

FILED
FEB 18 2004
DEPARTMENT OF REAL ESTATE

By Laura B. Arma

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of	)	NO. H-29812 LA
	)	L-2003010410
DELAWARE PRESTIGE MORTGAGE, INC.;	)	
HELGA LEAH TOMAINO, individually	)	
and as designated officer-broker	)	
for Delaware Prestige Mortgage,	)	
Inc.; and FRANK DOMINICK TOMAINO,	)	
	)	
Respondents.	)	

DECISION AFTER RECONSIDERATION

On December 23, 2003, a Decision was rendered herein by the Acting Real Estate Commissioner, adopting the Proposed Decision of the Administrative Law Judge. The Decision suspended the licenses and license rights of Respondents DELAWARE PRESTIGE MORTGAGE INC., HELGA LEAH TOMAINO and FRANK DOMINICK TOMAINO for two years from the effective date of the Decision; provided, however, that the suspension shall be stayed upon the following terms and conditions:

1. All Respondents' licenses and licensing rights shall be actually suspended for a period of thirty (30) days. Respondents may, pursuant to Section 10175.2,

1 petition the Commissioner to pay a monetary penalty and
2 thereby further stay imposition of the term of actual
3 suspension.

4 2. Respondents shall obey all laws, rules and
5 regulations governing the rights, duties and
6 responsibilities of a real estate licensee in the State of
7 California.

8 3. The Commissioner may, if a final subsequent
9 determination is made, after hearing or upon stipulation,
10 that cause for disciplinary action occurred during the term
11 of the suspension provided for in Condition 1, vacate and
12 set aside the stay order including any further stay imposed
13 pursuant to Business and Professions Code Section 10175.2.
14 Should no order vacating the stay be made pursuant to this
15 condition or Condition 4 below, the stay imposed herein
16 shall become permanent.

17 4. Pursuant to Section 10148 of the Business and
18 Professions Code, Respondents shall pay the Commissioner's
19 reasonable cost for a subsequent audit to determine if
20 Respondents have corrected the trust fund violations found
21 in this Decision. In calculating the amount of the
22 Commissioner's reasonable cost, the Commissioner may use
23 the estimated average hourly salary for all persons
24 performing audits of real estate brokers, and shall include
25 an allocation for travel costs, including mileage, time to
26 and from the auditor's place of work and per diem.
27 Respondents shall pay such cost within 60 days of receiving

1 an invoice from the Commissioner detailing the activities
2 performed during the audit and the amount of time spent
3 performing those activities. The Commissioner may, in his
4 discretion, vacate and set aside the stay order, if payment
5 is not timely made as provided for herein or as provided
6 for in a subsequent agreement between the Commissioner and
7 Respondents. The vacation and set aside of the stay shall
8 remain in effect until payment is made in full, or until
9 Respondents enter into an agreement satisfactory to the
10 Commissioner to provide for payment. Should no order
11 vacating the stay be issued, either in accordance with this
12 condition or Condition 3 above, the stay shall become
13 permanent.

14 Said Decision was to become effective on January 20,
15 2004 and was stayed by separate Order to February 19, 2004.

16 On January 8, 2004, Respondents petitioned for a
17 monetary penalty, pursuant to Business and Professions Code
18 Section 10175.2, in lieu of actual suspensions.

19 It is hereby ordered that Respondents' petition to pay
20 a monetary penalty in lieu of suspension is granted and the
21 disciplinary action imposed in the Order of the Decision is
22 modified as follows:

23 A. The Order is amended to allow DELAWARE PRESTIGE to
24 pay a monetary penalty of \$ 1,500.00 in lieu of a thirty (30)
25 day suspension of its corporate broker license and license
26 rights.

1 B. The Order is amended to allow HELGA LEAH TOMAINO
2 to pay a monetary penalty of \$1,500.00 in lieu of a thirty (30)
3 day suspension of her broker license and license rights.

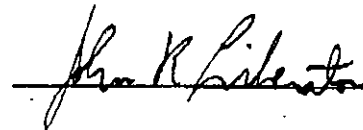
4 C. The Order is amended to allow FRANK DOMINICK
5 TOMAINO to pay a monetary penalty of \$1,500.00 in lieu of a
6 thirty (30) day suspension of his broker license and
7 license rights.

8 In all other respects, the Decision of December 23,
9 2003, remains unchanged.

10 As hereby modified and amended, the Decision of
11 December 23, 2003, shall become effective at 12 o'clock noon
12 on February 19, 2004.

13 IT IS SO ORDERED February 18, 2004.

14 JOHN R. LIBERATOR
15 Acting Real Estate Commissioner

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Supp

FILED
JAN 20 2004
DEPARTMENT OF REAL ESTATE

By Laura B. Olson

BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * * *

In the Matter of the Accusation of) NO. H-29812 LA
) L-2003010410
DELAWARE PRESTIGE MORTGAGE INC.;)
HELGA LEAH TOMAINO, individually)
and as designated officer-broker)
for Delaware Prestige Mortgage,)
Inc.; and FRANK DOMINICK TOMAINO,)
)
Respondents.)

ORDER STAYING EFFECTIVE DATE

On December 23, 2003, a Decision was rendered in the
above-entitled matter to become effective January 20, 2004.

IT IS HEREBY ORDERED that the effective date of the
Decision of December 23, 2003, is stayed for a period of 30 days.

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1 The Decision of December 23, 2003, shall become
2 effective at 12 o' clock noon on February 19, 2004.

3 DATED: January 20, 2004.

4 JOHN R. LIBERATOR
5 Chief Deputy Commissioner

6 By: Dolores Ramos

7 DOLORES RAMOS
8 Regional Manager

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FILED
DEC 29 2003
DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

By Shirley B. Lim

* * * * *

In the Matter of the Accusation of	)	No. H-29812 LA
	)	L-2003010410
DELAWARE PRESTIGE MORTGAGE, INC.;	)	
HELGA LEAH TOMAINO, individually and	)	
as designated officer-broker for	)	
Delaware Prestige Mortgage, Inc.; and	)	
FRANK DOMINICK TOMAINO,	)	
	)	
	)	
	)	
Respondent(s).	)	

DECISION

The Proposed Decision dated October 24, 2003, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock
noon on January 20, 2004.

IT IS SO ORDERED December 23, 2003.

JOHN R. LIBERATOR
Chief Deputy Commissioner

John R. Liberator

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

Case No. H-29812 LA

DELAWARE PRESTIGE MORTGAGE,
INC.; HELGA LEAH TOMAINO,
individually and as designated officer-broker
for Delaware Prestige Mortgage, Inc.; and
FRANK DOMINICK TOMAINO,

OAH No. L-2003010410

Respondents.

PROPOSED DECISION

This matter came on regularly for hearing before Mark T. Roohk, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California on September 22, 23, and 24, 2003.

Martha J. Rosett, Real Estate Counsel, represented Complainant Janice Waddell ("Complainant").

Frank M. Buda, Attorney at Law, represented Respondents. Helga Tomaino and Frank Tomaino were both present throughout the hearing.

Oral and documentary evidence was received, the matter argued, and the record was closed at the end of hearing and the case submitted for decision.

FACTUAL FINDINGS

1. Complainant Janice Waddell, a Deputy Real Estate Commissioner of the State of California, made and filed the Accusation in this proceeding in her official capacity and not otherwise.

2. Respondent Delaware Prestige Mortgage, Inc. ("Respondent DPMI") was originally licensed by the Department of Real Estate ("DRE") as a corporate real estate broker, license ID# 1209989, on October 31, 1996. The license is current, with an

expiration date of October 30, 2004. Respondent DPMI is authorized to act by and through Respondent Helga Tomaino as the designated officer and broker responsible for the supervision and control of the activities conducted on behalf of Respondent DPMI by its officers and employees. At all times relevant herein, Respondent DPMI has been authorized to do business as both Estate Realty and Prestige Mortgage.

3. Respondent Helga Tomaino was originally licensed as a real estate broker, license ID# 1009339, on March 10, 1995. Prior to this, she was licensed as a real estate salesperson. Respondent Helga Tomaino's broker license is current, with an expiration date of March 9, 2007.

4. Respondent Frank Tomaino was originally licensed as a real estate broker, license ID# 1015586, on July 10, 2000. Prior to this, he was licensed as a real estate salesperson. Respondent Frank Tomaino's broker license is current, with an expiration date of March 9, 2004.

The October 2000 Audit

5. In or about October 2000, Respondent DPMI's books and records were audited by DRE. The purpose of the audit was to examine Respondent DPMI's residential resale and escrow real estate activities for the period of October 1, 1999, through September 30, 2000. During this period, Respondent DPMI was involved in three (3) loan transactions, three (3) resale transactions, and four (4) escrow transactions. However, because all of the escrow transactions involved at least either a loan or a resale, and one of the transactions involved both a loan and a resale, there were actually five (5) relevant transactions involving Respondent DPMI that occurred during the audit period. The audit disclosed several irregularities in the records of those transactions.

6. One such irregularity involved a reconciliation of Respondent's DPMI trust account. The trust account is used as a depository for earnest money deposits and escrow funds received by Respondent DPMI. During the audit period, the total amount of trust funds deposited in Respondent DPMI's trust account was approximately \$400,000. The audit disclosed a shortage of \$355 was present in the account, and Respondent DPMI had received no written permission from the owners that would allow the balance in the account to be less than the aggregate trust fund liabilities of Respondent DPMI. (Exhibit 5B-1.) Respondents admitted the shortage to the DRE auditor, and cured it on or about October 18, 2000, by depositing a check for the shortage amount in the trust account. (Exhibit A.)

7. The audit also disclosed that, while Respondents did keep separate records for each beneficiary or transaction, Respondents failed to record the balance in the account following the posting of each transaction. (Exhibit 5B-1.) Respondents admitted to the DRE auditor that they failed to do this, and subsequently attempted to remedy this by providing DRE with updated ledgers for each identified beneficiary that did include the account balance following each posted transaction. (Exhibit B.) However, this was not done until March 2001, five (5) months after the audit occurred.

8. The audit further disclosed that Respondents additionally failed to maintain a monthly record of trust fund account reconciliation. Pursuant to Title 10, California Code of Regulations, section 2831.2, such reconciliation must be performed on a monthly basis, except in those months when the bank account did not have any activities. Respondents interpret the regulation to mean that no reconciliation need be performed following a month in which no account activity occurred. This interpretation is correct. However, Respondents' records lack evidence of any such reconciliation being performed during the audit period, even in those months where account activity clearly occurred. (Exhibit 5B-1, *et seq.*)

9. Pursuant to Business and Professions Code section 10240, subdivision (a), all real estate brokers who negotiate a loan to be secured directly or collaterally by a lien on real property shall cause to be delivered to the borrower in a timely manner a written statement containing all information required by Business and Professions Code section 10241. This written statement is known as a Mortgage Loan Disclosure Statement. The broker is further required by statute to retain a copy of this Statement on file for three years. As noted above in Factual Finding 5, during the audit period Respondents were involved in three such transactions. At the time of the audit, Respondents did not have available for the auditor's inspection a copy of the Mortgage Loan Disclosure Statement for any of those borrowers. Respondents subsequently claimed that the Statements were in fact retained, but they had been misfiled at the time of the audit, and that the borrowers had all received the Statements in timely fashion. (Exhibit B.) However, at the time of the audit, Respondents claimed to be unaware of the legal requirement, and seemed generally unfamiliar with the document itself.

The Winding Lane Transaction

10. On November 10, 1999, a Residential Purchase Agreement was entered into and executed for real property located at 265 Winding Lane in Brea. (Exhibits 5C-1.1 & E.) The parties to this transaction were Mason and Sheila Tomaino ("Buyers") and James and Jerilyn Mullen ("Sellers"). The Buyers are the son and daughter-in-law of Respondents, and were represented in this transaction by Respondents DPMI and Frank Tomaino, under his then-current real estate salesperson's license. Respondent Frank Tomaino also functioned as the escrow officer during this transaction. The Sellers were represented by Herb Medina, a licensed real estate salesperson working for Century 21.

11. The Buyers' original offering price on the Winding Lane property was \$285,000. The Sellers' then made a counter offer, which included an increase in price to \$299,500. (Exhibits 5C-1.2 & E.) The counter offer also amended or modified certain other terms of the original Purchase Agreement. The Buyers agreed to accept the counter offer. The Purchase Agreement, amended and modified by the Counter Offer (collectively hereafter referred to as "the Agreement"), was thereafter executed by both parties.

12. On December 9, 1999, well into the escrow period, the Agreement was amended in two ways: the sales price was increased to \$305,000; and Seller was designated to pay non-recurring closing costs of \$11,000. (Exhibit 5C-2.5.) The reason for this amendment was the Buyers' failure to qualify for a loan due to a poor credit history. By raising both the sales price on the property, as well as the Sellers' closing costs, the Buyers would be able to qualify for the loan necessary to satisfy the Agreement and complete the transaction.

At the time of this amendment, neither the Sellers nor Respondents were able to make contact with the Sellers' agent, Medina, to set up a meeting to discuss the amendment, despite numerous attempts by both parties. Because the closing date for escrow was fast approaching, Respondent Frank Tomaino contacted the Sellers directly and explained to them the reason for amendment.

Respondent Frank Tomaino represented to the sellers that their actual proceeds following closing would remain essentially the same under the amendment. However, the basis for Respondent Frank Tomaino's representation assumed that the Sellers had no pre-payment penalty, the existence of which would cause the Sellers' closing costs to increase approximately \$1,000. In fact, the Sellers did have a pre-payment penalty, and the parties disagree as to whether this issue came up during the meeting.

13. Several other disputes between the parties arose during the escrow period. One dispute involved the termite inspection and related repairs. According to the Agreement, the Sellers were to pay for the pest control report, which was to be prepared by Active Exterminators. (Exhibit 5C-1.1, p. 1.) Nothing in the Counter Offer modified or changed this term. Further, nothing in the Escrow Instructions can be construed to override this term. (Exhibit 5C-2.4, p. 4.) On November 18, 1999, Active Exterminators came to the Winding Lane property and performed an inspection. Active subsequently prepared a report that was provided by Respondent to the Sellers' agent. The report recommended repairs in the amount of \$1,830 needed to be made. (Exhibit F.) On November 20, 1999, a second pest control company, B&K Exterminating, came to the Winding Lane property and performed its own inspection. B&K also prepared a report, which recommended repairs in the amount of \$687. (Exhibits 9 & G.)

The arrangements with Active Exterminators were made by Respondent Helga Tomaino. The arrangements with B&K Exterminating were made by the Sellers' agent. Because of B&K's lower estimate in cost and the Sellers' objection to the cost of Active's estimate, B&K Exterminating was subsequently retained to make the repairs on the property. (Exhibit 9.)

14. Pursuant to the terms of the Agreement, the Buyers were entitled to a walkthrough of the property within five (5) days prior to the close of escrow. (Exhibit E.) However, due in large part to the inaccessibility of Sellers' agent Medina, the walkthrough did not occur until the day escrow closed, December 14, 1999. On that date, the Buyers discovered numerous things in need of repair, and recorded each of them on a list. (Exhibit H.) Sellers' agent Medina was present during the walkthrough, and

represented to the Buyers that he would take care of the repairs. Sellers were also of the understanding that Medina was responsible for taking care of any necessary repairs.

However, while several items on the Buyers' list were repaired by workers brought in by Medina, several other items were not. On or about December 18, 1999, Buyers provided Respondents with a letter, requesting that any moneys due Sellers in escrow be withheld until "repairs promised are completed, damages are corrected and items due us are returned". Another list of the items in need of repair, replacement, or correction was attached thereto. (Exhibit I.) Pursuant to this request, Respondents did in fact withhold funds, the final total being \$1,186.14, and did not distribute this money to Sellers until after Sellers filed a small claims court action against Respondent. (Exhibits 7 & K.) Although the Agreement is fairly explicit in providing that any disputes between the parties should be resolved pursuant to a mediation process, the document is silent regarding whether or not the escrow officer may withhold funds pending the results of that mediation. (Exhibit 5C-1.1.) This matter was resolved by mediation in small claims court, after Sellers had filed an action to recover the money, and after Buyers informed Respondents they no longer wished to pursue the issue.

15. At the conclusion of a sale of real property, it is standard practice for the escrow officer to file with the U.S. Department of Housing and Urban Development a Settlement Statement ("HUD 1 form"). The usual custom is to create three (3) different copies: one for the borrower that contains only the information relating to the borrower; one for the seller that contains only the information relating to the seller; and one master copy containing all relevant information that is provided to the lender.

During the course of this transaction, Respondents created and caused to be filed numerous HUD 1 forms. Based on the evidence presented, the forms were amended on at least two occasions. As a result, each new set of HUD 1 forms contained slightly different information. The differences are set forth below:

First HUD 1 form--Seller's copy (Exhibit 10):

Line 1204--1 st Half Taxes, Fidelity Title	\$1,318.14
Line 1305--Transfer Fee	\$100.00
--Nov/Dec Fee	\$66.00
--Repairs	\$141.00

Second HUD 1 form--Master copy (Exhibit 11):

Line 1204--1 st Half Taxes, Fidelity Title	[no entry]
Line 1305--Transfer Fee	\$100.00
--Nov/Dec Fee	\$66.00
--Repairs	\$141.00
--Repairs	\$1,318.14

Third HUD 1 form--Master copy (Exhibit 12):	
Line 1204--1 st Half Taxes, Fidelity Title	[no entry]
Line 1305--Transfer Fee	\$139.00
--Prims Appraisal	\$300.00
--Repairs	\$168.00
--Repairs	\$1,018.14

16. The differences in these amended forms can be attributed mostly to the changing circumstances of the transaction. For example, at the time of the first HUD 1 form, Fidelity Title was holding \$1,318.14 for taxes. Fidelity Title released this money to Respondents in February 2000, and normally this would have been refunded to the Sellers. However, by that time Respondents were aware of the dispute between the parties regarding the repairs, as well as the Buyers' request not to release money to the Sellers pending resolution of that dispute. Accordingly, that amount was transferred to "Repairs" on subsequent HUD 1 forms.

Likewise, the entries for "Transfer Fee" and "Nov/Dec Fee" refer to homeowner's association dues. At the time of the first HUD 1 form, Respondents believed that these amounts were \$100 and \$66, respectively. However, by the time of the third HUD 1 form, they had discovered that the correct amounts were \$75 and \$64, and accordingly those amounts were changed and combined into one entry on that form. (Exhibit 15.)

17. However, Respondents also made mistakes on these forms. The entry on the third HUD 1 form for "Prims Appraisal" indicates that the Sellers had responsibility for that cost, when in fact they did not. Respondents concede they made a mistake in this respect, but did not refund this money. Rather, they used it to offset some of the costs for repairing the property that were paid by the Buyers. (Exhibit U.)

18. Respondents also made other mistakes regarding the allocation of funds to the parties. According to the third HUD 1 form, the Sellers were responsible for \$1,161.25 for title insurance, while the Buyers were responsible for \$131.50 for title insurance. The Sellers were also responsible for a sub-escrow fee in the amount of \$125.00. (Exhibit O.) However, these amounts were inaccurate. In fact, the Sellers were only responsible for \$929.00 for title insurance and \$62.50 for the sub-escrow fee, a difference of \$294.75. (Exhibits P & Q.) Essentially, Respondents had shifted responsibility for these fees from the Buyers to the Sellers. Respondents conceded this discrepancy when it was pointed out to them by the DRE investigator, and refunded \$294.75 to the Sellers by check issued February 26, 2002. (Exhibit R.)¹

Respondent's Corporate Status

19. On June 3, 1996, Respondent DPMI was incorporated in the state of Delaware. On October 28, 1996, Respondent DPMI was qualified to transact business in

¹ Curiously, the Sellers never deposited or cashed this check, and so eventually Respondents placed a stop payment on it. (Exhibit S.) Respondents presented another check in the same amount to Sellers prior to the beginning of the hearing.

the state of California. On December 10, 1996, Respondent DPPI's status as a foreign corporation in the state of California was cancelled. (Exhibits 3A, 4A.)

20. On March 1, 1998, Respondent DPPI's corporate status in the state of Delaware was declared inoperative and void for non-payment of taxes. (Exhibit 4B.)

21. On March 20, 2002, Respondent DPPI was incorporated in the state of California. (Exhibit 3B.)

22. From December 10, 1996, through March 19, 2002, Respondent DPPI operated as an active real estate corporation in the state of California without being a corporation in good standing in the state of California.

Other Matters

23. Respondents Helga and Frank Tomaino have been licensed by the DRE since 1989. They have no prior record of discipline. Their office is small, with only one other employee. They belong to several local and national real estate associations. In addition, Respondent Frank Tomaino is a docent at a museum, where he conducts tours for children. Respondents both expressed remorse from the problems that were identified by the DRE audit and investigation, although they tended to blame filing and computer software glitches for many of the discrepancies and failures. They believe part of the problems with the Winding Lane transaction was the fact they were representing their son, and indicate that because of this experience they will not do that again in the future.

LEGAL CONCLUSIONS

1. Cause exists to impose discipline on Respondent DPPI and Respondent Helga Tomaino's licenses pursuant to the provisions of Business and Professions Code section 10177, subdivisions (d), (g), and (h), and Title 10, California Code of Regulations section 2832.1, for allowing the balance in Respondents' trust fund account to fall below Respondents' existing aggregate trust fund liability, as set forth in Factual Finding 6.

2. Cause exists to impose discipline on Respondent DPPI and Respondent Helga Tomaino's licenses pursuant to the provisions of Business and Professions Code section 10177, subdivisions (d) and (h), and Title 10, California Code of Regulations section 2831.1, subdivision (a)(7), for failing to keep adequate separate records for each beneficiary listed in Respondents' trust account, as set forth in Factual Finding 7.

3. Cause exists to impose discipline on Respondent DPPI and Respondent Helga Tomaino's licenses pursuant to the provisions of Business and Professions Code section 10177, subdivisions (d) and (h), and Title 10, California Code of Regulations section 2831.2, for failing to maintain appropriate trust fund reconciliation, as set forth in Factual Finding 8.

4. Cause exists to impose discipline on Respondent DPMI and Respondent Helga Tomaino's licenses pursuant to the provisions of Business and Professions Code section 10240, subdivision (a), for failing to properly maintain Mortgage Loan Disclosure Statements on file, as set forth in Factual Finding 9.

5. Cause exists to impose discipline on Respondent Helga Tomaino's license pursuant to the provisions of Business and Professions Code section 10177, subdivisions (d), (g), and (h), and section 10159.2, subdivision (a), for failing to supervise the activities performed on behalf of Respondent DPMI by its employees, to wit, Respondent Frank Tomaino, in failing to properly allocate funds in the Winding Lane transaction. On several occasions, the Sellers were charged fees for items that were not their responsibility, as set forth in Factual Findings 17 and 18.

6. Cause exists to impose discipline on Respondent Frank Tomaino's license pursuant to the provisions of Business and Professions Code section 10176, subdivision (i), for dishonest dealings in the course of the Winding Lane transaction. On several occasions, the Sellers were charged fees for items that were not their responsibility, as set forth in Factual Findings 17 and 18. Further, in representing to the Sellers the need to amend the purchase agreement so that his son, the Buyer, could qualify for a loan, Respondent Frank Tomaino should have more mindful of clearly explaining to the Sellers the reasons and ramifications of the situation, especially given the absence of the Sellers' agent during the conversation. (Factual Finding 12.)

7. Cause exists to impose discipline on Respondent DPMI and Respondent Helga Tomaino's license pursuant to the provisions of Business and Professions Code section 10177, subdivisions (d) and (f), by and through Title 10, California Code of Regulations section 2742, for engaging in the business of a real estate broker while the corporation was not in good standing, as set forth in Factual Findings 19, 20, 21, and 22.

8. Cause does not exist to impose discipline on Respondents for those actions set forth in Factual Findings 13, 14, 15, and 16.

Regarding the issue of the termite inspection, it is clear from the Agreement that Active Exterminators was the appropriate company to conduct the inspection, and accordingly, Respondents were well within their contractual rights to order that inspection, as Sellers had already agreed to this by executing the Agreement. Given that B&K Exterminating's report was prepared two days after Active's, it must be presumed that B&K performed its inspection after Active, most likely because either the Sellers or their agent did not like what Active had to say. (Factual Finding 13.)

Regarding the issue of the disputed repairs and the withholding of funds by Respondents, the Agreement and the evidence are clear that the Sellers had a certain responsibility to complete those repairs in a timely manner, and failed to do so. Although the Agreement mandates that any dispute between the parties should be resolved by mediation, it does not indicate whether or not funds may be withheld pending such resolution. Therefore, while Respondents' withholding of funds may not have been the

best course of action given the circumstances, it cannot be said to have violated the terms of the Agreement, and as such cannot be used as a basis for license discipline.² (Factual Finding 14.)

Regarding the issue of the HUD 1 forms, it appears from the evidence that, for the most part, Respondents were simply amending the forms to keep up with the changing information available to them. As Respondents point out, there is no place on the HUD 1 forms to indicate whether or not the form is a revision. While the confusion of the parties on this issue is understandable, and while Respondent probably was less than exemplary in obtaining the necessary information in an efficient manner, such does not rise to the level of a violation of the Real Estate law. (Factual Findings 15 and 16.)

On the other hand, Respondents' shifting of certain charges on those forms, including the appraisal fee, title insurance, and sub-escrow fee, were at the very least mistakes made by Respondents that should have and could have been avoided. (Factual Findings 17 and 18.)

Generally speaking, Respondents' violations in this matter all speak to a less than exemplary ability to accurately and efficiently conduct their real estate business. Looking cumulatively at all the violations, a clear pattern emerges of inaccurate record keeping and less than thorough efforts, whether in updating a trust account, keeping track of corporate status, or in explaining last minute changes in a transaction. However, for the most part it does not appear as if Respondents' acts were intended to defraud either DRE or the public, with the exception of the shifting of fees to the Sellers in the Winding Lane transaction. Even so, the dollar amounts involved in the violations are all relatively small: the total amount of money involved in the fee-shifting was \$594.75, and the only other financial inconsistency was a \$355 shortage in a \$400,000 account.

Further, as to most of the violations, Respondents attempted to cure them as soon as they became aware of them, and they were consistently cooperative with the various DRE auditors and investigators who came to speak with them regarding these allegations. In regard to the Winding Lane transaction, it appears that many of the problems were the result of Respondents representing their own son and daughter-in-law, coupled with a Sellers' agent whose erratic behavior made the timely completion of several conditions in the Agreement problematic. However, while many of the allegations regarding that transaction were not established, it must also be noted that even then, Respondents did not always use good judgment when confronting difficult issues that arose before and after escrow closed.

Respondents have committed several violations of law, and have demonstrated a less than desirable understanding of the requirements and duties that come with having

² It is apparent that the Sellers' agent, Medina, shoulders a good portion of the blame for this problem. Every witness who testified was clear regarding Medina's lack of availability and responsibility at critical points in this transaction. Indeed, but for Medina's failure to make himself available to his own clients, the issues regarding the amendment to the escrow instructions may never have arisen. Unfortunately, Medina himself did not testify at the hearing.

real estate licenses. At the same time, the violations are mostly minor, the by-product of either ignorance, neglect, or sloppiness. Respondents have already attempted to correct their mistakes, were cooperative during the audit and investigation, and have no record of prior discipline. Accordingly, while this is an appropriate case for discipline, there is sufficient mitigation present to obviate the need for revocation of any of the licenses at issue. Rather, the public interest would best be served by an order requiring Respondents to provide further proof that the shortcomings in their business practices have been remedied.

ORDER

The licenses and licensing rights of Respondents Delaware Prestige Mortgage, Inc.; Helga Leah Tomaino; and Frank Dominick Tomaino are suspended for two years from the effective date of this Decision; provided, however, that the suspension shall be stayed upon the following terms and conditions:

1. All Respondents' license and licensing rights shall be actually suspended for a period of thirty (30) days. Respondents may, pursuant to Section 10175.2, petition the Commissioner to pay a monetary penalty and thereby further stay imposition of the term of actual suspension.

2. Respondents shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the state of California.

3. The Commissioner may, if a final subsequent determination is made, after hearing or upon stipulation, that cause for disciplinary action occurred during the term of the suspension provided for in Condition 1, vacate and set aside the stay order including any further stay imposed pursuant to Section 10175.2. Should no order vacating the stay be made pursuant to this condition or Condition 4 below, the stay imposed herein shall become permanent.

4. Pursuant to Section 10148 of the Business and Professions Code, Respondent shall pay the Commissioner's reasonable cost for a subsequent audit to determine if Respondent has corrected the trust fund violations found in this Decision. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work, and per diem. Respondent shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may, in his discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between the Commissioner and Respondents. The vacation and set aside of the stay shall remain in effect until payment is made in full, or until Respondents enter into an agreement satisfactory to the Commissioner to provide for payment. Should no order vacating the

stay be issued, either in accordance with this condition or Condition 3 above, the stay imposed herein shall become permanent.

DATED: 10/29/03



MARK T. ROOHK
Administrative Law Judge
Office of Administrative Hearings

FILED
MAR 12 2003
DEPARTMENT OF REAL ESTATE

DEPARTMENT OF REAL ESTATE

Sama B. Aune

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BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * * *

FILED
JAN 28 2003
DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of) Case No. H-29812 LA
) OAH No. L-2003010410
DELAWARE PRESTIGE MORTGAGE, INC;)
HELGA LEAH TOMAINO, individually)
and as designated officer-broker for)
Delaware Prestige Mortgage, Inc.; and)
FRANK DOMICK TOMAINO,)
)
)
Respondent(s).)

Lane B. Dorn

NOTICE OF HEARING ON ACCUSATION

To the above-named Respondent(s):

You are hereby notified that a hearing will be held before the Department of Real Estate at the Office of Administrative Hearings, 320 West Fourth Street, 6th Floor, Suite 630, Los Angeles, California, on AUGUST 6, 7 & 8, 2003, at the hour of 9:00 a.m., or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served upon you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

Dated: January 28, 2003

DEPARTMENT OF REAL ESTATE

By: *Martha J. Robett*
MARTHA J. ROBETT, Counsel

cc: Delaware Prestige Mortgage, Inc.
Helga Leah Tomaino
Frank Domick Tomaino
Sacto./OAH/Audits-LA

*Sacto
Jury*

MARTHA J. ROSETT, Counsel (SBN 142072)
Department of Real Estate
320 West Fourth Street, Suite #350
Los Angeles, California 90013-1105

(213) 576-6982
(213) 576-6914

FILED
DEC 9 2002
DEPARTMENT OF REAL ESTATE
Laura B. Stone

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * * *

In the Matter of the Accusation of	)	No. H-29812 LA
	)	
DELAWARE PRESTIGE MORTGAGE, INC.;	)	
HELGA LEAH TOMAINO, individually and	)	<u>A C C U S A T I O N</u>
as designated officer-broker for	)	
Delaware Prestige Mortgage, Inc.; and	)	
FRANK DOMINICK TOMAINO,	)	
	)	
Respondents.	)	

The Complainant, Janice Waddell, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against DELAWARE PRESTIGE MORTGAGE, INC., dba California Commercial, Century 21 Estate Realtors, Estate Realty, Prestige Home Loan, Prestige Home Loans and Prestige Mortgage; HELGA LEAH TOMAINO, individually and as designated officer-broker for Delaware Prestige Mortgage, Inc.; and FRANK DOMINICK TOMAINO, Respondents, is informed and alleges as follows:

//

1. 1.

2 The Complainant, Janice Waddell, a Deputy Real Estate
3 Commissioner of the State of California, makes this Accusation in
4 her official capacity.

2. 2.

6 At all times material herein, Respondent DELAWARE
7 PRESTIGE MORTGAGE, INC., dba California Commercial, Century 21
8 Estate Realtors, Estate Realty, Prestige Home Loan, Prestige Home
9 Loans, and Prestige Mortgage (hereinafter "DPMI") was and now is
10 presently licensed and/or has license rights under the Real
11 Estate Law, Part 1 of Division 4 of the California Business and
12 Professions Code (hereinafter "Code"), as a corporate real estate
13 broker. Respondent DPMI is authorized to act by and through
14 Respondent HELGA LEAH TOMAINO as the designated officer and
15 broker responsible, pursuant to the provisions of Code Section
16 10159.2 for the supervision and control of the activities
17 conducted on behalf of DPMI by DPMI's officers and employees.

3. 3.

19 At all times material herein, Respondent HELGA LEAH
20 TOMAINO, (hereinafter "HELGA TOMAINO") was and now is presently
21 licensed by the Department individually as a real estate broker
22 and as the designated broker-officer of Respondent DPMI. As the
23 designated broker-officer, HELGA TOMAINO was and is responsible
24 for the supervision and control of the activities conducted on
25 behalf of DPMI by DPMI's officers and employees as necessary to
26 secure full compliance with the Real Estate Law pursuant to Code
27 Section 10159.

1 4.

2 At all times material herein, Respondent FRANK DOMINICK
3 TOMAINO, (hereinafter "FRANK TOMAINO") was and now is presently
4 licensed by the Department individually as a real estate broker.

5 5.

6 All further references to "Respondents" unless
7 otherwise specified, include the parties identified in Paragraphs
8 2, 3 and 4 above, and also include the officers, directors,
9 employees, agents and real estate licensees employed by or
10 associated with said parties, who at all times material herein
11 were engaged in the furtherance of the business or operations of
12 said parties and who were acting within the course and scope of
13 their authority, agency or employment.

14 6.

15 At all times material herein, Respondents engaged in
16 the business of, acted in the capacity of, advertised or assumed
17 to act as real estate brokers in the State of California, within
18 the meaning of Code Sections 10131(a) and (d) for another or
19 others, for or in expectation of compensation. Said activity
20 included representation of sellers and buyers of residential
21 property, collection of rents and property management on behalf
22 of the owners of rental properties, and soliciting borrowers and
23 lenders for loans. Respondents also provided escrow services in
24 relation to real estate transactions for which they represented
25 one or both principals pursuant to Financial Code Section
26 17006(a)(4).

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In the course of activities described in Paragraphs 6 and 7 above, and during the examination period described in Paragraph 7, Respondent acted in violation of the Code and the Regulations in that:

a) The trust account had a shortage of \$355 as of September 30, 2000, in violation of Code Section 10145 and Regulation 2832.1. This shortage was cured on or about October 18, 2000.

b) The separate records maintained for each beneficiary did not show a balance after posting each transaction, in violation of Code Section 10145 and Regulation 2831.1.

c) A monthly record of trust fund account reconciliation was not maintained, in violation of Code Section 10145 and Regulation 2831.2.

d) Respondents failed to retain on file a mortgage loan disclosure statement in three of the files examined, including the Litteral file, the Sheehan file and the Mason Tomaino file, in violation of Code Section 10240(a).

e) Additional findings regarding the handling of the Winding Lane transaction are set forth in the second cause of accusation below.

The foregoing violations constitute cause for the suspension or revocation of Respondent DPMI and Respondent HELGA TOMAINO's real estate licenses and license rights under the provisions of Code Sections 10177(d), 10177(h) and/or 10177(g).

1 sellers were to be responsible for structural pest control
2 repairs, maintenance of the pool and utilities, retrofit, and
3 smoke detector repair/installation. Additionally, the sellers
4 were responsible for the HOA transfer fee and payment of the
5 Owner's Title Insurance policy, while the buyers were responsible
6 for payment of the Lender's Title Insurance Policy.

7 13.

8 In accordance with escrow instructions, the sellers
9 ordered and paid for a termite inspection and related repairs of
10 approximately \$687. Respondent DPPI nonetheless ordered a
11 separate inspection on behalf of the buyers which estimated that
12 \$1,830 in repairs were needed. This inspection was not
13 authorized by the sellers.

14 14.

15 On or about December 9, 1999, an amendment to the
16 escrow instructions was signed and acknowledged by both parties.
17 This amendment increased the sales price from \$299,500 to
18 \$305,000 and increased the seller's non-recurring closing costs
19 from \$4,500 to \$11,000. As part of the inducement to agree to
20 these additional costs, Respondent FRANK TOMAINO represented to
21 the sellers that net proceeds from the sale would remain
22 unaltered.

23 15.

24 On December 14, 1999, escrow closed. On or about that
25 date, Respondent FRANK TOMAINO forwarded a HUD 1 Settlement
26 Statement and a Seller/Lender Closing Statement to the sellers
27 agent, Herb Medina, for forwarding to the sellers. In this

1 initial HUD 1 Settlement Statement, the sellers were to receive
2 \$30,286.09 in proceeds after the sale. Non-recurring closing
3 costs in the amount of \$11,000 were debited to the sellers, as
4 was \$500 for fence repair, \$500 for carpet allowance, and a
5 miscellaneous hold of \$307. These "miscellaneous" charges were
6 broken down as follows: \$100 for a HOA transfer fee, \$66.00 for
7 November/December HOA fee, and \$141 for repairs.

8 16.

9 The Seller/Lender Closing Statement that accompanied
10 the HUD 1 dated December 14, 1999 and referred to in Paragraph 15
11 above lists the same amount of cash back to sellers, but the
12 charges were materially different from those on the HUD 1.
13 Specifically, the \$307 miscellaneous hold does not appear.
14 Instead, the following charges are listed: "HOA Transfer Fee:
15 \$75.00; Nov/Dec HOA fee hold: \$66.00; Repair Termite (Hold)-
16 \$2,000."

17 17.

18 Respondent FRANK TOMAINO generated two additional HUD 1
19 and one additional Seller/Lender Closing Statements for this
20 transaction, each of which were dated December 14, 1999, which
21 contained figures that varied from those listed in the HUD 1 and
22 Seller/Lender Closing Statement described in Paragraphs 11 and 12
23 above. One of these was provided to the Department's auditor
24 during the course of Audit No. LA 990475.

25 18.

26 Pursuant to the escrow instructions, the true cost of
27 the Owner's Title Policy and the sub escrow were to be charged to

1 the sellers, while the cost of the Lender's Title Policy was to
2 be charged to the buyers. On the date that escrow closed,
3 December 14, 1999, the holder of the sub-escrow, Fidelity
4 National Title Company, issued a Disbursement Summary and Memo
5 Bill of Charges to Respondent FRANK TOMAINO, acting as DPMI's
6 escrow officer. That bill listed charges as follows:

7 Owner's Title Policy: \$ 929.00 (Seller)

8 Lender's Title Policy: \$ 426.25 (Buyer)

9 Sub Escrow Fee: \$ 62.50 (Seller)

10 Total: \$1417.75

11 < \$ 991.50 (Seller) >

12 < \$ 426.25 (Buyer) >

13 19.

14 In each of the HUD 1's produced by Respondent FRANK
15 TOMAINO, the costs of the title policies and sub escrow fees were
16 altered to reflect the following:

17 Owner's Title Policy: \$1,161.25 (Seller)

18 Lender's Title Policy: \$ 131.50 (Buyer)

19 Sub Escrow fee: \$ 125.00 (Seller)

20 Total: \$1,417.75

21 < \$1,286.25 (Seller) >

22 < \$ 131.50 (Buyer) >

23 This increase in amounts charged to the sellers of \$294.75, which
24 shifted costs from buyers to sellers, was not contractually
25 authorized.

26 20.

27 Pursuant to escrow instructions, the cost of the

1 appraisal was to be charged to the buyers/borrowers. On the
2 HUD 1 Settlement Statement, a \$300 appraisal fee to "Pacific
3 National Bank" was listed as a charge to the borrowers/buyers.
4 However, a \$300 charge also appears on the Seller's Second
5 Closing Statement as a "Prims Appraisal (sic)." Only one check
6 was written from escrow for an appraisal and that was check
7 number 14280 in the amount of \$300 made payable to "Primis
8 Appraisal." This disbursement was not reported in the escrow
9 check disbursement report. By listing the appraisal fee as
10 charges to both the buyers and the sellers, when there was in
11 fact only one check disbursement for the appraisal, Respondent in
12 essence shifted the cost of the appraisal onto the sellers
13 without their authorization.

14 21.

15 On the Disbursement Summary issued by Fidelity Title
16 Insurance at the close of escrow on December 14, 1999, a charge
17 of \$1318.14 was listed as a hold for taxes. On the first
18 seller's closing statement generated by Respondent FRANK TOMAINO,
19 as set forth in Paragraphs 15 and 16 above, and given to the
20 sellers, this hold for payment of \$1318.14 was debited to the
21 sellers. The second HUD 1 listed the \$1318 as a repair hold, not
22 as a hold for taxes. The third HUD 1 did not list the charge at
23 all.

24 22.

25 On or about February 4, 2000, DPMI received a refund of
26 \$1,318.14 via wire transfer for funds held for payment of taxes
27 on the subject property. This sum was credited to DPMI's record

1 of trust funds for the subject transaction and brought the
2 seller's balance to \$1,325.14, there having been only \$7.00 in
3 the trust account at that time. On that same date, Respondent
4 FRANK TOMAINO, as escrow officer, issued a check to Winding Way
5 Community Association in the amount of \$139 for the outstanding
6 HOA dues and transfer fee, since that amount had not properly
7 been maintained in the account. Therefore, \$1,186.14 remained in
8 the seller's trust fund account as of on or about February 5,
9 2000.

10 23.

11 Upon request from the sellers, Respondent DPMI, acting
12 through Respondent FRANK TOMAINO as escrow officer, refused to
13 return to the sellers the remaining \$1,186.14 in trust funds owed
14 to them. Respondents claimed that they were withholding the
15 release of these funds due to instructions from the buyers, who
16 claimed the funds were to be used to pay for repairs. However,
17 there were no written escrow instructions or modifications
18 authorizing Respondents to withhold these funds or otherwise
19 apply them for the benefit of the buyers (who were also their
20 children). This money was not returned to the sellers until
21 almost one year later, after the sellers brought suit against
22 Respondents in small claims court.

23 24.

24 The conduct, acts and/or omissions of Respondent DPMI
25 as set forth in Paragraphs 10 through 23 above constitute grounds
26 to suspend or revoke Respondent DPMI's real estate license and
27 license rights pursuant to Business and Professions Code Section

1 10145(a)(1).

2 25.

3 The conduct, acts or omissions of Respondent HELGA
4 TOMAINO as set forth in Paragraphs 10 through 23 above constitute
5 grounds to suspend or revoke Respondent HELGA TOMAINO's real
6 estate license and license rights pursuant to Code Sections
7 10177(d), 10177(g) and/or 10177(h) for violation of Code Sections
8 10145(a)(1) and 10159.2 and Regulation 2832.1.

9 26.

10 The conduct, acts or omissions of Respondent FRANK
11 TOMAINO as set forth in Paragraphs 10 through 23 above constitute
12 grounds to suspend or revoke Respondent FRANK TOMAINO's real
13 estate license and license rights pursuant to Code Sections
14 10176(a) and (i).

15 THIRD CAUSE OF ACCUSATION

16 (Regulation 2742)

17 27.

18 Complainant hereby restates and incorporates by
19 reference herein the allegations contained above in Paragraphs 1
20 through 6 of the Accusation.

21 28.

22 On or about October 28, 1996, Respondent DPMI filed a
23 "Statement and Designation by Foreign Corporation," with the
24 Office of the Secretary of State of the State of California.

25 29.

26 On or about October 31, 1996, Respondent DPMI became a
27 licensed real estate corporation with the Department of Real

1 Estate, State of California.

2 30.

3 On or about December 10, 1996, Respondent DPPI's status
4 as a foreign corporation was cancelled with the Office of the
5 Secretary of State, State of California.

6 31.

7 On or about March 20, 2002 Respondent DPPI became
8 incorporated within the State of California.

9 32.

10 Between on or about December 11, 1996 through March 19,
11 2002, Respondent DPPI operated as an active real estate
12 corporation in the State of California without being a
13 corporation in good standing with the Secretary of State's
14 Office.

15 33.

16 The conduct, acts and/or omissions of Respondent DPPI
17 as set forth in Paragraphs 27 through 32 above constitutes
18 grounds to revoke or suspend the license and/or license rights of
19 Respondent DPPI and Respondent HELGA TOMAINO pursuant to Code
20 Sections 10177(d) and/or 10177(f) for violation of Regulation
21 2742.

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1 WHEREFORE, Complainant prays that a hearing be
2 conducted on the allegations of this Accusation and that upon
3 proof thereof, a decision be rendered imposing disciplinary
4 action against all licenses and license rights of Respondents
5 DELAWARE PRESTIGE MORTGAGE, INC., FRANK DOMINICK TOMAINO and
6 HELGA LEAH TOMAINO, under the Real Estate Law (Part 1 of Division
7 4 of the Business and Professions Code), and for such other and
8 further relief as may be proper under other applicable provisions
9 of law.

10 Dated at Los Angeles, California

11 this 6th day of December, 2002.

12
13 
14 Deputy Real Estate Commissioner
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22 cc: Delaware Prestige Mortgage, Inc.
23 Helga Leah Tomaino
24 Frank Dominick Tomaino
25 Janice Waddell
26 Sacto.
27 MA
Audits