

**SOAH Docket No. 329-20-1466.REC / TREC Hearing No. 190974**  
**SOAH Docket No. 329-20-1730.REC / TREC Hearing No. 190974**

<b>Texas Real Estate Commission</b>	§	<b>Before the Texas Real Estate Commission</b>
	§	
<b>v.</b>	§	<b>("Commission")</b>
	§	
<b>Networth Realty of Houston LLC ("Respondent")</b>	§	
<b>Texas Real Estate Broker</b>	§	
<b>License No. 586150 and</b>	§	
	§	
<b>Scott Allen McClellan ("Respondent")</b>	§	
<b>Texas Real Estate Broker</b>	§	
<b>License No.507188</b>	§	
	§	<b>Sitting in Austin</b>
		<b>Travis County, Texas</b>

**Final Order**

The Commission considered the above case on May 4, 2020.

After proper notice was given, the case was heard at the State Office of Administrative Hearings ("SOAH") by an Administrative Law Judge ("ALJ") on February 4, 2020. On March 26, 2020, the ALJ filed a Proposal for Decision ("PFD") containing Findings of Fact and Conclusions of Law. This PFD was properly served on each party and each party was given an opportunity to file exceptions and replies as part of the administrative record. The Commission withdrew its action against Networth Realty of Houston, LLC and Docket No. 329-20-1466.REC was dismissed at hearing.

The Commission, after review and consideration of the PFD, attached as Exhibit A, adopts the Findings of Fact and Conclusions of Law of the ALJ contained in the PFD and incorporates those findings and conclusions of Law into this Final Order as if these were fully set out and separately stated in this Final Order. All proposed Findings of Fact and Conclusions of Law submitted by any party that are not specifically adopted in this Final Order are denied.

IT IS THEREFORE ORDERED by the Commission that Scott Allen McClellan is assessed an administrative penalty of \$1,750 effective June 1, 2020. Failure to timely pay automatically suspends Respondent's Texas real estate broker license until the administrative penalty is paid in full.

If enforcement of this Final Order is restrained or enjoined by court order, this Final Order is effective upon a final determination by the court or an appellate court in favor of the Commission.

Date Issued: 5/4/2020

  
The Presiding Member of the  
Texas Real Estate Commission

ACCEPTED  
329-20-1466  
03/26/2020 3:18 PM  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Jodi Brown, CLERK



FILED  
329-20-1466  
3/26/2020 3:07 PM  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Jodi Brown, CLERK

# State Office of Administrative Hearings

Kristofer Monson  
Chief Administrative Law Judge

March 26, 2020

Douglas E. Oldmixon  
Administrator  
Texas Real Estate Commission  
1700 N. Congress Avenue, Suite 400  
Austin, TX 78701

**VIA EFILE TEXAS**


**RE: Docket No. 329-20-1466.REC & 329-20-1730.REC; TEXAS REAL ESTATE COMMISSION v. NETWORTH REALTY OF HOUSTON LLC AND SCOTT ALLEN MCCLELLAN**

Dear Mr. Oldmixon:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507, a SOAH rule that may be found at [www.soah.texas.gov](http://www.soah.texas.gov)

Sincerely,



Christiaan Siano  
Administrative Law Judge

CS/jh  
Enclosure

xc: Mogeby Lovelle, Staff Attorney, 1700 N. Congress Ave., Suite 400, Austin, TX 78701 – **VIA EFILE TEXAS**  
Bay William Germany, Bayne, Snell & Kruase, 1250 N.E. Loop 410, Ste. 725, San Antonio, TX 78209- **VIA EFILE TEXAS**  
Mark Moore, Director of Standards & Enforcement Services, 1700 N. Congress Ave., Suite 400, Austin, TX 78701 (with 1 CD); – **VIA EFILE TEXAS AND VIA INTERAGENCY**



**SOAH DOCKET NO. 329-20-1466.REC**  
**&**  
**SOAH DOCKET NO. 329-20-1730.REC**

<b>TEXAS REAL ESTATE COMMISSION,</b>	§	
<b>Petitioner</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>v.</b>	§	
	§	<b>OF</b>
<b>NETWORTH REALTY OF HOUSTON,</b>	§	
<b>LLC, AND</b>	§	
<b>SCOTT ALLEN MCCLELLAN,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

Scott Allen McCellan holds an active real estate sales agent license (No. 507188) issued by the Texas Real Estate Commission (Commission). Commission staff (Staff) seeks an administrative penalty of \$1,750 for Mr. McClellan’s failure to provide a broker price opinion or comparative market analysis in the course of offering to purchase the property for his own account. The Commission withdrew its action against NetWorth Realty of Houston, LLC, at the hearing on the merits, and accordingly, SOAH Docket No. 329-20-1466.REC is dismissed. In SOAH Docket No. 329-20-1730.REC, the Administrative Law Judge (ALJ) recommends that the Commission fine Mr. McClellan \$1,750, and that his license be suspended until the administrative penalty is paid in full.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

No party contested notice or jurisdiction, and those matters are addressed solely in the findings of fact and conclusions of law. The Commission filed enforcement actions against NetWorth Realty of Houston, LLC, (NetWorth Realty) and Scott Allen McClellan and set them for hearing. The two actions were consolidated.<sup>1</sup> On February 4, 2020, a hearing on the merits convened before ALJ Christiaan Siano at the State Office of Administrative Hearings in Austin, Texas. Staff was represented by staff attorney Mogeey Elizabeth Lovelle. Mr. McClellan was represented by attorney William Germany. At the hearing, Petitioner abandoned its action against NetWorth Realty. The parties stipulated to the relevant facts and agreed to dispose of the remaining matter through a motion for summary disposition, filed on February 14, 2020 and the response filed on February 28, 2020. The record closed on February 28, 2020.

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<sup>1</sup> Order No. 1 Granting Motion to Consolidate (Jan. 31, 2020).

## II. APPLICABLE LAW

Under the Texas Real Estate License Act (TRELA),<sup>2</sup> the Commission may suspend or revoke a license if the license holder violates TRELA, a Commission rule, or:

(1) engages in misrepresentation, dishonesty, or fraud when selling, buying, trading, or leasing real property in the name of:

(A) the license holder;

(B) the license holder's spouse; or

(C) a person related to the license holder within the first degree by consanguinity.<sup>3</sup>

The term "license holder" is defined to include any business entity over which the license holder owns more than 10%.<sup>4</sup> As such, a license holder acting on behalf of himself is obligated to disclose in writing that he is a licensed real estate broker acting on his own behalf in any contract of sale or rental agreement or in any other writing given before entering into any contract of sale.<sup>5</sup> Additionally, when acting in his own interests, he may not use his expertise to the disadvantage of a person with whom he deals.<sup>6</sup> Under 22 Texas Administrative Code § 535.16(c) (Section 535.16(c)), a license holder is also required to provide a broker price opinion (BPO) or comparative market analysis (CMA) on a property when negotiating a listing or offering to purchase the property for the license holder's own account as a result of contact made while acting as a real estate agent.

A person is engaged in real estate brokerage if the person, with the expectation of receiving valuable consideration, directly or indirectly performs or offers, attempts, or agrees to perform for

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<sup>2</sup> Tex. Occ. Code § 1101.001 *et seq.*

<sup>3</sup> Tex. Occ. Code §§ 1101.652(a-1), .656(a).

<sup>4</sup> 22 Tex. Admin. Code § 535.144(a)(2).

<sup>5</sup> 22 Tex. Admin. Code § 535.144(b).

<sup>6</sup> 22 Tex. Admin. Code § 535.144(c).

another person certain defined acts as a part of a transaction or as an entire transaction.<sup>7</sup> A person is not engaged in real estate brokerage based solely on engaging in sponsoring, promoting, or managing, or otherwise participating as a principal, partner, or financial manager of, an investment in real estate.<sup>8</sup>

The Commission may impose an administrative penalty on a person for a violation of TRELA or a Commission rule.<sup>9</sup> The amount of an administrative penalty may not exceed \$5,000 per violation per day a violation occurs.<sup>10</sup> Factors taken into consideration in determining the amount of a penalty are set out in Texas Occupations Code § 1101.702(b), and the Commission has published a schedule of penalties in 22 Texas Administrative Code (TAC) § 535.191. The Commission has set a penalty range of \$500 - \$3,000 per violation per day for a violation of the requirement to provide a BPO or CMA.<sup>11</sup>

### III. EVIDENCE

The facts are not in dispute. The alleged violation stems from a complaint against Mr. McClellan relating to a real estate transaction that occurred in Galveston County in the summer of 2018. According to the complaint, Terry Jo Jenson (Seller) was contacted by an agent for NetWorth Realty regarding the purchase of her residential property, on behalf of the buyer, Gold Coast Equity, LLC. After some negotiation, they executed a purchase contract for \$177,000, with a closing date of August 31, 2018. However, instead of buying the property outright, NetWorth Realty began showing the property and when unable to secure a buyer, exercised its option to terminate the contract.<sup>12</sup> In the meantime, the Seller had arranged to vacate the property by the closing date, including putting earnest money down to purchase another residence.<sup>13</sup>

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<sup>7</sup> Tex. Occ. Code § 1101.004(a).

<sup>8</sup> Tex. Occ. Code § 1101.004(b)(2).

<sup>9</sup> Tex. Occ. Code § 1101.701.

<sup>10</sup> Tex. Occ. Code § 1101.702(a).

<sup>11</sup> 22 Tex. Admin. Code § 535.191(d)(15).

<sup>12</sup> Staff Ex. 3 at 67.

<sup>13</sup> Staff Ex. 3 at 63.

The contract lists Gold Coast Equity, LLC, as the buyer<sup>14</sup> and discloses that “Buyer holds an active real estate license with the state of Texas,”<sup>15</sup> although Gold Coast Equity, LLC does not hold an active real estate license. The Information About Brokerage Services provided to the seller lists NetWorth Realty as the broker firm and “Scott McClellan” as the Designated Broker of Firm.<sup>16</sup> Mr. McClellan owns 100 % of NetWorth Realty, and 100% of Gold Coast Equity, LLC. He did not give a BPO or CMA to the Seller.

**B. Mr. McClellan’s position**

Mr. McClellan argues that the Commission may regulate only brokers while they are “engaged in real estate brokerage.”<sup>17</sup> He argues he was not acting as a broker because he did not expect valuable consideration and was not acting “for another person.”<sup>18</sup> Because he owned the entities involved, he was acting on his own behalf and therefore, not under the Commission’s jurisdiction. TREL A, he goes on to argue, specifically excludes the alleged activity when, as here, he was investing in real estate or otherwise participating as a principal, partner, or managing real estate investments.<sup>19</sup> Therefore, he could not have violated Section 535.16(c).

Mr. McClellan further argues that Section 535.16(c) conflicts with other rule requirements and exceeds the Commission authority under the TREL A. First, he argues that a broker’s fiduciary duty to the principal under 22 TAC § 535.2(b) and the requirement that the license holder represent only the principal,<sup>20</sup> conflict with the requirement under Section 535.16(c) to provide a BPO or CMA. Finally, he argues that the requirement in Section 535.16(c) exceeds the Commission’s authority under TREL A because its regulations would require a license holder to breach its

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<sup>14</sup> Staff Ex. 3 at 83.

<sup>15</sup> Staff Ex. 3 at 83, 86, *One to Four Family Residential Contract*, paragraphs 4 and 11.

<sup>16</sup> Staff Ex. 3 at 79, 91, 102.

<sup>17</sup> Tex. Occ. Code § 1101.004(a); see also 22 TAC § 535.4(a).

<sup>18</sup> Tex. Occ. Code § 1101.004(a).

<sup>19</sup> Tex. Occ. Code § 1101.004(b)(3).

<sup>20</sup> 22 TAC § 535.156.

fiduciary duties to the principal under 22 TAC § 535.5 and .2(b), and directly violate Texas Occupations Code § 1101.557, which makes a broker an agent of the principal.

### C. Staff's Position

Staff argues that Mr. McClellan is the designated broker for Networth Realty and, therefore, is responsible for his acts and those he sponsors under Texas Occupations Code § 1101.803. Staff argues that the disclosures in the contract that “Buyer holds an active real estate license with the state of Texas”<sup>21</sup> were provided because Mr. McClellan, as a license holder and owner of Gold Coast Equity, LLC, is therefore required to disclose that representation.<sup>22</sup> Acting in his capacity as a license holder under 22 TAC § 535.144(a), Mr. McClellan used his expertise to the disadvantage of the seller.

Moreover, as the designated broker of NetWorth Realty, Mr. McClellan was the designated broker of an entity wholly owned by himself.<sup>23</sup> Staff argues that a license holder need not receive a commission to benefit from his specialized knowledge of a real estate transactions, and is still accountable even when representing his own interests. Moreover, a BPO and CMA must be in the broker's name, and is the broker's responsibility, even if done through a sales agent.<sup>24</sup>

In response to Mr. McClellan's arguments that Section 535.16(c) conflicts with other rules and exceeds the Commission's authority, Staff argues that there is no conflict with the requirement of a fiduciary duty to principal<sup>25</sup> because, when license holders represent themselves, the requirements change, as set out in Texas Occupations Code § 1101.652(a-1) and 22 TAC § 535.144(b), (c).

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<sup>21</sup> See Staff Ex. 3 at 83, *One to Four Family Residential Contract*, paragraphs 4 (at 83) and 11 (at 87).

<sup>22</sup> Tex. Occ. Code § 1101.558(b), (b-1).

<sup>23</sup> Petitioner Response to Respondent's Motion for Summary Disposition at 4.

<sup>24</sup> 22 Tex. Admin. Code § 535.17(d).

<sup>25</sup> 22 Tex. Admin. Code § 535.2(b),



#### IV. ANALYSIS AND RECOMMENDATION

Both parties argue that Mr. McClellan was acting both on his own behalf and for another. In his own defense, Mr. McClellan argues first, he was not acting for another person *and* that he was acting as a principal. Staff argues that he was acting for himself because he is 100% owner of both the buyer and the designated broker. The acts that constitute brokerage are necessarily broad and the exceptions necessarily narrow.<sup>26</sup> Both TREL A and Commission rules apply to both licensed and unlicensed persons and entities that engage in real estate brokerage. However, the jurisdiction of the Commission clearly does not end when a license holder acts on his own behalf. A license holder *may* not be engaging in real estate brokerage when acting on his own behalf, but the Commission retains oversight when a license holder is acting on behalf of himself, a spouse, or a close relative.<sup>27</sup>

Mr. McClellan does not dispute that he was offering to purchase Seller's property for his own account as a result of contact made while acting as a real estate agent. Instead he argues in fact that *because* he was acting for his own account, he was excepted from the requirement of Section 535.16(c) as he was not engaged in real estate brokerage under Texas Occupations Code Texas Occupations Code § 1101.004(b)(2). However, the applicability of Section 535.16(c) does not turn on whether someone is engaged in real estate brokerage, but rather on whether a license holder is offering to purchase the property for his own account. Therefore, the expectation of valuable consideration is irrelevant. Even if it were relevant, Mr. McClellan's holding the property under option for immediate resale – essentially collapsing the purchase and resale into a single transaction – and his inability to secure a buyer at an acceptable price indicate he expected valuable consideration for the transaction. One can hardly imagine a scenario in which Section 535.16(c) would apply if not here.

Moreover, even if the exception from engaging in real estate brokerage avoided the requirements of Section 535.16(c), that is not a broad exception. Rather, the exception applies

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<sup>26</sup> Cf. Tex. Occ. Code § 1101.004(a) with § 1101.004(b).

<sup>27</sup> Tex. Occ. Code § 1101.652(a-1).

only to activity based *solely* on sponsoring, promoting, or managing, or otherwise participating as a principal, partner, or financial manager of, an investment in real estate.<sup>28</sup> But Mr. McClellan did more. He was the designated broker of NetWorth Realty, which represented Gold Coast Equity, LLC, the buyer.<sup>29</sup> Because Mr. McClellan was 100% owner of both, it is clear that he was acting both on his own behalf *and* as a broker, though this could not have been apparent to the Seller. As such, he was required to disclose that he was acting on his own behalf and was prohibited from using his expertise to the Seller's disadvantage.<sup>30</sup> The ALJ finds that Mr. McClellan was not solely engaged in sponsoring, promoting, or managing, or otherwise participating as a principal, partner, or financial manager of, an investment in real estate, and therefore concludes that the exception to engaging in real estate brokerage under Texas Occupations Code § 1101.004(b)(2) does not apply.

Mr. McClellan's assertions that Section 535.16(c) conflicts with 22 TAC §§ 535.2(b) and 535.156 or exceeds the Commission's authority are not persuasive. TRELA and the Commission rules clearly contemplate the broker and principal as separate entities. Requiring a suite of customer protections to yield to the fiction of broker and principal where, as here, they are one and the same, elevates form above substance.

The ALJ finds that Mr. McClellan was offering to purchase the property for his own account as a result of contact made while acting as a real estate agent and, as such, was required to provide a BPO or CMA to the seller. An administrative penalty may not exceed \$5,000 per violation.<sup>31</sup> Commission rules set a penalty range of \$500 - \$3,000 per violation per day for violating this requirement.<sup>32</sup> The ALJ finds that a penalty of \$1,750 for this violation is within the permissible range and is reasonable. In considering the factors set out in Texas Occupations Code § 1101.702(b), the ALJ concludes that Mr. McClellan should be assessed a penalty of \$1,750 for this violation and his license should be suspended until the penalty is paid in full.

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<sup>28</sup> Tex. Occ. Code § 1101.004(b)(2).

<sup>29</sup> Staff Ex. 3 at 91, 102.

<sup>30</sup> 22 Tex. Admin. Code § 535.144(b)-(c).

<sup>31</sup> Tex. Occ. Code § 1101.702(a).

<sup>32</sup> 22 Tex. Admin. Code § 535.191(d)(15).

## V. FINDINGS OF FACT

1. Scott Allen McClellan holds an active real estate sales agent license (No. 507188) issued by the Texas Real Estate Commission (Commission).
2. Mr. McClellan is 100% owner of Networth Realty of Houston, LLC (NetWorth Realty).
3. NetWorth Realty is a licensed broker (No. 586150).
4. Mr. McClellan is 100% owner of Gold Coast Equity, LLC.
5. Gold Cost Equity, LLC is not a licensed broker.
6. In the summer of 2018, NetWorth Realty brokered a contract for purchase of a one to four family residential property.
7. The buyer was Gold Coast Equity, LLC.
8. Mr. McClellan was the designated broker of NetWorth Realty.
9. Mr. McClellan did not provide the seller a broker price opinion or comparative market price analysis.
10. Mr. McClellan was not engaged solely in sponsoring, promoting, or managing, or otherwise participating as a principal, partner, or financial manager of, an investment in real estate.
11. On December 5, 2020, the Commission's Staff sent Mr. McClellan a notice of the hearing to be held at the State Office of Administrative Hearings (SOAH). It contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.
12. On February 4, 2020, a hearing on the merits convened before ALJ Christiaan Siano at the SOAH in Austin, Texas. Staff was represented by staff attorney Mogeey Elizabeth Lovelle. Mr. McClellan was represented by attorney William Germany. At the hearing, Petitioner abandoned its action against NetWorth Realty of Houston, LLC. The parties stipulated to the relevant facts and agreed to dispose of the matter through a motion for summary disposition, filed on February 14, 2020, and responses on February 28, 2020. The record closed on February 28, 2020.

## VI. CONCLUSIONS OF LAW

1. The Commission has authority to impose disciplinary action against its licensees, including suspending or revoking a license and/or imposing administrative penalties. Tex. Occ. Code § 1101.701.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. Mr. McClellan received proper and timely notice of the hearing on the merits. Tex. Gov't Code §§ 2001.051-.052.
4. The Commission may suspend or revoke a license in response to a violation of a Commission rule. Tex. Occ. Code § 1101.656(a).
5. Mr. McClellan was not excepted from engaging in real estate brokerage. Tex. Occ. Code § 1101.004(b).
6. The Commission may assess an administrative penalty between \$500 and \$3,000 for failure to comply with Section 535.16. 22 Tex. Admin. Code § 535.191(15).
7. Considering the factors set out in Texas Occupations Code § 1101.702(b), Mr. McClellan should be assessed an administrative penalty of \$1,750.
8. Mr. McClellan's license should be suspended until he pays the penalty in full.
9. The action against NetWorth Realty of Houston, LLC is dismissed.

**SIGNED March 26, 2020.**



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**CHRISTIAAN SIANO**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**