IN RE: EVAN A. GREENE

NO. BD-2014-107

S.J.C. Order of Indefinite Suspension entered by Justice Spina on August 5, 2015, with an effective date of September 4, 2015.[1]

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[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2014-107

IN RE: EVAN A. GREENE

MEMORANDUM OF DECISION

Bar counsel brought a petition for discipline against the respondent. The petition contained three counts. A hearing committee found violations under each count. The Board of Bar Overseers adopted the findings and conclusions of the hearing committee and recommends that the respondent be indefinitely suspended from the practice of law. The findings and conclusions are summarized below.

1. Count 1. There were seven real estate transactions comprising the evidence in Count 1. The properties were residential premises, and the homeowners were facing imminent foreclosure. The homeowners all had equity in their homes and were desirous of remaining in their homes, but were unable to secure refinancing. They were referred to the respondent or his father, both of whom were lawyers in the firm Portnoy & Greene, P.C. The firm specializes in real estate transactions. During the relevant time period, 2005 and 2006, the respondent oversaw the firm's residential real estate business, which included supervising associates in the firm. The firm was not involved in an attorney-client relationship with any of the homeowners involved. Rather, the respondent arranged to purchase the homes, and lease the homes back to the homeowners. The respondent purchased three of the homes; his father purchased four. The lease contained an option to repurchase the home within one year of sale. The repurchase price

would be an amount calculated as the pay-off of the respondent's purchase money mortgage plus closing costs. The rental payments the homeowners would be obligated to pay were based on the carrying costs of the respondent's purchase money mortgage. In most cases that amount exceeded the monthly payments on the homeowner's mortgage, which was in default because the homeowner could not afford to make their own mortgage payments. All of the homeowners had defaulted on their lease-option monthly payments, which extinguished their repurchase options. One homeowner was able to repurchase, notwithstanding the extinguishment. The respondent had made no inquiry about the homowner's financial history, other outstanding debt, income, or ability to pay.

On one of his loan applications, the respondent falsely misrepresented that he planned to use the property as a second home. In six of the transactions the respondent's firm represented the lender, and he failed to disclose to his lender the conflict of interest, or to secure the client's informed consent. He concealed the underlying nature of the transactions as sale/lease-backs with options to purchase, and misrepresented to the lenders that the premises would be unoccupied. One lender specifically instructed that all brokers' fees had to be disclosed on the HUD-1 forms. On none of the HUD-1 forms that the respondent signed did he disclose any of the fees paid to himself or to his father. He falsely certified as to each transaction that he brought cash to the table and that the homeowner-sellers received cash. He caused his associates to make false certifications on the HUD-1 forms.

The board found that the respondent violated rule 8.4 (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) by his intentional misrepresentations on the HUD-1 forms; and by inducing or knowingly assisting his associates to make false certifications on the HUD-1 forms. The board also found that the respondent violated rule 8.4 (a) (knowingly assisting or

inducing another to violate a disciplinary rule) by inducing or knowingly assisting his associates to violate rule 1.4 (a) (keep client reasonably informed about the matter) and rule 1.4 (b) (explain the matter sufficiently to the client so as to permit informed decisions) by providing false documents to the lender-client and failing to keep the lender-client apprised of the entire nature of the transaction; and by inducing or knowingly assisting his associates to violate rule 1.7 (b) (do not represent the client if representation may be materially limited by the lawyer's own interests) because under rule 1.10 (a) (do not represent the client if another lawyer in the firm would be prohibited from doing so by conflict), his conflict of interest in representing the lender where he also was the purchaser, bent on furthering his own interests, was imputed to his associates; and, by inducing or knowingly assisting his associates to violate the duties they owed to the lender-clients under rule 1.1 (competence), rule 1.2 (a) (seek client's lawful objections), and 1.3 (diligence), by orchestrating the aforesaid real estate transactions and by directing or failing to prevent his associates from closing under terms harmful to their clients.

The board found that he violated rule 8.4 (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and 8.4 (h) (conduct that adversely reflects on fitness to practice law) by reason of his highly unfavorable transactions with homeowners under financial distress. In the case of Lucy Kangu the board found she had not been given the opportunity to read the documents before signing; that the respondent did not explain the nature of the transaction and she did not understand the nature of the transaction; and that the respondent should have known, based on his knowledge of her salary, that it was highly unlikely she would be able to repurchase the property. In the case of the Goodnows the board found that the respondent advised them not to proceed with the bankruptcy petition they had filed; that they did not understand the nature of the transaction, and that after the closing Barbara Goodnow did not realize she had sold her

home. Sandra Pelkie was told she did not need a lawyer for the transaction, and that she could get a mortgage through the respondent and his father to repurchase her home; she was not told that the Greenes and two brokers received substantial fees from the sale of her home, or what she would need to do to repurchase her home.

The board found that as to three of the transactions the respondent violated rule 1.15 (d) by commingling rent received from homeowners and other personal payments with client funds in the firm's IOLTA account.

The board's findings as to count one are supported by substantial evidence. See S.J.C. Rule 4:01, § 8 (6).

2. Count 2. The board found that the respondent pleaded guilty in the United States District Court for the District of Massachusetts to twelve counts of giving real estate kickbacks and giving and receiving unearned fees, in violation of 12 U.S.C. § 2607(a). The twelve transactions included five of the seven transactions described in the summary of Count 1, above. The respondent was sentenced to concurrent sentences of twelve months in prison on eleven counts, and a consecutive sentence of one day on the twelfth count, with supervised release of twelve months. He also was fined $10,000. The board determined that these guilty pleas constituted convictions under S.J.C. Rule 4:01, § 12 (1), and as such were violations of rule 8.4 (b) (criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). The board's findings as to count two are supported by substantial evidence.

3. Count 3. The respondent formed a limited liability company under the laws of Rhode Island. The company, Greenwich Title and Management LLC, had no employees and performed no functions. In the course of representing a lender at a closing the respondent's firm prepared a

HUD-1 form showing a $400 fee to Greenwich under the heading "Title Charges." Greenwich performed no work; this work was done by a paralegal at the respondent's law firm. The respondent signed the HUD-1 form certifying it was a "true and accurate account of this transaction." The board found the HUD-1 form was false, and the respondent's certification was a violation of rule 8.4 (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The board's findings as to count three are supported by substantial evidence.

4. Mitigation/Aggravation. The board found essentially no mitigation, but it did find several aggravating factors, namely, that the respondent had acted with a selfish motive, that he took advantage of desperate and vulnerable homeowners, and the absence of remorse or willingness to accept blame. These findings are supported by substantial evidence.

5. Respondent's arguments.

a. Conflict of interest. The respondent contends that contrary to the board's finding that he "took no steps to disclose to the lender-clients the conflict of interest or to get informed consent," he in fact disclosed that he was the borrower, and the lender approved his loan application before referring the transaction to the respondent's firm. Further, he argues, "waiver [of the conflict] could be implied from the circumstances." See Respondent's letter-brief dated February 11, 2015, at p.1-2. Rule 1.7 (b) prohibits a lawyer from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities . . . by the lawyer's own interests, unless: . . . '(1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after consultation'" (emphases added). The respondent has not argued before me that he reasonably believed the representation would not have been adversely affected by his personal interests, and he certainly does not argue that he brought the conflict to the attention of the lender-client. The conflict did not arise at the time he

