

November 24, 2008 which set the deadline for completion of discovery as December 31, 2008, and scheduled a full evidentiary hearing for February 5, 2009. By agreement of the parties, an Amended Pre-Hearing Conference Order was issued on January 12, 2009, setting the date for written discovery completion as January 31, 2009, and depositions by February 28, 2009. The date for evidentiary hearing was set for April 7, 2009.

On January 15, 2009, the Complainant, through counsel, filed a Motion for a Protective Order seeking relief from the propoundment of discovery requests by the Respondents. An objection to said Motion was filed by Respondents' counsel. Arguments were made via telephonic conference with Hearing Officer Jolin on January 26, 2009, and a Second Amended Pre-Hearing Conference Order was issued on January 29, 2009, which denied the Motion for Protective Order and reassigned the discovery deadlines.

An Order Appointing Substitute Hearing Officer and Notice of Hearing was entered on April 1, 2009 in which Catherine Warren was appointed in place of the previous Hearing Officer, and a new date of May 27, 2009 was assigned for full hearing.

Due to personnel changes at the Department, an Order appointing Ellen R. Balasco, Esq. as Substitute Hearing Officer was entered on July 16, 2009 setting a new date for hearing to July 22, 2009. On that date, the parties appeared with counsel and engaged in lengthy settlement discussions outside the presence of the Hearing Officer. After those discussions, they advised the Hearing Officer that the matter had been conditionally settled, dependent on the finalization of certain financial terms and payments, the details of which were not provided to the Hearing Officer. The parties were given until August 21, 2009 to submit in written form to the Hearing Officer either a request for dismissal of the pending complaint, or a request to have the matter assigned for full hearing.

On August 12, 2009, Complainant's Motion for Assignment of Hearing was filed with the Hearing Officer. Respondents filed an Objection to the Motion of Assignment of Hearing. As a result, an Amended Order and Notice of Hearing was issued on August 25, 2009, setting the date of September 14, 2009 for full evidentiary hearing. The hearing was conducted over three dates, and the record in this matter was to be closed on January 29, 2010 upon the receipt of proposed findings of fact and memoranda by counsel for each party.

At the request of the Complainant's attorney, the Hearing Officer held the matter for some time after the closing date, to give him an opportunity to file a Motion to Amend, which he had announced on the record at the close of his case that he intended to do. The Hearing Officer never received that Motion.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws §§ 5-20.5-1 *et seq.*, 42-14-1, *et seq.*, and 42-35-1, *et seq.*.

III. ISSUES

The issues presented in this matter were set forth in the Pre-Hearing Conference Order, which issued from the pre-hearing conference held on November 13, 2008 before Hearing Officer Jolin, and are as follows:

1. Whether Respondents violated R.I. Gen. Laws § 5-20.5-14(a)(20) during the real estate transaction at issue,
2. Whether Respondents violated Rule 8(A) of Commercial Licensing Regulation 11 - *Real Estate Brokers and Salespersons* ("CLR 11") during the real estate transaction at issue.

3. Whether Respondents violated Rule 8(B) of Commercial Licensing Regulation 11 - *Real Estate Brokers and Salespersons* (“CLR 11”) during the real estate transaction at issue.

IV. STANDARD OF REVIEW FOR AN ADMINISTRATIVE HEARING

It is well settled that in formal or informal adjudications modeled on the federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 at 759 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* at 763-766; see also, *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases); *Parker v. Parker*, 238 A.2d 57, 60 (R.I. 1968) (“satisfaction by a ‘preponderance of the evidence’ [is] the recognized burden [of proof] in civil actions”). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. See *Parker*, 238 A.2d at 60. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 100 (R.I. 2006).

Here, the proponent of this action is the Complainant. As such, she bears the burden of establishing why it is more likely than not that Respondents conducted themselves in a manner that violated the statutes and regulations under which they hold their real estate brokers’ licenses, as set forth in Section III herein.

V. PRE-HEARING MOTIONS AND STIPULATIONS

1. Motion for Assignment of Hearing

On August 12, 2009, Complainant filed a Motion for Assignment of Hearing. The Respondents filed an Objection to the Motion of Assignment of Hearing in Response. Neither the Motion nor the Objection contained a request for oral argument, and the Hearing Officer found that disposition of the Motion without oral argument best served the public interest. Accordingly, the Motion for Assignment of Hearing Date was granted by the Hearing Officer, in accordance with the provisions of CMR 2 – Rules of Procedure for Administrative Hearings, Sections 11(B) and (C). These findings were recorded and notice given to the parties in the Amended Order and Notice of Hearing, entered by the undersigned on August 25, 2009.

2. Motion for Final Order of Dismissal

The Respondents filed a Motion for Final Order of Dismissal on August 21, 2009 via electronic and regular mail. The Complainant filed an Objection to the Motion on August 24, 2009. The Motion was set down for hearing on September 14, 2009, and notice of that date was provided to the parties in the Amended Order and Notice of Hearing. For convenience of the parties, this Motion was to be heard the same day and prior to the start of a full evidentiary hearing, in the event the Motion for Dismissal was denied.

The grounds for Respondents' Motion as set forth in the body of the pleading as well as in oral argument was that the parties had agreed on July 22, 2009 at a pre-hearing conference in this matter. Respondents argued that the parties had resolved their dispute and no longer wished to press their claims, and that a settlement agreement reached that day included dismissal of the instant administrative action. However, the proposed terms of such

agreement were not reduced to writing that day, and were not reported to the Hearing Officer – either on or off the record.

Counsel for the Respondents entered several documents as full exhibits in concert with his argument, and presented co-counsel Nicole Labonte, Esq. to provide testimony regarding her participation in the alleged proposed settlement.

Ms. Labonte stated, in what counsel characterized as her being an “officer of the Court” (her statement was not sworn) that she had participated in settlement negotiations on July 22, 2009 with all parties present which resulted in an agreement, subject to the parties memorializing their agreement in writing. She stated that she had a telephone conversation with Mr. Leviss the following day in which he invited her to draft the proposed written agreement, which she did. It appears that the next correspondence received from Mr. Leviss was the document marked as Respondents’ #1; a letter stating that there was no agreement. This document preceded in time the receipt of the proposed settlement agreement from Ms. Labonte.

Counsel for the Complainant argued that there had never been a complete agreement made on July 22, 2009. According to Mr. Leviss, the parties discussed six elements of a proposed settlement, but that the specific terms were not finalized or agreed to by his client that day. He stated that his client “withdrew from settlement negotiations” prior to receiving the written document prepared by Ms. Labonte.

