

## Terms Completed

### ORDER SUMMARY – Case Number: C-07-498

**Name(s):** Malcolm Ersel Miller

**Order Number:** C-07-498-07-FO01

**Effective Date:** March 5, 2008

**License Number:** DFI: 40478

**Or NMLS Identifier [U/L]** (Revoked, suspended, stayed, application denied or withdrawn)  
If applicable, you must specifically note the ending dates of terms.

**License Effect:** Denial

**Not Apply Until:**

**Not Eligible Until:**

**Prohibition/Ban Until:**

<b>Investigation Costs</b>	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
<b>Fine</b>	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
<b>Assessment(s)</b>	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
<b>Restitution</b>	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
<b>Judgment</b>	\$	Due	Paid <input type="checkbox"/> Y <input type="checkbox"/> N	Date
<b>Satisfaction of Judgment Filed?</b>		<input type="checkbox"/> Y <input type="checkbox"/> N		
No. of Victims:				

**Comments:**



State of Washington

**DEPARTMENT OF FINANCIAL INSTITUTIONS  
DIVISION OF CONSUMER SERVICES**

**BRIEF ADJUDICATIVE PROCEEDING**

IN THE MATTER OF INVESTIGATING the  
Loan Originator License Application under the  
Washington Mortgage Broker Practices Act  
(Ch. 19.146 RCW) by:

MALCOLM ERSEL MILLER,

Respondent.

No. C-07-498-07-SC01

DCS – BAP – 2007-003 JMV

FINAL DECISION AND ORDER

THIS MATTER having come before Scott Jarvis, Director for the Department of Financial Institutions (“Department”), sitting in his capacity as Presiding Officer (“Presiding Officer”) in relation to review of the Initial Decision and Order, which denied a Loan Originator License under the Washington Mortgage Broker Practices Act, Chapter 19.146 RCW (“Act”), upon application by MALCOLM ERSEL MILLER, the Respondent (“Respondent”);

NOW THEREFORE, the Presiding Officer issues the following Final Decision and Order:

**1.0 CONSIDERATION**

1.1 The Presiding Officer has reviewed the record on review, including the Initial Decision and Order under the Brief Adjudicative Proceeding, which was issued on February 12, 2008.

1.2 Respondent did not submit a Petition for Review of the Initial Decision and Order.

1.3 More than twenty (20) days has expired since issuance of an Initial Decision and Order. It appears from the Certificate of Service that Respondent was duly served as of February 12, 2008.

1.4 The Presiding Officer agrees with and concurs in the Findings of Fact and Conclusions of Law made in the Initial Decision and Order in the Brief Adjudicative Proceeding below. All of these Findings of Fact and Conclusions of Law are hereby adopted as if fully set forth herein.

2.0 FINAL DECISION AND ORDER

For all of the reasons set forth above, IT IS HEREBY ORDERED THAT:

The application of Respondent MALCOLM ERSEL MILLER for a loan originator license with the Washington State Department of Financial Institutions is denied.

Dated and mailed on March 5, 2008, at Tumwater, Washington.



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Scott Jarvis, Director  
WASHINGTON STATE DEPARTMENT OF  
FINANCIAL INSTITUTIONS  
P.O. Box 41200  
Olympia, Washington 98504-1200

FURTHER APPEAL RIGHTS

**Address for filing the Petition for Review:**

Scott Jarvis, Director  
Washington State Department of Financial Institutions  
P.O. Box 41200  
Olympia, Washington 98504-1200

In accordance with RCW 34.05.470 and WAC 10-08-215, any *Petition for Reconsideration* of such *Final Decision and Order* must be filed with the Director within ten (10) days of the service of the *Final Decision and Order*. **NOTE: *Petitions for Reconsideration* do not stay the effectiveness of the *Final Decision and Order*.**

*Judicial Review* of this *Final Decision and Order* is available to a party according to the provisions set out in the Washington Administrative Procedures Act, at RCW 34.05.570.



State of Washington

**DEPARTMENT OF FINANCIAL INSTITUTIONS  
DIVISION OF CONSUMER SERVICES**

**BRIEF ADJUDICATIVE PROCEEDING**

IN THE MATTER OF INVESTIGATING the  
Loan Originator License Application under the  
Washington Mortgage Broker Practices Act  
(Ch. 19.146 RCW) by:

MALCOLM ERSEL MILLER,

Respondent.

No. C-07-498-07-SC01

DCS – BAP – 2007-003 JMV

INITIAL DECISION AND ORDER

THIS MATTER having come before Joseph M. Vincent, General Counsel for the Department of Financial Institutions (“Department”), sitting in his capacity as Presiding Officer (“Presiding Officer”) for Brief Adjudicative Proceedings (“BAP”) for the Division of Consumer Services (“Division”), in relation to review of the denial of a Loan Originator License under the Washington Mortgage Broker Practices Act, Chapter 19.146 RCW (“Act”), upon application by MALCOLM ERSEL MILLER, the Respondent (“Respondent”);

NOW THEREFORE, the Presiding Officer issues the following Findings of Fact, Conclusions of Law, and Initial Decision and Order:

**1.0 FINDINGS OF FACT**

The following facts are undisputed as between the Division and the Respondent:

- 1.1 Respondent made an online application to the Division for a Loan Originator License (“License”) under the Act on or about January 19, 2007.
- 1.2 On June 14, 2002, Respondent pleaded guilty in the Superior Court of Washington in and for Thurston County to the crime of Unlawful Manufacture of a Controlled Substance – Marijuana, a felony pursuant to RCW 69.50.401(a)(1)(i).
- 1.3 On December 3, 2007, the Division issued against Respondent a Statement of Charges and Notice of Intention to Enter an Order to Deny License Application (“Statement of Charges”)

and also issued to Respondent a Notice of Opportunity to Defend and Opportunity for Brief Adjudicative Proceeding ("BAP Notice").

1.4 On December 4, 2007, the Statement of Charges and BAP Notice were served upon Respondent and upon the Designated Broker.

1.5 On or about December 17, 2007, the Division received from Respondent a Request for Brief Adjudicative Proceeding ("BAP Request").

1.6 In the BAP Request, Respondent indicated: "I WILL be represented by an attorney," and indicated that Patrick Davidson, 4405 7<sup>th</sup> Avenue SE, Suite 100, Lacey, WA 98503, would be his legal representative in this matter.

1.7 In the BAP Request, Respondent also indicated: "I DO NOT request a qualified INTERPRETER be provided at no cost to me."

1.8 In the BAP Request, Respondent also indicated: "I may provide additional documents for the BAP residing officer."

1.9 On January 2, 2008, the Presiding Officer issued an initial scheduling letter to Respondent and his stated legal representative, Patrick Davidson, with a copy to Division ("Scheduling Letter"), which (1) granted Respondent until Wednesday, January 16, 2008, to submit to the Presiding Officer additional materials on his behalf and (2) notified Mr. Davidson that, if he was going to represent Respondent, he should file with the Presiding Officer a Notice of Appearance.

1.10 In response to the Scheduling Letter and by way of additional materials, Respondent submitted the following documents ("Additional Materials") in a timely manner:

1.10.1 Letter from Attorney Patrick Davidson, dated January 15, 2008, indicating that he would not be representing Respondent but attesting to Respondent's good character and work ethic.

1.10.2 Letter from Vaughn Marston, representative of Respondent's employer, Versata Home Loan Solutions, dated January 15, 2008, attesting to Respondent's professionalism and work ethic and requesting leniency from the Presiding Officer and the Department.

Letter from Respondent, dated January 15, 2008, attesting to his work ethic and professional reputation, and pointing out (1) that his criminal record has not deterred his providing "high-

quality financial service” to clients and (2) that he could have had his criminal record expunged but did not wish to incur the expense.

## 2.0 CONCLUSIONS OF LAW

Based upon the Findings of Fact above, the Presiding Officer must conclude, as follows:

2.1 The Act, at RCW 19.146.210, sets forth the requirements for issuance or denial of a mortgage broker or loan originator license as mandated by the Washington State Legislature. In pertinent part, subsection (1) of RCW 19.146.210 declares that –

“ . . . [t]he director shall issue and deliver a mortgage broker license to an applicant if, after investigation, the director makes the following findings:

....  
(d) Neither the applicant, any of its principals, or the designated broker have been *convicted of a* gross misdemeanor involving dishonesty or financial misconduct or a *felony within seven years of the filing of the present application; . . .*”

[Emphasis added.]

