BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE ALASKA REAL ESTATE COMMISSION

MARY MARTIN,	)	
Claimant	)	
v.	)	
E. ROY BRILEY	)	
Respondent.	)	Case No. OAH 09-0232-RES
	)	

DECISION

I. Introduction

Mary Martin bought a house in 2007 with the respondent, Roy Briley, acting as a neutral licensee. After the roof failed a year and a half later, Ms. Martin filed this claim against the surety fund for losses allegedly suffered as the result of the transaction. A hearing on the matter was held on July 23, 2009. Ms. Martin appeared and testified in person. Mr. Briley appeared in person with counsel, Shane Osowski, and testified.

Because Ms. Martin did not meet her burden of establishing that she suffered a loss as the result of fraud, misrepresentation, deceit, or the conversion of trust funds or community association accounts, the claim is denied.

II. Facts

Unless stated otherwise, all facts below are derived from the testimony at the hearing of Ms. Martin and Mr. Briley.

Ms. Martin is a single mother with three children at home. In March of 2007, Ms. Martin had been working with a real estate agent named Charles to find an affordable home for her and her children. On the morning of Saturday, March 31, 2007, Ms. Martin and her older daughter drove by a house in Anchorage with a "for sale" sign posted. Ms. Martin's immediate reaction was to remark what an "ugly" house this was, and she was initially not very interested. Nevertheless, she stopped and picked up a flyer.

The house in question had just been placed on the market by Mr. Briley. The owner of the house had lived in it several years earlier, but he had moved to Fairbanks and had not seen the property for some time. The house had been rented out and managed by an agency other than Mr. Briley's, and the most recent renters had not been good tenants. There is no dispute that the house was in a state of obvious neglect, with trash piled in the backyard, rodent feces throughout the

interior and minor damage to the walls. Because he had not seen the property for several years, the seller did not feel in a position to provide a meaningful disclosure of the property's condition.

While she considered the house to be extremely "ugly," Ms. Martin found the price of the property quite attractive. According to the flyer, the house was listed at $249,900, nearly within her price range, and it offered plenty of square footage for her children and a sizeable yard. Ms. Martin called Mr. Briley, the listing agent, on Saturday, March 31, 2007, and said she was interested in seeing the house. Ms. Martin returned to the house with her children, where Mr. Briley met her and showed her around the property. Ms. Martin asked why the price was so low for a house of that size, and Mr. Briley stated that the price had been set with recognition that the property "lacked kerb appeal." Ms. Martin asked if that was a technical term for ugliness, and Mr. Briley agreed that it was.

Ms. Martin told Mr. Briley that the house was priced for a bit more than she was qualified for. Mr. Briley told Ms. Martin that the house was in foreclosure, and because the seller was motivated, there might be some room for negotiation in the price. However, Ms. Martin testified that Mr. Briley also said that the key to his considerable success was fair pricing, and that he thought the listed price was reasonably calculated to sell the house quickly. After viewing the house with her children, Ms. Martin decided she liked the place and was interested.

Ms. Martin testified that she told Mr. Briley that she needed to talk with her own agent, and that Mr. Briley then told her that if she used Mr. Briley in a neutral capacity, he would be in a position to help her buy the house, because there would only need to be one commission paid by the seller and thus there would be more "room to play." Ms. Martin told Mr. Briley she was not sure that would be fair to her current agent, as she had been searching for a house for several months and he had shown her at least thirty properties, and that she would need some time to think about it. Mr. Briley made no objection; he gave Ms. Martin his card, and they both left the property and went about their respective ways.

A short time later that same day, Ms. Martin called some friends whose judgment she trusts and told them about the house. When her friends agreed to look at the house with her, Ms. Martin called Mr. Briley back and asked if he would come and show the place again. Mr. Briley told Ms. Martin that he was busy the rest of the day and unable to return to the property, but that access to the house was available through an unlocked back door to the garage, and that if Ms. Martin wanted to tour the house with her friends or anyone else, she was welcome to. Ms. Martin and her friends did return to the property, entered through the back door, and inspected the house at their leisure

without Mr. Briley being present. After seeing the house again with her friends, Ms. Martin considered it was an older house that would need a number of upgrades, such as removing old paneling and replacing carpets, but decided that "all in all, it was a nice size, a nice price, the yard was large enough, and my friends said, 'you know what, you should go for it,' and so I said, 'okay.'"

Ms. Martin called Mr. Briley back and advised him that she wanted to make an offer on the house. Mr. Briley reminded Ms. Martin that the house had just been listed and would appear on the Multiple Listing Service the following Monday. Mr. Briley offered his opinion that the house was very fairly priced in a brisk market, and that it might move quickly. According to Ms. Martin,

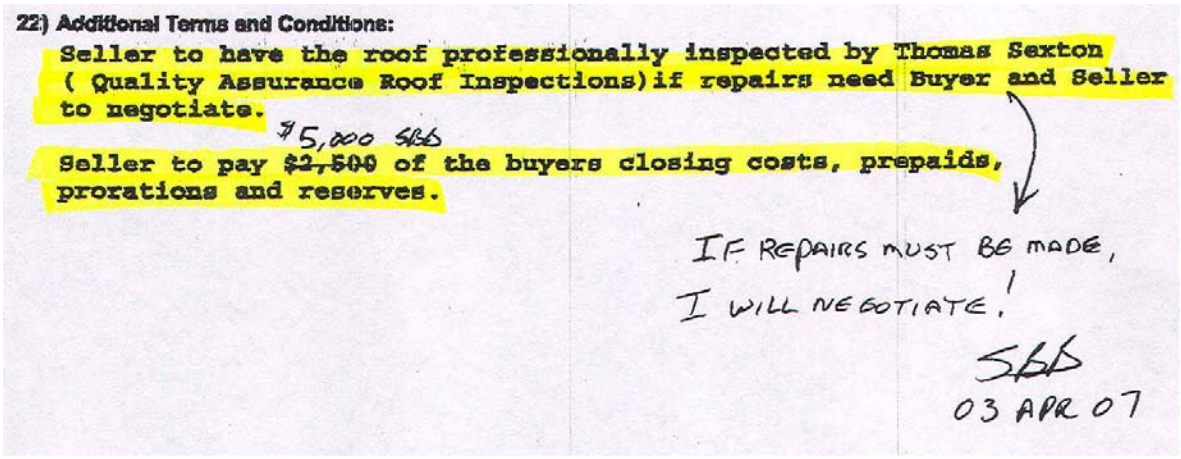
> He also promised me that if I used him to act as a neutral agent, that he could put in a good word with the seller to kind of help me get the house. You know, because the seller needed to sell the house as fast as possible, getting an offer before MLS listed, you know, would make it so that I kind of had the jump on everyone else because nobody else knew that it was out there. And as soon as it got put on MLS he was sure it was going to go fast. So I agreed to use him as a neutral agent and made an appointment to meet with him in his office the next day, which was a Sunday.

The next day, Ms. Martin went in to Mr. Briley's office, where she, Mr. Briley, and Mr. Briley's son Chad went to work compiling the necessary paperwork and signatures to prepare an offer. At one point Chad asked Ms. Martin if she had another agent, and Ms. Martin mentioned an agent who had shown her a number of houses. Though she felt guilty about not using her previous agent, Ms. Martin again decided to go ahead and submit an offer with Mr. Briley acting in a neutral capacity. Ms. Martin signed an Alaska Real Estate Commission Consumer Pamphlet and the Alaska Real Estate Commission Waiver of Right to be Represented, which authorized Mr. Briley to act as a neutral licensee. Ms. Martin also signed the "Additional Authorization" portion of the form authorizing Mr. Briley to discuss prices, terms or conditions with both parties, and to suggest compromises in the parties' bargaining positions. Ms. Martin also signed a HUD form advising her "For Your Protection: Get a Home Inspection."

With Mr. Briley's help, Ms. Martin prepared an offer in the form of a proposed purchase and sale agreement. The offer was for $244,900, with the seller paying $2,500 in closing costs.[1] This amount was more than Ms. Martin initially wanted to offer, but one in a range that Mr. Briley suggested was more realistic. The offer was written on a standard MLS form, with pre-printed language stating that brokers and licensees are not experts on the physical condition of the property,

[1] Exhibit 6.

and that the buyer has the right to have qualified professionals inspect the property. In a space indicating which professionals the seller would approve of, the names of five inspectors were typed in, followed by "anyone qualified." At the end of the form, two "additional terms and conditions" were typed in, as shown below.[2] Although the contract afforded Ms. Martin the right to have the house inspected by any qualified professional, Mr. Briley also included, on his own initiative, a contract provision that required the seller to have the roof inspected in addition to any inspection done by Ms. Martin. The seller countered at the original price of $249,900, but with the seller paying $5,000 in closing costs; Ms. Martin accepted the counteroffer. The image below shows the original offer, with handwritten changes made by the seller reflecting the final agreement reached by the parties:


22) Additional Terms and Conditions:
Seller to have the roof professionally inspected by Thomas Sexton (Quality Assurance Roof Inspections) if repairs need Buyer and Seller to negotiate.
$5,000 SBS
Seller to pay ~~$2,500~~ of the buyers closing costs, prepaids, prorations and reserves.
IF REPAIRS MUST BE MADE, I WILL NEGOTIATE.
SBS
03 APR 07

Mr. Briley had typed the contract language specifying Thomas Sexton as the roof inspector at or before the time that Ms. Martin arrived at his office on Sunday to discuss an offer; Ms. Martin had not requested this term. As a real estate professional, Mr. Briley has little practical knowledge or understanding beyond a layman's level about the technical aspects of roofing. Mr. Briley generally avoids even looking at roofs and crawlspaces in order to prevent giving buyers and sellers the impression of reliable expertise. Mr. Briley made no effort to hide the poor condition of the house, and he discussed with Ms. Martin the likelihood that the house needed considerable maintenance and that she should take such costs into account. Mr. Briley may have warned Ms. Martin of risk if she hesitated in making an offer. Such a warning could be regarded as salesmanship, but there is no reason to doubt Mr. Briley's assertion that he was providing an honest opinion and truthful

[2] Exhibit 6, page 6.

information about the price of the house, the reasons it was priced relatively low, and the then-current state of the Anchorage real estate market.

On April 6, 2007, a professional home inspection service inspected the house and produced a "Recommendation Page" with fifteen "health and life safety" items and twenty "significant repair items."[3] Significant repair item number two is "replace all missing shingles on the eave of the roof." Significant repair item number 19 states that "there is evidence of previous water damage in the ceiling of the garage and above the fireplace in the living room. Although dry at the time of inspection, verify leak source has been repaired."[4] No other problems with the roof were identified in the report. This report was not conveyed to the roof inspector before he performed his independent inspection.

Mr. Briley readily admitted at the hearing that in spite of his general lack of knowledge about the technical aspects of roofing, he did have serious concerns about the roof on this house before he even listed it, and that he made no effort to conceal his concern. The house had a flat built-up torched-down asphalt roof. While such roofs are not uncommon on older houses and commercial buildings, Mr. Briley was aware that such roofs are not the ideal design for Alaska's wet and freezing climate. Combined with the age of the house, the building's obvious state of neglect, and the absence of the landlord for several years, the circumstances led Mr. Briley to be seriously concerned about the possibility of roof problems, though he did not know if in fact there were any. For this reason, Mr. Briley included the provision in the contract for the seller to pay for the roof inspection, in addition to any inspections performed by the buyer. Mr. Briley was relieved when the inspector reported the roof to be in acceptable condition, as it allowed the deal to move ahead with fewer complications for all parties.

In the past, Mr. Briley has used roofers to perform roof inspections, and his experience was that, because they hoped to obtain some business, roofers did not always provide objective evaluations of a roof's condition. In 2000 another agent had listed Mr. Sexton's company in a counteroffer as the professional to provide an inspection. After discussing Mr. Sexton's business reputation with the other agent, Mr. Briley started also using Mr. Sexton when a transaction called specifically for a roof inspection, as opposed to a general home inspection or engineer's report. To Mr. Briley's knowledge, Mr. Sexton is the only licensed and insured roof inspector in Alaska. Mr.

[3] Exhibit 9.
[4] Exhibit 9, page 3.

Briley continues to use the services of Mr. Sexton's company, but he has never met Mr. Sexton personally.

Mr. Sexton inspected the roof on April 14, 2007.[5] Mr. Sexton's report details the structure of the roof, and concludes that "the BUR [Built Up Roof] is in good condition. The remaining service life of the BUR is ten years, plus. No repairs are needed. No maintenance items." This was followed with a recommendation to alter the metal edge of the roof to allow ponding water to drain off. Although there was snow on part of the garage roof, Mr. Sexton reported that "the roofing on the garage that could be seen is in good condition. The remaining service life of the BUR is five years, plus" (underline in original). The report did state that shingles over a back porch canopy were at the end of their serviceable life and should be replaced, but that because the canopy did not cover an occupied space the work was optional and could be done at any time.

Mr. Sexton's report concludes that "as with all BUR waterproofing, an annual inspection should be done to find and repair any defects that may occur during the year. This is considered normal maintenance for a BUR roof." There is no evidence that Ms. Martin ever had an annual inspection performed on the roof.

In August of 2008 water began leaking from the roof at several points in the house. According to Ms. Martin,

> I had water, there is water coming in through the living room window, there's water coming in over the dining room table, which is near the light fixture, there is water coming in at the, through the dining room window itself, and you go into the garage and there is like a big huge puddle of water and there was s small hole at that time, but at first it was just a bowing, and then every day, the more it rained, I would go out there and the bowing turned into a small hole.

Rather than checking the roof herself or calling a roofer when the roof first started leaking, Ms. Martin decided to contact Mr. Briley, even though it had been well over a year since the sale had closed. Ms. Martin testified that she "was pretty angry, pretty mad, and I tend to have a sailor's mouth when I get mad, and I know that I do, and I know that that can cause some kind of controversy and problems, so I decided it would be better to send an email than for you to call him and start cussing at him right now." Ms. Martin eventually attempted to contact Mr. Briley by replying to an email she had received more than a year earlier from a former assistant of Mr. Briley's. The former assistant replied that she no longer worked for Mr. Briley, but said that she

[5] Exhibit 10, page 1.

had forwarded the message to Mr. Briley and his current assistant and that she expected someone would probably call Ms. Martin.

Ms. Martin did not hear back from Mr. Briley, and she apparently did nothing to stop the leaks in her roof. Two weeks later, on September 12, 2008, Ms. Martin noticed that her bathroom smelled damp, and upon closer inspection she discovered extensive damage to the bathroom drywall. This discovery was an emotional event for Ms. Martin, who now believed that her house was crumbling around her. At this point, Ms. Martin had her son go up on the roof, and he was able to quickly identify the area where a seal around the bathroom drain vent was leaking. After diverting the water from the leak to prevent further damage, Ms. Martin resolved to immediately call Mr. Briley at home, even though it was late at night. But she first called a friend, to whom Ms. Martin was "screaming and ranting and raving," according to her testimony. Her friend calmed Ms. Martin down, and again Ms. Martin decided to send an email instead of calling Mr. Briley. This time Ms. Martin got an email address from Mr. Briley's website, and sent an angry email. Mr. Briley's son Chad responded the next day, encouraging Ms. Martin to call Mr. Briley. Ms. Martin did so the following Sunday, but the conversation quickly turned unpleasant, and Ms. Martin then filed her claim against the surety fund.

Ultimately, Ms. Martin did finally have the entire roof replaced. The parties stipulated that the roof was defective when Ms. Martin bought it, and that the cost to repair the damage was at least $15,000.[6] In very rough figures, the cost to replace the roof as it was built would have been about $10,000, but Ms. Martin had a better quality roof installed for about $15,000. Because costs to repair water damage from the leaks exceeded $5,000, the parties stipulated damages at the statutory limit for claims against the fund.

III. Discussion

In a claim upon the real estate surety fund,

> The claimant bears the burden of proof of establishing that the claimant suffered losses in a real estate transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds or the conversion of community association accounts under the control of a community association manager on the part of a real estate licensee and the extent of those losses. All facts shall be established by a preponderance of the evidence.[7]

[6] Considering the ease with which Ms. Martin's son spotted the leak around the bathroom vent, it is difficult to tell whether regular annual maintenance to the roof would have prevented damage or extended the serviceable life of the roof. Nor is it possible to tell how much damage would have been prevented if Ms. Martin had acted immediately when she detected the first leak, instead of waiting weeks for Mr. Briley to respond to a forwarded email. The parties have stipulated that the roof was defective, and the issue in this case does not require a determination on this matter.

[7] AS 08.88.465(d).

In her written claim, Ms. Martin alleged that "it is clear that the seller knew about these issues and even informed Roy of these issues and as a result Roy handpicked a team of individuals to prevent me from discovering the potential problems with this house." At the hearing Ms. Martin asserted that Mr. Briley "deceived and intentionally misrepresented fact to me in order to get the sale done." Ms. Martin suggests that Mr. Briley pressured her into waiving disclosure under AS 34.70, pressured her into not consulting with her own agent and agreeing to use Mr. Briley as a neutral agent, and she suggests a kind of conspiracy in which Mr. Briley chose Mr. Sexton to inspect the roof in order to conceal known damage. At the hearing, Ms. Martin stated that she believes Mr. Briley knew the roof was defective before the time of the sale, although she admitted she had no direct evidence. In her closing argument, Ms. Martin stated that

> Basically I just disagree, that there is a duty of care, of reasonable skill, you know, a duty of care, of reasonable skill is needed and I disagree that somebody should be allowed to rely solely on making sure that they signed the paperwork, that paperwork was signed, I believe that duty of care extends to properly explaining, thoroughly explaining paperwork and the repercussions thereof that, you know, a client is signing. And for me as a first time home buyer, I relied on believing that Mr. Briley had taken my best interest to heart and, you know, provided everybody with all the information they would need to provide a proper inspection of the home and of the roof, and had he done his job thoroughly and correctly and not just relied on paperwork, I would not be in the position I am in today.

The Alaska Supreme Court uses the terms "fraud," "misrepresentation" and "deceit" interchangeably, requiring for a claim under any of the terms proof of: (1) a false representation of fact; (2) knowledge that the representation was false (or lack of confidence in the representation, or knowledge that the basis for the representation was not as stated or implied); (3) intention that the other person rely on the representation; (4) justifiable reliance on the representation; and (5) damage as a result of the reliance.[8] In any case, knowledge is an essential element that must be proven. Black's Law Dictionary defines "fraud" as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment" or "a misrepresentation made recklessly without belief in its truth to induce another person to act."[9] In the context of tort law, the Alaska Supreme Court has stated that

> Alaska cases follow the Restatement (Second) of Torts on what constitutes a fraudulent misrepresentation. The Restatement identifies several elements of intentional misrepresentation: (1) a misrepresentation of fact or intention, (2) made fraudulently (i.e.,

[8] *City of Fairbanks v. Amoco Chemical Co.,* 952 P.2d. 1173, 1176 & n.4 (Alaska 1998); *Bubbel v. Wien Air Alaska, Inc.,* 682 P.2d 374, 381 (Alaska 1984).
[9] BLACK'S LAW DICTIONARY 685 (8th ed. 2004).

with *scienter*), (3) for the purpose of inducing another to act in reliance, (4) with justifiable reliance by the recipient, (5) causing loss.[10]

The Supreme Court has held that in claims against the surety fund for misrepresentation, the claimant must prove more than negligent misrepresentation, which could be the basis for recovery in a lawsuit against the licensee in court; in a surety fund claim, it must be shown that the misrepresentation was intentional.[11]

Ms. Martin's principal allegation is that Mr. Briley knew the roof was defective, and that he intentionally concealed the fact. The evidence does not support this claim, and several items of evidence refute the notion. Nor does the evidence support the accusation that Mr. Briley advanced a particular roof inspector because he knew that particular person would provide a false report on the condition of the roof, a very serious allegation.

The home inspection shows that there was previous water damage in the house, indicating that at one point the roof had been patched or repaired. Even if the seller had specifically told Mr. Briley that he had patched roof leaks in the past, that would not establish that Mr. Briley was aware of serious latent defects. If Mr. Briley knew of previous problems, there is nothing suggesting that it was unreasonable for him to believe that any repairs had been properly performed in a workmanlike manner, and that the roof had a service life as stated in the inspector's report.

As Mr. Briley points out, he provided Ms. Martin an opportunity to inspect the house in his absence, with the help of anyone she chose. Mr. Briley testified that in his experience, most people in Alaska are able to find a knowledgeable friend or relative with building skills, and such people are usually able to find any serious defects in a house if they are left alone to inspect at their leisure. Mr. Briley argues that for all he knew, the house might be purchased by a roofing contractor, and any effort to intentionally conceal a problem would just cause him trouble. If he had been trying to conceal a defect, it is unlikely that Mr. Briley would have allowed Ms. Martin and her friends to visit the house in his absence.

In weighing Ms. Martin's assertion, it must be considered that the contract language requiring a roof inspection was an extra item in addition to standard contract language. Mr. Briley included this language in the contract because of his concern about the roof. Had he wished to conceal known defects in the roof, Mr. Briley probably would not have made the extra effort to

[10] *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corporation*, 129 P.3d 905 (Alaska 2006).
[11] *State of Alaska, Real Estate Commission, v. Johnston*, 682 P.2d 383 (Alaska 1984).

include a roof inspection at the seller's expense in addition to the customary home inspection performed by the buyer.

Finally, the record also shows little incentive for Mr. Briley to conceal information that the roof was faulty. The seller's handwritten notation in the portion of the counteroffer shown above indicates that, in the event the roof inspection did reveal any problems, the seller was ready to negotiate further and likely would have been willing to make concessions in order to close the deal. Had Mr. Briley known of problems in the roof that Mr. Sexton did not find or report, it is likely he could have called attention to the problem and facilitated an appropriate resolution without affecting his commission or even delaying the closing date. Mr. Briley had little or nothing to gain by intentionally concealing known problems with the roof, and much to lose.

Ms. Martin asserts that Mr. Briley misled her by encouraging her to waive the seller's disclosure under AS 34.70.010. That statute states that a seller must provide the buyer with a form disclosing the seller's knowledge of a number of items regarding the condition of the property. The form asks the age of the roof and whether the seller is aware of any water leaking into the home.

Sellers who use the form to disclose any known defect are not liable for damages resulting from the defects.[12] The disclosure is not required if both parties agree to waiver.[13] Ms. Martin asserts that the seller had patched the roof in the past and was aware of problems with it before he moved to Fairbanks, two years before the sale, and that had she insisted on disclosure under the statute she would not have had to bear the costs of replacing the roof. As evidence, she relies on statements she asserts the seller made to her, and on a used container of roof patching material she found in the backyard or in a shed when she was hauling to the dump loads of trash that was in the yard, the house and in a shed.

It is not possible to determine what would have happened had Ms. Martin insisted on disclosure under the statute. Because the seller had already determined that he was not in a position to provide a meaningful disclosure, it is possible that Ms. Martin's refusal to waive disclosure may have scuttled the deal. Had the seller disclosed that he had patched the roof or done other work on it, he probably would have also provided a copy of an inspection report from a roofer when he bought the house in July, 2002, stating that "the roof appears in good condition. A minimum of eight (8) years life of roof remains and up to 15 years. The flashing is in good condition and the

[12] AS 34.70.030.
[13] AS 34.70.110.

vents have the roofing material tight around them."[14] While he may have had to patch some leaks during annual inspections or as they appeared, there was at least a basis for the seller to believe that the roof was fundamentally sound and still had a service life of three to seven years left. Had the seller disclosed past problems with the roof, Ms. Martin would now lack any recourse at all against the seller. Ultimately, the decision to waive disclosure or not to was Ms. Martin's, and she could have backed away from the deal if she was uncomfortable with the terms. There is no evidence that by suggesting or even recommending that Ms. Martin waive disclosure Mr. Briley was attempting to conceal information or to deceive her, even if he had been aware that repairs had been made to the roof in the past.

There is no evidence that Mr. Briley concealed any information or knowledge he had from Ms. Martin, or that he represented the house to be anything other than what it was: an old house in foreclosure, owned by an absentee landlord, that was suffering from obvious neglect. A preponderance of the evidence shows that Mr. Briley acted diligently and reasonably to address the concerns that he did have by including a clause in the contract requiring the seller to have the roof inspected by a qualified professional before the sale of the house. There is no evidence that Mr. Briley engaged in any measure of fraud, misrepresentation, deceit, or conversion of funds.

IV. Conclusion

Ms. Martin has not met her burden of demonstrating that she has suffered losses in a real estate transaction as a result of fraud, misrepresentation, deceit, or the conversion of trust funds or the conversion of community association accounts under the control of a community association manager on the part of a real estate licensee. Ms. Martin's claim is denied.

DATED this 20th day of August, 2009.

By: *Signed*
DALE WHITNEY
Administrative Law Judge

[14] Exhibit 8, page 2. The seller provided a copy of this report to Mr. Briley in preparation for this hearing.

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Alaska Real Estate Commission and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10th day of December, 2009.

By: *Signed*
Signature
Bradford Cole
Name
Chairman, AREC
Title

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