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FILED

MAY 10 2013

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

BY: 

* * * * *

In the Matter of the Order to)	No. H-38493 LA
Desist and Refrain to:)	
)	OAH No. 2012120646
DAVID L. RISOFF)	
)	
_____)	


DECISION

The Proposed Decision dated April 30, 2013, 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.

This Decision shall become effective at 12
o'clock
noon on MAY 30 2013

IT IS SO ORDERED 5/9/2013

Real Estate Commissioner


Wayne S. Bell

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Order to Desist & Refrain
Involving:

DAVID L. RISOFF

Respondent.

Case No. H-38493 LA

OAH No. 2012120646

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 12, 2013, in San Diego, California.

James R. Peel, Counsel, represented Wayne S. Bell, Chief Counsel, who filed the Order to Desist and Refrain (No. H-38493 LA) with the Department of Real Estate, State of California.

Respondent David L. Risoff represented himself and he was present throughout the administrative proceeding.

The matter was submitted on April 12, 2013.

SUMMARY

On February 4, 2009, David L. Risoff met with Bruce and Jill, who owned a home in Temecula. Mr. Risoff told them that he held a real estate license and that he was experienced in the area of loan modifications. Mr. Risoff provided many documents to Bruce and Jill, who signed those documents at his request. Mr. Risoff received a check in the amount of \$1,200, from Jill, which was an advance fee for services in helping Bruce and Jill obtain a loan modification.

Mr. Risoff did not hold a real estate broker's license at the time and he did not notify his real estate broker of the transaction. He deposited the \$1,200 check into his personal account. He later claimed that the check was given for construction services he provided to Bruce's employer, and not for services he provided in connection with a loan modification.

A preponderance of the evidence supports the issuance of the desist and refrain order.

FACTUAL FINDINGS

Jurisdictional Matters

1. On October 18, 2012, an Order to Desist and Refrain (the order) was signed by Wayne S. Bell, Chief Counsel, Department of Real Estate, State of California (the Department), on behalf of the Real Estate Commissioner.

The order alleged that respondent David L. Risoff (Mr. Risoff or respondent) engaged loan modification and advance fee activities that required a real estate broker's license, that Mr. Risoff was not licensed as a real estate broker, that Mr. Risoff was not acting on behalf of a licensed real estate broker, and that Mr. Risoff accepted compensation from a person other than a broker for loan modification services he was providing. The order directed Mr. Risoff to immediately desist and refrain from performing any acts for which a real estate broker's license was required, including the claiming of fees and advance fees for certain loan modification activities.

The order was served on Mr. Risoff, who timely appealed and requested a hearing. Mr. Risoff waived the statutory time in which a hearing was required and, when the Department did not set an early hearing upon his request, Mr. Risoff filed motions to quash and dismiss the order.

Mr. Risoff's motions were treated by the Office of Administrative Hearings (OAH) as a motion to advance the hearing date. An order was issued that advanced the hearing date in this matter to April 12, 2013, with the hearing to be conducted at OAH's San Diego Regional Office. The Department and Mr. Risoff were served with a copy of the Order Advancing the Hearing Date.

On April 12, 2013, all matters were consolidated for hearing and the administrative record was opened; jurisdictional documents were presented; sworn testimony was received; documentary evidence was produced closing arguments were given; the record was closed; and the matter was submitted.

License History

2. The Department issued Real Estate Salesperson License No. S/01154134 to David Risoff on February 10, 1993. Since that license was issued, Mr. Risoff was employed by Villarino Financial, Inc. from May 2005 through January 2007, by La Mesa Partners, Inc. from January 2007 through May 2009, by TD Holdings I, Inc. from May 2010 through June 2012, and by Pickford Real Estate, Inc. after June 2012. Mr. Risoff's real estate license expires on May 10, 2013.

No formal disciplinary action has been brought against his real estate salesperson's license. The desist and refrain order was filed on October 18, 2012, and the appeal from that order is the subject of this administrative proceeding.

3. The Department has never licensed Mr. Risoff as a real estate broker.

Mr. Risoff's Background, Education, Training and Experience

4. Mr. Risoff is 47 years old. He was born in Chicago, Illinois. He graduated from Main West High School in 1984. After graduating from high school, Mr. Risoff moved to San Diego where he worked in the construction industry and a framer and finish carpenter.

Mr. Risoff continues to work in the construction industry, and he currently serves as the Vice President and Chief Financial Officer of HKR Construction Services. In addition, to his responsibilities with HKR Construction Services, Mr. Risoff holds a Classification B (General Contractor) License that authorizes him to do business under the namestyle D L Risoff Const. That general contractor's license was issued by the Contractors' State License Board on July 26, 2007.

Mr. Risoff holds an associate's degree in Electronics Technology from ITT Technical Institute that was granted in 1992 and a bachelor's degree in Business Administration from the University of Phoenix that was granted in 2010. Mr. Risoff is currently attending San Marcos State University, where he is seeking a master's degree in Project Management. Mr. Risoff expressed a desire to attend law school and obtain a juris doctorate after completing his master's degree.

5. Mr. Risoff became licensed as a real estate salesperson in 1993. Before his employment with Villarino Financial, Inc., Mr. Risoff was an agent with Coldwell Banker, Century 21, and Prudential. Mr. Risoff was engaged primarily in the sale of residential real property, and was a leading salesperson with his brokerages, sometimes selling upwards of \$8 million in properties per year.

Mr. Risoff was a manager and engaged in real estate sales and loans during his employment with Villarino Financial, Inc. for approximately two years. He then became associated with La Mesa Partners, Inc., doing business as Keller Williams Realty in La Mesa, California, for approximately three years, where he specialized in residential sales including the sale of lender owned (REO) properties.¹ Mr. Risoff often worked out of his home in Escondido, California, where he maintained a branch office known as Ranch & Beach by Keller Williams.

6. Mr. Risoff estimated that he participated in approximately 200 loan modifications during his association with Keller Williams. Mr. Risoff testified that he

¹ Chuck Sackett was the broker of record for La Mesa Partners, Inc. from September 2006 until his retirement in October 2012. He was Mr. Risoff's employing broker. Robert Smith became La Mesa Partners, Inc.'s broker of record following Mr. Sackett's retirement.

created and modified various documents to assist his clients and the lenders in the loan modification process.

The Jill and Bruce Z Transaction

7. Jill and Bruce Z owned a single family residence in Temecula, California, that they purchased in 2007. Jill worked for a school district. Bruce was a manager of T D Tile, a tile installation company. It was through Bruce's employment that Bruce and Jill came into contact with Mr. Risoff.

8. In January 2009, Jill and Bruce were concerned about Bruce's income continuing and whether they could continue to pay their mortgage. They wanted to modify their home loan with Wells Fargo Bank. Bruce learned that Mr. Risoff provided loan modification services as a result of Bruce overhearing a conversation Mr. Risoff had with another individual at a construction site. Bruce asked Mr. Risoff if he would help Bruce and Jill obtain a home loan modification. Mr. Risoff agreed to meet with Bruce and Jill at their Temecula home.

9. On February 4, 2009, Mr. Risoff met with Bruce and Jill. He told them that he held a real estate license and was experienced in the area of loan modifications. Mr. Risoff provided many documents to Bruce and Jill which he asked them to sign. These documents included: a "deed in lieu, loan modification, and/or short sale application"²; a short addendum³; a disclosure form regarding real estate agency relationship required under the Civil Code bearing the handwriting "RE Loan #0171644933"; and a residential listing agreement "for the purpose of loan modification only."

10. Mr. Risoff told Bruce and Jill during his presentation that they were "perfect candidates" for a loan modification. Bruce and Jill, who were not experienced in the sale and financing of real property, trusted Mr. Risoff and signed the documents he presented to them based upon Mr. Risoff's professed expertise and representations.

² The upper left hand corner of the document stated "Ranch & Beach by Keller Williams" and set forth Mr. Risoff's home address. The document stated, "There are no guarantees the bank will accept or allow any of the above." The document contained a hold harmless agreement in favor of Mr. Risoff and Keller Williams, and provided that "Ranch & Beach requires the following processing fee of \$ 0 in the event the home is sold and full commission is paid to Mr. David L. Risoff . . . Ranch & Beach will return the processing fee . . ."

³ The addendum contained a provision that there was no assurance of lender approval and a recommendation that the seller seek advice from an attorney, CPA or other expert regarding the potential consequences of a short-sale.

11. Mr. Risoff told Bruce and Jill that he was not entitled to charge an advance fee for his services, but he was able to accept a "gift." Jill provided Mr. Risoff with a check drawn on Bruce and Jill's checking account, check no. 8839, dated 2-4-09, that was payable to David Risoff in the amount of \$1,200. Jill did not complete the left lower portion of the check after the word "Memo." That area was blank when she delivered the check to Mr. Risoff. The \$1,200 check was an advance fee to Mr. Risoff for his assistance in providing Bruce and Jill with loan modification services.

12. After Bruce and Jill provided check no. 88309 to Mr. Risoff, and before he deposited it in his account, the number 45020119 was entered into the "Memo" area of the check. Neither Bruce nor Jill wrote that number.

13. Mr. Risoff deposited the \$1,200 check into his account. The \$1,200 check was provided for no reason other than to compensate Mr. Risoff for his services related to seeking a loan modification for Bruce and Jill's property.

14. Jill learned that an 82 page application for a loan modification had been filed with Wells Fargo Bank. Jill remained in touch with Mr. Risoff concerning the application for the loan modification, and when she had questions about its status, Mr. Risoff told her "call your bank." In response to Jill's request, Mr. Risoff provided Jill with 57 pages of the 82 page application. When Bruce and Jill reviewed the loan application documents provided to them, they were somewhat confused because of a one year listing agreement and the short sale agreement.

In June 2009, Jill emailed Wells Fargo Bank and advised that Bruce was no longer being paid by his employer. In July 2009, Wells Fargo Bank notified Jill that the application for a loan modification had been denied due to a lack of hardship. Jill contacted Mr. Risoff, who told Jill "to contact Freddie Mac. In July 2009, Jill terminated Mr. Risoff's services and requested him to refund the \$1,200 loan modification fee provided in February 2009. Mr. Risoff refused.

15. Robert Smith became Keller Williams' broker of record in October 2010. The Department subpoenaed Mr. Smith and requested him to produce documentation relating to Mr. Risoff's relationship with Keller Williams and, more specifically, whether Mr. Risoff provided loan modification services on Keller Williams' behalf.

Mr. Smith testified that he reviewed Keller Williams' records and could not determine whether Mr. Risoff provided loan modification services on Keller Williams' behalf. Mr. Smith found nothing in Keller Williams' records that related to services being provided for Bruce and Jill and nothing that related to Bruce and Jill's home in Temecula. Mr. Smith had no personal knowledge that Mr. Risoff provided loan modification services on Keller Williams' behalf.

16. Chuck Sackett had known Mr. Risoff for many years. They had worked together at Coldwell Banker, Prudential and at La Mesa Partners, Inc. where Mr. Sackett was

broker of record from September 2006 until his retirement in October 2012. Mr. Sackett never spoke with Mr. Risoff about the loan modification related to Bruce and Jill's home and was unaware of it. Mr. Sackett testified that if a fee was collected for loan modification services, that fee had to be deposited into the broker's account.

Respondent's Evidence

17. Mr. Sackett testified that he considered Mr. Risoff to be an honest, competent and trustworthy real estate licensee. To Mr. Sackett's knowledge, it was Mr. Risoff's practice to contact Mr. Sackett whenever Mr. Risoff was having difficulty with a transaction.

18. Mr. Sackett signed a declaration that stated in part:

Mr. Risoff has always shown genuine care for his clientele in both real estate and construction business and has a drive for higher education. Since the mid 90's Mr. David L Risoff's business model has focused on working the Notice of Defaults. Over the years complaints against from clients have been few . . . At no time was he allowed, or do I believe he would attempt to collect fees from a homeowner for a loan modification.

19. Respondent pointed out some of the language set for in the various agreements he had Bruce and Jill sign, and he observed that they never sought mediation and did not hire an attorney, CPA or other expert to assist them in the loan modification process. Respondent produced a declaration that Mr. Sackett signed.

20. Respondent produced an invoice for proposal #45020119 for the Sheehan/Lo residence in Escondido on the letterhead of D.L. Risoff Const. The identification number on that proposal was the same number that appeared in the "Memo" section of the check provided by Bruce and Jill to Mr. Risoff for services related to the loan modification, and the amount of the proposal was the same as the amount of the check provided by Bruce and Jill. The project scope set forth in the proposal included replacing and refinishing certain tile work, furnishing stucco repairs, and furnishing and applying exterior paint to flashing. The proposal totaled \$1,200. The proposal indicated, "Subject is a back charge requiring approval of TD Tile and AmeriConstruction Inc.," and provided that payment was due upon completion and release. The proposal included the signatures of representatives of AmeriConstruction Inc and TD Tile. Mr. Risoff signed and dated the document 1/10/2009.

21. Mr. Risoff claimed that Bruce and Jill gave him the \$1,200 check in payment of TD Tile's obligation under proposal #45020119 and that the check was not provided as an advance fee for a loan modification. Mr. Risoff claimed he did not put the number 45020119 in the "Memo" section of the check. This testimony was not as convincing as the evidence to the contrary.

22. Bruce testified that he would, from time to time, purchase supplies for T D Tile with his credit card, and that T D Tile would reimburse him for those purchases. Bruce never purchased supplies or services for T D Tile with a check. Bruce did not have access to the proposal from D L Risoff Const and would not have known the proposal number. Bruce and Jill were very clear – check no. 88309 was not written to extinguish any obligation T D Tile may have had to D L Risoff Const; rather, that check was written to compensate Mr. Risoff in advance for his loan modification services. The testimony was credibly given and was not impeached.

23. Mr. Risoff said that when he asked T D Tile for payment of his construction services, he was told to “go see Bruce.” He said he made one trip to Bruce and Jill’s home in Temecula, and that trip was both for the purpose of obtaining payment for construction services and to discuss with them the loan modification process and how he might be of assistance.

24. Mr. Risoff said the name “Ranch & Beach” appearing on some of the documents he provided to Bruce and Jill was a fictitious name he registered and that was the name he used in connection with his real estate business operated through Keller Williams. Mr. Risoff provided no explanation for Keller Williams’ failure to have any documentation for the loan modification transaction other than to state that Keller Williams went through some type of record keeping transition and must have either lost or destroyed documentation related to the loan modification transaction.

25. Mr. Risoff said he deposited the \$1200 check into his own account because it was payment for construction services that were unrelated to his loan modification agreement with Bruce and Jill. Mr. Risoff said he did not write the number 45020119 in the “Memo” portion of the check he cashed. Mr. Risoff conceded that if the check was in payment for any real estate related service, it should have been deposited in a broker’s account.

26. Mr. Risoff said that affirming the order would hamper his chances of obtaining a real estate broker’s license and a license to practice law.

Evaluation

27. Bruce and Jill answered questions asked of them in a straightforward manner. They did not equivocate. They admitted matters asked on cross-examination without elaboration. Each of them had the opportunity to see and hear those matters to which they testified. Bruce and Jill’s testimony concerning the number set forth in the “Memo” area of the check made sense, as did Bruce’s claim that he did not advance payment on behalf of his employer for services and he never used a check in payment of his employer’s purchase of goods. Neither Bruce nor Jill had any interest in the outcome of this disciplinary proceeding. Their stories were straightforward and their testimony was consistent. They were respectful.

Mr. Risoff’s testimony was not as compelling even though his former broker of record described him as being an honest individual. He provided several answers in cross-

examination that were simply nonresponsive. His testimony was highly legalistic, and he was unable to explain in a compelling fashion why his broker of record, Keller Williams, was unable to produce documents that authorized him to engage in loan modifications and why Keller Williams had no record of his involvement with Bruce and Jill. His testimony concerning the number written in the "Memo" area of the check was highly suspicious. Mr. Risoff had a significant interest in the outcome of this proceeding

28. Mr. Risoff solicited and received a \$1,200 advance fee from Bruce and Jill to provide services related to a modification of their loan with Wells Fargo Bank. Mr. Risoff knew that his receipt of the fee was unlawful, and he convinced Bruce and Jill to characterize the loan as a "gift" even though the check was given and cashed for payment of services rendered.

Mr. Risoff was working through La Mesa Partners, Inc. at the time, which was doing business as Keller Williams. Their business address does not appear in any documentation.

After Mr. Risoff received the \$1,200 check, Mr. Risoff caused the number 45020119 to be written in the "Memo" portion of the check to enable him to claim that the \$1,200 was payment for construction services he provided to Bruce's employer and not an advance fee. He deposited that check into his account, not Keller Williams' account.

Mr. Risoff's broker of record and supervisor, Chuck Sackett, never spoke with Mr. Risoff about the loan modification for Bruce and Jill's home and he was unaware of it. Robert Smith, who became Keller Williams' broker of record in October 2010, searched Keller Williams' files and records and did not find any document authorizing Mr. Risoff to conduct loan modification services for Keller Williams or any record related to the sale or refinancing of Bruce and Jill's home.

More evidence supported the finding that Mr. Risoff collected a \$1,200 advance fee for providing loan modification services for Bruce and Jill than the evidence and argument presented in opposition to that finding. It was not significant that Bruce and Jill did not obtain the services of an attorney, CPA or other expert; they trusted Mr. Risoff and believed he had their best interests at heart. It was not significant that the loan modification at issue may have been tedious and difficult. It was highly significant that neither Bruce nor Jill entered the number 45020119 in the "Memo" portion of the check that they gave to Mr. Risoff for his loan modification services. Bruce and Jill's demeanor and testimony was far more compelling than the Mr. Risoff's testimony, explanations and evidence.

LEGAL CONCLUSIONS

Purpose of Department of Real Estate Actions

1. Protection of the public shall be the highest priority for the Department of Real Estate in exercising its licensing, regulatory, and disciplinary functions. Whenever the

protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code, § 10050.1.)

Burden and Standard of Proof

2. The preponderance of the evidence standard applies to administrative actions that do not seek the revocation or suspension of a professional license. (*Owen v. Sands* (2009) 176 Cal.App.4th 985, 993-994.) A “preponderance of the evidence” means evidence that has more convincing force than that opposed to it. (BAJI, Instruction No. 2.60.)
Applicable Statutes

Requirement of a Real Estate Broker’s License

3. Business and Professions Code section 10131 provides in part:

A real estate broker . . . is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

[¶] . . . [¶]

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity. . . .

4. Business and Professions Code section 10131.2 provides in part:

A real estate broker . . . is also a person who engages in the business of claiming, demanding, charging, receiving, collecting or contracting for the collection of an advance fee . . . to obtain a loan or loans thereon.

The Commissioner’s Authority to Issue a Desist and Refrain Order

5. Business and Professions Code section 10086 provides in part:

(a) If the commissioner determines through an investigation that (1) a person has engaged or is engaging in an activity which is a violation of a provision of this part . . . or which is a violation of a regulation of the commissioner adopted for the purpose of implementing

any provision of this part . . . the commissioner may direct the person to desist and refrain from such activity by issuance of an order specifying the nature of the activity and the factual and legal basis for his or her determination. The respondent to whom the order is directed shall immediately, upon receipt of the order, cease the activity described in the order. . .

[¶] . . . [¶]

(c) The administrative hearing shall be commenced by the commissioner within 30 days after receipt of respondent's request unless the respondent agrees to a postponement. If the hearing is not commenced within 30 days after receipt of respondent's request or on the date to which continued with respondent's consent, or if the commissioner does not render a decision within 15 days after receipt of the proposed decision following the hearing, the order shall be deemed rescinded.

Credibility Findings

6. Under California law, the power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court. It is an established principle that the credibility of witnesses and the weight to be given their testimony are matters within the sole province of the trier of fact. A trier of fact may accept such witnesses as he wishes and reject others. Where there is conflicting testimony, reviewing courts recognize that the trier of the facts has the better opportunity to judge the credibility of witnesses. In such a case the trial court's findings of fact, to the extent that they rest upon an evaluation of credibility, should be regarded as conclusive on appeal. So long as the trier of fact does not act arbitrarily and has a rational ground for doing so, it may reject the testimony of a witness even though the witness is uncontradicted. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1463.)

7. Bruce and Jill were more credible than Mr. Risoff. (Factual Finding 27.)

Cause Exists to Affirm the Desist and Refrain Order

8. Cause exists to deny respondent's motions to dismiss and quash the desist and refrain order, and to affirm the issuance and continuation of the desist and refrain order under Business and Professions Code section 10086. A preponderance of the evidence established that Mr. Risoff violated Business and Professions Code section 10131, subdivision (d), and Business and Professions Code section 10137 by acting as a real estate broker without having a real estate broker's license. A preponderance of the evidence established that Mr. Risoff collected a direct advance fee from Bruce and Jill for professional services relating to a

modification of a loan on Bruce and Jill's home in Temecula, that Keller Williams (Mr. Risoff's employing broker) did not authorize the loan modification activity and did not know about it, and that Mr. Risoff received compensation for his loan modification services from someone other than a broker.

ORDERS


Based upon the Findings of Fact and the Legal Conclusions set forth herein,

IT IS HEREBY ORDERED that DAVID L. RISOFF, whether doing business under his own name, or any other name(s), or any fictitious name, shall immediately desist and refrain from performing any acts within the State of California for which a real estate broker license is required.

IT IS FURTHER ORDRED that DAVID L. RISOFF shall desist and refrain from:

1. charging, demanding, claiming, collecting and/or receiving advance fees, as that terms is defined in Business and Professions Code section 10026, in any form, and under any conditions, with respect to the performance of loan modifications, or any other form of mortgage loan forbearance service, in connection with loans on residential property containing four or fewer dwelling units (Business and Professions Code section 10085.6); and,
2. charging, demanding, claiming, collecting and/or receiving advance fees, as that terms is defined in Business and Professions Code section 10026, or any other fees from anyone other than the broker who then employs him as compensation for real estate related services offered by him to others.

DATED: April 30, 2013


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings