

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of Marlon Terrell Pratt

**ORDER DENYING CONTINUANCE
AND GRANTING PARTIAL
SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Manuel J. Cervantes (ALJ) on the Motion of the Minnesota Department of Commerce (Department) for Summary Disposition. On July 15, 2010, Marlon Terrell Pratt (the Respondent), filed a response to the Department's motion and also moved for a continuance regarding the motion. The Department filed a reply and supplemental affidavits on July 23, 2010. The motion record closed with the filing by the Department on July 23, 2010.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Department. Larry E. Reed, Esq., appeared on behalf Marlon Terrell Pratt (Respondent).

Based upon all of the files, records, and proceedings herein, and for the reasons detailed in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. The Respondent's Motion for a Continuance is DENIED.
2. The Department's Motion for Summary Disposition is GRANTED to the extent that the Respondent is collaterally estopped from contesting the factual basis for imposing discipline arising out of his convictions for fraud and racketeering.
3. The Department's Motion for Summary Disposition is GRANTED regarding the violations of Minn. Stat. § 58.12 through the Respondent's role in the identified mortgage lending transactions (Ross and Smith transactions).

4. The parties will confer regarding scheduling a hearing in this matter on the remaining issues as further discussed in the Memorandum below.

Dated: August 25, 2010

s/Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

MEMORANDUM

I. Background Summary and Jurisdiction

In 1998, the Legislature enacted the Minnesota Residential Originator and Servicer Licensing Act (“the Act”), a measure that regulates the practice of originating residential mortgages. Under the Act, residential mortgage originators must either be directly licensed by the Department or covered by a specific statutory exemption.¹

Moreover, the Act imposes upon those who are directly licensed and those who are otherwise exempt from licensure certain standards of professional conduct, and these professional standards extend to matters that relate directly to residential mortgage origination and other non-mortgage-related volitional acts.²

On September 8, 2008, the Respondent was charged with 17 counts of Felony Theft by Swindle. Each count reflected a mortgage lending transaction that the Respondent was involved in some capacity. The charges included the allegation that the Respondent received a payment (described as a “kickback”) ranging from \$13,000 to \$100,000 as part of each transaction. The charges were later supplemented with two counts of racketeering.³ On July 8, 2009, the Respondent was convicted of all seventeen felonies for theft by swindle and both racketeering felonies.⁴ The Respondent was sentenced to 120 months in prison and fined \$500,000.⁵ The Respondent is presently incarcerated as a result of these convictions.

The Respondent’s convictions arose from his activities as a mortgage originator, more commonly known as a “mortgage broker,” working for Universal Mortgage, Inc. (UMI). The Respondent was not required to be licensed in that capacity because he

¹ See, Minn. Stat. §§ 58.01 – 58.18. Statutes are cited to the 2008 Edition.

² See, Minn. Stat. § 58.04.

³ Eider Affidavit, at 1-2, Ex. 1.

⁴ Eidem Aff., at 2, Ex. 2; Boyer Aff., Ex. 1.

⁵ The Department’s Notice and Order of Prehearing Conference, at 3 (filed March 23, 2010).

was working under the auspices of UMI's mortgage originator licenses.⁶ The criminal complaint identified the Respondent as being the loan officer on 13 of the 17 transactions resulting in felony convictions.⁷

The Department seeks to impose administrative discipline on the Respondent for violations of statute and rule "including debarment or the imposition of civil penalties."⁸ On March 23, 2010, the Department filed a Notice and Order for Prehearing Conference setting this matter on before the ALJ.

On June 18, 2010, the Department moved for summary disposition. The Respondent filed a response to the motion on July 15, 2010. The Department filed its reply memorandum and supplemental affidavits on July 23, 2010.

The Respondent contends that the Department lacks jurisdiction to proceed in this matter because the Respondent is not licensed by the Department. Furthermore, "[d]ocuments submitted at the time of trial clearly show that Mr. Pratt was not the signing loan officer in the transactions that were involved in the case."⁹ The Respondent notes that his actions were as "an individual purchaser or seller in several cases. Further, the jury found that there was no monetary loss in any of the transactions."¹⁰

The Department responded that its jurisdiction over this type of proceeding, and the Respondent in particular, is based in Ch. 58.¹¹ The Department characterized that authority as follows:

The Legislature vested the Department with broad authority to bar and impose civil penalties against any "residential mortgage originator, servicer, applicant, *or other person*, an officer, director, partner, employee, or agent *or any person* occupying a similar status or performing similar functions, or a person in control of the originator, servicer, applicant, or other person." Regardless of whether he acted as a facilitator, loan officer, or seller in any of the various transactions at issue, Respondent is subject to the Department's jurisdiction since his misconduct -- adjudicated as racketeering -- violated Minn. Stat. ch. 45 and 58.¹²

⁶ Boyer Aff., at 1

⁷ Eidem Aff., Ex. 1.

⁸ Notice and Order for Prehearing Conference, at 1 (filed March 23, 2010).

⁹ Respondent Brief, at 7.

¹⁰ *Id.*

¹¹ Minn. Stat. § 58.04, subd. 2(b)(2) exempts Respondent from having a license as an employee of a licensed mortgage originator. Minn. Stat. § 58.05, subd. 1, subjects Respondent to all other applicable provisions of Minn. Ch. 58. *See also, Pomrenke v. Commissioner of Commerce*, 677 N.W.2d 85, 90-91 (Minn. Ct. Appls. 2994) (acts committed by a mortgage originator who is exempt from licensure requirement provide the commissioner with jurisdiction to impose civil penalties and bar that individual from the field).

¹² Department Reply, at 5 (citing Minn. Stat. § 58.12, subd. 1(a)(2) (emphasis added)).

The Respondent falls into the category of a person who performed the function of a mortgage originator; in his role as a loan officer, Respondent assisted buyers of real estate with their loan applications and found lenders for them. Any person performing that function, whether a license holder or not, is subject to the jurisdiction of the Department. The Department has shown that it has jurisdiction to proceed against the Respondent in light of his conduct.

II. Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.¹³ The Office of Administrative Hearings has generally followed the summary judgment standards developed by state and federal courts when considering motions for summary disposition.¹⁴ A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.¹⁵

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.¹⁶ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.¹⁷ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.¹⁸

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.¹⁹ All doubts and factual inferences must be resolved against the moving party.²⁰ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.²¹

¹³ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500, subp. K; Minn. R. Civ. P. 56.03.

¹⁴ See Minn. R. 1400.6600. Rules are cited to the 2009 Edition.

¹⁵ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

¹⁶ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

¹⁷ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

¹⁸ *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

¹⁹ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

²⁰ See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

²¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

III. Standards for Determination of Undisputed Facts

The factual background for this motion has been hotly contested by the parties. The ALJ has carefully examined the affidavits to assess what facts are not in dispute. In carrying out this assessment, the ALJ has applied the foregoing summary disposition standards and relied upon those precedents for guidance. Several issues were raised regarding the determination of facts that must be addressed.

A. Hearsay

The Respondent contends that Department investigators have no first-hand knowledge of the underlying facts upon which this disciplinary action is based. The Respondent contends that:

Any information submitted by [the investigator] would not be admissible in court thus it cannot be used to support a summary judgment motion. It is fundamental that the evidence in support of a summary judgment motion must be evidence that would be admissible in a proceeding. The hearsay evidence of [the investigator] and his opinions founded in the theories of the department are not admissible evidence.²²

The Department responded that using investigators to collect and present their findings is a practice that has been approved by the Minnesota Supreme Court. These witnesses are competent, as other “qualified” witnesses, to supply foundation for admission of business records under Minn. R. Evid. 803(6).²³ The Department noted that the transactional documents attached to the investigator’s affidavit were obtained directly from the various lenders pursuant to administrative subpoenas or from other public records.²⁴

Admissible evidence in administrative proceedings is that which “possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.”²⁵ Records of regularly conducted business are not excluded as hearsay.²⁶ In this instance, such records, properly kept, are inherently reliable and should be considered.

²² Respondent Brief, at 11.

²³ Department Reply, at 5 (citing *Byers v. Commissioner of Revenue*, 741 N.W.2d 101, 106-07 (Minn. 2007)).

²⁴ Department Reply, at 5-6. See also, 1st Amended Criminal Complaint, where Investigator Eidem states that “Property purchase records seized from Universal, from Defendant’s [Respondent’s] residence, and provided by closing agents for the loans contain the ... details of property purchases orchestrated by Defendant resulting in kickbacks from loan proceeds to Defendant.”

²⁵ Minn. R. 1400.7300, subp. 1.

²⁶ Minn. Rules of Evidence 803(6).

B. Admissible Evidence

The Department replied that the investigators are testifying as to matters within their own knowledge based on subpoenaed documents obtained through their investigation from various affected lenders and public documents. As noted above, the hearsay objection is not a valid ground to preclude admission of the disputed records. The investigators have identified the sources of the documents offered to demonstrate a *prima facie* violation of the statutory standards governing mortgage lending. The documents identified are the sort of evidence that persons are accustomed to relying upon in the conduct of their serious affairs. Many of the offered documents were prepared by or on behalf of the Respondent and were intended to be relied upon by lending institutions in making mortgage loans. There is no evidence in the record to refute this. The Respondent has not demonstrated that these documents are in any way inadmissible in this proceeding.²⁷

C. Reliance on Affidavits

The Respondent contends that the Department investigators' affidavits do not meet the standard for personal knowledge to establish the factual background to support a grant of summary disposition. The Department replied that its affidavits are providing information developed through its investigation. The Department noted that the Respondent's affidavits are from Respondent's counsel and those affidavits do not reflect statements of fact relevant to this proceeding. The Respondent described the standard for reliance on affidavits as follows:

An affidavit supporting a motion in opposition for summary judgment must 'be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' Minn. R. Civ. P. 56.05. 'In the past, we have found affidavits to be insufficient to raise a question of material fact if they merely stated legal or factual Conclusions without providing a basis for the affiants' knowledge and without making any showing that the affiants were competent to testify as to the matters stated.' See *Federal Ins. Co. v. Pratt's Express*, 308 Minn., 282, 283-84, 241 N.W.2d 488, 489 (1976); *Peterson v. American Family Mut. Ins. Co.*, 280 Minn. 482, 487, 160 N.W.2d 541, 544-45 (1968).²⁸

The Respondent has correctly stated the standard for reliance upon affidavits. Applying this standard to the Department's affidavits, the Department has relied upon investigators who have identified specific information, obtained through their investigations. The investigators identified the sources of their information and how it was obtained. With very few exceptions, the investigators limited their statements to

²⁷ The Department offered a recording of a telephone conversation with one of the purchasers in the transactions cited below. The ALJ has not relied upon any part of that evidence as it is unsworn (by the purchaser) and not the sort of information that is sufficiently reliable to be accepted in this proceeding.

²⁸ Respondent's Memo, at 11, footnote 6.

factual matters. The inferences drawn by the investigators will be discussed in the analysis of specific issues.

The Respondent relied on two affidavits in opposing the Department's summary disposition motion and one affidavit in support of the Respondent's continuance motion. All of the affidavits are from Respondent's counsel only. The Department maintained that the contents of the Respondent's affidavits are not appropriate to demonstrate that genuine issues of material fact exist for hearing in this matter. Specifically, the Department described as inadmissible the portions of those affidavits which contained the following:

- Presenting legal theories on appeal as supposed facts for purposes of this proceeding. See, e.g., Reed Aff. No. 1, ¶¶ 10-20.
- Arguing failed defenses from the underlying criminal matter, notwithstanding that they were rejected by the jury and the court and that Respondent's conviction precludes him from relitigating those matters in this forum. Reed Aff. No. 1, ¶¶ 21-23, 84; Reed Aff. No. 2, ¶¶ 7-11; Reed Aff. No. 3, ¶¶ 5-16.
- Holding himself out as an apparent expert on the mortgage industry. Reed Aff. No. 1, ¶¶ 24-33, 47-59, 77, 89-90.
- Summarizing supposed findings and the testimony in the underlying criminal matter without providing any corresponding exhibits or transcripts. Reed Aff. No. 1, ¶¶ 34-42; Reed Aff. No. 2, ¶¶ 4-5.
- Offering general assertions as supposed factual statements concerning the transactions involving Mark Ross and Patricia Smith (and without establishing his competence to offer such contentions). Reed Aff. No. 1, ¶¶ 44-46, 83.
- Tendering personal beliefs and legal opinions concerning Mr. Boyer's affidavit, the Department's legal theories, and the pending administrative action. Reed Aff. No. 1, ¶¶ 60-69, 72-76, 78-81, 84, 86, 88, 91; Reed Aff. No. 3, ¶¶ 3-4.
- Commenting on the types of documents that he has not seen during the course of representing Respondent. Reed Aff. No. 1, ¶¶ 70-71, 82, 87.
- Holding himself out as a handwriting expert and opining that he does not recognize certain signatures as those of Respondent. Reed Aff. No. 1, ¶ 92; Opp'n Mem., p. 16.
- Promising to produce evidence at a later date. Reed Aff. No.3, ¶¶ 9, 11-15.²⁹

Both Respondent and the Department have cited the Minnesota Court of Appeals on this issue, which stated:

²⁹ Department Reply, at 7.

The only evidence presented to the court at the time of the hearing of the motion for summary judgment was an affidavit by defendant's attorney, stating that on *information and belief*, plaintiff failed to perform certain obligations under the lease guarantee agreement. Rule 56.05 requires such affidavits to be made on personal knowledge. Thus, defendant's attorney's affidavit was not proper evidence, under Rule 56.05, to oppose summary judgment.

The evidence shows that long before the summary judgment motion was heard, defendant knew who had personal knowledge of facts which might support triable issues of fact, yet no effort was made to obtain their deposition testimony or affidavits. Summary judgment was properly entered.³⁰

The Respondent's affidavits lack averments of actual facts in dispute. In the main, the averments to demonstrate that actual facts are in dispute must come either from Respondent (rather than Respondent's counsel) or other persons who have actual knowledge or who were actually involved in the transactions that form the basis of the Department's action against the Respondent. The Respondent's were not. The specific shortcomings of the Respondent's affidavits will be discussed regarding each issue asserted.

D. Foundation

The Respondent contends that Department investigators cannot provide foundation for the documents offered in support of the summary disposition motion. As discussed above, the Department's affidavits establish that the documents have been identified as having been kept in the normal course of business. The investigators identified where the documents were obtained. Nothing more is required for laying foundation for the purpose of admitting the document into the record. The Respondent has offered no affidavit that sheds doubt on whether the records were so maintained. The persuasiveness or weight attributable to any particular document rests with the development of the record through witness testimony and support by the introduction of other documents.

³⁰ *Boulevard Del, Inc. v. Stillman*, 343 N.W.2d 50, 52-53 (Minn. Ct. App. 1984) (emphasis in original).

IV. Determination of Undisputed Facts Regarding Respondent's Convictions

A. Respondent's Criminal Convictions

The Respondent was convicted on seventeen felony counts of fraud and two counts of racketeering arising out of mortgage lending transactions. There was no stay of execution entered on the convictions and the Respondent is currently incarcerated. The Respondent has appealed the convictions.

B. Finality of Convictions for Purposes of Estoppel

The Respondent contends that, since the convictions are on appeal, they are not final judgments that can have collateral estoppel effect. The Respondent has not cited any case law in support of the contention that the judgments cannot be used for collateral estoppel purposes.

The Department responded that the filing of an appeal does not stay execution of the judgment or sentence, absent the grant of such a stay by the district court judge or judge of the appellate court.³¹ In addition, the Department cites a significant number of cases holding that an appeal does not vacate or annul the underlying judgment unless and until the judgment is reversed.³² The Respondent has offered no legal support to the contrary.

There is a judgment of conviction against the Respondent and that judgment was not stayed pending appeal. The application of collateral estoppel is not barred by Respondent's appeal of the judgment of conviction.

C. Assertion of Double Jeopardy

The Respondent was fined \$500,000 at his criminal conviction sentencing. The Respondent contended that no fine could be levied in this proceeding. It is barred by application of the constitutional doctrine of double jeopardy. On this issue, the Respondent argued:

Both the United States and Minnesota Constitutions guarantee that a criminal defendant may not be tried more than once for the same offense. See U.S. Const. amend. V (providing that '[no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.>'); Minn. Const. art. 1, § 7 (providing that 'no person shall be put twice in jeopardy of punishment for the same offense.'). The federal provision is binding on

³¹ Department Reply, at 4, citing Minn. R. Crim. P. 28.02, subd. 6 (2010).

³² Department Reply, at 4, citing *Wilcox Trust, Inc. v. Rosenberger*, 169 Minn. 39, 43, 209 N.W. 308, 310 (1926); *State ex rel. Spratt v. Spratt*, 150 Minn. 5, 7, 184 N.W. 31, 32 (1921); *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 572 (Minn. Ct. App. 1984); see also *Rauchuy v. Anchor Bank*, 2009 WL 3426939, **5.6 (Minn. Ct. App. 2010), rev. dismissed (Minn. 2010) (holding that after reversal a criminal conviction is no longer effective for collateral estoppel purposes in a civil matter).

the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969).

See, *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 493 (1997) (stating that '[t]he Clause protects only against the imposition of multiple criminal punishment for the same offense.')

The Double Jeopardy Clauses of the United States Constitution and the Minnesota Constitution protect a criminal defendant from three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *United States v. Helper*, 490 U.S. 435, 440, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989); *State v. Fuller*, 374 N.W.2d 722, 726-27 (Minn. 1985).

The Supreme Court thus held that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution. 490 U.S. at 448.

The Department responded that neither the ALJ nor the Commissioner have the authority to address constitutional issues, as a matter of law.³³

In the context of a contested case proceeding, neither an ALJ nor an agency head can declare a statute or rule unconstitutional on its face, since that power is vested in the judicial branch of government.³⁴ Alms are obligated to apply laws, rules, and ordinances in a constitutional manner, but questions as to the constitutional validity of the laws, rules, and ordinances are outside the jurisdiction of an ALJ or agency official.³⁵ It is permissible, however, for an agency or ALJ to determine a constitutional question in the interpretation or application of a statute or rule to particular facts taking into account relevant judicial decisions.³⁶

In addressing the constitutional issue of double jeopardy as applied to the facts of this matter, the ALJ follows the direction of the Minnesota Court of Appeals which held:

The United States Supreme Court has recently returned to its earlier view that the Double Jeopardy Clause of the Fifth Amendment applies only to criminal punishment, not to civil sanctions that could be described as

³³ Department Reply, at 8-9 (citing *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d 366, 368 (Minn.1977); and *Padilla v. Minn. State Bd. of Med. Exam'rs*, 382 N.W.2d 876, 882 (Minn. App. 1986).

³⁴ *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Service, a Div. of Hiawatha Aviation of Rochester, Inc.*, 500 N.W.2d 495 (Minn. App. 1993).

³⁵ *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d at 368. In rules adopted under the Minnesota Administrative Procedure Act (MAPA), an ALJ is authorized to disapprove a proposed rule if the rule is not rationally related to the agency's objective or the rule is unconstitutional. Minn. R. 1400.2100 D. and E. (2009). This authority only applies to agency rulemaking.

³⁶ *Petterson v. Commissioner of Employment Services*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975); *Jackson County Education Ass'n v. Grass Lake Community*, 291 N.W.2d 53 (Mich. App. 1980).

punishment or that serve some of the same purposes as criminal punishment.³⁷

The Minnesota legislature in promulgating laws regulating mortgage originators, and their employees, established standards of conduct intended to protect the public from unscrupulous lending practices. When those standards, which are civil in nature, are violated, civil sanctions may be imposed. As applied to the facts of this proceeding, there is no constitutional prohibition arising from the double jeopardy doctrine to prevent the Department from imposing a civil fine, or any sanction enumerated in the statute, on the Respondent for violations of the standards governing mortgage originators.³⁸

D. Estoppel Effect

The Department has proceeded against the Respondent under Minn. Stat. § 58.12, which states in pertinent part:

Subdivision 1. Powers of commissioner. (a) The commissioner may by order take any or all of the following actions:

(1) bar a person from engaging in residential mortgage origination or servicing;

(2) deny, suspend, or revoke a residential mortgage originator or a servicer license;

(3) censure a licensee;

(4) impose a civil penalty as provided for in section 45.027, subdivision 6; or

(5) revoke an exemption or certificate of exemption.

(b) In order to take the action in paragraph (a), the commissioner must find:

(1) that the order is in the public interest; and

(2) that the residential mortgage originator, servicer, applicant, or other person, an officer, director, partner, employee, or agent or any person occupying a similar status or performing similar

³⁷ *Johnson v. 1996 GMC Sierra*, 606 N.W.2d 455, 458 (Minn. App. 2000), review denied (Minn. Apr. 18, 2000) (citations omitted).

³⁸ The Respondent asserted that the Department's action in bringing this enforcement proceeding was so obviously a violation of the double jeopardy doctrine that attorney's fees should be awarded to Respondent. As discussed above, the double jeopardy doctrine does not preclude this proceeding. Further, an award of attorney's fees in this type of proceeding is governed by the Minnesota Equal Access to Justice Act (Minn. Stat. § 15.471 to 15.474). Such awards are available only to litigants who prevail on the merits and demonstrate that the State's position is not substantially justified, and are not available to individuals. Minn. Stat. § 15.472 (a).

functions, or a person in control of the originator, servicer, applicant, or other person has:

(I) violated any provision of this chapter or rule or order under this chapter;

* * *

(iv) violated a standard of conduct or engaged in a fraudulent, coercive, deceptive, or dishonest act or practice, whether or not the act or practice involves the residential mortgage lending business;

(v) engaged in an act or practice, whether or not the act or practice involves the business of making a residential mortgage loan, that demonstrates untrustworthiness, financial irresponsibility, or incompetence;

(vi) pled guilty, with or without explicitly admitting guilt, pled *novo* contender, or been convicted of a felony, gross misdemeanor, or a misdemeanor involving moral turpitude;

To apply collateral estoppel, the current issue must be identical to one in a prior adjudication, where there is a final judgment on the merits. The estopped party must have been a party or in privity with a party to the prior adjudication. The estopped party must have been given a full and fair opportunity to be heard on the adjudicated issue.³⁹ The issue on which estoppel is to be applied must have been necessary and essential to the prior adjudication.⁴⁰

The Respondent was a party in his criminal trial and he was afforded the full opportunity to present his case in that proceeding. The criminal complaint states,

[t]he instant complaint concerns Defendant's [Respondent's] role in the purchase of [real] properties, some of which were sold to straw buyers in 2006. The property purchases outlined in this complaint were all financed by fraudulently obtained loans and all resulted in a 'kickback' to Defendant [Respondent] from the loan proceeds.⁴¹

The complaint goes on to enumerate the 17 counts of theft by swindle and a racketeering count.⁴²

The State prevailed on all counts under the higher standard of proof; beyond a reasonable doubt. As discussed above, the judgment of conviction is final for purposes of collateral estoppel.

³⁹ *Ill. Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 531 (Minn. 2003).

⁴⁰ *Hauser v. Mealey*, 263 N.W.2d 803, 808 (Minn. 1978).

⁴¹ 1st Amended Criminal Complaint, at 2 (attached to the Department's Notice and Order for a Prehearing Conference).

⁴² *Id.*, at 5-10.

Count I, in the Department's Notice and Order for Prehearing Conference, states that the Respondent was convicted of 19 felonies involving moral turpitude – 17 counts of Felony Theft by Swindle and two counts of Felony Racketeering – in conjunction with 17 transactions involving the mortgage lending business, each of which constitutes a separate violation of law. Respondent violated a standard of conduct, engaged in a fraudulent, coercive, deceptive, or dishonest act, and otherwise engaged in an act that demonstrates untrustworthiness, financial irresponsibility, or incompetence.⁴³

The facts underlying the Respondent's convictions for fraud and racketeering constitute grounds to impose discipline under Minn. Stat. § 58.12, sub. 1(b)(2)(I) (violation of any provision of this chapter), (iv) (engaged in a fraudulent, coercive, deceptive, or dishonest act or practice, whether or not the act or practice involves the residential mortgage lending business), (v) (engaged in an act or practice, whether or not the act or practice involves the business of making a residential mortgage loan, that demonstrates untrustworthiness, financial irresponsibility, or incompetence), and (vi) ([has] been convicted of a felony, gross misdemeanor, or a misdemeanor involving moral turpitude).⁴⁴ The factual background of the convictions falls squarely within the Act, and the criminal conduct of the Respondent would not have been possible, absent his actions as a mortgage originator.⁴⁵

Under this analysis, the Respondent is estopped from disputing the fact of his convictions for fraud and racketeering. The Department need not prove any additional facts, except for the criminal convictions, in order to impose administrative discipline. But there is a limit to the extent that estoppel on this issue addresses all the issues in this proceeding. The Respondent was convicted of violations of the criminal code, not the statutory obligations of mortgage originators. Where there is a difference between the underlying conduct that formed the basis for a conviction and the obligations governing mortgage originators under Minn. Stat. § 58.12, a Respondent would then be entitled to assert any defense relating to that difference for which he can adduce evidence.⁴⁶

E. Remaining Issues Surrounding Convictions

⁴³ Minn. Stat. §§ 45.027, subd. 7(a)(4), 58.12, subd. 1(b)(2)(iv), (v), and (vi), 58.13, subd. 1(19).

⁴⁴ Moral turpitude is not defined in the statute, but Black's Law Dictionary, pp. 1008-09 (6th ed. 1990) (citations omitted), defines it as follows: The act of baseness, vileness, or depravity in private and social duties which man owes his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others.

⁴⁵ The Respondent raised a number of issues concerning the conduct of the criminal trial and the nature of the evidence presented there. None of these issues has any bearing on the Respondent's conviction for criminal behavior engaged in while conducting mortgage origination activities. None of the Respondent's issues are relevant issues of material fact for which a hearing need be held.

⁴⁶ *ITMO the Disciplinary Hearing Relating to Michael Alan Kveene*, License No. 10639, OAH Docket No. 12-2402-10724-2 (ALJ Order Granting Partial Summary Disposition issued November 1, 1996) (relying on *ITMO the Matter of the Teaching License of Falgren*, 545 N.W.2d 901, 905-06 (Minn. 1996)).

Where there are differences between the underlying conduct to a conviction and the standards governing mortgage originators, a person subject to discipline must be afforded the opportunity to address any such differences in a contested case hearing. In this matter, there are no such differences relating to the conduct for which sanctions are being sought, since the fraudulent conduct that formed the basis of the Respondent's convictions occurred in the context of his conduct as a loan officer originating mortgage loans. However, there is a clear difference in penalties between the criminal conviction and this proceeding. The Respondent is entitled to make a record and introduce arguments regarding any proposed sanctions, including the amount of any civil penalty ultimately imposed, since none of those issues are collaterally estopped by the Respondent's conviction.

V. Determination of Undisputed Facts Regarding Respondent's Other Transactions

A. Respondent's Transactions

Apart from the evidence regarding Respondent's convictions, the Department introduced evidence regarding transactions entered into between the Respondent and two other persons (the Ross and Smith transactions).

The Department established that the Respondent was involved in five real estate closings between March 28, 2006 and August 28, 2006 involving Mark Ross. Consistent with schemes involving occupancy fraud, a different lender was used for each transaction. As the loans closed, Respondent neglected to notify the lenders on the pending loans that Ross had incurred significant liabilities and monthly payment requirements, distorting the debt-to-income ratio. This ratio is a key underwriting criterion in determining most mortgage loans and the omission of liabilities artificially lowered Ross' debt ratio. These undisclosed liabilities also significantly affected Ross' ability to repay each loan and increased the risk of default.⁴⁷

Except for the first Ross purchase of an Oliver Avenue property, Respondent was the loan officer on the remaining four transactions. A day after the Oliver property purchase, Respondent was the loan officer for Ross' Newton property purchase. Respondent knew or should have known that Ross had legal obligations on the Oliver property as the loan was closed in UMI's office the day before and the Oliver property was included as an asset, without any outstanding liability, on the 1003 signed by Respondent that was used, three days after the Oliver property purchase, for Ross' purchase of a Fremont Avenue property. Respondent provided false information on the 1003 used for the Newton property purchase by not disclosing Ross' liabilities on the Oliver property.⁴⁸

Respondent similarly provided false information on the 1003 by failing to include liabilities associated with the Oliver and Newton purchases for Ross' purchase of the

⁴⁷ Boyer Aff., at 3.

⁴⁸ *Id.*, at 4; Exs. 5 and 6.

Fremont property, his third property purchase.⁴⁹ This pattern continued for the subsequent Washington Avenue property purchase.⁵⁰

Approximately five months after Ross' purchase of the Fremont property, Ross cashed out approximately \$43,000 from the property by refinancing. Respondent refinanced Ross' loan with the same lender. Respondent provided false information on the 1003 by failing to include liabilities associated with Ross' prior Newton and Washington property purchases.⁵¹

Respondent also provided false information on the 1003s by failing to disclose that Ross was purchasing more than one property as his "primary residence." This is significant because lenders generally charge a higher interest rate to investors compared to an individual who personally occupies the residence because the risk of loss is generally higher with an investor.⁵² Respondent also overstated Ross' \$3,607 monthly income by \$1,393 to \$3,286 on the various 1003s.⁵³

Ross eventually defaulted on all four properties resulting in substantial losses to the lenders involved.⁵⁴

Like the Ross fraudulent property transactions described above, Respondent, as the loan officer, made similar false representations to lenders in three property purchase transactions involving Smith.⁵⁵

The Department alleged that the undisputed evidence regarding these transactions constituted violations of Minn. Stat. §§ 45.027, 58.12, and 58.13.⁵⁶

B. Respondent's Claim of Estoppel

In relation to the Ross and Smith transactions, the Respondent contends that:

Also, the department is asking that this court declare violations based upon collateral estoppel on matters that have not yet been litigated. In particular, the Commerce Department makes reference to "straw buyer" transactions. Those matters are the subject of a trial in Hennepin County District Court which is not yet commenced. Thus, they cannot serve as the basis for a claim of collateral estoppel.⁵⁷

⁴⁹ *Id.*, at 5; Exs. 9 and 10.

⁵⁰ *Id.*, at 5; Exs. 11 and 12.

⁵¹ *Id.*, at 6; Exs. 14, 15, and 16.

⁵² *Id.*, at 6.

⁵³ *Id.*, at 7.

⁵⁴ *Id.*, at 4-6.

⁵⁵ *Id.*, at 7-10; Exs. 19-28.

⁵⁶ Department Brief, at 10.

⁵⁷ Respondent Brief, at 2.

The Department has cited the Ross and Smith transactions as factual demonstrations of violations by the Respondent of his statutory obligations as a person engaging in mortgage origination. These allegations stand on their own factual underpinnings. The Department has not claimed that there is any final court judgment, civil or criminal, arising out of those transactions. There is no estoppel analysis of the Ross and Smith transactions to be performed.⁵⁸

C. Evidence on the Smith and Ross Transactions

Count II, in the Department's Notice and Order for Prehearing Conference, states the Respondent participated in, directed, or authorized false, deceptive, or misleading statements and representations concerning the borrower's intended residence, income, assets, and/or liabilities in connection with 7 other residential loan transactions, each of which constitutes a separate violation of law. Respondent violated a standard of conduct, engaged in a fraudulent, coercive, deceptive, or dishonest act, and otherwise engaged in an act that demonstrates untrustworthiness, financial irresponsibility, or incompetence.⁵⁹

Under a "straw borrower" mortgage fraud scheme, an investor is persuaded to purchase multiple residences with promises of high return on investment. The mortgage originator plays a key role in the scheme by securing loans from different lenders while misrepresenting the purchaser's status as an occupant (as compared to an investor), inflating the purchaser's income, and underestimating the purchaser's liabilities. The benefits to the mortgage originator are the fees and commissions paid at the closings. Inevitably, the investor cannot make the multiple mortgage payments and defaults on the loans. The consequences on the local community are serious, resulting in foreclosed residences and decreasing property values. Lenders also take substantial losses on the defaulted mortgage loans. Ultimately, the community suffers significant financial distress as a result of this type of mortgage fraud.⁶⁰

The Department offered evidence of a number of real estate transactions with two persons for which the Respondent was not criminally charged. Between March 28, 2006, and August 28, 2006, five real estate closings occurred involving mortgages originated through UMI for Mark Ross. The Respondent was the loan officer on all but one of these transactions. A different lender was utilized for each transaction. The Respondent did not notify the lenders on pending loans that Ross had incurred significant liabilities through closing on the preceding real estate purchases and that Ross was now obligated for monthly payments on those mortgages. Specifically, the Department alleges that the 1003 for at least four of the purchases failed to identify the loans incurred for prior purchases, even when the properties were identified as assets

⁵⁸ Respondent asserted that there was a trial scheduled regarding those transactions that had not yet occurred. Where properly pleaded, a stay of administrative proceedings can be had to allow a court proceeding to go forward, consistent with the principles of judicial economy. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S. Ct. 2161 (1983). In this instance, there is insufficient evidence of a parallel court proceeding to justify a stay regarding the Smith and Ross transactions.

⁵⁹ Minn. Stat. §§ 45.027, subd. 7(a)(4), 58.12, subd. 1(b)(2)(iv), (v), and (vi), 58.13, subd. 1(19).

⁶⁰ Notice and Order for Prehearing Conference, at 3-4.

owned by Ross. Some of the 1003s prepared for Ross overstated his income from about 40 to 90%.⁶¹ In the normal practice of mortgage origination, the 1003 is prepared by the loan officer, which for these transactions was the Respondent.⁶²

The Department also notes that a statement was prepared for Ross to sign which stated, "I, Mark Ross, have several inquiries on my credit report due to applying for a home loan. I gave several lenders permission to pull my credit, trying to find the best lender to meet my needs of having the lowest interest rate and affordable payment."⁶³

Four of the Ross-purchased properties were foreclosed upon, all within one year of the purchase date. These foreclosures resulted in substantial financial losses to the lenders in the Ross transactions.⁶⁴

Between December 5, 2005 and January 27, 2006, three real estate closings on behalf of Patricia Smith occurred involving mortgages originated through UMI and involving the Respondent. Smith also purchased a residence on December 5, 2005, through another loan officer at UMI. All of the real estate transactions were identified as Smith's primary residence. The 1003s for Smith were prepared in similar fashion to those for Ross, omitting the additional liabilities of the purchased residences and omitting the ongoing monthly payments for the mortgages on those properties.⁶⁵

Two of the Smith-purchased properties were foreclosed upon, within 17 months of the purchase date. On May 14, 2007, a financial institution involved in one Smith transaction complained to the Department regarding the conduct of the Respondent in misrepresenting the 1003 information. The complaint noted that the Respondent was the loan officer on another mortgage loan that bore very similar characteristics to the Smith loan. The complaint noted that the similarities suggested that the Respondent's conduct was a pattern or practice, not an isolated incident.⁶⁶

From the information provided by the lenders to the Ross and Smith transactions, the Department estimated that the foreclosures in those transactions resulted in losses to the lenders of more than \$650,000.⁶⁷

The Department contends that the Ross and Smith transactions are consistent with a pattern of financial transactions used in occupancy fraud. The Department noted that the manner in which the loan originator conducted the multiple purchases misstated both borrowers' debt-to-income ratios. Since the debt-to-income ratio is important to determine eligibility for most mortgage loans, failing to inform a lender of added

⁶¹ Boyer Aff., ¶ 22; and Exs. 2, 5, 9, 11, 14.

⁶² Boyer Aff. ¶ 9. The ALJ notes that a subsequent financial institution's complaints regarding false information in the relevant 1003 named the Respondent for his role in its preparation. Supp. Boyer Aff., Exs. B and C.

⁶³ Boyer Aff. ¶ 23 and Ex. 18.

⁶⁴ Boyer Aff.

⁶⁵ Boyer Aff., at 7-9.

⁶⁶ Supp. Boyer Aff., Ex. C.

⁶⁷ Department Brief, at 10; Boyer Aff.

liabilities had the result of artificially lowering the debt ratio of the borrower. The Department argues that these undisclosed liabilities significantly affected both Ross' and Smith's ability to repay each loan and increased the risk of default. The Department also maintained that the rapid succession of closings (three weeks for Ross, eight for Smith) ensured that the new mortgages would not appear on the borrowers' credit reports when the lender checked on each borrower's credit-worthiness.⁶⁸ These assertions are reasonable inferences from the undisputed facts in this proceeding. There are no reasonable inferences that can be taken from the undisputed facts to conclude that the Respondent did not have a plan to mislead mortgage lenders to their detriment and for his own enrichment through fees and commissions.

D. Respondent's Assertions of Fact Issues.

The Respondent maintains that summary disposition is inappropriate because genuine issues of material fact remain for hearing. The Respondent cites the possibility that he was not the signatory on the 1003s as an example of such a fact issue. But the Respondent has not filed an affidavit that affirmatively states the he did not sign the 1003s that bear his signature. Raising a speculation about the quality of the evidence offered by the moving party does not meet the standard for the nonmoving party. Posing a "metaphysical doubt" regarding a factual issue does not establish a genuine issue of material fact.⁶⁹

For the Respondent to raise a genuine issue of fact, a competent affidavit must contain information to show that there are issues remaining. An affidavit from the Respondent (not Respondent's counsel) asserting that the Respondent was not the loan officer on the Smith and Ross transactions, that the Respondent did not sign the 1003s, and that the Respondent had no culpable role in those transactions would be sufficient to carry the nonmoving party's burden (since all inferences are taken in favor of the nonmoving party). There is no such affidavit in the record of this motion.

The Respondent contends that there is no proof that any lender relied on the information in the 1003s. The only support for this contention is a description of the various types of loan instruments from the Respondent's counsel.⁷⁰ There is no affidavit or sworn deposition testimony from an affected lender that the information was not relied upon. There is evidence in the record that a statement from Ross was prepared to explain the unusual credit report activity coinciding with Ross purchasing multiple residences over a very short period of time.⁷¹ This statement suggests that lenders were relying on information regarding Ross in assessing credit-worthiness. The only competent evidence in the record on this motion supports the conclusion that the

⁶⁸ Department Brief, at 4; Boyer Aff., ¶ 8.

⁶⁹ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

⁷⁰ Respondent Brief, at 15-16; Reed Aff. No. 1, ¶¶ 24-33.

⁷¹ While the Department received a complaint from a financial institution, the complainant was not the initial mortgage lender. Supp. Boyer Aff., Ex. C. Similarly, a purchasing institution complained to the initial lender that circumstances constituting a default, including Ross not residing in property that was used for rental property, had occurred. Boyer Aff., Ex. 8.

Respondent acted as the loan officer in the Smith and Ross transactions and that he was knowledgeable about the nature of those transactions.

The evidence in the record shows that the Ross and Smith transactions were part of a fraudulent, deceptive, or dishonest practice involving the residential mortgage lending business; in violation of Minn. Stat. § 58.12, sub. 1(b). The Respondent had the opportunity to submit admissible evidence to rebut or contradict the Department's evidence but did not. The Respondent has not shown that any genuine issues of material fact remain for hearing concerning the alleged violation of those standards.

E. Remaining Issues Surrounding the Ross and Smith Transactions

As with the estoppel applied to the Respondent's criminal conviction, the grant of summary disposition for the Ross and Smith transactions does not resolve all the issues in this proceeding. The Respondent is entitled to make a record and introduce arguments regarding any proposed sanctions, including the amount of any civil penalty ultimately imposed, since none of those issues are addressed by the Department's request for summary disposition.

VI. Summary

The Respondent is subject to administrative discipline from the Department of Commerce because his conduct, both criminal and the Ross and Smith transactions, violated the Act while he worked as a mortgage originator.

The Department has shown that the Respondent's convictions support the imposition of discipline under Minn. Stat. § 58.12. The Respondent has not demonstrated that any genuine issue of material fact exists to dispute that discipline is appropriate.

While the Respondent moved for a continuance to conduct additional discovery, the only matter identified as needing discovery was the trial transcript in the Respondent's criminal proceeding. As discussed above, there are no aspects of the criminal trial that are at issue in this proceeding. The only information needed to demonstrate whether genuine issues of material fact exist for hearing can be obtained from the Respondent himself. Therefore, the Respondent's motion for a continuance is denied.

The Department has made a *prima facie* showing that the Respondent engaged in additional real estate transactions that were not the subject of his criminal convictions. The Department has made a *prima facie* showing that the Respondent engaged in fraudulent conduct through these transactions that violate Minn. Stat. § 58.12. The Respondent has failed to introduce any evidence showing that any genuine issue of material fact remains for hearing on these transactions.

The lack of material issues of fact relates only to the issues regarding the alleged violations. The Respondent will have the opportunity to present evidence regarding the propriety of the sanctions to be imposed for the violations.

M. J. C.