

STATE OF NEW YORK
DEPARTMENT OF STATE

In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant

-against-

DECISION

**HENRY D. LOPEZ, H.D.L. REAL ESTATE
ASSOCIATES, INC., RALPH DiLILLO, and
MANUEL JUARBE,**

Respondents

Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on March 19, April 28, and June 24, 1992 at the office of the Department of State located at 270 Broadway, New York, New York 10007.

Henry D. Lopez, currently of 7 Hugh Grant Circle, Bronx, New York 10462, was present at all sessions of the hearing. At the session on March 19, 1992 his attorney, Joseph C. Perez, Esq., 920 Castle Hill Avenue, Bronx, New York 10473 was not present. Mr. Perez had telephoned me at twenty minutes of four on the day prior to the hearing to request an adjournment. He was advised that pursuant to 19 NYCRR 400.11 requests for adjournments must be made in writing at least three business days prior to the scheduled hearing. He advised me that he had only been retained the previous day (March 17) and claimed that he had attempted to reach Paul Heyman, Esq., the attorney representing the complainant, on the morning of March 18. There was, however, no record of such an attempt, and Mr. Heyman did not hear from Mr. Perez until twenty minutes of three on March 18. In view of the fact that Lopez had been served with notice of hearing on March 2, 1992, and of the large number of witnesses who had been subpoenaed to testify and who could not be contacted with such short notice, Mr. Perez was advised that the adjournment would not be granted. As noted above, Lopez was present at the March 19 hearing session, and he fully participated in the hearing, including examining proffered exhibits and cross-examining witnesses.

Ralph DiLillo, of 104 Fowler Avenue, Yonkers, New York 10701, was not served with notice of hearing and was not present at any of the sessions (although he did receive notice of at least the first continued date).

Manuel Juarbe, of 134 East Mosholu Parkway So., Bronx, New York 10458 was, by pre-arrangement made on March 9, 1992 with his attorney, Jose R. Martinez, Esq., 631 East Tremont Avenue, Bronx, New York 10457, not present on March 19, 1992, at which time no evidence was received pertaining to the charges against him, but was present with his attorney at the subsequent two hearing sessions, at which evidence was received regarding those charges.

THE COMPLAINT

The complaint in the matter alleges: that Lopez, representative broker of H.D.L. Real Estate Associates, Inc. (HDL), commingled the money of principals with his own, failed and refused to refund trust monies held by him and converted same to his own use, failed to render an account to clients or to remit monies collected for his clients and unexpended on their account, breached his fiduciary obligations by failing to place trust monies in escrow and failing and refusing to return such trust monies, permitted Juarbe to act and hold himself out as a real estate salesperson associated with HDL although not so licensed, and procured a tenant for an apartment the occupancy of which was inconsistent with an existing certificate of occupancy and thereby exposed the tenant and her infant son to risk of physical harm; that DiLillo commingled the money of his principal with his own, failed and refused to refund trust monies held by him and converted said monies to his own use, and breached his fiduciary duties to his clients by self-dealing, by failing to place trust monies in escrow, and by failing and refusing to return said trust monies and converting them to his own use; that Juarbe commingled the money of his principal with his own, failed and refused to refund trust monies held by him and converted those monies to his own use, failed to render an account to his client or to remit monies collected for his clients and unexpended for their account, and acted and held himself out as a salesperson associated with HDL although he was not so licensed; and that HDL, by and through the actions of Lopez, is guilty of the same violations and is responsible therefore.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was personally served on Lopez on March 2, 1992 (Comp. Ex. 1).

Notice of hearing mailed to DiLillo by certified mail was returned unclaimed (Comp. Ex. 3), and an attempt to serve him personally at his last known business address was not successful when it was determined that his brokerage business was no longer operating at the address (Comp. Ex. 2).

No proof of service on Juarbe was presented, but he and his attorney appeared without objection.

2) At all times hereinafter mentioned Lopez was duly licensed as a real estate broker in his own name and as representative of HDL at various locations in Bronx County. He subsequently relocated his office to his current location without first notifying the Department of State and, therefore, by action of Real Property Law (RPL) section 441-a(5) that license was automatically suspended pending the vacating of that suspension by the Department which, according to Mr. Perez, has not occurred.

At all times hereinafter mentioned Juarbe was a duly licensed real estate salesperson associated with Investors New York Real Estate Services at 301 East 79th Street, New York, New York 10021. He began working as a salesperson for HDL in April 1991, and continued to do so until October 1991, when he began to work as a real estate salesperson for his attorney in this proceeding, Mr. Martinez. When Juarbe commenced working for HDL, at the direction of Lopez he gave his license to office manager Carmela Monahan along with a signed change of association form and a money order for the \$10.00 change fee, and Monahan said that she would take care of filing the form. He was subsequently informed by Lopez that the paperwork had been submitted and that he (Juarbe) was properly licensed with HDL. The records of the Department of State, however, do not show the filing of the change of association. Since December 31, 1991 he has been licensed as a real estate broker in his own name at 134 East Mosholu Parkway So., Bronx, New York 10458.

3) On September 9, 1991 Barbara Thompson went to the office of HDL located at 236 E. Gun Hill Road, Bronx, New York seeking to rent an apartment. She spoke with Lopez, who asked her what she was looking for. She told him what her requirements were, and he told her that he had an apartment available.

