

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE REAL ESTATE BOARD

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IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST:

RAINBOW AUCTION & REALTY and  
JON S. SCHUSTER,  
RESPONDENTS

FINAL DECISION AND ORDER  
  
LS0005301REB

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The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 28<sup>th</sup> day of June, 2001.

James Imhoff, Jr.  
A Member of the Board

STATE OF WISCONSIN  
BEFORE THE REAL ESTATE BOARD

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IN THE MATTER OF THE DISCIPLINARY  
PROCEEDINGS AGAINST:

RAINBOW AUCTION & REALTY and  
JON S. SCHUSTER,  
RESPONDENTS

PROPOSED DECISION AND ORDER  
  
LS0005301REB

The parties to this action for purposes of §227.53, Wis. Stats., are:

Rainbow Auction & Realty Co., Inc.  
716 2<sup>nd</sup> Avenue North

Onalaska, WI 54650

Jon S. Schuster

716 2<sup>nd</sup> Avenue North

Onalaska, WI 54650

Real Estate Board

P.O. Box 8935

Madison, WI 53708-8935

Department of Regulation and Licensing

Division of Enforcement

P.O. Box 8935

Madison, WI 53708-8935

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### **PROCEDURAL HISTORY**

A hearing in the above-captioned matter was held on March 16, 2001, before Administrative Law Judge Jacquelynn B. Rothstein. Mr. Schuster appeared in person and by his attorney William P. Skemp. The Division of Enforcement appeared by its attorney Charles J. Howden.

Based on the entire record in this case, the undersigned administrative law judge recommends that the Real Estate Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law, and Order.

### **FINDINGS OF FACT**

1. Rainbow Auction & Realty Co., Inc., (Rainbow Auction) is a real estate corporation licensed to practice as a real estate broker in Wisconsin. Rainbow Auction is located at 716 2<sup>nd</sup> Avenue in Onalaska, Wisconsin. The license was originally granted to Rainbow Auction on March 26, 1985.
2. Jon S. Schuster is a real estate broker licensed to practice in Wisconsin. His license was originally granted to him on December 19, 1986. Mr. Schuster's last address on file with the Department of Regulation and Licensing is 716 2<sup>nd</sup> Avenue in Onalaska, Wisconsin. He is the owner of Rainbow Auction.
3. In September of 1992, Rainbow Auction and Jon S. Schuster, entered into a commercial listing contract with Farmers & Merchants Bank (Bank) for the sale of a truck stop located in Oakdale, Wisconsin.
4. While acting as the agent for the Bank and in his capacity as a real estate broker through Rainbow Auction, Mr. Schuster drafted a contract for the payment of a \$100,000 commission to Wayne A. Greenlee, if Mr. Greenlee found a purchaser for the truck stop. Mr. Greenlee, Mr. Schuster, and a representative of the Bank signed the contract.
5. At the time Mr. Schuster drafted and signed the contract, he knew that Mr. Greenlee was not licensed as a real estate broker or salesperson in Wisconsin.
6. Mr. Schuster did not disclose to the Bank, in writing and in a timely manner, that Mr. Greenlee was prohibited from sharing in a commission or compensation for the sale of the truck stop.
7. The Ho-Chunk Nation ultimately bought the property. Mr. Greenlee filed suit when Rainbow Auction and the Bank refused to pay him his commission under the contract. Based upon the contract that Mr. Schuster drafted, a jury found in favor of Mr. Greenlee and awarded him a judgment in the amount of \$100,000 (Case No. 93CV308).
8. On motions after verdict, the trial court judge granted judgment notwithstanding the verdict ruling that the agreement violated state law and dismissed the complaint. Mr. Greenlee then appealed.

9. On appeal, the court found that Mr. Greenlee had acted as a broker and could not maintain an action for a commission under §452.20, Wis. Stats., thereby upholding the trial court's decision (*Greenlee v. Rainbow Auction/Realty Co., Inc.*, 202 Wis. 2d 653, 670 (Ct. App. 1996)). The matter then returned to the circuit court to determine whether Mr. Schuster and Rainbow Auction were liable for the Bank's attorney's fees and costs incurred in its defense of Mr. Greenlee's claim.

10. On remand, the circuit court ruled in favor of the Bank. Rainbow Auction and Mr. Schuster appealed. The court of appeals concluded that Mr. Schuster and Rainbow Auction were liable for the Bank's fees and costs and affirmed the judgment of the circuit court in all other respects (*Greenlee v. Rainbow Auction/Realty Co., Inc.*, 218 Wis. 2d 745, 756 (Ct. App. 1998)).

### **CONCLUSIONS OF LAW**

1. By having paid or having offered to pay a commission or valuable consideration to Mr. Greenlee, an unlicensed person, Mr. Schuster violated §452.14 (3) (j), Wis. Stats.
2. By having drafted a contract for payment of a commission to Mr. Greenlee, an unlicensed person, Mr. Schuster violated a standard of care owed to his client, Farmers & Merchants Bank, contrary to secs. RL 24.025, 24 (2) (a)-(b), Wis. Admin. Code.
3. By drafting a fee splitting agreement on a form not approved by the Department of Regulation and Licensing, Mr. Schuster violated secs. RL 16.04 (2) and (3), Wis. Admin. Code.
4. By failing to disclose to the Bank, in writing and in a timely manner, the legal prohibition of Mr. Greenlee to share in a commission for the sale of property, Mr. Schuster violated secs. RL 24.07 (1) and (1) (c), Wis. Admin. Code.
5. By aiding and abetting Mr. Greenlee in Mr. Greenlee's acting as an unlicensed real estate broker, Mr. Schuster violated secs. RL 24.17 (1) and (3), Wis. Admin. Code and §452.03, Wis. Stats.
6. By having violated multiple provisions of chapter RL 24, Wis. Admin. Code, Mr. Schuster has demonstrated incompetency to act as a broker in a manner that safeguards the interests of the public as provided in §452.14 (3) (i), Wis. Stats.

### **ORDER**

**NOW, THEREFORE, IT IS HEREBY ORDERED** that Jon S. Schuster's license to practice as real estate broker is hereby suspended for six months to begin on the date the Real Estate Board chairperson or its designee signs the Order.

**IT IS FURTHER ORDERED** that during the term of Mr. Schuster's suspension Rainbow Auction & Realty Co., Inc., shall not list, sell, or accept a referral fee with respect to any commercial property.

**IT IS FURTHER ORDERED** that Jon S. Schuster shall take and successfully pass all of the real estate prelicensing curriculum before his real estate broker's license is reinstated.

**IT IS FURTHER ORDERED** that Rainbow Auction & Realty Co., Inc., is hereby reprimanded.

**IT IS FURTHER ORDERED** that Jon S. Schuster is assessed a forfeiture in the amount of \$5000.00. Said forfeiture shall be paid before Mr. Schuster's real estate broker's license is reinstated.

**IT IS FURTHER ORDERED** that Rainbow Auction & Realty Co., Inc., is assessed a forfeiture in the amount of \$5000.00. Said forfeiture shall be paid before Mr. Schuster's real estate broker's license is reinstated.

**IT IS FURTHER ORDERED** that the assessable costs of this proceeding be imposed against Jon S. Schuster and Rainbow Auction & Realty Co., Inc., in equal amounts.

### **OPINION**

Prior to the hearing in this matter, the Complainant filed a Motion in Limine in which he requested that Mr. Schuster be prohibited from introducing evidence or testimony that would contradict the decisions that had previously been issued against Mr. Schuster and Rainbow Auction by the Wisconsin Court of Appeals. More specifically, the Complainant requested that the doctrine of collateral estoppel or issue preclusion be applied in order to prevent the relitigation of those issues in this forum.

The Motion in Limine set forth five issues that had been the subject of the prior "Greenlee" litigation. The Complainant's motion was granted. In the decision that followed, each of the five issues was analyzed. An excerpt from that decision addressing those five issues follows next.

**I. Whether Respondent Schuster violated §452.14 (3) (j), Wis. Stats., by having paid or having offered to pay a commission or valuable consideration to Greenlee, an unlicensed person, for acts or services in violation of Chapter 452, Wis. Stats.**

The court of appeals in *Greenlee v. Rainbow Auction/Realty Co., Inc.*, 202 Wis. 2d 653, 670 (Ct. App. 1996), found that Mr. Greenlee "[w]as acting as a broker as defined by the statute, without a license . . ." Additionally, the court held in *Greenlee v. Rainbow Auction/Realty Co., Inc.*, 218 Wis. 2d 745, 756 (Ct. App. 1998), that Mr. Schuster was "[r]equired to comply with the statutes governing real estate transactions and his license was subject to discipline if he did not do so. Section 452.14(3)(j), Stats." The court, in *Greenlee II* concluded that Schuster, in his capacity as a real estate broker had, indeed, drafted an agreement that provided for a commission to Greenlee. *Greenlee I* at 663-64.

These decisions make it clear that Mr. Schuster and Mr. Greenlee entered into a contract, albeit an invalid one, for a commission. At the time the two entered into the contract, Mr. Greenlee was not a licensed real estate agent or broker.

**II. Whether Respondent Schuster drafted a contract for payment of a commission to Greenlee, an unlicensed person, thereby violating a standard of care owed to his client Farmers & Merchants Bank.**

The court of appeals in *Greenlee II* held that as a matter of law Mr. Schuster, as a real estate broker drafted a fee-splitting agreement contrary to the prohibition of §§445.19 and 452.20, Stats., and thereby violated the standard of care which he owed to the Bank. *Greenlee II* at 756. As previously noted, the court also found that Mr. Greenlee was not a licensed real estate agent or broker at the time he and Schuster entered into that agreement.

**III. Whether the fee splitting agreement drafted by Schuster constitutes the drafting and use of a form not approved by the Department of Regulation and Licensing in violation of §§ RL 16.04 (2) and (3), Wis. Admin. Code.**

In the circuit court decision that followed Mr. Schuster's first appeal, Judge McAlpine specifically found that Mr. Schuster violated §§ RL 16.04 (2) and (3), Wis. Admin. Code, because he drafted a contractual agreement that had not been approved by the Real Estate Board. *Greenlee v. Rainbow Auction/Realty Co., Inc.*, Case No. 93CV308 (Monroe Co. Cir. Ct. March 20, 1997). Those findings were affirmed in the second *Greenlee* appeal. *Greenlee* at 759.

**IV. Whether Schuster and Rainbow failed to disclose to the Bank, their client, in writing and in a timely manner, the legal prohibition of Greenlee to effectively share in a commission for the sale of property, a fee splitting arrangement prohibited by §§452.19 and 452.20, Wis. Stats.**

According to the court in *Greenlee II*, Mr. Schuster did not disclose any information regarding the prohibition against fee-splitting with non-brokers to the Bank. *Greenlee II* at 758. Additionally, there is nothing in the record which shows the Bank was aware of the legal consequences of Greenlee's lack of a real estate license, in terms of the commission agreement. *Id.*

**V. Whether Schuster aided and abetted Greenlee in Greenlee's acting as a real estate broker without benefit of the license required under Chapter 452, Wis. Stats.**

Mr. Greenlee was found to have been acting as a broker as defined by statute, without a license. *Greenlee I* at 670. When Mr. Schuster became aware that Mr. Greenlee was not a licensed real estate broker, he did not sever his relationship with him, but instead went ahead and drafted a contract that effectively allowed Mr. Greenlee to broker the sale of the Oakdale property. Furthermore, the court found that "[a]lthough the parties attempted to avoid the statutory prohibition by drafting a contract as they did, the contract confirms that the property for which Greenlee was to provide a buyer is property covered under the statutory definition. The amount of the commission, it is true, is not tied to the value of the real estate. But it is tied to the value of goodwill and equipment, which are covered under §452.01(2)(d), Stats. More significantly, a condition that Greenlee must meet to earn the commission is to provide a buyer for the whole property, which includes the real estate, goodwill and equipment." *Id.* at 666.

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Because Mr. Schuster and Rainbow Auction have violated a variety of provisions governing the practice of real estate, consideration must now be given as to what discipline to impose. It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209, 237 N.W.2d 689 (1976). Punishment of the licensee is not an appropriate consideration. *State v. MacIntyre*, 41 Wis. 2d 481, 485, 164 N.W.2d 235 (1969).

Mr. Schuster knowingly drafted a contract on an unapproved form, which provided for a commission to an

unlicensed person. Such conduct is clearly prohibited by the real estate laws. Mr. Schuster also failed to represent his client, Farmers & Merchants Bank, in an appropriate manner. By acting in this regard, Mr. Schuster's actions fell below the minimal standards of the real estate profession. In order to rehabilitate Mr. Schuster and to prevent future misconduct of this nature, it is necessary for him to undergo a comprehensive review of the statutes and rules governing the practice of real estate. By enrolling in the prelicensing curriculum he shall have ample opportunity to reacquaint himself with those provisions and to properly implement them. Additionally, such instruction is necessary in order to safeguard the public and any future clients of Mr. Schuster's.

Moreover, a suspension, reprimand, and forfeiture are being imposed to deter other licensees from engaging in similar misconduct and to ensure that Mr. Schuster complies with the minimum standards for practicing real estate. In an effort to prevent any further wrongdoing by other real estate salespersons and brokers, it is essential to impress upon them the importance of adhering to the real estate laws. The transaction in which Mr. Schuster was involved demonstrates conduct that plainly fell below the minimally acceptable standards of the profession. As a result, it is necessary to impose discipline, including costs and forfeitures, in order to rehabilitate Mr. Schuster, to protect the public, and to deter other licensees from similar wrongdoing.

Dated at Madison, Wisconsin, this 14<sup>th</sup> day of May, 2001.

STATE OF WISCONSIN

DEPARTMENT OF REGULATION & LICENSING

Jacquelynn B. Rothstein

Administrative Law Judge