

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
of:

COMMISSIONER OF CORPORATIONS,

Complainant,

vs.

RICHARD J. FABULICH,

Respondent.

NMLS ID: 314867

Sponsor File No. 413-0574

OAH No. 2013060886

PROPOSED DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, on November 18, 2013, in Los Angeles. Complainant was represented by Alex M. Calero, Senior Corporations Counsel, and Adam J. Wright, Corporations Counsel. Respondent Richard J. Fabulich did not appear and was not represented at the noticed hearing.

When respondent did not appear for the hearing, the Administrative Law Judge called him on the telephone and reached him in Nevada. Respondent stated he was not coming to the hearing. Thereupon, the Administrative Law Judge declared respondent to be in default of this proceeding under Government Code section 11520. Complainant elected to proceed with the hearing as a default matter. Respondent did not participate in the hearing.

At the conclusion of the hearing, the Administrative Law Judge directed complainant to file a proposed order and granted the request of complainant's counsel that they be allowed to file a brief and have two months to file the proposed order and brief.

On January 15, 2014, complainant timely filed a proposed order and brief, which were marked collectively as Exhibit 36. On February 11, 2014, the Administrative Law Judge issued a Post-Hearing Order (Exh. 37), requesting

complainant to file a complete proposed order and a transcript of the hearing inasmuch as there were pages missing from the proposed order and references were made to a transcript in the proposed order. On March 3, 2014, complainant filed the hearing transcript as well as a complete proposed order. On March 10, 2013, the Administrative Law Judge received the hearing transcript and proposed order, which were marked as Exhibits 38 and 39, respectively. The hearing transcript was admitted into evidence.

Oral and documentary evidence and written argument having been received, the Administrative Law Judge submitted this matter for decision on March 10, 2014, and finds as follows:

FACTUAL FINDINGS

1. On or about April 16, 2012, respondent Richard John Fabulich filed an application for issuance of a mortgage loan originator license with the Commissioner of Business Oversight, formerly known as the Commissioner of Corporations (Commissioner), under provisions of the California Finance Lenders Law and the California Residential Mortgage Lending Act. Earlier, on March 17, 2011, respondent had filed an initial application for a mortgage loan originator license but was allowed to withdraw that first application.

2. (A) On May 29, 2013, the Department of Business Oversight (Department) informed respondent that it had determined not to issue him a mortgage loan originator license and asked when he would be available for a hearing.

(B) On June 13, 2013, respondent asked the Department if it would accept the withdrawal of this second application. The Department declined to accept respondent's offer to withdraw his application.

3. (A) On June 19, 2013, the Statement of Issues in Support of Denial of Mortgage Loan Originator License (Statement of Issues) was made and filed on behalf of the Commissioner by Alex M. Calero in his official capacity as Corporations Counsel for the Department.

(B) On July 17, 2013, the Statement of Issues and other required documents and notices were duly served upon respondent at his address in Nevada. Respondent was also served with a Notice of Hearing and a Notice to Appear. On or about September 24, 2013, respondent was served with a Motion to Compel Discovery after he failed to respond to complainant's request for discovery. On October 18, 2013, respondent appeared by telephone for a hearing on the Motion to Compel Discovery filed by the Commissioner. The Motion to Compel Discovery was granted. On November 18, 2013, respondent failed to appear for the noticed hearing on the Statement of Issues. Jurisdiction exists in this matter.

4. When he filed his application for issuance of a mortgage loan originator license on April 16, 2012, respondent submitted his application via the internet on the Nationwide Mortgage Licensing System (NMLS). He answered a number of disclosure questions, attached a number of documents and exhibits to his application, and submitted his application to the NMLS using an electronic signature. On the Attestation page of the application, respondent attested under penalty of perjury that the information, statements, and exhibits in his application were current, true, accurate, and complete. By signing the Attestation, respondent acknowledged that, if he made a false statement of a material fact in his application or in any documentation provided in support of the application, then his application may be denied.

PrimeCap Mortgage Fund, L.L.C.

5. In his April 16, 2012 application for a mortgage loan originator license, in response to a financial disclosure question asking whether he had ever filed for bankruptcy, respondent stated that he was president of PrimeCap Mortgage Fund, L.L.C. (PrimeCap), from 2002 until 2006. PrimeCap later changed its name to American Secured Capital Fund. Respondent also stated that he was hired in 2003 by the founder of PrimeCap, Paul Winter (Winter), to operate the company. In another section of his application pertaining to his employment history, respondent stated he was vice-president of PrimeCap from December 2005 until August 2006. Respondent's representations on his application about his position or role with PrimeCap were inconsistent.

6. (A) On or about April 15, 2004, PrimeCap filed a section 25102(f) securities exemption notice with the Commissioner. In the Notice of Transaction Pursuant to Corporations Code Section 25102(f), Winter was listed as the President of PrimeCap.

(B) On November 29, 2004, PrimeCap was issued a finance lender and broker license by the Department. In the Application for License Under the California Finance Lenders Law, PrimeCap listed or named Winter as the officer with direct responsibility for the conduct of the lending activity, the person who owned or controlled 10 percent or more of the company, and the person who was to be in charge of the place of business. In the Statement of Identity and Questionnaire accompanying that application, Winter was named as the president, secretary, and chief financial officer of PrimeCap. Respondent was not named as the president in that application. In addition, in PrimeCap's annual reports, Winter, and not respondent, was named as PrimeCap's manager.

(C) On November 15, 2004, PrimeCap filed an Application for Qualification of the Offer and Sale of Securities Under the Corporate Securities Law of 1968 with the Department in order to obtain a permit to offer and sell securities in

this state. In said application, Winter was named as the president of PrimeCap and he signed the application in his capacity of president of the applicant PrimeCap. In the offering circular for that application, Paul Winter was listed as the control person of PrimeCap and the person responsible for the final underwriting and approval of all loans.

7. (A) In December 2005, based upon the representations made by PrimeCap in its application for a securities permit, the Commissioner issued a permit authorizing PrimeCap to offer and sell securities in this state for the 12-month period ending on December 12, 2006.

(B) In July 2007, a Corporations Investigator accessed and viewed a website that was represented as the internet homepage for PrimeCap. From this website, the Corporations Investigator downloaded an offering circular for PrimeCap to offer and sell securities. The offering circular from the PrimeCap website homepage listed respondent as the control person for PrimeCap, which statement or representation was different from and contrary to the offering circular that had been submitted to the Department in connection with its application for a permit to offer and sell securities.

8. Based on Findings 4 – 7 above, respondent's statement in his application for a mortgage loan originator license that he was president of PrimeCap from 2002 until 2006 was false and incorrect. The clear preponderance of the evidence demonstrated that respondent was not the president of PrimeCap from 2002 until 2006 or at any other time. As such, respondent's statement that he was president of PrimeCap constituted a material misrepresentation.

2007 Desist and Refrain Order

9. In his April 16, 2012 application for a mortgage loan originator license, respondent was asked whether any state or federal regulatory agency had ever taken any action or entered an order against him in connection with a financial services-related activity or any license or registration. In response to this question, respondent indicated that the Department issued a Desist and Refrain Order against PrimeCap in 2007 but that no violations were found and PrimeCap's offering circular was approved. Respondent added that the 2007 Desist and Refrain Order was not really a "Cease and Desist" order but an order to stop advertising a public offering. Respondent explained that after its offering had been approved by the Department, PrimeCap decided to "shelve the offering" but had forgotten to remove the offering from its website homepage. Respondent implied that PrimeCap had done nothing illegal and stated the Department's action was "excessive."

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10. On July 11, 2007, the Commissioner issued a Desist and Refrain Order to respondent, Winter, PrimeCap, and American Secured Capital Fund for offering or selling securities in PrimeCap, which were subject to qualification under the California Corporate Securities Law of 1968, without first being qualified in violation of Corporations Code section 25110. The securities were offered or sold in this state in issuer transactions and the Department had not issued a permit or other form of qualification authorizing any person to offer or sell the securities in this state. Pursuant to Corporations Code section 25532, respondent, Winter, PrimeCap, and American Secured Capital Fund were ordered to desist and refrain from the further offer or sale of the PrimeCap securities unless and until qualification was obtained or unless exempt.

11. (A) In this state, the issuance of a desist and refrain order by the Commissioner is an indication that certain activity constitutes a violation of California's securities law. (Corp. Code, § 25532, subd. (a).)

(B) Contrary to respondent's representations in his April 2012 application, the Desist and Refrain Order issued by the Commissioner in 2007 was not an order to stop advertising but an indication that the Commissioner had determined that respondent, Winter, PrimeCap, and American Secured Capital Fund had, in fact, violated California's securities law.

12. Based on Findings 4 and 9 – 11 above, respondent's statements or representations in his application about the 2007 Desist and Refrain Order were misleading and therefore were not true or correct.

Wisconsin Order of Prohibition and Revocation

13. In his April 16, 2012 application for a mortgage loan originator license, and in further response to the question of whether any state or federal regulatory agency had ever taken any action or entered an order against him in connection with a financial services-related activity or any license or registration, respondent disclosed that the State of Wisconsin filed a "Petition for Order" against him. Respondent stated he had misinterpreted Wisconsin law for qualification for an exemption.

14. (A) On July 23, 1999, the Division of Securities, Department of Financial Institutions, State of Wisconsin, issued a Petition for Order alleging that respondent and other individuals and entities had offered and sold promissory notes of Tri-National Development Corporation, a San Diego company, which were deemed securities and never registered for offer and sale in that state, in violation of Wisconsin law. Respondent in his capacity of president of Johnson, Richards & Company, Inc., a San Diego company, and other individuals and entities were alleged to have employed agents to transact business in Wisconsin; the agents were not licensed as securities agents under Wisconsin law. In addition, the offering materials

failed to provide information to investors of the company's declining financial revenue and income, which was considered the making of an untrue statement of material fact or an omission to state a material fact.

(B) On July 28, 1999, based on the Petition for Order, the Administrator, Division of Securities, Department of Financial Institutions, State of Wisconsin, issued an Order of Prohibition and Revocation to respondent and other persons and entities. Under the Order of Prohibition and Revocation, respondent was prohibited from making any further offers or sales of securities, unless the securities were registered, and he was prohibited from employing an agent to represent him in Wisconsin. In addition, any exemptions for any offer or sale of any security that were previously issued to respondent were revoked.

15. Based on Findings 4 and 13 – 14 above, respondent's explanation about the issuance of the Wisconsin Petition for Order was misleading and not true and correct.

November 1999 Desist and Refrain Order

16. In his April 16, 2012 application for a mortgage loan originator license, and in further response to the question of whether any state or federal regulatory agency had ever taken any action or entered an order against him in connection with a financial services-related activity or any license or registration, respondent disclosed that the Department had issued two Desist and Refrain Orders to him in November 1999.

17. On November 30, 1999, the Acting Commissioner issued a Desist and Refrain Order to respondent, ordering him to desist and refrain from the further offer or sale of securities, including promissory notes of Tri-National Development Corporation, unless and until qualification had been made under the California Corporate Securities Law of 1968, unless exempt. The Acting Commissioner opined that the sale of those securities was subject to qualification and that the securities were being offered or had been offered for sale without first being so qualified. The Acting Commissioner found that the Desist and Refrain Order was necessary for the protection of investors and in the public interest.

18. On November 30, 1999, the Acting Commissioner issued a second Desist and Refrain Order to respondent, ordering him to desist and refrain from acting as a broker-dealer in this state unless and until he was licensed as such under the California Corporate Securities Law of 1968 or unless exempt. The Acting Commissioner opined that respondent was acting or had acted as an unlicensed broker-dealer and found that the Desist and Refrain Order was necessary for the protection of investors and in the public interest.

Bankruptcy

19. In his April 16, 2012 application for a mortgage loan originator license, and in response to the question asking whether he had filed a personal bankruptcy petition or been the subject of an involuntary bankruptcy petition within the past 10 years, respondent disclosed that he had filed for Chapter 7 bankruptcy in August 2008. He explained that he had no income in 2007 and 2008 due to the recession and the closure of PrimeCap and American Secured Capital Fund.

20. On or about August 22, 2008, in the United States Bankruptcy Court, Southern District of California, respondent filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code. He declared under penalty of perjury, in part, that his debts were primarily consumer debts, he had one to 49 creditors, he had estimated assets of \$500,001 to \$1 million and estimated liabilities of \$1,000,001 to \$10 million, and he estimated that, after any exempt property was excluded and administrative expenses paid, there would be no funds available for distribution to unsecured creditors. On November 26, 2008, the United States Bankruptcy Court issued a Discharge of Debtor to respondent.

Civil Lawsuits

21. In his April 16, 2012 application for a mortgage loan originator license, and in response to the question of whether he had ever been named as a defendant in a financial service-related consumer-initiated arbitration or civil litigation which resulted in an arbitration award or civil judgment against him, respondent disclosed that he had a judgment of \$62,850 entered against him in a civil lawsuit filed by Lucille Green. He explained that the Green lawsuit was "derived" from the Wisconsin Order of Prohibition and Revocation and the California Desist and Refrain Order and that the judgment was discharged in bankruptcy.

22. (A) On or about October 11, 2000, plaintiff Lucille Green filed a civil lawsuit for damages in the United States District Court, Middle District of Louisiana, against Johnson Richards & Company, Inc., respondent as president of Johnson Richards & Company, Inc., Tri-National Development Corporation, and other defendants. Plaintiff Green alleged that respondent and the other defendants had committed violations of state and federal securities laws, racketeering, and false advertising. Johnson Richards & Company, Inc., Tri-National Development Corporation, and a Louisiana marketing firm were alleged to have sold unregistered securities in the form of corporate promissory notes with a term of 270 days, which were represented as exempt from regulation under Louisiana securities laws. Green purchased \$62,000 worth of the promissory notes. Green tried to collect or redeem the promissory notes when they became due. However, the promissory notes or securities went into default and were not paid.

(B) On November 10, 2003, in a default judgment, the United States District Court ordered, adjudged, and decreed that plaintiff Green recover \$62,620 with interest from respondent and the other defendants. The federal court awarded two other plaintiffs the sums of \$10,200 and \$30,600, respectively, with interest and late charges. Respondent and the other defendants were served with process but failed to appear or to answer the complaint.

23. Respondent was a defendant in four other consumer or investor-initiated lawsuits as follows.

a. On March 27, 1980, plaintiff Rae C. Hoffman (Hoffman) filed a civil lawsuit in the Superior Court of California, County of San Diego, against respondent and other defendants. Hoffman sought damages from respondent and other defendants for fraud and breach of fiduciary duty.

b. On or about March 15, 1982, Jim Gompers and other plaintiffs filed a civil lawsuit in the Superior Court of California, County of San Diego, against respondent and other defendants. Plaintiffs sought damages and other remedies from respondent and the other defendants for negligent misrepresentation and breach of contract.

c. On or about June 17, 1982, Larry E. Carter and other plaintiffs filed a civil lawsuit in the Superior Court of California, County of San Diego, against respondent and other defendants, seeking damages and other remedies for fraud and breach of fiduciary duty.

d. On or about October 12, 1982, Charles R. Barranco and other plaintiffs filed a civil lawsuit in the Superior Court of California, County of San Diego, against respondent and other defendants. Plaintiffs sought damages and other remedies from respondent and the other defendants for fraud and other causes of action.

24. In a letter that accompanied his April 16, 2012 application for a mortgage loan originator license, respondent explained the facts and circumstances of the four civil lawsuits filed against him and other defendants described in Finding 23 above. He stated that, in or about 1977, he and co-defendant John Felton started an apartment building syndication investment business. Respondent and Felton were both licensed real estate brokers and operated the apartment syndication investment business through two corporations engaged in real estate activities. The two of them raised funds from friends, family, and referrals and used the funds to purchase apartment complexes. Respondent and Felton eventually purchased 14 apartment complexes or projects that had approximately 1,200 units. Later, investors demanded payoffs or refunds of their investments and filed civil lawsuits when respondent and

Felton did not have the funds or capital to pay them. Respondent and Felton sold and/or assigned the equity in several rental properties to settle the civil lawsuits and to pay damages to the plaintiffs.

25. (A) On or about July 11, 1994, plaintiff William L. Foster filed a civil lawsuit for breach of contract and fraud in the Superior Court of California, County of San Diego, against respondent and other defendants. On August 5, 1995, pursuant to a Stipulation for Judgment, the Superior Court entered a civil judgment against respondent for breach of contract for \$18,000. The other causes of action against respondent and all claims as to all other parties were dismissed.

(B) In his letter that accompanied his April 16, 2012 application for a mortgage loan originator license, respondent explained that he and his business partner, who was a friend and a real estate developer, started a business that developed, printed, and sold discount coupon booklets to charitable organizations which, in turn, sold the coupon booklets to the public to raise funds. Plaintiff Foster invested money in the business and, when he demanded and was not paid for his investment, filed the civil lawsuit against respondent and other defendants. According to respondent, his business partner settled the civil lawsuit by letting Foster work with him on a real estate development project.

26. No evidence of mitigation or rehabilitation or evidence in support of his application was presented by respondent. Respondent attempted to withdraw his application for a mortgage loan originator license as well as his request for hearing but complainant did not accede to his requests.

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Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds exist to deny respondent's application for a mortgage loan originator license under Finance Code sections 22109.1 and 50141, in that respondent has failed to demonstrate such financial responsibility, character, or general fitness to command the confidence of the community or to warrant a determination that he will operate as a mortgage loan originator in an honest, fair, and efficient manner and within the purposes of the Finance Lenders Law (Fin. Code, § 22000 et seq.) and the Residential Mortgage Lending Act (Fin. Code, § 50000 et seq.), based on Findings 1 – 26 above.

2. Discussion—On April 16, 2012, respondent submitted an application for a mortgage loan originator license. He provided information and answered questions on the application. Respondent's disclosures and answers, when examined against the documents of actual events and filings, showed that he lacks the financial responsibility, character, and general fitness to warrant issuance of the license.

In his application for a mortgage loan originator license, respondent made material misrepresentations to the Commissioner about his role or involvement with PrimeCap. He claimed that he was the president of PrimeCap from 2002 until 2006. Certain filings with the Department did not support his claim. In addition, respondent mischaracterized and made material misrepresentations about the nature and breadth of the Desist and Refrain Order issued to him in 2007. He claimed that he did nothing wrong and that the Department's actions were excessive when, in fact, the issuance of the Desist and Refrain Order demonstrated that he violated the securities laws of this state. Respondent was the subject of two other Desist and Refrain Orders in California and an Order of Prohibition and Revocation in Wisconsin for activities related to the offer and sale of securities. He was also a defendant in six financial services-related consumer –initiated civil lawsuits that resulted in judgments against him. In 2008, respondent filed for bankruptcy and his debts which exceeded \$1 million were discharged.

Based on the evidence of his material misrepresentations on his application, his history of being the subject of regulatory action and civil lawsuits, and his filing for bankruptcy, it cannot be concluded that respondent has the requisite character and financial responsibility necessary to be licensed as a mortgage loan originator in this state. For his part, respondent did not carry his burden of proving his entitlement to licensure.

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Wherefore, the following Order is hereby made:

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ORDER

The application of respondent Richard J. Fabulich for issuance of a mortgage loan originator license is denied, based on Conclusions of Law 1 – 2 above, jointly and for all. The Statement of Issues, NMLS ID No. 314867, Sponsor File No. 413-0574, is sustained.

Dated: April 10, 2014

/s/

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings

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DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated April 10, 2014, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter with technical and minor changes on the attached Errata Sheet pursuant to Government Code Section 11517(c)(2)(C).

This Decision shall become effective on August 22, 2014.

IT IS SO ORDERED this 23rd day of July, 2014.

COMMISSONER OF BUSINESS OVERSIGHT

/s/

Jan Lynn Owen