

IN THE SUPREME COURT OF MISSISSIPPI

**DELL H. PALMER, TANJA E. ADAMS,
and AUDREY NEELY**

APPELLANTS

VS.

CASE NO.: 2007-CC-01660

MISSISSIPPI REAL ESTATE COMMISSION

APPELLEE

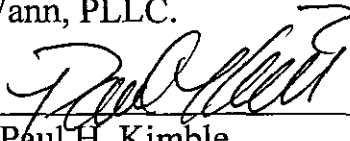
BRIEF OF APPELLEE
ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have or may have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible necessity of disqualification or recusal.

1. Dell H. Palmer, Tanja E. Adams, and Audrey Neely, Appellants;
2. Mississippi Real Estate Commission, Appellee;
3. Roy H. Liddell;
4. Clint Vanderver;
5. The law firm of Wells Marble & Hurst, PLLC;
6. John L. Maxey; II;
7. Paul H. Kimble; and
8. The law firm of Maxey Wann, PLLC.



Paul H. Kimble,
Attorney for Mississippi Real Estate
Commission, Appellee

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STATEMENT OF THE ISSUES

I. Whether There Is Substantial Evidence in the Record that the Respondents Engaged in Improper Dealing

II. Whether There Is Substantial Evidence in the Record that the Respondents Failed to Provide Property Disclosure

III. Whether There Is Substantial Evidence in the Record that Respondents Violated the Dual Agency Disclosure Requirement

IV. Whether the Mississippi Real Estate Commission Relied Upon Violations Not Included in the Complaint when Making Its Decision

STATEMENT OF THE CASE

The Mississippi Real Estate Commission (sometimes hereinafter referred to as “MREC” or “the Commission”) executed an Order on January 29, 2007, disciplining Dell H. Palmer (sometimes hereinafter referred to as “Palmer”), Tanja E. Adams (sometimes hereinafter referred to as “Adams”), and Audrey Neely (sometimes hereinafter referred to as “Neely”) for their misconduct in a real estate transaction which closed on December 7, 2005. (R. at 23-34). Specifically, the Commission Ordered the licenses of Palmer and Adams be suspended for ninety (90) days¹, the license of Neely be suspended for thirty (30) days, and that Palmer, Adams, and Neely complete additional continuing education in the areas of agency and license law. (R. at 30-31). Palmer is the responsible broker; therefore, Adams and Neely look to her for education about real estate practice and for supervision of their real estate activities. Adams is a broker who presumably should also be aware of the rules and regulations concerning real estate practice. Neely, meanwhile, is a salesperson and must be licensed under – and supervised by – a responsible broker.

After conducting a hearing, MREC ruled that Palmer, Adams, and Neely (sometimes hereinafter collectively referred to as “Respondents”) violated Miss. Code

¹The Commission ordered the suspension of Palmer’s license to be held in abeyance.

Ann. §73-35-21(m)², Miss. Code Ann. § 89-1-521(1)³, and Rule IV.E.3(c)(3) of the Mississippi State Real Estate Commission Rules and Regulations⁴. (R. at 27-29). While the Commission recognized Palmer failed in her duty to sufficiently supervise agents working under her to avoid violations of the real estate agent laws and regulations, that failure was not a basis for the suspensions and requirement that the Respondents complete additional continuing education. (R. at 27-29). The Circuit Court of Madison County, Mississippi, entered a Corrected Opinion and Order stating there was substantial evidence to support the disciplinary actions on August 24,

²This section empowers the Commission to revoke or suspend a license when it finds a licensee has been guilty of “[a]ny act or conduct, whether of the same or a different character than hereinabove specified, which constitutes or demonstrates ... dishonest, fraudulent or improper dealing.” Miss. Code Ann. § 73-35-21(1)(m).

³ This section provides “[i]f more than one (1) licensed real estate broker is acting as an agent in a transaction subject to sections 89-1-501 through 89-1-523, the broker who has obtained the offer made by the transferee shall, except as otherwise provided in sections 89-1-501 through 89-1-523, deliver the disclosure required by sections 89-1-501 through 89-1-523 to the transferee, unless the transferor has given other written instructions for delivery.” Miss. Code Ann. § 89-1-521(1).

