IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CC-01660

DELL H. PALMER, TANJA E. ADAMS, AND AUDREY NEELY

Appellants/Defendants

vs.

MISSISSIPPI REAL ESTATE COMMISSION

Appellee/Plaintiff

On Appeal from the Circuit Court of Madison County, Mississippi

BRIEF OF APPELLANTS DELL H. PALMER, TANJA E. ADAMS, AND AUDREY NEELY

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants Dell H. Palmer, Tanja E. Adams, and Audrey Neely certifies that the following listed persons have an interest in the outcome of this case.

Roy H. Liddell - Attorney for Appellants Dell H. Palmer, Tanja E. Adams, and and Audrey Neely

Clint D. Vanderver - Attorney for Appellants Dell H. Palmer, Tanja E. Adams, and Audrey Neely

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Dell H. Palmer

Tanja E. Adams

Audrey Neely

Mississippi Real Estate Commission

Robert Praytor, Administrator of Mississippi Real Estate Commission

Respectfully submitted,

Roy H. Liddell
Attorney of Record for Dell H. Palmer, Tanja E. Adams, and Audrey Neely

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

FORM OF CITATIONS TO THE RECORD

References to transcribed testimony shall be designated as "Tr. ___." References to exhibits shall be the same as their marking as exhibits at the hearing before the Mississippi Real Estate Commission. (*E.g.*, "Exh. 1 ..." for exhibits.)

STATEMENT OF THE ISSUES

The following issues are presented by this appeal:

1. Whether substantial evidence supported the Mississippi Real Estate Commission's ("MREC" or "Commission") January 29, 2007 Order (the "Order") disciplining Appellants with suspension of their licenses for alleged misconduct relating to the sale of a residence by Big Z Properties, LLC to Cynthia Curley;

2. Whether MREC's Order was arbitrary and capricious;

3. Whether the MREC clearly established the guilt of Appellants or any of them, sufficient to impose the drastic and harsh remedy of license suspension;

4. Whether MREC's Order, insofar as it relates to down payment assistance and the accuracy of the HUD-1 statement, is based on an actionable claim as asserted in MREC's complaint (*i.e.*, whether Count V of the Complaint is sufficient on its face to state a legally cognizable claim);

5. Whether MREC's Order of suspension of licenses of Appellants, insofar as it relates to dual agency allegations of Count IV of the Complaint, was arbitrary and capricious and lacked the requisite foundation of substantial evidence in the record;

6. Whether MREC's Order of suspension of licenses of Appellants, insofar as it relates to property condition disclosure allegations of Count IV of the Complaint, was arbitrary and capricious and lacked the requisite foundation of substantial evidence in the record;

7. Whether MREC's Order of Suspension of licenses of Appellants, insofar as it relates to the down payment assistance and other allegations of Count V of the Complaint, was arbitrary and capricious and lacked the requisite foundation of substantial evidence in the record;

8. Whether MREC's Order of suspension of the license of Appellant Dell Palmer relating to alleged failure to conduct a file review, was properly pled in the Complaint and was thus an issue for adjudication before MREC consistent with Palmer's right to due process and notice of claims against her;

9. Whether MREC's Order properly segregated and applied evidence applicable to each Appellant, and was therefore based on substantial evidence to support licensure suspension separately as to each Appellant;

10. Whether MREC's Order was arbitrary and capricious in purporting to apply all evidence indiscriminately as to all Appellants;

11. Whether MREC's Order was based on claims and alleged wrongs that were not asserted in the Complaint; and thus wrongfully deprived Appellants of fair notice and due process of the law;

12. Whether the Order, to the extent it represents MREC's effort to regulate down payment assistance and HUD-1 disclosures, exceeds MREC's power and authority under the Constitution of Mississippi and other applicable law; and

13. Whether MREC's Order is violative of Appellants' rights to procedural and substantive due process of law as guaranteed by the U.S. Constitution and the Constitution of the State of Mississippi.

STATEMENT OF THE CASE

Appellants Dell H. Palmer ("Palmer"), Tanja E. Adams ("Adams"), and Audrey Neely ("Neely") appeal the circuit court's affirmance of the Mississippi Real Estate Commission's ("Commission") January 29, 2007 Order disciplining them for alleged misconduct relating to the sale of a residence by Big Z Properties, LLC ("Big Z" or "Seller") to Cynthia Curley ("Curley" or "Buyer").

The Commission's ruling stems from the following three claims against Appellants: (1) that the Seller failed to provide a property condition disclosure statement as required by law; (2) that Appellants failed to have a dual agency confirmation form properly executed by the Seller; and (3) that Appellants are guilty of certain alleged irregularities concerning down payment assistance given by a non-party charity to the Buyer. These allegations either wholly fail to state a claim against Appellants (3) or are completely unsupported in the record of these proceedings (1), (2) and (3).

Appellants respectfully ask this Court to reverse and render the circuit court's ruling which upheld the decision of the Commission, including the ordering of additional continuing education and license suspensions for each Appellant. In the alternative, Appellants request that the Court reverse and render the license suspensions as lacking a substantial basis in the record, leaving in place only the continuing education requirements of the Order.

STATEMENT OF THE FACTS

On October 3, 2005, Curley offered to purchase a home located at 3603 Northview Drive, Jackson, Mississippi, that was owned by Big Z Properties, LLC, a Mississippi limited liability company ("Big Z"). (Exh. 4). The purchase price was $126,000. *Id.* On the same day, Curley signed a dual agency confirmation form, prominently identifying the "Seller" as "Big Z Properties, LLC." (Exh. 5). On October 11, 2005, John Zehr ("Zehr"), acting as "manager" for Big Z, signed a dual agency confirmation form. (Tr. 155-156). In fact, Zehr received the dual agency confirmation form as early as September 27, 2005. (Tr. 155-156 & 205). Zehr also completed a "Working With a Real Estate Broker" form on October 11, 2005, which recognized a disclosed dual agency. (Exh. 2). Seller signed a property condition disclosure statement. (Exh. 8). Appellant Neely gave this disclosure to Buyer Curley. (Tr. 202). On November 22, 2005, the contract was accepted by the Seller, and the sale of the property closed on December 8, 2005. (Tr. 57; Exh. 4, 5, & 14).

At the time of the above transactions, Adams and Neely, who are agents with Realty Executives, were acting as dual agents for Buyer and Seller. (Exh. 2, 3, 4, 5, & 6). The Contract of Sale required the Buyer to provide a 20% down payment. (Exh. 4). The Buyer, however, lacked the necessary funds for such a down payment which ultimately led to the use of down payment assistance from a lawful charitable organization, Maranatha Prison Ministries ("Maranatha"). (Tr. 130 & 175). After proper receipt of the gifted funds from Maranatha for the down payment before the closing, the Buyer tendered $27,442.79 of her money at the closing. (Tr. 187-188; Exh. 14). The down payment assistance to Ms. Curley from Maranatha was arranged by someone named "Damien" of "Windsor Financial" and not by any Appellant. (Tr. 112). MREC Commissioner Robert Praytor candidly admitted at trial that MREC had no information that Appellants were involved in the depositing or withdrawal of down payment assistance money in Curley's account. (Tr. 70). Curley herself admitted

she was not given the down payment assistance check "at the closing," (Tr. 112), an assertion on which MREC had staked its claim of wrongdoing that simply proved to be untrue.[1]

The HUD-1 closing statement was signed by Curley as the Borrower and Zehr as manager for the Seller, Big Z Properties, LLC and was accurate in every respect. (Exh. 14). Notably, MREC Administrator Robert Praytor admitted outright that he had no evidence that down payment assistance was unlawfully utilized in this transaction, such that the HUD-1 form was inaccurate in the way it was filled out. (Tr. 66-68). Appellants did not sign or certify the HUD-1 statement in any event. (*Id.* and Exh. 14).[2]

After hearing evidence, despite the foregoing facts that were either admitted by the Administrator or are otherwise uncontroverted in the record (or both), the Commission found against the Appellants.[3] The Commission rendered the following unsubstantiated findings of fact, conclusions of law, and disciplinary order:

1. That the Seller's written representations covering dual agency were in an individual capacity rather than as a limited liability company which precluded the application of an exception to

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[1] The Administrator had informally claimed that if the down payment assistance funds were tendered "at closing" by someone other than Curley, then the HUD-1 representation of Curley of her contribution to the settlement must not be true. Of course, since Curley undeniably received an irrevocable gift of funds in advance of -- and not "at the closing"-- from Maranatha, there was nothing amiss in the legitimacy of the down payment assistance transaction. And, more to the point, there was nothing in that transaction that implicated any Appellant in any way, shape or form. Accordingly, this claim–which was never pled in the Complaint–had no basis in any event.

[2] The Administrator agreed that if the down payment assistance was properly handled, and the money belonged to Buyer at the closing, then the HUD-1 would indeed be accurate in representing the Buyer's contribution to the purchase price. (Tr. 66-68). There was no evidence adduced at the hearing that would support any claim or notion that the down payment assistance used in this case was improperly secured or utilized.

[3] In a troubling aspect of the hearing, one witness offered uncontroverted testimony that, according to MREC's own investigation, Administrator Praytor was "out to get" these real estate agents, explaining how such an unfair and baseless prosecution could have occurred. (Tr. 159-160).

dual agency disclosure, **despite uncontroverted evidence (including an admission by Praytor) that the Seller was, in fact, a limited liability company which mandated application of the exemption from dual agency disclosure requirements;**

2. That the testimony did not confirm the property condition disclosure statement was provided to the Buyer as required by law, **despite uncontroverted evidence that Neely had provided the statement to the Buyer, and the demonstrable failure of the Commission to present any evidence to the contrary;**

3. That the details of the down payment assistance were not accurately reflected in the Contract of Sale or on the HUD-1 closing statement, **notwithstanding that (a) Administrator, Robert Praytor, *admitted to the accuracy of the HUD-1 closing statement*; (b) in any event, no Mississippi or federal law, rule, or regulation places any obligation on real estate agents like Appellants to insure the accuracy of HUD-1 closing statements in any event; (c) the Commission's rules and regulations do not address down payment assistance or provide any notice or requirement that down payment assistance be reflected in real estate contracts; (d) Appellants were not even signatories to the HUD-1; and (e) when the contract was signed by Buyer, there was no down payment assistance in place to disclose;**

4. That the testimony of the Administrator, Robert Praytor, established the misleading[4] nature of the transaction involving down payment assistance as reflected in the Contract of Sale and HUD-1 closing statement, **despite the Commissioner's admission at trial of: the lawfulness of down payment assistance; the accuracy of the HUD-1 closing statement; and that he is not a regulator in a position to testify as to whether down payment assistance was properly utilized**

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[4] Notably, no one involved in the transaction--not even the Buyer--even *claimed* to have been misled. No one was misled.

or not; and

5. That Appellants violated Miss. Code Ann. §73-35-21(m), Miss. Code Ann. §89-1-521(1), and Rule IV.E.3(c)(3) of the Rules and Regulations of the Commission for the alleged misconduct which resulted in the suspension of Palmer's license for a period of ninety (90) days,[5] the suspension of Adams' license for ninety (90) days, the suspension of Neely's license for thirty (30) days and the ordering of eight (8) additional hours of continuing education for each Appellant, **despite the lack of any evidence–much less substantial evidence–to support these claims.**

The circuit court's affirmance of the Commission's Order should be reversed and rendered in its entirety due to the clearly erroneous findings of fact and conclusions of law by the Commission which are not supported by substantial evidence. At a minimum, and consistent with Mississippi law, the circuit court's ruling should be reversed and rendered to the extent it upheld the harsh sanction of suspension of the licenses of the Appellants.

[5] The Commission suspended Palmer's license for ninety (90) days but ordered that the suspension be held in abeyance.

SUMMARY OF THE ARGUMENT

The Commission's disciplinary order against Palmer, Adams, and Neely arises from allegations of impropriety in a single transaction with regard to use of a property condition disclosure statement, a dual agency confirmation form, and down payment assistance by a lawful charity to the Buyer. However, there is no evidence in the record to support the Commission's findings.

As for the property condition disclosure statement, Appellants were in compliance with the applicable statute. This disclosure document had been signed by the Seller two months prior to closing. There was uncontroverted testimony at the hearing that Appellant Neely provided the disclosure to the Buyer. MREC failed to present any evidence to the contrary, much less clear evidence as is required to suspend the Appellants' licenses. The circuit court's affirmance of the Commission's Order should be reversed and rendered as regards the property condition disclosure claim.

The Commission's decision in regard to the dual agency confirmation form is likewise clearly erroneous and not supported by the applicable regulation or the record evidence. Both the Seller and Buyer signed the dual agency form approximately two months prior to closing. The Buyer was therefore made fully aware of the dual agency. Moreover, the transaction indisputably involved a limited liability company as a seller, which is categorically exempt, as a matter of clear Mississippi law, from the dual agency disclosure requirements. MREC's half-hearted effort to support this finding by citing to alleged discrepancies in the way certain documents were signed is wholly insufficient and ignores the inalterable fact that the seller, Big Z Properties, LLC, was a Mississippi limited liability company exempt by law (MREC regulations) from the dual agency disclosure requirement. There was no evidence presented to the contrary.

In regard to the issue of down payment assistance, the Commission's Complaint simply fails to state a claim of wrongdoing against the Appellants or to identify any specific wrongdoing of any Appellant that has any support in the record of the hearing.[6] Further, the Commission's ruling that the down payment assistance was not accurately reflected in the Contract of Sale or on the HUD-1 closing statement is unsupported by the record evidence, and is belied in any event by the inescapable admission by Administrator Praytor that a HUD-1 reflecting a Buyer contribution to the purchase is indeed accurate if down payment assistance is properly utilized, as it was in this case. In sum, MREC's claims regarding down payment assistance fall short of stating a claim, but in any event are not supported by substantial evidence, much less clear evidence, which MREC has the burden of proving.

Based on the lack of substantial evidence in support of its ruling, the Commission's decision should have been reversed and rendered in its entirety, or at least to the extent the Commission's Order provided the sanction of license suspension.

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[6] Administrator Praytor abandoned, for all practical purposes, the claim MREC initially attempted to state in Count V of the Complaint concerning down payment assistance and the HUD-1 form (that the Buyer did not tender funds at closing, making the HUD-1 inaccurate). Counsel for Appellants met with Praytor in advance of the hearing and explained how the Buyer had properly obtained down payment assistance from Windsor Financial, even volunteering documents obtained that showed the paper trial of the payments (none of which involved any Appellant). However, instead of dropping the prosecution and ending the harassment, Praytor simply attempted to concoct different claims that do not appear in the Complaint including, (a) that Appellants had some unspecified duty to incorporate down payment assistance information in the real estate contract (despite Buyer not having secured that assistance until a later date); and (b) that Appellants, who do not even sign HUD-1 forms, had some unspecified duty to do due diligence on the accuracy of such forms–audit them–at closings in Mississippi. Of course, these claims–that are not pleaded in the Complaint–were just made up by Praytor.

ARGUMENT

1. To Survive Review, MREC's Order Must be Supported by Clear and Convincing Evidence.

The law is well-established that "the scope of judicial review . . . of an administrative agency . . . is limited to determining whether the agency's order (1) was supported by substantial evidence, (2) arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party." *See Mississippi Real Estate Commission v. Anding*, 732 So. 2d 192, 196 (Miss. 1999). A court "will not overturn any administrative agency's finding that is based upon substantial evidence appearing in the record." *Id.* (internal quotation omitted). However, a heightened scrutiny of review is appropriate when, as in this case, the Commission adopts its own allegations as findings and conclusions. *Id.*

Moreover, when the suspension of a professional's license is at stake, testimony must clearly establish the guilt of the real estate agent. *Id.* As the Court in *Anding* noted: "When a realtor is threatened with the suspension or loss of his broker's license, he is protected by the familiar standard that the '*testimony . . . clearly establish . . . the guilt of the respondent.*'" *Id.* (citing *Mississippi Real Estate Comm'n v. White,* 586 So. 2d 805, 808 (Miss. 1991)) (emphasis added); *see also Mississippi State Bd. of Psychological Exam'rs v. Hosford,* 508 So. 2d 1049, 1054 (Miss. 1987) (holding that "disciplinary charges against a professional must be proved by clear and convincing evidence"). The need for this higher standard is particularly acute in the context of proceedings, like the ones in issue, to suspend the license of real estate professionals under the amorphous concept of alleged "conduct . . . which constitutes bad faith, incompetence or untrustworthiness, or dishonest, fraudulent or improper dealing" under Miss. Code Ann. § 73-35-21(m), the very ground on which MREC's Order

is based. However, the general nature of the grounds for action – *e.g.*, alleged "improper dealing"– is not a license to characterize any conduct of an agent, however innocent, as proper grounds for harsh punishment just because the Administrator wants to impose it and has a willing body of well-intentioned lay Commissioners essentially following his directives. *See Mississippi Real Estate Comm'n v. Ryan*, 248 So. 2d 790, 793 (Miss. 1971), wherein the Court held:

> In order to suspend the license of a real estate broker under a charge of bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings . . . the testimony must *clearly establish the guilt of the respondent*. Proof of surmise, conjecture, speculation or suspicion is not sufficient.

Id. at 793 (emphasis added). The record evidence in this case falls far short of the requirement that it "clearly establish" the guilt of Appellants as to *any* of the three claims asserted in the Complaint and adjudicated by MREC at the hearing. The proof adduced by MREC at the hearing is largely comprised of a collection of Administrator Praytor's personal opinions. Of course, the facts and applicable law, not the Administrator's opinions, are what should matter. There is no "clear evidence" to support any of MREC's claims.

Nor is the Commission's ruling supported by "substantial evidence." Indeed, the Order lacks *any* supporting or probative evidence on the claims relating to dual agency disclosure, down payment assistance and disclosures on the HUD-1 form. As for the allegation of technical non-compliance with the property condition disclosure, the evidence likewise falls far short of that required to suspend any Appellant's license. As shown below, there is certainly no "bad faith" or "fraudulent or improper dealing" evidenced in the record that could conceivably support a suspension of Appellants' licenses. Miss. Code Ann. § 73-35-21(m).

It is legally significant, in considering the standard of review, that the Commission plainly adopted its own allegations–which had little relation to the evidence--as findings and conclusions

in its ruling. As a result, heightened scrutiny of the findings and conclusions is necessary, appropriate and mandated by law, *see Anding, supra,* at 196. Application of this standard to the record and findings by MREC should compel overturning of the Commission's ruling, *at least insofar as licensure suspension is concerned.* Any attempt by the Commission to rely upon the standard of review as *carte blanche* justification for upholding its ruling must fail. This is particularly so with respect to certain claims, discussed at Section 4.e. *infra*, that were not pled in the Complaint and are not based on any law, rule, regulation or statute or other recognized standard of conduct.

2. **No Violation of Dual Agency Disclosure Requirement**.

Rule IV.E.4 of the Rules and Regulations of the Commission provides the following exception to dual agency disclosure requirements: **"[a] licensee shall not be required to comply with the provisions of Section 3, when engaged in transactions with any . . . limited liability company."** The Seller was Big Z Properties, LLC. (Exh. 5 & 14; Tr. 92-94). The exemption could not be clearer and its application to the instant transaction involving Big Z Properties, LLC could not be more apparent. The Commission's ruling that Appellants violated Rule IV.E.3(c)(3) of the Rules and Regulations of the Commission pertaining to dual agency disclosure was thus arbitrary and capricious under any conceivably rational reading of the law.

It is beyond dispute that the Seller was a limited liability company (*see* Exh.5 &14: **"Seller: Big Z Properties LLC"**). As such, the dual agency disclosure regulations are simply inapplicable. *See* Rule IV.E.4 of the Rules and Regulations of the Commission. (*See also*, Tr. 92-94 & 153-154). In any event, uncontroverted testimony established that all parties were fully aware of the dual agency relationship well in advance of the closing. (Tr. 89, 126-128, 154-155, & 201).

Nevertheless, in an apparent effort to find liability no matter the facts and applicable law, the Commission discredits itself entirely in stating that it would have recognized the exception but for the Seller allegedly having signed various documents as an individual. The record shows this to be utter nonsense. Rule IV.E.4 states nothing about how documents are signed. The only pertinent inquiry is whether the transaction was with an LLC. Administrator Praytor testified, when pressed: **"I understand that Big Z was in fact the seller."** (Tr. 94) The parties were similarly aware that Big Z was the Seller and that Zehr was acting as its manager. Indeed, the documents signed by the parties leave no other reasonable interpretation. (Exh. 5: **Dual Agency Confirmation** in which **Seller** is listed as **"Big Z Properties, LLC"**). Furthermore, Big Z Properties, LLC is plainly identified as a limited liability company as the Seller and was listed as such on the HUD-1 closing statement. (Exh. 14; *see also* Tr. 92-94; Administrator Praytor agreeing "absolutely" that Appellants were "engaged in a transaction with an LLC"). How the Commission could ignore this clear and unambiguous evidence is inexplicable.

The exception to dual agency disclosure should be strictly construed in favor of Appellants. *See Mississippi Real Estate Commission v. McCaughan* , 900 So. 2d 1169, 1173 (Miss. Ct. App. 2004)("Because the licensure statutes and regulations at issue are penal, the MREC is required to prove its case by clear and convincing evidence. The statute and regulations at issue must be strictly construed in favor of [the licensees].") The Commission's Order should be reversed and rendered to the extent it punishes Appellants for alleged failure to have dual agent disclosures signed.

3. <u>Substantial Compliance with Property Condition Disclosure Statement</u>

The Commission claims that the Appellants "failed to provide a property condition disclosure as required by law." (Compl. at ¶ IV.). Despite uncontroverted evidence that the disclosure was

delivered, the Commission found a violation of Miss. Code Ann. §89-1-521(1).

The Commission failed to adduce *any* evidence that the disclosure document was not delivered to and/or received by the Buyer. The disclosure form was signed by the Seller (indicating it was certainly not disregarded as a requirement). (Exh. 8). Also, there was uncontroverted testimony that Appellant Neely had told Adams that she had provided the disclosure to the Buyer. (Tr. 202). Buyer Curley was called by MREC to testify, but did not deny having been given the disclosure. Nor did Curley ever complain about the condition of the property. The record before the Court lacks affirmative evidence that the disclosure was not provided to Curley, the Buyer. MREC simply failed to meet its burden of proof on this claim. Accordingly, there is no substantial evidence, much less clear and convincing proof, to support the claim that the property condition disclosure was not provided to the Buyer.

4. No Legally Cognizable Claim or Irregularities Concerning Down Payment Assistance (Count V of the Complaint).

The Commission's findings of fact and conclusions of law in relation to down payment assistance are clearly erroneous and demonstrably unfounded. First, Count V of the Complaint fails to state any claim against Palmer, Adams, or Neely or identify any specific wrongdoing regarding down payment assistance or anything else. Thus, even if the allegations in Count V were presumed true, they would not support the Commission's order. Second, the core allegation of Count V (that the Buyer did not appear at closing with $27,442.79 as reflected in the HUD-1) was proven beyond any doubt at the hearing to be untrue. Instead, there was uncontroverted evidence that the Buyer was irrevocably given the money by a lawful charity before closing and tendered it at closing as reflected in the HUD-1. (Tr. 215-216). The Commission failed to elicit *any* testimony to the contrary.

Nevertheless, the Commission found that the details of the transaction were not accurately reflected in the Contract of Sale or on the HUD-1 closing statement. Based upon this "finding," the Commission determined that Appellants had violated Miss. Code Ann. §73-35-21(m) which allows for license suspension when found guilty of "[a]ny act or conduct . . . which constitutes or demonstrates . . . improper dealing."

As shown below, a careful review of the record demonstrates the absence of any evidentiary support for the Commission's ruling.

a. Praytor admitted that he does not regulate down payment assistance and, in any event, that it is not illegal.

Administrator, Robert Praytor, admitted he does not regulate down payment assistance and could not say whether down payment assistance was unlawfully utilized in this case (Tr. 56-58 & 76):

Q: ...You're not a regulator of down payment assistance, and you're not in a position to say whether down payment assistance is properly utilized or not?

A: No, sir.

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Q: Well, if I had witnesses who swear you've referred to it as creative financing, you wouldn't be in a position to–

A: Oh, no. It is creative.

Q: Okay. So you agree with that?

A: Oh, sure.

Q: And there's nothing inherently illegal about down payment assistance, is there?

A: Oh, no. I've never said it was illegal.

(Tr. 56-57). Praytor thus clearly testified that the Commission's rules and regulations do not address down payment assistance, that it was not illegal, and that he could not say it was improperly utilized by Appellants. (Tr. 56). Accordingly, there could be no "improper dealing" merely because the Buyer

utilized down payment assistance.

b. There was no evidence adduced at the hearing that the HUD-1 was inaccurate in any way; instead the evidence overwhelmingly established accuracy of the HUD-1 as regards Buyer's contribution of her money to the settlement at closing of the sale.

It should be noted at the outset that no Mississippi or federal law, rule, or regulation places *any* obligation on real estate agents like the Appellants to certify the accuracy of HUD-1 closing statements. *Indeed, Appellants were not even signatories to the HUD-1.* (Tr. 74-76 & 188).[7] Even so, MREC somehow found the transaction improper. As shown below, there is no evidence that the HUD-1 was inaccurate in any way.

The utter deficiency of this claim was demonstrated through Praytor's own admission that there would have been nothing improper on the agents' behalf concerning HUD-1 disclosures to the extent the Buyer had tendered the necessary payment at closing (which indisputably occurred):

Q: **...if Ms. Curley in fact came to closing with this amount of money and applied it to the transaction, there would be nothing improper [regarding the disclosure] with that would there?**

A: **That's correct.**

(Tr. 76). In other words, since Curley actually tendered her money at closing, the substance of the transaction is reflected accurately in the HUD-1, and there can be no basis for prosecuting a signatory to the HUD-1 for misrepresentation, much less an agent who was merely present when it was signed and did not sign or certify to its accuracy.

Significantly, Buyer Curley, a signatory, also affirmatively testified to the accuracy of the HUD-1 (Tr. 123; Q: Is that an accurate document to the best of your knowledge? A: Yes. It looks

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[7] The notion that real estate agents have a duty to audit and certify the accuracy of HUD-1 forms in closings of their clients would, no doubt, come as a surprise to the typical practicing, law-abiding Mississippi real estate agent.

like it.) Indeed the HUD-1 closing statement reflects exactly what occurred at closing - - that Buyer Curley tendered the amount of $27,442.79 at closing, which she had received prior to closing in an irrevocable gift from a lawful charity. The record thus unequivocally demonstrates that the money applied by Buyer Curley was *her* money at closing, and the HUD-1 simply and accurately recognized this fact. (Tr. 186-188 & 215-216; Exh. 14).

Praytor's (or MREC's) self-serving opinion or interpretation that the money applied to the purchase by Buyer Curley was not really hers at closing because she got it from a charity defies common sense, is not probative evidence, and is not based in fact. Therefore, such "evidence" is ultimately of no legal consequence.

Finally, the accuracy of the HUD-1 was plainly conceded by Praytor himself at trial. (Tr. 67):

> Q: **Well, and my question is, and let's get it completely clear here, if a valid, charitable gift was made of $27,442.79, and [Curley] used that money, that cash money, to buy this house, this statement in the HUD-1 that cash from Ms. Curley was paid in that amount, it's a true statement is it not?**
>
> A: **That's a true statement...**

(Tr. 67). This admission presents an insurmountable obstacle to any claim, however presented, that the HUD-1 signed by Curley was not accurate.

> c. Praytor's admission that the lawful use of down payment assistance results in an irrevocable gift of funds to the purchaser to use for a down payment at closing further confirms the accuracy of Buyer's representations in the HUD-1 of her contribution to the purchase.

In a related vein, it is critical that Praytor also admitted that proper utilization of down payment assistance results in a true, irrevocable gift of money from the charity to recipient which, as in this case, becomes the property of the recipient. (Tr. 66-68):

> Q: And if a down payment assistance program is properly utilized, the point of the program is for there to be a true gift of money from the charity to the recipient of the

charity, right?

A: That's correct.

Q: And if it's validly done, it's a true, irrevocable gift of money. It's like someone giving you money cash on the barrelhead, right?

A: If it's properly done and properly documented according to the federal guidelines and the rest of the regulations.

Q: All right. Do you have any information as you sit here today that down payment assistance was in compliance in each of those ways that you just mentioned?

A: **Our investigation did not look into whether or not there was a legitimate down payment assistance.**

Praytor, in making this admission, removed any rational perception that a claim could be stated or proven by MREC as regards down payment assistance or the accuracy of the HUD-1 form on the record of this case. Calling the transaction "misleading" and characterizing it as involving some unspecified "improper dealing" does not make it so.

d. The record is devoid of evidence to support MREC's claim in Count V that any impropriety occurred with either down payment assistance or the HUD-1 that can be attributed to Appellants.

What emerges from the evidence is that Administrator Praytor has fallen far short of stating a claim or making his case. **There is not a scintilla of evidence in the record that Curley was given the money during closing or that the money was tendered during closing by someone other than Curley or in such a way that would make it inaccurate for her to sign a HUD-1 confirming her contribution to the transaction.**

e. MREC (through Praytor) asserted claims in these proceedings that were never raised in the Complaint, but are not supported by any evidence or law in any event.

Although never asserted in any pleading, and thus never a legitimate part of these proceedings, Praytor concocted a "rule" that agents in Mississippi have legal duties to abort

transactions and rework contracts to reflect down payment assistance whenever that resource becomes available. MREC found that the contract in issue was somehow misleading because down payment assistance was not noted. This idea is as absurd when considered in light of undisputed evidence in the record that the parties signed the Contract of Sale *prior to* the Buyer's transaction involving down payment assistance; therefore, down payment assistance could not *possibly* have been reflected in the contract at that time it was signed. (Tr. 61). Nor is there any rule, law or other guide telling real estate professionals they have to incorporate the *possibility* of down payment assistance in contracts entered into in Mississippi. (Tr. 59-60).

Although not alleged in the Complaint, Praytor also asserted that real estate agents must perform some sort of financial due diligence on prospective buyers to ensure that buyers can satisfy their down payment obligations to sellers when a real estate contract is drawn up and lists a down payment amount; however, Praytor admitted that he was unaware of any rule or regulation of the Commission or any Mississippi law creating such an obligation, (Tr. 61-63 & 192), and appeared to abandon this "theory." In the end, Praytor's opinion testimony as to the "misleading" nature of the transaction was proven baseless. It would be the height of unfairness and a gross deprivation of due process of law for duties – that exist only in Praytor's mind and are neither pled nor founded in any rule, regulation or statute – to be applied to real estate agents in Mississippi.

CONCLUSION

The Commission's findings of fact, conclusions of law, and disciplinary order were clearly erroneous and not supported by substantial evidence.

As for the dual agency confirmation form, the transaction indisputably involved a limited liability company as a seller which is exempt, as a matter of law, from the dual agency disclosure requirement at issue. The Commission's ruling was therefore without substantial basis and was arbitrary and capricious.

Appellants were in compliance with the statute relating to the property condition disclosure statement. The document had been signed by the Seller prior to closing, and only the Buyer's signature was lacking. The disclosure was given to the Buyer. The Commission failed to offer any evidence proving that the document was not received by the Buyer or was not provided to the Buyer. Because the record demonstrates an absence of evidence on which to conclude that the property condition disclosure was not provided as alleged in the Complaint, it should be reversed.

The Commission's ruling on the issue of down payment assistance is not supported by the record whatsoever. The Commission's own witness, Praytor, testified that down payment assistance was lawful and that the HUD-1 closing statement was accurate in this case. As such, there is no basis for the Commission's disciplinary order suspending each Appellant's license and requiring additional hours of continuing education.

Appellants respectfully ask that the circuit court's affirmance of the Commission's Order be reversed and rendered in its entirety due to the lack of substantial evidence or, in the alternative, reverse and render the sanction of license suspension as to each Appellant since the Commission's Order plainly lacks clear and convincing evidentiary support. *Mississippi Real Estate Commission*

v. Anding, 732 So.2d 192, 196 (Miss. 1999).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roy H. Liddell, hereby certify that a true copy of the foregoing Brief of Appellants Dell H. Palmer, Tanja E. Adams, and Audrey Neely was served on the following by being deposited in the U.S. Mail, first-class postage prepaid, on this 25th day of January, 2008:

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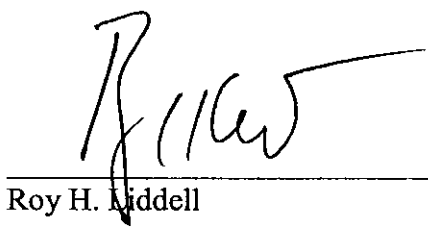

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