

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION
V.

ANGELA DILLONSMITH
RESPONDENT

AND

CLAIM OF LIPTON McKAIN and
DIANE MAIR
AGAINST THE REAL ESTATE
COMMISSION GUARANTY FUND

* BEFORE LATONYA B. DARGAN,
* ADMINISTRATIVE LAW JUDGE,
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No: DLR-REC-24-07-44422
* REC CASE NO: 2005-RE-162
*

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 11, 2008, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 20th day of August, 2008.

ORDERED,

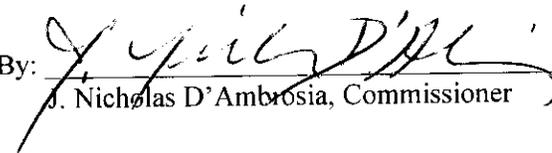
- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

8-20-2008
Date

By: 
J. Nicholas D'Ambrosia, Commissioner

MARYLAND REAL ESTATE	* BEFORE LATONYA B. DARGAN,
COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
ANGELA DILLONSMITH	* OF ADMINISTRATIVE HEARINGS
and	* OAH Case No.: DLR-REC-24-07-44422 ¹
CLAIM OF LIPTON McKAIN and	* REC Case No.: 05-RE-162
DIANE MAIR	*
AGAINST THE MARYLAND REAL	*
ESTATE COMMISSION GUARANTY	*
FUND	*
* * * * *	* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On October 18, 2004, Lipton McKain and Diane Mair (Claimants) filed a complaint with the Maryland Real Estate Commission (REC)² and a claim against the REC Guaranty Fund (Fund) for losses allegedly caused by the acts of a licensed real estate salesperson, Angela Dillonsmith (Respondent). On October 1, 2007, the REC

¹ This case was consolidated and heard with *MREC v. Angela Dillonsmith and Claim of Nahil (Nina) Davis Against the REC Fund*, OAH Case No. DLR-REC-24-07-44424 (MREC Case No. 04-RE-233). A separate decision is being issued in Case No. DLR-REC-24-07-44424.

² The REC is an administrative unit within the Department of Labor, Licensing and Regulation.

filed regulatory charges against the Respondent for her dealings with the Claimants and authorized a hearing on the Claimants' claim against the Fund.

On May 12, 2008, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2004).³ Assistant Attorney General Jessica B. Kaufman represented the REC. Assistant Attorney General Eric London represented the Fund. The Claimant and the Respondent represented themselves.

The Administrative Procedure Act, the REC's Hearing Regulations and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 & Supp. 2007); Code of Maryland Regulations (COMAR) 09.01.03, 09.11.03 and 28.02.01.

ISSUES

1. Did the Respondent violate Business Article § 17-322(b)(3) by directly or through another person willfully making a misrepresentation or knowingly making a false promise;
2. Did the Respondent violate Business Article § 17-322(b)(7) by retaining or attempting to retain the services of any unlicensed individual as an associate real estate broker or a real estate salesperson to evade the law prohibiting payment of a commission to an unlicensed individual;
3. Did the Respondent violate Business Article § 17-322(b)(8) by guaranteeing or authorizing another person to guarantee future profits from the resale of real property;
4. Did the Respondent violate Business Article § 17-322(b)(21) by accepting a commission or other valuable consideration from any person other than a real estate broker with whom the associate broker or the salesperson is affiliated;
5. Did the Respondent violate Business Article § 17-322(b)(25) by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

³ Throughout this decision, Maryland Code Annotated, Business Occupations & Professions (2004 & Supp. 2007) is referred to as "the Business Article."

6. Did the Respondent violate Business Article § 17-322(b)(33) by violating any of the regulations adopted under the title or any provision of the REC's Code of Ethics;
7. Did the Respondent violate Business Article § 17-534(b) by preparing a broker agreement that did not contain a termination date that was effective automatically without notice from the client;
8. Is the Respondent subject to the disciplinary sanctions of Business Article § 17-322(b);
9. Did the Claimants suffer an "actual loss" compensable under Business Article § 17-404 as a result of the Respondent's alleged misconduct and, if so, what award should be granted from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the REC:

- REC #1: March 5, 2008 Notice of Hearing
- REC #2: October 1, 2007 Statement of Charges and Order for Hearing, with attached transmittal cover letter to OAH
- REC #3: March 6, 2008 Certified copy of the Respondent's licensing history
- REC #4: Steven Long's February 5, 2008 affidavit
- REC #5: Walter C. Nooe, Jr.'s January 11, 2006 Investigation Report⁴
- REC #6: Jack L. Mull, Jr.'s July 9, 2007 Supplemental Investigation Report

Neither the Claimants, the Respondent, nor the Fund submitted any exhibits.

Testimony

The REC presented the following witnesses:

1. The Claimants
2. Nahil (Nina) Davis

⁴ Mr. Nooe retired and was replaced as the REC investigator by Jack L. Mull, Jr.

3. Jack L. Mull, Jr., REC Investigator

The Claimants testified on their own behalves and did not present any other witnesses. The Respondent testified on her own behalf and did not present any other witnesses. The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed real estate salesperson, Registration No. 532183. The Respondent's license was most recently renewed on January 24, 2007 and it expired on January 2, 2008. The Respondent's license was not renewed after it expired on January 2, 2008.
2. Sometime in August 2003, the Respondent worked as a real estate salesperson with RE/MAX™ Allegiance, a real estate franchise located in Bowie, Maryland. RE/MAX is an internationally-known and respected corporation that handles residential and commercial real estate sales/leasing and includes a network of franchises throughout the world.
3. Sometime in August 2003, the Claimants responded to an advertisement in the *Prince George's County Gazette* seeking home investors. The advertisement included the RE/MAX logo and the name "RE/MAX Professionals." When the Claimants called the contact telephone number in the advertisement, they reached Nahil (Nina) Davis, an investor recruiter who ultimately put the Claimants in touch with the Respondent. The Claimants told the Respondent that they were interested in being investors.

4. Sometime in August 2003, the Claimants met with the Respondent at the Respondent's business office in Bowie.
5. The Respondent's investor program operated under the names "RE/MAX Professionals International Group" and "All Under One Roof Real Estate." Neither RE/MAX Professionals International Group nor All Under One Roof Real Estate are formally or officially associated with RE/MAX.
6. During the August 2003 meeting, the Respondent explained her investment program to the Claimant. The Respondent advised the Claimants that if they became investors with the Respondent, they would have an opportunity to purchase multiple properties and, through land-installment contracts, lease those properties on a rent-to-own basis to buyers who could not obtain conventional mortgages because of credit problems.
7. During the August 2003 meeting, the Respondent told the Claimants that she would pre-screen potential buyers to determine if they were appropriate risks.
8. On or around August 23, 2003, the Respondent presented the Claimants with a buyer/broker exclusive retainer agreement (Agreement) and had the Claimants sign it. The Claimants believed they were signing the contract to become investors with the Respondent's program.
9. In addition to signing the Agreement on August 23, 2003, the Claimants paid the Respondent \$1,800.00, an amount the Claimants believed was a deposit that would be returned to them once they purchased their first investment property.

10. The Agreement did not contain a termination date. Instead, the Respondent struck through the language related to an expiration date.
11. On August 25, 2003, the Respondent deposited the \$1,800.00 payment into her brokerage commission account at SunTrust Bank.
12. On August 25, 2003, a check in the amount of \$1,800.00 was written to the Respondent from the brokerage commission account at SunTrust Bank.
13. On or around October 14, 2003, Willie and Antoinette Beverly contact the Respondent and expressed interest in participating in the homeownership investor program. The Beverlys acknowledged to the Respondent that they had a problematic credit history.
14. On or around October 24, 2003, the Respondent gave the Claimants a buyer profile data sheet on the Beverlys. After reviewing the Beverlys' profile, the Claimants decided to purchase a property of the Beverlys' choosing and to then lease the property to the Beverlys on a rent-to-own basis through a land installment contract.
15. The Respondent was responsible for preparing the land installment contract.
16. The Respondent never successfully completed the preparation of the land installment contract.
17. The Beverlys eventually selected the Long & Foster-listed property at 8903 Briardale Lane, Laurel, Maryland as their prospective home (the Briardale Property).
18. The purchase price for the Briardale Property was \$299,900.00.

19. As part of the Claimants' terms related to purchasing the Briardale Property, the Beverlys, prior to settlement on the Briardale Property, were to make an earnest money down payment totaling 6.5% of the purchase price, or \$19,493.50.
20. The Respondent was responsible for collecting the \$19,493.50 down payment from the Beverlys prior to or no later than the settlement date.
21. The settlement date for the Briardale Property was November 24, 2003.
22. As part of the Claimants' terms related to purchasing the Briardale Property, the Beverlys were to make monthly rental payments to the Claimants in the amount of \$2,573.00 until such time as the Beverlys were able to qualify for a home loan. The rental payments were due by the first of every month.
23. Respondent did not collect the down payment money from the Beverlys by November 24, 2003 and the Beverlys did not attend settlement on that date. At the time of settlement, the Claimants instructed the Respondent not to give the keys to the Briardale Property to the Beverlys until the down payment was fully collected.
24. Sometime in late November 2003/early December 2003, the Respondent gave the Beverlys the keys to the Briardale Property and the Beverlys moved in to the property.
25. To cover the cost of the down payment, the Beverlys gave the Respondent two cashier's checks, one in the amount of \$6,850.00, dated December 9, 2003, and one in the amount of \$3,000.00, dated December 10, 2003. The Beverlys also gave the Respondent a personal check for \$4,000.00, dated December 1,

2003. The \$4,000.00 personal check was returned unpaid due to insufficient funds in the account.
26. The total amount of money the Claimants received as down payment from the Beverlys was \$9,850.00. The balance owed to the Claimants for the down payment was \$9,643.50.
27. The Beverlys tendered a check dated January 4, 2004 to the Claimants in the amount of \$2,573.00 for January 2004 rent. The January 4th check was returned unpaid due to insufficient funds. When the Beverlys were made aware of the bounced check, they tendered a second check to the Claimants, but that check was also returned unpaid due to insufficient funds.
28. When the second January 2004 rent payment was returned to the Claimants unpaid, they advised the Respondent that they no longer wanted the Beverlys to reside at the Briardale Property.
29. On or around January 13, 2004, the Respondent filed paperwork to have the Beverlys evicted from the Briardale Property for failure to pay rent, but the wrong address was written on the court paperwork.
30. The Beverlys continued to reside at the Briardale Property until May 2004, at which time they were finally evicted. From January 2004 through May 2004, the Beverlys made no rent payments.

DISCUSSION

In its Statement of Charges, the REC determined that the regulatory charges and the monetary claim filed against the Fund by the Claimants arose from the same facts and circumstances and should be consolidated for hearing at the same time. Accordingly, the

evidence presented in this hearing was considered in determining the merit of both the regulatory charges and the Fund claim.

The Regulatory Violations

The case against the Respondent arises out of her dealings with the Claimants in connection with the Respondent's personal investment business. Specifically, the REC argued that the Respondent engaged in misconduct when she (i) represented to the Claimants that her personal investment business was affiliated with RE/MAX™ even though it was not; (ii) misrepresented the nature of the buyer/broker agreement she had the Claimants sign; (iii) accepted a commission from the Claimants, in the form of the \$1,800.00 payment, even though the Claimants are not real estate brokers; and, (iv) failed to protect the Claimants' interests during the transactions involving the Beverlys.

Under the REC's theory of the case, the Respondent's conduct constitutes violations of Business Article § 17-322(b) (Supp. 2007), which provides in pertinent part as follows:

§ 17-322. Denials, reprimands, suspensions, revocations and penalties – Grounds.

(b) Subject to the hearing provisions of § 17-243 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; ...

(7) retains or attempts to retain the services of any unlicensed individual as an associate real estate broker or a real estate salesperson to evade the law prohibiting payment of a commission to an unlicensed individual;

(8) guarantees or authorizes or allows another person to guarantee future profits from the resale of real property; ...

(21) for real estate brokerage services provided by an associate real estate broker or a real estate salesperson, accepts a commission or other valuable consideration from any person other than a real estate broker with whom the associate broker or the salesperson is affiliated; ...

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

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

The REC further argued that the Respondent's conduct constitutes a violation of: Business Article § 17-534(b), (failing to include in the brokerage agreement a definite termination date that is effective automatically without notice from the client); COMAR 09.11.02.01C (failing to protect the interests of the public against fraud, misrepresentation or unethical practices in the real estate field); COMAR 09.11.02.01H (failing to see to it that all financial obligations and commitments regarding real estate transactions are in writing); and, COMAR 09.11.02.02A (failing to protect and promote the interests of the client). For the reasons articulated below, I find that with the exception of Business Article § 17-322(b)(7), the Respondent violated the above statutory and regulatory provisions.

Violations under Business Article § 17-322(b)(3)

The evidence supports a finding that the Respondent made misrepresentations and false promises to the Claimants in a number of different matters. First, the Respondent represented to the Claimants that the Respondent's investment program was affiliated with RE/MAX™ even though it was not. The newspaper advertisement placed by the Respondent in the *Prince George's County Gazette* clearly sought to affiliate the Respondent's personal investment program/business with RE/MAX™; the advertisement

includes the RE/MAX™ name and the official RE/MAX logo. (REC Ex. #5, Attachment #3, p.2). Additionally, when the Respondent met with the Claimants in August 2003 to provide them with information and background on her investment program, she told the Claimants that her program, The International Group, was affiliated with RE/MAX. (T. Diane Mair; REC Ex. #5, Attachment #3, p.5). Furthermore, in both the Claimants' testimony before me as well as in their interview with the REC investigator, they indicated that a primary reason they felt it was safe to do business with the Respondent was because the Respondent led them to believe that her investment program was affiliated with RE/MAX™. (T. Diane Mair; T. Lipton McKain; *see also* REC #5, p. 3).

The REC presented evidence demonstrating that the Respondent's personal business was *not* affiliated with RE/MAX in any way. By letter dated November 1, 2004, Robert Blumenkrantz, the Broker of Record for the RE/MAX franchise that employed the Respondent as an agent, advised the REC investigator that the Respondent's personal enterprise was not sanctioned by the company. (REC #5, Attachment #4, p. 3). Shelly West, who worked as the office manager for the RE/MAX Allegiance franchise, noted that the franchise did receive the documents related to the purchase of the Briardale Property (i.e., the settlement sheet, contract of sale to the Claimants' and the Claimants' \$3,000.00 good faith deposit), but she indicated that the Respondent did not provide any of the paperwork related to the Claimants' transactions with the Beverlys. (REC Ex. #5, Attachment #4, p. 5).

For her part, the Respondent conceded that she placed the newspaper advertisement and that she used the RE/MAX™ name. (*See also*, REC Ex. #6, p. 3). She testified, however, that she believed it was appropriate to do so because she considered

herself to be selling her professional services to the public. According to the Respondent in both her testimony before me and in her interview with the REC investigator, she thought it was “okay” to use the RE/MAX™ name. I do not find the Respondent to be credible in this regard because she essentially concealed her activities from her supervisors at RE/MAX. If the Respondent’s use of the RE/MAX™ name in connection with her personal business enterprise was appropriate, then I find it more likely than not that the Respondent would have made her supervisors aware of what she was doing in *all* of her dealings with the Claimants.⁵ The fact that the Respondent did not make anyone at the RE/MAX franchise aware of her dealings with the Claimants *and* the Beverlys suggests that those dealings were actually *independent from* the Respondent’s official capacity as a RE/MAX agent. I find it more likely than not that the Respondent used the RE/MAX™ name in connection with her personal business enterprise because of the cachet that name carries in the real estate industry. Indeed, the Claimants testified that they believed the Respondent to be reputable because all of the Respondent’s business appeared to be affiliated with RE/MAX. The Claimants’ sentiments in this regard were echoed in the testimony of Nina Davis.

The second misrepresentation engaged in by the Respondent centers around the August 23, 2003 Agreement. Claimant Mair testified that the Respondent told the Claimants that the \$1,800.00 payment was a fee for joining the Respondent’s investment program. According to Ms. Mair, it was both her and Mr. McKain’s understanding that the \$1,800.00 payment would be returned to them once they purchased their first investment property. Additionally, Ms. Mair testified that based on the Respondent’s

⁵ The Respondent made her supervisors aware of the Claimants’ purchase of the Briardale Property. She did not make her supervisors aware of the ‘side’ arrangement between the Beverlys and the Claimants that arose out of the Respondent’s personal investment enterprise.

statements, she and Mr. McKain believed the document that they signed on August 23, 2003 was an investor contract. According to Claimant Mair, she genuinely did not understand that they were signing an exclusive buyer-broker retainer agreement; her understanding of the document came from how the Respondent explained the document. (*See also*, REC Ex. #5, p. 3). For her part, the Respondent maintained that the Claimants knew they were signing a buyer-broker agreement and that the \$1,800.00 fee was non-refundable. (*See also*, REC Ex. #6, p. 2).

I am mindful of the fact that on its face the August 23, 2003 Agreement states that it is an exclusive retainer agreement for a broker's representation of a buyer. (REC Ex. #5, Attachment #2, p. 5). I also note for the record that both Claimants presented as a reasonably intelligent individuals who were clearly also literate; on the surface, it would seem that the Claimants should have been able to review the document and ascertain that it was really a buyer-broker agreement and not an investor contract. In her testimony before me, Ms. Mair presented as sincere when she stated that she thought she was signing an investor contract based on the Respondent's explanation of the investment program. Although clearly disappointed by the Respondent's conduct, Ms. Mair did not seem to be angry, vindictive, or bitter; she was not hostile about or toward the Respondent. My overall impression of the Claimant was that she was telling the truth about what the Respondent said to her and Mr. McKain during their initial meeting and how the Respondent explained the August 23, 2003 Agreement to them.

It must also be noted that the Claimants are not the only people who had the impression that the document entitled "Exclusive Retainer Agreement" was an investor contract rather than a buyer-broker agreement or that the \$1,800.00 was refundable. Ms.

Davis testified that she thought the document was an investor contract and that she thought she would get the \$1,800.00 fee back once she purchased her first investment property. (T. Nina Davis). Given that three reasonably intelligent, literate adults all had the same impression that the document was an investor contract and that the \$1,800.00 was refundable, I find it more likely than not that they all came to these conclusions because *that is what the Respondent told them*. I find that the Respondent misrepresented to the Claimants the nature of both the August 23, 2003 Agreement and the \$1,800.00 fee.

Violations under Business Article § 17-322(b)(8)

The REC has also proven its case that the Respondent guaranteed the Claimants future profits from the resale of real property. In their interview with the REC investigator, the Claimants indicated that the Respondent, in explaining her investment program to them, told them that they would be able to rent properties under the land installment contracts at a higher amount than what they paid for the properties. (REC Ex. #5, p. 2). Indeed, the draft land installment contract shows that upon completion of the contract, the total cash price would be \$334,900.00, a \$35,000.00 profit above the actual purchase price of the Briardale Property. (REC Ex. #5, Attachment #2, p. 7). Although the Respondent denied telling the Claimants that they could make a profit when she was interviewed by the REC investigator (REC Ex. #6, p. 3), it strikes me as highly unlikely that the draft land installment contract, which the Respondent was responsible for creating, would contain terms that reflected a profit unless a profit was contemplated and promised to the Claimants.

Violations under Business Article § 17-322(b)(21)

The REC has also proven its case that the Respondent accepted a commission or other valuable consideration from a person other than a real estate broker, in violation of Business Article § 17-322(b)(21). The evidence clearly demonstrates that the Respondent accepted \$1,800.00 from the Claimants as the fee for “enrolling” the Claimants in the investment program. (T. Mair; REC Ex. #5, Attachment #5, pp. 1, 4). The evidence also demonstrates that the Respondent deposited the money into her brokerage commission account and then *immediately* withdrew it via a check made out to her personally. (REC Ex. #5, Attachment #5, p. 5).

Violations under Business Article § 17-322(b)(25)

I find that the Respondent’s entire course of conduct in this matter constitutes a violation of Business Article § 17-322(b)(25). The Respondent acted in an untrustworthy manner toward the Claimants when she misrepresented that her personal business enterprise was affiliated with RE/MAX and when she misrepresented the nature of the August 23, 2003 Agreement. The Respondent collected a commission from the Claimants in violation of Business Article § 17-322(b)(21). Additionally, the Respondent behaved incompetently when she failed to properly reduce to writing the land installment contract and additional terms of the Claimants’ transactions with the Beverlys (such as the required \$19,493.50 earnest money deposit). The Respondent further behaved incompetently when she (i) failed to secure the earnest money deposit from the Beverlys *prior* to the settlement date on the Briardale property, and (ii) gave the Beverlys access to the property, against the Claimants’ wishes, prior to securing all of the earnest money deposit.

I am mindful of the Respondent's assertion, made to the REC investigator and in her testimony, that she was not responsible for ensuring the Beverlys' checked cleared; she is correct in that regard – the ultimate responsibility for ensuring proper payment was the Beverlys. The Respondent, however, could have prevented some of the problems occasioned by the Beverlys' conduct had she honored the Claimants' wishes that the Beverlys not be permitted access to the Briardale Property until they had at least made the earnest money deposit. Despite the fact that the Beverlys and the Claimants agreed the Beverlys were to pay the earnest money deposit prior to the November 24, 2004 settlement date, the evidence demonstrates that the checks for the deposit were not written or presented to the Respondent to give to the Claimants until December 1, 2004. Not only did the Beverlys fail to make complete payment of the earnest money, they failed to make the payment on time. There was no excuse for the Respondent to nevertheless give them the keys to the property despite these failures.

Violations under Business Article § 17-322(b)(33) and the REC Code of Ethics

The REC has further proven that the Respondent acted in violation of Business Article § 17-322(b)(33) and COMAR 09.11.02.01 and .02. The REC Code of Ethics is found at COMAR 09.11.02. Regulation 09.11.02.01 states, in pertinent part, the following:

01. Relations to the Public.

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. ...

H. the protection of all parties with whom the licensee deals, the licensee shall see to it that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties, and that copies of these agreements are placed in the hands of all parties involved within a reasonable time after the agreements are executed. ...

Regulation 09.11.02.02 deals with the real estate salesperson's ethical obligations to his or her client and states, in pertinent part:

.02 Relations to the Client.

A. In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

By making significant misrepresentations to the Claimants — both members of the public — failing to honor agreements she entered into with the Claimants, and failing to reduce to writing the significant terms of the Claimants' dealings with the Beverlys within the context of the Respondent's personal investment program, the Respondent failed in her professional and ethical obligations under both COMAR 09.11.02.01C and .01H. Rather than eliminating practices in the community that could be damaging to the integrity of the real estate profession, the Respondent perpetuated such practices.

As discussed in the section dealing with violations under Business Article § 17-322(b)(25), the Respondent also violated her ethical obligations to the Claimants under COMAR 09.11.02.02A. She wholly failed to protect their interests during their dealings with the Beverlys. It is particularly troubling that the Respondent gave the Beverlys the keys to the Briardale Property even though the Claimants *specifically* directed her not to

do so. Had the Respondent honored that very simple and uncomplicated request, it would have spared the Claimants a great deal of frustration.

Violations under Business Article § 17-534(b)

Finally, the REC has demonstrated that the Respondent violated the provisions of Business Article § 17-534(b) (2004), which pertains to brokerage agreement requirements and provides as follows:

§ 17-534. Brokerage Relationship

(b) The brokerage agreement shall:

(1) have a definite termination date that is effective automatically without notice from the client[.]

As discussed above, I find that the Respondent misrepresented the nature of the August 23, 2003 Agreement to the Claimants; the Respondent lead the Claimants to believe the document was an investor contract even though it was really a buyer-broker agreement. Even though the Respondent misrepresented the nature of the document, her misrepresentation did not change what the document *actually* was – a buyer-broker agreement. As the document was, in form, a buyer-broker agreement, it must conform to the requirements for such agreements as those requirements are outlined in Business Article § 17-534(b). The evidence demonstrates that the Respondent struck the language dealing with automatic termination, an action that essentially rendered the document indefinite. (REC Ex. #5, Attachment #2, p. 5). The Respondent's action violates the provisions of Business Article § 17-534(b).

Alleged violations under Business Article § 17-322(b)(7)

The REC has not proven its case with regard to the Respondent's alleged violation of Business Article § 17-322(b)(7). There is no evidence demonstrating that the

Respondent sought to have the Claimants act as real estate brokers or real estate salespersons; they were investors. There is no evidence demonstrating that the Claimants ever showed properties to other investors or that during their association with the Respondent, they performed any of the duties of a real estate agent/salesperson or real estate broker.

Regulatory Sanctions/Penalties

In determining the appropriate penalties to be assessed in this case, I must consider the criteria set forth in Section 17-322(c) of the Business Article, which provides as follows:

§ 17-322. Denials, reprimands, suspensions, revocations, and penalties - Grounds. . . .

(c) *Penalty.*

- (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license, the Commission may impose a penalty not exceeding \$5,000 for each violation.
- (2) To determine the amount of the penalty imposed under this subsection, the Commission shall consider:
 - (i) the seriousness of the violation;
 - (ii) the harm caused by the violation;
 - (iii) the good faith of the licensee; and
 - (iv) any history of previous violations by the licensee. . . .

Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (Supp. 2007).

The Respondent does not have a prior disciplinary history. The REC, however, argued that the seriousness of the violations and the harm caused by the Respondent's conduct to the Claimants and to the reputation of the real estate profession justifies the

revocation of the last license held by the Respondent, as well as the imposition of a \$5,000.00 civil penalty. The REC further argued that the Respondent has demonstrated very little good faith throughout her dealings with the Claimants. I have considered the four factors used in assessing the imposition of civil penalties. I find that (i) the number and seriousness of the violations, (ii) the harm caused to the Claimants and to the reputation of the real estate profession by the Respondent's misconduct, and, (iii) the Respondent's lack of good faith in her dealings with the Claimants warrant the revocation of the last license held by the Respondent and the imposition of a \$5,000.00 penalty.

Guaranty Fund Claim

Claims for reimbursement from the Fund are governed by Business Article § 17-404 which states, in pertinent part, as follows:

§ 17-404. Claims against the Guaranty Fund.

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

(2) A claim shall:

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

3. a licensed real estate salesperson; . . .

(ii) involve a transaction that relates to real estate that is located in the State; and

(iii) be based on an act or omission: . . .

2. that constitutes fraud or misrepresentation.

Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2004).

With respect to claims against the Fund, COMAR 09.11.03.04 further provides as follows.

.04 Claims Against the Guaranty Fund

- A. A guaranty fund claim shall be based on the alleged misconduct of a licensee.
- B. For the purpose of a guaranty fund claim, misconduct:
 - (1) Is an action arising out of a real estate transaction involving real estate located in this State which causes actual loss by reason of theft or embezzlement of money or property, or money or property unlawfully obtained from a person by false pretense, artifice, trickery, or forgery, or by reason of fraud, misrepresentation, or deceit;
 - (2) Is performed by an unlicensed employee of a real estate broker or by a duly licensed real estate broker, associate broker, or salesperson; and
 - (3) Involves conduct for which a license is required by Business Occupations and Professions Article, Title 17, Annotated Code of Maryland.

COMAR 09.11.01.18 provides further:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, 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 his capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

The Claimants bear the burden of proof in this proceeding against the Fund.

Business Article § 17-407(e) (2004). In this case, the Claimants produced the cancelled check showing that they paid the Respondent \$1,800.00. (REC Ex. #5, Attachment #5, pp. 1, 4). As discussed above, the Respondent was prohibited from accepting that

payment under Business Article § 17-322(b)(21). As also discussed above, the Respondent obtained this payment through misrepresentation, in violation of Business Article § 17-322(b)(3).

The evidence further demonstrates that the Claimants were supposed to collect \$19,493.50 from the Beverlys as an earnest money deposit on the Briardale Property; they only received \$9,850.00, leaving an outstanding balance on the deposit totaling \$9,643.50. (T. Diane Mair; REC Ex. #5, Attachment #2, p.21; Attachment #3, p. 16). The Beverlys resided in the Briardale Property from January 2004 through May 2004 without paying rent; their total rental arrearage is \$12,865.00.

As discussed above, the Respondent was responsible for giving the Beverlys the keys to the property even though the Claimants instructed her not to do so because the Beverlys had not fully made the earnest money deposit. The evidence also demonstrates that the Respondent was originally responsible for filing the eviction papers, but the wrong address was written down for the property. (REC Ex. #5, Attachment #2, p. 17; Attachment #3, p. 36). Claimant McKain eventually had to file the eviction papers himself despite the Respondent's assurances that she and her 'team' were handling the matter. (REC Ex. #5, Attachment #2, p. 24). The Respondent's actions/omissions are directly responsible for the Beverlys gaining access to the Briardale Property and essentially living there rent-free for five months. The Claimants monetary losses in this matter are calculated as follows:

Investment program "fee":	\$1,800.00
Balance due of earnest money deposit:	\$9,643.50
<u>Five months' rent @ \$2,573.00:</u>	<u>\$12,865.00</u>

Total

\$24,308.50

The record supports a finding that the Claimant's losses were incurred as a result of the Respondent's conduct, for the reasons articulated above. Accordingly, I find that the Claimants are entitled to reimbursement from the Fund in the amount of \$24,308.50.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Business Article § 17-322(b)(3) by directly or through another person willfully making a misrepresentation or knowingly making a false promise.

I further conclude as a matter of law that the Respondent violated Business Article § 17-322(b)(8) when she guaranteed future profits from the resale of real property.

I further conclude as a matter of law that the Respondent violated Business Article § 17-322(b)(21) by accepting a commission or other valuable consideration from a person other than a real estate broker with whom the associate broker or the salesperson is affiliated.

I further conclude as a matter of law that the Respondent violated Business Article § 17-322(b)(25) by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings.

I further conclude as a matter of law that the Respondent violated Business Article § 17-322(b)(33) by violating the REC's Code of Ethics, specifically COMAR 09.11.02.01C and .01H and COMAR 09.11.02.02A.

I further conclude as a matter of law that the Respondent violated Business Article § 17-534(b) when she prepared a broker agreement that did not have a termination date that was effective automatically without notice from the client.

I further conclude as a matter of law that the Respondent is subject to the disciplinary sanctions of Business Article § 17-322(b) and (c).

I further conclude as a matter of law that the Claimants suffered an “actual loss” compensable under Business Article § 17-404 as a result of the Respondent’s misconduct and that the Claimants are entitled to an award for the REC Guaranty Fund in the amount of \$24,308.50.

Finally, I conclude as a matter of law that the Respondent did not violate Business Article § 17-322(b)(7) by retaining or attempting to retain the services of an unlicensed individual as an associate real estate broker or a real estate salesperson to evade the law prohibiting payment of a commission to an unlicensed individual. Md. Code Ann., Bus. Occ. & Prof. §§ 17-404 (2004), 17-322 (Supp. 2007), 17-534(b) (2004); COMAR 09.11.02.01C., 09.11.03.04, 09.11.01.18.

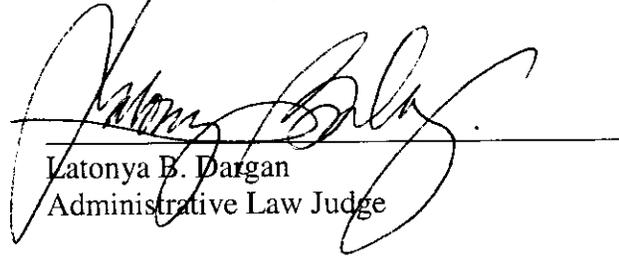
RECOMMENDED ORDER

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

1. The charges of the Commission be **UPHELD**;
2. A civil penalty in the amount of \$5,000.00 be assessed against the Respondent;
3. The last license held by the Respondent be **REVOKED**;
4. The Claimants be reimbursed \$24,308.50 from the Fund; and,

5. The Commission **ORDER** that REC's records and publications reflect its final decision.

August 11, 2008
Date Decision Mailed



Latonya B. Dargan
Administrative Law Judge

#98985

MARYLAND REAL ESTATE	* BEFORE LATONYA B. DARGAN,
COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
ANGELA DILLONSMITH	* OF ADMINISTRATIVE HEARINGS
and	* OAH Case No.: DLR-REC-24-07-44422
CLAIM OF LIPTON McKAIN and	* REC Case No.: 05-RE-162
DIANE MAIR	*
AGAINST THE MARYLAND REAL	*
ESTATE COMMISSION GUARANTY	*
FUND	*
* * * * *	* * * * *

FILE EXHIBIT LIST

I admitted the following exhibits into evidence on behalf of the REC:

- REC #1: March 5, 2008 Notice of Hearing
- REC #2: October 1, 2007 Statement of Charges and Order for Hearing, with attached transmittal cover letter to OAH
- REC #3: March 6, 2008 Certified copy of the Respondent's licensing history
- REC #4: Steven Long's February 5, 2008 affidavit
- REC #5: Walter C. Nooe, Jr.'s January 11, 2006 Investigation Report⁶
- REC #6: Jack L. Mull, Jr.'s July 9, 2007 Supplemental Investigation Report

Neither the Claimants, the Respondent, nor the Fund submitted any exhibits.

⁶ Mr. Nooe retired and was replaced as the REC investigator by Jack L. Mull, Jr.