

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE  
COMMISSION  
V.

CHERYL MOORE  
RESPONDENT

AND

CLAIM OF ROBERT L. RAGER  
AGAINST THE MARYLAND  
REAL ESTATE COMMISSION  
GUARANTY FUND

\* BEFORE KIMBERLY A. FARRELL.,  
\* ADMINISTRATIVE LAW JUDGE,  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No: DLR-REC-24-09-27275  
\* REC CASE NO: 2006-RE-309  
\*

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated June 4, 2010, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 21st day of July, 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

7/21/10  
Date

By:

(COMMISSIONER'S SIGNATURE  
APPEARS ON ORIGINAL ORDER)



MARYLAND REAL ESTATE	* BEFORE KIMBERLY A. FARRELL,
COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
CHERYL MOORE, RESPONDENT	* OF ADMINISTRATIVE HEARINGS
and	* OAH Case No.: DLR-REC-24-09-27275
CLAIM OF ROBERT L. RAGER,	* MREC Case No.: 2006-RE-309
CLAIMANT	*
AGAINST THE MARYLAND REAL	*
ESTATE COMMISSION GUARANTY	*
FUND	*
* * * * *	* * * * *

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On March 17, 2006, Robert L. Rager, (Claimant) filed a complaint with the Maryland Real Estate Commission (REC) and a claim against the REC Guaranty Fund (Fund) for losses allegedly suffered as a result of the actions of Cheryl Moore (Respondent), a licensed real estate salesperson.<sup>1</sup> On July 13, 2009, the REC filed regulatory charges against the Respondent related

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<sup>1</sup> The Respondent was a real estate salesperson during the events at issue in this case. She has subsequently become licensed as a real estate broker.

to a real estate transaction involving the Claimant and authorized the Claimant to proceed with his claim against the Fund.<sup>2</sup>

On April 7 and 8, 2010, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2004).<sup>3</sup> Peter Martin, Assistant Attorney General, represented the REC. The Claimant represented himself. The Respondent was represented by Jeffrey Zeigler, Esquire. The Fund elected not to participate in the hearing.

The Administrative Procedure Act, the REC's Hearing Regulations and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); COMAR 09.01.03 and 28.02.01.

### ISSUES

1. Did the Respondent violate § 17-310(b) by acting outside the scope of her license?
2. Did the Respondent violate § 17-322(b)(25) by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings?
3. Did the Respondent violate § 17-322(b)(30) by failing to make the disclosure or provide the consent form required by section 17-530 of the same title?
4. Did the Respondent violate § 17-322(b)(32) by violating any other provision of title 17?
5. Did the Respondent violate § 17-322(b)(33) by violating any regulation adopted under title 17 or any provision of the code of ethics?

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<sup>2</sup> The REC previously issued a Statement of Charges and Order for Hearing in this matter on April 22, 2008. The matter was transmitted to the Office of Administrative Hearings (OAH) on April 25, 2008, and the OAH scheduled a hearing. The hearing was postponed several times and eventually was set for February 26 and 27, 2009. On February 24, 2009, the REC revoked in whole the delegation of authority for OAH to conduct a hearing on the matter. On July 13, 2009, the REC issued a new Statement of Charges and Order for Hearing. On July 27, 2009, the July 13, 2009 Statement of Charges was transmitted to OAH and scheduled for hearing April 7 and 8, 2010. There is nothing in the current OAH file reflecting this procedural history and I was unaware of it until I was advised by the parties of this information at the hearing. The REC also provided me with the original file, should I need it for reference. The assigned number for the OAH file under the first delegation of authority was DLR-REC-24-08-18141. The REC number for the case did not change.

<sup>3</sup> All references in the remainder of this Proposed Decision are to the Business Occupations and Professions Article (2004 & Supp. 2009) unless otherwise stated.

6. Did the Respondent violate § 17-530 by failing to disclose in writing to the buyers her relationship with the Claimant?
7. Did the Respondent violate COMAR 09.11.01.07 by failing to maintain adequate records of the real estate transaction at issue?
8. Did the Respondent violate COMAR 09.11.02.01 by failing to protect, promote, and observe absolute fidelity to the interest of the Claimant?
9. Did the Claimant suffer an actual monetary loss as a result of the conduct of the Respondent and, if so, what is the amount of the loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits on behalf of the REC:

- REC # 1 Notice of Hearing dated January 1, 2010; Statement of Charges and Order for Hearing dated July 13, 2009
- REC # 2 Letter to the Respondent from the REC, dated October 10, 2008, with attachments
- REC # 3 REC licensing history for the Respondent
- REC # 4 REC Report of Investigation, with attachments
- REC # 5 Request for Investigation
- REC # 6 REC licensing history for Exit Powerhouse Realty
- REC # 7 REC certification dated June 16, 2009, that attached documents are true copies of documents contained in the REC's files, and attachments
- REC # 8 REC certification dated April 2, 2010, that attached document is a true copy of a document contained in the REC's commission, with attachment
- REC # 9 Not admitted<sup>4</sup>

I admitted the following exhibits on behalf of the Claimant:

- CLMT # 1 Metropolitan Regional Information Systems, Inc. record for 9413 Washington Blvd., Lanham, Maryland, dated August 3, 2005
- CLMT # 2 Email exchange between the Claimant and the Respondent dated May 29 and 31, 2005
- CLMT # 3 Email from the Respondent to the Claimant dated July 3, 2005
- CLMT # 4 Respondent's response to REC dated April 11, 2006, regarding allegations made by the Claimant
- CLMT # 5 Payment receipts for ezStorage Lanham
- CLMT # 6 Information on purchases made by the Claimant from TigerDirect.com

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<sup>4</sup> This document was marked for identification purposes and is contained in the file with admitted exhibits.

- CLMT # 7 Photocopy of check dated June 14, 2005, made payable to Exit Powerhouse Realty for \$4,000.00 drawn on the account of Josetito Rodriguez
- CLMT # 8 Verizon Service Record Information on page 6 of 7 of bill dated December 8, 2005
- CLMT # 9 Emails from Verizon to the Claimant during the months of July, August, and September 2005
- CLMT # 10 Email from Linda Rose to the Claimant dated February 3, 2009<sup>5</sup>
- CLMT # 11 Exit Powerhouse Realty work order form dated July 8, 2005

I admitted the following exhibits on behalf of the Respondent:

- RESP # 1 Residential Contract of Sale for 9413 Washington Blvd., Lanham, Maryland, between the Claimant and Keith and Natoshia Crockett dated July 31, 2005
- RESP # 2 Residential Contract of Sale for 9413 Washington Blvd., Lanham, Maryland, between the Claimant and Leo Oleye with an offer date of August 3, 2005
- RESP # 3 Fax from the Claimant to the Respondent dated June 29, 2005
- RESP # 4 Real Estate Original Salesperson License Confirmation for Respondent dated April 3, 2005
- RESP # 5 Letter of Understanding dated June 15, 2005
- RESP # 6 Mortgage Company of America approval letter, dated June 14, 2005

The Fund was not present to offer any exhibits.

### Testimony

The REC presented testimony from the Claimant and REC Investigator Jack Mull.

The Claimant testified in his own behalf and also called Ralph T. Simmons as a witness.

The Respondent testified in her own behalf and she also called Ralph Simmons as a witness. In addition, the Respondent offered testimony from Christina Stewart.

The Fund did not call any witnesses.

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<sup>5</sup> The offered exhibit contains additional emails. Only the first email on the first page was admitted into evidence.

## FINDINGS OF FACT

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

1. On April 3, 2005, the Respondent became a licensed real estate salesperson under License #01 600595. She was authorized to offer services through her affiliation with Exit First Realty.
2. The Respondent understood that a new Exit franchise was going to be opened, Exit Powerhouse, and she would be transferring from Exit First to the new office as soon as it was up and running.
3. In the spring of 2005 the Claimant was trying to sell his home located at 9413 Washington Blvd., Lanham, Maryland, as a “for sale by owner.” The Claimant is a writer who conducts business out of a home office. The Claimant was licensed some time ago as a real estate professional, but by the spring of 2005 he was no longer licensed.
4. The Respondent contacted the Claimant to express her interest in acting as his agent in selling the house. The Claimant was amenable to discussion about such an arrangement and the Respondent, the Claimant, and Ralph Simmons, prospective owner of Exit Powerhouse, met on June 1, 2005.
5. Mr. Simmons was also a real estate salesperson affiliated with Exit First Realty. At the time, he had much more experience in the real estate industry than the Respondent.
6. On June 1, 2005, the Claimant signed a listing agreement. The agreement recited that the broker was Exit Powerhouse Realty. The agreement contained a listing period of June 1, 2005 through August 31, 2005.
7. The Claimant, the Respondent, and Mr. Simmons had conversation that evening about the listing price for the property. They settled upon \$350,900.00, although the Claimant believed

that, given existing market conditions, he should receive offers for more than the listing price. The Respondent and Mr. Simmons brought documents with them on June 1, 2005, already filled out in case the Claimant agreed to be represented by their agency. The listing price on the forms when they arrived was \$359,000.00. The documents were changed with the agreement of both parties to reflect the listing price of \$350,900.00.

8. Exit Powerhouse Realty did not obtain any broker of record until June 14, 2005. That broker was Michael Tarver.

9. The Respondent became licensed under Michael Tarver as Exit Powerhouse's broker on June 15, 2005.

10. On June 15, 2005, the Respondent presented two contract offers to the Claimant. One offer was written by another Exit Powerhouse agent and one was written by the Respondent on behalf of unrepresented buyers – Jose Rodriguez and Berta Garcia. The latter offered \$358,000.00 for the property and had a proposed settlement date of July 15, 2005.

11. The Respondent never presented the potential buyers with an agency disclosure statement advising that her allegiance was to the seller in this transaction. Ms. Garcia did not speak, read, or understand English. Her native language is Spanish.

12. The Claimant accepted the Rodriguez/Garcia offer.

13. About June 16, 2005, the Respondent contacted the Claimant and left a message advising him that she believed the settlement could be moved up to July 1, 2005, and asked if this would be acceptable to the Claimant. The Claimant subsequently had a conversation with the Respondent confirming this information. The Claimant agreed to go to settlement on July 1, 2005.

14. The Respondent never provided any written notice or documentation of the accelerated closing date to the Claimant.

15. In accordance with his expectation that settlement would occur on July 1, the Claimant began making arrangements to move, including ensuring that his business operations would continue as smoothly as possible while he was in transition. This included, among other things, purchasing new business equipment and renting storage space for some of his possessions.

16. The Respondent contacted the Claimant on June 28, 2005, leaving a message reminding him of the settlement set for July 1, 2005.

17. On June 29, 2005, the Respondent contacted the Claimant and told him that the July 1 settlement would have to be postponed because an appraisal of the property found the value to be less than the contract sale price. The Claimant asked for details during this phone call and numerous times over the next month. The Respondent refused to give any information on this appraisal or on one subsequently performed on the property. Her refusal extended as far as denying the Claimant the name of or contact information for the companies that had performed the appraisals. All the Respondent would tell the Claimant was that it was "low."

18. The Respondent never scheduled settlement for July 1, 2005. The Claimant discovered this when he contacted Troese/Hughes Title Company (Troese) to try to get information on when settlement might reasonably take place. Troese personnel advised the Claimant that they had no file on him, the potential buyers, or this transaction. No settlement had ever been scheduled for July 1, 2005, and no settlement was pending so far as Troese was concerned.

19. When the Claimant called the Respondent to discuss this matter, the Respondent advised that she had additional paperwork the Claimant needed to fill out before settlement could take place. About a week later, on July 7, 2005, the property was inspected for termites. Settlement



could not have taken place before the termite inspection was performed under the terms of the contract.

20. On July 8, 2005, the Respondent filled out a work order to have the "For Sale" sign removed from the Claimant's yard. By mid-July, the Claimant had put his "For Sale By Owner" sign back out in the yard.

21. In mid-July the Claimant, concerned about the dearth of information he had regarding the status of the transaction, contacted the buyers directly. The information he obtained led him to believe it was unlikely the buyers could qualify for the mortgage loan.

22. On July 19, 2005, the Claimant faxed a letter to the Respondent expressing his frustration and demanding an immediate status report on (1) why the buyers had not secured financing or (2) why, if they had, the deal had not been consummated and (3) other information. The correspondence emphasized that the Claimant was considering declaring the Garcia/Rodriguez contract null and void as he was entitled to under the contract terms based on their failure to secure financing by a date certain.

23. On July 22, 2005, the Claimant called the Respondent and left a message seeking a status report.

24. On July 25, 2005, the Claimant was contacted by Keith and Natoshia Crockett, who had previously looked at the house on June 6, 2005, and who wished to see the house again.

25. On July 25, 2005, the Claimant faxed a letter to the Respondent declaring the Garcia/Rodriguez contract null and void as of July 26, 2005 at 12:01 a.m., and explicitly releasing any claim on the \$4,000.00 deposit paid by the buyers and instructing the Respondent to release the money to the buyers.

26. The Claimant did not communicate to the Respondent or anyone at Exit Powerhouse that he was directly contacted by or entertaining discussions with the Crocketts or any other potential buyers.

27. On August 2, 2005, the Claimant received a call from a lender advising him that Ms. Garcia (individually) had been approved for a mortgage to purchase his property. The Respondent also called him the same day and left a message to the same effect.

28. On August 6, 2005, the Respondent delivered a letter and accompanying documents to the Claimant. The attachments included an addendum to the original sales contract changing the buyer from Ms. Garcia and Mr. Rodriguez jointly to just Ms. Garcia. The attachments further amended the sales price to \$338,000.00.

29. The Claimant had never been agreeable to such a low price and refused to sign the addenda.

30. After declaring the contract with Garcia/Rodriguez null and void on July 26, 2005, the Claimant entered into a contract with Keith and Natoshia Crockett on July 31, 2005. Under the terms of the contract, the Crocketts agreed to pay \$369,000.00 to purchase the Claimant's home. The parties to that contract went to settlement on August 31, 2005.

31. The Crocketts had first toured the house in June of 2005 and they were extremely interested in buying the property. They attempted to work with the Respondent to make an offer but the Respondent would not return calls or communicate with the Crocketts. The Respondent also failed to return calls of other individual buyers and real estate professionals expressing interest in viewing or purchasing the property.

32. With respect to the Garcia/Rodriguez contract, the Respondent and Exit Powerhouse refused to surrender the \$4,000.00 deposit paid by the buyers back to them, despite a written

release executed by the Claimant. They insisted that the Claimant and the buyers had to sign a general release before the money would be disbursed.

33. The Claimant hired an attorney to advise him on this matter. After negotiation, everybody involved in the transaction signed a release and waiver. The document includes a provision declaring the listing agreement between the Claimant and Exit Powerhouse Realty null and void. It also states that that the Respondent (among others) is released from “any and all responsibility and liability in connection with the Contract of Sale.” REC #4, attachment 14.

34. The deposit was eventually released to Mr. Rodriguez.

35. The Respondent was poorly versed on her duties and responsibilities as a licensed real estate salesperson.

36. On July 22, 2008, the Respondent became licensed as a broker. She is currently the broker of record for Exit Powerhouse Realty.

## **DISCUSSION**

### ***Regulatory charges***

The Commission charged the Respondent with violating several sections of Maryland Real Estate Law. The first charge derives from § 17-310:

§ 17-310. Scope of licenses.

...

(b) *Associate real estate broker or real estate salesperson license.-*

(1) While an associate real estate broker or real estate salesperson license is in effect, it authorizes the licensee to provide real estate brokerage services on behalf of a licensed real estate broker:

(i) who is named in the license certificate of the associate real estate broker or real estate salesperson; and

(ii) with whom the associate real estate broker or real estate salesperson is affiliated.

(2) An associate real estate broker or real estate salesperson license does not authorize the licensee to provide real estate brokerage services on the licensee's

own behalf or on behalf of any person other than a licensed real estate broker named in the license certificate of the associate real estate broker or real estate salesperson.

The Respondent conceded that she had violated this provision and the proof was abundant. On the date she signed a listing agreement with the Claimant, June 1, 2005, and for approximately two weeks afterward she was authorized to offer services only for Exit First Realty. Instead, the listing agreement stated that the broker was Exit Powerhouse. At the time, Exit Powerhouse had no broker of record. I will take up the issue of a proposed penalty after considering each of the administrative charges.

The next charges involve allegations of violating various subsections of § 17-322. The section authorizes reprimanding a licensee, or suspending or revoking a licensee's license for violation of any of the listed subsections. In addition to or in lieu of a reprimand, suspension, or revocation, the REC may impose a \$5,000.00 penalty for each violation of § 17-322. The specific subsections at issue are these:

§ 17-322. Denials, reprimands, suspensions, revocations, and penalties -- Grounds.

....

(b) *Grounds*.--Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

...

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

...

(30) fails to make the disclosure or provide the consent form required by § 17-530 of this title;

...

(32) violates any other provision of this title;

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

The first charged subsection prohibits conduct demonstrating bad faith, incompetence, or untrustworthiness and also prohibits dishonest, fraudulent, or improper dealings. The Respondent's actions in this transaction amply demonstrate, at the least, bad faith, incompetence, untrustworthiness, and dishonest dealings. She had no idea what she was doing as a real estate professional. She was new to the profession, and there is a learning curve to be expected in any new professional endeavor, but according to the Respondent's testimony, she really did not have any professional knowledge at all at a time when she was holding herself out as being capable of taking care of another person's important personal and business interests. The analogy that came to mind was that of a completely inexperienced driver who obtains a learner's permit. While neglecting to learn anything about the mechanics of starting or operating a vehicle and omitting to learn the rules of the road, she started driving on a busy highway relying completely on the assumed skills of the licensed driver in the front passenger seat beside her.

Her testimony was replete with what she did not know and that she relied on the advice and instruction of Mr. Simmons about what she should do. She also blamed the eventual broker of record, Michael Tarver, for being consistently absent and unavailable to her for consultation. She testified that she knew when she was hired by Exit First that it was just a temporary arrangement because Exit Powerhouse was "incubating" at Exit First. She advised that she was unaware that Exit Powerhouse had no broker when she entered into a contract with the Claimant and that she did not know until later that it was necessary for her to change the affiliation on her license certificate so that she could offer services on behalf of Exit Powerhouse.

Aside from the knowledge that she lacked, the Respondent failed in the most basic obligations of honest dealings with her client. The evidence suggests that the Respondent initially believed that the closing on the Claimant's house under the Rodriguez/Garcia contract could be moved up to July 1, 2005. She notified the Claimant of the possibility and obtained his consent, although she did not do either in writing. As the July 1, 2005 date approached, however, it had to be clear to even a very inexperienced real estate salesperson that closing was not going to take place on that day. She made no arrangements with Troese for closing. She had not conveyed any information for Troese to even create a file. The contract of sale required a termite inspection. None had taken place and none was even scheduled until a week after the alleged closing date.

In the meantime, the Respondent turned a blind eye to the fact that the buyers were having real trouble getting financing. The reason had to do with Mr. Rodriguez' inability to show he was legally in the United States. Lenders were unwilling to include his income in deciding whether to give the couple a mortgage. Ms. Garcia alone could not qualify for a mortgage equal to the contract price.

The Respondent ignored calls from other potential buyers and from real estate professionals representing interested potential buyers. She also failed to pursue what might have been a viable back-up offer, the second offer originally presented to the Claimant. Both the Claimant and the Respondent agreed at the hearing that these events occurred at a time when the real estate market was on fire. The Respondent should not have had any difficulty finding a qualified buyer for the asking price or a higher offer.

On July 25, 2005, the Claimant advised the Respondent unequivocally in writing that he was declaring the Rodriguez/Garcia contract null and void as of 12:01 am on July 26, 2005. There is no dispute that he was within his rights to do so under the terms of the contract because financing had not been obtained in a timely fashion. Nevertheless, the Respondent continued to work to advance Ms. Garcia's interest in purchasing the house, even though her financing was for less than the purchase price specified in the contract.

The Claimant also gave unequivocal written instructions for the deposit to be returned to Mr. Rodriguez. The Respondent stated that she initially believed it prudent to check with the Claimant to ascertain the authenticity of the document. Even if I were to accept the premise that she wanted to have direct contact with the Claimant before releasing the deposit, the facts bear out that once she absolutely knew the Claimant authorized and even requested the release of the deposit to the buyers, the Respondent, in concert with Mr. Simmons, refused to turn the money over to Mr. Rodriguez. The \$4,000.00 deposit money was held hostage until all parties signed a general release absolving the named persons and business entity of "any and all responsibility and liability in connection with the Contract of Sale." The REC has proven that the Respondent violated § 17-322(b)(25).

The next subsection of § 17-322 charged by the REC is (30) which provides for discipline if a licensee "fails to make the disclosure or provide the consent form required by § 17-530." Section 17-530 imposes the following responsibility:

§ 17-530. Disclosure of relationship with lessor or seller.

...

(b) *Required.* - (1) A licensee who participates in a residential real estate transaction as a seller's agent, buyer's agent, or as a cooperating agent shall disclose in writing that the licensee represents the seller or lessor or the buyer or lessee.

(2) The disclosure shall occur not later than the first scheduled face-to-face contact with the seller or lessor or the buyer or lessee.

(3) (i) In any residential real estate transaction involving a cooperating agent as defined in this section, it shall be the obligation of the cooperating agent to make the written disclosure to the buyer or lessee required under this section.

(ii) In any residential real estate transaction that does not involve a cooperating agent as defined in this section, it shall be the obligation of the seller's agent, as defined in this section, to make the written disclosure to the buyer or lessee required under this section.

In other words, the Respondent was required to notify Mr. Rodriguez and Ms. Garcia in writing that she represented the seller (the Claimant). She failed to do so. The evidence showed that Ms. Garcia did not speak English. In dealing with buyers who did not have the benefit of being represented by a real estate professional, and particularly with one party who could not speak, read, or understand spoken English, it was imperative that the Respondent ensure, by following the plain language of the statute, that she clearly told the buyers in writing that she was not guarding their interests, but rather she was guarding the interests of the Claimant. The REC has proven that the Respondent violated § 17-322(b)(30).

The REC also charged the Respondent with violating § 17-322(b)(32), which prohibits violating any other provision of the subtitle not enumerated in § 17-322(b). The Respondent's violation of § 17-310, discussed above, qualifies. Her failure to adhere to the limitations contained in her license certificate constitutes a violation of this subsection.

The last charge by the REC under § 17-322 is that the Respondent violated subsection (33). This subsection makes violation of any regulation adopted under the subtitle or violation any provision of the code of ethics grounds for discipline and/or a fine. The Respondent was charged with violating both a regulation under the subtitle and a provision of the code of ethics.



Specifically, the Respondent was charged with violating COMAR 09.11.01.07, which reads as follows:

**.07 Records of Transactions.**

Licensees shall maintain adequate records of all real estate transactions engaged in by them as licensed real estate brokers or salesmen. If a licensee has custody or possession of money belonging to others, in the absence of proper written instructions from the parties involved in the transaction to the contrary, these funds may not be intermingled with funds belonging to the licensee, but rather they shall be deposited and retained as required in a non-interest-bearing escrow account clearly designated as containing funds held for others. The records of transactions, including bank accounts or deposits referred to in these regulations, shall be available during usual business hours for inspection by the Commission, its field representatives, or other employees.

I do not find the Respondent to have violated this regulation. This was charged in a sort of alternative pleading by the REC. It alleged that the Respondent failed to generate certain necessary paperwork, such as the disclosure to the buyers discussed above, or documentation regarding the accelerated closing date. In the alternative it was alleged that she kept inadequate records because she could not produce the documents to the REC when requested to do so. I find that she never created the documents. The problem was not in the record-keeping.<sup>6</sup>

Finally, the Respondent was charged with violating COMAR 09.11.02.02A, a provision in the Maryland real estate code of ethics regulating relations with the real estate professional's client. It requires that "[i]n 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." The discussion above highlights some of the many ways the

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<sup>6</sup> It could be argued that the failure to create required documents is a "failure to maintain adequate records." I am not so finding here because of the way that the Statement of Charges and Order for Hearing was structured. To me it offered a choice between finding that the Respondent (1) failed to create the documents or (2) created the documents and failed to appropriately maintain them so they could be produced at a later date. I find that she never created the documents and have drawn my conclusions of law accordingly.

Respondent violated this provision of the code of ethics. Her violation of the code of ethics is subject to sanction pursuant to § 17-322(b)(33).

The Respondent violated four subsections of § 17-322. Each subjects her to being reprimanded or to having her license suspended or revoked. § 17-322(b). Further, § 17-322(c) provides for the imposition of monetary penalties as follows:

(c) *Penalty.* – (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.

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

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

The REC recommended a reprimand and a monetary penalty in the amount of \$5,000.00. The REC observed that it might otherwise have sought a suspension, but the Respondent's current position as broker of record for Exit Powerhouse would likely result in many people associated with the agency being injured if the Respondent's license were suspended. The REC emphasized the Respondent's willingness to engage in business without the knowledge necessary to do it correctly. She blamed Mr. Simmons for telling her the wrong thing to do and she blamed Mr. Tarver for not being around to tell her what to do. There was no evidence of the Respondent having any other violations of Maryland real estate laws, regulations, or the code of ethics.

The Respondent emphasized that in the intervening five years she has not had any complaints or disciplinary action. She also addressed the REC's argument that she was not accepting responsibility for her errors by saying that she was offering her interaction with Simmons and her lack of interaction with Tarver as explanations for what happened, not excuses

to absolve her of responsibility. She acknowledged that a reprimand might be appropriate, but argued that a \$5,000.00 fine was unduly harsh and inappropriate. The Respondent did not believe any monetary penalty was warranted but at the very least sought an unspecified reduction from the \$5,000.00 suggested by the REC.

A reprimand is appropriate and not truly disputed by the Respondent. Based on all the evidence, I find that a monetary penalty is also warranted. The Respondent showed so little respect for the real estate profession and for the Claimant's interests in this case, that something other than a reprimand is necessary to penalize the Respondent. Even giving allowance for her being brand new to the industry, which might excuse some of the mistakes, she would have done a far better job if she had even once read what the law required, or what the regulations said. She was not honest with her client. She certainly was not looking to protect his interests. When she was not actually providing him with information she knew to be false, she was keeping him in the dark when she owed him a duty to promote his interest and to act with absolute fidelity to him. It appears that she held Ms. Garcia's interests more dearly than the Claimant's, and at the end, when she would not release the deposit money until there was a general release, she was putting her own interests over those of the Claimant. Her violations were serious and showed a lack of good faith. The possible monetary penalty could be \$20,000.00 - \$5,000.00 for each of the subsections of § 17-322 violated. In view of her good record in the intervening five years, \$5,000.00 seems reasonable and appropriate.

***Fund Claim***

Claims for reimbursement from the Fund are governed by § 17-404, which states, in pertinent part:

**§ 17-404. Claims against the Guaranty Fund.**

(a) *In general.* -- (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:

...

3. a licensed real estate salesperson;

...

(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.

With respect to claims against the Fund, COMAR 09.11.03.04 further provides as follows:

**.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 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.

COMAR 09.11.01.18 additionally addresses the issues surrounding recovery 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 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.

The Claimant bears the burden of proof in his case against the Fund. § 17-407(e). He initially filed a claim for \$6,417.00. That included the following items:

\$1,080.00	Legal fees
\$ 227.00	Bridge Loan Payment
\$2,163.00	One month's mortgage payment
\$1,637.00	Mobile office equipment
\$1,310.00	Storage rental fees for October 2005 through February 2006

He later sought to amend his claim, seeking an additional \$4,000.00. The added \$4,000.00 represented the deposit that the Claimant at some point came to believe the Respondent should be responsible for paying twice – once to the buyers and once to the Claimant based on her allegedly shabby treatment of both.

Addressing the added \$4,000.00 first, the Claimant is not entitled to that money. Whatever the terms of the original contract for sale between Rodriguez/Garcia and the Claimant may have said about how that money was to be disbursed if the sale fell through, the Claimant made a crusade out of seeing that the money was returned to the buyers. He authorized, requested, demanded, and then hired an attorney to assist in ensuring that the money was given to Mr. Rodriguez. If the Claimant was entitled to that money at some point, he nevertheless

insisted on giving it away. He cannot be heard to now assert that it is an actual loss to him reimbursable through the Fund.

The Respondent is further not entitled to any recovery from the Fund on his original claim. Firstly, he suffered no actual loss on the balance of the transaction. The Respondent's ineptitude in handling the sale of the Claimant's house may or may not have caused the Claimant to spend monies that he might otherwise not have spent; however, the sale fell through and the Claimant lost no time in negotiating for the sale of his house while the exclusive listing agreement with the Respondent was arguably still in effect and with buyers who first viewed the house while the listing agreement was clearly in force and effect. He sold the house for \$11,000.00 more than the Rodriguez/Garcia contract, an amount that exceeds the \$6,417.00 he claimed to have lost even without consideration of the lesser commission he was likely to have paid under the Crockett contract.

Beyond that, a number of the items claimed by the Respondent do not fit the definitions in the statutes and regulations governing recovery from the Fund as quoted above. Some of the claimed losses also defy logic. For example, the Claimant complained that he lost the opportunity to purchase his chosen home due to this deal falling through. There was no testimony that he moved or lived elsewhere during the month of July. He lived in his own house and he paid his mortgage payment. Although it is not what the Claimant would have preferred, it is not a loss to him. He would have had to pay to live somewhere. This is not an "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." COMAR 09.11.03.04B(1).

As another example, the Respondent claimed storage area rental fees for October 2005 through February of 2006. He hoped to close July 1, 2005. He instead closed at the end of August. Yet he believes the Respondent is responsible for storage fees accruing months later and lasting for five months. He bought over \$1,600.00 worth of mobile office equipment including a new computer and a new printer. The Claimant testified that this was necessary to keep his business open. Again, this is not an “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.” COMAR 09.11.03.04B(1). The Claimant had the benefit of all the new computer equipment. These types of expenditures are not appropriate for Fund compensation.

And finally, the Claimant, at a point in time when he was represented by an attorney, negotiated the terms of the general release signed by all parties to the original listing agreement and to the Rodriguez/Garcia contract to purchase the Claimant’s home. In addition to securing the release of the deposit money to the buyers, the Claimant’s attorney also negotiated for the release to contain an added clause voiding the listing agreement. The Claimant desired that clause because he had, unbeknownst to the Respondent, already not only agreed to sell his home to the Crocketts, he had also accepted a back-up contract for the sale of this house as a for sale by owner. In the negotiated release, the Claimant absolved the Respondent of “any and all responsibility and liability in connection with the Contract of Sale.” Given the blanket general release, it seems disagreeable at best for the Claimant to make a claim against the Fund relying solely on the Respondent’s conduct and knowing full well that if he succeeded the Respondent would be required to reimburse the Fund in order to keep her license in good standing. The Fund was not a party to the general release. However, the Claimant, who previously was licensed as a

real estate professional, understands how this would play out and how it would, in effect, end run the release.

For all these reasons I recommend that no award be made to the Claimant from the Fund.

The Claimant expressed frustration that others participating in the hearing did not fully understand his business and its needs. He also advised that the failure to sell his home as expected based on the Respondent's representations caused him to lose business and ruined an opportunity he had been nurturing for many years to write a book on a particular topic which he had researched extensively. These losses were not proven, but even if they had been, they would not be compensable under the statutes and regulations governing recovery from the Fund.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Real Estate Commission demonstrated by a preponderance of the evidence that:

1. The Respondent violated § 17-310(b) by acting outside the scope of her license in purporting to offer services on behalf of an agency that had no broker and that was not named in her license certificate. This also constitutes a violation of § 17-322(b)(32).
2. The Respondent violated § 17-322(b)(25) by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings, including but not limited to failing to advise the Claimant that no settlement had ever been scheduled for July 1, 2005, failing to provide him with accurate information regarding appraisals that were done on his property, failing to pursue viable buyers when the original contract was no longer in effect, and putting her own interests and the interests of an unrepresented buyer ahead of the interests of her client.



3. The Respondent violated § 17-322(b)(30) by failing to make the disclosure or provide the consent form required by § 17-530 to Mr. Rodriguez and Ms. Garcia, unrepresented buyers trying to purchase the Claimant's property.
4. The Respondent violated § 17-322(b)(33) by violating a provision of the code of ethics, specifically COMAR 09.11.02.01, that requires the Respondent to protect, promote, and observe absolute fidelity to the interests of the Claimant.
5. The Respondent violated section § 17-530 by failing to disclose in writing to the buyers her relationship with the Claimant.
6. The Respondent did not violate COMAR 09.11.01.07 by failing to maintain adequate records of the real estate transaction at issue.
7. The Respondent is subject to sanctions for her conduct, and a reprimand and a \$5,000.00 civil penalty are appropriate sanctions. § 17-322(c).
8. The Claimant did not suffer an actual monetary loss compensable by the Fund as a result of the conduct of the Respondent. § 17-404(a); COMAR 09.11.03.04; COMAR 09.11.01.18.

### **RECOMMENDED ORDER**

I THEREFORE RECOMMEND that the Maryland REC:

**ORDER**, that the Respondent be reprimanded; and further

**ORDER**, that the Respondent pay a civil penalty of \$5,000.00; and further

**ORDER**, that the Claimant not be awarded any money from the Fund; and that it further

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

June 4, 2010  
Date Decision Mailed

ADMINISTRATIVE LAW JUDGE'S SIGNATURE  
APPEARS ON ORIGINAL ORDER

Kimberly A. Farrell  
Administrative Law Judge



KAF  
Doc #113502