

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v.
JOSEPHINE STONE,
Respondent

*** Case No. 2013-RE-286**

And

*** OAH NO. DLR-REC-24-14-27085**

CLAIM OF ROBB AND LEAH SOUCY
AGAINST THE MARYLAND REAL ESTATE
GUARANTY FUND

*** * * * ***

OPINION AND FINAL ORDER

This matter came before the Maryland Real Estate Commission (“Commission”) on argument on Exceptions filed, on or about June 18, 2015, by the Respondent, Josephine “Cookie” Stone, to the Proposed Order of May 29, 2015. On May 4, 2015, Administrative Law Judge Marc Nachman (“ALJ”) filed a Recommended Decision and Recommended Order in which he recommended that, for violations of Sections 17-322(b)(25) and (33) and Section 17-530(c), Business Occupations and Professions Article, *Annotated Code of Maryland* (“Md. Bus. Occ. & Prof. Art.”), the Commission reprimand the Respondent; that the Respondent be fined \$5,000.00; and that the Claimants, Robb and Leah Soucy be paid \$4,931.56 from the Maryland Real Estate Guaranty Fund (“Fund”).

On May 29, 2015, the Commission issued a Proposed Order that adopted the ALJ’s Findings of Fact and Conclusions of Law but amended the ALJ’s Recommended Order as follows:

“ORDERED that the Respondent, Josephine Stone, shall be assessed a civil penalty in the amount of **Five Thousand Dollars (\$5,000)**, which shall be paid to the Real Estate Commission within thirty (30) days of the date of this Order;

ORDERED that the Claimants, Robb and Leah Soucy, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Four Thousand Nine Hundred Thirty One Dollars and Fifty Six Cents (\$4,931.56)**;

ORDERED that all real estate licenses held by the Respondent, Josephine Stone, 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.”

A hearing on the Exceptions filed by the Respondent was held by a panel of Commissioners, consisting of Commissioners Karen Baker, Marla S. Johnson and James Reeder on August 19, 2015. Susan Cherry, Assistant Attorney General, represented the Commission. Timothy G. Casey, Esquire represented the Respondent, Josephine Stone. The Respondent appeared but did not testify. The Claimants, Robb and Leah Soucy, appeared and Leah Soucy made an oral argument. A transcript of the hearing before the ALJ was provided to the Commission and reviewed by the Commissioners. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, one exhibit, as well as the Office of Administrative Hearings’ file, containing the exhibits which were entered into evidence at the hearing before the ALJ, were entered into the Exceptions’ hearing record. On behalf of the Respondent, two exhibits were entered into the Exceptions’ hearing record.

PRELIMINARY MATTERS

Subsequent to the Exceptions hearing, counsel for the Respondent addressed a letter, dated August 21, 2015, to Commissioner Marla Johnson with copies sent to Commissioners Karen Baker and James Reeder among others. Counsel for the Respondent did not request the Commission to leave the record open for the submission of additional argument at the conclusion of the Exceptions' hearing. Therefore the record of the Exceptions' hearing was closed on August 19, 2015. Since the record was closed on August 19, 2015 in this case, the Commissioners to whom Respondent's counsel sent an August 21, 2015 letter did not review or consider the contents of that letter in rendering a decision in this case. However, the copies of the August 21, 2015 letter from Respondent's counsel which were sent to the Commissioners have been placed in the Commission's file.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ as modified in its Discussion.

DISCUSSION

At all times relevant to this matter, the Claimants were married. They currently reside at 1211 Nicodemus Road, Reisterstown, Maryland ("Property"). Charges filed by the Commission, the complaint filed by the Claimants and the claim against the Fund are all related to this Property. FF 1.¹ Further, at all times relevant to this matter, the Respondent was a real estate salesperson licensed by the Commission (License # 05 31613). The Respondent is affiliated with Broker John D'Ambrosia (License # 01 38712) of Long and Foster Real Estate, Inc. in Chantilly, Virginia. The Respondent worked out of the Long and Foster office in Reisterstown,

¹ "FF" refers to the Administrative Law Judge's Findings of Fact.

Maryland. FF 2. The Respondent had been in the real estate business for forty-five years and has had no prior Commission claims filed against her. FF 3.

Claimant Robb Soucy's parents had been friends with the Respondent for many years. They had worked with her in a professional capacity as well. FF 4. Over ten years ago, the Claimants purchased a house located at 333 Stonecastle Road, Reisterstown, Maryland ("Stonecastle Property"). The Respondent served as their buyers' agent when they purchased the Stonecastle Property. FF 5. At some point prior to July 19, 2012, the Claimants decided to sell the Stonecastle Property and move to another property. FF 6. The Respondent listed the Stonecastle Property for sale on behalf of the Claimants. She became their listing agent for the Stonecastle Property. FF 7. The Claimants also asked the Respondent to show them houses for sale. FF 8. The Respondent showed the Claimants four or five houses for sale. The Respondent drove around with the Claimants to look at those houses. FF 9. The Respondent also recommended ways to repair the Claimants' credit to qualify for mortgage financing so that they could purchase a subsequent home. FF 10.

The Property was not among the houses that the Respondent initially showed the Claimants. FF 11. The Respondent told the Claimants about the Property, advising them that she was the listing agent. The Respondent took the Claimants to the Property. FF 12. The Seller showed the Claimants the Property and they expressed an interest in purchasing it. FF 13. The Respondent told the Claimants that she represented the Seller, that her obligations were to the Seller and that they could have their own agent. T366, 491, 366.² The Claimants declined. The Claimants acknowledged that the Respondent advised them that she was representing the Seller but they contended that she represented them as well and they did not understand the significance of the Respondent's statement; *i.e.*, that the Respondent would not be protecting

² "T" refers to the transcript of the hearing before the Administrative Law Judge.

their interests in the purchase of the Property. T108, 164. The Claimants did not get their own agent, as they assumed that the Respondent was representing both them and the Seller. The Respondent did not press them to get a separate agent, nor did she give them any further reason to believe that she could not protect their interests in purchasing the Property. FF 14. The Respondent told the Claimants that at least one other purchaser was interested in the Property. FF 15. The Respondent told the Claimants that, as the listing agent, she could not suggest an offer price; the Claimants offered the listing price. On July 12, 2012, the Claimants entered into a contract to purchase the Property. FF 16. Although the Respondent did not recommend to the Claimants a price to offer on the Property, the Respondent did complete the remainder of the contract on behalf of and in the presence of the Claimants. FF 17.

The Respondent did not present the Seller or the Claimants with any documents allowing her to represent both parties to the transaction (dual agency). FF 18. The contract included the following salient terms: a. A purchase price of \$329,000.00; b. Two deposits of \$2,500.00, the first submitted with the contract and the second submitted after the Seller accepted their offer; c. Financing contingencies; and d. Home inspection by a licensed home inspector chosen by the Claimants. FF 19. The following salient addenda were attached to the Contract: a. "Understanding Whom Real Estate Agents Represent"; b. "Notice to Buyer and Seller of Buyer's Rights and Seller's Obligations under Maryland's Single Family Residential Property Disclosure Law"; c. Property Inspection Addendum; d. Notification of Agency Within a Team (Maryland); e. On-site Sewage Disposal System (OSDS) Inspection and Test Addendum; f. Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards SALES; and g. Water Quality Addendum. FF 20. The Claimants and the Seller entered into a water quality addendum which called for testing for bacterial, chemical, lead and radium issues. The types of

loans being utilized by the Claimants required the performance of certain water tests. T457. The Claimants could have specified additional testing parameters, but did not do so. FF 21. The Respondent also explained to the Claimants that they could have a Homeowners' Warranty but the Claimants declined such warranty as indicated on the "Buyer Home Warranty Disclosure" form. T375, Resp. Ex. 12.

The Residential Contract of Sale form, on page 10, states that the buyers were Robb and Leah Soucy and the seller was Murry Rodman. The Residential Contract form also disclosed the Listing Broker as Long and Foster; the Sales Associate as Cookie Stone and stated that they are acting as the Listing Broker and Seller Agent. It also states that the Selling Broker is Long and Foster; the Sales Associate is Cookie Stone and that they are acting as the "Seller Agent". REC Ex. 4, Resp. Ex. 12.³ The Understanding Whom Real Estate Agents Represents" form provides, in pertinent part:

“.....

Seller's Agent: A seller's agent works for the real estate company that lists and markets the property for the sellers and exclusively represents the sellers. That means that the Seller's agent may assist the buyer in purchasing the property, but his or her duty of loyalty is only to the sellers.

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If you are viewing a property listed by the company with whom the agent accompanying you is affiliated and you have not signed a "Consent for Dual Agency" form, that agent is representing the seller.

.....

Presumed Buyer's Agent (no written agreement): When a person goes to a real estate agent for assistance in finding a home to purchase, the agent is presumed to be representing the buyer and can show the buyer properties that are *NOT* listed by the agent's real estate company. A presumed buyer's agent may *not* make or prepare an offer or negotiate a sale for the buyer. The buyer does *not* have an obligation to pay anything to the presumed agent. If for any reason the buyer does not want the agent to represent him or her as a presumed agent, either *initially* or *at any time*, the buyer can decline or terminate a presumed agency relationship simply by saying so.

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³ "REC Ex." Refers to an exhibit entered into evidence at the hearing before the Administrative Law Judge by the Real Estate Commission. "Resp. Ex." Refers to an exhibit entered into evidence at the hearing before the Administrative Law Judge by the Respondent, Josephine Stone.

You have the responsibility to protect your own interests. You should carefully read all agreements to make sure they accurately reflect your understanding....” REC Ex. 4.⁴

The “Understanding Whom Real Estate Agents Represent” form indicated that Long and Foster and Cookie Stone are working as “seller/landlord’s agent”. That form was signed by the Claimants on July 19, 2012. A Notice to Buyer and Seller of Buyer’s Rights and Seller’s Obligations Under Maryland’s Single Family Residential Property Condition Disclosure Law form bears the signatures of the Claimants and the Seller. The Respondent signed on the line designated for the “Agent’s Signature” for both the Buyers and the Seller. The Respondent explained that she signed both lines as a witness to the Buyers’ and Seller’s signatures. T488. The Claimants signed the Contract and the attached addenda where required on July 19, 2012. The Seller ratified the Contract two days later on July 21, 2012. FF 22. Subsequent to the Contract being signed by the Claimants on July 19, 2012, the following two addenda were added to the Contract: a. “Addendum to Sales Contract”, dated July 29, 2012, concerning repairs pursuant to the Property Inspection Addendum; and b. “Addendum to Sales Contract”, dated August 27, 2012, concerning storage of the Claimants’ personal property in the Property and accepting the Property “as is” without requiring the Seller to complete the repairs which were subject to the prior addendum. FF 23.

At some time prior to July 27, 2012, the Respondent chose and retained Home Advantage Home Inspection Services, Inc., to perform a home inspection pursuant to the home inspection addendum attached to the Contract. FF 24. The Claimants did not choose the home inspector, although the Contract gave them the right to do so. FF 25. The Respondent scheduled the home inspection. FF 26. The Claimants paid the home inspector \$375.00 for his services. The total

⁴ This form had previously been given to the Claimants, who signed it on November 2, 2011, when the Respondent became the seller’s agent and intra company/dual agent for the Claimants in the sale of their Stonecastle Road property. Resp. Ex. 13.

bill for the home inspection was \$500.00, which included radon testing. FF 27. The home inspection report was invoiced to the Respondent, who was referenced on the billing page as “Customer’s Real Estate Professional”. The Respondent did not correct the document or advise the Claimants that the designation was incorrect. FF 28. The Respondent and the Claimants were present during the home inspection. FF 29. During the inspection, several deficiencies were noted and recorded on the home inspector’s report of July 27, 2012. Among the deficiencies were leaks in the plumbing, defects in the flue liner and brick joints, and defective duct work in the basement. FF 30. The Respondent received the inspection report directly from the home inspector and advised the Claimants, who subsequently met with her in her office to go over the inspection items and write an addendum to the Contract for the Seller to correct the cited deficiencies. FF 32.

The Respondent told the Claimants that they could ask for structural and mechanical but not cosmetic items to be repaired. T304. The Claimants and the Respondent discussed what items the Claimants wanted repaired and the Respondent scribed the list. FF 32. The addendum required that the repairs be made by licensed repair persons. REC 5, Attachment 7-1. The addendum did not require the Seller to provide receipts for those repairs. FF33. The Property Inspection Addendum provided, on page 4 in paragraph 6, that the seller would complete the repairs in sufficient time for the Buyer to re-inspect prior to settlement and gave the Buyers a right to inspect the property upon completion of the work. REC Ex. 4. The Respondent controlled access to the Property; the Claimants could not inspect the Property for repairs unless the Respondent opened the Property and accompanied them. FF 34. The Respondent offered but the Claimants declined a walk-through inspection of the property prior to settlement and no walk-through inspection was scheduled prior to settlement. FF35, T335-336,365,427. The

Claimants believed that the Respondent was going to make sure that the work was completed. At some time prior to settlement, the Claimants asked the Respondent if the repairs were done. FF 36. The Respondent advised the Buyers that the Seller said the repairs had been made. T369.

The purchaser of the Stonecastle Property had their own realtor who represented the purchaser's interests. The Respondent asked the Claimants to provide receipts for the repairs done under the contract for the Stonecastle Property sale to be handed over to the purchaser's agent. The Claimants repeatedly asked the Respondent for similar receipts from the Property's Seller. FF 37.

The Respondent assured the Claimants that the repairs were completed and that there were receipts, but that she did not have them. FF 38, T366, 369. The Respondent testified that she advised the Claimants that she had been informed by the Seller that the repairs had been completed and he had receipts for the repairs. T366,369. Some items listed on the inspection addendum were repaired, including the repair of rotted wood and the removal of a dead tree. Other items from the list were not: leaks in the plumbing, defects in the flue liner and brick joints, and defective duct work in the basement. FF 39.

The water was tested for bacterial issues, chemical issues, lead issues and radium issues. The water passed the bacteria, chemical and radium tests. The water failed the lead test. Remediation efforts were conducted and the water subsequently passed the lead test. The Respondent correctly informed the Claimants that the water passed all ordered tests. FF 40. The Property contains two water wells. Prior to settlement, the wells were tested for their yield (water output). The inspectors found that the combined yield of both wells was in compliance with Baltimore County standards. The Respondent correctly informed the Claimants that the well was in compliance with Baltimore County standards. FF 41.

One of the terms of the Contract was that settlement on the Property was scheduled on or before August 29, 2012. Settlement could be earlier by the mutual agreement of the parties. This contingency did not occur. FF 42. On August 27, 2012, two days before settlement on the Property was scheduled to take place, the Claimants wanted to move some items of their personal property (*i.e.*, boxes, etc.) out of the Stonecastle Property. They asked the Respondent if they could store the personal property in the Property. The Seller agreed. FF 43. The Respondent prepared an addendum on August 27, 2012. The addendum was handwritten by the Respondent and stated as follows: “ It is understood and agreed that Seller will allow buyers to store their furniture and personal belongings in the property prior to settlement. Buyer and Seller agree that Buyers are accepting the Property as is and will unconditionally proceed with the settlement on August 29, 2012. Buyers further release Seller from any and all liability while they are in the property.” FF 44.

The Claimants signed the August 27, 2012 addendum. The Respondent explained to the Claimants that the Seller was allowing them to enter the Property before settlement, but in exchange, they were releasing any claims for damages to the Property or to their personal property being stored there. She did not explain to the Claimants that they were waiving their rights to enforce the inspection addendum of July 27, 2012, as they were accepting the Property “as is” without requiring the Seller to make any of the required repairs or provide evidence that the repairs had been completed. FF 45. The Respondent did not advise the Claimants what rights they were waiving. She still continued to tell the Claimants that she was waiting on the receipts for the repairs that the Seller was supposed to have licensed contractors complete. FF 46.

Settlement for the sale of the Stonecastle Property was scheduled to occur on August 29, 2012, the same date as the settlement for the Property. The Stonecastle Property settlement was to occur earlier in the day so that the funds from that sale could be used for the Property settlement later in the day. FF 47. The Seller told the Respondent that he was bringing the receipts to the settlement. The Respondent told the Claimants that the receipts would be at settlement, but did not tell them the source of that information. The Claimants believed that the Respondent already had some of those receipts. FF 48.

The two property settlements were conducted as scheduled. The Claimants did not receive the receipts for repairs at settlement. F367,368,433. Respondent tried, unsuccessfully, to obtain receipts from the Seller after settlement when they were requested by the Buyers. T98,368. The Claimants never received the receipts and the Respondent never delivered the receipts to them. FF 49. The following items listed on the inspection addendum still needed to be repaired: plumbing leaks and the chimney flue liner and brick joints, at a cost of \$187.56 and \$4524.00 respectively. The Claimants repaired the supply duct themselves at a cost of \$220.00 for the materials. FF 50. Any continuing water issues are cosmetic and aesthetic in nature and do not affect the water's ability to receive passing inspection marks. FF 51.

The Respondent was charged by the Commission with violating Business Occupations and Professions Article, *Annotated Code of Maryland* ("Md. Bus. Occ. and Prof. Art.") Sections 17-322(b)(25), (32), and (33) and 17-530(c) as well as Code of Maryland Regulations ("COMAR") 09.11.02.01C and 09.11.02.02A. The relevant sections of the Md. Bus. Occ. and Prof. Art. provide as follows:

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

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

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

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(32) violates any other provision of this title;

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

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§17-530 Disclosure of representation, dual agency

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

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The relevant sections of COMAR provide as follows:

09.11.02.01 – Relations to the Public

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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.

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09.11.02.02 – 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 does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

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The Respondent's role changed several times throughout her dealings with the Claimants. Initially, she acted as a seller's agent on behalf of the Claimants. In that capacity she listed their property on Stonecastle Road for sale and assisted them through the settlement process. In order to explain her role as a seller's agent for the Stonecastle Road property, she provided the Claimants with an Understanding Whom Real Estate Agents Represent form which they executed on November 2, 2011. Resp. Ex. 13. That form explains the difference between a seller's agent, a cooperating agent, a presumed buyer's agent, a buyer's agent and a dual agent. The Respondent also acted as a presumed buyer's agent for the Claimants when she referred them to a loan officer for assistance in improving their credit rating prior to purchasing another home and when she showed them properties for which she was not the sellers' agent.

The Respondent's agency status in regard to the Claimants changed again from presumed buyer's agent to seller's agent for the owner of the Nicodemus Road property when she showed the Claimants the Property on Nicodemus Road. As noted on the Residential Contract of Sale and MRIS listing sheet, the Respondent disclosed to the Claimants that she was the seller's agent for the Property on Nicodemus Road. REC Ex. 4, REC Ex. 5, attachment 9-1.⁵ The Respondent also provided the Claimants with a copy of the Understanding Whom Real Estate Agents Represent at the time she assisted them in preparing the Residential Contract of Sale and related forms for the property on Nicodemus Road. The Respondent testified that she informed the Respondent that she was representing the Seller; informed them that they could get their own agent, which they declined to do; explained the Understanding Whom Real Estate Agents Represent form to the Claimants; handed it to them and invited them to read it. T 293, 296, 297, 299. On that form, the Claimants are incorrectly designated as seller, an error which none of the

⁵ The Residential Contract of Sale also had a place for an agent to designate that he/she was the buyer's agent. That box was not marked on the Residential Contract of Sale for the Nicodemus Road property.

parties appear to have noticed; however, the form does clearly indicate that the Respondent is acting as the seller's agent. Thus, in addition to the MRIS listing sheet, the Claimants were provided with at least two documents, the Residential Contract of Sale and the Understanding Whom Real Estate Agents Represent form which disclosed to them that the Respondent was acting as the Seller's agent, not their agent, for the Nicodemus Road property. The Commission finds that the Understanding Whom Real Estate Agents Represent form clearly advised the Claimants in bold faced, underlined type, that: "If you are viewing a property listed by the company with whom the agent accompanying you is affiliated and you have not signed a "Consent for Dual Agency" form, that agent is representing the seller." The form also clearly advises the reader that: "A seller's agent works for the real estate company that lists and markets the property for the sellers and exclusively represents the sellers." (Emphasis added.) The form further warns that: "You have the responsibility to protect your own interests. You should carefully read all agreements to make sure they accurately reflect your understanding..." Despite the clear language in the Understanding Whom Real Estate Agents Represent form and the information contained on the MRIS listing sheet and page 10 of the Residential Contract of Sale which disclosed that the Respondent was the Seller's agent, the Claimants contended that the Respondent also represented them and, in support of that allegation, cited several tasks which the Respondent performed. The Respondent, who testified that she warned the Claimants that she did not represent them and informed them that they could get their own agent, in addition to providing them with documents disclosing that she was the Seller's agent, did assist the Claimants in completing the Residential Contract of Sale and various forms and addenda related to the sale. The Respondent contended that the services she performed in connection with the sale of the Nicodemus Road property for the Claimants were merely "ministerial acts", as

defined in Section 17-528, Md. Bus. Occ. & Prof. Art., which could be performed for another person other than her client, the Seller, without representing them or acting as their agent.

Section 17-528 provides, in pertinent part:

“Ministerial act “ means an act that:

- (1) a licensee performs on behalf of a client before and after the execution of a contract of sale or lease;
- (2) assists another person to complete or fulfill a contract of sale or lease with the client of the licensee; and
- (3) Does not involve discretion or the exercise of the licensee’s own judgment.

The Respondent testified that she went over the Contract and Property Inspection

Addendum page by page and explained each of the paragraphs to the Claimants. T391, 392. She stated that she also invited them to read the Contract and ask any questions they might have. T297. According to the Respondent, the Claimants did not ask any questions concerning the Contract and she filled it out in their presence. T297, 299. The Claimants did not dispute this testimony nor did they allege that the Respondent exercised her discretion or judgment in filling out the Residential Contract of Sale form. In fact, a comparison of the Contract offer with the final Contract discloses that, rather than exercising her discretion and judgment in favor of her client in regard to deposits on the Contract at the time she was assisting the Claimants in completing the form, the amounts of the initial and additional deposits were not completed when the offer was made but were apparently filled in prior to the Contract being finalized. REC. Ex. 4 and Resp. Ex. 12.

The Baltimore County Notices and Disclosures Addendum was not subject to the Respondent’s exercise of discretion or judgment. The only blanks which required completion related to whether the property was served by a private water system and whether the property was located within a historic district or appeared on the Baltimore County preliminary landmarks list or final landmarks list. REC. Ex. 4. Likewise, the Notice to Buyer and Seller of Buyer’s

Rights and Seller's Obligations Under Maryland's Single Family Residential Property Condition Disclosure Law, the Maryland Property Disclosure and Disclaimer Statement and Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards forms required only the completion of the buyers' and seller's name, their signatures or initials and the address of the property. The Notice to Buyer and Seller of Buyer's Rights and Seller's Obligations form has a line for the "Agent's Signature" under both the Buyers' signature lines and the Sellers' signature lines. Resp. Ex. 12. The Respondent signed on the "Agent's Signature" line for both the Buyers and Seller and the Claimants alleged that her signature was evidence that she was acting as their buyers' agent. The Respondent explained that she signed in both places as a witness to the signatures above her signature since she was the only agent involved in the transaction. T488. The Commission notes that the signature line for "Agent" on that form does not describe the agent as either a buyer's or seller's agent. The Commission accepts the Respondent's testimony that she signed on the "Agent" lines as a witness to the buyers' and seller's signatures and concludes that Respondent's signature on the "Agent's Signature" line as a witness to the Buyers' signatures was a ministerial act which did not involve the exercise of discretion or judgment on the part of the Respondent.

The Property Inspection Addendum was completed to require that the structural and mechanical systems of the Property be inspected. The Respondent explained to the Buyers that they could request structural and mechanical system inspections but could not seek to have cosmetic repairs performed pursuant to this Addendum. The Buyers did not request inspections for mold, environmental hazards, radon, the chimney or any other additional inspections when the form was initially prepared. The Claimants subsequently requested a radon inspection which was performed and the Seller paid for radon remediation although he was not contractually

required to do so. T 304, 305, 329. Paragraph 6. of the Property Inspection Addendum provided a deadline for when repairs were required to be completed i.e. "...in sufficient time for buyer to inspect prior to settlement. Buyer shall have the right to inspect the Property upon completion of repairs or corrective action by Seller to confirm that Seller has performed, in a good and workmanlike manner, all of the repairs and corrective action, which Seller agreed to perform." REC Ex. 4. There were neither allegations nor evidence that the Respondent exercised her discretion or judgment in preparing the Property Inspection Addendum. Therefore, the Commission concludes that the completion of the Property Inspection Addendum was a ministerial act performed by the Respondent. The Claimants had the right to select the firm which would do the home inspection. However, when the Respondent recommended a home inspection firm from several she used, the Claimants acquiesced in that selection and did not request the names of alternate inspectors. T149. Further, although the invoice from the home inspection company listed the Respondent as the "Customer's Real Estate Professional", the Commission accepts the testimony of the Respondent's expert witness that the invoice form was merely a template filled out by the home inspection company listing a contact person and the Commission concludes that the Respondent's designation as the "Customer's Real Estate Professional" did not create a contractual or agency relationship between the Claimants and the Respondent. T585-587.

Likewise there were neither allegations nor evidence that the Respondent exercised her discretion or judgment in completing the Addendum: Contingency on Settlement of Purchaser's Present Home form, the Affiliated Business Arrangement Disclosure Statement, Notification of Agency within a Team or the General Addendum to Contract of Sale forms and the Commission concludes that the completion of those forms by the Respondent were ministerial acts.

The Respondent also filled out the VA Financing Addendum which included the term of the loan, the loan amount, the initial interest rate, fees, the seller's agreement to pay charges up to \$300.00 and to pay for repairs up to \$100.00. The On-Site Sewage Disposal System Inspection and Test Addendum which required that test results be provided at least 15 days prior to settlement and required the seller to make repairs costing up to \$1,000.00 was also filled out by the Respondent. A Water Quality Addendum, which was filled out by the Respondent, required that a water quality test be performed within 20 days and limited the seller's expense for any needed corrections to the water system to \$1,000.00. A Notice of Baltimore County Well Water Law for Improved Property and Well Water Test Addendum was filled out by the Respondent in the section providing a time frame within which the buyer was required to order yield, chemical and bacteriological tests. The Respondent testified that the types of water testing which are performed are determined by the lender. T456-457. The Commission concludes that the Respondent would have been aware of the maximum the seller would be willing to pay to make repairs to the sewage and water systems, as well as the maximum the seller would be willing to pay for charges made by the VA and for VA required repairs, and thus was able to complete those sections of the forms to reflect terms to which the seller would agree. Further, the Claimants did not allege that the other blanks completed by the Respondent on the VA Financing form or the water testing forms were not reflective of their wishes. The Commission concludes that the Respondent completed these forms by having them reflect the seller's position on the amount of charges and repairs he would pay as well as reflecting the amount of the loan and interest rate the buyers were willing to assume in order to assist the buyers in making a timely offer on the property and neither evidence nor testimony disclosed that she exercised her discretion or judgment in completing them.

The Claimants also signed a Buyer Home Warranty Disclosure and declined home warranty coverage after the Respondent explained a home warranty to them. Resp. Ex. 12., T 375.

As a result of the structural and mechanical inspections, the Claimants met with the Respondent to prepare an Addendum to the Contract to correct deficiencies cited in the inspection report. The Claimants decided what repairs they wanted the Seller to perform and the Respondent scribed the list. T96-98, 325-327. The Commission concludes that the scribing of the list of items which the Claimants wanted repaired did not involve the exercise of her discretion or judgment and was a “ministerial act”. The Addendum required the items listed thereon for correction to be repaired by a “licensed repair person”. As noted above, the Property Inspection Addendum provided that the repairs were to be completed “...in sufficient time for buyer to inspect prior to settlement....” and gave the Claimants the right to inspect the Property to confirm that the repairs had been performed in a good and workmanlike manner. The Respondent testified that she asked the seller for receipts on several occasions prior to settlement. She stated that she informed the Claimants that the seller had stated that the repairs had been completed and that he would bring the receipts for repairs to the settlement. T333-335. She further testified that the buyers did not object to that proposal and the Claimants acknowledged that they did not ask for receipts prior to settlement. T 179, 333-335.

Several days prior to settlement, the buyers sought the permission of the seller to store items at the Property. The Respondent testified that she gave them the opportunity, in accordance with the provisions of the Residential Contract of Sale and Property Inspection Addendum, to do a walk-through of the Property so that they could determine that the required repairs had been performed. T415, 416. She explained that “...if the buyer wanted to make

certain the repairs were done, that's why they have the walk-through." T 444. The Claimants did not request a walk-through, explaining that they thought doing a walk-through was the Respondent's job, and none was scheduled. T 154, 415, 416. The Respondent prepared an Addendum which granted the Claimants early access to the Property in exchange for which the Claimants agreed to take the Property in "as is" condition and to proceed to settlement. The Commission concludes that the language of this Addendum was clear and put the Claimants on notice that any repairs which had not been completed would not be required to be made after execution of the Addendum since they were purchasing the Property in its "as is" condition. The Commission further concludes that the Respondent prepared the Addendum in a manner which protected the interests of her client, the seller.⁶

The Commission notes that the Claimants were provided with verbal and written notice that the Respondent was acting as the Seller's agent. The Understanding Whom Real Estate Agents Represent form specifically notified them that a seller's agent exclusively represents the seller and that although the seller's agent may assist the buyer in purchasing the property, her duty of loyalty is only to the sellers. They were also advised in that form that they had a responsibility to protect their own interests and should carefully read all agreements to make sure they accurately reflect their understanding. Despite these warnings, the Claimants elected not to be represented by a buyers' agent. They declined when offered the opportunity to purchase a home warranty which would have insured them against some of the repairs which needed to be performed on the Property after settlement. The Residential Contract of Sale, in paragraph 21,

⁶ The Commission does not consider the fact that the Respondent drove the Claimants to the Stonecastle property settlement as well as the settlement on the Property to be indicative of the Respondent representing the Claimants as a buyers' agent. Her presence at the Stonecastle property settlement was consistent with her role in that transaction as a seller's agent and her presence at the settlement on the Property was consistent with her role in that transaction as a seller's agent. The Commission concludes that providing transportation to both settlements for the Claimants did not create an agency relationship between the Claimants and the Respondent.

and the Property Inspections Addendum, in paragraph 6, which they signed, provided them with an opportunity to inspect the Property prior to settlement to assure themselves that agreed upon repairs had been completed. The Claimants failed to avail themselves of that opportunity. The Claimants executed an Addendum which, by its clear language, disclosed that they were agreeing to accept the Property in “as is” condition and would proceed with settlement. Finally, the Claimants proceeded with settlement without assuring themselves that there were receipts from licensed repairmen for agreed upon repairs to the Property. In short, the Claimants, despite written warning to protect their own interests and to carefully read documents which they were signing, failed to act in their own best interests.

The Commission finds that the Respondent did not act as a dual agent. Rather, she acted as a seller’s agent who performed permissible “ministerial acts” on behalf of the Claimants. She notified the Claimants of her change in status from a presumed buyer’s agent to a seller’s agent when she showed them the Nicodemus Road property as evidenced by the Residential Contract of Sale and the Understanding Whom Real Estate Agents Represent form. Therefore, the Commission concludes that the Respondent did not violate Section 17-530, Md. Bus. Occ. and Prof. Art.

The Commission also concludes that the Respondent did not violate Sections 17-322 (b)(25), (32) and (33), Md. Bus. Occ. & Prof. Art. and COMAR 09.11.02.01 and 09.11.02.02 in that she did not engage in conduct that demonstrated bad faith, incompetency, or untrustworthiness of that constituted dishonest, fraudulent or improper dealings. The Commission finds that the Respondent’s actions in her dealings with the Claimants did not involve fraud, misrepresentation, or unethical practices or practices which could be damaging to the public or to the dignity and integrity of the real estate profession nor did the Respondent

violate her statutory obligations towards the buyers. Therefore, the Commission concludes that the Respondent did not violate the provisions of COMAR 09.11.02.01 and 09.11.02.02.

The Commission does find that this case reflects the misunderstanding of the role of a seller's agent's in a transaction which can arise when a seller's agent engages in ministerial acts for a buyer who is not represented by a buyer's agent. Although the Commission has concluded that the Respondent did not violate any statutory requirements or regulations in this case, the Commission nonetheless encourages real estate professionals who are acting as a seller's agent to fully discuss their role as a seller's agent with any potential buyers and to encourage such buyers to retain an agent to protect their interests in a transaction in order to reduce the possibility of any misunderstanding on the part of a buyer about the role and responsibility of a seller's agent.

Claims for reimbursement from the Guaranty Fund are governed by Section 17-404, Md. Bus. Occ. and Prof. Art., which states, in pertinent part, as follows:

§17-404

(a) (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 09.11.03.04 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.

Under Section 17-407(e) of Md. Bus. Occ. and Prof. Art., the Claimants bear the burden of proving their entitlement to recover from the Fund.

It is undisputed that, at all relevant times, the Respondent was a licensed real estate salesperson. Further, the instant transaction related to Maryland real estate. Thus, the requirements of Sections 17-404(a)(2)(i) and (ii), Md. Bus. Occ. and Prof. Art. have been met. In order to prove entitlement to recovery from the Fund, the Claimants are further required to prove that they incurred an actual loss based on the Respondent's acts or omissions, in which the Respondent obtained money or property by theft, embezzlement, false pretenses, or forgery, or by conduct that constituted fraud or misrepresentation. The Claimants seek damages totaling \$24,768.00 based on the following:

(1) \$189.00 for issues with leaks and plumbing;

(2) \$3,715.00 for issues with the water quality;

(3) \$6,000.00 for repairs to the well;

(4) \$120.00 for treatment of bacteria in the well;

(5) \$4,524.00 for the chimney inspection and to repair the flue liner and brick joints

(6) \$220.00 to repair the supply duct; and

(7) \$10,000.00 for loss of quality of life, fuel costs, bottle water expenses and possible health issues.

The Commission concludes that the Respondent did not obtain money or property in this case by theft, embezzlement, false pretenses or forgery nor by conduct that constituted fraud.

Maryland recognizes two types of misrepresentation: fraudulent and negligent.

Fraudulent misrepresentation requires proof of scienter, an intent to deceive the other party. *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 333 (1982), quoting *Cahill v. Applegarth*, 98 Md. 493 (1904). The Commission concludes that the Claimants failed to prove that the Respondent intended to deceive them when she relayed to them the seller's assertions regarding repairs to the Property. Maryland also recognizes negligent misrepresentation. Negligent misrepresentation exists when all five of the following are present:

- (1) The defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
- (2) The defendant intends that his statement will be acted upon by the plaintiff;
- (3) The defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
- (4) The plaintiff, justifiably, takes action in reliance on the statement; and
- (5) The plaintiff suffers damage proximately caused by the defendant's negligence.

Martens Chevrolet, 292 Md. at 337. See also *Lloyd v. General Motors Corporation*, 397 Md. 108, 135 (2007).

The Commission finds that the Respondent in this case had the duty to treat all parties to the transaction honestly and fairly and to answer all questions truthfully. Section 17-532(c)(4), Md. Bus. Occ. and Prof. Art. The Commission further finds that the Respondent in this case, had no reason to doubt the credibility of the seller in regard to the completion of agreed upon repairs. As the seller's agent she merely truthfully reported to the Claimants the seller's assertion to her that the repairs had been completed and that he would bring receipts for the repairs to the

settlement. The Commission further concludes that since she had no reason to doubt the credibility of the seller, she was not negligent in repeating to the Claimants the seller's assertions that the repairs had been completed and that he would bring proof to the settlement.

The Claimants contended that they relied upon the information they received from the Respondent regarding the status of the repairs to their detriment. This raises the question of whether the Claimants' reliance on the information received from the Respondent was justified. It is clear that the Claimants were warned by the Understanding Whom Real Estate Agents Represent form that they were not being represented by the Respondent and that they should take any necessary steps to protect their own interests and they should "carefully read all agreements to make sure they accurately reflect your understanding". The Commission finds that the Claimants failed in their responsibility to take the steps necessary to assure that the repairs had been completed prior to signing the Addendum of August 29, 2012. The Commission finds that the Claimants were provided with several options by which they could have verified that the seller's assertion that the repairs had been completed was or was not true: They could have demanded copies of receipts for the asserted repairs prior to signing the Addendum of August 29, 2012 in which they agreed to accept the Property in "as is" condition. The Commission further finds that they were informed by language in the Residential Contract of Sale and the Property Inspections Addendum, as well as verbally by the Respondent, that they, not the seller's agent, had the right to inspect the Property prior to settlement. They were warned by paragraph 25. of the Residential Contract of Sale that: "Brokers, their agents, subagents and employees do not assume any responsibility for the condition of the Property or for the performance of this Contract by any or all parties hereto...." They could have availed themselves of the opportunity to do a "walk-through" of the Property to make certain the repairs had been completed prior to

signing the Addendum of August 29, 2012. Respondents did not avail themselves of either option. The Commission does not find credible their assertion that they believed the Respondent would do a “walk-through” on their behalf especially since they had the experience of having purchased the Stonecastle property and were in the process of selling that property and should have been aware of the importance of a “walk-through” by the buyer prior to settlement.

In light of the warning provided to the Claimants to protect their own interests and the options available to them to verify that the repairs had been performed as alleged by the seller, the Commission concludes that the Claimants were not justified in relying solely on the information concerning repairs which was relayed to them by the Respondent from the seller. Therefore, the Commission concludes that the Claimants did not meet all of the criteria for an action based upon the theory of negligent misrepresentation.

Having found that the losses claimed by the Claimants were also not based upon theft, embezzlement, false pretense or forgery by the Respondent or by conduct by the Respondent that constituted fraud or misrepresentation, the Commission concludes that the Claimants did not meet their burden of proof to warrant an award from the Guaranty Fund.

CONCLUSIONS OF LAW

Based upon the ALJ’s Findings of Fact, as modified herein, and the foregoing Discussion, the Commission concludes, as a matter of law:

1. That the Respondent, Josephine Stone did not violate Sections 17-322(b)(25) and (33) and Section 17-530(c), Md. Bus. Occ. & Prof. Art. nor COMAR 09.11.02.01C and 09.11.02.02A.
2. That the Claimants did not prove that they sustained an actual loss, relating to Maryland real estate, based on an act or omission of the Respondent, a real estate salesperson, in

which money or property was obtained from the Claimants by theft, embezzlement, false pretenses, or forgery or that constituted fraud or misrepresentation. The Claimants, therefore, are not entitled to an award from the Maryland Real Estate Guaranty Fund.

ORDER

The Exceptions of the Respondent, Josephine Stone, having been considered, it is this 4th day of November, 2015, by the Maryland Real Estate Commission

ORDERED:

1. That the Proposed Order of the Maryland Real Estate Commission of May 29, 2015 is hereby reversed in accordance with COMAR 09.01.03.10B.
2. That the Respondent, Josephine Stone, did not violate Sections 17-322(b)(25) and (33) and Section 530(c), Md. Bus. Occ. & Prof. Art. nor COMAR 09.11.02.01C and 09.11.02.02A.
3. That the claim of the Claimants, Robb and Leah Soucy, against the Maryland Real Estate Guaranty Fund be dismissed.

MARYLAND REAL ESTATE COMMISSION

SIGNATURE ON FILE

By: _____

Note: A judicial review of this Final Order may be sought in the Circuit Court of Maryland 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.