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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF
FINANCE, CONSUMER FINANCE BUREAU,

Complainant,

v.

WALL & ASSOCIATES, INC., A VIRGINIA
CORPORATION,

Respondent.

Docket No. 2019-9-10

**ORDER REGARDING
RESTITUTION AND PENALTIES**

This matter having come before the Hearing Officer on the Motion of Complainant (the Department) to impose penalties and order restitution following entry of the Order regarding the parties cross Motions for Summary Judgement the following decision is entered.

The Department seeks penalties pursuant to Idaho Code Section 26-2244 (2)(a) which provides for a maximum penalty of \$5,000.00 for each code violation.

The Department also seeks restitution based upon Idaho Code Section 26-2244(2)(b) and language which provides for the issuance of an order “restoring any person in interest any consideration that may have been acquired or transferred in violation of this act...”

Both parties acknowledge that under Idaho Code Section 26-2244(2) the ultimate imposition of an award of restitution and/ or penalties is a discretionary matter.

Turning first to the subject of penalties, based upon the prior determination that Wall

and Associates, Inc. has and is engaging in conduct as a debt counselor without a license, in violation of Idaho Code Section 26-2223(1) and (7), and that Wall has engaged in fifty four (54) separate violations from 2011 to 2020. Respondent is ordered pursuant to Idaho Code Section 26-2244 (2)(a) to pay a civil penalty to the Department of Finance of \$3,000 per violation, for a total penalty amount of \$162,000.

Next as to the award of potential restitution, both parties have presented numerous materials regarding the activities of Respondent as concerns the fifty four Idaho clients. Respondent performed services for these clients from the time period of 2011 through 2019.

The Department has presented in its arguments several calculation methods for a potential restitution recovery. The first is the simplest method, which is a straight return of all fees expended by all fifty four Idaho clients of Respondent. As part of this argument the Department's focus is upon the underlying failure of Respondent to follow the directions of the Department and obtain licensing when requested and the continuation of unlicensed activities known to be in violation of the registration requirements. The Department asserts that a full restitution of all sums paid is therefore warranted. This amount is calculated at \$661,339.00. Exhibit 1, Declaration of Counsel for the Department.

The second calculation method advanced by the Department is an alternate method which attempts to limit the restitution award to those Idaho clients who failed to receive, as asserted by the Department, a financial benefit from the services provided by Respondent. The Department contends that the examination of client file materials produced, reveal only eight of the fifty four Idaho clients received a benefit as a result of engaging the services of Respondent. This sum is then calculated at \$576,681.00. Exhibit 1, Declaration of Counsel for the Department; *See also*, Exhibit P to Stipulated Facts.

A third alternate calculation method presented by the Department is based upon the language of Idaho Code Section 26-2229(3)(b) which provides a fee limitation for charges made by debt counselors. This section limits charges which may be imposed for services to 20% of the amount of a client's debt and a 50% refund requirement in the event of contract cancellation. These percentage amounts are advanced by the Department as a means to calculate partial restitution sums for certain groupings of clients based upon their underlying tax obligations when they entered into contracts with Respondent or for clients who received no settlement of their debts through the services of Respondent.

An initial matter raised by the Respondent concerns the potential application of a statute of limitations for any consideration of penalties to be imposed. Respondent asserts that pursuant to Idaho Code Section 5-218 a three year statute of limitation applies in this matter and that as a result any penalty calculation must use this time period as a cut off for any restitution sought. This argument is, however, refuted by the decision of *Beale v. State Dept of Labor*, 139 Idaho 356, 79 P.3d 715 (Idaho 2003) which determined that the application of Idaho Code Section 5-218 concerns a "civil action" which is limited to "proceedings commenced in a court of law" *Id* at 359, 79 P.3d at 718. The subject administrative action would therefore not be within the scope of Idaho Code Section 5-218. *See also Yesco v. State, ex rel., Winder*, 25 P.3d 117, 135 Idaho 804 (2001).

Respondent has further countered the restitution arguments of the Department with claims addressing both problems in the methodology of the restitution amount calculation as well as the underlying question of whether the requested award is unconstitutionally excessive and impermissible as a violation of the Eight Amendment. Further, Respondent notes that it was denied the capability to present certain defenses in this action, those raising constitutional

questions, as the scope of the Hearing Officer's authority under IDAPA 04.11.01.415 prohibited consideration of those matters. This denial of the opportunity to present a complete defense is advanced as grounds to refrain from granting the requested relief.

Respondent also, as part of what is interpreted as a form of exculpatory argument, notes that the course of proceedings by the Department against Respondent occurred over an extended time frame, one argued to be created by the Department, and one which should be considered in any potential restitution calculation. To that end it is emphasized that the Department initially contacted the Respondent regarding the issue of licensing in 2011. Exhibits 57 and 58, P. Mark Yates Response Declaration. At that time the Department notified Respondent of the conclusion of the Department that Respondent was required to obtain licensing. An exchange of correspondence between the parties continued for several months into 2012. The Department apparently ceased its efforts at that time and not until later in 2019 did the Department subsequently commence the current action.

Respondent argues in part, that the Department should not at present be granted the request for restitution as the Department failed during the time from 2012 until the present action was filed, to issue a formal cease and desist order and thereby allowed Respondent to continue with actions the Department now claims to warrant the imposition of penalties. In essence, that the delay in seeking ultimate enforcement, allowed Respondent, unprotected, to continue acts for a time period of approximately seven years. While not being claimed as a form of estoppel, Respondent is asserting that it should not be now penalized for activities which the Department could have sought to stop at an earlier date. Respondent contends this form of punishment is not consistent with the purpose of regulatory enforcement which should instead be directed towards compliance and avoidance of future misconduct not punishment for past acts.

Respondent also presents numerous arguments regarding the difficulties in adopting the Department's restitution calculations. For reasons expressed below, several of these have merit.

As argued throughout these proceedings, the activities of Respondent are, even though as determined by the Hearing Officer to be within the scope of licensing requirements of a "debt counselor", multi faceted, especially when a review is undertaken of the client file materials submitted in this matter. Exhibits 2-55, Declaration of Counsel for the Department; Exhibits 1-156, Declaration of P. Mark Yates in Opposition. The activities of Respondent vary dependent upon the client's tax situation and status of any collection and/or enforcement proceedings. This becomes important when considering the underlying basis for calculating an amount to award with the remedy of restitution.

A decision cited by Respondent is noteworthy, *State ex rel. Kidwell v. Master Distributors, Inc.*, 101 Idaho 447, 615 P.2d 116, (Idaho 1980) considered a restitution award under the Idaho Consumer Protection Act, and indicated that the discretion to award restitutionary relief should be exercised with a view toward the purposes of the subject act and be remedial and not a penalty assessment. *Id* at 456, 615 P. 2d at 124. The purpose with the subject Act while not identical to that of the Consumer Protection Act is similar, and is directed at least in part to "correct certain abusive practices..." (Statement of Legislative Purpose 1990) and is also viewed broadly to protect the public. Deterrence is also an important concern as well as an attempt to restore, if possible, the status quo between the parties which existed prior to the improper acts. *See, e.g. Kidwell* at 456, 615 P. 2d at 124.

Respondent also advances a key concern with an award of restitution, which is that of the question of unjust enrichment with an award of a full return of all monies paid by the Idaho clients. That is if, as argued by the Department, all fees incurred are ordered to be repaid, would

not those clients who hired Respondent, and received the benefits of the services of Respondent, obtain an improper windfall should all of their paid fees be returned to them? Respondent argues that the “status quo ante” expressed by the Court in the cited case *Kidwell* also supports this concern.

Respondent also notes that the Idaho Supreme Court has recognized that an award of restitution under certain circumstances must reflect and offset expenses incurred by a party. *See, e.g. Agstar Fin. Servs., ACA v. Nw. Sand & Gravel, Inc.*, 168 Idaho 358, 483 P.3d 415 (2021) (consideration of the Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011).) This decision though, upon review is based upon principles in part derived from sections of the Restatement (Third) of Restitution and Unjust Enrichment, Numbers 18 and 65, which do not apply in this matter being restitution of a type different from that at issue.

More directly applicable is Section 51 of the Restatement (Third) of Restitution and Unjust Enrichment, pertaining to Enrichment by Misconduct. While the application of that section has not been found to be the subject of an Idaho State appellate decision, the language of this section is instructive for guidance. Of note is that remedies under this type of restitution are focused upon disgorgement of profits realized by the wrongdoer. On this issue a Ninth Circuit decision interpreting the scope of restitution under the Idaho Consumer Protection Act, *Edmark Auto, Inc. v. Zurich American Insurance Company* (US Dst Ct Ninth Circuit, 2020) 2020 WL 127979, determined that such disgorgement was within restitution as provided under that Act.

Under this Section, and comments thereto, the calculation of profits is noted as net rather than gross. This would allow an offset for expenses incurred. Further language of the Section also notes in the calculation of net profits, the consideration of other factors, *e.g.* credits,

deductions, apportionment, etc. in the calculation. This goes to the concern of the issue of benefits conferred to the Idaho clients of Respondent.

When considered as grounds for a potential offset of an award of restitution, a clear difficulty exists in making any such calculation with a mathematical certainty. Initially the very question of what those benefits are arises. The Department argues that a basic determination of what ultimate tax relief was obtained by a client is an easy means to designate which client received any “benefit” from Respondent’s services. Respondent, however, argues that this method is not appropriate as client services are alleged to provide instead a diverse range of potential benefits, some not always capable of simple financial calculation. As indicated, in the arena of tax liability, forgiveness or negotiation of the amount owed is not the only relief potentially obtained. A few examples being levy relief, timing of refunds, discharge of liens, collection timing modification, lien subordination, temporary cessation of collection actions, etc.. Declaration of P. Mark Yates in Opposition. Also certain Idaho clients did not apparently engage Respondent for the purpose of tax liability reduction but instead other tax related matters. *e.g.* Exhibits 3 and 40, Declaration of Counsel for the Department.

Of additional concern is the difficulty of accurately determining even in those matters where a reduction of the tax obligation was accomplished, the potential relative nature of the benefit obtained. This in light of the disparate circumstances of each client and the wide distinction in results, that is tax savings percentages, when compared to initial underlying liabilities. Further compounding this difficulty is the comparison of fees imposed to that of the underlying liability. Certain clients paid large fees relative to the underlying liability, *e.g.* Exhibits 14, 25, 30, 31, 35 and 54, Declaration of Counsel for the Department. Some as a result

of protracted activities, *e. g.* Exhibits 35 and 54, some not, *e. g.* Exhibits 25 and 38, Declaration of Counsel for the Department

Respondent also argues that consideration of the impact of awarding restitution for clients which still have pending files with Respondent should also be made. Respondent asserts that characterizing these clients as not having received benefits is improper as the ultimate nature of relief to be provided to them is indeterminate. It is argued that the ongoing status of their files preclude a determination that no benefit to them has been conferred. In turn it would be inappropriate to conclude they have not received benefits from services still being rendered and not yet finished. Next, Respondent contends that the Department seeks restitution and penalties for actions undertaken on behalf of certain clients which are not within the scope of the alleged violations. That is not all of Respondents activities concerned services which constitute “debt” counseling for a client and should therefore be excluded from any damage calculation.

All of these matters figure into the calculation of what if any restitution to award. An examination of the extensive client file materials produced, Exhibits 2-55, Declaration of Counsel for the Department; Exhibits 1-156, Declaration of P. Mark Yates in Opposition, and the consideration of the course of events giving rise to this action lead this Hearing Officer to find and conclude that a full return of all funds paid by all of the Idaho clients would not be an appropriate equitable form of relief and not a return to the status quo as intended by the language of the restitution allowance under Idaho Code Section 26-2244(2)(b). Nevertheless, the goal of repaying the consideration advanced by these clients as a result of Respondent’s improper acts is served by the repayment of a portion of such consideration for those clients who after review are determined to have received benefits from the services performed by Respondent. As a result in part, of the difficulties in calculating any benefit offsets in terms of a dollar amount, it is instead

the opinion of this Hearing Officer that consideration of the restoration of the status quo and disgorgement of profits is best served by an allowance of a percentage reduction in the award provided.

The award of restitution made here also takes into consideration Respondent's arguments that it is inappropriate to award a return of fees to a present client for whom services have not yet been concluded. The ongoing nature of the work for the client does not diminish, however, the fact that such activity is in violation of the subject registration requirements. It would also not be appropriate to award restitution solely based upon the status of file termination in light of the goal of deterrence with such an award.

In the calculation method to be used here, first, while Respondent asserts an entitlement to offset client expenses incurred, the record submitted does not contain an adequate showing to establish what those amounts in fact are. However, with the exception of a select number of Idaho clients, as the entire client fees are not being awarded, this amount, that of underlying expenses and their calculation, is an issue which is therefore moot.

Next, as to the offset for benefits conferred to clients, the following determination is made. Certain Idaho clients can be found to have not received any appreciable benefit from Respondent's services. These clients, described by Client number on Exhibit 1 from that of Declaration of Counsel in Support of Complainant's Memorandum of Restitution and Penalties, shall be awarded as restitution a full return of all the fees paid to Respondent. To the extent that Respondent has failed to substantiate what costs were incurred with these clients and potentially offset from the amount of restitution, such costs shall not be subtracted from these restitutionary awards.

These clients are, Client 9, Carpenter, Lynn; Client 14, Farris, Roger; Client 16, Fuller, William; Client 21, Gary, Scott; Client 23, Hernandez, Maria; Client 33, McAchran, Veronica & Aaron; Client 39, Pierce, Misty; Client 47, Stanford, Roy; Client 48, Stropkai, Alan; Client 51, Van Leuven, Shane. The amounts of such fees to be returned shall be subject to calculation following the submission of a true and accurate statement by Respondent of such fees paid by these clients.

The remaining Idaho clients, it being determined that they have received benefits from services rendered and which are subject to offset in a restitution calculation, are upon consideration of matters discussed above, awarded restitution in the amount of Seventy Five percent (75%) of total fees paid by the remaining Idaho clients as noted on Exhibit 1 from that of Declaration of Counsel in Support of Complainant's Memorandum of Restitution and Penalties.

These clients are: Client 1, Alonzo, Sylvia and Ramon; Client 2 Ames, Dawnett; Client 3, Ball, Barbara; Client 4, Ball, Tim; Client 4 Bicandi, Candice; Client 6, Brito, Nick; Client 7, Brumbach, Kim; Client 8, Burkett, Leon; Client 10 Clark, Brian, Lance, Densie; Client 11, Colson, Steve; Client 12, Crowley, Melissa; Client 13, Elder, frank; Client 15, Fraser, Richard and Jennifer; Client 17, Galan, Mary and Joe; Client 18 Genther, Tenna; Client 19, Goodsen, Michael; Client 20, Gray, Michael; Client 22, Hamblin, Matthew; Client 24, Hoggatt, Lynda; Client 25, Hyde, Ronald; Client 26, Johnson(Superior Chain); Client 27, Johnson, Thomas; Client 28, Kiser, Glenn; Client 29, Kisman, Ruth; Client 30, Kroshus, James; Client 31, Landry, Conrad; Client 32, Maciosek (Oct Country); Client 34, Miller, Jennifer; Client 35, Moncarr, Mark; Client 36, Moore, Ezra; Client 37, Nord, Darin; Client 38, Novak, scott; Client 40, Porr, Evander; Client 41, Rich, Penny; Client 42, Ridinger, Tim; Client 43, Shrposhire, Brett; Client 44, Skinner, Evan; Client 45, Smith, Danny; Client 46, Smith, Dwight; Client 49, Taylor, Clay

and Marcene; Client 50, trotter, Richard; Client 52, Villasenor, Rogelio; Client 53, Wren, Gregory; Client 54, Wright, Gerald. The amounts of such fees to be returned shall be subject to calculation following the submission of a true and accurate statement by Respondent of such fees paid by these clients.

It is recognized that a restitution award of this amount does not, from the perspective of the client provide a full dollar return of all consideration paid, but any such award to accomplish the goals with such a remedy must acknowledge that a full dollar return would allow the clients to receive benefits at no cost. This also is not permissible.

IT IS HEREBY ORDERED that the Complainant's Motion for Damages and Penalties is **GRANTED**.

IT IS HEREBY FURTHER ORDERED:

1. That the Complainant, the Department, within 14 days, submit a proposed Order providing for an award consistent with the above decision and order containing as follows:
 - (a) an award of penalties in an amount of \$3,000.00 for each of fifty four (54) separate violations of Idaho Code Section 26-2223(1) and (7);
 - (b) an award of restitution of all fees paid by certain Idaho clients of Respondent, those being; Client 9, Carpenter, Lynn; Client 14, Farris, Roger; Client 16, Fuller, William; Client 21, Gary, Scott; Client 23, Hernandez, Maria; Client 33, McAchran, Veronica & Aaron; Client 39, Pierce, Misty; Client 47, Stanford, Roy; Client 48, Stropkai, Alan; Client 51, Van Leuven, Shane;
 - (c) an award of restitution for the remaining 44 Idaho clients of Respondent in an amount of of Seventy Five percent (75%) of total fees paid by each not previously named Idaho client;

These clients are: Client 1, Alonzo, Sylvia and Ramon; Client 2 Ames, Dawnett; Client 3, Ball, Barbara; Client 4, Ball, Tim; Client 4 Bicandi, Candice; Client 6, Brito, Nick; Client 7, Brumbach, Kim; Client 8, Burkett, Leon; Client 10 Clark, Brian, Lance, Densie; Client 11, Colson, Steve; Client 12, Crowley, Melissa; Client 13, Elder, frank; Client 15, Fraser, Richard and Jennifer; Client 17, Galan, Mary and Joe; Client 18 Genther, Tenna; Client 19, Goodsen, Michael; Client 20, Gray, Michael; Client 22, Hamblin, Matthew; Client 24, Hoggatt, Lynda; Client 25, Hyde, Ronald; Client 26, Johnson(Superior Chain); Client 27, Johnson, Thomas; Client 28, Kiser, Glenn; Client 29, Kisman, Ruth; Client 30, Kroshus, James; Client 31, Landry, Conrad; Client 32, Maciosek (Oct Country); Client 34, Miller, Jennifer; Client 35, Moncarr, Mark; Client 36, Moore, Ezra; Client 37, Nord, Darin; Client 38, Novak, scott; Client 40, Porr, Evander; Client 41, Rich, Penny; Client 42, Ridinger, Tim; Client 43, Shrposhire, Brett; Client 44, Skinner, Evan; Client 45, Smith, Danny; Client 46, Smith, Dwight; Client 49, Taylor, Clay and Marcene; Client 50, trotter, Richard; Client 52, Villasenor, Rogelio; Client 53, Wren, Gregory; Client 54, Wright, Gerald.

(d) the manner and method of calculating and making such restitution payments including notification procedures;

(e) an award of the actual cost of the Department's investigation and the actual cost of this administrative proceeding, pursuant to Idaho Code Section 30-14-604(e) and/or Idaho Code Section 12-117.

Following submission of this proposed order the Hearing Officer shall issue a further Order consistent with the above determination.

2. In the event of a filing of a Motion for Reconsideration of this Interlocutory Order, the timeline for such filing shall be extended until the resolution of such Motion for Reconsideration;

3. That this decision and Interlocutory Order shall at present remain confidential and not open and available to the public.

NOTIFICATION OF RIGHTS

This is an Interlocutory order of the Hearing Officer. Any party may file a motion for reconsideration of this order with the Hearing Officer within fourteen (14) days of the service date of this order.

DATED this 4th day of January, 2022.

By: David V. Nielsen
David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2022, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

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State of Idaho
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