BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of:	)	
	)	
COMMISSIONER OF CORPORATIONS OF THE STATE OF CALIFORNIA,	)	OAH No. L2002100664
	)	
Complainant,	)	
	)	
vs.	)	
	)	
INNOVATIVE SYSTEMS TECHNOLOGY, INC., et al.,	)	
	)	
Respondents.	)	
	)	

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated August 4, 2003, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with the following technical and minor changes pursuant to Government Code Section 11517(c)(2)(C).

(1) In the second sentence of the fifth paragraph under the heading PROPOSED DECISION, on page 1 of the Proposed Decision, the word "argued" is substituted for the word "argue."

(2) In the third sentence of the sixth paragraph under the heading PROPOSED DECISION, on page 2 of the Proposed Decision, the word "letter" is substituted for the word "latter."

(3) In the first sentence of paragraph 11 of Factual Findings, on page 3 of the Proposed Decision, the word "its" is substituted for the word "their."

(4) In the first sentence of paragraph 18 of Factual Findings, on page 4 of the Proposed Decision, the word "clients" is substituted for the word "client."

(5) The second sentence of paragraph 18 of Factual Findings, on page 4 of the Proposed Decision, is broken down into the following two sentences:

"The negotiations often took place over a period of time, usually after a several-month 'relief period' in which no payments were made. This 'relief

period' allowed clients' funds to accumulate for payment of the debts and, in theory, made creditors more disposed to accept a lower payment to settle the outstanding balance for an amount less than what was owed."

(6) In paragraph 19 of Factual Findings, on page 4 of the Proposed Decision, the word "creditors" is substituted for "debtors."

(7) In paragraph 21 of Factual Findings, on page 4 of the Proposed Decision, the word "of" is substituted for the word "ob."

(8) In the second sentence of paragraph 22 of Factual Findings, on page 4 of the Proposed Decision, the word "clients'" is substituted for the word "client."

(9) In the fourth sentence of paragraph 23 of Factual Findings, on page 4 of the Proposed Decision, the word "by" is inserted in between "corroborated" and "negotiated."

(10) In the first sentence of paragraph 23 of Factual Findings, on page 4 of the Proposed Decision, the word "clients'" is substituted for the word "client."

(11) In the fourth sentence of paragraph 23 of Factual Findings, on page 4 of the Proposed Decision, the word "by" is inserted in between "corroborated" and "negotiated."

(12) In the sixth sentence of paragraph 23 of Factual Findings, on page 4 of the Proposed Decision, the word "credible" is substituted for the word "credited."

(13) In the third sentence of paragraph 1 of Legal Conclusions, on page 5 of the Proposed Decision, the word "an" is substituted for the word "that."

(14) The fourth sentence of paragraph 1 of Legal Conclusions, on page 5 of the Proposed Decision, is replaced with the following sentence: "(Cal. Fin. Code § 12101.5.)."

(15) The second sentence of paragraph 3 of Legal Conclusions, on page 5 of the Proposed Decision, is replaced with the following sentence: "(Cal. Fin. Code § 12002.1)."

(16) In the third sentence of the second paragraph of paragraph 8 of Legal Conclusions, on page 6 of the Proposed Decision, the word "clients'" is substituted for the word "client."

(17) In the first sentence of the third paragraph of paragraph 8 of Legal Conclusions, on page 6 of the Proposed Decision, the word "established" is substituted for the word "establish."

This Decision shall become effective on 11/12/03.

IT IS SO ORDERED 11/12/03.

DEMETRIOS A. BOUTRIS
California Corporations Commissioner

BEFORE THE
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STATE OF CALIFORNIA

In the Matter of:	)	
	)	
COMMISSIONER OF CORPORATIONS OF THE STATE OF CALIFORNIA,	)	OAH Case No. L2002100664
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Complainant,	)	
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vs.	)	
	)	
INNOVATIVE SYSTEMS TECHNOLOGY, INC., et al.,	)	
	)	
Respondents.	)	
	)	

PROPOSED DECISION

This matter regularly came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on November 6, 7, 8, and 25, 2002, and on March 28 and June 5, 2003.

Joan E. Kerst, Senior Corporations Counsel, appeared on behalf of Department of Corporations Commissioner ("Commissioner").

Gary Brown, Attorney at Law, appeared on behalf of respondents Innovative Systems Technology, Inc., d.b.a. Briggs & Baker, Innovative Systems Technology, Inc., and Briggs and Baker, Financial Services Provider ("respondent Briggs and Baker"); Todd A. Baker ("respondent Baker"); Darrin Baker ("respondent D. Baker"); and Darren Lee Albrecht ("respondent Albrecht").

Respondent Jack Briggs a.k.a. John David Briggs ("respondent Briggs") did not enter an appearance.

On September 18, 2002, the Commissioner issued a Desist and Refrain Order ("Order") prohibiting respondents from engaging in the business of a prorater[1] unless and until they obtained the appropriate license or a valid exemption from the licensure requirement. Respondents disputed some of the factual findings in the Order and argue the Order is unnecessary for the protection of the public because respondents had voluntarily ceased the practices in question before September 18, 2002.

[1]The definition of a prorater is set forth in legal conclusion number 3.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of evidence of the Commissioner's costs of investigation and prosecution, respondents' objections and evidence regarding such costs, and written argument. The Commissioner submitted a latter dated June 13, 2003, which has been marked for identification as Exhibit 30. Respondents filed a letter brief dated July 1, 2003, which has been marked for identification as Exhibit H. The Commissioner filed a reply on July 11, 2003, which document has been marked as Exhibit 31. Exhibit 31 contained a "Declaration in Support of Request for Recovery of Costs Pursuant to Financial Code Sections 12105 and 12106" ("Declaration"). No objection to the admission of the Declaration was submitted and it is received in evidence. The matter was submitted for decision on July 11, 2003.

FACTUAL FINDINGS

1. The Commissioner is responsible for administration and enforcement of the California Check Sellers, Bill Payers and Proraters Law ("Proraters Law"), pursuant to Financial Code[2] sections 12000 et seq.

2. On September 18, 2002, the Commissioner issued the Order, finding respondents had violated the Proraters Law by acting as proraters without a valid license from the Commissioner.

3. The Commissioner has not issued a license to respondents, or to any of them, to act as a prorater or check seller.

4. On October 8, 2002, respondents Briggs & Baker, Baker, D. Baker, and Albrecht, through their attorney, requested a hearing to contest the Order.

5. Respondent Briggs did not request a hearing.

6. At all times material, respondent Briggs and Baker has been involved in the business of negotiating debt relief on behalf of its debtor clients.

7. Respondent Baker has been an officer of respondent Briggs and Baker from 1997 to the present. He was President of respondent Briggs and Baker from 1997 until June 2001. He assumed direct responsibility for specific areas, i.e., finance and/or sales, for approximately 6 months in June 2001. At all times material, he and respondent Briggs effectively ran the day-to-day operations of respondent Briggs and Baker.

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[2]Unless otherwise stated, all further references are to the Financial Code.

8. Respondent Briggs was an officer of respondent Briggs and Baker from 1997 until June 25, 2002.

9. Respondent D. Baker has been a vice president in charge of customer relations for respondent Briggs and Baker at least since 2001.

10. Respondent Albrecht has been employed as a manager by respondent Briggs and Baker since June 2002. He has had responsibility in the finance and sales areas. He described himself at the hearing as respondent Baker's "right hand man."

11. Respondent Briggs and Baker advertised their services in local media, both radio and print. They solicited individuals who had fallen behind on their credit payments or wanted to consolidate their debts, promising lower payments through negotiations with creditors.

12. During the period of 1997 to the present, respondent T. Baker and respondent Briggs and Baker enrolled individual debtors who became respondents' clients into debt repayment programs. The vast majority of the programs provided from 1999 through June 2002 shared key elements: clients/debtors provided funds to respondents (in a lump sum, over a period of time, or in a combination) in order for respondents to pay to their creditors, hopefully as a smaller amount of total indebtedness.

13. Respondents gave specific names to their programs, such as "Accord and Satisfaction," "Best Deal," "Custom," "Fresh Start," "Immediate," "Indemnity," "24-Month," and "36-Month," depending on its features. The variations were often minor and evolutionary. Thus, some of the programs incorporated an indemnity feature, in which respondents agreed to accept a specified sum from the client and assumed the risk and reward of a different settlement amount with the creditor. Various programs offered options, depending on whether the client paid respondents an initial lump sum and on whether the clients paid respondents a monthly amount, usually 24 or 36 months.

For example, the "Fresh Start" Program, offered in the latter part of 2001 into 2002, had a "best deal" variant if the customer was able to offer a lump sum in settlement of the outstanding balance. The program had two other variations, both involving monthly payment plans, depending on whether the customer provided an initial "down payment." Also, the "Accord and Satisfaction" program sought to use Civil Code section 3311 to offer the creditor a specific amount in full settlement of the indebtedness; if the creditor did not accept the initial offer, then the client authorized respondents to negotiate other terms.

14. Respondents, primarily respondent Baker, prepared written instructions, variously described as "frequently asked questions" or "FAQs," "pointers," or "scripts," to assist staff involved in direct communications with prospective clients. The instructions described the programs and anticipated questions or concerns.

15. The clients entered into formal contracts with respondents agreeing to the terms of the programs and to the payment schedule to respondents.

16. In accordance with the various programs in place, and their contracts with clients, respondents received money from clients for payment of debts owed by respondents' clients to their creditors.

17. Upon receipt of their clients' money, respondents deducted their fees and deposited the clients' money into respondents' bank accounts. The fees charged varied between 15 to 30 percent of the total indebtedness, depending on the program and the time the debtor became a client, as the amount and structure changed over time.

18. The money remained under respondents' control while respondents' staff negotiated payoff agreements with the creditors of respondents' client/debtors. The negotiations often took place over a period of time, usually after a several-month "relief period" in which no payments were made –this "relief period" period allowed client funds to accumulate for payment of the debts and, in theory, made creditors more disposed to accept a lower payment to settle the outstanding balance for an amount less than was owed.

19. During the latter part of 2001, respondents held approximately $400,000 in clients' funds on any given day for payment to the clients' debtors.

20. Once they reached a settlement with creditors, respondents forwarded their clients' money to the creditors for payment of respondents' clients' debts.

21. In negotiating settlements, in forwarding clients' money for payment ob debts, and in other dealings with creditors, respondents acted as agents of their debtor clients.

22. Respondents' activities, set forth in factual finding numbers 11 through 21, continued at least through June 2002. Respondents held client funds at least through September 2002.

23. Respondent Baker testified that after June 2001 respondents did not sell any new programs in which respondents agreed to hold clients' funds for payment of the clients' debts and that respondents held no client funds as of October 2002. With the exception of program description documents, respondent Baker did not present any financial data or other document to corroborate his testimony. On the contrary, multiple witnesses and documents contradicted his testimony. A very credible and compelling witness, Alicia Scollard, testified she continued to make monthly payments to respondents through August 26, 2002; her testimony was corroborated negotiated personal checks. These payments, she credibly testified, were to be credited toward the settlement of debts to her creditors. Accordingly, respondent Baker's testimony is not credited.

24. In what respondent Baker described as a change in the company's business model, respondents started offering a "Debt Relief Program" in March 2002. In this program, they would agree to negotiate debt settlements on behalf of clients in exchange for a fee. Clients would make payments directly to their creditors once respondents negotiated an agreeable settlement.

25. During the period of January 2003 to June 5, 2003, the Commissioner has incurred the following costs, which are found to be reasonable: attorney's fees in the amount of $2,096.39; Office of Administrative Hearings charges in the amount of $1,125; and travel expenses in the amount of $489.79; or a total of $3,711.18.

LEGAL CONCLUSIONS

1. Under Evidence Code section 500, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Inasmuch as the Commissioner filed the Order he has the burden of proving the facts that warranted its issuance. Respondents, on the other hand, have the burden of establishing that exemption or exception to the licensure requirement. Section 12101.5.

2. Section 12200 provides, in pertinent part, that "[n]o person shall engage in the business, for compensation, of ... receiving money as agent of an obligor for the purpose of paying bills, invoices, or accounts of such obligor, or acting as a prorater ... without first obtaining a license from the commissioner."

3. A "prorater" is defined as "a person who, for compensation, engages in whole or in part in the business of receiving money or evidences thereof for the purpose of distributing the money or evidences thereof among creditors in payment or partial payment of the obligations of the debtor." Section 12002.1.

4. Section 12103 authorizes the Commissioner to issue desist and refrain orders. It states:

> "Whenever in the opinion of the commissioner any person is engaged in business as a check seller as defined in this division without a license from the commissioner, or any licensee is violating any provision of this division, the commissioner may order the person or licensee to desist and refrain from engaging in such business or further violating this division. If, after such an order is made, a request for a hearing is filed in writing and no hearing is held within 30 days thereafter, the order shall be deemed to have been rescinded."

A check seller or casher is defined in section 12002, in pertinent part, as follows:

> "A check seller is a person ... who, for compensation, engages, in whole or in part, in the business of selling checks, drafts, money orders, or other commercial paper serving the same purpose, or receiving money as agent of an obligor for the purpose of paying to a person other than the check seller bills, invoices, or accounts of such obligor ...."

5. As set forth in factual finding numbers 11 through 22, the evidence established that respondents, for compensation, received money on behalf of clients, debtors to various creditors, for the purpose of paying the client/debtor's obligations to the creditors. Respondents' activities, therefore, fall within the definitions of a check seller or casher in section 12002 and prorater in section 12002.1.

6. Pursuant to section 12200, respondents' activities, as set forth in factual finding numbers 11 through 22, require licensure by the Commissioner.

7. Cause exists pursuant to section 12103 for the Commissioner to issue the Order in that respondents were engaged in business of check sellers or cashers, and proraters without a license, by reason of factual finding numbers 3, and 11 through 22, and legal conclusion numbers 1 through 5.

8. Respondents argue cause for the Order does not exist because respondents ceased the activities in question as of June 2001 and, therefore, there was no need to protect the public through the Order.

However, as set forth in factual finding numbers 12, 22, and 23, respondents' receipt and payment of clients' obligations continued at least into June 2002. Respondents continued to receive money from clients as late as August 26, 2002, less than one month before the issuance of the Order. Further, respondents held client funds at least through September 2002.

The facts presented at the hearing establish that respondents engaged in activity that requires licensure for the protection of the public for at least 3 years, a significant period. The unlicensed activity represented respondents' basic business model and predominant business activity during the period in question. In light of such lengthy and extensive disregard of the licensure requirement, the Order is warranted for the protection of the public.

Further, as held by the Court in Cal-Am Corp. v. Department of Real Estate, 104 Cal.App.3d 453 (1980), in a proceeding involving a desist and refrain order under Business and Professions Code section 11019, a desist and refrain order may be appropriate even after the unlicensed activity has ceased. In Cal-Am Corp, the Court sustained the order despite cessation of the unlawful conduct. In this case, as in Cal-Am Corp., the unlicensed activity ceased shortly before issuance of the order. The situation in Cal-Am Corp. is analogous to the instant case and the decision in that case is persuasive.

9. Section 12105(e) provides: "[i]n any action brought under this division, the commissioner is entitled to receive costs, which in the discretion of the administrative or civil court shall include an amount representing reasonable attorney's fees and any related expenses for services rendered."

In this matter, the Order is an "action brought under this division" within the meaning of the statute. Inasmuch as the Commissioner has prevailed, an award of costs is appropriate under section 12105(e). The amount awarded, as set forth in factual finding number 25, is $3,711.18.

ORDER

The Order was properly issued and shall remain in effect.

DATED: 8/4/03

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings