

BEFORE THE
DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION
STATE OF CALIFORNIA

In the Matter of:

COMMISSIONER OF BUSINESS OVERSIGHT,

Complainant,

v.

ANDREW KENNETH KIEMM,

Respondent.

Agency No. 345157

OAH No. 2020070362

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Financial Protection and Innovation (formerly the Department of Business Oversight) as its Decision in the above-entitled matter.

This Decision shall become effective on May 12, 2021.

IT IS SO ORDERED THIS 12th day of April, 2021.



[Redacted Signature]

MANUEL P. ALVAREZ
Commissioner of Financial Protection and Innovation

**BEFORE THE
DEPARTMENT OF FINANCIAL PROTECTION AND
INNOVATION
STATE OF CALIFORNIA**

In the Matter of:

THE COMMISSIONER OF BUSINESS OVERSIGHT,

Complainant,

v.

ANDREW KENNETH KIEMM,

Respondent.

Agency Case No. 345157 (Statement of Issues)

OAH No. 2020070362

PROPOSED DECISION

Cindy F. Forman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter remotely by videoconference on December 3, 2020.

Uche L. Enenwali, Senior Counsel, appeared on behalf of Commissioner Manuel P. Alvarez (Complainant) of the Department of Financial Protection and Innovation (Department).

Lindsay M. Johnson, Attorney at Law, appeared on behalf of respondent Andrew Kenneth Kiemm (Respondent), who was present.

Testimony and documentary evidence were received. The record was kept open until December 17, 2020, to allow Complainant to file an Amended Statement of Issues (Amended Statement) and for Respondent to object to the Amended Statement as well as file an additional character letter. Complainant timely filed an Amended Statement (marked as Exhibit 13). Respondent timely filed a character letter (marked as Exhibit G) and an objection to the Amended Statement (marked and lodged as Exhibit H). Complainant filed a Reply to Complainant's Objection to Amended Statement of Issues on December 30, 2020, which was not considered because it was filed 13 days after the record in this matter was deemed closed. No objection was made to Exhibit G, which was admitted as administrative hearsay.

ADMISSIBILITY OF AMENDED STATEMENT

The Statement of Issues in Support of Notice of Intention to Issue Order Denying Mortgage Loan Originator License Application and Barring Andrew Kenneth Kiemm from Any Position of Employment, Management, or Control of any Residential Mortgage Lender, Servicer, or Mortgage Loan Originator (Statement of Issues) filed in this matter seeks to deny Respondent a mortgage loan originator (MLO) license and to bar Respondent from the mortgage lending, brokerage, and mortgage loan originator businesses based on certain identified conduct. At hearing, Complainant contended Respondent's breach of his obligations under a promissory note he executed with Arthur Gaerlan (Gaerlan promissory note) should also be considered in evaluating the relief requested and offered Mr. Gaerlan's testimony and email communications in support of the claim. Respondent objected to the admission of Mr. Gaerlan's

testimony and the documentary evidence on grounds of relevance and prejudice because the Statement of Issues makes no mention of the Gaerlan promissory note as a reason for the requested relief. In response, Complainant agreed to amend the Statement of Issues to include the new charge. In response to an inquiry by the ALJ, Respondent declined to continue the hearing to prepare a defense to the new charge. However, to avoid undue prejudice and surprise and to allow Respondent to prepare for his testimony on the issue, Complainant, in response to the ALJ's request, made an oral proffer of the substance of the amendment. The ALJ also gave Respondent leave to file an objection to the Amended Statement after it was filed.

In his written objection, Respondent asserts Complainant's amendment violates Government Code sections 11503, 11504, and 11513 and therefore is unduly prejudicial. According to Respondent, the Amended Statement violates Government Code section 11503 because it contains material not included in the oral proffer, thus hampering his defense. Respondent also complains Complainant's delay in amending the Statement of Issues until after the hearing, despite knowledge of the Gaerlan promissory note 20 days before the hearing, violates Government Code section 11504. That statute requires a statement of issues to specify any particular matters that have come to the Department's attention warranting action by the Department. Respondent further complains he has been prejudiced by his inability to address or rebut any new allegations in the Amended Statement in violation of Government Code section 11513, subdivision (b). Respondent contends these violations have deprived him of due process and his right to mount a meaningful defense.