The documents and arguments support that what next transpired was an exchange of written correspondence between counsel for the respective parties which basically illustrate the surprise and objection of Respondents’ counsel to Mr. Leviss’ attempt to “renegotiate and/or terminate” the settlement agreement reached verbally on July 22, and the rejection

of the terms of the proposed settlement by Complainant's counsel and his desire to schedule a full evidentiary hearing of this matter.

Due to a technical flaw with the recording device at the July 22 pre-hearing conference, there is no recording available of what transpired in the presence of the Hearing Officer after the negotiations. The amount of time the parties spoke "on the record" was, in fact, very brief. All parties agree that no specific terms of a proposed settlement were stated on the record. The sum and substance of the statements made before the Hearing Officer were that the parties had an agreement subject to being reduced to writing, and that the parties would notify the Hearing Officer when, and if that was done.

In addition to her independent recollection, the Hearing Officer relied on a memorandum she wrote on the same day confirming what had transpired during the formal portion of the pre-hearing conference. That memorandum was sent by electronic mail to both parties' legal counsel. That writing said, in pertinent part:

"To confirm the outcome of the hearing scheduled for this date, I have been advised that the parties have reached a conditional resolution of the issues which brought this matter to the attention of the Department through its administrative complaint process. In expectation of certain anticipated acts of the parties, it is agreed that on or before August 21, 2009, the parties shall submit in written form to the Hearing Officer a joint pleading which sets forth either a request for dismissal of the pending complaint, or to have the matter assigned for hearing. ***If this does not reflect the parties' respective positions***, or if there are procedural questions I can answer for you, please contact me by telephone or email at your convenience. (emphasis added)

The expectation of the undersigned was that the case would either be dismissed or a full hearing requested and that a written report of which path it was to take was to have been presented by the parties by August 21, 2009. The next written communication received by the undersigned relative to this matter was a one-line document from counsel for Complainant titled "Complainant's Motion for Assignment of Hearing Date."

After brief deliberation and review of the exhibits and argument of counsel, the undersigned denied the Motion for Final Order of Dismissal. The following specific findings were made:

- i. The Complainant did not, on July 22, 2009 or at anytime thereafter, withdraw or move to dismiss her complaint;
- ii. There were several communications between the parties after July 22, 2009 which indicated that they did not have an agreement containing terms which satisfied *both parties*, in essence there was never a “meeting of the minds” relative to the terms of a proposed settlement;
- iii. Neither party objected to or requested clarification of the statements contained in the memorandum prepared by the Hearing Officer and sent to them on July 22, 2009;
- iv. Rule 15(I) of Central Management Regulation 2 is applicable and controlling relative to the issues raised in Respondents’ Motion.

VI. DOCUMENTARY EVIDENCE, MATERIAL FACTS AND TESTIMONY

A. Complainants’ Case in Chief

Counsel for Complainant called Respondent Robert Scralia (“Scralia”) as his first witness. After being duly sworn, he testified that he had been a real estate broker for approximately fifteen years, and before that had been a real estate salesperson for at least five years – equaling approximately twenty years of total professional experience in the field of real estate. He has been the principal broker for ReMax 1st Choice since 1994. There are approximately 50 affiliated brokers and salespersons under his principal license. The agents who are members of “The Peter Micheli Team” (the “Team”) are included in that number, and Complainant Tina Devlin was a member of that team.

In reference to the “Independent Contractor Agreement” included as Exhibit 1 of the parties’ Amended Agreed Statement of Facts (“Agreement”), Scralia testified that the Agreement itself was prepared by ReMax International in template form and adapted

by ReMax 1st Choice, and that Addendum A to that Agreement had been prepared by the Team. The document indicates that the parties signed that document on April 13, 2007. This, he stated, was a document used for all sales associates. The document was still in use as of the date of the hearing, according to Scaralia.

Scaralia stated that his office administrator had presented this document, along with Exhibit 2 of the Amended Agreed Statement of Facts titled "Termination Rider", to the Complainant at the time she began working at ReMax 1st Choice. According to his testimony, the Complainant should not have been given the Termination Rider to sign because she was joining the Peter Micheli Team, so this document would not apply to her. The office administrator mistakenly gave it to her. He did not recall whether the Complainant was ever notified of the mistake.

However, when his attention was called to his Supplemental Answers to Interrogatories, which were marked as a full exhibit, Scaralia indicated that the answer to Interrogatory #8 was not consistent with this position. In fact, that answer appears to indicate that the inclusion of the "Termination Rider" with the Independent Contractor Agreement was intentional, and not a mistake. When questioned regarding this inconsistency, Scaralia testified that he has relied at all times on the validity of the "Termination Rider" as it related to Devlin's association with ReMax 1st Choice.

Two final points were brought out in the direct testimony of Scaralia. In reference to the February 11, 2008 letter from Peter Micheli to the complainant (marked as Exhibit 3 of Joint Exhibit 1), Scaralia testified that he had knowledge of the letter's contents at the time of its writing, and that he had approved of its contents prior to it being sent to the Complainant.

Finally, regarding the four real estate parcels described in paragraph 6 of the Amended Agreement Statement of Facts, he testified that he had no knowledge as to how they came to be listed for sale with ReMax 1st Choice.

Counsel for the Complainant next called Respondent Peter Micheli as a witness. Micheli's testimony began with his statement that the four parcels described in the preceding paragraph were secured by the Complainant for listing with the Peter Micheli Team. He then explained the corporate structure of the entities Preferred Realty, Inc. ReMax 1st Choice and the Peter Micheli Team. He stated that Preferred Realty Inc. is a duly incorporated entity doing business as The Peter Micheli Team. He is the sole officer of that corporation. He further described his business relationship with ReMax 1st Choice as that of being a broker associate with that agency.

This testimony was followed by a rather confusing and disjointed line of questions by counsel related to a series of correspondence between the respective attorney for the Complainant and the Respondents, marked as Complainant's exhibits B, C, D, E, F, G, H. As all but three of the letters were either penned by or addressed to Micheli directly, his first-hand knowledge of the majority of the correspondence was limited.

In summary, the letters placed into evidence chronicle an inquiry by Complainant's attorney regarding the reasons for her termination, and the responses made first by Respondents Micheli, and later by his attorney. These responses refer to the Independent Contractor Agreement and outline its terms, along with a description of the Respondent's position regarding a final accounting of monies due from and owed to the Complainant upon her termination. The exhibits speak for themselves, and make clear that this Respondents had relied on the terms and conditions set forth in the

Independent Contractor Agreement as being controlling at the time of the separation of the Complainant from ReMax 1st Choice and the Peter Micheli Team.

Respondent Micheli next answered a series of questions regarding whether he believed the Complainant “abandoned” her listings that were in effect at the time of her termination (which he did not) and whether she had complied with the other terms of the Independent Contractor Agreement. Micheli indicated that the letter he sent to the Complainant on February 11, 2008 (Exhibit 3 of the Amended Agreed Statement of Facts) summarized her obligations under the agreement, and requested her prompt (24 hour) choice of another Peter Micheli Team member to take over her listings.

Micheli stated that Devlin had six listings at the time of her termination, which were taken over by Peter Micheli Team member Daniel McCusker. He further testified that Downey Savings Bank, the listing owners, terminated their contract with ReMax 1st Choice and that he attempted to obtain those listings for himself, but was unsuccessful. According to his testimony, the agents of Downey Savings Bank chose to have Mr. McCusker take over as the listing agent for their properties.

The Complainant, Tina Devlin, was called as the next witness. After being sworn, she testified in direct examination by her attorney that she had received the February 11, 2008 letter from Micheli (marked as Exhibit 3 of the Amended Agreed Statement of Facts). She stated then that she did not contact Downey Savings Bank, the listing owners, after the date of her termination, due to what she perceived as a threat of suit by ReMax 1st Choice contained in Respondent Micheli’s letter. She contradicted this statement in later testimony when she admitted being in contact with a bank employee to advise her about her new affiliation.

Complainant testified that she had “ongoing” communications with Daniel McCusker after her termination, with the intention of bringing him “up to speed on what was happening with Downey Savings, and to help him along as he was the new listing agent for the Downey listings. Her testimony was that she continued to have conversations with Mr. McCusker because she believed that it would result in her being paid commissions on the sales related to those listings. She stated that she ceased having communication with McCusker because she was tired of his “sexual advances” toward her.

During a lengthy cross-examination, the Complainant initially testified that she had been licensed as a real estate salesperson for “eight or nine years”, but later stated that it was “about six years”. A review of the public licensing records reveals that she was in fact first licensed by the Department in May, 2001. She is currently associated with Hannaway Real Estate in Cumberland, Rhode Island. Her affiliation with ReMax 1st Choice and the Peter Micheli Team was not her first, having been previously affiliated with at least one other agency.

Regarding the documents in evidence relative to that affiliation with the Respondents, she testified that she read each of them, including the addendums thereto. She reported that she never filed a claim for commissions or for mediation of the termination issue as set forth under the terms of the Independent Contractors Agreement.

The Complainant testified that she had “never read” the Department’s real estate licensing regulations and did not have a working knowledge of them. She also testified that she did not take the Pre-Licensing real estate courses prior to receiving her license, as it was not required that she do so at the time she was licensed.

In response to questioning regarding the business relationships between her, Downey Savings Bank and the Respondents, the Complainant testified that she met with Respondents Micheli in November of 2007 and discussed the prospect of the bank listing some properties with ReMax 1st Choice (The Peter Micheli Team). The listing agreements for those properties were prepared by Downey Savings Bank, and the Listing Broker was “The Peter Micheli Team”. These listings took place between December of 2007 and late January of 2008. The Complainant indicated that she was named only as the Showing Agent on the listings. Based on the documents presented in evidence (Respondents’ D and E, full) and the Complainant’s testimony, it was Robert Scaralia who signed the listing agreements as the named “Listing Agent” on behalf of ReMax 1st Choice, not the Complainant.

Complainant testified that she does not remember having any conversations with anyone at ReMax 1st Choice or on the Peter Micheli Team prior to her termination about dissatisfaction with her performance. She first learned of her termination was when she received the letter from Peter Micheli, dated February 11, 2008. (Exhibit 2 of Joint Exhibit 1) She did recall some discussions among the associates regarding concerns about reimbursement for expenses related to the Downey Savings Bank properties, which she believed, were to have been borne by the Peter Micheli Team. During this period of discussion, the Complainant conceded that she may have used an expletive with reference to Mr. Micheli.

She further testified that she was very “confused and shocked” when she received the termination letter, but she did not recall whether she received it in the mail or it was handed to her. Her immediate reaction was to seek legal counsel, and she did so. She tried to check her voicemail at the office, and was technically unable to do so as her

passwords no longer worked. She stated that she made attempts to contact Respondents Scaralia and Micheli, to no avail, but that late in the evening on February 11, 2009, Mr. Micheli called her and told her effective immediately, her association with the agency was terminated. She testified that she received the letter the day after this conversation.

She believed that the letter was inconsistent with her contract with the Respondents. She believed that there should have been a 30 day notice period prior to termination, and she was concerned about her listings. She did not see the need to contact either of the Respondents after receipt of the letter, as its intention and Mr. Micheli's telephone call the previous night were very clear. She contradicted this statement later in cross examination, when she stated that she did place calls to both of the Respondents after receipt of the termination letter.

She believed that the Independent Contractor Agreement allowed her to solicit clients from ReMax 1st Choice, but the termination letter clearly prohibited it. She testified that she was confused, so she sought legal counsel. Again, contradicting herself, she testified that she knew she never had an agreement with the Respondents which would have allowed her to solicit listings from ReMax 1st Choice after her termination.

In fact, the Complainant contradicted her own testimony on at least one other point. She initially testified that she never contacted anyone at Downey Savings Bank after her termination. Her testimony on a subsequent hearing date was that she did, in fact, contact an employee of the bank regarding her intention to affiliate with a new broker.

In testimony regarding the Code of Ethics of the National Association of Realtors ("NAR"), the Complainant indicated that she did understand that a violation of any regulations promulgated by the NAR also constituted a violation of the Independent

Contractor Agreement between the Complainant and the Respondents. She has, however, “never seen” the Code of Ethics and had no knowledge of the rules or regulations therein.

With reference to Paragraph 11 of the Independent Contractor Agreement and Paragraph 4 of the Addendum thereto, the Complainant admitted that she was bound to comply with the Code of Ethics and regulations of the National Association of Realtors, both as a member of the organization and by virtue of the Independent Contractor Agreement. (Section J of the Independent Contractor Agreement also clearly states this.) Article 16 of the NAR Code of Ethics was read in part into the record, which states that a “realtor shall not solicit a listing which is currently listed exclusively with another broker.” (Standard of Practice 16-4 in Respondents’ Exhibit F)

Complainant admitted having read a provision of the Addendum to the Independent Contractor Agreement (Exhibit 1 in the Agreement Statement of Facts) which provides for the return of materials such as keys, lockboxes, executed agreements, etc. (see Paragraph 13). It states that those materials “shall be returned immediately to the Company” by the salesperson. It was brought out in the Complainant’s testimony that it was nearly two months after her termination before the Respondents and ReMax 1st Choice received those items which had been in the Complainant’s possession. Devlin testified that she gave those items to her attorney one week after her termination, at his request, and that she did not know what transpired after that which may have delayed the return of the items to ReMax 1st Choice. Those materials included access codes to listed properties, personal information regarding clients, keys to the office, and marketing and sales information.

Extensive cross-examination was conducted into the financial obligations of the Complainant to the Respondents as articulated in the Independent Contractor Agreement

and Addendum “A” thereto. Complainant understood that the commission split set forth in the agreement was 60/40 in favor of the Complainant. When asked what she understood her monthly financial responsibility to ReMax 1st Choice was, she answered again that she was confused by the Addendum. In fact, when questioned about the contents of the Independent Contractor Agreement, the Addendum and the Termination Rider, the Complainant stated repeatedly that she was “confused” by the contents of each.

However, Paragraph 5 of Addendum “A” sets out very clearly that the salesperson was responsible for paying a number of costs to the agency, including a “5% ReMax deduction from each commission check, in addition to a number of other monthly charges totaling \$342.00 per month.

Regarding a listing located on Dolly Pond Road, she testified that a closing on that property took place in December of 2007. She had been with ReMax 1st Choice for 8 months, had not closed one other property, and had never paid “a dime” to the agency for her affiliate fees or expenses during that time. Complainant stated the reason she had not paid was that she “never received a bill” for those charges. (Respondents’ Exhibit G.)

Respondents’ Exhibit H is “statement” of commission payment and expenses dated January 30, 2008. The Complainant testified that she did not receive that document until after her termination. She had been asking for some kind of statement before that relative to her fees and costs as an affiliate salesperson, but did not receive it. She stated that she had knowledge of what the monthly fees she owed would be, as it was set forth explicitly in the agreement. Notwithstanding the Complainant’s insistence that she did not understand the fees deducted from the Dolly Pond Road commission, the figures in Exhibit “H” are consistent with the provisions set forth in the Addendum.

Complainant testified she has reviewed and read the two documents (paragraph 12 of Addendum A and paragraph 11 D of the ICA), including the provisions for payment of commissions upon termination in both documents.

According to her testimony, the Complainant brought between 8 and 10 listings into ReMax 1st Choice by her efforts. These included the so-called “Downey Listings” and others. The “Downey” listing agreements contained provisions, which stated that they could terminate at any time, and she characterized these as being atypical listing agreements, prepared by the bank. Other listings were standard MLS listing agreements.

She affiliated with a new agency within several days after her termination date of February 11, 2008. She admitted that she communicated with the property owners on the “Downey listings” after her termination. She stated that she told most, if not all of the sellers that she was no longer with ReMax, and stated that she “may have advised some of them” that she was affiliated with a new agency, and she could handle their listings through that agency. Her testimony was that the sellers contacted her by telephone.

The Complainant testified that she is not seeking commissions for these properties and her attorney offered to so stipulate. These properties did not close through ReMax 1st Choice.

Based on the Complainant’s own testimony about several Multiple Listing Service documents, it is clear that she did induce at least three sellers to withdraw their listings listing withdrawals from ReMax 1st Choice. The relevance of this testimony is limited as it relates to the violations alleged against the Respondents, but it is certainly instructive as to whether the Complainant was in breach of the ICA, Addendum A. This is not being considered for persuasiveness on the issue of the violations, but may be

illustrative for other purposes. Clearly, this would be an issue of contract law, and for whether a cause of action exists for breach on behalf of either party.

Complainant testified that she was owed no money at the time of her termination by ReMax 1st Choice. On the date of her termination, there were no closings scheduled on the properties she had procured, there were no sales agreements in effect on any properties she had handed in any capacity for the agency. She stated there were no negotiations for offers in progress at the time either. This testimony was corroborated by both Respondents during the hearing.

Ms. Devlin testified that, after her termination, she remained apprised of progress on the sales of the ReMax 1st Choice listings on which she had worked by having discussions with a ReMax associate named Daniel McKusker, with whom she had an ongoing relationship. She also admitted to communicating with ReMax 1st Choice clients, who she reports were “calling her on a daily basis.” She further admitted that she called Downey Savings Bank and wrote at least one note to an employee of the bank named Heidi Burnhart to let her know that she had switched agencies.

She denied having given any clients instruction as to how to “pull” their listing from the agency, and she did not ask any of them to do so. This testimony is simply not credible, considering the evidence that shows that at least one of the property owners withdrew from the exclusive listing agreement at ReMax 1st Choice and re-listed with the Complainant at Hannaway Realty within three (3) days.

In redirect testimony, the Complainant again stated that she was confused by the meaning of Paragraph 12(b) of Addendum A to the Independent Contractor Agreement, as to whether or not she was allowed to take listings from the agency once she had been terminated. She testified that she was “very confused” as to the meaning of Paragraph D

of the Termination Rider (Exhibit 2 of the Agreed Statement of Facts) which related to outstanding listings at the time of termination. Again, she reiterated that she was very confused about what she could say to former clients after her termination and as to what her rights were.

Respondent Peter Micheli was called as a rebuttal witness. He was, at all times relevant hereto, an associate broker under Robert Scitalia at ReMax 1st Choice. Much of his testimony related to the grounds for the Complainant's termination. He stated that he had been dissatisfied with her job performance on approximately 5 occasions during the time she was associated with the Team, and that he had a number of conversations with her regarding what he characterized as her "unprofessional conduct" prior to January of 2008. He also said that during January, he intended to discharge her at a sales meeting, and he called her prior to the meeting to advise her. He stated that she asked him for a second chance, and he agreed to keep her on.

Micheli testified that the event, which triggered her termination, was related to her job performance. He received a complaint about the Complainant's job performance from Heidi Bernhart at Downey Savings Bank; specifically, her lack of communication with the Bank regarding their listings. Bernhart informed him that Downey Savings Bank was withdrawing their listings, based on their complaints about Ms. Devlin. The listings were reportedly given to Daniel McKusker on the Peter Micheli Team.

Micheli further stated that, in the week prior to her termination, he attempted to schedule a meeting with the Complainant, Daniel McKusker and himself regarding communications with Downey Savings Bank and the out of pocket expenses related to the Downey properties. The meeting never took place as the Complainant did not make herself available.

Respondent Micheli indicated that there were “months and months of dissatisfaction” with the Complainant prior to termination, and that she clearly had “no respect for him as a Team leader.” He illustrated this by describing how the Complainant used a toy pig at sales meetings, and would point it at him and make pig noises while he was speaking.

Respondent Scaralia was called as a second rebuttal witness by counsel for Complainant. He testified that he had discussions with Micheli about the Complainant’s poor job performance, and that he had serious reservations about her continued association with ReMax 1st Choice.

The witness testified that he is very familiar with Commercial Licensing Regulation 11, Rule 8, and that he has complied with it. The “Termination Rider”, marked as Exhibit 2 to Joint Exhibit 1 is his version of a “written policy” as mandated by Rule 8(b). This is the document he uses to control the association of agents in his agency unless and until their contractual arrangement with the agency changes in one of two ways. The first option for an associate would be to assume a “pay as you go” arrangement with Respondents Scaralia and ReMax 1st Choice. In this scenario, an associate “strokes a check every month” to pay their costs and expenses due to the agency, and also pays any carrying costs for the properties they themselves have listed. This was never the arrangement that the Complainant opted for.

Instead, this Complainant “joined a team” working under the agency umbrella – the second circumstance which would dictate an associate’s contractual arrangement with the agency. In this case, the Complainant joined the Peter Micheli Team immediately upon her association with the agency. When that occurred, her contractual arrangement with the agency, and with the Respondents, came to be controlled by the Independent

Contractor Agreement, and its Addendum A, marked as Exhibit 1 to Joint Exhibit 1. Respondent Scaralia is also a signatory on that document, so it then became the controlling policy of ReMax 1st Choice as it related to this Complainant.

According to Respondent Scaralia, because she opted to join the Team immediately upon her association with ReMax 1st Choice, the “Termination Rider” document (Exhibit 2 to Joint Exhibit 1) should not have been presented to the Complainant for her signature. By way of explanation of what he had termed this “mistake” by his office administrator in his earlier testimony, he said he presumed the office administrator presented it to Complainant because she was merely following a checklist of all documents which were to be presented to all new associates. It did not apply to the Complainant, and therefore should not have been used.

B. Respondents’ Case in Chief

Counsel for Respondents called Peter Micheli as his first direct witness. After being sworn a second time, Respondent Micheli reiterated his prior testimony that he was first licensed as a real estate salesperson in 1984, and became a licensed Broker in January of 1990. He has not been the subject of any complaints with the Department of Business Regulation in his entire career. He testified that he was a Broker Associate with ReMax 1st Choice at all times relevant to this complaint, and has never acted as or held the responsibility of acting as its Principal Broker.

His testimony corroborated that of the Complainant regarding the fact that no monies were due to her on February 11, 2008 from ReMax 1st Choice or from the Peter Micheli Team, and there were no Purchase and Sales Agreements or written offers pending which named her as the listing agent at that time. He testified that Respondents’

Exhibit H reflects the disbursements relative to the one and only closing involving a listing of the Complainant. The disbursement for this “Dolly Pond” property shows that the so-called “desk fees” owed by the Complainant to the agency on a monthly basis were taken in total for the months of April 2007 through December 2007, as they had not been paid monthly by her during her association, as required by their contract. Regarding the other listings obtained by the Complainant prior to her disaffiliation (the “Downey Savings” properties), Respondent Micheli testified that he did not reap any benefit from commissions on these properties.

Referring to Exhibit 1 of Joint Exhibit 1 (Independent Contractor Agreement), the witness stated that he himself prepared it, and gave it to the office administrator for typing on the 13th and it was given to the Complainant for review on that date. The document was executed on April 18th, notwithstanding the typed date. His custom, according to his testimony, is to prepare the Agreement, present it to the associate, review it and then sign it at least a few days later. That was done in this case as well.

He has nothing to do with the Termination Rider (Exhibit 2 of Joint Exhibit 1); this is a document solely controlled and mandated by ReMax 1st Choice. It is used for each and every associate who becomes affiliated with the agency. Once an affiliate joins his Team, however, they are asked to sign the Independent Contractor Agreement (Exhibit 1 of Joint 1) and that documents is the controlling contract for their duration of service on the Team. If an associate left the Team, and became a full associate with ReMax 1st Choice, the Termination Rider would become the controlling document.

When questioned regarding the Downey Savings listings, this witness testified that he had a conversation with Heidi Bernhard at the bank when he learned that they were pulling the listings from the Team. He attempted to salvage the listings for himself,

but was unsuccessful in doing so. Respondents' Exhibit L is a letter from Respondent Micheli to Downey Savings Bank, which corroborates his testimony. The letter further sets supports the testimony of the Respondents that the Complainant was discharged from her association with the Team due to complaints from the Bank about her job performance relative to these listings.

The witness testified further in support of his prior statements regarding his concerns about the Team Book, which was not returned to the Respondents in a timely fashion by the Complainant after her termination. The items contained were of a sensitive and confidential nature, and included alarm codes and keys for the office and private information for the owners of approximately thirty properties.

The witness outlined in detail the circumstances surrounding the Complainant's separation from the Peter Micheli Team and ReMax 1st Choice, much of which illustrated what the Respondents characterized as unprofessional conduct by her, including being unavailable for discussion with the agency principals. When asked to discuss the ending of her affiliation with the Team and the agency directly, this witness reports that the Complainant replied "you can talk to my attorney." This statement was corroborated by the Complainant's own testimony that she immediately retained legal counsel upon receiving the Termination Letter.

The next witness was Respondent Robert Scaria. He testified that he has been a licensed real estate broker for 15 years, and was licensed as a salesperson for 7 years prior to that. He was, at all times pertinent hereto, the Principal Broker for ReMax 1st Choice. His testimony, supported by Department records, is that he has never been the subject of a complaint or disciplinary action by the Department. He further stated that no

ethics complaints have ever been filed against him with any professional real estate board or commission.

Regarding his introduction to the Complainant, he testified that she first contacted him to request an affiliation with ReMax 1st Choice. Thereupon, he investigated her sales history on the Multiple Listing Service, and determined that her past experience and performance was poor. He therefore decided that she would require the support of a team sales environment, so he referred her to Respondent Micheli to discuss what his team had to offer her.

The Complainant signed the Termination Rider on April 18, 2007 and wrote in the date. That date is the same date that she executed all documents related to her affiliation with ReMax 1st Choice.

The Independent Contractor Agreement, he testified, was predated on April 13, but not actually executed until April 18. His custom, is that all employment documents are signed on the same day. There are a number of in-house documents in addition to worker's compensation, antitrust, etc. He is certain that all are signed at the same time, notwithstanding the apparent discrepancy in the typed dates on that Agreement.

VII. DISCUSSION

A. Motion to Dismiss Complaint as to Peter Micheli

Counsel for the Respondents made an oral motion to dismiss the complaint on behalf of Respondent Micheli, and only as it related to him. Although counsel for Respondent Micheli did not articulate specifically the statutory basis for his defense motion, he did predicate it on the fact that the regulations at issue cite the obligations of a so-called "Principal Broker", and that, as a matter of fact, Micheli never held that

position at ReMax 1st Choice. The Hearing Officer took notice of that provision of the regulations at issue.

The defense Motion is allowable in this administrative enforcement proceeding. Pursuant to Section 11, *Central Management Regulation 2 – Rules of Procedure for Administrative Hearings*, any party may request that the Hearing Officer enter any order or action not inconsistent with the law, provided that the types of motions made are permissible under the Rules and the Rhode Island Superior Court Rules of Civil Procedure (“Super.R.Civ.P.”) Under Section 11(B), any such motion may be made orally during a pre-hearing conference or hearing.

Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons (as amended April 24, 2006, and in effect at all times pertinent hereto) (“CLR 11”) was promulgated pursuant to R.I. Gen. Laws §§ 5-20.5-5, with the purpose of promoting the general welfare of the citizens of Rhode Island, through the implementation of § 5-20.5-5 *et seq.* Section 3 of CLR 11 contains definitions of the terms used in the regulation.

There are four (4) types of brokers defined in that section:

Subsection N defines a “Principal Broker” as being “the Broker designated by an agency to be responsible for the agency’s and/or any affiliated Licensees’ compliance with the Act and Regulations.”

Subsection C states that the term “Associate Broker” means any Licensed Broker who is employed or engaged as an independent contractor.

Subsection D lists activities may be conducted by a Broker in a general sense, and

Subsection F defines “Cooperating Broker” as a licensed Broker acting as a seller or buyer’s broker.

It is abundantly clear upon reading the definitions included in Section 3, that a

principal broker and an associate broker are distinct and separate entities within a real estate agency.

In the course of cross-examination by counsel for Respondents, it was established that the Complainant did, in fact, know that the principal broker for ReMax 1st Choice and the Peter Micheli Team was Robert Scaria, not Peter Micheli. Counsel had marked as Respondents' Exhibit A (full) a Transfer of Salesperson License form filed by the Complainant in April of 2007, notifying the Department of her affiliation with ReMax 1st Choice, which clearly indicates Respondent Scaria as the "principal broker" at that agency. The Complainant authenticated her signature on the form.

When questioned regarding her Answers to Interrogatories propounded by Respondent Micheli, she verified that her answer read: "I do not allege in my complaint that Micheli is the principal broker". One must query then, why she fashioned her complaint to include a Rule 8 violation against Respondent Micheli.

Further, she authenticated her own signature on Addendum A to the Independent Contractor Agreement, and that of Robert Scaria, with the words "Broker-Owner" next to his name. In fact, her own complaint form names Respondent Scaria as "Broker-Owner".

Although the Complainant testified that she had no knowledge of the division of duties that each of the Respondents held, and that she had "never read" any of the DBR rules or regulations, there is an expectation that each licensee of the Department has an obligation to have knowledge of the distinct roles and responsibilities for professionals in that industry. Certainly, being a competent real estate professional carries with it the responsibility of reading carefully and understanding each document to which one affixes their own signature. This Complainant admits that she did not understand the terms of

the documents related to her own employment, and there is no testimony that she ever asked for clarification of the terms, which “confused” her.

Among the motions included in, Super.R.Civ.P., Rule 12, is a defense based on failure to state a claim upon which relief can be granted, as set forth in Rule 12(b)(6). A violation filed against a Respondents who does not fall within the class defined by the regulation cited would certainly fall within those circumstance contemplated by Rule 12.

Here, it is clear on the face of the pleadings that the complaint names both Micheli and Scaralia as Respondents, one of whom is not a principal broker, then cites a specific regulation which by its terms attaches responsibilities to someone who meets the definition of principal broker. It is uncontroverted that Micheli is not a principal broker. He cannot then, technically or otherwise, have violated Rule 8(A) or 8(B) of CLR 11.

Motions to dismiss are granted with great reserve. However, where “the allegations ... show that on the face of the complaint there is some insuperable bar to relief,” this Court must grant the Rule 12(b)6 motion. *Goldstein v. Rhode Island Hosp. Trust Nat'l Bank*, 110 R.I. 580, 296 A.2d 112 (1972). The fact that Respondent Micheli did not meet the definition of “Principal Broker”, and was not acting as such at the time of the alleged violations is certainly just such a bar. It is a functional impossibility for Micheli to have violated a regulation, which addresses only the responsibilities of a Principal Broker.

Accordingly, the Motion to Dismiss the allegations that Respondent Micheli has violated Rule 8(A) or 8(B) of CLR 11 is granted.

B. Whether either Respondents violated R.I. Gen. Laws § 15-20.5-14(a)(20)

This statutory provision authorizes the Department to suspend or revoke a license where a licensee engaged in any conduct in a real estate transaction that demonstrates bad faith, dishonesty, untrustworthiness, or incompetency. “The purpose of licensing real estate salespersons and real estate brokers is to ensure professional standards within the real estate business.” See R.I. Gen. Laws § 5-20.5-1, *et seq.*, and CLR11; *Gallo v. Smith*, DBR No. 98-L-0058 4/19/00 at 12. As such, licensees have certain statutory and regulatory duties imposed upon them in order to maintain these standards and to ensure that the public receives a certain level of service. *Id.*

As held in a prior Departmental decision,

A [real estate] licensee’s honesty, trustworthiness, integrity and reputation affect his or her ability to conduct all real estate transactions fairly. If one of these character traits are [sic] compromised, then the stability and integrity ***of the transaction*** is compromised. *D’Orsi v. Santilli*, DBR No. 99-L-0086 (July 18, 2000).

The Department’s prior case law and the wording and construction of Section 14(a)(20) makes clear that the intent of the section is to protect the public from unscrupulous real estate professionals. It authorizes the director of the Department to take administrative action against a licensee who is found guilty of “any conduct ***in a real estate transaction*** which demonstrates bad faith, dishonesty, untrustworthiness or incompetency.” (emphasis added) The circumstances surrounding the complaint in this matter do not involve a real estate transaction. Rather, it involves the operation of a real estate agency as it relates to the affiliation of real estate professionals.

This Complainant has made no specific allegations, either during her testimony or in her verified complaint, of acts involving dishonesty, incompetency or untrustworthiness on the part of either Respondent. In fact, the section of her complaint form which calls for a Complainant to “List section(s) of Law(s) or Rule(s) violated”

does not include any reference to § 5-20.5-14(a)(20). It includes only the statement “Regulation 11, Rules 8(A) and 8(B).” It is unclear as to what formed the basis for the prior hearing officer to include this statute as an issue in his Pre-Hearing Conference Order of November 24, 2008. However, because the allegation was included in the Pre-hearing Order, and the Complainant did not move to dismiss it, this Hearing Officer left the Complainant to her proof thereon.

For these reasons, and as there was no testimonial or documentary evidence presented which established that either Respondents had violated this law, the undersigned finds that the Complainant failed to meet the burden of proof relative to R.I. Gen. Laws § 5-20.5-14(a)(20), and therefore finds that the Respondents did not violate this section.

C. Whether Respondents Robert Scaria violated Rules 8(A) and 8(B) of Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons (“CLR 11”)

Much of the testimony and evidence adduced at this hearing and summarized in this Decision could frankly have been found to be irrelevant. Simply put, this case boils down to the simple determination of whether Robert Scaria, as the Principal Broker for ReMax 1st Choice, had promulgated “a written policy for the payment of commissions to affiliated Licensees on their termination” and whether that policy complied with the remaining provisions of Rule 8(A) and 8(B) of CLR 11.

The intent of Rule 8 is to insure that licensees affiliated with a brokerage have full disclosure as to what they will potentially earn, and how they can earn it (vis-à-vis sales commissions), and to insure that they have full disclosure and disbursement of those earned commissions both during their affiliation and upon termination. It was

intended to protect those licensees with the least bargaining power in a professional real estate setting. In fact, the regulation was deemed significant enough to survive the amendments to Commercial Licensing Regulation 11, which were made effective on May 27, 2009. (Those provisions are now included in the current Section 21 – *Commissions*)

The parties submitted as Joint Exhibit No. 1 an Agreed Statement of Facts, which was amended at the start of the hearing. This exhibit, marked as Full, contained three documents: 1. Independent Contractor Agreement, with attached Addendum “A”, 2. Termination Rider, and 3. Letter to Complainant from Respondent Micheli, 2/11/08. Of these documents, the determinative one in consideration of the alleged violations is found to be the Independent Contractor Agreement with its Addendum “A”.¹

Rule 8(A) provides:

“Unless otherwise expressly provided by written agreement between the Principal Broker and an affiliated Licensee . . . all commissions due to a licensee .. shall be subject to an accounting and payment to the affiliated licensee no later than ten (10) calendar days from the receipt of such commission by the Principal Broker.”

In this case, the Complainant closed only one real estate sales transaction during her approximate ten month affiliation with ReMax 1st Choice (the so-called “Dolly Pond” property). That closing took place in January of 2008, and two documents were entered during the hearing which substantiate that the Complainant was provided with a written breakdown of the disbursement of the commission proceeds relative to that transaction.

¹ Testimony established that the Termination Rider did not apply to the Complainant and that it was presented to and executed by her in error. The uncontradicted testimony of the Respondents is that the Termination Rider was superseded by the Independent Contractor Agreement and Addendum A in this case because, once the Complainant joined the Peter Micheli Team, the Agreement and Addendum A became the operative document. Whether the Termination Rider maintains any contractual validity between the parties is not a matter to be determined in this forum.

Respondents' Exhibit H is dated January 28, 2008 and lists specifically the total commission for that closing, and an itemization of the agency fees deducted and net payment amount. The commission split, fees and expenses are absolutely consistent with the terms of Addendum A of the Independent Contractor Agreement (Exhibit 1 of the Amended Agreed Statement of Facts).

There was one commission due to the Complainant while she was an affiliated Licensee. That commission (from the "Dolly Pond" property) was accounted for in writing and her share paid to her within ten days from the receipt of the commission.

Accordingly, the documentary and testimonial evidence establishes that the Principal Broker, Respondent Scaralia, did in fact comply with Rule 8(A).

Rule 8(B) mandates that a written policy be established by a Principal Broker, which provides for the payment of commissions to affiliated Licensees on their termination. It states:

"Every Principal Broker must promulgate a written policy for the payment of commissions to affiliated licensees on their termination. Such policy must prescribe the rate of commission to be paid, if any, on termination. The Principal Broker must obtain the written signature of each licensee under such Broker as soon as such affiliation is established, indicating that such affiliated Licensee agrees to such policy..."

The Independent Contractor Agreement ("ICA") and its Addendum A contain numerous provisions which relate to termination and payment of commissions to Licensees in the event of termination. The requirements of Rule 8(B) are addressed in at least three sections of the ICA. Paragraph 3(C) addresses commission payment conditions and division between associates. Paragraph 15 specifically identifies the commission split percentages for associates. Section 11 titled "Termination" covers with great specificity the who, when, why and how related to the termination of a Contractor

(i.e. a sales associate) of the brokerage. Paragraph (D) of this section states that termination “shall have no effect on [existing listing agreements] with respect to Contractor’s entitlement to fees, commissions.” This provision meets the mandate of Rule 8(B) that “such policy must prescribe the rate of commission to be paid, if any, on termination.”

Similarly, Addendum A to the ICA specifically sets forth in Paragraph 12 what commission percentage will be paid to a Salesperson associate in the event of termination. Again, the provisions set forth in this paragraph specifically and unambiguously meet the requirements of Rule 8(B) as to the Principal Broker having a policy which “prescribes the rate of commission to be paid [] on termination.”

Upon careful reading of the two documents cited here, which are actually merged for all practical purposes as one is named as an “Addendum” to the first, some ambiguity exists. However, Paragraph 37 of Addendum A announces that it supercedes the ICA regarding the issue of termination, among others. This would point to Addendum A as being the controlling document where such ambiguities occur.

Since Respondent Scralia as the Principal Broker executed Addendum A, it was clearly adopted as the operative document for the purposes of Rule 8.

Other requirements of Rule 8(B) have been met here as well. The Complainant signed both Addendum A and the ICA upon her affiliation with ReMax 1st Choice, indicating that she agreed to the terms and provisions stated in each. Although Ms. Devlin testified that she was “confused” by the two documents, there was no evidence that she ever sought clarification of those terms after she signed the documents. Her stated confusion does not render the contracts or policies invalid. It was incumbent upon

this Complainant, both as a party to the contracts and as a real estate professional to read and fully comprehend what she was signing.

The only requirement which the undersigned finds lacking in the policies promulgated by Respondent Scaralia, lies in Rule 8(B)(1) and 8(B)(2). Nowhere in either the ICA or Addendum "A" is there a provision which explicitly states "upon termination or affiliation or employment, the Principal Broker shall make a complete accounting in writing of all commissions due to Licensee" or "in the event any commission so accounted for is not in accord with the established commission schedule, the Principal Broker shall give a complete written explanation of any difference." In a strict reading of the Rule, those words (or a paraphrase thereof) should be included in a document which is subject to Rule 8 compliance, based on the use of the words "shall include" in (B).

However, the undersigned finds that the exclusion of those specific phrases amounts to no more than a technical violation of the Rule. When the Independent Contractor Agreement and Addendum A are considered as a whole, the spirit and intention of Rule 8 are clearly met within its other terms. These documents establish that Respondent Scaralia has substantially complied with Rule 8. They meet the regulatory intent as previously stated – that licensees affiliates are entitled to full disclosure as to what they may potentially earn, how commissions will be disbursed to them during their affiliation and after termination, and that they are entitled to payment in a timely manner.

It must be concluded that since no commissions were owed to this Complainant at the time of her termination (a fact supported by the testimony of all three witnesses) there would have been no basis for the Respondents to provide her with "a complete accounting in writing" as required by Rule 8(B)(1) and (2). Therefore, the exclusion of

those statements from the policy in this specific case is inconsequential. As a cautionary note to the Respondent, a strict construction of the Rule would dictate that the exact wording in 8(B)(1) and (2) should appear in a well drafted, and specifically compliant policy.

Accordingly, the “written policy” mandated by Rule 8(B) does exist in Addendum A to the Independent Contractor Agreement promulgated by Respondent Scaralia. Whether or not Mr. Scaralia, Mr. Micheli or Ms. Devlin breached any of the terms of either of the documents presented in evidence is another matter entirely, and again, not a matter to be determined in this forum.

Whether or not the termination of this Complainant’s affiliation with ReMax 1st Choice was wrongful or justified is immaterial to the allegations made in this case. That is a matter which must involve the application of contract law as between these parties. Whether the written policies prescribed by Rule 8 did or did not exist, it is clear from the evidence that Complainant’s termination would still have occurred. The email messages which were admitted in the hearing, and the uncontradicted testimony regarding Ms. Devlin’s behavior around the time of her termination support a conclusion that this complaint may have been filed to exact revenge against the Respondents for what she felt was a wrongful termination, or because she believed the Respondents owed her some compensation, or perhaps both.

It is noteworthy that the Complainant never filed a claim or civil action against the Respondents to recover funds she believed were owed to her, nor did she produce any evidence at hearing that she was, in fact, entitled to any specific commissions. This fact makes the filing of this Complaint appear to be more a matter of vendetta, than of violation.

VIII. FINDINGS OF FACT

1. On or about January 7, 2009, the Complainant filed a complaint with the Department of Business Regulation against the two named Respondents.
2. A full evidentiary hearing was held on three dates: September 14, 2009, October 1, 2009 and November 10, 2009.
3. The facts, as detailed in sections I. through VI. *supra.* are incorporated herein by reference and adopted as findings.

IX. CONCLUSIONS

The Hearing Officer finds that neither Respondents named in this matter violated R.I. Gen. Laws § 5-20.5-14(a)(20), or Rule 20 of Commercial Licensing Regulation 11 – *Real Estate Brokers and Salespersons.*

IX. CONCLUSIONS OF LAW

In accordance with the testimony and facts presented:

1. The Department has jurisdiction over this matter as set forth in Section II, *supra.*
2. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant did not establish by a preponderance of the evidence that Respondents engaged in any conduct in a real estate transaction that demonstrated bad faith, dishonesty, untrustworthiness, or incompetency in violation of R.I. Gen. Laws § 5-20.5-14(a)(20).

3. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant failed to establish that Respondent Micheli was a Principal Broker, and he was therefore not obligated to comply with Rule 8 of Commercial Licensing Regulation 11 – *Real Estate Brokers and Salespersons* (as amended April 24, 2006).


4. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant failed to establish that Respondent Scaralia violated Rule 8 of Commercial Licensing Regulation 11 – *Real Estate Brokers and Salespersons* (as amended April 24, 2006).

X. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Director of the Department find that Complainant failed to meet her burden to prove that either of the named Respondents violated R.I. Gen. Laws § 5-20.5-14(a)(20) and has further failed to prove that Robert Scaralia violated Rules 8(A) and 8(B) of *Commercial Licensing Regulation 11*, as detailed herein. A Motion to Dismiss that portion of the complaint as to Respondent Micheli was granted by the Hearing Officer.

Accordingly, it is the considered recommendation of the Hearing Officer that the remainder of the Complaint be dismissed in its entirety as to both Respondents.

Dated: 10/1/10

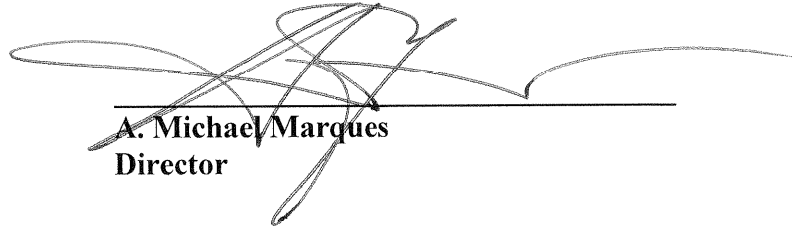


Ellen R. Balasco, Esq.
Hearing Officer

I have read and considered the Hearing Officer's Decision and Order in this matter, and I hereby take the following action:

- ADOPT
- REJECT
- MODIFY

Dated: 10-06-2010



A. Michael Marques
Director

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42, CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.

CERTIFICATION

I hereby certify on this 6th day of October, 2010, that a copy of the within Decision was sent by first class mail, postage prepaid, to the following:

Evan Scott Levis, Esq. 15 Old Beach Road Newport, Rhode Island 02840	Brian LaPlante, Esq. LaPlante Sowa Goldman West Exchange Center 67 Cedar Street Providence, Rhode Island 02903
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and sent by electronic mail to the following parties at the Department of Business Regulation:

Maria D'Alessandro, Deputy Director, Division of Commercial Licensing, Racing & Athletics

William DeLuca, Administrator of Real Estate - Commercial Licensing Division

