

**BEFORE THE MARYLAND REAL ESTATE COMMISSION**

**MARYLAND REAL ESTATE  
COMMISSION**

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**OAH NO. LABOR-REC-21-20-16491**

v.

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**ALFRED EKUBAN  
Respondent**

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**MREC NO. 2018-RE-344**

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**OPINION AND FINAL ORDER**

This matter came before a hearing panel of the Maryland Real Estate Commission (“Commission”) on August 18, 2021 as a result of written exceptions filed by Respondent, Alfred Ekuban, to the Commission’s Proposed Order of March 18, 2021. On December 1, 2020 Administrative Law Judge Robert F. Barry (“ALJ”) convened a hearing (“ALJ Hearing”) at the Office of Administrative Hearings (“OAH”) on the complaint filed against Respondent. The ALJ filed a Recommended Decision in which he recommended that Respondent be found to be in violation of the Maryland Real Estate Brokers Act, Title 17 of the Business and Occupations Article of the Maryland Code (“BOP”) and that as a result his license be suspended for a period of ninety (90) days and a penalty in the amount of \$5,000.00 be assessed against the Respondent. On March 18, 2021, the Commission issued the Proposed Order affirming the ALJ’s Findings of Fact, approving the Conclusions of Law, and adopting the Recommended Order.

On or about April 2, 2021, Respondent filed written exceptions to the Proposed Order. A virtual hearing on the exceptions was held August 18, 2021 (“August 18th Hearing”) before a panel consisting of Commissioners Anne Cooke, Michael Lord, and Michelle Wilson (“Panel”). Shara Hendler, Assistant Attorney General, appeared as the presenter of evidence on behalf of

the Commission. Respondent was represented by counsel, Kwaku D. Ofori, Esq., at the August 18th Hearing. The proceedings were electronically recorded.

### **PRELIMINARY MATTERS**

This matter was originally set for a hearing on June 16, 2021. Respondent requested a postponement which was granted and the hearing was rescheduled for August 18, 2021.

### **SUMMARY OF THE EVIDENCE**

On behalf of the Commission, three 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: Proposed Order and Recommended Decision
- REC Ex. 2: Respondent's exceptions
- REC Ex. 3: Commission hearing notices

### **FINDINGS OF FACT**

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

### **DISCUSSION**

Respondent was licensed by the Commission as a broker at all relevant times. FF 1.<sup>1</sup> In August of 2016 Respondent entered into a listing agreement with Joan Brewster to attempt to sell her property on Nolte Avenue in Montgomery County (the "Property"). FF 2. Shortly thereafter Respondent sent a letter to tenants occupying the units in the Property notifying them of their right to purchase. FF 3. In that same month Respondent contracted with the Complainant who was interested in the Property. FF 4-5. The buyer agency listed Respondent as the broker and Respondent and a licensed salesperson who has worked with the Respondent for approximately ten years as the agent of the broker assigned to represent the Complainant. FF6-7. Although the buyer agency agreement referenced two disclosures, Understanding Whom Real Estate agents Represent and Notification of Dual Agency in a Team, neither were attached. FF 8.

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

On August 26, 2016, Complainant (after having negotiated the price with Respondent) and Ms. Breswtwer entered into a sales contract (the "Contract") for the purchase of the Property. FF 9-10. The Contract contained language referencing dual agency. FF 12. The salesperson listed as the intra-company agent was ill and Complainant had never met him, the Respondent did not assign an intra-company agent to Ms. Brewster. FF 13-14. The Contract was ratified September 2, 2016, the earnest money deposit was held in Respondent's escrow account, and settlement was delayed several times while the Complainant worked to secure financing. FF 15-16, 18-19.

On November 20, 2016, Respondent was notified by the Department of Housing and Community Affairs that it had no information regarding the sale of the Property and that a Certificate of Compliance was required prior to sale in order to secure a rental license for the Property. FF 17, 21. Respondent did not timely acquire the Certificate of Compliance. FF 22. When Complainant appeared for settlement, neither Ms. Brewster<sup>2</sup> nor Respondent was there. 23-24.

After requesting termination of the Contract based on Ms. Brewster's failure to appear, Complaint eventually hired an attorney to negotiate the return of the earnest money deposit ("EMD"). FF 25-27. Respondent and his salesperson continued communicating with Montgomery County as though the sale was going forward and attempting to negotiate with Complainant regarding the EMD and sale.<sup>3</sup> FF 28-29, 31-33. Complainant's attorney eventually obtained an EMD release from Ms. Brewster who advised the Respondent was not responding to her. FF 30.

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<sup>2</sup> Apparently Ms. Brewster had suffered a mild stroke. FF 23.

<sup>3</sup> It was not until this time period that the salesperson listed as the intra-company agent became involved. FF 20.

In March 2017 Respondent filed a civil action against both Complainant and Ms. Brestwer seeking commission payments. FF 34. In November 2017 the court granted summary judgment in Complainant's favor and ordered Respondent to return Complainant's EMD. FF 35.

The Commission has disciplined Respondent several times since 1990, including a reprimand, a monetary penalty in 2003, and a suspension and additional penalty by consent in 2010. FF 37-39.

The ALJ found that the Commission met its burden to show Respondent violated BOP § 17-322(b) (6), (25), and (33) and Code of Maryland Regulations (“COMAR”) 09.11.02.01 C; 02 A, and B by violating State law concerning dual agency in a real estate transaction, engaging in conduct that demonstrated bad faith, incompetence, or untrustworthiness, or that constituted improper deals, and by violation provisions of the code of ethics. Recommended Decision 18. As a result, the ALJ recommended his license be suspended for a period of ninety (90) days and a penalty in the amount of \$5,000.00 be assessed against the Respondent. *Id.* at 18-19. The Commission adopted the ALJ's Recommended Order.

In written exceptions and at the August 18th Hearing, Respondent argued the ALJ made several errors:

1. Failure to recognize the historical relationship between the Complainant and Ms. Brewster to the Respondent's detriment.
2. Failure to take into account the parties' wishes that Respondent be involved and the verbal consents Respondent obtained.
3. The recommended sanction is too extreme for a “mistake in judgment” and the recommended penalty is excessive and/or disproportionate to the violation.

At the hearing, the presenter of evidence argued the ALJ had not erred. The relationship between Ms. Brewster and Complainant and verbal consents, she argued, are not relevant to Respondent's failure to comply with the law.

The Commission is required to “administer and enforce the provisions” of the Maryland Real Estate Brokers Act (the “Brokers Act”). BOP § 17-209. Included in the provisions the Commission shall enforce is BOP § 17-322(b) which provides that:

the Commission may ... reprimand any licensee, or suspend or revoke a license if the ... licensee ... violates § 17-530(a) or (b) of this title ... engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings [or] ... violates any regulation adopted under this title or any provision of the code of ethics.

In this matter the ALJ has recommended the Commission find that Respondent’s behavior in this matter substantiates the above provisions to such an extent that the Respondent’s license be suspended for 90 (ninety) days and he be required to pay a monetary penalty in the amount of \$5,000.00. The Commission agrees with the ALJ.

Regardless of the relationship between Ms. Brewster and the Complainant and whatever Respondent and the parties verbally agreed to, Respondent is subject to the requirements of the Brokers Act. He has been a licensed broker for years and is well aware of the Commission’s disciplinary authority, especially given his own disciplinary history. In addition, the recommended sanction and penalty are not incongruous with the violations. First, a 90 (ninety) day suspension is well within the Commission’s authority. Furthermore, under BOP § 17-322(c) the Commission is empowered to issue a penalty not exceeding \$5,000.00 for each violation. In this case the ALJ recommended the Respondent be found to have violated a total of 6 (six) statutory and regulatory requirements, making the penalty less than \$1000.00 each. The Commission agrees with that recommendation.

#### **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) (6), (25), and (33) and COMAR

09.11.02.01 C; 02 A, and B and that a ninety (90) days suspension and \$5,000.00 monetary penalty are the appropriate sanctions.

**ORDER**

The Exceptions of the Respondent, Alfred Ekuban, having been considered, it is this 16<sup>th</sup> day of November, 2021 by the Maryland Real Estate Commission, hereby ORDERED:

1. That all real estate licenses held by the Respondent, **ALFRED EKUBAN**, be **SUSPENDED** for a period of **NINETY (90)** days from the date all rights to appeal are exhausted;
2. That the Respondent, **ALFRED EKUBAN**, pay a civil penalty in the amount of **Five Thousand Dollars (\$5,000.00)** within **thirty (30)** days of the date this all rights to appeal are exhausted; and
3. That the records and publications of the Maryland Real Estate Commission reflect this decision.

MARYLAND REAL ESTATE COMMISSION

By: SIGNATURE ON FILE

Note: A judicial review of this Final Order may be sought in 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. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.

**BEFORE THE MARYLAND REAL ESTATE COMMISSION**

**MARYLAND REAL ESTATE  
COMMISSION**

\*

\* **CASE NO. 2018-RE-344**

v.

\*

\* **OAH NO. LABOR-REC-21-20-16491**

**ALFRED EKUBAN,  
Respondent**

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**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated March 1, 2021, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18<sup>th</sup> day of March, 2021, 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, 500 North Calvert Street, Baltimore, MD 21202. 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**

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

3/18/2021  
Date



STATE REAL ESTATE  
COMMISSION

v.

ALFRED EKUBAN,  
RESPONDENT

\* BEFORE ROBERT F. BARRY,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No.: LABOR-REC-21-20-16491  
\* MREC NO.: 18-RE-344

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**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On July 23, 2020, the State Real Estate Commission (Commission or REC) charged Alfred E. Ekuban (Respondent), a licensed real estate broker, with violating sections 17-322(b)(6), (25), (32), and (33) of the Business Occupations and Professions Article during the ultimately unsuccessful sale of a multi-family building to Afua Osseo-Asare (Complainant). The Commission alleged that the Respondent violated State law concerning dual agency in a real estate transaction and violated provisions of the Montgomery County Code concerning notice of a proposed sale of a multi-family building to the County and to tenants of the multi-family building. On August 7, 2020, the Commission transmitted this matter to the Office of Administrative Hearings (OAH) to conduct a hearing and issue a recommended decision.

The OAH postponed a hearing scheduled on October 6, 2020 to allow time for the Respondent to retain an attorney; the OAH rescheduled the hearing for December 1, 2020.

On December 1, 2020, I conducted a remote hearing via videoconference from the OAH in Hunt Valley, Maryland. Code of Maryland Regulations (COMAR) 28.02.01.20B.

John Hart, Assistant Attorney General, represented the Commission. Attorney Kwaku D. Ofori, Ofori Law Firm, LLC, represented the Respondent, who was present.

The contested-case provisions of the Administrative Procedure Act, the Commission's Hearing Regulations, COMAR 09.11.03; and the OAH Rules of Procedure govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 09.11.03; COMAR 28.02.01.

### **ISSUES**

1. Did the Respondent violate State law concerning dual agency in a real estate transaction?
2. Did the Respondent violate provisions of the Montgomery County Code concerning notice of a proposed sale of a multi-family building to the County and to tenants of the multi-family building?
3. If so, what sanction, if any, should be imposed?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits into evidence for the Commission:

- REC #1 - Letter from the OAH to the Respondent, September 25, 2020;  
Notice of Hearing December 1, 2020
- REC #2 - Statement of Charges and Order for Hearing, July 23, 2020
- REC #3 - Respondent's Licensing History for Associates of Ekuban Realty, Inc. (Associates of Ekuban) under registration number 01-40960

REC #4 - Report of Investigation, Case Number: 344-RE-2018 (1-12), with twenty-two exhibits:

- (1) Complaint and Guaranty Fund Claim, February 26, 2018, with Release Agreement, email from Sunday Faley to the Complainant; United States Postal Service Tracking; Maryland Business Express Entity Search (13-26)
- (2) Montgomery County Code, Chapter 53A - Tenant Displacement, Section 53A-4; Sections 17-322, 17-505, and 17-532 of the Business Occupations and Professions Article (27-32)
- (3) Sales Contract, with Addendums, including Buyer Agency Agreement and Listing Agreement (33-81)
- (4) Metropolitan Regional Information Systems, Inc., listing (82-83)
- (5) Maryland Case Search, Circuit Court for Montgomery County Case No. 430647V; Order of Court; Documentation of the Complainant's legal fees; Civil Complaint and related documents (84-125)
- (6) Respondent's Licensing History with the Commission under registration number 01-40960 (Associates of Ekuban Realty Services, Inc., and Associates of Ekuban Realty), including a reprimand and fines (126-135)
- (7) Email from the Montgomery County Department of Housing and Community Affairs (Department of Housing and Community Affairs) to the Respondent, November 30, 2016 (136)
- (8) Letter from the Respondent to the Montgomery County Housing Opportunity Commission (Housing Opportunity Commission), December 2, 2016 (137)
- (9) Email from the Respondent to the Complainant and Mr. Faley, December 9, 2016 (138)
- (10) Letter from the Respondent to Ms. Brewster, December 9, 2016 (139)
- (11) Email from the Complainant to the Respondent, December 10, 2016, with attached Release Agreement (140-141)
- (12) Email from Mr. Faley to the Complainant, December 12, 2016 (142)

- (13) Letter from the Complainant's attorney to the Respondent, December 15, 2016 (143-145)
- (14) Email from the Complainant's attorney to the Complainant, December 22, 2016 (146)
- (15) Note/Letter from the Respondent to Mr. Faley, undated (147)
- (16) Emails with the title company regarding settlement (148)
- (17) Email from Mr. Faley to the Complainant, January 13, 2017 (149)
- (18) Letter from the Respondent to the Complainant's attorney, December 17, 2016 (150-151)
- (19) General Addendum (152)
- (20) Letter from Ms. Brewster to the Department of [Housing and] Community Affairs, September 22, 2016 (153)
- (21) Letter from the Department of Housing and Community Affairs to the Respondent, December 21, 2016 (154)
- (22) Note from the Respondent to the Complainant, September 2, 2016 (155)

REC #5 - Report of Investigation – Supplemental Report (1), with four exhibits:

- (1) Listing Agreement (2-9)
- (2) Buyer Agency Agreement (10-13)
- (3) Sales Contract (14-23)
- (4) Understanding Whom Real Estate Agents Represent (24-25)

REC #6 - Report of Investigation – Supplemental Report (1), with three exhibits:

- (1) Letter from the Respondent's attorney to the Commission, July 31, 2019, with Understanding Whom Real Estate Agents Represent, and Buyer Agency Agreement (2-9)
- (2) Email from the Commission to the Complainant, August 7, 2019 (10-11)
- (3) Letter from the Complainant to the Commission (12-13)

REC #7 - Consent Order, April 26, 2010

- REC #8 - E-mail from the Respondent to the Neighborhood Assistance Corporation of America (NACA), September 8, 2016
- REC #9 - Respondent's Licensing History for registration number 01-5312 (Associates Real Estate Investors, LLC)

I admitted the following exhibits into evidence for the Respondent:

- RESP. #1 - Sales Contract, August 25, 2016 (signed by the Complainant on August 26, 2016)
- RESP. #2 - Broker Agency Agreement, August 12, 2016
- RESP. #3 - E-mail from the Complainant to NACA, November 14, 2016, with attachments
- RESP. #4 - E-mails between the Complainant and Mr. Faley, January 13, 2017, February 1, 2017, and February 4, 2017
- RESP. #5 - E-mail from Mr. Faley to the Complainant, January 13, 2017
- RESP. #6 - E-mail from Mr. Faley to the Complainant, December 12, 2016
- RESP. #7 - E-mail from NACA to the Complainant and Mr. Faley, November 22, 2016
- RESP. #8 - E-mail from the Complainant to NACA, November 14, 2016, with attachments
- RESP. #9 - E-mail from the Complainant to NACA, November 16, 2016, with attachments
- RESP. #10 - E-mail from NACA to the Complainant, November 14, 2016
- RESP. #11 - E-mail from NACA to the Complainant and Mr. Faley, October 3, 2016, with attachment
- RESP. #12 - E-mail from NACA to the Complainant and Mr. Faley, November 7, 2016
- RESP. #13 - Letter from the Respondent to "All Tenants," August 10, 2016, with receipt
- RESP. #14 - Letter from Ms. Brewster to the Department of [Housing and] Community Affairs, September 22, 2016
- RESP. #15 - Letter from the Department of Housing and Community Affairs to the Respondent, December 21, 2016
- RESP. #16 - Certificate of Compliance, Department of Housing and Community Affairs, January 24, 2017
- RESP. #17 - Letter from the Respondent to Mr. Faley, December 10, 2016

## Testimony

The Commission presented testimony from the Complainant and Jack Manning, a Commission Investigator.

The Respondent testified and he also presented testimony from Sunday Faley, a licensed real estate salesperson affiliated with the Respondent's brokerage.

## **FINDINGS OF FACT**

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

1. At all relevant times, the Respondent was licensed by the Commission as a real estate broker under two registration numbers: 01-40960 for Associates of Ekuban and Associates of Ekuban Realty Services and 01-5312 for Associates Real Estate Investors. (REC #3, #9).
2. On August 4, 2016, the Respondent entered into a listing agreement with Joan Brewster to attempt to sell her four-unit multi-family building on Nolte Avenue in Montgomery County at a listing price of \$750,000.00. (REC #5, 2-9).
3. On August 10, 2016, the Respondent sent or delivered a letter to the two tenants then living in the building, informing each of them of the right to purchase the building for \$799,000.00. On August 17, 2016, one of the tenants confirmed in writing that he received the Respondent's letter. (RESP. #13).
4. On or about August 12, 2016, the Respondent met the Complainant, who had seen the listing for the building on the Metropolitan Regional Information System at a list price of \$799,000.00.<sup>1</sup> (REC #4, 82-83).
5. On August 26, 2016, the Respondent entered into a buyer agency agreement with the Complainant to represent the Complainant in the purchase of real property in return for a commission of three percent of the sale price. (REC #5, 10-13). (The Respondent dated

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<sup>1</sup> The parties did not explain the discrepancy between the list price on the listing agreement and the list price on the Respondent's letter and the Metropolitan Regional Information Systems.

the buyer agency agreement as August 12, 2016, but the Complainant did not sign it until August 26, 2016.)

6. The buyer agency agreement listed the Respondent as the broker and the Respondent and Sunday Faley as agents of the broker assigned to represent the Complainant. (REC #5, 10-13)

7. Sunday Faley is licensed by the Commission as a real estate salesperson; he has been affiliated with the Respondent's brokerage for approximately ten years. (REC #4, 2, 6).

8. The buyer agency agreement indicated that the Respondent provided the Complainant two disclosures: (a) Understanding Whom Real Estate Agents Represent and (b) Notification of Dual Agency Within a Team. (REC #5, 10). Those two documents were not attached to the buyer agency agreement; the Understanding Whom Real Estate Agents Represent disclosure was part of the sales contract created that same day. (REC #5, 24-25).

9. On August 26, 2016, the Complainant and Ms. Brewster entered into a sales contract for the Complainant's purchase of the building for \$700,00.00. (REC #5, 14-25).

10. The Respondent and the Complainant negotiated the sales price. (REC #4, 155).

11. The sales contract listed Associates of Ekuban Realty Services, Inc., as the "listing company" representing the seller and Associates Real Estate Investors as the "selling company" representing the buyer and the seller. (REC #5, 14-25).

12. The sales contract contained language: "If the Broker is acting as a dual representative for both Seller and Buyer, then the appropriate disclosure is attached to and made a part of this Contract." (REC #5, 14).

13. On the Understanding Whom Real Estate Agents Represent disclosure, Mr. Faley, who was ill and whom the Complainant had not met, is listed as the intra-company agent representing the Complainant. (REC #5, 24-25).

14. The Respondent did not assign an intra-company agent to represent the seller.

15. The Complainant agreed to make an earnest money deposit of \$21,000.00 within one business day of ratification of the sales contract. The Respondent agreed to hold the deposit in escrow. The balance of the purchase price was due on or before settlement, which was set for October 15, 2016. (REC #5, 15).

16. The sales contract was ratified by Ms. Brewster on September 2, 2016. (REC #5, 21).

17. On September 22, 2016, Ms. Brewster sent a letter to the Department of Housing and Community Affairs as notice that she had a sales contract with the Complainant for \$700,000.00; she did not send the letter by certified mail. (RESP. #14).

18. The settlement date was extended three times by agreement of the parties – to November 15, 2016, November 28, 2016, and December 9, 2016. (REC #4, 62-64).

19. The Complainant, who was working with NACA to get a firm loan commitment, agreed to financial concessions totaling \$8,235.00 for the last two extensions of the settlement date. (REC #4, 63-64).

20. The Complainant first spoke directly with Mr. Faley by phone in late November 2016. Before then, Mr. Faley had been copied on some emails among the Complainant, the Respondent, and NACA.

21. On November 30, 2016, the Department of Housing and Community Affairs sent an email to the Respondent, indicating that it had no information concerning the sale of the building and no proof of notice of the sale of the multi-family building to the tenants, the County, or the Housing Opportunity Commission, all of which are required to be notified under the Montgomery County Code. The Department of Housing and Community Affairs stated that if



the closing occurred without the seller receiving a Certificate of Compliance with the Code requirements, the County would not issue a rental license for the property. (REC #4, 136).

22. The Respondent did not obtain a Certificate of Compliance with the Code requirements before the scheduled settlement date of December 9, 2016. (RESP. #16).

23. On or about December 8, 2016, the Respondent notified the Complainant and Mr. Faley that Ms. Brewster would not appear for settlement the next day, apparently due to an unspecified medical condition. (The Respondent subsequently reported that Ms. Brewster suffered a mild stroke.) (REC #4, 150).

24. On Friday, December 9, 2016, the Complainant appeared for settlement with Mr. Faley; neither Ms. Brewster nor the Respondent appeared. That same day, the Respondent, despite what he had told the Complainant and Mr. Faley, wrote to Ms. Brewster to encourage her to appear for settlement that day or the following Monday or Tuesday. (REC #4, 139).

25. On December 10, 2016, the Complainant sent an email to the Respondent, indicating that she considered the sales contract null and void due to Ms. Brewster's breach by not appearing for settlement. The Complainant attached a Release Agreement requesting the return of her earnest money deposit. (REC #4, 140-141).

26. On December 12, 2016, Mr. Faley sent an email to the Complainant, suggesting that she withdraw the release agreement she had submitted, ostensibly because it was invalid if not prepared by Mr. Faley, and again extend the settlement date due to Ms. Brewster's medical condition. (REC #4, 142).

27. On December 15, 2016, the Complainant's attorney wrote to the Respondent. As reasons for the sales contract being null and void, the attorney cited Ms. Brewster's failure to attend the settlement on December 9, 2016, as well as the Respondent's failure to provide the

Department of Housing and Community Affairs sixty-day notice by certified mail concerning the County's right of first refusal. (REC #4, 143-145).

28. The Complainant's attorney made an offer to extend the settlement date if Ms. Brewster and the Respondent agreed to certain terms by December 19, 2016. (REC #4, 143-145).

29. On December 17, 2016, the Respondent sent a letter to the Complainant's attorney, asserting that the Complainant had not acted in good faith because she did not appear at settlement with a check for the financial concessions she had agreed to. The Respondent suggested extending the settlement date to early February 2017 to allow time for him to obtain the Certificate of Compliance from the County. (REC #4, 150-151).

30. The Complainant's attorney obtained a release agreement directly from Ms. Brewster, who indicated that the Respondent was not responding to her. (REC #4, 20).

31. On December 21, 2016, the Montgomery County Department of Housing and Community Affairs sent a letter to the Respondent to serve as official notice that the County would not exercise its right of first refusal concerning the building. (RESP. #15).

32. Mr. Faley continued to refuse to present the Complainant's release agreement to Ms. Brewster and he demanded a letter from the Complainant recognizing Mr. Faley as the sole person authorized to prepare a release agreement for the Complainant. The Complainant provided such a letter, but she never heard back from Mr. Faley. (REC #4, 16-17).

33. On January 24, 2017, the Montgomery County Department of Housing and Community Affairs issued a Certificate of Compliance on its own behalf and on behalf of the Housing Opportunities Commission to certify that the sales contract between Ms. Brewster and the Complainant complied with provisions of the County Code. The certificate also certified that no tenant organization had any relevant rights concerning the sale of the building. (RESP. #16).

34. On March 3, 2017, the Respondent filed a civil action against the Complainant and Ms. Brewster in the Circuit Court for Montgomery County, seeking payment of a commission from each of them. The Respondent cited a provision of the sales contract making the Complainant responsible for the seller's commission in the event the seller (who apparently filed for bankruptcy) did not pay the seller's commission. (REC #4, 122-125).

35. On November 27, 2017, the court granted summary judgment in favor of the Complainant and ordered the Respondent to return to the Complainant her earnest money deposit. (REC #4, 84-90).

36. The Complainant incurred legal fees of \$9,843.93 to defend against the Respondent's civil action. (REC #4, 91).

37. In or about 1990, the Commission reprimanded the Respondent. (REC #4, 128).

38. In or about 2003, the Commission imposed a monetary penalty against the Respondent. (REC #4, 133).

39. On April 26, 2010, the Commission issued a Consent Order suspending the Respondent's real estate broker's licenses for thirty days and imposing a penalty of \$5,000.00 for violations of sections 17-322(b)(25), (31), and (33), 17-502(b), and 17-505(a) of the Business Occupations and Professions Article concerning the Respondent's management of his escrow account. (REC #7).

### **DISCUSSION**

The Commission may reprimand a licensee, or suspend or revoke a licensee if, in pertinent part, the licensee:

(6) violates § 17-530.1(a) or (b) of this title;

(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;

(33) violates any regulation adopted under this title or any provision of the code of ethics.

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

Sections 17-322(b)(6) and 17-530.1 – Dual Agency

Section 17-530.1(a) of the Business Occupations and Professions Article is the State law that generally prohibits a licensed real estate broker from acting as a dual agent in a real estate transaction. The general rule is subject to the following exception:

(1)(i) If a licensed real estate broker or a designee of the real estate broker obtains the written informed consent of all parties to a real estate transaction, the real estate broker may act as a dual agent in the transaction.

(ii) When acting as a dual agent in a real estate transaction, a real estate broker or a designee of the real estate broker shall assign a licensed associate real estate broker or licensed real estate salesperson affiliated with the real estate broker to act as the intra-company agent on behalf of the seller or lessor and another licensed associate real estate broker or licensed real estate salesperson affiliated with the real estate broker to act as the intra-company agent on behalf of the buyer or lessee.

(vii) 1. A dual agent may not also act as an intra-company agent in the same real estate transaction.

2. An intra-company agent may not also act as a dual agent in the same real estate transaction.

Bus. Occ. & Prof. § 17-530.1(b).<sup>2</sup>

Under the exception, dual agency representation necessarily involves the participation of three licensed real estate professionals – the real estate broker and two intra-company agents (either associate real estate brokers or real estate salespersons), one to act on behalf of the seller and one to act on behalf of the buyer. The Respondent reluctantly conceded that he did not assign a separate intra-company agent for the seller, Ms. Brewster. Despite his lengthy experience as a real estate broker, the Respondent asserted that he was confused about the Commission's

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<sup>2</sup> The dual agency provisions of the Business Occupations and Professions Article were moved from section 17-530(c) and (d) to section 17-530.1 effective October 1, 2016.

requirements for dual agency. He testified that he assigned Mr. Faley as the intra-company agent for the Complainant while he remained as the broker and the seller's agent. The Respondent claimed that Ms. Brewster, whom the Respondent represented when she purchased the building, did not want him to assign her another agent. The Respondent also claimed that the Complainant, who happens to be a lawyer, waived any issue concerning dual agency by signing documents acknowledging that the Respondent was acting as the broker and the seller's agent.

The statute on dual agency in real estate transactions expresses the legislature's concern about the conflicts of interest and divided loyalty inherent in a dual agency relationship. The statute sets forth a specific method for implementing the exception to the general rule prohibiting dual agency in a real estate transaction – disclosure to the parties to the transaction and the assignment of separate intra-company agents for the seller and the buyer. The statute does not provide for or even remotely suggest that a real estate client of any level of sophistication can waive the statutory requirements.

The Respondent's violation of section 17-530.1(b) was no mere technicality. It is obvious from the record that the Respondent controlled the entire real estate transaction, with Mr. Faley providing essentially no real estate services to the Complainant. Mr. Faley testified that he was ill in August 2016 when the Respondent assigned him as the Complainant's intra-company agent; he did not negotiate any aspect of the sales contract on the Complainant's behalf; he did not communicate directly by phone or email with the Complainant until late November 2016; and he did not meet the Complainant in person until the scheduled date of settlement on December 9, 2016. After December 9, 2016, Mr. Faley, obviously under the Respondent's direction, worked against the Complainant's interests by rejecting her attempts to get a release agreement and the return of her earnest money deposit.

The Respondent prepared all the relevant documents for the real estate transaction, including the sales contract in which the Complainant made her offer to purchase the building, and negotiated the sales price for the building with the Complainant and Ms. Brewster. Most egregiously, as pointed out by the Complainant in her complaint to the Commission, the Respondent had the Complainant provide financial incentives to Ms. Brewster in return for an extension of the November 28, 2016 settlement date when the Respondent was aware that the Department of Housing and Community Affairs had not yet provided a Certificate of Compliance concerning the County's right of first refusal. The Respondent also was aware that had settlement occurred on December 9, 2016 as scheduled, the Complainant would have purchased a rental property without a County rental license.

The Respondent clearly acted as a dual agent in this real estate transaction. He assigned Mr. Faley as a nominal intra-company agent for the Complainant, but then retained control over the entire transaction. The Complainant's relative sophistication and her apparent acquiescence with the Respondent's dual agency does not mitigate the Respondent's blatant violation of State law concerning dual agency in a real estate transaction.

Sections 17-322(b)(25) and (33)

Sections 17-322(b)(25) and (33) authorize the Commission to discipline a licensee for conduct that demonstrates bad faith, incompetency, or untrustworthiness; or which constitutes dishonest, fraudulent, or improper dealings; or which violates any regulation adopted under title 17 or any provision of the code of ethics. The Commission specifically cited three provisions of the code of ethics:

COMAR 09.11.02.01C: 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.

COMAR 09.11.02.02A: In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

COMAR 09.11.02.02B: In justice to those who place their interests in the licensee's care, the licensee shall endeavor always to be informed regarding laws, proposed legislation, governmental orders, and other essential information and public policies which affect those interests.

These statutory and regulatory provisions, unlike the specific provision for dual agency discussed above, broadly control the conduct of real estate licensees. I will focus on the Respondent's conduct concerning the relevant sections of the Montgomery County Code related to the sale of rental property.

An owner of rental housing (a multi-family dwelling of at least four units) who enters into a bona fide contract of sale to sell the rental housing must within five days of entering into the contract provide written notice of the sale to each tenant in the rental housing by first class mail and by posting notice in the public areas of the rental housing. Montgomery County Code, §§ 53A-2(e) and 53A-3(a)(1)(A)-(B). The owner must also provide the Department of Housing and Community Affairs a list identifying each tenant and the tenant's address. *Id.* § 53A-3(a)(1)(C). Additionally, an owner of rental housing must offer the County, the Housing Opportunities Commission, and any tenant organization the right to buy the rental housing before selling the rental housing to another party. *Id.* § 53A-4(a). An offer required by subsection (a) must be provided to the County, the Housing Opportunities Commission, and any tenant organization in writing and be sent by certified mail, return receipt requested, within five business days after the execution of a bona fide contract of sale. *Id.* § 53A-4(b)(1), (2)(A). The offer must include substantially the same terms and conditions as a pending bona fide contract of sale from a third party to buy the rental housing and remain open for sixty days after it is received by the County and the Housing Opportunities Commission and ninety days after it is

received by a tenant organization. *Id.* § 53A-4(b)(3), (4). (There was no tenant organization involved in this case.)

The Respondent testified that he was familiar with the relevant Code sections, and he asserted, despite overwhelming evidence to the contrary, that he complied with those Code sections. The evidence in the record indicates that the Respondent provided notice to one tenant in August 2016, just after he listed the building and before the ratification of the sales contract. The Respondent did not provide notice to the tenants of the Complainant's offer to purchase the building. The Respondent did not provide notice to the Department of Housing and Community Affairs concerning the County's right of first refusal before any of the relevant scheduled dates for settlement. On November 30, 2016, nine days before the last scheduled date for settlement, the Department of Housing and Community Affairs notified the Respondent that it had no information concerning the sale of the building and no proof of notice of the sale of the multi-family building to the tenants, the County, or the Housing Opportunity Commission, all of which were required by the Montgomery County Code. The Department of Housing and Community Affairs indicated that if the closing occurred without the seller receiving a Certificate of Compliance with the Code requirements, the County would not issue a rental license for the property. Eventually, on December 21, 2016, twelve days after the last scheduled settlement, the Department of Housing and Community Affairs indicated that the County did not intend to exercise its right of first refusal to the Respondent. On January 24, 2017, the Montgomery County Department of Housing and Community Affairs issued a Certificate of Compliance on its own behalf and on behalf of the Housing Opportunities Commission of Montgomery County to certify that the sales contract between Ms. Brewster and the Complainant, which no one except maybe the Respondent was interested in anymore, complied with provisions of the County Code.



The Respondent's conduct concerning the Montgomery County Code provisions was at best incompetent. His failure to disclose to any of the parties to the transaction that he had not obtained the Certificate of Compliance before the scheduled dates for settlement makes his conduct dishonest, untrustworthy, unethical, and damaging to the dignity and integrity of the real estate profession.<sup>3</sup>

### Sanction

Instead of or in addition to a reprimand, suspension, or revocation, the Commission may impose a penalty not exceeding \$5,000 for each violation. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(1). To determine the amount of the penalty imposed the Commission shall consider: the seriousness of the violation, the harm caused by the violation, the good faith of the licensee, and the history of any previous violations. *Id.* § 17-322(c)(2). In this case, the Commission argued that the Respondent's broker's licenses should be suspended for an unspecified period and he should be subject to a penalty of \$10,000.00. The Commission focused on the seriousness of the Respondent's violation – his blatant violation of State law concerning dual agency in a real estate transaction and his lack of good faith in compliance with that law, as well as his conduct concerning the Montgomery County Code. The Commission noted that the Respondent's prior reprimand, suspension, and penalties.

There is very little guidance for my consideration of an appropriate sanction, with essentially no case law on point. (The reported cases tend to analyze the licensing consequences for criminal convictions.) I concur with the Commission's assessment of the seriousness of the Respondent's conduct and I must note the Respondent's complete lack of remorse. I have considered the financial ramifications of a suspension of the Respondent's licenses. I ultimately

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<sup>3</sup> Section 17-322(b)(32) of the Business Occupations and Professions Article authorizes the Commission to discipline a licensee for violating any other provision of title 17. I am not sure what other provision of title 17 the Commission wanted me to consider. The Respondent's conduct is fairly covered under the other three provisions of section 17-322(b) discussed above. I have not made any finding as to section 17-322(b)(32).

conclude that the Respondent's conduct warrants a suspension of his broker's licenses for a period of ninety days and a penalty of \$5,000.00 based upon the severity of the Respondent's violations and his lack of good faith. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c).

I recommend that a \$5,000.00 civil penalty would be more appropriate under the circumstances.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Respondent violated sections 17-322(b)(6), (25), and (33) of the Business Occupations and Professions Article by violating State law concerning dual agency in a real estate transaction; engaging in conduct that demonstrated bad faith, incompetency, or untrustworthiness, or that constituted improper dealings; and by violating provisions of the code of ethics. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(6), (25), and (33); COMAR 09.11.02.01C; 02A, B. I further conclude that the Respondent did not violate section 17-322(b)(32) of the Business Occupations and Professions Article.

I further conclude that the Respondent's conduct warrants a suspension of his broker's licenses for a period of ninety days and a penalty of \$5,000.00 based upon the severity of the Respondent's violations and his lack of good faith. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c).

### **RECOMMENDED ORDER**

I **RECOMMEND** that the Maryland Real Estate Commission **ORDER** that

1. The charges of the Real Estate Commission as to sections 17-322(b)(6), (25), and (33) of the Business Occupations and Professions Article be **UPHELD**;
2. The Respondent's real estate broker's licenses be **SUSPENDED** for ninety days for his violations of Maryland Real Estate law;

3. A penalty in the amount of \$5,000.00 be assessed against the Respondent; and
4. The Commission **ORDER** that the State Real Estate Commission's records and publications reflect its final decision.

*Robert F. Barry*  
SIGNATURE ON FILE

March 1, 2021

Date Recommended Decision Issued

Robert F. Barry  
Administrative Law Judge

RFB/kdp  
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