

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

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

Complainant,

DECISION

-against-

**EMIL T. PAGANO and IRENE F. BECKER
REAL ESTATE AGENCY INC.,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on March 2, 1999 at the office of the Department of State located at 41 State Street, Albany, New York.

The respondents did not appear.

The complainant was represented by Assistant Litigation Counsel Scott NeJame, Esq.

COMPLAINT

The complaint alleges that: The respondents entered into an agreement with Robert J. and Marion E. Grabowski to represent them in the sale of real property; prior to the execution of the brokerage agreement Mr. Pagano failed to present the Grabowskis with, or obtain their signatures on, an agency relationship disclosure form, and failed to inform them whom he and Irene F. Becker Real Estate Agency Inc. (hereinafter "Becker") represented; respondents held themselves out and did business under the unlicensed name "Irene F. Becker, Licensed Real Estate Broker"; the broker employment agreement unlawfully and/or improperly provided that up to one half of any forfeited deposit would be retained by the respondents as a commission; the broker employment agreement did not contain language required by 19 NYCRR 175.24; Mr. Pagano showed the property to Joseph A. and Teresa C. Muraski and failed to obtain their signatures on an agency relationship disclosure form at the time of the first substantive contact; in preparing a purchase agreement Mr. Pagano engaged in the unauthorized practice of law; the purchase agreement was vague, ambiguous, indefinite,

incomplete, unconscionable, improper, and/or not in the best interests of the Grabowskis; the terms of the purchase agreement conflicted with and/or attempted to alter, change or modify the terms of the broker employment agreement; the respondents became dual agents when they represented the Muraskis in seeking financing for the property, but failed to make proper disclosure or obtain informed consent to such dual agency, and failed to make clear to the Muraskis whom they represented; Mr. Pagano made misrepresentations to, and failed to adequately advise, the Grabowskis about the Muraskis' ability to complete the transaction; Mr. Pagano improperly convinced the Grabowskis to hold a second mortgage and then obtained their signatures on a backdated purchase agreement for an increased price; Mr. Pagano failed to amend the purchase agreement to reflect payment by the Muraskis of an additional deposit; based on Mr. Pagano's misrepresentations the Grabowskis permitted the Muraskis to occupy the property prior to closing without a lease; Mr. Pagano improperly recommended that both the Grabowskis and the Muraskis use the same attorney; Mr. Pagano improperly backdated various documents; Mr. Pagano participated in a scheme in which the Grabowskis would hold an undisclosed mortgage; Mr. Pagano improperly submitted a mortgage application for other property owned by the Grabowskis; Mr. Pagano participated in a scheme in which \$7,900.00 of their money would be held in their attorney's escrow account to fraudulently show that the Muraskis had sufficient funds to complete the transaction; Mr. Pagano failed to notify the Grabowskis in a timely manner that the Muraskis' mortgage application had been denied, and failed to obtain the return of their \$7,900.00 in a timely manner; Mr. Pagano improperly demanded a commission from the Grabowskis, filed an affidavit of entitlement to a commission with the county clerk, and represented that he would release all money held in escrow and release the foregoing affidavit if the Grabowskis would withdraw all complaints submitted by them against him with the complainant; Mr. Pagano has improperly retained the \$2,000.00 deposit which he received from the Muraskis.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail delivered at their last known business address on January 4, 1999 (State's Ex. 1).

2) At all times hereinafter mentioned Mr. Pagano was duly licensed as a real estate broker representing Becker (State's Ex. 2). I take official notice of the records of the Department of State that that license expired on March 12, 1999 and was not renewed.

3) In 1992, in a transaction in which the respondents acted as broker, the Grabowskis purchased 5.2 acres located in Fort Plain, New York. They then had a house erected on the property.

About two years later the Grabowskis decided to sell the improved property, which they had rented to tenants. They contacted Mr. Pagano and, on September 12, 1994 entered into an exclusive right to sell agreement pursuant to which the respondents agreed to act as brokers in the sale of the property (State's Ex. 3). That agreement, which bore the heading "Irene F. Becker Licensed Real Estate Broker," provided that the Grabowskis agreed to pay Becker a commission of 8% of the sales price or \$300.00, whichever is greater, and that should a deposit be forfeited Becker would retain one-half of the deposit as a commission. The agreement did not contain the explanation of an exclusive listing mandated by 19 NYCRR 175.24.

4) At the time of the entering into the brokerage agreement Mr. Pagano did not explain to the Grabowskis whom the respondents were representing, and the respondents did not provide the Grabowskis with, or obtain the Grabowskis' signatures on, a real estate agency disclosure document until August 14, 1995 (State's Ex. 4).

5) Mr. Pagano showed the property to the Muraskis, who also did not sign the real estate agency disclosure document until August 14, 1995, and who expressed an interest in purchasing the property, and, again on August 14, 1995, he obtained the signatures of both the Grabowskis and the Muraskis on an agreement of purchase and sale (State's Ex. 5). The agreement provided for delivery of a \$1,000.00 deposit to Mr. Pagano against a purchase price of \$89,900.00, was subject to the Muraskis obtaining mortgage financing, called for a closing in 30 days, listed the various items real and personal property included in the sale, and provided for payment of a commission of \$8,800.00, which was more than the 8% provided for in the listing agreement. The agreement did not contain an attorney approval clause, and was not on a form approved by any committee of attorneys and real estate brokers. Various blank spaces on the form contained unexplained check marks, and the terms of the financing to be obtained by the Muraskis were not stated. Mr. Pagano assured the Grabowskis that the Muraskis were financially able to complete the transaction.

6) Two weeks later Mr. Pagano obtained the signatures of the Grabowskis and Muraskis on a second purchase agreement, using the same form as previously, which he backdated to August 14, 1995 (State's Ex. 6). That agreement, also to close in 30 days, provided for a purchase price of \$102,000.00, and reduced the commission to \$7,242.00, 7.1% of the purchase price. It stated that the Grabowskis agreed to hold a second, 19% mortgage in an amount which is not clear on the agreement but which Mrs. Grabowski testified was to be \$10,260.00, and ambiguously states that the mortgage will be "amortized for 15 years" to be followed by a balloon payment, which, although unclear on the document, was, according to Mrs. Grabowski's testimony and other evidence, to be in 5 years. That second mortgage was added to the transaction at

the suggestion of Mr. Pagano because the Muraskis had insufficient funds to complete the transaction as originally structured, and Mr. Pagano advised the Grabowskis that they should disclose only \$5,000 of that mortgage to the lender which would be holding the first mortgage. The increase in the purchase price was to cover the Muraskis' closing costs, and it was apparently anticipated that the amount that the Grabowskis would net would not increase from the amount anticipated under the first purchase agreement.

7) Mr. Pagano assured the Grabowskis that the sale would close in 30 days. In reliance on that assurance Mrs. Grabowski arranged to terminate her employment and to move to other property which she and her husband owned in Athens, New York, which they did on September 9, 1995.¹

The closing, however, did not occur within the promised time frame, and on October 1, 1995 Mrs. Muraski telephoned Mrs. Grabowski and asked for the keys because the house that she and her husband were living in had been rented. The Grabowskis refused, but two weeks later Mrs. Muraski telephoned again to ask for the keys, saying that she had no place to go and that she had a mortgage commitment. Mrs. Grabowski then telephoned Mr. Pagano, who, based on a preliminary approval subject to investigation and to the submission of extensive documentation (State's Ex. 22), not a mortgage commitment, also said that the Muraskis had a mortgage commitment, and stated that the closing would take place in a week to 10 days. Because the Muraskis had dogs, however, he advised against giving them the keys. Nevertheless, Mrs. Grabowski felt that if the closing was imminent if the dogs were to ruin the house it would be the Muraskis' problem, so she agreed to sign a release authorizing the respondents to give the keys to the Muraskis, which she and her husband did on October 14, 1995 (State's Ex. 7).

8) In the course of the transaction Mr. Pagano advised the Grabowskis that the Muraskis were being represented by attorney J. Paul Kolodziej, and recommended that the Grabowskis also retain Mr. Kolodziej as that would expedite the transaction. The Grabowskis followed that advice.

9) In visits to the Grabowskis Mr. Pagano was often accompanied by Ronald Persaud, a representative of Ivy Mortgage Corporation (hereinafter "Ivy"), the lender to which Mr. Pagano had referred the Muraskis and which was purportedly going to grant them

¹ It is not clear from the testimony what the sale of property, which the Grabowskis rented to tenants, had to do with their moving to another part of the state. It appears, however, that the connection may have been the opportunity to reduce their expenses and to reduce their outstanding debt through the proceeds of the sale.

a mortgage.² During one of those visits the Grabowskis said that they were anxious to close on the sale because they had bills to pay and they wanted to refinance their Athens house. When he heard that, Mr. Persaud immediately gave Mr. Pagano a mortgage application to fill out for the Grabowskis, with the result that Mr. Pagano and Mr. Persaud learned what the Grabowskis' assets, including \$8,000.00 in a savings account, were. The Grabowskis told Mr. Pagano and Mr. Persaud not to process the application since they could not afford to be paying on two mortgages, and they said they would not. The next week, however, an appraiser appeared at the Athens property and the Grabowskis were required to pay him \$275.00.

10) Sometime in October, 1995 Mr. Kolodziej prepared a new contract of purchase and sale for the property and obtained the signatures of the Grabowskis and the Muraskis thereto (State's Ex. 8 and 9).

11) On November 6, 1995, after it had become evident that the Muraskis would be unable to come up with the money needed for the closing, Mr. Pagano and Mr. Persaud told the Grabowskis that they would have to issue a check for \$7,900.00 to Mr. Kolodziej so that he could deposit the money in his escrow account in order to show the mortgage lender that the Muraskis had sufficient funds. Mrs. Grabowski objected, saying that they were requesting the money only because they had learned that she had \$8,000.00 in the bank, and they assured her that she would get the money back in one week, as soon as the check cleared. Mrs. Grabowski then gave them the check, payable to Mr. Kolodziej, who subsequently deposited it in his escrow account (State's Ex. 10).

12) On November 17, 1995, after the \$7,900.00 dollars had not been returned within the promised time frame and Mr. Kolodziej had refused to answer her telephone calls about it, Mrs. Grabowski wrote to Ivy to withdraw her mortgage application (State's Ex. 11). Several days later Mr. Pagano telephoned her and said that he would like to see her. On November 25, 1995 he went to her home, along with Irene Becker, and asked Mrs. Grabowski if she had written the cancellation letter. When she confirmed that she had he pounded on the table and told her that if she didn't sign a letter withdrawing the cancellation there would be no mortgage for the Muraskis. She accused him of blackmailing her, but, after much shouting, signed a previously prepared letter withdrawing the cancellation, which he had brought with him (State's Ex. 12), and in or about December, 1995 the Grabowskis received mortgage documents from Ivy by Federal Express (State's Ex. 13). On February 7, 1996 Mrs. Grabowski again

² There is no evidence that Mr. Pagano did anything more than refer the Muraskis to Ivy, and there is nothing before the tribunal to establish that he acted as a mortgage broker with regards to their loan application.

wrote to Ivy to cancel the application, noting in her letter that she could get a mortgage with a lower interest rate and no closing costs from a local bank (State's Ex. 14).

13) On December 20, 1995 Mrs. Grabowski wrote to Mr. Kolodziej inquiring, in the light of his failure to return any of her telephone calls, about the status of the \$7,900.00 (State's Ex. 15). On December 28 or 29, 1995 Mr. Kolodziej telephoned her, said that she had misunderstood, and advised her that the money would not be returned until there was a closing, which he said should be in a week. He said that he would call her back on January 6, 1996, but did not. On January 24 and February 16, 1996 the Grabowskis' new attorney, Charles G. Clay, Esq., whom they had retained to replace Mr. Kolodziej, wrote to Mr. Kolodziej requesting both the return of the money and that Mr. Kolodziej collect and pay to the Grabowskis rent at the rate of \$600.00 per month for the several months that the Muraskis' had been living in the Grabowskis' house. Finally, on March 4, 1996, there not having been a closing, Mr. Kolodziej sent a check for the refund, payable to the Grabowskis, to Mr. Clay (State's Ex. 17).