applied for the loan, but when the lender-client asked his firm to represent its interests. It was at that point that he was obliged to bring the potential conflict to the attention of the lender-client, consult with the client, and ask if the lender-client consented to the representation. He failed, as the board properly found, to do any of the things required by the rule. Indeed, he acknowledges that consent was not obtained. I do not infer consent, as the respondent requests. Consent must appear clearly from the record, and it does not.[1] The board acknowledged that the typical sanction where there is no substantial injury to the client, as here, is a public reprimand. See Matter of Carnahan, 449 Mass. 1003, 1005 (2007). However, because the respondent's selfish motive in causing his lender-clients to be kept in the dark about the true nature of these transactions, the board reasoned that the sanction fell slightly closer to Matter of Pike, 408 Mass. 740, 745 (1990) (six-month suspension for attorney who has "direct financial interest" in transaction; acted deliberately for his own benefit and in disregard of his client's interests; and caused client prejudice). In any event, it is clear that the respondent's conflict of interest was not the major impetus in the board's recommendation of a sanction of indefinite suspension.

b. Financially oppressive transactions. The respondent disputes the finding that the nature of the transactions with the homeowners was oppressive and that it violated rules 8.4 (c), (h). He contends that the transactions were arms'-length transactions, that the homeowners in two of the transactions were represented by counsel, and that none of the homeowners sustained any harm because they had no equity in their homes to lose. He cites other details as well in support of his argument. There is no need to dwell on this point because the board did not indicate it has increased its recommended sanction on this basis.

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[1] The respondent attempts to minimize the conflict by pointing to his testimony that the banks had no interest in knowing about the source of his down payments on the properties involved. The hearing committee rejected his testimony, as was their right.

Nevertheless, there was evidence from which the board reasonably could find that the homeowners were harmed and had equity in their homes. The properties were purchased at fair market value, which, as appears on the HUD-1 forms as the difference between the pay-off amount on the homeowners' respective mortgages, and the respondent's purchase price. Indeed, the respondent and certain brokers received fees from the homeowners' equity. The homeowners received nothing. The transactions were oppressive because the homeowners were desperate to avoid imminent foreclosure and the respondent took advantage of his superior bargaining position. The lease/buy-back options were high risk and likely to fail because the homeowners' lease payments were higher than the mortgage payments they demonstrated they could not afford. Compare Matter of Tobin, 7 Mass. Att'y Discipline Rep. 290 (1991) (assisting client to induce unsophisticated homeowner facing foreclosure to transfer her home in trust and to agree to financial obligations certain to result in default). In addition, there was evidence from which the board reasonably could find that in one case the respondent told the homeowners to dismiss their bankruptcy petition; in another case he advised the homeowner she did not need a lawyer; and in various cases he did not provide the homeowners with copies of the documents or afford them adequate time to read the documents, and he glossed over details -- including the real cost of the option and the aspects of the repurchase process -- all to induce the homeowners to sell under substantially unfavorable terms.

The board's finding that the respondent acted out of greed dovetails with the finding of oppressiveness. Contrary to the respondent's argument that the Rules of Professional Conduct only apply to conduct involving the practice of law, our jurisprudence holds otherwise. See Matter of Barrett, 447 Mass. 453, 464 (2006); Matter of Szostkiewicz, 26 Mass. Att'y Discipline Rep. 664, 665 (2010) (failure to report employee's income violates rule 8.4[c]). The fact that he

did not represent any of the homeowners does not defeat the finding that he violated rules 8.4 (c), (h).

c. Aggravating factors. The respondent disputes the presence of aggravating factors. The board found the following aggravating factors: the respondent acted with a selfish motive, the victims were desperate and vulnerable, the respondent displayed no remorse and he refused to accept blame. It rejected the respondent's assertions to the contrary. The board's findings are based on substantial evidence, and their conclusions are correct as to the aggravating factors.

d. Mitigating factors. The board gave little weight to the respondent's claim of mitigating factors, namely, his payment of settlement (with no admission of wrongdoing) monies in an action brought by the Attorney General, the absence of prior discipline, cooperation with bar counsel, and inexperience. As previously stated, the violations on which the recommended sanction is based are the criminal convictions and the dishonesty underlying the HUD-1 violations. To the extent that the respondent cooperated with bar counsel, he is expected to do so. The same essentially is true with respect to the absence of prior discipline. Both of those factors generally are associated with aggravation, when there is lack of cooperation or prior discipline. Those factors generally are not associated with mitigation, apart from being "typical." See Matter of Alter, 389 Mass. 153, 157 (1983). His claim of lack of experience was properly rejected, where he testified that he had seen "thousands" of closing documents and done "hundreds" of closings a year. The fact that he had been practicing law approximately four years when these transactions began is of little mitigation value given the specialized nature of the respondent's practice for four years. Finally, payments made pursuant to a settlement agreement generally are entitled to little, if any, mitigating effect. See Matter of Libassi, 449 Mass. 1014, 1017 (2007); Matter of Concemi, 422 Mass. 326, 330 (1996). The board properly rejected the

respondent's claims of mitigation. The board's findings are supported by substantial evidence.

6. Sanction. The board's recommendation of an indefinite suspension is based primarily on the respondent's criminal convictions, and his dishonesty with respect to the HUD-1 forms. The recommendation is based on the cumulative sanctions for these two ethical violations. The board determined that each violation warrants a two-year suspension. I agree.

The respondent was convicted of twelve counts of violating 12 U.S.C. § 2607(a), namely, giving real estate kickbacks and giving and receiving unearned fees. He was sentenced to twelve months in prison and fined $10,000. This was evidence of misconduct far more egregious than in Matter of Hochberg, 9 Mass. Att'y Discipline Rep. 165 (1993), on which the respondent relies. In that case the attorney received a one-year suspension after being convicted of only one count of accepting an unearned fee, for which he was sentenced to three years' probation. The board correctly reasoned that "the respondent's imprisonment and fine reflect either the more serious nature of his crimes [as compared to Mr. Hochberg], their number, or changing sensibilities about the gravity of such conduct." Contrary to the respondent's argument, a two-year suspension in the circumstances of this case is comparable to other cases involving fewer criminal convictions of a similar nature. See Matter of Grew, 23 Mass. Att'y Discipline Rep. 232 (2007) (one-year suspension for single attempt to defraud insurance company; single justice noted that respondent did not demonstrate callous lack of concern, and takes into account mitigating factors); Matter of Rendle, 5 Mass. Att'y Discipline Rep. 310, 311 (1987) (two-year suspension, retroactive to date lawyer voluntarily stopped practicing law, for single count of aiding and abetting father's HUD violation of unlawful receipt of gratuity; single justice noted mitigating factors). See also Matter of Andrews, 21 Mass. Att'y Discipline Rep. 11, 11-12 (2005) (eighteen-month suspension by stipulation for conviction of two misdemeanor counts of

conversion of public money, based on submission by United States Department of Justice attorney of inflated expenses and failure to report two weeks of vacation).

The respondent contests the board's recommendation that the HUD-1 violations warrant a two-year suspension. He contends that the information on the HUD-1 forms was not false or fraudulent because the lenders had no right to control how the sellers directed or spent their cash proceeds, and no lender or homeowner expected to receive the kickbacks ultimately paid to him, to his father, and to the brokers. His argument fails because the true nature of the transactions was concealed from the lender-clients. At least one lender-client demanded detailed information that the respondent never provided. The transactions were presented as garden-variety residential real estate purchases, when, as the board found, "they were high-risk [commercial] transactions with no real investment by the respondent, and a high likelihood of default if he or his father decided to allow foreclosure once the sellers -- the anticipated source of mortgage repayment -- were unable to make their rental payments. The respondent's argument that the HUD-1s disclosed everything necessary ignores his independent duty to his clients not to engage in dishonesty, a duty grounded in his obligations under the rules of professional conduct."

The respondent relies on several cases to support his argument that a lesser sanction is warranted. The board rejected this argument because the cases are highly fact specific. The board considered the cases cited by the respondent, as well as others.[2] The board determined that

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[2] The board considered and found persuasive HUD-1 cases that describe conduct comparable to the respondent's case. They include:

> "Matter of Komack, 429 Mass. 1025, 15 Mass. Att'y Disc. R. 322 (1999) (six-month suspension for representation of buyer and lender, concealment of second mortgage and preparation of false HUD-1 and insurance binder; Court rejected argument that six-month suspension for these violations is markedly

Matter of Foley, 26 Mass. Att'y Discipline Rep. 199 (2009), was the closest. In that case the attorney and his subordinate executed false HUD-1s, which misrepresented the amounts due from the buyers. Foley's eighteen-month suspension was based both on his own actions and his direction to his associate to violate the rules. Here, unlike Foley, the respondent also was an

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disparate); Matter of Alberino, SJC No. BD-2010-121 (January 10, 2011) (stipulation to 18-month suspension, for preparing three HUD-1s with false and deceptive statements, such as misrepresentation about a buyer's deposit; whether the buyer brought funds to the closing; and a failure to disclose payments to a mortgage broker; aggravated by experience and mitigated by the failure to realize financial gain); Matter of Coppo, 26 Mass. Att'y Disc. R. 113 (2010) (stipulation to 18-month suspension for, among other things, preparing three false HUD-1s and conflict of interest stemming from relationship with broker at the expense of lender-client; no discussion of mitigation or aggravation); Matter of Marks, 23 Mass. Att'y Disc. R. 438 (2007) (stipulation to two-year suspension for four instances of failing to notify lender-clients of the true terms of the transactions they were funding, intentionally misrepresenting the terms of transactions on HUD-1 settlement statements, and related misconduct, with aggravation). See also Matter of Palmer, 25 Mass. Att'y Disc. R. 486 (2009) (21-month suspension by stipulation for preparing HUD-1 settlement statements for 25 closings, knowing that each was inaccurate in failing to disclose details of transaction to lender; no discussion of mitigation or aggravation); Matter of Robbins, 24 Mass. Att'y Disc. R. 605, 607-608 (2008) (nine-month suspension, by stipulation, for intentionally misrepresenting transaction terms on 19 settlement statements, and numerous other rule violations including lack of competence, diligence, and conflict of interest, and mitigated by inexperience, junior status at firm and no financial gain); Matter of Jarosz, 22 Mass. Att'y Disc. R. 400 (2006) (nine-month suspension by stipulation for single instance of preparing misleading HUD-1 and fraudulent loan application, plus conflict of interest; no discussion of mitigation or aggravation)."

investor in the transactions, and his pursuit of personal gain is an aggravating factor. A two-year suspension for the HUD-1 violations is appropriate in this case.

The respondent's express financial interest in the transactions and his conflict of interest, although less egregious than the misconduct in Matter of Pike, 408 Mass. 740, 745 (1990) (six-month suspension), warrant a further sanction. The cumulative sanction exceeds four years. I am satisfied that an indefinite suspension is the appropriate sanction in this case. The respondent's conduct was, as the board found, beyond distasteful. He violated rules of professional conduct in a particularly offensive manner. He used his professional training and experience to devise a sophisticated plan that both took advantage of unsophisticated homeowners in financial distress, and concealed the true nature of his venture from his lender clients. He also was convicted of criminal acts for which he was sentenced to a term of imprisonment. The primary factor in determining the appropriate sanction in bar discipline cases "is the effect upon, and perception of, the public and the bar." Matter of Alter, 389 Mass. 153, 156 (1983). Sadly, the respondent's use of his professional skills was motivated by greed, as the board found.

The respondent has already been suspended for slightly more than nineteen months, from November 2, 2011, through June 14, 2013. He may petition for reinstatement nineteen months before he would otherwise be entitled to apply for reinstatement under S.J.C. Rule 4:01, § 18(2)(b).

Francis X. Spina

Francis X. Spina
Associate Justice

ENTERED: August 5, 2015