

**BEFORE THE REAL ESTATE AGENCY
STATE OF OREGON**

IN THE MATTER OF:)	FINAL ORDER
)	
JOHN VAN LEEUWEN)	OAH Case No. 2020-ABC-03791
)	Agency Case No. 2018-648
)	

This matter came before the Real Estate Commissioner to consider the Proposed Order issued by Administrative Law Judge (ALJ) Samantha Fair on December 18, 2020. The Proposed Order notified Mr. Van Leeuwen of his right to file exceptions to the Proposed Order. Mr. Van Leeuwen, through counsel John Heald, filed timely exceptions on January 5, 2021.

Mr. Van Leeuwen took exception to ALJ Fair’s conclusion that Mr. Van Leeuwen engaged in professional real estate activity. In support of this exception, Mr. Van Leeuwen relies on *Moody v. Hurricane Creek Lumber* case. This issue was previously briefed and was discussed by ALJ Fair in her proposed order. Mr. Van Leeuwen raising this issue again does not provide a basis to modify any findings or conclusions in the Proposed Order.

Mr. Van Leeuwen also took exception to the amount of the civil penalty proposed by ALJ Fair. ALJ Fair proposed that the Agency issue civil penalties totaling \$4,611.25, which includes a \$1,975 practice-appraisal fee paid by Dr. Sakun, which Mr. Van Leeuwen did not refund at closing. The agency did not seek the additional \$1,975 as profit as part of the civil penalty, so ALJ Fair’s proposed order will be modified accordingly to exclude this amount.

After considering the files and records in this case, including Mr. Van Leeuwen’s exceptions, the Agency issues a Final Order as set forth below.

HISTORY OF THE CASE

On May 19, 2020, the Real Estate Agency (Agency) issued a Notice of Intent to Assess a Civil Penalty: Notice of Opportunity for Hearing to John Van Leeuwen. On May 19, 2020, Mr. Van Leeuwen requested a hearing.

On May 26, 2020, the Agency referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Samantha A. Fair to preside at hearing. On June 26, 2020, ALJ Fair convened a prehearing conference. Mr. Van Leeuwen appeared. Senior Assistant Attorney General Raul Ramirez appeared on the Agency’s behalf. Liz Hayes also appeared on behalf of the Agency. ALJ Fair scheduled an in-person hearing for November 9, 2020, and set deadlines for the submission of witness lists and exhibits.

On August 11, 2020, the Agency issued an Amended Notice of Intent to Assess a Civil

Penalty and Order to Cease and Desist: Notice of Opportunity for Hearing to Mr. Van Leeuwen.

On September 21, 2020, because of the coronavirus pandemic, ALJ Fair converted the in-person hearing to a video conference hearing.

On October 15, 2020, attorney John Heald informed the OAH that he represented Mr. Van Leeuwen and requested deadlines for the submission of hearing memoranda. On October 16, 2020, ALJ Fair adopted the proposed deadlines.

On October 26, 2020, Mr. Van Leeuwen filed a Hearing Memorandum. On November 2, 2020, the Agency filed a Response to Van Leeuwen Hearing Memorandum.

On November 2, 2020, ALJ Fair convened a video conference practice session. Mr. Van Leeuwen, Mr. Heald, Mr. Ramirez and Ms. Hayes appeared.

On November 9, 2020, ALJ Fair convened a video conference hearing. Because of technical difficulties, the hearing was completed as a telephone hearing. Mr. Van Leeuwen appeared, testified, and was represented by Mr. Heald. The Agency appeared and was represented by Mr. Ramirez. Ms. Hayes, an Agency investigation auditor, appeared and testified. Natalia Sakun-Duvalko, DDS, appeared and testified on behalf of the Agency. The record was left open until November 20, 2020, for parties to submit written briefs.

On November 20, 2020, the Agency filed a Supplemental Brief. The record closed on November 23, 2020, without any further submissions.

ISSUES

1. Whether Mr. Van Leeuwen engaged in professional real estate activity without a license. ORS 696.020(2).
2. Whether the Agency may assess Mr. Van Leeuwen a civil penalty. ORS 696.990(4).
3. Whether Mr. Van Leeuwen must forfeit any profit he made from a violation of ORS 696.020(2). ORS 696.990(5).
4. Whether the Agency may order Mr. Van Leeuwen to cease and desist from violating ORS 696.020(2). ORS 696.397.

EVIDENTIARY RULINGS

Exhibits A1 through A30, offered by the Agency, were admitted into the record without objection. Exhibits R1 and R2, offered by Mr. Van Leeuwen, were admitted into the record without objection.

FINDINGS OF FACT

1. Mr. Van Leeuwen has never held an Oregon real estate license. (Test. of Hayes.)
2. Green Sail Transitions, Inc. (Green Sail) has been an Oregon-registered corporation since December 20, 2011. Mr. Van Leeuwen is the sole owner and president of Green Sail. (Ex. A2 at 1; test. of Van Leeuwen.) Green Sail's registered agent is Mr. Heald. (Ex. A2 at 1.)
3. Green Sail is well known in the dental community for assisting dentists with dental practice transactions. (Ex. A7 at 2; test. of Sakun-Duvalko.) Green Sail specializes in dental practice transitions, including practice sales, mergers, and appraisals. It also assists with retirement planning, partnership agreements, and associate recruitments. (Ex. A3 at 1-2; test. of Van Leeuwen.) Green Sail does not employ a licensed real estate agent.¹ (Ex. A3 at 2-6.)
4. If a dentist wants to sell the practice and the real property where the practice is located, Green Sail will have its attorney draw up a letter of intent to purchase the property and that same attorney would facilitate the sale of the practice and the property. (Ex. A4 at 1.) Green Sail uses Joyce Speight as an escrow agent to close any transactions involving real property. (*Id.* at 2.) Green Sail will only refer a seller to a licensed real estate agent if the seller needs a real property evaluation for a price or lease assessment. (*Id.* at 1.)
5. Green Sail's website and its Facebook page include its current and past dental practice listings. The listings include the sales price for the practice, the city or neighborhood in which the practice is located, the age and size of the practice, and any associated specialized equipment. The listings note the square footage of the practice's building and a description of the number of rooms and availability of parking. The listings also note if the seller is the owner of the building and whether the seller is offering to lease or sell the building, occasionally including the purchase price of the building or the monthly cost of the lease in the listing. The majority of Green Sail's listings note that the dental practice and its associated building are for sale or lease. (Exs. A4 at 2; A26 through A30.) As additional advertising, Green Sail emails copies of new listings and provides weekly updates of its listings to its pool of prospective buyers. (Test. of Sakun-Duvalko.)
6. The building that houses a dental practice is critical to the sale of the practice and the determination of the practice's value. More than 90 percent of dental practice sales include the sale or lease of the associated real property. Financial institutions will not extend a loan for the purchase of a dental practices that does not include the sale or lease of the associated building. (Test. of Van Leeuwen.)
7. When selling a practice with the real property, Mr. Van Leeuwen must invest more time in closing the sale because of the additional documents and steps, such as inspections and repairs, involved in the sale of the real property. There are also additional costs when purchasing a practice and the real property, such as the following: the purchase price of the real property; a down payment on the portion of the purchase price assigned to the real property, required by banks for any loans; real property inspections; and repairs to the real property. Because of these

¹ Real estate licenses are only issued to individuals. ORS 696.020(1).

additional costs, financially capable buyers are harder to locate and potential sales are more likely to fail to close than dental practice sales that only include a lease or no real property. Because of the additional time investment and greater difficulties on finalizing a sale, Mr. Van Leeuwen will increase his commission on the sales price of the dental practice by three percent or more whenever the dental practice sale includes the sale of real property. (Test. of Van Leeuwen.) Mr. Van Leeuwen does not charge a separate commission on the sales price of the real property. (Ex. A4 at 1.)

8. Dr. Sakun-Duvalko was the president and secretary for Midland Family Dentistry, PC (Midland), an Oregon-registered private corporation from 2002 through July 19, 2018. (Ex. A5 at 1-3.) Midland was based in a condominium, located at 1244 SE 122nd Ave, Portland, Oregon (Condo), owned by Dr. Sakun-Duvalko. (Exs. A5 at 1; A9 at 3; test. of Van Leeuwen.)

9. Dr. Sakun-Duvalko first listed the Condo for sale with licensed realtor Mike Devlin in August 2016. (Ex. A7 at 1; test. of Sakun-Duvalko.) Mr. Devlin listed the Condo for sale as a dental/office condo of 2,400 square feet with a sales price of \$349,000. (Ex. A13 at 1.) Mr. Devlin secured one offer, which failed to close. (Ex. A7 at 1.)

10. Per a recommendation from another local dentist, when Dr. Sakun-Duvalko decided to sell the dental practice (Practice) as well as the Condo, she contacted Green Sail and spoke to Mr. Van Leeuwen. (Ex. A7 at 1; test. of Sakun-Duvalko.) Mr. Van Leeuwen informed her that she would save money if she ceased using Mr. Devlin's services. (Ex. A7 at 1.) He advised her that Mr. Devlin's services are not ideal because he is marketing to the general public while Green Sail will market the property just to dentists. Mr. Van Leeuwen informed her that he did not have a real estate license but she should not worry about his lack of licensure because he would find a buyer for the Practice and the Condo and she would avoid paying a real estate commission. (Test. of Van Leeuwen and Sakun-Duvalko.) In response to Mr. Van Leeuwen's suggestion, Dr. Sakun-Duvalko let her listing with Mr. Devlin lapse. (Ex. A7 at 1; test. of Sakun-Duvalko.)

11. On April 4, 2017, Mr. Van Leeuwen sent Dr. Sakun-Duvalko a copy of a listing announcement regarding another dental practice that Green Sail was selling in the same area as Midland as an example of Green Sails' listings. The listing announcement stated that both the dental practice and the building were for sale. (Ex. A10 at 1.)

12. On April 19, 2017, Dr. Sakun-Duvalko signed an agreement with Green Sail for it to perform an assessment of the value of the Practice. She paid a \$1,975 fee for a full valuation, and the listing agreement provided that the fee "will be deducted from the commissions due to Green Sail at the time of closing." (Ex. A6 at 1.) On this same date, while discussing the sale of the Condo with the Practice, Mr. Van Leeuwen informed Dr. Sakun-Duvalko that he would charge an additional three percent commission on the Practice's sale price if the Condo was sold with the Practice. (Ex. A7 at 1.)

13. Mr. Van Leeuwen appraised the Practice at \$250,000. (Ex. A7 at 1.) The appraised value was higher than it should have been. The Practice was a very small facility with only four operatories and no room to expand, was not aesthetically appealing, and had a very low

profitability rate of only \$240,000 per year instead of the more typical \$800,000 per year. A dental practice's sale price is approximately 72 percent of its profitability rate. (Test. of Van Leeuwen.)

14. On May 1, 2017, Dr. Sakun-Duvalko emailed Mr. Van Leeuwen. In the email, she noted that Mr. Van Leeuwen did not reference the Condo in the draft of their listing agreement and inquired whether he needed to be a licensed real estate agent as she believed that was necessary for someone to sell real property in Oregon. On May 2, 2017, Mr. Van Leeuwen emailed the following response:

No, we are not realtors and won't be "selling" the property for you in a tradition sense where we market the real estate and charge a commission. We will find a practice buyer who will also be looking to own their own building and WE sell the practice to them and turn the real estate transaction over to the attorney you choose to write the practice sale paperwork. Same with the escrow/title company. They take care of the real estate closing at the same time they are doing the practice. I would only need a real estate license if I was trying to earn commissions on real estate deals. Technically you doing a "for sale by owner" transaction with the buyer we find for the practice.

(Ex. R1 at 1.) (Emphasis in original.)

15. On May 4, 2017, Mr. Van Leeuwen sent Dr. Sakun-Duvalko a draft of a listing announcement for her property. (Ex. A9 at 1.) The announcement stated, in part:

**General/Implant Dental Practice
AND BUILDING**

For "Sail!"

**\$250,000 Practice
\$330,000 Building**

* * * * *

This "mid-sized" Portland practice will be well-suited for a general dentist or dentist with an implant focus that has some basic implant skills and is looking to purchase a practice and a building at an affordable price.

ABOUT THE PRACTICE:

* * * * *

ABOUT THE FACILITY/BUILDING:

The “condo” building is 2,400 square feet and has a shared wall with the adjacent building. The monthly HOA fee is \$350. The 1,200 square feet downstairs included a separate entrance, lab, kitchen, office and a bathroom. It could be used by the dental practice/building owner or could be leased out.

* * * * *

- * **1,200 square foot clinic**
- * **1,200 square foot basement**
- * **Private parking lot**

(*Id.* at 2-3.) (Emphasis in original.) Dr. Sakun-Duvalko approved the listing. (Test. of Sakun-Duvalko.)

16. On May 9, 2017, Dr. Sakun-Duvalko and Mr. Van Leeuwen signed a Green Sail Listing Agreement, in which Dr. Sakun-Duvalko agreed to employ Green Sail as her agent to sell the Practice, consisting of furnishings, equipment, instruments, supplies, goodwill, trade name, and patient files. She agreed to pay a 6.5 percent commission at closing as a commission for services rendered. (Ex. A11 at 1.) However, based on her discussions with Mr. Van Leeuwen, she knew that the commission would be 9.5 percent of the Practice’s sale price if the Condo was sold with the Practice. (Test. of Sakun-Duvalko.)

17. While in discussions with a prospective buyer, on August 22, 2017, Mr. Van Leeuwen emailed Dr. Sakun-Duvalko and asked her to “give me your bottom line for both the practice and building. Bottom line.” (Ex. A15 at 1; test. of Sakun-Duvalko.)_

18. Mr. Van Leeuwen found buyers, Drs. Hadi Nouredine and Farid Bolouri, who were interested in Dr. Sakun-Duvalko’s Practice and the Condo. Dr. Sakun-Duvalko vacillated between whether she wanted to lease or sell the Condo to the buyers, which lengthened the negotiations. Dr. Sakun-Duvalko and the buyers never directly communicated with one another. All of their communications regarding the proposed terms of the sale occurred through Mr. Van Leeuwen. (Test. of Van Leeuwen.)

19. Drs. Nouredine and Bolouri sent a letter of intent (LOI) to purchase Dr. Sakun-Duvalko’s dental practice to Mr. Van Leeuwen to give to Dr. Sakun-Duvalko. The LOI set out the terms for a proposed acquisition of the “assets of Seller’s dental practice,” by Drs. Nouredine and Bolouri, who had already signed the LOI. (Ex. A17 at 1-2, 6.) The LOI identified the assets as equipment, supplies, tools, business records, patient charts and goodwill, and identified the purchase price as \$175,750. (*Id.* at 2-3.) The LOI included the following contingencies:

1.8.2 Buyer entering into a lease on terms satisfactory to Buyer for occupancy of the offices currently occupied by Seller.

1.8.3 Lease terms \$2,700 base rate (plus condo fee) flat for 24 months,

starting in the 25th month rate shall increase to \$2,781 with 3% annual increase. Seller to pay property taxes * * *. Buyer to pay all other utilities. Buyer to pay condominium fee subject to annual adjustments.

(*Id.* at 3.) On November 27, 2017, Mr. Van Leeuwen sent the LOI to Dr. Sakun-Duvalko, asking her to sign and return it. Dr. Sakun-Duvalko made some hand-written changes to the 1.8.3 contingency in the LOI and signed it on November 27, 2017. (*Id.* at 1, 6.)

20. On December 5, 2017, Mr. Van Leeuwen emailed Dr. Sakun-Duvalko and stated “Hadi says go forward with 3 year lease but ‘nothing else.’” (Ex. A18 at 1.) In response, on December 6, 2017 at 9:07 a.m., Dr. Sakun-Duvalko emailed Mr. Van Leeuwen the following:

Dear John,
With regards to a purchase/sale arrangements, please discuss with the Buyer the following terms:

Purchase price- \$317,500. (I am splitting the difference between previously acceptable \$325K offer and Hadi’s \$310K offer)

Terms- \$67,500K down payment and promissory note balance secured by trust deed at 5% with monthly payments based on 20 year amortization. Seller with right to call promissory note due and payable after three years provided Seller provides not less than 180 days written notice of such intent. Seller may also extend promissory note an additional three years under terms to be negotiated between the parties. Buyer may also want to pre-pay at any time.
Ok thanks and good luck!

(*Id.*)

21. On December 6, 2017 at 10:02 a.m., Mr. Van Leeuwen emailed Dr. Sakun-Duvalko and stated:

OK. You may have an outside shot at Ris’s practice in Battleground but we would need to move fast and take the lease as proposed by the landlord as is.

(Ex. A18 at 1.)

22. On December 6, 2017 at 2:58 p.m., Dr. Sakun-Duvalko emailed Mr. Van Leeuwen and stated:

I can’t accept the purchase price of \$310,000.

I prefer to go back to a 3 year lease terms, with option to buy at set price of \$350,000. This option will expire after 2 years and I have the ability

to actively market the bldg.

Could you suggest to Buyer the first and last month rent?

Will they be willing to pay security deposit equal to one month rent?

* * * * *

If they are good with that, please tell Mr. Heald² to go ahead with Drafts.

(Ex. A18 at 2.)

23. On December 6, 2017 at 3:02 p.m., Mr. Van Leeuwen emailed Dr. Sakun-Duvalko and stated:

Natalia, if I keep going back we are likely to scare them off. Are YOU SURE you are willing to kill the offer to be free of the building for \$7500? Once I go back there will be no changing your mind.

(Ex. A18 at 3.)

24. On January 3, 2018, Dr. Sakun-Duvalko and Drs. Nouredine and Bolouri signed a Purchase and Sale Agreement, in which Dr. Nouredine agreed to purchase the Condo for \$317,500, with a down payment of \$67,500 and the remaining \$250,000 to be paid in monthly installments with balance paid by January 1, 2021. (Ex. A20 at 1-2, 7.) The scheduled closing date was January 15, 2018. (*Id.* at 3.) The purchase of the Condo was contingent on the concurrent purchase of the Practice pursuant to a separate purchase agreement. (*Id.* at 2.) The Purchase and Sale Agreement was a form document, created by the Commercial Association of Brokers, and included the following language:

18. No Brokers. Each party represents to the other party that it has not engaged the services of a broker in connection with the transaction contemplated herein and there will be no obligation to pay any commissions. Each party agrees to indemnify and defend the other party from and against any claim for a commission, fee or other compensation (including any related claim for attorneys' fees) in connection with the transaction contemplated herein from a broker or agent claiming to represent a party.

(*Id.* at 6.)

25. On January 15, 2018, Mr. Van Leeuwen emailed Dr. Sakun-Duvalko the following information:

² Mr. Van Leeuwen had told Dr. Sakun-Duvalko to hire Mr. Heald, advising her that he was knowledgeable and familiar with Green Sail's practices. She hired Mr. Heald to prepare the purchase agreement. (Test. of Sakun-Duvalko.)

Here is the agreement you made notes on but never got back to me signed....

I cant remember what you needed up with for the sale price of the building but using 350k as the price this is how things work out. You can adjust if I have the building price wrong:

PRACTICE SALE PRICE \$175,000
BUILDING SALE PRICE: \$350,000

Standard GST commission for practice is 6.5% of \$175,000 = \$11,407
(no rebate for appraisal)
Typical real estate commission 5% (could be up to 7%) on \$350,000 = \$17,500
TOTAL \$28,907 (or more) which is 5.5% of total practice and building sale price.

You saved almost half (\$14,210) by NOT using a real estate broker.

Make sense?

(Ex. A21 at 1.) (Emphasis in original.)

26. On January 19, 2018, the sale of the Condo for \$317,500 and the Practice for \$175,750 closed. (Exs. A22 and A23.) When Dr. Sakun-Duvalko arrived at the title office, she was upset when she saw the amount of the commission she was paying Mr. Van Leeuwen, which was 9.5 percent of the Practice's sale price. She felt that the commission was too high in light of the low sale price for the Practice and the Condo. (Test. of Sakun-Duvalko.) She called Mr. Van Leeuwen and complained to him, and he agreed to reduce the 9.5 percent commission to 8 percent. (Ex. A7 at 2; test. of Sakun-Duvalko.) After the change in the commission rate, the title company deducted a commission of \$14,060 for Green Sail and deducted attorney fees of \$5,420 for Mr. Heald from the Practice's sale price. (Ex. A22 at 1.) There were no commissions or attorney fees deducted from the Condo's sale price. (Ex. A23.)

CONCLUSIONS OF LAW

1. Mr. Van Leeuwen engaged in professional real estate activity without a license. ORS 696.020(2).
2. The Agency may assess Mr. Van Leeuwen a civil penalty.
3. Mr. Van Leeuwen must forfeit any profit he made from his violation of ORS 696.020(2).
4. The Agency may order Mr. Van Leeuwen to cease and desist from violating ORS

696.020(2).

OPINION

The Agency proposes to assess Mr. Van Leeuwen a civil penalty, require him to forfeit his profits, and order him to cease and desist violations of ORS 696.020(2), based on the allegation that he engaged in professional real estate activity without a license. As the proponent of the allegation, the Agency has the burden to establish, by a preponderance of the evidence, that the allegation is correct and that it is entitled to impose the penalties and issue the order. ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position”); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Engaging in Professional Real Estate Activity

ORS 696.020(2) provides:

An individual may not engage in, carry on, advertise or purport to engage in or carry on professional real estate activity, or act in the capacity of a real estate licensee, within this state unless the individual holds an active license as provided for in this chapter.

ORS 696.010³ provides, in part:

(6) “Compensation” means valuable consideration for services rendered or to be rendered, whether contingent or otherwise.

* * * * *

(17) “Professional real estate activity” means any of the following actions, when engaged in for another and for compensation or with the intention or in the expectation or upon the promise of receiving or collecting compensation, by any person who:

(a) Sells, exchanges, purchases, rents or leases real estate;

(b) Offers to sell, exchange, purchase, rent or lease real estate;

³ This most current version of ORS 696.010 was effective January 1, 2018. The 2017 statute amended ORS 696.010 (2015) by changing compensation’s subsection from (4) to (6) and changing professional real estate activity’s subsection from (14) to (17). The amendments made no changes to the substantive language of the definitions.

(c) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate;

* * * * *

(i) Purports to be engaged in the business of buying, selling, exchanging, renting or leasing real estate;

(j) Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, leasing or rental of real estate;

(k) Assists or directs in the negotiation or closing of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate[.]

ORS 696.040 provides:

One act or transaction of professional real estate activity is sufficient to constitute engaging in professional real estate activity, within the meaning of this chapter.

Mr. Van Leeuwen argued that he received no compensation for his services in procuring a purchaser of the Condo, pointing out that his commission was “computed as a percentage of the sales price of the Practice.” Hearing Memorandum at 2 (emphasis in original). However, the question of whether he based his fee on a percentage of the sales price of the Practice or the Condo or both is irrelevant. ORS 696.010(6) defines “compensation” to mean “valuable consideration for services rendered.” There is no requirement that the “compensation” be in the form of a commission, let alone the form of a commission based solely on the price of the real property.

The 2018 Purchase and Sale Agreement included a clause in which Drs. Sakun-Duvalko and Nouredine acknowledged that no brokers were involved in the sale and, therefore, no commissions were owed on the sale of the Condo. However, this clause in the contract does not control or trump the legal interpretation of ORS 696.010(6) or (17). If Mr. Van Leeuwen received valuable consideration for services rendered, then he received compensation for the sale of the Condo regardless of the no broker clause. And that also holds true if Mr. Van Leeuwen engaged in professional real estate activity. ORS 696.010(17) determines whether his conduct amounted to professional real estate activity, not the no broker clause.

In his written contract with Dr. Sakun-Duvalko, Mr. Van Leeuwen agreed to provide his services in exchange for 6.5 percent of the Practice’s sale price. By a verbal arrangement, he agreed to provide his services in exchange for 9.5 percent of the Practice’s sale price, which was subsequently amended to 8 percent, if the Condo was sold with the Practice. The Practice ultimately sold for \$175,750, and the Condo was sold for an additional \$317,500 with the Practice. Because the Condo sold with the Practice, Dr. Sakun-Duvalko paid a commission of \$14,060 (8 percent of the Practice’s sale price) rather than \$11,423.75 (6.5 percent of the

Practice's sale price). Thus, Mr. Van Leeuwen received an additional \$2,636.25 as valuable consideration for the sale of the Condo. The question now becomes whether Mr. Van Leeuwen rendered services in the form of professional real estate activity.

Mr. Van Leeuwen argued that he did not engage in professional real estate activity because any services he provided that resulted in the sale of the Condo were incidental or ancillary to the services he provided to secure a buyer for the Practice. He cites to *Moody v. Hurricane Creek Lumber Co.*, 290 Or 729 (1981), as support for his position. However, Mr. Van Leeuwen's reliance on *Moody* is in error. In *Moody*, the Oregon Supreme Court found that the broker for the sale of a business and wood mill did not engage in professional real estate activity as defined by ORS 696.020(17)(j).⁴ *Id.* at 735. The Court found that the phrase "calculated to result in the sale" required a finding that the broker knew or intended their assistance to result in the sale of the real property. *Id.* at 737. In *Moody*, the evidence established that the broker understood his role as finding a buyer for the seller's business and that the broker was unaware of whether any subsequent sale would include the assets of the business or just the sale of the corporation's stock. The *Moody* broker never visited the business, was never informed of the assets of the business, and never participated in negotiations for the sale of the business. *Id.* at 737. The Court concluded that the evidence established that "it was not 'calculated' by him that his conduct would 'result in the sale * * * of any real estate;" and, therefore, he did not engage in professional real estate activity as defined by ORS 696.020(17)(j). *Id.*

The facts of *Moody* are distinguishable from the present case. The broker in *Moody* was not a professional broker but a sawmill machinery salesman who only provided assistance in the one transaction with the seller. *Moody*, 290 Or at 731. In contrast, Mr. Van Leeuwen is a professional broker in the business of arranging dental practice sales in which over 90 percent of the sales include the sale or lease of real property. The *Moody* broker referred a potential buyer to the seller but took no further action in regards to the eventual sale of the business. Instead, the price and structure of the sale were worked out directly between the buyer and the seller without any assistance or participation by the broker. It was during the buyer and seller's negotiations that the buyer requested the sale be one of the assets of the business rather than a sale of the stock. *Id.* at 732. In the present case, Mr. Van Leeuwen created a listing that advised prospective buyers that the Condo was for sale with details about the Condo; he marketed the listing to prospective buyers via Green Sail's website, Facebook page, weekly updates and direct emails; and he engaged in multiple communications with the buyer and seller about the price and terms of the sale, including urging the seller to accept the buyer's offer. In sum, Mr. Van Leeuwen engaged in significantly more activities than just finding a prospective buyer and introducing the buyer to Dr. Sakun-Duvalko, the only activities performed by the broker in *Moody*. Additionally, as demonstrated by the listing he created and marketed and his communications with Dr. Sakun-Duvalko, Mr. Van Leeuwen knew that his services were calculated to result in the sale or lease of the Condo, which satisfies the knowledge requirement of ORS 696.010(17)(j). Mr. Van Leeuwen assisted in the procuring of prospects, via his creation and marketing of the listing for the Practice and Condo, and he knew such procurement was calculated to result in the sale or lease of the Condo. Mr. Van Leeuwen engaged in professional

⁴ At the time of *Moody*, ORS 696.020(17)(j) was (9)(j); otherwise, the language is identical. *See Moody*, 290 at 735-6.

real estate activity as defined by ORS 696.010(17)(j).⁵

ORS 696.040 provides that one act of professional real estate activity is sufficient to constitute engaging in professional real estate activity. Therefore, Mr. Van Leeuwen's one act of creating and marketing the listing for the Practice and Condo constituted engaging in professional real estate activity. However, Mr. Van Leeuwen engaged in considerably more than one act. Mr. Van Leeuwen informed Dr. Sakun-Duvalko that he could assist her in selling or leasing the Condo in conjunction with the sale of the Practice. He advised her of Green Sail's specialty in marketing listings directly to dentists and provided her a copy of one of Green Sail's listings that included the sale of the real property with the dental practice. Thus, he purported to be in the business of selling real estate, a professional real estate activity as defined by ORS 696.010(17)(i). Mr. Van Leeuwen created the listing for Dr. Sakun-Duvalko's Practice and Condo, which included a description of the Condo with a sale price of \$330,000, plus marketed the listing. After the creation of the listing, Mr. Van Leeuwen contacted Dr. Sakun-Duvalko in August 2017, asking for her bottom line for selling the Practice and the Condo when he was discussing her property with a prospective buyer. Despite his claims during the hearing that he did not negotiate the price or terms of the eventual sale of her property, Mr. Van Leeuwen was the contact point for all of the negotiations between Dr. Sakun-Duvalko and Dr. Nouredine. With regard to those negotiations, the buyer and seller did not directly communicate. On November 27, 2017, Mr. Van Leeuwen forwarded the buyer's LOI to Dr. Sakun-Duvalko and directed her to sign and return it to him. On December 5 and 6, 2017, he had multiple communications with the buyer and Dr. Sakun-Duvalko regarding different proposed terms for the sale or lease of the Condo. In his final email to her, Mr. Van Leeuwen warned Dr. Sakun-Duvalko that her insistence on a term in the sale of the Condo that would only make a \$7,500 difference might jeopardize the entire deal.⁶ By these actions, Mr. Van Leeuwen negotiated, handled offers, and sold the Condo, all of which are professional real estate activities as defined by ORS 696.010(17)(a) – (c). In addition, Mr. Van Leeuwen directed Dr. Sakun-Duvalko to hire Mr. Heald to prepare the sales agreement and directed her to use Ms. Speight as the closing agent. Thus, Mr. Van Leeuwen assisted in the closing of the sale, a professional real estate activity as defined by ORS 696.010(17)(k).

Mr. Van Leeuwen does not have a real estate license. Because he engaged in

⁵ The Court in *Moody* also found that the broker was not required to be a licensed business chance broker because the broker had only engaged in the conduct for a single transaction. *Moody*, 290 at 732. Prior to 1981, the Agency issued licenses for “business chance brokers,” persons that engaged in the business of selling established businesses. *Former* ORS 696.610. The statutes that required the licensing of business chance brokers were repealed in 1981. Mr. Van Leeuwen argued that the repeal of the business chance brokers statutes meant that individuals such as Mr. Van Leeuwen were then permitted to engage in the selling of businesses without having a real estate license. However, the repeal simply meant that an individual such as Mr. Van Leeuwen would not need to obtain a business chance brokers license. There was no replacement statute that stated that business chance brokers do not need a license to engage in professional real estate activity. In actual fact, the *Moody* Court posed the question of whether a business chance broker would also need a real estate license if the broker engaged in professional real estate activity and then left that question unanswered because it determined that the broker had not engaged in professional real estate activity. *Moody*, 290 at 736.

⁶ In the email chain, it is clear that the \$7,500 difference concerns an argument regarding the sale price of the Condo being either \$325,000 or \$317,500. *See* Exhibit A18.

professional real estate activity without a license, he violated ORS 696.020(2).

Assessment of Civil Penalty and Forfeiture of Profit

ORS 696.990 provides, in part:

(4) Any person that violates ORS 696.020 (2) may be required by the Real Estate Commissioner to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner of:

(a) Not less than \$100 nor more than \$500 for the first offense of unlicensed professional real estate activity; and

* * * * *

(5) In addition to the civil penalty set forth in subsection (4) of this section, any person that violates ORS 696.020 may be required by the commissioner to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner but not to exceed the amount by which such person profited in any transaction that violates ORS 696.020.

* * * * *

(7) Civil penalties under this section shall be imposed as provided in ORS 183.745[.]

The Agency established that Mr. Van Leeuwen violated ORS 696.020(2) when he engaged in professional real estate activity regarding the sale of Dr. Sakun-Duvalco's condominium. There was no evidence that the Agency had previously found Mr. Van Leeuwen in violation of its statutes and rules. Therefore, this current action is Mr. Van Leeuwen's first offense.

Despite this being a first offense, there are factors that support the Agency's decision to assess Mr. Van Leeuwen the maximum \$500 civil penalty plus seek forfeiture of the profit he realized from the transaction. First, as shown above, Mr. Van Leeuwen engaged in multiple acts that constituted unlawful professional real estate activities over the course of several months. Additionally, Mr. Van Leeuwen's business model requires him to engage in these same unlawful activities for more than 90 percent of Green Sail's listings. Thus, his conduct demonstrates a pattern of unlawful behavior. Additionally, in this matter, Dr. Sakun-Duvalco expressed concerns to Mr. Van Leeuwen about his lack of licensure, and he reassured her that such licensure was unnecessary. Mr. Van Leeuwen thereby used his position as the transaction professional to assuage his client's legitimate concerns.

Finally, Mr. Van Leeuwen's violation of ORS 696.020(2) was a knowing violation. In

the May 2, 2017 email, Mr. Van Leeuwen's use of quotes around the word "selling" and his reference that he was not selling Dr. Sakun-Duvalko's condominium in the "traditional sense" suggest that he was simply trying to allay his client's concerns. His next comment, in which he acknowledges that he will find a buyer to buy both the practice and the condominium, demonstrates that he knew he was indeed engaging in real estate activity. Finally, his knowledge that he was engaging in real estate activity is further confirmed in his comment to Dr. Sakun-Duvalko that he did not need a real estate license simply because he was not charging her a commission on the sales price of the condominium. Mr. Van Leeuwen knew that he was engaging in real estate activity (finding a buyer for real property) but believed that he could evade the requirement of licensure by his disingenuous choice of language and disguising the additional consideration he would receive from the sale of the Condo by not calling it a real estate commission (he was not "selling" the property; he was finding a buyer for the property but "WE" were not selling the property; he would charge her a greater commission for selling the condominium but on the sales price of the practice, not on the sales price of the condominium). Given the above considerations, it is appropriate that Mr. Van Leeuwen be assessed the maximum civil penalty of \$500 and forfeit the amount by which he profited from his real estate activity in this transaction.

On January 18, 2018, Dr. Sakun-Duvalko paid \$14,060 in commissions to Green Sail, which is 8 percent of the \$175,750 sales price for the dental practice. By contract, Mr. Van Leeuwen agreed to a 6.5 percent commission for the sale of the Practice, if there was no accompanying real estate sale. Thus, he received a 1.5 percent commission as profit from the real estate activity he performed in this transaction. Therefore, Mr. Van Leeuwen's commission, solely for the sale of the Practice, is \$11,423.75 ($\$175,750 \times 0.065$). The difference of \$2,636.25 is the profit that is directly attributable to Mr. Van Leeuwen's activities in connection with the sale of the real estate.⁷

Pursuant to the April 19, 2017 practice valuation agreement, Dr. Sakun-Duvalko's payment of \$1,975 for the appraisal was to be refunded at closing by deducting it from Mr. Van Leeuwen's commission. However, following her January 18, 2018 conversation with Mr. Van Leeuwen, although the closing figures were adjusted to reflect his agreement to reduce his 9.5 percent commission to 8 percent, the refund for the appraisal payment was not deducted from his commission as required by the April 19, 2017 agreement. ALJ Fair recommended the Agency also impose the \$1,975 as a civil penalty because that amount represented additional profit to forfeit as a civil penalty. The Agency did not allege in its Amended Notice that the \$1,975 was profit to be forfeited, so the Agency does not adopt the ALJ's recommendation on this issue.⁸

Dr. Sakun-Duvalko paid \$14,060 in commissions to Green Sail on January 18, 2018. Based on her contracts with Green Sail (and excluding the \$1,975 fee that was not refunded), Dr. Sakun paid \$11,423.75 Practice-only commission. Mr. Van Leeuwen received a profit in the

⁷ The agency modified this paragraph to clarify the amount of profit the Agency seeks as a civil penalty as alleged in paragraphs 1.17 and 2.4 of the Amended Notice.


⁸ The Agency has modified this paragraph to revise the amount of profit Mr. Van Leeuwen should forfeit, in accordance with the Agency's Amended Notice.

ORDER

Based on the foregoing, the Real Estate Agency issues the following order:

1. John Van Leeuwen engaged in professional real estate activity without a license in violation of ORS 696.020(2).
2. John Van Leeuwen must pay a civil penalty of \$500 for violating ORS 696.020(2). The civil penalty is due and payable 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal.
3. John Van Leeuwen must forfeit \$2,636.25, as the amount he profited from his violation of ORS 696.020(2). The forfeited profit is due and payable 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal.¹⁰
4. John Van Leeuwen must cease and desist from engaging in any professional real estate activity without a real estate license, as required by ORS 696.020(2).

It is so Ordered this 5th of February, 2021

DocuSigned by:

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Steven Strode
Real Estate Commissioner

NOTICE OF RIGHT TO JUDICIAL REVIEW

You have the right to appeal this Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the court of Appeals within 60 days from the day this Order was served on you. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was mailed not the day you received it. If you do not file a petition for judicial review within the 60 day time period, you will lose your right to appeal

¹⁰ The Agency has modified this paragraph to clarify the amount of profit the Agency is imposing as a civil penalty under ORS 696.990(5).

Certificate of Service

On February 5, 2021, I mailed and emailed the foregoing Final Order issued on this date in OAH Case No. 2020-ABC-03791 and the Agency Case No. 2018-648.

By: First Class Mail

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