BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE ALASKA REAL ESTATE COMMISSION

In the Matter of	)	
	)	
JERRY GENE LYMBURNER	)	OAH No. 22-0784-REC
	)	Agency No. 2021-000267

DECISION

I. Introduction

This case evaluates a set of disciplinary allegations against licensed real estate broker Jerry Gene Lymburner. The allegations relate to a claim that, while serving as listing licensee for a Fairbanks home, he fraudulently concealed from buyers a known foundation problem. The Division seeks a brief suspension, a year of probation, a fine, and a reprimand.

A live hearing was held in Fairbanks on October 23-24, 2023. The Division of Corporations, Business and Professional Licensing presented testimony from Mr. Lymburner, engineers Vince Meurlott and Timothy Henry, licensee Michael Garza, and investigator Anna Gabriel. Mr. Lymburner presented a case that included testimony from the same witnesses as well as broker PeggyAnn McConnochie, whom he had engaged as an expert witness.[1]

This decision concludes that the Division did not meet its burden of showing that Mr. Lymburner violated any statute or regulation. No discipline should be imposed.

II. Facts

Jerry Gene Lymburner began his real estate career in 2013 as a salesperson for Stars and Stripes Realty in North Pole. In 2015 he became a licensed broker and opened his own office in North Pole under the name "Powered by Lymburner Realty." Initially it was just a two-person office, but the firm has grown since. Mike Garza—one of the individuals who plays a role in this case—became a salesperson at Powered by Lymburner shortly after it opened.[2]

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[1] In addition, exhibits 1, 2, 4, 6-9, 12, and 20 were offered by the Division; all were admitted without restriction except 12, which may only be used for procedural history. Lymburner exhibits D-F and J were admitted without restriction. No AS 44.62.460(d) hearsay limitations were requested or placed on any item, and pursuant to the terms of the governing prehearing order no such restrictions therefore apply.

No other documentary materials are part of the record for decision. The numbered "Agency Record" is not independently available for use in the decision, except to the extent included in one of the admitted exhibits.

[2] Paragraph drawn from Lymburner testimony.

This case is about a 1400-square-foot one-story residence at 1708 Carr Avenue in Fairbanks. In 2013, while still a salesperson at Stars and Stripes, Mr. Lymburner represented Joshua Rindlisbacher in the latter's purchase of the Carr Avenue property.

In connection with the 2013 purchase—and at Mr. Lymburner's recommendation—Mr. Rindlisbacher had an inspection done by Vince Meurlott, P.E, who wrote a written report.[3] Although he characterized the home as "appears to be generally safe and sound," he listed 29 items recommended "for immediate correction" as well as 11 items "for future reference."[4] Many in both categories were minor fixes (GFCI outlets, replacing some decayed flooring) or simply notations of items that needed to be checked (*e.g.,* "Have the furnace inspected . . ."). But several indicated significant structural problems of various kinds.[5] These included a lack of a needed bearing wall, as well as a nonstandard roof support similar to "a truss system of sorts."[6] Of central relevance to this case was item 14:

> Replace the foundation for the middle of the east exterior wall where it does not have a concrete foundation. The north 8' and the south 5' of the east wall has concrete foundation. Use a foundation approved by the City or have an engineered alternative that could cost less money to construct. See the City of Fairbanks Building Department website for SFD 1 through 8.[7]

Of particular note in understanding item 14 is that the east exterior wall is apparently 40 feet long.[8] The Meurlott report was recommending that over two-thirds of the east wall foundation (all but 13 feet) be replaced,[9] noting this as an item needing "immediate correction." There was no mention of the other walls. However, the foundation of this house was very difficult to access; he may have missed other matters of concern due to lack of access.[10]

Mr. Rindlisbacher owned the house for about four years. During that time, he apparently addressed a number of the smaller items of the Meurlott report, but he did not correct the foundation deficiency noted in item 14, nor any of the other significant structural problems with the home.[11]

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3 Lymburner testimony.

4 The typed Meurlott report is found at Exhibit 1. The handwritten marks on the report were added much later.

5 These were items 7, 14, 15, 26, and "c."

6 Ex. 1 at 1 (item 7) and 3 (item "c").

7 Ex. 1 at 2.

8 Mr. Henry testified that it was at least 60 feet long, but this surely is not so. The 40-foot figure is taken from Ex. 9, p. 14.

9 Ex. 1 at 2.

10 Henry testimony.

11 See Ex. 1 at 1-3. Only the initialed items were corrected. Lymburner testimony; Ex. 2 at 2 (addendum).

In 2017, Mr. Rindlisbacher listed the house for sale with Powered by Lymburner, with Mr. Lymburner as his licensee. Mr. Lymburner did a very brief walk-through of the house, observing that the house seemed to be in better shape than in 2013.[12] Mr. Rindlisbacher gave Mr. Lymburner the Meurlott report again (Mr. Lymburner no longer had access to his old Stars and Stripes file), saying that he had initialed all the items he had taken care of; items not initialed had not been done.[13] Mr. Lymburner knew the house had structural issues and would be a difficult sale.[14] Mr. Rindlisbacher declined to do a disclosure statement, opting instead for buyers to sign the waiver page of the statutory form.[15]

The asking price was $139,500. The MLS listing, which Mr. Lymburner prepared, described the house as a "Completely remodeled 3 bedroom, 2 bath Home being sold AS IS! Home is fully functional and in awesome condition . . . . AS-IS at this price, seller does not want to do any repairs."[16] It went on to say: "Foundation is mostly concrete per the seller, with wood foundation in a small section. Previous home inspection in assoc docs, per the seller, all the initialed items have been completed. Being sold AS IS, seller does not want to do any repairs."[17] The Meurlott report was provided, with the seller's initials showing which items had been completed.[18]

The home first went under contract with a buyer named Monroe who was represented by Mike Garza, another Powered by Lymburner licensee. This buyer was Mr. Garza's ex-fiancée.[19] She was deeply nervous about the transaction and there were early signs that it likely would not close.[20] Garza himself immediately noted the Meurlott report and knew from it that "there were issues" with this house.[21] Nonetheless, Garza seems to have allowed his buyer to go past the expiration of the due diligence period without an extension, inspection, or rescission.

On July 10, 2017, the buyer had a "walk and talk" inspection by Timothy Henry, P.E. Henry felt that portions of the foundation of the home were failing, and his oral advice to this

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12 Lymburner testimony.
13 *Id*.
14 *Id.*
15 *Id.* This seems to have been done by the subsequent potential buyers. However, neither side offered a full set of transaction documents into evidence.
16 Ex. 2 at 2.
17 *Id*.
18 Lymburner testimony; Ex. 1.
19 Garza testimony.
20 Lymburner testimony on recall (cross-exam using certain texts that were not separately admitted).
21 Garza testimony (cross).

effect made the buyer certain that she wanted out of the deal.[22] Through Garza, she proposed rescission on July 12, 2017.[23] However, since the inspection period had expired, it proved necessary to find another reason for rescission in order to recover the buyer's earnest money.[24] For this reason, Garza went back and asked Henry to prepare a short written report; Garza then shared that report with the lender, the lender predictably denied loan approval, and the transaction was rescinded with return of earnest money.[25]

Two documents of note resulted from this rescission. The first was the rescission agreement itself. Preparing this document before the loan denial, Garza did not check the box indicating that loan denial was the reason for rescission, even though the loan denial would subsequently become the legal justification for terminating the transaction and returning the earnest money. Garza also did not check the box for "Engineer/Home Inspection is unsatisfactory to Buyer or Lender." Instead, under "reasons" the "other" box was checked, and Garza had typed the explanation: "Per recent review of the property by Tim Henry it was discovered that the home had a failing foundation."[26] At the time the document was prepared—July 12—all Henry had done was a "walk and talk;" there was no written report.

The second document was the limited report that Henry prepared at Garza's request on July 13, 2017 and transmitted to him on July 14. The report did not say the foundation was "failing" as a whole, but it did characterize it as "not . . . permanent or stable" with "failing portions," noting there was a combination of concrete and wood with "stem walls . . . pushing inward in several locations and . . . large voids beneath sections of concrete footing."[27] While the Meurlott report had certainly raised a red flag regarding the foundation, I find that the Henry report was substantially more negative, if only because it identified problems extending to the concrete portions.

Mr. Henry's relationship was with Mr. Garza and his buyer, and accordingly Henry did not transmit his report to the seller or to Mr. Lymburner.[28] Mr. Garza did not talk to Mr. Lymburner about the written report.[29] He says today (six years later) that he probably emailed it

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22 Garza testimony.
23 Ex. F (proposed rescission agreement, executed by buyer but not by seller).
24 Garza testimony; Lymburner testimony.
25 Garza testimony; Ex. E (lender denial, July 21); Ex. 6 (rescission agreement, executed by seller on July 21).
26 Ex. F, Ex. 6.
27 Ex. 4.
28 Ex. J at 1; Henry testimony.
29 Garza testimony; Lymburner testimony.

to Lymburner, but the best evidence is that he did not,[30] and the Division's counsel (much to her credit) has conceded that he did not.[31] He did put it into his Monroe transaction file, and that is where it was found years later.[32] In 2017, however, Mr. Lymburner did not review the individual documents in the buyer's representative file for the abortive Monroe transaction.[33] All he reviewed was a checklist Garza had put on the file, which in no way indicated that an additional written report, beyond the one from Meurlott, was inside. The best evidence is that Mr. Lymburner was aware, in a general way, of some kind of negative oral opinion by Henry regarding the foundation, but not of a written report.

After the rescission, the home was re-listed. Despite encouragement from the ALJ to offer a more complete set of documents into evidence, the Division did not offer the renewed listing on the MLS into the hearing record and so, for purposes of this decision, its exact text is unknown. From testimony, one may surmise that it was probably similar to the original MLS listing; certainly, it did not say that the foundation was "failing" or that a prior sale contract had been rescinded. One may also surmise that the Henry report was not added to the associated documents (since Lymburner was not aware of it), and that it was not made available to subsequent prospective buyers.

A new buyer, Jerry Hodges, came forward in August 2017. The property went under contract to him for $130,500 ($126,500 net of additional concessions),[34] and the transaction ultimately closed. Hodges was represented in the transaction by licensee Jewel Addison, who was affiliated with another brokerage. No evidence has been offered to indicate that Ms. Addison took any steps to protect or caution her client, and we have no information about any counseling she may have given him about the contents of the disclosed Meurlott report. Mr. Hodges apparently did not arrange a home inspection of his own.[35]

The Carr Avenue property is still intact and being lived in today.[36] There has been a structural failure in the roof that has caused deflection there, but there is no evidence that the roof

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30 Garza's emails used a personal account under his sole control, and he did not find any email to Lymburner attaching the Henry report when he was producing documents for parallel civil litigation about this transaction. Lymburner is sure he did not see it, and he has no received email indicating that he did.

31 Division closing, rebuttal portion, final remarks.

32 Lymburner found it when gathering documents for the civil litigation.

33 Lymburner testimony; Ex. 20 (signed off on file checklist but not on individual documents).

34 Ex. 7.

35 The use of "apparently" and "surmise" in the last two paragraphs is because of gaps in the evidence.

36 Henry testimony.

failure was caused by the foundation issues as opposed to the nonstandard "truss system of sorts" used for roof framing, which was described in the Meurlott report.[37]

Mr. and Mrs. Hodges perceived that foundation issues they had not been aware of caused them damage, and they filed a civil suit against Mr. Lymburner, his firm, and others in 2019, as well as a Real Estate Commission complaint against Mr. Lymburner.[38] The civil suit has been closed. The Real Estate Commission complaint eventually led to the filing of an Accusation by the Division in September of 2022.

III. Disposition of the Counts Alleged

This case is presently framed by an Amended Accusation that the Division filed on October 5, 2023. The accusation in an administrative discipline matter against a real estate broker must set out "the acts or omissions with which the respondent is charged" and "the statute and regulation that the respondent is alleged to have violated."[39] There is no basis to impose discipline for matters that are not charged in the accusation controlling the case.

The Division has the burden of proof to establish, by a preponderance of the evidence, each factual element required to establish a violation under one of the counts of the accusation.[40] A preponderance of the evidence is evidence establishing that a fact is more probable than not.[41]

In this case, certain counts were dismissed by motion practice prior to the hearing, including three that had been pending in a prior accusation and that the Division continued to seek a favorable ruling on even after filing a superseding accusation that omitted them. Below, Part A briefly revisits the dismissals, which must now be adopted as final. Parts B and C then focus on the counts that were tried at the hearing.

A. Dismissed Counts

1. Former Counts 4-6

The first Accusation that the Division filed in this case included three counts, then numbered 4, 5, and 6, that were based on purported violations of AS 08.88.615 in connection with the Hodges transaction. On October 2, 2023 Respondent moved for dismissal of those counts. Without acknowledging that the motion was meritorious as to these counts, the Division

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37 *See* Ex. 1 at 3 (item "c").
38 Ex. 12 (admitted solely for procedural history).
39 AS 44.62.360, made applicable by AS 44.62.330(11).
40 AS 44.62.460(e)(1).
41 *State v. King*, 1994 WL 16196208, *1 n.1 (Alaska App. 1991).

filed a First Amended Accusation on October 5, 2023 that omitted those three counts. At the same time, however, the Division did not amend its own motion for summary adjudication, which expressly sought summary adjudication based on AS 08.88.615.[42] Since the legal theory was not cleanly withdrawn, it will be addressed briefly here.

AS 08.88.615 sets the duties a licensee owes "to each person to whom the licensee provides specific assistance." AS 08.88.620 extends those same duties (as well as others) to each person whom the licensee represents in a transaction. But Mr. Lymburner neither represented nor provided specific assistance to Mr. Hodges in the transaction at issue. Mr. Hodges was separately represented in the transaction. Since Mr. Lymburner did not represent or provide specific assistance to Mr. Hodges, any cause of action premised on § 615 had to be dismissed.

As a brief aside, we should note that § 615 bears the title "Duties owed by licensee in all licensee relationships." This broad title language may have been what misled the reviewing commission member[43] and others to think that the section applied to Mr. Lymburner in this transaction. However, section titles are not law.[44] In addition, the proper analysis of this transaction is that Mr. Lymburner did not have a "licensee relationship" with Mr. Hodges.[45] He had, instead, an arms-length relationship; he was entirely on the other side of the transaction. This does not mean he owed no duties to Hodges, but he owed no duties under § 615.

2. Count 4 of the Amended Accusation

The fourth count of the Amended Accusation alleges that Mr. Lymburner violated a Commission regulation, 12 AAC 64.125(b)(1), when he performed a "superficial" and "inadequate" "review of the Monroe file." This allegation related to the fact—noted above in the paragraph straddling pages 4 and 5—that Mr. Lymburner just looked at Garza's file checklist for the abortive Monroe transaction, and did not peruse the documents inside. In motion practice prior to the hearing, Mr. Lymburner moved for dismissal of the count based on 12 AAC 64.125(b)(1). The Division did not respond to the argument he set out in his motion for dismissal of this count. The motion was granted for the reason outlined below.

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42 *See* Div. Mtn. for Summary Adj. at 8.

43 In her defense, it should be noted that the RCM was inexperienced and would have preferred that "another, more seasoned Commission Member" be brought in to review the case. DIV 2955.

44 AS 01.05.006; *see also* AS 01.05.031(b)(2); *Ketchikan Retail Liquor Dealers Ass'n v. Alcoholic Bev. Control Bd.,* 602 P.2d 434, 438 (Alaska 1979).

45 *See generally* AS 08.88.640(d), AS 08.88.600.

12 AAC 64.125(b)(1) requires a supervising broker to "provid[e] for the review of tiles for completeness and accuracy and ensuring all required real estate related documents are on file, including all applicable local, state, and federal forms *before the recording of a transaction*." Since the Monroe transaction was never closed or recorded, this duty never arose, and Mr. Lymburner could not have violated it.[46] Nothing has been alleged, much less proven, in this case that would constitute a violation of this particular regulation, and nothing could be proven because the duty it creates never matures in an unconsummated transaction. The count therefore fails.

B. Counts 1, 3, and 5 of the Amended Accusation

1. Failure to disclose foundation defects discovered by Monroe's engineer

Counts 1, 3, and 5 are all aimed primarily at the fact that Mr. Lymburner apparently did not make any additional disclosure regarding the condition of the foundation after the recission of the Monroe transaction. Thus, he did not inform Mr. Hodges that the home had (or allegedly had) "a failing foundation" or a foundation or a foundation with defects even more pervasive than what was described in the Meurlott report.

In the context of real estate transactions, a failure to disclose can constitute a misrepresentation and/or dishonesty.[47] Count 1 addresses the nondisclosure in this case as a "substantial misrepresentation" (AS 08.88.071(a)(3)(i)); Count 3 addresses it as "dishonest" conduct (AS 08.88.071(a)(3)(iv)); and Count 5 addresses it as "failing to disclose to a prospective buyer a known material defect regarding the condition of . . . the offered real estate" (12 AAC 64.130(14)). The last—a specific provision adopted under the general authority of the first two—is probably the most apt rubric under which to analyze this transaction, but all three potentially apply.

The above provisions establish that a licensee must disclose material defects that the licensee knows of. Knowledge, as will be discussed more fully below, encompasses things the licensee would know of but for willful blindness.[48] Conversely, however, a licensee has no duty

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[46] Moreover, the regulation—which is clearly aimed at making sure all the elements of a transaction have been properly attended to before the recording date—does not require that the broker do the review in person; the broker only needs to "provid[e] for" this kind of review, which means that he or she must set up a system whereby it occurs.

[47] *E.g., In re Phillip Stephens,* No. C-86-10 (Alaska Real Estate Comm'n 1988); *Danitz v. Darlene Stephens*, No. S94-005 (Alaska Real Estate Comm'n 1995).

[48] *See In re Keating and Griebel*, OAH Case No. 10-0474-REC (Alaska Real Estate Comm'n 2011).

to ferret out hidden conditions.[49] As the Commission has held in the past, "it is difficult to imagine a circumstance where the licensee could be found to have engaged in deceit in the absence of a showing that he or she was specifically aware of a particular defect in the home, and was aware that the defect was being misrepresented or concealed."[50]

a. Was a material defect undisclosed?

The first question in this case is whether there was an undisclosed material defect with respect to the foundation. This is a close question, because the Meurlott report, read carefully, did disclose a foundation problem needing "immediate correction" and affecting the majority of the east wall of the house, one so significant that the affected portion of the foundation needed to be "replace[d]."[51] If one were to characterize the defect in general terms—as a "defective foundation"—the defect was disclosed. But based on the Henry report and Henry's testimony, which have not been challenged, we now know that the foundation had more extensive deficiencies than the already considerable defect Meurlott had noted. Since Henry identified fundamental problems with the concrete portion of the foundation, whereas Meurlott had only addressed the wooden parts, it is fair to say that the foundation overall was materially worse than what had been disclosed and that there was a defect with the concrete foundation that was wholly undisclosed.

b. Did Mr. Lymburner have actual knowledge of the material defect?

The inquiry then moves to whether Mr. Lymburner knew of this materially greater defect. Mr. Lymburner has testified, with no obvious indications of deception, that he did not.

Five things could have given him actual knowledge. The first would be a conversation with Mr. Garza, his client, or Tim Henry. There is absolutely no evidence of such a discussion. Lymburner had no direct contact with the buyer or Henry, and Garza says he did not try to discuss Henry's report, nor even the details of his findings, with Lymburner.[52] The second way to gain actual knowledge would be if the report had been forwarded to Mr. Lymburner. However, as found on pages 4-5 above, this did not occur. The third way would be if he had

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[49] AS 08.88.630 (no duty to own client to verify client's or others' word if reasonably believed to be reliable); AS 08.88.670(b) (client's undisclosed knowledge not imputed to licensee); *see also, e.g., Hall v. Erkins,* OAH No. 06-0353-RES (Alaska Real Estate Comm'n 2006), at 10 ("the licensee has no duty to investigate the matters covered in the disclosure").

[50] *Hall v. Erkins,* OAH Case No. 06-0353-RES (Alaska Real Estate Comm'n 2006), at 10 (published at https://aws.state.ak.us/OAH/Decision/Display?rec=5910).

[51] Ex. 1 at 1-2.

[52] Henry, Garza, and Lymburner testimony.

gone through Garza's file after the transaction failed to close. But he did not; the contemporaneous records show that he looked at the checklist but not at the individual items in the file, and the checklist did not indicate that a new report was inside.[53] The fourth way would be the denial of the loan approval. But that item provided no information at all, simply giving "unacceptable property" as the reason for denial.[54]

The fifth way the Division has suggested Mr. Lymburner could have acquired actual knowledge would be the rescission agreement itself,[55] on which Mr. Garza had written "Per recent review of the property by Tim Henry it was discovered that the home had a failing foundation."[56] However, this was a statement by the buyer's representative, not an engineer, and was not information that could be relied upon in itself. Garza had specifically left unchecked the box for "Engineer/Home Inspection is unsatisfactory to Buyer or Lender." Thus, while his language certainly conveyed that the walk-and-talk with Henry had resulted in a negative evaluation, it did not convey that there was another engineer's report available (and indeed, at the time Garza wrote it on July 12, there was not). In short, the rescission agreement did not convey actual knowledge of the foundation's condition, nor actual knowledge that there was an engineer's report by Henry. The question whether it conveyed enough information that Lymburner was under an obligation to inquire further is addressed in the next section.

Although none of these items has been shown to convey actual knowledge to Mr. Lymburner, the Division suggests that there is indirect evidence of such knowledge—however it might have been acquired. This is an email exchange between Mr. Lymburner and his client, the seller, on August 6, 2017, at a time when an offer from Mr. Hodges was pending and Mr. Rindlisbacher was considering the terms of a counteroffer. Mr. Lymburner suggested adding "that if an appraiser makes mandatory repairs that buyer cover the costs." The Division points to two sentences he added by way of explanation, which were as follows: "Appraiser might say everything is fine but he might not. Chances of them catching the foundation are slim to none

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53 *See* page 5 above.

54 Ex. E.

55 In keeping with general practice in the industry, the Division does not claim that the rescission itself or the rescission agreement itself were disclosable. The claim is that information "learned from" the rescission agreement was disclosable. *E.g.,* Amended Accusation ¶ 26.

56 Ex. 6.

and might not be an issue anyway, just want to be prepared or at least see how you guys feel about it."[57]

The best interpretation one can make of this email exchange is that both Lymburner and his client were concerned about preserving the "as is" nature of the sale. They feared that an appraiser, in valuing the property high enough to support the price, would condition the appraisal on a foundation upgrade, which Mr. Rindlisbacher did not want to undertake. The appraiser who later valued the property does seem to have been given the Meurlott report,[58] which called for a significant part of the foundation to be replaced, and it was an issue for him (although the appraiser simply devalued the house by $5,000 due to the foundation and structural issues rather than requiring repairs to certify that it "meets VA Minimum Property Requirements").[59] Lymburner's concern would have been well-founded based only on the fact that the Meurlott report was to be given to the appraiser and that one transaction had already fallen through due to foundation issues. To fully explain this email exchange, it is not necessary to infer that Mr. Lymburner or Mr. Rindlisbacher *also* knew any details about what Mr. Henry had observed. Indeed, the full text of the email is most consistent with it being solely about the Meurlott wood foundation finding—the comment that it "might not be an issue anyway" best fits with an observation of that magnitude, rather than with Henry's more dire findings.

All in all, therefore, there is little evidence to indicate Mr. Lymburner had seen the Henry report or knew of its contents. More likely than not, all he knew for a fact was that the buyer's representative attributed an oral opinion to Henry that the foundation was "failing" in some way.

c. Did Mr. Lymburner have constructive knowledge of the material defect?

The most difficult aspect of this case arises from the principle of law that willful blindness equates to knowledge. Thus, in trademark cases where the literal legal standard is whether a merchant sold a counterfeit product "knowing" that it was counterfeit, the courts will find civil liability for infringement where the merchant has reason to suspect counterfeiting but consciously decides not to investigate.[60] Likewise, in litigation surrounding the collapse of Madoff Securities, participants in the enterprise who "turned a blind eye" to indications of fraud

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57 Ex. 8.

58 One can infer this from language on Ex. 9, p. 2, and Mr. Lymburner confirmed it in testimony.

59 Ex. 9 at 1 (physical deficiencies paragraph) and 2 (summary paragraph).

60 *Hard Rock Café Licensing Corp. v. Concession Services, Inc.,* 955 F.2d 1143, 1149 (7th Cir. 1992); *see also Louis Vuitton, S.A. v. Lee,* 875 F.2d 584, 590 (7th Cir. 1989).

were potentially liable as though they had actual knowledge.[61] In the context of Alaska real estate licensees, however, this principle has to be balanced with the principle in Alaska statute that licensees ordinarily do not have a duty to investigate a property's condition. Thus, even when a licensee is providing specific assistance to a buyer (something Mr. Lymburner was not doing), the licensee has no duty to investigate in search of material adverse information not known to the licensee or the seller.[62]

This Commission has addressed the issue of willful blindness in only one case, *In re Keating & Griebel*,[63] decided 13 years ago. It provides a helpful benchmark in deciding where the duties of a licensee begin and end.

Licensees Keating and Griebel knew, for a fact, that the frame house they were selling had had a trailer frame embedded in it four years previously. This is a matter of great significance to the insurability, marketability, and financing of a home. Their seller had done major upgrades on the house, and so it was possible the trailer frame was gone. They asked him if he had removed the trailer frame, and he gave an evasive answer. Although they were troubled by his evasiveness, they went ahead without resolving it, disseminating a disclosure statement that failed to disclose the trailer parts. In fact, the frame was still embedded in the structure. In these circumstances, the Commission held that the licensees were complicit in the seller's wrongful nondisclosure; they had a duty to follow up with and counsel their evasive seller, which they failed to fulfil.[64]

This case falls short of the Keating and Griebel situation. Mr. Lymburner had no prior knowledge of foundation issues beyond the one in the Meurlott report, and indeed there is no evidence that even his seller had any additional knowledge regarding this difficult-to-access foundation. Whereas Keating and Griebel had actual knowledge of an undisclosed defect and decided not to find out if it had been corrected, the question here is whether Lymburner needed to inquire in the first instance to learn if there was an undisclosed defect.

As of July 12, 2017, Mr. Lymburner knew the Meurlott report said a portion of foundation needed to be replaced immediately. And he knew that engineer Henry had looked at

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61 *Picard v. Katz,* 462 B.R. 447, 454-6 (S.D.N.Y. 2011).

62 AS 08.88.615(a)(4) and (b)(1). In the context of a listing licensee not providing specific assistance, there is likewise "no duty to investigate [an] issue independently." *Hall v. Erkins*, supra, at 12.

63 OAH Case No. 10-0474-REC (Alaska Real Estate Comm'n 2011) (published at https://aws.state.ak.us/OAH/Decision/Display?rec=5885).

64 *Id*.

the house and said something negative about the foundation that led the buyer's representative, in the context of extricating his client and recovering her earnest money, to use the word "failing." These are not inherently inconsistent; it was possible, from Lymburner's vantage point, that Henry and Meurlott were reporting the same defect.

Mr. Lymburner had no direct knowledge at that time that there was a written report. He had no reason to think there was one, and indeed, when Mr. Garza wrote the sentence about Henry's "review," there was no such report. Thus, asking Mr. Garza at that time if he was referring to a written report would have yielded a "no" answer. And Mr. Lymburner could not get reliable information about the foundation directly from Mr. Garza, who is not an engineer and who does not seem to have gone into the crawl space or observed any defects firsthand.

In that context, if Lymburner had a duty to inquire further, it would essentially be one of two kinds of inquiries. The first would be a duty to contact the buyer's engineering professional and interview him about the foundation. Assuming Mr. Henry would have cooperated, this would be an unreasonable duty to put on a selling licensee, in light of the statutes' general negation of a licensee duty to "investigate." A duty to investigate of this kind needs to be extended sparingly, given that it can place a listing licensee into a conflict of interest with the licensee's client.

The second would be a duty to go back to Mr. Garza, after the lender sent its "unacceptable property" communication, and ask him if there was now a written report from Henry that might have been used to encourage that credit denial from the lender, or else go carefully through Garza's file (when he eventually received it) to look for such a report. The parties seem to agree that if a withdrawing buyer has a written engineer's report, and the seller's licensee knows it exists, the seller's licensee must ask for it.[65] But here, given that Lymburner did not directly know this, the question is whether the loan denial should have triggered so much suspicion in his mind that there was a new report that not asking about it or searching for it would be willful blindness. No evidence was offered on this point—what lenders rely on in issuing loan denials, whether negative information like that contained in the Meurlott report might equally well trigger, or be used to trigger, a loan denial, and so on. In the absence of evidence that it ought to have become obvious to Lymburner that Garza likely had obtained a

[65] This was directly and unequivocally conceded by respondent's expert, PeggyAnn McConnochie, and respondent's counsel declined to disavow it in closing. This decision neither endorses nor rejects that proposition.

written report from Henry, willful blindness cannot be attributed to Lymburner on the issue of *whether a report existed*.

Broadening to the overarching question of knowledge of *whether an undisclosed foundation defect existed,* the issue is a moderately close one, but the circumstances of this case do not quite rise to the level to demonstrate a duty for a licensee to take follow-up action of any kind, whether it be inquiries to Henry or inquiries to Garza. Thus, knowledge through willful blindness cannot be imputed to Mr. Lymburner as to the defect itself.

2. Remarks in the MLS Listing

The Division also alleges in various counts that the MLS listing contained a material, affirmative misrepresentation because it said in "remarks" that the home was "fully functional and in awesome condition."[66] In two counts the allegation is that Mr. Lymburner was dishonest in not updating the MLS listing after the Monroe transaction failed, an allegation that became problematic when the Division did not offer the later iterations of the MLS listing into evidence. In one count (Count 3), the allegation is that even the original MLS listing was dishonest. Regardless, the Division's contention is that the home was not in awesome condition and was not fully functional, whereas the MLS listing said it was.

The challenged statement has to be evaluated in its surrounding context. This statement appeared in a listing that:

- stated twice in the same "remarks" paragraph, and yet again in the next "addendum" paragraph, that the home was being sold "AS IS";
- stated twice in the same "remarks" paragraph, and yet again in the next "addendum" paragraph, that the seller would not do any repairs;
- attached an annotated engineer's report that plainly showed that major structural issues had been left uncorrected;
- referenced in the same line that the house had been completely remodeled, suggesting that "fully functional" and "awesome condition" related to the interior.

In this context, the statement simply has not been shown to be untrue. The use of "fully functional" in a paragraph replete with "AS IS" disclaimers conveys that this house has problems that need to be fixed but that you can live in it.[67] So far as one can tell from the limited evidence on this issue, the home was indeed "fully functional," in that one could live in it and be dry,

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66 Ex. 2 at 2. This is the June MLS listing.

67 The ALJ makes this determination independently, but it is also supported by the McConnochie testimony regarding how MLS listings should be read.

warm, and have a full set of working fixtures and appliances. As for "awesome condition," its interior does appear to have been well maintained and thoroughly updated.[68]

Lastly, a statement that something for sale is "awesome" is simply not a representation. It is puffery. To be a representation that buyers can rely on, a marketing statement must be "more than a mere opinion" and "susceptible of exact knowledge."[69] To say that a thing being sold is a great buy, the finest, the world's best, or awesome is "sales talk," not a warranty.[70]

C. Count 2 of the Amended Accusation

Count 2 of the Amended Accusation alleges a violation of AS 08.88.071(a)(3)(A)(iii) based on the core alleged nondisclosure at issue in this case. AS 08.88.071(a)(3)(A)(iii) permits discipline for a broker who "pursued a flagrant course of misrepresentation or made a false promise through another real estate licensee." Since there is no "false promise" alleged in this case, the provision is being relied on only through its "flagrant course of misrepresentation" prong.

AS 08.88.071(a)(3)(A)(iii) unquestionably requires at least one proven misrepresentation (which could be a misrepresentation by nondisclosure) before there can be a violation of the "flagrant course of misrepresentation" prong. Because no misrepresentation has been proven, as discussed in B above, this count fails.[71]

IV. Disposition

The Division has not proven the facts necessary to establish any of the violations alleged in this case.

DATED: November 20, 2023.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

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[68] *See* Ex. 2 at 2-3; Ex. 9 at 1.

[69] *Young & Cooper, Inc. v. Vestring,* 521 P.2d 281, 290 (Kans. 1974) (cited with approval in *Cousineau v. Walker*, 613 P.2d 608, 611 n.4 (Alaska 1980)).

[70] *Id*.

[71] There are other potential problems with using AS 08.88.071(a)(3)(A)(iii) in connection with this case's nondisclosure allegation. First, the provision is ambiguous. The phrase at the end, "through another real estate licensee," may or may not modify "flagrant course of misrepresentation." If it does, the provision does not apply because Mr. Lymburner—although he is a broker—was not acting through another licensee in any respect in connection with the Hodges transaction. Second, there is really just one alleged omission in this case, and the phrase "flagrant course" may limit the scope of this particular provision to allegations involving more than one misrepresentation or nondisclosure. Indeed, the operative paragraph of Count 2 (Amended Accusation ¶ 29) alleges only "a flagrant misrepresentation," not a "flagrant course of misrepresentation," and hence it diverges from the statute it seeks to apply.

Adoption

The Real Estate Commission adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 21st day of December, 2023.

By: *Signed*
Cheryl Markwood
Chairwoman, Alaska Real Estate Commission

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]