STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RHODE ISLAND 02903

NICOLE D. KATZMAN, **Complainant,**	:	
v.	:	**DBR No.: 06-L-00143**
CATHY SINGER, **Respondent.**	:	

DECISION

Hearing Officer: Michael P. Jolin, Esq.

Hearing Held: January 23, 2007

Appearances:

For Complainant: Robert D. Fine, Esq.

For Respondent: Philip J. Laffey, Esq.

I. INTRODUCTION

The above-entitled matter came before the Department of Business Regulation ("Department") as the result of a complaint filed on February 3, 2006 by Nicole Katzman ("Complainant") against Cathy Singer ("Respondent"), a real estate salesperson licensee. Based on the evidence presented at hearing and the applicable law, Complainant has failed to preponderate any basis for sanctioning Respondent's license pursuant to R.I. Gen. Laws § 5-20.5-14(a).

II. JURISDICTION

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

III. BACKGROUND AND ISSUES PRESENTED

Respondent is licensed as a real estate salesperson pursuant to R.I. Gen. Laws § 5-20.5-1, *et seq*. She represented Complainant and her husband as their buyers' agent for the purchase of 5 Alyssa Lane, Lincoln, Rhode Island, and for a short time, as their sellers' agent for their home at 6 Paddock Drive, Lincoln, Rhode Island.

Complainant makes three (3) allegations in her initial complaint. First, she avers that Respondent misled her about a stain that she noticed on the wall of the living room above the fireplace during the final walk through for the Alyssa Lane property shortly before the closing. Complainant alleges that Respondent told her that it was "nothing" and that she should proceed with the closing. The closing was held on September 2, 2005. On or about October 15, 2005, Complainant and her husband discovered that the chimney had several issues that caused water leakage into the home. She included a report from North Scituate Chimney Seeps, Inc., dated December 13, 2005, with her complaint that detailed the chimney's issues.

Second, Complainant alleges that Respondent pressured her into closing on the Alyssa Lane property even though the sellers had not applied the final coat of asphalt to the driveway as required in an addendum to the purchase and sales agreement. She also contends that Respondent brought her office manager to the closing to make sure that she did not back out of the deal.

Finally, Complainant believes that Respondent misled her in order to close the sale by telling Complainant that she could not a get an extension on the closing date even though the driveway was not finished.

Respondent provided a response to the complaint on or about March 9, 2006 in which she denied any violations of the Rhode Island laws pertaining to real estate licensure. Respondent confirmed that she was the buyers' agent for Complainant and her husband and that she assisted

them with the purchase of 5 Alyssa Lane. She stated that the parties executed the purchase and sales agreement ("P&S") on June 3, 2005. She also states that a home inspection was conducted on June 9, 2005, followed by a report of the home inspector's findings on June 14, 2005.

According to Respondent, the home inspection report brought several issues to light. To resolve these issues, the parties agreed to an addendum to the purchase and sales agreement (the "Addendum") that included a punch list of items that the sellers would repair before the closing date and a reduction of the sales price. There is no mention of any repairs required for the chimney in this document. The Addendum is dated June 25, 2005.

As for the specific allegations made by Complainant, Respondent avers that she did not mislead her as to any of the alleged defects or pressure her into closing the transaction. With regard to the alleged water stain on the wall in the living room above the fireplace, Respondent states that no mention was ever made of it during the final walk through before the closing or at the closing itself. She recalls that there was a lengthy conversation about some apparent damage to the garage ceiling but the seller (who, along with the seller's agent, accompanied Respondent and Complainant on the walk through) told them that the damage was from a nail, not water. Moreover, Respondent asserts that the garage ceiling issue was resolved with a one-year warranty for the ceiling that was prepared by Complainant's attorney and executed at the closing. As for the driveway issue, Respondent states that this was also addressed by Complainant's attorney when he negotiated an escrow agreement with the sellers' agent that allocated $1,500 for this purpose at the closing.

Respondent asserts that shortly after the home inspection, she advised Complainant that she did not have to purchase the property given the issues raised and at no time told her that she had to close on the property. As for the request for an extension on the closing date, Respondent

acknowledges that Complainant made such a request. Respondent states that she passed the request along but was told that the sellers denied it.

In her rebuttal to Respondent's answer to her complaint, Complainant disputes Respondent's version of the facts and alleges that Respondent knew that there were fundamental issues with the house that reduced its value substantially. Complainant submitted certain e-mail correspondence between Complainant and Respondent with the rebuttal. Most of the e-mails were written after the closing and discussed the driveway issue. However, one of the messages, dated October 25, 2005, discussed other issues that were discovered after the closing.

The Director of the Department issued an order appointing a hearing officer on August 9, 2006. A pre-hearing conference was held on November 6, 2006 where the issues were clarified and a hearing was scheduled for January 23, 2007. Both parties were represented by counsel throughout the process. A full evidentiary hearing was held on January 23, 2007 and the record was left open until February 23, 2007 for the filing of closing memoranda. The issues are further clarified here and presented as follows:

A. Whether or not Respondent made any substantial misrepresentations in violation of R.I. Gen. Laws § 5-20.5-14(a)(1), and if so, whether or not such violation warrants an administrative sanction against her license;

B. Whether or not 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) and if so, whether or not such violation warrants an administrative sanction against her license; and

C. Whether or not Respondent failed to adhere to the laws of agency governing fiduciary relationships in violation of Rule 20(A) of *Commercial Licensing Regulation 11 – Real*

Estate Brokers and Salespersons, and if so, whether or not such violation warrants an administrative sanction against her license.[1]

IV. MATERIAL FACTS AND TESTIMONY

A. Complainant's Case in Chief

Complainant testified at the hearing. No other witnesses testified on her behalf. Additionally, Complainant entered two exhibits into evidence.

1. Testimony of Complainant, Nicole Katzman

In the summer of 2005, Complainant and her husband, Gary Katzman, owners of a home at 6 Paddock Drive in Lincoln, Rhode Island, decided to put the house the market. They signed a listing agreement with Respondent and also retained her as a buyers' agent to help them find a new home. Complainant and Respondent agreed to list the house for approximately $995,000.

Although prospective buyers looked at the home, none made an offer. The lack of progress at selling the house eventually caused the parties to end the listing agreement three months early. Before the listing agreement's termination, however, Complainant testified that Respondent found a house for them at 5 Alyssa Lane, Lincoln, Rhode Island. Complainant and her husband eventually purchased this home. During this period, Complainant had re-listed the Paddock Drive home through another brokerage and sold the home ten days later for $892,000.

At the initial showing of the Alyssa Lane property, Complainant, her husband, Respondent, the sellers' agent, Carol Lamontagne ("Lamontagne"), and another couple were all present. Complainant claims that Respondent identified the other couple, Mike McLaughlin and Judy McLaughlin, as prospective buyers who were very interested in purchasing the property.

[1] R.I. Gen. Laws § 5-20.5-14(a)(15) authorizes the Department to suspend or revoke a license where a licensee violates any rule or regulation promulgated by the [Real Estate C]ommission or the Department.

Complainant was also very interested in the home and immediately made an offer. The sellers accepted the offer and the parties executed the P&S on June 3, 2005.

Complainant had the Alyssa Drive property inspected shortly thereafter and discovered, among other things, that the driveway required a final coat of asphalt. Respondent drafted an addendum to the P&S on behalf of Complainant that listed certain conditions for closing on the property. Chief among them was a requirement that the sellers lay a final coat of asphalt on the driveway prior to the closing.

When Complainant returned to the Alyssa Lane property for the final walk-through, she found that the driveway had not yet been completed. She expressed her concerns about closing on a home with an unfinished driveway to Respondent, who assured her that it would be completed before the scheduled closing date. Also, while at the walk-through, Complainant again noticed the presence of Mike McLaughlin. However, Complainant claims that Respondent no longer identified him as a potential buyer, but as a real estate agent employed by Lamontagne, the sellers' agent. This revelation concerned Complainant because she believed that Respondent might have intentionally misidentified McLaughlin as a possible buyer during the initial showing in order to pressure her into purchasing the property.

Complainant was still trying to sell her Paddock Drive home through her new listing agent as the scheduled date for closing on the Alyssa Lane property approached. Complainant was very worried about carrying two mortgages and told Respondent about this concern. Because of her concerns, Complainant asked Respondent to request an extension on the closing. According to Complainant, Respondent refused to do so. Based on a conversation that Complainant had with the sellers after the closing, she believes that they would have granted an extension had they known of the request.

On the date of the closing, Respondent and her manager, Holly Applegate, accompanied Complainant, her husband, and Complainant's attorney, John Krieger, to meet the sellers and Lamontagne at 5 Alyssa Drive. Upon her arrival at the property, Complainant found that the driveway had still not been paved. According to Complainant, Respondent told her that the unfinished state of the driveway was an inadequate justification for not going forward with the closing and that the sellers could sue Complainant if she failed to proceed. To allow the closing to go forward, Krieger negotiated an agreement with the sellers in which Krieger would hold $1,500 in escrow for the completion of the driveway. Over a year after the closing, the driveway had still not been paved and the $1,500 was still being held in escrow.

Complainant believed it was suspicious that Applegate attended the closing based on her past experiences purchasing properties. She had never seen a real estate agent's manager attend a property closing before. Complainant claimed to have had relatively little interaction with Applegate before the closing and saw no legitimate reason for her to be there. Complainant interpreted Applegate's presence as Respondent's attempt to place undue pressure on Complainant to close the transaction.

2. The Complainant's Exhibits

Complainant introduced two exhibits into evidence. The first exhibit, marked as "Complainant 1" and admitted into evidence, was the P&S for 5 Alyssa Lane. The second exhibit, marked as "Complainant 2" and admitted into evidence, was the Addendum to the P&S. The Addendum provided for a reduced sales price from $1.35 million to $1.31 million and required the sellers to address certain deficiencies listed on an attached punch list.

B. Respondent's Case in Chief

Respondent presented the testimony of two witnesses. She testified on her own behalf and also presented the testimony of Holly Applegate, the broker manager at Residential Properties, and Respondent's immediate supervisor. In addition to this testimony, Respondent entered five exhibits into evidence.

1. Testimony of the Respondent, Cathy Singer

Respondent received her undergraduate and masters degrees from George Washington University and has worked as a real estate agent for the past thirteen years. She stated that she has represented clients at over 160 closings and has never had a complaint filed against her.

Respondent testified that Complainant retained her services as both a listing agent to sell her and husband's home on Paddock Drive and as a buyers' agent to find them a new home.

Respondent acknowledged that she accompanied Complainant to the showing of 5 Alyssa Lane. However, she testified that she did not identify this property for Complainant; rather, it was a property Complainant discovered on her own initiative. As such, Respondent testified that she had no prior knowledge of the house, the sellers, or their listing agent. Because Respondent lacked any such knowledge, she was not able to make nor did she make any representations regarding the identities of other parties present at the showing.

Respondent stated that Complainant was very excited about the Alyssa Lane property and wanted to make an offer on it immediately. Respondent testified that she advised against making a hasty decision and urged Complainant to take a day to think over her decision before making an offer. According to Respondent, Complainant ignored this advice and requested that a purchase and sale agreement be negotiated immediately after the showing.

Meanwhile, the relationship between Complainant and Respondent had begun to deteriorate due to the lack of progress in selling of Complainant's home on Paddock Drive. Respondent avers that she did not receive any offers for the Paddock Drive property because the listing price, $995,000, was too high. While Respondent understood that Complainant was willing to sell for significantly less, she stated that Complainant refused to lower the list price itself. According to Respondent, she believed that many potential buyers did not even consider the house because it was out of their price range.

Respondent denied that she refused to sell the home below the list price or encouraged Complainant to lower the list price in order to help her sales statistics. Respondent testified that she is aware that some real estate agents do use such statistics in advertisements and promotional materials but stated that neither she nor Residential Properties uses them. Nevertheless, because of the deteriorating relationship, Respondent agreed to terminate the listing agreement on the Paddock Drive home soon after the P&S was signed for the Alyssa Lane property.

Ten days after the execution of the P&S, the Alyssa Lane property was inspected. The inspection report listed a number of deficiencies with the property. After discussing the report with Complainant, Respondent told her that she could choose not to close on the property or she could make closing on the sale conditional on the seller addressing the deficiencies to Complainant's satisfaction. Complainant chose to proceed with the sale and Respondent drafted the Addendum requiring the sellers address all of the deficiencies listed on an attached punch list. Complainant and the sellers signed the Addendum.

At the final walk-through before the closing, Respondent went through the punch list and checked off the issues that had been addressed. The only deficiency from the punch list that remained was a final coat of asphalt for the driveway. Respondent discussed the sellers' failure

to apply this final coat with Lamontagne, who assured her the problem would be fixed. However, the driveway issue had not been addressed by the closing date.

Respondent testified that the driveway was discussed at the closing but neither she nor Applegate were involved in those discussions. Respondent stated that Krieger and Lamontagne handled the issue and came to an agreement that $1,500 of the purchase price would be placed in escrow pending the completion of the driveway.

In addition to dealing with the problem with the driveway, Respondent maintains that Krieger and Lamontagne also addressed a small spot of water damage that was discovered on the garage ceiling. The leak was not included on the inspector's list of deficiencies because it had been discovered after the Addendum had been executed. Krieger and Lamontagne negotiated a warranty for the ceiling that seemed to satisfy all parties. As with the driveway escrow agreement, Respondent insists she took no part in negotiating the warranty agreement. She felt that Krieger, as Complainant's attorney, more appropriately represented Complainant's interests.

Respondent testified that she did not place any pressure on Complainant to go through with the closing. She contends that she never told Complainant that the driveway was an insufficient reason to justify a failure to close or that such a failure would result in a lawsuit. With regard to Applegate, Respondent stated that she asked her to attend the closing because of the previous disputes with Complainant, not to put any pressure on Complainant. Respondent also wanted to make sure her supervisor was there to observe the proceedings in order to better evaluate and address any additional problems that arose.

Five days before the scheduled closing, Respondent acknowledged that Complainant asked for a delay of the closing. Respondent admitted that she expressed her belief that such a request would likely be denied. Nonetheless, she asked for it anyway. But as Respondent

predicted, the sellers were not willing to extend the closing date. She testified that Complainant became very upset when Respondent told her that the sellers denied the extension request.

2. Testimony of Holly Applegate

Respondent's second witness was Holly Applegate, her manager at Residential Properties. Applegate testified that she attended the closing because Respondent asked her to be there. Applegate went with her because she wanted to show her support. She acknowledged that it was rare for her to attend closings with her agents but had done so a couple times in the past in similar circumstances.

Although Applegate had not attended the walkthrough, Respondent made her aware of the issue regarding the driveway and garage ceiling leak. Applegate confirmed that neither she nor Respondent were involved in the negotiations at the closing to resolve these issues.

3. The Respondent's Exhibits

Respondent introduced five exhibits into evidence. The first exhibit, marked "Respondent A," was Complainant's answers to an interrogatory submitted in the civil case, *Katzman v. Walsh, et al.*[2] In her answers to Interrogatory No. 17 and Interrogatory No. 18, Complainant claimed that Lamontagne made assurances that the driveway would be paved on the day of the closing. No mention is made that Respondent made the same or similar assurances at that time.

The second exhibit, marked "Respondent B," was a series of e-mail correspondence between Complainant and Respondent. They date from August 29, 2005 through September 23,

[2] In this action for fraud, filed in Providence County Superior Court, Complainant sought recovery of damages related to various undisclosed and unaddressed problems with the home at 5 Alyssa Drive, including the sellers' failure to pave the driveway. The defendants named in the action were Albert Walsh, Carol Lamontagne, Estate U.S. Inspect, Inc., the company hired to arrange a home inspection, and Lane Ukura, the inspector who actually performed the inspection at 5 Alyssa Lane.

2005. Complainant sent the first e-mail to Respondent on August 29, 2005 at 8:27 a.m., and asked if a top coat of asphalt will be applied to the driveway at 5 Alyssa Lane before closing. Complainant sent the second e-mail to Respondent on August 29, 2005 at 8:40 a.m., and requested that the closing be scheduled for an hour later than originally planned.

Respondent authored the third e-mail and sent it on September 6, 2005 at 12:27 p.m. It responded to Complainant's questions about the driveway. In that e-mail, written four days after the Alyssa Lane closing, she told Complainant that she had left a message about the issue with the sellers' agent, Lamontagne. Respondent also assured Complainant that the money held in escrow by the attorney would not be released until the work was complete.

In the fourth e-mail, sent on September 7, 2006 at 8:33 a.m., Complainant requests that Respondent give Complainant's contact information to Lamontagne. The fifth e-mail was from Respondent on September 12, 2005 at 2:29 p.m., ten days after the closing, and reads in its entirety:

> Nicole – Just checking in to see if the driveway paving has been complete. Thanks, Cathy

Respondent also sent the sixth e-mail, dated September 13, 2005 at 10:51 a.m., which states:

> I just talked to Carol again and she said she is going to call you directly with 24 hours notice to get the doors open. She said she is on top of it. Keep me posted. Cathy

Complainant replied back with "Thanks" on September 13, 2007 at 11:28 a.m.

In the eighth and final e-mail, sent on September 23, 2005, Complainant requested that Respondent not schedule the paving company on either October 13 or 14 because Complainant planned to move into the home on those two days.

The third exhibit, marked as "Respondent C," was the settlement statement signed by the sellers and Complainant and her husband. The fourth exhibit, marked as "Respondent D," was

the punch list of items originally attached to the Addendum to the P&S for the Alyssa Lane property. The Addendum states at the top of page that "SELLERS AGREE TO REPAIR THE FOLLOWING ITEMS BEFORE CLOSING" and lists eighteen (18) action items. A check mark precedes all items except for the item concerning the second coat of asphalt for the driveway.

The fifth exhibit, marked "Respondent E," was the warranty for the garage ceiling at 5 Alyssa Lane, dated September 2, 2005. It provides, "Sellers agree to warrant the ceiling of the garage against leaks and defects for a period of one year from the date of the closing." Both Complainant and the sellers signed this document.

V. 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 also, *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 Complainant. As such, she bears the burden for establishing why it is more likely than not that Respondent conducted herself in a manner that violated the statutes and regulations under which she holds her real estate salespersons license.

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 license was obtained by fraud or misrepresentation or upon proof that the holder of the license has violated this statute or any rule or regulation issued pursuant to this statute. In addition, R.I. Gen. Laws § 5-20.5-14(b) authorizes the Department to levy an administrative penalty not exceeding one thousand dollars ($1,000) for any violation under this section or the rules and regulations of the Department. R.I. Gen. Laws § 5-20.5-12(a)(2) provides that the Department shall establish any reasonable rules and regulations that are appropriate to the public interest.

The facts alleged in the complaint and during the hearing, if preponderated, implicate three (3) statutory provisions that may constitute violations of the Rhode Island laws and rules pertaining to real estate licensure. Each will be addressed in turn.

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

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. 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)). Previous

Department decisions have addressed the issue of substantial misrepresentation. In *Altomari v. Clark and Shirley*, DBR No.: 01-L-0160 (January 8, 2003), the Director found as follows:

> Since the term "substantial misrepresentation" is not defined in the statute at issue, it is necessary to define the elements necessary in order to support a finding of substantial misrepresentation as envisioned in R.I. Gen. Laws § 5-20.5-1, *et seq.*
>
> *Black's Law Dictionary*, Fifth Edition, defines "misrepresentation" as:
>
> > 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.
>
> … 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).

Altomari, at pp. 27-28.

Most cases before the Department involving substantial misrepresentation allegations concern conditions of the subject property. See *Beaudet v. Anderson-Sparn*, DBR No. 99-L-0099 (July 28, 1999); *Altomari*, *supra*. While such is the case in the instant matter, Complainant also alleges another substantial misrepresentation as well. In addition to the allegation that Respondent misled her about the living room water stain during the final walk through, there is the claim that Respondent used a "mystery couple" to induce Complainant into making an offer on the Alyssa Lane property. If either of these misrepresentations were made, they would indeed be considered substantial in that they would have had an adverse impact on the real estate

transaction at issue. However, because the record does not support a finding that Respondent made these misrepresentations in the first place, whether or not they were substantial is not a question that need be answered here.

First, for Complainant to show that Respondent substantially misrepresented the water stain, Complainant had to show that Respondent had information about it and its cause at the time of the walk through. She then would have to show that Respondent lied about her knowledge of it or failed to disclose this information to Complainant. See *Beaudet v. Anderson-Sparn*, *supra*.

While Complainant made the water stain allegation in her complaint and provided a report regarding several issues with the chimney, including water leakage behind the living room wall, the only testimony about the alleged misrepresentation came from Respondent, not Complainant. Respondent testified that there was some damage found on the garage ceiling during the final walk through that may have been characterized as water damage but this issue was resolved at the close with a warranty by the sellers. Curiously, Complainant proffered no testimony about any water damage to the living room wall to support her complaint's allegation. Moreover, she failed to produce any evidence whatsoever that Respondent had prior knowledge of this defect or any other defect. Without any support for allegation, no finding against Respondent can be made that she engaged in substantial misrepresentation regarding the living room water stain.

Second, Complainant alleges that Respondent falsely identified Mike and Judy McLaughlin, two real estate agents from Carol Lamontagne's firm, as potential buyers of the Alyssa Lane property. The complainant further alleges that this misrepresentation induced her to make an offer on the property more quickly than she would have liked. Although this allegation

is quite serious, Complainant again failed to introduce any compelling evidence to support this claim.

Lying to a client about a potential buyer who is ready to make an offer would certainly constitute a "substantial misrepresentation." But the only evidence of this potential violation was Complainant's direct testimony in which she claimed that Respondent identified the other couple at the initial showing, Mike McLaughlin and Judy McLaughlin, as prospective buyers. While there were potential witnesses present at this initial showing that could have supported Complainant's allegation, none were called to testify.

Respondent disputed this claim in her testimony. She acknowledged that she accompanied Complainant at the initial showing but denied making any representations regarding the identities of other parties present at the showing. She testified credibly that because Complainant had found the property through her own search, she had no prior knowledge of the property, the sellers, or their listing agent. As a final note on this allegation, Respondent pointed to Complainant's answers to an interrogatory in the civil case she filed against Carol Lamontagne and the sellers of the home at Alyssa Lane. In her answer to Interrogatory No. 18, she wrote:

> Additionally, at our initial viewing of the property Mike McLaughlin and Judy McLaughlin were present. Defendant Lamontagne falsely represented, these people to be prospective buyers. (Respondent Exhibit A, p. 20)

Complainant repeats this allegation against Lamontagne in her answer to Interrogatory No. 19:

> We, Gary and Nicole, first visited in or about late Spring of 2005, and those present were Cathy Singer of Residential Properties, Defendant Lamontagne, and two of Defendant Lamontagne's agents, Mike McLaughlin and Judy McLaughlin, whom defendant Lamontagne represented to be other prospective buyers. (See Respondent Exhibit A, p. 21)

Not only does Complainant fail to identify Respondent as the perpetrator of the "mystery couple" misrepresentation in her answer to Interrogatory No. 18, Complainant identifies Respondent as a fellow victim:

> The fraud was perpetrated by Defendants Lamontagne, Walsh, Westcott upon Plaintiffs in the presence of, and in communication to, Plaintiffs and Cathy Singer of Residential Properties. (See Respondent Exhibit A, p. 20)

Given this record, there is no adequate basis to find that Respondent made any misrepresentations, substantial or otherwise, about the identity of the McLaughlins.

B. R.I. Gen. Laws § 5-20.5-14(a)(20) – Bad faith, Untrustworthiness, Incompetency.

The second statutory provision implicated is R.I. Gen. Laws § 5-20.5-14(a)(20). It 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. As held in a Department 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).

In the instant matter, Complainant alleged that Respondent failed to seek an extension on the closing date that she requested because of the failure of the sellers to apply the final coat of asphalt on the driveway as required by the Addendum. In contrast, Respondent testified that she asked Lamontagne, the sellers' agent, for the extension but was told that the sellers denied the request. Complainant testified in support of her claim that she had a conversation with the sellers after the closing in which they told her that they would have granted an extension had one been made.

While there is no reason to doubt Complainant's veracity here, one possible explanation for conflicting versions regarding the request may be that Respondent passed along the request to

the sellers' agent but that the request was never communicated to the sellers. Certainly it is understandable why Complainant requested such an extension given the driveway issue. But neither the sellers nor Lamontagne testified at the hearing. Moreover, no written requests or correspondence on the extension request were submitted into evidence. Without their testimony and written documents regarding request, there is no basis from which to make a finding that Respondent exhibited bad faith, untrustworthiness or incompetency here.

Similarly, there is insufficient evidence to establish that Respondent used coercive and unscrupulous methods to pressure Complainant to close on the Alyssa Lane property. According to the complaint, Complainant was told she "had no choice" but to close on the Alyssa Lane property even though the driveway still required a final coat of asphalt per the Addendum. She reiterated this allegation in her closing memorandum, writing that Respondent coerced her into closing with the threat that "the closing must take place lest Mrs. Katzman and her husband be sued." See *Complainant's Closing Memorandum.*

Respondent denied making any such threat or giving any type of legal advice in her testimony. Her manager, Holly Applegate, testified that she did not recall any such threats or statements being made at the closing. But even if Respondent had warned Complainant about a possible lawsuit if she failed to close on the house, it is not clear how this would have compelled her to close on the house. As Complainant herself notes in the complaint, "it was clear that the terms of the contract of the sale had not been fulfilled by the seller." With her testimony that she had closed on two homes in the past and the sophistication found in her letter to Respondent after the inspection issues surfaced, it seems unlikely that Complainant could be intimidated by a real estate agent into closing on a $1.1 million home.

