

NEW JERSEY REAL ESTATE COMMISSION

NEW JERSEY REAL ESTATE COMMISSION, ) DOCKET NO.:UNI-12-020  
)  
Complainant, )  
v. ) **FINAL ORDER OF**  
) **DETERMINATION**  
)  
JEFFREY M. BROOKMAN, licensed New Jersey )  
real estate salesperson, Ref. No. 0568685 )  
Respondent. )

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This matter was heard at a plenary hearing by the New Jersey Real Estate Commission ("Commission") in the Department of Banking and Insurance, State of New Jersey at the Real Estate Commission Hearing Room, 20 West State Street, Trenton, New Jersey on June 4, 2013. The Commission matter was continued on July 9, 2013, July 23, 2013, October 8, 2013, November 13, 2013, December 17, 2013 and January 7, 2014.

**BEFORE:** Commissioners Linda Stefanik, Jacob S. Elkes, Esq., Robert Melillo, Harold J. Poltrock, Esq.<sup>1</sup>, Benjamin Steltzer<sup>2</sup>, Jeffrey A. Lattimer and Eugenia K. Bonilla.<sup>3</sup>

**APPEARANCES:** Marianne Gallina, Regulatory Officer, appeared on behalf of the New Jersey Real Estate Commission ("REC"). Respondent appeared pro se on June 4, 2013 and with Jorge Batista, Esq., his counsel, on November 13, 2013.

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<sup>1</sup> Commissioner Poltrock was not present at the June 4, 2013 hearing but signed a certification on January 7, 2014 stating that he received and reviewed the transcripts from the June 4, 2013 hearing, wherein witness testimony was taken.

<sup>2</sup> Commissioner Steltzer was not present at the June 4, 2013 hearing but signed a certification on January 7, 2014 stating that he received and reviewed the transcripts from the June 4, 2013 hearing, wherein witness testimony was taken.

<sup>3</sup> Commissioner Timoni, who was initially present for the June 4, 2013 hearing, recused himself because Respondent Brookman brought to the Commission's attention that in 2001 or 2002, Commissioner Timoni's brother had been involved in a lawsuit with Brookman's mother, who was Executrix on an estate matter. He also stated that he met with Commissioner Timoni with respect to an appraisal that Commissioner Timoni had done on "two of our houses" at which time Commissioner Timoni gave Brookman his business card.

## STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated October 18, 2012 pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18 and N.J.A.C. 11:5-1.1 et seq. The OTSC charged Respondent Brookman with engaging in real estate activity at In Action Realty LLC d/b/a ReMax In Action (“ReMax In Action”) without a written compensation agreement from February 28, 2012, in violation of N.J.A.C. 11:5-4.1. The OTSC further alleged that, because of these actions, Respondent Brookman demonstrated unworthiness in violation of N.J.S.A. 45:15-17e and fraud or dishonest dealing in violation of N.J.S.A. 45:15-17t.<sup>4</sup>

Respondent Brookman generally denied the allegations in the OTSC in an unsigned letter dated November 23, 2012. In this letter he stated, “I am writing to state that I deny all the allegations set forth in the Order to Show Cause and request a hearing be scheduled if this matter cannot be settled. Either I, or counsel on my behalf, intend to file a formal Answer within the next week.” However, no formal answer was filed. This matter was deemed a contested case, and after three adjournments, two at Respondent’s request and one because there was not a quorum of the REC, a full hearing was scheduled on June 4, 2013. This matter was also scheduled and heard on July 9, 2013, July 23, 2013, October 8, 2013, November 13, 2013, December 17, 2013 and January 7, 2014. At the June 4, 2013 hearing, the following exhibits<sup>5</sup> were admitted into evidence by REC over Respondent Brookman’s objection:

S-1 Computerized license history for Jeffrey M. Brookman

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<sup>4</sup> The OTSC also alleged that Respondent Brookman commenced employment and engaged in real estate activity at Rosa Agency Elizabeth, Inc. (“Rosa Agency”) between 2005 and October 10, 2010 without written compensation agreements in violation of N.J.A.C. 11:5-4.1(a) and that this demonstrated unworthiness in violation of N.J.S.A. 45:15-17e and N.J.S.A. 45:15-17t. However, these allegations were dismissed at the conclusion of the REC’s case.

<sup>5</sup> While seven exhibits were admitted into evidence, two exhibits (S-2 & S-3) are relevant only with respect to the allegations (Count 2 of the OTSC) relating to the Rosa Agency which were dismissed.

- S-2 Independent Contractor Agreement between Jeffrey Brookman and Rosa Agency dated October 8, 2010, signed October 27, 2010.
- S-3 Contract of Sale dated September 29, 2009 for 827 Union Avenue, Hillside, NJ.
- S-4 Independent Contractor Agreement between Jeffrey Brookman and ReMax In Action dated February 28, 2012 (unsigned).
- S-5 Independent Contractor Agreement between Jeffrey Brookman and ReMax in Action dated March 1, 2012, signed June 5, 2012.
- S-6 Fax cover sheet dated April 11, 2012 from Pedro Oliveira to REC Investigators with 1 page attachment.
- S-7 Documents allegedly showing Brookman real estate activity February – April, 2012:
  - (a) 2/22/12 Consumer Information Statement (“CIS”) and 3/1/12 listing for 955 Harding Rd. Elizabeth, NJ.
  - (b) 3/1/12 CIS and 3/4/12 listing for 8 Cleveland Terr., W. Orange, NJ.
  - (c) 3/1/12 Multiple Listing Service (“MLS”) sheet for 125 Wilder St., Hillside, NJ.
  - (d) 3/1/12 CIS and 3/2/12 listing for 876 Westminster Ave., Hillside, NJ.
  - (e) 3/6/12 MLS sheet for 1070 Boulevard, Bayonne, NJ.
  - (f) 3/24/12 CIS signed with Sharon Karnaz.
  - (g) 3/28/12 MLS for 269 Millard Ave., Hillside, NJ and 3/29/12 contract for 269 Millard Ave., Hillside, NJ.
  - (h) 3/31/12 contract for 20-26 Wilbur Avenue, Newark, NJ.
  - (i) 4/4/12 MLS for 1003 Sheridan Ave., Roselle, NJ.
  - (j) 4/4/12 MLS for 3 Round Hill Rd., Scotch Plains, NJ.

At the July 9, 2013 hearing the following exhibits were admitted into evidence by Respondent Brookman:

- R-1 Letter dated 7/3/13 from Brookman to Regulatory Officer Gallina with attachments including invoice, certification and judgment.
- R-2 Fax Coversheet from Brookman to Regulatory Officer Gallina with letters of reference.

### **PROCEDURAL HISTORY**

#### **Request for an Adjournment of the June 4, 2013 Hearing and Motion for Dismissal**

On June 3, 2013, Respondent Brookman requested Regulatory Officer Gallina (“RO Gallina”) to adjourn the June 4, 2013 hearing, stating “I am requesting an adjournment because I am currently preparing for trial of my civil suit v. Rosa Agency and Nancy Rosa, individually. That trial is scheduled to be heard and decided in Union County Superior Court on this Wednesday, June 5, 2013 at 9:00 am.” In this same email, Respondent Brookman stated he would like to make a motion to dismiss the charges against him “because of the rule that the broker only needs to maintain their records for 6 years.” RO Gallina responded to Respondent Brookman, stating she could not consent to an adjournment at this late date and informed him that he would have to appear at the June 4, 2013 hearing in person and make his argument before the Commissioners. Raymond S. Londa, Esq., Respondent Brookman’s attorney in the civil matter, also submitted a letter to Regulatory Officer Gallina dated June 3, 2013, in which he stated, “Please be advised that Jeffrey Brookman is a witness in a case in court on Wednesday, June 5, 2013, and I need him tomorrow to prepare for trial.” Both the email exchanges and the letter were considered by the Commission in determining whether or not to grant Respondent Brookman’s adjournment request at the June 4, 2013 hearing.

At the full hearing on June 4, 2013, Respondent Brookman appeared and made an oral motion to adjourn the matter so that he could retain an attorney. Respondent Brookman also asserted RO Gallina failed to provide him with discovery, specifically the settlement material related to the REC and Rosa Agency that he requested. He added that he made written motions to RO Gallina to dismiss the case because of the "six year statute." He claimed that he was waiting for a response from "[RO] Gallina, at this time I didn't want to engage counsel and sign a retainer and he comes in, in 30 days."

RO Gallina objected to an adjournment, asserting this was another delay tactic and several witnesses who were subpoenaed by Respondent Brookman had appeared to testify at the hearing. RO Gallina further stated Respondent Brookman was granted two prior adjournments. She explained that Respondent Brookman was served with the OTSC in October 2012. On November 23, 2012, he filed a general denial to the OTSC in which he stated that he would file an Answer on his own behalf or through counsel. RO Gallina asserted that, on December 26, 2012, she sent Respondent Brookman a letter which stated she had not received any letters or appearances but confirmed she received a voicemail message from him requesting, among other things, additional time to file a response. She also asserted she had numerous telephone conversations with Respondent Brookman advising him he had to file a written answer to the allegations in the OTSC. RO Gallina further stated Respondent Brookman made a verbal request "seeking to obtain information regarding disciplinary action which was taken against [his] former broker." She further asserted that, on January 7, 2013, she provided discovery to Brookman and informed him who she would call as witnesses. RO Gallina also sent him a copy of the administrative penalty letter that was sent to Rosa Agency on March 12, 2013.

RO Gallina further asserted the first full hearing was scheduled for January 9, 2013, but this was adjourned pursuant to Respondent Brookman's request. This was confirmed in a letter dated January 28, 2013, in which he was also advised that the matter was rescheduled for March 5, 2013. This hearing date of March 5, 2013 was also adjourned pursuant to Respondent Brookman's request and rescheduled for April 10, 2013. The April 10, 2013 hearing date was also adjourned until June 4, 2013 because the Commission did not have a quorum of Commissioners.

After considering the above arguments and information in Executive Session, the Commission denied Respondent Brookman's request for an adjournment of the June 4, 2013 hearing and his motion to dismiss the matter but advised Respondent Brookman he was free to renew the motion to dismiss at the conclusion of the presentation of all of the evidence in the case.<sup>6</sup>

**Motion for Summary Judgment,**  
**Consideration of Further**  
**Adjournments, Discovery Issues**

Following the completion of the hearing on June 4, 2013, RO Gallina made a Motion for Summary Judgment alleging violations of N.J.A.C. 11:5-4.1.

After consideration in Executive Session, the Commission denied the Motion for Summary Judgment because the motion was not in compliance with N.J.A.C. 11:1-12.5 and because there were genuine issues of material fact in dispute. Moreover, the Commission moved to continue the hearing on another date, at which time the REC could resume its case. The Commission also advised that Respondent Brookman could appear at the next hearing with

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<sup>6</sup> During the hearing on June 4, 2013, Respondent Brookman also stated he felt it was inappropriate that Investigator Sgourakis was talking with Commissioner Bonilla during a break. After discussing the issue in Executive Session, Commissioner Bonilla stated Investigator Sgourakis simply stated to her that Respondent Brookman was very excitable during questioning. The hearing continued without further objection.

counsel but the hearing would proceed even if he had not retained counsel and noted that no further adjournments would be granted. The Commission also made a motion that Respondent Brookman comply with the discovery request served upon him by RO Gallina within two weeks and, if he failed to do so, none of the materials he sought to be introduced into the record could be admitted into evidence.

**Respondent Brookman's Request to have the matter transferred to the Office of Administrative Law (OAL) and to Dismiss the Matter and to Sequester the Witnesses**

At the conclusion of the hearing on June 4, 2013, Respondent Brookman moved to have the matter transferred to the OAL and to have the witnesses sequestered. After considering this request in Executive Session, the Commission denied his request to have the matter transferred to the OAL and advised Respondent Brookman to put his request to have the witnesses sequestered in writing and submitted to the Commission.

On June 11, 2013, by way of email directed to RO Gallina, Respondent Brookman renewed his request to dismiss the case, noting that there was lack of evidence and "as a matter of law (due to the 6 year rule)" it should be transferred to the OAL. He also objected to what he characterized as *ex parte* contact between RO Gallina and members of the Commission.

In a letter dated June 26, 2013, RO Gallina responded to Respondent Brookman and objected to the Motion to Dismiss stating the State had not yet concluded the case; therefore, Respondent Brookman's motion was premature. She also addressed Respondent Brookman's reference to the "6 year rule" stating: "Staff assumes Respondent [Brookman] is referring to the provision in N.J.A.C. 11:5-4.1 which requires that brokers maintain employment agreements as a business record for six years. An employment agreement must be in effect for the entire length

of time that a licensee is employed with his or her broker. Respondent was employed with Rosa Agency until February 28, 2012. Therefore, Respondent [Brookman's] reliance on N.J.A.C. 11:5-4.1 as a basis for his motion to dismiss is misplaced."

RO Gallina also disagreed with Respondent Brookman's assertion he would be denied a fair and full hearing if the matter remained with the Commission because "the Commission extended every possible courtesy and consideration to [Respondent Brookman] as a pro se litigant." RO Gallina also denied she had ex parte communications with the commissioners on the day of the hearing.

On July 3, 2013, Respondent Brookman replied to RO Gallina's letter and attached a certification from Linton Hinds, Esq., an invoice from Maffey's Locksmith and a Judgment in favor of ReMax In Action for \$4,503.00 from the Union County Superior Court, Special Civil Part (Exhibit R-1). He requested these documents be submitted to the Commission at the July 9, 2013 hearing. He again insisted that RO Gallina spoke to the commissioners ex parte at the commencement of the June 4<sup>th</sup> hearing.

At the continuation of the hearing on July 9, 2013, RO Gallina advised the Commission of Brookman's July 3<sup>rd</sup> letter with attachments and additional documents that had been faxed by Brookman on July 9<sup>th</sup>, the date of the hearing, which included letters of reference (Exhibit R-2). Upon motion, the Commission held the matter in abeyance to review and consider the new material. The matter was then scheduled for a hearing on July 23, 2013. After considering the issues presented in Executive Session, the Commission denied Respondent Brookman's Motion to Dismiss as premature and again advised him he could renew this motion upon completion of the case. The Commission also denied Respondent Brookman's request to transfer the matter to the OAL. Moreover, the Commission advised they would set aside one



hour per Commission meeting to hear the case, for as many meetings as would be necessary to complete the hearing. Moreover, the Commission ordered both Respondent Brookman and RO Gallina provide a witness list within 10 days. By letter dated July 25, 2013, RO Gallina provided the Commission and Respondent Brookman with a witness list as requested.

**Respondent Brookman’s Request to  
Adjourn the October 8, 2013 Hearing Date**

On October 3, 2013, Raymond S. Londa, Esq. contacted the REC via letter requesting the hearing for October 8, 2013 be adjourned because of Respondent Brookman’s recent filing of a complaint against the Rosa Agency regarding the existence of an independent contract agreement<sup>7</sup>. Londa stated “I do not represent Mr. Brookman in the matter pending before your board, and I write this letter to you at his request as an accommodation to him.” On October 4, 2013, RO Gallina responded to Mr. Londa by letter stating she could not consent to an adjournment.

On October 7, 2013, Jorge A. Batista, Esq. sent RO Gallina a letter explaining he was retained by Respondent Brookman and renewed the request for an adjournment to enable him to review and prepare the file. RO Gallina responded to this request via a letter, also dated October 7, 2013, memorializing her verbal conversation with him wherein she advised that she could not consent to an adjournment and that he or Mr. Brookman would have to make that request in person to the Commission. On October 8, 2013, after consideration, the Commission denied Brookman’s adjournment request since it had informed Respondent Brookman there would be no further adjournments at the June 4<sup>th</sup> 2013 hearing. However, due to scheduling issues of the attending Commissioners, the remainder of the hearing was ultimately postponed

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<sup>7</sup> At no time during the course of this matter did Mr. Londa represent Respondent Brookman in this matter.

because a quorum of Commissioners could not be maintained.<sup>8</sup> It should be noted Commissioner Timoni had previously recused himself from the matter.

