STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF FINANCIAL REGULATION,

Petitioner,

vs. Case No. 17-3750

NATIONAL FORECLOSURE RESCUE CENTER, INC., f/k/a SAVE YOUR HOME HELP CENTER, INC.; R. JASON DE GROOT; AND CAREY CLEMENTS,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this matter before W. David Watkins, the assigned Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on November 29, 2017, in Deland, Florida.

APPEARANCES

For Petitioner: Scott R. Fransen, Esquire
Office of Financial Regulation
1313 North Tampa Street, Suite 615
Tampa, Florida 33602

For Respondents: R. Jason de Groot, Esquire
Post Office Box 5775
Deltona, Florida 32728-5775

STATEMENT OF THE ISSUES

The threshold issue is whether, as a prerequisite to the operation of their foreclosure-related rescue business, Respondents were required to be licensed as mortgage brokers and

as loan originators pursuant to chapter 494, Florida Statutes (2017).[1/] A secondary issue is whether Respondents solicited, charged, received, or attempted to collect or secure payment for loan modification services without the borrower receiving a material benefit prior to being charged for services.

PRELIMINARY STATEMENT

National Foreclosure Rescue Center, Inc., commenced operations in 2008 or 2009 under the name Save Your Home Law Center. It subsequently changed its name to Save Your Home Help Center, Inc. (SYHHC), and then became known as National Foreclosure Rescue Center, Inc. (National). The company's home office, where work was performed, was in Deltona, Florida.

On April 3, 2012, the Office of Financial Regulation (OFR) issued an administrative complaint against Save Your Home Help Center, Inc., f/k/a Save Your Home Law Center, and Carey Clements, in Administrative Proceeding No. 2996-F-2/11. The complaint alleged unlicensed mortgage activity and the collection of advance fees, and sought entry of a cease and desist order and an administrative fine. On November 2, 2012, OFR entered a Final Order (OFR 2012-285 FOF) on the violations charged. The Order directed Respondents to cease and desist from any loan modification activities under chapter 494, ordered Respondents to refund all advance fees for any loan modification

cases in which such fees were charged, and imposed an administrative fine of $25,000.

OFR subsequently received additional complaints about National, and on September 8, 2016, OFR concluded an examination of National for the period of January 16, 2013, through February 9, 2016. It is the results of that examination that are at issue in this proceeding.

On March 29, 2017, following its review of National's records for the above period, OFR issued the subject administrative complaint (Complaint) against National, R. Jason de Groot, and Carey Clements. The Complaint alleged Respondents were acting as a loan originator, mortgage broker, or mortgage lender without a license by performing loan modification services; collecting advance fees; violating the cease and desist Order of 2012 by continuing to act as a loan originator, mortgage broker, or mortgage lender without a license; and for failure to pay the administrative fine imposed by the 2012 Order.

On June 1, 2017, R. Jason de Groot, Esquire (de Groot), filed an Election of Proceeding form with OFR, stating that National disputed one or more of the factual allegations contained in the Complaint. On June 30, 2017, OFR referred the matter to DOAH for the assignment of an ALJ and the conduct of a formal hearing pursuant to section 120.57(1), Florida Statutes.

By Order dated August 4, 2017, the final hearing was scheduled for October 3 and 4, 2017. However, as a result of the disruptions caused by Hurricane Irma, OFR requested a continuance of the scheduled hearing, which was granted, and the matter was rescheduled for hearing on November 29, 2017.

On November 22, 2017, each party filed a unilateral pre-hearing stipulation in lieu of a joint stipulation.

The final hearing was convened as scheduled on November 29, 2017. OFR called the following witnesses to testify on its behalf: Greg Oaks, director, Division of Consumer Finance, OFR; Cathleen Bermudez-Gutierrez, financial specialist, Bureau of Enforcement, Division of Consumer Finance, OFR; and Alba Mayor, financial analyst, Bureau of Enforcement, Division of Consumer Finance, OFR. OFR offered exhibits P-6, and P-7A through P-7E into evidence. The undersigned took official recognition of OFR's Exhibit P-1, a prior Final Order (OFR 2012-285 FOF), issued by OFR against Respondents in 2012.