2.2 The Division’s rulemaking with respect to the Act reflects the mandate of the Washington State Legislature and is even more specific, declaring at subsection (2) of WAC 208-660-350, as follows:

**In addition to reviewing my application, what else will the department consider to determine if I qualify for a loan originator license?**

....  
(c) **Criminal history.** You are not eligible for a loan originator license if you have been convicted of a gross misdemeanor involving dishonesty or financial misconduct, or a felony, within seven years of the filing of the present application.

[Original emphasis.]

2.3 As stated above, the Act, at RCW 19.146.210(1)(d) is clear. The Division has no discretion in this matter where, as here, the intent of the Legislature is so clear. Respondent pleaded guilty within seven (7) years of his application to a crime punishable as a felony. The Division, therefore, had no discretion but to deny Respondent’s application for a loan originator

license. The Presiding Officer has no discretion in this matter either and, after thorough review of the relevant facts and law, is obliged to reach the same conclusion as the Division. *See* RCW 19.146.310(2).

2.4 The Presiding Officer does take note of Respondent's statement to the effect that he could have sought "expungement" of the conviction but did not want to incur the expense.

2.5 The Presiding Officer notes that pursuant to RCW 9.94A.640(1), an offender who has been discharged after completion of sentence pursuant to RCW 9.94A.637 and who meets the tests prescribed in RCW 9.94A.640(2), may apply to the sentencing court to withdraw his guilty pleas, enter a plea of not guilty, and request that the court dismiss the criminal information or indictment. If a court were to grant such a request, such action by the court would have the effect set forth in RCW 9.94A.640(3), as follows:

"Once the court vacates a record of conviction under [RCW 9.94A.640(1)], the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. ***For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime.*** Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution." [Emphasis added.]

2.6 In a case in which facts were properly before the Presiding Officer, the language of RCW 9.94A.640(1), which is emphasized in italics above, might raise a legal issue as to its legislative intent in the context of other statutes, such as RCW 19.146.210(1)(d), in which conviction of a felony or gross misdemeanor involving financial misconduct or dishonesty with a certain period of time prior to application was automatic grounds for denial of a license. In such a case, the issue would be whether the language of RCW 9.94A.640(1) above was intended by the Legislature to include the requirement of disclosure of convictions on an application for a state regulatory license.

2.7 However, the Presiding Officer notes that this issue is not properly before the Presiding Officer or the Department and is, therefore, not capable of consideration. First, by his own admission and regardless of the reason, Respondent has not applied to the sentencing court for a



vacation of his criminal record pursuant to RCW 9.94A.640(1). Second, the vacation of a record of criminal conviction, pursuant to the language of RCW 9.94A.640(1), is not automatic even if one meets the tests set forth in RCW 9.94A.640(2). It is *discretionary* with the sentencing court, and Respondent has so far failed to request that the sentencing court exercise such discretion. Third, Respondent did affirmatively state on his Department application that he had been convicted of a felony within seven (7) years of his application, which might render moot any proper, future inquiry as to the legislative intent of RCW 9.94A.640(3). Therefore, for all of these reasons, the issue of what RCW 9.94A.640(3) means, in the context of Respondent's application (if any), cannot and ought not to be addressed in this proceeding. Respondent lacks standing to raise the issue in *this* proceeding, and it is otherwise not ripe or is moot.

2.9 The Presiding Officer has additional authority to make an initial decision and order pursuant to RCW 19.146.220, RCW 19.146.221, RCW 19.146.223 and RCW 19.146.310.

2.10 This matter, as set forth in the Statement of Charges, is properly at issue before the Presiding Officer and ripe for consideration and entry of an Initial Decision and Order.

2.11 There is no triable issue of material fact as between the Division and Respondent, and an Initial Decision and Order may be entered as a matter of law.

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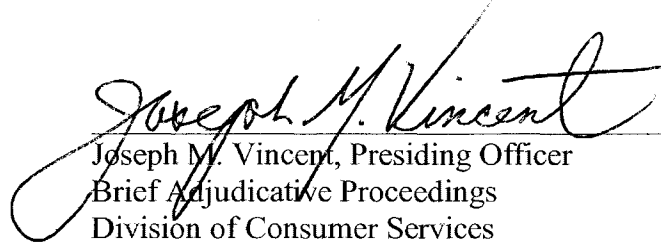
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3.0 INITIAL DECISION AND ORDER

Based upon the Findings of Fact and Conclusions of Law set forth above, IT IS HEREBY ORDERED THAT:

The application of Respondent MALCOLM ERSEL MILLER for a loan originator license with the Division of Consumer Services of the Washington State Department of Financial Institutions is denied.

Dated and mailed on February 12, 2008, at Tumwater, Washington.

  
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Joseph M. Vincent, Presiding Officer  
Brief Adjudicative Proceedings  
Division of Consumer Services  
WASHINGTON STATE DEPARTMENT OF  
FINANCIAL INSTITUTIONS  
P.O. Box 41200  
Olympia, Washington 98504-1200  
Phone: (360) 902-0516  
E-Fax: (360) 704-7036

### FURTHER APPEAL RIGHTS

Under the Washington Administrative Procedures Act, Chapter 34.05 RCW, and WAC 10-08-211, any party to an adjudicative proceeding may file a ***Petition for Review*** of this Initial Decision and Order. Any ***Petition for Review*** shall be filed with the Director of the Department of Financial Institutions within twenty (20) days of service of the Initial Decision and Order. **The deadline to file a Petition for Review is March 3, 2007.**

#### **Address for filing the Petition for Review:**

Scott Jarvis, Director  
Washington State Department of Financial Institutions  
P.O. Box 41200  
Olympia, Washington 98504-1200

A copy of any such ***Petition for Review*** must also be served upon the Division of Consumer Services, Washington State Department of Financial Institutions, P.O. Box 41200, Olympia, Washington 98504-1200, at the time the ***Petition for Review*** is filed with the Director.

A ***Petition for Review*** shall specify the portions of the ***Initial Decision and Order*** to which exception is taken and shall refer to the evidence of record which is relied upon to support the ***Petition for Review***. Any party may file a reply to a ***Petition for Review***. Replies must be filed with the Director within ten (10) days of the date of the service of the ***Petition for Review***, and copies of the reply must be served upon all other parties or their representatives at the time the reply is filed with the Director.

At the time for filing a ***Petition for Review*** has elapsed, the Director of the Washington State Department of Financial Institutions will issue a ***Final Decision and Order*** in this matter. In accordance with RCW 34.05.470 and WAC 10-08-215, any ***Petition for Reconsideration*** of such ***Final Decision and Order*** must be filed with the Director within ten (10) days of the service of the ***Final Decision and Order***. **NOTE: *Petitions for Reconsideration* do not stay the effectiveness of the *Final Decision and Order*.**

***Judicial Review*** of the ***Final Decision and Order*** is available to a party according to the provisions set out in the Washington Administrative Procedures Act, at RCW 34.05.570.

CERTIFICATE OF SERVICE

I, Chandra Wexler, certify that I personally delivered or mailed a copy of the Initial Decision and Order to parties named below at their respective addresses, postage pre-paid, on the date stated hereinabove.

Chandra Wexler

Print Name: Chandra Wexler

***Mailed to the following:***

Malcolm Ersel Miller  
5930 59<sup>th</sup> Loop SE  
Lacey, Washington 98513

Patrick Joseph Storm Davidson, Esq.  
4405 7<sup>th</sup> Avenue, Suite 100  
Lacey, Washington 98503-1055

James R. Brusselback  
Enforcement Chief  
Department of Financial Institutions  
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P.O. Box 41200  
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Fatima Batie  
Financial Legal Examiner Supervisor  
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P.O. Box 41200  
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**STATE OF WASHINGTON  
DEPARTMENT OF FINANCIAL INSTITUTIONS  
DIVISION OF CONSUMER SERVICES**

IN THE MATTER OF INVESTIGATING  
the Loan Originator License Application under the  
Mortgage Broker Practices Act of Washington by:

MALCOLM ERSEL MILLER,

Respondent.

NO. C-07-498-07-SC01

STATEMENT OF CHARGES and  
NOTICE OF INTENTION TO ENTER  
AN ORDER TO DENY LICENSE APPLICATION

**INTRODUCTION**

Pursuant to RCW 19.146.220 and RCW 19.146.223, the Director of the Department of Financial Institutions of the State of Washington (Director) is responsible for the administration of chapter 19.146 RCW, the Mortgage Broker Practices Act (Act)<sup>1</sup>. After having conducted an investigation pursuant to RCW 19.146.310, and based upon the facts available as of the date of this Statement of Charges, the Director, through his designee, Division of Consumer Services Director Deborah Bortner, institutes this proceeding and finds as follows:

**I. FACTUAL ALLEGATIONS**

**1.1 Malcolm Ersel Miller (Respondent Miller)** submitted an application to the Department of Financial Institutions of the State of Washington (Department) for a loan originator license under Capital Home Loans, Inc., a mortgage broker licensed under the Act. The on-line application was received by the Department on or about January 19, 2007.

**1.2 Prior Criminal Acts.** On June 14, 2002, Respondent Miller pleaded guilty in the Superior Court of Washington in and for Thurston County to the crime of Unlawful Manufacture a Controlled Substance – Marijuana, a felony pursuant to RCW 69.50.401(a)(1)(i).

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<sup>1</sup> RCW 19.146 (Amended 2006; Effective January 1, 2007)

1 **II. GROUNDS FOR ENTRY OF ORDER**

2 **2.1 Requirement of No Prior Convictions.** Based on the Factual Allegations set forth in Section I above,  
3 Respondent Miller fails to meet the requirements of RCW 19.146.310(1)(d) and WAC 208-660-350(2)(c) by  
4 having been convicted of a felony within seven years of the filing of the present application.

5 **III. AUTHORITY TO IMPOSE SANCTIONS**

6 **3.1 Authority to Deny Application for Loan Originator License.** Pursuant to RCW 19.146.220(1), the  
7 Director may deny licenses to loan originators. Pursuant to RCW 19.146.310(2) and WAC 208-660-350(7), the  
8 Director shall not issue a loan originator license if the conditions of RCW 19.146.310(1) have not been met by  
9 the applicant, and shall notify the loan originator applicant and any mortgage brokers listed on the application  
10 of the denial.

11 **IV. NOTICE OF INTENTION TO ENTER ORDER**

12 Respondent's violations of the provisions of chapter 19.146 RCW and chapter 208-660 WAC, as set forth  
13 in the above Factual Allegations, Grounds for Entry of Order, and Authority to Impose Sanctions, constitute a basis  
14 for the entry of an Order under RCW 19.146.220, RCW 19.146.221, RCW 19.146.223, and RCW 19.146.310.  
15 Therefore, it is the Director's intention to ORDER that:

16 **4.1** Respondent Malcolm Ersel Miller's application for a loan originator license be denied.

17 **V. AUTHORITY AND PROCEDURE**

18 This Statement of Charges and Notice of Intention to Enter an Order to Deny License Application  
19 (Statement of Charges) is issued pursuant to the provisions of RCW 19.146.220, RCW 19.146.221, RCW  
20 19.146.223, and RCW 19.146.230, and is subject to the provisions of chapter 34.05 RCW (The Administrative  
21 Procedure Act). Respondent may make a written request for a Brief Adjudicative Proceeding as set forth in the  
22 NOTICE OF OPPORTUNITY TO DEFEND AND OPPORTUNITY FOR BRIEF ADJUDICATIVE  
23 PROCEEDING accompanying this Statement of Charges.

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1 Dated this 3rd day of December, 2007.

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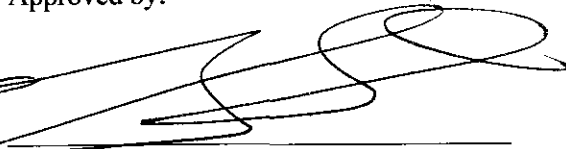
4 DEBORAH BORTNER  
5 Director  
6 Division of Consumer Services  
7 Department of Financial Institutions

8 Presented by:

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10 

11 STEVEN C. SHERMAN  
12 Financial Legal Examiner

13 Approved by:

14  
15 

16 FATIMA BATIE  
17 Financial Legal Examiner Supervisor

