

FLAC

FILED

JUL 17 2017

BUREAU OF REAL ESTATE

By Car Delorio

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * * *

In the Matter of the Application of) No. H-40363 LA
JERRY W. BURCH,)
Respondent.)

ORDER DENYING RECONSIDERATION

On May 23, 2017, a Decision was rendered that the application of Respondent for a mortgage loan originator license endorsement is denied to become effective June 15, 2017. Said Order was stayed by separate Order to July 15, 2017.

On June 20, 2017, Respondent petitioned for reconsideration of the Decision of May 23, 2017.

I have given due consideration to the petition of Respondent. I find no good cause to reconsider the Decision of May 23, 2017, and reconsideration is hereby denied.

IT IS SO ORDERED 7/12/17

WAYNE S. BELL
Real Estate Commissioner

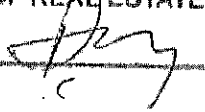
Daniel J. Sandri

By: DANIEL J. SANDRI
Chief Deputy Commissioner

FILED

JUN - 6 2017

BUREAU OF REAL ESTATE

By 

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Application of

JERRY W BURCH,

Respondent(s).

) CalBRE NO. H-40363 LA

) OAH NO. 2016090659

ORDER STAYING EFFECTIVE DATE

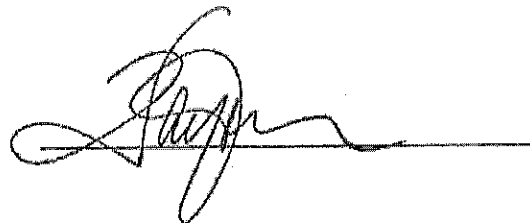
On May 23, 2017, a Decision was rendered in the above-entitled matter to become effective June 15, 2017.

IT IS HEREBY ORDERED that the effective date of the Decision of May 23, 2017, is stayed for a period of 30 days or consider Respondent's petition for reconsideration.

The Decision of May 23, 2017, shall become effective at 12 o'clock noon on July 15, 2017.

DATED: June 6, 2017.

WAYNE S. BELL
REAL ESTATE COMMISSIONER



F46

FILED

MAY 26 2017

BUREAU OF REAL ESTATE

By ae Selous

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Application of	)	CalBRE No. H-40363 LA
	)	
JERRY W BURCH,	)	OAH No. 2016090659
	)	
Respondent.	)	

DECISION

The Proposed Decision dated April 21, 2017, 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:

Findings, Page 2, Paragraph 2, Line 2:

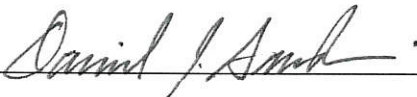
“applied for a real estate salesperson license” should be “applied for a mortgage loan originator license endorsement”.

The application for a mortgage loan originator license endorsement is denied. The earliest date on which the applicant may reapply for a license is one year from the effective date of this Decision. If and when application is again made for this license, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate Commissioner. Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau’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. 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 JUNE 15 2017.

IT IS SO ORDERED 5/23/17.

WAYNE S. BELL
REAL ESTATE COMMISSIONER

A handwritten signature in dark ink, appearing to read "Daniel J. Sandri", is written over a horizontal line.

By: DANIEL J. SANDRI
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Application of:

JERRY W. BURCH,

Respondent.

Case No. H-40363 LA

OAH No. 2016090659

PROPOSED DECISION

Administrative Law Judge Howard Posner, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on February 27, 2017.

James R. Peel, Staff Counsel, represented Complainant Chika Sunquist, Supervising Special Investigator of the State of California.

Attorney Mary E. Work represented Respondent Jerry Burch.

Oral and documentary evidence was received at the hearing. Complainant's evidence included exhibit 4, which contained three documents from the Financial Industry Regulatory Authority (FINRA): a Complaint and Hearing Panel Decision from the Office of Hearing Officers, and a Decision by FINRA's National Adjudicatory Council on an appeal of the Hearing Panel Decision. Respondent objected to Exhibit 4.

The record was left open until April 22, 2017, to allow the parties to submit written closing argument and briefing on the question of whether written FINRA decisions are admissible in this proceeding. Respondent filed a "Closing Argument and Briefing on Issue of Admissibility of Complainant's Exhibit 4" on March 10, 2017. Complainant filed "Complainant's Argument" on March 15, and Respondent filed a "Reply to Complainant's Closing Submission" on April 22. Exhibit 4 was admitted over Respondent's objection, and the record was closed, and the matter was submitted, on April 22, 2017.

Complainant brings this Statement of Issues to deny Respondent's application for a mortgage loan originator endorsement to his real estate salesperson license. Because Respondent engaged in a lengthy pattern of fraudulent conduct as a securities licensee, and has not made a convincing showing of a change in attitude since then, the application is denied.

FACTUAL FINDINGS

Jurisdiction and Background

1. Complainant issued this Statement of Issues solely in her official capacity.
2. Respondent has been licensed as a real estate salesperson since April 12, 2016. On June 14, 2016, Respondent applied for a real estate salesperson license. The Bureau of Real Estate refused to grant the application, and Respondent timely requested a hearing.

FINRA Bars Respondent from Securities Industry for Fraudulent Conduct

3. On July 9, 2009, the FINRA Office of Hearing Officers issued a decision barring Respondent from transacting in the securities field. On appeal, FINRA's National Adjudicatory Council upheld the bar, with some modifications in findings, on July 28, 2011. The decision on appeal found three types of violations of statutes or rules:
 - a. In March 2003 Respondent solicited clients to buy stock in Dogs International, Inc. without disclosing that his wife was selling large orders of the same stock at the same time through a corporation of which she was sole shareholder, officer and director. Dogs International was a corporation with a negligible business history and stock trading history, which had recently been renamed to reflect its new business plan of operating elite pet hotels. Respondent's wife, Teri Burch, opened a trading account for her corporation at a brokerage other than the one where Respondent worked—without making the required disclosure that her husband was a stockbroker employed at another firm—and sold the Dogs International shares through that account. FINRA found that the scheme violated section 10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10b-5 (17 C.F.R. § 240.10b-5), which prohibits any scheme to defraud, or making an untrue statement of material fact or omitting to state a necessary material fact, in the sale of securities. The National Adjudicatory Council found that Respondent's "disingenuousness to his customers reflects directly on his ability to deal responsibly with the public, including the obligation to disclose material information related to recommended investment." (Ex. 4c, p. 18.)
 - b. Respondent falsely told his employer brokerage firm that his clients' Dogs International stock purchases were "unsolicited," a misrepresentation which violated, among other provisions, the record-keeping provisions of Securities Exchange Act Rules 17a-3 and 17a-4. The FINRA National Adjudicatory Council found that he "not only deliberately defrauded his customers but compounded his offense by the deliberate deception he practiced on his employer, which included the intentional falsification of his employer's records." (Ex. 4c, p. 21.)
 - c. Respondent, when served with a "Wells Notice" (a regulator's notification that it intends to recommend enforcement proceedings against the recipient, and summarizing the violations to be alleged) in July 2006, did not update his "Form U-4"

registration information to disclose the Wells Notice, in violation of FINRA rules, until he received a deficiency notice in October 2007.

4. FINRA's National Adjudicatory Council found that Respondent had been untruthful throughout the investigative and enforcement process. It noted, "We find Burch's lack of candor during these proceedings to be disturbing. A preponderance of the evidence shows that Burch provided inaccurate and incomplete information in an effort minimize his own responsibility." (Ex. 4c, p. 18.) For example, although Respondent at first told FINRA investigators that he saw corporate documents for his wife's corporation in 2003, he claimed later at a FINRA hearing that he first learned of the corporation only during the FINRA investigation. At the FINRA hearing, Respondent and his wife also claimed that she had no financial interest in the shares her corporation owned. In the 2009 decision, FINRA's Office of Hearing Officers found that Respondent was not credible, a finding upheld by the National Adjudicatory Council in its 2011 decision.

Mitigation, Aggravation and Rehabilitation

5. Respondent was employed in the securities industry between 1986 and 2011, and held a Series 7 license.

6. Respondent's testimony at hearing minimized his culpability in the Dogs International scheme. He described it as a venture in which he was a victim of the "cowboy" promoter of the stock, losing \$250,000 of his own money. His parents, sister, aunts and cousins also invested in it and lost money. His testimony, and much of the other evidence he produced, focused on how he and the other investors were taken in by the promoter, rather than on his own conduct in violating rules that were in place to prevent fraud, or his attempts to deceive the FINRA investigators and finders of fact. He testified that he got caught up in the promoter's "world of cars and money and young girls," and lost his moral compass, but has since "created a moral code" and drawn "a line in the sand." Nonetheless, Respondent insisted that although he misjudged the promoter, he never misled the investors. He did not satisfactorily explain how it was not misleading to conceal his wife's sales of the stock he was soliciting the investors to buy. He acknowledged being in the wrong only by failing to adequately vet the promoter. He stressed that he continued to work for the same securities firm until 2011 without being the subject of any complaints or lawsuits or actions other than the FINRA investigation that led to the bar.

7. Respondent introduced a letter from a licensed clinical social worker who has been treating Respondent for over six years dealing with the loss of Series 7 securities license, working with him on issues of self worth, consequences of actions, judgment, character and morals, relationships and moving forward. She opined that he is now open and honest, realistic, diligent and respectful. She is impressed by his intellect, business acumen and humility.

//

8. Respondent introduced letters from three longstanding friends who lost money investing in Dogs International, and from two former owners of the firm Respondent worked for throughout the 2003–2011 period. All five of them wrote that Respondent had been unjustly treated in some unspecified way in the FINRA proceedings.

9. Respondent and Teri Burch separated in 2005 and divorced in 2009. They have no children. In a letter Respondent introduced at hearing (Ex. E), she wrote that the stress created by his association with the promoter “and poor decisions involving that relationship” was a significant cause of their breakup. She and Respondent have remained close, and she has attended some of his psychotherapy sessions. She wrote that he has become more self-aware, and is now an “honest and caring” person. She also wrote of the Dogs International incidents, “We have both taken steps to ensure this never happens again,” but it is not clear what she means by “this.” Like Respondent, she does not acknowledge specific wrongdoing.

10. Respondent testified that he now surrounds himself with better people than in 2003, and notices character flaws in other people more.

11. Respondent has not been involved in a real estate sales transaction as a licensed real estate salesperson. He has made some private equity investments on his own account. He spends time taking care of his parents, both of whom have recently been diagnosed with cancer. He attends a “Christian-based” church and participates in its outreach program distributing hygiene kits to the homeless.

12. Christopher Van Stelle, a stockbroker and friend of Respondent, who was Respondent’s supervisor during the FINRA investigation, testified that he now has many of Respondent’s former customers, who hold Respondent in great regard. Van Stelle would refer clients to Respondent if Respondent became a mortgage loan originator.

13. David D’Alessandro, an owner of an acting and modeling school for children in Costa Mesa and a friend of Respondent for more than 50 years, testified and submitted a letter (Ex. K) in support of Respondent’s application. He wrote, “I feel his only mistake was to trust and let someone into his life who was destructive and manipulating by nature. It cost him severely. Since then I have seen a change for the better in a number of ways. He has cut this destructive person out of his life” and surrounded himself with “quality men and women in the community.”

14. D’Alessandro’s statement encapsulates Respondent’s message in this proceeding: Respondent fell under the influence of a bad person and should have done a better job of vetting that person before recommending that his customers invest in his company; Respondent is now resistant to bad influences. But FINRA did not bar Respondent for recommending a bad investment, and neither Respondent nor his witnesses address the actual reasons for the bar, such as concealing his wife’s stock sales, falsifying records, and making inconsistent and untruthful statements to investigators. The FINRA decision was not concerned with the question of whether investors lost money. Remarks in the 2009 FINRA decision indicate that he might have kept his Series 7 license if he had

owned up to what he did in March 2003. He did not own up then and does not own up now, and both he and his witnesses all give the impression of avoiding the most significant issue.

15. Mortgage broker William Wong, who has known Respondent since 1993, testified at hearing and submitted a letter in support of Respondent, whom Wong has offered to employ in Wong's mortgage business despite the FINRA bar. Respondent is learning the mortgage business by coming to Wong's office and observing. Wong describes Respondent as someone on whom he could always depend. He also thinks Respondent's knowledge of the bond market might allow him to predict mortgage rate changes.

LEGAL CONCLUSIONS

1. Paragraph 5 of the Statement of Issues alleges that the license discipline FINRA imposed is cause for denying Respondent's application for a mortgage loan originator endorsement under Business and Professions Code section 10166.05, subdivision (c), which provides that a mortgage loan originator endorsement cannot be issued without a finding that 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[.]" Under the Bureau's regulations, an applicant may be precluded from obtaining a mortgage loan originator endorsement if the applicant's personal history includes "liens, judgments, or financial or professional conditions that indicate a pattern of dishonesty on the part of the applicant." (Cal. Code Regs., tit. 10, § 2758.3, subd. (a)(2).)

2. The findings and decision in Respondent's FINRA disciplinary action describe Respondent's dishonest dealings as a stockbroker, and years of disingenuousness during FINRA's investigation (in the 2009 Decision, the Office of Hearing Officers found that Respondent's lack of truthfulness during the investigation was more of a concern than the original misconduct), which would "indicate a pattern of dishonesty on the part of the applicant."

3. Under Business and Professions Code section 141, "a disciplinary action taken by another state, by any agency of the federal government, or by another country for any act substantially related to the practice regulated by the California license, may be a ground for disciplinary action by the respective state licensing board. A certified copy of the record of the disciplinary action taken against the licensee by another state, an agency of the federal government, or another country shall be conclusive evidence of the events related therein." Respondent argues that FINRA is not "an agency of the federal government," and that therefore the FINRA documents are mere hearsay, which "over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, sub (d).) The issue of admissibility of the FINRA documents is therefore of great importance in this proceeding, and it hinges on whether FINRA is an "agency of the federal government."

4. The Administrative Law Judge held the record open for briefing, and in particular, briefing on the question of whether FINRA was a government agency for purposes of Business and Professions Code section 141.¹ Neither party's briefs actually addressed the question. Respondent's two briefs simply assume that FINRA is not a government agency, and Complainant's brief does not touch on the issue at all.

5. FINRA is an agency of the federal government for purposes of Business and Professions Code section 141 because it is the agency legally responsible for enforcing federal authority in the securities industry:

"FINRA is a "self-regulatory organization" as defined in the Securities Exchange Act of 1934 that oversees the conduct of securities brokers and brokerage firms. (15 U.S.C. §§ 78c(a)(26), 78s(b); [citation]) "It is responsible for regulatory oversight of all securities firms that do business with the public; professional training, testing and licensing of registered persons; [and] arbitration and mediation" [Citation.]"

(*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal. App. 4th 1125, 1128, citing *Sacks v. S.E.C.* 648 F.3d 945, 948 (9th Cir. 2011).) FINRA was created in a 2007 merger of the National Association of Securities Dealers, Inc. (NASD), and the member regulation, enforcement and arbitration operations of the New York Stock Exchange. (*Sacks v. S.E.C.* 648 F.3d at 948, fn. 1.) That merger, and the resulting creation of a new regulatory authority, was approved by a new federal regulation setting out FINRA's authority:

The new SRO would be responsible for *regulatory oversight of all securities firms that do business with the public; professional training, testing and licensing of registered persons; arbitration and mediation; market regulation by contract for The NASDAQ Stock Market, Inc., the American Stock Exchange LLC, and the International Securities Exchange, LLC; and industry utilities, such as Trade Reporting Facilities and other over-the-counter operations.* NASD represents that none of NASD's current functions and activities would be eliminated as a result of the Transaction.

¹ The Administrative Law Judge did not know the answer to this question despite being a FINRA public arbitrator. As a "public arbitrator," he would serve on panels that resolve disputes between brokers and customers, or brokers and their brokerages (although to date his experience consists entirely of phone conferences to set hearing dates), rather than broker discipline. The Administrative Law Judge disclosed these facts at the outset of the hearing, when Respondent first objected to exhibit 4. Respondent did not ask the Administrative Law judge to recuse himself at that time. Later in the hearing, after more evidence, including live testimony, was admitted, Respondent made a motion to recuse, which was denied.

(72 Fed. Reg. 42170 (2007), *italics added*.) “Regulatory oversight” of “firms that do business with the public,” and “testing and licensing of registered persons” are government functions. Indeed, in California, the Bureau of Real Estate serves these very functions with regard to the real estate industry. So federal regulations have approved the creation of FINRA and give it the responsibility, and the authority, to enforce federal securities laws and regulations, and to license and discipline securities dealers. FINRA thus acts as the federal government’s agent, even if FINRA employees are not paid by the federal government. This makes FINRA an “agency of the federal government.” Respondent’s objection to exhibit 4, the FINRA documents, is therefore overruled.

6. There is cause to deny the application under Business and Professions Code section 10166.05, subdivision (c), and CCR section 2758.3, subdivision (a)(2), because the FINRA decision details conduct indicating that Respondent has not “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[.]”

7. Respondent has the burden of showing rehabilitation from his convictions. (*Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 259.) That burden is particularly substantial in an application for a mortgage loan originator endorsement, in which the statutory and regulatory scheme is far less forgiving of an applicant’s past fraudulent acts than for salesperson or broker licenses.²

8. Respondent’s showing is equivocal. He meets some of the criteria of rehabilitation for a license application set out in CCR section 2911. More than five years have passed since the FINRA final order. (CCR § 2911, subd. (a) Factual Finding 3.) He has shown some involvement in programs to provide social benefits (CCR § 2911, subd. (i); Factual Finding 11), though the evidence does not establish the extent of that involvement. He is fulfilling familial responsibilities. (CCR § 2911, subd. (h); Factual Finding 11.)

9. Respondent has not made a convincing showing that his attitude has changed since he committed the acts of fraud. (CCR § 2911, subd. (n).) He appears to think that his wrongdoing consisted of not doing a better job of protecting his clients, friends and family from a promoter who pushed an investment that went bad, and does not acknowledge his own acts of fraud. (Factual Findings 6 and 14.) His witnesses convey the same basic message. While Respondent has taken steps toward self-examination and self-improvement, licensing statutes are meant to protect the public (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016), and under the heightened scrutiny given to mortgage loan

² For example, Business and Professions Code section 10166.05, subdivision (b)(2), enacted in 2009, forbids granting a mortgage loan originator endorsement unless the applicant has never been convicted of a felony at “any time preceding the date of application, if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering.” CCR 2945.3 makes it clear that this is an absolute lifetime ban: “These restrictions constitute a ban on the real estate licensee’s ability to apply for a license endorsement. These restrictions are not subject to mitigation or rehabilitation.”

originator endorsements, Respondent's evidence does not establish that his licensure is consistent with the level of protection to which the public is entitled.

ORDER

Respondent Jerry W. Burch's application for a mortgage loan originator endorsement is denied.

DATED: April 21, 2017

DocuSigned by:

Howard Posner

07107569066649A

HOWARD POSNER

Administrative Law Judge

Office of Administrative Hearings