

Terms Completed

ORDER SUMMARY – Case Number: C-07-424

Name(s): Jeffrey David Mitchell

Order Number: C-07-424-07-FO01

Effective Date: March 3, 2009

License Number: DFI: 44343

Or NMLS Identifier [U/L] (Revoked, suspended, stayed, application denied or withdrawn)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: Denial

Not Apply Until: n/a

Not Eligible Until: _____

Prohibition/Ban Until: n/a

Investigation Costs	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
Fine	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
Assessment(s)	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
Restitution	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
Judgment	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
Satisfaction of Judgment Filed?		<input type="checkbox"/> Y <input type="checkbox"/> N		
No. of Victims:				

Comments: _____



State of Washington
DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF INVESTIGATING
The Loan Originator License Application
under the Mortgage Broker Practices Act of
Washington by:

JEFFREY DAVID MITCHELL,

Respondent.

OAH Docket No. 2008-DFI-0017

No. C-07-424-07-FO01

FINAL DECISION & ORDER GRANTING
SUMMARY JUDGMENT

THIS MATTER has come before the Director ("hereinafter, "Director") of the Department of Financial Institutions (hereinafter, "Department") in the above-enumerated administrative action in regard to the online Loan Originator License Application of JEFFREY DAVID MITCHELL dated June 8, 2007¹ (hereinafter, "License Application") and pursuant to Initial Order Granting a Motion for Summary Judgment (hereinafter, "Initial Order"), based upon a Statement of Charges and Notice of Intention to Enter an Order to Deny License Application and Prohibit from Industry (hereinafter, "Statement of Charges") issued by the Division of Consumer Services (hereinafter, "Division") on or about December 17, 2007, under the authority of the Mortgage Broker Practices Act, Ch. 19.146 RCW (hereinafter, "MBPA").

1.0 Procedural History. The Respondent, JEFFREY DAVID MITCHELL (hereinafter, "Respondent") timely requested an Administrative Hearing to contest the Statement of Charges (hereinafter, "Application for Hearing"), on January 4, 2008, and this matter was assigned to the Office of Administrative Hearings (hereinafter, "OAH"), which designated Administrative Law Judge Richard J. Roberts (hereinafter, "Administrative Law Judge") to

¹ Jeffrey David Mitchell also submitted, on or about June 13, 2007, a completed Uniform Individual Mortgage License/Registration & Consent Form.

1 hear the case. On April 16, 2008, the Division made a Motion for Summary Judgment
2 (hereinafter, "Summary Judgment Motion"), by and through its counsel, Assistant Attorney
3 General, Chad C. Standifer (hereinafter, "Division Counsel"). Respondent, by and through his
4 attorney of record, John Long (hereinafter, "Respondent's Counsel"), filed on or about May 5,
5 2008, the Department's Reply to Motion for Summary Judgment (hereinafter, "Respondent's
6 Reply"). Oral argument on the Summary Judgment Motion and Respondent's Reply was
7 heard on or about May 9, 2008. Then, after consideration of the entire OAH record, including
8 the License Application, Statement of Charges, Application for Hearing, Summary Judgment
9 Motion, and Respondent's Reply, the Administrative Law Judge issued the Initial Order on
10 June 6, 2008, containing "proposed" findings of fact (hereinafter, "FOF") and conclusions of
11 law (hereinafter, "COL").
12

13 Thereafter, Respondent made a Petition for Review dated June 25, 2008, but which
14 was not received by the Department or the Director until Friday, June 27, 2008. On July 7,
15 2008, Division Counsel filed with the Director a Reply to Respondent's Petition for Review of
16 Initial Order (hereinafter, "Division's Reply to Respondent's Petition for Review").
17 Thereafter, on July 15, 2008, Respondent's Counsel filed with the Director a Rebuttal to
18 Department's Reply to Petition for Review (hereinafter, "Respondent's Rebuttal"). This was
19 followed by Division Counsel filing on July 15, 2008, the Division's Motion to Strike
20 Respondent's Rebuttal Brief (hereinafter, "Motion to Strike Respondent's Rebuttal"). Then,
21 on July 24, 2008, Respondent's Counsel filed with the Department and the Director a Reply to
22 the Division's Motion to Strike Rebuttal Brief (hereinafter, "Reply to Motion to Strike") and a
23 Request for Oral Argument (hereinafter, "Request for Oral Argument").
24

25 The Director subsequently received and has now considered the entire OAH Record.
26 This Final Decision and Order are based upon a consideration of the entire OAH Record and
27 all documents received by way of Petition for Review before the Director, including, without
28 limitation, the following:

- 29 1. The License Application;
- 30 2. The Statement of Charges;
- 31 3. Application for Hearing;
- 32 4. Summary Judgment Motion;
- 33
- 34

5. Declaration of Robert E. Jones in support of Summary Judgment Motion, including all supporting exhibits (hereinafter, "Jones Declaration");
6. Respondent's Reply;
7. Declaration of Jeffrey David Mitchell (hereinafter, "Mitchell Declaration");
8. Initial Order;
9. Respondent's Petition for Review;
10. Division's Reply to Respondent's Petition for Review;
11. Respondent's Rebuttal;
12. Motion to Strike Respondent's Rebuttal;
13. Reply to Motion to Strike; and
14. Request for Oral Argument.

2.0 Preliminary Considerations. Before the Director may even consider the Petition for Review, there are three preliminary issues that must be addressed:

2.1 Timeliness of Petition for Review. The Washington Administrative Procedures Act, at RCW 34.05.250, authorized the adoption of Model Rules of Procedures by Washington State agencies. Pursuant to the Department's Rules, at WAC 208-08-020(1), the Department has adopted the Model Rules of Procedures as set forth in WAC 10-08-035 through 10-08-230.

The date of the Initial Order was June 6, 2008. The date of mailing (legal service) was also June 6, 2008. Pursuant to WAC 10-08-211(2), Respondent Mitchell had twenty (20) days to file his Petition for Review.

WAC 10-08-110(1)(a) declares:

Papers required to be filed with the agency shall be deemed filed upon actual receipt during office hours at any office of the agency. Papers required to be filed with the presiding officer shall be deemed filed upon actual receipt during office hours at the office of the presiding officer.

Yet the records of the Department appear to show that the Department and the Director did not receive the Petition for Review until Friday, June 27, 2008, even though it was dated June 25, 2008, and the Declaration of Service indicates that it was placed in the mail to the Director

1 on June 25, 2008.² If the Director truly received the Petition for Review one (1) day late,
2 pursuant to WAC 10-08-110(1)(a), then the Director could rule with legal certainty that the
3 Petition for Review was untimely and ought to be dismissed. However, while the Director is
4 deeply concerned with the lack of diligence of Respondent's Counsel with regard to the
5 timeliness of filing in this case,³ the Director cannot conclude with any legal certainty that the
6 Petition for Review was untimely filed as a matter of law.⁴ Accordingly, despite the
7 Director's deep concerns, the Director has determined to consider the Petition for Review.

8
9 2.2 The Disputed Propriety of Respondent's Rebuttal. The Division lodged a
10 Reply to Respondent's Petition for Review, which, in turn, precipitated Respondent's
11 Rebuttal. Thereafter, the Division Counsel filed a Motion to Strike Respondent's Rebuttal,
12 and Respondent's Counsel made a Reply to Motion to Strike. The Director is of the view that
13 Respondent's Rebuttal cannot be considered pursuant to governing rules of procedure. The
14 Washington Administrative Procedures Act, at RCW 34.05.464(6), provides that upon review
15 of initial orders, the "reviewing officer shall afford each party an opportunity to present
16 written argument" However, RCW 34.05.250 specifically authorized the adoption of
17 Model Rules of Procedure by Washington State agencies. As stated above, pursuant to the
18 Department's Rules, at WAC 208-08-020(1), the Department has adopted the Model Rules of
19 Procedures as set forth in WAC 10-08-035 through 10-08-230. The Model Rules of
20 Procedure, at WAC 10-08-211, set forth the procedure for providing the parties with an
21 opportunity for written argument in relation to review of initial orders. WAC 10-08-211
22 provides for a single petition for review by each party and a single reply [WAC 10-08-211(4)]
23 by the opposing party. Accordingly, the Director hereby grants the Division's Motion to
24 Strike Respondent's Rebuttal for the reasons set forth above.
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28 ² We note in passing that, in at least one other matter in which Respondent's Counsel has appeared before the Director, the Director received
29 a verifiable, timely FAX transmission of a petition for review pursuant to the FAX procedures set forth in WAC 10-08-110(1)(b). However,
30 the Director has no record of this procedure being used in the above-referenced case. Filing by *email* is impermissible under WAC 10-08-
31 110(1)(c), but filing by FAX – in last-minute, emergency situations – is permissible if the petition for review (1) is transmitted by FAX prior
32 to close of business (5:00 PM) on the last timely filing date and (2) otherwise complies with the procedures set forth in WAC 10-08-
33 110(1)(b). While the Director's general counsel, Joseph M. Vincent, acknowledged receipt by email on July 14, 2008, of Respondent's
34 Rebuttal (the filing of which is contested), the Director has no other record of a FAX filing in this case.

³ The Director takes this opportunity to strongly admonish Respondent's Counsel that in representing clients before the Department in the
future, Respondent's Counsel must make assurances to strictly adhere to statute and rule, including provisions of the Washington
Administrative Procedures Act and Model Rules of Procedure that relate to the timeliness of filings before the Director. Administrative
matters have the same gravity for clients of Respondent's Counsel as civil actions in court. Respondent's Counsel should be mindful of this
when appearing before the Department on behalf of clients.

⁴ The Director considers the issue of timeliness even more awkward in view of the Division Counsel's failure to raise it by a motion to dismiss.

1 2.3 The Request for Oral Argument. The Washington Administrative Procedures
2 Act, at RCW 34.05.464(6), provides that upon review of initial orders, the “reviewing officer .
3 . . . *may* afford each party an opportunity to present oral argument.” [Emphasis added.] Oral
4 argument is discretionary with the Director. The Director, in the exercise of his discretion,
5 hereby declines the Respondent’s Request for Oral Argument.⁵

6 3.0 Summary of the Case. This is a case in which the Division has sought to ban
7 Respondent from participation in the mortgage brokerage industry in Washington State until
8 June 8, 2014, for: (1) Negligently making a false statement or willfully making an omission of
9 material fact in connection with the Loan Application; (2) failing to provide an accurate and
10 complete License Application; and (3) failure to demonstrate character and general fitness
11 such as to command confidence of the community and to warrant a belief that the
12 Respondent’s business as a loan originator would be operated honestly and fairly within the
13 purposes of the MBPA. At issue upon petition for review are ultimately the following
14 questions:
15

16 3.1 Failure to Disclose California Administrative Order. Has Respondent
17 committed conduct enumerated in RCW 19.146.220(5)(a), which is described in RCW
18 19.146.0201(8)?

19 3.2 Applicability to “Applicants”. Is such a violation of the MBPA applicable only
20 to licensees, or is it also applicable to “applicants”?

21 3.3 Authority to Ban from Industry. Does the Division have the authority to ban
22 Respondent from participation in the affairs of a mortgage broker in Washington State until
23 June 8, 2014, rather than merely denying his License Application, pursuant to RCW
24 19.146.220(5)?

25 3.4 Scope of Authority to Ban from Industry. Notwithstanding broad authority
26 under RCW 19.146.220(5), is such a ban limited only to conduct that is “subject to licensing”?

27 3.5 “Negligent” or “Willful”. Is there a genuine issue of material fact as to
28 whether Respondent acted “negligently” or “willfully” in the making of false statements or
29 omitting material information on his License Application?
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34 ⁵ The Director notes parenthetically that both parties extensively argued the legal issues in the Summary Judgment Motion before the Director.

1 3.6 Character and Fitness. Is there a genuine issue of material fact as to whether
2 Respondent lacks requisite character and general fitness such as to command the confidence
3 of the community and to warrant a belief that his business as a loan originator will be operated
4 honestly and fairly within the purposes of the MBPA?

5 4.0 Director's Considerations.

6 4.1 Standards for Summary Judgment in Administrative Actions. The Department
7 has adopted the Model Rules of Procedure, Chapter 10-08 WAC, except to the extent of any
8 conflict with the Department's Rules of Procedure.⁶ WAC 10-08-135 sets forth the standards
9 to be followed by the Department and the Administrative Law Judge, as its agent, when
10 considering the Summary Judgment Motion, Jones Declaration, Respondent's Reply, and
11 Mitchell Declaration, and declares that "[a] motion for summary judgment may be granted
12 and an order issued [only] if the written record shows that there is no genuine issue as to any
13 material fact and that the moving party is entitled to judgment as a matter of law." In
14 evaluating the application of this standard, the Director may rely on applicable law from
15 sources other than WAC 10-08-135 itself and must be respectful of the constitutional rights of
16 respondents.⁷ To that end, the Director is required to weigh on review all pleadings, evidence
17 and argument in a light most favorable to the non-moving party.⁸ If there is any inference of a
18 triable issue of fact, then summary judgment is inappropriate.⁹ Litigants are entitled to a
19 dispositive hearing on all issues of fact and law.¹⁰ Summary judgment may be granted only if
20 reasonable minds could reach only one conclusion based upon the facts in evidence, but
21 neither the non-moving party, Administrative Law Judge or the Director may rely upon
22 speculation or argumentative assertions that unresolved factual issues remain to be tried.¹¹
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27 ⁶ WAC 208-08-020(1) declares: "The department adopts the model rules of procedure as set forth in WAC 10-08-035 through 10-08-230. If
28 there is a conflict between the model rules and this chapter, the rules in this chapter shall govern. Wherever the term 'agency' appears in the
29 model rules it means the department of financial institutions."

30 ⁷ WAC 10-08-220 declares: "Nothing in chapter 10-08 WAC is intended to diminish the constitutional rights of any person or to limit or
31 modify additional requirements imposed by statute, including the Administrative Procedure Act."

32 ⁸ *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

33 ⁹ *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 456 (2007).

34 ¹⁰ *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002), citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124
(2000).

¹¹ *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

1 These principles apply equally to the Administrative Law Judge and to the Director evaluating
2 the Initial Order.¹²

3 4.2 Failure to Disclose Material Facts. On September 27, 2002, the California
4 Department of Corporations entered a Cease and Desist Order against Respondent and others
5 for having been engaged in the marketing of certain securities by means of written
6 communications which contained untrue statements of material fact in violation of Sections
7 25.110, 25.210 and 25.401 of the California Corporations Code (hereinafter, "California
8 Order"). The Respondent was prohibited from further offering or sale in the State of
9 California of certain investment securities. FOF 1. It is therefore incontrovertible that by
10 answering "no" to certain questions on his License Application that were unquestionably
11 germane to the California Order, Respondent failed to make disclosures that were material.
12 Therefore, there was no genuine issue of material fact that Respondent made false statements
13 or omitted material information on his License Application.

15 However, did Respondent act "negligently" or willfully" in this regard? Has
16 Respondent necessarily demonstrated, as a matter of law, a lack of requisite character and
17 fitness? These are questions that the Director must still consider. See Subsection 4.4 below.

18 4.3 Discretion to Impose Industry Ban. RCW 19.146.220(5) declares in pertinent
19 part, as follows:

21 (5) The director may issue orders removing from office or
22 *prohibiting from participation in the conduct of the affairs of a*
23 *licensed mortgage broker, or both, any officer, principal,*
24 *employee, or loan originator of any licensed mortgage broker or*
25 *any person subject to licensing under this chapter* for:

26 (a) *Any violation of 19.146.0201 (1) through (9) or (13),*
27 *19.146.030 through 19.146.080, 19.146.200, 19.146.205(4), or*
28 *19.146.265;*

29 (b) False statements or omission of material information on the
30 application that, if known, would have allowed the director to
31 deny the application for the original license;

32 (c) Conviction of a gross misdemeanor involving dishonesty or
33 financial misconduct or a felony after obtaining a license; or

34 (d) Failure to comply with any directive or order of the
director.

¹² Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

1
2 [Emphasis added.]

3 RCW 19.146.0201(8) declares that it is a violation of the MBPA for a loan originator,
4 mortgage broker required to be licensed under the MBPA, or a mortgage broker otherwise
5 exempt from licensing under RCW 19.146.020(1)(e), (g), or (4) to –

6 “... [n]egligently make any false statement or knowingly and
7 willfully make any omission of material fact in connection with
8 any reports filed by a mortgage broker or in connection with any
9 investigation conducted by the department; ...”

10 The Director is of the view that the correct statutory interpretation is that the conduct
11 prohibited by RCW 19.146.0201(8), read in the light of RCW 19.146.220(5), applies to “any
12 person *subject to licensing* under [the MBPA]” – which includes *applicants* for a Loan
13 Originator License. In the first instance, RCW 19.146.220(5) is the provision on which we
14 must be focused – *not* RCW 19.146.0201(8). By itself, the relevant language of RCW
15 19.146.220(5) – “or any person subject to licensing under [the MBPA]” – is plain, clear and
16 unambiguous and, therefore, not subject to statutory interpretation. Washington courts will
17 not construe a plain and unambiguous statute – that is, they will not resort to canons of
18 construction or legislative history to analyze the meaning of a clear and unambiguous
19 statute.¹³ Because the Washington courts will not do so, neither can the Director. The
20 Director therefore concludes that, by itself, a Loan Originator License Applicant, such as
21 Respondent, is a “person subject to licensing under [the MBPA]” within the plain meaning of
22 RCW 19.146.220(5).
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24 It has been argued in other cases before the Department that RCW 19.146.220(5) must
25 be read with reference to the entire MBPA and, more particularly, RCW 19.146.0201(8). In
26 this regard, Respondent is relying upon the general textual canon that each statutory provision
27 should be read by reference to the whole act.¹⁴ While the Director does not disagree with this
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31 ¹³ This is often described as the *plain meaning rule*. A “court will interpret words in the statute according to their usual or plain meaning as
32 understood by the general public.” *Black’s Law Dictionary* 796 (abr. 6th ed. 1991). See, e.g., *Davis v. Dep’t of Licensing*, 137 Wash. 2d 957,
964, 977 P.2d 554, 556 (1999). See also *State v. Enstone*, 137 Wash. 2d 675, 680, 974 P.2d 828, 830 (1999); *State v. Chapman*, 140 Wash. 2d
436, 998 P.2d 282 (2000); *Hendrickson v. State*, 140 Wash. 2d 686, 2 P.3d 473 (2000).

33 ¹⁴ *Washington State Republican Party v. Washington State Pub. Disclosure Comm’n*, 141 Wash. 2d 245, 280-81, 4 P.3d 808, 827-28 (2000);
34 *Davis v. Dep’t of Licensing*, 137 Wash. 2d 957, 970-71, 977 P.2d 554, 559-60 (1999); *City of Seattle v. State*, 136 Wash. 2d 693, 698, 965
P.2d 619, 621 (1998); *State v. Talley*, 122 Wash. 2d 192, 213, 858 P.2d 217, 228-29 (1993).

1 general canon of statutory construction, the Director remains of the decided view that RCW
2 19.146.0201(8) does not supersede or control an essential understanding of RCW
3 19.146.220(5). Rather, RCW 19.146.0201(8) is enumerated in RCW 19.146.220(5)(a) so as
4 to include it within the kinds of conduct which confer upon the Director the authority and
5 discretion to impose upon mortgage brokers, loan originators, and also *applicants* for
6 mortgage broker and loan originator licenses a ban from participation in the mortgage
7 brokerage industry. One of the obvious purposes of this enumeration was to describe with
8 precision specific types of conduct upon which both licensees *and* applicants could be
9 debarred from the industry for a period of time. The most efficient way for the Legislature to
10 do this was to enumerate certain prohibited conduct set forth in RCW 19.146.0201 – including
11 the conduct described in subsection (8) thereof.¹⁵ The meaning of words may be indicated or
12 controlled by those with which they are associated.¹⁶ A term or phrase contained in a
13 statutory provision always takes its meaning from the context in which it is specifically
14 employed.¹⁷ The Director must avoid applying RCW 19.146.0201(8) in a way that would
15 render the relevant clause in RCW 19.146.220(5) superfluous.¹⁸ The words “or any person
16 subject to licensing under this chapter” as set forth in RCW 19.146.220(5), must also be read
17 with reference to the entire MBPA, including the intent of the Legislature as expressed in their
18 findings at RCW 19.146.005, as follows:

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21 “The legislature finds and declares that the brokering of
22 residential real estate loans substantially affects the public
23 interest, requiring that all actions in mortgage brokering be
24 actuated by good faith, and that mortgage brokers, designated
25 brokers, loan originators, ***and other persons subject to this***
26 ***chapter abstain from deception, and practice honesty and equity***
27 ***in all matters relating to their profession.*** The practices of
28 mortgage brokers and loan originators have had significant impact
29 on the citizens of the state and the banking and real estate
30 industries. ***It is the intent of the legislature to establish a state***

31 ¹⁵ The prohibitions set forth in RCW 19.146.0201 also apply to persons exempt from licensing under RCW 19.146.0201(1)(e), (g), or (4).

32 ¹⁶ *State v. Jackson*, 137 Wash. 2d 712, 729, 976 P.2d 1229, 1237 (1999) (citing *Ball v. Stokley Foods, Inc.*, 37 Wash. 2d 79, 87-88, 221 P.2d 832 (1950)).

33 ¹⁷ *City of Mercer Island v. Kaltenbach*, 60 Wash. 2d 105, 109, 371 P.2d 1009, 1012 (1962).

34 ¹⁸ *City of Bellevue v. East Bellevue Cmty. Council*, 138 Wash. 2d 937, 946-47, 983 P.2d 602, 607 (1999). See also *Davis*, 137 Wash. 2d at 969, 977 P.2d at 558-59; *City of Seattle v. Dep't of Labor & Indus.*, 136 Wash. 2d 693, 701, 965 P.2d 619, 623 (1998).

1 *system of licensure* in addition to rules of practice and conduct of
2 mortgage brokers and loan originators *to promote honesty and*
3 *fair dealing with citizens and to preserve public confidence in*
4 *the lending and real estate community.”*

5 [Emphasis added.]

6 Clearly, the Legislature intends that the provisions of the Act, including RCW
7 19.146.220(5), apply not just to licensees but also to *applicants*, thereby conferring upon the
8 Department the ability to exclude certain license applicants from the mortgage broker industry
9 in the interest of protecting the public. RCW 19.146.220(5) clearly permits the Director, to
10 issue an order “prohibiting from participation in the conduct of the affairs of a licensed
11 mortgage broker . . . any person subject to licensing under this chapter,” including an
12 unlicensed individual seeking a Loan Originator License, for conduct prohibited by RCW
13 19.146.0201(8).
14

15 The Director therefore concludes that, pursuant to RCW 19.146.220(5), it is within the
16 discretion of the Department to prohibit *unlicensed* individuals from the mortgage broker
17 industry for conduct enumerated in subsection (a) thereof which is described in RCW
18 19.146.0201(8) and other enumerated provisions. It is squarely within the Department’s
19 statutory authority to order that Respondent be prohibited from the mortgage broker industry
20 pursuant to RCW 19.146.220(5)(a). Respondent committed conduct described in RCW
21 19.146.0201(8) that is enumerated in RCW 19.146.220(5)(a), by submitting false statements
22 and omitting material information on the License Application. Therefore, it is within the
23 proper exercise of the Director’s discretion to consider whether to prohibit Respondent from
24 the mortgage broker industry in Washington State through June 8, 2014.
25

26 4.4 Appropriateness of Summary Judgment. However, before the Director may
27 conclude that summary judgment should be granted, the Director must deal with the problem
28 of the Administrative Law Judge not considering if there was a triable issue of fact as to
29 whether Respondent acted “negligently” or “willfully” in submitting false statements or
30 omitting material information on the License Application.

31 These are standards of care (or lack thereof) that often require a factual hearing,
32 except in cases where the record on summary judgment would lead to only one reasonable
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1 conclusion.¹⁹ In this regard, after evaluating the entire Record on Review, including the
2 Mitchell Declaration and California Consent Order, the Director finds that reasonable minds
3 cannot differ that Respondent was “negligent” in failing to disclose the existence of the
4 California Order and underlying action to the Department. There are, however, *degrees* of
5 “negligence” in combination with potential mitigating factors, which ought to have a bearing
6 in the Director determining (1) whether Respondent has failed to demonstrate requisite
7 character and fitness required of a loan originator and/or (2) whether an “industry ban” should
8 be imposed upon Respondent, and if so, for how long.²⁰

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10 4.5 The Issue of Lack of Requisite Character and Fitness. In Paragraph 2.3 of the
11 Statement of Charges, the Division has also alleged that the Respondent failed to meet the
12 requirements of RCW 19.146.310(1)(g) and WAC 208-660-350(2)(a) by failing to
13 demonstrate character and general fitness such as to command the confidence of the
14 community and to warrant a belief that the Respondent’s business as a loan originator will be
15 operated honestly and fairly within the purposes of the MBPA. The Director has already
16 concluded that Respondent committed conduct described in RCW 19.146.0201(8) that is
17 enumerated in RCW 19.146.220(5)(a), by submitting false statements and omitting material
18 information on the License Application. The Department, consistent with the “intent of the
19 [L]egislature to establish a state system of licensure . . . to promote honesty and fair dealing
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22 ¹⁹ We note in passing that in another recent case of Respondent’s Counsel before the Director, *In re Slava Dekman*, OAH Docket No. 2008-
23 DFI-0014, No. C-07-493-07-FO01, the representations of Slava Dekman in his own declaration opposing summary judgment were such that
24 the Director was also left with only one reasonable conclusion – that Mr. Dekman had at least acted “negligently” in making false statements
25 in his loan originator loan application. However, Mr. Dekman relied in his case principally on the notion that his self-serving declaration
26 statement (i.e., that he did not know that a consent order by the Department’s Division of Securities related to a “financial services-related
27 business” as identified in the License Application) gives rise to a genuine issue of material fact. The Director properly concluded in *that* case
28 that, regardless of Mr. Dekman’s subjective state of mind, he was precluded as a matter of law from raising such an inference by way of
opposition to a motion for summary judgment. The facts and circumstances are different in the present case. To his credit, Respondent in
this case is not pleading ignorance of the law. Respondent is, however, arguing that he was a minor, indirect party in the action of the
California Department of Corporations giving rise to the California Order, a review of which, Respondent contends, ought to lead to the
conclusion that he does not lack the character and general fitness requisite of a Loan Originator License. This is not the issue before the
Department. The issue is whether there were material facts, of which Respondent had sufficient knowledge at the time of his Loan
Application and failed to disclose, from which the Director is left with but one reasonable conclusion – that this failure of disclosure was at
least an act of “negligence.”

29 ²⁰ The Director notes with genuine concern the argument by Respondent’s Counsel in Respondent’s Reply, at p. 3 thereof, that Respondent
30 was “under the sincere belief that he was a part of a consent order that vacated the California Order dated September 27, 2002. This would be
31 a compelling argument for not granting summary judgment if a License Applicant were not required to be forthcoming with respect to all
32 regulatory history, regardless of the subsequent vacation of administrative orders. Then – and only then – would there be a genuine issue of
33 material fact as to Respondent’s “negligence.” However, in regard to Regulatory Action History, Question 7 of the License Application
34 clearly states: “Has any State or federal regulatory agency or foreign regulatory authority ever issued Charges or an order based on violations
of any law or regulations that prohibit fraudulent, manipulative, or deceptive conduct?” Regardless of whether Respondent subjectively
believed that a consent order in question had vacated the California Order, he was required, based upon the actual history of regulatory
activity involving him, to have answered “yes” to Question 7. The California Department of Corporations had brought charges and entered
the California Order. In providing an explanation, Respondent should have explained that he believed the California Order was vacated by
the Consent Order. But it was “negligent” to have failed to answer “yes” to Question 7 and to not disclose the existence of the California
Order, even if it had been vacated.

1 with citizens” as set forth in RCW 19.146.005, must maintain the integrity of the License
2 Application.²¹ The Director cannot ignore the “negligence” of applicants in making false
3 statements, even though the degree of “negligence” may be subject to mitigating factors that
4 affect the duration of any licensing ban. There must be consequences for Respondent
5 violating the MBPA in the submission of his License Application. Therefore, the Director
6 cannot at the same time conclude, as a matter of law, that Respondent has “negligently”
7 violated the MBPA, while failing to also conclude, as a matter of law, that Respondent, by
8 “negligently” making a false statement, failed in that one instance to meet the requirements of
9 RCW 19.146.310(1)(g) and WAC 208-660-350(2)(a).
10

11 Therefore, for the reasons set forth above, the Department is entitled to summary
12 judgment as a matter of law on all issues before the Administrative Law Judge and the
13 Director, including the *permissibility* of an “industry ban.”

14 3.8 Duration of Industry Ban. The sole remaining issue is whether the ban sought
15 by the Division is appropriate under the circumstances. The scope and duration of the
16 industry ban²² sought by the Division in its Statement of Charges is permissible,²³ but it is also
17 subject to the Director’s *discretion* when making a Final Decision and Order in this matter.
18 The Division seeks to ban the Respondent from participation in the affairs of a mortgage
19 broker subject to licensure by the Director, in any manner, until June 8, 2014. In matters that
20 have come before the Director, the Department has frequently imposed “industry bans” of ten
21 (10) years in administrative cases under the MBPA for “knowing” and “willful” omissions of
22 material fact in connection with loan originator license applications. The Director cannot say
23 as a matter of law that Respondent was any more than “negligent” in his conduct. Yet the
24 Statement of Charges seeks to impose an “industry ban” of seven (7) years.
25

26 Each case is unique in this regard. In this particular case, the Director finds that the
27 duration of “industry ban” sought by the Division is *inordinately excessive* and that, given the
28 duration of the pendency of this matter, any prospective “industry ban” *per se* is inappropriate.
29

30 ²¹ In this regard, the Director is of the view that the Legislature, in their express findings in RCW 19.146.005, has sought to confer upon the
31 new license classification of loan originator a high standard of integrity with no appearance of deception or dishonesty.

32 ²² In addition to a ban from participating in the affairs of a licensed mortgage broker, an “industry ban” may also include any future conduct
33 for a period of time as an “independent contractor” of an exempt mortgage broker under RCW 19.146.020(1)(b), (c), (e) and (g). WAC 208-
34 660-008(9) requires a loan originator license for any “independent contractor” loan officer of an exempt mortgage broker under RCW
19.146.020(1)(b), (c), (e) and (g).

²³ RCW 19.146.220(5)(a).

1 Of particular concern to the Director is the admission by the Division in the statement
2 of operative facts in its own Statement of Charges that Respondent was forthcoming in
3 explanatory notes in his License Application with respect to a certain administrative order
4 entered by the Securities and Exchange Commission (hereinafter, "SEC Order") and an
5 Assurance of Discontinuance in a certain complaint by the Attorney General in Spokane
6 County (hereinafter, "AGO Case"), even though in FOF 1 the Administrative Law Judge
7 correctly found that Respondent had failed to disclose the California Order. It is true that
8 Respondent was at least "negligent" as a matter of law with respect to failing to answer "yes"
9 as to Question 7 of the Regulatory Action History in the License Application.²⁴ But the
10 Director is persuaded that there is no credible evidence of intent to deceive the Department.
11 Moreover, the Director is also persuaded that there is some indication, worthy of further
12 factual investigation by the Division, that the circumstances giving rise to the California Order
13 may have only tangentially involved Respondent as an indirect party as he has so represented
14 – even though he was subject to the California Order as a matter of law.

16 The Director further notes, based upon uncontroverted representations of fact,²⁵ that
17 Respondent has had a lengthy career as an insurance licensee with apparently no
18 administrative actions taken against him in that field of endeavor.

20 Based upon the unique circumstances presented in this case and the lack of any
21 compelling reason shown by the record to impose an "industry ban" for what amounts to an
22 act of apparent simple "negligence" in failing to answer "yes" to Question 7, the Director has
23 determined that, while there must be consequences attached to Respondent's "negligent"
24 conduct, no automatic "industry ban" for any prescribed duration should be imposed.

26
27 ²⁴ See above, Footnote 20.

28 ²⁵ The Director notes in passing that so long as the Division seeks summary judgment in nearly all cases involving false statements or
29 material omissions on loan originator license applications, the Division will continue to run the risk of leaving *uncontroverted* the
30 representations of applicants in their opposing declarations that appear to the Director to be in good faith on their face and, in the absence of
31 contrary facts, tend to mitigate against imposing the duration of industry ban that may be sought by the Division. So while the issue of
32 having violated the MBPA has been frequently disposed of by summary judgment, the Division has left the Director in the limited position of
33 being compelled to determine, on review of an initial order of summary judgment, the lack of present character and fitness of an applicant (if
34 any) *only* on the limited basis of the applicant's "negligence" or "willfulness" (if any) in making false statements or material omissions on a
license application. If the nature of the misstatement or omission is egregious, the Director may be inclined to impose an "industry ban"
consistent with (or at least closer to) the duration prayed for by the Division in its statement of charges. However, in cases where simple
(rather than gross) negligence appears from the record on review, *uncontroverted* representations by the applicant as to his or her history of
professional conduct may tend to mitigate against an "industry ban" of lengthy duration. If the Division has in its possession evidence that
would controvert an applicant's representations, the Division ought to consider in the future taking all issues of fact and law to a testimonial
hearing before an administrative law judge or otherwise expand by rulemaking the scope of its brief adjudicative procedures so as to permit
adjudication of all potential issues of character and fitness by declaration and supporting argument. Otherwise, the Director, in his summary
judgment reviews, will continue to rely only upon the limited record that is often before him in summary judgment cases.

Respondent is free to re-apply to the Division for a Loan Originator License at any time, with the understanding that the Division may, in any future application by Respondent for a Loan Originator License, approve, deny or condition a Loan Originator License based upon all permissible criteria set forth in the MBPA and the MBPA Rules, Chapter 208-660 WAC, including, without limitation, the factual circumstances underlying the California Order, the SEC Order and the AGO Case, together with any other facts concerning Respondent's professional history.

4.0 Final Order. The Director reaffirms FOF 1 through FOF 8, inclusive, at pages 2-4 of the Initial Order, and incorporates herein additional findings of fact as set forth in Section 3.0 above. The Director incorporates herein the conclusions of law made in Section 3.0 above, and in this regard, the Director (1) re-affirms COL 1 through COL 6, inclusive, at pages 4-6 of the Initial Order, consistent, however, with the Director's modified and additional conclusions of law as articulated in Section 3.0 above and with the understanding that, notwithstanding the Division's authority to impose the relief sought in its Statement of Charges, such relief is subject to review and final determination by the Director.

IT IS HEREBY ORDERED AS FOLLOWS:

4.1 Summary Judgment. The Division's Motion for Summary Judgment is GRANTED consistent with this Final Decision and Order.

4.2 Denial of License. The application of Respondent, JEFFREY DAVID MITCHELL, for a Loan Originator License with the Department of Financial Institutions is DENIED.

4.3 Reconsideration. Pursuant to RCW 34.05.470, Respondent has 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 this Final Order upon Respondent. 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

1 the petition or (b) serve the parties with a written notice specifying the date by which it will
2 act on a petition.

3 4.4 Stay of Order. The Director has determined not to consider a Petition to Stay
4 the effectiveness of this order. Any such requests should be made in connection with a
5 Petition for Judicial Review made under chapter 34.05 RCW and RCW 34.05.550.

6 4.5 Judicial Review. Respondent has the right to petition the superior court for
7 judicial review of this agency action under the provisions of chapter 34.05 RCW. For the
8 requirements for filing a Petition for Judicial Review, see RCW 34.05.510 and sections
9 following.

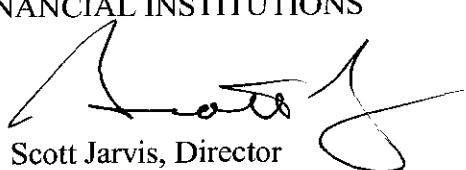
10 4.6 Service. For purposes of filing a Petition for Reconsideration or a Petition
11 for Judicial Review, service is effective upon deposit of this order in the U.S. mail, declaration of
12 service attached hereto.

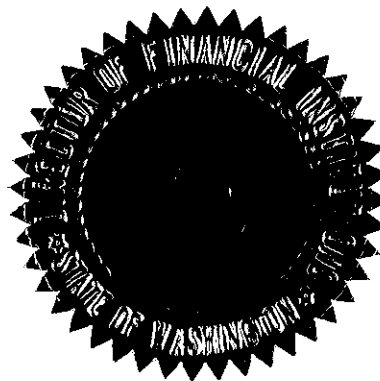
13 4.7 Effectiveness and Enforcement of Final Order. Pursuant to the Administrative
14 Procedures Act, at RCW 34.05.473, this Final Decision and Order shall be effective
15 immediately upon deposit in the United States Mail.

16 Dated at Tumwater, Washington, on this 2nd day of March, 2009.

17
18
19 WASHINGTON STATE DEPARTMENT
20 OF FINANCIAL INSTITUTIONS

21 By:

22 
23 Scott Jarvis, Director



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**STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
DIVISION OF CONSUMER SERVICES**

IN THE MATTER OF INVESTIGATING
the Loan Originator License Application under the
Mortgage Broker Practices Act of Washington by:

JEFFREY DAVID MITCHELL,

Respondent.

NO. C-07-424-07-SC01

STATEMENT OF CHARGES and
NOTICE OF INTENTION TO ENTER
AN ORDER TO DENY LICENSE APPLICATION
AND PROHIBIT FROM INDUSTRY

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 (Act)¹. After having conducted an investigation pursuant to RCW 19.146.310, 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 Jeffrey David Mitchell (Respondent Mitchell) submitted an application to the Department of Financial Institutions of the State of Washington (Department) for a loan originator license under American Freedom Group, Inc., a mortgage broker licensed under the Act. The on-line application was received by the Department on or about June 8, 2007.

1.2 Prior Administrative Action.

- A. On September 27, 2002, the California Department of Corporations entered a Desist and Refrain Order (Order) against Respondent Mitchell and National Marketing Solutions, LLC for violations of sections 25110, 25210 and 25401 of the California Corporations Code. The Order prohibits Respondent Mitchell and National Marketing Solutions, among others, from

¹ RCW 19.146 (Amended 2006; Effective January 1, 2007)

1 the further offer or sale in the State of California of securities in the form of investments in
2 Evergreen High Yield RLLPs. The Order found that the securities were being offered by
3 means of written communications which included untrue statements of material fact in
4 violation of the California Corporations Code Section 25401. That Section states that:

5 It is unlawful for any person to offer or sell a security in this state or buy
6 or offer to buy a security in this state by means of any written or oral
7 communication which includes an untrue statement of a material fact or
8 omits to state a material fact necessary in order to make the statements
9 made, in the light of the circumstances under which they were made, not
10 misleading.

11 **B.** On November 15, 2007, the Securities and Exchange Commission (Commission) entered an
12 Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities
13 Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions against
14 Respondent Mitchell. The Commission found that Respondent Mitchell was a principal of
15 National Marketing Solutions, LLC and received transaction based compensation earned from
16 the sale of the Capital Holdings offering. The Commission ordered that pursuant to Section
17 15(b)(6) of the Exchange Act that Respondent Mitchell be barred from association with any
18 broker or dealer.

19 **1.3 Responses to Application Questions.** The "Regulatory Action Disclosure" section of the loan
20 originator license application consists of nine questions, and includes the following instruction:

21 "If the answer to any of the following is "YES", provide complete details of all events or proceedings"
22 Respondent Mitchell answered "no" to the following questions on the "Regulatory Action Disclosure" section
23 of his loan originator license application:
24
25

- 2-Has any State or federal regulatory agency or foreign financial regulatory authority ever found you to have been involved in a violation of a financial services-related regulation(s) or statute(s)?
- 4-Has any State or federal regulatory agency or foreign financial regulatory authority ever entered an order against you in connection with a financial services-related activity?
- 5-Has any State or federal regulatory agency or foreign financial regulatory authority ever denied, suspended, or revoked your registration or license, disciplined you, or otherwise by order prevented you from associating with a financial services-related business or restricted your activities?
- 6-Has any State or federal regulatory agency or foreign financial regulatory authority ever barred you from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in a financial services-related business?
- 7-Has any State or federal regulatory agency or foreign financial regulatory authority ever issued charges or an order based on violations of any law or regulations that prohibit fraudulent, manipulative, or deceptive conduct?

Respondent Mitchell answered "Yes" to the following question on the "Regulatory Action Disclosure" section of his loan originator license application:

- 9-Are you now the subject of any regulatory proceeding that could result in a "yes" answer to any part of (1 to 7) or 8?

Respondent Mitchell provided the following verbatim explanation to this answer:

June 08, 2007

Washington State Department of Financial Institutions

Re: attached License/Registration & Consent Form

Dear Department of Financial Institutions:

Attached is my Washington License/Registration & Consent Form. I did answer yes to questions on the Loan originator Application. Please accept this letter as my explanation and make it a permanent part of my administrative file.

Relative to items # 1 form 4, # 9 form 6 #'s 3 & \$ form 7 I was named in two civil cases related to investigations into the same entity, known as Capital Holdings, although I was never actually involved in it. I entered into an Assurance of Discontinuance with the State of Washington and am currently in the process of settling with the SEC through a Consent Agreement, admitting no wrong doing in either case4.

My recent bankruptcy resulted directly from expenses over the last several years involved in defending against the above actions, in which I was never involved to begin with.

I have held insurance licenses for over 23 years and never had any regulatory complaint brought against me prior to those mentioned above. I am a member in good standing of the National Association of Insurance and Financial Advisors (NAIFA) National Association of Fixed Annuities (NAFA) National Association of Notaries, National Association of Self Employed (NASE) and the Washington Association of Mortgage Brokers (WAMB)

If you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

Jeffrey David Mitchell

Attachment: License/Registration & Consent Form

(Please see letter of explanation attached to finger print card.)

Respondent Mitchell was obligated by statute to answer questions on the loan originator license application truthfully and to provide the Department with complete details of all events or proceedings.

II. GROUNDS FOR ENTRY OF ORDER

2.1 Prohibited Practices. Based on the Factual Allegations set forth in Section I above, Respondent Mitchell is in apparent violation of RCW 19.146.0201(8) and WAC 208-660-500(3)(i) for negligently making any false statement or willfully making any omission of material fact in connection with any application or any information filed by a licensee in connection with any application, examination or investigation conducted by the Department.

1 **2.2 Requirement to Provide Information on License Application.** Based on the Factual Allegations set
2 forth in Section I above, Respondent Mitchell fails to meet the requirements of RCW 19.146.300(1) and (2) and
3 RCW 19.146.310(1)(b) by failing to provide an accurate and complete license application in the form
4 prescribed by the Director.

5 **2.3 Requirement to Demonstrate Character and General Fitness.** Based on the Factual Allegations set
6 forth in Section I above, Respondent Mitchell fails to meet the requirements of RCW 19.146.310(1)(g) and
7 WAC 208-660-350(2)(a) by failing to demonstrate character and general fitness such as to command the
8 confidence of the community and to warrant a belief that the business will be operated honestly and fairly
9 within the purposes of the Act.

10 **III. AUTHORITY TO IMPOSE SANCTIONS**

11 **3.1 Authority to Deny Application for Loan Originator License.** Pursuant to RCW 19.146.220(1), the
12 Director may deny licenses to loan originators. Pursuant to RCW 19.146.310(2) and WAC 208-660-350(7), the
13 Director shall not issue a loan originator license if the conditions of RCW 19.146.310(1) have not been met by
14 the applicant, and shall notify the loan originator applicant and any mortgage brokers listed on the application
15 of the denial.

16 **3.2 Authority to Prohibit from Industry.** Pursuant to RCW 19.146.220(5)(a), the Director may issue
17 orders removing from office or prohibiting from participation in the conduct of the affairs of a licensed
18 mortgage broker, or both, any officer, principal, employee, or loan originator of any licensed mortgage broker
19 or any person subject to licensing under the Act for any violation of RCW 19.146.0201(1) through (9).

20 **IV. NOTICE OF INTENTION TO ENTER ORDER**

21 Respondent's violations of the provisions of chapter 19.146 RCW and chapter 208-660 WAC, as set forth
22 in the above Factual Allegations, Grounds for Entry of Order, and Authority to Impose Sanctions, constitute a basis
23 for the entry of an Order under RCW 19.146.220, RCW 19.146.221, RCW 19.146.223 and RCW 19.146.310.

24 Therefore, it is the Director's intention to ORDER that:

25 **4.1** Respondent Jeffrey David Mitchell's application for a loan originator license be denied.

1 4.2 Respondent Jeffrey David Mitchell be prohibited from participation in the conduct of the affairs of any
2 mortgage broker subject to licensure by the Director, in any manner, through June 8, 2014.

3 **V. AUTHORITY AND PROCEDURE**

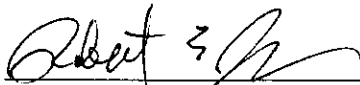
4 This Statement of Charges and Notice of Intention to Enter an Order to Deny License Application and
5 Prohibit from Industry (Statement of Charges) is entered pursuant to the provisions of RCW 19.146.220,
6 RCW 19.146.221, RCW 19.146.223 and RCW 19.146.230, and is subject to the provisions of chapter 34.05
7 RCW (The Administrative Procedure Act). Respondent may make a written request for a hearing as set forth in
8 the NOTICE OF OPPORTUNITY TO DEFEND AND OPPORTUNITY FOR HEARING accompanying this
9 Statement of Charges.

10 Dated this 17th day of December, 2007.

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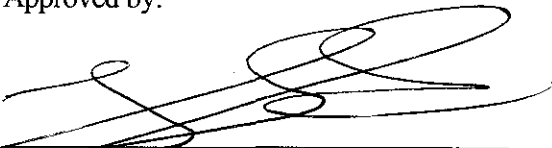
12 DEBORAH BORTNER
13 Director
14 Division of Consumer Services
15 Department of Financial Institutions

16 Presented by:

17 

18 ROBERT E. JONES
19 Financial Legal Examiner

20 Approved by:

21 

22 FATIMA BATIE
23 Financial Legal Examiner Supervisor

