

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE  
COMMISSION

V.

THOMAS MCTEAR,  
RESPONDENT

and.

CLAIM OF FRANK SHARPE, JR.

AGAINST THE REAL ESTATE  
COMMISSION GUARANTY FUND

\* BEFORE EILEEN C. SWEENEY,  
\* ADMINISTRATIVE LAW JUDGE,  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No: DLR-REC-24-15-07454  
\* MREC NO: 2014-RE-382 G.F.

\* \* \* \* \*

**PROPOSED ORDER**

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 26, 2015, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16th day of September, 2015.

ORDERED,

- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
  - B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
  - C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;
- and,
- D. That the records, files and documents of the Maryland State Real Estate Commission reflect this decision.

MARYLAND STATE REAL ESTATE COMMISSION

**SIGNATURE ON FILE**

By: \_\_\_\_\_

Marla S. Johnson, Commissioner

9/16/2015

Date

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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On February 28, 2014, Frank Sharpe, Jr., (Claimant) filed a complaint with the Maryland Real Estate Commission (REC) against Thomas F. McTear (Respondent). On or about March 12, 2014, the Claimant filed a claim against the Real Estate Commission Guaranty Fund (Fund) for reimbursement for losses allegedly incurred by him as a result of the Respondent's conduct.

On February 9, 2015, the REC issued a Statement of Charges and Order for Hearing against the Respondent.

I conducted a hearing on April 27, 2015 at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland.<sup>1</sup> Md. Code Ann., Bus. Occ. & Prof. §§ 17-324 and 17-408 (2010). Peter Martin, Assistant Attorney General, represented the REC. The Respondent represented himself. The Claimant represented himself. Hope Sachs, Assistant Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings of the Office of the Secretary of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); Code of Maryland Regulations (COMAR) 09.01.02; COMAR 09.01.03; and COMAR 28.02.01.

### ISSUES

1. Did the Respondent violate section 17-322(b)(22), (31), and 17-505(c) of the Business Occupations and Professions Article<sup>2</sup> by failing to account for or to remit promptly money that came into his possession belonging to another person?<sup>3</sup>
2. Did the Respondent violate sections 17-322(b)(31), (33) and 17-502(b)(1) and COMAR 09.11.01.07 by failing to promptly and, in not more than seven business days after the acceptance of a contract of sale by both parties, deposit trust money in an account maintained by him separately from his own accounts and solely for trust money?
3. Did the Respondent violate sections 17-322(b)(31) and 17-502(b)(2) by using trust money for any purpose other than that for which it was entrusted to him?
4. Did the Respondent violate sections 17-322(b)(31), (33) and 17-505(a), COMAR 09.11.01.07 and 09.11.01.21 by failing to maintain trust money in an account authorized

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<sup>1</sup> I postponed a hearing previously scheduled for April 27, 2015 because proper service had not been made upon the Respondent.

<sup>2</sup> All references to Title 17 hereinafter are to the Business Occupations and Professions Article.

<sup>3</sup> I note that although the REC alleged in the Statement of Charges that the Respondent also violated section 17-322(b)(32) (violates any other provision of Title 17) based on this and other conduct, it referred only to violations of subtitle 5 in that charging document. See Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(32).

under Part 1 of subtitle 5 of Title 17 until (a) the real estate transaction for which the trust money was entrusted was consummated or terminated; (b) the Respondent received proper written instructions from the owner and beneficial owner directing withdrawal or other disposition of the trust money; (c) a court ordered a different disposition on an interpleader filed by the Respondent; (d) the owner or beneficial owner of the trust money failed to complete the real estate transaction for which the trust money was entrusted and the Respondent, in his sole discretion, decided to distribute the trust money in accordance with subsection (b) of section 17?

5. Did the Respondent violate sections 17-322(b)(31) and section 17-505(d) by investing trust money without instructions or an agreement in writing from the owner and beneficial owner?
6. Did the Respondent violate sections 17-322(b)(31), (33) and 17-507(a), (b) and COMAR 09.11.01.07 by failing to (a) maintain all records of trust money in a secured area within his office; (b) keep copies of listings and any other document executed or obtained by the Respondent in connection with a transaction involving the provision of real estate brokerage services; and (c) keep records required by section 17-507 for five years?
7. Did the Respondent violate sections 17-322(b)(31), (33) and 17-507(d) and COMAR 09.11.01.07 by failing to provide, at the Respondent's expense, a paper copy of any document or record requested by the REC and to display to the REC on demand all records, books, and accounts of any money held in trust?
8. Did the Respondent violate section 17-322(b)(25) by engaging in conduct that demonstrated bad faith, incompetency, or untrustworthiness or that constituted dishonest, fraudulent, or improper dealings?
9. If so, what are the appropriate sanction and/or penalty?
10. Did the Claimant sustain an actual loss compensable by the Fund?
11. If so, what is the appropriate award?

## SUMMARY OF THE EVIDENCE

### Exhibits

The REC submitted the following exhibits, which I admitted into evidence:

- REC Ex. 1            May 21, 2015 Memorandum from Sandra Sykes to Legal Services; March 27, 2015 Notice of Hearing; February 9, 2015 Statement of Charges and Order for Hearing; certified mail receipt
- REC Ex. 2            April 3, 2015 letter from Mr. Martin to the Respondent, with attached March 27, 2015 Notice of Hearing and February 9, 2015 Statement of Charges and Order for Hearing; certified mail receipt
- REC Ex. 3            April 17, 2015 letter from Mr. Martin to the Respondent, with attached March 27, 2015 Notice of Hearing and February 9, 2015 Statement of Charges and Order for Hearing; certified mail receipts
- REC Ex. 4            May 6, 2015 Memorandum from Sandra Sykes to Legal Services; April 29, 2015; certified mail receipt
- REC Ex. 5            May 7, 2015 letter from Mr. Martin to Susan M. Hill; certified mail receipt
- REC Ex. 6            May 8, 2015 letter from Mr. Martin to Ms. Hill; certified mail receipt
- REC Ex. 7            May 7, 2015 licensing records
- REC Ex. 8            May 29, 2015 letter from Katherine F. Connelly, Executive Director, REC, to "To Whom it May Concern," with attached licensing information
- REC Ex. 9            October 3, 2014 REC Report of Investigation, with attachments
- REC Ex. 10           August 25, 2013 check from the Claimant to the Respondent in the amount of \$3,000.00
- REC Ex. 11           June 1, 2015 Affidavit of Katherine F. Connelly

The Claimant, the Respondent, and the Fund did not submit any exhibits into evidence.

## Testimony

The REC presented the testimony of the following witnesses:

- The Claimant<sup>4</sup>
- Sara Rubinstein, Real Estate Agent, Long and Foster
- Patrick Richardson, Auditor, REC
- Jennifer Grimes, Investigator, REC

The Claimant also testified on his own behalf; he did not present the testimony of any witnesses.

The Respondent testified on his own behalf and did not present the testimony of any witnesses.

The Fund did not present the testimony of any witnesses.

### **FINDINGS OF FACT**

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

1. At all times relevant, the Respondent was a licensed real estate broker and the broker of record for McTear Realtors.
2. On May 25, 2013, the Claimant entered into an Exclusive Buyer/Tenant Brokerage Agreement with the Respondent.
3. On May 25, 2013, the Claimant and the Respondent signed an Addendum to the Exclusive Buyer Brokerage Agreement Retainer Fee, which provided in pertinent part as follows:

19. It is understood and agreed that there is a \$2,000.00 fee due to [the Respondent] due at the time of removing the home inspection contingency from the contract to partially reimburse the Broker for his expenses to date, which will be given back to the buyer at the time of settlement. If for any reason whatsoever

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<sup>4</sup> The Claimant, who currently resides in North Carolina, testified by telephone.

the buyer does not go through with the settlement this fee becomes the permanent property of [the Respondent].

(REC Ex. 9.)

4. The Respondent did not explain to the Claimant at the time of the signing of the Addendum to the Exclusive Buyer Brokerage Agreement that he was going to apply part of the Claimant's deposit to the Respondent's retainer fee. The Claimant believed that he would be paying a retainer fee to the Respondent later and separately.

5. On May 25, 2013, the Respondent submitted a written offer on behalf of the Claimant to purchase a house located at 2520 Brookfield, Avenue, Baltimore, Maryland (Brookfield house).

6. The contract for the Brookfield house referred to a deposit of \$2,000.00.<sup>5</sup>

7. On or about May 25, 2013, the Claimant provided the Respondent with a check in the amount of \$4,000.00, as a "Downpayment for 2520 Brookville."<sup>6</sup> (REC Ex. 9.)

8. On May 28, 2013, the seller accepted the Claimant's offer on the Brookfield house.

9. On May 30, 2013, the Respondent deposited the Claimant's \$4,000.00 check into a McTear Realtors' escrow account at Wells Fargo Bank ("Business Checking" account no. 4000).

10. On June 12, 2013, the Respondent made an online transfer of funds in the amount of \$2,000.00 from the escrow account to a McTear Realtors' operating account at Wells Fargo Bank ("Business Checking" account no. 3962) with the description "Retainer fee from [the Claimant.]" (REC Ex. 9.)

11. The Claimant paid for a home inspection of the Brookfield house, but the sale, which would have been a short sale, did not go to settlement because the bank auctioned the house.

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<sup>5</sup> This Finding of Fact is based on the REC Investigator's Report and an attached HUD Settlement Sheet. The Claimant's copy of the contract did not include the first page of the Residential Contract of Sale (using the Maryland Association of Realtors (MARS) form.)

<sup>6</sup> Although the notation says "Brookville," it is clear that it relates to the Brookfield house.

12. After the sale of the Brookfield house did not go to settlement, the Claimant inquired about his deposit; the Respondent advised him that the deposit was in the Respondent's escrow account and would be used for the next property the Claimant bid on.

13. On June 22, 2013, the Respondent submitted a written offer on behalf of the Claimant to purchase a house located at 1606 Hollins Street, Baltimore, Maryland (Hollins house).

14. The deposit reflected in the contract for the Hollins house was for the amount of \$3,000.00.

15. The Respondent did not ask the Claimant for any additional funds for that deposit.

16. On June 27, 2013, the seller accepted the Claimant's offer on the Hollins house.

17. The Claimant paid for a home inspection of the Hollins house, but the sale did not go through for reasons relating to the results of a title search.<sup>7</sup>

18. Subsequently, the Claimant asked the Respondent to return his deposit; the Respondent assured him that it was being held in the Respondent's escrow account and would be applied to the next property the Claimant bid on.

19. The Respondent did not receive written instructions from the parties to the contracts on the Brookfield and Hollins houses directing withdrawal or other disposition of the deposit money, file an interpleader and obtain a court order relating to the disposition of the money, and did not distribute the money to any of the parties. The sellers of the Brookfield and Hollins house have not made a demand for the deposit money.

20. On August 27, 2013, the Respondent submitted a written offer on behalf of the Claimant to purchase a house located at 3405 Dennlyn Road, Baltimore, Maryland (Dennlyn house).

21. The deposit reflected on the contract for the Dennlyn house was \$3,000.00.

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<sup>7</sup> The parties did not explain the obstacle. In his Complaint, the Claimant stated. "[T]he title company discovered that my name was still attached to a property I had formerly owned and that my name would not be removed until 9/21/13. I could not pursue purchasing another house until after October 21<sup>st</sup>." (REC Ex. 9.)



22. On August 25, 2013, the Claimant wrote a check to the Respondent in the amount of \$3,000.00 marked "3405 Dennlyn Road, Baltimore, MD 21215."<sup>8</sup> (REC Ex. 10.)

23. On August 28, 2013, the seller accepted the Claimant's offer on the Dennlyn house.

24. The Claimant paid for a home inspection of the Dennlyn house, but the settlement, which was scheduled to take place on December 5, 2013, did not take place because the Claimant did not or could not obtain an FHA 203k loan (which includes renovation costs), which was a condition of the contract and was due to be completed by November 15, 2013.

25. Sara Rubenstein, Real Estate Agent, Long and Foster, was the agent for the seller of the Dennlyn house. She called and emailed the Respondent numerous times as the deadline for obtaining a mortgage commitment approached. She received no response except for one missed call from the Respondent and an email on November 11, 2013, stating that one source for the loan "was not able to do it very well" and that he believed another lender could "do it pretty quickly." (REC Ex. 9.)

26. The sale of the Dennlyn house did not go to settlement.<sup>9</sup>

27. On or about November 15, 2014, Ms. Rubenstein sent a Unilateral Notice of Termination Under Contract of Sale and a Mutual Release of Deposit Agreement to the Respondent for the Claimant's signature directing that the deposit on the Dennlyn house be remitted to the seller.

28. On November 21, 2013, the Respondent emailed a Mutual Release of Obligations and Deposit to Ms. Rubenstein for her client's signature directing that the deposit on the Dennlyn house be remitted to the Claimant.

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<sup>8</sup> As discussed below, the Statement of Charges alleged that the Claimant did not provide the Respondent with additional funds for this deposit and "that the [Claimant] believed that the existing deposit would cover the deposit for this Contract."

<sup>9</sup> The REC alleged in its Statement of Charges that after the Dennlyn house did not go to settlement, the Claimant again requested the return of his deposit from the Respondent. As discussed below, however, I have found that except as it relates to broader issues of the Respondent's conduct toward Ms. Rubenstein and his failure to maintain and produce records, the REC did not allege violations relating to the \$3,000.00 deposit on the Dennlyn house.

29. On November 17, 2013, the Respondent submitted a written offer on behalf of the Claimant to purchase a house located at 3612 Frankford Avenue, Baltimore, Maryland (Frankford house).
30. The deposit reflected on the contract for the Frankford house was \$1,000.00.
31. The seller did not accept the Claimant's offer on the Frankford house.
32. On February 17, 2014, after attempting to contact the Respondent on several occasions without success, the Claimant sent an email to the Respondent requesting that he return the Claimant's \$4,000.00 deposit.
33. Paragraph 7(c) of the Residential Contracts of Sale signed by the Claimant relating to all four houses provided that that all deposits would be held in escrow by McTear Realtors.<sup>10</sup>
34. On or about July 25, 2014, Patrick Richardson, Auditor, REC, conducted an audit at the Respondent's office.<sup>11</sup>
35. At the time of the audit, the Respondent was unable to show Mr. Richardson any records for the McTear Realtors escrow account. He advised Mr. Richardson that (a) \$2,000.00 of the Claimant's \$4,000.00 check was meant as an earnest money deposit (EMD) for the Brookfield house and \$2,000.00 was a retainer fee; (b) he deposited \$2,000.00 of the Claimant's \$4,000.00 check into an escrow account and then transferred \$2,000.00 into his operating account; (c) he subsequently transferred the \$2,000.00 into his personal savings account when he closed McTear Realtors in May 2015; (d) he would send a copy of a statement showing the latter transaction to Mr. Richardson; and (e) he would take steps to release the deposit.

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<sup>10</sup> The page of the contract for the Brookfield house containing paragraph 7(c) was missing from the Claimant's copy; however, the remaining pages indicate the Claimant signed a Maryland Association of Realtors (MAR) Residential Contract of Sale form. Paragraph 7(c) on that form used with regard to subsequent offers on other properties states that all deposits will be held in escrow by McTear Realtors.

<sup>11</sup> At that time, McTear Realtors had ceased operations and the Respondent had become an Associate Broker for Key View Realty.

36. On July 26, 2014, the Respondent addressed a letter to the Claimant, the seller of the Dennyln house and Ms. Rubenstein requesting that the entire escrow deposit “in the amount of two thousand (\$2,000.00)”<sup>12</sup> be returned to the Claimant and stating that because he “did not acquire financing” the contract became null and void. (REC Ex. 9.) The Respondent attached a Mutual Release of Obligations Under Contract of Sale for the seller to sign, advised that he intended to distribute \$2,000.00 to the Respondent, and made certain disclosures regarding the parties’ right to protest.

37. On August 26, 2014, Mr. Richardson received a facsimile from the Respondent stating that he “sent an interpleader on July 26, 2014 and no one contested the interpleader, so [he] dispersed the entire \$2,000 to [the Claimant] yesterday.” (REC Ex. 9.)

38. Sometime in early September 2014, the Claimant received two \$1,000.00 money orders from the Respondent totaling \$2,000.00.

39. On September 4, 2014, Jennifer Grimes, Investigator, REC, emailed the Respondent to set up a meeting with him and directed him to have with him at that time “all documents relating to [the Complaint and Guaranty Fund Claim filed by the Claimant] (offers, contracts, copies of checks, emails, faxes, etc.).” (REC Ex. 9.)

40. On September 4, 2014, the Respondent emailed Ms. Grimes that he had already given the Respondent his money and would send her copies of the checks.

41. On September 8, 2014, Ms. Grimes met with the Respondent. The Respondent advised Ms. Grimes that he had an escrow and an operating account while at McTear Realtors, but did not have records for those accounts. The Respondent had no paper records relating to the Claimant; he was able to locate some electronic records.

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<sup>12</sup> As noted above, the contract on the Dennyln house called for a deposit of \$3,000.00.

42. The Respondent promised Ms. Grimes that he would send the release for the contract for the Brookfield house to her. (He later sent an email indicating that there were no releases for the Brookfield or Hollins houses).

43. The Respondent advised Ms. Grimes that (a) only \$2,000.00 of the Claimant's \$4,000.00 check was meant as a deposit and the balance was meant as a retainer fee as prescribed by the Addendum to the Buyer/Broker Agreement; and (b) he deposited the Claimant's check in to his company's escrow account and later transferred \$2,000.00 to his operating account. He first told Ms. Grimes that after he remitted \$2,000.00 to the Claimant, he transferred the remaining \$2,000.00 to a personal account and then said that he withdrew the cash and kept it "on the side." (REC Ex. 9.)

44. The Respondent was able to produce a document showing that he transferred \$2,000.00 from an escrow account to an operating account. He advised Ms. Grimes that he would send to her bank records showing that he transferred \$2,000.00 to his personal account; however, he did not do so.

45. Subsequently, the Respondent sent the REC a copy of the \$4,000.00 check from the Respondent, a May 30, 2013 Wells Fargo deposit slip showing a deposit to account no. 4000 in the amount of \$4,000.00, and a June 12, 2013 online confirmation of a transfer of \$2,000.00 from one business checking account (no. 4000) to another (no. 3692) with the description "retainer fee from [the Claimant]." (REC Ex. 9.) He also sent a Wells Fargo Bank Essential Business Checking statement showing a deposit into account no. 3962 on June 12, 2013 with the description "Online transfer from McTear Realtors . . . Business Checking Retainer Fee From [the Claimant]" and a Wells Fargo Bank Essential Business Checking statement showing a withdrawal from account no. 4000 on June 12, 2013 with the same description. (REC Ex. 9.)

46. The actual loss sustained by the Claimant was \$2,000.00.

## DISCUSSION

### Regulatory Charges

In this case, the REC alleged that while acting as the real estate broker and broker of record for McTeal Realtors and on behalf of the Claimant with regard to four properties, (the Brookfield, Hollins, Dennlyn, and Frankford houses), the Respondent violated numerous provisions of the Business Occupations and Professions Article of the Annotated Code of Maryland and related regulations based on the following conduct:

- The Respondent accepted a check from the Claimant in the amount of \$4,000.00 to be used as a down payment on the Brookfield house and did not explain to the Claimant that part of the check was going to be used to pay the Respondent a retainer fee.
- When the Claimant asked for the return of the \$4,000.00 payment after the contract on the Brookfield house and then a subsequent contract on the Hollins house did not go to settlement, the Respondent told him that the money would remain in escrow and be used for the next property on which the Claimant made an offer.
- The Claimant did not provide the Respondent with additional funds for the deposit on the Dennlyn house and believed that the existing deposit would cover the deposit for that contract.
- When the Claimant asked for the return his \$4,000.00 payment after the contract on the Dennyln house did not go to settlement, the Respondent told him that the money was in escrow and would be used for the next property the Claimant bid on.

- When the Claimant asked for the return of the \$4,000.00 payment after a subsequent bid on the Frankford house, the Respondent did not remit all of the deposit to him and remitted only \$2,000.00 to him several months later.
- The Respondent did not obtain signed releases relating to the deposits on the Brookfield and Hollins houses.
- The Respondent deposited the Claimant's \$4,000.00 check in an escrow account for his original company, McTear Realtors, and the subsequent company, Key View Realty, and then transferred \$2,000.00 from the escrow account into his operating account, then into his personal account and then withdrew that amount to retain as cash.
- The Respondent did not have records available to the REC documenting the escrow or operating accounts for McTear Realtors, in particular sufficient records regarding the Claimant's \$4,000.00 deposit money.
- Several other professionals involved with the aforementioned contracts had difficulty reaching the Respondent, receiving responses from him by telephone or email, and the Respondent was unresponsive to their requests for the relinquishment of EMDs.
- The Respondent did not act in an expedient manner in presenting his contracts and providing proper documentation to the mortgagor and was not familiar with the procedures for obtaining financing.
- The Respondent did not return the Claimant's telephone calls or emails requesting, among other things, a return of his money.

### Legal Background

The REC relied upon the following provisions of the Business Occupations and Professions Article of the Annotated Code of Maryland as the bases for the regulatory charges against the Respondent.

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

...

(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:

...

(22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person;

...

(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;

...

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

.....

**§ 17-502. Handling of trust money.**

.....

(b) *Deposits by brokers; restricted use.* -- (1) Except as otherwise provided in subsection (c) of this section, a real estate broker promptly, but not more than 7 business days after the acceptance of a contract of sale by both parties, shall deposit trust money<sup>13</sup> in an account that is maintained by the real estate broker:

(i) separately from the real estate broker's own accounts; and

(ii) solely for trust money.

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<sup>13</sup> Section 17-501(c) of the Business Occupations and Professions Article provides:

(c) Trust money. -- "Trust money" means a deposit, payment, or other money that a person entrusts to a real estate broker or, on behalf of a real estate broker, to an associate real estate broker or a real estate salesperson to hold for:

(1) the benefit of the owner or beneficial owner of the trust money; and

(2) a purpose that relates to a real estate transaction involving real estate in the State.

Md. Code Ann., Bus. Occ. & Prof. § 17-501(c) (2010).

(2) A real estate broker may not use trust money for any purpose other than that for which it is entrusted to the real estate broker.

(c) *Exception.* -- Subsection (b)(1) of this section does not apply if the real estate broker receives written directions to the contrary as authorized under § 17-505(d) of this subtitle.

....

### **§ 17-505. Maintenance and distribution of trust money.**

(a) *Maintenance of Account.* -- A real estate broker shall maintain trust money in an account authorized under this Part I of this subtitle until:

(1) the real estate transaction for which the trust money was entrusted is consummated or terminated;

(2) the real estate broker receives proper written instructions from the owner and beneficial owner<sup>14</sup> directing withdrawal or other disposition of the trust money;

(3) on an interpleader filed by the real estate broker, a court orders a different disposition; or

(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.

(b) *Distribution of trust money; notice; protest.* -- (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

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<sup>14</sup> Section 17-510(b) defines "beneficial owner" as "a person, other than the owner of the trust money, for whose benefit a real estate broker or, on behalf of a real estate broker, an associate real estate broker or a real estate salesperson is entrusted to hold trust money." Md. Code Ann., Bus. Occ. & Prof. § 17-501(b) (2010).



(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.

(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.

(c) *Accounting.* -- When the duty of the real estate broker to maintain trust money in an account terminates, the real estate broker promptly shall account for all trust money.

(d) *Disposition on direction or agreement.* -- A real estate broker may invest trust money:

(1) as the owner and beneficial owner of the trust money instruct in writing; or

(2) as the real estate broker, owner, and beneficial owner of the trust money agree in writing.

(e) *Limit of liability of broker.* -- A real estate broker may not be liable to an owner or beneficial owner of the trust money for:

(1) a good faith decision to distribute the trust money under subsection (a)(4) of this section; or

(2) a decision not to distribute the trust money under subsection (a)(4) of this section.

(f) *Agreement of distribution.* -- An agreement under which a real estate broker is entrusted with the trust money shall contain a statement that the real estate broker may distribute the trust money in accordance with subsection (b) of this section if the owner or beneficial owner of the trust money fails to complete the real estate transaction for which the trust money was entrusted.<sup>15</sup>

....

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<sup>15</sup> Although the REC cited this provision in the Statement of Charges, it asserted no facts on which it based any alleged violation. In any event, my review of the Brookfield and other contracts shows that they do contain a statement that the Respondent may distribute the trust money in accordance with subsection (b) of section 17-505 if the owner or beneficial owner of the trust money fails to complete the real estate transaction for which the money was entrusted.

**§ 17-507. Maintenance of records.**

(a) *Trust money.* -- Each real estate broker shall maintain all records of trust money in a secured area within the office of the broker.

(b) *Listings and other documents.* -- (1) Each licensee shall keep copies of:

(i) listings; and

(ii) any other document executed or obtained by the licensee in connection with a transaction involving the provision of real estate brokerage services, including any electronic signature contained on a document.

(2)(i) A licensee shall keep the records required by this section for 5 years, starting on the date of the closing of a real estate transaction, or, if the transaction is not closed, 5 years after the date of the listing.

...

(c) *Electronic record.* -- For any record required to be kept under subsections (a) and (b) of this section, a licensee may keep and store an electronic record of the information if:

(1) the stored record cannot be erased or edited;

(2) the stored record is made or preserved as part of, and in the regular course of, the licensee's business;

(3) the original record from which the stored record was copied was made or prepared by the licensee or the licensee's employees at or near the time of the activity described in the record;

(4) the custodian of the record is able to identify the stored record, the mode of its preparation, and the mode of storage; and

(5) the electronic storage system contains a reliable indexing system that provides:

(i) convenient access to the document or record;

(ii) appropriate quality control of the storage process; and

(iii) chronological arrangement of stored documents or records.

(d) *Inspection.* -- (1) On reasonable notice from the Commission, a licensee shall allow a representative of the Commission to enter the licensee's place of business during business hours to inspect a record required to be kept under subsection (b) of this section.

(2) The licensee shall provide, at the licensee's expense, a paper copy of any document or record requested by the Commission.

(3) A licensee shall display to the Commission on demand all records, books, and accounts of any money held in trust.

Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b)(22), (25), (31)-(33), 17-502(b), (c), 17-505, 17-507(a), (b)(1), (2)(i), (c), (d) (2010).

In addition, the REC based the regulatory charges on COMAR 09.11.01.07 and 09.11.01.21, which provide as follows:

**.07 Records of Transactions.**

Licensees shall maintain adequate records of all real estate transactions engaged in by them as licensed real estate brokers or salesmen. If a licensee has custody or possession of money belonging to others, in the absence of proper written instructions from the parties involved in the transaction to the contrary, these funds may not be intermingled with funds belonging to the licensee, but rather they shall be deposited and retained as required in a non-interest-bearing escrow account clearly designated as containing funds held for others. The records of transactions, including bank accounts or deposits referred to in these regulations, shall be available during usual business hours for inspection by the Commission, its field representatives, or other employees.

....

**.21 Disposition of Deposit Monies Held by Licensees.**

In any transaction in which a licensee has custody or possession of funds which belong to others, in the absence of a provision to the contrary, in the contract of sale, rental lease, option agreement, or other similar type of document, and a dispute arises as to the disposition of these funds by and between the parties to the transaction, the licensee shall:

A. Hold these funds until he or she has releases signed by all parties to the transaction authorizing disposition of the funds;

B. File a bill of interpleader in the proper court in the county or Baltimore City, as the case may be, thereby causing these funds to be deposited in the registry of this court; or

C. Hold these funds until such time as one of the parties to the transaction files suit and the court in which this suit is filed orders the disbursement of these funds, whichever event under the purview of B and C of this regulation shall first occur.

REC's Case

*Claimant*

The Claimant testified that he retained the Respondent as his realtor/broker to assist him with purchasing a house. They entered into an Exclusive Buyer/Tenant Brokerage Agreement on May 25, 2013. The Claimant and the Respondent also entered into an Addendum to the Exclusive Buyer Brokerage Agreement Retainer Fee. The copy submitted into evidence by the REC shows that the Addendum provided that a \$2,000.00 fee was due to the Respondent "at the time of removing the home inspection contingency from the contract to partially reimburse

the [Respondent] for his expenses to date, which will be given back to the [Claimant] at the time of settlement.” (REC Ex. 9.) The Addendum further provided that “” [i]f for any reason whatsoever the [Claimant] does not go through with the settlement this fee becomes the permanent property of [the Respondent].” (REC Ex. 9.)

The Claimant testified that he understood that pursuant to that Addendum, he was obligated to pay a \$2,000.00 fee to the Respondent at settlement if settlement occurred. Although he could not locate his copy of the page(s) of the contract of sale referring to the amount of the deposit, the Claimant testified that on May 5, 2013,<sup>16</sup> he gave the Respondent a check made out to the Respondent in the amount of \$4,000.00 to be used as a downpayment on the Brookfield house. The REC submitted into evidence a contract showing a deposit in the amount of \$2,000.00 to be held in escrow by the Respondent, and a \$4,000.00 check from the Claimant to the Respondent marked “Downpayment for 2520 ‘Brookville’ Ave.” (REC Ex. 9.) It also submitted into evidence an Estimated HUD-1 Settlement Sheet, initialed by the Claimant, reflecting a deposit in the amount of \$2,000.00 and a retainer fee of \$2,000.00.

The Claimant testified that the sale of the Brookfield house did not go through; he was told sometime after a home inspection had been conducted that “a foreclosure bank owned [the property].” He further testified that when he told the Respondent that he wanted his money back, the Respondent told him that he would put the money in escrow to be used for another property, and that he agreed.

The Claimant testified that approximately a month later (June 22, 2013) he made a written offer on the Hollins house and that the downpayment he had given the Respondent for the Brookfield house was to be used as a downpayment on that property. The REC submitted

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<sup>16</sup> The Claimant’s Complaint indicates that he issued the check on May 25, 2013.

into evidence a contract showing a deposit of \$3,000.00 and that the Respondent was to hold that amount in escrow. The Claimant vaguely testified that the sale fell through because “it turned out [his] name was still on the deed for another property.” According to the Claimant, when that deal fell through, he again asked the Respondent for his money back, the Respondent told him that he would put the money in escrow to be used for another property, and he agreed.

The Claimant testified that he made a third offer on a property (the Dennlyn house) on August 27, 2013 and the REC submitted into evidence a contract showing a deposit in the amount of \$3,000.00 and that the deposit was to be held in escrow by the Respondent. The Claimant testified that he was not sure if he gave the Respondent more money for that deposit but the REC submitted into evidence a check dated August 25, 2013 from the Claimant to the Respondent in the amount of \$3,000.00 marked, “3405 Dennlyn Rd. Baltimore MD 21215.” (REC Ex. 10.) The Claimant further testified that he was required under the contract to obtain an FHA 203k loan, but the Respondent did not know much about pursuing such a loan and the process dragged out. As a result, the seller became impatient after granting extensions of time and ultimately the sale fell out. The Claimant testified that the Respondent told him that he could not get his \$3,000.00 deposit back under those circumstances.

The Claimant testified that he submitted a written offer on a fourth property (the Frankford house) on November 17, 2013. The REC submitted into evidence a contract showing a deposit in the amount of \$1,000.00 and that the deposit was to be held in escrow by the Respondent. The Claimant testified that he did not give the Respondent an additional check for the deposit and that the seller did not accept the Claimant’s offer.

According to the Claimant, it was at this point that he realized his business relationship with the Respondent was over. He tried to get in touch with the Respondent for two to three months, including sending an email on February 17, 2014, asking for the return of the \$4,000.00

he paid to the Respondent as “good faith money for any house/home I might be interested in.” (REC Ex. 9.) That email also expressed dissatisfaction with the Respondent’s conduct, including failing “to supply vital information to mortgage representatives when needed or furnish [the Claimant] contracts as expediently as [the Respondent] should have . . . . [and] showing up late for appointments. (REC Ex. 9.) According to the Claimant, the Respondent did not respond and did not return his deposit money.

The Claimant testified that he did not receive any money back from the Respondent until after he filed a Complaint with the REC on February 28, 2014. In early September 2014, he received two money orders from the Respondent (each in the amount of \$1,000.00; total: \$2,000.00).

It was difficult to assess the Claimant’s credibility because he testified by telephone and I was unable to observe his demeanor. Nonetheless, as indicated below, the Respondent did not present sufficient facts to dispute the Claimant’s testimony.

*Sara Rubenstein*

Sara Rubenstein, Real Estate Agent, Long and Foster, testified that she was the seller’s agent on the Dennlyn house. She testified that on August 25, 2013, the Claimant provided an EMD payable to the Respondent. According to Ms. Rubenstein, the contract contained an Addendum relating to obtaining a loan to restore the property and that as the deadline approached, she contacted the Respondent who asked for and was granted an extension. As the transaction progressed, and the November 15, 2014 deadline loomed, the Respondent “disappeared [and] never returned [Ms. Rubenstein’s] calls” except for one missed call. The REC submitted into evidence numerous emails from Ms. Rubenstein to the Respondent beginning November 6, 2013 through November 10, 2013 attempting to find out the status of the Claimant’s loan application and expressing dismay at the Respondent’s continued lack of

response. The Respondent sent only one email on November 11, 2013 indicating that he believed a different lender could provide the loan.

Ms. Rubenstein testified that the sale on the Dennlyn house never went to settlement and that on or about November 15, 2013, she sent a Unilateral Notice of Termination Under Contract of Sale to the Respondent for the Claimant's signature. That document indicates that the contract was terminated due to the Claimant's default and contained a Mutual Release of Deposit Agreement, by which the \$3,000.00 would be distributed to the seller.

According to Ms. Rubenstein, the Respondent never returned the signed document to Ms. Rubenstein or the seller and never returned the \$3,000.00 deposit to the seller.

Ms. Rubenstein presented as an experienced competent professional who was appalled at the Respondent's conduct as described above.

*Patrick Richardson*

Patrick Richardson, Auditor, REC, testified that he interviewed the Respondent on July 25, 2014 at the Respondent's office. At that time, he asked the Respondent for his escrow records relating to McTear Realty; however, the Respondent was unable to produce any of them. When he asked the Respondent about the \$4,000.00 check the Claimant had given him, the Respondent said he did not have access to those records at the time, \$2,000.00 of that amount was for a retainer fee, \$2,000.00 was for a deposit, and he put the \$2,000.00 deposit money in his personal account when he closed McTear Realtors.

Subsequently, the Respondent sent Mr. Richardson a copy of the \$4,000.00 check from the Respondent, a May 30, 2013 Wells Fargo deposit slip showing a deposit to account no. 4000 in the amount of \$4,000.00, and a June 12, 2013 online confirmation of a transfer of \$2,000.00 from one business checking account (no. 4000) to another (no. 3692) with the description "retainer fee from [the Claimant]." (REC Ex. 9.)

Mr. Richardson testified that on August 26, 2014, the Respondent sent a facsimile to him stating that he had filed an interpleader on July 26, 2014, and because no one contested the interpleader, he had dispersed \$2,000.00 to the Claimant on August 25, 2014.

Mr. Richardson's testimony was matter-of-fact and business-like. He presented as competent and professional.

*Jennifer Grimes*

Jennifer Grimes, Investigator, REC, testified that she interviewed the Claimant, the Respondent and Ms. Rubenstein. Her report and testimony regarding her interview of the Claimant substantially corroborated his testimony. In addition, the Claimant advised Ms. Grimes that he never received a letter from the Respondent dated July 26, 2014 stating his intention to disburse the deposit.

Ms. Grimes' report and testimony regarding her interview of Ms. Rubenstein also substantially corroborated Ms. Rubenstein's testimony. In addition, the seller of the Dennlyn house confirmed to Ms. Grimes that she wanted to keep the deposit on the house.

Ms. Grimes testified and indicated in her report that prior to interviewing the Respondent at his home on September 8, 2014, she had communicated with him and made clear that she needed all of the records from McTear Realtors, which had closed, relating to the transactions involving the Claimant. When she asked at the interview for records relating to the Claimant's \$4,000.00, the Respondent told Ms. Grimes that he did have an escrow account and an operating account when he was the broker for McTear Realty, but he did not have the records for those accounts and could not access them. He stated that he would have to get the escrow account records from the bank. With regard to each of the transactions involving the Claimant, the Respondent looked on his computer for five to ten minutes for documents but came up with nothing.



The Respondent told Ms. Grimes only \$2,000.00 of the Claimant's check was meant as a deposit and that the rest was meant for the Respondent's retainer fee. He told her that he deposited the \$4,000.00 in an escrow account, then moved \$2,000.00 to an operating account and then to a personal account when he closed McTear Realtors.

The Respondent told Ms. Grimes that he requested an additional \$1,000.00 from the Claimant in order to meet the \$3,000.00 deposit amount for the Hollins house; however, he did not have a copy of a check in that amount from the Claimant and was unable to produce any other proof of that additional payment.

Ms. Grimes testified that the Respondent indicated that he used \$2,000.00 from the Brookfield deposit plus the additional \$1,000.00 he obtained from the Claimant for the Hollins house to make the \$3,000.00 deposit on the Dennlyn house.

When Ms. Grimes asked the Respondent what he did about the \$3,000.00 deposit on the Dennlyn house after he received Ms. Rubenstein's request for a Release in November 2013, he stated that he filed an interpleader, but he could not say where he filed it or what he did to initiate such a proceeding. He also could present no proof that he sent his July 2014 letter to the Claimant, seller and Ms. Rubenstein by certified mail. (The seller later advised her that she never received the letter.)

When Ms. Grimes asked the Respondent what he did with the deposit during the time between November 2013 and August 2014, when he refunded \$2,000.00 to the Claimant, he stated that he had transferred it to a personal account when he closed McTear Realtors, then told her that he withdrew the cash and "kept it 'on the side.'" (REC Ex. 9.)

Ms. Grimes asked that the Respondent send to her bank records showing he transferred the \$2,000.00 in a personal account, but he never did. He sent her a Wells Fargo Bank Essential Business Checking statement showing a deposit into account no. 3962 on June 12, 2013 with the

description “Online transfer from McTear Realtors. . . Business Checking Retainer Fee From [the Claimant].” (REC Ex. 9.) He also sent a Wells Fargo Bank Essential Business Checking statement showing a withdrawal from account no. 4000 on June 12, 2013 with the same description.

Ms. Grimes presented as competent and professional. She seemed perplexed, however, about the evidence presented at the hearing with regard to the Claimant’s \$3,000.00 check relating to the Dennlyn house.

### Respondent’s Case

The Respondent presented as frazzled and scattered. He presented no real defense to the REC’s and the Claimant’s allegations. He testified that he has been diagnosed with a severe case of Attention Deficit Hyperactivity Disorder (ADHD) and that he has had this condition all his life but was not diagnosed until April 20, 2015. Thus, according to the Respondent, at the time of his dealings with the Claimant, Ms. Rubenstein, and the other individuals involved in the Claimant’s bids on the various properties, he had not received medication and therapy or assistance with the relevant documents. He appeared to believe that he was relieved from his statutory and regulatory obligations based on the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328.

### Analysis

#### *Using Trust Money for Any Purpose Other Than That for Which It Was Entrusted;*

Initially, I find that a preponderance of the evidence supports the Claimant’s assertion that he paid \$4,000.00 to the Respondent the first time he submitted a written offer on a property with the Respondent acting as his broker (the Brookfield house) to be used solely as a deposit and not to pay a retainer fee to the Respondent. The evidence presented by the REC as to the use the money was to be put was somewhat confusing. The May 25, 2013 Addendum to the

Exclusive Buyer Brokerage Agreement Retainer Fee indicates that the Claimant was to pay the Respondent a \$2,000.00 retainer fee. Furthermore, it is puzzling why the Claimant believed a \$4,000.00 check was necessary for the \$2,000.00 downpayment on the Brookfield house. I note also that an Estimated HUD-1 Settlement Sheet submitted into evidence by the REC reflects a deposit in the amount of \$2,000.00 and a retainer fee of \$2,000.00.

Regardless, the check is clearly marked, "Downpayment for 2520 Brookfield" and the Addendum provides that the retainer fee was not due until "the time of removing the home inspection contingency from the contract to partially reimburse the Broker for his expenses to date." (REC Ex. 9.) Furthermore, the Claimant's undisputed testimony established that the Respondent did not explain to the Claimant that part of the check was going to be used to pay the Respondent a retainer fee.

With regard to the use to which the money was to be put after the sale of the Brookfield house fell through, the Claimant indicated in his Complaint that the initial \$4,000.00 check was "to be used as a down payment on any property [the Claimant] contracted to purchase." (REC Ex. 9.) He also indicated in his Complaint that after the sales of the Brookfield and Hollins houses fell through, he voiced no objection when the Respondent stated that the deposit money was in escrow and would be used for future offers. The fact that the Claimant was led to believe that the full amount of his \$4,000.00 check was to be used for downpayment purposes is further supported by the evidence that when the Claimant bid on the second property (the Hollins house) for which a \$3,000.00 deposit was called for, the Respondent did not advise him that he had only \$2,000.00 available after deduction of the retainer fee, and did not request and obtain from the Claimant an additional \$1,000.00.

Thus, I find that a preponderance of the evidence supports the Claimant's assertion that he believed that he would be paying the retainer fee later and separately. By his own admission, the Respondent nevertheless applied \$2,000.00 of the deposit money to an alleged retainer fee.

The money the Claimant gave to the Respondent to be used for a deposit(s) clearly fell within the definition of "trust money."<sup>17</sup> Accordingly, I find that the Respondent violated sections 17-322(b)(31) and 17-502(b)(2) by using trust money for a purpose other than that for which it was entrusted to him.

A preponderance of the evidence established, however, that the Claimant did not believe that his initial \$4,000.00 deposit would be applied to the Dennlyn house. Rather, he wrote a separate check for \$3,000.00 for that deposit. Moreover, the Claimant's Complaint and the REC's Statement of Charges do not allege that the Claimant used the additional \$3,000.00 deposit on the Dennlyn house for a purpose other than for which it was intended. Indeed, the Statement of Charges asserts that "the [Claimant] did not provide the Respondent with additional funds." Thus, I cannot find that the Respondent violated the aforementioned sections with regard to the \$3,000.00 deposit on the Denlynn house.

*Failure to Account for or to Remit Promptly any Money that Comes into Possession of Licensee but Belongs to another Person*

I find that the Licensee violated section 17-322(b)(22) as well as sections 17-322(b)(31) and 17-505(c) when he failed to account for the Claimant's deposit and promptly remit the Claimant's full \$4,000.00 deposit.

Confusion regarding the intended use of the \$4,000.00 payment may have been avoided if the Respondent had properly accounted for the money, making clear for what reason it was being held and how. Simply telling the Claimant that the money was in the Respondent's escrow

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<sup>17</sup> See *supra* note 13.

account and would be used for the next property fell woefully short of an accounting of the status of the money required under section 17-322(b)(22) and was factually inaccurate after the Respondent transferred \$2,000.00 to another account. Furthermore, the Respondent failed to promptly account for all trust money when his duty as a broker to maintain that money in an account terminated as required under sections 17-322(b)(31) and 17-505(c).

The Claimant clearly requested the return of the full amount of his deposit when the settlement on the last property on which he bid (the Frankford house) did not take place, and the Respondent failed to remit the full deposit at that time. He subsequently remitted only \$2,000.00 to the Respondent in early September 2014.

Again, the Claimant's Complaint and the REC's Statement of Charges do not allege that the Claimant wrote a check for an additional \$3,000.00 deposit on the Dennlyn house, which the Respondent failed to account for or remit promptly. Accordingly, I cannot find that the Respondent violated the aforementioned sections of the Business Occupations and Professions Article with regard to that \$3,000.00 deposit.

*Handling of Trust Money;*

With regard to the initial deposit on the Brookfield house, I find that the REC failed to establish by a preponderance of the evidence that the Respondent violated sections 17-322(b)(31), (33) and 17-502(b)(1) and COMAR 09.11.01.07 by failing to promptly and in not more than seven business days after the acceptance of a contract of sale by both parties, deposit the money in an account maintained by him separately from his own accounts and solely for trust money. The contract submitted into evidence by the REC shows that the seller accepted the Claimant's offer on May 28, 2013. A deposit slip shows that that the Respondent deposited the Claimant's check in the amount of \$4,000.00 in an escrow account on May 30, 2013.

The Respondent's obligation to place that deposit money in a separate account continued, however, with its application to the subsequent contract on the Hollins house (accepted by the seller on June 27, 2013). The evidence shows that the Respondent advised the Claimant that the money would be used towards a deposit on subsequent offers, yet a Wells Fargo bank statement submitted into evidence shows that on June 12, 2013, the Respondent transferred \$2,000.00 to a company operating account (leaving only \$2,000.00 in the escrow account.)<sup>18</sup> Thus, he did not promptly and in not more than seven business days after the acceptance of a contract of sale by both parties, deposit the full \$3,000.00 deposit amount on the Hollins house in an account maintained by him separately from his own accounts and solely for trust money in violation of sections 17-322(b)(31), (33) and 17-502(b)(1) and COMAR 09.11.01.07.

For the same reasons discussed above, I find that the REC did not allege or prove violations of the aforementioned statutory and regulatory provisions with regard to the \$3,000.00 deposit on the Dennlyn house. Furthermore, the Claimant indicated in his Complaint that "the seller [of the Frankford house] accepted another contract from another buyer." (REC Ex. 9.) Thus, I cannot find that the aforementioned statutory and regulatory provisions requiring the deposit of trust money within a certain period of time after acceptance of the contract are inapplicable with regard to the deposit on the Frankford house.

*Maintenance and Disposition of Trust Money; Intermingling*

I find that a preponderance of the evidence established that the Respondent violated sections 17-322(b)(31), (33) and 17-505(a) and COMAR 09.11.01.07 with regard to the Claimant's \$4,000.00 deposit.

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<sup>18</sup> The Respondent indicated in the check description that this represented a retainer fee from the Claimant; however, as discussed above, I have found that was not the case.

The Wells Fargo bank statement submitted into evidence shows that approximately one and a half months after the initial \$4,000.00 deposit in the escrow account, the Respondent transferred \$2,000.00 to a company operating account.<sup>19</sup> In addition, the Respondent told the REC auditor that he subsequently put the money in a personal savings account in May 2014. He told the same thing to the REC investigator but also said he kept the money as cash on the side.

Thus, the Respondent failed to maintain the trust money in an account maintained by him separately from his own accounts and solely for the trust money, and intermingled the trust money with his own funds. The evidence further established that the Respondent did not distribute the trust money under any of the conditions in section 17-505(a)(1)-(4).<sup>20</sup> Instead, he distributed only \$2,000.00 of the trust money held by him to the Claimant, and kept the remainder for himself.

I find, however, that the REC failed to prove that the Claimant violated COMAR 09.11.01.21 as that regulation by its language applied only where “a dispute arises as to the disposition of [funds which belong to others] by and between the parties to the transaction.” COMAR 09.11.01.21. The REC presented no evidence of such a dispute with regard to the Brookfield, Hollins, and Frankford houses. Ms. Grimes testified that the seller’s agents for the Brookfield and Hollins houses indicated to her that their clients did not request any part of the deposit be remitted to them. According to the Claimant, the seller of the Frankford house never accepted his offer.

The evidence does indicate that there was a dispute between the parties with regard to distribution of the Claimant’s \$3,000.00 deposit on the Denlynn house. Indeed, based on the

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<sup>19</sup> The Respondent indicated in the check description that this represented a retainer fee from the Claimant; however, as discussed above, I have found that was not the case.

<sup>20</sup> The evidence shows that the Respondent prepared only a belated letter addressed to the Claimant, the seller of the Dennlynn house and Ms. Rubenstein (all of whom denied receiving it) relating to the \$3,000.00 deposit on that property.

Claimant's and Ms. Rubenstein's testimony, it appears that the Respondent did not obtain proper written instructions from the owner and beneficial owner, file an interpleader, or distribute the money after providing certain notice to the owner and beneficial owner. Nonetheless, as discussed above, the REC failed to allege or prove violations with regard to that deposit.

*Investing Trust Money without Instruction or Agreement*

A preponderance of the evidence clearly established that the Respondent invested<sup>21</sup> at least a portion of the Claimant's initial \$4,000.00 deposit without instructions or an agreement **in writing** from the owner. Although the Claimant orally approved the use of the initial deposit for deposits on future properties, he did not give instructions or agree in writing that the Respondent could do so.<sup>22</sup> Accordingly, I find that the REC proved that the Respondent violated sections 17-322(31) and 17-505(d) based on that alleged conduct.

*Maintenance and Inspection of Records*

Based on Mr. Richardson's and Ms. Grimes' uncontradicted testimony, it is clear that the Respondent violated sections 17-322(b)(31), (33) and 17-507(a), (b), and COMAR 09.11.01.07. Their uncontradicted testimony established that the Respondent was unable to produce all records of trust money which he was required to keep in a secured area within his office, as well as listings and any other documents executed or obtained by him in connection with the aforementioned transactions.

I further find based on Mr. Richardson's and Ms. Grimes' testimony that the Respondent violated 17-322(b)(31), (33) and 17-507(d)(2), (3) and COMAR 09.11.01.07 by failing to

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<sup>21</sup> "Invest" is defined as "[t]o commit (money or capital) in order to gain profit or interest, as by purchasing property, securities, or bonds." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College edition 1982) 689.

<sup>22</sup> Again, there was no such allegation with regard to the \$3,000.00 deposit on the Dennlyn house.



provide, at the Respondent's expense, a paper copy of any document or record requested by the REC and by failing to display to the REC on demand all records, books, and accounts of any money held in trust.<sup>23</sup>

*Engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings*

I find that by engaging in the conduct discussed above, on which I have based findings of violations of other sections of the statute, the Claimant engaged in conduct that demonstrated bad faith, incompetency, untrustworthiness and/or improper dealings, in violation of section 17-322(b)(25) of the Business Occupations and Professions Article.

In addition, Ms. Rubinstein's testimony established that she had difficulty reaching the Respondent and that he did not promptly respond to her telephone calls and emails relating to the looming deadline for the mortgage commitment on the Dennlyn property. (I find that he did respond within a reasonable time to her request for the relinquishment of the deposit money by sending a counter-release). Furthermore, the evidence established that the Respondent did not return the Claimant's telephone calls or emails requesting, among other things, a return of his money. On the other hand, the evidence with regard to the Respondent's dealings with the seller's agents for the Brookfield, Hollins and Frankford houses was sketchy and vague.

I find that the REC failed to present sufficient details to prove that the Respondent violated the aforementioned section based on his alleged failure to act in an expedient manner in presenting his contracts and providing proper documentation to the mortgagor, and his lack of familiarity with regard to the procedures for obtaining financing. It presented only the Claimant's vague testimony to that effect.

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<sup>23</sup> The REC presented no evidence that the Respondent refused, on reasonable notice from the REC, to allow a representative of the REC to enter the Respondent's place of business during business hours to inspect records in violation of section 17-507(d)(1).

ADA

I fail to see the relevance of the ADA to this proceeding, as alleged by the Respondent. Regardless, the Respondent presented no documentation of his alleged diagnosis of ADHD or medical evidence that it interfered with his ability to comply with Maryland statutes and regulations under consideration in this case. Even if he had, he presented no authority to support his apparent contention that his condition would excuse him from such compliance.

Sanction and Penalties

As discussed above, pursuant to section 17-322(b) of the Business Occupations and Professions Article, the REC may reprimand the Respondent, or suspend or revoke his license for a violation of that section. The REC may also impose a penalty for such violations under section 17-322(c), which provides in pertinent part:

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

...

(c) Penalty.— (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.

(2) To determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

(3) The Commission shall pay any penalty collected under this subsection into the General Fund of the State.

...

Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (2010).

In this case, the REC requested in closing argument that I recommend the revocation of the Respondent's license. For the following reasons, I find that revocation is appropriate.

The violations were very serious and call for severe sanctions. The Claimant entrusted the Respondent with several thousand dollars. The Respondent did not maintain those funds as required and then kept at least \$2,000.00 of the Claimant's \$4,000.00 deposit money for himself. He was unresponsive to his client and to another professional with whom he dealt. He totally ignored all requirements with regard to the maintenance and disposition of trust money meant to protect the public. The Respondent's lack of good faith was evident in his lack of responsiveness, his failure to remit all of the money even as of the date of the hearing, and his failure to establish the status of the account(s) into which he allegedly deposited the money. The aforementioned behavior is unquestionably damaging to the dignity and integrity of the real estate profession.

Finally, the REC presented evidence that the Respondent has a history of at least one prior violation, *i.e.*, a Proposed Order dated February 12, 2015 resulting from a claim against the Fund. That Proposed Order indicates that the claimants in that case were entitled to an award from the Fund after the Respondent failed to release a deposit to them and failed to respond to the REC when requested by the REC's investigator. The REC also submitted into evidence and Affidavit from the Executive Director of the REC stating that the Proposed Order has become final.

### **Guaranty Fund Claim**

#### **Misconduct**

Claims for reimbursement from the Fund are governed by section 17-404 and COMAR 09.11.03.04.

Section 17-404 provides on pertinent part:

**§ 17-404. Recovery of compensation from Guaranty Fund**

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

(2) A claim shall:

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

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) *Limitation on recovery.* -- The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (Supp. 2014).

COMAR 09.11.03.04 provides:

**.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 licensed 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.

At a hearing concerning a claim against the Fund, the burden of proof shall be on the claimant to establish the validity of the claim. Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2010).

For the following reasons, I find that the Claimant established by a preponderance of the evidence that he is entitled to reimbursement from the Fund.

The first two requirements of section 17-404 have been met in that Respondent was a licensed real estate broker and the transaction involved real estate located in Maryland.

The third requirement (money obtained from a person by theft or embezzlement; fraud or misrepresentation) has also been met. Specifically, as discussed above, the Respondent obtained a \$4,000.00 deposit from the Claimant, led him to believe that it would be used for deposits on properties on which the Claimant bid, and then kept \$2,000.00 of that deposit for a retainer fee, without advising the Claimant that any portion of his deposit would be used for that purpose. The Claimant testified without contradiction that when he attempted to contact the Respondent on numerous occasions to regain the deposit money, the Respondent was unresponsive.

The Respondent engaged in misrepresentation by leading the Claimant to believe that the entire amount of trust money would be applied to deposit(s), when clearly it was his intention to apply \$2,000.00 or the amount obtained to an alleged retainer fee. He did not even return that the balance to the Claimant until after he filed a Complaint with the REC. As discussed above, the Respondent offered no valid defense to the Claimant's allegations. He has engaged and continues to engage in fraud and deceit by failing to account for the money in any credible manner.

#### Actual Loss

The evidence supports a conclusion that the Claimant suffered an actual monetary loss as a result of the Respondent's conduct, namely, the loss of \$2,000.00 of his \$4,000.00 deposit. In reaching that conclusion, I note that Ms. Grimes testified that the seller's agents for the Brookfield and Hollins houses indicated to her that their clients did not request any part of the

deposit be remitted to them. In addition, the Claimant indicated in his Complaint that the seller of the Frankford house never accepted his offer.<sup>24</sup>

Therefore, I recommend the Claimant be awarded the amount of \$2,000.00 from the Fund to compensate him for actual losses sustained as a result of the actions of the Respondent.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, as follows:

1. The Respondent violated section 17-322(b)(22), (31), and 17-505(c) of the Business Occupations and Professions Article by failing to account for or to remit promptly money that came into his possession belonging to another person;
2. The Respondent violated sections 17-322(b)(31), ( 33) and 17-502(b)(1) of the Business Occupations and Professions Article and COMAR 09.11.01.07 by failing to promptly and in not more than seven business days after the acceptance of a contract of sale by both parties, deposit trust money in an account maintained by him separately from his own accounts and solely for trust money;
3. The Respondent violated sections 17-322(b)(31) and 17-502(b)(2) of the Business Occupations and Professions Article by using trust money for a purpose other than that for which it was entrusted to him;
4. The Respondent violated sections 17-322(b)(31), (33) and 17-505(a) of the Business Occupations and Professions Article, and COMAR 09.11.01.07 by failing to maintain trust money in an account authorized under Part 1 of subtitle 5 of Title 17 until (a) the real estate transaction for which the trust money was entrusted was consummated or terminated; (b) the

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<sup>24</sup> Again, even though the REC exhibits include an additional check for \$3,000.00 apparently relating to the Dennlyn house, the Claimant did not establish that the Respondent failed to return that amount to the proper party.

Respondent received proper written instructions from the owner and beneficial owner directing withdrawal or other disposition of the trust money; (c) a court ordered a different disposition on an interpleader filed by the Respondent; (d) the owner or beneficial owner of the trust money failed to complete the real estate transaction for which the trust money was entrusted and the Respondent, in his sole discretion, decided to distribute the trust money in accordance with subsection (b) of section 17.

The REC failed to prove by a preponderance of the evidence that the Respondent violated COMAR 09.11.01.21 with regard to the disposition of deposit monies over which a dispute(s) arose as to the disposition of funds between the parties to the transaction(s);

5. The Respondent violated sections 17-322(b)(31) and section 17-505(d) of the Business Occupations and Professions Article by investing trust money without instructions or an agreement in writing from the owner and beneficial owner;

6. The Respondent violated sections 17-322(b)(31), (33) and 17-507(a), (b) of the Business Occupations and Professions Article and COMAR 09.11.01.07 by failing to (a) maintain all records of trust money in a secured area within his office; (b) keep copies of listings and any other document executed or obtained by the Respondent in connection with a transaction involving the provision of real estate brokerage services; and (c) keep records required by section 17-507 for five years;

7. The Respondent violated sections 17-322(b)(31), (33) and 17-507(d) of the Business Occupations and Professions Article and COMAR 09.11.01.07 by failing to provide, at the Respondent's expense, a paper copy of any document or record requested by the REC; and to display to the REC on demand all records, books, and accounts of any money held in trust;

8. The Respondent violated section 17-322(b)(25) of the Business Occupations and Professions Article by engaging in conduct that demonstrated bad faith, incompetency, or untrustworthiness or that constituted dishonest, fraudulent, or improper dealings;

9. The appropriate sanction and/or penalty for the aforementioned violations is the revocation of the Respondent's license;

10. The Claimant sustained an actual loss compensable by the Fund;

11. The appropriate award from the Fund is \$2,000.00.

### **RECOMMENDED ORDER**

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

**ORDER** that the Respondent violated sections 17-322(b)(22), (25), (31), (33), 17-502(b)(1), (2) and 17-505(a), (c), (d), 17-507(a), (b), (d) of the Business Occupations and Professions Article and further,

**ORDER** that the Respondent violated COMAR 09.11.01.07; and further,

**ORDER** that the Respondent's license be revoked; and further,

**ORDER** that the Claimant be awarded the sum of \$2,000.00 from the Maryland Real Estate Commission Guaranty Fund to compensate him for actual losses sustained as a result of the actions of the Respondent; and further,

**ORDER** that the Respondent be ineligible for a broker's or agent's real estate license until he reimburses the Maryland Real Estate Commission Guaranty Fund for all monies disbursed under this order with annual interest as set by law; and further,



**ORDER** that the records and publications of the Maryland Real Estate Commission reflect its final decision.

August 26, 2015  
Date Decision Mailed

**SIGNATURE ON FILE**

Eileen C. Sweeney  
Administrative Law Judge

ECS/emh  
#157373