

**FILED**

BEFORE THE BUREAU OF REAL ESTATE  
STATE OF CALIFORNIA

MAY 11 2018

BUREAU OF REAL ESTATE

By Adew

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In the Matter of the Accusation of	)	CalBRE No. H-12055 SF
EILEEN YOLANDA PASSANISI,	)	OAH No. 2017050429
Respondent.	)	

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DECISION

The Proposed Decision dated April 12, 2018, 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.

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 party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. 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.

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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 JUN 01 2018

IT IS SO ORDERED May 10, 2018

WAYNE S. BELL  
REAL ESTATE COMMISSIONER



By: DANIEL J. SANDRI  
Chief Deputy Commissioner

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

In the Matter of the Accusation Against:

EILEEN YOLANDA PASSANISI,

Respondent.

Case No. H-12055 SF

OAH No. 2017050429

**PROPOSED DECISION**

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 13, 2018, in Sacramento, California.

Richard K. Uno, Staff Counsel III, represented Robin S. Tanner (complainant), Supervising Special Investigator, Bureau of Real Estate (Bureau), Department of Consumer Affairs.

Eileen Passanisi (respondent) appeared and represented herself.

Evidence was received, the record was closed, and the matter was submitted for decision on March 13, 2018.

**FACTUAL FINDINGS**

1. On January 12, 1976, the Bureau issued a salesperson license to respondent. Respondent was issued broker license number B/00546818 on September 6, 1978. The broker's license is in full force and effect and will expire on October 8, 2018, unless renewed or revoked. Respondent was at all times pertinent to this matter doing business as Granite Stone Real Estate Financial Services (Granite Stone).

2. In February 2017, complainant made and filed the Accusation in her official capacity. Complainant seeks to discipline respondent's broker license based upon her involvement in the failed residential lease with option to purchase agreement for the property located at 500 Arkansas Street, Fairfield, California. Specifically, complainant alleges respondent: (1) failed to deposit and maintain trust funds in a trust account or neutral escrow depository; (2) charged an advance fee as commission without a written agreement or Bureau

approval; (3) engaged in fraud or dishonest dealing; (4) was negligent in performing an act for which she is required to hold a license; and, (5) violated the Real Estate Law.

3. Respondent timely filed a notice of defense. This hearing followed.

#### *500 Arkansas Street – Listing Agreement*

4. At all times pertinent to this matter, Andrew Thrailkill and Alex Escalante were the sole members of Highwater Properties, LLC, and owners of the real property located at 500 Arkansas Street, Fairfield, California (Arkansas Property). In late November 2014, Highwater Properties, LLC entered into an exclusive listing agreement (Listing Agreement) with respondent to sell the Arkansas Property for the purchase price of \$319,500. The Listing Agreement included the following pertinent terms:

1. **COMPENSATION TO BROKER. Owner agrees to pay Broker as compensation for services rendered a fee of 0 percent of the selling price, plus \$2500.00 [sic] for MARKETING AND ADVERTISING provided that:**
  - a. Broker procures a buyer who offers to purchase the property during the above time period, or any written extension, on the terms specified or on any other terms acceptable to Owner.<sup>1</sup>
  - b. The property is sold, exchanged, or otherwise transferred during the above listing period, or any written extension, by Owner, or through any other source.
  - c. The property is withdrawn from sale, or transferred, conveyed, or leased without the consent of the Broker, or made unmarketable through any other source.
  - d. An agreement to sell or exchange the property is made by Owner **within ninety (90) days** after the termination of this Agreement to persons with whom Broker has had negotiations during the listing period; provided that the names of such persons are submitted in writing to the Owner prior to the Owner entering into a new listing agreement with another broker or **within five (5) days** after the termination of this Agreement, whichever occurs first. Presentation of a written offer during the term of the listing constitutes sufficient notice of such persons.

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<sup>1</sup> The listing period began November 19, 2014 and terminated at midnight on February 19, 2015.

\*\*\*HIGHWAY PROPERTIES, LLC, AGREES TO PAY \$25000.00 [sic] ON 11/19/14 OR AGREEMENT IS SUBJECT TO CANCELLATION.

2. **AGENCY. . . . \*\*\*HIGHWATER PROPERTIES AGREES TO TEST MARKET BY ALLOWING BROKER TO MARKET ON NON-MLS SITES FOR A PERIOD OF TEN (10) DAYS. THEREAFTER HIGHWATER WILL PAY \$490 FOR MLS.**

[¶] . . . [¶]

11. **ADDITIONAL TERMS AND CONDITIONS. HIGHWATER PROPERTIES, LLC UNDERSTAND THAT BECAUSE OF THE SUBSTANTIAL [sic] DISCOUNTED BROKER COMMISSION AGREED UPON, THAT BROKER WILL BE LIMITED TO ADVERTISING AND MARKETING.**
12. **ENTIRE AGREEMENT.** This document contains the entire agreement of the parties and supersedes all prior agreements or representations with respect to the property which are not expressly set forth. All modifications must be in writing signed and dated by both parties. **Owner acknowledges that he or she has not relied on any statements of the real estate Agent or Broker which are not expressed in this Agreement.**

(Capitalization and bolding in original.)

5. Highwater Properties, LLC remitted payment of \$2,500 to respondent on or about November 19, 2014. A few weeks later, respondent advertised the Arkansas Property on Zillow, a real property marketing website, as "for sale by owner" and for the purchase price of \$319,500. The advertisement further provided:

Special financing programs are available with no-money down for veterans and military, plus a special Neighborhood Program Redevelopment is available with as little as 1% down payment. Now is a great time to take advantage of low interest rates and special loan programs. Private money loans are also available with no FICO score or income documentation.

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### *Rental, Option, and Purchase Agreements*

6. On December 17 or 18, 2014, Warner and Iris Bowers contacted respondent to express an interest in buying the Arkansas Property and inquire about broker or owner financing. At that time, respondent was in Mazatlán, Mexico, attending to a family emergency. She told the Bowers she would not return to California until December 23, 2014. The Bowers informed respondent that they were renting their current residence which was in foreclosure, and that the trustee's sale was pending. As a result, they needed to move out immediately. Respondent suggested renting the Arkansas Property with a lease option to purchase it. The Bowers were interested in that proposal, and respondent followed up with Highwater Properties, which also agreed.

7. On December 19, 2014, the Bowers and Highwater Properties entered into a six-month Residential Lease/Rent Agreement (Rental Agreement), Option to Purchase Agreement (Option Agreement), and a Standard Residential Purchase Agreement (Purchase Agreement) for the Arkansas Property. These agreements provided, in pertinent part, as follows:

a. Rental Agreement. The Rental Agreement specified the monthly rent was \$1,600. The Bowers agreed to make an initial prorated rental payment of \$2,240 for the period of December 19, 2014 through January 30, 2015. The Rental Agreement further called for payment of a "security deposit in the amount of \$9,585 (OPTION)," for a total payment of \$11,825.<sup>2</sup>

b. Option Agreement. The Option Agreement incorporated the Rental Agreement by reference, and required the Bowers to pay \$9,585 as consideration for the option. The option period began on December 19, 2014 and ended at midnight on June 30, 2015. The agreement specified that the option payment shall be by wire transfer and made payable to "Granite Stone Real Estate & Financial Services – Trustee – CA BRE #00546818." If the Bowers exercised the option and purchased the Arkansas Property, the \$9,585 amount would be applied toward their down payment. If the Bowers did not exercise the option to purchase the property, or the option was otherwise terminated, "[a]ll Option Consideration paid, rent paid . . . by the Optionee, shall be retained by the Optionor in consideration of the granting of the Option . . . ."

The Option Agreement did not provide for compensation to respondent, as broker, to be paid by either the Bowers or Highwater Properties. Rather, the agreement specified that the Bowers and/or Highwater Properties agreed "to pay

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<sup>2</sup> The rental agreement listed \$2,400 as the prorated rent amount and \$9,585 as the option consideration, which total \$11,985. That amount is \$160 more than the \$11,825 total due stated in the agreement. Subsequent communications between respondent and the Bowers indicated the actual prorated rent amount was \$2,240, which accounts for this \$160 difference.

compensation to Broker as specified in a separate written agreement between [Optionee/Optionor] and Broker.”

c. Purchase Agreement. The Purchase Agreement listed Granite Stone as the agent for both the Bowers (as buyers) and Highwater Properties (as seller). The agreement listed a purchase price of \$319,500 and the \$9,585 option consideration as the Bowers’ deposit. The agreement was contingent on the Bowers obtaining financing for the purchase within 90 days after acceptance, and the full purchase price and deed recorded on or before June 30, 2015. The agreement did not provide for any broker commission to be paid to respondent.

8. There was no separate written agreement between respondent and Highwater Properties which addressed compensation to be paid to respondent with respect to the Rental Agreement, Option Agreement, or Purchase Agreement. Nor was there any separate written agreement between respondent and the Bowers by which respondent was to receive compensation or other consideration from the Bowers regarding the Arkansas Property.

*Bowers’ Deposit*

9. On December 19, 2014, at approximately 12:44 p.m., respondent sent the following email to the Bowers with instructions regarding the deposit:

[¶] . . . [¶] Attached is the Option Agreement. The total amount needed today is, which would include the prorated rent amount and the option money would be \$2240 [sic] . . . rent through January and the 3% option amount of \$9585 [sic] for a total of \$11,825.00. I will provide you with an immediate receipt. I have already left a message with the contractor for the keys.

The purchase contract to follow in the next email.

[¶] . . . [¶]

At the end of the email, respondent included the checking account and wire routing number for the personal checking account she shares with her son at US Bank’s Las Vegas branch.

10. On December 19, 2014, at approximately 5:10 p.m., the Bowers withdrew \$11,825 in cash from their bank account. Later that night, at approximately 10:47 p.m., Andrew Thrailkill emailed respondent the US Bank account number for Highwater Properties. Respondent did not forward this information to the Bowers, or otherwise direct them to deposit the \$11,825 into the account for Highwater Properties rather than respondent’s personal account.

11. On December 20, 2014, in accordance with respondent's instructions, the Bowers deposited \$11,825 cash into respondent's personal checking account at US Bank. That same date, respondent provided the Bowers with a written receipt on Granite Stone letterhead stating the following:

This is a confirmation and receipt for the deposit received into U.S. [sic] Bank account in the name of Eileen Passanisi of Granite Stone Real Estate & Financial Services from Warner and Iris Bowers for the sum of \$11,825.00 (Eleven Thousand Eight Hundred Twenty-Five Dollars and no/100). This sum represents the following:

- 1) Prorated rent for December of \$640 (Six Hundred Forty and no/100).
- 2) \$1600.00 [sic] (One Thousand Six Hundred and no/100) towards January, 2015 rent payment.
- 3) \$9585.00 [sic] (Nine Thousand Five Hundred Eighty Five Dollars and no/100) towards Option Consideration towards the purchase of the property located at 500 Arkansas Street, Fairfield, CA 94533 from Highwater Properties, LLC.

12. On Monday, December 22, 2014, respondent deposited \$7,825 into the US Bank account for Highwater Properties. She kept the remaining \$4,000 of the Bowers' deposit in her personal account.

13. Prior to moving into the Arkansas Property, the Bowers were pre-approved for a mortgage loan by First Priority Financial. After the Bowers moved into the Arkansas Property, they asked Highwater Properties to lower the purchase price based on the comparable sales in the surrounding neighborhood. Highwater Properties agreed to lower the purchase price to \$290,000. The property was subsequently appraised at \$265,000. Because the appraised value was lower than the purchase price, the Bowers were unable to secure financing through First Priority Financial or elsewhere and could not purchase the property. The Bowers did not receive a refund of any portion of the \$11,825 which they deposited into respondent's personal checking account. The Arkansas Property was subsequently sold in December 2015 for \$281,500.

#### *Bowers' Complaint to BRE*

14. The Bowers filed a consumer complaint with the BRE against Granite Stone and respondent with the BRE on August 14, 2015. The complaint alleged respondent breached her fiduciary duty to them when she failed to help them secure financing to buy the Arkansas Property, required them to deposit \$11,825 into respondent's personal checking account, and did not refund the \$9,585 paid for the option consideration. Further, the complaint alleged respondent knew or should have known that the Arkansas Property would



appraise much lower than the purchase price, thereby precluding the Bowers from being able to obtain financing.

15. BRE Special Investigator Terrence Patterson was assigned to investigate the Bowers' complaint. He interviewed respondent on August 19, 2016 and September 30, 2016. Respondent admitted she did not maintain a trust account and that she instructed the Bowers to deposit the monies due into her personal checking account, which she shared with her son, Anthony Passanisi. Respondent stated she was in Mexico when the Bowers contacted her, that the Bowers were senior citizens and were "in a hurry" to move into the Arkansas Property, and that the Bowers had in fact moved into the property before depositing the money into her account. Respondent also asserted to Investigator Patterson that there were exceptions to the trust fund law, and that such laws did not apply in cases of emergency.

16. Investigator Patterson interviewed respondent again on October 31, 2016. He asked respondent why she deposited \$7,825 into Highwater Properties' bank account, which was \$4,000 less than the amount deposited by the Bowers into respondent's bank account. Respondent asserted she retained the \$4,000 as payment of a 1.25 percent commission due to her based on the Listing Agreement. When Investigator Patterson noted the Listing Agreement did not provide for any commission, respondent claimed she had another written agreement with Highwater Properties authorizing the commission and would email a copy to the investigator. However, respondent never provided a copy of such agreement to Investigator Patterson. At hearing, respondent admitted there was no separate written agreement.

17. On December 20, 2016, Investigator Patterson interviewed Andrew Thrailkill. Mr. Thrailkill confirmed that respondent represented Highwater Properties in the listing of the Arkansas Property and that the company was required to pay respondent an upfront fee of \$2,500. Mr. Thrailkill told respondent that he thought the \$11,825 from the Bowers should have been deposited into an escrow account; however, respondent disagreed and insisted the money be deposited into her personal account. Mr. Thrailkill told Investigator Patterson that he never gave respondent permission to withhold any portion of the Bowers' deposit to pay herself a commission, but that respondent "took the money off the top anyway."

#### *Respondent's Evidence*

18. Respondent is 65 years old, and has been a real estate broker for more than 40 years. She holds a bachelor of science in business administration and a master of business administration (MBA), both from the University of Phoenix. Since 2008, she has doing business as Granite Stone. Additionally, she is licensed as an officer for Imperial Homes and Investments since 2016. She has no history of prior discipline.

19. Respondent testified regarding the circumstances underlying her involvement with the Arkansas Property, as summarized herein. On November 19, 2014, Alex Escalante contacted respondent regarding the Arkansas Property. Respondent had assisted Highwater

Properties with other real estate transactions in the past. Mr. Escalante informed respondent the company had a \$60,000 note due on the Arkansas Property and did not have sufficient funds to pay it. Respondent recommended selling the property. As a favor based on their existing relationship, respondent offered to write an advertisement and post it on the Zillow website. Mr. Escalante and respondent also discussed a 1.25 percent commission for respondent, but agreed they would formalize a commission agreement "down the road."

20. Respondent conceded she did not have an advanced fee agreement for the \$2,500 Highwater Properties remitted upon signing the Listing Agreement. She offered no explanation or mitigating circumstances for this failure.

21. Respondent was contacted by the Bowers on December 17, 2014, less than 24 hours after she posted the advertisement on Zillow. Respondent was in Mexico attending to a family emergency when she received their message.<sup>3</sup> She followed up with the Bowers right away, but informed them she would not return to the country until December 23rd. The Bowers told respondent they were in an "urgent situation"; they were being evicted from their current residence, which they had been renting, because it was in foreclosure and a trustee's sale was pending. Respondent wanted to help the Bowers and offered to recommend to the sellers that they rent the property to the couple. She also told the Bowers she had done many FHA loans in her career, but that she was not MLS certified and could not help them obtain financing. However, she offered to put them on a waitlist for the Fairfield Neighborhood Stabilization Association, which would help them obtain financing. Ultimately, the Bowers and Highwater Properties entered into the agreements discussed in Finding 7.

22. December 20, 2014 was a Saturday. That day, the Bowers contacted respondent and stated they had withdrawn \$11,825 and needed to know where to deposit it. Respondent did not have a trust account in which the money could be deposited. Although respondent had requested the bank account information from Highwater Properties, she had not received a response for several hours. Respondent was concerned that the Bowers, whom she believed were elderly and disabled, were driving around town with \$11,825 cash and could be robbed. Respondent knew it was wrong, but made an "executive decision" and told the Bowers to deposit the cash into her personal bank account and that she would "immediately" transfer it to the sellers. The Bowers deposited the cash into her account. Later that evening, respondent received an email from Mr. Thrailkill with the account information for Highwater Properties, which was also at US Bank. Respondent transferred the cash, less \$4,000, to Highwater Properties' account "within four hours."

23. Respondent advised the Bowers that the \$9,585 option consideration was non-refundable in the event they did not ultimately purchase the Arkansas Property. The non-refundable provision was also stated in the Option Agreement. When the Bowers initially contacted respondent, she verified with First Priority that they were preapproved for a loan.

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<sup>3</sup> Respondent has dual citizenship with the United States and Mexico, and has several family members who reside in Mexico.

She did not run a credit check on the couple. Regarding the value of the property, she asserted it was the Bowers' responsibility to exercise due diligence to make sure the Arkansas Property would appraise for the value of the purchase price. She asserted she warned the Bowers that the property may not appraise for the purchase price amount because it was the only two-story home in the neighborhood.

24. Respondent testified that Mr. Escalante had verbally authorized her to keep \$1,660 of the Bowers' deposit as a "rental agreement fee," though this authorization was never memorialized in a written agreement. Respondent did not initially explain why she kept an additional \$2,340 of the Bowers' deposit (for a total of \$4,000). Later in her testimony, she asserted the \$4,000 withheld amount was a combination of the rental fee agreement and the 1.25 percent commission she was owed as the listing agent for the property, which was separate from the \$2,500 advanced fee she received from Highwater Properties under the Listing Agreement. Although the Bowers did not purchase the Arkansas Property, respondent contended she was entitled to a commission because "realtors can earn a commission even if there is no closing if they did their part."

25. Respondent asserted she went "above and beyond the call of duty" for both the Bowers and Highwater Properties. She followed the parties' instructions at all times. For six months, she tried to find a solution that would allow the Bowers to complete the purchase. She acknowledged her mistakes in not obtaining an advanced fee agreement and directing the Bowers to deposit the \$11,825 into her personal account. However, she committed these mistakes because she took on the role of a "social worker" rather than a real estate broker. Respondent asserted if she were in the same situation again, she would avoid any involvement and tell the parties to "call someone else."

26. Respondent also contended that the Bowers were not "innocent victims" and that they had not accepted responsibility for their own actions. She has been dealing with this matter since 2014, and it has cost her a "tremendous amount of time, energy, and money." Given the "thousands" of successful transactions she has done, she asserted that revocation of her broker license is unwarranted.

### *Discussion*

27. Complainant established that respondent violated the trust fund law by directing the Bowers to deposit the \$11,825 into her personal account rather than a trust or escrow account. Respondent's explanation that she could not reach Mr. Thrailkill and that she was "worried" about the Bowers' safety was not credible. The evidence established she emailed the Bowers, at 12:44 p.m. on December 19, 2014, with instructions to deposit the monies into her personal account. The Bowers did not withdraw the funds from their bank until 5:10 p.m., more than four hours later. Further, though respondent received Mr. Thrailkill's email with account information at 10:47 p.m. that evening, she did not notify the Bowers or otherwise instruct them to deposit the monies into the account for Highwater

Properties. The Bowers did not complete the deposit until the next day, December 20, 2014.<sup>4</sup> Therefore, respondent had ample time to contact the Bowers and change the deposit instructions.

28. It was also established that respondent did not have an advanced fee agreement approved by the Bureau for the \$2,500 fee she was paid upon the signing of the Listing Agreement. Respondent did not dispute this violation.

29. The evidence established that respondent violated the Real Estate Law, was negligent, and engaged in dishonest dealing when she: (1) had the Bowers' monies deposited into her personal account rather than a trust or escrow account; (2) did not have an advanced fee agreement for the \$2,500 fee she was paid upon signing of the Listing Agreement; and (3) withheld \$4,000 from the Bowers' \$11,825 deposit for a "rental agreement fee" and "broker commission" despite not having the sellers' authorization to keep these funds. For the reasons discussed below, respondent's position that she "earned" this compensation because of the work she performed even though the Bowers did not purchase the property is untenable.

First, respondent initially represented to Investigator Patterson that the entire \$4,000 was for her 1.25 percent commission. She did not mention being owed a "rental agreement fee," nor does the Rental Agreement state that respondent was entitled to collect such a fee. Second, respondent kept the \$4,000 when the Bowers' deposited it (on December 20, 2014), months before she could have known the purchase transaction fell through. Third, the Listing Agreement explicitly stated that she was not to receive a broker commission. Fourth, the Option Agreement provided that neither the Bowers nor Highwater Properties owed respondent any compensation unless specified in a separate written agreement. At hearing, respondent admitted no separate agreement existed, even though she previously indicated to Investigator Patterson that she would email him a copy of such an agreement.

30. The Bureau has developed criteria for use in evaluating the rehabilitation of a licensee, which are set forth in California Code of Regulations, title 10, section 2911. Relevant criteria include: the passage of at least two years from the most recent act or offense, which time period may be increased depending on the nature and severity of the act or offense committed; payment of restitution; enrollment in educational or training courses; significant and conscientious involvement in community programs, church, or privately-sponsored programs to benefit society; and any change in attitude from that which existed at the time of the conduct in question.

31. More than two years have passed since respondent engaged in the misconduct. She has not paid any restitution to the Bowers or Highwater Properties. She is up to date on

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<sup>4</sup> At hearing, respondent asserted that the time difference between Mazatlán and California accounted for the delay in her communications with the Bowers. However, this contention lacks merit as the time difference between Mexico and California is at most one hour, depending on the time of year.

the educational requirements for her broker license. She has more than 40 years' experience in the industry and has no prior history of discipline.

32. Notwithstanding these facts, and despite admitting she made some mistakes, respondent did not accept full responsibility for her misconduct. It has been judicially recognized that rehabilitation requires an acknowledgment of wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation"].) Rather, respondent maintains she went "above and beyond" to ensure the purchase was successful and that her mistakes resulted from her altruistic motives to help the Bowers, whom she believed to be elderly and disabled, and in need of her help. Respondent's unwillingness to recognize any wrongdoing with respect to the monies she paid to herself from the Bowers' deposit without authorization is very concerning. A broker with decades of experience should have known better. Moreover, her testimony overall lacked credibility as it was inconsistent with her own prior statements or otherwise refuted by other evidence. When all the evidence is considered, it would be contrary to the public interest to allow respondent to retain her real estate license, even on a restricted basis, at this time.

#### *Costs*

33. Complainant submitted a Certified Statement of Costs and Certified Statement of Investigation Costs, requesting that respondents be ordered to pay the reasonable costs of investigation and enforcement in this case pursuant to Business and Professions Code section 10106. Complainant seeks \$1,753.30 in enforcement costs for the time expended by complainant's counsel, and investigative costs in the amount of \$2,197, for total costs of \$3,950.30.

In relevant part, Business and Professions Code section 10106, subdivision (c), provides that a respondent may be ordered to pay the investigative and enforcement costs incurred by complainant "up to the date of the hearing." The costs sought by complainant are not unreasonable given the allegations in this matter and the work performed in the investigation and enforcement of this matter. Other factors relating to the amount of reasonable costs to be ordered in this case are discussed in the Legal Conclusions below.

### LEGAL CONCLUSIONS

1. Complainant has the burden of proving the grounds for discipline alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212.) Clear and convincing evidence is evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

### *Applicable Statutes*

2. Pursuant to Business and Professions Code section 10176, subdivision (i), a real estate license may be disciplined when a licensee has engaged in conduct which constitutes fraud or dishonest dealing.

3. Pursuant to Business and Professions Code section 10177, a real estate license may be disciplined when the licensee has done any of the following:

(d) Willfully disregarded or violated the Real Estate Law . . . .

[¶] . . . [¶]

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

4. Pursuant to Business and Professions Code section 10145, subdivision (a)(1) provides:

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.

5. California Code of Regulations, title 10, section 2832, subdivision (a)(1) states:

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.

6. Business and Professions Code section 10085 provides:

The commissioner may require that any or all materials used in obtaining advance fee agreements, including but not limited to

the contract forms, letters or cards used to solicit prospective sellers, and radio and television advertising be submitted to him or her at least 10 calendar days before they are used. Should the commissioner determine that any such matter, when used alone or with any other matter, would tend to mislead he or she may, within 10 calendar days of the date he or she receives same, order that it not be used, disseminated, nor published. Any person or entity using, disseminating, or publishing any matter which the commissioner has ordered, pursuant to this section, not to be used, published, or disseminated shall be guilty of a misdemeanor punishable by a fine not exceeding two thousand five hundred dollars (\$2,500) or by imprisonment in the county jail not exceeding six months, or both, for each such use, dissemination, or publication.

The commissioner may determine the form of the advance fee agreements, and all material used in soliciting prospective owners and sellers shall be used in the form and manner which he or she determines is necessary to carry out the purposes and intent of this part.

Any violation of any of the provisions of this part or of the rules, regulations, orders or requirements of the commissioner thereunder shall constitute grounds for disciplinary action against a licensee, or for proceedings under Section 10081 of this code, or both. These sanctions are in addition to the criminal proceedings hereinbefore provided.

### *Causes for Discipline*

7. Complainant established cause to discipline respondent's license pursuant to Business and Professions Code section 10176, subdivision (i). As set forth in Findings 4 through 17, and 27 through 29, respondent engaged in dishonest dealing when she: (1) had the Bowers' monies deposited into her personal account rather than a trust or escrow account; (2) did not have an advanced fee agreement for the \$2,500 fee she was paid upon signing of the Listing Agreement; and (3) withheld \$4,000 from the Bowers' \$11,825 deposit for a "rental agreement fee" and "broker commission" despite not having the sellers' authorization to keep these funds.

8. Complainant established cause to discipline respondent's license pursuant to Business and Professions Code section 10177, subdivisions (d) and (g). As set forth in Findings 4 through 17, and 27 through 29, respondent willfully disregarded the Real Estate Law and acted negligently when she: (1) had the Bowers' monies deposited into her personal account rather than a trust or escrow account; (2) did not have an advanced fee agreement for the \$2,500 fee she was paid upon signing of the Listing Agreement; and (3)



withheld \$4,000 from the Bowers' \$11,825 deposit for a "rental agreement fee" and "broker commission" despite not having the sellers' authorization to keep these funds.

9. Cause exists to discipline respondent's license pursuant to Business and Professions Code section 10145, and California Code of Regulations, title 10, section 2832. As set forth in Findings 9 through 12, and 27, respondent had the Bowers' deposit \$11,825 into respondent's personal account rather than a trust or escrow account.

10. Cause exists to discipline respondent's license pursuant to Business and Professions Code section 10085. As set forth in Findings 4 through 5, and 28, respondent did not have an advance fee agreement that was approved by the Bureau for the \$2,500 advance fee she received from Highwater Properties.

11. When all the evidence is considered, and for the reasons set forth in Findings 31 and 32, it would be contrary to the public interest to allow respondent to retain her broker's license, even on a restricted basis. Her license therefore should be revoked.

#### *Costs*

12. Business and Professions Code section 10106, which permits the award of costs, in relevant part, provides:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

(b) In the case of a disciplined licensee that is a corporation or a partnership, the order may be made against the licensed corporate entity or licensed partnership.

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

13. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and



Professions Code section 10106. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

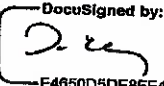
14. As set forth in Finding 33, complainant requested that respondent be ordered to pay the costs of the investigation and enforcement incurred up to the date of hearing in the total amount of \$3,950.30. Respondent was not successful at hearing in getting any of the charges dismissed or reduced. She did not raise a colorable challenge to the proposed discipline. The scope of the investigation was appropriate in light of the alleged misconduct. Although respondent appeared to believe that she was justified in engaging in her wrongful actions, her testimony was evasive, self-serving and lacking in credibility. When all the *Zuckerman* factors are considered, the requested costs are reasonable. Consequently, respondent should be ordered to pay these costs in full to the Bureau.

### ORDER

All licenses and licensing rights of respondent Eileen Yolanda Passanisi under the Real Estate Law are REVOKED.

Respondent shall pay the Commissioner the sum of \$3,950.30 for the Bureau's costs of investigation and enforcement within 30 days of the effective date of this Decision.

Dated: April 12, 2018

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TIFFANY L. KING  
Administrative Law Judge  
Office of Administrative Hearings