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LOEB & LOEB LLP
MICHAEL L. MALLOW (State Bar No. 188745)
mmallow@loeb.com
MICHELLE M. SHARONI (State Bar No. 217327)
mgrimberg@loeb.com
10100 Santa Monica Boulevard, Suite 2200
Los Angeles, California 90067-4120
Telephone: 310-282-2000
Facsimile: 310-282-2200

Attorneys for Petitioners
Nationwide Asset Services, Inc.,
Universal Nationwide, LLC and
Universal Debt Reduction

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,

vs.

The California Corporations Commissioner,

Respondent.

Case No. 06CS01309

PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS [CCP 1094.5]

[Filed Concurrently with Request for Judicial Notice]

Date: October 16, 2006
Time: 8:30 a.m.
Dept.: Not Yet Assigned

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 16, 2006, at 8:30 a.m., or as soon thereafter as the matter may be heard, in the above-captioned Court, located at 720 9th Street, Sacramento, CA 95814, Petitioners Nationwide Asset Services, Inc., Universal Nationwide LLC and Universal Debt Reduction (collectively, the "NAS Petitioners") will, and hereby do, move for a writ of administrative mandamus under California Code of Civil Procedure § 1094.5(b) directing the California Commissioner of Corporations ("Commissioner") to vacate its decision dated August 3, 2006, effective on August 4, 2006, in which it adopts the Administrative Law Judge's Proposed Decision dated April 28, 2006 ("Decision") (collectively, the "Writ").

The Writ is made on the grounds that (a) the Commissioner proceeded without or in excess of its jurisdiction, (b) the NAS Petitioners were deprived of a fair trial and (c) there was a prejudicial abuse of discretion.

This Writ is based on this Notice, the memorandum of points and authorities attached hereto, all pleadings, papers, and records on file with the OAH in this action; and all such other argument and evidence as may be presented to this Court in connection with this Writ.

Dated: September 1, 2006

LOEB & LOEB LLP
MICHAEL L. MALLOW
MICHELLE M. SHARONI

By: _____
Michael L. Mallow
Attorneys for Respondents
Nationwide Asset Services, Inc., Universal Nationwide, LLC and Universal Debt Reduction

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Petitioners Nationwide Asset Services, Inc., Universal Nationwide LLC and Universal Debt Reduction (collectively, the "Petitioners") petition this Court for a writ of administrative mandamus under California Code of Civil Procedure § 1094.5(b) directing the California Commissioner of Corporations ("Commissioner") to vacate its decision dated August 3, 2006, effective on August 4, 2006, in which it adopts the Administrative Law Judge's Proposed Decision dated April 28, 2006, issued on May 12, 2006 ("Decision") (collectively, the "Writ"). (*See* Decision, attached as Exhibit "142" to the NAS Petitioners' Request for Judicial Notice filed concurrently herewith ("Judicial Notice").)

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a classic example of the due process abuse that can occur when an enforcing agency is the same agency that decides whether its enforcement activities are proper and justified.

In this case, the Department of Corporations ("DOC")—which has been targeting the debt negotiation industry generally—set its sites on Petitioners based on the assumption that Petitioners were receiving money from their clients; holding the money while a clients' debt was being negotiated; and then distributing the money to creditors when a settlement was consummated. Had these facts been accurate, the DOC may have been justified in pursuing this action against Petitioners. But the facts are not accurate. As the DOC learned after a four-day evidentiary hearing, Petitioners do *not* receive money from their clients for the purposes of distributing such money to creditors; they do *not* hold money for their clients while debt is negotiated; and Petitioners do *not* distribute money to creditors. These were the very findings made by the administrative law judge in this case. But, instead of admitting that its initial understanding of Petitioners' business was wrong and dropping its case, the Commissioner instead changed the law to suit its purpose—to stop Petitioners from engaging in a perfectly lawful debt negotiation business in California.

This Writ challenges the Commissioner's decision to adopt the April 28, 2006 Proposed Decision rendered by Administrative Law Judge Jaime Rene Roman ("Decision"), which affirms the Desist & Refrain Order issued by the Commissioner on December 5, 2005 prohibiting Petitioners from operating in California as billpayers or proraters unless or until they are licensed

or establish they are exempt ("D&R Order"). (*See* Desist & Refrain Order, ¶ 15, attached as Exhibit "1" to Judicial Notice.) The Petitioners seek judicial relief because the Decision is inconsistent with the factual findings contained therein and improperly extends the scope of California Financial Code §§ 12000, et seq. ("Prorater Statutes") beyond the Prorater Statutes' plain meaning. Based on the factual findings in the Decision and a plain reading of the Prorater Statutes, the only logical conclusion that can be reached in this case is that Petitioners are not proraters and that the D&R Order was improperly issued.

To prevail in its case against Petitioners, the Commissioner must prove that Petitioners receive 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. In brining its enforcement action, the Commissioner believed Petitioners, either directly or indirectly through Global Client Solutions ("GCS"), an alleged affiliated entity, received client funds, negotiated debt and distributed client funds to creditors. But the evidence actually established—and the ALJ found—that Petitioners did not handle client funds at all. Rather, GCS, who acted as an agent of Rocky Mountain Bank and Trust ("RMBT") not Petitioners, initiated withdrawals from a client's primary account and deposited such funds into a client's restricted account at RMBT. GCS and RMBT were directly and contractual responsible to clients to hold client money. If a client requested return of the money, GCS and RMBT were contractual obligated to return the money. If GCS was notified that a settlement had been negotiated, GCS, not Petitioners, transferred funds to creditors. The closest Petitioners came to client money was there ability to "see" client account balances at RMBT and to initiate negotiations based on the balances in the client's RMBT account.

Based on the plain meaning of the Prorater Statutes, the only logical conclusion that can be reached in this case is that Petitioners are not proraters because they do not receive or distribute money. But in this case, the Commissioner illogically decided that Petitioners were proraters, not because they received or distributed money, but because they could see client bank statements at RMBT and thus "received" evidences of money. But "receiving evidences of money" cannot be

the same as receiving evidence that money is in a client's account, which is what the Commissioner decided in this case.

First, neither the Commissioner nor the ALJ cited to any authority supporting this novel position; and Petitioner has not found any such authority. Second, the very language of the prorater statute undermines the Commissioner's interpretation. Information about an account balance cannot constitute "evidence of money" as contemplated by the statute because Petitioner cannot distribute information about a client's bank account balance to a creditor in payment or partial payment of a debt. As the ALJ acknowledged in this case "evidences of money" is not defined but it appears the phrase refers to a monetary equivalent, like a check, money order, etc. What is clear, however, is that "evidences of money" does not include seeing or receiving a bank statement, which is the basis of the Commissioner's decision in this case.

Simply put, the Commissioner exceeded his authority and had no factual basis to conclude that Petitioners were violating the California's Prorater Statutes. The Commissioner cannot change or ignore the language of a statute to justify an improvidently initiated action. The Commissioner does not have authority to ignore facts that undermine its desired conclusion. The Commissioner cannot put aside basic due process concerns by initiating an action without proper investigation and without a proper factual basis. The Commissioner's abuses in this case are extraordinary and must be remedied through the extraordinary relief Petitioners request in this writ of mandamus. Absent such relief, Petitioners' lawful and successful business, and the hundreds of California consumers Petitioner serves, will be destroyed.

II. PARTIES

Petitioner Nationwide Asset Services, Inc. is a corporation organized and existing under the laws of the State of Nevada. During the time period under review by this Court, its headquarters were located at 4229 Northgate Blvd., Sacramento, California. Petitioner Nationwide Asset Services, Inc. is engaged in the debt settlement/negotiation business. Petitioner Universal Nationwide, LLC is a limited liability company organized and existing under the laws of the State of Nevada. During the period in question, its headquarters were located at 4229 Northgate Blvd., Sacramento, California. Petitioner Universal Nationwide LLC is engaged in the

debt settlement/negotiation business. Petitioner Universal Debt Reduction, LLC is a limited liability company organized and existing under the laws of the State of Arizona. During the period in question, its headquarters were located at 4229 Northgate Blvd., Sacramento, California. Petitioner Universal Debt Reduction is engaged in the debt settlement/negotiation business.

The NAS Petitioners have at all relevant times been named as respondents in the administrative proceedings and are named in the Decision, which is the subject of this Writ.

III. VENUE AND JURISDICTION

Venue is proper in the County of Sacramento because the Commissioner's office is in Sacramento, California and all actions against the NAS Petitioners arose in Sacramento, California. Also, the Decision was rendered in Sacramento, California.

Jurisdiction in the Superior Court is proper as this action is one for Mandamus and equitable relief.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The NAS Petitioners have exhausted their administrative remedies because the Decision is a final decision on the merits, which the Commissioner deemed effective August 4, 2006. The NAS Petitioners are not required to seek reconsideration as a prerequisite to seeking judicial review. Cal. Gov't Code § 11523.

V. ABSENCE OF OTHER ADEQUATE REMEDY

The NAS Petitioners do not have any plain, speedy or adequate remedy at law other than this Writ.

VI. APPLICABLE STANDARD OF REVIEW

A trial court's standard of judicial review in administrative mandamus cases depends on the nature of the decision being challenged. Determinations of ultimate questions, such as whether the agency's decision was unlawful or procedurally unfair, and evaluations of an administrative agency's interpretation and application of a statute, are questions of law. *See Duncan v. Dep't of Personnel Admin.*, 77 Cal. App. 4th 1166, 1174 (2000). Questions of law are always reviewed de novo. *See id.* This standard requires the reviewing court to exercise its own independent

judgment as to questions of law. *Alliance for a Better Downtown Millbrae v. Wade*, 108 Cal. App. 4th 123, 129 (2003).

