

1 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,)
) Default Judgment: Upper Valley
 6 Petitioner,) Mortgage LLC, Benjamin Hunter
) Lindberg, and Estate of Lawrence Gene
 7 Sandra L. Rowse,) Stern, M.D., Respondents
)
 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 Default Judgment: Upper Valley Mortgage LLC, Benjamin Hunter Lindberg,
 16 and Estate of Lawrence Gene Stern, M.D., Respondents

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18 PROCEDURAL CASE HISTORY

19 The Bank Commissioner issued an Order to Show Cause with Immediate
 20 Suspension and a Cease and Desist Order on November 24, 2010, which
 21 incorporated the November 24, 2010 Complaint issued by New Hampshire Banking
 22 Department Hearings Examiner Maryam Torben Desfosses. The Bank Commissioner
 23 also issued the Notice of Hearing - Order to Show Cause ("Notice of Hearing")
 24 against all Respondents on November 24, 2010. The Notice of Hearing was
 25 amended on December 6, 2010.

1 On December 9, 2010, the adjudicative hearing was held before Presiding
2 Officer Stephen J. Judge ("Presiding Officer") at the New Hampshire Banking
3 Department ("Department"). The Presiding Officer was delegated the authority
4 to decide the matter pursuant to RSA 383:7-a. All respondents were served
5 with the Show Cause Order, Notice of Hearing and Cease and Desist Order.
6 Respondent Upper Valley Mortgage LLC ("Respondent Upper Valley"), Respondent
7 Benjamin Hunter Lindberg ("Respondent Lindberg") and Respondent Estate of
8 Lawrence Gene Stern, M.D. (Respondent "Estate") did not file pre-marked
9 exhibits and/or List of Witnesses by the December 3, 2010 deadline.
10 *Administrative Rule Jus. 811.03.* Respondent Justin Craig Bitler ("Respondent
11 Bitler") filed a timely witness and exhibit list.

12 On December 7, 2010 at 5:46 p.m., after business hours, Respondent
13 Upper Valley and Respondent Lindberg (Collectively "Respondents Upper Valley
14 and Lindberg") faxed a letter to the Department's Hearings Examiner. The
15 letter was signed by Respondent Lindberg and requested a continuance because
16 Counsel for Respondents Upper Valley and Lindberg, the Law Offices of Clausen
17 Atwood & Spaneas, had a scheduling conflict and could not attend the hearing.
18 [Presiding Officer did not receive this letter until the December 9, 2010
19 hearing.] On December 8, 2010, Attorney Patrick Hayes faxed a Motion to the
20 Presiding Officer requesting a continuance on behalf of Respondents Upper
21 Valley and Lindberg because of a scheduling conflict.

22 RSA 397-A:17, III and RSA 541-A:30, III require the Commissioner to
23 hold a hearing not later than ten (10) business days after the date of an
24 order suspending a license ("ten (10) day hearing"). The Order was dated
25 November 24, 2010. Unless each of the Respondents expressly waives the ten

1 (10) day hearing, the Suspension Order is automatically vacated in regard to
2 that respondent. RSA 397-A:17, III. Neither the December 7, 2010 letter nor
3 the December 8, 2010 Motion to Continue ("Motion") expressly waived the ten
4 (10) day hearing. Also, while the Motion indicated that the Department's
5 hearings examiner and counsel for Respondent Bitler had been contacted, there
6 was no statement regarding assent. Moreover, there was no representation that
7 Respondent Estate had been contacted at all.¹

8 The Petitioner, Respondent Bitler, and Intervener Sandra L. Rowse
9 ("Consumer A") commenced the December 9, 2010 hearing. Respondent Estate did
10 not appear in person or by representative. Respondents Upper Valley and
11 Lindberg, in the person of Mr. Lindberg, arrived and indicated that they
12 wanted to waive the ten (10) day hearing and requested that the Motion be
13 granted. Respondent Bitler had no objection. The Petitioner objected to the
14 Motion and requested that a Default Judgment be entered against Respondents
15 Upper Valley and Lindberg. The Presiding Officer gave Mr. Lindberg over an
16 hour to reach Counsel in order to arrange a conference to discuss the Motion.
17 He was given a private room in which to make contact. He returned to the
18 hearing room after an hour and stated that the Law Offices of Clausen Atwood
19 & Spaneas had been called but no attorney was reached. He elected not to
20 contact Attorney Patrick Hayes or his firm.

21 Throughout the procedure, the Presiding Officer sought to avoid the
22 issuance of a Default Judgment and allow the Petitioner and Respondents Upper
23 Valley and Lindberg to reach an agreement in order to permit the hearing to
24 be continued for a limited time period. As is their right, Respondents Upper

25 ¹ While Respondent Estate was eventually defaulted, at the time of the
hearing, when the Motion to Continue was discussed, it remained a party.
Furthermore, Consumer A's Petition to Intervene was granted at the hearing
and no effort was made to seek assent from her.

1 Valley and Lindberg invoked their need to consult with Counsel and no
2 agreement could be reached.

3 Petitioner made a motion to Dismiss Respondent Bitler. That motion was
4 granted under separate order dated December 9, 2010.

5
6 **APPLICABLE RULE OF ADJUDICATORY PROCEEDINGS**

7 *Jus 810.02 of the CHAPTER Jus 800 MODEL RULES OF PRACTICE AND PROCEDURE*
8 provides:

9 If any party to whom a notice has been given in accordance
10 with Jus 807.03 fails to attend a hearing, the presiding officer
11 shall declare that party to be in default and shall either:

12 (a) Dismiss the case, if the party with the burden
13 of proof fails to appear; or

14 (b) Hear the testimony and receive the evidence offered
15 by a party, if that party has the burden of proof in
16 the case.

17 In addition, Administrative Rule Jus. 810.01(b) provides as follows:

18 If a postponement is requested by a party to the
19 hearing, it shall be granted if the presiding officer
20 determines that good cause has been demonstrated. Good
21 cause shall include the unavailability of parties,
22 witnesses or attorneys necessary to conduct the hearing,
23 the likelihood that a hearing will not be necessary because
24 the parties have reached a settlement or any other
25 circumstances that demonstrate that a postponement would

1 assist in resolving the case fairly.

2 Respondent Estate failed to appear and is therefore defaulted. The
3 remaining issue is whether Respondents Upper Valley and Lindberg demonstrated
4 "good cause" for postponement. Assuming, for the sake of argument, that
5 attorneys necessary to conduct the hearing could not be made available
6 (although this assumption ignores the delay by Respondents Upper Valley and
7 Lindberg in securing counsel²), the overarching factor is whether a
8 postponement on the day of hearing "would assist in resolving the case
9 fairly." The suspension of Respondents Upper Valley and Lindberg's licenses
10 is not the sole issue to resolve in this case. Equally, if not more
11 importantly, is the issue of restitution to Consumer A.

12 The Commissioner has the authority to order restitution pursuant to RSA
13 397-A:17,VIII and RSA 383:10-d. As described below, there is no genuine
14 issue of fact regarding the Respondents' obligation to repay Consumer A.
15 Postponing this case under these circumstances would not assist in resolving
16 the case fairly. Respondents Upper Valley and Lindberg have failed to
17 demonstrate good cause for postponement of the hearing. The Motion is denied.

18 Respondents Upper Valley and Lindberg were given ample opportunity to
19 participate in the hearing but, as is their right, insisted on representation
20 by counsel. While there is a right to counsel, there is no right to use it
21 as a sword to postpone a duly noticed hearing under the circumstances of this
22 case. In the alternative, under the circumstances of this case, Respondents
23 Upper Valley and Lindberg failed to attend the hearing. *Administrative Rule*

24
25 ² Based on the record, Respondents were confronted by Consumer A in February, 2010 (*Exhibit 5a*), interviewed by the Lebanon, New Hampshire Police Department on July 29, 2010 (*Id.*) and contacted during the Department's investigation on September 15, 2010. *Exhibit 6*. The need for counsel was apparent long before the hearing was scheduled. Moreover, as stated on the record, it became evident that Respondent Lindberg's actions during the hearing were an attempt to stall the proceedings.

1 *Jus. 810.02.* Attendance at a hearing requires participation. Respondents
2 Upper Valley and Lindberg qualified all efforts to conduct proceedings by
3 agreeing to proposals and then making the statement that an attorney needed
4 to be consulted. This does not constitute attendance at a hearing.

5
6 **APPLICABLE LAW**

7 Respondent Upper Valley is a limited liability company formed in New
8 Hampshire on March 11, 2004. *Exhibit 12.* Respondent Upper Valley has been
9 licensed with the Department as a New Hampshire mortgage broker since June
10 21, 2004 (with amended license date of April 12, 2010.) *Exhibit 16.*

11 Prior to January 2010, Respondent Lindberg was the 50% owner and
12 managing member of Respondent Upper Valley. *Exhibit 26.* After January,
13 2010, Respondent Lindberg has been the 100% owner of Respondent Upper Valley.
14 *Exhibit 2a.* Respondent Lindberg received a license as a Mortgage Loan
15 Originator for Respondent Upper Valley on January 14, 2010.

16 Prior to January 2010, Lawrence Gene Stern, M.D. ("Dr. Stern") was a
17 50% owner of Respondent Upper Valley. Dr. Stern passed away in March 2010.
18 The Estate of Dr. Stern is a Respondent ("Respondent Estate") in this matter.
19 There is no allegation that Dr. Stern was individually licensed by the
20 Department.

21 As a matter of law, however, both Respondent Lindberg and Dr. Stern,
22 prior to January 2010, were direct owners and in control of Respondent Upper
23 Valley. *Exhibit 26. RSA 394-A:1, VI-a, V-a.* Respondent Lindberg remained a
24 direct owner after January 2010 and also, at all relevant times, was in
25 control of Respondent Upper Valley. *RSA 397-A:1, V-a.* Respondent Upper

1 Valley, Respondent Lindberg and Respondent Estate, through Dr. Stern as a
2 direct owner of Respondent Upper Valley, are persons regulated by RSA 397-A,
3 in general, to engage in the business of making or brokering mortgage loans
4 secured by real property located in this state. RSA 397-A:2; RSA 397-A:3. In
5 order to obtain and keep a license, Respondent Upper Valley, Respondent
6 Lindberg and Respondent Estate, through Dr. Stern as a direct owner of
7 Respondent Upper Valley, are required periodically to submit, maintain and
8 allow examination of certain information. RSA 397-A:5; RSA 397-A:11; RSA
9 397-A:12; RSA 397-A:13.

10 As licensees, Respondent Upper Valley, including Respondent Estate as a
11 previous direct owner, and Respondent Lindberg are required to abide by
12 applicable federal laws and regulations, the laws and rules of this state,
13 and the orders of the commissioner and to refrain from unfair and/or
14 deceptive acts or practices under RSA 358-A. Any violation of such law,
15 regulation, or order is a violation of RSA 397-A. RSA 397-A:2, II; RSA
16 383:10-d.

17
18 **FINAL ORDER**

19 The allegations contained in the Petitioner's filings are established
20 through the Default Judgment. Moreover, the exhibits support the allegations
21 made by the Petitioner. *Administrative Rule Jus. 812.04(b)*. In addition, in
22 Petitioner's Exhibit 5a, Statement of Lindberg, Respondent Lindberg, owner of
23 Respondent Upper Valley, candidly admitted that Respondent Upper Valley,
24 Respondent Lindberg and Dr. Stern signed a \$150,000 promissory note (the
25 "Note") and were obligated to repay the loan to Consumer A at an 8% interest

1 rate. The Note itself is at Petitioner's Exhibit 5d, signed by Dr. Stern and
2 Respondent Lindberg on behalf of Upper Valley, and requires twenty four (24)
3 payments of \$6,784.09 each. Consumer A had provided funds for an annuity and
4 neither signed nor was aware of the Note. The evidence establishes that many
5 of these payments have not been made and Respondent Upper Valley, Respondent
6 Lindberg and Respondent Estate owe Consumer A \$82,000.00 plus interest.
7 Respondent Upper Valley, Respondent Lindberg and Respondent Estate, through
8 Dr. Stern, failed to make payments in December, 2009 while Dr. Stern was
9 still an owner. Other payments were missed in 2010. The exact amount is to
10 be calculated by the Petitioner with the assistance of Consumer A.

11 The evidence also establishes that Consumer A's check for \$150,000.00
12 was deposited in an account identified as belonging to Upper Valley Mortgage,
13 LLC ("the account") on March 23, 2009. *Exhibit 4a, 1/1/09 - 12/31/09, Quicken*
14 *Register P. 6. Exhibit 4b p. 4; Exhibit 4d pp. 3 and 6 (Check 3073).* The
15 check was endorsed by Respondent Lindberg. *Exhibit 5c.* On the same day and on
16 March 25, 2009, Respondent Lindberg's home mortgage was paid a total of
17 \$6,670.98 from the account, an amount greater than the balance in the account
18 prior to the deposit of Consumer A's \$150,000.00 check. *Exhibit 4a at p. 7.*
19 In addition to using Consumer A's funds for automobile lease payments, funds
20 in the amount of \$60,000.00 were withdrawn in person from the account on
21 March 24, 2009. *Id. Exhibit 4b at p. 5.* On July 30, 2009, Respondent
22 Lindberg wrote a check for \$62,500.00 of Consumer A's funds. On the same day,
23 Respondent Upper Valley obtained, as principal, a letter of credit with
24 Mascoma Savings Bank in the amount of \$62,500.00. *Exhibit 5f.* The surety of
25 the letter of credit is NGM Insurance Company, Keene, New Hampshire. *Id.*

1 Respondent Upper Valley, Respondent Lindberg and Respondent Estate's
2 violations of RSA 397-A and RSA 358-A began in March 2009 but constitute a
3 continuing course of conduct through November 2010.

4 As of result of using Consumer A's funds for business and personal
5 expenses, Respondent Upper Valley, Respondent Lindberg and Respondent Estate
6 failed to make payments to Consumer A, engaged in unfair, unethical,
7 deceptive and fraudulent business practices and obtained Consumer A's
8 property by fraud or misrepresentation. Respondents Upper Valley and Lindberg
9 operated at a loss, failed to operate with financial integrity, character and
10 general fitness by submitting information to the Commissioner that excluded
11 the liability to Consumer A, made false and misleading statements to the
12 Commissioner, and filed an inaccurate financial statement. RSA 358-A; RSA
13 397-A.

14 The Presiding Officer, however, dismisses violation #1 alleging theft
15 by deception against all respondents because of insufficient evidence to
16 establish a criminal violation.

17 Issuing this Judgment is not something done lightly. Respondents Upper
18 Valley and Lindberg were given an opportunity to contact the Department after
19 the close of the hearing to attempt to reach a fair resolution of the matter.
20 On December 16, 2010, Presiding Officer received an appearance solely on
21 behalf of Respondent Lindberg from Attorney Robert S. Carey of Orr and Reno.
22 P.A. The tally at the moment for Respondent Upper Valley is a letter and
23 testimony from Respondent Lindberg and a filed appearance to the effect that
24 it is represented by two different law firms; Respondent Lindberg is now
25 represented by three different firms. The only motion filed on behalf of

1 Respondent Upper Valley and Respondent Lindberg, the Motion to Continue as
2 described above, was not supported by good cause and has been denied. The
3 Presiding Officer leaves Respondents Upper Valley and Lindberg, aided by
4 Counsel, to sort out the representation issue and to determine whether to
5 file a Motion for Rehearing. RSA 541.

6 It is hereby ORDERED, that:

7 1. The Motion to Continue filed by Respondents Upper Valley and Lindberg
8 is HEREBY DENIED.

9 2. A Default Judgment entered against Respondent Upper Valley, Respondent
10 Lindberg and Respondent Estate on December 9, 2010 is HEREBY CONFIRMED.

11 3. Respondent Upper Valley, Respondent Lindberg and Respondent Estate each
12 violated RSA 397-A:14,IV(a) one (1) time when property was obtained by
13 fraud or misrepresentation.

14 4. Respondent Upper Valley, Respondent Lindberg and Respondent Estate each
15 violated RSA 397-A:14,IV(n) one (1) time for violations of unfair,
16 deceptive, unethical, or fraudulent business practices.

17 5. Respondents Upper Valley and Lindberg each violated RSA 397-
18 A:17,I(j)one (1) time as they were not qualified to maintain a license on
19 the basis of financial integrity.

20 6. Respondents Upper Valley and Lindberg each violated RSA 397-
21 A:17,II(e) (4) one (1) time for no longer demonstrating financial
22 responsibility or character and general fitness.

23 7. Respondents Upper Valley and Lindberg each violated RSA 397-A:17,I(e)
24 one (1)time for false or misleading statements/report to the Commissioner.

25 8. Respondent Upper Valley violated RSA 397-A:13,II one(1)time for filing

1 inaccurate financial statements.

2 9. Respondent Lindberg violated RSA 397-A:5,IV-d(a) (1) via 397-A:5,IV-c(5)
3 one (1) time for failure to meet minimum standards for licensure.

4 10. All licenses issued by the Department to the Respondents Upper Valley
5 and Lindberg are HEREBY REVOKED. To the fullest extent possible, this
6 revocation shall be communicated by the Department under its regular
7 procedure to all other regulatory jurisdictions, state and federal.

8 11. Respondents Upper Valley and Lindberg are HEREBY ORDERED to
9 immediately provide the Department a Pipeline Report of any pending
10 mortgage loan applications.

11 12. Respondent Upper Valley, Respondent Lindberg and Respondent Estate are
12 HEREBY ORDERED forthwith to pay to the Department administrative fines
13 totaling \$10,000.00, unless an agreement is reached between the Department
14 and Respondents for payment of the fine at a later time. Respondent Upper
15 Valley, Respondent Lindberg and Respondent Estate are jointly and
16 severally liable for the total fine.

17 13. Respondent Upper Valley, Respondent Lindberg and Respondent Estate
18 shall immediately reimburse Consumer A all monies (to be calculated by the
19 Department but totaling approximately \$82,200.00 plus interest) owed to
20 Consumer A. Respondent Upper Valley, Respondent Lindberg and Respondent
21 Estate are jointly and severally liable for all restitution owed to
22 Consumer A.

23 14. In order to expedite Paragraphs 13 and 14, Respondent Upper Valley,
24 Respondent Lindberg and Respondent Estate are FURTHERMORE ORDERED to take
25 all necessary action to immediately transfer all monies in full in the

