

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM
OF CORETTA BOND,
Claimant**

CASE NO. 2022-RE-184

v.

**THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND,
FOR THE ALLEGED MISCONDUCT
OF TIANHUI BRIGGS,
Respondent**

OAH NO. DOL-REC-22-23-09721

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated December 6, 2023, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 26 day of January, 2024, hereby **ORDERED:**

A. That the Findings of Fact in the recommended decision be, and hereby are, **AFFIRMED.**

B. That the Conclusions of Law in the recommended decision be, and hereby are, **APPROVED.**

C. That the Recommended Order in the recommended decision be, and hereby is, **ADOPTED.**

D. That the records, files, and documents of the Maryland Real Estate Commission reflect this decision.

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 written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 1100 N. Eutaw Street, Baltimore, MD 21201. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

F. Once this 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

Date

1/26/21

By: 

IN THE MATTER OF THE CLAIM
OF CORETTA BOND,
CLAIMANT
v.
THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND,
FOR THE ALLEGED MISCONDUCT
OF TIANHUI BRIGGS,
RESPONDENT

* BEFORE DEBORAH S. RICHARDSON,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
*
*
* OAH No.: LABOR-REC-22-23-09721
* REC No.: 22-RE-184

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about September 9, 2021, Coretta Bond (Claimant) filed a Complaint and Guaranty Fund Claim (Claim) with the Maryland Real Estate Commission (REC)¹ to recover compensation from the Real Estate Guaranty Fund (Fund) for an alleged actual loss resulting from an act or omission of Tianhui Briggs (Respondent), a licensed real estate salesperson. On March 2, 2023, the Executive Director of the REC issued a Hearing Order on the Claim and, on April 7, 2023, forwarded the case to the Office of Administrative Hearings (OAH) for a hearing.

¹ The REC is under the jurisdiction of the Department of Labor (Department).

On September 5 and 11, 2023, I held a remote hearing via the Webex videoconferencing platform. Md. Code Ann., Bus. Occ. & Prof. § 17-408(a) (2018); Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b).² Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. John Brennan, Esquire, represented the Claimant, who was present. Ali Kalarestaghi, Esquire, and Duane Demers, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, the REC's procedural regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 09.01.03; COMAR 09.11.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss, compensable by the Fund, due to an act or omission of the Respondent in the provision of real estate brokerage services that constitutes fraud or misrepresentation or in which money or property was obtained from the Claimant by theft, embezzlement, false pretenses, or forgery?
2. If so, what amount should be awarded to the Claimant from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 - Settlement documents for the Property, various dates

Clmt. Ex. 2 - General Addendum, November 7, 2018

² A June 8, 2023 hearing date was postponed at the request of the Claimant to allow her time to retain counsel. A hearing was then scheduled for August 2, 2023. On that day, I postponed this matter, finding that the Respondent had committed a discovery violation (by not responding to the Claimant's discovery requests) but that it could be cured by postponing the matter.

- Clmt. Ex. 3 - Property Inspections Notice, October 30, 2018
- Clmt. Ex. 4 - Agreement to Mediation & Confidentiality, February 21, 2020
- Clmt. Ex. 5 - Photographs, undated
- Clmt. Ex. 6 - Permit History by Street Address, August 31, 2021
- Clmt. Ex. 7 - Photographs, undated
- Clmt. Ex. 8 - Invoice from Home Remedies Real Estate Consultants, LLC,
October 20, 2019
- Clmt. Ex. 9 - Navy Federal Credit Union record of transfers, August 19, 2021
- Clmt. Ex. 10 - Navy Federal Credit Union record of transfer, August 23, 2021
- Clmt. Ex. 11 - Termite Treatment receipt, August 7, 2019
- Clmt. Ex. 12 - Certified Termite Receipt, August 7, 2019
- Clmt. Ex. 13 - Certificate of Analysis, October 18, 2019
- Clmt. Ex. 14 - Wood Destroying Insect Inspection Report, September 27, 2019
- Clmt. Ex. 15 - Home Inspection Report, October 25, 2018
- Clmt. Ex. 16 - Wood Destroying Insect Inspection Report, November 1, 2018
- Clmt. Ex. 17 - Photographs, undated
- Clmt. Ex. 18 - Decking Installation Proposal, August 23, 2021
- Clmt. Ex. 19 - Navy Federal Credit Union checking account statement,
August 11, 2023
- Clmt. Ex. 20 - Rubios Contractor, LLC Invoice, June 3, 2023
- Clmt. Ex. 21 - Keys Comfort LLC Invoice, October 6, 2022

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 - Photographs, undated
- Resp. Ex. 2 - CaseSearch, State of Maryland v. Rasaun Lamar Murphy, D-05-CR-22-003685, District Court of Maryland for Prince George's County, dates ranging from November 16, 2022 to August 10, 2023
- Resp. Ex. 3 - Texts between the Claimant and Rasaun Murphy, dates ranging from September 21, 2019 to February 2, 2021
- Resp. Ex. 4 - Termite Damage Repair Co. Articles of Dissolution, August 9, 2022

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Remote Hearing, August 23, 2023
- Fund Ex. 2 - Order for Hearing, March 2, 2023
- Fund Ex. 3 - Claimant Complaint, December 31, 2021
- Fund Ex. 4 - REC Licensing Information, printed May 25, 2023

Testimony

The Claimant testified and presented testimony from Bridgette Contee, Jack Ikpe, James Shimmel, and the Respondent.

The Respondent did not present witnesses.

The Fund did not present witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the REC licensed the Respondent as a real estate salesperson.
2. In June 2018, the Respondent purchased 10002 Carnot Drive in Cheltenham, Maryland (the Property) in a foreclosure sale.

3. The Respondent hired Marco Cucharez, a contractor, to renovate the Property.
4. Mr. Cucharez was not licensed by the Maryland Home Improvement Commission.
5. The Respondent did not enter into a written contract with Mr. Cucharez.
6. The Respondent did not produce to the Claimant in discovery an estimate from Mr. Cucharez for renovation to the Property, invoices from Mr. Cucharez, or any text, email, or other communications between the Respondent and Mr. Cucharez.
7. Neither the Respondent nor Mr. Cucharez obtained any permits for the Property renovation.
8. Neither the Respondent nor Mr. Cucharez had the Property inspected by the County during or after the renovation.
9. The renovation to the Property was extensive and included new bathroom vanities, showers, tiles and fixtures, new flooring throughout the property, and a new kitchen.
10. The renovation took two to three months to complete.
11. As part of the renovation, the Respondent had the contractor erect a partition wall in a large open space in the basement to convert the open space into two separate bedrooms.
12. The Respondent advertised the Property for sale as “newly renovated with chic design and quality workmanship.”
13. On October 19, 2018, the Claimant entered into a contract with the Respondent to purchase the Property for \$320,000.00 with a seller subsidy of \$5,000.00 (the Contract).
14. In the section of the Contract entitled Maryland Residential Property Disclaimer Statement, the Respondent checked the box “No” in answer to the question “Does the seller(s) have actual knowledge of any latent defects?”

15. On October 25, 2018, DHI Home Inspections inspected the Property.
16. Amongst a few other issues, the inspection report noted that the basement windowsill was deteriorating due to previous water exposure. The pictures included in the report showed a ledge of wood below the window with holes in the wood and a screwdriver inserted into the wood. (Clmt. Ex. 15, p. 38.)
17. On October 30, 2018, the Respondent agreed, by executing a General Addendum to the Contract, to repair the deteriorating windowsill.
18. On November 1, 2018, Century Termite and Pest inspected the Property and reported “no visible evidence of wood destroying insects was observed.” (Clmt. Ex. 16.)
19. On November 7, 2018, the parties amended the Contract and changed the purchase price of the Property to \$312,500.00 and the seller subsidy to \$0.
20. On or about November 7, 2018, the parties settled on the Property.
21. The Claimant moved into the Property in December 2018.
22. In August 2019, the Claimant discovered extensive termite damage in the walls and ceiling of the basement of the Property.
23. The Claimant had several contractors inspect the termite damage in the Property.
24. The Claimant hired Rasaun Murphy to repair the termite-damaged carpentry in the basement and separately paid to have the termites eradicated.
25. While Mr. Murphy was doing the carpentry remediation, he found a piece of drywall with a date stamp of August 8, 2018.
26. In order to remediate the termite infestation, the Claimant had to entirely gut the basement, including walls and ceiling. When the foundation walls were opened up, it was

revealed that there was both old wood framing, which had been extensively damaged by termites, and newer wood that was not as damaged.

27. There was termite damage directly below and in the windowsill that was flagged during the inspection report.

28. Sometime after November 2018, the Claimant discovered that her deck was deteriorating.

29. Sometime after November 2018, the Claimant discovered that the bathroom vanity was not affixed to a stud and was pulling away from the wall.

30. Sometime after November 2018, the Claimant discovered that a vent cover in the bathroom did not have an actual vent. The cover was cosmetic and there was no duct leading to the bathroom.

31. A reasonable cost to reconstruct the termite infested carpentry in the walls and ceiling of the basement is \$22,400.00.

32. A reasonable cost to eradicate the termites in the basement of the Property is \$585.00.

DISCUSSION

Burden of Proof

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Occ. & Prof. § 17-407(e) (2018);³ State Gov't § 10-217. To prove a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

³ Unless otherwise noted, all references to the Business Occupations and Professions Article are to the 2018 Volume of the Maryland Annotated Code.

Legal Framework

A person may recover compensation from the Fund for an actual loss based on certain types of acts or omissions in the provision of real estate brokerage services by a licensee. A licensee “means a licensed real estate broker, a licensed associate real estate broker, or a licensed real estate salesperson.” Bus. Occ. & Prof. § 17-101(k) (Supp. 2023).

A licensed real estate salesperson is a person who is “licensed by the [REC] to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated.” *Id.* § 17-101(j) (Supp. 2023). The provision of real estate brokerage services is defined as follows:

- (1) “Provide real estate brokerage services” means to engage in any of the following activities:
 - (1) for consideration, providing any of the following services for another person:
 - (i) selling, buying, exchanging, or leasing any real estate; or
 - (ii) collecting rent for the use of any real estate;
 - (2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;
 - (3) engaging regularly in a business of dealing in real estate or leases or options on real estate;
 - (4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;
 - (5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or
 - (6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

Id. § 17-101(l) (Supp. 2023).

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; or
 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.

Id. § 17-404(a)(2). The amount recovered for any claim against the Fund may not exceed \$50,000.00 for each claim. *Id.* § 17-404(b).

The evidence shows that the Respondent was a licensed real estate salesperson at all times relevant to this matter and that she was engaged in real estate brokerage services. The property at issue is located in the State of Maryland. The remaining question is whether the Respondent committed an act or omission in which she obtained money or property from the Claimant by theft, embezzlement, false pretenses, or forgery; or by an act or omission that constitutes fraud or misrepresentation. *Id.* § 17-404(a)(2)(iii).⁴ There was no argument that the Respondent obtained money or property by theft, embezzlement, false pretenses, or forgery. Therefore, the issue is whether the Respondent obtained money or property by fraud or misrepresentation.

⁴ Certain losses are excluded:

Losses excluded

(c)(1) A person may not recover from the Guaranty Fund for any loss that relates to:

- (i) the purchase of any interest in a limited partnership that is formed for the purpose of investment in real estate;
- (ii) a joint venture that is promoted by a licensed real estate broker, a licensed associate real estate broker, or licensed real estate salesperson for the purpose of investment in real estate by 2 or more individuals; or
- (iii) the purchase of commercial paper that is secured by real estate.

(2) A claim under the Guaranty Fund may not be made by:

- (i) the spouse of the licensee or the unlicensed employee alleged to be responsible for the act or omission giving rise to the claim; or
- (ii) the personal representative of the spouse of the licensee or the unlicensed employee alleged to be responsible for the act or omission giving rise to the claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(c). None of these circumstances barring recovery is found in this case. Moreover, there was no allegation the claim was not submitted within three years after the Claimant discovered the loss. *See* Md. Code Ann., Bus. Occ. & Prof. § 17-404(d).

A finding of fraud requires the intent to deceive through a representation that is knowingly false or made in reckless indifference to the truth. *First Union Nat. Bank v. Steele Software Sys.*, 154 Md. App. 97, 147 (2003). A negligent misrepresentation, on the other hand, requires the following:

- (1) the Respondent's negligent assertion of a false statement;
- (2) the Respondent's intent that his statement will be acted upon by the Claimant;
- (3) the Respondent's knowledge that the Claimant will probably rely on the statement, which, if erroneous, will cause loss or injury;
- (4) the Claimant, justifiably, takes action in reliance on the statement; and
- (5) the Claimant suffers damage proximately caused by the defendant's negligence.

UBS Financial Servs., Inc. v. Thompson, 217 Md. App. 500, 525 (2014).

The Parties' Positions

The Claimant argued that she purchased a house that the Respondent represented was newly renovated with quality workmanship and that it was of the utmost importance to her to purchase a home that was newly renovated – she did not want a “fixer upper.” Less than a year after closing on the Property, the Claimant discovered a substantial termite infestation in the basement, necessitating a repair of the carpentry walls and ceiling, as well as elimination of the termites themselves. The Claimant argued that the termite infestation was so far advanced that it must have existed at the time the Respondent renovated the Property. The Claimant argues that the evidence suggests the Respondent knew of the termite infestation when she sold the Property, including the rotted windowsill noted in the inspection report, the drywall dated 2018 in the basement, and the fact that electrical work was done on the home, meaning a contractor would have gone through the basement walls.

The Claimant also argued that her deck was damaged with warped railing and floorboards and paint that is coming off, her basement bathroom vanity was not properly

installed in that it was not affixed to a stud and separated from the wall, and a vent in the bathroom was a false vent, as there was no duct leading into that room.

The Respondent acknowledged that she renovated the Property, including finishing the basement with a wall that created two small bedrooms, but maintained that she never touched the exterior walls, where the termites were found, during the renovation. Accordingly, she argued she knew nothing about the termite infestation and therefore made no misrepresentations. Moreover, she argued that the Claimant had an opportunity and did have the Property inspected, and specifically inspected for termites. No termite infestation was revealed at that time and the Respondent did not offer a warranty on the older renovated Property that she sold.

Respondent also argued that the Claimant is pursuing this claim because she would be unable to prove a fraud case by clear and convincing evidence in civil court. She argued that there are a tremendous number of risks and hazards, and things that can go wrong in the hundreds of parts of a house and the Claimant accepted that risk by purchasing an older home.

Analysis

Basement Termite Damage

As stated above, the issue is whether the Respondent committed an act or omission that constitutes fraud or misrepresentation under section 17-404(a)(2)(iii)(2) for which the Claimant should be compensated by the Fund. In answering this question, I am guided by the code of ethics which governs the Respondent in 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. 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 Claimant introduced credible and persuasive evidence that the Respondent either knew about the termite infestation or failed to take reasonable efforts to learn of the termite infestation as discussed below.

The Claimant's contractor found drywall with the year 2018 stamped on it during his renovation. While the Respondent's counsel argued that it was possible this drywall was taken from the dividing wall, which was erected during the Respondent's renovation, the Claimant testified credibly that her contractor brought it to her attention when the dividing wall had not yet been opened up. Therefore, the drywall came from the exterior wall. When the Claimant's contractor opened the exterior wall of the basement, he found old wood framing that had been significantly damaged by termites, and newer blond wood that was not as significantly damaged. When the drywall on the exterior wall was removed during the Respondent's renovation, she would have seen the extensive termite damage, as well as the new and old wood making up the framing.

The Property inspection pointed out a rotted windowsill with a picture of a screwdriver inserted into the wood base of the windowsill. The Respondent agreed to repair that rotted windowsill before settlement. When that exterior wall was opened, termite damage in that exact

spot was revealed. This also leads to the conclusion that the Respondent knew or should have known about the termite infestation.

Mr. Shimmel is a contractor who was in the termite business for forty-five years before retiring. The Claimant contacted Mr. Shimmel to investigate the Property after she discovered termites, although she eventually had the work done by a different contractor. Mr. Shimmel testified that the pictures of the opened basement wall show old and new wood and that the new wood was put in without rectifying the termite damage. Mr. Shimmel testified that there is no way this termite damage occurred only after the house was purchased in October 2018, as it was discovered in August 2019. He definitively stated that the termite infestation had been going on for much longer than that.

Bridgette Contee testified that she owned the Property from 1992 until approximately 2012 when they allowed the house to go into foreclosure. She testified that she never had a termite issue and the home was never treated for termites. She did say they had flooding in the basement before they moved out during a hurricane where everyone on the street had flooding through basement windows. They had to replace some drywall on the front wall of the house. It is unclear whether Ms. Contee's drywall replacement included new framing to support the drywall. That would explain both the older and newer framing in that wall. Nevertheless, as I have concluded that the Claimant's contractor found 2018 drywall on that wall, the Respondent would have seen the termite damage and new wood, even if she did not put up the new wood herself.

Jack Ikpe works as an inspector in pest control. He was sent out to the Property to determine whether the termite infestation had caused structural damage when the Claimant was

trying to refinance her Property. Mr. Ikpe testified that moisture could increase the speed and spread of termites within a wood structure.

All of this evidence supports a finding that it is more likely than not that the termite damage was well underway when the Respondent undertook her renovations to the Property and that she knew or should have known about it.

The Respondent's entire defense centers around her not knowing about the termite infestation in the basement. The Respondent testified that her contractor did not open the exterior walls of the basement and she personally knew nothing about a termite infestation. I did not find the Respondent credible – her testimony was both disjointed and internally inconsistent.⁵ She testified that she normally goes to a property two to three times per week during renovation, and she believed that she followed her normal course during this renovation and that her contractor never opened the exterior wall and that she never saw a termite infestation.

The Respondent's theory of defense is undermined by the fact that there is no documentation whatsoever about her end of this real estate transaction. There is no written contract between her and her contractor. She produced not a single email, text, or other communication between her and her contractor. She produced no pictures taken during the renovation. She has no invoices from her contractor. She has no notes of the renovation. Although the Respondent was asked for all of these items in discovery, the Respondent testified that she is only obligated to keep documentation for three years, and that when her mediation

⁵ The Respondent testified and I had the opportunity to closely study her demeanor throughout her presentation. *Md. Bd. of Physicians v. Elliott*, 170 Md. App. 369, 387-89 (2006) (a finder-of-fact is authorized to determine the credibility of a witness's testimonial evidence based on the witness's demeanor). Moreover, the Respondent was subject to cross-examination by Fund. One of the most effective means of attacking the credibility of a witness is cross-examination. *Pantazes v. State*, 376 Md. 661, 680 (2003); *B.H. v. Anne Arundel Cty. Dep't of Soc. Servs.*, 209 Md. App. 206, 224-25 (2012). Through cross-examination, a party is able to impeach the credibility of a witness and to establish a witness's possible biases, prejudices, motives to testify falsely, or ulterior motives pertaining to the outcome of the trial. *Marshall v. State*, 346 Md. 186, 192 (1997).

with the Claimant was unsuccessful in 2020 and the Claimant did not follow up with her, she no longer thought she had an obligation to keep any documents. She also testified that she lost access to an email account since that time and was unable to find any documentation of this real estate transaction.

A real estate broker is required to keep copies of listings and “any other document executed or obtained by the licensee in connection with a transaction involving the provision of real estate brokerage services” for five years. Bus. & Prof. § 17-507(b)(1), (2). While this provision applies on its face to a real estate broker, it is reasonable to impose this requirement on a real estate salesperson, who, by definition, is providing real estate broker services. *See* Bus. Occ. & Prof. § 17-101(j) (Supp. 2023).

Spoliation refers to “the destruction or significant alteration of evidence, or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999) (citing Black’s Law Dictionary 1401 (6th ed.1990)). The Maryland Civil Pattern Jury Instructions provides the following with respect to spoliation:

The destruction of or the failure to preserve evidence by a party may give rise to an inference unfavorable to that party. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the party believes that his or her case is weak and that he or she would not prevail if the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to that party.

Maryland Civil Pattern Jury Instructions 1:16 (5th Ed. with 2023 replacement pages).

Even if the Respondent was correct and she was only obligated to maintain records for a three year period after a sale, the Claimant filed her claim with the REC within three years of the

originating transaction, putting the Respondent on notice of this potential litigation. Under those circumstances, I find it appropriate to infer that the documentary evidence of this major real estate renovation, if preserved, would have been unfavorable to the Respondent. Given this inference, the Respondent has failed to rebut the Claimant's evidence that the Respondent knew or should have known of the termite infestation. As such, the Respondent obtained money from the Claimant during the sale of the Property by misrepresentation.

Deck

The Claimant testified that sometime after she settled on the Property, the deck material began warping and rotting, requiring her to completely replace the deck at a cost of several thousand dollars. Unlike the basement termite infestation, which was behind closed walls, the deck was fully visible to the Claimant during the Contract process. While the Claimant testified there was a coat of interior paint improperly applied to the exterior deck, the Claimant did not explain why she could not fully ascertain the condition of the deck at the time of settlement. Decks do not rot overnight. Although many portions of the house had been recently renovated before the Claimant purchased it, there was no explicit representation or warranty about the age or the condition of the deck. The Claimant has not established, by a preponderance of the evidence, that the Respondent made a misrepresentation as to a material fact with respect to the deck.

Bathroom Vanity and Vent

The bathroom vanity was brand new and part of the Property renovation. The vanity was a style that is affixed to the wall, rather than standing on the ground. The Claimant testified that sometime after she moved into the Property, the vanity began pulling away from the wall. She had to put boards under the vanity to support its weight, and later learned that the vanity was not

properly affixed to a stud, as it should have been. The Claimant had to have the vanity reattached to the wall at a cost of several hundred dollars.

The Claimant also testified that an upstairs bathroom had a vent cover on one of the walls or ceiling. Sometime after she moved in, the Claimant discovered that the vent cover was cosmetic, as there was no duct attached to the vent. The Claimant had to add ventilation to that bathroom.

Unlike the basement termite infestation, there is no evidence that the Respondent knew about these defects. Whereas the property inspection directed the Respondent's attention to the rotting windowsill, the property inspection did not note anything about the bathroom vanity or vent. Moreover, a termite infestation would have been glaringly obvious, even to a layperson, who came to the Property during renovation. These alleged failures were subtle and would not necessarily have been noted by the Respondent while supervising renovation. I do not find, by a preponderance of the evidence, that the Respondent made a misrepresentation as to a material fact with respect to the bathroom vanity or vent.

Award

The regulations provide as follow with respect to amounts compensable from the Fund:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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*. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in the licensee's capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

COMAR 19.11.01.15 (emphasis added). The REC's regulation ties any recovery from the Guaranty Fund to a specific "originating transaction." The REC'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) (“[t]he 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 matter”).

As I have found that the Respondent made a misrepresentation of material fact only with respect to the basement termite infestation, that is the singular matter on which I will recommend an award. The Claimant introduced two invoices from her contractor totaling \$46,786.00 that it allegedly cost to repair the structural damage in the basement from the termite infestation. (Clmt. Ex. 8.) The Claimant also paid \$585.00 for eradication of the termites. (Clmt. Ex. 12.) However, on this limited topic I found the Claimant’s testimony unreliable. The Claimant testified that she paid these invoices in full, and that Claimant’s Exhibit 9 and 10 evidences those payments. But the payments in Claimant’s Exhibit 9 and 10 are not remotely close to \$46,786.00. Although the Claimant did not call Mr. Shimmel for this purpose, when he testified, the Fund took the opportunity to cross-examine Mr. Shimmel, who had over forty years in the business, about the costs allegedly incurred by the Claimant detailed on Claimant’s Exhibit. 8. Mr. Shimmel was eminently credible on all matters and readily acknowledged any issue he was not qualified to discuss. He testified that had he repaired the infested basement himself, he would not have charged \$10,400.00 that was allocated to outside work on the home, including waterproofing, removing bushes, installing window shutters and downspouts. As to the \$13,400.00 that was allocated to remediation of the basement bedrooms, Mr. Shimmel testified \$9,950.00 would have been reasonable. As to the \$14,300.00 that was allocated for basement bedroom improvements, Mr. Shimmel testified \$5,950.00 would have been reasonable. And as to the \$8,281.00 allocated to the basement family room, Mr. Shimmel testified \$6,500.00 would have been reasonable.

Therefore, I find a reasonable cost to renovate the termite infested basement, damage that was part of the originating transaction, was \$22,400.00 plus \$585.00 for the termite eradication, totaling \$22,985.00. Accordingly, I will recommend a reward of that amount.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss due to an act or omission of the Respondent in the provision of real estate brokerage services. Bus. Occ. & Prof. § 17-404(a)(2); COMAR 09.11.02.01.

I further conclude that the Claimant is entitled to recover \$22,985.00 from the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404(b) (2018).

RECOMMENDED ORDER

I **RECOMMEND** that the claim filed by the Claimant against the Maryland Real Estate Commission Guaranty Fund be **GRANTED**.

I further **ORDER**:

1. The Guaranty Fund award the Claimant \$22,985.00.
2. The Respondent shall reimburse the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Real Estate Commission.⁶
3. The Respondent's license is suspended. The Maryland Real Estate Commission may not reinstate the Respondent's license until the Respondent repays in full the amount paid by the Guaranty Fund, plus interest, and the Respondent applies to the Real Estate Commission for reinstatement of the license.⁷

⁶ Md. Code Ann., Bus. Occ. & Prof. § 17-411(a).

⁷ Md. Code Ann., Bus. Occ. & Prof. § 17-412(a), (b).

4. The records and publications of the Maryland Real Estate Commission reflect this decision.

December 6, 2023
Date Proposed Decision Issued

DSR/ja
#208596

**SIGNATURE ON FILE
FILE NO 2017-015**

Deborah S. Richardson
Administrative Law Judge

4/17/24
13:15:24

Department of Labor, Licensing and Regulation
REAL ESTATE COMMISSION
Citation/Invoice Maintenance

INVMASTM
SCR2GEN

Cat: 05 - SALESPERSON
Reg#/Suf: 594406 Status (O/P/V): P - PAID
Name: TIANHUI BRIGGS (NANCY)
Address: FAIRFAX REALTY PREMIER #Days:
10770 COLUMBIA PIKE
SUITE 250
C/S/Z: SILVER SPRING MD 20901-0000
E-Mail: NANCYSELLSHOMES@OUTLOOK.COM
CCTAN#: 1105240318142114496

Invoice#: 100379
Invoice Date: 3/12/2024
Amount Due: \$22,985.00
30 Due Date: 4/11/2024
Days Overdue:
Cmpl# / FYYYY: 184 2022
Paid Date: 3/18/2024
Amt Paid: \$22,985.00
Deposit No.:

Code	Invoice	Itemized	Description	Itemized Fee
01			GUARANTY FUND AWARD	\$22,985.00
				\$00
				\$00
Total Amount:				\$22,985.00

Last Prt: 3/12/2024
Crt User:
Crt Date: 0001-01-01
Upd User: INTERNET
Upd Date: 2024-03-18
Void Usr:
Void Dte: 0001-01-01

Comments:

1. _____
2. _____
3. _____
4. _____
5. _____

Reason Voided: _____

F3=Exit F4=Violations F5=Restart F7=Prt F8=E-Mail F9=Void