U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 27 February 2014

CASE NO.: 2013-CFP-00004

OWCP NO: 6-1730-13-055

IN THE MATTER OF:

THOMAS CHILDS
Complainant

v.

SENTE MORTGAGE
Respondent

APPEARANCES:

THOMAS CHILDS,
Pro se

THOMAS A. NESBITT, ESQ.,
DeShazo & Nesbitt, L.L.P.,
For the Respondent

BEFORE: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

This proceeding arises under the employee protection provisions of Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which prohibits covered persons or service providers from terminating or in any other way discriminating against covered employees who engage in protected activity. 12 U.S.C. §5567. Title X of the Dodd-Frank Act is

referred to as the "Consumer Financial Protection Act of 2010" (CFPA), and it contains Section 1057. Under the CFPA, protected activity includes reporting, objecting to, or refusing to participate in any practice or assigned task that the employee perceives to be a violation of any provision of CFPA or any other provision of law, rule, order, standard or prohibition subject to the jurisdiction of or enforceable by the Consumer Financial Protection Bureau ("Bureau" or "CFPB").

In this case, Complainant alleges Respondent discharged him on September 25, 2012 because he refused to violate the Real Estate Settlement Procedures Act (RESPA); Secure and Fair Enforcement for Mortgage Licensing Act (SAFE); Do-Not-Call Improvement Act of 2007 (DNC) and the Telemarketing Sales Rule (TSR). By letter dated August 14, 2013, the Regional Supervisor for OSHA dismissed Complainant's complaint, finding that Complainant's protected activity was not a contributing factor in Complainant's termination. Rather, the evidence showed via e-mail and testimony that management had an ongoing and escalating dissatisfaction with Complainant's work performance before his alleged protected activities which led to his termination.

Complainant filed a timely appeal of OSHA's findings and the matter was referred to me for hearing. A hearing was held on October 28 and October 29, 2013 in Dallas, Texas, at which Complainant appeared *pro se*, testified, and introduced 22 exhibits.[1] Respondent was represented by counsel, called witnesses regional manager Wesley Hardman and senior HR generalist Kim Vitray, and introduced eight exhibits. The parties introduced one joint exhibit which set forth the following stipulated facts. Included with these stipulated facts is OSHA's uncontested finding that Respondent is a covered person or service provider within the meaning of 12 U.S.C. § 5567(a) and Complainant is an employee within the meaning of 12 U.S.C.§ 5567(b).

I. Stipulations[2]

1. Complainant began his employment with Respondent on May 2, 2012.

2. The Texas Department of Savings and Mortgage Lending re-activated Complainant's mortgage banker's license on May 24, 2012.

3. On May 1, 2012, as part of his employment with Respondent as a mortgage banker, Respondent had Complainant acknowledge that before he could act as a mortgage banker he had to be licensed and approved through Nationwide Mortgage Licensing System (NMLS). Those actions included (1) engaging in the business of a loan originator; (2) taking a residential mortgage loan application; (3) providing any information regarding loan programs; (4) offering or negotiating the rate and/or terms of a residential mortgage loan; (5) representing to the public through advertising or other means of communicating or providing information that one can or will perform any of the activities of a loan originator.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.__ ; Complainant's Exhibits: CX-__; Respondent's Exhibits: RX-__; and Joint Exhibit: JX-

[2] *See also* JX-1.

4. Complainant was also advised on May 1, 2012 by Respondent that if he did any of the above described activities before approved by NMLS, he would be terminated immediately.

5. However, Complainant could perform (1) administrative or clerical tasks on behalf of a mortgage loan originator, including receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry and 2) could communicate with a consumer to obtain information necessary for the processing or underwriting of a residential loan.

6. Complainant was informed via e-mail on August 28, 2012 that he was being placed on a performance improvement plan ("PIP").

7. Complainant signed the PIP on September 7, 2012.

8. Complainant understood the PIP to be a final warning that he needed to improve based on Mr. Wesley Hardman's suggestions or face termination. Mr. Hardman was Respondent's Dallas-Fort Worth regional manager and was in charge of the Plano office where Complainant worked.

9. Complainant e-mailed Mr. Hardman on September 18, 2012 requesting that he be moved out of his draw-based commission structure and that Respondent create a new, hybrid position for Complainant to continue working at Sente in the Dallas-Fort Worth region.

10. In his September 18, 2012 e-mail, Complainant stated:

> I'd like to start by retracting my recent acknowledgement of the performance improvement plan I was instructed to sign, and inquire within our operations department for creating a new hybrid position – one I'm able to fulfill the responsibilities of here at Sente.

11. Production numbers of selected mortgage bankers in the Dallas/Fort Worth region from March 2012 through December 2012 were as follows:

Fully-Funded Loans

Mortgage Banker Name	Mar. & Apr. units/volume	May units/vol	Jun. units/vol.	Jul. units/vol.	Aug. units/vol.	Sep. units/vol.	Oct. units/vol.	Nov. units/vol.	Dec. units/vol
Denise Donoghue	4 units/ $807,000	5 units/ $1,185,000	15 units/ $3,000,000	8 units/ $1,494,000	11 units/ $2,487,000	9 units/ $1,515,000	11 units/ $2,429,000	7 units/ $1,526,000	8 units/ $1,665,000
Michael Cox	2 units/ $567,000	4 units/ $632,000	3 units/ $377,000	2 units/ $279,000	1 unit/ $1,118,000	5 units $1,187,000	1 units/ $131,000	2 units/ $489,000	1 units/ $328,000
Nicole Davenport	0/0	0/0	0/0	2 units/ $490,000	2 units/ $300,000	2 units/ $408,000	3 units/ $413,000	3 units/ $423,000	2 units/ $46,000
Steven Gribble	0/0	0/0	0/0	0/0	0/0	1 unit/ $798,000	0/0	0/0	1 unit/ $158,000
Wanda Janolo	0/0	0/0	0/0	1 unit/ $197,000	2 units/ $264,000	0/0	4 units/ $542,000	1 unit/ $125,000	2 units/ $237,000

Lauren Kovalic	0/0	0/0	0/0	0/0	2 units/ $632,000	1 unit/ $628,000	1 unit/ $140,000	2 units/ $346,000	2 units/ $1,086,000
Thomas Childs	0/0	0/0	0/0	0/0	0/0	1 unit/[3]	N/A	N/A	N/A

12. Respondent terminated Complainant on September 25, 2012.

13. Respondent's CEO, Tom Rhodes, was contacted by a law firm representing Complainant on November 27, 2012 in regards to Complainant's alleged wrongful discharge.

14. Respondent placed Wando Janolo, Lauren Kovalic and Michael Cox on PIPs between January and February 2013, after which they all resigned.

II. Parties' Position

Complainant contends he was terminated by Respondent because he refused to act (1) as a mortgage banker before his license with activated by the Texas State Department of Savings and Mortgage Lending through Nationwide Mortgage Licensing System (NMLS) under the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act); (2) engage in cold-calling in violation of the Telemarketing Sales Rule (TSR) and the Do-Not-Call Improvement Act of 2007 (DNC)[4] as confirmed by e-mails and eight to 10 impromptu meetings with Hardman where Hardman provided scripts of what to tell person on Respondent lists; (3) and to violate RESPA by splitting commissions with licensed brokers.

Respondent contends that Mr. Hardman advised Complainant that he could not perform certain duties of mortgage brokers as set forth in the stipulation #3 above until he came fully licensed, but told Complainant he could do certain administrative and clerical tasks described in stipulation #5 above. Concerning commissions, Mr. Hardman advised Complainant that Respondent would pay for any commission he received prior to his license renewal, which was a standard industry practice. Regarding cold-calling, Mr. Hardman advised Complainant he was responsible to ensure that the people he called were not on the National Do-Not-Call Registry and that there were services to use to avail himself of this data. Further, Complainant, during his licensed period, closed no loans except for one to a relative, which constituted an extraordinary record of poor performance in an industry where four (4) closed loans per month was a baseline minimum. In fact, Respondent added, no one in the Dallas-Fort Worth area where Respondent worked since Respondent's business opened had such a poor record. Complainant had a poor record despite Mr. Hardman's strategy by e-mails, meetings and one-on-one conferences of trying to help him. Only after giving Complainant a PIP on August 28, 2012, in which Mr.

[3] Complainant's only funded loan closed on September 25, 2012, the day he was terminated. Although the production chart does not list Complainant as having a funded loan under the September 2012 heading, Complainant had one unit for $105,000 was previously listed in his name under a "Pipeline" heading, and both parties acknowledge that he closed a loan on September 25, 2012.

[4] See *V. Discussion, supra*. Complainant stated that Do-Not-Call Improvement Act of 2007 was violated, but that act does not address the issues regarding the internal call list. The TSR does address the National Do Not Call Registry as governed by the Federal Trade Commission, and the Registry is discussed later in this Decision and Order.

Hardman told Complainant he had to close four loans in September 2012 did Complainant make a reference to flagrant violations of federal law.

Before the PIP, Complainant had discussions with Mr. Hardman about the internal do-not-call list and National Do-Not-Call Registry. In essence, Mr. Hardman told Complainant that if he had a number but was not confident it had been "scrubbed" or checked against the national Do-Not-Call list, that he should use an internal system called "Encompass" to check and see if a customer was already in the company's database. Concerning his treatment, Respondent put other mortgage brokers who had greater production records than Complainant, but who did not meet production standards, on PIPs. In turn, these individuals resigned before being before being terminated.

III. Issues

1. Whether Complainant reported, objected to, or refused to participate in any activity or assigned task that Complainant reasonably perceived to be violation of the CFPA or any other provision of law, rule, order, standard or prohibition subject to the jurisdiction of or enforceable by the Bureau.

2. If so, whether Complainant's activity as described in paragraph 1, above, was protected activity.

3. If so, whether such activity was a contributing factor in his termination.

4. If so, whether Respondent would have taken the same action in the absence of such activity.

IV. Complainant's Testimony

Complainant testified he worked for Respondent as a mortgage banker in its Plano, TX branch from May 2, 2012 to September 25, 2012 under the supervision of Wesley Hardman, regional branch manager. (Tr. 39, 40). As a mortgage banker, it was his job to contact potential customers to see if he could sell mortgages to them by finding a benefit, addressing that benefit, and starting the whose process from application to funding. (Tr. 41.42). Complainant was to take the leads provided by Sendera and Lawyers Title, which Hardman distributed, and cold call these clients or customers to solicit HARP (Home Affordable Refinance Program) business, whereby the government would buy these loans on the market to lower their interest rate or higher balances at lower interest rates. (Tr. 43-48). After receiving the list, Complainant and other mortgage bankers were instructed to call or contact them a certain number of times (Tr. 49,55). The HARP lists were sent out with a new hire binder, a HARP sales kit or via e-mail. (Tr. 59). Before his termination Complainant closed out one loan, to his uncle, on the day of his termination. (Tr. 56).

During his employment with Respondent, Complainant attended weekly Monday and Wednesday meetings and eight to 10 impromptu meetings for a total of about 40 meetings led by various persons, including Hardman, during which sales strategy was discussed. (Tr. 57-58).

What complainant objected to was Respondent's "buddy system," whereby an unlicensed employee would get 100 basis points as they came on board and 30 basis points to the licensed loan originator to whom the application was turned over. According to Complainant, RESPA allows a mortgage originator company such as Respondent to pay its employees a referral fee which is a set amount per lead but not a percentage of the loan itself. Complainant asserts he was prodded by Mr. Hardman to solicit loans before he was licensed to do so starting from May 2, 2012 onward by getting loan applications in and transferring them over to licensed broker. (Tr. 67-69). Complainant asserts that Texas and federal SAFE laws were violated by taking applications and discussing loan details (Tr. 75). RESPA deals with compensation factor. An employer can pay referral fee (set fee) but not pay commissions, offer profit distribution to unlicensed employees which increases real estate settlement fees.

Respondent's buddy system pays 100 basis points to unlicensed persons and 15 basis points to licensed broker which equates with commissions and is not a referral fee (Tr. 76). CX-15,16,22 and RX-D show Nichole Davenport (licensed June 12, 2012) but submitting one loan application in May 2012; Steven Gribble (never licensed in Texas) yet submitting one loan application in July, 2012, one loan application in October 2012 and two loan applications in November with one full funded loan in September 2012 and another fully funded loan in December 2012 ; Staci Catherine Fincher (licensed on May 28, 2013) yet submitting one loan application in January 2013, five loan applications in February, 2013, four loan applications in March, 2013 three loan applications in April 2013, and one fully funded loan in March 2013. (Tr. 80-89,) (CX-15, 16 and RX-D). All of these actions were, according to Complainant, in violation of SAFE.

Complainant further alleged that Mr. Hardman prodded him to violate the Telemarketing and Sales Rule and Do Not Call Improvement Act by cold-calling (Tr. 92). During the week of May 2, 2012, Hardman handed Complainant a new hire binder which included "red line tools." Respondent's 5/5 25 script was to be used when making cold calls to leads provided by Sendera or Lawyers Title, after which Complainant could make calls to friends and family. According to Complainant, this script started with a PG-rated sales version that by August got to an R-rated pitch. During the first week, Complainant was to make 100-plus calls calling people consecutively every 24 to 48 hours up to five times to instill a sense of urgency while tracking these calls on a HARP spreadsheet. (Tr. 93). Mr. Hardman instructed Complainant to maintain an internal do-not-call list and to cross-check it with Respondent's internal do-not-call list. Further, Mr. Hardman told Complainant to call five to eight consecutive days, which Complainant said was harassing, and to access the national Do-Not-Call list before making these calls, which Respondent was allegedly supposed to do, but did not provide at its expense to its employees. (Tr. 97). Respondent, moreover, did not maintain an internal do-not-call list or have policy about said list as required by TSR and DNC. (Tr. 98). Complainant maintained he tried on several occasions to get Respondent to pay for such only to be told at employee meetings it was his responsibility to pay for such. (Tr. 99, 100). Mr. Hardman told Complainant it was incumbent upon him to access the national Do-Not-Call list because he was not going to provide it.

In essence, Complainant admitted he had low production numbers but he could not meet them without violating the law, which he was not willing to do. (Tr. 113, 114). Complainant

further stated he talked with the President of Sendera when he stopped by Complainant's office in July and was told, when asked by Complainant, that the Sendera lists were not vetted against then National Do-Not-Call Registry. (Tr. 114). Sendera 's President suggested sending out post cards which if returned would establish a business relationship. Complainant refused Mr. Hardman's request in July to use the HARP list. (Tr. 115). Complainant asserted that the TSR required company such as Respondent to pay for and make available to its employees the national do not call registry. (Tr. 116). On September 25, 2012, the day of his termination, Complainant's uncle's loan closed between 10:30 am and 11:00 am, and Complainant, by an e-mail at 2:00 or 3:00 pm, was notified of his termination. (Tr. 118; CX-2, pp.29,30).

On cross, Complainant admitted he knew of only one other licensed mortgage banker, Steven Gribble, who worked for Respondent for four months and closed only one loan. (Tr. 121-25). Further, no one at Respondent told him he was being terminated because he refused to perform an illegal act. (Tr. 131). However, Mr. Hardman allegedly told him during his unlicensed period to go over product details, take applications, and then turn the application over to his "buddies" whereby both would be paid for it. (Tr. 132). Complainant refused to participate in this buddy system. (Tr. 133).

Also on cross, Complainant testified he complained to Mr. Hardman verbally on four occasions and by e-mail on May 22, 2012, during his unlicensed period, that he was being asked to engage in illegal activities. According to Complainant, CX-2-2 was the only written complaint he made of being required to engage in illegal activities prior to being licensed. (Tr. 143).

Concerning the Do Not Call list, Complainant testified that in June 2012, he complained to Mr. Hardman about being asked to violate the do-not-call rules and, thereafter, on at least five other occasions, repeated the same complaints to Mr. Hardman. (Tr. 148). Further, during his unlicensed period, Complainant complained about being paid 100 basis points or a commission on referrals, to which Mr. Hardman stated it was not a violation. Complainant admitted never reporting any of his concerns to Respondent's human resources department. (Tr. 149). Further, Complainant admitted he wrote Respondent on only two occasions (May 22, 2012 and September 21, 2012) in which he complained about being asked to engage in illegal conduct. (Tr. 151-52). Complainant also admitted making HARP calls without first checking the Do Not Call Registry and continuing to do so until July 2012, when he learned for sure from Sendera's President that his list had not been checked against the Registry. (Tr. 159,399, 400).

Complainant also identified numerous e-mails between himself and Mr. Hardman without any mention of him not making calls because to do so would be illegal (Tr. 167-172). In essence, Complainant blamed his lack of production due to underwriting and processing departments and flagrant disregard of federal law, i.e., TSR and DNC. (Tr. 218). Complainant admitted getting a PIP from Mr. Hardman; meeting with him on September 7, 2012; not closing a loan by September 18, 2012; retracting his acknowledgement of the PIP on September 18, 2012, i.e. not taking responsibility for such but suggesting another position be created for him at which he could perform; accusing Mr. Hardman of flagrant disregard of federal law on September 21, 2012 and not going into the office on September 21 or September 24, 2012, or thereafter. (Tr. 198-220; RX-F, pp 70-80). Complainant admitted that Mr. Hardman told him he

could go to a public website, type in a person's name and determine whether that person was on the Do Not Call Registry. (Tr. 223, 224).

IV. Respondent's Testimony

Wesley Hardman, regional manager for Respondent's DFW Region, testified he hired Complainant as a licensed mortgage banker with an inactive license.[5] Complainant and Mr. Hardman worked out of the same office in Plano, TX. Complainant's duties were to source and originate loans. (Tr. 242). With an inactive license, Complainant, as a mortgage banker, was allowed to notify his database of contacts about his move to Respondent, attend association events at which he could meet realtors, builders, attorneys, and CPA's who would be in a position to refer mortgage business and inform them of his move to Respondent while refraining from discussing loan term, rates, and programs. (Tr. 243). Once licensed, Mr. Hardman then instructed Complainant and other licensed bankers on how to sell providing them with a script such as CX-4, which is a script for HARP leads. (Tr. 244).

Before being licensed, Mr. Hardman instructed Complainant on what he could and could not do. (RX-A). Mr. Hardman testified that he never asked Complainant nor did Complainant ever accuse him of telling him to do anything that was illegal. (Tr. 245). Moreover, none of those conversations were contentious, out of the ordinary, or resulted in any action against Complainant, including his termination four months later. (Tr. 246). When Complainant asked if he could share a commission with a licensed banker, Mr. Hardman replied that the unlicensed banker could receive a "referral fee" for referring a mortgagee with whom he had developed a relationship to a licensed banker. (Tr. 247). Complainant never earned a referral fee since he never referred a loan, and this subject had nothing to do with his termination. (Tr. 249).

Regarding Do Not Call Registry rules, Mr. Hardman said he talked to Complainant on four to five occasions throughout his employment about these rules (Tr. 248). Mr. Hardman told Complainant, when Complainant asked if he could call the persons on the title company list since they had not been scrubbed against the national Do Not Call Registry, to first scrub or check the list against the national Registry since it was his responsibility. However, Complainant could still have been successful without using the lists provided him including the 5/5/25 practice of going to realtor association meetings and using LinkedIn and Facebook, which were the preferred sales methods. (Tr. 259-51).

Concerning Complainant's production, Mr. Hardman testified his production was at the lowest level of any mortgage banker that Respondent had since he came joined Respondent. Complainant closed only one loan, including his uncle's loan, in the period he was employed by Respondent. As part of Respondent's sales practice, Mr. Hardman supplied daily Production Reports to team members, including Complainant, showing applications (loans that were locked or disclosed, i.e. an active prospect) and closed or fully-funded loans for which the mortgage banker is paid. (254-55).

[5] In order for Complainant to activate his license Respondent had to sponsor him for a period of 10 days to two weeks. (Tr. 242).

Mr. Hardman realized Complainant was not producing loans, so he sent a number of e-mails to Complainant and met with him on a number of occasions to review his progress and discuss strategies to improve his loan origination. (Tr. 256). Complainant always had excuses, but many of them also affected other mortgage bankers as well. (Tr. 258). Eventually, Mr. Hardman sent Complainant a PIP on September 6, 2012, met with him on September 19, 2012 to discuss his retraction or have him agree to follow the PIP, followed by a request on September 21, 2012 to meet with him later that day, which he did not do. (RX-E, p.1; RX-F, 78-80). Mr. Hardman decided to terminate Complainant on September 25, 2012 for the following reasons: not closing one loan in 4 months as a licensed mortgage banker; refusing to acknowledge he had a performance problem; and refusing to do those things he was required to do as a mortgage banker. (RX-F, p.89; Tr. 268-69; 421). Beside Complainant, Mr. Hardman placed three other mortgage bankers (Michael Cox, Wanda Janolo and Lauren Kovalic) on PIP's for lack of production, and all three eventually resigned. (Tr. 330, 414).

According to Mr. Hardman, in order for Respondent to record an application, Respondent had to know their name, property address, phone number, social security number and two other items of information that are entered into Respondent's Encompass system, which is a common origination system in the mortgage industry. (Tr. 333-34). Working with Encompass is another system called Optimal Blue, which provides the mortgage banker to access to pricing once his/her license is activated. (Tr. 348-49). An unlicensed mortgage banker that referred a loan received a referral credit or so many basis points of the loan, with 100 basis points equal to one percent of the loan. (Tr. 387-88).

Regarding Complainant's accusations that he complained to Mr. Hardman about being required to engage in flagrant violations of federal law, Mr. Hardman testified that the subject never came up until after his last meeting with Complainant, in which Complainant gave excuses for his lack of production. Following that meeting Complainant sent an e-mail to Mr. Hardman in which, for the first time, he raised "documented flagrant disregard of Federal Law via the agenda set forth there." (CX-2 p. 23).

Further, Mr. Hardman testified he never directed or expected Complainant to engage in such activities. Nor did Complainant tell him he expected Mr. Hardman to report his concerns to Respondent or that he (Complainant) was going to report such conduct. (Tr. 350-51). Mr. Hardman testified that occasionally, Complainant, in response to his encouragement about doing things which would prove successful, would tell him that he could not use the HARP list because it was not scrubbed against the Do Not Call Registry. In other words, Complainant brought up the subject as an excuse for non-production. (Tr. 402-403).

Regarding Respondent's do-not-call policy, Mr. Hardman testified that if someone made a cold call they should first that call against the National Do Not Call Registry and that Respondent had an internal do-not-call list in which a mortgage banker making a cold call could access to through Respondent's database manager. (Tr. 369, 370).

Kim Vitray, Respondent's human resources employee in charge of all HR functions from payroll, benefits administration and employee relations, testified in late August she had discussions with Hardman about Complainant's poor performance, i.e. not closing a single loan.

She drafted a PIP plan for Complainant, which Mr. Hardman subsequently gave to and discussed with Complainant. (Tr.276-81).

Thereafter on Friday, September 21, Mr. Hardman contacted Ms. Vitray, told her that Complainant still had not closed any loans or engaged in activities that would allow him to successfully close any loans, whereupon both agreed that Complainant should be terminated. (Tr. 281). Mr. Hardman sent e-mails to Ms. Vitray dated September 21, 2012, in which Complainant mentioned his lack of production due to a lack of personal funds and stated:

> Of course my financial restraints in no way, shape, or form draw attention away from documented flagrant disregard of Federal law via the agenda set forth there. One of my comments to Mr. Watson might be for sales at the various branches to attend or revisit the 20hr SAFE MLO Fundamentals.

(CX-2, p. 23).

Ms. Vitray inquired from Mr. Hardman what Complainant mean by above e-mail, to which Mr. Hardman responded he was not aware of any violations. (Tr. 284). In turn, Ms. Vitray asked Complainant for details of flagrant violations, which Complainant refused to provide. (Tr. 285).

V. Discussion

A. Employee Protection Created Under Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law on July 21, 2010. Section 1057 of the Dodd-Frank Act created a new whistleblower law covering individuals who perform tasks related to the offering or provision of a consumer financial product or service**.** Title X of Dodd-Frank Act is referred to as the Consumer Financial Protection Act of 2010 (CFPA), and it contains the employee protection provisions of Section 1057, which are codified at 12 U.S.C. § 5567(a) and state as follows:

> (a) In general
>
> No covered person or service provider shall terminate or in any other way discriminate against, or cause to be terminated or discriminated against, any covered employee or any authorized representative of covered employees by reason of the fact that such employee or representative, whether at the initiative of the employee or in the ordinary course of the duties of the employee (or any person acting pursuant to a request of the employee), has—
>
> (1) provided, caused to be provided, or is about to provide or cause to be provided, information to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of, any provision of this title or any other provision of law that is subject

to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(2) testified or will testify in any proceeding resulting from the administration or enforcement of any provision of this title or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(3) filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or

(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.

The Act also defines a covered employee as "any individual performing tasks related to the offering or provision of a consumer financial product or service." 12 U.S.C. § 5567(b).

B. Consumer Financial Protection Bureau

The Consumer Financial Protection Bureau ("Bureau" or "CFPB") was created as part of the CFPA in Title X of the Dodd-Frank Act. 12 U.S.C § 5491; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X (Bureau of Consumer Financial Protection), Section 1002(12), 124 Stat. 1957 (July 21,2010). The Bureau's purpose is to enforce "Federal consumer financial law" for the purpose of ensuring access for consumers to markets for "consumer financial products and services," and ensuring that the markets are fair, transparent and competitive. 12 U.S.C. § 5511. A consumer financial product or service includes extending credit and servicing loans and providing real estate settlement services. 12 U.S.C. § 5481(5), (15). "Federal consumer financial law" includes the provisions of Title X of the Dodd-Frank Act and the "enumerated consumer laws," but does not include the Federal Trade Commission Act. 12 U.S.C. § 5481(14).

The "enumerated consumer laws" under the Dodd-Frank Act are as follows:
(A) the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. § 3801 et seq.);
(B) the Consumer Leasing Act of 1976 (15 U.S.C. § 1667 et seq.);
(C) the Electronic Fund Transfer Act (15 U.S.C. § 1693 et seq.), except with respect to section 920 of that Act [15 U.S.C. § 1693o–2];
(D) the Equal Credit Opportunity Act (15 U.S.C. § 1691 et seq.);
(E) the Fair Credit Billing Act (15 U.S.C. 1666 et seq.);
(F) the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. §§ 1681m (e), 1681w);
(G) the Home Owners [2] Protection Act of 1998 (12 U.S.C. § 4901 et seq.);
(H) the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.);

(I) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. § 1831t (c)[(b)]–(f));
(J) sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. § 6802–6809) except for section 505 [15 U.S.C. 6805] as it applies to section 501 (b) [15 U.S.C. § 6801 (b)];
(K) the Home Mortgage Disclosure Act of 1975 (12 U.S.C. § 2801 et seq.);
(L) the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. § 1601 note);
(M) the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601 et seq.);
(N) the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. § 5101 et seq.);
(O) the Truth in Lending Act (15 U.S.C. § 1601 et seq.);
(P) the Truth in Savings Act (12 U.S.C. § 4301 et seq.);
(Q) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111–8) [12 U.S.C. § 5538]; and
(R) the Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1701).

12 U.S.C. § 5481(12).

1. RESPA

The Real Estate Settlement Procedures Act of 1974 ("RESPA") governs the settlement process. "Settlement" means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. 12 C.F.R. § 1024.2. "Settlement service" means any service provided in connection with a prospective or actual settlement, including, but not limited to, the origination of a federally related mortgage loan and the rendering of services by a mortgage broker (including counseling, taking of applications, obtaining verifications and appraisals, and other loan processing and origination services, and communicating with the borrower and lender). *Id.* RESPA requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process. 12 C.F.R. § 1024.2; 12 U.S.C. § 2601 *et seq.*; *See RESPA*, CFPB Consumer Laws and Regulations, p. 1 (August 2013).[6] The Act also prohibits specific practices, such as kickbacks, and places limitations upon the use of escrow accounts in the real estate settlement services process. *Id.*

The Dodd-Frank Act transferred rule-making authority under RESPA from the Department of Housing and Urban Development to the Bureau and, with respect to entities under its jurisdiction, generally granted authority to the Bureau to supervise for and enforce compliance with RESPA and its implementing regulations. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X (Bureau of Consumer Financial Protection), Section 1061, 124 Stat. 2035-2038 (July 21,2010); *see also RESPA*, *supra*, p. 1. In December 2011, the CFPB restated HUD's implementing regulation at 12 C.F.R. § 1024 (76 Fed. Reg. 78978) (December 20, 2011). *Id.*

[6] A summary of CFPB regulations for RESPA is available at: *RESPA*, CFPB Consumer Laws and Regulations, (August 2013), http://files.consumerfinance.gov/f/201308_cfpb_respa_narrative-exam-procedures.pdf (last visited February 14, 2014).

Under 12 C.F.R. § 1024.14, "[a]ny person who gives or accepts a fee, kickback, or thing of value (payments, commissions, gifts, tangible item or special privileges) for the referral[7] of settlement business is in violation of Section 8(b) of RESPA." *RESPA*, *supra*, p. 1; 12 C.F.R. § 1024.14(b). "Any person who gives or accepts any portion, split, or percentage of a charge for real estate settlement services, other than for services actually performed, is in violation of Section 8(c) of RESPA." *RESPA, supra*, p. 1; 12 C.F.R. § 1024.14(c). However, Section 8 of RESPA permits "[a]n employer's payment to its own employees for any referral activities." 12 C.F.R. § 1024.14(g)(vii).

Here, Complainant has alleged Respondent violated RESPA by allowing the use of referral fees in its buddy system, specifically violating the exclusion of any component of the loan as compensation. Respondent acknowledged that Complainant inquired about the permissibility of sharing commissions between a licensed broker and an unlicensed broker. (Tr. 247). Mr. Hardman stated that Respondent's compensation plan allowed a "referral fee to somebody," i.e. an unlicensed broker, "that refers a mortgage over to a licensed mortgage banker," and that this practice had been reviewed multiple times by Respondent's attorneys. *Id*. When asked to clarify his belief of whether the sharing of a commission between a licensed person and unlicensed person was permissible, Mr. Hardman stated, "In the form of a referral fee, yes." *Id*.

Complainant claims that Respondent paid commissions to unlicensed persons. Respondent "vehemently" denied the practice of paying commissions to unlicensed persons. (Emp. Post Tr. Br., p. 3). Mr. Hardman testified that the sharing of a commission "in the form of a referral fee," is a permitted practice. Mr. Hardman's attempt at distinguishing a traditional "commission" from an employee-to-employee "referral fee" was not perfectly clear, and Respondent's attorney asked him to discuss "referral commissions." (Tr. 247). However, Mr. Hardman's intent can be gleaned from his consistent use of "referral fee" and the need for the unlicensed broker to "refer" the customer to a licensed broker when the conversation turned to rates or eligibility. (Tr. 246-47). Furthermore, Section 8 of RESPA permits an employer's payment to its own employees for referral activities, and Complainant acknowledges that RESPA allows a mortgage originator to pay its employees for a referral. 12 C.F.R. § 1024.14(g)(vii); (Emp. Post-Tr. Br., p. 3).

Complainant introduced no evidence showing that Respondent made payments from any component of the loan *and* that payments were made "other than for services actually performed," nor did he prove the presence of payments that were not true "referral fees" for internal employee-to-employee referrals as allowed under RESPA. 12 C.F.R. § 1024.14(b)-(c), (g). Thus, by inquiring about his role as an unlicensed broker and the sharing of commissions and referral fees with a fellow employee who is a licensed broker, Complainant did not object to a policy that he reasonably believed to be a violation of a law subject to, or enforceable by, the Bureau. 12 U.S.C. § 5567(a)(4).

[7] "A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business." 12 C.F.R. § 1024.14(f).

2. SAFE Act:

The Secure and Fair Enforcement for Mortgage Licensing Act of 20082 ("SAFE Act") was enacted on July 30, 2008, and mandates a nationwide licensing and registration system for residential mortgage loan originators (MLOs). *See SAFE Act Manual, Version 2*, CFPB Consumer Laws and Regulations, p. 1 (March 2012); 12 U.S.C. § 5101.[8] "A "mortgage loan originator" is an individual who (1) takes a residential mortgage loan application *and* (2) offers or negotiates terms of a residential mortgage loan for compensation or gain." *SAFE Act Manual*, p. 1. "The term mortgage loan originator does not include an individual who performs purely administrative or clerical tasks on behalf of an individual who is an MLO." *Id*. Under the SAFE Act, "administrative or clerical tasks" means "the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry and communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan." 12 U.S.C. § 5102(4)(C).

In this case, Complainant did not show any violation of SAFE nor did he show any action by Mr. Hardman which could be reasonably perceived to be violations of SAFE. Rather the credible evidence shows Mr. Hardman to be fully compliant with SAFE. Regarding other allegedly unlicensed employees potentially violating SAFE, CX-15 and RX-D identify one employee, Steven Gribble, receiving credit for a fully-funded loan during Complainant's period of employment, and CX-15 indicates that Mr. Gribble's application status with the state of Texas was withdrawn or abandoned. (CX-15, p. 3). However, without knowing the circumstances or the status of Mr. Gribble – who, according to CX-15, does have an NMLS number – Complainant's claims cannot be substantiated, and it does not prove up his case.

3. Do Not Call Registry and Telemarketing Sales Rule

While RESPA and SAFE are listed "enumerated consumer laws" covered by Dodd-Frank's Consumer Financial Protection Act, the National Do Not Call Registry and Telemarketing Sales Rule are not. *Id*. The National Do Not Call Registry ("Registry") is a list of phone numbers from consumers who have indicated their preference to limit the telemarketing calls they receive. *See Q&A For Telemarketers & Sellers About DNC Provisions in TSR*, Federal Trade Commission.[9] The Do Not Call Registry provision was formerly set out as a note of the Telemarketing Sales Rule ("TSR"). 16 C.F.R. § 310.4(b)(1)(iii). The Federal Trade Commission ("FTC") was granted authority to implement and enforce the Registry. 15 U.S.C. § 6151(a). The Federal Communications Commission ("FCC") had its own do-not-call regulations pursuant to the "Telephone Consumer Protection Act;" however, beginning in 2003, the FCC and FTC were commanded to coordinate their efforts on the Registry. 15 U.S.C. § 6153; *see also FCC Encyclopedia – Do Not Call List*, Federal Communications Commission

[8] A summary of CFPB regulations for the SAFE Act is available at: *SAFE Act Manual, Version 2*, CFPB Consumer Laws and Regulations, (March 2012), http://files.consumerfinance.gov/f/201203_cfpb_update_SAFE_Act_Exam_Procedures.pdf (last visited February 14, 2014).

[9] The *Q&A For Telemarketers & Sellers About DNC Provisions in TSR*, is available on the Federal Trade Commission website at: http://www.business.ftc.gov/documents/alt129-qa-telemarketers-sellers-about-dnc-provisions-tsr (last visited February 14, 2014).

(stating that the FCC, pursuant to its authority under the "Telephone Consumer Protection Act," established together, with the FTC, a national Do-Not-Call Registry).[10] Hence, the Registry is generally managed by the FTC and enforced by the FTC, the Federal Communications Commission (FCC), and state officials. *Id.*; 15 U.S.C. § 6151(a).

The TSR implements the "Telemarketing and Consumer Fraud and Abuse Prevention Act," located at 15 U.S.C. §§ 6101-6108. 16 C.F.R. § 310. Subtitle H of Dodd-Frank amends the Telemarketing and Consumer Fraud and Abuse Prevention Act, specifically 15 U.S.C. § 6105, to state that

> this Act shall be enforced by the Bureau of Consumer Financial Protection under subtitle E of the Consumer Financial Protection Act of 2010, with respect to the offering or provision of a consumer financial product or service subject to that Act.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X (Bureau of Consumer Financial Protection), Section 1100C(d), 124 Stat. 2111 (July 21,2010).

Consequently, the Do Not Call Registry and Telemarketing Sales Rule – only as it relates to the offering or a provision of a consumer financial product or service – are "subject to the jurisdiction of, or enforceable by," the Bureau. Here, the Registry and TSR were implicated by Complainant not merely as telemarketing sales calls for Respondent, but as telemarketing sales calls related to the offering of a residential mortgage loan, which is a "consumer financial product or service." 12 U.S.C. § 5481(5), (15). Therefore, there is jurisdiction to consider whether there has been any violation of employee protection provisions of the Act as it relates to the Registry and TSR because it is, in this instance, "subject to the jurisdiction of, or enforceable by, the Bureau." 12 U.S.C. § 5567; 15 U.S.C. § 6105.

In this matter, Complainant raised questions to his supervisor, Mr. Hardman, about whether to cold-call certain people in the offering of a consumer financial product or service. Yet Complainant was told it by Mr. Hardman that it was his responsibility to access the Registry and ensure he was in compliance. Complainant has alleged that Respondent had a duty to pay for his access to the Registry. Indeed, it is a violation for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by 16 C.F.R. §310.8(c). 16 C.F.R. §310.8(b). However, the first five area codes are provided to the seller/telemarketer **free of charge**. 16 C.F.R. §310.8(c); 16 U.S.C. § 6152. ("[T]here shall be no charge to any person for accessing the first five area codes of data"); *see also Q&A For Telemarketers & Sellers About DNC Provisions in TSR,* Federal Trade Commission.[11] Any additional area codes are $59 or $30 each, depending on when they are accessed during the annual period. 16 C.F.R. §310.8(c).

---

[10] The *FCC Encyclopedia – Do Not Call List* is available on the Federal Communications Commission website at: http://www.fcc.gov/encyclopedia/do-not-call-list (last visited February 18, 2014).

[11] *Q&A For Telemarketers & Sellers About DNC Provisions in TSR,* Federal Trade Commission, http://www.business.ftc.gov/documents/alt129-qa-telemarketers-sellers-about-dnc-provisions-tsr (last visited February 14, 2014).

Complainant has not offered evidence of an employer's duty to pay for his access to the Registry. Furthermore, he could have accessed the Registry himself and received numbers of five area codes for free. CX-3 demonstrates that Complainant was responsible for 152 calls within the Dallas-Fort Worth area. (CX-3). Of the 152 numbers, 151 were to five DFW area codes: 214, 469, 817, 972, and 940.[12] (CX-3). Just one number fell in a sixth area code, 903, which is for areas far east of Dallas. Respondent's refusal to pay for something Complainant could have accessed on his own for free to obtain numbers in his primary area codes does not violate a provision of the Registry or TSR as it relates to the offering of consumer financial products or services.

Complainant has alleged that the Do-Not-Call Improvement Act of 2007 and TSR impose an obligation upon the Respondent to maintain its own, internal do-not-call list. According to the text of the Do-Not-Call Improvement Act of 2007 statute, signed into law on February 15, 2008, the prohibition on the expiration date of numbers on the Registry was amended, and a report detailing efforts to improve the accuracy of the 2003 do-not-call act was ordered for production no later than nine months after passage; but no duty upon the employer to pay for a list was imposed through this act. Do-Not-Call Improvement Act of 2007, Pub. L. 110-187 (February 15, 2008). Complainant has not identified a duty in this regard. Regarding the TSR and an internal do-not-call list, Complainant did not specify which provision of the TSR imposes a requirement, but he could be referring to the "entity-specific do-not-call provision," which states that "initiating any outbound telephone call to a person" when that person "previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered" is a violation of the TSR. 16 C.F.R. §310.4(b)(1)(iii)(A).[13]

Nonetheless, Respondent has stated it maintains its own, internal do-not-call list through the Encompass system. Further, Complainant did not access either the national registry or the internal registry to ensure compliance with the do-not-call rules. Thus, Complainant has not proven that questioning Respondent about cold calls and being told it was his responsibility to comply with the Registry constituted a protected refusal to participate in an assigned task that would violate Do Not Call Registry or TSR rules or laws. 12 § U.S.C. 5567(a)(4).

Moreover, Complainant did not prove that Mr. Hardman retaliated against him as a result of those questions, thus failing to meet another requirement of the Act. *Id*. Complainant has not specified which aspect of the TSR, other than the Registry, was allegedly violated by Respondent. In fact, Mr. Hardman credibly testified that Respondent had an internal do-not-call policy, maintained an internal do not call list; and told Complaint how to access this list and the national list. Complainant, on the other hand, never tried to access this internal list or the national list. Had Complainant tried to access the national list he would have discovered that the

---

[12] Area Code Map for Dallas Fort Worth, White Pages, http://www.whitepages.com/maps/DAL (last visited Feb. 18, 2014). The White Pages map lists Dallas and Plano area codes as 214, 469 and 972; Fort Worth and Arlington as 817 and 682; Denton as 940; areas far east of Dallas as 903 and 430; and areas far south of Fort Worth as 254.

[13] *See also Complying with Telemarketing Sales Rule*, Bureau of Consumer Protection Business Center – Federal Trade Commission, *available at*: http://www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule (last visited February 25, 2014) (discussing the "entity-specific do-not-call provision").

national list provided by itself, independent of other websites, free access to five (5) area codes that would have covered almost all of telephone numbers on the HARP list provided by Mr. Hardman.

VI. Conclusion and Order

Having reviewed all the hearing testimony and exhibits I find as follows:

1. Complainant did not engage in protected activities by asking questions about applications of law related to CFPA or alleging violations of such for none of this conduct related to objections, refusal to participate in any activity, policy, practice or assigned task that Complaint reasonably perceived to be violations of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1057 of Public Law 111-203 (12 U.S.C. §5567) or any other provision of law subject to the jurisdiction of the Bureau of Consumer Financial Protection or any rule, order, standard or prohibition prescribed by the Bureau.

2. Rather Complainant's conduct in this case amounted to nothing more than attempted excuses by Respondent for his failure to meet otherwise lawful production standards.

3. Complainant was discharged by Respondent on September 25, 2012 for failing to meet otherwise lawful production standards. Respondent's decision to terminate Complainant had nothing to do with any protected or alleged protected activity by Complainant.

4. Accordingly Complainant's complaint is **DISMISSED** for lack of merit.

SO ORDERED this 27th day of February, 2014, at Covington, Louisiana.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE