BEFORE THE
DEPARTMENT OF CORPORATIONS
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, vs. GINA SIMNOWSKI, Respondent.	File No.: 963-1155 OAH No. L2001110583

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on 4/12/2002.

IT IS SO ORDERED 4/12/2002.

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PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings on February 27 and 28, 2002, in Los Angeles, California.

Complainant was represented by Judy L. Hartley, Senior Trial Counsel, Enforcement and Legal Services Division, Department of Corporations.

Respondent Gina Simnowski was present and represented by Loren Nizinski, Esq., Ahtirski & Nizinski, 14622 Victory Boulevard, 2nd Floor, Van Nuys, California 91411.

The case was submitted for decision on February 28, 2002.

FACTUAL FINDINGS

1. Demetrios A. Boutris (complainant) is the California Corporations Commissioner. He filed an Accusation dated November 7, 2001, seeking to bar Gina Simnowski (respondent) from any position of employment, management or control of any escrow agent.

2. Respondent was at all times relevant to this matter an escrow officer at the Encino Branch of Mara Escrow Company (Mara), an escrow agent licensed by the California Corporations Commissioner pursuant to the Escrow Law of the State of California. (Fin. Code, § 17000 et seq.)

3. Department of Corporations Examiner Reynaldo O. Atienza commenced a regulatory examination of the books and records of Mara on August 3, 2000. As a result of this regulatory examination complainant determined and now alleges that respondent failed to follow instructions in two separate escrows and that she violated other provisions of Escrow Law. Specifically, complainant contends that respondent, in connection with two escrows, did not comply with lender instructions and that she prepared false receipts, false settlement and false closing statements. Complainant also alleges that respondent failed to submit pre-release amendments to lenders and that she made two unauthorized disbursements of trust funds.

Background

4. The two escrows in this case were separate, but they were also related in terms of certain monetary transactions and in terms of the seller in one transaction being the buyer in the other transaction. Escrow No. 5-17690-MB (Escrow A) involved the sale of a $1 million property. Escrow A was opened on February 17, 2000. The seller was Miriam Aghchay and the buyer was Derek Aghchay. Escrow instructions called for a cash down payment of $250,000, with the balance of $750,000 to be financed through a new first trust deed loan. Amended escrow instructions dated March 3, 2000, provided for a lower sales price of $950,000 with a down payment of $238,000 and a new first trust deed loan of $712,500. Washington Mutual Bank was the lender in this transaction. Its Lender's Escrow Instructions specified that:

> This is to be an all-cash transaction, unless specifically shown to be otherwise in the Earnest Money/Purchase and Sale Agreement. There is not to be any other financing, secondary financing, or other charges without express written approval from the lender. ...
>
> Lender is not aware of any Mortgage Broker or other third party involvement in this transaction. If a Mortgage Broker or third party is involved, do not close this transaction. Immediately return any final loan documents and funds that Lender has provided, and notify Lender of any broker and third party charges. Lender will redraw final loan documents and/or provide new Lender's Escrow Instructions.
>
> (Emphasis in original.)

5. Escrow No. 5-17460-GS (Escrow B) involved the sale of a $360,000 property. Escrow B was opened on January 11, 2000. The seller was Derek Aghchay, the buyer in Escrow A. The buyer in Escrow B was initially Shahrogh Nasseri, and then the buyer was changed to Shadi Mohajer per amended escrow instructions dated June 14, 2000. Escrow B instructions called for a down payment of $36,000 with the balance of $324,000 to be financed through a new first trust deed loan. Amended Escrow Instructions dated June 23 lowered the sales price by $2000 to $358,000. The down payment was changed to $12,961 and the new first trust deed loan was changed to $345,039. Equicredit Corporation was the lender in this transaction. A total cash down payment of $17,900 was due from the buyer at

closing. Mijean Park was Equicredit's loan processor and account executive for this transaction. Ms. Park notes that the 5 percent down payment ($17,900) was to come from the borrower and that if she had ever been made aware that money deposited into escrow came from someone other than the borrower the transaction would have been stopped. Ms. Park at that point would have needed to refer the transaction to underwriting or to a branch manager for further review and approval.

6. Five monetary transactions through these two escrows form the basis for allegations in this case. The amounts involved and the flow of funds are described below in no particular order:

a. $19,500. Two checks totaling $19,500 were deposited into Escrow B on March 15, 2000, and were handled by respondent. She prepared receipts indicating that they were received from Sharogh Nasseri, the buyer. One of the checks ($7500) indicated that the remitter was Derek Aghchay, the buyer. Amended Escrow Instructions dated March 15, 2000 were prepared authorizing the release of $19,500 to Derek Aghchay. Mr. Aghchay had also executed an earlier (March 14, 2000) Amended Escrow Instruction calling for the transfer of funds from Escrow B to Escrow A. By check dated March 15, 2000, respondent arranged for the transfer of $19,500 from Escrow B to Escrow A. This check was deposited into Escrow A on March 15. Respondent prepared a deposit receipt dated March 15 indicating that the $19,500 had been received from Escrow B. Respondent then disbursed $19,500 out of Escrow A to Maryam Aghchay. This was also on March 15, 2000.

b. $100,000. (Afkhamirad) A check for $100,000 made payable to Mara Escrow was received from Mehdi Afkhamirad. Printed on the check was escrow number "5-17690 MB" (Escrow A). Respondent crossed this number out and hand wrote "5-17460 GS" (Escrow B). She also prepared a receipt indicating that $100,000 had been received March 15, 2000 into Escrow B from Mehdi Afkhamirad for the benefit of Shahrogh Nasseri. Amended Escrow Instructions were prepared authorizing release of these funds prior to close of escrow to Derek Aghchay. That same day $100,000 was transferred from Escrow B to Escrow A. Respondent prepared a trust receipt indicating that $100,000 had been received from Escrow B. Amended Escrow Instructions for Escrow A were then prepared authorizing the release of funds prior to close of escrow to Mehdi Afkhamirad. A check dated March 15, 2000, for $100,000 made payable to Mehdi Afkhamirad was then drawn from Escrow A. The entire transaction occurred on one day.

c. $100,000. (Kodama) Derek Aghchay brought two checks totaling $100,000 to Mara on March 16, 2000, to be deposited into Escrow A. One check ($90,000) indicated that the remitter was Victor Kodama. Michelle Budd prepared the receipts for both checks. The two receipts indicated that the checks were received from Derek Aghchay. No third party deposit instruction was found in the file. On the same day a $100,000 check was disbursed to Victor Kodama out of Escrow A.

There were no escrow instructions in the file authorizing this disbursement. The closing statement describes this disbursement as a charge to the seller.

d. $20,000. Derek Aghchay brought a $20,000 check dated March 15, 2000 to be deposited into Escrow A. Respondent prepared a receipt indicating that these monies had been received from him on March 15. That same day a check for $20,000 was disbursed out of Escrow A to Maryam Aghchay. There were Amended Escrow Instructions, dated March 9, 2000, authorizing the release of these funds prior to close of escrow to Maryam Aghchay. These Amended Escrow Instructions were not submitted to the lender. The HUD-1 Settlement Statement did not indicate that the $20,000 disbursement to Maryam Aghchay was pre-closing.

e. $4,000. Derek Aghchay brought a $4,000 check dated March 15, 2000 to be deposited into Escrow A. It was receipted that same day by respondent. A $4,000 disbursement out of Escrow A made payable to Maryam Aghchyay was made on August 1, 2000. The HUD-1 Settlement Statement misrepresented that the $4,000 had been disbursed to Mehdi Afkhamirad per instructions. Amended Escrow Instructions for Escrow A had been prepared on March 15, 2000, and signed by the seller, authorizing disbursement of $104,000 to Mehdi Afkhamirad. A letter from Mr. Afkhamirad to Mara confirms that he expected to receive $104,000, and not the $100,000 that he received on March 15 from Mara. He characterized his initial deposit as "a $100,000 Loan to the above reference escrow number." (Mr. Afkhamirad's letter referenced Escrow A.)

Secondary Financing/Third Party Involvement

7. Lender's Escrow Instructions for Escrow A specifically precluded any secondary funding or third party involvement without express written approval of the lender. (See Finding 4.) If this occurred the transaction was not to close. A $238,000 down payment from the buyer was required for Escrow A. Per Findings 6b and 6c, at least $200,000 of monies deposited into Escrow A involved third parties. Disbursements of $100,000 each to Mr. Afkhamirad and Mr. Kodama from Escrow A were made the same day that deposits into escrow, from these same individuals, were made on behalf of Derek Aghchay.

In Escrow B, a down payment of $36,000, later amended to $12,961, was to be deposited by the buyer. No down payment was received into escrow from the buyer. Instead, $19,500 was deposited from the seller, and then transferred to Escrow A. Another $100,000 was received from Mehdi Afkhamirad and immediately transferred to Escrow A.

8. In connection with these two escrows, it was established that respondent closed both escrows without having first received the down payments and closing costs as required by the lender's escrow instructions. The funds deposited into escrow came from third parties in Escrow A. For Escrow B, the funds on deposit were from the buyer and a third party, Mehdi Afkhamirad. Respondent avers that the $100,000 deposit from Mr. Afkhamirad into

Escrow B was an error that she corrected by subsequent transfer of his funds to Escrow A. Regardless, no funds were deposited by the buyer in Escrow B as required by escrow instructions.

Such disbursement of escrow funds from Escrows A and B by respondent was, at the very least, reckless and not in accordance with escrow instructions.

Misrepresentations on Escrow Documents

9. Complainant avers that respondent's actions in depositing and routing Mr. Afkhamirad's funds through Escrow B into Escrow A constituted a misstatement or omission to state a material fact on an escrow document. By routing the $100,000 through Escrow B, it was easier to disguise the fact that the funds originated with a third party, Mr. Afkhamirad, and not Derek Aghchay. For example, the receipt that respondent prepared for the transfer of $100,000 between escrows only indicates that monies were transferred from "Mara Escrow No. 5-17460-GS." There is no way of knowing whether these funds originated from a third party. Respondent cannot recall why the money was first deposited into Escrow B. She characterizes it as a mistake and notes that it was never her intent to mislead lenders. In hindsight, she acknowledges that she should have reversed out the receipt.

Respondent's explanation is not credible. The check from Mr. Afkhamirad had the correct escrow number printed on its face, and respondent crossed it out and wrote instead the number for Escrow B. She then went through the additional trouble of preparing Amended Escrow Instructions to transfer these sums from Escrow B to Escrow A, and then having these amendments signed by the parties to Escrow B. At the time, Escrow B was relatively dormant. It did not close until the end of June 2000. The required down payment in Escrow B was relatively small, nothing close to $100,000. There was absolutely no reason for a deposit of this amount to be made into Escrow B. The fact that after the $100,000 was transferred from Escrow B to Escrow A it was immediately returned to Mr. Afkhamirad further suggests that the whole transaction was carefully planned from the point of respondent's initial deposit of the monies into Escrow B. For these reasons it was established that respondent knowingly caused the $100,000 to be deposited in Escrow B, instead of Escrow A, and that such constituted misrepresentation of material facts on an escrow document.

10. It was also established that on March 15, 2000, respondent prepared a receipt that misrepresented that Mehdi Afkhamirad had deposited the sum of $100,000 into Escrow B on behalf of then buyer Shahrogh Nasseri. She knew that these funds were a loan from Mr. Afkhamirad specifically designated for Escrow A.

Similarly, on March 15, 2000, respondent prepared a receipt that misrepresented that the buyer, Shahrogh Nasseri, had deposited the sum of $7,500 into Escrow B. The $7,500 check was actually from the seller, Derek Aghchay, and this information was apparent from the face of the check where his name appears as the remitter.

11. It was not established that respondent prepared, or caused to be prepared, two receipts that misrepresented that Derek Aghchay had deposited $100,000 into Escrow A. These funds were received into escrow by Michelle Budd and she, not respondent, prepared the receipts for the two checks. (See Finding 6c.)

12. In connection with Escrow A, at no time did respondent or Mara submit to the lender, Washington Mutual Bank, the following escrow instruction amendments:

a. March 9, 2000 escrow instruction amendment that instructed escrow to pay the sum of $19,500 to the seller prior to close of escrow.
b. March 9, 2000 escrow instruction amendment that instructed escrow to pay the sum of $20,000 to the seller prior to close of escrow.
c. March 15, 2000 escrow instruction amendments that instructed escrow to pay the sum of $104,000 to Mehdi Afkhamirad prior to close of escrow.

Respondent avers that the amendments were forwarded to Washington Mutual Bank after escrow closed, along with the closing documents. However, she confirms that Mara's file for Escrow A contains no transmittal letters to Washington Mutual Bank that reference these amendments. Lydia Contreras is a loan processor with Washington Mutual Bank. She confirms that these escrow instruction amendments were not contained in the bank's loan file either. She has no independent recollection of ever seeing them and notes that had she been aware of these amendments she would have submitted them to the bank's underwriter for review and the transaction would have ceased at that point.

13. In connection with Escrow B, at no time did respondent or Mara submit to the lender, Equicredit Corporation, the following escrow instruction amendments:

a. March 14 and 15, 2000 escrow instruction amendments that instructed escrow to release the sum of $19,500 prior to close of escrow to Escrow A.
b. March 14 and 15, 2000 escrow amendments that instructed escrow to release the sum of $100,000 prior to close of escrow to Escrow A.

Respondent believes that she forwarded this amendment information to Equicredit Corporation with the loan documents (note and trust deed). She confirms that no transmittal letters in the file for Escrow B reference these amendments. Mijean Park further confirms that these four documents were not in Equicredit's loan file and she has no independent recollection of receiving or seeing them. Ms. Park notes that there was no reason for $100,000 to have come into this escrow and that had she been aware of these amendments she would have stopped the transaction and researched it.

14. Respondent prepared, or caused to be prepared, a Closing Statement for Escrow A. It references March 16, 2000, as the closing date. Under Deposits, it indicates that the $100,000 deposit was "By: Escrow No. 5-17460-gs." It does not name Mehdi Afkhamirad as the depositor. Under Disbursements Paid, it indicates that $4,000 was paid to Mehdi Afkhamirad, and this never occurred.

A HUD-1 Settlement Statement for Escrow A shows disbursements of $19,500 and $20,000 to Maryam Aghchay, but does not indicate that these disbursements were pre-closing. It also indicates that $4,000 had been disbursed to Mehdi Afkhamirad. Line 200 of the HUD-1 asks for "Amounts Paid by or on Behalf of Borrower." It is blank. Line 201 is for "Deposit or earnest money" and it lists $243,500.

15. The HUD-1 Settlement Statement for Escrow B shows a settlement date of June 29, 2000. There are no references to the $119,500 that went in and out prior to close of escrow. (See Findings 6a and 6b.) Respondent notes that this information was included in the Estimated Closing Statement prepared on June 23, 2000. Once this information was inputted into Mara's database, the computer normally causes it to appear on both the HUD-1 and Closing Statement forms. There is no explanation why this did not happen here. Accordingly, it was not established that respondent was responsible for the omission of the $119,500 transaction on the HUD-1 Settlement Statement for Escrow B.

Unauthorized Disbursements

16. Amended Escrow Instructions dated March 15, 2000 for Escrow A instructed the escrow holder to disburse $104,000 to Mehdi Afkhamirad, upon close of escrow. These instructions were signed by the seller, Maryam Aghchay. Respondent failed to disburse this entire sum to Mr. Afkhamirad. She paid him $100,000. Respondent explains that she did not accept the March 15 amended instructions because it was was not signed by both parties. Department of Corporations Special Administrator in Escrow, Steven Thompson, notes that there is nothing improper about an instruction signed only by the seller, especially since the disbursement was to be made upon close of escrow. It was an appropriate instruction and one that could be prepared prior to close of escrow.

Importantly, the HUD-1 Settlement Statement for Escrow A shows that Mr. Afkhamirad had been paid the additional $4,000 and this was not accurate. Respondent notes that it should have been shown on the HUD-1 Settlement Statement as a hold. The $4,000 was held in escrow until August 1, 2000, when it was disbursed to Maryam Aghchay. There were no amended escrow instructions or other authorization for this disbursement contained in the escrow file.

17. Complainant also contends that the March 16, 2000, disbursement from Escrow A of $100,000 to Victor Kodama was unauthorized. It was established that there was no escrow instruction in the escrow file authorizing this disbursement. However, respondent had no involvement in this transaction. Michelle Budd received the monies, prepared the receipts and issued the check for this transaction. (See Finding 6c.)

Other Matters

18. Respondent has worked twenty years in escrow and is quite familiar with escrow duties. She began working at Mara in January 2000. With regard to accepting monies brought into escrow she believes it is not part of her duties to question the source of

funds. She essentially thanks the individuals who drop off the money and prepares receipts. She understands that the receipts should be in the name of the remitter, but if no remitter is indicated she typically prepares receipts in the name of the party (usually borrower) for whose benefit monies are being deposited. Disbursements are made pursuant to amended escrow instructions, invoices, closing instructions or cancellation. All pre-closing disbursements are made per amended escrow instructions.

Respondent sees no problems with the major transactions in this case where there were amended escrow instructions signed by the parties authorizing the disbursements. The amounts of money flowing through escrow caused her no alarm. She understood that Derek Aghchay was the seller in Escrow B and that the payoff from that escrow would be available to him. She had no problem with his transfer of $19,500 from Escrow B to Escrow A. As noted earlier, she characterizes the deposit of $100,000 from Mr. Afkhamirad into Escrow B as a mistake and she had nothing to do with the $100,000 transaction involving Victor Kodama. She believes she forwarded all amendment information to the two lenders.

Respondent contends that no monies were disbursed contrary to escrow instructions. She suggests that it was common to have such large amounts going in and out of escrow the same day, particularly since these transactions occurred the day just prior to close of escrow. She avers that she neither knew the parties in this case nor their relationships, and that it is ridiculous to suggest that she worked with them to defraud any lender. She would have no incentive to do so. Her job is to simply accept funds, hold them and disburse them per instructions. She has no motive to hide or move funds around, particularly where the lenders have already verified that sufficient buyer funds were on deposit to support funding both loans. In short, respondent argues that she was just following instructions and that there is no evidence that she was part of any plan to defraud the lenders. At worse, respondent may have been used unwittingly by the buyer and seller in these transactions.

19. As noted in Finding 9, it does appear that respondent's involvement was knowing and deliberate. Monies were being recycled to make it appear that required deposits were made into escrow. She knew the monies originated from a third party and that lender's instructions for Escrow A specifically prohibited secondary financing or third party involvement. Respondent received a $100,000 check from a third party, Mr. Afkhamirad. She purposely receipted it into Escrow B and thereby masked the source of funds. She then prepared all documentation for an inter-escrow transfer of funds that made it appear that buyer's funds were being deposited into Escrow A, and she finally prepared amended escrow instructions for disbursement of the full amount back to Mr. Afkhamirad, all in one day. The lender never received the escrow amendments and there was testimony that the lenders would have questioned the transactions had they been aware of these matters. The Final HUD-1 Settlement Statement continued to mask the source of the down payment. The line for amounts paid by or on behalf of borrower was left blank. Instead, the buyer was given full credit for $243,500 as his "Deposit or earnest money."

Respondent participated in each step and prepared all documents in connection with this transaction. She was not blind to what was happening – essentially receiving and

returning $100,000 to a third party in the course of a day. Such actions belie her suggestion that she simply made a mistake, or that her involvement was unwitting. Her actions also compromised the integrity of what should be an independent escrow system. That she continues to find nothing unusual or inappropriate about these transactions raises serious questions about her fitness to continue working as an escrow officer.

LEGAL CONCLUSIONS

1. California Financial Code section 17414, subdivisions (a)(1) and (a)(2) provides:

> (a) It is a violation for any person subject to this division or any director, stockholder, trustee, officer, agent, or employee of any such person to do any of the following:
>
> (1) Knowingly or recklessly disburse or cause the disbursal of escrow funds otherwise than in accordance with escrow instructions, or knowingly or recklessly to direct, participate in, or aid or abet in a material way, any activity which constitutes theft or fraud in connection with any escrow transaction.
>
> (2) Knowingly or recklessly make or cause to be made any misstatement or omission to state a material fact, orally or in writing, in escrow books, accounts, files, exhibits, statements, or any other document pertaining to an escrow or escrow affairs.

2. Escrow instructions govern all escrow disbursements, transfers and transactions. Thus, California Code of Regulations, title 10, section 1738 provides:

> All money deposited in such 'trust' or 'escrow' account shall be withdrawn, paid out, or transferred to other accounts only in accordance with the written escrow instructions of the principals to the escrow transaction or pursuant to order of a court of competent jurisdiction.

Similarly, California Code of Regulations, title 10, section 1738.2 provides:

> An escrow agent shall use documents or other property deposited in escrow only in accordance with the written escrow instructions of the principals to the escrow transaction, or if not otherwise directed by written instructions, in accordance with sound escrow practice, or pursuant to order of a court of competent jurisdiction.

3. The California Corporations Commissioner may suspend or bar from any position of employment, management or control of any escrow agent if it is determined that the suspension or bar is in the public interest and "that the 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." (Fin. Code, § 17423, subd. (a)(1).)

4. Cause exists for disciplinary action against respondent under Financial Code sections 17423 and 17414, subdivision (a)(1), by reason of the matters set forth in Findings 7, 8, 14 and 16. Respondent knowingly or recklessly disbursed or caused the disbursal of escrow funds otherwise than in accordance with escrow instructions. (See also Cal. Code Regs., tit. 10, §§ 1738 and 1738.2.)

5. Cause exists for disciplinary action against respondent under Financial Code sections 17423 and 17414, subdivision (a)(2), by reason of the matters set forth in Findings 9, 10, 12, 13 and 14. Respondent knowingly or recklessly made or caused to be made material misrepresentations pertaining to escrow.

6. Other violations alleged under Financial Code sections 17423 and 17414 were not established. (See Findings 11, 15 and 17.)

7. The matters set forth in Findings 18 and 19 were considered in making the following Order. It would not be in the public interest for respondent to continue working as an escrow officer at this time.

ORDER

Respondent Gina Simnowski is barred from any position of employment, management or control of any escrow agent pursuant to Legal Conclusions 4 and 5, jointly and individually.

DATED: March 13, 2002

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings