

FILED

JUN 11 2013

DEPARTMENT OF REAL ESTATE

DEPARTMENT OF REAL ESTATE
BY: Jane B. Chen

STATE OF CALIFORNIA

* * * * *

In the Matter of the Application of)	No. H-38573 LA
)	
DAVID LEIBOWITZ,) L-2013020962
)	
Respondent.)
_____)	

DECISION

The Proposed Decision dated April 16, 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.

Pursuant to Section 11517(c) (2) of the Government Code, the following correction is made:

Caption, first page, "In the Matter of the Accusation" should read "In the Matter of the Application".

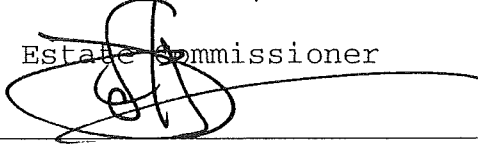
The application for a real estate salesperson license is denied, but the right to a restricted real estate salesperson license is granted to respondent. Petition for the removal of restrictions from a restricted license is controlled by Section 11522 of the Government Code. A copy of Section 11522 is attached hereto for the information of respondent.

If and when application is made for a real estate salesperson license through a new application or through a petition for removal of restrictions, all competent evidence of rehabilitation presented by the respondent will be considered by the Real Estate Commissioner. A copy of the Commissioner's Criteria of Rehabilitation is attached hereto.

This Decision shall become effective at 12
o'clock noon on ~~JUL 1 2013~~

IT IS SO ORDERED JUNE 5, 2013

Real Estate Commissioner

A handwritten signature in black ink, appearing to be 'JM', is written over a horizontal line. The signature is stylized and somewhat circular.

By: Jeffrey Mason
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation
of:

DAVID LEIBOWITZ,

Respondent.

Case No. H-38573 LA

OAH No. 2013020962

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, on March 11, 2013, in Los Angeles. Complainant was represented by Amelia V. Vetrone, Real Estate Counsel. Respondent David Leibowitz was present and represented by Edwin C. Schreiber, Attorney at Law.

Oral and documentary evidence having been received and the matter submitted for decision, the Administrative Law Judge finds as follows:

FACTUAL FINDINGS

1. On or about March 16, 2012, respondent David Leibowitz filed a Salesperson License Application with the Department of Real Estate for issuance of a real estate salesperson license. On his application, respondent indicated he would be working in real estate which required a license and that his employing and sponsoring broker will be Krikorian Investment Services, Inc., of Encino.

2. In the Background Information section, respondent disclosed that there was a license disciplinary action pending against his Series 3 license for trading commodities. He explained that the National Futures Association (NFA) had accused him of guaranteeing profits, not explaining risks of investment, and placing trades that were not in his client's best interest.

3. On March 14, 2012, respondent was issued a course completion certificate demonstrating he had successfully passed examinations for courses in real estate principles, real estate practice, and real estate finance. He took the classes at Real Estate Trainers, Inc., in Anaheim.

4. On November 27, 2012, the Statement of Issues, Case No. H-38573 LA, was made and filed by Robin Trujillo in her official capacity as Deputy Real Estate Commissioner, Department of Real Estate, State of California (Department). The Department has denied respondent's application for issuance of a real estate salesperson under Business and Professions Code section 10177, subdivision (f), on the grounds that he was suspended by the NFA for one year for violation of several NFA rules.

5. On December 11, 2012, respondent filed a Notice of Defense, acknowledging receipt of the Statement of Issues and requesting a hearing so that he can establish his qualification for licensure.

6. (A) Respondent attended Tulane University where he took classes in finance and played golf. In 1990, after two years, he left college and worked in the garment industry. Two years later, he moved to California and embarked on a professional golf career while working part-time for a non-profit organization doing advertising work. In 1997, he retired from golf due to a back injury and started trading stock and commodities on his own.

(B) In May 2005, respondent joined Statewide FX, Inc., a full-service commodities trading firm (Statewide), as an associate and commodities broker in its Los Angeles office. He was employed at Statewide for the next five years until the firm was closed in 2010. He then worked at Trans Atlantic Trading for one year before that firm was closed as well. In 2011, respondent stopped working in the commodities trading business.

7. After joining Statewide, respondent became one of the firm's top producing associates. He had approximately 150 clients. In his first two years with the firm, respondent made profits for a majority of his clients while trading commodities for them. In the following three years from 2008 through 2010, when the country suffered through a financial crisis and an economic recession, respondent found it difficult to earn profits from trading commodities and most of his clients lost money. One of those clients was Roy Stowers, a retired truck driver who lost most of an inheritance in trading commodities in 2009 and 2010. Stowers filed a complaint against respondent with the NFA.

8. (A) NFA is self-regulatory organization for the futures industry and is registered with the Commodity Futures Trading Commission (CFTC). CFTC is a federal regulatory agency with jurisdiction over futures trading. CFTC has delegated to NFA the responsibility and authority to process and act as the custodian records of the official CFTC registration records for all categories of registration. NFA regulates every firm or individual who conducts futures trading business with public customers. Registration or membership in NFA is mandatory for firms and individual

brokers and traders to trade futures or options on future contracts for various products or commodities in the futures exchanges or marketplaces. Members are required to comply with regulatory responsibilities of the NFA.

(B) In 2004, Statewide became a registered introducing broker-member of the NFA. As such, Statewide was required to comply with the requirements and rules of the NFA and was subject to disciplinary action for violations thereof.

(C) Respondent was an associated person (AP) of Statewide. By virtue of his employment and association with Statewide, he was registered as an associate member of NFA. As a Statewide AP and associate member of NFA, respondent was required to comply with NFA compliance rules and requirements and was subject to disciplinary proceedings for violations of such rule and regulations.

(D) In addition, respondent holds a Series 3 securities license that entitles him to engage in selling, trading, or brokering of commodities and/or futures contracts. To obtain his securities license, respondent passed the Series 3 examination administered by the Financial Industry Regulatory Authority. Passage of the Series 3 examination is required by NFA and various domestic commodity futures in order for a person to act as an AP, commodity trading advisor, or introducing broker.

9. In June 2010, NFA began an unannounced audit of Statewide after receiving a "couple of customer complaints alleging misleading sales solicitations." NFA analyzed Statewide's trading in a sampling of customer accounts and interviewed customers regarding their experiences with the firm, including Stowers. NFA also interviewed the two principals and owners of Statewide about their supervisory duties over the activities and solicitations of their APs and obtained Statewide's procedures for supervising and guiding its APs in soliciting customers, making trade recommendations, and disclosing commissions and "break even points." The NFA audit revealed that, during 2009, approximately 95 percent of Statewide's customers lost money trading and that the customers' losses totaled \$4.9 million. Respondent's client Stowers lost approximately \$94,000 in 2009 and \$80,000 in 2010, or 95 percent of his investment. At the same time, Statewide made over \$2.2 million in commissions in 2009.

10. (A) On December 9, 2010, following the audit and preparation of an investigative report, the NFA's Business Conduct Committee issued a Complaint in Case No. 10-BCC-036 against Statewide, its two principals or owners, and three APs, including respondent, alleging violations of NFA compliance rules and requirements. Respondent, among others, filed an answer, denying the allegations of the Complaint.

(B) The Complaint alleged that the majority of trades placed by Statewide customers in 2009 and 2010 were based on recommendations made by Statewide APs and, for the most part, the trade recommendations that Statewide APs

made to their customers were not in the customers' best interests and were intended, instead, to benefit Statewide by generating high commissions. According to the Complaint, the principals and owners of Statewide developed this trading strategy and instructed its APs to carry out this strategy through the trade recommendations that they made to their customers.

(C) The Complaint further alleged then that, during sales solicitations, respondent and the other Statewide APs consistently recommended trades to customers which were not in their best interests but maximized commissions for Statewide. The Complaint alleged that respondent and the two other APs failed to disclose to prospective customers that approximately 95 percent of Statewide's customers lost money trading in 2009 and, instead, made dramatic profit claims to prospective customers that exaggerated the profit potential and ignored the substantial risk of loss of trading. Finally, the Complaint alleged that the principals of Statewide failed to supervise the solicitations and trade recommendations of the firm's APs.

11. On September 26 – 27, 2011, a Panel of the Hearing Committee of NFA held a hearing on the Complaint to consider the charges against respondent. NFA presented four witnesses, including respondent's customer Stowers, and introduced documents into evidence. Respondent testified in his own defense and presented documents into evidence as well as a tape recording and transcript of a conversation between himself and Stowers.

12. (A) On March 16, 2012, the NFA Hearing Panel issued a Decision in Case No. 10-BCC-036 and imposed discipline against respondent by barring him from membership in NFA, associate membership, and from acting as a principal of an NFA member for one year. In addition, the Hearing Panel determined that, if, at any time after expiration of the one-year period, respondent is granted NFA membership, associate membership, or principal status with an NFA member, he must pay a \$5,000 fine within 30 days of his being granted NFA membership, associate membership, or principal status with a NFA member. The findings and conclusions of the Hearing Panel are summarized below.

(B) First, based entirely on the testimony of customer Stowers, the Hearing Panel determined that respondent told Stowers that he could make over \$200,000 by trading Eurodollars and thereby exaggerated the profit potential from trading Eurodollars and downplayed the risk of loss. On this issue, the Hearing Panel indicated that there was a "clear dispute" whether respondent ever made the statement regarding the profitability of trading Eurodollars, for Stowers was adamant that Stowers promised profits on the Eurodollar trades and respondent was adamant that he did not make such a statement. In the end, the Hearing Panel found Stowers to be more credible and accepted the customer's testimony. The Hearing Panel found respondent's statement was deceptive and misleading because "it paint[ed] an unrealistic picture of the likelihood of profits." The Hearing Panel concluded respondent should have known that his statement depicted a misleading picture of the

likelihood of profits and, that if he was going to talk about profits, he should have disclosed to Stowers the poor performance of his own and other Statewide customers. The Hearing Panel determined respondent's conduct violated NFA Compliance Rules 2-2(a) and 2-29(a)(1) and was inconsistent with just and equitable principles of trade.

(C) Second, the Hearing Panel found that respondent failed to adequately discuss or explain commissions with his customer Stowers and the impact that those commissions would have on Stower's ability to realize a profit on his trades, in violation of NFA Compliance Rules 2-4, 2-2(a), and 2-29(a)(1). The Hearing Panel accepted Stowers' testimony that he did not understand how commissions were charged and that respondent did not discuss commissions with him. The Hearing Panel was not surprised Stowers did not understand the commission charged on his account since the commission schedule did not clearly explain commission charges and indicated respondent should have ensured that Stowers understood the commissions charges and the impact that such charges had on profitability. Respondent's conduct was deemed inconsistent with just and equitable principles of trade.

(D) Third, based largely on the testimony of a NFA market regulation manager, the NFA Hearing Panel found that respondent recommended Eurodollar option trades to Stowers that had little chance of being profitable due to the high break-even points and appeared to be designed for the purpose of generating profits. The Hearing Panel found respondent's testimony on this issue not to be believable and, at a minimum, he should have discussed his trade strategies with Stowers. The Hearing Panel determined that respondent's conduct with respect to his Eurodollar option trade recommendations was inconsistent with just and equitable principles of trade as required by NFA Compliance Rule 2-4.

13. (A) Under the Complaint, NFA Case No. 10-BBC-036, the NFA charged the two principals and owners of Statewide with failure to diligently supervise the solicitations and trade recommendations of Statewide's APs in violation of NFA Compliance Rule 2-9(a).

(B) Respondent testified that the NFA suspended the two principals and owners of Statewide for three years and five years, respectively, from membership or from acting as principals of an NFA member. He testified that the two other Statewide APs were suspended from NFA membership for 10 months and five years, respectively. In 2010, Statewide withdrew from membership in NFA and the firm ceased doing business and closed.

14. (A) NFA Compliance Rule 2-4 provides, in pertinent part, that members shall observe high standards of commercial honor and just and equitable principles of trade while conducting their commodity futures business.

(B) NFA Compliance Rule 2-2(a) provide that no member or associate shall cheat, defraud, or deceive, or attempt to cheat, defraud, or deceive any commodity future customer.

(C) NFA Compliance Rule 2-29(a)(1) provides that no member or associate shall make any communication with the public which operates as a fraud or deceit.

(D) NFA Compliance Rule 2-9(a) provides, in pertinent part, that each member shall diligently supervise its employees and agents in the conduct of their commodity future activities for or on behalf of the member.

Other Evidence

15. In February 2012, respondent applied for a real estate salesperson's job at Krikorian Investment Services, Inc. a real estate brokerage firm that is involved in the purchase and sale of apartments, office buildings, hotels, and shopping centers and employs 12 persons who are either real estate brokers or real estate salespersons. The chief managing officer and chief shareholder of Krikorian Investment Services, Inc., is Raffi D. Krikorian, a licensed real estate broker. After calling respondent's references and receiving a stellar recommendation from one of his former supervisors, Krikorian offered the real estate salesperson's job to respondent subject to his receipt of a real estate license. Respondent took the required real estate courses and passed the real estate salesperson licensure examination.

16. (A) Since February 2012 to the present time, respondent has worked as an unpaid trainee at Krikorian Investments Services, Inc., and learned about the real estate business. He has assisted real estate brokers at the firm by conducting research on comparable properties, taking pictures of properties, doing various field work, and performing surveys of rents and property values of different types of commercial properties.

(B) For over one year, Krikorian supervised and observed respondent while he worked as an unpaid trainee in his real estate brokerage firm, the real estate broker found respondent to be a dependable and trustworthy employee. Respondent completed his assignments in timely and reliable manner. Krikorian considers respondent to be not only a fast learner and experienced in business but also a person of high integrity and a potentially valuable asset for his firm. Krikorian would hire respondent as a real estate salesperson for his firm if he is issued a license and is willing to supervise his real estate activities. Krikorian appeared and testified at the hearing in support of respondent's licensure and was a credible and impressive witness.

17. Respondent is married and has a daughter in college. His wife is a dental hygienist. He has no plans to work again as a commodities trader and hopes to be a real estate salesperson for Krikorian Investments Services, Inc., and work in the real estate field.

* * * * *

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds exist to deny respondent's application for a real estate salesperson license under Business and Professions Code sections 10177, subdivision (f), for having acted or conducted himself in a manner that would have warranted the denial of his real estate application for a real estate license, based on Findings 2 – 14 above.

2. Discussion—Here, it was not established that respondent had a license that was issued by another agency of this state, another state, or the federal government, revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the revocation or suspension of a California real estate license. Respondent does hold or held a Series 3 securities license but that license was not disciplined by the Financial Industry Regulatory Authority or any other state or federal agency. Rather, respondent was suspended from associate membership in NFA for acts that were deemed inconsistent with just and equitable principles of trade and represented fraudulent or deceptive communication and conduct while he recommended and conducted commodity futures trades for a single client in 2009 and 2010. Respondent's conduct as determined by the NFA Hearing Panel constituted the making of substantial misrepresentations, the making of false promises of a character likely to influence, persuade, or induce, and fraud or dishonest dealing, within the meaning of Business and Professions Code sections 10176, subdivisions (a), (b), and (i), and, as such, constitutes grounds for denial of his application for a real estate license.

The primary issue in this matter is whether respondent is sufficiently rehabilitated from his fraudulent or deceptive acts as a commodities futures trader to warrant issuance of a real estate license. Under California Code of Regulations, title 10, section 2911, the Department has promulgated criteria to evaluate whether an applicant is rehabilitated from act or acts when considering whether to grant or deny the issuance of a real estate license.

Here, the evidence demonstrated that it has been three or four years since respondent engaged in the conduct that led to his customer investing in commodities futures and losing most of his investment. Respondent stopped trading in commodities futures in 2011 after the firms with which he was associated closed and ceased doing business. He has no intention of working as a commodities futures trader again. For over one year since February 2012, respondent has worked diligently as an intern or trainee at Krikorian Investment Services, Inc., a real estate brokerage firm in Encino. He has performed well at the company and learned about the real estate business under the supervision and watchful eye of Krikorian, the managing broker. In an uncommon gesture, Krikorian appeared at the hearing in this matter and testified in support of respondent's licensure. As established by the testimony of this real estate broker, respondent is a dependable and trustworthy employee and a person of high integrity. Krikorian is willing to hire respondent if he is granted a restricted real estate license. Thus, respondent demonstrated that he has changed his business practices and formed a new and important business relationship with the real estate broker that is different from that which he had with his supervisors at the commodities futures trading firm Statewide.

In addition, there were important mitigating factors to respondent's conduct. Respondent's client was not the only one who lost money trading commodities futures in 2009 and 2010. More than 95 percent of the firm's customers lost money in 2009 based on trade recommendations of traders at Statewide. The financial market and economy was in a recession in 2009 as well. The NFA Complaint also alleged that respondent's employers and supervisors at Statewide developed the strategy to recommend trades intended to make commissions and profits for the firm but were not in the best interests of the customers. Respondent and other APs at Statewide were instructed to carry out this strategy through trade recommendations to their clients. The NFA Complaint also alleged that the owners and supervisors at Statewide did not supervise the solicitations and trade recommendations of the firm's APs. In other words, respondent was not a rogue trader who made unconscionable trade recommendations to a client for his own financial benefit but a valued member of a trading firm which had a company-wide strategy to make trade recommendations to maximize commissions at the expense of its customers in a difficult financial market in 2009 and 2010.

Based on the passage of time, the evidence of respondent having developed a new business relationship and performed well at the real estate brokerage company, the recommendation of the managing real estate broker, and the mitigating circumstances to his conduct, it is concluded that respondent does not represent a danger to the public and should be given a chance to work as a real estate licensee. As a matter of public protection, respondent should be issued a restricted license that requires his supervision by his employing broker.

* * * * *

Wherefore, the following Order is hereby made:

ORDER

The application for issuance of a real estate salesperson license filed by respondent David Leibowitz is denied; provided, however, a restricted real estate salesperson license will 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 within 90 days from the effective date of this Decision and Order. The restricted license 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 the authority of Business and Professions Code sections 10156.6:

1. The restricted license 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 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 nor for the removal of any of the conditions, limitations or restrictions of a restricted license until three (3) years have elapsed from the effective date of this Decision.

4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:

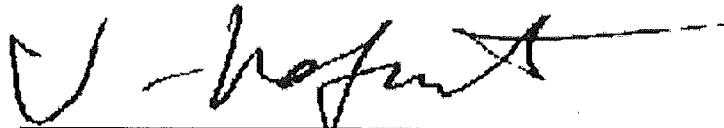
(a) That the employing broker has read the Decision of the Commissioner which granted the right to a restricted license; and

(b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.

5. 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 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.

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

Dated: April 16, 2013



Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings