into an
5 agreement satisfactory to the Commissioner to provide for payment, or until a decision providing
6 otherwise is adopted following a hearing held pursuant to this condition.

7 5. Respondent shall, within six (6) months from the effective date of this Decision, take and
8 pass the Professional Responsibility Examination administered by the Department including the
9 payment of the appropriate examination fee. If Respondent fails to satisfy this condition, the
10 Commissioner may order suspension of the license until Respondent passes the examination.

11
12 15-Jan-13

13 DATED

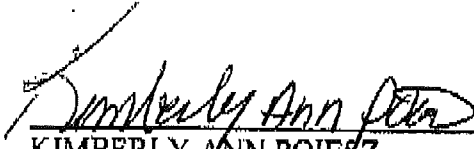
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15 TRULY SUGHRUE
16 Counsel for Complainant

17 * * *

18 I have read the Stipulation and Agreement, discussed it with my counsel, and its
19 terms are understood by me and are agreeable and acceptable to me. I understand that I am
20 waiving rights given to me by the California Administrative Procedure Act, and I willingly,
21 intelligently and voluntarily waive those rights, including the right of requiring the
22 Commissioner to prove the allegations in the Accusation at a hearing at which I would have the
23 right to cross-examine witnesses against me and to present evidence in defense and mitigation of
24 the charges.

25 1/10/13

26 DATED

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KIMBERLY ANN POIESZ
Respondent

I have reviewed the Stipulation and Agreement as to form and content and have
advised my client accordingly.

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1/10/13
DATED


MICHAEL THOMAS
Attorney for Respondent

The foregoing Stipulation and Agreement is hereby adopted as my Decision and shall become effective at 12 o'clock noon on MAR 05 2013

IT IS SO ORDERED 2/5/13

REAL ESTATE COMMISSIONER



By AWET P. KIDANE
Chief Deputy Commissioner