

NEW JERSEY REAL ESTATE COMMISSION

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COMMISSION

Complainant,

v.

JOSEPH DAMONE, a licensed New Jersey
real estate salesperson (Ref. No. 0344310),
and JOHN ANDRIE, a licensed New Jersey
broker (Ref. No. 0452080),

Respondents.

Docket No.: GLO-16-007
REC Ref. No.: 10001876

**FINAL ORDER OF
DETERMINATION**

THIS MATTER was heard by the New Jersey Real Estate Commission (“Commission”) at the Department of Banking and Insurance, State of New Jersey, in the Commission Hearing Room, 20 West State Street, Trenton, New Jersey, on July 25, 2017.

BEFORE: Commissioners Linda K. Stefanik, Eugenia Bonilla, Jacob Elkes, William Hanley, and Denise M. Illes.

APPEARANCES: Marianne Gallina, Regulatory Officer, appeared on behalf of the Complainant, the New Jersey Real Estate Commission Staff (“REC”). John D. Kosylo, Esq. appeared on behalf of Respondent Joseph Damone (“Damone”) and Respondent John Andrie (“Andrie”) (collectively, “Respondents”). Both Damone and Andrie were present at the hearing.

STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated June 20, 2016, 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 alleges that on February 28, 2014, Damone submitted a letter of termination to Randel Jones (“Jones”), broker of record at Re/Max Preferred (“Preferred”), along with unconditional releases signed by the owners of properties located at 769 Allen Avenue, Gibbstown, NJ (“Allen Avenue”); 106 Carlisle Court, Runnemede, NJ (“Carlisle Court”); and 842 Rosetree Drive, Williamstown, NJ (“Rosetree Drive”), seeking to terminate their relationship with Preferred. Preferred did not sign the releases and did not consent to the release of these listings. The OTSC alleges that on March 3, 2014, Andrie entered the above listings into the Multiple Listing Service (“MLS”) as “active” with Re/Max Associates (“Associates”). The OTSC alleges that in doing so, Damone and Andrie violated N.J.A.C. 11:5-6.4(a) in that this conduct failed to protect and promote the interests of their principals by transferring the above-referenced listings to Associates without the permission of Preferred. In addition, the OTSC alleges this conduct demonstrates unworthiness, bad faith, or dishonesty, in violation of N.J.S.A. 45:15-17e.

John D. Kosylo, Esq. timely filed an Answer to the OTSC on behalf of the Respondents, wherein the Respondents admitted to and denied certain allegations set forth in the OTSC. Accordingly, on July 26, 2016, the Commission deemed this matter a contested case and directed that a hearing be scheduled.

A hearing was conducted on July 25, 2017, at which time the following exhibits were admitted into evidence by the REC:

- S-1 Independent Contractor Agreement between Joseph Damone and Re/Max Preferred, dated January 3, 2013;
- S-2 Letter of Resignation, signed by Joseph G. Damone and Cindy E. Hoose, dated February 28, 2014;
- S-3 Listing Status Change Form for 769 Allen Avenue, signed by Michelle Krupica, Frank Krupica, and John Andrie of Re/Max Associates, dated February 28, 2014;

Listing Transfer Agreement for 769 Allen Avenue signed by Michelle Krupica, Frank Krupica, and John Andrie of Re/Max Associates, dated February 28, 2014;

- S-4 Listing Status Change Form for 106 Carlisle Court, signed by Anthony Granato, on behalf of Julia Granato, and John Andrie of Re/Max Associates, dated February 28, 2014; Listing Transfer Agreement for 106 Carlisle Court, signed by Anthony Granato, on behalf of Julia Granato, and John Andrie of Re/Max Associates, dated February 28, 2014;
- S-5 Listing Status Change Form for 842 Rosetree Drive, signed by Nikki Voci and John Andrie of Re/Max Associates, dated February 27, 2014; Listing Transfer Agreement for 842 Rosetree Drive, signed by Nikki Voci and John Andrie of Re/Max Associates, dated February 27, 2014;
- S-6 Termination of License for Joseph E. Damone and Cindy Hoose of Re/Max Preferred, effective March 10, 2014;
- S-7 Status Change History Report for 769 Allen Avenue generated by Trend MLS;
- S-8 "Taken Off Market" MLS for 769 Allen Avenue by Re/Max Preferred Listing Agent Greg Damone,¹ listed on October 29, 2013 and last modified on March 1, 2014;
- S-9 "Active" MLS for 769 Allen Avenue by Re/Max Associates Listing Agent John Andrie, listed on March 3, 2014 and last modified on March 4, 2014;
- S-10 Status Change History Report for 106 Carlisle Court generated by Trend MLS;
- S-11 "Taken Off Market" MLS for 106 Carlisle Court by Re/Max Preferred Listing Agent Greg Damone, listed on September 16, 2013 and last modified on March 1, 2014;

¹ Damone testified that he also uses the name "Greg Damone" or "Gregory Damone."

- S-12 “Active” MLS for 106 Carlisle Court by Re/Max Associates Listing Agent John Andrie, listed on March 3, 2010 and last modified on March 3, 2014;
- S-13 Status Change History Report for 842 Rosetree Drive generated by Trend MLS;
- S-14 “Taken Off Market” MLS for 842 Rosetree Drive by Re/Max Preferred Listing Agent Greg Damone, listed on October 24, 2013 and last modified on March 1, 2014;
- S-15 “Active” MLS for 842 Rosetree Drive by Re/Max Associates Listing Agent John Andrie, listed on March 3, 2010 and last modified on March 3, 2014;
- S-16 New Jersey Residential Listing Agreement for Exclusive Listing of 769 Allen Avenue signed by Joseph Damone of Re/Max Preferred, dated October 29, 2013;
- S-17 New Jersey Residential Listing Agreement for Exclusive Listing of 842 Rosetree Drive signed by Joseph Damone of Re/Max Preferred, dated October 24, 2013; and
- S-18 Independent Contractor Agreement between Joseph Damone and Re/Max Associates, signed by Joseph Damone and John Andrie, dated February 26, 2014.

TESTIMONY OF THE WITNESSES

Randel Jones

Randel Jones testified on behalf of the REC. Jones testified that he filed the initial complaint regarding Andrie and Damone’s conduct because he stated that listings were “stolen” from his office at Preferred, where he is the broker of record.

Jones explained that he brought Damone onto his team on January 3, 2013. At the time Damone was working for Berkshire Hathaway. Jones met with Damone and offered him a job that included a sign-on bonus and an offer to pay for lost commission on Damone’s listings sold

through Berkshire Hathaway. Damone agreed to these terms. Jones noted that none of Damone's listings at Berkshire Hathaway were moved over to Preferred. In accepting Jones' offer, Damone signed an Independent Contractor Agreement and became a licensed agent through Preferred, effective January 3, 2013. (Exhibit S-1).

Jones stated that Damone submitted a written letter of resignation from Preferred providing 60-day notice on Friday, February 28, 2014. (Exhibit S-2). Jones testified that later that same day, he received an e-mail stating that Damone was planning on leaving Preferred immediately, prior to the expiration of the 60-day prior notice period. Jones stated that at the time, Damone was the listing agent for at least three active properties. Those listings included Allen Avenue, Carlisle Court, and Rosetree Drive. Attached to his letter of resignation, Damone submitted Listing Status Change forms for each of the properties he intended to take with him upon resignation. (Exhibits S-3, S-4, and S-5). In reviewing these exhibits, Jones noted that none of the forms were signed by an authorized broker at Preferred, which is required to release the listings from their contracts in order to transfer them to another agency.

Jones stated that the listings at issue had been changed in the Trend MLS. The listing for Allen Avenue had been changed to "taken off market" status at 12:56 PM on February 28, 2014 and stripped of all media at approximately 3:17 AM on March 1, 2014. (Exhibits S-7 and S-8). The property was then relisted as "active" by Andrie, broker of record at Associates, on March 3, 2014. (Exhibit S-9). Similarly, the listing for 106 Carlisle Court had been changed to "taken off market" status at 1:04 PM on February 28, 2014 and stripped of all media at approximately 3:19 AM on March 1, 2014. (Exhibits S-10 and S-11). The property was relisted as "active" by Andrie on March 3, 2014. (Exhibit S-12). Lastly, the listing for 842 Rosetree Drive had been changed to "taken off market" status at 12:57 PM on February 28, 2014 and stripped of all media at

approximately 3:20 AM on March 1, 2014. (Exhibits S-13 and S-14). The property was relisted as “active” by Andric on March 3, 2014. (Exhibit S-15).

Jones indicated that he had reviewed the Residential Listing Agreements for 769 Allen Avenue and 842 Rosetree Drive. (Exhibits S-16 and S-17). These properties were listed by Damone in his capacity as an agent of Preferred. Damone listed Allen Avenue on October 29, 2013. The agreement was signed by Damone, acting as an authorized representative of Preferred, and does not provide a clause for releases or transfers of the listing. (Exhibit S-16). The Listing Agreement for 842 Rosetree Drive is identical in that it does not include a clause for release or transfer of the listing and is signed by Damone as an authorized representative of Preferred. (Exhibit S-17). Jones went on to state that he was unable to locate the original Listing Agreement for 106 Carlisle Court.

Jones testified that Damone had no authority to release these listings on behalf of Preferred and that releases require the signature of the broker of record to be effective. Jones stated that he first learned that Damone was planning to leave Preferred on Friday, February 28, 2014. Jones did not realize that the listings had been altered until the following Monday (March 1, 2014) or Tuesday (March 2, 2014). After learning that these listings had been transferred without authorization, Jones stated he did not contact the property owners. He stated that the listings had already been moved and he did not want to fight over these properties or hurt the clients. Traditionally, had he had the opportunity, he would have contacted the sellers to let them know they were being assigned a new agent who would continue to market their properties.

He further stated that he has been in the real estate business since 1989 and that he has a good reputation for protecting his clients. He stated that when Damone came to his office, no rules were broken, so when Damone left, he did not expect any rules to be broken. Jones stated that he

filed his complaint with the REC because he believed that it was wrong for Damone, with the aid of his new broker, Associates, to transfer the listings as he did. Furthermore, Jones stated he did not opt for mediation or arbitration to resolve Damone's unauthorized transfer of Preferred's listings because he interpreted the "Dispute Resolution" portion of the Independent Contractor Agreement to pertain to matters that would otherwise be heard in court, and not an administrative proceeding like this one. (Exhibit S-1, ¶9). He further emphasized that without Andrie's help, Damone would not have been able to re-list the properties with Associates in this manner.

Jones also testified that Preferred does not require the signature of a broker on a Listing Agreement; only the agent is required to sign as an authorized representative of the agency. He further stated that when an agent brings a listing into the office, he or she gives a copy of documents to the Office Administrator, who creates and maintains the original file and gives copies to the agent. Jones testified that two other properties, 234 Oak Street and 134 E. Main Street, were also listed by Damone while licensed through Preferred. While Jones was unable to locate the original files at Preferred's office, he was able to locate them on the Trend MLS. Jones testified that 234 Oak Street was listed by Damone on January 1, 2014. The listing was extended until February 11, 2014, and then it was "taken off market" on February 28, only to be relisted by Andrie on March 13, 2014. Similarly, 134 E. Main Street was listed by Preferred on February 3, 2014, "taken off market" on March 10, 2014, and relisted by Andrie on March 13, 2014.

Jones testified that information about a listing is entered into the MLS either by the office administrator or the listing agent, who are each assigned a unique identification number. Upon closer review of the Trend MLS Report, Jones pointed out that all the activity on these reports, including the change of status from "active" to "taken off market" and the removal of all media, was done by an individual with the identification number 60006793. (Exhibits S-7, S-10 and S-

13). Jones also indicated that this identification number corresponds to the “List Agent” number assigned to Damone, located at the bottom of Listing Report for each property. (Exhibits S-8, S-11, and S-14).

Lastly, Jones stated that he had last spoken to Damone in 2016. He subsequently learned that the Allen Avenue and Carlisle Court properties had been sold through Associates.

Joseph Damone

Respondent Damone testified on his own behalf. He testified regarding his relationship to the owners of the listings at Allen Avenue, Carlisle Court, and Rosetree Drive. Damone assisted the seller of 769 Allen Avenue via a marketing campaign. He noted that this property was not actually sold; rather, the property had been an attempted short-sale that was not approved by the bank.² The owner of 106 Carlisle Court was the mother of Damone’s personal friend. He stated that met the seller of 842 Rosetree Avenue when he assisted her with a tax appeal. When she was ready to sell the property, she reached out to Damone. Damone testified that this home also did not sell.

Damone detailed the circumstances surrounding his resignation from Preferred. Damone recalled that when Jones first offered him a position at Preferred, the offer included compensation for commission lost for his listings sold under contract with his then employer, Berkshire Hathaway. Upon reviewing his end-of-year numbers at Preferred in 2013, he realized that his lost commission from Berkshire Hathaway had not been realized as promised due to the pay structure at Preferred. On February 28, 2014, Damone submitted his formal resignation to Jones, which included a 60-day notice period. (Exhibit S-2). Upon receipt of his resignation, Jones asked for a

² Jones testified that he had eventually learned that the Allen Avenue and Carlisle Court properties had been sold through Associates. Damone testified that Allen Avenue property had not sold, but had been a short-sale that was ultimately not approved by the bank. Damone affirmed that Carlisle Court had sold but did not verify the status of Rosetree Drive.

closed-door meeting with Damone that included an offer of “vague compensation” as incentive for Damone to stay at Preferred. However, Damone testified that he was not interested in remaining at Preferred, and furthermore, he now felt uncomfortable staying for the 60-day period because he believed that he would no longer have the support from Preferred’s staff or access to the tools he needed to service his clients properly.

Damone further stated that, while he was uncertain how many active listings he had at this time, he believed that he may have had three such listings. Damone also stated that prior to tendering his resignation, he had met with each owner, in person or by phone, to inform them that he was planning on leaving Preferred and that they could come with him to Associates or stay at Preferred and work with a new agent. In addition to speaking to each client, Damone provided his clients with documentation to sign including a Listing Status Change Form, which states that changing the status of a listing does not release parties from the remaining time covered by the Listing Agreement. He also provided his clients with a Listing Transfer Agreement, which gives the original agency permission to transfer a listing to another with the signature of the original agency. (Exhibits S-3, S-4, and S-5). All three parties opted to leave Preferred and signed these documents. (Answer, Appendix: Letter from Frank and Michelle Krupica, Letter from Nikki Voci, Letter from Anthony Granato). However, Damone admitted that he did not inform his clients that that they had signed a Residential Listing Agreement with Preferred, which gave Preferred the exclusive right to market their property or that Preferred owned the listing, not Damone. He also admitted that he failed to advise his clients that said agreements were legally binding contracts under New Jersey law, nor did he advise his clients to contact an attorney. (Exhibits S-16 and S-17).

Damone further testified that he submitted these documents, the Listing Status Change Form and the Listing Transfer Agreements signed by the owners, to Jones with his resignation on February 28, 2014. He stated that he never heard from Jones or Preferred regarding the transfer of the listings. (Exhibit S-2). Damone stated that he followed-up regarding the release of his license and these listings when he hand-delivered paperwork to Preferred's offices on March 3, 2014. In addition, Damone admitted that he had begun to perform work for Associates while his license status with Preferred had not been confirmed on March 3, 2014.

Damone also testified that, on March 5, 2014, he received an e-mail from Preferred requesting a meeting with Jones to discuss his resignation. On March 7, 2014, Damone contacted Preferred to inquire about the release of both his license and the listings. His license with Preferred was released on March 10, 2014. (Exhibit S-6).

On cross-examination, Damone examined the Status Change History Report for 842 Rosetree Drive generated by Trend MLS. (Exhibit S-13). He noted that all material changes made to a listing are time-stamped, including a change from "Active" to "Taken Off Market" at 12:54 PM on February 28, 2014, and that there is another form that indicates who made the changes in the system that was not submitted into evidence. In addition, he noted that the active listings submitted into evidence, (Exhibits S-7, S-10, and S-13), are also time-stamped with the date and time they were transferred from Damone at Preferred to Andrie at Associates. Lastly, Damone stated that he submitted the transfer documentation to Associates on February 28, 2014, the same day he left Preferred.

Damone indicated that he did not believe anyone from Preferred had contacted his clients following his resignation and he was not asked to attend arbitration or mediation to resolve this dispute. Damone also stated that he still does not think his conduct was inappropriate.

Lastly, Damone testified that he continued to market these properties upon leaving Preferred and transferring the listings to Associates without consent from Jones because he was protecting his clients. He stated that he sold the Carlyse Court property and received commission through Associates for three percent with a “100 percent commission split.” He also indicated that the Allen Avenue listing was updated by the MLS to “settled” when it had not been sold.

John Andrie

Respondent Andrie testified on his own behalf. He testified concerning why he had assisted Damone in transferring Preferred’s listings to Associates. Andrie is the broker of record of Associates. He was first licensed as a salesperson in 2004 and as a broker in 2007. He testified that when Damone expressed an interest in leaving Preferred for Associates, Damone also expressed serious concerns about leaving his current listings at Preferred. Specifically, Damone mentioned that oftentimes, when an agent left Preferred, their listings were not properly serviced. Andrie agreed that should anyone contact Preferred to ask questions about Damone’s active listings, nobody at Preferred would be able to answer them. He also stated he did not want the owners of the properties at issue to be hurt in any way or to be charged a double commission. Andrie noted that Damone’s employment agreement was executed on February 26, 2014, and was effective March 1, 2014. Andrie stated that these dates were not changed to reflect the actual effective date, which was March 10, 2014.

Andrie confirmed that he was aware that Damone had contacted the owners regarding his leaving Preferred prior to joining Associates and prepared documents for the sellers’ signatures in order to transfer his listings from Preferred to Associates. Andrie reviewed the Listing Transfer Agreements (Exhibits S-3 to S-5), which requires signatures from both the listing agency (Preferred) and Associates, but he admitted that he did not review the Listing Status Change Forms

(Exhibits S-3 to S-5), which require only a signature from a broker at Preferred. Andrie stated that he was initially unaware that these documents were incomplete, specifically that these forms were missing a signature from Preferred, and that Andrie's own signature is not dated. Andrie further stated that when this error came to his attention, he did not take any steps to procure signatures from Preferred. In addition, Andrie stated that he did not know why his signature was undated on these documents. Andrie stated that these documents were executed by him between February 28, 2014 and March 5, 2014.

Andrie further testified that it was his understanding that Jones and Preferred would release these listings to Associates, even without Preferred's signature, knowing the listings were under contract with Preferred. Re/Max of New Jersey provides independent contractor agreements which state that if an agent's fees are current, they can take their listings with them when they leave an agency. Andrie stated that Re/Max's brokers typically use these boilerplate contracts, but that Damone's contract with Preferred was the first time he had seen an independent contractor agreement without these protections.³ Even in light of this information, Andrie stated that he had just assumed the listings would come with Damone.

Additionally, Andrie stated that he had spoken to the owners of the properties on Allen Avenue, Carlyle Court, and Rosetree Drive during the first week of March 2014. While the conversations were admittedly brief, each owner confirmed that Preferred had not contacted them regarding their listing.

³ During Andrie's testimony he indicated that his Independent Contractor Agreement, Re/Max of New Jersey's boilerplate contract, provides these types of protections for agents and their listings. The clause he references (6E) states: "Contractors obligations for payments due to Broker, Regional and RE/MAX, LLC, shall survive termination or expiration of this Agreement or any Renewal of this Agreement" (Exhibit S-18).

Andrie stated that Associates received a commission on the sale of the Carlisle Court property, which he believed was 3 percent of the sale price. He also stated that neither agency had claimed the commission on another one of the listing at issue that had sold.

Lastly, Andrie testified that he and Jones did speak, when an agent from Associates left to pursue employment at Preferred. Andrie stated that he signed off on the agent taking active listings with him to Preferred. The two spoke to “iron out” the details regarding this agent, and that is when the situation with Damone came up for the first time.

FINDING OF FACT

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

1. Damone is a licensed salesperson and has been licensed with Andrie Group, LLC d/b/a Re/Max Associates, whose office is located at 309 Fries Mill Road, Suite 15, Sewell, New Jersey, from March 10, 2014 to present. He was licensed as a salesperson with Augusta Investments d/b/a Re/Max Preferred, licensed real estate broker, from January 4, 2013 through March 10, 2014.
2. Andrie is a licensed broker and is broker of record of Andrie Group, LLC d/b/a Re/Max Associates.
3. On February 28, 2014, Damone submitted a letter of termination to Jones, broker of record at Preferred, along with unconditional releases signed by the sellers of the listings for Allen Avenue, Carlisle Court, and Rosetree Drive, seeking to terminate their relationships with Preferred.
4. Preferred did not sign the releases and did not consent to the releases of the above listings.

5. Damone submitted these releases to Andrie, who transferred them from Preferred to Associates without consent from Preferred, and began to represent these listings as of March 4, 2014, through Associates.

CONCLUSIONS OF LAW

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

1. Damone and Andrie violated N.J.A.C. 11:5-6.4(a), failing to protect and promote the interests of their principals, by transferring the listings for Allen Avenue, Carlyle Court, and Rosetree Drive from Preferred to Associates without the permission of Preferred's broker.
2. Damone and Andrie are in violation of N.J.S.A. 45:15-17e in that their conduct demonstrated incompetency and dishonesty.

DETERMINATION

At the conclusion of the hearing and executive session in this matter, the Commission voted in favor of finding the violations and imposing the sanctions described in this Final Order of Determination. In arriving at the determination in this matter, the Commission took into consideration the pleadings, the testimony of the witnesses, the undisputed documentary evidence admitted during the course of the hearing, and the nature and circumstances of the Respondents' conduct.

The OTSC alleges, and the Respondents do not dispute, that Damone and Andrie transferred listings from Preferred to Associates without the consent or authorization of Preferred. The OTSC alleges that such conduct demonstrates unworthiness, bad faith, or dishonesty, in

violation of N.J.S.A. 45:15-17e. Furthermore, the OTSC alleges that such conduct is in violation N.J.A.C. 11:5-6.4(a), in that by transferring these listings without the consent or authorization of Preferred, Damone and Andrie failed to protect and promote the interests of their principals, the owners of Allen Avenue, Carlisle Court, and Rosetree Drive.

The Real Estate Brokers and Salespersons Act, N.J.S.A. 45:15-1 et seq. (“Act”) charges the Commission with the “high responsibility of maintaining ethical standards among real estate brokers and sales[persons]” in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Comm’n, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The Commission is empowered to suspend and revoke the licenses of, and impose fines against, real estate licensees that commit any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Maple Hill Farms, Inc. v. Div. of New Jersey Real Estate Comm’n, 67 N.J. Super. 223, 232 (App. Div. 1961); Div. of New Jersey Real Estate Comm’n v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, in order to protect the public interest. See Div. of New Jersey Real Estate Comm’n v. Ponsi, supra. at 532-33.

Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for “any conduct which demonstrates unworthiness, incompetency, bad faith, or dishonesty.” N.J.S.A. 45:15-17e.

The evidence in this matter demonstrates that when Damone resigned from Preferred on February 28, 2014, he submitted a Listing Status Change Form and Listing Transfer Agreement for three listings located on Allen Avenue, Carlisle Court, and Rosetree Drive. In the days prior, Damone had spoken to the owners to inform them he was leaving Preferred, and knowing an enforceable contract was already in place, provided them with said forms to transfer listings to his

new agency without advising them to speak to an attorney. These forms were signed by each owner and submitted with Damone's resignation. However, each form still needed Preferred's signature to consent to the release of the listing. The Status Change History Reports submitted into evidence show that after submitting his resignation, Damone went into the MLS system and changed the status of each property to "temporarily off market." In addition, Damone testified that he submitted these unsigned documents to his new broker at Associates, to initiate the transfer process, even though they still needed Preferred's signature. Although the documents were incomplete, Andrie accepted the forms and transferred the listings to his name on or about March 4, 2014, when Damone's license was still active through Preferred. At this same time, Damone entered the MLS system again and stripped each listing of all media and images, rendering the listings temporarily unusable.

The OTSC alleges that the conduct described above constitutes a violation of N.J.S.A. 45:15-17e, specifically alleging that their actions demonstrated unworthiness, bad faith, or dishonesty. The OTSC also alleges that this conduct is in violation of N.J.A.C. 11:5-6.4(a), in both Damone and Andrie failed to protect and promote the interests of their clients.

After careful consideration of the oral testimony and documentary evidence presented, the Commission found that Damone and Andrie's conduct did not rise to unworthiness, which signifies a lack of ethical qualities befitting the profession, or bad faith, which can connote a failure of reasonable prudence and care to avoid misunderstandings. Goodley v. New Jersey Real Estate Comm'n, supra. at 181–182; Maple Hill Farms, Inc. v. Div. of New Jersey Real Estate Comm'n, supra. at 231. Rather, in relying on Goodley, the Commission found that Damone and Andrie's conduct demonstrated incompetency because there was sufficient proof of negligence related to their professional license to warrant a finding of incompetency under N.J.S.A. 45:15-17e. The

Commission noted that while Damone and Andrie testified they were benefitting their clients by taking the actions described above, both broker and salesperson failed to consider the serious legal consequences that could have resulted if Jones had taken any of the legal actions he was entitled to take related to the listings.

Motivated to “protect” the owners of Allen Avenue, Carlisle Court, and Rosetree Drive from “neglect” at the hands of Preferred, Damone, acting in his capacity as licensed salesperson, met with each client and assisted them in transferring their listings to his future employer by providing the necessary forms, even though he knew they had an enforceable contract in place with Preferred, giving Preferred an exclusive right to market their properties. Furthermore, he admittedly failed to advise his clients to consult an attorney before breaching an enforceable contract. In addition to constituting incompetency in violation of N.J.S.A. 45:15-17e, Damone’s conduct fails to protect and promote the interests of his clients, in violation of N.J.A.C. 11:5-6.4(a).

Similarly, Andrie, a licensed broker with ten years of experience, testified that his conduct was motivated by the desire to “protect” the owners of Allen Avenue, Carlisle Court, and Rosetree Drive. Andrie testified that he agreed with Damone that they needed to ensure that the listings would be given priority and serviced properly through Associates. As justification of this conduct, both Damone and Andrie contend that Jones did not even contact the owners of these listings following Damone’s abrupt departure from Preferred. However, the evidence presented substantiates Jones’ contention that approaching these sellers after the listings had been transferred, albeit without proper authorization, to another agency, would only have hurt them. Jones contended that clients could have been confused due to this conflict between brokers and that was not in their best interest. Further, Andrie acquiesced in Damone’s failure to advise his clients to consult an attorney before breaching an enforceable contract with Preferred. He went on

to speak to the clients personally, but testified that during these conversation, he did not advise that they should consult an attorney. Both broker and salesperson demonstrated negligence warranting a finding of incompetency, in violation of N.J.S.A. 45:15-17e and failed to protect and promote the interests of his principal, in violation of N.J.A.C. 11:5-6.4a(a).

In addition, the Commission found that Damone and Andrie's conduct is in violation of N.J.S.A. 45:15-17e, in that it demonstrates dishonesty. The Commission noted that Damone submitted incomplete forms to Andrie on the day of his resignation from Preferred, which did not give Preferred the opportunity to consent to their release. He went on to remove all information from the property listings in the MLS within 72 hours of his resignation, rendering them unusable. Andrie accepted the documents submitted by Damone on February 28, 2017, to secure the listings that were transferred to his agency. After it came to Andrie's attention that the documents authorizing the transfer had not been signed by Preferred, he continued to facilitate the transfer of the listings. This conduct demonstrates dishonesty by both Andrie and Damone, in violation of N.J.S.A. 45:15-17e.

After considering the testimony and evidence presented, the Commission finds that an appropriate penalty in this matter includes subjecting Respondent Damone to closer scrutiny by the Commission by placing his salesperson license on probation for a period of six months, with certain reporting conditions to be imposed during the probationary period. No action will be taken against Respondent Andrie's license.

Pursuant to N.J.S.A. 45:15-17, the Commission may impose a penalty of not more than \$5,000 for the first violation of the Act, and a penalty of not more than \$10,000 for any subsequent violation. In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors to evaluate the imposition of fines in administrative

proceedings and these factors are applicable to this matter which seeks the imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) any injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139. Each of these factors is discussed below.

The first factor examines the good or bad faith of the respondents. Both Damone and Andrie testified that they believed they were acting in the best interest of their clients when they transferred their client's listings to Associates without the consent of Preferred. As previously discussed, this conduct demonstrates negligence and incompetence on the part of both licensees, who put their clients at risk by urging them to violate their legally binding contractual obligations. There is no contrary evidence that suggests this conduct was motivated by the bad faith by either Damone or Andrie.

Second, neither Damone nor Andrie provided any testimony that indicated they would be unable to pay fines assessed in this matter. A respondent who wishes to claim an inability to pay civil penalties must bear the burden of proving their incapacity. NJREC v. Cortese, Final Order of Determination, Dkt. No. SOM-16-019 (08/09/17) (citing Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08)). Thus, neither Respondent has met that burden.

The third factor examines how much money was obtained from the illegal activity. In this matter, Damone and Andrie transferred three listings from one agency to another without authorization. The profits obtained in the transfer of these listings are unclear. Andrie testified that at least one of the listings, Carlyle Court, sold and a commission of approximately three percent of the sale price was collected by Associates.

The fourth factor relates to the injury to the public. 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, supra, at 182. Therefore, the public is harmed when salespersons surreptitiously take listings from one agency to another without required consent, and in so doing, fails to promote and protect the interests of their principals, who are members of the public. These actions constitute undesirable behavior within the meaning of the Act. Sammarone v. Bovino, 395 N.J. Super. 132 (App. Div.), 193 N.J. 275 (2007); see also Tobias v. Comco/America, Inc. 96 N.J. 173, 180 (1984); Kazmer-Standish Consultants, Inc. v. Schoeffel Instruments Corp. 89 N.J. 286, 290 (1982); and Markheim-Chalmers, Inc. v. Masco Corp. 332 N.J. Super. 452, 457 (App. Div. 1999). In this matter, Damone facilitated the abrogation of an enforceable contract, which required these individuals sell their homes exclusively with Preferred, with Damone acting as Preferred’s agent. Knowing this contract was in place, Damone encouraged these individuals to leave Preferred and transfer their listings to Associates, but failed to mention that doing so may subject them to legal liability and as such, they should consult an attorney. Andrie, a broker with over 10 years of experience, stood by and assisted in the transfer of these listings, without stepping in to ensure these homeowners, now clients of his agency, were protected by consulting an attorney, should Jones have opted to exercise his rights under their legally enforceable contract, including the right to commission on the sale of their homes. The Commission finds that this type of behavior must be discouraged as the public needs to be able to trust the agents and brokers that they entrust to facilitate the sale of their homes. This factor weighs heavily in favor of monetary penalty against both Respondents.

The fifth factor examines the duration of the illegal activity or conspiracy. Preferred’s executed Listing Agreements for Allen Avenue and Rosetree Drive were signed in October 2013

and slated to expire, absent renewal or termination, on April 30, 2014. (Exhibits S-16 and S-17). The Listing Agreements also specified that a brokerage fee must be paid to Preferred if the property became subject to a written agreement of sale or if it is sold, conveyed, issued, or in any way transferred within 90 days after the termination or expiration of the Listing Agreement. As discussed above, these agreements were not properly terminated and expired effective April 3, 2014. Thus, a brokerage fee was due to Preferred until June 30, 2014. However, on or about February 28, 2014, Damone and Andrie had begun to facilitate the transfer of listings for properties at Allen Avenue, Carlysle Court, and Rosetree Drive from Preferred's to Associates without consent and without advising these homeowners that in doing so, they were breaching legally enforceable contracts. By March 4, 2014, the transfers were complete. Thus, the duration of the illegal activity ran from February 28, 2014 to June 30, 2014, or a period of four months.

The sixth factor is the existence of criminal or treble actions stemming from the conduct at issue. In this case, neither respondent has faced any such actions.

Lastly, there is no evidence of prior violations of the Act or corresponding regulations by either respondent.

Considering these factors and penalties previously assessed by the Commission, Damone shall pay a fine in the amount of \$5,000 and Andrie shall pay a fine of \$7,500. As discussed above, Damone's conduct was incompetent, dishonest, and failed to promote and protect his clients. Andrie, as Associate's broker of record, assisted in transferring listings to his agency without the consent of Preferred, knowing this could put the property owners in jeopardy of legal repercussions because in transferring these listings, they had breached an enforceable contract with Preferred. The listing agreement between Associates and the owners of Allen Avenue, Carlysle Court, and Rosetree Drive is signed by Andrie, as the broker of record, and not Damone. In addition, Andrie

had multiple opportunities to intercede: he could have refused to process the transfer request unless the forms had Preferred's signature, or he could have advised the owners to speak to an attorney before breaching their contract. Rather, he elected to facilitate the transfer.

As the Commission may impose a penalty of not more than \$5,000 for the first violation of the Act, and a penalty of not more than \$10,000 for any subsequent violation, a penalty of \$5,000 (with respect to Damone) and \$7,500 (with respect to Andrie) is appropriate because each listing transferred constitutes a separate violation of the Act.

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

- I. Respondent Damone's real estate salesperson license will be held on probation for six months. During the period of probation, the following conditions shall apply: Damone shall inform any employing broker that his license is on probation and Damone's broker shall notify the Commission within 72 hours if he or she receives any information indicating that Damone may have violated the Act or corresponding regulations;
- II. Respondent Damone shall pay a fine in the amount of \$5,000; and
- III. Respondent Damone shall complete six continuing education hours, three in Agency and three in Ethics, which shall not count towards his license renewal requirement.

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

- I. Respondent Andrie shall pay a fine in the amount of \$7,500; and
- II. Respondent Andrie shall complete six continuing education hours, three in Agency and three in Ethics, which shall not count towards his license renewal requirement.

SO ORDERED this 14th day of February, 2018.

By: Linda K. Stefanik, President
Eugenia K. Bonilla, Vice President
Jacob Elkes, Commissioner
William Hanley, Commissioner
Denise M. Illes, Commissioner



Patrick J. Mullen
Director of Banking

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