State of New Hampshire Banking Department

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3	In re the Matter of:) Case No.: 10-464	
4	State of New Hampshire Banking)	
5	Department,	/)) Order Regarding Regnandent Poniamin	
6	Petitioner,) Order Regarding Respondent Benjamin) Hunter Lindberg's Motion for) Rehearing	
7	Sandra L. Rowse,		
8	Intervener,)	
9	and)	
10	Upper Valley Mortgage LLC, Benjamin)	
11	Hunter Lindberg, Justin Craig Bitler,	,))	
12	Estate of Lawrence Gene Stern, M.D.,)	
13	Respondents	,))	
14		,	
15	I. PROCEDURAL CASE HISTORY		
16	A Default Judgment (the "Order") was issued on December 17, 2010 ¹		
17	This matter is a procedural thicket. Attorney Robert Carey, Counsel fo		
18	Respondent Benjamin Hunter Lindberg ("Lindberg"), filed a Motion fo		
19	Rehearing on January 18, 2011. Attorney Patrick Hayes filed a withdrawal fo		
20	Lindberg and Respondent Upper Valley Mortgage LLC ("Upper Valley") on Januar		
21	13, 2011^2 . The Withdrawal was not in the form of a motion and whil		
22	Administrative Rule Jus. 807.04 allows	the filing of an appearance, the rules	

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 $_{25}$ | ¹ A complete procedural history is set out in the Order.

² Lindberg asserted in a letter dated December 7, 2010 that he and Upper Valley are represented by the Firm of Clausen, Atwood and Spaneas. This firm has taken no action in this proceeding.

do not appear to contemplate a withdrawal. The Intervener, Consumer A, was
 not copied on either the Withdrawal or Motion for Rehearing.

The deadline for filing a Motion for Rehearing has passed and Upper Valley has not filed a motion. Upper Valley has waived its right to such rehearing and to appeal the Order. RSA 541:3; RSA 541:4. The Order remains in full effect regarding Upper Valley. The same is true for the Estate of Benjamin Stern, M.D. (the "Estate"); the Order remains in full effect regarding the Estate. For the reasons that follow, the Order remains in full effect regarding Lindberg.

While Lindberg's Motion for Rehearing attacks the basis for the Order, 10 it raises no issues contesting the violations of RSA 397-A:17,I(j)(not 11 12 qualified to maintain a license on the basis of financial integrity); RSA 13 397-A:17,II(e)(4)(no longer demonstrating financial responsibility or character and general fitness); RSA 397-A:17,I(e)(false or misleading 14 statements/reports to the Commissioner); RSA 397-A:5, IV-d(a)(1) via RSA 397-15 A:5m IV-c(5) (failure to meet minimum standards for licensure). Unless an 16 17 exception is made, no appeal can be taken from the Order as it relates to 18 these violations. RSA 541:4.

In his motion, Lindberg seeks to distance himself from the activities he acknowledged at the hearing, acknowledged in a statement to the Lebanon, New Hampshire Police Department ("Lebanon Police"), and is supported by the record in this case. His effort is unavailing.

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II. ORDER

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A. Jurisdiction

Lindberg argues that the Department does not have jurisdiction over the 3 4 transaction between Consumer A and Upper Valley because it was not a mortgage loan. There are two problems with this argument. First, Upper Valley has not 5 filed a Motion for Rehearing. Lindberg does not explain how he can raise 6 7 arguments which have been waived by Upper Valley. Second, Upper Valley is a licensee of the Department. As a licensee, Upper Valley is not only required 8 to comply with RSA Chapter 397-A but also the laws and rules of New 9 Hampshire, RSA 397-A:2,II, RSA 397-A:2, III, and the provisions of Titles 10 XXXV and XXXVI. RSA 383:10-d. 11

12 Assuming arguendo that the transaction between Consumer A and Upper 13 Valley was not a mortgage loan and further assuming that Lindberg may raise this issue, Upper Valley engaged in unfair or deceptive acts by taking 14 Consumer A's funds with a promise to repay plus 8% interest, failing to make 15 such payments, and using the funds, among other things, to pay Lindberg's 16 17 home mortgage³. These acts were in violation of RSA Chapter 385-A, RSA 397-18 A:14,IV(a), and RSA 397-A:14,IV(n). While Lindberg correctly points out that the title of RSA 397-A:14 is "Lending Practices", the words of the statute 19 20 take precedence over the title. Upper Valley was subject to RSA Chapter 397-A when it obtained Consumer A's property by misrepresentation and through 21 unfair, deceptive, unethical, or fraudulent business practices. Therefore, 22 the Department has jurisdiction over Upper Valley and this transaction. 23

