BEFORE THE WEST VIRGINIA REAL ESTATE COMMISSION

IN THE MATTER OF:

MARLA BASS SINKO
Licensed Real Estate Broker
License No. WV-0023574

Complaint No. P-18-001

CATHY E. SMITH
Licensed Salesperson
License No. WV-0024231

CONSENT DECREE

Now comes the Respondents, Marla Bass Sinko (hereinafter at times "Respondent Sinko" or "Broker Sinko"), Cathy E. Smith (hereinafter at times "Respondent Smith" or "Salesperson Smith") (collectively "Respondents"), and the West Virginia Real Estate Commission (hereinafter "Commission"), by Cheryl L. Dawson, its Chairman, for the purpose of resolving a complaint filed against Respondents by Glen B. Warrington (hereinafter at times "Owner" or "Mr. Warrington"). As reflected in this Consent Decree, the parties have reached an agreement in which Respondents agree and stipulate to the Findings of Fact and Conclusions of Law set forth in this Consent Decree concerning the proper disposition of this matter. The Commission, having approved such agreement, does hereby Find and Order as follows:

FINDINGS OF FACT

1. The Commission, as the state entity created to regulate the conduct of real estate brokers, associate brokers and salespersons, has jurisdiction over this Complaint.

2. Respondent Sinko is a broker doing business as Glade Springs Real Estate, LLC ("GSRE") in Daniels, West Virginia, holding broker license number WV-0023574.

3. Respondent Smith is a real estate salesperson licensed by the Commission, holding license number WV-0024231, working under the supervision of Respondent Sinko.

4. Complaint P-18-001 filed by Mr. Warrington was received on August 28, 2017, and responses were timely received from each Respondent, after which the Commission received additional information from the Complainant and was advised the Respondents would be represented by Counsel.

5. This Complaint concerns a somewhat convoluted real estate transaction regarding 126 Long Drive, Daniels, West Virginia (hereinafter referred to as "the Glade Springs transaction") involving Mr. Warrington and his wife; Respondents; Meridian Marketing Direct, the entity named on the relevant documents ("MMD" or the "Lease Purchaser"); the principals of MMD, Mr. and Mrs. Sink, who occupied the property; and Attorney Clyde Smith ("Attorney Smith"), who is an associate broker at GSRE and the husband of Respondent Smith.

6. The following events occurred between August 2015 and the end of July 2017:

   a. Complainant listed the property with Respondents, who had represented Complainant in the purchase of the home in 2009, by agreement signed by Owner on August 15, 2015, at which time a Notice of Agency Relationship was signed reflecting Respondent Smith's representation of Owner.

   b. The listing agreement provided for a commission of 5%, which was payable when (1) Owner sells, exchanges, or otherwise transfers, or contracts to sell, the property … at the close of the sale, exchange or other transfer, or (2) [if Owner is unable or unwilling to consummate the sale].

   c. There being no offers of purchase in the first year, Owner agreed to consider a lease-purchase arrangement on the property.

d. A Lease Agreement was entered into between Owner and MMD on September 6, 2016, which leased the property from September 15, 2016 through January 5, 2017 for $1,800.00 per month, with $1,800.00 to be paid to GSRE as commission at the "closing."

e. A Real Estate Purchase Contract ("Purchase Agreement No. 1") was also entered into between Owner and MMD on September 6, 2016, which agreed to the payment of $270,000.00 for the real estate and $15,000.00 for certain furnishings, payment to be made in quarterly installments of $30,000.00 beginning on January 5, 2017.

f. Purchase Agreement No. 1 referenced a closing of January 5, 2017, and stated that Respondent Smith was to receive a 5% commission from Owner's proceeds minus the $1,800.00 first month's rent which would be deducted at the closing.

g. In December of 2016, Mr. Sink contacted Respondent Smith requesting some changes to Purchase Agreement No. 1, which were agreed to by Owner according to Respondent Smith, and a new agreement ("Purchase Agreement No. 2") was prepared by Attorney Smith and then signed by the parties.

h. Purchase Agreement No. 2 moved the "closing" to January 9, 2017, and set forth a different payment schedule which modified the $30,000.00 quarterly payments to $16,000.00 at the closing, two payments of $7,000.00 in February and March, and $10,000.00 per month payments until paid in full.

i. All three agreements, as well as the promissory note for $277,950.00 referenced in both purchase agreements, contemplated the conveyance of a general warranty deed and transfer of title.

j. The promissory note for $277,950.00 was dated January 5, 2017 but was pre-signed by Mr. Sink on an unknown date.

k. The Glade Springs transaction did not proceed in accordance with the terms of Purchase Agreement No. 2 or the promissory note in that no deed of trust was executed simultaneously (in fact, no deed of trust was ever prepared or executed), and there was no transfer of title.

l. The "closing" occurred on January 5, 2017, as originally scheduled, and was attended only by Attorney Smith and Mr. Sink and involved only the receipt of a check from MMD for $16,000.00.

m. The $16,000.00 payment was itemized and distributed by Attorney Smith as reflected in a "Breakdown of Fees" dated January 6, 2017, which paid GSRE $7,450.00 (the balance due on the claimed amount of commission of $14,250.00 (5% of $285,000.00) after deduction of the $1,800.00 "finder's fee" and $5,000.00 in earnest money already in the custody and control of Broker Sinko and paid Owner $8,372.94 after the deduction of certain expenses, including $150.00 to Attorney Smith.

n. There is nothing in the file that indicates Owner was apprised of the nature and extent of the "closing" until the following occurred after the closing:

(1) Owner called Respondent Smith about documents for his taxes, and she advised him to call Attorney Smith about the details of the Glade Springs transaction;

(2) After a discussion between Attorney Smith and Owner, Attorney Smith sent Owner a letter on January 31, 2017, explaining why there was no transfer of the title to the property.

o. Similarly, there is nothing in the file regarding the agency relationship between Respondents and the parties to the Glade Springs transaction until a dual Notice of Agency Relationship was signed by the parties in February 2017, after a representative for Owner questioned the dual agency.

p. The Glade Springs transaction quickly became non-performing, with no payments after May 1, 2017, after which there were several communications between Owner or his representative and Respondents regarding attempts for resumption of payments which were unsuccessful and other matters.

q. Mr. & Mrs. Sink vacated the premises on May 31, 2017, taking all Owner's furnishings, and Owner sent a Notice of Right to Cure Default to MMD and the Sinks on June 9, 2017, but the transaction remained in default.

r. As a result of the non-performance, Owners retained ownership of the subject property and over the course of the Glade Springs transaction received almost $35,000.00 for damage deposits, rent, earnest money, and the initial payments paid pursuant to the purchase agreement.

s. Respondent Sinko, Attorney Smith and a representative of GSRE met on July 25, 2017.

t. On July 26, 2017, Attorney Smith sent a letter on his attorney letterhead to Owner stating that GSRE was entitled to the full commission of $14,250.00 and informing Owner that GSRE declined to continue to list Owner's property.

u. The Commission's investigation revealed no payments to Attorney Smith by any entity other than the $150.00 for contract preparation included in the Breakdown of Fees which was deducted from the amount paid to Owner at the "closing."

v. The Commission, at its meeting on October 18, 2017, found probable cause to proceed against Respondents upon a finding that some of the allegations, if true, constituted violations of various provisions of West Virginia Code §§ 30-40-1 *et seq.*

7. Some of the allegations set forth in the Complaint, even if true, either do not violate the West Virginia Real Estate License Act (the "Act") or the legislative rules of the Commission or are found to be *de minimis* compared to the violations addressed herein, and the Commission makes no findings regarding same. Such allegations include Respondents' failure to conduct any credit check or other check of the LLC or its principals, mistakes in Respondents' paperwork and correspondence, unorthodox contracts being used (but for the findings regarding the "closing" not proceeding in accordance with the purchase agreement), and other matters.

8. Likewise, although it is a violation of the West Virginia Real Estate License Act for a licensee to procure an attorney for a client or customer or solicit business for any attorney (W. Va. Code § 30-40-19(a)(20)), the Commission makes no finding that Attorney Smith was procured by Respondents or that they solicited business for him since there is some indication that Complainant voluntarily selected Attorney Smith to provide legal services or acquiesced to same.

9. The Commission finds that:

a. The Glade Springs transaction inured more to the benefit of Respondents and the Lease-Purchaser, with Owner not being provided the information, documentation,

and representation sufficient to meet the fiduciary duty owed to Owner by Respondents.

b. Respondents' transaction file is wholly lacking with regard to the required timely consents to and notices regarding their agency relationship to the parties to the Glade Springs transaction, and it is not clear that Respondents ever assumed the role of agent for Lease Purchaser, much less when such agency commenced.

c. Based on these findings, Respondents' taking a Commission of $14,250.00 at the "closing" when there was no transfer of title as contemplated by the purchase agreements nor meaningful involvement in or knowledge of the Glade Springs transaction by Respondents after it was essentially turned over to Attorney Smith for handling constituted a breach of their fiduciary duty to Owner.

d. The $1,800.00 agreed-to commission set forth in the lease agreement is an amount reasonably paid to Respondents in connection with the Glade Springs transaction.

e. The Glade Springs transaction as a whole, as evidenced by the various documents or lack thereof, indicates that both Respondents were deficient in their knowledge and understanding of agency law, fiduciary duty, the lease-purchase process and the clarity required regarding the amount and timing of any commission paid to the licensee in connection with a lease-purchase, and the difference between a deeded purchase and a land contract.

10. Respondent Smith admits:

a. she should have had but did not have adequate and timely documentation in her file showing her agency relationship with the parties, in violation of W. Va. Code § 30-40-19(a)(7) and W. Va. Code R. § 174-1-22.4;

b. even if there was a dual agency, she did not have the parties sign the required Notice of Agency Relationship regarding the dual agency until February of 2017, in violation of W. Va. Code § 30-40-19(a)(13); W. Va. Code § 30-40-26(d) and W. Va. Code R. § 174-1-22.1; and

c. her lack of involvement in and knowledge about the Glade Springs transaction constituted an abandonment of the agency relationship, at least as to Owner, which constituted a breach of the fiduciary duty she owed to Owner.

11. Respondent Sinko admits she failed to adequately supervise Respondent Smith in connection with the Glade Springs transaction, which failure also constituted or demonstrated a breach of the fiduciary duty she owed to Owner.

12. The parties have agreed to settle the Complaints informally through the entry of this Consent Decree.

13. The Commission has incurred expenses in connection with these complaints in an amount in excess of $4,500.00, which expenses relate to the Commission's legal and procedural expenses, as well as time expended by Commission staff in the review and investigation of the Complaint, including matters considered in the payment of restitution, and other expenses incurred by the Commission in the prosecution and resolution of this Complaint.

CONCLUSIONS OF LAW

1. West Virginia Code § 30-40-1 *et seq.*, vests the Commission with the authority and responsibility to regulate real estate brokers, associate brokers and salespersons in the State of West Virginia.

2. West Virginia Code § 30-40-7 gives the Commission all the powers set forth in West Virginia Code § 30-1-1 *et seq.* and additional powers, including the discretionary power to "impose one or more sanctions as considered appropriate in the circumstances for the discipline of a licensee. Available sanctions include, but are not limited to, denial of a license or renewal thereof, administrative fine not to exceed one thousand dollars per day per violation, probation, revocation, suspension, restitution, required additional education, censure, denial of future license, downgrade of license, reprimand or order the return of compensation collected from an injured consumer."

3. W. Va. Code § 30-40-19(a)(7) provides that the Commission may revoke, suspend or impose any other sanction against a licensee if the licensee "[a]cts for more than one party in a transaction without the knowledge and written consent of all parties for whom he or she acts."

4. West Virginia Code § 30-40-19(a)(12) provides that the Commission may revoke, suspend or impose any other sanction against a licensee if the licensee "[f]ails to disclose, on the notice of agency relationship form promulgated by the [C]ommission, whether the licensee represents the seller, buyer or both."

5. West Virginia Code § 30-40-26(d) states that "[e]very licensee shall disclose in writing, on the notice of agency relationship form promulgated by the [C]ommission, whether the licensee represents the seller, the buyer or both. The disclosure shall be made prior to any person signing any contract for representation by a licensee or a contract for the sale or purchase of real estate."

6. Among the rules implementing W. Va. Code § 30-40-26(d), W. Va. Code R. § 174-1-22 regarding Agency Disclosure sets forth the following provisions:

> a. Each licensee shall provide a written notice disclosing which party the licensee is representing as agent to all parties to a real estate transaction. The required written notice shall be signed by all parties, and the real estate broker shall maintain a copy of the notice in his or her transaction files. The licensee shall execute this written notice prior to any party signing any contract for representation, offer to purchase,

to sell, or to exchange real estate for which a broker's license is required by W. Va. Code §§ 30-40-1, *et seq*. W. Va. Code R. § 174-1-22.1.

b. Any licensee acting as agent of a buyer, shall disclose his or her agency relationship to the seller, or the broker representing the seller, prior to any showing of the property or the initiation of negotiations whichever occurs first. W. Va. Code R. § 174-1-22.2.

c. A licensee may not be the agent for both the buyer and the seller without obtaining the written consent of both the buyer and the seller. W. Va. Code R. § 174-1-22.4.

d. If change in a licensee's agency status makes an earlier disclosure inaccurate, incomplete or misleading, the licensee shall prepare a revised disclosure form and immediately present it to all parties to the transaction. The revised disclosure must be dated and must be acknowledged in writing by all parties. W. Va. Code R. § 174-1-22.5.

7. Respondents' failure to comply with the law regarding consent to and notice of agency relationship violates W. Va. Code § 30-40-19(a)(7), West Virginia Code § 30-40-19(a)(12), and West Virginia Code § 30-40-26(d) and related legislative rules.

8. West Virginia Code § 30-40-19(a)(30) provides that the Commission has the authority to revoke, suspend or otherwise discipline a licensed broker if the broker "[f]ails to adequately supervise all associate brokers and salespersons employed by him or her."

9. W. Va. Code § 30-40-19(a)(31) provides that the Commission may revoke, suspend or impose any other sanction against a licensee if the licensee: "(b)reaches a fiduciary duty owed by a licensee to his or her principal in a real estate transaction."

10. Respondents, in allowing the Glade Springs transaction to proceed as set forth above, breached the fiduciary duty owed to their principal, the Owner, in violation of West Virginia Code § 30-40-19(a)(31).

11. W. Va. Code § 30-40-19(a)(37) provides that the Commission may revoke, suspend or impose any other sanction against a licensee if the licensee: "(e)ngages in any act or conduct

which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing."

12. The Commission may assess administrative costs, which shall be placed in the account of the Commission. Any fine shall be deposited in the state treasury's general revenue account. West Virginia Code § 30-1-8(a).

CONSENT

Respondents, by signing below, agree to the following:

1. Respondents execute 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 Respondents to make this settlement other than as set forth herein. Respondents acknowledge that they may pursue this matter through appropriate administrative and/or court proceedings and are aware of their legal rights regarding this matter, but intelligently and voluntarily waive such rights.

2. Respondents consent to the findings above and the entry of the following Order.

ORDER

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

1. Respondent Smith is **REPRIMANDED** and is **ORDERED** to pay to the State of West Virginia, by and through the Commission, a fine in the total amount of Fifteen Hundred Dollars ($1,500.00) for Respondent Smith's violations of the West Virginia Real Estate License Act, including her failure to comply with the laws of consent to and notice of agency.

2. Respondent Sinko is hereby **REPRIMANDED** and is **ORDERED** to pay to the State of West Virginia, by and through the Commission, a fine in the amount of Seven Hundred Fifty Dollars ($750.00) for Respondent Sinko's violations of the West Virginia Real Estate License Act, including her failure to supervise her salesperson, in violation of W. Va. Code § 30-40-19(a)(30).

3. Within six (6) months after the entry of this Consent Decree, Respondents shall each complete a total of seven (7) hours of approved continuing education, which shall be in addition to the continuing education required for annual renewal, and shall submit documentation to the Commission demonstrating successful completion of each class or course within thirty (30) days of same.

4. Respondents shall pay Glen B. Warrington Nine Thousand Dollars ($9,000.00) in partial **RESTITUTION** for the sales commission paid to Respondents by Attorney Smith.

5. Respondent Smith shall pay administrative costs associated with this matter in the significantly discounted amount of Three Thousand Dollars ($3,000.00).

6. The total payment of fines and administrative costs shall be paid by check or money order payable to the State of West Virginia and sent directly to the Commission's office within ninety (90) days of the date of entry of the Consent Decree.

7. Payment of the Nine Thousand Dollars ($9,000.00) in restitution shall be paid by check or money order made payable to Glen B. Warrington and sent to the Commission's Office within ninety (90) days of the entry of this Consent Decree by the Commission for forwarding to Mr. Warrington.

8. Any deviation from the requirements of this Consent Decree, without the prior written consent of the Commission, by either Respondent shall constitute a violation of an Order

of the Commission by that Respondent and may, upon Board action, result in the summary suspension of her license until such time as she achieves full compliance.

The Commission shall immediately notify the non-complying Respondent(s) via certified mail of the alleged violation and whether there is a summary suspension of her license. The non-complying Respondent may request reinstatement of her license, which shall be probationary, through renewal of this Consent Decree, or execution of a new Consent Decree which may contain different or additional terms. The Commission is not bound to comply with the non-complying Respondent's request for probationary reinstatement.

In the event the non-complying Respondent contests the allegations of violation of the Consent Decree resulting in the suspension of the Respondent's license, she may request a hearing to seek reinstatement of her license. Any such hearing shall be scheduled and conducted in accordance with the provisions of West Virginia 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 the non-complying Respondent based upon her violation of this Order of the Commission.

AGREED TO BY:

Marla Bass Sinko
MARLA BASS SINKO

06/27/18
DATE

Cathy E. Smith
CATHY E. SMITH

6/27/18
DATE

ENTERED into the records of the Real Estate Commission this 18 day of July, 2018.

WEST VIRGINIA REAL ESTATE COMMISSION,

By: Cheryl L. Dawson
CHERYL L. DAWSON,
Its Chairperson

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