

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

v.

**KOY BANKS,
Respondent**

and

**IN THE MATTER OF THE CLAIM
OF VERNITA PICKETT AGAINST
THE MARYLAND REAL ESTATE
COMMISSION GUARANTY FUND**

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PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law, and Recommended Order of the Administrative Law Judge dated May 14, 2020, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 17th day of June, 2020, hereby

ORDERED:

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

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

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

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

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

adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then this Proposed Order becomes final.

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

6/17/20
Date

MARYLAND REAL ESTATE COMMISSION

SIGNATURE ON FILE

By: _____

SIGNATURE

SIGNATURE

MARYLAND REAL ESTATE

* BEFORE SUSAN H. ANDERSON,

COMMISSION

* AN ADMINISTRATIVE LAW JUDGE

v.

* OF THE MARYLAND OFFICE OF

KOY BANKS,

* ADMINISTRATIVE HEARINGS

RESPONDENT,

* OAH No.: LABOR-REC-24-20-08943¹

AND

* REC CASE No.: 18-RE-041

IN RE CLAIM OF VERNITA

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PICKETT AGAINST THE

*

MARYLAND REAL ESTATE

*

GUARANTY FUND

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PROPOSED DECISION ON REMAND

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

STATEMENT OF THE CASE

On August 16, 2017, Vernita Pickett (Claimant) filed a Complaint against licensed real estate salesperson Koy Banks (Respondent). That same day, the Claimant also filed a Claim for compensation from the Real Estate Guaranty Fund (Fund) for losses the Claimants allegedly

¹ This case was initially captioned as LABOR-REC-24-19-24197 and consolidated with case number LABOR-REC-24-19-24202 for purposes of the hearing on October 24, 2019, over the objection of the Respondent. At the start of the hearing, he indicated that his attorney had advised him to ask for an “extension” because he was still in negotiations with his Errors and Omissions insurance carrier about coverage for any monetary penalties that might result. He also objected to the consolidation on the basis that the cases involve separate matters. I treated his request for an “extension” as a request for postponement and denied it because the reasons for the request did not constitute an emergency; I also overruled his objection to consolidation of the cases, as both cases involve the same transaction and a consolidation was necessary in order to promote judicial economy. Code of Maryland Regulations (COMAR) 28.02.01.16D. I am issuing individual Proposed Remand Decisions for each case.

sustained as a result of the Respondent's misconduct. The Complaint and Claim both arose out of a contract of sale (Contract) entered into by the Claimant on or about November 15, 2016 for the purchase of 5100 Addison Road, Capitol Heights, Maryland (the Property).

On May 16, 2019, after an investigation, the Maryland Real Estate Commission (REC or Commission) determined that charges against the Respondent were warranted and that the Claimant was entitled to a hearing of her Claim and, accordingly, the Commission issued a Statement of Charges and Order for Hearing (Statement of Charges) against the Respondent. The Statement of Charges set forth information about the Claim and further alleged that the Respondent violated subsections 17-320(c)(1), 17-322(b)(3), (b)(6), (b)(25), (b)(27), (b)(32), (b)(33), and 17-530.1(a) of the Business Occupations and Professions Article (Business Occupations Article) of the Maryland Code and that he also violated COMAR sections 09.11.02.01C and 09.11.02.02A. The Statement of Charges advised the Respondent that if the charged violations were substantiated, the Commission could sanction him by, among other things, suspending or revoking his real estate license and imposing a monetary fine. On July 29, 2019, the Commission forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing.

On October 24, 2019, I conducted the hearing at the County Office Building in Largo, Maryland. Md. Code Ann., Bus. Occ. & Profs. §§ 17-324(a) and 17-408(a) (2018).² Michelle Wilson, Assistant Attorney General, Maryland Department of Labor (Labor), represented the REC on the charged violations of law. Andrew Brouwer, Assistant Attorney General, Labor, represented the REC on the claim for compensation from the Fund. The Claimant represented herself. The Respondent represented himself.

² All references to the Business Occupations and Professions Article are to the 2018 Replacement Volume.

On January 10, 2020, I issued a proposed decision. On March 9, 2020, the REC remanded the case as follows:

. . . for the limited purpose of consideration of charges against Respondent of violations of COMAR 09.11.02.02A and whether the consideration changes Administrative Law Judge, Susan Anderson's Proposed Conclusions of Law and Recommended Order, or any other sections, of her January 10, 2020 Proposed Decision in the captioned case;

The Administrative Law Judge, Susan H. Anderson, shall issue a Proposed Decision addressing COMAR 09.11.02.02A stating how, if at all, consideration of the charge affects or modifies the Proposed Conclusions of Law and Recommended Order, or any other sections of her January 10, 2020 Proposed Decision;. . .

After review of the Remand Order, I determined that no additional testimony was needed in order to fulfill the Order's directive.

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings before the Office of the Secretary of Labor, and the Rules of Procedure of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 and Supp. 2019); COMAR 09.01.02; COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. In connection with the sale of the Property, did the Respondent violate the Business Occupations Article, subsections 17-320(c)(1), 17-322(b)(3), (b)(6), (b)(25), (b)(27), (b)(32), (b)(33), or subsection 17-530.1(a), or COMAR 09.11.02.01C or 09.11.02.02A?
2. If the Respondent violated any of these statutory or regulatory provisions, what is the appropriate sanction?
3. Has the Claimant established a compensable claim against the Fund under section 17-404 of the Business Occupations Article; and, if so, what is the appropriate award?

SUMMARY OF THE EVIDENCE

Exhibits

The REC offered the following exhibits, which I admitted into evidence³:

- REC Ex. 1 - Statement of Charges for Andrea Tucker, July 16, 2019
- REC Ex. 2 - Statement of Charges for Koy Banks, July 16, 2019
- REC Ex. 3 - Notice of Hearing in REC v. Andrea Tucker, August 26, 2019
- REC Ex. 4 - Notice of Hearing in REC v. Koy Banks, August 26, 2019
- REC Ex. 5 - Complaint and Guarantee Fund Claim, August 16, 2017
- REC Ex. 6 - Licensing History for Andrea Tucker, printed October 22, 2019
- REC Ex. 7 - Licensing History for Koy Banks, printed October 22, 2019
- REC Ex. 8 - Report of Investigation, completed January 28, 2019, with the following attachments⁴:
 - 1. Complaint and Guaranty Fund Claim, August 16, 2017
 - 2. Residential Contract of Sale, signed November 15, 2016, with attached disclosures, addendums, and reports
 - 3. Residential Contract of Sale, p. 11 of 11 (highlighted)
 - 4. Home Inspection Report: Property Preservation Specialists, Inspection Date December 17, 2016
 - 5. SDAT⁵Real Property Data Search for 5100 Addison Road, Capitol Heights, Maryland, printed January 28, 2019
 - 6. Water Escrow Agreement, undated
 - 7. Bid Sheet for repairs from Chapman Construction, undated
 - 8. Maryland Home Improvement Commission (MHIC) search results for Chapman Construction, undated
 - 9. Text message thread between Claimant and Broker, Koy Banks, spanning January 15, 2017 to January 23, 2017
 - 10. MHIC search results for Keith Cross, January 17, 2019
 - 11. Text message thread between Claimant and home inspector, Tory Hunnicutt, spanning January 17, 2017 to February 3, 2017
 - 12. Text message thread between Claimant and Koy Banks, and Daniel Horrell, spanning January 17, 2017 to January 25, 2017
 - 13. REC License for Calandra Taylor, printed January 17, 2019

³ As this case was consolidated with case number LABOR-REC-24-19-24202 for purposes of the hearing, the REC's exhibits cover both cases.

⁴ Several of the attachments were duplicative. As the REC sequentially numbered the attachments, I have nonetheless separately listed each attachment.

⁵ State Department of Assessments and Taxation

14. Photographs of premises of the Property, undated
15. Invoice for waste and debris clean up from VJ General Contractors, April 6, 2017
16. Photographs of outside of the Property, undated
17. Letters of Representation from Jeffrey S. Yablon, May 1, 2017
18. Eagle Premier Inspections, LLC inspection report, Inspection Date May 3, 2017
19. Invoice for air conditioning units from The Home Depot, June 12, 2017
20. SDAT Real Property printout for 1805 DeWitt Avenue, printed January 18, 2019
21. MRIS Residential Listing printout for the Property, printed October 11, 2018
22. Consent for Dual Agency form, signed November 16, and 17, 2017
23. Photographs of the Claimant at closing, printed January 28, 2019
24. REC licensee database printout for Kirkton Banks, printed October 1, 2018
25. Email from REC investigator, Umar Abdul-Hamid, to Brandon L. Wyatt, Esq., November 16, 2018
26. The Home Depot invoice for washer/dryer set, January 12, 2017
27. Chapman Construction bid sheet for repairs, undated
28. Residential Brokerage Agreement, signed November 2, and 3, 2016
29. Articles of Organization for Lanken Investments, LLC, signed January 14, 2016
30. Email chain between REC investigator, Umar Abdul-Hamid and Brandon L. Wyatt, Esq., spanning October 9, 2018 to October 12, 2018
31. Email chain between REC investigator, Umar Abdul-Hamid and Brandon L. Wyatt, Esq., November 8, 2018
32. Buyer Agency Agreement, executed on April 18, 2016

REC Ex. 9 - Home Inspection Report; Property Preservation Specialists, Inspection Date December 17, 2016⁶

REC Ex. 10 - General Addendum to Contract of Sale, signed January 13, 2017

REC Ex. 11 - Government of the District of Columbia (D.C.) Certificate of Organization for Lanken Investments LLC, printed October 23, 2019

The Claimant offered the following exhibits, which I admitted into evidence:

Clmt. Ex. 1 - Statement included with Claimant's original Complaint to the REC, undated

Clmt. Ex. 2 - Letter from Monarch Title, Inc. to Claimant, April 18, 2017, with original recorded deed attached

Clmt. Ex. 3 - Letters of Representation from Jeffrey S. Yablon to Monarch Title, Inc., May 1, 2017; emails between Claimant and Monarch Title, April 21, and 28, 2017

⁶ The REC submitted the Home Inspection Report as attachment number four to their Report of Investigation; however, in that copy, the REC removed all of the blank pages so it is a much shorter document. To ensure that the record clearly reflects that the entire report was submitted, the REC submitted this exhibit with the blank pages included.

Clmt. Ex. 4 - Listing of additional fees compiled by Claimant, undated, with invoices and receipts

Clmt. Ex. 5 - Listing of photographs with photographs attached of the Property, undated

Clmt. Ex. 6 - Estimate from ESBY Design Build, October 24, 2019

Clmt. Ex. 7 - Acknowledgement by Buyer/Seller of Certification and Receipt of Settlement Statement/Closing Disclosure, January 13, 2017; Water Escrow Agreement, undated; Maryland Form WH-AR for Lanken Investments LLC, undated; Deed for the Property, recorded February 26, 2017; check number 4840049733 from Claimant to Monarch Title, January 13, 2017

The Respondent offered the following exhibits, which I admitted into evidence:

Resp. Ex. 1 - American Land Title Association (ATLA) Settlement Statement – Combined, settlement date, January 13, 2017

Resp. Ex. 2 - Deed for the Property, January 13, 2017

The Fund did not offer any exhibits for inclusion in the record.

Testimony

The REC presented testimony from Umar Abdul-Hamid, its real estate investigator; Calandra Taylor, a realtor with Tri-Star Realty; Claimant Vernita Pickett; Respondent Koy Banks; and Andrea Tucker. Ms. Pickett was treated as both a witness for the REC and the Claimant when she testified.

The Claimant testified in her own behalf and presented no other witnesses.

The Respondent testified in his own behalf.

The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. The Respondent has been a licensed real estate agent in Maryland since June 30, 2005 and has had no prior complaints filed against him with the REC. The Respondent became a licensed real estate broker in Maryland in approximately 2008. The Respondent primarily works in Prince Georges County. The Respondent is also a licensed broker in D.C. and Virginia.

2. On February 20, 2015, the Respondent and his wife, Monique Banks, filed Articles of Organization in D.C. for a limited liability company they had formed, Lanken Investments LLC (Lanken I). Lanken I was formed for the Respondent and his wife to purchase rental properties in D.C.

3. In January 2016, the Respondent gave his father, Kirkton Banks, the authority to register and run the company in Maryland. On January 14, 2016, Kirkton Banks executed a Limited Liability Company Operating Agreement (Agreement) for Lanken Investments, LLC (Lanken II). The Agreement identified Kirkton Banks as the sole member of Lanken II. The Respondent had no association with Lanken II.

4. For reasons not clear in the record, no Articles of Incorporation were filed for Lanken II. Therefore, instead of being registered as a new corporation in Maryland, it was identified in the State Department of Assessments and Taxation (SDAT) records as a foreign corporation doing business in Maryland. Neither the Respondent nor Kirkton Banks was aware that Lanken II was not considered a separate business from Lanken I.

5. In 2016, Kirkton Banks (seller), through Lanken II, purchased and partially rehabbed the Property. On November 2, 2016, the seller entered into an Exclusive Right to Sell Residential Brokerage Agreement with Exit Elite Realty (Exit Elite), an entity owned by the Respondent. The Respondent was listed as the seller's agent and Exit Elite was identified as the broker.

6. In mid-November 2016, a part-time real estate agent with Exit Elite, Andrea Tucker, saw the listing for the Property on the sale board in her office. Ms. Tucker was assisting the Claimant in looking for a house and she believed the Claimant might be interested in this house which the listing referred to as a "renovated rancher." The Claimant visited the Property and opted to put in an offer on it.

7. On November 16, 2016, the Claimant submitted an offer to purchase the Property for the asking price of \$170,000.00, along with a deposit for \$1,500.00. Ms. Tucker negotiated for a \$7,500.00 credit from the seller towards the Claimant's settlement costs and for the seller to provide a washer and dryer. The seller accepted this offer.⁷

8. The seller executed a Maryland Residential Property Disclaimer Statement with regard to the Property. This meant that the seller elected to sell the property without representations and warranties as to its condition. In other words, the Property was sold "as is."

9. The Contract also contained a Home Inspection Addendum (Addendum). This Addendum provided for a 21-day period in which the Claimant could arrange for a home inspection. If the home inspection took place within 21 days of the ratification of the Contract, the Claimant would have the right to present a list of repairs and/or monetary concessions she wished the seller to make based upon the results of the inspection. This Addendum also gave the Claimant the unconditional right to terminate the Contract "for no stated reason, based upon Buyer's general dissatisfaction with the inspection results" and have her \$1,500.00 deposit returned to her. However, the Addendum also provided that if the Claimant did not comply with the 21-day time frame, she would lose the right to rescind the Contract without the loss of her \$1,500.00 deposit.

10. Ms. Tucker scheduled the home inspection at the request of the Claimant, but scheduled it for December 17, 2016 (beyond the 21-day deadline), without obtaining an agreement from the seller to extend the time frame.

11. As part of the Contract, the Claimant signed a Dual Agency Agreement. The Dual Agency Agreement explained that a dual agency situation exists when the seller's agent and the buyer's agent work for the same broker. In such a situation, the broker does not owe an

⁷ This agreement is also termed the "Contract" throughout the decision.

undivided loyalty to either the buyer or the seller. The Dual Agency Agreement to which the Claimant agreed listed Ms. Tucker as the buyer's agent and the Respondent as the seller's agent. It did not identify the broker. In fact, the Respondent acted as the broker as well as the seller's agent for this transaction. The Respondent did not notice that Ms. Tucker had not correctly and completely prepared the Dual Agency Agreement.

12. On December 17, 2016, Property Preservation Specialist, a home inspection company owned by Tory Hunnicutt, conducted the home inspection for the Property. The Claimant, Ms. Tucker, and the Respondent were all present. The Respondent walked around with Mr. Hunnicutt as he inspected the Property. The Claimant remained in the living room during the inspection. She had little interaction with Mr. Hunnicutt except at the end of the visit when she asked him a few questions about some minor issues she could see, such as the countertops in the kitchen not being properly mounted and the oven door not being properly attached. The Claimant asked the Respondent about these items and he assured her the things she asked him about would be fixed prior to settlement. The Respondent made no affirmative representations about the condition of the Property.

13. Mr. Hunnicutt emailed the home inspection report to Ms. Tucker and the Claimant on or about December 20, 2016. The Claimant tried to open the report on her phone but saw only blank pages when she did so. The portal used by Mr. Hunnicutt to allow clients to see the home inspection report also included a feature to allow clients to create a Repair Addendum and choose which repairs they wanted the seller to make. The Claimant never created a Repair Addendum for the Property, nor did she ask Mr. Hunnicutt to resend the home inspection report until after she had closed on the house.

14. The Claimant never asked the seller, through the Respondent, to make any of the repairs suggested in the Home Inspection Report. The Respondent never received a copy of the Home Inspection Report.

15. The Claimant attended the final walkthrough of the Property on the morning of January 13, 2017, her closing date. At that time, she noted that some of the issues she had addressed with the Respondent on the date of the inspection were still not completed. Specifically, additional crown molding had not been added to the top of a kitchen cabinet, the baseboards that were stained with floor stain had not been painted, the stove door had not been fixed or replaced, and the GFCI outlet in the bedroom had not been replaced.

16. The Claimant closed on the Property on January 13, 2017. At the time of closing, she and Ms. Tucker created a General Addendum that provided the Seller would escrow \$500.00 to complete the following repairs: add additional crown molding to top of kitchen cabinet, paint baseboards in house that are discolored, fix/replace stove door, and add a GFCI outlet to the bedroom.⁸ This General Addendum, to which the seller agreed, addressed the issues the Claimant had discussed with the Respondent at the time of the home inspection.

17. Once the Claimant moved into the Property, she noted there was no heat or hot water. Per instructions from Ms. Tucker, the Claimant addressed these concerns with the Respondent. He arranged for repairs to the furnace and at the Claimant's behest, Mr. Hunnicutt repaired the hot water heater. The Respondent also arranged for a washer and dryer to be delivered to the Property and sent over a handyman to hook up the washer and properly mount the kitchen countertops.⁹

⁸ The Claimant testified that the GFCI outlet in the bedroom was to be replaced; for reasons that are not clear in the record, the General Addendum called for adding a GFCI outlet to the bedroom rather than replacing the existing one.

⁹ The handyman was also supposed to hook up the dryer. However, for unknown reasons he was unable to do so. Someone did eventually hook up the dryer; it is not clear in the record who did it, when it was done, or who paid to have it done.

18. On January 14, 2017, the Claimant also advised the Respondent that the locksmith who came to re-key the lock said that the door jamb needed to be replaced. The Respondent advised the Claimant that he would pay for the locksmith to fix the door jamb even though it had never been on a list of repairs because he wanted the Claimant to be happy. The locksmith did not repair the door jamb.

19. On January 17, 2017, the Claimant texted the Respondent to express some frustration about the condition of the Property. She was concerned because that morning she noticed that the toilet in the half bath was stopped up completely. The Claimant also noted in her text that there was a “huge” hole in the siding in the back door area where someone tried installing security cameras and damaged both sides. She further noted that the awnings were gone and she was concerned about rodents and water damage.

20. The Respondent replied that evening reassuring the Claimant that he was not going to “leave her hanging.” He assured her that the plumber would be there in the next day or two, reminded her that she had said she was going to put up new awnings and that her heat had been restored, and that someone would look at “the door.”¹⁰ The Respondent also advised the Claimant that the home warranty the seller supplied should cover any other major issues.

21. The Claimant became increasingly concerned about potential problems with her new home. Therefore, on January 20, 2017, the Claimant texted Mr. Hunnicutt and asked him to resend the Home Inspection Report, which he did. The Claimant was disturbed to see the items on the list for which Mr. Hunnicutt recommended repairs. She had not been concerned about the home inspection results prior to settlement because she assumed that a “renovated rancher” meant that everything had been updated and was new.

¹⁰ It is not clear from the text messages what “the door” refers to. However, other evidence suggests that the Respondent is referring to the fact that the Claimant had advised the front door was not properly installed and so it appears “the door” refers to the front door.

22. On January 23, 2017, the Claimant texted the Respondent about her frustration that repairs had not been done well and that the Respondent had not done “the things that should have been done from the inspection.” In response, the Respondent advised that the plumber would fix what the Respondent had agreed to fix and the Respondent would instruct the title company to release to the Claimant the \$500.00 being held for repairs so that she could fix whatever she deemed necessary.

23. On April 6, 2017, the Claimant paid VJ General Contractors \$925.00 to clean up debris in her yard. That fee included \$200.00 to clean out the garage; however, the Claimant never removed her things from the garage so the contractor never cleaned out the other debris left in the garage by the seller.

24. On a date not clear in the record, the Claimant contacted Exit Elite about the \$500.00 in escrow for the repairs. A contractor sent to do some repairs had become “disgruntled” with the Claimant. Calandra Taylor, an agent and team leader with Exit Elite, overheard the conversation between the Claimant and the office manager and contacted the Claimant to try and get additional information. The Respondent then asked Ms. Taylor to meet with the Claimant to try and resolve her concerns since the Claimant’s relationship with both the Respondent and the contractor had broken down.

25. On April 21, 2017, Amy Cinoski, a representative from Monarch Title (Monarch), the title company that had conducted the settlement for the Property, emailed the Claimant about the status of the \$500.00 check Monarch had sent. The \$500.00 was the amount escrowed for repairs that the Respondent had directed be released to the Claimant.

26. On May 1, 2017, the Claimant retained an attorney, Jeffrey Yablon, to represent her in connection with the matters concerning the Property. That same day, Mr. Yablon emailed

Ms. Cinoski and advised that the Claimant had not received the \$500.00 check and instructed her to hold the amount in escrow “until otherwise directed.”

27. Sometime prior to May 3, 2017, Ms. Taylor met with the Claimant at the Property. Ms. Taylor arranged for a contractor to fix the baseboards and trim. The contractor also looked the front door but was unable to fix it; he recommended that the door frame be replaced. He was also unable to fix a problem with the dryer because parts were missing.

28. Ms. Taylor also recommended a second home inspection after the Claimant advised her that Mr. Hunnicutt had not sent her a copy of the initial home inspection report until after settlement. On May 3, 2017, the Claimant paid for a second home inspection from Eagle Premier Inspections, LLC because she did not trust the report from Mr. Hunnicutt as she believed he “worked with” the Respondent and was not impartial.

29. On a date not clear in the record, the Claimant obtained an estimate from Chapman Construction, an unlicensed contractor, to complete the repairs noted in the second home inspection of May 3, 2017.

30. At some point in late spring or early summer 2017, the Claimant discovered the air conditioning was not working when she went to turn it on for the first time. Mr. Hunnicutt had not been able to test the air conditioning during the home inspection on December 17, 2016 because it was too cold outside.¹¹ The Claimant purchased two window units to cool her home.

31. By this point in time, communication had totally broken down between the Claimant and the Respondent. On August 16, 2017, the Claimant filed her Complaint with the REC.

32. On October 22, 2019, the Claimant obtained an estimate from Flood of VA Inc. in the amount of \$16,694.00 to replace her HVAC system. On October 24, 2019, the Claimant

¹¹ The inspector from Eagle Premier Inspections, LLC noted in his report that the AC (air conditioning) compressor “appeared functional at the time of inspection.”

obtained an estimate from ESBY Design Build for \$20,935.00 to complete the repairs noted in the second home inspection of May 3, 2017.¹² No one from ESBY Design Build visited the Claimant's home to review current conditions before providing the estimate.

33. The Claimant has no familial or business relationship to the Respondent.

DISCUSSION

The Regulatory Charges

I. The Regulatory Charges

The Legal Framework and Burden of Proof

The REC contends the Respondent violated sections 17-320(c)(1), 17-322(b)(3), (b)(6), (b)(25), (b)(27), (b)(32), (b)(33), and 17-530.1(a) of the Business Occupations Article as well as COMAR sections 09.11.02.01C and 09.11.02.02A.

Section 17-320(c)(1) provides:

(c)(1) A real estate broker shall exercise reasonable and adequate supervision over the provision of real estate brokerage services by any other individual, including an independent contractor, on behalf of the broker.

The specific subsections of 17-322(b) cited by the REC provide as follows:

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

...

(3) directly or through another person willfully makes a misrepresentation or knowingly makes a false promise;

¹² The Claimant obtained this estimate after the REC advised her that Chapman Construction was not licensed and she could therefore not use the estimate from them to prove her damages in this case.

... (6) violates § 17-530(a) or (b) of this title;¹³

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

... (27) violates § 17-320(c) of this subtitle by failing as a real estate broker to exercise reasonable and adequate supervision over the provision of real estate brokerage services by another individual on behalf of the broker;

... (32) violates any other provision of this title; [or]

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

Section 17-530.1(a) provides, as relevant here:

(a) Except as otherwise provided in subsection (b) of this section, a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson may not act as a dual agent in this State.

COMAR 09.11.02.01C provides, as pertinent here:

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee

¹³ Sections 17-530(a) and (b) provide as follows:

(a)(1) Except as provided in paragraphs (2) and (3) of this subsection, a licensee who participates in a residential real estate transaction as a seller's agent, buyer's agent, or a subagent shall disclose in writing that the licensee represents the seller or lessor or the buyer or lessee as provided in this section.

(2) The disclosure required under this section does not apply to a seller, lessor, buyer, or lessee with whom a broker has entered into a written brokerage agreement.

(3) In addition to the written disclosure required under subsection (b) of this section:

(i) if the first contact between a seller's agent and a prospective buyer or lessee is not a face-to-face contact, the seller's agent shall disclose, through the medium in which the contact occurs, that the seller's agent represents the seller or lessor; and

(ii) if the first contact between a buyer's agent and a prospective seller or lessor is not a face-to-face contact, the buyer's agent shall disclose, through the medium in which the contact occurs, that the buyer's agent represents the buyer or lessee.

(b)(1) Except as provided in paragraph (2) of this subsection, the disclosure shall occur not later than the first scheduled face-to-face contact with the seller or lessor or the buyer or lessee.

(2)(i) If a licensee is holding a property open to the public, the licensee complies with the disclosure requirements of this section if the licensee displays, in a conspicuous manner, a notice to prospective buyers or lessees that the licensee present on the property represents the seller or lessor.

(ii) The Commission shall prepare and provide the notice required under this paragraph.

shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

Finally, COMAR 09.11.02.02A provides:

- 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 REC bears the burden of establishing, by a preponderance of the evidence, that the

Respondent committed the violations alleged in the Statement of Charges. COMAR

09.01.02.16A. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[,]" when all of the evidence is considered. *Coleman v.*

Anne Arundel Cty. Police Dep't, 369 Md. 108, 125 n.16 (2002).

For the reasons that follow, I find the REC has partially met its burden.

The Position of the Parties

The parties agree that the Respondent has been a licensed real estate agent since 2005 and that he has not been the subject of any prior complaints. They also agree that the Respondent violated the law when he acted as both seller's agent and broker on the same transaction. They differ, however, on whether he had an ownership interest in Lanken II that should have been disclosed, whether the Respondent properly fulfilled his supervisory duties as a broker with regard to the Claimant's purchase of the Property, and whether he made unfulfilled promises to make certain repairs.

The REC asserts that the Respondent had an ownership interest in Lanken II that he did not disclose and so was not only the seller's agent and broker, but was actually the owner of the Property. The REC also contends that the Respondent failed to properly supervise Ms. Tucker, and in doing so, failed to protect the Claimant's interests which he had a duty to do since he was the broker for the transaction and the Claimant was therefore his client. As further proof of a failure to properly supervise, the REC also maintains that the Respondent failed to provide

appropriate training for the real estate agents in his employ. In addition, the REC argues that the Respondent agreed to make certain repairs that he then did not make.

The Respondent strongly denies having any ownership interest in Lanken II and asserts that, as far as he knew, Lanken II was a Maryland limited liability company owned and run by his father and was completely separate from Lanken I, the company the Respondent owned with his wife in D.C. He asserts that he never made any promise that he would fix “everything” in the first home inspection report. The Respondent also denies that he failed to properly supervise Ms. Tucker, although he admits that she clearly erred when she did not ensure the inspection was set prior to the 21 day deadline specified in the Contract or at least get an extension of the timeframe, and when she did not correctly complete the Dual Agency Agreement paperwork.

Analysis

The REC’s case rests heavily on the information gathered by its inspector and presented in his report of January 28, 2019. The REC relied on this information when it created the Statement of Charges and continues to rely on them as proof that the Respondent actually violated the sections of the statute and COMAR listed in that Statement of Charges.

Unfortunately for the REC, much of the contents of the inspector’s report were proven to be inaccurate. Moreover, the Claimant’s testimony regarding the Respondent’s alleged representations about the repairs that would be made is simply not credible, largely because several of her statements were also proven to be inaccurate and she clearly had difficulty recalling specific details relating to her purchase of the Property.

The Ownership of Lanken II

The REC asserts that the Respondent is the true owner of Lanken II and therefore had an ownership interest in the Property that should have been disclosed.¹⁴ In doing so, the REC argues the Respondent violated section 17-322(b)(25) which prohibits a licensee from engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings, as well as COMAR 09.11.02.01C which requires a licensee to protect the public against fraud, misrepresentation, or unethical practices in the real estate field. For the following reasons, I find the REC did not meet its burden with regard to these violations.

The REC argues that because Articles of Organization for Lanken II were never actually filed in Maryland, Lanken II is considered a foreign business in Maryland. A foreign business is one that was originally formed in another state and then registers to do business in Maryland. According to this theory, Lanken II is not a separate business from Lanken I but rather is just an extension of Lanken I that operates in Maryland. Accordingly, because the Respondent is the owner of Lanken I, he is the legal owner of Lanken II and, thus, the owner of the Property.

The Respondent may very well be technically considered the “owner” of Lanken II for legal purposes due to his father’s failure to file the appropriate paperwork to establish a separate business in Maryland. However, that does not end the inquiry. In order for the REC to prove that the Respondent violated section 17-322(b)(25) or COMAR 09.11.02.01C, the REC would

¹⁴ The REC, in questioning the Respondent, also elicited testimony that Kirkton Banks is a licensed real estate agent with Exit Elite and that this fact was not disclosed to the Claimant but should have been. The REC has pointed me to no legal authority which would require such a disclosure.

have to show the Respondent knew or should have known he was technically considered the owner of Lanken II.¹⁵ The evidence does not support this conclusion.

The Respondent agreed that if he were the owner of Lanken II, he was obligated to disclose his ownership in the Property. The Respondent readily admitted that he and his wife are the owners of Lanken I in D.C. and that they started the business to purchase rental properties in D.C. He explained that he “gifted” the ownership of the business in Maryland to his father, Kirkton Banks, so that his father could purchase properties in Maryland, rehab them, and then sell them at a profit, a process known as “flipping.” In support of contention that they are two separate businesses, he points to the Agreement his father executed in January 2016 listing the company name as Lanken Investments, LLC rather than Lanken Investments LLC (without a comma). The Agreement clearly lists Kirkton Banks as the sole member of the corporation and also as the resident agent. The Respondent expressed surprise that Articles of Organization had never been filed in Maryland and explained that he believed his father had filed them.

The REC presented corporate filings and paperwork for both Lanken Investments LLC and Lanken Investments, LLC, as well as the testimony of Calandra Taylor in support of its assertion that the Respondent had an ownership interest in the Property. However, the corporate filings and paperwork are consistent with the Respondent’s testimony that they are (or were meant to be) two separate business entities. The Articles of Organization filed in D.C. in February 2015 for Lanken I reflect that the Respondent and his wife are the organizers of the corporation. In subsequent Two-Year Reports, the filings show that “all entity governors” are

¹⁵ The Law Dictionary defines fraud as consisting of “some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. *As distinguished from negligence, it is always positive, intentional.*” (emphasis added). *What is FRAUD?*, THE LAW DICTIONARY, <https://thelawdictionary.org/fraud/> (last viewed January 7, 2020). Merriam Webster defines a misrepresentation as “an intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally.” *Misrepresentation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/misrepresentation> (last viewed January 7, 2020).

the Respondent, his wife, and Stephanie Cooper. Kirkton Banks's name does not appear anywhere in these filings and there is nothing to show he is in any way affiliated with the business. Likewise, the Agreement executed in January 2016 for Lanken II reflects that Kirkton Banks is the sole member of the corporation as well as its resident agent. It also unequivocally states that Lanken II is a "single member-managed limited liability company." The Respondent's name does not appear anywhere in the Agreement.

The REC also presented the testimony of Calandra Taylor in support of its contention that the Respondent actually had an ownership interest in Lanken II. Ms. Taylor testified that, to her understanding, the owners of "Lanken Investments" were the Respondent, the Respondent's wife, and the Respondent's father. However, Ms. Taylor offered nothing concrete to establish that her understanding was in fact correct. It is easy to see how she could have surmised that "Lanken Investments" referred to a single business given the similarity in the names. And the paperwork demonstrates that the Respondent, the Respondent's wife, and the Respondent's father were indeed owners of "Lanken Investments"; nevertheless, the Respondent's father was the owner of a different "Lanken Investments" than the Respondent.

The REC offered no motive for the Respondent to construct this elaborate scheme to allegedly hide an ownership interest in Lanken II. The Respondent was already openly involved in purchasing rental properties in D.C., where he is also a broker, through Lanken I. If he had wanted to flip houses in Maryland, it would have been much easier for him to register Lanken I as a foreign corporation in Maryland and then use Lanken I to do so. I note that during the course of this investigation, the REC investigator initiated an unscheduled audit of Exit Elite; that audit turned up no violations of any regulations or laws. Had the Respondent been involved in setting up Lanken II for some sort of illegal or unethical purpose, it seems more likely than not the audit would have uncovered other violations.

In short, the REC has presented no proof from which I can conclude the Respondent is or was actually knowingly affiliated with Lanken II and so I find the evidence simply does not support the conclusion that the Respondent violated section 17-322(b)(25) or COMAR 09.11.02.01C.

The Promise of Repairs

The REC also charged the Respondent with violating section 17-322(b)(3) which prohibits a licensee from willfully making a misrepresentation or knowingly making a false promise. The REC contends that the Respondent knowingly falsely promised that repairs would be made to the Property. The REC contends that in doing so, the Respondent also violated COMAR 09.11.02.01C which requires a licensee to protect the public against fraud, misrepresentation and unethical practices. The REC did not meet its burden with regard to these alleged violations.

The Claimant repeatedly asserted that the Respondent advised her during the home inspection that “everything” would be fixed and she relied on this to her detriment. The Claimant contended that she believed that since the Respondent walked around with the home inspector, he was getting a list of what needed to be fixed and would fix everything before closing, although she admitted that no one had told her that specifically. She also told the inspector that at closing she received a Bid Sheet for Repairs compiled by Chapman Construction and asserted this was proof that the seller had agreed to make the repairs outlined in the home inspection report.

The evidence does not support the Claimant’s contentions. The Claimant admitted that she never saw the home inspection report prior to settlement and never specifically requested that the seller address any of the items on the report. The Claimant explained that she tried to open the link to the home inspection report that Mr. Hunnicutt sent her but was unable to view it. She

admitted that she did not request a copy of the report for review until after settlement when she had moved into the house. Moreover, the Respondent denied receiving a copy of the home inspection report from Mr. Hunnicutt at any time prior to settlement and there is no evidence one was ever sent to him. While he walked around with Mr. Hunnicutt during the inspection, he explained that he did not take notes nor does he recall any specific problems being mentioned. Further, the language of the Home Inspection Addendum clearly puts the burden on the Claimant to provide the seller with a copy of the report “together with a Home Inspection Notice . . . listing home inspection conditions or items the Buyer requires Seller to repair, and/or stipulating a dollar credit, as allowed by Lender, to be paid at Settlement by Seller toward Buyer’s charges to buy the Property.” It does not make sense that the Respondent would have agreed to make repairs on behalf of the seller without knowing the extent of the repairs needed, discussing the matter with his client, and without a formal request from the Claimant.

In addition, the Bid Sheet for Repairs actually addresses the items on the second home inspection report that the Claimant obtained on May 3, 2017, four months after closing on the Property. It would have been impossible for the Claimant to receive this sheet at closing as evidence of the promise of repairs to be made when it was not created until several months later. There is simply no rational basis for the Claimant’s contention that she believed the Respondent would fix “everything” on the home inspection report prior to closing when she never formally requested that he do so.

The Claimant did speak with both Mr. Hunnicutt and the Respondent towards the end of the inspection to inquire about things she saw, such as the oven door not being properly attached. It is true that the things which she spoke to the Respondent about at the inspection were still not

fixed by the day of closing. However, that is the reason why the General Addendum was created.¹⁶

In addition, the record reflects that while the Respondent did not address all of the items listed in the General Addendum, he did initially work to try and resolve the concerns the Claimant brought to his attention after she moved into the house and started seeing problems. He had someone repair the heating and attach the kitchen countertops, and Mr. Hunnicutt fixed the hot water heater. It appears that the Respondent's attempts to resolve the problems stopped in large part because of the breakdown in communication between the Claimant and him due to the Claimant's increasing demands and dissatisfaction with his efforts. However, the Respondent did send Ms. Taylor to try and work with the Claimant and also arranged for the \$500.00 being held in escrow to be released to the Claimant so that she could arrange and pay for the repairs herself. The Claimant refused to take the money.

The Claimant also asserted that the Respondent had assured her the air conditioning system worked. However, the Respondent credibly denied ever making that statement, explaining that he had no way of knowing whether the air conditioning system worked. Even if the Respondent had advised the Claimant in December 2016 that the air conditioning worked, there is no evidence that it was not working at that time. I note that the home inspection report prepared in May 2017 notes that the air conditioning compressor "appeared functional at the time of inspection."

¹⁶ The Claimant asserted that there were other things she asked about that the Respondent did not fix. For example, she testified that she asked about the front door and the fact that it was not properly installed. However, later in her testimony, she admitted that it was only after a locksmith came to change the lock after settlement and mentioned that the door was not properly installed that she saw there was a problem. It would have been impossible for her to ask the Respondent in December to fix something she did not know was broken until January.

I decline to find that the Respondent knowingly made any false promises about repairs that would be made to the Property and the evidence simply does not support the conclusion that the Respondent violated section 17-322(b)(3) or COMAR 09.11.02.01C.

The Dual Agency Agreement

A dual agent is a broker whose brokerage represents both sides of a given transaction, i.e., both the buyer and the seller. A broker is prohibited from acting as a dual agent unless he obtains written informed consent from the parties and assigns two different licensed real estate agents to act as intra-company agents on behalf of the buyer and seller, respectively. Md. Code Ann., Bus. Occ. & Profs §§ 17-530.1(a) and 17-530.1(b)(1)(i). A dual agent is specifically prohibited from acting as an intra-company agent in the same transaction. Md. Code Ann., Bus. Occ. & Profs § 17-530.1(b)(vii)(2). In this case, the Respondent was the broker. One of the agents from his brokerage, Ms. Tucker, represented the buyer. In order for the Respondent to have properly acted as a dual agent, he should have assigned a different intra-company agent to represent the seller in this transaction and he should have disclosed all of this in writing to both the buyer and the seller. The parties agree that the Respondent improperly acted as both the dual agent and the intra-company agent on behalf of the seller in this transaction. In addition, the documents show that while the Dual Agency Agreement disclosed that the Respondent was the seller's agent, nowhere did it list the identity of the broker.

The Respondent explained that, despite his many years of experience as a broker, he was unaware that he could not act as both broker and seller's agent in the same transaction. He further explained that he now understands the law and the reason for it. At the hearing, the Respondent articulated his understanding that, since the broker's job is to essentially oversee the agents and ensure that they are doing their jobs and properly serving their clients, it makes sense

that the role of the broker should be separate and apart from that of the intra-company agents. He also testified that he has put measures into place since this incident so that this violation is not repeated. The evidence clearly supports a finding that the Respondent violated section 17-530.1(a) when he acted as both the broker and the seller's agent in this instance.

The Failure to Supervise

The REC argues that the Respondent violated section 17-320(c)(1) when he failed to properly supervise Ms. Tucker.¹⁷ While the Respondent disagrees with this assertion, the evidence reveals otherwise. The Respondent admitted that he failed to notice that Ms. Tucker had not fully completed the Dual Agency Agreement and that she had failed to ensure that the home inspection for the Property was scheduled within the 21-day time frame set forth in the Home Inspection Addendum. He conceded that the protection offered by the 21-day timeline was an important one and that Ms. Tucker, an agent under his supervision, had failed to safeguard it in this case. However, the Respondent shrugged off any suggestion that he should have paid closer attention to the specifics of this Contract, saying it would be "impossible" to know every date in every deal for which he acted as broker, suggesting that he could not be expected to know the details of each and every contract at Exit Elite. That may be true; nevertheless, the fact of the matter is that the Respondent, as the dual agent for this transaction, had a duty to ensure that the agents for both parties were properly representing their respective clients. Further, in this case, the Respondent was also the seller's agent and so he would have had even more reason to be aware of the terms of the Contract. Yet he did not even notice that

¹⁷ The REC asserted initially that the Respondent also failed to adequately supervise other agents affiliated with Exit Elite as the investigator reported that Ms. Taylor advised him that trainings were sporadic in nature and not well-attended. However, during the hearing, Ms. Taylor testified that the Respondent offered an "array" of trainings several times per month, usually facilitated by the office manager, and that she never saw any alcohol being served. The Respondent admitted that he did not keep proper records documenting attendance at these trainings, such as using a sign in sheet; but, after this incident, he explained that he did institute changes and now does keep those records. The evidence does not support a finding that the Respondent failed to adequately supervise anyone other than Ms. Tucker.

the home inspection was set after the 21-day deadline, much less ask Ms. Tucker about it, or remind her to ask for an extension.

As I have found the Respondent violated section 17-320(c)(1), of the Business Occupations Article, the REC has also established violations of subsections 17-322(b)(27), (32), and (33). In addition, the REC established the Respondent violated COMAR 09.11.02.02A, which provides that a 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.” Simply put, the Respondent failed to protect the Claimant’s interests when he failed to properly supervise Ms. Tucker resulting in a significant loss of contractual rights to the Claimant.

Penalties for the Regulatory Violations

The REC urges the imposition of \$5,000.00 in civil penalties and the revocation of the Respondent’s license pursuant to subsection 17-322(c) of the Business Occupations Article. For the reasons that follow, I recommend the imposition of a six-month suspension and the imposition of a \$1,000.00 civil penalty.

The Statement of Charges notes that the charges may result in a reprimand, a suspension, or revocation of the Respondent’s license and does not specify or attempt to support a specific sanction. Section 17-322(c) of the Business Occupations Article does not provide guidance concerning the appropriate level of sanction, though it does provide guidance concerning the appropriate monetary penalty. In the absence of other guidance, I have considered the factors identified in the monetary penalty provision, section 17-322(c) of the Business Occupations Article, in evaluating the appropriateness of a reprimand, suspension, or revocation, as I find those considerations to be relevant to the issue.

The violations in this matter are serious – the Respondent clearly failed to supervise Ms. Tucker and he violated the law when he acted as both broker and seller’s agent in the same transaction. However, I credited the Respondent’s testimony that he did not realize at the time that he could not act as both broker and intra-company agent, as well as his testimony that he has since put measures in place to prevent any such violations in the future. This is supported by the lack of any further violations during the unscheduled audit of Exit Elite conducted during the course of the investigation. Moreover, I did not uphold the most serious charge against the Respondent, the charge that he fraudulently misrepresented his ownership stake in the Property. In addition, the Respondent has, at this point, over fourteen years of experience as a licensed real estate agent and over ten years of experience as a broker without any other complaints to the REC.

I note that the regulatory violation charged pursuant to COMAR 09.11.02.02A is for the same conduct, i.e., the failure to supervise, as the statutory violation charged under subsection 17-320(c)(1). Had the Respondent properly supervised Ms. Tucker, the Claimant would not have lost significant contractual rights and her interests would have been protected. As these violations essentially sanction the same conduct for the same reasons, I do not find that multiple sanctions are necessary for the violations of subsection 17-320(c)(1) and COMAR 09.11.02.02A. Thus, although on remand I have determined that the Respondent also violated COMAR 09.11.02.02A, consideration of that violation does not affect or modify the Proposed Conclusions of Law and Recommended Order, or any other sections of my January 10, 2020 Proposed Decision.

I therefore find it appropriate to recommend that the REC impose a lesser sanction of suspension for six months, which acknowledges the serious nature of the violations, but also reflects the Respondent’s clean disciplinary history and lack of intentional wrongdoing

In considering the factors laid out in subsection 17-322(c)(2) for the imposition of a monetary fine, the REC argues that the violations were serious in nature and urges me to recommend a penalty of \$5,000.00. Considering that I have not upheld all of the charges upon which this recommendation was based, I find that a more appropriate penalty would be \$1,000.00. This reflects the fact that I do not find the Respondent willfully misrepresented anything to the Claimant, as well as the Respondent's complaint-free history. I also believe this penalty will be adequate to ensure that the Respondent will conform his conduct to the statutory and regulatory requirements of his profession.

II. The Guaranty Fund Claim

The Legal Framework and the Burden of Proof

Section 17-404 of the Business Occupations Article governs 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:

- (a) In general.-
 - (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.
 - (2) A claim shall:
 - (i) be based on an act or omission that occurs in the provision of real estate brokerage services by:
 - 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) The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

With respect to claims against the Fund, COMAR 09.11.01.14 states:

The amount of compensation recoverable by a claimant from the Real Estate 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. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in the licensee's 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.

This regulation specifically ties any recovery from the Fund to the "originating transaction" and it is a reasonable interpretation of the term "actual loss," which is employed in section 17-404(a)(1) of the Business Occupations Article. *See Marriott Employees Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437 (1997) (the consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference, as the agency is likely to have expertise and practical experience with the statute's subject).

Under section 17-407(e) of the Business Occupations Article, the Claimant bears the burden of proof to establish her claim for recovery from the Fund. The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.01.02.16C. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[,]" when all of the evidence is considered. *Coleman*, 369 Md. at 125 n.16. Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the reasons that follow, I find the Claimant has failed to meet her burden.

The Positions of the Parties

The Claimant asserts that the Respondent assured her that he would fix all of the items listed in the initial home inspection report from Property Preservation Specialist but then did not follow through. She also asserts that he misrepresented that the air conditioning worked when it

did not. As a result, the Claimant argues, she incurred costs associated with a second home inspection (because she did not trust the results of the first home inspection as she believed the inspector “worked with” the Respondent), in fixing things that the seller should have fixed, in having to purchase two air conditioning window units, and now is facing the cost of replacing the entire HVAC system.¹⁸

The Respondent argues that the Claimant never raised any of the issues listed in the home inspection report prior to settlement or advised him that she wanted them fixed. The Respondent acknowledges that the repairs the Claimant did ask him about were not completed by the settlement date, but points to the General Addendum executed at closing to handle the problems the Claimant spotted during the final walk-through.

Analysis

There is no dispute that two of the required elements set forth in section 17-404(a) have been met. First, the Property is located in the State. Second, the Respondent’s licensing status was established by the documents in evidence and the Respondent’s testimony. The testimony and documents establish that the Respondent improperly acted as both the dual agent and the seller’s agent in this transaction and also failed to properly supervise Ms. Tucker, the Claimant’s real estate agent; thus there was an omission by the Respondent in the provision of real estate services.

The Fund, however, provides a limited mechanism for recovery against a licensed real estate agent; there must be an act or omission by which money or property is obtained by, as potentially relevant here, fraud or misrepresentation. A claim of fraud requires a showing that

¹⁸ The Claimant also asserted that the Respondent should be responsible for cleaning the debris left in the yard and the garage. She notes that she paid a contractor \$925.00 to remove it, although she conceded that the contractor did not actually remove any debris from the garage because she had too much stuff in it. The Claimant also admitted under questioning that the Respondent had told her specifically that he was not going to clean out the garage. Therefore, as the Fund pointed out, the Respondent could not have misrepresented that he would clean up the debris when he specifically advised the Claimant he was not going to do so.

the person made a false representation, with either knowledge of the falsity or reckless indifference as to its truth, for the purposes of defrauding the other party, and the other party reasonably relied upon the false representation and had the right to do so. *See Moscarillo v. Prof'l Risk Mgmt. Servs., Inc.*, 398 Md. 529, 544 (2007).

Recovery is also permitted from the Fund if the act or omission complained of constitutes misrepresentation.¹⁹ A claim of negligent misrepresentation requires a showing that a party, owing a duty of care, negligently asserts a false statement, and intends the statement to be acted on by the other party, with knowledge that reliance will cause loss to that other party, who takes action on the misrepresentation and sustains loss. *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 451 Md. 600, 627 n.18 (2017).

I find the evidence does not support a conclusion, by a preponderance of the evidence, that the omission constituted fraud or misrepresentation. The Claimant asserted that the misrepresentation occurred when the Respondent allegedly advised her that he would repair “everything” listed in the Home Inspection Report. As previously discussed, I did not find that the evidence supports this assertion.

Because I do not find that any act or omission by the Respondent occurred through fraud or misrepresentation, the final requirement under section 17-404(a) has not been met. As such, the Claimant has failed to prove her case and I hold she is not entitled to compensation and I do not reach the issue of whether she could have proven an “actual loss.”²⁰ Accordingly, I must deny her claim to recover any damages from the Fund.

¹⁹ Intentional misrepresentation is simply another name for fraud. *See B.N. v. K.K.*, 312 Md. 135, 149 (1988). Thus, I consider negligent misrepresentation within the scope of subsection 17-404(a)(2)(iii)(2) of the Business Occupations Article; to hold otherwise would impermissibly render statutory language nugatory and meaningless. *See Baltimore Bldg. & Constr. Trades Council, AFL-CIO v. Barnes*, 290 Md. 9, 15-17 (1981) (“a statute . . . is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory”).

²⁰ It should be noted that the Claimant’s asserted losses were speculative at best because the estimate she relies on to show her damages was not created until almost three years after settlement using a home inspection report compiled four months after she moved in.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated subsections 17-322(b)(25), (b)(32) and (b)(33), subsection 17-532(b)(1)(vi) of the Business Occupations Article and COMAR 09.11.02.02A. I further conclude that the REC should suspend the Respondent's real estate agent's license for six months and impose a total sanction of \$1,000.00. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b), (c) (2018).

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the Claimant is not entitled to an award from the Fund because she did not sustain an actual loss as a result of misrepresentations made by the Respondent, in his capacity as a licensed real estate salesperson and/or broker, in connection with the sale of the Property. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2018); COMAR 09.11.01.14.

RECOMMENDED ORDER

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

- (1) That the Respondent's real estate agent license be suspended for six months;
- (2) That the Respondent pay a civil penalty in the amount of \$1,000.00;
- (3) That the Claimant has not established a compensable claim against the Fund under section 17-404 of the Business Occupations Article; and
- (4) That the records and publications of the Maryland Real Estate Commission reflect this decision.

May 14, 2020
Date Decision Issued

SIGNATURE ON FILE

Susan H. Anderson
Administrative Law Judge

SHA/da
#185802