IN THE SUPREME COURT OF FLORIDA

047

THE FLORIDA BAR,

Complainant,

v.

ANA HERNANDEZ-YANKS

Respondent.
_____/

Supreme Court Case
No. 86,337

7/23

The Florida Bar's Initial Brief

On Petition for Review

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Other Authorities

Rules Regulating The Florida Bar

SYMBOLS AND REFERENCES

For the purposes of this Initial Brief on Appeal, The Florida Bar will be referred to as either "The Florida Bar" or "the Bar". Ana Hernandez-Yanks will be referred to as "Hernandez-Yanks or Petitioner". References to the Report of Referee will be denoted as RR and page number. References to the transcript of the final hearing will be denoted as T and page number. The Department of Banking and Finance Final Order and Notice of Rights will be denoted as "Final Order".

STATEMENT OF CASE AND FACTS

On August 24, 1995, Ana Hernandez-Yanks filed a Petition for Reinstatement. The Petitioner had been suspended from the practice of law by a Supreme Court Order dated April 29, 1993. The Petitioner received a one year suspension, pursuant to a consent judgment, for a four count complaint containing violations of the rules governing trust accounting, interference with justice and conduct involving fraud and misrepresentation. The charges arose out of the Respondent's services as an escrow agent for her husband's mortgage brokerage company. Three clients, Charles Friedberg, Church of God in Christ Calvary Church and Pura Castillo filed the initial complaints against the Respondent for failing to return escrow funds. The Florida Bar v. Hernandez-Yanks, Supreme Ct. Case No. 80, 716 (Fla. 1993)

On February 29, 1996, a Referee hearing was held before Judge Murray Goldman. At the Referee hearing, the Petitioner presented four witnesses who testified as to the Petitioner's competency to resume the practice of law. The Petitioner served as a legal secretary and paralegal for the witnesses during her suspension. (T-26,72,93) The Petitioner also testified regarding her desire for reinstatement and her remorse regarding her wrongdoing. (T- 161)

Carlos Ruga, Staff Auditor of the Florida Bar, testified the audit of the Petitioner's joint checking account showed thirty four check were dishonored by the bank in the period between April 16, 1993 and October 13, 1995.(T-103) In addition, the account had overdrafts fifty-four times.(T-103) Although many of the checks were written by the Petitioner's husband, at least seven of the checks were written by the Petitioner. (T-103)

Additionally, the Respondent's competency to practice law was questioned by an expert witness who testified that the Petitioner should have known that the documents in the Castillo transaction were inconsistent and did not transfer fee simple title to the property.(T-131) The expert witness also testified that the Respondent had an obligation to review the documents and explain them to the parties in the transaction.(T-136). According to the expert witness, the Petitioner would need several basic real estate courses to become competent in this area of the law. (T-138).

Finally, the Respondent's character and fitness was challenged by the attorney who represented Calvary Church in the civil action. The attorney stated the Respondent demonstrated disregard for the legal process by her treatment of the litigants and opposing counsel.(T-114, 116) Moreover, the Respondent's lack

of integrity was demonstrated by her presentation of the $14,000 check as accord and satisfaction and her misrepresentation that the funds were being deposited in the court registry.(T-112, 113)

On March 13, 1996, the Referee issued his Findings of Fact and Conclusions of Law which recommended reinstatement with conditions.

The Report of Referee was considered by the Board of Governors at their May, 1996 meeting. The Board of Governors directed the filing of a petition for review and this appeal.

SUMMARY OF THE ARGUMENT

The Referee erroneously recommended reinstatement despite the fact that the Petitioner failed to produce clear and convincing evidence of the essential requirements for reinstatement: (1) Good moral character, personal integrity and general fitness for position of trust and confidence and (2) professional competence and ability.

The Referee erroneously found the Petitioner had presented clear and convincing evidence of unimpeachable character. The Referee improperly disregarded the Petitioner's handling of her joint checking account as character evidence bearing on her fitness to practice law. The Referee ignored the evidence that the Petitioner's checking account had fifty-four overdrafts and thirty-four dishonored checks over a two year period. This Court has held the writing of bad checks, even if eventually made good, is fundamentally dishonest and inconsistent with fitness to practice law.

Furthermore, in her practice before her suspension, the Petitioner demonstrated questionable integrity, exhibited disdain for litigants and fellow practitioners and abused the legal process.

The Referee also improperly ruled that the testimony regarding the Petitioner's presuspension behavior was irrelevant and not probative in these proceedings. This Court has repeatedly stated that a Petitioner's presuspension conduct including the reasons for the original disciplinary proceedings are relevant in reinstatement proceedings and the Referee should compare the Petitioner's prior conduct and present conduct in order to gauge rehabilitation.

The Referee also erred in finding that the Petitioner had presented clear and convincing evidence of a reputation for good professional ability. The majority of the witnesses who testified on the Petitioner's behalf had never worked with the Petitioner as an attorney and could not evaluate her professional competence. Furthermore, the record was replete with evidence regarding the Petitioner's incompetency in the areas of real property transactions and trust accounting.

The Referee also erroneously disregarded the evidence that the Petitioner had failed to take any steps to address the competency problems which led to her suspension. The evidence was uncontroverted that the Petitioner incompetently handled real estate transactions for which she had no background or training to the detriment of the public. Further, the Petitioner did not

present any evidence that she took any steps to rehabilitate herself or to become competent in the areas of trust accounting or real property transactions. This Court has consistently held that where competence is at issue, the Petitioner must demonstrate that she has taken concrete steps to address the issues which led to the suspension.

Accordingly, the Referee's recommendation of reinstatement is erroneous and the Petitioner should not be reinstated to the practice of law until she has taken specific steps to address the competency and character issues which led to her suspension.

ARGUMENT

I. THE REFEREE ERRONEOUSLY HELD THAT THE PETITIONER DEMONSTRATED CLEAR AND CONVINCING EVIDENCE OF UNIMPEACHABLE CHARACTER.

Unimpeachable character is the cornerstone of the requirements for reinstatement. The Florida Bar re Grusmark, 662 So.2d 1235 (Fla. 1995); The Florida Bar re Inglis, 471 So.2d 38 (Fla. 1985). In order to be reinstated, the Petitioner must demonstrate unimpeachable character by clear and convincing evidence. The Florida Bar re Timson, 301 So.2d 448 (Fla. 1974). The Referee failed to give appropriate consideration to the Bar's testimony regarding conduct by the Petitioner demonstrating a lack of fundamental honesty. Although a referee's finding of fact must be accepted unless it is not supported by competent, substantial evidence, the Court's scope of review with regard to legal conclusions and recommendations is much broader because it is this Court's ultimate responsibility to enter an appropriate judgment. Inglis at 40.

A. The Petitioner's Handling of Her Joint Checking Account.

During the period between April 16, 1993 and October 13, 1995, the Petitioner's joint checking account at Transatlantic Bank had overdrafts on fifty-four occasions.(T-103) During the same period, there were thirty-four dishonored checks written on

the account. (T-103) Although the records indicated that a majority of the checks were written by the Petitioner's husband, at least seven of the checks were written by the Petitioner. (T-103)

The Report of Referee erroneously states the Petitioner was not aware of her bank balance at the time the dishonored checks were written. (R.R. 5). However, there is no evidence in the record to support this finding. Under questioning by the referee, the Petitioner stated that she was not aware of her bank balance at the time that a check to her pediatrician was written in 1995.(T.181). The Petitioner did not present any evidence regarding her knowledge of her bank balance in regard to the other checks. Indeed, the Petitioner did not offer any explanation with regard to why the checks bounced. The Petitioner's only defense was that the checks were eventually made good.(T. 182)

This Court addressed the identical situation in The Florida Bar v. Lopez, 545 So.2d 835(Fla. 1989). In Lopez, *supra*, the Petitioner also had a high number of overdrafts and bounced checks in his checking account during his suspension. The Petitioner testified that he had an oral overdraft arrangement with his bank and that the checks were eventually made good. The

Referee accepted this explanation for the bounced checks. In this Court's opinion, the petitioner's explanation was not sufficient. In denying Lopez' Petition for Reinstatement, this Court held that "(r)outinely writing bad checks, even if eventually made good, burdens the recipients and is fundamentally dishonest. It brings disrepute on the writer and the profession. It is inconsistent with fitness to practice law." Lopez at 837.

In the instant case, the Petitioner's conduct similarly reflects a lack of fundamental honesty. Under questioning by the Petitioner's attorney, the Bar's auditor testified the number of bounced checks written by the Petitioner was a high amount.(T-107). Further, unlike Lopez, the petitioner did not present any explanation regarding her writing of the dishonored checks.

The Petitioner's handling of her joint checking account evidenced a lack of moral character and a lack of fitness to practice law. Furthermore, in light of the Petitioner's prior trust accounting difficulties, her behavior evidenced a lack of rehabilitation. The Petitioner's handling of her joint checking account demonstrated that she had not progressed in her understanding of her ethical responsibilities to the point where she may now be reposed with the public's trust.

In the case at bar, the Referee ignored the caselaw on this

issue when he considered the Bar's evidence regarding the Petitioner's handling of her checking account as character evidence. As the Lopez Court stated " (e)ven if this were a disciplinary proceeding against petitioner, it would be clear that he would be subject to suspension or other discipline. In the context of a petition for reinstatement, petitioner has completely failed to demonstrate his fitness to resume the practice of law. Lopez at 837. Therefore, under the Court's holding in Lopez, the Referee erred in finding that the Petitioner had demonstrated unimpeachable character.

B. The Character Testimony From Other Members of the Bar

The Referee improperly held that the character testimony of Holly Moody was irrelevant and not probative to these proceedings. Rule 3-7.10(h)(1) provides that "... any interested person may appear before the referee in support of or in opposition to the petition." Therefore, the Referee should have considered Holly Moody's testimony regarding the petitioner's fitness to resume the practice of law.

Moreover, Moody's testimony went to the heart of this Court's rulings regarding the character required of a petitioner for reinstatement. This Court has held that a lack of moral character is not demonstrated only by acts of moral turpitude but

also "includes acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness and respect for the rights of others and for the laws of the state and the nation." The Florida Bar re Jahn, 559 So.2d 1089(Fla. 1990).

In that regard, the character testimony of Holly Moody provided extensive evidence of the Petitioner's lack of moral character. Moody testified that the Petitioner took advantage of the "very trusting" members of the Calvary Church which had a small Black congregation. (T-114) Further, Moody testified that the Petitioner used bankruptcy proceedings to avoid payment of the attorney's fee award in the Calvary Church case. (T-115) The attorney's fees were not paid until 1995 despite the judgment and this Court's order of restitution in the suspension proceedings. As the only witness involved in litigation with the Petitioner as an attorney, Moody testified that the Petitioner's work as an attorney was incompetent and that she had to obtain a writ of bodily attachment in order to make the Petitioner and her husband appear at a deposition.(T-116) Moreover, Moody's assessment of the Petitioner's professional character was uncontroverted since none of the other character witnesses had ever litigated a case against the Petitioner as an attorney.

The character testimony of Holly Moody was relevant for the purpose of illustrating Petitioner's lack of moral character as evidenced by acts of incompetence, misrepresentation and abuse of the legal process and its participants.

II. THE REFEREE ERRONEOUSLY DISREGARDED EVIDENCE OF PRESUSPENSION BEHAVIOR

The Referee erroneously found the testimony regarding the Petitioner's presuspension conduct was irrelevant in these proceedings.(R.R. p.4). This Court has consistently held that presuspension behavior is relevant and probative to the Petitioner's fitness to resume the practice of law. The Florida Bar v. Lopez, 545 So.2d 835(Fla. 1989)(Evidence concerning presuspension behavior is relevant and admissible.); The Florida Bar v. Wolf, 257 So.2d 547(Fla. 1972) (Petitioner's disciplinary history including nature of offenses, gravity and similarity relevant in reinstatement proceedings); The Florida Bar v. Rubin, 323 So.2d 257 (Fla. 1975)(Referee should consider evidence regarding prior conduct for, among other things, comparing past and prior conduct.) In order to determine whether a petitioner has been rehabilitated, it is necessary to examine her present conduct against the conduct which led to the suspension. Otherwise, there is no need for a rehabilitative suspension.

The instant case demonstrates why the facts regarding the underlying suspension should be considered in a reinstatement proceeding. The Petitioner's handling of her joint checking account during her suspension mirrored the problems which led to the initial suspension. As the Bar's witnesses and exhibits illustrate, the Petitioner was suspended as a result of serious competency and trust accounting problems. Without an understanding of the problems which led to the suspension, the Referee could not evaluate whether the Petitioner was sufficiently rehabilitated to resume the practice of law. Lopez at 836.

The Petitioner was suspended as a result of a four count complaint. Three counts of the complaint involved the Petitioner's actions as a closing agent for B and B Mortgage Equity. (Appendix #3.) B and B Mortgage Equity was a mortgage brokerage business owned by the Petitioner's husband, Barry Yanks. In June, 1988, Charles Friedberg applied to B and B for help obtaining a mortgage loan. Friedberg made a Twenty-Five Hundred Dollar ($2,500) application deposit which was placed in the Petitioner's escrow account. (T-160) Six weeks later, Friedberg withdrew his application and requested a refund of the twenty-five hundred dollars ($2500). The Petitioner refused to

refund the money on the grounds that the deposit was non-refundable. An audit of the Petitioner's trust account revealed that the funds were no longer in her trust account at the time that Friedberg was requesting a refund.(Appendix #3) The audit also revealed that the Petitioner had used the funds to pay personal expenses unrelated to the Friedberg loan.(Appendix #3)

The Petitioner also served as an escrow agent For Chapel of God In Christ Calvary ("Calvary") Church. Calvary approached the Petitioner's husband for help in obtaining a mortgage for a larger church.(Final Order p. 11) In order to prove Calvary's creditworthiness, the Petitioner's husband requested a cash deposit in his escrow account. Calvary made one deposit of Ten Thousand Dollars ($10,000) which was placed in B and B Mortgage Equity's account and another deposit of Fourteen Thousand Dollars ($14,000) which was placed in the Petitioner's trust account. (Final Order p. 14,16) Subsequently, Calvary failed to close on the property and requested a refund of the monies held in escrow. When the funds were not returned, Calvary filed suit against the Petitioner and her husband. Subsequent to the filing of the suit but prior to trial, the Petitioner forwarded a $14,000 check to Calvary which stated that it was an accord and satisfaction for the entire amount owed to the church. (T-113) When Calvary

refused to accept the check on those terms, the Petitioner stated that the funds were being deposited in the Court registry. (T-114) However, the funds were never deposited in the Court Registry. A final judgment was eventually entered for the church and the Respondent was ordered to make full restitution. (T-113)

The Petitioner also served as a closing agent in the sale of a condominium from Ana Vasquez to Pura Castillo. The condominium was encumbered by a first mortgage held by Standard Federal Savings.(T-130) At the closing, the Petitioner represented all parties in the transaction.(Final Order p. 26) The Petitioner knew or should have known that the mortgage documents constituted an inferior wrap-around mortgage despite the fact that the documents claimed to transfer fee simple title to the property.(Final Order p.29) Moreover, the closing statement contained several fraudulent charges. (Final Order p. 32,33)

The reinstatement proceeding is designed to examine a Petitioner's conduct during the period of suspension. In order to make such an examination, the Referee must consider the facts which led to the suspension. There is no point of reference to make a determination of whether rehabilitation has occurred absent an understanding of the conduct which led to the suspension. If the Referee had properly considered the evidence

regarding the Petitioner's presuspension behavior and the public harm it caused, he could not have concluded that the Petitioner had demonstrated sufficient character and competency rehabilitation to resume the practice of law.

III. THE PETITIONER FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF A REPUTATION FOR GOOD PROFESSIONAL ABILITY

The Referee erroneously found that the Petitioner had presented clear and convincing evidence of a reputation for good professional ability. In a reinstatement proceeding, the Petitioner has to demonstrate clear and convincing evidence of professional competence to resume the practice of law. The Florida Bar re Davis, 397 So.2d 690(Fla. 1981); The Florida Bar v. Grusmark, 662 So.2d 1235 (Fla. 1995); The Florida Bar v. Timson, 301 So.2d 448 (Fla. 1974) and In Re Wolf, 257 So.2d 547(Fla. 1972). The record contains numerous examples of the Petitioner's competency problems in trust accounting and real estate transactions. Further, the majority of the Petitioner's witnesses could not testify to her professional competence as an attorney. Therefore, the Referee improperly held that the Petitioner had demonstrated evidence of a reputation for good professional ability.

In Wolf, *supra*, the Petitioner presented prominent character

witnesses during his reinstatement hearing. However, the witnesses did not have any direct knowledge regarding the Petitioner's competence as an attorney. The Court found Wolf did not satisfy his burden of proving a reputation for good professional ability and denied his petition for reinstatement. Id at 549.

Similarly, the Petitioner did not meet her burden to demonstrate that she was competent to resume the practice of law. Three of the witnesses presented by the Petitioner, Andrew Parrish, Leonard Gorman and Murray Dubbin stated they had no knowledge of the Petitioner's competency as an attorney.(T. 27,29,81,100). These three witnesses had never worked with the Petitioner as an attorney on a case or had any knowledge regarding her professional reputation as an attorney. Only one of the Petitioner's witnesses, Martha Block, had ever worked with the Petitioner on a case. However her interaction with the Petitioner on the case was "limited" and she had no other knowledge of the Petitioner's competence as an attorney.(T. 149). Block also testified that she was not aware of the specifics of the problems which led to the Petitioner's suspension. (T. 149)

In contrast, the Bar presented extensive evidence that the Petitioner lacked the competency to practice law. Subsequent to

the Petitioner's suspension, the Petitioner and her husband were the subject of administrative proceedings by the Department of Banking and Finance regarding the Castillo mortgage transaction and the Calvary Church transaction which were the subject of the original suspension proceedings.

The Department of Banking and Finance found that the Petitioner's handling of the transaction violated Florida Statute §494.055(1)(b) which governs fraud, misrepresentation, deceit, negligence and incompetence in a mortgage transaction. Further, the Department of Banking and Finance Order barred the Petitioner for life from participating in any activity within the jurisdiction of the department under the statute. (T. 166) (Final Order p. 38, 43)

The Bar also introduced into evidence a letter of advice from disciplinary proceedings which took place in 1994. Although the committee found the Petitioner's conduct did not rise to the level of a violation, the Committee found the Petitioner's " total lack of formal bookkeeping, the lack of a written retainer agreement and sloppy record keeping" were matters of grave concern. (Appendix #4). The Committee also recommended that the Petitioner take a formal accounting course.

However, the Petitioner did not take a formal accounting

course or any type of course work to address her persistent trust accounting problems. The Petitioner did not work with an accountant or a law office management service to address her trust accounting problems. Indeed as the petitioner herself admitted, she did not take any steps to become proficient in trust accounting .(T-176) Therefore, the Referee erred in finding that the petitioner was rehabilitated and had demonstrated the professional competence to resume the practice of law.

Furthermore, the Petitioner did not take any specific steps to address the other competency problems which led to her suspension(T-176)). The Petitioner did not take any course work related to real property transactions. As the Bar's expert witness testified, at a minimum, a person with the Petitioner's deficiencies would need several basic real estate courses to become competent.(T-138) In response, the Petitioner stated that she would not handle real estate transactions or have a trust account. This is insufficient to prove rehabilitation.
In cases where competence is at issue, the Petitioner in a rehabilitative suspension, must demonstrate that she has taken concrete steps to correct her deficiencies. Wolf at 348. Generally, rehabilitation for a petitioner under these

at 450.

The Petitioner essentially argued that she was rehabilitated because she had served her term of suspension. The caselaw is unequivocal that this is insufficient to prove rehabilitation. Rubin at 258 ;Timson at 450; Wolf at 548. Recitations of contrition and the intent to behave in a more appropriate manner in the future are insufficient to prove rehabilitation. If that was all that was required, there would be no need for a rehabilitative suspension. The Petitioner must demonstrate, through her actions, that she appreciates the seriousness of her misconduct and that she has taken the appropriate steps to address the underlying problems which led to her suspension. Rubin at 258. Despite her suspension and the Banking and Finance Order, by her own admission, the Petitioner has taken no steps to address her competency problems.(T- 176)) Despite being disciplined twice for trust accounting problems and receiving a letter of advice, the Petitioner, by her own admission, has not taken any specific steps to address her trust accounting problems. (T-176)

In light of the fact that the Petitioner failed to present any evidence of her professional competence as an attorney or document any specific steps taken to address the competency

problems which led to her suspension, the Referee erred in finding the Petitioner had demonstrated a reputation for good professional ability.

CONCLUSION

For the foregoing reasons, The Referee's recommendation is erroneous and the Petitioner should not be reinstated to the practice of law. Furthermore, prior to being reinstated, the Petitioner should take specific steps to address the competency and trust account issues which led to her suspension.

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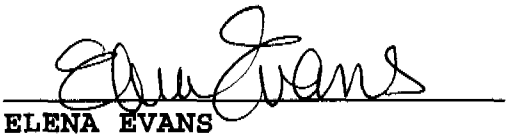
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief on Petition for Review was forwarded Via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Murray Yanks, Attorney for Respondent, at 19 West Flagler Street, Biscayne Building, Suite 401, Miami, Florida 33130, on this 27th day of June, 1996.



ELENA EVANS
Bar Counsel

APPENDIX

INDEX TO APPENDIX

1. Referee's Report of Findings of Fact and Recommendations

2. B &B Mortgage Equity Inc. v. Department of Banking and Finance, Division of Finance - Final Order and Notice of Rights

3. The Florida Bar v. Ana Hernandez-Yanks, Supreme Court Case No, 816(Fla. 1993)- Conditional Guilty Plea for Consent Judgment

4. The Florida Bar v. Ana Hernandez-Yanks, The Florida Bar Case No. 92-71, 523 (11C) Notice of No Probable Cause and Letter of Advice

Appendix Part 1

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case No. 86,337

Florida Bar File No. 96-70,274 (MRE-11J)

IN RE: PETITION FOR REINSTATEMENT
OF ANA HERNANDEZ-YANKS

_____/

REFEREE'S REPORT OF FINDINGS
OF FACT AND RECOMMENDATIONS

THIS CAUSE came on to be heard before me on the Petition for reinstatement to membership in good standing of Ana Hernandez-Yanks (Petitioner) at the hearing held on February 28, 1996, Petitioner presented the testimony of Andrew M. Parrish, Esquire, Leonard H. Gorman, Esquire, Murray H. Dubbin, Esquire, Martha Block, Esquire, and Petitioner.

The Florida Bar presented the testimony of Holly Moody, Esquire, Carlos Ruga, Esquire, and Jim Coad, Esquire. Petitioner had exhibits entered into evidence and The Florida Bar had exhibits entered in evidence. After consideration of all the evidence presented, I make the following findings of fact:

✓ 1. Petitioner is thirty-three years old, married and the mother of two children ages seven and five.

2. Petitioner was admitted to the Florida Bar in 1986, and entered the private practice as a sole practitioner. In the beginning of her career, her practice was in the area of criminal law.

EXHIBIT
1

3. In 1987 Petitioner married. The following year she moved her office into the same office space which she shared with her husband who was a licensed mortgage broker. Thereafter, she became involved with some real estate matters involving her husband's mortgage broker business.

4. Petitioner concentrated mainly in Bankruptcy law between 1990 and 1993.

5. Petitioner was 19 years old when she graduated college, and 22 years old when graduating from law school and admitted to the Florida Bar.

6. The report of Referee accepting consent judgment imposed as disciplinary measures (a) one year suspension with proof of rehabilitation (b) payment of costs to the Florida Bar (c) restitution in Circuit Court Dade County Case No. 88-49277-16 and (d) restitution of any forthcoming Client Security Fund.

7. Petitioner was suspended for one year period beginning April 29, 1993. However, since she was unable to pay the costs judgment of the Florida Bar until August 1995, she did not apply for readmission until September 1995.

8. Petitioner has paid all of the costs, with interest, to the Florida Bar.

9. Petitioner has paid restitution to the proper parties in Case. No. 88-49277(16), in the Circuit Court of Dade County, Florida.

10. No claims have been made to the Client Security Fund involving or against Petitioner.

11. Petitioner has complied with all of the conditions of her suspension order, including filing all required employment reports with the Florida Bar.

12. Petitioner was hired as a secretary/paralegal by the law firm of Dubbin, Berkman, Bloom & Karan in September 1993 and remained in such employment until the law firm dissolved in September 1994. During such time, attorney Leonard Gorman was of counsel to the firm, and she worked part of the time for him.

13. From October 1, 1994, through the present time, Petitioner has worked for attorneys Leonard Gorman and Andrew Parrish who share office space in Coral Gables, Florida. She has continued to work for both attorneys as a secretary/paralegal.

14. Since the date of suspension, no complaints have been made against the Petitioner with the Florida Bar.

15. Petitioner's witness, Murray Dubbin, has been a member of the Florida Bar for 45 years; served on the Ethics Committee of the Florida Bar; served in the Florida Legislature as a Legislator; and, currently is the City Attorney of Miami Beach and the City of North Bay Village.

16. The referee accepts the testimony of attorney Murray Dubbin with regard to his opinions of Petitioner, and that she is a person of good moral character and is fit to resume to the practice of law.

17. The referee also accepts the testimony of attorneys Andrew Parrish, Leonard Gorman, and Martha Block, with regard to their opinions of the Petitioner, including that she is of good moral character; fit to resume to the practice of law; and professionally competent and capable.

18. The testimony presented by Bar counsel of attorney Holly Moody was not relevant and probative to these proceedings. Attorney Holly Moody had represented the parties whose complaints led to Petitioner's suspension. She has had no dealings with the Petitioner since her suspension. Her opinion as to Petitioner's professional ability was based solely on her involvement in the matter that led to the suspension.

19. The testimony presented by Bar counsel of attorney Jim Coad was not relevant to the issues involved in these proceedings. He had no personal knowledge of the Petitioner either before or after her suspension. His testimony covered his opinions concerning the legal documents and charges on the real estate closing statement which was the subject matter that led to her suspension.

20. Petitioner maintained a joint checking account with her husband from April 1993 through October 1995. Nearly all of the checks written on the checking account were made by her husband.

21. That during the above time period, five (5) checks Petitioner wrote were returned for insufficient funds, and two (2) checks were returned for uncollected funds. One of the returned checks was to her employer, Dubbin, Berkman, et al. for health

insurance. Petitioner did not know the available balances when the checks were written, and further, all of the checks were subsequently paid to each payee. There was no detriment or loss caused to any of the payees.

22. The testimony of Petitioner's employers, all of whom are commercial attorneys, is that she is of good moral character with professional ability and competence to practice law.

23. Petitioner has not exposed or shown any ill will towards those responsible for the disciplinary action that led to her suspension.

24. Petitioner is fit for a position of trust and confidence.

25. Petitioner presented competent evidence of her capacity as a competent attorney and professional ability.

✓26. The testimony of attorney Martha Block shows that Petitioner was a competent attorney before her suspension. Attorney Block, worked for the U.S. Trustee in Bankruptcy, Stephen Freedman, who now is a U.S. Bankruptcy Judge. By coincidence, attorney, Block, met Petitioner again after her suspension, when they both worked for attorney, Andrew Parrish.

27. Petitioner has expressed remorse for her wrongdoing and accepted the discipline imposed.

28. Petitioner is current with all CLE requirements.

29. Petitioner has expressed sincere remorse and an honest desire to comply with any conditions imposed as a condition of reinstatement.

30. Petitioner is rehabilitated and does not pose a harm to the public.

31. Petitioner has a sincere desire to return to the practice of law and conduct herself as an attorney in an exemplary fashion.

Recommendations

Based upon the evidence presented at the hearing and upon the foregoing Findings of Fact, I make the following recommendations:

1. That Petitioner, Ana Hernandez-Yanks, be reinstated as a member in good standing of the Florida Bar.

2. That Petitioner attend the Florida Bar sponsored seminar known as Professional Practice and Responsibility Enhancement Program within one year from the date she is readmitted, and provide proof to the Florida Bar that she undertook and attended such course.

3. That Petitioner, for a period of two years, shall file quarterly reports with the Florida Bar notifying them that either she does not maintain a trust account or strictly comply with all trust accounting procedures and provide the Florida Bar with quarterly trust account records.

4. That prior to Petitioner establishing a trust account, she is to give written notice to the Florida Bar of her intent to do so, and provide the name and address of such financial institution, and further, comply with any conditions that the Florida Bar may impose.

5. That Petitioner be required to complete thirty (30) hours of C.L.E. credit in real estate (real property) law and procedure before being permitted to handle any real estate transaction.

Dated this 11 day of March, 1996 at Miami, Dade County, Florida.

MURRAY GOLDMAN, REFEREE

MURRAY GOLDMAN

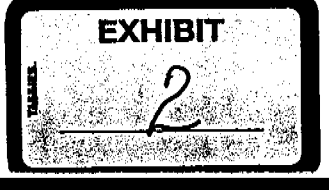
Appendix Part 2

STATE OF FLORIDA
DEPARTMENT OF BANKING AND FINANCE
DIVISION OF FINANCE

B & B MORTGAGE EQUITY, INC., and BARRY YANKS, Petitioner, vs. DEPARTMENT OF BANKING AND FINANCE, DIVISION OF FINANCE, Respondent.	CASE NO. 90-4722
DEPARTMENT OF BANKING AND FINANCE, DIVISION OF FINANCE, Petitioner, vs. B & B MORTGAGE INVESTORS, INC.; B & B EQUITY, INC.; BARRY YANKS, individually and as principal mortgage broker of B & B Mortgage Investors, Inc.; and ANA HERNANDEZ-YANKS, Respondents.	CASE NO. 90-6577

FINAL ORDER AND NOTICE OF RIGHTS

This matter has come before the undersigned as Head of the Department of Banking and Finance, Division of Finance ("Department") for the entry of a Final Order in the above-referenced proceeding. Upon a review of the entire record of this proceeding and due consideration thereof, the Recommended Order by the Hearing Officer is adopted in toto.



BACKGROUND

This matter arose when the Department denied an application for registration of a mortgage brokerage business filed by Barry Yanks on behalf of B & B Mortgage Equity, Inc. on January 4, 1990 (referred to hereinafter as the "Application Case"). Further, on August 30, 1990, the Department filed an Administrative Complaint for a Cease and Desist Order, an Order of Refund, and for the Imposition of One or More Administrative Penalties and Notice of Rights amended on April 22, 1992 (referred to hereinafter as the "Violations Case") against B & B Mortgage Investors, Inc. ("B & B Investors"), B & B Mortgage Equity, Inc. ("B & B Equity"), Barry Yanks ("Yanks") and Ana Hernandez-Yanks ("Hernandez-Yanks") (collectively referred to as "Respondents"). The Respondents subsequently requested an administrative hearing on the charges. Respondents' requests were granted, and this matter was transferred by the Department to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct the formal hearing. A formal hearing was held in Miami, Florida on April 29 through May 1, 1992. Respondents subsequently filed a Notice of Voluntary Dismissal with respect to the application case on November 9, 1992. Respondents' Notice of Voluntary Dismissal was mistakenly filed on both cases and both files were erroneously closed by the Division of Administrative Hearings. It was subsequently determined that the Violations Case should not have been dismissed and a Recommended Order was prepared by the Hearing Officer to reflect the recommended disposition of

both cases. On August 18, 1994, the Hearing Officer from the Division of Administrative Hearings submitted his Recommended Order ("Recommended Order") in this proceeding, a copy of which is attached hereto as Exhibit "A". Said Recommended Order recommended that the Department enter a Final Order finding Respondents B & B Investors, Yanks, and Hernandez-Yanks guilty of the violations alleged in Counts I, II, III, and IV of the Amended Administrative Complaint; Imposing an Administrative Fine of Five Thousand Dollars ($5,000) payable jointly and severally; requiring Respondents Yanks and B & B Investors to repay Nine Thousand Dollars ($9,000) to Calvary Chapel within thirty (30) days after the rendition of the Final Order and that failure to repay this sum should be a basis for the imposition of additional penalties, including revocation; and recommending that the mortgage brokerage licenses of Respondents Yanks and B & B Investors be suspended for one (1) year based on their actions in connection with the Calvary Chapel transaction. Further, the Recommended Order recommended that a Cease and Desist Order be entered against Hernandez-Yanks prohibiting her from any future violations of Chapter 494, Florida Statutes, from engaging in any act within the jurisdiction of the Department pursuant to Chapter 494, Florida Statutes, and from being an ultimate equitable owner of a business license pursuant to Chapter 494, Florida Statutes. The facts surrounding her trust account should also be reported to the Florida Bar for investigation. Further, the Recommended Order recommended that a Final Order be entered against

Respondents Yanks, Hernandez-Yanks, and B & B Equity finding these Respondents to have committed the violations alleged in Counts VIII, IX, and XI, finding Respondent Yanks and B & B Equity to have committed the violations alleged in Count XII, and finding Respondent Hernandez-Yanks guilty of violations alleged in Count XIII of the Amended Administrative Complaint. Further, the Recommended Order recommended that the Department impose an administrative fine of $5,000 on these Respondents and that the mortgage brokerage license of Respondent Yanks be suspended for a period of three (3) years to run consecutively with the suspension issued in connection with the Calvary Chapel transaction. Respondents should also be required to repay $6,040.12 to Ana Vazquez for inappropriate and undisclosed charges made at the closing. Further, the Recommended Order recommended that the collection of all fines and or assessments against Respondents Hernandez-Yanks and/or B & B Investors be suspended pending approval of the Bankruptcy Court. Further, the Recommended Order recommended that Counts VI, X, and XIV be dismissed. Further, in view of the Voluntary Dismissal filed on November 9, 1993, it was recommended that the Final Order formally dismiss the Application Case.

On September 1, 1994, the Department filed its Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "B". On September 8, 1994, Respondent Barry Yanks filed his Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "C". On September 13, 1994, the

Department filed its Response to Exceptions to the Recommended Order filed by Barry Yanks, a copy of which is attached hereto as Exhibit "D". No exceptions were filed by Respondents B & B Mortgage Investors, Inc., B & B Equity, Inc., and/or Ana Hernandez-Yanks.

Based on a complete review of the record presented in this proceeding, the following rulings on exceptions, findings of fact, conclusions of law, and final agency action are entered herein.

RULINGS ON THE EXCEPTIONS OF THE DEPARTMENT

First Exception: The Department's exception to paragraph (1) Of the Recommendation Section within the Recommended Order providing that the $5,000 fine shall be payable within thirty (30) days after rendition of the Final Order is hereby accepted. See Rule 3-7.012(1), Florida Administrative Code.

Second Exception: The Department's exception to paragraph (3) of the Recommendation Section within the Recommended Order providing that the $5,000 fine and $6,040.12 repayment to Ana Vazquez shall be payable within thirty (30) days after rendition of the Final Order is hereby accepted. See Rule 3-7.012(1), Florida Administrative Code.

RULINGS ON THE EXCEPTIONS OF THE RESPONDENT YANKS

First Exception: Respondent's exception to the Recommended Order being entered in excess of ninety (90) days from the date of the formal hearing, purportedly in violation of Florida Administrative Code is hereby rejected. The issuance of

a Final Order outside of the ninety (90) days time period is considered harmless error. Department of Business Regulation, Division of Pari-Mutuel Wagering vs. Hyman, 417 So.2d 671 (Fla. 1982) on remand 431 So.2d 673 (Fla. 3rd DCA 1983). No provision exists within the Florida Administrative Code mandating that the Recommended Order be entered within ninety (90) days from the date of the final hearing.. Further, the appropriate remedy would have been for the Respondent to mandamus the Hearing Officer, which Respondent failed to do. See Hyman, 417 So.2d at 673.

Second Exception: The Respondent's exception to the Hearing Officer's failure to recommend a retroactive license suspension is denied. It is within the Hearing Officer's discretion to enter a recommendation as to appropriate discipline in accordance with Chapter 494, Florida Statutes and the rules promulgated thereto. As the Hearing Officer's recommendation complies with the law, Respondent's exception is rejected. See Section 120.57(1)10., Florida Statutes.

Third Exception: Respondent's exception to the nature of the recommended discipline as being too harsh and excessive is rejected. The fact that Respondent and the Complainant settled the victim's civil complaint does not foreclose the Department from proceeding against the Respondent, nor does it prohibit the Hearing Officer from making recommendations as to the appropriate discipline. Further, the discipline recommended by the Hearing Officer is in accordance with Chapter 494, Florida Statutes and the rules promulgated thereto, and as such, Respondent's

exception is rejected. See Section 120.57(1)10., Florida Statutes.

Fourth Exception: Respondents' exception to the Department's failure to provide Respondent with an index of its decisions is rejected. Respondent failed to cite-to any discovery in the record where Respondent requested a copy of the index. Further, had such a request been made and the production of the index refused, Respondent could have filed a motion to compel discovery, which Respondent failed to do. Further, agency orders are indexed in an electronic data base maintained in Tallahassee, Florida and thus, Respondent could have reviewed the index. See Rules 3-8.007 and 3-8.009, Florida Administrative Code. Accordingly, Respondent's exception is rejected.

Fifth Exception: Respondents' exception to the Hearing Officer's recommendation that Ana Vazquez be paid the sum of $6,040.12 as no evidence was presented to maintain this finding is rejected. See Findings of Fact #67, $72, #91, and #92 of the Hearing Officer's Recommended Order.

FINDINGS OF FACT

The Hearing Officer's Findings of Fact as contained within the Recommended Order, paragraphs (1) - (96) are accepted as true and correct and are adopted as the Findings of Fact of this Final Order and Notice of Rights.

CONCLUSIONS OF LAW

The Hearing Officer's conclusions of Law, as contained within the Recommended Order, paragraphs (97) - (113) are

accepted as true and correct and are adopted as the Conclusions of Law of this Final Order and Notice of Rights.

STATEMENT OF FINAL AGENCY ACTION

Having ruled on all of the exceptions filed by the Department and the Respondent, and having reviewed the complete record, it is accordingly ORDERED:

A. Respondents B & B Investors, Yanks and Hernandez-Yanks:

1. Are found to have violated Sections 494.055(1)(e), (f) and (g) and 494.093(3) and (4), Florida Statutes;

2. Shall pay an administrative fine in the amount of Five Thousand Dollars ($5,000), payable jointly and severally to:

Division of Finance
City Centre
227 N. Bronough Street
Tallahassee, FL 32301

Payment shall be tendered within thirty (30) days from the date of entry of this Final Order.

B. Respondents Yanks and B & B Investors:

1. Shall repay Calvary Chapel Nine Thousand Dollars ($9,000) within thirty (30) days from the date of entry of this Final Order. Failure to repay this sum shall be the basis for the imposition of additional penalties, including revocation of licensure;

2. The mortgage brokerage licenses shall suspended for each Respondent, Yanks and B & B Investors for one (1) year from the date of entry of this Final Order.

C. Respondent Hernandez-Yanks:

1. Shall cease and desist from any future violations of Chapter 494, Florida Statutes, from engaging in any act within the jurisdiction of the Department pursuant to Chapter 494, Florida Statutes, and shall not be the ultimate equitable owner of a business license pursuant to Chapter 494, Florida Statutes;

2. The facts surrounding Hernandez-Yanks' trust account shall be reported to the Florida Bar for investigation.

D. Respondent Yanks and B & B Equity:

1. Are found to have violated Section 494.055(1)(b), Florida Statutes.

E. Respondent Yanks, Hernandez-Yanks, B & B Equity:

1. Are found to have violated Sections 494.055(1)(g), and (h) and 494.093(3) and (4), Florida Statutes;

F. Respondents B & B Investors, B & B Equity, Yanks and Hernandez-Yanks:

1. Shall pay an administrative fine in the amount of Five Thousand Dollars ($5,000), payable jointly and severally to:

Division of Finance
City Centre
227 N. Bronough Street
Tallahassee, FL 32301

Payment shall be tendered within thirty (30) days from the date of entry of this Final Order;

2. Shall repay $6,040.12 to Ana Vazquez within thirty (30) days from the date of entry of this Final Order for inappropriate and undisclosed charges made at the closing .

G. Respondent Hernandez-Yanks:

1. Is found to have violated Section 494.055(1)(b), Florida Statutes.

H. Respondent Yanks' mortgage broker's license, is suspended for a period of three (3) years, which suspension shall run consecutively with the suspension imposed in the Statement of Final Agency, #B.2., for a total of a four year mortgage broker's license suspension from the date of entry of this Final Order.

I. All fines and/or assessments against Respondents Hernandez-Yanks and/or B & B Investors shall be suspended pending approval of the Bankruptcy Court.

J. Count VI, pertaining to Respondents B & B Investors, Yanks, and Hernandez-Yanks, and Counts X and XIV of the Amended Administrative Complaint are hereby dismissed.

K. DBF #1893-F-7/90 is hereby dismissed.

DONE and ORDERED this 18th day of November, 1994, in Tallahassee, Leon County, Florida.

GERALD LEWIS, as Comptroller
and Head of the Department of
Banking and Finance, Division
of Finance

Copies furnished to:

Linda G. Dilworth, Director
Division of Finance

NOTICE OF RIGHTS TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE (1) COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF BANKING AND FINANCE AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order with Notice of Rights was furnished by Regular U.S. Mail to George J. Lott, Esquire, Lott and Levine, 5975 Sunset Drive, Suite 302, Miami, Florida 33143 and Barry Yanks, 1901 Northwest South River Drive, Unit #41, Miami, Florida 33125, this 18 day of November, 1994.

ELISE M. GREENBAUM
Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399-0350
(904) 488-9896

c:b&b.fin

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

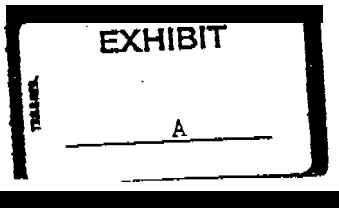
B & B MORTGAGE EQUITY, INC., and BARRY YANKS, Petitioners, vs. DEPARTMENT OF BARKING AND FINANCE, DIVISION OF FINANCE, Respondent.	CASE NO. 90-4722
DEPARTMENT OF BANKING AND FINANCE, DIVISION OF FINANCE, Petitioner, vs. B & B MORTGAGE INVESTORS, INC.; B & B EQUITY, INC.; BARRY YANKS, individually and as principal mortgage broker of B & B Mortgage Investors, Inc.; and ANA HERNANDEZ-YANKS, Respondents.	CASE NO. 90-6577

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 29 through May 1, 1992, in Miami, Florida., before J. Stephen Menton, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For 'Petitioner: Paul C. Stadler
Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399



For Respondent George J. Lott, Esquire
5975 Sunset Drive, Suite 302
Miami, Florida 33143

STATEMENT OF THE ISSUES

The issue in Case No. 90-4722 was whether B & B Mortgage Equity, Inc. was entitled to licensure as a mortgage broker in the State of Florida. As discussed in more detail below, B & B Mortgage Equity subsequently withdrew its application for licensure and that case is now moot. The issue in Case No. 90-6577 is whether Respondents committed the offenses alleged in the Amended Administrative Complaint filed in that case, and, if so, what disciplinary action should be imposed.

PRELIMINARY STATEMENT

In a letter dated June 4, 3990, the Department of Banking and Finance (the "Department") denied an application for registration as a mortgage brokerage business filed by Barry Yanks on behalf of 3 & B Mortgage Equity, inc. The denial was based upon the Department's determination that the designated principal mortgage broker for the business, Barry Yanks, had violated Section 494.055(1), Florida Statutes, which prohibits fraud, misrepresentation, deceit, negligence or incompetence in any mortgage- financing transaction. Barry Yanks filed a Petition for Formal Proceeding contesting the denial of the application. The case was referred to the Division of Administrative Hearings pursuant to Section 120.57, Florida Statutes, where it was assigned Case No. 90-4722 (the "Application Case").

On August 30, 1990, the Department filed an Administrative Complaint for a Cease and Desist Order, an Order of Refund, and

for the Imposition of One or More Administrative Penalties and Notice of Rights (the "Administrative Complaint") against B & B Mortgage Investors, Inc. ("B & B Investors"), B & B Mortgage Equity, Inc. ("B & B Equity"), Barry Yanks ("Yanks") and Ana Hernandez-Yanks ("Hernandez-Yanks") (collectively referred to as Respondents). Respondents filed an Answer to the Administrative Complaint and requested an administrative hearing on the charges. The case was transmitted to the Division of Administrative Hearings pursuant to Section 120.57, Florida Statutes, where it was assigned Case No. 90-6577 (hereinafter referred to as the "Violations Case").

Both cases were assigned to Hearing Officer Michael Parrish, who entered an Order of Consolidation on November 28, 1990. On September 13, 1990, the Department filed a Motion to Amend. That Motion sought to amend the grounds for denial in the Application Case to reflect the same allegations contained in the Violations Case. That Motion was granted by Hearing Officer Michael Parrish in an Order dated September 20, 1991.

Based on the unavailability of certain witnesses and bankruptcy proceedings involving two of the Respondents in the Violations Case, the hearing in this matter was continued several times. On October 5, 1990, a Motion to Dismiss or Abate was filed in the Violations Case on behalf of Hernandez-Yanks. That Motion alleged that Hernandez-Yanks filed a Petition for Relief under the U.S. Bankruptcy Code on March 15, 1990. The Motion also pointed out that Hernandez-Yanks was not licensed pursuant to Chapter 494, Florida Statutes. in the Administrative

Complaint, the Department acknowledged the filing of the bankruptcy petition by Hernandez-Yanks as well as the filing of a separate petition for bankruptcy by B & B Investors. The Department argued that, notwithstanding the filing of the bankruptcy petitions, a government agency can still take action against a license held by a person or entity in bankruptcy and can still enter orders necessary to protect the public and assess fines which are nondischargable, provided that the agency makes no attempt to collect such fines. Title 11 U.S.C. Section 362(b)(4) specifically recognizes that the automatic stay provisions of the Bankruptcy Code do not apply to "the commencement or continuation or' an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power...." Fearing Officer Parrish entered an Order Denying Motion to Dismiss or Abate on November 28, 1990. See, Board of Governors of The Federal Reserve System v. Mcorp. Financial, Inc., 112 S.C. 459 (1991).

At the commencement of the hearing in these cases, counsel for Respondents took exception to Fearing Officer Parrish's prior Order Denying Motion to Dismiss or Abate and further argued that, since Hernandez-Yanks was a member of the Florida Bar, only the Bar could-appropriately discipline her for her profession& activities. Hernandez-Yanks did not appear at the hearing. The legal issues regarding the Department's authority to take action against Hernandez-Yanks are addressed in more detail in the Conclusions of Law below. At the hearing, the parties were allowed to present all of the factual evidence'relevant to the both the Violations Case and the Application Case.

On April 6, 1992, the Department filed a Second Motion to Amend. That Motion sought to amend the Administrative Complaint in the Violations Case and the Amended Notice of Intent in the Application Case to conform to the discovery that had taken place in the proceedings. By Order dated April 22, 1992, the Motion to Amend was granted.

The Amended Administrative Complaint contained 15 counts, however Count 15 was related to the Application Case. The allegations in the Amended Administrative Complaint arose from two separate transactions which are described in more detail in the Findings of Fact below.

In the April 22, 1992 Order, Hearing Officer Parrish also granted a Motion for Official Recognition which had been submitted by the Department on April 6, 1992 regarding a Final Order entered in a prior case. The Department also filed a Request for Official Notice on January 9, 1992 regarding certain rules of the Department. No ruling on that request was ever entered. That request is hereby granted.

The consolidated cases were ultimately rescheduled for hearing on April 29 through May 1, 1992. Prior to the hearing, the cases were transferred to the undersigned Hearing Officer who conducted the hearing as scheduled.

At the hearing, the Department presented the testimony of seven witnesses: John Thornton, a senior vice president with Ticor Title Insurance Company; Ana Vazquez; Marie Hall; Reverend Philip Hall; Robert Crespo, an investigator employed by the Department; Yolanda Lewis, a financial examiner employed by the

Department; and Jan Hutchersion, a financial examiner analyst employed by the Department.

The Department had 35 exhibits marked for identification. The Department's Exhibits 1-32 and 35 were admitted into evidence. Ruling on the Department's exhibits 33 and 34 was reserved. The Department's Exhibit 33 was 2 deposition of Barry Yanks taken in a related circuit court proceeding. The Department's Exhibit 34 was a deposition of Ana Hernandez-Yanks. As discussed above, Hernandez-Yanks filed a Petition for Relief in federal bankruptcy court and did not appear at the hearing. The parties were given an opportunity to address the admissibility of these depositions in their proposed recommended orders. After considering the arguments made by the parties at the hearing and in their Proposed Recommended Orders, the depositions are accepted in accordance with the provisions of Section 90.803(18) and 120.58(1), Florida Statutes.

Respondent Barry Yanks testified on behalf of Respondents, who also called the Reverend Frank Lloyd and Salvador Busquets to testify. Respondents had 15 exhibits marked for identification, all of which were accepted except Respondent's Exhibit 14. Respondent's Exhibit 14 was a letter dated May 19, 1989. The letter was never properly authenticated at the hearing and was not accepted into evidence. During the course of the hearing, one of the witnesses utilized the letter to refresh his recollection. Counsel for Respondents indicated during the hearing that the letter would be authenticated through the deposition of the author of the letter. Respondents were granted

an opportunity at the conclusion of the hearing to supplement the record with proper authentication of Respondent's Exhibit *14.* **As** of the date of this Recommended Order, no such documentation has been submitted. Consequently, Respondent's Exhibit 14 is rejected.

At the conclusion of the hearing, the parties agreed that proposed recommended orders should be filed within 30 days of the filing of the transcript of the proceedings. The parties subsequently requested a delay in submitting the **transcript** in order to allow them an opportunity to explore settlement possibilities. On July 15, 1992, the Department filed a Notice of Filing Transcript of Administrative Hearing. That Notice states that the parties were unable to reach 2 settlement. The Department subsequently filed a proposed recommended order in accordance with the schedule agreed to at the conclusion of rhe hearing. Respondents filed several motions for extensions of **time** for filing a proposed recommended order. Those extensions were granted with the proviso that the Department would have an opportunity to file a response to Respondents' proposed recommended order.

Respondents filed a Notice of Voluntary Dismissal with respect to the Application **Case** on November 9, 1992.. Respondents' Notice of Voluntary Dismissal was mistakenly filed in both cases and both files were erroneously closed. It was subsequently determined that the Violations Case should not have been dismissed and this Recommended Order was prepared to reflect the recommended disposition of both cases. No conclusions are

reached herein as to the legal issues raised in the Application Case.

Both parties have submitted proposed findings of fact. A ruling on each of the parties' proposed findings of fact is included in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent hereto, B & B Investors was registered with the Department as a mortgage broker pursuant to Chapter 494, Florida Statutes. Until June 15, 1990, the business address for B & B Investors was 1481 N.W. 7th Street $1, Miami, Florid2 33125. B & B investors' registration number is HB 592369518.

2. On or about July 5, 1990, 3 & 3 Investors filed a petition for relief under the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Florida, Case No. 9090-14587-SMW.

3. Yanks was the president and principal mortgage broker for B & B investors until Key 10, 1989. Yanks is a licensed mortgage broker in Florida having been issued license number was 262788177, He has been licensed since 1980 or 1981. There is no evidence of any prior disciplinary action against him or B & B Investors.

4. At all times pertinent hereto, Yanks was also the President of B & B Equity. B & B Equity has never been registered pursuant to Chapter 494, Florida Statutes. Until June 15, 1990, the business address for B & B Equity was also 1481 N.W. 7th Street #1, Miami, Florida 33125.

5. At all times pertinent hereto, Hernandez-Yanks was married to Yanks and was the Vice President and Secretary of B & B Equity. Hernandez-Yanks is an attorney, but she has never been licensed pursuant to Chapter 494, Florida Statutes. On or about March 15, 1990, Hernandez-Yanks filed a Petition for Relief under the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Florida, Case No. 90-11654-BKC-AJC.

6. On or about January 1, 1990, B & B Equity filed an Application for Registration as a Mortgage Brokerage Business (the "Registration Application"). Paragraph 6 of the Registration Application stated in part:

> List all officers, directors, partners, joint-ventures, and ultimate equitable owners. Ultimate equitable owner means natural person who owns 10% or more of applicant.

Name	Address	Title
Barry Yanks	1481 NW 7 St.	Dres.
Ana Hernandez-Yanks	1481 NW 7 St.	VP/Scty

7. Yanks was designated as the principal mortgage broker on the Registration Application. The Department denied the Registration Application by notice dated June 4, 1990.

CALVARY CHAPEL TRANSACTION

8. At the time of the hearing in this matter, Marie Hall was 66 years old. She was last employed in 1988 by the Broward County School System as an adult vocational education instructor teaching students how to operate sewing machines. Her husband, the late Reverend Arthur Hall, died on March 22, 1988, at the age of 75. Because of health problems, he had been unable to work since 1962. The late Reverend Hall had very little education.

Prior to the transactions involved in this case, the only other real estate deal in which the late Reverend and Mrs. Hall had been involved was the purchase of their home many years ago.

9. In the summer of 1987, the late Reverend and Mrs. Hall sought to purchase Mount Bethel Baptist Church (the "Church"). To assist in their effort to purchase the Church, the Halls contacted Reverend Frank Lloyd. Reverend Frank Lloyd was rhe pastor of Hope Outreach, Church of God in Christ and the Chairman of the State of Florida Prison Ministry. Reverend Lioyd was also engaged in a consulting business through a company celled Professional Proposal and Financial Consultants, Inc. ("PPFC").

10. In the summer of 1987, the Halls entered into en agreement with PPFC pursuant to which they paid PPFC $800 for PPFC's assistance in securing a loan of $250,000 to purchase the church. The agreement called for an interest rate of approximately 11 3/4%.

11. The Halls deposited a totalof $15,000 in escrow with Reverend Lloyd and/or PPFC. At the time the first $10,000 was deposited with PPFC, the parties entered into an agreement which provided as follows:

> ...This money is not to be used fox down payment, or services rendered. It is to be escxowed only. At the closing of the loan this entire amount is to be returned *to* Elder Hall ox his designate. If in the event no loan is secure [sic] all funds is [sic] to be returned to Elder Arthur Hall, President Calvary Chapel Church of God in Christ or his designate.

12. Reverend Lloyd attempted to obtain a mortgage for the Halls from several companies including Ft. Lauderdale Mortgage

and Horizon Development Mortgage ("Horizon*). The Halls decided not to pursue a loan from Horizon because Horizon wanted a non-refundable $3,000 up-front fee. There was also some question whether either company would handle a loan for a church.

13. Reverend Lloyd introduced the late Reverend and Mrs. Hall to Yanks because Reverend Lloyd knew that Yanks had successfully obtained loans for other churches.

14. The Halls met with Yanks on a couple of occasions in late 1987 and early 1988. Other members of the Hall's congregation attended some of these meetings. During those meetings, the need for some of the other church members to sign on the loan and/or pledge additional collateral was discussed. Yanks advised the late Reverend and Mrs. Hall that he might be able to secure a loan for them to purchase the Church, but the amount of the loan would be smaller 2nd the interest rate would be higher than they had anticipated in their agreement with PPFC. Yanks did not require an up-front loan application fee.

15. On January 14, 1988, the late Reverend and Mrs. Hall met with Reverend Lloyd and Yanks at the office of B & B Investors in Miami. As noted above, the Halls were initially seeking a loan of $250,000. During the January 14, 1988 meeting, Yanks advised the representatives of Calvary Chapel that he could arrange a loan of '$162,000 at 17% if additional collateral was provided.

16. At the January 14 meeting, the late Reverend and Mrs. Hall executed a mortgage loan application (the "Loan Application") with B & B Investors. The Halls executed the Loan

Application on behalf of Calvary Chapel Church of God in Christ, Inc. (hereinafter Calvary Chapel). Yanks executed the Loan Application on behalf of B & B Investors,

17. The Loan Application was for a $162,000 loan and stated that the loan origination fee would be $4,860.00 and the loan discount fee would be $4,860.00. The Loan Application did not indicate when those fees would be due or to whom they-would be paid. The Loan Application noted that there would be an appraisal fee of $600.00 and attorneys' fees of $750.00.

18. The evidence established that, in the mortgage brokerage business, a loan origination fee is often considered synonymous with a broker's fee. The origination fee is traditionally charged at closing. However, the agreement between a mortgage broker and a client determines when the mortgage broker is entitled to his fee. In certain circumstances, a mortgage broker may be entitled to payment upon obtaining a firm commitment for a loan irrespective of whether the loan closes.

19. Although there was no statutory or rule requirement at the time of this transaction, it was customary in. the industry for a mortgage broker to set forth in writing the terms as to when he is to be paid. The Application in this case did not state when the fees were to be considered as earned.

20. The Loan Application also provided in part:

> If the above commitment or 2 commitment in an amount and/or upon terms acceptable to the undersigned is obtained and said mortgage loan-is not closed because (I)(We) have not fulfilled our part of this agreement. (I)(We) agree to pay $_____ the application deposit being a pert, for-obtaining said commitment. If an acceptable commitment is

not obtained, the mortgage application deposit will be refunded, except $_____ to cover expenses actually incurred.

21. A loan discount fee is the cost to the lender to discount the interest rate on a mortgage loan for sale in the secondary market. The discount fee is owed to the lender or investor and was collected at closing. A broker is not entitled to a loan discount fee.

22. Yanks tries to ignore the terminology used in the Loan Application he prepared and claims that all parties knew that he and/or B & B Investors would receive both the loan origination fee and loan discount fee. He contends that he explained to the late Rev. Hall and Mrs. Hall that the loan origination fee and the loan discount fees were fees that would be paid to him when he arranged a firm commitment for a loan at the agreed upon terms. However, the more persuasive evidence established that the late Rev. Hall and Mrs. Hall did not understand that the loan -origination fee and/or discount fee would be paid to Yanks irrespective of whether the loan actually closed. Moreover, Yanks has provided no credible explanation as to why he would ever be entitled to receive the loan discount fee.

23. At the January 14, 1988 meeting, Yanks orally arranged a deal with Alan Greenwald, a private investor with whom Yanks had worked in the past, to fund a $162,000 loan at 17%. At the time of this transaction, there was no statutory requirement that loan commitments be made in writing. No written confirmation of the commitment was provided even though it was common in the industry for commitments- to be given in writing in order-to bind

the lender to the transaction and to provide evidence of the terms of the commitment.

24. The only written evidence of the loan commitment is a letter from Yanks to the attorney for Alan Greenwald. That letter states that Mr. Greenwald had asked for additional collateral. During the January 14, 1988 meeting, the late Rev. and Mrs. Hall agreed to put up their house es additional collateral. In addition, two other members of the congregation who were present et the meeting, Effie Davis and Cleveland Foreman, agreed in principal to permit a mortgage to be placed on their houses as additional collateral to secure the loan.

25. Yanks contends that, as a result of his efforts in securing a commitment from Alan Greenwald as noted above, he was entitled to receive the loan origination fee and loan discount fee set forth in the Loan Application. After the January 14, 1988 meeting, Rev. Lloyd released to Yanks $10,000 of the $15,000 that he had been holding in escrow for the late Rev. and Mrs. Hall. The $10,000 check was made payable to B & B Investors. The $10,000 wcs not placed in an escrow or trust account upon receipt. Yanks apparently arranged. for $1,000 of the-money to be paid to Debbie Landsberg, the attorney for Alan Greenwald,' as- an advance on the legal fees and costs that were expected to be incurred in closing the transaction.

26. At the time the $10,000 was transferred to B & B Investors, all of the parties to the transaction expected the loan to close and no one contemplated or anticipated that the loan would not go through. While both Yanks and Rev. Lloyd claim

that the late Rev. Hall approved the release of the $10,000 as payment to Yanks for services in securing a commitment from Alan Greenwald, this testimony is rejected as not credible. The more persuasive evidence clearly established that at no time did the late Rev. and Mrs. Hall understand that if the loan did not close Yanks would keep the $10,000.

27. After the January 14, 1988 meeting, the parties initiated the steps necessary to close the deal. These efforts were complicated by the illness of the attorney for the seller, the marriage of the attorney for the lender and the difficulty in locating the abstracts for the properties involved. Moreover, a number of title deficiencies regarding the Church were discovered and had to be corrected.

28. The arrangements for financing the purchase of the Church changed several times. Initially, the Seller had indicated that it would take back a second mortgage for $50,000 in order to facilitate a closing. However, as the parties got closer to closing, the Seller changed its mind regarding the second mortgage. Ultimately, in September of 1988, the Seller agreed to take back a second mortgage of $35,000.

29. Sometime during the summer of 1988, Greenwald reduced to $110,000 the amount he was willing to lend on the deal. That amount was to be secured solely by the Church property. Yanks claims that he arranged for another investor to lend between $40,000 to $45,000 with the residences of certain congregation members, including the Halls, Effie Davis and Cleveland Foreman, serving as collateral. These modifications were never memorialized in writing.

30. As preparations for a closing proceeded, it became apparent that Effie Davis' house could not be used as security for the loan. While there is conflicting evidence as to why Effie Davis' house could not be used for additional collateral, the more persuasive evidence indicates that the presence of one or more existing liens on the property rendered it of minimal value as additional collateral.

31. As a result of the inability to use Ms. Davis' house as part of the collateral for the loan, Yanks advised Calvary Chapel that the amount of the loan would have to be decreased from $162,000 to $150,000. Yanks also advised Calvary Chapel that an additional cash deposit of $14,000 was necessary to demonstrate to the lender that sufficient funds were available to conclude the deal. The additional money was paid in two parts. on or about August 23, 1988, Calvary Chapel paid $10,000 to the Ana-Hernandez-Yanks Trust Account. Shortly thereafter, on or about September 1, 1988, Calvary Chapel paid an additional $4,000 to the Ana Hernandez-Yanks Trust Account. These sums were received by Ana Hernandez-Yanks in trust as the attorney for the B & B Investors. No written escrow agreement was executed.

32. No written amendment to the Loan Application was provided to reflect the new terms for the anticipated loan nor was there any written commitment letter.

33. As noted above, the late Rev. Hall died in March of 1988. Reverend Phiilip Hall, the son of the late Rev. Hall, was appointed the pastor of Calvary Chapel in April of 1988. At the time of his appointment, Rev. Phillip Hall was living in

Nashville. He commuted between Nashville and Fort Lauderdale for a while before moving to Fort Lauderdale on July 31, 1988.

34. Yanks suggests that the Reverend Philip Hall did not like the deal his parents had entered into and refused to honor it. More specifically, Yanks contends that Calvary Chapel and the seller made alternate arrangements for the sale of the property in order to **avoid paying** him. The evidence does not support such a conclusion.

35. The Seller was obligated to provide clear title before the sale could close. The evidence established that the Seller was never able to provide all of the documents necessary to clear title. There is no persuasive evidence that Calvary Chapel failed to meet its obligations under the contract to purchase the Church. Instead, it appears that Calvary Chapel did everything in its power to go through with the transaction.

36. Sometime in the fall of 1988, the seller, Mount Bethel Baptist Church, rescinded the contract to sell the Church. At some point thereafter, Calvary Chapel began occupying the Church under a lease/purchase arrangement, the terms of which have not been established in this case.

37. As noted above, there is no persuasive evidence that the Rev. Phillip Hall and/or Calvary Chapel conspired to cheat Yanks out of his fees. In any event, even if Calvary Chapel decided for economic reasons not to go forward with the loan that Yanks was trying to arrange, it is concluded that neither Yanks nor B & B Investors had the contractual right to retain any of the money that had been advanced.

38. After the deal failed to close, Rev. Lloyd returned to Calvary Chapel the remaining $5,000 he had been holding in escrow for the Halls.

39. By letter dated September 19, 1988, Holly Eakin Moody, an attorney for Calvary Chapel, wrote -to Yanks demanding the return of all the money that 'had been advanced. The letter stated:

> Please be advised that I have been retained by Calvary Chapel Church of God in Christ, Inc., to begin the appropriate legal action against you and your wife, Ana Hernandez-Yanks, for return of my clients [sic] escrow funds in the amount of $24,000.

40. On or about December 24, 1988, Hernandez-Yanks tendered a check in the amount of $14,000 to Calvary Chapel. On the back of the check, the following release language was written:

> Full and Final Settlement of all claims against 3 & 3 Mortgage and Barry Yanks or Ana iiernandez-Yanks.

41. iiernanciez-Yanks wrote a letter dated February 7, 1989 to Holly Eakin Moody stating in part:

> Please be advised that as per your client's request, on December 24, 1988 I mailed them my trust account check in the amount of $14,000.
>
> I have checked numerous times with the bank and said check has not been presented for payment.
>
> I am hereby depositing said monies with the Registry of the Court.
>
> If YOU should have any questions, please contact me.

42. It does not appear that Hernandez-Yanks ever deposited any money in the Registry of the Court in accordance with that February 7 letter.

43. By letter dated March 14, 1989, Holly Eakin Moody returned the check containing the accord and satisfaction language to Hernandez-Yanks and reiterated a demand for a return of the entire $24,000.

44. Ultimately, Hernandez-Yanks paid Calvary Chapel. $14,000 by check dated March 6, 1990 on account number 020051156008 at the TransAtlantic Bank.

45. A review of the bank records indicates that the $14,000 advanced by Calvary Chapel to B & B Investors in late August and early September of 1988 was not held in escrow. On or about September 1, 1988, $10,000 was deposited in the trust or escrow account of Hernandez-Yanks at Continental Bank (the. "Continental Trust Account"). An additional $4,000 was deposited in the Continental Trust Account on or about September 6, 1988. On or about October 4; 1988, the Continental Trust Account was closed with a closing balance of or about $13,553.06.

46. On or about October 4, 1988, Hernandez-Yanks opened a trust or escrow account at Ocean Sank (the "Ocean Trust Account"). The beginning balance of the Ocean Trust Account on or about October 4, 1988, was $13,000. On or about December 7, 1988, the balance in the Ocean Trust Account was $2,437.

47. On or about December, 15, 1988, Hernandez-Yanks opened a trust or escrow account- at United National Bank (the "United Trust Account"). On or about January 19, 1990, the cash balance in the United Trust Account was $2,236.29.

48. On or about January 5; 1990, Hernandez-Yanks opened a trust or escrow account at TransAtlantic Bank (the "TransAtlantic

Trust Account"). The beginning balance of the TransAtlantic Trust Account on or about January 5, 1990, was $10,000. By check dated March 6, 1990, Calvary Church was paid $14,000 from the TransAtlantic Trust Account.

49. There is no evidence that Yanks, Hernandez-Yanks and/or B & B Investors had any other escrow accounts.

50. Based upon the foregoing, it is concluded that Yanks failed to ensure that monies received in trust were properly placed in escrow in a transaction wherein he acted es a mortgage broker. Moreover, Yanks failed to ensure that the $14,000 received by Hernandez-Yanks was returned expeditiously to Calvary chapel. Yank's explanation that he does no: tell his wife, who is an attorney, "how to run her business" does not excuse his failure to ensure that money placed in escrow with his company was promptly returned when the transaction was terminated,

51. Yanks refused to repay any of the remaining $10,000 that was paid to B & B Investors claiming that he was entitled to keep the money as fees earned for processing 2 mortgage commitment from Allan Greenweld. As set forth ebove, the contention that the'late Rev. Hall authorized payment in full of Yanks' fees is rejected as not credible. The-more persuasive evidence established that the principals of Calvary Chapel did not understand that Yanks and/or B & B Investors were to be paid their fee even if the loan did not close. Since there was no agreement specifying when Yanks was to be paid, he had no legal right to retain the $10,000. Arguably, Yanks was entitled to some reimbursement for the expenses he incurred, including

perhaps the $1,000 he supposedly paid to the investor's attorney. However, the evidence clearly established that Yanks was not entitled to retain the entire $10,000.

52 After the Department began its investigation of this case, Yanks offered to repay the loan discount fee of $4,860 to Calvary Chapel. As of-the date of the hearing, Yanks was still refusing to repay the $4,860 loan origination fee which he claims he has earned.

53. While Yanks' claim to the $10,000 waslegally insufficient and should have been recognized as such, the evidence did not establish that Yanks was attempting to defraud the Halls and/or Calvary Chapel. There were clearly some misunderstandings between the parties. Many of these problems could have been avoided if Yanks had properly documented his fee arrangement in writing. Yanks spent a good bit of time trying to put the deal together and felt slighted when the transaction he structured fell apart,especially when Calvary Chapel ended up occupying the Church anyway. Yanks overreacted in his attempts to obtain compensation for his services. The evidence was insufficient to establish that his actions should be characterized as fraudulent.

VAZOUEZ-CASTILLO TRANSACTION

54. In approximately mid-December of 1988, Ana Vazquez began working for Yanks. Vazquez was hired by Yanks to assist in the processing of mortgages. Prior to becoming employed by Yanks, she had little experience in real estate transactions. Vazquez was employed by Yanks for only about two or three weeks.

Thereafter, she was employed by Hernandez-Yanks as a secretary. Both Yanks and Hernandez-Yanks occupy space in the same building. As noted above, Hernandez-Yanks is an attorney.

55. On or about February 27, 1989, Pura Castillo entered into a contract (the "Sales Contract") with Vazquez for the purchase of a condominium owned by Vazquez and located in Dade County, Florida, at 7440 Harding Avenue, Unit 301, Miami Beach, Florida (the "Condominium"). The sales price was $70,000. Pursuant to the Sales Contract, Vazquez was to convey title free and clear of all encumbrances, by a good and sufficient Warranty Deed. "Free and clear of all encumbrances" meant that the title being transferred from Ana Vazquez to Pura Castillo was not to be encumbered by any mortgages, judgments or other liens. The Sales Contract was not made contingent upon Pura Castillo obtaining new financing.

56. The relationship between Ana Vazquez and Pura Castillo is not entirely clear. They were obviously well acquainted with each other. The evidence suggests that Pura Castillo's common law husband, Joseph Hirdisson, was a close friend of the father of Ana Vazquez. While Pura Castillo and Joseph Hardisson were visiting with Vazquez, they began discussing the possible purchase of the Condominium by Pura Castillo.

57. Yanks first learned about the possible sale of the Condominium to Pura Castillo when Vazquez asked Hernandez-Yanks to represent her. Hernandez-Yanks indicated that she would represent Vazquez in the sale.' Vazquez also requested Yanks' assistance in obtaining a loan for Pura Castillo. -Yanks advised

Vazquez that he did not process loan applications for employees. He suggested that she contact one of the mortgage lenders with whom he did business. Vazquez contacted one such company, Inter-Mortgage corporation, and obtained a loan application package.

58. shortly thereafter, a loan application was submitted with InterMortgage Corporation in the name of Pura Castillo. The circumstances surrounding the completion and submittal of that loan application are not entirely clear nor are they necessarily pertinent to this proceeding. The evidence did establish that the loan application contained some false information regarding Pura Castillo's residence and employment.

59. InterMortgage contacted Yanks' office and advised that there were some problems with the application. Vazquez went to InterMortgage's office and retrieved the application. The evidence did not establish that Yanks was aware of the filing of the application with InterMortgage and/or that he knew the application contained any false information.

60. It appears that a similar application with false information may also have been filed with another lender, Dixie Mortgage. There is no indication that Yanks was aware of the, filing of this application and/or that he knew it contained false information.

61. The Condominium was subject to a $42,000 mortgage from Standard Federal to Vazquez (the "Standard Federal Mortgage"). The Standard Federal Mortgage was a typical Fannie Mae mortgage and included a commonly used due-on-sale clause in Clause 17. That clause provided for a default by the borrower upon sale of

the property unless the mortgagee had consented to the assumption of the mortgage by the purchaser. There were no federal or state laws in existence at the time prohibiting the enforceability of clause 17.

62. Vazquez had a contract to purchase another home which was contingent upon the sale of her Condominium. Thus,., she was under some time pressure to close the sale of the Condominium. When it became apparent that a quick loan could not be arranged for Pura Castillo, Ana Vazquez turned to Yanks for advice.

63. while there is conflicting evidence as to the discussions that took place, the more persuasive evidence established that Yanks agreed to structure 2 deal that would enable Ana Vazquez to sell the Condominium to Pura Castillo.

64. As discussed in more detail below, Yanks structured a complicated and confusing arrangement whereby Pura Castillo was to make her monthly payments to B & B Equity, which was to play the role of 2 servicing agent and distribute the payments to the first mortgagee, Standard Federal. While Yanks now claims that after the Standard Federal Mortgage'payment was made, the remainder of the monthly payments received by B & B Equity were going to be paid to Vazquez, there is no written agreement confirming this arrangement.

65. It is the usual practice in the industry for mortgage brokers to determine whether there are outstanding mortgages on the property to be sold and to see to it that an existing mortgage is paid off or otherwise taken care of at the time of closing. It is the responsibility of the mortgage broker to

contact the institution holding the mortgage to find out if it is assumable. If an existing mortgage has a due-on-sale clause, the mortgage broker would characteristically contact the first lien holder and get an estoppel letter to determine the balance of the loan. The mortgage broker might also seek a waiver from the lender so that the sale could be made without paying off the loan. Without such a waiver, a due-on-sale clause would entitle the original lender to declare the entire original loan due upon sale of the property. Yanks never obtained an estoppel letter or a waiver of the due-on-sale clause from Standard Federal. While Yanks claims that he contacted various persons regarding the enforceability of due-on-sale clauses, he never contacted Standard Federal about the specific clause *in its* mortgage to Vazquez.

66. There is conflicting evidence regarding the discussions between Yanks end Vazquez regarding the structuring of the transaction. It is clear that Vazquez was more concerned with concluding the transaction rather than understanding the intricacies of it. As discussed in more detail below, the transaction structured by Yanks included several unexplained and/or inappropriate charges. In addition, the loan documentation was confusing and sometimes conflicting and/or contradictory. Vazquez indicated to Yanks that Pura Castillo was prepared to go forward with the sale and a closing was scheduled for June 16, 1989.

67. In preparation for the closing of the sale of her condominium, Vazquez incurred several expenses. On or about

March 31, 1989, she paid $275 to have the condominium appraised. On or about April 5, 1989, Vazquez paid $200 to National Title Abstract Company for an update of the abstract. On or about June 15, 1989, she paid $150 to Ticor Title Co. She also paid for a credit report on Pura Castillo.

66. On June 16, 1989, Pure Castillo arrived at the office of Yanks and B & B Investors at 1481 N.W. 7th Street, Miami, Florida, to close on the purchase of the Condominium in accordance with the Sales Contract. Yanks and/or Hernandez-Yanks prepared the closing documents used at the closing.

69. Much of the closing was conducted in-Spanish. Yanks is not fluent in Spanish. Hernandez-Yanks, who speaks Spanish, acted ES the closing agent and remained throughout the process. Yanks and Vazquez were in and out of the room throughout the closing. During the closing, Pura Castillo was told that B & B Equity was going to be the lender for the transaction.

70. Pura Castillo inquired whether it was necessary for her to have her own attorney. Bernandez-Yanks replied that she could represent all parties and that it was not necessary for Pura Castillo to have her own attorney.

71. At the closing, Pura Castillo presented cashiers checks for $5,800, $7,250 and $5,900 all made payable to the order of Ana Hernandez-Yanks, Trust Account. In addition, either Yanks or Hernandez-Yanks was given a check from Parker Realty in the amount of $2,800 which was the balance of the $7,000 deposit after payment of the $4,200 real estate commission.

72. From the $21,750 brought to the closing, $14,000 was disbursed to Ana Vazquez. As noted above, Vazquez had alreidy

paid for the abstract, appraisal and credit report. In addition, as part of her mortgage payment, she had contributed approximately $1,281 to an escrow for taxes and insurance for which she was entitled to be reimbursed. Thus, the net cash that she received from the closing was less than $12,000 from the sale of a $70,000 condominium with a $42,000 mortgage.

73. At the closing, Vazquez executed an "Agreement for Deed" in favor of Pura Castillo. An agreement for deed is a conditional sales contract pursuant to which a seller agrees to sell property to a buyer over a period of time. The seller retains the legal ownership of the property until the full consideration for the purchase is paid. After all the conditions have been met, the seller delivers a deed conveying ownership of the lend to the buyer.

74. The Agreement for Deed in this transaction provided as follows:

> That if said Buyers shall first make the payments and perform the covenants herein mentioned on their part to be performed, the said Sellers hereby covenant and agree to convey and assure to the Buyers or their heirs or assigns, in fee simple, clear of all encumbrances whatever, by good and sufficient Warranty Deed...[the condominium]
>
> And the Buyers hereby covenant and agree to pay to the Sellers the sum of $70,000 to be paid as follows: $19,073.12 cash in hand, the receipt of which is hereby acknowledged, and $704.32 or more per month on or before the 16th day of each and every month after the date of this instrument, to be mailed to the Sellers' address given herein, with interest at the rate of 11%, per annum on the whole sum remaining from time to time unpaid,...

75. Arguably, the Agreement for Deed required Pura Castillo to make monthly payments to Vazquez of $704.32 plus interest on the outstanding balance. However, at the closing, Yanks provided Pura Castillo with 2 letter which explained that her monthly payments of $704.32 included $499.97 for principal and interest, $142.35 for real estate taxes and $62 for insurance.

76. At the closing, Pura Castillo executed a mortgage (the "Mortgage") in favor of 3 & B Equity a5 mortgagee. The Mortgage stated that it secured an indebtedness of $52,500 2nd 2 promissory note for that amount was executed by Pura Castillo to B & B Equity at the closing,

77. The Mortgage was similar in form 2nd content to 2 Fannie Mae or a Freddie Mac mortgage form, except it included some addition21 provisions stating that it was 2 "Wraparound Mortgage." A wraparound mortgage is 2 financing device that is sometimes used when 2 seller of 2 piece of property agrees to take back and finance a portion of the difference between an existing first mortgage which is not being assumed or satisfied 2nd the sales price for the property. Typically, the mortgagor on the first mortgage is the-seller of the property and the mortgagee on the wraparound *mortgage. The wraparound mortgage becomes a second or other junior mortgage behind the existing mortgage, The mortgagee of the wraparound mortgage agrees to continue making payments on the existing primary mortgage, at least SO long 2s payments are made under the wraparound mortgage.

78. Page 8 of the Mortgage included the following language:

35. This is 2 Wraparound Mortgage.

> 36. This wraparound mortgage is a second mortgage. It is inferior to certain mortgage [sic], herein called the first mortgage which covers the above described property at the time of execution of this wraparound mortgage.
>
> 37. The wraparound mortgagee shall be excluded from any terms or conditions of the prior mortgagees.
>
> 38. The wraparound mortgagee's obligation to pay the prior mortgages is limites [sic] to funds received from the wraparound mortgagor.

79. For a number of reasons, the use of a **wraparound** mortgage in this transaction was totally inappropriate. The first page of the mortgage included a number of warranties including the following:

> The mortgagor hereby covenants with and warrants to the Mortgagee that the Mortgagor is indefeasibly seized with the absolute and fee simpie title to said property.

This warranty is inconsistent with the ownership interest that the Mortgagor, Pura Castillo., had as a result of this transaction. Pura Castillo's only claim to title was via the Agreement for Deed and she was not indefeasibly seized with the fee simple title.

80. As noted above, the Mortgage states that it secures an indebtedness of $52,500 and a promissory note (the "Note") for that amount was executed by Pura Castillo to B & B Equity at the closing. That Note required Pura Castillo to make payments directly to B & B Equity, However, the Agreement for Deed calls for Pura Castillo to make payments to Vazquez. Moreover, Pura Castillo signed the Note obligating herself to make payments on a $52,500 indebtedness to B & B Equity even though the Standard

Federal Mortgage was not satisfied and had a remaining balance of $42,000. In other words, the result of this transaction, at least as it appeared on the public records, is that a $70,000 condominium was encumbered by two separate mortgages (the Standard Federal Mortgage and the "Wraparound Mortgage") securing separate promissory notes totalling more than $94,000.

81. At no time prior to or during the closing did Yanks or Hernandez-Yanks explain to Pura Castillo that an Agreement for Deed was being utilized in this transaction and that she would not obtain full legal title until all of the mortgages were paid off. Furthermore, neither Yanks or Bernandez-Yanks explained to Pura Castillo that the mortgage she signed in favor of 3 & 3 Equity was a wraparound second mortgage.

82. While Yanks contends that Pura Castillo had plenty of opportunity to review the documents and ask questions regarding them, she was clearly an unsophisticated buyer who was incapable of deciphering the confusing and ambiguous documentation for this clumsily crafted transaction.

83. In sum; the use of an agreement for deed and a wraparound mortgage in the same transaction was redundant, confusing and illogical. Moreover, Yanks' efforts in this transaction -clearly violated the due-on-sale clause (Clause 17) in Standard Federal's existing first-mortgage.

84. The Department has suggested that the transaction was a calculated fraud with some undefined goal. After considering all the evidence, the transaction can more accurately be described as an awkward attempt at creative financing which included a number

of hidden and inappropriate charges for the benefit of Yanks and/or B & B Equity.

85. Yanks contends that Vazquez was desperate to close the sale and authorized him to proceed with whatever financing he could arrange so long as she netted $14,000 from the sale. He claims that she agreed to the wraparound mortgage as the only way to proceed with the deal under the circumstances. Under this arrangement, he contends that B & B was authorized to retain any additional proceeds as compensation for serving as a servicing agent on the wraparound mortgage. Even if this explanation is accepted, there are a number of problems with the actions -of Yanks and B & B Equity in this transaction. First of all, there was no written servicing agreement setting forth the obligations of the servicing agent nor is there any delineation of the amount of money to be paid for servicing the wraparound mortgage. Moreover, the Agreement For Deed and the Promissory Note call for Pura Castillo to make payments of slightly more than $700 per month. These payments exceed the monthly payments due under the Standard Federal Mortgage. However, there is no written delineation of how the additional payments received each month were to be disbursed, Finally, the servicing arrangement was never explained to Pura Castillo and the documentation for the transaction was very confusing and often contradictory.

86. There is no closing statement for the transaction that accurately reflects-211 of the disbursements made from the proceeds of the closing. Petitioner 's Exhibit 23 is a closing statement signed by both Vazquez and Pura Castillo and purports

to delineate certain *expenses* paid from the proceeds of the sale, petitioner's Exhibit 7 is an unsigned closing statement which Yanks contends he prepared for use at the closing of the loan. He claims that, after the closing, he found out that Vazquez substituted Petitioner's Exhibit 23 for the closing statement that he intended to be used because she thought it more accurately depicted the fees as she had discussed them with Pura Castillo. This explanation is rejected as *not credible,* Petitioner's Exhibit 23 was the only closing statement signed by both the buyer and seller. As noted above, Vazquez was in and out during the closing. Hernandez-Yanks was present throughout the closing. The more credible evidence established that Petitioner's Exhibit 23 was the closing statement presented at the closing and executed by the participants.

87. Neither closing statement accurately explains ho-6 all of the funds from the sale were disbursed. Thus, it is impossible to determine conclusively how much money Yanks and/or B & B Equity received 'from the closing. Both statements include some'charges which are inappropriate or questionable. Furthermore, it is clear that Yanks and/or B & B received mbre than either statement indicated.

88. Both closing statements reflect a payment of $600 for title insurance. However, the evidence established that no title insurance policy was ever issued. Vazquez paid for-a title insurance commitment prior to the closing. Such a commitment is typically issued by a title insurance company prior to a real estate transaction and is a contractual agreement by the title

insurer to issue a policy of title insurance upon compliance with certain terms and conditions. The actual title insurance policy is not issued until after the transaction has closed. The title insurance policy, not the commitment, insures the main insured against certain defects in title. The $600 charge for title insurance reflected on both closing statements was totally inappropriate in this, case since no title policy was ever issued.

89. Petitioner 's Exhibit 23 includes a number of charges assessed to the buyer which were wholly inappropriate to this transaction. For example, the closing statement included a $500 charge for FNMA underwriting. This fee is charged by the institution underwriting a mortgage loan for compliance with Fannie Mae guidelines. Since the Mortgage in this case was clearly not intended to be sold to a Fannie Mae pool, the FNMA charge was not appropriate. Similarly, the closing statement included a $250 charge for a warehouse fee. This is a fee paid to institutions to cover the cost of a warehouse line of credit and is totally inapplicable to the transaction involved in this case. The-closing statement also included a photo fee of $25, a lender's inspection fee of $150 and a survey fee of $225. There is no indication that any photos were taken, an inspection was conducted or a survey was prepared. Petitioner's Exhibit 23 also included a loan origination fee of $1,375 and brokerage fees of $1,575. Petitioner's Exhibit 7 included a lump sum brokerage fee of $5000, but did not include any of the other charges listed in this paragraph.

90. There is no dispute that Yanks and/or his firm were paid mortgage brokerage fees out of the proceeds of the closing.

These fees are reflected on both of the closing statements (Petitioner's Exhibits 7 and 23). A mortgage broker is paid a fee to negotiate a mortgage loan transaction for another party. In other words, he is retained to find a lender for a potential borrower. Under a mortgage servicing agreement, the servicer is paid a fee to handle the collection and disbursement of payments on a mortgage loan. Any fees paid for servicing a loan should be separately itemized and disclosed. It is not appropriate for a person who is to service a loan to receive what has been disclosed as a broker fee.

91. Irrespective of which closing statement is deemed authentic, the evidence established that Yanks and/or 3 & B Equity received significantly more money from the closing than was reflected on either closing statement. As indicated above, $21,750 cash was presented at the closing, of which $14,000 was paid to Vazquez. According to Petitioner's Exhibit 7, there was $6,123.35 in closing costs (including a $5,000 brokerage fee). Thus, there is et least $1,626.65 in cash that is not reflected on the closing statement. Yanks contends that Vazquez told him to keep this money in return for servicing the loan. This contention is rejected as not credible.

92. Similarly, Petitioner's Exhibit 23 indicates closing costs of $6,379 (including the charges in paragraph 89 above). Thus, there is $1371 unaccounted for. Moreover, it is clear that Yanks and/or B & B received in excess of $6,500 which is not readily discernible from the face of the closing statement.

93. Subsequent to the closing, B & B Equity received at least five monthly payments of $704.32 on the Wraparound Mortgage

from Joseph L. Hardisson, the common law husband of Pura Castillo. B & B Equity apparently distributed some of these funds in accordance with its claimed role of "servicing agent." However, on at least one occasion in late 1989, a check issued by B & B Equity to pay the Standard Federal Mortgage was returned for insufficient funds. In addition, a check issued by B & B Equity in the amount of $700 to Ana Vazquez in December of 1989 bounced.

94. At some point in late 1989 or early 1990, Pura Castillo became concerned when she learned that the Standard Federal Mortgage had not been paid off. In January or February 1990, Pura Castillo and her husband came to Florida and attempted to contact Yanks regarding the transaction and the irregularities surrounding it. Ultimately, Pura Castillo filed a complaint with the Department and also filed a civil suit in Circuit Court seeking cancellation of the Mortgage and the issuance of a warranty deed in her favor,

95. On April 17, 1990, Vazquez executed a warranty deed to Pura Castillo, Vazquez states that she felt obligated to convey all of her interest in the property to Pura Castillo in view of the confusing and unfair circumstances surrounding the initial transaction.

96. On October 23, 1990, Yanks and B & B Equity entered into a Settlement Agreement with Pura Castillo pursuant to which they paid Pura Castillo $12,000 and the wraparound mortgage- was cancelled of record. The Settlement Agreement also resulted in the dismissal of the civil suit and called for Pura Castillo to

withdraw her complaint filed with the Department. Despite this withdrawal, the Department has chosen to proceed with this administrative action.

CONCLUSIONS OF LAW

97. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding pursuant to Section 120.57(1), Florida Statutes.

98. Pursuant to Section 494.052, Florida Statutes, the Department is empowered to revoke, suspend, or otherwise discipline the *license* **of** any mcrtgage broker in the State of Florida who is found to have committed any of the acts enumerated in Section 494.055, Florida Statutes.

99. Hernandez-Yanks and 3 & 3 Equity are not registered mortgage brokers under Chapter 494, Florida Statutes. However, their involvement in the transactions discussed in this case arguably contravene certain provisions of Chapter 494, Florida Statutes, The Department contends that it can enter cease and desist orders and fine unlicensed persons who have violated Chapter 494.

100. Section 494.072(1), Florida Statutes (1987), provides

> The Department shall have the power to issue and serve upon any person a cease and desist order whenever there is reason to believe the person is violating, has violated, or is about to violate any provision of this chanter. . . .All procedural matters relating **to** issuance and enforcement of the cease and desist order shall be in accordance with the Administrative Procedure Act.

101. Section 494.02(1), Florida Statutes, defines a "person" for purposes of the statute es a "individual,

partnership, corporation, association, and any other group, however organized." Thus, the statute does not limit the Department 's cease and desist authority or its enforcement powers to those individuals or groups registered pursuant to Chapter 494. Accordingly, the Department's interpretation is accepted. See Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1255 (Fla. 1990).

102, As set forth in the Preliminary Statement above, Hernandez-Yanks did not personally appear at the hearing in this matter, Counsel for Respondents took exception to the earlier ruling of Hearing Officer Parrish that the Violations Case could proceed notwithstanding the filing of a bankruptcy petition by Hernandez-Yanks. Counsel for Respondents also argued that, since Hernandez-Yanks is an attorney, only the Florida Bar can take disciplinary action against her for professional violations.

103. Hearing Officer Parrish's ruling on the Motion to Dismiss or Abate is hereby adopted 2nd incorporated herein. Enforcement actions are exempt from the automatic stay provisions Of the Bankruptcy Code by virtue of 11 U.S.C. Section 362(b)(4). See, Board of Governors of the Federal Reserve System v. Mcord Financial, Inc., 112 S.Ct. 45'9 (1991). While sanctions may be imposed, collection of any monetary fines requires application to the bankruptcy court. National Labor Relations Board v. 15th Avenue Iron Works, Inc., 964 F. 2d 1336 (2d Circuit 1992).

104. Respondents have provided no authority for the contention that Hernandez-Yanks' status as 2n attorney provides her immunity from proceedings initiated by the Department to halt

violations under Chapter 494. To the extent that the Department seeks a determination that Hernandez-Yanks' representation of both parties in the Pura Castillo closing was improper, such matters are only properly reviewed by the Florida Bar and should not be considered as part of this proceeding. However, to the extent the Department seeks to enforce the provisions of Chapter 494, it is concluded that such efforts are appropriate.

105. As noted in the Preliminary Statement, B & B Equity has withdrawn its application for licensure under Chapter 494. Consequently, the Application Case is dismissed as moot.

106. With respect to the Violations Case, the Department has the burden of proving the allegations in the Amended Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So.2d 232 ('la., 1987).[2] As noted in Smith v. Department of Health and Rehabilitative Services, 522 So.2d 956 (Fla. 1st DCA 1988);

> "clear and convincing evidence" is an intermediate standard of proof, more than the "preponderance of the evidence" standard used in most civil cases, and less than the "beyond a reasonable doubt" standard used.,-in criminal cases.

107.. Respondents are charged with violations of the following provisions of Chapter 494, Florida Statutes (1987):

> 494.055 Grounds for Disciplinary action.
>
> (1) The following acts shall constitute grounds for which the disciplinary actions specified in Section 494.052 may be taken:
>
> * * *
>
> (b) Fraud, misrepresentation, deceit, negligence, or incompetence in any mortgage financing transaction;

* * *

(e) Failure to place, immediately upon receipt, any money, fund, deposit, check, or draft entrusted to him by a person dealing with him as *a* broker, in escrow with an escrow agent located and doing business in this state, pursuant to a written agreement, or to deposit said funds in a trust or escrow account maintained by him with a bank or savings and loan association located and doing business in this state, wherein said funds shall be kept until disbursement thereof is properly authorized;

* * *

(f) Failure to account or deliver to any *person* any personal property, such as any money, fund, deposit, check, draft, mortgage, or other document or thing of value, which has come into his hands and which is not his property or which he is not in law or equity entitled to retain, under the circumstances and at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery;

* * *

(g) Failure to disburse funds in accordance with agreements;

* * *

(h) Any breach of trust funds or escrow funds, or any misuse, misapplication, or misappropriation of personal property, such as any money, fund, deposit, check, draft, mortgage, or other document or thing of value, entrusted to his care to which he had no current property right at the time of entrustment regardless of actual injury to any person;

* * *

(q) Failure to comply with, or violation of, any other provision of this chapter.

* * *

108. Section 494.08, Florida Statutes (1987) provides as follows:

494.08 Requirements and Prohibitions.

* * *

(5) No person shall enter into a contract for mortgage brokerage services without delivering to the borrower a statement in writing setting forth the total maximum costs to be charged, incurred, or disbursed in connection with processing and closing the mortgage loan. The contract for mortgage brokerage services shall indicate the financing terms, interest rate, and loan origination fees which are acceptable to the borrower. The maximum estimated costs may be expressed 2s 2 range of possible costs. In the event the total actual costs, -excluding the mortgage brokerage fee, loan origination fee, and prepaid items, including taxes, hazard insurance, prepaid interest, and mortgage insurance, exceed the estimate by more than 10 percent or $100, whichever is greater, the broker shall be required co obtain a written agreement from the borrower acknowledging that, although the borrower is under no obligation to conclude the transaction, the borrower has elected to do so notwithstanding the increase over estimated costs. This subsection shall apply only to brokerage agreements on loans to be secured by residential properties containing four or less units.

* * *

494.093 Prohibited Practices

* ✉ •

(3) In any practice or transaction or course of business relating to the sale, purchase, negotiation, promotion, advertisement, or hypothecation of mortgage transactions, including any transaction consummated by parties under the provision5 of Section 494.03, directly or indirectly:

(a) To knowingly or willingly employ any device, Scheme, or artifice to defraud.

(b) To engage in any transection, practice, or course of business which operates as a

fraud upon *any* person in connection with the purchase or sale of any mortgage loan.
(c) To obtain property by fraud, willful misrepresentation of a future act, or false promise.

(4) In any matter within the jurisdiction of the department, to knowingly and willfully falsify, conceal, or cover up by any trick, scheme, or device a material fact, or make any false or fraudulent statement or representation, or make or use any false writing or **document,** knowing the same to contain any false or fraudulent statement or entry.

109. The failure of B & B Investors 2nd Yanks to return the loan discount fee received in the Calvary Chapel transaction clearly violated Sections 494.055(1)(b), (f), (g) 2nd (h)(1987) since that fee was only payable to the lender if the ioan closed. It is also concluded that the failure to return the loan origination fee was 2 violation of these statutory provisions.

110. The borrowers were not clearly advised that the loan origination fee would be retained by Yanks 2nd B & B Investors irrespective of whether the loan closed. While Yanks and B & B Investors expended efforts in attempting to arrange 2 loan, numerous changes were made to the proposed transaction *after* the January 14, 1988 meeting. None of these transactions are reflected in writing even though these changes resulted in the borrowers having to seek addition21 collateral and a second mortgage from the sellers after-they executed their Loan Application. Notwithstanding the efforts of Calvary Chapel, the loan failed to close.

111. The evidence clearly established that the late Rev. and Mrs. Hall wanted to minimize any expenses prior to the loan

closing. They clearly specified that the initial $15,000 that they delivered to Rev. Lloyd was to be held in escrow.,,. While $10,000 of that money was delivered to Yanks end B & B Investors, it is concluded that the late Rev. 2nd Mrs. Hall did not agree that Yanks and B & B Investors had fully earned this sum. The money should have been retained in escrow until the loan closed or written authorization was received from the borrowers to use the money to pay expenses.

112. The evidence also clearly established that Yanks 2nd Hernandez-Yanks violated Section 494.055(1)(e) (1987) by failing to deposit the $10,000 received on August 23, 1988 and the $4,000 received on September 1, 1988 in an escrow account with a written escrow agreement.

113. With respect to the pure Castillo transaction, the evidence also clearly established that Yanks 2nd Hernandez-Yanks failed to explain *to* **Pure** Castillo the extremely confusing 2nd unusual financing arrangement. In addition, the loan documentation was negligently prepared. The Respondents also attempted to deliberately circumvent the requirements of -Clause 17 of the Standard Federal Mortgage. Finally, the evidence. clearly established that the buyer in that transaction was charged a number of inappropriate and excessive fees. -Consequently, Yanks and Hernandez-Yanks have violated Section 494.055(1)(b),(f),(g) 2nd (h) (1987 and 1989) as alleged in the Amended Administrative Complaint. In addition, Yanks has violated Section 494.055(1)(q) by failing to comply with the requirements of Section 494.08, Florid2 Statutes.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that:

(1) A Final Order be entered finding Respondents B & B Investors, Yanks and Ana Hernandez-Yanks guilty of the violations alleged in Counts I, 11, III, and IV of the Amended Administrative Complaint, finding them not guilty of Count VI and imposing an administrative fine of $5,000 which should be payable jointly and severally. Yanks and B & B Investors should also be required to repay $9,000 to Calvary Chapel within 30 days after the rendition of the Final Order. Failure to repay this sum should be a basis for the imposition of additional penalties, including revocation. The mortgage brokerage licenses of Yanks and B & B Investors should be suspended for one (1) year for their actions in connection with the Calvary Chapel transaction.

(2) A Cease and Desist Order should also be entered against Ana Hernandez-Yanks prohibiting her from any future violations of Chapter 494, Florida Statutes, from engaging in any act within the jurisdiction of the Department pursuant to Chapter 494, Florida Statutes, and from being an ultimate equitable owner of a business license pursuant to Chapter 494, Florida Statutes. The facts surrounding her trust account should be reported to the Florida Bar for investigation.

(3) A Final Order should also be entered finding Yanks, Hernandez-Yanks, and B & B Equity guilty of the violations -alleged in Counts VIII, IX, and XI, finding Yanks and B & B

Equity guilty of the violations alleged in Counts XII and finding Hernandez-Tanks guilty of violations alleged in Count XIII of the Amended Administrative Complaint. The Final Order should find the Respondents not guilty of the violations alleged in Counts X and XIV. Based upon the foregoing, the Department should impose an administrative fine of $5,000. The mortgage brokerage license of Yanks should be suspended for a period of three (3) years to run consecutively with the suspension issued in connection with the Calvary Chapel transaction. Respondents should also be required to repay $6,040.12 to Ana Vazquez for inappropriate and undisclosed charges made at the closing.

(4) The collection of all fines and/or assessments against Ana Hernandez-Yanks and/or B & B Investors should be suspended pending approval of the Bankruptcy Court.

(5) in view of the Voluntary Dismissal filed on November 9, 1,093, the Final Order should formally dismiss the Application Case.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 18. day of August 1994.

J. STEPHEN MENTON
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 18 day of August 1994.

ENDNOTES

[1] The present statute includes similar cease and desist authority. See Section 494.0014(1), Florida Statutes.

[2] While there is some authority for the position that a preponderance of the evidence standard should be used in a cease and desist case which does not involve the loss of a license, see Southport Pharmacy v. Department of Health and Rehabilitative Services, 596 So.2d 106,109 (Fla. 1st DCA 1992); Allen v. Dade County School Board, 571 So.2d 568, 569 (Fla. 3d DCA 1990), the clear and convincing standard has been applied to all aspects of the Violations Case.

APPENDIX TO RECOMMENDED ORDER
DOAH CASE NO. 90-4722

Both parties have submitted Proposed Recommended Orders. The following constitutes my rulings on the proposed findings of fact submitted by the parties.

Petitioner's Proposed Findings of Fact.

A. Preliminary Facts

1. Adopted in substance in Findings of Fact 1 and 2.

2. (a) Adopted in substance in Findings of Fact 4 and 5.
(b) Adopted in substance in Findings- of Fact 6.

3. Adopted in substance in Findings of Fact 3.

4. Adopted in substance in Findings of Fact 5.

B. Calvary Chapel Church of God and Christ, Inc. Transaction

1. Adopted in substance in Findings of Fact 8.

2. Adopted in substance in Findings of Fact 9 and 11.

3. Adopted in substance in Findings of Fact 12.

4. Adopted in substance in Findings of Fact 13.

5. Adopted in substance in Findings of Fact 15.

6. Adopted in substance in Findings of Fact 16, 17 and 20.

7. Adopted in substance in Findings of Fact 18 and 21.

8. Subordinate to Findings of Tact 17, 18 and 22.

9. Subordinate to Findings of Fact 23.

10. Adopted in substance in Findings of Fact 25.

11. Adopted in substance in Findings of Fact 33..

12. Adopted in substance in Findings of Tact 31.

13. Adopted in substance in Findings of Fact 31.

14. Adopted in substance in Findings of Fact 31.

15. Subordinate to Findings of fact 34, 35, 36 and 37.

16. Adopted in substance in findings of Fact 36.

17. Adopted in substance in Findings of Fact 38, 39 and 51.

18. Adopted in substance in Findings of Tact 40.

19. Adopted in substance In Findings of Fact 41, 42 and 43.

20. Adopted in substance in Findings of Fact 44.

21. Subordinate to lindings of Fact 50.

22. (a)-(d) Adopted in substance in Findings of Fact 45-48.

23. Adopted in substance in Findings of Fact 50.

C. Pura Castillo Transaction

1. Subordinate to Findings of Fact 56.

2. (a) Adopted in substance in Findings of Fact 61.

(b) Adopted in substance in Findings of Fact 65.

(c) Rejected as ambiguous and unnecessary.

3. Adopted in substance in Findings of Tact 54 and 57.

4. Adopted in substance in Findings of Fact 55.

5. Adopted in substance in Findings of Fact 67.

6. Subordinate to Findings of Fact 63 and 68.

7. Adopted in substance in Findings of Fact 68 and 69.

8. Adopted in substance in Findings of Fact 70.

9. Adopted in substance in Findings of Fact 71.

10. Adopted in substance in Findings of Fact 72 and 75.

11. Adopted in substance in Findings of Fact 76-78, 81 and 85.

12. Subordinate to Findings of Fact 93-94.

13. Adopted in substance in Findings of Fact 88.

14. Rejected as unnecessary.

15. Adopted and pertinent in part in Findings of Fact 73.

16. (a)-(d) Adopted and pertinent in part in Findings of Fact 79 and 80.

17. (a)-(f) Adopted and pertinent in part in Findings of Fact 79-80, 84 end 85.

18. (a)-(c) Adopted in substance in Findings of Fact 86 and 89.

19. Adopted in substance in Findings of Tact 90-92.

20. (a)-(d) Adopted in substance in Findings of Fact 67, 72, 91 and 92.

Respondent's Proposed Findings of Fact.

A. Preliminary Facts

1. Adopted and pertinent in part in Findings of Fact 1-3.

2. Adopted in substance in Findings of Fact 4-7.

3. Addressed in the preliminary statement and in Findings of Fact 5.

B. Calvary Chapel Church of God and Christ, Inc. Transaction

1. Adopted in substance in Findings of Fact 8-11.

2. Subordinate to Findings of Fact 12.

3. Subordinate to Findings of Fact 13-14.

4. Subordinate to Findings of Fact 14 and 15.

5. Rejected as vague, ambiguous and unnecessary.

6. Adopted and pertinent in part in Findings of Fact 16 and 17.

7. Adopted in substance in Findings of Fact 18.

a. Subordinate to Findings of Fact 18 and 22.

9. Adopted in substance in findings of Fact 23.

10. Adopted in substance in Findings of Fact 23.

11. Rejected as argumentative.

12. Rejected as argumentative and ambiguous.

13. Rejected as argumentative and ambiguous,

14. Rejected as argumentative and subordinate to Findings of fact 51.

15. Subordinate to Findings of Fact 22 and 51.

16. Subordinate to Findings of Fact 25 and 26.

17. Subordinate to Findings of Fact 25 and 26.

18. Subordinate to Findings of Fact 25 and 26.

19. Adopted in substance in Findings of Fact 21 and 22. Subordinate to Findings of Fact 24 and 30-31.

20. Subordinate to Findings of Fact 30 and 31.

21. Adopted in substance in Findings of Fact 31.

22. Adopted in substance in Findings of Fact 35.

23. Adopted in substance in Findings of Fact 36.

24. Adopted in substance in Findings of Fact 39.

25. Adopted in substance in Findings of Fact 44.

26. Subordinate to Findings of Fact 51 and 52.

27. Adopted in substance in Findings of Fact 3.

C. Pura Castillo Transaction

1. Adopted in substance. in findings of Fact 54.

2. Adopted in substance in Findings of Fact 55.

STATE OF FLORIDA
DEPARTMENT OF BANKING AND FINANCE
DIVISION OF FINANCE

B&B Mortgage Equity, Inc. et al,

Petitioners,

DBF # 1893-F-7/90

(DOAH Case No.: 90-4722)

vs.

DEPARTMENT OF BANKING AND FINANCE,
DIVISION OF FINANCE,

Respondent.
_____/

DEPARTMENT OF BANKING AND FINANCE,
DIVISION OF FINANCE,

Petitioner,

DBF # 1792,a,b-F-4/90

(DOAH case No.: 90-6577)

vs.

B&B Mortgage Investors et al,

Respondents.
_____/

EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW the State of Florida Department of Banking and Finance, Division of Finance, by and through its undersigned counsel and pursuant to Rule 3-7.012(1), Florida Administrative Code, and files these exceptions to the recommended order entered on August 18, 1994, and states:

(1) Paragraph (1) on page 43 should state that the $5,000 fine shall be payable within 30 days after rendition of the Final Order.

(2) Paragraph (3) on pages 43-44 should state that the $5,000 fine and $6,040.12 repayment shall be payable within 30 days after

EXHIBIT
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rendition of the Final Order.

Respectfully submitted,

PAUL C. STADLER, JR.
Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399
(904) 488-9896

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served by Certified Mail, Return Receipt Requested, to George J. Lott, Lott and Levine, 5975 Sunset Drive, Suite 302, Kiami, Fla. 33143, this 1 day of Sept, 1994.

Respectfully submitted,

PAUL C. STADLER, JR.
Assistant General Counsel

16:block.exc

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

B & B MORTGAGE EQUITY, INC., and BARRY YANKS,

Petitioners,

vs. CASE NO. 90-4722

DEPARTMENT OF BANKING AND FINANCE, DIVISION OF FINANCE,

Respondent.

DEPARTMENT OF BANKING AND FINANCE, DIVISION OF FINANCE,

Petitioner,

vs. CASE NO. 90-6577

B & B MORTGAGE INVESTORS, INC.; B & B EQUITY, INC.; BARRY YANKS individually and as principal mortgage broker of B & B Mortgage Investors, Inc.; and ANA HERNANDEZ-YANKS,

Respondents.

EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, Barry Yanks, pro se, hereby submits the following exceptions to the Recommended Order dated August 18, 1994 and amended on August 23, 1994.in the above styled cause:

1. The Recommended Order was entered in excess of ninety days after the formal hearing in violation of the Florida Administrative Code.

2. The Recommended Order as applied will give Respondent an eight (8) year suspension instead of the four (4) years that the Order imposes. The reason being that the hearing. in this cause took place -on April 29, 1992 through May 1, 1992, in excess of two (2) years ago. Due to the fact that the Respondent has not been allowed to license a company since 1990, the time of the original application. The recommended discipline should be

retroactive a5 of 1990.

3. The discipline is too harsh and excessive in light of the fact that prior to any hearings, the Respondent and the complainants settled this matter and General Releases were exchanged.

4. The Department failed to provide Respondent with an Index of its decisions as required by Florida Statutes.

5. No evidence was presented to mantain the Recommended Order's finding that Ana Vasquez be paid the sum of $6,040.12.

WHEREFORE, Respondent prays the Final Order be entered adopting the following exceptions.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Paul C. Stadler, Assistant General Counsel, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399 and Gerald Lewis, Comptroller, State of Florida, The Capitol, Plaza Level, Tallahassee, Florida 32399-0350 this 8th day of September, 1994.

Barry Yanks
Respondent
1901 N.W. South River Drive
Unit 41
Miami, Florida 33125

STATE OF FLORIDA
DEPARTMENT OF BANKING AND FINANCE
DIVISION OF FINANCE

B&B Mortgage Equity, Inc. et al,

Petitioners,

DBF # 1893-F-7/90

(DOAH Case No.: 30-4722)

vs.

DEPARTMENT OF BANKING AND FINANCE,
DIVISION OF FINANCE,

Respondent.

DEPARTMENT OF BANKING AND FINANCE,
DIVISION OF FINANCE,

Petitioner,

DBF #-1792,a,b-F-4/90

(DOAB Case No.: 90-6577)

vs.

B&B Mortgage Investors et al,

Respondents.

---/

RESPONSE TO EXCEPTIONS FILED BY BARRY YANKS

COMES NOW, the State of Florida Department of Banking and Finance, Division of Finance, by and through its undersigned counsel and pursuant to Rule 3-7.012, Florida Administrative Code, and files this response to the exceptions filed by Barry Yanks (hereinafter Respondent) and states:

(1) The first exception complains that "[t]he Recommended Order was entered in excess of ninety days after the formal hearing in violation of the Florida Administrative Code." However, the exception fail to cite to any such ninety day requirement in the Code; Furthermore, even if such a requirement did exist, the

EXHIBIT
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appropriate remedy would have been to mandamus the hearing officer which Respondent failed to do. See Department of Business Regulation v. Hyman, 417 So.2d 671, 673 (Fla. 1962).

(2) The second exception appears to argue that the four-year recommended suspension should be reduced because "the Respondent has not been allowed to license a company since 1990 . . .." However, as noted on page 7 of the Re-commended Order, B & B Mortgage Equity, Inc., filed a notice of voluntary dismissal regarding the denial of its application for licensure.

(3) The third exception suggests that the penalty is too harsh as "the Respondent and the complainants settled this matter ...." The fifth exception objects to the recommended payment to be made to Ana Vazquez. While it is true that Ana Vazquez did settle her civil complaint against Respondent, Respondent has failed to cite to any authority for the proposition that a state agency is foreclosed from proceeding against one of its licensees when an alleged victim of the licensee's actions has settled the victim's civil complaint. Furthermore, disciplinary action is especially warranted in light of the damage incurred by Ana Vazquez, see Recommended Order para. 72; see also Department's Proposed Recommended-Order- page 31, and the monies retained by Respondent. See Recommended Order paras. "89-92; see also Department's Proposed Recommended Order pages 29-30.

(4) Next, Respondent claims in exception four that the Department has failed to provide an index of its decisions. First, Respondent has failed to cite to **any** discovery in **the record** where Respondent requested a copy of the index. Second, had the request

been made and production of the index refused, Respondent could have filed a motion to compel discovery which Respondent has failed to do. Third, agency orders are indexed in an electronic data base, see Rule 3-8.007, F.A.C., which is maintained in Tallahassee, Fla. See Rule 3-8.009, F.A.C.

Respectfully submitted,

PAUL C. STADLER, JR.
Assistant General Counsel
Office of the Comptroller
The Capitol, Suite 1302
Tallahassee, Florida 32399
(904) 488-9896

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were *served* by Certified Mail, Return Receipt Requested, to George J. Lott, Lot-l and Levine, 5975 Sunset Drive, Suite 302, Miami, Fla. 33143 and to Barry Yanks, 1901 N.W. South River Drive, Unit 41, Miami, Fla. 33125 this 13 day of September, 1994.

Respectfully submitted,

PAUL C. STADLER, JR.
Assistant General Counsel

16:b&b2.exc

Appendix Part 3

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 80,716
[TFB Case Nos. 89-70,531 (07A);
89-71,023 (07A);
90-71,276 (07A);
and 90-71,292 (07A);]

v.

ANA HERNANDEZ-YANKS,

Respondent.

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

COMES NOW, the undersigned respondent and files this Conditional Guilty Plea to the formal Complaint filed herein and appended as Attachment 1. This Conditional Guilty Plea is filed pursuant to the Rules Regulating The Florida Bar, Rule 3-7.9(b), and tendered in exchange for the following disciplinary measures to be imposed upon respondent to wit:

1. The respondent, Ana Hernandez-Yanks, is and at all times here and after mentioned, was a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. The respondent agrees to a one year suspension with proof of rehabilitation prior to reinstatement and restitution of any forthcoming Client Security Fund claims.

3. The respondent is acting freely and voluntarily in this matter and in accordance with the advice of counsel.

EXHIBIT
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4. The respondent admits she improperly utilized client funds for purposes other than for which they were intended, that she misappropriated client funds for her personal use, and failed to maintain her trust accounts in compliance with the Rules Regulating Trust Accounts.

5. The respondent further admits her conduct violated Rules Regulating The Florida Bar as outlined in the bar's formal Complaint which is appended as Attachment 1.

6. In mitigation, the respondent has reimbursed most of the client funds she improperly utilized and/or misappropriated. The respondent will pay restitution in Case No. 89-71,023 (07A) pursuant to the Final Judgment of February 12, 1990, Circuit Court, Dade County, Case No. 88-49277-16, prior to reinstatement. The respondent no longer handles trust monies. The respondent has expressed sincere remorse. The respondent is rehabilitated. The respondent's misconduct occurred when she was a very young, inexperienced lawyer. She was under the undue influence of her husband. That situation has been corrected. She has continuously practiced law during the past three years with no complaints resulting in discipline. The substantial delay since the misconduct occurred was not caused by the respondent. The respondent has fully cooperated with The Florida Bar in this matter.

7. If this Conditional Guilty Plea is not finally approved by The Florida Bar, the Referee, and the Supreme Court of Florida then it shall be of no effect and may not be used against respondent in any way.

8. If this plea is accepted, the respondent agrees that all costs concerned with this case pursuant to Rule of Discipline 3-7.6(k)(5) shall be paid by the respondent. Such costs now total $5,433.00. The respondent further agrees that should she file for personal bankruptcy she shall continue to remain liable for payment of the costs incurred in this case.

Dated this 28th day of March, 1993.

Ana Hernandez-Yanks
Respondent
ATTORNEY NO. 524931

Dated this 29 day of March, 1993.

L. M. Jepeway, Jr.
Louis Jepeway
Counsel for Respondent
ATTORNEY NO. ~~39550~~ 113699

Dated this 31st day of March, 1993.

John William Thornton, Jr.
I/Designated Reviewer
ATTORNEY NO. 241148

Dated this 2nd day of April, 1993.

Jan Wichrowski
Jan K. Wichrowski
Bar Counsel
ATTORNEY NO. 381586

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case Nos. 89-70,531 (11C);
89-71,023 (11C);
90-71,276 (11C);
and 90-71,292 (11C)

v.

ANA HERNANDEZ-YANKS,

Respondent.
_____/

COMPLAINT

The Florida Bar, complainant, files this Complaint against Ana Hernandez-Yanks, respondent, pursuant to the Rules Regulating The Florida Bar and alleges:

1. The respondent, Ana Hernandez-Yanks, is and at all times hereinafter mentioned, was a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida and the Rules Regulating The Florida Bar.

2. Respondent resided and practiced law in Dade County, Florida, at all times material.

IN GENERAL

3. Barry S. Yanks (hereinafter referred to as "B. Yanks") was and is the respondent's husband.

16. At that time Mr. Friedberg entrusted the respondent with a $2,500.00 application deposit. Mr. Friedberg understood that his application deposit would be refunded if the loan commitment was not obtained by B & B Investors or if the commitment obtained was unacceptable to Mr. Friedberg.

17. On June 29, 1988, the respondent deposited the $2,500.00 check she received from Mr. Friedberg into her Continental Trust Account.

18. In or around July, 1988, Mr. Friedberg withdrew his mortgage loan application and requested the respondent and/or B. Yanks return his $2,500.00 deposit. The respondent failed and/or refused to return the deposit from her trust account to Mr. Friedberg.

19. In response to Mr. Friedberg's complaint to The Florida Bar about his deposit, the respondent advised by letter dated November 8, 1988, that Mr. Friedberg's $2,500.00 deposit was still in her trust account. However, the audit of the Continental Trust Account revealed that as of August 31, 1988, the respondent's trust account balance was $299.18.

20. The respondent's trust account balance was not Sufficient to cover Mr. Friedberg's deposit because on August 29, 1988, the respondent issued trust account check number 322 to the

Betty Quiat Trust Account in the amount of $3,400.00. That disbursement was a "loan" to her husband, Barry Yanks, to pay child support arrearages.

21. Between August 25, 1988 and August 31, 1988, the respondent issued several checks from her trust account for personal expenditures or business expenses unrelated to the Friedberg mortgage application.

22. As of June 29, 1988, and subsequent thereto, the respondent should have had $2,500.00 preserved in her Continental Trust Account on behalf of Mr. Friedberg.

23. The respondent misappropriated the funds she was entrusted to hold in connection with the Friedberg mortgage application and then misrepresented the status of those funds to Mr. Friedberg and The Florida Bar,

24. By reason of the foregoing paragraphs one through twenty-three, the respondent has violated Rule of Professional Conduct 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Rule 5-1.1 of The Rules Regulating Trust Accounts for utilizing trust funds other than for the specific purpose for which they were intended.

COUNT II
Case No. 89-71,023 (11C)

The Florida Bar realleges paragraphs one through fourteen and further alleges:

25. The audit conducted by The Florida Bar on the respondent's four trust accounts revealed that in numerous instances, the respondent misused client funds; deposited personal funds and fees- together with client funds; used her trust accounts to pay employees and other personal and business obligations and gave "loans" to her husband to pay his child support obligation.

26. The audit was conducted on the respondent's Continental Trust Account for the period January 4, 1988 to October 4, 1988. On October 4, 1988, the respondent closed the Continental Trust Account with the balance on that day of $13,553.06.

27. On October 4, 1988, the respondent opened her trust account at Ocean Bank, using $13,000.00 of the funds she withdrew when she closed the Continental Trust Account. The respondent used the remaining $553.06 of trust funds for personal purposes unauthorized by the persons for whom the money was held in trust.

28. Prior to closing the Continental Trust Account, the respondent issued four checks totalling $1,200.50 as follows: On

September 27, 1988, check number 355 was issued for "cash/cleaning" in the amount of $80.00; on September 27, 1988, check number 356 was issued to the Clerk of the Court in the amount of $1,010.50; on September 29, 1988, check number 357 was issued to the U.S. Bankruptcy Court in the amount of $20.00; and on September 29, 1988, check number 358 was issued to the U.S. Bankruptcy Court in the amount of $90.00.

29. The four checks listed above were still outstanding when the respondent closed her Continental Trust Account and were subsequently dishonored by the bank due to the closed account.

30. If the respondent was to cover her liability to Charles Friedberg as indicated in Count I above and to another client, Calvary Chapel Church of God in Christ, the respondent's trust account balance was actually $4,147.44 short at the time the continental Trust Account was closed.

31. The respondent utilized the Ocean Trust Account in the same manner as she used the Continental Trust Account by Utilizing trust funds to pay nonclient trust matters including employee salaries, personal credit card bills, advertising and printing, telephone bills, publications and taking cash withdrawals.

32. The last transaction in the Ocean Trust Account was on December 7, 1988, and a balance of $2,437.00 was left in the account.

33. On June 14, 1988, the respondent transferred $36,500.00 of trust funds from the Continental Trust Account to a personal interest bearing account at the Lawyers' Credit Union, account number 7774. The respondent used those funds to pay personal and business obligations. The respondent failed to pay the interest earned on those funds to any client.

34. On or around December 15, 1988, the respondent opened another trust account at United National Bank. The respondent also used this account to pay her personal and business expenses.

35. By reason of the foregoing paragraphs one through fourteen and twenty-five through thirty-four, the respondent has violated Rule of Professional Conduct 4-1.15 for failing to hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with the representation and for failing to comply with The Florida Bar Rules Regulating Trust Accounts.

36. The respondent has also violated the following Rules Regulating Trust Accounts: 5-1.1 for utilizing client funds other than for the specific purpose for which they were intended; and 5-1.2 for failing to maintain the minimum required trust accounting records and procedures.

COUNT III
Case No. 90-71,276 (11C)

The Florida Bar realleges paragraphs one through fourteen and further alleges:

37. On or around February 27, 1989, Pura Castillo entered into a contract to purchase a condominium from Ana Vazquez (hereinafter referred to as "the seller").

38. The respondent represented the seller in the above mentioned transaction.

39. Pursuant to the sales contract, the seller was to convey title to Ms. Castillo free and clear of all encumbrances by a good and sufficient warranty deed.

40. The condominium, which was the subject of the aforementioned sales contract, was encumbered by a nonassumable first mortgage held by Standard Federal Savings (hereinafter referred to as "Standard Federal").

41. Ms. Castillo intended to obtain a new first mortgage in the amount of $45,500.00, the proceeds of which would be used to satisfy the existing first mortgage held by Standard Federal.

42. In or around May, 1989, the seller contacted Ms. Castillo and notified her that her mortgage loan application

would be submitted to B & B Equity, Inc. which was associated with the respondent who was the seller's employer.

43. At the seller's request, Ms. Castillo executed blank mortgage loan application forms which were then submitted to the respondent and B. Yanks.

44. Prior to the closing, the respondent's office advised Ms. Castillo *to* bring with her to the closing three cashier's checks made payable to the respondent's trust account in the amounts of $5,800.00; $7,250.00; and $5,900.00.

45. The closing was held at the respondent's office on or about June 16, 1989. At the closing Ms. Castillo inquired whether it was necessary for her to have her own attorney. The respondent advised Ms. Castillo that she did not need her own attorney because in Florida an attorney could represent all the parties in a real estate transaction.

46. During the closing on June 16, 1989, the respondent represented Ms. Castillo, the seller and B & B Equity.

47. Ms. Castillo relied upon the respondent's representations and did not consult with an attorney to review the documents which the respondent presented to her at the closing.

48. During the closing Ms. Castillo was presented with a note and mortgage which listed B & B Equity as the mortgagee.

49. The aforementioned mortgage was a wrap-around second mortgage. The respondent knew or should have known that the loan documents the seller executed constituted a wrap-around second mortgage.

50. The respondent failed to explain to Ms. Castillo that she was entering into a mortgage which was a wrap-around second mortgage and which was inferior to the existing first mortgage held by Standard Federal.

51. Although the mortgage document executed by Ms. Castillo on June 16, 1989, had been prepared by B. Yanks, the respondent notarized said document and therefore was or should have been aware that Ms, Castillo was not entering into a first mortgage.

52. In addition, Ms. Castillo was presented with and executed an Agreement For Deed. The Agreement For Deed was witnessed by the respondent and B. Yanks.

53. The respondent did not advise Ms. Castillo that the mortgage was not a first mortgage or that she was receiving an Agreement For Deed instead of a warranty deed which was required pursuant to the sales contract.

54. Ms. Castillo had never executed mortgage loan documents prior to her experience with the respondent and B & B Equity. She never heard the term "wrap-around mortgage" before and she did not know what a deed was.

55. After the closing Ms. Castillo paid her mortgage payments directly to B & B Mortgage believing she was paying on a new first mortgage. However, the respondent and B. Yanks failed to make the mortgage payments on the existing first mortgage held by Standard Federal thereby placing the property in jeopardy.

56. Although the respondent indicated she would be representing all the parties at the closing, she failed to advise Ms. Castillo as to the mortgage she was receiving. By virtue of her attendance at the closing, and her notarization and witnessing of the closing documents, the respondent was aware that the mortgage provided to Mr. Castillo was not the mortgage she was seeking to obtain.

57. By reason of the foregoing paragraphs one through fourteen and thirty-seven through fifty-six, the respondent has violated Rule of Discipline 3-4.3 for engaging in conduct that is unlawful or contrary to honesty and justice; and the following Rules of Professional Conduct: 4-4.3 for dealing improperly with a person unrepresented in a legal matter; and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

COUNT IV

Case No. 90-71,276 (11C)

The Florida Bar realleges paragraphs one through fourteen and further alleges:

58. A closing statement had been prepared and given to Pura Castillo in the real estate transaction as indicated in Count III above. The respondent knew or should have known the debits reflected on the statement were either false or fictitious.

59. The following debits listed on the closing Statement were fictitious: the $25.00 debit purportedly for "photo fee"; the debit of $150.00 purportedly for "lender's inspection"; the debit of $20.00 purportedly for "recording affidavits"; the $250.00 debit purportedly for "warehouse fee"; the $84.00 debit purportedly for "documentary stamps on mortgage"; the $500.00 debit purportedly for "FMNA underwriting"; the $224.00 debit purportedly for "survey"; the debit of $913.00 purportedly for "flood and hazard insurance and assessments in escrow"; and the $50.00 debit purportedly for a "credit report".

60. The debit of $600.00 purportedly for title insurance Was false in that title insurance in the amount of approximately $150.00 had been prepaid by the seller.

67. The respondent's actions as detailed above were undertaken in furtherance of the perpetration of a fraud upon Ms. Castillo.

68. By reason of the foregoing paragraphs one through fourteen and fifty-eight through sixty-seven, the respondent has violated the following rules: Rule of Discipline 3-4.3 for engaging in conduct that is unlawful or contrary to honesty and justice; and the following Rules of Professional Conduct: 4-4.3 for dealing improperly with a person unrepresented in a legal matter; 4-8.4(b) for committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and Rule 5-1.1 of the Rules Regulating Trust Accounts for utilizing client funds other than for the specific purpose for which they were intended.

COUNT V
Case No 90-71,292 (11C)

The Florida Bar realleges paragraphs one through fourteen above and further alleges:

69. On or about January 14, 1988, representatives of Calvary Chapel Church of God In Christ, Inc. (hereinafter referred to as "the church") entered into a contract to buy a

piece of property. The mortgage loan was to be obtained by B. Yanks acting as the agent for B & B Investors.

70. At the time the contract was entered into, no deposit monies were paid to B & B Investors or any of its agents.

71. In or around August, 1988, B. Yanks requested that the church deposit with B & B Investors the sum of $24,000.00 as good faith money to show potential lenders that the church had sufficient funds to pay the balance of the purchase price of on the property which the church intended to buy.

72. On or about August 23, 1988, the respondent received a check from or on behalf of the church in the amount of $10,000.00 made payable to her trust account. The respondent deposited that sum into her Continental Trust Account on September 1, 1988.

73. On or about September 1, 1988, the respondent received from or on behalf of the church a check in the amount Of $4,000.00 made payable to her trust account. The respondent deposited that sum into her Continental Trust Account on September 6, 1988.

74. Also during this time the church paid directly to B. Yanks the sum of $10,000.00. It does not appear that sum of money was ever deposited to the respondent's trust account.

75. A mortgage commitment on behalf of the church was never obtained by B & B Investors during the nine months after the original contract was executed. Due to the lack of financing, the seller cancelled the contract on the property the church wished to purchase.

76. Church representatives requested in writing that *the* respondent and B. Yanks return their $24,000.00 deposit. B. Yanks advised he would only return the $14,000.00 held in the respondent's trust account as he was keeping the other $10,000.00 as his commission.

77. Thereafter, the church retained attorney Holly Eakin Moody to initiate legal action to recover their $24,000.00 deposit from the respondent and B & B Investors.

78. On or around December 24, 1988, the respondent sent a United National Bank trust account check to Ms. Moody in the amount of $14,000.00. The check also contained a clause indicating that the amount was for full accord and satisfaction of all claims against the respondent, B. Yanks and B & B Investors.

79. The church refused to accept the respondent's $14,000.00 check as full satisfaction because final settlement of all claims would only be upon their receipt of $24,000.00.

80. On February 7, 1989, the respondent sent Ms. Moody a letter stating that since her $14,000.00 trust account check had not been negotiated by the bank, she was "hereby depositing said monies with the registry of the court".

81. On March 14, 1989, Ms. Moody returned the respondent's $14,000.00 trust account check by certified mail to the respondent indicating the amount was not satisfactory to settle all claims.

82. The respondent's representation that she was depositing the monies with the court registry was false as she never deposited the funds in the court registry nor did she attempt to obtain a court order to allow her to deposit any funds she received from the church into the registry of the court.

83. Additionally, as mentioned in paragraphs twenty-six through thirty-six in Count II above the respondent closed her Continental Trust Account approximately one month after depositing the church's $14,000.00.

84. At the time she closed the Continental Trust Account she had a balance of $13,553.06 of which she used $13,000.00 to open her trust account at Ocean Bank. Therefore, approximately one month after she deposited the church's funds to her trust account, she had not retained the total amount originally deposited by the church.

85. Further, the respondent's Continental Trust Account was approximately $4,000.00 short to pay her liability to the church and to Charles Friedberg for his $2,500.00 application deposit.

86. The respondent issued the $14,000.00 check in December, 1988, to the church from her United National Bank Trust Account. As the church's funds were improperly disbursed from the respondent's Continental and Ocean Bank *Trust Accounts,* it is unclear whether she intended to use her own personal funds or other client trust funds in order to pay her obligation to the church.

87. On February 12, 1990, a final judgment was executed regarding the church's claims against the respondent and B & B Investors. The respondent was ordered to pay to the church $14,000.00 plus interest and attorney's fees.

88. On February 12, 1990, the church obtained a judgment against B & B Mortgage Investors, Inc. for $9,000.00. The judge awarded $1,000.00 to B. Yanks out of the $10,000.00 deposit he had received from the church as payment of costs B. Yanks had incurred. Subsequently, B. Yanks declared bankruptcy and the church was stayed from collecting on the judgment,

89. In March, 1990, the respondent issued a $14,000.00 check to the church but did not include the amount awarded for

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interest and attorney's fees. Thereafter, the respondent declared Chapter 13 bankruptcy and the interest and attorney's fees due the church were discharged during the bankruptcy proceedings.

90. By reason of the foregoing paragraphs one through fourteen and sixty-nine through eighty-nine, the respondent has violated the following Rules of Professional Conduct: 4-4.1(a) for making a false statement of material fact or law to a third person; 4-8.4(b) for committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Rule 5-1.1 of the Rules Regulating Trust Accounts for utilizing client funds other than for the specific purpose in which they were intended.

WHEREFORE, The Florida Bar prays respondent will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.

David Raben

David Raben, Former Chair
Eleventh Judicial Circuit
Grievance Committee "C"
2250 S. W. 3rd Avenue
Miami, Florida 33129-2045
(305) 858-9550
Attorney No. 308641

Date: 10/21/92

Jan Wichrowski

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Date: 10/26/92

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and

JOHN F. HARKNESS, JR.
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Attorney No. 123390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the Original of the foregoing Complaint to the Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing Complaint, by certified mall No. P 832 290 081, return receipt requested, on Counsel for Respondent, Louis Jepeway, Biscayne Building, 19 W. Flager Street, Building #407, Miami, Florida 33130-4404; and a copy by First-Class mail to Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida, 32801-1085, this 3rd day of November, 1992.

JOHN T. BERRY
Staff Counsel

Appendix Part 4

IN THE SUPREME COURT OF FLORIDA
(Before a Grievance Committee)

THE FLORIDA BAR,

Complainant,

Case No. 92-71,523(11C)

v.

Ana Hernandez-Yanks,

(Complaint by Betty Holmes McKenzie)

Respondent.

NOTICE OF NO PROBABLE CAUSE AND LETTER OF ADVICE TO RESPONDENT

The grievance committee has found no probable cause in the referenced case against you and the complaint has been dismissed.

The committee wants to make it clear, however, that its finding does not indicate that it condones your conduct in this matter. While your conduct in this instance did not warrant formal discipline, the committee believes that it was not consistent with the high standards of our profession. The committee hopes that this letter will make you more aware of your obligation to uphold these professional standards, and that you will adjust your conduct accordingly.

This admonishment does not constitute a disciplinary record against you for any purpose, and it is not appealable by you. Rules 3-7.4(k).

Although Grievance Committee 11"C" has found No Probable Cause, the Committee felt that your actions regarding this case were problematic, as outlined below.

The Committee **finds that your total** lack of formal bookkeeping, the **lack of a written retainer agreement, no records of disbursements and** sloppy **recordkeeping are** matters of grave concern. In the future careful attention **to these matters is highly recommended.** The Committee further suggests taking **a formal accounting course.**

Dated this 22nd day of April, 1994.

ELEVENTH JUDICIAL CIRCUIT
GRIEVANCE COMMITTEE 11"C"

Michael R. Band, Chair

cc: John W. Thornton, Jr., Designated Reviewer
Ana Hernandez-Yanks, Respondent
Betty Holmes McKenzie, Complainant

EXHIBIT
4