Lopez took Thompson to see the apartment, located at 1690 Metropolitan Avenue, Parkchester (Apt. TF), and told her that she could take occupancy at the end of September. He told her that he was buying the apartment, and required that she give \$2,275.00. for rent, security and a commission. (Comp. Exs. 7 and 8).

When the time of the promised occupancy arrived Thompson was unable to obtain possession of the apartment. She attempted unsuccessfully to reach Lopez on the telephone, and when she visited his office she found a sign that it was closed for vacation until October 5. As of the date of the hearing she had not obtained occupancy of the apartment and had not received a refund of her \$2,275.00.

4) On June 20, 1991 Colleen Joseph went to the HDL office at 236 East Gun Hill Road, Bronx, New York and spoke with HDL employee Carmella Monahan about the availability of an apartment to rent. Monahan said that there was an apartment available, and a real estate salesperson associated with HDL took Joseph to see apartment A2 at 3336 Decatur Avenue, Bronx, New York. Joseph told Monahan that she liked the apartment and gave her a \$130.00 deposit toward rent, security and

a commission. (Comp. Ex. 11). Subsequent additional payments by Joseph brought the total amount that she paid to HDL to \$2,040.00 (Comp. Exs. 10 and 12).

Having made the above payments, Joseph asked Lopez for the key to the apartment, and was told by him that the key was not then available because the landlord was probably on vacation. Subsequently, Joseph repeatedly called HDL but was not able to speak with Lopez. On August 20, 1991 she completed and submitted a form in which she requested a refund (Comp. Ex. 13), and was told by Lopez that she would have to wait seven days for her money. However, on two later visits to the HDL office she was told that the money was not available, and when she finally saw Lopez again he told her that she would never get her money and that she could take him to court.

Joseph has never obtained possession of the apartment, which is occupied by someone else, and has not received the return of her money. No proof of acceptance of Joseph as a tenant by the landlord has ever been produced.

5) Sometime in mid-August, 1991 Marcia Brown went to an HDL office and spoke with an employee about obtaining an apartment to rent. She was sent to see an apartment, which she liked, and was told that she should leave a deposit. In response she gave Lopez \$1700.00 (Comp. Ex. 14). Several days later she was told to go to the landlord's office, where she was told that they had never heard of her and that she should speak to Juarbe.

Brown returned to the HDL office and requested a refund. Several weeks later she spoke with Lopez on the telephone, and he told her to come into the office and sign a stipulation of settlement, which she did. That stipulation, signed on October 12, 1991, called for Brown to receive a refund of \$1,700.00 by no later than April 7, 1992 (Comp. Ex. 15). No refund has been made and Brown has not received possession of the apartment.

6) On or about January 5, 1991 Altagracia Colon-Yapor went to the HDL office at 236 East Gun Hill Road, Bronx, New York seeking an apartment to rent. She spoke with an HDL employee, and was taken to see an apartment located at 3044 Kingsbridge Road, Bronx, New York. She wished to rent the apartment and was told that she would have to pay one month's rent security and a broker's fee, and she gave HDL employee Louis Torres \$2,450.00 (Comp. Ex. 16). Colon-Yapor wished to sign a lease for the apartment, but was told by Torres that she would have to wait. Eventually, she was told by Torres that the landlord refused to rent to her, but that he (Torres) would attempt to find her another apartment.

Torres took Colon-Yapor to see an apartment located at 103 Sherman Avenue, Bronx, New York, and she expressed an interest in renting it. The landlord had, however, rented the apartment to someone else, and Torres told Colon-Yapor that she would have to look at more apartments. Torres never showed Colon-Yapor any more apartments, and she finally asked Lopez for a refund (Comp. Ex. 16). Lopez told her that she would

have to wait seven days, and eventually she received a refund check dated February 2, 1991, signed by Lopez which, when deposited, was returned unpaid by the bank for reason of insufficient funds (Comp. Ex. 17).

Colon-Yapor returned to the HDL office told Lopez what had happened, and requested a cash refund. Lopez said that he would not give her cash but would give her another check. Such a check was not, however, forthcoming. Colon-Yapor then sued Lopez and HDL in Civil Court, Bronx County, and obtained a default judgment in the amount of \$2,663.45 including interest, costs, and disbursements (Comp. Ex. 18). She then spoke with Lopez, and he told her that he did not have the money to satisfy the judgement and that she would have to wait for payment. She attempted to have the sheriff collect the judgment, but an attempt to levy on the HDL bank account revealed that it was overdrawn (Comp. Ex. 19).

On May 31, 1991 Lopez wrote to Colon-Yapor and asked her to make an appointment to meet with her (Comp. Ex. 20). Colon-Yapor spoke with an attorney provided by her union, and that attorney reached a payment agreement with Lopez, who promised to refund \$2,000.00 in installments and, on September 17, 1991 sent that attorney two checks for Colon-Yapor in the amount of \$500.00 each which were subsequently dishonored by the bank for reason of insufficient funds (Comp. Ex. 21). Colon-Yapor has never received the return of her money and has not obtained an apartment through the efforts of HDL or Lopez.

7) On August 26, 1991 Charlene Cain went to the HDL office on Gun Hill Road. She spoke with an HDL employee named "Marlene" and told her about a house which she had seen that had a sign directing inquiries to HDL. Marlene took Cain to see the house, and upon returning to the HDL office Cain completed an application to rent the first floor and basement of the house, which was cosigned by Lopez (Comp. Ex. 22). At that time she made a payment of \$200.00 towards the costs of the rental, and on August 30, 1991 she made an additional payment of \$1325.00 (for a total of \$1525.00), although the rental agreement called for that payment to be in the amount of \$1,500.00 (Comp. Ex. 23). Cain never completed the payments, which pursuant to the agreement where to total \$4,500.00 (divided evenly among rent, security, and HDL's fee), and if not completed by September 13, 1991 would, pursuant to the terms of the agreement, result in Cain being held in default. Both payments were made in the presence of Lopez.

Cain subsequently passed by the house and discovered that it looked like someone had broken in and was living in it. She called the HDL office and, although the rental agreement called for Cain to take the apartment "as is", Lopez told her that the house would be cleaned up before she got the keys. No work was done, and several weeks later Cain asked Lopez for the return of her money. Without stating any reason, Lopez replied that she could not have her money back. No evidence was offered to show that the proposed tenancy was ever accepted by the landlord.

8) In April, 1990 Jesus Martinez went to the HDL office at 1506 Castle Hill Avenue, Bronx, New York seeking to purchase a house. He spoke with HDL employee Raul Lopez and was shown a house located at 1534 St. Lawrence Avenue, Bronx, New York.

Martinez liked the house, and gave Lopez, who was acting on behalf of HDL, a deposit of \$500.00 (Comp. Exs. 25 and 26). On April 28, 1990 Lopez gave an additional deposit of \$6,500.00 cash to Lopez's wife, and received a receipt signed by Lopez (Comp. Ex. 26). On May 15, 1990 Martinez and his wife signed a contract to purchase the house for \$255,000.00. The contract stated that the previously paid \$7,000.00 would be held in escrow by HDL, acknowledged HDL and T.R.U.S.T. Realty as the brokers who brought about the transaction, and Lopez signed the contract to evidence HDL's agreement to pay \$3,000.00 of the promised \$9,000.00 commission to the other broker (Comp. Ex. 24). At the time of the contract signing Martinez gave the sellers' attorney an additional deposit of \$10,000.00.

Lopez had introduced the Martinez's to attorney Perez, who agreed to represent them in applying for a mortgage, and applications were made. Those applications were unsuccessful, and the Martinez's retained another lawyer to assist them. The application made with the assistance of that lawyer was also unsuccessful. Eventually, not having been able to obtain a mortgage, the Martinez's spoke to Lopez about obtaining the return of their money. Lopez took the position that there had been a default on the contract and that, therefore, no refund was due. He then suggested that they come back another day to look at other houses, which offer they refused. Lopez also said that business was not good and that, therefore, he did not have the money.

After some effort, the Martinez's were able to obtain the return of the \$10,000.00 which was being held by the sellers' attorney. On October 13, 1990 Lopez agreed to refund, on November 15, 1990, the \$7,000.00 held by him (Comp. Ex. 29). After not honoring that agreement, except for the payment of an unspecified amount of interest, on June 17, 1991 Lopez agreed to pay back the money in 35 weekly installments (Comp. Ex. 28). Lopez actually made 6 of those payments (\$1,500.00). He then gave the Martinez's two checks for installments which were dishonored by the bank. Mr. Martinez confronted Lopez about the bad checks, and to calm Martinez down Lopez gave him an additional \$2,000.00 in cash. The record is unclear as to the total amount of money paid by Lopez to the Martinez's, and as to how much of that money represented principal and how much was interest.

About two months prior to the start of the hearing Mr. Martinez met with Lopez again, and Lopez offered to resolve the matter by giving the Martinez's his Cadillac automobile in exchange for \$1,600.00. The Martinez's did not accept that offer. At a subsequent meeting Lopez promised to return the Martinez's money to them as soon as he could close on the pending sale of some property which he owned, but the Martinez's did not either accept or refuse that offer, and they have received no further payments from Lopez.

9) In early 1991 Sharon Harris went to the HDL office at 236 East Gun Hill Road seeking to rent an apartment. She told an HDL employee what she was looking for and was shown an apartment, but she was rejected by the landlord. She was then shown another apartment, at 2063 Turnbull Avenue, which did not have a stove, and was told by Lopez that a stove would be installed. Harris agreed to rent the apartment, signed a lease (Comp. Ex. 31), and paid \$3,190.00, constituting two months rent, two months security, and a brokerage fee.

Harris moved into the apartment, which was in the cellar of a legal one family house (Comp. Ex. 32) in which the upstairs was occupied by another tenant. On March 11, 1991 the boiler exploded (Comp. Ex. 33), and both Harris and her two year old son where injured (Comp. Ex. 34). As a result of his burns, the son was hospitalized for two months. The apartment was no longer habitable, and Harris spoke to Lopez about getting the return of her security payment. He refused, saying that Harris would have to await the return of his mother, who was purportedly the owner of the house (although the lease of the other tenant in the house indicates that Lopez is the owner, and Lopez had told Harris that he owned the house). However, as of the date of the first hearing session no refund had been made.

10) In early September, 1991 Craig Martin and his wife each individually went to an HDL office and spoke with Louis Torres about finding an apartment to rent. Torres took them to look at some private houses in which apartments where available. Although Mrs. Martin was able to see the apartment on the top floor of one of those houses, at 777 East 216th Street, Bronx, New York, Mr. Martin was initially unable to gain access. In any case, they gave Lopez \$400.00 as an initial deposit on the apartment, and subsequently made additional payments, for a total of \$3,150.00 to be applied to a security payment of one month's rent, the rent for one month, and a brokerage fee based on one and one-half month's rent (Comp. Ex. 35).

The Martins were subsequently told that they had been rejected as tenants by the owner of the house, and Mr. Martin asked Torres for a refund of his money. Martin completed a refund request (Comp. Ex. 35), and was told by office secretary Carmella Monahan that he would get his money in ten days. No refund was, however, received, in spite of repeated telephone calls and visits made by Mr. Martin to HDL. The Martins then approached the owner of the house directly and learned that she had not been contacted by anyone from HDL. They gave her additional rent and security and were accepted as tenants.

11) On June 16, 1989 Hugh McLaren went to the HDL office on Gun Hill Road seeking to rent an apartment. He spoke with two HDL employees named Ms. Howell and Ms. Johnson, and they took him to see an apartment which they told him was owned by Lopez. They returned to the office and McLaren gave then a deposit of \$1,012.50 (Comp. Ex. 38). He was told that he could move in at the end of the week after some work was done. Several days later he received a telephone call from someone at HDL and was told to come in and pay an additional \$1,800.00, which he did (Comp. Ex. 38).

A week after the initial visit McLaren telephoned HDL and was told that the apartment was not ready. Several days later he went to the Gun Hill Road office to inquire, and was told that he would have to see Lopez at his office on Castle Hill Avenue. McLaren went there and spoke with Lopez, who said that he needed four or five more days to have the work done. After four or five days McLaren again spoke with Lopez, and, when told that the apartment was not ready, requested a refund of his money. Lopez told him that he would have to come back in a month when he expected to have received a loan.

A month later McLaren again asked for his money, only to be told by Lopez that he had been part owner of the building but no longer was, and that he had to speak to the woman who owned the house. He did so, and she told him that he would have to speak to Lopez. McLaren then returned to Lopez's office on several occasions to demand the return of his money, only to be told not to come back because he made too big a disturbance.

McLaren brought suit against Lopez and obtained a default judgment in the amount of \$3,087.91, including interest, costs, and disbursements (Comp. Ex. 36). That judgment was vacated, and McLaren instituted a new suit against Lopez and HDL, resulting in another default judgment, this time in the amount of \$3,549.01, including interest, costs and disbursements (Comp. Ex. 37). He has not received any payment in satisfaction of that judgment, and never received possession of the apartment.

12) In November 1989 Djuana Holiness went to the HDL office on Castle Hill Avenue seeking to rent an apartment. She was shown an apartment located at 1830 Gleason Avenue, liked it, and on November 11, 1989 gave a \$50.00 deposit to HDL employee Hazel Nicholson; on November 16, 1989 she made a second payment of \$625.00; and on November 24, 1989 she gave the landlord one month's rent of \$625.00 and gave HDL a brokerage fee of \$937.50 (Comp. Ex. 40). She was then told that she could pick up the keys, but when she went to the apartment it was in need of painting. She spoke with the landlord, who told her that he was selling the building, that the rent of \$625.00 a month which she had agreed to pay (Comp. Ex. 41) was not what he (the landlord) had told Lopez it would be, and that he would not give her a lease.

Holiness telephone HDL and spoke with Lopez. She told him what had transpired, and he said that he would show her something else, to which she agreed. HDL did not, however, obtain another apartment for her.

By letter dated January 6, 1990 Lopez agreed to refund, by cash, money order, or certified check, the sum of \$2,237.50 to Holiness (Comp. Ex. 43). That money was not forthcoming, and Holiness sued HDL. A default hearing before an arbitrator was held on January 21 1991, and on March 19, 1991 Holiness received a judgment against HDL in the amount of \$2,612.80, including interest, costs, and disbursements (Comp. Ex. 44). That judgment has not been satisfied, and Holiness has also not received a refund of the money paid to the landlord.

13) On June 23, 1989 Martin Kar went to an HDL office seeking to rent an apartment. He spoke with an HDL employee named "Ozzie" who then took him to see an apartment at 2066 Watson Avenue. Kar said that he liked the apartment, and Ozzie told him that he would have to leave a deposit of \$1,500.00, which Kar paid in cash (Comp. Ex. 45).

Kar returned to the HDL office the next day, and was told by Ozzie to come back in a week, which he did, at which time he was told that the landlord decided not to rent the apartment. Ozzie said that he would get Kar something else, but Kar did not like the apartment which he was shown. After an extended period in which Ozzie did not produce an acceptable apartment, Kar requested a refund. Ozzie had Kar speak with Lopez, who told Kar that he had a house, at 1846 Watson Avenue, into which Kar could move, and Kar agreed to look at it.

Kar liked Lopez's house, but it required repairs, which Lopez said he would have done once Kar paid an additional \$2,000.00, as originally agreed on the first apartment. Kar gave that additional money to Ozzie (Comp. Ex. 45), based on an agreement that he could rent the house for \$1,000.00 per month. Lopez told Kar that the house would be ready in three or four days, but it was not. Lopez then suggested that Kar have the repairs done, but Kar refused and Lopez said he needed another five days. Again the work was not completed, and again Lopez promised it would be done in a few days.

There was a problem with a toilet, and Lopez told Kar to have it taken care of, which Kar did. The toilet still did not work because the water pressure was inadequate. Kar subsequently returned to the house with an HDL employee named Fernando, whom Lopez had told Kar would take care of any problems when he was not available, and who had accompanied Kar when he had the toilet fixed. Fernando turned on the water full strength (it had been on partially), with the result that the pipes leaked. Fernando told Kar to telephone in a day or two, but when Kar did so there was no answer.

Kar returned to the house and found that the ceiling had partially collapsed, and he informed Fernando. Fernando then indicated that he was aware of a problem with the plumbing leaking. That was the first that anyone from HDL had told Kar that they had been aware of the problem in advance. Some time later Kar returned to the house and found that the locks had been changed and the keys which he had been given did not work. Kar never moved into the house, and has not received the return of his money, although he has demanded it.

14) In October 1988 Louis and Stephanie Jefferson were interested in buying a house. They were shown a house at 3732 Barnes Avenue by real estate salesperson Eileen Lee, and were then taken to a real estate brokerage office on the outside of which there were signs for HDL Sunshine Acres, Loral Realty, and Ralph DiLillo, where they had a conversation with Lopez. They told him that they wished to buy the house but that they had only \$10,000.00 of the required \$18,900.00 deposit. He said that he was the sole owner of the house, that they shouldn't worry, and that they should give him \$5,000.00 towards the down payment at that time, and they gave him a check payable to Loral

Realty in that amount (Comp. Ex. 48). An additional payment of \$500.00, for which Mrs. Jefferson was unable to produce the canceled check when she testified, was also made prior to contract.

On October 17, 1988, while represented by an attorney recommended by Lopez, Louis Jefferson entered into a contract to purchase the house from "H.D.L. sunshine acres, inc. & RALPH DILELLO" (Comp. Ex. 47). The contract provided for a purchase price of \$189,000.00, with a deposit of \$179,000.00, and named "LORAL" as the broker. In addition to Mr. Jefferson, the contract was signed by Lopez and DiLillo. From the presence of Lopez's signature on this contract and on the contract with Herman Alverio (FOF 18, infra), I find that Lopez was a principal of H.D.L. Sunshine Acres, Inc. The Jefferson's also gave an additional check for \$5,000.00 to Roy Lipson, Esq., attorney for the sellers (Comp. Ex. 49).

The Jeffersons were unable to obtain a mortgage, as provided for in the contract, and in January 1989 they telephoned Lopez's office. Lopez was not there and they eventually spoke with a woman named Maggie, with whom they had previously spoken in Lopez's absence. They told her that they wanted their money back, and she told them to wait and see what Lopez could come up with. Mrs. Jefferson subsequently had repeated conversations with Maggie, who told her not to worry, everything was going to be all right. When Mrs. Jefferson finally got to speak with Lopez, in April 1989, he threatened to sue her and tie up her money in court for three years. He then relented and expressed an interest in making a deal.

On April 17, 1989 the Jeffersons met with Lopez. The Jeffersons told Lopez that they could not continue with the deal because Mr. Jefferson had lost his job, and Lopez offered him a job. That offer was refused. Lopez said that he would give the Jeffersons a credit of \$8,500.00 towards repairs on the house if they would continue to work with the mortgage company, and the Jeffersons agreed.

The Jeffersons heard nothing further from Lopez until June 1989, when Mrs. Jefferson telephoned Lopez and asked if she and her husband could rent the house prior to closing. Lopez agreed, but Mr. Jefferson did not like the idea. Finally, in August 1989 Mr. Jefferson changed his mind and the Jefferson's moved into the house, agreeing to pay a monthly rent of \$1500.00. They subsequently paid two months rent to HDL Sunshine Acres.

In September 1989 the Jeffersons went to the office of Loral Realty and spoke to DiLillo, who stated that he knew nothing about the house being sold to them. (There was no explanation offered at the hearing for the presence of DiLillo's signature on the contract of sale). After a while Lopez appeared, he and DiLillo had a conversation, and DiLillo told the Jeffersons not to pay anymore money to Lopez, that DiLillo and Lopez's partnership was being dissolved.

The Jeffersons paid rent to DiLillo for a period of time which is not clear from the record, after which they received a telephone call

telling them that DiLillo had lost all of his properties and that they should now pay their rent to Westchester Square Development Corporation.

The Jeffersons never closed on the property, and have not received a refund of the \$10,500.00 which they paid on the contract.

15) Sometime in 1991 Samson Management (Samson) listed for rent with HDL apartment 4K at 50 East 191 Street, Bronx, New York, a building which it owned. In turn, HDL produced Angel Ortiz as a tenant, and Ortiz was given occupancy of the apartment.

Ortiz gave HDL \$835.00 rent, \$835.00 security, \$1670.00 as a brokerage fee, and \$50.00 denominated as "RW", for a total of \$3390.00 in cash (Comp. Ex. 53). HDL then sent Samson a check signed by Lopez for \$1670.00 which was dishonored twice by the bank for reason of insufficient funds (Comp. Ex. 52). HDL has never made good on that check.

16) In June 1991 Lowell Dansker, Esq., a trustee of New York Properties Trust was approached by Juarbe, who at the time was working as a real estate salesperson in association with, although not licensed with, HDL, and asked to list with HDL apartments which the trust had for rent. Dansker agreed to list a few apartments with HDL, and sent Juarbe a supply of the trust's application forms.

Juarbe obtained applications from two potential tenants and returned the forms to Dansker, who had leases prepared and delivered to Juarbe with instructions to have the leases signed and returned to him with the required checks, which was done (Comp. Ex. 54 and 55). The checks, however, both for \$1,100.00 and signed by Lopez, were returned by the bank for reason of insufficient funds.

Dansker telephoned Juarbe about the bounced checks, and Juarbe said that he didn't understand why that had happened. Dansker explained to Juarbe that he was satisfied with the tenants, who were already in occupancy, and that all he wanted was for HDL to make good on the checks. It was Dansker's impression that Juarbe was very upset by the situation and he felt that he had been taken advantage of.

Dansker then spoke to Sharon Coy (Lopez was not available), HDL's office manager, whose name appears on one of the leases as a witness. He told her that the checks had bounced, and she said that it would be taken care of. Over the subsequent two weeks Dansker spoke with Coy a dozen times about the problem, but the checks were still not replaced and Lopez continued to be unreachable. Coy continued to promise that the matter was being taken care of. Dansker threatened to sue, and Coy responded that he shouldn't do that, that there was a little cash flow problem.

Eventually Dansker got to speak to Lopez, who apologized for the bounced checks and said that they would be made good, and had attorney Perez telephone him in the beginning of August 1991. Mr. Perez told Dansker that there had been a mixup and that Lopez was a little short

of cash, but that he had a big closing coming up at the end of the month for which Mr. Perez had monies in escrow, and that as soon as Lopez got his commission Mr. Perez would issue checks and make the trust whole. Dansker agreed to wait until the end of August, but still no checks came.

17) Sometime in 1991 Martin Blum, acting on behalf of landlord Stanley Wasserman, listed for rental apartment 2E at 3500 Tryon Avenue, Bronx, New York with HDL after having received a request for such listing from Juarbe. Juarbe arranged a rental of the apartment and delivered the lease and a check for rent and security to Blum's office. The check, dated June 7, 1991, for \$1,258.00, drawn on HDL's account and signed by Lopez, was dishonored twice by the bank for reason of insufficient funds (Comp. Ex. 57). The dishonored check was then sent to the tenants with instructions to contact HDL and find out what had happened. They were, however, never required by Blum to make good on the bad check.

Blum telephoned Juarbe about the bounced check, and he said that he had nothing to do with the money and that Blum would have to talk to Lopez, although he would try to do what he could. In both this case and with regards to the matter with Dansker, supra, Juarbe spoke with Lopez and attempted to have him make good on the bounced checks, and Lopez said that he would issue new checks.

Blum telephoned the HDL office several times thereafter and spoke with secretaries when he was unable to reach Lopez. Eventually Blum was able to speak with Lopez, who explained that he was having financial difficulties, expected to have some money coming in from a sale, and promised that the first money from that sale would be used to make good on the bounced check. Blum agreed to that, but never received the money.

18) In May 1988 Herman Alverio was seeking to rent an apartment or a house. He went to Loral Real Estate (Loral) on Castle Hill Avenue, Bronx, New York and spoke with a salesperson (who he was unable to name at the hearing). He completed a form in which he retained Loral as his agent to locate property for him (Comp. Ex. 58). He was shown several properties, including a house located at 2131 Ellis Avenue, Bronx, New York, which he decided he would like to rent with the option to purchase.

The salesperson introduced Alverio to Lopez (indicating that Lopez was the owner of Loral), who discussed the proposed purchase with Alverio, who said that he would have a problem coming up with the full down payment. Lopez said that there were ways to get around that, including Alverio coming up with some of the money and Lopez loaning him the balance of the deposit, or the house being put in somebody else's name, and Alverio signed an offer to purchase the property for \$189,000.00 (Comp. Ex. 59). On June 19, 1988 Alverio signed a contract in which he agreed to purchase the house from "H.D.L. SUNSHINE & RALPH DELILLO" for \$189,000.00 (Comp. Ex. 61). That contract named Loral as the broker who brought about the sale, was signed by Alverio, DiLillo, and Lopez, and was conditioned on Alverio being able to obtain a

conventional mortgage in the amount of \$170,000.00. It also stated that Alverio had paid a deposit of \$18,900.00 upon signing, although up to that time had actually paid only a total of \$1,511.00, and subsequently paid only another \$559.00 (Comp. Ex. 60). A mortgage application was made and, on September 7, 1988 was rejected (Comp. Ex. 62).

Alverio went to the Loral office and requested a refund from a woman working there whom he understood to be Lopez's mother. She said that Alverio would have to come back and speak directly with Lopez. Alverio returned to Loral several times but was never able to speak with Lopez. The sale of the property never closed, and Alverio has never received the refund of his \$2,070.00.

OPINION

I- Counsel to Mr. Lopez has raised an objection to the fact that the first session of the hearing was conducted without him being present. It must be noted, however, that Lopez's lack of representation on that day was the direct result of his own action. The notice of hearing and complaint were served on Lopez on March 2, 1992, seventeen days before the date of the hearing. (Real Property Law (RPL) section 441-e(2) requires that the notice of hearing be served at least ten days in advance). In spite of that, and in spite of the fact that he had a pre-existing professional relationship with his attorney, Lopez did not retain counsel until two days before the hearing, and counsel, in spite of the clear requirement of 19 NYCRR 400.11 that requests for adjournment must be made, in writing, at least three days prior to the date of the hearing, did not contact me until just before the close of business on the day before the hearing. In such a situation, where an extremely serious charge has been made and there is a pending motion for an interim suspension of a license, and where numerous non-party witnesses have been subpoenaed to testify and could not be contacted with such short notice (twelve such witnesses actually testified on that day), Lopez's right to counsel of his choice was outweighed by countervailing governmental interests. People v Dinsdale Jackson, 138 Misc.2d 1015, 525 N.Y.s.2d 1002 (1988). Lopez chose to retain, at the last minute, an attorney who claimed to be otherwise engaged, and that attorney, for whatever reason, accepted the retainer although he was unable or unwilling to appear on the required date. Any ensuing problem is the fault of Lopez and his chosen counsel.

II- The record clearly establishes numerous instances in which Lopez and HDL received money which was to be applied to the rental or purchase of real property and were then unable to either return that money to the payors when the circumstances required them to do so or, in other circumstances, to deliver the money to the intended payees. Therefore, the conclusion that Lopez and HDL failed to place that money in escrow or special accounts, commingled it with their own funds, and failed and refused to account for the money is inescapable.

A real estate broker has the obligation of handling his or its clients' funds with the utmost scrupulousness, and must take extreme

care to assure that the rights of the lawful owners of those funds will not be jeopardized. Department of State v Mittleberg, 61 DOS 86, conf'd sub nom Mittleberg v Shaffer, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988); Division of Licensing Services v Pellittieri, 77 DOS 92; Division of Licensing Services v Tripoli, 96 DO 91. The use by a real estate broker for its own purposes of money received from and belonging to other persons warrants the revocation of the broker's license. Lawrence Black, Inc. v Cuomo, 65 A.D.2d 845, 410 N.Y.S.2d 158 (1978), aff'd. 48 N.Y.2d 774, 423 N.Y.S.2d 920. "The imposition of any lesser penalty would unduly jeopardize the welfare of any persons who might do business with the respondents in the future." Division of Licensing Services v Pellittieri, supra at p. 3.

In addition to being a violation by Lopez and HDL of their fiduciary duties, the way that they handled the money was also a violation of 19 NYCRR 175.1, which provides that a broker shall deposit in escrow, as promptly as practicable, all money received on behalf of his or its principal. Division of Licensing Services v Ratan, 102 DOS 91; Division of Licensing Services v Barmonde, 48 DOS 91. That conduct was also in violation of 19 NYCRR 175.2, which provides that a real estate broker must, within a reasonable time, render an account to his client and remit to the client any monies collected for the client and not expended for the client's account.

III- Conduct by a licensed real estate broker which has the effect of or encourages violation of local zoning and occupancy regulations has, on several occasions, been held to be a demonstration of untrustworthiness and incompetency. Department of State v Delza B. Smith, 150 DOS 80, conf'd. sub nom Smith v Paterson, 88 A.D.2d 917, 450 N.Y.S.2d 577 (1982); Division of Licensing Services v Rabizadeh, 27 DOS 92; Division of Licensing Services v J.R. Valino Your Realty Co., Inc., 19 DOS 90; Division of Licensing Services v Frank Dell'Accio, Jr., 15 DOS 88. Lopez and HDL clearly demonstrated such untrustworthiness when they arranged for Sharon Harris and her infant son to move into the cellar of a one family house owned either by Lopez or his mother. The tragic result of such an illegal occupancy is evidenced by the injuries suffered by the child as a direct result of the illegal occupancy.

IV- RPL section 442-b provides that when a real estate salesperson commences an association with a broker, the broker must file a change of association notification with the Department of State. Division of Licensing Services v Resource Realty of New York Inc., 92 DOS 91. As representative broker of HDL it was part of Lopez's non-delegable supervisory duties, as imposed by 19 NYCRR 175.21, to see to it that the change of association notice which Juarbe signed and gave to HDL's office manager together with a money order for the required fees was properly filed.

The employment by a licensed real estate broker of a salesperson who is not licensed in association with that broker is a violation of RPL section 440-a, c.f. Doherty v Cuomo, 64 A.D.2d 847, 407 N.Y.S.2d 337 (1978), app. dism. 45 N.Y.2d 960, 411 N.Y.S.2d 566, and depending on the circumstances may be a demonstration of incompetency alone or of both incompetency and untrustworthiness. C.f. Division of Licensing

Services v Valentin, 30 DOS 87, conf'd. sub nom Valentin v Shaffer, 545 N.Y.S.2d 629 (A.D. 1st Dept. 1989); Department of State v Donati, 17 DOS 90; Department of State v Poyatos Realty Management Co. Inc., 67 DOS 89; Department of State v Eksteen, 49 DOS 88; Department of State v Lobaido, 38 DOS 88.

V- Fraudulent practices "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading. Since the purpose of such restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." Allstate Ins. Co. v Foschio, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted). A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. Division of Licensing Services v Linfoot, 60 DOS 88, conf'd. sub nom Harvey v Shaffer, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989). In this case, Lopez's and HDL's failure to render accounts to their clients and to return to those clients money belonging to those clients which was not expended for the purposes of those clients constitutes fraudulent practices.

VI- Being an artificial entity created by law, HDL can only act through its officers, agents, and employees, and it is, therefore, bound by the knowledge acquired by and is responsible for the acts committed by its representative broker, Lopez, within the actual or apparent scope of his authority. A-1 Realty Corporation v State Division of Human Rights, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); Division of Licensing Services v First Atlantic Realty Inc., 64 DOS 88; cf. Roberts Real Estate, Inc. Department of State, 575 N.Y.S.2d 945 (A.D. 3rd Dept. 1991).

VII- In view of the foregoing, it would be a dereliction of this tribunal's obligation to protect the public to impose any penalty on Lopez and HDL short of revocation of their licenses as real estate brokers. Even if the evidence received on March 19, 1992 in the absence of Lopez's attorney were disregarded (which, as discussed supra, is not warranted), there is sufficient evidence with regards to the matters involving Sampson Management (FOF 15), New York Properties Trust (FOF 16), Martin Blum/Stanley Wasserman (FOF 17), Herman Alverio (FOF 18), and the employment of Juarbe, all of which was received at the April 28 and June 24, 1992 sessions of the hearing at which Lopez was represented by counsel, to support a finding that Lopez and HDL have demonstrated such untrustworthiness and incompetency as to warrant the revocation of their licenses.

VIII- Where a broker or salesperson has received money to which he is not entitled, he may be required to return it as a condition of retention of his license. Kostika v Cuomo, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); Edelstein v Department of State, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962). In this case, that principle would apply to all

of the monies collected by the respondents as discussed supra, with the exception of the rent paid by Sharon Harris inasmuch as she did reside in the illegal apartment prior to the explosion of the boiler.

CONCLUSIONS OF LAW

1) By commingling the money of his principals with that of his own, and by failing to place it in escrow, Lopez, and through him HDL as the corporation of which he was representative broker, violated 19 NYCRR 175.1 and demonstrated untrustworthiness and incompetency.

2) By failing and refusing to refund monies held by him and belonging to others, and by converting the monies to his own use, Lopez, and through him HDL, have demonstrated untrustworthiness and incompetency.

3) By failing to render accounts to his clients and to remit to them monies collected for them and unexpended in their accounts, Lopez, and through him HDL, violated 19 NYCRR 175.2, and thereby engaged in fraudulent practices and demonstrated untrustworthiness and incompetency.

4) By employing and permitting Juarbe to act as a real estate salesperson on behalf of HDL without first filing a change of association form on his own behalf, Lopez, and through him HDL, violated RPL sections 440-a and 442-b and demonstrated incompetency.

5) By procuring an illegal apartment for a tenant, and thereby exposing the tenant and her infant son to serious physical harm, Lopez, and through him HDL, demonstrated untrustworthiness and incompetency.

6) By reason of its failure to serve notice of hearing on DiLillo, the complainant has failed to obtain jurisdiction over him for the purpose of this matter (RPL section 441-e(2)), and the charges against him should be dismissed.

7) The complainant has failed to establish by substantial evidence that Juarbe committed any of the violations involving client monies of which he is charged, and those charges should, therefore, be dismissed. State Administrative Procedure Act section 306.

8) The evidence establishes that Juarbe executed a change of association card and delivered it and the required filing fee to HDL, and that he is not to blame for the failure of Lopez and HDL to file that card, and, therefore, the charges relating to his unlicensed status should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Henry Lopez and H.D.L. Real Estate Associates, Inc. have violated Real Property Law sections 440-a and 442-b and have demonstrated untrustworthiness and incompetency, and have engaged in fraudulent practices, and

accordingly, pursuant to Real Property Law section 441-c all licenses issued to them as real estate brokers are revoked, effective immediately, and

IT IS FURTHER DETERMINED THAT should Henry Lopez and/or H.D.L. Real Estate Associates, Inc. ever re-apply for a license or licenses as a real estate broker or salesperson, no action shall be taken on such application(s) until they shall produce proof satisfactory to the Department of State that they have made the following refunds:

- 1) Barbara Thompson, \$2,275.00;
- 2) Colleen Joseph, \$2,040.00;
- 3) Marcia Brown, \$1,700.00;
- 4) Charlene Cain, \$1,525.00;
- 5) Jesus Martinez, all monies shown by a certified accounting to have been paid by Martinez to Lopez and/or HDL and not to have been refunded;
- 6) Sharon Harris, the security payment and brokerage fee paid by her to Lopez and HDL;
- 7) Craig Martin, \$3,150.00;
- 8) Martin Kar, \$3,500.00;
- 9) Louis and Stephanie Jefferson, \$10,500.00;
- 10) Sampson Management, \$1,670.00;
- 11) New York Properties Trust, \$2,200.00;
- 12) Stanley Wasserman, \$1,258.00;
- 13) Herman Alverio, \$2,070.00,

all plus interest at the legal rate for judgments from the date hereof, and that they have satisfied in full the following judgments:

- 1) Altagracia Colon-Yapor against Lopez and HDL;
- 2) Hugh McLaren against Lopez and HDL;
- 3) Djuana Holiness against HDL, and

IT IS FURTHER DETERMINED THAT the charges herein against Ralph DiLillo are dismissed without prejudice, and

IT IS FURTHER DETERMINED THAT all charges herein against Manuel Juarbe are dismissed.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James Coon
Deputy Secretary of State