STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs. Case Nos. 17-3961PL
17-3989PL

ALICIA F. KING,

Respondent.
_______________________________/

RECOMMENDED ORDER

On October 20 and 30, 2017, Hetal Desai, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in this matter by video teleconference with sites in Tallahassee and St. Petersburg, Florida.

APPEARANCES

For Petitioner: Maureen Y. White, Esquire
Tabitha Rae Herrera, Esquire
Department of Business
and Professional Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399

For Respondent: Daniel Villazon, Esquire
Daniel Villazon, P.A.
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STATEMENT OF THE ISSUES

The issues in these two cases are whether Respondent violated provisions of chapter 475, Florida Statutes (2015),[1/] regulating

real estate sales brokers, as alleged in the Administrative Complaints, by (1) failing to return a rental deposit to a potential tenant; (2) serving as the qualifying broker for Friendly International Realty, Inc. ("Friendly"), but failing to actively supervise Friendly's operations and/or sales associates; (3) failing to preserve Friendly's transaction records and escrow account documents; and (4) acting in a manner that constitutes culpable negligence or a breach of trust. If there was a violation, an additional issue would be what penalty is appropriate.

PRELIMINARY STATEMENT

On April 27, 2017, the Department of Business and Professional Regulation, Division of Real Estate ("Department" or "Petitioner"), filed two Administrative Complaints against Alicia Faith King ("Ms. King" or "Respondent"). The first Administrative Complaint alleged violations of chapter 475, in connection with a lease agreement involving Christian Viton, who was represented in the transaction by Friendly. The Viton Administrative Complaint alleges the following:

Count I – Failure to Deliver Funds

Count II – Failure to Supervise

Count III – Failure to Preserve Records

Count IV – Fraud or Culpable Negligence

On July 14, 2017, the Viton case was referred to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge ("ALJ")("Case No. 17-3961" or "Viton case").

The second Administrative Complaint alleged violations of chapter 475, in connection with a rental transaction involving Cindy Dorestant, who was also represented by Friendly. The Dorestant Administrative Complaint alleges the following:

Count I – Failure to Supervise

Count II – Failure to Preserve Records

Count III – Fraud or Culpable Negligence

On July 17, 2017, this case was referred to DOAH for assignment of an ALJ ("Case No. 17-3989" or "Dorestant case").

On July 25, 2017, DOAH Case Nos. 17-3961PL and 17-3989PL were consolidated into a single matter pursuant to Florida Administrative Code Rule 28-106.108.

After being continued at the parties' request, the final hearing was noticed and held on October 20 and 30, 2017. Prior to the hearing, the parties stipulated to facts, which were accepted and incorporated into the findings of fact below.

Petitioner offered 17 exhibits, Petitioner's Exhibits 1 through 17, all of which were admitted. Petitioner presented eight witnesses: Natalie James, a former Sales Associate for Friendly; Carlos Rubio, Department Investigation Specialist II;

Percylla Kennedy, Department Investigator; Sheila Dreher, Sales Associate – TIR Prime Properties ("TIR"); Liliana Maldonado, Property Manager – TIR; Mariano Saal, Qualifying Broker – TIR; Mark Trafton, Department's expert witness; and the Respondent.

Respondent offered no exhibits and testified on her own behalf.

The Transcript of the proceeding was filed with DOAH on December 4, 2017. On December 26, 2017, both parties timely filed proposed recommended orders, which have been considered.

FINDINGS OF FACT

Parties

1. The Department is the state agency that regulates the practice of real estate pursuant to section 20.165, and chapters 455 and 475, Florida Statutes.

2. Ms. King is a licensed real estate broker registered with the Department (license numbers BK 3203595, 3261628, 3293588, 3306619, 3335771, 3354773, and 3363985).

3. Ms. King is registered with the Department as the qualifying broker for 16 brokerages located throughout the state of Florida.

4. At all times relevant to this case, Ms. King's registered address with the Department was 4430 Park Boulevard North, Pinellas Park, Florida 33781.

Friendly International Realty, LLC

5. Friendly was a Florida licensed real estate corporation, holding license number CQ 1040825. Records reflect that James Berthelot was the registered agent for Friendly at the time of incorporation, June 2011.

6. At all times relevant, Mr. Berthelot was a licensed Real Estate Sales Associate (license number SL 3226474) registered with Friendly.

7. In May 2014, Respondent drafted and entered into a Limited Qualifying Broker Agreement ("Broker Agreement") with Friendly and its owner, Ivania De La Rocha.[2/]

8. Friendly and Ms. King entered into the Broker Agreement, "in order to comply with the requirements of the Florida Department of [Business and] Professional Regulation."

9. Under the terms of the Broker Agreement, Respondent was not paid by Friendly per transaction. Rather, Respondent agreed to serve as the "Corporate Broker of Record" in exchange for a payment of $300 a month "as a flat fee for any and all real estate business conducted by [Friendly]." The Broker Agreement also provided for a "late fee" penalty if Friendly was delinquent in this monthly payment.

10. Section 1.1 of the Broker Agreement outlined Respondent's duties to Friendly, requiring her to: (1) keep her and Friendly's licenses active and in good standing under Florida

law; (2) keep her other business interests separate from those involving Friendly's interests; and (3) provide Friendly notice of any governmental inquiry involving her serving as Friendly's broker.

11. There was no mention in the Broker Agreement of either Respondent's or Friendly's responsibilities regarding oversight of transactions, training for sales associates, or day-to-day operations.

12. Regarding document retention, the Broker Agreement provided:

> Section 9.0 AUDIT & REVIEW RIGHT: Broker shall have the right to enter [Friendly's] offices upon reasonable advance written notice to verify compliance with the real estate laws of the State of Florida.

13. There was no evidence that Ms. King ever provided Friendly with the kind of notice described in section 9.0 of the Broker Agreement.

14. Although the Broker Agreement did not prohibit Friendly from holding funds or assets on behalf of third parties, section 10.0 (Miscellaneous) explicitly prohibited Friendly from operating an escrow account.

> (g) Escrow and Ernest Money Accounts. [Friendly] shall not be permitted to hold any escrow account(s).

15. On July 31, 2014, Ms. King was registered with the Florida Department of State, Division of Corporations, as "manager" of Friendly.

16. Ms. King was the qualifying broker for Friendly (license number BK3303898) from August 6, 2014, through September 30, 2015, and November 4, 2015, through January 13, 2016.[3/]

17. During the time Ms. King served as the qualifying broker, Friendly operated from a number of addresses in Miami-Dade County, including 11900 Biscayne Boulevard, Suite 292, Miami, Florida 33181; and 2132 Northeast 123rd Street, Miami, Florida 33181.

18. The office door of the Friendly office located on Northeast 123rd Street was painted in large letters, "FRIENDLY INTERNATIONAL REALTY" and "ALICIA KING" painted underneath.

19. At the hearing, when asked about Friendly's address, Ms. King could only confirm that when she became the broker the office was "on Biscayne." The Biscayne Boulevard address is the one listed on the Broker Agreement.

20. At the hearing, Ms. King was wrong about when the Friendly office had moved from the Biscayne Boulevard to the Northeast 123rd Street location, insisting it was over the Christmas holidays in 2015.

21. Records establish Friendly moved from the Biscayne Boulevard location to the Northeast 123rd Street location sometime between April and July 2014.

22. In January 2016, Ms. King believed the office was still on Biscayne Boulevard. In reality, it had been over a year since the office had relocated to that location.

23. At the hearing, when asked by her own counsel how many transactions a month Friendly handled, Ms. King replied, "That's hard to say. It was not many at all. Ten, maybe."

24. Respondent could not give the exact number of employees or sales associates affiliated with Friendly; when asked, she stated she could not remember the exact amount, but knew it was "very limited."

25. Respondent did not have any agreements or documentation related to how many sales associates were registered under her broker's license.

26. Respondent could not name any other sales associates affiliated with Friendly while she was the qualifying broker, except for Mr. Berthelot.

27. While she was Friendly's qualifying broker, Respondent did not perform any of the training for the sales associates at Friendly.

28. Respondent did not have any face-to-face meetings with any Friendly sales associates, except for Mr. Berthelot.

29. Respondent did not have phone or e-mail contact with any of the Friendly sales associates, except for Mr. Berthelot.

30. Respondent did not have copies of any forms, handbooks, reports or files related to Friendly. All of these documents were in paper form and kept in the Friendly office.

31. Respondent had no access or signatory authority for any of Friendly's bank accounts.

32. Natalie James was a registered real estate sales associate affiliated with Friendly for approximately five months, from November 2015 through March 2016.

33. Ms. James worked out of the Friendly office and was physically present at the office at least three or four times a week.

34. Ms. James was involved in several rentals and one sales transaction while at Friendly. For each transaction she assembled a file, which was kept in the Friendly office.

35. For rental transactions, Ms. James would negotiate and facilitate lease agreements. When she represented potential tenants, she received deposit funds that she deposited with Friendly.

36. Ms. James attended meetings at Friendly; Ms. King was not present at any of them.

37. Ms. James never had any telephonic, electronic, personal, or other contact with Respondent.

38. While at Friendly, neither Mr. Berthelot nor any of Ms. James' co-workers mentioned Ms. King to Ms. James.

39. Although Ms. King's name was on the door of Friendly's office, Ms. James was unaware Ms. King was Friendly's broker.

40. There was conflicting testimony as to how often Respondent visited the Friendly office. Ms. King's testimony at the hearing was at odds with the Department's evidence and testimony regarding this issue. Ms. King insisted that while she was Friendly's broker, she would travel from Pinellas Park to the Friendly office once or twice a week. This was not believable for a number of reasons. First, had Ms. King visited Friendly's office as often as she stated, she would have known about the change in location; she did not. Second, Ms. King could not give one concrete date or detail about her travels to the Friendly office. Third, and most compelling, was the testimony of Ms. James (who worked at Friendly for at least two months while Ms. King was its broker) that she had never seen, communicated with, or heard mention of Ms. King while at Friendly. Ms. James' unbiased and compelling testimony alone supports a finding that Ms. King did not visit the Friendly office as frequently as she indicated.

41. Ms. King was aware that Friendly and Mr. Berthelot provided rental or "tenant placement" services.[4/]

42. Friendly collected security deposits and other move-in funds from potential renters and held them in an escrow account.

43. Ms. King was not aware Friendly had an escrow account until January 2016 when she was contacted by the Department in an unrelated case.

44. On January 13, 2016, Respondent resigned with the Department as the qualifying broker for Friendly effective that same day.

45. On January 14, 2016, Respondent filed a complaint with the Department against Mr. Berthelot for operating an escrow account and collecting deposit funds without her knowledge.

Facts Related to the Viton Case

46. In November 2015, during the time Ms. King was Friendly's qualifying broker, Christian Viton signed a lease agreement to rent an apartment located in Miami at 460 Northeast 82nd Terrace, Unit 8 ("Viton transaction"). The Viton lease agreement listed Friendly as the holder of the deposit monies and required Friendly to transfer the deposit and move-in funds to the owner of the property.

47. Pursuant to the terms of the Viton lease agreement, Mr. Viton remitted an initial deposit of $500, and received a written receipt from Friendly dated November 2, 2015.

48. Mr. Viton gave Friendly a second deposit of $380, and received a written receipt dated November 4, 2015.

49. Mr. Viton never moved into the apartment and demanded a refund of his deposit from Friendly.

50. On December 8, 2015, Friendly issued a check to Mr. Viton in the amount of $530.

51. Three days later, Friendly issued a stop-payment order on the $530 check to Mr. Viton.

52. On February 29, 2016, Mr. Viton filed a complaint with the Department seeking a return of the $880 he had given to Friendly. As a result, the Department initiated an investigation into Mr. Viton's complaint and contacted Respondent.

53. Upon learning about the Viton complaint, Ms. King contacted Mr. Berthelot who admitted Friendly had stopped payment on the $530 refund check, but had reissued the full amount of the deposit to a third-party not named on the lease.

54. There is no evidence Mr. Viton ever received a refund of his $880 deposit.

Facts Related to Dorestant Case

55. In June 2015, during the time Ms. King served as Friendly's qualifying broker, Cindy Dorestant entered into a lease agreement to rent a condominium located at 1540 West 191 Street, Unit 110 ("Dorestant transaction"). In the lease, Friendly was listed as the "broker" and holder of the deposit; TIR Prime Properties ("TIR") was listed as the owner's agent.

56. The Dorestant lease agreement required Friendly to transfer the deposit and move-in funds collected from Ms. Dorestant to TIR.

57. Pursuant to the terms of the Dorestant lease agreement, Ms. Dorestant gave Friendly $1,050 as an initial deposit, and received a written receipt dated June 24, 2015.

58. In late July 2015, Ms. Dorestant contacted TIR's property manager and sales agent to ask for information about the status of her move into the condominium. TIR explained to Ms. Dorestant that Friendly had not conveyed any of monies collected from Ms. Dorestant to TIR.

59. Both Ms. Dorestant and TIR attempted to contact Friendly, but Friendly was non-responsive. The TIR sales associate relayed this information to TIR's broker, Mariano Saal, who in turn tried to reach Friendly to resolve the issue.

60. Eventually, TIR was told by Mr. Berthelot that Friendly would release the move-in funds to TIR and that Mr. Berthelot would schedule the move-in.

61. TIR did not receive any funds from Friendly, nor did Mr. Berthelot facilitate Ms. Dorestant's move into the condominium.

62. On August 31, 2015, Mr. Saal contacted Mr. Berthelot and informed him that if TIR did not receive the move-in funds for the

Dorestant transaction by 5:00 p.m. that day, it would be required to find another tenant.

63. Ms. Dorestant did not move into the condominium and demanded a refund from Friendly and TIR.

64. On September 14, 2015, Mr. Saal sent an e-mail to what he believed was Respondent's address, demanding the $1,050 from Friendly because it considered Ms. Dorestant's failure to move into the property a default of the lease agreement. Respondent, however, did not have access to Friendly's e-mails. The e-mail was also sent to Mr. Berthelot, and Ms. De La Rocha.

65. TIR did not receive any funds from Friendly for the Dorestant transaction.

66. After discovering she could not move into the condominium because Friendly had not transferred the deposit to TIR, Ms. Dorestant demanded a refund of her deposit monies from Friendly. She did not receive it.

67. On February 10, 2016, Mariano Saal, TIR's qualifying broker, filed a complaint against Mr. Berthelot and Friendly with the Department regarding the Dorestant transaction.

68. Ms. Dorestant initially did not receive a refund from Friendly and, therefore, filed a police report against Mr. Berthelot and sued him in small claims court.

69. Eventually, Mr. Berthelot refunded Ms. Dorestant her deposit monies.

Department Investigations of Friendly

70. Upon receiving the Viton complaint, the Department assigned the case (DPBR Case No. 2016018731) to Erik Lluy, an Investigator Specialist II in the Miami field office.

71. Similarly, on or around the same time the Department received the Dorestant complaint; it was also assigned to Mr. Lluy (DPBR Case No. 2016018069).

72. On April 25, 2016, Mr. Lluy officially notified Ms. King of each of the complaints.

73. On May 25, 2016, the Department transferred both the Viton and Dorestant complaints from Mr. Lluy to Percylla Kennedy.

74. Ms. King provided a written response to both complaints via e-mail to Mr. Lluy on May 26, 2016. At that time, Mr. Lluy indicated the case had been transferred to Ms. Kennedy and copied Ms. Kennedy on the response.

75. Ms. Kennedy was familiar with Friendly, Mr. Berthelot and Ms. King. In January 5, 2016, she had conducted an investigation of Friendly in an unrelated complaint filed against Friendly by Borys Bilan ("Bilan complaint").

76. As part of the investigation into the Bilan complaint, Ms. Kennedy arrived at the Friendly office address registered with the Department on Biscayne Boulevard to conduct an official office inspection. When she arrived, however, she found the office vacant.

77. As a result, that same day Ms. Kennedy contacted the registered qualifying broker for Friendly--Ms. King--by phone.

78. During that call, Ms. Kennedy asked Ms. King where Friendly's office was located, but Ms. King did not know.

79. Eventually, Ms. Kennedy determined the Friendly office had relocated to the Northeast 123rd Street location.

80. Ms. Kennedy testified that during this call, Ms. King admitted to her that she had not been to the Northeast 123rd Street location. Respondent testified she did not tell Ms. Kennedy this and as proof insisted that the January call was inconsequential and "a very short call." The undersigned rejects Respondent's version of events and finds Ms. Kennedy's testimony and report regarding the January 2016 interview more reliable. First, although Ms. King describes the conversation as occurring on January 7, 2016, both Ms. Kennedy's testimony and the Inspection Report establish the conversation occurred on January 5, 2016. Second, Respondent's characterization of the call as inconsequential contradicts her own May 26, 2016, written response to the Department in which Ms. King outlines a number of substantive issues discussed during this phone conversation, including: the nature of Friendly's practice, whether Friendly had an escrow account, the type of payment accepted by Friendly, and the address of Friendly's office.

81. After speaking with Ms. King about the Bilan complaint, Ms. Kennedy conducted the inspection at Friendly's Northeast 123rd Street location. Respondent was not present when Investigator Kennedy conducted the office inspection. Ms. Kennedy then e-mailed the Office Inspection form to Respondent.

82. As a result of the January 5, 2016, phone conversation with Ms. Kennedy, Ms. King contacted Mr. Berthelot about the Bilan complaint.

83. On January 13, 2016, Mr. Berthelot provided Ms. King with the transaction file related to the Bilan complaint. When Ms. King reviewed the lease agreement, she realized that Friendly was holding deposit funds in escrow.

84. As a result, on December 13, 2016, Ms. King filed a resignation letter with the Department explaining she was no longer the qualifying broker for Friendly.

85. Ms. King did not ask Mr. Berthelot or anyone else at Friendly for any other transaction records at this time, nor did she make any effort to review any of Friendly's transaction files to determine whether Friendly had obtained other deposit funds or conducted other transactions similar to the one that was the subject of the Bilan complaint.

86. After having knowledge of the Bilan complaint and transaction, and suspecting Friendly had been operating an escrow

account, Ms. King made no immediate effort to access the operating or escrow bank accounts or reconcile the escrow account.

87. After resigning as Friendly's qualifying broker with the Department, Ms. King filed a complaint with the Department against Mr. Berthelot for unlicensed activity involving an escrow deposit.[5/]

88. Despite no longer being Friendly's qualifying broker, on January 21, 2016, Ms. King executed and sent back to Ms. Kennedy the Inspection Report related to the Bilan complaint.

89. Five months later, on or around May 25, 2016, Ms. Kennedy notified Ms. King she was taking over the investigation into the Viton and Dorestant cases.

90. Ms. Kennedy testified that as part of her investigation into the Viton and Dorestant complaints, she interviewed Respondent again. Respondent denies she was interviewed by Ms. Kennedy regarding the Viton and Dorestant complaints, and instead insists she was only interviewed in January 2016 in connection with the Bilan complaint. Ms. King testified she believed Ms. Kennedy lied about interviewing her more than once because Ms. Kennedy was "lazy." The undersigned rejects this assertion. Ms. Kennedy's testimony was specific, knowledgeable, and credible, unlike Ms. King's testimony, which was intentionally vague. Moreover, Ms. Kennedy specifically

attributes her findings to specific sources such as Ms. King's written response, her interview with Ms. King relating to the Viton and Dorestant transactions, and to her previous conversation with Ms. King during the Bilan investigation. The citations to information gleaned from the January 5, 2016, call were marked by the following sub-note.

> SUBJECT was previously interviewed by this Investigator in January 2016 for the unrelated complaint and was unaware that FRIENDLY INTERNATIONAL REALTY LLC had moved from license location 11900 Biscayne Blvd.[,] Suite 292 Miami, FL 33181 to 2132 NE 123ST[,] Miami, FL 33181 (*See* Ex. 9). At that time, SUBJECT was unable to provide the transaction file.

91. Ms. Kennedy would have no reason to fabricate the source of the conclusions she reached in her report or the number of times she contacted Ms. King.

92. Ms. Kennedy submitted her original investigative report to the Department for the Viton complaint on October 31, 2016. Per the Department's request, Ms. Kennedy interviewed Mr. Viton and submitted a supplemental report on December 13, 2016. In this report, Ms. Kennedy determined that on February 25, 2016, Friendly issued a check in the amount of $875 to a person who was not listed on either the lease agreement, the receipts Friendly issued to Mr. Viton, or any other paperwork.

93. Similarly, Ms. Kennedy submitted her original investigative report to the Department for the Dorestant

complaint on October 31, 2016. Per the Department's request, Ms. Kennedy interviewed Ms. Dorestant and submitted a supplemental report on December 13, 2016, indicating Ms. Dorestant did eventually receive a refund.

94. During the course of the Viton investigation, Mr. Lluy and Ms. Kennedy requested that Respondent provide the Department with the file related to the Viton transaction, and documentation for Friendly's escrow account.

95. Although Respondent provided the Department a response (consisting of a written explanation with a copy of the Bilan file and some communications between Mr. Berthelot and herself from May 2016), she did not provide the Department with the transaction file related to the Viton transaction or Friendly's escrow account documentation.

96. During the course of the Dorestant investigation Mr. Lluy and Ms. Kennedy requested that Respondent provide the Department with the file related to the Viton transaction, and documentation for Friendly's escrow account.

97. Although Respondent provided the Department a response (consisting of a written explanation with a copy of the Bilan file and some communications between Mr. Berthelot and herself from May 2016), she did not provide the Department with the transaction file related to the Dorestant transaction or Friendly's escrow account documentation.

Professional Standards

98. Mr. Saal, TIR's qualifying broker, testified he had served as a broker for approximately ten years. As TIR's qualifying broker, he kept the documentation related to the transactions handled by TIR's six sales associates. The testimony of the TIR sales associate and property manager established that they relied on Mr. Saal for advice and to resolve issues. For example, when Ms. Dorestant began contacting TIR's sales associate and property manager regarding the move-in and then for a refund of her deposit, the sales associate went to Mr. Saal to discuss the situation. Mr. Saal then attempted to resolve the issue by attempting to communicate with Friendly, Mr. Berthelot and Ms. King.

99. Mr. Trafton, an experienced real estate broker and expert in brokerages, reviewed the Department's investigative files and reports relating to the Viton and Dorestant complaints, as well as applicable Florida Statutes and rules.

100. Mr. Trafton's testimony and report established that in Florida the usual and customary standard applicable to brokers is that they must promptly deliver funds in possession of the brokerage that belong to others.

101. Petitioner showed that Mr. Viton was entitled to a refund of his deposit from Friendly and that Respondent erred in not ensuring he received this refund.

102. Mr. Trafton also testified that the standard of care applicable to a broker in supervising sales associates requires active supervision. "Active supervision" is not defined by statute or rule, but by usual and customary practices exercised statewide.

103. "Active supervision" requires a broker to:

- have regular communications with all sales associates, not just communicating when there is a complaint;
- be aware of problems, issues and procedures in the office and among sales associates;
- have access to and signatory power on all operating and escrow accounts;
- hold regular scheduled office/sales meetings;
- conduct in-person training meetings;
- provide guidance and advice for sales associates;
- be intimately involved in how transaction forms and other documents are stored and retrieved; and
- be available to provide advice and direction on short notice.

In other words, a broker should set the tone at the brokerage by overseeing her sales associates' conduct of transactions.

104. Ms. King failed to manage, direct, and control her real estate sales associate, Mr. Berthelot, to the standard expected of

a qualifying broker in both the Viton and Dorestant transactions, if not all of Friendly's transactions. She did not actively supervise Mr. Berthelot as a sales associate.

105. Mr. Trafton also testified that a broker, not the brokerage, is ultimately responsible for preserving transaction files, forms related to transactions, and other related documents.

106. Although less certain than Mr. Trafton about whether a broker or the brokerage firm is responsible for preservation of transaction files, Mr. Saal testified "the broker is responsible for the . . . transactions. It's [the broker's] client at the end of the day."

107. Ms. King failed to preserve accounts and records relating to Friendly's accounts, the files related to the Viton and Dorestant rental transactions, or any other documents related to Friendly.

108. Petitioner also clearly established that Respondent was guilty of either "culpable negligence" or "breach of trust" in the Viton or Dorestant transaction.

109. As Investigator Kennedy testified, and as corroborated by cost summary reports maintained by the Department, from the start of the investigation of the Viton complaint through September 14, 2017, the Department incurred $1,625.25 in costs, not including costs associated with an attorney's time.

110. As Investigator Kennedy testified, and as corroborated by cost summary reports maintained by the Department, from the start of the investigation of the Dorestant complaint through September 14, 2017, the Department incurred $1,608.25 in costs, not including costs associated with an attorney's time.

CONCLUSIONS OF LAW

111. DOAH has jurisdiction over the subject matter and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).

112. The Department seeks to take disciplinary action against Respondent's real estate broker's license. 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. See Fla. Dep't of Child. & Fams. v. Davis Fam. Day Care Home, 160 So. 3d 854, 856 (Fla. 2015).

113. 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.

S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872-73 (Fla. 2014)(citations omitted).

Failure to Return Funds--Viton

114. Section 475.25(1)(d)1. provides the Department may discipline a licensee who:

> Has failed to account or deliver to any person . . . upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, . . . or other document or thing of value . . . 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.

115. Petitioner established by clear and convincing evidence that Friendly failed to return the deposit amount demanded by Mr. Viton and due to him. In fact, Friendly essentially admitted it was not entitled to retain this deposit when it issued a refund check to Mr. Viton.

116. Although Mr. Berthelot certainly had an obligation to deliver the funds, this obligation was not exclusive to him. As Friendly's broker, Respondent also had a clear legal responsibility to promptly deliver the funds to Mr. Viton. As the Department established, this is the customary practice and standard applicable to licensed brokers. Failure to do so violates section 475.25(1)(d)1.

117. While it may be true that Friendly issued a second check after stopping payment on Mr. Viton's refund check (albeit

to a person not a party to the Viton lease agreement and for an amount not equivalent to the amount owed to Mr. Viton), this fact does not diminish Respondent's obligation to deliver the proper amount of funds to the person who was entitled to them: Mr. Viton. Respondent knew or should have known that the provisions of chapter 475 required Friendly to deliver funds to the person who provided them and then demanded them. See White v. Dep't of Bus. & Prof'l Reg., 715 So. 2d 1130 (Fla. 5th DCA 1998)(affirming order imposing discipline where broker failed to return buyer's money when transaction failed, in violation of section 475.25(1)(d)1.).

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

Failure to Supervise--Viton and Dorestant

119. A real estate broker violates section 475.25(1)(u) when she fails to "to direct, control, or manage a broker associate or sales associate employed by such broker." § 475.25(1)(u), Fla. Stat.; Smith v. Fla. Dep't of Bus. & Prof'l Reg., 182 So. 3d 767, 768 (Fla. 1st DCA 2015).

120. Section 475.01(1)(j) defines "sales associate" as "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." There is no question

Mr. Berthelot was a sales associates working under the management of Respondent.

121. At the hearing, Petitioner presented both expert reports and testimony (Mr. Trafton) and lay testimony (Mr. Saal) establishing that a broker must engage in active supervision over her brokerage to meet the statutory requirements. As established by the lack of knowledge about Friendly's operations, Respondent did not meet that standard with respect to Friendly.

122. Respondent argues she cannot be at fault because Mr. Berthelot violated the Broker Agreement by opening an escrow account and deceived her. This contention is rejected.

123. In Department of Business and Professional Regulation v. Murata, Case No. 17-3959PL, 2018 Fla. Div. Adm. Hear. LEXIS 1 (Fla. DOAH Jan. 1, 2018), Petitioner made similar allegations against the same brokerage (Friendly) and sales associate (Mr. Berthelot), but with another broker. As Respondent does here, the broker in Murata raised the same defense that she should not be held responsible for the bad acts of Mr. Berthelot, a sales associates operating under her broker's license. As in Murata, this argument is rejected. There, ALJ Boyd explained:

> It is beyond dispute that Mr. Berthelot acted inappropriately, but Respondent could not, by either written agreement or consistent practice, ever shift her own statutory responsibility to manage onto the managed. The argument that either the withholding of information by an employee or the delegation

> of authority to the very persons a broker is supposed to be controlling absolves the broker of responsibility is completely inconsistent with the burden the statutory scheme places upon a broker. This is not to say that a broker has absolute liability for the actions of her sales associates, but the statutory duty to direct, control, and manage cannot be lessened or contracted away.

Murata, 2018 Fla. Div. Adm. Hear. LEXIS 1, at *16.

124. The Department proved clearly and convincingly that Respondent did not actively supervise Mr. Berthelot in either the Viton and Dorestant transactions, which violated section 475.25(1)(u).

Preservation of Records--Viton and Dorestant

125. Respondent argued that Friendly (as the brokerage), not she (as the broker), is responsible for maintaining the required documentation related to Friendly's escrow accounts and real estate transactions. The law clearly states otherwise. Section 475.5015 provides, in relevant part:

> Each **broker** shall preserve at least one legible copy of all books, accounts, and records **pertaining to her or his real estate brokerage** business for at least 5 years from the date of receipt of any money, fund, deposit, check, or draft entrusted to the broker or, in the event no funds are entrusted to the broker, for at least 5 years from the date of execution by any party of any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement which engages the services of the broker. (Emphasis added).

126. The Department established Respondent did not preserve any records relating to Friendly. Specifically, she did not preserve, nor was she able to provide, any records for Friendly's escrow or operating account or the records relating to the Viton and Dorestant transactions. In fact, she admitted she did not have any of Friendly's records as they were all kept in the office.

127. Respondent also argues she cannot be held responsible for the failure to preserve Friendly's records because Mr. Berthelot acted surreptitiously. Even assuming Respondent's ignorance of the escrow account excused her from her obligations to keep escrow records under the statute--which it does not--this argument cannot reasonably be extended to documentation for the Viton and Dorestant transactions. Ms. King knew Friendly was conducting rental transactions; she should have known she would need to preserve records relating to these transactions.

128. Furthermore, in the realm of chapter 475, ignorance is no excuse. As explained in Murata,

> Respondent had a duty to actively seek out information about Friendly and the operations of the brokerage. A broker cannot hide behind a curtain of ignorance and leave herself completely dependent for information on those she has the responsibility to control. A broker has an ongoing duty to inform herself as to the conduct of the brokerage. . . . The apparent absence of any transaction documents

> is certainly a circumstance that should have compelled Respondent to further inquiry.

Murata, 2018 Fla. Div. of Adm. Hear. LEXIS 1, at *18-19.

129. Based on the facts that (1) Ms. King allowed all of Friendly's transactions records to be kept as paper copies, (2) these records were all kept at the Friendly office, and (3) Respondent had not visited the Friendly office since at least July 2014, the Department clearly and convincingly established Respondent's failure to preserve the transaction files as required by section 475.5015.

130. Also troubling is the fact that at no time after January 2016, when Respondent had a suspicion or actual knowledge that Friendly had an escrow account or was collecting deposit funds, did she ever direct Mr. Berthelot or Friendly that she be given access to all of Friendly's e-mails, files or escrow accounts; or that Friendly preserve all its records. Respondent also never attempted to perform reconciliation on the escrow accounts or resolve the Viton or Dorestant disputes. In fact, she did the exact opposite. When she realized Friendly was receiving deposit funds and holding them, she sought to limit her liability and shed herself of her statutory obligations rather than perform them. Although this may have been a reasonable response to her suspicion that Mr. Berthelot may have breached the Broker

Agreement, it did nothing to meet her responsibility to preserve the records related to the Viton and Dorestant transactions.

131. Petitioner proved by clear and convincing evidence that Respondent violated sections 475.5015 and 475.25(1)(e) in both the Viton and Dorestant transactions.

Fraud or Culpable Neglect--Viton and Dorestant

132. Section 475.25(1)(b) provides discipline may be imposed against a real estate licensee, if he or she is found 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."

133. A violation of section 475.25(1)(b) requires a finding of wrongful intent. See Dep't of Prof'l Reg., Div. of Real Estate v. Fiorello, Case No. 14-4147PL, 2015 Fla. Div. Adm. Hear. LEXIS 235 (Fla. DOAH June 11, 2015, Fla. DBPR Sept. 10, 2015), at *24 and 29; Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143–44 (Fla. 1st DCA 1992).

134. In the administrative context, "culpable negligence" requires a showing of more than simple negligence, it must be gross and flagrant. Culpable negligence has been described as "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." Fiorello, 2015 Fla. Div. Adm. Hear. LEXIS 235, at *25.

135. Respondent knew Friendly handled real estate transactions, but made no effort to determine how Friendly handled these transactions, handled funds collected from or on behalf of clients, or managed its bank accounts. According to the Broker Agreement, which she had drafted, Respondent's primary focus was to ensure Friendly had no right to her other business ventures, and that she be notified of any investigations. By all accounts, Respondent acted as the qualifying broker only so that Friendly could "comply with requirements of the Florida Department of Professional Regulation," without any intention of do anything more than receiving her monthly fee.

136. Unlike Murata, where the broker was found guilty of chapter 425 violations without being found culpably negligent, Respondent made no efforts to shut down the escrow account or reimburse the victims of her sales associate. Such behavior has been found to be intentional and have a detrimental effect on the public.

> Respondent failed to supervise and control [the sales associate] or any other professional employees of [the brokerage] during Respondent's brief tenure as its qualifying broker. As to this matter too, Respondent's failure was intentional, not merely negligent and reckless. Respondent's

> sole record activity in connection with [brokerage] appears to have been to have filed the necessary documentation to serve as its qualifying broker, to have cashed a couple of [] checks, and to have filed the necessary documentation to resign as [] qualifying broker . . . . Through Respondent's intentional disregard of his professional obligations, as well as negligence and recklessness, Respondent helped [the brokerage] defraud three persons of their $5500 deposit--in return for payments of an unspecified amount of "rent" for his broker's license. The public has been damaged, and Respondent has failed to make restitution on his violations. . . .

Dep't. of Prof'l. Reg., Fla. Real Estate Comm. v. Meraz, Case No. 13-1834PL, RO at 15-16 (Fla. DOAH September 10, 2013; Fla. DBPR Feb. 12, 2014); see also Fiorello, 2015 Fla. Div. Adm. Hear. LEXIS 235, at *25-26 (noting the lack of proper documentation and attention to legal requirements demonstrated by the real estate professional pervasively establishes a calculated and intentional pattern of behavior).

137. Petitioner proved by clear and convincing evidence that Respondent was culpably negligent in violation of section 475.25(1)(d) in both the Viton and Dorestant cases.

Penalty

138. The Florida Real Estate Commission adopted disciplinary guidelines for the imposition of penalties authorized by section 475.25(1) in Florida Administrative Code Rule 61J2-24.001.

139. For the Viton case, rule 61J2-24.001(3)(e) provides the following appropriate range of penalty for the first offense of failing to account or deliver escrowed property to any person as required by agreement or law in violation of section 475.25(1)(d):

(1) A $250.00 to $1,000.00 administrative fine; and

(2) license suspension to revocation.

140. For both the Viton and Dorestant cases, rule 61J2-24.001(3)(u) provides the appropriate range of penalty for the first offense of failing to direct, control, or manage a sales associate in violation of section 475.25(1)(u):

(1) A $250.00 to $1,000.00 administrative fine; and

(2) license suspension to revocation.

141. For both the Viton and Dorestant cases, rule 61J2-24.001(3)(f) provides the appropriate range of penalty for the first offense of violating any rule or provision under chapter 475 in violation of section 475.25(1)(e), including the failure to preserve brokerage records pursuant to section 475.5015:

(1) A $250.00 to $1,000.00 administrative fine; and

(2) license suspension to revocation.

142. For both the Viton and Dorestant cases, rule 61J2-24.001(3)(c) provides the appropriate range of penalty for the first offense of culpable negligence or breach of trust in violation of section 475.25(1)(b):

(1) A $1,000.00 to $2,500 administrative fine; and

(2) 30-day suspension to revocation.

143. Section 455.227(3)(a) provides, in addition to any other discipline, the Florida Real Estate Commission may assess costs related to the investigation and prosecution of the case, excluding costs associated with an attorney's time.

144. Rule 61J2-24.001(4) provides the demonstration of aggravating or mitigating circumstances can warrant deviation from the penalty guidelines.

145. Neither party demonstrated aggravating or mitigating circumstances warranting deviation from the standard penalties stated in the guidelines.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Florida Real Estate Commission:

A. Case No. 17-3989

1. Finding Respondent Alicia Faith King in violation of sections 475.25(1)(d)1., 475.25(1)(u), 475.25(1)(e), and 475.25(1)(b), as charged in Counts I through IV of the Administrative Complaint in the Viton case.

2. Imposing an administrative fine totaling $2,500 ($500 fine per count for Counts I, II and III; and $1,000 fine for Count IV).

3. Imposing license suspension for a total period of nine months (one-month suspensions each for Counts I, II, and III; and a six-month suspension for Count IV).

4. Imposing costs related to the investigation and prosecution of the case in the amount of $1,625.25.

B. Case No. 17-3961

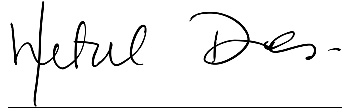
1. Finding Respondent Alicia Faith King in violation of sections 475.25(1)(u), 475.25(1)(e), and 475.25(1)(b), as charged in Counts I through III of the Administrative Complaint in the Dorestant case.

2. Imposing an administrative fine totaling of $2,000 ($500 fine per count for Counts I and II; and $1,000 fine for Count III).

3. Imposing license suspension for a total period of eight months to be imposed consecutive to the suspension in Case No. 17-3989 (one-month suspensions each for Counts I and II; and a six-month suspension for Count III).

4. Imposing costs related to the investigation and prosecution of the case in the amount of $1,608.75.

DONE AND ENTERED this 25th day of January, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2018.

ENDNOTES

1/ Unless otherwise noted, references to the Florida Statutes, Florida Administrative Code, and other rules are to the 2015 version, which were in effect at the time of the conduct alleged in the underlying Viton and Dorestant Complaints.

2/ Ms. De La Rocha's signature block in the Broker Agreement indicates she is the "President/Owner" of Friendly; her signature block on her e-mails indicate she is the "Office Manager." According to Respondent, Ms. De La Rocha and Mr. Berthelot are married.

3/ The time gap in October 2015 was caused by Ms. King allowing her broker license to lapse for non-renewal effective October 1, 2015, and then reinstating it on November 4, 2015.

4/ Although, Ms. King repeatedly used the term "tenant placement" services, Ms. James stated she was unfamiliar with this term, and she and other real estate professionals referred to the transactions for obtaining rental property and entering into a lease agreement as "rentals" or "property management." Regardless, it is clear that Ms. James and Mr. Berthelot--in their capacity as licensed sales associates--represented clients in transactions involving the rental of real property.

[5] Ms. King did not cite to a specific regulation which she believed Mr. Berthelot violated, but presumably she intended to allege a violation of section 475.42(1)(d), which states in pertinent 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." There was no evidence presented regarding the outcome of Ms. King's complaint.

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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.