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> ³ Moreover, \$60,000.00 of Consumer A's funds were withdrawn with no explanation. An additional, \$62,500.00 was used to obtain a letter of credit to satisfy a statutory requirement for licensure. Consumer A is owed approximately \$80,000.00. Order Regarding Motion for Rehearing - 3

B. Postponement of Hearing

Next, Lindberg argues that there is a question of fact whether he, instead of Upper Valley, is obligated to reimburse Consumer A and therefore, the hearing should have been postponed. On the contrary, Lindberg admitted at the hearing that he is obligated to reimburse Consumer A and that he intended to do so. Previously, in Exhibit 5a, Lindberg wrote in a statement to the Lebanon Police that he "will make every effort to repay the note on my own."

9 Lindberg's personal obligation to repay Consumer A is also established
10 by his conduct. Lindberg endorsed the check written by Consumer A. Ex. 5c.
11 Lindberg's home mortgage was paid from the proceeds of Consumer A's check.
12 Ex. 4a at p.7. In sum, there is no issue of fact that Lindberg is obligated
13 to reimburse Consumer A and the denial of the Motion to Continue was lawful
14 and reasonable.

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C. Evidence of Deceptive Business Practice or Misrepresentation

Lindberg further argues that the Petitioner did not prove that Lindberg obtained property by fraud or misrepresentation (*RSA 397-A:14, IV(a)*) nor prove that he engaged in unfair, deceptive, unethical, or fraudulent business practices.

Lindberg is licensed under RSA Chapter 397-A as a loan originator. As previously explained, RSA Chapter 397-A regulates a licensee in regards to all fraud and misrepresentation, unfair, deceptive, unethical or fraudulent business practices.

In this case, Lindberg admitted that he is obligated to repay Consumer A's funds plus 8% interest. Lindberg has not repaid the funds and Consumer A

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1 is owed approximately of \$80,000.00.

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Moreover, Lindberg admitted in his statement to the Lebanon Police that 2 he accepted Consumer A's funds on March 23, 2009 with the understanding that 3 4 the funds would be returned to Consumer A with 8% interest through monthly payments. On the same day he deposited Consumer A's check, Lindberg used 5 Consumer A's funds to pay his home mortgage. Lindberg knew of 6 the 7 representation made to Consumer A about the repayment of funds and did not use the funds to produce repayment with 8% interest. Instead, he used the 8 funds to pay his home mortgage and to obtain a CD with only 2.713% interest. 9

Assuming arguendo that a violation of RSA 397-A:14(a) requires contact between Lindberg and Consumer A and further assuming that no such contact occurred here, there is no such requirement in regard to RSA 397-A:14(n). Lindberg obtained Consumer A's funds on the basis of a misrepresentation and treated Consumer A's funds as his own, using them to make home mortgage payments. This constitutes misrepresentation and unfair, deceptive, unethical or fraudulent behavior.

D. Restitution and Fines

Finally, Lindberg argues that he is not responsible for Upper Valley's actions. Lindberg asserts that the authority to order restitution is confined to a violation of RSA Chapter 397-A. As previously explained, Lindberg violated the statute through his own personal actions. In addition, the Commissioner has the authority to order restitution pursuant to both RSA Chapter 397-A and RSA 383:10-d.

Lindberg objects to being held jointly and severally liable with Upper Valley and the Estate. Lindberg has described the financial situation of

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1 Upper Valley as "devastated" as of July 2010. Ex.5-d. No one, including 2 Lindberg, has suggested that the Estate has any assets. Lindberg used 3 Consumer A's money for his personal benefit. It is entirely appropriate that 4 the burden of restitution falls on him. Of course, if the Estate or Upper 5 Valley has assets, that burden should be shared.

6 The fine was also based on the actions of Lindberg as well as Upper 7 Valley, an entity which at all relevant times was owned by Lindberg either to 8 the extent of 50% or 100%. As previously noted, Lindberg has not challenged 9 four violations related to the licensure requirements of RSA Chapter 397-A. 10 Each of the uncontested violations carries an administrative fine not to 11 exceed \$2,500.00. *RSA 397-A:21,IV*. The fine of \$10,000.00 was not 12 unreasonable or unlawful.

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III. CONCLUSION

15 For the foregoing reasons, Lindberg's Motion for Rehearing is HEREBY16 DENIED.

SO ORDERED.

Dated:1/28/11

SIGNED,

/s/ STEPHEN J. JUDGE, ESQ. PRESIDING OFFICER