

IN THE MATTER OF THE CLAIM  
OF DEATRES BAGBY,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF JERMON CHURCHILL,  
T/A CHURCHILL CONSTRUCTION LLC,  
RESPONDENT

\* BEFORE RACHAEL BARNETT,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: DLR-HIC-02-16-37552  
\* MHIC No.: 15 (75) 1199  
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On October 7, 2016, Deatres Bagby (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,691.89 in alleged actual losses suffered as a result of a home improvement contract with Jermon Churchill, trading as Churchill Construction (Respondent).

On May 22, 2017, I held a hearing at the Office of Administrative Hearings (OAH), in Hunt Valley Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

### ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Photographs of the kitchen at 7706 Middlesex Place Parkville, Maryland<sup>1</sup>, exact date taken unknown, 2015  
Contract for replacement work, inspection photograph, and after photographs October 6 and 30, 2015, and May 5, 2016
- Clmt. Ex. 2 - Photographs of the kitchen sink cabinet, undated  
Contract for remediation of issues with kitchen sink cabinet, and after photographs, April 20, 2016 and May 4, 2016
- Clmt. Ex. 3 - Home inspection by American Home Shield contractor, M.R. Mechanical, and contemporaneous photographs May 28, 2015  
Invoice from M.R. Mechanical, October 16, 2015
- Clmt. Ex. 4 - E-mail between Department and the Claimant, October 1 and 7, 2015
- Clmt. Ex. 5 - Certified letter from Claimant to Respondent with tracking information, October 14, 2015
- Clmt. Ex. 6 - Second certified letter from Claimant to Respondent with tracking information, May 5, 2016
- Clmt. Ex. 7 - E-mail between Department and the Claimant, June 23 and 27, 2016

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<sup>1</sup> All of the photographs and documentation relate to this property address.

- Clmt. Ex. 8 - E-mails between property managers and Claimant, various dates
- Clmt. Ex. 9 - E-mails between property manager, Claimant, and insurance agent, various dates
- Clmt. Ex. 10 - E-mails between property manager and Claimant, various dates
- Clmt. Ex. 11 - Text messages between the Respondent and the Claimant, various dates
- Clmt. Ex. 12 - Facebook updates published by the Claimant regarding the construction work at Claimant's home, various dates
- Clmt. Ex. 13 - Invoice for hardwood floor replacement, August 6, 2014  
Insurance estimate for this work, September 16, 2014

The Respondent did not offer any exhibits for admission.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of hearing, mailed March 2, 2017
- Fund Ex. 2 - Hearing order, dated November 23, 2016
- Fund Ex. 3 - Contractor registration, expires January 10, 2020
- Fund Ex. 4 - Home improvement claim form, received October 7, 2016
- Fund Ex. 5 - Letter from Department to the Respondent, dated October 17, 2016

### Testimony

The Claimant testified in her own behalf and presented the testimony of her friend, Stephanie Burke.<sup>2</sup>

The Respondent testified in his own behalf.

The Fund did not present any witnesses.

### **PROPOSED FINDINGS OF FACT**

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 4838259.

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<sup>2</sup> The Claimant participated telephonically because she was stationed in Hawaii. Ms. Burke appeared in person.

2. The Claimant and her husband own 7706 Middlesex Place, Parkville, Maryland.

3. On August 11, 2013, the Claimant's home was damaged in a fire while the Claimant was stationed in Hawaii and tenants were occupying the Claimant's home. The home suffered fire and water damage, and the tenants vacated.

4. On August 12, 2013, Horizon Management, the company that was managing the rental of the Claimant's home, notified the Claimant about the loss.

5. On September 10, 2013, Horizon Management informed the Claimant, "I will have my contractor go there this week." The contractor was Churchill Construction, LLC.

6. Between August 2013 and November 2013, the Claimant worked with Travelers Indemnity Company (Travelers), her home insurance carrier, to obtain an estimate for repairing the home.

7. On November 8, 2013, Travelers issued a property estimate to the Claimant, which was a detailed estimate of covered home repairs and the amount which Travelers would pay for each reimbursable repair. The total estimate of covered repairs was \$75,407.83.

8. On November 11, 2013, the Claimant and the Respondent entered into a contract. The contract stated that work would begin within one week of the Claimant accepting the contract and would be completed within ninety days. The contract included work throughout the home. The relevant portions of the contract were:

- Kitchen
  - Repair wall as needed
  - R&R wallpaper border
  - Countertop detach and reset
  - R&R cabinetry lower base/ full height

- R&R vinyl floor covering
  - Prime and paint
- Exterior
  - Pressure wash soot from bricks
  - R&R storm windows
  - Place two dumpsters thirty yards from the house
  - License and permits are included
- HVAC
  - R&R AC unit in attic and outdoor unit
  - R&R duct work up to 900 square feet
- Electrical
  - Rewire upstairs unit, lights and receptacles
  - Replace lights and ceiling fans
  - Rewire smoke/carbon detectors
  - Labor/materials and permits included

9. The original agreed-upon contract price was \$93,250.00; however, the Respondent ultimately accepted the payments from Travelers, in the amount of \$87,349.80, as payment in full.

10. On November 23, 2013, Travelers paid the Respondent a third of Travelers' estimate for repairs.

11. The Respondent began working on the home by January 2014 and concluded in or about December 2014.

12. In 2014, the Claimant also had solar panels installed on her home; the solar panel technicians worked in the attic, the same area where the Respondent installed the new air handler.

13. On August 28, 2014, the Claimant returned from Hawaii to Maryland to find that the work on her property was partially complete.

14. Following the Claimant's return to Maryland, her friend, Stephanie Burke, began visiting two to three times per week.

15. In the week before the Respondent laid the kitchen flooring, he aimed a fan at the subfloor to dry it out, since the house had suffered water damage.

16. The Respondent laid the kitchen floor on the subflooring after the Claimant returned from Hawaii. A gap formed between the flooring and the molding, and by January 2015, the flooring began to bubble.

17. On September 14, 2014, Travelers issued the Complainant a revised property estimate to the Claimant, in which Travelers agreed to pay \$87,349.80 for the claim. This total payment included a payment of \$974.55 for linoleum installation and \$2,387.05 for cabinetry installation in the kitchen.

18. Travelers made payments directly to the Respondent, and the Respondent completed the work on the house.<sup>3</sup>

19. The kitchen cabinets had the following problems: the cabinets were not secured in place, the door under the sink did not close, there was a gap between the cabinets and the countertop, and the countertop dipped.

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<sup>3</sup> The Record is clear that the Respondent received payments from Travelers; however, there is only a copy of one check for \$14,942.23 and a payment log for \$47,224.23 in the Record. This amount totals \$62,166.46.

20. In September 2015, the Claimant, the Respondent, and Hubert Lowry, an employee of the Department, met in the Claimant's home to discuss areas of concern with the work performed.

21. On October 14, 2015, the Claimant sent the Respondent a certified letter, requesting that the Respondent repair the kitchen sink cabinet, kitchen floor, upstairs faucet, and the air conditioning (AC) unit.

22. The Respondent did not respond to the Claimant's letter.

23. On October 6, 2015, the Claimant contracted with Empire Today to replace the kitchen floor laid by the Respondent. The contract amount was \$1,923.00. Empire Today laid a thin layer of wood flooring on top of the subfloor before laying the new linoleum.

24. On May 26, 2015, the Claimant contracted with M.R. Mechanical to repair the AC unit's supporting features, including the drainage, insulation, and a voltage increase. The Claimant paid M.R. Mechanical \$75.00 on May 28, 2015, and \$1,500.00 on October 16, 2015.<sup>4</sup>

25. On April 20, 2016, the Claimant contracted with Mr. Handyman to disassemble and reassemble the kitchen cabinetry, countertop and sink. The contract amount was \$1,848.52.

26. On May 31, 2016, the Claimant sent the Respondent a second certified letter in which the Claimant demanded repayment for repairs to the flooring and the kitchen cabinetry she paid to have completed and attached receipts.

27. The AC was running during the Respondent's work on the home. It later became nonoperational.

28. The Claimant's actual loss is \$3,103.45.

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<sup>4</sup> The description of work for the service order invoice dated October 16, 2015 is partially illegible. (Claimant Ex. 3).

## DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).<sup>5</sup> “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a) (2015);<sup>6</sup> *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

The Respondent performed unworkmanlike, inadequate or incomplete home improvements. I will address the Respondent’s work by the area of the home for which the Claimant sought compensation.

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<sup>5</sup> As noted above, “COMAR” refers to the Code of Maryland Regulations.

<sup>6</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.



### *Kitchen Cabinets*

The Complainant argued that the Respondent failed to properly assemble the kitchen cabinets. She testified about her extensive observations of the deficient assembly and presented photographic evidence of the various problems, along with the supporting testimony of Ms. Burke. Ms. Burke testified that following the Complainant's return home to Maryland, she visited the Complainant two to three times per week and when Ms. Burke first set her Apple laptop down on the kitchen countertop, it caved in. The Complainant's testimony was consistent with the photographic evidence of the cabinetry contained within Claimant's Exhibit 2. This exhibit shows a level being held up to the side of the cabinet, demonstrating that the side of the cabinet was not flat. Another photograph shows that the cabinet was loose from the wall, instead of being secured. Another photograph shows a top-down view of the cabinet under the sink – this cabinet door sat ajar. Two other photographs show there was a gap between the countertop and the supporting cabinetry. The Complainant also included photographs of each of these items being fixed in her "after" photographs, following reassembly of the cabinetry by Mr. Handyman.

The Respondent countered that the kitchen floor was sagging due to moisture in the floor and that caused the problems with the kitchen cabinets. However, the record supports a different conclusion. In Claimant's Exhibit 11, text messages between the Respondent and the Claimant, with various dates in November 2014, specifically mention problems with the cabinets immediately after their installation. Clearly, the Respondent did not assemble the cabinets properly.

The Claimant sought to have the Respondent fix the kitchen cabinets; however, he did not. In November 2014, the Claimant first notified the Respondent about problems with the cabinets via text message. In September 2015, the Claimant, the Respondent, and an inspector

from the Department met in the Claimant's house. The inspector agreed with the Claimant that the kitchen cabinets needed fixing. Additionally, the Claimant sent the Respondent two certified letters regarding the cabinetry issues; however, he neither fixed the cabinets nor reimbursed the Claimant to have them fixed.

Based on the two invoices included in Claimant's Exhibit 2, Mr. Handyman visited the Complainant's home three times in relation to the kitchen cabinets. On April 20, 2016, Mr. Handyman spent 1.25 hours at the Complainant's home and reattached a tub handle, started to repair the cabinets, and consulted with the Complainant about "cracking and sticking doors"<sup>7</sup> The number of hours per work item is not listed and only one of the three work items is clearly related to remedying the Respondent's work on the home. The charge for this visit was \$170.00. Since only one of the three work items related to the cabinetry and the time allotted is not identified, I cannot count any amount of this invoice towards the Claimant's award for the cabinetry.

Mr. Handyman created a second invoice for work performed on May 4 and 5, 2016, which related almost entirely to reassembly of the cabinetry. The "description of work" includes nine items and Mr. Handyman billed at the rate of \$146.00 for the first hour and \$96.00 for each additional hour, with a total of 14.25 hours. The description of the work includes the disassembly of the kitchen countertops and connected items, such as the garbage disposal, cutting and installing stabilizing boards and reassembling the cabinetry. Mr. Handyman did this work to remedy the cabinet assembly errors of the Respondent. However, Mr. Handyman's work also included the removal and reinstallation of copper piping under the sink, which was not part of the Respondent's contract with the Claimant. Therefore, one of the nine work items was unrelated to the work. I will therefore reduce the Claimant's award by one ninth of the billed

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<sup>7</sup> It is unclear whether these doors are the kitchen cabinet doors or doors located elsewhere in the home.

work hours at the rate of \$96.00 per hour. The work hours totaled \$1,418.00 and one ninth of this amount is \$157.55, for a resulting amount of \$1,260.45. Additionally, the Claimant had Mr. Handyman install a bottom “shelf” (a flat piece of wood) under the sink, as is demonstrated by the final “after” picture in Claimant’s Exhibit 2. This was not part of the original contract; however, it is an extremely minor work item. The Department recommended that I reduce the award to the Claimant by \$80.00 to account for the installation of the shelf. I find this to be a reasonable recommendation and adopt this figure. The resulting total eligible for reimbursement from the Fund is \$1,180.45.<sup>8</sup>

While the text of the work items in Claimant’s Exhibit 2 is clear enough that I can read it, the column for “materials used” is photocopied so lightly that it is illegible. I can make out the words “plywood” and “pipe” in this category. Considering that plywood is considerably less expensive than copper piping and I cannot read any other items in the short materials list, I cannot award the Claimant compensation for any portion of the materials cost, \$430.52. I thus find that the Claimant is eligible for compensation of \$1,180.45 from the Fund for the Respondent’s inadequate work on the kitchen cabinets.

#### *Kitchen Flooring*

The Claimant argued that the Respondent failed to properly lay linoleum flooring in her kitchen. The Respondent laid linoleum flooring in the kitchen of the Claimant’s home sometime after she arrived back in Maryland on August 28, 2014 and before December 2014. The linoleum did not reach all the way to the wall molding on one side, as is clear from a photograph included with Claimant’s Exhibit 1.<sup>9</sup> The Claimant testified that by January 2015, the flooring was bubbling. The photographs in Claimant’s Exhibit 1 show bubbling in both the foreground

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<sup>8</sup> The complete calculation is included at the end of the decision.

<sup>9</sup> The Claimant testified that she took the photographs of her floor in January 2015.

and background of the picture. On October 30, 2015, the Claimant had Empire Today replace the flooring. The Claimant testified that the Empire Today technician told her that the bubbling was caused by insufficient glue on the back of the linoleum. One of the photographs shows the underneath of the linoleum, exposed when the Empire Today technician did a cross-cut in the flooring. There is no visible adhesion on the back of the linoleum; however, that was just a small section of the flooring. Certainly, the flooring should have continued all the way to the wall's molding.

The Respondent argued that the linoleum could have bubbled because there was no air conditioning or heat in the home during the installation of the linoleum. Without any evidence of an exact date when the linoleum was laid, it is impossible to determine the temperature of the home at the time and therefore the likelihood of extreme temperatures affecting the newly installed linoleum. Furthermore, the Respondent presented no evidence that linoleum bubbles when exposed to either hot or cold temperatures.

The Respondent further argued that the linoleum could have bubbled due to moisture remaining in the subflooring from the water damage to the home during the fire. He testified that he aimed a fan at the subflooring for a week to dry it out before laying the linoleum on top of it. The Respondent was aware that the subflooring had water damage and decided that aiming a fan at it would be sufficient to solve the problem. Empire Today laid a thin layer of wood flooring over the water-damaged subflooring and then glued the linoleum to that flooring. The picture of the new linoleum shows no bubbling. The Respondent was responsible for the quality of his work and he failed to ensure that the linoleum was properly laid in the kitchen. His work on the kitchen flooring was inadequate, because the result was an uneven surface. If the subflooring was too moist for linoleum to properly adhere to it, then he should have alerted the Complainant,

and if necessary, asked for supplemental payment from Travelers to lay an intermediate level of flooring before the linoleum.

The Claimant sought to have the Respondent fix the flooring; however, he did not. In September 2015, the Claimant, the Respondent, and an inspector from the Department met in the Claimant's house. The inspector agreed that he could see the floor was bubbling and said that it had to be fixed. Subsequently, the Claimant sent the Respondent two certified letters regarding the flooring issue; however, he neither fixed the flooring nor reimbursed the Claimant to have it fixed.

In October 2015, Empire Today removed the vinyl flooring laid by the Respondent and laid subflooring and linoleum on top of the fresh subflooring. The cost was \$1,923.00. There was no additional work performed that exceeded the scope of the Claimant and the Respondent's contract. The Fund recommended that the Claimant be found eligible for compensation of this amount, and I am considering \$1,923.00 in my final calculation below.

I thus find that the Claimant is eligible for compensation from the Fund for the Respondent's inadequate work on the linoleum flooring.

#### *HVAC System*

The Claimant argued that the Respondent failed to properly install the air handler in the attic of her home. The Claimant testified that the air conditioning would not turn on in May 2015 when she attempted to use it for the first time that season. The Claimant wrote in Claimant's Exhibit 3 that Climate Masters informed her that the air handler had been working during Respondent's work on the home, because there was construction dust inside of it. The Claimant also acknowledged on cross examination that she had solar panel installers working in her attic at the same time that the Respondent was working on her home. It is unknown what

impact the installers may have had on the air handler and more generally, why the air handler stopped working.

The Claimant did not produce an expert witness or an inspection report to diagnose the cause of the air handler's dysfunction, which is important because it was functioning following its installation. The March 2015 report from M.R. Mechanical includes recommendations for work on the exterior air conditioning unit; however, this unit was not part of the contract with the Respondent. In October 2015, M.R. Mechanical ran a new service wire in the attic with greater voltage, added insulation, connected the drain pipe and insulated the unit. The Claimant had not contracted with the Respondent for a voltage upgrade, to insulate the air handler, or to perform work on the exterior air conditioning unit. It is unclear what percentage of the \$1,500.00 bill should be allocated to these additional work items, because the October 2015 service order is not itemized and is partially illegible.<sup>10</sup>

I thus find that the Claimant is not eligible for compensation from the Fund for work on the air handler.

Having found eligibility for compensation for the linoleum and kitchen cabinetry, I now turn to the amount of the award, if any, to which the Claimant is entitled. A claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula<sup>11</sup> offers an appropriate measurement to determine the amount of actual loss in this case.

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has

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<sup>10</sup> The photocopying on the left side of the document is so light I cannot read it.

<sup>11</sup> For purposes of the calculation, I consider the amounts paid by Travelers to the Respondent as the contract price, which Travelers paid in full.

paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Travelers paid the Respondent \$974.55 to replace the linoleum flooring and \$2,387.05 to replace the kitchen cabinets and set the countertop on the cabinets, for a total of \$3,361.60. This amount is effectively the contract price, because the Respondent accepted Travelers' payment as payment in full. The Claimant paid Mr. Handyman \$1,180.45 in eligible expenses to remedy the cabinetry issues and paid Empire Today \$1,923.00 to remove and replace the linoleum for a total of \$3,103.45. Therefore the calculation is:  $\$3,361.60 + \$3,103.45 - \$3,361.60 = \$3,103.45$ .

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015).

Travelers paid \$3,361.60 on behalf of the Claimant to the Respondent, which is more than the Claimant's actual loss of \$3,103.45 computed using the formula in COMAR 09.08.03.03B(3)(c). Accordingly, the Claimant is entitled to reimbursement of \$3,103.45. Md. Code Ann., Bus. Reg. § 8-405(a) (2015).

#### **PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$3,103.45 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-405(a) (2015); COMAR 09.08.03.03B(3)(c).

**RECOMMENDED ORDER**

I **RECOMMEND** that the Maryland Home Improvement Commission:

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,103.45; and

**ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>12</sup> and

**ORDER** that the records and publications of the Maryland Home Improvement Commission reflect this decision.

**Signature on File**

August 17, 2017  
Date Decision Issued

\_\_\_\_\_  
Rachael Barnett  
Administrative Law Judge

RAB/sm  
#168546

<sup>12</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



**PROPOSED ORDER**

***WHEREFORE, this 10<sup>th</sup> day of October, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.***

***Bruce Quackenbush***

***Bruce Quackenbush  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**