PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed April 15, 2013

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of SEAN DONRAD, A Member of the State Bar, No. 242665.	)	Case Nos. 10-O-07779; 11-O-12670 (11-O-13264; 11-O-13322; 11-O-14876) OPINION

I. SUMMARY

Sean Donrad seeks review of a hearing judge's recommendation that includes a one-year actual suspension from the practice of law for committing ethical violations against three clients. The judge found that Donrad: (1) performed incompetently; (2) failed to return unearned fees; (3) failed to render an accounting; (4) failed to inform clients of significant developments; (5) committed an act of moral turpitude by misrepresentation; (6) misled a judge; and (7) engaged in the unauthorized practice of law (UPL). Donrad's case was aggravated by four factors, including a 2011 prior record of discipline. No mitigating circumstances were found. According to the judge, much of Donrad's trial testimony lacked credibility.

Except for two adverse credibility findings, Donrad does not contest the hearing judge's factual, culpability, or aggravation findings. Instead, he requests mitigation credit for his good character evidence, and urges a 90-day suspension. The State Bar's Office of the Chief Trial Counsel (State Bar) supports the decision below.

Upon independent review (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's uncontested findings. We differ only in finding that Donrad is entitled to additional limited

mitigation credit for his good character evidence. However, even considering this mitigation, we adopt the hearing judge's recommendation as fully supported by the record, the applicable discipline standards,[1] and comparable case law.

II. FACTS AND CULPABILITY

The State Bar filed two Notices of Disciplinary Charges (NDCs), which were consolidated for trial. The NDCs charged Donrad with 14 counts of misconduct in four client matters between 2009 and 2011. The hearing judge found Donrad culpable of nine counts in three client matters. We adopt and summarize the uncontested factual and culpability findings below, adding relevant facts from the record.

Case Number 10-O-07779 – Collis Matter

Philip Collis represented himself in his dissolution of marriage. After he received a default, his spouse retained counsel. Collis hired Donrad to oppose any motion to set aside the default and to obtain a final judgment of dissolution.

In June 2009, Collis signed a retainer agreement with Donrad. It provided that Collis would pay a non-refundable "true retainer" fee of $3,800 for legal services, which included responding to a motion to vacate the default judgment and attempting to settle the case. The agreement also called for "any and all fees to be figured on an hourly basis and that the total fee can and probably will be more than the retainer paid." Donrad acknowledged in his pleadings below that the $3,800 fee ensured his availability *and* compensated him for legal services.

Thereafter, Donrad did not perform any legal services of value for Collis. He failed to file a proper substitution of attorney, make court appearances, respond to the motion to set aside the default, or contact opposing counsel to obtain a final judgment of dissolution.

[1] All references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

By October 2009, Collis grew frustrated with Donrad's lack of attention to his case and terminated his employment. Collis requested an accounting of the $3,800, and a refund of any unearned fees. He repeated the requests on December 7 and 17, 2009, but Donrad never responded. Collis eventually paid other counsel between $12,000 and $16,000 to conclude his dissolution.

The hearing judge found that Donrad failed to: (1) perform with competence, in violation of rule 3-110(A) of the Rules of Professional Conduct;[2] (2) refund unearned fees, in violation of rule 3-700(D)(2);[3] and (3) provide an accounting, in violation of rule 4-100(B)(3).[4] The record supports the hearing judge's findings, which Donrad does not challenge.

Case Number 11-O-12670 – Mandegar Matter

In June 2010, Donrad filed a civil complaint on Kumars Mandegar's behalf against Anaheim Village Three Owners Association. The complaint sought return of homeowners' dues that Mandegar and 78 others alleged had been improperly collected.

On January 7, 2011, Donrad was enrolled inactive and became ineligible to practice law after his default was entered in his prior discipline case. The hearing judge found that Donrad knew of his ineligibility by January 19, 2011.[5] Mandegar testified that Donrad never told him he

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[2] Rule 3-110(A) prohibits an attorney from "intentionally, recklessly, or repeatedly fail[ing] to perform legal services with competence." All further references to rules are to this source.

[3] Rule 3-700(D)(2) requires an attorney to "[p]romptly refund any part of a fee paid in advance that has not been earned."

[4] Rule 4-100(B)(3) requires an attorney to "[m]aintain complete records of all funds . . . of a client . . . and render appropriate accounts to the client regarding them . . . ."

[5] Donrad testified he did not receive the January 7, 2011 order for entry of default, but acknowledged that the hearing judge's credibility finding against him on this point is entitled to great weight. We will not disturb this finding, particularly since Donrad testified inconsistently about the date he learned he was ineligible to practice law. (Rules Proc. of State Bar, rule 5.155(A) [all factual findings by hearing judge entitled to great weight]; *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055 [court reluctant to reverse hearing department on matters of credibility].)

was ineligible to practice law or advised him to retain new counsel. Donrad testified that he had informed Mandegar, but the hearing judge found that Donrad's testimony was not credible. The record supports these credibility and factual findings.

On March 15, 2011, the superior court held a hearing on Anaheim Village's motion to strike the complaint. Donrad did not appear nor did he arrange for another attorney to appear in his place. Mandegar and the other homeowners ultimately dismissed the case.

The hearing judge found Donrad culpable of violating Business and Professions Code section 6068, subdivision (m),[6] because he failed to communicate a significant development to Mandegar – that he was ineligible to practice law, effective January 7, 2011. The record supports this finding.[7]

Case Numbers 11-O-13264 and 11-O-13322 – Yazdani Matter

On December 7, 2010, Donrad agreed to represent Kaveh Yazdani, a family friend, in a civil matter against Ticor Title Company. Yazdani paid Donrad $2,500 in advance fees.

Beginning in late January 2011, Donrad unsuccessfully attempted to remedy the default in his prior discipline case. He filed a motion to set it aside and the State Bar filed an opposition. On February 7, 2011, the hearing judge held a status conference, and informed the parties that Donrad's motion would be granted. But after the hearing, the court discovered that Donrad had not submitted a verified proposed response. Consequently, the next day, the hearing judge denied Donrad's motion without prejudice to refile it by February 16, 2011, and served him by mail. Donrad denied receiving the ruling, but the hearing judge found he lacked credibility and

[6] Section 6068, subdivision (m), requires an attorney "to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." All further references to sections are to this source unless otherwise noted.

[7] The State Bar does not contest, and we adopt, the hearing judge's dismissal of allegations in the Mandegar matter that Donrad violated rules 3-700(A)(2) (improper withdrawal from employment) and 4-100(B)(3) (failure to provide accounting).

concluded he received it no later than February 17, 2011.[8] On February 21, 2011, the hearing department received a faxed copy of Donrad's untimely verified answer. In response to this late and incomplete filing, the hearing judge again denied Donrad's motion to vacate his default on February 22, 2011.

Although Donrad was not eligible to practice law, he appeared at a superior court hearing on Yazdani's behalf on February 18, 2011. Donrad represented to the court that the basis for his ineligibility to practice law had been resolved, stating: "Your Honor, that judgment [Entry of Default] has been vacated." In fact, his motion to set aside the default had not been granted. A few days later, on February 22, 2011, Donrad appeared telephonically at a status conference for Yazdani and informed the superior court that he did not know whether or not he was eligible to practice law. On February 23, 2011, Donrad appeared at the trial and admitted his ineligibility.

The hearing judge properly found that Donrad's misrepresentations to the superior court violated section 6106 (act involving moral turpitude).[9] When he told the superior court that his default had been set aside, he knew or reasonably should have known it was not true, particularly since he failed to file the requisite verified proposed response and claimed he had not yet received the hearing judge's ruling. For purposes of moral turpitude, "[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315; accord *Bach v. State Bar* (1987) 43 Cal.3d 848, 855-856 [attorney's misleading false statement constitutes moral turpitude warranting discipline].) Even if Donrad believed his default had been set aside, he was grossly negligent for making representations to the superior court without first confirming that his license to practice law had

[8] Donrad disagrees with the hearing judge's finding as to when he learned that his default had not been set aside. We find no reason to disturb that finding given Donrad's overall lack of credibility throughout the trial.

[9] This section makes an attorney's commission of any act involving moral turpitude, dishonesty, or corruption a cause for disbarment or suspension.

been reinstated. (See *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [moral turpitude in violation of § 6106 by gross negligence rather than intentional dishonesty].)

In addition to committing an act of moral turpitude, Donrad also violated section 6068, subdivisions (a) (failing to support the law by engaging in UPL),[10] (d) (misleading a judicial officer),[11] (m) (failing to inform client of significant development), and rule 4-100(B)(3) (failing to provide an accounting). However, we treat violations of sections 6106 and 6068, subdivision (d) as a single offense when determining the appropriate discipline because both charges involve Donrad's misrepresentation to the superior court judge about his eligibility to practice law. (See *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221.)[12]

Case Number 11-O-14876 – Ward Matter

The hearing judge found no culpability in this matter, and dismissed two counts with prejudice: (1) failing to perform with competence; and (2) failing to refund unearned fees. The State Bar does not seek to revive these charges. We adopt the hearing judge's dismissals.

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[10] This section requires an attorney "[t]o support the Constitution and laws of the United States and of this state." Donrad failed to do so by practicing law without active State Bar membership (violation of § 6125), and by holding himself out as entitled to practice law without active State Bar membership (violation of § 6126). (See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 505-506 [appropriate method of charging violations of §§ 6125 and 6126 is by charging violation of § 6068, subd. (a)].)

[11] This section makes it an attorney's duty "[t]o employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

[12] The hearing judge dismissed a charge in the Yazdani matter that Donrad violated rule 3-700(B)(2) (failure to withdraw from employment when mandatory). The State Bar does not contest the dismissal, and we adopt it.

III. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravating and mitigating circumstances. The State Bar must establish aggravation by clear and convincing evidence (std. 1.2(b)),[13] while Donrad has the same burden to prove mitigation. (Std. 1.2(e).)

A. FOUR FACTORS IN AGGRAVATION

The hearing judge found four factors in aggravation, which Donrad does not challenge. We adopt these uncontested findings and summarize them below.

1. Prior Record of Discipline (Std. 1.2(b)(i))

In October 2011, the Supreme Court suspended Donrad for 60 days, subject to a one-year stayed suspension, and ordered that he remain suspended until he paid restitution and successfully moved the State Bar Court to terminate his suspension. His misconduct began in February 2009, three years after his 2006 admission to the Bar, and the NDC was filed in October 2010. Donrad had been retained for $5,000 in a patent infringement case but failed to perform any legal services of value. The client terminated him and requested the files and a refund. Donrad provided neither. In his default proceeding, he was found culpable of violating rules 3-110(A) (failure to perform with competence), 3-700(D)(1) (failure to release client file), and 3-700(D)(2) (failure to refund unearned fees) in a single client matter.

In aggravation, Donrad committed multiple acts of misconduct, failed to cooperate, and caused significant client harm. No mitigating factors were present. We assign significant aggravating weight to Donrad's prior record because he committed misconduct in the Mandegar and Yazdani matters after his default was entered. Moreover, the previous discipline is recent and the misconduct is similar to his wrongdoing in the present case.

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[13] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

2. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

Donrad committed multiple acts of misconduct in three client matters over two years. We consider these multiple acts as aggravation.

3. Client Harm (Std. 1.2(b)(iv))

We assign aggravating weight to the financial harm Donrad caused Collis. Donrad failed to refund any portion of the $3,800 advance fee Collis paid him even though he performed no services of value. Collis was harmed because he had to pay another attorney a sizeable sum to resolve his dissolution.

4. Indifference (Std. 1.2(b)(v))

Lack of remorse and failure to acknowledge misconduct are aggravating factors. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) Although Donrad's attorney stated at oral argument that Donrad is *now* remorseful, the record does not support a showing of remorse. At trial, Donrad testified that Collis should not receive the $3,800 since the fee was "non-refundable." We are troubled by Donrad's insistence that he was entitled to keep this fee without performing any services of value merely because he improperly labeled it as a non-refundable true retainer in his agreement.

Further, two of Donrad's own character witnesses corroborated his lack of remorse. They disclosed that Donrad did not believe the NDC charges were "bona fide" and that he felt he was the "victim" in these proceedings. While the law does not require Donrad to be falsely penitent, it "does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Donrad has not done this. We assign the most significant weight to this factor because his lack of insight makes him an ongoing danger to the public.

B. ONE FACTOR IN MITIGATION

The hearing judge found no factors in mitigation. As Donrad's primary argument on review, he urges that he is entitled to mitigation credit based on the testimony of his four character witnesses. He is correct.

Under standard 1.2(e)(vi), a mitigating circumstance is "an extraordinary demonstration of good character . . . attested to by a wide range of references in the legal and general communities . . . who are aware of the full extent of the . . . misconduct." Donrad presented testimony from his sister (a dentist), a friend from college (a periodontist), and two attorneys, one of whom is a former deputy district attorney. These witnesses had reviewed the charges to varying degrees and knew the allegations against Donrad. Collectively, they opined that Donrad is an honest, caring, competent, and hard-working attorney with great integrity.

The hearing judge concluded that Donrad did not present a wide range of references in the legal and general communities. In this case, we disagree. While four witnesses may not always meet the standard's requirements, Donrad's character evidence is entitled to mitigation credit for two reasons.

First, the witnesses were from varied backgrounds. (See *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from attorneys, judges, employer, and psychologist constitutes sufficient cross-section of witnesses to provide picture of present character].) Their character testimony was meaningful since they had maintained continual contact with Donrad for more than a decade. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591-592 [considerable weight given to testimony of two attorneys and fire chief who had long-standing familiarity with attorney and broad knowledge of his good character, work habits, and professional skills].)

Second, we give serious consideration to the testimony of the two attorney witnesses. (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. at p. 319 [testimony from members of bench and bar entitled to serious consideration due to "strong interest in maintaining the honest administration of justice"].) Thus, under relevant case authority, Donrad is entitled to limited weight in mitigation for the character evidence provided by his four witnesses. (See *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [testimony from four attorneys entitled to limited weight].)

IV. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession, to preserve public confidence in the profession, and to maintain high professional standards for attorneys. (Std. 1.3.) We must balance all relevant factors on a case-by-case basis to recommend the appropriate discipline. (*In re Young* (1989) 49 Cal.3d 257, 266; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

The Supreme Court instructs us to follow the standards "whenever possible." (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) Although not binding on us, we give great weight to them to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91.) The applicable standards call for reproval to disbarment.[14]

As the standards direct, we focus on the extent of misconduct and the degree of client harm. Donrad's culpability for nine counts of misconduct in three client matters is serious and the financial harm he caused Collis is significant. Donrad's inability to perform competently or

[14] Those standards are: 1.6 (where multiple sanctions apply, most severe shall be imposed); 1.7(a) (imposed discipline shall be more severe than that imposed in prior discipline); 2.2(b) (violation of rule 4-100 shall result in minimum 90-day actual suspension); 2.3 (committing act involving moral turpitude shall result in actual suspension or disbarment depending on client harm); 2.4(b) (reproval or suspension imposed where attorney fails to perform or communicate); 2.6 (disbarment or suspension imposed for violations of §§ 6068, 6125, and 6126); and 2.10 (reproval or suspension imposed for violations of rule 3-700(D)(2)).

adequately communicate with his clients is "a breach of the good faith and fiduciary duty owed" to his clients. (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) Notably, Donrad committed an act of moral turpitude for misrepresenting his eligibility to practice law to the superior court and unreasonably failed to account for or refund $3,800 to Collis. Given the broad range of discipline suggested by the applicable standards, we look to case law for specific guidance. (*Snyder v. State* Bar (1990) 49 Cal.3d 1302, 1310-1311.)

