IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

V.

L. VAN STILLMAN,

Respondent-Appellee.

Supreme Court Case No. 76,066

The Florida Bar File No.
90-50,518 (15D)

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

This proceeding was commenced after findings of probable cause were entered by Fifteenth Judicial Circuit Grievance Committee "D". The case was heard by the Honorable Stewart R. Hershey, referee, who, upon the conclusion of the initial hearing on January 8, 1990, found respondent to have committed certain violations and thereupon announced his intention to recommend to the Court, as a sanction, that respondent receive a public reprimand and be suspended for a period of sixty (60) days.

Immediately subsequent to the hearing and before the parties had submitted their proposed reports of referee, the bar received a grievance against the respondent from the same individual who had filed the grievances resulting in the probable cause findings and bar prosecutian. The new grievance involved allegations concerning a transaction essentially the same as those encompassed in the bar's complaint. The parties were able to agree upon a statement of facts and requested that the referee consider the new allegations in rendering his report. The referee agreed but deferred further proceedings pending respondent's review of his files for purposes of insuring that if any additional, similar transactions existed, the same should be revealed by the respondent and all such matters be resolved in one disciplinary proceeding.

Respondent revealed the existence of two (2) additional transactions. Probable cause was waived, the three (3) additional transactions were reduced to an agreed statement of facts (and exhibits) and the matters submitted to the referee.

The referee reconvened the proceeding for purposes of revisiting the sanction issue and after hearing counsel for the respective parties, revised his previous recommendation of a public reprimand plus a sixty (60) days suspension to a recommendation of a public reprimand plus a six (6) months suspension.

The Board of Governors of The Florida Bar at its July 31 - August 3, 1991 meeting, reviewed the report of referee and directed bar counsel to petition for review. Specifically, the board directed bar counsel to seek an increase in sanction to a two (2) year suspension.

FACTS

The bar's original complaint encompassed two (2) transactions, one involving Joel B. Tag ("Tag") and Greater New York Mortgage Corporation of Florida ("lender"), and the other involving the same lender and one Rory D. Kaiser ("Kaiser").

Insofar as Count I of the bar's complaint is concerned, the parties stipulated to each and every finding of fact as appears in the report of referee (4 - 17).* The facts found with respect to the bar's Count I are as follows:

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* All page references are to the January 8, 1991 transcript of final hearing unless indicated otherwise,

Respondent is, and at all times hereinafter mentioned, was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

Heretofore, in 1988, one Joel B. Tag ("Tag") entered into an agreement with Southeast Development of Palm Beaches, Inc. ("Southeast") wherein and whereby Southeast agreed to sell to Tag, who agreed to purchase the same, for an agreed upon price of $75,000.00, a residence and lot situate at Lantana, FL.

The purchase and sale, aforesaid, was subject to and contingent upon Tag's securing a first mortgage loan from The Greater New York Mortgage Corporation of Florida ("lender") in the principal sum of $56,250.00.

The lender agreed to advance the subject $56,250.00 first mortgage loan and selected respondent who agreed to act as the closing agent in the transaction and, as an attorney agent for Attorneys' Title Insurance Fund, Inc., to issue a mortgagee title insurance policy in the principal amount of the lender's mortgage loan.

Upon selecting respondent as closing agent, the lender issued to respondent certain written closing instructions, which written instructions, recited, inter alia, as follows:

> Secondary financing has been approved in the amount of $ NONE. (See the bar's Exhibit 1 in evidence).

At the time Tag and Southeast entered into the agreement of purchase and sale, there was extant a certain mortgage lien affecting title to the subject premises held by one Lea Bruschi ("Bruschi") in the principal sum of $33,000.00.

Respondent participated in securing an assignment of the Bruschi note and mortgage to Southeast. (See the bar's Exhibit 2 in evidence).

In preparation for the subject closing, respondent secured Tag's signature to a Fannie Mae Affidavit and Agreement Form 1009 verified June 13, 1988. The referenced affidavit and agreement recited, inter alia, as follows:

> Representation No. 4. There is no subordinate financing relating to the Property except as specifically set forth immediately below: NONE (See the bar's Exhibit 3 in evidence).

Having received written closing instructions specifying that there was no secondary financing approved (Exhibit 1) and having secured Tag's signature to the referenced affidavit and agreement (Exhibit 3) which expressly recited that there was no subordinate financing relating to the subject property, respondent nonetheless, without disclosure to or consent by the lender, prepared and secured Tag's signature to a purchase money second note and mortgage in the principal sum of $33,000.00 in favor of Bruschi. (See the bar's Exhibit 4 in evidence).

Respondent thereafter closed title to the subject property on June 13, 1988 and completed a U.S. Department of Housing and Urban Development Settlement Statement purporting to set forth the particulars of the closing. (See the bar's Exhibit 5 in evidence).

Notwithstanding that the settlement statement he completed (Exhibit 5) specified at item 303 thereof that cash in the sum of $23,804.92 was produced by Tag to pay the balance due and owing on account of the purchase price, borrower's costs and adjustments, no such cash was produced or collected at the closing.

Notwithstanding that the settlement statement respondent completed (Exhibit 5) specified no existing loans taken subject to and no second mortgage loan at items 203 and 204, respectively, respondent knowingly prepared, had executed and recorded a second purchase money mortgage and note from Tag to Bruschi in the principal sum of $33,000.00 which note and mortgage produced a disparity from the subject settlement statement in the sum of $9,195.08.

On or about July 18, 1988 respondent issued a mortgagee title insurance policy #MP-1089174 to the lender in the principal amount of its mortgage, viz., $56,250.00. (See the bar's Exhibit 6 in evidence).

The mortgagee title insurance policy (Exhibit 6) failed to disclose the existence of the second purchase money note and mortgage given by Tag to Bruschi despite the fact that respondent had prepared such mortgage and note, secured the execution thereof and caused the same to be recorded on or about August 2, 1988.

Thereafter respondent provided the lender with copies of the mortgage title policy (Exhibit 6) and loan settlement statement (Exhibit 5) but made no disclosure to the lender regarding the secondary financing and particulars thereof as hereinabove specified.

Though not recited in the report of referee, the Tag mortgage went into default and foreclosure (121, 122).

With respect to the bar's Count II, the referee found as facts, the following:

Notwithstanding that respondent prepared and secured Tag's verified execution of the affidavit and agreement (Exhibit 3), respondent nonetheless actively participated with Tag in rendering Tag's averments and representations concerning secondary financing to constitute a lie and deceit by preparing, causing to be executed and recording the second purchase money note and mortgage as hereinabove referenced.

The referee's findings with respect to Count II track, exactly, paragraph 19 of the bar's complaint which respondent denied. The evidence establishing such allegation and the referee's findings was overwhelming. Respondent, called as the bar's witness, testified as follows:

> Q. And as a matter of fact, sir, at the time that you represented Mr. Tag in connection with the purchase and sale made reference to in the Bar's complaint, you had previously participated in a number of Fannie Mae closings, had you not?
>
> A. Some, yes.
>
> Q. And you were aware at the time, sir, of the requirement that the Fannie Mae affidavit, as represented by the Bar's Exhibit Number 3, was a requisite for a Fannie Mae closing?
>
> A, Yes.
>
> MR. BARNOVITZ: I'm going to offer that in evidence, your Honor.
>
> THE COURT: Okay.
>
> MR. WEISS: No objection, your Honor.
>
> THE COURT: We'll maintain the same number. (Thereupon, Bar Exhibit Number 3 was received in evidence.)

BY MR. BARNOVITZ:

Q. And you were aware, sir, were you not, that one of the requisites for a Fannie Mae closing is that the borrower make a representation under oath that there be no secondary financing?

A. Yes.

Q. And you nonetheless actually prepared the secondary financing documents that were used in connection with the Tag transaction, did you not, sir?

A. Yes.

Q. And you caused the secondary financing documents to be executed by your client, Mr. Tag?

A. Yes.

Q. And would you agree with me, sir, that by so doing you rendered your client's representation and averment as set forth in Exhibit 3 to be untrue regarding secondary financing?

A. Could you clarify that? I mean --

Q. You don't understand my question?

A. Well, when you say I rendered it --

Q. Yes.

A. What? -- tell me what you mean by that.

Q. You caused the representation that your client made under oath regarding secondary financing to be untrue by your actions and preparing and causing to be executed and recorded the secondary financing documents, did you not, sir?

A. Well, my client signed it. I did prepare the secondary financing. That I rendered it? I mean, I would -- Yes. Okay.

Q. You were the only individual who requested of Mr. Tag that he execute the secondary financing documents that you prepared, isn't that true?

A. I forwarded the documents up to Mr. Tag's attorney in New Jersey. I mean -- Excuse me, in North Carolina. But my only instructions to them were, yes, please have the documents signed and sent back here.

Q. So --

A. So I guess my answer to it would be, Yes.

Q. So you issued instructions to have your client execute the secondary financing documentation that you prepared for the purposes of this closing, isn't that correct?

A, Yes (21-23).

The referee found no violations by respondent with respect to Count III of the bar's complaint. The bar takes no issue with such finding.

The referee's findings of fact with respect to the bar's Count IV were admitted by the respondent (9-11, 29). The referee's findings are as follows:

Heretofore, in 1988, one Rory D. Kaiser ("Kaiser") entered into an agreement with L & M Management of the Palm Beaches, Inc. ("L & M") wherein and whereby L & M agreed to sell to Kaiser who agreed to purchase the same, for an agreed upon price of $170,000.00, a residence and lot situate at Plantation.

The purchase and sale, aforesaid, was subject to and contingent upon Kaiser's securing a first mortgage loan from The Greater New York Mortgage Corporation of Florida ("lender") in the principal sum of $127,500.00.

The lender agreed to advance the subject $127,500.00 first mortgage loan and selected respondent who agreed to act as the closing agent in the transaction and, as an attorney agent for Attorneys' Title Insurance Fund, Inc., to issue a mortgagee title insurance policy in the principal amount of the lender's mortgage loan.

Upon selecting respondent as closing agent, the lender issued to respondent certain written closing instructions, which written instructions, recited, inter alia, as follows:

> Secondary financing has been approved in the amount of $ NONE. (See the bar's Exhibit 7 in evidence).

In preparation for the subject closing, respondent secured Kaiser's signature to a Fannie Mae Affidavit and Agreement Form #10009 which respondent verified, as notary public on August 8, 1988.

The referenced affidavit and agreement recited, inter alia, as follows:

> Representation No. 4. There is no subordinate financing relating to the Property except as specifically set forth immediately below: NONE (See the bar's Exhibit 8 in evidence).

Having received written closing instructions specifying that there was no secondary financing approved (Exhibit 7) and having prepared and secured Kaiser's signature to the referenced affidavit and agreement (Exhibit 8) which expressly recited that there was no subordinate financing related to the subject property, respondent nonetheless, without a disclosure to or consent by the lender, prepared and secured Kaiser's signature to two (2) subordinate purchase money notes and mortgages, one in the principal sum of $55,937.97 given by

Kaiser to H. S. Sibia and Dr. Manjit Kaur Sibia and one in the principal sum of $13,500.00 given by Kaiser to L & M. (See the bar's Exhibits 9 and 10 in evidence).

Respondent thereafter closed title to the subject property on August 8, 1988 and completed a U. S. Department of Housing and Urban Development Statement purporting to set forth the particulars of the closing. (See the bar's Exhibit 11 in evidence).

Notwithstanding that the settlement statement respondent completed (Exhibit 11) specified at item 303 thereof that cash in the sum of $50,314.22 was produced by Kaiser to pay the balance due and owing on account of the purchase price, borrower's costs and adjustments, no such cash was produced or collected at the closing.

Notwithstanding that the settlement statement respondent completed (Exhibit 11) specified no existing loans taken subject to and no second mortgage loan at items 203 and 204, respectively, respondent knowingly prepared, had executed and recorded a second purchase money mortgage and note from Kaiser to Sibia in the principal sum of $55,937.97 and a third purchase money mortgage and note from Kaiser to L & M in the principal sum of $13,500.00 which second and third purchase money notes and mortgages produced a disparity from the subject settlement statement in the sum of $12,162.65.

On or about August 25, 1988 respondent issued a mortgagee title insurance policy #MP-1135214 to the lender in the principal amount of its mortgage, viz., $127,500.00. (See the bar's Exhibit 12 in evidence).

The mortgagee title insurance policy (Exhibit 12) failed to disclose the existence of the second and third purchase money notes and mortgages given by Kaiser to Sibia and to L & M despite the fact that respondent had prepared such mortgages and notes, secured the execution thereof and caused the same to be recorded.

Thereafter respondent provided the lender with copies of the mortgage title policy (Exhibit 12) and loan settlement statement (Exhibit 11) but made no disclosure to the lender regarding the secondary financing and particulars thereof as hereinabove specified.

The referee's findings with respect to Count V of the bar's complaint were:

Notwithstanding that respondent verified Kaiser's agreement with and representations to the lender, including the specific representations regarding no secondary financing, respondent nonetheless actively participated with Kaiser in rendering Kaiser's averments regarding no secondary financing to constitute a lie and deceit by preparing, causing to be executed and recording the second and third purchase money notes and mortgages as hereinabove referenced.

Though not recited in the report of referee, the Kaiser mortgage went into default and foreclosure (121, 122).

The referee's findings with regard to Count V exactly track the allegations in paragraph 40 of the bar's complaint which was denied by the respondent. The evidence was overwhelming in establishing the allegation and in supporting the referee's findings. The respondent testified as follows:

Q. All right. And it was you who secured Mr. Kaiser's signature to this Fannie Mae affidavit?

A. Yes.

Q. And as in the Tag transaction and in the other Fannie Mae transactions, you were aware of the Fannie Mae requirement that there be an affidavit representing that there was no secondary financing?

A. Yes.

Q. Notwithstanding your knowledge in that respect, Mr. Stillman, you prepared a second and third mortgage in the Kaiser transaction, did you not?

A, No. I prepared a third mortgage. I didn't prepare a second mortgage.

Q. All right. You prepared what has been received in evidence as the Bar's Exhibit Number 10, a mortgage to L & M, your client; is that correct?

A. *Yes.*

Q. And you secured the execution of that mortgage by Mr. Kaiser; is that correct?

A. Yes.

Q. Now you were aware, were you not, sir, that Mr. Kaiser was executing and delivering that day, referring to the date of the Kaiser L & M transaction, a second mortgage to people named Sibia?

A. Yes, I was.

Q. So that it's fair to say, is it not, Mr. Stillman, that you actively participated with Mr. Kaiser in making his representations in the Fannie Mae affidavit concerning secondary financing to be untrue?

A. Would you -- Could you read that back? I didn't --

(Thereupon, the preceding question was read back by the court reporter.)

> **THE** WITNESS: I didn't represent **Mr.** Kaiser. **He signed** it. But, yes, I did prepare the mortgages and knew that he **was** signing the secondary financing despite signing the affidavit (36-38).

The referee's findings regarding the post hearing allegations concern three (3) transactions known as the "White closing", the "Godfrey **closing"** and the "Blackwood closing". Respondent stipulated to each and **every** fact and to the admission of the bar's exhibits 13 through 38 as pertain to the referee's findings of fact as follows:

WHITE TRANSACTION

Heretofore, in 1988, one Kathleen White ("White") entered into an agreement with one Lance Lovejoy **("Lovejoy")** wherein and whereby Lovejoy agreed to sell to White, who agreed to purchase the same, for an agreed upon price of $182,000.00, real property situate at Palm Beach County, Florida,

The purchase and sale, aforesaid, was subject to and contingent upon White's securing a first mortgage loan from The **Greater** New **York** Mortgage Corporation of Florida ("lender") in the principal sum of $135,000.00.

The lender agreed to advance the subject $135,000.00 first mortgage loan and selected respondent who agreed to act as the closing agent in the transaction and, as an attorney agent for Attorneys' Title Insurance Fund, Inc., to **issue** a mortgage title insurance policy in the principal amount of the lender's mortgage loan.

Upon selecting respondent as closing agent, the lender issued to respondent certain written closing instructions, **which** written instructions, recited, inter alia, as follows:

> **Secondary** financing has been approved in the amount of $ **NONE.**

At **the** time White **and** Lovejoy entered into the agreement of purchase and sale, there **was** extant a certain mortgage **lien** affecting title to the subject premises held by John S. Maggard and Donna M. Maggard ("Maggards") in the principal sum of $40,000.00. ***(See*** the bar's Exhibit **14** in evidence.)

Respondent prepared**,** had executed and recorded a satisfaction of the White note and **mortgage** to Maggards.

In preparation for the subject closing, respondent secured White's signature to a Fannie **Mae** Affidavit and Agreement **Form** 1009 verified January 12, **1988.** The referenced affidavit and agreement recited, inter alia, **as** follows:

> Representation **No. 4** there is no subordinate financing relating to the Property except as specifically set forth immediately below: **NONE** (See the bar's Exhibit 15 in evidence).

Having received written closing instructions specifying that there was no secondary financing approved and having secured White's signature to the referenced affidavit and agreement which expressly recited that there **was** no subordinate financing relating to the subject property, respondent nonetheless, without disclosure to **or** consent by the lender, prepared and secured White's signature to **a** second note and mortgage in the principal sum of $25,000.00 in favor of Maggards and acted as notary to the acknowledgement of a third note and mortgage in **the** principal sum of $5,000.00 in favor of one Susan Blair-Sheets ("Sheets"). (See the **bar's** Exhibits 20 and **21** in evidence),

Respondent thereafter closed title to the subject property on January 12, 1988 and completed a U.S. Department of Housing and Urban Development Settlement Statement purporting to set forth the particulars of the closing. (See the bar's Exhibit 19 in evidence).

Notwithstanding that the settlement statement he completed specified at item 303 thereof that cash in the sum of $51,747.58 was produced by White to pay the balance due and owing on account of the purchase price, borrower's costs and adjustments, the only cash, if any, produced at the closing by White, was in the sum of $21,747.58.

Notwithstanding the settlement statement respondent completed specified no existing loans taken subject to and no second mortgage loan at items 203 and 204, respectively, respondent knowingly prepared, had executed and recorded a second note and mortgage from White to Maggards in the principal sum of $25,000.00 and notarized the acknowledgement to a third note and mortgage in the principal sum of $5,000.00 given by White to Sheets which notes and mortgages produced a disparity from the subject settlement statement in the sum of $21,747.58.

On or about January 21, 1988 respondent issued a mortgagee title insurance policy #MP970713 to the lender in the principal amount of its mortgage, viz., $135,000.00. (See the bar's Exhibit 12 in evidence).

The mortgagee title insurance policy failed to disclose the existence of the second note and mortgage given by White to Maggards despite the fact that respondent prepared such note and mortgage and failed to disclose the existence of the third note and mortgage given by White to Sheets despite the fact that respondent notarized the acknowledgement appearing on such note and mortgage.

Thereafter respondent provided the lender with copies of the mortgage title policy and loan settlement statement but made no disclosure to the lender regarding the secondary and tertiary financing and particulars thereof as hereinabove specified,

Notwithstanding that respondent prepared and secured White's verified execution of the Fannie Mae affidavit and agreement aforesaid, respondent nonetheless actively participated with White in rendering her averments and representations concerning secondary financing to constitute a lie and deceit by preparing, causing to be executed and recording the second note and mortgage and by notarizing the acknowledgement appearing on the third note and mortgage as hereinabove referenced.

Though not recited in the report of referee, the White mortgage went into default and foreclosure (See page 7 of April 24, 1991 transcript of hearing).

GODFBEY TRANSACTION

Heretofore, in 1987, one Wanda A. Godfrey ("Godfrey") entered into an agreement with one Lance Lovejoy ("Lovejoy") wherein and whereby Lovejoy agreed to sell to White, who agreed to purchase the same, for an agreed upon price of $75,000.00, real property situate at North Lauderdale, Florida.

The purchase and sale, aforesaid, was subject to and contingent upon White's securing a first mortgage loan from The Greater New York Mortgage Corporation of Florida ("lender") in the principal sum of $54,000.00.

The lender agreed to advance the subject $54,000.00 first mortgage loan and selected respondent who agreed to act as the closing agent in the transaction and, as an attorney agent for Attorneys' Title Insurance Fund, Inc., to issue a mortgage title insurance policy in the principal amount of the lender's mortgage loan.

Upon selecting respondent as closing agent, the lender issued to respondent certain written closing instructions, which written instructions, recited, inter alia, as follows:

> Secondary financing has been approved in the amount of $ NONE. (See the bar's Exhibit 23 in evidence).

At the time Godfrey and Lovejoy entered into the agreement of purchase and sale, there was extant a certain mortgage lien affecting title to the subject premises held by William S. Lehman and Thelma C. Lehman ("Lehmans") in the principal sum of $49,000.00.

Respondent prepared, had executed and recorded a satisfaction of the Godfrey note and mortgage to Lehmans. (See the bar's Exhibit 26 in evidence).

In preparation for the subject closing, respondent secured Godfrey's signature to a Fannie Mae Affidavit and Agreement Form 1009 verified November 24, 1987. The referenced affidavit notarized by respondent, and agreement, recited, inter alia, as follows:

> Representation No. 4 there is no subordinate financing relating to the Property except as specifically set forth immediately below: NONE (See the bar's Exhibit 24 in evidence).

Having received written closing instructions specifying that there was no secondary financing approved and having secured Godfrey's signature to the referenced affidavit and agreement which expressly recited that there was no subordinate financing relating to the subject

property, respondent nonetheless, without disclosure to or consent by the lender, prepared and secured Godfrey's signature to a second note and mortgage in the principal sum of $34,000.00 in favor of Lehmans. (See the bar's Exhibit 29 in evidence).

Respondent thereafter closed title to the subject property on November 24, 1987 and completed a U.S. Department of Housing and Urban Development Settlement Statement purporting to set forth the particulars of the closing. (See the bar's Exhibit 28 in evidence).

Notwithstanding that the settlement statement he completed specified at item 303 thereof that cash in the sum of $24,456.58 was produced by White to pay the balance due and owing on account of the purchase price, borrower's costs and adjustments, no such cash was paid.

Notwithstanding the settlement statement respondent completed specified no existing loans taken subject to and no second mortgage loan at items 203 and 204, respectively, respondent knowingly prepared, had executed and recorded a second note and mortgage from Godfrey to Lehmans in the principal sum of $34,000.00, which note and mortgage produced a disparity from the subject settlement statement in the sum of $34,000.00.

On or about January 12, 1988 respondent issued a mortgagee title insurance policy #MP970711 to the lender in the principal amount of its mortgage, viz., $54,000.00. (See the bar's Exhibit 30 in evidence).

The mortgagee title insurance policy failed to disclose the existence of the second note and mortgage given by Godfrey to Lehmans despite the fact that respondent prepared such note and mortgage.

Thereafter respondent provided the lender with copies of the mortgage title policy and loan settlement statement but made no disclosure to the lender regarding the secondary financing and particulars thereof as hereinabove specified.

Notwithstanding that respondent prepared and secured Godfrey's verified execution of the Fannie Mae affidavit and agreement aforesaid, respondent nonetheless actively participated with Godfrey in rendering her averments and representations concerning secondary financing to constitute a lie and deceit by preparing, causing to be executed and recording the second note and mortgage as hereinabove referenced.

Though not referenced in the report of referee, the Godfrey mortgage is in arrears and continues in arrears *(See* page 8 of April 24, 1991 transcript of hearing).

BLACKWOOD TRANSACTION

Heretofore, in 1988, one Cecile Blackwood ("Blackwood") entered into an agreement with one L & M Management of the Palm Beaches, Inc. ("L & M") wherein and whereby L & M agreed to sell to Blackwood, who agreed to purchase the same, for an agreed upon price of $105,000.00, real property situate at Margate, Florida.

The purchase and sale, aforesaid, was subject to and contingent upon Blackwood's securing a first mortgage loan from The Greater New York Mortgage Corporation of Florida ("lender") in the principal sum of $77,750.00.

The lender agreed to advance the subject $77,750.00 first mortgage loan and selected respondent who agreed to act as the closing agent in the transaction and, as an attorney agent for Attorneys' Title Insurance Fund, Inc., to issue a mortgage title insurance policy in the principal amount of the lender's mortgage loan.

Upon selecting respondent as closing agent, the lender issued to respondent certain written closing instructions, which written instructions, recited, inter alia, as follows:

> Secondary financing has been approved in the amount of $ NONE. (See the bar's Exhibit 31 in evidence).

At the time Blackwood and L & M entered into the agreement of purchase and sale, there was extant a certain mortgage lien affecting title to the subject premises held by Jean Lavigne and Lisa Lavigne ("Lavignes") in the principal sum of $32,500.00.

Respondent prepared, had executed and recorded a satisfaction of the L & M note and mortgage to Lavignes. (See the bar's Exhibit 34 in evidence).

In preparation for the subject closing, respondent secured Blackwood's signature to a Fannie Mae Affidavit and Agreement Form 1009 verified June 14, 1988 and notarized by respondent. The referenced affidavit notarized by respondent, and agreement, recited, inter alia, as follows:

> Representation No. 4 there is no subordinate financing relating to the Property except as specifically set forth immediately below: NONE (See the bar's Exhibit 32 in evidence).

Having received written closing instructions specifying that there was no secondary financing approved and having secured Blackwood's signature to the referenced affidavit and agreement which expressly recited that there was no subordinate financing relating to the subject property, respondent nonetheless, without disclosure to or consent by the lender, prepared and secured Blackwood's signature to a second note and mortgage in the principal sum of $32,500.00 in favor of Lavignes. (See the bar's Exhibit 37 in evidence).

Respondent closed title to the subject property on June 14, 1988 and completed a U.S. Department of Housing and Urban Development Settlement Statement purporting to set forth the particulars of the closing. (See the bar's Exhibit 36 in evidence).

Notwithstanding that the settlement statement he Completed specified at item 303 thereof that cash in the sum of $33,235.47 was produced by Blackwood to pay the balance due and owing on account of the purchase price, borrower's costs and adjustments, no such cash was paid by Blackwood.

Notwithstanding the settlement statement respondent completed specified no existing loans taken subject to and no second mortgage loan at items 203 and 204, respectively, respondent knowingly prepared, had executed and recorded a second note and mortgage from Blackwood to Lavignes in the principal sum of $32,500.00, which note and mortgage produced a disparity from the subject settlement statement in the sum of $32,500.00.

On or about July 29, 1988 respondent issued a mortgagee title insurance policy #MP-1135211 to the lender in the principal amount of its mortgage, viz., $77,750.00. (See the bar's Exhibit 38 in evidence).

The mortgagee title insurance policy failed to disclose the existence of the second note and mortgage given by Blackwood to Lavignes despite the fact that respondent prepared such note and mortgage.

Thereafter respondent provided the lender with copies of the mortgage title policy and loan settlement statement but made no disclosure to the lender regarding the secondary financing and particulars thereof as hereinabove specified.

Notwithstanding that respondent prepared and secured Blackwood's verified execution of the Fannie Mae affidavit and agreement aforesaid, respondent nonetheless actively participated with Blackwood in rendering her averments and representations concerning secondary financing to constitute a lie and deceit by preparing, causing to be executed and recording the second note and mortgage as hereinabove referenced.

The referee found no violation with respect to the bar's Count VI. In that the bar specifically charged the respondent with occupying an attorney/client relationship with the lender rather than the relationship of lender/closing agent, the bar does not take exception to the referee's findings regarding Count VI.

In his recommendations regarding respondent's guilt, the referee specifically found that respondent occupied a fiduciary relationship to the lender and that respondent's acts were done knowingly and intentionally and constituted fraud as a matter of law. Respondent took issue with both such findings (See page 13 of original transcript and page 23 of the April 24, 1991 transcript of hearing.) At respondent's deposition before trial, portions of which were read into the record (40-44) respondent acknowledged that he understood what a fiduciary relationship is (41) and after interrupting his deposition for purposes of consulting with his counsel, testified at his deposition, as follows:

> Q. Yes. In the Tag transaction, what, if any, fiduciary responsibility did you consider you had to Greater New York Mortgage Corporation of Florida?

A. Even though I believe I was representing Mr. Tag as the closing agent, I believe that I probably did owe a fiduciary duty to the bank. Should I have told them that Mr. Tag was in jail? Mr. Tag wanted the loan. He wanted a house for his girl friend and his child. He was in jail. The bank, I guess, was relying on me as their closing agent (43, 44).

With respect to the referee's fraud finding, respondent specifically acknowledged the fact that his actions constituted a fraud upon the lender. He testified:

Q. Well, you knew it constituted fraud on the --

A. Yes, it does.

Q. -- Greater New York?

A. You're right. You're correct.

Q. And you knew that in the one instance your client was participating in a fraud on the lender by executing the affidavit and by executing and going forward with secondary financing, you knew that?

A, Yes (126).

Although not referenced in his report, the referee found, as an aggravating circumstance, the fact that respondent knew that there were additional violations not encompassed in the bar's original complaint. The referee stated:

Also, the Court is not unmindful of the fact that Mr. Stillman, I would presume, knew that there were additional violations out there. And while I am not prepared to make a finding of additional law violations, certainly, I think it is as you said earlier, an aggravating circumstance (See page 28 of April 24, 1991 transcript of hearing).

Respondent called six (6) character witnesses who testified favorably regarding respondent's reputation and character. Respondent's first character witness, Lawrence Ginsburg, stated that

he would find it to constitute a mark against an individual's business character should such individual have been convicted and found guilty of violating rules regarding honesty and integrity (54). Respondent's second character witness, Daniel Mendicino testified that the general type of misconduct in which respondent involved himself would not speak well of his character (63). Respondent's third character witness, Gaylord Perry, an attorney, conceded that respondent's actions underlying the disciplinary proceeding did not constitute good character and good business judgment (72).

Respondent's next character witness, Thomas Sliney, an attorney, conceded that the activities involved in by respondent constituted dishonesty and that dishonesty on the part of an attorney is "probably not" reflective of good character.

With respect to each of the five (5) transactions, the referee found that respondent had violated Rule 3-4.3, Rules of Discipline which provides that the commission by a lawyer of any act which is unlawful or contrary to honesty and justice may constitute a cause for discipline and that respondent's actions constituted violations of Rules 4-8.4(a) and 4-8.4(c), Rules of Professional Conduct which provide, respectively, that a lawyer shall not violate or attempt to violate the Rules of Professional Conduct or do so through the acts of another and that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The referee found, as mitigation, that respondent was not motivated by personal gain nor greed and that it was unlikely that any such conduct will be repeated in the future.

SUMMARY OF ARGUMENT

The Court has not, heretofore, regarded the commission by attorneys of what may generally be referred to as "mortgage fraud cases" as warranting substantial discipline. Thus, in cases involving egregious frauds perpetrated against banks and other lenders, the sanctions imposed have consisted of public reprimands and non-reinstatement suspensions. In especially aggravating circumstances, usually involving prior discipline, the court has ordered ninety-one (91) day suspensions.

The case at bar warrants a sterner sanction. Firstly, unlike the prior cases, respondent occupied a fiduciary relationship to the mortgagee. Equally as important, however, the prior cases considered by the Court preceded the crisis in our financial institutions that has gripped and threatens Florida, the nation and indeed, the world. The savings and loan disaster and the anticipated collapse of our commercial banks have demonstrated the need for assiduous policing and rigid enforcement of the lending industry. The public which bears and will continue to bear the enormous burden of restoring the nation's financial institutions to a state of health, is entitled to know that its representatives will deal quickly and sternly with those individuals who, through their chicanery, have wrecked such havoc. It is respectfully submitted that the Court should reconsider its sanctions in mortgage fraud cases thereby assuring the public that its victimization is regarded seriously while at the same time delivering a message to the bar membership that will deter attorneys from actions such as engaged in by the respondent.

I. RESPONDENT'S REPEATED CONSPIRACIES TO DEFRAUD, MEASURED IN LIGHT OF PREVAILING SOCIAL AND ECONOMIC CONDITIONS, WARRANT IMPOSITION OF A TWO (2) YEAR SUSPENSION.

Over a nine (9) month period, from November, 1987, through August, 1988, respondent, on five (5), separate occasions, repeatedly victimized the Greater New York Mortgage Corporation of Florida. Respondent, aware from previous experiences in Fannie Mae financings, that an essential requisite is that there be no secondary financing (22, 23) nonetheless, in five (5) closings, openly conspired with five (5) borrowers, to make Greater New York believe that the borrowers were committed to their respective properties by virtue of approximately 25% equity contributions, when, in fact, no such contributions had been made.

In five (5) affidavits, four (4) of which respondent acted as notary public, respondent knowingly permitted borrowers to perjure themselves by averring, in order to induce Greater New York to advance the loans:

> There is no subordinate financing relating to the Property except as specifically set forth immediately below:
> None (See bar's Exhibits 3, 8, 15, 24 and 32).

In five (5) closing statements, respondent represented to Greater New York that the following net cash payments were advanced by the borrowers:

Borrower	Contract Price	Net Cash	Exhibit No.
Godfrey	$ 75,000.00	$ 24,456.58	28
White	$ 182,000.00	$ 51,747.58	19
Tag	$ 75,000.00	$ 23,804.92	5
Blackwood	$ 105,000.00	$ 33,235.47	36
Kaiser	$ 170,000.00	$ 50,314.22	11

In fact, save for the "White" transaction, where, at most, White contributed $21,747.58 rather than the $51,747.58 as represented by respondent, in every other transaction, the borrowers were funded to the extent of over 100% of the sales price.

Respondent knew at the time that he submitted the Fannie Mae affidavits, closing statements and title insurance policies to Greater New York that he was perpetrating frauds (125). In the Tag transaction, respondent testified that Tag was his client (19). Thus, not only is the Court faced with attorney-fraud, but with an attorney openly aiding, abetting and joining with a client in perpetrating a fraud. At the time respondent participated in the various frauds, he knew that he occupied a fiduciary relationship with the victim of his fraud (43, 44).

While the bar understands the distinction between an attorney's commission of a fraud upon the courts which serves to undermine the very foundation of our system of jurisprudence and an attorney's fraud on individuals and/or institutions other than our courts, the dichotomy in sanction seems far too wide. Thus in Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960), the Court, in addressing an attorney's urging and advising various parties to give false testimony, determined that such misconduct warranted disbarment. The Court stated:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty (19).

The Court reaffirmed its position in The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981) even where the false testimony knowingly introduced by the attorney may not necessarily have affected the

outcome of the case in question. The Court, viewing other cases of similar misconduct where lesser sanctions were meted out, noted: "they represent the exception to the general rule of strict discipline against deliberate, knowing elicitation or concealment of false testimony" (406). See also, The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990).

While the bar agrees that an attorney's knowledgeable use of false testimony in the judicial process casts attorneys into a position of scorn and ridicule in the public eye, it is respectfully submitted that it is extremely "hurtful to the public appraisal of the legal profession" when attorneys knowingly defraud institutions other than our courts. While our democracy, as we revere it, could not survive absent our unique system of jurisprudence, there are other institutions which, when their foundations suffer cracks, create fear and concern in the public eye. Certainly, the debacle of the collapse of our financial institutions has riveted the attention of everyone. Florida, the nation and the world are beset by the ever present and ubiquitous horror stories regarding fraud and deceit which have rocked our lending industry.

Thus, it is respectfully submitted that it would not, in the present climate, be comforting to the public to observe an attorney receive a public reprimand for securing a 65% loan in the sum of $160,000.00 having represented to the lender that the purchase price of the subject property was $245,000.00 when, in fact, the actual purchase price was but $159,000.00. The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985). It is respectfully submitted that the public, in light of the enormity of the financial crisis now existing and the portent of the collapse of our commercial lending institutions would be astounded and

feel threatened to observe attorneys receive ninety (90) day suspensions for defrauding Southeast Bank into advancing a $150,000.00 loan for the purchase of a law office, representing to the bank that they had a $50,000.00 cash equity commitment to the property when, in fact, they had no such commitment; that they had concealed from the bank that they had previously borrowed $50,000~00from an individual and had given such individual an unrecorded second mortgage against such loan, The bar respectfully suggests that the public would appraise the profession poorly upon seeing that such ninety (90) day suspensions incorporated a second fraud upon the very same bank when respondents submitted additional documents in support of an application for an additional $45,000.00 loan, again, not revealing the existence of the prior $50,000.00 mortgage. See The Florida Bar v. Siegel and The Florida Bar v. Canter, 511 So.2d 995 (Fla. 1987).

It is respectfully submitted that the public appraisal of the legal profession would reach new depths at observing a ninety (90) day suspension of an attorney for knowingly securing 100% financing in a project in which he shared an interest, from banks which believed that they were extending 80% loans. The public would be shocked and chagrined in the prevailing climate to learn that the same attorney exhibited a $36,000.00 check to one of the banks, representing it to be for down payments when, in fact, no such down payments had been made and that the check was never cashed. See The Florida Bar v. Nuckolls, 521 So.2d 1120 (Fla. 1988).

Do the underpinnings of our society loosen so much more when an attorney attempts to carry out his deceased client's testamentary intent

in circumstances such as presented by Kickliter, supra, than when attorneys, with apparently baser motives, fraudulently secure fundings from financial institutions? While the bar, as hereinabove stated, does not condone the Kickliter misconduct or urge that it warrants any lesser sanction than imposed, it appears that deliberate frauds committed against non-judicial institutions and/or individuals should not occupy such a lower rung on the sanctions ladder. This is especially true when the institutions involved occupy such a central and vital role in the public welfare.

In a way, the banks involved in the Beneke, Siegel-Canter and Nuckolls transactions were in an adversary position (in the commercial sense). That is not the situation in the case at bar. Here, respondent knew that he occupied a fiduciary relationship with Greater New York, but, nonetheless, abused the trust reposed in him. Additionally, he actively participated in his client's (Tag's) fraud, aiding, abetting and orchestrating the same.

In his report, the referee specifically found that respondent's actions constituted fraud and that respondent occupied a fiduciary relatianship vis a vis Greater New York (Report of Referee, page 17). In addition, though not specified in his report, the referee agreed with bar counsel that respondent, faced with the original formal disciplinary proceeding encompassing only the Tag and Kaiser transactions, remained silent notwithstanding that he knew of the other three (3) transactions (See page 28 of the April 24, 1991 transcript of hearing).

The bar, respectfully, takes issue with the referee's finding that respondent was not motivated by greed or personal gain (Report of Referee, page 20). The evidence discloses that one Lance Lovejoy

acted on behalf of every seller except for the Tag transaction (See Fannie Mae affidavits bearing Lovejoy's signature on the bar's Exhibits 8, 15, 24 and 32). Respondent maintained his office in the same building where the sellers were located (123). Respondent testified that he represented Mr. Lovejoy's corporation (36). According to the five (5) closing statements, respondent collected a total of $1,100.00 in attorney's fees and an additional $4,542.00 for title insurance (See bar's Exhibits 5, 11, 19, 28 and 36). In the bar's view there is a clear inference to be drawn from respondent's receipt of the $5,642.00, viz., that he would do whatever was necessary to close the transactions and keep the fees coming.

CONCLUSION

Respondent repeatedly, over a period of nine (9) months, defrauded and victimized Greater New York Mortgage Corporation of Florida. He knew he was engaging in acts of fraud. He knew that he occupied a fiduciary relationship with Greater New York. He knew that he aided and abetted a client in defrauding Greater New York. He remained mute about three (3) of the transactions waiting to see whether they would be discovered.

The public needs to know that lawyers who engage in that type of misconduct that has contributed to the collapse of our financial institutions will be dealt with sternly and that our courts Will not deal severely only with assaults upon the judicial system but with all institutions vital to the public welfare.

It is respectfully submitted that the board of governors' sanction recommendation will deliver the appropriate message to the public and warning to the bar membership.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief of The Florida Bar was furnished to John A. Weiss, Esquire, Attorney for Respondent, 101 N. Gadsden St., P.O. Box 1167, Tallahassee, FL 32302 by regular mail on this 14th day of August, 1991.

DAVID M. BARNOVITZ