

BEFORE THE MARYLAND REAL ESTATE COMMISSION

**IN THE MATTER OF THE CLAIM OF *
WALLACE J. GARNER *
AGAINST THE MARYLAND REAL * CASE NO. 2007-RE-501
ESTATE COMMISSION GUARANTY *
FUND FOR THE ALLEGED * OAH NO. DLR-REC-22-08-41593
MISCONDUCT OF REBECCA L. *
HAMMER, LICENSED REAL ESTATE *
SALESPERSON ***

* * * * *

OPINION AND FINAL ORDER

This matter came before the Commission for argument on Exceptions filed by the Claimant, Wallace J. Garner, to the Proposed Order of November 18, 2009. On August 28, 2009, Administrative Law Judge Marc H. Nachman (“ALJ”) filed a Recommended Decision in which he recommended that the Claimant be awarded the sum of \$25,000.00 from the Maryland Real Estate Guaranty Fund (“Fund”) and that the Respondent be ineligible for any real estate broker’s or salesperson’s license until such time as the Respondent reimbursed the Fund for all monies disbursed pursuant to the Recommended Decision.

On November 18, 2009, the Maryland Real Estate Commission (“Commission”) issued a Proposed Order that affirmed the ALJ’s Findings of Fact but amended the ALJ’s Conclusions of Law. The amended Conclusions of Law concluded that the Claimant had established an “actual loss” of \$350.00 not \$25,000.00 as had been concluded by the

ALJ. Based on that Conclusion of Law, the Commission proposed an award of \$350.00 from the Maryland Real Estate Guaranty Fund. The Claimant filed Exceptions, dated December 1, 2009, to the Proposed Order.

A hearing was held by a panel of the Commission, consisting of Commissioners Nicholas D'Ambrosia, Marla S. Johnson and Colette P. Youngblood on February 17, 2010. Mr. Garner was represented by Julie Schejbal, Esquire. Peter Martin, Assistant Attorney General, represented the Commission. The Respondent, Rebecca L. Hammer, did not appear for the hearing. On November 30, 2009, Ms. Hammer acknowledged, in writing, that she had received a copy of the Proposed Order in this case as well as a cover letter informing her of her rights regarding the Proposed Order. On December 11, 2009, a copy of a letter notifying the parties of the Exceptions hearing date of February 17, 2010 was mailed to the Respondent. In addition, a notice of the hearing was mailed by regular and certified mail to the Respondent on January 26, 2010. The certified mail copy of the notice was returned to the Commission; however, the regular mail copy of the notice was not returned.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, five exhibits, including the exhibits which were admitted before the ALJ, were entered into evidence. A transcript of the ALJ's hearing was also submitted and made part of the record.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ.

CONCLUSIONS OF LAW

The Commission amends the Conclusions of Law in the ALJ's Recommended Decision as follows:

The Claimant has established an "actual loss" valued at \$350.00 based on the theft/false pretenses and fraud or misrepresentation on the part of the Respondent, Rebecca L. Hammer, a licensed real estate salesperson.

DISCUSSION

The Claimant owned a house at 3409 King Drive, Dunkirk, Maryland in 2006. FF2¹ The Claimant and his wife decided to sell the house in order to move to Utah and listed the property for sale with the Respondent, Rebecca L. Hammer, a licensed real estate salesperson, in August, 2006. FF2,3. The Respondent offered to purchase the property from the Claimant for \$415,900.00 on or about September 25, 2006 but kept the property on the market for sale. FF4. On or about October 4, 2006, the Claimant and Respondent executed a Residential Contract of Sale for the property at a price of \$415,900.00. FF5. Based on the Respondent's assurances that her purchase of the property was certain, the Claimant and his wife resigned from their respective employment to prepare for their move to Utah. FF6. The Respondent informed the Claimant on two occasions that there would be a short delay in settlement. FF7,8. The Respondent learned on or about November 1, 2006 that she was unable to purchase the property due to her inability to obtain sufficient financing. FF9. The Respondent subsequently asked the Claimant to advance her a \$350.00 appraisal fee, which was the

¹ "FF" refers to the Findings of Fact in the ALJ's Recommended Decision.

Respondent's responsibility, and the Claimant agreed to pay the fee. FF10. The Respondent has never reimbursed the Claimant for the \$350.00 appraisal fee which the Claimant paid. FF11. On or about November 11, 2006, the Respondent presented the Claimant with a new Residential Contract of Sale with a purchase price of \$400,000.00. FF12. In December, 2006 and again on January 2, 2007, the Respondent advised the Claimant that she anticipated settling on the property and there was no need to list the property for sale again. FF13, 14. Between January 9 and 15, 2007, the Claimant was unable to contact the Respondent despite the fact that settlement was to have occurred during that time period. FF, 14, 15. On or about January 16, 2007, the Claimant was informed by Bill Sherwood, a broker for Phoenix Real Estate, the Respondent's business, that the Respondent did not have the money to purchase the home. FF15, 16, 17. Mr. Sherwood agreed to market the property and on or about February 13, 2007, the Claimant received a contract to sell the property for \$365,000.00. FF19. The Claimant and his wife sold the property for \$365,000.00 which was \$35,000 less than the most recent offer made by the Respondent. FF20.

The Claimant claimed losses in the amount of \$52,680.39, seeking the maximum award from the Fund of \$25,000.00. The Claimant alleged the following losses:

- a. A loss due to the Claimant's need to sell his motorcycle in order to pay his continuing mortgage and expenses which were caused by the Respondent's delay in closing on the property;
- b. The Claimant's and his wife's lost wages because they terminated their employment in anticipation of the closing on the property;

- c. The reduced proceeds from the sale of the house due to the actions of the Respondent in keeping the property off the market; and
- d. The Claimant's advance of the \$350.00 appraisal fee to the Respondent who failed to reimburse the Claimant for that expense.

Section 17-404(a), Business Occupations and Professions ("Bus. Occ. & Prof.")

Article, *Annotated Code of Maryland* governs claims brought against the Fund and sets forth the criteria which must be met in order for a Claimant to obtain an award from the Fund:

§17-404

- (a) (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.
- (2) A claim shall:
 - (i) be based on an act or omission that occurs in the provision of real estate brokerage services by:
 - 1. a licensed real estate broker;
 - 2. a licensed associate real estate broker;
 - 3. a licensed real estate salesperson; or
 - 4. an unlicensed employee of a license 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.

Code of Maryland Regulations (“COMAR”) 09.11.03.04 provides:

“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.”

The Respondent was a licensed real estate salesperson at all times relevant to this matter and acted as the seller’s agent, representing the Claimant. Thus, the Respondent was providing real estate brokerage services. The property which was involved in this matter is located in the State of Maryland.

The Commission finds that the Respondent engaged in misrepresentation and deceit in the real estate transaction between the parties. The Respondent repeatedly assured the Claimant that she would purchase the Claimant’s home and that the sale was imminent. The Respondent no longer actively marketed the property after entering into a contract with the owners for its purchase despite the fact that she had encountered difficulties in obtaining financing for her proposed purchase of the property. Finally, the Respondent evaded the Claimant’s attempts to contact her when the settlement did not

occur as promised. The Commission therefore concludes that the Respondent engaged in acts of misrepresentation and deceit which constitute misconduct as defined by COMAR 09.11.03.04 B.(1).

The Commission must next determine whether the Claimant sustained any actual losses as a result of the Respondent's conduct. The Claimant testified at the hearing before the ALJ that he had sold his motorcycle for \$11,500.00 because he was no longer working. However, he failed to present any evidence to show that the sale represented a loss in the value of the motorcycle or that the proceeds from the sale were actually used to pay expenses incurred due to the Respondent's actions. Thus, the Claimant did not prove that the sale of the motorcycle is an "actual loss" which is compensable by the Fund as a result of an act or omission of the Respondent.

At the hearing before the ALJ, the Claimant also estimated that he and his wife lost \$10,830.39 in wages when they terminated their employment prematurely in reliance on the Respondent's assurance that settlement on their property would occur within a short period of time. However, the Claimant failed to show that he or his wife attempted to get their jobs back or in some other way attempted to mitigate any possible losses while waiting for the closing on the property. Thus, the Claimant did not prove that he suffered an "actual loss" of wages compensable by the Fund as the result of an act or omission of the Respondent.

Although the Claimant and his wife may have been able to sell their home at a higher price if they had continued to market it and not relied upon the Respondent's assurances and misrepresentations, no proof was provided of this assertion. No evidence was presented at the hearing before the ALJ to establish that the property was actually

valued at \$400,000.00, the amount of the second contract with the Respondent and the amount upon which the Claimant's calculated their loss. It is just as likely, especially in light of the absence of other offers at or near that price, that the property was worth less than \$400,000.00. The Claimant failed to provide any proof at the hearing before the ALJ as to the actual value of the property. At the Exceptions hearing counsel for the Claimant attempted to offer additional evidence as to the value of the property. However, pursuant to COMAR 09.01.03.09 K, additional evidence may not be introduced at the Exceptions hearing unless the party seeking to introduce it demonstrates to the satisfaction of the Commission that the new evidence is relevant and material; was not discovered before the ALJ hearing; and could not have been discovered before the ALJ hearing with the exercise of due diligence. The Commission concludes that the proffered evidence from the Metropolitan Regional Information Systems, Inc. regarding mean and average selling prices in the area of the subject property at the time of the contract could have been discovered and presented before the ALJ had the Claimant exercised due diligence. Therefore, the Commission concludes that the Claimant has failed to meet the third criteria for the submission of additional evidence at an Exceptions hearing. Based on the evidence which is properly before the Commission, it concludes that the Claimant presented a speculative claim in regard to the sale of the property at a contract price lower than the price set forth in the contract with the Respondent and did not prove an "actual loss" compensable by the Fund.

The Commission concludes that the \$350.00 appraisal fee paid by the Claimant which was not reimbursed by the Respondent is an "actual loss" resulting from an act or omission by the Respondent and is compensable by the Fund. It was the Respondent's

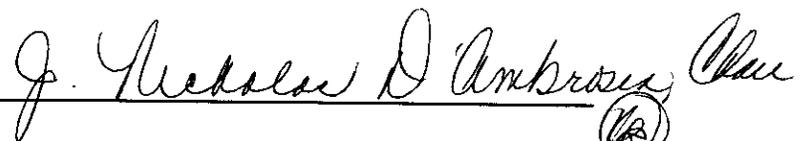
responsibility to obtain and pay for an appraisal as part of financing the sale of the property. The Respondent promised to reimburse the Claimant when he advanced the fee at her request but has failed to do so. The Respondent obtained the payment of the appraisal fee by the Claimant through false pretenses and engaged in theft by failing to reimburse him for the fee despite having promised to do so. Therefore, the Commission concludes that the Claimant should be reimbursed the cost of the appraisal fee which he paid on behalf of the Respondent based upon the Respondent's false pretenses.

ORDER

It is this 22nd day of March 2010 **ORDERED** that:

1. The claim of Wallace J. Garner against the Maryland Real Estate Guaranty Fund is **GRANTED** in the amount of Three Hundred Fifty Dollars (\$350.00) for actual loss sustained as a result of the misconduct of the Respondent, Rebecca L. Hammer;
2. The Respondent, Rebecca L. Hammer is ineligible to hold a real estate license until she reimburses the Maryland Real Estate Guaranty Fund for all monies disbursed under this Order plus annual interest of 10% in accordance with the Business Occupations and Professions Article, Sections 17-411(a) and 17-412, Annotated Code of Maryland; and
3. The records and publications of the Maryland Real Estate Commission reflect this decision.

MARYLAND REAL ESTATE COMMISSION

By: J. Nicholas D. Ambrose 

NOTE: A judicial review of this Final Order may be sought in the Circuit Court of Maryland in which the Appellant resides or has his/her principal place of business, or in

the Circuit Court for Baltimore City. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.

BEFORE THE MARYLAND REAL ESTATE COMMISSION

IN THE MATTER OF THE CLAIM OF *
WALLACE J. GARNER *
AGAINST THE MARYLAND REAL * CASE NO. 2007-RE-501
ESTATE COMMISSION GUARANTY * OAH NO. DLR-REC-22-08-41593
FUND FOR THE ALLEGED *
MISCONDUCT OF REBECCA L. HAMMER *
LICENSED REAL ESTATE SALESPERSON *

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated August 28, 2009, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 18th day of November 2009,

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, **AMENDED** as follows:

The Claimant has established an "actual loss" valued at \$350 based on the theft/false pretenses and fraud or misrepresentation on the part of the Respondent, a licensed real estate salesperson.

C. That the Recommended Order be, and hereby is, **AMENDED** as

follows:

ORDERED that the Claim of Wallace J. Garner against the Maryland Real Estate Guaranty Fund is **GRANTED** in the amount of \$350.00 for actual loss sustained as a result of the misconduct of the Respondent; and

ORDERED that the Respondent Rebecca L. Hammer is ineligible to hold a real estate license until she reimburses the Fund for all monies disbursed under this Order plus annual interest of 10% in accordance with the Business Occupations and Professions Article, Sections 17-411(a) and 17-412, Annotated Code of Maryland; and

ORDERED that the records and publications of the Maryland Real Estate Commission reflect this decision.

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the amount of the Guaranty Fund claim recommended by the Administrative Law Judge was incorrect. The Judge correctly decided that the sale of the Claimant's motorcycle and the lost wages of the Claimant and his wife did not constitute actual loss compensable by the Fund, while the appraisal fee was an actual loss. However, the Judge was incorrect in awarding the Claimant the amount of \$35,000 (reduced to \$25,000 due to the cap on recovery from the Fund) for the loss of proceeds from the sale of the house. There was not evidence in the record to establish that \$400,000, the amount of the second contract with the Respondent, was the value of the property on which actual loss

should be based. It was simply a dollar amount set forth in a contract. The Commission has not recognized a difference in contract amounts alone as the basis for calculating actual loss. A Claimant must offer at a minimum some evidence of the value of comparable properties in the area at the time, in order for the Commission to properly determine the amount of actual loss.

In this case, the only evidence as to the claimed value of the property was the contract that was entered into with the Respondent. There was nothing else in the record that supports this amount as the basis on which the loss could be calculated. Given the Respondent's inability to obtain financing at this amount, and the lack of any other offers, it is very possible that the property was worth less than \$400,000. The Commission simply has no way to make that determination.¹

For this reason, the Commission must deny the Guaranty Fund award relating to the loss in value of the property. The Conclusions of Law must therefore be amended to state that the Claimant has established an "actual loss" valued at \$350 based on the theft/false pretences and fraud or misrepresentation of the Respondent.

¹ In his discussion, on page 13, the Judge states "Without the Respondent's continued assurance and misrepresentation, the Claimant and his wife may have been able to sell their home at the higher price." (emphasis supplied) This language shows the speculative nature of the determination based on the evidence presented. An award from the Guaranty Fund may not be based on speculation. It requires additional corroborating facts that were not present

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

Suzanne A. Jordan Commissioner
Maryland Real Estate Commission

in this case.

IN THE MATTER OF THE CLAIM	*	BEFORE MARC NACHMAN,
OF WALLACE J. GARNER	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND REAL	*	OF THE MARYLAND OFFICE
ESTATE COMMISSION GUARANTY	*	OF ADMINISTRATIVE HEARINGS
FUND FOR THE ALLEGED	*	OAH NO.: DLR-REC-22-08-41593
MISCONDUCT OF REBECCA L. HAMMER,	*	REC NO.: 07-RE-501
LICENSED REAL ESTATE SALESPERSON	*	

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RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On February 23, 2007, Wallace J. Garner (Claimant) filed a complaint with the Maryland Real Estate Commission (MREC) and, on the same date, filed a claim against the MREC Guaranty Fund (Fund) in the amount of \$25,000 for monetary losses incurred as a result of the alleged misconduct of Rebecca L. Hammer (Respondent), a licensed real estate salesperson.

On October 31, 2008, based upon the content of the complaint, the MREC issued an Order for Hearing. On March 6, 2009,¹ the Office of Administrative Hearings (OAH) scheduled a hearing for June 10, 2009, at 10:00 a.m.

¹ An initial hearing notice was sent to the Respondent on March 6, 2009 to two addresses on file with the MREC. However both hearing notices were returned with the note from the postal service which read, "Not deliverable as addressed." A subsequent hearing notice was mailed on April 22, 2009, to a more current address determined by the MREC's investigator; that subsequent letter was also declared to be undeliverable.

On June 10, 2009, the above-captioned case was heard before Marc Nachman, Administrative Law Judge (ALJ), on behalf of the MREC. The hearing was conducted at the OAH located at 11101 Gilroy Road, Hunt Valley, Maryland. The Claimant represented himself. Jessica Kaufman, Assistant Attorney General, Office of the Attorney General, Department of Labor, Licensing & Regulation (DLLR), represented the Fund. The Respondent failed to appear for the hearing. After waiting more than fifteen minutes for the Respondent or anyone representing her to appear, the hearing began.

The Administrative Procedure Act; the procedural regulations of the DLLR; and the OAH Rules of Procedure govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); COMAR 09.01.02, COMAR 09.01.03, COMAR 09.11.03.02; COMAR 28.02.01.

ISSUES

The issues are whether the Claimant sustained an "actual loss" compensable by the Fund as the result of an act or omission of the Respondent within the meaning of section 17-404(a) of the Business Occupations and Professions Article of the Annotated Code of Maryland, and if so, the amount of the award.

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following exhibits that were admitted into evidence:

- MREC #1 - Notice of Hearing, dated, March 6, 2009, with a copy of an Order for Hearing and return receipts for certified mail and a regular mail envelope returned to the OAH
- MREC #2 - Notice of Hearing, April 22, 2009, with a copy of an Order for Hearing; a signed return receipt for certified mail; a returned receipt for certified mail and a regular mail envelope returned to the OAH

- MREC #3 - MREC Order for Hearing
- MREC #4 - MREC licensing information on the Respondent
- MREC #5 - Affidavit of Steven Long, MREC Investigator
- MREC #6 - Copy of a MREC Complaint and Guaranty Fund Claim form filed by the Claimant.

The Claimant submitted the following exhibits that were admitted into evidence:

- Claim Ex. #1 - Outline of Failed Transactions between the Respondent and the Claimant.
- Claim Ex. #2 - Copy of a MREC Complaint and Fund Claim form filed by the Claimant
- Claim Ex. #3 - Copy of the check for the second appraisal fee for home
- Claim Ex. #4 - Bill of Sale for Claimant's motorcycle
- Claim Ex. #5 - Earning Statement #1 for Georgianne Garner (Georgianne)
- Claim Ex. #6 - Earning Statement #2 for Georgianne
- Claim Ex. #7 - Earning Statement #1 for Claimant
- Claim Ex. #8 - Earning Statement #2 for Claimant
- Claim Ex. #9 - Residential contract of sale, dated October 4, 2006
- Claim Ex. #10 - Residential contract of sale, dated November 11, 2006
- Claim Ex. #11 - Claimant's email communication with Bill Sherwood, Broker, Phoenix Real Estate
- Claim Ex. #12 - E-mail communication from Respondent, dated August 7, 2006, with listing agreement
- Claim Ex. #13 - Residential contract sale, dated February 13, 2007 (Final sale)

The Respondent did not submit any exhibits to be admitted into evidence.

Testimony

The Claimant testified in his own behalf and presented testimony from his wife, Georgianne. Neither the Fund nor the Respondent offered the testimony of any witnesses.

FINDINGS OF FACT

I find by a preponderance of the evidence the following to be fact:

1. At all times relevant to this proceeding, the Respondent was licensed by the MREC as a real estate salesperson.²
2. The Claimant owned a house at 3409 King Drive, Dunkirk, Maryland (the property) where they lived. The Claimant and his wife decided to sell the property so that they could move to Utah.
3. The Claimant and his wife chose the Respondent to list the property for sale. In August 2006, the Respondent presented the Claimant and his wife with a listing agreement which they signed, agreeing that the Respondent would act as their real estate salesperson (Claimant Ex. # 12).
4. On or about September 25, 2006, the Respondent offered to buy the property for \$415,990. Even though she agreed to purchase the property from the Claimant and his wife, the Respondent kept the property on the market for sale.
5. On or about October 4, 2006, the Claimant signed an initial Residential Contract of Sale for the Respondent to purchase the property at a price of \$ 415,990 (Claimant Ex. # 9).

² The Respondent was a real estate salesperson with Re/Max 100 and later became an agent of Champion Reality. In December 2006, the Respondent no longer worked for Champion Reality and joined Phoenix Real Estate. (MREC Ex. # 4 and Claimant Ex. # 1).

6. The Respondent assured the Claimant and his wife that her purchase of the property was certain; the Claimant and his wife resigned from their respective employment in preparation for their move to Utah.
7. On or about October 24, 2006, the Respondent informed the Claimant there would be a short delay in the sale of the property.
8. On October 29, 2006 the Respondent informed the Claimant and his wife (as well as guests at their farewell party) that the delay in settlement would only be a week or two.
9. On or about November 1, 2006, the Respondent learned that she was unable to purchase the property because the lender would only provide her 80% of the necessary funding.
10. On or about November 6, 2006, the Respondent asked the Claimant to advance her the \$350 appraisal fee. Although payment of this fee was the Respondent's responsibility, the Claimant agreed to pay it.
11. Despite the Respondent's promise to repay the Claimant and his demand for payment, the Respondent has never reimbursed the Claimant for the appraisal fee.
12. On or about November 11, 2006, the Respondent presented the Claimant and his wife with a new Residential Contract of Sale with the Respondent at a purchase price of \$400,000 (Claimant Ex. # 10). The Claimant and his wife signed the contract.
13. On or about December 12, 2006, the Respondent informed the Claimant that a loan had been secured but she had to wait until after January 1, 2007, to receive the money.
14. On or about January 2, 2007, the Respondent informed the Claimant she expected to settle on the home during the week of January 8, 2007. The Respondent told the Claimant and his wife that there was no need to list the property for sale again because

the settlement date was close. The Claimant was told the sale should close within three days of the settlement because it was a cash deal.

15. Between January 9 and 15, 2007, the Claimant was unable to contact the Respondent. He and his wife left telephone messages on the Respondent's phone, as well as that of her daughter and her business, Phoenix Real Estate.
16. The messages were not returned until on or about January 15, 2007, when Bill Sherwood, broker for Phoenix Real Estate, responded. Mr. Sherwood was unaware of the situation between the Respondent and the Claimant. Mr. Sherwood agreed to contact the Respondent and provide the Claimant updated information on the sale.
17. On or about January 16, 2007, Mr. Sherwood informed the Claimant that the Respondent did not have the money to purchase the home. He explained that the Respondent felt ashamed for betraying the Claimant and did not want to contact the Claimant or his wife directly.
18. Mr. Sherwood agreed to market the property; he also promised to seek disciplinary action against the Respondent.
19. On or about February 13, 2007, the Claimant received a contract to sell the property for \$365,000; settlement on that contract occurred shortly thereafter. Due to his financial condition caused by the Respondent's delay, the Claimant could not have waited for a higher price.
20. The Claimant and his wife sold the property for \$365,000, which was \$35,000 less than the most recent price offered them by the Respondent.
21. On February 23, 2007, the Claimant filed a claim with the Fund.

DISCUSSION

I. Notice

On March 6, 2008, the OAH mailed notice of the hearing to the Respondent to her last business address and an alternate address on file with the MREC by certified and regular mail. The notice advised the Respondent of the time, place and date of the hearing. At the time the notice was mailed, the Respondent was not licensed by the MREC. The U. S. Postal Service returned the certified mail to the OAH marked "RETURN TO SENDER, NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD." The certified mail that was sent to the Respondent at her alternate address was returned to the OAH marked "ATTEMPTED, NOT KNOWN." The regular mail that was sent to the Respondent at her address of record and her alternate address was returned to the OAH respectively marked "ATTEMPTED, NOT KNOWN" and "RETURN TO SENDER, NOT DELIVERABLE AS ADDRESSED, UNABLE TO FORWARD." MREC Ex. 1.

On April 22, 2008, the OAH mailed a second notice of the hearing to the Respondent by certified and regular mail at two additional alternate addresses for the Respondent. The second notice also advised the Respondent of the time, place and date of the hearing. One of the alternate addresses was on record with the Motor Vehicle Administration as the Respondent's address. The U.S. Postal Service returned a receipt for the certified mail reflecting that the notice had been received and signed for by the Respondent's agent at one of the two additional alternate addresses.

"In Maryland, a finding that an individual properly mailed a letter raises a presumption that the letter 'reached its destination at the regular time and was received by the person to whom it was addressed.'" *Bock v. Insurance Comm'r*, 84 Md. App. 724, 733 (1990), quoting *Border v.*

Grooms, 267 Md. 100, 104 (1972), and *Kolker v. Biggs*, 203 Md. 137, 144 (1953). Based on that presumption - and that the April 22, 2009 notice sent by regular mail to one of the Respondent's alternate address was not returned to the OAH, and that a certified receipt was signed by the Respondent or her agent - the notice of hearing sent by the OAH to the Respondent is deemed to have been received by her and provided her with notice of the instant hearing in a timely fashion.

Because the Respondent received notice of the hearing, I directed that the hearing proceed in her absence. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2004); Code of Maryland Regulations (COMAR) 09.01.02.05; COMAR 09.01.02.07.

II. Claim

The burden of proof at any hearing on a claim against the Fund is on the “claimant to establish the validity of the claim.” Md. Code Ann., Bus. Occ. & Prof. § 17-407(e) (2004). Section 17-404(a) of the Business Occupations and Professions Article governs all claims brought against the Fund and sets forth criteria that must be established by the Claimant in order to obtain an award. In pertinent part, that section provides:

§ 17-404. Claims against 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; 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.

Md. Code Ann., Bus. Occ. & Prof. § 17-404(a) (2004). COMAR 09.11.03.04, entitled *Claims Against the Guaranty Fund*, provides:

- 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 all times relevant, the Respondent was a licensed real estate salesperson. The Respondent acted as the seller's agent, representing the Claimant. The Respondent's activities fall within the definition of providing real estate brokerage services. Md. Code Ann., Bus. Occ.

& Prof. § 17-101(l)(1), (2), and (3) (Supp. 2008).³ The acts and omissions of the Respondent complained of by the Claimant relate to real estate located in Maryland. The Claimant has met the requirements of sections 17-404(a)(2) (i) & (ii) of the Business Occupations and Professions Article.

For the instant claim to be successful against the Fund, the acts and omissions of the Respondent must also constitute one or more of six prohibited actions specified in section 17-404(a)(2)(iii) of the Business Occupations and Professions Article.

After reviewing the Respondent's Actions in this case, I conclude the Claimant was a victim of theft, false pretenses, fraud and misrepresentation. The Claimant has shown that there was a monetary loss caused by the Respondent which related to the sale of real property in Maryland.

The Respondent was the Claimant's real estate salesperson. It was the Respondent's duty to assist the Claimant and his wife in selling their property. The Claimant intended to sell his home and move to Utah. After the house was on the market for a short period of time, the Respondent asked to purchase the home. On October 25, 2006, the Respondent prepared a contract of sale for \$415,000 and advised the Claimant and his wife to sign it. The contract

³ (l) "Provide real estate brokerage services" means to engage in any of the following activities:

- (1) for consideration, providing any of the following services for another person:
 - (i) selling, buying, exchanging, or leasing any real estate; or
 - (ii) collecting rent for the use of any real estate;
- (2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;
- (3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

. . . .

Md. Code Ann., Bus. Occ. & Prof. § 17-101(l) (Supp. 2008).

included a minimal deposit (\$500 on a \$415,000 contract); there was no evidence the Respondent ever paid the deposit or deposited any earnest money into a proper escrow account. The Respondent no longer actively marketed the property for the Claimant. The Claimant and his wife gave termination notices to their respective employers after the Respondent gave them her assurance that she was purchasing the property.

The Respondent was unable to secure a loan to purchase the property, initially delaying the closing. Nevertheless, the Respondent assured the Claimant that her inability to secure financing was merely a small setback. The Respondent reiterated her certainty that the settlement on the property was imminent; reassuring the Claimant and his wife in front of their family and friends. The Respondent gave her clients a false sense of security regarding the transaction; she later evaded their attempts to contact her.

Compensable monetary losses must be a result of the actual transaction. *Sheppard v. Bay County Realty, Inc.*, 297 Md. 88, 95 (1983). The Claimant claims the following monetary losses:

- a. the Claimant's need to sell his motorcycle in order to pay his continuing mortgage and expenses necessitated by the Respondent's delay in closing on the property;
- b. the Claimant's and his wife's lost wages because they terminated their employment in anticipation of the closing;
- c. the Claimant's advancing an appraisal fee to the Respondent, who promised repayment but failed to do so; and
- d. the reduced proceeds from the sale of the house due to the actions of the Respondent keeping the property off of the market..

The Claimant claims losses of \$52,680.39, seeking the maximum amount of a claim in the Fund of \$25,000.

A. Motorcycle Sale

In order to pay the mortgage on his home, the Claimant testified that he was forced to sell his motorcycle for \$11,500 because he was no longer working. (Claimant Ex. # 4). There is no evidence to show that such a sale resulted in a loss of value or that the proceeds from the sale were used directly to pay his mortgage. Accordingly, the Claimant did not prove that the sale of his motorcycle is an “actual loss” compensable by the Fund as the result of an act or omission of the Respondent within the meaning of section 17-404(a) of the Business Occupations and Professions Article of the Annotated Code of Maryland.

B. Lost Wages

The Claimant estimated that his and his wife’s lost wages were \$10,830.39 (Claimant Exs. 5, 6, 7 and 8). The Claimant has the responsibility to show that he mitigated his damages. The Claimant and his wife did not show evidence that they were unable to get their jobs back or that they could not find other jobs while he waited for the closing. Accordingly, the Claimant did not prove that this is an “actual loss” compensable by the Fund as the result of an act or omission of the Respondent within the meaning of section 17-404(a) of the Business Occupations and Professions Article of the Annotated Code of Maryland.

C. Appraisal Fee

The appraisal fee of \$350 paid by the Claimant on behalf of the Respondent is an “actual loss” compensable by the Fund as the result of an act or omission of the Respondent within the meaning of section 17-404(a) of the Business Occupations and Professions Article of the Annotated Code of Maryland (Claimant Ex. # 3). An appraisal is a part of the process of financing a sale, which was the Respondent’s responsibility to obtain and pay for. The Respondent asked the Claimant to advance the fee and she promised to reimburse him for that

expense. By doing so, she used her position as a real estate salesperson to ask for these funds, which she never repaid. She made this request in order further the real estate transaction that she orchestrated. The Respondent engaged in theft and false pretenses by obtaining money for the appraisal fee from the Claimant, which she did not repay as promised. The Claimant should be reimbursed the cost of the appraisal paid due to the Respondent's false pretense and fraud. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii)(1) (2004).

D. Loss from Sale of the Property at a Lower Price

Without the Respondent's continued assurance and misrepresentation, the Claimant and his wife may have been able to sell their home at the higher price. Due to the delay in the sale of the home with the Respondent, the Claimant's claimed a loss of proceeds of \$35,000.⁴ The diminution in proceeds was due to the Respondent's actions. The Claimant agreed to keep the property off the market under the belief that the Respondent would fulfill her obligation to purchase the home under the contract she prepared and presented. This prevented his home from being properly and timely marketed. The Respondent abused her position a real estate agent, which would have required her to take appropriate steps to protect the Claimants; instead, the Respondent drafted and presented a contract that had little protection for the Claimant. The minimal deposit of \$500 was not paid at all.⁵

The Respondent continually misrepresented her financial position to the Claimant and his wife, who were waiting for her to close on their property. By failing to protect the interests of her clients, the Respondent forced the Claimant into a financial position wherein he and his wife

⁴ This cost is calculated by taking the second Residential Contract Sale Price (\$400,000) and deducting the actual selling price of the home (\$365,000). (Claimant Exhibits -10 and 13).

⁵ Even the contract for sale of February 13, 2007 that led to the eventual sale of the property required the buyers to pay a \$2,500 non-refundable deposit, five times the amount of the deposit that the Respondent wrote into her contract with the Claimant and his wife.

were desperate to sell their property and had to accept a lower price. By denying the Claimant an opportunity to timely market the property, the Respondent took away from the Claimant and his wife the chance to bargain for a higher price. By wasting the time that the Claimant had in which he could sell his property, he lost most of his negotiating power – he had to sell the property at less than she assured them it was worth because the Claimant and his wife had already resigned their jobs and committed to their move to Utah.

The Respondent initially valued the property at \$415,990, then reduced the contract price to \$400,000, a value to which the Claimant and his wife agreed, based on the Respondent's recommendation. By delaying the marketing of their property, the Claimant and his wife did not have time to negotiate an acceptable sales price; they were forced to take the first offer made to them. Accordingly, the Claimant and his wife received \$35,000 less than the Respondent convinced them the property was worth. The Claimant should be reimbursed for the diminished proceeds from the sale of the property due to the need to quickly sell their home, which was a result of the Respondent's fraud and misrepresentation. Md. Code Ann., Bus. Occ. & Prof. § 17-404(a)(2)(iii)(2) (2004).⁶

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Claimant has established an "actual loss" valued at \$35,350 based on theft/false pretenses and fraud or misrepresentation perpetuated by the Respondent, a licensed real estate salesperson. Accordingly, the Claimant is entitled to prevail in his claim against the Fund in the

⁶ The AAG did not argue for or against measuring actual losses in this manner, but requested consideration of the efficacy of this calculation.

amount of \$25,000, the maximum claim allowable. Md. Code. Ann., Bus. Occ. & Prof. § 17-404(a) (2004); COMAR 09.11.03.04; COMAR 09.11.01.18.

RECOMMENDED ORDER

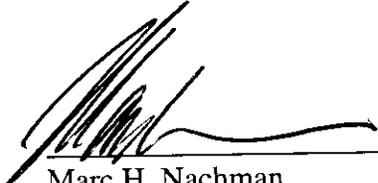
On the basis of the foregoing Findings of Fact, Discussion and Conclusions of Law, it is **RECOMMENDED** that the Maryland Real Estate Commission:

ORDER, that the Claimant be awarded the sum of \$25,000 from the Fund based on the claim filed on March 14, 2006, for actual losses sustained as a result of the misconduct of the Respondent; and that it further

ORDER that the Respondent be ineligible for any real estate broker's or salesperson's license until such time as the Respondent reimburses the Fund for all monies disbursed under this Order plus annual interest of ten percent (10%), pursuant to sections 17-411(a) and 17-412 of the Business Occupations and Professions Article of the Annotated Code of Maryland; and that it further

ORDER that the records and publications of the Maryland Real Estate Commission reflect this decision.

August 28, 2009
Date Decision Mailed



Marc H. Nachman
Administrative Law Judge

MN/tc
Doc. # 106171

IN THE MATTER OF THE CLAIM	*	BEFORE MARC NACHMAN,
OF WALLACE J. GARNER	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND REAL	*	OF THE MARYLAND OFFICE
ESTATE COMMISSION GUARANTY	*	OF ADMINISTRATIVE HEARINGS
FUND FOR THE ALLEGED	*	OAH NO.: DLR-REC-22-08-41593
MISCONDUCT OF REBECCA L. HAMMER,	*	REC NO.: 07-RE-501
LICENSED REAL ESTATE SALESPERSON	*	

* * * * *

EXHIBIT LIST

Exhibits

The Fund submitted the following exhibits that were admitted into evidence:

- MREC #1 - Notice of Hearing, dated, March 6, 2009, with a copy of an Order for Hearing and return receipts for certified mail and a regular mail envelope returned to the OAH
- MREC #2 - Notice of Hearing, April 22, 2009, with a copy of an Order for Hearing; a signed return receipt for certified mail; a returned receipt for certified mail and a regular mail envelope returned to the OAH
- MREC #3 - MREC Order for Hearing
- MREC #4 - MREC licensing information on the Respondent
- MREC #5 - Affidavit of Steven Long, MREC Investigator
- MREC #6 - Copy of a MREC Complaint and Guaranty Fund Claim form filed by the Claimant.

The Claimant submitted the following exhibits that were admitted into evidence:

- Claim Ex. #1 - Outline of Failed Transactions between the Respondent and the Claimant.

- Claim Ex. #2 - Copy of a MREC Complaint and Fund Claim form filed by the Claimant
- Claim Ex. #3 - Copy of the check for the second appraisal fee for home
- Claim Ex. #4 - Bill of Sale for Claimant's motorcycle
- Claim Ex. #5 - Earning Statement #1 for Georgianne Garner (Georgianne)
- Claim Ex. #6 - Earning Statement #2 for Georgianne
- Claim Ex. #7 - Earning Statement #1 for Claimant
- Claim Ex. #8 - Earning Statement #2 for Claimant
- Claim Ex. #9 - Residential contract of sale, dated October 4, 2006
- Claim Ex. #10 - Residential contract of sale, dated November 11, 2006
- Claim Ex. #11 - Claimant's email communication with Bill Sherwood, Broker, Phoenix Real Estate
- Claim Ex. #12 - E-mail communication from Respondent, dated August 7, 2006, with listing agreement
- Claim Ex. #13 - Residential contract sale, dated February 13, 2007 (Final sale)

The Respondent did not submit any exhibits to be admitted into evidence.