

BEFORE THE MISSISSIPPI REAL ESTATE COMMISSION

MISSISSIPPI REAL ESTATE COMMISSION

COMPLAINANT

VS.

NO. 012-1902

GARY FONTENOT, non-resident BROKER

and

MARY McCABE, resident BROKER

RESPONDENTS

AGREED ORDER

This cause came before the Mississippi Real Estate Commission, sometimes hereinafter "Commission," pursuant to the authority of Miss. Code Ann. §§73-35-1, *et seq.*, as amended, on a Complaint against Mary McCabe, Broker, and Gary Fontenot, non-resident Broker, and the Commission was advised that there has been an agreement reached with Respondent Mary McCabe resolving the issues brought forward against her in this complaint. By entering into this Agreed Order, this Respondent waives her right to a full hearing and her right to appeal to a circuit court. The Commission, then, does hereby find and order the following:

I.

Gary Fontenot, sometimes hereinafter "Respondent Fontenot," is an adult resident citizen of LA, whose last known address of record with the Commission is 38035 Post Office Rd, #20 A, Prairieville, LA. Respondent Fontenot is the principal broker with Executive Realty South Louisiana, a real estate company at 15615 Airline Hwy, Ste. B in Prairieville, LA, and is the holder of a non-resident MS real estate broker's license. As such, he is subject to all Commission rules, regulations and Mississippi statutes governing the sale and transfer of real estate and licensing of real estate brokers under Mississippi law.

II.

Mary McCabe, sometimes hereinafter called "Respondent McCabe," is an adult resident citizen of MS, whose last known address of record with the Commission is 10767 Taylor Rd., Gulfport, MS. Respondent McCabe is a holder of a real estate broker's license issued by the Commission pursuant to Miss. Code Ann. §§73-35-1, *et seq.*, as amended and, as such, she is subject to the provisions, Commission rules, regulations and statutes governing the sale and transfer of real estate and licensing of real estate salespersons under Mississippi law.

III.

On or about March 1, 2019 this office received a sworn statement of complaint from Jennifer L. McCullough, of 12457 Preservation Drive, Gulfport, MS 39503. Her complaint is against Gary Fontenot, holder of a Mississippi Non-Resident Broker's license who has a Louisiana business named Realty Executives South Louisiana and which is located at 15615 Airline Highway, Suite B, in Prairieville, LA, 70769, and Mona C. Morales, a LA real estate agent license with Fontenot but unlicensed in MS. Morales acted in the capacity as an exclusive buyer's agent assisting the McCulloughs in purchasing a property in Mississippi. The residential property that was purchased by the McCulloughs was listed for sale by Broker Mary McCabe of Mary McCabe Realty which is located at 10767 Taylor Road in Gulfport, MS (39503). The sellers were Ramona and Rick Berry.

VI.

McCullough's husband, Michael, is in the military. In early 2017, they were living in Ethiopia, where he was stationed. Jennifer McCullough and Mona Morales (the LA salesperson unlicensed in MS) had been childhood friends. Morales was contacted by McCullough via Facebook to "remotely" assist them with purchasing a property in the Greater New Orleans area. Their search eventually led them into the Gulfport, Mississippi area.

V.

On 4/2/2017 McCullough emailed Morales asking if she had "jurisdiction" to operate in MS because they had found some homes in Gulfport and Biloxi near the military base. Morales replied by email on 4/3/2017 at 5:47 am with "Yes, I am licensed to sell in MS". On 04/6/2017 Morales phoned Respondent McCabe to inquire about a residential listing located on Preservation Drive in Gulfport, MS. Morales said *she was in Ocean Springs, MS* in the process of viewing several homes on behalf of her clients, who were out of the country. Later that same day, Morales met McCabe at the Gulfport, MS property. Respondent McCabe stated that she asked Morales if she was licensed in MS and was told by Morales that she was, and so was her broker. McCabe did not verify this. Morales spoke with her client McCullough while at this house and said she thought the house was nice and was a good size and was what the McCulloughs were looking for.

VI.

Subsequently, an offer to purchase this Gulfport, MS home was made on 4/19/2017 and \$1,000.00 was wired to the closing attorney, Laura Paulk, Esq., by the McCulloughs. The Contract for Sale stated that a \$1,000.00 earnest money check was to be deposited with (space left blank).

VII.

After much negotiating, an offer was accepted on the Preservation Road property for a purchase price of \$577,000.00. The sales contract showed that Mary McCabe Realty was the listing broker, and Respondent Fontenot was the selling broker. A home inspection was performed 4/25/2017 by Phil Hage of WIN Home Inspections. Hage reported several items which needed observation and/or repair. Hage noted that at several locations there were indications of roof leaks, wood rot, and mold. The Berrys agreed to repair several items noted in the report. In reply to the items needing attention, the Berrys stated that they were aware of the identified old moisture stains.

They said their previous owner had addressed those by spending over \$10,000 to place "ice" underlayment under the shingles in those areas. Hage also conducted a re-inspection on 6/2/2017, after repairs were performed. Hage's remarks regarding the evidence of a leaking roof was "Unknown" and referred to his recommendation on his earlier inspection report. He was unable to determine if the Berrys had repaired it. The Berrys did provide a home warranty with First American Home Warranty. Hage disclosed to Buyer Jennifer McCullough, in a 4/26/2017 email, that he had done an inspection on that same house a few years prior. The roof leaks that he mentioned and photos in the inspection ordered by the McCulloughs were present at the time of that previous inspection. Hage said it appeared that the conditions had not gotten any worse, and that the roof may have been repaired since his earlier inspection, but that the McCulloughs would need to verify that information. The Berrys were not Hage's client for the previous inspection.

VIII.

The McCullough's arrived from Ethiopia on June 8, 2017, about a week prior to closing. According to Respondent McCabe, the Berrys told her that the McCullough's showed up unannounced at the home and asked to come in and look at it. Unknown to Respondent McCabe, the McCulloughs were at the home several other times prior to closing. When Respondent McCabe asked Morales when she and the McCulloughs wanted to perform a final walkthrough, Morales said she would let McCabe know. Morales later informed McCabe that the McCullough's did not need a final walkthrough since they had been in the house several times already and had looked around with the Sellers.

IX.

The loan was finalized with Movement Mortgage, which is located at 4451 Bluebonnet Boulevard, Suite G, in Baton Rouge, Louisiana 70809. The loan officer was Ann Matassa. Closing occurred on 6/16/2017 in Gulfport, MS. The date and time of the closing had been postponed several times for the McCullough's and Morales. Attorney Laura Paulk had several closings scheduled that same day but, since the matter of the loan interest rate lock-in was important, Paulk agreed to work it in. Attorney Paulk contacted all parties and said there was a tight window of time in which their closing could be done. Present at the closing were the McCulloughs and the sellers' agent, Mary McCabe, who was attorney in fact for her clients. Respondent Fontenot had told McCabe by telephone that he and Morales were in a car headed that way but were not able to get there in time due to the distance. They never appeared.

X.

According to Respondent McCabe, she was in attorney Paulk's lobby when the McCullough's arrived. As they were all walking into the room, Respondent McCabe said Jennifer McCullough turned to McCabe and said, "Do not tell the attorney we are in the home already". Without McCabe's knowledge, her clients apparently had already given the McCulloughs a key to the home and had let them put their suitcases and some refrigerated items in the home. At closing, they signed all the paperwork; including the Declaration of Acceptance. After closing, Respondent McCabe went to the house around 4:00 pm to remove the key box and she gave the key to Mr. McCullough. No complaints or issues about the property were raised at that time.

XI.

According to Ms. McCullough's complaint, she called Morales to inform her of the closing setting. However, Morales said she was not aware of it until 30 minutes prior and couldn't make it in time from Baton Rouge. McCullough later told Morales to meet them at the house once she got

in town. Once there, they chatted for a bit, McCullough gave Morales the closing packet and the commission check that attorney Paulk gave her to give Morales, and then they went out to eat. *The commission check was made out to Realty Executives South LA Group, a company not licensed in the state of Mississippi* and was in the amount of \$17,310.00. Per an e-mail to the MREC from Respondent Gary Fontenot, Morales (a real estate agent unlicensed in MS) received a "referral fee" in the amount of \$13,155.60. McCullough went on to say that following the closing, when they started moving into the residence, they noticed several minor things---such as some locks that were not fixed as the home inspector claimed, larger amounts of mold in the attic than was in his report, and two of the bathrooms were sticky and not cleaned.

XII.

During the night of 6/20/2017, a named Tropical Storm (Cindy) hit the area. At that time, the McCullough's oldest son discovered water was in the front foyer. Water was running down the walls and pooling on the floor. These buyers went to the second floor and noticed water coming in from the ceiling and windows. They went into the attic and found seven active leaks in the roof, as well as more water in the daughter's closet, the front wall of the dining room, and in the smaller attic. At 11 pm, Jennifer McCullough texted Rick & Ramona Berry (sellers) and agent Morales photos of the water. Rick replied he was sorry but that he had never had that problem when he lived there. Jennifer McCullough spoke with Morales but did not get anything of content from her.

XIII.

Mr. McCullough included a narrative with the complaint. He stated that between 4/2/2017 and 6/15/2017, Morales played an active role in their home purchase. She found and arranged for the home inspector, she told them what mortgage broker to use, and she regularly communicated with

the seller's agent (Respondent McCabe). Included in the McCulloughs' complaint were numerous emails back and forth between Morales and Ms. McCullough showing Morales was willfully and intimately involved in licensable real estate activity involving the subject Mississippi property. He further stated that the closing attorney gave them the commission check. He said agent Morales came over after closing and picked them up to go get celebratory drinks. After getting daquiris, Morales drove back to the residence and they later had dinner. He said Morales returned to LA with the commission check.

XIV.

McCullough added that the day after it rained so badly, Morales called them several times. She was not really concerned with the water leaks but trying to cover for her actions. Morales offered to send her husband and boys over to help clean up. Morales also said she had a gift card for them that would help, and that she'd give them her commission to help with the damages. That same day Morales also called several times to tell the McCulloughs who their realtor was. Morales told them that she was not their realtor, but that Gary (Fontenot) was. She said she was just helping Gary, and that they needed to start talking to him from that point on. McCullough stated they had NEVER heard of Gary Fontenot until this point. On 6/28/2017, Respondent Fontenot sent an email to Ms. McCullough, to follow up to a previous phone call they had. McCullough wrote a note on the copy of the email that this was the first time she had contact with Respondent Fontenot.

XV.

The McCulloughs called First American Home Warranty. The McCullough's contract number was not in their data files nor did they have information about a Home Warranty being issued on the property or to the sellers. There was, however, a home warranty payment reflected on the Settlement Statement. The McCullough's contacted their homeowner's insurance, USAA, and Terry Berger of SRR was sent out. He stated that the leaking roof was a pre-existing condition.

The shingles had not been repaired properly. He found spots in the kitchen that were painted over, and several other areas of suspected water damage that was improperly repaired or not disclosed at all. Phil Hage, the licensed home inspector, was copied in the email that McCullough sent to the sellers advising them of the water and damage issues. Hage replied with the part of his re-inspection report of the roof issue in which he could not determine any active leaks but found evidence of prior water damage. He had recommended that a licensed roofer evaluate the roof and had recommended that the buyers ask the sellers if they were aware of the damage and if any repairs had been made. Seller Rick Berry replied to this email and expressed sympathy for the issues the buyers were having. He said that no such problems had occurred during his brief period of ownership. They were aware of leaks and repairs made by the previous owners but had not experienced any problems personally. He provided the name and number of the roofer used.

XVI.

McCabe stated that the Berry's daughter and son in law (the Hightower's) had purchased the home from Ryan Goldin in 2012; that they owned it for about three years before selling it to the Berry's. After living there for approximately two years, the Berrys then purchased a condo in Biloxi where they decided to live full time.

XVII.

The McCulloughs were unable to get any satisfaction so they filed a civil suit against Rick and Ramona Berry, LA agent Mona Morales, Respondent Gary Fontenot, Realty Executives South Louisiana, Respondent Mary McCabe, Phil Hage, of Win Home Inspections, and a host of other individuals and corporations. Respondents McCabe, Fontenot, his company, and Morales were dismissed from the suit. Hage reportedly settled with a payment to the McCulloughs.

XVIII.

In response from a request from the Commission to provide documentation, Respondent Gary Fontenot provided the following:

His statement said that the agency relationship with the McCullough's began with home searches in Louisiana and under the jurisdiction of the LREC. He also asserted that the buyers erroneously listed Morales as their representative in the court proceedings. Morales did assist the McCullough's in their search for homes in the Baton Rouge area, then into the New Orleans area. Morales wasn't a member of that MLS, but Fontenot was, so she asked him for assistance in that MLS area home search. He agreed and began communicating with the McCullough's in mid-March of 2017 by sending them listings and, together with Morales, more info, pics, and often videos. Fontenot continued by saying that when the search was expanded into Mississippi, the McCullough's still wanted Morales to continue to represent them and asked if she could. Morales replied she could as soon as she got her license, which shouldn't take long since her brokerage was licensed there. She contacted the MREC, who discussed the procedure with her, and mailed her a packet, along with a fingerprint card. This took some time and the McCullough's were needing to move forward with their search but wanted to accommodate their friend and preferable representative. However, when Morales received the packet, it had gotten soaked somehow during delivery because of bad storms in MS and LA at the time. Since time was of the essence, Morales explained to the McCullough's that Fontenot could represent them and help them move forward sooner. They wanted Mona to remain involved in their search, so she communicated to them that she could continue assisting Fontenot and communicate with them, but he would have to be their representative in any transaction in Mississippi. They were ok with this, so Fontenot provided them with agency documents and an explanation of such and began previewing and sending Mississippi listings as he and Mona had done in their New Orleans area search.

Fontenot further said that, from time to time, when Jennifer McCullough, in her communications with Mona, would ask a question that only her designated agent should answer, Morales then referred her to Fontenot and that he handled that communication. Fontenot stated that after the closing and following the aforementioned rainstorm, "they noticed an apparent roof leak and contacted me to help find a roofer...which I did..." He also stated that Morales drove over to Gulfport, MS "to visit" and pick up the closing docs and commission check, which was made out to Realty Executives South Louisiana.

XIX.

However, Respondent Fontenot was unable to provide a signature page of the WWREB form for the McCullough's. Respondent McCabe did not have a dated WWREB form with her sellers.

XX.

It is alleged that Respondent Mary McCabe failed in her fiduciary duties to her clients, when she did not ascertain that the buyer's agent, Mona Morales, was licensed to act in MS as a real estate agent. In furtherance of this failure, Respondent McCabe facilitated this unlicensed agent with viewing the home for the buyers. McCabe is in violation of M. C. A. §73-35-21(n) **Any act or conduct, whether of the same or a different character than hereinabove specified, which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing;** and Rule 4.2 (G) 5: G. "Fiduciary Responsibilities" are those duties due the principal (client) in a real estate transaction are:

(5) 'Reasonable skill, care and diligence' - the agent must perform all duties with the care and diligence which may be reasonably expected of someone undertaking such duties.; and

Rule 4.3 Disclosure Requirements

A. In a single agency, a broker is required to disclose, in writing, to the party for whom the broker is an agent in a real estate transaction that the broker is the agent of the party. The written disclosure must be made before the time an agreement for representation is entered into between the broker and the party. This shall be on an MREC Agency Disclosure Form.

XXI.

It is alleged that Respondent Gary Fontenot failed in his duties as a MS broker by allowing and facilitating an unlicensed agent to operate in MS, contrary to Mississippi statutes. Further, upon questioning by the Commission of the unlicensed agent's actions in MS, Respondent Fontenot misrepresented the truth to the Commission. Additionally, Respondent Fontenot provided commission monies from this MS transaction to this unlicensed agent, Mona Morales, in clear violation of Mississippi law. It is alleged that broker Gary Fontenot is in violation of the following:

M. C. A. §73-35-21: (1) The Commission may, upon its own motion and shall upon the verified complaint in writing of any person, hold a hearing for the refusal of license or for the suspension or revocation of a license previously issued, or for such other action as the commission deems appropriate. The commission shall have full power to refuse a license for cause or to revoke or suspend a license where it has been obtained by false or fraudulent representation, or where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

(a) Making any substantial misrepresentation in connection with a real estate transaction;

(b) Pursuing a continued and flagrant course of misrepresentation or making false promises through agents or salespersons or any medium of advertising or otherwise;

(j) Paying any rebate, profit or commission to any person other than a real estate broker or salesperson licensed under the provisions of this chapter;

(n) Any act or conduct, whether of the same or a different character than hereinabove specified, which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing.

Rule 3.1

E. No licensee shall pay any part of a fee, commission, or other compensation received by such licensee in buying, selling, exchanging, leasing, auctioning or renting any real estate except to another licensee through the licensee's responsible broker.

No licensee shall knowingly pay a commission, or other compensation to a licensed person knowing that licensee will in turn pay a portion or all of that which is received to a person who does not hold a real estate license.

Rule 4.2

A. "Agency" shall mean the relationship created when one person, the Principal (client), delegates to another, the agent, the right to act on his behalf in a real estate transaction and to exercise some degree of discretion while so acting. Agency may be entered into by expressed agreement, implied through the actions of the agent and or ratified after the fact by the principal accepting the benefits of an agent's previously unauthorized act. An agency gives rise to a fiduciary relationship and imposes on the agent, as the fiduciary of the principal, certain duties, obligations, and high standards of good faith and loyalty.

B. "Agent" shall mean one who is authorized to act on behalf of and represent another. A real estate broker is the agent of the principal (client) to whom a fiduciary obligation is owed. Salespersons licensed under the broker are subagents of the Broker, regardless of the location of the office in which the salesperson works.

C. "Client" shall mean the person to whom the agent owes a fiduciary duty. It can be a seller, buyer, landlord, tenant or both.

G. "Fiduciary Responsibilities" are those duties due the principal (client) in a real estate transaction are:

(5) 'Reasonable skill, care and diligence' - the agent must perform all duties with the care and diligence which may be reasonably expected of someone undertaking such duties.

H. "First Substantive Meeting" shall be:

(3) In a real estate transaction in which the Broker is the agent for the buyer, first substantive meeting shall be at the initial contact with a seller or a seller's agent or before or just immediately prior to the first of any of the following:

(a) Showing the property of a seller to a represented buyer.

(b) Eliciting any confidential information from a seller concerning their real estate needs, motivation, or financial qualifications.

(c) The execution of any agreements governed by Section 73-35-3 of the MS Code.

Rule 4.3 Disclosure Requirements

B. In a single agency, a broker is required to disclose, in writing, to the party for whom the broker is an agent in a real estate transaction that the broker is the agent of the party. The written disclosure must be made before the time an agreement for representation is entered into between the broker and the party. This shall be on an MREC Agency Disclosure Form.

DISCIPLINARY ORDER

THEREFORE, by agreement, understanding and consent, the Commission ORDERS discipline as follows:

As to Mary McCabe, Broker, the Commission orders that her license incur a one (1) month full suspension, beginning January 01, 2020, followed by five (5) months of probation; contingent upon both future compliance with all Mississippi Real Estate Statutes and Commission Rules and also contingent upon her completing eight (8) hours of Mandatory Continuing Education (4 hours of Agency, 2 hours of Contract law and 2 hours of License Law) by March 31st, 2020. Said education cannot be completed online and will not be the same classes from the same provider as those used by this Respondent in the last renewal period. Further, these classes will be courses approved by this Commission and be in addition to the regular hours of continuing education already required of licensees for license renewal. Evidence of completion of these classes is to be provided to this Commission.

SO FOUND AND ORDERED this the 1st day of JANUARY, 2020.

MISSISSIPPI REAL ESTATE COMMISSION



BY: Robert E. Praytor
ROBERT E. PRAYTOR, Administrator

AGREED: Mary McCabe DATE: 12/17/19
Mary McCabe, Broker

BEFORE THE MISSISSIPPI REAL ESTATE COMMISSION

**IN RE: THE NON-RESIDENT BROKER'S LICENSE OF GARY FONTENOT;
LICENSE NO. 20261**

**AFFIDAVIT OF VOLUNTARY SURRENDER OF LICENSE
IN LIEU OF DISCIPLINARY PROCEEDINGS**

I, GARY FONTENOT, being of lawful age, swear and affirm under penalty of perjury, that:

1. I hold a Mississippi non-resident real estate broker's license, No. 20261, issued by the Miss. Real Estate Commission pursuant to Miss. Code Ann. §73-35-1, et seq., as amended, and, as such, I am subject to all of the provisions, rules, regulations and statutes governing the sale of real estate and the licensing of real estate brokers under Mississippi law.

2. I am named as a Respondent in a formal complaint brought by the Mississippi Real Estate Commission ("Commission") against me as a Responsible Broker styled as Mississippi Real Estate Commission vs. Gary Fontenot, Non-Resident Broker, and Mary McCabe, Resident Broker, being Case No. 012-1902 on the administrative docket of the Commission. Relevant to this complaint, I was the Responsible Broker for the involved real estate transaction.

3. I am aware that the referenced matter, Case No. 012-1902, remains pending before the Commission. The content and substance of the above referenced complaint, and of any of the Commission's investigative files regarding said complaint, are incorporated herein by reference.

4. I am aware and acknowledge that the allegations set forth in the above referenced pending complaint, if proven, could be considered substantial violations of the Mississippi Real Estate Broker's License Law of 1954, Miss Code Ann. §73-35-1, et seq., as amended, and/or the rules and regulations promulgated thereto, for which I could be subjected to discipline by the Commission, up to and including revocation of my license to practice real estate in Mississippi.

5. I am fully aware of my rights to contest the allegations of the above referenced complaint at a disciplinary hearing before the Commission. In lieu of a disciplinary hearing before the Commission, I desire to voluntarily surrender my non-resident broker's license, No. 20261, and so have my Mississippi license file closed. I acknowledge that the described acts and omissions contained in the Complaint pending against me, if proven at a Commission hearing only upon clear and convincing evidence, could constitute violations of the Mississippi Real Estate Brokers License Act of 1954, as amended, Miss. Code Ann.

6. I am surrendering my license freely and voluntarily and not subject to duress or coercion.

7. In exchange for the Commission's acceptance of my voluntary surrender of my license in lieu of disciplinary proceedings against my license, I acknowledge that I am voluntarily and knowingly waiving all of my rights regarding my license and the above referenced complaint, which include, but are not necessarily limited to, an administrative disciplinary hearing with full due process, representation by counsel at my own expense at any hearing, the right to present witnesses and evidence on my own behalf and the right to cross-examine witnesses called to testify against me, and the right to seek judicial review of any decision of the Commission on the merits of the complaint brought against me.

8. I acknowledge and agree that the surrender of my license shall be effective upon the date of my execution of this Affidavit of Voluntary Surrender.

9. My original wall license and pocket card are attached or enclosed herewith for return to the Commission along with this Affidavit of Voluntary Surrender.

10. I acknowledge and expressly agree that, at any time following this voluntary surrender of my non-resident broker's license No. 18997, should I desire to seek licensure from the Commission authorizing any real estate practice in Mississippi, I will wait at least until year 2022 to make application on such terms and conditions as may be, at that time, required as if I

were a Mississippi resident applicant, including applicable examination, and subject to Commission review of my fitness to practice real estate activity in Mississippi.

2

11. I acknowledge and expressly agree that consideration of any future application submitted by me for licensure from the Commission, authorizing any real estate practice in Mississippi following the voluntary surrender of my nonresident broker's license, will only be considered for satisfaction of all terms and conditions then in effect for licensure as if I were a Mississippi resident applicant, including applicable examination, and not with respect to any possible terms that may be available for non-resident licensure by reciprocity for any purposes.

FURTHER, AFFIANT SAYETH NOT.


GARY FONTENOT

STATE OF LOUISIANA
PARISH OF ASCENSION

SWORN TO AND SUBSCRIBED BEFORE ME, this the 10th day of January, 2020


Notary public

