STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE,

Petitioner,

vs. Case No. 14-4147PL

LINDA FIORELLO,

Respondent.
_____/
DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE,

Petitioner,

vs. Case No. 14-4148PL

CATHERINE A. LICHTMAN,

Respondent.
_____/

RECOMMENDED ORDER

On February 24 and 25, 2015, a duly-noticed hearing was held by video teleconference at locations in Lauderdale Lakes and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joshua N. Kendrick, Esquire
Whitney Rebecca Hays, Esquire
Crystal D. Stephens, Esquire
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For Respondent, Linda Fiorello:

Daniel Villazon, Esquire
Daniel Villazon, P.A.
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For Respondent, Catherine A. Lichtman:

Robert Brian Resnick, Esquire
Law Office of Robert B. Resnick
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STATEMENT OF THE ISSUES

Whether either Respondent violated the provisions of chapter 475, Florida Statutes,[1/] regulating real estate sales associates, as alleged in the administrative complaints, and if so, what sanctions are appropriate.

PRELIMINARY STATEMENT

On March 17, 2014, Petitioner, Department of Professional Regulation, Division of Real Estate (Petitioner or Department), filed an Administrative Complaint against Ms. Linda Fiorello, alleging that Ms. Fiorello had violated several sections of chapter 475 in connection with an offer to purchase real property at 10861 Royal Palm Boulevard in Coral Springs, Florida

("the property"). On March 17, 2014, the Department also filed an Administrative Complaint against Ms. Catherine A. Lichtman, alleging violations of chapter 475 stemming from the same offer. Each sales associate disputed the allegations and requested a hearing pursuant to section 120.57(1), Florida Statutes. On September 5, 2014, the cases were referred to the Division of Administrative Hearings for assignment of an administrative law judge. The cases were consolidated on September 17, 2015, and, after continuance, the final hearing was conducted on February 24 and 25, 2015.

At hearing, the Department presented the live testimony of Ms. Jennifer North, an Investigation Supervisor with the Department; Ms. Jennie Pollio, a renter and prospective purchaser of the property; and Mr. Brian Davis, the real estate broker for Luxury Realty Partners, Inc. Exhibits P-1 through P-14 were offered by the Department and admitted into evidence. Ms. Fiorello testified and presented the testimony of Ms. Victoria Guante and Ms. Patty Ashford, both real estate sales associates at Luxury Realty Partners, Inc. Ms. Fiorello offered Exhibit F-1, which was admitted. Ms. Lichtman testified and offered exhibits L-1, L-2, L-4, L-6 through L-15, L-21, L-23, L-27, and L-29, which were admitted into evidence.

The two-volume Transcript was filed on April 21, 2015. On May 19, 2015, Ms. Lichtman filed a Motion to Correct Transcript

and Extend or Stay Date for Service of Proposed Order. On the same date, the Department filed a motion in opposition. The motion to extend the time for filing proposed orders was denied. The motion to correct the Transcript was granted. An amended Transcript of Proceedings and a Transcript Errata Sheet were filed on June 5, 2015. All parties filed Proposed Recommended Orders, which were carefully considered.

FINDINGS OF FACT

1. The Florida Real Estate Commission, created within the Department, is the entity charged with regulating real estate brokers, schools, and sales associates in the State of Florida.

2. The Division of Real Estate is charged with providing all services to the commission under chapters 475 and 455, Florida Statutes, including recordkeeping services, examination services, investigative services, and legal services.

3. In 2006, Ms. Linda Fiorello and Ms. Catherine Lichtman, associates at another brokerage, decided to open up their own real estate business, with each owning a fifty-percent share. They created Luxury Realty Partners, Inc. ("the corporation"), a licensed real estate corporation in the State of Florida. While Ms. Lichtman was initially the qualifying broker, she soon stepped down from that position and a series of other individuals served as brokers for the corporation. Neither Ms. Fiorello nor Ms. Lichtman was licensed as a real estate

broker at any time relevant to the Administrative Complaints. The corporation sold, exchanged, or leased real property other than property which it owned and it was not an owner-developer.

4. On April 23, 2010, Mr. Brian Davis was added as the sole officer and director of the corporation, and he became the qualifying broker. At all times material to the complaints, Ms. Fiorello and Ms. Lichtman were licensed as real estate sales associates in the State of Florida, Ms. Fiorello having been issued license number 659087 and Ms. Lichtman having been issued license number 3170761. They worked together at the corporation, nominally under the direction, control, and management of Mr. Davis.

5. The corporation did not maintain an escrow account. Mr. Davis did not manage any of the corporation's bank accounts. He was not a signatory on the operating account. He did not collect brokerage commissions or distribute them to sales associates. He testified he went into the office "maybe once, once or twice a month." When he agreed to become the qualifying broker for the corporation, he did not even know all of the names of the agents he was supposed to be responsible for. Mr. Davis stated:

> Well, basically, I was just doing a favor and I was – I put my license there until one of the other two could get their Broker's license. I was just really stepping in for a short term to – to fill the time frame

> until one of them could get their Brokerage license, and I didn't go on any management or any other books or anything of that nature.

6. As Ms. Patty Ashford, one of the sales associates testified, Mr. Davis was seldom in the office. Ms. Ashford would turn in her contracts to Ms. Fiorello or Ms. Lichtman, who would review them. Ms. Ashford testified that her commission checks were then paid by checks signed by Ms. Lichtman. In short, Mr. Davis effectively provided no direction, control, or management of the activities of the corporation or its sales associates.

7. In December of 2009, Ms. Jennie Pollio was living at 10861 Royal Palm Boulevard in Coral Springs, Florida (the property), a Section 8 property that she had been renting from Mr. Jimmy Laventure for about nine years. The property was in foreclosure. Ms. Pollio thought that she might be able to buy the property. She consulted Ms. Victoria Guante, a real estate sales associate with Luxury Realty Partners, Inc. Ms. Pollio knew Ms. Guante because they both had sons who played baseball on the same team. Ms. Guante told Ms. Pollio to get $40,000.00 in cashier's checks and put it in escrow with Luxury Realty Partners, Inc., so that she could make a strong offer and show that she really had the money.

8. Although they were not produced as exhibits at hearing, Ms. Pollio testified that she signed a couple of different contracts for the property in early 2010. On or about April 29, 2010, Ms. Guante accompanied Ms. Pollio to the bank to get cashier's checks. Ms. Pollio received five Bank of America cashier's checks made out to "Luxury Partner Realty," four in the amount of $9000.00, and one in the amount of $4000.00. Ms. Pollio understood that the property could be purchased for a total of $40,000.00, which included $37,000.00 for the property, and the balance in closing costs.

9. The cashier's checks were not given to a broker. Ms. Pollio gave the $40,000.00 to Ms. Fiorello as a deposit on the property when she met with her in the corporation office on State Road 7. Ms. Pollio made a copy of the cashier's checks and Ms. Fiorello wrote a note on the bottom of the copy, "Received by Linda A. Fiorello for Luxury Escrow deposit on contract 10861 Royal Palm Blvd Coral Springs FL 33065" and gave it back to Ms. Pollio.[2/] Although the payee name on the cashier's checks was transposed, Ms. Pollio gave the checks to Ms. Fiorello as agent of the corporation as a deposit on the property, and Ms. Fiorello accepted the checks on behalf of the corporation for the same purpose.

10. Ms. Fiorello did not advise Mr. Davis that the checks had been received. Instead, she deposited the checks in an

account formerly belonging to Luxury Property Management, an entity unaffiliated with Luxury Realty Partners, Inc.[3/] Luxury Property Management had never been a licensed real estate brokerage corporation, and was no longer in existence, as it had been dissolved. The account had never been properly closed. The account usually had a low balance. Just prior to the deposit of Ms. Pollio's money, the balance was $10,415.15.

11. Ms. Lichtman had no ownership or interest in Luxury Property Management, but she was aware of the account. The corporation did not have an escrow account, and the Luxury Property Management account was sometimes used to hold money "in escrow," as Ms. Lichtman was aware. As he testified, Mr. Davis knew nothing about this account and did not authorize Ms. Fiorello to place Ms. Pollio's deposit there. Ms. Fiorello's contrary testimony that she told Mr. Davis of the transaction and had his authorization was not credible and is rejected.

12. Ms. Guante was negotiating for the property on Ms. Pollio's behalf. She testified:

> At that point the guy was asking (unintelligible) I think was sixty-five, and then we made the offer for $40,000.00. The guy came back and say "no," and then we went back and make another offer for $50,000.00, and then by that time the guy still say "no." And then her and I get into an argue because baseball game that don't have nothing to do with the real estate and then

she decided she don't want me no more as her agent.

13. Ms. Guante called Ms. Fiorello and told her that Ms. Pollio didn't want to work with Ms. Guante anymore. Ms. Fiorello told Ms. Guante not to worry about it, that the corporation would handle the transaction for Ms. Pollio.

14. On September 23, 2010, a check in the amount of $40,000.00 was written from the Luxury Property Management, LLC, account to Luxury Realty Partners. It is undisputed that the hand writing on the "amount" and "pay to the order of" lines on the check was that of Ms. Lichtman, while the signature on the check was that of Ms. Fiorello. This check, posted into the corporation's operating account the same day, along with a check for $6000.00, left a balance of only $684.15 in the Luxury Property Management, LLC, account.

15. The two sales associates gave completely different explanations for the check. Ms. Fiorello testified that she always left one or two signed checks locked in the office when she was out of town. She testified that only she and Ms. Lichtman had keys to the lock. Ms. Fiorello testified that without her knowledge, Ms. Lichtman had removed a signed check and filled in the top portion. She testified that although it was her account, she did not realize that the money had been removed until around May 2011, some eight months later.[4/]

16. On the other hand, Ms. Lichtman testified that on numerous occasions, the two associates would write out checks together, and that in this instance they discussed the transfer in connection with the opening of a Rapid Realty real estate office in New York which involved Ms. Fiorello's son. Ms. Lichtman testified that she filled out the top portions of the check, and Ms. Fiorello then signed it. Ms. Lichtman testified that the $40,000.00 "represented monies coming back into Luxury Realty Partners from Rapid Realty." Ms. Lichtman did not explain why funds from Rapid Realty to repay a loan from Luxury Realty Partners would have been deposited into the Luxury Property Management account, and records for the Luxury Property Management account do not reflect such deposits.

17. On November 4, 2010, a little over a month later, Ms. Lichtman transferred $40,000.00 from the corporation operating account into an account for Chatty Cathy Enterprises, an account controlled by her, and inaccessible to Ms. Fiorello.

18. Ms. Lichtman's explanation for these transfers, that the $40,000.00 came from the New York real estate venture in repayment of a loan made from the corporation, was unpersuasive, and is rejected. First, the only documentary evidence of a loan made to the "start-up" was an unsigned half-page note dated April 30, 2010. That document indicated that an interest-free business loan in the amount of 25,000 would be made from the

corporation to "Rapid Realty RVC and its owners" and that re-payment of the loan would be made in monthly payments to the corporation. No amount was specified for these payments. Similarly, there was no evidence of any repayment checks from Rapid Realty to Ms. Fiorello, Ms. Lichtman, or the corporation.

19. A document dated November 5, 2010, purports to be a "formal release" of that loan. It states in part:

> The above stated note lists a dollar amount of $25,000 dollars which is inaccurate. The total balance of the loan was approximately $48,000 dollars that was loaned by Luxury Partners Realty (sic), Catherine A. Lichtman and Linda A. Fiorello. This is the formal dollar amount of the loan that is considered paid and satisfied in full.

This release appears to be signed by Ms. Lichtman and Ms. Fiorello. Even assuming that the loan had been repaid in full by the New York venture (although no corporation account deposits indicate this), it is not credible that Ms. Lichtman believed she was personally entitled to a payment of $40,000.00 for repayment of a $48,000.00 loan made by the corporation. The spreadsheet of itemized expenses of the New York office and offered by Ms. Lichtman as proof of amounts loaned has no apparent correlation to a spreadsheet prepared by Ms. Lichtman purporting to show checks and cash amounts transferred to New York.[5/]

20. In January 2011, Ms. Teresa Ebech, the listing agent for the property with First United Realty, took another contract for the Royal Palm property to Ms. Pollio. This contract referenced a $40,000.00 deposit and listed "Luxury Property Mgt. Escrow" as the escrow. This contract indicated a total purchase price of $55,000.00, and called for a February 21, 2011, closing date. Ms. Pollio signed the contact.

21. The closing did not occur. Ms. Pollio decided to stop trying to buy the property and get her money back. No other party ever acquired an interest or equity in the deposit. Ms. Pollio had difficulty getting in touch with Ms. Fiorello about getting her money back. When Ms. Pollio finally was able to ask Ms. Fiorello for a return of her deposit, Ms. Fiorello did not return it, but told Ms. Pollio that she should get it from Ms. Lichtman.

22. On or about April 28, 2011, Ms. Pollio, with help from her friend, Ms. Joyce Watson, prepared a letter to cancel the contract. The letter noted that the $40,000.00 had been in escrow for over a year and stated that due to the inability of Luxury Realty Partners to close on the property, Ms. Pollio requested immediate return of the deposit. The letter was sent to Catherine Lichtman at the Luxury Realty Partners, Inc., address. Ms. Lichtman's testimony that she never received the letter is discredited.

23. Ms. Ashford, another real estate sales associate at the corporation, had never met Ms. Pollio, but was in the Luxury Realty Partners, Inc., office one day in May of 2011 when Ms. Pollio came in with her husband. Ms. Ashford testified:

> She came in with her husband pretty much screaming and yelling from the minute she stepped foot in the door. She was very angry, very upset. I looked at her and said, you know, Ma'am please calm down. She said I'm not calming down. She pointed at Cathy, she said she knows exactly why I'm f'in here. This has nothing to do with you.

24. Ms. Lichtman asked Ms. Ashford to call her husband, which Ms. Ashford did, thinking this was unusual because he never had anything to do with what went on at the office.

25. Ms. Pollio yelled at Ms. Lichtman, and Ms. Lichtman yelled back, each becoming more and more agitated. Ms. Lichtman then left the room and locked the door. The police were called, though Ms. Ashford was not sure if it was Ms. Pollio or her husband, or perhaps Ms. Lichtman's husband, who called them. Ms. Ashford testified that when the police officer arrived, Ms. Lichtman lied and told him that her name was Victoria. The officer tried to calm both parties, and told them it was a civil matter. The police officer finally persuaded Ms. Pollio and her husband to leave.

26. Ms. Ashford testified as follows about the conversation that took place between Ms. Lichtman and Ms. Ashford after Ms. Pollio left:

> Q What did you say?
>
> A I asked her point blank what the hell was going on and she responded.
>
> Q What did she respond?
>
> A That yes, she had her money. The money was--
>
> Q When you said her money. What--what are talking about?
>
> A She had Jennie's money.
>
> Q She--
>
> A It was a deal, a transaction. "She came into our office with cash coming out of her boobs and I don't have to give it back." Were her words.
>
> Q Did you tell Cathy that she had to return the money?
>
> A Yes, I did. I said "Cathy, its escrow money, it doesn't matter where she got it from," and Cathy went on about "it's illegal she's a dancer, she's on Section 8. I'm going to report it to the IRS. She thinks she buying a f'in house."

Ms. Lichtman's admission to Ms. Ashford after Ms. Pollio left showed that Ms. Lichtman knew that she had money in her possession that had been given by Ms. Pollio to buy a house.

27. Ms. Ashford testified that she was upset, as an agent with the corporation, about what appeared to be going on. She

and Ms. Fiorello met with Mr. Davis in April of 2011. Ms. Fiorello told Mr. Davis that Ms. Lichtman had stolen funds. Mr. Davis reviewed the January contract that Ms. Fiorello gave him, and concluded that it didn't make much sense. He had not given any authorization to place escrow funds into the Luxury Property Management, LLC, account. He did not have access to that account or to any of the corporation's operating accounts to determine if money was missing.

28. After the meeting, Mr. Davis asked Ms. Lichtman what she knew about the accusation. Ms. Lichtman denied that she took any money from an escrow account. Mr. Davis called the Florida Real Estate Commission and reported the incident.

29. At some point, Ms. Lichtman advised Ms. Pollio that the cancellation letter was not sufficient, and provided Ms. Pollio with a "Release and Cancellation of Contract for Sale and Purchase" form. Mr. Laventura signed the form in June 2011, and Ms. Pollio signed the form when she returned it to Ms. Lichtman at the Luxury Realty Partners, Inc., office. The form released Luxury Partner Realty from liability and indicated that the escrow agent should disburse all of the $40,000.00 deposit to Ms. Pollio. At the time of the final hearing, Ms. Pollio had yet to receive her $40,000.00 deposit back.

30. The testimony and documentary evidence in this case clearly demonstrates a recurring and systematic disregard of the

legal entities and procedures intended to provide structure and accountability to business and real estate transactions by both Ms. Fiorello and Ms. Lichtman.

31. Ms. Fiorello and Ms. Lichtman employed a qualifying "broker" for the corporation, but intentionally assumed the responsibilities of that position themselves during the time relevant to the Administrative Complaints. In doing so, they each operated as a broker without being the holder of a valid and current active brokers' license.

32. No evidence was introduced at hearing to indicate that the professional license of either Ms. Fiorello or Ms. Lichtman has ever been previously subjected to discipline.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569, and 120.57(1), Florida Statutes (2014).

