STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE CENTER, BLDGS. 68-69
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND 02920

DEBORAH MACHALA, **Complainant**	:	
v.	:	**DBR No. 12RE031**
BRUCE E. THUNBERG, **Respondent.**	:	

DECISION

Hearing Officer: Ellen R. Balasco, Esq.

Dates of Hearing: October 29, 2013 and November 6, 2013

Appearances: For Complainant: *Pro se*

For Respondents: Vincent A. Indeglia, Esq.

I. INTRODUCTION

This matter came before the Department for Business Regulation ("Department") as the result of a complaint filed on or about December 17, 2012 by Deborah A. Machala ("Complainant") against Bruce E. Thunberg ("Respondent"). This Respondent holds a real estate salesperson's license issued by the Department pursuant to R.I. Gen. Laws §5-20.5-1, *et seq.*, and at all times relevant hereto he was affiliated with Landmark Realty Group, LLC, previously known as RE/MAX Flagship ("Landmark").

After an investigation into the details of this Complaint by the Department, an order appointing the undersigned Hearing Officer and providing notice of complaint hearing was issued on June 6, 2013, and was duly served on the parties ("Order"). Thereafter, on June 12,

2013, an Amended Order was issued which corrected the property address of the real estate transaction in question. On June 27, 2013, a Motion to Continue Pre-Hearing Conference was submitted by Respondent seeking rescheduling of the date due to unavailability of counsel. The Hearing Officer was advised on July 8, 2013 that the Complainant would not agree to that continuance. Respondent's counsel advised that he would be appearing without his client.

A pre-hearing conference in this matter was held on July 9, 2013. At that pre-hearing conference, the issues in this matter were clarified and an opportunity for discovery was afforded to the parties. The deadline for completion of discovery was set for August 9, 2013 and a date for hearing was scheduled on September 24, 2013. On September 17th, the undersigned received a message by electronic mail from the Complainant requesting a new date for hearing. By agreement with counsel for the Respondent, the evidentiary hearing was scheduled to begin on October 29, 2013. Hearing commenced on that date, and the case was continued to November 6, 2013 for conclusion.

It is noted that the Complainant initially failed to comply with the discovery requests propounded to her prior to the discovery deadline, prompting Counsel for the Respondent to consider objections to the Complainant's submission of documentary evidence at hearing due to her non-compliance. On the date of hearing, however, it was reported that discovery was satisfactorily completed by both sides.

During September, 2013, counsel for the Respondent filed Applications for Witness Subpoenas for first two parties: Scot Hallberg, Principal Broker for Landmark Realty Group, and Timothy Kane, Esq., and later for one additional witness, John V. McGreen, Esq., both of which included summaries of their anticipated testimony. Witness subpoenas were issued by the Director and apparently served on the witnesses at the direction of counsel.

On the hearing dates, both parties and their respective witnesses appeared and declared their readiness for hearing. Complainant appeared without counsel, and indicated that she waived her right to be represented at hearing.

As a preliminary matter at the commencement of hearing, one of the witnesses expressed through counsel that he may have been unable to testify on the grounds of attorney/client privilege. Timothy Kane, who has under subpoena issued at the request of Respondent's counsel, had represented the Complainant in a closing relative to the transaction described in her complaint. After discussion, and an explanation of waiver of the privilege, the Complainant signed a waiver form indicating that she did not object to any testimony to be elicited from Attorney Kane.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws §§ 5-20.5-1 *et seq.*, 42-14-1, *et seq.*, and 42-35-1, *et seq.*

III. ISSUES

As is often the case in many non-prosecution matters, the Complaint did not contain a list of the specific provisions of the law and regulations alleged to have been violated by the Respondent. Based on a review of her written Complaint, coupled with her testimony during the hearing, she has alleged that the Respondent has committed violations of the following provisions of the law during the real estate transaction at issue:

1. That Respondent violated R.I. Gen. Laws § 5-20.5-14(a)(1) by making a substantial misrepresentation;
2. That Respondent violated R.I. Gen. Laws § 5-20.5-14(a)(2) by making a false promise of a character likely to influence, persuade or induce any person to enter into any contract or agreement when he or she could not or did not intend to keep that promise;

3. That Respondent violated R.I. Gen. Laws § 5-20.5-14(a)(20) by engaging in conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness or incompetence.

IV. STANDARD OF REVIEW FOR AN ADMINISTRATIVE HEARING

It is well settled that in formal or informal adjudications modeled on the federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 at 759 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* at 763-766. See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases); *Parker v. Parker*, 238 A.2d 57, 60 (R.I. 1968) ("satisfaction by a 'preponderance of the evidence' [is] the recognized burden [of proof] in civil actions"). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. See *Parker*, 238 A.2d at 60. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 100 (R.I. 2006).

Here, the proponent of this action is the Complainant. As such, she bears the burden of establishing why it is more likely than not that Respondent, during the course of a real estate transaction, conducted himself in a manner that violated the statutes and/or regulations under which he holds his real estate broker's license, as set forth in Section III herein. The allegations made by the Complainant must be proven by a preponderance of the evidence.

V. DOCUMENTARY EVIDENCE, MATERIAL FACTS AND TESTIMONY

A number of documents were presented by the Complainant and the Respondent during the hearing. These documents, where relevant, are described herein during the points in witness testimony that they were admitted as full exhibits. In addition, the parties agreed that the documents provided to the Department which accompanied Ms. Machala's complaint, and Mr. Thunberg's response to her complaint would also be admitted as evidence to be reviewed by the Hearing Officer.

A. Complainant's Case in Chief

After being duly sworn, the Complainant testified in narrative form to detail the circumstances surrounding the real estate transaction which formed the basis for her complaint. She testified that the Respondent not only represented her as a Seller's agent for several properties, but that she had also leased property to him, and had "many, many dealings with him over the span of approximately five years prior to the year 2010, when one of her properties was sold through his listing.

She stated that the precipitating event prompting her to file this complaint was that while attempting to sell her home, she discovered that she owed outstanding taxes due on the property. At the suggestion of her accountant, she attempted to borrow against a 50 acre parcel which she owned to obtain the funds to pay the taxes due. It was her intention to borrow against that parcel to pay her taxes and clear the title to her home for sale. After a title search was conducted, she was advised that there had been a lien placed against that

parcel in conjunction with the sale of a riding arena in 2010. This, she claims, was an "absolute shock" to her.[1]

She testified that, upon request, her attorney did present to her a copy of the lien agreement that she had signed at the closing which took place on November 17, 2010. A copy of that document was marked as Complainant's exhibit #1. It is a four-page document titled Promissory Note Secured by a Mortgage in the amount of $44,000.00, and Mortgage Deed payable to Landmark Realty Group, each signed by Ms. Machala and witnessed by her attorney, Timothy Kane.

In her testimony, Ms. Machala stated that she did recognize the documents, acknowledged that she had, in fact, signed both, and had "no problem" with the contents of them. She stated that she had every intention to pay the commission owed to Landmark.

According to the terms of the sale of the arena property, Ms. Machala is holding the mortgage on that sale for a period of seven (7) years, and the commission amount would be paid to Landmark Realty from the monies she collected from the new owner, at a rate of $1000 per month. She testified that she was told at the closing that if the new owner of the arena property defaulted at some point, that the remainder of the commission would no longer be owed. She had no memory of who made that statement to her.

She stated that at the closing, papers were being pushed in front of her with the instruction to "sign here" and she had no idea whatsoever what she was signing. In her exact words "who reads every document at a closing?" She willingly admitted that she did

---

[1] The "real estate transaction" involved in this complaint involves three separate parcels, and spans a number of years. For clarity, they are described as follows. First is the property located at 121 Tarkiln Road, Smithfield, Plat 50, Lot 14, which includes a 26 stall horse stable and riding arena (hereinafter referred to as the ***"arena property"***). The second is an undeveloped 50 acre parcel of land, located at 131 Tarkiln Road, described as Plat 50, Lot 13 (hereinafter referred to as the ***"50 acre parcel"***). The third property mentioned during the hearing was a combined parcel including the Complainant's home and a 12 stall horse barn located at 101/113 Tarkiln Rd, described as Plat 50, Lots 15A and 16 (hereinafter described as the ***"house property"***).

not read the Promissory Note and Mortgage Deed at that time. She reiterated that she did not find out until much later that a lien had been placed against the 50 acre parcel as part of her closing on the arena property. She testified that she trusted her attorney and the Respondent, with whom she had dealt for many years. She indicated that they conducted real estate business, and were friends. She stated that she was not properly represented by either in this transaction.

In further testimony, Ms. Machala described the financial transaction which took place subsequent to the eventual sale of the arena property. According to her, the buyer paid her first year mortgage payments in advance so that a well located on the property could be repaired or installed. Landmark Realty held those funds pending the necessary repairs. The mortgage monies after that time period would be three thousand dollars from the buyer, two thousand to be retained by the Complainant, and one thousand to Landmark Realty for the commission.

Ms. Machala testified that Mr. Thunberg had held an exclusive listing for her property for approximately four years, and that he would have her sign "blank" status change forms to extend the listing agreement. She testified that she was never provided with copies of those forms. Over the four years the property listing price had been reduced from nearly one million dollars to approximately four hundred and fifty thousand, according to the Complainant. She understood that this was necessary due to the current economy.

Due to the vast reduction in price, the Complainant reportedly asked Mr. Thunberg verbally to reduce his commission from ten percent (10%) to six percent (6%). She testified that he did agree to that reduction in commission. However, as is shown by documentary evidence submitted at hearing by the Respondent, Ms. Machala executed an

Exclusive Right to Sell Listing Contract on July 21, 2006 which clearly indicated that the commission rate was to be ten percent (10%). She stated that the agreement between them occurred once, she did not know when, and she did not ask him to reduce that agreement to writing, or to change the terms of the Listing Agreement on paper.

She also testified that the Respondent produced a couple who were to become potential buyers for the arena property ("Locke and Cast"). Due to the financial status of this couple, Mr. Thunberg reportedly suggested to the Complainant that they be allowed to Lease the arena property initially, with an option to purchase. Accordingly, a Lease with Option contract was executed by Ms. Machala and Locke and Cast on July 3, 2007. According to the Complainant, this contract was executed in her attorney's (Timothy Kane) office, and that at that time Mr. Thunberg asked her to pay him a ten percent commission on the rental payments, to which she agreed. She made these "commission" payments, she testified, to Mr. Thunberg's business "Twin Peaks Land and Cattle Company."

When cross-examined on this point, Ms. Machala indicated that some work had been done on the arena, including window replacements and excavation, but that the Respondent did not personally pay for any work done to the arena property. She disagreed with the characterization that the Respondent performed or caused to be performed any work on the property that had been authorized by her.

According to her testimony, Locke and Cast were evicted after 11 months for non-payment, and that they left significant damage to the property during their tenancy. She states that she personally cleaned and repaired the property after their eviction, for which she also incurred attorney's fees.

The Complainant further testified that Mr. Thunberg also presented another potential buyer for the arena property, whom she referred to as the "R.I. Girl Scouts

Olympics", though she had no recollection of exactly when this group was presented to her. A representative for this group, based in Florida, executed a Purchase and Sale Agreement and paid a deposit in the amount of ten thousand dollars ($10,000) to Mr. Thunberg and Landmark Realty.

According to Ms. Machala's testimony, the group was given a one year period in which to arrange financing. The property was taken off the market during this time. This sale failed, and according to Complainant's testimony, the deposit monies are still being held by the R.I. General Treasurer as the parties continue to dispute ownership of the deposit. She states that she was upset that she lost a year of marketing time for the property, but does not blame Mr. Thunberg for this failed transaction, and does not allege that he in any way caused it.

In summary she testified that she believes Mr. Thunberg was not honest with her, and that he "wrongly represented her" throughout this transaction.

During cross-examination by counsel for the Respondent, Ms. Machala's recollection was refreshed by review of Respondent's Exhibit F, the Purchase and Sale Agreement executed by the U.S. Gymnastics Center, Inc. She indicated that she did not remember reading the document, leading to her confusion about the actual name of the organization with whom she had contracted.

In further cross-examination testimony, Ms. Machala stated that she first met the Respondent when he approached her about renting out the riding arena for his horses. After renting it for two months - July and August of 2006 - at a rate of two thousand dollars ($2000) per month, he discovered that the property was unsuitable for his intended use, and the parties cancelled the lease by agreement. It was at or near that time that Ms. Machala engaged the Respondent to act as her seller's agent to list the arena property.

The Complainant acknowledged that Mr. Thunberg advised her that work would need to be performed at the property to make it marketable, and that he undertook the arrangement of those repairs. She stated, however, that she never asked or authorized him to participate in having the repairs and work done.

She also acknowledged that Mr. Thunberg provided significant assistance to her in obtaining a special use permit from the Smithfield Zoning Board of Review to allow for a residential unit to be constructed in the arena property. He completed the application process, and appeared before the zoning board to testify. She admitted that without this permit having been issued, she would have been unable to market this property to Locke and Cast as lessor/option buyers, and that she was very grateful to the Respondent for his help.

At the time she signed a listing agreement with Mr. Thunberg, Ms. Machala testified, that she did not have a problem with paying him the ten percent (10%) commission as the property was listed at $945,000.

There were a number of extensions to the Listing Agreement, which she agreed to, and there were no changes in the commission to be paid in the listing agreement status change documents that she signed.

The Complainant testified that she did not recall reading the Lease with Option to Purchase, either before or when she signed it, because she trusted the Respondent and her attorney. In fact, she stated specifically that it was not her practice to read any of the documents prepared by either Mr. Thunberg or her attorney, as she trusted them both.

She did recall that there was a $10,000 deposit paid with this and that the option/lessees Locke and Cast ultimately breached the agreement. They could not exercise their option due to inability to get financing, and to keep up with the rental payments. Her

testimony revealed that she collected "something like" $18,000 in rent from them. When they were evicted, she also retained the $10,000 deposit. Of that amount, $7,500 was kept by the Complainant and $2,500 went to her brokers, in accordance with the terms of the listing agreement.

During the term of the Lease with Option, the property was off the market. Respondent's counsel produced Exhibit D, which was a status change form showing that the property was placed "back on market" on April 16, 2009. According to the Complainant, the option/lessees were living in a camper on the property until a special use permit was obtained from the Town, at which point Locke and Cast began building an apartment on the second floor of the arena. She repeated that if Mr. Thunberg had not been successful in his efforts to obtain the special use permit for her, she would not have been able to rent to these parties, and she was very grateful for his help.

When her attention was called to Respondent's Exhibit F – Purchase and Sales Agreement with USGTC, Inc., the Complainant indicated that she did not remember the exact name of the other party. She testified that her memory is poor regarding what happened in the past with the many property transactions she was involved in with Mr. Thunberg, and she does not recall all the "details" surrounding these real estate transactions. She stated "my memory was better at the time than it is now."

After her recollection of the transaction had been refreshed by counsel, the witness testified that the USGTC, Inc. signed a Purchase and Sale agreement for the amount of one million three hundred thousand dollars ($1,300,000.00), of which the ten thousand dollars ($10,000.00) was to be used as a deposit, with a check made payable to Landmark Realty. The Purchase and Sale agreement was executed on October 20, 2008, and included a planned closing date of April 15, 2009. The closing did not take place on the projected

date, and the Buyer breached the agreement some months later. As ownership of the $10,000 deposit monies was in dispute, the funds were forwarded to the Office of the General Treasurer, where it remains as of the date of hearing. Neither party has initiated litigation to recover those funds.

On September 20, 2010, the Complainant and yet another potential buyer for the property executed a Purchase and Sales Agreement with a sale price of four hundred fifty thousand ($450,000.00) dollars, and a closing date of October 1, 2010. Ms. Machala did acknowledge through testimony that, at the time she read and signed the Purchase and Sales Agreement, she was aware that she would owe a commission to the brokers (Landmark Realty) in the amount of forty five thousand dollars ($45,000.00), or ten percent (10%) of the purchase price. This transaction did take place, but the closing took place on November 17, 2010. (See Respondent's Exhibit "H") The Complainant testified that she was represented by an attorney at the closing, and that she was very pleased with his services.

Under the terms of the sale, the Complainant was to provide financing for the purchase price for a period of seven years, at five percent (5%) interest. The loan was secured by a mortgage on the 101 Tarkiln Road property to the Complainant as evidenced by a Promissory Note, which was appended to the mortgage deed conveyed.

The Complainant verified in her testimony that she also signed a Promissory Note Secured by a Mortgage on November 17, 2010 at the closing, which was in the amount of $44,000 due to Landmark Realty Group. (Complainant's Exhibit 1) (The $1000 difference was due to the deposit paid at the time of having been retained by Landmark.) This document clearly contained a paragraph, just above where the Complainant executed it:

> "The indebtedness evidenced by this Note is secured by a Mortgage of even date herewith on property identified as Tax Assessors Plat 50, Lot 13 in the Town of Smithfield."

When shown a copy of the Mortgage Deed executed by her, she verified her signature, and that the Deed bears the statement "For legal description of the mortgaged premises see exhibit "A" attached hereto and made a part hereof by reference." She did not recall whether she checked to see if said "exhibit A" was in fact attached, but also stated that she is not accusing anyone of slipping the document in after she had signed the Deed.

A Broker's Statement was also presented to the Complainant at the closing clearly stating that the Fee for Professional Services due to Landmark Realty Group in the amount of $45,000, or ten percent of the selling price. She did indicate that she "does not remember whether she read any of the documents" given to her for signature at the closing, stating that "these papers were put in front of me and I was told to sign them." She testified that the Respondent did not review all the documents with her prior to or at the closing, and she rejected the notion that this was her attorney's job when it was raised by counsel, stating "I am not going to throw my attorney under the bus."

The Complainant's daughter, Christi Machala offered testimony regarding having engaged the services of the Respondent as a seller's agent to sell her home in Cranston, Rhode Island. Counsel for the Respondent objected on the grounds of relevancy, and the undersigned Hearing Officer agrees that her testimony regarding an unrelated real estate transaction was not relevant to the determination of this proceeding, nor was it particularly probative as to the allegations made against the Respondent.

She also testified that she engaged Mr. Thunberg's services both as a seller's agent, and later as a buyer's agent, and that she was very satisfied with his services on both

occasions. She stated that she did not personally observe or hear the Respondent make any statements to her mother regarding the arena property transaction. The undersigned Hearing Officer does find this portion of this witness's testimony to be relevant in weighing the evidence presented in this hearing.

B. Respondents' Case in Chief

Attorney Timothy Kane testified, in response to a subpoena issued by counsel for the Respondent. He met Mr. Thunberg in 2007. He stated that he prepared the documents for the closing between Complainant and the buyer of the arena property. According to his testimony, Mr. Kane explained each of the documents to Ms. Machala at the closing, and he witnessed her signature on them, in addition to notarizing her signature. He caused them to be recorded in the land evidence records. She signed them freely and voluntarily in his opinion and never voiced an objection to anything contained in those documents at any time to him or in his presence.

His attention having been called to Complainant's Exhibit #1, Promissory Note and Mortgage Deed, the witness testified that he specifically recalled explaining to Ms. Machala that the Promissory Note she was signing was in fact being secured by a mortgage on the 50 acre parcel of land that she owned at the time. In addition, it was stated in his testimony that he drafted an escrow Agreement (Respondent's Exhibit K) to record the obligations of the Complainant and the Buyer regarding certain funds which were to be held by Attorney Kane as escrow agent for the purpose of installing a new well and septic system on the property.

The agreement was necessary as no money would be changing hands at the closing, so the mortgage payments are paid by the Buyer directly to Attorney Kane's IOLTA

account, and he would make the disbursements as outlined by the Agreement, specifically for a well to be installed on the property, for legal fees due and owing to him from past representation of Ms. Machala, and the commission payments to Landmark Realty.

The witness stated that he was never told by anyone that the Complainant was unhappy with the fact that a broker's commission was to be paid to Landmark, and the amount of the broker's commission was never discussed by her or anyone else in his presence. He testified that, at no time during the closing or subsequent thereto did the Complainant make any comment to him indicating that she was dissatisfied with his services, or with the services of Mr. Thunberg.

Scott Hallberg was presented next, as a witness who also appeared in response to subpoena. He is the owner/principal broker of Landmark Realty, the office with which the Respondent was affiliated at all times relevant to the transactions that form the basis for this action. He identified Exhibit I as a Brokers Statement which is prepared in the routine course of all transactions in his office. In the instant case, he did have independent recollection that the commission fee was to be ten percent (10%) of the purchase price. He specifically recalled this because, in his twenty four years of experience, his office policy has been that commercial property and land-only transactions are charged ten percent, while residential transactions may vary from 4, 5 or 6%, which he finds to be consistent with practices in the MLS marketplace.

Mr. Hallberg stated that the commission was financed in the transaction at issue in this matter, rather than being paid at closing, which is the normal practice. Landmark was to be paid $1000 at closing and $1000 monthly thereafter, without interest, until the commission of $45,000 was paid in full. This, he testified, is a concession he agreed to make in this case, but it is not customary practice at his brokerage. To insure payment,

Attorney Kane was engaged and paid by Landmark Realty to draft a mortgage deed and promissory note on another parcel of land owned by the Seller.

He testified that he never received any complaint from Ms. Machala regarding the amount of the commission in this case or the activities of the Respondent, and that he, as the Principal Broker, was the only party with decision-making authority at Landmark Realty regarding commission fee setting. He was aware of the details of this transaction, and the previous failed transactions on this property, as they progressed due to his supervisory duties over the Respondent.

The final witness called was Bruce Thunberg, the Respondent in this matter. He has held a real estate salesperson license issued by the Department for the past seven (7) years, and at the time of hearing was affiliated with Randall Realtors, but at all times relevant hereto, was affiliated with Landmark Realty Group, LLC. Landmark was purchased by Randall several months before the hearing.

The witness had independent recollection of the lengthy set of transactions in which he rented from, and acted as sales agent for the Complainant beginning in 2006. In testifying about the Cast/Locke Purchase Option transaction, he indicated that Helen Cast was a well-known equestrian instructor and show person, who wished to relocate her home and training facility to Rhode Island from Massachusetts. After months of showing her the property and negotiating terms, a Lease/Purchase contract was signed. It was necessary to obtain a Special Use Permit from the Town of Smithfield, and a new septic system to modify the arena in order to accommodate Cast and Locke. He discussed these requirements at length with the Complainant.

He described that the existing septic system on the property had been installed years earlier without a design and installation plan approved by the Department of Environmental

Management ("DEM"), and without a permit. In order to comply with state laws, it would be necessary for an engineer to design a system, and perform test holes, a backhoe to dig those holes, and a full application and fee to be submitted. The approximate cost of this work at the time would have been between $10,000 and $15,000.

Mr. Thunberg contacted a local engineer and surveyor who had worked on the property previously to begin the process. There were wetlands, rocks and other issues and he engaged Adler Brothers to hire a backhoe. Respondent reportedly paid for the backhoe out of pocket, because Helen Cast refused to pay. The test holes created at this time were the ones eventually used by the actual purchaser of the property to install the system, so he contends that Ms. Machala was the direct beneficiary of the sums he expended.

In order to assist the Complainant in selling the property, and at her request, he also filed for and secured a Special Use permit for the property on two occasions – once on December 19, 2007 and again on October 27, 2010. The first was for the Cast/Locke tenancy as they required a residential unit in the arena. He filed all necessary paperwork and notices, and appeared at the hearing and the permit (with a one year expiration date) was issued. Cast and Locke failed to construct with the one year period, so that permit expired. When the property was eventually purchased in 2010, it was necessary for him to repeat the process over again for the buyer's intended use.

Regarding the sales commission on the eventual sale of the arena property, it was the Respondent's emphatic testimony that he never agreed to accept or recommend to Landmark Realty that the ten percent commission fee would be reduced. He did state that at one point during the period (in April of 2007) he was acting as sales agent for the Complainant for all of the property owned by her as a package for the asking price of four

million dollars. Because this was listed as a "single family residential" listing, the commission fee for that listing agreement would have been for six percent.

He stated that, during the approximate five years that he acted as a sales agent for Ms. Machala, the properties she owned on Tarkiln Road were packaged and marketed in several different groups; the entire parcel, the entire parcel with the 10 acre parcel, arena only, etc. For each "package"' if the parcel including the residence was included, the sales commission was to be 6%. If the arena property, land, business was listed without the residence, the commission fee was to be 10%, in accordance with office policy.

Regarding the payments made to him by the Complainant during the Cast/Locke tenancy, he testified that this was in no way intended to be treated as a "commission" on the rental fees. The payments made to him were for reimbursement of the monies he had expended in the improvements to the property previously described and for rent he had paid for his own cancelled lease for the property. During the course of the tenancy, the Complainant reimbursed the Respondent the sum of $ 8,420.00 (subtracting out the return of his $2000.00 rental payment from August of 2006 on his failed lease). According to the invoices presented in documentary evidence, Mr. Thunberg had expended the sum of $9,115.00 out of pocket for improvements to the property.

Cast and Locke were evicted from the property for non-payment, and the Respondent was reportedly of assistance in obtaining that judgment.

There was another potential buyer presented by the Respondent in October of 2008 – the U.S. Gymnastics Training Center, Inc. This transaction failed, due to their supposed inability to secure financing through the RIDEC. However, the Respondent was of the belief that they were backing out of the deal based on the financial state of the economy during that period. He corresponded with attorney Alden Harrington, who represented

USCGT, Inc. to request evidence that they had at least applied for financing in accordance with the terms of the Purchase and Sales Agreement. After not receiving that documentation, he advised Ms. Machala that USGTC, Inc. was not entitled to a return of their $10,000 deposit. Mr. Thunberg states that he attempted to resolve the dispute by negotiating a percentage for each party to obtain, but that Ms. Machala did not agree. Therefore, those disputed ownership deposit funds were deposited with the office of the General Treasurer from the Landmark escrow account, and remained there as of the hearing date.

Respondent's marketing attempts were restarted in 2009, and he presented another buyer to the Complainant which resulted in a Purchase and Sales Agreement and eventual closing in November of 2010.

In further testimony, the Respondent indicated that he did not receive any complaints that Ms. Machala was dissatisfied in any way with his services or was upset about having to pay this brokers commission to Landmark Realty, until he received a call one evening at his home from a man identifying himself as her accountant in March of 2013. The man reportedly accused that Mr. Thunberg had taken too much commission from her in the sale of her property and that she was now in financial peril. He then asked that the Respondent refund a portion of the commission, and that the accountant be appointed as escrow agent for the funds. The witness testified that, when he told the caller that he had no authority or ability to do so, the caller threatened that he would cause a complaint to be filed against him with the Department of Business Regulation if this wasn't done. He reportedly told the witness during the call "you have to be careful, you'll lose your license."

C. Motion for Summary Judgment

Counsel for the Respondent made an oral motion to dismiss the complaint before the presentation of his case in chief.

The defense Motion is allowable in this administrative enforcement proceeding. Pursuant to Section 11, *Central Management Regulation 2 – Rules of Procedure for Administrative Hearings,* any party may request that the Hearing Officer enter any order or action not inconsistent with the law, provided that the types of motions made are permissible under the Rules and the Rhode Island Superior Court Rules of Civil Procedure ("Super.R.Civ.P.") Under Section 11(B), any such motion may be made orally during a pre-hearing conference or hearing.

The Hearing Officer withheld judgment on this Motion, in order to assess the evidence to be presented by the Respondent and weigh it against that presented by the Complainant. Based on the findings and recommendation set forth herein, that Motion is determined to create a moot point.

VI. DISCUSSION

R.I. Gen. Laws § 5-20.5-6(b) provides that the Department, after a due and proper hearing may suspend, revoke or refuse to renew any license upon proof that the holder of the license has violated the statutes pertaining to real estate licensure. In addition, R.I. Gen Laws § 5-20.5-14(b) authorizes the Department to levy an administrative penalty no exceeding one thousand ($1000) dollars for any violation of these laws. The facts alleged in the complaint and during the hearing, if preponderated, implicate three statutory provisions of the Rhode Island laws pertaining to real estate transactions.

The Complainant's testimony and her long narrative complaint have several recurrent themes. One, that she was desperate to sell the property at issue in this matter. Two, that she is in financial peril at the current time due to the buyer of her property beginning to default in her payments. Three, she believes that Mr. Thunberg made a verbal statement to her that the ten percent commission which was to be charged on this commercial transaction would be reduced to six percent at the time of closing. And finally that she had no idea that the monies she owed for the commission fee and for improvements to the property were to be secured by a mortgage on the ten acre parcel she owned.

A. **R.I. Gen. Laws § 5-20.5-14(a)(1) – Substantial misrepresentation** and

B. **R.I. Gen. Laws § 5-20.5-14(a)(2) – Making a false promise to influence or induce entry into a contract or agreement.**

The first provision implicated is R.I. Gen. Laws § 5-20.5-14(a)(1), which authorizes the Department to suspend or revoke a license where a licensee makes a substantial misrepresentation in a real estate transaction. As noted in a previous Department decision, statutory and regulatory requirements serve and protect the public interest by promoting real estate transactions based on honesty, good-faith, competency and fair-dealing. See *D'Orsi v. Santilli*, DBR No. 99-L-0086 (July 18, 2000).

In order to prove a violation of these statute sections, the Complainant must show that the Respondent did, in fact, misrepresent material facts, and also demonstrate that the misrepresentation was substantial. A misrepresentation is "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." *Travers v. Spidell,* 682 A.2d 471, 473 n. 1 (R.I. 1996) (per curiam) (quoting *Halpert v. Rosenthal,* 107 R.I. 406, 413, 267 A.2d 730, 734

(1970)). The meaning of substantial in this context has been defined in *Altomari v. Clark and Shirley*, DBR No.: 01-L-0160 (January 8, 2003):

> ... It is reasonable to interpret that substantial misrepresentation as envisioned in R.I. Gen. Laws § 5-20.5-14(a)(1) applies to the conduct of the licensees and its effect on the transaction at issue. Thus, the requirement that the misrepresentation be substantial in order to support a finding of a violation of R.I. Gen. Laws § 5-20.5-14(a)(1) infers that it is necessary for the misrepresentation to be made knowingly by the real estate licensee and affect the real estate transaction at issue (internal citation omitted).

A misrepresentation is "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." *Halpert v. Rosenthal,* 107 R.I. 406, 413, 267 A.2d 730, 734 (1970) (quoting Restatement *Contracts* § 470 at 890–91).

According to *Black's Law Dictionary*, Fifth Edition, "misrepresentation" is defined in pertinent part as follows:

> Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.

See also Restatement of Contracts, § 470 at 890-891.

Since the statutory requirements deal with real estate licensees involved in real estate transactions, it is reasonable to infer that the "substantial misrepresentation" applies to real estate licensee actions or real estate transactions. It is therefore reasonable to interpret that substantial misrepresentation as envisioned in R.I. Gen. Laws § 5-20.5-14(a)(1) applies to the conduct of licensees and its effect on the transaction at issue. Thus, the requirement that the misrepresentation be substantial in order to support a finding of a violation of R.I. Gen. Laws § 5-20.5-14(a)(1) infers that it is necessary for the

misrepresentation to be made knowingly by the real estate licensee and affect the real estate transaction at issue. *D'Orsi* at 13-14. It is well-settled in this jurisdiction that fraudulent misrepresentation is not actionable unless such misrepresentations are "acted upon by the plaintiff to its detriment." *International Shoe Co. v. Berick*, 55 R.I. 333, A. 297.

The difficulty this Complainant has in proving that the Respondent misrepresented to her either the terms of the sale and commission fee payment or the amount of the commission fee itself is that she cannot state with any certainty when Mr. Thunberg made those alleged misrepresentations, and no other person had first-hand knowledge that the statements were, in fact made by him at any time. Her second hurdle was to have proven that, had she known that the commission fee was ten percent, as set forth in the listing agreement, she would not have gone forward with the closing (i.e. that the "misrepresentation" affected the outcome of the real estate transaction).

That being said, even if she were able to substantiate a promise had been made to her by her having presented a witness to the conversation or a document containing a written promise, it would not constitute a misrepresentation of a *fact*, because according to the testimony of the Respondent's principal broker, Mr. Hallberg, he had not authorized any reduction in commission fees, and the Respondent did not have the authority to reduce the commission on his own.

She states throughout her testimony that she absolutely trusted the Respondent throughout their lengthy history, and the facts establish that he was successful in selling her property and in finding her a number of potential buyers before the parcel was eventually purchased. In fact, she stated numerous times in her testimony that she trusted him to the extent that she did not feel it was necessary to read the documents he was presenting to her,

both throughout his years of acting as her agent and also at the eventual closing. This is to her detriment in establishing that Mr. Thunberg himself made any misrepresentations to her about this transaction. It was incumbent upon the Complainant to insure that she was aware of its details, and could certainly have become so aware by simply asking questions, and reading the documents she was given.

Under the parol-evidence rule, " 'parol or extrinsic evidence is not admissible to vary, alter or contradict a written agreement.' " *Filippi v. Filippi,* 818 A.2d 608, 619 (R.I.2003) (quoting *Paolella v. Radiologic Leasing Associates,* 769 A.2d 596, 599 (R.I.2001)). "The basis of the rule is that a complete written agreement merges and integrates all the pertinent negotiations made prior to or at the time of execution of the contract." *Filippi,* 818 A.2d at 619 (quoting *Fram Corp. v. Davis,* 121 R.I. 583, 587, 401 A.2d 1269, 1272 (1979)). "A document is integrated when the parties adopt the writing as 'a final and complete expression of the agreement.' " *Id.* "Once integrated, other expressions, oral or written, that occurred prior to or concurrent with the integrated agreement are not viable terms of the agreement." *Id.*

Furthermore, "a party who **signs** an instrument manifests his assent to it and cannot later complain that he did not **read** the instrument or that he did not understand its contents." *C & J Leasing Corp. v. Paolino,* 721 A.2d 839, 841 (R.I.1998) (quoting *F.D. McKendall Lumber Co. v. Kalian,* 425 A.2d 515, 518 (R.I.1981)).

The Exclusive Right to Sell Listing Contract executed by the parties on July 21, 2006 clearly indicates that a commission of "10 percent of the gross sales price" was to be paid by the Seller in this transaction. Each subsequent time a Status Change form was executed, it indicated no other change other than the extension of the listing agreement was being made. The Promissory Note Secured by Mortgage (Complainant's Exhibit 1) had

attached to it a Mortgage Deed and property description for the ten acre parcel. Even in a light most favorable to the Complainant, if she had missed all of the opportunities to become enlightened about the specific details of an eventual closing, she was represented by competent counsel, whom she stated that she also trusted, and that he did a "fine job" for her. His testimony, which the Hearing Officer finds most credible, is that he described each and every document presented at and prior to closing to the Complainant, and that she indicated to him that she understood the terms of each. It is further uncontradicted that she was not forced, threatened or coerced in any manner to complete the closing, and that she did so freely and voluntarily.

The Respondent vehemently denies that he ever told the Complainant that he would take a reduced commission fee. This is consistent with the fact that he did not have the authority to do so, as explained in the testimony of his principal broker, Scott Hallberg.

It is also the Complainant's contention that Mr. Thunberg was charging her a ten percent commission on the rents being paid under the Purchase Option agreement with Cast and Locke. In response to the defense argument that the sums paid to Twin Peaks Land and Cattle were reimbursement for repairs made to the arena property which were facilitated and funded by Mr. Thunberg, the Complainant states that she did not authorize the repairs which were made. The undersigned finds the Complainant's position relative to this issue less than credible. Ms. Machala's testimony is that she "desperately needed" to sell some of her real estate, as she had no cash available for living expenses as all of her assets were "tied up in the real estate."

She does acknowledge that improvements to the property were made, beginning when the Respondent began to rent the property for his own use in 2006. She contends that, in the case of the window installation, she paid for the work to be done. Yet, Mr.

Thunberg has produced receipts, cancelled checks and accounting records establishing that it was he who purchased the window materials and paid for the installation labor in August of that year. The Complainant did not present any such records which would corroborate her statements that it was she who paid for the work. Respondent has documentation supporting his testimony that he also made payments for other improvements during 2006 to the arena.

Due to circumstances beyond the control of either party, the Respondent's lease agreement was cancelled. Financial adjustments were made between the parties, including a rent refund and a full accounting of monies expended by the Respondent for repairs. The Respondent presented written documentation of this accounting at hearing or funds paid by him additionally for the clearing of riding trails on the ten acre parcel and a new septic system design. The total amount paid out of pocket for the repairs was $9,115.00. Ms. Machala did not produce any evidence which showed that she had paid for any of the foregoing expenditures made by Mr. Thunberg, yet she acknowledged that they were all performed.

The Hearing Officer is convinced that, when the Cast and Locke Purchase Option contract was signed in early 2007, Mr. Thunberg was rightfully seeking reimbursement for the monies he expended, and an agreement was struck between the parties that Ms. Machala would reimburse him from a portion of the rental monies owed to her during the course of the Cast/Locke contract. It is certainly clear that this issue would not be before the Hearing Officer today, if this agreement had been reduced to writing, however, and the parties should be so advised for future reference in such matters.

Complainant's characterization of these payments to Twin Peak and Cattle as "commission" payments is not consistent with the evidence presented, and that argument is rejected.

Accordingly, the undersigned finds that the Respondent did not make any misrepresentation of a material fact which would constitute a violation of R.I. Gen. Laws §5-20.5-14(a)(1). Further, no credible evidence has been presented that the Respondent made any false promise to the Complainant intended to induce her into executing a contract or agreement in connection with this real estate transaction which would constitute a violation of R.I. Gen. Laws § 15-20.5-14(a)(2).

C. R.I. Gen. Laws § 5-20.5-14(a)(20) – Bad faith, dishonesty, untrustworthiness, or incompetent acts.

This statutory provision authorizes the Department to suspend or revoke a license where a licensee engaged in "any conduct in a real estate transaction that demonstrates bad faith, dishonesty, untrustworthiness, or incompetency."

"The purpose of licensing real estate salespersons and real estate brokers is to ensure professional standards within the real estate business." See R.I. Gen. Laws § 5-20.5-1, *et seq.*, and CLR11; *Gallo v. Smith*, DBR No. 98-L-0058 4/19/00 at 12. As such, licensees have certain statutory and regulatory duties imposed upon them in order to maintain these standards and to ensure that the public receives a certain level of service. As held in a prior Departmental decision,

> A [real estate] licensee's honesty, trustworthiness, integrity and reputation affect his or her ability to conduct all real estate transactions fairly. If one of these character traits are [sic] compromised, then the stability and integrity of the transaction is compromised. *D'Orsi v. Santilli*, DBR No. 99-L-0086 (July 18, 2000).

Thus, "[t]he statutory and regulatory scheme of licensing real estate salespersons and brokers ensures a system where consumers can rely on licensed professionals to handle real estate sales in a trustworthy and competent manner." *Altomari v. Clark and Shirley*, DBR No. 01-L-0160 at 24.

The Department's prior case law and the wording and construction of Section 14(a)(20) makes clear that the intent of the section is to protect the public from unscrupulous real estate professionals. It authorizes the director of the Department to take administrative action against a licensee who is found guilty of "any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness or incompetency."

Though this Complainant has alleged that Mr. Thunberg suggested to her at some point during this five-year real estate transaction that his broker would accept a reduced commission fee, she stated numerous times during her testimony that she had the highest trust in him, and continued to transact her real estate business with him. He worked diligently during the lengthy term of his agency contract with the Complainant to market and find potential buyers for the Tarkiln Road properties, even going beyond his responsibilities under his agency relationship to arrange and pay out of pocket for necessary repairs to the property. He also assisted her in obtaining a Special Use Permit from the Town on two separate occasions to facilitate the intended use of the property by a potential buyer; work for which he did not seek compensation.

The evidence presented shows that the Complainant was pleased with the Respondent's work as her agent, as she continued to agree to extensions of the Exclusive Listing Agreement, and sent messages to him over a month after the closing wishing him well and requesting his continued assistance regarding the septic system. The fact that the Complainant waited two years after the closing on her property to file this complaint, and

only when the new owner of the property began to default in her payments is troubling in this regard.

As to the incompetency component of this section, the undersigned finds that the evidence presented at hearing illustrates that the Respondent conducted this transaction in a competent fashion. The documents presented and executed in the transaction were in accordance with the laws and regulations in effect, and the marketing efforts as outlined in the testimony were performed in an efficient manner, consistent with professional standards and the state of the real estate market existing at the time of the transaction. It follows then, that the Respondent's activities during the course of his agency relationship with the Complainant did not include acts involving dishonesty, incompetency or untrustworthiness.

For these reasons, and as there was no testimonial or documentary evidence presented which established that this Respondent has violated this law, the undersigned finds that the Complainant failed to meet the burden of proof relative to R.I. Gen. Laws § 5-20.5-14(a)(20), and therefore finds that the Respondent did not violate this section.

It is noteworthy that the Complainant has never filed a claim or civil action against the Respondent to recover funds she believed were owed to her, nor did she produce any evidence at hearing that she was, in fact, entitled to any reimbursement for the disputed portion of the commission fees.

VI. FINDINGS OF FACT

1. On or about December 17, 2012, the Complainant filed a complaint with the Department of Business Regulation against the named Respondent.

2. A full evidentiary hearing was held on two dates: October 29, 2013 and November 6, 2013.

3. The facts, as detailed in sections I. through V. *supra.* are incorporated herein by reference and adopted as findings of fact in this matter.

IX. CONCLUSIONS OF LAW

In accordance with the testimony and facts presented:

1. The Department has jurisdiction over this matter as set forth in Section II, *supra.*

2. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VI, Complainant did not establish by a preponderance of the evidence that Respondent made any substantial misrepresentation in violation of R.I. Gen. Laws § 5-20.5-14(a)(1).

3. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VI, Complainant did not establish by a preponderance of the evidence that the Respondent made a false promise of a character likely to induce, persuade or influence her to enter into a contact or agreement, which would have constituted a violation of R.I. Gen. Laws § 5-20.5-14(a)(2).

4. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant did not establish by a preponderance of the evidence that Respondent engaged in any conduct in a real estate transaction that demonstrated bad faith, dishonesty, untrustworthiness, or incompetency in violation of R.I. Gen. Laws § 5-20.5-14(a)(20).

X. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Director of the Department find that Complainant failed to meet her burden that Respondent violated any provision of R.I. Gen. Laws § 5-20.5-14(a) and that Complainant's claims be dismissed.

Dated: April 16, 2014

Ellen R. Balasco, Esq.
Hearing Officer

I have read and considered the Hearing Officer's Decision and Order in this matter, and I hereby take the following action:

☒ **ADOPT**

☐ **REJECT**

☐ **MODIFY**

Dated: 18 April 2014

Paul McGreevy
Director

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42, CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.

CERTIFICATION

I hereby certify on this 18 day of April, 2014, that a copy of the within Decision was sent by first class mail, postage prepaid, to the following:

Vincent A. Indeglia, Esq. Indeglia and Associates 300 Centerville Road - Suite 320 Warwick, RI 02886	Ms. Deborah A. Machala 101 Tarkiln Road P.O. Box 575 Greenville, RI 02828

and also sent by electronic mail to the following parties at the Department of Business Regulation: Maria D'Alessandro, Deputy Director, and William DeLuca, Real Estate Administrator.