ORDER NO.: E18-75

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-06304
AGENCY DOCKET NO.: OTSC #E16-12

MARLENE CARIDE, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	FINAL DECISION AND ORDER
v.	)	
RANDOLPH A. FISHER, JR., KEVIN G. MADDEN, AND REGAL FINANCIAL GROUP, LLC,	)	
Respondents.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner")[1] pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001 ("Producer Act"), N.J.S.A. 17:22A-26 to -57, and all powers expressed or implied therein, for the purposes of reviewing the December 8, 2017 Initial Decision ("Initial Decision") of Acting Director and Chief Administrative Law Judge Laura Sanders ("ALJ"). In the Initial Decision, the ALJ found in favor of the Department of Banking and Insurance ("Department") against Respondents Randolph A. Fisher, Jr. ("Fisher") and Regal Financial Group, LLC ("Regal") on Counts 1 through 12 of the Department's Order to Show Cause No. E16-12 ("OTSC"). The ALJ found in favor of Respondent Fisher against the Department as to

[1] Pursuant to R. 4:34-4, Commissioner Marlene Caride has been substituted in place of former Commissioner Richard J. Badolato in the caption.

Counts 13 through 16. The ALJ found in favor of the Department against Respondent Kevin G. Madden ("Madden") as to Count 17. The ALJ recommended the imposition of civil monetary penalties against Fisher and Regal, jointly and severally, in the amount of $10,900, and Madden, individually, in the amount of $2,000. The ALJ recommended suspension should be imposed only if the Respondents failed to comply with the payment of penalties within a reasonable time.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 8, 2016, the Department issued the OTSC against Fisher, Madden and Regal, which sought to revoke their insurance producer licenses and impose civil monetary penalties for alleged violations of the Producer Act and the regulations governing the conduct of insurance producers in this State. The OTSC contains seventeen counts, wherein the Department alleges that Fisher, Madden and Regal engaged in activities that are a violation of the insurance laws of this State as follows.

> Count 1 - Fisher and Regal sold a Tax Deductible Installment Plans ("Installment Plan") offered by the National Foundation of America ("NFOA") on or about October 11, 2006 to JK and MK ("JK/MK"), which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (8). The sale of an NFOA Plan to JK/MK also constitutes a breach of fiduciary duty in violation of N.J.A.C. 11:17A-4:10;
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> Count 2 - As it pertains to the sale of a NFOA Installment Plan to JK/MK, Fisher and Regal presented JK/MK with untrue, deceptive, and misleading information regarding insurance, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (7), N.J.S.A. 17:29B-3, N.J.S.A. 17:29B-4(2), and N.J.S.A. 17B:30-3;
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> Count 3 - As it pertains to the sale of a NFOA Installment Plan to JK/MK, Fisher and Regal acted as an agent for, or otherwise represented or sided on behalf of another, an insurer not authorized to transact such insurance in this State, which constitutes a violation of N.J.S.A. 17:22-6.37;
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> Count 4 - Fisher and Regal sold a NFOA Installment Plan on or about October 30, 2006 to WB, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (8). The sale of an NFOA Plan to WB

also constitutes a breach of fiduciary duty in violation of N.J.A.C. 11:17A-4:10;

Count 5 - As it pertains to the sale of a NFOA Installment Plan to WB, Fisher and Regal presented WB with untrue, deceptive, and misleading information in order to induce the customer to change annuity contracts to another insurer, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (7), N.J.S.A. 17:29B-3, N.J.S.A. 17:29B-4(2), N.J.S.A. 17B:30-3 and N.J.S.A. 17B:30-6;

Count 6 - As it pertains to the sale of a NFOA Installment Plan to WB, Fisher and Regal acted as an agent for, or otherwise represented or sided on behalf of another, an insurer not authorized to transact such insurance in this State, which constitutes a violation of N.J.S.A. 17:22-6.37;

Count 7 - Fisher and Regal sold a NFOA Installment Plan on or about April 4, 2007 to GB and MB ("GB/MB"), which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (8). The sale of an NFOA Plan to GB/MB also constitutes a breach of fiduciary duty in violation of N.J.A.C. 11:17A-4:10;

Count 8 - As it pertains to the sale of a NFOA Installment Plan to GB/MB, Fisher and Regal presented GB/MB with untrue, deceptive, and misleading information in order to induce the customer to change annuity contracts to another insurer, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (7), N.J.S.A. 17:29B-3, N.J.S.A. 17:29B-4(2), N.J.S.A. 17B:30-3 and N.J.S.A. 17B:30-6;

Count 9 - As it pertains to the sale of a NFOA Installment Plan to GB/MB, Fisher and Regal acted as an agent for, or otherwise represented or sided on behalf of another, an insurer not authorized to transact such insurance in this State, which constitutes a violation of N.J.S.A. 17:22-6.37;

Count 10 - Fisher and Regal sold a NFOA Installment Plan on or about May 7, 2007 to DC, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (8). The sale of an NFOA Plan to DC also constitutes a breach of fiduciary duty in violation of N.J.A.C. 11:17A-4:10;

Count 11 - As it pertains to the sale of a NFOA Installment Plan to DC, Fisher and Regal presented DC with untrue, deceptive, and misleading information regarding insurance, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (7), and N.J.S.A. 17B:30-3;

Count 12 - As it pertains to the sale of a NFOA Installment Plan to DC, Fisher and Regal acted as an agent for, or otherwise represented or sided on behalf of another, an insurer not authorized to transact such insurance in this State, which constitutes a violation of N.J.S.A. 17:22-6.37;

Count 13 - On or about January 14, 2011, the Department of Enforcement at the Financial Industry Regulatory Authority ("FINRA") filed disciplinary proceeding No. 2009019041802 against Fisher as it relates to his sale of a NFOA Installment Plans to consumers. Fisher failed to notify the Department of these proceedings within the time prescribed, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and N.J.S.A. 17:22A-47(c);

Count 14 - On or about March 8, 2012, the FINRA Office of Hearing Officers, Department of Enforcement, issued an Order Accepting Offer of Settlement regarding disciplinary proceeding No. 2009019041802, suspending Fisher from associating with FINRA members for six months in any capacity, the payment of restitution in the amount of $47,258.90, and the payment of fines in the amount of $15,000. Fisher failed to notify the Department of the final disposition of the FINRA formal disciplinary proceeding within the time prescribed, which constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and (19);

Count 15 - On or about July 18, 2007, the Office of Consumer Protection Services in the Department issued a letter to Fisher requesting a statement within 15 calendar days describing his involvement with NFOA. The Department received Fisher's response August 8, 2007, 21 days late. Fisher's failure to respond to the Department's inquiry within the time requested constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and N.J.A.C. 11:17A-4.8;

Count 16 - On or about April 19, 2011, the Office of Consumer Protection Services in the Department issued a letter to Fisher requesting a statement regarding Fisher's annuity solicitation and sales. The Department received Fisher's response on June 6, 2011, 48 days later. Fisher's failure to respond to the Department's inquiry within the time requested, no later than 15 calendar days from the date of inquiry or mailing where no time was specified, constitutes a violation of N.J.S.A. 17:22A-40(a)(2) and N.J.A.C. 11:17A-4.8; and,

Count 17 - Madden, as designated responsible licensed producer ("DRLP") of Regal and holding an ownership interest of more than 10 percent of Regal, failed to properly supervise Fisher and Regal's

insurance related conduct as described in Counts 1 through 16[2], which constitutes a violation of N.J.S.A. 17:22-40(a)(2) and N.J.A.C. 11:17A-1.6(c).

On April 15, 2016, Respondents filed an Answer to the OTSC, wherein the Respondents admitted and denied some of the allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL"), where it was filed on April 26, 2016, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. On May 15, 2017, the Department moved for Summary Decision against the Respondents, which was opposed by Respondents' letter brief filed on June 14, 2017. The Department submitted its reply to the Respondents' opposition by letter dated June 28, 2017. On June 29, 2017, the ALJ denied the Department's motion in full and the case proceeded to hearing on July 18, 2017 and September 18, 2017. Closing statements were heard telephonically on October 25, 2017 and the record was closed. The ALJ rendered the Initial Decision on December 8, 2017.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ found that several facts are not in dispute. Between October 2006 and May 2007, Fisher, on behalf of Regal, of which he and Madden each owned 50 percent interest, began to promote and sell the NFOA's Installment Plan product to four sets of clients, JK/MK, WB,

[2] Count 17 of the OTSC alleges that as DRLP, Madden failed to supervise the insurance related conduct of his agents and employees, specifically the conduct of Regal and Fisher as described in Counts 1 through 16. However, Counts 13 through 16 of the OTSC do not describe Fisher's conduct as an agent or employee of Regal. As such, throughout this Final Decision and Order, Count 17 will refer to conduct described in Counts 1 through 12.

GB/MB, and DC. All four sets of clients, all over the age of 80, signed an NFOA Installment Plan Agreement.[3] Initial Decision at 2.

As Fisher and Madden began presenting the NFOA product to their clients, the NFOA's application for 501(c)(3) status was pending before the Internal Revenue Service, resulting in an investigation by the Office of the Tennessee Commissioner of Commerce and Insurance ("Tennessee Commissioner"), who notified this Department of said inquiry. Id. at 3. In July 2007, the Tennessee Commissioner was appointed as a receiver for purposes of rehabilitating the NFOA. Ibid. Due to the NFOA's receivership status, repayment of all commissions associated with the sale of NFOA Installment Plans was requested of Regal, which complied and repaid a total of $37,489.75. Ibid. On March 7, 2013, Richard Olive, President of the NFOA, was convicted of mail fraud, wire fraud and money laundering, sentenced to 31 years in prison and ordered to pay nearly $6 million in restitution to the approximately 190 persons who had purchased products from his company. Ibid.

On January 11, 2011, FINRA filed a disciplinary proceeding against Fisher regarding his sale of the NFOA Installment Plan to consumers. On March 8, 2012, FINRA issued an Order Accepting Offer of Settlement, which ordered that Fisher be suspended for six months, pay restitution in the amount of $47,258.90, and pay a fine in the amount of $15,000. Ibid.

Counts 1, 4, 7, and 10: Incompetence and Breach of Fiduciary Duty
(Respondents Fisher and Regal)

The ALJ noted that Counts 1, 4, 7, and 10 of the OTSC allege that by offering to sell and/or selling the NFOA Installment Plan to their clients, Fisher and Regal violated N.J.S.A. 17:22A-

[3] Fisher facilitated the sale of the product to JK/MK on October 11, 2006; Fisher and Madden facilitated the sale of the product to WB on October 30, 2006; Fisher facilitated the sale of the product to GB/MB on April 4, 2007 and DC signed his NFOA Installment Plan Agreement on May 7, 2007. Initial Decision at 2.

40(a)(8), which prohibits the use of fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility. Counts 1, 4, 7, and 10 also allege that this conduct is in violation of N.J.A.C. 11:17A-4.10, which requires insurance producers to act in a fiduciary capacity when conducting their insurance business. Lastly, Counts 1, 4, 7, and 10 allege that Respondents Fisher and Regal's conduct constitutes a violation of insurance laws and regulations, for which the Commissioner has the authority to suspend or revoke the license of an insurance producer and levy monetary penalties, in accordance with N.J.S.A. 17:22A-40(a)(2). Id. at 13. The ALJ found that the sale of the NFOA Installment Plan breached their fiduciary responsibility to their clients and demonstrated incompetence, based on the findings set forth below.

The ALJ summarized Fisher's testimony wherein he stated that he began presenting clients with an Installment Plan product offered by the NFOA in October 2006 as follows. At the time, the NFOA was headquartered in and listed as a registered corporation in Tennessee. The NFOA was not registered in New Jersey. Id. at 3. Fisher represented that he considered the Installment Plan an attractive opportunity for investors because they could avoid paying penalties associated with the early liquidation of annuities, as the NFOA would simply take the annuity and "keep the flow," or convert it to cash, absorbing the penalty. Id. at 4. In addition, due to the structure of the Installment Plan, clients could take advantage of a charitable tax deduction, lowering their tax liability. Ibid.

The ALJ also recounted Fisher's testimony regarding the due diligence he conducted prior to presenting the NFOA Installment Plan to his customers. Fisher testified that he had spoken to the President and CEO of NFOA, Richard Olive ("Olive") on multiple occasions before recommending the company's products to his clients. Id. at 5. Regarding the charitable tax

deduction, a pamphlet created by the NFOA and distributed to JK/MK by Fisher represented that the organization would make charitable donations to organizations that assist children, men, and women in Africa in the fight against AIDS, the homeless, orphans and the needy, or a charitable organization of the investors choice. Ibid. Fisher stated that he did not ask Olive for a list of organizations that received funding from the NFOA. Id. at 6. Fisher also testified that he spoke to the IRS on three occasions to confirm the NFOA's own pending 501(c)(3) application and to confirm that pending organizations could operate as a charity prior to IRS approval. Id. at 5. Fisher spoke to employees of the National Community Foundation ("NCF"), which was started by Olive's father in 1972. Ibid. Lastly, Fisher testified that he had discussed with JK/MK the fact that the 501(c)(3) application was pending before the IRS meant it was possible that the IRS would deny it, causing the proposed charitable-donation tax breaks to become unavailable. Ibid. In addition, the NFOA pamphlet stated that it used SEI Private Trust ("SEI") to hold its assets. Id. at 6-7. When asked if he had contacted SEI, Fisher stated that he had not. Id. at 6. Fisher's testified that SEI would be unable to confirm or deny that they were doing business with the NFOA due to confidentiality restrictions. Id. at 6. The ALJ found as fact that Fisher did conduct some research on the NFOA, which appeared to be a legitimate company in Tennessee with a pending 501(c)(3) application at that time. Id. at 7. The ALJ also found that by talking to the NFOA's competitor, the NCF, Fisher exercised a legitimate investigative technique. Ibid.

The ALJ considered the Department's argument, that Fisher, Madden and Regal failed to exercise due diligence before presenting the Installment Plan to their clients, demonstrating incompetence and breaching their fiduciary duty to their clients. The Department directed the ALJ's attention to numerous documents demonstrating that a discussion of how controversial these types of products were with regulators existed in the public domain at that time and, had the

Respondents exercised more diligence, this information could have been uncovered.[4] Id. at 5 - 6. In response, Fisher testified that he did not come across this information in his search and pointed out that the search engines of 2006 were far less powerful than they are in 2017. Id. at 5. The ALJ noted that while these documents are hearsay and are not admissible to establish the truth of their contents, she found that the exhibits demonstrated that prior to marketing the NFOA Installment Plan to his clients, a more-established, less-aggressive version of the plan was already attracting questionable press and negative attention from regulators. Id. at 6. Furthermore, the ALJ specifically noted that the Maine order was filed against the NCF,[5] a company offering similarly structured charitable gift annuities with whom the NFOA was familiar. Ibid.

In conclusion, the ALJ found the Department had established that sales of the NFOA Installment Plan violated the prohibition against incompetence in violation of N.J.S.A. 17:22A-40(a)(8), and in turn, violated the insurance laws of New Jersey, in violation of N.J.S.A. 17:22A-40(a)(2). Id. at 14. The ALJ noted the Department's argument that the NFOA plan appeared to

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[4] These documents included: a cease-and-desist order issued against the NFOA, issued by the Washington State, dated September 2006, available online; a cease-and-desist order issued against the NCF and the NCF's parent, New Life Corporation of America ("New Life"), for marketing of a similar type of charitable-gift annuity, issued by the State of Maine Office of Securities, dated February 14, 2003; an article published in the September 29, 1999 issue of Forbes magazine entitled, "The New Giving Game," outlining the potential instability of several variations on the charitable-gift annuity, specifically addressing New Life's potential to run afoul of the SEC and the 1995 Philanthropy Protection Act; and a 2004 article published in the Nashville Post discussing an ongoing lawsuit between the Pennsylvania's Attorney General and New Life and NCF, describing the charitable-gift annuity product as "an elaborate statewide living trust sales scheme," and claiming that sales representatives for New Life were not "registered and bonded as professional solicitors, in violation of the Charities Act." Id. at 5 - 6.

[5] The ALJ refers to the NCF as both the NFOA's parent company and competitor in the Initial Decision. Id. at 5 and 6. A review of the record indicates that the NCF was started by the NFOA President, Richard Olive's father. Id. at 5. The record does indicate that the NCF is a competitor of the NFOA.

be an attractive investment because it paid the investor substantial benefits not available elsewhere, however, a closer inspection of the NFOA's ledgers revealed that the plan made no financial sense. Id. at 13. As discussed further below, the NFOA promised to assume a client's long-term annuity, pay the investor up front in cash, and then either keep the annuity or convert it to cash and absorb the penalty. Id. at 14. In addition, the NFOA represented that it would donate the money to charity. Ibid. The Department argued that this provided the NFOA with a multitude of ways to lose money and no explanation of how it could turn a profit. Ibid. Considering this argument, the ALJ found that an insurance producer's fiduciary duty is a high-level duty, requiring reasonable prudence, and that the Department's proof of the "too good to be true" nature of the product was sufficient to establish a breach of that prudence.[6] Ibid.

Counts 2, 5, 8, and 11: Prohibition of Unfair and Deceptive Acts
(Respondents Fisher and Regal)

The ALJ noted that Counts 2, 5, 8, and 11 of the OTSC allege that Fisher and Regal presented untrue, deceptive, and misleading information to their clients is in violation N.J.S.A. 17:22A-40(a)(7), which prohibits unfair trade practice or fraud, and in turn, violate N.J.S.A. 17:22A-40(a)(2), which prohibits the violation of insurance laws and regulations of the State, and N.J.S.A. 17B:30-3, which prohibits the misrepresentation and false advertising of insurance policies or annuity contracts. Id. at 9-10, 14-15.

In addition, the ALJ noted that Counts 2, 5, and 8 of the OTSC also allege that this conduct is in violation of N.J.S.A. 17:29B-3, which prohibits producers from engaging in unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, and N.J.S.A.

[6] The ALJ does not expressly cite the statutory violation found as it relates to Counts 1, 4, 7, and 10 in the Initial Decision.

17:29B-4(2), which prohibits the dissemination of false information and advertising generally. Id. at 15.

Finally, the ALJ noted that Counts 5 and 8 of the OTSC also allege that Fisher and Regal are in violation of N.J.S.A. 17B:30-6, which prohibits "twisting," as it pertains to the sale of the Installment Plan to their clients.[7] Ibid.

Regarding the sale of the NFOA Installment Plan to JK/MK as alleged in Count 2, the ALJ found that Fisher supplied the NFOA pamphlet to JK/MK, and represented that by participating in the Installment Plan with an investment of $211,788, JK/MK would receive a $61,614 tax deduction, $15,403 in tax savings, and annual payments of $24,703.24 over a period of 10 years. Id. at 4. Subsequently, JK/MK invested a total of $209,927.35 in an NFOA Installment Plan—$90,000 by check and the remainder in the form of shares of General Electric stock, 3,383 shares valued at $119,927.35. Ibid. Fisher's commission from this sale amounted to $19,060.92. Ibid. Ultimately, the NFOA timely paid JK/MK $20,586 of their investment before entering receivership, where they were eventually re-paid $157,978.98, totaling $178.564.98. Ibid. Thus, per the Department's calculations, JK/MK lost $31,362.37, plus the time value of money by purchasing an NFOA Installment Plan at the recommendation of the Fisher and Regal. Ibid. The ALJ noted Fisher's testimony that JK/MK continued to work with Fisher and remain his clients today. Id. at 7. The ALJ found that the sample cash flows and benefits that Fisher presented to JK/MK were never viable long-term because the underlying company was operating like a Ponzi

[7] Only Counts 5 and 8 of the OTSC make allegations of twisting. Counts 2 and 11 do not make such allegations.

scheme, and accordingly, Respondents Fisher and Regal violated N.J.S.A. 17B:30-3 and 17:29B-4(2).[8] Id. at 15.

Regarding the sale of the NFOA Installment Plan to WB as alleged in Count 5 of the OTSC, the ALJ found that Fisher represented to WB, a client who solicited his services after receiving an advertisement in the mail, that by participating in the Installment Plan with an investment of $111,258.05, she would receive a $43,312 tax deduction, $10,828 in tax savings and a charity tax credit that would allow her to free up $18,000 she needed to pay for pressing medical expenses, yielding a total return of $111,770.78 after ten years. Id. at 8. The ALJ found that WB received a check for $18,000 by the NFOA dated January 2, 2007, and was able to address her medical issues. Ibid. WB was repaid in full by 2012 after receiving funds from the NFOA bankruptcy receiver and repayment ordered by the FINRA settlement. Id. at 9. The ALJ found that the sample cash flows and benefits that Fisher presented to WB were never viable long-term because the underlying company was operating like a Ponzi scheme, and accordingly, Respondents Fisher and Regal violated N.J.S.A. 17B:30-3 and 17:29B-4(2).[9] Id. at 15.

Regarding the sale of the NFOA Installment Plan to GB/MB as alleged in Count 8 of the OTSC, the ALJ found as fact that GB/MB, seeking to free up $20,000, signed an NFOA Installment Plan Agreement on April 4, 2007, indicating that they would transfer $108,161.26 from an AIG policy in return for deferred payments beginning on May 1, 2022, after a presentation from Fisher. Id. at 9. The ALJ found that the NFOA was shut down before any funds were

[8] The ALJ did not make specific findings as to whether the conduct also violates N.J.S.A. 17:22-40(a)(7), N.J.S.A. 17:22-40(a)(2), and N.J.S.A. 17:29B-3 as alleged in Count 2 of the OTSC.

[9] The ALJ did not make specific findings as to whether the conduct also violates N.J.S.A. 17:22-40(a)(7), N.J.S.A. 17:22-40(a)(2), and N.J.S.A. 17:29B-3 as alleged in Count 5 of the OTSC.

transferred so these clients sustained no monetary loss. Ibid. The ALJ found that the sample cash flows and benefits that Fisher presented to GB/MB were never viable long-term because the underlying company was operating like a Ponzi scheme, and accordingly, Respondents Fisher and Regal violated N.J.S.A. 17B:30-3 and 17:29B-4(2).[10] Id. at 15.

Regarding the sale of the NFOA Installment Plan to DC as alleged in Count 11 of the OTSC, the ALJ found that Fisher and DC executed an NFOA Installment Plan Agreement on May 7, 2007, wherein DC would transfer $378,000 in annuities to the NFOA, constituting a charitable deduction that would leave him with the qualifying assets and income he needed to move into housing specifically for firefighters. Id. at 10. The deferred payments on the annuity would eventually go to his children, although the contract lacked a specific payment schedule. Ibid. However, the ALJ found the facts demonstrated that the funds were never transferred to the NFOA, and as such, Fisher testified that DC incurred no financial harm. Ibid. The ALJ found that the sample cash flows and benefits that Fisher presented to DC were never viable long-term because the underlying company was operating like a Ponzi scheme, and accordingly, Respondents Fisher and Regal violated N.J.S.A. 17B:30-3 and 17:29B-4(2).[11] Id. at 15.

The ALJ noted that Counts 5 and 8 of the OTSC allege that Fisher and Regal are in violation of N.J.S.A. 17B:30-6, which prohibits "twisting," as it pertains to the sale of the NFOA Installment Plan to WB (Count 5) and GB/MB (Count 8).[12] Id. at 15-16. Twisting is defined as making

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[10] The ALJ did not make specific findings as to whether the conduct also violates N.J.S.A. 17:22-40(a)(7), N.J.S.A. 17:22-40(a)(2), and N.J.S.A. 17:29B-3 as alleged in Count 8 of the OTSC.

[11] The ALJ did not make specific findings as to whether the conduct also violates N.J.S.A. 17:22-40(a)(7), N.J.S.A. 17:22-40(a)(2) as alleged in Count 11 of the OTSC. In addition, the ALJ found this conduct in violation of N.J.S.A. 17:29B-4(2), which was not alleged in the OTSC.

[12] Only Counts 5 and 8 of the OTSC make allegations of twisting. Counts 2 and 11 do not make such allegations.

misleading representations or comparisons of insurance policies or annuity contracts for the purposes of inducing or converting a policy or contract or to take out a policy or contract with another insurer. Id. at 15. As described above, after speaking with Fisher, GB/MB transferred $108,161.25 from their AIG annuity to the NFOA Installment Plan. Id. at 9. Similar facts were found by the ALJ as to WB, who had an annuity when she contacted Fisher. Id. at 8. Fisher initially suggested that WB contact her annuity provider to terminate her annuity prematurely. Ibid. However, she opted to transfer her annuity to the NFOA Installment Plan. Ibid. The ALJ concluded that in both instances, the parties were seeking to escape the onerous provisions of their existing annuity and that Fisher offered the NFOA's product as a vehicle for achieving that goal. Id. at 16. In conclusion, as the NFOA itself proved to be fraudulent, the ALJ found that the Department had proven the violations of N.J.S.A. 17B:30-6 pertaining to GB/MB and WB as alleged in Counts 5 and 8 of the OTSC. Ibid.

Counts 3, 6, 9, and 12: Assisting an Unauthorized Insurer
(Respondents Fisher and Regal)

The ALJ noted that Counts 3, 6, 9, and 12 allege that, by offering the NFOA Installment Plan to their clients, Fisher and Regal aided an insurer not authorized to offer that type of insurance in New Jersey, in violation of N.J.S.A. 17:22-6.37. Id. at 16.

The ALJ noted that Fisher and Regal question whether the NFOA product ever constituted insurance under the law and contend that it was an installment contract. Ibid. The Respondents argued that this is demonstrated by FINRA's disciplinary proceeding against Fisher for his sale of the NFOA Installment Plan as a security, and not insurance. Ibid. Furthermore, the ALJ highlighted Fisher's testimony wherein he admitted that he did not consider consulting with the Department about the NFOA's product as it was his understanding that the Installment Plan was

not an annuity, which is an insurance product requiring Department involvement, but rather was an installment contract. Id. at 5.

Upon review of the documentary and testimonial evidence submitted in this matter, the ALJ determined that the proofs established that this type of offering was on the fringes of both types of financial instruments. Id. at 16. First, the ALJ found it somewhat persuasive that Tennessee law appears to consider charitable-gift annuities as securities and exempt from registration, and that in Maine, these types of charitable-gift annuity agreements did not appear to qualify as insurance, and illustrate why Fisher was not wholly wrong in thinking that the NFOA Installment Plan was a security, as opposed to an insurance product. Id. at 6. However, the ALJ further found that there is sufficient counter-opinion from several other states, including Washington and Florida, to indicate that the Installment Plan could constitute an insurance product. Id. at 16. In conclusion, as New Jersey regulates this type of product as insurance, and not a security, the ALJ concluded that Fisher and Regal aided an insurer not authorized to offer that type of insurance in New Jersey by selling the NFOA product in this State. Id. at 17.

Count 13 and 14: Failure to Notify the Department of FINRA Proceedings
(Respondent Fisher)

Count 13 of the OTSC alleges that Fisher, by failing to notify the Department of the January 14, 2011 disciplinary proceeding initiated against him by FINRA, No. 2009019041802, relating to his sale of a NFOA Installment Plans to consumers, violated N.J.S.A. 17:22A-40(a)(2) and N.J.S.A. 17:22A-47(c). Id. at 11. N.J.S.A. 17:22A-47(c) requires that an insurance producer report, within 30 days, any disciplinary action taken against the insurance producer, including proceedings initiated by FINRA, to the Commissioner. The insurance producer is to include a copy of the order, consent order or other relevant legal documents. This conduct is also alleged as a violation of N.J.S.A. 17:22A-40(a)(2), violating any insurance laws of the State. Id. at 17.

Similarly, Count 14 of the OTSC alleges that Fisher's failure to notify the Department of the March 8, 2012 FINRA Order Accepting Offer of Settlement[13] violated N.J.S.A. 17:22A-40(a)(19) and N.J.S.A. 17:22A-40(a)(2). Ibid. N.J.S.A. 17:22A-40(a)(19) requires that an insurance producer report the final disposition of any formal disciplinary proceeding initiated against the insurance producer, including proceedings initiated by FINRA, to the Commissioner within 30 days of the final disposition of the matter.

The ALJ noted that Fisher testified that his attorney at that time had notified the Department in a timely manner as it relates to both the initiation of FINRA disciplinary proceedings No. 2009019041802 on January 14, 2012 and of the March 8, 2012 final disposition. Id. at 11. To the contrary, the Department provided testimony from Albert Verdel ("Verdel"), Supervising Investigator for the Department, who stated he had no record of contact from Fisher's attorney at that time. The ALJ noted that Verdel could not say with certainty that Fisher's lawyer had not notified the Department as he had no definitive recollection and had no notes confirming either the presence or the absence of notification. Ibid. In addition, as discussed below as it relates to Count 16, the ALJ found that the Department's April 19, 2011 letter requesting a statement of Fisher's annuity solicitations and sales was sent in response to Fisher's timely notification to the Department of the FINRA complaint. Id. at 12. Based on this testimony and the ALJ's findings as it relates to Count 16, the ALJ found that the Department had failed to prove that Fisher failed to notify the Department of the FINRA proceedings or the final disposition as alleged in Counts 13 and 14 of the OTSC. Ibid.

[13] The March 8, 2012 Order Accepting Offer of Settlement suspended Fisher from associating with FINRA members for six months in any capacity, the payment of restitution in the amount of $47,258.90, and the payment of fines in the amount of $15,000. Id. at 3.

Count 15: Failure to Respond to the Department's Inquiry Within 15 Days
(Respondent Fisher)

Count 15 of the OTSC alleges that Fisher failed to respond to the Department's inquiry regarding his involvement with the NFOA within 15 days, as required by law. Id. at 10.

The ALJ noted that Verdel wrote a letter to Fisher, dated July 18, 2007, requesting a statement within 15 days of Fisher's involvement with the NFOA. Ibid. Fisher's response was marked received on August 8, 2007, well beyond the 15-day time period. Ibid. The ALJ noted Fisher's testimony wherein he stated that upon receipt of Verdel's July 18, 2007 letter, he called Verdel to ask for more time to respond. Ibid. The ALJ also noted Verdel's testimony wherein he stated he had no recollection of this conversation with Fisher, but that he typically agreed to such extensions, and would not normally make a note of such approval. Ibid.

Based on the credible testimony of both Verdel and Fisher concerning this issue, and the fact that the Fisher's August letter is very lengthy, laying out many details, the ALJ found that Fisher sought an extension of time to respond, that Verdel followed his usual practice and granted said extension, and that Fisher responded within an appropriate time period per their agreement. Ibid. Thus, the ALJ found that Fisher did not violate N.J.S.A. 17:22A-40(a)(2) and N.J.A.C. 11:17A-4.8, as alleged in Count 15 of the OTSC. Ibid.

Count 16: Failure to Respond to the Department's Inquiry Within 15 Days
(Respondent Fisher)

Count 16 of the OTSC alleges that Fisher failed to respond to the Department's April 19, 2011 letter requesting a statement of his annuity solicitations and sales, in violation of N.J.A.C. 11:17A-4.8 and N.J.S.A. 17:22A-40(a)(2). Id. at 17. N.J.A.C. 11:17A-4.8 requires that an insurance producer respond to the Department's inquiry within the time requested, or no later than 15 calendar days from the date of inquiry or mailing where no time was specified.

The ALJ noted that Verdel sent a letter to Fisher on April 19, 2011 that demanded Fisher reimburse $58,689.66 to WB and JK/MK and assessed a fine of $2,500 per transaction, for $5,000 total. Id. at 11. The Department contended that this letter was triggered by the agency keeping up with FINRA's publications. Ibid. Fisher contended that Verdel's letter is a result of Fisher's timely notification to the Department regarding the FINRA proceeding initiated against him. Id. at 12. Furthermore, Fisher testified that upon receipt of the April 2011 letter, he called Verdel to ask for more time to respond. Id. at 11. Verdel testified that he had no recollection or notation indicating that he received such a call or granted the request. However, he would have made a note had he denied such a request, and there is no notation concerning a denial. Fisher responded with a lengthy letter to Verdel dated June 6, 2011. Ibid.

In conclusion, the ALJ found that Verdel's letter was in response to Fisher's attorney's timely notification to the Department of the FINRA complaint. The ALJ found Fisher and Verdel's testimony credible concerning Fisher's request for more time and Verdel's testimony that he would likely grant such a request and was not in the habit of noting such approvals. Id. at 17. The ALJ found that given that the burden is on the Department to establish the facts related to its charges by a fair preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), the Department had not carried its burden with relation to proving the facts necessary to establish that Fisher's conduct was in violation of N.J.S.A. 17:22A-40(a)(2) and N.J.A.C. 11:17A-4.8, as specified in Count 16. Ibid.

Count 17: Failure to Supervise as DRLP
(Respondent Madden)

Count 17 of the OTSC alleges that Madden, as the DRLP and having an ownership interest of more than 10 percent in Regal, failed to properly supervise Fisher and Regal's insurance related conduct as described in Counts 1 to 12, in violation of N.J.S.A. 17:22-40(a)(2) and N.J.A.C.

11:17A-1.6(c). Id. at 17. N.J.A.C. 11:17A-1.6(c) states that "[l]icensed partners, officers and directors, and all owners with an ownership interest of 10 percent or more in the organization shall be held responsible for all insurance related conduct of the organization licensee, any of its branch offices, its other licensed officers or partners, and its employees." Such conduct is also in violation of N.J.S.A. 17:22A-40(a)(2), which prohibits violations of New Jersey's insurance laws. Ibid.

The ALJ noted the Department's contention that Madden failed to properly supervise Fisher by: failing to investigate what his co-owner was offering clients; participating directly in the WB transaction;[14] and through his firm, benefiting from the commissions earned on the sales. Id. at 12. The ALJ found Madden's testimony regarding his involvement credible. Regarding the NFOA Installment Plan, Madden testified that, after discussing the details of the plan with Fisher, he was confident his partner had conducted the due diligence necessary to offer the product to their clients. Ibid. Furthermore, Madden testified that he relied on Fisher's accurate representation that the NFOA was licensed as a Tennessee corporation, and had an application pending for IRS charitable-tax-status; and acknowledged Fisher's multiple attempts to confirm said information with the IRS. Ibid. Regarding Madden's participation in the sale of the Installment Plan to WB, Madden stated that he and Fisher only offered this product to WB after WB had turned down two other investment ideas. Id. at 8. Lastly, Madden testified that he and Fisher founded Regal together in 2004, where they treated all their clients as clients of the firm, having only one

[14] As noted in the Initial Decision, Madden was directly involved in the sale of the NFOA Installment Plan to WB. Id. at 12. A review of Madden's testimony demonstrates that WB contacted Regal upon receipt of a direct mailing to her home. Madden met with WB for an initial "fact finding" meeting. (September 18, 2017 Transcript, 64:14-17). Approximately two weeks later, Madden and Fisher met with WB for a second time to continue evaluating her financial goals. (September 18, 2017 Transcript, 67:4). Prior to a third meeting, Fisher approached WB about the NFOA Installment Plan product. (September 18, 2017 Transcript, 69:8). A third meeting took place between Fisher and WB to discuss the product further, at which Madden was not present. Id. at 69:2-3.

checkbook and one trust account, and accepting all commissions on behalf of the firm to be divided evenly. Id. at 12. Finally, Madden left Regal in 2016 to start his own company. Ibid.

Based on this testimony, the ALJ found that Madden failed to properly supervise the operations of Fisher and Regal, in violation of N.J.A.C. 11:17A-1.6(c) and N.J.S.A. 17:22A-40(a)(2). Id. at 17-18. Furthermore, the ALJ noted that with regard to the sale of the Installment Plan to WB, Madden directly participated in the recommendation of the product without conducting independent due diligence. Id. at 18.

ALJ'S FINDINGS AS TO THE PENALTY AGAINST RESPONDENTS

Imposition of Monetary Penalties

The ALJ determined that the imposition of civil monetary penalties was appropriate in this matter. The ALJ noted that the standards for the imposition of administrative fines and penalties are set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 18. These factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions or treble-damages actions; and (7) past violations. Ibid.

Regarding the first factor, good or bad faith, the ALJ found that the Respondents' conduct was erroneous, but did not rise to the level of bad faith. The ALJ relied on Rider v. Lynch, 42 N.J. 465, 476 (1964), where the Court described the fundamental expectations for an insurance producer, which include exercising "reasonable skill, care and diligence in the execution of the commission... expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected. If he neglects to procure the insurance or if the policy is void or materially deficient or does not provide

the coverage he undertook to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby." Further, the ALJ relied on Carter Lincoln-Mercury, Leasing Division v. EMAR Group, 135 N.J. 182, 198 (1994), where the Court explicitly stated that brokers have a duty to investigate the financial solvency of a carrier with whom they are placing insurance. The ALJ did not find the Department's argument that Fisher and Regal were so negligent in their investigation of the NFOA to warrant a finding a bad faith. In light of these cases, the ALJ found that Fisher, who did not have access to the internet as we know it today, was a victim of a Ponzi scheme as much as his clients. Id. at 19. The ALJ noted that she was convinced that Fisher proposed the Installment Plan to these clients when other avenues had failed them, and after his first client received timely payments, continued to refer others to the NFOA product.[15] Id. at 20. In addition, the ALJ found Fisher was generally motivated by his focus on helping his clients achieve "goals not otherwise attainable" and this intent is demonstrated by the speed with which he returned the commissions, the fact that the IRS charitable deductions were available to the clients for a couple of tax years, and the thoroughness of his response to Investigator Verdel's letters. Ibid. Thus, the ALJ concluded that Fisher's conduct did not demonstrate bad faith. Ibid.

As to the second factor, ability to pay, the ALJ found that based on the 2015 tax return provided, Fisher has demonstrated that his ability to pay fines imposed is very limited. Ibid. The

[15] The record reflects that JK/MK signed their Installment Plan Agreement on October 1, 2006. (Exhibit J-15). JK/MK received their first installment payment in a timely manner on January 1, 2007 and continued to receive payments until October 1, 2007. (Exhibit J-30). WB signed her Installment Plan Agreement on October 30, 2006. (Exhibit J-17). As part of the Agreement, WB requested an advance payment of $18,000. The record indicates that the NFOA issued a check to WB for $18,000, dated January 2, 2007. (Exhibit J-19). In addition, WB received her first payment in a timely manner on February 1, 2007. (Exhibit J-31).

ALJ did not make any determination as to whether Regal or Madden had demonstrated an ability or inability to pay fines assessed.

As to profits from the improper conduct, the ALJ focused on the commissions Fisher, Regal and Madden earned by selling NFOA Installment Plans totaling $37,489.75. However, since these commissions were repaid to the NFOA while under receivership in 2007, the ALJ found that there was no profit from the improper conduct, and therefore this factor weighed in favor of mitigation. Ibid.

The ALJ noted that the fourth factor—injury to the public—is sharply disputed. Fisher contended that JK/MK saw highly favorable results as the GE stock that were transferred to the NFOA to fund their investment plummeted in value shortly after the sale and were able to receive the promised tax break for two consecutive years. Id. at 7. Fisher stated that WB received the cash payment required to undertake the eye care and dental work she needed, without forfeiting her access to the Pharmaceutical Assistance to the Aged and Disabled ("PAAD") plan. Id. at 8. The Department argued that Fisher cannot claim benefit from the vagaries of the stock market, and that WB had waited years for the return of her full investment, which, even then, was made without any interest. Moreover, the Department argued that the public is harmed when faith in the insurance markets is damaged by illegal activity. Weighing both arguments, the ALJ concluded that this factor weighs toward the penalty side, but not heavily. Id. at 21.

The ALJ found that the fifth factor, the duration of illegal activity, occurred over a period of five months in October and November 2006, January 2007, and April and May 2007, and found the short duration to be a mitigating factor. Ibid.

The sixth factor examines the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. Here, the ALJ found that the FINRA

proceedings against Fisher, which included a substantial penalty of $47,258.90 in restitution, a $15,000 fine and a six-month suspension, weighed in favor of mitigation. Ibid. The ALJ did not discuss prior criminal or civil actions against Madden, who was not named in the FINRA proceeding. The ALJ's Initial Decision also did not specifically address Regal.

Lastly, the ALJ found that because there are no other past violations[16], factor seven also weighs in favor of mitigation. Ibid.

Based upon the above analysis, the ALJ concluded that the following fines should be imposed for each count:

As to Counts 1, 4, 7, and 10, relating to the sale of the NFOA Installment Plan product to four separate clients, the ALJ assessed a penalty of $500 for four violations of N.J.S.A. 17:22A-40(a)(8) and $500 for four violations of N.J.A.C. 11:17A-4.10, totaling $4,000, to be paid jointly and severally by Fisher and Regal.

As to Counts 2, 5, 8, and 11, for the presentation of the NFOA Installment Plan to JK/MK, WB, and GB/MB, and misleading information to DC, the ALJ assessed a penalty of $500 for four violations of N.J.S.A. 17:29B-3 and N.J.S.A. 17:29B-4(2); $500 for four violations of N.J.S.A. 17B:30-3; and, $500 for four violations of N.J.S.A. 17:22A-40(a)[17], totaling $6,000, to be paid jointly and severally by Fisher and Regal.

As to Count 2, for the two allegations of twisting involving GM/MB, and WB, in violation of N.J.S.A. 17B:30-6, the ALJ assessed a fine of $250, totaling $500, to be paid jointly and severally by Fisher and Regal.

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[16] The ALJ did not specify which of the Respondents had no past violations.

[17] The ALJ did not specify which statutory violation of N.J.S.A. 17:22A-40(a) alleged in Counts 2, 5, 8, and 11 is being addressed by this penalty.

As to Counts 3, 6, 9, and 12, for acting on behalf of an unlicensed insurer, the ALJ assessed a fine of $100 for four violations of N.J.S.A. 17:22-6.37, totaling $400, to be paid jointly and severally by Fisher and Regal.

As to Count 17, for Respondent Madden's failure to supervise the conduct of Respondents Fisher and Regal, the ALJ assessed a fine of $1,000 for his violation of N.J.S.A. 11:17A-1.6(c) and a fine of $1,000 for his violation of N.J.S.A. 17:22A-40(a)(2), for a total of $2,000, to be paid individually by Respondent Madden.

In summary, the ALJ recommended that Fisher and Regal shall be jointly and severally liable for Counts 1 through 12, for a total of $10,900 in penalties, and that Madden shall be liable for penalties for Count 17 totaling $2,000. In addition, the ALJ recommended that the Respondents' licenses be suspended only if the Respondents failed to pay said fines "within a reasonable period of time.", however, "a reasonable period of time" was not defined in the Initial Decision.

Revocation or Suspension of Respondents' Insurance Producer Licenses

The ALJ found that neither revocation or suspension of the Respondents' insurance producer licenses were warranted in this matter. The ALJ relied on New Jersey Department of Insurance v. Sarris Financial Group, 96 N.J.A.R. 2d (INS) 77, which determined that the immediate suspension of insurance producer licenses was not appropriate where the producers had been accused of demonstrating "unworthiness, bad faith, dishonesty and incompetency to transact business as insurance producers" by selling the products as the producers had not sold the products within the last three years, there was no ongoing threat to the public. Further, the ALJ cited In re Commissioner of Banking & Insurance v. Parkwood Co., 98 N.J. Super. 263, 273 (App. Div. 1967), where the Commissioner set fines and suspended an insurance producer license until

restitution, amounting to $8,242.23, was paid in full, imposing revocation only if restitution was not made within 15 days. In addition, the ALJ relied on Commissioner v. Bonnell, BKI 06993-08, Initial Decision, (05/19/2014), Final Decision and Order, (10/06/2014) (licensure revocation is appropriate for egregious conduct) and Commissioner v. Uribe, BKI 07363-07, Final Decision and Order, (09/28/2011), adopting Initial Decision, (03/31/2011), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-1285-11T1 (App. Div. March 7, 2013) (revocations and significant fines are appropriate for repetitive conduct over several years) to find that licensure revocation is often appropriate for demonstrably more egregious conduct.

Overall, the ALJ held that license revocation was not warranted and that suspension should only be imposed if the Respondents fail to comply with the payment of penalties within a reasonable time. Id. at 23.

EXCEPTIONS

Following the issuance of the Initial Decision, exceptions in this matter were originally due December 21, 2017. By letter dated December 21, 2017, the Department requested an extension of time to file exceptions until January 8, 2018, which was granted on December 22, 2017. By letter dated January 8, 2018, the Department requested a second extension of time to file exceptions until January 22, 2018. No objection was received from the Respondents and the request was granted on January 9, 2018. By letter dated January 22, 2018, the Department requested a third extension of time to file exceptions until January 29, 2018. Again, no objection was received from the Respondents and the request was granted. The Department submitted its exceptions on January 29, 2018, on this same date, the Respondents requested an extension of time to file a reply to the Department's exceptions until February 14, 2018. This request was granted. On February 14,

2018, the Respondents filed their reply. On February 22, 2018, the Department filed a sur reply to the Respondent's reply.[18]

Petitioner's Exceptions

The Department concurred with the ALJ's findings in the Initial Decision that the Department has proven certain allegations contained in the OTSC. Nevertheless, the Department sought to clarify several issues, and excepts to the ALJ's application of the Kimmelman factors in the determination of appropriate civil monetary penalties and the determination regarding the revocation of Fisher's insurance producer license.

Counts 1, 4, 7, and 10

The Department concurred with the ALJ's findings as to Counts 1, 4, 7, and 10, finding that the sale of NFOA Installment Plans demonstrated Fisher's incompetence, in violation of the insurance laws of New Jersey and constituted a breach of Fisher and Regal's fiduciary duty to their clients due largely in part to the Installment Plan's "too good to be true" nature. However, the Department contends that the statements contained in the NFOA pamphlet and related documentation, (Exhibit J-2: NFOA Pamphlet; J-14: NFOA Illustration for JK/MK; J-15: NFOA Installment Plan Agreement for JK/MK; J-16: NFOA Illustration for WB; J-17: NFOA Installment Plan Agreement for WB; J:20: NFOA Illustration for GB/MB; J-21: NFOA Installment Plan Agreement for GB/MB; and J-22: NFOA Installment Plan Agreement for DC), should carry more weight in determining the imposition of penalties, as they further demonstrate the egregiousness of the Respondents' conduct.

[18] I note that there is no provision in the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1 to - 21, for the filing of a sur reply to a reply to exceptions. In addition, the sur reply did not contain any new information that would impact my determination in this matter.

First, the Department points out that the contents of the NFOA pamphlet (Exhibit J-2) Fisher obtained from Olive is "so bizarre and unreasonable that any sensible insurance producer should have recognized that the product was not legitimate and avoided NFOA." Specifically, the Department argued that Fisher failed to discern or investigate how the NFOA made the charitable contributions highlighted as a feature of the Installment Plan. The Department examined the NFOA's Installment Plan pamphlet, which states the NFOA helps "millions" of men, women, and children and "provides support to organizations providing humanitarian relief," (Exhibit J-2, DOBI 0004) noting that the pamphlet does not provide any further specificity or detail. The Department pointed out that Fisher never spoke to anyone at the NFOA other than Olive, at which time he did not ask any questions related to charitable contributions. In addition, the Department examined the JK/MK, WB, GB/MB and DC's NFOA Installment Plan Agreements (Exhibits J-15, J-17, and J-22), and noted that each contract is only three pages long and does not mention what portion of the clients' monies would be donated to these unnamed charitable organizations in order to receive tax deductions. In addition, the Department emphasized portions of Fisher's testimony where he stated that he was not concerned about his inability to investigate the solvency of the NFOA as it was a private company, that he did not care what the NFOA did with their money, and that he could not identify any of the charitable organizations with which the NFOA purported to work.

Second, the Department asserted that the NFOA's "guarantee" to provide a tax favored income was unreasonable. The Department examined the NFOA pamphlet, which states that it could provide a "guaranteed, fixed, taxed favored income for a guaranteed period of years" of up to six percent per year with tax deductions, elimination of the capital gains tax, and "no market risks," set up charges, legal fees or annual tax filings (Exhibit J-2, DOBI 0005). The Department contended that Fisher was not able to explain how the NFOA could make such guarantees while

still providing additional benefits. In addition, the Department pointed out that Fisher's "investigation" into the NFOA was insufficient in that it included only looking at the NFOA's website, talking to a competitor (the NCF) and Olive, and checking on the NFOA's charitable tax exemption application with the IRS. The Department argued that this "investigation" by Fisher failed to satisfy his affirmative duty to conduct an evaluation of the financial stability of the NFOA. The Department outlined many affirmative steps Fisher should have taken to ensure the financial stability of the NFOA prior to presenting the Installment Plans to his clients.[19]

The Department stated that it does not agree with the ALJ's conclusion that speaking to NFOA's competitor, the NCF, constituted a legitimate investigate technique because the competitor was founded by Olive's father and because publications calling into question the NCF's legitimacy were available to Fisher at that time. In addition, the Department contended that Fisher failed to conduct adequate due diligence in that he failed to uncover the fact that the NFOA was not licensed to conduct business in New Jersey and that the NFOA had been subject to public regulatory sanctions in Washington (September 2006) and Florida (April 2007), prior to Fisher's presentation regarding the Installment Plan to his clients in October 2007. The Department also reiterated that in 2006, the NFOA was not a well-established company with a longstanding reputation for selling legitimate investments. Because the NFOA was from out-of-state, not approved by the IRS at the time as a charitable organization and newly established, Fisher was obligated to perform reasonable due diligence to determine the nature of the Installment Plan. The Department highlighted that Fisher's clients transferred six-figure sums to Fisher, their life

[19] The proposed steps Fisher should have taken included: obtaining a prospectus or other financial filings for the NFOA plan, confirming the accuracy of the statements regarding "guaranteed income," further investigating the charities the NFOA allegedly partnered with, independently verifying statements made to him by Olive, and contacting the SEI Private Trust where the NFOA allegedly kept its assets.

savings, which had previously been held in secure investments, for a bogus product that made no financial sense. The Department contended that this constituted a breach of Fisher's fiduciary duty to his clients in that he did not act with reasonable skill, care, and diligence. Accordingly, the Department maintained that a substantial civil penalty and revocation of Fisher's insurance producer license is warranted.

Third, the Department asserted that Fisher also breached his fiduciary obligation by presenting the NFOA Installment Plan to his clients, which promised investors a multitude of tax benefits based on its 501(c)(3) status, while approval was still pending with the IRS. The Department highlighted that Fisher proposed the Installment Plan to his clients without any apparent concern that the NFOA would not be able to provide the tax benefits promised or the harm to his clients' investments if 501(c)(3) status was denied. In addition, the Department contended that the fact that page one of the NFOA Installment Plan Agreement stated that the NFOA was recognized by the IRS as a charitable organization under the Internal Revenue Code, while Fisher knew that its 501(c)(3) status was still pending, should have indicated to Fisher that the NFOA was making material misrepresentations about the Installment Plan they were offering.

Counts 2, 5, 8, and 11

The Department concurred with the ALJ's findings as to Counts 2, 5, 8, and 11, that Fisher and Regal presented their clients with untrue, deceptive, and misleading information regarding insurance, in violation of the insurance laws of New Jersey. However, the Department raised two exceptions pertaining to these counts.

First, the Department indicated that there is a typographical error on page 14 of the Initial Decision, which excludes Count 11 from the heading title, "Counts 2, 5, and 8" and later, in that

same section, finds that Fisher violated Count 11. The Department requested that the Final Decision conclude that Counts 2, 5, 8, and 11 were found in favor of the Petitioner.

The Department's second exception pertains to the ALJ's conclusions regarding Counts 2, 5, 8, and 11. The Department requested that the Final Decision and Order specify, from the undisputed facts and joint exhibits, which false and misleading materials Fisher presented to his clients that violated the insurance laws. Specifically, the Department requested that the Final Decision and Order reflect that by presenting the NFOA pamphlet and custom illustrations representing what they would be entitled to in tax deductions, tax savings and annual payouts upon investing in the NFOA's Installment Plan to JK/MK, Fisher violated the insurance laws as specified in Count 2 of the OTSC. Next, the Department requested that the Final Decision and Order reflect that by presenting the custom illustrations representing what WB (Count 5) and GB/MB (Count 8) would be entitled to in tax deductions, tax savings and annual payouts upon investing in the NFOA's Installment Plan, Fisher violated the insurance laws as specified in Counts 5 and 8 of the OTSC. Finally, the Department requested that the Final Decision and Order reflect that by providing DC with a false and misleading NFOA Installment Plan Agreement, Fisher violated the insurance laws as alleged in Count 11 of the OTSC.

Counts 3, 6, 9, and 12

The Department concurred with the ALJ's findings as it relates to Counts 3, 6, 9, and 12, that, based on the evidence presented, the NFOA Installment Plan was an insurance product and the NFOA was not authorized to conduct business in New Jersey. Thus, Fisher and Regal were in violation of N.J.S.A. 17:22-6.37 in that they acted as an agent for or otherwise represented an insurer not authorized to transact such insurance in this State. Nevertheless, the Department

requests that the Commissioner clarify the nature of the NFOA Installment Plan product under the insurance laws of this State.

First, the Department contended that not only was the NFOA Installment Plan an insurance product, but that the Commissioner should find that the plan, as described in the OTSC, Fisher's Answer to the OTSC, and on the record, fits squarely within the definition of an "annuity" under N.J.S.A. 17B:17-5.[20]

Furthermore, the Department asserts that Fisher, as an experienced insurance producer licensed by the Department, should have known that the annuity he was selling was a regulated insurance product and that the NFOA required authorization to be sold in New Jersey. Thus, the Department stated that Fisher's failure to recognize these salient points further demonstrated his "flagrant incompetence" and breach of his fiduciary duties to his clients.

Counts 13 and 14

The Department respectfully disagreed with the ALJ's findings and conclusions with regard to Count 13 and Count 14, wherein the ALJ concluded the Department did not establish, by a preponderance of the evidence, that Fisher failed to notify the Department of a January 14, 2011 FINRA complaint or March 8, 2012 settlement against Fisher in a timely manner, in violation of N.J.S.A. 17:22A-47(c) and N.J.S.A. 17:22A-40(a)(19).

First, the Department contended that the ALJ mistakenly relied upon an April 19, 2011 letter from Verdel to Fisher for the finding that Fisher timely notified the Department. The Department stated that the letter makes no reference to FINRA, the restitution schedule referenced

[20] "Annuity" is defined as "a contract under which an insurer obligates itself to make periodic payments for a specified period, such as for a number of years, or until the happening of an event, or for life, or for a period of time determined by any combination thereof." N.J.S.A. 17B:17-5.

in the letter is based on information obtained from NFOA liquidators, and that this letter predates the 2012 FINRA settlement requiring restitution.

In addition, the Department pointed out that the language of N.J.S.A. 17:22A-47 creates an affirmative duty for the producer to create a report when notifying the Commissioner of any administrative action taken against the producer, which should include copies of the order, consent order or other relevant documents. The Department contended that Fisher failed to preserve documents to support his position that the Department was notified regarding the FINRA actions taken against him, failing to satisfy this affirmative duty. Further, the Department argued that as competent evidence was submitted to show that Fisher was subject to a FINRA action and settlement, and the Department provided Verdel's credible testimony that no report detailing these actions was received by the Department, Counts 13 and Count 14 should be found for the Department. Lastly, the Department argued that the ALJ's position that, as the Department could not prove that the report was not provided to the Department because the Department did not have any documents or evidence to the contrary, is at odds with N.J.S.A. 17:22A-47.

Monetary Penalty Imposed by the ALJ

The Department also took exception to the ALJ's imposition of a $10,900 total fine against Fisher and a $2,000 total fine against Madden, arguing that a more substantial monetary fine is warranted. As discussed above, the ALJ applied the factors as set forth in Kimmelman to determine the imposition of monetary penalties in this matter.[21] These factors include the good faith or bad faith of the producer and the injury to the public. The Department took exception to the ALJ's findings regarding these two factors.

[21] See Initial Decision at 19 for the application of the Kimmelman factors.

First, the Department took exception to the ALJ's finding that Fisher's errors constituted a mistake that did not rise to the level of bad faith. The Department stated that under the Producer Act, bad faith need not be proven by actual intent or malice because the Act does not require proof of intent. Furthermore, the conduct of the producer itself is the determinative factor as to whether a violation has occurred. As such, the Department argued that Fisher's failure to conduct any meaningful due diligence into the NFOA before selling their product to his elderly clients demonstrates bad faith and warrants the imposition of a substantial civil penalty for each violation.

The Department took exception to the ALJ's finding that Fisher's conduct constituted harm to the public "which did not weigh heavily towards a penalty." The Department contended that substantial, direct harm occurred, both to Fisher's clients and to the insurance industry at large. The Department argued that substantial harm occurred to Fisher's clients, who collectively invested over $800,000 in assets through the NFOA Installment Plan, putting them in jeopardy of losing their life savings and rendering their savings unavailable to them for other investment opportunities. In addition, JK/MK were forced to wait several years to be made whole of their investment while WB passed away before being made whole. The Department maintained that Fisher's reckless incompetence deprived his clients of their ability to use their money as they saw fit, constituting substantial harm to the public, weighing heavily for the imposition of a substantial civil penalty.

Furthermore, the Department argued that Fisher's breach of fiduciary duties to his clients created serious harm to the public, warranting a substantial civil penalty, as this type of unscrupulous behavior causes harm to the insurance industry. The Department contended that, as the Commissioner is charged with the duty to protect the public welfare and instill public confidence in both insurance producers and the industry as a whole and that an insurance producer

collects money from the insureds, the public's confidence in a licensee's honesty, trustworthiness and integrity are of paramount concern. Furthermore, the Producer Act is designed not only to impose penalties and provide restitution, but to protect the public from illegal and unethical actions taken by insurance agents and brokers. The Department contended that as Fisher acted in bad faith by neglecting his clearly defined duties as an insurance producer, substantial civil penalties are necessary to protect the public from producers who fail to exercise skill and diligence when recommending that senior citizens invest their life savings in dubious insurance products and degrade the insurance industry as a whole, eroding the public's confidence.

Lastly, the Department took exception to the ALJ's conclusion that Madden, as the DRLP who also had over 10 percent ownership interest in Regal, should be liable for a $2,000 total penalty for the violations as stated in Count 17 of the OTSC. The Department contended that the ALJ failed to fully consider Madden's legal duty to supervise the activities Fisher and Regal. The Department maintained that a $5,000 civil penalty would be more appropriate. As DRLP, Madden was responsible for the Regal's compliance with New Jersey insurance laws and rules. Furthermore, pursuant to N.J.A.C. 11:17A-1.6(c), licensed partners or owners with an ownership interest of 10 percent or more of an organization shall be held responsible for all insurance related conduct of the organizations licensees and its employees. The Department asserted that as Madden and Fisher were the only two owners of Regal, any violations of insurance laws and rules are imputed directly upon Madden as well. Furthermore, Madden was involved in the solicitation of the Installment Plan to WB, and Madden admitted that he did not conduct any research into the product himself and lending credibility to the plan as it was presented to WB by two licensed agents as a worthy investment. In conclusion, the Department maintained that, as Madden violated N.J.A.C. 11:17A-1.6(c) a total of 16 times, one violation for each count of the OTSC pertaining to

Fisher and/or Regal, and because any violation of an insurance regulation constitutes a violation of the Producer Act pursuant to N.J.S.A. 17:22A-40(a)(2), the Department recommended a civil penalty of $5,000 should be imposed against Madden.

The Revocation of Fisher's Insurance Producer License

The Department took exception to the ALJ's conclusion that revocation is not warranted in this matter. The Department distinguished the Sarris decision upon which the ALJ based her decision because Sarris is based on the immediate suspension of a producer license whereas in the instant matter, the immediate suspension of Fisher's license is not being requested. Further, the Department pointed out that the producer license at issue in Sarris was subsequently revoked by the Commissioner in Commissioner v. Sarris Financial Group, BKI 8902-97, Final Decision and Order, (08/31/1999).

The Department also contended that Fisher failed to exercise the requisite skill and diligence required of an insurance producer, breaching his duty of care, giving rise to liability. The Department indicated that Fisher breached his duty of care by failing to conduct any due diligence, relying on NFOA documentation making outrageous and unsupportable claims, and failing to confirm the NFOA's status with State regulators prior to recommending the NFOA's products to his clients.

The Department also pointed out that all of the clients who were presented with and purchased the Installment Plan from Fisher were elderly clients, each of whom was in their 80s. Elderly populations are especially vulnerable to fraudulent insurance products as they are incapable from recovering from the resulting financial losses. The Department asserted that this is especially salient in the case of WB, who died before she could be made whole.

The Department also argued that revocation of Fisher's license in this matter would serve the public interest. Fisher's reckless actions irreparably harm the public's confidence in the insurance industry, where honesty, trustworthiness and integrity are of paramount concern. Commissioner v. Fonseca, BKI 11979-10, Initial Decision, (08/15/2011), Final Decision and Order, (12/28/2011). Furthermore, the Department contended that revocation would act as a deterrent to the insurance producer profession as a whole, as it is necessary to send the clear message that such conduct will result in significant remedial action.

Lastly, the Department maintained that the Commissioner has consistently ordered revocation in cases of similar producer conduct. The Department referred to Commissioner v. Berlin, BKI 05377-03, Final Decision and Order, (08/11/2009), wherein the Commissioner revoked the producer license of the respondent who induced his elderly clients to purchase annuities by misrepresenting the terms of the proposed annuities in a "twisting" scheme, calling the scheme reprehensible and ordering revocation. Similarly, the Department argued, Fisher solicited his clients with an annuity without knowing what it was he was selling to his elderly clients, violating his duty of trust to his clients.

In conclusion, the Department pointed to Fisher's own testimony, wherein he stated, "quite frankly, I don't care what [NFOA] were going to do with their money," indicating his "blind ignorance" in this matter, warranting revocation for this gross deviation from the standard of care required of insurance producers.

Clarification of the Full Procedural History

The Department's final exception was that the Initial Decision's procedural history did not include the relevant motion practice. As discussed above,[22] on May 15, 2017, the Department moved for Summary Decision against the Respondents, which was opposed by Respondents' letter brief filed on June 14, 2017. The Department submitted its reply to the Respondents' opposition by letter dated June 28, 2017. On June 29, 2017, the ALJ denied the Department's motion in full and the case proceeded to hearing on July 18, 2017 and September 18, 2017.

Respondent's Reply to Petitioner's Exceptions

The Respondents submitted their reply to the Department's exceptions on February 14, 2018. In their reply, the Respondents discuss the testimony and evidence submitted into the record as well as what they categorize as the "inflammatory rhetoric" used in the Department's exceptions. The Respondents repeatedly maintained that each count is repetitive and that each of the Department's exceptions constitute a "second bite at the administrative apple."

The Respondents reemphasized the steps Fisher took to ensure that the Plan was a sound investment prior to suggesting the product for the first time to his clients, JK/MK. These steps have been discussed above, with the only new assertion being that while conducting his due diligence, Fisher compared the NFOA pamphlet to that of the NCF and found them to be of comparable size, thus not raising any "red flags."[23]

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[22] See Statement of the Case and Procedural History, page 5.

[23] In their Reply to Petitioner's Exceptions, the Respondents assert several facts not found by the ALJ in the Initial Decision and without appropriate citations to the record. These assertions are noted in this discussion of their Reply to the Petitioner's Exceptions. However, as no citations to the record have been provided, these assertions are given limited consideration. Moreover, I note that even if these assertions were accepted as true, this does not change my legal analysis or conclusions.

The Respondents also provided some background information as to how they began working with JK/MK. The Respondents emphasized that upon learning about their specific financial needs, Fisher suggested a charitable remainder trust accompanied by an insurance policy with a survivorship policy as a solution, but JK/MK's application for such a policy was denied by ING. Upon ING's denial, Fisher then proposed the NFOA Installment Plan product to JK/MK. The Respondents pointed out that after the NFOA fraud was revealed, JK/MK continued to work with Fisher, purchasing additional annuities from him in 2008, and they remain his clients today. Furthermore, the Respondent asserted that the family's financial goals were achieved – due to a charitable tax credit applied to their adjusted gross income, their taxable income was reduced by approximately $19,000. The Respondents also asserted that the IRS did not question the deductions or credits taken by the family, including a $3,000 carry-forward. Lastly, the GE stock that JK/MK transferred to participate in the Installment Plan declined in value, approximately 70 percent due to market activity, saving the family from suffering that loss.

The Respondents also provided some background information as to how they began working with WB, who contacted them after receiving a third-party marketing card. The Respondents emphasized that upon learning about WB's specific financial needs, which included the need to liquidate assets to address a pressing medical problem, Fisher and Madden suggested that WB participate in the NFOA Installment Plan. WB received an immediate payout of $18,000 for her medical expenses. The Respondents emphasized that WB was not presented with the NFOA *pamphlet* as tax-related issues were not paramount to her financial situation. The Respondents also stated that restitution was made using funds set aside in a trust account pending the location of her beneficiaries. Once her son was located, the funds were sent immediately to her estate.

In addition, Respondents provided some background information as to how they began working with GB/MB, who was referred to them by another insurance agent. They reiterated that GB/MB, who required immediate income, suffered liquidity problems after being sold two new annuities through AIG. After determining that AIG would not cancel the annuities, Fisher proposed the NFOA Installment Plan. GB/MB immediately received $20,000 from the NFOA, even though he did not purchase a policy from them or transfer any assets to them. The Respondents pointed out that GB/MB later received a second payment and an upfront payment of $20,000 that was never returned.

The Respondents also provided some background information as to how they began working with DC, who contacted them after receiving a third-party marketing card. The Respondents emphasized that, upon learning about DC's specific financial needs, who needed to decrease his assets so that he could reside at a specific assisted living facility, they proposed DC participate in the NFOA Installment Plan. The Respondents noted that DC's NFOA transaction was not processed.

Counts 1, 4, 7, and 10

As to Counts 1, 4, 7, and 10, the Respondents attempted to address several of the points made by the Department. They begin by pointing out that the counts are repetitive. Their first contention is that the charitable tax deduction touted in the NFOA Installment Plan was reasonable and JK/MK, who needed the tax write off, were able to take advantage of this benefit as it was represented to them by the Respondents. Secondly, the Respondents argued that "it does not matter to what charity the NFOA was making a charitable deduction" because the charitable tax deduction came from the client donation to the NFOA, which they assert was a charity, and was not related to where the NFOA made subsequent charitable donations with these funds. Furthermore, the

Respondents reiterated that comparing the NFOA's pamphlet with a pamphlet generated by the NCF constituted due diligence on the part of Fisher, and that because the documents were comparable in size, it was appropriate that no red flags were raised.

To bolster their argument that Fisher's due diligence was extensive and appropriate, the Respondents emphasized Fisher's prior testimony which asserted that evidence of regulatory action in other states, including Washington and Florida, or any findings of fraud against the NFOA by State and Federal investigative agencies, was not readily available at that time via by Google Search and that Google's search algorithm has been greatly improved since then. Furthermore, the Respondents argue that a further search was not warranted to be undertaken by Fisher because he was an insurance agent, not an investigator.

In addition, the Respondents pointed out that the NFOA paid JK/MK, their first clients for their participation in the Investment Plan through October 2007, so there was no indication of the investment failing due to fraud. The Respondents also referred to Verdel's testimony, wherein he stated that Fisher stopped selling NFOA products immediately upon learning that the State of Tennessee was investigating the NFOA, as a meaningful fact.

Lastly, the Respondents emphasized that the IRS application for the NFOA was pending, as confirmed by Fisher. The tax benefit conferred to the NFOA if their charitable status was approved only impacted one customer, JK/MK. However, the Respondents stated, that Fisher had discussed with the couple, that the application may be denied.

Courts 2, 5, 8, and 11

As to Counts 2, 5, 8, and 11, the Respondents maintained that each count is repetitive.

As to Count 2, the Respondents affirmed that Fisher provided the NFOA pamphlet to JK/MK because he explained that the NFOA's 501(c)(3) application may be denied and the repercussions of said denial.

As to Counts 5, 8, and 11, the Respondents contended that the illustrations referenced in the Petitioner's Exceptions were provided by the NFOA and presented to GB/MB, WB and DC after the Installment Plan agreements were executed and not by Fisher as a method to induce the participation of his clients. The Respondents emphasized that Fisher did not prepare or present said illustration to his clients.

Counts 3, 6, 9, and 12

The Respondents maintained that each count is repetitive, and that the Department, in charging the Respondents for acting as an agent of an insurer not authorized to transact business in the State of New Jersey, is taking "a second bite at the administrative apple." The Respondents assert that FINRA has already acted against Fisher, and in doing so, determined that the NFOA product at issue constitutes a security. The Respondents maintained that the Department is calling that same product an insurance product.

The Respondents also argued that the due diligence standard is one of reasonableness. The Respondents admit that Fisher made a mistake by failing to discern whether the NFOA was registered with Department. However, the Respondents maintained that Fisher otherwise acted in a clearly diligent and methodical way when he recommended the NFOA products to his specific customers based on their specific financial needs.

Counts 13 and 14

The Respondents argued that the testimony provided by both Fisher and Verdel demonstrated that Fisher was fully cooperative with the Department on many occasions throughout

the investigation into this matter. The Respondents argued that Verdel was unable to state with certainty that Fisher did not report the FINRA action against him within the statutory time period in 2011. Thus, the Respondents except that the Department was unable to meet its burden that Fisher did not timely notify the Department of the FINRA action.

Monetary Penalty Imposed by the ALJ

The Respondents concurred with the ALJ's application of the Kimmelman factors and provided their position as to factual and legal support for the ALJ's conclusions. However, the Respondents sought to further expound on the ALJ's conclusions pertaining to the good or bad faith of the producer and the injury to the public, in response to the assertions made by the Department in its exceptions.

The Respondents concurred with the ALJ's conclusion that Fisher's actions constituted an error or mistake, but that such action did not constitute bad faith. Citing several anti-trust cases, the Respondents argue that that courts have consistently and uniformly assessed the egregiousness of a defendant's conduct and whether the defendant could have reasonably believed their conduct was legal. The Respondents further stated that conduct is evaluated under a "rule of reason" test where actions are evaluated "to determine whether it in fact causes significant harm relative to the business justification." Thus, the Respondents argued it is possible for a defendant to act in good faith, while adopting conduct that is ultimately ruled unlawful. With respect to Fisher, the Respondents reiterated that, upon learning of the NFOA's fraud by way of the State of Tennessee, he immediately returned any commissions earned and cooperated with all agencies involved by providing documentation and information as requested.

In addition, the Respondents concurred with the ALJ's conclusion that the "injury to the public" in this matter weighs towards the penalty side, but not heavily. The Respondents argue

that many courts equate the injury to the public with the profits obtained by the defendant through their illegal conduct. However, the Respondents stated that, in this matter, the two investing customers (JK/MK and WB) were made whole. Furthermore, the Respondents argued that as JK/MK continued to invest with Fisher after the NFOA fraud was revealed, this demonstrated that their confidence in the insurance industry was not tarnished. Therefore, Respondents' conclude that the lack of injury to their clients demonstrates that there is no injury to the industry generally, and thus there is no basis for an increased penalty.

The Revocation of Fisher's Insurance Producer License

The Respondents concurred with the ALJ's determination that revocation of Fisher's insurance producer license is not warranted in this matter. The Respondents argued that revocation would constitute an extraordinary remedy, only appropriate in extreme circumstances, and that to revoke Fisher's producer license would result in an administrative sanction disproportionate to the offense and "would constitute a shock to one's sense of fairness." The Respondents argued that revocation would be appropriate had Fisher drafted the misleading or incorrect NFOA pamphlet. However, since he only distributed a document that later turned out to be incorrect, revocation is not warranted here. Further, the Respondents asserted that because Fisher's conduct did not cause threat to the welfare of his clients and was not fraudulent or dishonest, revocation is not reasonable. The Respondents asserted that revocation has been imposed only upon licensees who engage in misconduct involving fraud, misappropriation of funds and bad faith or dishonesty.

Clarification of the Full Procedural History

The Respondents concurred with the Department's request that the procedural history be amended to include relevant motion practice.

LEGAL DISCUSSION

The conduct of an insurance producer in New Jersey is governed by the Producer Act, authorizing the Commissioner to refuse to issue or renew a license, or to revoke or suspend an existing license for enumerated violations of the insurance laws. N.J.S.A. 17:22A-26 to -57. Furthermore, N.J.S.A. 17:22A-40(a) and -45c permit the Commissioner to impose civil penalties for violations of the Producer Act. In addition, through administrative enforcement proceedings, such as license revocation or suspension matters, the Department bears the burden of proving a violation. Commissioner v. Myerson, BKI 6740-01, Initial Decision, (06/14/2002), Final Decision and Order, (08/02/2002). The Department must establish the essential elements of fact by a fair preponderance of the evidence. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006); In re Polk, 90 N.J. 550, 560 (1982). A fair preponderance of the evidence is evidence that is sufficient to assure reliability and to avoid the appearance of arbitrariness. Commissioner v. Ladas, BKI 0947-02, Initial Decision, (02/05/2004), Final Decision and Order, (06/22/2004).

Allegations Against the Respondents

For all the reasons set forth in the Initial Decision, I concur with the ALJ's findings as to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 17 of the OTSC issued against the Respondents. As found by the ALJ, the Department has met the preponderance of evidence standard and proven each allegation, and is, therefore, entitled to prevail as to those Counts. I reject the ALJ's findings that the Department failed to meet its burden as it relates to Counts 13 and 14 and concur with the ALJ's findings as to Counts 15 and 16, that the Department failed to meet its burden to establish a violation as alleged in those Counts.

Counts 1, 4, 7, and 10: Incompetence and Breach of Fiduciary Duty
(Respondents Fisher and Regal)

Counts 1, 4, 7, and 10 of the OTSC allege that by selling the NFOA Installment Plan to their clients, Fisher and Regal violated N.J.S.A. 17:22A-40(a)(8), N.J.A.C. 11:17A-4.10, and N.J.S.A. 17:22A-40(a)(2). As previously noted, the ALJ found that selling the NFOA plan violated the prohibition against incompetence and, in turn, against the breaking of insurance laws. In addition, the ALJ found that the Department's proofs of the "too good to be true" nature of the product were sufficient to establish the breach of prudence required of an insurance producer's fiduciary duty.

While I concur with the ALJ's findings, I note that the Initial Decision does not specifically set forth the statutory and regulatory violations that the Respondents committed in relation to Counts 1, 4, 7, and 10 of the OTSC. As the ALJ found that selling the NFOA plan violated the prohibition against incompetence and, in turn, against the breaking of insurance laws, I MODIFY the Initial Decision to find Fisher and Regal's actions as alleged in Counts 1, 4, 7, and 10 of the OTSC, were in violation of N.J.S.A. 17:22A-40(a)(8) (prohibits the use of fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility) and N.J.S.A. 17:22A-40(a)(2) (prohibits the violation of any insurance law or regulation). As the ALJ found that the Department's proofs of the "too good to be true" nature of the product is sufficient to establish the breach of prudence required by fiduciary duty, I MODIFY the Initial Decision to find that Fisher and Regal's actions as alleged in Counts 1, 4, 7, and 10 of the OTSC, were also in violation of N.J.A.C. 11:17A-4.10 (requires insurance producers act in a fiduciary capacity when conducting their insurance business).

I find the Department's exceptions pertaining to the weight the ALJ gave to the evidence submitted on the record in relation to Counts 1, 4, 7, and 10 compelling. The Department argues

that a review of the NFOA pamphlet, critical and/or questioning documents that existed in the public domain at that time regarding the NFOA and/or similar products, and the NFOA Installment Plan Agreement itself, clearly identify "red flags" that would indicate to a reasonable insurance producer that further investigation was needed prior to recommending this product to his clients. I agree with the Department's persuasive argument that this demonstrates the egregiousness of Fisher's failure to properly conduct due diligence.

Further, I do not find the Respondents' Reply persuasive. The Respondents argue that by comparing the size of the NFOA's pamphlet to that of a competitor, Fisher conducted due diligence.[24] Upon a further review of the evidence submitted, Fisher compared the NFOA's pamphlet, which touted benefits that should have appeared "too good to be true," to the pamphlet of the NCF, a competitor already facing regulatory action. Id. at 5. As to the Respondents' argument that Fisher failed to uncover relevant information about the NFOA and other similar charities because in 2006 Google was not the search tool it is today, I find this argument is unpersuasive. Fisher testified that he first learned of the NFOA in a magazine article. Id. at 4. The Department presented newspaper and magazine articles that discussed the questionable legitimacy of similar types of institutions that were published at that time. Id. at 6. If Google was not a reliable search tool, then Fisher should have used other reliable search tools he had at his disposal, such as newspapers and magazines, to which he had access. The degree of reliability of an internet search engine does not relieve a licensed insurance producer of performing his or her required due diligence prior to offering an investment product, particularly one which exhibited "red flags" as discussed above.

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[24] In their Reply to the Petitioner's Exceptions, the Respondents state that the NFOA's pamphlet was approximately the "same size" of the pamphlet created by that of their competitor, the NCF, a similar product that was started by the NFOA's President, Richard Olive's, father.

Overall, the Respondents' actions with regard to their review of this product before sale to elderly New Jersey insurance consumers does not constitute the necessary "due diligence" required of a licensed insurance producer acting in a fiduciary capacity. In re Parkwood Co., 98 N.J. Super. at 268. Insurance producers in New Jersey are required to exercise "reasonable skill, care and diligence in the execution of the commission… expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected. If he neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby." Lynch, 42 N.J. at 476. Here, the Respondents took limited steps to ascertain the legitimacy and security of the product being sold, and did not even take the most important initial step to determine if this product was permitted for sale in this State. This conduct amounted to gross incompetence – at a minimum – and breaches of their fiduciary duties that risked the life savings of their elderly clients in violation of the laws of this State as charged in the OTSC.

Counts 2, 5, 8, and 11: Prohibition of Unfair and Deceptive Acts
(Respondents Fisher and Regal)

Counts 2, 5, 8, and 11 of the OTSC allege that Fisher and Regal presented untrue, deceptive, and misleading information to their clients is in violation N.J.S.A. 17:22A-40(a)(7), which prohibits unfair trade practice or fraud, and in turn, violate N.J.S.A. 17:22A-40(a)(2), which prohibits the violation of insurance laws and regulations of the State, and N.J.S.A. 17B:30-3, which prohibits the misrepresentation and false advertising of insurance policies or annuity contracts. In addition, Counts 2, 5, and 8 of the OTSC also allege that this conduct is in violation of N.J.S.A. 17:29B-3, which prohibits producers from engaging in unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, and N.J.S.A. 17:29B-4(2), which

prohibits the dissemination of false information and advertising generally. Finally, Counts 5 and 8 of the OTSC also allege that Fisher and Regal are in violation of N.J.S.A. 17B:30-6, which prohibits "twisting," as it pertains to the sale of the Installment Plan to their clients. Ibid.

As it relates to Count 2, I concur with the ALJ's finding that Department has proven that Fisher and Regal's actions were in violation of N.J.S.A. 17B:30-3 and N.J.S.A. 17:29B-4(2). However, the ALJ made no specific finding as to whether Fisher and Regal's conduct was in violation of N.J.S.A. 17:22A-40(a)(7), N.J.S.A. 17:22A-40(a)(2), or N.J.S.A. 17:29B-3 as alleged in Count 2 of the OTSC. In the Initial Decision, the ALJ found that by presenting sample cash flows and benefits to JK/MK, which were untenable because the NFOA was structured like a Ponzi scheme, Regal and Fisher used unfair methods of competition and unfair or deceptive acts and practices. Id. at 10. The ALJ's finding supports the determination that Respondents Fisher and Regal's conduct is also in violation of N.J.S.A. 17:29B-3, which prohibits producers from engaging in unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, N.J.S.A. 17:22A-40(a)(7), which prohibits the commission of unfair trade practices or fraud, this, in turn, supports a finding that the Fisher and Regal's conduct is in violation of N.J.S.A. 17:22A-40(a)(2), which prohibits which prohibits the violation of any insurance law or regulation in New Jersey, as alleged in Counts 2 of the OTSC.

In their exceptions, the Department requested that the Final Decision and Order articulate the specific false and misleading documents underlying the violations in Counts 2 of the OTSC – i.e., the NFOA pamphlet and custom illustrations prepared for JK/MK. In their Reply, the Respondents argue that Fisher provided the NFOA pamphlet to JK/MK because the tax implications of the charitable deduction benefit were related to their financial situation, but that he also explained that the NFOA's 501(c)(3) application may be denied and the repercussions of said

denial. I do not find this argument persuasive, as other information in the pamphlet was found to be deceptive and untrue, and as such, the reason it was presented is irrelevant. Furthermore, the Respondents contended that the illustrations referenced in the Department's exceptions were provided by the NFOA and presented to each client after the Installment Plan Agreement was already executed, and not by Fisher as a method to induce the participation of his clients.

The record is unclear as to when the custom illustrations were presented to JK/MK. The custom illustrations are dated November 16, 2006, and the NFOA Installment Plan Agreement is dated October 11, 2006. However, the NFOA Installment Plan Agreement reflects figures prominently featured on the custom illustrations. The Installment Plan Payout Schedule provided to JK/MK as part of their custom illustration dated November 16, 2006, indicates that JK/MK would receive a monthly payment of $2,058.60 beginning on January 1, 2007, for a period of ten years. (Exhibit J-14). Clause 3 of the NFOA Installment Plan Agreement states that JK/MK will receive 120 monthly payments in the amount of $2,058.60 beginning on January 1, 2007. (Exhibit J-15). Thus, even if the custom illustration was presented to JK/MK after the Installment Plan agreements were executed, Fisher also provided JK/MK with an NFOA Installment Plan Agreement and illustrations that were untrue and deceptive as the NFOA was found by the ALJ to be structured like a Ponzi scheme and thus incapable of producing the promised guaranteed returns on the financial investment. As such, I do not find the Respondents argument persuasive.

In conclusion, I MODIFY the ALJ's decision and FIND that by presenting JK/MK with the deceptive and misleading NFOA pamphlet and NFOA Installment Plan Agreement, Fisher and Regal's actions were in violation of N.J.S.A. 17B:30-3 and N.J.S.A. 17:29B-4(2). Furthermore, I MODIFY the Initial Decision and FIND that Fisher and Regal's conduct was also in violation of

N.J.S.A. 17:22A-40(a)(2), N.J.S.A. 17:22A-40(a)(7) and N.J.S.A. 17:29B-3 as alleged in Count 2 of the OTSC.

As it relates to Counts 5 and 8, the ALJ made identical findings as to Count 2, namely that Department has proven that Fisher and Regal's actions were in violation of N.J.S.A. 17B:30-3 and N.J.S.A. 17:29B-4(2) of the OTSC, and I CONCUR with these determinations. However, also identical to Count 2, the ALJ made no specific finding as to whether the conduct as alleged by the Department in Counts 5 of the OTSC was in violation of N.J.S.A. 17:22A-40(a)(7), N.J.S.A. 17:22A-40(a)(2), or N.J.S.A. 17:29B-3. In the Initial Decision, the ALJ similarly found on Counts 5 and 8 that by presenting sample cash flows and benefits to the clients named in those Counts, which were untenable because the NFOA was structured like a Ponzi scheme, Regal and Fisher used unfair methods of competition and unfair or deceptive acts and practices. Id. at 10. As discussed above, the ALJ's finding also supports a determination that Respondents Fisher and Regal's conduct is also in violation of N.J.S.A. 17:29B-3, N.J.S.A. 17:22A-40(a)(7), and N.J.S.A. 17:22A-40(a)(2) as alleged in Counts 5 and 8 of the OTSC.

The Department also requested that the Final Decision and Order articulate the specific false and misleading documents underlying the violations related to Counts 5 and 8 of the OTSC– i.e., the custom illustrations presented to WB and GB/MB. Identical to Count 2, the record is unclear as to when the custom illustrations were presented to those clients[25], but both NFOA Installment Plan Agreements reflect figures prominently featured on the custom illustrations. (See Exhibits J-16 and J-17 (WB); and Exhibit J-20 and J-21 (GB/MB). Thus, even if the custom illustrations were presented after the Installment Plan Agreements were executed, Fisher still

[25] For WB, the illustrations are dated January 2, 2007 and the NFOA Installment Plan Agreement is dated October 30, 2006; for GB/MB, the custom illustrations are dated May 14, 2007 and the NFOA Installment Plan Agreement is dated April 4, 2007.

presented WB and GB/MB with an NFOA Installment Plan Agreement and illustrations that were untrue and deceptive as the NFOA found by the ALJ to be structured like a Ponzi scheme and thus incapable of producing the promised guaranteed returns on the financial investment. As such, I do not find the Respondents argument persuasive, and I MODIFY the ALJ's decision as to Counts 5 and 8 and FIND that by presenting the deceptive and misleading NFOA Installment Plan Agreements, Fisher and Regal's actions were in violation of N.J.S.A. 17B:30-3 and N.J.S.A. 17:29B-4(2). I also MODIFY the Initial Decision and FIND that Fisher and Regal's conduct was also in violation of N.J.S.A. 17:22A-40(a)(2), N.J.S.A. 17:22A-40(a)(7) and N.J.S.A. 17:29B-3 as alleged in Counts 5 and 8 of the OTSC.

In addition to these violations, Counts 5 and 8 of the OTSC allege that Fisher and Regal engaged in the prohibited act of "twisting," as set forth in N.J.S.A. 17B:30-6 (prohibits misleading representations or comparisons of an insurance policy or annuity contract for the purpose of inducement to take out a policy or contract with another insurer). As previously noted, the ALJ found that both GB/MB and WB were seeking to escape the more onerous provisions of their respective annuities, Fisher offered the NFOA plan as a vehicle for achieving their goals. Thus, the ALJ concluded that because the NFOA itself has proven to be fraudulent, the Department has proven these charges. I concur with the ALJ's findings, and MODFIY the Initial Decision to specifically find Fisher and Regal's actions, as alleged in Counts 5 and 8 of the OTSC, were in violation of N.J.S.A. 17B:30-6.

As it relates to Count 11, I concur with the ALJ and FIND that Department has proven that Fisher and Regal's actions were in violation of N.J.S.A. 17B:30-3. However, the ALJ made no specific finding as to whether the conduct as alleged by the Department in Counts 11 of the OTSC was in violation of N.J.S.A. 17:22A-40(a)(7) and N.J.S.A. 17:22A-40(a)(2). In the Initial

Decision, the ALJ found that by presenting sample cash flows and benefits to DC, which were untenable because the NFOA was structured like a Ponzi scheme, Regal and Fisher used unfair methods of competition and unfair or deceptive acts and practices. Id. at 10. The ALJ's finding supports the conclusion that Respondents Fisher and Regal's conduct is also in violation of N.J.S.A. 17:22A-40(a)(7), which prohibits the commission of unfair trade practices or fraud, this, in turn, supports a finding that the Fisher and Regal's conduct is in violation of N.J.S.A. 17:22A-40(a)(2), which prohibits which prohibits the violation of any insurance law or regulation in New Jersey, as alleged in Count 11 of the OTSC.

In addition, I note the ALJ's finding that Respondents Fisher and Regal presented sample cash flows and benefits to four clients, JK/MK, WB, GB/MB and DC, that were never viable long term because the underlying company was operating like a Ponzi scheme, in violation of N.J.S.A. 17:29B-4(2). Id. at 15. The OTSC does not allege a violation of N.J.S.A. 17:29B-4(2) as it relates to the sale of the NFOA Installment Plan to DC in Count 11, however, pursuant to N.J.A.C. 1:1-6.2(a), "unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." Respondents Fisher and Regal were on notice as to the factual basis underlying the charge of a violation of N.J.S.A. 17:29B-4(2), which prohibits advertisements, announcements or statements containing any assertion, representation or statement with respect to the business of insurance which are untrue, deceptive or misleading. Here, the ALJ found that Fisher and DC executed an NFOA Installment Plan Agreement on May 7, 2007, wherein DC would transfer $378,000 in annuities to the NFOA, constituting a charitable deduction that would leave him with the qualifying assets and income he needed to move into housing specifically for firefighters. Id. at

10. Fisher and Regal represented that the deferred payments on the annuity would eventually go to his children, although the contract lacked a specific payment schedule. Ibid. The ALJ found that the sample cash flows and benefits presented to DC were untenable. Id. at 10. Based on these facts, the OTSC in this matter should be conformed to reflect the ALJ's conclusion that Respondents Fisher and Regal presented DC with untrue and misleading statements as it relates to the business of insurance, in violation of N.J.S.A. 17:29B-4(2). Moreover, these findings provide the factual basis to find that Respondent Fisher and Regal were violation of N.J.S.A. 17:29B-3, which prohibits producers from engaging in unfair methods of competition and unfair or deceptive acts or practices in the business of insurance. Again, the Respondents were on notice as to the factual basis underlying this charge.

In their exceptions, the Department also requested that the Final Decision and Order articulate the specific false and misleading documents on which the found violations related to Counts 11 of the OTSC are based. Fisher presented the NFOA Installment Plan Agreement to DC, which asserted that DC would transfer $378,000 in annuities to the NFOA, constituting a charitable deduction, that would leave him with the qualifying assets and income he needed to move into housing specifically for firefighters. Id. at 10. According to the Agreement, deferred payments on the annuity would eventually go to his children, although the contract lacked a specific payment schedule. Ibid. However, as I determined above with regard to Counts 2, 5 and 8, the NFOA was a misleading investment that could not result in the returns promised. Therefore, I MODIFY the ALJ's decision and FIND that by presenting DC with a deceptive and misleading NFOA Installment Plan Agreement, Fisher and Regal's actions were in violation of N.J.S.A. 17B:30-3. Further, I amend the pleadings to conform with the facts and FIND that Fisher and Regal's conduct is in violation of N.J.S.A. 17:29B-4(2) and N.J.S.A. 17:29B-3. Lastly, I MODIFY

the Initial Decision and FIND that Fisher and Regal's conduct was also in violation of N.J.S.A. 17:22A-40(a)(2), N.J.S.A. 17:22A-40(a)(7), and N.J.S.A. 17:29B-3 as alleged in Count 11 of the OTSC.

Counts 3, 6, 9, and 12: Assisting an Unauthorized Insurer
(Respondents Fisher and Regal)

Counts 3, 6, 9, and 12 of the OTSC allege that by offering the NFOA Installment Plan to their clients, Fisher and Regal assisted an insurer not authorized to conduct business in this State, in violation of N.J.S.A. 17:22-6.37. As previously noted, the ALJ found that although the actions by FINRA and the states of Maine and Tennessee strongly suggest that the Installment Plan was an investment contract, there is sufficient counter-opinion from several states indicating that the Installment Plan was an insurance product. Id. at 16. The ALJ also noted that in New Jersey, this type of product is categorized as an insurance product, and is therefore subject to New Jersey's laws and regulations. Ibid. Furthermore, the ALJ concluded that the Department has proven these charges against Fisher and Regal. Ibid.

