

FILED

SEP 24 2021

DEPT. OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE

By *al silva*

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of:)	DRE No. H-41848 LA
)	
LUIS ALBERTO ARAYA,)	OAH No. 2021020229
)	
Respondent.)	

DECISION

The Proposed Decision dated August 2, 2021, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted broker license is granted to Respondent.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

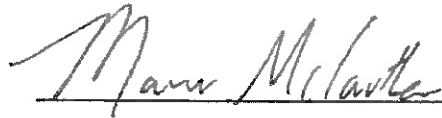
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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on OCT 14 2021.

IT IS SO ORDERED SEP 20 2021

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER



**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

LUIS ALBERTO ARAYA,

Respondent.

Case No. H-41848 LA

OAH No. 2021020229

PROPOSED DECISION

Thomas Y. Lucero, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by videoconference on June 24, 2021.

Judith B. Vasan, Staff Counsel, represented complainant, Veronica Kilpatrick. The ALJ took official notice that complainant is a Supervising Special Investigator who, in executing the accusation, was acting in her official capacity on behalf of the Department of Real Estate (DRE). Luis Alberto Araya, respondent, represented himself.

The record was held open until June 29, 2021, for respondent's submission of three character reference letters, and until July 2, 2021, for response by complainant. Respondent timely submitted three character reference letters, which were marked for identification collectively as Exhibit I. Complainant's objection, that the letters are hearsay and lack foundation, was marked for identification as Exhibit 9. The objections

are overruled and Exhibit I was admitted under Government Code section 11513, subdivision (d), as administrative hearsay.

Testimony and documents were received in evidence during the hearing. The record was closed and the matter was submitted for decision on July 2, 2021.

STATEMENT OF THE CASE

Respondent, a broker with an individual Mortgage Loan Originator's license endorsement (MLO endorsement), was faced in 2016 with an onslaught of difficulties, financial and personal. To help meet them, respondent borrowed from a former client, Rodney Hopkins, the loan secured by a note and deed of trust encumbering property belonging to another of respondent's clients. As Mr. Hopkins complained to DRE, respondent collected interest owing under the deed of trust, but kept the money for himself. In 2017, respondent gave Mr. Hopkins a bank draft in repayment, but it was drawn on an account with insufficient funds. The client then obtained a judgment, which respondent has not satisfied, offering instead to compromise, which Mr. Hopkins has rejected.

ISSUES

1. Whether respondent acted honestly, fairly, efficiently, and in accordance with the laws governing the real estate profession, or did he act, rather, in a way justifying discipline of his license and MLO endorsement, based on his giving as repayment to Mr. Hopkins a draft on an account with insufficient funds.
2. Whether respondent's non-payment of Mr. Hopkins's judgment constitutes conduct for which DRE should impose discipline.

3. If discipline is appropriate, what degree is appropriate in the circumstances, given especially respondent's financial straits and personal problems.

SUMMARY OF DECISION

Respondent's using a draft NSF (not sufficient funds) was dishonest and merits discipline of his license and MLO endorsement. Respondent's failure to repay debt was not shown to be unlawful or a type of misconduct. Respondent has had many personal and financial difficulties but though they have been severe and long lasting, they do little to mitigate his wrongful conduct. Restrictions on respondent's license and MLO endorsement are appropriate for the protection of the public.

FINDINGS OF FACT

1. With a December 21, 2020 Notice of Defense on Accusation, respondent timely sought a hearing in response to the accusation, which DRE served on December 9, 2020.

Licensure

2. As set out in the License History Certification, Exhibit 2:
 - A. DRE first issued respondent a salesperson's license on December 6, 1991 and a broker's license, number B/01126066, on December 28, 1995. The broker's license is set to expire on January 13, 2024.

B. On January 11, 2015, DRE approved an individual Mortgage Loan Originator's (MLO) license endorsement, which expired on January 1, 2019 and was approved again on April 10, 2019.

C. Following a July 27, 1993 formal administrative filing, case number H-25470 LA, DRE ordered respondent's salesperson's license suspended for 30 days, the order stayed however for one year and released on January 19, 1994.

D. From November 30, 1995 to October 1, 2017, DRE licensed respondent as Officer of J S T Development Corporation (JST), license number C/01166965.

3. JST's license, number C/01166965, expired on October 1, 2017, as shown in Exhibit 3, a copy of information from DRE's website.

4. Consumer access information in Exhibit 4 from the NMLS (the National Multi-State Licensing System and Registry) shows that since June 2017, respondent has been authorized to represent Option Funding, Inc., a mortgage loan originator located in Westlake Village, California.

Respondent's Statement to DRE

5. In an undated letter, Exhibit B, respondent provided DRE "the history of my association with Rodney Hopkins," respondent's former client. Respondent's testimony at the hearing was consistent with his statement to DRE, as set out below.

A. Mr. Hopkins refinanced his personal residence several times with respondent's assistance.

B. In 2008, respondent lent Mr. Hopkins \$125,000, secured by a deed of trust. Mr. Hopkins repaid the loan as agreed.

C. Years later, respondent suffered through: (i) rancorous dissolution proceedings that ended his 26-year marriage, one result of which was respondent's quitclaiming the family home to his ex-wife in 2018; (ii) respondent's paying defense costs in the criminal prosecution of his adult daughter, who was in bad health, owing to her addiction to illegal drugs; (iii) respondent's own illness, for which he was taking medication to prevent heart attacks and stroke; and (iv) business volume at JST so low that respondent could no longer cover the lease and was forced to surrender his business premises.

D. In need of funds, in February 2016, respondent turned to Mr. Hopkins, who agreed to lend \$20,000, as stated above in Mr. Hopkins's complaint to DRE. Respondent gave Mr. Hopkins a promissory note for \$25,000 to be repaid in installments and secured by JST's assignment of a \$25,000 interest in the Esquivel deed of trust.

E. Repaid \$10,000, Mr. Hopkins agreed to respondent's request to lend the \$10,000 back, as respondent's business continued to struggle and he continued in need of income.

F. Respondent was unable to pay back the loan timely. Following Mr. Hopkins's requests for repayment, respondent wrote him a March 5, 2017 bank draft, Exhibit 5, page DRE 010, for \$30,456. The bank returned the draft NSF. Respondent asserted at the hearing that he was not in his right mind when he gave the draft to Mr. Hopkins, owing to his bad health at the time and the drug regimen he was on.

Litigation Against JST

6. On August 16, 2017, Mr. Hopkins filed a complaint, Exhibit 6, in the Superior Court of California, County of Los Angeles (LASC), case number LC106082, alleging breach of contract and fraud against defendants JST and respondent. As no defendant appeared for the bench trial, the court rendered judgment for \$35,043 in Mr. Hopkins's favor, as set out below.

Mr. Hopkins's Complaint to DRE

7. On January 22, 2019, DRE received the Licensing/Subdivider Complaint, Exhibit 5, filed by Mr. Hopkins against JST.

A. Mr. Hopkins wrote and certified under penalty of perjury, as set out in Exhibit 5, page DRE 003:

I invested \$20,000 into a 2nd loan which was to pay out \$25K with Luis Araya. We had been friends and mortgage acquaintances for 16 yrs. He had financed/refinanced my homes on several occasions. When it came time for me to receive payment, he started giving me excuses as to why he couldn't repay me. After 6 months of excuses he finally gave me a check for monies owed plus interest. Unfortunately the check for \$30,456 came back NSF. . . . I took him to court . . . and was awarded a judgment of \$35,043 (with interest).

I have yet to receive the awarded judgment.

Mr. Hopkins goes on to accuse respondent of fraud against him and others:

I've come to find out the 2nd Deed I invested in was "sold" to two other people. I owned 50%, Larry George invested 30% and owned 60% and Deborah Sellers invest[ed] \$25,000 and owned 50%. Luis Araya sold 160% of a note worth \$50,000 – clear fraud!!!

B. Among evidence included in the complaint to DRE is the judgment, Exhibit 5, page DRE 014 to DRE 015, filed on August 9, 2018 in LASC case number LC106082, against respondent and JST for \$35,043.

C. Also included with the complaint to DRE was a Preliminary Report regarding title (Preliminary Title Report) by Stewart Title, Exhibit 5, pages DRE 019 to DRE 022. According to the Preliminary Title Report, Exhibit 5, page DRE 022:

i. JST assigned a 50 percent beneficial interest in a deed of trust encumbering real property in Woodland Hills, California, owned by Rudy Esquivel (the Esquivel property) in the amount of \$50,000 (the Esquivel deed of trust). The 50 percent interest in the Esquivel deed of trust, that is, a \$25,000 interest, was assigned to Deborah Sellers and recorded on April 23, 2014,

ii. JST assigned the remaining 50 percent interest in the Esquivel deed of trust, a \$25,000 beneficial interest, to Mr. Hopkins, which was recorded on February 11, 2016.

iii. JST attempted to assign a 60 percent interest in the Esquivel deed of trust to Larry P. George, recording the purported assignment on April 19, 2016. The Preliminary Title Report states that the purported assignment was executed by "a person that was not the record holder of the beneficial interest."

Respondent's Evidence

8. Respondent was unapologetic, maintaining that he has been unable to repay Mr. Hopkins but fully intends to do so, as his financial and business prospects improve. Respondent pointed out that he has offered to settle with Mr. Hopkins. An example is an April 27, 2021 email to Mr. Hopkins, the last page of Exhibit A, which proposed a payment of \$5,000 within two weeks followed by installment payments for four years for a total with interest of \$25,000.

9. Respondent convincingly testified that he has been unable to offer Mr. Hopkins more. For approximately two years, respondent was not working at all. He was instead forced to attend to his own health. He was also spending all he had to help his daughter, who eventually stopped taking drugs, avoided a criminal conviction, and is doing well, raising a son. Currently respondent works approximately two hours per day, as much as he is able to handle in light of the health and financial challenges he is still working to overcome.

10. Exhibit A has respondent's handwritten notes, which characterize Mr. Hopkins as intent on revenge and ill intent. Respondent testified similarly at the hearing. Far from intending to mislead or cheat Mr. Hopkins, respondent believes he treated Mr. Hopkins fairly in trying to pay him back despite his financial straits. Respondent believes, moreover, that Mr. Hopkins always had self-help available to him, such as by foreclosing on the Esquivel deed of trust.

11. There are several testimonials in Exhibit F to respondent's expertise and good work as a broker from clients he served before his life was thrown into turmoil in 2016. Character reference letters in Exhibit I are from June 2021. They show that

respondent has maintained up to the present a very good reputation among grateful clients for honesty and professionalism.

12. Respondent has volunteered time and effort to Habitat for Humanity and the Los Angeles Mission. At one point before 2016 he traveled to South America to do charitable work there.

13. Respondent credibly testified to the care he took to operate a brokerage that operated for decades efficiently and within the law. Thus JST had an extensive written Quality Control Plan, Exhibit G, which respondent distributed to JST's employees, whom he monitored for compliance.

Costs

14. DRE incurred reasonable costs totaling \$3,368.20: (i) \$2,254.60 for investigation, as set out in Exhibit 7, plus (ii) \$1,113.60 for enforcement, as set out in Exhibit 8.

PRINCIPLES OF LAW

1. The burden of proof is on DRE, which must demonstrate by "clear and convincing proof to a reasonable certainty" that discipline of respondent's broker's license is warranted. (*Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Medical Board of Quality Assurance* (1982) 135 Cal.App.3d 853, 855.)

2. Business and Professions Code section 10166.05 provides in part:

Notwithstanding any other provision of law, the commissioner shall not issue a license endorsement to act

as a mortgage loan originator to an applicant unless the commissioner makes all of the following findings:

[1] . . . [1]

(c) The applicant has demonstrated such financial responsibility, character, and general fitness as to command the confidence of the community and warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of the article.

3. Business and Professions Code section 10166.051 provides in part:

In addition to any penalties authorized by regulations adopted pursuant to Section 10166.15, the commissioner may do one or more of the following, after appropriate notice and opportunity for hearing: [1] . . . [1]

(b) Deny, suspend, revoke, [or] condition. . . a mortgage loan originator license endorsement, if an . . . endorsement holder fails at any time to meet the requirements of Section 10166.05

4. Business and Professions Code section 10177 provides in part:

The commissioner may suspend or revoke the license of a real estate licensee . . . who . . . has done any of the following: [1] . . . [1]

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2. [1] . . . [1]

(g) Demonstrated negligence or incompetence in performing an act for which the . . . person is required to hold a license.

ANALYSIS

1. Respondent's evidence of financial hardship and personal adversity was quite convincing. For some years, beginning as early as 2016, respondent has faced extraordinary challenges such as were likely severely to disrupt, if not destroy, the ability to generate income or continue in business.

The NSF Draft

2. But difficulties such as respondent has faced, however hard and unrelenting, do not excuse or mitigate financial misconduct. Respondent gave his creditor, Mr. Hopkins, an NSF draft. If respondent was unable to repay Mr. Hopkins, he should have admitted as much. His issuing an NSF draft is not an honest admission and must rather be considered a dishonest attempt to delay a financial reckoning.

3. Respondent's testimony to facts was for the most part credible. His testimony regarding the NSF check is an exception. It is not credible that the draft was collateral or merely a signal that respondent intended to repay Mr. Hopkins later.

4. Respondent was for the most part credible. Respondent's manner in testifying, the tone of his voice, the eager pace at which he testified, his emphatic expressions, especially in describing Mr. Hopkins and Mr. Hopkins's conduct, reflected, however, resentment or negative emotions toward Mr. Hopkins, which diminished the reliability of respondent's testimony.

5. As a result of the misconduct in providing an NSF draft, respondent failed to demonstrate such financial responsibility, character, and general fitness as to command the confidence of the community and warrant a determination that, as a mortgage loan originator, respondent would operate honestly, fairly, and efficiently.

6. Cause exists to discipline respondent's MLO endorsement under Business and Professions Code sections 10166.05, subdivision (c), and 10166.051, subdivision (b).

The Unsatisfied Judgment

7. The evidence did not show that respondent's failure to satisfy the judgment against him and in Mr. Hopkins's favor is misconduct of some kind. In borrowing money, respondent was not acting as Mr. Hopkins's broker or agent. Mr. Hopkins was not respondent's client at the time. He was merely a former client. Mr. Hopkins's judgment against respondent was not based on an obligation of that respondent had under the Business and Professions Code.

8. There was, moreover, no indication that respondent was able to borrow money because he was using his licensure in some way to be able to do so. There was likewise no indication that respondent was using his licensure in some way to avoid repayment. The Business and Professions Code sections cited in the accusation do not apply either to respondent's borrowing money or to his failure to repay the money and are not grounds for discipline.

9. Respondent's evidence indicates that he was and continues to be unable to repay Mr. Hopkins in full. Respondent is not ignoring or refusing to acknowledge the obligation to satisfy the judgment. Thus respondent, post-judgment, offered Mr. Hopkins a compromise. Mr. Hopkins refused it. The evidence did not establish that the compromise offered was unfair, such as because respondent was using his status as a licensed broker, or using his MLO endorsement, to impose an unfair compromise on Mr. Hopkins. The evidence indicates instead that respondent does not have the means to pay the judgment in full.

10. Cause does not exist for discipline of respondent's MLO endorsement or license under Business and Professions Code section 10177. Respondent's failure to satisfy Mr. Hopkins's judgment does not constitute, under subdivision (d), willful disregard or violation of the Real Estate Law, and likewise does not, under subdivision (g), demonstrate negligence or incompetence in performing an act for which respondent was required to hold a license. It is not a violation of law or negligence or incompetence to be overstretched financially and unable to repay a debt.

11. Respondent's situation would be different if the debt to Mr. Hopkins was the result of a real estate transaction for which licensure was required. If for instance respondent was acting as Mr. Hopkins's agent for the purchase of real property, and

held Mr. Hopkins's funds meant to be paid to close the transaction, then respondent's license would be implicated. Such is not the case here.

12. The evidence did not establish that respondent was engaged in fraud or dishonesty, such as by respondent's assigning interests held by JST in the Esquivel deed of trust. Respondent's testimony that he intended to assign 50 percent to both Mr. George and Mr. Hopkins is believable. The assigned 60 percent interest that appears in the Preliminary Title Report was mistaken, not dishonest. The mistake may be considered negligence or incompetence, but not such as supplies grounds for license discipline. The mistake appears to be rather in the nature of a typographical error, which was not shown to have caused any significant adverse consequences to any of respondent's clients. The accusation DRE filed, moreover, is vague on how respondent's conduct may be considered matter for discipline, under either subdivision (d) or (g) of Business and Professions Code section 10177. It was not established that respondent violated this Code section or other laws to which the Code section refers in general.

Mitigation and Related Matters

13. In mitigation of respondent's misconduct, he attempted to negotiate with Mr. Hopkins, so that respondent might satisfy the judgment, even if only by compromise, over time or in some fashion that Mr. Hopkins would accept. Negotiation failed, but the evidence did not show that that was because respondent was negotiating in bad faith or acting otherwise unreasonably.

14. A judgment debtor like Mr. Hopkins has the right to insist on satisfaction of judgment in full and without compromise, and has no obligation to engage in negotiations with a judgment debtor. But so too respondent was within his rights,

being unable to satisfy the judgment, to leave it unpaid. By negotiation, respondent attempted to meet his obligation in some sort and to avoid misconduct (which however he committed when he sent the NSF draft, as noted above).

15. Respondent did not put himself in a position to be unable to satisfy the Mr. Hopkins's judgment.

16. To respondent's credit, he has had a long career in the real estate profession with no prior discipline. There was no evidence that any client of respondent's, other than Mr. Hopkins, has been displeased or harmed by respondent's actions or inaction. The character reference letters that respondent presented show that he holds the esteem of several clients willing to vouch for his competence in real estate matters and good service on their behalf.

17. Nonetheless, respondent's licensure should be restricted, for the protection of the public, in light of the misconduct described above.

Costs

18. Under Business and Professions Code section 10106, costs are to be paid by respondent. Due process requires, however, that an order regarding costs must be "tailored . . . to "the capacities and circumstances of those who are to be heard," [citation] to insure that they are given a meaningful opportunity to present their case." (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 46, citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 349.) As respondent has had difficulty repaying debt and satisfying a judgment, an order for payment of all costs would make his financial difficulties worse, to the detriment of due process. Payment of half the costs in installments is warranted.

CONCLUSIONS OF LAW

1. Respondent acted dishonestly in giving Mr. Hopkins a draft on an account with insufficient funds. In this way respondent delayed Mr. Hopkins's efforts to be repaid. Discipline of respondent broker license and MLO endorsement should be imposed for this misconduct.

2. The evidence did not support discipline of respondent's licensure based on his failure to satisfy Mr. Hopkins's judgment. Respondent has been unable to pay Mr. Hopkins owing to many circumstances, none of them grounds for discipline.

3. Respondent expressed no remorse for misconduct. Circumstances, respondent's many personal and financial difficulties, explain to some extent why he acted as he did, but do not excuse or significantly mitigate his misconduct. Respondent's licensure should be restricted for four years.

ORDER

All licenses and licensing rights of respondent Luis Alberto Araya under the Real Estate Law, specifically his broker license and Mortgage Loan Originator endorsement, are revoked; provided, however, a restricted real estate broker license and Mortgage Loan Originator endorsement shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted license and endorsement within 90 days from the effective date of this Decision. The restricted license and endorsement issued to respondent shall be subject to all of the provisions of Business and Professions Code section 10156.7 and to the following limitations,

conditions, and restrictions imposed under authority of Business and Professions Code section 10156.6:

1. The restricted license and Mortgage Loan Originator endorsement issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

2. The restricted license and Mortgage Loan Originator endorsement issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner, or conditions attaching to the restricted license.

3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license and Mortgage Loan Originator endorsement nor for the removal of any of the conditions, limitations, or restrictions of a restricted license and endorsement until four years have elapsed from the effective date of this Decision.

4. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license and Mortgage Loan Originator endorsement until respondent

presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

5. Respondent shall pay the Commissioner a total of \$1,684.10 in reimbursement of enforcement and investigation costs. Respondent shall pay such reimbursement in installments and on such terms as the Commissioner may determine, with due regard for respondent's financial resources.

6. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department, including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

DATE: 08/02/2021

Thomas Lucero

THOMAS LUCERO

Administrative Law Judge

Office of Administrative Hearings