

**BEFORE THE WEST VIRGINIA REAL ESTATE COMMISSION**

**WEST VIRGINIA REAL ESTATE COMMISSION,**

***Complainant,***

**v.**

**Formal Complaint No. C-19-014**

**DAVID CLEVELAND BAILEY,  
Licensed Broker  
License Nos. WVB180300495 and WV0017517**

***Respondent.***

**CONSENT DECREE**

Respondent, David Cleveland Bailey ("Respondent"), and the West Virginia Real Estate Commission ("Commission") enter into the following Consent Decree for the purpose of resolving the above-styled complaint. As reflected in this Consent Decree, the parties have reached an agreement in which Respondent agrees and stipulates to the Findings of Fact, Conclusions of Law, and disposition of this matter. The Commission, having approved such agreement, does hereby Find and Order as follows:

**FINDINGS OF FACT**

1. Respondent is a licensed real estate broker in the State of West Virginia, holding license number WVB180300495 (for Long Run Realty, Inc. dba Timberline Four Seasons Realty (T4SR)) and license number WV0017517 (for Lee Street Properties, LLC dba Selling WV-Real Estate Professionals).
2. Respondent became the licensed broker of record for T4SR on November 8, 2018.

3. Respondent received a letter dated November 14, 2018 from Mr. Richard Neely, an attorney with Neely and Callaghan, who represents the owners of T4SR and T4SR.

4. The Neely letter requested that the Respondent issue a check or checks for roughly \$250,000.00 from one of the T4SR trust account to be paid to the owners of Timberline to so that they could “borrow” the money and use it to open for the winter ski season. Mr. Neely represented that a note would be signed when the money is borrowed that would call for the money to be paid back at the end of ski season. Mr. Neely informed Respondent that subject account did not contain trust monies and that a previous broker for T4SR “stole the money in the trust account from Timberline and “squirreled it away” in the T4SR trust, thus justifying the transfer of funds to be used to allow Timberline to open.

5. Thereafter, on November 16, 2018, Respondent issued a check for \$250,000.00 from the subject T4SR trust account at Miners and Merchants Bank payable to Richard Neely, Trustee, or Frederick Herz.

6. The Respondent admits that he did not conduct any review or research to determine whether or not the \$250,000.00 that he transferred to Mr. Neely and Mr. Herz was in fact trust funds that belonged in the T4SR trust account.

7. After closing out the subject trust account per Mr. Neely’s written correspondence, the Respondent willingly contacted the Commission to inform it that, while he believed the trust account did not contain trust monies, he was reporting its closure since applicable regulations require the same.

8. On January 14, 2019, Robert Rucker, the Commission’s Investigator, conducted a compliance audit of T4SR in response to the Respondent’s provided information. Investigator

Rucker also conducted a follow-up visit on February 4, 2019. Mr. Rucker's audit determined that the total amount of funds that should have been in the T4SR trust account was \$465,836.69. The actual trust account balance was \$195,762.55. Therefore, Investigator Rucker concluded that the trust account was short by \$270,074.14, the bulk of which was the \$250,000.00 transferred by the Respondent to Mr. Neely and Mr. Herz.

9. On February 8, 2019, the Commission met and decided to direct its legal counsel to send correspondence to the Respondent demanding that he make the T4SR trust account solvent by depositing \$270,074.14 in the account within five (5) business days.

10. The Respondent subsequently responded, by counsel, that he would be unable to meet the Commission's demand within five (5) business days, but that he was actively and diligently working to make the subject trust account solvent. The Respondent did not meet the Commission's demand within five (5) business days.

11. On March 6, 2019, the Commission met to discuss the facts and circumstances described above. The Respondent and his legal counsel appeared at such meeting and addressed the Commission. The Commission voted to initiate a complaint against the Respondent for possible violations of the West Virginia Real Estate License Act or the Commission's Legislative Rules. As a result, a written complaint was prepared and served upon the Respondent and his counsel.

12. The Respondent was given an opportunity to respond to the Complaint initiated by the Commission and did respond thereto.

13. On April 17, 2019, the Respondent informed the Commission in a formal supplemental response that he had made the T4SR trust account solvent by depositing \$270,074.14

into the account. Investigator Rucker subsequently audited the account and verified that the deposit had been made.

14. On May 22, 2019, the Commission met and voted to find probable cause that the Respondent committed violations of the West Virginia Real Estate License Act or the Commission's Legislative Rules. As a result, the Commission voted to offer the Respondent the opportunity to enter into this Consent Agreement to resolve this matter in lieu of proceeding to a formal disciplinary hearing and adjudication.

### **CONCLUSIONS OF LAW**

1. Pursuant to the *West Virginia Real Estate License Act*, West Virginia Code § 30-40-1, et seq., the Commission is charged with the regulation of the practice of real estate brokerage in this State, and, thus, has jurisdiction over this Formal Complaint.

2. In relevant part, West Virginia Code § 30-40-7(l) authorizes the Commission to impose sanctions for violations of the *West Virginia Real Estate License Act*, including, but not limited to, an administrative fine not to exceed \$1,000 per day per violation; probation; revocation; suspension; restitution; additional education; denial of future license; downgrade of license; reprimand; and/or the return of compensation collected from an injured consumer.

3. West Virginia Code § 30-40-19(a)(19) authorizes the Commission to sanction a licensee if the licensee "[v]iolates any of the provisions of [the *West Virginia Real Estate License Act*], any rule or order or final decision issued by the commission."

4. West Virginia Code § 30-40-18(b) requires earnest money deposits, security deposits, rental receipts, auction proceeds and money held in escrow at closing to be deposited into a trust fund account.

5. Pursuant to West Virginia Code § 30-40-18(f), a broker may not commingle his or her own funds with trust funds and the account may not be pledged as collateral for a loan or otherwise utilized by the broker in a manner that would violate his or her fiduciary obligations in relation to the trust funds.

6. Pursuant to 174 W. Va. C.S.R. 1, § 15.1: Commingling Prohibited. -- In order to prevent the commingling of trust funds with other funds, brokers are required to deposit all trust funds into one or more trust accounts established in accordance with W. Va. Code § 30-40-18, which accounts may be audited by the Commission through its authorized representative.

7. Pursuant to 174 W. Va. C.S.R. 1, § 15.3: Deposit of trust funds. -- Unless otherwise directed or allowed in the signed purchase agreement, every broker who receives any trust funds shall immediately or by the next business day following receipt deposit the trust funds in the broker's trust account.

8. Pursuant to West Virginia Code 30-40-19(a)(8), (9), (19) (29), (31) and (37), the Commission has the authority to discipline a licensee if he or she: Fails, within a reasonable time, to account for or to remit moneys or other assets coming into his or her possession, which belong to others; Commingles moneys belonging to others with his or her own funds; Violates any of the provisions of this article, any rule or any order or final decision issued by the Commission; Fails to maintain adequate records on the broker's "trust fund account"; Breaches a fiduciary duty owed by a licensee to his or her principal in a real estate transaction; and, Engages in any act or conduct which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing;

9. The Respondent's transfer of \$250,000.00 out of the T4SR trust account to Mr. Neely and Mr. Herz violated his duties and responsibilities under the above-cited provisions of the *West Virginia Real Estate License Act and Legislative Rule*. Therefore, there is probable cause to conclude that Respondent's conduct subjects him to discipline by the Commission.

### **CONSENT**

By signing below, Respondent agrees to the following:

1. Respondent has had the opportunity to consult with counsel and executes this Consent Decree voluntarily, freely, without compulsion or duress and mindful that it has legal consequences. No person or entity has made any promise or given any inducement whatsoever to encourage Respondent to make this settlement other than as set forth herein. Respondent acknowledges that he may pursue this matter through appropriate administrative proceedings and is aware of his legal rights regarding this matter, but intelligently and voluntarily waives such rights.

2. Respondent acknowledges the Findings of Fact set forth above, admits that there is probable cause to conclude that the violations set forth above in the Conclusions of Law occurred, and consents to the entry of the following Order:

### **ORDER**

On the basis of the foregoing, the Commission hereby ORDERS as follows:

1. Respondent's broker's licenses are REVOKED. However such REVOCATION is hereby immediately stayed for a period not to exceed twenty-four (24) months that shall begin to run on the date of entry into the Commission's records of this Consent Agreement.

2. Before the expiration of the twenty-four (24) month stay period, Respondent shall complete the entire Broker Training Program and successfully pass the exam associated therewith.

3. Respondent shall also reimburse the Commission for its costs associated with this Complaint and its attorney fees, in the total amount of \$5,000.00.

4. The total amount of \$5,000.00 shall be paid within eighteen (18) months of the date of entry of this Consent Decree by the Commission. The Respondent may submit partial payments in the period before the expiration of the eighteen (18) month period as long as the total amount is paid on or before the expiration of the eighteen (18) month period. Payments made by the Respondent shall be by certified check or money order made payable to the State of West Virginia and sent directly to the Commission's Office.

5. Until such time as Respondent completes the Broker Training Program and passes the exam, he shall submit to the Commission's Office monthly financial statements for all T4SR trust accounts administered by him and all information necessary to reconcile such accounts. Such financial statements shall be submitted to the Commission's office by 5:00 p.m. on the 15<sup>th</sup> of every month. If the 15<sup>th</sup> of a particular month falls on a weekend or a holiday, then the next business day.

6. Until such time as Respondent completes the Broker Training Program and passes the exam, he shall be ineligible to apply for any new or additional licenses issued by the Commission.

7. Any deviation from the requirements of this Consent Decree, without the prior written consent of the Commission, shall constitute a violation of an order of the Commission and may result in the summary suspension of Respondent's license until such time as Respondent achieves full compliance. The Commission shall immediately notify Respondent via certified mail



of the alleged violation of the Consent Decree and the summary suspension of Respondent's license. In the event Respondent contests the alleged violation of the Consent Decree resulting in the suspension of Respondent's license, Respondent is entitled to a hearing to challenge the alleged violation. Any such hearing shall be scheduled and conducted in accordance with the provisions of W. Va. Code §§ 30-1-8 and 30-40-1 *et seq.* and any procedural rules promulgated by the Commission. At its discretion, the Commission also may schedule a hearing on its own initiative for the purpose of allowing the Commission to consider further discipline against Respondent based upon Respondent's violation of this Order of the Commission.

8. Respondent shall comply with all duties and obligations placed upon him under the *West Virginia Real Estate License Act* and the Commission's Legislative Rule at all times during the stay period. Any violation of the same, may result in further proceedings against Respondent's license.

9. If the Respondent successfully and timely fulfills the requirements of this Consent Agreement, then the REVOCATION of his license shall be voided.

**CONSENT DECREE AGREED TO BY:**

  
David Cleveland Bailey

8-6-19  
Date

**ENTERED into the records of the Real Estate Commission this:**

21<sup>st</sup> day of August, 2019.

**WEST VIRGINIA REAL ESTATE COMMISSION,**

By:   
Cheryl Dawson, Chair