

NEW JERSEY REAL ESTATE COMMISSION

NEW JERSEY REAL ESTATE COMMISSION,	)	DOCKET NO.: BER-17-023
	)	REC REF. NO.: 10004437
Complainant,	)	
	)	
v.	)	FINAL ORDER OF
	)	DETERMINATION
JOHN VIAUD, licensed New Jersey real estate	)	
salesperson (SP0683271)	)	
	)	
Respondent.	)	

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This matter was heard at a hearing 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 June 12, 2018.

**BEFORE:** Commissioners Linda K. Stefanik, Sanjeev Aneja, Christina Banasiak, Jacob Elkes, and Denise M. Illes.

**APPEARANCES:** Marianne Gallina, Regulatory Officer (“RO Gallina”), appeared on behalf of the complainant, the New Jersey Real Estate Commission staff (“REC”). Respondent John Viaud (“Respondent”) appeared pro se.

**STATEMENT OF THE CASE**

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated December 12, 2017, 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 to -12.18. The OTSC alleged that the Respondent advertised the property

located at 513 Tilden Avenue, Teaneck,<sup>1</sup> New Jersey 07083 (“Tilden Ave. property” or “property”) for sale on or after May 25, 2016 without noting in the listing that the property was under contract, in violation of N.J.A.C. 11:5-6.1(o). The OTSC additionally alleged that the Respondent failed to deal fairly with the prospective buyers of the Tilden Ave. property when he did not mark the property as “under attorney review” or “under contract” in the Multiple Listing Service (“MLS”), in violation of N.J.A.C. 11:5-6.4(a). The OTSC further alleged that the Respondent’s conduct in not appropriately updating the MLS listing with the current status of the sale constitutes unworthiness, incompetency, bad faith, or dishonesty, in violation of N.J.S.A. 45:15-17e. Additionally, the OTSC alleged that the Respondent demonstrated unworthiness by failing to cooperate with the REC investigator during the course of the investigation and by failing to provide a written statement when requested to do so, in violation of N.J.S.A. 45:15-17e. Lastly, the OTSC alleged that the Respondent’s conduct in misrepresenting the actual amount of the taxes assessed on the Tilden Ave. property in the May 3, 2016 listing agreement after the incorrect amount was specifically brought to his attention, constitutes a violation of N.J.S.A. 45:15-17a.

By letter dated November 29, 2017 and received on December 4, 2017, the Respondent filed an Answer to the OTSC, wherein he admitted to and denied certain allegations as set forth in the OTSC. Accordingly, on December 12, 2017, the Commission reviewed the pleadings, deemed this matter contested, and directed that a hearing be scheduled. A hearing was conducted on June 12, 2018, at which the following exhibits were admitted into evidence by the REC, without

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<sup>1</sup> The OTSC alleges that the property was located in Bogota, New Jersey; however, the Respondent’s Answer to the OTSC and all documentary evidence admitted at the hearing in this matter states that the property was located in Teaneck, New Jersey.

objection:<sup>2</sup>

- S-1 Contract of Sale for 513 Tilden Avenue, Teaneck, New Jersey 07803 between sellers, John and Anita Viaud, and buyers, Eury R. Camacho and Tania T. Cruz, dated May 9, 2016;
- S-2 MLS listing for 513 Tilden Avenue, Teaneck, New Jersey 07803 for the period of January 19, 2016 through May 31, 2016, showing property taxes listed as \$8,500;
- S-3 MLS listing for 513 Tilden Avenue, Teaneck, New Jersey 07803 for the period of May 3, 2016 through July 31, 2016, showing property taxes listed as \$8,500;
- S-4 MLS listing for 513 Tilden Avenue, Teaneck, New Jersey 07803 for the period of June 7, 2016 through September 30, 2016, showing property taxes listed as \$9,800;
- S-5 Bergen County Master Report for 513 Tilden Avenue, Teaneck, New Jersey 07803, showing property taxes for 2015 and 2016 listed as \$9,985 and \$10,146, respectively;
- S-6 MLS Property History Report for 513 Tilden Avenue, Teaneck, New Jersey 07803;
- S-7 Email communications between John Viaud and John Baek, agent for buyers, Eury R. Camacho and Tania T. Cruz, dated May 3, 2016 and May 4, 2016;
- S-8 Letter, with rider, from attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, to attorney Joel Furst, attorney for Sellers John and Anita Viaud, dated May 12, 2016;
- S-9 Letter from attorney Joel Furst, attorney for Sellers John and Anita Viaud, to attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, dated May 13, 2016;
- S-10 Letter from attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, to attorney Joel Furst, attorney for Sellers John and Anita Viaud, dated May 14, 2016;
- S-11 Email communications between attorney Joel Furst, attorney for Sellers John and Anita Viaud, via paralegal Colleen Faronea, and attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, regarding the oil tank on the property located at 513 Tilden Avenue, Teaneck, New Jersey 07803, dated May 19, 2016 and May 20, 2016;

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<sup>2</sup> Exhibits S-1 through S-16 were admitted into the record at the commencement of the hearing. Exhibits S-17 through S-19 were admitted into the record upon the request of the Commission during the testimony of REC Investigator Erica Berg.

- S-12 Letter from attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, to attorney Joel Furst, attorney for Sellers John and Anita Viaud, dated May 23, 2016; and signed rider, dated May 24, 2016;
- S-13 Email communication from attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, to John Baek, agent for buyers, Eury R. Camacho and Tania T. Cruz, advising that the attorney review was concluded, dated May 25, 2016;
- S-14 Letter from attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, to attorney Joel Furst, attorney for Sellers John and Anita Viaud, regarding the inspection report, dated June 2, 2016;
- S-15 Letter from attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, to attorney Joel Furst, attorney for Sellers John and Anita Viaud, advising that the contract was canceled, dated June 6, 2016;
- S-16 Email communications between attorney Jack Chan, attorney for buyers, Eury R. Camacho and Tania T. Cruz, and attorney Joel Furst, attorney for Sellers John and Anita Viaud, via paralegal Colleen Faronea, regarding the confirmation of canceled contract and the release of the initial deposit, dated June 14, 2016;
- S-17 Email communication from REC Investigator Erica Berg to John Viaud, requesting documentation and a statement that was previously requested on February 10, 2017 during a telephonic conversation, dated March 17, 2017;
- S-18 Email communication from REC Investigator Erica Berg to George Reggo, employing broker of John Viaud, requesting that John Viaud provide documentation and a statement that was previously requested, dated April 18, 2017; and
- S-19 Letter from John Viaud to REC Investigator Erica Berg, setting forth his response to the complaints made against him, dated April 24, 2017.

### **TESTIMONY OF THE WITNESSES**

#### **John Baek**

John Baek (“Baek”) testified on behalf of the REC and stated that he is presently employed by Weichert Realtors (“Weichert”) in Oradell, New Jersey as a New Jersey licensed real estate salesperson. He further stated that he has been licensed as a real estate salesperson in this State for over six years. Baek stated that he was involved in a transaction between the Respondent and

his clients, Eury Camacho (“Camacho”) and Tania Cruz (“Cruz”) (collectively, “Buyers”), who attempted to purchase the Tilden Ave. property. Baek stated that after showing other properties to the Buyers, the Buyers submitted an offer to purchase the Tilden Ave. property. Baek identified Exhibit S-1 as the written offer for the purchase of the Tilden Ave. property, which had been fully executed by the Buyers and the sellers, the Respondent and Anita Viaud (collectively, “Sellers”).<sup>3</sup> He testified that the purchase price listed in the Exhibit S-1 was \$285,000 and the contract date was May 5, 2016, as the Buyers executed the contract of sale on that date.<sup>4</sup> Baek further testified that Exhibit S-1 entered into attorney review after it was fully executed by the parties.

Additionally, Baek stated that he went over the listing sheets for the Tilden Ave. property with the Buyers and stated that Exhibit S-2 is the MLS listing for the Tilden Ave. property with a listing period from January 19, 2016 through May 31, 2016 and a listing price of \$299,900. Baek also testified that the property taxes listed on Exhibit S-2 are \$8,500. Baek further testified that he spoke with the Buyers about the property taxes on the Tilden Ave. property, and stated that the Respondent made him aware that the property taxes were higher than what was set forth on Exhibit S-2. Baek stated that he checked the tax records, which showed that property taxes were actually about \$10,000; however, the Buyers confirmed with their mortgage lender that they could still afford to purchase the property and proceeded with the transaction.

Baek stated that Exhibit S-3 is a new listing for the Tilden Ave. property, with a listing period from May 3, 2016 through July 31, 2016; however, this new listing contains the same purchase price of \$299,999 and property taxes of \$8,500. Baek further testified that Exhibit S-4

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<sup>3</sup> Exhibit S-1 is the fully executed Real Estate Sales Contract for the Tilden Ave. property.

<sup>4</sup> While the Buyers signed the contract of sale for the Tilden Ave. property on May 5, 2016, the Sellers did not sign the contract of sale until May 9, 2016. As such, the contract was fully executed by both parties and the date of the contract of sale is May 9, 2016.

is yet another listing for the Tilden Ave. property, with a listing period of June 7, 2016 through September 30, 2016. He stated that Exhibit S-4 shows the purchase price of \$295,000 and the property taxes are listed as \$9,800. Baek stated that Exhibit S-4 still did not accurately reflect the property taxes assessed on the Tilden Ave. property.

Baek then testified that Exhibit S-5 is the Bergen County Master Tax Report (“Master Report”) that he obtained through the MLS, and it shows that the actual taxes assessed on the Tilden Ave. property for 2016 were \$10,146. Baek stated that he did not have a conversation with the Respondent regarding his review of the Master Report but did discuss same with his clients. Baek further stated that he did not remember when he obtained the Master Report, as it is undated. However, he noted that he believes it was obtained between May and June 2016, and regardless of when he obtained the Master Report, the property taxes would not have changed until several months later when the following year’s property taxes would be assessed. Additionally, Baek stated that the reason that he pulled the Master Report for the taxes was because the Buyers’ mortgage lender wanted to know what the actual taxes for the property were at that time of contracting.

Baek testified that Exhibit S-7 is email communications between himself and the Respondent in which he informed the Respondent that his clients were concerned about the \$1,500 increase in the property taxes on the property from 2014 to 2015 and wherein, Baek advised the Respondent that his clients may be making an offer on the property shortly.

Baek stated that Exhibit S-8 is the rider sent from the Buyers’ attorney to the Sellers’ attorney, dated May 12, 2016, and was prepared during attorney review. Baek testified that during attorney review, but before the inspections took place, the Respondent notified the Buyers that there was an oil tank on the premises. Because of this information, the Buyers considered

canceling the contract for the sale of the Tilden Ave. property. Baek stated that Exhibit S-9 is a letter from the Sellers' attorney to the Buyers' attorney, dated May 13, 2016, in which the Sellers' attorney advises that the "Seller represents that there is an underground oil tank on said property that is no longer in use, and, furthermore, has been properly decommissioned. Seller will not remove said tank." Baek further stated that Exhibit S-10 is a letter from the Buyers' attorney to the Sellers' attorney, dated May 14, 2016, in which the Buyers notified the Sellers that they are canceling the contract based upon the Sellers' refusal to remove the oil tank on the property.

Baek testified that he did not remember seeing a seller's disclosure on the listing and originally stated that the Sellers did not fill out a disclosure. However, Baek then stated that the listing shows that there is a seller's disclosure, but that he still does not remember seeing same. Baek additionally stated that he was not aware of any attachments on the listing, including the oil tank decommissioning letter ("decommissioning letter"). Baek stated that the Respondent advised him of the oil tank on the premises through email; however, he never provided any letter confirming that the oil tank was decommissioned. Additionally, Baek testified that they were not advised of the oil tank until the parties were in attorney review, after the Buyers made an offer on the property.

Baek stated that Exhibit S-6 is the MLS history of the Tilden Ave. property. Baek testified that the contract of sale for the Tilden Ave. property entered attorney review on or about May 12, 2016 and the contract was canceled on May 14, 2016, via Exhibit S-10. Based upon a review of Exhibit S-6, Baek stated that property statuses listed in the MLS show that the Tilden Ave. property was listed for sale on May 3, 2016, went into "attorney review" on May 22, 2016, and went "under contract" on June 1, 2016. Baek stated that based upon Exhibit S-6, the property was marked as active in the MLS during the actual dates that the contract for the Tilden Ave. property was in

attorney review. Baek additionally testified that the Buyers informed him that there were open house signs for the property while the contract of sale was under attorney review. Baek stated that the Respondent informed him that the open houses would continue to be shown because they were previously advertised by his company.

Baek testified regarding how the MLS statuses are entered and the effect thereof. Specifically, he stated that when a listing agent changes a status to reflect either attorney review or under contract, his office gets a notification of same. He stated that he can then click on the notification, and it will say the date and time that the listing agent made the change.

Baek stated that Exhibit S-11 contains an email communication, dated May 19, 2016, between himself, the Buyers, and the Buyers' attorney, wherein the Buyers' attorney stated that "The sellers have agreed to pull the tank. Although I'm not sure what she is talking about because we haven't even completed attorney review and no inspection has taken place yet. Let me know if you want to continue toward the purchase of this house and I will withdraw the cancellation." Baek further noted that Exhibit S-11 also contains an email communication, dated May 20, 2016, between the Buyers' attorney and the Sellers' attorney wherein the Sellers were informed that the Buyers withdrew their cancellation of the contract of sale for the Tilden Ave. property based upon the Sellers' agreement to have the underground oil tank removed and the driveway repaired to the original condition prior to the tank removal.

Baek stated that Exhibit S-12 is a letter, dated May 23, 2016, from the Buyers' attorney to the Sellers' attorney, which contains the fully-executed rider to the contract of sale for the Tilden Ave. property. Baek originally stated that as of May 23, 2016, a contract of sale for the Tilden Ave. property was in existence; however, he later corrected his testimony and stated that the Sellers signed the rider on May 24, 2016 and thus, the contract was in existence on that date. However,



Back stated that Exhibit S-6 shows that the property went “under contract” on June 1, 2016, rather than May 24, 2016. Back further testified that Exhibit S-13 is a May 25, 2016 email communication from the Buyers’ attorney to the Sellers’ attorney, attaching the fully-executed rider and advising that the attorney review is concluded.

After the attorney review period concluded, Baek stated that an inspection was performed, and a list of requests and repairs was made by the Buyers and provided to the Sellers. Baek stated that Exhibit S-14 is a letter from the Buyers’ attorney to the Sellers’ attorney, dated June 2, 2016, which set forth the inspection issues that the Buyers had with the Tilden Ave. property. Baek stated that he believes that the Sellers’ attorney agreed to certain items and refused others. Baek stated that the Sellers’ concessions were not enough for the Buyers, and the Buyers were attempting to decide if it was worth it for them to continue with the contract. Baek stated that he does not remember the specific responses that the Sellers had to each of the inspection issues set forth by the Buyers; however, he believes that the Sellers refused to address most of the issues mentioned in Exhibit S-14. Baek stated Exhibit S-15 is a letter, dated June 6, 2016, from the Buyers’ attorney to the Sellers’ attorney, advising that based upon the Sellers’ refusal to repair the Buyers’ requested inspection items, the Buyers were canceling the contract. Baek stated that Exhibit S-6 shows that on June 3, 2016, the Respondent removed the “under contract” status of the Tilden Ave. property and listed the status as back on the market; however, the contract with the Buyers was not officially canceled until June 6, 2016.

Baek stated that the “big ticket items” that concerned the Buyers after the inspection concerned the garage, chimney, and termites. Baek further noted that unless it is reported, banks usually do not find out about most issues with the property. However, he stated that issues with

termites needed to be remediated prior to closing. Moreover, Baek stated that he was not aware if the removal of the oil tank was required by the Buyers' mortgage lender.

After the termination of the contract on June 6, 2016, Baek stated that the Sellers' attorney had difficulty getting in touch with the Sellers. Specifically, Baek noted that Exhibit S-16 is email communications between the Buyers' attorney and the Sellers' attorney on June 14, 2016, wherein the Buyers' attorney asked the Sellers' attorney to confirm that the contract was canceled and advised same that Weichert will not release the initial deposit to the Buyers without acknowledgement by both attorneys that the contract was canceled. Baek elaborated on this statement and explained that his company, Weichert, has a policy that a deposit cannot be released to the Buyers unless there is a letter or email from both parties agreeing to the cancelation of the contract. In response to the Buyers' attorney's email, Baek testified that the Sellers' attorney stated, "I cannot as our client refuses to answer our emails."

#### **Eury Camacho**

Eury Camacho ("Camacho") testified on behalf of the REC and stated that he was one of the Buyers who attempted to purchase the Tilden Ave. property from the Respondent. Camacho stated that the issue regarding the amount of the property taxes on the Tilden Ave. property came up several times during the proposed transaction to purchase the property. Specifically, Camacho testified that when the Buyers first saw the listing for the Tilden Ave. property, they noticed that the property taxes were way below those in the area. Camacho stated that when the Buyers first saw what the taxes were listed as, they were excited because they were significantly lower than \$12,000. Camacho stated that the Buyers asked Baek if the property taxes listed in the MLS were correct. Camacho testified that Baek looked into the matter and informed them that the property taxes were actually over \$10,000. Because the taxes were still below those in the area, they

reviewed their finances in order to determine if they could still afford the property. Once the Buyers determined that they could afford the property with the increased property taxes, they attempted to continue with the transaction. To clarify, Camacho stated that they knew about the increased property taxes while they were making their offer for the purchase of the Tilden Ave. property.

Camacho stated that the contract of sale for the Tilden Ave. property was immediately submitted to his attorney for attorney review after the contract was executed. He further noted that the closing was to be made within 30 days after the attorney review was completed. Camacho testified that he and his wife did not live far from the Tilden Ave. property at the time they attempted to purchase the property. He further stated that he reviewed the MLS and saw that an open house was listed for the property while they were in attorney review. Because of this, the Buyers decided to go by the property. Camacho stated that there was a sign outside of the property that said "open house" and a man was standing at the door; however, they decided to keep driving. After they returned to their apartment, Camacho called Baek and asked if it was appropriate for there to be open houses on the property while they were under attorney review. Camacho stated that Baek informed him that having these open houses was not appropriate. Camacho additionally stated that he had conversations with his attorney and was informed that once a contract goes into attorney review, showings of the property should not occur. Camacho additionally testified that the Respondent stated that the open houses were prearranged and there was nothing that the Respondent could do to stop the open houses from occurring at that time. Camacho stated that because the Buyers were first time homebuyers, they were unaware of the appropriate process related to the advertisement of a property under attorney review.

After the attorney review and the inspection, Camacho stated that there were issues with the Tilden Ave. property. Camacho stated that they made a list of items that the Buyers wanted done before the closing and requested the removal of the oil tank on the premises. Camacho stated that he was not aware of anything that needed to be done to the property in order for his mortgage lender to agree to provide a loan to the Buyers for the purchase of the property.

Camacho stated that the contract of sale in this matter was originally canceled because the Sellers stated that they would not remove the oil tank on the premises. Camacho stated that the Sellers indicated that they had a letter from the town regarding the oil tank being decommissioned, but he stated that he never saw that letter. He additionally stated that the Buyers were concerned about how the tank was sealed and did not know if it was sealed with oil in it. He noted that they were first time homebuyers and knew nothing about this; however, the Buyers did some research and found out that the tank could have been sealed with oil still in the tank. Camacho stated that if this were the case, it would be costly to get the soil tested. After the contract was canceled, the Sellers agreed to remove the oil tank, and the Buyers agreed to continue with the purchase of the property.

Camacho additionally stated that after the inspection, the Buyers requested that expensive issues with the property be remedied by the Sellers. Camacho stated that the Respondent would not fix anything that the Buyers requested because the Respondent stated that he was already spending a lot of money to remove the oil tank from the premises. Camacho stated, however, that the Buyers saw no movement by the Sellers in removing the oil tank as agreed upon. Specifically, he stated that he would drive by the Tilden Ave. property almost every day to see if they were attempting to remove the oil tank; however, at no time did Camacho see anything being done on the property that would lead him to believe the oil tank was being removed. Camacho stated that

the Buyers canceled the contract because they believed that the Respondent was not being honest and was not going to remove the oil tank as he had promised. Camacho acknowledged that the Respondent had until the closing date to remove the oil tank, but that he lost faith in the Respondent. Camacho stated that if the Respondent removed the oil tank, the Buyers probably would have gone through with the contract even though the Buyers believed that the Respondent was lying. Additionally, Camacho stated that before the contract was canceled, the Tilden Ave. property was listed in the MLS as active.

Camacho further stated that after the contract was canceled, it took the Buyers almost a month to get their deposit back because the Sellers' attorney could not get in contact with the Sellers. Additionally, Camacho stated that the Buyers informed their landlord that they were purchasing a house and would not be renewing their lease after it expired on July 1, 2016. Because of this, their landlord rented out their apartment. However, after the contract was canceled, the landlord allowed the Buyers to pay another month's rent for the apartment while they continued to look for a place to live. Camacho stated that the Buyers were forced to stay at their apartment for another three weeks as a result of the sale not being completed. Camacho stated that his landlord voided a \$2,000 charge that would have been incurred by the Buyers by staying past the expiration of their lease term.

**Erica Berg**

REC investigator, Erica Berg ("Berg"), testified on behalf of the REC and stated that she was assigned to investigate the present matter involving the Respondent. Berg stated that she attempted to discuss the complaint with the Respondent after it was assigned to her. Specifically, Berg testified that around the beginning of the year in 2017, she left several voicemails for the Respondent to no avail. She stated that she never received a phone call back from the Respondent

and testified that she never spoke with the Respondent's wife. Berg stated that she was then made aware that the Respondent is also an accountant and was too busy to speak with her because it was tax season. Berg further testified that in February 2017, via a telephone call, the Respondent informed her that he would not speak with her regarding the complaint because he needed to speak with his broker first. Berg additionally stated that she sent emails to the Respondent wherein she requested information; however, the Respondent did not respond to same. She further testified that on March 17, 2017, she sent an email to the Respondent advising him that during their telephone conversation on February 10, 2017, she requested that he provide her with documentation by February 17, 2017. This email was admitted into evidence as Exhibit S-17. Additionally, Exhibit S-17 notes that Berg gave the Respondent a deadline of April 24, 2017 to provide the information requested to her; however, the requested information was never provided to her. However, during cross-examination, Berg was shown Exhibit S-19, which is a letter from the Respondent to Berg dated April 24, 2017, and she acknowledged that the Respondent had submitted his written statement to her via that letter, which addressed some of the questions that Berg asked of the Respondent and later, his broker, such as why were the taxes changed, why was the oil tank not discussed at the beginning of the contract, and why the MLS was not updated to reflect the under contract status in a timely manner. However, Berg stated that the requested documentation was still not provided. Berg additionally testified that she spoke with the Respondent on March 31, 2017.

Berg stated she reached out to the Respondent's broker through an email dated April 18, 2017, which is Exhibit S-18, and informed him that the Respondent failed to provide requested documentation and a statement regarding the complaint filed against him. Berg stated that the Broker informed her that he would reach out to the Respondent, have Berg's questions answered,

and have the Respondent get in contact with Berg. Berg stated that the Respondent's broker had the Respondent answer her questions, which Berg obtained, in the April 24, 2017 letter, but she did not receive any of the documentation that she requested.

As such, Berg stated that her report and investigation file were based upon her conversation with the Respondent and the information obtained from the Buyers and Baek as the Respondent provided very little information to her.

In relation to the difference between the actual assessed property taxes and those listed in the MLS for the Tilden Ave. property, Berg stated that the Respondent advised her that the property taxes were being assessed at that time of contracting. Berg stated that she advised the Respondent that the taxes are not assessed every month or three times in a three-month period. Berg testified that she pulled the tax records for the Tilden Ave. property and the property taxes were listed at over \$10,000. However, she noted that the MLS listing, after it was changed by the Respondent, still showed property taxes that were significantly lower than the actual property taxes that were assessed for that property. Berg also stated that although she was aware of the Buyers' complaint that their deposit was not promptly returned, she was unable to obtain any information that related to the status of same and the status of the property.

Berg testified regarding the process she goes through as an investigator. Specifically, she stated that in most cases, she makes a telephone call and emails the licensee. If she does not hear back from the licensee, she then sends a subpoena. However, in this case, she did not go that route, as she was able to get in contact with the Respondent's broker.

#### **George Reggo**

George Reggo ("Reggo") testified on behalf of the Respondent and stated that he is the broker and owner of Reggo and Kelemen Real Estate. Reggo stated that he has been a real estate

broker for 44 years, owner of three real estate offices for 40 years, and a tax assessor for 27 years in 10 towns in Bergen County, New Jersey. Reggo stated that the property tax issue in this matter related to the 2017 tax year and noted that the 2017 taxes at \$10,000 were not available at the time of contracting, as the taxes do not come out until July or August.<sup>5</sup> Reggo stated that the \$10,500<sup>6</sup> in property taxes assessed on the Tilden Ave. property “was never a number in regards to this because the tax bill came out way after.” Reggo further testified that even if the closing occurred within 30 days, it would still be before the July or August date when property tax bills are sent out. Reggo stated that at the time of the prospective sale of the Tilden Ave. property at issue, the property taxes were assessed at approximately \$9,800 and then went up the following year. Reggo additionally testified that the reason that the Respondent had the taxes listed incorrectly on the listing was because there was a reevaluation done on the property taxes in Teaneck, New Jersey in late 2016. Reggo stated that the Respondent listed the property taxes as they were for the previous year, prior to the reevaluation being done on the Tilden Ave. property; however, Reggo stated that the Respondent should have updated the listing. Reggo stated that he had several MLS listings in his possession that show incorrect property taxes for their respective properties, and he further contended that when the new property taxes are issued this year, no MLS listing will be updated to include the updated property taxes. Reggo further remarked that the Buyers were responsible to do their own due diligence when purchasing a home.

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<sup>5</sup> While Reggo discussed the 2017 property taxes for the Tilden Ave. property, the taxes at issue related to the assessed property taxes for 2016, which would have been issued by the July or August of the previous year, as the contract was entered into in May 2016.

<sup>6</sup> It is unclear where Reggo obtained the \$10,500 reference in relation to the property taxes on the Tilden Ave. property. According to Exhibit S-6, the 2016 property taxes were \$10,146 and the 2015 property taxes were \$9,985.



Reggo stated that he was directly involved in the present transaction and had contact with the Respondent, as the agent and owner of the Tilden Ave. property. Reggo stated that the contract in this matter was an ongoing negotiation. Reggo further noted that the oil tank was in the listing for the property and thus, was made aware to all of the parties. Reggo testified that in the MLS listing for the property, the oil tank was disclosed as "oil tank decommissioned."

Reggo stated that the Respondent works part-time as an agent for Reggo and Kelemen Real Estate. Reggo additionally noted that the Respondent is a CPA. Reggo acknowledged his responsibility to provide increased supervision of the Respondent, as the Respondent is a part-time agent.

Reggo stated that he never spoke with the Buyers and that the Buyers never attempted to contact him to discuss any issues that they may have had with the Respondent or the sale of the Tilden Ave. property. Reggo said that he needed to look up who the Buyers were after the Buyers filed their complaint with the REC, because he was unaware of who they were.

Reggo stated that he initially had no idea regarding the complaint filed with the REC regarding the Respondent. However, Reggo stated that after he was contacted by Berg regarding her investigation into the Respondent and this transaction, her questions were addressed immediately. He also stated that he asked the Respondent why he did not immediately cooperate with the investigation. He stated that the Respondent's excuse was that he was very busy with it being tax season.

**Anita Viaud**

Anita Viaud ("A. Viaud") testified on behalf of the Respondent. A. Viaud stated that she was the co-owner of the Tilden Ave. property. A. Viaud testified that she received a telephone call from Berg in relation to this matter. She additionally stated that she informed Berg that the

Respondent was extremely busy with tax season and that she would give him a message and have him return her telephone call. A. Viaud further noted that she knows that the Respondent spoke to Berg on the telephone several times as there were several telephone calls that went back and forth between the Respondent and Berg; however, they did not record the dates and times of these telephone calls because they did not know that they would need to do so.

