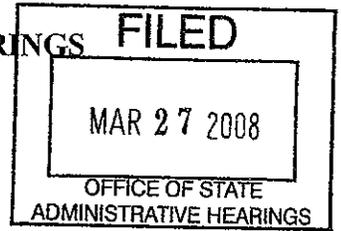


**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**



ALVARO CUBIAS,

Petitioner,

v.

GEORGIA DEPARTMENT OF
BANKING AND FINANCE,

Respondent.

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* Docket Number:
* OSAH-DBF-MBL-0818772-67-Howells
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INITIAL DECISION

Respondent filed its affidavit supported Motion for Summary Determination on January 31, 2008. Petitioner did not file a response to the motion. For the reasons stated below, Respondent's Motion for Summary Determination is **GRANTED**.

I. FINDINGS OF FACT

The following facts are undisputed:

1.

Starting on June 20, 2005, the Department initiated its examination of Georgia Premier Lending Corporation ("Georgia Premier"), which was licensed as a mortgage broker on January 7, 2005. (Hester Aff. ¶ 4). During the examination, the Department requested that Mr. Alvaro Cubias, the owner of Georgia Premier, complete the Officer's Questionnaire for Georgia Premier. (Hester Aff. ¶ 5; see Ex. C). As indicated in the Officer's Questionnaire provided to the Department, Alvaro Cubias is employed as the sole owner and president of Georgia Premier. (See Ex. C at 4-5, 4-18 & 4-19).

Evelin Morales' "Work" at Georgia Premier Lending Corporation

2.

During the examination, Mr. Cubias identified a desk at Georgia Premier's place of business belonging to Evelin Morales a/k/a Evelyn Morales. (Hester Aff. ¶ 6). While in Ms. Morales' office, the Department's examiner discovered a stack of bank statements – some of which contained hand written computations. (Hester Aff. ¶ 6, Exs. D-1, D-2 & D-3). In addition, the examiner discovered various other mortgage related documents in Ms. Morales' office, including a settlement statement, a payoff statement, and a response from Bank of America regarding a verification of deposit request. (Hester Aff. ¶ 6, Ex. E). When the examiner returned to Georgia Premier the next day to continue the exam, the bank statements were no longer in Ms. Morales' office. (Hester Aff. ¶ 6). Despite repeated requests for those statements, Mr. Cubias did not produce the documents. (*Id.*)

3.

Although Ms. Morales had an office at Georgia Premier and mortgage related documents were located in her office, the Officer's Questionnaire completed by Georgia Premier does not list Ms. Morales as a current or former employee. (*See* Ex. C at 4-19). The examiner asked Mr. Cubias to explain this discrepancy. (Hester Aff. ¶ 7). Mr. Cubias stated that Ms. Morales reviewed the bank statements of loan applicants for Georgia Premier. (*Id.*) Mr. Cubias also provided a written response to the examiner's inquiry which was received by the Department on June 28, 2005. (*Id.*; *see* Ex. F). The letter states that "Evelyn Morales was originally supposed to commence working with my company 'Georgia Premier Lending' when it first started running." (Ex. F). According to Mr. Cubias, Ms. Morales never completed an employment application. (*Id.*) However, he elaborated that Sherila Caquias, an employee of Georgia Premier, "allowed

Evelyn Morales to come to [Georgia Premier's] office and use a company computer knowing well that she was not an employee." (Ex. F). Mr. Cubias also indicated that Ms. Morales removed the bank statements from Georgia Premier's office. (*See id.* ("[f]rom the day our examination was complete to this day I have been trying to get a hold of Evelyn Morales so that she may complete her employment application and hand me the original bank statements as per your request[]")).

4.

Evelyn Morales a/k/a Evelin Morales is not licensed or registered with the Department as a mortgage broker or mortgage lender. (Shelley Aff. ¶ 4). Ms. Morales has never been individually licensed or registered with the Department as a mortgage lender or mortgage broker. (*Id.*)

5.

Ms. Morales processed the loan applications for at least three borrowers – Jose Pineda, Felipe Vasquez, and Jose Arqueta – on behalf of Georgia Premier by “reviewing” their bank statements. (Hester Aff. ¶¶ 6-7; *see* Exs. D-1, D-2, & D-3; Stimac Aff. ¶¶ 4 - 5; Ricard Aff. ¶ 4).

Loan of Jose Pineda

6.

During the examination, the Department reviewed the loan file of Jose Pineda for the property located at 5923 Jim Crow Road, Flowery Branch, Georgia 30542. (Hester Aff. ¶ 8). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Ex. G; Hester Aff. ¶ 8). The loan application states that Mr. Pineda had \$4,533.00 on deposit in Bank of America account number 009514719048. (*See* Ex. G). In addition, the examiner discovered in Mr. Pineda's loan file two bank statements indicating that

Mr. Pineda had in excess of \$4,500.00 on deposit at Bank of America. One bank statement for the period of January 24, 2005 through February 23, 2005 indicated that Mr. Pineda had an ending balance of \$4,898.20, while the other bank statement for the period of February 24, 2005 through March 23, 2005 indicated that Mr. Pineda had an ending balance of \$4,532.69. (Hester Aff. ¶ 8; *see* Ex. H).

7.

However, the bank statements discovered by the Department were not legitimate records of Bank of America, N.A. (*See* Trapp Aff. ¶ 2). Contrary to the representation in one of the bank statements that Mr. Pineda's account was open as of January 24, 2005, bank account number 009514719048 was not opened until March 23, 2005. (Trapp Aff. ¶ 2). Because account number 009514719048 was not opened until March 23, 2005, the bank statements for January 24, 2005 through February 23, 2005 and February 24, 2005 through March 23, 2005 are necessarily false or fabricated statements. Furthermore, because the account was not opened until March 23, 2005, the balance information in the fabricated statements is also false. Finally, the account balance on the loan application is also false because it is supported by the false February 24, 2005 through March 23, 2005 bank statement. (*See* Stimac Aff. ¶ 4, Exs. 1, 2).

8.

A bank statement for Mr. Pineda for the period of January 21, 2005 through February 23, 2005 was among the bank statements discovered by the examiner in Ms. Morales' office at Georgia Premier.¹ The number in the column of "Other Subtractions" on that statement had been blacked out and annotated with the hand written notation "268.09 = 67.56." (Ex. D-1). The statement did not have a heading for "ATM and Debit Card Subtractions." (*See id.*) These handwritten

¹ (Hester Aff. ¶ 6, Ex. D-1). Because Mr. Pineda did not open this account at Bank of America until March 23, 2005, the underlying document found in Ms. Morales' office by the examiner was false. (Trapp Aff. ¶ 2).

notations were incorporated into the altered bank statement for the period of January 24, 2005 through February 23, 2005 found in the loan file of Mr. Pineda and submitted to the lender. (Ex. H; Stimac Aff. ¶ 4, Ex. 2). The bank statement for January 24, 2005 through February 23, 2005 in Mr. Pineda's loan file indicates that he had "ATM and Debit Card Subtractions" in the amount of \$268.09 and "Other Subtractions" in the amount of \$67.56. (Ex. H; Stimac Aff., Ex. 2).

9.

Alvaro Cubias submitted Mr. Pineda's loan package to Irwin Mortgage Corporation ("Irwin") for funding. (Stimac Aff. ¶ 4). On April 27, 2005, Irwin funded Mr. Pineda's loan. (Stimac Aff. ¶ 4). Irwin relied on the information in the loan file including the information in the loan application as well as the produced bank statements to decide to fund Mr Pineda's loan. (Stimac Aff. ¶ 4, Exs. 1 & 2). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 4). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

Loan of Jose Argueta

10.

During the examination, the Department reviewed the loan file of Jose Argueta for the property located at 2920 Evergreen Hollow Drive, Gainesville, Georgia 30507. (Hester Aff. ¶ 9). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 9; Ex. I). The loan application states that Mr. Argueta had

\$4,791.62 on deposit in Bank of America account number 003340148587. (Ex. I). In addition, the examiner discovered in Mr. Argueta's loan file two bank statements indicating that Mr. Argueta had in excess of \$4,700.00 on deposit at Bank of America. One bank statement for the period of February 23, 2005 through March 22, 2005 indicated that Mr. Argueta had an ending balance of \$5,216.83, while the other bank statement for the period of March 23, 2005 through April 22, 2005 indicated that Mr. Argueta had an ending balance of \$4,791.62. (Hester Aff. ¶ 9; Ex. J).

11.

However, the bank statements discovered by the Department were not legitimate records of Bank of America, N.A. (See Trapp Aff. ¶ 2). Contrary to the representation in one of the bank statements that Mr. Argueta's account was open as of February 23, 2005, bank account number 003340148587 was not opened until May 9, 2005. (Trapp Aff. ¶ 2). Because account number 003340148587 was not opened until May 9, 2005, the bank statements for February 23, 2005 through March 22, 2005 and March 23, 2005 through April 22, 2005 are necessarily false or fabricated statements. Furthermore, because the account was not opened until May 9, 2005, the balance information in the fabricated statements is also false. Finally, the account balance on the loan application is also false because it is supported by the false March 23, 2005 through April 22, 2005 bank statement. (See Stimac Aff. ¶ 5, Exs. 4, 5).

12.

A bank statement for Mr. Argueta for the period of February 23, 2005 through March 22, 2005 was among the bank statements discovered by the examiner in Ms. Morales' office at Georgia Premier.² The number in the column of "ATM and Debit Card Subtractions" on that statement is

² (Hester Aff. ¶ 6, Ex. D-2). Because Mr. Argueta did not open this account at Bank of America until May 9, 2005, the underlying document found in Ms. Morales' office by the examiner was false. (Trapp Aff. ¶ 2).

\$467.31. (Ex. D-2). Next to this number is the handwritten notation "317.31". (*Id.*) In addition, the statement includes the handwritten notation "Other Withdraws 150.00." (*Id.*) The ending balance according to this statement is \$4,216.83. (*Id.*) These handwritten notations were incorporated into the altered bank statement for the period of February 23, 2005 through March 22, 2005 found in the loan file of Mr. Argueta and submitted to the lender. (Ex. J; Stimac Aff. ¶ 5, Ex. 5). The bank statement in Mr. Argueta's loan file for February 23, 2005 through March 22, 2005 indicates that he had "ATM and Debit Card Subtractions" in the amount of \$317.31 and "Other Subtractions" in the amount of \$150.00. (Ex. J). In addition, the bank statement in Mr. Argueta's loan file indicates that he had an ending balance of \$5,216.83. (*Id.*)

13.

Alvaro Cubias submitted Mr. Argueta's loan package to Irwin Mortgage Corporation ("Irwin") for funding. (Stimac Aff. ¶ 5). On June 15, 2005, Irwin funded Mr. Argueta's loan. (*Id.*) Irwin relied on the information in the loan file including the information in the loan application as well as the produced bank statement to decide to fund Mr Argueta's loan. (Stimac Aff. ¶ 5, Exs. 4 & 5). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 5). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

Loan of Felipe Vasquez

14.

During the examination, the Department reviewed the loan file of Felipe Vasquez for the property located at 714 Catherine Street, Forest Park, Georgia 30297. (Hester Aff. ¶ 10). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 10; *see* Ex. K). The loan application states that Mr. Vasquez had \$17,467.00 on deposit in Bank of America account number 003258986605. (*See* Ex. K). In addition, the examiner discovered in Mr. Vasquez's loan file a bank statement for the period of March 11, 2005 through April 8, 2005 indicating that Mr. Vasquez had an ending balance of \$17,879.61 in this account. (Hester Aff. ¶ 10; *see* Ex. L).

15.

However, the bank statement discovered by the Department was not a legitimate record of Bank of America, N.A. (*See* Karlson Aff. ¶ 2). Contrary to the representations in the loan application and the bank statement that Mr. Vasquez had an account balance in excess of \$17,000.00, the highest balance in Mr. Vasquez's checking account for this period was \$2,499.42. (*Id.*)

16.

A bank statement for Mr. Vasquez for the period of March 11, 2005 through April 8, 2005 was among the bank statements discovered by the examiner in Ms. Morales' office at Georgia Premier. (Hester Aff. ¶ 6, Ex. D-3). The number in the column of "Qualifying Balance" had been blacked out and replaced with the hand written notation "18,805.71." (Ex. D-3). The number in the column of "Total" had been crossed out and replaced with the hand written notation "18,805.71." (*Id.*) These handwritten notations were incorporated into the altered bank statement found in the loan file of Mr. Vasquez and submitted to the lender. (Ex. L; Ricard Aff.

¶ 4, Ex. 2). The bank statement in Mr. Vasquez's loan file indicates that he had a "Qualifying Balance" in the amount of \$18,805.71 and "Total" in the amount of \$18,805.71. (Ex. L).

17.

Mr. Cubias submitted Mr. Vasquez's loan package to Webster Bank, N.A. ("Webster") for funding. (Ricard Aff. ¶ 4). On June 14, 2005, Webster funded Mr. Vasquez's loan. (*Id.*) Webster relied on the information in the loan file including the information in the loan application as well as the produced bank statement to decide to fund Mr Vasquez's loan. (Ricard Aff. ¶ 4, Exs. 1 & 2). A borrower's bank account balance is a material factor to Webster in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Ricard Aff. ¶ 4). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Webster had known that the account balance listed on the bank statement and the loan application was false, then Webster would not have funded the loan. (*Id.*)

Loan of Javier Sanchez

18.

During the examination, the Department reviewed the loan file of Javier Sanchez for the property located at 2930 Willow Ridge Circle, SW, Gainesville, Georgia 30504. (Hester Aff. ¶ 11). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 11; Ex. M). The loan application states that Mr. Sanchez had \$6,773.38 on deposit in Wachovia account number 1010096589728. (Ex. M). In addition, the examiner discovered in Mr. Sanchez's loan file a bank statement for the period of December 31,

2004 through January 28, 2005 indicating that Mr. Sanchez had an ending balance of \$6,773.38. (Hester Aff. ¶ 11; *see* Ex. N).

19.

However, the bank statement discovered by the Department was not a legitimate record of Wachovia Bank, N.A. (Quinones-Perry Aff. ¶ 5, Ex. 2). Contrary to the representations in the loan application and the bank statement that Mr. Sanchez had an account balance of \$6,773.38, the highest balance in Mr. Sanchez's checking account for this period was \$1,093.94. (Quinones-Perry Aff. ¶ 4, Ex. 1).

20.

Mr. Cubias submitted Mr. Sanchez's loan package to Irwin for funding. (Stimac Aff. ¶ 6). On April 20, 2005, Irwin funded Mr. Sanchez's loan. (*Id.*) Irwin relied on the information in the loan file including the information in the loan application as well as the produced bank statement to decide to fund Mr Sanchez's loan. (Stimac Aff. ¶ 6, Exs. 7 & 8). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 6). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

Loan of Luciano Paz

21.

During the examination, the Department reviewed the loan file of Luciano Paz for the property located at 311 Engle Drive, Tucker, Georgia 30084. (Hester Aff. ¶ 12). The loan application for

this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 12; *see* Ex. O). The loan application states that Mr. Paz had \$3,386.00 on deposit in Wachovia account number 1010116613163. (*See* Ex. O). In addition, the examiner discovered in Mr. Paz's loan file a bank statement for the period of February 26, 2005 through March 29, 2005 indicating that Mr. Paz had an ending balance of \$3,563.38. (Hester Aff. ¶ 12; *see* Ex. P).

22.

However, the bank statements discovered by the Department were not legitimate records of Wachovia Bank, N.A. (Quinones-Perry Aff. ¶ 7). Contrary to the representations in the loan application and the bank statement that Mr. Paz had an account balance in excess of \$3,300.00, the highest balance in Mr. Paz's account for this period was \$200.00. (Quinones-Perry Aff. ¶ 6, Ex. 3).

23.

Mr. Cubias submitted Mr. Paz's loan package to Irwin for funding. (Stimac Aff. ¶ 7). On May 26, 2005, Irwin funded Mr. Paz's loan. (*Id.*) Irwin relied on the information in the loan file including, but not limited to, the information in the loan application as well as the produced bank statement to decide to fund Mr Paz's loan. (Stimac Aff. ¶ 7, Exs. 10 & 11). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 7). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

As a result of the investigation, the Department issued a Cease and Desist Order to Manuel Cubias on February 10, 2006. (See Ex. A). Petitioner timely requested a hearing before this Tribunal pursuant to O.C.G.A. § 7-1-1018. (See Ex. B).

II. CONCLUSIONS OF LAW

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit(s) or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(3).

2.

Respondent asserts that Alvaro Cubias violated Georgia Code Section 7-1-1002(c) by directly or indirectly controlling a person who violated Code Section 7-1-1002(a). Section 7-1-1002 states, in pertinent part:

(a) On and after July 1, 1993, it is prohibited for any person to transact business in this state directly or indirectly as a mortgage broker or a mortgage lender unless such person:

(1) Is licensed or registered as such by the department;

(2) Is a person exempted from the licensing or registration requirements pursuant to Code Section 7-1-1001; or

(3) In the case of an employee of a mortgage broker or mortgage lender, such person has qualified to be relieved of the necessity for a license under the employee exemption in paragraph (11) of Code Section 7-1-1001.

* * *

(c) On or after July 1, 1996, every person who directly or indirectly controls a person who violates subsection (a) or (b) of this Code section, every general

partner, executive officer, joint venturer, or director of such person, and every person occupying a similar status or performing similar functions as such person violates with and to the same extent as such person, unless the person whose violation arises under this subsection sustains the burden of proof that he or she did not know and, in the exercise of reasonable care, could not have known of the existence of the facts by reason of which the original violation is alleged to exist.

O.C.G.A. § 7-1-1002 (2007).

3.

The Georgia Residential Mortgage Act defines “mortgage broker” to include “any person who directly or indirectly solicits, *processes*, places, or negotiates mortgage loans for others” O.C.G.A. § 7-1-1000(11) (emphasis added). “Person” is defined as “any individual, sole proprietorship, corporation, limited liability company, partnership, trust, or any other group of individuals, however organized.” O.C.G.A. § 7-1-1000(14). Thus, pursuant to Code Section 7-1-1002(a), an individual is prohibited from processing, soliciting or negotiating mortgage loans unless the individual is licensed or is exempted from the licensing requirement. In the event a company directly or indirectly controls a person who violates Code Section 7-1-1002(a), then “every general partner, executive officer, joint venture, or director of such [company], and every person occupying a similar status or performing similar functions” for the company also violates Code Section 7-1-1002(a). O.C.G.A. § 7-1-1002(c).

Violation Related to Evelin Morales’ “Work” at Georgia Premier Lending Corporation

4.

Ms. Morales processed the loan applications for at least three borrowers, Jose Pineda, Felipe Vasquez, and Jose Arqueta on behalf of Georgia Premier by “reviewing” their bank statements. (See Findings of Fact ¶ 5). Ms. Morales has never been licensed or registered with the Department as a mortgage broker or mortgage lender. (See Findings of Fact ¶ 4). Thus, Ms.

Morales was transacting business as a mortgage broker in violation of Code Section § 7-1-1002(a).

5.

Employees of licensees are exempt from registration. O.C.G.A. § 7-1-1001(11). However, Mr. Cubias informed the Department that Ms. Morales was not an employee of Georgia Premier. (See Findings of Fact ¶ 3). Therefore, this exception does not apply. The exceptions contained in Code Sections 7-1-1001(3), (4), (5), (6), (8), (12), and (13) apply to natural persons. O.C.G.A. §§ 7-1-1001(3), (4), (5), (6), (8), (12) & (13). However, these exceptions do not apply to individuals who broker mortgage loans for licensed mortgage brokers. *See id.*

6.

By handling documents relevant to the loan files of Jose Pineda, Felipe Vasquez, and Jose Arqueta, Ms. Morales “directly or indirectly” processed these loans. It is a violation of law for a licensee and the licensee’s “executive officer” to “directly or indirectly control” a person who violates Code Section 7-1-1002(a). O.C.G.A. § 7-1-1002(c). Alvaro Cubias is the sole owner and president of Georgia Premier. (See Findings of Fact ¶ 1). Georgia Premier violated Code Section 7-1-1002(c) by having Ms. Morales, an unlicensed mortgage broker, process three loans on its behalf. Ms. Morales was not a licensed mortgage broker, nor was she exempt from the license requirement because she was not an “employee” of Georgia Premier. Accordingly, as the sole owner and president (i.e. executive officer) of Georgia Premier, Alvaro Cubias violated Code Section 7-1-1002(c) to the “same extent” as Georgia Premier.

7.

Pursuant to Code Section 7-1-1018(a), the Department can issue an order “requiring such person to cease and desist immediately from such unauthorized practices.” O.C.G.A. 7-1-1018(a). The

definition of person includes an officer and employee of a licensed mortgage broker. O.C.G.A. § 7-1-1018(f). Therefore, the Cease and Desist Order issued to Alvaro Cubias based on a violation of Section 7-1-1002(c) is valid.

Violations Related to the Loans of Jose Pineda, Jose Argueta, Felipe Vasquez, Javier Sanchez, and Luciano Paz

8.

Respondent asserts that Alvaro Cubias violated the prohibitions found in Georgia Code Sections 7-1-1013(1), (2) & (6) by submitting false information regarding the deposit history of several borrowers to two lenders. Prior to May 5, 2005, Code Section 7-1-1013 stated, in pertinent part:

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts or make false statements or promises likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or pursue a course of misrepresentation to the department or anyone through agents or otherwise;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

* * *

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (2004).

9.

Subsequent to a 2005 amendment, which became effective May 5, 2005, Code Section 7-1-1013 stated, in pertinent part:

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts, made false statements or promises, or submit false statements or documents likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or, through agents or otherwise, pursue a course of misrepresentation by use of fraudulent or unauthorized documents or other means to the department or anyone;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

* * *

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, transfer of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (amended 2005).

10.

Prior to May 5, 2005, Code Section 7-1-1000(10) stated that the term “[m]isrepresent’ means to make a false statement of a substantive fact or to engage in, with the intent to deceive or mislead, any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10) (2004).

11.

The 2005 Amendment rewrote Code Section 7-1-1000(10). Subsequent to the amendment, which became effective May 5, 2005, Code Section 7-1-1013 stated “[m]isrepresent’ means to make a false statement of a substantive fact. Misrepresent may also mean to intentionally engage

in any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10) (amended 2005).

12.

By submitting the loan applications and the bank statements which misrepresented the bank account balances for Mr. Pineda, Mr. Argueta, Mr. Vasquez, Mr. Sanchez, and Mr. Paz – Alvaro Cubias misrepresented the funds available to these individuals. The lenders would not have funded the loans for these individuals if they had known that their bank account information was false. (See Findings of Fact ¶¶ 9, 13, 17, 20 & 23). Mr. Cubias’ misrepresentations caused the lenders to take loans on terms that they would otherwise not have taken. Accordingly, Mr. Cubias violated Section 7-1-1013(1).

13.

A borrower’s bank balance is a material factor to lenders in deciding whether to fund a loan or the amount of interest to charge. (See Findings of Fact ¶¶ 9, 13, 17, 20 & 23). By misrepresenting the funds available to Mr. Pineda, Mr. Argueta, Mr. Vasquez, Mr. Sanchez, and Mr. Paz in connection with the mortgage loan applications submitted to the lenders, Mr. Cubias misrepresented material factors to the lenders and, therefore, violated Section 7-1-1013(2). (*Id.*)

14.

Additionally, by submitting to the lenders the loan applications and bank statements for Mr. Pineda, Mr. Argueta, Mr. Vasquez, Mr. Sanchez, and Mr. Paz – all of which contained false account balances – Alvaro Cubias engaged in a practice which was not in good faith or fair dealing with the lenders in violation of O.C.G.A. § 7-1-1013(6).

15.

Georgia Code Section 7-1-1018(a) states in pertinent part that:

Whenever it shall appear to the department that any person required to be licensed . . . under this article or employed by a licensee or registrant pursuant to Code Section 7-1-1001 . . . has violated any law of this state or any order or regulation of the department, the department may issue an initial written order requiring such person to cease and desist immediately from such unauthorized practices.

O.C.G.A. § 7-1-1018(a) (2007).

16.

For the purposes of Section 7-1-1018, “person” is defined as “any officer, director, *employee*, agent, or other person participating in the conduct of the affairs of the person subject to the orders issued pursuant to this Code section.” O.C.G.A. § 7-1-1018(f) (emphasis added). It is a violation of the law for a licensee or an individual that is exempt from the licensing requirements³ to make false statements to a lender in order to close a loan. O.C.G.A. §§ 7-1-1013(1), (2) & (6) (amended 2005). By submitting to lenders multiple loan applications that misrepresented the bank account balances of borrowers as well as false bank statements to support the asserted bank account balances, Mr. Cubias violated Code Sections 7-1-1013(1), (2), and (6).⁴ Further, although not a necessary element for a violation of Code Sections 7-1-1013 (1), (2), and (6), Mr. Cubias knew or should have known that the bank statements for at least three of the borrowers were false, because an individual processing loans for the company actively participated in the alteration of the documents. Because Alvaro Cubias violated Code

³ Alvaro Cubias was exempt from the licensing requirements of the Georgia Residential Mortgage Act during the applicable timeframe because he was an employee of Georgia Premier, a licensed mortgage broker. O.C.G.A. § 7-1-1001(11).

⁴ In 2005, the legislature amended Georgia Code Section 7-1-1000(10) and portions of Section 7-1-1013. Some of Mr. Cubias’ conduct occurred prior to May 5, 2005 and some occurred after the 2005 amendment became effective. Notwithstanding, under either version of the law, Mr. Cubias’ conduct violated Code Sections 7-1-1013(1), (2), and (6).

Sections 7-1-1013 (1), (2), and (6), the Department's order requiring Mr. Cubias to cease and desist from violating the law was valid.⁵

DECISION

Based on the undisputed material facts, Petitioner violated Georgia Code Sections 7-1-1002(c) and 7-1-1013(1), (2), and (6). Accordingly, Respondent's Cease and Desist Order issued pursuant to Section 7-1-1018(a) was proper. Respondent's motion for summary determination is hereby **GRANTED**, and the Cease and Desist Order is **UPHELD**.

SO ORDERED, this 27th day of March 2008.


STEPHANIE M. HOWELLS
Administrative Law Judge

⁵ The only administrative action that the Department can take against an employee of a licensee is the issuance of a Cease and Desist Order under Georgia Code Section 7-1-1018(a). Because Alvaro Cubias does not have a license, the Department cannot revoke or suspend his license. Likewise, the Department's rules and regulations do not permit the imposition of fines to an employee of a licensee. See GA. COMP. R. & REGS. r. 80-11-3-.01(1) ("[e]xcept as otherwise indicated, these fines and penalties apply to any person who is acting as a mortgage lender or broker and who is required to be licensed or registered under O.C.G.A. Title 7, Article 13 . . ."). Therefore, the only administrative action that the Department can take against Mr. Cubias for engaging in a prohibited act barred by Code Section 7-1-1013 is to issue a Cease and Desist Order.

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

ALVARO CUBIAS, :
Petitioner, :
 :
v. : Docket No.: OSAH-DBF-MBL-0818776-67-Howells
 :
DEPARTMENT OF BANKING AND FINANCE, : Agency Reference No.: 0818776
Respondent. :

NOTICE OF INITIAL DECISION

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

FILING A MOTION WITH THE JUDGE AT OSAH

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such motion may or may not toll the time for filing an application for agency review.** See O. C.G.A. §§ 50-13-19 and 50-13-20.1. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk
Office of State Administrative Hearings
Attn.: Jennifer Martin, jmartin@osah.ga.gov
230 Peachtree Street, NW, Suite 850
Atlanta, Georgia 30303-1534

APPLICATION FOR AGENCY REVIEW

An application for Agency Review must be filed within thirty (30) days after service of this Initial Decision. O.C.G.A. §§ 50-13-17 and 50-13-41. A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Department of Banking and Finance
Attn: Commissioner
2990 Brandywine Road, Suite 200
Atlanta, Georgia 30341.

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. §§ 50-13-17 and 50-13-41. In certain cases, an Initial Decision may become Final and therefore not subject to review either by agency provision or the provisions of O.C.G.A. § 50-13-17(c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G. A. § 50-13-19(b).

CERTIFIED MAIL

RE: ALVARO CUBIAS, Petitioner

DOCKET NO.: OSAH-DBF-MBL-0818776-67-Howells

MAIL TO:

ALVARO CUBIAS (NOTICE AND DECISION CERTIFIED MAIL)
2094 LONGMONT DRIVE (ALSO NOTICE ROUTINE MAIL)
LAWRENCEVILLE, GA 30044

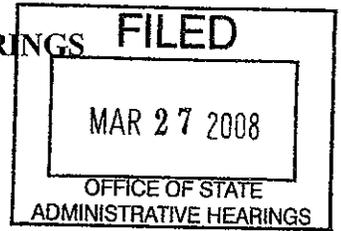
ALVARO CUBIAS
1829 AUSTINS POINTE DRIVE
LAWRENCEVILLE, GA 30043



GEORGIA DEPARTMENT OF BANKING AND FINANCE (DECISION)
2990 BRANDYWINE ROAD SUITE 200
ATLANTA GA 30341

OSCAR FEARS
ASSISTANT ATTORNEY GENERAL
40 CAPITOL SQ, SW
ATLANTA, GA 30334-1300

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



ALVARO CUBIAS,

Petitioner,

v.

GEORGIA DEPARTMENT OF
BANKING AND FINANCE,

Respondent.

*
*
* Docket Number:
* OSAH-DBF-MBL-0818772-67-Howells
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INITIAL DECISION

Respondent filed its affidavit supported Motion for Summary Determination on January 31, 2008. Petitioner did not file a response to the motion. For the reasons stated below, Respondent's Motion for Summary Determination is **GRANTED**.

I. FINDINGS OF FACT

The following facts are undisputed:

1.

Starting on June 20, 2005, the Department initiated its examination of Georgia Premier Lending Corporation ("Georgia Premier"), which was licensed as a mortgage broker on January 7, 2005. (Hester Aff. ¶ 4). During the examination, the Department requested that Mr. Alvaro Cubias, the owner of Georgia Premier, complete the Officer's Questionnaire for Georgia Premier. (Hester Aff. ¶ 5; see Ex. C). As indicated in the Officer's Questionnaire provided to the Department, Alvaro Cubias is employed as the sole owner and president of Georgia Premier. (See Ex. C at 4-5, 4-18 & 4-19).

Evelin Morales' "Work" at Georgia Premier Lending Corporation

2.

During the examination, Mr. Cubias identified a desk at Georgia Premier's place of business belonging to Evelin Morales a/k/a Evelyn Morales. (Hester Aff. ¶ 6). While in Ms. Morales' office, the Department's examiner discovered a stack of bank statements – some of which contained hand written computations. (Hester Aff. ¶ 6, Exs. D-1, D-2 & D-3). In addition, the examiner discovered various other mortgage related documents in Ms. Morales' office, including a settlement statement, a payoff statement, and a response from Bank of America regarding a verification of deposit request. (Hester Aff. ¶ 6, Ex. E). When the examiner returned to Georgia Premier the next day to continue the exam, the bank statements were no longer in Ms. Morales' office. (Hester Aff. ¶ 6). Despite repeated requests for those statements, Mr. Cubias did not produce the documents. (*Id.*)

3.

Although Ms. Morales had an office at Georgia Premier and mortgage related documents were located in her office, the Officer's Questionnaire completed by Georgia Premier does not list Ms. Morales as a current or former employee. (*See* Ex. C at 4-19). The examiner asked Mr. Cubias to explain this discrepancy. (Hester Aff. ¶ 7). Mr. Cubias stated that Ms. Morales reviewed the bank statements of loan applicants for Georgia Premier. (*Id.*) Mr. Cubias also provided a written response to the examiner's inquiry which was received by the Department on June 28, 2005. (*Id.*; *see* Ex. F). The letter states that "Evelyn Morales was originally supposed to commence working with my company 'Georgia Premier Lending' when it first started running." (Ex. F). According to Mr. Cubias, Ms. Morales never completed an employment application. (*Id.*) However, he elaborated that Sherila Caquias, an employee of Georgia Premier, "allowed

Evelyn Morales to come to [Georgia Premier's] office and use a company computer knowing well that she was not an employee.” (Ex. F). Mr. Cubias also indicated that Ms. Morales removed the bank statements from Georgia Premier's office. (*See id.* (“[f]rom the day our examination was complete to this day I have been trying to get a hold of Evelyn Morales so that she may complete her employment application and hand me the original bank statements as per your request[]”).

4.

Evelyn Morales a/k/a Evelin Morales is not licensed or registered with the Department as a mortgage broker or mortgage lender. (Shelley Aff. ¶ 4). Ms. Morales has never been individually licensed or registered with the Department as a mortgage lender or mortgage broker. (*Id.*)

5.

Ms. Morales processed the loan applications for at least three borrowers – Jose Pineda, Felipe Vasquez, and Jose Arqueta – on behalf of Georgia Premier by “reviewing” their bank statements. (Hester Aff. ¶¶ 6-7; *see* Exs. D-1, D-2, & D-3; Stimac Aff. ¶¶ 4 - 5; Ricard Aff. ¶ 4).

Loan of Jose Pineda

6.

During the examination, the Department reviewed the loan file of Jose Pineda for the property located at 5923 Jim Crow Road, Flowery Branch, Georgia 30542. (Hester Aff. ¶ 8). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Ex. G; Hester Aff. ¶ 8). The loan application states that Mr. Pineda had \$4,533.00 on deposit in Bank of America account number 009514719048. (*See* Ex. G). In addition, the examiner discovered in Mr. Pineda's loan file two bank statements indicating that

Mr. Pineda had in excess of \$4,500.00 on deposit at Bank of America. One bank statement for the period of January 24, 2005 through February 23, 2005 indicated that Mr. Pineda had an ending balance of \$4,898.20, while the other bank statement for the period of February 24, 2005 through March 23, 2005 indicated that Mr. Pineda had an ending balance of \$4,532.69. (Hester Aff. ¶ 8; *see* Ex. H).

7.

However, the bank statements discovered by the Department were not legitimate records of Bank of America, N.A. (*See* Trapp Aff. ¶ 2). Contrary to the representation in one of the bank statements that Mr. Pineda's account was open as of January 24, 2005, bank account number 009514719048 was not opened until March 23, 2005. (Trapp Aff. ¶ 2). Because account number 009514719048 was not opened until March 23, 2005, the bank statements for January 24, 2005 through February 23, 2005 and February 24, 2005 through March 23, 2005 are necessarily false or fabricated statements. Furthermore, because the account was not opened until March 23, 2005, the balance information in the fabricated statements is also false. Finally, the account balance on the loan application is also false because it is supported by the false February 24, 2005 through March 23, 2005 bank statement. (*See* Stimac Aff. ¶ 4, Exs. 1, 2).

8.

A bank statement for Mr. Pineda for the period of January 21, 2005 through February 23, 2005 was among the bank statements discovered by the examiner in Ms. Morales' office at Georgia Premier.¹ The number in the column of "Other Subtractions" on that statement had been blacked out and annotated with the hand written notation "268.09 = 67.56." (Ex. D-1). The statement did not have a heading for "ATM and Debit Card Subtractions." (*See id.*) These handwritten

¹ (Hester Aff. ¶ 6, Ex. D-1). Because Mr. Pineda did not open this account at Bank of America until March 23, 2005, the underlying document found in Ms. Morales' office by the examiner was false. (Trapp Aff. ¶ 2).

notations were incorporated into the altered bank statement for the period of January 24, 2005 through February 23, 2005 found in the loan file of Mr. Pineda and submitted to the lender. (Ex. H; Stimac Aff. ¶ 4, Ex. 2). The bank statement for January 24, 2005 through February 23, 2005 in Mr. Pineda's loan file indicates that he had "ATM and Debit Card Subtractions" in the amount of \$268.09 and "Other Subtractions" in the amount of \$67.56. (Ex. H; Stimac Aff., Ex. 2).

9.

Alvaro Cubias submitted Mr. Pineda's loan package to Irwin Mortgage Corporation ("Irwin") for funding. (Stimac Aff. ¶ 4). On April 27, 2005, Irwin funded Mr. Pineda's loan. (Stimac Aff. ¶ 4). Irwin relied on the information in the loan file including the information in the loan application as well as the produced bank statements to decide to fund Mr Pineda's loan. (Stimac Aff. ¶ 4, Exs. 1 & 2). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 4). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

Loan of Jose Argueta

10.

During the examination, the Department reviewed the loan file of Jose Argueta for the property located at 2920 Evergreen Hollow Drive, Gainesville, Georgia 30507. (Hester Aff. ¶ 9). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 9; Ex. I). The loan application states that Mr. Argueta had

\$4,791.62 on deposit in Bank of America account number 003340148587. (Ex. I). In addition, the examiner discovered in Mr. Argueta's loan file two bank statements indicating that Mr. Argueta had in excess of \$4,700.00 on deposit at Bank of America. One bank statement for the period of February 23, 2005 through March 22, 2005 indicated that Mr. Argueta had an ending balance of \$5,216.83, while the other bank statement for the period of March 23, 2005 through April 22, 2005 indicated that Mr. Argueta had an ending balance of \$4,791.62. (Hester Aff. ¶ 9; Ex. J).

11.

However, the bank statements discovered by the Department were not legitimate records of Bank of America, N.A. (See Trapp Aff. ¶ 2). Contrary to the representation in one of the bank statements that Mr. Argueta's account was open as of February 23, 2005, bank account number 003340148587 was not opened until May 9, 2005. (Trapp Aff. ¶ 2). Because account number 003340148587 was not opened until May 9, 2005, the bank statements for February 23, 2005 through March 22, 2005 and March 23, 2005 through April 22, 2005 are necessarily false or fabricated statements. Furthermore, because the account was not opened until May 9, 2005, the balance information in the fabricated statements is also false. Finally, the account balance on the loan application is also false because it is supported by the false March 23, 2005 through April 22, 2005 bank statement. (See Stimac Aff. ¶ 5, Exs. 4, 5).

12.

A bank statement for Mr. Argueta for the period of February 23, 2005 through March 22, 2005 was among the bank statements discovered by the examiner in Ms. Morales' office at Georgia Premier.² The number in the column of "ATM and Debit Card Subtractions" on that statement is

² (Hester Aff. ¶ 6, Ex. D-2). Because Mr. Argueta did not open this account at Bank of America until May 9, 2005, the underlying document found in Ms. Morales' office by the examiner was false. (Trapp Aff. ¶ 2).

\$467.31. (Ex. D-2). Next to this number is the handwritten notation "317.31". (*Id.*) In addition, the statement includes the handwritten notation "Other Withdraws 150.00." (*Id.*) The ending balance according to this statement is \$4,216.83. (*Id.*) These handwritten notations were incorporated into the altered bank statement for the period of February 23, 2005 through March 22, 2005 found in the loan file of Mr. Argueta and submitted to the lender. (Ex. J; Stimac Aff. ¶ 5, Ex. 5). The bank statement in Mr. Argueta's loan file for February 23, 2005 through March 22, 2005 indicates that he had "ATM and Debit Card Subtractions" in the amount of \$317.31 and "Other Subtractions" in the amount of \$150.00. (Ex. J). In addition, the bank statement in Mr. Argueta's loan file indicates that he had an ending balance of \$5,216.83. (*Id.*)

13.

Alvaro Cubias submitted Mr. Argueta's loan package to Irwin Mortgage Corporation ("Irwin") for funding. (Stimac Aff. ¶ 5). On June 15, 2005, Irwin funded Mr. Argueta's loan. (*Id.*) Irwin relied on the information in the loan file including the information in the loan application as well as the produced bank statement to decide to fund Mr. Argueta's loan. (Stimac Aff. ¶ 5, Exs. 4 & 5). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 5). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

Loan of Felipe Vasquez

14.

During the examination, the Department reviewed the loan file of Felipe Vasquez for the property located at 714 Catherine Street, Forest Park, Georgia 30297. (Hester Aff. ¶ 10). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 10; *see* Ex. K). The loan application states that Mr. Vasquez had \$17,467.00 on deposit in Bank of America account number 003258986605. (*See* Ex. K). In addition, the examiner discovered in Mr. Vasquez's loan file a bank statement for the period of March 11, 2005 through April 8, 2005 indicating that Mr. Vasquez had an ending balance of \$17,879.61 in this account. (Hester Aff. ¶ 10; *see* Ex. L).

15.

However, the bank statement discovered by the Department was not a legitimate record of Bank of America, N.A. (*See* Karlson Aff. ¶ 2). Contrary to the representations in the loan application and the bank statement that Mr. Vasquez had an account balance in excess of \$17,000.00, the highest balance in Mr. Vasquez's checking account for this period was \$2,499.42. (*Id.*)

16.

A bank statement for Mr. Vasquez for the period of March 11, 2005 through April 8, 2005 was among the bank statements discovered by the examiner in Ms. Morales' office at Georgia Premier. (Hester Aff. ¶ 6, Ex. D-3). The number in the column of "Qualifying Balance" had been blacked out and replaced with the hand written notation "18,805.71." (Ex. D-3). The number in the column of "Total" had been crossed out and replaced with the hand written notation "18,805.71." (*Id.*) These handwritten notations were incorporated into the altered bank statement found in the loan file of Mr. Vasquez and submitted to the lender. (Ex. L; Ricard Aff.

¶ 4, Ex. 2). The bank statement in Mr. Vasquez's loan file indicates that he had a "Qualifying Balance" in the amount of \$18,805.71 and "Total" in the amount of \$18,805.71. (Ex. L).

17.

Mr. Cubias submitted Mr. Vasquez's loan package to Webster Bank, N.A. ("Webster") for funding. (Ricard Aff. ¶ 4). On June 14, 2005, Webster funded Mr. Vasquez's loan. (*Id.*) Webster relied on the information in the loan file including the information in the loan application as well as the produced bank statement to decide to fund Mr Vasquez's loan. (Ricard Aff. ¶ 4, Exs. 1 & 2). A borrower's bank account balance is a material factor to Webster in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Ricard Aff. ¶ 4). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Webster had known that the account balance listed on the bank statement and the loan application was false, then Webster would not have funded the loan. (*Id.*)

Loan of Javier Sanchez

18.

During the examination, the Department reviewed the loan file of Javier Sanchez for the property located at 2930 Willow Ridge Circle, SW, Gainesville, Georgia 30504. (Hester Aff. ¶ 11). The loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 11; Ex. M). The loan application states that Mr. Sanchez had \$6,773.38 on deposit in Wachovia account number 1010096589728. (Ex. M). In addition, the examiner discovered in Mr. Sanchez's loan file a bank statement for the period of December 31,

2004 through January 28, 2005 indicating that Mr. Sanchez had an ending balance of \$6,773.38. (Hester Aff. ¶ 11; *see* Ex. N).

19.

However, the bank statement discovered by the Department was not a legitimate record of Wachovia Bank, N.A. (Quinones-Perry Aff. ¶ 5, Ex. 2). Contrary to the representations in the loan application and the bank statement that Mr. Sanchez had an account balance of \$6,773.38, the highest balance in Mr. Sanchez's checking account for this period was \$1,093.94. (Quinones-Perry Aff. ¶ 4, Ex. 1).

20.

Mr. Cubias submitted Mr. Sanchez's loan package to Irwin for funding. (Stimac Aff. ¶ 6). On April 20, 2005, Irwin funded Mr. Sanchez's loan. (*Id.*) Irwin relied on the information in the loan file including the information in the loan application as well as the produced bank statement to decide to fund Mr Sanchez's loan. (Stimac Aff. ¶ 6, Exs. 7 & 8). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 6). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

Loan of Luciano Paz

21.

During the examination, the Department reviewed the loan file of Luciano Paz for the property located at 311 Engle Drive, Tucker, Georgia 30084. (Hester Aff. ¶ 12). The loan application for

this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 12; *see* Ex. O). The loan application states that Mr. Paz had \$3,386.00 on deposit in Wachovia account number 1010116613163. (*See* Ex. O). In addition, the examiner discovered in Mr. Paz's loan file a bank statement for the period of February 26, 2005 through March 29, 2005 indicating that Mr. Paz had an ending balance of \$3,563.38. (Hester Aff. ¶ 12; *see* Ex. P).

22.

However, the bank statements discovered by the Department were not legitimate records of Wachovia Bank, N.A. (Quinones-Perry Aff. ¶ 7). Contrary to the representations in the loan application and the bank statement that Mr. Paz had an account balance in excess of \$3,300.00, the highest balance in Mr. Paz's account for this period was \$200.00. (Quinones-Perry Aff. ¶ 6, Ex. 3).

23.

Mr. Cubias submitted Mr. Paz's loan package to Irwin for funding. (Stimac Aff. ¶ 7). On May 26, 2005, Irwin funded Mr. Paz's loan. (*Id.*) Irwin relied on the information in the loan file including, but not limited to, the information in the loan application as well as the produced bank statement to decide to fund Mr Paz's loan. (Stimac Aff. ¶ 7, Exs. 10 & 11). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 7). It is a material factor because it is an indication of the borrower's liquidity and, therefore, the borrower's ability to make his or her mortgage payments in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance listed on the bank statement and the loan application was false, then Irwin would not have funded the loan. (*Id.*)

As a result of the investigation, the Department issued a Cease and Desist Order to Manuel Cubias on February 10, 2006. (See Ex. A). Petitioner timely requested a hearing before this Tribunal pursuant to O.C.G.A. § 7-1-1018. (See Ex. B).

II. CONCLUSIONS OF LAW

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit(s) or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(3).

2.

Respondent asserts that Alvaro Cubias violated Georgia Code Section 7-1-1002(c) by directly or indirectly controlling a person who violated Code Section 7-1-1002(a). Section 7-1-1002 states, in pertinent part:

(a) On and after July 1, 1993, it is prohibited for any person to transact business in this state directly or indirectly as a mortgage broker or a mortgage lender unless such person:

(1) Is licensed or registered as such by the department;

(2) Is a person exempted from the licensing or registration requirements pursuant to Code Section 7-1-1001; or

(3) In the case of an employee of a mortgage broker or mortgage lender, such person has qualified to be relieved of the necessity for a license under the employee exemption in paragraph (11) of Code Section 7-1-1001.

* * *

(c) On or after July 1, 1996, every person who directly or indirectly controls a person who violates subsection (a) or (b) of this Code section, every general

partner, executive officer, joint venturer, or director of such person, and every person occupying a similar status or performing similar functions as such person violates with and to the same extent as such person, unless the person whose violation arises under this subsection sustains the burden of proof that he or she did not know and, in the exercise of reasonable care, could not have known of the existence of the facts by reason of which the original violation is alleged to exist.

O.C.G.A. § 7-1-1002 (2007).

3.

The Georgia Residential Mortgage Act defines “mortgage broker” to include “any person who directly or indirectly solicits, *processes*, places, or negotiates mortgage loans for others” O.C.G.A. § 7-1-1000(11) (emphasis added). “Person” is defined as “any individual, sole proprietorship, corporation, limited liability company, partnership, trust, or any other group of individuals, however organized.” O.C.G.A. § 7-1-1000(14). Thus, pursuant to Code Section 7-1-1002(a), an individual is prohibited from processing, soliciting or negotiating mortgage loans unless the individual is licensed or is exempted from the licensing requirement. In the event a company directly or indirectly controls a person who violates Code Section 7-1-1002(a), then “every general partner, executive officer, joint venture, or director of such [company], and every person occupying a similar status or performing similar functions” for the company also violates Code Section 7-1-1002(a). O.C.G.A. § 7-1-1002(c).

Violation Related to Evelin Morales’ “Work” at Georgia Premier Lending Corporation

4.

Ms. Morales processed the loan applications for at least three borrowers, Jose Pineda, Felipe Vasquez, and Jose Arqueta on behalf of Georgia Premier by “reviewing” their bank statements. (See Findings of Fact ¶ 5). Ms. Morales has never been licensed or registered with the Department as a mortgage broker or mortgage lender. (See Findings of Fact ¶ 4). Thus, Ms.

Morales was transacting business as a mortgage broker in violation of Code Section § 7-1-1002(a).

5.

Employees of licensees are exempt from registration. O.C.G.A. § 7-1-1001(11). However, Mr. Cubias informed the Department that Ms. Morales was not an employee of Georgia Premier. (See Findings of Fact ¶ 3). Therefore, this exception does not apply. The exceptions contained in Code Sections 7-1-1001(3), (4), (5), (6), (8), (12), and (13) apply to natural persons. O.C.G.A. §§ 7-1-1001(3), (4), (5), (6), (8), (12) & (13). However, these exceptions do not apply to individuals who broker mortgage loans for licensed mortgage brokers. *See id.*

6.

By handling documents relevant to the loan files of Jose Pineda, Felipe Vasquez, and Jose Arqueta, Ms. Morales “directly or indirectly” processed these loans. It is a violation of law for a licensee and the licensee’s “executive officer” to “directly or indirectly control” a person who violates Code Section 7-1-1002(a). O.C.G.A. § 7-1-1002(c). Alvaro Cubias is the sole owner and president of Georgia Premier. (See Findings of Fact ¶ 1). Georgia Premier violated Code Section 7-1-1002(c) by having Ms. Morales, an unlicensed mortgage broker, process three loans on its behalf. Ms. Morales was not a licensed mortgage broker, nor was she exempt from the license requirement because she was not an “employee” of Georgia Premier. Accordingly, as the sole owner and president (i.e. executive officer) of Georgia Premier, Alvaro Cubias violated Code Section 7-1-1002(c) to the “same extent” as Georgia Premier.

7.

Pursuant to Code Section 7-1-1018(a), the Department can issue an order “requiring such person to cease and desist immediately from such unauthorized practices.” O.C.G.A. 7-1-1018(a). The

definition of person includes an officer and employee of a licensed mortgage broker. O.C.G.A. § 7-1-1018(f). Therefore, the Cease and Desist Order issued to Alvaro Cubias based on a violation of Section 7-1-1002(c) is valid.

Violations Related to the Loans of Jose Pineda, Jose Argueta, Felipe Vasquez, Javier Sanchez, and Luciano Paz

8.

Respondent asserts that Alvaro Cubias violated the prohibitions found in Georgia Code Sections 7-1-1013(1), (2) & (6) by submitting false information regarding the deposit history of several borrowers to two lenders. Prior to May 5, 2005, Code Section 7-1-1013 stated, in pertinent part:

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts or make false statements or promises likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or pursue a course of misrepresentation to the department or anyone through agents or otherwise;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

* * *

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (2004).

9.

Subsequent to a 2005 amendment, which became effective May 5, 2005, Code Section 7-1-1013 stated, in pertinent part:

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts, made false statements or promises, or submit false statements or documents likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or, through agents or otherwise, pursue a course of misrepresentation by use of fraudulent or unauthorized documents or other means to the department or anyone;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

* * *

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, transfer of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (amended 2005).

10.

Prior to May 5, 2005, Code Section 7-1-1000(10) stated that the term “[m]isrepresent’ means to make a false statement of a substantive fact or to engage in, with the intent to deceive or mislead, any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10) (2004).

11.

The 2005 Amendment rewrote Code Section 7-1-1000(10). Subsequent to the amendment, which became effective May 5, 2005, Code Section 7-1-1013 stated “[m]isrepresent’ means to make a false statement of a substantive fact. Misrepresent may also mean to intentionally engage

in any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10) (amended 2005).

12.

By submitting the loan applications and the bank statements which misrepresented the bank account balances for Mr. Pineda, Mr. Argueta, Mr. Vasquez, Mr. Sanchez, and Mr. Paz – Alvaro Cubias misrepresented the funds available to these individuals. The lenders would not have funded the loans for these individuals if they had known that their bank account information was false. (See Findings of Fact ¶¶ 9, 13, 17, 20 & 23). Mr. Cubias’ misrepresentations caused the lenders to take loans on terms that they would otherwise not have taken. Accordingly, Mr. Cubias violated Section 7-1-1013(1).

13.

A borrower’s bank balance is a material factor to lenders in deciding whether to fund a loan or the amount of interest to charge. (See Findings of Fact ¶¶ 9, 13, 17, 20 & 23). By misrepresenting the funds available to Mr. Pineda, Mr. Argueta, Mr. Vasquez, Mr. Sanchez, and Mr. Paz in connection with the mortgage loan applications submitted to the lenders, Mr. Cubias misrepresented material factors to the lenders and, therefore, violated Section 7-1-1013(2). (*Id.*)

14.

Additionally, by submitting to the lenders the loan applications and bank statements for Mr. Pineda, Mr. Argueta, Mr. Vasquez, Mr. Sanchez, and Mr. Paz – all of which contained false account balances – Alvaro Cubias engaged in a practice which was not in good faith or fair dealing with the lenders in violation of O.C.G.A. § 7-1-1013(6).

15.

Georgia Code Section 7-1-1018(a) states in pertinent part that:

Whenever it shall appear to the department that any person required to be licensed . . . under this article or employed by a licensee or registrant pursuant to Code Section 7-1-1001 . . . has violated any law of this state or any order or regulation of the department, the department may issue an initial written order requiring such person to cease and desist immediately from such unauthorized practices.

O.C.G.A. § 7-1-1018(a) (2007).

16.

For the purposes of Section 7-1-1018, “person” is defined as “any officer, director, *employee*, agent, or other person participating in the conduct of the affairs of the person subject to the orders issued pursuant to this Code section.” O.C.G.A. § 7-1-1018(f) (emphasis added). It is a violation of the law for a licensee or an individual that is exempt from the licensing requirements³ to make false statements to a lender in order to close a loan. O.C.G.A. §§ 7-1-1013(1), (2) & (6) (amended 2005). By submitting to lenders multiple loan applications that misrepresented the bank account balances of borrowers as well as false bank statements to support the asserted bank account balances, Mr. Cubias violated Code Sections 7-1-1013(1), (2), and (6).⁴ Further, although not a necessary element for a violation of Code Sections 7-1-1013 (1), (2), and (6), Mr. Cubias knew or should have known that the bank statements for at least three of the borrowers were false, because an individual processing loans for the company actively participated in the alteration of the documents. Because Alvaro Cubias violated Code

³ Alvaro Cubias was exempt from the licensing requirements of the Georgia Residential Mortgage Act during the applicable timeframe because he was an employee of Georgia Premier, a licensed mortgage broker. O.C.G.A. § 7-1-1001(11).

⁴ In 2005, the legislature amended Georgia Code Section 7-1-1000(10) and portions of Section 7-1-1013. Some of Mr. Cubias’ conduct occurred prior to May 5, 2005 and some occurred after the 2005 amendment became effective. Notwithstanding, under either version of the law, Mr. Cubias’ conduct violated Code Sections 7-1-1013(1), (2), and (6).

Sections 7-1-1013 (1), (2), and (6), the Department's order requiring Mr. Cubias to cease and desist from violating the law was valid.⁵

DECISION

Based on the undisputed material facts, Petitioner violated Georgia Code Sections 7-1-1002(c) and 7-1-1013(1), (2), and (6). Accordingly, Respondent's Cease and Desist Order issued pursuant to Section 7-1-1018(a) was proper. Respondent's motion for summary determination is hereby **GRANTED**, and the Cease and Desist Order is **UPHELD**.

SO ORDERED, this 27th day of March 2008.


STEPHANIE M. HOWELLS
Administrative Law Judge

⁵ The only administrative action that the Department can take against an employee of a licensee is the issuance of a Cease and Desist Order under Georgia Code Section 7-1-1018(a). Because Alvaro Cubias does not have a license, the Department cannot revoke or suspend his license. Likewise, the Department's rules and regulations do not permit the imposition of fines to an employee of a licensee. See GA. COMP. R. & REGS. r. 80-11-3-.01(1) ("[e]xcept as otherwise indicated, these fines and penalties apply to any person who is acting as a mortgage lender or broker and who is required to be licensed or registered under O.C.G.A. Title 7, Article 13 . . ."). Therefore, the only administrative action that the Department can take against Mr. Cubias for engaging in a prohibited act barred by Code Section 7-1-1013 is to issue a Cease and Desist Order.

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

ALVARO CUBIAS, :
Petitioner, :
 :
v. : Docket No.: OSAH-DBF-MBL-0818776-67-Howells
 :
DEPARTMENT OF BANKING AND FINANCE, : Agency Reference No.: 0818776
Respondent. :

NOTICE OF INITIAL DECISION

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

FILING A MOTION WITH THE JUDGE AT OSAH

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such motion may or may not toll the time for filing an application for agency review.** See O. C.G.A. §§ 50-13-19 and 50-13-20.1. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk
Office of State Administrative Hearings
Attn.: Jennifer Martin, jmartin@osah.ga.gov
230 Peachtree Street, NW, Suite 850
Atlanta, Georgia 30303-1534

APPLICATION FOR AGENCY REVIEW

An application for Agency Review must be filed within thirty (30) days after service of this Initial Decision. O.C.G.A. §§ 50-13-17 and 50-13-41. A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Department of Banking and Finance
Attn: Commissioner
2990 Brandywine Road, Suite 200
Atlanta, Georgia 30341.

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. §§ 50-13-17 and 50-13-41. In certain cases, an Initial Decision may become Final and therefore not subject to review either by agency provision or the provisions of O.C.G.A. § 50-13-17(c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G. A. § 50-13-19(b).

CERTIFIED MAIL

RE: ALVARO CUBIAS, Petitioner

DOCKET NO.: OSAH-DBF-MBL-0818776-67-Howells

MAIL TO:

ALVARO CUBIAS (NOTICE AND DECISION CERTIFIED MAIL)
2094 LONGMONT DRIVE (ALSO NOTICE ROUTINE MAIL)
LAWRENCEVILLE, GA 30044

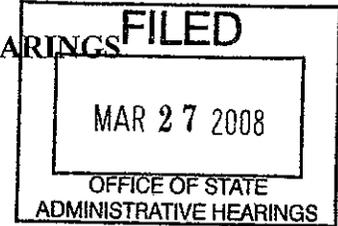
ALVARO CUBIAS
1829 AUSTINS POINTE DRIVE
LAWRENCEVILLE, GA 30043



GEORGIA DEPARTMENT OF BANKING AND FINANCE (DECISION)
2990 BRANDYWINE ROAD SUITE 200
ATLANTA GA 30341

OSCAR FEARS
ASSISTANT ATTORNEY GENERAL
40 CAPITOL SQ, SW
ATLANTA, GA 30334-1300

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



MANUEL CUBIAS,

Petitioner,

v.

GEORGIA DEPARTMENT OF
BANKING AND FINANCE,

Respondent.

*
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* Docket Number:
* OSAH-DBF-MBL-0818772-67-Howells
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INITIAL DECISION

Respondent filed its affidavit supported Motion for Summary Determination on January 31, 2008. Petitioner did not file a response to the motion. For the reasons stated below, Respondent's Motion for Summary Determination is **GRANTED**.

FINDINGS OF FACT

The following facts are undisputed:

1.

Starting on June 20, 2005, the Department initiated its examination of Georgia Premier Lending Corporation ("Georgia Premier"), which was licensed as a mortgage broker on January 7, 2005. (Hester Aff. ¶ 4). During the examination, the Department requested that Mr. Alvaro Cubias, the owner of Georgia Premier, complete the Officer's Questionnaire for Georgia Premier. (Hester Aff. ¶ 5; see Ex. C). As indicated in the Officer's Questionnaire provided to the Department, Manuel Cubias is employed as a loan officer for Georgia Premier. (See Ex. C at 4-19).

2.

During the examination, the Department reviewed the loan file of Rosa Nava for the property located at 991 Providence Way, Lawrenceville, Georgia 30045. (Hester Aff. ¶ 6). The April 5,

2005 loan application for this property indicates that Manuel Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 6; see Ex. D). The loan application states that Ms. Nava had \$5,736.00 on deposit at Wachovia in account number 1010102889956. (See Ex. D). In addition, the examiner discovered in Ms. Nava's loan file a bank statement for the period of February 26, 2005 through March 17, 2005 indicating that Ms. Nava had an ending balance of \$5,736.40. (Hester Aff. ¶ 6; see Ex. E).

3.

However, the bank statement discovered by the Department was not a legitimate record of Wachovia. (Quinones-Perry Aff. ¶ 5). Contrary to the representations in the loan application and the bank statement that Ms. Nava had an account balance of \$5,736.00, the highest balance in Ms. Nava's checking account for this period was \$393.29. (Quinones-Perry Aff. ¶ 4, Ex. 1).

4.

On April 29, 2005, Irwin Mortgage Corporation ("Irwin") funded Ms. Nava's loan for the property located at 991 Providence Way. (Stimac Aff. ¶ 4). Irwin relied on the information in the loan file including, but not limited to, the information in the loan application as well as the produced bank statement to decide to fund Ms. Nava's loan. (Stimac Aff. ¶ 4, Exs. 1 & 2). A borrower's bank account balance is a material factor to Irwin in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Stimac Aff. ¶ 4). It is a material factor because the borrower's bank account balance is an indicator of the borrower's liquidity and, thus, the borrower's ability to pay his or her mortgage in the event of a financial crisis, such as the loss of a job. (*Id.*) If Irwin had known that the account balance ~~listed on the bank statement and the loan application was false, then Irwin would not have~~ funded the loan. (*Id.*)

5.

As a result of the investigation, the Department issued a Cease and Desist Order to Manuel Cubias on February 10, 2006. (See Ex. A). Petitioner timely requested a hearing before this Tribunal pursuant to O.C.G.A. § 7-1-1018. (See Ex. B).

CONCLUSIONS OF LAW

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit(s) or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(3).

2.

Respondent asserts that Manuel Cubias violated the prohibitions found in Georgia Code Sections 7-1-1013(1), (2) & (6) by submitting false information regarding the deposit history of a borrower to a lender.¹ Section 7-1-1013 states, in pertinent part:

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts or make false statements or promises likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or pursue a course of misrepresentation to the department or anyone through agents or otherwise;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker

¹ In 2005, the legislature amended portions of Section 7-1-1013. The amendment became effective May 5, 2005. Petitioner's alleged violations occurred prior to May 5, 2005. (See Findings of Fact ¶ 4). Accordingly, this Tribunal applied the law in effect at the time of Petitioner's conduct.

is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

* * *

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (2004).

3.

For the purposes of Article 13, the term “[m]isrepresent’ means to make a false statement of a substantive fact or to engage in, with the intent to deceive or mislead, any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10) (2004).²

4.

By submitting the loan application and the bank statement which misrepresented Ms. Nava’s bank account balance, Mr. Cubias misrepresented the funds available to Ms. Nava. Irwin would not have funded Ms. Nava’s loan if it had known that the bank account information was false. (See Findings of Fact ¶¶ 3-4). Mr. Cubias’ misrepresentation caused Irwin to take a loan on terms that it would otherwise not have taken. Accordingly, Mr. Cubias violated Section 7-1-1013(1).

5.

A borrower’s bank account balance is a material factor to Irwin in deciding whether to fund a loan or the amount of interest charged. (See Findings of Fact ¶ 4). By misrepresenting the funds available to Ms. Nava in connection with the mortgage loan application submitted to

² Georgia Code Section 7-1-1000(10) was also amended, effective May 5, 2005. The cited version was in effect at the time of Petitioner’s conduct.

Irwin, Mr. Cubias misrepresented a material factor to Irwin and, therefore, violated Code Section 7-1-1013(2).

6.

Finally, by submitting the loan application and bank statement containing a false account balance, Manuel Cubias engaged in a practice which was not in good faith or fair dealing with Irwin in violation of O.C.G.A. § 7-1-1013(6).

7.

Georgia Code Section 7-1-1018(a) states in pertinent part that:

Whenever it shall appear to the department that any person required to be licensed . . . under this article or employed by a licensee or registrant pursuant to Code Section 7-1-1001 . . . has violated any law of this state or any order or regulation of the department, the department may issue an initial written order requiring such person to cease and desist immediately from such unauthorized practices.

O.C.G.A. § 7-1-1018(a) (2004). For the purposes of Section 7-1-1018, “person” is defined as “any officer, director, *employee*, agent, or other person participating in the conduct of the affairs of the person subject to the orders issued pursuant to this Code section.” O.C.G.A. § 7-1-1018(f) (2004) (emphasis added). It is a violation of the law for a licensee or an individual that is exempt from the licensing requirements³ to make false statements to a lender in order to close a loan. O.C.G.A. §§ 7-1-1013(1), (2) & (6) (2004). Because Manuel Cubias violated O.C.G.A. § 7-1-1013 (1), (2) and (6), the Department’s order requiring Mr. Cubias to cease and desist from violating the law was valid.⁴

³ Manuel Cubias was exempt from the licensing requirements of the Georgia Residential Mortgage Act during the applicable timeframe because he was an employee of Georgia Premier, a licensed mortgage broker. O.C.G.A. § 7-1-1001(11).

⁴ The only administrative action that the Department can take against an employee of a licensee is the issuance of a Cease and Desist Order under Georgia Code Section 7-1-1018(a). Because Manuel Cubias does not have a license, the Department cannot revoke or suspend his license. Likewise, the Department’s rules and regulations do not permit the imposition of fines to an employee of a licensee. See GA. COMP. R. & REGS. r. 80-11-3-.01(1) (“[e]xcept as otherwise indicated, these fines and penalties apply to any person who is acting as a mortgage lender or broker and who is required to be licensed or registered under O.C.G.A. Title 7, Article 13 . . .”). Therefore, the only

DECISION

Based on the undisputed material facts, Petitioner violated Georgia Code Sections 7-1-1013(1), (2), and (6). Accordingly, Respondent's Cease and Desist Order issued pursuant to Section 7-1-1018(a) was proper. Respondent's motion for summary determination is hereby **GRANTED**, and the Cease and Desist Order is **UPHELD**.

SO ORDERED, this 2nd day of March 2008.


STEPHANIE M. HOWELLS
Administrative Law Judge

administrative action that the Department can take against Manuel Cubias for engaging in a prohibited act barred by O.C.G.A. § 7-1-1013 is to issue a Cease and Desist Order.

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

MANUEL CUBIAS,
Petitioner,

v.

DEPARTMENT OF BANKING AND FINANCE,
Respondent.

:
:
:
Docket No.: OSAH-DBF-MBL-0818772-67-Howells

:
:
Agency Reference No.: 0818772
:

NOTICE OF INITIAL DECISION

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

FILING A MOTION WITH THE JUDGE AT OSAH

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such motion may or may not toll the time for filing an application for agency review.** See O. C.G.A. §§ 50-13-19 and 50-13-20.1. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk
Office of State Administrative Hearings
Attn.: Jennifer Martin, jmartin@osah.ga.gov
230 Peachtree Street, NW, Suite 850
Atlanta, Georgia 30303-1534

APPLICATION FOR AGENCY REVIEW

An application for Agency Review must be filed within thirty (30) days after service of this Initial Decision. O.C.G.A. §§ 50-13-17 and 50-13-41. A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Department of Banking and Finance
Attn: Commissioner
2990 Brandywine Road, Suite 200
Atlanta, Georgia 30341.

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. §§ 50-13-17 and 50-13-41. In certain cases, an Initial Decision may become Final and therefore not subject to review either by agency provision or the provisions of O.C.G.A. § 50-13-17(c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G. A. § 50-13-19(b).

CERTIFIED MAIL

RE: MANUEL CUBIAS, Petitioner

DOCKET NO.: OSAH-DBF-MBL-0818772-67-Howells

MAIL TO:

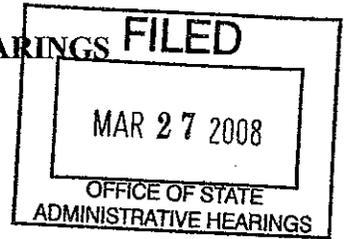
MANUEL CUBIAS (NOTICE AND DECISION CERTIFIED MAIL)
4949 COLD SPRINGS DRIVE (ALSO NOTICE ROUTINE MAIL)
LILBURN, GA 30047

MANUEL CUBIAS
4564 CANDY LANE
LILBURN, GA 30047

GEORGIA DEPARTMENT OF BANKING AND FINANCE (DECISION)
2990 BRANDYWINE ROAD SUITE 200
ATLANTA GA 30341

OSCAR FEARS
ASSISTANT ATTORNEY GENERAL
40 CAPITOL SQ, SW
ATLANTA, GA 30334-1300

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



ROBERTO HERNANDEZ,

Petitioner,

v.

GEORGIA DEPARTMENT OF
BANKING AND FINANCE,

Respondent.

*
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* Docket Number:
* OSAH-DBF-MBL-0818773-67-Howells
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INITIAL DECISION

Respondent filed its affidavit supported Motion for Summary Determination on January 31, 2008. Petitioner did not file a response to the motion. For the reasons stated below, Respondent's Motion for Summary Determination is **GRANTED**.

FINDINGS OF FACT

The following facts are undisputed:

1.

Starting on June 20, 2005, the Department initiated its examination of Georgia Premier Lending Corporation ("Georgia Premier"), which was licensed as a mortgage broker on January 7, 2005. (Hester Aff. ¶ 4). During the examination, the Department requested that Mr. Alvaro Cubias, the owner of Georgia Premier, complete the Officer's Questionnaire for Georgia Premier. (Hester Aff. ¶ 5; see Ex. C). As indicated in the Officer's Questionnaire provided to the Department, Roberto Hernandez is employed as a loan officer for Georgia Premier. (See Ex. C at 4-19).

2.

During the examination, the Department reviewed the loan file of Luis Casales for the property located at 182 Ernie Way, Statham, Georgia 30666. (Hester Aff. ¶ 6). The loan file for Mr.

Casales contained two loan applications for this property. Both loan applications indicate that Roberto Hernandez took the loan applications on behalf of Georgia Premier. (Hester Aff. ¶ 6; *see* Ex. D). One loan application states that Mr. Casales had \$9,500.00 on deposit at Wachovia in account number 10101116780614, while the other loan application states that Mr. Casales had \$4,903.00 on deposit in this account. (*See* Ex. D). In addition, the examiner discovered in Mr. Casales' loan file a bank statement for the period of December 15, 2004 through January 11, 2005 stating that the account, owned solely by Mr. Casales, had an ending balance of \$4,801.05. (Hester Aff. ¶ 6; *see* Ex. E).

3.

However, the bank statement discovered by the Department was not a legitimate record of Wachovia. (Quinones-Perry Am. Aff. ¶ 6, Ex. 1). Contrary to the representations in the loan applications and the bank statement that Mr. Casales had an account balance in excess of \$4,800.00, the highest balance in Mr. Casales' account in January of 2005 was \$1,400.00. (Quinones-Perry Aff. ¶ 4, Ex. 1). Further, the account was not solely in the name of Mr. Casales but, instead, held jointly in the names of Javier Ocampo and Luis Casales – and the account was not opened until January 6, 2005. (Quinones-Perry Aff. ¶ 4). Therefore, the loan applications misrepresented Mr. Casales' bank account balance and the bank statement was false.

4.

On April 7, 2005, AccuBanc Mortgage (“Accubanc”) funded Mr. Casales' loan for the property located at 182 Ernie Way, Statham, Georgia 30666. (Beck Aff. ¶ 4). Accubanc relied on the information in the loan file including, but not limited to, the information in the submitted loan application as well as the produced bank statement to decide to fund Mr. Casales' loan. (Beck Aff. ¶ 4, Ex. 1; Beck Am. Aff. ¶¶ 5-6, Ex. 1). A borrower's bank account balance is a material

factor to AccuBanc in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Beck Aff. ¶ 4). It is a material factor because the borrower's bank account balance is an indication of the borrower's liquidity and, therefore, the borrower's ability to pay his or her mortgage in the event of a financial crisis, such as the loss of a job. (*Id.*) If AccuBanc had known that the account balance listed on the bank statement and the loan application was false, then AccuBanc would not have funded Mr. Casales' loan. (*Id.*)

5.

As a result of the investigation, the Department issued a Cease and Desist Order to Roberto Hernandez on February 10, 2006. (*See Ex. A*). Petitioner timely requested a hearing before this Tribunal pursuant to O.C.G.A. § 7-1-1018. (*See Ex. B*).

CONCLUSIONS OF LAW

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit(s) or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(3).

2.

Respondent asserts that Roberto Hernandez violated the prohibitions found in Georgia Code Sections 7-1-1013(1), (2) and (6) by submitting false information regarding the deposit history of a borrower to a lender.¹ Section 7-1-1013 states, in pertinent part:

¹ In 2005, the legislature amended portions of Section 7-1-1013. The amendment became effective May 5, 2005. Petitioner's alleged violations occurred prior to May 5, 2005. (*See Findings of Fact ¶ 4*). Accordingly, this Tribunal applied the law in effect at the time of Petitioner's conduct.

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts or make false statements or promises likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or pursue a course of misrepresentation to the department or anyone through agents or otherwise;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

* * *

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (2004).

3.

For the purposes of Article 13, the term “[m]isrepresent’ means to make a false statement of a substantive fact or to engage in, with the intent to deceive or mislead, any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10) (2004).²

4.

By submitting the loan application and bank statement which misrepresented Mr. Casales’ bank account balance, Mr. Hernandez misrepresented the funds available to Mr. Casales. AccuBanc would not have funded Mr. Casales’ loan if it had known that the bank account information was false. (See Findings of Fact ¶¶ 3-4). Mr. Hernandez’s misrepresentation caused AccuBanc to

² Georgia Code Section 7-1-1000(10) was also amended, effective May 5, 2005. The cited version was in effect at the time of Petitioner’s conduct.

take a loan on terms that it would otherwise not have taken. Accordingly, Mr. Hernandez violated Section 7-1-1013(1).

5.

A borrower's bank account balance is a material factor to AccuBanc in deciding whether to fund a loan or the amount of interest charged. (See Findings of Fact ¶ 4). By misrepresenting the funds available to Mr. Casales in connection with the mortgage loan application submitted to AccuBanc, Mr. Hernandez misrepresented a material factor to Irwin and, therefore, violated Code Section 7-1-1013(2).

6.

Finally, by submitting the loan application and bank statement containing a false account balance, Roberto Hernandez engaged in a practice which was not in good faith or fair dealing with AccuBanc in violation of Section 7-1-1013(6).

7.

Georgia Code Section 7-1-1018(a) states in pertinent part that:

Whenever it shall appear to the department that any person required to be licensed . . . under this article or employed by a licensee or registrant pursuant to Code Section 7-1-1001 . . . has violated any law of this state or any order or regulation of the department, the department may issue an initial written order requiring such person to cease and desist immediately from such unauthorized practices.

O.C.G.A. § 7-1-1018(a) (2004).

8.

For the purposes of Section 7-1-1018, "person" is defined as "any officer, director, *employee*, agent, or other person participating in the conduct of the affairs of the person subject to the orders issued pursuant to this Code section." O.C.G.A. § 7-1-1018(f) (2004) (emphasis added).

It is a violation of the law for a licensee or an individual that is exempt from the licensing

requirements³ to make false statements to a lender in order to close a loan. O.C.G.A. §§ 7-1-1013(1), (2) & (6) (2004). Because Roberto Hernandez violated Sections 7-1-1013 (1), (2) and (6), the Department's order requiring Mr. Hernandez to cease and desist from violating the law was valid.⁴

DECISION

Based on the undisputed material facts, Petitioner violated Georgia Code Sections 7-1-1013(1), (2), and (6). Accordingly, Respondent's Cease and Desist Order issued pursuant to Section 7-1-1018(a) was proper. Respondent's motion for summary determination is hereby **GRANTED**, and the Cease and Desist Order is **UPHELD**.

SO ORDERED, this 27th day of March 2008.


STEPHANIE M. HOWELLS
Administrative Law Judge

³ Mr. Hernandez was exempt from the licensing requirements of the Georgia Residential Mortgage Act during the applicable timeframe because he was an employee of Georgia Premier, a licensed mortgage broker. O.C.G.A. § 7-1-1001(11).

⁴ The only administrative action that the Department can take against an employee of a licensee is the issuance of a Cease and Desist Order under Georgia Code Section 7-1-1018(a). Because Mr. Hernandez does not have a license, the Department cannot revoke or suspend his license. Likewise, the Department's rules and regulations do not permit the imposition of fines to an employee of a licensee. See GA. COMP. R. & REGS. r. 80-11-3-.01(1) ("[e]xcept as otherwise indicated, these fines and penalties apply to any person who is acting as a mortgage lender or broker and who is required to be licensed or registered under O.C.G.A. Title 7, Article 13 . . ."). Therefore, the only administrative action that the Department can take against Mr. Hernandez for engaging in a prohibited act barred by Section 7-1-1013 is to issue a Cease and Desist Order.

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

ROBERTO HERNANDEZ, Petitioner,	:	
	:	
v.	:	Docket No.: OSAH-DBF-MBL-0818773-67-Howells
	:	
DEPARTMENT OF BANKING AND FINANCE, Respondent.	:	Agency Reference No.: 0818773
	:	

NOTICE OF INITIAL DECISION

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

FILING A MOTION WITH THE JUDGE AT OSAH

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such motion may or may not toll the time for filing an application for agency review.** See O. C.G.A. §§ 50-13-19 and 50-13-20.1. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk
Office of State Administrative Hearings
Attn.: Jennifer Martin, jmartin@osah.ga.gov
230 Peachtree Street, NW, Suite 850
Atlanta, Georgia 30303-1534

APPLICATION FOR AGENCY REVIEW

An application for Agency Review must be filed within thirty (30) days after service of this Initial Decision. O.C.G.A. §§ 50-13-17 and 50-13-41. A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Department of Banking and Finance
Attn: Commissioner
2990 Brandywine Road, Suite 200
Atlanta, Georgia 30341.

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. §§ 50-13-17 and 50-13-41. In certain cases, an Initial Decision may become Final and therefore not subject to review either by agency provision or the provisions of O.C.G.A. § 50-13-17(c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G.A. § 50-13-19(b).

CERTIFIED MAIL

RE: ROBERTO HERNANDEZ, Petitioner

DOCKET NO.: OSAH-DBF-MBL-0818773-67-Howells

MAIL TO:

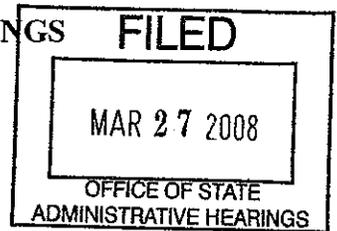
ROBERTO HERNANDEZ
3270 DRAYTON MANOR RUN
LAWRENCEVILLE, GA 30045

ROBERT HERNANDEZ
1819 AUSTINS POINT DRIVE
LAWRENCEVILLE, GA 30043

GEORGIA DEPARTMENT OF BANKING AND FINANCE (DECISION)
2990 BRANDYWINE ROAD SUITE 200
ATLANTA GA 30341

OSCAR FEARS
ASSISTANT ATTORNEY GENERAL
40 CAPITOL SQ, SW
ATLANTA, GA 30334-1300

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



ALEJANDRO SAUCEDA,
Petitioner,

v.

GEORGIA DEPARTMENT OF
BANKING AND FINANCE,
Respondent.

*
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* Docket Number:
* OSAH-DBF-MBL-0818775-67-Howells
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INITIAL DECISION

Respondent filed its affidavit supported Motion for Summary Determination on January 31, 2008. Petitioner did not file a response to the motion. For the reasons stated below, Respondent's Motion for Summary Determination is **GRANTED**.

FINDINGS OF FACT

The following facts are undisputed:

1.

Starting on June 20, 2005, the Department initiated its examination of Georgia Premier Lending Corporation ("Georgia Premier"), which was licensed as a mortgage broker on January 7, 2005. (Hester Aff. ¶ 4). During the examination, the Department requested that Mr. Alvaro Cubias, the owner of Georgia Premier, complete the Officer's Questionnaire for Georgia Premier. (Hester Aff. ¶ 5; see Ex. C). As indicated in the Officer's Questionnaire provided to the Department, Alejandro Saucedo is employed as a loan officer for Georgia Premier. (See Ex. C at 4-19).

2.

During the examination, the Department reviewed the loan file of Francisco Penaranda for the property located at 990 Eagle Pointe Drive, Lawrenceville, Georgia 30044. (Hester Aff. ¶ 6). The April 14, 2005 loan application for this property indicates that Alejandro Saucedo took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 6; *see* Ex. D). The loan application states that Mr. Penaranda had \$3,161.00 on deposit at SunTrust Bank in account number 8811631954. (*See* Ex. D). In addition, the examiner discovered in Mr. Penaranda's loan file a bank statement for the period of December 30, 2004 through January 28, 2005 indicating that the account, owned solely by Mr. Penaranda, had an ending balance of \$3,160.66. (Hester Aff. ¶ 6; *see* Ex. E).

3.

However, the bank statement discovered by the Department was not a legitimate record of SunTrust Bank. (Tucker Aff. ¶ 5). Contrary to the representations in the loan application and the bank statement that Mr. Penaranda had an account balance in excess of \$3,160.00, the account does not belong to Mr. Penaranda but instead is the account of an individual named "Gustavo Moreno." (Tucker Aff. ¶ 4). Therefore, the loan application misrepresented Mr. Penaranda's bank account balance and the bank statement was false.

4.

On April 14, 2005, Webster Bank, N.A. ("Webster") funded Mr. Penaranda's loan for the property located at 990 Eagle Pointe Drive, Lawrenceville, Georgia 30044. (Ricard Aff. ¶ 4). Webster relied on the information in the loan file including, but not limited to, the ~~information in the submitted loan application as well as the produced bank statement to~~ decide to fund Mr. Penaranda's loan. (Ricard Aff. ¶ 4, Exs. 1 & 2). A borrower's bank

account balance is a material factor to Webster in determining whether to fund a loan and, if the loan is funded, the amount of interest charged on the loan. (Ricard Aff. ¶ 4). It is a material factor because the borrower's bank account balance is an indication of the borrower's liquidity and thus, the borrower's ability to pay his or her mortgage in the event of a financial crisis, such as the loss of a job. (*Id.*) If Webster had known that the account balance listed on the bank statement and the loan application was false, then Webster not have funded the loan. (*Id.*)

5.

As a result of the investigation, the Department issued a Cease and Desist Order to Alejandro Saucedo on February 10, 2006. (*See* Ex. A). Petitioner timely requested a hearing before this Tribunal pursuant to O.C.G.A. § 7-1-1018. (*See* Ex. B).

CONCLUSIONS OF LAW

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit(s) or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(3).

2.

Respondent asserts that Alejandro Saucedo violated the prohibitions found in Georgia Code Sections 7-1-1013(1), (2) and (6) by submitting false information regarding the deposit history of a borrower to a lender.¹ Section 7-1-1013 states, in pertinent part:

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts or make false statements or promises likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or pursue a course of misrepresentation to the department or anyone through agents or otherwise;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

* * *

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (2004).

3.

For the purposes of Article 13, the term “[m]isrepresent’ means to make a false statement of a substantive fact or to engage in, with the intent to deceive or mislead, any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10) (2004).²

¹ In 2005, the legislature amended portions of Section 7-1-1013. The amendment became effective May 5, 2005. Petitioner’s alleged violations occurred prior to May 5, 2005. (See Findings of Fact ¶ 4). Accordingly, this Tribunal applied the law in effect at the time of Petitioner’s conduct.

² Georgia Code Section 7-1-1000(10) was also amended, effective May 5, 2005. The cited version was in effect at the time of Petitioner’s conduct.

4.

By submitting the loan application and the bank statement which misrepresented Mr. Penaranda's bank account balance, Mr. Saucedo misrepresented the funds available to Mr. Penaranda. Webster would not have funded Mr. Penaranda's loan if it had known that the bank account information was false. (See Findings of Fact ¶¶ 3-4). Mr. Saucedo's misrepresentation caused Webster to take a loan on terms that it would otherwise not have taken. Accordingly, Mr. Saucedo violated Section 7-1-1013(1).

5.

A borrower's bank account balance is a material factor to Webster in deciding whether to fund a loan or the amount of interest charged. (See Findings of Fact ¶ 4). By misrepresenting the funds available to Mr. Penaranda in connection with the mortgage loan application submitted to Webster, Mr. Saucedo misrepresented a material factor to Webster and, therefore, violated Code Section 7-1-1013(2).

6.

Finally, by submitting the loan application and bank statement containing a false account balance, Mr. Saucedo engaged in a practice which was not in good faith or fair dealing with Webster in violation of Section 7-1-1013(6).

7.

Georgia Code Section 7-1-1018(a) states in pertinent part that:

Whenever it shall appear to the department that any person required to be licensed . . . under this article or employed by a licensee or registrant pursuant to Code Section 7-1-1001 . . . has violated any law of this state or any order or regulation of the department, the department may issue an initial written order requiring such person to cease and desist immediately from such unauthorized practices.

O.C.G.A. § 7-1-1018(a) (2004).

For the purposes of Section 7-1-1018, "person" is defined as "any officer, director, *employee*, agent, or other person participating in the conduct of the affairs of the person subject to the orders issued pursuant to this Code section." O.C.G.A. § 7-1-1018(f) (2004) (emphasis added). It is a violation of the law for a licensee or an individual that is exempt from the licensing requirements³ to make false statements to a lender in order to close a loan. O.C.G.A. §§ 7-1-1013(1), (2) & (6) (2004). Because Mr. Saucedo violated Sections 7-1-1013 (1), (2) and (6), the Department's order requiring Mr. Saucedo to cease and desist from violating the law was valid.⁴

DECISION

Based on the undisputed material facts, Petitioner violated Georgia Code Sections 7-1-1013(1), (2), and (6). Accordingly, Respondent's Cease and Desist Order issued pursuant to Section 7-1-1018(a) was proper. Respondent's motion for summary determination is hereby **GRANTED**, and the Cease and Desist Order is **UPHELD**.

SO ORDERED, this 27th day of March 2008.


 STEPHANIE M. HOWELLS
 Administrative Law Judge

³ Mr. Saucedo was exempt from the licensing requirements of the Georgia Residential Mortgage Act during the applicable timeframe because he was an employee of Georgia Premier, a licensed mortgage broker. O.C.G.A. § 7-1-1001(11).

⁴ The only administrative action that the Department can take against an employee of a licensee is the issuance of a Cease and Desist Order under Georgia Code Section 7-1-1018(a). Because Mr. Saucedo does not have a license, the Department cannot revoke or suspend his license. Likewise, the Department's rules and regulations do not permit the imposition of fines to an employee of a licensee. See GA. COMP. R. & REGS. r. 80-11-3-.01(1) ("[e]xcept as otherwise indicated, these fines and penalties apply to any person who is acting as a mortgage lender or broker and who is required to be licensed or registered under O.C.G.A. Title 7, Article 13 . . ."). Therefore, the only administrative action that the Department can take against Mr. Saucedo for engaging in a prohibited act barred by Section 7-1-1013 is to issue a Cease and Desist Order.

CERTIFIED MAIL

RE: ALEJANDRO SAUCEDA, Petitioner

DOCKET NO.: OSAH-DBF-MBL-0818775-67-Howells

MAIL TO:

ALEJANDRO SAUCEDA (NOTICE AND DECISION CERTIFIED MAIL)
4564 CANDY LANE (ALSO NOTICE ROUTINE MAIL)
LILBURN, GA 30047

ALEJANDRO SAUCEDA
1176 ADAH COURT
LAWRENCEVILLE, GA 30043

GEORGIA DEPARTMENT OF BANKING AND FINANCE (DECISION)
2990 BRANDYWINE ROAD SUITE 200
ATLANTA GA 30341

OSCAR FEARS
ASSISTANT ATTORNEY GENERAL
40 CAPITOL SQ, SW
ATLANTA, GA 30334-1300

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



ERICK MONTERROSA,

Petitioner,

v.

GEORGIA DEPARTMENT OF
BANKING AND FINANCE,

Respondent.

*
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* Docket Number:
* OSAH-DBF-MBL-0818774-67-Howells
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INITIAL DECISION

Respondent filed its affidavit supported Motion for Summary Determination on January 31, 2008. Petitioner did not file a response to the motion. For the reasons stated below, Respondent's Motion for Summary Determination is **GRANTED**.

FINDINGS OF FACT

The following facts are undisputed:

1.

Starting on June 20, 2005, the Department initiated its examination of Georgia Premier Lending Corporation ("Georgia Premier"), which was licensed as a mortgage broker on January 7, 2005. (Hester Aff. ¶ 4). During the examination, the Department requested that Mr. Alvaro Cubias, the owner of Georgia Premier, complete the Officer's Questionnaire for Georgia Premier. (Hester Aff. ¶ 5; see Ex. C). As indicated in the Officer's Questionnaire provided to the Department, Erick Monterrosa is employed as a processor for Georgia Premier. (See Ex. C at 4-19).

2.

During the examination, the Department reviewed the loan file of Jose Argueta for the property located at 2920 Evergreen Hollow Drive, Gainesville, Georgia 30507. (Hester Aff. ¶ 6). The June 15, 2005 loan application for this property indicates that Alvaro Cubias took the loan application on behalf of Georgia Premier. (Hester Aff. ¶ 6; *see* Ex. D). The loan application states that Mr. Argueta was the manager for La Sirenita and that he had worked at La Sirenita for two years and one month. (*See* Ex. D).

3.

In addition, the examiner discovered in Mr. Argueta's loan file a Verbal Employment Verification Form indicating that Erick Monterrosa had spoken with Virginia Quintanilla, the owner of La Sirenita, and confirmed Mr. Argueta's employment at La Sirenita. (Hester Aff. ¶ 6; *see* Ex. E). The Department's examiner also discovered an executed Verification of Employment. (Hester Aff. ¶ 6; *see* Ex. F). The document indicates that Mr. Monterrosa mailed it to La Sirentia and that the owner of La Sirenita confirmed Mr. Argueta's employment. (*See* Ex. F). In obtaining these verifications of employment, Mr. Monterrosa was acting as a loan processor on the file. (*See* Exs. E & F).

4.

However, contrary to the representations in the two verifications of employment, Mr. Argueta never worked for La Sirenita. (Quintanilla Aff. ¶ 5). Further, contrary to the verifications of employment in Mr. Argueta's file, Ms. Quintanilla, the owner of La Sirenita, never confirmed Mr. Argueta's employment with Mr. Monterrosa or anyone else from Georgia Premier. (Quintanilla Aff. ¶¶ 4 & 6).

5.

On June 15, 2005, Irwin Mortgage Corporation ("Irwin") funded Mr. Argueta's loan for the property located at 2920 Evergreen Hollow Drive, Gainesville, Georgia. (Stimac Aff. ¶ 4). Irwin relied on the information in the loan file including, but not limited to, the information in the loan application as well as the verifications of employment to decide to fund Mr. Argueta's loan. (Stimac Aff. ¶ 4, Exs. 1-3). A borrower's employment history is a material factor in determining whether to make a loan because Irwin wants to insure that an applicant has the ability to make the monthly mortgage payments. (Stimac Aff. ¶ 4). Irwin would not have funded Mr. Argueta's loan if it had known that Mr. Argueta was not employed by La Sirenita, as indicated on his application. (*Id.*)

6.

As a result of the investigation, the Department issued a Cease and Desist Order to Erick Monterrosa on February 10, 2006. (*See Ex. A*). Petitioner timely requested a hearing before this Tribunal pursuant to O.C.G.A. § 7-1-1018. (*See Ex. B*).

CONCLUSIONS OF LAW

1.

On motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit(s) or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(3).

2.

Respondent asserts that Erick Monterrosa violated the prohibitions found in Georgia Code Sections 7-1-1013(1), (2), and (6) by generating false information regarding the employment history of a borrower that was submitted to a lender. Section 7-1-1013 states, in pertinent part:

It is prohibited for any person transacting a mortgage business in or from this state, including any person required to be licensed or registered under this article and any person exempted from the licensing or registration requirements of this article under Code Section 7-1-1001, to:

(1) Misrepresent the material facts, make false statements or promises, or submit false statements or documents likely to influence, persuade, or induce an applicant for a mortgage loan, a mortgagee, or a mortgagor to take a mortgage loan, or, through agents or otherwise, pursue a course of misrepresentation by use of fraudulent or unauthorized documents or other means to the department or anyone;

(2) Misrepresent or conceal or cause another to misrepresent or conceal material factors, terms, or conditions of a transaction to which a mortgage lender or broker is a party, pertinent to an applicant or application for a mortgage loan or a mortgagor;

(6) Engage in any transaction, practice, or course of business which is not in good faith or fair dealing, or which operates a fraud upon any person, in connection with the attempted or actual making of, purchase of, or sale of any mortgage loan[.]

O.C.G.A. § 7-1-1013 (2007).

3.

For the purposes of Article 13, the term “[m]isrepresent’ means to make a false statement of a substantive fact. Misrepresent may also mean to intentionally engage in any conduct which leads to a false belief which is material to the transaction.” O.C.G.A. § 7-1-1000(10).

4.

Erick Monterrosa processed a loan application and verifications of employment that falsely represented Mr. Argueta's employment history. Irwin relied on these documents which falsely represented Mr. Argueta's employment in electing to fund the loan. Irwin would not have funded the loan if it had known that the employment information was false. (See Findings of Fact ¶¶ 4-5). By submitting the false verifications of employment, Mr. Monterrosa caused Irwin to take a loan that it would otherwise not have taken. Accordingly, Mr. Monterrosa violated Section 7-1-1013(1).

5.

A borrower's employment history is a material factor to Irwin in deciding whether to make a loan. (See Findings of Fact ¶ 5). By misrepresenting that Mr. Argueta was employed by La Sirenita on the verifications of employment submitted to Irwin, Mr. Monterrosa misrepresented a material factor and, therefore, violated Code Section 7-1-1013(2).

6.

Finally, the owner of La Sirenita never spoke to Mr. Monterrosa or anyone from Georgia Premier. Thus, the Verbal Employment Verification Form is false. By creating and submitting the false Verbal Employment Verification Form, Mr. Monterrosa violated Section 7-1-1013(6), because he engaged in a practice which was not in good faith or fair dealing with Irwin.

7.

Georgia Code Section 7-1-1018(a) states in pertinent part that:

Whenever it shall appear to the department that any person required to be licensed . . . under this article or employed by a licensee or registrant pursuant to Code Section 7-1-1001 . . . has violated any law of this state or any order or regulation

of the department, the department may issue an initial written order requiring such person to cease and desist immediately from such unauthorized practices.

O.C.G.A. § 7-1-1018(a).

8.

For the purposes of Section 7-1-1018, "person" is defined as "any officer, director, *employee*, agent, or other person participating in the conduct of the affairs of the person subject to the orders issued pursuant to this Code section." O.C.G.A. § 7-1-1018(f) (emphasis added). It is a violation of the law for a licensee or an individual that is exempt from the licensing requirements¹ to make false statements to a lender in order to close a loan. O.C.G.A. §§ 7-1-1013(1), (2) & (6). Because Erick Monterrosa violated Sections 7-1-1013 (1), (2) and (6), the Department's order requiring Mr. Monterrosa to cease and desist from violating the law was valid.²

¹ Erick Monterrosa was exempt from the licensing requirements of the Georgia Residential Mortgage Act during the applicable timeframe because he was an employee of Georgia Premier, a licensed mortgage broker. O.C.G.A. § 7-1-1001(11).

² The only administrative action that the Department can take against an employee of a licensee is the issuance of a Cease and Desist Order under Georgia Code Section 7-1-1018(a). Because Erick Monterrosa does not have a license, the Department cannot revoke or suspend his license. Likewise, the Department's rules and regulations do not permit the imposition of fines to an employee of a licensee. *See* GA. COMP. R. & REGS. r. 80-11-3-.01(1) ("[e]xcept as otherwise indicated, these fines and penalties apply to any person who is acting as a mortgage lender or broker and who is required to be licensed or registered under O.C.G.A. Title 7, Article 13 . . ."). Therefore, the only administrative action that the Department can take against Erick Monterrosa for engaging in a prohibited act barred by O.C.G.A. § 7-1-1013 is to issue a Cease and Desist Order.

DECISION

Based on the undisputed material facts, Petitioner violated Georgia Code Sections 7-1-1013(1), (2), and (6). Accordingly, Respondent's Cease and Desist Order issued pursuant to Section 7-1-1018(a) was proper. Respondent's motion for summary determination is hereby **GRANTED**, and the Cease and Desist Order is **UPHELD**.

SO ORDERED, this 2nd day of March 2008.


STEPHANIE M. HOWELLS
Administrative Law Judge

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

ERICK MONTERROSA,
Petitioner,

v.

DEPARTMENT OF BANKING AND FINANCE,
Respondent.

Docket No.: OSAH-DBF-MBL-0818774-67-Howells

Agency Reference No.: 0818774

NOTICE OF INITIAL DECISION

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

FILING A MOTION WITH THE JUDGE AT OSAH

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such motion may or may not toll the time for filing an application for agency review.** See O. C.G.A. §§ 50-13-19 and 50-13-20.1. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk

Office of State Administrative Hearings
Attn.: Jennifer Martin, jmartin@osah.ga.gov
230 Peachtree Street, NW, Suite 850
Atlanta, Georgia 30303-1534

APPLICATION FOR AGENCY REVIEW

An application for Agency Review must be filed within thirty (30) days after service of this Initial Decision. O.C.G.A. §§ 50-13-17 and 50-13-41. A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Department of Banking and Finance
Attn: Commissioner
2990 Brandywine Road, Suite 200
Atlanta, Georgia 30341.

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. §§ 50-13-17 and 50-13-41. In certain cases, an Initial Decision may become Final and therefore not subject to review either by agency provision or the provisions of O.C.G.A. § 50-13-17(c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G. A. § 50-13-19(b).

CERTIFIED MAIL

RE: ERICK MONTERROSA, Petitioner

DOCKET NO.: OSAH-DBF-MBL-0818774-67-Howells

MAIL TO:

ERICK MONTERROSA (NOTICE AND DECISION CERTIFIED MAIL)
1618 CHRISTLANA DRIVE (ALSO NOTICE ROUTINE MAIL)
LAWRENCEVILLE, GA 30045

GEORGIA DEPARTMENT OF BANKING AND FINANCE (DECISION)
2990 BRANDYWINE ROAD SUITE 200
ATLANTA GA 30341

OSCAR FEARS
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