

1 State of New Hampshire Banking Department

2 In re the Matter of:) Case No.: 08-374
)
 3 State of New Hampshire Banking)
)
 4 Department,) Order to Show Cause
)
 5 Petitioner,) and
)
 6 and) Cease and Desist Order
)
 7 Smart Money Mortgage, Inc., Wayne)
)
 8 Andrew Kim, and Scott Robert Labeda,)
)
 9 Respondents)
)
 10)
)
 11)

12 NOTICE OF ORDER

13 This Order commences an adjudicative proceeding under the provisions of
14 RSA 397-A, RSA 541-A, BAN 200 and JUS 800.

15 LEGAL AUTHORITY AND JURISDICTION

16 Pursuant to RSA 397-A:17, the Banking Department of the State of New
17 Hampshire (hereinafter the "Department") has the authority to issue an order
18 to show cause why license revocation and penalties for violations of New
19 Hampshire Banking laws should not be imposed.

20 Pursuant to RSA 397-A:18, the Banking Department of the State of New
21 Hampshire (hereinafter the "Department") has the authority to issue a
22 complaint setting forth charges whenever the Department is of the opinion
23 that the licensee or person over whom the Department has jurisdiction is
24 violating or has violated any provision of RSA Chapter 397-A, rule or order
25 thereunder.

Pursuant to RSA 397-A:18 II, the Banking Department of the State of New
Hampshire (hereinafter the "Department") has the authority to issue and cause

1 to be served an order requiring any person engaged in any act or practice
2 constituting a violation of RSA 397-A or any rule or order thereunder, to
3 cease and desist from violations of RSA 397-A.

4 Pursuant to RSA 397-A:20, the Commissioner may issue, amend, or rescind
5 such orders as are reasonably necessary to comply with the provisions of the
6 Chapter.

7 Pursuant to RSA 397-A:21, the Commissioner has the authority to
8 suspend, revoke or deny any license and to impose administrative penalties of
9 up to \$2,500.00 for each violation of New Hampshire banking law and rules.

10 Pursuant to RSA 383:10-d, the Commissioner shall investigate conduct
11 that is or may be an unfair or deceptive act or practice under RSA 358-A and
12 exempt under RSA 358-A:3, I or that may violate any of the provisions of
13 Titles XXXV and XXXVI and administrative rules adopted thereunder. The
14 Commissioner may hold hearings relative to such conduct and may order
15 restitution for a person or persons adversely affected by such conduct. The
16 Commissioner may utilize all remedies available under the Act.

17 **NOTICE OF RIGHT TO REQUEST A HEARING**

18 The above named Respondents have the right to request a hearing on this
19 Order to Show Cause and Cease and Desist Order, as well as the right to be
20 represented by counsel at each Respondent's own expense. All hearings shall
21 comply with RSA 541-A. Any such request for a hearing shall be in writing, and
22 signed by the Respondent or the duly authorized agent of the above named
23 Respondent, and shall be delivered either by hand or certified mail, return
24 receipt requested, to the Banking Department, State of New Hampshire, 53
25 Regional Drive, Suite 200, Concord, NH 03301.

Such hearings will be scheduled within 10 days of the request. Within 20
days of the date of any such hearing, the Commissioner shall issue a further
order either vacating this Order or making it permanent as the facts require.
All hearings shall comply with RSA 541-A. If the Respondent fails to appear at

1 the hearing after being duly notified, such person shall be deemed in default,
2 and the proceeding may be determined against the Respondents upon consideration
3 of the Order to Show Cause and Cease and Desist Order, the allegations of which
4 may be deemed to be true.

5 If any of the above named Respondents fails to request a hearing within
6 30 calendar days of receipt of such order or reach formal settlement with the
7 Department within that time frame, then such person shall likewise be deemed in
8 default, and the orders shall, on the thirty-first day, become permanent, and
9 shall remain in full force and effect until and unless later modified or
10 vacated by the commissioner, for good cause shown.

11 **STATEMENT OF ALLEGATIONS, APPLICABLE LAWS AND REQUEST FOR RELIEF**

12 The Staff Petition dated September 10, 2008 (a copy of which is
13 attached hereto) is incorporated by reference hereto.

14 **ORDER**

15 WHEREAS, finding it necessary and appropriate and in the public
16 interest, and consistent with the intent and purposes of the New Hampshire
17 banking laws, and

18 WHEREAS, finding that the allegations contained in the Staff Petition,
19 if proved true and correct, form the legal basis of the relief requested,

20 It is hereby ORDERED, that:

- 21 1. Respondent Smart Money Mortgage, Inc. ("Respondent Smart Money
22 Mortgage") shall show cause why penalties in the amount of
23 \$52,500.00 should not be imposed against it individually and
24 therefore, \$157,500.00 jointly and severally;
- 25 2. Respondent Wayne Andrew Kim ("Respondent Kim") shall show
cause why penalties in the amount of \$87,500.00 (\$52,500.00
for Respondent Smart Money Mortgage and \$35,000.00 for
Respondent Kim) should not be imposed against him personally
and therefore, \$227,500.00 jointly and severally;

- 1 3. Respondent Scott Robert Labeda ("Respondent Labeda") shall
2 show cause why penalties in the amount of \$87,500.00
3 (\$52,500.00 for Respondent Smart Money Mortgage and \$35,000.00
4 for Respondent Labeda alone) should not be imposed against him
5 personally and therefore, \$227,500.00 jointly and severally;
- 6 4. The above named Respondents shall show cause why, in addition
7 to the penalties listed in paragraphs 1 through 3 above,
8 statutory penalties of \$800.00 should not be imposed for late
9 filing of the annual report, jointly and severally against the
10 above named Respondents;
- 11 5. The above named Respondents shall show cause why, in addition
12 to the penalties listed in paragraphs 1 through 4 above,
13 statutory penalties of \$9,850.00 (to date and accruing daily)
14 should not be imposed for failing to file requested
15 examination documents, jointly and severally against the above
16 named Respondents; and
- 17 6. The above named Respondents shall show cause why, in addition
18 to the penalties listed in paragraphs 1 through 5 above,
19 Respondent Smart Money Mortgage's license should not be
20 revoked.

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1 It is hereby further ORDERED that:

- 2 7. Along with the \$52,500.00 administrative penalty for
3 Respondent Smart Money Mortgage and \$35,000.00 each for
4 Respondent Kim and Respondent Labeda, the outstanding two
5 invoices in the total amount of \$10,650.00 shall be
6 immediately paid;
- 7 8. The Respondents shall immediately **Cease and Desist** from all
8 violations of New Hampshire law and the rules promulgated
9 thereunder; and
- 10 9. Failure to request a hearing within 30 days of the date of
11 receipt of this Order shall result in a default judgment being
12 rendered and administrative penalties imposed upon the
13 defaulting Respondents(s).

14
15
16 Dated: 09/10/08

SIGNED,

/s/
PETER C. HILDRETH
BANK COMMISSIONER

1 State of New Hampshire Banking Department

2 In re the Matter of:) Case No.: 08-374
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3 State of New Hampshire Banking) Staff Petition
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4 Department,))
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5 Petitioner,) September 10, 2008
))
6 and))
))
7 Smart Money Mortgage, Inc., Wayne))
))
8 Andrew Kim, and Scott Robert Labeda,))
))
9 Respondents))
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10))
11))

12 I. STATEMENT OF ALLEGATIONS

13 The Staff of the Banking Department, State of New Hampshire (hereinafter
14 "Department") alleges the following facts:

15 Facts Common on All Counts:

- 16 1. Respondent Smart Money Mortgage, Inc. (hereinafter "Respondent
17 Smart Money Mortgage") has been licensed as a Mortgage Banker
18 since June 13, 2005.
- 19 2. Respondent Wayne Andrew Kim (hereinafter "Respondent Kim") is, or
20 was at all relevant times, Chief Executive Officer, 100% Owner of
21 Respondent Smart Money Mortgage.
- 22 3. Respondent Scott Robert Labeda (hereinafter "Respondent Labeda")
23 is, or was at all relevant times, Chief Operating Officer of
24 Respondent Smart Money Mortgage.

1 Violation of RSA 397-A:5 Failure to File Requested Police Report (1 Count):

2 Violation of RSA 397-A:13, VI Failure of Officer and Owner to Respond to

3 Department Inquiries Regarding Police Report (4 Counts):

4 4. Paragraphs 1 through 3 are hereby realleged as fully set forth
5 herein.

6 5. On or about September 24, 2007, the Department received a
7 background report from the Federal Bureau of Investigations
8 indicating Respondent Labeda had a conviction on August 14, 2004
9 and was sentenced to probation.

10 6. On or about October 4, 2007, pursuant to the Legal Division's
11 direction, the Department submitted a request that Respondent
12 Labeda submit all documents relating to the conviction, including
13 the disposition of the issue.

14 7. The Department has not received a response to its September 4, 2007
15 request.

16 8. On or about October 15, 2007, the Department's Licensing Division
17 left a voicemail requesting the same information.

18 9. The Department submitted another request on March 6, 2008, again
19 with response by either Respondent Kim as CEO or Respondent Labeda.

20 10. The Department sent a final request on April 28, 2008 on the same
21 issue, again with no response from either Respondent Kim as CEO or
22 Respondent Labeda.

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1 Violation of RSA 397-A:13, II Failure to File Financial Statement (1 Count):

2 Violation of RSA 397-A:13, VI Failure of Officer and Owner to Respond to

3 Department Inquiries Regarding Financial Statement (3 Counts):

4 11. Paragraphs 1 through 10 are hereby realleged as fully set forth
5 herein.

6 12. The Department's fiscal year end was December 31, 2007 and the
7 financial statement was due on or before March 31, 2008.

8 13. Respondent Smart Money Mortgage was licensed on the date the
9 financial statement filing was due.

10 14. The Department sent Respondent Smart Money Mortgage a reminder
11 letter on January 24, 2008, notifying the Respondents of the
12 upcoming filing requirement.

13 15. The Department sent Respondent Smart Money Mortgage another letter
14 on April 9, 2008, indicating the filing was not received and that a
15 fine had begun to accrue.

16 16. On May 8, 2008, the Department sent Respondent Smart Money Mortgage
17 a final notice advising it the financial statement had not been
18 received and if it was not received by May 30, 2008, a referral to
19 the Legal Division would be made.

20 17. To date, none of the above named Respondents have responded to
21 these letters, submitted the financial statement or paid the
22 accrued fine of \$2,500.

23 Violation of RSA 397-A:12, VII Failure to Facilitate Exam (3 Counts):

24 Violation of RSA 397-A:12, III Examinations: Failure to Provide Requested

25 Files (3 Counts):

Violation of RSA 397-A:13, II Failure to File Financial Statement (2 Counts):

1 Violation of RSA 397-A:13, V Failure to File Additional Documents (3 Counts):

2 Violation of RSA 397-A:11, II Record Keeping: Failure to Provide Requested

3 Files (1 Count):

4 Violation of RSA 397-A:10, IV Failure to Update Information on File with

5 Commissioner (1 Count):

6 Violation of RSA 397-A:13, VI Failure of Officer and Owner to Respond to

7 Department Inquiries Regarding Financial Statement (3 Counts):

8 18. Paragraphs 1 through 17 are hereby realleged as fully set forth
9 herein.

10 19. The Department attempted to conduct an examination of Respondent
11 Smart Money Mortgage on February 25, 2008.

12 20. On February 5, 2008, the Department sent the February 5, 2008
13 Notice of Examination to Respondent Smart Money Mortgage via U.S.
14 Certified Mail Return Receipt, which one Vanessa Petrouski of
15 Respondent Smart Money Mortgage signed for and received on February
16 8, 2008.

17 21. The February 5, 2008 Notice of Examination required the Respondent
18 to submit the following documents:

19 a. A list of all New Hampshire files of loans that the licensee
20 originated, funded, closed, denied, or that were withdrawn,
21 canceled or serviced by the licensee during the period 18 months
22 prior to the date of this notice;

23 b. A copy of the most recent year-end financial statement, SEC 10-K
24 and 10-Q if applicable, and most recent Federal Income Tax
25 return;

c. A copy of the most recent quarterly financial statement;

1 d. Work papers and copies of source documents to support the
2 figures submitted on the company's most recently filed New
3 Hampshire Annual Report; the work papers shall demonstrate the
4 actual calculation of the numbers for verification by the
5 department; and

6 e. A list on Schedules A and B of the license application form of
7 the current direct owners, indirect owners and all principals of
8 the company.

9 22. With no response from any of the above named Respondents, a second
10 notice dated March 19, 2008 was submitted to Respondent Smart Money
11 Mortgage via U.S. Certified Mail Return Receipt and delivered at
12 11:35 a.m. on March 24, 2008 as evidenced by Track and Confirm
13 label 7007 1490 0000 0420 3832.

14 23. The March 19, 2008 noticed was also emailed on the same date with
15 successful delivery.

16 24. The March 19, 2008 was also faxed to Respondent Smart Money
17 Mortgage using the facsimile number on file but it was
18 undeliverable. Respondent Smart Money Mortgage failed to update
19 the Commissioner regarding the facsimile number on file with the
20 Department.

21 25. To date, the requested materials have not been received and
22 Respondents have not responded to these inquiries and requests.

23 26. To date, fines have accrued for failing to provide the requested
24 files. The current fine to date is \$9,850.00 (\$50/day x 197 days)
25 and still accruing.

1 Violation of RSA 397-A:10, IV Failure to Notify Commissioner of License

2 Revocation by Another State, which is a significant event (1 Count):

3 27. Paragraphs 1 through 26 are hereby realleged as fully set forth
4 herein.

5 28. Pursuant to cooperation between state regulators, the Department
6 was informed that the State of Georgia revoked Respondent Smart
7 Money Mortgage's license in March of 2008.

8 29. The license revocation occurred because Respondent Smart Money
9 Mortgage was purposefully withholding, deleting, destroying or
10 altering information requested by an examiner, and making false
11 statements to the department.

12 Violation of 397-A:13, IV Failure to Pay Annual Report Late Filing Fee (1

13 Count):

14 Violation of RSA 397-A:13, VI Failure of Officer and Owner to Respond to

15 Department Inquiries Regarding Financial Statement (4 Counts):

16 30. Paragraphs 1 through 29 are hereby realleged as fully set forth
17 herein.

18 31. Respondent Smart Money Mortgage's annual report was due in the
19 Department on or before February 1, 2008.

20 32. The Department received the annual report on March 4, 2008,
21 generating a fine of \$25 a day, for a total of \$800.00 (\$25/day x
22 32 days).

23 33. The Department sent three invoices: March 2008, May 2008 and June
24 24, 2008 and received no payment.

25 34. On July 8, 2008, an additional letter from the Department's
Licensing Supervisor was sent regarding this penalty, with no

1 response from any of the three Respondents.

2 35. On August 15, 2008, Bank Examiner Sarah Lobdell attempted to
3 contact Respondent Smart Money Mortgage by calling Respondent
4 Kim. The telephone number simply beeped as if off the hook. She
5 was not able to make contact.

6 36. To date the invoice for \$800.00 remains unpaid.

7 Violation of RSA 397-A:10-a I (a) Failure to Properly Surrender License (1
8 Count):

9 Violation of RSA 397-A:10, III Failure to Inform Commissioner of Office

10 Closure (1 Count):

11 Violation of RSA 397-A:10, IV Failure to Update Information on File with
12 Commissioner (2 Counts):

13 37. Paragraphs 1 through 36 are hereby realleged as fully set forth
14 herein.

15 38. As mentioned above, on July 8, 2008, the Department notified
16 Respondent Smart Money Mortgage about the penalty due for late
17 filing of the annual report.

18 39. Attempts at collection revealed the telephone number is
19 consistently busy and the fax number does not work.

20 40. Further, on August 22, 2008, the Department received a letter by
21 regular mail from Respondent Smart Money Mortgage dated July 14,
22 2008 (with no signature) that stated: "Please be advised that
23 effective immediately, Smart Money Mortgage, Inc. will cease to
24 conduct any business..."

25 41. No previous notices were given on either the contact information
or the business closure.

1 42. To date, Respondents have not provided the Department a copy of
2 the publication notice or license surrender paperwork.

3 **II. ISSUES OF LAW**

4 The staff of the Department, alleges the following issues of law:

5 1. The Department realleges the above stated facts in paragraphs 1
6 through 42 as fully set forth herein.

7 2. The Department has jurisdiction over the licensing and regulation
8 of persons engaged in mortgage banker or broker activities pursuant
9 to NH RSA 397-A:2 and RSA 397-A:3.

10 3. RSA 397-A:5 provides that to be considered for licensing, a
11 criminal records history is conducted on the applicants and that
12 the applicants shall submit any other information the Commissioner
13 may require, which can include police reports. Each of the above
14 named Respondents violated this provision on one occasion as
15 alleged above.

16 4. RSA 397-A:10, III provides that licensees shall provide written
17 notice to the Department of any proposed closing of any licensed
18 office no later than ten (10) business days prior to the effective
19 date of such change. Each of the above named Respondents violated
20 this statute on one occasion as alleged above.

21 5. RSA 397-A:10, IV provides that persons licensed under RSA Chapter
22 397 are under a continuing obligation to update information on file
23 with the Commissioner. Each of the above named Respondents failed
24 to update the Commissioner on at least four occasions as alleged
25 above.

1 6. RSA 397-A:10-a, I (a) provides that a licensee who ceases to engage
2 in the business of a mortgage banker or mortgage broker at any time
3 during a license year for any cause shall surrender such license in
4 person or by registered or certified mail to the Commissioner
5 within 15 calendar days of such cessation, and shall cause to be
6 published in a newspaper of general circulation in the licensee's
7 market area a notice to such effect. Each of the above named
8 Respondents violated this statute on one occasion as alleged above.

9 7. RSA 397-A:11, II provides that requested files and business records
10 must be received by the Department within 21 calendar days of
11 request. The licensee will be subject to a \$50.00 a day fine every
12 day after the 21-day period the records are not produced.

13 Respondents currently owe \$9,850.00 to date and the fine is still
14 accruing.

15 8. RSA 397-A:12, III requires licensees to comply with examination
16 requests with or without prior notice. All books, papers, files,
17 related material, and records of assets shall be subject to the
18 Department's examination. Each of the above named Respondents
19 violated this statute on at least three occasions as alleged above.

20 9. RSA 397-A:12, VII provides that every person being examined, and
21 all of the officers, directors, employees, agents, and
22 representatives of such person shall make freely available to the
23 Commissioner or his or her examiners, the accounts, records,
24 documents, files, information, assets, and matters in their
25 possession or control relating to the subject of the examination
 and shall facilitate the examination. Each of the above named

1 Respondents violated this statute on at least three occasions as
2 alleged above.

3 10. RSA 397-A:13, I-a provides that a person who surrenders,
4 withdraws, or does not renew a license shall file the annual report
5 as required in paragraph 1 of RSA 397-A:13, notwithstanding the
6 fact that he or she is not licensed on the date that the report is
7 due.

8 11. RSA 397-A:13, II provides that each licensee shall file a financial
9 statement within 90 days from the date of its fiscal year end.

10 Each of the above named Respondents violated this statute on three
11 occasions as alleged above.

12 12. RSA 397-A:13, IV provides that any mortgage banker or broker
13 failing to file the annual report within the time prescribed may be
14 required to pay to the Department a penalty of \$25.00 per calendar
15 day for each day the annual report is overdue, for a maximum of
16 \$2,500.00. Each of the above named Respondents violated this
17 statute on one occasion by failing to pay the late fee of \$800.00
18 for a late filed annual report. Respondents still owe the \$800.00
19 outstanding invoice, as well.

20 13. RSA 397-A:13, V provides that in addition to the annual report and
21 financial statement, the Department may require such additional
22 special or regular reports as it may deem necessary under RSA
23 Chapter 397-A. Each of the above named Respondents violated this
24 provision on at least three occasions as alleged above.

25 14. RSA 397-A:13, VI provides that any officer, owner, manager or agent
of any licensee shall reply promptly in writing, or other

1 designated form, to any written inquiry from the Department.
2 Respondent Kim and Respondent Labeda each violated this provision
3 on at least fourteen occasions each as alleged above.

4 15. RSA 397-A:18, I provides that the Department may issue a complaint
5 setting forth charges whenever the Department is of the opinion
6 that the licensee or person over whom the Department has
7 jurisdiction, has violated any provision of RSA 397-A or orders
8 thereunder.

9 16. RSA 397-A:21, IV provides that any person who, either knowingly or
10 negligently, violates any provision of Chapter 397-A, may upon
11 hearing, and in addition to any other penalty provided for by law,
12 be subject to an administrative fine not to exceed \$2,500, or both.
13 Each of the acts specified shall constitute a separate violation,
14 and such administrative action or fine may be imposed in addition
15 to any criminal penalties or civil liabilities imposed by New
16 Hampshire Banking laws.

17 17. RSA 397-A:21, V provides that every person who directly or
18 indirectly controls a person liable under this section, every
19 partner, principal executive officer or director of such person,
20 every person occupying a similar status or performing a similar
21 function, every employee of such person who materially aids in the
22 act constituting the violation, and every licensee or person acting
23 as a common law agent who materially aids in the acts constituting
24 the violation, either knowingly or negligently, may, upon notice and
25 opportunity for hearing, and in addition to any other penalty
provided for by law, be subject to suspension, revocation, or denial

1 of any registration or license, including the forfeiture of any
2 application fee, or the imposition of an administrative fine not to
3 exceed \$2,500, or both. Each of the acts specified shall constitute
4 a separate violation, and such administrative action or fine may be
5 imposed in addition to any criminal or civil penalties imposed.

6 **III. RELIEF REQUESTED**

7 The staff of the Department requests the Commissioner take the following
8 Action:

- 9 1. Find as fact the allegations contained in section I of this Staff
10 Petition;
- 11 2. Make conclusions of law relative to the allegations contained in
12 section II of the this petition;
- 13 3. Pursuant to RSA 397-A:17, order each of the above named Respondents
14 to show cause why their license should not be revoked;
- 15 4. Pursuant to RSA 397-A:18, order each of the above named Respondents
16 to immediately Cease and Desist from violations of this chapter;
- 17 5. Assess fines and administrative penalties in accordance with RSA 397-
18 A:21, for violations of Chapter 397-A, in the number and amount equal
19 to the violations set forth in section II of this Staff Petition; and
20 6. Take such other administrative and legal actions as necessary for
21 enforcement of the New Hampshire Banking Laws, the protection of New
22 Hampshire citizens, and to provide other equitable relief.

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IV. RIGHT TO AMEND

The Department reserves the right to amend this Staff Petition and to request that the Commissioner take additional administrative action. Nothing herein shall preclude the Department from bringing additional enforcement action under RSA 397-A or the regulations thereunder.

Respectfully submitted by:

 /S/
Maryam Torben Desfosses
Staff Attorney

 9/10/08
Date