

NEW JERSEY REAL ESTATE COMMISSION

NEW JERSEY REAL ESTATE)	Docket No.: BUR-19-024
COMMISSION,)	(REC Ref. Nos. 10002852,
)	10002948, 10002970, 10003340,
Complainant,)	10003534)
v.)	
)	
SHAWN BURKE, licensed New Jersey real)	FINAL ORDER OF
estate broker, (Lic. No. 0678863), broker of)	DETERMINATION
record of Burke Properties, LLC, licensed)	
New Jersey real estate broker (Lic. No.)	
1430019),)	
)	
Respondent.)	

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 25, 2021 with further deliberations and the amended final determination decided on February 8, 2022.¹

BEFORE: Commissioners Christina Banasiak, Darlene Bandazian, Jacob S. Elkes, Denise M. Illes, and Carlos Lejnieks.²

APPEARANCES: Marianne Gallina, Regulatory Officer (“RO Gallina”), appeared on behalf of the New Jersey Real Estate Commission staff (“REC”). Respondent Shawn Burke (“Respondent”) did not appear at the hearing.

¹ Both hearings were conducted via Zoom. All those present participated via Zoom.

² Commissioner Stefanik was present at the initial presentation of this matter on May 25, 2021; however, she was not present on February 8, 2022 for further deliberations and amendments to the Final Order as reflected herein.

STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated November 13, 2019, pursuant to N.J.S.A. 45:15-17, 45:15-17.1,³ 45:15-18 and N.J.A.C. 11:5-1.1. The OTSC alleges that the Respondent committed the following violations of the Real Estate Brokers and Salespersons Act, N.J.S.A. 45:15-1 to -42 (“Act”):

Count One: The Respondent commingled the money of his principals with his own, and failed to maintain in a special account, separate and apart from other personal or other business accounts, all monies received by the Respondent acting in the capacity of a real estate broker or as an escrow agent or the temporary custodian of funds of others in a real estate transaction, in violation of N.J.S.A. 45:15-17(o), N.J.A.C. 11:5-5.1(a) and (c), and N.J.A.C. 11:5-6.4(a);

Count Two: The Respondent failed to maintain a designated main office open to the public, in violation of N.J.S.A. 45:15-12;

Count Three: The Respondent did not appear or otherwise comply with the directives in a Commission subpoena, demonstrating unworthiness, in violation of N.J.S.A. 45:15-17(e);

Count Four: The Respondent failed to notify the Commission within 30 days that he had been charged with a crime, in violation of N.J.S.A. 45:15-17(s); and

Count Five: Pursuant to N.J.S.A. 45:15-41, the Respondent’s license was immediately revoked until such time as he makes reimbursement to the Real Estate Guaranty Fund.

The OTSC was served at the Respondent’s last known business address and a P.O. Box. The business has been confirmed closed by REC investigators. The mail sent to this address has been returned as “Undeliverable as Addressed - Unable to Forward”. Both the certified and regular mail sent to the business address were returned in the same manner. The OTSC was also sent by

³ N.J.S.A. 45:15-17.1 permits the temporary suspension of a license in certain circumstances. Although the OTSC was issued under this statutory authority, no motion or request for temporary suspension was made.

regular and certified mail to a P.O. Box in Collingswood found by a New Jersey Motor Vehicle Commission (“MVC”) search concerning the Respondent. The certified mail was returned as “Unclaimed”. However, the regular mail was not returned, establishing proof of good service.

The Respondent did not file an Answer to the OTSC. Accordingly, on January 14, 2020, the Commission reviewed the OTSC, noted that the Respondent failed to file an Answer and therefore, no material facts or issues of law were in dispute and directed that a hearing be scheduled pursuant to N.J.A.C. 11:5-11.3(b).

The REC sent a letter to the Respondent, dated March 16, 2021, indicating that a hearing had been scheduled for May 25, 2021. S-1 at 1. The letter was sent via regular and certified mail, return receipt requested, to two Camden addresses, one of which was 1 Market Street, Apartment 664, Camden, New Jersey, 08102.⁴

A hearing before the Commission was conducted on May 25, 2021. The following exhibits were entered into evidence during the hearing:

- S-1 First page of a Scheduling letter dated March 16, 2021 and print out from USPS Tracking related to Tracking Number 70140510000091006862;
- S-2 Unsigned Minutes of the January 14, 2020 meeting of the New Jersey Real Estate Commission meeting⁵;
- S-3 Documents related to Shawn M. Burke from the Burlington County Office of the Prosecutor: August 30, 2016 letter to REC Investigator Clark Masi; Complaint-Warrant No. 0311-W-2016-000057 in the State of New Jersey v. Shawn M. Burke, dated April 20, 2016; April 16, 2016 Probable Cause Statement in State v. Shawn

⁴ RO Gallina represented that the Market Street address was obtained through a search conducted by Accurint and submitted proof from the U. S. Postal Service confirming that a delivery was made on April 1, 2021 “in Camden, N.J. 08102” which corresponds to the Market Street address zip code on the REC scheduling letter. S-1 at 2.

⁵ The unsigned REC meeting minutes (S-2) are removed from the public record in this matter. See Libertarians for Transparent Government v. Government Records Council, 453 N.J. Super. 83, 92 (App. Div. 2018) (draft minutes are not government records subject to disclosure under OPRA and there is no requirement for their production in a redacted form).

M. Burke, Complaint No. 16-000057; Indictment No. 2016-09-0928-I in State of New Jersey v. Shawn M. Burke; and Judgment of Dismissal dated December 14, 2016 in State of New Jersey v. Shawn M. Burke;

- S-4 Property Management Contract between Burke & Company and 349 Billingsport LLC (Seth Martinez) dated September 25, 2014; statement of rents due; Consent Order for Payment from the New Jersey Real Estate Guaranty Fund, New Jersey Superior Court of New Jersey, Special Civil Part – Camden County, Docket No. CAM-DC-1211-15, 349 Billingsport Road, LLC v. Shawn Burke, Burke & Company and the New Jersey Real Estate Guaranty Fund, dated June 29, 2017; Page 1 of an Assignment of Judgment wherein 349 Billingsport Road LLC assigns a default judgment to the New Jersey Real Estate Commission; and print out of Judgment Search related to Judgment No. DJ 036261 16-349;
- S-5 PNC Bank August 2014 statements for Burke & Co, the Escrow Sub-Account Information for Sub-Accounts 6000190713, 6000190708, and 6000190716; Unsigned and undated lease agreement for the time period of July 18, 2014 through July 31, 2015 between Jeffrey Sjogren, Concetta Simon, and Shannon Lynch and Market Street Development Company for the property located at 225A Market Street, Camden, New Jersey; Signed August 8, 2014 lease agreement for the time period of August 9, 2014 through August 31, 2015 between Graham Staton, Carolyn Brown with cosigner James Brown and Market Street Development Company for the property located at 225 Market Street, Unit B, Camden, New Jersey; Signed June 11, 2014 lease agreement for the time period of June 15, 2014 through June 30, 2015 between Michael A. Petito, Shannon Van Demark, Arpreet Singh, Abhishek Apt with cosigner Maria Lacher and Market Street Development Company for the property located at 229 Market Street, Apartment, Camden, New Jersey;
- S-6 Property Management Contract between Burke & Company and Frank and Amber Rovello for 11 Castle Road, Burlington, New Jersey, dated April 20, 2014; and lease contract for the time period of July 1, 2014 through June 30, 2015 between Sean Moor as lessee and Patricia Cantor as occupant and Frank Rovello and Amber Rovello, dated June 28, 2014;
- S-7 Property Management Contract between Burke & Company and Eric and Nancy Chin for 105 and 107 Willow Turn, Mount Laurel, New Jersey, dated March 31, 2014; lease contract for the time period of July 10, 2014 through June 30, 2015 between Steven Nelson and Eric Chin for the property located at 107 Willow Turn, Unit B, Mount Laurel, New Jersey, dated July 10, 2014; and Burke & Company Property Cash Summary to Eric Chin for the properties located at 105 Willow Turn and 107 Willow Turn, both in Mount Laurel, New Jersey;
- S-8 E-mail directive from Investigator Robert Spillane to Shawn Burke dated March 5, 2015; Email Responses from Shawn Burke dated March 5, 2015 and March 16, 2015;

- S-9 REC Subpoena dated March 19, 2015 issued to Shawn Burke, Burke Properties LLC d/b/a Burke & Company returnable March 26, 2015; March 23, 2015 email from REC Investigator Robert Spillane to Shawn Burke (shawnburke519@gmail.com) attaching a Subpoena; copy of Certified Mail envelope addressed to Shawn Burke, Broker of Record, Burke Properties LLC, 528 Eayrestown Road, Suite 100, Southampton, indicating "Return to Sender, Attempted – Not Known, Unable to Forward"; copy of Certified Mail envelope addressed to Shawn Burke, Burke Properties LLC, P.O. Box 8970, Colling [illegible], indicating "Return to Sender, Unclaimed, Unable to Forward"; and
- S-10 PNC Bank Business Checking Statements for the period of August 30, 2014 to September 30, 2014 and November 29, 2014 to December 31, 2014, for Burke Properties, LLC escrow account statements.

TESTIMONY OF ROBERT SPILLANE

REC investigator Robert Spillane ("Spillane") testified on behalf of the REC. Spillane confirmed that the information contained in Count One, paragraph two, of the OTSC pertaining to the complainants and their properties was accurate. Spillane testified that the allegations contained therein were related to multiple complaints against business entities operated by the Respondent for failing to remit money due and owing to various property owners.⁶ He then testified as to the nature of the complaints by each property owner as set forth in Count One of the OTSC.

Spillane testified regarding the claim of Sean Killian ("Killian") relating to the property located at 12 Buckingham Drive, Eastampton, New Jersey, 08060 ("Eastampton Property").⁷ By letter from the Burlington County Prosecutor's Office, the REC was made aware that a criminal complaint was filed in April 2016 against the Respondent by Robert Saylor ("Saylor") for theft of

⁶ The REC records indicate that the Respondent is the broker of record of "Burke Properties, LLC." Respondent also signed property management agreements and property leases in the name of "Burke & Company" which identified Respondent as the representative and/or owner of said company. See S-4; S-6; S-7. Respondent was also the owner of "Burke & Company" according to provisions in property management agreements executed by Respondent. Ibid.

⁷ According to the OTSC, Respondent allegedly failed to remit \$2,000 relating to the Eastampton Property to Killian, but there is no specific designation as to whether said amount refers to rent, security and/or other monies collected by Respondent from tenants and not remitted to Killian.

movable property and a criminal indictment was returned against the Respondent in September 2016. S-3. The criminal charges related to Respondent's alleged failure to return a \$2,000 security deposit to Saylor who was the tenant in Killian's Eastampton Property. Ibid. Spillane testified that the Respondent failed to notify the REC about the pending charges, warrant, or indictment. He further testified that the criminal complaint was later dismissed in Superior Court and no additional information was available about the circumstances of the dismissal.

Spillane then testified regarding the claims of Seth Martinez ("Martinez") relating to four properties located in Paulsboro, New Jersey, 08066 (collectively, "Paulsboro Properties") owned by his company, Billingsport Road, LLC.⁸ Spillane testified that Martinez provided the REC with a copy of a property management agreement dated September 25, 2014, which was executed by the Respondent on behalf of Burke & Company. S-4.⁹ Spillane further testified that Martinez also provided the REC with a written statement for the months of October through December 2014 itemizing the total monies "stolen" by the Respondent. S-4.¹⁰ Spillane testified that the \$5,821 outlined in Martinez's breakdown were funds misappropriated by the Respondent and were the

⁸ According to the OTSC, the Respondent allegedly failed to remit to Martinez a total of \$5,821 relating to the Paulsboro Properties, but there is no specific designation as to the specific amount owed to each property and whether the amounts owed refers to rent, security and/or other monies collected by the Respondent from tenants and not remitted to Martinez.

⁹ The property management contract between Martinez and the Respondent stated that Burke & Company was required to render monthly statements, expenses and charges, and to remit receipts less the disbursements. The contract provided monthly disbursements were to be made by Burke & Company to the owners who pay mortgage payments privately, on or about seven days after receipt of the tenant's check. Further, the contract stated that the owner agreed to pay Burke & Company a management fee of 7.5% of all rent and funds collected, and that Burke & Company would deduct the sum from the amounts remitted to the owner. S-4.

¹⁰ The breakdown provided in S-4 shows rents, security deposits, and management fees for October, November, and December of 2014 and tallies \$5,821 in unremitted funds due and owed to Martinez.

subject of a Real Estate Guaranty Fund claim submitted by Martinez on behalf of 349 Billingsport Road, LLC. He further testified that the REC verified Martinez's guaranty fund claim, authorized payment, and executed a consent order dated on June 29, 2017, assigning the default judgment against Respondent and Burke & Company entered in the New Jersey Superior Court, Docket No. CAM-DC-1211-15, in the amount of \$6,940.80 (\$6,640 in misappropriated funds and \$300.80 in costs). S-4.

Spillane then testified regarding the claims of Asuncion Muniz ("Muniz") relating to three residential rentals located at 225A Market Street, 225B Market Street and 229 Market Street in Camden, New Jersey, 08102 (collectively "Market Street Rentals").¹¹ Spillane testified that Muniz provided the REC with copies of the landlord/tenant agreements for the Market Street Rentals, two of which were executed by Respondent on behalf of Burke & Company as "Lessor."¹² S-5. Spillane testified that copies of three bank statements from PNC were also provided to the REC by Muniz. Ibid. Spillane explained that during his investigation, he contacted PNC regarding the bank statements but could not confirm the existence of the escrow sub-accounts referenced therein and was advised that all the funds were contained in one escrow account.¹³

¹¹ According to the OTSC, the Respondent allegedly failed to remit to Muniz the amounts of \$1,200, \$1,746.72, and \$1,400 relating to 225A Market St., 225B Market St., and 229 Market St., respectively, but there is no specific designation as to whether said amounts refer to rent, security and/or other monies collected by the Respondent from tenants and not remitted to Muniz.

¹² The landlord/tenant agreement for 225A Market Street is unsigned but is set forth on the letterhead of Burke & Company. No copy of the property management agreement between the Respondent and Muniz was offered into evidence.

¹³ It is noted that there is a PNC Bank statement for each Market Street Property and each statement, in fact, contains a reference to a difference sub-account number and different taxpayer number.

Spillane further testified regarding the claims of Frank Rovello (“Rovello”) relating to 11 Castle Road, Burlington, New Jersey, 08016 (“Castle Road Property”).¹⁴ Spillane testified that the Respondent rented out the Castle Road Property on behalf of Rovello and that Rovello never received compensation from the transaction. He also testified that Rovello provided the REC with a copy of the landlord/tenant agreement for Castle Road Property.¹⁵ S-6. Spillane also testified that Rovello also provided the REC with a copy of his property management agreement relating to the Castle Road Property, which was executed by Respondent on behalf of Burke & Company.¹⁶

Ibid.

Spillane also testified regarding the claims of Eric Chin (“Chin”) relating to two residential rental units located at 105 Willow Turn and 107 Willow Turn, Mount Laurel, New Jersey, 08054 (collectively “Willow Turn Rentals”).¹⁷ Spillane testified that Chin provided the REC with a copy

¹⁴ According to the OTSC, the Respondent allegedly failed to remit to Rovello \$2,200 relating to the Castle Road Property, but there is no specific designation as to whether the amount refers to rent, security and/or other monies collected by the Respondent from tenants and not remitted to Rovello.

¹⁵ It is noted that the lease agreement submitted by Rovello was printed on the letterhead of Burke & Company but not signed by the Respondent.

¹⁶ The property management contract between Rovello and the Respondent stated that Burke & Company was required to render monthly statements, expenses and charges, and to remit receipts less the disbursements. The contract provided monthly disbursements were to be made by Burke & Company to the owners who pay mortgage payments privately, on or about 15 days after receipt of the tenant’s check. Further, the contract stated that the owner agreed to pay Burke & Company a management fee of 10% of all rent and funds collected, and that Burke & Company would deduct the sum from the amounts remitted to the owner.

¹⁷ According to the OTSC, the Respondent allegedly failed to remit to Chin the amounts of \$3,269 and \$1,500 relating to 105 Willow Turn and 107 Willow Turn, respectively, but there is no specific designation as to whether said amounts refer to rent, security and/or other monies collected by the Respondent from tenants and not remitted to Chin.

of the property management agreement¹⁸ for the Willow Turn Rentals.¹⁹ S-7. He also testified that Chin provided the REC with a copy of the landlord/tenant agreement for 107 Willow Turn, which was executed by the Respondent on behalf of Burke & Company as “Lessor.”²⁰ Ibid. Spillane further testified that Chin also provided copies of a separate “Owner Statement” for 105 Willow Turn Property and for 107 Willow Turn which he received from the Respondent.²¹ Ibid.

Spillane next testified as to the findings and conclusions of his investigation with respect to the allegations set forth in Counts Two through Five of the OTSC.

Spillane testified that he made multiple attempts to contact the Respondent and visit the offices of Burke Properties, LLC, which REC records listed as 528 Eayrestown Road, Suite 100, Southampton, New Jersey, 08088 (“Eayrestown Road Address”). He testified that he sent the Respondent a notice to appear on March 16, 2015 at the Eayrestown Road Address to meet with REC investigators and produce records including any and all brokerage, personal, and financial records available for review. Spillane testified this notice was sent to the Respondent via e-mail

¹⁸ The property management contract between Chin and Burke & Company stated that Burke & Company was required to render monthly statements, expenses and charges, and to remit receipts less the disbursements. The contract provided monthly disbursements were to be made by Burke & Company to the owners who pay mortgage payments privately, on or about 15 days after receipt of the tenant’s check. Further, the contract stated that the owner agreed to pay Burke & Company a management fee of 10% of all rent and funds collected, and that Burke & Company would deduct the sum from the amounts remitted to the owner.

¹⁹ It is noted that the property management agreement submitted by Chin was on the letterhead of Burke & Company and signed by Chin, but not by the Respondent.

²⁰ Spillane testified that both Willow Turn Properties were rented and managed by the Respondent. However, only one lease agreement was entered into evidence for 107 Willow Turn, Unit B, Mount Laurel, New Jersey. S-7.

²¹ Spillane stated that that the breakdown was an accounting of the monies received, which were in the account, but never disbursed. However, it is noted that the breakdown identifies not only the monies the Respondent had collected from tenants but also the expenses, distributions and commissions paid between May 2014 and September 2014.

on March 5, 2015 and the Respondent acknowledged receipt of same on March 5, 2015. S-8. Spillane also testified that the email address he used for the Respondent was on file in REC licensing records which is used by the REC licensing office to communicate with licensees. He also testified that he called the Respondent at the phone number listed in REC licensing records, but there was no answer and the message did not contain any broker agency information.

Spillane testified that he and another REC investigator, Clark Masi, went to the Eayrestown Road Address listed for the Respondent in REC records on March 16, 2015, and were met by Linda Burke, the Respondent's mother and a licensed New Jersey real estate salesperson. Spillane testified that he interviewed Linda Burke, who stated that the listed address in REC records was her residence, not an office, and that she was not in contact with the Respondent. He testified that there was no visible signage indicating that the location was the Respondent's office. Spillane further testified that he made follow up visits to the same location twice on March 20th and once on March 23rd but found the location locked and vacant on all occasions.

Spillane testified that the Respondent failed to appear at the Eayrestown Road Address on March 16, 2015 as required by the REC notice issued on March 5, 2015, and also subsequently failed to appear and produce records on March 26, 2015 as required by a subpoena issued on March 19, 2015. S-8. He further testified that personal service of the subpoena was attempted several times at the agency location of record but was unsuccessful. Spillane testified the subpoena was also sent both to the agency location of record and to a Collingswood, New Jersey address, found through a MVC search, via certified and regular mail. He testified that the certified mail was returned "unclaimed" and the regular mail was not returned. S-9. Spillane further testified that the subpoena was also sent via the email of record with the REC on March 23, 2015, but no response was received from the Respondent. Ibid.

Spillane testified that a subpoena was also issued to PNC Bank for records from January 2014 through March 2015 based on the account numbers the REC has on file for the Respondent in its licensing records. He testified that in his interpretation, these records purportedly show the transfer of over \$30,000 in September 2014 from the escrow account to the operating account of the Respondent, as well as show a negative balance of the escrow account in December 2014. S-10 at 49-52. Spillane, however, testified that he had no information to explain why the escrow account was out of trust by December 2014 and why the escrow money transfers were done in September 2014.²² He also testified that the REC never received any information from the Respondent directly, that the Respondent was uncooperative after initially responding to the REC notice to appear, and Respondent subsequently failed to comply with the directives in both the notice to appear and the subsequent subpoena. Spillane further testified that there was no evidence of any restitution made to any of the complainants other than the single payment made by the REC from the Real Estate Guaranty Fund.

FINDINGS OF FACT

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

1. The Respondent is a formerly licensed New Jersey real estate broker and was broker of record of Burke Properties, LLC, formerly licensed New Jersey real estate broker, which was located at 528 Eayerstown Road, Southampton, New Jersey, 08088.
2. The Respondent obtained his New Jersey real estate salesperson license in 2006 and his broker license in 2010. The Respondent was then employed by Remax of Cherry Hill from 2012 to

²² Spillane's testimony regarding his own interpretation of the PNC Bank records is not supported in the documents admitted into evidence. The PNC Bank statement for August 30, 2014 to September 30, 2014 is missing page 2, and while the account balance went from \$30,222 to \$3.00, no documentation or testimony was submitted proving that this escrow money was, in fact, transferred into an operating account or personal account controlled by the Respondent.

2014, when he was once again licensed as a broker. The Respondent's broker license and the license of Burke Properties, LLC expired on June 30, 2017 and have not been renewed.²³

3. The Respondent operated an entity named "Burke & Company" and executed property management contracts on behalf of Burke & Company which stated that he was the owner of Burke & Company. S-4; S-6 and S-7. The Respondent also executed residential lease agreements with tenants on behalf of Burke & Company as the "Lessor." S-5 and S-7.
4. Robert Saylor rented the property located at 12 Buckingham Drive, Eastampton New Jersey which was managed by the Respondent and on or about April 16, 2016, filed a criminal complaint against the Respondent for failure to return a \$2,000 security deposit. S-3.
5. On or about April 20, 2016, a criminal complaint-warrant was issued (Complaint No. 0311-W-2016-000057) charging the Respondent with third degree theft of movable property in connection with the Respondent's failure to return Saylor's \$2,000 security deposit. Ibid.
6. On or about September 15, 2016, a Criminal Indictment was returned against the Respondent charging him with one count of third-degree Theft by Unlawful Taking, in violation of N.J.S.A. 2C:20-3a. Ibid.
7. On December 14, 2016, a Judgment of Dismissal was entered dismissing the Indictment. Ibid.
8. The Respondent was licensed as a New Jersey real estate salesperson and broker at the time he was arrested and charged with third degree Theft by Unlawful Taking, but did not notify the REC within 30 days thereof.
9. On September 25, 2014, 349 Billingsport LLC (owned by Seth Martinez) entered into a Property Management Contract with Burke & Company to manage 16 rental properties from September 1, 2014 through September 1, 2015, which included the four properties set forth in the OTSC.
10. 349 Billingsport LLC filed a civil action in the Superior Court of New Jersey, Special Civil Part, Camden County (Docket No. CAM-DC-1211-15) against the Respondent and Burke & Company for embezzlement and conversion of money. S-4. On February 26, 2016, Billingsport obtained a default judgment against the Respondent and Burke & Company in the amount of \$6,940.80, which was designated as \$6,640 for the total funds misappropriated by the Respondent and Burke & Company and \$300 for costs. Ibid.
11. 349 Billingsport LLC filed a claim with the REC for payment from the Real Estate Guaranty Fund relating to the \$6,940.80 default judgment against the Respondent and Burke & Company. On June 29, 2017, a Consent Order was executed between 349 Billingsport LLC

²³ Based upon REC records, RO Gallina made representations regarding the Respondent's licensing records and employment history.

and the REC assigning all rights, title and interest in the default judgment against the Respondent and Burke & Company to the REC. S-4.

12. The \$6,940.80 default judgment obtained by 349 Billingsport LLC against the Respondent and Burke & Company and assigned to the REC included the \$5,821 not remitted by the Respondent to Martinez as alleged in the OTSC and detailed in the Martinez's written itemization statement.
13. The Respondent has not made any payment towards satisfaction of the \$6,940 default judgment.
14. The Respondent managed three residential rental properties located on Market Street in Camden, New Jersey on behalf of Asuncion Muniz. The Respondent, in the name of "Burke & Company" as "Lessor," executed residential lease agreements with the tenants in 225B Market Street and 229 Market Street. S-5.
15. For the time period of July 18, 2014 through July 31, 2015, tenants Jeffrey Sjogren, Concetta Simon, and Shannon Lynch rented 225A Market Street, and the Respondent maintained a separate tenant escrow subaccount (Sub-Account No. 6000190713) with PNC Bank related to said tenancy. Ibid.
16. For the time period of August 9, 2014 through August 31, 2015, tenants Graham Staton and Carolyn Brown rented 225B Market Street and the Respondent maintained a separate tenant escrow subaccount (Sub-Account No. 6000190708) with PNC Bank related to said tenancy. Ibid.
17. For the time period of June 15, 2014 through June 30, 2015, tenants Michael A. Petito, Shannon Van Demark and Arpreet Singh rented 229 Market Street and the Respondent maintained a separate tenant escrow subaccount (Sub-Account 6000190716) with PNC Bank related to said tenancy. Ibid.
18. The Respondent managed a residential rental property located at 11 Castle Road, Burlington, New Jersey on behalf of Frank Rovello and executed a property management contract dated April 20, 2014 with Rovello on behalf of Burke & Company. S-6.
19. On or about June 28, 2014, a lease contract, set forth on the letterhead of Burke & Company, was executed by tenants Sean Moor and Patricia Cantor and landlords Frank Rovello and Amber Rovello for the time period of July 1, 2014 through June 30, 2015. Ibid.
20. The Respondent managed two residential rental properties located at 105 and 107 Willow Turn in Mount Laurel, New Jersey on behalf of Eric Chin ("Chin") and the Respondent executed a property management contract dated March 31, 2014 on behalf of Burke & Company. S-7.

21. The Respondent on behalf of Burke & Company as "Lessor" executed a residential lease agreement with tenant Steven Nelson for the time period of July 10, 2014 through June 30, 2015. Ibid.
22. Based on information supplied by the Respondent, REC licensing records identified 528 Eayrestown Road, Suite 100, Southampton, New Jersey as the last known address for both the Respondent and Burke Properties, LLC and identified "shawnburke519@gmail.com" as the last known email address for the Respondent.
23. On March 16, 2015, March 20, 2015, and March 23, 2015, REC investigators went to the premises located at 528 Eayrestown Road, Suite 100, Southampton, New Jersey. REC Investigators testified that Linda Burke (the Respondent's mother) stated that the address on file with the REC was her residence, not an office, and that she was not in contact with the Respondent. There were no visible signage indicating that the location was the Respondent's Office. On two occasions, the location was locked and vacant.
24. On March 5, 2015, Spillane sent written notice to the Respondent via "shawnburke519@gmail.com" requesting that the Respondent appear at 528 Eayrestown Road, Suite 100, Southampton, New Jersey on March 16, 2015 and produce records for inspection.
25. On March 5, 2015, via return email, the Respondent acknowledged his receipt of the REC notice to appear and produce records on March 16, 2015.
26. On March 16, 2015, Spillane appeared at 528 Eayerstown Road, Suite 100, Southampton, New Jersey, but the Respondent did not.
27. On March 19, 2015, the REC issued a Subpoena to the Respondent to compel him to appear at the REC offices on March 26, 2015 and produce certain requested records and transaction files. Personal service of the Subpoena on the Respondent was attempted but unsuccessful. S-9.
28. On March 23, 2015, the Subpoena was sent to the Respondent by email (at shawnburke519@gmail.com). Ibid. No reply or acknowledgement was received from the Respondent.
29. The Subpoena was sent by regular and certified mail to 528 Eayrestown Road, Suite 100, Southampton, New Jersey and to "P.O. Box 8970, Collingswood, New Jersey." However, both certified mailings were returned marked "Attempted – Not Known" and "Unable to Forward." Ibid.
30. On March 26, 2015 the Respondent did not appear at the REC offices as directed in the Subpoena.

CONCLUSIONS OF LAW

1. The Respondent's conduct violated N.J.A.C. 11:5-6.4(a), N.J.S.A. 45:15-17(d), and N.J.S.A. 45:15-17(e), with respect to Seth Martinez, in that the Respondent failed to comply with the laws of agency, failed to comply with the principles governing fiduciary relationships, and failed to protect and promote the interests of Martinez by failing to account for or pay over \$5,821 to Martinez.
2. There is insufficient evidence that the Respondent violated N.J.S.A. 45:15-17(o) and N.J.A.C. 11:5-5.1(a) and (c) as alleged in the OTSC.
3. The Respondent's conduct violated N.J.S.A. 45:15-12 in that he failed to maintain a designated main office open to the public.
4. The Respondent's conduct violated N.J.S.A. 45:15-17(e) in that he demonstrated unworthiness by failing to appear and produce records on March 16, 2015 as required in the REC's written notice dated March 5, 2015.
5. The Respondent's conduct violated N.J.S.A. 45:15-17(s) in that he failed to notify the Commission within 30 days that he had been charged with a crime.

DETERMINATION

At the conclusion of the hearing and executive session in this matter, and after further deliberations on February 8, 2022, the Commission voted in favor of finding the violations and imposing the sanctions described in this Final Order of Determination. In arriving at the determination in this matter, the Commission took into consideration the testimony of the witness, documents admitted into evidence, 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).

Count One of the OTSC alleges that the Respondent violated N.J.S.A. 45:15-17(o) and N.J.A.C. 11:5-5.1 (a) and (c) by commingling funds and failing to maintain separate bank accounts for himself and the property owners. It also alleges that the Respondent violated N.J.A.C. 11:5-6.4(a) in that he failed to protect and promote the interests of his principals.

The OTSC alleges the Respondent “failed to turn over rent money and security deposits that he had collected on rental properties” which were the subject of property management agreements between the Respondent and several complaining consumers. The failure to account for or to pay over any moneys belonging to others, coming into the possession of the licensee constitutes a violation of N.J.S.A. 45:15-17(d). Further, the OTSC alleges the Respondent failed to protect and promote the interests of his clients by misappropriating funds, as evidenced by the default judgment obtained by a client. The Respondent’s failure to protect and promote the interests of his clients demonstrates unworthiness, incompetency, bad faith, or dishonesty in violation of N.J.S.A. 45:15-17(e).

N.J.A.C. 1:1-6.2(a) provides that “[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge’s discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.” Pursuant to N.J.A.C. 1:1-6.2, the Commission amends the pleadings to conform to the proofs for purposes of clarification. Thus, Count One of the OTSC in this matter should be conformed to reflect the proofs and the correct regulatory violations as follows: “Respondent’s failure to turn over rent money and security deposits that he had collected on rental properties is in violation of N.J.S.A. 45:15-17(d); Respondent’s failure to protect and

promote the interests of his clients by misappropriating funds constitutes a violation of N.J.S.A. 45:15-17(e).”

Sufficient competent evidence was presented demonstrating that the Respondent violated N.J.S.A. 45:15-17(d), N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a) only with regard to property owner Seth Martinez. The default judgment obtained by Martinez against the Respondent and Burke & Company legally established that the Respondent had, in fact, misappropriated a total of \$6,940.80 and the itemized statement submitted by Martinez demonstrated that a portion of said judgment total (\$5,821) included the unremitted monies stated in the OTSC. S-4.

The allegations of commingling and failure to maintain separate accounts against the Respondents with respect to Martinez were not proven by sufficient competent evidence. The allegations of misappropriation against the Respondent pertaining to the other property owners Killian, Muniz, Rovello and Chin, however, were not proven by sufficient competent evidence. The documents offered into evidence concerning Killian did not relate to monies owed to Killian but rather to a \$2,000 security deposit owed to Killian’s tenant. S-3. As to Muniz and Rovello, the documentation submitted only established that an agency relationship existed with the Respondent but did not sufficiently detail or explain the specific funds that the Respondent allegedly misappropriated nor correlate to the amounts set forth in the OTCS. S-5; S-6. Similarly, with regards to Chin, an agency relationship was shown to have existed with the Respondent, but the figures set forth in Chin’s “Owner’s Statement” (S-7) do not correspond to the unremitted amounts stated in the OTSC and nothing explains the discrepancy.

Spillane testified that property owners Killian, Muniz, Rovello and Chin had lost the amounts set forth in the OTSC. His testimony, however, was hearsay and not support by any other competent evidence. “Notwithstanding the admissibility of hearsay evidence, some legally

competent evidence must exist to support each ultimate finding of fact.” N.J.A.C. 1:1-15.5(b). Moreover, no competent evidence was offered to support the allegation that the Respondent had violated N.J.A.C. 11:5-5.1 (a) and (c) given that the PNC Bank records do, in fact, indicate that there existed escrow sub-accounts for tenants and does not show any transactions where money flowed from the property owner’s account into the Respondent’s personal bank account.

A preponderance of the competent evidence was presented to prove Count Two of the OTSC which alleges that the Respondent violated N.J.S.A. 45:15-12 by failing to maintain a designated main office open to the public. Spillane’s testimony established that the Respondent had last provided the REC with an office address of 528 Eayrestown Road, Suite 100, Southampton, New Jersey and did not update same. Spillane’s testimony regarding his visits and his personal observations at said location, together with the statements of the hearsay statements of Respondent’s mother, proved that this licensee address was not being maintained by the Respondent as an active business office open to the public.

Count Three of the OTSC alleges that the Respondent’s conduct violated N.J.S.A. 45:15-17(e) in that he demonstrated unworthiness by failing to appear and produce records on March 16, 2015 and on March 26, 2015. There was sufficient evidence presented that the Respondent violated N.J.S.A. 45:15-17(e) given that he, in fact, had received written notice on March 5, 2015 via email from the REC setting the date of March 16, 2015 for him to appear and produce records, and that thereafter he failed to appear on said date.²⁴ S-8. However, there is no evidence that there

²⁴ The REC did receive a second email from the Respondent, dated March 16, 2015, which again acknowledged that he had received the prior written notice to appear with records on that specific date. Nevertheless, the Respondent advised that he would not be appearing, and no further contact was received from the Respondent to reschedule. S-8.

was actual service of the REC Subpoena setting the date of March 26, 2015 for him to appear and produce records, despite the good faith efforts of Spillane to have him served personally. Ibid.

Sufficient credible evidence was offered to substantiate the allegations in Count Four of the OTSC in that the Respondent violated N.J.S.A. 45:15-17(s) in that formal criminal charges had been filed and an indictment had been returned in 2016 while he had an active license, which did not expire until July 2017, and the Respondent failed to notify the Commission within 30 days of said events.

No violation is found with respect to Count Five of the OTSC for the Respondent's license having already been revoked by operation of law prior to the filing of the OTSC as this circumstance does not constitute a separate violation of any specific REC statute or regulation and no such specific violation is alleged in Count Five of the OTSC.

Penalty Against the Respondent²⁵

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.

²⁵ After the May 25, 2021 hearing in this matter, the Commission initially determined that the Respondent shall pay a total fine of \$115,000 with respect to twelve violations of the real estate laws, comprised of a \$75,000 fine for eight violations related to Count One; a \$10,000 fine for one violation found related to Count Two; a \$20,000 fine for two violations related to Count Three; and a \$10,000 fine for one violation related to Count Four. However, after an additional review of the witnesses' testimony and documentary evidence entered into the record on May 25, 2021, the Commission further deliberated and determined that there is insufficient evidence to support the number of violations initially found. As such, this Final Order reflects an amended decision by the Commission and correctly reflects the violations that the Commission finds that the Respondent committed, and which are supported by the evidence admitted during the hearing in this matter.

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, *supra* at 532-533. Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for “any conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty.” N.J.S.A. 45:15-17(e). N.J.S.A. 45:15-17 further states that

if a licensee is deemed to be guilty of a third violation of any of the provisions of this section, whether of the same provision or of separate provisions, the commission may deem that person a repeat offender, in which event the commission may direct that no license as a real estate broker, broker-salesperson, or salesperson shall henceforth be issued to that person.

Further, N.J.S.A. 45:15-41 states that

upon the issuance of a court order for payment from the real estate guaranty fund the license of the broker, broker-salesperson, or salesperson, whose acts gave rise to the claim, shall be revoked and no such broker, broker-salesperson, or salesperson shall be eligible for reinstatement of his license until he shall have satisfied the judgment in full including reimbursement of the real estate guaranty fund together with interest.

The facts indicate that the Respondent acted in bad faith in this matter. The Respondent’s conduct demonstrates a lack of good judgment as well as a complete disregard for the real estate laws of this State. Additionally, N.J.S.A. 45:15-17 provides that if the Commission deems a licensee “to be guilty of a third violation of any of the provisions of [N.J.S.A. 45:15-17] ..., the commission may deem that person a repeat offender, in which event the commission may direct that no license shall henceforth be issued to that person.” Given the seriousness of the

Respondent's actions and the number of violations found by the Commission, the Commission deemed the Respondent to be a repeat offender and determined that a lifetime revocation of any and all real estate licenses presently or formerly held by the Respondent is necessary and appropriate.

Furthermore, pursuant to N.J.S.A. 45:15-17, 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. The facts presented in this matter are undisputed. It is imperative to acknowledge that the Respondent's conduct is so severe it rises to the level of bad faith. The default judgment obtained by Martinez against the Respondent and Burke & Company legally established that the Respondent had, in fact, misappropriated a total of \$6,940.80 (\$6,640 in misappropriated funds and \$300.80 in costs) and the itemized statement submitted by Martinez demonstrated that a portion of said judgment total (\$5,821) included the unremitted monies as found herein and stated in the OTSC. S-4. The Respondent undeniably violated a variety of real estate laws, including failing to protect and promote the interests of his principals, failing to comply with a duly issued subpoena, failing to notify the Commission within 30 days that he had been charged with a crime, and failing to

maintain a designated main office open to the public. This factor weighs in favor of a significant monetary penalty.

The second factor of the Kimmelman analysis is used to determine the respondent's ability to pay the fines assessed. 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 analysis is the amount of profits obtained from the illegal activity. In this case, the itemized statement submitted by Martinez demonstrated that \$5,821 of the judgment total was comprised of unremitted monies, as stated in the OTSC. S-4. 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. The public is harmed when licensed professionals fail to maintain the level of honesty and trustworthiness demanded under the laws of this State. It is the responsibility of the Commission to ensure that individuals who hold licenses demonstrate behavior which instills the utmost public trust. It must be recognized that salespersons and brokers engaged in the business of real estate in New Jersey act as fiduciaries, and they are "required to exercise fidelity, good faith and primary devotion to the interests of [their] principal[s]," Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 553 (1967), and "reasonable skill, care and diligence in performing" the business of real estate with regard to their clients. See Sullivan v. Jefferson, 167 N.J. Super. 282, 286-287 (App. Div. 1979). The Legislature explicitly recognized the need to protect real estate consumers by ensuring that licensees possess good moral character, honesty, integrity, and trustworthiness. See N.J.S.A. 45:15-9(a). In this matter, the Commission found that the Respondent's conduct constituted violations of N.J.S.A. 45:15-17(d), N.J.S.A. 45:15-17(e), and N.J.A.C. 11:5-6.4(a) relating to Seth Martinez in that he failed to comply with the laws of

agency, failed to comply with the principles governing fiduciary relationships, and failed to protect and promote the interests of Martinez by misappropriating \$5,821 from Martinez. This factor weighs in favor of a significant monetary penalty.

The fifth factor in a Kimmelman analysis is the duration of the illegal conspiracy or scheme. The facts outlined in this case show misconduct by the Respondent. For example, Martinez provided the REC with a written statement for the months of October through December 2014 itemizing the total monies “stolen” by the Respondent. S-4. The \$5,821 outlined in Martinez’s breakdown were funds misappropriated by the Respondent and were the subject of a Real Estate Guaranty Fund claim submitted by Martinez on behalf of 349 Billingsport Road, LLC. The REC verified Martinez’s guaranty fund claim, authorized payment, and executed a consent order dated on June 29, 2017, assigning the default judgment against Respondent and Burke & Company entered in the New Jersey Superior Court, Docket No. CAM-DC-1211-15, in the amount of \$6,940.80 (\$6,640 in misappropriated funds and \$300.80 in costs). S-4. Respondent’s multiple transgressions occurred between 2014 and 2016, and thus this factor supports 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, supra, 108 N.J. at 139. Here, the Respondent has not faced any criminal punishment for his actions. While there were criminal charges filed in Burlington County, the charges were subsequently dismissed. Additionally, the Respondent has not made any payment towards satisfaction of the \$6,940 default judgment obtained by Martinez. As such, this factor weighs in favor of a significant monetary penalty.

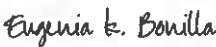
The seventh and final factor takes into consideration the Respondent's past violations, of which there are none. No evidence of past violations was presented at the hearing. This factor does not weigh in favor of a significant monetary penalty.

Accordingly, and pursuant to N.J.S.A. 45:15-17 and N.J.S.A. 45:15-41, the Commission imposes the following sanctions:

1. The Commission imposes a lifetime revocation of any and all real estate licenses presently or formerly held by Respondent Burke.
2. Respondent Burke shall pay a total fine of \$35,000 with respect to the violations of the real estate laws as found in this Final Order, \$10,000 for the violations found related Martinez in Count One; \$10,000 for the violation found related to Count Two; \$10,000 for the violation found related to Count Three; and, \$5,000 for the violation found related to Count Four.

SO ORDERED this 13th day of April, 2022.

By: Christina Banasiak, Commissioner
Darlene Bandazian, Commissioner
Jacob S. Elkes, Commissioner
Denise M. Illes, Commissioner
Carlos Lejniaks, Commissioner

DocuSigned by:

SD4CC9788508402
Eugenia K. Bonilla, President
New Jersey Real Estate Commission

04/21/22 | 8:48 AM EDT

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