BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Second Amended Accusation Against DIANA LOPEZ Respondents.	File No. 963-2596 OAH No. 2013110620

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated August 28, 2015, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter with the following technical and minor change pursuant to Government Code Section 11517(c)(2)(C). In footnote 1 of the Proposed Decision, change "Department of Finance" to "Department of Financial Institutions".

This Decision shall become effective on January 6, 2016.

IT IS SO ORDERED this 7th day of December, 2015.

/S/

JAN LYNN OWEN
Commissioner of Business Oversight

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DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Second Amended Accusation Against: DIANA LOPEZ, Respondent.	File No. 963-2596 OAH No. 2013110620

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 22-24, 2015, in Los Angeles.

Blaine A. Noblett, Senior Counsel, and Adam J. Wright, Counsel, represented Jan Lynn Owen (complainant).

Russell J. Thomulka, Esq., represented Diana Lopez (respondent), who was present.

The record was held open after the hearing for the parties to submit closing briefs, which were timely received and marked for identification as follows: complainant's, exhibit 64; respondent's, exhibit 134. The ALJ subsequently reopened the record to obtain an accurate copy of exhibit 133, which was provided by complainant's counsel (and a copy served on respondent). The record was closed and the matter submitted for decision one week thereafter, on August 28, 2015, having received no objection or response from respondent's counsel.

FACTUAL FINDINGS

Parties and Jurisdiction

1. In October 2013, complainant, in her official capacity as the Commissioner of Business Oversight (Commissioner),[1] brought an accusation and notice of intention to issue a bar order (notice) against respondent, in which she seeks to bar respondent from any employment, management, or control of any escrow agent, based on various alleged violations of the Escrow Law (Fin. Code, § 17000 et seq.).

[1] As of July 1, 2013, the Department of Corporations and the Department of Finance merged to form the Department of Business Oversight (Department).

2. Respondent timely filed a notice of defense, which contained a request for a hearing in connection with the accusation and notice.

3. In January 2014, a first amended accusation was filed on behalf of complainant. By operation of Government Code section 11507, respondent was not required to submit a new notice of defense in response to the amended pleading.

4. In May 2015, the second amended accusation was filed on behalf of complainant, which was the operative pleading contested during the hearing of this matter.

Diversity Escrow, Inc.

5. Diversity Escrow, Inc. was incorporated under the laws of the State of California in June 2009. Its corporate privileges have been suspended since April 2, 2012.

6. Diversity Escrow, Inc. (Diversity Escrow) was an independent escrow agent licensed by the Commissioner under the Escrow Law on January 28, 2010.

7. According to Diversity Escrow's application and other documents on file with the Department and Secretary of State, David Z. Jimenez (Jimenez) was Diversity Escrow's chief executive officer, chief financial officer, treasurer, secretary, director, sole shareholder, and registered agent. Respondent is Jimenez's daughter. Jimenez had no prior experience in the escrow business.

8. Christina Espitia (Espitia) was hired as Diversity Escrow's manager and escrow officer in June 2010. It was not established who was Diversity Escrow's manager and escrow officer from when it became licensed in January 2010 until the time that Espitia was hired in June 2010.

9. The initial accusation and notice filed in this matter also included Diversity Escrow, Jimenez and Espitia as parties. However, none of them timely requested a hearing. Therefore, on January 13, 2014, by a default decision, the Commissioner revoked the escrow agent's license issued to Diversity Escrow and issued orders barring Jimenez and Espitia from any employment, management, or control of any escrow agent based upon their alleged violations of the Escrow Law. The decision and orders are now final.

Respondent's Involvement with Diversity Escrow

10. Respondent initially assisted her father, Jimenez, to set up Diversity Escrow. Respondent thereafter remained involved with Diversity Escrow after it received its escrow agent license in January 2010. For example, company bank records show that respondent was an authorized signatory on Diversity Escrow's general bank account until October 2010. Respondent also concedes that she was an employee of the company from February through September 2010. Payroll records show respondent was paid significant compensation during that time period by Diversity Escrow, albeit less than what Espitia was paid.

11. Although respondent testified that her compensation was related to business referrals she made to Diversity Escrow, it was established that she had greater involvement than that. For example, it is more likely than not that respondent was primarily involved in operating the company from its inception through June 2010, when Espitia was hired. This is because Jimenez had no prior escrow experience and the evidence does not indicate that the company had any other employee with such experience.

12. In addition, two letters written on behalf of Diversity Escrow in August and September 2010 were signed by "Diana Lopez, President." Respondent denied signing or sending those letters, but her denial was not persuasive. Both Espitia and Jimenez had indicated that respondent previously "ran" the company. While those statements were not clear as to the time in question, it is more likely than not that such was, at least, from the inception of the company until sometime before September 2010. In addition, respondent concedes that she submitted documents to the Escrow Agents' Fidelity Corporation (EAFC) to "terminate" her relationship with Diversity Escrow. The EAFC is the statutory non-profit mutual benefit corporation and statutory fidelity indemnitor for each licensed member escrow agent. Those documents, reviewed and signed by respondent, stated that her position at Diversity Escrow was "President."

13. Respondent initiated the process to terminate her relationship from Diversity Escrow in September 2010. After some paperwork delays, respondent was able to successfully submit paperwork to the EAFC terminating her relationship with Diversity Escrow, effective October 2010.

14. Complainant contends but failed to establish that respondent was also an owner of Diversity Escrow stock. However, both respondent and Jimenez denied that, and complainant presented no evidence, including filings with relevant government agencies, indicating that respondent ever had any ownership interest in Diversity Escrow. The only evidence presented was a balance sheet created in early 2011, which showed that Diversity Escrow owed a debt to respondent and which referred to her as "s/h." However, the person who created the balance sheet did not testify, he was not interviewed, and no other evidence presented indicated what "s/h" meant.

15. Thus, it was established that respondent was an employee and officer of Diversity Escrow from its inception until she terminated her relationship in October 2010.

16. At no time was it reported to the Commissioner that respondent was an officer and/or employee of Diversity Escrow. The only such indication was respondent's termination filing in October 2010 with the EAFC, which disclosed her as the company's President, but which was filed months after the fact.

17. Respondent had previously reported to the Commissioner her affiliation with another escrow company unrelated to Diversity Escrow. She testified that she believed all she needed to do was contact the EAFC regarding terminating her relationship with Diversity Escrow.

The Commissioner's Special Examination of Diversity Escrow

18. On or about January 28, 2011, Diversity Escrow's bank, City National, notified the Commissioner in writing that Diversity Escrow's trust account was overdrawn as of January 26, 2011. In light of this information, and concerned about the status of the trust account, the Commissioner, by and through the Department's audit staff, commenced a special examination of the books and records of Diversity Escrow at its licensed location. The special examination was conducted by Corporation Examiner Daniel Kim; it began on February 20, 2011, and concluded in April 2011.

19. The special examination disclosed the following litany of Escrow Law violations, including issuing post-dated checks; failing to maintain books and records; causing overdrafts to occur in the trust account; failing to meet tangible net worth and liquidity requirements; and failure to use loan funds in accordance with written escrow instructions that caused debit balances and trust account shortages.

A. Issuance of Post-Dated Checks

20. Diversity Escrow issued two post-dated checks in the amounts of $300,000.00 and $5,000.00, in violation of Financial Code section 17400 and California Code of Regulations, title 10, section (Regulation) 1738. Check number 1537, in the amount of $300,000.00 and dated January 27, 2011, was actually issued on January 25, 2011. Espitia told Examiner Kim that she reset her computer's clock, so that the date of the check was changed from January 25 to January 27. The bank returned check number 1537, unpaid, on January 26, 2011, due to non-sufficient funds. Check number 1538, in the amount of $5,000.00 and dated January 27, 2011, was actually issued on January 25, 2011.

21. Espitia also admitted to Examiner Kim that the checks in question were issued out of sequence, blank and pre-signed by Jimenez, in violation of Regulation 1732.

22. Moreover, check numbers 1537 and 1538 were disbursed early to the buyer in the escrow without written authorization from the parties, in violation of Financial Code section 17414, subdivision (a)(1), and Regulation 1732.

B. Failure to Maintain Books and Records

23. Diversity Escrow failed to prepare its daily banking and trust reconciliations, in violation of Financial Code section 17404 and Regulation 1732.2. Diversity Escrow's last prepared daily banking report was on or about February 2, 2011, and the last prepared trust banking reconciliation was in or about July 2010. As discussed above, Espitia had taken over as manager and escrow officer of Diversity Escrow in June 2010, and was in charge of the daily operations thereafter. No evidence suggests that respondent was involved in, or responsible for, maintaining Diversity Escrow's books and records after Espitia was hired.

C. Trust Account Overdraft

24. Diversity Escrow caused an overdraft to occur in the trust account in the amount of $131,048.56, in violation of Financial Code section 17414, subdivision (a)(1), and Regulations 1738 and 1738.1. Espitia issued receipt number 282, dated January 18, 2011, in the amount of $230,000.00 without any corresponding deposit at the bank. Thereafter, on January 18, 2011, Espitia made a wire transfer in the amount of $230,000.00 without any funds having been deposited into escrow. The wire transfer (disbursement) to the sellers was made without having received written authorization from the parties to the escrow transaction. As a result, a shortage occurred in the trust account in the amount of $230,000.00 from January 18, 2011, until February 24, 2011, thereby causing the trust account overdraft at the bank in the amount of $131,048.56.

D. Liquidity and Tangible Net Worth Deficiencies

25. Under Financial Code section 17210, all escrow licensees are required to maintain, at all times, liquid assets of at least $25,000.00 and a tangible net worth of at least $50,000.00. Examiner Kim determined that, as of January 31, 2011, Diversity Escrow had a liquid asset deficiency of at least $12,008.77 and a tangible net worth deficiency of at least $19,354.71, in violation of section 17210.

E. Trust Account Shortages

26. *Escrow Number 10334.* Diversity Escrow caused a shortage to occur in the trust account from February 2, 2011, to February 3, 2011, in the amount of $100,000.00, in violation of Financial Code section 17414, subdivision (a)(1), and Regulations 1738 and 1738.1. Examiner Kim's review of escrow file number 10334 disclosed that Espitia had issued receipt number 304 in the amount of $100,000.00 on February 2, 2011, but the corresponding funds were not wired into escrow number 10334 until February 3, 2011. Espitia had issued receipt number 304 at least one day before the funds were received in escrow. Receipt number 304 showed that the funds were received from L.D.T. Investments (the purported seller in the transaction). On February 1, 2011, two days before the funds were wired into the trust account, and one day before the receipt was issued, Espitia issued trust account check number 1539 to L.D.T. Investments in the amount of $100,000.00. L.D.T. Investments cashed check number 1539 on February 2, 2011, thereby creating a trust account shortage from February 2, 2011, to February 3, 2011. As discussed in more detail below, respondent owned and operated L.D.T. Investments at that time. Espitia told Examiner Kim that respondent had directed her to issue the trust account check as she had.

27. *Escrow Number 10257-CE.* Diversity Escrow caused a shortage to occur in the trust account from January 5, 2011, through February 25, 2011, in the amount of $120,000.00, in violation of Financial Code section 17414, subdivision (a)(1), and Regulations 1738 and 1738.1. Espitia told Examiner Kim that the shortage occurred because, on or about January 5, 2011, respondent directed Espitia to disburse $120,000.00 to L.D.T. Investments without any corresponding escrow. A wire confirmation showed that

Espitia had wired $120,000.00 from Diversity Escrow's trust account to L.D.T Investments on January 5, 2011.

28. *Escrow Number 10203-CE.* Diversity Escrow caused a shortage to occur in the trust account from November 16, 2010, through December 31, 2010, in the amount of $52,000.00 in escrow file number 10203-CE. Examiner Kim's review of the file documents disclosed that there were five sales affiliated with this one escrow file. All five escrows concerned different buyers and different properties. Examiner Kim determined the following Escrow Law violations had occurred on this escrow:

A. On or about November 16, 2010, Espitia disbursed $52,000.00 from escrow number 10203-CE to the lender without having received signed escrow instructions from the buyer, in violation of Financial Code section 17414, subdivision (a)(1), and Regulations 1738 and 1738.1. Espitia told Examiner Kim that respondent had directed her to do so. Thereafter, on or about December 30, 2010, L.D.T. Investments deposited $52,000.00 into escrow number 10203-CE to cover the disbursement to the lender. Only the seller authorized the disbursal of the funds; the buyer had failed to sign the escrow instructions.

B. On or about November 19, 2010, Espitia disbursed $72,000.00 from escrow number 10203-CE to the lender without having received any signed escrow instructions from the buyer, in violation of Financial Code section 17414, subdivision (a)(1), and Regulation 1738. Espitia told Examiner Kim that respondent had directed her to do so.

C. On or about October 29, 2010, L.D.T. Investments deposited $459,000.00 in to escrow number 10203-CE. That same day, Espitia disbursed the $459,000.00 to the lender without any signed escrow instructions having been received from the buyer, in violation of Financial Code section 17414, subdivision (a)(1), and Regulation 1738. Espitia told Examiner Kim that respondent had directed her to do so.

Respondent's Involvement in Diversity Escrow's Regulatory Violations

29. As discussed above, Espitia was hired as manager and escrow officer of Diversity Escrow in June 2010, and she had taken over the daily operations of the company thereafter. In turn, Espitia hired a few other employees to assist her. At that time, respondent did not have an office on the Diversity Escrow premises and she was rarely, if ever, seen there. No evidence suggests that respondent was involved in, or responsible for, maintaining Diversity Escrow's books, records or bank accounts after Espitia was hired. Thus, it was not established that respondent was directly involved in, or responsible for, the aforementioned regulatory violations related to Diversity Escrow issuing post-dated checks, failing to maintain books and records, trust account overdrafts, and liquidity or tangible net worth deficiencies.

30. In fact, almost all of the regulatory violations discussed above occurred after respondent submitted her paperwork with the EAFC terminating her relationship with Diversity Escrow in October 2010. Complainant contends that respondent is still responsible

for, or actively caused, the aforementioned regulatory violations, for the reasons discussed below:

A. Complainant erroneously argues respondent sent the two letters referenced in Factual Finding 12 above in August and September 2011, and that she was still a signatory on Diversity Escrow's bank account through at least October 2011. However, as discussed above, those events happened in 2010, not 2011.

B. Complainant points out that respondent was replaced as a bank account signatory by Susan Moreno, who was her assistant at L.D.T. Investments. While suspicious, this fact alone does not establish that respondent was involved in running Diversity Escrow's business. For example, Ms. Moreno was not interviewed by Examiner Kim, and no evidence indicates whether or how she was involved in the Diversity Escrow bank account.

C. Jimenez had almost no role in Diversity Escrow, other than signing checks. He was rarely at the office. When Examiner Kim advised Jimenez of trust account shortages in the amount of $230,000.00 and demanded that it be replaced, Jimenez indicated that he could not do so. Jimenez speaks limited English. Examiner Kim utilized Espitia as a translator. Jimenez explained to Examiner Kim, through Espitia, that his daughter, respondent, "runs the business;" that she was out of the country at the time; and that he could not help him. However, during the hearing, Jimenez testified that he had told Espitia that respondent ran the business initially, i.e., before Espitia had been hired. Espitia provided no meaningful testimony on the subject. Respondent argues Espitia mistranslated what Jimenez told Examiner Kim. Jimenez's testimony is generally consistent with the timeline established above concerning respondent's role in Diversity Escrow before she terminated from it in October 2010. As explained below in more detail, Espitia had a motive to misinterpret what Jimenez told her. Thus, it cannot be concluded that Jimenez's testimony was false.

D. Complainant also points to the fact that respondent later replaced the $230,000.00 trust shortage from L.D.T. Investment funds. Examiner Kim concluded this event demonstrated to him respondent's ownership status in Diversity Escrow. However, respondent testified that she told Examiner Kim that Jimenez, as owner of Diversity Escrow, would replace the shortfall, and that she used funds from L.D.T. Investments to do so on behalf of her father because he had an interest in L.D.T. Investments and the money used to replace the shortfall was his.

E. Examiner Kim spoke to respondent several times about the various escrows involved in the special examination. When Examiner Kim also requested financial information from Diversity Escrow, he testified that respondent provided him with a balance sheet "prepared by her accountant." This happened because Examiner Kim was often referred to respondent by Espitia when she could not answer his questions. During the hearing, Espitia demonstrated a poor recollection of the events and at times appeared befuddled. She also admitted to Examiner Kim engaging in the aforementioned regulatory violations. Therefore it is not surprising that she was of limited use to Examiner Kim or did

not want to go into specifics with him. Given her past experience as an employee and officer of Diversity Escrow, and the fact that her company, L.D.T. Investments, was involved in the various escrows in question, it is also not surprising that respondent was able to provide details to Examiner Kim. Moreover, respondent denied asking her accountant for the balance sheet; she testified that Espitia obtained it. In any event, since she had previously assisted her father with the financial affairs of Diversity Escrow, it is not surprising that respondent would have been the one to give Examiner Kim the balance sheet in question.

F. Complainant contends that Examiner Kim testified that when he told respondent what Espitia had told him about respondent directing the disbursements, respondent did not deny it to him. However, complainant's description of Examiner Kim's testimony on this regard is overstated. Moreover, Examiner Kim makes no mention of such events in his report. Examiner Kim avoided confronting respondent on whether she owned or controlled Diversity Escrow for fear that it would limit the amount of information she provided, so the scope and meaning of their conversations on this topic are limited. Thus, it was not established that respondent made any adoptive admission on this topic when she was interviewed by Examiner Kim.

G. As discussed above, it was not established that respondent ever had any ownership interest in Diversity Escrow at any time.

31. The most direct evidence relied upon by complainant in asserting respondent owned or controlled Diversity Escrow when the regulatory violations happened is information provided by Espitia. As discussed above, she told Examiner Kim during the special examination that respondent had directed her to make the improper trust account disbursements. During the hearing, Espitia also testified that respondent was her boss at Diversity Escrow, even after October 2010; that she directed Espitia to make the disbursements in question, and that respondent had access to Diversity Escrow's computer system and thereby was able to open escrows for Diversity Escrow after she terminated her relationship with it.

32. Espitia's statements to Examiner Kim and her testimony on this topic was unpersuasive for the following reasons:

A. During the hearing, Espitia's recollection of the events was poor, especially on the disbursements respondent allegedly directed her to make. Espitia seemed confused by, and unable to differentiate between, contacts respondent made with her on behalf of an interested party in many of the escrows in question, L.D.T. Investments. It is not uncommon for a party to an escrow to contact the escrow officer and ask questions or make requests. In her testimony, respondent specifically denied requesting or directing Espitia to make any improper trust account disbursements. She testified that, at most, she would have called Espitia, on behalf of a party to the escrow, to check on the escrow status.

B. Espitia's demeanor during the hearing did not instill confidence in her accurate recitation of the events in question. She often appeared befuddled by questions.

Moreover, as the person who actually engaged in the misconduct in question, it was too convenient for Espitia to deflect responsibility away from herself and onto someone else, respondent. The fact that the special examination revealed that Diversity Escrow committed no regulatory violations before Espitia was hired tends to confirm the doubt cast on her testimony.

C. Espitia testified that the improper disbursement related to Escrow No. 10310-CE was the result of being directed by respondent to do so. However, in a written statement she provided to Examiner Kim, Espitia mentioned nothing about respondent, but rather blamed the improper disbursement on being pressured by one of the parties to the escrow (Ray).

D. Espitia admitted on cross-examination that she did not actually see respondent gain access to Diversity Escrow's computer system; she based her testimony on what Examiner Kim had told her. However, Examiner Kim never told Espitia that respondent had access to the company's computer after October 2010. Espitia's testimony here was surmise.

33. Respondent's failure to notify the Commissioner of her status with Diversity Escrow and many of the facts discovered by Examiner Kim and described in Factual Finding 30 above are suspicious. Those circumstances gave Examiner Kim reasonable cause to suspect respondent's involvement in the regulatory violations. However, as explained above, respondent provided credible explanations for those facts, leading to more than one conclusion about them. The information provided by Espitia was discredited as discussed immediately above. What remains is Examiner Kim's surmise that respondent owned and/or controlled Diversity Escrow when the regulatory violations occurred. For the reasons explained above, Examiner Kim's surmise is insufficient to establish, by a preponderance of the evidence, that respondent owned and/or controlled Diversity Escrow at that time.

Respondent's Involvement with L.D.T. Investments, Inc.

34. L.D.T. Investments, Inc. (LDT Investments) was incorporated under the laws of the State of California on June 8, 2007. Its corporate privileges have been suspended since March 1, 2011.

35. Jimenez and respondent initially started LDT Investments for the purpose of engaging in real estate investments, essentially buying and flipping residential properties. According to documents filed with the relevant agencies, Jimenez was initially the sole owner of LDT Investments, as well as the company's chief executive officer; respondent was listed as the company's chief financial officer and a director. However, as of December 2010, respondent was listed as the company's chief executive officer, chief financial officer, treasurer and sole director. Jimenez testified that respondent became the sole owner of LDT Investments in 2010. Respondent testified that she moved from Diversity Escrow to LDT Investments in 2010 because LDT Investments' business was becoming active.

36. LDT Investments held a California DRE (Department of Real Estate) real estate broker license.

37. On August 24, 2011, the DRE filed an accusation against LDT Investments and another individual, seeking discipline against their licensing rights. By a default decision, LDT Investments' real estate broker license was revoked, effective October 6, 2011.

38. A. On August 25, 2011, the DRE also issued an Order to Desist and Refrain (D&R Order) against LDT Investments and respondent under the authority of Business and Professions Code section 10086. The D&R Order was based on conclusions by the Real Estate Commissioner that LDT Investments and respondent, jointly, violated Financial Code section 17006, subdivision (a)(4) (for performing third-party escrows in violation of the exemption for real estate brokers performing escrows incidental to a real estate transaction where the broker is a party);[2] and that LDT Investments violated Business and Professions Code section 10777, subdivision (j) (conversion, fraud, and dishonest dealing). Although there were some factual allegations made in the D&R Order pertaining to respondent, there was no legal conclusion or judgment that she specifically engaged in conversion, fraud or dishonest dealing.

B. As a result, respondent was ordered to immediately desist and refrain from performing any acts requiring a real estate license in California unless and until LDT Investments was in compliance with Financial Code section 17006, subdivision (a)(4).

C. No evidence was presented indicating that respondent or LDT Investments appealed the D&R Order or otherwise had it set-aside or reversed. It was therefore established that the DRE's D&R Order against respondent is final.[3]

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[2] Financial Code section 17200 provides that, "It shall be unlawful for any person to engage in business as an escrow agent within this state except by means of a corporation duly organized for that purpose licensed by the [C]ommissioner as an escrow agent." However, Financial Code section 17006 provides several exceptions to the license requirement, including subdivision (a)(4), which provides, "Any broker licensed by the Real Estate Commissioner while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required." It was concluded in the D&R Order that because respondent was not a licensed real estate broker, and no other person licensed by the DRE had been designated as LDT Investments' real estate broker, the exception of subdivision (a)(4) did not apply to respondent and she therefore engaged in escrow and real estate activities without the appropriate license(s).

[3] The DRE was later reorganized within the Department of Consumer Affairs and is now known as the Bureau of Real Estate.

39. On October 31, 2011, LDT Investments was placed in involuntary bankruptcy by some of its creditors. The bankruptcy action remains pending before the United States Bankruptcy Court for the Central District of California.

Regulatory Actions Against Diversity Escrow

40. For the reasons discussed above, the Commissioner concluded that Diversity Escrow was conducting its business in an unsafe and injurious manner, and on July 15, 2011, issued an Order to Discontinue Escrow Activities under Financial Code section 17415 (Order to Discontinue).

41. On July 19, 2011, and in light of Diversity Escrow's inability to cure the defects set forth in the Order to Discontinue, the Commissioner issued a Demand For and Order Taking Possession of the Trust Account and Escrow Records of Diversity Escrow Pursuant to Financial Code section 17621 and an Order Appointing Conservator Pursuant to Financial Code section 17630. Thereafter, the Commissioner sought to have the conservatorship converted into a receivership, and petitioned the Superior Court of the State of California, County of Los Angeles (Superior Court), to appoint a receiver over the trust account and related records of Diversity Escrow.

42. On April 13, 2012, Superior Court Judge James C. Chalfant granted the Commissioner's petition and appointed Peter A. Davidson (Receiver) as Diversity Escrow's limited receiver.

43. The Receiver and his accountants reviewed certain Diversity Escrow files, as well as reports and documentation assembled by the Commissioner and staff. Based upon that review, the Receiver prepared and filed a proof of loss claim with the EAFC. Diversity Escrow, during the relevant period, was an EAFC member. After reviewing the proof of loss and correspondence and negotiations with the Receiver, the EAFC agreed to settle the proof of loss claim and pay the Receiver $1 million, the total amount of coverage under Diversity Escrow's policy. The court approved the Receiver's settlement with the EAFC on July 18, 2013.

44. On March 5, 2015, Superior Court Judge Chalfant issued his order approving the Receiver's determinations regarding allowance and disallowance of claims and authorized the Receiver to make his pro rata distributions of the $800,000.00 in settlement funds to the approved trust fund claimants.

Other Relevant Facts

45. It is more likely than not that the damages to others caused by Diversity Escrow's aforementioned regulatory violations exceeded the $1 million obtained through the Receiver's settlement. However, an exact amount was not established.

46. Respondent's testimony that she never exercised any control over Diversity Escrow, at any time, was unpersuasive and an attempt by her to discount her actual involvement in the company. In addition, respondent was less than candid when explaining to Examiner Kim during the special examination the $120,000.00 trust shortage related to Escrow No. 10257-CE. These are aggravating facts.

47. Respondent was not involved in the closure of Diversity Escrow's business. Her father, Jimenez, fired Espitia in 2011 and he allowed the business to close. The suspension of LDT Investment's corporate status was related to its failure to pay taxes to the California Franchise Tax Board. Before respondent could attempt to revive the company, creditors took LDT Investments and her into bankruptcy. Respondent estimates that she had invested into LDT Investments, and lost, $1 million of funds and property.

48. Respondent testified that she currently works part-time for her brother's cleaning company. She has over 12 years' experience in the escrow business. She is not currently involved in escrow or real estate, though she would like to try again in the future.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Commissioner has the authority to administer and enforce the California Escrow Law. (Fin. Code, § 17000 et seq.)

2. As the party bringing administrative charges and seeking administrative action against respondent, complainant bears the burden of proof. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.)

3. A. Pursuant to Evidence Code section 115, "Except as otherwise provided by law, the burden of proof requires preponderance of the evidence."

