STATE OF NEW YORK DEPARTMENT OF STATE

-----X

In the Matter of the Complaint of

DEPARTMENT OF STATE DIVISION OF LICENSING SERVICES,

Complainant,

DECISION

-against-

CARON MALDON, and JOHN MURPHY d/b/a CENTURY 21 PETREY REAL ESTATE

Respondents.

-----X

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 September 21, 1992 at the office of the Department of State located at 270 Broadway, New York, New York 10023.

Respondents Maldon, of Gull Realty Inc., 48 East Park Avenue, Long Beach, New York 11561, and Murphy, of 860 West Beech Street, Long Beach, New York 11561, having been advised of their right to be represented by attorneys, appeared <u>pro</u> <u>se</u>.

The Complainant was represented by compliance officer William Schmitz.

COMPLAINTS

The complaints in the matter allege that Maldon, a licensed real estate broker, failed to make clear for which party she was acting when she showed property to a prospective purchaser; that Murphy engaged the services of Maldon as an associate broker without notifying the Department of State of her employment; that Murphy engaged in negotiations for the sale of property in which he owned an interest without making that interest known to the prospective purchaser; and that Murphy is responsible for Maldon's failure to make clear for which party she was acting.

FINDINGS OF FACT

1) Caron Maldon is duly licensed as a real estate broker associated with Gull Realty Inc., 48 East Park Avenue, Long Beach, New York 11561, and in her own name at 134 Coolidge Avenue, Long Beach, New York 11561. John W. Murphy is duly licensed as a real estate broker d/b/a Century 21 Petrey Real Estate (Petrey) at 860 West Beech Street, Long Beach, New York 11561.

2) From April 1991 until October 1991 Maldon worked as a real estate broker in association with Petrey and under the supervision of Murphy. At the time that Maldon commenced that association she gave her license to Murphy, but was not asked to sign a change of association notice. Although Murphy claims that he signed a change of association notice, and relied on an employee to mail it, such a notice was not submitted to the Department of State.

3) Sometime during Maldon's association with Petrey, Murphy offered for sale, through Petrey, a house which he and his wife owned at 69 Kentucky Street, Long Beach, New York. Maldon showed the property to potential purchasers William Frey and Mary Ellen Pollina, one of whom lived very close to the Petrey office. Because of that proximity, Murphy was concerned that if the potential purchasers learned of his ownership of the house they would come into the office and try to negotiate directly with him, rather than through Maldon. Murphy was concerned that such direct negotiations would give Maldon what he considered to be an unfair advantage over other salespersons in his office who where also showing the property, and, therefore, he directed Maldon not to disclose his ownership to the potential purchasers.

It was not until September 1991, after there had been negotiations, a purchase price had been agreed upon, and a proposed contract (Comp. Ex. 2) was presented to the potential purchasers through their attorney, that those potential purchasers where told of Murphy's ownership interest in the property. For reasons which are unclear from the record, the potential purchasers did not sign the contract and the transaction did not close.

OPINION

I- Real Property Law (RPL) §442-b states that when a real estate salesperson enters into association with a broker that new broker must notify the Department of State of that change. That requirement also applies to a change of association by an associate broker such a Maldon, whose conduct is, pursuant to RPL §440(2), governed by the provisions of RPL Article 12-A as they pertain to real estate salespersons.

The statute places the burden of filing the change of association notice squarely on the shoulders of the employing broker. When a broker, who is personally liable to see to the supervision of his or her brokerage office (RPL §§440(2) and 441(1)(d); 19 NYCRR 175.20 and 175.21; <u>Division of Licensing Services v Misk</u>, 64 DOS 92) delegates to an employee the filing of a required document, such as a change of association notice, that broker must bear the responsibility if the filing does not occur. II- 19 NYCRR 175.6 states: "Before a real estate broker sells property in which he owns an interest, he shall make such interest known to the purchaser." The intent of that regulation is to enable prospective purchasers to negotiate with the broker on a more equal footing than would be the case if they were ignorant of the broker's interest in the property. Therefore, the required disclosure must be made early, certainly before the terms and conditions of the sale are agreed upon, and it is not sufficient for the broker to rely on the fact that his or her interest in the property will be disclosed in the contract. Nor is it an excuse to say, as does Murphy, that his action was for a good purpose. A broker may not carve out his or her own exceptions to the regulations. In this case, Murphy could have avoided entering into the negotiations which he professed a desire to avoid simply by refusing to take part in such direct negotiations.

III- 19 NYCRR 175.7 provides that a real estate broker must make clear for which party he or she is acting. That regulation has repeatedly been interpreted as meaning that a broker must disclose whether he or she is representing the seller or the buyer (see, e.g., <u>Department of State v Almo</u>, 24 DOS 87, conf'd <u>sub nom Almo v Shaffer</u>, 149 AD2d 417, 539 NYS2d 765 (1989); <u>Division of Licensing Services v</u> <u>McGill</u>, 21 DOS 92), but I am unaware of any cases which hold that the regulation requires the disclosure of the name of the broker's principal. Such an interpretation would eliminate the possibility of the broker representing a partially disclosed principal, a procedure which is well established in the law of agency (Restatement (Second) of Agency, $\S4(2)$), and, therefore, would be inappropriate in the light of the history of the application of the regulation and without a clear statement of such regulatory intent.

CONCLUSIONS OF LAW

1) By failing to file a change of association notice with the Department of State when Maldon commenced working in association with Petrey, Murphy violated RPL §442-b.

2) By directing Maldon not to disclose to prospective buyers his interest in the house in question, Murphy violated 19 NYCRR 175.6, and thereby demonstrated untrustworthiness and incompetency as a real estate broker.

3) Inasmuch as the complainant failed to establish that Maldon did not disclose to the prospective buyers that she was representing the owner of the house in question, and, therefore, did not meet their burden of proof (State Administrative Procedure Act §306(1)), the complainant failed to establish that the respondents violated 19 NYCRR 175.7, and that charge should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT John W. Murphy has violated Real Property Law §442-b and has demonstrated

untrustworthiness and incompetency, and accordingly, pursuant to real property law section 441-c he shall pay a fine of \$1000.00 to the Department of State on or before November 30, 1992, and should he fail to pay the fine then his license as a real estate broker shall be suspended for a period of one month, commencing on December 1, 1992 and terminating on December 31, 1992; and

IT IS FURTHER DETERMINED THAT the charge that John W. Murphy and Caron Maldon failed to make clear for which party they were acting is 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