

**NEW JERSEY REAL ESTATE COMMISSION**

NEW JERSEY REAL ESTATE	)	Docket No.: REC-E-22-001
COMMISSION,	)	REC Ref No.: 10010130
	)	
Complainant,	)	
v.	)	
	)	<b>FINAL ORDER OF</b>
JOAO PAULO BARROS LEMES, licensed	)	<b>DETERMINATION</b>
New Jersey real estate salesperson (Ref. No.	)	
1969403)	)	
	)	
Respondent.	)	
	)	

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**THIS MATTER** was heard at a plenary hearing by the New Jersey Real Estate Commission (“Commission”) by video conference in accordance with P.L. 2020, c. 11 on May 24, 2022.<sup>1</sup>

**BEFORE:** Commissioners Eugenia K. Bonilla, Christine Banasiak, Darlene Bandazian, Jacob Elkes, William Hanley, Denise Illes, and Carlos Lejniaks.

**APPEARANCES:** John Rossakis, Regulatory Officer (“RO Rossakis”), appeared on behalf of the New Jersey Real Estate Commission staff (“REC”). Joao Pailo Barros Lemes (“Respondent”) appeared on his own behalf. Respondent acknowledged his right to counsel and voluntarily waived that right.

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<sup>1</sup> The meeting was conducted via Zoom. All those participating participated via Zoom.

## STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated January 5, 2022 pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18, and N.J.A.C. 11:5-1.1 to -12.18.

The OTSC alleges that the Respondent violated the Real Estate Brokers and Salespersons Act, N.J.S.A. 45:15-1 to -29.5 and corresponding regulations as follows:

The OTSC alleged the following violations:

The Respondent failed to disclose the existence of a cesspool on 2301 Church Road, Cinnaminson, New Jersey (the “Property”) to the Teresa Soca (“Buyer”), which information was known to the Respondent and was material to the physical condition of the Property, in violation of N.J.A.C. 11:5-6.4(c);

The Respondent advertised the Property as having a “Public Septic” sewage system on the Bright Multiple Listing Service (“Bright MLS”), when he was aware that statement was false and knew of the existence of a cesspool located on the Property, which conduct constitutes a substantial misrepresentation, in violation of N.J.S.A. 45:15-17(a);

The Respondent falsely represented to the Buyer that his brother was the previous purchaser or owner of the Property, when in fact the Property was previously purchased and owned by Lemes & Oliveira Construction, LLC (“L&O”), a company owned by the Respondent, which conduct constitutes a substantial misrepresentation in violation of N.J.S.A. 45:15-17(a);

The Respondent falsely represented to an REC Investigator that his brother was the previous purchaser or owner of the Property, when in fact the Property was previously purchased and owned by L&O, a company owned by the Respondent, which conduct constitutes a substantial misrepresentation in violation of N.J.S.A. 45:15-17(a);

The Respondent misrepresented the type of sewage system servicing the Property to the Buyer when he had prior knowledge of the cesspool’s existence and the approximate cost to remediate the issue and an awareness of the issues associated with real estate transactions involving such properties. By perpetuating this

misrepresentation through multiple listing service advertisements, written misrepresentations in the contract to sell the Property to the Buyer, verbal misrepresentations to the Buyer and her agent, and attempting to obscure the existence of the cesspool throughout the course of the L&O's attempted sale to the Buyer, the Respondent's conduct constitutes a continued course of misrepresentation, in violation of N.J.S.A. 45:15-17(c);

The Respondent misrepresented the type of sewage system servicing the Property and falsely denying his knowledge of the existences of a cesspool to the Buyer, her agent, and an REC Investigator. This conduct constitutes fraud or dishonest dealing, in violation of N.J.S.A. 45:15-17(l);

The Respondent failed to provide documentation and a written statement addressing specific questions requested by a REC Investigator. The Respondent failed to fully cooperate with the REC's investigation of this matter demonstrating unworthiness for licensure, in violation of N.J.S.A. 45:15-17(e); and

The Respondent failed to deal fairly with the Buyer, by obscuring the existence of a cesspool on the Property, in violation of N.J.A.C. 11:5-6.4(a).

The Respondent filed an Answer to the OTSC on or about January 24, 2022. On February 23, 2022, the Commission reviewed the pleadings, deemed this matter contested, and directed that hearing be scheduled.

At the hearing, the following documents were submitted by the REC, and entered into evidence, without objection:

- S-1: New Jersey Department of Banking and Insurance, Real Estate Commission, License Certifications with History for Joao Paulo Barros Lemes, dated April 18, 2022;
- S-2: Pennsylvania Real Estate Commission License Information;
- S-3: New Jersey Department of Treasury, Division of Revenue and Enterprise Services, Certificate of Formation for Lemes & Oliveira Construction, LLC;

- S-4: Georgia Certificate of Organization, Articles of Organization, Operating Agreement, New Jersey Department of Treasury, Division of Revenue and Enterprise Services, Certificate of Registration for REI Executive Group, LLC;
- S-5: Contract of Sale and Addendum for 2301 Church Road, Cinnaminson, New Jersey, from Seller Fannie Mae to Buyer REI Executive Group LLC;
- S-6: E-mail correspondence between Joao Paulo Barros Lemes and Susan Pierce, diverse dates between November 8-13, 2018;
- S-7: A & L Septic Service Proposal and Estimate to Replace Septic System at 2301 Church Road, Cinnaminson, New Jersey dated November 13, 2018;
- S-8: Price Reduction Request Correspondence from Susan Pierce to Fannie Mae;
- S-9: Amendment to Fannie Mae to REI Executive Group, LLC Contract of Sale, dated November 13, 2018;
- S-10: U.S. Department of Housing and Urban Development, Final Settlement Statement for the Sale of 2301 Church Road, Cinnaminson, New Jersey from Fannie Mae to REI Executive Group, LLC, dated November 29, 2018;
- S-11: Special Warranty Deed for the Transfer of 2301 Church Road, Cinnaminson, New Jersey by Grantor REI Executive Group, LLC to Grantee Lemes & Oliveira LLC, dated November 29, 2018;
- S-12: Bright Multiple Listing Service Listing Page for 2301 Church Road, Cinnaminson, New Jersey, listed by Joao Paulo Barros Lemes, created on July 22, 2019;
- S-13: Contract of Sale for 2301 Church Road, Cinnaminson, New Jersey between Seller Lemes & Oliveira LLC and Buyer Teresa Soca, dated July 26, 2019;
- S-14: A & A Construction Bill for Septic Inspection for 2301 Church Road, Cinnaminson, New Jersey, dated August 22, 2019 and related photographs;
- S-15: E-mail Correspondence between Teresa Soca, Kay Becnel, and Joao Paulo Barros Lemes, diverse dates between August 23-26, 2019; and
- S-16: E-mail Correspondence between Real Estate Commission Investigator Robert McCloskey and Joao Paulo Barros Lemes, diverse dates between June 23-July 9, 2020.

**TESTIMONY OF THE WITNESSES**

**Susan Pierce**

Susan Pierce (“Pierce”) testified that she received her real estate salesperson license in 2014. She testified that she is a full-time real estate salesperson and is currently licensed with Weichert Realtors.

Pierce testified that she listed the Property for sale in 2018, and the seller was Fannie Mae. She testified that she found the buyer, REI Executive Group (“REI”), and acted as a dual agent on the transaction. Pamela Fenceroy (“Fenceroy”) acted as REI’s representative.

Pierce testified that the Respondent was also involved in the transaction, and she communicated with him through Fenceroy. She testified that she and Fenceroy handled the day-to-day details of the transaction and that the Respondent oversaw the inspection.

Pierce testified that the Respondent called her and said that a neighbor of the Property had indicated that there was a cesspool on the Property. Pierce told the Respondent to get an estimate to remediate the cesspool, and the Respondent got an estimate from A & L Septic Service. Exh. S-7. Pierce then reached out to Fannie Mae, which agreed to drop the price by \$14,000, which equaled the amount of the estimate. Exhs. S-8, S-9. She also identified e-mail exchanges between herself and the Respondent where the Respondent indicated that the Property had a cesspool and sent an estimate to have it remediated. Exhs. S-6, S-7.

Pierce testified that the transaction with Fannie Mae closed, and that she was unaware of what happened to the Property after closing. She was unaware that the Respondent planned to purchase the property from REI and she believed that the Respondent was aware of the cesspool.

Pierce denied having prior knowledge of the cesspool because the Property was on the main road where there are sewer lines. She testified that there was no concrete rim or anything

that would indicate there was a cesspool. She testified that she was unaware of any flooding issues on the Property, and did not recall any conversations regarding flooding or necessary repairs.

**Kay Becnel**

Kay Becnel (“Becnel”) testified that she has been licensed as a real estate salesperson since November 2016. She stated that she represented the Buyer in the attempt to purchase the Property in 2019. She testified that the Buyer was a previous rental client who Becnel had five children, was working and attending school to earn a nursing degree, and was a first time homebuyer.

Becnel testified that she showed the Buyer the Property, and the Buyer put a bid on it, which was accepted. Becnel identified the MLS listing for the Property, which indicated that the Property had a public water and public septic and identified the listing agent as “John Lemes.” Exh. S-12. Becnel identified the contract of sale that she prepared, which stated that the seller represented that there was no cesspool on the Property. Exh. S-13. The contract listed L&O as the seller and also indicated that the seller was a licensed real estate agent. Exh. S-13. Becnel testified that the Respondent represented to her that Respondent’s brother had purchased the property, and that the Respondent completed the work on it.

Becnel testified that she and the Buyer had done a final walk through of the Property before the closing on August 21, 2019. They were about to leave the Property, when a neighbor informed them that there was a cesspool on the Property and that the seller was aware of that condition because the seller had discovered it when he bought the Property. Becnel testified that she then spoke to Cinnaminson Township (“Township”) which indicated that there was no sewer line to the Property. Becnel testified that she had an inspection done by A&A Construction the morning of the closing and took pictures after they exposed the cesspool. Exh. S-14.

Becnel testified that when the Respondent came to the Property, he seemed surprised by the cesspool and called his brother. She testified that the Buyer had been ready to move into the home that day after the closing, but was unable to do so. She also testified that she and the Buyer would have been unaware of the cesspool if not for the neighbor and the inspection. She identified e-mails between herself, the Buyer, and the Respondent regarding the cesspool. Exh. S-15.

On cross-examination, Becnel testified that she did not recall any conversations between herself and the Respondent about getting an inspection of the cesspool. She further testified that the Respondent had sent her the estimate from A&L Septic Services and indicated that he converted the cesspool. She did not have any documentation of the Buyer waiving the home inspection.

On re-direct examination, Becnel testified that she first spoke to the Respondent about the cesspool after speaking to the neighbor on the morning closing was scheduled. She did not recall when the Respondent sent the estimate from A&L Septic Services. She also testified that the Buyer declined to get a home inspection because her husband worked in construction and she was unaware that there was a cesspool.

On re-cross examination, Becnel testified that that she did not recall any conversations with the Respondent about obtaining a home inspection.

**Robert Spillane**

Robert Spillane (“Spillane”) testified on behalf of the REC. Spillane began his career as a police officer, he is a nationally certified real estate investigator, and is an inactive licensed New Jersey real estate broker. He is currently an investigator with the REC. He testified that he was not originally assigned to this matter, but took it over when the original investigator, Robert

McCloskey (“McCloskey”) retired. He testified that he reviewed McCloskey’s investigation notes.

Spillane identified the license history of the Respondent. Exh. S-1. He testified that the Respondent was first licensed as a real estate salesperson on March 28, 2019. The Respondent was not licensed in 2018 at the time he purchased the Property, but was licensed at the time of sale to the Buyer. Spillane testified that the Respondent’s license not currently active.

Spillane testified that title was transferred from REI to L&O. The Respondent then “flipped” the home and sold it to the Buyer. He testified that it was possible that there was a wholesale arrangement between the Respondent and REI.

Spillane identified e-mail correspondence between the Respondent and McCloskey. Exh. S-16. He testified that McCloskey e-mailed the Respondent twice to request a statement -- once on June 23, 2020, and again on July 7, 2020. He testified that the Respondent responded on July 9, 2020. Spillane testified that the Respondent’s statement was not responsive to McCloskey’s request which sought information about his conversations with Price, the details about how he discovered there was a cesspool on the property, and his attempts to determine the status of the sewage discharge system. The Respondent indicated in his statement that his brother purchased the property.

**Joao Paulo Barros Lemes**

The Respondent testified on his own behalf. He identified Exh. S-6 as an e-mail he sent to Pierce when REI was purchasing the Property. He admitted to knowing that there was a cesspool on the Property at that time. He admitted that he negotiated a reduction in the sale price of the Property for REI. He admitted that he did not remediate the cesspool, but did fix flooding on the



property. He also admitted that he did not disclose the cesspool when he listed the Property on Bright MLS or on the contract of sale between L&O and the Buyer.

Respondent testified that he asked the Township multiple times about the sewer, but never got a straight answer. He testified that he received a sewer bill, so he was unsure if the house also had public sewer. He testified that he disclosed the cesspool when the appraiser was at the Property. The appraiser noticed a pipe in the driveway and the Respondent advised the Buyer to get an inspection to see if the house was connected to the public system. He testified that was confused about terminology regarding cesspools and sewers. He identified an e-mail exchange between himself and Becnel. Exh. S-15. He testified that when he used the wrong wording when he described the cesspool as “newly discovered” in the e-mailed correspondence.

Respondent testified that REI was an investment company in Georgia. REI would purchase properties, and he would then buy the properties from REI because he wanted to begin investing in real estate by fixing houses and selling them for a profit. He testified that he would help REI in New Jersey transactions, but was not compensated for it.

He testified that his brother is a “silent partner” in L&O, but the Respondent is the only owner of L&O. He testified that his brother helps with construction work, but legally did not have an ownership interest in the Property.

He testified that he is currently licensed as a real estate salesperson in Pennsylvania, where he has two active listings. His license is inactive in New Jersey.

### **FINDINGS OF FACT**

Based on the pleadings, the testimony of the witnesses, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact:

1. The Respondent was first licensed in New Jersey as a real estate salesperson on March 28, 2019. His New Jersey real estate salesperson license is currently inactive.
2. L&O is a domestic limited liability company, formed on October 8, 2018. Respondent is the sole owner of L&O.
3. On September 28, 2018, REI entered into a contract to purchase the Property from Fannie Mae. The purchase price listed in the contract of sale was \$180,000. Pierce represented both buyer and seller in the capacity of dual agent. The contract of sale and all other transactional documents were signed by REI's representative, Fenceroy.
4. On November 8, 2018, the Respondent e-mailed Pierce. The subject of the e-mail was "2301 Church Road, Cinnaminson NJ." In the e-mail, the Respondent stated, in part, "the inspector was there today A&L Septic Services. Currently there is cesspool there..."
5. On or about November 13, 2018, the Respondent obtained an estimate to install a septic system from A&L Septic Service for a price of \$14,000.
6. The price of the Property was reduced from \$180,000 to \$166,000, the price of the estimate to install a septic system.
7. The sale transaction was completed on November 29, 2018, and title to the Property was transferred from Fannie Mae to REI. The same day, REI conveyed title to the Property to L&O by special warranty deed.
8. The Respondent did not remediate the cesspool nor install a septic system.
9. On April 11, 2019, the Respondent marketed the Property for sale on the Bright MLS. The listing page indicated "Public Septic" as the sewage type for the Property and that the Respondent was the listing agent.

10. The Respondent was licensed as a New Jersey real estate salesperson at the time he advertised the Property for sale on Bright MLS.
11. On or about July 26, 2019, L&O entered into a contract to sell the Property to the Buyer, who was represented by Becnel. The Respondent signed the contract of sale on behalf of L&O as the seller, and stated in the contract that there was no cesspool on the Property. The contract of sale indicates that the Respondent was acting as the seller's agent.
12. On the date of the closing, the Buyer obtained an inspection from A&A Construction, which revealed the cesspool.
13. After discovering the cesspool, the Respondent indicated to Becnel that his brother owned the property. In an e-mail dated August 26, 2019, the Respondent indicated that his brother would be willing to cover the cost of an engineer and a survey.
14. On June 23, 2020, the McCloskey e-mailed the Respondent and requested the following:
  - 1) a written statement regarding his alleged misconduct in the attempted sale of the Property to the Buyer;
  - 2) copies of any and all documents related to the attempted sale of the Property to the Buyer;
  - 3) a written statement specifically addressing the email he sent to Pierce on November 18, 2018, indicating his knowledge of a cesspool on the Property and
  - 4) documentation related to Lemes' ownership interest in the Property as a principal of L&O.
15. McCloskey did not receive a response and sent another e-mail to the Respondent on July 7, 2020.

On July 9, the Respondent e-mailed a written statement to McCloskey. In the statement, the Respondent indicated that the Property was purchased by his brother in 2018 and denied that he had prior knowledge of the cesspool. The statement did not address the McCloskey's questions

regarding the November 18, 2018 email to Pierce. The Respondent indicated that the credit towards the sale of the Property in 2018 was to address a flooding issue. The Respondent did not provide any of the documentation that McCloskey had requested.

### **CONCLUSIONS OF LAW**

In light of the above findings of fact, the Commission makes the following conclusions of law with regard to the charges contained in the OTSC as summarized above:

1. The Respondent failed to disclose the existence of the cesspool on the Property to the Buyer. The Respondent was aware of the cesspool and the existence of the cesspool was material to the physical condition of the property. This conduct is in violation of N.J.A.C. 11:5-6.4(c).
2. The Respondent advertised the Property as having a “Public Septic” sewage system on the Bright MLS, despite being aware of the existence of a cesspool located on the Property. This conduct constitutes a substantial misrepresentation in violation of N.J.S.A. 45:15-17(a).
3. The Respondent falsely represented to the Buyer’s agent, Becnel, that his brother owned the Property when the Property was owned by L&O, of which the Respondent was the sole owner. This conduct constitutes a substantial misrepresentation in violation of N.J.S.A. 45:15-17(a).
4. The Respondent falsely represented to McCloskey that his brother owned the Property when the Property was owned by L&O, of which the Respondent was the sole owner. This conduct constitutes a substantial misrepresentation in violation of N.J.S.A. 45:15-17(a).

5. The Respondent repeatedly misrepresented the type of sewage system servicing the Property to the Buyer on the Bright MLS, and in the contract of sale. By doing so, the Respondent engaged in course of misrepresentation and dishonest dealing, and did not deal fairly with the Buyer. This conduct is in violation of N.J.S.A. 45:15-17(c) and (l), and N.J.A.C. 11:5-6.4(a).
6. During the investigation, the Respondent failed to provide documentation and a written statement addressing specific questions as requested by a REC Investigator. By doing so, the Respondent failed to fully cooperate with the Commission's investigation of this matter. This conduct demonstrates unworthiness and is in violation of N.J.S.A. 45:15-17(e).

### **DETERMINATION**

At the conclusion of the hearing in this matter, the Commission voted in favor of finding the violations and imposing the sanctions described in this Final Decision and Order. In arriving at the determination in this matter, the Commission took into consideration the documentary evidence submitted, the testimony of the witnesses, and the nature of and circumstances surrounding the Respondent's conduct.

#### **Allegations Against the Respondent**

The REC bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 560 (1982). The evidence must be such as would "lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may be described as "the greater weight of credible evidence in the case. It does

not necessarily mean evidence of the greater number of witnesses but means that evidence which carries the greater convincing power.” State v. Lewis, 67 N.J. 47, 49 (1975).

The OTSC alleges that the Respondent violated N.J.A.C. 11:5-6.4(c) which requires licensees to disclose all known information material to the physical condition of any property to their client, and when appropriate, to any other party to a transaction. Here, the Respondent was aware that there was a cesspool located on the property. The Respondent discovered the cesspool while assisting REI in purchasing the Property, the Respondent obtained an estimate to remediate the cesspool and later was able to aid REI in negotiating a reduced purchase price to account for the cost to remediate the cesspool. Exhs. S-6, S-7, and S-9. Once he purchased the Property from REI, Respondent, however, did not remediate the cesspool. Moreover, he did not disclose the cesspool’s existence to the Buyer when selling the Property. The Respondent testified that he was inexperienced, was unsure of the correct terminology to use, and believed that there might also have been a public sewer. However, as a real estate licensee Respondent is obligated to know the laws governing his profession and the laws applicable to the real estate transaction in which he is involved, including the correct terminology. Here, Respondent had a duty to know that except in limited circumstances, cesspools that are part of a real property transfer must be abandoned and replaced. N.J.A.C. 7:9A-3.16(b). Further, even if the Property was also serviced by public sewer, Respondent was still obligated to disclose the existence of the cesspool, which is material to the physical condition of the property.

The OTSC also alleges that the Respondent violated N.J.S.A. 45:15-17(a) which prohibits licensees from making any false promises or any substantial misrepresentation. The Respondent violated this provision multiple times. The Respondent advertised the Property as having a “Public Septic” sewage system on the Bright MLS. Exh. S-12. Moreover, Respondent also expressly

represented to the Buyer in the contract of sale that no cesspool was located on the Property. Exh. 13. However, as stated above, the Respondent was aware that there was a cesspool located on the property. Falsely stating that there was a public septic system on the property and there was no cesspool were substantial misrepresentations.

Further, Respondent violated N.J.S.A. 45:15-17(a) when he falsely represented to the Buyer's agent that his brother owned the Property and failed to disclose his ownership interest. Becnel testified that the Respondent indicated that his brother owned the Property after she and the Buyer discovered the cesspool on the day of closing. Respondent also falsely represented to Investigator McCloskey that his brother owned the Property when, in fact, it was purchased by L&O, of which the Respondent was the sole owner. Exh. S-16. These statements by the Respondent also constitute substantial misrepresentations in violation of N.J.S.A. 45:15-17(a).

The OTSC further alleges that the Respondent violated N.J.S.A. 45:15-17(c) and (l) and N.J.A.C. 11:5-6.4(a). As a licensee, Respondent is prohibited from pursuing a flagrant and continued course of misrepresentation or making of false promises through agents or advertisements. N.J.S.A. 45:15-17(l). It is uncontroverted that Respondent misrepresented the type of sewage system servicing the Property to the Buyer on the Bright MLS and falsely stated that no cesspool existed on the Property in the contract of sale. Exhs. S-12 and S-13. This constitutes a continued course of misrepresentation and a false promise through an advertisement in violation of N.J.S.A. 45:15-17(c). Moreover, the evidence demonstrates that the Respondent was aware of the cesspool but repeatedly failed to inform the buyer or her agent that it existed on the Property. This conduct also constitutes dishonest dealing in violation of N.J.S.A. 45:15-17(l) as well as a failure to deal fairly with all parties to the transaction in violation of N.J.A.C. 11:5-6.4(a).

The OTSC finally alleges that the Respondent violated N.J.S.A. 45:15-17(e) which requires licensees to cooperate in Department investigations and give statements concerning matters under investigation. On June 23, 2020, Investigator McCloskey e-mailed the Respondent and requested the following: 1) a written statement regarding his alleged misconduct in the attempted sale of the Property to the Buyer; 2) copies of any and all documents related to the attempted sale of the Property to the Buyer; 3) a written statement specifically addressing the email he sent to Pierce on November 18, 2018, indicating his knowledge of a cesspool on the Property and 4) documentation related to Lemes' ownership interest in the Property as a principal of L&O. Exh. S-16.

When McCloskey did not receive a response, he sent the Respondent a second e-mail on July 7, 2020, again requesting that the Respondent reply and provide certain specific information. Exh. S-16. The Respondent replied on July 9, 2020. In his statement, the Respondent indicated that his brother purchased the Property in 2018 and denied prior knowledge of the cesspool. Respondent did not address his e-mail to Pierce or provide any documentation that McCloskey requested. The Respondent's failure to cooperate in the Commission's investigation demonstrates unworthiness and is in violation of N.J.S.A. 45:15-17(e).

#### Penalty Against the Respondent

The Act charges the Commission with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]" in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Commission, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The Commission is empowered to suspend and revoke the licenses of, and impose fines against, brokers and salespersons that violate any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Maple Hill Farms, Inc. v. New Jersey Real Estate Commission, 67 N.J. Super. 223, 232 (App. Div. 1961); Division of New Jersey Real Estate



Commission v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, in order to protect the public interest. See Div. of New Jersey Real Estate Commission v. Ponsi, 39 N.J. Super. at 532-533.

The Commission has the power to suspend, revoke, or place on probation the license of any licensee for any of the enumerated offenses at N.J.S.A. 45:15-17. As stated above, the Commission finds that the Respondent violated N.J.S.A. 45:15-17(a), (c), (e), and (l). Despite his knowledge of the cesspool, the Respondent did nothing to remediate it before attempting to sell the home to the Buyer. Instead, the Respondent repeatedly made false representations to the Buyer about the sewage system on the Property. After considering the testimony and evidence presented, and in light of the violations committed by the Respondent, as set forth herein, the Commission imposes a revocation of the Respondent's real estate salesperson license for a period of two years. This is consistent with the Commission's decision in a similar matter. See NJREC v Louis Edge, Dkt No. MER-13-024, Final Order of Determination (12/01/15) (The Commission revoked Edge's license for two years for Edge failing to properly advise potential buyers of a conditional new septic tank that was not yet in place and other water quality issues).

Pursuant to N.J.S.A. 45:15-17, in addition to a suspension of license, the Commission may impose "a penalty of not more than \$5,000 for the first violation" of the Act, and a "penalty of not more than \$10,000 for any subsequent violation." In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors that must be considered in evaluating the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the

illegal activity; (4) the injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139.

The first Kimmelman factor is whether the Respondent acted in good or bad faith. Here, the Respondent acted in bad faith when he did not disclose the cesspool to the Buyer. The Respondent was aware of the cesspool, but chose not to disclose it and instead represented that the Property had a public septic system on the Bright MLS. He also represented that there was no cesspool on the Property in the contract of sale. This factor weighs in favor of a monetary penalty.

The second factor of the Kimmelman analysis is the Respondent's ability to pay the fines imposed. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. NJREC v. Cortese, Final Order of Determination, (08/09/17) (citing Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08)). Here, no evidence was presented as to Respondent's ability to pay fines assessed, and thus this factor is neutral.

The third factor of the Kimmelman addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. Kimmelman does not limit consideration to actual profits, but warrants the consideration of the profits that the Respondent would have likely made if his acts in violation of the laws of this State were successful. Ibid. Here, he purchased the Property from REI for \$184,500. Exh. S-11. In 2019, he entered into a contract to sell it to the Buyer for \$245,000. Exh. S-13. This is an anticipated profit of \$60,500, less the cost of work that the Respondent put into the Property, of which there was no evidence presented. This factor weighs in favor of a monetary penalty.

The fourth factor of the Kimmelman analysis is to determine whether the licensee's conduct caused injury to the public. In order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]." Goodley, 29 N.J. Super. at 182. It is the responsibility of the Commission to ensure that individuals who hold licenses demonstrate behavior which instills the utmost public trust. The public is harmed when licensed professionals fail to maintain the level of trustworthiness demanded under the laws of this State, as the Respondent failed to do so here. Further, the Respondent caused injury to the Buyer when he advertised the Property as having a public septic sewer in the Bright MLS and did not disclose the cesspool on the contract of sale. The Buyer, in reliance on the representations of the Respondent, committed significant money and time in an effort to purchase the Property for her family and was blindsided on the day of closing by the discovery of a cesspool, forcing her to immediately alter her plans. Clearly, this unsuspecting consumer was harmed by Respondent's actions, and accordingly this factor weighs in favor of a monetary penalty.

The fifth factor in a Kimmelman analysis is the duration of the illegal conspiracy or scheme. Here, the Respondent listed the Property on the Bright MLS on July 22, 2019. Exh. S-12. He denied the existence of the cesspool in the contract of sale dated July 26, 2019. Exh. S-13. The Buyer did not discover the cesspool until the morning of closing. Even after the discovery of the cesspool, the Respondent denied knowing that the cesspool had been there and described it as "newly discovered" in an e-mail to Becnel on August 26, 2019. Exh. S-15. Further, the Respondent never completely responded to McCloskey's request for information during the REC's investigation. Accordingly, this factor weighs in favor of a monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. No criminal or civil proceedings have stemmed from the Respondent's actions. Accordingly, this factor weighs in favor of a monetary penalty given that the Commission's actions are the only consequence Respondent will receive for his conduct.

The seventh and final factor takes into consideration the Respondent's past violations. No evidence of past violations was presented at the hearing. This factor does not weigh in favor of a monetary penalty.

In light of these factors, which weigh heavily in favor of assessing a monetary penalty, the Commission has determined that the Respondent shall pay a fine in the total amount of \$15,500 to be allocated as follows: \$5,000 for failing to disclose the existence of the cesspool on the Property to the Buyer in violation of N.J.A.C. 11:5-6.4(c); \$5,000 for repeatedly misrepresenting the type of sewage system servicing on the Property to the Buyer on the Bright MLS, and in the contract of sale, engaging in dishonest dealing, and failing to deal fairly with the Buyer in violation of N.J.S.A. 45:15-17(c) and (l), and N.J.A.C. 11:5-6.4(a); \$2,500 for failing to fully cooperate with the Commission's investigation of this matter in violation of N.J.S.A. 45:15-17(e); \$1,000 for advertising the Property as having a "Public Septic" sewage system on the Bright MLS, when he was aware that statement was false and knew of the existence of a cesspool located on the Property, in violation of N.J.S.A. 45:15-17(a); \$1,000 for falsely representing to the Buyer's agent that his brother owned the Property when the Property was owned by L&O, of which the Respondent was the sole owner, in violation of N.J.S.A. 45:15-17(a); and \$1,000 for falsely representing to

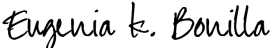
McCloskey that his brother owned the Property when the Property was owned by L&O, of which the Respondent was the sole owner, in violation of N.J.S.A. 45:15-17(a).

Accordingly, and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

1. The Respondent's real estate salesperson license is revoked for two years. No real estate license shall be issued to the Respondent until he pays the fines and penalties as Ordered by this Final Decision and Order.
2. The Respondent shall pay a fine in the amount of \$15,500 with respect to the violations of the real estate laws and regulations as found in this Final Decision and Order.

SO ORDERED this 28<sup>th</sup> day of June, 2022.

By: Eugenia K. Bonilla, President  
Christina Banasiak, Commissioner  
Darlene Bandazian, Commissioner  
Jacob Elkes, Commissioner  
William J. Hanley, Commissioner  
Denise M. Illes, Commissioner  
Carlos Lejnieks, Commissioner

DocuSigned by:  
  
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Eugenia K. Bonilla, President  
New Jersey Real Estate Commission

07/12/22 | 6:30 AM EDT

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