STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL REGULATION,

Petitioner,

vs. Case No. 16-0214

MOCTEZUMA ENVIOS, INC., AND LILIANA CARRASCAL, *AMENDED AS TO PARAGRAPH 44 ONLY

Respondents.
_____/

*AMENDED RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015), before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on May 2, 2016, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jennifer Leigh Blakeman, Esquire
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For Respondents: Eric Arthur Falk, Esquire
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STATEMENT OF THE ISSUE

Whether Respondents failed to maintain and deposit payment instruments into their own commercial account in a federally-insured financial institution, in violation of section 560.309(3), Florida Statutes (2013).[1/]

PRELIMINARY STATEMENT

On or about July 8, 2015, Petitioner, Office of Financial Regulation, issued an Administrative Complaint against Respondents, Moctezuma Envios, Inc., and Liliana Carrascal, alleging that they had violated section 560.309(3) by failing to maintain and deposit payment instruments in their own commercial account in a federally-insured financial institution, and proposing to fine Respondents $7,500. Respondents timely challenged Petitioner's proposed action. On January 14, 2016, Petitioner referred the matter to DOAH for assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1).

The final hearing initially was scheduled for March 8, 2016, but pursuant to Petitioner's motion, was continued until May 2, 2016.

The final hearing was held on May 2, 2016. Petitioner presented the testimony of Sharon Dawes, Kelly Knopps, Phillip Salter, Andrew Grosmaire, and Respondent Liliana Carrascal.[2/] Petitioner's Exhibits 1, 4b, 5, 6, 7, 8, and 9 were admitted into evidence without objection, and Petitioner's Exhibit 4a was

admitted over a relevancy objection. The undersigned took official recognition of Florida Administrative Code Rule 69V-560.1000. Respondents presented the testimony of Liliana Carrascal, and Respondents' Exhibit 1 was admitted into evidence without objection.

The two-volume Transcript of the final hearing was filed at DOAH on May 19, 2016. Pursuant to Petitioner's request, the deadline for filing proposed recommended orders was extended to June 6, 2016. Both parties' proposed recommended orders were timely filed and duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner, Office of Financial Regulation, is the state agency charged with administering and enforcing chapter 560, Florida Statutes, including part III of that statute, related to money services businesses.

2. Respondent, Moctezuma Envios, Inc. ("Moctezuma Envios"), is a Florida corporation operating as a money services business, cashing checks and acting as a money transmitter, as authorized by License No. FT30800203 issued by Petitioner. Its address of record is 19784 Southwest 177th Street, Miami, Florida 33187.

3. Respondent Liliana Carrascal has a 100 percent controlling interest in, and is the sole officer of, Moctezuma Envios.[3/]

II. The Events Giving Rise to this Proceeding

4. Respondents have been in the money services business, and Moctezuma Envios has been licensed to conduct this business, since 2001.

5. Respondents were doing business with Intermex Wire Transfer LLC ("Intermex"), a money transfer services business, before the events giving rise to this proceeding.

6. Sometime prior to January 2013, Carrascal was approached by representatives of Intermex about opening an account in the name of Moctezuma Envios at U.S. Bank.[4/] Intermex representatives told Carrascal that the account could be used for depositing the checks that Moctezuma Envios cashed and also for paying Intermex for money transfers.

7. According to Carrascal, this offer was attractive to Respondents because U.S. Bank accepted third-party checks, and opening a check-cashing account that accepts such checks is difficult. Additionally, having the account would streamline the process by which Moctezuma Envios paid Intermex to serve as its money transmitting agent, and would enable Carrascal to avoid driving across town carrying large sums of money to deposit cash into Intermex's account.

8. Carrascal testified, credibly, that Intermex representatives told her she would be the owner of the account, that she could deposit payment instruments into and withdraw funds from the account, and that the account would be compliant with the law.

9. On the basis of these representations, Carrascal authorized Intermex representatives to open an account in the name of Moctezuma Envios at U.S. Bank. The account number was XX3503.

10. The persuasive evidence shows that Account No. XX3503 was established as an agent account, with Moctezuma Envios acting as a money transmitter agent for Intermex. As such, Moctezuma Envios was authorized to deposit funds and payment instruments into the account.

11. Robert Lisy and Darryl J. Ebbert, both employees of Intermex, were signatories on Account No. XX3503, and, as such, were the owners of the account. They were authorized to deposit funds into, withdraw funds from the account, and otherwise control the account.

12. The persuasive evidence further shows that Respondents were not signatories to Account No. XX3503.[5/] Accordingly, they were not authorized to withdraw funds from the account.

13. During the period spanning from January 2013 to late 2014, Respondents deposited payment instruments received through their check-cashing business into Account No. XX3503.

14. The persuasive evidence shows that once Respondents deposited the payment instruments into Account No. XX3503, they lost access to and control of those funds. This is because, as noted above, only Intermex representatives were authorized signatories on the account.

15. When Respondents deposited payment instruments into Account No. XX3503, those funds were thereafter "swept" into Account No. XX7788, which was Intermex's main operating account at U.S. Bank. This means that the funds were removed from Account No. XX3503 and deposited in Account No. XX7788.

16. Respondents were not signatories to Account No. XX7788, so did not have access to the funds in that account.

17. As a result of Respondents not being signatories on either Account No. XX3503 or Account No. XX7788, once they deposited payment instruments into Account No. XX3503, they lost access to and control of the funds paid under those payment instruments.

18. The persuasive evidence establishes that Respondents deposited approximately ten percent of the payment instruments that they received from their check cashing business into Account No. XX3503 during the timeframe pertinent to this

proceeding. The other payment instruments were deposited into other accounts that Respondents held at other banks.

19. Carrascal credibly testified that when Intermex first approached her about opening an account at U.S. Bank, she was concerned because she knew that the law required payment instruments to be deposited into the business's own commercial account. Thus, she declined to open such account. When Intermex representatives approached her a second time, they told her that the account would be in the name of Moctezuma Envios and assured her that Moctezuma Envios would be in compliance with the law. She believed them, so authorized them to open Account No. XX3503.

20. Carrascal further testified, credibly and persuasively, that as soon as she received notice that Petitioner believed that Account No. XX3503 did not comply with the law, she closed the account and ceased doing business with Intermex and U.S. Bank.

21. The credible, persuasive evidence establishes that Respondents did not attempt to conceal any information or mislead Petitioner regarding Account No. XX3503.

22. Carrascal credibly and persuasively testified that she had intended to fully comply with the law. She had received training in order to serve as Moctezuma Envios' compliance

officer, and Moctezuma Envios has a legal compliance manual in place to help ensure that it complies with applicable laws.

23. The evidence establishes that Moctezuma Envios has been disciplined twice for previous violations of applicable laws. Specifically, some time prior to December 2008, Moctezuma Envios failed to file currency transaction reports concerning cash received from another chapter 560 licensee and failed to timely file at least two quarterly reports, as required by statute and rule. In 2011, Moctezuma Envios failed to timely file a required quarterly report. Both violations were resolved pursuant to Stipulation and Consent Agreement between Petitioner and Moctezuma Envios, under which Moctezuma Envios paid fines and agreed to comply with the law in the future.

24. Carrascal acknowledged that the violations had occurred, but testified, credibly, that in both instances, Respondents had not intended to violate the law, and that Respondents had cooperated with Petitioner to rectify the circumstances that had resulted in noncompliance.

25. Petitioner has adopted rule 69V-560.1000, which codifies a penalty matrix that authorizes and enables Petitioner to impose a fine for a specific statutory or rule violation, based on the level of fine adopted in rule 69V-560.1000(150) and the number of times a licensee has violated that particular statute or rule.

26. Rule 69V-560.1000(150) establishes a range of $1,000 to $3,500 for a Level A fine; $3,500 to $7,500 for a Level B fine; and $7,500 to $10,000 for a Level C fine.

27. Here, Respondents are charged with having violated section 560.309(3) for the first time. Pursuant to rule 69V-560.1000(85), Respondents are subject to a Level B fine, which ranges from $3,500 to $7,500.

28. Rule 69V-560.1000(148) sets forth the factors, which Petitioner characterizes as "aggravating" or "mitigating," that must be considered in determining the specific amount of the fine within the ranges established in rule 69V-560.1000(150).

29. Rule 69V-560.1000(148) states:

> In accordance with Sections 560.1141(2) and (3), F.S., the Office shall consider the following circumstances in determining an appropriate penalty within the range of penalties prescribed in this rule for each violation as based upon the citation number. The Office also shall consider these circumstances in determining a penalty that deviates from the range of penalties prescribed for each violation and citation number as a result of such circumstances:
>
> (a) Whether the violation rate is less than 5% when compared to the overall sample size reviewed;
>
> (b) The degree of harm to the customers or the public;
>
> (c) The disciplinary history of the licensee;

(d) Whether the licensee detected and voluntarily instituted corrective responses or measures to avoid the recurrence of a violation prior to detection and intervention by the Office;

(e) Whether the licensee's violation was the result of willful misconduct or recklessness;

(f) Whether at the time of the violation, the licensee had developed and implemented reasonable supervisory, operational or technical procedures, or controls to avoid the violation;

(g) Where the violation is attributable to an individual officer, director, responsible person, or authorized vendor, whether the licensee removed or otherwise disciplined the individual prior to detection and intervention by the Office;

(h) Whether the licensee attempted to conceal the violation or mislead or deceive the Office;

(i) The length of time over which the licensee engaged in the violations;

(j) Whether the licensee engaged in numerous violations or a pattern of misconduct;

(k) The number, size and character of the transactions in question;

(l) Whether the licensee provided substantial assistance to the Office in its examination or investigation of the underlying misconduct;

(m) Other relevant, case-specific circumstances.

30. Andrew Grosmaire, Chief for Petitioner's Bureau of Enforcement, testified that Petitioner proposes to impose a $7,500 fine on Respondents, and explained the basis for that amount.

31. Grosmaire testified that Petitioner did not have any information regarding several of the factors listed in rule 69V-560.1000, so did not "use" those factors in determining the fine to be imposed on Moctezuma Envios.[6/] Specifically, Petitioner did not use the factors in subsections (a), (b), (d), (e), (f), (g), (h), (i), (j), (l), and (m) in determining the fine.

32. Petitioner did consider subsection (c), regarding the licensee's disciplinary history, in determining the fine. As discussed above, Petitioner presented evidence showing that Moctezuma Envios had been disciplined twice for violations of provisions of chapter 560 and implementing rules, albeit not for the same violation that is the subject of this proceeding.[7/] Grosmaire noted that it was "unusual" for a licensee to have two previous violations. Petitioner thus considered Moctezuma Envios' disciplinary history an aggravating factor in determining the applicable fine.

33. Petitioner also considered subsection (k), which addresses the number, size, and character of the transactions in question. According to Grosmaire, "100 percent of the checks

were deposited into this account during the period in question," so Petitioner considered this an aggravating factor in determining the appropriate fine.

34. As noted above, pursuant to rules 69V-560.1000(85), (147), and (148), Petitioner proposes to fine Respondents $7,500.

III. Findings of Ultimate Fact Regarding Alleged Violation

35. Florida case law holds that the determination of whether alleged conduct violates a statute or rule is a question of ultimate fact. Gross v. Dep't of Health, 819. So. 2d 997, 2002 (Fla. 5th DCA 2002); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st SCA 1995).

36. For the reasons discussed above, the undersigned finds that the evidence clearly and convincingly establishes that Respondents did not own Account No. XX3503, into which payment instruments from Moctezuma Envios' check-cashing business were deposited.

37. Although Respondents were able to deposit payment instruments into Account No. XX3503, they were not signatories on the account so could not withdraw funds from that account. Further, Respondents were not signatories to, and therefore did not have access to funds in, Account No. XX7788, into which Intermex swept the funds from the deposited instruments in Account No. XX3503 on a routine basis.

38. On this basis, it is determined that Petitioner demonstrated, by clear and convincing evidence, that Moctezuma Envios and Liliana Carrascal, by virtue of being an affiliated party pursuant to section 560.103(1), violated section 560.309(3) by failing to maintain and deposit payment instruments into their own commercial account at a federally-insured financial institution.

39. As discussed above, Petitioner proposes to fine Respondents $7,500, the maximum amount that can be imposed for a Level B fine. Petitioner reached this amount taking into account the factors set forth in rules 69V-560.1000(148)(c) and (k), which it considered to be aggravating factors that militated imposition of a higher fine within the Level B range.

40. As discussed above, Carrascal presented evidence regarding several of the factors in rule 69V-560.1000(148) considered in determining the appropriate fine. Specifically, Carrascal testified, persuasively, that no harm to her customers or the public resulted from Respondents' violation of section 560.309(3); that Respondents' violation of the statute was inadvertent and was the result of misrepresentation by Intermex, so that the violation was not the result of Respondents' willful conduct or recklessness; that Moctezuma Envios has in place a professionally-prepared compliance manual to help Respondents avoid future violations, including the type of violation at

issue in this proceeding; that once Carrascal became aware that Petitioner believed Account No. XX3503 was noncompliant with section 560.309(3), she cooperated fully with Petitioner's investigation and did not attempt to conceal, mislead, or deceive Petitioner; that as soon as Carrascal became aware of the noncompliance issues with Account No. XX3503, she closed the account and Respondents terminated all business dealings with U.S. Bank and Intermex, the latter with which Respondents had a business relationship that predated the matters giving rise to this proceeding; and that the deposits into Account No. XX3503 constituted only approximately ten percent of the total deposits Respondents made during the timeframe pertinent to this proceeding, with the other 90 percent being deposited in other accounts at other financial institutions.

41. As discussed above, the undersigned found Respondents' evidence of mitigation regarding the factors set forth in rules 69V-560.1000(148)(b), (e), (f), (h), (k), and (l) credible and persuasive. Further, the undersigned considers relevant that in this case, Respondents affirmatively were misled into violating the law by Intermex.[8/]

42. Petitioners did not present persuasive countervailing evidence rebutting the evidence of mitigation presented by Respondents with respect to the amount of the fine.

43. As noted above, Grosmaire testified that Petitioner considered subsections (c) and (k) as aggravating factors in determining that Respondents should be fined $7,500. Rule 69V-560.1000(148) does not specifically address how much weight each factor should be assigned in determining the specific fine within the authorized range, and Grosmaire did not explain how the factors Petitioner "used" were weighed in arriving at the $7,500 fine.

44. Considering the "aggravating" and "mitigating" factors on which the parties presented evidence, the undersigned determines that a $4,250 fine should be imposed on Respondents in this proceeding.[9/]

CONCLUSIONS OF LAW

45. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

46. Section 560.114(1) provides in pertinent part:

> (1) The following actions by a money services business, authorized vendor, or affiliated party constitute grounds for the issuance of a cease and desist order; the issuance of a removal order; the denial, suspension, or revocation of a license; or taking any other action within the authority of the office pursuant to this chapter:
>
> (a) Failure to comply with any provision of this chapter or related rule or order, or any written agreement entered into with the office.

47. In this proceeding, Petitioner has charged Respondents with failing to maintain and deposit payment instruments into its own commercial account at a federally-insured financial institution, in violation of section 560.309(3). Section 560.309(3) provides:

> (3) A licensee under this part must maintain and deposit payment instruments into its own commercial account at a federally insured financial institution. If a licensee ceases to maintain such a depository account, the licensee must not engage in check cashing until the licensee reestablishes such an account and notifies the office of the account as required by s. 560.126(4).

§ 560.309(3), Fla. Stat.

48. This statute is penal, so "must be construed strictly in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002).

49. Because Petitioner seeks to impose an administrative penalty in this proceeding, it has the burden to prove, by clear and convincing evidence, that Respondents committed the violation alleged in the Administrative Complaint and that the penalty sought to be imposed is appropriate. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla.

1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This evidentiary standard has been described as follows:

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

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

50. For the reasons discussed at length above, Petitioner presented clear and convincing evidence showing that Respondents did not own U.S. Bank Account No. XX3503. Specifically, the evidence shows that Respondents were not signatories to the account so could not access or withdraw funds from the account. Once Respondents deposited payment instruments into Account No. XX3503, they lost possession of, access to, and control over the funds from those instruments.

51. Florida law holds that ownership[10/] of property implies the right of possession and control thereof, as well as the right to dispose of, alienate, or transfer the property freely without interference or restraint. See Chianese v. Culley, 397 F. Supp. 1344 (S.D. Fla. 1975); MacGregor v. Fla. Real Estate

Comm'n, 99 So. 2d 709 (Fla. 1958). Here, the evidence clearly and convincingly establishes that Intermex, not Respondents, was entitled to maintain and assert possession and enjoyment of the funds from the payment instruments once Respondents deposited the instruments into Account No. XX3503, and that only Intermex had the right to dispose of, alienate, or transfer the funds in Account No. XX3503 freely without interference or restraint. As such, pursuant to Florida law, Intermex held title to Account No. XX3503, and, thus, owned the account. See Joel Strickland Enters. v. Atlantic Discount Co., 137 So. 2d 627 (Fla. 1st DCA 1962)(title is the evidence of a person's ownership, the means by which the owner is enabled to maintain or assert possession or enjoyment).

52. Accordingly, it is concluded that Respondents violated section 560.309(3) by depositing payment instruments into U.S. Bank Account No. XX3503, which they did not own.

53. As discussed above, Petitioner has adopted rule 69V-560.1000, which codifies a penalty matrix that authorizes and enables Petitioner to impose a fine for a specific statutory or rule violation, based on the level of fine adopted in rule 69V-560.1000(150) and the number of times a licensee has violated that particular statute or rule.

54. Also as discussed above, rule 69V-560.1000(150) establishes a range of $1,000 to $3,500 for a Level A fine;

$3,500 to $7,500 for a Level B fine; and $7,500 to $10,000 for a Level C fine.

55. Here, Respondents are charged with having violated section 560.309(3) for the first time. Pursuant to rule 69V-560.1000(85), Respondents are subject to a Level B fine, which ranges from $3,500 to $7,500.

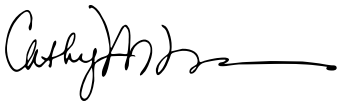
56. As discussed in detail above, rule 69V-560.1000(148) sets forth the factors that must be considered in the determining the specific amount of the fine within the ranges established in rule 69V-560.1000(150).

57. Based on the evidence in the record and pursuant to the foregoing discussion and analysis under rules 69V-560.1000(85), (148) and (150), the undersigned concludes that a $4,250 fine should be imposed on Respondents for violating section 560.309(3).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Office of Financial Regulation enter a final order finding that Respondents, Moctezuma Envios, Inc., and Liliana Carrascal, violated section 560.309(3), Florida Statutes, and imposing a fine of $4,250.

DONE AND ENTERED this 22nd day of June, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2016.

ENDNOTES

[1/] Respondents' conduct alleged to violate section 560.309(3) occurred during the period in which the 2013 version of chapter 560, Florida Statutes, was in effect. Accordingly, all citations to provisions in chapter 560 are to the 2013 version of that statute.

[2/] Kelly Knopps and Phillip Salter testified by telephone, as authorized by the Order Allowing Testimony by Telephone entered on April 7, 2016. Pursuant to Florida Administrative Code Rule 28-106.213(5)(b), a notary public was present with each of these witnesses, and the written certification required by that rule was filed with DOAH on May 5, 2016. Additionally, Carrascal's testimony was translated from Spanish to English by a qualified interpreter who was present at the Miami site and who was administered the oath as required by section 90.606, Florida Statutes (2015).

[3/] As noted above, Moctezuma Envios is the holder of License No. FT30800203. Petitioner also named Carrascal as a Respondent in this proceeding, pursuant to section 560.114(1), because she is an "affiliated party," as defined in section 560.103(1), by virtue of being an officer and having a 100 percent controlling interest in Moctezuma Envios.

[4/] Intermex is a separate business entity from Respondent Moctezuma Envios, and, during the relevant period, was a client of U.S. Bank.

[5/] To this point, the credible, persuasive evidence establishes that U.S. Bank would not have authorized Respondents to be signatories on Account No. XX3503 because their client relationship was with Intermex, and that doing so would have required U.S. Bank to conduct enhanced due diligence of Moctezuma Envios, contrary to U.S. Bank procedures.

[6/] In other words, Petitioner did not apply, or "use," the factors for which it lacked information, in determining the fine.

[7/] Grosmaire explained that if Respondents' previous two violations had constituted the same offense as that at issue in this proceeding, Respondents could have been subjected to a $10,000 fine or up to 30 days' suspension of Moctezuma Envios' license.

[8/] See rule 69V-560.1000(148)(m). This is not even a case where Respondents inadvertently violated the law while acting on their own volition. Here, Respondents were concerned about ensuring they complied with the law, but affirmatively were assured by Intermex that establishing and maintaining Account No. XX3503 would comply with the law. While Respondents' mistake in this case does not relieve them of liability for failing to comply with section 560.309(3), they are without culpability.

[9/] As noted, rule 69V-560.1000(148) does not address the weight that each factor in the rule should be given in determining the specific fine within the range authorized pursuant to rules 69V-560.1000(85) and 69V-560.1000(150). Accordingly, the undersigned attempted to apply the rule in as neutral and impartial a manner as possible, based on the evidence presented by both parties at the hearing. As discussed, Petitioner presented evidence regarding two factors that militated in favor of an increased penalty——i.e., were "aggravating" factors. The undersigned found persuasive Petitioner's evidence regarding Moctezuma Envios' disciplinary history. Respondents presented evidence regarding seven factors that militated in favor of a decreased penalty——i.e., were "mitigating factors"——including Carrascal's credible, persuasive testimony that only approximately ten percent of the payment instruments Moctezuma Envios received during the timeframe pertinent to this proceeding was deposited into Account No. XX3503. Upon careful

consideration of all of the evidence presented regarding aggravating and mitigating circumstances, the undersigned determines that a fine of $4,250 is reasonable and appropriate in this case.

[10/] The term "own" is not defined in chapter 560, and Petitioner has not adopted a rule defining this term. Under these circumstances, the statute controls and the ALJ is tasked with interpreting the statute. Here, the ALJ finds that regardless of whether OFR has adopted a rule defining the term "own," its interpretation of that term in section 560.309(3) under the circumstances present in this case is correct. See Brandy's Prods. Inc. v. Dep't of Bus. and Prof'l Reg., Case No. 14-3496 (Fla. DOAH Feb. 24, 2015), overturned on other grounds, DBPR Case No. 66-00115 (DBPR Final Order June 11, 2015), reversed and remanded, Brandy's Prods. v. Dep't of Bus. and Prof'l Reg., 188 So. 3d 130 (Fla. 1st DCA 2016).

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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.