

1 State of New Hampshire Banking Department

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|----|--------------------------------------|-----------------------|
| 2 | In re the Matter of: |) Case No.: 09-060 |
| | |) |
| 3 | State of New Hampshire Banking |) |
| 4 | Department, |) Order to Show Cause |
| | |) |
| 5 | Petitioner, |) |
| | |) |
| 6 | and |) |
| | |) |
| 7 | First American Mortgage Trust (d/b/a |) |
| | |) |
| 8 | NxtLoan.com), Shifra Nachama Polack, |) |
| | |) |
| 9 | and Barry S. Polack, |) |
| | |) |
| 10 | Respondents |) |

11 NOTICE OF ORDER

12 This Order commences an adjudicative proceeding under the provisions
13 of RSA Chapter 397-A and RSA Chapter 541-A.

14 LEGAL AUTHORITY AND JURISDICTION

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

19 Pursuant to RSA 397-A:18, the Department has the authority to issue a
20 complaint setting forth charges whenever the Department is of the opinion
21 that the licensee or person over whom the Department has jurisdiction is
22 violating or has violated any provision of RSA Chapter 397-A, or any rule or
23 order thereunder.

24 Pursuant to RSA 397-A:20,IV, the Commissioner may issue, amend, or
25 rescind such orders as are reasonably necessary to comply with the

1 provisions of the Chapter.

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

6 Pursuant to RSA 383:10-d, the Commissioner shall investigate conduct
7 that is or may be an unfair or deceptive act or practice under RSA Chapter
8 358-A and exempt under RSA 358-A:3,I or that may violate any of the
9 provisions of Titles XXXV and XXXVI and administrative rules adopted
10 thereunder. The Commissioner may hold hearings relative to such conduct and
11 may order restitution for a person or persons adversely affected by such
12 conduct.

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

14 The above named Respondents have the right to request a hearing on
15 this Order to Show Cause, as well as the right to be represented by counsel
16 at each Respondent's own expense. All hearings shall comply with RSA Chapter
17 541-A. Any such request for a hearing shall be in writing, and signed by the
18 Respondent or the duly authorized agent of the above named Respondent, and
19 shall be delivered either by hand or certified mail, return receipt
20 requested, to the Banking Department, State of New Hampshire, 53 Regional
21 Drive, Suite 200, Concord, NH 03301. Such hearings will be scheduled within
22 10 days of the Department's receipt of the request. If the Respondent fails
23 to appear at the hearing after being duly notified, such person shall be
24 deemed in default, and the proceeding may be determined against the Respondent
25 upon consideration of the Order to Show Cause, the allegations of which may be

1 deemed to be true.

2 If any of the above named Respondents fails to request a hearing within
3 30 calendar days of receipt of such order or reach a formal written and
4 executed settlement with the Department within that time frame, then such
5 person shall likewise be deemed in default, and the orders shall, on the
6 thirty-first day, become permanent, and shall remain in full force and effect
7 until and unless later modified or vacated by the Commissioner, for good cause
8 shown.

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

10 The Staff Petition dated August 4, 2009 (a copy of which is attached
11 hereto) is incorporated by reference hereto.

12 **ORDER**

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

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

18 It is hereby ORDERED, that:

- 19 1. Respondent First American Mortgage Trust (d/b/a NxtLoan.com)
20 ("Respondent First American Mortgage") shall show cause why
21 penalties in the amount of \$12,500.00 should not be imposed
22 against it;
- 23 2. Respondent Shifra Nachama Polack ("Respondent S. Polack")
24 shall show cause why penalties in the amount of \$12,500.00
25 should not be imposed against her;

1 3. Respondent Barry S. Polack ("Respondent B. Polack") shall
2 show cause why penalties in the amount of \$12,500.00 should
3 not be imposed against him;

4 4. The above named Respondents shall show cause why, in addition
5 to the penalties listed in Paragraphs 1 through 3 above, the
6 Respondents shall not reimburse the following consumers the
7 following amounts for co-brokering with an unlicensed entity:

8 A. Consumer A: \$2,750.00.

9 5. The above named Respondents shall show cause why, in addition
10 to the penalties listed in Paragraphs 1 through 4 above, the
11 Respondents shall not reimburse the following Consumers the
12 following amounts for collected "discount fees" that do not
13 reveal the fee collected actually lowered the rate of the
14 loan given to the Consumers:

15 A. Consumer B: \$1,278.90; and

16 B. Consumer C: \$1,053.55.

17 6. Respondents shall be jointly and severally liable for the
18 above amounts alleged in Paragraphs 1 through 5 above;

19 7. The above named Respondents shall show cause why, in addition
20 to the penalties listed in Paragraphs 1 through 6 above,
21 Respondent First American Mortgage's license should not be
22 revoked.

23 It is hereby further ORDERED that:

24 8. Along with the administrative penalties listed for the above
25 named Respondents, each individual consumer's restitution

1 listed above shall be immediately paid; and

2 9. Failure to request a hearing within 30 days of the date of
3 receipt or valid delivery of this Order shall result in a
4 default judgment being rendered and administrative penalties
5 imposed upon the defaulting Respondent(s).

6
7 SIGNED,

8
9 Dated: 08/24/09

/s/

PETER C. HILDRETH
BANK COMMISSIONER

1 State of New Hampshire Banking Department

2 In re the Matter of:) Case No.: 09-060
3 State of New Hampshire Banking)
4 Department,) Staff Petition
5 Petitioner,) August 4, 2009
6 and)
7 First American Mortgage Trust (d/b/a)
8 NxtLoan.com), Shifra Nachama Polack,)
9 and Barry S. Polack,)
10 Respondents)

11 I. STATEMENT OF ALLEGATIONS

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

14 Facts Common on All Counts:

- 15 1. Respondent First American Mortgage Trust (d/b/a NxtLoan.com)
16 (hereinafter "Respondent First American Mortgage") has been
17 licensed as a Mortgage Banker from at least 1997.
- 18 2. Respondent Shifra Nachama Polack (hereinafter "S. Polack") is the
19 100% owner and Vice President/Trustee of Respondent First
20 American Mortgage.
- 21 3. Respondent Barry S. Polack (hereinafter "B. Polack") is the
22 President, Trustee of and control person for Respondent First
23 American Mortgage.

1 **Violation of RSA 397-A:17,I(c) Unlawful Co-Brokered Loans (1 Count):**

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

4 5. The Consumer A loan contained a fee of \$2,750.00 collected "POC"
5 (which means paid outside of closing) by PAL Financial Corp.

6 6. Pal Financial Corp. is a Massachusetts registered corporation and
7 Massachusetts registered Mortgage Broker only.

8 7. Pal Financial Corp. of Massachusetts has never been licensed by
9 the Department, is not exempt under RSA 397-A:4, and in
10 expectation of compensation or gain acted as an intermediary,
11 finder, or agent of a borrower or lender for the purpose of
12 negotiating, arranging, finding or procuring mortgage loans for
13 at least one New Hampshire mortgage loan. Consumer A needs the
14 above named Respondents to refund the \$2,750.00 collected by PAL
15 Financial Corp. on the HUD Settlement Statement.

16 **Violation of the Real Estate Settlement Procedures Act, Regulation X, 24**

17 **C.F.R. Section 3500.8 & Appendix A, Line Item Instructions via RSA 397-**

18 **A:2,III (2 Counts):**

19 8. Paragraphs 1 through 7 are hereby realleged as fully set forth
20 herein.

21 9. The Consumer B loan file included a discount fee charged to the
22 Consumer by the mortgage broker in the amount of \$1,260.00. Yet,
23 Consumer B was also charged a discount fee of \$1,278.90 by
24 Respondent First American Mortgage. However, nothing in Consumer
25 B's loan file indicates the fee charged by Respondent First

1 American Mortgage actually lowered the rate of the loan given to
2 Consumer B.

3 10. Consumer C was charged a discount fee of \$1,053.55 by Respondent
4 First American Mortgage. However, nothing in Consumer C's loan
5 file indicates the fee charged by Respondent First American
6 Mortgage actually lowered the rate of the loan given to Consumer
7 C.

8 11. The following discount fees must be refunded to the Consumers:

9 a. Consumer B: \$1,278.90; and

10 b. Consumer C: \$1,053.55.

11 Violation of the Gramm-Leach-Bliley Act, Title V, and Standards for
12 Safeguarding Customer Information, 16 C.F.R. Section 314.3 via RSA 397-

13 A:2,III (1 Count):

14 Violation of RSA 397-A:12,VIII Failure to Correct Reported Deficiencies (1
15 Count):

16 12. Paragraphs 1 through 11 are hereby realleged as fully set forth
17 herein.

18 13. The above named Respondents have failed to maintain a
19 comprehensive information security program.

20 14. The above named Respondents are required to develop, implement,
21 and maintain a comprehensive information security program
22 (hereinafter "Information Security Program") that is written in
23 one or more readily accessible parts and contains administrative,
24 technical, and physical safeguards.

25 15. This Information Security Program was required to be implemented

1 by May 23, 2003 and was to contain the following:

2 A. a designated employee to:

3 (1). coordinate the program;

4 (2). perform a risk assessment;

5 (3). design, implement and regularly test safeguard
6 controls;

7 (4). monitor service providers and enter into contracts
8 that require service providers to implement and
9 maintain appropriate safeguards; and

10 (5). evaluate and adjust the program as necessary.

11 16. In the 2007 examination, the Department observed that the above
12 named Respondents had failed to maintain an adequate Information
13 Security Policy pursuant to the Gramm-Leach-Bliley Act.

14 17. During the 2008 examination, the Department once again noted that
15 the above named Respondents failed to provide evidence of a
16 written Information Security Policy.

17 **II. ISSUES OF LAW**

18 The staff of the Department alleges the following issues of law:

19 1. The Department realleges the above stated facts in Paragraphs 1
20 through 17 as fully set forth herein.

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

24 3. RSA 397-A:2, III requires persons subject to or licensed under RSA
25 Chapter 397-A to abide by applicable federal laws and regulations,

1 the laws and rules of the State of New Hampshire, and the orders
2 of the Commissioner. Any violation of such law, regulation, order,
3 or rule is a violation of RSA Chapter 397-A. Each of the above
4 named Respondents violated this statute on at least three
5 occasions as alleged above.

6 4. RSA 397-A:12,VIII provides that upon receipt of a written report
7 of examination, the licensee shall have 30 days or such additional
8 reasonable period as the Commissioner for good cause may allow,
9 within which to review the report, recommend any changes and set
10 forth in writing the remedial course of action the licensee will
11 pursue to correct any reported deficiencies outlined in the
12 report. The above named Respondents violated this provision on at
13 least one occasion as alleged above.

14 5. 16 C.F.R. Section 314.3 Standards for Safeguarding Customer
15 Information, states that the licensee must develop, implement and
16 maintain a comprehensive information security program that is
17 written in one or more readily accessible parts and contains
18 administrative, technical and physical safeguards. Each of the
19 above named Respondents violated this federal law on at least one
20 occasion as alleged above.

21 6. 24 C.F.R. Section 3500.8 and Appendix A, Line Item Instructions,
22 Real Estate Settlement Procedures Act, provides that line 801 is
23 used to record the fee charged by the Lender for processing or
24 originating the loan. If this fee is computed as a percentage of
25 the loan amount, the percentage must be entered in the blank

1 indicated. Line 802 is used to record the loan discount or
2 "points" charged by the Lender, and, if it is computed as a
3 percentage of the loan amount, then the percentage is entered in
4 the blank indicated. Each of the above named Respondents violated
5 this provision on at least two occasions by failing to properly
6 place the payment of fees on the HUD Settlement Statement but also
7 the loan files do not show the discount fee charged both Consumer
8 B and Consumer C actually lowered the rate of the loan given to
9 the borrower.

10 7. RSA 397-A:17,I provides in part that the Commissioner may by
11 order, upon due notice and opportunity for hearing, assess
12 penalties or deny, suspend, or revoke a license or application if
13 it is in the public interest and the applicant, respondent, or
14 licensee, any partner, officer, member, or director, any person
15 occupying a similar status or performing similar functions, or any
16 person directly or indirectly controlling the applicant,
17 respondent, or licensee: (a) has violated any provision of RSA
18 Chapter 397-A or rules thereunder, or (b) has not met the
19 standards established in RSA Chapter 397-A.

20 8. RSA 397-A:17,I(c) provides that it is a violation of RSA Chapter
21 397-A to accept or process loan applications transmitted or
22 brokered by a mortgage broker who is not licensed, and is not
23 exempt from licensing. Each of the above named Respondents
24 violated this statute on at least one occasion as alleged above.

25 9. RSA 397-A:18,I provides that the Department may issue a complaint

1 setting forth charges whenever the Department is of the opinion
2 that the licensee or person over whom the Department has
3 jurisdiction, has violated any provision of RSA Chapter 397-A or
4 orders thereunder.

5 10. RSA 397-A:21,IV provides that any person who, either knowingly or
6 negligently, violates any provision of Chapter 397-A, may upon
7 hearing, and in addition to any other penalty provided for by
8 law, be subject to an administrative fine not to exceed
9 \$2,500.00, or both. Each of the acts specified shall constitute
10 a separate violation, and such administrative action or fine may
11 be imposed in addition to any criminal penalties or civil
12 liabilities imposed by New Hampshire Banking laws.

13 11. RSA 397-A:21,V provides that every person who directly or
14 indirectly controls a person liable under this section, every
15 partner, principal executive officer or director of such person,
16 every person occupying a similar status or performing a similar
17 function, every employee of such person who materially aids in the
18 act constituting the violation, and every licensee or person acting
19 as a common law agent who materially aids in the acts constituting
20 the violation, either knowingly or negligently, may, upon notice
21 and opportunity for hearing, and in addition to any other penalty
22 provided for by law, be subject to suspension, revocation, or
23 denial of any registration or license, including the forfeiture of
24 any application fee, or the imposition of an administrative fine
25 not to exceed \$2,500, or both. Each of the acts specified shall