A. Viaud testified that she helped the Respondent set up open houses and showings. Specifically, she stated that the decommissioning letter was placed on the counter next to the listing. She also stated that the removal of the oil tank was very costly, and they did not immediately remove the tank because the contract was continually in flux. A. Viaud stated that they had a feeling that the Buyers were going to cancel the contract after the inspection took place. She stated that the Buyers agreed to the property being sold "as is;" however, they submitted a list of repairs that they wanted made after the inspection was completed. A. Viaud testified that she was not sure if the contract of sale in this matter indicated that the property was being sold "as is."

**John Viaud<sup>7</sup>**

During his opening statement, the Respondent stated that he made every effort that he could to respond to the REC upon being contacted by Berg. He noted that he expected that he would get some correspondence from his broker if there were an issue before the Commission. Additionally, he stated that he was not aware of what the investigation against him pertained to and it was not his intent to delay the investigation.

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<sup>7</sup> After the presentation of testimony from A. Viaud, the Commission asked the Respondent if he had any other witnesses that would testify on his behalf. The Respondent stated that he had no other witnesses, and he did not formally testify in his defense. However, the Respondent was sworn in at the commencement of the hearing and made an opening and closing statement on his own behalf as well as additional statements during the hearing in an attempt to counteract the testimony of the REC's witnesses. As such, the statements made by the Respondent are included in this Final Order of Determination as testimony.

In response to the Baek's testimony, the Respondent stated that the Buyers wanted him to come down in price to \$280,000. He stated that he agreed to come down in price to the \$285,000 agreed upon, on the condition that the house be sold "as is." The Respondent stated that he relayed this to Baek, and the Buyers agreed because they were informed that the Sellers spent a lot of money on a new roof and furnace and could not come down in price while also making additional repairs that may be requested by the Buyers.

The Respondent stated that the open house that was scheduled was previously advertised in the local newspapers prior to the property being under contract and he felt obligated to be there. However, the Respondent stated that no one attended the open house. The Respondent further noted that he was not being dishonest in holding the open houses while the contract was in attorney review and that even though he is not aware if holding open houses during this time is common, there is no requirement that he cease additional showings or open houses during that time. The Respondent additionally stated that the decommissioning letter from the township was next to the listing in the Tilden Ave. property during all open houses and was also included as an attachment in the MLS.

During Reggo's testimony, the Respondent stated that the decommissioning letter from the township was forwarded to all of the parties and was included in the listing for the property as an attachment with his seller's disclosure, and was provided next to the listing on the kitchen counter of the property at scheduled open houses and showings. The Respondent stated that he did not have the decommissioning letter with him at the hearing. The Respondent stated that the decommissioning letter from the township was e-mailed to Baek when the Respondent informed him directly about the oil tank on the property.

The Respondent stated that the Buyers were aware of the difference between the property taxes listed in the MLS and the actual, assessed property taxes at the time of contracting. He referred to an email communication, which may be Exhibit S-7 but not specifically referenced by the Respondent, in which Baek advises the Respondent that the Buyers would be updating their financials with the mortgage lender to see if they could afford the property with the increased taxes.

The Respondent stated that the Tilden Ave. property has since been sold and that all the inspection issues found by the Buyers were disclosed to the subsequent purchasers of the home and those purchasers performed their own home inspection as well.

In his closing statement, the Respondent stated that it was never his intention on behalf of him or his wife to harm any individual. He stated that if there was an issue with the timeliness of updating the property's status in the MLS, he takes responsibility for that. He further noted that he did not lie nor was he acting dishonestly towards the Buyers. The Respondent felt that he "bent over backwards" in trying to get this sale to take place. He noted that there were constant letters from the Buyers' attorney that canceled then reinstated the contract. The Respondent additionally stated that the Sellers agreed to remove the oil tank from the property, even though they originally refused, in order to sell the property to the Buyers. Moreover, he contends that the sale was supposed to be "as is" based upon the Sellers lowering the sale price for the Buyers. However, once they received the "laundry list" of issues that arose from the Buyers' inspection, the Respondent felt as though the deal was never going to close.

Additionally, the Respondent stated that he responded to any email from anyone involved in the transaction as quickly as possible. The Respondent contended that his attorney's statement

in Exhibit S-16, wherein his attorney advised the Buyers attorney that the Respondent refuses to answer his emails, was not true.

### **FINDINGS 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. The Respondent is a licensed New Jersey real estate salesperson, who was first licensed on October 30, 2006 and is currently employed with Reggo and Kelemen Real Estate, licensed New Jersey real estate broker, located at 129 Queen Anne Road, Bogota, New Jersey 07603.
2. The Respondent was the owner of the Tilden Ave. property, and it was listed for sale with Reggo and Kelemen Real Estate, with the Respondent acting as the listing agent, on or about January 19, 2016 for \$299,000, with a listing period from January 19, 2016 through May 31, 2016. This listing represented that the property taxes for the Tilden Ave. property were \$8,500.
3. The actual property taxes assessed on the Tilden Ave. property were \$9,985 for 2015 and \$10,146 for 2016.
4. In May 2016, the Buyers became interested in the Tilden Ave. property, and on or about May 3, 2016, Baek, the Buyers' agent, informed the Respondent via an email communication that the Buyers were "wary about the \$1,500 tax increase from 2014 to 2015."
5. On May 3, 2016, the Respondent entered a new listing in the MLS with the listing period of May 3, 2016 through July 31, 2016. This listing again represented that the property taxes for the Tilden Ave. property were \$8,500.

6. On or about May 5, 2016, the Buyers made an offer on the Tilden Ave. property for \$285,000, which was accepted by the Respondent, and a contract of sale was signed by the parties on or about May 9, 2016.
7. The contract for the property entered attorney review on or about May 12, 2016.
8. During the attorney review, the Buyers learned that there was an underground oil tank on the property. On or about May 14, 2016, the Buyers canceled the contract after the Sellers refused to remove the oil tank from the premises.
9. However, negotiations continued and the Sellers agreed to remove the oil tank. The cancelation was rescinded by the Buyers on or about May 20, 2016.
10. The Respondent did not mark the property as “under attorney review” in the MLS until May 22, 2016.
11. On May 22, 2016, the Respondent held an open house and continued to market the property even though the parties revived the contract and were in attorney review at the time.
12. On or about May 24, 2016, the parties executed a rider to the contract, and on May 25, 2016, the attorney review concluded.
13. The Respondent did not change the status of the property to “under contract” until June 1, 2016.
14. On June 3, 2016, the Respondent updated the MLS status of the property to “back on the market.” At that time, the property was under contract with the Buyers.
15. The Buyers canceled the contract on June 6, 2016 due to unresolved inspection issues.
16. On June 7, 2016, the Respondent entered a new listing in the MLS for the property with the listing period of June 7, 2016 through September 30, 2016. This listing represented

that the property taxes for the Tilden Ave. property were \$9,800. However, this amount was still lower than the actual property taxes of \$9,985 for 2015 and \$10,146 for 2016.

17. During the course of the investigation of the complaint filed by the Buyers, REC Investigator Berg contacted the Respondent and requested that he provide a statement as well as documents related to the transaction in question. Berg made requests both verbally and/or via email communications on February 10, 2017 and March 17, 2017. The Respondent failed to comply with Berg's requests.

18. Berg then notified the Respondent's broker, Reggo, on April 18, 2017, via an email communication, that the Respondent has failed to cooperate with the REC's investigation in this matter. It was only after Reggo was contacted that the Respondent provided a statement to Berg, dated April 24, 2017. However, the Respondent failed to provide any of the requested documentation to Berg.

### **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 and summarized above.

1. The Respondent advertised the Tilden Ave. property as "under attorney review" rather than "under contract" from May 25, 2016 through June 1, 2016 and advertised the property as "back on market" rather than as "under contract" from June 3, 2016 through June 6, 2016, in violation of N.J.A.C. 11:5-6.1(o).
2. The Respondent failed to deal fairly with the Buyers when he failed to mark the property as "under contract" in the MLS in a timely manner, in violation of N.J.A.C. 11:5-6.4(a).

3. The Respondent's failure to correctly update the Tilden Ave. property's listing in the MLS in a timely manner demonstrates incompetency, in violation of N.J.S.A. 45:15-17e.
4. The Respondent's failure to cooperate with the REC Investigator during the course of the investigation demonstrates unworthiness, in violation of N.J.S.A. 45:15-17e.
5. The Respondent misrepresented the actual amount of the property taxes on the Tilden Ave. property in the MLS listings for the property only after the incorrect amount was specifically brought to the Respondent's attention, in violation of N.J.S.A. 45:15-17a.
6. The Respondent did not deal unfairly with Buyers in violation of N.J.A.C. 11:5-6.4(a) by failing to mark the property as "under attorney review" in the MLS.

#### **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 testimony presented at the hearing and the undisputed documentary evidence admitted at the hearing.

The REC bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 560 (1982). The evidence must be such as would "lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may be described as "the greater weight of credible evidence in the case. It does not necessarily mean evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975).



### Allegations Against the Respondent

As it relates to the Respondent's alleged failure to properly update the Tilden Ave. property's status in the MLS during the pendency of the transaction at issue in this matter, the OTSC alleges the following: (1) the Respondent advertised the Tilden Ave. property for sale on or after May 26, 2016 without noting in the listing that the property was under contract, in violation of N.J.A.C. 11:5-6.1(o); (2) the Respondent failed to properly mark the property as "under attorney review" and "under contract" in the MLS, in violation of N.J.A.C. 11:5-6.4(a); and (3) the Respondent demonstrated unworthiness, incompetency, bad faith, or dishonesty, in violation of N.J.S.A. 45:15-17e by failing to properly update the status of the property in the MLS.

The evidence in this matter shows that the Respondent failed to timely update the MLS listings for the Tilden Ave. property to correctly reflect the current status of the property in relation to the transaction between the Buyers and the Sellers in this matter. Specifically, the contract originally entered attorney review on or about May 12, 2016. Thereafter, on May 14, 2016, the Buyers canceled the contract after discovering that an underground oil tank existed on the property and the Sellers' refused to remove same. See Exhibit 10. However, the Buyers rescinded their original cancellation of the contract through an email from the Buyers' attorney to the Sellers' attorney on May 20, 2016. See Exhibit S-11 at 2. This email additionally provided that the parties did not complete attorney review prior to the original cancellation, and thus, the attorney review was in effect at the time that the Buyers rescinded their cancellation. Ibid. Although the contract originally went into attorney review on or about May 12, 2016 and continued on or about May 20, 2016, the Respondent failed to mark the property as "under attorney review" in the MLS until May 22, 2016. Additionally, on or about May 24, 2016, the parties executed a rider to the contract. See Exhibit S-12. Then on May 25, 2016, the attorney review concluded. See Exhibit S-13. However,

the Respondent waited until June 1, 2016 to update the status of the property in the MLS to “under contract.” On June 3, 2016, the Respondent updated the MLS status of the property to “back on market.” See Exhibit S-6 at 2. However, on that date, the Tilden Ave. property was still under contract with the Buyers and remained so until June 6, 2016, when the Buyers canceled the contract due to unresolved inspection issues. See Exhibit S-15.

N.J.A.C. 11:5-6.1(o)2 provides that in the time period after a contract that is prepared by a licensee emerges from attorney review or a contract that is not subject to attorney review is fully executed and delivered to the parties, but before a closing occurs, “any advertisement of the property which is the subject of the contract shall include the term ‘under contract.’” N.J.A.C. 11:5-6.1(o)1 states that the term “advertisement” includes communications with other licensees through notices submitted to a MLS. Here, it is clear that the Respondent advertised the Tilden Ave. property as under attorney review in the MLS from May 22, 2016 through June 1, 2016. See Exhibit S-6 at 2. However, as of May 25, 2016, the parties completed attorney review and the property was not properly advertised as “under contract” until six days later on June 1, 2016. See Exhibits S-13 and S-6 at 2. Moreover, on June 3, 2016, the Respondent updated the property’s status in the MLS to reflect that the property was “back on market,” even though the property was still under contract until June 6, 2016, when the Buyers terminated same. See Exhibits S-6 at 2 and S-15. In light of the foregoing, the Commission finds that the Respondent violated N.J.A.C. 11:5-6.1(o) by failing to properly update the MLS listing for the Tilden Ave. property to reflect that the property was “under contract” between the dates of May 22, 2016 through June 1, 2016, and June 3, 2016 through June 6, 2016.

N.J.A.C. 11:5-6.4(a) provides that a licensee is required to strictly comply with the laws of agency and the principles governing fiduciary relationships while also dealing fairly with all

parties to the transaction. In the present matter, the Respondent was both the listing agent and the owner of the Tilden Ave. property. As such, the Respondent owed a greater duty to deal fairly with the Buyers in this transaction. However, as noted above, the Respondent failed to properly update the status of the property in the MLS to “under contract” on at least two separate occasions. Moreover, the Respondent admitted during the hearing that he removed the property from the “under contract” status to the “back on market” status prior to the actual cancelation of the contract because he believed that the transaction would not close. As such, he was actively marketing the property while still under contract. In light of the foregoing, the Commission finds that the Respondent violated N.J.A.C. 11:5-6.4(a) by failing to deal fairly with the Buyers by not properly marking the property as “under contract” in the MLS.

However, while it is clear from the documentary evidence and testimony presented at the hearing that Respondent did not update the property’s listing to show the status of the transaction as “under attorney review,” in a timely manner, the Respondent is not required to do so under the Real Estate Brokers and Salespersons Act, N.J.S.A. 45:15-1 to -42 (“Act”) and accompanying regulations which govern his New Jersey salespersons license. As such, the Commission finds that the Respondent’s failure to update the MLS listing to mark the status of the property as “under attorney review” is not a violation of N.J.A.C. 11:5-6.4(a).

As stated above, N.J.S.A. 45:15-17e provides the Commission with 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.” Here, as already found by the Commission, over the course of the pending transaction to purchase the Tilden Ave. property by the Buyers, the Respondent repeatedly failed to properly update the MLS to reflect the accurate status of the property. While the Commission acknowledges that the Respondent was under a duty

to properly manage his listing and correctly update same to reflect the current status of the property, it is noted that the transaction in this matter appeared to be unstable and/or in flux, as it was previously canceled by the Buyers once before, and the Respondent eventually did update the listing in the MLS to reflect the "under contract" status of the property. Specifically, while the Respondent should have updated the MLS on or about May 25, 2016 to reflect that the status of the property was "under contract," the Respondent did update the MLS on June 1, 2016 to reflect same. The Commission additionally notes that the attorney review concluded directly before Memorial Day Weekend, which began on May 27, 2016. Based upon these mitigating factors, the Commission finds that the Respondent's actions, as they relate to the improper status listings in the MLS, do not constitute bad faith, dishonestly, or unworthiness, in violation of N.J.S.A. 45:15-17e.

However, the Respondent's actions in not immediately updating the MLS upon the property's status change as well as the Respondent's explanation that he listed the property as "back on market" in the MLS prior to the cancellation of the contract because he believed that the transaction was not going to close demonstrates a lack of competency on the part of the Respondent in the practice of his profession. As such, the Commission finds that the Respondent's actions, as they relate to the improper status listings in the MLS, constitute incompetency, in violation of N.J.S.A. 45:15-17e.

The OTSC additionally alleges that the Respondent demonstrated unworthiness by failing to cooperate with a REC Investigator during the course of the investigation and failing to provide a written statement when required to do so, in violation of N.J.S.A. 45:15-17e. In addition to permitting the Commission to suspend, revoke, or place on probation the license of any licensee

for “[a]ny conduct that demonstrates unworthiness, incompetency, bad faith or dishonesty,”

N.J.S.A. 45:15-17e provides that

[t]he failure of any person to cooperate with the [C]ommission in the performance of its duties or to comply with a subpoena issued by the [C]ommission compelling the production of materials in the course of an investigation, or the failure to give a verbal or written statement concerning the matter under investigation may be construed as demonstrating unworthiness.

Here, Berg testified that on several occasions, she attempted to contact the Respondent and requested that documentation and a statement be provided by him to Berg. Berg specified that she left several messages for the Respondent and was informed that the Respondent is a CPA who was very busy because it was tax season. Berg finally spoke with the Respondent on February 10, 2017, during which she requested a statement from the Respondent and specific documentation including a copy of the contract at issue, emails, letters from attorneys, or any other documentation that may be pertinent in the sale of the Tilden Ave. property by February 17, 2017. See Exhibit S-17. However, the Respondent did not provide a statement or any of the documentation by that date. Additionally, Berg stated that she emailed the Respondent on March 17, 2017, wherein she reiterated her February 10, 2017 oral request for a statement and documentation. Ibid. Berg stated that the Respondent failed to respond to her email communication. Berg then emailed the Respondent’s broker, Reggo, on April 18, 2017, and advised him that the Respondent had failed to provide the statement and documentation requested. See Exhibit S-18. Berg additionally gave Reggo a deadline of April 24, 2017 for the Respondent to submit his statement and documentation. Ibid. It was only after this email communication with Reggo that the Respondent submitted his statement, dated April 24, 2017. See Exhibit S-19. However, the Respondent failed to provide any of the requested documentation to Berg.

Based upon the testimony and documentary evidence admitted at the hearing in this matter, it is clear that the Respondent failed in his duty to cooperate with REC Investigator Berg in her investigation into the complaint filed against him. The Respondent's excuse that he was too busy to comply with Berg's requests because it was tax season does not alleviate him of his responsibility as a New Jersey real estate licensee to cooperate with the REC in its investigation. As such, the Commission finds that Respondent's failure to cooperate with Berg and provide the requested documentation demonstrates unworthiness, pursuant to N.J.S.A. 45:15-17e.

Lastly, the OTSC additionally alleges that the Respondent misrepresented the actual amount of the taxes assessed on the Tilden Ave. property in the May 3, 2016 listing agreement after the incorrect amount was specifically brought to the Respondent's attention, in violation of N.J.S.A. 45:15-17a, which provides that the Commission may suspend, revoke, or place on probation the license of any licensee for "[m]aking any false promises or any substantial misrepresentations." Here, the Respondent posted three listings for the Tilden Ave. property in the MLS with the following listing dates: January 19, 2016 through May 31, 2016; May 3, 2016 through July 31, 2016; and June 7, 2016 through September 30, 2016, respectively. See Exhibits S-2 through S-4. While the first two listings showed that the property taxes were \$8,500, the Respondent was aware that this number was not the actual, assessed property taxes. Specifically, Baek and Camacho testified that the Respondent informed them that the property taxes listed on the listing was not correct prior to the Buyers making an offer on the property, which occurred on or about May 5, 2016. Moreover, on or about May 3, 2016, the Buyers' agent, Baek informed the Respondent that the Buyers were "wary about the \$1,500 tax increase from 2014 to 2015." Exhibit S-7. On that same date, the Respondent posted his second listing for the Tilden Ave. property in the MLS. However, he failed to update the property taxes to the correct amount. Additionally,

after the Buyers canceled the contract on June 6, 2017, the Respondent again, on June 7, 2017, posted a listing for the Tilden Ave. property in the MLS. This third listing portrayed the property taxes as \$9,800. See Exhibit S-4. This number, however, still did not reflect the actual assessed property taxes for either the 2015 or 2016 tax year, which were \$9,985 and \$10,146, respectively. In light of the foregoing, the Commission finds that the Respondent misrepresented the actual amount of the property taxes on the Tilden Ave. property, in violation of N.J.S.A. 45:15-17a.

#### Penalty Against the Respondent

The Act charges the Commission with the “high responsibility of maintaining ethical standards among real estate brokers and sales[persons]” in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Comm’n, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The nature and duties of a real estate business are grounded in interpersonal, fiduciary, and business relationships and demand the utmost honesty, trust, and good conduct. Maple Hill Farms, Inc. v. New Jersey Real Estate Commission, 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 Ponsi, 39 N.J. Super. at 532-533. Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for “any conduct which demonstrates unworthiness, incompetency, bad faith, or dishonesty.” N.J.S.A. 45:15-17e.

As set forth above, the Commission found that: the Respondent’s failure to cooperate with Investigator Berg during the course of her investigation demonstrates unworthiness, in violation of N.J.S.A. 45:15-17e; the Respondent’s actions in not immediately updating the MLS upon the property’s status change as well as the Respondent listing the property as “back on market” in the

MLS prior to the cancelation of the contract demonstrates incompetency, in violation of N.J.S.A. 45:15-17c; and the Respondent's continued misrepresentations of the amount of the property taxes on the Tilden Ave. property constitutes a violation of N.J.S.A. 45:15-17a. Based upon these findings, the Commission is empowered, under the Act, to suspend or revoke the Respondent's real estate salespersons license. The Respondent's actions during the transaction in this matter demonstrate a continued disregard of the high standards that are imparted upon real estate licensees in this State. As such, the Commission finds that the suspension of the Respondent's real estate salespersons license to be an appropriate sanction for the violations found herein. However, the Commission notes that there are mitigating factors in this manner that must be taken into consideration in determining the appropriate length of time for the suspension of the Respondent's salespersons license. Specifically, the Commission considered the following mitigating factors in its determination: that the changes in the property status occurred prior to a holiday weekend, that the Respondent eventually updated the MLS to set forth the correct property status, and that the transaction in this manner appeared to be unstable and/or in flux during the pendency of the transaction. After considering the testimony and evidence presented, and in light of the violations committed by the Respondent, as well as the mitigating factors, as set forth herein, the Commission finds that an appropriate penalty in this matter includes the suspension of the Respondent's real estate salespersons license for a period of six months. See NJREC v. Grady, Final Order of Determination, (08/10/17) (imposing a license suspension of six months based upon the finding that mitigating factors were present).

Moreover, 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 in order 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. No one Kimmelman factor is dispositive for or against fines and penalties. See Id. at 139 (“[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case.”).

First, the Respondent acted in bad faith by failing to cooperate with REC Investigator Berg in her investigation into the Respondent's wrongful conduct during the period of the transaction with the Buyers. The Respondent was aware that Berg had attempted to contact him on several occasions and additionally knew that she had requested specific information and documentation from him as it related to this transaction. However, the Respondent continually failed to provide the requested information to Berg and instead insisted that he was too busy as a CPA during tax season to respond in a timely manner to Berg's requests. It was only after Berg reached out to the Respondent's broker, Reggo, that the Respondent even provided a statement to Berg, which was over three months after Berg had initially requested same. However, the Respondent still failed to produce any of the requested documentation to Berg. These actions weigh in favor of a monetary penalty.

Further, the Respondent was aware that the taxes on the Tilden Ave. property were not accurate on the property listing in the MLS. Specifically, the Respondent discussed the fact that the listing was not accurate in relation to the property taxes with Baek on or about May 3, 2016.

On the same day, the Respondent entered a new listing for the property in the MLS. Instead of making sure that the new listing had the correct taxes listed, the Respondent again listed the property taxes as \$8,500, when in fact they were much higher. Further, the Respondent again, on June 7, 2016, entered a new listing for the property in the MLS and misrepresented the property taxes. On this listing, the Respondent listed the taxes as \$9,800, which is still lower than the \$9,985 and \$10,146 assessed on the property for 2015 and 2016, respectively. Again, these actions weigh in favor of a significant monetary penalty.

However, as it relates to the Respondent's failure to properly update the property's listing in the MLS to correctly reflect the status of the property, there was no evidence to determine that the Respondent acted in bad faith. As previously noted, the contract in this matter was unstable and/or in flux and had previously been canceled by the Buyers. Moreover, the parties completed attorney review on May 25, 2016, which was directly before a holiday weekend, and the Respondent updated the MLS listing to reflect the status of "under contract" on June 1, 2016, the day after Memorial Day. While the Commission notes that the Respondent's actions in removing the property's status of "under contract" from MLS three days prior to the cancellation of the contract were wrongful, the Commission does not believe that the Respondent acted in bad faith in doing so. As such, these actions do not weigh in favor of a significant monetary penalty.

The Respondent did not provide any specific testimony or proofs in relation to the second Kimmelman factor, which address the Respondent's ability to pay the fines imposed. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. NJREC v. Cortese, Final Order of Determination, (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)). The Respondent has thus not met that burden.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. In this case, no evidence was presented at the hearing regarding the existence of any monies earned by the Respondent as a result of his conduct.

The fourth Kimmelman factor addresses the injury to the public. 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, 29 N.J. Super. at 182. Therefore, the public is harmed when individuals fail to comply with Commission regulations. When a licensee is unable to conduct himself in accordance with the high standards expected of him and his profession, the public’s confidence in the real estate industry is eroded.

In this matter, the Respondent was unable to conduct himself in accordance with the high standards expected of him and those in his profession when he refused to cooperate with REC Investigator Berg during the course of her investigation into the Respondent’s conduct during the transaction at issue. Moreover, the Respondent clearly misrepresented the amount of the property taxes on the Tilden Ave. property on several occasions, which is in contrast to the high standards demanded of those maintaining a real estate license in this State. The responsibility falls on the licensee to be aware of the applicable statutory and regulatory requirements of those in their profession. The Commission must encourage licensees to abide by the rules that are in place in order to protect consumers and ensure ethical conduct by those in the real estate profession. The Respondent’s failure to abide by these rules weighs in favor of a significant monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Respondent failed to cooperate with the Berg’s investigation for a period of over three months.

Moreover, the Respondent misrepresented the property taxes on the Tilden Ave. property for a period of at least five months, from May 3, 2016, when the Respondent failed to update the property taxes on his new MLS listing for the property, through September 30, 2016, when the Respondent's third MLS listing for the property expired. The Respondent's actions in failing to update the property's status in the MLS to "under contract" occurred only two times during a month-long period.

Sixth, the Respondent has not been party to criminal proceedings or other civil proceedings stemming from the conduct at issue.

As to the final factor, there is no evidence of prior real estate violations committed by the Respondent.

In light of these factors, the Respondent shall pay a fine in the total amount of \$3,000, representing \$1,000 for failing to cooperate with a REC Investigator during the course of an investigation, in violation of N.J.S.A. 45:15-17e, and \$2,000 for misrepresenting the actual amount of the taxes assessed on the Tilden Ave. property, in violation of N.J.S.A. 45:15-17a. These fines are fully warranted, not excessive or unduly punitive, and are necessary to demonstrate the appropriate level of opprobrium for the Respondent's conduct.

However, because of the mitigating factors discussed above, as they relate to the Respondent's failure to properly update the property's status in the MLS to "under contract," the Commission does not issue fines against the Respondent for: (1) advertising the Tilden Ave. property for sale when it was under contract, in violation of N.J.A.C. 11:5-6.1(o); (2) failing to deal fairly with the Buyers when he failed to mark the property's status in the MLS as "under contract," in violation of N.J.A.C. 11:5-6.4(a); and (3) for demonstrating incompetency by failing to mark the property's status in the MLS as "under contract," in violation of N.J.S.A. 45:15-17e.

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

- I. Respondent John Viaud's real estate salesperson license is hereby suspended for a period of six months from the issuance of this Order.
- II. Respondent John Viaud shall pay a total fine in the amount of \$3,000, which is comprised of a fine of \$1,000 for failing to cooperate with a REC Investigator during the course of an investigation, in violation of N.J.S.A. 45:15-17e, and a fine in the amount of \$2,000 for misrepresenting the actual amount of the taxes assessed on the Tilden Ave. property, in violation of N.J.S.A. 45:15-17a.

SO ORDERED this 11<sup>th</sup> day of October, 2018.

By: Linda K. Stefanik, President  
Sanjeev Aneja, Commissioner  
Christina Banasiak, Commissioner  
Jacob Elkes, Commissioner  
Denise M. Illes, Commissioner



Patrick J. Mullen  
Director of Banking

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