⁴The Rule provides “[t]he Broker must confirm that the buyer(s) understands and consents to the consensual dual agency relationship prior to the signing of an offer to purchase. The buyer shall give his/her consent by signing the MREC Dual Agency Confirmation Form which shall be attached to the offer to purchase. The Broker must confirm that the seller(s) also understands and consents to the consensual dual agency relationship prior to presenting the offer to purchase. The seller shall give his/her consent by signing the MREC Dual Agency Confirmation Form attached to the buyer’s offer. The form shall remain attached to the offer to purchase regardless of the outcome of the offer to purchase.” Rule IV.E.3(c)(3) of the Mississippi State Real Estate Commission Rules and Regulations.

2007.⁵ (R. at 67-69). The Respondents appealed to this Court.

⁵The original Opinion and Order, entered August 14, 2007, contained a typographical error.

STATEMENT OF FACTS

Realty Executives, through Tanja Adams, had an oral listing for sale of a residence located at 3603 Northview Drive, Jackson, Mississippi 39211. (R. at 25). The price advertised was \$126,000. (R. at 25). On October 3, 2005, Cynthia Curley (sometimes hereinafter referred to as "Curley") offered to purchase the property for \$126,000. (R. at 25). On November 22, 2005, a contract was accepted. (R. at 25). The contract stated the buyer was to provide a 20% down payment. (T.R. ex. 4). Curley told Adams at the time she executed the offer that she only had \$100 and would not be able to make a down payment of 20% of the purchase price. (T.R. at 38). Adams told her she did not have to worry about that deficit. The contract was accepted by the seller on November 22, 2005. (T.R. ex. 4). A dual agency confirmation form signed by Curley, on October 3, 2005, was apparently signed by the seller on December 8, 2005, the day the transaction closed, confusing the confirmation of dual agency. (T.R. ex. 5).

A Property Condition Disclosure Statement form, dated by seller on October 12, 2005, did not appear with the documents relating to the transaction kept by the broker and transmitted to the Commission in the course of its investigation. (T.R. ex. 8). The Respondents were unable to explain why the document which related to the transaction had not been maintained in their files as required by the Commission

regulations. There was no indication as to when the Disclosure Statement was delivered to the buyer as required by law.

The closing took place on December 8, 2005. (R. at 27). The closing statement showed the sales price to be \$126,000.00. (T.R. ex. 14). The HUD-1 stated the principal amount of the new loan to be \$100,800.00. (T.R. ex. 14). A check was brought to the closing for the buyer as reflected on the HUD-1 in the amount of \$27,442.79. (T.R. ex. 14). The lender required confirmation of Curley's ability to pay a 20% down payment. This was accomplished by deposit of \$25,200 by Maranatha Industries into Curley's credit union account where it was held for six days and then drafted out of the account. (T.R. ex. 16). This apparently gave the lender the opportunity to "verify" that the buyer had the financial capacity to pay the \$25,200.00 down payment.

The details of the transaction were not accurately reflected in the Contract of Sale or on the closing statement. (T.R. ex. 4, ex. 14). Adams and Neely were aware of these inaccuracies. (R. at 38-42). The Contract of Sale indicated a 20% down payment and the closing statement revealed the financing to be a conventional uninsured loan. (T.R. ex. 4, ex. 14). Testimony established the misleading nature of the transaction as reflected in the Contract of Sale and on the closing statement. Testimony established the transaction apparently included use of a down payment

assistance program which is an acceptable method under most circumstances for assisting home buyers. In this case a 20% down payment was provided by a non-profit corporation and then immediately repaid to the non-profit corporation by the seller. This payment was not reflected on the HUD-1. (T.R. ex. 14). Thus, the seller, in truth, sold the property which had a contract price of \$126,000.00 for approximately \$100,000.00. An investor in the secondary market would not be aware of the details of the transaction and in particular since it would not be alerted that the down payment by the buyer had actually not originated from her funds. The Commission noted that in a transaction such as this, when a high risk borrower does not invest a substantial amount of equity, the probability of default increases considerably. Further, there was testimony that the actual value of the sale here was substantially below the \$126,000.00 contract sales price because the seller paid \$27,442.79 on behalf of the buyer.