Making this even more unlikely is the fact that she had her own attorney at the closing. He was available to protect her legal interests and apparently did so with the negotiation of the escrow monies for the driveway and the warranty for the garage ceiling. Moreover, if intimidation tactics were used at the closing, Complainant should have had her attorney or some of the other parties present at the closing testify at the hearing about what took place. Instead, she relied on her own conclusory statements such as having "no choice" but to close. Such evidence provides little, if any, momentum to clear the preponderance hurdle and establish that Respondent engaged in bad faith here.

In further support of the intimidation claims, Complainant also alleged that Respondent brought her manager, Holly Applegate, to the closing "to make sure [complainant] could not back out." Not only is there a lack of support on the record for imputing such a motivation here, it does not seem plausible. There is no logical reason why Applegate's presence at the closing would have intimidated her or her husband. As mentioned above, Complainant had experience with at least two prior real estate transactions. In addition, she had her attorney at the closing.

While it is admittedly unusual for a supervisor to accompany an agent to a closing, Applegate rather tactfully testified that she attended the closing to "represent Residential Properties" and to "support" Respondent. In other words, she came to the closing because of the issues that had developed between Complainant and Respondent. Applegate was well aware of these issues. Complainant made no secret of her unhappiness with Respondent's services. Applegate testified to this point in describing how she had received two complaints from Complainant about Respondent's representation. While Complainant may very well have felt some pressure to close on the house, the evidence simply does not establish that Respondent was

its cause. As such, Respondent did not act in bad faith or in any manner that would violate R.I. Gen. Laws § 5-20.5-14(a)(20).

C. Rule 20(A) via R.I. Gen. Laws § 5-20.5-14(a)(15) – Breach of Fiduciary Duty.

The third and final potential violation involves R.I. Gen. Laws § 5-20.5-14(a)(15), which authorizes the Department to suspend or revoke a license where a licensee violates any rule or regulation promulgated by the commission or the Department. Here, the rule applicable to the facts alleged in the complaint is Rule 20(A) of *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons*. It provides, in pertinent part:

> All Licensees are subject to and shall strictly comply with the laws of agency and the principals governing fiduciary relationships. Thus, in accepting employment as an agent, the Licensee pledges him/herself to protect and promote, as he/she would his own, the interests of the principal he/she has undertaken to represent.

It is undisputed that Respondent owed Complainant a fiduciary duty as the listing agent for Complainant's home on Paddock Drive and as her buyer's agent for the purchase of the Alyssa Lane property. As such, Respondent had a duty to protect and promote Complainant's interests as her own. While it is clear that there was a breakdown in the relationship between Complainant and Respondent, the record is devoid of any evidence that Respondent failed in her fiduciary duties to her client with either the listing of the Paddock Drive home or the purchase of the Alyssa Lane home.

Complainant did not make any allegations regarding Respondent's representation as a listing (sellers) agent for the sale of the Paddock Drive home in her complaint. Instead, she raised these issues in her testimony at the hearing and in her closing memorandum. In a nutshell, Complainant alleged that Respondent was unable to sell her Paddock Drive home because Respondent "would not accept or pass on to [Complainant] any offer that was a certain percentage below the asking

price for the Paddock home." The only evidence submitted at hearing to support this was Complainant's own testimony:

> COMPLAINANT: My husband and I had asked her multiple times that if an offer came in that was lower than the asking price that if they could negotiate a price that we were all happy with.
>
> MR. LAFFEY: So you were willing to sell the price for less—sell the house for less than the listing price?
>
> COMPLAINANT: Absolutely.
>
> MR. LAFFEY: Did Ms. Singer and Residential Properties offer to assist you in selling the house at a reduced price?
>
> COMPLAINANT: No, they did not.
>
> MR. LAFFEY: And explain that to me please.
>
> COMPLAINANT: They told me that in order to take a price that was less than the asking price that I needed to drop the price of the home.
>
> MR. LAFFEY: Why was that?
>
> COMPLAINANT: Because they wanted their statistics to look good.
>
> MR. LAFFEY: Can you explain that to me please?
>
> COMPLAINANT: To be honest, I'm not really clear on that myself but that was the answer I was given by both Ms. Applegate and Ms. Singer; that they have statistics and they need to make them look good for other buyers.
>
> MR. LAFFEY: So they did not want to entertain offers for the Paddock home that were a certain percentage below the list price and they told you that?
>
> COMPLAINANT: Yes, they did.

