BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION	*	
	*	**OAH CASE NO. DLR-REC-24-18-05959**
v.	*	
KIRK STEFFES, **Respondent**	*	**MREC CASE NO. 2015-RE-418**
and	*	
THE CLAIM OF KENNETH AND KERRY GLOVER, CLAIMANTS, AGAINST THE MARYLAND REAL ESTATE COMMISSION GUARANTY FUND	*	

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

OPINION AND FINAL ORDER

This matter came before a hearing panel of the Maryland Real Estate Commission ("Commission") on April 17, 2019 as a result of the written exceptions filed by Respondent, Kirk Steffes, and the written exceptions filed by Claimants, Kenneth Glover and Kerry Glover, to the Commission's Proposed Order of December 17, 2018. On July 10, 2018 Administrative Law Judge Emily Daneker ("ALJ") held a hearing ("ALJ Hearing") on Claimants' Complaint and Guaranty Fund Claim. The ALJ filed a Proposed Decision in which she recommended that Claimants' claim against the Maryland Real Estate Guaranty Fund ("Fund") be granted and Claimants be awarded $4,000. The ALJ further recommended that Respondent's license be suspended for four months and the imposition of a $10,000 fine. On December 17, 2018, the Commission issued the Proposed Order affirming the ALJ's Findings of Fact, approving the Conclusions of Law, and adopting the Recommended Order, with minor amendments.

On January 2, 2019, Respondent filed written exceptions to the Proposed Order. On January 3, 2019, Claimants filed written exceptions to the Proposed Order. A hearing on both parties' exceptions was held April 17, 2019 by a panel consisting of Commissioners Anne Cooke, Jeff Wright, and Kambon Williams. Hope Sachs, Assistant Attorney General, appeared as the presenter of evidence on behalf of the Commission and the Fund. Claimants appeared at the April 17, 2019 hearing represented by Clifford L. Hardwick, Esq. Respondent, Kirk Steffes, appeared represented by Bradley R. Stover, Esq. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

Claimants submitted a transcript of the ALJ Hearing which was entered into the record pursuant to Code of Maryland Regulations ("COMAR") 09.01.03.09G(5). Neither Claimants nor Respondent presented additional evidence. On behalf of the Fund, four exhibits, as well as the Office of Administrative Hearings' file containing the exhibits which were introduced at the ALJ Hearing, were entered into evidence:

REC Ex. 1:	Proposed Order by Commission, dated December 17, 2018 and Proposed Decision by ALJ Emily Daneker, dated October 5, 2018.
REC Ex. 2:	Respondent's written exceptions dated January 2, 2019
REC Ex. 3:	Claimants' written exceptions dated January 3, 2019
REC Ex. 4:	February 13, 2019 notice of April 17, 2019 hearing.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ.

DISCUSSION

At all times relevant to this matter, Respondent Kirk Steffes was a licensed real estate salesperson and was one of three individuals with an ownership interest in Consolidated Property Acquisitions, LLC ("Consolidated") to invest in and sell real estate. FF 1-2.[1] In August of 2013

[1] "FF" refers to the ALJ's Findings of Fact in the proposed decision.

Consolidated purchased 2919 Grafton Lane, Churchville, Maryland 21028 (the "Property"). FF. 3. Renovation work was done to the Property but neither Consolidated nor the contractors it hired completed the required permitting process. FF. 4. The Property has a well and septic system. In March of 2014, the Harford County Health Department performed a percolation test at the Property and the Property failed. FF. 5-7. On March 12, 2014, Respondent signed a letter agreement with the Harford County Health Department which acknowledged the failed test and explained his intent to continue to use the septic system, despite the fact that a holding tank system was recommended, and Respondent agreed to disclose the letter of agreement to any prospective buyers/owners. FF. 8-10.

The Property was listed for sale in April 2014 and Claimants made an offer on April 7, 2014. FF. 15, 18. After closing, Claimants went to Harford County to inquire about the installation of a pool. FF. 22. It was then Claimants learned about the unpermitted renovation work, the March 12, 2014 letter agreement, and that the fourth bedroom in the Property was not permitted because of the septic system's limits. FF. 22-24. Respondent had assured Claimants' real estate agent that "everything he had was in the disclosures." FF. 16. When notified about the permitting issues, Consolidated agreed to pull the necessary permits, have inspections performed, and do any corrective work required. Respondent suggested to Claimants that for the purposes of inspection, they convert the fourth bedroom to a den by closing off or converting the closet, and then turning it back to a bedroom once the process was complete. FF. 25. Although to date the holding tank has not failed, Claimants testified they would not have purchased the Property or an adjoining half acre had they known of the issue. FF. 28-29. As a result of its review of the Proposed Decision, the Commission issued the December 17, 2018 Proposed Order, ordering as follows:

> all real estate licenses held by Respondent, Kirk Steffes, be and hereby are **SUSPENDED** for four (4) months;

...that Respondent, Kirk Steffes, shall be assessed a civil penalty in the amount of **Ten Thousand Dollars ($10,000)**, which shall be paid to the Real Estate Commission within thirty (30) days of the date of this Order;
...that Claimants, Kenneth and Kerry Glover, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Four Thousand Dollars ($4,000)**;
...that all real estate licenses held by Respondent, Kirk Steffes, 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 the records and publications of the Maryland Real Estate Commission reflect this decision.

Respondent took exception to the four month suspension. He argued both in his written exceptions and at the April 17, 2019 hearing that, given his lack of disciplinary history and his "contrite nature", the suspension was too lengthy. Respondent requested a reprimand in lieu of a suspension.

The Commission is unmoved. While it is true that Respondent has no disciplinary record and was purportedly remorse about the allegations against him he admitted to not complying with, and not even reading, the March 12, 2014 letter agreement. This an egregious violation of Respondent's duties as a licensed real estate salesperson. Further, Respondent tried to excuse his behavior by insisting he had relied on a business partner to address the letter agreement, but the legal duties of a licensed salesperson are that licensee's duties, regardless of business structure. Respondent conceded he had a duty to disclose and failed to do so. The Commission disagrees that the punishment is too severe and agrees with the ALJ's legal analysis of the statutory factors and her resulting conclusion. *See* MD. CODE ANN. BUS. OCC. & PROF. ("BOP") §§17-322(b)(4), (b)(25), (b)33, (c) and 17-532(b)(1)(iv), (vi) and COMAR 09.11.02.01C and D.

Claimants took exception to the ALJ's Findings of Fact and the Fund award. They argued the ALJ erred by not considering testimony other than that of Kenneth Glover and in failing to propose a larger Fund award. Claimants argued the ALJ ignored the "unchallenged" testimony of Tracy Simms, Claimants' real estate agent. Claimants then argued the award should be $50,000

because of the holding tank rather than $4,000 because of the bedroom issue. Claimants noted that Respondent's profit was approximately $62,000, argued that profit was unfair given the loss Claimants suffered, and suggested that the purpose of the Fund is to correct such an unfairness.

BOP § 17-404(a)(1) provides that a person may recover compensation from the Fund for an actual loss. BOP § 17-404(a)(2) provides the specific criteria that must be met to award a claim against a Respondent.

Contrary to allegations otherwise, the ALJ did take Ms. Simms' testimony into consideration. For example, the ALJ noted both that Ms. Simms' opinion was not that of an expert, was based on a "very limited comparison", and that her opinion did not include a marketability or difference in value comparison. *See* Proposed Decision p. 22. Ms. Simms' testimony was, in fact, the only evidence provided of the alleged $50,000 loss.

The Commission agrees with the ALJ regarding the claim for $50,000. Although Claimants referred to Ms. Simms as an expert and a "defacto expert," she was neither designated as an expert nor is there such a thing as a defacto expert. When asked at the ALJ Hearing if she had an opinion as to the value difference Ms. Simms explained "...if you have a holding tank on the property, you're looking at probably $50,000 less in purchase price...." Claimants' counsel replied, "[a]nd you said probably, correct?" Ms. Simms responded, "Probably." *See* Transcript of ALJ Hearing at 99. When asked about comparables Ms. Simms explained it "would take [her] a great deal of time to do that research" but did discuss two other homes in the area, one that sold in a day and one that has not yet sold because, she opined, the owners will not lower the price despite the fact that the property has a holding tank. *Id.* at 99-100. Nowhere in her testimony did Ms. Simms describe the other homes or explain how their prices led her to estimate a *probable* $50,000 loss suffered by Claimants. No evidence was offered to prove the valuation of the Property other than Ms. Simms'

estimate. Accordingly, the evidence is insufficient to establish an actual monetary loss entitling Claimants to an award from the Fund regarding the holding tank.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, the Commission concludes as a matter of law that Respondent violated BOP §§17-322(b)(4), (b)(25), (b)33 and (c) and 17-532(b)(1)(iv) and (vi) and COMAR 09.11.02.01C and D.

In addition, the Commission concludes as a matter of law that Claimants are entitled to an award from the Fund in the amount of $4,000 for the actual loss they sustained as a result of misrepresentations made by Respondent, in his capacity as a licensed real estate salesperson, in connection with the sale of the Property. BOP §14-404.

ORDER

The exceptions of Respondent Kirk Steffes and the exceptions of Claimants, Kenneth Glover and Kerry Glover, having been considered, it is this 3rd day of June, 2019 by the Maryland Real Estate Commission, hereby **ORDERED:**

1. That all real estate licenses held by Respondent, Kirk Steffes, be and hereby are suspended for four (4) months from the date this Final Order is mailed and all rights to appeal are exhausted;

2. That Respondent, Kirk Steffes, shall be assessed a civil penalty in the amount of ten thousand dollars ($10,000) which shall be paid to the Maryland Real Estate Commission within thirty (30) days of the date this Final Order is mailed and all rights to appeal are exhausted;

3. That Claimants, Kenneth Glover and Kerry Glover, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of Four Thousand Dollars ($4,000); and

4. That all real estate licenses held by Respondent, Kirk Steffes, shall be suspended from the date this Final Order is mailed and all rights to appeal are exhausted, until the civil penalty is paid in full, and the Maryland Real Estate Guaranty Fund is repaid in full, including any interest that is payable under the law; and

5. That the records and publications of the Maryland Real Estate Commission reflect this decision.

MARYLAND REAL ESTATE COMMISSION

By: SIGNATURE ON FILE

Note: A judicial review of this Final Order may be sought in 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. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION	*	
	*	
v.		
	*	**CASE NO. 2015-RE-418**
KIRK STEFFES,		
Respondent	*	
And	*	**OAH NO. DLR-REC-24-18-05959**
THE CLAIM OF KENNETH AND KERRY GLOVER AGAINST THE MARYLAND REAL ESTATE GUARANTY FUND	*	

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

PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated October 5, 2018, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 17 day of December, 2018

ORDERED,

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

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

C. That the Recommended Order in the recommended decision be, and hereby is, **AMENDED** as follows:

ORDERED that all real estate licenses held by the Respondent, Kirk Steffes, be and hereby are **SUSPENDED** for four (4) months;

ORDERED that the Respondent, Kirk Steffes, shall be assessed a civil penalty in the amount of **Ten Thousand Dollars ($10,000)**, which shall be paid to the Real Estate Commission within thirty (30) days of the date of this Order;

ORDERED that all real estate licenses held by the Respondent, Kirk Steffes, 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

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

D. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the Recommended Decision of the Administrative Law Judge required modification because it omitted the following: (1) a provision that the civil penalty be paid within a specified time period, (2) suspension of all licenses held by the Respondent until the civil penalty is paid, and (3) a provision that all real estate licenses of the Respondent be suspended and may not be reinstated until the amount paid by the Guaranty Fund is repaid in full together with the interest prescribed by law, in accordance with Annotated Code of Maryland, Business Occupations and Professions Article §§ 17-322 and 17-412.

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 exceptions and 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.

MARYLAND STATE REAL ESTATE
COMMISSION

17 December 2018
Date

By: SIGNATURE ON FILE

MARYLAND REAL ESTATE	*	**BEFORE EMILY DANEKER,**
COMMISSION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
KIRK STEFFES,	*	**ADMINISTRATIVE HEARINGS**
RESPONDENT,	*	**OAH No.: DLR-REC-24-18-05959**
and	*	**REC CASE No.: 2015-RE-418**
IN RE CLAIM OF KENNETH AND	*	
KERRY GLOVER AGAINST THE	*	
MARYLAND REAL ESTATE	*	
GUARANTY FUND	*	

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

PROPOSED DECISION

STATEMENT OF THE CASE

On March 16, 2015, Kenneth and Kerri Glover (Claimants) filed a Complaint against licensed real estate salesperson Kirk Steffes (Respondent). That same day, the Claimants also filed a Claim for compensation from the Real Estate Guaranty Fund (Fund) for losses the Claimants allegedly sustained as a result of the Respondent's misconduct. The Complaint and Claim both arose out of a contract of sale entered into by the Claimants on or about April 7, 2014 for the purchase of 2919 Grafton Lane in Churchville, Maryland (the Property).

On February 7, 2018, after an investigation, the Maryland Real Estate Commission (REC or Commission) determined that charges against the Respondent were warranted and that the Claimants were entitled to a hearing of their 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 17-322(b)(4), (b)(25), (b)(32), (b)(33) and (c) and subsection 17-532(b)(1)(iv) and (vi)[1] of the Business Occupations and Professions article (Business Occupations Article) of the Maryland Code and that he also violated section 09.11.02.01C and D of the Code of Maryland Regulations (COMAR). 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 February 12, 2018, the Commission forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing.

On July 10, 2018, I conducted the hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Profs. §§ 17-324(a) and 17-408(a). Hope M. Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the REC on the charged violations of law. Shara Hendler, Assistant Attorney General, DLLR, represented the REC on the claim for compensation from the Fund. Clifford Hardwick, Esquire, represented the Claimants. Bradley R. Stover, Esquire, represented the Respondent.

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[1] In its February 2018 Statement of Charges, the REC listed a violation of subsection 17-532(c)(1)(iv) and (vi) and recited the statutory language. The provision cited is now found, verbatim, at subsection 17-532(b)(1)(iv) and (vi). I cite to the current, 2017, codification throughout because that is the version in effect when the REC filed its Statement of Charges and because current law generally applies to both the regulatory and fund claims. *See Hawker v. New York*, 170 U.S. 189 (1898) (holding that in the interest of protecting the public, an agency regulating a profession may give consideration to past conduct, predating the effective date of the law at issue, in determining fitness for the profession); *Landsman v. Maryland Home Improvement Comm'n*, 154 Md. App. 241, 255 (2003) (explaining that the right to compensations from a statutorily-created fund is subject to change "at the whim of the legislature" and is not bound by the usual presumption against retrospective application of statutory amendments); *see also Maryland Bd. of Social Exam'rs v. Chertkov*, 121 Md. App. 574 (1998) (observing that disciplinary actions of professional licensing boards are for the protection of the public and not punishment).

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings before the Office of the Secretary of the DLLR, 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. 2017); 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 17-322(b)(4), (b)(25), (b)(33), or (c) or subsections 17-532(b)(1)(iv) or (vi), or COMAR 09.11.02.01C or D?

2. If the Respondent violated any of these statutory or regulatory provisions, what is the appropriate sanction?

3. Have the Claimants 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 evidence:

REC Ex. 1 – Notice of Hearing, dated May 2, 2018

REC Ex. 2 – Statement of Charges, dated February 7, 2018

REC Ex. 3 – Report of Investigation, completed April 13, 2017, with the following attachments:[2]

1. Complaint and Guaranty Fund Claim, dated March 16, 2015
2. Residential Contract of Sale, signed April 7, 2014 with attached disclosures, addendums, and reports
3. Marketing material for the Property, undated; MRIS Residential Listing, dated April 6, 2014
4. Residential Contract of Sale, page 1 of 10, offer date April 6, 2014
5. Residential Contract of Sale, page 9 of 10, acceptance date April 7, 2014
6. Residential Contract of Sale, page 1 of 10, offer date April 6, 2014
7. Residential Contract of Sale, page 1 of 10, offer date April 6, 2014

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

8. Seller Contribution Addendum, accepted April 7, 2014
9. Disclosure of Licensee Status, dated April 6, 2014
10. Marketing material for the Property, undated; MRIS Residential Listing, dated April 6, 2014
11. Letter from the Harford County Health Department (Health Department) to the Respondent, dated March 12, 2014
12. Letter from the Health Department to Consolidated Property Acquisitions, LLC, countersigned by the Respondent, dated March 12, 2014
13. Excerpted page from the Complaint and Guaranty Fund Claim (section 3), page undated
14. Exclusive Buyer/Tenant Representation Agreement, signed March 30, 2014; Communications Consent Addendum, dated March 30, 2014
15. Excerpted page from the Complaint and Guaranty Fund Claim (section 3), page undated
16. Excerpted page from the Complaint and Guaranty Fund Claim (section 3), page undated
17. Letter from the Health Department to the Respondent, dated March 12, 2014; Letter from the Health Department to Consolidated Property Acquisitions, LLC, countersigned by the Respondent, dated March 12, 2014
18. Letter from the Health Department to the Respondent, dated March 12, 2014
19. Letter from the Health Department to Consolidated Property Acquisitions, LLC, countersigned by the Respondent, dated March 12, 2014
20. Signature page from the letter from the Health Department to Consolidated Property Acquisitions, LLC, countersigned by the Respondent, dated March 12, 2014
21. Signature page from the letter from the Health Department to Consolidated Property Acquisitions, LLC, countersigned by the Respondent, dated March 12, 2014
22. Home Inspection Checklist, dated April 11, 2014; Wood Destroying Insect Inspection Report, dated February 19, 2014; Aerobiology Laboratory Certificate of Analysis, dated December 24, 2013; Air Check, Inc. Radon Test Result, dated October 25 to 28, 2013
23. Health Department Public Information Act Request for Information, dated April 3, 2014; Health Department Public Information Act Request for Information, dated April 16, 2014
24. Well Water Solutions, Inc. invoice, dated May 8, 2014; Enviro-Chem Laboratories, Inc. Final Report of Analysis, dated April 1, 2014
25. B.E. Miller & Son Septic Services OSDS Inspection Final Report Form, dated April 10, 2014; Application for Sanitary Construction Permit, dated May 9, 1975; Memo to File, dated between May 9 and 27, 1975; Building Permit Worksheet, dated November 17, 1998; Permit Application and Zoning Certificate, dated March 8, 1985; Building Permit, dated July 23, 1974; Permit Application and Zoning Certificate, dated May 15, 1979; On-Site Sewage Disposal application and permit, issue date March 25, 2014 and inspection date April 2, 2014
26. On-Site Sewage Disposal application and permit, issue date March 25, 2014 and inspection date May 29, 2014; Application for Sanitary Construction Permit, dated May 9, 1975; Well Completion Report, dated March 2, 2015;

Geothermal Well Report, undated; drawing, undated; Building Permit Worksheet, dated June 26, 2014; drawings, undated; Building Permit Worksheet, dated November 10, 1998; drawing, undated; Permit Application and Zoning Certificate, dated March 8, 1985; Building Permit, dated July 23, 1974; Letter from the Health Department to Bay State Land Services, dated November 28, 2012; Building Permit Worksheet, dated May 15, 2014; Second page of letter from unidentified sender to the Respondent, undated

27. On-Site Sewage Disposal application and permit, issue date March 25, 2014 and inspection date April 2, 2014
28. Letter from the Health Department to the Respondent, dated March 12, 2014
29. Email from Tracey Simms, realtor, to Diane Carson, with the Department of Labor, Licensing, and Regulation, dated February 22, 2017
30. Licensing History for Tracey Simms, printed April 13, 2017
31. Licensing History for Diane Mahaffey, printed April 13, 2017
32. Letter from the REC to the Respondent, dated March 16, 2015
33. Letter from Carolyn Evans, Esquire, to the REC, dated April 3, 2015
34. Letter from MREC to Georgeanna Garceau, dated March 16, 2015
35. Letter from Carolyn Evans, Esquire, to the REC, dated April 3, 2015
36. Letter from Gerard Magrogan, Esquire, to the REC, dated February 2, 2017
37. Excerpted page from the Complaint and Guaranty Fund Claim (section 3), page undated
38. Letter from the Health Department to the Respondent, dated March 12, 2014
39. Invoice from Smith & Smith, Inc., dated April 2, 2014
40. MRIS Residential Listing, dated April 6, 2014
41. Invoice from Duraclean Services, LLC, dated September 25, 2013
42. Building Permit Worksheet, dated July 25, 2014; drawing, undated
43. Letter from the Respondent, for Consolidated Property Acquisitions, LLC, to the Claimants, dated June 25, 2014
44. Letter from the Health Department to the Respondent, dated August 7, 2014
45. Letter from the Health Department to the Respondent, dated August 7, 2014
46. Letter from the Health Department to the Respondent (page 1), dated August 7, 2014
47. Licensing History for the Respondent, printed March 7, 2017

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

Resp. Ex. 1 – Letter from the Respondent, for Consolidated Property Acquisitions, LLC, to the Claimants, dated June 25, 2014

Resp. Ex. 2 – Invoice from Smith & Smith, Inc., dated April 2, 2014

The Claimants offered the following exhibit, which I admitted into evidence:

Clmt. Ex. 1 – Marketing material for the Property

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

Testimony

The REC presented testimony from Diane Carson, its real estate investigator; Tracey Simms, a realtor with Keller Williams American Premier Realty; and Claimant Kenneth Glover. Mr. Glover was treated as both a witness for the REC and the Claimants when he testified.

The Claimants did not present any witnesses other than Mr. Glover.

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 2007 and has had no prior complaints filed against him with the REC. The Respondent primarily works in Harford and Baltimore Counties and Baltimore City.

2. At all relevant times, the Respondent was one of three individuals with an ownership interest in Consolidated Property Acquisitions, LLC (Consolidated).

3. In approximately August 2013, Consolidated purchased the Property with the plan to renovate and sell it. At that time, the Property was in disrepair with mold and water damage in the basement. Consolidated's renovations included remediation of the basement, renovation of the kitchen, and replacement of the windows and a boiler. As part of the renovations, a living room was converted to add a fourth bedroom and bathroom to the formerly three-bedroom dwelling. The square footage of the dwelling did not change.

4. At the time the renovation work was done, neither Consolidated nor the contractors it hired completed the required permitting process for those renovations. The omitted permits included the building permit, electrical permit, plumbing permit, and mechanical permit.

5. The Property is not served by public water or sewer; it has a well and septic system. At the time Consolidated purchased the Property, the original septic system was in place.

6. On March 10, 2014, the Harford County Health Department (Health Department) performed a percolation test at the Property; the test showed that the soils at the Property were not suitable for installation of a conventional on-site sewage disposal system.

7. In a March 12, 2014 letter, the Health Department notified the Respondent, directly, that the Property failed its percolation test.

8. On March 12, 2014, the Respondent countersigned (as "property owner") a letter agreement with the Health Department for the installation of a septic system at the Property.

9. The letter agreement signed by the Respondent contains the following representations:

> A percolation test for a repair to my septic system at the above referenced property was conducted on March 10, 2014. I understand that the percolation test results were not satisfactory because of slow percolation rate and high clay content. However, I would like to install the following septic system at my own risk: 180 ft. long x 2 ft. wide x 10 ft. deep. I understand that the . . . Health Department cannot guarantee that the above referenced septic system will function satisfactorily.
>
> . . .
>
> I understand that due to the variability of soil conditions, water table, and individual use experience (occupancy and water usage), approval of a private waste disposal system does not, in any manner, give or imply a guarantee that the system will operate satisfactorily for any set period of time.
>
> . . .
>
> The Health Department has also informed me of the importance of water conservation measures including, if necessary, doing laundry off site and proper maintenance of the plumbing and septic system, and I agree to institute water conservation measures as needed.
>
> . . .
>
> In the event that this repair fails to work properly and creates a threat to the public health or the environment, the Health Department will require the owner of the property to make additional repairs as necessary, or to convert

the septic system to a holding tank system and keep a renewable pumping contract in force indefinitely, or until public sewage becomes available.

(REC Ex. 3 at 12-1 to 12-2.)

10. The March 12, 2014 letter agreement further states, directly above the Respondent's signature and in bold type: "I agree to disclose this document to any prospective buyers/owners."

11. On March 25, 2014, an application was filed and a permit was issued for construction of on-site sewage disposal system at the Property. The application inquired as to the use of the Property (residential or commercial) and the number of bedrooms; that information was not filled in on the application.

12. On or about April 2, 2014, a contractor retained by Consolidated installed a new septic system at the Property and it was inspected by the Health Department.

13. On April 2, 2014, Consolidated listed the Property for sale. The Respondent was the listing agent.

14. The Property was advertised as a four-bedroom home with two bathrooms.

15. The Claimants were interested in the Property and wanted to know where the septic drain field was located because they wanted to install a pool. Accordingly, on or about April 3, 2014, their real estate agent, Tracey Simms, made a Public Information Act request for the Property's building permits; its on-site sewage disposal permits, inspection and enforcement; its percolation tests; its site plans and subdivision review; and its well water sampling. Ms. Simms was provided with approximately eight pages of documents and she obtained copies of those documents. The file included the on-site sewage disposal application/permit dated March 25, 2014, which referenced the March 12, 2014 letter agreement. The letter agreement was not in the file and, upon inquiry by Ms. Simms, the Health Department worker stated that he did not have any additional documents.

16. Ms. Simms inquired of the Respondent about the referenced March 12, 2014 letter agreement, which was described in the documents as a "signed release letter 3/12/14." The Respondent advised her that everything he had was in the disclosures.

17. In connection with the listing of the Property for sale, Consolidated elected to provide a Residential Property Disclaimer Statement (Disclaimer) instead of the more detailed Residential Property Disclosure Statement form. In the Disclaimer, Consolidated indicated that it did not have actual knowledge of any latent defects at the Property. In its disclosures, Consolidated included a copy of the March 25, 2014 on-site sewage disposal application/permit in its disclosures, but not the referenced March 12, 2014 letter agreement. The Respondent disclosed his ownership interest in Consolidated as part of those disclosures.

18. On April 7, 2014, the Claimants entered into a Residential Contract of Sale (Contract) to purchase the Property for $332,000.

19. The Contract included an on-site sewage disposal system inspection and repair contingency, as recommended by the Claimants' real estate agent. Accordingly, on April 18, 2014, the Claimants had the septic system inspected by B.E. Miller & Son Septic Services. The report of the inspection reflected that the septic system was new, the wastewater facilities were all within the property boundaries and met setoff restrictions, that the system had a permit from the Health Department, and there were no restrictions on the permit. Various components of the system were visually inspected and found to be in working order. A hydraulic test was performed and the results were satisfactory. The inspection report also noted that the washing machine and dishwasher discharged to the septic system.

20. On or about May 15, 2014, the Claimants closed on the purchase of the Property.

21. Prior to the closing, neither the Respondent nor Consolidated disclosed the

March 12, 2014 letter agreement with the Health Department, or the substance thereof, to the Claimants.

22. The Claimants desired to install an above-ground pool and deck at the Property and, in or about June 2014, the Claimants' contractors applied for the necessary permits from Harford County. Harford County initially declined to issue the permits due the unpermitted renovation work performed when Consolidated owned the Property.

23. On or about June 25, 2014, the Claimants gave Consolidated permission to pull the necessary permits, have the necessary inspections performed, and perform any corrective work required.

24. On August 7, 2014, the Health Department informed Consolidated, by letter to the Respondent, that it could not issue a permit to add a fourth bedroom to the Property due to the limitations of the septic system. The letter explained: "The capacity of the system and soil to accept and treat sewage effluent is based on soil percolation test results and the soil profile description. . . . [B]ased on the previous soil test results, the site is unacceptable to receive a larger waste water flow."

25. The Respondent suggested that, for purposes of the permitting inspection, one of the bedrooms could be converted to a den, by closing off the closet or converting the closet to a bookshelf, and then converted back to a bedroom with a closet once the process was complete.

26. The Claimants' family of five, including children ages 16, 14, and 9 (as of the time of the hearing), reside at the Property and occupy all four bedrooms. The fourth bedroom remains unpermitted.

27. The septic system at the Property has not failed and its life expectancy is unknown.

28. The Claimants would not have purchased the Property had they known of the issues with the septic system.

29. The Claimants also purchased the adjoining half-acre lot for approximately $40,000. The Claimants would not have purchased that lot had they known of the issues with the septic system at the Property.

30. Consolidated offered to compensate the Claimants for the loss of a bedroom.

31. The Claimants have no familial or business relationship to the Respondent.

The parties stipulated to the following additional fact:

32. The cost to pump out a sewage holding tank is $225 per month.

DISCUSSION

The Regulatory Charges

The REC charged the Respondent with violating subsections 17-322(b)(4), (b)(25), (b)(33) and (c) and subsection 17-532(b)(1)(iv) and (vi) of the Business Occupations Article, and subsections 09.11.02.01C and D of COMAR. Section 17-322 of the Business Occupations Article provides, in pertinent part:

> (b) Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:
>
> . . .
>
> (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 the licensee or applicant deals;
>
> . . .
>
> (25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;
>
> . . .
>
> (32) violates any other provision of this title; [or]
>
> (33) violates any regulation adopted under this title or any provision of the code of ethics[.]
>
> . . .

(c) 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.

Section 17-532 of the Business Occupations Article provides, as relevant here:

(b)(1) A licensee shall:

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

. . .

(vi) exercise reasonable care and diligence[.]

Finally, COMAR 09.11.02.01 provides, as pertinent here:

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

D. The licensee shall make a reasonable effort to ascertain all material 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.

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).[3]

There was little dispute as to the essential facts in this case. The REC submitted a licensing history showing that the Respondent was licensed as a real estate agent since 2007, a

[3] There was reference in the testimony to flooding in the basement at the Property during a tropical storm that occurred sometime after the Claimants entered into the Contract and prior to closing on the Contract. The evidence established that the Claimants first learned of the flooding by happenstance, and not by any report from the Respondent. The evidence did not establish, however, any significant lapse of time between when the flood occurred and when the Claimants learned of the flood. The Respondent addressed the Claimants' concerns by putting in new carpet and drywall and installing a sump pump, as the Claimants requested. The flooding in the basement is not included in the Statement of Charges and the REC did not argue that these facts support any of the charged violations or provide a basis for any sanctions. Given the omission of these facts from both the Statement of Charges and the REC's arguments at the hearing, I do not consider these facts further.

fact that the Respondent readily acknowledged in his testimony. The REC also noted that the Respondent was not the subject of any prior complaints; again, the Respondent's testimony was in accord. The documents and the Respondent's testimony also establish that he held an ownership interest in Consolidated, the seller of the Property, which was properly disclosed.

The documents in evidence and the testimony, notably from Mr. Glover, establish that the Property was marketed as a four-bedroom home. (*See, e.g.,* Clmt. Ex. 1.) The documents and testimony further establish that Consolidated did not complete the necessary permit process for the renovation work at the Property prior to selling the property to the Claimants. (*See* REC Ex. 3 at 43-1.) The Respondent did not contest that fact, instead, he testified that another member of Consolidated, who has a background in contracting, selected the contractors to perform the work and Consolidated hired those contractors. The Respondent pointed to his lack of experience in renovating homes and explained that he assumed the contractors hired by Consolidated obtained any permits necessary for the renovations at the Property. The Respondent noted that upon learning of the permit issue, he took steps to obtain the permits. There is also no dispute that, despite those efforts, the Health Department refused to issue a building permit for the addition of a fourth bedroom to the Property, due to the limitations of the septic system at the Property. (*See* REC Ex. 3 at 44-1 to -3.)

There was some dispute as to the suggestions made by the Respondent for resolving the issue with the unpermitted fourth bedroom. Having considered the testimony, I find it credible that the Respondent suggested temporarily converting a bedroom to a den by closing off the closet and making it a bookshelf, solely for purposes of obtaining the building permit, and

thereafter converting it back to a bedroom.[4] I note that Consolidated offered to compensate the Claimants for their losses, but discussions were not fruitful.

In regard to the limitations of the septic system, the testimony from Mr. Glover, Ms. Simms, and the Respondent establishes that the Respondent did not disclose either the March 12, 2014 letter agreement with the Health Department, or the contents of that letter, to the Claimants or their real estate agent in connection with the sale of the Property. The Respondent conceded that he should have disclosed the letter. He seeks to excuse his failure to disclose it by his testimony that the letter was handed to him at the Health Department and he did not read the letter because he was told that it was necessary for him to sign it in order to be permitted to install the septic system. The Respondent further noted that the septic system was thereafter properly installed by a licensed contractor pursuant to a permit.

A failure by the Respondent to read the letter agreement is not a legal excuse for failing to comply with its terms. *See Windesheim v. Larocca,* 443 Md. 312, 328 (2015) (observing it is settled law that where there is no dispute that a party signed a document, the party is presumed to have read and understood the document as a matter of law); *Merit Music v. Sonneborn,* 245 Md. 213, 221-22 (1967)("the law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms"). Moreover, the letter is a short document, less than two pages; it is not written in technical language that would be cumbersome or off-putting to a reader; it addresses significant matters and contains ongoing obligations; and the duty to disclose the document "to any prospective buyers/owners" is in bold type directly above the Respondent's signature; it required not only his own signature but the signature of a witness. Further, the Respondent testified that Consolidated purchased the

[4] I did not find it logical that the Respondent would have suggested boarding up an entire bedroom and the overall testimony on this point was indicative of a misunderstanding by the Claimants of the Respondent's suggestion to close off the closet. In any event, the scope of the Respondent's suggestion for temporarily converting the Property to a three bedroom home for purposes of obtaining the building permit is of little effect.

Property to renovate it and sell it and that it was his role to buy and sell the Property. In these circumstances, it is not reasonable that, despite the bolded agreement to disclose the letter to any prospective buyers, prominently and separately set forth immediately above his signature, the Respondent would not have further reviewed this short document to understand its contents and what he was agreeing to disclose. This is particularly so because the Property was less than a month from being listed for sale.

The Respondent further points out, however, that the permit was included in the disclosure package provided to the Claimants during the purchase of the Property and it references the letter agreement. The Respondent also notes that the Claimants and their real estate agent inspected the Health Department's file, though the Respondent was unable to refute the testimony that the letter agreement was not in the file at that time. Indeed, Ms. Simms credibly testified that when she and Mr. Glover inspected the documents provided by the Health Department, they noted the reference to the "signed release letter 3/12/14" on the on-site sewage disposal application/permit and inquired about it but were told there were no further documents in the file. Ms. Simms also testified that she asked the Respondent about the reference and he responded that everything he had was in the disclosures.

Mr. Glover was clear in his testimony that he would not have purchased the Property, or the adjoining acreage, if he had known of the issues with the septic system and the limitation on the number of bedrooms. Given the size of his family, the likelihood that, as active duty member of the U.S. Coast Guard, he will need to relocate in the near-future (and thus sell the Property), and his inability to market the Property as a four-bedroom home, I credited Mr. Glover's testimony. Ms. Simms testified that, due to the maintenance costs and marketability issues, the Claimants had rejected another property because it had a holding tank for its septic. Ms. Simms further testified that both the septic issue and the number of bedrooms (three versus four) would

decrease the value of the Property. Mr. Glover, who has been licensed in Maryland as a real estate agent since January 2018, also testified that the issues with the septic and the number of bedrooms would decrease the value of the Property. Plainly, the information concerning the suitability and limitations of the site for a septic system, the need for a storage tank if the septic system fails, and the number of permitted bedrooms at the Property are material facts in the purchase of a residence, and were material to the Claimants.

Finally, I note that the Respondent acknowledged that a real estate agent should know that the septic system is based on the size of the house and the number of bedrooms in the house. This is relevant to the Respondent's failure to disclose the septic issue, and also to the impropriety of the Respondent's subsequent suggestion that the Property be presented as a three-bedroom home to pass inspection, and then reconverted to a four bedroom home, despite knowing the septic system was not suited for such use.

Under these circumstances, I find that the Respondent's failure to disclose the March 12, 2014 letter agreement, or its substance, in connection with the sale of the Property, violates subsection 17-322(b)(4) and (b)(25) and subsection 17-532(b)(1)(iv) and (vi) of the Business Occupations Article and COMAR 09.11.02.01D. I further find that the Respondent's proposal to temporarily convert a fourth bedroom at the Property into a den solely for purposes of obtaining a building permit violates subsection 17-322(b)(25) of the Business Occupations Article[5] and COMAR 09.11.02.01C. As I have found that the Respondent violated subsection 17-532(b)(1)(iv) of the Business Occupations Article and COMAR 09.11.02.01C and D, the REC has also established violations of subsections 17-322(b)(32) and (33) of the Business Occupations Article.

[5] The REC did not argue that the Respondent's proposal to temporarily reconfigure the dwelling for purposes of obtaining the building permit violated sections 17-322(b)(4) or 17-532(c)(1)(iv) or (vi) of the Business Occupations Article.

The REC urges the imposition of $30,000 in civil penalties and revocation of the Respondent's license, pursuant to subsection 17-322(c) of the Business Occupations Article. Section 17-322(c) of the Business Occupations Article does not provide guidance concerning the appropriate level of sanction—reprimand, suspension, or revocation—though it does provide guidance concerning the appropriate monetary 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. In requesting, at the hearing, that the Respondent's license be revoked, the REC did not explain why a lesser sanction of suspension would be insufficient. Indeed, there was no indication that it considered and rejected a lesser sanction than revocation. 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 and implicate the Respondent's competency, ethics, and trustworthiness and caused monetary damage to the Claimants. However, the Respondent also has more than ten years as a licensed real estate agent without prior complaint and he acknowledged at the hearing that he should have disclosed the March 12, 2014 letter agreement.

Notably, the REC does not argue that the Respondent fraudulently or intentionally failed to disclose the March 12, 2014 letter agreement. Although the REC, under the facts here, could have raised at least a colorable argument that the Respondent engaged in intentional wrongdoing, it chose not to do so. Rather, in closing arguments the REC accepted that the failure to disclose was a result of the Respondent's failure to read the document, and there was certainly evidence to support that position—notably, the Respondent's testimony and his disclosure of the permit

referencing the letter agreement, which would seem to be inconsistent with an intentional effort to conceal the letter agreement. The REC argues that this demonstrated the Respondent's incompetence, lack of care and diligence, and employment of unethical practices.

Although I have upheld all of the charged violations, I did so on a slightly more limited factual basis than what was argued by the REC. In this regard, the REC argued that the Respondent was incompetent because he failed to ensure the proper permits were obtained at the time work was performed at the Property. However, I did not find the Respondent's reasonable reliance on his business partner, who has experience with contracting, and the contractors hired to perform the work to be evidence of the Respondent's incompetence.

I find it appropriate to recommend that the REC impose a lesser sanction of suspension for four months, which acknowledges the serious nature of the harm done and the acute level of incompetence exhibited, but also reflects the Respondent's disciplinary history and acknowledgement of his error in this discrete incident.

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 resulted in actual monetary harm to the Claimants. The REC asserts that the good faith of the Respondent does not lean one direction or the other and notes that the Respondent does not have any prior violations. The REC urges that each statutory or regulatory violation warrants a separate $5,000.00 fine, despite those violations all arising out of the same two issues in connection with a single transaction.

Imposing separate monetary penalties for statutory and regulatory violations arising out of the same two misdeeds during the course of a single real estate transaction would seem to be needlessly punitive and duplicative. There are two separate factual bases for the charges and the Claimants sustained damage. In these circumstances, and considering the lack of prior violations

over more than ten years as a licensed real estate agent, a penalty of $10,000.00 is recommended as both substantial and appropriate. I decline to subject the Respondent to any additional penalty based on violations arising from the same conduct.

The Guaranty Fund Claim

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 Claimants bear the burden of proof to establish their 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.*

There is no dispute that the Property is located in the State. 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 failed to disclose the March 12, 2104 letter agreement in connection with the sale of the Property; thus, there was an omission by the Respondent in the provision of real estate services. The Claimants purchased the Property as their residence and they have no business or familial relationship with the Respondent that would disqualify them from recovery. *See* Md. Code Ann., Bus. Occ. & Prof. § 17-404(c).

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, false pretenses that constitute "fraud or misrepresentation." A claim of fraud requires a showing that the person made a false representation, with either knowledge of

the falsity or reckless indifference as to its truth, for the purposes of defrauding the other party, and the other party reasonably relied upon the false representation and had the right to do so. *See Moscarillo v. Prof'l Risk Mgmnt. Servs., Inc.*, 398 Md. 529, 544 (2007). I find the evidence does not support a conclusion, by a preponderance of the evidence, that the omission constituted fraud.

Recovery is also permitted from the Fund if the act or omission complained of constitutes misrepresentation.[6] 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). Negligent misrepresentation can include a negligent failure to disclose. *See Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 135-36 (2007); *see also* Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii). The Respondent's conduct, detailed above, falls within the scope of negligent misrepresentation—the March 12, 2014 letter agreement includes a disclosure requirement and Respondent acknowledged in his testimony that as a licensed real estate agent he was required to disclose this information; the Respondent did not disclose the March 12, 2014 letter agreement or its substance; the Respondent was directly questioned by Ms. Simms, for the Claimants, about the reference in the on-site sewage disposal application/permit to a release letter, and the Respondent represented that the disclosures included all the information on the septic system; the testimony from the Respondent and Ms. Simms demonstrated that any real estate agent would know that the septic system and the

[6] 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").

number of bedrooms are related and that the number of bedrooms impacts the value of a home; the Claimants relied on the Respondents' misrepresentation, to their detriment.

The Claimants seek to recover for (1) $40,000.00 expended to acquire the adjoining property; (2) the future costs of pumping out a sewage holding tank over the life of the home; (3) the diminution in value of the Property with a sewage holding tank verses a septic system; (4) the diminution in value of the Property due to the required disclosure of the terms of the March 12, 2014 letter agreement; and (5) the diminution in value of the Property as a three-bedroom home verses a four-bedroom home.

As noted above, a claim against the Fund may not include monetary losses other than the monetary loss from the originating transaction. COMAR 09.11.01.14. This bars the Claimants from recovering for their separate purchase of the adjoining property.

The septic system at the Property is currently working. The Claimants recognized at the hearing that the longevity of their existing septic system is unknown; Mr. Glover conceded that it was "very hard" to determine the life expectancy of the system and testified that the system could fail tomorrow or it could last twenty years. There was no expert testimony on this issue. Ms. Simms testified as to her opinion on the difference in value between a property with a septic holding tank verses a septic system; her opinion was based on a very limited comparison between two properties—one with a holding tank and one with a septic system—that she marketed in 2015. Further, the Property currently has a traditional septic system and Ms. Simms did not offer an opinion on the marketability or difference in value between a home with a traditional septic system, but no septic reserve area, and a home with a traditional septic system that has a septic reserve area to be utilized in the event the initial septic fails. In these circumstances, damages related to the future failure of the septic system are too speculative to constitute an actual loss. Further, Mr. Glover's testimony failed to establish that the Claimants

intended to reside at the Property for a significant period of time in the future, as opposed to moving and selling the Property on the four year schedule he is typically subject to as a member of the U.S. Coast Guard. This makes any claim for the future costs of monthly pump outs of a sewage holding tank even more speculative—without any evidence that the Claimants were likely to continue to reside at the Property, an award for costs to be incurred in the future would be speculative.

The Claimants also argue that the mere fact that they will need to disclose the March 12, 2014 letter agreement, and its terms which require water conservation and the possibility of laundering clothing off-site, decreases the value of the Property. The decrease was not quantified and, as such, it does not provide a basis for an award from the Fund.

Finally, the Claimants make a claim for the loss in value based on the decreased number of bedrooms. Ms. Simms explained that due to the rural nature of the Property, it would be difficult to quantify the loss, but she believed it would be a "few thousand" dollars. Mr. Glover, who has been licensed as a real estate agent since January 2018 and who is an owner of the Property, testified that the difference in the value of the Property was five to eight thousand dollars and subsequently testified that four thousand dollars would be within the "ballpark."[7] Mr. Glover explained that his opinion was based on comparable properties, but acknowledged that there were no "outright" comparable properties. There is an actual loss in value to the Claimants as a result of paying for a four-bedroom home but receiving a three-bedroom home. The Claimants are entitled to recover $4,000.00 from the Fund as their actual loss.

[7] While the owner of real property is presumptively competent to express an opinion on its current value, a future decrease in value may require expert testimony. *See Brannon v. State Roads Comm'n*, 305 Md. 793, 801-02 (1986); *see also Ray v. Mayor & City Council*, 430 Md. 74, 98-99 (2013).

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)(4), (b)(25), (b)(33) and (c) and subsection 17-532(b)(1)(iv) and (vi) of the Business Occupations Article, and subsections 09.11.02.01C and D of COMAR. I further conclude that the REC should suspend the Respondent's real estate agent's license for four months and impose a total sanction of $10,000.00. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b), (c) (Supp. 2017).

Based on the Findings of Fact and Discussion, I conclude as a matter of law that the Claimants are entitled to an award from the Fund in the amount of $4,000.00 for the actual loss they sustained as a result of misrepresentations made by the Respondent, in his capacity as a licensed real estate salesperson, in connection with the sale of the Property. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (Supp. 2017); 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 four months;

(2) That the Respondent pay a civil penalty in the amount of $10,000.00;

(3) The Maryland Real Estate Commission Guaranty Fund pay the Claimants $4,000.00 as the amount of their actual loss from the Respondent's wrongful acts or omissions; and

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

SIGNATURE ON FILE

October 5, 2018
Date Decision Issued

Emily Daneker
Administrative Law Judge

ED/cj
#176045