

BEFORE THE  
DEPARTMENT OF CORPORATIONS  
STATE OF CALIFORNIA

CALIFORNIA CORPORATIONS  
COMMISSIONER,

Case number: 963-2267

OAH No.: 2008040755

vs.

SIMPLY ESCROW, INC., a California  
Corporation,

Respondent.

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated September 8, 2008, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter, with the following change:

Pursuant to Government Code Section 11517(c)(2)(C), in paragraph 1 of the Factual Findings on page 1 of the Proposed Decision, the phrase "credit unions" is deleted.

This Decision shall become effective on December 18, 2008.

IT IS SO ORDERED this 17<sup>th</sup> day of December 2008.

CALIFORNIA CORPORATIONS COMMISSIONER

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Preston DuFauchard

BEFORE THE  
COMMISSIONER OF CORPORATIONS  
STATE OF CALIFORNIA

CALIFORNIA CORPORATIONS  
COMMISSIONER,

vs,

SIMPLY ESCROW, INC., a California  
Corporation,

Respondent.

File No. 963-2267

OAH No. 2008040755

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 15, 2008, in San Diego, California.

Joyce Tsai, Corporations Counsel, who appeared personally in San Diego, California, represented Preston DuFauchard, California Corporations Commissioner, Department of Corporations, State of California.

Sean McCarthy and Donald P. Kennedy, Attorneys at Law, who appeared electronically from Sacramento, represented Simply Escrow, Inc., a California corporation.

On August 15, 2008, the matter was submitted.

**FACTUAL FINDINGS**

*The Licensing and Regulation of the Escrow Agents*

1. The Department of Corporations (the Department) is an agency within California's Business, Transportation, and Housing Agency. Among other matters, the Department regulates the sales of securities, and licenses and supervises securities brokers, investment advisers, credit unions, finance lenders, and escrow agents.

Escrow agents - those who act as escrow holders for compensation - must, with certain exceptions, be licensed by the Commissioner of Corporations, and licensees are subject to strict regulation under California's "Escrow Law" (Fin. Code, § 17000 et seq.).

Escrow agents must, on request, exhibit and allow the Commissioner of Corporations to inspect and copy books and records (Fin. Code, § 17405) and must file an annual audit report containing audited financial statements (an audit report) within 105 days of the close of the fiscal year (Fin. Code, § 17406). The failure to file a required report may result in the issuance of an order imposing a financial penalty (Fin. Code, § 17408, subd. (b)).

The Commissioner of Corporations may censure, suspend, or bar from employment or management of escrow agents any persons who have violated or caused a violation of the Escrow Law or any rule or order of the commissioner whenever the violation was known or should have been known by the licensee committing or causing the violation, or where the violation has caused material damage to either the escrow agent or the public (Fin. Code, §17423, subd. (a)(1)).

### *Simply Escrow*

2. Simply Escrow, Inc. (Simply Escrow) is a California corporation which incorporated on January 1, 2005. Simply Escrow initially conducted business at 13400 Sabre Springs Parkway, #275, San Diego, California 92128, and conducted business at 13400 Sabre Springs Parkway, #170, San Diego California 92128 after January 7, 2008. Jennifer L. Malham (Malham) was Simply Escrow's principal corporate officer, CEO, and CFO. Malham was Simply Escrow's single shareholder.

On July 20, 2005, Malham signed an application for the issuance of an escrow agent's license that was filed with the Department. On October 25, 2005, the Department issued Escrow Agent's License (File No. 963 2267) to Simply Escrow. The agent's license was "to continue in effect until surrendered, suspended, or revoked as provided by law."

There is no history of any formal disciplinary action having been imposed previously against Simply Escrow's escrow agent's license.

3. Simply Escrow's fiscal year end was December 31. Thus, Simply Escrow was required to file an audit report with the Department annually on or before April 15 of each calendar year.

### *The Failure to Timely File Annual Audit Reports*

4. The Department maintained a practice of sending notices to licensed escrow agents to remind them that an annual audit report was coming due. In accordance with that practice, the Department notified Simply Escrow in writing on November 14, 2006, that Simply Escrow's annual audit report for the fiscal year ending December 31, 2006, was due on April 15, 2007.

5. When Simply Escrow did not file an audit report in a timely fashion for the 2006 fiscal year, the Department sent a follow up letter to Simply Escrow dated May 15, 2007, concerning Simply Escrow's failure to file the audit report. That letter warned Simply Escrow that its failure to file the required audit report could result in the assessment of penalties, in a special examination, and/or in administrative action. Simply Escrow received this warning letter on May 16, 2007. Similar letters were sent concerning Simply Escrow's obligation to file an audit report for the 2007 fiscal year and Simply Escrow's failure to file such a report in a timely fashion.

#### *Jurisdictional Matters*

6. On March 24, 2008, Joyce Tsai, Corporations Counsel, signed the Accusation in File No. 963-2267 (the accusation). The accusation sought the suspension of Simply Escrow's license.

On March 24, 2008, Alan S. Weinger, Lead Corporations Counsel, signed an Order Imposing Penalties Pursuant to California Financial Code Section 17408 (the order imposing penalties). The order imposing penalties found that Simply Escrow failed to file audited financial statements for the fiscal year ending on December 31, 2006, and, as a consequence thereof, Simply Escrow was ordered to pay to the Commissioner "the sum of \$34,400.00, plus an additional \$100.00 per day for each day after March 24, 2008, that the annual audit report is not filed." The order imposing penalties set forth Simply Escrow's right to request an administrative hearing.

The accusation, the order imposing penalties, and other required documents were served on Simply Escrow.

By letter dated April 7, 2008, Sean E. McCarthy, Attorney at Law, advised the Department that his firm represented Simply Escrow with respect to the accusation and the order imposing penalties. A special notice of defense accompanied that letter.

On July 10, 2008, Joyce Tsai signed the Amended Accusation in File No. 963-2267 (the amended accusation). The amended accusation sought the revocation of Simply Escrow's license. The new allegations were deemed controverted by operation of law.

The amended accusation and other required documents were served on Simply Escrow's attorneys.

On August 15, 2008, the record in the disciplinary proceeding was opened. It was stipulated that counsel for respondent could appear electronically and that the matter could be reported electronically. Opening statements were given, documentary evidence was produced, sworn testimony was obtained, closing arguments were provided, the record was closed, and the matter was submitted.

## *The Evidence*

7. The testimony of Kathleen Partin (Partin), Special Administrator, Escrow Law, Department of Corporations, the testimony of Sepah Sanaee (Sanaee), Senior Examiner, Department of Corporations, and the documentary evidence established those matters set forth in Factual Findings 1-5.

8. On July 1, 2008, Malham, the sole director of Simply Escrow, signed a document entitled "Director's Action and Shareholder's Approval by Unanimous Written Consent" in which it was resolved that Simply Escrow was ceasing operations at the time, that the corporation would provide the Department with such information and documentation necessary to effect the surrender of the escrow agent's license including, but not limited to, the preparing of a closing audit, that Malham would retain the corporate books and records, and that the corporation planned to attempt to resolve the accusation filed in the matter on mutually agreeable terms with the Department.

9. Sanaee's testimony established: That the Department sent a letter to Simply Escrow dated November 14, 2006, advising Simply Escrow that it was required to file an audit report prepared by an independent certified public accountant or an independent public accountant for the fiscal year ending December 31, 2006, no later than April 15, 2007, and that penalties could be imposed for the failure to file the required report in a timely fashion; that the Department sent a letter to Simply Escrow dated May 15, 2007, advising Simply Escrow that the Department had not received Simply Escrow's annual report for the fiscal year ending December 31, 2006, and that sanctions for the failure included the imposition of financial penalties, a special examination, and an administrative action; that the Department sent a letter to Simply Escrow dated November 13, 2007, advising Simply Escrow that it was required to file an audit report prepared by an independent certified public accountant or an independent public accountant for the fiscal year ending December 31, 2007, no later than April 15, 2008, and that penalties could be imposed for the failure to file the required report in a timely fashion; and, that the Department sent a letter to Simply Escrow dated May 8, 2008, advising Simply Escrow that the Department had not received Simply Escrow's annual report for the fiscal year ending December 31, 2007, and that sanctions for the failure included the imposition of financial penalties, a special examination, and an administrative action.

The Department did not conduct a field examination of Simply Escrow. Sanaee was not aware of Simply Escrow's financial condition.

10. Partin determined that Simply Escrow had not filed required annual reports for the 2006 fiscal year and the 2007 fiscal year in a timely fashion. Partin acknowledged that on the evening of August 14, 2008, Simply Escrow filed a closing audit report, but she had not had the chance to review that report thoroughly before the hearing. Partin was concerned because the audit report which she reviewed, purportedly prepared by a certified public accountant, suggested the existence of a trust account shortage.

Partin testified the Department did not conduct a field examination of Simply Escrow because the Department lacked the resources to conduct such examinations in each instance a licensee failed to file a required annual report.

Partin testified that the Commissioner sought penalties of \$100 per day for Simply Escrow's delinquency in filing the required report for the 2006 fiscal year, even though the governing statutes authorized the imposition of penalties in a greater amount.

Partin established that Simply Escrow's attempt to surrender its escrow agent's license on July 2, 2008, was ineffective because the Department did not accept the surrender of a license in those instances where, as here, the licensee had not filed required audit reports.

11. It was not established that the Commissioner, or his agent, had reviewed and accepted Simply Escrow's closing audit report. Moreover, no determination was made by the Commissioner that Simply Escrow had not violated the Escrow Law. It was not established that Simply Escrow's tender of its escrow agent's license was accepted in writing by the Commissioner or his designee.

## **LEGAL CONCLUSIONS**

### *Relevant Statutory Authority*

1. Financial Code section 17600 provides:

"(a) An escrow agent's license remains in effect until surrendered, revoked, or suspended.

(b) A licensee that ceases to engage in the business regulated by this division and desires to no longer be licensed shall notify the commissioner in writing and, at that time, tender the license and all other indicia of licensure to the commissioner. Within 105 days of the written notice to the commissioner, the licensee shall submit to the commissioner, at its own expense, a closing audit report as of the date the license is tendered to the commissioner for surrender, or for another period as the commissioner may specify, to be performed by an independent certified public accountant. The closing audit shall include, but not be limited to, information required by the commissioner, a bank reconciliation of the trust account, and a verified statement from a certified public accountant confirming lawful disbursement of funds. A license is not surrendered until the commissioner has reviewed and accepted the closing audit report, a determination has been made by the commissioner that there is no violation of this law, and tender of the license is accepted in writing by the commissioner."

2. Financial Code section 17408 provides in part:

"(a) if any person subject to this division fails to make any report required by law . . . the commissioner may immediately cause the books, records, papers, and affairs of said person to be thoroughly examined.

(b) The commissioner may impose, by order, a penalty on any person who fails, within the time specified in any written demand of the commissioner, (1) to make and file with the commissioner any report required by law or requested by the commissioner, or (2) to furnish any material information required by the commissioner to be included in the report. The amount of the penalty may not exceed one hundred dollars (\$100) for each day for the first five days the report or information is overdue, and thereafter may not exceed five hundred dollars (\$500) for each day the report or information is overdue.

(c) If, after an order has been made under subdivision (b), a request for hearing is filed in writing within 30 days of the date of service of the order by the person to whom the order was directed, a hearing shall be held in accordance with the Administrative Procedure Act . . . and the commissioner shall have all the powers granted under that chapter.

(e) If a hearing is requested, the penalty shall be paid within five business days after the effective date of any decision in the case ordering payment to be made."

3. Financial Code section 17608 provides in part:

"The commissioner may, after notice and a reasonable opportunity to be heard, suspend or revoke any license if he finds that:

. . .

"(b) The licensee has violated any provision of this division or any rule made by the commissioner under and within the authority of this division . . . ."

4. Financial Code section 17602.5 provides:

"If any licensed escrow agent fails to make any reports required by law or by the commissioner within ten (10) days from the day designated for the making of the reports, or within any extension of time granted by the commissioner, or fails to include therein any matter required by law or by the commissioner, such failure shall constitute grounds for the suspension or revocation of the license held by such escrow agent."

*Cause Exists to Affirm the Order Imposing Penalties and to Revoke the Escrow Agent 's License Issued to Simply Escrow*

5. The preponderance of the evidence established good cause under Financial Code section 17408 to affirm the Order Imposing Penalties Pursuant to California Financial Code Section 17408 and to impose a financial penalty of \$48,600 (the original amount of the order, together with an additional penalty calculated at the rate of \$100 per day through July 14, 2008, when Simply Escrow made an effort to file a closing report).

This conclusion is based on all Factual Findings and on Legal Conclusions 1 and 2.

6. The preponderance of the evidence established good cause under Financial Code sections 17602.5 and 17608 to revoke the Escrow Agent's License issued to Simply Escrow.

This conclusion is based on all Factual Findings and on Legal Conclusions 1, 3, and 4.

ORDERS

The Escrow Agent's License issued to Simply Escrow, Inc. is revoked.

Simply Escrow, Inc. shall pay \$48,600 to the Department of Corporations.

DATED: 9/8/08

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JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings