

**BEFORE THE MARYLAND REAL ESTATE COMMISSION**

**MARYLAND REAL ESTATE COMMISSION** \* **Before Debroah S. Richardson**  
**V.** \* **Administrative Law Judge**  
\* **of the Maryland Office**  
**JENNIFER COATES, RESPONDENT** \* **of Administrative Hearings**  
**AND** \* **MREC CASE NO. 16-RE-160**  
\* **OAH NO. DLR-REC-24-19-12242**  
**THE CLAIM OF** \*  
**MICHAEL AND PEGGY MCALOON** \*  
**AGAINST THE REAL ESTATE** \*  
**GUARANTY FUND**

\* \* \* \* \*

**OPINION AND FINAL ORDER**

This matter came before the Maryland Real Estate Commission (“Commission”) as a result of written exceptions filed by Respondent, Jennifer Coates, to the Commission’s Proposed Order of September 25, 2019. On June 14, 2019 Administrative Law Judge (“ALJ”) Deborah S. Richardson held a hearing (the “ALJ Hearing”) at the Office of Administrative Hearings (“OAH”) on Claimants’ Maryland Real Estate Guaranty Fund (the “Fund”) Claim and regulatory charges issued by the Commission. On September 10, 2019, the ALJ filed a Proposed Decision in which she recommended Claimants’ claim against the Fund be denied, Respondent’s license be suspended for 30 days, and the Commission issue a penalty against Respondent in the amount of \$5,000.00. On September 25, 2019, the Commission issued the Proposed Order affirming the ALJ’s Findings of Fact, approving and amending in part the Proposed Conclusions of Law, and

adopting and amending in part the Recommended Order. In its Proposed Order the Commission extended the suspension to sixty (60) days and increased the penalty to \$7,500.00.

On October 16, 2019, Respondent filed written exceptions to the Commission's Proposed Order. A virtual hearing on the exceptions was held August 19, 2020 (the "August 19th Hearing") before a panel consisting of Commissioners Demetria C. Scott, Anne Cooke, and Karen Baker (the "Panel"). Hope Sachs, Assistant Attorney General, appeared as the presenter of evidence on behalf of the Commission. Claimants did not appear. Respondent appeared, without an attorney. She acknowledged her right to representation by counsel but waived that right and proceeded *pro se*. The proceedings were electronically recorded.

#### **PRELIMINARY MATTERS**

Several days before and again at the beginning of the August 19th Hearing Respondent advised she wished to introduce additional evidence not presented at the ALJ Hearing. Respondent explained she wished to enter three documents regarding her health that she deemed relevant.

Pursuant to the Code of Maryland Regulations ("COMAR") 09.01.03.09 K:

Additional evidence may not be introduced unless the party seeking to introduce it demonstrates to the satisfaction of the administrative unit that the new evidence:

- (1) Is relevant and material;
- (2) Was not discovered before the ALJ hearing; and
- (3) Could not have been discovered before the ALJ hearing with the exercise of due diligence.

Respondent argued the documents met the standard. The Commission opposed Respondent's request. The Panel recessed to review and in accordance with the provisions of COMAR 09.01.03.09 K and after careful consideration, determined that none of the three documents were

relevant or material, and furthermore that two of the documents were discovered before the ALJ Hearing, and denied Respondent's request.

### **SUMMARY OF THE EVIDENCE**

On behalf of the Commission, six exhibits, as well as the OAH file containing the exhibits which were introduced at the ALJ Hearing, were admitted and entered into evidence:

- REC Ex. 1: September 26, 2019 letter with Proposed Order and Proposed Decision
- REC Ex. 2: Proposed Order and Proposed Decision
- REC Ex. 3: Respondent's exceptions
- REC Ex. 4: October 22, 2019 letter scheduling hearing on exceptions
- REC Ex. 5: May 12, 2020 letter rescheduling hearing on exceptions
- REC Ex. 6: June 30, 2020 letter rescheduling hearing on exceptions

No additional evidence was admitted.

### **FINDINGS OF FACT**

The Commission adopts the Findings of Fact recommended by the ALJ.

### **DISCUSSION**

At all times relevant to this matter, Respondent Jennifer Coates was a licensed real estate salesperson. FF 1.<sup>1</sup> That license has since expired, Respondent has not filed to renew or reinstate. At all times relevant to this matter, Respondent was a member of Real Estate Teams, LLC, a team led by her father, Jerry Coates. FF 2. Mr. Coates has since retired and sadly, passed away.

The property at issue in this matter, 7431 Round Hill Road, Frederick, Maryland (the "Property") was owned by the Lees. FF 3. Mr. Lee passed away sometime prior to February 20, 2015. FF 3-5. Mrs. Lee entered into an Exclusive Right to Sell Residential Broker Agreement with Mr. Coates (the Respondent's father and then team leader) on February 20, 2015. FF 7. According to the testimony, Mrs. Lee was ill so Mr. Coates dealt mostly with her sons. FF 8. Mr.

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<sup>1</sup> FF refers to the Findings of Fact in the ALJ's Proposed Decision.

Coates was out of the country during much of the sale of the Property and communicated with Respondent regarding the sale, who handled the day to day, on a regular basis. FF 9.

In March of 2015 groundwater<sup>2</sup> petroleum contamination at 7432 Round Hill Road came to the attention of the Maryland Department of the Environment (“MDE”). FF 11. A letter was sent from MDE to Mrs. Lee regarding the contamination but no response was received. FF 12.

On May 15, 2015 Claimants entered into a Residential Contract of Sale to purchase the Property. FF 13. The Contract included a Water Quality Addendum but petroleum was not included in the panel of tests. FF 16. Mr. Coates was notified of the date of the test, set for May 20, 2015, and the results of that test were received June 3, 2015. FF. 20.

In the meantime, the owner of 7432 Round Hill Road had been in contact with MDE and trying to obtain permission from neighbors, including Mrs. Lee, to sample their water but had not heard back. FF 21. On June 9, 2015, the owner of 7432 Round Hill Road notified MDE the Property was for sale, MDE contacted the Respondent about the petroleum issue, she provided the lock box code and advised the Property had sold and testing would need to be completed before closing, scheduled for June 16, 2015. FF 22-25. On June 15, 2015 someone called Respondent advising they could not access the property with the lockbox and advised they would obtain a sample from the outside spigot, that same day an MDE contractor received a sample from the Property. FF 27.

Respondent did not inform Claimants or their agent of the potential petroleum groundwater contamination and the Property went to settlement as scheduled on June 16, 2016. FF 28-29.

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<sup>2</sup> The Lees were aware of other, unrelated apparently, water contamination issues dating back to at least 2006 at the Property. FF 3-5.

On June 25, 2015 MDE notified Claimants the water contained unacceptably high levels of petroleum, advised them not to drink the water from the well, and that the state would provide bottled water until a filtration system could be installed, at no cost to Claimants. FF 31-32. Claimants decided they did not want the system installed, did not want to live in the Property, and when Mrs. Lee refused to rescind the Contract, listed the Property for sale, but were unable to sell it. FF 35-38. Claimants stopped making mortgage payments, the Property sold in foreclosure, and Claimants eventually filed for bankruptcy which resulted in the discharge of the \$95,337.59 deficiency balance owed by them as a result of the foreclosure. FF 39-43.

The ALJ found that Claimants failed to establish a claim under the Fund but determined regulatory charges were sustainable. Proposed Decision at 11, 18. Specifically, the ALJ recommended Respondent be charged with violation of section 17-322 (b), subsections (4) and (25), of the Business Occupations and Professions Article ("BOP"). BOP § 17-322 (4) provides that a licensee may be reprimanded or have their license suspended or revoked if the licensee:

intentionally or negligently fails to disclose to any person with whom the applicant deals a material fact that the licensee knows or should know and that relates to the property with which the licensee or applicant deals.

BOP § 17-322 (25) gives the Commission the same authority if a licensee

engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings.

The ALJ recommended Respondent be ordered to pay a \$5,000.00 penalty as a result of the regulatory violations and her license be suspended for thirty (30) days. Proposed Decision at 18.

After review of the Proposed Decision the Commission agreed with the ALJ regarding the denial of the Fund claim and to proceed with regulatory charges, but increased the suspension

from thirty (30) to sixty (60) days and the penalty from \$5,000.00 to \$7,500.00 and issued the Proposed Order.

Respondent took exception to the Commission's Proposed Order and argued as follows:

- (1) Respondent was not at fault, her father was because he was the listing agent.
- (2) Respondent has a medical condition she claims renders her disabled and she is thus being discriminated against.
- (3) Respondent was under the mistaken impression MDE was performing the water test for the Complaints and thus felt she had no duty to inform the Claimants.

Assistant Attorney General Sachs argued on behalf of the Commission that failure to inform the Claimants amounted to a failure to disclose a material fact and at a minimum incompetence.

First, regarding the matter of materiality, the Commission agrees with the ALJ that the groundwater petroleum contamination was a material fact. Proposed Decision at 15-16. Regarding Respondent's first exception, that the blame falls on her father, the Commission is not persuaded. Respondent was very involved in the transaction, was in constant communication with her father, received the calls from MDE, and failed to disclose a material fact. No evidence was presented to establish Respondent's second exception, claims of disability discrimination. While the Commission takes Respondent's allegations very seriously, without evidence it cannot be persuaded. Neither at the ALJ Hearing nor at the August 19th Hearing did Respondent provide admissible evidence of a disability or that she was being discriminated against by any party or entity based on a disability. Finally, Respondent's third exception, that she thought MDE was performing the water quality test on behalf of the Claimants as required by the Contract is, as the ALJ explained in great detail, not credible. For example, the person who called from MDE

identified himself and mentioned petroleum and Respondent simply could not have assumed the Claimants were taking the water sample just one day before closing, especially when her Mr. Coates, with whom she was in constant contact, knew the date of Claimants' test. Proposed Decision at 11-14.

### CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, the Commission concludes as a matter of law that Respondent violated BOP § 17-322 (b) (4) and (25) and as a result shall pay a civil penalty in the amount of Seven Thousand Five Hundred Dollars pursuant to BOP § 17-322 (c).

In addition, the Commission concludes as a matter of law that Claimants are not entitled to an award from the Fund. BOP §14-404.

### ORDER

The Exceptions of the Respondent, Jennifer Coates, having been considered, it is this 12<sup>th</sup> day of November, 2020 by the Maryland Real Estate Commission, hereby ORDERED:

1. That the Claimants' claim against the Fund is DENIED ;
2. That all real estate licenses held by the Respondent, JENNIFER COATES, shall be suspended for sixty (60) days from the date all rights to appeal are exhausted;
3. That Respondent, Jennifer Coates, shall pay a civil penalty in the amount of Seven Thousand Five Hundred Dollars (\$7,500.00) within thirty (30) days from the date all rights to appeal are exhausted
3. That the records, files, and documents of the Maryland Real Estate Commission reflect this decision.





MARYLAND REAL ESTATE  
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v.

JENNIFER COATES,  
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MICHAEL AND PEGGY MCALOON,

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AGAINST THE REAL ESTATE

GUARANTY FUND

\* BEFORE DEBORAH S. RICHARDSON,

\* ADMINISTRATIVE LAW JUDGE

\* OF THE MARYLAND OFFICE

\* OF ADMINISTRATIVE HEARINGS

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\* OAH No.: DLR-REC-24-19-12242

\* MREC No.: 16-RE-160

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On May 5, 2016, Peggy and Michael McAloon (Claimants) filed a complaint with the Maryland Real Estate Commission (Commission) against Jennifer Coates (Respondent),<sup>1</sup> a licensed real estate salesperson, concerning the Respondent's conduct in relation to residential real estate the Claimants purchased in Frederick, Maryland. On that same date, the Claimants filed a claim against the Real Estate Guaranty Fund (Guaranty Fund) to recover compensation

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<sup>1</sup> The Complaint was originally filed against Jennifer Coates-Wang. At the hearing, the Respondent informed me she had changed her name to Jennifer Coates.

for an alleged actual loss that occurred due to the Respondent's acts or omissions related to that same residential real estate.

On April 15, 2019, the Commission, by Michael L. Kasnic, Executive Director, issued a Statement of Charges and Order for Hearing concerning the Commission's regulatory charges and the Claimants' claim against the Guaranty Fund. That same day, the Commission referred this case to the Office of Administrative Hearings (OAH) for a combined hearing on the regulatory charges and the claim against the Guaranty Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-323(d)(2) (2018) (regulatory charges); *id.* § 17-407(c)(2)(ii) (Guaranty Fund claim).<sup>2</sup>

On June 14, 2019, I conducted a hearing at the St. Mary's County Library in Leonardtown, Maryland. *Id.* § 17-324 (regulatory charges); *id.* §§ 17-407(e) and 17-408 (Guaranty Fund claim); and *id.* § 17-409 (joinder of regulatory charges and Guaranty Fund claim). Shara Hendler, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Commission in relation to the regulatory charges. The Claimants represented themselves. H.C. Jones, Esq., represented the Respondent. Andrew Brouwer, Assistant Attorney General, Department, represented the Guaranty Fund.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); the Department's and the Commission's procedural regulations, Code of Maryland Regulations (COMAR) 09.01.03 and 09.11.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

### ISSUES

#### Regulatory Charges

1. Did the Respondent violate the following provisions of section 17-322 of the Business Occupations and Professions Article?

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<sup>2</sup> All references to the Business Occupations and Professions Article are to the 2018 Replacement Volume.

- a. 17-322(b)(4) (intentionally or negligently fail to disclose to any person with whom the licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee deals);
- b. 17-322(b)(25) (engage in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings);
- c. 17-322(b)(32) (violate any other provision of title 17 of the Business Occupations and Professions Article);

2. If the Respondent did violate any of these sections, what sanction, if any, is appropriate under section 17-322(b) or (c) of the Business Occupations and Professions Article?

Claim Against the Guaranty Fund

3. Did the Claimants sustain an actual loss resulting from an act that occurred in the provision of real estate brokerage services by the Respondent, a licensed real estate salesperson, which involved a transaction relating to real estate located in the State, and by which the Respondent obtained the Claimants' money or property by theft, embezzlement, false pretenses, or forgery; or by fraud or misrepresentation?

4. If so, what compensation are the Claimants due from the Guaranty Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence for the Commission:

REC #1 - Statement of Charges and Order for Hearing, April 15, 2019

REC #2 - Notice of Hearing, April 23, 2019

REC #3 - Printouts from the Commission's computer system regarding the Respondent's real estate salesperson's license, June 13, 2019

REC #4 - Commission Report of Investigation, with attachments, undated

REC #5 - Commission Supplemental Report, with attachments, April 5, 2018

REC # 6 - Aerial photograph of Round Hill Road, undated

I admitted the following exhibits into evidence for the Claimants:

- CL. #1 - Spreadsheet of alleged damages, undated
- CL. #2 - HUD-1 Settlement Statement, June 16, 2015
- CL. #3 - Letter from BB&T to the Claimants, November 16, 2015
- CL. #4 - Substitute Trustee's Deed, August 31, 2016
- CL. #5 - Auditor's Report, December 12, 2016
- CL. #6 - Bank statements and checks from NASA Federal Credit Union, dates ranging from May 1, 2015 to March 31, 2016
- CL. #7 - Maryland Department of the Environment E-mails and reports regarding groundwater investigation on Round Hill Road in 2006-2007; letter from Paul Certeza to Genevieve Lee, April 10, 2015; packet of emails beginning from Bryan Gilbert to Mr. Certeza, March 13, 2015; email from Mr. Certeza to Andrew Miller June 26, 2015

The Respondent did not offer any exhibits for admission into evidence.

The Fund did not offer any exhibits for admission into evidence.

### Testimony

The Commission introduced testimony from Claimant Peggy McAloon, Diane Carson, Commission Investigator, Paul Certeza, retired from the Maryland Department of the Environment, and Ellen King, retired real estate broker.

The Claimant Peggy McAloon testified in her own behalf as to her claim against the Guaranty Fund.

The Respondent testified in her own behalf as to the regulatory charges and the claim against the Guaranty Fund.

The Guaranty Fund did not present any testimony.

## FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to this matter, the Respondent was licensed by the Commission as a real estate salesperson. She is currently licensed as an associate broker and her current registration expires on September 6, 2020.
2. At all times relevant to this matter, the Respondent was licensed with Real Estate Teams, LLC in Frederick, Maryland. The Respondent was part of a team, of which her father, Jerry Coates, was the team leader. Jerry Coates is now retired.
3. In 2006, the residents of 7430 Round Hill Road in Frederick, Maryland reported to the Maryland Department of Environment (MDE) that they had concerns about the quality of their groundwater. As a result of that report, the MDE tested the groundwater at 7430 Round Hill Road as well as several neighboring properties for contamination. The MDE determined there was an improperly abandoned underground storage tank at 7431 Round Hill Road, a property then owned by James and Genevieve Lee (Property).
4. The MDE obtained water samples from the Property as well as from 7430 Round Hill Road. The results of the test from the Property indicated the presence of methyl tertiary-butyl ether (MTBE), but at a level below the State maximum containment level and no remediation was required. The test also indicated the presence of Benzene below the established safe drinking water level.
5. Mr. Lee had water removed from the underground storage tank at the Property and had the tank filled with expanding foam. The MDE issued a Notice of Compliance with respect to the removal of the underground storage tank.
6. Sometime prior to February 20, 2015, Mr. Lee passed away.

7. On or about February 20, 2015, Mrs. Lee entered into an Exclusive Right to Sell Residential Broker Agreement with Real Estate Teams, LLC, with Jerry Coates and the Respondent being the primary licensees responsible for the listing. Jerry Coates had been friends with Mr. Lee for thirty years and the two were both members of a local gardening club.

8. Jerry Coates had primary responsibility for the sale of the Property. As Mrs. Lee was ill at the time, Mr. Coates dealt primarily with Mrs. Lee's sons. The Respondent did work on the sale of the Property as it was delegated to her by her father.

9. Mr. Coates was out of the country during much of the sale of the Property. Mr. Coates and Respondent communicated regularly by phone and email.

10. The Respondent held two open houses at the Property, including one known as a "neighbor preview." Several neighbors attended this open house. No one made any mention of the presence of contaminants within the water supply.

11. Sometime around March of 2015, the issue of potential groundwater contamination on Round Hill Road again came to the attention of the MDE because of an issue at the home of Bryan Gilbert, who lived at 7432 Round Hill Road.

12. On or about April 10, 2015, Paul Certeza from the Oil Control Program at the MDE, sent a letter to Mrs. Lee, at the Property, informing her that the MDE was investigating residential drinking water quality in the vicinity of her home. He requested permission to sample her water supply to determine if there was a water quality concern associated with the well on the property. Mr. Certeza did not receive a response from Mrs. Lee.

13. On May 15, 2015, the Claimants signed a Residential Contract of Sale (Contract) to purchase the Property for \$410,000.00 and the contract was ratified on May 19, 2015.

14. Ellen King represented the Claimants in the purchase of the Property.

15. The Contract provided the sale of the Property was "as-is" with a property disclaimer signed by Mrs. Lee. Although the property disclaimer did not require Mrs. Lee to make any specific disclosures, she was still required to disclose any latent defects.

16. Included within the Contract was a Water Quality Addendum which indicated the Claimants would be having the well water tested for bacteria, chemicals, lead, radium and nitrates. The Contract provided that the testing would be completed within fourteen days from the Contract acceptance. Petroleum testing was not included in that panel of tests.

17. The line of the Water Quality Addendum addressing the amount of expenses the seller would incur to correct any contamination discovered before settlement was left blank.

18. Ms. King arranged for water testing at the Property even before the contract was ratified. On May 18, 2015, Ms. King sent Mr. Coates an email letting him know the water testing had been scheduled for May 20, 2015. The email also detailed that the lab would need access to the inside of the Property in order to test the water.

19. On May 20, 2015, Fredericktowne Labs conducted well-water testing at the Property.

20. On or about June 3, 2015, Fredericktowne Labs sent a Certificate of Analysis to the Claimants with the results of the water testing stating the water was safe for human consumption and meets federal, state and local requirements. The presence of petroleum had not been a requested test and was not included in that analysis.

21. Between March and June 2015, Mr. Gilbert emailed with Mr. Certeza and other employees of the MDE about the status of his own home and regarding testing on his neighbors' properties. Mr. Certeza informed Mr. Gilbert he had sent letters to several neighbors to obtain permission to sample their water but he had not heard back.

22. On June 9, 2015, Mr. Gilbert contacted Mr. Certeza and told him the Property had a for-sale sign in front of it. Mr. Gilbert provided Mr. Certeza with the contact information of the listing agent for the Property.

23. On June 10, 2015, Mr. Certeza telephoned the Respondent. He provided his full name and said he was from the MDE. He said he was calling about petroleum groundwater contamination in the general area and said that he needed access to sample the water at the Property.

24. The Respondent indicated that the Property had been sold and Mr. Certeza needed to complete the testing prior to closing, which was scheduled for June 16, 2015.

25. The Respondent provided Mr. Certeza with the lock box code to gain access to the Property.

26. On June 15, 2015, the Respondent received a call from someone at the Property letting her know he was unable to access the Property through the lock box. He then said he would obtain the water sample from the outside spigot.

27. On June 15, 2015, Chesapeake GeoSciences, Inc., a contractor for the MDE, obtained a water sample from the Property.

28. The Respondent did not inform the Claimants or their agent of the potential for petroleum groundwater contamination at the Property.

29. The Property went to settlement on June 16, 2015.

30. The results of Chesapeake GeoSciences' testing revealed the presence of MTBE at a concentration level of 1.48, which is below the EPA or State action level of 20. It also indicated the presence of total petroleum hydrocarbons-diesel range organics (TPH-DRO) at a concentration level of .10, which is well above the State action level of .047.



31. On June 25, 2015, Mr. Certeza contacted the Respondent and then Ms. King to obtain contact information for the buyers of the Property. Mr. Certeza then provided the Claimants with the results of the water testing done for the MDE, specifically that the water contained unacceptably high levels of petroleum. He told the Claimants not to drink the well water at the Property and that bottled water would be provided to them until the State could install a two-stage water filtration system in their basement. He told them they could cook with the water after it had been boiled.

32. The water filtration system would have been installed and maintained by the State of Maryland, at no cost to the Claimants.

33. The proposed water filtration system would have lowered the amount of TPH-DRO in the Property's well water to below the State action level at which level the water would be safe to drink.

34. At the time the Claimants learned of the Property's water contamination, they had moved their household goods into the Property but had not yet begun living at the Property.

35. The Claimants did not have the carbon filtration system installed in the Property.

36. The Claimants decided they did not want to live in the Property, even with a carbon filtration system.

37. The Claimants requested Mrs. Lee rescind the Contract of sale for the Property, which she declined. She did, however, offer to pay for a filtration system.

38. On March 23, 2015, the Claimants listed the Property for sale disclosing "Contact Maryland Department of Environment in regards to Well. SOLD STRICTLY 'AS IS.'" The Claimants were unable to sell the Property.

39. The Claimants stopped making mortgage payments on the Property.

40. In April 2016, substitute trustees filed foreclosure proceedings against the Claimants.

41. The Claimants attempted to execute a deed in lieu of foreclosure but on November 16, 2015 that offer was declined by BB&T, with BB&T informing the Claimants the Property was not in marketable condition.

42. On June 8, 2016, the Property was sold at public auction for the sum of \$289,095.00.

43. After the property was sold, there remained a \$95,337.59 deficiency balance owed by the Claimants. The deficiency balance was later discharged in a bankruptcy proceeding filed by the Claimants.

### DISCUSSION

#### Regulatory Charges

Section 17-322 of the Business Occupations and Professions Article provides that the Commission may reprimand any licensee, or suspend or revoke a license if, in pertinent part, the licensee:

(4) intentionally or negligently fails to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee or applicant deals;

.....

(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

.....

(32) violates any other provision of this title;

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b).

The Commission charged the Respondent with violating the above three sub-sections of the statute. As to sub-section (b)(32), however, the Commission did not cite the Respondent with violating any other provisions of title 17, so I recommend that the Commission dismiss that charge. The other two charges relate to the Respondent's alleged failure to disclose to the Claimants or the Claimants' real estate agent that the MDE had requested permission to test the

groundwater at the Property for petroleum contamination after the parties entered into the Contract, but before settlement on the Property. The Commission asked that I recommend a sixty-day suspension of the Respondent's real estate salesperson's license and the imposition of a \$7,500.00 penalty for the violations.

As explained below, I recommend that the Commission sanction the Respondent for violating sub-sections (b)(4) and (b)(25), albeit in different amounts than those recommended by the Commission. The evidence presented concerning the regulatory charges established under sub-section (b)(4) that the Respondent negligently failed to disclose to the Claimants a material fact about potential petroleum groundwater contamination at the Property, information that the Respondent knew or should have known. This same conduct demonstrated under sub-section (b)(25) the Respondent's incompetency.

As noted above, sub-section (b)(4) prohibits a licensee from intentionally or negligently failing to disclose to any person with whom the licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee deals. First, the Respondent argued she did not know, nor should she have known, about the potential petroleum groundwater contamination at the Property. Second, the Respondent argued the existence of petroleum groundwater contamination was not material because it was not specifically contemplated by the Contract, whereas other potential contaminants were, and also because even had they known of the potential contamination, the Claimants were without recourse to cancel the Contract.

The Respondent testified that she did not know that the MDE was investigating potential petroleum groundwater contamination at the Property. She testified she remembers receiving a call from a man named Paul, but because she answered the call using her Bluetooth while driving, the reception was scratchy and she did not hear every word that he said. She testified specifically

she did not hear his last name or that he was from the MDE. She only heard something about water testing, and assumed it was the testing the buyers had requested. Although it is the buyers' agent's responsibility to arrange for such tests, she said she was just trying to facilitate the process and wanted to make sure that it got done before closing.

The Respondent took issue with Mr. Certeza's testimony about that call. She argued that Mr. Certeza's recollection seems to get sharper each time he is asked about the call, with additional details, such as him identifying himself as being from the MDE, emerging after he was first asked about the call by the Claimants long before the hearing. There is nothing inconsistent between the email sent by Mr. Certeza to the Claimants when they asked for an accounting of the events at issue, the statements he made to the Commission investigator, and the testimony he gave at the hearing. The latter statements and testimony did contain additional details, but only because he was asked very specific questions to elicit those details. Those details likely did not occur to him as important when he was asked more general open-ended questions. I found Mr. Certeza sincere, forthright and credible and I believe the call took place as he recounted.

The Commission argued that a reasonable real estate salesperson should have been on notice that there was a potential problem with the groundwater at the Property. The question then becomes, what would a reasonable real estate salesperson have known or attempted to learn after receiving this call. In answering this question, I am guided by the code of ethics which governs the Respondent with respect to her dealings with the public:

***A. The licensee shall remain informed of matters affecting real estate in the community, the State, and the nation.***

B. The licensee shall be informed on current market conditions in order to be in a position to advise clients as to the fair market price.

***C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field.*** The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The

licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

***D. The licensee shall make a reasonable effort to ascertain all material facts concerning every property for which the licensee accepts the agency, in order to fulfill the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts.***

E. The licensee, acting as agent, may not discriminate in the sale, rental, leasing, trading, or transferring of property to any person or group of persons in violation of State Government Article, §20-402, Annotated Code of Maryland.

F. The licensee may not be a party to the naming of a false consideration in any document.

G. Advertisement.

(1) The licensee in advertising shall be especially careful to present a true picture. A broker may not advertise without disclosing the broker's name or the company name as it appears on the license. A broker may not permit associate brokers or salespersons to use individual names unless the connection with the broker is obvious in the advertisement.

(2) Effective October 1, 2004, an associate broker or salesperson may not use an individual telephone number or email address in an advertisement, as defined in Business Occupations and Professions Article, §17-527.2(a)(3), Annotated Code of Maryland, unless the identified telephone number of the broker or branch office manager also appears in the advertisement.

H. For the protection of all parties with whom the licensee deals, the licensee shall see to it that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties, and that copies of these agreements are placed in the hands of all parties involved within a reasonable time after the agreements are executed.

I. All real estate documents shall be signed by a licensee in the licensee's own name, and may not be signed in the name of a group or team.

COMAR 09.11.02.01 (emphasis added).

This code of conduct puts certain obligations on the Respondent beyond merely gathering information from her client, specifically when information comes to her attention that puts her on notice of a potential issue. She has a duty to protect the public against misrepresentations and to

make a “reasonable effort” to ascertain all material facts about the Property. The Commission and Claimants both argued the Respondent had actual knowledge of potential groundwater contamination based on the attenuated theory that Mr. Lee and Mr. Coates founded the gardening club together and therefore must have discussed the quality of Mr. Lee’s soil, and that Mr. Coates must have passed this information on to his daughter. It is unnecessary for me to examine each of these loosely tied threads, as I find the preponderance of the evidence already establishes the Respondent was on notice of the potential groundwater contamination because of the call from Mr. Certeza.

There were several details about the phone call at issue that should have put the Respondent on notice. First, the water inspections contemplated by the Claimants had to be completed within fourteen days of the acceptance of the Contract, May 19, 2015, which would have been June 2, 2015. Moreover, Ms. King sent an email to Mr. Coates letting him know the water inspection had been scheduled for May 20, 2015 and that the inspectors would need access to the inside of the Property to test the water. The Respondent testified she and her father would communicate via telephone and email about the status of their properties for sale. Given that her father was out of the country during much of this transaction, it is reasonable to believe Mr. Coates would have kept the Respondent apprised about the progress of the sale. Therefore the Respondent knew the water inspections had to be completed by June 2, 2015 and had in fact been scheduled for May 20, 2015. The phone call from Mr. Certeza was on June 10, 2015, which was inconsistent with the time frame of the Claimants’ water testing. The second phone call was on June 15, 2015, and the man said he would take the water sample from the outside spigot, which is inconsistent with the email sent by Ms. King about the Claimants’ water testing.

Furthermore, the Respondent’s testimony that she told Mr. Certeza he had to get into the Property to complete the testing before closing makes no sense. Ultimately, someone called the

Respondent just the day before closing to tell her he was unable to get into the house, but took the water sample from the outside spigot. There is no reasonable way to anticipate that the results of a water analysis test could be returned within one day. If the Respondent was not aware after the June 10, 2015 phone call that it related to something other than the buyers' requested water tests, she certainly should have been aware when the water sampling was taking place just the day before settlement.

Finally, the Respondent testified that ordinarily gaining access to the Property for an inspection would be the responsibility of the buyer's agent. Yet she did not question why she was receiving the call. And in response to that call, she gave the lock box code to a person she spoke to over the phone but had such a poor connection she did not have his last name or where he worked. These are not the actions of a reasonable and diligent real estate salesperson ensuring to obtain knowledge of all material facts.

The Court of Appeals has defined "materiality" as:

In a business transaction, reliance upon a misrepresentation of a fact, intentionally misrepresented or otherwise, is justifiable only if the fact misrepresented is material. *A fact is material if its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction*, or the maker of the misrepresentation knows that its recipient is likely to regard the fact as important although a reasonable man would not so regard it.

*Gross v. Sussex, Inc.*, 332 Md. 247, 258 (1993) (emphasis added).

I do not agree with the Respondent's argument that petroleum groundwater contamination was not material because the Claimants specifically included other contaminants as a contingency for testing in the Contract addendum while petroleum was not included. I found Ms. King's testimony on this issue persuasive. She explained that petroleum contamination is fairly rare, and something one would only test for if the subject property were near a gas station or a farm. There was nothing about this Property, especially given that the Claimants were entirely unaware about

the underground storage tanks, that would have put the Claimants or the Claimants' lab on notice that they should have tested for petroleum. That did not mean the petroleum contamination was not a material fact. Any reasonable purchaser of a home would want to know whether their well water was safe to drink and/or was contaminated with petroleum. *See Maryland Real Estate Commission v. Garceau*, 234 Md. App. 324, 358-360 (2015) (failure to disclose potential well contamination was a material omission). The potential for petroleum groundwater contamination was a material fact relating to the Property.

I also do not agree with the Respondent's contention that any omission was not material because the Claimants were without recourse to cancel the Contract. Indeed, neither the Claimants nor the Commission were able to articulate to me under what provision of the Contract they may have been able to cancel had they learned of the petroleum contamination prior to settlement. However, it is not my job to parse this Contract to determine whether the Claimants had a legal right, had they know of this latent defect, to cancel this Contract. They were certainly entitled to their own opportunity to consult a lawyer of their choosing to advise them on how to proceed. Moreover, putting the legal right aside, the Claimants always had available to them the option to breach the Contract, taking their chances that Mrs. Lee may choose not to pursue any breach of Contract claim. One's legal obligation under a contract and the practical considerations once a breach have occurred are two entirely separate matters.

For the reasons discussed above, I find the Respondent knew or should have known of the potential for petroleum groundwater contamination on the Property and failed to disclose that information to the Claimants prior to settlement. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(4). The same conduct discussed above constitutes incompetency under sub-section (b)(25). *See* COMAR 09.11.02.01D (real estate agent must ascertain material facts concerning a property).



While I find the Respondent acted negligently and incompetently, I do not find she acted in bad faith, in that she was not consciously attempting to perform a bad act.

Penalty

Section 17-322(c) of the Business Occupations and Professions Article provides no specific guidance concerning the issue of whether to reprimand, suspend, or revoke a license, but does provide guidance concerning the appropriate penalty:

(c)(1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000.00 for each violation.

(2) To determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

The Respondent's conduct concerning the groundwater contamination was serious. The omission of this material fact affected the Claimants' drinking water, an issue of the utmost importance to virtually every homebuyer. I conclude the Claimants were harmed, because they purchased a home they would not have purchased had they known about the presence of petroleum. Their testimony made this clear.

With respect to good faith, I turned to a definition provided by the Court of Appeals:

"Good-faith" is an intangible and abstract quality that encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. Black's Law Dictionary 623 (5th ed.1979). To further illuminate the definition of "good-faith," we have found it most instructive to compare the definition of "bad-faith." "Bad-faith" is the opposite of good faith; it is not simply bad judgment or negligence, but implies a dishonest purpose or some moral obliquity and a conscious doing of wrong. Though an

indefinite term, “bad-faith” differs from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a furtive design. Thus, we would infer that the definition of “good-faith” under § 5-708 means with an honest intention.

*Rite Aid Corp. v. Hagley*, 374 Md. 665, 680-681 (2003) (citations omitted). I do not find the Respondent had a dishonest purpose and an affirmative plan to do wrong. With the absence of these qualities to describe her actions, they are best described as negligent and incompetent, and, under the preceding definition, were done in good faith. The Respondent has no history of previous violations.

The Commission’s recommendation of a suspension of the Respondent’s real estate salesperson’s license is appropriate in light of the Respondent’s conduct. However I find the recommendation of a sixty-day suspension excessive given the circumstances, and instead I recommend a thirty-day suspension. I also find it appropriate to recommend that the Commission impose a monetary penalty. However I consider the two statutory violations to be the same and find that multiple sanctions are not necessary. Therefore I find a total of \$5,000.00 to be adequate to ensure that the Respondent will conform her conduct to the statutory and regulatory requirements of her profession.

#### Claim Against the Guaranty Fund

The Claimants bear the burden of proving their entitlement to recover compensation from the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e). As explained below, the Claimants did not meet their burden of proof that they are entitled to recover compensation from the Guaranty Fund.

Section 17-404(a) of the Business Occupations and Professions Article provides the criteria for a person to recover compensation from the Guaranty Fund:

- (a) (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

(2) A claim shall:

(i) be based on an act or omission that occurs in the provision of real estate brokerage services by:

1. a licensed real estate broker;
2. a licensed associate real estate broker;
3. a licensed real estate salesperson;
4. an unlicensed employee of a licensed real estate broker;

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission;

1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
2. that constitutes fraud or misrepresentation.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a).

The amount recovered for any claim against the Guaranty Fund “shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction.” COMAR 09.11.01.14. The Commission’s regulation ties any recovery from the Guaranty Fund to a specific “originating transaction.” The Commission’s regulation represents a reasonable interpretation of the statutory term “actual loss.” *Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437 (1997) (the consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference, as the agency is likely to have expertise and practical experience with the statute’s subject).

While the regulatory statute discussed above addresses intentional or negligent failure to disclose a material fact the licensee knew or should have known, the type of act with which a licensee can be found responsible in a claim against the Guaranty Fund is more limited. Unlike

the above cited regulatory charge, the Guaranty Fund act requires intentional misrepresentation. When read in context with the five terms preceding misrepresentation – theft, embezzlement, false pretenses, forgery, and fraud – which all require intent to steal or defraud, any misrepresentation must also contain an element of an intent to steal or defraud. The Guaranty Fund language contains no mention of a negligent omission.

Although “fraud” and “misrepresentation” are both acts that may support a claim in this case, these terms are not defined in the Business Occupations and Professions Article of the Maryland Code. Fraud, also known as deceit, is defined elsewhere:

To recover damages for deceit, it must be shown that:

- (1) the defendant made a false representation of a material fact;
- (2) the defendant knew of its falsity or made it with such reckless indifference to the truth that it would be reasonable to charge the defendant with knowledge of its falsity;
- (3) the defendant intended that the plaintiff would act in reliance on such statements;
- (4) plaintiff did justifiably rely on the representations of the defendant;  
and
- (5) plaintiff suffered damages as a result of that reliance.

Maryland Pattern Jury Instructions (MPJI)-Cv 11:1.

The elements of false representations are as follows:

A false representation is a statement, conduct, or act by which one intentionally misleads another person about a material fact.

A statement of opinion, judgment, prediction of a future event, or promise may constitute false representation of a material fact.

A promise to do something may be a false representation if the person did not intend to do the promised act when the promise was made.

MPJI-Cv 11:3. Nothing in these definitions supports an interpretation that a false representation, included within the list of other prohibited acts, such as false pretenses and embezzlement, includes a negligent omission.

Counsel for the Guaranty Fund argued that misrepresentation in the context of the Guaranty Fund includes an omission. To be sure, the language of section 17-404(a) includes “an act or omission,” albeit there is no mention of a negligent omission. Even were I to accept this construction, and include a negligent omission as a compensable act, I also agree with counsel’s other argument, which is that the Claimants have otherwise failed to prove their entitlement to compensation from the Fund because they failed to prove damages.

The deficiency balance owed on the Property was discharged in bankruptcy. Therefore the Claimants are no longer seeking compensation for that sum of money. They have provided a list of money they paid towards the Property, totaling in excess of \$60,000. This list includes money paid as a deposit on the Property, money paid at settlement, the cost of a new furnace, installed before they learned of the water contamination, legal fees, and the costs to maintain the Property before they allowed it to go to foreclosure. Counsel for the Guaranty Fund argued that while the Claimants may have decided not to live in the Property, even with the carbon filtration system, that action was not reasonable, given that the MDE stated such a system would have made the water potable and the house livable. Moreover, the Claimants did not investigate any other water supply, such as obtaining a water tank.

I do not necessarily agree that it was reasonable to expect the Claimants to live in the Property, a property they testified unequivocally they would not have purchased had they known of the petroleum contamination. However, the fact remains that the MDE said a carbon filtration system would have made the water potable and would have been installed at no cost whatsoever to the Claimants. I do find it was unreasonable for the Claimants to not have this system

installed. There was no logical reason not to have the system installed. Had they done so, the house would have been marketable, and the Claimants could have sold the house. At that time, perhaps they would have incurred damages, for example, by selling the house for less than they originally purchased it, or in closing costs. However, given the Claimants' course of action in not installing the system, and allowing the Property to proceed to foreclosure, any such damages are entirely speculative.

On the record in this case, I concur with the Guaranty Fund's argument that there is insufficient proof of actual loss. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a); COMAR 09.11.01.14.

### **PROPOSED CONCLUSIONS OF LAW**

#### **Regulatory Charges**

Based on the proposed findings of facts and discussion, I conclude that the Respondent violated two sub-sections of section 17-322 of the Business Occupations and Professions Article. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(4) & (25).

I further conclude that the Commission should suspend the Respondent's real estate salesperson's license for thirty days, and impose a total penalty of \$5,000.00. Md. Code Ann., Bus. Occ. & Prof. § 17-322.

#### **Claim Against the Guaranty Fund**

Based on the proposed findings of facts and discussion, I conclude that the Claimants did not sustain an actual loss resulting from an act that occurred in the provision of real estate brokerage services by the Respondent, a licensed real estate salesperson, which involved a transaction relating to real estate located in the State, and by which the Respondent obtained the Claimants' money or property by theft, embezzlement, false pretenses, or forgery; or by fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404; COMAR 09.11.03.04.

**RECOMMENDED ORDER**

I **PROPOSE** that the State Real Estate Commission suspend the Respondent's real estate salesperson's license for thirty days and impose a penalty of \$5,000.00.

I further **PROPOSE** that the State Real Estate Commission deny the Claimants' claim against the Real Estate Guaranty Fund.

September 10, 2019  
Date Decision Issued

*Deborah S. Richardson /MKS*  
Deborah S. Richardson  
Administrative Law Judge

DSR/cmg  
#181417

**BEFORE THE MARYLAND REAL ESTATE COMMISSION**

**MARYLAND REAL ESTATE COMMISSION \***

**v. \***

**JENNIFER COATES, \***

**RESPONDENT \***

**OAH NO. DLR-REC-24-19-12242**

**AND \***

**MREC NO.: 16-RE-160**

**THE CLAIM OF MICHAEL AND PEGGY \***

**MCALOON \***

**CLAIMANTS, \***

**AGAINST THE MARYLAND REAL ESTATE \***

**GUARANTY FUND \***

**\* \* \* \* \***

**PROPOSED ORDER**

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated September 10, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 25 day of September 2019

**ORDERED,**

A. That the Findings of Fact in the Proposed Decision be, and hereby are, **ADOPTED;**

B. That the Conclusions of Law in the Proposed Decision be, and hereby are, **ADOPTED** in part and **AMENDED** in part as follows:

*Change Regulatory Charges*





*The Commission concludes that Respondent's real estate salesperson's license shall be suspended for sixty days. The Commission does not consider the two statutory violation to be the same, but concludes that Respondent's conduct resulted in violations of two different subsections of section 17-322 and that multiple sanctions are warranted. See Md. Code Ann., Bus. Occ. & Prof. § 17-322 (b) (4) and (25). Accordingly, the Commission imposes a penalty of \$7,500.00 (\$3,750.00 per violation).*

C. That the Order in the Proposed Decision be, and hereby is, **ADOPTED** in part and **AMENDED** in part as follows:

**ORDERED** that the Respondent, Jennifer Coates, be suspended for sixty days;

**ORDERED** that the Respondent, Jennifer Coates, pay a civil penalty in the amount of **Seven Thousand Five Hundred Dollars (\$7,500.00)** within thirty days;

**ORDERED** that all real estate licenses held by the Respondent, Jennifer Coates, shall be suspended until the civil penalty is paid, including any interest that is payable under the law;

**ORDERED** that the claim filed by Michael and Peggy McAloon against the Maryland Real Estate Guaranty Fund based on the actions of Respondent Jennifer Coates is **DENIED**; and

**ORDERED** that the records and publications of the Maryland Real Estate Commission reflect this decision.

D. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the Proposed Decision of the Administrative Law Judge must be amended to provide that (1) the suspension and civil penalty is increased and (2) the deadline for payment of the civil penalty and that all real estate licenses held by the Respondent shall be suspended

until the civil penalty is paid in full.

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file exceptions and request to present arguments on the Proposed Decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

F. Once the Proposed Order becomes final, the parties have an additional thirty (30) days in which to file an appeal to the Circuit Court for the Maryland County in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City.

MARYLAND REAL ESTATE COMMISSION

**SIGNATURE ON FILE**

September 25, 2019  
Date

By: \_\_\_\_\_

