THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge

Trial Court Case No. 2011-AL-11-00168

Vanessa Patrick,

Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation, State Real Estate Commission,

Respondent.

FINAL REPLY BRIEF OF APPELLANT

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RESPONSE TO INACCURATE ASSERTIONS OF FACT AND REPLY ARGUMENT

For a case to be justly weighed, the facts must be stated accurately. Reliance on inaccurate "facts" has no other possible outcome but to lead to erroneous conclusions of law. Throughout Respondent's Brief, there are numerous erroneous recitals not borne out by evidence. Regardless of any statute permitting Appellant to petition the Real Estate Commission for reinstatement, it follows that, unless LLR attains a more perfect understanding of the facts, and ignores allegations that are not supported by evidence, Appellant could only expect licensure to be denied. Further, barring a retraction of the incorrect statements in both the LLR Final Order and the ALC Order that are now public record, Appellant's reputation will continue to be severely compromised. In this discussion, Appellant will not point out every instance, but will discuss the most critical misstatements of fact:

I. Appellant continues to be prejudiced by incorrect interpretation of contract terms.

Respondent states "[t]he addendum to the contract contained a paragraph entitled "Earnest Money..." and continues throughout to draw conclusions based exclusively on the single paragraph repeatedly and improperly held forth as the lone governing clause. However, as discussed in detail in each of Appellant's previous briefs, the Contract of Sale and Addenda contain **numerous** clauses governing earnest money which must be viewed in concert with the paragraph so often referenced. Respondent's Initial Brief continues to demonstrate LLR's failure to correctly interpret and understand the operative terms of the underlying contract: absent an understanding of this critical document – the basis for the entire transaction – Appellant cannot hope to be justly heard. When analyzed as a whole, in

accordance with proper contract construction, it is readily apparent that the contract cannot and **must not** be boiled down to a single paragraph taken out of context. Refer to Appellant's Brief to the Administrative Law Court (ALC)(R. pp. 277-279) for a more thorough discussion of this issue.

For example, Respondent states "[u]nder the terms of the addendum, after the 120 day expiration date, an additional $50,000 was to be deposited in escrow. Ultimately, the transaction did not close by the August 29, 2008 deadline set forth in the contract, and the parties entered into a contract addendum extending the deadline to September 30, 2008. Under the terms of the original March 8th contract, one thirty-day extension was permitted as long as Riverpath... deposited an additional $30,000 in non-refundable money." First, LLR again relies on one phrase to interpret the entire contract, totally disregarding the other governing terms and conditions (R. p. 149, line 24 – p. 153, line 2). Second, the September 30, 2008 extension request **made no mention** of a requirement to deposit additional earnest money. In fact, Appellant concurrently provided the seller's agent a document explaining why no additional earnest money was being offered. (R. p. 155, lines 11-14; R. p. 303; R. p. 101, lines 3-8; R. p. 109, lines 5-19; R. p. 169, lines 2-22). Third, the seller's "agent" had informed Appellant that the sellers did not plan to extend the deal (R. p. 153, lines 5-13; R. p. 158, lines 2-6; R. p. 362), and Appellant ***never received the extension***, and thus considered the contract expired on August 29, 2008. Appellant provided compelling evidence in the civil action as well as in the hearing indicating the extension was never received and was backdated at some point later in time, including an email from one of the sellers indicating ignorance of the extension's existence - days after it was later allegedly signed (R. p. 155, lines 16-24; R. p. 156 line 23 – p. 158, line 21; R. p. 362).

Respondent continues "[t]he parties agreed to extend the contract to no later than December 31, 2008, in exchange for the deposit of an additional $75,000 in "non-refundable penalty funds." In its recitals, the extension stated… [a]t this point, the total amount that should have been in Asset Realty's escrow account was $185,000. The extension also stated that, **going forward** (emphasis added), "the earnest money and penalty money is to be held in escrow in the trust account of Henry P. Bufkin, Attorney for the Sellers." Grooms signed the extension for Riverpath and Appellant signed as a witness." The December 31 extension was first executed by licensee Grooms and later executed by the sellers, as confirmed by testimony of the seller's agent (R. p. 88, lines 8-13; R. p. 103, lines 15-19). When Appellant discovered attorney Bufkin was looking for $185,000 to be transferred into his trust account – a grossly inaccurate amount – and that the December 31 extension signed by Grooms was replete with factual errors AND was not an accurate representation of the prior discussions between Appellant and the Seller's agent, (R. p. 160, line 14 - p. 161, line 5; R. p. 162, line 2 – p. 169, line 1), she withdrew the Extension **prior to** delivery of the final executed extension. Thus, by contract law the extension was, at the time it was withdrawn, an **unaccepted offer**. It was also ultimately **void** since Riverpath was unable and unwilling to fulfill the terms of the **unaccepted offer** by remitting the incorrect figure of $185,000. Yet the Final Order maintains $185,000 should have been in Asset Realty's escrow account. Further, regarding the December 31 extension, it is technically incorrect to state that $185,000 should have been in Asset's account. Even if one assumes the September 30 extension was valid, any reasonable person could see the contract had **long expired** by the time the December 31 extension was offered, and any earnest money funds held by Asset would have already been disbursed or disputed. By this time Appellant had transferred her license to Acquire Real Estate, Inc.; the proposed extension called for Bufkin to hold the earnest money, not Asset or

Acquire. Any earnest money and penalty funds to be put up would have been *initially* deposited with Bufkin, as the ratified extension would have in effect been a new contract; it is not by any reckoning a logical assumption nor a correct statement that Asset would have been holding $185,000, including penalty funds, in its escrow account at that time.

Yet in the footnote to the above statement at the bottom of page 8, Respondent states "[a]lthough it is Respondent's position that the contract is clear as to the $185,000 that should have been in the Asset Realty escrow account, the Commission based its decision on Appellant's admission of the mishandled initial $30,000 escrow account." If indeed the decision was based upon the handling of the initial $30,000, why does LLR's Final Order (a public record pasted on the pages of the internet) state unequivocally and without proof "there was suppose (sic) to be approximately One Hundred, Eighty-Five Thousand Dollars ($185,000) in the trust account"? This clearly demonstrates that erroneous statements of fact, unless overturned, have and will continue to substantially prejudice Appellant.

II. Appellant continues to be prejudiced by mischaracterization of her disclosure of her role as licensee and one of the purchasers.

Respondent asserts "she (Appellant) did not disclose the fact she was also one of the buyers to the sellers." Although Appellant inadvertently failed to disclose *in writing* that she was one of the buyers, she **did** upon several occasions verbally disclose this fact to certain of the sellers as well as to their agent. (R. p. 100, lines 22-25). This is discussed in more detail later in this Brief.

III. Appellant continues to be prejudiced by statements that she could not produce the earnest money. No evidence was presented to confirm this allegation; therefore, it is clear that inadmissible hearsay was the SOLE source behind this allegation, and it must be reversed.

Once Appellant determined her partner could not or would not cover the earnest money checks, she secured the **full $30,000** but, due to egregious mishandling of earnest money funds by her Broker-in-Charge on another transaction during the same time frame, Appellant and her licensee partners decided to not place the funds in Asset's escrow account, but to leave them in the account of the third party (a trusted friend and senior bank officer), for safekeeping. Appellant admits she could have chosen to comply with the letter of the law by depositing the $30,000 earnest money into Asset's trust account, even if it placed the funds at risk from further unlawful mishandling by Asset's BIC. Appellant could have also offered to place the funds in the escrow account of the seller's attorney; however, her previous experiences with the attorney made her doubt that said funds could ever be released, regardless of cause, without a legal skirmish. Alternatively, she could have notified the sellers of the perceived risks and jointly agreed to an alternative placement of the funds; in hindsight this would have been the best option. So Appellant admits she and her partners chose to house the funds in a non-compliant account.

The only other player with first-hand knowledge of this transaction, the seller's agent, corroborates $30,000 was put up and that this amount was the *only* amount specifically confirmed by Appellant to have been deposited (R. p. 86, lines 7-11; R. p 98, lines 15-17). Evidence clearly shows that the September 30, 2008 extension made absolutely no mention of additional earnest money; in fact, evidence shows that Appellant gave the seller's agent a handwritten memorandum stating that the purchasers were **not** willing to put up additional earnest money for an extension due to certain developments (R. p. 303; R. p.361; R. p. 99, lines 17 - p. 100, line 6.). The seller's agent testified that the $185,000 figure was only discussed in context of *future* events, should an entire set of requirements come to pass – which were not fulfilled (R. p. 87, lines 15-24; R. p. 88, lines 17-22; R. p. 103, lines 1-19; R. p. 322, item 11). Yet, without any evidence to support it, the Final Order states $185,000 was supposed to be in the trust account. Without corroborative evidence or first-hand testimony, one can only infer the source was the letter and testimony challenged by Appellant as hearsay.

Even more damaging to Appellant's reputation, the Final Order incorrectly states "when asked to produce the trust money, [Appellant] was unable to do so" and "[Appellant] was unable to produce any money regarding this transaction....." Respondent produced no evidence or first-hand testimony to support this statement, while Appellant has a wealth of written documentation affirming that she **did** have the initial $30,000 amount (R. p. 67, lines 17-23; R. p. 68, lines 10-23; R. p. 69, lines 5-10; R. p. 170, lines 8-10; R. p. 171, lines 10-20) and made it available to the sellers on at least two occasions. This libelous statement, which strongly implies that Appellant somehow made off with funds which were never accounted for, is clearly not based in fact. Once again it logically follows that the basis for Respondent's claim was inadmissible hearsay, and therefore must be reversed.

IV. <u>Appellant's due process rights were indeed violated by (1) proceedings not being conducted promptly; (2) Respondent giving Appellant the evidence against her only nine days before trial, and failing to obtain evidentiary support for the allegations before prosecuting Appellant; (3) not being given an opportunity to present her evidence prior to any proceedings; and (4) being prosecuted for charges not included in the original complaint nor in the Notice of Charges, and without clearly explaining how Appellant's actions constituted violations of certain cited statutes.</u>

A. <u>Appellant was harmed by Respondent's failure to conduct proceedings promptly</u>. Appellant was subjected to undue stress and sidelined from earning a living for many months by LLR's failure to conduct their proceedings promptly. Admittedly, Appellant had voluntarily placed her license on inactive status in late 2008 so she could concentrate on defending the civil case. However, by February 2010. And as the civil case was moving slowly yet the outcome looked very promising, Appellant sought to reinstate her license. Respondent states only "once Appellant wanted to reactivate her license, the outstanding disciplinary matter needed to be dealt with and the investigation resumed." Yet as outlined in

Appellant's Initial Brief, due to LLR's ineptitude and lack of due care LLR did not conduct the Hearing until February 2011, a **full year** later.

B. <u>Appellant was unable to mount an adequate defense since LLR failed to provide the evidence against her until nine days prior to the Hearing</u>.

Respondent states "[t]he letter, which served as the complaint that prompted the investigation into this matter, was mailed to Appellant and copied to the Commission on November 24, 2008. Therefore, Appellant and her attorney had ample time to review the complaint and prepare a defense." This assertion implies Appellant should have been prosecuted only on allegations made in the original complaint that were investigated and found to have evidentiary support. This statement would hold true *if* the charges levied against Appellant in the Notice of Charges, or introduced in the Hearing itself, had mirrored the allegations in the complaint letter, but they did not:

The **original complaint letter** charges:

- Appellant "gave the assurances to the sellers' agent that these funds ($185,000) were on deposit in the trust account of her real estate agency" yet the funds, based upon Bufkin's interpretation of the contract and addenda, had not been transferred to Bufkin's trust account.
- Terms of contract were breached by the Purchaser with regard to earnest money.
- Several agents breached their fiduciary responsibility with regards to escrow funds.
- Apparent fraud committed by Purchasers due to signing contract extensions calling for earnest money deposits which were not made.

The **LLR Notice of Charges** states:

- Appellant presented two checks "**to give the appearance** that the money had been placed into the appropriate trust account."
- "The contract **was extended numerous times** which lead (sic) to more money being placed into the trust account based on the contract. All total, by approximately December of 2008, there was suppose (sic) to be approximately One Hundred Eighty-five Thousand Dollars ($185,000) being held in the trust account."
- Appellant was "unable to produce any money in regards to this transaction despite constant reassurances on her part that the money was in the trust account."
- Appellant failed to notify her BIC (of Asset) of the contract.
- Neither Appellant's BIC nor office manager "consented to" this transaction.
- Appellant never informed her **new** BIC (of Acquire) that contract was pending.
- Appellant failed to place any money into **new** BIC's trust account.
- Respondent's license was "presently lapsed."

Since the Notice of Charges introduced several matters not mentioned in the original letter of complaint, and repeated or added numerous statements without a shred of evidence, Respondent's argument is without merit, especially when coupled with the argument below.

Respondent adds "[r]egardless of what issues were raised in the initial complaint, Respondent is not bound by the initial facts alleged. Through the investigation process, the agency is able to discover new facts and assert new violations based on those facts." LLR Investigator Sowell, as he testified in the hearing, compiled only three pieces of "evidence:" a complaint letter which the author admits was based almost entirely on hearsay (R. p. 58, line 13 – p. 66, line 19), a letter from Asset's office manager (rife with speculation as to Appellant's motives) and a copy of an office log. Following Respondent's own logic, any differences between the

Complaint and the Notice of Charges should have been based upon facts uncovered in the investigation, yet the product of the investigation was admittedly to the greatest extent "facts" alleged in a hearsay letter. (R. p. 52, lines 5-18; R. p. 76, lines 18-21; R. p. 227-229).

Deepening the mystery, Respondent states "Respondent questions whether the letter (of complaint) contains hearsay because it was not admitted for the truth of the matter asserted." This is most interesting since, in a summation of pertinent arguments, Respondent has now claimed Appellant and her attorney should have based their defense upon the same complaint letter, as said letter represented the bulk of the "evidence" uncovered in the investigation. It thus served as Respondent's justification for amplifying the Notice of Charges to include additional "facts" discovered in the investigation – to account for the differences between the complaint letter and the Notice of Charges. If no other "evidence" existed prior to the hearing, nor was brought to light in the hearing, and the letter of complaint was "not admitted for the truth of the matter asserted", just exactly what were many of the Commission's conclusions based upon, if not inadmissible hearsay?

[Paragraph deleted in compliance with Order dated July 10, 2012]

Not only is Respondent's convoluted argument without merit, it serves to corroborate Appellant's claim that her due process rights were violated due to the agency's lack of due care with regards to her career, including but not limited to reliance upon inadmissible hearsay which **clearly** prejudiced Appellant.

Further, Respondent states "the evidence in this case consisted of the contract and addenda, and Appellant was very familiar with all the documents" but later goes on to state "she and her counsel were extremely familiar with both the subject transaction . . . and the documents and correspondence that were Respondent's exhibits." The Notice of Charges was delivered without an attachments or exhibits, so what was the evidence? The documentation generated in the transaction, civil case, and LLR matters amounted to several feet thick; Appellant could THEREFORE not be expected to predict the content of LLR's "evidence." So finally receiving the attachments only nine days prior to the hearing was not "in plenty of time to mount an adequate defense." And when the "evidence" was transmitted, it amounted to only the hearsay letter and the documents from Asset – lending no clarity to the charges against Appellant.

C. <u>Appellant was not able to present her evidence to Respondent prior to agency proceedings, a violation of her due process rights.</u> Respondent states "Appellant was able to present her evidence to the Respondent prior to agency proceedings. The record is replete with documentation from Appellant and her counsel where she explained her actions. In addition, Appellant mailed a detailed six page letter to Respondent that served as her official response to the complaint." Respondent's argument is without merit. First, Investigator Sowell, in the hearing, testified that he didn't speak to Appellant until after the investigation was complete, and that his "evidence" consisted solely of the original complaint letter, a letter from Asset Realty's office manager, and a copy of Asset's transaction log. Second, what "record is replete with documentation"? Interestingly enough, the official Record on Appeal prepared by LLR in response to Appellant's appeal to the ALC **omitted all such documentation, including the "detailed six page letter" referred to above** – a key point in

Appellant's Brief to the ALC – yet the Administrative Law Judge (ALJ) disregarded all such documentation submitted by Appellant (R. p. 3, Footnote 4; R. pp. 319-324) since it was not in the "record" and thus not "properly preserved." Respondent cannot have it both ways. If such documentation existed, why did Respondent omit it from the record and fail to consider its content as evidence when framing the charges against Appellant? Furthermore, why does Respondent *now* insist such documentation not only existed, but "served as her official response to the complaint" - an assertion never communicated to Appellant? Respondent further states "Appellant and her counsel were given an opportunity to show compliance." The truth of the matter is Appellant's "detailed six-page letter" mentioned above was in great part a plea for LLR to exercise due care and actually obtain and review Appellant's body of evidence (referenced in the letter) *prior to* levying formal charges. Yet none of this ever happened. As Appellant produced much evidence in Appellant's Brief to the ALC evidencing that LLR failed to meet with Appellant or consider Appellant's evidence (R. p. 269, lines 19-37; R. p. 270, lines 6-8; R. pp. 276-7, item "l"; R. p. 76, lines 22-25), Respondent's argument is completely without merit.

D. <u>Appellant was unable to mount an adequate defense since the Notice of Charges was unclear as to how Appellant's actions constituted violations of certain of the statutes cited therein</u>. Appellant's Initial Brief and Appellant's Brief to the ALC both contain detailed arguments as to how the Notice of Charges was not at all clear, contained no exhibits of evidence, and therefore was not APA compliant.

For example, Respondent has *yet* to provide an explanation of how Appellant's failure to provide the sellers with a written disclosure of her dual position as a licensee and a buyer specifically violated **Section 40-57-135(D)**, which can only apply to situations in which a

licensee defrauds his or her *own client* in a fiduciary relationship. In Respondent's Brief, Respondent quotes **Section 40-57-135(D)** as follows: "No licensee either directly or indirectly may buy for his account or for...any other business in which he holds an interest...without first making his true position clearly known in writing to all parties involved. Upon request of the department, the licensee shall provide evidence of having made this disclosure." It is interesting to note that Respondent omitted the definitive section of the statute – the section that indicates its applicability to a fiduciary relationship between agent and client – prohibiting a licensee from purchasing without the prescribed disclosure "real estate **listed with him** or real estate for which he has been approached by the seller...**to act as agent** (emphasis added)" – clearly not the case in this transaction wherein the sellers had their own agent.

Appellant unfortunately overlooked providing a formal written disclosure of her status as buyer and licensee, as is required by **Section 40-57-135 (C)(6)** which states, in relevant part "[a] licensee clearly shall reveal his license status in a personal transaction involving the purchase... of real estate." As licensee had in years past handled other transactions for a subset of the sellers, and since Appellant's daughter and one seller's daughter were at that time best friends and college roommates and the families interacted and discussed the deal on several occasions, and since Appellant knew she had verbally disclosed her position on even more occasions to several of the sellers as well as the sellers' agent, failure to document her position in writing was a simple oversight with no harm intended. Appellant would like to point out that the complaint letter did not mention the lack of written disclosure as an issue, yet in the hearing the witnesses were coached by the prosecuting attorney to make it an issue. Respondent, following the lead of the ALC Order, errs by quoting the testimony of two of the

sellers, Dr. Pinner and Dr. West, as "proof" of Appellant's violations, although both parties admitted to absolutely no first-hand knowledge of the events.

Notably, Appellant was **not** charged in the Notice of Charges with a violation of Section **40-57-135(C)(6),** the correct statute governing the case at hand. But she was then prosecuted in the hearing for said violation.

Now please refer to section IV.B. above, wherein Appellant summarized the charges found in the original Complaint and the Notice of Charges. Then compare them to the following charges that are found in the Final Order:

- All of the charges listed in the Notice of Charges, ***plus***:
- "Failure to disclose the nature of her relationship with potential sellers and buyers"
- "Engaged either directly or indirectly in the purchase of real estate for her own account...listed with her or for which she was approached... to act as agent, without first making her true position clearly known"
- "Knowingly gave them false or misleading information about the buyer's ability to perform"

Although the Notice of Charges made reference to certain statutes, it failed to explain exactly how Appellant's behavior was seen to be a violation of said statutes. Since Appellant viewed them as inapplicable to her case or completely without foundation in fact, absent said explanation she was unable to properly defend herself when literally ambushed at the hearing.

V. <u>Improper admission of hearsay clearly prejudiced Appellant and permanently damaged her reputation.</u>

As mentioned above and in much more detail in Appellant's Initial Brief, Appellant feels it is necessary to once again expound upon why admittance of the "Bufkin letter" and certain hearsay testimony, all objected to by Appellant's attorney in her hearing, substantially prejudiced Appellant. While it is true that the Commission's advising attorney stated "no hearsay from this document or anything else will be used in making of any decision by the board," the fact remains that hearsay was admitted into evidence and remains intact as part of the record to the obvious detriment of Appellant. In fact, Appellant was clearly prejudiced by said hearsay as certain "facts" and conclusions made their way into the Final Order without a shred of evidentiary support.

Whether it is the letter that launched the investigations – rife with accusations of fraud and breach of fiduciary duties - or the testimony of witnesses like Dr. Laura West, the truth remains that the information is second or even third hand. Appellant dealt only with sellers "agent" Bowers and could not control what he communicated to his "clients" and their attorney. In this regard, and as more specifically discussed in Appellant's Initial Brief, much of what Bowers communicated was apparently inaccurate as a result of his own misunderstandings of the contract, addenda, and other discussions.

That admission of the letter, along with additional hearsay testimony, substantially prejudiced Appellant is thus without question. "Whenever hearsay which has some probative value to a material fact is erroneously admitted into evidence, prejudice is presumed." *Orangeburg County DSS v. Schlins*, 291 S.C. 477, 354 S.E.2d 388 (1987); *see also Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (wherein the Court stated that where case law shows improper evidence is merely cumulative to testimony, rather than evidence, it "cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact

of improper corroboration"). Respondent has failed to rebut this presumption and there is little doubt that the cumulative effect of hearsay testimony piled upon hearsay testimony – whether in letter form or on the stand – had a "devastating impact" upon Appellant's case.

Respondent also states Appellant "held herself out as acting on behalf of Asset Realty, without having any intention of going through place of employment." However, Respondent fails to note that the contract clearly called for 3% commission to be paid to Asset Realty upon closing, a contract clause which Appellant never struck. Further, Appellant had already selected a closing attorney, provided a copy of the contract, and informed the attorney that Asset was to be paid when the deal closed. For Respondent to imply that Appellant intended to deny Asset Realty any commissions due them is untrue, and could only have stemmed from the speculative and hearsay testimony of Reggie Murphy, Asset's General Manager. (R. p. 136, line 6 – p. 137, line 16).

As discussed above, absolutely no clear or credible first-hand testimony exists, and certainly not one bit of hard evidence exists to support certain findings of fact and conclusions of law reached by Respondent and the ALC. It is therefore abundantly clear that their conclusion *could only have been derived from hearsay and from no other source*. Therefore, it is not possible to dispute that Appellant was substantially prejudiced by the admission of hearsay.

VI. Appellant was subjected to an abuse of discretion by the arbitrary and capricious sanction enacted by the Real Estate Commission, thereby depriving Appellant of her fundamental constitutional rights.

A. Appellant was singled out for prosecution, despite the fact that another licensee was named in the complaint and two other licensees involved in the transaction committed

violations. Respondent states "Appellant also argues that she was "singled out" and disciplined, while others were not. Respondent is unable to discuss whether an investigation and/or discipline proceedings against someone else have been initiated." Respondent is unable to discuss such matters because absolutely no other real estate licensee involved in this transaction has been investigated and disciplined. As Appellant stated in her Initial Brief, two licensees were specifically named in the original Complaint to LLR and two licensees were also specifically named as parties to the related civil action. Yet only Appellant was chosen for prosecution and censure by LLR.

The second licensee Sally Grooms, who also placed her license on inactive status pending resolution of the lawsuit, applied for reinstatement and her license was issued without hesitation. This despite the *facts* (1) she signed and wrote checks for $30,000 she could not cover (Appellant had to do so); (2) she chose, along with Appellant, to deposit the funds in an account other than that of Asset Realty; (3) she failed to disclose her status as licensee and one of the buyers to the sellers; and (4) she actually read and signed the December 31 Addendum, whereas Appellant only signed as a witness.

In Respondent's Brief, Appellant is accused of having "mishandled *at least* $30,000 in earnest money." See p. 26 [emphasis added]. If that is the case, then why wasn't Grooms also investigated – instead of being dropped from investigation and ultimately reinstated? What did she do that was different from Appellant? Answer: nothing. Appellant, upon information and belief, was prosecuted simply because she was out front dealing with the seller's alleged "agent" while Grooms remained "behind the curtains" so to speak. This, however, should not be an excuse for selective prosecution as Grooms was with Appellant every step of the way, including the civil action.

Licensee Nancy Curtis, like Appellant and Grooms, was also a member of the purchasing entity. She too failed to disclose her position as licensee and one of the purchasers, and she joined in the decision to place the earnest money funds in another account. Curtis was, however, not included in the original complaint although any more than a cursory investigation would have indicated her participation.

Further, licensee and Broker-in-Charge Andy Bowers handled the sellers' transaction from start to finish. While Mr. Bowers contended at the hearing he was only assisting and advising the sellers, his actions spoke otherwise. Appellant spoke to no one but Bowers; thus, at all times, Bowers and Bowers only was personally handling the negotiations and the contract terms on behalf of the sellers. That an agent-client relationship existed is abundantly clear. However, Bowers admittedly failed to obtain a written agency agreement with the sellers – a clear violation of license law.

Respondent, like her predecessors and the ALJ before her, continues to conveniently sidestep this very important issue by basically choosing to ignore it. Yet, if due process and equal protection under the law are the most fundamental tenets of our judicial system, then why is no explanation required? Why are other licensees allowed to break the rules with no consequences whatsoever? Appellant has admitted her mistakes but cannot, in good conscience, understand why only she was prosecuted when clearly others violated license law without consequence. [Following sentences deleted in compliance with Order dated July 10, 2012].

B. License revocation was unfair, excessively harsh and lacked precedential support. Considering Appellant's excellent track record and candor in dealing with this matter, license revocation was an arbitrary and capricious punishment. Revoking Appellant's real estate license effectively barred her from obtaining a license to practice in other occupations licensed by LLR, and from similar careers in other states. Further, the erroneous statements in the Final Order, which took Appellant's actual violation of placing a modest sum into a different account (**and** able to produce the funds at any time) and amplified it to suggest that a huge sum of funds were never accounted for, have repeatedly hindered Appellant from obtaining meaningful employment. In this age of public information pasted all over the internet, a lack of due care in characterizing a citizen can be devastating. No one wants to hire someone who appears to have been effectively convicted of fraud.

It is fundamentally unfair that an administrative agency be vested with too-broad and vague powers enabling it to enact sanctions without specific guidelines as to what violations may result in what penalties. More specific guidelines certainly exist elsewhere in the law: a tribunal expressly may not hand down a life sentence for simple assault. Although the agency's powers unfortunately allow such broad discretion, it would have been more appropriate and in conformance with a basic tenet of our judicial system that the Commission and the ALC would have stated case law to justify the sanctions they respectively enacted and upheld – but they did not. Appellant, however, in Appellant's Brief to the ALC, cited a litany of cases wherein similar and/or far more egregious behavior resulted in relatively minor punishment but not revocation (R. pp. 284-286). While the ALJ was correct in citing *Deese v. S.C. Bd. Of Dentistry*, 286 S.C. 182, 185, 332 S.E.2d 539, 541 (Ct. App. 1985) that an agency need not exercise its discretion identically in every case, Appellant finds it hard to believe our

judicial system would not at least consider past decisions in determining the outcome of a particular case. Indeed, precedent is the foundation of our legal system and there is absolutely no reason why administrative bodies like LLR should not be held to the same standard. Past administrative decisions, after all, are readily available to such entities and therefore should be consulted before any punishment is levied. Appellant strongly believes that had the Commission done so, her punishment would have been less severe given the number of prior cases where similar or more serious violations resulted in lesser penalties.

Since neither Respondent nor the ALC used any precedence to how the Appellant's actions harmed the public or how the sanctions accomplished the purpose of "protecting the public," it is apparent their only justification for such a harsh sanction was the result of overly broad discretionary powers that are not in tune with the basic tenets of our judicial system. Thus, the sanction levied against Appellant was both arbitrary and capricious and therefore clearly constitutes an abuse of discretion.

VII. Appellant's reputation was damaged through unjust revocation of her license, whether revocation was permanent or otherwise.

In section "V" of Respondent's brief, Respondent states unequivocally in the first paragraph: "Appellant also mistakenly argues that she is permanently revoked from practicing in the real estate profession; however, that is not the case. Although the Commission did revoke her license, it was **not a permanent revocation. Appellant may contact the Commission and petition for reinstatement**." [Emphasis added]. Upon careful review of the applicable law, Appellant agrees with Respondent's "new" contention but remains mystified as to why the State did not point out this fact earlier in the appeals process.

Pursuant to the relevant law governing professions and occupations such as real estate licensees, two sections specifically concern the type of sanctions a Board such as the Real Estate Commission may impose. The first is **Section 40-1-110(1)** which states, in relevant part: "In addition to other grounds contained in this article and the respective board's chapter: (1) A Board may **cancel, fine, suspend, revoke, or restrict** the authorization to practice of an individual who . . . ." [Emphasis added]. The second is **Section 40-1-120(A)** which gives a Board four options for sanctions: (1) issue a public reprimand; (2) impose a fine . . . ; (3) place a licensee on probation or restrict or suspend the individual's license for a definite or indefinite time . . . ; (4) **permanently revoke the license**." [Emphasis added]. Clearly then, there is a definite difference between having a license revoked and having a license "permanently" revoked.

Further hammering this distinction home is **Section 40-57-110(F)** which deals with reinstatement of a real estate license and provides, in relevant part: "After **revocation** of a license, a new license may not be issued to the same individual within a period of one year from the date of **revocation** or at any time thereafter except upon the affirmative vote of a majority of the members of the commission . . . ." [Emphasis added]. It is telling that the word "revocation" is used as opposed to, e.g., "suspension" or "restriction." There is therefore only one conclusion to once again reach: revocation is not the same as permanent revocation. So Respondent is correct in her analysis and Appellant accordingly admits her mistake.

Yet, the question remains: how did this misunderstanding get so far? Rewinding to the beginning of this entire process, Appellant listened to the State's prosecuting attorney demand that the Commission never allow Appellant to practice real estate again. Then the

Commission's "Final Order" was issued which stated bluntly: "The Respondent's license is hereby revoked." Putting two and two together, Appellant – representing self and without legal counsel to advise her otherwise – naturally assumed her license was permanently revoked rather than just revoked with the possibility of reinstatement. Further supporting her interpretation was the LLR itself which never disputed Appellant's belief her license had been permanently revoked in its brief to the Administrative Law Judge ("ALJ") despite Appellant's assertions to that effect.

Even more egregious is the ALJ himself who also failed to notice the distinction. In addressing Appellant's argument that the Commission's sanction of permanent revocation was too severe, the Judge disagreed and directly cited **Section 40-1-120(A)(4)** despite the fact the Commission's Final Order did **not** include the phrase "permanently revoked," only "revoked." *See* ALJ "Order" (R. p. 13). How can a Judge essentially add words that are not there and then base a conclusion thereon? And how can LLR attorneys who are supposed to know their area of practice better than anyone not know the difference between permanent revocation and just revocation. It is one thing for an amateur legal mind like Appellant to misunderstand the sanction imposed. It is quite another for long-time practicing attorneys and an Administrative Law Judge to equally misinterpret the law and even worse to argue in favor of and uphold a sanction that, as it turns out, was never levied against Appellant. If either the ALJ or the LLR understood the actual and correct penalty, then both would have mentioned **Section 40-57-110(F)**. But neither did, not once.

Respondent has now finally changed its tune. The "why" behind this change is – as stated above - a mystery to Appellant, but is welcome considering their previous position. Still, this Court must be reminded that significant damage has already been done. Even though

Appellant can apply for reinstatement, the Real Estate Commission can year after year refuse said reinstatement and effectively keep Appellant from ever practicing real estate again. Furthermore, Appellant's name and reputation has been sullied to devastating effect and will no doubt inhibit her business for years to come even if Appellant succeeds in winning reinstatement. The mere appearance of impropriety, much less a ruling to that effect, can easily cast a shadow upon anyone's business. Accordingly and even though Appellant can in theory and in practice regain her real estate license, it is still not enough to overcome the incorrect aspersions first cast upon Appellant in her hearing and later magnified by the Order resulting from Appellant's appeal to the Administrative Law Court.

Appellant has shown that both the State and the ALJ made serious errors of law regarding the actual sanction imposed. Even the Respondent now admits the same. Appellant has had to live with the belief that her license had been permanently revoked and so too have her peers and the public at large. Yet, clearly this is and was not the case. Had the State and the ALJ applied the law correctly, some semblance of Appellant's reputation could have been saved if not partially restored and this current appeal may have been wholly unnecessary. Appellant has admitted that she made mistakes and deserved punishment. But Appellant never believed her mistakes amounted to the drastic measure of permanent revocation. Thus, Appellant continued to fight under the mistaken belief that her license had indeed been forever revoked - a belief incorrectly reinforced by the State and later the ALJ himself.

As for the latter, this clearly represents an abuse of discretion and a misapplication of the relevant law. The Commission's "Final Order" states only that Appellant's license is revoked. Despite this clear and unambiguous language, the ALJ improperly cited **Section 40-1-120(A)(4)** regarding "permanent revocation" and failed to include anywhere in his order

Section 40-57-110(F). Therefore, a serious error of law was committed and constitutes grounds for reversal.

CONCLUSION

Although its charges were largely uncorroborated by substantial evidence or testimony in the hearing, Respondent wishes this Court to affirm the Real Estate Commission Final Order, a public sanction revoking Appellant's license and levying a Two Thousand, Five Hundred Dollar ($2,500.00) fine – an almost unprecedented penalty for a first offense, especially regarding a complex, contested issue. LLR failed to prove Appellant's harmful intent toward the sellers, nor actual damages suffered by the sellers; therefore, how can imposition of such a sanction be justified and credibly intended only to "protect her clients and other members of the public from harm"?

Throughout this case, the agency and then the ALC failed to verify the truthfulness of all "facts" considered in the case, errors which could only lead to inaccurate Conclusions of Law. Certain critical "facts" and conclusions in the Final Order are uncorroborated by either first-hand testimony or actual evidence, and clearly have their sole basis in hearsay. With absolutely no evidence to the contrary, "facts" and conclusions based upon hearsay are erroneous and prejudicial, and must be reversed.

Although Respondent now offers that Appellant may statutorily petition for reinstatement, absent the Agency and the Real Estate Commission demonstrating a more perfect understanding of the facts without reliance on hearsay, and absent correction of the damaging public record, Appellant's livelihood and reputation may continue to be irreparably harmed.

Accordingly, Appellant prays that the Court will overturn the rulings of the Agency and the Administrative Law Court and impose a lesser sanction than revocation.

Respectfully submitted,

May 10, 2012

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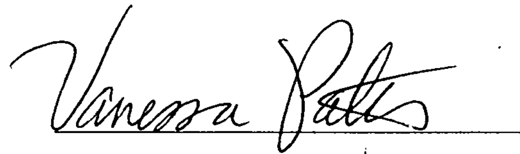
Pro Se Appellant

CERTIFICATE OF APPELLANT

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, appellant certifies that this Final Reply Brief of Appellant contains all material proposed to be included by any of the parties and not any other material.

Appellant further certifies that this Final Reply Brief of Appellant complies with the Order of the Supreme Court of South Carolina entitled *Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings*, 375 S.C. 56, 650 S.E.2d 462 (August 13, 2007).



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 11-ALJ-11-0168-AP

Vanessa Patrick,

Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation, State Real Estate Commission,

Respondent.

PROOF OF SERVICE

I certify that I have filed the Final Reply Brief of Appellant, amended to comply with the Order dated July 10, 2012, and served a copy thereof on the persons hereafter named:

The Honorable Jenny Kitchings
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PO Box 11629
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(Hand Delivered)

Melina Mann
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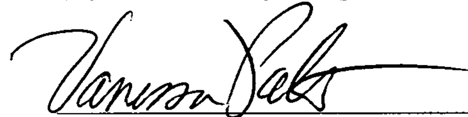
August 20, 2012



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SC Court of Appeals

August 20, 2012

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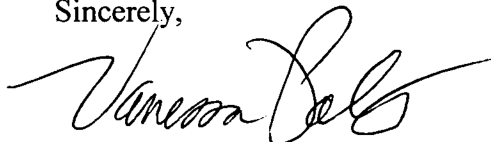
RE: Vanessa Patrick v. South Carolina Department of Labor, Licensing and Regulation, State Real Estate Commission, Respondent, Case No. 11-ALJ-11-0168-AP

Dear Ms. Kitchings:

Enclosed for filing is the Final Reply Brief of Appellant, amended to comply with the Order dated July 10, 2012. Please note that the Exhibits referenced in the Order were not included in the Record on Appeal nor in the Final Brief of Appellant previously submitted to the Court. The Exhibits were only in the Final Reply Brief.

Sincerely,



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SC Court of Appeals