

Before the  
Administrative Hearing Commission  
State of Missouri



MISSOURI REAL ESTATE COMMISSION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11-0532 RE
	)	
PAUL PERNICIARO and NEW	)	
HOME REALTORS, LLC,	)	
	)	
Respondent.	)	

**DECISION**

Paul Perniciaro and New Home Realtors, LLC (“New Home”) are subject to discipline for failure to display their real estate licenses and improperly transferring listings.

**Procedure**

The MREC filed a complaint with this Commission on March 18, 2011, seeking to discipline the real estate broker license of Perniciaro and New Home’s real estate association license. We mailed our notice of complaint/notice of hearing to Respondents by certified mail on April 6, 2011, and receipt was acknowledged by Perniciaro on April 19, 2011. Perniciaro and New Home, acting *pro se*, filed a motion to dismiss on January 4, 2012. By our order of January 12, we suspended ruling on the motion until February 24, 2012, to permit New Home additional time to secure legal counsel, and gave the MREC until February 23 to respond to the motion, which it did on that date. On February 6, 2012, Perniciaro and New Home filed another

motion to dismiss, and on February 23, 2012, also filed a “counter-petition, motion for summary judgment, and motion for mistrial.” On February 27, we issued an order denying Respondents’ motions. However, on March 12, Perniciaro filed another motion to dismiss, and on March 15, filed an amended counter-petition.

We held a hearing on March 16, 2012. The MREC was represented by Assistant Attorney General Kevin Hall. Perniciaro appeared, *pro se*, but New Home was not represented by counsel, and, therefore, did not appear.<sup>1</sup> The case became ready for our decision on September 12, 2012, the date the last written argument was due.

### **Findings of Fact**

1. At all relevant times, Perniciaro held the following real estate licenses issued by the MREC: a broker-officer license (License No. 2009003486); a broker-associate license with New Home, which expired March 12, 2012; and a broker-associate license (License No. 2008000927), which expired March 18, 2009. At all relevant times, these licenses were current and active.

2. Perniciaro was designated broker for Jackson Real Estate (“Jackson”) from January 8, 2008, until March 18, 2009.

3. Jackson was owned by Frank Jackson, who at all relevant times held no real estate license.

4. Frank Jackson terminated Perniciaro in October 2008, although Perniciaro continued to serve as Jackson’s broker until March 18, 2009.

5. After his termination from Jackson, Perniciaro opened his own real estate company, New Home, in November, 2008.

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<sup>1</sup> Our regulation 1 CSR 15-3.250(3) provides only a licensed attorney may represent a legal entity. All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

6. New Home held a real estate association license issued by the MREC, License No. 2008033298. At all relevant times, its license was current and active.

Count I – Failure to Provide Records for Inspection

7. On March 20, 2008, the MREC’s examiner, David Thomas (“Thomas”), sent Perniciaro a letter advising him that he had been randomly selected for an audit. The letter was addressed to Perniciaro at the name and business address he had registered with the MREC: “Paul V. Perniciaro, Homefinders Realty-Referral Division, 5541 Oakville Center #253, St. Louis, MO 63129.”

8. Perniciaro failed to respond to the MREC’s March 20, 2008 letter.

9. On April 15, 2008, Thomas left a voice message on Perniciaro’s business phone regarding the MREC’s audit. Perniciaro returned Thomas’ call the following day and left a voice message that Perniciaro would call him back to schedule the audit.

10. On May 20, and again on June 11, 2008, Thomas left voice messages on Perniciaro’s business phone regarding the MREC’s audit. Perniciaro finally returned Thomas’ call on June 16, 2008, and advised Thomas there was no need for the MREC’s audit and that he would not appear.

11. By letter dated August 4, 2008, the MREC again notified Perniciaro that he had been selected to be audited. As before, the August 4 letter was sent to the name and business address Perniciaro had registered with the MREC. Perniciaro did not respond to the MREC’s August 4 letter.

12. On August 20, 2008, the MREC sent Perniciaro letters by regular and certified mail, notifying him that he was scheduled to be audited on September 24, 2008. Although the August 20 letters were addressed to Perniciaro using the name and address he registered with the MREC, both were returned to the MREC stamped, “Return to Sender.”

13. The MREC cancelled the scheduled September 24, 2008 audit of Perniciaro.

Count II – Failure to Transfer Licenses

14. Rebecca Wall and Jenny Larson worked as licensed real estate salespersons at Jackson in 2008 under Perniciaro as its designated broker.

15. On November 15, 2008, Wall sent Perniciaro a certified letter requesting that he release her real estate license with Jackson so that she could transfer to a new broker. Wall did not specify the date she intended to end her association with Jackson, but included a blank “application for license/information change” form for his signature.

16. Perniciaro responded to Wall’s letter on November 17, 2008, but did not release Wall’s real estate license.

17. At around that same time, Larson also contacted Perniciaro to request that he release her real estate license with Jackson so that she could transfer to a new broker. Larson did not specify the date she intended to end her association with Jackson.

18. Perniciaro did not release Larson’s real estate license.

19. By letter dated November 17, 2008, Frank Jackson notified the MREC that he was closing Jackson. The MREC declined to act on the notice because Frank Jackson was not Jackson’s broker.

20. On November 25, 2008, the MREC issued a Notice of Rejection to Perniciaro, informing him that, as Jackson’s designated broker, he would need to comply with the applicable regulations regarding voluntary closure of the firm, including without limitation, the return of all real estate licenses issued under Jackson and the submission of a written statement to the MREC within thirty days of the Notice.

21. Perniciaro did not initiate the voluntary closure of Jackson, or return the real estate licenses of Wall and Larson to the MREC within thirty days of the Notice of Rejection.

22. The MREC reissued real estate licenses to Wall and Larson in 2009.

23. Although it is unclear whether Perniciaro ever formally closed Jackson, the firm's closing was recorded by the MREC after Perniciaro's association as its broker ended on March 18, 2009.

### Count III – Improper Transfer of Listings

24. On October 24, 2008, one day after he was terminated by Jackson, Perniciaro travelled to the offices of Professional Registration in Jefferson City, Missouri, to inquire about the steps involved in voluntarily closing Jackson, and how to handle pending transactions. He was referred to the legal hotline and was advised he would need to transfer the listings and form a new real estate company.

25. Perniciaro also consulted the St. Charles Board of Realtors, which recommended he seek assistance from MARIS<sup>2</sup> with the pending transactions and listings.

26. Concerned that Larson, Wall, and Frank Jackson were continuing business at Jackson without his knowledge or participation, and that he was being denied commissions, Perniciaro contacted the MREC.

27. On December 8, 2008, Perniciaro transferred approximately 36 real estate listings from Jackson Real Estate to his company, New Home, without the prior authorization or consent of the property owners. The listings included the following Multiple Listing Service ("MLS") designations: 80060754, 723318, 723312, 723319, 723284, 782793, 782817, 80022753, 732492, 732495, 782800, 782813, 732496, 732503, 782847, 80055692, 782795, 782799, 675643, 675648, 782803, 782810, 675764, 675846, 80050257, 743636, 80022741, 651286, 651283, 651284, 80040014, 80040020, 80062912, 80038620, 80038624, and 80013696.

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<sup>2</sup> "MARIS" is the Mid America Regional Information Systems, a regional multiple real estate listing service.

28. Perniciaro and New Home listed the transferred listings on the MLS under his company's name as the association affiliated with the properties, and himself as the broker affiliated with the properties.

29. Neither Perniciaro nor New Home had listing agreements authorizing the transfer of the 36 listings from Jackson.

#### Count IV – Failure to Display Licenses

30. On February 10, 2009, the MREC's examiner, Thomas, travelled to Perniciaro's office to attempt an audit of New Home at the location registered with the MREC, 5541 Oakville Center, in St. Louis, Missouri.

31. Upon his arrival at that address, however, Thomas found the building appeared to be occupied by a post office service. Thomas entered the building, but did not see an office door with New Home Realty's name on it, though he did see a sign bearing Perniciaro's name. Thomas did not enter any office in the Oakville Center building.

32. Thomas returned to his car and contacted Perniciaro by telephone. They agreed to meet at a McDonald's restaurant across the street from the Oakville Center building.

33. While at the restaurant, Thomas interviewed Perniciaro and completed an audit checklist. Thomas noted on the audit checklist that Perniciaro failed to produce his real estate licenses and that of New Home Realty when requested to do so. Both Thomas and Perniciaro signed the audit checklist.

34. At no time did Thomas enter New Home Realty's office at the Oakville Center building.

## Conclusions of Law

We have jurisdiction over the MREC's complaint. § 621.045.<sup>3</sup> The MREC has the burden of proving by a preponderance of the credible evidence that Perniciaro and New Home Realty engaged in conduct for which the law allows discipline. *Missouri Real Estate Commission v. Berger*, 764 S.W.2d. 706, 711 (Mo. App. E.D., 1989). "Preponderance of the evidence is that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not." *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000). The MREC meets this burden by substantial evidence of probative value or by inferences reasonably drawn from the evidence. *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony. *Id.* Our findings of fact reflect our determination of the credibility of the witnesses and evidence.

The MREC contends the real estate licenses of Perniciaro and New Home Realty are subject to discipline under § 339.100.2(2), (14), (15), (16), (19) and (24). That statute provides:

2. The commission may cause a complaint to be filed with the administrative hearing commission as provided by the provisions of chapter 621 against any person or entity licensed under this chapter or any licensee who has failed to renew or has surrendered his or her individual or entity license for any one or any combination of the following acts:

\* \* \*

(2) Making substantial misrepresentations or false promises or suppression, concealment or omission of material facts in the

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<sup>3</sup>All statutory references are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.

conduct of his or her business or pursuing a flagrant and continued course of misrepresentation through agents, salespersons, advertising or otherwise in any transaction;

\* \* \*

(14) Placing a sign on or advertising any property offering it for sale or rent without the written consent of the owner or his or her duly authorized agent;

(15) Violation of, or attempting to violate, directly or indirectly, or assisting or enabling any person to violate, any provision of sections 339.010 to 339.180 and sections 339.710 to 339.860\*<sup>[4]</sup>, or of any lawful rule adopted pursuant to sections 339.010 to 339.180 and sections 339.710 to 339.860\*;

(16) Committing any act which would otherwise be grounds for the commission to refuse to issue a license under section 339.040;

\* \* \*

(19) Any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence;

\* \* \*

(24) Use of any advertisement or solicitation which is knowingly false, misleading or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed[.]

We examine each count of the MREC's complaint in turn below.

Count I: Failure to Provide Records for Inspection (§ 339.100.2(15))

The MREC alleges Perniciaro failed to provide records to its staff for an audit scheduled for September 24, 2008, in violation of § 339.105.3<sup>5</sup>, which states:

In conjunction with each escrow or trust account a broker shall maintain books, records, contracts and other necessary documents so that the adequacy of said account may be determined at any

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<sup>4</sup> Section 339.860 was repealed by S.B. 613 Revision, 2007.

<sup>5</sup> The MREC's post-hearing brief also cites 20 CSR 2250-8.160, which similarly requires a broker to retain books and records, and to make them available for inspection by the MREC at all times during usual business hours at its regular place of business. We do not address this regulation because it was not cited in the MREC's complaint as grounds for discipline; however, we note its inclusion in the complaint would not change our analysis of Count I.

time. The account and other records shall be provided to the commission and its duly authorized agents for inspection at all times during regular business hours at the broker's usual place of business.

The record before us establishes that the MREC sent Perniciaro letters on March 20 and August 4, 2008 notifying him he had been randomly selected for an audit; neither letter specified a time or place for the audit. While Perniciaro may have received this correspondence, he did not respond. His failure to respond does not constitute a failure to provide his records for inspection, as the MREC neither scheduled an audit date, nor attempted to conduct an audit of Perniciaro at his place of business during regular business hours. In any event, the March 20 and August 4 correspondence did not relate to the September 24 audit subsequently scheduled.

The MREC notified Perniciaro of the September 24, 2008 audit on August 20, 2008, by regular and certified mail letters sent to the address he registered with the MREC, but then cancelled it when both letters were returned to the MREC stamped "Return to Sender." Again, this does not suggest any failure or refusal by Perniciaro to produce his records for inspection.

Even without prior notice, the MREC had a statutory right to visit Perniciaro's office during regular business hours for an inspection and audit of his books and records; that it elected not to do so cannot be attributed to Perniciaro. We find no cause to discipline Perniciaro under § 339.100.2(15) for violating § 339.105.3 with regard to the September 24, 2008 audit.

#### Count II – Failure to Transfer Licenses (§ 339.100.2(15))

The MREC contends Perniciaro, as designated broker for Jackson, failed to transfer the real estate licenses of Rebecca Wall and Jenny Larson upon request, in violation of 20 CSR 2250-4.050 and 20 CSR 2250-8.155, and that such violations are cause for discipline pursuant to § 339.100.2(15).

Regulation 20 CSR 2250-4.050 provides, in pertinent part:

(2) A broker-salesperson or salesperson license shall be issued only to a person who is associated with a licensed broker. The license of each broker-salesperson or salesperson shall be mailed to the broker. A broker-salesperson or salesperson cannot be licensed with more than one (1) broker during the same period of time.

(3) Within seventy-two (72) hours of the termination of the association of any broker-salesperson or salesperson, a broker shall notify the commission and shall return to the commission that licensee's license. The broker shall provide a dated and timed receipt to the licensee when the licensee submits a letter of termination to the broker. When a licensee's license is surrendered to the commission, the licensee shall have six (6) months in which to transfer to another broker or change license status. If the application for transfer or change in status is not made within the six (6)-month period, the applicant will be required to complete the required Missouri Real Estate Practice Course and show proof of satisfactory completion of that course within six (6) months prior to reinstatement of the license. If the license is not transferred or placed on inactive status, or if no status change has been made within the subsequent renewal period, the licensee will be required to requalify as if an original applicant.

Regulation 20 CSR 2250-8.155 states:

(1)(A) A real estate brokerage shall be closed in the following manner. The individual broker of the designated broker shall—

\* \* \*

1. Notify the commission in writing on a form prescribed by the commission of the effective date of the closing, the location where the records will be stored, and that all requirements of 20 CSR 2250-8.155(1) have been met;
2. Notify all licensees associated with the brokerage in writing of the effective date of closing. The licenses of any licensees associated with the brokerage at the time of closing must be returned to the commission with the closing statement;
3. Notify all current listing, buyer or tenant agreement, and management contract clients as well as parties and co-brokers to existing contracts, in writing, advising of the date the brokerage will close. All listing, buyer, tenant, and management clients must be advised in writing that they may enter into a new listing, buyer, tenant, or management agreement with the broker of their choice;
4. Remove all advertising signs from all properties which were listed with or managed by the brokerage. Arrange to cancel all advertising in the name of the brokerage, including office signs and telephone listing advertisements;
5. Maintain all escrow or trust accounts until all monies are transferred to a title company, an escrow company, or an attorney for closing of the transaction, or are otherwise properly disbursed as agreed to in writing by the parties having an interest in the funds; and
6. Arrange for pending contracts to be closed by a title company, a lending institution, an escrow company, or an attorney....Notify all parties involved in pending transactions as to the name, address, and telephone number of the closing agent.

Perniciaro admits he did not return the licenses of Wall and Larson in response to their requests. However, we find his actions did not violate either 20 CSR 2250-4.050 or 20 CSR 2250-8.155.

Regulation 20 CSR 2250-4.050 requires a broker to notify the MREC and return the salesperson's license to the MREC within 72 hours of termination of the association of any salesperson. The record does not establish when either Wall or Larson terminated their association with Jackson. The MREC's "License Relationship Report"<sup>6</sup> indicates Wall's relationship to Jackson ended on November 26, 2008, and Larson's ended December 16, 2008. However, these are not the dates Larson and Wall terminated their associations with Jackson Real Estate; these dates mark the MREC's receipt of Wall's and Larson's applications to change brokers. In fact, there is no evidence that Wall or Larson notified Perniciaro of the date they intended to terminate, or in fact terminated their association with Jackson.

Wall's correspondence to Perniciaro of November 12, 2008 references telephone conversations she had with Perniciaro on November 4, 5 and 10, 2008, regarding the return of her license and those of Larson and Corey Doggett so they "can be transferred to another broker," but makes no mention of the date of their termination from Jackson Real Estate. With her November 12 letter to Perniciaro, Wall submitted an application to change brokers for his signature, but the form was blank and gave no indication of when she intended to leave Jackson.

In a letter dated December 1, 2008, the MREC's executive director, Janet Carder, advised Perniciaro:

Rebecca Jean Wall has notified this office that on November 12, 2008, she sent you a certified letter requesting that her license be returned to the [MREC].

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<sup>6</sup> Petitioner's Exhibit 19.

As of this date, Ms. Perniciaro's<sup>7]</sup> salesperson license has not been returned to this office. Pursuant to 20 CSR 2250-4.050(3) of the rules and regulations, you must surrender the salesperson license to the [MREC] within seventy-two (72) hours of notification or provide a signed statement advising Ms. Gray's<sup>8]</sup> 2010 license has been lost or misplaced.

If the above-mentioned salesperson's license is not received in this office by the close of business on January 1, 2009, this matter will be referred to the Attorney General's Office for filing with the Administrative Hearing Commission for disciplinary action against your license.<sup>9]</sup>

Carder's letter does not inform Perniciaro of the date of Wall's termination from Jackson Real Estate, but references Wall's pending request that her license be returned to the MREC. It accurately reflects the MREC's interpretation of 20 CSR 2250-4.050(3), though, which was reiterated in Carder's testimony:

Q Did [Perniciaro] return either of those licenses within 72 hours of these two requests?

A He did not.

COMMISSIONER NELSON: Make sure I understand. When you say 72 hours of the request, which request?

THE WITNESS: When an individual submits a request to a broker who says gee, I want to transfer and there's an indication that the broker will not do that, they have, the regulation says the broker has 72 hours from the postmark of their letter to return that license to the Commission.

COMMISSIONER NELSON: So in the case of Ms. Larson with regard to Exhibit 17, it would have been 72 hours of December 2?

THE WITNESS: That's correct.

The regulation does not require a broker to return a salesperson's license within 72 hours of the request, but within 72 hours of termination of the association. The MREC failed to establish when either Wall or Larson terminated her association with Jackson Real Estate, the event that would trigger Perniciaro's obligation to return their licenses. Consequently, we find no violation of 20 CSR 2250-4.050(3).

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<sup>7</sup> From the context of the letter, we assume the author meant Ms. Wall.

<sup>8</sup> Carder testified, and we accept, that this should have read, "Ms. Wall." (Tr. 118).

<sup>9</sup> Petitioner's Exhibit 18.

Similarly, 20 CSR 2250-8.155 requires a broker to return the licenses of any associated licensees to the MREC at the time of closing, with the closing statement. There is no evidence in the record establishing when, if ever, Perniciaro submitted to the MREC a completed Notification for Closing of a Real Estate Firm form to formally close Jackson.<sup>10</sup> We find no grounds to discipline Perniciaro for violating 20 CSR 2250-8.155.

Count III – Improper Transfer of Listings (§ 339,100.2(2), (14), and (24))

The MREC argues Perniciaro’s transfer of 36 listings from Jackson Real Estate to his firm, New Home, constituted misrepresentations of his authority to list and sell the properties. We agree.

Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.<sup>11</sup> Perniciaro transferred the listings in his capacity as broker for Jackson Real Estate; however, when he did so, he had no listing agreements for any of the properties, nor did he seek the prior written consent of the properties’ owners. His knowingly listing these properties in the MLS for sale by New Home was, therefore, a misrepresentation of his agency as broker, as his firm had no authority to act on the owners’ behalf. While Perniciaro raised serious questions about whether Jackson had listing agreements for the properties in question, the relevant evidence shows that, at the time the listings were transferred, Perniciaro and New Home did not either.

The transferred MLS listings advertised the properties for sale by Perniciaro and New Home. We find cause to discipline his license or New Home’s under § 339.100.2(2), (14), and (24).

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<sup>10</sup> Although Frank Jackson attempted to give written notice to the MREC of his intention to close Jackson on November 17, 2008, and copied Perniciaro (Petitioner’s Ex. 6), Carder testified the firm closed on March 18, 2009, when it ceased to have a broker of record with the MREC. (Tr. 97) According to the MREC’s License Relationship Report (Petitioner’s Ex. 19), March 18, 2009 is also the last date Perniciaro served as broker for the firm, as his broker-associate license expired. Thus, the record does not establish whether Perniciaro closed Jackson Real Estate or whether the MREC deactivated it because it no longer had a designated broker.

<sup>11</sup> Merriam-Webster’s Collegiate Dictionary, 794 (11<sup>th</sup> ed. 2004).

Count IV – Failure to Display Licenses (§ 339.100.2(15))

The MREC urges us to find Perniciaro and New Home subject to discipline for failing to display real estate licenses at a meeting with its examiner, David Thomas, on February 19, 2009, in violation of 20 CSR 2250-8.060. That regulation provides:

(1) Every broker shall maintain his/her license and the licenses of all associates in the regular place of business or branch office(s). The licenses shall be displayed to any member of the public on request.

Thomas testified that, upon his arrival at the registered business address of Perniciaro's firm, he found a building that appeared to be a post office with a sign with Perniciaro's name. When he entered the building, he was unable to find an office door for either Perniciaro or New Home, and subsequently met with Perniciaro at a nearby McDonald's. While Perniciaro and Thomas do not agree whose idea it was to meet at that location instead of Perniciaro's office, it is not in dispute that Thomas never entered that office.

Nevertheless, Perniciaro signed Thomas' audit checklist at their meeting on February 19, 2009, acknowledging that he did not provide the real estate licenses upon request. While we cannot conclude that Perniciaro and New Home failed to maintain their licenses at their place of business, we must infer from Perniciaro's signature on the audit checklist that he was, in fact, asked by Thomas to display the licenses and failed to do so. Because Perniciaro and New Home violated 20 CSR 2250-8.060, we find cause for discipline under § 339.100.2(15).

Count V – Other Conduct (§ 339.100.2(16) and (19))

The MREC asserts the conduct of Perniciaro and New Home constitutes untrustworthy, improper, and/or fraudulent business dealings, and demonstrates bad faith, incompetence, misconduct or gross negligence, providing cause for discipline under § 339.100.2(19), and that, because such conduct would otherwise be grounds to refuse licensure, there exist further grounds for discipline under § 339.100.2(16). Specifically, the MREC points to Perniciaro's failure to

provide records for audit, his refusal to transfer the real estate licenses of Wall and Larson, his unauthorized transfer of listings from Jackson Real Estate to New Home, and his failure to display his real estate licenses. Of these, we found only that Perniciaro and New Home transferred Jackson Real Estate's listings, and that they failed to display their real estate licenses upon request. We examine whether these two violations are grounds for further discipline.

Section 339.100.2(16) permits discipline for the commission of "any act which would otherwise be grounds for the [MREC] to refuse to issue a license under section 339.040." The latter section provides that licenses shall only be granted to persons or legal entities whose officers provide satisfactory proof to the MREC that they:

- (1) Are persons of good moral character; and
- (2) Bear a good reputation for honesty, integrity, and fair dealing; and
- (3) Are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public.<sup>[12]</sup>

Good moral character is honesty, fairness, and respect for the law and the rights of others. *Hernandez v. State Bd. of Regis'n for Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo. App., W.D. 1997). We cannot conclude Perniciaro's failure to produce his real estate licenses, under these circumstances, indicates lack of good moral character. Had his refusal occurred when the MREC's inspector was at Perniciaro's office, rather than at McDonald's, we might find support for discipline; however, Perniciaro's signature on Thomas' audit form, standing alone, does not provide sufficient evidence to support a finding that he was dishonest, unfair, or lacking in respect for the law.

Perniciaro addressed the circumstances leading to his transfer of listings from Jackson Real Estate to New Home. In a letter to the MREC's investigative supervisor on December 21, 2008, Perniciaro wrote:

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<sup>12</sup> Section 339.040.1.

On October 24th [2008,] I drove to Jefferson City to sign what ever papers were needed to close out Jackson Real Estate. I went to Professional Registration and was told to voluntarily close the company, I had to dissolve all the listings and pending transactions[.] I also have a transaction trying to close and asked how do I transfer the transaction because if Jackson Real Estate closes, the transaction is dead. They had me contact the legal hotline and I was told which form to use to take care of the pending transaction and to transfer the listings. The people at Professional Registration suggested I form a new Real Estate company to take care of this, and I did.

I went to the St. Charles Board of realtors, and explained the situation and they recommended that I go to MARIS for help regarding the listings and past sales[.] I found out that Jenny Larson and Rebecca Wall had put listings into MLS and in some cases if the house was sold in house, they cancelled or let it expire so that Frank Jackson did not have to pay a commission, even though a commission was due to Jackson Real Estate for the transaction. When frank [sic] Jackson found out that I was doing an investigation of all of his dealings, he had Jenny Larson cancel or expire several of their current listings on November 15<sup>th</sup>[.] Then he wrote in to the MREC wanting to close out his company and announcing that he had cancelled several of his listings[.<sup>13</sup>]

The MREC presented no conflicting evidence, and we found Perniciaro's account both plausible and credible. Perniciaro had been terminated by Jackson on October 23, 2008, but continued to serve as its broker. He believed he had lost control over the firm's listings, and that others at Jackson were acting to deprive him of commissions. Perniciaro acted on the advice purportedly given him by the MREC and MARIS, albeit without ensuring that he was also acting in accordance with Chapter 339, and transferred the listings from Jackson Real Estate to his firm, New Home Real Estate. In so doing, he is subject to discipline under § 339.100.2(2), (14), and (24), as we found above, because the resulting MLS listings falsely and misleadingly represented that he and New Home were authorized to list the properties for sale. However, these facts are insufficient support for a finding that his actions reflect a lack good moral character.

The MREC asserts Perniciaro does not bear a good reputation for honesty, integrity, and fair dealing. Reputation is the "consensus view of many people[.]" *Haynam v. Laclede Elec. Coop.*, 827 S.W.2d 200, 206 (Mo. banc 1992). Reputation is not a person's actions; it is "the

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<sup>13</sup> Petitioner's Ex. 5, pp.2-3.

general opinion . . . held of a person by those in the community in which such person resides[.]” *State v. Ruhr*, 533 S.W.2d 656, 659 (Mo. App., K.C.D. 1976) (quoting Black’s Law Dictionary, Rev. 4<sup>th</sup> ed. 1467-68)). Reputation means “the overall quality or character as seen or judged by people in general.” Merriam-Webster’s Collegiate Dictionary, 1058 (11<sup>th</sup> ed. 2004).

Although the MREC presented ample evidence of Perniciaro’s actions, it provided no evidence of the general opinion held of him in the community in which he resides. Therefore, we find no support for a finding that he lacks a reputation for honesty, integrity, or fair dealing.

The MREC also contends Perniciaro’s conduct shows he is incompetent to transact the business of a broker in a manner that safeguards the public’s interest. Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation. *Tendai v. Missouri State Bd. of Reg’n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005). We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg’n for the Healing Arts*.<sup>14</sup> Incompetency is a “state of being” showing that a professional is unable or unwilling to function properly in the profession.<sup>15</sup>

Without question, Perniciaro was aware he did not have listing agreements for the 36 properties he transferred from Jackson to New Home. His actions, though understandable, violated the law. But a single incident<sup>16</sup> does not constitute the “state of being” required to find incompetence. The *Albanna* court said the evaluation necessitates a broader scale analysis, taking into account the licensee’s capacities and successes. *Id.* at 436. Prior to the filing of the MREC’s complaint, Perniciaro had not been the subject of any complaint or disciplinary action

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<sup>14</sup> 293 S.W.3d 423 (Mo. banc 2009).

<sup>15</sup> *Id.* at 435.

<sup>16</sup> For reasons previously noted, we do not find Perniciaro’s failure to present his licenses an act of “incompetence.”

since he was licensed in 1999. Despite his missteps here, we find no basis to conclude he is incompetent.

Given the foregoing, we find no basis to discipline Perniciaro under § 339.100.2(16) for committing an act that would be grounds for the MREC to refuse him licensure under § 339.040.

Nor do we find Perniciaro's conduct demonstrated gross negligence. Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty. *Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524, 533 (Mo. App., E.D. 1988).

As we previously noted, Perniciaro's failure to display his licenses on request, at an audit interview conducted at McDonald's, may be a colorable violation of regulations, but falls far short of a "conscious indifference to a professional duty." His transfer of listings from Jackson Real Estate to his own firm appears to have been done on the advice of MREC and MILS staff,<sup>17</sup> and in an effort to protect his license and his interest in commissions. Again, his conduct violated the law and may show poor judgment, yet we do not find it grossly negligent. The MREC failed to meet its burden, and we find no cause to discipline Perniciaro under § 339.100.2(16).

Finally, the MREC contends Perniciaro is subject to discipline under § 339.100.2(19) for "any other conduct which constitutes untrustworthy, improper or fraudulent business dealings or demonstrates bad faith or gross incompetence[.]" The adjective "other" means "being the one (as of two or more) remaining or not included; being the one or ones distinct from that or those first mentioned or implied." Merriam-Webster's Collegiate Dictionary, 878 (11<sup>th</sup> ed. 2004). Therefore, subdivision (19) refers to conduct not referred to in the remaining subdivisions of the

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<sup>17</sup> We do not mean to imply that either MREC or MILS staff gave misleading or inappropriate advice to Perniciaro. On the contrary, while their advice may have been sound, it is Perniciaro's implementation of it that is at issue here.

statute. We have found that the conduct at issue is cause for discipline under § 339.100.2(2), (14), (15), and (24). There is no “other” conduct. Therefore, we find no cause for discipline under § 339.100.2(19).

### **Summary**

Perniciaro and New Homes Real Estate are subject to discipline under § 339.100.2(2), (14), (15) and (24).

SO ORDERED on September 16, 2013.

\s\ Mary E. Nelson  
MARY E. NELSON  
Commissioner