14) On February 17, 1996 Mr. Pagano wrote to the Grabowskis, advised them that Ivy had rejected the Muraskis' mortgage application for "noncompliance," and advised them that they were "required" to attend a meeting on February 27, 1996 at Mr. Kolodziej's office, at which a representative from Ivy would be present (State's Ex. 18). That was the first time that the Grabowskis were advised of the status of the application, although it had, in fact, been denied in December, 1995 (State's Ex. 19). However, on the morning of the scheduled meeting Mr. Pagano telephoned Mrs. Grabowski and told her that the meeting was cancelled because the Muraskis were not going to show up. Then, that afternoon, Mr. Pagano telephoned again and told Mrs. Grabowski to telephone Mr. Persaud because the Muraskis could still get a mortgage from Ivy. Instead, she called Mr. Clay's associate, who telephoned Mr. Persaud to no avail.

15) The Muraskis lived in the house for nine months, damaging it and making only one \$600.00 payment, received by the Grabowskis on November 23, 1995. They moved out in August, 1996 only after the Grabowskis instituted eviction proceedings. The Grabowskis eventually obtained a default judgement against the Muraskis for \$6,152.48 plus interest, costs, and disbursements (State's Ex. 20). As of the date of the hearing no part of that judgement, which had not yet been filed, had been satisfied.

16) The respondents had received deposits from the Muraskis totalling \$2,000.00 (State's Ex. 21A), although they never amended the purchase agreements, which showed a deposit of only \$1,000.00. Mr. Pagano has refused to give that money to the Grabowskis unless they withdraw the complaint which they filed against him.

17) On or about July 3, 1997 Mr. Pagano filed an affidavit of entitlement to commission for complete brokerage services in the office of the Clerk of Herkimer County, claiming that the Grabowskis owed him a commission of \$7,242.00 (State's Ex. 24).

18) On July 21, 1997 Mr. Pagano wrote to Mr. Clay. He stated that he would release all monies that he was holding in escrow and would satisfy the affidavit of entitlement if the Grabowskis would withdraw their complaint with the Department of State (State's Ex. 25).

OPINION

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. Real Property Law (RPL) §441-e[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- The expiration of the respondents' license does not divest this tribunal of jurisdiction, as the act of misconduct occurred, and the proceedings were commenced, while the respondents were licensed. *Albert Mendel & Sons, Inc. v N.Y. State Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (1982); *Main Sugar of Montezuma, Inc. v Wickham*, 37 AD2d 381, 325 NYS2d 858 (1971). That is particularly so since the respondents may renew that license by merely submitting an application to do so prior to March 12, 2001 (RPL §441[2]).

III- Pursuant to RPL §443 a real estate broker must, prior to entering into a listing agreement with a seller of residential real property³, provide that seller with a real estate agency relationship disclosure form. In addition, any real estate broker, whether acting as seller's agent or buyer's agent, must provide a real estate agency relationship disclosure form to the prospective buyer of residential real property either, in the case of a seller's agent, at the time of the first substantive contact with the buyer, or, in the case of a buyer's agent, upon entering into an agreement to act in that capacity. The respondents did not provide such forms to either the Grabowskis or the Muraskis until many months after they were required to do so. The failure to provide such a form in a timely manner was not only a violation of the statute, but also a demonstration of untrustworthiness and incompetency.

³ "Residential real property" is real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, as the home or residence of a person or persons. RPL §443[1][f].

A related requirement is encompassed in 19 NYCRR 175.7, which provides that a real estate broker must make it clear for which party he is acting.

"The regulation places a heavy burden on the broker: 'to make it clear what the state of facts are. It is the broker's responsibility to be sure that the person with whom he or she is dealing understands...." *Department of State v Almo*, 24 DOS 87 at 3.

In confirming that decision, the Appellate Division wrote that the regulation "requires that real estate brokers clearly state for which party they are acting." *Almo v Shaffer*, 149 AD2d 417, 539 NYS2d 765 (1989).

When he entered into the listing agreement with the Grabowskis, Mr. Pagano did not tell them whom he and Becker were representing. He thereby violated 19 NYCRR 175.7 and further demonstrated untrustworthiness and incompetency. The evidence does not, however, establish what, if anything, he told the Muraskis.

IV- When Mr. Pagano, acting on behalf of himself and Becker, agreed to assist the Grabowskis in the sale of their home the respondents became their agent, and they become the respondents' principals. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubinfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Department of State v Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 575 NYS2d 61 (1991); *Department of State v Goldstein*, 7 DOS 87, conf'd. *Sub nom Goldstein v Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1988).

Quite early in the proposed transaction between the Grabowskis and the Muraskis, Mr. Pagano learned that there was a problem with the Muraskis' finances, and it was not much after that he knew that they would not be able to complete the purchase of the property. In spite of that he continued to mislead the Grabowskis into believing that a closing was imminent. His misrepresentations lead the Grabowskis to conclude that it was not against their best interests to allow the Muraskis to take possession of the property

prior to closing. In making those misrepresentations Mr. Pagano breached his fiduciary duties to the Grabowskis.

An even earlier breach of fiduciary duties by Mr. Pagano occurred when he advised the Grabowskis to use the same attorney as the Muraskis. As quickly became evident, that attorney, J. Paul Kolodziej, could not properly represent the divergent and opposing interests of seller and buyer in the same transaction.

V- The listing agreement with the Grabowskis provided for the respondents to have an exclusive right to sell the property. Pursuant to 19 NYCRR 175.24 such an agreement is required to contain a specific explanation of the terms "exclusive right to sell" and "exclusive agency." By failing to comply with that regulation by using an agreement not containing the mandated explanation Mr. Pagano demonstrated untrustworthiness and incompetency.

VI- The listing agreement used by the respondents provided for Becker to retain one half of any deposit forfeited by a buyer. Such a term in a listing agreement is improper, inasmuch as the broker is retained to find a buyer ready, willing, and able to purchase the property, and does not earn a commission until at least that is done. The forfeiture clause would, by its terms, allow the respondents to retain part of a deposit paid by a potential buyer who did not meet those qualifications, and would convert the part of the deposit retained by the respondents into an unearned commission, the retention of which is a demonstration of untrustworthiness and incompetency. *Division of Licensing Services v Citylife Realty*, 275 DOS 98. The use of a listing agreement containing such a provision is, of itself, a demonstration of untrustworthiness and incompetency.

VII- A real estate broker who or which wishes to conduct brokerage business under a name other than that on his/her/its license must apply for a license under that new name. RPL §441[1][a]. *Division of Licensing Services v Cucci*, 65 DOS 95; *Division of Licensing Services v Perry*, 57 DOS 95; *Division of Licensing Services v Morse*, 12 DOS 95; *Division of Licensing Services v Scala*, 38 DOS 94; *Division of Licensing Services v Feld*, 147 DOS 93; *Division of Licensing Services v Cruz*, 8 DOS 93; *Division of Licensing Services v Fishman*, 153 DOS 92; *Division of Licensing Services v Selkin*, 47 DOS 92; *Division of Licensing Services v Tripoli*, 96 DOS 91; *Department of State v Prater*, 29 DOS 88; *Department of State v Lombardo*, 30 DOS 86. The respondents were licensed only as Irene F. Becker Real Estate Agency Inc., and, therefore, could do business only under that name. By doing business under the name "Irene F. Becker, Licensed Real Estate Broker," and thereby implying a non-corporate status, they violated the statute and demonstrated incompetency.

VIII- Real Estate brokers are permitted to prepare purchase offer contracts subject to very definite limitations.

"The line between such permitted acts by real estate brokers and the unauthorized practice of the law has been recognized as thin and difficult to define and, at times, to discern. Whether or not the services rendered are simple or complex may have had a bearing on the outcome, but it has not been controlling....

The justification for granting to real estate brokers and agents the privilege to complete simple purchase and sale documents has been said to be the practical aspect of the matter, that is, the business need for expedition and the fact that the broker has a personal interest in the transaction. It should be noted in this regard, however, that the so-called 'simple' contract is in reality not simple....The personal interest of the broker in the transaction and the fact that he is employed by one of the opposing parties are further reasons to require that, insofar as the contract entails legal advice and draftsmanship, only a lawyer or lawyers be permitted to prepare the document, to ensure the deliberate consideration and protection of the interests and rights of the parties.

The law forbids anyone to practice law who has not been found duly qualified and licensed to do so....Thus, the privilege accorded to real estate brokers and agents must be circumscribed for the benefit of the public to ensure that such professionals do not exceed the bounds of their competence and, to the detriment of the innocent public, prepare documents the execution of which requires a lawyer's scrutiny and expertise." *Duncan & Hill Realty v Dept. of State*, 62 AD2d 690, 405 NYS2d 339, 343-344 (1978) (citations omitted), appeal dismissed 45 NY2d 821, 409 NYS2d 210.

In preparing a purchase offer contract, real estate brokers and salespersons may not insert any provision which requires the exercise of legal expertise. They may not devise

"legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given....(and) may

readily protect (themselves) from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses (a purchase offer form) recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National Association of Real Estate Brokers...has no need to worry about the propriety of his conduct in such transactions." *Duncan & Hill Realty v Dept. of State, supra*, 405 NYS2d at 345.

Mr. Pagano prepared two contracts. Both of those contracts contained involved clauses setting forth in full the legal rights of the buyer and of the seller. The second contract contained a purchase money mortgage clause which, because of the respondent's apparent lack of expertise, was ambiguous. Neither of the contracts contained a clause making it subject to the approval of the parties' attorneys. The form used by respondent contains no indication that it was recommended by a joint bar/real estate board committee. Accordingly, Mr. Pagano is guilty of the unauthorized practice of law, and by his conduct demonstrated both untrustworthiness and incompetence. *Janes v Department of State*, 167 AD2d, 561 NYS2d 1021 (1990); *Mulford v Shaffer*, 124 AD2d 876, 508 NYS2d 302 (1986); *Tucci v Department of State*, 63 AD2d 835, 405 NYS2d 846 (1978).

IX- The contracts prepared by Mr. Pagano were unclear, ambiguous, vague, and incomplete in a number of aspects. In addition, by changing the commission rate and having the Grabowskis agree that the commission had been earned, contrary to the terms of the listing agreement that the commission would be earned upon sale, which contemplates a passing of title (as opposed to the normal, common law provision of such agreements that the commission will be earned upon production of a ready, willing, and able purchaser), the contracts purported to change the terms of the agency agreement into which Mr. Pagano had entered on behalf of Becker when the Grabowskis signed the original listing agreement. In using such contracts he, again, demonstrated untrustworthiness and incompetency.

X- The respondents received deposits from the Muraskis totalling \$2,000.00. However, upon receipt of the second \$1,000.00 they failed to amend the purchase agreements, which indicated receipt of only the original \$1,000.00. That failure was a further demonstration of incompetency.

XI- Mr. Pagano backdated the second purchase agreement. In so doing he demonstrated untrustworthiness.

XII- When the Muraskis were unable to come up with sufficient funds, Mr. Pagano participated in schemes in which the Grabowskis would hold an undisclosed second mortgage, and in which they gave a check for \$7,900.00 to Mr. Kolodziej to deposit in his escrow account to be used to mislead the mortgage lender into believing that the Muraskis in fact had sufficient funds. While those ruses were, through no apparent fault of the respondents, unsuccessful, they were a demonstration of untrustworthiness and constituted fraudulent practices, which

"...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).

Even 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).

XIII- In spite of the fact that the sale to the Muraskis was never consummated, and it was evident that they were unable to consummate it, Mr. Pagano still demanded, and filled an affidavit of entitlement to, a commission. The claiming of an unearned commission is a demonstration of untrustworthiness. *Division of Licensing Services v Loffredo*, 83 DOS 95, conf'd. *sub nom Loffredo v Treadwell*, 235 AD2d 541, 653 NYS2d 33 (1997). In a case such as this, where the respondent clearly must have known that he was not entitled to the commission and acted in the face of a contract the terms of which he had not fulfilled, and then persisted in his demand for a commission unless his principals would withdraw the complaint which they had filed against him, while all the time retaining \$2,000.00 in forfeited deposits, such untrustworthiness is particularly egregious.

XIV- Where a broker has received money to which he or it is not entitled, the broker may be required to return that money, together with interest, as a condition of retention or re-issuance of his or its license. *Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990);

Edelstein v Department of State, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962).

XV- Being an artificial entity created by law, Becker 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 various salespersons, associate brokers, and representative brokers within the actual or apparent scope of their authority. *Roberts Real Estate, Inc. v Department of State*, 80 NY2d 116, 589 NYS2d 392 (1992); *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; RPL § 442-c. It is, therefore, responsible and liable for Mr. Pagano's conduct.

CONCLUSIONS OF LAW

1) The holding of an ex-parte hearing was lawful and proper, and the Department of State has jurisdiction to do so in spite of the expiration of the respondents' license.

2) By failing to provide real estate agency relationship disclosure forms to the Grabowskis prior to entering into the listing agreement, and to the Muraskis when he first showed them the property, the respondents violated RPL §443 and demonstrated untrustworthiness and incompetency.

3) By failing to make clear to the Grabowskis whom they were representing, the respondents violated 19 NYCRR 175.7 and thereby demonstrated untrustworthiness and incompetency.

4) By breaching their fiduciary duties to the Grabowskis by, inter alia, misleading them and referring them to an attorney who they knew or should have known could not properly protect their interests, the respondents demonstrated untrustworthiness and incompetency.

5) By using an "exclusive right to sell" listing agreement which did not contain the disclosures mandated by 19 NYCRR 175.24 the respondents demonstrated untrustworthiness and incompetency.

6) By using a listing agreement which provided for Becker to retain a portion of any forfeited deposit, the respondents demonstrated untrustworthiness and incompetency.

7) By engaging in the business of real estate broker under a name other than that in which they were licensed the respondents demonstrated incompetency.

8) By engaging in the unauthorized practice of law the respondents demonstrated untrustworthiness and incompetency.

9) By using contracts which were unclear, ambiguous, vague, and incomplete, and which purported to change the terms of the listing agreement, the respondents demonstrated untrustworthiness and incompetency.

10) By failing to amend the purchase agreements to show the full amount of the deposits paid, the respondents demonstrated incompetency.

11) By backdating a purchase agreement the respondents demonstrated untrustworthiness.

12) By participating in the schemes in which the Grabowskis would hold an undisclosed second mortgage and in which they gave Mr. Kolodziej money to hold in escrow and to use to mislead the mortgage lender about the Muraskis' finances, the respondents engaged in fraudulent practices and demonstrated untrustworthiness.

13) By claiming an unearned commission the respondents demonstrated untrustworthiness.

14) The complainant has failed to establish by substantial evidence that the respondents acted as undisclosed dual agents, acted improperly in convincing the Grabowskis to hold a second mortgage, had responsibility for the improper submission of the Grabowskis' mortgage application, or were responsible for Mr. Kolodziej's failure to return the \$7,900.00 promptly, and those charges should be, and are, dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Emil T. Pagano and Irene F. Becker Real Estate Agency Inc. have violated Real Property Law §443, have demonstrated untrustworthiness and incompetency, and have engaged in fraudulent practices, and accordingly, pursuant to Real Property Law §441-c, all licenses issued to them as real estate brokers are revoked, effective immediately. Should they ever re-apply for a license or licenses as a real estate broker or salesperson, no action shall be taken on such application(s) unless they shall have produced proof satisfactory to the Department of State that they have paid the sum of \$2,000.00, together with interest at the legal rate for judgements (currently 9% per year) from August 14, 1995, to Marion E. and Robert J. Grabowski, and have fully released the affidavit of entitlement to a commission which they filed against the Grabowskis. They are directed to send their license certificates and pocket cards to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: April 7, 1999