34. Petitioner seeks to take disciplinary action against the real estate sales associate licenses of Respondents. A proceeding to impose discipline against a professional license is penal in nature, and Petitioner bears the burden to prove the allegations in the administrative complaints by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern &

Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

35. Clear and convincing evidence has been said to require:

> [T]hat 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 fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

36. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011). Any ambiguities must be construed in favor of the licensee. Lester v. Dep't of Prof'l Reg., 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

Counts Filed Against Respondent Fiorello

Count I

37. Section 475.25(1)(k) provided, in relevant part, that discipline may be imposed if the commission finds that a sales associate has failed:

> 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.

38. In support of Count I, Petitioner clearly showed that Ms. Pollio entrusted her deposit money to Respondent Fiorello as an agent of Luxury Realty Partners, Inc. Respondent Fiorello did not immediately place that money with her registered employer, but instead deposited it in an account belonging to a dissolved entity she had once owned, completely unaffiliated with the corporation, and unknown to Mr. Davis.

39. Petitioner proved by clear and convincing evidence that Respondent Fiorello violated section 475.25(1)(k).

Count II

40. Section 475.25(1)(d) provided, in relevant part, that discipline may be imposed if the commission finds that a sales associate:

> 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 . . . .

41. In support of Count II, Petitioner showed that when Ms. Pollio, a person entitled to return of her $40,000.00, requested return of her deposit, Respondent Fiorello failed to return it to her.

42. Petitioner proved by clear and convincing evidence that Respondent Fiorello violated section 475.25(1)(d).

Count III

43. Section 475.42(1)(d) provided, in relevant part:

> A sales associate may not collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer . . . .

44. In support of Count III, the evidence clearly showed that Respondent Fiorello collected the deposit that Ms. Pollio gave to her for the purchase of property without the express consent of the qualifying broker or the corporation.

45. Petitioner proved by clear and convincing evidence that Respondent Fiorello violated section 475.42(1)(d), and so section 475.25(1)(a), which provides that any violation of section 475.42, containing criminal provisions, also constitutes an administrative discipline offense.

Count IV

46. Section 475.42(1)(a) provided, in relevant part:

> A person may not operate as a broker or sales associate without being the holder of a valid and current active license therefor. Any person who violates this paragraph commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, or, if a corporation, as provided in s. 775.083.

47. Section 475.01(1)(a) included within the definition of "broker" a person who with an intent to collect or receive compensation or valuable consideration therefor, attempts or agrees to negotiate the purchase of real property or who holds out to the public by any representation that she is engaged in the business of buying real property of others, or takes any part in the procuring of sellers, or who directs or assists in the negotiation or closing of any transaction which is calculated to result in a sale thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor.

48. Section 475.01(1)(j) provided that a "sales associate" is a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person.

49. As charged in the Administrative Complaint, in accepting Ms. Pollio's deposit for the purchase of the property

on behalf of the corporation, Respondent Fiorello performed actions specified within the definition of "broker." The only qualifying broker, Mr. Davis, provided no direction, control, or management of these activities, or any of her activities, as Respondent Fiorello well knew. Respondent Fiorello operated as a broker without being the holder of a valid and current active broker's license.

50. Petitioner proved by clear and convincing evidence that Respondent Fiorello violated section 475.42(1)(a), and so section 475.25(1)(a), which provides that violation of the criminal provision is also a basis for administrative discipline.

Count V

51. Section 475.25(1)(b) provided, in relevant part, that discipline may be imposed if the commission finds that a licensee:

> 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.

52. A violation of section 475.25(1)(b) requires a finding of wrongful intent or scienter. Morris v. Dep't of Prof'l Reg., 474 So. 2d 841, 843 (Fla. 5th DCA 1985). See, e.g., White v. Dep't of Bus. & Prof'l Reg., 715 So. 2d 1130, 1130 (Fla. 5th DCA 1998) (violation of section 475.25(1)(b) shown where broker did not place deposit in escrow, used it for personal benefit, and did not return it to buyer when transaction failed to close). While simple negligence is not sufficient, "culpable negligence" does constitute a violation.

53. For negligence to rise to the "culpable" level, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that a respondent must have known, or reasonably should have known, was likely to cause great injury, and must be determined "upon the facts and the totality of the circumstances in each particular case." Cf. Kish v. State, 145 So. 3d 225, 227-28 (Fla. 1st DCA 2014) (citing Fla. Std. Jury Instr. (Crim.) 16.6).

54. In support of Count V, Petitioner established by clear and convincing evidence that Ms. Fiorello was culpably negligent and breached the trust of Ms. Pollio. Respondent Fiorello

admitted that she knowingly placed Ms. Pollio's $40,000.00 in an account of an entity that had never been a licensed real estate brokerage corporation, that had absolutely no affiliation with the corporation, that Respondent Fiorello had solely owned, and that in fact was no longer in existence because it had been dissolved. Although Respondent Fiorello knew the entity was no longer in existence, she never closed the bank account, but continued to use it. Respondent Fiorello provided Ms. Pollio with an undated "escrow verification" that did not mention the corporation, failed to provide even minimal monitoring of the "escrow" account to ensure the safety of the funds, and later intentionally or negligently allowed the funds to be transferred into an operating account. In short, Respondent Fiorello showed utter disregard for the safety of Ms. Pollio's money and had to have known that her course of conduct was likely to cause great injury to Ms. Pollio. If Respondent Fiorello did not have an actual intent to defraud Ms. Pollio from the beginning, she certainly showed a wanton or reckless indifference to Ms. Pollio's rights, which was equivalent to an intentional violation of them. Cf. Ibeagwa v. State, 141 So. 3d 246, 250 (Fla. 1st DCA 2014). Ms. Pollio, who admitted she was not sophisticated in real estate transactions, trusted in Respondent Fiorello to guide her and safeguard her deposit in a real estate transaction. That trust was breached.

55. Petitioner proved by clear and convincing evidence that Respondent Fiorello violated section 475.25(1)(b).

Counts Filed Against Respondent Lichtman

Count I

56. Section 475.25(1)(b), Florida Statutes (2010), provided, in relevant part, that discipline may be imposed if the commission finds that a licensee:

> 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.

57. In Count I of the Administrative Complaint, Petitioner alleged that Respondent Lichtman violated this statute when she transferred the $40,000.00 escrow deposit from the corporation operating account into the Chatty Cathy Enterprises account.

58. Ms. Pollio, having had five years to consider the matter while waiting for the return of her $40,000, is convinced that Respondents were working together to defraud her: "they scammed me," "these two ladies in cahoots robbed my money." She

may be right. The two associates may well have been working together when Respondent Lichtman filled out the check from the Luxury Property Management account and Respondent Lichtman may have been fully aware that the money was Ms. Pollio's deposit. If so, she was still aware at the time she transferred the money into Chatty Cathy Enterprises. There may have been a conspiracy to defraud Ms. Pollio that was only abandoned when Respondents later had a falling out as business partners. But none of this was clearly and convincingly shown.

59. Specifically as to this count, it was not shown that at the time Respondent Lichtman made the transfer into the Chatty Cathy Enterprises account she knew that it was Ms. Pollio's deposit money. While it was clear from Respondent Lichtman's admissions to Ms. Ashford that she acknowledged this by the time Ms. Pollio visited her at the office in May, it is not clear if she knew this from the beginning, or, if not, when she learned it.

60. What Respondent Lichtman knew at the time of the transfer from the corporation operating account is important because section 475.25(1)(b) requires proof of an intentional act. Munch v. Dep't of Prof'l Reg., 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992). Petitioner failed to show that at the time Respondent Lichtman made the transfer from the corporation operating account into the Chatty Cathy Enterprises account that

either: 1) Respondent Lichtman was conspiring with Respondent Fiorello; or 2) she otherwise knew the money belonged to Ms. Pollio.

61. Petitioner failed to prove by clear and convincing evidence that Respondent Lichtman violated section 475.25(1)(b).

Count II

62. Section 475.25(1)(d), Florida Statutes (2010), provided, in relevant part, that discipline may be imposed if the commission finds that a sales associate:

> 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.

63. Clear and convincing evidence showed that by the time of Ms. Pollio's verbal demand upon Respondent Lichtman to return her deposit, and at the time of Ms. Pollio's submission of the

Release and Cancellation of Contract for Sale and Purchase form to Respondent Lichtman, Respondent Lichtman knew that she had Ms. Pollio's deposit money. Respondent Lichtman acknowledged that the $40,000.00 that came into her hands as a result of her transfer from the corporation account was not her property and that she was not entitled to retain it in law or equity under the circumstances. Immediately after Ms. Pollio's police-assisted departure from the corporation office following her earsplitting verbal demands for return of her deposit, Respondent Lichtman admitted to Ms. Ashford that she was in possession of money that Ms. Pollio had given for purchase of a house. Respondent Lichtman also knew this later, when she received the Release and Cancellation of Contract for Sale and Purchase form. Petitioner never proved whether she knew it from the outset, as suspected by Ms. Pollio, or if she only learned it later, in some other way, such as examination of the various accounts to which she had access. However, Petitioner's proof that Respondent knew that the funds in her possession belonged to Ms. Pollio at the time of Ms. Pollio's demands was sufficient. Once Respondent Lichtman acknowledged that the funds belonged to Ms. Pollio and she was not entitled to retain them, she was legally obligated to deliver them to Ms. Pollio. It is undisputed that she did not do so.

64. Respondent Lichtman's argument that "money is fungible" is disingenuous under all of the circumstances here. It rings hollow in the face of Respondent Lichtman's earlier acknowledgment that she was in possession of Ms. Pollio's deposit money. While it is clear that escrow rules were not followed, that misconduct provides no defense to Respondent Lichtman. She was aware that the Luxury Property Management account was sometimes improperly used to hold escrow funds. The customary low balance in that fund, followed in succession by the deposit of Ms. Pollio's $40,000.00, the movement of the sum of $40,000.00 to the corporation operating account, and finally the movement of the sum of $40,000.00 to the Chatty Cathy Enterprises account, is telling. Under all of the circumstances, it is abundantly clear to any reasonable observer that the funds that ultimately were deposited into the Chatty Cathy Enterprises account rightfully belonged to Ms. Pollio, just as Respondent Lichtman herself admitted.

65. Petitioner showed that Respondent Lichtman failed to account or deliver $40,000.00 to Ms. Pollio, a person entitled to such delivery, upon her May verbal demand and upon her June submission of the Release and Cancellation of Contract for Sale and Purchase form.

66. Petitioner proved by clear and convincing evidence that Respondent Lichtman violated section 475.25(1)(d).

Count III

67. Section 475.42(1)(d), Florida Statutes (2010), provided, in relevant part:

> A sales associate may not collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer . . . .

68. In support of Count III, Petitioner argues in its Proposed Recommended Order that evidence at hearing clearly showed that on more than one occasion Respondent Lichtman directly compensated herself, and other sales associates, for real estate transactions conducted through the corporation without involving her broker. These facts might well show a violation of section 475.42(1)(d), and even more clearly a violation of section 475.42(1)(a), which prohibits a person from acting as a broker without a current license, but these were not the facts alleged in Count III of the Administrative Complaint to constitute the violation. Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (disciplinary action against a licensee can only be based upon the conduct alleged in the administrative complaint).

69. Count III instead alleged that Respondent Lichtman compensated herself with Complainant's $40,000.00 escrow deposit. It is clear that Respondent Lichtman withdrew money

from the corporation operating account and put it into an account belonging to Chatty Cathy Enterprises, an account she wholly controlled. She admitted at hearing that the transfer was intended to compensate her personally. The first, and dispositive, question is whether that transfer constituted a "collection" of money within the meaning of the statute. Given that penal statutes must be strictly construed, the answer must be "no."

70. It is clear from the text of section 475.42(1)(d) that the "collections" that may not be undertaken, except in the name of the employer and with the employer's consent, are things such as deposits, commissions, rents, or other collections made in connection with a real estate brokerage transaction. While the evidence showed that the $40,000.00 had been earlier "collected" by Respondent Fiorello from Ms. Pollio in connection with a real estate transaction, it was not "collected" again within the meaning of the statute when Respondent Lichtman transferred the money to Chatty Cathy Enterprises. The November 4, 2010, transfer was not a collection of money in connection with a real estate brokerage transaction.

71. Petitioner failed to prove by clear and convincing evidence that Respondent Lichtman violated section 475.42(1)(d).

Penalties

72. Section 475.25(1)(a) provided that discipline may be imposed if the commission finds that a sales associate has violated any provision of section 475.42.

73. Section 475.25(1) set forth possible penalties which may be imposed by the commission for each offense, including: reprimand; probation; administrative fine up to $5000; suspension up to 10 years; and revocation.

74. Section 455.2273, Florida Statutes, provided that each board, or the department when there is no board, shall adopt disciplinary guidelines applicable to each ground for disciplinary action which may be imposed pursuant to a practice act.

75. From December 25, 2007, until July 20, 2010, Florida Administrative Code Rule 61J2-24.001(3)(l) provided that for a violation of section 475.25(1)(k), the usual action of the Commission shall be to impose an administrative fine not to exceed $5000 and a 90-day suspension to revocation.

76. From July 21, 2010, until November 14, 2012, Florida Administrative Code Rule 61J2-24.001(3)(e) provided that for a first violation of section 475.25(1)(d), the usual action of the Commission shall be to impose a $250 to $1000 administrative fine and suspension to revocation.

77. From December 25, 2007, until July 20, 2010, Florida Administrative Code Rule 61J2-24.001(3)(bb) provided that for a violation of section 475.42(1)(d), the usual action of the Commission shall be to impose an administrative fine not to exceed $5,000 and up to a 3-year suspension.

78. From December 25, 2007, until July 20, 2010, Florida Administrative Code Rule 61J2-24.001(3)(y) provided that for a violation of section 475.42(1)(a), the usual action of the Commission shall be to impose an administrative fine not to exceed $5,000 and a 3-year suspension to revocation.

79. From December 25, 2007, until July 20, 2010, Florida Administrative Code Rule 61J2-24.001(3)(c) provided that for an act of culpable negligence and breach of trust in violation of section 475.25(1)(b), the usual action of the Commission shall be to impose an administrative fine not to exceed $5,000 and a one-year suspension.

80. Rule 61J2-24.001(4)(b)[6/] provided:

> (b) Aggravating or mitigating circumstances may include, but are not limited to, the following:
>
> 1. The degree of harm to the consumer or public.
>
> 2. The number of counts in the Administrative Complaint.
>
> 3. The disciplinary history of the licensee.

> 4. The status of the licensee at the time the offense was committed.
>
> 5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
>
> 6. Violation of the provision of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(4), F.S., previously has been issued to the licensee.

81. No aggravating or mitigating circumstances are present here with respect to either Respondent to the extent necessary to warrant deviation from the wide range of penalties already permitted within the guidelines.

82. Section 455.227(3)(a) provides that in addition to any other discipline imposed, costs related to the investigation and prosecution of the case may be assessed.

RECOMMENDATION

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that final orders be entered by the Florida Real Estate Commission:

Finding Linda Fiorello in violation of sections 475.25(1)(k), 475.25(1)(d), 475.42(1)(d), 475.42(1)(a), 475.25(1)(b), and 475.25(1)(a), Florida Statutes, as charged in the Amended Administrative Complaint, and imposing an administrative fine of $10,000.00, reasonable costs, and revocation of her license to practice real estate; and

Finding Catherine A. Lichtman in violation of section 475.25(1)(d), Florida Statutes, as charged in the Administrative Complaint, and imposing an administrative fine of $1000.00, reasonable costs, and revocation of her license to practice real estate.

DONE AND ENTERED this 11th day of June, 2015, in Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of June, 2015.

ENDNOTES

[1/] Except as otherwise indicated, references to statutes and rules are to versions in effect in April 2010, when the counts against Ms. Fiorello are alleged to have taken place. The actions leading to counts against Ms. Lichtman are not alleged to have taken place until November of 2010, and the statutes and rules in effect at that time are specifically cited.

[2/] At some point, Ms. Fiorello also prepared an "Escrow Verification" letter advising that the $40,000.00 was being held in escrow for the purchase of the property, but it is undated and it is not clear when this was prepared.

[3/] Ms. Fiorello testified that Luxury Property Management, LLC, had been created to work with a Miami company called The Solutions Group in buying, refurbishing, and re-selling foreclosed properties, though Department of State filings indicate that Ms. Fiorello had originally filed Articles of Organization under an earlier name, Skylines Luxury Property Management, LLC, as early as December of 2006. In any event, Ms. Fiorello was aware that this entity had been dissolved at the time the deposit was made.

[4/] As noted at hearing, Ms. Fiorello submitted pleadings to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County which indicated that the deposit was initially placed in the Luxury Management account, then transferred to Luxury Realty Partners operating account and remained there "while the negotiations were being handled," without any suggestion that Ms. Lichtman had moved the money from the Luxury Management account without her consent. In Ms. Fiorello's later complaint to the Department, she indicated that the deposit was held in Luxury Realty Partners, Inc., and was removed from that account without her consent. Ms. Fiorello's testimony on this, and many other matters, was simply not credible.

[5/] The complete lack of proper documentation and attention to legal requirements demonstrated by Ms. Lichtman in her business affairs is pervasive and suggests a calculated and intentional pattern of behavior. The self-serving documents prepared for hearing have no probative value and could not reliably establish facts, even if they were not hearsay. Her responses to questions at hearing were evasive. Ms. Lichtman's testimony on this, and many other matters, was simply not credible.

[6/] Although this rule was amended effective July 21, 2010, the portions of the rule relevant here were not changed.

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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.