

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**MARYLAND REAL ESTATE
COMMISSION**

*

* **CASE NO. 2020-RE-381**

v.

*

* **OAH NO. DOL-REC-21-22-00530**

**JUMEL (MAY) ZHANG,
Respondent**

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PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated May 27, 2022, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16 day of June, 2022, hereby **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**;

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

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file written exceptions to this Proposed Order. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202. If no written exceptions are filed within the twenty (20) day period, then

THE UNIVERSITY OF CHICAGO

IN THE DEPARTMENT OF THE HISTORY OF ARTS
AND ARCHITECTURE
AND IN THE DEPARTMENT OF EAST ASIAN STUDIES
AND IN THE DEPARTMENT OF CLASSICAL AND
MEDITERRANEAN STUDIES

SIGNATURE ON FILE

MARYLAND REAL ESTATE

*** BEFORE MARC NACHMAN**

COMMISSION

*** AN ADMINISTRATIVE LAW JUDGE**

v.

*** OF THE MARYLAND OFFICE OF**

JUMEL (MAY) ZHANG,

*** ADMINISTRATIVE HEARINGS**

RESPONDENT

*** OAH No.: LABOR-REC-21-22-00530**

*** MREC No.: 2020-RE-381**

*** * * * ***

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On December 1, 2021, the Maryland Real Estate Commission (REC or Commission) issued a Statement of Charges and Order for Hearing against Jumel (May) Zhang (Respondent), a licensed real estate broker, for violating Maryland Annotated Code, Business Occupations and Professions Article (Bus. Occ. & Prof.), section 17-322(b) (25), (31) and (32), which incorporated a violation of Bus. & Prof. §17-505.¹

On March 2, 2022, I convened a remote hearing using the Webex platform. Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). John D. Hart, Assistant Attorney General, represented the REC. The Respondent represented herself. At the Respondent's

¹ Unless otherwise specified, any reference to the Bus. Occ. & Prof. article is to the 2018 volume.

request, she was assisted by a Mandarin Chinese interpreter provided by the Office of Administrative Hearings (OAH).²

Procedure is governed by the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); the REC Hearing Regulations, COMAR 09.11.03; and the OAH Rules of Procedure, COMAR 28.02.01.

ISSUES

1. Did the Respondent violate the Maryland Real Estate Brokers Act or its implementing regulations,
 - by engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings, in violation of section 17-322(b)(25);
 - by violates any provisions in this title that relates to the distribution of trust money held as a deposit on a contract,³ in violation of sections 17-322(b)(31) and 17-505(b);
 - by violating any other provisions of Title 17 in violation of section 17-322(b)(32)?
2. If so, what sanction, if any, should be imposed?

SUMMARY OF THE EVIDENCE

Exhibits

The REC submitted the following exhibits which were admitted into evidence:

- REC Ex. 1 Ruling on Motion converting hearing to remote, dated February 25, 2022
- REC Ex. 2 Notice of Hearing, dated January 26, 2022

² During the hearing, the Respondent was able to effectively communicate in English; the interpreter assisted her when she requested him to do so.

³ Throughout this decision, those funds are referred to "EMD," or earnest money deposits.

REC Ex. 3 Statement of Charges and Order for Hearing, Complaint No. 2020-RE-381, dated December 1, 2021

REC Ex. 4 Report of Investigation, undated, with the following attachments:

1. Complaint (pp. 1-6), received January 1, 2020, with the following attachments:
 - a. Email regarding Buyers' withdrawal from the contract, dated November 3, 2019 (p. 7)
 - b. Emails between the agents, dated between November 4, 2019 and January 5, 2020 (pp. 8-9)
 - c. Emails between the agents, dated between January 3 and 5, 2020 (pp. 10-16)
 - d. Buyer's form – Release of Deposit Agreement, electronically signed by the Buyers November 4, 2019 (p. 17)
 - e. Sellers' form – Release of Deposit Agreement, signed by the Sellers, dated December 11, 2019 (p. 18)
 - f. Email from Sellers' Broker to Respondent, dated December 20, 2019 (p. 19)
 - g. Executed Contract (Contract), dated October 27, 2019 (pp. 20-59)
 - h. Mutual Release of Obligation Under Contract of Sale, signed by the parties, November 3, 2019 (p. 60)
 - i. Emails between Respondent and Sellers' Broker, dated between December 5 and 9, 2019 (pp. 61-62)
 - j. Emails between Respondent and Sellers' Broker, dated between November 8 and December 12, 2019 (pp. 63-66)
 - k. Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards, dated December 3, 2019 (pp. 67)
2. Correspondence from Respondent to REC (pp. 68-72), dated March 9, 2020, with the following appended documents:
 - A. [not submitted]⁴
 - B. Sellers' Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards, December 3, 2019 (pp. 73-74)
 - C. Mutual Release of Obligation Under Contract of Sale, dated November 3, 2019 (pp. 75-76)
 - D. Emails between the agents, dated between October 29 and November 3, 2019 (pp. 77-79)
 - E. [not submitted]
 - F. Emails between the agents, November 3, 2019 (pp. 80-82)
 - G. [not submitted]
 - H. [not submitted]
 - I. [not submitted]
 - J. [not submitted]
 - K. Email between Respondent and Sellers' agent, dated between January 3 and 5, 2020 (pp. 83-87)

⁴ The Appendix started at "B." I assume that the Respondent considered her accompanying letter as "A" as no other documents were marked as such.

3. Emails between Complainants and REC, April 30, 2020 (pp. 88-90)
4. Correspondence from Respondent to REC (pp. 91-92), May 28, 2020, with attachments:
 - Memo from Respondent to brokerage agents: Company Policy Change Regards EMD Holding, dated May 26, 2020 (p. 93)
 - Confidential Inspection Report, dated November 1, 2019 (pp. 94-117)
 - Emails between the agents, dated between October 29 and November 3, 2019 (p. 118)

REC Ex. 5 REC registration record and licensing history for Respondent, dated March 1, 2022

The Respondent submitted the following exhibits which were admitted into evidence:⁵

- Resp. Ex. 1 Maryland Homeowners Association Act Disclosures to Buyer and Transmittal of Documents, (two forms – one for “initial sale of lot” and one for “resale of a lot”, dated October 19 and 28, 2019, respectively; and Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards, undated.
- Resp. Ex. 2 Excerpt from Contract (page 3 of 11)
- Resp. Ex. 3 Email between agents, October 29 through November 3, 2019
- Resp. Ex. 4 Emails between Respondent and broker, January 3 to 5, 2020
- Resp. Ex. 5 Release of Deposit Agreement, signed by Buyers, November 4, 2019
- Resp. Ex. 5A Release of Deposit Agreement, signed by Sellers, December 11, 2019
- Resp. Ex. 6 Mutual Release of Obligation Under Contract of Sale, signed by the parties, November 3, 2019
- Resp. Ex. 7 Subsequent sale of Property, closed January 30, 2020
- Resp. Ex. 8 Memo from Respondent to agents: Company Policy Change Regards EMD Holding, dated May 26, 2020

⁵ The Respondent’s exhibits were the same as the REC’s exhibits, save for Resp. Exs. 1 and 7. In this decision, the references are to the REC exhibits.

Testimony

The REC presented the testimony of the following witnesses:

1. Lucinda Rezek, Investigator, REC; and
2. Caleb Fryer.⁶

The Respondent testified on her own behalf.

FINDINGS OF FACT

After considering the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent was a licensed real estate broker affiliated with Signature Home Realty.
2. At all times relevant, Zachary Liu (Buyers' agent) was a licensed real estate salesperson affiliated with Signature Home Realty. The Respondent was his broker.
3. At all times relevant, Steve Wolff (Sellers' agent) was a licensed real estate salesperson affiliated with Berkshire Hathaway Home Services PenFed Realty. Debbie Dwyer (Sellers' Broker) was his broker.
4. The Buyers' agent represented Yua Lun Tang and Bo Lin (Buyers).
5. The Sellers' agent represented Caleb and Patricia Fryer (Sellers).
6. On October 29, 2019, the Buyers and Sellers entered into a contract (Contract) for the sale of the Sellers' property at 6711 Hawkeye Run (Property), located in Columbia, Maryland. It was ratified on that date.
7. The Contract called for the Buyers to pay an EMD of \$4,000.00 which was held by the Respondent in her brokerage escrow account.

⁶ The witness' wife, Patricia Fryer, was present but did not testify.

8. The Contract contained several addenda, among which was an inspection addendum.

9. The inspection addendum gave the Buyers five days after the Contract ratification to have an inspection performed and submit a list of requested repairs for the Sellers to complete.

10. The addendum also required the Buyers to submit the entire inspection report to the Sellers if there were unsatisfactory conditions found in the Property, and submit to the Sellers a written statement indicating what conditions were unsatisfactory and what corrective action would be required for the Sellers to perform.

11. If the Sellers declined to take the corrective actions requested, the Buyers could terminate the Contract and have their EMD returned to them.

12. However, if the Buyers failed to submit the entire inspection report and written statement of unsatisfactory conditions to the Sellers, the Buyers would not have the right to terminate the Contract.

13. According to the terms of the Contract, if the Buyers were in breach of the Contract, they would waive their right to terminate the Contract without penalty, and forfeit their EMD.

14. The Property inspection was completed on November 1, 2019.

15. On the evening of November 3, 2019, the Buyers' agent wrote to the Sellers' agent advising him that the Buyers were withdrawing from the Contract due to the results of the inspection.

16. On that same evening, the Sellers' agent requested a copy of the inspection report, which the Buyers' agent did not provide.

17. The Buyers' agent also sought to terminate the Contract because the lead paint and homeowner's association disclosure were not provided to him.

18. On the evening of November 3, 2019, the Sellers' agent provided the Buyers' agent the requested disclosures, which the Buyers refused to sign acknowledging their receipt.

19. On November 3, 2019, the Buyers and Sellers signed a Mutual Release of Obligation, terminating the Contract. The parties did not, however, sign a Release of Deposit Agreement required to distribute the EMD held by the Respondent.

20. The agents exchanged Release of Deposit Agreements written in favor of their respective clients, but neither party signed the document provided by the other's agent.

21. On December 12, 2019, the Sellers' broker emailed the Buyers' agent, inquiring about the disposition of the EMD held by the Respondent. In that email, the Sellers' agent reiterated his position why the EMD should be paid to the Sellers.

22. The email requested that the Respondent contact the Sellers' broker to address the EMD distribution.

23. On January 3, 2020, the Respondent emailed the Sellers' agent, advising him that the EMD had indeed been returned to the Buyers.

24. That Sellers' broker responded to the Respondent's email, challenging the Respondent's actions returning the EMD to the Buyers.

25. On January 5, 2020, the Respondent answered the Sellers' broker, explaining that the Contract was never legally ratified due to the lack of the required disclosures.

26. The Respondent failed to notify the Sellers or their representatives of her proposed distribution of the EMD, which is required by under Bus. Occ. & Prof. § 17-505.

27. The law required that the person holding the EMD follow a detailed procedure before distributing an EMD if there is a dispute.

28. The Respondent followed none of those requirements prior to distributing the EMD to the Buyers.

DISCUSSION

Applicable law - charges

The REC may deny a real estate license or reprimand, suspend or revoke a real estate license. Section 17-322 of the Business and Occupational Professions Article of the Maryland Code sets out the grounds for such action; those cited by the REC in this case are as follows:

(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;

...

(31) violates any provision of Subtitle 5 of this title that relates to trust money;

(32) violates any other provision of this title. . . .

Bus. Occ. & Prof. § 17-322(b) (2018). The provisions of Subtitle 5 of the Bus. Occ. & Prof. article related to trust money is as follows:

Prior to distributing the trust money under subsection (a)(4) of this section,⁷ the real estate broker shall notify both the owner and the beneficial owner that the real estate broker intends to distribute the trust money to the person who, in the good faith opinion of the real estate broker, is entitled to receive the trust money in accordance with the terms of the real estate contract which established the trust.

Md. Code Ann., Bus. Occ. & Prof. § 17-505 (b)(1).

⁷ (a) A real estate broker shall maintain trust money in an account authorized under this Part I of this subtitle until:

...

(4) the owner or beneficial owner of the trust money fails to complete the real estate transaction for which the trust money was entrusted and the real estate broker, in the real estate broker's sole discretion, decides to distribute the trust money in accordance with subsection (b) of this section.

Bus. Occ. & Prof. § 17-505(a)(4).

Section 17-322(c) of the Business Occupations and Professions Article authorizes the REC to “impose a penalty not exceeding \$5,000 for each violation,” instead of, or in addition to, other sanctions. Bus. Occ. & Prof. § 17-322(c)(1) (2018).

The REC bears the burden to prove, by a preponderance of the evidence, that the Respondent committed the alleged violations. Md. Code Ann., State Gov’t § 10-217 (2021); COMAR 28.02.01.21K(1), (2)(a). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

Positions of the Parties:

The REC contends that the Buyers’ EMD was placed in the Respondent’s Escrow account in accordance with the Contract. When the Buyers withdrew from the Contract, both parties to the contract signed a Mutual Release of Obligation. However, the Sellers refused to sign the Mutual Release of Deposit, claiming that the EMD should be released to them. However, the EMD was released by the Respondent’s brokerage to the Buyers despite there being no Mutual Release of Deposit signed by the parties to the contract and without the required notice provided to the Sellers.

The Respondent’s position is that the Contract could have been terminated without the need for mutual assent and the EMD could therefore be released to the Buyers. The Respondent contends the Contract was terminable because two disclosures were not timely provided to the Buyers by the Sellers, and alternatively, the Buyers decided to withdraw from the Contract as a result of the home inspection. Accordingly, the Respondent contends she was correct in releasing the EMD to the Buyers over the Sellers’ objection.

For the following reasons, I find that the REC has met its burden of proof as to the charges.

Factual background

The REC presented testimony of Lucinda Rezek, paralegal and investigator for the REC. Ms. Rezek presenting the results of her investigation which the REC contends supports its charges. REC Ex. 4.

The investigation was initiated when the Sellers filed a complaint with the REC alleging that the EMD was not properly handled and should not have been returned to the Buyers but distributed to the Sellers, or at the least, the decision to release the EMD to the Buyers should not have been unilaterally made by the Respondent.

The essential facts are as follows: The Contract was signed by the Sellers and Buyers on October 29, 2019. REC Ex. 4 (1)(g). The Sellers were represented by Steve Wolff of Berkshire Hathaway Home Services, Penfed Realty; Debbie Dwyer was his broker. The Buyers were represented by Zachary Liu of Signature Home Realty; the Respondent was his broker.

Among the Contract addenda, the parties agreed to a home inspection, giving the Buyers five days to have an inspection performed and submit a list of requested repairs for the Sellers to complete. *Id.* The inspection was completed on November 1, 2019. REC Ex. 4 (4) (p. 97-117). The following chain of events ensued, evidenced by the emails between the parties' representatives:

Date	Time	From	To	Contents of Communication	REC Ex. 4 (1)(a)
Nov. 3, 2019	5:36 p.m.	Buyers' agent	Sellers' agent	Buyers' agent sought to withdraw from the Contract "due to the results of the inspection."	p. 9
Nov. 3, 2019	6:39 p.m.	Sellers' agent	Buyers' agent	"Please send me the inspection notice as stated in our contract by the deadline set."	p. 9
Nov. 3, 2019	8:30 p.m.	Sellers' agent	Buyers' agent	"As I said before. Please send me over a release to send over to my client."	p. 8 - 9
Nov. 3, 2019	10:17 p.m.	Buyers' agent	Sellers' agent	"I have sent you two release forms through zipform."	p. 8
Nov. 3, 2019	10:45 p.m.	Sellers' agent	Buyers' agent	"Here is a copy of the lead paint (sic) for your records and the termination. We'll be in touch regarding the earnest money. My clients don't agree to that portion."	p. 8
Nov. 4, 2019	3:32 p.m.	Buyers' agent	Sellers' agent	"I have contacted my broker and confirmed that the ratified contract lacks important documents. I saw this property back on market already and I wish you a quick sale. Please ask seller to sign the earnest money release form. It is time to move forward for both parties"	p. 8
Nov. 4, 2019	4:25 p.m.	Sellers' agent	Buyers' agent	"My clients still don't agree to sign the earnest money release until it is directed towards them. Please ask your clients again to sign the form directing the earnest money deposit towards the seller. Feel free to have your broker reach out to my broker manager."	p. 8
Nov. 4, 2019	7:57 p.m.	Buyers' agent	Sellers' agent	"I have consulted my team lead and forwarded the contract to him to review. He pointed out that there is no lead-paint and HOA resale documents which are required to this contract"	p. 9
Nov. 4, 2019	8:36 PM	Buyers' agent	Sellers' agent	"My broker stated that Seller is obviously in breach of-contract and has no right to confiscate the deposit. Now we request the release"	p. 8

The gravamen of these communications is that on November 3, 2019, the Buyers sought to withdraw from the Contract because of some unspecified defect in the inspection report and the failure to timely provide two disclosures. The Buyers' withdrawal from the Contract due to the inspection report is untenable because they failed to provide the required information to the Sellers in order to terminate the contract.

The Sellers requested the inspection notice within the time required in the Inspection Addendum:

2. ITEMS TO BE INSPECTED:

A. Structural and Mechanical: Buyer, at Buyer's expense, has the right to have the Property inspected by a qualified professional engineer, licensed home inspector, or other expert selected by Buyer. Such inspection shall be completed and ***in the event unsatisfactory conditions are found, a copy of the entire inspection report shall be submitted to Seller together with a written statement indicating what conditions in the report are considered unsatisfactory and what corrective action is required, within Five (5) days from the Date of Contract Acceptance.***

REC Ex. 4 (1) (g) p. 36 (emphasis added). The right to terminate the Contract upon an inspection report unsatisfactory to the Buyers requires compliance with this provision, i.e., that the Buyers share the report with the Sellers:

4. INSPECTION REPORT PROCESS: The following terms shall apply to EACH initialed inspection contingency in Paragraph 2 above:

A. Waiver of Buyer's Right to Terminate Contract

If, within the time period specified, Buyer fails to have inspection performed, or if Buyer pursuant to paragraph 4.C. below⁸ ***fails to submit entire Inspection report to Seller*** along with a ***separate written statement*** indicating what conditions in the

⁸ Paragraph 4C allows the Sellers to make the required repairs, but is predicated on the Sellers' receipt of the full inspection report:

Within five (5) days from receipt of notice from Buyer of an unsatisfactory inspection report, Seller shall notify Buyer in writing whether Seller, at Seller's expense, will repair or correct all, some or none of the conditions noted by Buyer, or offer a credit. If Seller elects to repair or correct all of the stated unsatisfactory conditions. the Contract shall remain in full force and effect; and Seller shall repair or correct, in a good and workmanlike manner and prior to settlement all of the unsatisfactory conditions noted by Buyer.

REC Ex. 4 (1)(g), p. 37.

report are considered unsatisfactory and what corrective action and/or credit is requested, Buyer shall be deemed to have accepted as satisfactory said inspection report; and ***Buyer shall have no right thereafter to terminate the Contract or request corrective action pursuant to the provisions of this Addendum.*** If Buyer elects not to request corrective action from Seller as a result of an inspection, Buyer shall not be required to submit a copy of the Inspection report to Seller.

REC Ex. 4(1)(g), p. 35 (emphasis added). Accordingly, by failing to submit the inspection report to the Sellers, as required under the Contract, the Buyers waived their right to terminate the Contract without penalty.

A day later, the Buyers' agent cited the lack of required disclosures (including the Lead Paint Disclosure), which were immediately sent to him for the Buyers to sign. The Buyers' agent stated that the Buyers declined to sign the disclosure, despite not having signed or asked for the "Lead-Based Paint Hazard Inspection" under paragraph 2 F of the Inspection Addendum.

REC Ex. 4 (1)(g) p. 36.

The immediate result of the impasse was that the parties signed a Mutual Release of Obligation, terminating the Contract and allowing the house to go back on the market.

Buyer and Seller agree that the Contract of Sale Identified above is null and void and of no further legal force and effect....

REC Ex. 4 (1)(h) p. 60. The release of the deposit, however, is a separate consideration:

Buyer and Seller may mutually agree to terminate the Contract without executing a Release of Deposit Agreement.

Note: Buyer and Seller may use the Release of Deposit Agreement to facilitate disbursement of the Deposit.

Id. Documents seeking to release the EMD to the respective parties were prepared and emailed by the respective agents, but neither party signed the other's form directing the EMD distribution towards the drafting agent's party. REC Ex. 4 (1) (d) p. 17 (in favor of the Buyer) and (e) p. 18 (in favor of the Seller).

The Sellers' agent and his Broker communicated with each other about the Buyers' failure to sign the EMD over to Seller. REC Ex. 4 (1)(j). No communications between the Sellers' Broker and the Respondent appear in the record until January 3, 2020:

Date	Time	From	To	Contents of Communication	REC Ex. 4 (1)(c)
Dec. 12, 2019	3:31 p.m.	Sellers' Broker	Buyers' agent	"To date I have not heard from your broker/manager. The sellers are not willing to release the EMD. The buyers had no contractual reason for walking away after the home inspection. Per the contract of sale they agreed to submit a report to the sellers and request repairs be made. This was not done." The Sellers' broker also copied the Sellers' agent on her email.	p.11
Jan. 3, 2020	9:45 a.m.	Sellers' agent	Resp.	After reviewing the history of the transaction, he wrote, "The buyers elected to walk away from the contract in violation of the terms set forth in the contract. My clients have been requesting that the earnest money deposit be returned to them in full as a result." Complaining that neither the agent nor the Respondent had contacted his broker, he continued: "Can you please confirm that your brokerage is still in possession of the earnest money deposit? Would you please discuss the matter with the agent in your office and give me an update? It has been quite some time."	p.11
Jan. 3 2020	4:13 p.m.	Resp.	Sellers' agent	"Per the Executed Mutual Release of Obligation under Contract of Sale (see attachment, dated on Nov. 04, 2019), the EMD fund has been refunded to buyer and the case was closed. Let me know if you have any questions, thank you!"	p. 10
Jan. 3 2020	4:18 pm.	Sellers' Broker	Resp.	"Please read the addendum that you attached. The funds cannot be	p. 10

				distributed to the buyers unless a Release of Deposit has been signed by all parties. The funds returned to the buyers is not in accordance with the Maryland Real Estate Commission guidelines. When did you release the funds without the consent of the sellers. Please provide the paperwork”	
Jan. 3 2020	11:22 p.m.	Resp.	Sellers’ Broker	Advising that the Respondent is out of the country, with a promise to reply “later.”	p. 10
Jan. 4, 2020	11:36 a.m.	Sellers’ broker	Resp.	Advising that the Respondent is out of the country, with a promise to reply later.	p. 13
Jan. 4, 2020	12:22 p.m.	Sellers’ Broker	Resp.	An inquiry to who can discuss the EMD while the Respondent was out of town.	p. 10
Jan. 5, 2020	7:50 p.m.	Resp.	Sellers’ Broker	The Respondent explained that she released the EMD to the Buyers due to the lack of the lead paint disclosure, as the property was building 1972; she acknowledged that the disclosure was provided after it was requested. However, the Buyers refused to sign for receipt of the disclosure due to a concern about lead paint in the house. She further explained, “Therefore, legally, the contract had never been ratified due to the absence of this important required legal document. The contract could be cancelled or terminated by either party without any mutual agreement presence. Based on the above facts and after we discussed with our legal consultant, we released the EMD fund to Buyer.”	p.13

The email chain confirms that the brokers had a continuing disagreement about whether the EMD funds should be released to the Buyers or the Sellers after the Contract sale mutually terminated. The Respondent acknowledged disbursing the EMD to the Buyers over the Sellers’ objection.

Analysis

Sections 17-322(b)(31) and 17-505 (b) - violating provisions that relate to the distribution of trust money held as a deposit a contract⁹

The applicable provisions relating to EMD deposits and distributions are found in Bus.

Occ. & Prof. § 17-505(b):

(b)(1) Prior to distributing the trust money under subsection (a)(4) of this section, the real estate broker shall notify both the owner and the beneficial owner that the real estate broker intends to distribute the trust money to the person who, in the good faith opinion of the real estate broker, is entitled to receive the trust money in accordance with the terms of the real estate contract which established the trust.

(2) The notice required under this subsection shall:

(i) be in writing;

(ii) state whether the trust money will be paid to the owner or beneficial owner; and

(iii) disclose to the owner and the beneficial owner that:

1. either party may prevent distribution of the trust money under subsection (a)(4) of this section by submitting a protest within 30 days from the date the notice was delivered or mailed by the real estate broker; and

2. if neither party submits a protest within 30 days from the date the notice was delivered or mailed by the real estate broker, the trust money will be distributed in accordance with the real estate broker's notice.

(3) The notice required under this subsection shall be:

(i) hand delivered to both the owner and beneficial owner; or

(ii) sent by certified mail, return receipt requested, and regular mail to both the owner and beneficial owner.

(4) (i) An owner or beneficial owner may protest the distribution of the trust money.

(ii) An owner or beneficial owner shall submit the protest to the real estate broker holding the trust money within 30 days from the date the notice required in paragraph (1) of this subsection was delivered or mailed by the real estate broker.

(iii) A protest shall be in writing and either:

1. hand delivered; or

2. sent by certified mail, return receipt requested, and regular mail.

(5) (i) If a written protest is received by the real estate broker, the real estate broker shall distribute the trust money in accordance with subsection (a)(1), (2), or (3) of this section.

⁹ Although this discussion is not in ordinal sequence or in the order of the Issues listed above, this violation forms the basis of the REC findings and will be addressed first.

(ii) If no written protest is received by the real estate broker holding the trust money, the real estate broker shall distribute the trust money in accordance with the terms of the notice as required in this section.

This very detailed procedure to release EMDs requires several steps, none of which the Respondent followed prior to distributing the EMD to the Buyers.

The Respondent testified and responded to the REC investigator that the Sellers did not request mediation – but that is not the required procedure when the distribution of an EMD is challenged, as expressed in the email chain. Before releasing an EMD, a broker holding those funds must notify the other party (in this case, the Sellers) that he or she intends to distribute the deposit to a contractual party (in this case, the Buyers), and the proposed distribution must be done in the good faith opinion of the broker that the party receiving the funds is entitled to receive them in accordance with the terms of the real estate contract which established the trust. Bus. Occ. & Prof. § 17-505(b)(1).

The required notice must be in writing, hand delivered or sent by certified mail, explaining to whom the distribution would be made, and advising the recipient about the procedures for protesting the distribution if they choose to do so. Bus. Occ. & Prof. § 17-505 (b)(2), (3) and (4). Only upon completion of these steps can the broker distribute the EMD. Bus. Occ. & Prof. § 17-505(b)(5). The Respondent acted cavalierly releasing the EMD to her clients, the Buyers, without following any of these required steps.

Putting aside the merits of the distribution (discussed below), the Respondent eschewed every safeguard required by law, violating Bus. Occ. & Prof. § 17-322(b)(31), which incorporates Bus. Occ. & Prof. § 17-505(b). By releasing these funds to her client without obtaining the proper written authorization or following the required process, the Respondent violated Section 17-505(a)(2) of the Bus. Occ. & Prof. Article, as charged by the REC.

Section 17-322(b)(25) - engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings

This subsection addresses the merits of the Respondent's decision to release the EMD to her client, the Buyers. Although I will not analyze for compliance every part of the Contract provisions cited above, it is clear that the release of the EMD to the Buyers, who did not follow the provisions of the inspection addendum permitting them to terminate the contract without penalty, was not a good faith interpretation of the Contract. It also appears to be the Buyers' (or alternatively the agent's or Respondent's) afterthought that the Sellers' oversight in not providing the lead paint disclosure was a means to terminate the Contract, although the oversight was acknowledged and corrected by the Sellers' agent within minutes of it being brought to his attention. The same goes for the homeowner's association documents.

Although the Respondent maintained in her response to the REC that the Contract was terminable due to the lack of the disclosures, the Respondent did not properly notify the Sellers, giving them their right to protest. REC Ex. 4. The Respondent might have eventually been proven correct in returning the EMD to the Buyers, but the legally required process to handle the dispute according to the established law was totally bypassed.¹⁰ The Respondent's cavalier actions and bold assertions contradict her argument that she made a good faith determination that the Buyers were entitled to the return of their deposit. If she were right, her argument could have stood the Sellers' challenge – but no challenge was forthcoming, as they were not notified prior to the EMD distribution to the Buyers.

¹⁰ Concerning the HOA disclosure, even if the Contract were terminable, the required process needs to be followed:

(c-1) If any deposits are held in trust by a licensed real estate broker, the return of the deposits to a purchaser under subsection (a), (b), or (c) of this section shall comply with the procedures set forth in § 17-505 of the Business Occupations and Professions Article.

Even without assessing the merits of these legal issues, the glaring fact is that the Respondent failed to follow the procedures for the Sellers to protest her decision regarding the distribution of the EMD. By foreclosing their right to protest her unilateral determination, and to do so in a manner that summarily stripped them of their right to protest, the Respondent demonstrated bad faith.

Incompetency is defined as “lacking the skills or knowledge to do a job or perform an action correctly or to a satisfactory standard.”¹¹ The Respondent did not follow the procedures for releasing the EMD according to the statutory standard.

By releasing the EMD which she held in trust, the Respondent was “untrustworthy,” as the EMD was entrusted to her to hold and distribute according to the law. She failed to meet that standard, bypassing the established legal procedure for distributing the EMD after the contract obligations were mutually released. Similarly, the Respondent was “dishonest” as well, which is included in the above elements: “characterized by lack of truth, honesty, or trustworthiness.”¹² Her dealings with the Sellers’ agent and his broker were improper, stonewalling them and keeping the EMD from being suitably handled.

On the other hand, the Respondent timely responded to the REC inquiries and fully participated in the hearing process. REC Ex. 4. By the end of the hearing, having been fully advised of her error, the Respondent acknowledged that she was now educated and accepted that she failed to follow the proper procedures. In a memorandum to her agents dated May 26, 2020, provided to the REC, the Respondent announced to her agents that the brokerage would no longer hold EMDs in the office escrow account. REC Ex 4 (4)(p. 93).

¹¹ “Incompetent,” Cambridge Academic Content Dictionary, (Cambridge University Press). Accessed on line

¹² “Dishonest” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/dishonest>. Accessed on line.

Section 17-322(b)(32) - violating any other provisions of Title 17

I will not speculate on what provisions of its governing statutes the REC believes the Respondent violated. The specifically charged violations have been noted, considered and adjudicated.

Sanction under Bus. Occ. & Prof. § 17-322(c)

The REC made no recommendations regarding the sanction or monetary penalty. Instead, the REC left that determination to my discretion. The Respondent sought leniency due to her lack of any prior violations since she started her brokerage in 2015, and asked that I waive any such penalties.

In determining the sanction to be imposed for a violation of Bus. Occ. & Prof. § 17-322(c) – including the possibility of a license reprimand, suspension or revocation by the REC – the following criteria are to be considered in assessing any penalty, which cannot exceed \$5,000.00 per violation:

- (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.

These elements have been discussed above in the context of the transaction, but will be summarized here.

The violation was serious. Money that the Respondent held in trust for both the Buyers and the Sellers was distributed outside of the legally required process that protects the parties to the transaction. Brokers holding EMDs are entrusted to protect the procedural rights of the parties to a transaction, and the Respondent failed the Sellers by denying them the chance to challenge her decision. As indicated above, the Respondent might have been proven ultimately

correct, but she denied the Sellers the process to challenge her unilateral determination. The money is gone.

The harm the Respondent caused to the Sellers was great. Although the Sellers were able to quickly move on once the Mutual Release of Obligations was presented and signed, and their house did sell, it was not a guarantee. The Sellers had a contractual right that was denied them by the Respondent, and they are out the \$4,000.00 EMD to which they might have been entitled. It is not only the amount of the EMD that is material – it is the trust that the Sellers put in the Respondent, who failed them by denying them the established process to seek their entitlement to the EMD.

Although I do not find that the Respondent acted in good faith when she unilaterally released the EMD in favor of her clients, I do recognize that she has since changed her office policies and procedures regarding EMDs (no longer maintaining them in her escrow account). Her good faith was evident by the end of the hearing, having recognized her error. I believe that the Respondent realized by the end of the hearing that she failed to meet her obligation, and I felt that her contrition was genuine – she thanked the AAG for “pointing out things that she needed to pay attention to” and that she learned “a lot” in the process.

Finally, the Respondent has no history of prior violations.

I recommend that the Respondent be reprimanded for her violations, and that a monetary penalty be assessed of \$4,000.00, the amount of the EMD that was wrongfully distributed to her clients. Although I have found the Respondent to have committed two violations of the applicable statute, it was only one transaction and assessing only one monetary penalty is appropriate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Sections 17-322(b)(31) and 17-505 of the Business Occupations and Professions Article by unlawfully distributing trust money held as a deposit to a contract

I further conclude that the Respondent violated Section 17-522(b)(25) of the Business Occupations and Professions Article by engaging in conduct that constituted bad faith, untrustworthiness as well as dishonest, and improper dealings.

I further conclude that the Respondent did not violate Section 17-322(b)(32) of the Business Occupations and Professions Article.

I further conclude that a reprimand of the Respondent's real estate broker license is an appropriate sanction, and the Respondent should be subject to the imposition of a \$4,000.00 civil penalty. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (2018 & Supp. 2021).

RECOMMENDED ORDER

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

1. The charges of the Real Estate Commission under the Business Occupations and Professions Article Sections 17-322(b) (25) and (31) shall be **UPHELD**;
2. The Respondent's shall be **REPRIMANDED** based on her violations of the Maryland Real Estate law;
3. A civil penalty in the amount of \$4,000.00 shall be assessed against the Respondent; and

4. The Commission shall **ORDER** that the Real Estate Commission's records and publications reflect its final decision.

May 27, 2022
Date Decision Issued

SIGNATURE ON FILE

Marc Nachman
Administrative Law Judge

MN/kkc
#198405

SIGNATURE ON FILE