BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation of:	)	
	)	
THE CALIFORNIA CORPORATIONS COMMISSIONER	)	
	)	OAH No. N2003050833
Complainant,	)	
	)	
v.	)	
	)	
National City Mortgage Company,	)	
	)	
Respondent.	)	

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated October 31, 2003, is hereby adopted by the California Corporations Commissioner as his Decision in the above-entitled matter with the following technical and clarifying changes pursuant to Section 11517(c)(2)(C) of the Government Code. The clarifying changes conform the decision to Article III, Section 3.5 of the California Constitution and do not change the factual or legal basis of the proposed decision.

(1) In the third line of Paragraph No. 7 of Factual Findings on page 2 of the proposed decision, "Bank" is substituted for the first usage of the word "Mortgage."

(2) At the end of footnote 9 on page 2 of the proposed decision, "(Citations from Advisory Letter.)" is added.

(3) At the end of footnote 10 on page 2 of the proposed decision, "(Citations from Advisory Letter.)" is added.

(4) At the end of footnote 11 on page 3 of the proposed decision, "over national banks." is substituted for the period.

(5) In the second line of the first paragraph on page 6 of the proposed decision, "been alleged" is substituted for the word "existed."

(6) In the eighth and ninth lines of the first paragraph on page 6 of the proposed decision, "for the Commissioner's action" is substituted for "for Commissioner action."

(7) In the second line of the second paragraph on page 6 of the proposed decision, "federal laws that function" is substituted for "a federal statute that functions."

(8) In the second line of the third paragraph on page 6 of the proposed decision, "the Commissioner's visitorial power" is substituted for "Commissioner visitorial power."

(9) In the eighth line of the third paragraph on page 6 of the proposed decision, "his" is substituted for the second usage of "its."

(10) In the first line of the fourth paragraph on page 6 of the proposed decision, "the District Court ruled the Commissioner" is substituted for the words "the Commissioner."

(11) In the sixth line of the first paragraph on page 7 of the proposed decision, "by federal law (subject to federal appellate court resolution)" is substituted for "by federal law.'

(12) In the ninth line of the first paragraph on page 7 of the proposed decision, "unnecessary (subject to appellate court resolution)" is substituted for "unnecessary."

(13) In the eleventh line of the first paragraph on page 7 of the proposed decision, "gained (subject to appellate court resolution)" is substituted for "gained."

(14) In the eleventh line of the first paragraph on page 7 of the proposed decision, "function" is substituted for "functioned."

This Decision shall become effective on February 10, 2004

IT IS SO ORDERED February 10, 2004

CALIFORNIA CORPORATIONS COMMISSIONER

By _____
WILLIAM P. WOOD

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation of: THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, v. NATIONAL CITY MORTGAGE COMPANY, Respondent.	OAH No. N2003050833

PROPOSED DECISION

On August 1, 2003, and October 3, 2003, the matter came on regularly for hearing before Jaime René Román, Administrative Law Judge, Office of Administrative Hearings,[1] State of California, in Sacramento, California.

Complainant appeared by and through Donald A. Newbold, Corporations Counsel.

Respondent National City Mortgage Company appeared by and through Kirkpatrick & Lockhart, LLP, Attorneys at Law, by Edward P. Sangster, Esq., and Jon Jaffe, Esq.

Evidence, in the form of a stipulation[2] and documentary submissions having been received; following written and oral argument, and a post-hearing opportunity for review by respondent of a complainant submission until October 10, 2003; the matter was submitted on October 10, 2003.

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[1] The Office of Administrative Hearings, extant in the executive branch of the State of California, provides a forum independent of the Department of Corporations to fully effectuate the State's interest in providing due process with an independent and neutral adjudicative body. See *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017.
[2] Exhibit 1.

FACTUAL FINDINGS

1. On April 21, 2003, Complainant, Demetrios A. Boutris, California Corporations Commissioner ("the Commissioner"), filed, by and through Donald A. Newbold, Corporations Counsel, an Accusation against respondent National City Mortgage Company ("NCMC"), solely in his official capacity.

2. On May 7, 2003, NCMC filed a timely Notice of Defense.[3]

3. The Commissioner issues licenses to qualified applicants who engage in the business of lending and/or servicing of loans under the California Residential Mortgage Lending Act.[4]

4. NCMC has been licensed (by the Commissioner) since 1997 under the California Residential Mortgage Lending Act as a mortgage lender and servicer.[5]

5. NCMC agreed to comply with the requirements of the California Residential Mortgage Lending Act and rules adopted, and orders issued, by the Commissioner.

6. On November 25, 2002, the U.S. Comptroller of the Currency issued an OCC [Office of the Comptroller of the Currency][6] Advisory Letter, AL 2002-9, addressed to Chief Executive Officers of all National Banks, Department and Division Heads, and All Examining Personnel. The Advisory Letter stated, in pertinent part, that the OCC retains exclusive "visitorial power"[7] over national banks[8] or their operating subsidiaries,[9] including compliance review with applicable state laws.[10]

7. On January 27, 2003, Julie L. Williams, OCC First Senior Deputy Comptroller and Chief Counsel, addressed a letter to National City Corporation addressing federal and state regulation of National City Mortgage and its operating subsidiary, National City Mortgage

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[3] The Notice of Defense included special defenses pursuant to Government Code §§11506(a)(2), 11506(a)(3) and 11506(a)(5).

[4] Financial Code §50000, et seq.

[5] Financial Code §50002.

[6] 12 C.F.R. §5.34(e). The National Bank Act charges the OCC with the supervision of the Act and primary responsibility for surveillance of "the business of banking." See *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.* (1995) 513 U.S. 251, 256; *Burke, supra* at p. 137; and also 12 U.S.C. §§1, 26 – 27, and 481.

[7] Visitorial powers include examination of a bank, inspection of a bank's books and records, regulation and supervision of activities authorized or permitted pursuant to federal banking law, and enforcing compliance with any applicable federal or state laws concerning those activities. 12 C.F.R. §7.4000(a)(2). See also *Guthrie v. Harkness* (1905) 199 U.S. 148, 158.

[8] 12 U.S.C. §21, et seq.

[9] See 12 C.F.R. §5.34, 12 U.S.C. §24 (Seventh), and *Bank of America v. City and County of San Francisco* (9th Cir. 2002) 309, F.3d 551, 562.

[10] *National State Bank v. Long* (3rd Cir. 1980) 630 F.2d 981, 989. See also 12 C.F.R. §7.4000.

Company. Ms. Williams, on behalf of the OCC, concluded that the OCC has exclusive visitorial power over National City Mortgage Company.

8. On March 28, 2003, NCMC responded to a year 2000 Commissioner regulatory examination[11] by letter. In relevant part, NCMC represented to a Senior Examiner of the Commissioner:

> "NCMC is a wholly owned operating subsidiary of National City Bank of Indiana, a national bank. Accordingly, NCMC is subject to exclusive examination and regulation of the Office of Comptroller of the Currency ("OCC"). Respectfully, I want to draw your attention to OCC Advisory Letter AL2002-9, dated November 24, 2002....The Advisory Letter states that national banks and their operating subsidiaries are not subject to state examination."

9. On March 31, 2003, NCMC filed in the United States District Court, Eastern District of California, a lawsuit against the Commissioner seeking Declaratory Relief, Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction. Pertinent to this matter, NCMC sought:

A. That the Commissioner be enjoined from exercising visitorial powers over NCMC; and

B. That the California Residential Mortgage Lending Act be declared preempted by the National Bank Act[12] as applied to national bank subsidiaries.

10. The United States District Court issued the following pertinent orders:

A. On May 7, 2003, the court issued an order preliminarily enjoining the Commissioner from exercising visitorial powers over NCMC and from enforcing California's per diem statutes.

B. On July 2, 2003, the court issued a summary judgment order and permanent injunction enjoining the Commissioner and his agents from exercising visitorial powers over NCMC and found that the National Bank Act preempts California's powers to regulate an operating subsidiary of a national bank.

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[11] See Financial Code §50302. Cf. *First Union National Bank v. Burke* (1999) 48 F.Supp.2d 132, 144 re state visitorial powers.

[12] 12 U.S.C. §21, et seq.

11. While the parties agree that an issue pursuant to the Accusation remains for determination, they differ with respect to its content:

A. Complainant asserts that the issue is whether a fact or condition now exists that, if it had existed at the time of the original application for license, reasonably would have warranted the Commissioner in refusing to issue the license originally.

B. NCMC, instead, asserts that the issue is:

(1) Whether the Commissioner may revoke its license on the sole ground that NCMC commenced litigation contending that:

(a) It did not need a license, and

(b) The purported violations were preempted by federal law.

(2) Is the remedy of license revocation premature and excessive, in light of the appeal of the judgment in the litigation.

LEGAL CONCLUSIONS

1. Respondent filed a timely Notice of Defense that included several Special Defenses. Submitting that jurisdiction is appropriately vested in a federal tribunal, no cogent or credible evidence was presented with respect to several discrete issues raised by its Special Defenses. Cause, accordingly, does not exist to find that:

A. The Commissioner lacks jurisdiction to proceed on the Accusation.

B. The Accusation should be dismissed or stayed pending final order in the United States District Court, Eastern District of California.

C. The Accusation is not ripe.

D. The Accusation is moot.

E. Preemption precludes the Accusation.

F. The Accusation or proceedings thereunder violate NCMC's right to petition the government or that the action is being pursued solely for the purpose of retaliating against respondent for filing a federal action.

G. Financial Code §50204(o) is unconstitutional.

H. That the Commissioner is barred from bringing this action because the borrowers either consented to or ratified the actions of NCMC and third-party escrow agents.

I. The action is subject to offset and recoupment.

J. The Accusation is so indefinite or uncertain precluding NCMC from identifying the transaction or presenting a defense.

K. The Commissioner's compliance requirement places an impossible requirement on NCMC.

2. While each party submits that its presented or framed issue is the singular matter properly before this tribunal; what emerges from a careful observation and consideration of the issues presented is that each party presents appropriate matters for determination.

Indeed, NCMC, in its submitted Notice of Defense properly raises the propriety of revocation of its license as commensurate to the alleged violation (i.e., proportionality).

However, before this tribunal can properly consider proportionality it must first address whether, in fact, culpability, to wit, a violation of California law has occurred.

Complainant submits that a determination of culpability rests on whether any "fact or condition now exists that, if it had existed at the time of the original application for license, reasonably would have warranted the commissioner in refusing to issue the license originally."[14] While respondent argues that the issue is more properly framed upon a determination as to whether the Commissioner may revoke its license on the sole ground that NCMC commenced litigation contending that: (a) it did not need a license, and (b) the purported violations were preempted by federal law; complainant's presentation of the issue mirrors the statutory basis for culpability and discipline—respondent's presentation of the issue does not.

Nevertheless, in addressing the issue presented by complainant to determine culpability, if any, respondent's focus begs the question more aptly raised by the facts herein.

[14] Financial Code §50327(a)(2).

Complainant contends that respondent's culpability lies in the fact that visitorial power preclusion, if it had existed at the time of the original application for license, reasonably would have warranted the commissioner in refusing to issue the license originally. Respondent submits that the pertinent "fact or condition" functioning to invoke the Commissioner's jurisdiction to discipline the license of respondent rests not only with the limitation imposed by the federal court on the Commissioner's visitorial power but also the federal court's preclusion of the Commissioner's enforceability of California's per diem statutes. While inviting, the undersigned concludes that respondent overstates the basis for Commissioner action and dismisses respondent's position that the federal court's restriction on the Commissioner's enforceability of California's per diem statutes is a fact or condition relevant to this tribunal's consideration. Indeed, as cogently argued by respondent, it would appear that per diem statutes' enforceability rests more on a consideration of the import and applicability of the Depository Institutions Deregulation Monetary Control Act of 1980. Accordingly, whether the Commissioner can revoke a license based solely on an alleged failure to comply with preempted state law is dismissed from consideration.

What remains, therefore, is a determination of whether a state licensee's invocation of a federal statute that functions to preclude the state licensee's issuing authority from conducting visitorial power over the state licensee should serve as an appropriate basis for discipline.

The Commissioner posits that a respondent who applies for a license with the proviso that such license would escape Commissioner visitorial power, concomitantly depriving the Commissioner of the capacity to investigate or ascertain the propriety of the licensee's activities, would not be issued to such an applicant. In that same vein, the Commissioner posits that a licensee who obtains its state-issued license, then subsequently places itself in a position that would preclude the Commissioner from exercising visitorial powers, would be equally subject to loss of its state-issued license—not because of errant conduct, but because its status deprives the Commissioner of appropriately exercising its statutory and regulatory functions to properly protect the public weal or interest.

In the instant matter, the parties have stipulated that the Commissioner may not exercise visitorial powers over NCMC. The affect of such restraint precludes the Commissioner from exercising any capacity to supervise its state-issued license possessed by respondent. It cannot seriously be the intent of the Legislature that the California Department of Corporations or its Commissioner can issue licenses incident to the California Residential Mortgage Lending Act and not possess some capacity, for the benefit of the California public, to properly monitor the exercise of the panoply of rights associated with such state-issued licenses.

Admittedly, respondent has sought to characterize the issue as to whether the Commissioner may revoke its license on the ground that it commenced litigation contending that it did not need a license. However, such characterization oversimplifies the import of the matter before the undersigned. Respondent—not the Commissioner—sought the issuance of a state-issued license to conduct residential mortgage lender and residential loan servicing activities. Respondent—not the Commissioner—obtained the capacity, by federal law, to preclude the Commissioner from supervising activities occasioned by the issuance of its license. In fact, by its operating subsidiary status to a national bank, respondent albeit acknowledges that it rendered its state-issued license unnecessary.[16] However the state-issued license remained extant. Whether respondent commenced litigation is not dispositive. Having gained and invoked its federally protected status that functioned to obviate the necessity of its state-issued license constitutes the basis of the Commissioner's scrutiny. Cause, therefore, exists to discipline the residential mortgage lender and residential loan servicer license of respondent for a fact or condition that, if extant at the time of original application, would have reasonably warranted the Commissioner's refusal to issue the license pursuant to Financial Code §50327 and as set forth in Findings 1 – 11.

Respondent next questions whether the Commissioner may revoke its license. Indeed, respondent further questions whether revocation measured against the import of its culpability is a disproportionate penalty.

Financial Code §50327 provides that the Commissioner may either suspend or revoke a license. No other alternative is statutorily proffered. Nor does respondent suggest another alternative—except dismissal. Having determined culpability, respondent's invitation to dismiss the matter is summarily discarded. While acknowledging that no evidence has been presented that would establish financial improprieties effected by respondent, to which a suspension might ordinarily be considered and, if meted, would function with a remedial period and terms and conditions; respondent's capacity to circumvent state supervision by its state-issuing authority obviates such consideration. As a consequence of the visitorial power preclusion imposed on the Commissioner, the statutory mandate consequently results in a revocation. Accordingly, cause exists to revoke the residential mortgage lender and residential loan servicer license of respondent for a fact or condition that, if extant at the time of original application, would have reasonably warranted the Commissioner's refusal to issue the license pursuant to Financial Code §§50003(g) and 50327 and as set forth in Findings 1 – 11.

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[16] 12 U.S.C. §371, 12 U.S.C. §24 (Seventh), 12 CFR §§34.3 and 34.4, and 61 Federal Register 11294 (1996).

ORDER

The Residential Mortgage Lender and Residential Loan Servicer License of National City Mortgage Company, issued by the California Corporations Commissioner, is, pursuant to Legal Conclusion 2, revoked.

Dated: 10-31-03

JAIME RENÉ ROMÁN
Administrative Law Judge
Office of Administrative Hearings