

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION, DIVISION	)	
OF REAL ESTATE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NOS. 96-2705
	)	96-3002
IAN R. LAW, BENJAMIN SCHIFF, and	)	
FLORIDA HOME FINDERS REALTY, INC.,	)	
	)	
Respondents.	)	
_____	)	

**RECOMMENDED ORDER**

Pursuant to notice, a formal hearing was conducted in these consolidated cases on October 22, 1997, at Miami, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

**APPEARANCES**

For Petitioner: Steve Fieldman, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
Hurston North Tower  
400 West Robinson Street  
Orlando, Florida 32801-1772

For Respondent: Mark Herron, Esquire  
Christopher R. Haughee, Esquire  
Akerman, Senterfitt & Eidson, P.A.  
216 South Monroe Street, Suite 200  
Tallahassee, Florida 32301

**STATEMENT OF THE ISSUES**

This is a license discipline proceeding in which the Petitioner seeks to have disciplinary action taken against two

individual licensees and one corporate licensee on the basis of allegations of several violations of Sections 455.227 and 475.25, Florida Statutes, by each of the Respondents. Each of the three Respondents has been charged in an Administrative Complaint with violation of the following statutory provisions: Sections 455.227(1)(j), 475.25(1)(b), 475.25(1)(j), and 475.25(1)(k), Florida Statutes.

#### **PRELIMINARY STATEMENT**

These two consolidated cases began with the issuance of an Administrative Complaint charging a total of ten Respondents with a total of thirty-eight counts of violations of portions of Chapters 455 and 475, Florida Statutes. The three Respondents in these two consolidated cases were charged with a total of twelve counts of violations, four each.

These three Respondents all disputed the charges and requested an evidentiary hearing which was conducted on October 22, 1996. Prior to the final hearing on October 22, 1996, the parties filed a prehearing stipulation in which they stipulated to numerous facts. At the beginning of the final hearing the Petitioner voluntarily dismissed counts 28, 35 and 36 of the Administrative Complaint.

During the course of the final hearing the Petitioner offered the testimony of three witnesses. The Petitioner also offered eight joint exhibits and one Petitioner's exhibit, all of which were received in evidence. The two individual Respondents

both testified on their own behalf at the final hearing. They did not call any additional witnesses, nor did they offer any additional exhibits.

At the conclusion of the final hearing the parties requested, and were granted, thirty days from the filing of the transcript within which to file their proposed recommended orders. The transcript was filed with the Division of Administrative Hearings on November 22, 1996. On December 10, 1996, all parties moved for an extension of time and on December 10, 1996, an order was issued extending the deadline for filing proposed recommended orders until January 13, 1997. Thereafter, all parties timely filed proposed recommended orders containing proposed findings of fact and conclusions of law.<sup>1</sup> The parties proposed recommended orders have been carefully considered during the preparation of this Recommended Order.

#### **FINDINGS OF FACT**

##### **Stipulated facts<sup>2</sup>**

1. Petitioner is a state government licensing and regulatory agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular Section 20.165, Florida Statutes, Chapters 120, 455, and 475, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent Robert Ian Law is and was at all times material hereto a licensed real estate broker pursuant to Chapter

475, Florida Statutes, having been issued license number 3000835. The last license issued was as a broker in care of Law Property Services, Inc., t/a Century 21 Law Realty, 190 Malabar Road Southwest 120, Melbourne, Florida 32907.

3. Respondent Benjamin Schiff is and was at all times material hereto a licensed real estate broker pursuant to Chapter 475, Florida Statutes, having been issued license number 0449353. The last license issued was as a broker at 9771 Northwest 41st Street, Miami, Florida 33178.

4. Respondent Florida Home Finders Realty, Inc., is and was at all times material hereto a licensed real estate brokerage corporation pursuant to Chapter 475, Florida Statutes, having been issued license number 1003632. The last license issued was at 1648 Southeast Port St. Lucie Boulevard, Port St. Lucie, Florida 34952.

5. At all times material hereto, Selma Del Carmen Schevers, Cheryl Ann Atwood, Lynn Marie Lake, Barbara Kay Davidson, Carol Ann Chandler, and Beverly J. Klemzak were licensed and operating as qualifying brokers and officers of Respondent Florida Home Finders Realty, Inc.

6. On or about April 18, 1995, the real estate brokerage corporate license (former license number 0027454) of Florida Home Finders, Inc., was voluntarily dropped by Florida Home Finders, Inc. Simultaneously, Florida Home Finders Realty, Inc., submitted documents for and received a real estate brokerage

corporate license effective April 18, 1995, from the Florida Division of Real Estate.

7. Benjamin Schiff and Ian R. Law are directors of both Florida Home Finders, Inc., and Florida Home Finders Realty, Inc.

8. Benjamin Schiff is the Chief Financial Officer for both Florida Home Finders, Inc., and Florida Home Finders Realty, Inc. Ian R. Law is the Chief Executive Officer for both Florida Home Finders, Inc., and Florida Home Finders Realty, Inc.

9. On or about May 5, 1995, Selma Schevers and Cheryl Atwood notified various banking institutions of the authorized officers/directors and account signatories for Florida Home Finders, Inc., and Florida Home Finders Realty, Inc.

10. On or about June 14, 1995, at the request of Benjamin Schiff, Selma Schevers and Cheryl Atwood authorized various banking institutions to transfer \$2,492,000.00 in security deposits and rental trust funds to an account entitled "Florida Home Finders, Inc.," account number 3603969464 at NationsBank of Florida. At no time material did the Respondents obtain the authorization or permission of the owners of the trust funds to transfer the funds.

11. Subsequent to the transfer referenced in paragraph 10 herein, the funds were used to purchase a certificate of deposit (No. 012897).

12. After the purchase of the certificate of deposit, Cheryl Atwood, at the request of Ian Law, signed a document which

placed the certificate of deposit as collateral for a commercial loan (No. 018002410263) from loan officer F. Larry Robinette of County National Bank of South Florida. The terms of the loan were: \$2,000,000 principal; Benjamin Schiff and Ian Law as borrowers; proceeds payable to Atlantic Gulf Communities, Corp., as partial payment for the stock of Florida Home Finders, Inc., and two related companies.

13. On or about August 21, 1995, Respondent Law instructed Barnett Bank to transfer \$65,000.00 from Florida Home Finders, Inc., Rental Receipts Account No. 2274002335 to Florida Home Finders, Inc., Operating Account No. 2274027149.<sup>3</sup> After this transfer Respondent Law instructed the bank to transfer the \$65,000.00 from the operating account to Atlantic Gulf Communities Corporation, the former owner of Florida Home Finders, Inc., a formerly licensed real estate brokerage company and predecessor to Respondent Florida Home Finders Realty, Inc.

14. On or about June 14, 1995, the following bank funds transfers were requested to be made to Florida Home Finders, Inc., (FHFI) account No. 3603969464 at NationsBank of Florida from the following accounts:

<b>Barnett Bank Acct. Name</b>	<b>Acct No.</b>	<b>Date</b>	<b>Amt.</b>
FHFI Rental Receipts Escrow Acct	1700027712	6/22	138,000
Rental Security Deposit Acct	1700027810	6/22	398,000
FHFI Rent Receipts Acct	3388072440	6/21	38,000
FHFI Security Deposit Acct	3388072558	6/21	158,000
FHFI Rent Receipts Escrow Acct	2274002335	6/15	179,000
FHFI Rental Security Escrow	2274002343	6/15	609,000

<b>SunBank Acct Name</b>	<b>Acct No.</b>	<b>Date</b>	<b>Amt.</b>
FHFI Escrow-Rental Receipts	0809000005795	6/16	87,000
FHFI Escrow-Rental Security	0809000005806	6/16	285,000
<b>1st Union Nat. Bank Acct Name</b>	<b>Acct No.</b>	<b>Date</b>	<b>Amt.</b>
FHFI Rental Receipts-Escrow Acct	2161006787374	6/14	152,000
FHFI Rental Security Escrow Acct	2161006724586	6/14	406,000
<b>1st Bank Acct Name</b>	<b>Acct No.</b>	<b>Date</b>	<b>Amt.</b>
FHFI Rental Receipts-Escrow Acct	20-116845-06	6/15	8,000
FHFI Rental Security Escrow	20-116888-06	6/15	34,000

Additional facts based on evidence at hearing

14. Prior to April of 1995, Florida Home Finders, Inc., then a licensed real estate brokerage corporation, engaged in soliciting, obtaining, and leasing to tenants the real property of others, pursuant to contracts between Florida Home Finders, Inc., and the property owners.

15. A substantial majority of the money, probably more than 75 percent of the money, contained in the security deposit accounts and rental receipts accounts that was transferred in mid-June of 1995 was money collected from tenants on behalf of property owners while Florida Home Finders, Inc., was a licensed real estate brokerage corporation.<sup>4</sup>

16. Subsequent to the transfers of funds in mid-June of 1995, there was on at least one occasion insufficient funds in some of the security deposit and rental receipts trust accounts to meet disbursement demands. On that occasion the bank paid a number of checks for which Florida Home Finders, Inc., did not have sufficient funds on deposit and requested that Florida Home

Finders, Inc., make an immediate transfer of funds to cover the insufficiencies. Shortly thereafter a transfer was made to cover the insufficiencies.

17. Subsequent to the transfers of funds in mid-June of 1995, on some occasions funds that had been collected from new clients after those transfers took place were paid out to meet the demands of clients who were owed money that had been paid to Florida Home Finders, Inc., prior to the mid-June transfers.

18. At the end of March of 1995, Respondents Schiff and Law purchased Florida Home Finders, Inc., a real estate brokerage corporation licensed pursuant to Chapter 475, Florida Statutes, (license number 0027464) from Atlantic Gulf Communities Corporation. The purchase price was three and a half million dollars, with the Respondents to pay \$500,000.00 down and the three million dollar balance within three months.

19. One aspect of the business plan of the Respondent's Schiff and Law was to create a separate company to conduct real estate brokerage activities and to continue to engage in property management activities with the existing corporation, Florida Home Finders, Inc. Respondents Schiff and Law met with all managers and employees of Florida Home Finders, Inc., during the first week of April of 1995 to explain the business plan to them. At that time they also explained that they intended to utilize the provisions of Section 83.49(1), Florida Statutes, to hold security deposits in a manner which would allow them to pay interest to tenants.



20. Respondents Schiff and Law were not involved in the day to day operations of either Florida Home Finders, Inc., or Florida Home Finders Realty, Inc.

21. At the time the Respondents Schiff and Law purchased Florida Home Finders, Inc., the corporation maintained at least three types of accounts for deposits received from its operations: sales escrow accounts, rental receipts accounts, and security deposit accounts. Each of the seven offices of Florida Home Finders, Inc., maintained its own separate set of accounts.

22. The sales escrow accounts maintained by Florida Home Finders, Inc., contained money derived from purchasing and leasing transactions.

23. The rental receipts accounts maintained by Florida Home Finders, Inc., contained money received from tenants for the payment of rent. The use of these funds was governed by the property management agreements with the landlords. Typically, the funds in these accounts would be used to pay for such things as maintenance and repairs to the rental properties, mortgage payments due on the rental properties, and/or property management fees, with any excess funds being periodically paid to the respective landlords.

24. The security deposit accounts maintained by Florida Home Finders, Inc., contained money received from tenants for security deposits to be held to guarantee the tenants' performance under their respective rental agreements.

25. Shortly after the formation of Florida Home Finders Realty, Inc., and its licensure as a real estate brokerage

corporation, the sales escrow accounts of Florida Home Finders, Inc., were transferred to Florida Home Finders Realty, Inc. There were no irregularities in any of the sales escrow accounts while they were under the control of either of these two corporations.

26. Following the creation of Florida Home Finders Realty, Inc., Florida Home Finders, Inc., did not engage in any licensed real estate brokerage activities. All such activities were conducted by Florida Home Finders Realty, Inc., after it was licensed as a brokerage corporation.

27. On or about June 27, 1995, Florida Home Finders, Inc., posted a security deposit bond in the amount of \$250,000.00 with the Florida Secretary of State in an effort to comply with Section 83.49(1)(c), Florida Statutes.

28. None of the landlords and none of the tenants were ever provided with notice that money had been transferred from the security deposit accounts and from the rental receipts accounts. None of the landlords and none of the tenants were ever provided with notice that Florida Home Finders, Inc., had posted a bond with the Florida Secretary of State and intended to rely on the provisions of Section 83.49(1)(c), Florida Statutes.

29. Subsequent to the transfer of the \$2,492,000.00 to the NationsBank account, the funds were used to purchase three separate certificates of deposit. One certificate of deposit in the amount of \$242,000.00 was purchased from NationsBank and secured a loan of the same amount. The second certificate of deposit in the amount of two million dollars was purchased from

County National Bank in Miami in the name of Florida Home Finders, Inc., and was used to secure a personal loan to Respondents Schiff and Law in the amount of two million dollars. The third certificate of deposit in the amount of \$250,000.00 was purchased from NationsBank in the name of Florida Home Finders, Inc., and was used as security for the bond posted with the Florida Secretary of State.

30. The loan proceeds secured by two of the certificates of deposit described above, plus \$100,000.00 from the operating account of Florida Home Finders, Inc., at Barnett Bank, were used to pay Atlantic Gulf Communities Corporation against the balance of the purchase price of Florida Home Finders, Inc.

31. Between the time of the mid-June transfer of funds from the accounts of Florida Home Finders, Inc., and the freezing of the assets of Florida Home Finders, Inc., in September of 1995, Florida Home Finders, Inc., was able to pay all current demands for funds from tenants and landlords.

32. As of September 21, 1995, all funds transferred from the various security deposit and rental receipt accounts of Florida Home Finders, Inc., remained in accounts and financial instruments in the name of Florida Home Finders, Inc. However, \$2,242,000.00 of those financial instruments in the name of Florida Home Finders, Inc., were pledged as security for personal loans of the Respondents Schiff and Law and were not available to Florida Home Finders, Inc., while those personal debts remained unpaid.

### CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to these consolidated cases. Section 120.57(1), Florida Statutes.

34. Only twelve of the counts in the Administrative Complaint allege violations by the three Respondents in these consolidated cases. Of those twelve counts, six have been voluntarily dismissed by the Petitioner.<sup>5</sup> Based on those voluntary dismissals, the following six counts should be dismissed: XXVI, XXVII, XXVIII, XXXV, XXXVI, and XXXVIII (26, 27, 28, 35, 36, and 38).

35. The remaining counts relevant to these two consolidated cases are: VII, VIII, X, XVII, XVIII, and XIX (7, 8, 10, 17, 18, and 19). In these six remaining counts each of the three Respondents is charged with one count of violating Section 475.25(1)(b), Florida Statutes, and with one count of violating Section 475.25(1)(k), Florida Statutes. Counts VII and XVII (7 and 17) charge Respondent Law, Counts VIII and XVIII (8 and 18) charge Respondent Schiff, and Counts X and XIX (10 and 19) charge the corporate Respondent, Florida Home Finders Realty, Inc.

36. Petitioner seeks to impose discipline which includes the possibility of suspension or revocation of Respondents' licenses to practice real estate brokerage. Therefore, Petitioner must prove its allegations by clear and convincing evidence. See, Ferris v. Turlington, 510 So.2d 292 (Fla. 1987);

Nair v. Department of Business and Professional Regulation, 654 So.2d 205 (Fla. 1st DCA 1995). Recent amendments to the Administrative Procedures Act have codified the burden of proof set forth in Ferris v. Turlington and its progeny. Section 120.57(1)(h), Florida Statutes (1996 Supp.), now provides that: "Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record, and on matters officially recognized." [Emphasis added.]

37. The nature of clear and convincing evidence has been described as follows in Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983):

We therefore hold that clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of facts a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

See also, Smith v. Department of Health and Rehabilitative Service, 522 So.2d 956 (Fla. 1st DCA 1988), which, at page 958 quotes with approval the above-quoted language from Slomowitz. The Smith case also includes the following at page 958:

"Clear and convincing evidence" is an intermediate standard of proof, more than the "preponderance of evidence" standard used in

most civil cases, and less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So.2d 486 (Fla. 2nd DCA 1970).

38. Pursuant to Section 475.25(1), Florida Statutes (1994 Supplement), the Florida Real Estate Commission is empowered to revoke or suspend real estate brokerage licenses or otherwise discipline real estate brokerage licensees upon a determination that any of the acts set forth in that Section were committed, which include a determination that the licensees:

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

\* \* \*

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as a broker in escrow with a title company, banking institution, credit union, or savings

and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized; or has failed, if a salesperson, to immediately place with his registered employer any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as agent of his registered employer. The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made. [Emphasis added.]

39. Section 475.01(1)(c), Florida Statutes, defines the term "broker" as follows, in pertinent part:

. . . a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction

which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists.

40. Florida law imposes a high standard of ethical conduct upon real estate brokers. In Zichlin v. Dill, 25 So.2d 4 (Fla. 1946), for example, the Florida Supreme Court stated:

The broker in Florida occupies a status under the law with recognized privileges and responsibilities. The broker in this state belongs to a privileged class and enjoys a monopoly to engage in lucrative business . . . The state, therefore, has prescribed a high standard of qualifications and by the same law granted a form of monopoly and in doing so the old rule of caveat emptor is cast aside. Those dealing with a licensed broker may naturally assume that he possesses the requisites of an honest, ethical man.

In a similar vein, the Florida Supreme court, in Ahern v. Florida Real Estate Commission, 6 So.2d 857 (Fla. 1942), stated that "the real estate broker is now the confidant of the public in much the same manner as the lawyer or the banker. His relation to the public exacts the highest degree of trust and confidence. . . ."

41. Any person or entity engaging in activity set out in Section 475.01(1)(c), Florida Statutes, must be licensed by the State of Florida as a real estate salesperson, broker, or brokerage corporation and must comply with Chapter 475 of the Florida Statutes and rules enacted pursuant thereto. Sections 475.15 and 475.42(1)(a), Florida Statutes.



42. Florida Administrative Code Rule 61J2-14.008(1)(a) defines a "deposit" as "a sum of money, or its equivalent, delivered to a real estate licensee, as . . . a payment, or a part payment, in connection with any real estate transaction . . . or such sum delivered in escrow, trust or on condition, in connection with any transaction conducted, or being conducted, by such licensee within the scope of Chapter 475, Florida Statutes."

43. Florida Administrative Code Rule 61J2-14.010(1) provides that "every broker who receives from . . . persons interested in any real estate transaction, any deposit . . . shall immediately place the same in a bank, savings and loan association, trust company, credit union or title company having trust powers, in an insured escrow or trust account. . . ."

44. Florida Administrative Code Rule 61J2-14.011 provides that a broker who receives a deposit "shall not have any right to or lien upon said deposit, except upon the written agreement or order of the depositor so long as the depositor has sole control of said deposit, until the transaction involved has been closed. . . ."

45. Prior to April 1995, Florida Home Finders, Inc., was leasing property to tenants, and thereby brokering pursuant to Section 475.01(1)(c), Florida Statutes. Florida Home Finders, Inc., collected security deposits and rental payments in conjunction with that brokering activity. Therefore, Florida Home Finders, Inc., and those acting on its behalf, were required

to comply with Chapter 475 of the Florida Statutes and the rules enacted pursuant thereto.

46. Florida Home Finders, Inc., and those acting on its behalf, were required to maintain the security deposits and rental receipts collected prior to April of 1995 in an escrow or trust account until disbursement of those funds was properly authorized by the parties to the leasing transactions.

47. Turning first to the charges against the individual Respondents, in Counts VII and VIII (7 and 8) of the Administrative Complaint, Respondents Law and Schiff are each charged with having violated Section 475.25(1)(b), Florida Statutes. Both of these individual Respondents violated Section 475.25(1)(b), Florida Statutes, by reason of the following conduct. They caused the transfer of \$2,492,000.00 of security deposits and rental receipts from various separate bank accounts into a single Florida Home Finders, Inc., account at NationsBank, the vast majority of which funds had been collected while Florida Home Finders, Inc., was a licensed real estate brokerage corporation engaging in brokerage activities. They then caused that money to be used to purchase certificates of deposit. Thereafter, they caused \$2,242,000.00 of that money in the form of two certificates of deposit to be pledged as collateral for personal loans to the two individual Respondents. Additionally, on or about August 21, 1995, the Respondent Law caused a series of transfers to take place by means of which \$65,000.00 of money

from the rental receipts account of Florida Home Finders, Inc., was paid to Atlantic Gulf Communities Corporation. Neither of the individual Respondents, nor anyone else on their behalf or on behalf of Florida Home Finders, Inc., obtained authorization or permission of the tenants or the property owners to transfer the funds, purchase the certificates of deposit, pledge the funds as collateral for personal loans to Respondents Law and Schiff, or disburse some of the funds to Atlantic Gulf Communities Corporation.

48. Respondents' pledging of the security deposits and rental receipts funds of others to secure their personal loans was inconsistent with the trust which had been placed in them, particularly since the Respondents are licensed real estate brokers governed by the high ethical standards of Florida law. Such failure breached the Respondents' agreements to hold those funds in escrow and subjected the tenants and property owners involved, undoubtedly without their knowledge, to the risk that the Respondents may not have been able to timely disburse the security deposits and rental trust funds to the appropriate parties, due to some unforeseen contingency rendering the Respondents unable to fulfill their obligation to the lenders holding the trust funds as collateral.

49. In Counts XVII and XVIII (17 and 18) of the Administrative Complaint, Respondents Law and Schiff are each charged with having violated Section 475.25(1)(k), Florida

Statutes. Both of these individual Respondents violated Section 475.25(1)(k), Florida Statutes, in that they caused the removal of \$2,492,000.00 in security deposits and rental receipts funds from the escrow and trust accounts of Florida Home Finders, Inc., and ultimately used those funds to purchase certificates of deposit which they then caused to be pledged as collateral to secure their own personal loans.

50. The vast majority of the \$2,492,000.00 in security deposits and rental receipts were "deposits" within the meaning of Florida Administrative Code Rule 61J2-14.008(1)(a), which had been collected by Florida Home Finders, Inc., from or on behalf of tenants and property owners while Florida Home Finders, Inc., was a licensed real estate brokerage corporation engaged in real estate brokering, as defined in Section 475.01(1)(c), Florida Statutes. Therefore, the individual Respondents and Florida Home Finders, Inc., had an obligation to maintain those funds in an escrow or trust account, unencumbered and available for immediate disbursement.

51. In reaching the foregoing conclusions regarding the violations of Sections 475.25(1)(b) and 475.25(1)(k), Florida Statutes, I have not overlooked the Respondents' arguments to the effect that, by operation of Section 83.49, Florida Statutes, they were excused from compliance with various requirements of Chapter 475, Florida Statutes, and, therefore, were not in violation of any provision of Chapter 475, Florida Statutes. At

the time of the various transfers of funds in 1995, Section 83.49, Florida Statutes, read as follows in pertinent part:

(1) Whenever money is deposited or advanced by a tenant on a rental agreement as security for performance of the rental agreement or as advance rent for other than the next immediate rental period, the landlord or the landlord's agent shall either:

(a) Hold the total amount of such money in a separate non-interest-bearing account in a Florida banking institution for the benefit of the tenant or tenants. The landlord shall not commingle such moneys with any other funds of the landlord or hypothecate, pledge, or in any other way make use of such moneys until such moneys are actually due the landlord;

(b) Hold the total amount of such money in a separate interest-bearing account in a Florida banking institution for the benefit of the tenant or tenants, in which case the tenant shall receive and collect interest in an amount of at least 75 percent of the annualized average interest rate payable on such account or interest at the rate of 5 percent per year, simple interest, whichever the landlord elects. The landlord shall not commingle such moneys with any other funds of the landlord or hypothecate, pledge, or in any other way make use of such moneys until such moneys are actually due the landlord; or

(c) Post a surety bond, executed by the landlord as principal and a surety company authorized and licensed to do business in the state as surety, with the clerk of the circuit court in the county in which the dwelling unit is located in the total amount of the security deposits and advance rent he or she holds on behalf of the tenants or \$50,000, whichever is less. The bond shall be conditioned upon the faithful compliance of the landlord with the provisions of this section and shall run to the Governor for the benefit of any tenant injured by the landlord's violation of the provisions of this section. In addition to posting the surety bond, the landlord shall pay to the tenant interest at the rate of 5 percent per

year, simple interest. A landlord, or the landlord's agent, engaged in the renting of dwelling units in five or more counties, who holds deposit moneys or advance rent and who is otherwise subject to the provisions of this section, may, in lieu of posting a surety bond in each county, elect to post a surety bond in the form and manner provided in this paragraph with the office of the Secretary of State. The bond shall be in the total amount of the security deposit or advance rent held on behalf of tenants or in the amount of \$250,000, whichever is less. The bond shall be conditioned upon the faithful compliance of the landlord with the provisions of this section and shall run to the Governor for the benefit of any tenant injured by the landlord's violation of this section. In addition to posting a surety bond, the landlord shall pay to the tenant interest on the security deposit or advance rent held on behalf of that tenant at the rate of 5 percent per year simple interest.

(2) The landlord shall, within 30 days of receipt of advance rent or a security deposit, notify the tenant in writing of the manner in which the landlord is holding the advance rent or security deposit and the rate of interest, if any, which the tenant is to receive and the time of interest payments to the tenant. Such written notice shall:

(a) Be given in person or by mail to the tenant.

(b) State the name and address of the depository where the advance rent or security deposit is being held, whether the advance rent or security deposit is being held in a separate account for the benefit of the tenant or is commingled with other funds of the landlord, and, if commingled, whether such funds are deposited in an interest-bearing account in a Florida banking institution.

(c) Include a copy of the provisions of subsection (3).

Subsequent to providing such notice, if the landlord changes the manner or location in which he or she is holding the advance rent

or security deposit, he or she shall notify the tenant within 30 days of the change according to the provisions herein set forth. This subsection does not apply to any landlord who rents fewer than five individual dwelling units. Failure to provide this notice shall not be a defense to the payment of rent when due.

(3)(a) Upon the vacating of the premises for termination of the lease, the landlord shall have 15 days to return the security deposit together with interest if otherwise required, or in which to give the tenant written notice by certified mail to the tenant's last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim. The notice shall contain a statement in substantially the following form:

This is a notice of my intention to impose a claim for damages in the amount of \_\_\_\_\_ upon your security deposit, due to \_\_\_\_\_. It is sent to you as required by s. 83.49(3), Florida Statutes. You are hereby notified that you must object in writing to this deduction from your security deposit within 15 days from the time you receive this notice or I will be authorized to deduct my claim from your security deposit. Your objection must be sent to \_\_\_\_\_(landlord's address)\_\_\_\_\_.

If the landlord fails to give the required notice within the 15-day period, he or she forfeits the right to impose a claim upon the security deposit.

(b) Unless the tenant objects to the imposition of the landlord's claim or the amount thereof within 15 days after receipt of the landlord's notice of intention to impose a claim, the landlord may then deduct the amount of his or her claim and shall remit the balance of the deposit to the tenant within 30 days after the date of the notice of intention to impose a claim for damages.

\* \* \*

(d) Compliance with this subsection by an individual or business entity authorized to conduct business in this state, including Florida-licensed real estate brokers and salespersons, shall constitute compliance with all other relevant Florida Statutes pertaining to security deposits held pursuant to a rental agreement or other landlord-tenant relationship. Enforcement personnel shall look solely to this section to determine compliance. This section prevails over any conflicting provisions in chapter 475 and in other sections of the Florida Statutes. [Emphasis added.]

52. In 1996, several months after the actions which led to the charges in these consolidated cases, the Florida Legislature enacted an amendment to paragraph 3(d) of Section 83.49, Florida Statutes. As amended in 1996, paragraph 3(d) of Section 83.49, Florida Statutes, reads as follows:

(d) Compliance with this section by an individual or business entity authorized to conduct business in this state, including Florida-licensed real estate brokers and salespersons, shall constitute compliance with all other relevant Florida Statutes pertaining to security deposits held pursuant to a rental agreement or other landlord-tenant relationship. Enforcement personnel shall look solely to this section to determine compliance. This section prevails over any conflicting provisions in chapter 475 and in other sections of the Florida Statutes and shall operate to permit licensed real estate brokers to disburse security deposits and deposit money without having to comply with the notice and settlement procedures contained in s. 475.25(1)(d).

53. The Respondents' argument to the effect that their reliance on Section 83.49, Florida Statutes, insulates them from liability under Chapter 475, Florida Statutes, fails for several



reasons. In this regard it is first noted that the language of paragraph (3)(d) of Section 83.49, Florida Statutes, as of the date of the 1995 conduct at issue in these consolidated cases referred to "compliance with this subsection," which was a reference to subsection (3) of Section 83.49, Florida Statutes. The plain and ordinary meaning of that statutory language as it existed in 1995 was that real estate brokers who made refunds of security deposits in the manner described in subsection (3) of the statute were excused from compliance with any conflicting provisions in Chapter 475 regarding the procedure for making refunds of security deposits. The terms of the statute limiting its scope to "compliance with this subsection" could not be logically read as authorizing a real estate broker to take advantage of any of the three alternatives in subsection (1) of the statute and thereby be excused from compliance with any conflicting provisions in Chapter 475 regarding the manner in which deposits received by licensed real estate brokers must be held.

54. Under the 1996 amendments to paragraph (3)(d) of Section 83.49, Florida Statutes, (which included substituting the term "this section" in place of the earlier term "this subsection") it now seems clear that a real estate broker is authorized to take advantage of any of the three alternatives in subsection (1) of the statute and thereby achieve exemption from compliance with any conflicting provisions of Chapter 475,

Florida Statutes, with respect to the manner in which security deposits and advance rental payments must be held. The Respondents argue that the 1996 amendments were intended by the Florida Legislature to be retrospective. The Legislative intent in that regard is far from clear. But even assuming that retrospective effect was intended, for the reasons set forth below, the Respondents' arguments still fail.

55. If retrospective effect is given to the 1996 amendments to paragraph (3)(d) of Section 83.49, Florida Statutes, in order to be eligible for the benefits of paragraph (3)(d), as amended, the Respondents must be in compliance with the requirements of Section 83.49, Florida Statutes. They failed to comply in several ways; the most obvious failure being their failure to give the notice required by subsection (2) of the statute. That subsection requires the landlord to advise the tenant of various specified details regarding the manner in which any security deposit and advance rent is being held, including the name and address of the depository where the funds are being held. That subsection also states: "[I]f the landlord changes the manner or location in which he or she is holding the advance rent or security deposit, he or she shall notify the tenant within 30 days of the change according to the provisions herein set forth." No such notice was ever provided to any tenant following the transfer of the security deposit money.

56. The Respondents also appear to have failed to comply with the requirements of Section 83.49(1)(c), by filing a bond of doubtful efficacy, inasmuch as the status of Florida Home Finders, Inc., is incorrectly described in the bond filed with the Florida Secretary of State. In the second paragraph of the bond document Florida Home Finders, Inc., described itself as a "Landlord" in several specified counties in Florida. Florida Home Finders is not a landlord in those counties, or in any other counties; it is the agent for numerous landlords in several counties. This misdescription of the status of Florida Home Finders, Inc., casts serious doubts as to the extent to which the bond could be enforced.

57. Finally, the Respondents appear to have failed to comply with the requirements of Section 83.49(1)(c), Florida Statutes, because the statute does not appear to be susceptible to an interpretation which would allow one agent to file one bond as security for the obligations of numerous landlords. Throughout paragraph (1)(c) of the statute, as well as throughout all other paragraphs of the statute, all references to "landlord" are in the singular; the references are all in terms of "the landlord" or "a landlord." There is nothing in paragraph (1)(c) or anywhere else in Section 83.49, Florida Statutes, that purports to authorize a group of landlords, either on their own behalf or through an agent, to post a single bond covering the liabilities of numerous landlords. In sum: Inasmuch as the

Respondents failed to comply with Section 83.49, Florida Statutes, when they transferred the \$2,492,000.00 out of the several trust and escrow accounts, the Respondents fail to come within the scope of the provisions of paragraph (3)(d) of Section 83.49, Florida Statutes, as amended.<sup>6</sup>

58. Turning now to the charges against the corporate Respondent, Florida Home Finders Realty, Inc., the two remaining counts against this Respondent which have not been voluntarily dismissed are Counts X and XIX (10 and 19) of the Administrative Complaint. Those two counts allege the following:

COUNT X

Based upon the foregoing, Respondent Florida Home Finders Realty, Inc., is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction in violation of Sec. 475.25(1)(b), Fla. Stat.

\* \* \*

COUNT XIX

Based upon the foregoing, Respondent Florida Home Finders Realty, Inc., is guilty of failure to maintain trust funds in the real estate brokerage escrow bank account or some other proper depository until disbursement thereof was properly authorized in violation of Sec. 475.25(1)(k), Fla. Stat.

59. The evidence in these consolidated cases is insufficient to prove either of the violations quoted immediately above. The only evidence of any business transaction engaged in by the Respondent Florida Home Finders Realty, Inc., is that when Florida Home Finders, Inc., relinquished its corporate real estate brokerage license, the Respondent Florida Home Finders

Realty, Inc., received from Florida Home Finders, Inc., all of the latter's trust funds related to real estate sales. The only evidence regarding the manner in which the Respondent Florida Home Finders Realty, Inc., handled its trust funds was to the effect that all of its trust fund accounts were in proper order. In this regard it is important to note that none of the approximately two and a half million dollars of security deposit money and rental receipt money that forms the basis of the charges against the other Respondents was ever in the possession of the Respondent Florida Home Finders Realty, Inc.

60. In view of the insufficiency of the evidence, the charges in Counts X and XIX (10 and 19) against the Respondent Florida Home Finders Realty, Inc., should be dismissed.<sup>7</sup>

#### **RECOMMENDATION**

For all of the foregoing reasons, it is **RECOMMENDED** that a Final Order be entered in these consolidated cases to the following effect:

(1) Dismissing all six of the counts of the Administrative Complaint which were voluntarily dismissed by the Petitioner;

(2) Dismissing Counts X and XIX (10 and 19) against the corporate Respondent Florida Home Finders Realty, Inc., on the basis of the insufficiency of the evidence;

(3) Concluding that the Respondent Law is guilty of violations of Sections 475.25(1)(b) and 475.25(1)(k), Florida Statutes, as charged in Counts VII and XVII (7 and 17);

(4) Concluding that the Respondent Schiff is guilty of violations of Sections 475.25(1)(b) and 475.25(1)(k), Florida Statutes, as charged in Counts VIII and XVIII (8 and 18);

(5) Imposing a penalty against the Respondent Law consisting of the revocation of his real estate broker license and an administrative fine in the amount of two thousand dollars; and

(6) Imposing a penalty against the Respondent Schiff consisting of the revocation of his real estate broker license and an administrative fine in the amount of two thousand dollars.

**DONE AND ENTERED** this 22nd day of April, 1997, in Tallahassee, Leon County, Florida.

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**MICHAEL M. PARRISH**

Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32301-3060  
(904) 488-9675 SUNCOM 278-9675  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of April, 1997.

**ENDNOTES**

1/ The Respondents also filed a separate memorandum of law addressed to the issue of the extent to which the Respondents may rely on Section 83.49, Florida Statutes, in these proceedings. The memorandum has been carefully considered.

2/ In their Prehearing Stipulation all parties stipulated to all of the facts set forth in paragraphs 1 through 14 of the findings of fact in this Recommended Order.

3/ In their Prehearing Stipulation in the first sentence of paragraph 13, the parties inadvertently referred to Florida Home Finders, Inc., as a "Respondent." Florida Home Finders, Inc. is not a Respondent in these proceedings. And it is clear from other evidence that the \$65,000.00 transferred in August of 1995 was transferred from accounts controlled by Florida Home Finders, Inc., not from accounts controlled by the Respondent Florida Home Finders Realty, Inc.

4/ With regard to the security deposit and rental receipts trust funds that were eventually used to buy the three certificates of deposit, the evidence in the record of these proceedings does not directly show how much of that money was received while Florida Home Finders, Inc., held a brokerage license and how much was received after Florida Home Finders, Inc., relinquished its brokerage license. However, other evidence in the record reveals that each year approximately 20 percent of such funds were paid out to landlords who discontinued their relationships with Florida Home Finders, Inc. As of the time of the transfer of the subject funds, Florida Home Finders, Inc., had been operating without a brokerage license for approximately two months; from mid-April to mid-June of 1995. It follows logically that the vast majority of the security deposit and rental receipts funds in the possession of Florida Home Finders, Inc., in mid-June were funds that had been received while Florida Home Finders, Inc., held a brokerage license. The exact amount received while it was licensed as a broker is irrelevant to the disposition of these proceedings because, under any view of the matter, at the time of the mid-June transfers a very large amount of the transferred money was money Florida Home Finders, Inc., had received while it held a brokerage license.

5/ The Petitioner voluntarily dismissed the following three counts at the commencement of the final hearing: XXVIII, XXXV, and XXXVI (28, 35, and 36). (See page 5 of the transcript of the final hearing.) The Petitioner voluntarily dismissed the following three counts when it filed its proposed recommended order: XXVI, XXVII, and XXXVIII (26, 27, and 38). (See paragraphs 48 and 50 of the Petitioner's proposed recommended order.)

6/ In response to the Respondents' argument that they were insulated by operation of Section 83.49(3)(d), Florida Statutes, the Petitioner also argued that the Respondents were estopped from relying on that defense because it had been resolved against them in Circuit Court proceedings involving the same facts and parties. In view of the conclusions reached here regarding the application of Section 83.49, Florida Statutes, to the facts in this case, it is not necessary to reach the estoppel issue.

7/ In addition to the insufficiencies in the evidence, upon careful review of the allegations of the Administrative Complaint it appears that the facts alleged regarding the Respondent Florida Home Finders Realty, Inc., even if proved, would be insufficient to make out either of the violations charged in Counts X and XIX. There are simply no allegations in the Administrative Complaint of any conduct by the Respondent Florida Home Finders Realty that would constitute a violation of either of the statutory provisions relied upon in Counts X and XIX.

**COPIES FURNISHED:**

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**NOTICE OF RIGHT TO SUBMIT EXCEPTIONS**

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.