

NEW JERSEY REAL ESTATE COMMISSION

)	Docket No.: HUN-17-006
NEW JERSEY REAL ESTATE)	REC Ref No.: 10001867
COMMISSION,)	
)	
Complainant,)	
)	
v.)	FINAL ORDER OF
)	DETERMINATION
DONNA M. SCHAAL, licensed New Jersey)	
real estate salesperson (Ref. No. 9035246),)	
)	
Respondent.)	

THIS MATTER was heard by the New Jersey Real Estate Commission (“Commission”) in the Department of Banking and Insurance, State of New Jersey at the Commission Hearing Room, 20 West State Street, Trenton, New Jersey on February 13, 2018.

BEFORE: Commissioners Linda K. Stefanik, Eugenia K. Bonilla, Sanjeev Anuja, Christina Banasiak, Denise M. Illes and Kathryn Godby Oram.

APPEARANCES: John Rossakis, Regulatory Officer, appeared on behalf of the complainant, the New Jersey Real Estate Commission staff (“REC”). Respondent Donna M. Schaal (“Respondent”) waived her right to counsel and represented herself pro se at the hearing.

STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated March 15, 2017, pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18 and N.J.A.C. 11:5-1.1 to -12.18.

The OTSC alleges that the Respondent, acting as a buyer’s agent for B. and K. MacDade, failed to deliver the MacDades’ earnest money deposit check to her broker for deposit in a trust

account, in violation of N.J.S.A. 45:15-12.8. By failing to deposit the MacDades' earnest monies, the OTSC also alleges that the Respondent's conduct is in violation of N.J.A.C. 11:5-6.4(a), in that this conduct constitutes a breach of the Respondent's fiduciary obligation to her clients, B. and K. MacDade. Lastly, the OTSC alleges that the Respondent's conduct is in violation of N.J.S.A. 45:15-17(e) (three counts), in that by changing the date on the deposit check, and by signing the names of the MacDades' without authorization, the Respondent demonstrated unworthiness, incompetency, and dishonesty. The Respondent filed a timely Answer to the OTSC on April 2, 2017, wherein the Respondent admitted to and denied certain allegations set forth in the OTSC. Accordingly, on April 25, 2017, the Commission deemed this matter a contested case and directed that a hearing be scheduled.

A hearing before the Commission was conducted on February 13, 2018, at which time the following exhibits were admitted into evidence by the REC, without objection:¹

- S-1 Department of Banking and Insurance Complaint Information Sheet, dated April 22, 2014, submitted by Krystal MacDade;
- S-2 Offer #1 Contract of Sale, dated November 25, 2013;
- S-3 Offer #2 Contract of Sale, dated January 22, 2014;
- S-4 Offer #3 Contract of Sale, dated January 22, 2014;
- S-5 Check #1392 representing buyers' earnest deposit, dated November 25, 2013;
- S-6 Check #1392 representing buyers' earnest deposit, dated January 22, 2014; and,
- S-8 Letter from REC to Respondent, dated March 15, 2017.

¹ The Respondent objected to the entry of S-7, a comparison of the signatures from the second offer (S-3) and the third offer (S-4). S-7 was not entered into evidence.

TESTIMONY OF THE WITNESSES

Sheila Young-Golden

Sheila Young-Golden ("Young-Golden") testified on behalf of the REC. Young-Golden stated that she has served as an investigator for the REC for the past six years. She was assigned to investigate the complaint filed by Krystal MacDade ("K. MacDade") against the Respondent that provided the basis for the OTSC. (Exhibit S-1).

During her investigation, Young-Golden interviewed K. MacDade. Young-Golden recalled K. MacDade's statement that she and her husband had submitted their first offer to purchase 202 Shafer Avenue in Phillipsburg, New Jersey ("Subject Property"), in November 2013 with the aid of the Respondent. (Exhibit S-2). Young-Golden also recalled K. MacDade's statement that this offer included an earnest deposit, which her and her husband gave the Respondent in the form of Check #1392, dated November 25, 2013, in the amount of \$1,000. (Exhibit S-5). Young-Golden provided that K. MacDade stated that this initial offer was not accepted and MacDade stated that Check #1392 was never returned to them.

Per her interview with K. MacDade, a second offer was made on the Subject Property in January 2014. Young-Golden provided that K. MacDade stated that neither her nor her husband signed or initialed documentation related to the second offer. (Exhibit S-3). The offer again required a \$1,000 earnest deposit. (Exhibit S-6). Young-Golden testified that K. MacDade informed her that the MacDades never signed the second offer, Exhibit S-3, and the offer was never accepted.²

² This statement is later contradicted by the testimony of the Respondent, who contends that the second offer was not denied, but was withdrawn because K. MacDade wanted to increase the seller's concession from 3% to 6%. A third offer was submitted reflecting this change and this offer was denied. This contention is corroborated by the documentary evidence (Answer,

Young-Golden recalled that K. MacDade had informed her that a third offer was made on the Subject Property in early February 2014. (Exhibit S-4). Young-Golden also recalled K. MacDade's assertion that neither she nor her husband had signed or initialed any documentation related to the third offer.

Upon reviewing the first offer (Exhibit S-2), the second offer (Exhibit S-3), the third offer (Exhibit S-4), the Check #1392 dated November 25, 2013 submitted with the first offer (Exhibit S-5) and Check #1392 dated January 22, 2014 submitted with the second offer (Exhibit S-6), Young-Golden made several observations. Young-Golden testified that she had compared the MacDades' signatures on the Opinion 26 cover page of Exhibits S-3 and S-4. She stated that these signatures look similar. Young-Golden also examined the signature pages of Exhibit S-3 and Exhibit S-4, and she testified that, upon further review, the signatures appeared to be identical. In addition, Young-Golden noted that Exhibits S-5 and S-6 are both checks numbered as 1392, with different dates. Upon closer inspection, Young-Golden stated that she believed Exhibit S-5 and Exhibit S-6 are the same check.

In her investigation, Young-Golden also interviewed the Respondent. Young-Golden stated that the Respondent had been very upset about the complaint filed by the MacDades. Young-Golden also stated that the Respondent was very upset about her interactions with the MacDades generally, stating that they were constantly bothering her with phone calls and using abusive language. The Respondent revealed that she had been friendly with K. MacDade's mother, Sherry, so she did not understand how her relationship with K. MacDade had devolved as it had. The Respondent also revealed that the second offer that the MacDades made on the Subject Property had been accepted by the bank with a 3% seller's concession, but that upon

Attachment #6). Attachment #6 provides email correspondence between the MacDades and the Respondent regarding their request to submit a new offer with a 6% seller's concession.

conferring with the MacDades, the offer had been withdrawn and resubmitted requesting a 6% seller's concession.

Young-Golden further testified that when she asked the Respondent about the deposit check, she became defensive, and stated that she was not required to deliver the deposit check to her broker as there was no executed contract on the MacDades' offers. Furthermore, when Young-Golden inquired as to how the same deposit check was submitted with two different offers, the Respondent stated that the MacDades had authorized the change the date on the check so that it could be submitted with their second offer. The Respondent also testified that she did not change the dates on the deposit check herself.

Young-Golden testified that she then spoke to the Respondent's broker at Re/Max Advantage. Young-Golden stated that when she asked the broker for the MacDades' file, the broker informed Young-Golden that he was unable to locate it and indicated that the Respondent may have removed the file from the office. In addition, Young-Golden relayed the broker's statement that there had been a "conflict of personalities" between the Respondent and the MacDades. In addition, the broker stated he was not given the MacDades' transaction file or the deposit checks associated with any of their offers. Lastly, Young-Golden stated that she did not talk to the broker about Re/Max Advantage's policy regarding escrow checks.

Donna M. Schaal

The Respondent testified on her own behalf. She stated that she has been a realtor for 31 years, is hardworking and honest. The Respondent stated that the MacDades were referred to her by Sherry, Krystal MacDade's mother, who was a referral agent at Re/Max Advantage Realtors, where the Respondent and Sherry were both employed. The Respondent testified that Sherry was very involved in this transaction from start to finish. Sherry accompanied the Respondent

and the MacDades to see each prospective property and the contracts of sale were drawn up at Sherry's home.

The Respondent testified that three offers were made on the property and examined the contracts associated with said offers, Exhibits S-2, S-3, and S-4. The first offer (Exhibit S-2), which included an earnest deposit check in the amount of \$1,000, was rejected. After the price of the property was reduced dramatically, a second offer, Exhibit S-3, which included a 3% seller's concession, was made and accepted by the seller. However, the offer was retracted as the MacDades wanted to amend the offer to request a 6% seller's concession. The Respondent testified that she had communicated to the MacDades' via email that their second offer had been accepted and reviewed the email, which was submitted as Attachment #6 to the Respondent's Answer dated April 2, 2017 ("Answer"). The third revised offer, Exhibit S-4, was later submitted and subsequently rejected by the seller, who now had multiple offers on the property.

Further, the Respondent testified that the MacDades and Sherry spoke to the Respondent's broker of record, who was aware of the transaction and the status of the MacDade's deposit check. The Respondent testified that upon losing the Subject Property, K. MacDade became verbally abusive. When K. MacDade accused the Respondent of not returning their deposit check, the Respondent located their check in their file and sent it to K. MacDade via certified mail.

The Respondent examined Exhibits S-5 and Exhibit S-6, identifying Exhibit S-5 as a copy of the deposit check submitted with the MacDades' first offer (Exhibit S-2) and Exhibit S-6 as a copy of a deposit check submitted with the MacDades' second offer (Exhibit S-3). The Respondent testified that the check in S-5 and S-6 are the same, with the date altered by K. MacDade while preparing the second offer at her mother's home. The Respondent testified that

both the MacDades and Sherry (K. MacDade's mother) were present when K. MacDade changed the date on the check. The Respondent testified that after submitting the amended check with the second offer, the check was sent back to the MacDades' file and never deposited into a broker's trust account.

The Respondent testified that the policy at Re/Max Advantage Realtors is that earnest funds are not deposited into the broker's trust account until an offer has been executed. The Respondent was unable to remember if this policy had appeared in writing. The Respondent reviewed the language of Exhibit S-2, which states that the deposit check would be deposited in the Re/Max Advantage trust account and the Statement of the Selling Agent, located on page 2 of the HomeSteps Addendum. The Statement provides that any misrepresentations of the agreement by either the buyer's agent or the buyer could result in criminal or civil liability and the cancellation of the sale. (Answer, Attachment #1). Upon review, the Respondent stated that as the MacDades' transaction had never resulted in an executed contract, their check had remained in their file. The Respondent also testified that her broker of record was aware of this fact. Further, the Respondent testified that she was aware of the "five-day rule," which requires the deposit of escrow money into the company's trust account within five days after the execution of a contract. The Respondent stated that the bank requires a letter from the attorney which informs the bank that the contract for sale in the transaction is "null and void" in order to return funds. However, she reiterated, in the MacDades' transaction, there was no executed contract; thus, the bank would not have returned their check had it been deposited.

In addition, the Respondent examined the signatures on the second contract of sale (Exhibit S-3) and the third contract of sale (Exhibit S-4). The Respondent testified that in her opinion the signatures are not identical on both documents. Additionally, the Respondent stated

that she did not simply change the body of the contract and reuse the first and last pages of Exhibit S-3 for Exhibit S-4. The Respondent stated that, in hindsight, she would not have represented the MacDades, as they were difficult clients, or in the alternative, she would have requested that a new check be issued for the second offer.

Lastly, the Respondent testified that she understood the seriousness of the charges alleged against her. The Respondent further testified that she had tried to obtain legal counsel for this hearing but opted to forgo representation after contacting an attorney who required a substantial retainer to represent her.

Jason Freeby

Jason Freeby (“Freeby”) testified on behalf of the Respondent. Freeby testified that he was licensed as a salesperson in 2007 and has had his broker-salesperson license for the last seven years. He testified that the MacDades contacted him because they were unhappy with their current realtor, and that he began to work with the MacDades in March 2014. He stated that he had known the Respondent for several years but did not know that the Respondent was the realtor with whom the MacDades had previously been working.

Freeby testified that K. MacDade’s mother, Sherry, was involved with her daughter’s transaction. Sherry and Freeby had verbally agreed that Sherry would receive a referral fee on the transaction. Freeby also stated that Sherry attended all appointments with Freeby and her daughter and was involved in writing an offer that the MacDades submitted for another property. Freeby also confirmed the Respondent’s earlier statement that K. MacDade could be a volatile client.

Freeby testified that he submitted an offer for another property on behalf of the MacDades. When the offer was not accepted within five days, the check was returned to them.

Freeby testified that this practice is known as the “five-day rule,” which means that if a contract is accepted or not, funds received from the client must be turned over to the broker within five days.

Lastly, Freeby testified that while he had not been party to the original transaction between the Respondent and the MacDades, he believed that when the Respondent placed the deposit check into the MacDades’ file, she was effectively turning it over to her broker, who did not deposit the check. After reviewing the email chain that was attached to the Answer, Freeby pointed out that broker was obviously aware of the transaction, as the emails discuss a meeting between the broker, Sherry and K. MacDade.

FINDINGS OF FACT

Based on the pleadings, the testimony of the witnesses, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact:

1. The Respondent is a licensed New Jersey real estate salesperson and is currently licensed with Clinton Regional Realty, LLC d/b/a/ Keller Williams Real Estate, located at 2901 Emrick Blvd, Suite 100, Bethlehem, Pennsylvania.
2. The Respondent was licensed with First Advantage Inc. d/b/a Re/Max Advantage Realtors, located at 431 US Highway 22, East, Whitehouse Station, New Jersey, from 2006 to 2014.³
3. At all relevant times, the Respondent represented Bryan and Krystal MacDade as buyers.

³ The OTSC provides that the Respondent was employed at Re/Max Advantage Realtors from September 27, 2005 through November 21, 2014. The Respondent provided testimony that she was employed by Re/Max Advantage from 2006 to 2014. As the dates provided in the OTSC were not corroborated by any additional documentary evidence, i.e. official documentation of the Respondent’s licensure history, a factual determination is made that the Respondent was licensed with Re/Max from 2006 to 2014. However, there is no dispute that the Respondent was licensed with Re/Max during the relevant time frame.

4. On or about November 24, 2013, the MacDades submitted an offer to purchase the Subject Property, located at 202 Shafter Avenue, Phillipsburg, New Jersey, for a purchase price of \$116,000. The contract of sale indicated that a \$1,000 deposit was to be paid upon signing and was to be held in the trust account of Re/Max Advantage.
5. On or about November 25, 2013, the Respondent received personal check #1392 from K. MacDade, in the amount of \$1,000, which represented the MacDades' earnest money deposit for the purchase of the Subject Property. The Respondent failed to timely deliver the check to her broker for deposit into a trust account and instead maintained possession of the MacDades' earnest money check in the MacDades' file.
6. The November 24, 2013 offer was not accepted, and the transaction did not proceed.
7. On or about January 22, 2014, the Respondent submitted a second offer to purchase the Subject Property on behalf of the MacDades for the purchase price of \$104,500. The contract of sale indicated that a \$1,000 deposit check was to be paid upon signing and was to be held in a trust account of "Seller's Attorney."
8. In conjunction with the January 22, 2014 offer, the Respondent reused check #1392, with the date of the check changed from November 24, 2013 to January 22, 2014.
9. The January 22, 2014 offer was accepted by the sellers, but was withdrawn by the buyers because the MacDades wanted to increase the seller's concession from 3% to 6%.
10. On or about February 7, 2014, the Respondent submitted a third offer to purchase the Subject Property on behalf of the MacDades for the purchase price of \$105,242. This offer reflected a 6% seller's concession fee. The contract of sale indicated that a \$1,000 deposit check was to be paid upon signing and was to be held in a trust account of "Seller's Att."

11. No check was submitted in conjunction with the February 7, 2014 offer.
12. The February 7, 2014 offer was not accepted by the seller and the transaction did not proceed.
13. The MacDades' earnest money deposit was never deposited into the broker's trust account.
14. On or about March 15, 2014, the Respondent returned check #1392 to the MacDades' via certified mail.

CONCLUSIONS OF LAW

Considering the above findings of fact, the Commission makes the following conclusions of law regarding the charges contained in the OTSC and summarized above:

1. The Respondent's conduct is in violation of N.J.S.A. 45:15-12.8, in that the Respondent failed to deliver the MacDades' earnest money deposit check to her broker for deposit in a trust account.
2. The Respondent's conduct is in violation of N.J.A.C. 11:5-6.4(a), in that the Respondent failed in her fiduciary duty to her clients, the MacDades, by failing to deliver the MacDades' earnest money to her broker for deposit into a broker trust account.
3. There is insufficient evidence to support a finding that the Respondent demonstrated unworthiness, incompetence, and dishonesty by changing the date on the deposit check and by signing the names of the MacDades without authorization, in violation of N.J.S.A. 45:15-17(e) (three counts).

DETERMINATION

After the hearing and executive session in this matter, the Commission voted in favor of finding the violations and imposing the sanctions described in this Final Order of Determination.

In arriving at the determination in this matter, the Commission took into consideration the testimony of the witnesses, the documentary evidence admitted during the hearing, and the nature of and circumstances surrounding the Respondent's conduct.

Allegations Against the Respondent

The OTSC alleges that the Respondent, acting as an agent for the MacDades, failed to deliver their earnest money deposit check to her broker for deposit in the broker's trust account, breaching her fiduciary duty to her client, in violation of N.J.S.A. 45:15-12.8 and N.J.A.C. 11:5-6.4(a). N.J.S.A. 45:15-12.8 requires that real estate licensees that receive any monies of others as a representative of a broker acting as an escrow agent or as the temporary custodian of the funds shall immediately, upon receipt of the funds, account for and deliver the funds to the broker for deposit into the escrow or trust account maintained by the broker, or for such other disposition as is required by the escrow agreement under the terms of which the funds were provided to the licensee. The testimonial evidence in this matter confirms that the Respondent did not deliver the funds provided by the MacDades to her broker for deposit into an escrow account. She did not turn over a deposit check with the first, second or third offer made on the Subject Property. Therefore, this conduct is in violation of N.J.S.A. 45:15-12.8.

This conduct is also a violation of the Respondent's fiduciary duty to the buyers. As the buyers' agent, the Respondent had a fiduciary obligation, which includes the duty of loyalty, wherein the licensees pledge to protect and promote, as she would her own, the interests of the client or principal she has undertaken to represent. All three offers made by the MacDades' to purchase the Subject Property used the New Jersey Association of REALTORS Standard Form of Real Estate Contract ("Standard Form of Real State Contract") which clearly states:

“All deposit monies paid by the Buyer shall be held in escrow in the NON-INTEREST BEARING TRUST ACCOUNT of RE/MAX ADVANTAGE, Escrowee, until closing of title, at which time all monies shall be paid over to the Seller.”

By failing to turn the MacDades’ earnest check for deposit into the appropriate trust account, she jeopardized her client’s transaction, failing to act in their best interest, which constitutes a breach of her fiduciary obligation, in violation of N.J.A.C. 11:5-6.4(a).

Finally, the OTSC alleges that the Respondent demonstrated unworthiness, incompetence, and dishonesty by changing the date on the deposit check and by signing the names of the MacDades without authorization, in violation of N.J.S.A. 45:15-17(c) (three counts). The testimonial evidence presented as it relates to this allegation is unclear. Young-Golden testified regarding her conversation with K. MacDade wherein MacDade stated that she and her husband only signed and initialed the first offer. Young-Golden asserted MacDades’ statement that neither she nor her husband signed or initialed the second or third offer. Furthermore, Young Golden testified that during her conversation with K. MacDade, MacDade stated that she did not authorize the Respondent to change the date on the earnest deposit check.

In contrast, the Respondent testified repeatedly and asserted in her Answer that she did not sign the MacDades’ names on the second or third offer without their authorization. As it relates to the changed date on the earnest deposit check, the Respondent testified that K. MacDade changed the date on the check during the preparation of the second offer. The Respondent asserted that both MacDades’ and Sherry (K. MacDade’s mother) witnessed K. MacDade make these changes to the date on the check.

The Commission notes that while Young-Golden’s testimony regarding her conversation with MacDade is hearsay, pursuant to the residuum rule, hearsay evidence shall be admissible in contested cases and accorded whatever weight the Commission deems appropriate upon

consideration of the nature, character and scope of the evidence, the circumstances of its creation and production, and its general reliability. N.J.A.C. 1:1-15.5. Furthermore, pursuant to N.J.A.C. 1:1-15.5(b), there must exist some legally competent evidence to support each ultimate finding of fact to avoid the fact or appearance of arbitrariness. The hearsay testimony presented by Young-Golden is not substantiated by any additional legally competent evidence, and will not be considered by the Commission. Therefore, there is insufficient evidence to support a finding that the Respondent demonstrated unworthiness, incompetence, and dishonesty by changing the date on the deposit check and by signing the names of the MacDades without authorization, in violation of N.J.S.A. 45:15-17(c) (three counts).

Penalty Against the Respondent

The Real Estate License Act, N.J.S.A. 45:15-1 to -42 (“Act”) charges the Commission with the “high responsibility of maintaining ethical standards among real estate brokers and sales[persons]” in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Comm’n, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The Commission is empowered to suspend and revoke the licenses of, and impose fines against, brokers and salespersons that violate any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Mogolefsky v. Schoem, 50 N.J. 588, 596 (1967); Maple Hill Farms, Inc. v. New Jersey Real Estate Comm’n, 67 N.J. Super. 223, 232 (App. Div. 1961). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, to protect the public interest. See Div. of New Jersey Real Estate Comm’n v. Ponsi, 39 N.J. Super. 526, 532-533. Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for “any conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty.” N.J.S.A. 45:15-17(c).

The facts developed do not indicate that the Respondent acted in bad faith in this matter. The Respondent testified that she believed that the deposit check did not have to be delivered to her broker until there was an executed contract. This is a misunderstanding of the law that applies to real estate licensees. Pursuant to N.J.S.A. 45:15-12.8 requires that any real estate licensee that receives monies of another as a representative of a broker acting as an escrow agent as the temporary custodian of the funds, shall immediately, upon receipt of the funds, account for and deliver the funds to the broker for deposit into the escrow or trust account maintained by the broker. It is undisputed that the Respondent did not deliver the funds to her broker in this matter. Furthermore, and as stated above, this conduct is also in violation of the Standard Form of Real State Contract, signed by both the Respondent and the MacDades', which clearly states that the Respondent was to turn over the \$1,000 in deposit monies to her broker to be deposited into an interest-bearing trust account. (Exhibits S-2, S-3 and S-4). As a real estate licensee, the Respondent should have known of this important requirement. The Respondent's conduct demonstrates a lack of good judgment, and to correct her behavior and prevent further misconduct going forward, within 60 days of the issuance of this Final Order of Determination, the Respondent shall complete an additional six hours of continuing education courses in the area of agency (three hours) and ethics (three hours) which shall not count towards the continuing education requirement for the next license renewal term.

Pursuant to N.J.S.A. 45:15-17, the Commission may impose a penalty of not more than \$5,000 for the first violation of the Act, and a penalty of not more than \$10,000 for any subsequent violation. In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors to evaluate the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the

imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) any injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139. Each of these factors is discussed below.

The first factor examines the good or bad faith of the Respondent. The Respondent testified that she did not deliver the MacDades' earnest deposit check to her broker because it was her belief that the office policy stated that funds are not deposited into the broker's trust account until an offer has been executed. As no offer was executed in this transaction, she did not deliver the deposit check to her broker. In light of this testimony, there is no evidence that suggests the Respondent was acting with bad faith when she failed to deliver the MacDades' earnest deposit check to her broker for deposit into the broker trust account.

As to the second factor, the Respondent did not testify to or produce evidence of any circumstances that would render her unable to pay monetary penalties assessed. A respondent who wishes to claim an inability to pay civil penalties must bear the burden of proving their incapacity. NJRIC v. Cortese, Final Order of Determination, (08/09/17) (citing Goldman v. Shah, BKI 11903-05, Initial Decision, (04/15/08), Final Decision and Order, (09/02/08)). Thus, the Respondent has not demonstrated an inability to pay fines assessed in this matter.

The third factor examines the amount of profits obtained from the Respondent's conduct. The Respondent's failure to deposit the MacDades' earnest deposit check did not result in any profits for the Respondent.

The fourth factor relates to the injury to the public. In order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real

estate brokers and sales[persons].” Goodley v. New Jersey Real Estate Comm’n, 29 N.J. Super. at 182. When a licensee is unable to conduct herself in accordance with the high standards expected of her profession, the public’s confidence in the real estate industry is eroded. In this matter, the Respondent failed to submit her client’s earnest deposit check to her broker for deposit into the broker trust account as required by N.J.S.A. 45:15-12.8. This conduct constitutes a breach of her fiduciary duty to her clients, in violation of N.J.A.C. 11:5-6.4(a). The Respondent prepared three separate offers maintaining to her clients that upon their signing, their earnest deposit check would be provided to her broker for deposit in the appropriate trust account. The offer states that it is a receipt of the deposit paid by the buyer upon signing the Agreement. In each instance, this was a misrepresentation on her part, as the earnest deposit check remained in the MacDades’ file, unbeknownst to them. Furthermore, this breach of the Respondent’s fiduciary duty to her client translates to injury to the public at large, who need to remain confident that real estate licensees will handle their monies in the appropriate manner set forth in N.J.S.A. 45:15-12.8 by delivering deposit monies to their brokers for deposit. Therefore, this factor weighs in favor of a monetary penalty.

The fifth factor of the Kimmelman analysis is the duration of the illegal activity or conspiracy. The evidence presented appears to demonstrate that the Respondent’s failure to deposit the earnest money took place between November 24, 2013 and February 7, 2014.

The sixth factor is the existence of criminal or treble actions stemming from the conduct at issue. In this case, there is no evidence that any criminal or civil actions related to the transaction at issue exist.


The seventh and final factor takes into consideration the Respondent's past violations. No evidence of past violations was presented at the hearing either through documentary or testimonial evidence.

Accordingly, and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

1. Within 60 days from the date of this Final Order of Determination, the Respondent shall complete six hours of continuing education courses in the area of agency (three hours) and ethics (three hours) which shall not count towards the continuing education requirement to renew her license.
2. The Respondent shall a pay of fine in the amount of \$3,000, which may be paid pursuant to a payment plan agreed upon by the Respondent and the Department of Banking and Insurance.

SO ORDERED this 26th day of September, 2018.

By: Linda K. Stefanik, President
Eugenia K. Bonilla, Vice-President
Sanjeev Aneja, Commissioner
Christina Banasiak, Commissioner
Denise M. Illes, Commissioner
Kathryn Godby Oram, Commissioner



Patrick J. Mullen
Director of Banking