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IN RE: DISCIPLINARY

PROCEEDINGS AGAINST:

MARK E. MALEC, and
OPPORTUNITY HOMES, INC.,
Respondents

FINAL DECISION AND ORDER

LS9912141REB

DOE Investigative Files 95 REB 286, 99 REB 033

The parties in this matter agree to the terms and conditions of the attached Stipulation as the final decision of this matter, subject to the approval of the Wisconsin Real Estate Board (hereinafter "Board"). The Board has reviewed this Stipulation and considers it acceptable.

Accordingly, the Board in this matter adopts the attached Stipulation and makes the following findings:

FINDINGS OF FACT

1. **Mark E. Malec** (hereafter "Malec") (D.O.B. 6/16/60) is a licensed real estate broker, having license #90-25039, granted on March 6, 1981. Malec's broker's license has been renewed each biennium thereafter and remained active and in good standing until the year 2001. Respondent's license is currently expired. Malec's last known business address is 1325 E. Bristlecone Drive, Hartland, Wisconsin 53029.

2. **Opportunity Homes, Inc.**, (hereafter "OHI") is a residential construction and real estate sales corporation. OHI holds a real estate business license, #91-25138, which was granted on March 31, 1981, renewed each biennium thereafter and remained active and in good standing until the year 2001. Respondent's license is currently expired. The last known business address of OHI is 1325 E. Bristlecone Drive, Hartland, Wisconsin, 53029.

95 REB 286

3. The complaint was filed with the Department of Regulation and Licensing by Leland V. Martell and Barbara J. Martell ("buyers"). The complaint alleges that Randall Stumpf, a licensed real estate sales agent, employed by OHI and working under the supervision of Malec, had failed to disclose that certain lots in Bristlecone Pines in Hartland, Wisconsin, a residential subdivision owned by Malec Holdings II, Ltd. were subject only to revocable options to purchase. The sales agent and sales brochures described the lots as "sold". The complainants alleged that the agent's misrepresentation about the sold status of the lots induced them to purchase a more expensive lot.

99 REB 033

4. The complaint was filed with the Department by Malec Holdings II, Ltd., alleging that Malec failed to enter into a listing contract for the sale of the residential lots in Bristlecone Pines. The complaint further alleges that Malec had failed to deposit earnest money into a broker's real estate trust account and tender the earnest money to Malec Holdings II, Ltd.

5. Malec was, at all times relevant hereto, a shareholder in Malec Holdings II, Ltd. Pursuant to the shareholder's agreement, Malec was responsible for the sales and marketing of lots and the construction of homes and condominiums at Bristlecone Pines. Malec provided brokerage and construction services through his licensed real estate company, OHI. Acting as the broker for Malec Holdings II, Ltd., Malec received funds from buyers, referred to as "downpayments" and "reservation money deposits." These funds were deemed non-refundable and transferred to the OHI general account and used for the purpose of constructing the buyer's home or condominium. The funds so deposited were deemed by Malec to be construction funds.

6. The Department conducted an audit of the business records related to the transactions by Malec and OHI, on behalf of Malec Holdings, II, Ltd., and reported potential violations of real estate laws in connection with those transactions. Malec and OHI disputed the alleged violations.

7. A formal disciplinary complaints was filed by the Division of Enforcement and set for hearing before

Administrative Law Judge Austin (LS9912141REB). The proceedings were held in abeyance pending the conclusion of civil judicial proceedings involving the parties. Malec and OHI received a substantially favorable jury verdict in the civil proceedings.

8. Malec and OHI have offered to resolve the pending cases (**95 REB 286 and 99 REB 033**) by the Voluntary Surrender of Malec's Real Estate Broker's license and OHI's Real Estate Business license, pursuant to the terms of the Order set forth below.

CONCLUSIONS OF LAW

1. The Wisconsin Real Estate Board has jurisdiction to act in this matter pursuant to sec. 452.14, Wis. Stats.
2. The Wisconsin Real Estate Board is authorized to approve the attached Stipulation pursuant to sec. 227.44(5) Wis. Stats.
3. Respondent, **Mark E. Malec**, has been charged by the Department with violating the following, based upon allegations which are disputed by the Respondent:

(a) RL 17.08, Wis. Admin. Code, which provides that a broker-employer shall supervise the activities of any salesperson-employee, including but not limited to reviewing all listing contracts, offers to purchase, trust account records and other documents related to the transaction;

(b) RL 24.025 (2), Wis. Admin. Code, by providing brokerage services to a client without an agency agreement authorizing those brokerage services.

(c) 452.14(3) (m), Wis. Stats. and RL 16.04(1), Wis. Admin. Code, which requires a licensee to use approved forms when acting as an agent or a party in real estate or business opportunity transaction;

(d) RL 16.04(2), Wis. Admin. Code, which requires that in transactions where the Department has not approved a form, a licensee may only use contractual forms drafted by a party or an attorney if the name of the drafter is imprinted on the form;

(e) RL 16.07, Wis. Admin. Code, which provides that a licensee who violates the chapter requiring the use of approved real estate forms demonstrates incompetency to act as a real estate licensee and shall be in violation of s. 452.14 (3) (m), Wis. Stats.

(f) 452.13, Wis. Stats. and RL 18.031, Wis. Admin. Code, which requires that a broker who holds client funds shall deposit all real estate trust funds received by the broker or the broker's salespersons within 48 hours of receipt of the trust funds;

(g) RL 18.13 (1) through (5), Wis. Admin. Code, which requires that a broker maintain a bookkeeping system consisting of an accurate cash journal; ledger, reconciliation, trial balance and monthly validation;

4. Respondent **Opportunity Homes, Inc.** has been charged by the Department with violating the following, based upon allegations which are disputed by the Respondent:

(a) 452.14(4) Wis. Stats, which provides that if the broker is a business entity it shall be sufficient cause for reprimand, limitation, suspension or revocation of the broker's license that any business representative of the entity or anyone who has a financial interest in the entity or who is connected to the operation of the business, has been guilty of any act or omission which would be cause for refusing a broker's license to such person or such individual.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the attached Stipulation is accepted.

IT IS FURTHER ORDERED, that the Voluntary Surrender of the Real Estate Broker's license of Respondent, Mark E. Malec, (lic.#90-25039), is accepted.

IT IS FURTHER ORDERED, that the Voluntary Surrender of the Real Estate business license of Respondent, Opportunity Homes, Inc., (lic.#91-25138) is accepted.

IT IS FURTHER ORDERED, that all rights and privileges heretofore granted to Respondent Mark. E. Malec (lic.#90-25039) and Respondent Opportunity Homes, Inc., (lic.#91-25138), are terminated effective at 11:59 p.m. on the date of the Order as set forth below for a period of three (3) years commencing as of January 1, 2001.

IT IS FURTHER ORDERED, that Mark E. Malec may petition for relicensure consistent with the terms of this Order. This Order, and matters relating to this Order, shall not prejudice Respondent from obtaining licensure, provided, however, that the Board in its sole discretion may determine whether, and under what terms and conditions, Respondent may be relicensed. The Board may require Respondent to submit proof of his rehabilitation, including but not limited to, his completion of the required broker education and examination requirements pursuant to RL 12.03(2) at the time of his application for licensure. The denial in whole or in part of a petition under this paragraph shall not constitute denial of a license and shall not give rise to a contested case within the meaning of secs. 227.01(3) and 227.42, Stats.

IT IS FURTHER ORDERED, that Division of Enforcement files **95 REB 286 and 99 REB 033** be, and hereby are, closed.

WISCONSIN REAL ESTATE BOARD

By: James Imhoff, Jr.

5-23-02

A Member of the Board

Date