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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

In the Matter of NATIONWIDE ASSET SERVICES, INC., a.k.a. NATIONWIDE ASSET SERVICES, and UNIVERSAL NATIONWIDE, L.L.C., d.b.a. UNIVERSAL DEBT REDUCTION, Petitioners, v. THE CALIFORNIA CORPORATIONS COMMISSIONER, Respondent.	CASE NO. 06CS01309 RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S ANSWER AND IN OPPOSITION TO THE PETITION FOR A WRIT OF ADMINISTRATIVE MANDAMUS Date: December 1, 2006 Time: 9:00 Dept.: 11 Judge: Honorable Gail D. Ohanesian

State of California - Department of Corporations

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INTRODUCTION

Respondent, California Commissioner of Corporations ("Commissioner") of the Department of Corporations submits this Memorandum of Points and Authorities In Support of the Answer and In Opposition to the Petition for a Writ of Administrative Mandamus filed by Petitioners Nationwide Asset Services, Inc. and Universal Nationwide, LLC dba Universal Debt Reduction. Petitioners seek a writ to vacate the Commissioner's Decision that adopted the proposed decision issued by the California Office of Administrative Hearings ("OAH"). The Commissioner's Decision affirmed an order that prohibited Petitioners' unlicensed prorater activities in violation of the Check Sellers, Bill Payers and Prorators Law ("CSBPPL") found in California Financial Code section 12000 et seq.

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To ensure the protection of the public, the Legislature mandates compliance with basic legal requirements under the CSBPPL for persons who deal with debtors. The Commissioner enforces the CSBPPL legal requirements to protect consumers. The Commissioner did so in this case by ordering Petitioners to cease from acting as a prorater unless they are licensed or exempt. Petitioners now ask this Court to issue a writ that requires the Commissioner to set aside the order that prohibits their unlicensed activity. The Petition for Administrative Mandamus ("Petition") should be denied because it is procedurally improper and substantively without merit.

I. FACTUAL STATEMENT AND PROCEDURAL HISTORY

The Commissioner, pursuant to Financial Code section 12103, issued a Desist and Refrain Order ("Order") on December 5, 2005 to Petitioners.[1] (Petitioners' request "request" for judicial notice, exhibit 1 and exhibit 142, Decision, page 4.) The Order prohibits Petitioners' unlicensed activities in violation of Financial Code section 12200. (Petitioners' request exhibit 1 and exhibit 142 (Decision) pages "pgs" 4 and 9.) The Order is effective immediately upon issuance and remains in effect unless and until it is set aside. (Fin Code §12103.)

A hearing was held before Administrative Law Judge Jaime Roman ("Judge Roman") on February 21, 22, 23, and 24, 2006. (Petitioner's request exhibit 142, Proposed Decision, pg. 1, para. 1.) Judge Roman, a knowledgeable and experienced judge, possesses an LLM in Banking Law. (Petitioners' request exhibit 95, Reporter's Transcript ("RT") Feb 23, pg. 62, lines:15-16.) Judge Roman issued a Proposed Decision issued on April 28, 2006. (Petitioner's request exhibit 142, Proposed Decision, pg. 9 .) On August 3, 2006, the Commissioner adopted Judge Roman's Proposed Decision. (Petitioner's request exhibit 142, Decision, pg. 2.)

This Court may take judicial notice of Petitioners' oral argument on September 7, 2006, during their first request to this Court for a stay wherein counsel admitted Petitioners were violating the Commissioner's Order by continuing to engage in prorating activities with the California clients and that Petitioners had not informed clients about the Commissioner's Order. (RT, pgs. 9-11.)

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[1] The Commissioner's Order, worded in the alternative, alleges unlicensed bill paying or prorater activity. For judicial economy and to insure completion of the administrative hearing within the time scheduled, the Commissioner elected to only present evidence of Petitioners' prorating activity.

II. ISSUES PRESENTED

A. Whether a Petition with incurable defects should be summarily dismissed or denied.

B. Whether a Petition failing to demonstrate any grounds for its issuance should be denied.

C. Whether a Petition that seeks to rewrite the law and to retry a case should be denied.

III. LEGAL DISCUSSION

A. THE PETITION MUST BE DENIED BECAUSE IT CONTAINS INCURABLE DEFECTS

Petitioners failed to comply with multiple legal requirements necessary for judicial review of their Petition; each will be briefly discussed below.

First, Petitioners elected to seek an administrative writ by noticed motion, rather than by an alternative writ of mandate, but they failed to comply with the requirements in the Code of Civil Procedure and Sacramento Court Local Rules. Petitioners are required to provide notice that sets forth the date, time and place for the hearing. (CCP §§ 1010, Cal Rules of Court, R. 311 (b).) The Petition contains a hearing notice, numbered page "(2)" located between "page ii" and "page iii" of the Petition,[2] which states "**NOTICE** that on October 16, 2006, at 8:30 a.m. . . . Petitioners will, and hereby do, move for a writ of administrative mandamus . . .." Since this Court never scheduled October 16, 2006, as a date for a hearing on the writ petition, Petitioners' notice to Respondent is false. Additionally, local rules require Petitioners to "serve a copy of the notice of hearing on Respondents no later than the time allowed for filing and serving the opening brief," which in this case was on October 17, 2006. (Sacramento Ct R. Local Rule 2.01(I), pg. 7.) Petitioners have never served Respondent with notice of the December 1, 2006, scheduled hearing of their Petition.

Second, the Petition contains a false proof of service. Under penalty of perjury Petitioners' proof of service states that on September 1, 2006, Preston DuFauchard, California Corporations Commissioner of the California Department of Corporations was served by delivering the Petition and Request for Judicial Notice to his offices located at 71 Stevenson Street, Suite 2100 in San Francisco, California. On September 6, 2006, the undersigned first received indirectly a copy of the Petition, which contained a photocopy of the above-described false proof of service. Neither

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[2] The Petition does not have a page labeled one ("1") or a first page with any text besides the caption.

Commissioner Preston DuFauchard nor anyone from the Department were served the Petition on September 1, 2006. The Commissioner has never been personally served with a copy of the Petition as required. (CCP § 1088; Declaration of Joan E. Kerst, page 2 and attachment A, thereto.)

Third, the Petition lacks an adequate statement of facts. A basic rule of code pleading requires that the Petition contain "a statement of the facts constituting the cause of action, in ordinary and concise language." (CCP §§ 425.10 (a) (1), 1094.5, 1109.) Appearing throughout the Petition's 22 pages are factual allegations lacking any support[3] in the Administrative Record ("Record"). For example, unsupported facts begin in the Petition's section headed "Introduction and Summary of Argument" and are intertwined in most of the sections of the Petition, including its "Conclusion."

Fourth, Petitioners did not file a separate opening brief but included their points and authorities in the Petition. However, neither the headings in Petitioners' Table of Contents nor the legal authorities listed in Petitioners' Table of Authorities appear on the pages stated therein.

Fifth, Petitioners have failed to file the Record with this Court. (CCP § 1094.5 (a).) The Administrative Procedure Act ("APA") and case law requires a petitioner to pay for and to provide a reviewing court the record. (Govt. Code §§ 11340, 11523; *I.X.L. Lime Co. v. Super. Ct.* (1904) 143 Cal. 170, 176.) A court is bound by the rule that it must review the entire record to determine whether the findings are supported by substantial evidence or whether the agency committed errors of law and the burden is upon a petitioner to produce the record. (*Hothem v. City and County of San Francisco et al.* (1986) 186 Cal.App.3d 702.) Petitioners have the responsibility to act diligently and make the record available to the court. (*Wisler v. Calif. State Board of Accountancy* (1955) 136 Cal.App.2d 79.) In mandamus actions the petitioner is responsible to provide an adequate record of the administrative proceeding. Otherwise the presumption of regularity will prevail, since a petitioner's burden in attacking the administrative decision is to demonstrate to a court in what respects the administrative proceedings were unfair, were in excess of jurisdiction, or showed prejudicial abuse of discretion. (*Foster v. Civil Service Comm.* (1983) 142 Cal.App.3d 444, 453.)

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[3] It also appears questionable if Mr. Gary Brown could verify the writ petition as it currently reads.

Petitioners have had six months to obtain a copy of the Record of the hearing but have not requested one, must less lodged it with this Court despite their acknowledgement of the importance of the Record found in their Petition on page 8, lines 9-10 and 14-17, which states:

> In applying this standard, **this Court must not only examine the administrative record for errors of law but also exercise its independent judgment upon the evidence disclosed**. (Emphasis added.)
>
> In applying this standard, **this Court must still review the administrative record** to determine whether or not the findings are supported by substantial evidence and whether the agency committed any errors of law**, but the court is not required to look beyond that record.** (Emphasis added.)

Petitioners' failure to include the Record renders it near impossible for a reviewing court to determine if, as Petitioners' allege, the Commissioner proceeded without, or in excess of jurisdiction, that there was an unfair trial or there was any prejudicial abuse of discretion. Absent a Record in the instant case this Court lacks evidentiary facts that provide a legally sufficient basis to issue a writ of administrative mandamus and may even lack jurisdiction to render a decision.

The entire Record of the OAH proceedings fully supports the Decision, which may be why Petitioners failed to lodge it and instead filed their Request for Judicial Notice ("request"). But Petitioners' filing of their request in this case is inappropriate and procedurally improper. Their request does not constitute the Record and they have failed to comply with the legal requirements for judicial notice. None of the documents are certified or even stamped filed conformed copies. Petitioners' request clearly contains numerous documents that cannot be regarded as evidence, but which Petitioners treat as such to support their allegations. Although a court may take judicial notice of its court records that does not require that a court to accept as true and genuine every paper that appears in the file. (*Kaplan v. Hacker* (1952) 113 Cal.App.2d 571.) A court cannot take judicial notice of hearsay allegations as being true just because they are part of a court record or file. (*P. v. Moore* (1997) 59 Cal.App.4th 168; *Williams v. Wraxall* (1995) 33 Cal.App.4th 120; *Day v. Sharp* (1975) 50 Cal. App.3d 904.)

Petitioners' request cannot substitute for the Record for several reasons. True and complete copies of the evidence have not been provided. The trier of fact, Judge Roman, marked well over one

hundred documents for identification with OAH's official exhibit labels.[4] Ten witnesses testified about various documents and referred to them by the specific OAH exhibit label affixed to each document. Petitioners' request does not include documents containing the OAH exhibits labels that would properly identify the documents witnesses referred to when they testified at the hearing.

Petitioners' request is not properly authenticated. The documents appearing in the request differ in appearance and content from the OAH evidence. All OAH Hearing Exhibits were full letter size, not reduced. None of the documents marked for identification at the hearing included bates stamped numbers on them, unlike documents contained in the request. If an OAH Hearing Exhibit consisted of documents with a large number of pages, each was numbered with a handwritten page number located in the lower right hand corner. Petitioners' request does not contain any such pagination for the multi-page exhibits. Moreover, documents appearing in the request as exhibit 143 have pages missing, added or in a different sequence from the OAH Hearing Exhibits. For example, what Petitioners represented to be OAH Hearing Exhibit 7 is not a true copy of documents marked by Judge Roman as such. Even if the documents in the request were full size and the additional markings appearing on these documents were ignored, the pages as they appear in the request are not true copies of the OAH Hearing Exhibit.

Petitioners request does not contain all the exhibits. For example, Judge Roman marked for identification OAH Hearing Exhibits 27-116. Petitioners request contains exhibit tabs 27-120, but no documents appear after tab 113. At least 21 tabs of the total 145 tabs in the request contain no documents. Referencing to Petitioners' request is confusing because the Petition refers to exhibit tabs that have no documents associated with them. For example, page 9, line 1 of the Petition, shows as support a citation to exhibit "97" found in Petitioners' request. However, exhibit 97 in Petitioners' request does not have any documents following it. Referencing to Petitioners' request is also difficult because the bound volumes greatly exceed the 300-page limit. (Cal. Rules of Court, R. 129(c).)

Significantly Petitioners' request lack any of the exhibits introduced by the other party who participated in the hearing, Global Client Solutions ("GCS"). GCS provided numerous exhibits

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[4] To differentiate between OAH evidence and Petitioners' proffered documents references to them herein will respectively be "OAH Hearing Exhibits" and Petitioners' "request exhibits or ex."

identified by Judge Roman as "GCS Exhibits A through Y." During the hearing the parties and witnesses referred to GCS' exhibits and some were admitted into evidence. Yet, Petitioners have not provided any of the marked "GCS Exhibits" to this Court. Likewise, at hearing Petitioners' exhibits were identified as "NAS Exhibits A-Y," and although some were admitted into evidence, Petitioners have not provided these exhibits in their request.

Petitioners' request contains documents identified as exhibits 144 and 145; the former purports to be hearing exhibit K and the latter purports to be hearing exhibit R. However, what Petitioners proffer as hearing exhibit K and hearing exhibit R are not true copies of what was identified for the record and admitted into evidence. The administrative hearing occurred in February 2006 but the pages in exhibits 144 and 145 bear the date "09-01-06." Moreover, the OAH hearing had two exhibits labeled "K", one labeled "GCS Exhibit K" and the other "NAS Exhibit K". Similarly at the hearing Judge Roman marked an exhibit "GCS Exhibit R" and a different exhibit "NAS Exhibit R". Therefore, it is unclear what, if anything, exhibit 144 and 145 represent. More importantly, exhibits 144 and 145 were not admitted into evidence as they appear in the request. Since the exhibits to Petitioners' request are not true and correct copies of the evidence in the Record, and fail to comply with legal requirements concerning authenticity, this Court lacks an adequate record to review in determining some of the allegations in the Petition.

B. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS FAILED TO DEMONSTRATE GROUNDS EXIST FOR GRANTING A WRIT

1. The Petition Lacks Credible Facts

Petitioners' fail to provide the requisite specific facts for a court to infer "(a) the Commissioner proceeded without or in excess of its (sic) jurisdiction; (b) Petitioners were deprived of a fair trial; and (c) there was any prejudicial abuse of discretion," (*Western Air Lines, Inc. v. Sobieski* (1961) 191 Cal.App.2d 399; *Ward v. Co. of Riverside* (1969) 273 Cal.App.2d 353, 358.) The Petition lacks facts to enable this Court to render a decision and fails to allege "with particularity the element, aspects and principles wherein such evidence . . . supports the conclusion that the authority abused the discretion vested in it." (*Faulkner v. Calif. Toll Bridge Auth.* (1953) 40 Cal.2nd 317, 331; *County of Contra Costa v. Social Welfare Bd.* (1962) 199 Cal.App.2nd 468, 471, 472.)

Although Petitioners appear to allege that the evidence does not support the findings, they fail to allege with specificity how the findings are unsupported. (*Black v. State Personnel Bd.* (1955) 136 Cal.App.2d 904, 909.) A petition is bound by the allegations it contains and presumptions are against the pleader and all doubts are to be resolved against him. Thus, facts not alleged do not exist. (*Melikian v. Truck Ins. Exchange* (1955) 133 CalApp.2d 113, 115.) Petitioners offer neither specific facts nor requisite evidentiary support for their legal contentions. Instead the Petition asserts a number of alleged facts – but all lack any references to either the Record or to the Decision. For example, unsupportable facts found in the Petition on pages 3, 4, 5, include:

> Petitioners do not hold money for their clients while debt is negotiated
>
> Petitioners do not distribute money to creditors
>
> GCS acted as an agent of RMBT
>
> GCS initiated withdrawals from a client's primary account and deposited such into a client's restricted account at RMBT
>
> GCS and RMBT were directly and contractually responsible to clients to hold client money
>
> If a client requested return of the money GCS and RMBT were contractual (sic) obligated to return the money
>
> If GCS was notified that a settlement had been negotiated GCS transferred funds to creditors
>
> Petitioners had the ability to "see" client account balances at RMBT
>
> Petitioners could initiate negotiations based on the balances in the client's RMBT account
>
> The Commissioner decided that Petitioners were proraters because they could see client bank statements at RMBT and thus "receive" evidences of money

Factual matters that are not part of the appellate record will not be considered on appeal and factual assertions attributed to sources outside the record are to be disregarded. (*Banning v. Newdown* (2004) 119 Cal.App.4th 438, 453; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481; *C.J.A. Corp. v. Trans-Action Fin'l Corp.* (2001) 86 Cal.App.4th 664, 673.) What the Petition claims are "relevant facts" are instead contentions, deductions, and conclusions that may not be considered in judging its sufficiency. (*Gruenberg v. Aetna Ins. Co.*, (1973) 9 Cal.3d 566, 572.) The Petition's recitation of the Decision misstates and omits material relevant facts and may be subject to sanctions.

It is well settled law that issuance of the writ of administrative mandamus is discretionary, not a matter of right. *Parker v Bowron* (1953) 40 Cal.2d 344, 351; *Berry v Coronado Bd. of Educ.* (1965) 238 Cal.App.2d 391.) A petition that raises vague claims of error without citation to the record or adequate references may be dismissed. *Anthony D. v. Super. Ct.* (Orange Co. Social Services) (1998) 63 Cal.App.4th 149, 157-158.) Since mandamus is a discretionary writ when a Petition fails to allege sufficient facts supported by the record and it demonstrates no grounds exist for granting the writ, a court may summarily deny it. (*Wilson v. L.A. Civil Service Comm'n* (1951) 103 Cal.App.2d 426, 431.) Although appellate courts avoid exercising their discretion to summarily deny petitions for technical reasons of procedure, they are not required to do petitioners' work and to expend judicial resources when petitions do not meet the threshold legal requirements. (*Glen C. v. Super. Ct. (Alameda Co. Social Serv. Agency)* (2000) 78 Cal.App.4th 570, 578-584; *Cresse S. v. Super. Ct. (L.A. Co. Dept. of Children & Family Serv.* (1996) 50 Cal.App.4th 947, 955.)

2. The Commissioner's Actions were Proper - Petitioners Cannot Overcome Legal Presumptions

The Commissioner, legislatively mandated to enforce the CSBPPL, can prohibit unlicensed prorater activities — his actions were coextensive with his authority and within his jurisdiction. (Fin. Code §§ 12103, 12220.) Public policy favors placing responsibility with administrative officers (*Ray v. Parker* (1940) 15 Cal.2d 275, 290) and a presumption that official duty has been legally performed places the burden of proof on a petitioner to persuade the court that an agency's decision is invalid. (Evid. Code § *664; Ehrlich v. McConnell* (1963) 214 Cal.App.2d 280, 287.)

The interpretation of statutes and ordinances is ultimately a judicial function. Even so, the courts, in exercising independent judgment, must give appropriate deference to the agency's interpretation. (*MHC Operating Ltd. Partnership v. City of San Jose et al.* (2003) 106 Cal. App. 4th 204; 9 Witkin, Cal. Proc. (4th ed. 1997) Admin. Proc., § 111, p. 1156.) A judgment or order of a lower court is presumed correct and the Petitioner must overcome that presumption. (*StarMotor Imports v. Super. Ct.* (1979) 88 Cal.App.3d 201, 203.) The California Supreme Court stated that the administrative findings of fact come before the reviewing court "with a strong presumption of their correctness." (*Drummey v. State Bd. of Funeral Dirs. & Embalmers* (1939) 13 Cal.2d 75, 85.)

A respondent's denial of petitioner's assertion of irregular procedure or insufficiency of evidence gives rise to presumptions that the proceedings were in fact regular and that the decision was supported by the evidence. (*Campbell v. Bd. of Dental Exam.* (1971) 17 Cal.App.3d 872, 876.) Here, Respondent's Answer denies Petitioners' assertions that any grounds exist for a writ. Thus, Respondent's denial of Petitioners' assertions in this case gives rise to a presumption that the proceedings were regular and the Decision was supported by the evidence.

Courts have noted that the above presumption is especially meaningful when petitioners assert claims of error but produces no evidence, or only unsatisfactory evidence of such claims (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144), as the Petitioners do here. The Petition does not demonstrate abuse of discretion and fails to state precise errors, provide persuasive material facts or relevant legal authority. Petitioners produced no satisfactory evidence of their claims to satisfy their burden of proving that the Respondent's decision is invalid and should be set aside. Therefore, Respondent is entitled to the following legal presumptions: (l) Respondent's official duty has been legally performed; and (2) the administrative findings of fact are correct.

3. The Applicable Standard of Review is the Substantial Evidence Test

The standard of review utilized by the trial court depends upon whether the administrative action affects a fundamental vested right. (*Clerici v. DMV* (1990) 224 Cal.App.3d 1016, 1023.) A "fundamental vested right" has been defined in terms of a contrast between a right possessed and one that is merely sought. (*Id.* at p.1023.) "The term 'vested ' denotes a right that is either already possessed or legitimately acquired. Business and professional licensing cases have distinguished between a denial of an application for a license (non-vested right) and a suspension or revocation of an existing license (vested right). A license denial to a previously unlicensed person does not affect a vested right, and the substantial evidence test should be used. (*Id.*) Here, Petitioners were unlicensed and received an Order prohibiting further unlicensed activity. There is no vested right to conduct a business free of reasonable governmental rules and regulations. (*People v. Mel Mack Co.* (1975) 53 Cal.App.3d 621, 629.) Petitioners argue that they are entitled to the "independent judgment" standard of review. (CCP § 1094.5 (c).) but they do not have a vested right to violate the law and conduct unlicensed activities. Thus, the substantial evidence test should be applied.

Since no fundamental vested right is affected and the substantial evidence test applies here (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144), Petitioners have the burden of demonstrating that in light of the whole record the Decision is not supported by substantial evidence, which is defined as either:

(a) relevant evidence that a reasonable mind might accept as adequate to support a conclusion" (*Hosford v. State Personnel Bd.* (1977) 74 Cal.App 3d 302, 307 quoting *Gubser v. Dept of Employment* (1969) 271 Cal.App.2d 240), or

(b) evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. (*Bowers v. Bernard* (1984) 150 Cal.App3d 870, 873.)

The testimony of a single witness may be sufficient. (*Mickelson Concrete Co. v. Contr. State License Bd.* (1979) 95 Cal.App.3d 631, 634.) When the substantial evidence test governs and the petition for administrative mandamus is based solely on insufficiency of the evidence, as it appears to be in this case, a court must deny the writ if there is any substantial evidence in the record to support the findings. (*Martin v. Alcoholic Beverage Control Appeals Bd.* (1961) 55 C.2d 867, 880.)

C. THE PETITION MUST BE DENIED BECAUSE PETITIONERS IMPERMISSIBLY SEEK TO RETRY THEIR CASE BEFORE THIS COURT AND TO REWRITE THE LAW

1. Petitioners Failed to Meet their Burden of Proof at the Administrative Hearing

The standard of proof utilized by an administrative agency is found in California Evidence Code section 115, which provides, in part, that "except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Courts have determined that the burden of proof at the administrative level is governed by the preponderance of evidence standard. (*Skelly v. State Pers. Bd.* (1975) 15 Cal.3d 194, 204 n 19.) After the hearing Judge Roman found the evidence proved that Petitioners were acting as unlicensed proraters. Petitioners failed to meet their burden of proving an exemption or an exception from definitions found in the CSBPPL. (Fin. Code § 12101.5)

2. Petitioners Change the Law and Facts to Raise Constitutional Issues for a De Novo Review

Petitioners' argue the Commissioner exceeded his jurisdiction but the CSBPPL mandates the Commissioner enforce this law, prohibiting unlicensed prorating activity. (Fin. Code § 12200.)

In examining the definition of "prorater" found in Financial Code section 12002.1, courts will look to the words of that section and if they "have a well-established meaning, there is no need for construction and courts should not indulge in it." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 24.)

The Petition attempts on page 16 to redefine, omit and replace the words in Financial Code section 12002.1 in a blatant attempt to achieve a different result. Petitioners ignore the fact there are multiple disjunctive words used in section 12002.1, and seek to substitute some of them with the conjunctive word "and" in its place. Petitioners also ignore whole phrases such as "engaged in whole or in part", "in the business", and "for the purpose of" to convince this Court the statute is void for vagueness. Statutory construction that is preferred is that which gives meaning to all the terms of the statute (*P. v. Gilbert* (1960) 1 Cal. 3d 475, 480) and making some of the words surplusage is to be avoided. (*P. v. Parkmerced Co.* (1988) 198 Cal.App.3d 683, 691.) The Petition errs in omitting, ignoring and excluding over a dozen words from the one-sentence prorater definition to argue that the statute is vague and therefore unconstitutional.

Petitioners seek to add words that do not appear in the statute, including "must" (three times), "and" (three times) and "debt or obligation" to come up with their "three requirements" under the statute to be a prorater on page 16 in their Petition. In sum, Petitioners ignore or exclude almost 30% of the words that exist in section 12002.1 and then replace 20% of the words found in section 12002.1 to convince this Court that section 12002.1 is unconstitutionally vague and unenforceable.

However, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Select Base Material. v. Bd. of Equal.* (1950) 51 Cal.2d 640, 645.) When language is susceptible to more than one reasonable interpretation, the court can consider the ostensible objects to be achieved and evils to be remedied. (*Bradshaw v. City of L.A.* (1990) 221 Cal.App.3d 908, 915; *P v. Shirokow* (1980) 26 Cal3d 301, 306.)

Consumer protection statutes, such as the CSBPPL, should be interpreted liberally in favor of the consumer to effectuate their broad remedial purposes. (*Mirabal. v. G.M.A.C.* (7th Cir. 1997) 537 F. 2d 871, 878.) Established California law reflects that courts are instructed to construe remedial or protective statutes liberally. "As a general matter, remedial or protective statutes . . . are liberally construed to effect their object and quell the mischief at which they are directed." (*California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 347; *Alford v. Piermo* (1972) 27 Cal.App.3d 682, 688.) Courts in interpreting whether an arrangement comes within a statutory definition are mindful of the remedial and protective nature of statutes. "In construing a statute, the trier of fact

should ascertain the intent of the Legislature so as to effectuate the purpose of the law and should construe the statute with reference to the entire system of law of which it is a part." (*People v. Kline* (1980) 110 Cal.App.3d 587, 593-5.)

With regard to the statutory definitions, such as Financial Code section 12002.1, each element should be construed liberally to broaden the group protected by the law and to carry out the legislative intent. (*Kim v. Servosnax, Inc.* 10 Cal.App.4th 1346, 1356.) That construction of a statute is favored which would defeat subterfuges, expediences or evasion employed to continue the mischief sought to be remedied by the statute or to defeat compliance with its terms or any attempt to accomplish by indirection what the statue forbids. (*P. ex rel. S.F. Bay etc. Town of Emeryville* (1968) 69 Cal 2d 533, 543-544; *P. v. Hacker Emporium, Inc.* (1971) 15 Cal.App.3d 474, 478.) Moreover, in general, questions regarding statutory interpretation and construction must be raised with the administrative agency having jurisdiction to administer that statute; otherwise, the court may deny a petition for writ of administrative mandamus based on such a statutory claim. (*City of Walnut Creek* (1980) 101 Cal.App.3d 1012, 1021.)

To prop up their "due process" argument Petitioners introduce new "facts" not in the Record. Generally, on judicial review of an administrative hearing the petitioner may not advance a new theory of the case. (*Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 256 Cal.App.2d 158, 176.) Yet, Petitioners do so here. For the first time Petitioners now claim their activities involve "seeing" "bank statements." However, there is not one mention of the term "bank statement(s)" anywhere to be found in the Commissioner's Decision. As a factual matter, the Petition cites no evidence in the Record concerning "Petitioners' ability to see bank statements".

As a legal matter the alleged bank statements are irrelevant; Petitioners control consumers' funds by means of their agreements, powers of attorney and authorizations that Petitioners or their designee receive from consumers. Judge Roman did not hold that "seeing a bank statement" is prorating, as Petitioners inaccurately allege. The Decision speaks for itself and the Petitioners' attempt to rewrite it to provide grounds for issuance of a writ are obvious and indefensible. The Petition's reference (page 5 lines 3-4) to the Commissioner's "novel position" is Petitioners' new theory raised for the first time on appeal.

Contrary to Petitioners' representations, the "Prorater Statutes" are not void for vagueness or unconstitutional. Statutes, such as the CSBPPL, come before courts with a strong presumption in favor of their constitutionality. (*Ojai v. Chaffee* (1943) 60 Cal.App.2d 54, 61.) A plain reading of the Decision illustrates the difference between Petitioners' rhetoric and what transpired at the hearing. Judge Roman correctly decided the case by applying ordinary and well-settled principles of law.

Petitioners fail in their attempt to show they were not given due process. Without question due process requires some form of notice and an opportunity to respond but it does not require any particular form of notice or method. If the statute provides for a reasonable notice and a reasonable opportunity to be heard, that is all that is required. (*Drummey v. State Bd. of Funeral Directors and Embalmers,* supra 13 Cal.2d 75.) Providing for a hearing, after notice, before a board or officer empowered to hear and determine the issues presented satisfies the requirement of due process. (*Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County* (1944) 62 Cal.App.2d 378.) The constitutional requirement of due process is met by a fair hearing before an established administrative agency. (*In re Stobie's Estate* (1930) 30 Cal.App.2d 967.) In this case Petitioners admit that they were given several notices about their unlicensed activity from the Department first by "DOC Examiner DiAun Burns." Petitioners admit they received notice in the form of the Order and in the form of the Statement in Support of the Desist and Refrain Order and that they defended their position. (request exhibits 1, 2 and 18.) In assessing what process is due, substantial weight must be given to the good faith judgments of the agency that its procedures ensure fair consideration of the claims of individuals.

Courts have held that the judicial model of an evidentiary hearing is not required. (*Mathews v. Eldridge* (1976) 424 U.S. 319; *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267.) Even so, Petitioners were given a hearing at which they cross-examined witnesses, presented evidence and legal arguments (request ex. 93, 94, 95 and 96) to contest the Order. (Govt. Code §§ 11340 et seq.) The Record reflects that Administrative Law Judge Roman considered Petitioners' evidence and arguments in rendering his proposed decision. (Petitioners' request exhibit 142.) Therefore, Petitioners have no basis either in fact or in law to claim they were deprived of due process.

Petitioners argue a de novo review is warranted by citing *Duncan v. Dept. of Pers. Admin* (2000) 77 Cal.App.4th 1166 at page 1174. In *Duncan,* page 1174, appears is a quotation that reads:

> However, the ultimate questions, whether the agency's decision was . . . unlawful or procedurally unfair, are essentially questions of law. (Ellipsis in the original.)

Petitioners alter what the *Duncan* court quoted by adding the phrase "and evaluation of an administrative agency's interpretation and application of a statute" to the above *Duncan* citation. Although questions of law are reviewed de novo, Petitioners present no factual basis or references to the Record to support their allegation that the Decision was unlawful or procedurally unfair.

Lastly, Petitioners mischaracterize one of the Commissioner's prior decisions. Specifically, the Petition references the decision, In the Matter of Positive Return, Inc., OAH N2004070225 (2004), in a futile attempt to support their allegation that the Commissioner has a "new interpretation of the Prorater Statutes" or that Petitioners' due process rights were violated. The Commissioner's earlier decision (request exhibit 140), which may be judicially noticed, speaks for itself.

CONCLUSION

The Commissioner and Judge Roman recognized that the Desist and Refrain Order acted as a proper restraint. Licensing is favored and presumptively constitutional and on the facts of this case, the governmental interest expressed in the CSBPPL were sufficient to justify its issuance to Petitioners. The Desist and Refrain Order in this case was properly affirmed. In view of the incurable defects in the Petition, its failure to demonstrate grounds exist for issuance of a writ and it inappropriate attempt to rewrite the law and retry the facts in this forum, the Petition for a Writ of Administrative Mandamus should be denied

Dated: November 6, 2006
San Francisco, California

Respectfully submitted,

PRESTON DuFAUCHARD
California Corporations Commissioner

By: _____
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

In the Matter of NATIONWIDE ASSET SERVICES, INC., a.k.a. NATIONWIDE ASSET SERVICES, and UNIVERSAL NATIONWIDE, L.L.C., d.b.a. UNIVERSAL DEBT REDUCTION, Petitioners, v. THE CALIFORNIA CORPORATIONS COMMISSIONER, Respondent.	CASE NO. 06CS01309 DECLARATION OF JOAN E. KERST Date: December 1, 2006 Time: 9:00 Dept.: 11 Judge: Honorable Gail D. Ohanesian

I, Joan E. Kerst, declare as follows:

1. I am an attorney at law duly admitted to practice before all the courts in the State of California.

2. I represent Respondent, the California Corporations Commissioner, in the above-captioned case.

/ / /

State of California - Department of Corporations

3. On September 6, 2006, the undersigned first received indirectly a copy of the Petition of Administrative Mandamus and the Request for Judicial Notice. Included with the Petition was a photocopied document with the heading "PROOF OF SERVICE BY PERSONAL SERVICE". This proof of service states under penalty of perjury that on September 1, 2006, Preston DuFauchard, California Corporations Commissioner of the California Department of Corporations was served by delivering the Petition and Request for Judicial Notice to his offices located at 71 Stevenson Street, Suite 2100 in San Francisco, California. A copy of this proof of service is attached herein as Exhibit A.

4. Neither Commissioner Preston DuFauchard nor anyone from the Department were served the Petition on September 1, 2006. The Commissioner has never been personally served with a copy of the Petition as required.

I have personal knowledge of the aforementioned facts and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 6, 2006
San Francisco, California

PRESTON DuFAUCHARD
California Corporations Commissioner

By_____
JOAN E. KERST
Senior Corporations Counsel
Declarant

State of California - Department of Corporations