BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	File No.: 963-1967
	OAH No.: L2005110304
DII ESCROW CORP., and HENRY MELENZEZ	
Respondents.	

DECISION

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

This Decision shall become effective on MAY 26, 2006.

IT IS SO ORDERED this 25TH day of MAY 2006.

CALIFORNIA CORPORATIONS COMMISSIONER

WAYNE STRUMPFER
Acting California Corporations Commissioner

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PROPOSED DECISION

This matter came for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on February 23, 2006.

Judy L. Hartley, Senior Corporations Counsel, represented complainant Wayne Strumpfer.

Anton Plese, Attorney at Law, represented DII Escrow Corp (respondent DII) and Henry Melendez (respondent Melendez).

Complainant seeks to revoke respondent DII's escrow license and to bar respondent Melendez from any position of employment, management, or control of any escrow agent because respondents allegedly continued to conduct escrow business during a period of suspension and falsified records to hide such activity. Respondents deny the allegations and assert that cause for discipline does not exist.

The parties presented oral and written evidence at the hearing and the matter was thereafter submitted for decision.

FACTUAL FINDINGS

1. Complainant filed the Accusation solely in his official capacity as Acting California Corporations Commissioner, Department of Corporations (Department).

2. Respondent DII is a California corporation, incorporated on May 16, 2002. On September 24, 2002, the California Corporations Commissioner (Commissioner), acting pursuant to the Escrow Law of the State of California (California Financial Code[1] section 17000 et seq.), issued a license to respondent DII to engage in the business of an escrow agent. Respondent DII has its principal place of business at 1050 Lake Drive, Suite 120, West Covina, California.

3. Respondent Melendez is, and at all times material has been, the president and sole shareholder of respondent DII.

4. In 2004, respondent Melendez also owned three affiliated companies, Dynamic Investments, Inc. and Dynamic Lending, which were in engaged in the real estate loan brokerage business, and Dynamic Realty, a real estate brokerage firm.

5. On September 23, 2004, the Commissioner issued a Decision suspending respondent DII's license for fifteen consecutive calendar days (Disciplinary Decision). The Disciplinary Decision was issued after a hearing before Office of Administrative Hearings Administrative Law Judge Timothy S. Thomas, in which he found that respondent DII had allowed funds to be deposited with affiliates rather than to its escrow account and had recklessly caused the disbursal of escrow funds other than in accordance with escrow instructions.

6. On September 29, 2004, the Commissioner, by Steven C. Thompson, Special Administrator, California Escrow Law, issued an Order Suspending Escrow Agents License (Order) in accordance with the Disciplinary Decision. The Order, served on respondents on September 29, 2004, stated that "the escrow agent's license issued to DII Escrow Corp. is suspended for a period of fifteen (15) consecutive calendar days commencing on October 21, 2004, during which period DII Escrow Corp. shall not accept any new escrow business, but may continue to service prior and existing escrows . . . ." The Order directed respondent DII to submit a list of all escrows open as of October 21, 2004.

7. By letter dated October 20, 2004, Respondent DII submitted a list of open escrows as of that date. The list included the escrows set forth in factual finding numbers 9, 11, 12, 13, and 15. Escrow officer Jill Prentice (Prentice) informed the Department that respondent DII would not accept any new business during the suspension period and that it would use the time to implement a new software program and to train employees on newly established policies and procedures.

8. Department Examiner Yong Hi Kristie Jaynes (Jaynes) conducted a regulatory examination of the books and records of respondent DII, commencing June 3, 2005. She issued a report on June 26, 2005, revised on September 9, 2005, concluding that respondent DII violated the Disciplinary Decision by opening new escrows during the suspension period and by falsifying records to mask the opening dates of the escrows in question.

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[1] All further references are to the Financial Code.

9. a. Respondent DII's escrow log showed a spike in the number of escrows opened the day before the suspension was to take effect. Respondent DII opened an average of 2.4 escrows per day over the September 1, 2004 through December 30, 2004 period, exclusive of October 20 and November 5, 2004. However, on October 20, 2004, it opened 31 new escrows, of which 15 listed the lender as Dynamic Lending, an affiliated company owned by respondent Melendez. The escrows were given numbers 2901 to 2931, inclusive.

b. Of the 31 escrows listed in the log as opened on October 20, 2004, 24 of them, including 14 of those with Dynamic Lending as lender, involved refinances.

c. Of the 31 escrows listed as opened on October 20, 2004, 13 were cancelled, nine by Dynamic Lending. Six others were closed less than two months later: November 23, 2004 (two); November 24, 2004 (two); December 6, 2004 (one); and December 8, 2004 (one). One was never activated, despite having received a number.

d. Jaynes reviewed the folders for each of the escrows purportedly opened on October 20, 2004, and some of them were empty or contained minimal documentation, including escrow numbers 2902, 2904, 2914, and 2942.

e. In the October 20, 2004, letter to the Department, respondent DII listed escrow number 2905 as an open escrow, but did not include the name of the buyer. Also, escrow number 2927 listed the buyer as Taylor Munoz, whereas the last name of the actual homeowners in the refinance was Pfau.

f. A fair inference to be drawn from the foregoing is that respondent DII assigned escrow numbers to several non-existent escrows in order to assign those numbers to escrows actually opened during the suspension period. Dummy escrows not actually opened were then cancelled after respondent DII could legitimately open escrows on November 5, 2004.

10. The escrow log indicates that 11 escrows, numbers 2932 to 2942, inclusive, were opened on November 5, 2004.

11. Ana Warner (Warner), an escrow officer employed by respondent DII, purportedly opened Escrow number 2905, designated as Escrow number 2905-AW in the Accusation, on October 20, 2004. She wrote the date and her name on a Residential Purchase Agreement and Joint Escrow Instructions dated October 19, 2004. However, a counter offer was accepted on October 22, 2004, making this the likely date the instructions would have been forwarded to respondent DII. The Sale Escrow Instructions, also prepared by Warner and dated October 20, 2004, refer to the sale price of $435,000, an amount agreed upon by the parties to the underlying real estate transaction on October 22, 2004.

12. Escrow officer Carol Virginia De Bari (De Bari) purportedly opened escrow number 2927, or 2927-CVD, on October 20, 2004, as indicated by the escrow log and escrow instructions prepared by Respondent DII. However, a document by an independent mortgage broker, Prime Financial, indicates that the homeowners actually sought to refinance their home on October 28, 2004.

13. Warner was the handling officer of escrow number 2930, or 2930-AW. The escrow log and instructions refer to an opening date of October 20, 2005, but a document by an independent mortgage broker, Sherman Oaks Mortgage, indicates that the homeowners actually sought to refinance their home on October 28, 2004.

14. Respondent DII backdated escrow instructions in escrow numbers 2905, 2927, and 2930 to October 20, 2004, to falsely represent that the escrows were opened on October 20, 2004.

15. a. De Bari purportedly opened escrow number 2934, or 2934-CVD, on November 5, 2005. The Residential Purchase Agreement and Joint Escrow Instructions were dated October 25, 2004, with counter offers dated October 26, 27, and 29, 2004, the last of which was accepted on October 30, 2004. The last counteroffer contained the following provision: "Buyers and seller agree that escrow will [not] be open until November 5, 2004 due to escrow company going through software conversion."

b. The buyers wrote an earnest money check for $2,000 on October 25, 2004. A file receipt for the $2,000 was dated October 25, 2004 and listed escrow number 2934. The October 29, 2004 counter offer stated that "Earnest money deposit to be $2,000 and to be deposited with DII Escrow Corporation on November 5, 2004."

c. The delay in the opening of escrow until the day after the suspension ended, the reference to the software conversion, and the check and receipt dated October 25, 2004, all indicate involvement by respondent DII in the transaction during the period respondent DII was prohibited from opening new escrows. Respondent DII's mere deferral of the opening of the escrow, rather than outright rejection, constitutes the opening of an escrow during the suspension.

16. Credible evidence, such as real estate transaction documents and loan documents completed by independent third parties, establishes that respondent DII in fact opened at least four escrows, numbers 2905, 2927, 2930, and 2934, during the October 21 to November 4, 2004 period of suspension.

17. The unusual opening of 31 escrows on the day before the suspension was to begin, the subsequent backdating of escrow documents, and the deferral of an escrow opening, as set forth in factual finding numbers 9 through 16, evidence a scheme or plan to evade the suspension and the requirements of the Disciplinary Decision.

18. Respondent further testified that he informed all escrow employees about the suspension and that he stressed they could not open any escrows during the suspension.

19. Respondent Melendez testified that he hired Prentice as the manager to run respondent DII and that he was not involved in the company's day-to-day operations. He nevertheless visited the company on a daily basis and was involved in important business decisions. He stated that he hired De Bari to increase the volume of the escrow business, which she did from January to August 2004, as respondent DII averaged 20 to 30 escrows per day. While this explains that respondent DII achieved 30-day escrow opening figures in the past, it does not negate the 2.4 average prior to October 20, 2004, or explain the spike on the day before the suspension was to take effect. Respondent also testified that he had to let her go in early December 2004 because she did some things that did not make sense to him, such as changing the fee structure. Respondent stated he also terminated a number of employees at Dynamic Lending in November and December 2004, after receiving complaints about their behavior, and that they retaliated by canceling pending escrows and taking their business elsewhere.

20. Despite respondent Melendez' assertions to the contrary, the evidence presented at the hearing, and the logical inferences that flow from the evidence, particularly the scope and scale of a plan that involved multiple employees, establish that he knew that respondent DII continued to open escrows during the suspension period and falsified escrow records to cover such operations. Moreover, he is the president of respondent DII and the person with both the incentive and the ability to devise and carry out the plan and cover-up.

21. Even if it were assumed that respondent Melendez had no actual knowledge or involvement in the plan to continue opening escrows during the suspension or the falsification of records attendant to such plan, his failure to supervise employees and manage respondent DII in accordance with the requirements of the Escrow Law, particularly after the issuance of Disciplinary Decision, constitutes reckless and/or willful participation in the violations and dishonesty.

LEGAL CONCLUSIONS

1. The Commissioner may, after notice and a reasonable opportunity to be heard, suspend or revoke any license if he finds that the licensee has violated any provision of the Escrow Law or any rule of the Commissioner. (Fin. Code §17608).

2. Cause exists to discipline respondent DII's license pursuant to Financial Code sections 17200 and 17600 in that respondent DII opened new escrows during the period of October 21 to November 4, 2004, despite the suspension of its escrow agent license, by reason of factual finding numbers 2 through 17.

3. Cause exists to discipline respondent DII's license pursuant to Financial Code sections 17404, 17414, subdivision (a)(2), and 17702, in that respondent DII knowingly, recklessly, and willfully falsified escrow records and submitted false information to the Commissioner, by reason of factual finding numbers 2 through 17.

4. Cause exists to bar respondent Melendez from any position of employment, management, or control of any escrow agent pursuant to Financial Code sections 17200, 17423, subdivision (a)(1), and 17600 in that respondent Melendez caused respondent DII to open new escrows during the period of October 21 to November 4, 2004, despite the suspension of its escrow agent license, by reason of factual finding numbers 2 through 21.

5. Cause exists to bar respondent Melendez from any position of employment, management, or control of any escrow agent pursuant to Financial Code sections 17404, 17414, subdivision (a)(2), 17423, subdivision (a)(1), and 17702 in that respondent Melendez caused respondent DII to falsify escrow records and submit false information to the Commissioner, by reason of factual finding numbers 2 through 21.

6. Barring respondent Melendez from any position of employment, management, or control of any escrow agent is in the public interest, in light of the established violations and respondent Melendez' involvement and failure to prevent the violations, by reason of factual finding numbers 2 through 21 and legal conclusion numbers 1 through 5.

ORDER

1. The escrow agent license issued to DII Escrow Corporation is revoked.

2. Henry Melendez is barred from any position of employment, management, or control of any escrow agent.

DATED: 3/24/06

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings