

# FINAL ORDER

MAR 01 2011

BEFORE THE MARYLAND REAL ESTATE COMMISSION  
ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION \*

v. \*

ROBYN Y. SMITH  
Respondent

\* CASE NO. 2009-RE-432

\* OAH NO. DLR-REC-21-10-04907

\*

\* \* \* \* \*

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated November 19, 2010, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 29<sup>th</sup> day of December, 2010

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, AFFIRMED;

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

C. That the Recommended Order be, and hereby is, AMENDED as follows:

ORDERED that the Respondent Robyn Y. Smith violated Md. Bus. Occ. and Prof. Art. §§17-322(b)(22), (25), and (33); and COMAR 09.11.02.02A;

ORDERED that the Respondent Robyn Y. Smith be, and hereby is, REPRIMANDED;

ORDERED that the Respondent Robyn Y. Smith be assessed a civil penalty in the amount of \$3,000.00, which shall be paid within thirty (30) days of the date of this Proposed Order:

ORDERED that all real estate licenses held by the Respondent Robyn Y. Smith shall be suspended unless the civil penalty is paid in full within the 30-day period, and shall remain suspended until it is paid.

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

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the Recommended Decision of the Administrative Law Judge had to be modified because the judge omitted the provisions that the civil penalty had to be paid within 30 days, and that all real estate licenses held by the Respondent would be suspended unless the penalty is paid in full by that time.

E. 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.

(COMMISSIONER'S SIGNATURE  
APPEARS ON ORIGINAL ORDER)

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Maryland Real Estate Commission  
*for Anne S. Cooke, Chair*

THE MARYLAND REAL ESTATE  
COMMISSION

v.

ROBYN Y. SMITH, BROKER,  
RESPONDENT

\* BEFORE THOMAS G. WELSHKO,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DLR-REC-21-10-04907  
\* MREC NO.: 2009-RE-432

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On March 5, 2009, Sonya Valentine (Complainant) filed a complaint with the Maryland Real Estate Commission (MREC) and, on that same date, a claim against the MREC Guaranty Fund (Fund) for reimbursement of \$2,650.00 in actual losses stemming from the alleged misconduct of the Respondent. The Complainant alleged these losses resulted from the Respondent's representation of OCWEN Loan Servicing (Seller) as a seller's agent in a real estate sales transaction involving the Complainant as the buyer.

Based on its investigation of the Complainant's complaint, the MREC issued a Statement of Charges and Order for Hearing (Charges) against the Respondent on December 30, 2009. The parties resolved the Fund claim before the MREC issued its Charges.

I held a hearing to adjudicate the regulatory charges on September 8, 2010 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. § 17-324(a) (2010). Assistant Attorney General Jessica B. Kaufman represented the MREC. The Respondent participated by telephone and represented herself.<sup>1</sup>

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 09.01.03 and 28.02.01.<sup>2</sup>

### **ISSUES**

1. Did the Respondent fail to account for and refund good faith deposit funds to the Complainant promptly after the home purchase she negotiated for the Complainant fell through?

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<sup>1</sup> On the afternoon of Tuesday, September 7, 2010, the Respondent called the OAH and spoke with Postponement Officer Pamela Johnson. The Respondent explained to Ms. Johnson that she had traveled to Boston, Massachusetts to assist her daughter in registering for college, and she could not travel to Hunt Valley by the next day to be present for the hearing. She asked that the hearing be postponed. Ms. Johnson notified Ms. Kaufman, the MREC's representative. After reviewing the file, Ms. Johnson denied the postponement request as being untimely since the OAH had sent notice of the hearing to the Respondent on June 24, 2010. Ms. Johnson left a message with the parties to inform them of her decision. The Respondent called Ms. Johnson and left a voicemail message. She asked whether she could participate by telephone instead of appearing in person. Ms. Johnson notified me of this request. Since it was about 4:30 p.m. when I received Ms. Johnson's message, Ms. Kaufman could not be reached because she had just left her office. I instructed Ms. Johnson to call the Respondent and tell her to be available by telephone at the scheduled hearing time, Wednesday, September 8, 2010 at 10:00 a.m. I would call, convene the hearing, get Ms. Kaufman's view on whether proceeding by telephone was feasible and make a ruling about whether the hearing would proceed. When I convened the hearing, Ms. Kaufman had no objection to allowing the Respondent to participate by telephone. I held the hearing with the understanding that the Respondent would not have an opportunity to review the MREC's documents, a limitation that she accepted.

<sup>2</sup> The current regulations are published at 37:6 Md. Reg. 480 (Mar. 12, 2010, effective Mar. 22, 2010) (proposed 37:1 Md. Reg. 34 - 41 (Jan. 4, 2010) (to be codified at Code of Maryland Regulations (COMAR) 28.02.01).

2. Did the Respondent engage in conduct that demonstrated bad faith, incompetency or untrustworthiness or that constituted dishonest, fraudulent or improper dealings?

3. Did the Respondent fail to represent the interests of the Complainant in contravention of the Code of Ethics governing real estate brokers, assistant brokers and salespersons?

4. If the Respondent committed violations of the Maryland Real Estate Law, what is the appropriate sanction for her misconduct?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted six exhibits on behalf of the MREC and no exhibits on behalf of the Respondent. I have attached a complete Exhibit List as an Appendix to this decision.

#### **Testimony**

Lucinda Rezek, Investigator with the MREC, testified for the MREC. The Respondent testified on her own behalf.

### **FINDINGS OF FACT**

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

1. In 2008 and at all times relevant, the Respondent held a valid real estate broker's license. The MREC most recently renewed the Respondent's license on January 21, 2010, and it has a scheduled expiration date of January 21, 2012. (REC<sup>3</sup> Ex. 4.)

2. On June 29, 2008, the Complainants, Sonya Valentine and Eric Andre Rutledge, entered into contract to purchase a residential property in Clinton, Maryland (the

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<sup>3</sup> The MREC premarked its exhibits with the designation "REC." I did not remark them.

Property) from OCWEN Loan Servicing, the seller. The Respondent's real estate brokerage, Visions Realty Professionals, served as listing broker in that transaction. (Test. Rezek and Resp.; REC Ex. 6.)

3. On July 24, 2008,<sup>4</sup> the Complainants gave the Respondent a check for \$2,000.00, payable to Visions Realty Professionals. The Respondent placed the proceeds from that check in her brokerage's escrow account. (REC Ex. 6, Attachment.)

4. The Complainants and the seller ratified the sales contract on July 14, 2008. (Test. Rezek; REC Ex. 6, Attachment A and A2.)

5. The title company handling the sale of the Property could not verify clear title to the Property. The Property was in foreclosure, so the Circuit Court for Prince George's County had to ratify foreclosure before the title company could assure the buyers of clear title. (Test. Rezek; REC Ex. 6, Investigation Report.)

6. After waiting four months, the title company still could not verify clear title to the Property. (REC Ex. 6., attached e-mail.)

7. On or about November 21, 2008, the Complainants' attorney informed Raquel N. Gordon, the Respondent's associate broker, that the Complainants wanted to cancel the contract to buy the Property because they did not want to wait any longer for title to clear. (Test. Rezek; REC Ex. 6, Attachment E.)

8. On November 23, 2008, the Complainants signed a release to cancel the sale of the Property, but a representative of the sellers had not signed it. (REC Ex. 6, Attachment E.)

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<sup>4</sup> A photocopy of a check dated "June 29, 2007" is also attached. I surmise that on July 24, 2008, the Complainants gave the Respondent a new check when either they or the Respondent realized that they had misdated the original check.

9. On or about December 4, 2008, Ms. Gordon sent an e-mail to the Respondent asking whether the brokerage had issued a deposit refund to the Complainants. On December 12, 2008, the Respondent sent an e-mail indicating that a check was mailed on December 12, 2008. (Test. Rezek; REC Ex. 6, Attachment E.)

10. The Respondent's brokerage had not refunded the Complainants' deposit on December 12, 2008. (Test. Rezek; REC Ex. 6, Attachment E.)

11. On December 19, 2008, Ms. Gordon e-mailed the Respondent to inform her that the Complainants' agent had not received a refund of the escrow funds. (REC Ex. 6, attached e-mail.)

12. On January 8, 2009, a representative of the seller signed the release. (Test. Rezek; REC Ex. 6, Attachment E.)

13. The Respondent took no further action in refunding the deposit on her own initiative. (Test. Rezek.)

14. On or about March 5, 2009, the Complainants filed a Complaint and Guaranty Fund Claim with the MREC based on the Respondent's failure to refund their deposit money. (Test. Rezek; REC Ex. 6, attached Complaint and Claim Form.)

15. In March 2009, the MREC forwarded the Complainants' Complaint to the Respondent, and asked her to respond. The MREC provided a copy of the Complainants' release to the Respondent. (Test. Rezek.)

16. On May 13, 2009, the Respondent provided a written response to the MREC's inquiry. In her response, she explained that she had not disbursed the deposit funds because she had not received a fully executed release from the seller and the

Complainants. Now that she had the fully executed release, the Respondent promised the MREC that she would refund the deposit. (Test. Rezek; REC Ex. 6, attached Response.)

17. On July 30, 2009, the Complainant's agent alerted the MREC that the Respondent had not issued a check for the deposit money. (Test. Rezek; REC Ex. 6, Investigation Report.)

18. On July 30, 2009, the MREC attempted to call the Respondent to discuss the return of the Complainants' deposit money, but the telephone number in the REC's file for the Respondent was not working. (REC Ex. 6, Investigation Report.)

19. On July 31, 2009, the MREC followed-up with an e-mail to the Respondent. (Test. Rezek; REC Ex. 6, attached e-mail.)

20. On August 1, 2009, the Respondent sent a return e-mail to the MREC in which she explained that she was waiting for the MREC to direct her to send the money before she sent it. (Test. Rezek and Resp.; REC Ex. 6, attached e-mail.)

21. On August 3, 2009, Steven Long, Assistant Executive Director, MREC, sent an e-mail to the Respondent, directing her to send a deposit refund check, payable to Complainant Sonya Valentine, to Ms. Rezek by August 10, 2009; Ms. Rezek would in turn remit the funds to the Complainant. Mr. Long warned the Complainant, "[f]ailure to do so will result in the Commission opening a complaint against you for breaching your responsibility to your client." (REC Ex. 6, attached e-mail.)

22. As of August 10, 2009, the Respondent had not sent the refund check to Ms. Rezek. (Test. Rezek and Resp.)



23. On August 21, 2009, the MREC issued a Proposed Order directing the Respondent to remit the deposit money to MREC to pay to the Complainants. (Test. Rezek; REC Ex. 6, attached copy of October 13, 2009 letter.)

24. On September 21, 2009, the Respondent issued a check for \$2,000.00 from her escrow account to the MREC payable to Complainant Valentine. (REC Ex. 6, attached check copy.)

25. On October 13, 2009, Katherine F. Connelly, Executive Director, MREC, sent the Respondent a letter to notify her that by refunding the \$2,000.00 to the Complainants, the Guaranty Fund portion of the Complainants' Complaint and Guaranty Fund claim was resolved. (REC Ex. 6, attached copy of October 13, 2009 letter.)

### **DISCUSSION**

Upon the foregoing Findings of Fact, I find by a preponderance of the evidence that the MREC has proven the charges it issued against the Respondent. I have set out the reasons for my conclusions in detail below.

#### *I. Regulatory Charges.*

The MREC charged the Respondent with violations of the statutory and regulatory sections governing licensed real estate brokers and agents. The sections of the Maryland Business Occupations and Professions Article, Annotated Code of Maryland<sup>5</sup> that the Respondent allegedly violated are set out below:

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<sup>5</sup> Unless otherwise noted, all references will be to the Business Occupations and Professions Article.

§ 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:

(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 provision of this title;

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

Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(22), (25), (32) and (33) (2010).

COMAR 09.11.02.02A (Code of Ethics) states:

*.02 Relations to the Client.*

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.

The MREC, as the moving party, has the burden of proof by a preponderance of the evidence to demonstrate that the Respondent violated the statutory and regulatory sections at issue. Section 10-217 of the Maryland State Government Article; *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) citing *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959).

The facts here are straightforward. In July 2008, the Complainants entered into a sales contract to buy the Property, a residential property in Clinton, Maryland. The Respondent's real estate brokerage served as the listing/selling broker; a lender that had foreclosed on the Property was the seller. The Complainants submitted an earnest money

deposit of \$2,000.00, which the Respondent's brokerage placed in an escrow account. The seller could not obtain clear title to the property, so the sale fell through. The Complainants sought the return of their deposit. The Respondent mistakenly thought she ordered disbursement in December 2008. At that time, however, a seller's representative had not signed a release to allow voiding of the sale. What occurred after this was delay followed by more delay. When the Complainants had not received the return of their deposit as of March 5, 2009, they filed a Complaint and Guaranty Fund claim with the MREC. Additional delay followed. The MREC sent notices to the Respondent, requiring her response. Ultimately, the MREC's prodding got the Respondent to return the deposit to the Complainants. This did not happen until September 2009, ten months after the Complainants' original refund request.

The Respondent blames her failure to refund the deposit on several factors. Initially, it was because the seller's representative had not signed the release. Then, the Respondent had no knowledge of when the seller's representative signed the release. When the MREC verified the release's signing and notified the Respondent of this fact, the Respondent still did not issue a refund. She explained that she thought she could not do anything without the MREC's permission. Additionally, the Respondent was moving her offices in the summer of 2009, which caused her schedule to become chaotic. Finally, the Respondent informed the MREC that she did not have the Complainants' address.

I find no merit in the Respondent's excuses, particularly after March 2009, when the MREC alerted her that the seller had signed the release. At this point, there was no impediment to releasing the funds. The Respondent could have done so then, but she still waited. I find it unreasonable that the Respondent thought she needed the MREC's

permission to disburse the deposited funds, because the MREC was clearly urging her to send the refund. I question why she did not call a MREC representative to clarify this point. Essentially, I find fault with the Respondent for her failure to take an active part in finding a way to refund the \$2,000.00 deposit instead of simply waiting for the answers to come to her. Serving the interests of the parties to a real estate transaction where she provided representation was her responsibility as a licensed real estate broker. Since she breached that responsibility, I find that the MREC has the requisite authority to sanction her.

I will now address the MREC's specific charges.

*A. Violation of Section 17-322(b)(22) – Failure to Remit Trust Money Promptly*

The facts speak for themselves. As noted, there was a ten-month gap between the Complainants' request for reimbursement of their deposit and the Respondent's remittance. I can understand the Respondent's reticence in returning the deposit when she did not have confirmation of the seller's release. As noted, though, the Respondent took a passive role in obtaining information. The MREC's investigation revealed that the seller's representative had signed the release on January 8, 2009. Yet in March 2009, the Respondent still did not know about it. She then offered other excuses for not returning the deposit, which I have already dismissed as meritless. In short, the Respondent did not remit the deposit funds promptly and, therefore, she violated section 17-322(b)(22).

*B. Violation of Section 17-322(b)(25) – Engaging in Conduct that Demonstrates Bad Faith, Incompetency, or Untrustworthiness or that Constitutes Dishonest, Fraudulent, or Improper Dealings*

The Respondent did not engage in dishonest, fraudulent or improper dealings. The MREC presented insufficient evidence to show that the Respondent was acting in bad faith because there was no showing of intentional wrongdoing. I agree, however, that the

Respondent's conduct demonstrated incompetency. A licensed real estate broker has the obligation to manage financial matters actively, which the Respondent failed to do. Therefore, she violated section 17-322(b)(25).

*C. Violation of Section 17-322*

Based on my conclusion that the Respondent violated sections 17-322(b)(22) and (25), I conclude that she violated section 17-322(b)(32) as well. I will merge this charge into those cited above because it is redundant.

*D. Violation of the Code of Ethics*

The Respondent violated section 17-322(b)(33) of the Business Occupations Article by violating COMAR 09.11.02.02A, which demands that licensed real estate agents and brokers take into account the interests of all parties to a real estate sales transaction. The Respondent did not observe absolute fidelity to the Complainants' interests given her delay in refunding their deposit. This delay denied the Complainants' access to their money for an inordinately long time.

*II. Penalties.*

Section 17-322(c) of the Business Occupations Article provides that a licensee may be reprimanded or have his/her Real Estate Agent's, Associate Broker's or Broker's license suspended or revoked for violations of the Maryland Real Estate law. Section 17-322(c)(1) provides that instead of or in addition to reprimanding a licensee or suspending or revoking a Real Estate license, the MREC may impose a civil penalty not to exceed \$5,000.00. Section 17-322(c)(2) lists the factors that must be considered in imposing a civil penalty:

(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 violations that the Respondent committed are serious. The evidence presented by the MREC demonstrates that she did not adhere to the law by delaying the refund of the Complainants' deposit after a pending residential real estate transaction fell through. Moreover, it took the MREC's intervention to get the Respondent to act in issuing the refund. The harm caused by the Respondent's violations was blocking access by Complainants' to their funds. The Respondent exhibited some good faith.<sup>6</sup> The funds remained in escrow; she did not convert them for personal use, which would have made the situation even worse. I know of no previous violations by the Respondent.

The MREC asked that the Respondent be reprimanded and that she pay a civil penalty totaling \$3,000.00. I agree. The Respondent's activities here reveal that she is not well-versed in her responsibilities as a real estate broker. Therefore, I recommend a \$1,000.00 penalty for her violation of section 17-322(b)(22), a \$1,000.00 penalty for her violation of section 17-322(b)(25), and a \$1,000.00 penalty for her violation of section 17-322(b)(33) (which includes COMAR 09.11.02.02A) for a total civil penalty of \$3,000.00 (\$1,000.00 x 3). (I have merged the Respondent's violation of section 17-322(b)(32) with sections 17-322(b)(22) and (25) as noted above.)

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<sup>6</sup> The MREC does not believe that the Respondent showed good faith. It argues that even after everything that has happened, she still does not take full responsibility, which she should as the broker of record. During her testimony, for example, she tried to blame her associate broker and the MREC itself for her failure to remit the deposit. While it is true that the Respondent has attempted to dodge responsibility, I still find the Respondent's acts were negligent not intentional. As such, I am giving her credit for good faith.

### **CONCLUSIONS OF LAW**

Upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The Respondent violated section 17-322(b)(22) of the Business Occupations and Professions Article by failing to promptly remit the Complainants' \$2,000.00 earnest money deposit when the sale of the Clinton, Maryland property fell through.

2. The Respondent violated section 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrated incompetency.

3. The Respondent violated section 17-322(b)(33) of the Business Occupations Article and COMAR 09.11.02.02A by failing to abide by the Code of Ethics governing Real Estate agents and brokers by failing to promote the interests of all parties to the subject transaction.

4. The Respondent is subject to sanction based on her violations of the Real Estate law pursuant to Business Occupations Article section 17-322(c)(2).

### **RECOMMENDED ORDER**

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

**ORDER**, that the Respondent violated sections 17-322(b)(22), (25), and (33) of the Business Occupations and Professions Article and COMAR 09.11.02.02A, and be it further,

**ORDERED**, that the Respondent be **REPRIMANDED**; and be it further,

**ORDERED**, that the Respondent pay a civil statutory penalty to the Maryland Real Estate Commission in the amount of \$3,000.00; and be it further,

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

ADMINISTRATIVE LAW JUDGE'S SIGNATURE  
APPEARS ON ORIGINAL ORDER

November 19, 2010  
Date Decision Mailed

\_\_\_\_\_  
Thomas G. Welshko  
Administrative Law Judge

#116596



THE MARYLAND REAL ESTATE  
COMMISSION

v.

ROBYN Y. SMITH, BROKER,  
RESPONDENT

\* BEFORE THOMAS G. WELSHKO,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: DLR-REC-21-10-04907  
\* MREC NO.: 2009-RE-432

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**FILE EXHIBIT LIST**

**MREC's Exhibits:**

1. June 24, 2010 Notice of Hearing, with Statement of Charges and Order for Hearing
2. September 7, 2010 Postponement Request
3. December 30, 2009 Transmittal
4. August 18, 2010 Licensing Record for the Respondent
5. September 2, 2010 e-mail
6. August 18, 2009 Investigation Report of MREC Investigator Lucinda Rezek, which includes a narrative and the following attachments:
  - (1) July 14, 2008 Residential Contract of Sale
  - (2) June 29, 2007 (sic) Earnest Money Deposit Check
  - (3) Contract of Sale and Earnest Money Checks (second check replaced first ostensibly misdated check)
  - (4) 2008 – 09 e-mails
  - (5) May 13, 2009 letter from the Respondent to the MREC
  - (6) November 24, 2008 Release Agreement without the sellers' signature

(7) Additional e-mails

(8) October 13, 2009 Letter from Katherine F. Connelly, Executive Director, MREC, to the Complainants with enclosed refund check (copy)

Respondent Exhibits:

The Respondent did not submit any exhibits.