Respondent's objections are overruled. Government Code section 11507 permits Complainant to amend an accusation at any time before the matter is submitted for decision. The statute provides if the amendment contains new charges, a

respondent may have a reasonable opportunity to prepare his or her defense to those charges. Thus, Complainant had the right to amend the Statement of Issues at any time until the issuance of this Proposed Decision. While delaying the amendment until after the hearing may have violated the spirit of Government Code section 11504, Complainant made Respondent aware of the Gaerlan promissory note before the hearing, and Respondent had the opportunity to seek a continuance at that time or at the hearing, which he declined to do. Nor has Respondent requested a continuance after receipt of the Amended Statement. Respondent's concerns about allegations not included in the oral proffer are noted. However, allegations are not evidence, and they will not be considered unless they were supported by evidence admitted at the hearing. The Amended Statement is therefore admitted as Exhibit 13 for jurisdictional purposes.

SUMMARY

Complainant seeks to deny Respondent's application for an MLO license as well as bar him from any position of employment, management, or control of in the mortgage lending, brokerage, or MLO business. Complainant established that Respondent has failed to show the necessary financial responsibility, character, and fitness required to hold an MLO license, and therefore its denial of Respondent's application for an MLO license is affirmed. However, considering the absence of evidence showing Respondent's conduct involved fraud or dishonesty and significant rehabilitation evidence, the bar sought by Complainant is not necessary or warranted to protect the public. Accordingly, Complainant's request to bar Respondent from the mortgage lending, brokerage, and MLO businesses is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. On April 10, 2013, Complainant granted Respondent a Mortgage Loan Originator license (MLO), NMLS (Nationwide Mortgage Licensing System) unique identifier number 345157. The MLO license expired on January 1, 2014. According to the State License/Registration List, MLO License number 345157 was reinstated on November 13, 2014, and expired on January 1, 2019. (Exhibit 7, p. 66.) The Amended Statement does not reflect the reinstatement dates; no explanation for the omission was provided at the hearing.

2. On August 28, 2019, Respondent filed an application for an MLO license with the Complainant by submitting a Form MU4 (Application) through the NMLS under Financial Code section 50140.

3. On May 29, 2020, the Statement of Issues signed by Uche L. Enenwali on behalf of Complainant, both in their official capacity, was served on Respondent. Respondent timely filed a Notice of Appeal, and this hearing followed.

The Application

4. The Application required Respondent to disclose specific information in certain categories, including his finances, criminal history, civil judgments relating to financial services activity, regulatory action, financial services-related customer arbitration and civil litigation, and employment termination. Respondent answered affirmatively and supplied explanations to questions regarding whether he had filed a personal bankruptcy petition within 10 years of the Application, whether he had unsatisfied judgments or liens against him, whether a state or federal regulatory

agency had revoked his registration or license, and whether a state or federal regulatory agency had denied or suspended his registration or license or application for licensure, disciplined him, or otherwise by order, prevented him from associating with a financial services related business or restricted his activities. Respondent answered "No" to all other questions in the Application.

5. Respondent provided the requested information under penalty of perjury, representing that his answers were current, true, accurate, and complete. (Exhibit 7.)

6. The Department assigned Ms. Naureen Saeed, Examiner, to evaluate the Application. According to Examiner Saeed, who testified at the hearing, the Department uses internal and external data to review an MLO application and to determine whether an applicant will operate fairly and honestly. Examiner Saeed found Respondent had correctly responded to the Application's questions. However, she concluded Respondent was unfit to hold an MLO license because of the revocation of his real estate broker license by the Department of Real Estate (DRE), the DRE's denial of his petition for reinstatement, his outstanding tax lien, his multiple civil judgments, and the actions by the State of Colorado denying his MLO license application. Examiner Saeed was not asked to review the Gaerlan promissory note because she was unaware of its existence at the time of her evaluation of the Application.

Discipline by DRE

LICENSE REVOCATION

7. Respondent obtained his real estate broker license on June 8, 2004. On March 29, 2010, the DRE Commissioner filed an accusation against Respondent in the action titled *The Matter of the Accusation of Milestone Capital Group Inc. and Andrew*

Kenneth Kiemm, individually and formerly as designated officer of Milestone Capital Group, Case number H-36566 LA (DRE Accusation). According to the DRE Accusation, Milestone Capital Group Inc. (Milestone) held a corporate real estate broker license and was in the business of brokering mortgage loans and performing loan modification activities. Respondent was the designated officer of Milestone from November 6, 2008, to May 20, 2009.

8. The DRE Accusation charged Respondent with failure to supervise Milestone, based on a letter he wrote in response to a DRE inquiry regarding his relationship with Milestone. In that letter, dated October 20, 2009, Respondent admitted he had lent his broker license to a friend, the president of Milestone, and Respondent had no knowledge of or access to Milestone's activities. The DRE Accusation alleged that Respondent's actions and omissions constituted a breach of responsibility in violation of Business and Professions Code section 10159.2 and a cause for discipline of Respondent's broker license pursuant to Business and Professions Code section 10177, subdivisions (d), willfully disregarding or violating the Real Estate Law or the rules and regulations promulgated thereunder; (g), demonstrating negligence or incompetence in performing an act for which the officer is required to hold a license; and (h), failing to exercise reasonable supervision over the activities of the corporation for which a real estate license is required. The DRE Accusation did not charge Respondent with any fraud or dishonest dealing.

9. The DRE Accusation charged Milestone with collecting advance fees for four loans during Respondent's tenure at the company. According to the DRE Accusation, Milestone failed to submit the advance fee agreements to the Commissioner 10 days before using them in violation of Business and Professions Code section 10085 and California Code of Regulations, title 10, section 2970. The DRE

Accusation alleged Milestone's conduct was cause for discipline under Business and Professions Code sections 10085, 10177, subdivision (d), and 101177, subdivision (g). The DRE Accusation did not allege Respondent had knowledge of or profited from Milestone's activities. The DRE Accusation also did not charge Milestone with any fraud or dishonest dealing.

10. Milestone did not defend the DRE Accusation and petitioned DRE for voluntary surrender of its license on May 17, 2010, which DRE accepted on June 24, 2020, and ordered effective on October 4, 2010. In the Petition, Milestone agreed that all relevant evidence obtained by DRE and all allegations contained in the DRE Accusation could be considered true and correct for the purpose of deciding whether or not to grant reinstatement of Milestone's corporate real estate license. (Exhibit 8.) As a result of Milestone's surrender, no evidentiary hearing was held regarding DRE's allegations of Milestone's alleged misconduct, and no factual findings or legal conclusions were made.

11. Respondent failed to file a Notice of Defense to the DRE Accusation within the time required by Government Code section 11506 and was found in default. A Default Order was entered on July 20, 2010. On August 10, 2010, the DRE Commissioner issued a decision revoking Respondent's licensing rights based on his decision to lend his broker license to Milestone. The DRE Commissioner found Respondent's conduct constituted a breach of responsibility by the corporate officer in charge, in violation of Business and Professions Code section 10159.2, and cause for revocation of Respondent's licenses and licensing rights under Business and Professions Code sections 10177, subdivisions (d), (g), and (h). The decision became effective October 4, 2010.

12. At hearing, Examiner Saeed testified DRE had revoked Respondent's license because he had engaged in multiple fraudulent activities and failed to supervise Milestone. Neither the DRE Accusation nor the DRE orders accepting Milestone's voluntary license surrender or revoking Respondent's real estate license support Examiner Saeed's finding that Respondent engaged in fraudulent activities while associated with Milestone. DRE made no finding that either Respondent or Milestone engaged in fraud or dishonest dealings. Respondent was not charged with improper billing; nor was any finding made as to whether Milestone improperly charged advanced fees.

13. There is also no evidence to support the Amended Accusation's allegation that Respondent "rented" his license to Milestone. (Exhibit 13, ¶ 36.) DRE made no such findings, and Respondent never stated he had done so. In the Application, Respondent confirmed he had lent his broker license to a friend he had known for 10 years and had "known him to do things right." (Exhibit 7, p. 60.) He noted he had had no financial interest in Milestone nor was he compensated for the use of his broker license. According to Respondent, he was just doing "a favor" for a friend and was assured that Milestone "was an attorney based loan modification company and so adhered to different regulations when it came to accepting upfront fees." (*Ibid.*) Respondent's testimony at the hearing mirrored his statement in the Application.

PETITION FOR REINSTATEMENT

14. On April 25, 2018, Respondent petitioned DRE to reinstate his real estate broker license (DRE Petition) at his employer's request. On April 30, 2019, DRE denied the DRE Petition because Respondent did not meet the criteria for rehabilitation set forth in California Code of Regulations, title 10, section 2911. Specifically, DRE found that Respondent had not demonstrated bona fide efforts toward discharging

adjudicated debts or monetary obligations to others, he had not formed new and different social and business relationships, and he had not demonstrated a change in attitude, and therefore he failed to demonstrate sufficient rehabilitation to warrant reinstatement of his broker license.

15. Relevant to the Department's MLO evaluation according to Examiner Saeed and the Amended Statement was DRE's finding that Respondent failed to provide any evidence of bona fide efforts toward resolving a \$1.36 million non-dischargeable debt in favor of Peter Huang. (Exhibit 8, p. 101.) The debt was part of a Stipulation and Order Respondent entered into on March 14, 2000, before the United States Bankruptcy Court, Central District of California in Case No. 8:99-ap-01984-JR.

16. According to his testimony at hearing, Respondent sought bankruptcy in late 1999 or early 2000 because of a failed business; he filed for personal bankruptcy under Chapter 7 as well as bankruptcy for his business upon his attorney's advice. Mr. Huang was Respondent's mentor, and he had financed Respondent's business. Mr. Huang refused to agree to make his debt dischargeable, and Respondent agreed to make the debt non-dischargeable to close the proceedings. Respondent no longer has a relationship with Mr. Huang and has not paid any of the debt owed to Mr. Huang.

17. Also relevant to the Department's MLO evaluation according to the Amended Statement was DRE's finding that Respondent failed to disclose the 2000 bankruptcy that led to the \$1.36 million judgment in the DRE Petition. The DRE Commissioner stated as follows:

In response to Question 4A in his Enforcement Petition Application, to wit "Do you have any past debts, outstanding judgments, or have you filed for bankruptcy?",

Respondent disclosed a different bankruptcy, but did not disclose the bankruptcy which led to the \$1,360,00 judgment. . . . In *Harrington vs. Dept. of Real Estate* (1989), 214 Cal. App. 3d, the court stated that lack of candor in completing a license application is itself sufficient to sustain a finding that the applicant does not yet appreciate the need to speak honestly about and to accept responsibility for one's actions.

(Exhibit 8, p. 101.)

18. Respondent contended the DRE Petition did not require Respondent to disclose the 2000 bankruptcy. However, he provided no evidence to support his contention. Nor has Respondent appealed the DRE's denial of the DRE Petition.

Civil Monetary Judgments and Liens

19. The Department's investigation and review of public records disclosed several civil monetary judgments entered against Respondent. The Amended Statement identifies six judgments between 1991 and 2010 entered on behalf of B.A., Ar.P., P.M., Y.K., and two judgments on behalf of Foot Joy. (Exhibit 13, ¶ 20.) However, the evidence only reflects judgments on behalf of B.A., Y.K., and Foot Joy; there are no records of any judgments entered on behalf of Ar.P. or P.M., and the B.A. judgment is reflected in the records as \$3,635, not \$3,495 as noted in the Amended Statement. (Exhibits 7, pp. 71, 77, 78, and 10, p. 125.) The Department also confirmed Respondent filed for Chapter 7 bankruptcy in 2012, and it was unclear whether any of these judgments had been discharged in that bankruptcy.

20. Respondent stated that all the identified judgments had been paid. After the discharge of the 2012 bankruptcy, Respondent faced two IRS tax liens. One of those liens has been released. As of the hearing date, one IRS tax lien remains pending. Respondent continues to make payments toward the lien.

Out-of-State Applications for MLO License

21. Respondent submitted two applications for an MLO license to the Colorado Department of Regulatory Agencies (Colorado Department), the first in July 2016 and the second in May 2017. According to the Colorado Department's responses, the Colorado Board of Mortgage Loan Originators reviewed both applications and in each case determined Respondent "has not demonstrated financial responsibility, character, and general fitness to command the confidence of the community and to warrant a determination that the individual will operate honestly, fairly, and efficiently; and . . . Respondent has had a mortgage loan originator license or similar license revoked in any jurisdiction." (Exhibit 9.) The Colorado Department therefore denied Respondent's two applications. It provided no further explanation for its denials.

22. In the Application and at hearing, Respondent admitted the Colorado Department had denied both of his MLO license applications. According to Respondent, conversations with Colorado authorities led him to believe his application had been denied because of his poor credit rating in 2016. He had improved his creditworthiness by the time of his 2017 application, and he applied in 2017 with the hope that the Colorado authorities would recognize the improvement and approve his application. He did not appeal the Colorado determination because his employer no longer required the MLO license and he was not a resident of Colorado.

Unsatisfied Promissory Note

23. On April 11, 2006,¹ Respondent and Mr. Gaerlan executed the Gaerlan promissory note, which set forth the terms of a loan Mr. Gaerlan's made to Respondent's car remodeling business. The Gaerlan promissory note states as follows:

I, [Respondent] (Borrower) . . . received . . . a loan in the amount of \$80,000 (Principal) to be invested. Terms of Payment: The borrower will make a one time [sic] payment of principal plus 20% interest in 6 weeks from the date of this promissory note is executed to the lender

(Exhibit 11, p. 143.) Although Respondent indicated the note would be secured by his home in an earlier email, no promise of security was contained in the note. (*Id.* at p. 138.)

24. In June 2006, Respondent repaid \$53,000 of the loan to Mr. Gaerlan, leaving a balance of \$27,000 of principal and \$16,000 of interest. Mr. Gaerlan made repeated requests for Respondent to repay the balance of the loan for more than a year and then again in 2014. Although Respondent told Mr. Gaerlan he would "keep in touch" and "his intention was to pay" Mr. Gaerlan, Respondent did not keep in touch and did not make good on his commitment to pay the amount due. (Exhibit 11, p. 191.) As of the date of the hearing, Respondent had not made any efforts to repay the

¹ The Amended Statement states that Respondent and Mr. Gaerlan executed the note on April 11, 2020. (Exhibit 13, ¶ 23.) The ALJ assumes this is a typographical mistake as the evidence demonstrates the note was executed on April 11, 2006.

outstanding principal or interest; nor had he indicated whether he intended to pay off the debt, given that it was now more than 14 years old and well beyond the statute of limitations.

25. Mr. Gaerlan had learned of the investment opportunity from his real estate broker who considered Respondent "her partner." (Exhibit 11, p. 140.) His real estate broker told Mr. Gaerlan she had invested with Respondent in the past. (*Ibid.*) She also informed Mr. Gaerlan that Respondent owned the company that had processed his loan when he refinanced his mortgage. (*Ibid.*) When Mr. Gaerlan queried Respondent seeking more information about the loan, Respondent stated the following: "I do quite a few things. I have the mortgage company. I invest in real estate and small businesses, but what I had already made arrangements for your money is the safest investment of all. . . . I guarantee you that your money is very safe. [T]here is no risk." (*Id.* at p. 142.)

26. At hearing, Respondent acknowledged accepting Mr. Gaerlan's loan and failing to repay it. He testified the loan was made before the mortgage meltdown and he believed at the time he would be able to repay the loan fully with interest. Respondent also testified that his priorities had changed since 2007 and therefore never addressed his outstanding loan obligations to Mr. Gaerlan, despite his promises to do so. Respondent denied any personal knowledge of the details of the loan his company processed for Mr. Gaerlan, testifying he was uninvolved in the actual processing work of his company.

Evidence of Mitigation and Rehabilitation

27. Respondent is 52 years old. He is married and the sole financial support for his wife and six children.

28. Respondent graduated from the University of California San Diego in 1992 with an undergraduate degree in quantitative economics. He obtained his master's degree in business administration from the University of Southern California in 1992.

29. Respondent has not been convicted of any crime except for a single conviction for driving under the influence of alcohol.

30. After 2016, Respondent obtained his MLO license from 18 states and the District of Columbia. The licenses were never disciplined by any of those states. The licenses have since expired because Respondent did not seek to renew them. No other states except Colorado and California have denied his application for an MLO license.

31. Respondent has been employed in the mortgage industry since 1997. He has worked as a mortgage loan originator, mortgage loan processor, loan agent, and loan officer for various companies. He has processed hundreds of mortgage loans without incident.

32. Respondent obtained his California MLO license in 2013, after his broker's license had been revoked by the DRE and after declaring bankruptcy twice. Respondent's MLO license was never disciplined by the Department. Respondent testified he allowed his license to expire because he believed he no longer needed it.

33. Since July 2019, Respondent has worked as a residential mortgage loan processor at Owning Corporation (Owning). He works with borrowers daily. Owning is aware of his issues with the Department and the DRE. Nonetheless, Owning submitted a letter in support of Respondent and would like Respondent to continue his work at Owning. According to Owning, if Respondent is not barred from working for a

residential mortgage lender, he "will have a strong future with our company." (Exhibit H.)

34. Respondent obtained his real estate broker license in 2004. He used the broker license as a corporate officer with a few companies he worked for or owned. He never used the license to buy or sell residential properties. Until 2010, Respondent's real estate license had never been disciplined by DRE.

35. Respondent took responsibility for his violation of the real estate laws. He admitted he was naive in trusting his friend to abide by the law. At the time, he did not realize the consequences of his actions. Respondent testified he had no role in Milestone and was not involved in the decision to take advance fees for loan modifications. He now knows that allowing his license to be used without supervision was careless and wrong.

36. Since he remarried in 2009, Respondent has made major changes in his life. He has reestablished his creditworthiness. His credit report as of September 2020 indicates a score of 688 and that his loans are in good standing. (Exhibit C.) He now pays all bills on time, and he has not defaulted on any of his obligations. The only debts he has not addressed are those owed to Messrs. Huang and Gaerlan.

37. Respondent has complied with his continuing education requirements. He completed an eight-hour comprehensive required course in 2019 and completed several on-line courses relating to financial privacy, fair lending laws, the fair credit program, fraud, and various federal statutes in 2020. (Exhibit E.)

38. Respondent is active in his community. He volunteers at his children's school, is active in the Men's PTA Group, was a member of the school's parent board in 2019, and coaches his son's sports teams.

39. Respondent submitted several reference letters from family and colleagues who are aware of the denial of his MLO license application. (Exhibit A.) All wrote of his integrity and honesty. His colleagues praised the high quality of his work as well as his positive contributions, management capabilities, and knowledge. Respondent's customers also expressed their pleasure with the work he had performed for them. (Exhibit B.)

40. Respondent considers himself to be an honest person who has made some bad decisions and mistakes. He is not proud of certain things he has done in the past and he is always trying to do better. Respondent is seeking an MLO license to keep his business options open and increase his earnings capacity. Respondent will not be able to keep his current job if Complainant's request for a bar is granted.

LEGAL CONCLUSIONS

MLO License

1. Respondent bears the burden of proving he meets all prerequisites necessary for the requested MLO license. (See *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1221.) This burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

2. "An applicant for a license as a mortgage loan originator shall apply by submitting the uniform form prescribed for that purpose by the Nationwide Mortgage Licensing System and Registry." (Fin. Code, § 50140, subd. (a).) The Department Commissioner "shall deny" the application unless he finds, among other things, that the applicant "has demonstrated such financial responsibility, character, and general fitness as to command the confidence of the community and to warrant a

determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of this division.” (Fin. Code, §§ 22109.1, subd. (a)(3), 50141, subd. (a)(3).)

3. The Department Commissioner may deny, suspend, revoke, condition, or decline to renew an MLO license if an applicant fails to meet the requirements of Financial Code section 50141. (Fin. Code, § 50513, subd. (a)(2).)

4. Complainant has established by a preponderance of the evidence that Respondent has not demonstrated the necessary financial responsibility, character, and general fitness to command the community’s confidence or to warrant a determination that he will operate honestly, fairly, and efficiently. Although no one factor was sufficient by itself to disqualify Respondent from holding an MLO license, the confluence of Respondent’s financial issues, including his outstanding tax lien and his outstanding debt to Mr. Huang; Respondent’s license discipline by DRE; Colorado’s denial of his MLO license application; his lack of candor in the DRE Petition; and his handling of the promissory note to Mr. Gaerlan evidences irresponsibility and a lack of general fitness to hold an MLO license.

5. Respondent still has unresolved debt issues with Mr. Huang and he continues to resolve his tax lien with the IRS. Although DRE found no fraud on Respondent’s part, Respondent demonstrated carelessness and incompetence regarding his financial responsibilities as a real estate broker and acted contrary to the public interest. His conduct with Mr. Gaerlan is equally troubling. Even if Respondent was not aware of the specifics of Mr. Gaerlan’s refinancing and residential loan, engaging in a separate financial transaction with a former or current client recommended by a real estate “partner” representing that client is unwise and smacks of impropriety, particularly given Respondent’s potential access to Mr. Gaerlan’s

financial information. Moreover, Respondent never contacted Mr. Gaerlan after November 2007 to repay the loan or inform Mr. Gaerlan that he was unable to do so despite telling him he would do so. As a result, Mr. Gaerlan was forced to engage in repeated correspondence and fruitless efforts to recover the amounts that were due. Although Respondent may no longer have a legal obligation to pay off the note, he continues to have a responsibility to make his intentions clear.

6. Respondent has made substantial progress since 2010 in rehabilitating his credit. He also has expressed genuine remorse for his past conduct and shown he can be an active member of the community. However, his lack of candor to the DRE in 2019 in failing to disclose his 2000 bankruptcy in the DRE Petition, when combined with his past conduct and financial history, confirms that he is not ready at this time to command the confidence of the community required to hold an MLO license. Thus, cause exists to deny Respondent an MLO license at this time pursuant to Financial Code sections 22109.1, subdivision (a)(3), 50141, subdivision (a)(3), and 50513, subdivision (a)(2).

Requested Bar

7. Complainant has the burden of proving by a preponderance of the evidence the propriety of an order barring respondent from any position of employment with, or management or control of, any finance lender, broker, or program administrator. (Evid. Code, §§ 115, 500.)

8. The Department Commissioner may "bar from any position of employment, management, or control any residential mortgage lender, residential mortgage loan servicer, or mortgage loan originator, or any other person" any person who has been held liable in any administrative judgment by any public agency if that

"administrative judgment involved any offense specified in subdivision (b) of Section 50317, or any other offense reasonably related to the qualifications, functions, or duties of a person engaged in the business in accordance with the provisions of this division." (Fin. Code, § 50318, subd. (a)(2)(B).)

9. Complainant has not established that Respondent's past conduct is sufficient to bar him from the residential mortgage industry under Financial Code section 50318, subdivision (a)(2)(B). Contrary to Complainant's allegations (Amended Statement, ¶ 43), DRE did not find either Respondent or Milestone liable for committing any act of fraud, dishonesty, or deceit when it revoked Respondent's license and accepted Milestone's voluntary surrender. Nor, as alleged in the Amended Statement (¶ 44), were Respondent or Milestone found liable for unlawfully charging borrowers multiple illegal advances. (Factual Finding 12 & 13.) Although Respondent incorrectly answered one question in the DRE Petition, the DRE Commissioner did not find fraud, but a "lack of candor." (Factual Finding 17.) Thus, Complainant did not establish that any of the administrative findings against Respondent fell within the scope of Financial Code section 50318, subdivision (a)(2)(B).

10. Even if Complainant could establish the DRE's actions fell within Financial Code 50318, subdivision (a)(2)(B), Respondent's rehabilitation evidence supports Respondent's continued employment in the residential mortgage industry. Respondent has worked without incident in the mortgage industry for 17 years. He is seen as an able and trusted employee. His current employer has expressed its confidence in his work. In addition, Respondent needs the work to provide for his family. Barring Respondent from his lifetime work therefore is unwarranted and unduly punitive.

///

ORDER

1. The mortgage loan originator license application filed by respondent Andrew Kenneth Kiemmm is denied.

2. Complainant's request to bar Respondent Andrew Kenneth Kiemmm in the State of California from any position of employment with, or management or control of, any finance lender, broker, or mortgage loan originator is denied.

DATE: Jan 15, 2021



CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings