

STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCE AND CORPORATE SECURITIES

In the Matter of

122ND GROUP, LLC;

Respondent.

Division Case No. 13-0020
OAH Case No. 1303311

FINAL ORDER TO CEASE AND
DESIST AND ASSESSING CIVIL
PENALTY

HISTORY OF THE CASE

On March 1, 2013, the Department of Consumer and Business Services, through the Division of Finance and Corporate Securities (“Division”), issued an Order to Cease and Desist, Proposed Order Assessing Civil Penalty and Notice of Right to an Administrative Hearing (“Notice”) to 122nd Group, LLC (“122nd Group” or “Respondent”). Respondent timely requested a hearing and the matter was referred to the Office of Administrative Hearings (“OAH”) in due course. OAH Administrative Law Judge (“ALJ”) Rick Barber was assigned to preside.

On September 27, 2013, Senior Assistant Attorney General Joanna Tucker Davis filed a Motion for Summary Determination on behalf of the Division. On October 25, 2013, Respondent filed a Response and Cross-Motion for Summary Determination. The Division filed its Reply and Response on October 31, 2013, and Respondent filed its Reply on November 5, 2013. The summary determination record closed upon receipt of the final argument on November 6, 2013.

On December 9, 2013, ALJ Barber issued a Ruling on Motion for Summary Determination and Proposed Order (“Proposed Order”). ALJ Barber concluded that all of the issues were decided and granted summary determination in favor of the Division.

On January 8, 2014, Respondent timely filed exceptions to the Proposed Order.



1 Now, therefore, having reviewed the entire record in this matter, and having
2 reviewed, considered and rejected the exceptions filed by Respondent, the Director issues
3 the following findings of fact, conclusions of law and final order consistent with that
4 proposed by OAH.

5
6 ISSUES ON SUMMARY DETERMINATION

7 On the motion for summary determination, the ALJ found two issues to be
8 dispositive:

- 9 a. Whether Respondent violated ORS 646.620(1)(c); and
10 b. If so, whether Respondent should be assessed a \$5,000 civil penalty.

11
12 FINDINGS OF FACT

13 Respondent is a commercial landlord, and David McInnis is the managing
14 member of the LLC. (Ex. A6).

15 Agape Home Mortgage, Inc. (“Agape”), formerly an Oregon licensed mortgage
16 lender, was a tenant of Respondent at 12143 NE Halsey Street in Portland. Bill
17 McInerny was the president and owner of Agape, and George Elliott was the general
18 manager. (Ex. A1). Respondent was aware that Agape was a mortgage company. (Ex.
19 A7).

20 Agape was having financial problems in the summer of 2011. As of August 2011,
21 it had not paid its rent to Respondent in several months. During that period of time,
22 McInerny told Elliott to box up all of the mortgage records in the office. Elliott removed
23 the records from the filing cabinets and put them in boxes. He filled over 30 boxes with
24 mortgage records and placed them in the room where McInerny had told him to put the
25 records. (Ex. A1).

26 Late in the summer of 2011, Respondent came into possession of the Agape





1 mortgage records when Respondent evicted Agape and locked out its employees.

2 Respondent would not allow Elliott to retrieve the boxed mortgage records or his own
3 personal effects from the offices. (Ex. A1).

4 After locking Agape out, Respondent hired a “cleaning company” to clean out the
5 property and did not give the “cleaning company” any direction regarding disposal of the
6 personal property in the office. No instructions were given to the “cleaning company”
7 other than to clean out the premises and make it ready for the next renter. (Decl. of
8 McInnis).

9 Respondent’s “cleaning company” placed the 30 boxes of mortgage records, into
10 an unlocked “dumpster” garbage receptacle on Respondent’s premises. The dumpster
11 was in a parking lot, close to the street and to a neighboring restaurant. (Ex. A1; Decl. Of
12 McInnis).

13 Elliott heard from a former Agape employee that the documents were in the
14 dumpster, and went to retrieve what documents he could. Elliott recovered six boxes of
15 Agape records from the dumpster. The files in the boxes contained identification
16 information including Social Security numbers, addresses, dates of birth, driver license
17 numbers, and other identifying information. (Ex. A1).

18 Dwayne Edsinga (“Edsinga”) is an investigator for the Division. On November
19 15, 2012, Edsinga met with Elliott and received the six boxes of Agape mortgage records
20 recovered by him. Elliott told Edsinga that the boxes had been retrieved from the
21 dumpster on Respondent’s property. Edsinga reviewed the contents of the boxes, which
22 included bank and tax records, and mortgage records of at least 38 clients residing in
23 Oregon. The records contained names, dates of birth and Social Security numbers. The
24 confidential information was not redacted on the documents found in the dumpster. (Ex.
25 A2).

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1 OPINION

2 The Oregon Consumer Identity Theft Protection Act, ORS 646A.600 to 646A.628
3 (“ID Theft Act”), provides in pertinent part:

4 Except as otherwise specifically provided by law a person shall not:

5 * * * * *

6 (c) Publicly post or publicly display a consumer’s Social Security number
7 unless redacted. As used in this paragraph, “publicly post or publicly display”
means to communicate or **otherwise make available to the public.**

8 ORS 646A.620(1)(c) (emphasis added). Social Security numbers are one of the types of
9 information defined in the ID Theft Act as “personal information.” ORS
10 646A.602(11)(a)(A).

11 The ID Theft Act defines “person” as

12 any individual, private or public corporation, partnership, cooperative,
13 association, estate, limited liability company, organization or other entity,
14 whether or not organized to operate at a profit, or a public body as defined in
ORS 174.109.

15 ORS 646A.602(10). It is clear that Respondent is a “person” for the purposes of the ID
16 Theft Act.

17 Responsibility for the cleaning company’s actions. Respondent leased the
18 premises to Agape knowing it was a mortgage company. Upon eviction, Respondent
19 locked Agape out of its former offices and would not allow Elliott to retrieve Agape’s
20 files. After Agape was locked out, Respondent had possession and control of Agape’s
21 records. Respondent knew or should have known that boxes of documents of a mortgage
22 company could contain confidential information about Agape’s clients.

23 The fact that Respondent employed a company to clean out the premises does not
24 absolve Respondent of its responsibilities under the ID Theft Act. The cleaning company
25 was acting on the directions—or lack thereof—given by Respondent. The cleaning
26 company accomplished the task it was given to do, and in the process placed boxes of



1 confidential records in an unlocked trash dumpster that was readily accessible to the
2 public. The ALJ found that, under the doctrine of *respondeat superior*, Respondent is
3 responsible for the actions of its agent when fulfilling the duties that it assigned to the
4 agent. *See, Lourim v. Swenson*, 328 Or 380 (1999) (Boy Scouts responsible for a scout
5 leader’s actions). Whether analyzed in terms of *respondeat superior* or otherwise, the
6 Director concurs with the ALJ’s conclusion that the Respondent was responsible for the
7 actions of the cleaning company, and for the eventual placement of the boxes containing
8 confidential client information in the unlocked dumpster. It was the Respondent that
9 allowed the cleaning company to have access to the records. Whatever occurred after
10 that was put into motion by the Respondent.

11 Making Social Security numbers available to the public. Respondent discarded or
12 caused to be discarded the mortgage records in a manner that made the records available
13 to the public. The records were placed in an unlocked dumpster, adjacent to a public
14 street and a neighboring restaurant. Disposing of the records in such a manner resulted in
15 the records being insecurely discarded, and made available to public.

16 Respondent argued that documents placed into a dumpster on private property are
17 not accessible to the public, as that phrase is used in ORS 646A.620(1)(c). The question,
18 however, is not whether the records were on public or private property, but whether they
19 were made available to the public. The material facts were undisputed by the
20 Respondent; the question that remains is one of law: whether placing the unredacted
21 records in an unlocked dumpster constitutes making the records available to the public.

22 The records in this case were accessible to persons in the trash removal and
23 disposal chain, as well as those who may engage in dumpster diving. “Dumpster diving”
24 is a common practice in Portland and other cities, as shown by blogs such as “PDX
25 Dumpster Divers” and “Portland Divers.” (Ex. A8 at 14). Articles on the Internet, such
26 as WikiHow’s “How to Dumpster Dive,” describe dumpster diving as “the process of



1 scavenging trash—not always dumpsters, however—for useful or valuable items.” (*Id.* at
2 1). The undisputed facts speak for themselves: 24 boxes of mortgage records remain
3 missing. The records were clearly made available to the public.

4 Appropriateness of the civil penalty. The ID Theft Act authorizes the Director to
5 assess a civil penalty of \$1,000 against “any person who violates or who procures, aids or
6 abets in the violation of [the ID Theft Act].” ORS 646A.624(4)(a). Each violation is
7 considered a separate violation and the maximum penalty cannot exceed \$500,000. ORS
8 646A.624(4)(b).

9 Respondent argued in its exceptions that the proposed \$5,000 civil penalty “is not
10 supported by the facts in the record.” (Respondent’s Exceptions to Proposed Order at 2.)
11 However, Respondent’s comparison of this case to another ID Theft Act enforcement
12 case, Samaritan Health Services, is unpersuasive.

13 The Samaritan Health Services case was settled by a consent order rather than
14 taken to hearing. In that case, the civil penalty assessed was \$5,000, although \$4,000 of
15 the assessed penalty was suspended on condition that Samaritan Health Services comply
16 with all terms and conditions set out in the consent order and commit no new violations
17 within a five-year period from the date of the order.

18 In this matter, the ALJ found that the Division had interpreted its rules uniformly
19 and fairly, and that the proposed civil penalty was appropriate and reasonable given the
20 facts of the case. The records discarded in this case related to at least 38 Oregon
21 residents. The Director could have assessed a civil penalty of \$38,000. The assessed
22 civil penalty of \$5,000 is clearly within the range of discretion authorized by ORS
23 646A.624(4)(a).

24
25 **CONCLUSIONS OF LAW**

26 Respondent discarded, caused to be discarded or failed to safeguard, the Agape



1 mortgage business records that contained or bore “personal information” as defined in
2 ORS 646A.602(11)(a)(A) in that the documents contained consumer names associated
3 with unredacted Social Security numbers.

4 Respondent violated ORS 646A.620(1)(c) by publicly posting, displaying or
5 otherwise making available to the public the unredacted Social Security numbers of
6 consumers when the Agape mortgage records were discarded.

7 In accordance with ORS 646A.624(4)(a), a person who violates or who procures,
8 aids or abets in the violation of the ID Theft Act may be subject to an order to Cease and
9 Desist, as well as to a civil penalty of not more than \$1,000 for every violation.

10
11 **ORDERS**

12 Based on the foregoing, the Director issues the following ORDERS:

13 **Order to Cease and Desist**

14 As authorized by ORS 646A.624(3), the Director hereby ORDERS Respondent
15 122nd Group, LLC to CEASE AND DESIST from violating the requirements of the
16 Consumer Identity Theft Protection Act, ORS chapter 646A.

17 **Order Assessing Civil Penalty**

18 As authorized by ORS 646A.624(4)(a), the Director hereby ORDERS Respondent
19 122nd Group, LLC to pay a CIVIL PENALTY of \$5,000 (five thousand dollars) for
20 publicly posting, displaying or otherwise making available to the public, files bearing
21 unredacted Social Security numbers in violation of ORS 646A.620(1)(c).

22 In accordance with ORS 646A.624(4)(c) and 183.745(2), the civil penalty
23 assessed herein shall become due and payable 10 days after the order becomes final by
24 operation of law or on appeal.

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