

THE MARYLAND REAL ESTATE COMMISSION

THE CLAIM OF \* BEFORE EILEEN C. SWEENEY,  
HEATHER AU YANG \* ADMINISTRATIVE LAW JUDGE  
AGAINST THE MARYLAND REAL \* OF THE MARYLAND OFFICE OF  
ESTATE COMMISSION GUARANTY \* ADMINISTRATIVE HEARINGS  
FUND FOR THE ALLEGED \* OAH No: DLR-REC-22-09-35435  
MISCONDUCT OF \* MREC No. 2008-RE-131 G.F.  
MARK ZIMIN \*  
\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated November 16, 2010, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 15th day of December, 2010,

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;

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

12/15/2010  
Date

By: 

( COMMISSIONER'S SIGNATURE APPEARS ON ORIGINAL ORDER )
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THE CLAIM OF HEATHER AUYANG,	* BEFORE EILEEN C. SWEENEY,
CLAIMANT	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND	* OF THE MARYLAND OFFICE
REAL ESTATE COMMISSION	* OF ADMINISTRATIVE HEARINGS
GUARANTY FUND FOR	* OAH NO.: DLR-REC-22-09-35435
THE ALLEGED MISCONDUCT OF	* MREC NO.: 08-RE-131
MARK ZIMIN,	*
RESPONDENT	*

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On or about August 17, 2007, Heather Auyang (Claimant) filed a complaint with the Maryland Real Estate Commission (MREC) and, on that same date, filed a claim against the MREC Guaranty Fund (Fund) for reimbursement of \$64,765.58<sup>1</sup> for actual losses suffered as a result of alleged misconduct by the Respondent related to a real estate sales transaction in which the Claimant was the buyer of a property and the Respondent was the owner/seller and listing agent.

I held a hearing on the Claimant's Fund claim on September 7, 2010, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. § 17-408 (2010). The Claimant, who participated by telephone, represented herself. The Respondent

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<sup>1</sup> At the hearing, the Claimant amended that amount to \$57,722.63.

represented himself. Hope Sachs, Assistant Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 09.01.03 and 28.02.01.

### ISSUE

Did the Claimant sustain an actual loss that is compensable by the Fund based on the Respondent's acts or omissions that constituted fraud or misrepresentation?

### SUMMARY OF THE EVIDENCE

#### Exhibits

The Claimant offered the following exhibits that were admitted into evidence:

- CL #1            March 4, 2004 - August 17, 2007 Timeline
- CL #2            October 31, 2007 letter from Alvin C. Monshower, Jr., to Katherine F. Connelly, Executive Director, MREC
- CL #3            August 30, 2010 Fax from Martin Shipley, Department of Finance Bureau of Revenue Collections, to the Claimant, with attachments
- CL #4            August 28, 2008 Lien Certificate
- CL #5            March 4, 2004 Violation Notice and Order to Remove Lead Nuisance
- CL #6            May 27, 2005 Settlement Statement
- CL #7            May 26, 2005 Residential Contract of Sale
- CL #8            Case Sheet, printed on August 4, 2010, with attached check in the amount of \$2,450.00 from Advantage Title issued to Long & Foster
- CL #9            Listing for the Property, printed on June 15, 2005
- CL #10           June 16, 2005 Residential Contract of Sale<sup>2</sup>
- CL #11           July 1, 2005 Settlement Statement

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<sup>2</sup> Paragraphs 8-12 and 18-42 were not included in the exhibit.

- CL #12 Undated Owner/Seller Affidavit
- CL #13 Undated Lien Affidavit
- CL #14 July 1, 2005 Registration Statement of Residential Property, with attachments
- CL #15 April 5, 2006 Violation Notice and Order to Remove Lead Hazard
- CL #16 August 30, 2004 Workplan & Notice for Alternative Procedures for Abatement to Reduce Lead Nuisance, with attachments
- CL #17 February 21, 2007 Workplan & Notice for Alternative Procedures for Abatement to Reduce Lead Nuisance
- CL #18 August 8, 2010 Affidavit of Bruce A. Wasserman, M.D.
- CL #19 Photograph
- CL #20 Real Property Data Search, printed on January 3, 2007
- CL #21 August 18, 2010 Confirmatory Assignment
- CL #22 July 1, 2005 Assignment
- CL #23 January 4, 2007 Show Cause Order
- CL #24 Complaint for Injunctive and Other Relief, received by the District Court of Maryland on December 29, 2006
- CL #25 February 28, 2007 Consent Order for Injunctive Relief
- CL #26 April 25, 2007 Confirmation of Notice Completed
- CL #27 Real Property Data Search, printed on August 18, 2010
- CL #28 Undated list of Auyang's Actual Losses
- CL #29 April 14, 2017 invoice from Blue Point Housing & Restoration LLC, with attachments
- CL #30 March 27, 2007 check in the amount of \$500.00 from the Respondent issued to the Director of Finance
- CL #31 July 27, 2007 check in the amount of \$4,224.90 from the Respondent issued to DLA Piper US LLP; April 19, 2007 check in the amount of \$6,949.00 from the Respondent issued to DLA Piper US LLP; August 7, 2007 check in the amount of \$1,020.00 from the Respondent to DLA Piper US LLP; March 23, 2007, June 27, 2007, and July 31, 2007 Invoices from

DLA Piper US LLP

CL #32      October 18, 2005 Declaration Page  
CL #33      August 11, 2006 Official Payments Code printout  
CL #34      October 4, 2006 and October 11, 2005 Declaration Pages  
CL #35      August 11, 2006 Official Payments Code printout  
CL #36      September 19, 2006 Official Payments Code printout  
CL #37      July 1, 2007 - June 30, 2008 Real Property Tax Levy  
CL #38      July 7, 2010 letter from the Respondent to the OAH  
CL #39      Schedule for the Black Cat, printed on August 7, 2010  
CL #40      January 26, 2008 Settlement Statement

The Respondent did not offer any exhibits into evidence.

The Fund offered the following exhibits that were admitted into evidence:

Fund #1      July 22, 2010 Notice of Telephone Hearing, with attachment  
Fund #2      MREC licensing information, printed on August 31, 2010  
Fund #3      MREC Complaint and Guaranty Fund Claim, received by the MREC on August 17, 2007, with attachment

### Testimony

The Claimant testified; she did not present the testimony of any other witnesses.

The Respondent testified; he did not present the testimony of any other witnesses.

The Fund did not call any witnesses.

### **FINDINGS OF FACT**

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

1.      At all times relevant, the Respondent was licensed as a real estate salesperson in Maryland.

2. On or about March 4, 2004, Edith L. Kerney<sup>3</sup> owned property located at 1610 North Broadway, Baltimore, Maryland (Property).

3. On March 4, 2004, the Baltimore City Health Department (City) issued a Violation Notice and Order to Remove Lead Nuisance (Violation Notice) to Ms. Kerney relating to the Property, mailed to the address for the Property. The Violation Notice ordered Ms. Kerney to permanently remove the lead-based paint nuisance from the Property by April 5, 2004.

4. On August 30, 2004, the City issued a Workplan & Notice for Alternative Procedures for Abatement to Reduce Lead Nuisance (Workplan) to Ms. Kerney mailed to the address for the Property and ordering her to complete the Workplan detailed within the prescribed time limits.

5. On September 2, 2004, Ms. Kerney signed an Alternative Abatement Agreement form agreeing to complete the work specified in the Workplan within forty-five days of the issue date of the Workplan.

6. Ms. Kerney did not abate the lead-based paint violations.

7. Sometime prior to May 14, 2005, Ms. Kerney contracted with a buyer for the sale of the Property. The title work for that sale was handled by Advantage Title.

8. On May 14, 2005, the Mayor and City Council of Baltimore, Bureau of Treasury Management Collection Division, Lien Section (Collection Division), issued a Lien Certificate to Advantage Title on the Property showing the lead-based paint violations and a resulting lien (June 28, 2005 void date).

9. The original buyer for the Property did not complete the sale. Therefore, sometime prior to May 27, 2005, the Respondent and Victor Acosta contracted with Ms. Kerney to purchase the Property. Advantage Title continued to handle the title work.

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<sup>3</sup> In some of the documents introduced into evidence, this individual is referred to as Edith Kerney-Harris.

10. Settlement on the Property took place on or about May 27, 2005. The settlement was ill-handled and chaotic; the deed for the Property was not recorded.

11. The Respondent did not receive a Violation Notice from the City after he purchased the Property.

12. The Respondent and Mr. Acosta did not abate the lead-based paint violations.

13. On June 16, 2005, the Respondent and Mr. Acosta entered into a Residential Contract of Sale (Contract) with the Claimant for the Property for \$57,000.00. The Respondent acted as the listing agent for himself and Mr. Acosta.

14. Paragraph 15 of the Contract provided in pertinent part as follows:

**SELLER RESPONSIBILITY:** . . . All violation notices or requirements noted or issued by any governmental authority, or actions in any court on account thereof, against or affecting the Property at the date of settlement of this Contract, shall be complied with by Seller and the Property conveyed free thereof.<sup>4</sup>

(CL #10.)

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<sup>4</sup> Pursuant to Paragraph 43 of the Contract, the Claimant declined the opportunity to condition her purchase upon a Home Inspection and/or Environmental Inspection in order to ascertain the physical condition of the Property or the existence of environmental hazard. That paragraph further provided: "Buyer and Seller acknowledge that Brokers, agents or subagents are not responsible for the existence or discovery of property defects." (CL #10.)

Paragraph 44 of the Contract provided in pertinent part as follows:

**44. LEAD-BASED PAINT HAZARDS:**

A. FEDERAL LEAD-BASED PAINT LAW: Title X, Section 1018, the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the Act), requires the disclosure of certain information regarding lead-based paint and lead-based paint hazards in connection with the sale of residential real property. Unless, otherwise exempt, the Act applies only to housing constructed prior to 1978. A Seller of pre-1978 housing is required to disclose to Buyer, based upon Seller's actual knowledge, all known lead-based paint hazards in the Property and provide Buyer with any available reports in the Seller's possession relating to lead-based paint or lead-based paint hazards applicable to the Property. Seller, however, is not required to conduct or pay for any lead-based paint risk assessment or inspection . . . Seller is required under the Act to provide Buyer with a ten (10) day time period (or other mutually agreeable time period) for Buyer, at Buyer's expense, to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards unless Buyer waives such assessment or inspection by indicating such waiver on the Lead-Based Paint Disclosure form.

(CL # 10.)

15. On or before June 16, 2005, the Respondent and Mr. Acosta signed an Owner/Seller Affidavit,<sup>5</sup> which provided in pertinent part as follows:

15. I/We have no actual knowledge of any violations of State or local subdivision laws or ordinances.

...

19. That I/We understand that this Affidavit is made to induce Stewart Title Guaranty Company<sup>6</sup> to issue an enhanced coverage owners and/or loan policy on the property without exception to any adverse matters that would be disclosed by this affidavit;

...

22. THE PROPERTY BEING SOLD IS FREE OF ALL LIENS, EXCEPT AS FOLLOWS:

Annual Base Taxes are paid in the amount of \$250.92.

(CL #12.)

16. Settlement on the Property took place on or about June 16, 2005. Fountainhead Title Group (Fountainhead) performed the title work.

17. Because no lien certificate had yet been obtained for the Property,<sup>7</sup> the Respondent and Mr. Acosta signed a Lien Affidavit,<sup>8</sup> which provided in pertinent part as follows:

**WHEREAS, FOUNTAINHEAD.** . . was unable to obtain a current lien certificate prior to the settlement date; and

**WHEREAS, FOUNTAINHEAD.** . . has agreed to conduct settlement on the above referenced property without the benefit of a current lien certificate; and

**IN CONSIDERATION, of FOUNTAINHEAD.** . . agreeing to close the [Property];

- **SELLERS** hereby agrees [sic] to satisfy any violations, alley or footway charges, sidewalk, sewer, front foot benefit, water or miscellaneous liens or encumbrances or any other charge there withstanding, on the property, fixtures, or chattels contained therein, originating prior to settlement, as evidenced by current lien certificate.
- **BUYERS** hereby agrees [sic] to satisfy any charges originating after the date, as evidenced by a current lien certificate.

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<sup>5</sup> The Affidavit admitted into evidence was not dated or notarized.

<sup>6</sup> The parties did not explain Stewart Title Guaranty Company's role in this matter.

<sup>7</sup> Neither party explained why this was the case.

<sup>8</sup> The Lien Affidavit admitted into evidence was not dated or notarized.



**THIS AFFIDAVIT** is made for the purpose of inducing **FOUNTAINHEAD**. . . to hold settlement and to insure title to the above referenced property.

(CL #13.)

18. The Respondent executed the Contract, Owner/Seller Affidavit and Lien Affidavit, knowing that Advantage Title had handled the settlement relating to the sale of the Property to him in a chaotic manner. He did not obtain verification from a reliable source prior to settlement on the Property by the Claimant that the Property was not subject to violation notices or liens.

19. The Respondent misrepresented in the Contract that he would comply with all violation notices or requirements noted or issued by any governmental authority against or affecting the Property at the date of settlement and that the property would be conveyed free thereof.

20. The Respondent misrepresented in the Owner/Seller Affidavit that the Property was being sold free of all liens, except taxes.

21. The Respondent misrepresented in the Lien Affidavit that he would satisfy any violations or miscellaneous liens on the Property originating prior to settlement, and would satisfy any charges originating after that date as evidenced by current lien certificate.

22. The Respondent knew or should have known of the lead-based paint violations and resulting lien but did not disclose that information to the Claimant.

23. The Claimant was induced to purchase the Property by the Respondent's misrepresentations regarding the non-existence of lead-based paint violations and liens on the Property and his misrepresentations that he would satisfy any violations or liens. She would not have purchased the Property if she had known about the lead-based paint violations, the resulting lien, and/or the Respondent's unwillingness to satisfy them.

24. On April 5, 2006, the City issued a Violation Notice to the Claimant relating to the Property, based on the violations previously referred to in the March 4, 2004 Violation Notice

issued to Ms. Kerney. The April 5, 2006 Violation Notice was mailed to the address for the Property and ordered the Claimant to permanently remove the lead-based paint nuisance from the Property by May 5, 2006.

25. Because the deed for the Property executed on May 27, 2005 was lost prior to its recordation among the land records, Ms. Kerney executed a Confirmatory Deed on August 18, 2006.

26. On August 28, 2006, the Collection Division issued a Lien Certificate on the Property to Fountainhead showing the lead-based paint violations and resulting lien (October 12, 2006 void date).

27. On or about December 29, 2006, the City filed a Complaint for Injunctive and Other Relief against the Claimant in the District Court of Maryland for Baltimore City, requesting, among other things, that the Court compel the Claimant to comply with the Violation Notice, enjoin her from transferring the Property or allowing any person to occupy the Property until the lead-based paint nuisances were abated, and compel her to pay a civil fine, attorney's fees and costs.

28. The Claimant first became aware of the violations on or about January 15, 2007, when she learned of the Complaint filed against her.

29. Pursuant to a February 28, 2007 Consent Order for Injunctive Relief, the Claimant was ordered to abate the lead-based paint hazards; prohibited from transferring or allowing anyone to occupy the Property until abatement was completed, and pay \$500.00 for the cost of code enforcement.

30. The Claimant incurred the following expenses as a result of the Respondent's acts and omissions:

Blue Point Housing & Restoration LLC (removal of all loose paint from the exterior walls; removal of all base boards, vestibule walls, kitchen window casing, and the first and second floor stairwell)	\$ 6,300.00
Fine paid to Director of Finance	500.00
Attorney's fees paid to DLA Piper US LLP incurred to resolve the legal proceedings relating to the lead paint violations	12, 195.30
Settlement fees relating to the purchase of the Property	2,154.40
Taxes paid by the Claimant from the date of purchase until the date of resale	818.54
Water bill paid by the Claimant after purchase of the Property	178.99
Property Registration fee	<u>33.00</u>
	Total: \$22,180.23 <sup>9</sup>

31. The Claimant made demand upon the Respondent for payment of the aforementioned expenses, but he has failed and refused to pay them.

### DISCUSSION

Claims for reimbursement from the Fund are governed by section 17-404 of the Maryland Business Occupations and Professions Article of the Annotated Code of Maryland and COMAR 09.11.03.04.

Section 17-404 provides:

**§ 17-404. Recovery of compensation from 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;

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<sup>9</sup> As discussed below, I did not include insurance costs or loss sustained by the Claimant on resale.

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.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010).

COMAR 09.11.03.04 provides:

.04 Claims Against the Guaranty Fund.

A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.

B. For the purpose of a guaranty fund claim, misconduct:

(1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;

(2) Is performed by an unlicensed employee of a licensed real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and

(3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

The Maryland Court of Appeals has defined fraud as follows:

To present a prima facie case of fraud, in Maryland, it must be pleaded and proved:

(1) that a false representation was made by a party;

(2) that its falsity was known to that party or that the misrepresentation was made with such reckless indifference to truth as to impute knowledge to the party;

(3) that the misrepresentation was made for the purpose of defrauding some other person;

(4) that the person not only relied on the misrepresentation but had a right to rely upon it with full belief in its truth, and that the person would not have done the thing from which the damage resulted if the misrepresentation had not been made; and

(5) that the person suffered damage directly resulting from the misrepresentation.

*Gross v. Sussex Inc.*, 332 Md. 247, 257 (1993) (citations omitted). The Court further held that “[o]ne under a duty to disclose a material fact and who fails to do so, may be liable for fraud.” *Gross*, 332 Md. at 258, n.4.

The burden of proof rests with the Claimant to establish the validity of the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010).<sup>10</sup>

In this case, the Claimant alleged that to induce her to purchase the Property, the Respondent misrepresented to her that there were no violations or liens against the Property and that, if there were, he would satisfy them. The Respondent contended that his conduct did not involve fraud, misrepresentation, or deceit because he was unaware of the lead paint violations and the resulting lien when he made his statements. For the following reasons, I find that the Claimant met her burden of proving that she is entitled to receive compensation from the Fund under section 17-404 of the Business Occupations and Professions Article and COMAR 09.11.03.04.

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<sup>10</sup> In *Gross*, the Court held that “[t]o be sufficient, the evidence [of fraud] must be such as to constitute proof by clear and convincing evidence.” *Gross*, 342 Md. at 258. I find that the Claimant met her burden using either that standard or the preponderance of the evidence standard.

### ***Fraud or Misrepresentation***

The Fund presented evidence that the Respondent was a licensed real estate salesperson at the time of the alleged acts or omissions on which the Claimant based her claim. The Claimant submitted the Contract of Sale into evidence showing that the Respondent was acting not only as the owner/seller of the Property sold to the Claimant, but also as the listing agent for himself and the co-owner, Mr. Acosta. The Respondent did not dispute that he was a licensed real estate salesperson or that the transaction, which is the basis of the Claimant's Complaint involved real estate located in Maryland. Thus, the only remaining issue is whether the act or omission on which the Claimant based her claim constituted fraud or misrepresentation.<sup>11</sup> See Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(i), (ii) and (iii)(2); COMAR 09.11.03.04F.

The evidence clearly established that a lead-based paint Violation Notice had been issued to Ms. Kerney; a resulting lien existed on the Property prior to its sale to the Respondent; and the lien remained unsatisfied and the conditions unabated at the time of the sale to the Claimant. The Lien Certificates admitted into evidence by the Claimant clearly showed such a lien and that Advantage Title obtained a copy of a Lien Certificate prior to settlement.

The evidence also clearly established that the Respondent never notified the Claimant of the aforementioned violations and lien. Furthermore, he affirmatively stated in the Contract that "all violation notices or requirements noted or issued by any governmental authority, or actions in any court on account thereof, against or affecting the Property at the date of settlement of this Contract, shall be complied with by Seller and the Property conveyed free thereof," when that was untrue. (CL #10.) Additionally, the Owner/Seller Affidavit executed by the Respondent stated not just that he lacked actual knowledge of any violations of State or local subdivision laws or

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<sup>11</sup> The Claimant did not assert that the Respondent's act or omission involved "money or property. . . obtained by theft, embezzlement, false pretenses, or forgery; . . ." Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii)(1).

ordinances but also that the Property was being sold free of all liens except a specified tax lien, which, again, was untrue. The Lien Affidavit clearly stated that Respondent would satisfy any violations or miscellaneous liens or any other charge on the Property originating prior to settlement as evidenced “by current lien certificate” and would satisfy any charges “originating after the date, as evidenced by a current lien certificate,” but his subsequent failure to do so indicates that he was not so willing. (CL #13.)

The Respondent testified at the hearing, and the evidence corroborated that he never received a Violation Notice from the City. He further testified that he never saw a lien certificate and that his title company represented to him when he purchased the Property that it was free of liens. In his initial response to the Complaint, however, the Respondent stated that by signing the Lien Affidavit, he was willing to satisfy any problems with the City that appeared on the lien certificate generated by his title work and on the Claimant’s lien certificate, but that no violations/liens appeared in the title work.<sup>12</sup> Therefore, he continued to misrepresent the existence of violations and a lien, as well as his willingness to satisfy any problems right up to the time of the investigation by the MREC. Thus, I find that the Respondent made a promise as to a matter material to the bargain with no intention to fulfill it.

Furthermore, regardless of whether the Respondent actually knew about the violation and lien, his own testimony established that he made misrepresentations with such reckless indifference to truth as to impute knowledge to him. The Respondent testified that he bought the Property from Ms. Kerney under a great deal of time pressure in order to help her out at the last minute when a prior contract fell through. (Ms. Kerney needed to sell the house in order to purchase another property.) He used Advantage Title, the title company chosen by the prior

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<sup>12</sup> I note that the Claimant argued that the Respondent admitted to the MREC that he reviewed the lien certificate but his written response to the Complainant did not so indicate and the Claimant and the Fund presented no additional evidence to that effect.

buyer, and assumed that the title company had properly performed the title work. The Respondent described “chaos” at the settlement, however, and noted that Advantage Title had difficulty determining whether Ms. Kerney had even paid off her mortgage. The Respondent further testified that the lien certificate obtained by Advantage Title for the prior buyer “disappeared” and it was represented to him that there was no problem. (He did not state who made this alleged representation or when.) Thus, the Respondent’s own testimony established that the sale to him was rushed and that Advantage Title did a poor job of handling settlement. Accordingly, the Respondent should not have made affirmative representations to the Claimant regarding matters on which Advantage Title advised him and about which he had insufficient knowledge.

I find that the Respondent’s actions showed an intent to mislead or deceive. In light of Paragraph 15 of the Contract of Sale and the Affidavits executed by him, and his position as a licensed real estate salesperson, the Respondent had a duty to base his representations on fact rather than speculation or misinformation.

I note also that I do not find merit in the Respondent’s argument that the Claimant could have discovered the lien through her own title company. The Respondent was aware that, for whatever reason, Fountainhead did not obtain a Lien Certificate prior to settlement and he signed the Affidavits to induce the Claimant and her title company to proceed with settlement nonetheless.

The Claimant testified by telephone, thus I was unable to observe her demeanor. Nevertheless, I found her credible. She was articulate and organized in her presentation and her position was well supported by documentation. She testified without contradiction that she was induced her to buy the Property by the misrepresentations made by the Respondent, a licensed real estate salesperson, in the Contract of Sale and Affidavits; she would not have purchased the



Property but for the misrepresentations; and, as discussed below, she suffered an actual loss as a direct result of the misrepresentations. (CL #13.)

***Actual Loss***

COMAR 09.11.01.18 provides:

**.18 Amount of Compensation Recoverable from Real Estate Guaranty 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 his 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.

For the following reasons, I find that the Claimant sustained an actual loss as the result of the Respondent's fraud or misrepresentation.

The Claimant testified, without contradiction, regarding the expenses she incurred in order to defend against and abate the lead-based paint violations. She testified that she had to pay an attorney to represent her in resolving the matter with the City (\$12, 195.30). I find that the attorney's fees incurred by the Claimant are recoverable from the Fund because they were a monetary loss from the originating transaction, *i.e.*, the fees related to the legal proceedings involving resolution of the lead-based paint violation matter and were not incurred in pursuing or perfecting the claim against the Fund. COMAR 09.11.01.18. I note also that counsel for the Fund agreed that the legal fees are recoverable for that reason. The Claimant also presented uncontradicted evidence that she contracted with Blue Point Housing & Restoration LLC, to perform the necessary abatement work (removal of all loose paint from the exterior walls; removal of all base boards, vestibule walls, kitchen window casing, and the first and second floor stairwell (\$6,300.00). In addition, she was required to pay a fine to the City for the violations (\$500.00). Again, she would not have purchased the Property but for the Respondent's misrepresentations.

Thus, she incurred the following expenses relating to that purchase and ownership: settlement fees (\$2,154.40); taxes from the date of purchase until the date of resale (\$818.54); water bill (\$178.99); and property registration fee (\$33.00). Accordingly, I find that the Claimant sustained an actual loss in the total amount of \$22,180.23. (I did not include insurance costs or loss sustained by the Claimant on resale; it was her choice to obtain insurance and the loss at resale was too attenuated).

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant sustained an actual loss that is compensable by the Fund based on the Respondent's acts or omissions that constituted fraud or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2010); COMAR 09.11.03.04F.

### **RECOMMENDED ORDER**

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

**ORDER**, that the Claimant be reimbursed \$22,180.23 from the Maryland Real Estate Guaranty Fund to compensate for actual losses that she sustained because of the acts or omissions of the Respondent, and further,

**ORDER**, that the Respondent be ineligible for any Maryland Real Estate Commission license until the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of at least ten percent, as set by the Commission; Md. Code Ann., Bus Occ. & Prof. § 17-411(a)(2) (2010), and further,

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

November 16, 2010  
Date Decision Mailed

ADMINISTRATIVE LAW JUDGE'S SIGNATURE  
APPEARS ON ORIGINAL ORDER

Eileen C. Sweeney  
Administrative Law Judge



# 117971

THE CLAIM OF HEATHER AUYANG,	*	BEFORE EILEEN C. SWEENEY,
CLAIMANT	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND	*	OF THE MARYLAND OFFICE
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THE ALLEGED MISCONDUCT OF	*	MREC NO.: 08-RE-131
MARK ZIMIN,	*	
RESPONDENT	*	
* * * * *		

**FILE EXHIBIT LIST**

The Claimant offered the following exhibits that were admitted into evidence:

- CL #1            March 4, 2004 - August 17, 2007 Timeline
- CL #2            October 31, 2007 letter from Alvin C. Monshower, Jr., to Katherine F. Connelly, Executive Director, MREC
- CL #3            August 30, 2010 Fax from Martin Shipley, Department of Finance Bureau of Revenue Collections, to the Claimant, with attachments
- CL #4            August 28, 2008 Lien Certificate
- CL #5            March 4, 2004 Violation Notice and Order to Remove Lead Nuisance
- CL #6            May 27, 2005 Settlement Statement
- CL #7            May 26, 2005 Residential Contract of Sale
- CL #8            Case Sheet, printed on August 4, 2010, with attached check in the amount of \$2,450.00 from Advantage Title issued to Long & Foster
- CL #9            Listing for the Property, printed on June 15, 2005
- CL #10          June 16, 2005 Residential Contract of Sale<sup>13</sup>

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<sup>13</sup> Paragraphs 8-12 and 18-42 were not included in the exhibit.

- CL #11 July 1, 2005 Settlement Statement
- CL #12 Undated Owner/Seller Affidavit
- CL #13 Undated Lien Affidavit
- CL #14 July 1, 2005 Registration Statement of Residential Property, with attachments
- CL #15 April 5, 2006 Violation Notice and Order to Remove Lead Hazard
- CL #16 August 30, 2004 Workplan & Notice for Alternative Procedures for Abatement to Reduce Lead Nuisance, with attachments
- CL #17 February 21, 2007 Workplan & Notice for Alternative Procedures for Abatement to Reduce Lead Nuisance
- CL #18 August 8, 2010 Affidavit of Bruce A. Wasserman, M.D.
- CL #19 Photograph
- CL #20 Real Property Data Search, printed on January 3, 2007
- CL #21 August 18, 2010 Confirmatory Assignment
- CL #22 July 1, 2005 Assignment
- CL #23 January 4, 2007 Show Cause Order
- CL #24 Complaint for Injunctive and Other Relief, received by the District Court of Maryland on December 29, 2006
- CL #25 February 28, 2007 Consent Order for Injunctive Relief
- CL #26 April 25, 2007 Confirmation of Notice Completed
- CL #27 Real Property Data Search, printed on August 18, 2010
- CL #28 Undated list of Auyang's Actual Losses
- CL #29 April 14, 2017 invoice from Blue Point Housing & Restoration LLC, with attachments
- CL #30 March 27, 2007 check in the amount of \$500.00 from the Respondent issued to the Director of Finance
- CL #31 July 27, 2007 check in the amount of \$4,224.90 from the Respondent issued to DLA Piper US LLP; April 19, 2007 check in the amount of \$6,949.00 from the Respondent issued to DLA Piper US LLP; August 7,

2007 check in the amount of \$1,020.00 from the Respondent to DLA Piper US LLP; March 23, 2007, June 27, 2007, and July 31, 2007 Invoices from DLA Piper US LLP

- CL #32      October 18, 2005 Declaration Page
- CL #33      August 11, 2006 Official Payments Code printout
- CL #34      October 4, 2006 and October 11, 2005 Declaration Pages
- CL #35      August 11, 2006 Official Payments Code printout
- CL #36      September 19, 2006 Official Payments Code printout
- CL #37      July 1, 2007 - June 30, 2008 Real Property Tax Levy
- CL #38      July 7, 2010 letter from the Respondent to the OAH
- CL #39      Schedule for the Black Cat, printed on August 7, 2010
- CL #40      January 26, 2008 Settlement Statement

The Respondent did not offer any exhibits into evidence.

The Fund offered the following exhibits that were admitted into evidence:

- Fund #1      July 22, 2010 Notice of Telephone Hearing, with attachment
- Fund #2      MREC licensing information, printed on August 31, 2010
- Fund #3      MREC Complaint and Guaranty Fund Claim, received by the MREC on August 17, 2007, with attachment