B. The Escrow Law is silent as to which standard of proof applies. But it is well established that the applicable standard of proof in an administrative matter depends upon the nature of the license or authorization at issue. In a disciplinary action against a professional license, the governing agency bears the burden of establishing cause for discipline by clear and convincing proof to a reasonable certainty. (*Ettinger v. Board of Med. Quality Assurance* (1982) 135 Cal.App.3d 853, 857.) This is because a professional license represents the licensee's fulfillment of extensive education, training and testing requirements; the licensee has an extremely strong interest in retaining the license that she has expended so much effort in obtaining. The same cannot be said for a licensee's interest in retaining a non-professional license. Thus, the revocation of a non-professional license requires only the preponderance of the evidence standard. (*Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889.)

C. In order to obtain an escrow agent's license, an applicant must join the EAFC; obtain a fiduciary bond; meet the minimum financial requirements; obtain a surety bond, undergo a historical background check; hire an escrow manager with a minimum of five years' experience; and sign an affidavit certifying that he/she has read and is familiar with the Escrow Law and regulations. (Fin. Code, §§ 17200, 17200.8, 17201, 17202.1, 17203, 17203.1, 17207, 17209, 17209.1, 17210, & 17320.) Those are almost perfunctory requirements. In the absence of extensive education, training and testing requirements, it cannot be concluded that an escrow agent's license is a professional license requiring a higher standard of proof. It must also be remembered that respondent does not even have a license or authorization under the Escrow Law, which is further evidence that the lower standard should apply.

D. Accordingly, the standard of proof applicable to respondent in this case is the lower preponderance of the evidence standard.

Cause for Administrative Action Against Respondent

4. Financial Code section 17423 provides, in pertinent part:

> (a) The commissioner may, after appropriate notice and opportunity for hearing, by order, censure or suspend for a period not exceeding 12 months, or bar from any position of employment, management, or control any escrow agent, or any other person, if the commissioner finds either of the following:
>
> (1) That the . . . bar is in the public interest and that person has committed or caused a violation of this division or rule or order of the commissioner, which violation was either known or should have been known by the person committing or causing it or has caused material damage to the escrow agent or to the public.
>
> (2) That the person has been convicted of or pleaded nolo contendere to any crime, or has been held liable in any civil action by final judgment, or any administrative judgment by any public agency, if that crime or civil or administrative judgment involved any offense specified in subdivision (b) of Section 17414.1, or any offense reasonably related to the qualifications, functions, or duties of a person engaged in the business in accordance with the provisions of this division.

5. A. Failure to Report a Corporate Officer. Financial Code sections 17209 and 17212.1, as well as Regulation 1726, require that the Commissioner be informed in writing of the names of any officer, director, trustee, employee or other person directly or indirectly compensated by the escrow agent, before allowing the person to have access to moneys or negotiable securities belonging to or in the possession of the escrow agent, or to draw checks upon the escrow agent or the trust funds of the escrow agent.

B. In this case, respondent was an employee and officer with significant responsibilities at Diversity Escrow from its inception until October 2010, who, in that capacity, had access to moneys, checks and/or trust funds of the escrow agent. However, respondent's capacity with Diversity Escrow was not reported to the Commissioner while she was affiliated with it, in violation of sections 17209 and 17212.1, as well as Regulation 1726. (Factual Findings 5-17 & 29-33.)

C. Respondent's defense that she submitted to the EAFC a written notice of termination of her relationship in October 2010 does not absolve her of responsibility for this violation of the Escrow Law. Such notification was submitted after she had been affiliated with Diversity Escrow for a number of months, in the so-called position of "President." While respondent had previously notified the Commissioner that she was affiliated with an unrelated escrow company, it is unknown how the Commissioner would have known that she transferred from that entity to Diversity Escrow, unless she reported that to either the Commissioner or the EAFC. She did not. On these facts, the Commissioner would have had no formal knowledge of Respondent's affiliation with Diversity Escrow until after she terminated her relationship with it.

6. A. Regulatory Violations Discovered by the Special Examination. Examiner Kim's special examination disclosed that Diversity Escrow had also violated the Escrow Law by failing to use loan funds in accordance with written escrow instructions that caused debit balances and trust account shortages; issuing post-dated checks; failing to maintain books and records; causing overdrafts to occur in the trust account; and failing to meet tangible net worth and liquidity requirements. In so doing, Diversity Escrow violated Financial Code sections 17210, 17400, 17404, and 17414, as well as Regulations 1732, 1732.2, 1738, 1738.1, and 1738. (Factual Findings 18-28.)

B. However, it was not established by a preponderance of the evidence that respondent owned or controlled Diversity Escrow when those regulatory violations occurred, or that those violations were caused by her. Respondent had terminated her relationship with Diversity Escrow months before most of the violations occurred. The misconduct was clearly committed by Espitia, who was the manager and escrow officer of the company at the times in question. The evidence presented by complainant, while enough to raise suspicion concerning respondent's involvement in some of the violations, especially the improper trust fund disbursements, was ultimately insufficient to prove respondent's responsibility for those violations by a preponderance of the evidence. (Factual Findings 29-33.)

7. Misstatement or Omissions in Escrow Documents. Based on the above, it was not established by a preponderance of the evidence, as alleged, that respondent knowingly or recklessly made or caused to be made misstatements or omissions to state material facts, orally or in writing, in escrow books, accounts, files, reports, exhibits, statements, or other documents pertaining to an escrow or escrow affairs during the period from October 2010 to February 2011 in violation of Financial Code section 17414, subdivision (a)(2). (Factual Findings 5-33.)

8. A. Financial Code section 17423, subdivision (a)(1), allows the Commissioner to take certain administrative action when it has been demonstrated that such action is in the public interest and the subject person has committed a violation of the Escrow Law, which violation was known or should have been known by that person, or when the violation has caused material damage to the public.

B. In this case, it was established that respondent violated the Escrow Law by failing to report in writing to the Commissioner her affiliation with Diversity Escrow during the approximate nine months that she held a significant position of responsibility with the company. Respondent has been in the escrow business for 12 years, she previously submitted a report of her affiliation with an unrelated escrow entity and she knew to submit a notice of termination to the EAFC when she left Diversity Escrow. Under these circumstances, it was established by a preponderance of the evidence that she knew, or should have known, of her reporting responsibility in this regard. In addition, respondent's failure to timely report to the Commissioner her affiliation with Diversity Escrow caused, to some extent, the confusion experienced by Examiner Kim, and aroused his reasonable suspicion, over respondent's involvement in Diversity Escrow's regulatory violations. A member of the public would have no way of knowing respondent's affiliation with Diversity Escrow until well after the fact, which is anathema to this part of the Escrow Law. In these regards, it is concluded that respondent's omission caused a material damage to the public.

9. A. Financial Code section 17423, subdivision (a)(2), similarly allows the Commissioner to take administrative action against a person who has been held liable in an administrative judgment by a public agency, of an offense reasonably related to the qualifications, functions, or duties of a person engaged in the escrow business. In this case, it was established by a preponderance of the evidence that respondent was held liable in such an administrative judgment by the Real Estate Commissioner.

B. In 2011, the Real Estate Commissioner issued a Desist and Refrain Order against respondent for violating a provision of the Escrow Law, i.e., Financial Code section 17006, subdivision (a)(4). The Real Estate Commissioner's order is a final administrative judgment by a public agency. In that order, the Real Estate Commissioner concluded, as a matter of law, that respondent had engaged in unlicensed escrow activity, as it related to a real estate transaction in which she was further unlicensed to engage. Unlicensed escrow activity is reasonably, if not substantially, related to the qualifications, functions or duties of an escrow agent or officer, in that it demonstrates the present or potential unfitness of respondent to act in the escrow business in a manner consistent with the public interest.

C. Based on the above, it was established by a preponderance of the evidence that respondent has been held liable, in an administrative judgment by a public agency, of an offense reasonably related to the qualifications, functions, or duties of a person engaged in the escrow business, within the meaning of Financial Code section 17423, subdivision (a)(2). (Factual Findings 34-39.)

Disposition

10. A. Financial Code section 17423 provides the Commissioner with discretion to censure, suspend up to 12 months, or bar a person who has violated the Escrow Law. While the Commissioner in this case requests simply to bar respondent from any involvement in the escrow business, section 17423 does not support an election of remedies situation that would eliminate the other forms of administrative action from being available.

B. In this case, complainant failed to prove the heart of her case, i.e., respondent was the unstated principal of Diversity Escrow when its regulatory violations occurred and caused over $1 million of damages, or at least that she was responsible for urging Espitia to make improper disbursements of trust funds. However, complainant did establish that respondent failed to timely report her affiliation with Diversity Escrow as required by the Escrow Law, and that the Real Estate Commissioner had previously taken administrative action against her for essentially unlicensed escrow and real estate activity. The extent of Respondent's misconduct in that case cannot be assumed and it was not established by a preponderance of the evidence. On these facts, respondent's misconduct is viewed as being moderate, neither so severe as to warrant a permanent bar from the escrow business, nor so minor as to support a simple censure. This finding is supported by the aggravating fact that respondent was not completely candid in this case.

C. Based on the above, the public will be adequately protected by a one-year suspension against respondent, given her moderate level of misconduct established in this case. (Factual Findings 1-48 & Legal Conclusions 1-9.)

ORDER

Respondent Diana Lopez is suspended from any employment, management, or control of any escrow agent for the period of 12 months from the effective date of this Decision.

DATED: August 28, 2015

/s/

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings