STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of the Complaint of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Complainant,

-against-

DECISION
Complaint No.: 2016-1613

JOHNNY COLON,
LISSETTE CANO, and
RAPID REALTY WINDSOR TERRACE OFFICE LLC, brokerage

Respondents.

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The above-noted matter came on for hearing before the undersigned, Aiesha L. Hudson, on May 31, 2018, at the office of the Department of State ("Department") located at 123 William Street, New York, New York.

The Division of Licensing Services ("DLS") was represented by Matthew Wolf, Esq.

Prior to the hearing, the charges against Respondents Johnny Colon and Rapid Realty Windsor Terrace Office LLC were resolved by consent order.[1] At the hearing, the DLS proceeded with the charges against the remaining respondent, Lissette Cano, who did not appear.[2]

COMPLAINT

The complaint alleges that the respondent committed violations of Real Property Law, Article 12-A, and the implementing regulations thereunder, by advertising a property without the

[1] The tribunal takes official notice of the consent order executed by Johnny Colon, on his behalf, and by Lovell Ramsay, on behalf of Rapid Realty Windsor Terrace Office LLC, as the current representative broker for the limited liability company. The consent order is available on the New York Department of State's website at:
https://docs.dos.ny.gov/ooah/consent/2018/Johhny%20Colon%20-%20Lessett%20Cano-%20Rapid%20Realty%20Windsor%20Terrace%20Office%20LLC%202016-1613%206-20-18.pdf

[2] Since the charges against Johnny Colon and Rapid Realty Windsor Terrace Office LLC have been resolved by consent order, all subsequent references in this decision to the "respondent" refer solely to Ms. Cano.

owner's authorization; advertising a property subject to an exclusive listing without permission of the listing broker; posting photographs of a property on the company's website without written permission; and thereby demonstrating untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) On November 24, 2017 (date of Affidavit of Service), the DLS sent a Notice of Hearing and Complaint by certified and regular mail to the respondent's last known business address (State's Ex. 1). The certified mailing was returned from the Post Office with no forwarding address. The regular mailing was not returned. On February 9, 2018, an adjournment notice was sent by regular mail to respondent's last known business address, advising that the hearing had been adjourned to May 31, 2018 (State's Ex. 1). The tribunal takes official notice that the adjournment notice was not returned by the Post Office to the Office of Administrative Hearings.

2) The respondent, Lissette Cano, was a duly licensed as a Real Estate Salesperson, UID# 10401272839, for the term March 13, 2015 through March 12, 2017, under the sponsorship of Rapid Realty Windsor Terrace Office LLC ("Rapid Realty") until the association was terminated on September 13, 2016 (State's Ex. 2). At all relevant times herein, Johnny Colon was the licensed limited liability company real estate broker representing Rapid Realty (State's Ex. 2).

3) At the hearing, Division of Licensing Services Investigator Jenna Berschwinger testified that, on an unspecified date, the DLS received a preliminary statement of complaint ("complaint") against Johnny Colon and Lissette Cano from Mark Murray ("complainant") (Transcript at 8-9). The record does not include a copy of the complaint or any testimony regarding the content of the complaint, other than the documents the complainant attached to it. It is not clear to the tribunal why the complaint was not provided as evidence at the hearing.

4) Investigator Berschwinger testified that, after receiving the complaint, she interviewed the complainant by phone. During their conversation, the complainant explained that he and his wife were selling their home at 3194 Weidner Avenue in Oceanside, NY ("subject property") and to do so had entered into an Exclusive Listing Contract with For Sale By Owner ("FSBO") for a six-month period beginning on or about June 22, 2016 (Transcript at 10-11; State's Ex. 3). Pursuant to that agreement, FSBO listed the subject property on the Multiple Listing Service ("MLS") to advertise the sale of the property (State's Ex. 3, 4). The complainant represented in the Exclusive Listing Contract that he owned the photographs used in the MLS listing (State's Ex. 3). The complainant submitted a copy of his Exclusive Listing Contract with FSBO with his complaint to the DLS (Transcript at 11-12).

5) The Investigator further testified that, during her interview of the complainant, he stated that, during the exclusive listing period, he was contacted by someone he believed was the respondent who was looking for opportunities to show the subject property to potential buyers (Transcript at 10). The complainant stated that, after that conversation, he checked the listings for the subject property on the websites www.trulia.com ("*Trulia*") and www.Zillow.com ("*Zillow*"), to determine the number of people viewing the subject property, and discovered that the listings

for his property had been altered to indicate that the respondent was the listing agent for sale of the property, rather than the complainant (Transcript at 10, 12). The complainant also told the Investigator that, after searching the internet to identify the respondent, he found that the respondent worked for Rapid Realty, and there was a listing on the Rapid Realty website advertising a house for rent at an undisclosed address which appeared to be his home (the subject property). The complainant also told the Investigator that the listing for the subject property he found on the Rapid Realty website indicated that the respondent was the listing agent (Transcript at 12-13).

6) The Investigator testified that the complainant attached to his complaint printouts showing: the listing he found on the Rapid Realty website, which he determined was advertising the subject property; the MLS listing of the subject property posted by FSBO; and the listings for the subject property on the *Trulia* and *Zillow* websites that were allegedly altered, some of which were advertisements for a property located at an undisclosed address (State's Ex. 4). The Investigator testified that the complainant stated he was "very confident" of his conclusion that the listings he found on the Rapid Realty, *Zillow*, and *Trulia* websites, which did not identify the property address, were advertising his property based on the pictures used in the listings and the description of the property (Transcript at 14). He stated that his conclusions were further supported by other indications in the listings such as the city, neighborhood, and number of bedrooms of the property (Transcript at 14).

7) The complainant's printouts showing the listings of the subject property posted on the Rapid Realty, *Zillow*, and *Trulia* websites indicate that the websites were captured on August 2, 2016. Each printout is annotated with a statement identifying the website captured and its relevance to his complaint (State's Ex. 4).[3] One of the printouts shows a listing on the Rapid Realty website advertising a property for rent without an address, which the complainant labeled as a "Fraudulent Listing" of his property (State's Ex. 4, at p. 1). The photograph used in the Rapid Realty listing matches one of the photographs used in the MLS listing posted by FSBO on complainant's behalf (State's Ex. 4, at pp. 1, 5). The complainant's printouts also show the listings on the *Trulia* and *Zillow* websites, which identify the respondent as the listing agent for a property at the complainant's address and for properties at undisclosed locations, all of which have the same photograph and property description used in the MLS listing for the subject property (State's Ex. 4, at pp. 2-6).[4] Also included is a printout of a webpage showing a list of the respondent's active listings on the *Zillow* website, including a property at the "undisclosed" address (State' s Ex. 4, pp.7-8; Transcript at 14-15). The printouts of the *Trulia*, and *Zillow* websites are also annotated to state the complainant's contention that listings depicted were "Fraudulent" advertisements (State' s Ex. 4). Notably, all the listings identified as the subject property (whether directly by

[3] It is unclear whether the complainant is the author of the statements since there was no testimony at the hearing regarding the annotations on the printouts. Based on the Investigator's testimony that the complainant provided the printouts of the listings with his complaint, the statements have been attributed to the complainant.

[4] The MLS Listing indicates that FSBO is the contact person for inquiries regarding the subject property and provides their contact information (State's Ex. 4, at pp. 4-5).

address or by the complainant) indicate the same asking price for the property, $579.888.[5] However, the listing on the Rapid Realty website differs from the *Zillow* and *Trulia* listings in that, contrary to the complainant's statement, the respondent is not indicated as listing agent on the Rapid Realty listing (State's Ex. 4).

8) At the hearing, Investigator Berschwinger testified that she was told by the complainant that his wife had also spoken to the respondent, but neither he or wife gave the respondent permission to advertise the subject property (Transcript at 13). Neither the complainant nor his wife testified at the hearing, and the DLS did not offer sworn statements from the complainant or his wife as evidence.

9) Investigator Berschwinger also stated at the hearing that she attempted to speak with the respondent during the investigation but was unable to make contact because the phone number the respondent provided to the DLS in connection with her real estate salesperson license was no longer valid. Investigator Berschwinger also indicated that she contacted Mr. Colon, who was the limited liability company real estate broker representing Rapid Realty at the time of the investigation, to obtain updated confirmation for the respondent; however, she was told that Rapid Realty did not have updated contact information for the respondent since she was no longer employed by the brokerage (Transcript at 17).

10) Investigator Berschwinger testified that she also interviewed Mr. Colon regarding complainant's complaint. When she initially contacted Mr. Colon, he stated that he was unaware of the listing of the subject property, and he would have to speak with the respondent since this was first time the issue had been brought to his attention (Transcript at 16). Subsequently, Investigator Berschwinger spoke to Mr. Colon's attorney and asked Mr. Colon to address the complainant's allegations and provide either a copy of a listing agreement between Rapid Realty and the complainant or a statement explaining why the property was listed on the Rapid Realty website without a listing agreement (Transcript at 17-18). In response to the Investigator's request, Mr. Colon submitted a Verified Answer to the complainant's complaint, dated February 21, 2017, which generally denied the complainant's allegations of any improper listing of the subject property but failing to provide the information requested by the Investigator (State's Ex. 5). The Investigator testified that when she asked for clarification, Mr. Colon admitted, through his attorney, that Rapid Realty did not have a listing agreement with complainant (Transcript at 20). Mr. Colon thereafter submitted an Amended Verified Answer dated March 3, 2017 stating that Rapid Realty never obtained an exclusive listing from the complainant or his wife, but Rapid Realty did obtain the consent to bring prospective buyers to the subject property (State's Ex. 6). The Amended Answer also included the caveat that, although Rapid Realty had no record of a listing agreement, since the respondent was no longer employed by Rapid Realty, he could not be certain an open listing agreement did not exist (State's Ex. 6).

[5] The advertisement of the subject property on the Rapid Realty website as a rental property appears to be an error, given that the asking price listed is $579.888 (State's Ex. 4, p. 1).

OPINION & CONCLUSIONS OF LAW

I – To obtain personal jurisdiction and bind the applicant to the agency decision, DLS must properly serve the applicant with notice of the hearing and afford her an opportunity to be heard. Service properly made in a manner reasonably calculated to provide notice of the time, date, place, manner, and nature of the proceedings is sufficient whether or not the opposing party actually receives notice. *See Persad v. Division of Licensing Services*, 63 DOS APP 09 (2009); *Pinger v. Division of Licensing Services*, 23 DOS APP 07 (2007).

In this case, service of the Notice of Hearing and Complaint was made by certified and regular mail to the respondent's last known business address. Although the certified mailing was returned, the regular mailing was not returned. Accordingly, inasmuch as there is evidence that notice of the place, time, and purpose of the hearing was properly served, the holding of an ex parte quasi-judicial administrative hearing was permissible. *Patterson v. Department of State*, 35 A.D.2d 616, 312 N.Y.S.2d 300 (3d Dep't 1970); *Verdell v. DeBuono*, 262 A.D.2d 812, 691 N.Y.S.2d 679, 680 (3d Dep't 1999) (quoting *Silverstein v. Minkin*, 49 N.Y.2d 260, 263, 425 N.Y.S.2d 88, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865); *Matter of the Application of Rose Ann Weis*, 118 DOS 93 (1993).

II- The Department of State retains jurisdiction in this matter even though the respondent's registration expired of its own terms. *Albert Mendel & Sons, Inc. v. N.Y. State Department of Agriculture and Markets*, 90 A.D.2d 567, 455 N.Y.S.2d 867 (3d Dep't 1982); *Main Sugar of Montezuma, Inc. v. Wickham*, 37 A.D.2d 381, 325 N.Y.S.2d 858 (3d Dep't 1971). The Department of State retains jurisdiction over a disciplinary matter and may impose disciplinary sanctions where (1) the alleged unlawful conduct occurred while the respondent was licensed and (2) the respondent was eligible to automatically renew the prior license at the time of the commencement of the action. *See Division of Licensing Services v. Yasrebi*, 12 DOS 99 (1999); *Division of Licensing Services v. Uqdah,* 287 DOS 98 (1998). Both criteria are met in the case at bar.

III– As the party who initiated this action, the complainant has the burden to prove, by substantial evidence, the truth of the charges. SAPA § 306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. *Division of Licensing Services v. Guiterrez*, 1101 DOS 08 (2008) (citing *Gray v. Adduci*, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988)). In determining whether substantial evidence has been presented by the complainant, "the question…is whether a conclusion or ultimate fact may be extracted reasonably probatively and logically." *Division of Licensing Services v. Cirrincione*, 246 DOS 98 (1998) (citing *City of Utica Water Supply v. NYS Health Department*, 96 A.D.2d 710, 465 N.Y.S.2d 365, 66 (4th Dep't 1983)).

IV- Pursuant to New York Civil Practice Law and Rules ("CPLR") § 3025(c), a court may amend pleadings to conform to the evidence before or after a judgment has been rendered. However, an Administrative Law Judge may amend the pleadings *sua sponte* to conform to the proof only where the matters that are the subject of the amendment were litigated by the parties and fall within the broad framework of the original complaint so as to not cause undue surprise or prejudice to either party. *Division of Licensing Services v. Iglicki*, 2 DOS APP 12 (2012); *Town of*

Lumberland v. NYS Div. of Human Rights, 229 A.D.2d 631, 634 (3d Dep't 1996); *see also Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380 (1st Dep't 2006). Where the parties had an opportunity to litigate or address all the issues relevant to an amendment, there is no prejudice. *Division of Licensing Services v. Mabry*, 240 DOS 12 (2012) (finding the amendment of pleadings was appropriate where the applicant for security guard registration was given the opportunity to address inconsistencies in his prior statements at the hearing); *Division of Licensing Services v. Drucker*, 272 DOS 15 (2015) (finding *sua sponte* amendment of pleadings to conform to evidence appropriate where respondent, who failed to appear, was given sufficient notice of the arrest upon which the DLS' complaint and amendment were based); *Division of Licensing Services v. Wooden*, 875 DOS 05 (2005) (amending complaint to include evidence of the resolution of arrest charges appropriate because "the evidence was relevant, was within the framework in the original complaint and did not prejudice the respondent"); *cf. Division of Licensing Services v. Peixoto*, 4 DOS APP 12 (2012) (finding that the tribunal had improperly amended the pleadings in question at the hearing because it did not afford the respondent the opportunity to produce information that would have been relevant to the added issue of the respondent's fitness for licensure).

In this case, the DLS' complaint in this action alleges that the respondent violated 19 NYCRR § 175.25(b)(2)(a), (b) and (c), by advertising the subject property, specifically on the Rapid Realty website, without the authorization required under those regulations. At the hearing, the DLS offered evidence that, in addition to advertising the subject property on the Rapid Realty website, the respondent also violated § 175.25(b)(2) by fraudulently advertising herself as the listing agent and contact person on advertisements for the subject property found on the *Zillow* and *Trulia* websites. The DLS did not seek to the amend the complaint at the hearing. This tribunal declines to amend the pleadings *sua sponte* to add any allegations related to the respondent's alleged fraudulent listings on the *Zillow* and *Trulia* websites for the reasons that follow.

Although the DLS' complaint broadly alleges that the respondent "violated provisions of Article 12-A and the NY [Real Property Law] and regulations promulgated thereunder," the complaint refers only to the advertisement of the subject property on the Rapid Realty website as the basis for that charge. The allegations that the respondent also fraudulently advertised the subject property on the *Trulia* and *Zillow* websites, by substituting her name as listing agent without the complainant's authorization, constitute separate violations of the relevant regulations than those alleged in the original complaint. Whether the respondent is responsible for posting unauthorized listings on *Trulia* and *Zillow* involves a separate set of facts than those related to the advertisement of the subject property on the Rapid Realty website. Although the DLS may contend that the respondent is responsible for all the unauthorized advertisements of the subject property in the record, the evidence supporting those allegations with respect to the Rapid Realty, *Trulia* and *Zillow* websites are not the same. Thus, while the added allegations involving the *Trulia* and *Zillow* websites arguably fall within the broad framework of DLS' original complaint, amending the complaint to include them would prejudice the respondent since by doing so the respondent could be penalized for actions she was not provided notice of in the DLS' original complaint.

That the respondent did not appear at the hearing does not negate the fact that the respondent was not given sufficient notice of the full extent of the DLS's allegations regarding her violation the applicable regulations in this case. Based on the complaint, the respondent was given

sufficient notice to prepare a defense against the DLS' contention that she posted the advertisement of the subject property on the Rapid Realty website, but she was not given the opportunity to prepare a defense against the DLS' added allegations regarding her alteration of the advertisements on the *Zillow* and *Trulia* websites. That being the case, the tribunal finds that amendment of the pleadings to conform the evidence in the record is not appropriate in this case.[6] Accordingly, the tribunal will determine if the respondent violated § 175.25(b)(2) only with respect to the advertisement of the subject property on the Rapid Realty website.

V- Section 440(3) of the Real Property Law ("RPL") defines a real estate salesperson as a person who is "associated with a real estate broker" and performs real estate services "for or in behalf of such real estate broker." Thus, a real estate salesperson may only engage in real estate services as an agent and under the supervision of a licensed real estate broker. *Id*; RPL § 441-d; 19 NYCRR §§ 175.20; 175.21; *see Division of Licensing Services v. Hevey,* 40 DOS 93 (1993) (a real estate "salesperson is a fiduciary agent of the broker with whom the salesperson is associated and owes fiduciary obligations both to the broker and to the broker's principals"); *Matter of the Application of Jeffrey B. Mendell*, 2 DOS 91 (1991) (the "relationship between a licensed real estate broker and an associated salesperson is that of agency").

Advertising property for sale or lease is an act reserved for licensed real estate brokers and their agents, and a licensed real estate salesperson is authorized "to undertake and facilitate" those activities, only in association with and, under the supervision of, a licensed real estate broker. *Division of Licensing Services v. Caldwell*, 22 DOS APP 11 (2011) (citing *Hevey*, 40 DOS 93 (1993); *Triolo v. Department of State*, 37 A.D.2d 641 (3d Dep't 1971)). Therefore, a real estate salesperson placing an advertisement on behalf of a broker must comply with the broker's responsibilities laid out in 19 NYCRR § 175.25. *Caldwell*, 22 DOS APP 11. Accordingly, any advertisement of the subject property by the respondent was done on behalf of the respondent's broker, Rapid Realty, and the respondent was thereby obligated to comply with the terms of § 175.25(b)(2).

VI - DLS contends that the respondent advertised the subject property without obtaining the requisite authorization, and in doing so committed multiple violations of § 175.25(b)(2) and demonstrated untrustworthiness and/or incompetency. More specifically, DLS contends that the respondent violated § 175.25(b)(2) by: advertising the subject property without obtaining the authorization for such advertisement from the owner, in violation of 175.25(b)(2)(a); advertising

[6] This case differs from *Division of Licensing Services v. Drucker*, 272 DOS 15 (2015), a case which also involved the amendment of a pleadings to conform to the evidence at hearing when the respondent failed to appear. In that case, the tribunal *sua sponte* amended the complaint, which sought to revoke or suspend the respondent's security guard registration based on the respondent's 2014 arrest, to conform to the evidence presented at the hearing that the respondent, subsequent to the complaint, pled guilty to the charge stemming from that 2014 arrest. Unlike this case, the respondent in *Drucker* had adequate notice of the issue at bar at his hearing, his 2014 arrest. The Notice of Hearing and Complaint sent to the respondent prior to the hearing "informed him of the date, time, and location of the arrest underlying the [DLS's] case and the respondent's subsequent guilty plea." *Id.* That the respondent in *Drucker* pled guilty to the charge corresponding to that arrest as a consequence would not be a surprise to the respondent.

the subject property while it is subject to an exclusive listing held by another real estate broker without obtaining the permission of the listing broker, in violation of § 175.25(b)(2)(b); and posting photographs of the subject property on the Rapid Realty website without written permission from the copyright holder of such photographs, in violation of Section § 175.25(b)(2)(c).

As an initial matter, it is clear from the record that the DLS' case that the respondent violated § 175.25(b)(2) is primarily based on the unsworn statements of the complainant as relayed through the testimony of the DLS Investigator. It is well established that hearsay evidence is permitted in an administrative proceeding and, under certain circumstances, may constitute an agency's entire case. (*Posner v. Division of Licensing Services*, 37 DOS APP 09 (2009); *Doctor v. NYS Office of Alcoholism and Substance Abuse Services*, 112 A.D.3d 1020, 1022 (3d Dep't 2013); *Today's Lounge of Oneonta, Inc. v. New York State Liq. Auth*., 103 A.D.3d 1082, 1083 (3d Dep't 2013)). Further, "under the appropriate circumstances, statements from absent witnesses may be the sole basis for an agency's ultimate determination." *Harry's Chenango Wine & Liq. v. State Liq. Auth. of N.Y.*, 158 A.D.2d 804, 805 (3d Dep't 1990). However, an administrative determination may be based entirely on hearsay evidence only if it is "sufficiently relevant and probative" or "sufficiently reliable" and is not otherwise "seriously controverted." *Doctor*, 112 A.D.3d at 1022; *Watson v. NYS Justice Ctr. for Protection of People with Special Needs*, 152 A.D.3d 1025, 1027 (3d Dep't 2017); *see also Division of Licensing Services v. Sottile*, 19 DOS 91 (1991) (to be admissible in administrative hearing, the hearsay evidence must be "reliable, relevant, and probative"); *Sowa v. Looney*, 23 N.Y.2d 329, 333 (1968) ("All relevant, material, and reliable evidence which will contribute to an informed result should be admissible in a disciplinary proceeding"). In determining whether the evidence presented constitutes substantial evidence, [t]he question is whether the hearsay introduced is the kind of evidence on which responsible person are accustomed to rely on." *Diehsner v. Schenectady City Sch. Dist.*, 152 A.D.2d 796, 797 (3d Dep't 1989) (internal quotations omitted). Ultimately, the decision of "whether or not to accept proffered hearsay evidence is within the discretion of the Administrative Law Judge." *Posner*, 37 DOS APP 09 (quoting *Greenberg v. Division of Licensing Services*, 05 DOS APP 02 (2002)).

While the tribunal does not doubt the veracity of the Investigator testimony regarding the complainant's statements to her, the unsworn hearsay statements from a private party, such as the complainant, are not inherently trustworthy and lack the indicia of reliability to support the associated finding of facts. *See Division of Licensing Services v. Kulesa*, 13 DOS 91 (1991) (investigator's hearsay testimony of unsworn statements of complaining witnesses that were not corroborated by other evidence lacked indicia of reliability); *see e.g., Division of Licensing Services v. James*, 291 DOS 05 (2005) (investigator's hearsay testimony of statements made to him by a witness who did not appear and testify was found unreliable and not given any weight in determining the State's allegations); *Division of Licensing Services v. Sweetland*, 610 DOS 18 (2018) (charge dismissed where sole evidence was unsworn documentary evidence and verbal statements provided to DLS by the complainant, who did not testify, during course of investigation); *cf. Conley v. Division of Licensing Services*, 720 DOS 05 (2005) (hearsay evidence given significant weight in ALJ's determination because it was substantiated by testimony at the hearing which corroborated the hearsay evidence). Here, although the complainant's unsworn

statements to the Investigator are not inherently reliable, there is sufficient indicia of reliability given that the statements are substantiated by other evidence. Further, because the respondent did not appear, the hearsay statements are undisputed and, accordingly, there is no other evidence or testimony to weigh against it. *See, e.g., Division of Licensing Services v. McClean*, 253 DOS 11 (2011) (complaint dismissed because complainant's evidence, given by way of unsworn writings and hearsay testimony of complainant's investigator, was clearly outweighed by the respondent's credible testimony); *Division of Licensing Services v. McInerney*, 599 DOS 12 (2002) (respondent's sworn testimony outweighed testimony of complainant's investigator and an unsworn written statement); *but see Stevens v. DiNapoli*, 155 A.D.3d 1294, 1296 (3d Dep't 2017) (hearing officer credited contemporaneous and investigative documentary evidence over petitioner's sworn testimony). The question then is whether the hearsay evidence presented in this case is sufficient to sustain the charges in the complaint.

VII – DLS contends that the respondent violated § 175.25(b)(2)(a) by advertising a property without the owner's authorization. Thus, the DLS must establish by substantial evidence that (1) the respondent advertised (2) the subject property (3) without obtaining the complainant's authorization. Although the evidence is based largely on hearsay, the tribunal finds that DLS has met its burden of proof.

At the outset, that the property advertised on the Rapid Realty website is the subject property is supported only by the Investigator's second-hand testimony regarding: complainant's unsworn verbal and written statements explaining his conclusion that the listing on the Rapid Realty website was advertising the subject property; and the complainant's statements laying the foundation for the printouts of the Rapid Realty and other websites which show the advertisements. The complainant's explanation of his conclusion that the listing on the Rapid Realty website was advertising the subject property was based on the photograph and description of the property (and other particulars such as that the property was located in Oceanside, NY, contained four bedrooms and was listed at $579,888).[7] That conclusion is supported by the printouts of the Rapid Realty and MLS listings in the record, which when compared show commonalities in the details, including a common photograph, and identify the subject property by address.[8]

Further, that the respondent is responsible for posting the listing for the subject property on the Rapid Realty website, is primarily based on the Investigator's hearsay testimony that: the complainant was contacted by someone he believed was the respondent and later determined was associated with Rapid Realty regarding showing the subject property; and he thereafter discovered the listing on the Rapid Realty website advertising the subject property. While the printout of the Rapid Realty listing does not specifically indicate that the respondent was the listing agent for the Rapid Realty listing, it is reasonable to conclude that the respondent was responsible for posting

[7] The complainant also typed his conclusion that the Rapid Realty listing was advertising his property on the printout (State's Ex, 4, p.1).

[8] While there may be more details in the listing on the Rapid Realty website, which further support the complainant's conclusions, but are not visible on the complainant's one-page printout, that information is not before this tribunal (State's Ex. 4, p.1). The tribunal finds that there are sufficient similarities between the Rapid Realty listing (as shown) and the MLS listing to support the conclusion that the Rapid Realty listing is advertising the subject property.

the Rapid Realty listing based on her recent conversation with the complainant and his wife about the subject property and her association with Rapid Realty at the time the listing was posted. That the respondent was connected to the Rapid Realty listing is also supported by a comparison to the *Trulia* and *Zillow* listings for the subject property in which the respondent is displayed as the listing agent for the property.

Last, that the respondent posted the listing without authorization is supported by both hearsay and documentary evidence in the record. In addition to the Investigator's hearsay testimony regarding complainant's denial that he or his wife gave the respondent authorization to list his property, the complainant also made unsworn written statement annotating the printout that describes the listing depicted as "Fraudulent" (State's Ex. 4).[9] Moreover, the complainant's Exclusive Listing Contract with FSBO, which gives FSBO authorization as exclusive agent to post the complainant's MLS listing, is also evidence supporting that the respondent did not have authorization to post the Raid Realty website.[10] Further support is Mr. Colon's Amended Answer to the complainant's complaint, which contains the sworn statement that he found no record of a listing agreement between the complainant and Rapid Realty (the broker) in the brokerage's file. Although Mr. Colon qualifies his statement by adding that he could not be certain an open listing agreement did not exist because the respondent no longer works for Rapid Realty, the tribunal finds his attempt to leave open the opportunity that no violation was committed, by conjecturing about a listing agreement between the respondent and the complainant that could exist somewhere, is without merit. Based on the foregoing the tribunal finds that there is substantial evidence in the record to sustain the charge that the respondent listed the subject property on the Rapid Realty website without authorization in violation of § 175.25(b)(2)(a).

To the contrary, there is insufficient proof in the record that the respondent listed the property without the authorization of the listing broker in violation of § 175.25(b)(2)(b). While the existence of the Exclusive Listing Contract between the complainant and FSBO evidences that such an agreement existed at the time the complainant found the subject property on the Rapid Realty website, the Exclusive Listing Contract by itself does not prove that the respondent did not obtain authorization *from FSBO* to list the property notwithstanding that agreement. In fact, there was no testimony at the hearing regarding whether the listing broker FSBO had given authorization to the respondent to list the property. There was also no testimony or sworn statement from FSBO, nor any indication that the listing broker was contacted by the Investigator. Thus, the evidence in the record falls short of establishing the DLS' burden of proof, and therefore the charge the respondent violated § 175.25(b)(2)(b) is dismissed.

However, the charge that the respondent violated § 175.25(b)(2)(c) by posting photograph(s) of the subject property on the Rapid Realty website "without written permission from the copyright holder of such photographs" is supported by evidence in the record. The record shows that the photograph of the subject property used on the Rapid Realty listing is one of the

[9] The probative value of the statements annotating the pictures is lessened, however, by the fact that there was no testimony at the hearing about the statements and, accordingly, no identification of the author.
[10] However, the complainant's exclusive contract with FSBO does not preclude the complainant from granting authorization to respondent to post a listing advertising the subject property notwithstanding the contract.

photographs that FSBO posted with the MLS listing. Thus, based on the complainant's representation in the Exclusive Listing Contract that he is the copyright owner of the photographs used in the MLS listing, it follows that the complainant is also the owner of the photograph used in the Rapid Realty listing which was taken from the MLS listing. There was no testimony or other evidence presented at the hearing indicating otherwise. Accordingly, the complainant's authorization was required for use the photograph in the Rapid Realty listing. The Investigator's testimony did not identify ownership of the photographs or address whether authorization for use was given. However, given the Investigator's testimony that complainant denied giving authorization for posting the entire listing, it follows that the requisite authorization for the photograph used in the listing was not obtained. The respondent had the opportunity to appear at the hearing to provide written proof to the contrary, but she failed to do so. Thus, the respondent's use of the photograph in the advertisement of the subject property was a violation of § 175.25(b)(2)(c).

VIII- Based on the finding that the respondent advertised the subject property without authorization, in violation of § 175.25(b)(2)(a), and in doing so used a photograph of the subject property without written authorization, in violation of § 175.25(b)(2)(c), the charge that the respondent has demonstrated untrustworthiness and/or incompetency, in violation of RPL § 441-c, is sustained.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Lissette Cano has violated Title 19 of the New York Code of Rules and Regulations §§ 175.25(a) and (c), and has demonstrated untrustworthiness in violation of Real Property Law § 441-c. Accordingly, her license as a real estate salesperson, UID #10401272839, is deemed revoked, effective as of the date the license expired, March 12, 2017. She is directed to send, as appropriate, her license certificate, pocket card, and salesperson's identification, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

/S/

Aiesha L. Hudson
Administrative Law Judge

Dated: January 18, 2019