Donrad suggests that we rely on three cases to support a 90-day suspension: *Matthew v. State Bar* (1989) 49 Cal.3d 784 [60-day suspension for failure to perform competently, communicate and return unearned fees involving three clients; aggravated by financial harm and mitigated by no priors in three years of practice]; *King v. State Bar* (1990) 52 Cal.3d 307 [90-day suspension for failure to perform competently or return files and misrepresentation involving two client matters; aggravated by financial and emotional client harm and failure to pay restitution, and mitigated by no priors in 17 years, financial problems, and depression]; and *Colangelo v. State Bar* (1991) 53 Cal.3d 1255 [stayed suspension in default proceeding for failure to perform competently, return unearned fees, properly withdraw from representation, and communicate in four client matters; mitigated by no harm and physical difficulties where hearing judge had "serious misgivings" about three client matters].) We find these cases distinguishable because, unlike Donrad, the respondents had no prior record of discipline, did not commit acts of moral turpitude, or had proved several mitigating factors. In contrast, Donrad has a recent prior disciplinary record for similar misconduct, committed an act of moral turpitude, proved only one limited factor in mitigation, and appears to lack insight into his wrongdoing.

Given these distinctions, the hearing judge properly relied on other cases that are more comparable to Donrad's circumstances in recommending a one-year suspension. (See, e.g., *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73 [one-year suspension

where attorney performed incompetently, improperly withdrew from representation, committed acts of moral turpitude by deceit, and failed to cooperate with State Bar; aggravated by multiple acts, significant client harm, indifference, and lack of cooperation]; *In the Matter of Bach* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 631 [nine-month suspension where attorney performed incompetently, and failed to properly withdraw from representation, communicate, refund unearned fees in two client matters, or cooperate with State Bar; aggravated by multiple acts, client harm, indifference, and prior discipline record with mitigation for pro bono activities].) Further, our independent research reveals additional cases that support a one-year suspension as the proper discipline to protect the public and the courts, and maintain high standards for the legal profession.[15]

V. RECOMMENDATION

For the foregoing reasons, we recommend that Sean Donrad be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first year of his probation, and remain suspended until the following conditions are satisfied:

    a. He makes restitution to Philip Collis in the amount of $3,800 plus 10 percent interest per year from October 29, 2009 (or reimburses the Client Security Fund to the extent of any payment from the Fund to Philip Collis, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof to the State Bar Office of Probation in Los Angeles; and,

[15] See, e.g., *In the Matter of Burkhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343 [one-year suspension in two client matters for engaging in UPL, failing to communicate, performing incompetently, accepting an illegal fee, improperly withdrawing from representation, committing act of moral turpitude, and failing to cooperate with State Bar; mitigated by 13 years of practice despite one prior for misconduct contemporaneous with present case]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944 [two-year suspension for misconduct in four client matters including failing to perform competently, improperly withdrawing from employment, failing to render an accounting, return fees, communicate, and release files; aggravated by prior record, multiple acts, harm, lack of insight and overreaching with no mitigation].)

b. If he remains suspended for two years or more, he shall remain suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Donrad has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

Since the Supreme Court ordered Donrad to take and pass the Multistate Professional Responsibility Examination (MPRE) in its September 2011 order imposing discipline (S194447), we do not recommend imposing passage of the MPRE as a probation condition.

VII. RULE 9.20

We further recommend that Sean Donrad be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.