

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation of:

THE CALIFORNIA CORPORATIONS
COMMISSISONER,

Complainant,

vs.

DEL WEBB MORTGAGE CORP.,

Respondent.

Case No.: 413-0365

OAH No.: 2008080630

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated January 5, 2009, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on April 25, 2009.

IT IS SO ORDERED this 24th day of April 2009.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

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PROPOSED DECISION

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings on October 31, 2008, in Los Angeles California.

Complainant was represented by Johnny Vuong, Counsel for the Department of Corporations. Stuart A. Shanus, Attorney at Law, represented Del Webb Mortgage Corp. (respondent).

Evidence was received and the record was left open to allow the parties to submit statements of undisputed facts and legal conclusions. Complainant submitted "Complainant's Contentions and Legal Conclusions . . ." on November 17, 2008, and was marked for identification as exhibit C-18. Respondent submitted "Respondent Del Webb Mortgage Corp.'s Statement of Facts, Conclusions of Law and Order" on November 19, 2008, and was marked for identification as exhibit R-49. The matter was deemed submitted on November 19, 2008.

FACTUAL FINDINGS

1. Uche L. Enewali made the First Amended Accusation and the First Amended Notice of Intention to Issue Order Revoking Residential Mortgage Lender's License in her official capacity as Corporations Counsel for the Department of Corporations (Department), and on behalf of Preston DuFauchard, Commissioner of Corporations (Commissioner).

2. Respondent is a residential mortgage lender and/or servicer licensed by the Commissioner pursuant to the California Residential Mortgage Lending Act (CRMLA). (Fin. Code § 5000 *et seq.*)¹

3. Respondent was an Arizona Corporation incorporated on November 3, 1983. Formerly incorporated as Fairmont Mortgage, Inc., respondent changed its name to Del Webb Mortgage Corporation on June 14, 2001.

4. On February 27, 2003, respondent sent a letter to the Commissioner advising that it would no longer conduct business in California, and offered to surrender its license. (Exhibit C-14)

5. On March 3, 2003, the Commissioner sent a letter to respondent rejecting its offer to surrender its license on the basis that the offer did not comply with section 50123. The Commissioner's March 3, 2003 letter set forth the procedures and requirements necessary to effect a surrender under section 50123, and further stated that respondent's license would not be considered surrendered until all of the required items, including a closing audit and plan of surrender, was accepted by the Commissioner. (Exhibit C-15)

6. On May 21, 2003, respondent sent a letter to the Commissioner explaining that respondent had been purchased by and became a wholly owned subsidiary of Pulte Home, Inc., on March 2, 2002. Along with the letter, respondent submitted 2002 audited financial statements. The letter states in pertinent part:

. . . all Del Webb Mortgage loans in process were transferred to Pulte Mortgage (as validated by the state examiner all loan (sic) after this time frame were originated by Pulte Mortgage in the State of California instead of Del Webb Mortgage Corporation) based on the fact that all Del Webb employees elected to leave the company.

All custodial account funds have been disbursed with proper authorization and funds were not taken into income or transferred to the corporation general account and there were no outstanding checks. Also, according to our records, there were no loan applications pending which were received before the decision to surrender the license was made. (R-1)

7. On May 29, 2003, the Commissioner sent a letter to respondent which detailed the requirements for a valid surrender of a license, and advised respondent it that it would not accept respondent's surrender because it failed to provide a plan for surrender and closing audit required under section 50123. (Exhibit R-2)

¹ All further statutory references are to the Financial Code, unless specified otherwise.

8. On November 1, 2003, Del Webb Mortgage Corporation merged into Del Webb Mortgage, LLC (LLC). (Exhibit C-17)

9. On November 6, 2003, Cynthia Mitchell-Dawson, Senior Paralegal for respondent, wrote to the Department of Corporations rescinding its previous notification to surrender its California license. (Exhibit C-3)

10. On December 8, 2003, the Commissioner issued an "Order Approving Effectiveness of Post License Amendment To Appoint New Officers and Directors" pursuant to section 50124, subdivision (a)(6). This amendment to the license authorized John Andrew D'Agostino as Treasurer for respondent. The Commissioner's December 8, 2003 Order references an application for Post License Amendment filed on September 11, 2003. (Exhibit R-3)

11. On December 11, 2003, the Commissioner sent a letter to respondent reminding it that its audited financial statement for the year ending 2003, was due no later than April 15, 2004, and that failure to file the audited financial statement would result in fines in accordance with section 50326, an immediate examination by the Commissioner in accordance with section 50307, and/or revocation of its license. (Exhibit R-14)

12. On April 5, 2004, Pulte Mortgage filed audited financial statements for LLC with the Commissioner. (Exhibit R-6)

13. On May 12, 2004, respondent filed a Certificate of Surrender with the Secretary of State. The Certificate of Status indicates that as of May 12, 2004, respondent was no longer authorized to transact business in California. (Exhibit C-13)

14. Sometime prior to June 25, 2004, LLC submitted an application for a California Residential Mortgage Lender and Servicer License. On June 25, 2004, Licensing Specialist Recy D. Ubaldo, wrote to LLC indicating receipt of the application and listed a number of items detailing required information that was missing from the application. (Exhibit R-7)

15. On June 25, 2004, the Commissioner notified respondent in writing that LLC's financial statements were rejected pursuant to section 50200, subdivision (b), and that the audited financial statements of Del Webb Mortgage Corporation had not yet been filed. (Exhibit R-8)

16. On November 12, 2004, Norman Beitner, Attorney at Law, wrote a letter on behalf of Pulte and LLC, explaining that on November 1, 2003, respondent merged into LLC, and that at the time of the merger, Pulte Mortgage was the sole shareholder of respondent and was the sole member of LLC. In his letter, Mr. Beitner further states, "Therefore, any direct ownership of the entity holding any license in the state of California, remained the same." In a December 13, 2004 letter, Diaun Burns, Special Administrator for the Commissioner, replied that respondent's license could not be transferred to LLC pursuant to section 50207, subdivision (b). (Exhibits R-11 and R-13)

17. On December 13, 2004, the Commissioner sent a letter informing respondent that it had not yet filed a financial statement for the year-end 2003, required under section 50200. (Attachment 17 of Comp. Post trial submission)

18. On January 4, 2005, the Commissioner sent a letter to respondent stating that the Commissioner had not yet received respondent's audit financial statement for year-end 2003. The Commissioner assessed a penalty of \$1,000 pursuant to section 50326, for failure to file said report. (Exhibit R-14)

19. On January 12, 2005, respondent sent a letter to the Commissioner advising the Commissioner that respondent could not provide an audited financial statement as requested because Del Webb Corporation ceased to exist in October 2003, and had not conducted any business in California since then. (Exhibit R-15)

20. On July 7, 2005, the Commissioner assessed a penalty of \$1,000 against respondent for failure to file an audited financial statement pursuant to section 50326, for failing to file the 2004 year-end audit report. (Exhibit R-18)

21. On November 17, 2005, the Commissioner sent a reminder letter to respondent directing respondent to pay the penalty and to file the 2004 audit report. The penalty has not been paid and the report has not been filed. (Exhibit R-24)

22. On December 6, 2005, the Commissioner sent a letter informing respondent that its audited financial statement for the year ending 2005, was due no later than April 15, 2006, and that failure to file the audited financial statement would result in fines in accordance with section 50326, an immediate examination by the Commissioner in accordance with section 50307, and/or revocation of its license. (Exhibit R-27)

23. On August 10, 2006, the Commissioner assessed another \$1,000 penalty against respondent pursuant to section 50326, for failing to file a 2005 audit report. Respondent has not filed the 2005 audit report. (Exhibit R-33)

24. On August 28, 2006, the Commissioner received a letter from LLC, advising the Commissioner that Del Webb Mortgage Corporation has not been able to file its audited financial statements for the years 2003 through 2005, because said corporation ceased to exist in 2003, when it was converted to LLC. In its letter to the Commissioner, LLC submitted its 2003, 2004 and 2005 financial audit reports in lieu of the audit reports requested for Del Webb Mortgage Corporation. (Exhibit R-36)

25. On October 5, 2006, the Commissioner sent a letter to respondent informing respondent that its surrender was not accepted because the LLC does not hold a California license under the CRMLA, and, therefore, LLC's financial statements cannot be used as those of Del Webb Mortgage Corporation. (Exhibit R-37)

26. On December 11, 2006, the Commissioner sent a letter to respondent reminding it that its audited financial statement for the year ending 2006, was due no later than April 15, 2007, and that failure to file the audited financial statement would result in fines in accordance with section 50326, an immediate examination by the Commissioner in accordance with section 50307, and/or revocation of its license. (Exhibit C-17)

27. On June 12, 2007, the Commissioner sent a second letter to respondent reminding it that its audited financial statement for the year ending 2006 was due no later than April 15, 2007. (Exhibit C-17)

28. To date, respondent has not filed a 2003, 2004, 2005, and 2006 audit reports pursuant to section 50200, subdivisions (a) and (d).

DISCUSSION

29. Financial Code section 50123, in effect during the relevant time period in the amended accusation, set forth the parameters for a surrender of a residential mortgage lender/servicer license. That section stated in pertinent part:

(a) A license shall remain in effect until suspended, surrendered, or revoked.

(b) A licensee that ceases to engage in the business regulated by this division and desires to no longer be licensed shall inform the commissioner in writing and, at that time, surrender the license and all other indicia of licensure to the commissioner. The licensee shall file a plan for the withdrawal from regulated business, and the plan shall include a timetable for the disposition of the business. The plan shall also include a closing audit, review, or other agreed upon procedures performed by an independent certified public accountant prescribed by rule or order of the commissioner. Upon receipt of the written notice and plan, the commissioner shall review the plan and, if satisfactory to the commissioner, shall accept the surrender of the license. A license is not surrendered until its tender is accepted in writing by the commissioner after a review, and a finding has been made on the licensee's plan required to be filed by this section, and a determination has been made that there is no violation of this law.

30. California Code of Regulations, title 10, section 1950.123, sets forth in detail the type of plan that a licensee is required to submit to the Commissioner when seeking to surrender its license. This regulation states:

Prior to surrendering its license, a licensee must file a plan for approval by the Commissioner. The plan shall contain the licensee's detailed proposal for the orderly closing out of its residential mortgage lending or residential mortgage loan servicing business. At a minimum, the plan shall contain the following:

(a) A detailed description of the plan to process to completion any loan applications pending which were received before the decision to surrender the license was made. In the alternative, the plan may describe the process for cancellation or completion of the loan by another licensee or exempt person.

(b) A detailed description of the plan to transfer the licensee's existing servicing portfolio, including the time frame within which the transfer will be completed.

(c) The time frame required for payout to the lender of all payments received from the borrowers, or the time frame required for transfer of payments received to another servicing licensee or exempt person.

31. Before respondent requested to surrender its license on February 27, 2003, it was purchased and acquired by Pulte Home, Inc. (Pulte) on March 2, 2002.² After receipt of respondent's request to surrender its license, the Commissioner informed respondent on March 3, 2003, that he would not accept the proposed surrender unless respondent complied with section 50123. On May 29, 2003, the Commissioner sent a letter to respondent detailing the requirements to properly surrender a license. Rather than submitting a closing audit and plan of surrender, as the Commissioner directed, Pulte, the parent company and sole shareholder of respondent, decided to merge respondent into LLC. Because of this merger, the respondent corporation no longer existed as of the merger date. (*J. C. Peacock v. Hasko* (1960) 184 Cal.App.2d 142, 151.) Therefore, it had no officers in place to file the required plan and documentation for surrender of its license. To add to this insoluble problem, section 50207, subdivision (b), prohibits a licensee from transferring or assigning a license. Neither party cited any legal authority for terminating a license by operation of law under the facts of this case.

32. The chronology of facts in this case resulted in what is popularly known as a "catch -22."³ This catch-22 problem was caused by respondent and/or its acquiring parent company, Pulte, for failing to submit the required closing audit and plan of surrender before Pulte caused the merger of respondent into LLC.

² The accusation did not allege that this acquisition violated Financial Code 50206, which sets forth the requirements for a change in control of a licensee's business.

³ A term coined by author Joseph Heller in his novel *Catch-22* (1961), which describes a condition or regulation preventing the resolution of a problem.

33. Although respondent terminated its residential mortgage loan business in 2003, it did not follow the requirements for surrender of a license as set forth in section 50123. LLC attempted to submit its 2003 audited financial statements rather than submitting respondent's audited financial statements. This was done despite the fact that as late November 2003, respondent rescinded its notification to surrender its license. Further, as late as September 2003, respondent filed an application for a Post License Amendment to Appoint New Officers and Directors.

34. While the license remained in effect, respondent was required to submit yearly audited financial statements. It has failed to file these required statements in 2003, 2004, 2005 and 2006, in violation of sections 50200 and 50326. However, it is noted that since the merger with LLC, respondent has not conducted business in California.

35. In mitigation, there was no evidence presented at the hearing that respondent committed any dishonest acts or that any consumer was harmed from any actions or omissions of respondent. Further, there is no previous record of discipline of respondent's license. However, this is a highly regulated industry where licensees are expected to comply with relevant statutes and regulations enacted to protect the public.

LEGAL CONCLUSIONS

Cause exists to revoke respondent's license to act as a residential mortgage lender and/or servicer under Financial Code sections 50326 and 50327, for failing to file year-end audited financial reports for 2003 through 2006.

ORDER

The residential mortgage lender and/or servicer license previously issued to Del Webb Mortgage Corporation is revoked.

DATED: January 5, 2009

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings