

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM	*
OF JUDITH NIGH,	*
CLAIMANT	*
AGAINST THE MARYLAND REAL	* CASE NO. 295-RE-2015 GF
ESTATE GUARANTY FUND,	* OAH NO. DLR-REC-22-16-10188
FOR THE ALLEGED MISCONDUCT	*
OF HELEN KOIS, RESPONDENT	*
*            *            *            *            *	

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated October 24, 2016, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 9th day of December, 2016

ORDERED,

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

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

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 Real Estate Commission reflect this decision.

E. Pursuant to §10-220 of the State Government Article, the Commission has reviewed the factual findings, conclusions of law and recommended order of the Administrative Law Judge (ALJ) and finds that no modifications are necessary. Nevertheless, the Commission issues this proposed order to clarify the proper legal basis for the approval of the claim and to further discuss the application of certain legal principles discussed in the ALJ's recommended decision.

This case presents a twist on the normal fact pattern for Guaranty Fund (Fund) cases. The Respondent in this case embezzled funds belonging to property owners (net rents) and tenants (security deposits), but it is a third party, the Claimant, and not the property owners or tenants, who filed the claim against the Fund. The Commission agrees with the ALJ's legal conclusion that the Claimant suffered an actual loss as a result of her subsequent decision to spend her own funds to make the property owners and tenants whole for financial losses suffered as a result of the Respondent's embezzlement.

The ALJ based the decision to grant the claim on two separate and distinct legal bases: (1) that the Claimant's payment of the Respondent's debts owed to the property owners and tenants entitles the Claimant to be subrogated to the rights of the property owners

and tenants under the theory of legal subrogation, and (2) that the Fund statute, specifically §17-404(a) of the Business Occupations and Professions Article, allows any person to recover from the Fund for an actual loss, provided that the claimant meets their burden of proof and demonstrates the validity of the claim.

The Commission agrees with the ALJ's conclusion that the Claimant was legally subrogated to the rights of the property owners and tenants, including their right to file a claim against the Fund based on the actions of the Respondent, as a result of the Claimant's actions to make the property owners and tenants whole by paying back the funds embezzled by the Respondent. Based on this conclusion and the principles discussed further below, the Commission upholds the ALJ's conclusions of law and recommended order.

In light of the Commission's acceptance of legal subrogation as the basis for approval of the claim, the Commission does not find it necessary to conclude, as a matter of law, that the statute allows any person to recover from the Fund. Legal subrogation has the effect of allowing the Claimant to stand in the shoes of the property owners and tenants and pursue the claim against the Fund. Therefore, the Commission does not adopt that part of the ALJ's recommended decision where the ALJ concludes as a matter of law that the statute allows any person to recover from the Fund.

At its most basic, subrogation is the substitution of one

person to the position of another whose claim he or she has satisfied. *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 312-313 (2007) (citations omitted). Subrogation allows the substituted party to step into the shoes of the person whose claim he or she has satisfied and thereby obtain the right to compel payment of a debt or obligation by the responsible party.

*Id.* The primary purpose of subrogation is to prevent unjust enrichment of the responsible party. *Id.*

The elements necessary for legal subrogation are: (1) the existence of a debt or obligation for which a party, other than the subrogee, is primarily liable, which (2) the subrogee, who is neither a volunteer nor an intermeddler, pays or discharges in order to protect his own rights and interests. *Id.* at 303 (citations omitted).

There was ample evidence before the ALJ to demonstrate that the first element of legal subrogation was present. After the Claimant resumed management of the rental property accounts, she conducted an audit which revealed that the Respondent had failed to pay net rent to the property owners (factual findings 16, 18).

The Claimant then paid certain property owners the net rents due to them based on her audit of the rental property accounts (factual finding 19). The total amount of payments made by the Claimant to the property owners was \$37,499.26.

The audit also showed that Respondent failed to refund

security deposits after certain tenants terminated their leases (factual finding 20). As a result, the Claimant satisfied outstanding claims for refunds of security deposits based on her audit of the rental property accounts (factual finding 21). The total amount of payments made by the Claimant to the former tenants was \$17,047.25. The Claimant proved, with great detail, that a debt existed as a result of Respondent's actions while in charge of the rental property accounts.

The second element of legal subrogation requires a court to make two separate conclusions: (1) that the subrogee paid a debt or obligation for which the subrogee was not primarily liable; and (2) that the subrogee was neither a volunteer nor an intermeddler. In this case, the Claimant clearly demonstrated through her introduction of bank statements, checks, and account notes and ledgers that she had paid Respondent's debts to property owners and former tenants as described in detail in the preceding two paragraphs.

The Court of Appeals, in *Hill*, waded into the morass in order to determine what exactly it means to be a "volunteer" or "intermeddler". Being deemed as such by a court has the effect of preventing the application of subrogation and casting the volunteer into "legal outer darkness".<sup>1</sup> *Id.* at 313 (citation

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<sup>1</sup> The Commission assumes that being cast into legal outer darkness has the effect of inducing "weeping and gnashing of teeth" on the part of the volunteer who is so cast. See generally *Matthew*, 8:12, 22:13, and 25:30

omitted).

The facts in *Hill* were similar to the facts of the present case. In *Hill*, a third party title company had satisfied the debt of the defendant mortgagor (defendant) and brought an action against the defendant to recover the money paid to satisfy the debt. *Id.* at 289-293. The title company alleged unjust enrichment on the part of the defendant in its complaint, and prevailed at the trial level on this count. Before the Court of Appeals, the defendant alleged that the title company was a volunteer and therefore prohibited from recovering from her.<sup>2</sup> *Id.* at 302. The Court ultimately reversed and remanded the case to the trial court to determine whether the title company was a volunteer. *Id.* at 310.

The Court based its decision to remand on its review and summation of the case law and scholarly publications regarding what it means to be a volunteer in the context of an unjust enrichment or subrogation claim. *Id.* at 301-305. While finding that the terms "volunteer" and "intermeddler" have been vaguely defined, the Court notes that more recent cases from various states indicate a pronounced reluctance on the part of courts to designate a plaintiff a volunteer and a more liberal attitude

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(referencing outer darkness as a place into which a person may be cast out, and where there is weeping and gnashing of teeth). The Commission notes, however, that for the normal person, in other words, the non-lawyer, being cast into legal outer darkness may actually produce the opposite effect and be cause for rejoice.

<sup>2</sup> If determined to be a volunteer, a plaintiff is prohibited from recovering

toward those who pay the debt of another. *Id.* at 302-303.

The Court was also able to identify some general principles to help guide the analysis of whether a particular person is a volunteer. The Court explained that absolute legal compulsion is not required in order for a person to avoid the designation of volunteer. *Id.* at 304-305 (citation omitted). Instead, the crucial issue in determining whether a particular person is a volunteer is whether that person made a justified intervention in the affairs of the responsible party. *Id.* at 305. The Court goes on to list specific examples of situations where a person would not be deemed a volunteer, including: when he or she acts under a legal compulsion, acts under a legally cognizable moral duty, acts to protect his or her own property interests, acts at the request of the defendant, or acts pursuant to a reasonable or justifiable mistake as to any of the aforementioned categories.

The Court's review of Maryland cases construing the term volunteer reveals that Maryland law is in accord with the national trend towards providing restitution to persons who satisfy the debts of another. In *Robertson v. Mowell*, 66 Md. 530 (1887), the Court enforced a plaintiff's subrogation rights when she paid her brother's mortgage even though she was under no legal obligation to do so. In finding that the plaintiff in *Robertson* was not a volunteer, the Court found it significant

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under unjust enrichment and subrogation. *Id.* at 301-302.

that "[t]here are no intervening incumbrances or rights of creditors to be interfered with, nor any superior or equal equities to be displaced." *Id.* at 538. Similarly, in *Springham v. Kordek*, 55 Md. App. 449 (1983), the Court of Special Appeals held that children who had made payments on their mother's mortgage after her spouse abandoned her were not volunteers. The Court of Special Appeals held that, although the children acted without legal compulsion, they were not prohibited from recovery on the bases that: (1) they had a moral obligation to assist their mother; (2) they were protecting their own property interest; and, (3) they acted at the request of their mother.

The sole case cited by the Court in *Hill* where a person was found to be a volunteer was *McNiece v. Eliason*, 78 Md. 168 (1894), where an unsecured creditor of an estate sought to pay an overdue mortgage on property owned by the estate and thereby become subrogated to the rights of a mortgagor. In *McNiece*, the crucial distinction was that the creditor was unsecured, and therefore did not have a legally cognizable interest in the real property at issue. To allow the unsecured creditor to become subrogated to the rights of the mortgagor would have been inequitable in that it would have granted him a right that he was not legally entitled to, to the detriment of other, secured, creditors with stronger equitable claims.

A more recent case in the Court of Special Appeals, *James B.*



*Nutter & Co. v. Black*, 225 Md. App. 1 (2015), provides another example of a type of situation where a person would be prohibited from recovery under legal subrogation because of that person's status as a volunteer. In *Nutter*, a reverse mortgage company sought to recover money it lent to a disabled person without the knowledge or consent of the disabled person's court-appointed guardian. *Id.* at 5. Part of the loan proceeds were used to satisfy an existing loan. *Id.* at 8. On becoming aware of the loan, the court-appointed guardian refused to ratify the reverse mortgage transaction or reimburse the reverse mortgage lender for the proceeds of the reverse mortgage loan. *Id.* at 8-9. The reverse mortgage lender argued that it was entitled to be subrogated to the rights of the lender whose existing loan had been paid off by the proceeds of the reverse mortgage loan. The Court held that the reverse mortgage lender was not operating under any legal duty to pay off the existing loan since the reverse mortgage loan was void *ab initio*. In other words, the reverse mortgage lender was acting solely in its own interest when it extended a loan to an adjudicated disabled person, and it would have been inequitable to allow the reverse mortgage lender to benefit from its decision to make the reverse mortgage loan.

Based on its review of *Hill*, Maryland case law, and the factual findings of the ALJ, the Commission is persuaded that there was sufficient evidence before the ALJ to conclude as a

matter of law that the Claimant was neither a volunteer nor an intermeddler. Although the ALJ did not conclude that the Claimant had a legal obligation to reimburse the property owners and former tenants, there is enough evidence in the record to conclude that the Claimant had a moral obligation to assist her former property management clients who had been harmed as a result of the Claimant's decision to sell the rental property accounts to the Respondent. As noted by the ALJ, the Claimant had initially sold the rental property accounts to Respondent and then suspended the sale agreement after receiving complaints from property owners and tenants regarding the conduct of the Respondent with respect to the accounts. Most of the property owners whom the claimant paid were her former property management clients. This evidence is sufficient to conclude as a matter of law that the Claimant is not a volunteer, and therefore is permitted to become subrogated to the rights and claims of the property owners and former tenants.

A subrogee "can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor." *Hill, supra* at 313 (citations omitted). Therefore, in the context of a Fund claim, the subrogee must still satisfy a claimant's burden of proving the elements of the claim. Based on its review of the evidence, the Commission concludes that the

Claimant in this case has met that burden.

Ultimately, the Commission finds that equity dictates that the Claimant be reimbursed by the Fund to prevent unjust enrichment by the Respondent. See *Hill, supra*, at 298 ("One is enriched not only when he receives an asset but also when someone else performs for him a duty which would be a burden to him. The clearest case is that of one person paying another's debt. The elimination of this obligation is clearly a benefit....") (citation omitted). The Commission agrees with the ALJ's point that allowing the Claimant to recover from the Fund will encourage similarly-postured brokers and agents to pay financial losses incurred by members of the public who deal with unscrupulous brokers and agents. Therefore, the decision to grant this claim is in accord with, and advances, the purpose underlying the creation of the Fund.

The Commission is also satisfied that adequate safeguards are in place to prevent speculative claims or waste of Fund resources as a result of this decision. The very nature of legal subrogation requires the Commission to balance equities and limits the application of legal subrogation to those persons who can satisfy the elements described above. The case law makes clear that there will potentially be scenarios where equity dictates that a claim of legal subrogation be denied. In future cases involving the application of legal subrogation, the

Commission will use existing case law to guide its decision as to whether the claimant is a volunteer, and thereby prohibited from recovering from the Fund. Even if legal subrogation exists, the claimant will still be required to meet his or her burden of proof that the claim is valid.

Although making a claim and collecting an award could potentially be quicker, and therefore less costly to a claimant, than proceeding to trial court, a claimant in a Fund case is limited to actual losses and is not permitted to obtain the types of additional damages which may be available in a court proceeding. Further, as demonstrated in this case, recovery against the Fund is limited to a maximum of \$50,000 for each claim. In light of these considerations, the Commission is convinced that recovery by the Claimant is warranted in this case.

F. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

**SIGNATURE ON FILE**

Maryland Real Estate Commission

**IN THE MATTER OF THE CLAIM OF  
JUDITH NIGH,  
CLAIMANT  
v.  
THE MARYLAND REAL ESTATE  
COMMISSION GUARANTY FUND,  
FOR THE ALLEGED MISCONDUCT OF  
HELEN KOIS,  
RESPONDENT**

**\* BEFORE JOHN J. LEIDIG,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH CASE No.: DLR-REC-22-16-10188  
\* MREC CASE No.: 295-RE-2015 GF  
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On August 7, 2015, Judith Nigh (Claimant) filed a Complaint & Guaranty Fund Claim (Complaint) with the Maryland Real Estate Commission (Commission) regarding the allegedly improper acts and omissions of a licensed real estate broker, Helen D. Kois (Respondent).

After an investigation, the Commission issued its March 17, 2016 Hearing Order against the Respondent, referencing the Claimant's claim for reimbursement (Claim) from the Commission's Guaranty Fund (Fund) for losses she allegedly incurred as a result of the Respondent's misconduct. On March 23, 2016, the Commission forwarded the Hearing Order to

the Office of Administrative Hearings (OAH) to conduct a hearing and to issue a proposed decision and order in this case.

On August 2, 2016, I conducted a hearing at the OAH in Hunt Valley, Maryland, pursuant to section 17-408 of the Business Occupations and Professions Article. The Claimant represented herself. Assistant Attorney General Jessica V. Kaufman represented the Fund. The Respondent did not attend the hearing and I proceeded to hear the case in her absence.<sup>1</sup>

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2014 and Supp. 2016); the Commission's procedural regulations, COMAR 09.11.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

### **ISSUES**

1. Did the Claimant sustain an actual loss, compensable by the Fund, due to the Respondent committing acts or omissions involving theft, embezzlement, false pretenses, forgery, fraud, or misrepresentation?
2. If so, what amount should be awarded to the Claimant from the Fund?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following documents into evidence on behalf of the Fund:

- |         |   |
|---------|---|
| FUND #1 | Notice of Hearing, dated June 21, 2016                                      |
| FUND #2 | Transmittal to the OAH (undated), with Hearing Order and Complaint attached |
| FUND #3 | The Respondent's Licensing History, printed on July 14, 2016                |

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<sup>1</sup> Section 17-324 of the Business Occupations and Professions Article provides that if the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. Md. Code Ann., Bus. Occ. & Prof. § 17-324(f) (2010). *See also* COMAR 28.02.01.23.

FUND #4 Jack L. Mull, Jr.'s Report of Investigation, (closed October 19, 2015), with attachments.

FUND #5 Mr. Mull's Supplement 1 to Report of Investigation, submitted October 26, 2015, with attachments

I admitted the following document on behalf of the Claimant:

CL. #1 Complaint, with attachments

The Respondent failed to appear at the hearing.

### Testimony

The Claimant testified on her own behalf. The Fund did not present the testimony of any witnesses. The Respondent did not appear or present any testimony at the hearing.

### **FINDINGS OF FACT**

I propose that the Commission find the following facts by a preponderance of the evidence:

1. The Claimant obtained her license as a real estate broker in April 2003, and was the sole owner of and a broker for Snowden Chase Realty, LLC (Snowden) at all relevant times.
2. Beginning in 2007, the Claimant and the Respondent worked together at Snowden; the Respondent was a salesperson.
3. As part of her job with Snowden, the Claimant managed various rental property accounts (Accounts) for certain property owners (Property Owners).
4. Sometime in 2010, the Claimant decided to retire.
5. On or about May 6, 2010, the Respondent filed Articles of Organization with the Maryland Department of Assessments and Taxation to create a new limited liability company, Snowden Chase Realty Services, LLC (Snowden Services).

6. On June 18, 2010, the Claimant and the Respondent executed an Accounts Purchase Agreement (APA), whereby the Respondent purchased the Accounts for the sum of \$86,500.00 (Purchase Price).

7. Pursuant to a Promissory Note dated June 15, 2010, the Respondent was obligated to pay the Purchase Price in sixty-nine monthly installments of \$1,250.00 each, with a final payment of \$250.00 being due the following month.

8. The Claimant is not the spouse, or the personal representative of the spouse, of the Respondent.

9. Pursuant to the APA, the Claimant transferred \$17,255.91 to Snowden Services, which was the balance of the Property Owners' funds, plus an additional \$47,041.18, which was the balance of security deposits then held by Snowden for the Accounts.

10. On July 2, 2010, the Respondent obtained her real estate broker's license, License No. 01-303167. The Respondent had previously been licensed as a real estate salesperson since July 20, 1992.

11. Following the execution of the APA, the Respondent collected monthly rent from tenants (Tenants) for the Accounts.

12. Although the Tenants consistently and timely tendered their monthly rent to the Respondent, the Respondent did not consistently remit net rents (after deducting a commission) to the Property Owners.

13. The Respondent also failed to refund security deposits to certain Tenants following the termination of their leases.

14. In the spring of 2013, the Claimant began receiving complaints that the Respondent was not timely remitting net rents and was not responding to telephone calls and e-mails from Property Owners and Tenants.



15. The Respondent failed to make the monthly installments on the Purchase Price as due in April and May 2013.

16. On or about June 3, 2013, the Claimant and Respondent met and agreed that the Claimant would resume management of the Accounts, the parties would suspend the APA, and the Respondent would transfer to the Claimant all of the outstanding rents, operating funds and security deposits.

17. Following that meeting, the Respondent failed to remit any rents, operating funds or security deposits to the Claimant. The Claimant subsequently attempted to contact the Respondent many times, but the Respondent did not respond to telephone calls, e-mails or letters.

18. The Claimant conducted an audit of the Accounts and determined certain Property Owners were owed net rents because, even though Tenants had paid rent to the Respondent, the Respondent failed to pay net rent to the Property Owners.

19. The Claimant thereafter paid certain Property Owners the net rents due to them based on her audit, as follows:

<b>Property Owner(s)</b>	<b>Property Address(es)</b>	<b>Net Rent Due to Property Owner</b>	<b>Check Number of Claimant's Check<sup>2</sup> to Property Owner</b>
Anderson	9751 Whiskey Run and 6587 Overheart Lane	\$794.00	5908
Bodie	8313 Cloud Street and 8621 Savannah River Road	\$2,873.50	5873
Cook	11812 Bristolwood Terrace	\$2,600.00	5876
Fisher	7656 Arbory Way	\$1,350.00	5884

<sup>2</sup> All of the checks were drawn on the Snowden account.

Lenart	11614 Lighthouse Drive	\$7,376.00	5886
McMahon	7932 Mayfair Circle	\$2,660.00	5880
Santiago and Cruz	2714 Mapleview Court	\$1,688.00	5882
Vicino	9792 Whiskey Run	\$1,455.00	5877
Gercon Investments, LLC	East Pine Gardens, 349-351 Main Street, and River Terrace Apartments	\$6,581.04 \$9,187.92 \$933.80	5871 5870 5872
<b>TOTAL</b>		<b>\$37,499.26</b>	

20. The audit further showed that the Respondent failed to refund security deposits after certain Tenants had terminated their leases and vacated the properties.

21. The Claimant thereafter satisfied outstanding claims for refunds of security deposits, as follows:

<b>Tenant Name</b>	<b>Owner Name</b>	<b>Amount of Security Deposit due to Tenant or transferred to Owner</b>	<b>Check Number of Claimant's Check to Property Owner or Tenant<sup>3</sup></b>
Alvarez	Anderson	\$1,375.00	6556
Tambe and Talbot	Cook	\$5,600.00	6557
Dalton	Fisher	\$1,250.00	5885
Farmer	Lenart	\$2,900.00	5887
Unger	Santiago/Cruz	\$2,392.00	6512
Levendusky	Murga	\$2,155.25	6000 and 6030

<sup>3</sup> In some cases the checks was made payable to a Property Owner if the Property Owner had decided to assume management of the property.

Stewart	Vicino	\$1,375.00	5878
<b>TOTAL</b>		\$17,047.25	

22. Beginning on August 17, 2015, Jack L. Mull, Jr., an investigator with the Commission, conducted an investigation of the allegations set forth in the Claim. On October 19, 2015, Mr. Mull issued a Report of Investigation, and on October 26, 2015, he issued a Supplement 1 to Report of Investigation.

23. Mr. Mull obtained copies of bank statements for the Respondent's business accounts, which revealed the following balances as of May 31, 2013:

Bank of America operating account ending in 7170:	\$2,438.46
Bank of America company account ending in 7167:	-\$24.32
Bank of America rental trust account ending in 7138:	\$73.61

24. Had the Respondent properly deposited all of the security deposits she received from Tenants, the trust account should have had a principal balance of \$45,663.18 as of May 31, 2013.

25. The Respondent failed to respond to numerous attempts by Mr. Mull in August and September 2015 to contact her by mail, e-mail and in person at her home on Montreal Road in Severn, Maryland.

### DISCUSSION

Claims for reimbursement from the Fund are governed by section 17-404 of the Business Occupations and Professions Article, which provides, in pertinent part:

- (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<sup>[4]</sup> 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.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (Supp. 2016).

The governing regulations further provide as follows:

- 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

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<sup>4</sup> To “[p]rovide 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.

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 09.11.03.04.

The Claimant bears the burden of proving her entitlement to recover from the Fund. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (Supp. 2016). It is undisputed that, at all relevant times, the Respondent was a licensed real estate broker and that her transactions with the Claimant related to Maryland real estate,<sup>5</sup> fulfilling the requirements of sections 17-404(a)(2)(i) and (ii) of the Business Occupations Article. To recover from the Fund, therefore, the Claimant must prove that she incurred an actual loss based on acts or omissions of the Respondent that amounted to theft, embezzlement, false pretenses, forgery, fraud, or misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(1), (2)(iii).

As an initial matter, I conclude that the Claimant has met her burden of proving that the Respondent embezzled funds from the Property Owners and the Tenants. Embezzlement occurs whenever money or other property is entrusted to someone who stands in a fiduciary relationship with the owner and the fiduciary fraudulently and willfully appropriates the property to a use other than that which was intended. *State v. Burroughs*, 333 Md. 614 (1994); *see generally* 9 M.L.E. *Embezzlement* §§ 2 & 3, pp. 251-52 (2008) (“The offense of embezzlement is complete whenever a person who has been entrusted with money or property forms an intent to convert it

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<sup>5</sup> It is also undisputed that the Respondent’s transactions with the Property Owners and the Tenants involved real estate located in Maryland.

to his or her own use, and has possession with such intent.”). Section 7-113(a) of the Criminal Law Article further defines embezzlement as follows:

**§ 7-113. Embezzlement -- Fraudulent misappropriation by fiduciary**

- (a) *Prohibited.* -- A fiduciary may not:
- (1) fraudulently and willfully appropriate money or a thing of value that the fiduciary holds in a fiduciary capacity contrary to the requirements of the fiduciary’s trust responsibility; or
  - (2) secrete money or a thing of value that the fiduciary holds in a fiduciary capacity with a fraudulent intent to use the money or thing of value contrary to the requirements of the fiduciary's trust responsibility.

Additionally, section 17-502(b) of the Business Occupations and Professions Article provides that “a real estate broker may not use trust money for any purpose other than that for which it is entrusted to the real estate broker.” *See also* Md. Code Ann., Bus. Occ. & Prof. § 17–505(a)(1) (duties of real estate broker regarding maintenance and distribution of trust funds); Md. Code Ann., Real Prop. § 8-203(d), (e) (2015) (duty to maintain security deposits in a trust account and return the deposit to the tenant, with interest, within forty-five days after the termination of a lease).

I am persuaded by the evidence, particularly Mr. Mull’s investigative reports and the attachments thereto, that the Respondent lawfully obtained funds from the Tenants on the Property Owners’ behalf and then failed to account for more than \$50,000.00. FUND Exs. 4 and 5. Despite repeated attempts at resolution by Property Owners, Tenants, the Claimant, Mr. Mull, and the Commission, the Respondent has never returned any of the embezzled funds. As the Property Owners’ agent providing real estate management services, the Respondent owed a fiduciary obligation to the Property Owners: “In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This *obligation of absolute fidelity to the client’s interest is primary*, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.” COMAR 09.11.02.02A (emphasis added). She also

owed a fiduciary duty to safeguard Tenant security deposits that came into her hands. Md. Code Ann., Bus. Occ. & Prof. §§ 17-502(b), 17-505(a)(1); Md. Code Ann., Real Prop. § 8-203(d), (e). The Respondent's embezzlement violated her fiduciary duties to both the Property Owners and the Tenants.

Although the Respondent did embezzle funds, she did not embezzle funds belonging to the Claimant. Instead, the Respondent embezzled funds that should have ended up in the hands of the Property Owners (the net rents) and the Tenants (security deposits).<sup>6</sup> Nevertheless, as explained below, I conclude that the Claimant is entitled to recovery from the Fund based on her right of legal subrogation.

Maryland recognizes three distinct categories of subrogation: legal subrogation, conventional subrogation, and statutory subrogation. *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 311 (2007), citing *Fin. Co. of Am. v. U.S. Fid. & Guar. Co.*, 277 Md. 177, 182 (1976). Legal subrogation "arises by operation of law when there is a debt or obligation owed by one person which another person, who is neither a volunteer nor an intermeddler, pays or discharges under such circumstances as in equity entitle him to reimbursement to prevent unjust enrichment." *Md. Title & Escrow Corp. v. Kosisky*, 245 Md. 13, 20 (1966). Subrogation is "the substitution of one person to the position of another, an obligee, whose claim he has satisfied..." *Hill* at 312 (citations omitted). The substituted person "can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor." *Hill* at 313, citing *George L. Schnader, Jr., Inc. v. Cole Bldg. Co.*, 236 Md. 17, 23, 202 A.2d 326, 330 (1964) (quoting *Poe v. Phil. Cas. Co.*, 118 Md. 347, 353 (1912)). A plaintiff or claimant does not need to specifically mention subrogation in order to

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<sup>6</sup> For this reason, it may be said that this is not a typical Fund claim against a property manager: in a typical claim, the claimant is either the property owner seeking return of net rents or a tenant seeking return of a security deposit.

obtain relief under the doctrine. *See Bachmann v. Glazer & Glazer, Inc.*, 316 Md. 405, 412 (1989).

In this case, the Claimant's bank statements, checks, and Account notes and ledgers demonstrate that the Claimant paid the claims of certain Property Owners and Tenants after discovering the Respondent's embezzlement. *See* FUND Ex. 4 at attachments 4 through 19. The Claimant's payment of the Respondent's debts to the Property Owners and the Tenants legally entitles the Claimant to be subrogated to their rights, claims, causes of action and remedies, including but not limited to a claim against the Fund. *See generally Hill* at 311-313. The Claimant was not a "volunteer" or an "intermeddler" in discharging the Respondent's debts to the Property Owners and the Tenants, because the Respondent had previously purchased the Accounts from the Claimant, most of the Property Owners whom the Claimant paid were her former property management clients, and the Claimant agreed to resume responsibility for the Accounts as of June 2013.

With respect to whether the Claimant, as a subrogee, is entitled to recovery from the Fund, it is notable that the Legislature used the phrase "a person" twice in section 17-404. Section 17-404(a)(1) provides that "[s]ubject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss." The same phrase is used again in section 17-404(a)(2)(iii): "be based on an act or omission: ... in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or ... that constitutes fraud or misrepresentation." As used in this statute, the word "a" is an indefinite article meaning "any."<sup>7</sup> It is not a specifying or limiting word such as "the" or "such." Because the Legislature chose to use the phrase "a person" in both instances, I conclude that the language of section 17-404(a) denotes that "any person" may recover compensation from the Fund

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<sup>7</sup> For a definition of indefinite article, see <http://www.merriam-webster.com/dictionary/indefinite%20article>.



whenever money or property has been obtained from “any person” by theft, embezzlement, false pretenses, forgery, fraud or misrepresentation.” In other words, the person seeking recovery (the Claimant) need not be the person from whom money was improperly obtained. Had the Legislature used the phrase “the person” or “such person” in both instances, section 17-404 might be subject to a different interpretation: that the Claimant would have to be the same person from whom money or property was improperly obtained. However, the Legislature did not use limiting language in either instance, and to impose a limitation would alter the plain meaning of the words used. As the Court of Appeals remarked in the case of *Robinson v. Baltimore Police Dept.*, 424 Md. 41 (2011):

Principal among [the rules of statutory construction] is the “cardinal rule” that we “ascertain and effectuate the real and actual intent of the Legislature.” *State v. Johnson*, 415 Md. 413, 421, 2 A.3d 368, 373 (2010). In doing so, we look first to the language of the statute to determine its “normal, plain meaning,” and we “neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute.” If we conclude that “the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily.” In that situation, “we apply the statute as written, without resort to other rules of construction.”

*Id.* at 50-51 (internal citations omitted). For the same reason, I find it significant that the phrase “a person” is also used in COMAR 09.11.03.04B(1): “In 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.” (emphasis added).

The Fund “was established to provide security for members of the public involved in real estate transactions.” *Maryland Real Estate Comm’n v. Johnson*, 320 Md. 91, 101 (1990)

(construing former Md. Code Art. 56 § 217A). Allowing the Claimant to recover from the Fund accomplishes this purpose because it encourages brokers and agents in similar situations to pay financial losses incurred by members of the public who deal with unscrupulous brokers or agents, giving those brokers and agents some assurance that they are not prohibited from pursuing a claim for reimbursement from the Fund. *See Robinson*, 424 Md. at 50-51 (where the plain meaning is consistent with the statute's apparent purpose, “we apply the statute as written, without resort to other rules of construction”).

I further conclude that section 17-404 does not prohibit or exclude the Claimant from recovery from the Fund. The evidence showed that the Claimant is not the spouse of the Respondent; nor is she the personal representative of the spouse of the Respondent. Md. Code Ann., Bus. Occ. & Prof. § 17-404(c)(2) (Supp. 2016). Also, I conclude that the Claimant’s loss is not excluded from recovery under section 17-404(c)(i) because the loss does not relate to the purchase of an interest in a limited partnership to invest in real estate, a joint venture to invest in real estate, or commercial paper that is secured by real estate. The APA was an unsecured sale of accounts, and the Claimant’s loss derives from the Respondent’s transactions with Property Owners and Tenants.

I further conclude that the Claimant has met her burden of proving that she suffered an actual loss compensable from the Fund. Section 17-404(a)(1) provides that “a person may recover compensation from the Guaranty Fund for an actual loss.” By regulation, the amount of compensation recoverable by a claimant from the Guaranty Fund “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.” COMAR 09.11.01.18. The Court of Special Appeals has written that the Fund serves “to protect persons who suffer financial loss” due to the

misconduct of a licensed real estate professional. *Lewis v. Long & Foster Real Estate, Inc.*, 85 Md. App. 754, 761 (1991).

In this case, the Claimant demonstrated that she did suffer an actual monetary loss; namely, the Claimant's checks to the Property Owners and Tenants show that the Claimant spent her own funds to make the Property Owners and Tenants whole for financial losses suffered as a result of the Respondent's embezzlement. The Fund did not assert that the term "originating transaction" found in COMAR 09.11.01.18 prevents the Claimant from Fund compensation, and I am not aware of any authority interpreting the regulation in such a manner. Although the Respondent's embezzlement from the Property Owners and the Claimant's subsequent payment to the Property Owners might be viewed as two separate transactions, as discussed above, the Claimant's payment to the Property Owners nevertheless entitles her to be subrogated to their rights. Essentially, the Claimant steps into the shoes of the Property Owners and Tenants whose funds were embezzled by the Respondent, and the Claimant's rights are coextensive with those of the Property Owners and Tenants as to the originating transactions. *See Hill*, 402 Md. at 313.

The only remaining question is the amount that the Claimant has proven that she is entitled to recover from the Fund as a result of the Respondent's embezzlement. The evidence demonstrates that the Claimant paid a total of \$54,546.51 to satisfy the Respondent's debts to Property Owners and Tenants, consisting of \$37,499.26 in net rents and \$17,047.25 in security deposits. In calculating this amount, I relied on the Claimant's checks as the best evidence, even though those amounts in some cases varied from the summary prepared by the Claimant. *See FUND Ex. 4 at attachment 3.*

COMAR 09.11.01.18 provides that "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 Claim presented by the Claimant does not include any commissions or attorneys’ fees.

In addition, I have not included as part of the Claimant’s actual loss the amount paid by the Claimant to a contractor to allegedly repair damage to the property owned by Mr. and Mrs. Anderson (Check #5906 for \$471.00 paid to Michael D. Arndt). This is based on my conclusion that the contractor was neither a Tenant nor a Property Owner to whom the Respondent owed a fiduciary duty. I have also not included as part of the actual loss the \$1,702.00 claimed for net rent allegedly due on the account of Property Owner Supnik (10401 Balsamwood Court). The Claimant did not provide a check to show that she paid the Supniks, and Mr. Mull’s report indicates that as of October 19, 2015 the payment to the Supniks was “anticipated,” not actually made. I also did not include the sum of \$2,929.35 that the Claimant alleges should have been maintained by the Respondent in a reserve fund that would eventually have to be paid to certain Property Owners upon the termination of their property management agreements with the Respondent. The Claimant did not introduce checks to show that these amounts were actually paid to the Property Owners, as she did for the net rents and the security deposits. Also, I found the Claimant’s testimony about the reserve funds to be less than precise. Therefore, without supporting documentation from the Claimant, I am not persuaded that the Claimant met her burden of proof as to the reserve funds, particularly where I have concluded that her Fund entitlement rests upon subrogation. In addition, it bears noting that the Claimant has not sought to recover any portion of the APA Purchase Price.

A final matter to address involves the notation in Mr. Mull’s report that the Respondent has been named as a respondent in four pending Commission actions (2014-RE-361, 2014-RE-507, 2014-RE-510, and 2015-RE-015) and one action that has been closed (2013-RE-256). Mr.

Mull's letter to the Respondent dated August 10, 2015 further states that the claimants in three of those actions are former clients of the Claimant, as follows:

<b>REC Case Number</b>	<b>Name of REC Claimant</b>
2014-RE-361	Robert Conley d/b/a Gercon Investments, LLC
2014-RE-507	Michael Reidy
2015-RE-015	James Rupp

No portion of the Claim in this case relates to the properties owned by Mr. Reidy or Mr. Rupp. However, a portion of the Claim does relate to certain properties owned by Gercon Investments, LLC, and Gercon did have another claim pending before the Commission as of October 2015 (2014-RE-361). There is no evidence in the record to suggest that my proposed order in this case will result in a double recovery to the Claimant or Gercon. Nevertheless, because Gercon's claims have not been fully adjudicated, I am including this analysis to prevent any windfall in a pending or future case involving Gercon and/or the Respondent. Obviously, any claimant is entitled to a single satisfaction of his or her claim.

Accordingly, I conclude that the Claimant met her burden of proving an actual monetary loss, calculated as follows:

Net Rents Embezzled by the Respondent and Subsequently Paid by the Claimant		\$37,499.26
Security Deposits Embezzled by the Respondent and Subsequently Paid by the Claimant	+	\$17,047.25
<b>THE CLAIMANT'S ACTUAL MONETARY LOSS</b>		<b>\$54,546.51</b>

Section 17-404(b) of the Act limits the recovery for any claim against the Fund to \$50,000.00. Because the Claimant's actual monetary loss exceeds that limit, a recovery in the amount of \$50,000.00 is appropriate.

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**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has suffered an actual monetary loss of \$54,546.51 due to the Respondent committing acts or omissions involving embezzlement; and that the Fund should pay the Claimant the amount of \$50,000.00 (the limit on recovery from the Fund) for the Respondent's wrongful acts and omissions. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (Supp. 2016); COMAR 09.11.03.04; *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 311 (2007).

**PROPOSED ORDER**

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

1. The Maryland Real Estate Commission Guaranty Fund shall pay to Judith Nigh the amount of \$50,000.00 for the Respondent's wrongful acts and omissions.
2. The Commission's records and publications shall reflect this decision.

October 24, 2016  
Date Decision Issued

JJL/dlm  
#163831

**SIGNATURE ON FILE**

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John J. Letdig  
Administrative Law Judge