Aside from her own testimony, Complainant failed to submit any evidence to establish that Respondent made such statements or that such statistics are even used by Residential Properties. There were no documents or advertisements from this brokerage admitted into evidence to support this claim. In addition, there was no additional testimony from other

witnesses to buttress this charge. Indeed, the only other evidence on the record about the statements is Respondent's categorical denial that she made these comments. She also denied the allegation that Residential Properties used the type of statistics alleged. Applegate was never asked about the use of such statistics during her testimony.

Respondent admits to suggesting that Complainant reduce the initial asking price of $995,000 but only to encourage buyers in a slightly lower price bracket to consider the home. Moreover, she testified that she was prepared to negotiate with potential buyers on her client's behalf. Interestingly, Complainant testified that, after terminating the listing agreement with Respondent, the home sold for $892,000 just ten days after being listed at the new, lower price of $905,000. In other words, one could argue that Respondent correctly advised Complainant on the price point for the house and therefore was trying to serve her client's best interest. No compelling evidence exists to conclude that Respondent breached her fiduciary duty with respect to the Paddock Drive listing.

Similarly, with the purchase of the Alyssa Lane property, Complainant failed to establish that Respondent breach her fiduciary duty as her buyer's agent. For example, after the home inspection, Respondent successfully negotiated and drafted a detailed addendum to the P&S to address the numerous deficiencies. The sellers corrected all of the deficiencies by the closing except for the final coat of asphalt for the driveway. As discussed previously, Complainant's attorney negotiated an escrow agreement that provided $1,500 for the paving. It is undisputed that Respondent was not involved with the creation of the escrow agreement. As both Complainant and Respondent admitted, the agreement was a product of the negotiation between Complainant's attorney and the seller's agent, Carol Lamontagne. Complainant's legal counsel adequately and properly protected her interests at this stage in the transaction.

But even so, after the closing took place, Respondent continued to assist Complainant with the driveway issue as shown by the e-mails presented at hearing. As such, Complainant's contention that Respondent "failed to take any action to protect Mrs. Katzman's interests" here is without merit.

VII. CONCLUSION

For each of the potential violations identified, Complainant failed to provide sufficient evidence to support a finding that Respondent engaged in improper conduct as a licensed real estate salesperson. None of Complainant's allegations are supported by anything more than her own testimony. Some of the allegations have no support at all. For her part, Respondent denies the allegations made against her and, in all candor, offers a more credible account of events. As such, the Hearing Officer finds that Respondent did not violate R.I. Gen. Laws §§ 5-20.5-14(a)(1), (15), or (20), or Rule 20(A) of *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons*.

VIII. FINDINGS OF FACT

1. On or about December 14, 2005, Complainants filed a complaint against the Respondent with this Department.

2. A full, evidentiary hearing was held on January 23, 2007.

3. The facts contained in Sections III, IV, and VI, are incorporated by reference herein.

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

3. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI-B, 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).

4. Under the standard set forth in Section V and the statutory framework and analysis set forth in Section VI-C, Complainant did not establish by a preponderance of the evidence that Respondent failed to adhere to the laws of agency governing fiduciary relationships in violation of Rule 20(A) of *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons*.

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: 30 APR 2008

Michael P. John, Esq.
Hearing Officer

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

__✓__ ADOPT
_____ REJECT
_____ MODIFY

Dated: 5-01-2008

A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION AND DECLARATORY RULING CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 1st day of ~~April~~ May, 2008 that a copy of the within Decision was sent by first class mail, postage prepaid to:

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LaPlante Sowa Goldman
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Robert D. Fine, Esq.
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and by hand-delivery to:

Valerie Voccio
Real Estate Administrator
Department of Business Regulation
233 Richmond Street
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