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**BEFORE THE UTAH INSURANCE COMMISSIONER**

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**UTAH INSURANCE DEPARTMENT,**

Complainant,

vs.

**FIDELITY TITLE SERVICES, LLC,**

Respondent.

**ORDER**

Docket No. 2019-4186

Lisa Watts Baskin  
Presiding Officer

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Complainant Utah Insurance Department (“the Department”), by and through counsel, Helen Frohlich, Assistant Utah Attorney General, commenced this Complaint by Notice of Formal Agency Action, dated February 6, 2020. The complaint seeks payment of \$5,000.00 in forfeiture, pursuant to Utah Code §§ 31A-1-105, 31A-2-201, 31A-2-308, and Utah Admin. Code R592-15. Respondent Fidelity Title Services, LLC (“Fidelity Title Services, LLC”), by and through counsel, Kyler McCarty (“McCarty”), filed an Answer, requesting dismissal with prejudice, costs and attorneys fees, and other equitable relief. A formal evidentiary proceeding was held on June 4, 2020. The matter was recorded.

**JURISDICTION**

Jurisdiction is proper pursuant to Utah Code §§ 31A-1-105, 31A-2-201, 31A-2-308, 63G-4-204 through 209 and Utah Admin. Code R590-160 and R592-15.

**FINDINGS OF FACT**

The undersigned enters these findings of fact based on a preponderance of evidence. In

assessing the credibility of witnesses, the court has considered the source and basis of each witness's knowledge; the ability of each witness to observe; the strength of the witness's memory; each witness's interest, if any, in the outcome of the litigation; the relationship of each witness to either side in the case; and the extent to which each witness's testimony is either supported or contradicted by other evidence.

1. Fidelity Title Services, LLC is a Resident Producer Organization holding license number 628783 with lines of authority in Title Escrow, Title Examination, and Title Marketing Representative.

2. McCarty is the owner of Fidelity Title Services, LLC. He holds an Individual Resident Producer License with Title Escrow, Title Examination, and Title Marketing Representative lines of authority. His license number is 622314. McCarty is also a licensed attorney in good standing with the Utah State Bar at McCarty Parry Attorneys at Law.

3. On February 11, 1982, Fidelity Land & Title ("FL&T") was licensed with the Department as a Resident Producer Organization with Title Escrow and Title Examination lines of authority. The license number was 2580.

4. In complete compliance with Utah Code § 31A-19a-209(2)(a), FL&T filed its minimum escrow rates with the Department on August 25, 2006.

5. McCarty purchased FL&T from Lyle Duncan on May 16, 2017. McCarty acquired FL&T for the purpose of continuing the operations and purchasing all the assets of FL&T, including trade names and business names. On May 16, 2017, McCarty formed Fidelity Title Services, LLC, with the knowledge that the seller Duncan wanted to retire and not maintain the legal entity. R. at 13:09-16:27.

6. FL&T voluntarily surrendered its Resident Producer Organization license with Title Escrow and Title Examination lines of authority with the Department on December 18, 2017, and retired. UID Exh. 2, Individual Agency Change Request Form.<sup>1</sup>

7. On August 17, 2017, Fidelity Title Services LLC was formed as a new entity, with a new name, new federal employer ID number, and new Department license number.

8. Fidelity Title Services, LLC was licensed with the Utah Insurance Department on August 17, 2017, as a Resident Producer Organization with Title Escrow, Title Examination, and Title Marketing Representative lines of authority. McCarty is the owner and qualifier for the agency license.

9. On September 12, 2019, the Department conducted an internal audit review of all Utah licensed title agencies to confirm the filing of minimum escrow rates by each title agency.<sup>2</sup> The Schedule of Minimum Charges for Escrow Services (“schedule”) must be filed pursuant to Utah Code § 31A-19a-209(2)(a) and Utah Admin. Code R592-15.

10. Adam Martin (“Martin”), Market Conduct Examiner with the Department, conducts investigations and audits, and addresses complaints regarding title and escrow matters. He has worked for the Department since 2007, and possesses substantial experience and expertise. Martin testified that the audit was ordered by the Department to review the minimum escrow filings of all 170 licensed agencies to verify compliance. R. at 1:21:44 - 1:23:55. The audit revealed that other title agencies had completed closings without properly filing the schedule of escrow rates. They were subsequently ordered to pay

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<sup>1</sup> Document was filed post-hearing upon court’s request with no objection from the parties.

<sup>2</sup> Mini escrow means an escrow settlement service conducted by an agency title insurance producer to clear a title, obtain payoffs and record necessary closing documents for a lender that performs his or her own closing service. A minimum escrow fee is the minimum amount that must be charged for escrow settlement services that are rendered.

forfeitures of \$5,000.00 for violating the statute and rule. The Department complied with the mandate to assess penalties pursuant to § 31A-19a-209(2)(a)(i) and Utah Admin. Code R592-15-10.<sup>3</sup> Martin explained that it is lawful for title agencies to be licensed without filing the schedule of mini escrow rates if the organization does not intend to transact escrow closings. R. at 1:21:44 – 1:23:55.

11. During the audit, the Department determined that Fidelity Title Services, LLC had not filed its schedule of rates with the Department.

12. On September 23, 2019, the Department sent a letter with instructions on how to file the schedule and to pay the filing fee.

13. On October 1, 2019, Fidelity Title Services, LLC filed its schedule of escrow charges and paid the \$25 fee. UID Exh. 1, 006. Even though Fidelity Title Services, LLC was quick to respond to correct the violation, it does not negate that the violation occurred.

14. On October 2, 2019, the Department acknowledged receipt of the schedule of minimum escrow rates. The letter requested further information regarding all escrow closings conducted between August 17, 2017 and September 30, 2019, along with a statement of estimated profit of each escrow closing.

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<sup>3</sup> See *Utah Insurance Department v. Invictus Title Insurance Agency, LLC*, Docket No. 2019-4164 (September 27, 2019)(Concurrence with Imposition of Penalty, Title and Escrow Commission, by a vote in open meeting of 4-0, October 21, 2019)(Licensee had not filed the schedule of mini escrow rates for four years with 531 closings); *Utah Insurance Department v. Lendmark Closing Services of Utah, LLC*, Docket No. 2019-4177 (October 30, 2019)(Title and Escrow Commission Response to Request for Concurrence with Penalty, by a vote in open meeting of 5-0, November 18, 2019) (Licensee had not filed the schedule for 18 months with 122 closings); *Utah Insurance Department v. Synergy Title Insurance Agency, LLC*, Docket No. 2019-4181 (November 8, 2019)(Title and Escrow Commission Response to Request for Concurrence with Penalty, by a vote in open meeting of 5-0, November 18, 2019)(Licensee had not filed the schedule for 18 months with 512 closings). The administrative forfeiture amount in each case was uniformly applied at \$5,000.00, despite varying dates of noncompliance and numbers of closings.

15. On October 8, 2019, Fidelity Title Services, LCC responded and thereby admitted that it had completed 185 closings between August 17, 2017 and September 30, 2019, without having filed its schedule of escrow charges with the Department.

16. Fidelity Title Services, LLC estimated its profit per closing was \$130.00.

17. On October 22, 2019, Martin notified Fidelity Title Services, LLC that the Department determined it violated Utah Code § 31A-19a-209(2)(a), seeking forfeiture of \$5,000.00. R. at 1:17:53-1:18:26. Martin utilized the Utah Insurance Department Penalty Worksheet, explaining to McCarty the possible forfeiture amounts, ranging from \$18,500 to approximately \$49,000. Martin identified the cap of \$5,000.00 for an audit forfeiture. UID Exh. 1, 025-031. McCarty alleged and testified that Martin threatened to impose penalties of \$40,000 which are indeed authorized in Utah Code in the absence of an audit procedure. Martin testified that he remained cordial throughout the audit process and did not threaten McCarty. R. at 1:18:26-1:18:59. Based upon the evidence and testimony presented, the court finds no threat occurred beyond a factual explanation of the penalty worksheet.

18. Notably, Fidelity Title Services, LLC has experienced several other lapsed licensing and filing deadlines for which McCarty was notified by the Department.<sup>4</sup>

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<sup>4</sup> In documents filed by the parties, post-hearing, and without objection, records show that on other occasions the Department provided notice and assistance to Fidelity Title Services, LLC about filing requirements. UID Exh. 3, pp. 1-7, UID Exh. 4, pp. 1-3; FTS Exh. 2, pp. 1-7. For example, on January 16, 2020, numerous emails were exchanged cordially between the parties wherein the Department notified McCarty that his resident producer individual license was inactivated on November 30, 2019, for incomplete continuing education (CE). The email also provided statutory provisions, instructions, and a link to SIRCON to complete the reinstatement. The letter referenced an earlier notice on October 30, 2019, sent from the Department to McCarty, reminding him of his CE requirements. In a second email on the January 16, 2020, the Department explained that in order to be exempt from

19. In his pleadings and at the hearing, McCarty argued that his small title company does not have the comprehensive staff to stay in compliance with state requirements and that they “tried to follow all applicable requirements to the best we know how.” R. at 9:52. McCarty testified that he believes regulatory compliance is important, but admitted Fidelity Title Services, LLC has “had challenges in complying with timelines.” R. 34:33-36:12.

20. The evidence of late filings and noncompliance by Fidelity Title Services, LLC displays a pattern of conduct that is contrary to statute and rule. McCarty argued in closing argument that he responded promptly to emails from the Department regarding his failure to file the schedule, and despite some delays, he exercised good faith in trying to provide the necessary information requested. Fidelity Title Services, LLC brings the defense of the title agency’s small size, its limited staff, and the lack of sufficient notice to justify its dilatory actions regarding statute and rule. To this point, the statutory provisions and administrative rules do not contemplate or permit substantial compliance. Otherwise the purpose of regulation would be undermined. Of the 170 title agencies subject to audit, only three other title agencies were in violation and sanctioned. The late filings are impermissible and related explanations as defenses are unpersuasive.<sup>5</sup>

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CE requirements, and be a qualifier for Fidelity Title Services, LLC, a licensed attorney must file a Certificate of Good Standing to ensure education credit with each renewal. On January 17, 2020, McCarty apologized “about the mixup” and attached his request for Certificate of Good Standing, bar license renewal receipt, and Certificate of Compliance. He also said he paid the fee through SIRCON. However, it was not until just days before the present hearing that he completed the reinstatement form.

<sup>5</sup> On May 29, 2020, the Department informed McCarty that Fidelity Title Services, LLC had not filed its Annual Report which was due April 30, 2020. UID Exh. 5, pp. 1-2. On June 1, 2020, Fidelity Title Services, LLC filed its Annual Report and it is officially noted as complete. On June 1, 2020, the Department informed McCarty by email that his individual license was still inactive and asked if McCarty had completed the reinstatement form. On June 2, 2020, just two days prior to the scheduled evidentiary hearing, his license

21. Fidelity Title Services, LLC alleges that it had not received sufficient notice of the requirement to file the minimum escrow rate schedule. This defense is unpersuasive in light of the specificity of Utah Admin. Code R592-15-5 and R592-15-6. The rules state that “[e]ach filing submitted must be accurate, consistent, complete, and contain all required documents in order for the filing to be processed in a timely and efficient manner.” Subsection (2) of R592-15-5 clearly states: “Licensees are responsible for assuring compliance with Utah laws and rules.” The Department’s official, public webpage is readily accessible and current with the applicable filing fees, procedures, and information required, citing both current statute and administrative rule and providing detailed instructions and forms. Nevertheless, administrative rules place the responsibility on the licensee to comply. This failure to file the schedule of minimum escrow rates, as applied to 185 closings, provides persuasive evidence to the court that it was Fidelity Title Services, LLC that lacked attention and professional safeguards which resulted in regulatory violations. Evidence exists to show the business’s pattern of conduct, including a dilatory 2020 Annual Report Form, an inactivated licensure due to incomplete continuing education, the failure to complete the reinstatement form, and an unfiled annual Certificate of Good Standing with the state bar. The Department’s numerous emails and letters provided to Fidelity Title Services, LLC alerted the organization of its duty to know the rules and the law to conduct a lawful title insurance business. Findings of Fact, ¶¶ 18, footnote 4; 20, footnote 5.

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was reinstated with lines of authority through the Department’s Renewal and Reinstatement personnel. The evidence provides a record of numerous notifications and reminders by the Department to McCarty.

22. McCarty submitted a draft invoice for legal services billed by McCarty Parry Attorneys at Law on behalf of client Fidelity Title Services, LLC for \$3,552.00. FTS Exh.1, 039-040. The attorneys are not entitled to a separate award of attorneys' fees in this administrative proceeding; such may be awarded to prevailing parties in actual court proceedings. *Muddy Boys, Inc., v. Dept. of Commerce, DOPL*, 2019 UT App 33, ¶29, 440 P.3d 741.

23. Good faith compliance to file the schedule does not equate to actual compliance. Fidelity Title Services, LLC violated Utah Code § 31A-19a-209(2)(a)(i) which requires strict compliance, not substantial compliance. Findings of Fact, ¶¶ 13, 19.

24. The doctrine of estoppel, laches, and waiver are inapplicable based upon the Department's strict compliance and uniform enforcement. Findings of Fact, ¶ 10, footnote 3. Once the Department became aware of Fidelity Title Services, LLC's conduct in the audit, it immediately notified the organization and requested that a rate schedule be filed and further information be provided to gather facts and determine appropriate corrections and penalties. Findings of Fact, ¶¶ 10, 11, 12, 13, 14, 15, 16, 17.

25. The purpose of the schedule of minimum escrow rates is to protect consumers, members of the public, and other individuals engaged in title and escrow transactions. Insurance rate regulation is vital to assure there exists a reasonable degree of price competition so that rates, including minimum escrow rates, are not "excessive, inadequate, or unfairly discriminatory." Utah Code § 31A-19a-201. Publication of the



schedule of rates on the department's webpage in also intended to protect competitors. The failure to provide such information may cause harm to other title agencies in direct competition.

26. Fidelity Title Services, LLC was ordered to pay a forfeiture of \$5,000.00, entirely consistent with penalties imposed upon the other audited title agencies. Findings of Fact, ¶ 10, footnote 3. Utah Code § 31A-2-308(1)(a) mandates a forfeiture up to twice the amount of any profit gained from the violation to be imposed. Fidelity Title Services, LLC obtained profits during October 17, 2017 to September 30, 2019, and so the penalty could have been higher. UID Exh. 1, 014-015. However, Fidelity Title Services, LLC was assessed only \$5,000.00 because the Department's Penalty Worksheet deemed the matter an audit forfeiture, with a \$5,000.00 limit. UID Exh. 1, 027-029. R. at 1:14:36.

27. Fidelity Title Services, LLC provides no evidence whatsoever that the Department acted with unclean hands. The relevant statute and rules were effective at the time the violations occurred. The court is not sufficiently persuaded otherwise.

28. Utah Code § 31A-2-404(1)(b)(ii) does not require the concurrence by the Title and Escrow Commission before imposing the penalty. This is not the way the statute is executed. Findings of Fact, ¶ 10, footnote 3.

29. Fidelity Title Services, LLC provides no evidence or case law that the \$5,000.00 forfeiture to be imposed is excessive, repetitive, and fundamentally unfair, violates the Sixth, Eighth and Fourteenth Amendments, or impairs competition. This kitchen sink defense carries no weight whatsoever. At oral argument, Fidelity Title

Services, LLC asserted that the violation of Utah Code § 31A-19a-209(2)(a) amounts to just one violation, not 185 violations, without providing evidence or legal authority. Utah Code § 31A-2-308 provides that each day a violation continues is a separate violation. Forfeitures that accumulate and accrue for each day of violation are statutory sanctions widely used in federal, state, and local legislative and administrative contexts. From environmental hazards to public utility rates, enforcement penalties that accrue for each day of violation are not excessive, repetitive and fundamentally unfair.<sup>6</sup>

### CONCLUSIONS OF LAW

1. The Utah Insurance Commissioner (“Commissioner”) has jurisdiction over the parties and this adjudicative proceeding pursuant to Utah Code §§ 31A-1-105 and 31A-2-201.
2. The Commissioner has legal authority to impose penalties on the Department's licensees who violate the Utah Insurance Code. Utah Code § 31A-2-308.
3. Utah Code § 31A-19a-209(2)(a)(i) requires a title agency to file a schedule of escrow charges that it proposes to use in Utah. Fidelity Titles Services, LLC violated this statutory provision by failing to file a schedule of escrow charges from August 17, 2017 to September 30, 2019.
4. As a penalty for this violation in this case, Respondent should be ordered to pay a forfeiture of \$5,000.00.

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<sup>6</sup> R.D. Hursh, *Recovery of Cumulative Statutory Penalties*, 71 ALR2d 986 (Originally published in 1960).


## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and good cause appearing, the Utah Insurance Commissioner orders as follows:

1. The Request for Dismissal with Prejudice by Fidelity Title Services, LLC is DENIED.
2. Fidelity Title Services, LLC shall pay a forfeiture of \$5,000.00 for the violations described in the Conclusions of Law.
3. Fidelity Title Services, LLC is ordered not to commit the violations described in the Conclusions of Law.

DATED this 10<sup>th</sup> day of July, 2020.

TODD E. KISER  
UTAH INSURANCE COMMISSIONER

  
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Lisa Watts Baskin  
Administrative Law Judge  
Utah Insurance Department  
3110 State Office Building  
Salt Lake City, UT 84114  
801-538-3860  
Email: uidadmincases@utah.gov

### **Right To Apply for Reconsideration**

Pursuant to Utah Code § 63G-4-302, any party may file a written request for reconsideration with the agency within 20 days after the date of this order.

### **Right to Judicial Review**

Pursuant to Utah Code § 63G-4-401, a party may obtain judicial review of final agency action by filing a petition for judicial review within 30 days after the date the order constituting final agency action is issued.

You may find the rules regarding Administrative Law Judges at <https://rules.utah.gov/publicat/code/r477/r477-101.htm>.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date a true and correct copy of the foregoing

**Order** was emailed to:

Kyler McCarty  
Fidelity Title Services, LLC  
[kyler@fidelitytitleprovo.com](mailto:kyler@fidelitytitleprovo.com)

Helen Frohlich  
Assistant Attorney General  
[hfrohlich@agutah.gov](mailto:hfrohlich@agutah.gov)

DATED this 10<sup>th</sup> day of July, 2020.

  
\_\_\_\_\_  
Jeanine Couser  
Utah Insurance Department  
3110 State Office Building  
Salt Lake City, UT 84114  
(801) 538-3860