

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-4449PL  
 )  
DAVID L. RHOTEN, II, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in West Palm Beach, Florida, on March 2, 2005.

APPEARANCES

For Petitioner: Juana Carstarphen Watkins  
Department of Business and  
Professional Regulation  
Hurston Building, North Tower  
Suite N801  
400 West Robinson Street  
Orlando, Florida 32801

For Respondent: Gary J. Nagle  
14255 U.S. Highway 1, Suite 223  
Juno Beach, Florida 33408

STATEMENT OF THE ISSUE

The issue is whether Respondent failed to maintain his trust account properly, failed to examine and sign monthly reconciliation statements for his trust account, and failed to

respond appropriately to disputes concerning escrow deposits that he held. If so, an additional issue is the penalty to be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint filed May 24, 2001, Petitioner alleged that Respondent was a licensed real estate broker of record for Castles By The Sea. The Administrative Complaint alleges that Respondent was the only signatory on the Castles escrow account.

The Administrative Complaint alleges that, on or about August 31, 2000, Castles negotiated a sales contract between Advanced Builders Corporation, as seller, and Michael Arnston, as buyer. The contract allegedly stated that Castles received the earnest money deposit of \$42,800 and provided a closing date of October 1, 2000. On September 11, 2000, the buyer's attorney wrote a letter to the seller, with a copy to an employee of Respondent, withdrawing the offer to purchaser and demanding the return of the earnest money deposit. Three days later, the seller's attorney wrote a letter to the buyer, with a copy to Castles, demanding the escrow money deposit.

Respondent admits all of the above-stated allegations, but he denies the allegation that he failed to notify Petitioner of the dispute over the escrow money deposit.

Based on the above-stated allegations, Count I of the Administrative Complaint alleges that, in violation of Florida Administrative Code Rule 61J2-10.032(1)(a) and, thus, Section 475.25(1)(e), Florida Statutes, Respondent is guilty of failing to provide written notification to the Florida Real Estate Commission, within 15 days of the last demand, of the procedure to resolve disputes over escrow funds and institute one of the settlement procedures described in Section 475.25(1)(d)1, Florida Statutes, within 30 days after entertaining doubt as to which party is entitled to the money in the Arnston transaction.

Based on the above-stated allegations, Count II of the Administrative Complaint alleges that, in violation of Florida Administrative Code Rule 61J2-10.032(1)(b) and, thus Section 475.25(1)(e), Florida Statutes, Respondent is guilty of failing to provide written notification to the Florida Real Estate Commission, within 15 days of entertaining doubt as to which party is entitled to the money, of the procedure to resolve disputes over escrow funds and invoke one of the procedures described in Section 475.25(1)(d)1, Florida Statutes, within 30 days after entertaining doubt as to which party is entitled to the money in the Arnston transaction.

The Administrative Complaint alleges that Petitioner conducted an audit of Castles' records on November 16, 2000. Respondent admits this allegation, but denies the next two

allegations, which are that the audit revealed a shortage of about \$1,288,597 and Castles failed to maintain the required escrow account records.

Count III alleges that, in violation of Section 475.25(1)(k), Florida Statutes, Respondent is guilty of failing to maintain trust funds in an escrow account or other proper depository until disbursement is properly authorized.

Count IV alleges that, in violation of Section 475.25(1)(b), Florida Statutes, Respondent is guilty of culpable negligence or a breach of trust in any business transaction.

Count V alleges that, in violation of Florida Administrative Code Rule 61J2-14.012(2) and (3) and, thus, Section 475.25(1)(e), Florida Statutes, Respondent is guilty of failing to prepare monthly the required written reconciliation of the escrow account.

The Administrative Complaint alleges that, on or about March 26, 2000, Castles negotiated a sales contract between Jacqueline Bardach, as seller, and Stephen and Claire Sims, as buyers. The contract allegedly stated that Castles received the earnest money deposit of \$10,000 and that the buyers would deposit another \$20,000 within ten days after the effective date of the contract.

The Administrative Complaint alleges that, on May 2, 2000, a Castles agent notified the seller in writing that the buyers

were unable to obtain financing and requested a release of the escrow deposit. In response, the sellers' attorney wrote a letter on May 8, 2000, to the Castles agent suggesting alternative financing sources. Ten days later, a new attorney for the sellers filed a formal written demand for the earnest money deposit with the Castles agent. On July 20, 2000, the sellers' attorney sent a demand for the escrow money to Respondent.

Respondent admits the allegations set forth in the preceding paragraph, but he denies the next allegation in the Administrative Complaint, which is that he failed to notify Petitioner of the dispute over the escrow money deposit.

Count VI alleges that, in violation of Section 475.25(1)(d)1, Florida Statutes, Respondent is guilty of failing to account for or deliver funds.

Count VII, alleges that, in violation of Florida Administrative Code Rule 61J2-10.032(1)(a) and, thus, Section 475.25(1)(e), Florida Statutes, Respondent is guilty of failing to provide written notification to the Florida Real Estate Commission, within 15 days of the last demand, of the procedure to resolve disputes over escrow funds and institute one of the settlement procedures described in Section 475.25(1)(d)1, Florida Statutes, within 30 days after entertaining doubt as to which party is entitled to the money.

On November 19, 2003, the Florida Real Estate Commission entered a Final Order revoking Respondent's license. The Final Order noted that Petitioner had agreed to strike paragraphs 6-12 and 15 and to dismiss Counts I, II, and V-VII of the Administrative Complaint. (Presumably, this agreement was conditioned upon the imposition of discipline on the remaining allegations.) The Final Order recited that the November 16, 2000, audit revealed a shortage of about \$658,000 and found Respondent guilty of Counts III and IV, which are failing to maintain trust funds and culpable negligence or breach of trust. In aggravation, the Final Order found that the shortage was due to theft that went undetected for a period of time, Respondent failed to supervise his bookkeeper, Respondent failed to take corrective action with his bookkeeper after learning that the bookkeeping was substandard, about \$400,000 of the shortage was not attributed to checks written to the bookkeeper, and Respondent had received prior complaints from clients. The facts contained in the Final Order are contained in the present record only to the extent that they have been introduced by testimony, exhibits, or stipulations.

On October 29, 2004, based on Petitioner's "confession of error," the First District Court of Appeal reversed and remanded the case. The mandate followed on November 16, 2004. On

December 2, 2004, Petitioner re-transmitted the file to the Division of Administrative Hearings for a hearing.

At the hearing, Petitioner called three witnesses and offered into evidence six exhibits: Petitioner Exhibits 1, 3, 5-7, and 12. Respondent called no witnesses and offered into evidence four exhibits: Respondent Exhibits 1-4. All exhibits were admitted except Respondent Exhibit 4.

The Administrative Law Judge ordered Petitioner to allow Respondent an opportunity, at any reasonable time during the three weeks immediately following the hearing, to examine Petitioner's case database, due to insufficiencies in Petitioner's index of final orders, and inform the Administrative Law Judge of any need to reopen the record based on any information discovered by the examination of the database. The Administrative Law Judge also gave Respondent ten days immediately following the hearing to respond to the past discipline shown in Petitioner Exhibit 3. Except as noted below, nothing was filed after the hearing.

The Administrative Law Judge gave Petitioner four weeks immediately following the hearing within which to depose Jacqueline Bardach. Petitioner never took her deposition.

The court reporter filed the transcript on March 15, 2005. Respondent filed his proposed recommended order on April 26, 2005, but Petitioner filed, on the prior day, a motion for

extension of time, to which Respondent objected. The Administrative Law Judge granted Petitioner's motion and gave Petitioner until May 16, 2005, within which to file a proposed recommended order. In the same Order, the Administrative Law Judge gave Respondent an additional week to file a reply.

On May 16, 2005, Petitioner filed a Second Motion for Extension of Time for Filing Proposed Recommended Order. On May 19, 2005, Respondent filed his Response in Opposition to a Second Extension of Time. Petitioner eventually filed its proposed recommended order on May 27, 2005, and Respondent filed a response on June 3, 2005.

#### FINDINGS OF FACT

1. Since 1994, Respondent has been a licensed real estate broker, at all times serving as the broker of record for Castles By The Sea (Castles).

2. The Arnston transaction involves a contract dated August 30, 2000, in which Michael Arnston is the buyer, Advanced Builders is the seller, and Castles is the real estate broker. The contract contains a financing contingency that gives Mr. Arnston 20 days to obtain financing, acknowledges that Mr. Arnston has paid \$42,800 in earnest money to Castles, calls for a closing on October 1, 2000, and provides Advanced Builders with 30 days from post-closing notice to cure any title defects.



3. As pleaded by Petitioner and admitted by Respondent, on September 11, 2000, Mr. Arnston's attorney wrote a letter to Advanced Builders, with a copy to Jennifer McCrary, who is an employee of Respondent. In the letter, Mr. Arnston's attorney withdrew Mr. Arnston's offer to purchase and demanded the return of his earnest money. The stated reason is that the offer was never accepted by the owners of record, who were Michael Mucha, as owner of a two-thirds interest in the property, and Carolyn Kline, as owner of a one-third interest in the property. Although Mr. Mucha signed the contract, apparently in an individual capacity, Ms. Kline never signed the contract.

4. As pleaded by Petitioner and admitted by Respondent, on September 14, 2000, Advanced Builder's attorney wrote a letter to Mr. Arnston's attorney stating that Ms. Kline was a beneficial owner of Advanced Builders, Ms. Kline had authorized Advanced Builders to enter into the Arnston contract, and Ms. Kline, Advanced Builders, and Mr. Mucha were prepared to convey good title to Mr. Arnston at closing. Treating the September 11 letter as an anticipatory breach, the September 14 letter, a copy of which was furnished Castles, demands the \$42,800 earnest money deposit.

5. As pleaded by Petitioner and admitted by Respondent, on September 25, 2000, Mr. Arnston filed a complaint with Petitioner concerning Respondent's handling of the earnest money

deposit. This complaint led to the office audit in 2000 described below.

6. The Sims transaction involves a contract dated March 26, 2000, in which Stephen and Claire Sims are the buyer, Jacqueline Bardach is the seller, and Castles is the real estate broker. The contract contains a financing contingency that runs through closing, defines the contingency in part as the buyers' ability to acquire 75 percent financing, acknowledges that the Simses have paid \$10,000 in earnest money to Castles, calls for the Simses to pay Castles an additional \$20,000 in earnest money within 10 days, and calls for a closing within 90 days.

7. As pleaded by Petitioner and admitted by Respondent, on May 2, 2000, Stephanie McCauley, an agent of Castles, wrote Ms. Bardach and informed her that the Simses had been unable to acquire the 75 percent financing and were withdrawing from the contract and requesting the return of their earnest money.

8. As pleaded by Petitioner and admitted by Respondent, on May 8, 2000, Ms. Bardach's attorney wrote Ms. McCauley and the other broker at Castles, with a copy to the Simses, and stated that the cancelation of the contract and release of the escrow money was premature. In the letter, the attorney informed Castles and the Simses of alternative financing sources for 75 percent of the contract price consisting of a lender for 60 percent and the seller holding a purchase money note and

mortgage for the remaining 15 percent. On May 18, 2000, Ms. Bardach's attorney wrote another letter to Ms. McCauley and the other Castles broker formally declaring a default on the part of the Simses for their failure to exercise due diligence to obtain financing and demanding the \$30,000 in earnest money. The letter offers Castles the option of interpleader in circuit court. On July 20, 2000, Ms. Bardach's attorney wrote a letter to Respondent stating that Castles had taken no action since his letter of May 18 and authorizing him to submit the dispute to circuit court or the Florida Real Estate Commission.

9. On November 29, 2000, Petitioner received a complaint from Ms. Bardach concerning Castle's handling of the earnest money deposit.

10. Since early 1996, Respondent had employed Chris McMahel as a comptroller/bookkeeper in his real estate office. Prior to employing Ms. McMahel, who was a licensed real estate salesperson, Respondent had been acquainted with her from her employment in an ERA office in Boynton Beach and as the executive vice-president of the local Board of Realtors. At the time of the events described below, Ms. McMahel had had 20 years' experience in real estate.

11. Each month while employed by Respondent, Ms. McMahel, who had placed her real estate license with Castles, prepared the reconciliation statements for the Castles escrow account.

For some time prior to the events described below, Respondent was not signing these reconciliation statements. With Respondent's consent, and presumably at his direction, Ms. McMahel stamped the monthly statements with Respondent's facsimile signature. Ms. McMahel had similar authority to stamp Respondent's facsimile signature on trust account checks, and she routinely exercised this authority. The last monthly reconciliation statement that Respondent saw was for July 2000.

12. Petitioner's investigator had conducted an office audit in August 1999 and had met with Ms. McMahel. Although the investigator had found the real estate records poorly kept, he did not find anything in violation of applicable law and did not attempt to communicate directly with Respondent about the audit or the audit findings. The investigator's findings and actions were identical with respect to the 1998 audit.

13. On October 23 or 24, 2000, Respondent received a telephone call from a title insurance company informing him that a Castles trust account check in the amount of \$54,000 had failed to clear. Respondent called Ms. McMahel, who assured him that there had been some sort of mistake and she would call the bank to clear up the problem. Ms. McMahel later called Respondent back and told him that she had given the title insurance company a new check. However, this check also failed to clear.

14. Upon learning that the second check had failed to clear, Respondent immediately approached Ms. McMahel and told her to produce the books and records. She did so, and Respondent found that the books and records were in disarray. Respondent demanded an explanation from Ms. McMahel, but she remained silent and offered no excuse.

15. Respondent also contacted SunTrust, which held the trust funds, and confirmed that the account balance was insufficient to pay the trust account check. Upon learning of this shortage, Respondent contacted a representative of the Division of Real Estate and was told to document the problem and deposit sufficient money into the account as soon as possible. Respondent immediately borrowed \$50,000 from a friend and deposited it into the trust account, so that the twice-dishonored check could be paid.

16. The next day, Respondent went to Ms. McMahel's home to discuss the matter, but found that she had fled. Neither Respondent nor Petitioner was able to find her subsequently. Respondent formally fired Ms. McMahel at this time.

17. Eventually, Respondent pieced together much of what had happened. The ultimate shortage in the trust account was about \$658,000. Ms. McMahel had paid herself, as payee on numerous trust account checks, almost \$400,000. She had used additional trust account funds to pay off her obligations, such

as credit card debts, although it is unclear if these fraudulent transactions account for the remaining \$258,000.

18. By October 30, 2000, Respondent sold 25 percent of Castles, which he owned, for \$250,000, and he deposited the sale proceeds into the trust account. Still needing over \$350,000 to eliminate the shortfall, Respondent offered for sale the remaining interest in Castles. At the same time, Respondent decided not to file a police report against Ms. McMahel because he believed that such an action would reduce the price for which he could sell the company. Pending the sale of Castles, Respondent borrowed \$200,000 personally and deposited this money into the trust account to pay off outstanding trust account liabilities.

19. In late November 2000, Respondent found a buyer for Castles. Following a closing in January 2001, Respondent deposited sufficient funds into the trust account to eliminate any shortage. Respondent continued to work with Castles for a month after the closing, at which time the new owners fired him.

20. Respondent filed a police report in April or May 2001. However, the Delray Police Department, with which Respondent filed the complaint, never found Ms. McMahel. Respondent never filed suit against Ms. McMahel or SunTrust.

21. At the time of these events, Castles was closing 35-50 sales per month. With respect to contracts for which Castles

held the escrow money, all closings took place as scheduled without delays, and no one lost any money due to the theft from Respondent's trust account.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

23. Section 475.25, Florida Statutes, provides in part:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

\* \* \*

(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 her or 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.

\* \* \*

(d)1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not in law or equity entitled to retain under the circumstances. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:



a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;

b. With the consent of all parties, submit the matter to arbitration;

c. By interpleader or otherwise, seek adjudication of the matter by a court; or

d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein and abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property. Under certain circumstances, which the commission shall set forth by rule, a licensee may disburse property from the licensee's escrow account without notifying the commission or employing one of the procedures listed in sub-subparagraphs a.-d. If the buyer of a residential condominium unit delivers to a licensee written notice of the buyer's intent to cancel the contract for sale and purchase, as authorized by s. 718.503, or if the buyer of real property in good faith fails to satisfy the terms in the financing clause of a contract for sale and purchase, the licensee may return the escrowed property to the purchaser without notifying the commission or initiating any of the procedures listed in sub-subparagraphs a.- d.

\* \* \*

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

\* \* \*

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or 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 her or 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 sales associate, to immediately place with her or his registered employer any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as agent of the 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. A broker may place and maintain up to \$5,000 of personal or brokerage funds in the broker's property management escrow account and up to \$1,000 of personal or brokerage funds in the broker's sales escrow account. A broker shall be provided a reasonable amount of time to correct escrow errors if there is no shortage of funds and such errors pose no significant threat to economically harm the public. It is the intent of the Legislature that, in the event of legal proceedings concerning a broker's escrow account, the disbursement of escrowed funds not be delayed due to any dispute over the personal or

brokerage funds that may be present in the escrow account.

24. Florida Administrative Code Rule 61J2-10.032 provides  
in part:

(1)(a) A real estate broker, upon receiving conflicting demands for any trust funds being maintained in the broker's escrow account, must provide written notification to the Commission within 15 business days of the last party's demand and the broker must institute one of the settlement procedures as set forth in Section 475.25(1)(d)1., Florida Statutes, within 30 business days after the last demand.

(b) A broker, who has a good faith doubt as to whom is entitled to any trust funds held in the broker's escrow account, must provide written notification to the Commission within 15 business days after having such doubt and must institute one of the settlement procedures as set forth in Section 475.25(1)(d)1., Florida Statutes, within 30 business days after having such doubt. The determination of good faith doubt is based upon the facts of each case brought before the Commission.

25. Florida Administrative Code Rule 61J2-14.012 provides  
in part:

(2) Once monthly, a broker shall cause to be made a written statement comparing the broker's total liability with the reconciled bank balance(s) of all trust accounts. The broker's trust liability is defined as the sum total of all deposits received, pending and being held by the broker at any point in time. The minimum information to be included in the monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the

account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, an itemized list of the broker's trust liability, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. The broker shall review, sign and date the monthly statement-reconciliation.

(3) Whenever the trust liability and the bank balances do not agree, the reconciliation shall contain a description or explanation for the difference(s) and any corrective action taken in reference to shortages or overages of funds in the account(s). Whenever a trust bank account record reflects a service charge or fee for a non-sufficient check being returned or whenever an account has a negative balance, the reconciliation shall disclose the cause(s) of the returned check or negative balance and the corrective action taken.

26. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

27. In the Arnston and Sims transactions, Respondent failed to avail himself of one of the settlement procedures set forth by law. However, the first sentence of Section 475.25(1)(d)1, Florida Statutes, requires Respondent to deliver the escrowed property only at the time agreed upon by the parties. On this important point, the Arnston and Sims transactions are distinguishable.

28. The Arnston transaction was to close on October 1, 2000. Mr. Arnston's attorney demanded a return of the earnest money two weeks prior to the scheduled closing date, and Mr. Arnston filed a complaint with Petitioner one week prior to the scheduled closing date. The agreed-upon time for the delivery of the earnest money had not yet arrived because the time for Advanced Builders to convey good title to Mr. Arnston had not yet arrived. Mr. Arnston's objection to the identity of the seller in the contract, as compared to the record titleholder, was premature and possibly would prove groundless, as Advanced Builders could obtain good title by the time of the closing. Also, Mr. Arnston, not Advanced Builders, breached the contract by failing to give the seller the required notice and 30 days to cure any claimed title defect. Gaylis v. Caminis, 445 So. 2d 1063 (Fla. 3d DCA 1984) (per curiam).

29. Under the facts of the Arnston transaction, Respondent was thus not required, as of the time of the premature demand and premature complaint, to deliver the escrow money to anyone, so he could decline to invoke one of the settlement procedures without subjecting himself to discipline.

30. The Sims transaction presents a different situation. The Simses tried to exercise the financing contingency, which ran through closing, about 30 days into the 90-day period between the date of contract and the date of closing. The

suggestion of Ms. Bardach's attorney that the Simses obtain a 60 percent first mortgage and 15 percent second, purchase money mortgage presented a materially different alternative--two mortgages totaling 75 percent--to the condition to which the Simses had agreed--one mortgage of 75 percent. However, the attorney accurately characterized as premature the attempt of the Simses to use the financing contingency to cancel the contract. On these facts, Respondent could not avail himself of the last sentence of Section 475.25(1)(d)1, Florida Statutes, to ignore Ms. Bardach's claim to the earnest money because at least a fact question existed as to the "good faith" of the Simses. Also, the demand of Ms. Bardach's lawyer by letter dated July 20, 2000, and the complaint of Ms. Bardach were not premature because the transaction should have closed by the end of June 2000. Given the time that elapsed between the lawyer's letter and the seller's complaint, it is apparent that Respondent did not timely invoke one of the settlement procedures.

31. Under the facts of the Sims transaction, Respondent violated Section 475.25(1)(d)1, Florida Statutes, and Florida Administrative Code Rule 61J2-10.032(1)(a).

32. With respect to the theft of trust funds, Respondent did not steal these funds or assist Ms. McMahel in the theft of these funds. The question under Section 475.25(1)(b), Florida

Statutes, is thus whether Respondent is guilty of culpable negligence in his handling of his trust funds, including his supervision of Ms. McMahel. In hindsight, Respondent's trust in Ms. McMahel was misplaced, but substantial facts justified this trust at the time. Ms. McMahel had occupied for many years positions of responsibility and trust in the local real estate industry, and she had worked for Respondent, without incident, for four years. However, but for Respondent's delegation to Ms. McMahel of important duties in completing monthly reconciliation statements and signing trust account checks, Ms. McMahel could not have stolen the money.

33. By rule, as discussed below, Respondent was required to examine and sign each reconciliation statement, so this issue, which also falls within the discussion of culpable negligence, is better covered in the discussion of the rule that explicitly addresses monthly reconciliation statements. However, proving culpable negligence in supervision is greatly facilitated by evidence of what Respondent reasonably should have done as compared to what Respondent did do in supervising Ms. McMahel. Cf. Ganter v. Department of Insurance, 620 So. 2d 202 (Fla. 1st DCA 1993). The present record contains no such evidence and does not establish any violation of Section 475.25(1)(b), Florida Statutes.

34. The \$658,000 shortfall in trust funds violates Section 475.25(1)(k), Florida Statutes, which requires the maintenance of trust funds until disbursement is authorized. Two alternatives require this result. In contrast to Section 475.25(1)(b), Florida Statutes, Section 475.25(1)(k), Florida Statutes, does not require intent or culpable neglect on the part of the licensee for a violation to occur. The statute imposes strict liability upon licensees when it comes to maintaining trust funds. Cf. Camejo v. Department of Business and Professional Regulation, 812 So. 2d 583 (Fla. 3d DCA 2002) (per curiam) (strict liability imposed in disciplinary case against general contractor whose licensed was used to pull building permits, but who did not personally perform any of the work).

35. In the alternative, if some personal act or omission were required as a condition for a violation of Section 475.25(1)(k), Florida Statutes, Petitioner has proved sufficient acts and omissions. Although insufficient to establish culpable negligence, Respondent's delegation of important duties to Ms. McMahel allowed her to steal money from the trust account and prevented earlier detection of her defalcation. Imposing discipline upon Respondent on these facts would therefore not be the equivalent of imposing discipline upon a licensee when the nonpayment of a trust check is outside of his or her control,



such as in the case of a bank error or unanticipated bank failure.

36. Lastly, Respondent's failure to personally examine and sign the monthly reconciliation statements violates Florida Administrative Code Rule 61J2-14.012(2), which clearly allows the broker to delegate the duty of preparing the statement, but, by negative implication, clearly requires the broker personally to examine and sign each statement. Respondent did not do so, at least during the crucial months leading up to the failure of his trust account.

37. Petitioner has therefore proved the violations alleged in Count III (Section 475.25(1)(k), Florida Statutes), Count V (Florida Administrative Code Rule 61J2-14.012(2) and, thus, Section 475.25(1)(e), Florida Statutes), and Count VII (Florida Administrative Code Rule 61J2-10.032(1)(a) and, thus, Section 475.25(1)(e), Florida Statutes). Counts I and II involve the Arnston transaction, for which the proof was insufficient. Count IV raises culpable negligence and breach of trust, for which the proof was absent or insufficient. Count VI is duplicative of Count V, to the extent that Count VI is restricted to Respondent's failure to invoke one of the settlement procedures. To the extent that Count VI raises the issue of a failure to pay out the escrow money, the record fails to establish all of the elements of this offense, including who

was entitled to the escrow money and whether Respondent ever paid it out to anyone.

38. Florida Administrative Code Rule 61J2-24.001(3)(1) provides that the penalty range for a violation of Section 475.25(1)(k), Florida Statutes, is a 90-day suspension and \$1000 fine to revocation. Florida Administrative Code Rule 61J2-24.001(3)(f) provides that the penalty range for a violation of Section 475.25(1)(e), Florida Statutes, is an eight-year suspension to revocation with a \$1000 fine. Respondent contends that Florida Administrative Code Rule 61J2-24.002(2)(ff) provides for a sharply reduced penalty for a violation of Florida Administrative Code Rule 61J2-14.012(2), when a trust account has not been properly reconciled, but this provision applies only when the trust account balances, so it is inapplicable to this case.

39. The main aggravating factor is the size of the shortfall in Respondent's trust account. The main mitigating factors are that Respondent did not personally take the money, Respondent immediately alerted Petitioner to the theft, and Respondent promptly restored the money that was needed immediately and, in short order, restored all of the money, even though it required the sale of his business. Petitioner seeks revocation, but this is too harsh a penalty, in part because it fails to differentiate between the more responsible licensee,

such as Respondent, who works hard to restore trust funds after a theft, and the unscrupulous licensee, who never undertakes the effort.

RECOMMENDATION

It is

RECOMMENDED that the Florida Real Estate Commission enter a final order finding Respondent guilty of one violation of Section 475.25(1)(k), Florida Statutes; one violation of Section 475.25(1)(e), Florida Statutes, by virtue of a violation of Florida Administrative Code Rule 61J2-14.012(2); and one violation of Section 475.25(1)(e), Florida Statutes, by virtue of a violation of Florida Administrative Code Rule 61J2-10.032(1)(a); and imposing a penalty of one year's suspension and a fine of \$3000.

DONE AND ENTERED this 23rd day of June, 2005, in Tallahassee, Leon County, Florida.

**S**

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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of June, 2005.

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.