For their part, Respondents called Edward Darrell Traylor, an owner of National; and Carey Clements, Director, Officer, and Manager of National, as its witnesses, and offered one exhibit in evidence.

The two-volume Transcript of the hearing was filed with DOAH on December 14, 2017, and by prior agreement of the parties, proposed orders were to be filed not later than

January 13, 2018. However, on January 11, 2018, the parties filed a Joint Motion for Enlargement of Time to File Proposed Recommended Orders, which was granted, extending the time for filing to January 26, 2018. Thereafter, the parties timely filed Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, other evidence presented at the final hearing, and on the entire record of this proceeding, the following Findings of Fact[2/] are made:

Background

1. Pursuant to sections 494.0011 and 494.0012, Petitioner is the state agency charged with the regulation and enforcement of chapter 494, relating to mortgage brokering, mortgage lending, and loan origination.

2. Respondents are charged by administrative complaint with: (a) offering loan modification services for compensation without a license, in violation of chapter 494; (b) charging up-front fees from consumers for loan modification services before completing or performing all services included in the agreement for loan modification services, in violation of chapter 494; (c) failing to obey a final order of OFR; and (d) failure to pay a fine imposed by OFR.

3. Respondent National was originally named Save Your Home Law Center, Inc., when organized in 2009. Respondent R. Jason de Groot served as corporate president and a director of National until February 2, 2016. Respondent Carey Clements served as secretary and a director of National, supervised the employees, and generally managed National throughout National's corporate existence. Carey Clements has not held a loan originator license pursuant to chapter 494, since December 31, 2010. At no time has National held a mortgage broker or mortgage lender license.

4. As explained by Edward Traylor, National was formed at the height of the national housing market crisis in order to assist persons whose homes were in default and at risk of foreclosure.

5. National operated as a "foreclosure-rescue consultant" and provided "foreclosure-related rescue services" to persons who had defaulted on their mortgage payments and whose homes were in the foreclosure process.

6. Section 501.1377(2)(b), Florida Statutes, defines a foreclosure-rescue consultant as "a person who directly or indirectly makes a solicitation, representation, or offer to a homeowner to provide or perform, in return for payment of money or other valuable consideration, foreclosure-related rescue services. The statutory definition expressly excludes:

> 6. A licensed mortgage broker or mortgage lender that provides mortgage counseling or advice regarding residential real property in foreclosure, which counseling or advice is within the scope of services set forth in chapter 494 and is provided without payment of money or other consideration other than a loan origination fee.

7. "Foreclosure-related rescue services" is defined by section 501.1377(2)(c) as follows:

> (c) "Foreclosure-related rescue services" means any good or service related to, or promising assistance in connection with:
>
> 1. Stopping, avoiding, or delaying foreclosure proceedings concerning residential real property; or
>
> 2. Curing or otherwise addressing a default or failure to timely pay with respect to a residential mortgage loan obligation.

The Mortgage Rescue Process

8. Edward Traylor, an owner of National, described the steps his company took when approached by a client seeking foreclosure-related rescue services. According to Mr. Traylor, the initial step was to meet face-to-face with the client and obtain authorization for National to talk directly to the client's lender.

9. Next, National would contact the lender to confirm that the client was in default on his or her mortgage. National would only accept clients whose mortgage loans were in default. Upon confirming that the client was in default, National would

determine whether the matter had been referred to the lender's loss mitigation department, foreclosure department, or assigned to an attorney. Loans in default would be assigned to the loss mitigation department, and if the default was not cured, then to the foreclosure department (or attorney).

10. Once National determined which of the lender's departments had been assigned the matter, that department was contacted by National to determine the following:

- current term and interest rate of the loan;
- type of loan (conventional? FHA? Fannie Mae? Freddie Mac? Home equity line of credit?).
- Has the loan been approved for a home retention program trial? Has the loan been in a home retention program previously? Is the lender currently evaluating the loan for a retention workout program?
- Is the home in foreclosure? If so, has a sale date been set? If so, is it possible to postpone the sale date?
- If a sale date has been set and postponement is possible, what is required from the borrower to postpone the sale? What is the deadline for the borrower to meet those requirements?
- Does the lender require a current financial package from the borrower in order to consider whether to offer a "workout plan?"

11. If the lender was willing to consider offering the borrower a workout plan, but required updated financial information from the borrower, that information was gathered by National and provided to the lender. However, not all lenders required updated financial information from borrowers as a prerequisite to offering a workout plan.

12. The majority of the borrowers assisted by National had obtained their mortgages through sub-prime lending practices with minimal loan qualifications required. These mortgages were then sold to investors as "mortgage backed securities," usually in blocks of a billion dollars each.

13. With the national collapse of the housing market in 2007 and 2008, tens of thousands of borrowers in Florida defaulted on their mortgages, resulting in their homes going into foreclosure. Since many of these homes were bundled as mortgage backed securities, the investors in those securities retained banks and other institutions as servicers of those defaulted loans. Those servicers included Wells Fargo, Beneficial Finance, Merrill Lynch, and Bank of America, among others.

14. Each servicer established its own criteria for offering workout plans to lenders. Depending upon the servicer, the workout plan might include a reduction in interest rate,

reduction of principal owed, and/or waiver of fees and penalties.

15. The terms of the workout plans offered by the lenders/servicers were nonnegotiable. National did not have the ability to counteroffer the terms of a workout plan. In other words, if the lender's workout plan was a two-percent reduction in the interest rate, National could not negotiate a higher percentage reduction. In essence, the workout plan was a "take it or leave it" offer to the borrower. However, some lenders/servicers did include several options that the borrower could choose from to incorporate into the workout plan. Those options might include a reduction in the interest rate, term, or principal deferment, or reduction to the current principal balance.

16. In those instances where the lender/servicer was willing to offer options to avoid foreclosure, including a workout plan, National would communicate those options to the borrower, along with a recommendation as to the terms of the workout plan. That recommendation would be based, at least in part, on National's evaluation of the borrower's financial condition and ability as reported to National.

17. In the same letter containing National's workout plan recommendation, the borrower was also informed of the necessity to enter into an Enrollment Agreement with National if the

borrower wished to continue receiving services from National. That Enrollment Agreement set forth the scope of services to be provided to the borrower by National, which included four phases of work, identified as Parts I through IV in the agreement:

> PART 1:
>
> 1. SYHHC has conducted the first interview with the Client, prepared a Client Information Form and received authorization to speak to the Lender/Servicer and/or their counsel.
>
> 2. SYHHC has made initial contact with the Lender/Servicer to determine if the above loan qualifies for a workout program which will avoid foreclosure and if the Lender will accept a workout offer from the Client.
>
> 3. SYHHC has conducted a second interview to compile financial information to help Client determine if they can qualify and what kind of offer they can make.
>
> 4. Based upon preliminary information obtained from the Lender/Servicer and Client, SYHHC has prepared a preliminary proposal/offer which Client believes to be reasonable for the Lender/Servicer to consider.
>
> 5. SYHHC conducted a third interview with the Client and went over the proposal offer to make sure the Client wishes to proceed with this offer. Client was advised that they could present the offer themselves and no monies were due SYHHC.
>
> PART II:
>
> 1. SYHHC will collect and verify all information from Client to prepare a reasonable workout plan for Client to

present to the Lender/Servicer to avoid foreclosure.

2. SYHHC will contact Client and review the proposed workout with Client. Client may reject any proposed workout option prepared by Save Your Home Help Center and decide not to proceed and cancel this Enrollment Agreement and any monies that have been paid for services rendered as outlined in Part I shall not be refunded and this agreement is cancelled.

3. If Client agrees and accepts in writing the proposed workout offer a payment of $700.00 is due and payable for services rendered.

4. SYHHC shall submit Client's file to the Lender/Servicer no later than 30 days after receipt of said payment.

PART III:

1. Submit Client's formal workout offer/proposal to Lender/Servicer within 30 days.

2. Weekly contact or as needed with the Lender/Servicer updating file per Lender/Servicer request.

3. Weekly contact or as needed with Client.

4. When Client's workout/offer is received and processed by Lender/Servicer and is in review for consideration and advises SYHHC that all requested documents have been received a fee of $795.00 is due.

5. Client understands once file is submitted to Lender/Servicer and the above payment is not received within (5) five days following the request for payment the file shall be withdrawn from the Lender/Servicer.

PART IV:

1. Continue to update file as requested from Lender/Servicer.

2. Continue providing foreclosure related services until an offer to avoid foreclosure has been provided to Client.

3. SYHHC will review any offer/option provided by Lender/Servicer/Counsel with Client and at the sole discretion of SYHHC may resubmit any counter proposal on behalf of Client until a final offer is presented to Client. If Client's [sic] declines the latest offer from Lender/Servicer/Counsel and Client's circumstances have not changed SYHHC reserves the right not to resubmit.

4. If Client receives an offer from Lender/Servicer including a trial period which avoids foreclosure it is agreed that SYHHC has completed this Agreement.

18. No payment was due from borrower to National until after the completion of each of the four phases of work.

Was National Providing Unlicensed Loan Modification Services?

19. Count 1 of the Complaint charges Respondents with offering loan modification services for compensation without a license, in violation of section 494.00255(1)(p). Specifically, the Count alleges that "Respondents offered loan modification services, which is acting as a loan originator, mortgage broker, or mortgage lender, and which therefore requires a license from the Office."

20. The referenced statutory provision prohibits "[a]cting as a loan originator, mortgage broker, or mortgage lender

without a current license issued under part II or part III of this chapter."

21. Section 494.001(15) defines "loan modification" to mean a modification to an existing loan, and specifically does not include a refinancing transaction.

22. OFR conducted a review of National's operations from the period of January 16, 2013, through February 9, 2016, consisting of 26 sample files, and based upon that review concluded that National was providing loan modification services.

23. OFR's conclusion that National was offering loan modification services was primarily based upon several of the "best options" letters (Petitioner's Ex. 7A) referenced above that were sent by National to borrowers. As noted, those letters included recommendations as to the best options offered by lenders/servicers for incorporation in a workout plan.

24. OFR also based its conclusion on a series of communications from National to lenders/servicers proposing a "loan modification or workout option" in order for the borrower to avoid foreclosure. (Petitioner's Ex. 7B).

25. While on their face, National's letters to lenders/servicers proposing new terms to the defaulted loans would appear to constitute offers to modify the loans, it is more likely the letters simply identify the options of the

workout plan offered by the lender/servicer that were acceptable to the borrower. This inference is consistent with the finding that the terms of the workout plans offered by lenders/servicers were nonnegotiable. In other words, while a loan originator or broker would have the ability to negotiate the terms and conditions of a loan, National, as a rescue consultant could not, since the parameters of the workout plan were established solely by the lenders/servicers.

26. Competent substantial evidence of record established that Respondents were not offering loan modification services and were not acting as loan originators or brokers.

Collection of Advance Fees for Loan Modification Services

27. Count II of the Complaint alleges that Respondents solicited, received, or attempted to collect one or more payments, directly or indirectly, for loan modification services before completing or performing all services included in the agreement for loan modification services.

28. Section 494.00296 provides as follows:

> (1) PROHIBITED ACTS.--When offering or providing loan modification services, a loan originator, mortgage broker, or mortgage lender may not:
>
> * * *
>
> (c) Solicit, charge, receive, or attempt to collect or secure payment, directly or indirectly, for loan modification services before completing or performing all services

> included in the agreement for loan modification services. A fee may be charged only if the loan modification results in a material benefit to the borrower. The commission may adopt rules to provide guidance on what constitutes a material benefit to the borrower.

29. Upon qualifying the borrower, Respondents provided a contract to the borrower for services. The contract included a standard fee of $2,495 to complete the entire process. Only part of the total fee was collected from the borrower at the time Respondents were retained.

30. Contemporaneous with signing the contract, Respondents provided an invoice to the borrower, which showed a total due at the bottom of the page for those future services that were to be rendered through conclusion of the Enrollment Agreement.

31. As noted, the first step in the process was to contact the lender; the next step was to gather documents and information required by the lender; the third step was to submit the information as a package to the lender; the final step was to assist the customer with obtaining approval from the lender.

32. The fees to be charged for the above services were $500, which was due at the time the Enrollment Agreement was executed. The remaining fees were $700, to be paid when the proposed workout offer is agreed to and accepted by the borrower; and $795, for preparing the file, updating the file,

reviewing the file with the borrower and obtaining signatures, and submitting the file to the lender.

33. Given the finding that Respondents were not providing loan modification services, and were not acting as loan originators, mortgage brokers, or mortgage lenders, section 494.00296 is inapplicable. However, even if this provision applied, borrowers received a material benefit from the services provided by National in Part 1 of the Enrollment Agreement, since they were advised of the options available to them to avoid foreclosure.

34. While section 494.00296 does not apply to the foreclosure-related rescue services being provided by Respondents, section 501.1377 does apply. That section sets forth very detailed requirements and language that must be included in all written agreements for foreclosure-related rescue services. There is no evidence of record that the Enrollment Agreement used by National did not comply with those requirements.

35. Section 501.1377 also identifies practices that are prohibited. The pertinent section provides:

> (3) Prohibited acts.--In the course of offering or providing foreclosure-related rescue services, a foreclosure-rescue consultant may not:
>
> (a) Engage in or initiate foreclosure-related rescue services without first

> executing a written agreement with the homeowner for foreclosure-related rescue services; or
>
> (b) Solicit, charge, receive, or attempt to collect or secure payment, directly or indirectly, for foreclosure-related rescue services before completing or performing all services contained in the agreement for foreclosure-related rescue services.

36. While it could be argued that National was in violation of section 501.1377(3)(b) for collecting payments before all services contained in the Enrollment Agreement were completed, this section was not cited in the Complaint, nor does OFR have jurisdiction to bring an enforcement action for violation of the above provision.

Failure to Comply with Prior Final Order

37. Count III alleges that Respondents continued to act as loan originators, mortgage brokers, or mortgage lenders without a license, and in violation of the OFR's Final Order in OFR Case 2012-285 FOF entered on November 2, 2012. Count IV alleges that Respondents failed to pay the $25,000 fine imposed in the Final Order.

38. The procedural history resulting in the entry of the prior Final Order reveals that the allegations contained in the underlying Administrative Complaint were never resolved on their merits. Rather, when Respondents failed to respond to discovery requests propounded on them by OFR, including 13 requests for

admissions, those requests for admissions were deemed admitted by the ALJ, and OFR's motion to relinquish jurisdiction, based upon the matters deemed admitted, was granted. The Final Order, upon which OFR grounds Count III and IV of the instant Complaint, was then entered.

39. Respondents in the prior proceeding were represented by Attorney John Baum. According to Mr. Traylor's unrebutted testimony, Respondents were advised by Mr. Baum that the matter had been settled or dismissed, and that Respondents had won the case. Respondents were not informed until early 2014 that, in fact, an adverse Final Order had been entered against them, when they received a letter from a collections agency seeking collection of the $25,000 fine.

40. Mr. Baum was disbarred on July 15, 2013, for reasons not of record.

41. The substantive allegations contained in the prior Administrative Complaint are indistinguishable from the allegations at bar. Both assert that Respondents were providing loan modification services without proper licensure, and that payments were received for loan modification services before all services had been provided.

42. Given the findings herein that Respondents have not been improperly providing loan modification services, and lack of adjudication on the merits that Respondents ever improperly

provided such services, OFR's Final Order in OFR Case 2012-285 FOF may not form the basis of the new allegations set forth in Counts III and IV of the instant Complaint.[3/]

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding pursuant to section 120.57(1), Florida Statutes.

44. OFR is charged with administering and enforcing the provisions of chapter 494, and conducting examinations and investigations to determine whether any provision of chapter 494 has been violated. §§ 494.0011(1) and 494.0012(3), Fla. Stat.

45. Section 494.00255 states, "[e]ach of the following acts constitutes a ground for which the disciplinary actions specified in subsection (2) may be taken against a person licensed or required to be licensed under part II or part III of this chapter." Part II governs mortgage brokers and loan originators, part III governs mortgage lenders. Section 494.00255(1)(u) lists "failure to comply with, or violations of, any provision of this chapter" as a ground for disciplinary action.

46. OFR has the burden of proving its allegations by the clear and convincing evidentiary standard. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This means that the weight of the evidence must produce in the mind of the trier of

fact a firm belief or conviction, without hesitancy, that the allegations of the administrative complaint are true. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

47. Slomowitz stands for the proposition that "clear and convincing" evidence:

> [M]ust be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.
> 429 So. 2d 797, 800.

48. Applying Slomowitz to the facts of this case, and for the reasons discussed below, OFR has failed to persuasively establish, by clear and convincing evidence, the factual allegations set forth in the Complaint.

49. Both parties agree that this is a matter of first impression. And the independent research of the undersigned has failed to uncover any judicial or administrative precedent addressing the interplay between chapter 494 and section 501.1377.

National was not Engaged in Unlicensed Loan Modification

50. Section 494.0025(1) and (2), Florida Statutes, Prohibited Practices, states that it is unlawful for any person to act as a loan originator or mortgage broker in this state

without an active license. A loan originator is defined as someone who "negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender." § 494.001(17), Fla. Stat. A mortgage broker is defined as a person who is "conducting loan originator activities through one or more licensed loan originators employed by the mortgage broker." § 494.001(22), Fla. Stat.

51. It is undisputed that neither National nor any of its controlling persons or employees were licensed by OFR in any capacity. The evidence established that National, through its employees, sent correspondence to borrowers and to lenders (or lenders' agents) that requested substantive changes to mortgage terms, and advised borrowers whether to accept either modification or restructure of their mortgage. National's standard letter to lenders stated a re-capitulation of current mortgage terms and proposed revised terms that, in most cases, included reducing the rate of interest, extending the amortization, and reducing the principal balance. Therefore, argues OFR, National's employees were acting as loan originators, and, ipso jure, as mortgage brokers.

52. Contrary to OFR's assertion, the evidence established that National was not engaged in negotiating mortgage modifications. Rather, the credible evidence of record established that the lenders/servicers set the terms and

conditions for changes to mortgages they owned, and Respondents were merely fitting their clients into the lender's predetermined programs that established what changes were acceptable to the lender. National would discuss with the lenders/servicers the availability of workout plans and the various options that might be offered to borrowers to stop, avoid, or delay foreclosure proceedings. After evaluating a client's financial condition and the existing terms of the loan at issue, National would then make a recommendation to the client as to which of the workout plan options would best work for the client. The correspondence National sent to lenders/servicers that requested changes to mortgage terms merely served to identify the specifics of the workout plan that were acceptable to the borrower.

There is No Conflict Between Chapter 494 and Section 501.1377

53. The Legislative Findings and Intent of section 501.1377 provide as follows:

> (1) Legislative findings and intent.--The Legislature finds that homeowners who are in default on their mortgages, in foreclosure, or at risk of losing their homes due to nonpayment of taxes may be vulnerable to fraud, deception, and unfair dealings with foreclosure-rescue consultants or equity purchasers. The intent of this section is to provide a homeowner with information necessary to make an informed decision regarding the sale or transfer of his or her home to an equity purchaser. It is the further intent of this section to require

> that foreclosure-related rescue services agreements be expressed in writing in order to safeguard homeowners against deceit and financial hardship; to ensure, foster, and encourage fair dealing in the sale and purchase of homes in foreclosure or default; to prohibit representations that tend to mislead; to prohibit or restrict unfair contract terms; to provide a cooling-off period for homeowners who enter into contracts for services related to saving their homes from foreclosure or preserving their rights to possession of their homes; to afford homeowners a reasonable and meaningful opportunity to rescind sales to equity purchasers; and to preserve and protect home equity for the homeowners of this state.

54. Section 501.1377(2)(b), which defines "foreclosure-rescue consultant," specifically exempts from that definition "[a] licensed mortgage broker or mortgage lender that provides mortgage counseling or advice regarding residential real property in foreclosure, which counseling or advice is within the scope of services set forth in chapter 494 and is provided without payment of money or other consideration other than a loan origination fee."

55. In specifically exempting mortgage brokers or lenders from the definition of foreclosure rescue consultant, the legislature implicitly recognized that foreclosure-related rescue services might be provided by mortgage brokers or lenders, but that foreclosure-related rescue services could also be provided by persons or entities other than mortgage brokers

or lenders. Indeed, there are six additional categories of persons or entities that are also excluded from the definition of foreclosure-rescue consultant,[4/] but none of those other six categories apply to National. If the legislature did not wish to sanction the provision of foreclosure-related rescue services by entities like National, they would have required that such services be provided only by the seven categories of entities excluded by the definition of foreclosure-rescue consultant.

56. As found, neither National nor the two other Respondents were acting as mortgage brokers, and therefore the foreclosure-related rescue services they were providing do not fall within the purview of chapter 494. Rather, given the evidence adduced at hearing, section 501.1377 is the controlling statute. And while there may be some overlap in the entities regulated by chapter 494 and section 501.1377, in this instance, Respondents are not subject to regulation pursuant to chapter 494.

57. Given the finding that Respondents are not subject to regulation under chapter 494, Count II of the Complaint alleging improper advance collection of fees, in violation of section 494.00296, also must fail.

Count III is Not Supported by the Evidence

58. Count III of the Complaint alleges that Respondents continued to act as loan originators, mortgage brokers, or mortgage lenders without a license, and in violation of the OFR's Final Order in OFR Case 2012-285 FOF entered on November 2, 2012.

59. For the reasons set forth above, Count III is not supported by the competent substantial evidence of record. Respondents are not in violation of chapter 494, and therefore there can be no continuing violation of the prior Final Order.

Count IV is Not Properly Before this Tribunal

60. Count IV alleges that Respondents failed to pay the $25,000 fine imposed in the Final Order.

61. While through unfortunate circumstances a Final Order was entered finding Respondents in violation of chapter 494 and imposing a fine, the undersigned declines the invitation to enforce the prior Final Order in the context of this proceeding.

62. The cited statutory provision authorizing OFR to pursue the $25,000 fine in this proceeding is section 494.00255(1)(x), which allows OFR to impose administrative penalties for "[f]ailure to timely pay any fee, charge, or fine imposed or assessed pursuant to this chapter or related rules." However, this provision applies only to "a person licensed or required to be licensed under part II or part III of this

chapter." As found, Respondents are not required to be licensed pursuant to chapter 494.

63. Should OFR wish to seek enforcement of the prior Final Order, the proper recourse is through the process established in section 120.69.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Office of Financial Regulation enter a final order dismissing Administrative Complaint No. 69868.

DONE AND ENTERED this 9th day of April, 2018, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of April, 2018.

ENDNOTES

[1/] Statutory references herein are to the 2017 version of the Florida Statutes.

[2/] The majority of the relevant facts are not in dispute

[3/] Notwithstanding this finding, OFR is free to pursue enforcement of its Final Order in Case No. OFR Case 2012-285 FOF through any appropriate means, including as set forth in section 120.69.

[4/] The other six categories of persons and entities excluded from the definition of foreclosure-rescue consultant are:

> 1. A person excluded under s. 501.212.
>
> 2. A person acting under the express authority or written approval of the United States Department of Housing and Urban Development or other department or agency of the United States or this state to provide foreclosure-related rescue services.
>
> 3. A charitable, not-for-profit agency or organization, as determined by the United States Internal Revenue Service under s. 501(c)(3) of the Internal Revenue Code, which offers counseling or advice to an owner of residential real property in foreclosure or loan default if the agency or organization does not contract for foreclosure-related rescue services with a for-profit lender or person facilitating or engaging in foreclosure-rescue transactions.
>
> 4. A person who holds or is owed an obligation secured by a lien on any residential real property in foreclosure if the person performs foreclosure-related rescue services in connection with this obligation or lien and the obligation or lien was not the result of or part of a proposed foreclosure reconveyance or foreclosure-rescue transaction.
>
> 5. A financial institution as defined in s. 655.005 and any parent or subsidiary of the financial institution or of the parent or subsidiary.
>
> * * *

7. An attorney licensed to practice law in this state who provides foreclosure rescue-related services as an ancillary matter to the attorney's representation of a homeowner as a client.

COPIES FURNISHED:

Scott R. Fransen, Esquire
Office of Financial Regulation
Suite 615
1313 North Tampa Street
Tampa, Florida 33602
(eServed)

Carey E. Clements
1155 Private Road
Deland, Florida 32720

R. Jason de Groot, Esquire
Post Office Box 5775
Deltona, Florida 32728-5775
(eServed)

Drew J. Breakspear, Commissioner
Office of Financial Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0350
(eServed)

Anthony Cammarata, General Counsel
Office of Financial Regulation
The Fletcher Building, Suite 118
200 East Gaines Street
Tallahassee, Florida 32399-0370
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.