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**STATE OF ARIZONA
DEPARTMENT OF FINANCIAL INSTITUTIONS**

In the Matter of the Mortgage Broker
License of:

File No. 19F-BD008-BNK

**AMERICAPITAL MORTGAGE &
INVESTMENTS, LLC, Arizona
Mortgage Broker License No. 0905819**

ORDER

15150 N. Hayden Road, Suite 225
Scottsdale, Arizona 85260

Respondent.

On October 28, 2019, the Office of Administrative Hearings through Administrative Law Judge Thomas Shedden issued an Administrative Law Judge Decision (“Recommended Decision”) received by the Interim Superintendent of the Arizona Department of Financial Institutions (“Superintendent”) on October 29, 2019, a copy of which is attached and incorporated by this reference. The Superintendent has reviewed the Recommended Decision and enters the following:

1. The Superintendent adopts the Recommended Findings of Fact, Conclusions of Law, and Proposed Order.
2. The Superintendent orders that AmeriCapital Mortgage & Investments, LLC’s Mortgage Broker License Number 0905819 is revoked effective immediately.

NOTIFICATION OF RIGHTS

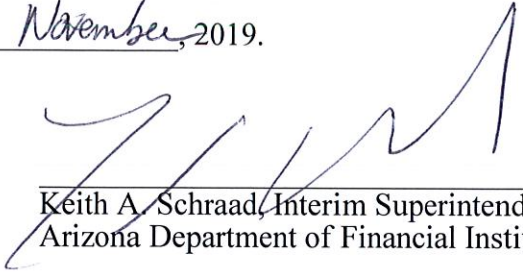
Pursuant to Arizona Revised Statutes (“A.R.S.”) § 41-1092.09, Respondent may request a rehearing or review with respect to this Order within 30 days after the date this Order has been served on Respondent. A rehearing or review of the Order is requested by serving on the Superintendent a written motion that specifies the grounds upon which the motion is based. Pursuant to A.R.S. § 41-1092.09, it is not necessary to request a rehearing before filing an appeal to Superior Court.

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1 Respondent may appeal the Superintendent's final decision to the Superior Court of Maricopa
2 County for judicial review pursuant to A.R.S. §§ 6-139, 12-904 and 41-1092.08(H).

3 DATED this 5th day of November, 2019.

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7 _____
8 Keith A. Schraad, Interim Superintendent
9 Arizona Department of Financial Institutions
10
11
12

13 **E-FILE** of the foregoing filed electronically
14 this 5th day of November 2019, to:

15 Thomas Shedden, Administrative Law Judge
16 Office of the Administrative Hearings

17 **ORIGINAL** of the foregoing filed
18 this 5th day of November 2019, in the office of:

19 Keith Schraad, Interim Superintendent
20 Arizona Department of Financial Institutions
21 ATTN: Ana Starcevic
22 100 N. 15th Avenue, Suite 261
23 Phoenix, AZ 85007
24 AStarcevic@azdfi.gov

25 **COPY** mailed/delivered same date to:

Eric Schwarz, Assistant Attorney General
Office of the Attorney General
2005 N. Central Avenue
Phoenix, AZ 85004
Eric.Schwarz@azag.gov

1 Gabriela Macias, Division Manager
Richard Fergus, Examiner-in-Charge
2 ATTN: Ana Starcevic
Arizona Department of Financial Institutions
3 100 North 15th Avenue, Suite 261
Phoenix, Arizona 85007
4 GMacias@azdfi.gov
RFergus@azdfi.gov
5

6 **COPY** of the foregoing mailed same date by
Certified Mail, Return Receipt Requested,
7 and U.S. regular mail to:

8 Paul M. Levine, Esq.
PAUL M. LEVINE, P.C.
9 8502 E. Via De Ventura, Suite 200
Scottsdale, AZ 85258-3240
10 Attorney for Respondent
Tracking No.: 9489 0090 0027 6139 7407 14
11

12 **COPY** of the foregoing mailed same date by
U.S. regular mail to:

13 Amy Winski
14 AmeriCapital Mortgage & Investments, LLC
15 15150 N. Hayden Road, Suite 225
Scottsdale, Arizona 85260
Owner/Responsible Individual
16

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1 7. As pertinent to this matter, the Department also conducted examinations of
2 AmeriCapital in 2011 and 2015.

3 8. The Department alleges that Ms. Winski made material misstatements or
4 suppressed or withheld information in applications to renew AmeriCapital's license in
5 "MU1" filings, in financial statements, and in documents provided to the Department
6 during examinations; that AmeriCapital misstated its equity because it did not report
7 judgments against it as liabilities on its balance sheet; that AmeriCapital is insolvent;
8 that while acting in the course of the mortgage business as an employee of
9 AmeriCapital, Mr. Winski had a judgment involving fraud, deceit or misrepresentation
10 entered against him and he has been shown not to be a person of honesty truthfulness
11 and good character; and that Ms. Winski has been shown not to be a person of
12 honesty, truthfulness and good character.

13 9. Based on these allegations, the Department charged that that Ms. Winski
14 violated ARIZ. REV. STAT. sections 6-905(A)(2), (A)(8) and (C); that Mr. Winski violated
15 sections 6-905(A)(2), (A)(6), and (C); and that AmeriCapital violated section 6-
16 905(A)(1).¹

17 10. The Department alleges that many or all of Ms. Winski's misstatements were
18 made in the course of the mortgage business and resulted in information being
19 concealed from the Department. As such, it also charged Ms. Winski with violating
20 ARIZ. REV. STAT. section 6-909(L), which if proven would also be a violation of sections
21 6-905(A)(3) and (C).

22 11. During the hearing, the Department withdrew an allegation that AmeriCapital
23 violated section 6-905(A)(4).

24 12. The Department is requesting that AmeriCapital's license be revoked.

25 13. Ms. Winski conceded that some violations had occurred, but she denies that
26 these are as severe or pervasive as the Department alleges. She argues that the
27

28
29 ¹ ARIZ. REV. STAT. section 6-905(A) sets out acts for which a licensee can be disciplined. For cases such
30 as this one where the licensee is an LLC, section 6-905(C) provides that the license is subject to
discipline for the acts of its owner and in some circumstances, its employees.

1 violations that do exist do not justify revocation and that the Department is precluded
2 from bringing many of these charges based on principles of equity.

3 The Department's 2018/19 examination and Report

4 14. Between October 9, 2018 and February 12, 2019, the Department conducted
5 the examination of AmeriCapital that gave rise to the allegations in this matter (the
6 "2018/19 examination").

7 15. Mr. Fergus was the Examiner-in-Charge.

8 16. Mr. Fergus had reviewed the Department's 2011 and 2015 e-Examination
9 Reports for AmeriCapital before he began the examination of AmeriCapital.

10 17. There were no consumer complaints against AmeriCapital during the period
11 covered by the 2018/19 examination.

12 18. On February 27, 2019, Mr. Fergus, as the "Examiner-in-Charge", and Ms.
13 Gabriela Macias, as the "Division Manager Mortgage Lending," signed the
14 Department's Report for the 2018/19 examination ("the 2018/19 Report").

15 19. Although the examination was concluded at an exit meeting on February 12,
16 2019, the Report was not sent to AmeriCapital until May 9, 2019, which was 71 days
17 after the Report was signed. AmeriCapital did not receive the Report until after the
18 Department issued the Complaint against it.

19 20. Mr. Fergus is not a CPA, he did not receive any formal or classroom training to
20 become an examiner or an examiner in charge, and he had received no training
21 regarding the statutes or legal aspects of the examination.

22 21. The 2018/19 Report was the first report for a mortgage broker that Mr. Fergus
23 had prepared since 2005.

24 22. During the 2018/19 examination, AmeriCapital and Ms. Winski complied with all
25 the Department's requests for information.

26 23. According to Mr. Fergus, typically, the business of a mortgage broker is to take
27 mortgage or loan applications for individuals or entities, work with the lender to get
28 approval, have the lender fund the loan, and then receive compensation for brokering
29 the loan to a lender.

1 24. At the hearing, Mr. Fergus acknowledged that the Department had not followed
2 all the statutes and policies applicable to investigations or examinations. These failures
3 included: (1) not sending the 2018/19 Report to AmeriCapital for it to review and
4 prepare a response; (2) not providing AmeriCapital with a copy of the Report within 30
5 working days after the examination was complete; (3) not providing AmeriCapital an
6 opportunity to correct any of the Department's alleged deficiencies; and (4) not
7 providing AmeriCapital with an update on the status of the examination at least once
8 every month.

9 25. Mr. Fergus explained that he forgot to provide AmeriCapital with the required
10 monthly updates.

11 26. The purpose of the exit meeting is to review the findings with the licensee and
12 have discussions before the Report is finalized so that the licensee knows what will
13 appear on the Report. However, Mr. Fergus acknowledged that during the exit meeting,
14 he did not discuss with Ms. Winski several of the issues for which the Department is
15 alleging violations on the part of Ms. Winski.

16 The Grunberg judgment against AmeriCapital

17 27. On January 25, 2011, a final civil judgment was entered against AmeriCapital in
18 the amount of \$70,670.77 (the "Grunberg judgment").

19 28. During the 2011 examination of AmeriCapital, Ms. Winski answered "yes" to the
20 question of whether it had been involved in any litigation since the last examination or
21 since its license was issued. Ms. Winski wrote that "There was a dispute between our
22 company and our previous landlord, which resulted in a lawsuit. In the event that we
23 are required to pay any additional amounts more than we have already paid, we will do
24 so. Therefore, no effect on financial condition is anticipated."

25 29. Ms. Winski's testimony was to the effect that this was a disclosure of the
26 Grunberg judgment.

27 30. As of June 28, 2019, accrued interest had raised AmeriCapital's debt for the
28 Grunberg judgment to \$179,368.03.

29 31. At the hearing, Ms. Winski acknowledged that as of July 18, 2019, AmeriCapital
30 had not paid the Grunberg judgment and that it had never made any attempt to pay.

1 32. When asked why AmeriCapital has not paid this judgment, Ms. Winski
2 answered "I honestly don't know."

3 33. But Ms. Winski acknowledged her belief that AmeriCapital likely would not have
4 been able to pay the Grunberg judgment when it was issued on January 25, 2011, and
5 that she did not know whether AmeriCapital would have been able to pay that debt as
6 of January 25, 2012.

7 34. Ms. Winski testified that the Grunberg judgment did not have any effect on
8 AmeriCapital's operations, but considering that it has not paid the judgment, this
9 statement is of little probative value.

10 The Helal Judgment against AmeriCapital

11 35. In 2010, Aziz and Teresa Helal were seeking to refinance property they owned.
12 On March 31, 2011, the Helals filed suit against AmeriCapital, Ms. Winski, Mr. Winski,
13 Cadillac Properties LLC, Star 1 Investments LLC, and other individuals and entities
14 alleging breach of fiduciary duties, interference with contractual relations, tortious
15 interference with business expectancy, fraud, negligent misrepresentation, consumer
16 fraud, and aiding and abetting.

17 36. The superior court entered an Under Advisement Verdict on October 15, 2015,
18 and a Supplement/Amended Verdict and Final Judgment on February 5, 2014.
19 (Collectively, the "Helal judgment.")

20 37. The superior court found that the Helals and the Defendants had entered into a
21 borrower-broker relationship and that Mr. Winski had committed a breach of fiduciary
22 duty; that Mr. Winski, AmeriCapital and Star 1 had committed interference with
23 contractual relations; and that Mr. Winski, AmeriCapital and Star 1 had committed
24 tortious interference with business expectancy. The court found that the Helals had not
25 proven any of the other alleged torts.

26 38. The court did not impose any liability against Ms. Winski for her independent
27 conduct, but it found that Mr. Winski acted on behalf of the marital community. The
28 court found that Mr. Winski's behavior was egregious, outrageous, and conducted with
29 an evil mind, and consequently, the court imposed punitive damages.

30

1 39. The court awarded the Helals compensatory damages of \$233,000 and punitive
2 damages of \$150,000, which were assessed against Mr. Winski, AmeriCapital, and
3 Star 1, jointly and severally.

4 40. As set forth in more detail below, the Arizona Court of Appeals affirmed the
5 superior court's ruling that Mr. Winski committed a breach of fiduciary duty in dealing
6 with the Helals, which occurred while he was an employee of AmeriCapital.

7 41. At the hearing, Ms. Winski acknowledged that as of July 18, 2019, AmeriCapital
8 had not paid the Helal judgment and that it had never made any attempt to pay that
9 judgment.

10 42. When asked why AmeriCapital has not paid this judgment, Ms. Winski testified
11 "I don't know." Ms. Winski has however also taken the position that AmeriCapital owes
12 the Helals only 1% of the judgment, whereas through the "Cadillac judgment" the Helals
13 owe AmeriCapital substantially more than that.

14 43. Ms. Winski testified that AmeriCapital disclosed the Helal judgment during the
15 2015 examination and that the examiner never asked for any additional documents
16 regarding the case.

17 44. Ms. Winski asserts that there was no attempt to withhold any information
18 regarding either the Grunberg or Helal judgments and that she offered to make all the
19 records regarding the Helal case available to Mr. Fergus during the Department's
20 2018/19 examination.

21 45. Ms. Winski asked Mr. Fergus if she needed to get him any other information
22 concerning the Helal case. Ms. Winski testified that Mr. Fergus told her that he would
23 let her know, but he never did. Mr. Fergus testified that he told Ms. Winski that she
24 needed to ask an examiner who was conducting an examination of another of her
25 businesses.

26 The Cadillac judgment held by AmeriCapital

27 46. Cadillac Properties LLC was one of the defendants in the Helals' lawsuit against
28 AmeriCapital and the Winskis.

29 47. Cadillac Properties LLC obtained a judgment against the Helals in Pima County
30 Superior Court ("the Cadillac judgment") in the amount \$242,500.

1 48. Cadillac assigned that judgment to AmeriCapital on September 20, 2013.

2 49. As of May 4, 2018, the sum due was \$341,072.10.

3 The Department's 2011 e-Examination Report

4 50. Between July 8 and August 3, 2011, the Department conducted an e-
5 Examination of AmeriCapital. The Department's Report is in evidence as Exhibit F. The
6 2011 Report was signed by Tammy Seto, "Examiner-in-Charge" and by Robert D.
7 Charlton, "Assistant Superintendent of Financial Institutions."

8 51. In its 2011 Report, the Department concluded that AmeriCapital had not
9 committed any violations of statute and that it was solvent.

10 52. During the 2011 examination, AmeriCapital answered "yes" to the question of
11 whether it had been involved in any litigation since the last examination or since its
12 license was issued. AmeriCapital explained that "There was a dispute between our
13 company and our previous landlord, which resulted in a lawsuit. In the event that we
14 are required to pay any additional amounts more than we have already paid, we will do
15 so. Therefore, no effect on financial condition is anticipated." (Underscore added.)

16 53. This disclosure was in reference to the lawsuit that led to the Grunberg
17 judgment being entered against AmeriCapital.

18 54. As discussed below, the Department alleges that during the 2011 examination,
19 Ms. Winski should have disclosed that the Helals had filed their lawsuit, but failed to do
20 so.

21 The Department's 2015 e-Examination Report

22 55. On January 25, 2015, the Department conducted an e-Examination of
23 AmeriCapital. The Department's Report is in evidence as Exhibit D.

24 56. The 2015 Report was signed by Michael Contreras, "Examiner-in-Charge" and
25 by Robert D. Charlton, "Assistant Superintendent Financial Services Division."

26 57. In its 2015 Report, the Department concluded that AmeriCapital was solvent
27 and that it had committed three statutory violations, none of which are related to the
28 Department's allegations in this matter.

29 58. During the 2015 examination, the examiner (Mr. Contreras) informed Ms. Winski
30 of the deficiencies he noted and AmeriCapital was allowed to make corrections.

1 59. During the 2015 examination, AmeriCapital answered “yes” to the question
2 whether it had been involved in any litigation since the last examination. Ms. Winski
3 testified that AmeriCapital was disclosing the Helal judgment.

4 60. As discussed below, during the 2015 examination, Ms. Winski submitted to the
5 Department a Responsible Individual Questionnaire on behalf of AmeriCapital; the
6 Department alleges that the questionnaire contained a material misrepresentation
7 because it did not disclose that the Helal judgment had been entered against Mr.
8 Winski.

9 Allegations that Ms. Winski made misrepresentations or suppressed or withheld
10 information

11 61. The Department alleges that Ms. Winski submitted numerous documents to the
12 Department in which she made material misstatements or suppressed or withheld
13 information in violation of ARIZ. REV. STAT. section 6-905(A)(8) and (C). These include

- 14 a. Allegations that Ms. Winski made material misstatements on license
15 renewal applications and MU1 filings by reporting that AmeriCapital had
16 no unpaid judgments against it;
- 17 b. Allegations that Ms. Winski made material misstatements on financial
18 statements and regarding AmeriCapital's equity;
- 19 c. Allegations that Ms. Winski made material misstatements regarding
20 AmeriCapital's liability for the Helal judgment;
- 21 d. Allegation that Ms. Winski made a material misrepresentation during the
22 2011 examination by failing to report that the Helals had filed suit;
- 23 e. Allegation that Ms. Winski made a material misstatement during the 2011
24 examination when she committed to pay the Grunberg judgment;
- 25 f. Allegation that Ms. Winski made a material misstatement during the 2015
26 examination by failing to report that the Helal judgment had been entered
27 against Mr. Winski.

28 62. The Department also alleges that in the documents at issue, Ms. Winski
29 misrepresented or concealed essential or material facts in the course of the mortgage
30

1 broker business, in violation of ARIZ. REV. STAT. section 6-909(L), which would also be
2 violations of sections 6-905(A)(3) and (C).

3 *Allegations that Ms. Winski made material misstatements on license renewal*
4 *applications and MU1 filings by reporting that AmeriCapital had no unpaid judgments*
5 *against it*

6 63. The Department participates in the Nationwide Multistate Licensing System &
7 Registry (“NMLS”), and all Arizona-licensed mortgage brokers are required to submit
8 filings to the Department through NMLS. As pertinent to this matter, AmeriCapital filed
9 license renewal applications, financial statements, and MU1s through the NMLS.

10 64. These filings included Ms. Winski’s affirmations or attestations that the
11 information was true and accurate.

12 65. The annual renewal applications and MU1 filings each have a “Question J” that
13 asks: “Does the entity have any unsatisfied judgments or liens against it?”

14 66. On eight license renewal applications that Ms. Winski filed for AmeriCapital
15 covering years 2012 through 2019, Ms. Winski answered “no” to Question J.

16 67. Ms. Winski also answered “no” to Question J in MU1 filings submitted on
17 February 12, 2014, January 5, 2017, and March 9, 2017.

18 68. At the hearing, Ms. Winski acknowledged that these “no” answers were not true
19 and that because the Grunberg and Helal judgments were unsatisfied, she should have
20 answered “yes” in each case.

21 69. According to Ms. Winski, she thought she had to disclose only unsatisfied
22 judgments that had occurred during the prior year, not all unsatisfied judgments.

23 70. Ms. Winski argues that because she had disclosed to the Department the
24 Grunberg and Helal judgments, there could not have been any intent to deceive when
25 she falsely reported that AmeriCapital had no unsatisfied judgments.

26 71. The Department in its Complaint did not charge Ms. Winski for the alleged
27 misrepresentations that occurred in the 2019 renewal application, and alleges
28 violations for only the seven other renewal applications and the three MU1s.

29 *Allegations that Ms. Winski made material misstatements on financial statements and*
30 *regarding AmeriCapital’s equity*

1 72. In the years 2011 through 2018, AmeriCapital filed annual financial statements
2 that included a calculation of AmeriCapital's total equity. During the Department's
3 2018/19 examination of AmeriCapital, it provided the Department with an additional
4 financial statement that included a calculation of the total equity.

5 73. At the hearing, Ms. Winski acknowledged that she did not include either the
6 Grunberg or Helal judgment on any of those financial statements.

7 74. Mr. Fergus testified that he had spoken to a CPA working for the Department
8 who informed him that generally accepted accounting principles or GAAP requires that
9 all unsatisfied civil judgments be included in financial statements as either assets or
10 liabilities.²

11 75. During the 2018/19 examination, Mr. Fergus never told Ms. Winski that he was
12 of the opinion that the financial statements were deficient because these did not
13 include the judgments.

14 76. Ms. Winski acknowledged that she did not know whether GAAP requires
15 disclosure of judgments on financial statements.

16 77. Ms. Winski also testified that prior to the 2018/19 examination, the Department
17 had not told her that the judgments should be included on a financial statement. If she
18 would have been told that judgments should have been included on the financial
19 statements, she would have done so.

20 78. According to Ms. Winski, NMLS does not have a suggested format or form for
21 submitting a financial statement, and that AmeriCapital uses QuickBooks to prepare its
22 financial statements. To Ms. Winski's recollection, QuickBooks did not include a place
23 to enter judgments in the financial statements she prepared.

24 79. Through its Complaint, the Department alleged violations of statute for only the
25 four financial statements Ms. Winski submitted in years 2014 to 2017 and the
26 statement she submitted in August 2018.

27 80. The Department is not alleging AmeriCapital or Ms. Winski failed to follow
28 GAAP.

29 _____
30 ² "Every mortgage broker shall observe generally accepted accounting principles and practices." ARIZ.
REV. STAT. § 6-906(B).

1 *Allegations that Ms. Winski made material misstatements regarding AmeriCapital's*
 2 *liability for the Helal judgment*

3 81. During the Department's 2018/19 examination of AmeriCapital, Ms. Winski
 4 provided the Department with signed statements showing that AmeriCapital was
 5 responsible for only 1% of the monetary judgment in the Helal case.

6 82. Ms. Winski wrote that AmeriCapital only owed the Helals 1% of the Helal
 7 judgment, rather than 100%, because Michael Reeves, her attorney in that lawsuit, told
 8 her that AmeriCapital was responsible for only 1%.

9 83. Mr. Reeves has been practicing law in Arizona since 1986. He has tried more
 10 cases than he has counted, he has arbitrated matters through the American Arbitration
 11 Association, and he has served as an Arbitrator. His experience includes cases
 12 involving fraud, negligent misrepresentation, deceit, breach of fiduciary duty,
 13 interference with contractual relations, interference with business expectancy and
 14 consumer fraud.

15 84. Mr. Reeves testified that the Helal judgment was not clear and that the
 16 traditional form of judgment was not signed in the Helal case.

17 85. Mr. Reeves confirmed that he had advised Ms. Winski that AmeriCapital was
 18 only liable for 1% of the Helal Judgment, and he confirmed that this was still his opinion
 19 as of the hearing date.

20 86. Mr. Fergus acknowledged that during the 2018/19 examination, he never asked
 21 Ms. Winski why she was of the opinion that AmeriCapital had only a 1% liability for the
 22 Helal judgment and that he had never contacted Mr. Reeves to discuss his opinion to
 23 that effect.³

24 87. The Department argues that Mr. Reeves and Ms. Winski are wrong, and
 25 therefore that Ms. Winski's statements in violation of ARIZ. REV. STAT. sections 6-
 26 905(A)(8) & (C), and 6-909(L).

27 *Allegation that Ms. Winski made a material misrepresentation during the 2011*
 28 *examination by failing to report that the Helals had filed suit*

29 _____
 30 ³ There is no information in the record showing that any of the Department's attorneys had contacted Mr. Reeves to discuss the issue.

1 88. During the 2011 examination, AmeriCapital disclosed the Grunberg litigation,
2 but not that the Helals' had filed their lawsuit.

3 89. Because the Helal lawsuit was filed and served on March 31, 2011, the
4 Department alleges that Ms. Winski was obligated to disclose that lawsuit during the
5 2011 examination, but instead she concealed its existence.

6 90. During its 2015 examination, the Department did not find that AmeriCapital had
7 committed a violation during the 2011 examination by not listing the Helal litigation.

8 *Allegation that Ms. Winski made a material misstatement during the 2011 examination*
9 *when she committed to pay the Grunberg judgment*

10 91. When Ms. Winski disclosed the Grunberg matter during the 2011 examination,
11 she informed the Department that AmeriCapital would pay Grunberg any monies they
12 were required to pay.

13 92. At the hearing, Ms. Winski acknowledged that it never made any attempt to pay
14 the Grunberg judgment.

15 93. The Department argues that the promise to pay was therefore a material
16 misstatement.

17 *Allegation that Ms. Winski made a material misstatement during the 2015 examination*
18 *by failing to report that the Helal judgment had been entered against Mr. Winski*

19 94. During the 2015 examination, Ms. Winski submitted to the Department a
20 Responsible Individual Questionnaire dated January 20, 2015.

21 95. Ms. Winski answered "No" to Question 17, which asks: "Have you ... or [an]
22 employee had a final judgment entered against same in a civil action upon grounds of
23 fraud, deceit or misrepresentation (6-905.A.6.)?"

24 96. The Helal judgment was final against Mr. Winski as of February 5, 2014. Mr.
25 Winski was an employee of AmeriCapital on January 20, 2015 when Ms. Winski filed
26 the Questionnaire. The Department argues that this shows that Ms. Winski should have
27 answered "yes" to Question 17, and that her failure to do so violated sections 6-
28 905(A)(8) and (C), and 6-909(L).

29 97. Ms. Winski testified however that she had disclosed to the Department's
30 examiner the Helal judgment during the 2015 examination.

Whether AmeriCapital is solvent

1
2 98. The Superintendent may suspend or revoke a mortgage broker's license if the
3 Superintendent finds that the licensee "[i]s insolvent as defined in [ARIZ. REV. STAT.
4 section] 47-1201." ARIZ. REV. STAT. § 6-905(A)(1).

5 99. As defined in ARIZ. REV. STAT. section 47-1201(B)(23)(b), "insolvent" means:
6 "Being unable to pay debts as they become due." As defined in section 47-
7 1201(B)(23)(c), "insolvent" means: "Being insolvent within the meaning of federal
8 bankruptcy law."

9 100. Ms. Winski testified that prior to her receipt of the complaint in this matter the
10 Department had never told her that AmeriCapital did not meet the financial
11 responsibility or net worth requirements required by statute. She stated that if she
12 would have been told, she would have made the corrections necessary, including
13 making monetary contributions to AmeriCapital to increase its net worth, and that she
14 had the financial resources to make the contribution if necessary.

Whether AmeriCapital is able to pay its bills as they come due

15
16 101. Ms. Winski acknowledged that AmeriCapital has not paid the either the
17 Grunberg or Helal judgments, which were final as of January 25, 2011 and February 5,
18 2014, respectively.

19 102. During the hearing, Ms. Winski could not provide an explanation as to why
20 AmeriCapital had not paid the Grunberg and Helal judgments, although she did take
21 the position that AmeriCapital was responsible for only 1% of the Helal judgment, which
22 is less than the Cadillac judgment against the Helals.

23 103. The Department argues that the only reasonable explanation for AmeriCapital's
24 failure to pay those debts is that AmeriCapital has been unable to do so.

25 104. The Department believes that this conclusion is bolstered by Ms. Winski's
26 acknowledgments that AmeriCapital was likely not able to pay the Grunberg judgment
27 when it was entered in 2011 and that she did not know whether AmeriCapital would
28 have been able to pay that debt as of January 25, 2012, and because AmeriCapital has
29 not originated a loan since 2015.
30

1 105. Consequently, the Department argues that the evidence shows that
2 AmeriCapital is insolvent as defined in ARIZ. REV. STAT. section 47-1201(B)(23)(b)
3 because it is unable to pay its debts as they come due.

4 *Whether AmeriCapital is insolvent within the meaning of federal bankruptcy law*

5 106. As defined in ARIZ. REV. STAT. section 47-1201(B)(23)(c), insolvent means
6 "Being insolvent within the meaning of federal bankruptcy law."

7 107. Mr. Fergus testified that when an entity's liabilities exceed its assets (i.e.,
8 negative total equity), that constitutes being insolvent within the meaning of federal
9 bankruptcy law, but he did not provide any explanation as to why he was of this
10 opinion. AmeriCapital did not refute his testimony, but the Department did not provide
11 any legal citations or other authority to support the testimony.

12 108. Mr. Fergus testified as to his opinion that AmeriCapital's financial statement
13 showing that as of August 31, 2018, it had equity of \$149,431.57 was in error because
14 it did not include as liabilities either the Grunberg or Helal judgments, which he asserts
15 is required under GAAP. Mr. Fergus also was of the opinion that AmeriCapital should
16 have reported the Cadillac judgment as an asset in its statements.

17 109. Mr. Fergus testified that when the three judgments are properly accounted for,
18 as of August 31, 2018, AmeriCapital's equity was a negative \$39,462.15.

19 110. Mr. Fergus reached this conclusion by subtracting from \$149,431.57 (the total
20 equity figure reported on the August 31, 2018 financial statement) the outstanding
21 balances of the Grunberg and Helal judgments and adding the outstanding balance of
22 the Cadillac judgment.

23 111. In reaching this conclusion, Mr. Fergus considered AmeriCapital to be 100%
24 liable for the Helal judgment, and he acknowledged that if AmeriCapital was only 1%
25 responsible for that judgment, it would not be insolvent under his calculations.

26 112. Mr. Fergus acknowledged that he did not account for interest that had accrued
27 on the Grunberg and Cadillac judgments. The Department asserts that even if this
28 interest was to be considered, AmeriCapital would still have a negative equity.
29
30

1 113. The Department concludes that as of August 31, 2018, AmeriCapital was
2 insolvent as defined in ARIZ. REV. STAT. section 47-1201(B)(23)(c) because as of that
3 date AmeriCapital was insolvent within the meaning of federal bankruptcy law.

4 Allegations related to Mr. Winski

5 114. The Helal lawsuit was filed on March 31, 2011, and the final judgment was
6 entered on February 5, 2014. Mr. Winski was an AmeriCapital employee from 2003
7 until January 30, 2015.

8 115. The superior court in the Helal case found that the Helals and Mr. Winski had
9 "entered into a borrower-broker relationship" and that Mr. Winski had committed the tort
10 of breach of fiduciary duty against the Helals.

11 116. On December 15, 2015, the Arizona Court of Appeals issued a decision in the
12 Helal case which affirmed the trial court's decision in its entirety, including the finding
13 that Mr. Winski was acting as the Helals' mortgage broker.

14 117. In its decision, the Court of Appeals made the following findings:

15 Although the parties presented conflicting evidence at trial,
16 the trial court found that the Winskis defrauded the Helals
17 by intentionally leading them on while working separately
18 with M&I to buy the Helals' properties' promissory notes and
deeds of trust.

19 ***

20 By the end of the day, she told [the Helals] that Mr. Winski,
21 a mortgage broker with Americapital, was interested in being
their broker.

22 ***

23 A fiduciary relationship exists between a broker and his
24 client, and the broker owes his client the utmost good faith
as a result of that relationship.

25 ***

26 Here, Mr. Winski was the Helals' broker and a fiduciary
27 relationship existed between the Helals and him. The record
28 shows that the Helals trusted Mr. Winski and believed that
he would act for their benefit.

29 ***
30

1 Consequently, Mr. Winski's actions were improper as to
2 motive and means. He knew the Helals' situation and took
3 full advantage of it to benefit himself and his company."

4 ***

5 Here, Mr. Winski committed outrageous conduct with the
6 requisite evil mind that supports the punitive damages
7 award. The record shows that Mr. Winski consciously
8 disregarded the Helals' rights under the settlement
9 agreement with M&I. Instead of looking for potential
10 investors for the Helals to help them refinance their loans,
11 Mr. Winski was working with M&I to purchase the notes
12 directly from the bank for his own benefit.

13 ***

14 Even though Mr. Winski knew that his action was contrary to
15 the Helals' interests, he continued to act in the same
16 manner in deliberate contravention to the Helals' rights.

17 Moreover, the record shows that Mr. Winski had a motive to
18 defraud the Helals to secure benefits for him and his
19 company.... Mr. Winski repeatedly asked the Helals for
20 information – personal information regarding themselves
21 and their properties – under the guise that potential
22 investors wanted that information. ... Although Mr. Winski
23 claimed that he did not know about the second settlement
24 agreement and knew only that the first settlement agreement
25 expired on December 22, on January 3, he proceeded to
26 ask the Helals for more information – once again under the
27 guise that he had a potential investor for them.

28 ***

29 Consequently, because the record supports the trial court's
30 finding that Mr. Winski's actions were outrageous and
 conducted with an evil mind, the court did not err in
 awarding the Helals punitive damages.

 Exhibit 28 (Underscoring added; citations and internal
 quotations omitted.)

1 118. The Department alleges that because the superior court and appeals court
2 found that Mr. Winski breached his fiduciary duty to the Helals, he has violated ARIZ.
3 REV. STAT. section 6-605(A)(6) and that the courts' findings show that he is not a
4 person of honesty, truthfulness and good character in violation of section 6-905(A)(2).

5 119. AmeriCapital argues to the effect that because the Helal court found that the
6 Helals did not prove the torts of fraud, negligent misrepresentation or consumer fraud,
7 the judgment against Mr. Winski does not fall within section 6-905(A)(6).

8 120. The Department notes that despite the superior court's decision on those three
9 allegations, the Court of Appeals specifically used the word fraud to describe Mr.
10 Winski's conduct toward the Helals. The Department argues that the Court of Appeals
11 was certainly aware that Mr. Winski had not been found liable for the tort of fraud in the
12 Helal case, and yet that Court nevertheless described Mr. Winski's actions in terms of
13 fraud.

14 Whether Ms. Winski is a person of honesty, truthfulness and good character

15 121. The Department argues that Ms. Winski has engaged in a years-long pattern of
16 concealment, misrepresentation, misstatements, suppression and withholding
17 regarding information she has provided to the Department in the course of the
18 mortgage broker business.

19 122. The Department also notes that Ms. Winski had committed to pay the Helal
20 judgment, but failed to do so.

21 123. As such, the Department alleges that Ms. Winski has shown that she is not a
22 person of honesty, truthfulness and good character.

23 **CONCLUSIONS OF LAW**

24 1. The Department bears the burden of persuasion. ARIZ. REV. STAT. § 41-
25 1092.07(G)(2).

26 2. At an administrative hearing, unless otherwise provided by law, the party
27 asserting a claim, right, entitlement, or affirmative defense has the burden of proof, and
28 the standard of proof on all issues in this matter is that of a preponderance of the
29 evidence. ARIZ. ADMIN. CODE § R2-19-119.

30 3. A preponderance of the evidence is:

1 The greater weight of the evidence, not necessarily
2 established by the greater number of witnesses testifying to
3 a fact but by evidence that has the most convincing force;
4 superior evidentiary weight that, though not sufficient to free
5 the mind wholly from all reasonable doubt, is still sufficient
6 to incline a fair and impartial mind to one side of the issue
7 rather than the other.

8 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

9 4. An Administrative Law Judge Decision must be based on evidence that is
10 substantial, reliable and probative. ARIZ. REV. STAT. § 41-1092.07(F).

11 5. "Substantial evidence is evidence which would permit a reasonable person to"
12 conclude that the proposed finding should be substantiated. See *Sierra Club – Grand*
13 *Canyon Chapter v. Ariz. Corp. Comm'n*, 237 Ariz. 568, ¶ 22, 354 P.3d 1127 (2015
14 App.)(citing *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704 (1999).

15 6. Although hearsay can be admitted at an administrative hearing, the Decision
16 may not be based on unreliable hearsay. A sufficient foundation must be provided
17 before hearsay can be considered reliable. "Reliable hearsay must be of the kind
18 reasonable persons rely upon in serious matters." *Plowman v. Ariz. State Liquor Bd.*,
19 152 Ariz. 331, 337, 752 P.2d 222, 228 (App. 1986)(citation omitted).

20 7. ARIZ. REV. STAT section 6-905 shows in part:

21 A. The superintendent may deny a license to a person or
22 suspend or revoke a license if the superintendent finds that
23 an applicant or licensee:

- 24 1. Is insolvent as defined in section 47-1201.
- 25 2. Has shown that he is not a person of honesty,
26 truthfulness and good character.
- 27 3. Has violated any applicable law, rule or order.
- 28 4. Refuses to permit an examination by the superintendent
29 of the licensee's books and affairs or refuses or fails, within
30 a reasonable time, to furnish any information or make any
report that may be required by the superintendent.

6. Has had a final judgment entered against him in a civil
action upon grounds of fraud, deceit or misrepresentation
and the conduct on which the judgment is based indicates

1 that it would be contrary to the interest of the public to
2 permit such person to be licensed or to control or manage a
licensee.

3 *****

4 8. Has made a material misstatement or suppressed or
5 withheld information on the application for a license or any
document required to be filed with the superintendent.

6 ****

7 C. If a licensee is other than a natural person, it is sufficient
8 cause for the suspension or revocation of the license if an
9 officer, director, member, partner, trustee, employee, while
10 acting in the course of the mortgage broker business, or
11 person entitled to vote more than twenty per cent of the
12 outstanding voting shares of the licensed corporation,
13 partnership, association or trust has acted or failed to act in
the same manner as would be cause for suspending or
revoking a license of the party as an individual....

14 (Underscoring added.)

15
16 8. "A mortgage broker shall not make a false promise or misrepresentation or
17 conceal an essential or material fact in the course of the mortgage broker business."

18 ARIZ. REV STAT. § 6-909(L).

19 9. "Every official report of the department is prima facie evidence of the facts
20 therein stated in any action or proceeding wherein the superintendent is a party." ARIZ.

21 REV STAT. § 6-129(D).

22 10. Insolvent means "(b) Being unable to pay debts as they become due; or (c)
23 Being insolvent within the meaning of federal bankruptcy law." ARIZ. REV STAT. § 47-
24 1201(B)(23).

25 11. "Every mortgage broker shall observe generally accepted accounting
26 principles and practices." ARIZ. REV STAT. § 6-906(B).

27 12. ARIZ. REV. STAT. section 41-1009 provides in part:

28 ***

1 D. An agency that conducts an inspection shall give a copy
2 of the inspection report to the regulated person or on-site
3 representative of the regulated person either:

4 ***

5 2. Notwithstanding any other state law, within thirty working
6 days after the inspection.

7 ***

8 J. At least once every month after the commencement of the
9 inspection, an agency shall provide a regulated person with
10 an update on the status of any agency action resulting from
11 an inspection of the regulated person. An agency is not
12 required to provide an update after the regulated person is
13 notified that no agency action will result from the agency
14 inspection or after the completion of agency action resulting
15 from the agency inspection.

16 ***

17 P. Failure of an agency, board or commission employee to
18 comply with this section:

19 ***

20 2. Shall be considered by the judge and administrative law
21 judge as grounds for reduction of any fine or civil penalty.

22 13. Statutes should be interpreted to provide a fair and sensible result. *Gutierrez v.*
23 *Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234, 238, 439
24 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable construction
25 on statutes.").

26 14. Each word, phrase, clause, and sentence of a statute or rule must be given
27 meaning so that no part will be void, inert, redundant, or trivial. See *Deer Valley, v.*
28 *Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

29 15. The tribunal may disregard self-serving testimony. See e.g., *State v. Medrano*,
30 185 Ariz. 192, 914 P.2d 225 (1996).

16. The tribunal is not required to accept evidence even if it is not contradicted.
Gaveck v. State Board of Podiatry, 222 Ariz. 433, 215 P.3d 1114 (App. 2009).

17. A client has a right to rely on the advice of her attorney. *Lietz v. Primock*, 84
Ariz. 273, 327 P.2d 288 (1958).

1 18. License holders are expected to know the law. See *Lugo v. Moore*, 11 Ariz.
2 App. 85, 90, 462 P.2d 102, 107 (1969).

3 19. “[E]stoppel may apply against the state only when the public interest will not be
4 unduly damaged and when its application will not substantially and adversely affect the
5 exercise of government powers.” *Valencia Energy Co. v. Arizona Dept. of Revenue*,
6 191 Ariz. 565, 578, 959 P.2d 1256, 1269 (1998).

7 The allegations that Ms. Winski made material misstatements or suppressed or
8 withheld information

9 *Allegations that Ms. Winski made material misstatements on license renewal*
10 *applications and MU1 filings by reporting that AmeriCapital had no unpaid judgments*
11 *against it*

12 20. Ms. Winski acknowledged that she falsely reported that AmeriCapital had no
13 unpaid judgments against it in the eight license renewal applications and three MU1
14 filings.

15 21. Question J on those documents is straightforward and Ms. Winski’s
16 justifications for failing to provide truthful answers is not persuasive.

17 22. Even though the examiners in 2011 and 2015 presumably knew that
18 AmeriCapital had not paid the judgments in those years, AmeriCapital was obligated to
19 provide truthful answers in subsequent filings with the Department, which obligation is
20 heightened by the expectation is that AmeriCapital would pay its debts.

21 23. The preponderance of the evidence shows that by answering “no” to the
22 question of whether AmeriCapital had any unpaid judgments against it, Ms. Winski
23 violated ARIZ. REV. STAT. sections 6-905(A)(8) and (C).

24 24. The Department alleges that these documents were filed in the course of the
25 mortgage business and that Ms. Winski has also violated ARIZ. REV. STAT. section 6-
26 909(L), which if true would be a violation of sections 6-905(A)(3) and (C).

27 25. The Administrative Law Judge does not agree that these documents were filed
28 in the course of the mortgage business as that term is used in the statute.

29 26. Under the Department’s reading, section 6-905(A)(8) would be unnecessary (or
30 void or trivial) because any violation of it would also be a violation of section 6-909(L).

1 The more sensible reading is that the two statutes are designed to address two
2 different things: the licensee's interactions and filings with the Department (6-905(A)(8))
3 and the licensee's business dealings with the public (6-909(L)).

4 27. That section 6-909(L) also prohibits making false promises, further indicates
5 that the legislature is addressing interactions between the licensee and the public, and
6 not documents filed with it. This reading of the statute is also consistent with Mr.
7 Fergus's definition related to the meaning of mortgage business.

8 28. Because the Department has not proven by a preponderance of the evidence
9 that any of Ms. Winski's alleged material misstatements occurred in the course of the
10 mortgage broker business, it has not proven that she violated 6-909(L).

11 *Allegations that Ms. Winski made material misstatements on financial statements and*
12 *regarding AmeriCapital's equity*

13 29. There is no dispute that AmeriCapital did not report as liabilities the Grunberg
14 and Helal judgments.

15 30. Mr. Fergus testified that under GAAP, AmeriCapital was required to report the
16 judgments on its financial statements. But Mr. Fergus acknowledged that he is not a
17 CPA and that he was relying on what someone else told him.

18 31. The Department presented no other evidence or legal authority to support Mr.
19 Fergus's testimony on this point and the Department did not show that Mr. Fergus has
20 the requisite education, experience or training to provide a reliable opinion regarding
21 GAAP.

22 32. Considering the serious nature of this matter in which the Department seeks to
23 revoke AmeriCapital's license, there is insufficient foundation for Mr. Fergus's
24 testimony on this issue to be considered reliable and the Department has not presented
25 substantial evidence showing that a violation occurred.

26 33. Moreover, there is evidence to show that the judgments did not have to be
27 reported on the financial statements at issue in that AmeriCapital had not reported
28 these judgments on its balance sheets at the times of the 2011 and 2015 examinations.
29 Presumably, those examiners were aware that the judgments had not been reported on
30 the financial statements and yet the Department's Reports did not show that

1 AmeriCapital had committed a violation. Those Reports are prima facie evidence of the
2 truth of the information therein, and those Reports weigh against finding that the failure
3 to include the judgments on the financial statements was a violation.

4 *Allegations that Ms. Winski made material misstatements regarding AmeriCapital's*
5 *liability for the Helal judgment*

6 34. When Ms. Winski reported that AmeriCapital was liable for only 1% of the Helal
7 judgment she was relying on the advice of its attorney, Mr. Reeves. Mr. Reeves
8 appeared and affirmed his opinion that AmeriCapital was only responsible for 1%. The
9 Department argues that Mr. Reeves and by extension Ms. Winski are wrong.

10 35. Ms. Winski was justified in relying on Mr. Reeves's opinion, and so regardless
11 of whether that opinion was correct, the facts do not support a finding that Ms. Winski's
12 statement were violations of ARIZ. REV. STAT. sections 6-605(A)(8) or (C), or 6-909(L).

13 *Allegation that Ms. Winski made a material misrepresentation during the 2011*
14 *examination by failing to report that the Helals had filed suit*

15 36. Although there is no evidence to show that Ms. Winski reported that the Helal
16 litigation during the 2011 examination, during the 2015 examination, the Department
17 was aware of the judgment against AmeriCapital and Mr. Winski, but did not find that
18 AmeriCapital had committed a violation in 2011.

19 37. The reasonable assumption is that in 2015, the Department did not consider the
20 failure to report the Helal judgment to be a "material misstatement" or that Ms. Winski
21 was suppressing information.

22 38. The Department has not proven AmeriCapital's failure to list the Helal litigation
23 during the 2011 examination is now a violation of ARIZ. REV. STAT. sections 6-605(A)(8)
24 or (C), or 6-909(L).

25 *Allegation that Ms. Winski made a material misstatement during the 2011 examination*
26 *when she committed to pay the Grunberg judgment*

27 39. During the 2011 examination Ms. Winski reported to the Department that
28 AmeriCapital would pay whatever it was required to as a result of the Grunberg
29 judgment. Ms. Winski acknowledged that AmeriCapital has not done so and she
30 provided no justification for that failure.

1 40. The preponderance of the evidence shows that Ms. Winski made a material
2 misstatement during the 2011 examination by falsely stating that AmeriCapital would
3 pay the Grunberg judgment, which is a violation of ARIZ. REV. STAT. sections 6-
4 905(A)(8) and (C).

5 *Allegation that Ms. Winski made a material misstatement during the 2015 examination*
6 *by failing to report that the Helal judgment had been entered against Mr. Winski*

7 41. Ms. Winski provided testimony that during the 2015 examination, she informed
8 the examiners of the Helal judgment and that they did not require her to provide more
9 information than she did. The Department notes that in a Questionnaire Ms. Winski
10 submitted in the course of the 2015 examination, she answered to the effect that there
11 had been no judgments entered against her or any employees.

12 42. Considering that during the 2015 examination, the Department was made aware
13 of the Helal judgment, there is insufficient evidence to conclude that by submitting the
14 Questionnaire Ms. Winski violated ARIZ. REV. STAT. sections 6-605(A)(8) or (C), or 6-
15 909(L).

16 The allegation that AmeriCapital is insolvent

17 *Unable to pay bills when due*

18 43. Ms. Winski acknowledged that AmeriCapital has not paid either the Grunberg or
19 the Helal judgment and she offered no valid justification for that failure.

20 44. Ms. Winski argues that it has not been proven that AmeriCapital cannot pay the
21 judgments, and asserts that if, at some point, the Grunberg judgment needs to be
22 satisfied, AmeriCapital will address the issue accordingly.

23 45. Ms. Winski acknowledged however that when the Grunberg judgment was
24 entered, AmeriCapital could not have paid it. Consequently, AmeriCapital was insolvent
25 at that time.

26 46. The Department argues that the only reason AmeriCapital would not have paid
27 the judgments is that it could not pay.

28 47. The Department's argument is not persuasive for the simple reason that
29 AmeriCapital may not have paid the judgments because Ms. Winski does not want to
30 do so. Consequently, the Department has not shown that AmeriCapital is currently

1 unable to pay its bills when due. This conclusion however necessitates a finding that
2 Ms. Winski is a person of bad character because she has willingly chosen not to pay
3 AmeriCapital's debts.

4 48. As such, the Department has not proven by a preponderance of the evidence
5 that AmeriCapital cannot pay its bills when due and has not proven that AmeriCapital
6 has violated ARIZ. REV. STAT. section 6-605(A)(1).

7 *The Bankruptcy definition of insolvent*

8 49. Mr. Fergus testified to the effect that under the bankruptcy laws, an entity is
9 insolvent if its liabilities exceed its assets.

10 50. Mr. Fergus testified that AmeriCapital is insolvent under this definition if the
11 Grunberg and Helal judgments are considered to be liabilities and the Cadillac
12 judgment is considered to be an asset, which in his opinion was required by GAAP.

13 51. Mr. Fergus had acknowledged however that he is not a CPA and that he had
14 not received any training on the laws applicable to the legal aspects of mortgage broker
15 examinations.

16 52. The Department provided no evidence, legal authority, or legal argument
17 showing that Mr. Fergus's testimony as to the definition of insolvency under the
18 bankruptcy law was correct. In addition, as set out above, there is insufficient
19 foundation to conclude that Mr. Fergus has sufficient education, training or experience
20 to render a reliable opinion regarding GAAP.

21 53. As such, the Department has not presented substantial evidence that
22 AmeriCapital is insolvent under the bankruptcy laws and has not proven that
23 AmeriCapital has violated ARIZ. REV. STAT. section 6-605(A)(1).

24 The allegations that Mr. Winski has violated subsection (A)(6) and that he is a not a
25 person of honesty, truthfulness and good character

26 54. The Department argues to the effect that a judgment of breach of fiduciary duty
27 is per se a judgment on grounds of fraud, deceit or misrepresentation. AmeriCapital
28 argues that the judgment against Mr. Winski does not fall with subsection (A)(6)
29 because the superior court found that he did not commit the torts of fraud, negligent
30 misrepresentation, or consumer fraud.

1 55. It is not necessary however to determine whether a breach of fiduciary duty is
2 necessarily a judgment on grounds of fraud, deceit or misrepresentation because the
3 appeals court's decision shows that Mr. Winski asked the Helals for information "under
4 guise" that he needed the information for potential investors. In other words, the
5 judgment against Mr. Winski involved the use of deceit and therefore falls within
6 subsection (A)(6). Moreover, as the Department pointed out, the appeals court
7 specifically noted that the Winskis' dealings with the Helals involved fraudulent
8 conduct.

9 56. Mr. Winski's conduct during the Helal matter is conduct showing that "it would
10 be contrary to the interest of the public to permit such person to be licensed."

11 57. Consequently, the preponderance of the evidence shows that Mr. Winski has
12 violated ARIZ. REV. STAT. section 6-905(A)(6) and (C).

13 58. This same information also shows that Mr. Winski is not person of honesty,
14 truthfulness or good character in violation of ARIZ. REV. STAT. section 6-905(A)(2) and
15 (C).

16 The Allegation that Ms. Winski has not shown that she is a person of honesty,
17 truthfulness and good character.

18 59. The Department alleges that Ms. Winski has engaged in a pattern of filing with
19 the Department documents that contain material misstatements or that suppress or
20 withhold information, including a false promise to pay the Grunberg judgment, and as
21 such, the evidence shows that she is not a person of honesty, truthfulness or good
22 character.

23 60. AmeriCapital argues to the effect that the only violations are Ms. Winski's
24 answers to Question J on the renewal applications and MU1s, and that these were the
25 result of Ms. Winski not understanding what was being asked of her. Ms. Winski's self-
26 serving testimony on this point is unavailing because the Question J is simple and clear
27 in what it asks.

28 61. AmeriCapital also notes that the superior court in the Helal matter found that the
29 Helals found no independent wrong-doing on Ms. Winski's part. But in making that
30 finding the court noted that she was protected by the corporate veil. And the court did

1 find that AmeriCapital committed the torts of interference with contractual relations and
2 tortious interference with business expectancy.

3 62. As set out above, the evidence of record shows that AmeriCapital has chosen
4 not to pay the Grunberg or Helal judgments even though it appears to have the ability
5 to do so. This conclusion is bolstered by the fact that Ms. Winski testified that she could
6 provide sufficient capital to show a positive equity if these judgments were treated as
7 liabilities on the balance sheet. This failure to pay the judgments is a sign of bad
8 character on Ms. Winski's part.

9 63. The preponderance of the evidence shows that Ms. Winski is not a person of
10 honesty, truthfulness and good character in violation of ARIZ. REV. STAT. section 6-
11 905(A)(2) and (C).

12 Conclusion

13 64. The preponderance of the evidence shows that Ms. Winski has committed
14 violations of ARIZ. REV. STAT. sections 6-905(2), (A)(8) and (C), and that while an
15 employee of AmeriCapital, Mr. Winski committed violations of sections 6-905(A)(2),
16 (A)(6) and (C).

17 65. Considering the facts and circumstances of this matter, including that Ms.
18 Winski has been found not to be a person of honesty, truthfulness and good character
19 and the nature of Mr. Winski's and AmeriCapital's involvement in the Helal matter, the
20 Department's request that AmeriCapital's license be revoked is justified.

21 RECOMMENDED ORDER

22 **IT IS ORDERED** that AmeriCapital Mortgage & Investments, LLC's license number
23 0905819 is revoked.

24 *In the event of certification of the Administrative Law Judge Decision by the Director of*
25 *the Office of Administrative Hearings, the effective date of the Order is five days after*
26 *the date of that certification.*

27 Done this day, October 28, 2019.

28 /s/ Thomas Shedden
29 Thomas Shedden
30 Administrative Law Judge

1 Transmitted electronically to:

2 Keith A. Schraad, Interim Director
3 Arizona Department of Financial Institutions

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