BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION	*	
	*	**CASE NO. 2019-RE-258**
v.	*	**OAH NO. DOL-REC-24-22-08246**
CATHERINE FLEISHMAN, Respondent	*	
and	*	
IN THE MATTER OF THE CLAIM OF GHASSAN GHAIDA AGAINST THE MARYLAND REAL ESTATE COMMISSION GUARANTY FUND	*	

* * * * * * * * * * * * * *

PROPOSED ORDER

The Proposed Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated January 18, 2023, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 27 day of March, 2023, hereby **ORDERED**:

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

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

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

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

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties

adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 1100 N. Eutaw Street, Baltimore, MD 21201. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

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

MARYLAND REAL ESTATE COMMISSION

3/27/2023
Date

By: SIGNATURE ON FILE

MARYLAND REAL ESTATE	*	**BEFORE STEPHEN W. THIBODEAU,**
COMMISSION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
CATHERINE FLEISHMAN,	*	**OF ADMINISTRATIVE HEARINGS**
RESPONDENT	*	
AND	*	
THE CLAIM OF GHASSAN GHAIDA,	*	
CLAIMANT,	*	
AGAINST THE MARYLAND	*	
REAL ESTATE COMMISSION	*	**OAH No.: LABOR-REC-24-22-08246**
GUARANTY FUND	*	**MREC No.: 2019-RE-258**

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about October 27, 2018, Ghassan Ghaida (Claimant) filed a complaint (Complaint) against Catherine Fleishman, a licensed real estate broker (Respondent), for alleged violations of the Maryland Real Estate Brokers Act (Act), Md. Code Ann., Bus. Occ. & Prof. §§ 17-101 to -702 (2018 & Supp. 2022), and the provisions at Code of Maryland Regulations (COMAR) 09.11.02, enacted under the Act.

The Claimant also filed a claim (Claim) with the Maryland Real Estate Commission's (REC or MREC) Guaranty Fund (Fund) to recover compensation of $35,000.00 for an alleged actual loss resulting from an act or omission of the Respondent.

On April 5, 2022, after an investigation, the REC issued a Statement of Charges (Charges) against the Respondent. The REC further determined that the Claimant was entitled to a hearing to establish eligibility for an award from the Fund. Accordingly, the REC ordered a combined hearing on the Charges and the Claim and, on April 28, 2022, forwarded the case to the Office of Administrative Hearings (OAH) to conduct a hearing. Bus. Occ. & Prof. § 17-409 (2018).

On August 23, 2022 and October 21, 2022, I held a hearing by video. Bus. Occ. & Prof. §§ 17-324(a), 17-408(a) (2018); COMAR 28.02.01.20B(1)(b). Andrew J. Brouwer, Assistant Attorney General, Maryland Department of Labor (Department), represented the REC on the charged violations of law. Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. Brian E. Barkley, Esquire, represented the Respondent, who was present.

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

ISSUES

1. Did the Respondent violate Section 17-322(b)(2) of the Act by fraudulently or deceptively using her license?

2. Did the Respondent violate Section 17-322(b)(22) of the Act by failing to account for or remit promptly any money that came into her possession but belonged to another person?

3. Did the Respondent violate Section 17-322(b)(25) of the Act by engaging in conduct that demonstrated bad faith, incompetency, or untrustworthiness or that constituted dishonest, fraudulent, or improper dealings?

4. Did the Respondent violate Section 17-322(b)(32) of the Act by violating another provision of the Act, including her duties to her client to treat all parties to a transaction honestly and fairly and all answer all questions truthfully and exercise reasonable care and diligence, as required by Section 17-532(b) of the Act?

5. Did the Respondent violate Section 17-322(b)(33) of the Act by violating any regulation adopted under the Act or any provision of COMAR 09.11.02 ("the Code of Ethics"), including COMAR 09.11.02.01 governing relations to the public, and COMAR 09.11.02.02, governing relations to the client?

6. If so, what is the appropriate sanction?

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

8. If so, what amount should be awarded to the Claimant from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the REC:

MREC Ex. 1 - Statement of Charges and Order for Hearing, April 5, 2022

MREC Ex. 2 - Notice of Remote Hearing, April 19, 2022

MREC Ex. 3 - REC Licensing and Registration History for the Respondent, printed May 31, 2022

MREC Ex. 4 - REC Licensing and Registration History for the Respondent's real estate brokerage, Metropolitan Realty Marketing, Inc. (MRMI), printed May 31, 2022

MREC Ex. 5 - REC Report of Investigation, January 5, 2021, with the following attachments:

- REC Complaint filed by the Claimant, October 27, 2018 (pgs. 1-1 to 1-30)
- Memorandum of Understanding (MOU) between the Claimant and the Respondent, February 21, 2017 (pg. 2-1)
- Promissory Note, October 23, 2017 (pgs. 3-1 to 3-3)
- Email between the Respondent and Diane Carson, December 4, 2020 (pg. 4-1)
- Motor Vehicle Administration Record Search for the Respondent, November 16, 2020 (pg. 5-1)
- Letter to the Respondent from the REC, March 28, 2019 (pg. 6-1)
- Notice of Complaint sent to the Respondent, May 6, 2019 (pgs. 7-1 to 7-2)
- Respondent's Response to the Notice of Complaint, May 21, 2019 (pgs. 8-1 to 8-9)
- Licensing History for Respondent's REC License Number 03-574983, printed December 23, 2020 (pgs. 9-1 to 9-3)
- Licensing History for Respondent's REC License Number 01-5516, printed December 23, 2020 (pgs. 10-1 to 10-3)
- Licensing History for Respondent's REC License Number 01-5822, printed December 23, 2020 (pgs. 11-1 to 11-3)
- Licensing History for Respondent's REC License Number 03-17497, printed December 23, 2020 (pgs. 12-1 to 12-3)
- Licensing History for Respondent's REC License Number 01-6100, printed December 23, 2020 (pgs. 13-1 to 13-3)
- Licensing History for Respondent's REC License Number 03-6195, printed December 23, 2020 (pgs. 14-1 to 14-3)
- Licensing History for Respondent's REC License Number 01-6228, printed December 23, 2020 (pgs. 15-1 to 15-3)
- MREC Complaint Information against the Respondent for Complaint 2017 REC 557, printed December 23, 2020 (pgs. 16-1 to 16-4)
- MREC Complaint Information against the Respondent for Complaint 2018 REC 96, printed December 23, 2020 (pgs. 17-1 to 17-4)
- MREC Complaint Information against the Respondent for Complaint 2018 REC 646, printed December 23, 2020 (pgs. 18-1 to 18-3)
- MREC Complaint Information against the Respondent for Complaint 2020 REC 646, printed December 23, 2020 (pgs. 19-1 to 19-4)
- Maryland Judiciary Case Search Printout for Circuit Court of Montgomery County, Case #104585F, printed October 28, 2020 (pg. 20-1)
- Maryland Judiciary Case Search Printout for Circuit Court of Montogmery County, Case #113234R, printed October 28, 2020 (pgs. 21-1 to 21-2)
- Maryland Judiciary Case Search Printout for Circuit Court of Montgomery County, Case #422750V, printed October 28, 2020 (pg. 22-1)
- Maryland Judiciary Case Search Printout for Circuit Court of Montogmery County, Case #98980F, printed October 28, 2020 (pg. 23-1)

- Maryland Judiciary Case Search Printout for Circuit Court of Montgomery County, Case #124389R, printed October 28, 2020 (pgs. 24-1 to 24-2)
- Maryland Judiciary Case Search Printout for Circuit Court of Montgomery County, Case #136969R, printed October 28, 2020 (pgs. 25-1 to 25-2)
- Maryland Judiciary Case Search Printout for Circuit Court of Montgomery County, Case #466705V, printed October 6, 2020 (pgs. 26-1 to 26-33)
- Email Chain between the Respondent and Diane Carson, December 29, 2020 (pg. 27-1)
- Email Chain between the Respondent and Diane Carson, December 29, 2020 (pg. 28-1)
- Letter from Phoenix Strategic Acquisition to MRMI, July 21, 2017 (pg. 29-1)
- SunTrust Bank Receipt and Copy of Cancelled Check, December 29, 2020 (pgs. 30-1 to 30-2)
- Receipt from SunTrust Bank, printed December 29, 2020 (pg. 31-1)
- Statement of Escrow Account for Metropolitan Realty Marketing, Inc., February 2017 (pg. 32-1)
- Email from Diane Carson to the Respondent, January 3, 2021 (pg. 33-1)
- "List of holding companies" from www.wikipedia.org, printed January 4, 2021 (pgs. 34-1 to 34-6)
- Profile of Phoenix Strategy Investments from www.mergr.com, printed January 4, 2021 (pgs. 35-1 to 35-2)
- Email from Diane Carson to Phoenix Strategic Acquisition, January 4, 2021 (pg. 36-1)

MREC Ex. 6 - MREC Addendum to Investigation, January 14, 2021, with the following attachments:

- Email from the Respondent to Diane Carson, January 6, 2021 (pg. 1-1)
- Letter from Phoenix Strategic Acquisition to MRMI, July 21, 2017 (pg. 2-1)
- Memorandum of Understanding between the Claimant and the Respondent, February 21, 2017 (pgs. 3-1 to 3-3)
- Email Chain between Diane Carson and Phoenix Acquisition, January 4-7, 2021 (pgs. 4-1 to 4-3)

MREC Ex. 7 - MREC Addendum to Investigation, May 31, 2022,[1] with the following attachments:

- Additional Documents submitted by the Claimant to the REC, various dates (pgs. 1-1 to 1-29)
- Multiple Listing Service (MLS) Listing for 8612 Vintage Earth Path, Laurel, Maryland, printed May 27, 2022 (pgs. 2-1 to 2-4)
- MLS Listing for 6152 Michener Drive, Haymarket, Virginia, printed May 27, 2022 (pgs. 3-1 to 3-2)
- Subpoena issued to SunTrust Bank by the REC, August 10, 2021 (pg. 4-1)
- Subpoena request by the REC, September 17, 2021 (pgs. 5-1)

[1] MREC Exhibit 7 has a date of May 31, 2021. However, Diane Carson, Investigator for the REC, testified that this was a typographical error and the actual date of the addendum was May 31, 2022.

- SunTrust Response to the REC subpoena, with attachments, September 21, 2021 (pgs. 6-1 to 6-11)
- Maryland Department of Assessments and Taxation (SDAT) Response to REC Request for Records, with attachments, April 4, 2022 (pgs. 7-1 to 7-22)

MREC Ex. 8 Letter and Proposed Order from the REC in REC Case #64-RE-2020, May 27, 2022

I admitted the following exhibits offered by the Claimant, except as otherwise noted:

Clmt. Ex. 1 - (Not offered)

Clmt. Ex. 2 - Email Chain between the Claimant and the Respondent, February 20, 2017 through April 10, 2017, with attachments

Clmt. Ex. 3 - Email Chain between the Claimant and the Respondent, May 12, 2017 through July 13, 2017

Clmt. Ex. 4 - Email from the Respondent to the Claimant, July 7, 2017, with attached MLS listing

Clmt. Ex 5 - Email Chain between the Claimant and the Respondent, July 21, 2017 through September 7, 2017

The Respondent did not offer any exhibits.

Testimony

The REC presented the testimony of the Claimant and Diane Carson, Investigator for the REC.

The Claimant testified in his own behalf and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was licensed by the REC as a real estate broker, both individually and as part of her real estate brokerage, Metropolitan Realty Marketing Incorporated (MRMI).

2. On February 21, 2017, the Respondent, through MRMI, entered into a Memorandum of Understanding (MOU) with the Claimant.

3. The MOU provided that MRMI was the "Listing Broker" or "Introducing Broker" and the Claimant was the "Purchaser."

4. The terms of the MOU established conditions for the Claimant to purchase real estate owned (REO) property under $500,000.00 to be rehabbed and resold as part of MRMI's "investor program."

5. Under the MOU, the Claimant was given the opportunity to review a list of suitable REO properties from a master "bank tape" and choose a suitable property for purchase.

6. As part of the MOU, the Claimant chose one of the REO properties to purchase, specifically 6152 Michener Drive, Haymarket, Virginia, 20169 (Michener Property).

7. The MOU required the Claimant to make a reservation deposit of $35,000.00 to MRMI's escrow account in order to purchase the Michener Property. Once a final purchase price on the Michener Property was determined, the Claimant would remit the remaining amount of the purchase price via wire transfer, less the $35,000.00.

8. The MOU provided that once the Michener Property was purchased, renovated, and resold, the Claimant would receive sixty percent of the profits minus costs, and MRMI would receive forty percent.

9. The MOU provided two remedies to the Claimant in the event the Michener Property was no longer available for sale from the REO bank tape. The Claimant could either apply his deposit to another property on the REO bank tape of an equal value or could request a full refund of his $35,000.00.

10. The MOU provided that if the Claimant requested a refund, his money would be refunded within ninety to one hundred and twenty business days of his refund request.

11. The MOU also included the following statement, in boldface type and capital letters: "**WARNING: RISK AND INVESTMENT RETURNS ARE NOT GUARANTEED.**" The Respondent never explained to the Claimant that this could include the full loss of his $35,000.00.

12. Per the terms of the MOU, on February 21, 2017, the Claimant transferred $35,000.00 to MRMI's escrow account.

13. Two days later, on February 23, 2017, MRMI wired $35,000.00 from its escrow account to Zachman Holdings (Zachman), an entity unknown to the Claimant. The Respondent signed the wire transfer order. Zachman was not a party to the MOU.

14. Zachman shared a business address with MRMI. Zachman was also known as Zachman Properties, and the Respondent served as the resident agent of Zachman Properties.

15. On March 31, 2017, the Michener Property was sold to another party. As a result, the Claimant contacted the Respondent on April 9, 2017, to find an alternative property that the Claimant could close on by April 21, 2017. Otherwise, the Claimant requested a refund of his $35,000.00.

16. No property suitable for closing by April 21, 2017 was available. As a result, the Claimant pursued a refund of his $35,000.00.

17. The parties corresponded via email between May and June 2017 regarding the status of the Claimant's refund. The Respondent told the Claimant he could expect a refund sometime between July 8 and August 7, 2017.

18. Despite the request for a refund, the Respondent attempted to interest the Claimant in a replacement property to invest in. On July 7, 2017, the Respondent forwarded another REO from the bank tape, 8612 Vintage Earth Path, Laurel, Maryland 20723 (Vintage Earth Property).

19. The Claimant had no interest in the Vintage Earth Property and continued to ask for a refund of his deposit.

20. On July 21, 2017, the Respondent emailed the Claimant stating she was working on getting his refund. Attached to her email was a letter dated July 21, 2017 from Alex Marsh of Phoenix Strategic Acquisition (Phoenix). The letter acknowledged that a request for a refund of the Claimant's deposit was being processed and a refund would be issued no later than August 9, 2017.

21. Phoenix was unknown to the Claimant. Phoenix was also not a party to the MOU, and Phoenix did not have the Claimant's deposit money, as Zachman held the Claimant's money and did not transfer the money to Phoenix.

22. To date, it is unknown whether Phoenix was a legitimate business or otherwise exists.

23. On August 10, 2017, the Respondent forwarded the Claimant a copy of a letter she wrote to Phoenix requesting a refund for the Claimant. The letter was written on MRMI letterhead.

24. The Claimant never received any money from Phoenix.

25. On October 23, 2017, the Respondent executed a "Promissory Note" on behalf of MRMI for $35,000.00 for the Claimant.

26. To date, the Claimant has not received $35,000.00 from MRMI or Zachman.

27. On December 17, 2017, the Claimant filed suit against the Respondent and MRMI in the Circuit Court of Fairfax County, Virginia in the amount of $35,000.00 for breach of contract, negligence, and civil fraud, an intentional tort.

28. The Virginia lawsuit alleged that the Respondent committed fraud when she told the Claimant she would retain the Claimant's $35,000.00 in MRMI's escrow account with no

intention to retain said money and knowing that representation to be false. The lawsuit further alleged that the Claimant relied on that representation when he deposited $35,000.00 with MRMI.

29. On July 20, 2018, the Circuit Court of Fairfax County, Virginia entered a default judgment against the Respondent and MRMI and awarded the Claimant $35,000.00 in compensatory damages and an additional $10,000.00 in punitive damages for the fraud claim.

30. To date, the judgment has not been satisfied.

31. The Respondent's REC broker license was suspended for a period of twelve months in 2022 because of REC case number 646-RE-2020. That case involved findings regarding the Respondent's mishandling of an earnest money deposit.

DISCUSSION

Regulatory Charges

The REC charged the Respondent with violating subsections 17-322(b)(2), b(22), b(25), b(32), and (b)(33) of the Business Occupations Article; 17-532(b) of the Business Occupations Article; and subsections 09.11.02.01C and 09.11.02.02A of COMAR. Section 17-322 of the Business Occupations Article provides, in pertinent part:

> (b) 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:
>
> . . .
>
> (2) fraudulently or deceptively uses a license;
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> . . .
>
> (22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person;
>
> . . .
>
> (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;

. . .

Bus. Occ. & Prof. § 17-322(b) (Supp. 2022).

Section 17-532 of the Business Occupations Article provides, in pertinent part:

(b)(1) A licensee shall:

. . .

(iv) treat all parties to the transaction honestly and fairly and answer all questions truthfully;

(vi) exercise reasonable care and diligence.

Bus. Occ. & Prof. § 17-532(b) (Supp. 2022).

COMAR 09.11.02.01 provides, as pertinent here:

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

Finally, COMAR 09.11.02.02 provides, as pertinent here:

A. 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.

When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim. State Gov't § 10-217 (2021); COMAR 28.02.01.21K. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

In this case, the REC bears the burden to prove by a preponderance of the evidence that the Respondent committed the violations alleged in the Charges. COMAR 28.02.01.21K(1), (2)(a).

1. 17-322(b)(2) charge (Fraudulently or deceptively using a license)

At the hearing, the Respondent maintained she did not act fraudulently or deceptively in using her REC broker's license in her dealings with the Claimant. Indeed, for the first time at any point during the REC's investigation of this case, the Respondent stated that she was also a victim of fraud as part of the transaction with the Claimant. The Claimant testified that a longtime friend, Maryann Manuel, introduced her to the concept of buying REO properties through a master tape of properties, and put her in touch with GKL Properties. The Respondent never mentioned GKL Properties to either the REC or the Claimant prior to the hearing. Moreover, the Respondent attempted to get Ms. Manuel to testify at the hearing, but was told by Ms. Manuel's attorney she would not be able to testify because Ms. Manuel was currently under federal investigation in relation to a similar scheme with GKL Properties. The Respondent maintained she was wholly unaware of Ms. Manuel's and GKL's schemes, and therefore, was also a victim of fraud along with the Claimant.

The Respondent's story is unpersuasive. The first time the Respondent even mentioned Ms. Manuel or GKL during the REC's investigation of this case was at the hearing. The REC was unaware of Ms. Manuel or GKL, despite a thorough investigation by the REC's investigator, Diane Carson, including several interviews with the Respondent. Even the mention of GKL Properties, a previously unknown entity, clouds the Respondent's credibility. This would constitute a third entity besides MRMI involved with the Claimant's transaction in addition to Zachman, who ultimately received the Claimant's deposit and never returned it, and Phoenix, who the REC cannot confirm exists.

The evidence of the Respondent's fraudulent or deceptive use of her license, on the other hand, is convincing. The Respondent used her license to enter into the MOU with the Claimant and persuaded the Claimant to deposit $35,000.00 in MRMI's escrow account, with the understanding that the money would be used towards the purchase of an appropriate REO property. The MOU specifically noted the Michener Property. Yet two days after the deposit, the Respondent transferred $35,000.00 from MRMI's escrow account to Zachman.

While there is no "smoking gun" to show the Respondent personally kept the money, she was the resident agent for Zachman, and is the only known person connected with Zachman on the record before me. When the Claimant requested a refund of his deposit per the terms of the MOU, the Respondent stated that the Claimant would need to get the money from Phoenix, even though there is no record the money went to Phoenix, or that Phoenix was a legitimate enterprise. Once no money came from Phoenix, the Respondent created a bogus "promissory note" indicating that MRMI would be responsible for paying the deposit back to the Claimant. After all of that, the Claimant still did not receive his money, and was forced to file a lawsuit in Virginia. Ultimately, the court in Virginia found in the Claimant's favor as part of a default judgment, including but not limited to a finding that the Respondent committed fraud against the Claimant. As of the hearing, the Claimant had not received his deposit money back.

In Maryland, a claim of fraud requires a showing that the person made a false representation, with either knowledge of the falsity or reckless indifference as to its truth, for the purposes of defrauding the other party, and the other party reasonably relied upon the false representation and had the right to do so. *See Moscarillo v. Prof'l Risk Mgmt. Servs., Inc.*, 398 Md. 529, 544 (2007). The Claimant's complaint in Virginia on the fraud count suggests the definition of fraud in Virginia is similar.

While not binding, the default judgment the Claimant obtained against the Respondent on the fraud count, including an award of $10,000.00 in punitive damages, is strong evidence that the Respondent used her license to defraud the Claimant.

Of course, the REC's charge does not require a finding of fraud. Mere deceptive use of the Respondent's license suffices. Here, there is no doubt the Respondent used her license in a deceptive way. At a minimum, the Respondent never told the Claimant his money would be transferred to Zachman, an entity he had no knowledge of, or that the risk of losing his investment under the MOU could include his deposit, which under the MOU's terms would be refunded if he requested such a refund. Simply stated, the Respondent engaged in a pattern of deception with respect to the Claimant's $35,000.00, with scant evidence she ever intended to refund the money, other than her own testimony that she used her best efforts to get it back.

2. <u>17-322(b)(22) charge (Failing to account for or remit money coming into possession of the licensee but belonging to another person)</u>

For the same reasons cited above on the 17-322(b)(2) charge, the REC met its burden to show that the Respondent failed to account for or remit money that came into the Respondent's possession but rightfully belonged to the Claimant. The Respondent testified as much at the hearing, stating that to her knowledge, she currently does not know the status of the Claimant's deposit money. Even so, the Respondent did transfer the money out of MRMI's escrow account to Zachman without the Claimant's knowledge. Under the terms of the MOU, the $35,000.00 rightfully belonged to the Claimant at the point he requested a refund, and the Respondent did not remit it or otherwise account for it.

3. <u>17-322(b)(25) charge (Conduct demonstrating bad faith, incompetency, or untrustworthiness)</u>

As the Respondent engaged in fraud or deception to obtain the Claimant's $35,000.00, it follows that those actions demonstrated, at a minimum, that the Respondent is untrustworthy. Indeed, while the Respondent did not concede acting in bad faith or being untrustworthy, she conceded that her actions could be viewed as incompetent in line with her duties as a real estate broker. In any event, the REC need only show the Respondent in engaged in any course of conduct that constitutes bad faith, incompetency, or untrustworthiness. As a result, the REC met its burden as to this charge.

4. 17-322(b)(32) charge (Violation of another section of the Act by violating Section 17-532(b) of the Act requiring honest and fair treatment of all parties to a transaction and exercising reasonable care or diligence)

As evidenced above, the Respondent did not treat the Claimant honestly or fairly, or exercise reasonable care or diligence in her transactions with the Claimant. If she had, the Respondent would have been forthright about the transfer of the Claimant's $35,000.00 out of MRMI's escrow to Zachman, informed the Claimant of the existence of Zachman, tracked where the Claimant's money went, and promptly returned the Claimant's money when it was requested pursuant to the MOU. None of those things occurred. As a result, she did not treat the Claimant honestly or fairly, or act with reasonable care or diligence.

5. Alleged COMAR Violations

The REC charged the Respondent with violating two sections of COMAR: 09.11.02.01C and 09.11.02.02A. These charges are brought through subsection 17-322(b)(33) of the Business Occupations Article, which allows for charges for violations of applicable regulations and the REC licensee's code of ethics.

Pursuant to COMAR 09.11.02.01C, the REC argues that the Respondent failed to protect the public against fraud, misrepresentation, or unethical practices in the real estate field primarily because she herself engaged in such practices. Indeed, the Respondent's conduct constituted

fraud or misrepresentation in relation to the Claimant. As a result, she failed to protect the public from such practices. Therefore, the REC has met its burden with respect to demonstrating the Respondent violated COMAR 09.11.02.01C.

In addition, the REC charged the Respondent with violation of COMAR 09.11.02.02A, in particular the provision that she engaged in conduct that failed to promote and protect the interests of the Claimant. Once again, by obtaining the Claimant's $35,000.00 and failing to remit that money in a timely fashion, or otherwise protect that money in MRMI's escrow account, the Respondent did not protect the interests of the Claimant, and the REC established the Respondent violated COMAR 09.11.02.02A.

I conclude that the Respondent violated the statutes and regulations charged, and I will address sanctions as follows.

Disciplinary Sanctions

Section 17-322(c) of the Act provides as follows:

> (c)(1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding $5,000 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.
>
> (3) The Commission shall pay any penalty collected under this subsection into the General Fund of the State.
>
> (4) The Commission may not impose a fine based solely on a violation of subsection (b)(35) of this section.

Bus. Occ. & Prof. § 17-322(c) (Supp. 2022).

I will address the four statutory factors to determine the penalty. There is no doubt the violations were serious, and the harm caused was great. Indeed, the fraud and misrepresentation committed by the Respondent demonstrate a lack of recognition on the Respondent's part of the

duties related to her license, or the trust placed by the public in her as a real estate broker. The Claimant was caused great harm by the loss of his $35,000.00, which remains lost and unpaid nearly six years after the execution of the MOU. In terms of any good faith on the part of the Respondent, even if her testimony is credited that she too was involved in a conspiracy that led to defrauding the Claimant, her gross incompetence in losing the Claimant's money outweighs what little evidence of good faith exists in the record. Finally, given that the Claimant has previously been suspended for twelve months for a similar REC violation that involved the loss of another client's trust money, the REC's recommended penalty of revocation of the Respondent's license is appropriate, as she has failed to demonstrate she can be trusted to engage in the future use of her license. Moreover, a monetary penalty of $25,000.00, which includes $5,000.00 for each of the four statutory violations, and an additional $5,000.00 for the COMAR violations, is appropriate.

Fund Claim

A person may recover compensation from the Fund for an actual loss based on certain types of acts or omissions in the provision of real estate brokerage services by a licensee. A licensee "means a licensed real estate broker, a licensed associate real estate broker, or a licensed real estate salesperson." Bus. Occ. & Prof. § 17-101(k) (2018).

The provision of real estate brokerage services is defined as follows:

> (l) "Provide real estate brokerage services" means to engage in any of the following activities:
> (1) for consideration, providing any of the following services for another person:
> (i) selling, buying, exchanging, or leasing any real estate; or
> (ii) collecting rent for the use of any real estate;
> (2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;
> (3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

(4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;

(5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or

(6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

Id. § 17-101(l).

A Claim shall:

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

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

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

(iii) be based on an act or omission:

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

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

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Occ. & Prof. § 17-407€ (2018); State Gov't § 10-217. To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman*, 369 Md. At 125 n.16.

Here, there is no dispute that the Respondent is a licensed real estate broker who engaged in providing real estate brokerage services by regularly engaging in the business of dealing in real estate. As to the Claimant, and whether the $35,000.00 transaction involved real estate located within in the State of Maryland, the record is less clear. Indeed, the MOU contemplated the purchase of the Michener Property, which is located in Virginia, not Maryland. However, the MOU also contemplated the possibility of replacement properties if the Michener Property

fell through, which it did. Indeed, the Respondent did propose an alternative property located in Maryland – the Vintage Earth Property. To that end, the MOU contemplated that the Claimant's transaction with the Respondent could conceivably involve a property located in the State. Finally, because the REC established that the Respondent engaged in fraud or misrepresentation in obtaining $35,000.00 from the Claimant, the Claimant met his burden as to all elements of a claim from the Fund with an actual loss of $35,000.00.

The Claimant urged, in addition to the $35,000.00 suffered in actual losses, that punitive damages and attorney's fees be awarded. However, the Fund may not order any punitive damages for the Claimant, as his loss is limited to the actual loss of $35,000.00. Similarly, the Fund cannot award attorney fees, and no evidence was provided as to the Claimant's attorney's fees in any event. Therefore, an award of $35,000.00 is recommended.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Respondent violated subsection 17-322(b)(2), (b)(22), (b)(25), (b)(32), (b)(33), and subsection 17-532(b) of the Business Occupations Article, and subsections 09.11.02.01C and 09.11.02.02A of COMAR. Consequently, I conclude that the Respondent is subject to the disciplinary sanctions of revocation of her real estate broker's license and a fine of $25,000.00. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b), (c) (2022).

I further conclude that the Claimant demonstrated by a preponderance of the evidence that he sustained an actual loss compensable by the Fund due to an act or omission of the Respondent in the provision of real estate brokerage services and is entitled to recover $35,000.00 from the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-404(b) (2018)

RECOMMENDED ORDER

I therefore **RECOMMEND** that the Maryland Real Estate Commission **ORDER** as follows:

(1) That the Respondent's real estate broker's license be revoked;

(2) That the Respondent pay a civil penalty in the amount of $25,000.00;

(3) That the Maryland Real Estate Commission Guaranty Fund pay the Claimant $35,000.00 as the amount of his actual loss from the Respondent's wrongful acts or omissions; and

(4) That the records and publications of the Maryland Real Estate Commission reflect this decision.

SIGNATURE ON FILE

January 18, 2023
Date Decision Issued

Stephen W. Thibodeau
Administrative Law Judge

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