

**FILED**  
APR - 7 2008  
DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

*Lawrence B. Owen*

\* \* \* \* \*

In the Matter of the Accusation of )	No. H-34255 LA
)	L-2007090482
JEFFREY OWEN BLACK and )	
DANA LYNN POTTER, )	
)	
)	
)	
Respondent(s) )	
)	

DECISION

The Proposed Decision dated February 29, 2008, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

Pursuant to Section 11517(c)(2) of the Government Code, the following correction is made to the Proposed Decision:

Page 10, Footnote 6, "The one-day" is amended to read "The one-year".

This Decision shall become effective at 12 o'clock  
noon on APR 28 2008.

IT IS SO ORDERED 4-3-08.

JEFF DAVI  
Real Estate Commissioner

*Barbara J. Bigby*

BY: Barbara J. Bigby  
Chief Deputy Commissioner

**BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA**

**In the Matter of the Accusation of:**

**JEFFREY OWEN BLACK and  
DANA LYNN POTTER,**

**Respondents.**

**Case No. H-34255 LA**

**OAH No. L2007090482**

**PROPOSED DECISION**

This matter came on regularly for hearing on December 19 and 20, 2007, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Robin Trujillo (Complainant) was represented by Martha J. Rosett, Staff Counsel.

Jeffrey Owen Black (Mr. Black) and Dana Lynn Potter (Mr. Potter) (collectively Respondents) were present and were represented by Stephen A. Diguissepe, Attorney at Law.

Oral and documentary evidence was received. The record was held open through February 8, 2008, for the parties to submit closing briefs in accordance with a specified briefing schedule. The briefs were timely received. "Complainant's Closing Argument" was marked as Complainant's Exhibit 17 for identification. "Respondents' Closing Argument" was marked as Respondents' Exhibit R28 for identification. "Respondents' Exhibit 'A' to Closing Argument" was marked as Respondents' Exhibit R29 for identification. "Complainant's Reply to Respondents' Closing" was marked as Complainant's Exhibit 18 for identification.

On February 8, 2008, the record was closed, and the matter was deemed submitted for decision.

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In this case, Complainant alleges that Respondents, and/or each of them, violated certain statutes relating to the practice of real estate in California (1) by claiming or receiving illegal fees in connection with a Participation Agreement to provide title reinsurance on title insurance policies written for their real estate clients, (2) by taking secret or undisclosed compensation, commission or profit through their failure to disclose to their clients their relationship with the carriers for which they were providing reinsurance, and (3) by creating a corporation to circumvent the real estate laws and hide illegal compensation. Specifically, Complainant alleges violations of Business and Professions Code sections 10176, subdivision (g), 10177, subdivisions (d), (g) and (j), and 10177.4.

### FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. The Accusation was made by Robin Trujillo, who is a Deputy Real Estate Commissioner of the State of California, acting in her official capacity.
2. On December 13, 1985, the Department of Real Estate (Department) issued a corporate real estate broker license to Pinnacle Estate Properties, Inc. (Pinnacle). The license was in full force and effect at all relevant times.
3. In 1979, the Department issued a real estate salesperson license to Respondent Black. Mr. Black was licensed by the Department as a real estate broker in approximately July 1986. Since 1986, Mr. Black has also been licensed by the Department as the broker-officer of Pinnacle. He was so licensed at all relevant times. Mr. Black's real estate broker license will expire on July 10, 2010, unless renewed. His officer license will expire on December 12, 2009, unless renewed.
4. In 1993, Mr. Black's broker and officer licenses were suspended for five days. The suspension was stayed subject to various terms and conditions. Neither the terms and conditions nor the reason(s) for the suspension was disclosed by the evidence.
5. In approximately December 1977, the Department issued a real estate salesperson license to Respondent Potter. The license was in full force and effect at all relevant times. It will expire on June 12, 2010, unless renewed.

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6. Respondents are, and have been, the sole owners of Pinnacle, having founded it in 1985. Pinnacle now has seven locations and employs 628 salespersons. In 2006, Pinnacle's gross income was approximately \$28,000,000. Respondents also own two escrow companies, which are licensed by the California Department of Corporations. One of those companies (Pinnacle Escrow) is a division of Pinnacle and serves only Pinnacle's clients. The other company, Ridgegate Escrow, is an independent company and is not so limited.

7. At all relevant times, Respondents carefully divided their labor. As responsible broker and Chief Financial Officer, Mr. Black oversaw sales, escrow operations and contracts, as well as certain legal aspects of the businesses. Mr. Potter operated a training program involving over 40 classes, set up office meetings for each of the seven offices, and motivated and worked with the agents. Since they operate two escrow companies in addition to their real estate company, both Mr. Black and Mr. Potter are, and have been, very much aware of their obligations regarding disclosures to clients. Mr. Potter teaches a disclosure class to their employees.

8. Respondents' companies have done, and continue to do, business with a number of title insurance companies. One of the largest of those companies is Fidelity National Financial, Inc. (Fidelity). Fidelity operates several subsidiaries including Fidelity National Title, Chicago Title, TICOR Title, American Title Company, Security Union Title, Security Title, Alamo Title, National Title Insurance Company of New York, Inc., Fidelity National Information Services, and AIS Fidelity Information Services.

9. In approximately April 2004, Rod Gordy, Fidelity's sales director for Los Angeles County and part of Orange County, and another individual from Fidelity, approached Mr. Black with a proposal that Respondents (more specifically, one or more of Respondents' companies) act as reinsurers for title insurance policies written by Fidelity for Respondents' clients. In August 2004, Fidelity presented a Power Point demonstration to Respondents which explained the details of the proposed reinsurance plan. The Power Point demonstration referred to program participants generally, and did not specifically target Respondents.

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10. According to that Power Point demonstration, the objective of the plan was to “generate an ancillary revenue stream by the formation of a Sponsored Captive Reinsurance Company (SCRC).” The plan contemplated that, when Fidelity or any of its subsidiaries issued a title insurance policy to one of Pinnacle’s clients, FNF Title Reinsurance Company (FNF), another Fidelity subsidiary, would execute reinsurance treaties with Respondents who would assume a percentage of the risk in return for an equal percentage of the premium. Under the plan, FNF would create a separate account, referred to as a “protected cell,” which would insulate Respondents from losses incurred by other participating reinsurers. Those reinsurers would each have their own protected cells. To participate in the program, Respondents would have to pay Fidelity an annual Participant Fee of \$10,000, and they would be required to post an irrevocable letter of credit in the sum of \$25,000 to secure their obligations to Fidelity. In addition, Fidelity would deduct a \$350 administration fee from Respondents’ share of the premium on each issued policy. In the Power Point demonstration, FNF represented that its overall claims history for 2003 was 4.73 percent of the premium. FNF also recommended that participants obtain an “outside legal opinion about the Initiative and whatever consumer disclosures may be required.” According to the Power Point demonstration, FNF was licensed and in good standing with the Vermont Department of Insurance. FNF also represented that an SCRC was a “RESPA<sup>1</sup>] compliant vehicle created to allow participation in the profit or loss generated by reinsuring a portion of the title risks from transactions the participant has produced.”

11. Consistent with the division of labor Respondents had utilized through the years, Mr. Potter had little to do with the dealings involving Fidelity’s reinsurance offer. Mr. Black performed the vast majority of the work in that regard. Because of Fidelity’s size, stability and position in the industry, Mr. Black believed the program would be a safe one that would suit Respondents’ purposes of supplementing their companies’ income by branching into a related field. Neither Mr. Black nor Mr. Potter considered Fidelity’s reinsurance program to be a sham designed to provide illegal rebates or kickbacks.

12. Fidelity prepared a Participation Agreement and sent it to Respondents who, in turn, forwarded it to their attorney. On August 29, 2004, the attorney wrote to Mr. Black approving the Participation Agreement and opining as follows: “It is my assessment that the terms of the agreement adequately share the loss and benefits in an acceptable manner as between the parties and it is acceptable for execution.”

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<sup>1</sup> RESPA is the Real Estate Settlement Procedures Act, a federal Housing and Urban Development consumer protection statute which requires certain disclosures to clients and prohibits kickbacks that tend to increase settlement services costs to homebuyers.

13. On August 31, 2004, Respondents signed articles of incorporation for a new company, Southern California Title Solutions (SCTS).<sup>2</sup> The sole purpose of SCTS was to handle all reinsurance matters related to the Participation Agreement with Fidelity as well as any other reinsurance agreements into which Respondents might enter. Respondents were the only shareholders in SCTS. They formed the corporation because they were concerned that any loss for which they might become liable under the Participation Agreement could be a large one which could detrimentally affect Pinnacle's financial well-being. Rather than take that risk, they chose to funnel all reinsurance-related assets and liabilities through the new company.

-14. On September 1, 2004, Respondents signed the Participation Agreement according to which they agreed to accept 15 percent of the liability for all claims on policies subject to the agreement in exchange for receipt of 15 percent of the premiums on those policies. The Participation Agreement contained the following provisions which are germane to the issues in this case:

**Section 4. Funding of and Charges to the Protected Cell.** On a monthly basis or such other basis as determined by the Company in its discretion, but no less frequently than annually, the Company will: (i) allocate an amount equal to the Assumed Premium allocable to the Risk to the Participant's Protected Cell, and (ii) pay Losses, Participant Expenses and the Participation Fee from the funds held in such Protected Cell.

[¶] . . . [¶]

**Section 7. Distribution to Participants.** Subject to the prior approval of the Commissioner [of the Vermont Department of Banking, Insurance, Securities and Health Care Administration], the Company will distribute assets from the Participant's Protected Cell to the Participant from time to time, but at least annually, as consideration for the Participant's indemnity obligations under Section 2 and duty to maintain reserves under Section 8. The Company will have complete discretion in the timing and amount of such distributions, but in no event will a distribution cause the value of the assets in the participant's Protected Cell to fall below the Protected Cell's required Reserves. Any distribution pursuant to this Section 7 will reduce the balance of assets allocated to the Participant's Protected Cell by the amount of such distribution.

[¶] . . . [¶]

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<sup>2</sup> SCTS was not, and was not required to be, licensed by the Department of Real Estate.

**Section 10. Regulatory Requirements.** The Participant hereby acknowledges and agrees to the following regulatory requirements:

[¶] . . . [¶]

(e) The Participant shall provide a satisfactory Affiliated Business Arrangement & Reinsurance disclosure statement to any consumer and/or purchaser for any transaction subject to this Agreement and the reinsurance arrangement described herein; and

(f) Participant shall make all consumer disclosures to those involved in the Sale as may be required under federal or state law.

15. Upon their execution of the Reinstatement Agreement, Respondents paid the first \$10,000 Participant Fee, and they obtained the required letter of credit, which was issued on October 1, 2004. FNF then began performing on the contract. When Respondents used Fidelity or any of its subsidiaries as the source of a title insurance policy, SCTS provided FNF with records concerning the transaction, and FNF credited SCTS with 15 percent of the policy's premium minus the \$350 administration fee. However, Respondents failed to disclose the reinsurance relationships between Pinnacle and SCTS, and between SCTS and FNF to any of their clients who received title insurance policies from Fidelity or any of its subsidiaries.

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16. According to Mr. Black's testimony at the administrative hearing, he asked his contact person at Fidelity, Rod Gordy, to have Fidelity provide him with the appropriate language for the disclosures that were to be made to Respondents' clients, but that Fidelity failed to do so. Mr. Black further testified that Respondents did not intend for the Reinsurance Agreement to go into effect until they received that information and were then able to make the proper disclosures. Mr. Potter testified in a similar manner. Respondents' testimony in that regard was not credible for the following reasons: (1) No writing or other corroborative evidence was offered to show that Mr. Black made such a request. (2) No writing or other corroborative evidence was offered to show that Mr. Black informed FNF that he did not want to commence performance on the Participant Agreement until he had obtained the necessary disclosure language. (3) FNF was not obligated in any way to provide such language. In fact, the language of section 10, subsection (e) of the Participation Agreement made it clear that it was the participant (i.e., SCTS) that was to provide the disclosure language. (4) According to the Power Point demonstration, each participant was urged to contact private counsel regarding the disclosures to be made. (5) Mr. Black had already paid the \$10,000 Participant Fee, applied for the \$25,000 letter of credit, and formed SCTS by the time he and Mr. Potter signed the Participation Agreement. Once Respondents signed it, nothing was left for FNF to do before commencing performance under the contract. (6) Respondents continued to use Fidelity and its subsidiaries for their title insurance needs after they executed the Participant Agreement. Had they desired to avoid commencement of the agreement, they could have used any of the several other title insurance companies they had regularly used for their title insurance needs.<sup>3</sup> (7) From the time the Participation Agreement was signed, SCTS provided FNF with records of the policies written by Fidelity and its subsidiaries. Although Mr. Black testified that he never sent FNF a billing statement or any type of request for compensation, it was unnecessary for him to do so. FNF performed its own bookkeeping and disbursed payments in accordance with the provisions of section 7 of the Participation Agreement. (8) The Participation Agreement is dated September 1, 2004. Nothing in that agreement or in any other document indicates a different commencement date, or that Mr. Black requested a different commencement date.

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<sup>3</sup> Mr. Black testified that, in 2004, Respondents did business with approximately two dozen title companies, most of which were underwritten by the two large companies, Fidelity and First American.



17. On November 22, 2004, Barton M. London, Senior Vice President and Assistant General Counsel of FNF, wrote to Mr. Black. According to that letter, Mr. London had received "inquiry letters" from agencies in Colorado, Washington and California which regulated the insurance industry in those states regarding "title insurer practices related to reinsurance covering one to four-family residential properties." Mr. London enclosed the three letters and wrote: "The purpose of this correspondence is to help keep you apprised of certain regulatory developments that could affect the reinsurance arrangement(s) between the FNF brands and your company."

18. At the administrative hearing, Mr. Black testified that, upon receipt of Mr. London's November 22, 2004 letter, he orally notified Rod Gordy that SCTS no longer wished to participate in Fidelity's title reinsurance program. However, Mr. Black did not issue any writing to that effect. In the absence of any corroborative evidence (i.e., a writing or Mr. Gordy's testimony<sup>4</sup>), Mr. Black's testimony in that regard is of questionable credibility. In any event, Mr. Black failed to comply with the provisions of Section 9 of the Participation Agreement which set forth the procedure by which either party could terminate the agreement. Among other things, section 9 required notice of termination to be in writing. Thus, the Participation Agreement remained in full force and effect.

19. In December 2004, Mr. Black received a cashier's check in the sum of \$8,059.49, made payable to Southern California Title Solutions, from FNF, as a cash distribution.<sup>5</sup> Mr. Black did not negotiate the check. Instead, he returned it to Mr. Gordy. Mr. Black testified that he returned the check to Mr. Gordy within a couple of days of receiving it, and that he made no writing concerning the check. His credibility in that regard is questionable in that the amount of the check was not credited back to FNF's account until August 9, 2006.

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<sup>4</sup> Mr. Black testified on the second day of the hearing that he had spoken with Mr. Gordy only the day before (December 19, 2007), and that he believed Mr. Gordy still managed the sales force for Los Angeles and Orange Counties, California. To the extent that Mr. Gordy was within the State's subpoena power, Respondents' failure to call him as a witness results in Mr. Black's testimony being viewed with distrust. (Evid. Code § 412.)

<sup>5</sup> Mr. Black testified that, at the time he received the cashier's check, he did not know its purpose. We now know that it was a cash disbursement from FNF, based on Complainant's Exhibit 9H, a document received from Fidelity in response to a subpoena. The document is entitled "FNF Title Reinsurance Company Broker Premium Assumed and Distributed Since Inception As of September 12, 2005." Although Respondents emphasized that Complainant's witness, Robin Trujillo, testified that she was unable to determine the document's meaning with certainty, the document is self-explanatory as to this issue. It indicates that a distribution of \$8,059.49 was made by check to "So. Cal Title."

20. On February 4, 2005, Fidelity's Vice-Chairman and Director, Frank P. Willey, wrote to Respondents advising them that Fidelity was terminating the Participation Agreement. Mr. Willey's letter stated in part:

As you are probably aware, captive title reinsurance agreements are being heavily criticized by many state insurance regulators as constituting illegal rebates. That appears to be the developing position of the National Association of Insurance Commissioner's Title Issues Working Group. Moreover, we have been advised by one state that it intends to impose fines on the parties to such captive reinsurance agreements, while another state has told us that in the near future it will be issuing cease and desist orders forbidding such agreements. We believe that there is regulatory exposure to FNF and to you which warrants the termination of such captive reinsurance agreements along with any ancillary agreements where applicable, such as participation agreements relating to sponsored reinsurance arrangements.

Consequently, please accept this letter as formal notice of termination of the Participation Agreement between FNF Title Reinsurance Company and Southern California Title Solutions dated September 1, 2004, pursuant to Section 9.2(a) of that agreement. The Reinsurance Agreement between the FNF Title Brands and FNF Reinsurance Company will also be terminated. Because the foregoing agreements provide for a 90 day notice of termination, the effective date of the termination is May 12, 2005. However, the agreement may also be terminated immediately with your consent. We believe that is in our best interest to do so and request your consent to terminate the agreement immediately. We will be contacting you shortly to discuss this matter.

21. On February 28, 2005, Mr. Willey signed a Termination Agreement according to which all reinsurance agreements were terminated as of February 18, 2005, and all participation agreements were terminated as of May 12, 2005.

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22. A Participation Rescission Agreement with an effective date of May 11, 2006,<sup>6</sup> was composed and signed by the parties. That agreement read in part:

**1.0 Cancellation and Rescission of Participation Agreement.**

(a) The Participation Agreement is hereby cancelled and rescinded, ab initio, which cancellation and rescission shall be effective as of the Effective Date.

(b) As of the Effective Date, neither party shall have any of the rights, liabilities or obligations originally established under the Participation Agreement. Their respective status shall be the same as if the Participation Agreement had never been executed.

**2.0 Mutual Payments; Release of Collateral.** The parties agree to take and/or acknowledge that they have already taken, the following actions in conjunction with, or prior to, the execution of this Agreement:

(a) The Company has returned to the Participant the sum of \$10,000, (the "Participation Fee") that was paid by Participant to the Company in conjunction with executing the Participation Agreement. Participant herein acknowledges that it has already received (prior to the execution of this Agreement) the foregoing \$10,000 Participation Fee.

(b) The Participant received no cash distributions from the Company. Therefore, there is no cash distribution for the Participant to return to the Company.

(c) The Company shall return to the Participant the irrevocable letter of credit in the amount of \$25,000 (the "Security" as defined in section 1.19 of the Participation Agreement) or otherwise cause such security to be cancelled and discharged.

(d) No amount shall be payable by either party to the other with respect to this Agreement, the Participation Agreement or the Participant's participation in the Company's sponsored captive insurance company other than as specified in this Section 2.

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<sup>6</sup> The one-~~day~~<sup>year</sup> difference in the effective dates referenced in the Termination Agreement and the Participation Rescission agreement was not explained.

23. In support of her allegation that Respondents violated Business and Professions Code section 10177.4 by claiming and/or accepting consideration, as compensation or inducement, for referring customers to a title insurer or underwritten title company, Complainant offered the testimony of Ramon Calderon, the Deputy Commissioner of the Financial Surveillance Branch of the California Department of Insurance. Mr. Calderon had been involved with, and had testified at, the Department of Insurance's investigatory hearing regarding captive reinsurance programs operated by title insurance companies.

24. Mr. Calderon testified that, after reviewing claims histories, it was determined that title insurance carries a very low loss ratio of approximately three to five percent, which constituted an insufficient transfer of the risk to the reinsurer. Therefore, it appeared to him that no reinsurance was necessary for title insurance policies, and that such policies did not qualify for reinsurance accounting. Instead, the Participation Agreement into which Respondents entered with FNF was a "virtual guaranteed revenue stream" for Respondents. He further testified that a reinsurance agreement that fails to serve the purpose of reinsurance constitutes an illegal rebate, and that is what occurred in this case.

25. On cross-examination, Mr. Calderon conceded that the manner in which transfer of risk is calculated is not formulaic, and that, by structuring the Participation Agreement as FNF did, and by FNF deducting the \$350 administration fee from the 15 percent premium SCTS was to receive, SCTS could have been accepting a higher proportion of the risk than indicated by the premium ratio. However, even in that situation, the transfer of risk, based on claims history, was insufficient to qualify for reinsurance accounting. The key to determining whether the risk transfer is sufficient to qualify as reinsurance is the amount of premium the ceding company is paying to the reinsurer versus the amount of risk assumed by the reinsurer.

26. Respondents countered Mr. Calderon's testimony with that of Jeffrey Arouh, an attorney practicing in New York, whose area of emphasis for the past 32 years has been in RESPA issues. Mr. Arouh lists Fidelity among his clients.

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27. Mr. Arouh approached the issue of whether the reinsurance premiums payable to SCTS constituted an illegal rebate from a quota share perspective rather than from a loss ratio perspective. He opined that, under the Participation Agreement, Respondents could not have received premiums in greater proportion than the risk they were assuming. Under the pro rata agreement, the risk was commensurate with the premium received and, in light of the administration fee deduction, was actually greater. Mr. Arouh further opined that recent loss history is misleading because a claim under a policy of title insurance usually arises when the home is sold, which can be 10 or 20 years after the policy is issued. Therefore, a determination of the legality of a reinsurance agreement based on loss history can change if a loss occurs years after the policy's issuance, since that loss changes the loss history figures. Claims history is only a factor in considering the legality of a reinsurance agreement. It is not dispositive.

28. Both approaches to the issue are deemed to have merit, and neither Mr. Calderon's nor Mr. Arouh's testimony was more convincing than the other's. However, because Complainant bore the burden of proving that Respondents violated Business and Professions Code section 10177.4, the fact that neither witness was more convincing establishes that Complainant failed to sustain her burden of proof on that issue.

### LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following Legal Conclusions:

**1. Cause does not exist to revoke or suspend the real estate broker and officer licenses of Respondent Jeffrey Owen Black pursuant to Business and Professions Code sections 10177.4 and 10177, subdivisions (d) and (g), for claiming, demanding or receiving commissions, fees or other consideration from a title insurance company for referral of customers to the title insurance company, as set forth in Findings 2 through 28, inclusive.**

**2. Cause does not exist to revoke or suspend the real estate salesperson license of Respondent Dana Lynn Potter pursuant to Business and Professions Code sections 10177.4 and 10177, subdivisions (d) and (g), for claiming, demanding or receiving commissions, fees or other consideration from a title insurance company for referral of customers to the title insurance company, as set forth in Findings 2 through 28, inclusive.**

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3. Business and Professions Code<sup>7</sup> section 10177.4 states in relevant part:

(a) Notwithstanding any other provision of law, the commissioner may, after hearing in accordance with this part relating to hearings, suspend or revoke the license of a real estate licensee who claims, demands, or receives a commission, fee, or other consideration, as compensation or inducement, for referral of customers to any escrow agent, structural pest control firm, home protection company, title insurer, controlled escrow company, or underwritten title company. . . .

(b) The term "other consideration" as used in this section does not include any of the following:

(1) Bona fide payments for goods or facilities actually furnished by a licensee or for services actually performed by a licensee, provided these payments are reasonably related to the value of the goods, facilities, or services furnished.

4. Respondents argue that, because Complainant failed to prove that they violated any insurance laws, they cannot be found to have violated any real estate laws in connection with their Participation Agreement with FNF and, further, because they returned the cashier's check to FNF, they cannot be found to have received any funds that would trigger a cause for discipline pursuant to section 10177.4. Respondents are wrong on both counts.

5. The laws alleged in the Accusation to have been violated apply to the practice of real estate in this State. Although some laws governing the practice of insurance may be relevant to a determination of one or more issues in this case, they do not control the determination of whether any real estate laws were violated. For example, a determination of whether bona fide payments to a licensee for services performed are reasonably related to the value of the services may be made by considering laws relating to the practice of insurance, or by any other means such as industry standards, etc. Further, as in this case, where a licensee may not be proven to have violated any insurance laws or section 10177.4, he/she may yet be found to have violated other real estate laws based on other criteria.

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<sup>7</sup> All further statutory references are to the Business and Professions Code unless otherwise indicated.

6. In this case, Respondents did receive consideration, the cashier's check, in connection with the Participation Agreement. What they did with the cashier's check after they received it is of no import, and the language of the Termination Agreement that SCTS received no cash distributions does not control. In addition, that language is inaccurate as evidenced by FNF's cashier's check and its own records. Further, by entering into the Participation Agreement, Respondents claimed 15 percent of the reinsurance premiums on all policies issued pursuant to the agreement. The true question with respect to section 10177.4 is not whether Respondents claimed and/or received consideration, but whether the consideration received constituted a bona fide payment for services that was reasonably related to the services' value. As more specifically set forth in Findings Nos. 23 through 28, Complainant failed to prove the affirmative on that issue.

7. Because Complainant failed to prove a violation of section 10177.4, Respondents cannot be found to have willfully disregarded or violated the Real Estate Law pursuant to section 10177, subdivision (d), or to have been negligent or incompetent pursuant to section 10177, subdivision (g), in connection with such a violation.

**8. Cause exists to revoke or suspend the real estate broker and officer licenses of Respondent Jeffrey Owen Black pursuant to Business and Professions Code sections 10176, subdivision (g), and 10177, subdivision (j), for claiming or taking a secret or undisclosed amount of compensation, commission or profit in relation to the referral of customers to FNF, as set forth in Findings 2 through 19, inclusive.**

**9. Cause exists to revoke or suspend the real estate salesperson license of Respondent Dana Lynn Potter pursuant to Business and Professions Code sections 10176, subdivision (g), and 10177, subdivision (j), for claiming or taking a secret or undisclosed amount of compensation, commission or profit in relation to the referral of customers to FNF, as set forth in Findings 2 through 19, inclusive.**

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10. Section 10176 states in pertinent part:

The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

[¶] . . . [¶]

(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of the licensee the full amount of the licensee's compensation, commission or profit under any agreement authorizing or employing the licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of the agreement, whether evidenced by documents in an escrow or by any other or different procedure.

11. Section 10177 states in relevant part:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

[¶] . . . [¶]

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

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12. As more fully set forth in Finding No. 16, above, Mr. Black's testimony that he did not consider the Participation Agreement to have gone into effect after it was signed was not credible for several reasons. Given that it was the participant's obligation to make the necessary disclosures to its customers, and since all other conditions precedent had been satisfied, Mr. Black had no reason to believe the agreement was not in effect. If he relied on FNF to provide the necessary disclosure language, he did so unreasonably and to the detriment of his clients who were left without information to which they were entitled.

13. However, the evidence did not establish that Respondents simply waited for FNF to provide the disclosure language, all the time believing that the Participation Agreement had not gone into effect. The only evidence in support of that position was Mr. Black's testimony which was belied by the following facts: (1) Respondents put nothing in writing requesting FNF to provide proper disclosure language. (2) Respondents put nothing in writing postponing the effective commencement date of the Participation Agreement. (3) There was nothing in the Participation Agreement or any other evidence to indicate that FNF was responsible for providing the proper disclosure language. (4) Both the Participation Agreement and the Power Point demonstration put Respondents on notice that they were responsible for the disclosure language. (5) No one from FNF, Fidelity, or Fidelity subsidiary carriers testified at the hearing to corroborate Respondents' claims, and Respondents offered no other evidence of corroboration. (6) After signing the Participation Agreement, Respondents did not limit their title insurance business to Great American and its subsidiaries, thus avoiding any risk that a disclosure could be missed. Instead, Respondents continued to give title insurance business to Fidelity and/or its subsidiaries and took no steps to stop FNF from performing on the contract. Further, in an industry as dependent on the written word as is the real estate industry, Respondents' failure to place anything in writing related to the need for disclosure language, or the Participation Agreement's commencement date, defies both logic and reason.

14. Based on their extensive experience in the escrow business, both respondents were fully aware of the necessity and importance of complete disclosure. Yet, they continued doing business with Fidelity and its subsidiaries, they continued to keep FNF apprised of all policies written by those entities, and they continued to deceive their clients. The failure of FNF to provide appropriate disclosure language to Respondents does not excuse Respondents' failure to make proper disclosures to their clients.

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15. Even if Respondents truly believed that the Participation Agreement had not gone into effect because FNF had not yet provided the disclosure language, they had constructive knowledge to the contrary. Constructive knowledge is determined by whether the individual charged with it has notice of facts sufficient to put a prudent man upon inquiry and if so, whether a reasonably conducted inquiry would have disclosed the true facts to him/her. (*Sime v. Malouf* (1949) 95 Cal.App.2d 82, 104.) In this case, Respondents knew that the agreement had been signed, that all conditions precedent had been satisfied, and that they were providing information to FNF that would be used to determine their compensation. They need only have checked with FNF to learn that the agreement was in effect.

16. Respondents' failure to disclose the relationship between FNF and Fidelity and/or its subsidiaries that wrote title insurance policies on property purchased by the clients, and their failure to disclose the relationship between SCTS and Pinnacle, and between SCTS and FNF, constitutes violations of sections 10176, subdivision (g) and 10177, subdivision (j).

**17. Cause does not exist to revoke or suspend the real estate broker and officer licenses of Respondent Jeffrey Owen Black pursuant to Business and Professions Code section 10177, subdivisions (i) and (j), for creating SCTS as a separate corporation, solely for the purpose of circumventing the real estate laws and hiding additional compensation received for referral of customers to title companies, as set forth in Findings 2 through 28, inclusive.**

**18. Cause does not exist to revoke or suspend the real estate salesperson license of Respondent Dana Lynn Potter pursuant to Business and Professions Code section 10177, subdivisions (i) and (j), for creating SCTS as a separate corporation, solely for the purpose of circumventing the real estate laws and hiding additional compensation received for referral of customers to title companies, as set forth in Findings 2 through 28, inclusive.**

19. Respondents created SCTS for a legitimate business purpose. They were concerned that losses arising out of claims against their reinsurance agreements with FNF could be substantial and could adversely affect Pinnacle's financial condition. They formed and incorporated SCTS as a shield against that eventuality. Complainant failed to prove any ignoble intent on Respondents' parts in connection with the allegations contained in paragraph 15 of the Accusation.

**20. Complainant sustained her burden of proof with respect to violations of sections 10176, subdivision (g) and 10177, subdivision (j), as referenced in Conclusions Nos. 8 through 16. Therefore, the issue of the proper discipline to be imposed is next addressed.**

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21. The purpose of a disciplinary action such as the one *sub judice* is not to punish the licensee, but to protect the public. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.) Both respondents in this case were involved in the matters that led to the filing of the Accusation. However, their individual involvement was disparate as should be their respective discipline. Because Mr. Potter was only peripherally involved, he shall be publicly reprovved. Because of Mr. Black's greater involvement and decision making, a brief probationary period under appropriate terms and conditions should ensure the public's safety, welfare and interest.

## ORDER

**WHEREFORE, THE FOLLOWING ORDER is hereby made:**

**As to Respondent Dana Lynn Potter:**

Respondent Dana Lynn Potter is hereby publicly reprovved under the provisions of Business and Professions Code section 495, for the conduct specified in Factual Findings 2 through 19 and Legal Conclusions 9 through 16.

**As to Respondent Jeffrey Owen Black:**

1. All licenses and licensing rights of Respondent Jeffrey Owen Black under the Real Estate Law are revoked; provided, however, a restricted real estate broker license and a restricted broker-officer license shall be issued to Respondent pursuant to Section 10156.5 of the Business and Professions Code if Respondent makes application therefor and pays to the Department of Real Estate the appropriate fee for the restricted licenses within 90 days from the effective date of this Decision. The restricted licenses issued to Respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

a. The restricted licenses issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of Respondent's conviction or plea of nolo contendere to a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee.

b. The restricted licenses issued to Respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that Respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted licenses.

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c. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.


d. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that Respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If Respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until Respondent presents such evidence. The Commissioner shall afford Respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

2. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If Respondent fails to satisfy this condition, the Commissioner may order suspension of Respondent's licenses until Respondent passes the examination.

3. Respondent shall report in writing to the Department of Real Estate as the Real Estate Commissioner shall direct by his Decision herein or by separate written order issued while the restricted licenses are in effect such information concerning Respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate to protect the public interest.

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of Respondent and periodic summaries of salient information concerning each real estate transaction in which the Respondent engaged during the period covered by the report.

DATED: February 29, 2008

  
H. STUART WAXMAN  
Administrative Law Judge  
Office of Administrative Hearings

*Sachs*  
*Jacobs*

**FILED**

AUG 28 2007

MARTHA J. ROSETT, Counsel (SBN 142072)  
Department of Real Estate  
320 West Fourth St., #350  
Los Angeles, CA 90013

DEPARTMENT OF REAL ESTATE  
BY: *Jana B. Olson*

(213) 576-6982  
(213) 620-6430

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

\* \* \* \*

In the Matter of the Accusation of ) No. H-34255 LA  
)  
JEFFREY OWEN BLACK and )  
DANA LYNN POTTER, )  
)  
)  
Respondents. )

The Complainant, Robin Trujillo, a Deputy Real Estate Commissioner, for cause of Accusation against JEFFREY OWEN BLACK and DANA LYNN POTTER is informed and alleges as follows:

1.

The Complainant, Robin Trujillo, a Deputy Real Estate Commissioner of the State of California, makes this Accusation in her official capacity.

2.

At all times relevant herein, Respondent JEFFREY OWEN BLACK (hereinafter "BLACK") was and is licensed by the Department of Real Estate of the State of California (hereinafter

1 "Department") as a real estate broker. Respondent BLACK was  
2 originally licensed by the Department as a real estate broker on  
3 or before July 11, 1986. Beginning on or about October 27, 1986,  
4 and continuing until the present time, Respondent BLACK was and  
5 is also licensed by the Department as the broker-officer of  
6 Pinnacle Estate Properties, Inc. (hereinafter "Pinnacle"),  
7 designated to be responsible for the supervision and control of  
8 the activities conducted on behalf of Pinnacle by its officers  
9 and employees as necessary to secure full compliance with the  
10 Real Estate Law. At all times relevant herein, Respondent BLACK  
11 was also an officer and director of Southern California Title  
12 Solutions. On or about June 25, 1993, in Department Case No.  
13 H-25149 LA, Respondent BLACK's real estate broker license was  
14 suspended for five days.

15  
16 3.

17 At all times relevant herein, Respondent DANA LYNN  
18 POTTER (hereinafter "POTTER") was and is licensed by the  
19 Department as a real estate salesperson. Respondent POTTER was  
20 originally licensed by the Department as a real estate  
21 salesperson on or before December 2, 1977. At all times relevant  
22 herein, Respondent POTTER was employed by Pinnacle Estate  
23 Properties, Inc., as a salesperson. At all times relevant  
24 herein, Respondent POTTER was also an officer and director of  
25 Southern California Title Solutions.

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4.

1  
2 At all times relevant herein, Pinnacle Estate  
3 Properties, Inc. is and was licensed by the Department as a  
4 corporate real estate broker. Pinnacle was originally licensed  
5 by the Department as a corporate real estate broker on or about  
6 December 13, 1985. At all times relevant herein, Pinnacle was  
7 and is authorized to act as a real estate broker by and through  
8 Respondent JEFFREY OWEN BLACK as the designated officer and  
9 broker responsible, pursuant to the provisions of Code Section  
10 10159.2, for the supervision and control of the activities  
11 conducted on behalf of Pinnacle by Pinnacle's officers and  
12 employees.

13  
14 5.

15 Southern California Title Solutions ("SCTS") is a  
16 California Corporation. SCTS is not now and has never been  
17 licensed in California as a real estate broker. At all times  
18 relevant herein, Respondent BLACK and Respondent POTTER were and  
19 are the sole officers and directors of SCTS. SCTS' corporate  
20 status was suspended on or about July 12, 2007.

21 6.

22 At all times material herein, Pinnacle and Respondents  
23 BLACK and POTTER (collectively referred to herein as  
24 "Respondents"), engaged in the business of, acted in the capacity  
25 of, advertised or assumed to act as real estate brokers within  
26 the meaning of Code Section 10131(a), representing another or  
27

1 others in the purchase, sale or exchange of real property.

2 7.

3 All further references to "Respondents", unless  
4 otherwise specified, include the parties identified in Paragraphs  
5 2, 3 and 6 above, and also include the employees, agents and real  
6 estate licensees employed by or associated with said parties, who  
7 at all times herein mentioned were engaged in the furtherance of  
8 the business or operations of said parties and who were acting  
9 within the course and scope of their authority and employment.

10 Unlawful Referral of Customers for Compensation

11 (Business and Professions Code Section 10177.4)

12 8.

13 On or about September 8, 2004, Respondents filed  
14 articles of incorporation with the California Secretary of State,  
15 creating SCTS. The Articles of Incorporation were signed on  
16 August 31, 2004 by Respondent BLACK and Respondent POTTER as the  
17 initial directors. An additional Statement of Information  
18 described the business of the corporation as "Title Reinsurance."  
19

20 "Participation Agreement"

21 9.

22 Beginning on or about September 1, 2004, and continuing  
23 through on or about September 12, 2005, Respondents, and each of  
24 them, in connection with their real estate sales activities set  
25 forth in Paragraph 7 above, engaged in a reinsurance program with  
26 Fidelity National Group of Insurers, and its affiliates,  
27 including Fidelity Title, Chicago Title, and Ticor Title



1 (hereafter collectively referred to as "FNF"). Pursuant to this  
2 agreement, in connection with the sales of homes "that involved"  
3 Respondents, or their "affiliates," the title companies would  
4 issue title insurance policies, and in exchange, Respondents  
5 would receive compensation in the form of reinsurance "premiums"  
6 and additional periodic distributions of capital.

7 10.

8 Specifically, on or about September 1, 2004, Respondent  
9 BLACK, signing as "President" of SCTS, and Respondent POTTER,  
10 signing as "CEO" of SCTS, executed a "Participation Agreement"  
11 with FNF. Pursuant to the Participation Agreement, SCTS would  
12 receive a percentage of the premium paid to FNF for every real  
13 estate transaction in which the parties, in connection with sales  
14 of real estate involving SCTS or its affiliate (Pinnacle),  
15 purchased title insurance from one of the FNF affiliates. Under  
16 this Participation Agreement, Respondents paid a one time \$10,000  
17 "Participation Fee", an annual "Participant Expense Fee" of  
18 \$10,000, and a security deposit of \$25,000. Pursuant to a  
19 subsequent "Reinsurance Agreement," Respondent agreed to assume  
20 15% liability for title insurance losses, if any, from real  
21 estate transactions generated by SCTS and/or its affiliates, as  
22 "reinsurance." In exchange, FNF and/or its affiliates would pay  
23 SCTS 15% of the title insurance premiums collected per  
24 transaction, plus a \$350.00 processing fee, per transaction.

25 11.

26 In 2005, the California Department of Insurance (DOI)  
27 held public hearings relating to the business practice of

1 entering into the types of reinsurance agreements described  
2 above. At these hearings, it was determined that the typical  
3 loss ratio as to title insurance is three to five percent. DOI  
4 found that there is in fact little or no risk transferred to the  
5 reinsurer (such as, in this case, the real estate broker) in  
6 exchange for the portion of premium they are collecting.  
7 Further, DOI found that in California, the normal practice is not  
8 to have a reinsurer in connection with title business. DOI  
9 determined that the reinsurance agreements of the type entered  
10 into between FNF and related affiliates and Respondents were not  
11 legitimate reinsurance agreements. Rather, these agreements were  
12 created as part of a scheme under which title insurers were  
13 paying real estate brokers illegal rebates - in the form of  
14 "premiums" on fictitious reinsurance paid to captive reinsurers -  
15 in exchange for the brokers channeling business to the title  
16 companies.

17 12.

18 As of on or about September 12, 2005, for the period  
19 between September 1, 2004 and September 12, 2005, SCTS was  
20 credited with earning premiums of \$34,046.71, and with receiving  
21 cash distributions of \$8,059.49 as compensation for referrals of  
22 parties to FNF and FNF affiliates as a result of real property  
23 purchase and sale transactions negotiated by Pinnacle.

24 13.

25 The conduct, acts and/or omissions of Respondent BLACK  
26 and Respondent POTTER, as set forth in Paragraphs 8 through 12  
27 above, are in violation of Code Section 10177.4, and constitute

1 grounds to suspend or revoke Respondent BLACK's and Respondent  
2 POTTER's real estate licenses pursuant to Business and  
3 Professions Code Sections 10177(d) and 10177(g) for claiming,  
4 demanding or receiving commissions, fees or other consideration  
5 from a title insurance company for referral of customers to the  
6 title insurance company.

7 14.

8 The conduct, acts and/or omissions of Respondents BLACK  
9 and POTTER, in claiming or taking a secret or undisclosed amount  
10 of compensation, commission or profit in relation to the referral  
11 of customers to FNF affiliated title insurance companies  
12 constitutes grounds to discipline Respondents' real estate  
13 licenses and/or licensing rights pursuant to Business and  
14 Professions Code Sections 10176(g) and/or 10177(j).

15 15.

16 The conduct, acts and/or omissions of Respondents BLACK  
17 and POTTER in creating SCTS as a separate corporation, solely for  
18 the purpose of circumventing the real estate laws and hiding  
19 additional compensation received for referral of customers to  
20 title companies, constitutes grounds to discipline Respondents'  
21 licenses and/or licensing rights pursuant to Business and  
22 Professions Code Sections 10176(i) and/or 10177(j).

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1           WHEREFORE, Complainant prays that a hearing be  
2 conducted on the allegations of this Accusation and that upon  
3 proof thereof, a decision be rendered imposing disciplinary  
4 action against all licenses and/or license rights of Respondent  
5 JEFFREY OWEN BLACK and Respondent DANA LYNN POTTER; and for such  
6 other and further relief as may be proper under applicable  
7 provisions of law.

8 Dated at Los Angeles, California

9 this 28 day of August, 2007.

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12 Robin Trujillo,  
13 Deputy Real Estate Commissioner  
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24 cc:           Jeffrey Owen Black  
25               Dana Lynn Potter  
26               Robin Trujillo  
27               Sacto.