A different standard applies when the trial court is evaluating the evidentiary basis for an administrative decision, as opposed to evaluating questions of law. California Code of Civil Procedure ("C.C.P.") Section 1094.5 provides the basic framework in these circumstances. Section 1094.5 does not, however, establish a single standard for judicial review. *See* Cal. Code Civ. P. § 1094.5(c). Instead, the standard of review depends on the nature of the right affected by the administrative decision. *See MHC Operating Ltd. P'ship v. City of San Jose*, 106 Cal. App. 4th 204, 217 (2003). "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence" ("independent judgment" standard of review). Cal. Code Civ. P. § 1094.5(c). "In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record" ("substantial evidence" standard of review). *Id.*

This Writ is based on the following three grounds: (a) the Commissioner proceeded without or in excess of its jurisdiction; (b) the NAS Petitioners were deprived of a fair trial; and (c) there was a prejudicial abuse of discretion. *See id.* § 1094.5(b); *see also Frink v. Prod*, 31 Cal. 3d 166, 172 (1982). All of these grounds are pure questions of law. As such, the standard of review applicable here is "de novo."

Assuming *arguendo* that this Court characterizes the issues on appeal as an evaluation of the evidentiary basis of the Decision rather than questions of law, this Court should apply the "independent judgment" standard of review, which is very similar to the de novo standard and often referred to as the "limited trial de novo" standard. *See, e.g., Bixby v. Pierno*, 4 Cal. 3d 130, 143 (1971) (seminal California case on point). In cases, such as here, where vested[1] fundamental

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[1] The term "vested" has been defined as a right that is "already possessed by the individual." *Id.* at 146 (citation omitted).

rights are substantially affected by the administrative decision, the trial court must review the case under the independent judgment test. *Id.* Courts have interpreted fundamental vested rights to include, *inter alia*, individual rights guaranteed under the due process and equal protection clauses of the state and federal Constitutions. *County of Alameda v. Bd. of Ret.*, 46 Cal. 3d 902, 907 (1988).

All three grounds upon which the NAS Petitioners seek this Writ revolve around the NAS Petitioners' due process rights to notice of the current DOC's interpretation of the Prorater Statutes. Due process rights are, without question, a "fundamental right." Therefore, this Court should apply the "independent judgment" review standard. 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. *Bixby*, 4 Cal. 3d at 143. An application of this standard will undoubtedly result in the granting of this Writ.

If, however, this Court characterizes the rights at issue as non-fundamental, then it should apply the "substantial evidence" review standard. *Id.* at 144. 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. *Id.* An application of even this standard will result in the granting of this Writ, particularly since the Commissioner did not proceed in the manner required by law and the Decision is not supported by the findings.

VII. PROPRIETY AND TIMELINESS OF PETITION

This Writ is authorized by C.C.P. § 1094.5. This Writ is timely, as it is filed within 30 days after the last date on which reconsideration can be ordered. *See* Cal. Gov't Code §§ 11521, 11523.

VIII. RELEVANT FACTUAL BACKGROUND

A. Overview of Petitioners' Business Operation

Since November 2003, Petitioners' debt settlement program has operated as follows: Consumers who are overwhelmed with credit card debt contact Universal directly or through an independent correspondent to sign up for the debt settlement program. (*See* Anderson Testimony,

attached as Exhibit "97" to the Judicial Notice, at 151:21-152:9; *see also* Webb Testimony, attached as Exhibit "94" to the Judicial Notice, at 12:1-10.) Consumers then receive information on the debt settlement program via telephone conversations and a "client enrollment packet" sent to all consumers who wish to join the program. (*Id.*; *see also* Exhibit K to Trial Transcript, attached as Exhibit "144" to Judicial Notice.) The client packet includes a description of the program; data sheets on which consumers are to provide or verify their statistics such as income, expenses, and debt figures; multiple disclosures; a letter of introduction to Petitioners; and relevant agreements. (*See* Exhibit 144.) NAS is the entity that actually negotiates with and obtains settlements from creditors on behalf of consumers; meaning that NAS contacts creditors, pursues settlement possibilities with creditors, and strategizes to obtain the lowest possible settlement on each account of each consumer. (*See* Anderson Testimony, Exhibit 96, 151-181; *see also* Exhibit 144.)

Prior to the commencement of negotiations, clients begin to accumulate money in their special purpose account at RMBT, which clients have established pursuant to the Special Purpose Account Application contained in each client enrollment packet. (*See* Anderson Testimony, Exhibit 96, at 164:5-12; Merrick Testimony, Exhibit 96, at 113:3-15, 23-25; *see also* Exhibit 144; Exhibit R to Trial Transcript, attached as Exhibit "145" to Judicial Notice.) Clients set up accounts in their name that are separate from their home checking or savings account. The purpose of forming and maintaining new, separate accounts, is to provide clients a better chance of saving money, which ultimately enables them to get out of their respective financial crises.

Once a settlement is reached, NAS ensures that the settlement is properly papered and then communicates the terms of the settlement to GCS and the client. (*See* Anderson Testimony, Exhibit 96, at 167:22-168:7.) NAS informs GCS, who processes the accounts for RMBT and clients. (*See id.*; Merrick Testimony, Exhibit 96, at 113:9-15.) Creditors obtain payment from client's funds held at RMBT. Petitioners are paid a settlement fee from clients. (*See id.*)

RMBT and GCS are the entities contractually authorized by the client to administer a client's account and any withdrawal or transfer of funds is handled solely by GCS as agent of RMBT. (*See e.g.*, Exhibits 144, 145.)

Petitioners do not pay creditors. Petitioners do not distribute money or evidences thereof to consumers. Petitioners do not control the client's funds held at RMBT. The funds remain the client's funds until a settlement is reached. (*See* Anderson Testimony, Exhibit 96, at 162:22-163:12, Schulz Testimony, Exhibit 96, at 34:20-35:16.) Clients have the ability at all times prior to settlement to terminate their contracts and withdraw their funds from RMBT. (*See* McClure Testimony, attached as Exhibit "95" to Judicial Notice, at 140:17-141:5; *see also* Exhibit 144 (Special Purpose Account Application), Exhibit 145 (Webb's Special Purpose Account Application) (stating that "I (applicant) understand that the Account, when established pursuant to this Application, will be my sole and exclusive property, that only I may authorize deposits to and disbursements from the Account; and that I may close the Account at any time as provided for in the Agreement [defined as the "Rocky Mountain Bank and Trust Account Agreement and Disclosure Statement that accompanies this Application"].".)

B. The DOC's Initial Contact

The DOC's initial interest in Petitioners began on or about July 31, 2003, when DOC Examiner DiAun Burns ("Burns") sent Petitioners a letter stating that "[i]t has been brought to the attention of the Department of Corporations that you are operating as a bill payer and/or prorater in the State of California" without a license in violation of the Check Sellers, Bill Payers and Proraters Law. (*See* Formal Hearing Transcript dated February 22, 2006, attached as Exhibit "94" to Judicial Notice, at 153-54.) In her letter, Burns requested that Petitioners furnish to the Department evidence of Petitioners' authority to conduct their business without a license. (*Id.*)

On August 18 and 27, 2003, Petitioners, through its then counsel, replied in writing to Burns, stating that, *inter alia*, "[Petitioners do] not factually or legally receive money or evidences of money . . . from the debtors. Debtor funds are placed in a separately administered trust fund. . . . This avoids the scenario contemplated by the statutes wherein the prorater/billpayer controls and/or commingles the debtors' funds. If the Commissioner has a different statutory interpretation, then please contact me. [Petitioners] value [their] California clients and wish[] to continue to serve this important market." Notwithstanding the request for further communication, neither Burns nor anyone else at the DOC ever responded. (*See* Exhibit 94 at 154, 158.)

According to Burns, this silence occurred even though the DOC did not agree with Petitioners' position back in August 2003. (*Id.* at 158-60.)

C. The Administrative Proceeding

After almost two and one-half years of silence, and with apparently no further investigation, the DOC issued the D&R Order against Petitioners.

The D&R Order asserted that Petitioners "pay the bills of a consumer from the funds a consumer forwarded to them for that purpose, by arranging for periodic electronic funds transferred through the Automated Clearing House (ACH), whereby they initiate withdrawals from a consumer's trust account(s) for payment to a consumer's creditor." (Exhibit 1, at 3:20-23.) (emphasis added) Based on these allegations, the D&R Order required Petitioners, "individually, in concert and/or in participation with others, to desist and refrain from engaging in the business as a bill payer and prorater unless and until they are licensed or exempt." (Exhibit 1, at 4:24-5:1.)[2]

After the NAS Petitioners requested a hearing, the DOC served its Statement in Support of the Commissioner's Desist and Refrain Order Issued Pursuant to Financial Code Section 12103, Request for Ancillary Relief and Costs Pursuant to Financial Code Sections 12105 and 12106 ("First Statement"). (*See* First Statement, attached as Exhibit "18" to Judicial Notice.) The main allegation in the First Statement was that Petitioners were receiving and distributing client funds directly or through affiliates, namely GCS, in violation of the Prorater Statutes. (*Id.*)

On or about December 30, 2005, Petitioners filed and served their First Notice of Defense, in which Petitioners objected to the DOC's request for ancillary relief as expressed in the DOC's First Statement. (*See* NAS Respondents' Notice of Defense, attached as Exhibit "18" to Judicial Notice.) In their Notice of Defense, Petitioners asserted, *inter alia*, that they were not proraters on the grounds that they did not receive money or evidences thereof for the purpose of distributing such money or evidences thereof to a consumer's creditors and they did not sell checks, drafts, money orders or other commercial paper. (*See id.* at ¶ 2, 2.) Petitioners further asserted in their

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[2] At the Formal Hearing in the First Action, the DOC abandoned its claim that Respondents were bill payers (*See* Exhibit 94, at 118, 122.)

Notice of Defense that they neither had any control of or management responsibility over the funds received from the consumers nor did they collect consumer funds or distribute/transfer such funds to creditors. (*See id.*) Petitioners asserted that they were not affiliated or operated as agents of any other entity named as a respondent in this matter. (*See id.*) Finally, Petitioners objected to the DOC's request for restitution or disgorgement as ancillary relief because the DOC failed to allege facts, that if true, would establish that California consumers were in any way harmed by the acts or practices of Petitioners for which they should have been licensed, and thus no grounds exist for awarding disgorgement or damages as ancillary relief. (*See id.* at ¶ 3.)

On January 5, 2006 and in response to Petitioners' Notice of Defense, the DOC filed an Amended Statement in Support of the Commissioner's Desist and Refrain Order Issued Pursuant to Financial Code Section 12103, Request for Ancillary Relief, Penalties, and Costs Pursuant to Financial Code Sections 12105 and 12106 ("First Amended Statement") (*See* DOC's First Amended Statement, attached as Exhibit "46" to Judicial Notice.) The First Amended Statement, actually expands the "affiliation" theory of liability to include RMBT. (*Id.*) The "affiliation" theory of liability became more critical to the DOC's case because at the time the DOC filed its First Amended Statement, it knew that Petitioners were defending the case on the ground that they did not handle client money. (*Id.*)

In his February 15, 2006 Order, Administrative Law Judge, Judge Stephen J. Smith, foreseeing that the DOC would use the upcoming formal hearing in front of Judge Roman ("Formal Hearing") as its initial investigation of this matter, stated that the issues to be litigated at the Formal Hearing were "quite limited." (*See* The [Corrected] NAS Respondents' Closing Brief filed in preparation for the Formal Hearing, attached as Exhibit "100" to Judicial Notice, at 2.) He added that "[t]he issues here are limited to a review of the propriety of the issuance of the Desist and Refrain Order; to wit, whether there existed *on December 5, 2005, a persuasive legal and factual basis for its issuance*. The issue is whether [Petitioners'] business practices and relationships with one another are such that a license is required under the law." (*Id.*) (emphasis added).

The Formal Hearing was held on February 21 through 24, 2006 before Judge Roman. By the end of the first day of the Formal Hearing, Judge Roman was so frustrated with the DOC's case that he expressed concern that the DOC issued its D&R Order and then conducted an investigation to determine whether the D&R Order was properly issued.[3] (*See* Exhibit 100, at 2.) By the end of the fourth day of the Formal Hearing, it was clear that this is exactly what occurred.

Notwithstanding four days of hearing, the DOC failed to introduce any evidence establishing that it had a persuasive legal and factual basis for issuing the D&R Order. (*See id.*) All but one DOC witness testified that they had no contact with the DOC prior to the D&R issuance. (*See id.*) The one witness, Rebecca Webb, who was not a California resident, testified that she spoke with DOC's counsel but could not remember what she said prior to December 5, 2005 (the date in which the D&R Order was issued). (*See id.*) More incredibly, DiAun Burns, the DOC examiner who was the only individual at the DOC to have direct contact with the Petitioners, testified that she had no involvement in the issuance of the D&R Order. (*See id.* at 172-73.) In fact, she admitted that she did not speak with DOC's counsel until *after* the DOC issued the D&R Order (*Id.* at 173.) Furthermore, the DOC did not present a single complaint from any California consumer at the Formal Hearing. At best, the evidence at the Formal Hearing established that the DOC issued the D&R based on nothing more than a brief, non-descript telephone call from a non-California consumer, Rebecca Webb, who could not talk throughout the issuance of the D&R Order because her jaw was wired shut. (*See id.*)

Despite the utter lack of evidence, on April 28, 2006, Judge Roman issued a Proposed Decision finding the NAS Petitioners were "proraters" and operating without a license. (*See* Proposed Decision, attached as Exhibit "121" to Judicial Notice.) The Proposed Decision was adopted by the Commissioner, without comment, on August 3, 2006, effective August 4, 2006. (*See* Exhibit 142.)

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[3] In multiple status conferences, Judge Smith and the NAS Petitioners conveyed the same concern.

D. The Commissioner's Decision

As discussed more fully, *infra*, the Commissioner's decision is internally inconsistent. The Decision expressly finds that Petitioners do not receive client funds for the purposes of distributing those funds to creditors in satisfaction of their clients' debt. The Decision also expressly finds that GCS and Petitioners are *not* affiliated and that GCS is actually an agent of RMBT, not Petitioners. Consequently, and as tacitly acknowledged in the Decision itself, Petitioners do not fit within the express language of the Prorater Statutes. The Decision nonetheless holds that Petitioners' activities fall within the definition of prorater and require licensure by the Commissioner because: "once some evidence of the deposit of client funds in Rocky Mountain is received, respondents commence the rendering of services;" although Petitioners do not receive funds "they do receive evidence of such funds' deposits;" and "no respondent . . . commences any activity for the benefit of their customers until client funds are both deposited in an account and available for distribution . . . ." (Exhibit 142 at 8.)

In short, the Decision relies entirely on the fact that because Petitioners receive information that money has been deposited in a *clients' account at RMBT*, Petitioners are proraters. The absurdity of this conclusion is the reason Petitioners must file this Petition.[4]

IX. ARGUMENT

A. Grounds For The Writ

C.C.P. § 1094.5 sets forth three independent grounds for granting a writ of administrative mandamus: (a) whether the agency proceeded without or in excess of its jurisdiction; (b) whether there was a fair trial; and (c) whether there was a prejudicial abuse of discretion. Cal. Code Civ. P. § 1094.5(b); *see also Frink*, 31 Cal. 3d at 172. Because the Decision in this case attempts to expand the Commissioner's jurisdiction by interpreting the Prorater Statutes in a manner that effectively dispenses with a significant limitation in the statute; and because there is no evidence

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[4] The Decision also provides that GCS was not subject to the Prorater Statutes because GCS does not negotiate debt and the Commission failed to establish a sufficient nexus between GCS and Petitioners "to impute culpability or engaged in activity that constitutes prorating." (Exhibit 142 at 9.)

establishing that Petitioners' activities fall within the plain meaning of the statute, all three grounds independently justify vacating the Decision, and this Court can and should vacate the Decision if it finds that the Decision violates any one of the enumerated grounds.

B. This Writ Must Be Granted Because The Commissioner Proceeded In Excess Of Its Jurisdiction

A writ of administrative mandamus must be granted when the agency proceeded in excess of its jurisdiction. Cal. Code Civ. P. § 1094.5(b). The Commissioner here proceeded in excess of its jurisdiction, because the Decision improperly interprets the Prorater Statutes in a way that falls outside the plain meaning of the Statutes. In effect, the Commissioner's interpretation impermissibly rewrote the Prorater Statutes to cover Petitioner's business activities.

1. *The Decision Improperly Interprets The Prorater Statutes*

Under California law, the basic principles of statutory construction dictate that in reviewing the meaning of a statute, the court must look to the words of the statute for guidance and give those words their usual, plain and ordinary meaning. *See Sounhein v. City of San Dimas*, 47 Cal. App. 4th 1181, 1188 (1996) (noting that statutory interpretation is guided by the "plain-meaning rule," such that words used in a statute should be given the meaning they bear in ordinary use. If the language is clear and unambiguous, there is neither a need for construction nor a need to resort to indicia of Legislative intent); *see also Ruiz v. Sylva*, 102 Cal. App. 4th 199, 209 (2002) (same); *Kerollis v. Dep't of Motor Vehicles*, 75 Cal. App. 4th 1299, 1304 (1999) (same); *People v. Pena*, 74 Cal. App. 4th 1078, 1082 (1999) (same).[5]

[5] Looking to legislative history in this case is not necessary because the Prorater Statute is clear that only a person who receives money or evidences thereof for the purpose of distributing money or evidences thereof in payment or partial payment of a debt falls within the definition of a "prorater." That said, it seems clear that the prorater statute was intended to address the concern that arises when a party is receiving money on behalf of a client with no regulatory oversight or assurance that the money will be properly handled. Of course that is not an issue in this case, because client money is held by a bank, RMBT, and administered by the bank's agent GCS.

A review of the Prorater Statutes clearly establishes that the NAS Petitioners are not "proraters." Financial Code § 12200 sets forth the prohibition against acting as a "prorater" without a license:

> No person shall engage in the business, for compensation, of selling checks, drafts, money orders, or other commercial paper serving the same purpose, or 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, nor shall any person, without direct compensation and not as an authorized agent for a utility company, accept money for the purpose of forwarding it to others in payment of utility bills, without first obtaining a license from the commissioner.

Cal. Fin. Code § 12200. Financial Code § 12002.1 defines the term "prorater" as follows:

> A prorater is 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.*

Id. § 12002.1 (emphasis added).[6]

The Prorater Statutes contain, *inter alia*, the following three requirements:

(a) To be a prorater, a person must receive money or evidences thereof; and

(b) The person must distribute the money or evidences thereof among creditors; and

(c) The distribution of money and evidences thereof must be in payment or partial payment of a debt or obligation.

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[6] The language of this provision is critical in that its focus is on "a person" engaging in the described prorating activity. It does not say, as the DOC urged in its closing brief, that the definition applies to a group of persons.

As the factual findings and legal conclusions in the Decision clearly illustrate, Petitioners do not handle the money that is to be used to pay client debt. For example, the Decision provides that "[e]ach NAS or Universal customer enters into a formal contract that provides the terms and payment schedule due respondents for services rendered. Consistent with these contracts, *respondents NAS, Universal, and Universal Nationwide receive no money from customers for the payment of debts owed by respondents' customers to their creditors.*" (Exhibit 142 ¶ 15.)

Similarly, the Decision states that,

> Upon full payment of enrollment fees, NAS or Universal personnel undertake the negotiation of customers' debt with their respective creditors. Rocky Mountain receives customer EFT deposits. Global facilitated the establishment of the EFT process between the parties. . . . Global imposes fees and charges, and directs EFT payments from Rocky Mountain bank customers to Global for its account management function. Global also facilitates EFT transfer to creditors of NAS or Universal customers from the customers' Rocky Mountain bank accounts.

(Exhibit 142 ¶ 18.)

In its legal discussion, the Decision once again states that "[a]dmittedly, respondents themselves do not receive client funds; however, they do receive evidence of such funds' deposits." (Exhibit 142 at 8.) The Decision repeats this statement, providing that "While they (NAS, Universal, or Universal Nationwide) do not directly receive money (a function reserved to Global) . . . ." (*Id.*)

It is beyond question that Petitioners do not receive client money for the purposes distributing such money to creditors in payment or partial payment of debt and thus, Petitioners do not fall within in the plain meaning of the Prorater Statutes.

To hold that Petitioners are proraters, the Commissioner had to literally change the meaning of the Prorater Statutes to account for the fact that Petitioners do not receive or distribute client funds. But California law clearly states that judges cannot rewrite statutes. Specifically, California C.C.P. § 1858 sets forth the general rule for construction of statutes as follows: "[i]n

the construction of a statute . . . , the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ." Cal. Code Civ. P. § 1858. California case law further supports the proposition that judges cannot rewrite statutes. *Cal. Ins. Guarantee Ass'n v. Workers Comp. Appeals Bd.*, 128 Cal. App. 4th 569, 574 (2005) (citation omitted) (in construing statutory provisions, a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language); *see also In re Elijah S.*, 125 Cal. App. 4th 1532, 1546 (2005) (same).

The critical portion of the Decision states as follows:

> The Financial Code admittedly does not define "receiving money or evidences thereof" or what constitutes "money or evidences thereof." It is nevertheless fundamental that a "receiving" can be either actual or constructive. Operating within respondents' business models, the evidence reveals that once some evidence of the deposit of client funds in Rocky Mountain is received, respondents commence the rendering services. Admittedly, respondents themselves do not receive client funds; however, they do receive evidence of such funds' deposits. While the Legislature has not defined "money or evidence thereof," such shortfall, if any, does not function to restrict the scope of complainant's focus.

(Exhibit 142 at 8.)

As the Decision acknowledges, there is no definition of "evidences of money," but it is nonetheless clear from the remaining language of the Prorater Statutes that "evidences of money" must refer to some alternative to cash because the "evidences of money" must be able to be distributed to creditors and such distribution must be in payment or partial payment of debt. The Decision correctly states that "evidences of money" is meant "to expand not diminish, the scope and extent of what constitutes 'money.'" But, this expansion cannot, as the Decision indicates, include receiving information that a deposit has been made in a bank account. Why? Because information that a deposit has been

made in a bank account cannot be distributed to a creditor in payment or partial payment of a debt. So while it may not be clear what constitutes "evidences of money," it is abundantly clear that it does not mean what the Commissioner thinks it means.[7]

In finding liability against the NAS Petitioners, not only did the Commissioner ignore its own factual findings, it rewrote the Prorater Statutes, specifically, the term "receiving money or evidences thereof." The Decision basically provides that if a person or entity has access to view customers' accounts and uses information learned from that viewing in negotiating consumers' debts, then that person/entity is a prorater. It is without question that the Commissioner rewrote the Statutes to justify its otherwise unsupportable Decision, and in so doing, it exceeded its jurisdiction.

2. *The Commissioner's Decision and Actions in this Case Violate Petitioners' Due Process Rights*

It is axiomatic that due process requires that, at a minimum, a party have reasonable notice of the consequences of their actions. *See In Re Cindy B.*, 192 Cal. App. 3d. 771, 783-84 (1987); *In re Michael D.*, 116 Cal. App. 3d 237, 244-45 (1981). In order to be constitutional, the notice must be adequate to protect the rights at stake. *See In re Michael D.*, 116 Cal. App. 3d at 245. The Commissioner is governed, in part, by the due process rights enunciated in the United States Constitution. *See Dole Bakersfield, Inc. v. Workers' Comp. Appeals Bd.*, 64 Cal. App. 4th 1273, 1276 (1998). Although the Commissioner is obligated to abide by these due process laws, it failed to do so in this case. Furthermore, the due process violations committed against the NAS Petitioners were prejudicial because they effected the NAS Petitioners' substantial rights.

The due process violation in this case take three forms: (1) the Commissioner failed to provide any notice in its First Statement or Amended First Statement that Petitioners' were violating the Prorater Statutes because they received information about client bank accounts; (2) as

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[7] Moreover, if the Prorater Statutes are so vague that no one knows what the critical portion of the statute means as it is applied to this case, then the Prorater Statutes must be unconstitutionally vague and therefore void. *See* discussion, *infra*, regarding the unconstitutionality of the Prorater Statutes as applied in this case.

is now evident by the Decision, the Prorater Statutes are unconstitutionally vague and therefore void; and (3) the Commissioner never publicly articulated its new interpretation of the Prorater Statute.

In this case, the Commission concocted its current interpretation of the Prorater Statutes so that it did not have to admit that it failed to establish the facts upon which its enforcement action was originally based.

At the initiation of this case, the Commissioner alleged in its First Statement and Amended First Statement that Petitioners either directly received and distributed funds or in affiliation with others received and distributed funds on behalf of their clients. The Commissioner could not prove or convince the ALJ that Petitioners received funds or that they were affiliated with GCS, despite dedicating almost the entirety of their closing briefs to these issues. Probably because it is an interpretation that has no support, at no time did the Commissioner provide notice to Petitioners or anyone else that having the ability to obtain information about a client's bank account balance constituted "receiving evidence of money."

In fact, the only publicly available decisions related to prorating activity in California suggest that absent the receiving and distribution of client funds, negotiating debt is not prorating. As extensively discussed in Petitioners' Closing Brief, *In the Matter of Positive Return, Inc.*, OAH N2004070225 (2004) ("*Positive Return*"), implies that if various services provided to clients are handled by multiple entities, a violation of the Prorater Law can only be found if the multiple entities constitute a single person, either via ownership or control.[8] So not only is the Decision inconsistent with the plain language of the Prorater Statutes, it is inconsistent with prior positions taken by the Commissioner.

While Petitioners' believe that a plain meaning of the Prorater Statutes language establishes that Petitioners' are not proraters, to the extent the Decision indicates otherwise, then

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[8] The Decision fails to address *Positive Return*.

the Prorater Statutes must be unconstitutionally vague. Enforcement of a unconstitutionally vague statute is also a violation of Petitioners' due process rights.

The underlying concern raised by a claim that a statute is unconstitutionally vague is "the core due process requirement of adequate *notice*." *Gallo v. Acuna*, 14 Cal. 4th 1090, 1115 (1997) (emphasis in original). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* As noted in *Gallo*,

> In its more recent application of the vagueness doctrine, the high court has also expressed a concern for the potential for arbitrary and discriminatory enforcement inherent in vague statutes. (*See, e.g., Smith v. Goguen* (1974) 415 U.S. 566 ...["We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the ;mot meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." (fn. omitted.)]

Id. at 1116.

Such is the problem in this case. The Prorater Statutes appear to be facially quite clear. If a person does not receive money or evidences thereof from a client and distribute that money or evidences thereof to a creditor in payment or partial payment of a debt, such person is not a prorater and need not be licensed by the state. Though not defined, it seems clear that "evidences thereof of" must refer to some equivalent of money because the distribution thereof must constitute a payment or partial payment of a debt. Receiving a bank statement or having access to account information simply cannot qualify. But if the lack of a definition in the Prorater Statute permits the Commissioner to arbitrarily and discriminately interpret the Prorater Statutes as it has in this case, then the Prorater Statutes are clearly unconstitutionally vague and therefore, unenforceable.

X. CONCLUSION

This case highlights all that is wrong with an administrative process that permits an enforcing agency to determine whether that agency's enforcement activities are proper. The Commissioner initiated its action against Petitioners believing they received money. The evidence established otherwise. The Commissioner initiated this action believing that Petitioners were affiliated with GCS and that together, these entities were prorators. The evidence established otherwise. The Commissioner initiated this action knowing that "receiving money or evidence thereof" meant receiving money or some money equivalent, like a check; but to justify its enforcement action against Petitioners, it has interpreted the Prorater Statutes in a way that no independent and disinterest person could and in doing so, trampled Petitioners' due process rights. This Court must vacate the Commissioner's Decision because it is plainly wrong and disregards all notions of due process.

WHEREFORE, the NAS Petitioners pray that this Court:

1. Issue a writ of mandamus or other appropriate order to the Commissioner at the Department of Corporations directing the Commissioner to vacate the Decision and to vacate the Desist and Refrain Order issued to Petitioners; and

2. For such other and further relief as the Court deems just and proper.

September 1, 2006

LOEB & LOEB LLP
MICHAEL L. MALLOW
MICHELLE M. SHARONI

By: _____
Attorneys for Petitioners
Nationwide Asset Services, Inc., Universal Nationwide, LLC and Universal Debt Reduction

VERIFICATION

I, Gary Brown, declare as follows:

I have read the foregoing Petition For Writ of Administrative Mandamus and know its contents.

I am an officer of Petitioners Nationwide Asset Services, Inc., Universal Nationwide LLC and Universal Debt Reduction, parties to this action, and am authorized to make this verification for and on their behalf, and I make this verification for that reason.

The matters stated in the foregoing document are true of my own knowledge.

Executed on August 31, 2006, at Victoria, British Columbia, Canada.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 31st day of August, 2006, at Victoria, British Columbia, Canada.

Gary Brown

In the Matter of: Nationwide Asset Services, Inc. v. The California Corporations Commissioner
Sacramento County Superior Court Case No.

SERVICE LIST

Preston DuFauchard
California Corporations Commissioner
California Department of Corporations
71 Stevenson Street, Suite 2100
San Francisco, CA 94105-2980
Telephone No.: 415/972-8559
Facsimile No.: 415/972-8550

Samantha Williams
Ralph Sharpe
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
Telephone No.: 202/344-8138
Facsimile No.: 202/344-8300

PROOF OF SERVICE BY PERSONAL SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am employed in the County of SAN FRANCISCO, State of California. I am over the age of 18 and not a party to the within action. My business address is 520 TOWNSEND STREET, SUITE D, San Francisco, California 94103

On SEPTEMBER 1, 2006, I served the within:

***PETITIONERS NATIONWIDE ASSET SERVICES, INC., UNIVERSAL NATIONWIDE, LLC AND UNIVERSAL DEBT REDUCTION REQUEST FOR JUDICIAL NOTICE FOR PETITIONERS' WRIT OF ADMINISTRATIVE MANDAMUS**

***PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS [CCP 1094.5]**

on the interested party(ies) in this action by personally delivering it in sealed envelope(s) to the offices of the person(s) listed below:

PRESTON DUFAUCHARD
CALIFORNIA CORPORATIONS COMMISSIONER
CALIFORNIA DEPARTMENT OF CORPORATIONS
71 STEVENSON STREET, SUITE 2100
SAN FRANCISCO, CA 94105-2980

Executed on SEPTEMBER 1, 2006, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Worldwide Network Inc.

(Type or print name) (Signature)