

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

-----X

In the Matter of the Application of

**MALIKA CUMBIE,**

Applicant,

For a License as an Associate Real Estate Broker

**DECISION**

File No. 2018-0894

Complaint Nos. 2014-0191;

2014-0475; 2014-0290; 2014-2103;

2014-1219; 2013-2226

-----X

This matter was originally assigned to the Hon. Aiesha L. Hudson and was reassigned and to and came on for hearing before the undersigned, Joan R. Salzman, on December 5, 2018, at the Department of State, Office of Administrative Hearings, located at 123 William Street, New York, New York.

The applicant, a formerly licensed real estate broker and an applicant for an associate real estate broker’s license, failed to appear.

The Division of Licensing Services (“DLS”) was represented by Jenifer Rajkumar, Special Counsel to the Department.

**ISSUE**

The Department alleges that the applicant, formerly a limited liability real estate broker, failed to refund money owed to six clients within a reasonable time with respect to failed rental transactions, failed to supervise a number of real estate salespersons in her office, employed unlicensed salespersons, commingled client funds and used their deposits for her own personal expenses and entertainment, and ceased co-operating with the Department’s investigation in August 2014. The question presented is whether the application to renew her associate real estate broker’s license should be granted or denied (State’s Ex. 10).

For the reasons set forth below, I find that the applicant has shown herself to be untrustworthy and incompetent to transact the business of an associate real estate broker in such manner as to safeguard the interests of the public and the application is denied.

**FINDINGS OF FACT**

1) Notice of Hearing together with a copy of the DLS’s May 25, 2018 letter notice that it proposed to deny the applicant’s license application on the basis that departmental investigations found that she was in violation of Article 12-A of the Real Property Law and regulations in Title

19 NYCRR, was served upon the applicant by certified and regular mail addressed both to her address of record and the new address she supplied to the Department when she demanded an administrative hearing in a letter received by the DLS on June 21, 2018 (State's Ex. 1). The DLS letter also notified her of her right to a hearing before an administrative law judge and of her burden to prove that she was qualified for licensure (State's Ex. 1). The certified mailing addressed to her older address on file with the Department relating to the hearing, which was then scheduled for October 16, 2018, was returned as undeliverable, but the regular mail to that address was not. Neither the certified mail nor the regular mailing directed to her newly supplied address was returned (State's Exs. 1, 2). This matter was adjourned several times (Tr. at 5) and ultimately adjourned to December 5, 2018, by an adjournment notice mailed by this tribunal to the applicant at both addresses (ALJ Ex. 1).

2) The applicant was a licensed limited liability real estate broker, UID No. 10491202186 (State's Ex. 2). The DLS "Certification Preparation Report," license history, license renewal application, and other Department records show that Ms. Cumbie was doing business as "Alotta Apartments," 701 Flatbush Avenue, Brooklyn, New York (State's Exs. 2, 3). The DLS issued a "Hold Card Notice" on August 25, 2015, with the following written reason for the hold:

Respondent's license expired on June 12, 2015 and it has not been renewed. Respondent failed to properly supervise a salesperson in her office regarding a number of rental transactions. Broker fees and deposit monies were collected for the failed rental transactions and not returned to the complainants. By collecting unearned broker's fees, retaining deposits for failed rental transactions and failing to properly supervise the salesperson in her office the Respondent has violated the RPL and her license should not be renewed until the RPL violations have been resolved.

(State's Ex. 3). The Hold Card Notice, signed by John Kenny, then of DLS, stated: "Do not issue a license/registration to this name unless this hold has been released, nor make any changes in status without the written permission of the undersigned" (State's Ex. 3).

3) On March 14, 2018, with her limited liability real estate broker's license on hold, the applicant applied to renew her expired associate real estate broker's license, UID No. 10301211395 (State's Ex. 2). John P. Reinhardt signed the Association Statement indicating that he was sponsoring the applicant, who gave Fillmore Real Estate Brooklyn Inc. as her place of business (State's Ex. 2).

4) The following facts are undisputed and are based upon the trial testimony of Senior DLS Investigator Stephen Cavota and a set of six DLS Enforcement Unit Investigation Reports by Mr. Cavota, some with input from other DLS enforcement or investigative staff, and the voluminous exhibits to those reports (State's Exs. 4-16). Mr. Cavota testified credibly and professionally that six complainants came to the DLS with similar complaints against Ms. Cumbie. They each gave her a deposit to be used to rent an apartment. They delivered their payments to Ms. Cumbie's salesperson and manager, who would drop the check or money into a safe, not into an escrow account. When the apartments were not rented to these clients, each demanded a refund. Ms. Cumbie's staff and, in some cases Ms. Cumbie herself, delayed and, except in one case, denied the refunds, offering various excuses to evade responsibility for these refunds. Mr. Cavota testified that the complaints were all similar to each other and shared the same pattern of delay, evasion,

and refusal to pay. (Tr. at 16-21; 27). Only one complainant got her money back after threatening suit. Mr. Cavota provided his assessment of the results of DLS’ in-depth investigation. He called it a “scam”:

In my opinion, it pretty much appears that this was an orchestrated scam because they were the only person [Ms. Cumbie and manager Quadir Lewis], they hired a lot of new salespersons that had no knowledge of the business, they trained them and the only control of the money was from Quadir Lewis to the safe and the only person with the keys to the safe were Malika Cumbie and Quadir Lewis, the overall bosses at this establishment, the broker of record, Malika Cumbie, who is responsible for everything.

(Tr. at 21; 26). He testified that “the money is gone. . . . People are out of their money. This was covered on Channel 11 News, where they were just banging on the door trying to get their money back.” But Ms. Cumbie shuttered the business and did not return the money (Tr. at 28).

5) Six prospective tenants gave deposits on rental apartments to the applicant either directly or to her associated real estate salesperson, Quadir Lewis, or to other staff of hers. The clients either paid cash or certified check or money orders, which were made payable to Malika Cumbie or to a staff person named “Rasheem.” None of the apartments at issue was actually rented to these applicants, either because the respective landlords denied the rental applications or the clients decided not to rent the units at issue and withdrew their applications. Each of them demanded that their deposits be refunded. Each of these applicants complained to the Department that the applicant retained and refused to refund their deposits even though there was no rental transaction to which to apply these deposits. The following chart sets forth the amounts of the deposits each of these clients gave to the applicant:

<b>Complainant</b>	<b>Amount of Deposit/Reason Apartment Not Rented</b>	<b>Amount Refunded</b>	<b>Property</b>	<b>Amount of Civil Judgment, if Any</b>	<b>Amount of Judgment Paid</b>
Jene Gonzalez-Jack Complaint No. 14-0191	\$1,450 money order for one month’s rent, 12/7/13, money order payable to “Rasheem,” real estate salesperson (of the total \$200 was a “processing fee”)  Landlord rejected application.	\$1,450, but with a delay, on 3/28/14, 3-4 months after request, despite broker’s written policy of 7-14 business days from request for refund.	596 East 22 <sup>nd</sup> St. #2D Brooklyn, NY		

Michael Roach Complaint No. 13-1219	\$700 (cash paid; of that amount, \$500 was to hold the apartment; \$200 was a “processing fee”)  Salesperson informed client that the application was rejected; fees were “rolled over” to second transaction, which second landlord rejected.	-0-	690 Rogers Ave. #3B Brooklyn, NY		
Rachel Killick Complaint No. 13-2226	\$1,475 (cashier’s check payable to Malika Cumbie, Nov. 6, 2013; of that payment \$100 was a “processing fee”)  Salesperson informed client that the application was rejected.	-0-	3021 Avenue I, Apt. #D3 Brooklyn, NY	\$1,466  Civil judgment awarded to Ms. Killick against Alotta Apartments, et al., on May 14, 2014, Index No. K5421/13, Kings Co. Civil Court, Small Claims Part. Certified copy on file (State’s Ex. 13).	-0- <sup>1</sup>  Not satisfied, appealed or vacated.
Mara Mervius Complaint No. 14-0290	\$1,450 cash (of that amount, \$100 was a “processing fee” and \$1,350 was for rent)	-0-	647 Albany Ave., #4E Brooklyn, NY		

<sup>1</sup> I have marked into the record as State’s Ex. 10 email correspondence with the parties. At the hearing, when Ms. Rajkumar argued at the end of the hearing that outstanding civil judgments against a broker show incompetence and untrustworthiness, citing case law, I asked Ms. Rajkumar to explain whether in the State’s lengthy investigative file (State’s Exs. 4-9) there were unpaid judgments against the applicant (Tr. at 31-34). Ms. Rajkumar undertook to respond to that question. In her email of December 19, 2018, she answered that the Department’s investigation (already in the record) showed that at least two claimants, Rachel Killick, Civ. Ct. Index No. 5421-2013, and Theodore Guggenheim, Civ. Ct. Index No. 5567-2013, won judgments against Alotta Apartments in the Civil Court of the County of Kings, Small Claims/Commercial Claims Part. She added that the Civil Court in Kings County had no record of any satisfaction of these judgments on file in those two matters. While she wrote that “[t]herefore, there is no way to verify whether or not Cumbie made payment” (State’s Ex. 10), I read the state of the record somewhat differently. I find that the applicant, who bears the burden of proof here, failed or declined to participate in this proceeding and submitted no proof that these judgments have been satisfied. Accordingly, the DLS provided undisputed evidence of the judgments, which, with respect to this record, appear to remain outstanding. I had also requested that the exhibits noted in the six investigative memoranda of DLS Investigator Stephen Cavota (State’s Exs. 4-9) be submitted so that I could better understand those memoranda. In my email to Ms. Rajkumar, I held the record open for this purpose until January 2, 2019, and instructed her to copy Ms. Cumbie on all communications with the tribunal. Ms. Rajkumar did copy Ms. Cumbie on that exchange of email, notifying the applicant that the additional exhibits had been hand-delivered to the tribunal and that copies of the voluminous papers would be made for Ms. Cumbie on request. I have marked into the record the evidentiary attachments to the investigative reports as State’s Exhibits 11-16.

	<p>Provided to the woman "Boss"</p> <p>Ms. Mervius backed out of the deal when salesperson asked for copies of her children's birth certificates</p>				
<p>Sasha Warner-Berry</p> <p>Complaint No. 2013-2103</p>	<p>\$3,100 cash paid Sept. 27, 2013 (including \$300 credit check fee @ \$100 x 3 roommates)</p> <p>Salesman identified only as "Tarrick" informed Warner-Berry on Oct. 1, 2013, that application was denied and someone else got the apartment.</p>	-0-	<p>711 Ocean Ave. #2A Brooklyn, NY</p>		
<p>Theodore C. Guggenheim</p> <p>Complaint No. 14-0475</p>	<p>\$1,575 (including \$200 @ \$100 x 2 persons for credit check; certified check payable to Malika Cumbie).</p> <p>Client refused apartment when it was not available for the time he wanted; Salesperson "Kay" informed him falsely that she had already paid over his deposit to management company (later identified as "Shamco"), which denied that it had ever even received his rental application or any money.</p>	-0-	<p>690 Rogers Ave., #1A, Brooklyn, NY</p>	<p>\$1,395</p> <p>Civil judgment awarded to Mr. Guggenheim against Alotta Apartments, on May 15, 2014, Index No. K5567/13. Kings Co. Civil Court, Small Claims Part. Certified copy on file (State's Ex. 16).</p>	<p>-0-<sup>2</sup></p> <p>Not satisfied, appealed or vacated.</p>

6) Mr. Cavota and other DLS staff interviewed the complainants, Ms. Cumbie, and her real estate salesperson, Quadir Lewis, as well as other staff of her firm. In all cases at issue, Ms. Cumbie and Mr. Lewis blamed each other for not refunding the money (State's Exs. 4-9). Ms.

<sup>2</sup> See note 1 above.

Cumbie claimed in her interviews with the DLS that she was unaware that money had not been returned to clients, that Mr. Lewis stole the money, and that she had closed her business on July 14, 2014. Mr. Lewis denied any knowledge of the transactions and allegations and denied that he had access to the bank accounts operated by Ms. Cumbie (State's Exs. 4-9). Another real estate salesperson associated with Ms. Cumbie was Rasheem or Rasheed Lance.

7) Through his counsel, Stuart Meltzer, who supplied via email dated April 9, 2014, additional information requested by former DLS Investigator MaryJo Triano, Mr. Lewis asserted that Ms. Cumbie was motivated to take client's money to fund a planned business expansion for which she had no funds. He asserted that she used the client's funds as her "seed capital." He asserted that Chase Bank had shut down her account after she "used up her overdraft credit and ran into financial difficulties . . . ." He claimed that she opened two additional accounts at TD Bank and commingled her clients' funds with her personal funds in those accounts, that she had been in business at the time for 30 months, and that he had witnessed Ms. Cumbie "being harassed" for refunds from the time he began working for her at Alotta Apartments. He further asserted that Ms. Cumbie employed "several unlicensed individuals," who, upon receiving money, signed Lewis' name on documents by writing Mr. Lewis' initials. Meltzer stated further that Lewis knew that Cumbie spent lavishly on global travel and that Lewis believed she had never been able to "climb" out of her "financial hole" (State's Ex. 11).

8) Ms. Cumbie told the DLS in two in-person interviews and one by telephone, and in a written statement in 2014, that she relied on Mr. Lewis as the manager of the business and did not know what was happening in her own office. She claimed to have heard that the complaining clients wanted refunds when she saw a report on Channel 11 News in March 2014 about her business. Ms. Cumbie told investigators that she fired Mr. Lewis upon discovering the retained deposits. She stated that Mr. Lewis was the only staff person who had access to the office safe, as well as the business escrow account at TD Bank, and was deceitful in his reporting to her on the daily business activities. She stated to Mr. Cavota that Lewis had authorization to make deposits and had access to the cash on hand in the office. She claimed further that either the money was never provided to her as broker or that Lewis gave her client checks, requesting cash back but never turned the money over to the clients (e.g., State's Ex. 4). She stated that Lewis stole from the customers and from her business. She told Mr. Cavota that she was the sole owner of the business City Flats, LLC d/b/a Alotta Apartments, that she called Mr. Lewis every day to check on the business but only appeared at the office once every week or two. (*Id.*) She also told the DLS that she could not pay any more refunds because she closed down her business on or about July 14, 2014, and Mr. Lewis stole the clients' money (State's Exs. 5; 6).

9) Mr. Cavota visited the respondent's office in August of 2014 and found the office was closed and there was no evidence at the business address at that time of Ms. Cumbie or her business, Alotta Apartments operating there. Asked by Mr. Cavota to supply a written statement, Ms. Cumbie failed to respond (e.g., State's Ex. 4).

10) Some of the complainants alleged that the salespersons were unlicensed. Mr. Cavota wrote that Rasheed Lance was unlicensed based on a "negative search" of licensing records, and that Mr. Lewis was a licensed real estate salesperson associated with Alotta Apartments at the time of the events at issue. Mr. Cavota wrote that Mr. Lewis' real estate salesperson's license expired September 28, 2015, and was cancelled (State's Ex. 4). Asked how his name appeared, for

example, on the December 7, 2013 receipt Ms. Gonzalez-Jack for the money order in the amount of \$1,450 representing her rent deposit, Lewis denied that he had signed that receipt and claimed to have no knowledge of the transaction (State's Ex. 4). The other five complaints showed the same history of failed rental transactions, demands for refunds, retention of the funds by the applicant's brokerage (Tr. at 13), but the remaining five complainants never got their money back from Ms. Cumbie. In these transactions, Alotta Apartments gave notice that it was acting as a dual agent representing both landlord and tenant (E.g., State's Ex. 14). Because the six complaints were indeed very similar, only some highlights are recited below.

*Gonzalez-Jack*

11) At first, Mr. Lewis told Ms. Gonzalez-Jack that even though he was the CEO of the company, only the owner, Cumbie, could provide a refund but that Cumbie was on vacation. Ms. Gonzalez-Jack emailed Ms. Cumbie to no avail, but later managed to get hold of her personally on the phone. Ms. Cumbie initially told her that she had no control over refunds, but Ms. Gonzalez-Jack complained to the Department, threatened legal action, and persisted until she went to Ms. Cumbie's office and extracted the full refund (State's Exs. 4, 11). Only after substantial delay and evasion by Ms. Cumbie and her brokerage was Ms. Gonzalez-Jack able to secure the belated refund.

*Roach*

12) Carl Henry Volcy, then a licensed real estate salesperson working at Alotta Apartments, showed an apartment to Mr. Roach. Volcy told the DLS that he worked for Ms. Cumbie's firm under the supervision of Mr. Lewis for only three months. He stated that three of his clients, including Mr. Roach, requested refunds and all were refused. Mr. Roach told the DLS that he saw Mr. Volcy give the cash deposit of \$700 to Mr. Lewis and never met Ms. Cumbie (State's Ex. 5). Mr. Roach complained that after Mr. Volcy told him he did not get the first apartment he wanted, Alotta Apartments retained his \$700 deposit to allow him to look at a second apartment. He told the DLS that the realtor had conveyed to the landlord that the tenant was to be Michelle Lane, who was his employer and who had kindly agreed to guarantee the lease. When the second landlord received the lease with the wrong tenant's name entered, the landlord's agent accused Mr. Roach of submitting fraudulent papers, when, in fact, he had submitted documentation to Alotta Apartments indicating that he and his family were to be the tenants and Ms. Lane the guarantor. He lost time and wages from work going to sign the lease. Ms. Lane, he said, accompanied him to what they both thought would be the lease signing but instead were berated, humiliated, and accused of fraud. When he went back to the broker's office and sought the refund from Mr. Volcy, said Mr. Roach, Mr. Volcy refused the refund and blamed Roach for scheduling the lease signing. Mr. Roach complained not only of the refusal to refund his deposit for the failed rentals, but also about the salesperson's rude, blame-shifting, and accusatory treatment of him (State's Exs. 5, 12).

13) Although the pre-printed receipt form Ms. Cumbie used when clients paid deposits stated that refunds were available only in cases where a landlord rejected a tenant, this limitation was not permissible. The Alotta "Deposit Receipt" form signed by the complainants stated, in pertinent part:

- I understand that the good faith deposit(s) is given to show my sincere interest in renting the apartment and will be refunded **ONLY** if my application gets denied[.]
- I understand that for any reason other than *non-approval* I am not entitled to any refund, full, or partial[.]

(*E.g.*, State’s Exs. 11, 12) (emphasis in original). As Mr. Roach correctly pointed out, however, in his handwritten complaint to the DLS, the Department publishes an online “Real Estate Education Campaign” pamphlet listing “Twelve Things New Yorkers Should Know Before Buying, Selling or Renting.” [https://www.dos.ny.gov/licensing/pdfs/realestate\\_guide.pdf](https://www.dos.ny.gov/licensing/pdfs/realestate_guide.pdf). I take official notice of this publication, which I have included in the record as ALJ Ex. 2. At paragraph 8, that publication states, in a passage that Mr. Roach directly quoted in his complaint form:

Non-refundable commission deposits are not permissible. An agent earns a commission when he or she finds a person who is ready, willing and able to purchase the property or rent the apartment. Only if the agent has assisted the parties in reaching an agreement on all of the material elements of the deal has he or she earned a commission.

(ALJ Ex. 2; State’s Ex. 12). In any event, the payments at issue here were for rent, and Cumbie had no basis to retain rent after her clients received no rental apartments.

*Rachel Killick*

14) Ms. Killick complained to the DLS on December 9, 2013, that Darlene Muniz, who represented herself as a real estate salesperson associated with Alotta Apartments, showed her an apartment, that Ms. Killick gave to James Warren, who represented himself as a real estate agent from Alotta Apartments a bank check in the amount of \$1,475, made out to Malika Cumbie, to hold the apartment, and that Muniz then informed her by text message that she did not get the apartment because her credit score was low, which, Killick wrote in her complaint, was not true. She requested her deposit back and a copy of her background check and credit score, which the firm’s staff refused to give to her. She made numerous attempts to get her money and the information, to no avail. She even called the police (State’s Exs. 6, 11). The DLS submitted a copy of the \$1,475 cashier’s check dated November 6, 2013, a certified official copy of the judgment Ms. Killick obtained against Alotta Apartments, Muniz, and Warren, in the amount of \$1,466, and a signed receipt, like those given to the other complainants, for her deposit; this receipt was also dated November 6, 2013 (State’s Ex. 6). Mr. Cavota’s search of DLS records found that Muniz was unlicensed (State’s Ex. 6).

15) The DLS submitted with the record of the Killick investigation its subpoena issued to J.P. Morgan Chase Bank, of all documents relating to Ms. Killick’s cashier’s check, which was drawn on Chase Bank. The copy of the cancelled check shows that it was endorsed and posted as of November 12, 2013. The check was cashed at TD Bank, Ms. Cumbie’s bank. The DLS also subpoenaed TD bank for Ms. Cumbie’s business bank account. Ms. Cumbie told Ms. Triano of the DLS that she was aware of the refund complaints, but claimed not to know the full extent of them until she saw a report on her on Chanel 11 News (State’s Ex. 6). She denied cashing Ms. Killick’s check, even though it was cashed at Cumbie’s bank, TD. Mr. Warren told Ms. Triano

that, like Lewis, he was fired from Alotta Apartments because of the refund issues. He told Ms. Triano that Ms. Cumbie was solely responsible for refunding deposit money, was in the office between two and four days per week and regularly collected money from the office safe. He further reported that all cashier's checks or money orders were to be made payable to Malika Cumbie or City Flats LLC, and to no other names. He denied knowing about the Killick transaction. Mr. Warren signed a statement confirming his account to the DLS on April 24, 2014 (State's Ex. 11). Ms. Cumbie stated that she was in her office much less, once every week or two (State's Ex. 6).

16) Ms. Cumbie supplied her business bank account number to the DLS, which subpoenaed that account. The account is in the name of City Flats LLC. The Killick deposit was not found in this account. Ms. Cumbie did not respond to Mr. Cavota's August 15, 2014, email request for a written statement answering all six complaints (State's Exs, 6, 13). The TD bank documents for the account Ms. Cumbie identified to the DLS as an "escrow" account do not say the words "escrow account," -- and an "escrow" account does not appear to be required by the regulations - - but the bank account is in the corporate name of her brokerage, City Flats LLC. The bank records show frequent deposits that are identified by property names and addresses, but also show numerous expenses on the same account's debit card that appear to be personal and sometimes recurring charges, and improper for a real estate brokerage business bank account, such as, to name a few representative examples: NYS Licensing (\$150, June 14, 2013), LivingSocial, Netflix, Audible, McDonald's, Machavelle Sports Bar, Brooklyn, Crown Electronics, Fandango.com, Trader Joe's, Staples, Starbucks, FishandSip, Sock Drawer, Cablevision, Daffy's, Lemongrass Grill, Duane Reade, AT&T, Crunch (\$219.98, Oct. 25, 2011), Junior's Restaurant, Lizzy Discount, Walgreen's, Sephora, Target, Zen Palate II, Forever 21, Mrs. Field's, Wendy's, Indique Hair (\$304.85, Dec. 27, 2011), Ikea (\$176.79, same date), MTA Vending, Downtown Natural Market, DSW (\$93.89, Oct. 24, 2011), Barnes & Noble, CVS, Café Enduro, ATM cash withdrawal (\$740, June 28, 2013), and numerous overdrafts (State's Ex. 11). Mr. Cavota wrote in his memorandum that the account showed commingling of personal and business monies, and the documents support his assessment in full (State's Ex. 13).

#### *Mervius*

17) Ms. Mervius complained to the DLS that in January 2014, she answered an ad on Craigslist (like other complainants). She met a salesperson named Nicole Haynie, who was representing Alotta Apartments, and who showed apartments in Brooklyn, including one that fit her needs. Mr. Cavota later did a search that showed that Haynie was unlicensed. At the broker's office in Brooklyn the next day, Ms. Mervius also met Quadir Lewis, who represented himself as one of the bosses, and a woman called "the Boss," to whom she gave a \$1,450 cash payment toward a rental, to secure the apartment and prevent other agents from showing it, together with a completed application. Haynie told her no checks would be accepted, cash only. Ms. Mervius asked if there would be a problem with a refund if her requests that Ms. Haynie ask the landlord to install window guards for her children. Ms. Haynie reportedly stated to Ms. Mervius that a full refund would not be a problem if Mervius did not get the apartment. Ms. Mervius received a receipt on the same form as that given by Alotta Apartments to the other complainants; it was signed by Mr. Lewis and showed the cash received toward the rental of the apartment (State's Ex. 7).

18) Ms. Mervius reportedly was uncomfortable with a request from Haynie to supply additional documents, including her childrens' birth certificates. She went to Ms. Cumbie's office on January 13, 2014, and met Lewis, who told her she was not entitled to a refund because the firm had found her an apartment. He then instructed her to make her request in writing via the email address [alotta.deposits](mailto:alotta.deposits). Mervius wrote in her February 15, 2014 official complaint that during this visit, Mr. Lewis "announced" to her that he was the owner, and she found him "very rude, unprofessional when i insisted that he refund me my money" (State's Ex. 14). Ms. Mervius submitted a detailed email request to Alotta Apartments at [alotta.deposits@gmail.com](mailto:alotta.deposits@gmail.com). She emailed repeatedly from January 13 through February 4, 2014, and received two summary replies, via email of January 17 and February 5, 2014, from a generic email "Refund Alotta," [alotta.deposits@gmail.com](mailto:alotta.deposits@gmail.com), no individual signature, indicating first that her request was received and the firm would be in touch with further information, and then that Alotta Apartments was setting up a date for her to pick up a refund and would let her know at least 48 hours in advance. Although she emailed repeatedly, on January 13, 16, 26, and February 4, 2014, demanding her refund, the appointment never occurred, and she got no response, even though her written receipt from Alotta Apartments promises refunds within 7-14 business days. Mervius' multiple email demands for a full refund and the dilatory responses were submitted with the investigative report (State's Ex. 14). She told the DLS that Ms. Cumbie and her firm never made any real attempt to refund her money, which she never got back (State's Ex. 7).

Mr. Lewis told investigators that he remembered Ms. Mervius returning to Alotta Apartments very upset as she demanded a deposit. He and Cumbie denied knowledge of the transaction, but Lewis told investigators that he directed Ms. Mervius to contact Ms. Cumbie to rectify the situation (State's Ex. 7). Lewis denied his signature was on the receipt for the deposit even though it legibly says "Q. Lewis" (State's Ex. 14). Haynie told the DLS that she worked for Alotta Apartments only for a week in January 2014, then left due to surgery. She told the DLS that she believed that Lewis was the owner of the firm, that she never met Cumbie, and that she was given free training for four hours per day, set up by Mr. Lewis, and that at least 25 other newly hired people were also being trained. After this training, she and others were to begin showing apartments and "getting deposits" (State's Ex. 7).

*Warner-Berry*

19) A real estate salesman identified by the complainant only as "Tarrick" informed Ms. Warner-Berry that the \$2,800 she and her roommates paid on September 27, 2013, was a "deposit" that would hold the apartment and take it off the market but did not specify whether it would be used as a commission or as rent (State's Exs. 8, 15). The salesperson Ms. Warner-Berry identified as "Tarrick" was not known or further identified in the investigation (State's Ex. 8). Despite Tarrick's report to Warner-Berry that her rental application was denied, her numerous written demands for a full refund and her phone calls to Mr. Lewis demanding the same in October of 2013, Ms. Warner-Berry got no money back. Like others, Warner-Berry complained that Lewis was unprofessional and would not commit to a specific day the refund would be made. Warner-Berry and her roommate, Corrina Bain, like other complainants, spoke with Lewis and corresponded with Alotta Apartments and Cumbie, repeatedly demanding a full refund, all to no avail (State's Ex. 8).

20) Mr. Lewis told investigators that he was not the agent on this transaction and did not receive any funds or even recall this transaction. The procedure set by Cumbie, he said, was to have the client email Cumbie directly to request a refund (State's Ex. 8). Ms. Warner-Berry, like other clients of Ms. Cumbie's, complained in writing (November 17, 2013), that when she and her roommate asked for a refund upon learning from the salesperson on October 1, 2013, that they did not get the apartment, they were told to submit a refund request by email (State's Ex. 15). Warner-Berry did so on October 2<sup>nd</sup>, but when she called to confirm that she could pick up the refund check within 7 business days, an employee informed her that it would not be ready because the company was experiencing a "backlog." She called Lewis, and found him extremely unprofessional, refusing to provide an explanation in writing via email or an exact date for the refund (State's Ex. 8). She wrote in her DLS complaint that he variously denied that he was in charge of money for refunds, adding that she could not speak to the person in charge, then reversed course and stated that he was the person in charge (State's Ex. 15).

21) On October 11, 2013, Ms. Bain received an email from the "Refunds Dept." at [alottaapartmentsdeals@gmail.com](mailto:alottaapartmentsdeals@gmail.com), stating that she could pick up her check on October 18, 2013, but when that day arrived, she received another email from the "Refunds Dept.," this time at "requestrefundalottaapartments@gmail.com, again with no individual signature, stating that "due to a high volume of indiscrepancies [*sic*] with different refund amounts and different request dates all refunds have been postponed until November 6, 2013." Warner-Berry then emailed Cumbie directly, informing her of the history and demanding a refund. Cumbie did not respond, but Lewis later made reference to this demand, which, said Warner-Berry, the firm received. On October 18<sup>th</sup>, she and her roommate went to the office of Alotta Apartments, saw Lewis, and demanded the refund, which he refused without explanation, even though more than 7 business days had passed. He also refused to put the roommates in touch with anyone who could explain. He told them they would definitely get their refund November 6<sup>th</sup>, and when they were not satisfied with that promise, Ms. Warner-Berry wrote, Lewis "became dismissive, rude, and insulting" (State's Ex. 15). On November 4, 2013, she received the same type of email from the firm, same wording, but this time saying that all refunds had been postponed to December 3, 2013. Again, no refund was paid to Warner-Berry (State's Ex. 15). The DLS submitted the email record of refund requests and the firm's dilatory and empty promises (State's Ex. 15).

22) Ms. Warner-Berry similarly got a signed receipt for the deposit (with the agent's signature illegible) on the Alotta Apartments form, stating that refunds would be given within 7 business days of the request (though other, similar but non-identical forms issued to other complainants said 7-14 days) after the request for refund.

23) When Warner-Berry went to Cumbie's office in Brooklyn in May 2014, Cumbie told her that she was trying to pay back her clients, but that there were others ahead of her, that she was next on the list of refunds, that she, Cumbie, was the victim because Lewis stole her money, and that she had terminated Lewis' employment for that reason (State's Ex. 8).

24) Ms. Warner-Berry searched the company online and found a number of similar complaints, including complaints documented by the Better Business Bureau (State's Ex. 15).

*Guggenheim*

25) Mr. Guggenheim's complaint is essentially the same in nature as the others, with its own twist. Answering an ad on Craigslist on or about November 6, 2013, he dealt with a real estate agent from Alotta Apartments he knew as "Kay," last name unknown. He liked an apartment she showed him for himself and his wife, and told her he needed a move-in date of December 1. He went to the Alotta Apartments office and Kay asked him to provide a deposit; Mr. Guggenheim complained in writing to the DLS on January 2, 2014, that the deposit was for a month's rent of \$1,375, plus \$100 each for background and credit checks for him and for his wife. He provided a certified check in the amount of \$1,575, payable to Malika Cumbie (State's Ex. 9). The DLS submitted a copy of this certified check (State's Ex. 16).

26) Mr. Lewis' initials are on the receipt provided by Kay to Mr. Guggenheim, but he did not see Mr. Lewis initial it and Lewis was not present during this transaction. This similar, but non-identical receipt gave the refund policy of 15-30 business days from demand for refund (State's Ex. 16). Kay informed him on or about November 8, 2013, that he was accepted and approved for a November 15<sup>th</sup> move-in date. He informed her that this was unacceptable because he needed a December 1<sup>st</sup> move-in date and was not going to pay for half a month (State's Ex. 9). On November 19, 2013, he requested a refund of his deposit. Kay reportedly responded that she had checked with her "Boss," and learned that it was impossible to issue a refund because the money had already been given to the management company. He asked Kay for the name of the management company, and she promised to supply it but never did. Refusing to be put off, Mr. Guggenheim independently searched the internet and found that the owner/management company went by the name "Shamco" (State's Ex. 9). Guggenheim himself contacted the management company and learned that its policy was to collect the first month's rent and a security deposit only after approval of a rental application; the woman with whom he spoke at Shamco told him that his application was never even received, and no money had been required or received. Investigator Triano verified this information by speaking with Steven Stanton of "Shamco Mgmt. Co.," who confirmed that Guggenheim's application was never received. Shamco also informed Guggenheim that the amount of the check made no sense because Shamco requires one month's rent and a security deposit, not merely one month's rent (State's Exs. 9, 16).

27) When Guggenheim went back to Alotta Apartments to demand a refund, he for the first time met Mr. Lewis, who reportedly treated him rudely. Although his initials "QL" appear on the receipt for Guggenheim's deposit, Lewis denied to investigators that he had ever met Guggenheim, denied that he had signed the receipt, denied knowing Kay's last name, and could not recall any part of this transaction (State's Ex. 9). Guggenheim did not receive any refund, so he sued Malika Cumbie and Alotta Apartments in Small Claims Court in Brooklyn for \$1,575. Cumbie defaulted and Guggenheim was awarded judgment in the amount of \$1,395 against Alotta Apartments. Although Mr. Cavota indicated in his investigative memorandum that the judgment ran against both Ms. Cumbie and Alotta Apartments, Ms. Cumbie's name does not appear in the caption of the judgment. A certified copy of this judgment was included in the evidence submitted by the DLS (State's Ex. 16). Mr. Cavota reported that this judgment has not been satisfied. On or about June 15, 2014, Guggenheim initiated collection through the City Marshal's Office, without success (State's Ex. 9).

28) The same bank records subpoenaed by the DLS showed, according to Mr. Cavota, that Mr. Guggenheim's check was not deposited into the business account of Ms. Cumbie's firm (State's Exs. 9, 16).

### **OPINION AND CONCLUSIONS OF LAW**

I - The DLS properly served the applicant with a Notice of Hearing and Complaint in this matter, via certified and regular mail to the applicant's last known address on file with the Department. Neither the regular nor the certified mail was returned. *See* 19 New York Codes, Rules, and Regulations ("NYCRR") § 400.4(b). To obtain personal jurisdiction over and bind the applicant to the agency decision, the complainant must properly serve the applicant with notice of the hearing and a copy of the complaint and afford him or her an opportunity to be heard. *Matter of Skolnick*, 108 AD3d 720, 723 (2d Dep't 2013) ("An elementary and fundamental requirement of due process in any proceeding which is accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections") (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]). Service properly made in a manner reasonably calculated to provide notice of the time, date, place, and nature of the proceedings is sufficient whether or not the opposing party actually receives notice. *See Persad v. Division of Licensing Services*, 63 DOS APP 09 (2009); *Pinger v. Division of Licensing Services*, 23 DOS APP 07 (2007).

Inasmuch as there is evidence that notice of the place, time, and purpose of the hearing was properly served upon the applicant at her last known address on file with the Department, the hearing was permissibly conducted in the applicant's absence. *See generally Jacoby v. New York State Bd. for Professional Medical Misconduct*, 295 AD2d 655 (3d Dep't 2002); *Verdell v. DeBuono*, 262 AD2d 812 (3d Dep't 1999); *Patterson v. Dep't of State*, 35 AD2d 616 (3d Dep't 1970); *Roy Staley v. Division of Licensing Services*, 14 DOS APP 01 (2001); *Matter of Application of Rose Ann Weis*, 118 DOS 93 (1993).

II - As the person who initiated the hearing, the applicant bears the burden to prove by "substantial evidence" that she should be granted a license. State Administrative Procedure Act ("SAPA"), § 306(1); *see Matter of Kelly v. DiNapoli*, 30 NY3d 674, 684 (2018) (defining substantial evidence); *Matter of Haug v. State Univ. of N.Y. at Potsdam*, 32 N.Y.3d 1044 (2018) (substantial evidence "is a minimal standard;" "it is less than a preponderance of the evidence"; (citing, *inter alia*, *Kelly v. DiNapoli*). Substantial evidence is that which "a reasonable mind" could "accept as adequate to support a conclusion or ultimate fact." *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 NY2d 176, 180 (1978), *cited in Gray v. Adduci*, 73 NY2d 741, 742-743 (1988); *Tutuianu v. New York State*, 22 AD3d 503, 504 (2d Dep't 2005). "The question. . . is whether 'a conclusion or ultimate fact may be extracted reasonably -- probatively and logically.'" *City of Utica Bd. of Water Supply v. New York State Health Dep't*, 96 AD2d 719 (4th Dep't 1983), *quoting 300 Gramatan Ave. Associates, supra*, 45 NY2d at 181; *Division of Licensing Services v. Cirrincione*, 246 DOS 98 (1998).

*To Qualify for a Broker's License, the Applicant Must be Both Competent and Trustworthy.*

III – Before granting a license to an applicant for a real estate broker's license, the Department is entitled to information:

to enable it to determine the *trustworthiness* of the applicant if an individual, or of each member of a co-partnership or each member of a limited liability company or each officer of a corporation for whom a license as a broker is asked, and his or their *competency* to transact the business of real estate broker *in such a manner as to safeguard the interests of the public*. In determining competency, the department shall require proof that the person being tested to qualify to apply for a broker's license has a fair knowledge of the English language, a fair understanding of the general purposes and general legal effect of deeds, mortgages, land contracts of sale, and leases, a general and fair understanding of the obligations between principal and agent, as well as of the provisions of this section.

Real Property Law § 441(b) (emphasis supplied).

The regulation of licensing is expressly aimed at safeguarding the interest of the public. “The purpose of article 12-A in the licensing of brokers and salesmen is ‘to assure by means of licensing competency and the observance of professional conduct on the part of real estate brokers and salesmen.’ . . . The real estate broker is brought by his calling into a relation of trust and confidence. . . ., and demonstrated misconduct in disregard of law and public policy may be considered in determining untrustworthiness.” *Diona v. Lomenzo*, 26 AD2d 473, 477 (1st Dept 1966) (citations omitted).

Ms. Cumbie failed to supervise her staff, retained rent deposits to which she was not entitled when rental transactions of six clients failed, used the business bank account that must be devoted exclusively to client deposits to pay her personal living expenses, and failed to satisfy at least two Civil Court judgments won by the frustrated prospective tenants. There is no doubt on this record that Ms. Cumbie is neither competent nor trustworthy and, therefore, should not be granted an associate broker's license. *See Department of State v. Gerard M. Campbell*, 1037 DOS 17 at 3 (2017) (retaining unearned deposit for failed rental transaction showed both incompetence and untrustworthiness), *aff'd sub nom. Gerard M. Campbell v. Division of Licensing Services*, 143 DOS APP 17 (2017); *Liesha T. Markland v. Division of Licensing Services*, 54 DOS APP 09 at 6-7 (2009). *See also Division of Licensing Services v. Anays Caceres*, 85 DOS 19 (2019) (retention of rental deposit for failed rental proved untrustworthiness). Indeed, she seems to have attempted to circumvent the investigation and the hold on her broker's license by seeking to renew a lesser, associate broker's license. This kind of dodge should not be rewarded.

Ms. Cumbie's self-serving denials of knowledge of what was going on in her solely-owned brokerage leave her whipsawed between two equally unattractive positions: either she is incompetent and did not know her business or she knew about and was guilty of deceptive conduct and is, therefore, untrustworthy. Either of these positions independently supports denial of her application for licensure, and if she was, as she told the DLS, initially ignorant (possibly willfully so) and then became aware of a scam in her office but knowingly failed to make any effort at restitution, her conduct militates doubly against the grant of any type of real estate broker's license.

*Breach of Fiduciary Duty*

IV -- In New York, “[I]t is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal.” *Northland E., LLC v. J.R. Militello Realty, Inc.*, 163 AD3d 1401, 1402 (4<sup>th</sup> Dep’t 2018) (citing *Dubbs v. Stribling & Assocs.*, 96 NY2d 337, 340 [2001]). “A fiduciary relationship is ‘founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another’” *Braddock v. Braddock*, 60 AD3d 84, 88-89 (1<sup>st</sup> Dep’t 2009) (citation omitted).

“As an agent for the owner, a real estate broker stands “in a position of trust and owes a duty of good faith and loyalty to his principal.” *L.A. Grant Realty, Inc. v. Cuomo*, 58 AD2d 251, 255 (4<sup>th</sup> Dep’t 1977). See also *Short Term Housing, Inc. v. Department of State*, 176 AD2d 619 (1<sup>st</sup> Dep’t 1991) (Department of State properly disciplined broker for charging tenant illegal, excessive rent and accepting commissions thereon; where corporate brokerage was aware that one of its broker-agents had demonstrated untrustworthiness and nonetheless accepted a portion of a brokerage fee, agent’s wrongdoing was properly imputed to the brokerage), *confirming Division of Licensing Services v. Short Term Housing, Inc.*, 31 DOS 90 (1990); *Goldstein v. Department of State*, 144 AD2d 463, 464 (2d Dep’t 1988) (noting broker’s fiduciary duties to principal), *confirming Division of Licensing Services v. Glen B. Goldstein*, 7 DOS 87 (1987); *Division of Licensing Services v. Pamela Mays, et al.*, 161 DOS 16 at 5 (2016) (same).

Ms. Cumbie violated her fiduciary duties as a broker. Although there is no issue here as to disclosure of dual representation to the complainants, I find that the six clients of Ms. Cumbie got a terrible run-around from Cumbie and her firm and (with only one exception, after inordinate delay) were denied their refunds, which were properly owed by her and her firm to them. Her treatment of them, either personally and directly or knowingly, through an admitted, initial failure to supervise her unlicensed and licensed salespersons, all of whom were prohibited from taking their money, was nothing short of stealing. She refused, directed and/or had actual knowledge of the refusal to refund their money, or personally delayed and refused them their money once she admittedly learned of the problem, and she retained the benefit of the deposits amounting to nearly \$10,000, including the delayed refund to Gonzalez-Jack. Her attempt to shift blame to Mr. Lewis is unavailing, because she admitted that she knew the clients were refused refunds and did nothing about it. She simply shuttered her business and left these six customers flat.

*Commingling and Appropriating Client Deposits for Personal Living Expenses*

V -- Moreover, Ms. Cumbie treated her business bank account as her own personal treasury, using the business deposits for her living and entertainment expenses. This conduct is simply unacceptable in a broker of any level, and for this additional reason, Ms. Cumbie’s renewal application must be denied.

Such commingling of personal and business funds and misappropriation of client deposits constitute an egregious violation of the regulation prohibiting such conflicts of interest and bespeak a sloppy approach to the work of the broker here at best, and an intolerable breach of the most

fundamental fiduciary obligations of this broker to her principals. Her conduct flouted the real estate broker's duty not to commingle the client's money with her own and to maintain a separate, special bank account to be used *exclusively* for the deposit of client monies, to safeguard such monies, and to prevent loss or misappropriation of funds. 19 NYCRR § 175.1. There is nothing in that regulation that countenances using a debit card on the broker's business account to support the brokers day-to-day living expenses.

The rule against commingling is as follows:

**§ 175.1 Commingling money of principal**

A real estate broker shall not commingle the money or other property of his principal with his own and shall at all times maintain a separate, special bank account to be used *exclusively* for the deposit of said monies and which deposit shall be made within three business days. Until such time as the money is deposited into a separate, special bank account, it shall be safeguarded in a secure location so as to prevent loss or misappropriation. Said monies shall not be placed in any depository, fund or investment other than a federally insured bank account. Accrued interest, if any, shall not be retained by, or for the benefit of, the broker except to the extent that it is applied to, and deducted from, earned commission, with the consent of all parties.

19 NYCRR § 175.1 (emphasis supplied). The TD Bank records show (State's Exs. 13, 16), without dispute, that Ms. Cumbie used her business account as a personal cache to be used for her living expenses and discretionary personal spending.

*The Misdeeds of the Salespersons Should be Imputed to Ms. Cumbie Both Because She Had Actual Knowledge of Their Misconduct and Retained the Deposits for the Failed Rentals. She Failed to Supervise Her Salespersons.*

VI – The Department has proved that the applicant improperly retained money received with respect to six failed real estate transactions. I need not resolve the relative credibility of Ms. Cumbie and Mr. Lewis, neither of whom appeared as witnesses at the hearing, because Cumbie admitted wrongdoing, both the failure to supervise and actual knowledge of the improperly retained deposits. Each made self-serving statements to investigators, attempting to blame the other for the retained monies and the one delayed refund that was paid only due to the doggedness of the client. I find that the efforts of neither one of them at exculpation was persuasive. Their statements were taken and memorialized in the investigation by DLS Investigator Cavota, whom I found a credible witness with no vested interest in this case. I find that Mr. Cavota conducted a professional investigation and had no reason to distort or embellish the statements he and his colleagues took down. It is axiomatic that “[h]earsay is not only admissible in an administrative proceeding, but may also constitute substantial evidence if it is sufficiently reliable and probative on the issues to be determined,” *Ayala v. Ward*, 170 AD2d 235 (1<sup>st</sup> Dep’t 1991), *leave to appeal denied*, 78 N.Y.2d 8519 (1991), and may form the sole basis for an administrative determination. *See, e.g., Matter of Heisler v Scappaticci*, 81 AD3d 954 (2d Dep’t 2011); Administrative Procedure Act § 306(1). In addition to Mr. Cavota’s testimony, the record is replete with voluminous documentary exhibits,

such as signed receipts for tenant deposits, bank statements, and Civil Court judgments against the respondent's firm, all of which corroborate the complaints.

Ms. Cumbie, as the real estate broker, was obligated to take responsibility for monies paid by prospective tenants and to supervise her salespersons. She admitted that she failed to supervise Mr. Lewis and attempted to shift the blame entirely to him. Even assuming he was at fault, she had a higher responsibility than his both to supervise him and to account for client funds. Moreover, she admitted that she did become aware that her customers were claiming refunds and did not receive them, stating without proof that she had no money to pay them, as if that were the end of the inquiry. Rather than addressing their complaints and finding a way to refund their money, and even assuming, *arguendo*, that Mr. Lewis stole the money for himself, she did nothing shown on this record to pursue remedies against him. Thus, she both failed to supervise her salespersons and actually knew of the retained refunds, yet did nothing about them. Rather, she closed up shop without a trace and left the clients with no recourse and failed to satisfy at least two judgments against her solely-owned brokerage. She told Mr. Cavota in August of 2014, that she was dissolving her business (State's Ex. 6).

Liability for any unlicensed real estate activities Ms. Cumbie's staff conducted on her behalf as demonstrated on this record should be imputed to her because she actually knew of the refund requests and nonetheless retained the deposits. *See Liesha T. Markland v. Division of Licensing Services*, 54 DOS APP 09 at 5-6 (2009). Real Property Law § 442-c provides that: "No violation of a provision of [Article 12-A of the RPL] by a real estate salesperson or employee of a real estate broker shall be deemed to be cause for the revocation or suspension of the license of the broker, unless it shall appear that the broker had actual knowledge of such violation or retains the benefits, profits or proceeds of a transaction wrongfully negotiated by his salesperson or employee after notice of the salesperson's or employee's misconduct." RPL § 442-c; *see Roberts Real Estate, Inc. v. Department of State*, 80 NY2d 116, 119-123 (1992) (actual knowledge required for revocation or suspension; remanded for consideration of lesser penalties based on demonstrated untrustworthiness or incompetency where supervisory personnel of broker and individual brokers had no actual knowledge that well water for newly constructed homes was contaminated with methane gas but employee salespeople did know). "A broker is responsible for the wrongful acts of a salesman employed by him if he has actual knowledge of such acts or retains the benefits or proceeds of a transaction wrongfully negotiated by such salesman after notice of the salesman's misconduct." *Domus Arbiter Realty Corp. v Bayrock Group LLC*, 2018 NY Slip Op 33021[U], \*5 [Sup. Ct. N.Y. Co. 2018] (citing *Diona v. Lomenzo*, 26 AD2d 473, 475 [1st Dep't 1966], and Real Property Law §442-c); *see also Matter of Razik v. Department of State Division of Licensing Services*, 60 AD3d 769, 771 (2d Dep't 2009), *leave to appeal denied*, 12 NY3d 805 (2009); *Cornell Assocs. Realty, Ltd. v. Shaffer*, 210 A.D2d 537, 540 (3d Dep't 1994), *appeal dismissed*, 85 NY2d 1021 (1995); *Trustee of the Jerome J. Nash Revocable Trust v. Harmon*, 2018 NY Slip Op 31206[U] at \*7 (Sup Ct. NY Co. 2018); *Cruiseland Real Estate Inc. v. Division of Licensing Services*, 15 DOS APP 04 (2004).

In addition, as the broker, Cumbie had an affirmative duty to supervise her salespeople. *Friedman v. Paterson*, 89 AD2d 701, 702 (3d Dept 1982) (citing 19 NYCRR 175.21), *aff'd*, 58 NY2d 727 (1982). By her own admission, she utterly failed in this duty. *Matter of Razik, supra*. Section 175.21 of the regulations provides in pertinent part:

**§ 175.21 Supervision of salesperson by broker**

(a) The supervision of a real estate salesperson by a licensed real estate broker, required by subdivision 1 (d) of section 441 [441(1)(b)] of the Real Property Law, shall consist of regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker, and all matters relating thereto.

19 NYCRR § 175.21(a). Ms. Cumbie dropped into her office, by her own account only infrequently. She did not, and on that schedule, could not have supervised Lewis and the other salespersons, many of whom she did not even bother to insist be licensed. The use of unlicensed real estate salespersons violated Real Property Law §§ 440(3) and 440-a, which provide, respectively:

“Real estate salesperson” means a person associated with a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate other than a mortgage loan as defined in section 590 of the Banking Law, or to lease or rent or offer to lease, rent or place for rent any real estate, or collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker, or who, notwithstanding any other provision of law, performs any of the above stated functions with respect to the resale of a condominium property originally sold pursuant to the provisions of the General Business Law governing real estate syndication offerings.

Real Property Law § 440(3).

**§ 440-a. License required for real estate brokers and salesmen**

No person, co-partnership, limited liability company or corporation shall engage in or follow the business or occupation of, or hold himself or itself out or act temporarily or otherwise as a real estate broker or real estate salesperson in this state without first procuring a license therefor as provided in this article.

Real Property Law § 440-a.

Ms. Cumbie’s failure to supervise her salespersons again demonstrates that she is untrustworthy and incompetent and should not be licensed as a broker. *Cruiseland Real Estate Inc. v. Division of Licensing Services*, 15 DOS APP 04 at 5 (2004).

VII -- To the extent that Ms. Cumbie claims that her salesperson took client money, his conduct in doing so patently violated section 442-a of the Real Property Law, which provides:

No real estate salesman in any place in which this article is applicable shall receive or demand compensation of any kind from any person, other than a duly licensed real estate broker with whom he associated, for any service rendered or work done

by such salesman in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate.

Real Property Law § 442-a (“Compensation of salespersons; restrictions”). *See In the Matter of the Application of Ewan Richards, Jr.*, 456 DOS 18 at 4-5 (2018) (“Because members of the public must be able to rely upon the trustworthiness of real estate professionals, the kind of knowing and deceitful conversion of a tenant’s monies for personal use by a real estate salesperson shown here must not be tolerated or repeated. The public interest must be safeguarded, according to the Real Property Law, against such sharp practices”), *aff’d sub nom. Ewan Richards, Jr. v. Division of Licensing Services*, 20 DOS APP 19 (2019).

As real estate salespersons, Lewis, Rasheem Lance, Muniz, Haynie, and others were not permitted to accept payments from prospective tenants. They were required to turn over monies received to Ms. Cumbie as the broker. Real Property Law § 442-a. It is undisputed that Lance and others in her employ were not even licensed. Ms. Cumbie utterly failed to supervise this business. She has shown herself to be both incompetent and untrustworthy in allowing such sloppy and deliberate fraudulent practices to characterize her business.

*The Unpaid Judgments Independently Demonstrate Untrustworthiness.*

VIII - “It is well-settled that the failure to pay a judgment lawfully obtained, without a showing of being financially unable to do so, is a demonstration of untrustworthiness by a real estate broker.” *Gerard M. Campbell v. Division of Licensing Services*, 143 DOS APP 17 at 2 (2017), citing *Feldman v. Department of State*, 81 AD2d 553 (1<sup>st</sup> Dep’t 1981); *Scott M. Pasquariello v. Division of Licensing Services*, 33 DOS APP 10 (2010). As noted in *Campbell*:

The willful nonpayment of money judgments, where the judgment debtor is able to pay and does not manifest opposition to the validity of the judgment by taking an appeal, adversely affects the public interest in that the frustration of creditors’ efforts to collect on their judgments undermines the efficacy of money judgments as tools of justice in general, and such a deliberate failure to provide payment due serves as an indicium of untrustworthiness with regard to the judgment debtor.

*Campbell* at 2, quoting *Pasquariello* at 4. *See also Gerard Pallotta v. Division of Licensing Services*, 52 DOS APP 16 at 3 (2016) (same).

I find sufficient evidence in this record to support the proposition that as sole owner of City Flats, LLC d/b/a Alotta Apartments, Ms. Cumbie, who benefitted from the deposits of cash and checks made payable by the six complainants to her personally, and who used the corporate bank account as her own personal account, is responsible for the judgments in the two Civil Court matters styled as against Alotta Apartments as the named defendant. *Cf. Cornell Assocs. Realty, Ltd. v. Shaffer*, 210 AD2d 537, 540 (3d Dep’t 1994) (insufficient facts to pierce the corporate veil where brokerage had multiple owners and principals could not be shown to have actual knowledge of improper retention of client deposits), *appeal dismissed*, 85 NY2d 1021 (1995). Even assuming that the plaintiffs in Civil Court would have the burden to pierce the corporate veil in a separate proceedings, I find sufficient evidence here, including her

admission that she did learn of the retention of the rent deposits, to conclude that Ms. Cumbie herself is responsible for bilking these clients and to that extent does not merit a broker's license.

In view of the forgoing, I find that the complainant established by substantial evidence that the applicant improperly and unlawfully retained nearly \$10,000 in total from six prospective tenants (about \$8,300 after she grudgingly repaid Ms. Gonzalez-Jack). The charges that she improperly retained the money, failed to supervise her real estate salespersons, many of whom were not even licensed, failed to satisfy two Civil Court judgments, commingled client funds with her own, and, worse, used their money to fund her personal living and entertainment expenses, are sustained in full.

It is important to note that the burden of proof is on the applicant, and Ms. Cumbie, having defaulted, has completely failed to sustain her burden of proving that she is entitled to an associate real estate broker's license.

The record of illegality amassed here is so troubling that I recommend that the Department consider referring this matter to the relevant District Attorney's Office for whatever action that Office may deem appropriate, if such action is still timely and the Department has not already done so. At a minimum, no new licenses should be issued to Ms. Cumbie unless and until she proves in a form satisfactory to the Department that she has refunded in full all monies she still owes to the complainants herein and satisfies the two outstanding civil judgments in full, plus interest at the legal rate for judgments with respect to each refund and each judgment. *See Division of Licensing Services v. Arihay Leon Kaikov*, 313 DOS 12 (2012); *Matter of Application of Daniel Reyes*, 43 DOS 14 (2014).

### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** the application for renewal of Malika Cumbie's license as an associate real estate broker, UID No. 10301211395, is denied. Should Ms. Cumbie ever apply for any other license regulated by the Department of State, no action shall be taken on any new application until she refunds in full all the complainants' outstanding deposits still owed as detailed in the chart at ¶ 5 above, and fully satisfies the two outstanding Civil Court judgments, plus interest at the legal rate for judgments, currently 9%, pursuant to CPLR § 5004, with respect to each refund and each judgment, produces proof of all such refunds and payments to the satisfaction of the Department of State, and otherwise shows to the Department's satisfaction that she should be granted a new license notwithstanding the history of serious misconduct shown here.

/S/

Joan R. Salzman  
Administrative Law Judge

Dated: March 4, 2019