Terms Completed

ORDER SUMMARY – Case Number: C-12-1058

Name(s): Law Firm of Macey, Aleman, and Searns
Kelly Patrick Sibert

Order Number: C-12-1058-13-CO01 & C-12-1058-14-FO05

Effective Date: February 12, 2014

License Number: n/a
Or **NMLS Identifier** [U/L]
(Revoked, suspended, stayed, application denied or withdrawn)
If applicable, you must specifically note the ending dates of terms.
License Effect: n/a

Not Apply Until: n/a

Not Eligible Until: n/a

Prohibition/Ban Until: n/a

Investigation Costs	$2,597	Due	Paid ☒ Y ☐ N	Date 2/12/14
Fine (Respondent Macey)	$5,000	Due	Paid ☒ Y ☐ N	Date 2/12/14
Assessment(s)	$	Due	Paid ☐ Y ☐ N	Date
Restitution	$9,036	Due	Paid ☒ Y ☐ N	Date
Judgment	$	Due	Paid ☐ Y ☐ N	Date
Satisfaction of Judgment Filed?		☐ Y ☐ N		
No. of Victims:		5		

Comments: cease and desist engaging in the practice of a mortgage broker or loan originator until licensure or exemption, withdrawal of Nunc Pro Tunc Second Corrected Final Order C-12-1058-13-FO04 and incorporated portion of Final Order C-12-1058-13-FO01.

STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CONSUMER SERVICES

IN THE MATTER OF DETERMINING Whether there has been a violation of the Mortgage Broker Practices Act of Washington by: LAW FIRM OF MACEY, ALEMAN, AND SEARNS, and KELLY PATRICK SIBERT, Loan Modification Managing Member, Respondents.	No.: C-12-1058-13-CO01 CONSENT ORDER

COMES NOW the Director of the Department of Financial Institutions (Director), through his designee Deborah Bortner, Division Director, Division of Consumer Services, the Law Firm of Macey, Aleman, and Searns (Respondent Macey, Aleman, and Searns), and Kelly Patrick Sibert (Respondent Sibert), and finding that the issues raised in the above-captioned matter may be economically and efficiently settled, agree to the entry of this Consent Order. This Consent Order is entered pursuant to chapter 19.146 of the Revised Code of Washington (RCW), and RCW 34.05.060 of the Administrative Procedure Act, based on the following:

AGREEMENT AND ORDER

The Department of Financial Institutions, Division of Consumer Services (Department) and Respondents have agreed upon a basis for resolution of the matters alleged in Statement of Charges No. C-12-1058-SC-01 (Statement of Charges), entered September 27, 2012, (copy attached hereto). Pursuant to chapter 19.146 RCW, the Mortgage Broker Practices Act (Act), and RCW 34.05.060 of the Administrative Procedure Act, Respondents hereby agree to the Department's entry of this Consent Order and further agree that the issues raised in the above-captioned matter may be economically and efficiently settled by entry of this Consent Order. The parties intend this Consent Order to fully resolve the issues raised in the Statement of Charges. Respondents are agreeing not to

contest the Statement of Charges in consideration of the terms of this Consent Order, and do not admit to any wrongdoing by its entry.

Based upon the foregoing:

A. **Jurisdiction.** It is AGREED that the Department has jurisdiction over the subject matter of the activities discussed herein.

B. **Waiver of Hearing.** It is AGREED that Respondents have been informed of the right to a hearing before an administrative law judge, and waived their right to a hearing and any and all administrative review of the issues raised in this matter, or of the resolution reached herein, by failing to timely file an Application for Adjudicative Hearing.

C. **Dismissal of Petition for Judicial Review.** It is AGREED that Respondents shall dismiss their petition for review with prejudice, case number 13-2-01397-2, filed in Thurston County Superior Court. Such dismissal shall be filed no later than 10 days after the withdrawal of the Final Order identified in paragraph D. It is further AGREED that each side will bear their own costs related to the petition for judicial review.

D. **Withdrawal of Final Order.** The Director has determined that the entry of this Consent Order is in the best interest of the consumers, as it would bring restitution to the consumers without further delay in consumers recovering the funds owed them. It is AGREED that Nunc Pro Tunc Second Corrected Final Order C-12-1058-13-FO04[1] will be withdrawn, and to the extent that it is affirmed and incorporated within said order, by reference, Final Order C-12-1058-13-FO01 will be withdrawn as well.

E. **No Admission of Liability.** The parties intend this Consent Order to fully resolve the Statement of Charges and agree that Respondents do not admit to any wrongdoing by its entry.

[1] Nunc Pro Tunc Second Corrected Final Order C-12-1058-13-FO04 supersedes or incorporates all prior Final Orders (C-12-1058-13-FO01, C-12-1058-13-FO02, and C-12-1058-13-FO03) issued in this matter. With the withdrawal of the Nunc Pro Tunc Second Corrected Final Order, the prior Final Orders issued in this matter have no further effect.

F. **Cease and Desist.** It is AGREED that Respondents will cease and desist from engaging in the business of a mortgage broker or loan originator or participating in the conduct of the affairs of any mortgage broker subject to licensure by the Director in the State of Washington, unless and until proper licensure is obtained or an exemption from the Act applies.

G. **Fine.** It is AGREED that Respondent Macey, Aleman, and Searns shall pay a fine to the Department in the amount of $5,000 in the form of a cashier's check made payable to the "Washington State Treasurer," upon entry of this Consent Order.

H. **Restitution.** It is AGREED that Respondents have paid restitution in the amount of $9,036 and provided documentation of restitution paid to the following Washington consumers:

Consumer	Amount Paid
C.B.	$1,195
B.C.	$1,200
Y.C.	$3,446
J.D.	$2,000
D.R.	$1,195

I. **Rights of Non-Parties.** It is AGREED that the Department does not represent or have the consent of any person or entity not a party to this Consent Order to take any action concerning their personal legal rights. It is further AGREED that for any person or entity not a party to this Consent Order, this Consent Order does not limit or create any private rights or remedies against Respondents, limit or create liability of Respondents, or limit or create defenses of Respondents to any claims.

J. **Investigation Fee.** It is AGREED that Respondents shall pay to the Department an investigation fee of $2,597, in the form of a cashier's check made payable to the "Washington State Treasurer," upon entry of this Consent Order. The Fine and Investigation Fee may be paid together in one $7,597 cashier's check made payable to the "Washington State Treasurer."

K. **Authority to Execute Order.** It is AGREED that the undersigned have represented and warranted that they have the full power and right to execute this Consent Order on behalf of the parties represented.

L. **Non-Compliance with Order.** It is AGREED that Respondents understand that failure to abide by the terms and conditions of this Consent Order may result in further legal action by the Director. In the event of such legal action, Respondents may be responsible to reimburse the Director for the cost incurred in pursuing such action, including but not limited to, attorney fees.

M. **Voluntarily Entered.** It is AGREED that Respondents have voluntarily entered into this Consent Order, which is effective when signed by the Director's designee.

N. **Completely Read, Understood, and Agreed.** It is AGREED that Respondents have read this Consent Order in its entirety and fully understand and agree to all of the same.

RESPONDENTS:
Law Firm of Macey, Aleman, and Searns
By: [redacted]
[Name] [Title]

1/15/14
Date

Kelly Patrick Sibert
[redacted]

1-15-2014
Date

Approved for Entry:
[redacted]
Bryan C. Grant, WSBA No. 38553
Attorney at Law
Ryan, Swanson & Cleveland, PLLC
Attorneys for Respondents

2/11/14
Date

DO NOT WRITE BELOW THIS LINE

THIS ORDER ENTERED THIS 12th DAY OF February, 2014

[redacted]

DEBORAH BORTNER
Director
Division of Consumer Services
Department of Financial Institutions

Presented by:

[redacted]

SHANA L. OLIVER
Financial Legal Examiner

Approved by:

[redacted]

CHARLES E. CLARK
Enforcement Chief

STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF DETERMINING Whether there has been a violation of the Mortgage Broker Practices Act of Washington by: LAW FIRM OF MACEY, ALEMAN, AND SEARNS, and KELLY PATRICK SIBERT, Loan Modification Managing Member, Respondents.	No.: C-12-1058-14-FO05 FINAL ORDER WITHDRAWING NUNC PRO TUNC SECOND CORRECTED FINAL ORDER

COMES NOW the Director of the Department of Financial Institutions (Director), and hereby withdraws Nunc Pro Tunc Second Corrected Final Order No. C-12-1058-13-FO04, issued November 19, 2013, and to the extent that it is affirmed and incorporated within said order by reference, Final Order C-12-1058-13-FO01, issued March 7, 2013, to permit the entry of a Consent Order in this matter. The Director has determined that the entry of the Consent Order is in the best interest of the consumers, as it would bring restitution to the consumers without further delay.

ORDER

Based on the above, Nunc Pro Tunc Second Corrected Final Order No. C-12-1058-13-FO04, which was issued on November 19, 2013, and Final Order No. C-12-1058-13-FO01, which was issued March 7, 2013, are hereby withdrawn.

DATED this 12th day of February, 2014.

STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS

[redacted]

SCOTT JARVIS
Director

State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF DETERMINING Whether there has been a violation of the Mortgage Broker Practices Act of Washington by: LAW FIRM OF MACEY, ALEMAN & SEARNS, and KELLY PATRICK SIBERT, Loan Modification Managing Member, Respondent.	No. C-12-1058-13-FO04 *NUNC PRO TUNC* SECOND CORRECTED ORDER DENYING PETITION FOR RECONSIDERATION AND AFFIRMATION OF FINAL ORDER DATED MARCH 7, 2013

THIS MATTER originally came before Scott Jarvis, Director ("Director") of the Department of Financial Institutions ("Department"), as Presiding Officer, upon Petition for Reconsideration, dated March 25, 2013 ("Petition"), of a Final Default Order by the Department's Division of Consumer Services ("Division") dated March 7, 2013 ("Final Order") against Respondents Law Firm of Macey, Aleman & Searns ("Law Firm") and Kelly Patrick Sibert ("Sibert"); and the Director, having given this matter due consideration as hereinafter described, and having determined that the Petition has no merit in light of the Record on Reconsideration enumerated below, the Director entered the *Corrected* Final Order No. C-12-1058-13-FO03, on May 31, 2013. Subsequently, while this matter was on Petition for Judicial Review, the Director determined *sua sponte* that there was an error in the *Corrected* Final Order No. C-12-1058-13-FO03 with respect to two documents referred to therein as "1st Clark Letter" and "2nd Clark Letter."

NOW, THEREFORE, the Director makes the following findings by way of denying the Petition for Reconsideration:

1.0 CORRECTION OF RECORD

1.1 Only One "Clark Letter" Apparently Existed. Apparently, there was never both a "1st Clark Letter" and a "2nd Clark Letter." As the Director has apparently now discovered from the Certified Record on Judicial Review, only the "2nd Clark Letter" apparently existed. Therefore, the Record on Reconsideration is hereby amended and further corrected to state as the record on reconsideration (see *Subsection 2.15* below) the document previously known as "2nd Clark Letter," and the previous reference to an apparently non-existent "1st Clark Letter" is deleted from the Record on Reconsideration set forth in the new *Section 2.0* below.

1.2 Error Had No Significant Bearing on Substance of Deliberation. In *Corrected* Final Order No. C-12-1058-13-FO03, the Director set forth all the documents that he believed at the time were to be considered on Petition for Reconsideration. But the communication(s) of Mary Clark were not ultimately dispositive in the Director's decision-making. (Note: "1st Clark Letter" and 2nd Clark Letter" are not subsequently referred to in *Corrected* Final Order No. C-12-1058-13-FO03.)

1.3 Nunc Pro Tunc – Retroactive Effect of This Order. The Director determines that it is just and proper to give retroactive effect to this amendment and further correction of the Record on Reconsideration and *Corrected* Final Order No. C-12-1058-13-FO03.

2.0 RECORD BEFORE THE DIRECTOR

The Director has considered the entire record on reconsideration, including, without limitation, the following documents (collectively, "Record on Reconsideration"):

2.1 The Statement of Charges and Notice of Intent to Enter an Order to Produce Records, Cease and Desist Business, Prohibit from Industry, Order Restitution, Impose Fine, and Collect Investigation Fee, dated September 27, 2012 ("Statement of Charges");

2.2 The Notice of Opportunity to Defend and Opportunity for Hearing, dated September 27, 2012, to Respondent Law Firm ("Notice to Law Firm");

2.3 The Notice of Opportunity to Defend and Opportunity for Hearing, dated September 27, 2012, to Respondent Sibert ("Notice to Sibert");

2.4 The Application for Adjudicative Hearing from Law Firm, dated December 18, 2012 ("Law Firm's Hearing Application");

2.5 The cover letter to second service on Respondent Law Firm of the Statement of Charges and Notice to Law Firm, dated November 15, 2012, from Shana L. Oliver, Financial Legal Examiner, Division of Consumer Services ("2nd Cover Letter to Law Firm");

2.6 The Federal Express proof of delivery of the 2nd Cover Letter to Law Firm, dated November 16, 2012 ("Proof of Delivery on Law Firm");

2.7 The Application for Adjudicative Hearing from Respondent Law Firm, filed December 19, 2012 ("Law Firm's AAH");

2.8 The cover letter to second service on Respondent Sibert of the Statement of Charges and Notice to Sibert, dated January 9, 2013, from Shana L. Oliver, Financial Legal Examiner, Division of Consumer Services ("Cover Letter to Sibert");

2.9 The Federal Express proof of delivery of the Cover Letter to Sibert, date January 10, 2013 ("Proof of Delivery on Sibert");

2.10 The Final Order, dated March 7, 2013;

2.11 The Notice of Appearance for Respondents, dated March 23, 2013, and received March 25, 2013 ("Notice of Appearance");

2.12 The Petition, dated March 25, 2013;

2.13 The Declaration of Jeffrey J. Aleman in Support of Motion for Reconsideration, dated March 25, 2013 ("Aleman Declaration");

2.14 Declaration of Kelly P. Sibert in Support of Respondents' Petition for Reconsideration, dated March 23, 2013 ("Sibert Declaration");

2.15 A letter to Steven C. Sherman of the Department's Division of Consumer Services, dated February 28, 2013, from Mary B. Clark, Esq.;

2.16 Declaration of Service of Notice of Appearance, the Petition, the Aleman Declaration, and the Sibert Declaration, dated March 25, 2013;

2.17 The Division of Consumer Services' General Reply to Petition for Reconsideration, dated April 3, 2013 ("Reply to Petition"); and

2.18 The Declaration of Shana L. Oliver in Support of Division's Reply to Petition for Reconsideration, dated April 3, 2013 ("Oliver Declaration").

3.0 DIRECTOR'S FINDINGS

On the basis of the Record on Reconsideration, the Director finds as follows:

3.1 Consideration on the Merits. The Division, by and through the Reply to the Petition, does not contest the timeliness of the Petition. Therefore, the Director finds that the Petition was *timely* filed pursuant to RCW 34.05.470 and will be considered on the merits. The Reply to the Petition was filed with the Director within ten days of the filing of the Petition. Therefore, the Director finds that the Reply to the Petition was timely and will be considered on the merits.

3.2 Director's Discretion; Effect. This Petition is a matter of *discretion* with the Director.[1] Pursuant to the Washington Administrative Procedures Act ("WAPA"), the Director, by and through his general counsel, Joseph M. Vincent, furnished written notice of the estimated time in which the Director would act on the Petition, which thereby preserved the Petition being deemed "at issue" rather than "denied" by operation of law.[2] Because the Director has elected to formally consider this Petition, the thirty (30) day period for seeking judicial review (if at all) under WAPA (see *Notice to the Parties* below) is tolled until the issuance of this Order.[3]

3.3 Due Process. The Petition relies heavily upon *Graves v. Department of Employment Security* for the proposition that an "abuse of discretion [has] occur[ed] when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. [citations omitted]".[4] In doing so, the Petition purports to create the impression that a general "good cause" standard of relief from default is universal in administrative law. However, the Director finds the Division's Reply to the Petition persuasive in this regard. The Petition *does* fail to acknowledge that the holding in *Graves* turns entirely on WAC 192-04-180, the specific rule applicable in administrative adjudications before the Department of Employment Security. Such a "good cause" rule does not apply in administrative adjudications before this Department.

The Department relies upon WAPA, which declares that "[f]ailure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or

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[1] "The decision to set aside a default judgment is discretionary." *Graves v. Department of Employment Sec.*, 144 Wash.App. 302, 309, 990 P.2d. 981, 1006 (2008), citing *Griggs v. Averbeck Realty, Inc.*, 92 Wash.2d 576, 582, 599 P.2d 1289 (1979); *Hwang v. McMahill*, 103 Wash.App. 945, 949, 15 P.3d 172 (2000), *review denied*, 144 Wash.2d 1011, 31 P.3d 1185 (2001).

[2] RCW 34.05.470(3).

[3] *Trohimovich v. State*, 90 Wash.App. 554, 952 P.2d 192 (1998), reconsideration denied, review denied, 136 Wn.2d 1018, 966 P.2d 1278.

[4] *Graves*, *Id.*

agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, . . ."[5] While the Department is thus empowered under WAPA to adopt rules concerning default applicable to adjudicative proceedings before the Department, there is no mandate to create the same rules as the Department of Employment Security. The Department instead follows the Model Rules of Procedure[6] and its own Rules of Administrative Procedure,[7] the latter of which control as long as they are consistent with WAPA and to the extent that they conflict with the Model Rules. The Department's administrative rule setting forth the time for requesting a hearing and the consequences for failure to comply with these time limits is clearly set forth, as follows:

> (2) **Time limits for request.** ***The department must receive the request for an adjudicative hearing no later than twenty calendar days after the department serves the applicant with a written notice of an opportunity to request a hearing upon department action or contemplated department action. Service upon the applicant is completed when made in accordance with WAC 10-08-110 (2) and (3) or as provided by the statute under which the department initiated the action.*** If the statute under which the department initiated the action specifically provides for a different time limit, the time limit in that statute shall apply unless it has been superseded by the Administrative Procedure Act, chapter 34.05 RCW, but in no case shall the time limit for requesting an adjudicative hearing be less than twenty calendar days.
>
> (3) **Failure to request hearing.** ***Failure of an applicant to file an application for an adjudicative hearing within the time limit set forth in subsection (2) of this section constitutes a default and results in the loss of the applicant's right to an adjudicative hearing. When an applicant defaults, the department may proceed to resolve the case pursuant to RCW 34.05.440(1).***[8]

[Emphasis added.]

The Respondents clearly had twenty (20) calendar days from service to request an adjudicative hearing by filing within that time an Application for Administrative Hearing ("AAH"). Respondent Law Firm's AAH was not filed until thirty-three (33) days after proper service (see below) of the Statement of Charges and Notice to Law Firm and Notice to Sibert,

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[5] RCW 34.05.440(1).

[6] Chapter 10-08 WAC.

[7] Chapter 208-08 WAC.

[8] WAC 208-08-050(2) and (3).

respectively. Respondent Sibert never filed an AAH. The Notice of Appearance by counsel for Respondents, filed at the same time as the Petition at issue, is the first time the Department heard from Respondent Sibert in response to the Statement of Charges.

While Respondents do not appear to be attorneys at law in the State of Washington, they are licensed attorneys in the states of Illinois, Arizona and/or Florida. The Director is permitted to take this into consideration when evaluating their ability to comprehend the gravity of being served with the Statement of Charges and Notice to Law Firm and Notice to Sibert. With this in mind, the Director now turns to the two principal arguments by Respondents – *equitable estoppel* and *excusable neglect* – which the Director has considered at length prior to issuing this Order.

3.4 Equitable Estoppel and Excusable Neglect. According to the Oliver Declaration, there were two separate unsuccessful attempts, on October 2, 2012, and October 30, 2012, to serve Respondents Law Firm and Sibert by First Class mail alone. Then, on November 15, 2012, the Division employed *Federal Express* to effect service on Respondents Law Firm (via its corporate office in Illinois) and Respondent Sibert (via his address on the Florida Bar's Web site). On November 16, 2012, the Division received confirmation from Federal Express of Respondent Law Firm having been properly served at its Chicago, Illinois, corporate office. [See *Proof of Delivery on Law Firm.*] Notwithstanding proper service, it was not until December 19, 2012, which was thirty-three (33) days after personal service on Law Firm consistent with the due process requirements of WAPA, that the Division received Law Firm's AAH. The deadline for Respondent Law Firm filing an AAH was December 6, 2013. Not having done so, Respondent Law Firm lost the right to an adjudicative hearing even though it latently filed an AAH before entry of the Final Order on March 7, 2013.[9]

The facts with respect to personal service on Respondent Sibert are different. The Division takes the position that Respondent Sibert was served by Federal Express delivery on January 10, 2013, at his Port St. Lucie, Florida, address. [See *Proof of Delivery on Sibert.*] Respondent Sibert thus had until January 30, 2013, to file with the Division an AAH. None was ever received. His counsel's Notice of Appearance for purposes of this Petition was not filed until March 25, 2013, after issuance of the default Final Order.

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[9] WAC 208-08-050(1) and (3).

Both Respondents argue that the 2nd Cover Letter to Law Firm and the Cover Letter to Sibert contain a misstatement of law to the effect that the "twenty day" rule for filing an AAH runs from the date of *receipt* of the Notice and Statement of Charges rather than "service." In the Director's view, this argument is without any merit whatsoever. Even though "service" is typically by U.S. mail, the Division appears to have made sure that Respondents actually had actual knowledge and subjective appreciation that they were served under the requirements of WAPA and that they were, indeed, subject to the jurisdiction of the Division. The Director finds these efforts proper and even commendable in the case of statement of charges involving unlicensed persons who are nonetheless subject to the Mortgage Broker Practices Act, chapter 19.146 RCW, and are perhaps being informed of the Division's authority over them for the first time. In such cases, it was prudent for the Division to use Federal Express and assure itself of actual rather than constructive receipt of the Statement of Charges. This was the process relied upon by the Division as to both Respondents. The Director sees no facts in the Record on Reconsideration suggesting that the Division be equitably estopped from holding both Respondents in default and certainly not on account of the language in the 2nd Cover Letter to Law Firm and Cover Letter to Sibert, which were simply allowing each of the out-of-state Respondents a full twenty (20) days to file an AAH. The Director agrees with the Division's Reply to the Petition that "[t]he party asserting estoppel must show not only lack of knowledge of the facts, but also an absence of any convenient and available means of acquiring such knowledge."[10] The Respondents are educated lawyers. The Notice to Law Firm and Notice to Sibert (like any other administrative or judicial summons or notice of charges) is clear as to what was expected of Respondents – filing an AAH within twenty (20) days of the date of receipt of the Notice and Statement of Charges.

Further, the Petition's defense of *excusable neglect* is without merit. Absent a "good cause" administrative rule as existed in the *Graves* case (involving Department of Employment Security) cited above, the Director agrees that the Respondents' argument in this regard is particularly weak. But it is also well-settled, as the Division has pointed out in its Reply to the Petition, that an attorney's negligence or incompetence is attributable to his or her client and is

[10] *Davidheider v. Pierce County*, 92 Wash.App. 146, 153, 960 P.2d 998, 1002 (1998).

insufficient grounds to justify relief from a default judgment. Respondents cannot blame their prior counsel for untimely filing of an AAH.[11] The Director has carefully considered the Statement of Facts of the Petition and the supporting documentation and can find nothing therein which rises to the level of a defendable case of excusable neglect.

In appropriate cases, the Director agrees that controversies ought to be determined on the merits rather than by default.[12] For this reason, the Director carefully deliberates petitions for reconsideration which make claims of equitable estoppel or excusable neglect. Moreover, the Director is inclined to pay particularly close attention to petitions for reconsideration involving unlicensed, out-of-state respondents who are pro se and may lack an understanding of the law and the implications of non-judicial, administrative pleadings being served upon them by U.S. mail or even Federal Express. But cases in which such petitions for reconsideration have been granted by the Director have either involved (1) a true lack of clarity as to notice of charges or (2) extenuating circumstances beyond the control of the respondent in question (including a lawyer representing the respondent). The facts as to both Respondents are plainly *not* akin to any of these situations. The Respondents are not entitled to relief from the Final Order.

For all of the reasons set forth above, the Director hereby denies the Petition of Respondents and re-affirms the Final Order issued March 7, 2013.

3.0 ORDER

IT IS HEREBY ORDERED, as follows:

3.1 The Petition for Reconsideration dated March 25, 2013, is hereby denied on its merits.

3.2 The Final Order dated March 7, 2013, is affirmed and incorporated herein as if fully set forth.

3.3 This Final Order shall supersede Corrected Final Order No. No. C-12-1058-13-FO03, dated May 31, 2013.

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[11] *Barr v. McGugan*, 119 Wash.App. 43, 46, 73 P.3d 660 (2003); *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wash.App. 102, 107, 912 P.2d 1040 (1996); *M.A. Mortensen Co. v. Timberlake Software Corp.*, 93 Wash.App. 819, 838, 970 P.2d 803 (1999).

[12] *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

3.4 This Final Order shall be retroactive to May 31, 2013.

DATED this 19th day of November, 2013.

[redacted]

SCOTT JARVIS, Director

State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF DETERMINING Whether there has been a violation of the Mortgage Broker Practices Act of Washington by: LAW FIRM OF MACEY, ALEMAN & SEARNS, and KELLY PATRICK SIBERT, Loan Modification Managing Member, Respondent.	No. C-12-1058-13-FO03 CORRECTED ORDER DENYING PETITION FOR RECONSIDERATION AND AFFIRMATION OF FINAL ORDER DATED MARCH 7, 2013

THIS MATTER having come before Scott Jarvis, Director ("Director") of the Department of Financial Institutions ("Department"), as Presiding Officer, upon Petition for Reconsideration, dated March 25, 2013 ("Petition"), of a Final Default Order by the Department's Division of Consumer Services ("Division") dated March 7, 2013 ("Final Order") against Respondents Law Firm of Macey, Aleman & Searns ("Law Firm") and Kelly Patrick Sibert ("Sibert"); and the Director having given this matter due consideration as hereinafter described, and having determined that the Petition has no merit in light of the Record on Reconsideration enumerated below;

NOW, THEREFORE, the Director makes the following findings by way of denying the Petition for Reconsideration:

1.0 RECORD BEFORE THE DIRECTOR

The Director has considered the entire record on reconsideration, including, without limitation, the following documents (collectively, "Record on Reconsideration"):

1.1 The Statement of Charges and Notice of Intent to Enter an Order to Produce Records, Cease and Desist Business, Prohibit from Industry, Order Restitution,

Impose Fine, and Collect Investigation Fee, dated September 27, 2012 ("Statement of Charges");

1.2 The Notice of Opportunity to Defend and Opportunity for Hearing, dated September 27, 2012, to Respondent Law Firm ("Notice to Law Firm");

1.3 The Notice of Opportunity to Defend and Opportunity for Hearing, dated September 27, 2012, to Respondent Sibert ("Notice to Sibert");

1.4 The Application for Adjudicative Hearing from Law Firm, dated December 18, 2012 ("Law Firm's Hearing Application");

1.5 The cover letter to second service on Respondent Law Firm of the Statement of Charges and Notice to Law Firm, dated November 15, 2012, from Shana L. Oliver, Financial Legal Examiner, Division of Consumer Services ("2nd Cover Letter to Law Firm");

1.6 The Federal Express proof of delivery of the 2nd Cover Letter to Law Firm, dated November 16, 2012 ("Proof of Delivery on Law Firm");

1.7 The Application for Adjudicative Hearing from Respondent Law Firm, filed December 19, 2012 ("Law Firm's AAH");

1.8 The cover letter to second service on Respondent Sibert of the Statement of Charges and Notice to Sibert, dated January 9, 2013, from Shana L. Oliver, Financial Legal Examiner, Division of Consumer Services ("Cover Letter to Sibert");

1.9 The Federal Express proof of delivery of the Cover Letter to Sibert, date January 10, 2013 ("Proof of Delivery on Sibert");

1.10 The Final Order, dated March 7, 2013;

1.11 The Notice of Appearance for Respondents, dated March 23, 2013, and received March 25, 2013 ("Notice of Appearance");

1.12 The Petition, dated March 25, 2013;

1.13 The Declaration of Jeffrey J. Aleman in Support of Motion for Reconsideration, dated March 25, 2013 ("Aleman Declaration");

1.14 A letter to Steven C. Sherman of the Department's Division of Consumer Services, dated February 1, 2013, from Mary B. Clark, Esq. ("1st Clark Letter");

1.15 Declaration of Kelly P. Sibert in Support of Respondents' Petition for Reconsideration, dated March 23, 2013 ("Sibert Declaration");

1.16 A letter to Steven C. Sherman of the Department's Division of Consumer Services, dated February 28, 2013, from Mary B. Clark, Esq. ("2nd Clark Letter");

1.17 Declaration of Service of Notice of Appearance, the Petition, the Aleman Declaration, and the Sibert Declaration, dated March 25, 2013;

1.18 The Division of Consumer Services' General Reply to Petition for Reconsideration, dated April 3, 2013 ("Reply to Petition"); and

1.19 The Declaration of Shana L. Oliver in Support of Division's Reply to Petition for Reconsideration, dated April 3, 2013 ("Oliver Declaration").

2.0 DIRECTOR'S FINDINGS

On the basis of the Record on Reconsideration, the Director finds as follows:

2.1 Consideration on the Merits. The Division, by and through the Reply to the Petition, does not contest the timeliness of the Petition. Therefore, the Director finds that the Petition was *timely* filed pursuant to RCW 34.05.470 and will be considered on the merits. The Reply to the Petition was filed with the Director within ten days of the filing of the Petition. Therefore, the Director finds that the Reply to the Petition was timely and will be considered on the merits.

2.2 Director's Discretion; Effect. This Petition is a matter of *discretion* with the Director.[1] Pursuant to the Washington Administrative Procedures Act ("WAPA"), the Director, by and through his general counsel, Joseph M. Vincent, furnished written notice of the estimated time in which the Director would act on the Petition, which thereby preserved the Petition being deemed "at issue" rather than "denied" by operation of law.[2] Because the Director has elected to formally consider this Petition, the thirty (30) day period for seeking judicial review (if at all) under WAPA (see *Notice to the Parties* below) is tolled until the issuance of this Order.[3]

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[1] "The decision to set aside a default judgment is discretionary." *Graves v. Department of Employment Sec.*, 144 Wash.App. 302, 309, 990 P.2d. 981, 1006 (2008), citing *Griggs v. Averbeck Realty, Inc.*, 92 Wash.2d 576, 582, 599 P.2d 1289 (1979); *Hwang v. McMahill*, 103 Wash.App. 945, 949, 15 P.3d 172 (2000), *review denied*, 144 Wash.2d 1011, 31 P.3d 1185 (2001).

[2] RCW 34.05.470(3).

[3] *Trohimovich v. State*, 90 Wash.App. 554, 952 P.2d 192 (1998), reconsideration denied, review denied, 136 Wn.2d 1018, 966 P.2d 1278.

2.3 Due Process. The Petition relies heavily upon *Graves v. Department of Employment Security* for the proposition that an "abuse of discretion [has] occur[ed] when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. [citations omitted]" [4] In doing so, the Petition purports to create the impression that a general "good cause" standard of relief from default is universal in administrative law. However, the Director finds the Division's Reply to the Petition persuasive in this regard. The Petition *does* fail to acknowledge that the holding in *Graves* turns entirely on WAC 192-04-180, the specific rule applicable in administrative adjudications before the Department of Employment Security. Such a "good cause" rule does not apply in administrative adjudications before this Department.

The Department relies upon WAPA, which declares that "[f]ailure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, . . ."[5] While the Department is thus empowered under WAPA to adopt rules concerning default applicable to adjudicative proceedings before the Department, there is no mandate to create the same rules as the Department of Employment Security. The Department instead follows the Model Rules of Procedure[6] and its own Rules of Administrative Procedure,[7] the latter of which control as long as they are consistent with WAPA and to the extent that they conflict with the Model Rules. The Department's administrative rule setting forth the time for requesting a hearing and the consequences for failure to comply with these time limits is clearly set forth, as follows:

> (2) **Time limits for request.** ***The department must receive the request for an adjudicative hearing no later than twenty calendar days after the department serves the applicant with a written notice of an opportunity to request a hearing upon department action or contemplated department action. Service upon the applicant is completed when made in accordance with WAC 10-08-110 (2) and (3) or as provided by the statute under which the department initiated the action.*** If the statute under which the department initiated the action specifically provides for a different time limit, the time limit in that statute shall apply unless

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[4] *Graves, Id.*

[5] RCW 34.05.440(1).

[6] Chapter 10-08 WAC.

[7] Chapter 208-08 WAC.

> it has been superseded by the Administrative Procedure Act, chapter 34.05 RCW, but in no case shall the time limit for requesting an adjudicative hearing be less than twenty calendar days.
> (3) **Failure to request hearing.** ***Failure of an applicant to file an application for an adjudicative hearing within the time limit set forth in subsection (2) of this section constitutes a default and results in the loss of the applicant's right to an adjudicative hearing. When an applicant defaults, the department may proceed to resolve the case pursuant to RCW 34.05.440(1).***[8]

[Emphasis added.]

The Respondents clearly had twenty (20) calendar days from service to request an adjudicative hearing by filing within that time an Application for Administrative Hearing ("AAH"). Respondent Law Firm's AAH was not filed until thirty-three (33) days after proper service (see below) of the Statement of Charges and Notice to Law Firm and Notice to Sibert, respectively. Respondent Sibert never filed an AAH. The Notice of Appearance by counsel for Respondents, filed at the same time as the Petition at issue, is the first time the Department heard from Respondent Sibert in response to the Statement of Charges.

While Respondents do not appear to be attorneys at law in the State of Washington, they are licensed attorneys in the states of Illinois, Arizona and/or Florida. The Director is permitted to take this into consideration when evaluating their ability to comprehend the gravity of being served with the Statement of Charges and Notice to Law Firm and Notice to Sibert. With this in mind, the Director now turns to the two principal arguments by Respondents – *equitable estoppel* and *excusable neglect* – which the Director has considered at length prior to issuing this Order.

2.4 Equitable Estoppel and Excusable Neglect. According to the Oliver Declaration, there were two separate unsuccessful attempts, on October 2, 2012, and October 30, 2012, to serve Respondents Law Firm and Sibert by First Class mail alone. Then, on November 15, 2012, the Division employed *Federal Express* to effect service on Respondents Law Firm (via its corporate office in Illinois) and Respondent Sibert (via his address on the Florida Bar's Web site). On November 16, 2012, the Division received confirmation from Federal Express of Respondent Law Firm having been properly served at its Chicago, Illinois, corporate office. [See *Proof of Delivery on Law Firm.*] Notwithstanding proper service, it was not until December 19,

[8] WAC 208-08-050(2) and (3).

2012, which was thirty-three (33) days after personal service on Law Firm consistent with the due process requirements of WAPA, that the Division received Law Firm's AAH. The deadline for Respondent Law Firm filing an AAH was December 6, 2012. Not having done so, Respondent Law Firm lost the right to an adjudicative hearing even though it latently filed an AAH before entry of the Final Order on March 7, 2013.[9]

The facts with respect to personal service on Respondent Sibert are different. The Division takes the position that Respondent Sibert was served by Federal Express delivery on January 10, 2013, at his Port St. Lucie, Florida, address. [See *Proof of Delivery on Sibert.*] Respondent Sibert thus had until January 30, 2013, to file with the Division an AAH. None was ever received. His counsel's Notice of Appearance for purposes of this Petition was not filed until March 25, 2013, after issuance of the default Final Order.

Both Respondents argue that the 2nd Cover Letter to Law Firm and the Cover Letter to Sibert contain a misstatement of law to the effect that the "twenty day" rule for filing an AAH runs from the date of *receipt* of the Notice and Statement of Charges rather than "service." In the Director's view, this argument is without any merit whatsoever. Even though "service" is typically by U.S. mail, the Division appears to have made sure that Respondents actually had actual knowledge and subjective appreciation that they were served under the requirements of WAPA and that they were, indeed, subject to the jurisdiction of the Division. The Director finds these efforts proper and even commendable in the case of statement of charges involving unlicensed persons who are nonetheless subject to the Mortgage Broker Practices Act, chapter 19.146 RCW, and are perhaps being informed of the Division's authority over them for the first time. In such cases, it was prudent for the Division to use Federal Express and assure itself of actual rather than constructive receipt of the Statement of Charges. This was the process relied upon by the Division as to both Respondents. The Director sees no facts in the Record on Reconsideration suggesting that the Division be equitably estopped from holding both Respondents in default and certainly not on account of the language in the 2nd Cover Letter to Law Firm and Cover Letter to Sibert, which were simply allowing each of the out-of-state Respondents a full twenty (20) days to file an AAH. The Director agrees with the Division's

[9] WAC 208-08-050(1) and (3).

Reply to the Petition that "[t]he party asserting estoppel must show not only lack of knowledge of the facts, but also an absence of any convenient and available means of acquiring such knowledge."[10] The Respondents are educated lawyers. The Notice to Law Firm and Notice to Sibert (like any other administrative or judicial summons or notice of charges) is clear as to what was expected of Respondents – filing an AAH within twenty (20) days of the date of receipt of the Notice and Statement of Charges.

Further, the Petition's defense of *excusable neglect* is without merit. Absent a "good cause" administrative rule as existed in the Graves case (involving Department of Employment Security) cited above, the Director agrees that the Respondents' argument in this regard is particularly weak. But it is also well-settled, as the Division has pointed out in its Reply to the Petition, that an attorney's negligence or incompetence is attributable to his or her client and is insufficient grounds to justify relief from a default judgment. Respondents cannot blame their prior counsel for untimely filing of an AAH.[11] The Director has carefully considered the Statement of Facts of the Petition and the supporting documentation and can find nothing therein which rises to the level of a defendable case of excusable neglect.

In appropriate cases, the Director agrees that controversies ought to be determined on the merits rather than by default.[12] For this reason, the Director carefully deliberates petitions for reconsideration which make claims of equitable estoppel or excusable neglect. Moreover, the Director is inclined to pay particularly close attention to petitions for reconsideration involving unlicensed, out-of-state respondents who are pro se and may lack an understanding of the law and the implications of non-judicial, administrative pleadings being served upon them by U.S. mail or even Federal Express. But cases in which such petitions for reconsideration have been granted by the Director have either involved (1) a true lack of clarity as to notice of charges or (2) extenuating circumstances beyond the control of the respondent in question (including a

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[10] *Davidheider v. Pierce County*, 92 Wash.App. 146, 153, 960 P.2d 998, 1002 (1998).

[11] *Barr v. McGugan*, 119 Wash.App. 43, 46, 73 P.3d 660 (2003); *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wash.App. 102, 107, 912 P.2d 1040 (1996); *M.A. Mortensen Co. v. Timberlake Software Corp.*, 93 Wash.App. 819, 838, 970 P.2d 803 (1999).

[12] *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

lawyer representing the respondent). The facts as to both Respondents are plainly *not* akin to any of these situations. The Respondents are not entitled to relief from the Final Order.

For all of the reasons set forth above, the Director hereby denies the Petition of Respondents and re-affirms the Final Order issued March 7, 2013.

3.0 ORDER

IT IS HEREBY ORDERED, as follows:

3.1 The Petition for Reconsideration dated March 25, 2013, is hereby denied on its merits.

3.2 The Final Order dated March 7, 2013, is affirmed and incorporated herein as if fully set forth.

DATED this 31st day of May, 2013.

[redacted]

SCOTT JARVIS, Director

State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF DETERMINING Whether there has been a violation of the Mortgage Broker Practices Act of Washington by:	No. C-12-1058-13-FO02
LAW FIRM OF MACEY, ALEMAN & SEARNS, and KELLY PATRICK SIBERT, Loan Modification Managing Member,	ORDER DENYING PETITION FOR RECONSIDERATION AND AFFIRMATION OF FINAL ORDER DATED MARCH 7, 2013
Respondent.	

THIS MATTER having come before Scott Jarvis, Director ("Director") of the Department of Financial Institutions ("Department"), as Presiding Officer, upon Petition for Reconsideration, dated March 25, 2013 ("Petition"), of a Final Default Order by the Department's Division of Consumer Services ("Division") dated March 7, 2013 ("Final Order") against Respondents Law Firm of Macey, Aleman & Searns ("Law Firm") and Kelly Patrick Sibert ("Sibert"); and the Director having given this matter due consideration as hereinafter described, and having determined that the Petition has merit in light of the Record on Reconsideration enumerated below;

NOW, THEREFORE, the Director makes the following findings by way of granting the Petition for Reconsideration:

1.0 RECORD BEFORE THE DIRECTOR

The Director has considered the entire record on reconsideration, including, without limitation, the following documents (collectively, "Record on Reconsideration"):

1.1 The Statement of Charges and Notice of Intent to Enter an Order to Produce Records, Cease and Desist Business, Prohibit from Industry, Order Restitution,

Impose Fine, and Collect Investigation Fee, dated September 27, 2012 ("Statement of Charges");

1.2 The Notice of Opportunity to Defend and Opportunity for Hearing, dated September 27, 2012, to Respondent Law Firm ("Notice to Law Firm");

1.3 The Notice of Opportunity to Defend and Opportunity for Hearing, dated September 27, 2012, to Respondent Sibert ("Notice to Sibert");

1.4 The Application for Adjudicative Hearing from Law Firm, dated December 18, 2012 ("Law Firm's Hearing Application");

1.5 The cover letter to second service on Respondent Law Firm of the Statement of Charges and Notice to Law Firm, dated November 15, 2012, from Shana L. Oliver, Financial Legal Examiner, Division of Consumer Services ("2nd Cover Letter to Law Firm");

1.6 The Federal Express proof of delivery of the 2nd Cover Letter to Law Firm, dated November 16, 2012 ("Proof of Deliver on Law Firm");

1.7 The Application for Adjudicative Hearing from Respondent Law Firm, filed December 19, 2012 ("Law Firm's AAH");

1.8 The cover letter to second service on Respondent Sibert of the Statement of Charges and Notice to Sibert, dated January 9, 2013, from Shana L. Oliver, Financial Legal Examiner, Division of Consumer Services ("Cover Letter to Sibert");

1.9 The Federal Express proof of delivery of the Cover Letter to Sibert, date January 10, 2013 ("Proof of Deliver on Sibert");

1.10 The Final Order, dated March 7, 2013;

1.11 The Notice of Appearance for Respondents, dated March 23, 2013, and received March 25, 2013 ("Notice of Appearance");

1.12 The Petition, dated March 25, 2013;

1.13 The Declaration of Jeffrey J. Aleman in Support of Motion for Reconsideration, dated March 25, 2013 ("Aleman Declaration");

1.14 A letter to Steven C. Sherman of the Department's Division of Consumer Services, dated February 1, 2013, from Mary B. Clark, Esq. ("1st Clark Letter");

1.15 Declaration of Kelly P. Sibert in Support of Respondents' Petition for Reconsideration, dated March 23, 2013 ("Sibert Declaration");

1.16 A letter to Steven C. Sherman of the Department's Division of Consumer Services, dated February 28, 2013, from Mary B. Clark, Esq. ("2nd Clark Letter");

1.17 Declaration of Service of Notice of Appearance, the Petition, the Aleman Declaration, and the Sibert Declaration, dated March 25, 2013;

1.18 The Division of Consumer Services' General Reply to Petition for Reconsideration, dated April 3, 2013 ("Reply to Petition"); and

1.19 The Declaration of Shana L. Oliver in Support of Division's Reply to Petition for Reconsideration, dated April 3, 2013 ("Oliver Declaration").

2.0 DIRECTOR'S FINDINGS

On the basis of the Record on Reconsideration, the Director finds as follows:

2.1 Consideration on the Merits. The Division, by and through the Reply to the Petition, does not contest the timeliness of the Petition. Therefore, the Director finds that the Petition was *timely* filed pursuant to RCW 34.05.470 and will be considered on the merits. The Reply to the Petition was filed with the Director within ten days of the filing of the Petition. Therefore, the Director finds that the Reply to the Petition was timely and will be considered and will be considered on the merits.

2.2 Director's Discretion; Effect. This Petition is a matter of *discretion* with the Director.[1] Pursuant to the Washington Administrative Procedures Act ("WAPA"), the Director, by and through his general counsel, Joseph M. Vincent, furnished written notice of the estimated time in which the Director would act on the Petition, which thereby preserved the Petition being deemed "at issue" rather than "denied" by operation of law.[2] Because the Director has elected to formally consider this Petition, the thirty (30) day period for seeking judicial review (if at all) under WAPA (see *Notice to the Parties* below) is tolled until the issuance of this Order.[3]

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[1] "The decision to set aside a default judgment is discretionary." *Graves v. Department of Employment Sec.*, 144 Wash.App. 302, 309, 990 P.2d. 981, 1006 (2008), citing *Griggs v. Averbeck Realty, Inc.*, 92 Wash.2d 576, 582, 599 P.2d 1289 (1979); *Hwang v. McMahill*, 103 Wash.App. 945, 949, 15 P.3d 172 (2000), *review denied*, 144 Wash.2d 1011, 31 P.3d 1185 (2001).

[2] RCW 34.05.470(3).

[3] *Trohimovich v. State*, 90 Wash.App. 554, 952 P.2d 192 (1998), reconsideration denied, review denied, 136 Wn.2d 1018, 966 P.2d 1278.

2.3 Due Process. The Petition relies heavily upon *Graves v. Department of Employment Security* for the proposition that an "abuse of discretion [has] occur[ed] when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. [citations omitted]" [4] In doing so, the Petition purports to create the impression that a general "good cause" standard of relief from default is universal in administrative law. However, the Director finds the Division's Reply to the Petition persuasive in this regard. The Petition *does* fail to acknowledge that the holding in *Graves* turns entirely on WAC 192-04-180, the specific rule applicable in administrative adjudications before the Department of Employment Security. Such a "good cause" rule does not apply in administrative adjudications before this Department.

The Department relies upon WAPA, which declares that "[f]ailure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, . . ."[5] While the Department is thus empowered under WAPA to adopt rules concerning default applicable to adjudicative proceedings before the Department, there is no mandate to create the same rules as the Department of Employment Security. The Department instead follows the Model Rules of Procedure[6] and its own Rules of Administrative Procedure,[7] the latter of which control as long as they are consistent with WAPA and to the extent that they conflict with the Model Rules. The Department's administrative rule setting forth the time for requesting a hearing and the consequences for failure to comply with these time limits is clearly set forth, as follows:

> (2) **Time limits for request.** ***The department must receive the request for an adjudicative hearing no later than twenty calendar days after the department serves the applicant with a written notice of an opportunity to request a hearing upon department action or contemplated department action. Service upon the applicant is completed when made in accordance with WAC 10-08-110 (2) and (3) or as provided by the statute under which the department initiated the action.*** If the statute under which the department initiated the action specifically provides for a different time limit, the time limit in that statute shall apply unless

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[4] *Graves, Id.*

[5] RCW 34.05.440(1).

[6] Chapter 10-08 WAC.

[7] Chapter 208-08 WAC.

it has been superseded by the Administrative Procedure Act, chapter 34.05 RCW, but in no case shall the time limit for requesting an adjudicative hearing be less than twenty calendar days.

(3) **Failure to request hearing.** ***Failure of an applicant to file an application for an adjudicative hearing within the time limit set forth in subsection (2) of this section constitutes a default and results in the loss of the applicant's right to an adjudicative hearing. When an applicant defaults, the department may proceed to resolve the case pursuant to RCW 34.05.440(1).***[8]

[Emphasis added.]

The Respondents clearly had twenty (20) calendar days from service to request an adjudicative hearing by filing within that time an Application for Administrative Hearing ("AAH"). Respondent Law Firm's AAH was not filed until thirty-three (33) days after proper service (see below) of the Statement of Charges and Notice to Law Firm and Notice to Sibert, respectively. Respondent Sibert never filed an AAH. The Notice of Appearance by counsel for Respondents, filed at the same time as the Petition at issue, is the first time the Department heard from Respondent Sibert in response to the Statement of Charges.

While Respondents do not appear to be attorneys at law in the State of Washington, they are licensed attorneys in the states of Illinois, Arizona and/or Florida. The Director is permitted to take this into consideration when evaluating their ability to comprehend the gravity of being served with the Statement of Charges and Notice to Law Firm and Notice to Sibert. With this in mind, the Director now turns to the two principal arguments by Respondents – *equitable estoppel* and *excusable neglect* – which the Director has considered at length prior to issuing this Order.

2.4 Equitable Estoppel and Excusable Neglect. According to the Oliver Declaration, there were two separate unsuccessful attempts, on October 2, 2012, and October 30, 2012, to serve Respondents Law Firm and Sibert by First Class mail alone. Then, on November 15, 2012, the Division employed *Federal Express* to effect service on Respondents Law Firm (via its corporate office in Illinois) and Respondent Sibert (via his address on the Florida Bar's Web site). On November 16, 2012, the Division received confirmation from Federal Express of Respondent Law Firm having been properly served at its Chicago, Illinois, corporate office. [See *Proof of Delivery on Law Firm.*] Notwithstanding proper service, it was not until December 19, 2012, which was thirty-three (33) days after personal service on Law Firm consistent with the

[8] WAC 208-08-050(2) and (3).

due process requirements of WAPA, that the Division received Law Firm's AAH. The deadline for Respondent Law Firm filing an AAH was December 6, 2013. Not having done so, Respondent Law Firm lost the right to an adjudicative hearing even though it latently filed an AAH before entry of the Final Order on March 7, 2013.[9]

The facts with respect to personal service on Respondent Sibert are different. The Division takes the position that Respondent Sibert was served by Federal Express delivery on January 10, 2013, at his Port St. Lucie, Florida, address. [See *Proof of Deliver on Sibert.*] Respondent Sibert thus had until January 30, 2013, to file with the Division an AAH. None was ever received. His counsel's Notice of Appearance for purposes of this Petition was not filed until March 25, 2013, after issuance of the default Final Order.

Both Respondents argue that the 2nd Cover Letter to Law Firm and the Cover Letter to Sibert contain a misstatement of law to the effect that the "twenty day" rule for filing an AAH runs from the date of *receipt* of the Notice and Statement of Charges rather than "service." In the Director's view, this argument is without any merit whatsoever. Even though "service" is typically by U.S. mail, the Division appears to have made sure that Respondents actually had actual knowledge and subjective appreciation that they were served under the requirements of WAPA and that they were, indeed, subject to the jurisdiction of the Division. The Director finds these efforts proper and even commendable in the case of statement of charges involving unlicensed persons who are nonetheless subject to the Mortgage Broker Practices Act, chapter 19.146 RCW, and are perhaps being informed of the Division's authority over them for the first time. In such cases, it was prudent for the Division to use Federal Express and assure itself of actual rather than constructive receipt of the Statement of Charges. This was the process relied upon by the Division as to both Respondents. The Director sees no facts in the Record on Reconsideration suggesting that the Division be equitably estopped from holding both Respondents in default and certainly not on account of the language in the 2nd Cover Letter to Law Firm and Cover Letter to Sibert, which were simply allowing each of the out-of-state Respondents a full twenty (20) days to file an AAH. The Director agrees with the Division's Reply to the Petition that "[t]he party asserting estoppel must show not only lack of knowledge of the facts, but also an absence of any convenient and available means of acquiring such

[9] WAC 208-08-050(1) and (3).

knowledge."[10] The Respondents are educated lawyers. The Notice to Law Firm and Notice to Sibert (like any other administrative or judicial summons or notice of charges) is clear as to what was expected of Respondents – filing an AAH within twenty (20) days of the date of receipt of the Notice and Statement of Charges.

Further, the Petition's defense of *excusable neglect* is without merit. Absent a "good cause" administrative rule as existed in the *Graves* case (involving Department of Employment Security) cited above, the Director agrees that the Respondents' argument in this regard is particularly weak. But it is also well-settled, as the Division has pointed out in its Reply to the Petition, that an attorney's negligence or incompetence is attributable to his or her client and is insufficient grounds to justify relief from a default judgment. Respondents cannot blame their prior counsel for untimely filing of an AAH.[11] The Director has carefully considered the Statement of Facts of the Petition and the supporting documentation and can find nothing therein which rises to the level of a defendable case of excusable neglect.

In appropriate cases, the Director agrees that controversies ought to be determined on the merits rather than by default.[12] For this reason, the Director carefully deliberates petitions for reconsideration which make claims of equitable estoppel or excusable neglect. Moreover, the Director is inclined to pay particularly close attention to petitions for reconsideration involving unlicensed, out-of-state respondents who are pro se and may lack an understanding of the law and the implications of non-judicial, administrative pleadings being served upon them by U.S. mail or even Federal Express. But cases in which such petitions for reconsideration have been granted by the Director have either involved (1) a true lack of clarity as to notice of charges or (2) extenuating circumstances beyond the control of the respondent in question (including a lawyer representing the respondent). The facts as to both Respondents are plainly *not* akin to any of these situations. The Respondents are not entitled to relief from the Final Order.

For all of the reasons set forth above, the Director hereby denies the Petition of Respondents and re-affirms the Final Order issued March 7, 2013.

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[10] *Davidheider v. Pierce County*, 92 Wash.App. 146, 153, 960 P.2d 998, 1002 (1998).

[11] *Barr v. McGugan*, 119 Wash.App. 43, 46, 73 P.3d 660 (2003); *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wash.App. 102, 107, 912 P.2d 1040 (1996); *M.A. Mortensen Co. v. Timberlake Software Corp.*, 93 Wash.App. 819, 838, 970 P.2d 803 (1999).

[12] *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

3.0 ORDER

IT IS HEREBY ORDERED, as follows:

3.1 The Petition for Reconsideration dated March 25, 2013, is hereby denied on its merits

3.2 The Final Order dated March 7, 2013, is affirmed and incorporated herein as if fully set forth.

DATED this 17th day of May, 2013.

[redacted]

SCOTT JARVIS, Director

STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CONSUMER SERVICES

IN THE MATTER OF DETERMINING Whether there has been a violation of the Mortgage Broker Practices Act of Washington by: LAW FIRM OF MACEY, ALEMAN, AND SEARNS, and KELLY PATRICK SIBERT, Loan Modification Managing Member, Respondents.	No.: C-12-1058-13-FO01 FINAL ORDER

I. DIRECTOR'S CONSIDERATION

A. Default. This matter has come before the Director of the Department of Financial Institutions of the State of Washington (Director), through his designee, Consumer Services Division Director Deborah Bortner (Director's designee), pursuant to RCW 34.05.440(1). On September 27, 2012, the Director, through the Director's designee, issued a Statement of Charges and Notice of Intention to Enter an Order to Produce Records, Cease and Desist Business, Prohibit From Industry, Order Restitution, Impose Fine, and Collect Investigation Fee (Statement of Charges) against the Law Firm of Macey, Aleman, and Searns, and Kelly Sibert (Respondents). A copy of the Statement of Charges is attached and incorporated into this order by this reference.

On November 15, 2012, the Department served Respondent Law Firm of Macey, Aleman, and Searns with the Statement of Charges, a cover letter dated November 15, 2012, a Notice of Opportunity to Defend and Opportunity for Hearing, and blank Applications for Adjudicative Hearing for Respondents, by First-Class mail and Federal Express overnight delivery. On November 16, 2012, the documents sent by Federal Express overnight delivery were delivered. The documents sent by First-Class mail were not returned to the Department by the United States Postal Service.

On January 9, 2013, the Department served Respondent Kelly Sibert with the Statement of Charges, a cover letter dated January 9, 2013, a Notice of Opportunity to Defend and Opportunity for Hearing, and blank Applications for Adjudicative Hearing for Respondents by First-Class mail and Federal Express overnight delivery. On January 10, 2013, the documents sent by Federal Express overnight delivery were delivered. The documents sent by First-Class mail were not returned to the Department by the United States Postal Service.

Respondents did not request an adjudicative hearing within twenty calendar days after the Department served the Notice of Opportunity to Defend and Opportunity for Hearing, as provided for in WAC 208-08-050(2).[1]

B. Record Presented. The record presented to the Director's designee for her review and for entry of a final decision included the Statement of Charges, cover letters dated November 15, 2012, and January 9, 2013, Notices of Opportunity to Defend and Opportunity for Hearing, and blank Applications for Adjudicative Hearing for Respondents, with documentation of service.

C. Factual Findings and Grounds for Order. Pursuant to RCW 34.05.440(1), the Director's designee hereby adopts the Statement of Charges, which is attached hereto.

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[1] Respondent Law Firm of Macey, Aleman, and Searns provided an Application for Adjudicative Hearing to the Department on December 19, 2012, 33 days following service upon Respondent Macey, Aleman, and Searns. Respondent Sibert did not respond to the Statement of Charges.

II. FINAL ORDER

Based upon the foregoing, and the Director's designee having considered the record and being otherwise fully advised, NOW, THEREFORE:

A. IT IS HEREBY ORDERED, That:

1. Respondents cease and desist from engaging in the business of a mortgage broker or loan originator.

2. Respondents provide the Department with a list detailing all residential mortgage loan modification services transactions with Washington consumers, including the name, address, and phone numbers of the consumers, the transaction date, and fees collected by Respondents for the provision of those services.

3. Respondents are prohibited from participation in the conduct of the affairs of any mortgage broker subject to licensure by the Director, in any manner, for a period of five years.

4. Respondents shall pay, jointly and severally, restitution of $9,836 to the consumers identified by the Department in the Restitution Appendix of the Statement of Charges.

5. Respondents shall pay, jointly and severally, a fine of $15,000.

6. Respondents shall pay, jointly and severally, an investigation fee of $2,597. The combined fine and investigation fee may be paid together in the form of a cashier's check in the amount of $17,597 made payable to the "Washington State Treasurer."

7. Respondent Law Firm of Macey, Aleman, and Searns, its officers, employees, and agents maintain records in compliance with chapter 19.146 RCW, the Mortgage Broker Practices Act (Act) and provide the Director with the location of the books, records and other information relating to Respondent Law Firm of Macey, Aleman, and Searns' mortgage broker business, and the name, address and telephone number of the individual responsible for maintenance of such records in compliance with the Act.

B. Reconsideration. Pursuant to RCW 34.05.470, Respondents have the right to file a Petition for Reconsideration stating the specific grounds upon which relief is requested. The Petition must be filed in the Office of the Director of the Department of Financial Institutions by courier at 150 Israel Road SW, Tumwater, Washington 98501, or by U.S. Mail at P.O. Box 41200, Olympia,

Washington 98504-1200, within ten (10) days of service of the Final Order upon Respondents. The Petition for Reconsideration shall not stay the effectiveness of this order nor is a Petition for Reconsideration a prerequisite for seeking judicial review in this matter.

A timely Petition for Reconsideration is deemed denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on a petition.

C. Stay of Order. The Director's designee has determined not to consider a Petition to Stay the effectiveness of this order. Any such requests should be made in connection with a Petition for Judicial Review made under chapter 34.05 RCW and RCW 34.05.550.

D. Judicial Review. Respondents have the right to petition the superior court for judicial review of this agency action under the provisions of chapter 34.05 RCW. For the requirements for filing a Petition for Judicial Review, see RCW 34.05.510 and sections following.

E. Non-compliance with Order. If Respondents do not comply with the terms of this order, including payment of any amounts owed within 30 days of receipt of this order, the Department may seek its enforcement by the Office of the Attorney General to include the collection of the fines, fees, and restitution imposed herein. The Department also may assign the amounts owed to a collection agency for collection.

F. Service. For purposes of filing a Petition for Reconsideration or a Petition for Judicial Review, service is effective upon deposit of this order in the U.S. mail, declaration of service attached hereto.

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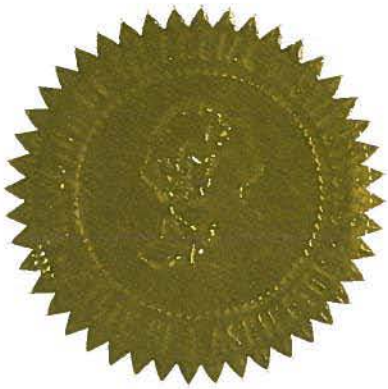
DATED this 7th day of March, 2013



STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS

[redacted]

DEBORAH BORTNER
Director
Division of Consumer Services

STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CONSUMER SERVICES

IN THE MATTER OF DETERMINING Whether there has been a violation of the Mortgage Broker Practices Act of Washington by: LAW FIRM OF MACEY, ALEMAN, AND SEARNS, and KELLY PATRICK SIBERT, Loan Modification Managing Member, Respondents.	No. C-12-1058-12-SC01 STATEMENT OF CHARGES and NOTICE OF INTENT TO ENTER AN ORDER TO PRODUCE RECORDS, CEASE AND DESIST BUSINESS, PROHIBIT FROM INDUSTRY, ORDER RESTITUTION, IMPOSE FINE, AND COLLECT INVESTIGATION FEE

INTRODUCTION

Pursuant to RCW 19.146.220 and RCW 19.146.223, the Director of the Department of Financial Institutions of the State of Washington (Director) is responsible for the administration of chapter 19.146 RCW, the Mortgage Broker Practices (Act). After having conducted an investigation pursuant to RCW 19.146.235, and based upon the facts available as of the date of this Statement of Charges, the Director, through his designee, Division of Consumer Services Director Deborah Bortner, institutes this proceeding and finds as follows:

I. FACTUAL ALLEGATIONS

1.1 Respondent Law Firm of Macey, Aleman, and Searns (Respondent Macey, Aleman, and Searns) has never been licensed by the Department of Financial Institutions of the State of Washington (Department) to conduct business as a mortgage broker or loan originator.

1.2 Respondent Kelly Patrick Sibert (Respondent Sibert) is Loan Modification Managing Member of Respondent Macey, Aleman, and Searns. During the relevant time period, Respondent Sibert was not licensed by the Department to conduct business as a mortgage broker or loan originator.

1.3 Unlicensed Activity. From at least August 1, 2010 to present, Respondents Macey, Aleman, and Searns and Sibert (Respondents) were offering residential mortgage loan modification services to

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Olympia, WA 98504-1200
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Washington consumers on property located in Washington State. Respondents entered into a contractual relationship with at least one Washington consumer to provide those services and collected an advance fee for the provision of those services. The Department has received at least one complaint from a Washington consumer alleging Respondents provided or offered to provide residential mortgage loan modification services while not licensed by the Department to provide those services. A list of Washington consumers with whom Respondents conducted business as a mortgage broker or loan originator, and the amount paid by each, is appended hereto and incorporated herein by reference.

1.4 Misrepresentations and Omissions. Respondents represented that they were licensed to provide the residential mortgage loan modification services or omitted disclosing that they were not licensed to provide those services. During the relevant time period, Respondent Sibert represented that he was licensed to practice law in Washington or omitted disclosing that he was not licensed to practice law in the State of Washington.

1.5 On-Going Investigation. The Department's investigation into the alleged violations of the Act by Respondents continues to date.

II. GROUNDS FOR ENTRY OF ORDER

2.1 Mortgage Broker Defined. Pursuant to RCW 19.146.010(14) and WAC 208-660-006, "Mortgage Broker" means any person who, for compensation or gain, or in the expectation of compensation or gain (a) assists a person in obtaining or applying to obtain a residential mortgage loan or (b) holds himself or herself out as being able to make a residential mortgage loan or assist a person in obtaining or applying to obtain a residential mortgage loan. Pursuant to WAC 208-660-006, a person "'assists a person in obtaining or applying to obtain a residential mortgage loan' by, among other things, counseling on loan terms (rates, fees, other costs), [and] preparing loan packages...."

2.2 Loan Originator Defined. Pursuant to RCW 19.146.010(11), "loan originator" means a natural person who for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain: takes a residential mortgage loan application for a mortgage broker; offers or negotiates terms of a mortgage loan; or holds themselves out to the public as able to perform any of these activities.

2.3 Prohibited Acts. Based on the Factual Allegations set forth in Section I above, Respondents are in apparent violation of RCW 19.146.0201(2) & (3) for engaging in an unfair or deceptive practice toward any person and obtaining property by fraud or misrepresentation.

2.4 Requirement to Obtain and Maintain Mortgage Broker License. Based on the Factual Allegations set forth in Section I above, Respondents are in apparent violation of RCW 19.146.200(1) for engaging in the business of a mortgage broker for Washington residents or property without first obtaining a license to do so.

2.5 Requirement to Obtain and Maintain Loan Originator License. Based on the Factual Allegations set forth in Section I above, Respondents are in apparent violation of RCW 19.146.200(1) for engaging in the business of a loan originator without first obtaining and maintaining a license.

2.6 Requirement to Maintain Accurate and Current Books and Records. Pursuant to RCW 19.146.060 and WAC 208-660-450, Respondents are required to keep all books and records in a location that is on file with and readily available to the Department until at least twenty-five months have elapsed following the effective period to which the books and records relate.

III. AUTHORITY TO ORDER PRODUCTION OF RECORDS

3.1 Authority to Order Production of Records. Pursuant to RCW 19.146.223, RCW 19.146. 235(2), and WAC 208-660-520, the Director may issue orders directing any person to produce books, accounts, records, files, and any other documents the director or designated person deems relevant to an investigation.

IV. AUTHORITY TO IMPOSE SANCTIONS

4.1 Authority to Issue an Order to Cease and Desist. Pursuant to RCW 19.146.220(4), the Director may issue orders directing any person subject to the Act to cease and desist from conducting business.

4.2 Authority to Prohibit from Industry. Pursuant to RCW 19.146.220(5), the Director may issue orders prohibiting from participation in the conduct of the affairs of a licensed mortgage broker any person subject to licensing under the Act for any violation of RCW 19.146.0201(1) through (9) or (13), or RCW 19.146.200.

4.3 Authority to Order Restitution. Pursuant to RCW 19.146.220(2), the Director may order restitution against any person subject to the Act for any violation of the Act.

4.4 Authority to Impose Fine. Pursuant to RCW 19.146.220(2), the Director may impose fines against any person subject to the Act for any violation of the Act.

4.5 Authority to Collect Investigation Fee. Pursuant to RCW 19.146.228(2), and WAC 208-660-550(4)(a), the Department will charge forty-eight dollars per hour for an examiner's time devoted to an investigation of any person subject to the Act.

V. NOTICE OF INTENT TO ENTER ORDER

Respondents' violations of the provisions of chapter 19.146 RCW and chapter 208-660 WAC, as set forth above constitute a basis for the entry of an Order under RCW 19.146.220, RCW 19.146.221, and RCW 19.146.223. Therefore, it is the Director's intent to ORDER that:

5.1 Respondents cease and desist engaging in the business of a mortgage broker or loan originator.

5.2 Respondents provide the Department with a list detailing all residential mortgage loan modification services transactions with Washington consumers, including the name, address, and phone numbers of the consumers, the transaction date, and fees collected by Respondents for the provision of those services.

5.3 Respondents be prohibited from participation in the conduct of the affairs of any mortgage broker subject to licensure by the Director, in any manner, for a period of five years.

5.4 Respondents jointly and severally pay restitution to the 5 consumers identified by the Department in paragraph 1.3 as having paid $9,036 to Respondents, and that Respondents jointly and severally pay restitution to each Washington consumer with whom they entered into a contract for residential mortgage loan modification services related to real property or consumers located in the state of Washington equal to the amount collected from that Washington consumer for those services in an amount to be determined at hearing.

5.5 Respondents jointly and severally pay a fine of $3,000 for each residential loan modification transaction entered into with Washington consumers. As of the date of this Statement of Charges, the fine totals $15,000.

5.6 Respondents jointly and severally pay an investigation fee at the rate of $48.00 per hour. As of the date of this Statement of Charges, the investigation fee totals $2,597.

5.7 Respondents maintain records in compliance with the Act and provide the Department with the location of the books, records and other information relating to Respondents' provision of residential mortgage loan modification services in Washington, and the name, address and telephone number of the individual responsible for maintenance of such records in compliance with the Act.

VI. AUTHORITY AND PROCEDURE

This Statement of Charges is entered pursuant to the provisions of RCW 19.146.220, RCW 19.146.221, RCW 19.146.223, and RCW 19.146.230, and is subject to the provisions of chapter 34.05 RCW (The Administrative Procedure Act). Respondents may make a written request for a hearing as set forth in the NOTICE OF OPPORTUNITY TO DEFEND AND OPPORTUNITY FOR HEARING accompanying this Statement of Charges.

Dated this 27th day of September, 2012.

[redacted]

DEBORAH BORTNER
Director, Division of Consumer Services
Department of Financial Institutions

Presented by:

SHANA L. OLIVER
Financial Legal Examiner

Approved by:

CHARLES E. CLARK
Enforcement Chief

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APPENDIX - RESTITUTION

Consumer	Amount Paid
C.B.	$1,195
B.C.	$1,200
Y.C.	$3,446
J.D.	$2,000
D.R.	$1,195

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