STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of the Application of

JON LEFKOWITZ

DECISION
Complaint No.: 2017-1061

for a Real Estate Broker's License
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Procedural History

The above-captioned matter came on for hearing before the Honorable Teneka Frost-Amusa on July 11, 2017 ("Transcript ['Tr.'] I," July 11, 2017). I take official notice of the records of the prior proceedings in this matter in this tribunal, the Department of State (the "Department") Office of Administrative Hearings ("OAH"). I am informed that Judge Frost-Amusa subsequently left the employ of OAH before deciding the matter. Thereafter, this case was reassigned to the Honorable Ziedah F. Diata, who re-opened the hearing to afford the applicant a full and fair opportunity to appear before her. As another OAH Administrative Law Judge, she offered to hear the case afresh and issue a written decision, after being able to assess in person the credibility of any and all witnesses, including the respondent, and all the evidence. However, the respondent defaulted and failed to appear for his new hearing on March 1, 2018, at OAH, 123 William Street, New York, New York ("Transcript ['Tr.'] II," March 1, 2018).

The undersigned, Joan R. Salzman, was assigned to hear a different matter involving the respondent, his application to renew his commission as a notary public, *Matter of Application of Lefkowitz*, 588 DOS 18 (2018) ("*Lefkowitz I")*. The applicant appeared for his hearing on the notary commission on July 18, 2018, before me. In that proceeding, the Department was represented by Jenifer Rajkumar, Esq., Special Counsel to the Department. Because the applicant had appeared before me at the tribunal at 123 William Street on that date and I had been assigned to hear and decide both cases concerning him, I re-opened the record in the instant case, after the conclusion of the notary commission hearing on July 18, 2018, and offered to afford him a second opportunity for a new hearing on his application for a real estate broker's license, on a date to be determined, at OAH, so that he could appear before a judge who could fully hear all witnesses, assess their credibility, along with all other evidence, and issue a written decision on the matter. The applicant stated that he had received the notice of the new hearing scheduled for March 1, 2018, and deliberately defaulted on the March 1st new hearing. He also expressly declined on July 18, 2018, to return for a new hearing in the instant case before me. ("Transcript ['Tr.'] III," at 3-5, July 18, 2018).

When asked why he deliberately defaulted on March 1st, the applicant stated: "I lost interest in the real estate broker's license." At first he stated, ". . . I didn't want to follow up with that, I don't see any prospect as a career as a real estate broker" (Tr. III at 4). When I asked the Department lawyer to inform me as to whether she would like to go back to her office and confer with Nadine Azarian, the non-attorney representative of the Department who appeared in the

original hearing on July 11, 2017, and let me know if the Department wanted to withdraw this matter in light of the applicant's statement that he no longer wanted to pursue this license, the applicant then changed his position, as was his prerogative, and asked for a decision based on the record made before Judge Frost-Amusa:

> What I would like then to do is make a determination based on the records. I wouldn't come back for another hearing and spend another day here, but given that the record was already created, I already came here once, I would like them to make a determination. Again, I wouldn't come back for another hearing.

(Tr. III at 4-6). He stipulated "to having [this case] decided on the record" made originally (Tr. III at 6). He added:

> Just to clarify, the reason I said I would like the decision to be made on the record is because given whatever effort I did put into coming here a year ago, let them decide that, it's not worth for me to come back again, but, of course, I would rather have the license than not have it, so if my application to be [*sic*] granted on the record on the basis of whatever [has] already been submitted[,] as you put it on the cold record, that would be better, but to be honest with you, I would not come back for another hearing.

Tr. III at 7-8). And finally, the applicant stated: "I am not withdrawing it. I am telling you quite frankly that I wouldn't come back for a hearing, but I would have them decide it as it is (Tr. III at 8). I advised the parties that in light of the applicant's representations on the record in open court, I was closing the record herein as of July 18, 2018, and undertook to take a fresh look at the record made on July 11, 2017, before Judge Frost-Amusa, in accordance with the applicant's wishes, and issue a decision based on the record of the prior hearing. I also had the benefit of having heard the applicant present the similar case for a notary public commission on July 18, 2018, and the ability to assess his credibility in a licensing case involving essentially the same operative facts about the same criminal conviction at issue in the notary case.

Having been advised of his right to be represented by an attorney, the applicant elected to represent himself in the July 11, 2017 hearing (Tr. I at 3). The Department Division of Licensing Services (the "DLS") was represented at that hearing by Nadine Azarian, Hearing Presenter. At the March 1, 2018 hearing, which the applicant deliberately declined to attend, Ms. Azarian also represented the Department.

ISSUE

The issue is whether the applicant possesses the requisite "trustworthiness" to serve as a real estate broker pursuant to Real Property Law sections 441(1)(b) and 441-a(1). The DLS proposes to deny the license because of his conduct underlying a criminal conviction in May of 2016 for misdemeanor criminal facilitation. The applicant was suspended from the practice of law by the New York State Supreme Court, Appellate Division, Second Department, following his conviction for the same conduct at issue here.

FINDINGS OF FACT

1) The applicant was previously admitted to practice law in New York. He was suspended from the practice of law, effective March 23, 2017, as a result of his conviction of misdemeanor criminal facilitation and the conduct underlying it (State's Ex. 3) (print-out of New York State Courts Attorney Directory entry for the applicant). By Decision dated August 24, 2018, upon consideration of the full record of the hearing held July 18, 2018, this tribunal denied the application to renew his notary public commission. *Lefkowitz I.*

2) In June and November of 2013, the applicant wrote two judicial subpoenas *duces tecum*, each bearing his name and office address and the name of a sitting New York State Supreme Court Justice. The subpoenas were aimed at two witnesses with information about the applicant's cousins, one with respect to a pending criminal matter, and the other with respect to a civil litigation. The applicant never submitted these subpoenas to this judge, nor to any judge, for review or signature.

3) The first one, dated June 11, 2013 bears the title "Judicial Subpoena *Duces Tecum*," and shows the caption of the Supreme Court of the State of New York, County of Onondaga, in the matter of *Countrywide Home Loans Inc. v. March, Sima, and United States of America*, Index Number 2008/7218. This subpoena in a civil case was addressed to United Northern Mortgage Bankers, Ltd. in Levittown, New York. The subpoena stated: "**WE COMMAND YOU, that all business and excuses being laid aside, you produce, on or before the 29th day of July 2013, at the Law Office of Jon Ari Lefkowitz,"** at his office address in Brooklyn, New York, evidence concerning Countrywide's former employee, **Maria Carvalho**. (App. Ex. C) (emphasis supplied). Handwritten information appears next to some of the demands in this subpoena, as noted in brackets below. There was no testimony indicating who handwrote the notes:

> (1) last known home address of your former employee, Maria Carvalho [an address in Mineola, NY is handwritten next to this demand];
> (2) her last known home phone number [a telephone number is handwritten next to this demand]
> (3) her last known cell phone number [a telephone number is handwritten next to this demand]
> (4) her last known email address ["UNKNOWN" is handwritten next to this demand]
> (5) her last known employer ["UNKNOWN" is handwritten next to this demand]
> **(6) any other contact information that you have regarding said Maria Carvalho now in your custody, and all other evidences and writings, which you have in your custody or power, concerning the above.**
>
> **Failure to comply with this subpoena is punishable as contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.**
>
> **WITNESS, Honorable Donald A. Greenwood, one of the judges of said Court at Syracuse, New York on the 11th day of June 2013.**

_____S/_____
Jon A. Lefkowitz
Attorney for Sima March
1222 Ave. M Suite 204
Brooklyn, NY 11230
(718) 692-0459

(App. Ex. C) (emphasis other than underscoring supplied). The letter "S/" above the applicant's signature conveys that there was an original subpoena bearing the applicant's signature as Attorney for Sima March -- whether or not it was so -- and that this document was a copy of a signed original, thus lending it further, apparent, official force (App. Ex. C).

4) The second judicial subpoena the applicant submitted at the hearing was titled a "Judicial Subpoena *Duces Tecum*" showing the caption of the County Court of the State of New York, County of Onondaga, in the criminal case of *People v. Sima March and Alexander March*, Indictment # 2011-0513-1, 2, 3, 4, Index #: 2011–0593. The Marches are his cousins. Under the caption in large type, the applicant wrote: "The People of the State of New York" and directed the document to **Jacqueline Watkins** at an address in Buffalo, New York. The document stated: "**WE COMMAND YOU, that all business and excuses being laid aside, answer the attached questionnaire, under oath, and return it to the Law Office of Jon Ari Lefkowitz PC, on or before the 17th day of January 2014**," at his office address in Brooklyn. The subpoena went on to say: "**Failure to comply with this subpoena is punishable as contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.**" Under this threat of contempt and penalty, the applicant included the name of the same judge, a Supreme Court Justice in Onondaga County Supreme Court, and under that the applicant's name and office address:

> **WITNESS, Honorable Donald A. Greenwood, one of the judges of said Court at Syracuse, New York on the 15th day of Nov, [*sic*] 2013.**
>
> **_____**
> **Jon A. Lefkowitz**
> **Attorney for Sima March**
> **1222 Ave. M Suite 204**
> **Brooklyn, NY 11230**
> **(718) 692-0459**

(App. Ex. C) (emphasis supplied). The questionnaire was not attached to this judicial subpoena in the record before Judge Frost-Amusa.

5) The applicant admitted at the hearing that he did not submit the subpoena to the judge before he sent it (Tr. I at 17). He testified further that "of course, nobody signed the judge's name" and that he did not even sign his own name on the two subpoenas (Tr. I at 20).

6) However, it is undisputed that the applicant knew and understood that Justice Greenwood was never going to sign these subpoenas and that the judge did not know this subpoena went out. The applicant also knew that his cousin arranged for service of the subpoenas upon the witnesses (Tr. I at 17, 20, 29). As will be seen in detail below, the applicant was not counsel in the criminal case whose caption he wrote in the subpoena and had no business issuing such a subpoena for service upon an unsuspecting witness. There was no testimony about whether he had ever appeared as counsel for any party in the civil case. Throughout the license application process and the hearing on the broker's license, the applicant denied that issuing these subpoenas renders him untrustworthy, even after entering his guilty plea to knowingly facilitating his cousin's felony forgery, a crime in which dishonesty inheres.

7) The applicant testified that Mr. March is his cousin, who was being prosecuted in Onondaga County, and that his cousin asked the applicant to help him with his case because the applicant was a lawyer (Tr. I at 15). Mr. March, the applicant stated at the hearing, wanted him "to get some testimony from two witnesses and he asked me to prepare two subpoenas from [*sic*] these witnesses, which I did" (Tr. I at 15). He admitted that he sent the two subpoenas (App. Ex. C) to Mr. March, who then sent them to the witnesses (Tr. I at 15). The applicant explained that at the time there were two cases pending involving Mr. March, one civil and one criminal, so he prepared one subpoena for each case, "And basically, the attorney general felt that this was a crime" (Tr. I at 15). The applicant testified that he was "not trying to get [the witnesses] to lie or do anything underhand" (Tr. I at 15). "It was largely -- the top count that I was charged with was forgery but that subpoena contained at the bottom of it was the name of the judge. The name of the judge who was presiding in the civil case, Judge Greenwood, which was a normal thing to do" (Tr. I at 15-16). There was nothing "normal" about these subpoenas. The respondent stated at the hearing that in practicing law for 20 years, he always put the name of the presiding judge at the bottom of the subpoena. He contended that he simply used a standard Blumberg form (Tr. I at 16; State's Ex. 2). He also contended that "that's what everybody else does, and I had no idea that it would lead to such trouble and be considered a crime, but the State decided that that's forged even though, of course, I did not sign any name, I just printed the name of the presiding judge in the civil case, but they decided that's forgery and that was the top charge" (Tr. at 17).

8) The applicant was prosecuted by the Office of the New York State Attorney General. He executed a Plea and Co-operation Agreement on May 11, 2016 (the "Plea Agreement"), with that Office. The agreement is signed by Andrew J. Tarkowski, Assistant Attorney General, the applicant, and two attorneys for the applicant, James (Jim) Hopkins, Esq., and Dan Arshack, Esq. (State's Ex. 2). The applicant agreed to plead guilty on the date of the agreement, to one count of Criminal Facilitation in the Fourth Degree, in violation of Penal Law § 115.00(1), a Class A misdemeanor, "a lesser included offense under Count 3 of the Indictment charging Forgery in the Second Degree" (Plea Agreement ¶ 4, State's Ex. 2). He was released on his own recognizance and agreed to cooperate with the Attorney General, such that his sentencing could be adjourned more than two years while he cooperated with the Office of the Attorney General (Agreement ¶ 4, State's Ex. 2).

9) The Plea Agreement provided that in return for his cooperation in a related criminal case involving his cousin, the Attorney General's Office would recommend a sentence of a one-year conditional discharge, would not oppose any application he made for a certificate of relief from civil disability, and would not prosecute him for other specified crimes initially charged

(Plea Agreement ¶ 13, State's Ex. 2). The applicant agreed to make the following allocution and admissions:

> I, defendant Jon Lefkowitz, on or about November 22, 2013, believing it probable that I was rendering aid to Alexander March who intended to commit a crime in Onondaga County, engaged in conduct which provided Alexander March with the means and opportunity for the commission thereof and which in fact aided Alexander March to commit the felony of Forgery in the Second Degree in violation of Penal Law § 170.10(l), to wit: with knowledge that it would be served, I drafted a judicial subpoena that purported to be witnessed by a Supreme Court Judge that ordered a witness to answer a written questionnaire under oath and under penalty of contempt, in regards to the matter of The People of the State of New York v. Sima March and Alexander March.

(Plea Agreement ¶ 11, State's Ex. 2). Forgery in the Second Degree is a Class D Felony under Penal Law section 170.10(1), which provides in pertinent part:

> A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed: 1. A deed, will, codicil, contract, assignment, commercial instrument, credit card . . . or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status.

Penal Law § 170.10(1). Clearly, the applicant admitted to facilitating, with knowledge of the purpose of the subpoena, a forgery or fraud by his cousin. Section 115.00(1) of the Penal Law provides:

> A person is guilty of criminal facilitation in the fourth degree when, believing it probable that he is rendering aid: [1] to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony[.]

Penal Law § 115.00(1).

10) On March 23, 2017, based on the applicant's guilty plea before the Hon. Thomas J. Miller, County Court, County of Onondaga, and before sentencing, the New York State Supreme Court, Appellate Division, suspended the applicant's law license, "as a result of his conviction of a *serious crime*, continuing until further order of the Court. . . ." *Matter of Jon A. Lefkowitz*, 2017 NY Slip Op. 68079(U) (State's Ex. 3) (emphasis supplied). The applicant was ordered to advise the Court promptly upon being sentenced. The Appellate Division deemed criminal facilitation to be a serious crime.

11) By application dated March 27, 2017, and file-stamped by the Department April 4, 2017, the applicant applied for a real estate broker's license, to operate as Jon Lefkowitz Realty (State's Ex. 2). On the application, the applicant disclosed that he had been convicted of a crime (State's Ex. 2). Appended to the application were a Memorandum of Law submitted on behalf of

the respondent in the attorney disciplinary matter concerning him in the Appellate Division, Second Department, and a copy of the Plea Agreement (State's Ex. 2).

12) The applicant was sentenced about a year after his plea, on May 12, 2017, before Judge Miller. The applicant noted at the hearing before Judge Frost-Amusa that the transcript of the sentencing proceeding showed that he had fulfilled his end of the plea bargain by cooperating with the Attorney General's Office, and that Assistant Attorney General Tarkowski spoke to the judge about the applicant's co-operation, stating that he was not the mastermind of his cousin's crimes (Tr. I at 11-12; App. Ex. B). Mr. Tarkowski stated on the record that "the Court is aware that this case arose from the Alex March mortgage front case" (Sentencing Tr. at 3, App. Ex. B). He added:

> It is known that Alex March was the mastermind behind the entire tampering and forgery, and that it was – Mr. Lefkowitz's role was that he facilitated Mr. March in helping him try to evade extradition by creating these judicial subpoena[s]. And we know Mr. Lefkowitz didn't have anything to do with the – he wasn't the one making the phone calls. That was Mr. March. But Mr. Lefkowitz did aid Mr. March in ultimately achieving his goal of attempting to evade extradition.
>
> And for that reason, Judge, we did enter an agreed upon disposition whereby Mr. Lefkowitz will receive a one year conditional discharge for his plea to the misdemeanor of criminal facilitation.

(Sentencing Tr. at 3, App. Ex. B). Mr. Tarkowski added by way of clarification that the applicant "did aid Mr. March in this whole process." He noted, however, that because the applicant had adhered to the terms of the Plea Agreement, the Government was ready to go forward with the one-year conditional discharge (Sentencing Tr. at 4-5, App. Ex. B). Mr. Hopkins, attorney for the applicant, argued that the applicant was "not the princip[al] player in this whole endeavor," that he had "acknowledged that he crossed the line," and that he and his family had suffered from his suspension from the practice of law (Sentencing Tr. at 4, App. Ex. B). Based on the attorneys' representations and "the equities" presented by Mr. Hopkins, Judge Miller stated that the applicant had "accepted responsibility" and issued the Certificate of Relief from Disabilities on the same day as the sentencing proceeding, May 12, 2017 (Sentencing Tr. at 5, App. Ex. B). The applicant declined to speak on his own behalf at sentencing (Sentencing Tr. at 5, App. Ex. B). He was sentenced to a one-year conditional discharge, waived appeal, was granted a Certificate of Relief from Disabilities, and was ordered to pay a $175 mandatory surcharge, a $25 crime victim fee, and a $50 DNA fee (Sentencing Tr. at 6; App. Ex. B). The applicant was about 45 years old at the time of the crime, and is now 49 (App. Ex. A).

13) By Decision and Order of the Appellate Division dated July 19, 2017, the applicant was directed to show cause at a hearing before the Honorable Charles J. Thomas, as Special Referee, why a final order of suspension, censure, or disbarment should not be made based on his conviction of a "serious crime." *Matter of Jon Lefkowitz*, No. 2016-07364 (July 19, 2017), http://www.courts.state.ny.us/courts/ad2//Handdowns/2017/Motions/M233989.pdf. The applicant was represented in the course of the disciplinary proceedings concerning his law license by Hal Lieberman, Esq. (Tr. I at 27), and Kelly McCollum, Esq. (July 19, 2017 Decision and Order of the Appellate Division, Second Department). The applicant submitted at the instant hearing a Memorandum of Law filed

on his behalf in his attorney disciplinary case in the Appellate Division, Second Department, to show mitigation and to argue against suspension from the practice of law (State's Ex. 2). Based upon the applicant's motion to vacate his suspension, and the papers filed in support of and against his motion, the Appellate Division denied the motion to vacate the suspension on March 15, 2018, in *Matter of Jon A. Lefkowitz*, No. 2016-07364, 2018 NY Slip Op. 67143(U), found at: http://www.courts.state.ny.us/courts/ad2/Handdowns/2018/Motions/M247389.pdf.

14) Based in part on the explanation of rights on the back of the Certificate of Relief from Disabilities, section B, the applicant argued, the certificate should relieve him of all bars to employment and licensing (Tr. I at 7-10).

15) The back of that certificate explains that forfeiture of a license is not automatic, but also notes that neither is relief from civil disabilities mandated. Section C of the explanation on the back of the certificate provides:

> A conviction of the crime or the offense specified on the face of this certificate shall **NOT** prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified on the reverse side of this certificate as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or renew any license, permit or other authority or privilege.

(App. Ex. A) (emphasis in original).

16) By letter dated April 20, 2017, the DLS advised the applicant that it proposed to deny his application for a real estate broker's license because "his conviction, actions and circumstances which surround said conviction indicate a lack of the good character, and trustworthiness and competency required for licensure" (State's Ex. 1). By letter stamped received by the DLS on May 2, 2017, the applicant requested an administrative hearing "to review the unjust denial" of his application for a real estate broker's license (State's Ex 1).

17) On July 11, 2018, the Appellate Division, Second Department issued its latest Opinion and Order in *Matter of Lefkowitz,* 2018 NY Slip Op. 05164, 2018 N.Y. App. Div. LEXIS 5116 (July 11, 2018). In that decision, the Court recited the full opportunity afforded to the applicant to be heard about his conduct affecting his law license: that after it suspended him from the practice of law *sua sponte,* based on his conviction of a serious crime, the applicant was afforded a hearing before the Special Referee; the Court then entertained and denied the applicant's motion to vacate the suspension. The Court for the first time put a time frame on the applicant's law license suspension: two years, with credit for the time since the initial suspension on March 23, 2017. The Court held that the applicant would have to apply for reinstatement; it would not be automatic. And, the Court noted that there were initially charges against the applicant of felony forgery, misdemeanor witness tampering, misdemeanor criminal impersonation, and other charges that were not prosecuted as result of the applicant's co-operation with the Government, all as noted in the Plea Agreement (State's Ex. 2). The Court considered the applicant's guilty plea, and, in mitigation of the applicant's conduct, the statements of Assistant Attorney General Tarkowski in the applicant's favor at sentencing.

18) The Appellate Division gave full consideration to the applicant's arguments and factual submissions for mitigation and for a penalty no greater than a public censure. The Court noted that at the conclusion of the hearing the Special Referee found that the applicant was "fully remorseful and clearly understands that he faces further sanctions and is resolute not to repeat his mistakes." The Court considered and recited the very same arguments for mitigation that the applicant made here, but the Court did not adopt those arguments as factual findings. Rather, it stated: "In seeking public censure, the respondent asks that the following mitigating factors be considered: he harbored no intent to deceive; he acted in good faith by using a form that he had used in the past without a problem; he was merely attempting to help a relative; he did not act for financial gain; he made a mistake, which he vows never to repeat again; and he has an excellent reputation and is known as attorney who cares deeply about his clients." *Matter of Lefkowitz,* 2018 NY Slip Op. 05164 at **1, 2018 N.Y. App. Div. LEXIS 5116 (July 11, 2018). However, significantly for our purposes here, the Court did find dishonesty in the applicant's conduct:

> Notwithstanding the above mitigation, *the respondent's conduct on its face created a deception. Not only had Judge Greenwood not signed the subpoena, but the respondent had not entered an appearance on behalf of his cousin or his cousin's wife. Yet, the respondent interjected himself into a criminal proceeding by providing the subpoena to his cousin for the purpose of evading extradition. The conclusion that the respondent's conduct constituted a knowing, direct, and intentional interference in the judicial process is inescapable as he admittedly attempted to assist his cousin in evading extradition. The respondent's conduct cannot be condoned or treated lightly simply because he mistakenly employed a means that he knows now is incorrect, or because, as he testified, he believed he was attempting to elicit truthful testimony from the witness.*

Id. at **1-2 (emphasis supplied). The Court noted also: "The subpoena identified the respondent as the attorney for Alexander March's spouse, Sima March, despite the fact that the respondent had never entered an appearance on her behalf." *Id.* at **1. The Court's point that the applicant injected himself into a criminal proceeding in which he was not counsel belies the applicant's claims of innocence and honesty at the hearing on his broker's license application. In addition, the Court noted that the applicant was recently admonished, on January 11, 2018, "for failing to pay a sanctions order in the amount of $5,000 issued against him." *Matter of Lefkowitz,* 2018 NY Slip Op. 05164 at **1, 2018 N.Y. App. Div. LEXIS 5116.

19) These judicial findings are difficult to accept for any lawyer, and the applicant was, in common parlance, "in denial" during the hearing on his real estate broker's license about the inherent and patent deceitfulness of his actions. During that hearing, the applicant denied repeatedly that his crime involved dishonesty or untrustworthiness, and he refused to take ownership of or responsibility for the knowing and dishonest abuse of legal process, despite his guilty plea. The Appellate Division recently found that he worked a deception by delivering to his cousin for service upon an unsuspecting witness a deceptive judicial subpoena. This conduct was knowing, in that he admitted that he knew his cousin would serve the subpoenas on the witnesses. And the purportedly official documents demonstrably were drafted to have an *in terrorem* effect on the witnesses by including the penalty of contempt of court and a judge's name, even though no judge had reviewed or issued these subpoenas. And he made them returnable to his office, even though he was not even counsel of record to any party, at least in the criminal

case.

He testified here, for example:

- So the only reason that they offered for the State to deny my license is not something that we heard today but rather what has been stated in the letter of April 20th, 2017, that's part of Exhibit 1. It simply is the two lines which explains that there's a lack of good character plus competency required for licensure, and that's not true, and the reason it's not true is because *all you have before you is a conviction for criminal facilitation, that has nothing to do with my character, trustworthiness* nor competency *for a license*, and it's just not me saying that. The
  judge, the sentencing judge felt the same way which is why he issued me a certificate of relief from civil disability.

- There was no cheating involved.

- There's *no indication that I lack* the character or *trustworthiness* to have a real estate license and there's no indication that the State or the people of the State of New York would in any way be harmed if I would have a real estate license.

- It was largely -- the top count that I was charged with was forgery but *that subpoena contained at the bottom of it was the name of the judge. The name of the judge who was presiding in the civil case, Judge Greenwood, **which was a normal thing to do.**"*

- I am trying to make a living as a real estate broker and *none of what we heard before in terms of evidence is any indication that I am not fit to have a real estate license or that I have done anything dishonest* or that I was harming the people of the State of New York. There's no allegation that I lied or did anything dishonest or that there's anything lacking in the character of a person who should have a real estate license . . . .

- And *there's really no evidence of untrustworthiness or dishonesty or bad character or anything else that would harm the people* of the State of New York and no reason why I shouldn't have my license and be able to earn an honest living.

- Well, as I explained, because *it is not true that there's any circumstance indicating lack of good character or untrustworthiness* and I should be able to earn a living like everybody else. The circumstances indicate only that I made a mistake for which I paid severely and it's not a matter, it's not like I lied or cheated or stole any dollars from anyone, I didn't even ask for any money, I didn't get any money, I didn't hurt anyone, so I should be able to

> have a license. There's no indication that it's contrary to the interest of the State of New York.

(Tr. I at 7-8; 10, 15-16,18-19, 26, 29-30) (emphasis supplied). There was nothing "normal" about a lawyer invoking the name of a sitting Justice of the New York State Supreme Court in a "judicial subpoena," without the judge's knowledge, in a criminal case in which the lawyer was not even appearing. This testimony contradicts the applicant's guilty plea -- entered before Judge Miller only two months before his hearing concerning his real estate broker's license application -- that he knowingly facilitated his cousin's crime of forgery, which itself, by definition, is a crime of dishonesty.

20) The applicant testified that unbeknownst to him, the New York State Attorney General's Office recorded a call concerning the subpoenas. He did not offer the two recordings he testified he had because they could not be opened or played (Tr. I at 12), but he described them. A lawyer from New Jersey cooperating with the Attorney General's Office reportedly called him on his cell phone about the subpoena in the criminal case and told him that the subpoena he "sent to the witness stated some things that were not true" (Tr. I at 12). The applicant testified here that he responded, "well, if it's not true then she should say it's not true" (Tr. I at 12-13). He asserted that because of this statement, "there is no evidence there's any lack of honesty or trustworthiness on my part, quite the contrary, all I was trying to do was get people to say the truth, and the State is well aware of that" (Tr. I at 13). Giving the applicant the benefit of the doubt, even without the recordings, all this testimony shows is that the applicant had an obligation as an attorney to seek the truth from a witness, but this narrative does nothing to obscure the fact that he had no right to demand any evidence from this witness in the first place through the use of a bogus subpoena.

21) Based on his testimony and his guilty plea that he knowingly helped his cousin perpetrate felony forgery, which is, at base, a fraud, and the fact that he was not representing anyone in the criminal case, the applicant, a lawyer for more than two decades (State's Ex. 3), had to know that what he was doing was deceitful.

22) The applicant submitted no character references in the hearing before Judge Frost-Amusa and called no witnesses other than himself. He also made no showing on the record of the hearing before Judge Frost-Amusa of rehabilitation or good conduct other than his co-operation with the Attorney General's Office after he was indicted. I note, however, that the Appellate Division considered, in its subsequent, July 11, 2018 Opinion and Order the applicant's character references, and I am also mindful of the record he made before me in *Lefkowitz I* concerning his application for renewal of his notary public commission. That record includes 11 character reference letters that he submitted both to the Special Referee and to me, and his testimony in the notary case, *see Lefkowitz I* at 10, about his *pro bono* work and mentoring of staff in his former law office (State's Ex. 3 and App. Ex. A; Tr. July 18, 2018 at 36-38, in *Lefkowitz I* ['Tr. IV']).

23) The applicant submitted in this matter a set of Verizon phone records he said pertained to the witnesses, Watkins and Carvalho, for the period 2012 through 2014, that had been subpoenaed by the Attorney General's Office. The applicant contended without opposition that there were no calls from his office telephone number shown on the subpoenas (App. Ex. C) to the witness or witnesses. He argued that because his office telephone number is not shown in these documents, he did not tamper with these witnesses (Tr. I at 21-22, 24-25; App. Ex. D). There is

nothing in this exhibit that eliminates cell phone numbers or other phones that could have been used, and I note that the search by Verizon seemed to be of only Ms. Watkins' number. In any event, there is no indication that the applicant was convicted of witness tampering, and these documents are relevant only to the extent that they tend to support the applicant's argument that he did not personally call the witnesses.

24) The applicant made the same arguments here in mitigation of his conduct that he made in his attorney disciplinary matter: that the subpoenas were not signed; that they followed a Blumberg form including space for a judge's name, and that that he had copied the form (though I note that he did write in the name of an actual judge and the civil subpoena indicated that it was a conformed copy of an original document that the applicant had signed); that he got no jail time, no fine (other than fees charged), and no probation; that he was discharged upon fulfillment of a co-operation agreement with the Attorney General's Office; that he received a certificate of relief from disabilities; that there was no harm or intent to harm anyone; that there was no evidence that anyone was in fact deceived; that the applicant did not profit and was not paid for his work on the subpoenas; that he was not involved or charged in any aspect of his cousin's fraud scheme (though the Plea Agreement contradicts this point and shows that he was charged with forgery, witness tampering, and criminal impersonation, charges that he settled with the misdemeanor conviction for criminal facilitation); that he was only asking the witnesses to tell the truth; and that he did not know that he had done anything wrong or illegal (State's Ex. 2, Memorandum of Law submitted in the *Matter of Jon Lefkowitz* in the Appellate Division at 2; Tr. I at 7-10).

OPINION AND CONCLUSIONS OF LAW

I - As the person who initiated the hearing, the burden is on the applicant to prove by "substantial evidence" that he has the required trustworthiness to serve as a real estate broker. State Administrative Procedure Act ("SAPA"), § 306(1); *see Matter of Kelly v. DiNapoli*, 30 NY3d 674, 684 (2018) (defining substantial evidence). Substantial evidence is that which "a reasonable mind" could "accept as adequate to support a conclusion or ultimate fact." *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 NY2d 176, 180 (1978), *cited in Gray v. Adduci*, 73 NY2d 741, 742-743 (1988); *Tutuianu v. New York State*, 22 AD3d 503, 504 (2d Dep't 2005). "The question. . . is whether 'a conclusion or ultimate fact may be extracted reasonably -- probatively and logically.'" *City of Utica Bd. of Water Supply v. New York State Health Dep't*, 96 AD2d 719 (4th Dep't 1983), *quoting 300 Gramatan Ave. Associates, supra*, 45 NY2d at 181; *Division of Licensing Services v. Cirrincione*, 246 DOS 98 (1998).

I find that the applicant failed meet his burden to prove that he has the requisite trustworthiness to serve as a real estate broker at this time.

II – In applying for a real estate broker's license, the applicant must present to the Department "[s]uch further information as the department may reasonably require . . . to enable it to determine the *trustworthiness* of the applicant. . . ." Real Property Law § 441(1)(b) (emphasis supplied). Before the Department will issue a real estate broker's license, it must be "satisfied of the . . . *trustworthiness* of the applicant." Real Property Law § 441-a(1) (emphasis supplied).

In making licensing determinations, the Department must abide by Correction Law Article 23-A, and "deal equitably with ex-offenders while also protecting society's interest in assuring

performance by reliable and trustworthy persons." *Bonacorsa v. Van Lindt*, 71 NY2d 605, 611 (1988). Article 23-A "was enacted in 1976 in an attempt to eliminate the effect of bias against ex-offenders which prevented them from obtaining employment." *Id.*

The Department may use a person's criminal conviction as the basis for denying a license only where "(1) [t]here is a direct relationship between [a previous criminal offense] and the specific license or employment sought" by the applicant, or (2) where "the issuance or continuation of the license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." Correction Law § 752. There is a "direct relationship" between a criminal offense and the license sought when "the nature of [the] criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license. . . in question." Correction Law § 750(3). As it is not defined by statute, a finding of "unreasonable risk" "depends upon a subjective analysis of a variety of considerations relating to the nature of the license. . . sought and the prior misconduct." *Bonacorsa*, 71 NY2d at 612. Absent either a direct relationship or unreasonable risk, "a conviction cannot be considered as a basis for denying a license or employment." *Id*. At 612-13.

III - Where a direct relationship exists between the criminal offense in question and the license sought, the eight factors set forth in Correction Law § 753(1) are applied to determine whether "the direct relationship is sufficiently attenuated to warrant issuance of the license" despite the nexus between the license and the crime. *Bonacorsa*, 71 NY2d at 612-14. Those eight factors are:

> (a) The public policy of [New York State], as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
> (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
> (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
> (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
> (e) The age of the person at the time of occurrence of the criminal offense or offenses.
> (f) The seriousness of the offense or offenses.
> (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
> (h) The legitimate interest of the public agency . . . in protecting property, and the safety and welfare of specific individuals or the general public.

Correction Law § 753(1). *See Matter of Bonaventure v. Perales*, 106 AD3d 665 (1st Dep't 2013), *leave to appeal denied*, 22 NY3d 851 (2013) (Secretary of State properly considered and weighed the factors in section 753[1] with respect to license application).

In addition, the Correction Law provides for consideration of certificates of relief from disabilities:

> In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

Correction Law § 753(2).

"The weighing of the factors is not a mechanical function and cannot be done by some mathematical formula, but rather, as the Court of Appeals has held, must be done through the exercise of discretion to determine whether the direct relationship between the []convictions and the license ['has been sufficiently attenuated to warrant issuance of the license']." *Perez v. Division of Licensing Services*, 21 DOS APP 13 at 3 (2013) (citing *Bonacorsa*, 71 NY2d at 612).

The duties of a real estate broker inform the determination of whether there is a direct relationship between the crime of which the applicant was convicted and the broker's license. As noted in an appellate decision of the Department, "[t]he relationship of a real estate broker and his or her clients [is] *fiduciary in nature*." *Andrew G. Maloney v. Division of Licensing Services*, 13 DOS APP 03 at 2 (2003) (citing, *inter alia*, *Northeast Gen. Corp. v. Wellington Advertising*, 82 NY2d 158, 162-163 [1993]) (emphasis supplied). Significantly, for purposes of the instant review, *"[a] fiduciary relationship is '[one] founded on trust or confidence reposed by one person in the integrity and fidelity of another*.'" *Maloney* at 2 (citing *Mobil Oil Corp. v. Rubenfeld*, 72 Misc 2d 392, 399 (Civ. Court Queens Co. 1972) (emphasis supplied), *aff'd,* 77 Misc 2d 962 (Sup. Ct. App. Term 1974) (per curiam), *rev'd on other grounds,* 48 AD2d 428 (2d Dep't 1975), *aff'd,* 40 N.Y.2d 936 (1976)). "The public depends upon the Secretary to license only those who are trustworthy." *Maloney* at 3 (emphasis supplied). The Department recently reaffirmed this bedrock principle of law that "a real estate broker acts in a fiduciary capacity." *Alexis Mendez v. Division of Licensing Services*, 32 DOS APP 18 at 8 (Sept. 17, 2018).

In *Roman v. Lobe*, 243 NY 51, 54 (1926), where the Court of Appeals upheld the statutory requirement for a real estate broker's license, Justice Cardozo, writing for the majority, warned:

> The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost. With temptation so aggressive, the dishonest or untrustworthy may not reasonably complain if they are told to stand aside.

Roman v. Lobe, 243 N.Y. at 54. The Court of Appeals has further elucidated in a later case the obligations of real estate brokers in New York State:

> . . . it has been observed in several Appellate Division cases that the Legislature has given respondents wide discretion in determining what conduct can constitute "untrustworthiness" . . . . Indeed, courts, recognizing the inherent flexibility in the term "untrustworthiness," have been careful not to fashion, nor require rigid

> definitions. . . . As one court observed: "We do not here attempt to define 'untrustworthiness' or fix the absolute limits of its application. However, there should be such factual presentation concerning acts or conduct by the licensee or his agent as would warrant a conclusion of unreliability, and which establishes that any confidence or reasonable expectation of fair dealing to the general public would be misplaced. It is apparent from the context in which the term 'untrustworthiness' appears in the statute that the Legislature intended the Secretary of State to be vested with a wide discretion in determining what should be deemed untrustworthy conduct. . . . This is as it should be for his is the obligation of protecting the public against wrongdoing. . . ."
>
> . . . The concept of "untrustworthiness" is similar to that of "unprofessional conduct" found in other regulated callings and it has never been necessary for the Legislature to specifically enumerate the precise deviations which it considers unworthy of a particular profession. . . .

Gold v. Lomenzo, 29 NY2d 468, 476-77 (1972) (citations omitted); *Kenneth E. Beasley v. Division of Licensing Services*, 14 DOS APP 11 at 2 (2011) ("Secretary of State is vested with wide discretion in determining what conduct constitutes untrustworthiness . . . ").

In this case, the nexus between the crime for which the applicant was convicted and his fitness to fulfill the duties and responsibilities of a real estate broker is direct and strong. He subverted the judicial process by using false and intimidating judicial subpoenas, thereby undermining his trustworthiness to serve in a fiduciary capacity. As a fiduciary, a real estate broker "deals on a regular basis with such documents as mortgage and rental applications, leases and deeds." *Matter of Application of Sean D. McPhail*, 780 DOS 17 at 5 (2017). I find a direct relationship between the applicant's issuance of bogus legal process and the real estate broker's license, which requires brokers to secure the integrity of real property documentation and transactions. Here, the applicant's testimony shows that he tried to negate his guilt for his crime, and this refusal to accept responsibility weighs against him. *See Matter of Levine v. N.Y.C. Taxi & Limousine Comm'n*, 136 AD3d 1037, 1039 (2d Dep't 2016) (attorney suspended from the practice of law for two years was properly denied a yellow cab license where his "crimes were recent and serious, and bore a direct relationship to how he dealt with persons who hired him for his services," and he minimized his responsibility for his crimes at his fitness interview); *Glucksman v. Cuomo*, 62 AD2d 978 (2d Dep't 1978) (denial of application for license as a real estate broker was warranted based upon determination by Secretary of State that there was a direct relationship between the applicant's criminal offenses and the license he sought); *McPhail*, supra, 780 DOS 17 at 2, 3 (2017) (real estate broker's license denied to applicant who had been convicted of misdemeanor of Offering a False Instrument for Filing for failing to report to the New York State Insurance Fund earnings received from a church while he was collecting worker's compensation benefits for a purported disability, and who, in his testimony "was not forthright" and attempted to "negate his guilt in the matter").

The question presented is whether, notwithstanding the conviction and the conduct surrounding it, the applicant has shown that the direct relationship is sufficiently attenuated post-conviction to warrant a license on this record. I turn now to consideration of the factors set forth

in Correction Law section 753, and to the meager record here of the applicant's efforts at rehabilitation since his conviction.

The pertinent duties and responsibilities of a real estate broker (§753[1][b]) have already been discussed with respect to the question of direct relationship. The fact that the applicant was convicted of a crime directly related to those duties gives rise to a negative inference regarding his fitness to perform those duties and to meet those responsibilities (§753[1][c]).

Only two years have passed since the applicant's conviction and about five years since the underlying conduct (§753[1][d]). The applicant committed the crime when he was a mature adult and an experienced lawyer presumably able to understand the consequences of his actions (§753[1][e]).

The seriousness of the crime (§753[1][f]) is established by the findings by the Appellate Division of the applicant's deception and "knowing, direct, and intentional interference" with "the judicial process," which the court found "inescapable." The Court deemed criminal facilitation a "serious crime."

In the applicant's favor is the public policy of encouraging licensure of ex-offenders (§753[1][a]).

Although he bears the burden of proof, the applicant presented at the hearing on the broker's license no proof of rehabilitation and good conduct since the crime, other than his own assertions of his trustworthiness and testimony and documentation of his post-indictment cooperation with prosecutors (§753[1][g]). As noted, however, I am mindful that recently, *see Lefkowitz I* at 14, he provided his own testimony and documentary proof of his character and good conduct before and after conviction. In that case, he provided 11 character reference letters and his own testimony there about his *pro bono* work as a lawyer and his mentoring of employees, and the 11 letters attesting to his honesty in other contexts, his community service, mentorship, and his reported refusal to notarize documents outside the presence of the person signing them. I have also considered his cooperation with the Attorney General's Office and the findings of the sentencing judge. However, I note that the brief record of attorneys' representations before the sentencing judge did not include the applicant's first-hand, repeated denials of responsibility that pervaded the record here.

I have also considered in the applicant's favor the Certificate of Relief from Disabilities granted by the sentencing judge. However, the Certificate is not dispositive here; "the rebuttable presumption of rehabilitation raised by that certificate is only one of several factors that [an] Administrative Law Judge [is] required to consider. . . ." *Hughes v. Shaffer*, 154 AD2d 467 (2d Dep't 1989) (notary commission renewal properly denied on consideration of all relevant factors after, *inter alia*, criminal impersonation conviction); *Maneri v. New York State Dep't of State*, 240 AD2d 748, 748-49 (2d Dep't 1997) (certificate of relief from disabilities did not preclude revocation of real estate broker's license where the licensee was guilty of fraudulent practices and had shown untrustworthiness to serve as a broker; notary public commission was also properly revoked); *Plantone v. State Dep't of State, Div. of Licensing Servs.*, 251 AD2d 1049, 1049 (4th Dep't 1998) ("It is well settled that a certificate of relief from disabilities does not preclude a

licensing body from exercising its discretion to revoke a license over which the licensing body has authority") (revocation of real estate salesperson found "untrustworthy" upheld notwithstanding certificate of relief from disabilities).

All of the above must be considered in the light of the legitimate interest of DLS in the protection of the property, safety, and welfare of the public (§753[1][h]).

The applicant was convicted of an act of dishonesty directly related to the duties of a fiduciary -- a person who must handle clients' documents, funds, and property honestly. The applicant did not take responsibility here for the dishonesty inherent in the bogus subpoenas he created for use and service by his cousin, to aid in the cousin's fraud. That the applicant was not counsel to any party in the criminal case and nonetheless issued a bogus subpoena that invoked the name of a sitting judge, commanded a witness to answer a questionnaire under oath, and threatened her with contempt penalties obviously indicates that the use of such a subpoena involved deception of the witness. The applicant repeatedly testified that he had not been dishonest and minimized his crime, stating that he simply used a Blumberg form that he had used many times over the years in civil cases. But the record showed that he deployed his skill as a lawyer to facilitate his cousin's crime. And he cannot relitigate his conviction here. "A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts. . . . Therefore, a defendant who pleads guilty to or is convicted of a criminal charge is collaterally estopped from relitigating, in a subsequent civil action, the facts upon which the conviction is based." *Vance v Wilson*, 2018 NY Slip Op. 30475(U) at **3, 2018 N.Y. Misc. LEXIS 962 (Sup. Ct. N.Y. Co. 2018) (citing, *inter alia, S. T. Grand, Inc. v. New York*, 32 NY2d 300, 305 (1973)).

The notion that there was no dishonesty in the applicant's crime is simply not credible and contradicts the Appellate Division's findings on the same issue the applicant litigated and lost in that Court. Even if the applicant sincerely believes his actions were not dishonest, then he is still in denial and not ready to be granted a real estate broker's license. The record here reflects a sharp practice that is incompatible with the trust placed in real estate brokers, who must deal honestly with buyers and sellers alike. The applicant contended that he did not know his conduct in issuing subpoenas with the judge's name featured was illegal and that he did not know of his "mistake" at the time, but that he has been punished "a lot, and it would be seriously disproportionate to the fact that I pleaded guilty to this matter . . . and in addition to that, suspension from the practice of law, which, by the way, we have no idea when that will end" (Tr. I at 17-18). But against the respondent's adjudicated deceptive conduct demonstrating untrustworthiness, these arguments are unavailing.

Although the applicant bore the burden of proving his trustworthiness, he offered in the instant hearing no character reference letters or testimony other than his own on this subject before Judge Frost-Amusa. I am mindful of all the good that the applicant has done both as a lawyer and as a member of his community as shown by his submissions to me recently in *Lefkowitz I*, concerning his application to renew his notary public commission. However, after balancing all the factors set forth in the Correction Law, I find that the strong nexus between the crime and its underlying conduct and the real estate broker's license is not yet sufficiently attenuated to warrant the grant of the real estate broker's license.

CONCLUSIONS OF LAW

The real estate broker's license requires honesty and integrity in dealing with the purchase, sale, and rental of real property. *McPhail*, *supra*, 780 DOS 17 at 3 (2017) (real estate broker "is held to a high standard of honesty. The acts underlying [the] guilty plea were a demonstration of dishonesty and, therefore, of untrustworthiness, and [the] attempt to conceal . . . guilt amplifies that untrustworthiness"). In consideration of the full record of this matter, I find the risk created by the strong correlation between the crime the applicant committed and the real estate broker's license he seeks has not been sufficiently attenuated at this juncture.

After having given full consideration to the factors set forth in Correction Law section 753, I find that the applicant has not met his statutory burden of establishing that he has shown the trustworthiness required of a real estate broker (State Administrative Procedure Act § 306[1]; Real Property Law §§ 441(1)(b) and 441-a(1)), and that his registration as a real estate broker would not pose an unreasonable risk to the property, safety, and welfare of the public.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Jon Lefkowitz, for a real estate broker's license is hereby denied.

/S/
Joan R. Salzman
Administrative Law Judge

Dated: September 21, 2018