Respondents claimed that since the seller was a limited liability company, it fell within the exceptions for disclosure set forth in Rule IV.E.4. The Commission stated it would have recognized this exception to the disclosure, but the seller signed the Working With a Real Estate Broker form dated October 3, 2005, the Contract for Sale and Purchase of Property dated November 22, 2005, the Contract Addendum dated November 22, 2005, another Contract Addendum dated November 22, 2005, and

another Dual Agency Confirmation form dated July 27, 2005, on this property as an individual (not as a limited liability company). (T.R. ex. 4, ex. 6, ex. 17). Since there was no written listing agreement, there was no clear statement by the seller whether he was selling the property as a limited liability company or as an individual. In view of these written representations of the seller as an individual, rather than as a limited liability company, the Commission held the Respondents were required to properly comply with the dual agency confirmation procedures and that they had failed to conform to these procedures. (R. at 26).

Palmer, the responsible broker, testified at the hearing that she usually reviewed the files of the agents in her firm and that she specifically reviewed the file in this transaction. (T.R. at 213). She could not explain why the forms had not been properly completed or why the Property Condition Disclosure Form had not appeared in the file. She did not appear at the closing of the transaction.

SUMMARY OF THE ARGUMENT

As the Madison County Circuit Court found, the Mississippi Real Estate Commission's Order suspending the Respondents' real estate licenses and ordering additional continuing education is supported by substantial evidence contained in the record. The Commission's decision in this case is not arbitrary, capricious, beyond the power of the agency to make or violative of any statutory or Constitutional right of the complaining party. "In reviewing an administrative agency's findings of fact, this court's authority, as well that of the circuit court, is limited by the arbitrary and capricious standard of review." *Mississippi Real Estate Comm'n v. McCaughan*, 900 So.2d 1169, 1172-73 (Miss.App. 2004) (quoting *Mississippi Real Estate Comm'n v. Hennessee*, 672 So. 2d 1209, 1217 (Miss. 1996)). The Court, quoting *McDerment v. Mississippi Real Estate Comm'n*, 748 So. 2d 114, 118 (Miss. 1999) said, "Deference is given to only an administrative board's knowledge within its own area of expertise, or afforded to an administrative agency's 'construction of its own rules and regulations'". *Id.* Based on the facts and evidence presented at the hearing of the case, suspending the Respondents' licenses and ordering them to complete continuing education was proper. *Mississippi Real Estate Comm'n v. McCaughan*, 900 So.2d 1169, 1172-73 (Miss.App. 2004).

Testimony of witnesses under oath at the January 16, 2007, administrative

hearing, as well as documentary evidence, supports the Commission's decision to suspend the Respondents' licenses and order them to complete continuing education on the basis of improper dealings, the failure to properly receive and maintain consent for dual representation, and the failure to provide the proper disclosure.

The Commission's decision to suspend the Respondents' real estate brokers license and to order them to complete additional continuing education was not arbitrary and capricious. The Commission based its ruling and sanctions against the Respondents on substantial evidence contained in the record. Evidence presented at the hearing on this matter support the Commission's finding that the Respondents violated Miss. Code Ann. §73-35-21(m), Miss. Code Ann. § 89-1-521(1), and Rule IV.E.3(c)(3) of the Mississippi State Real Estate Commission Rules and Regulations.

The Commission based its ruling and sanctions in this case on the substantial evidence contained in the record. It is respectfully requested, therefore, that this Court affirm the Madison County Circuit Court's Opinion and Order affirming the Mississippi Real Estate Commission's January 27, 2007, Order in full.

