BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

| | | |
|---|---|---|
| In the Matter of Positive Return, Inc., et al., for an Administrative Hearing Pursuant to Financial Code Section 12103. | ) | OAH No. N2004070225 |

**DECISION**

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated September 21, 2004, is hereby adopted by the Department of Corporations ("Department") 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 first sentence of paragraph 2 on page 1 of the Proposed Decision, the word "Commissioner" is substituted for the word "commissioner".
(2) In the third sentence of paragraph 4 of the Factual Findings, on page 2 of the Proposed Decision, the phrase "on behalf of respondent" is deleted.
(3) In the first sentence of paragraph 5 of the Factual Findings, on page 2 of the Proposed Decision, the word "Commissioner" is substituted for the word "commissioner".
(4) In the third sentence of paragraph 5 of the Factual Findings, on page 2 of the Proposed Decision, the acronym "CSBPPL" is substituted for the acronym "CSSBPL".
(5) In the fourth sentence of paragraph 5 of the Factual Findings, on page 3 of the Proposed Decision, the word "Commissioner" is substituted for the word "commissioner".
(6) In the first sentence of paragraph 9 of the Factual Findings, on page 4 of the Proposed Decision, the year "2003" is substituted for the year "1993".
(7) In the first sentence of paragraph 9(a) of the Factual Findings, on page 5 of the Proposed Decision, a space is inserted between the word "Inc." and the phrase "(defined in the agreement as "CPA Firm").
(8) In the second sentence of paragraph 10(a)(1) of the Factual Findings, on page 6 of the Proposed Decision, the phrase "Acuity records at that time, but were recorded in the [respondent's] Quickbooks files" is substituted for the phrase "[respondent's] Quickbook files".

(9) In the first sentence of paragraph 10(a)(2) of the Factual Findings, on page 6 of the Proposed Decision, the word "trust" is inserted after the word "own" and before the word "accounts".

(10) In the first sentence of paragraph 5 of the Legal Conclusions, on page 9 of the Proposed Decision, the word "Commissioner" is substituted for the word "commissioner".

(11) In the first sentence of paragraph 6 of the Legal Conclusions, on page 9 of the Proposed Decision, the word "Commissioner" is substituted for the word "commissioner".

(12) In the fifth sentence of paragraph 6 of the Legal Conclusions, on page 10 of the Proposed Decision, the word "Commissioner" is substituted for the word "commissioner".

(13) In the first sentence of paragraph 7 of the Legal Conclusions, on page 10 of the Proposed Decision, the word "Commissioner" is substituted for the word "commissioner".

(14) In the second sentence of the Order, on page 10 of the Proposed Decision, the word "Corporations" is substituted for the phrase "Real Estate".

This Decision shall become effective on December 29, 2004.

IT IS SO ORDERED December 29, 2004.

WILLIAM P. WOOD
California Corporations Commissioner

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

| In the Matter of Positive Return, Inc., et al. for an Administrative Hearing Pursuant to Financial Code Section 12103. | OAH No. N2004070225 |
|---|---|

**PROPOSED DECISION**

Administrative Law Judge Victor D. Ryerson, State of California, Office of Administrative Hearings, heard this matter in Oakland, California on July 26 – 28, 2004.

Joan E. Kerst, Senior Corporations Counsel, represented complainant William P. Wood, Commissioner of Corporations (commissioner), Department of Corporations (Department), State of California.

Bruce Hurwitz, Attorney at Law, represented the respondent, Positive Return, Inc.

The record was left open following the hearing for submission of post hearing briefs. Briefs were filed by complainant and respondent on August 9, 2004, and were respectively marked and received as complainant's Exhibit 23 and Respondent's Exhibit Q. The record was closed and the matter was submitted on August 9, 2004.

FACTUAL FINDINGS

1. Department has jurisdiction over and regulates bill payers and proraters under the California Check Sellers, Bill Payers and Proraters Law (Fin. Code § 12000 *et seq.*) (CSBPPL).

2. Respondent, a California corporation, filed its Articles on April 25, 2001. It holds itself out to the public as being a professional financial management organization that offers a range of financial services, with a mission to help its clients "become financially strong as quickly, ethically, and intelligently as possible" through a Financial Wellness Program (or Package). Its target market is that of consumers who have overextended themselves with credit card debt. A significant number of its clients

are not native English speakers. Respondent is not licensed as a bill payer or prorater by the Department. Certain of its employees hold brokers' licenses issued by the Department of Real Estate.

The first step in respondent's program is to negotiate settlements of credit card accounts with the client's creditors on the client's behalf. In return for performing this service respondent receives various fees, as explained below. Respondent appears to have concentrated almost exclusively on this aspect of its activities since it started doing business. Respondent's respective business relationships with its clients and other participants in its debt settlement efforts are governed by a series of written agreements.

3. Under respondent's current procedures, funds furnished by a client to pay debt settlements and fees are sent directly to Acuity Financial Corporation (Acuity, unless otherwise required by context) to be held in trust in an interest free FDIC-insured account. Any client funds received by respondent from its clients are not deposited to respondent's account, but are forwarded to Acuity to be deposited in the trust account. Settlements with creditors are paid from funds held in trust by Acuity, as are fees payable to respondent and to Acuity itself pursuant to client retainer agreements. Acuity has no discretion to refuse to follow respondent's payment directions when a creditor account is settled, unless there are insufficient funds in the client's account to enable Acuity to comply. There is no evidence that Acuity is licensed by the Department. Its present relationships with respondent and respondent's affiliates are unclear from the record.

Since June 30, 2004, respondent has not accepted any new clients. It now refers potential clients to a new affiliate, Olive Tree Financial. However, respondent has been providing debt settlement services for clients of Olive Tree Financial since July 1, 2004.

4. Austin Greiner (Greiner) is president and CEO of respondent. He is not licensed by Department as a bill payer or prorater. Greiner testified on behalf of respondent at the hearing in this matter. Although the gravamen of his testimony was substantially consistent with Factual Finding 3, he was extremely evasive in answering questions about the history of respondent's operations. The credibility of his testimony is accordingly limited.

5. On May 28, 2004, Alan S. Weinger, Supervising Counsel, Enforcement and Legal Services Division of the Department, issued on behalf of the commissioner a Desist and Refrain Order pursuant to Corporations Code section 12103. The order was issued to respondent, and also to Acuity Financial Corporation, Acuity Financial Corp., AFC, Acuity Financial, Acuity, Greiner, Rocco J. Digilio, Gonzalo I. Vergara, Lavonne D. Hing and Randall Morgan Kilgore individually, in concert and/or in participation with others. It directed these persons to desist and refrain from engaging in business (collectively or individually) as a bill payer and prorater, as defined in the CSSBPL, unless and until licensed or exempt. Issuance of the order was based upon the opinion of

the commissioner that these persons had been engaging in such business without a license from the commissioner, and that the order was necessary, in the public interest, and for the protection of consumers.

6. By letter dated June 29, 2004, the respondent requested a hearing in response to the order. No other person to whom the order was directed made such a request.

7. A client signs a written Financial Wellness Agreement (Client Agreement) with respondent before receiving any services. The client's signature is generally obtained by a Debt Consultant, an independent contractor who receives compensation in the form of commissions. The Client Agreement sets forth various financial services that respondent offers, but the heart of the document is a series of provisions under the title, "Debt Management." These provisions govern the arrangement by which respondent undertakes the task of negotiating reduced payoffs to the client's creditors. As is required with respect to all provisions of the Client Agreement, the client must initial each provision of the Debt Management section to indicate his or her acceptance. The relevant provisions under this title are as follows:

a. Paragraph 1 creates a limited power of attorney. It collectively appoints respondent, its agents, and affiliates as attorney in fact to mediate, negotiate, and settle creditors' claims. In bold letters this provision states somewhat ambiguously, "THE SOLE PURPOSE OF THIS LIMITED POWER OF ATTORNEY IS FOR NEGOTIATING THE SETTLEMENT OF UNSECURED CREDITORS' CLAIMS AND FOR THE COMPLETE FINANCIAL ANALYSIS."

b. Under Paragraph 3 the client agrees (with minor exceptions) to put all non-secured consumer debt into the program.

c. Under Paragraph 4 the client agrees to pay as an administration fee an amount equal to eight percent of the unsecured debt to be settled, but not less than $500. This fee is refundable only during the first thirty days after the client is approved to participate in the program. In addition the client agrees to pay "earned fees," which are essentially contingent fees that become payable at the time a settlement is made. Although the agreement specifies that earned fees are 15 percent of the amount by which the debt is reduced, in practice respondent charges clients as much as 20 percent in certain instances.

d. Clients pay the fees in monthly installments under an arrangement whereby the fees are deducted from funds deposited by the client in the trust account described in Factual Finding 3 and below. Under this procedure clients pay respondent's administration fee before funds are accumulated in the account for paying the negotiated settlements.

Paragraph 6 states in part:

> After the first payment is made along with this contract, a trust account for the purposes of debt settlement will be established with a third party fiduciary or financial institution, in this case: Acuity Financial Corporation, a CPA firm. All payments will be placed in a trust account overseen by Acuity Financial Corporation. A trust account is an account for the purpose of receiving and distributing funds, to include [respondent's] fees.... To carry out these duties, I/we authorize Acuity Financial Corporation to open and establish a trust account in my/our name and to monitor the status of such accounts and make the necessary transfers at my/our direction.

Paragraph 7 further states in part:

> Acuity Financial Corporation will disperse [sic] funds for my/our debt settlements and [respondent's] fees from the custodial Trust account. Monies available in the account will be used for settlement purposes and payment of fees only. The Trust account being set up by Acuity Financial Corporation for me/us as [respondent's] clients is with an FDIC insured institution. The trust account is a non-interest bearing account as directed by California law.

8. After respondent assesses the client's monthly budgetary requirements and accepts the client for the program, the client deposits a stipulated sum into the account. Additional deposits of like amount are made monthly. This is generally accomplished by electronic funds transfer (EFT) from the client's personal bank account, but some clients opt to make these deposits by cashier's check or money order instead.

9. According to information supplied at the request of the Department by Greiner, the business arrangement between respondent and Acuity is set forth in the Trust Financial Services Agreement dated July 31, 1993, signed by Greiner and Randall Kilgore, CPA, Inc. (Trust Agreement), and also in a document titled "Memorandum of Agreement—February 12, 2004," signed on behalf of Acuity by Randall Kilgore on March 4, 2004, and by Greiner on behalf of respondent (MOU).

Randall Kilgore is a certified public accountant licensed to practice in California. He did not testify at the hearing.

a. The Trust Agreement provides that respondent agrees to utilize the services of Randall Kilgore, CPA, Inc.(defined in the agreement as "CPA Firm"), and

Randall Kilgore, an individual, for the purpose of providing trust account management services in connection with respondent's debt management activities. Acuity is not identified a party to the agreement or otherwise defined, but certain provisions contain references to Acuity. From these references it is inferable that Acuity is a corporate entity separate from CPA Firm.

b. Section 1 of the Trust Agreement contains various conditions of performance. Under subsection 1.3 CPA Firm must qualify under the rules governing proraters under the California Financial Code, and must maintain such qualification in good standing while performing under the agreement; failure to do so is cause for termination. Under subsection 1.5 CPA Firm must also become licensed in every state in which respondent does business if the state requires licensing.

Subsection 1.6 states in part, "CPA Firm agrees that Acuity will perform such services as are the subject of this agreement exclusively for [respondent]...." Subsection 1.7 states in part, "[respondent] agrees to transfer the shares of Acuity Financial Corporation (AFC) to CPA Firm...." In his testimony Greiner confirmed that this stock transfer was actually made, and explained that the consideration was satisfaction of a debt respondent owed to CPA Firm.

c. Section 2 of the Trust Agreement defines the scope of services to be performed by CPA Firm (or Acuity) as trust account manager in connection with respondent's performance of its duties as its respective clients' attorney in fact. Subsection 2.2 provides that CPA Firm will charge a monthly fee of $3.00 to each of respondent's clients ($4.00 to clients signing up after February 28, 2004) to cover the cost of EFT transactions. Subsection 2.3 provides that a client's funds are to be deposited in a trust fund controlled by CPA Firm, to be held in a non-interest bearing account established at an FDIC insured banking institution, and that an individual ledger account is to be kept for each client serviced by respondent and CPA Firm. Under directions provided by respondent, debt settlement funds and respondent's fees will be withdrawn from a client's trust account and sent to creditors and CPA Firm.

d. Section 3 of the Trust Agreement defines respondent's duties under the Trust Agreement. Subsection 3.2 makes respondent solely responsible for providing CPA Firm with instructions for activities in the trust accounts, and allows CPA Firm no discretion to make deductions from the trust accounts, other than its own automatic deduction for its monthly fees.

Subsection 3.4 states in part:

> [Respondent] shall direct all disbursements of [a client's] funds except as provided herein. [...] Neither CPA Firm nor Acuity nor Randall Kilgore shall owe a duty to

> examine the propriety of such directions, but shall act merely as a scribe in this regard.

e. Section 4 of the Trust Agreement sets forth the duties of CPA Firm. Subsection 4.8 requires CPA Firm to pay funds out of [clients'] trust accounts at the direction of respondent.

These provisions reflect relationships and procedures that are consistent with the descriptions by respondent's witnesses of respondent's debt management activities from early 2004 until it stopped accepting new clients in June 2004.

10. The MOU is prepared on Acuity's letterhead stationery. Certain language in this document dramatically indicates that the dealings between respondent, CPA Firm, Acuity, and respondent's clients were totally at variance with the procedures contemplated by the parties and reflected in the Trust Agreement. Portions of the MOU demonstrate that from July 31, 2003, at least until January, 2004, respondent was receiving funds from its clients, holding the funds in accounts it controlled, and disbursing settlement payments directly to creditors. Even after January respondent was maintaining direct control over client trust monies, both in one of its own accounts and in one in which Greiner had joint signature authority with Kilgore. The Trust Agreement consequently was (and may still be) a sham agreement.

Although Greiner admitted that respondent had owned Acuity and made direct disbursements to clients, he testified that this occurred for a period of only two or three weeks. By reason of the conflicting statements in the MOU, this testimony is not credible.

a. The first section of the MOU, "Review of Events," contains the following recitals:

> 1. The accounting firm of Randall Kilgore, CPA, has been attempting for the last five months to make order of the records that were prepared by Lavonne Hing [CPA Firm's predecessor] and that were presented to him last summer by [respondent] when he undertook this work.... He has yet to integrate many transactions that were not present in the [respondent's] Quickbook files.
>
> 2. [Respondent] retained all client trust funds in its own accounts until January. *It deposited and disbursed funds on behalf of clients, based on its calculations of account balances. Kilgore has operated ostensibly as Acuity, but has had no actual control of funds until January.* (Italics supplied.)

> 3. In January Positive Return transferred $200,000 to a new Acuity-owned trust account opened at Bank of the West, *with the signature authority of either Randall Kilgore or [Greiner.]* Since that time client funds have been deposited to and disbursed from this new account. [Respondent] has ordered nearly all of the disbursements from this account via check-by-phone, EFTs and physical checks *signed by [Greiner.]* The other client moneys, totaling about $2,000,000 still remain in trust accounts owned by [respondent.] (Italics supplied.)
>
> ***
>
> 7. Randy [Kilgore] is concerned that, since [respondent's] clients see Acuity, and by derivation Randy, as the trustee of their funds, *it is time that Acuity begin to act like a true trustee....* (Italics supplied.)

b. The second section of the MOU, "Measures to be taken," specifies, among other things, that,

> 1. All client moneys that ought to be in the control of Acuity are to be transferred to the Acuity Trust Account at Bank of the West....
>
> 2. [Respondent], its employees and agents are to desist *from making disbursements from the Acuity trust account....* (Italics supplied.)
>
> ***
>
> 6. The website that [respondent] has unilaterally devised for Acuity is to be shut down immediately....

11. On December 11, 2003, DiAun Burns, a Department investigator, sent Greiner a letter inquiring about various aspects of respondent's operations after the Department had received a number of complaints about respondent's customer service. Greiner did not respond until February 6, 2004, when he sent Burns an e-mail. Notwithstanding the state of affairs reflected in Factual Finding 10, Greiner expressly denied in his e-mail that respondent was in the business of receiving money (or evidences thereof) for the purpose of making distributions to clients' creditors. He further states that respondent "refers clients to a certified public accounting firm, Acuity, which is exempt from the requirements of a prorater's license...."

12. Although respondent for some time undertook to receive and disburse clients' funds to pay the settlements it negotiated, there is no evidence that any of its clients suffered economic harm because respondent did so. Respondent paid the settlements on behalf of the clients and only retained sums payable as fees under the terms of the Client Agreement.

13. Complainant attached the Declaration of Joan E. Kerst in Support of Commissioner's Request for and [sic] Costs to Exhibit 23, its posthearing brief. An attached spreadsheet provides an explanation of the type and amount of expenses complainant incurred to investigate and prosecute its case. These expenses include an estimate of $750.00 for ten hours of investigative services of DiAun Burns at a rate of $75.00 per hour and $7,972.97 for 71.5 hours of legal services (which are enumerated in detail) of Senior Corporations Counsel Joan E. Kerst at a rate of $111.51 per hour. These expenses are based upon information readily ascertainable by Ms. Kerst from internal Department records, and are reasonable in relation to the evidence adduced at the hearing. The estimated costs also include $3,975.00 for administrative law judge time and $522.00 for related expenses. These estimates are somewhat conjectural. The grand total of all estimated litigation and investigative costs is $13,219.97.

## LEGAL CONCLUSIONS

1. The persons other than respondent to whom complainant directed the Desist and Refrain Order dated May 28, 2004, have not requested a hearing. Accordingly, with respect to those persons the order remains in full force and effect.

2. Financial Code section 12200 prohibits any person from receiving money as agent of an obligor for the purpose of paying bills, invoices, or accounts of such obligor, or acting as a prorater. Financial Code section 12002.1 defines a prorater 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." There is no statutory definition of "bill payer," and that term is accordingly understood to have a meaning in the context of CSBPPL that is consistent with common English usage: one who pays bills on behalf of another.

3. By reason of Factual Findings 2 and 7 through 10, respondent violated Financial Code section 12200 from July 31, 2003, until sometime after January 2004, in that it engaged in the activities of a prorater and bill payer without being licensed to do so by the Department. Even if respondent thereafter transferred all client trust monies into accounts controlled by Acuity to which Greiner or respondent have no access, the Trust Agreement and other documents make it clear that respondent still retains control over both the negotiation of settlements and the disbursement of funds to pay them, and receives compensation for doing so.

Acuity's role, by contrast, is that of a mere "scribe." It receives its instructions from respondent, and not from the clients for whom it is holding funds. It has no discretion to refuse respondent's directions, except if there are insufficient funds to issue a payment as instructed. Acuity simply serves as respondent's agent; respondent continues to constructively receive and disburse funds in violation of Financial Code section 12200.

4. Respondent contends that when it and its trustee receive(d) and disburse(d) client funds in the course of their debt settlement activities, they are (or were) exempt from CSBPPL licensing requirements under Financial Code section 12100, subdivision g, which affords exemptions for both accountants and real estate brokers. However, the cited exemptions only apply to services performed in the course of those licensees' respective licensed activities. The activities in which respondent and its trustee have been engaged are neither the provision of accounting services nor anything related to real estate transactions. They involve only the negotiation and payment of consumer credit account bills. Respondent is not exempt from CSBPPL licensing under Financial Code section 12100 simply because persons involved in its work may hold other licenses.

5. Financial Code section 12103 provides that, whenever in the commissioner's opinion any person is violating any provision of the CSBPPL, the commissioner may order the person to desist and refrain from further violating the CSBPPL. Cause existed for the Commissioner to order respondent to desist and refrain from further violating section 12200 under Legal Conclusion 2. Although by the time the order was issued respondent may have transferred all client funds into Acuity's accounts and ceased to play any direct role in receiving and disbursing clients' funds, its indirect role still violates the CSBPPL.

In light of Greiner's past conduct and lack of candor at the hearing, cause also exists for maintaining the order. It remains necessary to ensure that consumers are adequately protected from harm that could occur if there is no regulatory oversight, and this can only be accomplished through the licensing process. Moreover, the implications of respondent's relationship with its new affiliate, Olive Tree Financial, are not clear. The entry of this new player raises a concern that respondent may have devised yet another stratagem to circumvent the Department's licensing requirements for engaging in debt management activities by shifting certain functions to the new entity.

6. Financial Code section 12105, subdivision (b), permits the commissioner to include in any action under the CSBPPL a claim for ancillary relief including, but not limited to, a claim for restitution or disgorgement of damages on behalf of the persons injured by the act or practice that are the subject matter of the action. Complainant requests ancillary relief in the form of restitution of the fees that were paid to respondent by certain clients who brought their situations to the Department's attention. However,

there is no proof that these clients were in any way harmed by the acts or practices of respondent for which it should have been licensed, and thus no grounds exist for awarding such ancillary relief. These clients received, or are receiving, services under the Client Agreement. To the extent that damages are claimed for respondent's alleged breach of that agreement, the commissioner is without jurisdiction to make an award.

7. Financial Code section 12105, subdivision (e), provides that in any action brought under the CSBPPL the commissioner is entitled to receive costs that, in the discretion of the administrative court, shall include an amount representing reasonable attorney's fees and any related expenses for services rendered. Complainant requests an award of $13,219.97 pursuant to this provision. Complainant should be awarded a total of $8,722.97, the reasonable cost of investigative and legal services in this matter.

The costs of administrative law judge services and the incidental expenses relating to the conduct of litigation are not ordinarily awarded in cases under the California Administrative Procedure Act, and the evidence of these costs in this record is conjectural to some degree. Although the standard is somewhat broader under Financial Code section 12105, subdivision (e), the amount of the award is left to the discretion of the administrative law judge. Accordingly, it is determined that any award beyond that for the cost of investigative and legal services should be denied.

ORDER

The Desist and Refrain Order issued by the Commissioner of Corporations on May 28, 2004, against respondent Positive Return, Inc., is affirmed.

Respondent Positive Return, Inc. shall pay the Commissioner of Real Estate costs in the amount of $8,722.97 within sixty (60) days of the effective date of this order.

DATED: September 21, 2004

VICTOR D. RYERSON
Administrative Law Judge
Office of Administrative Hearings