THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM	*	BEFORE NICOLAS ORECHWA,
OF CLAIRE KAUSERUD,	*	ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE OF
V.	*	ADMINISTRATIVE HEARINGS
THE MARYLAND REAL ESTATE	*	
COMMISSION GUARANTY FUND	*	OAH NO: DLR-REC-22-18-36400
FOR THE ALLEGED MISCONDUCT	*	
OF DUANE FARLEY,	*	MREC NO: 2019-RE-003 G.F.
RESPONDENT		

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

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated March 19, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 17th day of April, 2019.

ORDERED,

A. That the Findings of Fact in the Recommended Decision be, and hereby are, ADOPTED;

B. That the Conclusions of Law in the Recommended Decision be, and hereby are, ADOPTED;

C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

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

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

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

MARYLAND STATE REAL ESTATE COMMISSION

4-17-2019
Date

By: SIGNATURE ON FILE
Anne S. Cooke, Commissioner

IN THE MATTER OF	*	**BEFORE NICOLAS ORECHWA,**
CLAIM OF CLAIRE KAUSERUD,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
v.	*	**OF ADMINISTRATIVE HEARINGS**
MARYLAND STATE	*	
REAL ESTATE COMMISSION,	*	
REAL ESTATE GUARANTY FUND,	*	
FOR THE ALLEGED MISCONDUCT	*	
OF DUANE FARLEY,	*	**OAH No.: DLR-REC-22-18-36400**
RESPONDENT	*	**REC No.: 19-RE-003GF**

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

PROPOSED DECISION

STATEMENT OF THE CASE

On July 10, 2018, Claire Kauserud (Claimant) filed a complaint against Duane Farley, Real Estate Broker (Respondent). The Claimant also filed a claim with the MREC Guaranty Fund (MREC or Fund), in which she alleged she sustained monetary losses as a result of the Respondent's acts or omissions. Specifically, the Claimant alleged the Respondent, acting in her capacity as the property manager for property owned by the Claimant, failed to reimburse the

Claimant for various monies to which the Claimant was rightfully entitled. On November 9, 2018, the MREC ordered the Claimant should have a hearing to establish her eligibility for an award from the Fund. On November 21, 2018, the MREC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 13, 2019, at 9:30 a.m., I conducted a hearing at the OAH headquarters in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2018). The Claimant appeared without counsel. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation, represented the Fund. As of 9:48 a.m., neither the Respondent nor anyone on her behalf appeared at the hearing or requested a postponement.

On January 16, 2019, the OAH mailed notice of the hearing to the Respondent by certified and regular mail to The Estate of Duane Farley,[1] c/o Thomas Kokolis and Jacob Deaven, Parker, Simon & Kokolis, LLC, 110 North Washington Street, Suite 500, Rockville, Maryland, 20540, the Respondent's last known address of record on file with the MREC. Md. Code Ann., Bus. Reg.§ 8-312(d) (2015).[2] The notice advised the Respondent of the time, place, and date of the hearing. The United States Postal Service (USPS) did not return the notice as unclaimed or undeliverable. On January 22, 2019, the OAH received the signed[3] return receipt for the notice. I received no forwarding order or other correspondence from the Respondent to identify alternative addresses. Therefore, I determined that the Respondent received proper notification, but failed to appear for the hearing. As a result, I found it appropriate to proceed in the Respondent's absence. After waiting over fifteen minutes for the Respondent to appear, I

[1] As set forth in further detail below, the Respondent is deceased and all correspondence and interaction with regard to the Claim concerns the Respondent's estate. However, for the sake of simplicity, I will simply refer to the Estate as the Respondent for the balance of this decision.
[2] "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2015).
[3] The signature on the return receipt is illegible.

proceeded with the hearing. Md. Code Ann., Bus. Occ. & Prof. § 17-408(c) (2018). Code of Maryland Regulations (COMAR) 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the Department's and the MREC's procedural regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.03 and 09.11.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual monetary loss as a result of the Respondent's conduct which constituted theft, embezzlement, forgery, false pretenses, fraud, or misrepresentation; and, if so,

2. What is the amount of the actual loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits for the Claimant:

CL Ex. 1: Property Management Statement with attached receipts, June 8, 2017 to October 3, 2017

CL Ex. 2: Property Management Agreement, May 7, 2014

CL Ex. 3: Residential Dwelling Lease (Lease), July 27, 2017

CL Ex. 4: Cancelled checks and statement from Suntrust Bank, various dates

CL Ex. 5: E-mails between the Claimant and the Respondent, various dates

CL Ex. 6: E-mail from John Tselepis CPA to the Claimant, March 12, 2018

CL Ex. 7: Property Management Statement, September 1, 2017 to April 1, 2018

I admitted the following exhibits for the Fund:

GF Ex. 1: Hearing Order, November 9, 2018

GF Ex. 2: Notice of Hearing, January 16, 2019

GF Ex. 3: Cover letter with Claimant's Complaint, July 10, 2018

GF Ex. 4: Respondent's Licensing History

GF Ex. 5: Affidavit of Jillian Lord, January 15, 2019

GF Ex. 6: Printout from the Maryland Register of Wills

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses. The Respondent and the Fund did not present witnesses.

FINDINGS OF FACT

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

1. At all times relevant, the Respondent was a real estate broker licensed by the MREC under License #0148951. In particular, the Respondent managed properties on behalf of owners who rented their properties to third parties.

2. At all times relevant, the Claimant owned a residence located at 302 Merlin Drive, Belcamp, Maryland (Merlin Drive).

3. On May 7, 2014, the Claimant and the Respondent entered into a Property Management Agreement with regard to Merlin Drive. The Respondent managed Merlin Drive per the terms of the Property Management Agreement, which remained in full force and effect until April 1, 2018.

4. On or about April 1, 2018, the Respondent closed her business and terminated the Property Management Agreement as of that date. The Respondent died on June 24, 2018.

5. On July 27, 2017, two tenants, Gregory J. Hild and Mindi Hertzog (Hild)[4] signed a lease (lease of Hild lease) to rent Merlin Drive. The time period of the lease spanned from July 28, 2017, until July 31, 2018. The lease obligated Hild to pay $1,995.00 per month in rent.[5] At the time the lease ended, Hild had paid all rent due and owing pursuant to the terms of the lease.

6. The Property Management Agreement obligated the Respondent to market Merlin Drive for rent. The Respondent engaged the services of a leasing associate, Ellen Cherry (Cherry). The Hild lease designates Cherry as the leasing associate. The Respondent earned a $1,995.00 commission on the Hild lease.

7. The Property Management Agreement obligated the Respondent to deposit $200.00 into the Claimant's escrow account to cover incidental repairs. Just prior to the signing of the Hild lease, the Respondent made $1,772.65 in repairs to Merlin Drive without the Claimant's authorization or knowledge. The Respondent applied the Claimant's $200.00 deposit toward payment of those repairs and deducted the balance from rents collected from Hild.

8. The Property Management Agreement obligated the Respondent to pay the Claimant rents collected after deduction of an eight percent management fee. As of April 1, 2018, the Respondent owed the Claimant $8,004.60 in net rental proceeds. The Respondent did not pay the Claimant the $8,004.60.

9. The lease obligated Hild to make a security deposit of $1,995.00. The Property Management Agreement obligated the Respondent to hold the Security Deposit in an escrow

[4] At the hearing, the Claimant often referred only to Hild in referring to this particular lease. For the sake of simplicity, I will do the same.
[5] Per an addendum to the lease, Hild paid rent on a sliding scale with the first monthly payment being $4,472.00 and the last monthly payment being zero. However, the lease itself designates Hild's monthly rent as $1,995.00.

account to be returned to Hild upon expiration of the lease. Hild paid the Respondent $1,995.00 as a security deposit which the Respondent deposited in her escrow account. The Respondent did not return the security deposit to Hild. When Hild moved out of Merlin Drive, the Claimant paid Hild the security deposit from her own funds.[6]

DISCUSSION

The Respondent's Failure to Appear

Per the MREC's hearing order, the Respondent died on June 24, 2018. (GF. Ex. 1.) The OAH scheduled the hearing in this case for Wednesday, February 13, 2019, at the OAH offices in Hunt Valley, Maryland. The OAH originally mailed a Notice of the hearing to the parties on November 29, 2018. The OAH sent the Respondent's copy of the Notice by first-class and certified mail (return receipt requested) to 327 South Union Avenue, Havre De Grace, Maryland, 21078, the Respondent's address of record with the MREC when she was alive. The OAH addressed the Notice to the attention of the Respondent's estate. The OAH sent the Notice by certified mail and the USPS returned it to the OAH as "moved left no address, unable to forward, return to sender." The USPS also returned the Notice sent by regular first class mail as "moved, unable to forward."

On or about January 15, 2019, Assistant Attorney General Andrew Brouwer searched the Maryland Register of Wills for an estate opened on behalf of the Respondent. The search yielded an estate opened on behalf of the Respondent on or about October 15, 2018. The search also revealed the estate's personal representative to be Thomas J. Kokolis, Esquire , 110 North Washington Street, Suite 500, Rockville, Maryland, 20850. Mr. Kokolis's attorney is listed as

[6] The Claimant paid the tenant $1,945.00 for the security deposit. She held back $50.00 to address some minor repairs.

Jacob Deaven, Esquire, also located at 110 North Washington Street, Suite 500, Rockville, Maryland, 20850.[7] On January 15, 2019, Mr. Brouwer sent a letter to the OAH notifying the clerk of the address of the Estate's personal representative and instructing the clerk to send Notice to that address.[8] On January 16, 2019, the OAH sent notice by first-class and certified mail (return receipt requested) to "The Estate of Duane Farley, C/O Thomas Kokkolis (sic) and Jacob Deaven, Parker, Simon & Kokkolis (sic), LLC, 110 N. Washington Street, Suite 500, Rockville, MD 20850." On January 25, 2019, the OAH received the green return receipt from the USPS which the recipients signed on January 22, 2019. The USPS did not return the notice the OAH sent to that address by first class mail.

As someone signed for the Notice sent by certified mail on behalf of the personal representative of the Respondent's Estate, I find that the Respondent received proper notice of the hearing. At no time did the Respondent or anyone on the Respondent's behalf request a postponement of the hearing.

Section 17-324 of the Business Occupations and Professions Article provides that before the Commission can take any final action against an individual, the individual must be personally served with a hearing notice or the hearing notice must be sent by certified mail at least ten days prior to the hearing to the individual's last known business address. Md. Code Ann., Bus. Occ. & Prof. § 17-324(d)(1) (2018). If the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. Md. Code Ann., Bus. Occ. & Prof. §§ 17-324(f), 17-408(c) (2018). The address used to notify the Respondent of the hearing is the address of the Respondent's personal representative as determined by Mr. Brouwer on behalf of the MREC. I therefore find it is the Respondent's

[7] All information concerning Mr. Brouwer's search of the Estate and the results of that search is contained in GF Ex. 6.
[8] Mr. Brouwer provided an alternate address for the Respondent of P.O. Box 426, 42 Neptune Drive, Joppa, Maryland, 21085. The OAH sent notice to that address which the USPS returned as "unclaimed, unable to forward."

address of record with the MREC. Accordingly, I conclude that the Respondent received proper notice of the hearing, but nevertheless failed to appear. As a result, I determined that it was appropriate to proceed with the hearing despite the Respondent's failure to appear.

Legal Framework

Section 17-404(a) of the Business Occupations and Professions Article provides the criteria for a person to recover compensation from the Guaranty Fund:

> (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;
>
> 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.

The amount recovered for any claim against the Guaranty Fund "shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction." COMAR 09.11.01.14. The Claimant bears the burden of proving her entitlement to recover compensation from the Guaranty Fund by a preponderance of the evidence. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2018). To prove

something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel Co. Police Dep't*, 369 Md. 108, 125 n.16 (2002). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the reasons articulated below, I find the Claimant has satisfied her burden.

The Merits of the Case

Arguments of the Parties

Neither the Respondent nor the Fund presented any evidence to be considered. In support of her claim, the Claimant testified that she and the Respondent entered into a Property Management Agreement whereby the Respondent would manage Merlin Drive as a rental property. Per the terms of the Property Management Agreement, the Claimant deposited $200.00 into the Respondent's escrow account to cover the costs and expenses of repairs. Hild signed a lease, paid a security deposit, commenced living in Merlin Drive at the end of July 2017, and paid rent monthly thereafter. The Respondent would deduct an eight percent management fee from the monthly rent received and remit the balance to the Claimant.

In the spring of 2018, the Claimant learned the Respondent would be closing her business. The last statement the Claimant received from the Respondent reflected a balance of $8,004.00 in rents owed by the Respondent to the Claimant as of April 1, 2018. Additionally, the Claimant learned the Respondent made a variety of repairs to Merlin Drive which the Claimant did not authorize. When Hild left Merlin Drive, the Respondent did not return the security deposit to him per the terms of the lease and the Property Management Agreement. This required the Claimant to remit the security deposit to Hild out of her own pocket. Finally, the Claimant alleged that the

Respondent and Cherry entered into an agreement to split commissions on the marketing and leasing of Merlin Drive. The Respondent did not pay $997.50 owed in commissions to Cherry. After the Respondent's death, Cherry sought payment of the commissions from the Claimant.

Analysis

There is no dispute the Respondent is a licensed real estate broker, Merlin Drive is located in the State of Maryland, and the agreements into which the Claimant and the Respondent entered concern Merlin Drive. The issues to be decided are whether the Respondent committed "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." Md. Code Ann., Bus. Occ. & Prof. 17-404(a), I shall address each of the Claimant's allegations separately below:

Cherry's alleged $997.50 commission

I do not find the Claimant established she suffered an actual loss as a result of the Respondent's failure to pay Cherry the commission. Therefore, I do not find this component of her claim to be compensable by the Fund. As the Fund correctly observed in its closing statement, COMAR 09.11.01.14, entitled "Amount of Compensation Recoverable from Real Estate Guaranty Fund," reads as follows:

> The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund, pursuant to Business Occupations and Professions Article, Title 17, Subtitle 4, Real Estate Guaranty Fund, Annotated Code of Maryland, shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction. Actual monetary losses ***may not*** **include commissions owed to a licensee of this Commission acting in the licensee's capacity as either principal or agent in a real estate transaction**, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

(Emphasis added.)

Accordingly, I find the Claimant is not entitled to an award for Cherry's alleged commission by operation of law. Assuming the law did provide for reimbursement from the Fund, I still would not find the Claimant suffered an actual loss. The Claimant presented no evidence that any document or contract obligated her to reimburse Cherry for commissions unpaid by the Respondent. The Respondent did deduct $1,995.00 as a service fee for property management on August 1, 2017. (CL Ex. 1). While Cherry's name appears on the Lease as the "Leasing Associate," there is no language in the Lease or the Property Management Agreement which evidences any agreement between Cherry and the Respondent to split commissions equally.[9] It is unclear where the Claimant obtained her information about this alleged arrangement between Cherry and the Respondent and thus unclear whether the Claimant is simply accepting Cherry's representation that the agreement exists.[10] In the absence of any concrete agreement or the testimony of Cherry as to such, I find the Claimant owes no obligation to Cherry as a third party or otherwise with regard to the $997.50 commission.

Repairs made by the Respondent

Article 3.6 of the Property Management Agreement entitled "Repairs" reads as follows:

> [The Respondent] shall attend to the making and supervision of all ordinary and extraordinary repairs, decorations, and alterations to the Property; however, no single expenditure shall exceed Two Hundred Dollars ($200.00) without the express consent of [the Claimant], except where deemed by [the Respondent] to be emergent in nature. [The Respondent] will attempt to contact [the Claimant] at all communication numbers provided by [the Claimant] to inform [the Claimant] of any such emergency expenditures.

[9] One half of $1,995.00 is $997.50 – the amount the Claimant says Cherry is claiming as her share of the commission.

[10] The Claimant seemed so certain she owed Cherry the $997.50, she testified that she planned to pay Cherry that sum upon being reimbursed by the Fund. However, as noted, she presented no evidence she owed Cherry anything.

Article 6.2 of the Property Management Agreement entitled "Repair/Expense Escrow" reads as follows: "[The Claimant] shall initially deposit the sum of Two Hundred Dollars ($200.00) to cover costs of expenses over and above anticipated rents to be collected, and further agrees to make additionally (sic) deposits, if deemed necessary, during the term of this agreement."

The Claimant contended the Respondent made $1,772.65[11] in unauthorized repairs to Merlin Drive both when readying Merlin Drive for Hild and when Hild left Merlin Drive after the expiration of the lease. Those repairs are as follows:

- $400.00 for painting various walls and a ceiling in Merlin Drive. The Claimant testified the contractor the Respondent hired to complete the painting did an unworkmanlike job. This required her to hire (and pay out of her own pocket) a new contractor to repaint the walls.
- $500.00 for cleaning the carpets in Merlin Drive prior to Hild moving in
- $350.00 for cleaning the inside of Merlin Drive and mowing the back yard
- $83.83 to repair a non-functioning faucet (includes the $29.98 cost of the faucet).[12] The Claimant testified she needed to purchase from her own funds and replace the faucet because the one the Respondent installed did not work properly.
- $80.00 for various repairs, no receipt provided

[11] This is the amount the Claimant alleges in her Complaint to the Fund. (GF Ex. 3) However, it is unclear how she arrived at this sum. On Claimant's Exhibit 1, she underlined the following items as being unauthorized repairs: $400.00 for painting; $500.00 for carpet cleaning; $350.00 for cleaning, mowing, and repairing a kitchen chair; $83.83 for purchase of repair materials; $80.00 for various repairs; $59.82 for the purchase of repair materials; and $299.00 for various repairs. The sum total of these amounts is $1,772.65. The difference between this amount and the amount on the Claimant's Complaint is $84.20.

[12] The Claimant identified this expense in her testimony. Claimant's Exhibit 1 contains a receipt substantiating this expense. However, the property statement on the front of the exhibit does not indicate the Respondent ever deducted this specific expense from the Claimant's account. The property statement references a deduction of $88.86 from the Claimant's account for repairs on July 28, 2017. The Claimant did not reference this specific expense in her testimony, did not explain the discrepancy in the amounts of the two expenses, and did not opine on whether the $88.86 pertains to the same repairs as the $83.83 to which she testified.

- $59.82 for various repairs which concerned, among other things, a "plastic pop up" and "wired door chime receiver"
- $299.00 for various repairs, no receipt provided

At the hearing the Fund agreed that the Claimant suffered an actual loss with regard to two repairs: the $400.00 for painting repairs, because the Claimant received no benefit from those repairs as a result of the Claimant having to redo (and incur the cost of redoing) the unworkmanlike paint job of the Respondent's contractor; and the $29.98 for the non-functional faucet the Respondent installed, which the Claimant had to replace. The total of these two repairs exceeds the $200.00 the Claimant deposited in the Respondent's escrow account per Article 6.2 of the Property Management Agreement.[13] Article 3.6 obligated the Respondent to contact the Claimant and obtain her permission prior to commencing any work or incurring any expense to make repairs above and beyond the $200.00. There is no evidence either repair arose out of an emergency. Thus, I find Article 3.6 of the Property Management Agreement obligated the Respondent to contact the Claimant and obtain her authorization for those repairs, which she did not do. As to these two repairs, I find the Claimant is eligible for compensation from the Fund.

The Fund argued the balance of the repairs was not compensable because the Claimant, although she may not have authorized the repairs, benefited from them. With regard to some of those repairs, I agree.

I will not recommend compensation with regard to the following repairs: 1) $500.00 carpet cleaning; 2) $350.00 for cleaning Merlin Drive and mowing the back yard; 3) $53.85 for repairs to the faucet (not including the cost of the replacement faucet noted above); and 4) $59.82

[13] At the hearing, the Claimant conceded the total amount she claimed for reimbursement for repairs did not include a deduction for the $200.00 deposit she paid. The $200.00 deposit will be deducted from my recommendation of an award from the Fund with regard to the repairs.

for various repairs which concerned, among other things, a "plastic pop up" and "wired door chime receiver." All these repairs, while perhaps not authorized by the Claimant, were tangible and the Claimant did not testify that she received no benefit from them. For example, with regard to the $350.00 for cleaning and mowing – the Claimant could not testify the Respondent did not incur this expense and actually cleaned the house and mowed the back yard. Thus, I do not find the Claimant incurred an actual loss with regard to these expenses.

However, with regard to $299.00 and $80.00 for "various repairs" for which the Respondent provided no receipt, I find the Claimant incurred an actual loss and is eligible for compensation from the Fund. I do not find the Claimant authorized either repair. I found the Claimant's testimony to be credible. All the figures upon which she based her claim are substantiated by her exhibits. Further, she testified as to a variety of unrelated expenses and costs she incurred but did not include in her claim. Thus, I find her claims rooted in sincerity.

The Claimant's testimony that she did not authorize the repairs, or even know about them, is substantiated by e-mails she entered into evidence. (CL Ex. 5). For example, in one e-mail to the Respondent dated October 5, 2017 (approximately two months after Hild vacated Merlin Drive) the Claimant wrote:

> We still have not heard from you. Our concerns are growing as received (sic) somewhat of a statement from your office last week. The repairs were surprising given that we were assured that the previous renters were leaving our property in "excellent" condition. My math may be off, but when I added them up it was almost $2000.
>
> Please respond with a detailed explanation of our previous concerns as well as a timeline when we will see disbursements. We have not seen any income since a check in July.

I find the e-mails substantiate that the Claimant neither authorized nor knew of the nature of the repairs. The repairs I excluded above are tangible (e.g. the house cleaning or doorbell replacement), and the Claimant benefited from those repairs. However, the $299.00 and $80.00 repairs are simply unknown. To conclude the Claimant inured benefit from them would be conjecture. The evidence shows the Respondent deducted $80.00 for "various repairs" on August 8, 2017, and $299.00 for "various repairs" on August 30, 2017. (CL Ex. 1). Thus, the Claimant did not receive those amounts from rental proceeds. Article 7 of the Property Management Agreement obligated the Respondent to forward rental proceeds to the Claimant after deduction of the eight percent management fee. One exception to that provision is Article 3.6 which allows the Respondent to deduct amounts for repairs above and beyond the Claimant's $200.00 repair deposit. However, the Respondent may only exceed that amount with the Claimant's authorization or in the event of an emergency. The Respondent did not receive the Claimant's authorization and did not provided the Claimant with documentation of an emergency or information as to what these costs represented.

Misrepresentation is defined as "[t]he act or an instance of making a false or misleading assertion about something [usually] with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion." Black's Law Dictionary (10th ed. 2014). I find the Respondent violated the terms of the Property Management Agreement with regard to the $400.00 painting repair, the $29.98 faucet, and the $299.00 and $80.00 in unsubstantiated repairs by not obtaining the Claimant's authorization for those repairs. I find the Respondent engaged in misrepresentation with regard to these repairs. The Respondent represented to the Claimant in the Property Management Agreement that she would only make repairs with the Claimant's authorization. The Respondent failed to obtain the Claimant's

authorization. For the reasons stated above I find the Claimant sustained an actual loss with regard to these repairs. The total of that actual loss is $400.00 + $29.98 + $299.00 + $80.00 = $808.98. As noted above, the Claimant conceded she did not deduct the $200.00 repair deposit from her claim. Because Article 3.6 of the Property Management Agreement authorized the Respondent to utilize the $200.00 deposit for the purpose of repairs, without the Claimant's authorization, I shall deduct that amount from my recommended award from the Fund. Accordingly, I shall recommend the Fund award the Claimant $608.98 for the repairs.

Unpaid rents

Paragraph 3.4 of the Property Management Agreement entitled "Collection of Rents" reads as follows:

> [The Respondent] will endeavor to collect all rents and other charges which may become due to [the Claimant] at any time from any tenant. All monies so collected shall be deposited in the Operating Account of [the Respondent]. [The Respondent] shall remit to [the Claimant] or deposit in [the Claimant's] designated account all sums in excess of those required to operate the Property (i.e., monthly management fees, repair escrow funds, costs of necessary repairs, etc.) on or before the fifteenth (15th) day of each month, provided rents received from the Tenant are available that day.

The Claimant presented evidence the Respondent received the following rents[14] from Hild:

- September 1, 2017 -- $1,995.00
- September 1, 2017 -- $4,935.00
- October 1, 2017 -- $2,205.00
- October 3, 2017 -- $1,995.00
- November 3, 2017 -- $3,600.00

[14] The Respondent received $4,200.00 in rent on October 10, 2017. However, the Respondent removed that amount from the Claimant's account the same day due to an NSF notification (ostensibly returning the $4,200.00 check to Hild's bank).

- December 5, 2017 -- $1,200.00
- January 9, 2018 -- $930.00
- February 19, 2018 -- $840.00

(CL. Ex. 7).

This equates to $17,700 in rents received by the Respondent. The Respondent's final statement reflects a balance owed to the Claimant of $8,004.60 as of April 1, 2018, after deducting management and other fees. Paragraph 8.2 of the Property Management Agreement entitled "Termination for Cause by Agent" reads in full as follows:

> This Agreement will terminate immediately without further action from [the Respondent] in the event [the Owner] breaches any of its obligations to [the Respondent] under the terms of this Agreement (herein defined to be "Default"), and fails to cure such Default within thirty (30) days after receipt of written notice from [the Respondent] specifying the nature of such Default.
>
> Notice of Termination by [the Respondent] shall be sent to [the Claimant], mailed postage prepaid, by both "regular first class mail" and separately by "certified, return receipt requested" mail.

A letter dated March 12, 2018, from John Tselepis, a Certified Public Accountant, advised the Claimant the Respondent would be closing her business. (Cl. Ex. 6). While the letter does not specifically terminate the Property Management Agreement or provide a specific closure date for the Respondent's business, I find the Property Management Agreement was terminated as of April 1, 2018 by virtue of both the Tselepis letter and the Respondent's last statement ending April 1, 2018. (CL Ex. 7). Paragraph 8.3 of the Property Management Agreement entitled "Final Accounting" reads: "Upon termination of this agreement **for any reason**, [the Respondent] shall deliver to [the Claimant] all records, contracts, leases, unpaid bills, outstanding sums of monies (**i.e., repair escrow, security deposit, etc.**), and any other papers or documents which are in [the Respondent's] possession and which relate to the Property." (Emphasis added.) Accordingly, I

find the Respondent's termination of the Property Management Agreement obligated her to return the $8,004.60 in undistributed rents to the Claimant. Because the Respondent failed to return the $8,004.60 in undistributed rents upon termination of the Property Management Agreement, I find the Claimant incurred an actual loss in that amount.

I find the Respondent committed an act or omission by failing to return the $8,004.60 to the Claimant. I further find the Respondent committed that act or omission through misrepresentation as defined above. I find the Respondent's act of failing to return the $8,004.60 in rental proceeds despite agreeing to do so pursuant to the Property Management Agreement constitutes a misrepresentation. Accordingly, I find the $8,004.60 in unpaid rental proceeds to be compensable by the Fund.

$1,995.00 Security Deposit

Paragraph 3 of Hild's lease obligates him to provide a $1,995.00 security deposit upon the signing of the lease. (CL Ex. 3). The last page of the lease is a security deposit receipt showing Hild paid the $1,995.00 security deposit. Paragraph 3.5 of the Property Management Agreement entitled "Security Deposits" reads: "Monies collected from the Tenant for the required Security Deposit will be held by [the Respondent] in a Security Deposit escrow account so as to comply with the Landlord/Tenant Security Deposit Law of the State of Maryland." As noted above, paragraph 8.3 of the Property Management Agreement obligates the Respondent to return the security deposit upon its termination. The Respondent terminated the Property Management Agreement as of April 1, 2018. However, she did not return the security deposit to the Claimant. I find this by virtue of the fact the Claimant paid Hild $1,945.00 out of her own funds on August 17, 2018 as a refund of the security deposit. (CL Ex. 4.) The Claimant testified she held back $50.00 from the security deposit to pay an expense incurred by Hild. I thus find the Claimant

incurred an actual lost in the amount of $1,945.00 as a result of having to pay Hild the security deposit out of her own pocket.

I find the Respondent committed an act or omission by failing to return the security deposit to the Claimant per the terms of the Property Management Agreement. I further find the Respondent committed that act or omission through misrepresentation as defined above. I find the Respondent's act of failing to return the security deposit despite agreeing to do so pursuant to paragraphs 3.5 and 8.3 of the Property Management Agreement constitutes a misrepresentation. Thus, I find the Claimant is entitled to reimbursement from the fund of $1,945.00 representing the principal amount of the security deposit.

In light of the above, I find the Claimant is entitled to the following reimbursement from the Fund: $608.98 (unauthorized repairs above and beyond the $200.00 repair deposit) + $8,004.60 (rental proceeds owed) + $1,945.00 (security deposit) = $10,558.58.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Facts and Discussion, I conclude that the Claimant has established by a preponderance of the evidence that she sustained an actual loss compensable by the Guaranty Fund resulting from the Respondent's act or omission in providing real estate brokerage services that constitutes misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2) (2018).

I further conclude as a matter of law that the amount of the award the Claimant is entitled to receive from the Fund is $10,558.58. Md. Code Ann., Bus. Occ. § 17-404(b) (2018); COMAR 09.11.01.14.

RECOMMENDED ORDER

I **PROPOSE** that the Claim filed by the Claimant against the Maryland Real Estate Commission Guaranty Fund be **GRANTED** in the amount of $10,558.58;

I further **PROPOSE** that the Maryland Real Estate Commission Guaranty Fund pay to the Claimant her actual monetary loss in the amount of $10,558.58 for the Respondent's wrongful acts and omissions;

I further **PROPOSE** that the Respondent shall be ineligible for any Maryland Real Estate Commission license until the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of at least ten percent, as set by the Commission pursuant to Section 17-411(a) of the Business Occupations and Professions Article of the Maryland Annotated Code; and

I further **PROPOSE** that the Commission's records and publications reflect this proposed decision.

SIGNATURE ON FILE

March 19, 2019
Date Decision Issued

Nicolas Orechwa
Administrative Law Judge

NO/sw
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