ARGUMENT

I. Standard of Review

The standard of review from a decision of the Mississippi Real Estate Commission is well settled in the State of Mississippi. A court has no authority to intervene unless it makes a determination that the "Commission's decision was arbitrary and capricious, a standard we have equated with our familiar substantial evidence rule limiting our scope of review to trial court findings of evidentiary and ultimate fact." *Mississippi Real Estate Comm'n v. White*, 586 So. 2d 805, 808 (Miss. 1991), citing *Harris v. Mississippi Real Estate Comm'n*, 500 So. 2d 958, 962 (Miss. 1986); *Smith v. Sullivan*, 419 So. 2d 184, 187-88 (Miss. 1982); *Mississippi Real Estate Comm'n v. Ryan*, 248 So. 2d 790, 793-94 (Miss. 1971). This Court's review of the Commission's disciplinary action in this case is limited to determining whether or not the Commission's action was (1) supported by substantial evidence, (2) arbitrary or capricious, (3) beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. *McDerment v. Mississippi Real Estate Comm'n*, 748 So. 2d 114, 118 (Miss. 1999). In *Harris*, the Supreme Court of Mississippi declined to take the complainant's invitation to separately evaluate the findings and punishment of the Mississippi Real Estate Commission:

[O]ur traditional standard of review, whether or not it arguably allows such a determination, does not obligate us to separately second guess an administrative agency's imposition in position of sanction. We take this position in recognition of the unique position administrative agencies hold. The agency charged with regulating certain activities knows best how to police its own. This seems especially true where an agency commission comprised of fellow practitioners, as in the Real Estate Commission, sits in judgment of one of its own.

Harris, 500 So. 2d at 963.

In this case now before the Court, the Commission's action was (1) supported by substantial evidence contained in the record, (2) not arbitrary or capricious, (3) within the power of the Commission to make, and (4) not in violation of any statutory or Constitutional right of the Respondents, and, therefore, MREC respectfully suggests this Court should affirm the Madison County Circuit Court's decision to uphold the Commission's Order.

The Respondents claim the Commission's decision should be subject to "heightened scrutiny". This argument is misplaced. It is a well-settled rule that an appeal from an administrative agency's decision is "limited to determining 'reasonableness' and 'lawfulness' of the order of the administrative agency." *Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair*, 222 So. 2d 664 (quoting *Illinois Central R.R. v. Dodd*, 105 Miss. 23, 61 So. 743 (1913)). A court

sitting in review of an appeal from the Commission, or any other administrative agency, has no authority to intervene unless it makes a determination that the Commission's decision was arbitrary and capricious. This standard is equated with the "substantial evidence rule" articulated in *Mississippi Real Estate Comm'n v. White*, 586 So. 2d 805, 808 (Miss. 1991), which limits the scope of review of an administrative decision to "trial court findings of evidentiary and ultimate fact." *Id.* at 808.

Great deference is accorded to an administrative agency's construction of its own rules and regulations and the statutes under which it operates. In *Mississippi Real Estate Comm'n v. Geico Financial*, 602 So. 2d 1155 (Miss. 1992), the Court said "In attempting to determine the sufficiency and applicability of MREC's rules ..., it is proper to accord deference to the agency's construction of its own rules and regulations. *Id.* at 1156. See also, *Mississippi Real Estate Comm'n v. White*, 586 So. 2d 805 (Miss. 1991); *Harris v. Mississippi Real Estate Comm'n*, 500 So. 2d 958 (Miss. 1986); *Smith v. Sullivan*, 419 So. 2d 184 (1982); *Mississippi Real Estate Comm'n v. Ryan*, 248 So. 2d 790 (Miss. 1971). See generally, *Melody Manor Convalescent Center v. Mississippi State Dept. of Health*, 546 So. 2d 972 (Miss. 1989) (citing *Briscoe v. Buzbee*, 163 Miss. 574, 143 So. 407 (1932); *Winston County v. Woodruff*, 187 So. 2d 299 (Miss. 1966); *State Tax Commission v. Edmondson*, 196

So. 2d 873 (Miss. 1967); *Grant Center Hosp. v. Health Groups, etc.*, 528 So. 2d 804, 808 (Miss. 1988)).

The Mississippi Supreme Court also has held that it will not substitute its judgment for the judgment of an administrative agency when the action of the agency is not arbitrary or unreasonable, and when it is supported by substantial evidence. *Mississippi Real Estate Comm'n v. Anding*, 732 So. 2d 192 (Miss. 1999) (citing *Mississippi Real Estate Comm'n v. Hennessee*, 672 So. 2d 1209, 1214; *Melody Manor Convalescent Center*, 546 So. 2d at 974)). See also *State Board of Psychological Examiners v. Coxe*, 355 So. 2d 699 (Miss. 1978). The burden of proof rests with the party challenging the actions of an administrative agency. See *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511 (5th Cir. 1983). The Respondents have clearly not met this burden.

II. There Is Substantial Evidence in the Record that the Respondents Engaged in Improper Dealing

The Commission, in its January 27, 2007, Order, found the Respondents violated Miss. Code Ann. § 73-35-21. This section empowers the Commission to revoke or suspend a license when it finds a licensee has been guilty of “[a]ny act or conduct, whether of the same or a different character than hereinabove specified, which constitutes or demonstrates ... dishonest, fraudulent or improper dealing.”

Miss. Code Ann. § 73-35-21(1)(m).

The facts concerning financial details of the transactions are not in dispute. Curley, the buyer, was counseled by Adams to make an offer of \$126,000 on the subject property. The contract reflects that the buyer was to provide a down payment of 20%. When Curley told Adams she would not be able to make such a down payment, she was told not to worry about it. Curley testified the lender required confirmation of her ability to pay the \$26,200 down payment required in the contract. To accomplish this, \$26,200 was provided for deposit in Curley's account by a non-profit corporation, the deposit was verified by the lender, and the money was immediately drafted back out of Curley's account and repaid to the non-profit corporation. The settlement statement – or HUD-1 – did not reflect this occurrence. Instead, the HUD-1 listed the loan as a conventional, uninsured loan, and the Contract of Sale indicated that a down payment of 20% was made by the buyer. As this Court is no doubt aware, the rates of foreclosure of such a loan are much lower than a loan where the purchaser does not make a down payment of 20% of the purchase price. Correspondingly, loans where a 20% down payment has been made have a much higher value in the secondary market. Recent months have demonstrated the dramatic rise in foreclosure rates which occur with these types of loans – as well as the significant incentives to improperly characterize a loan as low-risk. The Respondents

complicity in this plan is made clear by Adams's statement to Curley that she did not need worry about where she would get the \$26,200 down payment indicated on the offer sheet. The Respondents refer to this \$26,200 as "Curley's money". Nothing could be further from the truth. As Curley herself stated about the money, "I wasn't supposed to touch it." This "gift" from Maranatha Industries to Curley was repaid out of the closing proceeds by the seller, Big Z Properties, LLC. Clearly, this transaction constituted improper dealing by the Respondents as contemplated by Miss. Code Ann. § 73-35-21(1)(m). Therefore, MREC was justified in imposing the license suspensions and requiring additional continuing education.

Similar misrepresentations concerning settlement documents were made in *Mississippi Real Estate Comm'n v. McCaughan*, 900 So.2d 1169 (Miss.App. 2004). There, when a \$1600 unpaid debt threatened to derail the buyer's financing, the agent changed the selling price to cover this indebtedness out of the proceeds of the sale. *Id.* at 1171. However, the HUD-1 was not changed to reflect the payment of this debt. The Court stated, "the MREC heard evidence that [the agent] was involved in the preparation of a false contract and allowed the sellers to sign a settlement statement falsely certifying that they had no knowledge of loans other than what was listed in the contract ... This evidence was sufficient to make a finding of substantial misrepresentation, as well as a finding of bad faith, incompetency or

untrustworthiness, in violation of Mississippi Code Annotated § 73-35-21(1)(a) and (m).” *Id.* at 1177. The Respondents were engaged in the preparation of similarly dishonest documents in the instant case. The apparent scheme to disguise the status of the type of loan used to purchase the subject property was aided and abetted by the Respondents through their preparation of documents which misrepresented the nature of the transaction.

As this Court is no doubt aware, with the rise of the secondary market in mortgage securities, there has been a corresponding rise in dishonest, fraudulent or improper behavior in order to make the loan more attractive to potential purchasers. The paperwork with this loan does not indicate that down payment assistance was used to purchase the home. The Contract of Sale – prepared by the Respondents – indicates Curley will provide 20% of the purchase price as a down payment; Curley’s bank statement makes clear the \$25,200 was deposited, presumably checked by the lender, and, soon thereafter, withdrawn; and the settlement statement likewise does not reflect the down payment assistance, labeling the loan as conventional uninsured, instead. There is substantial evidence in the record that the Respondents were not just aware of these machinations but that they took an active part in bringing them to fruition.

The Respondents, by definition, acted as Curley’s agents. They counseled her

to make a false contract offer to the buyer and brushed aside her concerns about her ability to pay for the house they advised her to purchase. The Respondents led Curley to believe she purchasing a house in which she already had nearly \$30,000 in equity. Instead, she was advised to purchase a home she could not afford that has put in her in financial difficulties which could lead to foreclosure. The Respondents' misrepresentations when acting as Curley's agents have grievously injured her and provide more than adequate justification for the suspension of the Respondents licenses and requiring additional continuing education.

III. There Is Substantial Evidence in the Record that the Respondents Failed to Provide Property Disclosure

The Respondents claim they substantially complied with the property disclosure required by Mississippi law. Miss. Code Ann. § 89-1-521 dictates that an agent must deliver the property disclosure statement to a buyer. A property disclosure statement, dated October 12, 2005, was introduced into evidence during the January 16, 2007, hearing concerning the Respondents' violations of Mississippi Statutes and the Rules and Regulations of the Mississippi Real Estate Commission. The property disclosure statement, however, did not appear with the documents relating to the transaction kept by the broker and transmitted to the Commission in the course of its investigation. The Respondents were unable to explain why the property disclosure

document which related to the transaction had not been maintained in their files *as required by Commission regulations*.

The Respondents complain there is no affirmative evidence the disclosure was not provided to Curley. Notwithstanding the impossibility of proving a negative, the failure of the Respondent to keep the Property Disclosure Condition Statement, as required by MREC, is manifest as it was not included in the documents kept on file by the respondents concerning this transaction. The fact that MREC cannot somehow prove beyond reasonable doubt that the Respondents did not provide a property disclosure statement does not mean there was substantial compliance with Miss. Code Ann. § 89-1-521; instead, the fact that the disclosure was not included in the file transmitted to the Commission constitutes substantial evidence that the Respondents failed to comply with their statutory requirements. Therefore, the license suspensions and additional continuing education requirements mandated by the Commission should be upheld.

IV. There is Substantial Evidence in the Record that the Respondents Violated the Dual Agency Disclosure Requirement

The Respondents also violated Rule IV.E.3(c)(3) of the Mississippi Real Estate Commission Rules and Regulations. Rule IV.E.3(c)(3) provides “[t]he Broker must confirm that the buyer(s) understands and consents to the consensual dual agency

relationship prior to the signing of an offer to purchase. The buyer shall give his/her consent by signing the MREC Dual Agency Confirmation Form which shall be attached to the offer to purchase. The Broker must confirm that the seller(s) also understands and consents to the consensual dual agency relationship prior to presenting the offer to purchase. The seller shall give his/her consent by signing the MREC Dual Agency Confirmation Form attached to the buyer's offer. The form shall remain attached to the offer to purchase regardless of the outcome of the offer to purchase." Rule IV.E.3(c)(3) of the Mississippi Real Estate Commission Rules and Regulations.

The Respondents claim they were exempt from Rule IV.E.3(c)(3) because licensees are not required to comply with that rule when a limited liability company is part of the transaction and Big Z Properties, LLC, was the seller. However, there were numerous documents which indicated the seller was an individual – John Zehr – rather than a limited liability company. For example, the seller signed the Working With a Real Estate Broker form dated October 3, 2005, the Contract for Sale and Purchase of Property dated November 22, 2005, the Contract Addendum dated November 22, 2005, another Contract Addendum dated November 22, 2005, and another Dual Agency Confirmation form dated July 27, 2005, on this property as an individual. Since there was no written listing agreement, there was no clear statement

by the seller as to whether he was selling the property as a limited liability company or as an individual. In view of these written representations of the seller as an individual, rather than as a limited liability company, the Commission held the Respondents were required to properly comply with the dual agency confirmation procedures – which they failed to do. Thus, there is substantial evidence to support MREC’s contention that the Respondents failed to comply with Rule IV.E.3(c)(3) of the Mississippi State Real Estate Commission Rules and Regulations, and the license suspensions and additional continuing education requirements should be upheld.

V. The Mississippi Real Estate Commission Found the Respondents Violated Miss. Code Ann. §§73-35-21(m) and 89-1-521(1) and Rule IV.E.3(c)(3) of the Rules and Regulations of the Commission

The Respondents complain that Palmer was sanctioned for a violation which was not included in the original complaint served by MREC. Specifically, the Respondents appear to claim the Commission based its decision to impose discipline on the Respondents breach of a “rule” that agents have a legal duty to perform financial checks on purchasers or to rework contracts to reflect the use of proper down payment assistance.⁶ MREC’s Order, however, made it clear the sole basis for

⁶The Respondents also claim as error in their statement of the issues MREC’s purported reliance upon Palmer’s failure to properly supervise agents under her direction. The Respondents do not, however, make any reference to this issue in the body of their brief. To the extent same is raised, as shown below, it is clear on the face of the Order that the Commission did not rely upon Rule IV.A.1 which provides “It shall be the duty of the responsible broker to instruct the licensees under that broker in the fundamentals of the real estate practice, ethics of the profession

the imposition of the license suspensions and requirement for additional continuing education was the Respondents violation of Miss. Code Ann. §§73-35-21(m) and 89-1-521(1) and Rule IV.E.3(c)(3) of the Rules and Regulations of the Commission. MREC did not rule that an agent must conduct an investigation of a purchaser's financial condition; rather, the evidence showed the Respondents were guilty of improper dealing, that they failed to provide the property disclosure required by law, and that they violated the dual agency disclosure requirement. MREC did not sanction the Respondents because down payment assistance was used; rather, the evidence showed the Respondents were an integral part of a dishonest and misleading transaction. The plain language of the Commission's Order establishes it only relied upon the Respondents violations of Miss. Code Ann. §§73-35-21(m) and 89-1-521(1) and Rule IV.E.3(c)(3) of the Rules and Regulations of the Commission in making its decision, rather than the nebulous violations claimed by the Respondents.

Harris v. Mississippi Real Estate Comm'n, also makes clear the propriety of the Commission's actions. In *Harris*, the agent complained the sworn complaint upon which MREC instituted disciplinary proceedings did not include sworn

and the Mississippi Real Estate License Law and to exercise supervision of their real estate activities for which a license is required." Nowhere in the Commission's Opinion is Rule IV.A.1 even mentioned. Notwithstanding the fact that the Commission did not rely upon Rule IV.A.1 in imposing discipline on Palmer, it is clear she, in fact, did not adequately supervise the agents under her direction as evidenced by the violation of Rule IV.E.3(c)(3) and the improper dealing which occurred.

allegations which were the eventual basis for the imposition of discipline. 500 So. 2d 958, 966. The agent concluded such an action was error. *Id.* The Court disagreed, stating the “Commission may also hold a hearing on its own motion and proceed by its own complaint.” *Id.* As the face of its Order makes clear, the Mississippi Real Estate Commission did not base its decision concerning Palmer’s suspension on her failure to properly supervise agents under her control. In any event, as *Harris* makes clear, the MREC is entitled to pursue allegations on its own motion and by its own complaint. There was no violation of the due process rights of Dell Palmer.

CONCLUSION

The Mississippi Real Estate Commission’s finding are supported by substantial evidence contained in the record. The evidence reflects the Respondents engaged in dishonest and improper dealing by taking part – or, more accurately, facilitating – a scheme wherein the nature of the mortgage on the property was mischaracterized. The evidence also shows the Respondents also failed to provide the required property disclosure. In addition, the evidence contained in the record makes clear the Respondents failed to disclose their dual agency. There is substantial evidence in the record supporting the Mississippi Real Estate Commission’s decision, and it respectfully suggests the Opinion and Order of the Madison County Circuit Court upholding the Commission’s Order should be affirmed.


CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the *Brief of the Appellee* was caused to be served on the following:

Judge William E. Chapman
Madison County Circuit Court
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Canton, Mississippi 39046

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This the 25th day of February, 2008.



Paul H. Kimble