

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

*

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CASE NO. 2010-RE-445

V.

*

THOMAS J. MOONEY, IV
O'CONOR & MOONEY LLC
2333 W. JOPPA ROAD
LUTHERVILLE, MARYLAND 21093
Respondent

*

*

AND

CLAIM OF JENNIFER AND BRYAN
WALKER AGAINST THE MARYLAND
REAL ESTATE COMMISSION GUARANTY
FUND

*

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* * * * *

CONSENT ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 9, 2012 having been received, read and considered; the Maryland Real Estate Commission having issued a Proposed Order dated August 14, 2012; the Claimants, Jennifer and Bryan Walker, and the Respondent, Thomas J. Mooney IV, having each filed Exceptions to the Proposed Order; a hearing on Exceptions having been scheduled for November 28, 2012 before a panel of Commissioners; the parties having reached an agreement to resolve this matter without an Exceptions Hearing as set forth in the Order below, it is by the Maryland Real Estate Commission, this 5 day of DECEMBER, 2012:

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 this Consent Order supersedes the Proposed Order of the Commission dated August 14, 2012 and shall constitute the Final Order of the Commission in this matter;

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

ORDERED that the Respondent Thomas J. Mooney, IV violated Md. Code Ann., Bus. Occ. & Prof. Art., §17-322(b)(4), (32) and (33); §17-532(c); and Code of Maryland Regulations 09.11.02.01D;

ORDERED that pursuant to Md. Code Ann., Bus. Occ. & Prof. Art., §17-322(b) all real estate licenses held by the Respondent Thomas J. Mooney, IV shall be suspended for thirty (30) days;

ORDERED that pursuant to Md. Code Ann., Bus. Occ. & Prof. Art., §17-322(c) the Respondent Thomas J. Mooney, IV shall be assessed a civil penalty in the amount of \$6000 which shall be paid to the Real Estate Commission within thirty (30) days of the date of this Consent Order;

ORDERED that the Respondent Thomas J. Mooney, IV shall pay directly to the Claimants Jennifer and Bryan Walker the sum of \$15,225 by cashier's or certified check or money order which shall be paid within thirty (30) days of the date of this Consent Order;

ORDERED that all real estate licenses held by the Respondent, Thomas J. Mooney, IV, shall be suspended until the civil penalty and the Claimants are paid in full and that this suspension is in addition to the disciplinary suspension;

ORDERED that in the event that the Respondent, Thomas J. Mooney IV, fails to pay the sum of \$15,225 directly to the Claimants within thirty (30) days of this Consent Order, the Claimants shall be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of \$15,225 and all real estate licenses held by the Respondent shall be suspended until the Maryland Real Estate Guaranty Fund is reimbursed by him, including any interest that is payable under the law, and that this suspension is in addition to the disciplinary suspension;

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

MARYLAND REAL ESTATE COMMISSION:
SIGNATURE ON FILE

KATHERINE F. CONNELLY
EXECUTIVE DIRECTOR

By their signatures below, the Claimants and the Respondent acknowledge and agree to the Amendments made to the Recommended Decision and Order as set forth above. The Claimants and the Respondent further acknowledge and agree that they enter into this Consent Order freely, voluntarily and willingly and that by entering into this Consent Order they are waiving their right to an Exceptions hearing before a panel of Commissioners and they are waiving all rights to appeal from this Consent Order.

AGREED: **SIGNATURE ON FILE**

Bryan Walker, CLAIMANT
SIGNATURE ON FILE

11/21/2012

Date

Jennifer Walker, CLAIMANT

11/21/2012

DATE

SIGNATURE ON FILE

Thomas J. Mooney, IV, RESPONDENT

11/19/12
DATE

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

THOMAS J. MOONEY, IV *
Respondent *

CASE NO. 2010-RE-445

And *

OAH NO. DLR-REC-24-11-41176

CLAIM OF JENNIFER AND *
AND BRYAN WALKER *
AGAINST THE MARYLAND *
REAL ESTATE GUARANTY FUND *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 9, 2012, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 14th day of August, 2012

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 Thomas J. Mooney, IV violated Md. Bus. Occ. and Prof. Art. § 17-322(b)(4), (32), and (33); §17-532(c); and COMAR 09.11.02.01D;

ORDERED that all real estate licenses held by the Respondent Thomas J. Mooney, IV shall be suspended for ninety days;

ORDERED that the Respondent Thomas J. Mooney, IV shall be assessed a civil penalty in the amount of \$15,000.00, which shall be paid to the Real Estate Commission within thirty (30) days of the date of this Proposed Order;

ORDERED that the Claimants Jennifer and Bryan Walker be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of \$6,725.00;

ORDERED that all real estate licenses held by the Respondent Thomas J. Mooney IV shall be suspended until the civil penalty is paid in full, and the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law, and that this suspension is in addition to the disciplinary suspension;

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

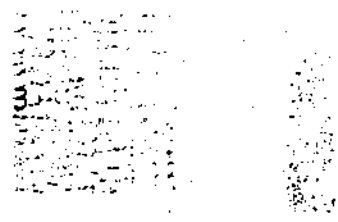
D. Pursuant to '10-220 of the State Government Article, the Commission finds that the Recommended Decision of the Administrative Law Judge had to be modified to provide a time period within which the civil penalty must be paid, to provide that

all real estate licenses held by the Respondent would be suspended until the civil penalty is paid in full and the Guaranty Fund is reimbursed, and to provide for a ninety-day license suspension and a \$15,000 civil penalty in lieu of revocation of his real estate license.

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.



RE ON FILE



MARYLAND REAL ESTATE
COMMISSION
and
JENNIFER and BRYAN WALKER,
CLAIMANTS
v.
THOMAS J. MOONEY, IV,
RESPONDENT

* BEFORE A. J. NOVOTNY, JR.,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No.: DLR-REC-24-11-41176
* REC CASE No.: 2010-RE-445
*
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*

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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 April 29, 2010, Jennifer and Bryan Walker (the Claimants) filed a complaint against a licensed real estate salesperson, Thomas Mooney, IV (the Respondent), as well as a claim for reimbursement (the Claim) from the Maryland Real Estate Guaranty Fund (the Fund) for losses the Claimants allegedly incurred as a result of the Respondent's misconduct. After conducting an investigation, on September 16, 2011, the Maryland Real Estate Commission (the REC or the Commission) issued a Statement of Charges and Order for Hearing against the Respondent for his alleged violations of sections 17-322(b)(32) and (33); 17-532(c)(1)(iv), (vi) of the Maryland Annotated Code's Business Occupations and Professions Article (the Business Occupations

Article), as well as Code of Maryland Regulations (COMAR) 09.11.02.01D. The Hearing Order further referenced the Claimants' Claim against the Fund.

I held a hearing on the Charges and the Claim on February 16, 2012 at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland. Assistant Attorney General Kris King represented the REC. The Claimants represented themselves. Assistant Attorney General Hope Miller represented the Fund. Michael Wyatt, Esquire, represented the Respondent.

I heard this case pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-408. Procedure in this case is governed by the provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2011); COMAR 09.01.03 and 28.02.01.

ISSUES

The issues in this case are as follows:

1. Did the Respondent violate Business Occupations Article § 17-322(b)(4), by intentionally or negligently failing to disclose to any person with whom the Respondent dealt a material fact that the Respondent knew or should have known and that related to the property with which the Respondent dealt in violation of Business Occupations Article § 17-322(b)(4)?
2. Did the Respondent violate Business Occupations Article § 17-532(c)(1)(iv), by failing to treat all parties to a transaction honestly and fairly, and answer all questions truthfully?
3. Did the Respondent violate Business Occupations Article § 17-322(b)(33), by violating a regulation?
4. Did the Respondent violate the provisions of COMAR 09.11.02.01D by failing to ascertain all material facts concerning every property for which the Respondent accepts the

agency, in order to fulfill the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts?

5. If so, what, if any, sanctions and or penalties should be imposed against the Respondent?

6. Did the Claimants sustain an actual loss as a result of the Respondent's acts or omissions?

7. If so, what, if any, amount should be awarded to the Claimants from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits:

The Commission submitted the following documents, which I admitted into evidence as the following numbered exhibits:

REC #1 Notice of Hearing issued on December 9, 2011

REC #2 Statement of Charges and Order for Hearing, September 16, 2011

REC #3 Respondent's REC licensing history

REC #4¹ Report of Investigation prepared by Robert J. Oliver, Investigator

The Claimants submitted the following document for admission into evidence:

CL #1 Claim packet (virtually a duplicate of the claim part of REC #4)

CL #2 Amendment to Fund Claim

The Respondent submitted the following documents for admission² into evidence:

Resp #1 On-line real property, land records and assets printout for the Claimants, District 01

¹ The Report was admitted over the Respondent's objection because Mr. Oliver failed to appear, although subpoenaed.

² The exhibits were admitted over objection as to relevance.

Resp. #2 On-line real property, land records and assets printout for the Claimants, District 05

Resp. # 3 On-line real property, land records and assets printout for the Claimants, District 03

Resp. # 4 Email dated December 26, 2007

Resp. # 5 Affidavit of Service upon Claimants (2), February 15, 2012

Testimony

The following witnesses testified on behalf of the Commission and Claimants:

Jennifer Walker, Claimant

Carmella Kuper, licensed real estate agent with Long & Foster Real Estate

Kimberly Proffitt, licensed real estate agent, formerly with Long & Foster Real Estate

Bryan Walker, Claimant

The Respondent testified on his own behalf.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all relevant times, the Respondent has been licensed by the REC as a real estate salesperson at O'Conner & Mooney Realtors under REC license # 4028176, where he is an agent, broker (license # 4227667) and employee.
2. At all relevant times the Respondent was the seller's agent for 917 Fallen Stone Court, Bel Air, Maryland, 21014 (the Property). The Property was initially listed for sale in April 2007. The Property was always listed for sale in "as is" or "as in" condition.

3. The Respondent was the seller's agent and Kim Proffitt, at that time a licensed real estate agent³ with Long & Foster, was the buyer's agent for a contract of sale of the Property in late 2007.
4. On December 31, 2007, the prospective buyers had a mold inspection done on the Property by Stephan Stran of Harford Radon & Real Estate Repair Services, Inc. (Harford Radon)
5. When the mold inspection revealed the presence of mold in the basement, the buyers cancelled the contract because of the presence of the mold. The sellers subsequently released the prospective buyers from the contract.
6. On or about January 9, 2008, Ms. Proffitt advised the Respondent of the buyer's cancellation, the reason for it, and offered to send the Respondent a copy of the mold inspection report. The Respondent advised Ms. Proffitt that he did not want a copy of the mold report.
7. In January 2008, the Respondent was aware of the presence of mold in the Property and that a sale of the Property did not come to fruition because of the presence of mold.
8. At all relevant times, Carmela Kuper was the Claimants' buyer's agent.
9. The Claimants became interested in the Property in early 2008. They inspected the Property three times, along with Ms. Kuper and at least once with the Respondent.
10. When asked about the failure of the previous contract of sale, the Respondent advised untruthfully that the sale failed for financing reasons. He did not disclose anything about the presence of mold or that the previous contract had been cancelled because of the discovery of the presence of mold in the basement.

³ Ms. Proffitt is currently a licensed real estate agent with a different company.

11. On March 15, 2008, the Claimants had an inspection of the property by FPM Home Inspections, Inc., who noted some evidence of moisture and water intrusion (from the driveway area), some mold around the sump area and recommended a mold inspection.
12. The Claimants decided to forego the mold inspection.
13. The Claimants bought (settled on) the property on March 28, 2008 and moved in.
14. After moving into the Property, the Claimants had driveway repair done to alleviate the water intrusion and emplaced dehumidifiers to address the moisture.
15. In April 2009, the Claimants noted a dust-like covering occurring over the basement walls the area where there had been evidence of water intrusion, an area different from around the sump area.
16. Following a mold inspection (coincidentally done again by Stephan Stran of Harford Radon) on July 1, 2009, the Claimants signed a remediation proposal on July 9, 2009 and paid \$6,950.00 (Inspection fee of \$225.00 plus remediation costs of \$6,725.00) for mold remediation.
17. Among the various molds found in the same areas during both inspections of the Property by Harford Radon were Penicillium/Aspergillus types and Smuts, Periconia, and Myxomycetes.
18. Portions of the basement had to be gutted in order to ameliorate the mold infestation. The carpeting, finished drywall and ceiling that were removed have not been replaced.
19. The Claimants lost clothes, rugs and other personal property because of mold contamination.

20. On April 29, 2010, the Claimants filed a complaint with the Commission against the Respondent and also filed a claim for reimbursement from the Fund.

DISCUSSION

Because the Claim against the Fund and the Charges arose from the same facts and circumstances, I heard them in one proceeding. Accordingly, I considered the evidence presented in this case in determining the merits of both the regulatory Charges and the Fund Claim.

The REC, as the moving party on the Charges, has the burden of proving that the Respondent violated the statutory and regulatory sections at issue; the Claimants, as the moving parties on the Claim, have the burden of proving that they suffered an actual loss as the result of the Respondent's misconduct, all by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009); *Maryland Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) (quoting *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959)). I find that the REC met its burden of proving all of the Charges and that the Claimants have partially met their burden with respect to the Claim. This is essentially a simple situation despite the Respondent's attempts to exclude evidence, minimize his involvement and shift responsibility. The matter is essentially summed up by the Respondent's admission, "I made a mistake."

Regulatory Charges

At all times relevant to this matter the Respondent was licensed by the REC as a real estate sales person and was affiliated with O'Conner & Mooney Realtors. The REC has filed charges against the Respondent that arise from the sale of the Property on March 28, 2008. The Respondent acted as the selling agent in the transaction. The REC has charged the Respondent with violating several provisions of the Maryland Business Occupations Article as well the

regulations regarding licensed real estate sales persons in connection with the sale of the Property to the Claimants.

For the reasons discussed below, I conclude that the REC has established by a preponderance of the evidence that the Respondent violated section 17-322(b)(4) of the Business Occupations and Professions Article, which states:

(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:

....

(4) intentionally or negligently fails to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know and that relates to the property with which licensee or applicant deals:

In late 2007, the Respondent was the selling agent for the Property. A sale in late 2007 did not go through and the potential buyers cancelled the contract because of discovery of a mold problem in the basement. Even the Respondent admitted at the hearing that he knew that mold could be a serious problem. The Respondent had actual knowledge of the mold problem from the buyer's agent, Ms. Proffitt, even though he advised her that he did not want to see a copy of the mold inspection report. Ms. Proffitt's testimony was clear, unequivocal, and totally credible. I also found the Claimants and Ms. Kuper credible. Clearly, the Respondent knew that the property had recent mold contamination. He also knew that the initial buyers cancelled the contract in January 2008 for reasons relating to the mold contamination.

Nonetheless, when the Claimants became interested in the property soon thereafter, the Respondent did not disclose the mold contamination that was discovered within a few months prior to the Claimants' interest in the Property. Not only did he fail to disclose the mold contamination, he did not tell the truth when asked about why the prior sale failed. As noted, the

entire case can best be summed up by the Respondent's admission at the hearing: "I made a mistake." The Respondent violated section 17-322(b)(4) of the Business Occupations and Professions Article when he failed to disclose the material facts concerning the mold contamination and when he misrepresented the reason for the prior sale's cancellation.

The evidence is also clear as follows, that the Respondent violated other parts of section 17-532(b) of the Business Occupations and Professions Article which state:

(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:

...

(32) violates any other provision of this title;

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

From the same factual scenario, the evidence shows that the Respondent violated section 17-532(c) of the Business Occupations and Professions Article which states:

(c) In General. _ (1) A licensee shall:

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

When asked why the prior contract of sale failed, the Respondent untruthfully advised Ms. Kuper and the Claimants that it was because of financing. The evidence shows that the previous prospective buyers had good financing and the Respondent knew it. Ms. Proffitt had clearly advised the Respondent that the previous sales contract's cancellation was because of the mold report. The Respondent did not treat the Claimants fairly and did not answer all questions truthfully when he failed to disclose the material facts concerning the mold contamination and when he misrepresented the reason for the prior sale's cancellation.

Lastly, the evidence is clear that the Respondent violated COMAR 09.11.02, which states:

01. Relations to the Client.

- D. The Licensee shall make a reasonable effort to ascertain facts concerning every property for which the licensee accepts the agency, in order to fulfill the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts.

Ms. Proffitt testified clearly and credibly that when she advised the Respondent that the mold inspection report on the Property was not favorable and that the prospective buyers were cancelling the contract, the Respondent told her that he did not want a copy of the report. The Respondent did not deny that that he declined a copy of the report, albeit, he tried to excuse his actions by stating that he knew that the deal had already folded, so he did not need the report. I conclude that the Respondent's excuse is simply a lame attempt to avoid the responsibility for not ascertaining relevant facts about the Property, which affected one sale and which certainly could affect future sales attempts. Since the Respondent continued as the selling agent for the Property, COMAR 09.11.02.01D clearly required him to ascertain facts in order to avoid "error, exaggeration, misrepresentation, or concealment of material facts," which coincidentally followed within two months.

It is clear to me that the Respondent deliberately and intentionally withheld material facts from the Claimants and Ms. Kuper, and deliberately and intentionally gave false information about the failure of the prior contract in order to make the sale to the Claimants. He intentionally placed his financial interests to get a sale and a commission above the interests of the Claimants and the tenants of the law. As such, he violated the Business Occupations and Professions Article sections as charged.

Regulatory Sanctions/Penalties

Section 17-532(b) of the Business Occupations and Professions Article states:

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

Counsel for the REC argued that there are three violations and that a total of \$6,000.00 in fines should be imposed. Section 17-322(c) of the Business Occupations Article permits, instead of or in addition to reprimanding, suspending or revoking a real estate license for violation of the statutes and regulations, an assessment of up to a \$5,000.00 monetary penalty per violation, applying the following criteria:

- (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.

In this case, Counsel for the REC noted that the Respondent was charged with several violations and could be fined \$5,000.00 under each one, but he was only requesting a \$6,000.00 total penalty in light of the Respondent's otherwise violation free history. Counsel for the Respondent argued unpersuasively that there were no violations and that there should be no sanctions.

The seriousness of the Respondent's violations is severe and the resulting harm was severe, and could have been even more severe. His omissions and misrepresentations showed a wanton lack of good faith. His non-disclosures and misrepresentations to the Claimants regarding the Property caused them not only economic losses, but could have jeopardized their health and safety. The Respondent argued that the mold reports did not state that the mold was "Toxic," as though that would elevate the concern and problem. However, it is obvious that the Respondent did not know *what* the first mold report stated: he did not want a copy. The

Respondent did not know what mold was present or how bad the contamination was, and he did not care. The Respondent jeopardized the Claimants' (or anyone else's in that house) health simply to make a sale and get a commission.

The Respondent has demonstrated a total lack of honesty and good faith in his interactions with the Claimants. He has taken little responsibility for his actions; he made lame excuses, and has attempted to shift responsibility to the Claimants (for not having their own mold inspection early on). At the hearing he offered no mitigating factors for me to consider other than his previous record and his admission that he made a mistake.

I have weighed the seriousness of the Respondent's violation and the harm caused by the Respondent's improper behavior heavily against the Respondent in recommending an action. Despite the Respondent's prior good history, I do not feel that a mere fine, possibly less than the commission that he earned⁴ from the sale, to be sufficient sanction for his wanton and deliberate disregard of the standards that he is expected to apply. I recommend that the Respondent's license be revoked.

Guaranty Fund Claim

The burden of proof at a hearing regarding a claim against the Fund is on the "claimant to establish the validity of the claim." Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010). Section 17-404(a) of the same statute governs all claims brought against the Fund and sets forth, in pertinent part, the following criteria that must be established by a claimant to obtain an award:

§ 17-404. Claims against Guaranty Fund.

(a) *In general.*-(1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.

⁴ The evidence disclosed that the Respondent was a co-listing agent for the Property, along with a newly hired real estate agent, coincidentally a relative of the seller.

(2) A claim shall:

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

1. a licensed real estate broker;
2. a licensed associate real estate broker;
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.

(b) *Limitation on recovery.*- The amount recovered for any claim against the Guaranty Fund may not exceed \$25,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2010). See COMAR 09.11.03.04.

The REC shall order payment of a valid claim from the Fund for actual monetary losses suffered by a claimant not to exceed \$25,000. Md. Code Ann., Bus. Occ. & Prof. § 17-410(a), (b) (2010); COMAR 09.11.01.18.

The Claimants seek reimbursement from the Fund in the maximum amount. The Claimants assert that they are entitled to reimbursement because the Respondent, a licensed real estate salesperson, misrepresented the condition of Property to them, and as a result, they ultimately suffered significant financial losses.

For the reasons already discussed in the portion of this decision regarding the Respondent's statutory and regulatory violations, I conclude that the eligibility requirements of a Fund claim have been met by the Claimants based upon the Respondent's misrepresentations.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a), (b) (2010). See COMAR 09.11.03.04. The next step is to determine the amount of the Fund award.

The Claimants requested on the REC claim form reimbursement in the amount of \$25,000.00, and they have provided an itemization as follows:

Mold Inspection.....	\$ 225.00
Mold Remediation & Clean-up.....	6,725.00
Refinish Basement to previous condition...	8,500.00
Loss of personal property.....	1,500.00
11 gallons of Dry-Loc®.....	225.00
Loss in home value.....	<u>7,825.00</u>
Total Claim	\$25,000.00

While I am sure that the Claimants have brought this claim in good faith and that they are sincere in their claim, they have not met their burden to substantiate⁵ their total claim. Taking their itemizations in order, the mold inspection (\$225.00) cannot be considered an actual loss recoverable from the Fund because such an inspection, made either at the time of the purchase (as recommended by FPM, Inc) or thereafter, was not necessarily a result of the Respondent's misrepresentations.

The mold remediation and clean-up I find to be an actual loss suffered by the Claimants and as such, recoverable from the Fund based upon the Respondent's misrepresentations. Had the true history and condition of the Property been disclosed, the sale may have been cancelled as was the previous contract, there could have been re-negotiation and adjustment, or the Claimants could have waived the claim. As it was, however, the mold remediation and clean-up was unexpected, the need for it withheld, and the need for it hidden and misrepresented by the Respondent. As such, the claim of \$6,725.00 for the mold remediation is appropriate.

⁵ A Fund claim "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 11.09.01.18.

A need to refinish the basement to its previous condition based upon demolition due to mold remediation could be a valid claim. However, the Claimants have not, aside from their claim itself, verified the cost, extent or reasonableness of the claimed amount to restore the basement. There is no legible⁶ estimate, proposal, or appraisal by any licensed home improvement contractor verifying the claimed cost of \$8,500.00 to restore the basement. As such, I cannot recommend that the Fund award this amount as an actual loss.

Similarly, the loss of personal property claim (\$1,500.00) is totally unsubstantiated as to the personal property's value or replacement value. Values are just speculation. I cannot recommend that the Claimants' estimate of replacement values be considered as actual losses compensable from the Fund.

The cost of Dry-Loc claim (\$225.00) is totally unsubstantiated as well as the actual need for the installation of it as *remediation* for the Respondent's misrepresentations. It may have been a reasonable upgrade to the basement, but the need for it was not based upon the Respondent's misrepresentations. I cannot recommend that the Claimants' cost of Dry-Loc be considered as an actual loss compensable from the Fund.

Lastly, as to the loss in home value claim (\$7,825.00), again, the claim is speculative and totally unsubstantiated. There are no appraisals, estimates or other substantiations of the claim aside from the claim itself. I cannot recommend that the Claimants' estimate of loss in home value be considered as actual losses compensable from the Fund.

As an aside, the claims for the basement refinishing and for the loss of home value would logically cancel one or the other. If the basement were restored, there would be no loss in home value. Likewise, if the basement remained gutted, there could be a resultant loss in home

⁶ Attached to exhibit CL #1 is a partial document listing costs and work to be done, dated November 17, 2009, but it is incomplete. It does not even disclose the company name.

value. Thus, both claims, even if sustained, could not reasonably have been granted.

In conclusion, I find that the Claimants have established that they are entitled to reimbursement from the Fund in the amount of \$6,725.00, being the cost of the mold remediation.

CONCLUSIONS OF LAW

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

1. The Respondent violated section 17-322(b)(4) of the Business Occupations Article by intentionally or negligently failing to disclose to any person with whom the Respondent dealt a material fact that the Respondent knew or should have known and that related to the property with which the Respondent dealt.
2. The Respondent violated section 17-532(c) of the Business Occupations Article by failing to treat all parties to the transaction honestly and fairly and answer all questions truthfully. *See also* Md. Code Ann., Bus. Occ. & Prof. § 17-532(b)(32).
3. The Respondent violated regulations adopted under the Business Occupations Article by failure to ascertain facts in order to avoid error, exaggeration, misrepresentation, or concealment of material facts. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(33); COMAR 09.11.02.01D.
4. The Respondent is subject to sanctions for his conduct, and that revocation of his license is the appropriate sanction instead of a monetary penalty. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c).
5. The Claimants have established an actual loss recoverable from the Fund, in the amount of \$6,725.00. Md. Code Ann., Bus. Occ. & Prof. § 17-404.

RECOMMENDED ORDER

I THEREFORE RECOMMEND that the Maryland Real Estate Commission:

ORDER that the Respondent's real estate license be revoked; and further

ORDER that the Claimants' claim against the Guaranty Fund be allowed in the amount of \$6,725.00; and

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

May 9, 2012
Date Decision Issued

#131985



A. J. Novotny
Administrative Law Judge

SIGNATURE ON FILE