**Motion to Allow Witness  
Testimony by Telephone Conference**

On October 17, 2013, the REC moved to Allow Witness Testimony by Telephone Conference. At the November 13, 2013 hearing, Respondent Brookman, through his attorney Mr. Batista, opposed the motion stating he was entitled to observe the witnesses' demeanor. He also stated he wanted a full opportunity to question and examine the witnesses. RO Gallina informed the Commission she had not received a witness list from the Respondent. After consideration of these issues in Executive Session, the Commission denied the REC's Motion to Allow Witness Testimony by Phone. The Commission further directed that state investigators were to be made available at the next hearing in person for Mr. Batista to cross-examine and, at that point, he could also move forward with his case. The Commission also ordered the Respondent provide a witness list, including those individuals who Respondent will cross-examine, by 5pm of that same day.

**Adjournment of December 17, 2013 Hearing**

At the hearing on December 17, 2013, RO Gallina informed the Commission she had received an e-mail that morning from Respondent Brookman's attorney, Jorge A. Batista, Esq., stating he was unable to appear at the hearing because, due to weather conditions, his kids were home from school. He therefore requested an adjournment. RO Gallina objected to the adjournment. The Commission ultimately granted the adjournment but noted the next date would be scheduled on a peremptory basis. RO Gallina informed the Commission she had received documentation and a witness list from Respondent. Thereafter, RO Gallina

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<sup>8</sup> The matter was also adjourned from the next scheduled date of October 22, 2013 because there was not a quorum of Commissioners. The matter was then heard on November 13, 2013.

administratively dismissed Count 2 of the OTSC against Respondent Brookman as it related to the Rosa Agency because witnesses became unavailable after the re-scheduling of hearing dates. Consequently, RO Gallina intended to proceed with Count 1 of the OTSC and the supporting exhibits admitted into evidence. The matter was then rescheduled for January 7, 2014.

#### **January 7, 2014 Hearing**

Both Mr. Batista and Respondent Brookman failed to appear at the January 7th hearing even though notice of the hearing was provided to Batista, Brookman's attorney. RO Gallina informed the Commission she was prepared to rest her case. After considering the notice issue in Executive Session, the Commission decided to proceed because adequate notice was provided to Respondent Brookman through his attorney, Jorge Batista, Esq., via Gallina's letter dated October 30, 2013. Moreover, Bastista had appeared on November 13, 2013 and had requested an adjournment on December 17, 2013.<sup>9</sup>

#### **Statement by Respondent Brookman on June 4, 2013**

After being sworn in and during his opening statement, Respondent Brookman stated:

Okay, I mean basically the second issue with the Independent Contractors Agreement I had with Pedro [Oliveira], I was under the impression that we had that one page agreement which we sent right into them, and I don't think that that should rise to a level of any type of misbehavior or whatever by not having a whole formal thing. If anything, as [Regulatory Officer Gallina] could have recommended that I add one or two extra points in the thing and say don't do it again, make sure you have all the points as a teaching. ...I didn't do anything intentionally. I had the Independent Contractor Agreement in place, and Tino Rosa would not have allowed me to work there.

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<sup>9</sup> Since the REC had concluded its case on January 7, 2014, the Commission placed findings regarding the final decision on the record at this time.

## TESTIMONY OF THE WITNESS<sup>10</sup>

### Investigator Robert McCloskey

Investigator McCloskey (“McCloskey”) testified on behalf of the REC that he has been an investigator with the REC for over ten years and he was assigned to investigate a complaint by Lidia Lehman against Respondent Brookman. During his investigation, McCloskey met with Respondent Brookman, who was then working for ReMax In Action in Elizabeth.

Investigator McCloskey testified that on April 11, 2012 that he interviewed Pedro Oliveira (“Oliveira”), Respondent Brookman’s broker, regarding Respondent’s Independent Contractor Agreement with ReMax In Action. McCloskey identified Exhibit S-4 as being a copy of the agreement that was provided to him by Oliveria. Investigator McCloskey described Exhibit S-4 as being dated February 28, 2012 and signed by Oliveira and Oliveira told him it was not signed by Respondent Brookman. Investigator McCloskey further stated the Independent Contractors Agreement, which was dated February 28, 2012, corresponded to the information in the REC’s licensing database as being the date Respondent Brookman became affiliated with and employed by ReMax In Action. [See Exhibit S-1].

Investigator McCloskey further identified Exhibit S-5, a subsequent Independent Contractors Agreement also provided by Oliveira. Investigator McCloskey stated Exhibit S-5, dated June 5, 2012, shows that Oliveira signed the agreement on March 2, 2012 and that Brookman signed the agreement and dated it June 5, 2012. According to Oliveria, the lapse in time between the first and second signature occurred because Respondent Brookman wanted to have his attorney review the document and that Respondent Brookman wanted to negotiate some issues.

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<sup>10</sup> Investigator Sgourakis and Dora Quijano testified on June 4, 2013. However, their testimony was relevant only to the charges related to the Rosa Agency. Since that count (Count 2 of the OTSC) was dismissed, a summary of their testimony will not be recounted here.

Investigator McCloskey testified that, during his initial conversation with Oliveira on April 11, 2012, no other document of any sort was offered. However, after obtaining Exhibits S-4 and S-5, Oliveira later provided Investigator McCloskey with Exhibit S-6, which was a fax cover sheet dated April 11, 2012 from Pedro Oliveira to REC Investigators with an attachment. McCloskey further described the attachment [Exhibit S-6] as a “one paragraph substitution” for an employment agreement which was signed by Oliveira and Brookman and dated February 28, 2012.

Investigator McCloskey further testified that while he was in the ReMax office on April 11, 2012 he reviewed several listings and sales documents for transactions that Respondent Brookman handled. [See Exhibit S-7, (a) through (j)]. Investigator McCloskey stated these documents support the fact that Respondent Brookman was actively engaged in the real estate business from February 28, 2012 until the signing of the agreement on June 2012.<sup>11</sup> [See Exhibit S-5].

On cross-examination, Investigator McCloskey further testified Oliveira told him there was not an Independent Contractor Agreement in place and that the agreement was not signed. Investigator McCloskey stated Respondent Brookman had told him there was a letter he had typed which was what Oliveira ultimately faxed to Investigator McCloskey.

Lastly, Investigator McCloskey answered in the negative when asked on cross examination if he had ever seen an Independent Contractor Agreement that was not prepared on the real estate broker’s stationary.

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<sup>11</sup> Respondent Brookman did not dispute the fact that he was actively engaged in the real estate business during the relevant time period from February 28, 2012 through June 5, 2012.

## FINDINGS OF FACT

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

1. Jeffrey M. Brookman is currently a licensed New Jersey real estate salesperson and, at all relevant times, licensed with ReMax In Action, a licensed New Jersey real estate broker located at 351 Jersey Avenue, Elizabeth, NJ 07202. Respondent Brookman became licensed with ReMax in Action on February 28, 2012.
2. On April 11, 2012, during the course of an investigation, REC Investigator McCloskey visited the office of ReMax In Action and interviewed Respondent Brookman and Pedro Oliveira. At that time, he was provided with copies of listings and sales documents which reflected some of Respondent Brookman's sales activity on behalf of ReMax In Action during the relevant time period from February 28, 2012 through June, 2012. These documents were admitted into evidence as Exhibit S-7 (a) – (j) and demonstrate that Respondent Brookman was actively engaged in real estate transactions from February 28, 2012 through at least June, 2012.
3. On April 11, 2012, during Investigator McCloskey's site visit to the ReMax In Action office, he requested a copy of Respondent Brookman's employment agreement. Pedro Oliveira, broker of record for ReMax In Action, produced a fifteen (15) page ReMax of New Jersey form Independent Contractor Agreement which was not signed by Respondent Brookman. [Exhibit S-4]. This document, dated February 28, 2012, was signed only by Oliveira on February 28, 2012. The name "Jeffrey Brookman" is printed above the line for "contractor" at the end of the document; however, Respondent Brookman did not sign this document.

4. After the office interview, broker Oliveira provided a one page document [Exhibit S-6] to Investigator McCloskey bearing the date of February 28, 2012 signed by himself and Respondent Brookman which purported to be an employment agreement. This one paragraph document consisted of the following language: "I, Pedro Oliveira, broker of ReMax In Action and Jeffrey Brookman, the licensed sales person, agree that Jeffrey Brookman (sic) will work and be compensated for a 80 percent commission split on all properties sold. I also agree that if I decide to leave Remax In Action that all the listings that are currently active in the office will remain with Jeffrey Brookman to bring to whichever agency he is to be employed by. Any property that is under contract will remain with the office and Jeffrey Brookman will be compensated 80 %."
5. This document [Exhibit S-6] was not provided to Investigator McCloskey at the time of the office interviews and does not comply with the requirements of N.J.A.C. 11:5-4.1 because it does not contain all the required terms. Therefore, as of April 11, 2012, Respondent Brookman did not have a written employment agreement with ReMax In Action as required by N.J.A.C. 11:5-4.1.
6. Investigator McCloskey was also provided with an Independent Contractor Agreement between Oliveira as broker/owner of ReMax In Action and Respondent Brookman as Contractor. [Exhibit S-5]. The first line of this agreement states: "THIS INDEPENDENT CONTRACTOR AGREEMENT (this "*Agreement*") is made and entered into this 1 day of March, 2012, to be effective the 1 day of March, 2012 (the "*Effective Date*")..." Oliveira signed the document on March 2, 2012 and Respondent Brookman signed the document on June 5, 2012.

#### **CONCLUSIONS OF LAW**

In light of the above findings of fact, the Commission makes the following conclusions of law regarding the charges contained in the OTSC and summarized above:

1. Respondent Brookman is in violation of N.J.A.C. 11:5-4.1(a) in that he commenced employment and engaged in real estate activity as a salesperson at ReMax In Action without having a signed written agreement as provided in this subsection.
2. Respondent Brookman did not violate N.J.S.A 45:15-17e and N.J.S.A 45:15-17t because his conduct did not demonstrate unworthiness nor fraud or dishonest dealing as set forth above.

### **DETERMINATION**

In arriving at the determination in this matter, the Commission took into consideration the testimony and credibility of the witnesses including statements offered by Respondent Brookman, and the documentary evidence admitted during the course of the hearing.

In this case, Respondent Brookman actively engaged in the real estate business as a real estate salesperson without a signed Independent Contractor Agreement as required by N.J.A.C. 11:5-5-4.1, between the dates February 28, 2012 and June 5, 2012. Pursuant to N.J.A.C. 11:5-5-4.1(a), "No salesperson or referral agent may commence operations as such for a broker and no broker may authorize a salesperson or referral agent to act as such on his or her behalf until a written agreement as provided in this section has been signed by the broker and salesperson. Prior to an individual's commencement of activity as a salesperson or referral agent under the authority of a broker, the broker and salesperson or referral agent shall both sign a written agreement which recites the terms under which the services of the salesperson or referral agent have been retained by the broker." The terms shall include the rate of compensation to be paid to the salesperson or referral agent during his or her affiliation with the broker; a promise by



the broker to pay the salesperson his portion of the commissions earned within 10 business days of their receipt by the broker or as soon thereafter as such funds have cleared the broker's bank, or in accordance with another payment schedule explicitly set forth in the employment agreement. N.J.A.C. 11:5-4.1(a). The terms of the agreement shall also include the rate of compensation payable to the salesperson on transactions which close and, if applicable, on renewals which occur subsequent to the termination of the salesperson's affiliation with the broker and a provision that any future changes to the agreement will not be binding unless the changes are contained in a writing signed by both parties. Id.

Here, Respondent Brookman admitted that he did not have an adequate Independent Contractors Agreement between himself, as salesperson, and Oliveira as broker. He specifically stated, "Okay, I mean basically the second issue with the Independent Contractors Agreement I had with Pedro [Oliveira], I was under the impression that we had-that one page agreement which we sent right into them, and I don't think that that should rise to a level of any type of misbehavior or whatever by not having a whole formal thing. If anything, as [Regulatory Officer Gallina] could have recommended that I add one or two extra points in the thing and say don't do it again, make sure you have all the points as a teaching. ...I didn't do anything intentionally." In this statement Respondent Brookman refers to Exhibit S-6, which contains a one page, one paragraph document purportedly signed on February 28, 2012 by both Respondent Brookman and Oliveira. However, it remains suspect and unclear why this document was not immediately provided to Investigator McCloskey during his initial inquiries and interviews with Respondent Brookman and Oliveira. Instead, the document surfaced and was submitted later that day. Nevertheless, even if the document is authentic, it does not comply with the requirements of N.J.A.C. 11:5-4.1. First, this one page, one paragraph document does not contain a provision

of commissions earned within 10 business days of their receipt by the broker or as soon thereafter as such funds have cleared the broker's bank. Moreover, it contains no provision stating that any further changes to the agreement will not be binding unless the changes are contained in a writing signed by both parties.

Further, the agreement between Oliveira and Respondent Brookman dated February 28, 2012 [Exhibit S-4] only contained Oliveira's signature and was never signed by Respondent Brookman. Oliveria also told Investigator McCloskey that Brookman did not sign the agreement. It was not until June 5, 2012 [Exhibit S-5] that an Independent Contract was signed by Respondent Brookman. It was at this time that Respondent Brookman began to operate under a fully executed Independent Contractor agreement that was in compliance with N.J.A.C. 11:5-4.1. Therefore, Respondent Brookman engaged in real estate business without having a signed employment agreement in violation of N.J.A.C. 11:5-4.1. However, this conduct did not demonstrate unworthiness in violation of N.J.S.A. 45:15-17e, nor did he violate N.J.S.A. 45:15-17t.

The Commission may impose "a penalty of not more than \$5,000.00 for the first violation, and a penalty of not more than \$10,000.00 for any subsequent violation." N.J.S.A. 45:15-17. In Kimmelman v. Henkels & McCoy, Inc. 108 N.J. 123 (1987), the Supreme Court established the following seven factors to evaluate the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the imposition of penalties pursuant to the Real Estate License Act, N.J.S.A. 45:15-1, et seq.: (1) The good or bad faith of the respondent; (2) The respondent's ability to pay; (3) Amount of profits obtained from illegal activity; (4) Injury to the public; (5) Duration of the illegal activity or conspiracy; (6) Existence of criminal or treble actions; and (7) Past violations. Kimmelman, supra 108 N.J. at

137-139. Analysis of these factors in this matter requires imposition of a fine designated to discourage this type of conduct.

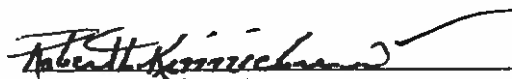
Applying the Kimmelman factors, the evidence does not show Respondent Brookman demonstrated bad faith by failing to sign his Independent Contractors Agreement. Second, no evidence was submitted regarding Respondent Brookman's ability to pay. Third, Respondent Brookman profited by receiving commissions on transactions while he was working without a signed agreement. For example, Respondent Brookman was entitled to multiple commissions. [See Exhibit S-7]. Fourth, in order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]." Goodley v. New Jersey Real Estate Comm'n, 29 N.J. Super. 178, 182 (App. Div. 1954). Therefore, the public is harmed when individuals in a fiduciary position violate their responsibilities and fail to comply with REC regulations. In this case, Respondent Brookman violated his responsibilities by not having a signed employment agreement while entering into listing agreements with the public to earn commissions. Also, the public's confidence in the real estate industry is eroded when a licensee is unable to conduct himself in accordance with the high standards expected of him and his profession. Fifth, Respondent Brookman's actions took place from February 28, 2012 to June 5, 2012, a relatively short duration. Sixth, the Commission is not aware of any criminal or treble actions. Finally, to the Commission's knowledge, there are no prior violations of the real estate regulations by Respondent Brookman. However, the penalty shall deter future violations.

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

I. Respondent Brookman shall pay a fine in the amount of \$2,500.00 for violation of N.J.A.C. 11:5-4.1 to be paid within 30 days of this written order.

SO ORDERED this 16<sup>th</sup> day of September, 2015.

By: Linda Stefanik, President  
Jacob S. Elkes, Esq., Commissioner  
Robert Melillo, Commissioner  
Harold J. Poltrock, Esq., Commissioner  
Benjamin Steltzer, Commissioner  
Jeffrey A. Lattimer, Commissioner  
Eugenia K. Bonilla, Commissioner

  
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Robert L. Kinniebrew  
Executive Director  
New Jersey Real Estate Commission