While I concur with the ALJ's findings, I note that the Initial Decision does not specifically set forth the statutory and regulatory violations that the Respondents committed in relationship to Counts 3, 6, 9, and 12 of the OTSC. As the ALJ found that in New Jersey, the Installment Plan is classified as an insurance product and regulated as insurance, I MODIFY the Initial Decision to find Fisher and Regal's actions as alleged in Counts 3, 6, 9, and 12 of the OTSC, were in violation of N.J.S.A. 17:22-6.37 (prohibits the solicitation, procurement or dissemination of information as to coverage for annuities or insurance from an insurer not authorized to transact business in this state).

The Department's exceptions indicate that not only was the NFOA Installment Plan an insurance product, but the plan, as described in the OTSC and Fisher's Answer to the OTSC fits

squarely within the definition of an "annuity" under N.J.S.A. 17B:17-5.[26] In addition, the Department points out that as a licensed insurance producer, Fisher should have known that the annuity he was selling was a regulated insurance product and that the NFOA needed authorization in New Jersey to sell it, and this further demonstrates his flagrant incompetence and disregard of his fiduciary duty to his clients.

In their Reply to the Petitioner's Exceptions, the Respondents argue that the State is taking "a second bite at the administrative apple" in that FINRA has already acted on Fisher for the sale of this product. I do not find this argument persuasive. I concur with the ALJ, who noted that the proofs established that this type of offering was on the fringes of both types of financial instruments nationally but as a New Jersey licensed insurance producer, Fisher should have ascertained how New Jersey regulates this type of product prior to offering it to his client. Ibid. Furthermore, I note that many types of financial products that are sold in this State are regulated by multiple entities, especially annuities, e.g. this Department, the New Jersey Bureau of Securities and FINRA, because they contain features of both insurance and securities. Moreover, Fisher and Regal failed to undertake any due diligent to determine whether this product could be sold in New Jersey and whether the NFOA was authorized to transact business in this State. This in and of itself is a significant failing in satisfying their fiduciary obligations as licensed insurance producers in this State, and if they had taken such steps, they could have likely avoided the consequences of these impermissible sales by not engaging in such conduct. They did not, and thus the Respondents are rightfully subject to an administrative enforcement action as licensees of this Department.

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[26] Pursuant to N.J.S.A. 17B:17-5 an annuity is "a contract not coming within the definition of life insurance ... under which an insurer obligates itself to make periodic payments for a specified period of time, such as for a number of years, or until the happening of an event, or for life, or for a period of time determined by any combination thereof".

In response, the Respondents argue that while Fisher may have erred by not confirming whether this product was allowed for sale in New Jersey, he otherwise acted in a diligent and methodical way, conducting due diligence before recommending this product to his clients based on their specific financial needs. I find that this argument is unsupported by the evidence as discussed above.

In sum, I find that the ALJ correctly concluded that the Department proved the charges against Fisher and Regal in Counts 3, 6, 9, and 12.

Counts 13 and 14: Failure to Notify the Department of FINRA Proceedings
(Respondent Fisher)

Counts 13 and 14 of the OTSC allege that Fisher failed to notify the Department of the January 14, 2011 disciplinary proceeding initiated against him by FINRA and of the March 8, 2012 Order Accepting Offer of Settlement issued by FINRA within 30 days as required by statute. The ALJ concluded that the Department had not met its burden and failed to prove that Fisher failed to properly notify the Department of the FINRA proceedings and the Order Accepting Offer of Settlement issued by FINRA. For the reasons that follow, I reject these conclusions.

Count 13 of the OTSC alleges that Fisher was in violation of N.J.S.A. 17:22A-47(c), which states the following:

> An insurance producer shall report to the [C]ommissioner any disciplinary action taken against the insurance producer, or any formal disciplinary proceedings initiated against the producer, by the Financial Industry Regulatory Authority (FINRA), any successor organization, or other similar non-governmental regulatory authority with statutory authority to create and enforce industry standards of conduct, within 30 days of the final disposition of the matter. The report shall include a copy of the order, consent order or other relevant legal documents.

Here, Fisher argues that his attorney notified the Department in a timely manner. Id. at 11. However, the Department has no record of such notification. Ibid. In addition, Fisher has failed

to provide any written communication to the Department as proof that he complied with the notification requirement. The lack of a Department record of Fisher's formal written notification to the Department is sufficient evidence to sustain a finding of a violation of N.J.S.A. 17:22A-47(c). Moreover, it is unclear based on the record that an oral notification occurred. Furthermore, even if it did occur, an oral notification is insufficient to satisfy the requirement of reporting such a violation to the Department. Accordingly, I MODIFY the Initial Decision to find that Fisher's actions as alleged in Count 13 of the OTSC are in violation of N.J.S.A. 17:22A-47(c) (requires an insurance producer report any disciplinary action taken against the insurance producer within 30 days of the final disposition of the matter, provides for additional documentation); and N.J.S.A. 17:22A-40(a)(2) (prohibits the violation of any insurance law or regulation).

Similarly, Count 14 alleges that Fisher was in violation of N.J.S.A. 17:22A-40(a)(19), which provides:

> Failing to notify the [C]ommissioner within 30 days of the final disposition of any formal disciplinary proceedings initiated against the insurance producer, or disciplinary action taken against the producer, by the Financial Industry Regulatory Authority (FINRA), any successor organization, or other similar non-governmental regulatory authority with statutory authority to create and enforce industry standards of conduct, or of any other administrative actions or criminal prosecutions, as required by sections 15 and 22 of P.L.2001, c.210 (C.17:22A-40 and 17:22A-47), or failing to supply any documentation the [C]ommissioner may request in connection therewith.

Again, Fisher argues that his attorney notified Department in a timely manner of the March 9, 2011 FINRA Settlement. Id. at 11. However, the Department has no record of such notification. Ibid. In addition, Fisher has failed to provide any written communication to the Department as proof that he complied with the notification requirement. The ALJ found that a letter subsequently sent by the Department to Fisher requesting information related to his business dealings with the

NFOA was the result of Fisher's timely notification and in conclusion, found that Fisher prevailed on Count 14 of the OTSC. Ibid. However, the lack of a Department record of Fisher's formal written notification to the Department is sufficient evidence to sustain a finding of a violation of N.J.S.A. 17:22A-40(a)(19). Moreover, it is unclear based on the record that an oral notification occurred. Furthermore, even if it did occur, an oral notification is insufficient to satisfy the requirement of reporting such a violation to the Department.

Thus, I MODIFY the Initial Decision to find that Fisher's actions as alleged in Count 14 of the OTSC are in violation of N.J.S.A. 17:22A-40(a)(19) (requires an insurance producer report the final disposition of any formal disciplinary proceeding within 30 days of the final disposition of the matter) and N.J.S.A. 17:22A-40(a)(2) (prohibits the violation of any insurance law or regulation).

Count 15: Failure to Respond to Department's Inquiry Within 15 Days
(Respondent Fisher)

Count 15 of the OTSC alleges that Fisher failed to respond to the Department's inquiry regarding his involvement with the NFOA within 15 days, in violation of N.J.A.C. 11:17A-4.8 and N.J.S.A. 17:22A-40(a)(2). The ALJ found that the Department was unable to establish that Fisher failed to respond to the Department's inquiry within 15 days based on the testimony of Fisher and Verdel. Fisher testified that upon receipt of the inquiry, he had contacted Verdel seeking an extension of time to respond. Id. at 10. Verdel testified that he had no recollection or note concerning the conversation, but that he typically agreed to such extensions, and would not normally make a note of such approval. Ibid. Fisher did provide a reply on August 8, 2007, which was lengthy and provided great detail in response to the Department's inquiry. Ibid. Due to the credibility of both witnesses, and the lengthy August 2007 letter, the ALJ found that the Department did not provide sufficient evidence to prevail on Count 15.

I concur with the ALJ's finding that the Department did not provide sufficient evidence that Fisher failed to timely reply to the Department's inquiry. I note that the Department did not except to the ALJ's findings as it relates to Count 15. Therefore, for the reasons expressed by the ALJ, I ADOPT the ALJ's findings as to Count 15 of the OTSC.

Count 16: Failure to Respond to Department Inquiry Within 15 Days
(Respondent Fisher)

Count 16 of the OTSC alleges that Fisher failed to respond to the Department's April 19, 2011 letter requesting a statement of his annuity solicitation and sales, in violation of N.J.A.C. 11:17A-4.8 and N.J.S.A. 17:22A-40(a)(2). The ALJ found that the Department was unable to establish that Fisher failed to respond to the Department's inquiry within 15 days based on the testimony of Fisher and Verdel. Fisher testified that in this case, he had contacted Verdel upon receipt of the Department's inquiry as he had done in 2007. Id. at 11. Verdel testified that has no recollection or notation indicating that he received such a call or granted the request. Ibid. However, he stated that he would have made a note had he denied such a request, and there is no notation concerning a denial in his records. Ibid. Fisher responded with a lengthy letter to Verdel dated June 6, 2011. Ibid. Based on the testimony and the June 6, 2011 letter, the ALJ found that the Department did not provide sufficient evidence to prevail on Count 16.

I concur with the ALJ's finding that the Department did not provide sufficient evidence that Fisher failed to respond to the Department's inquiry within 15 days. I note that the Department did not except to the ALJ's findings as it relates to Count 16. Therefore, for the reasons expressed by the ALJ, I ADOPT the ALJ's findings as to Count 16 of the OTSC.

Count 17: Failure to Supervise as DRLP
(Respondent Madden)

Count 17 of the OTSC alleges that Madden, as the DRLP with 50 percent ownership interest in Regal, failed to properly supervise Fisher and Regal's insurance related conduct as described in Counts 1 to 12, in violation of N.J.S.A. 17:22-40(a)(2) and N.J.A.C. 11:17A-1.6(c). The ALJ found that the Department had met their burden to prove this charge.

I concur with the ALJ's findings that Madden conduct is in violation of N.J.A.C. 11:17A-1.6(c) and N.J.S.A. 17:22-40(a)(2) as alleged in Count 17 of the OTSC. Madden, who had an ownership interest of 50 percent in Regal, failed to supervise Fisher and Regal's sale of the NFOA Installment Plan product to four different sets of clients, in turn, violating New Jersey's insurance producer laws. I note that while this finding is sufficient to sustain that the Department has met its burden, however, I also note the ALJ's observation that Madden directly participated in the sale of the NFOA Installment Plan product to WB, alleged in Count 5, without conducting any independent due diligence.[27]

As such, I ADOPT the ALJ's findings that Madden's actions as alleged in Count 17 of the OTSC were in violation of N.J.A.C. 11:17A-1.6(c) (owners with an ownership interest of 10 percent or more in the organization shall be held responsible for all insurance related conduct of the organization) and in turn, a violation of N.J.S.A. 17:22-40(a)(2) (prohibits the violations of insurance laws).

[27] See FN 12.

Penalties Against the Respondents

Monetary Penalty Against the Respondents

As discussed by the ALJ, under Kimmelman, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed pursuant to N.J.S.A. 17:22A-45 upon insurance producers (up to $5,000 for the first violation and up to $10,000 for any subsequent violations). No one Kimmelman factor is dispositive for or against fines and penalties. Kimmelman, 108 N.J. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case").

As to Respondents Fisher and Regal, the first Kimmelman factor addresses the good faith or bad faith of the violator, which includes an analysis of the egregiousness of the producer's conduct and whether the producer could have reasonably believed their conduct was legal. In the Initial Decision, the ALJ found that Fisher and Regal erred, but that their error did not rise to the level of bad faith. To make her determination, the ALJ focused on the Respondents' actions after the sales when they learned that the NFOA was a pyramid scheme, including their immediate return of commissions and their cooperation with all investigative agencies involved. I disagree with the ALJ's conclusions as to this factor. I find persuasive the analysis set forth by the Department in their exceptions. As the Department noted, under the Producer Act, the conduct of a licensed producer itself is the determinative factor as to if the violation occurred and that bad faith need not be proven by actual intent or malice because the Act does not require proof of intent. Commissioner v. Dobrek, BKI 2360-13, Initial Decision, (06/02/2014), Final Decision and Order, (01/15/2015), at 20, aff'd sub nom. Badolato v. Dobrek, No. A-2990-14 (App. Div. June 30, 2016). Moreover, after the fact attempts to "cure" the results of the improper conduct are not dispositive.

The ALJ found that Fisher, as an experienced insurance producer, did not reasonably conduct due diligence regarding the NFOA or their product prior to recommending it to his elderly clients. These elderly clients, upon Fisher's recommendation, took their life savings from legitimate insurance products and transferred those monies to a company that had not been properly vetted, despite numerous "red flags," jeopardizing their financial futures.

In their Reply, the Respondents argue that it is appropriate to apply the "rule of reason" test, which they purport would allow the Respondent to act in good faith even though their underlying conduct is ultimately ruled unlawful. The Respondent cites several non-binding decisions that relate to anti-trust cases.[28] These cases describe the "rule of reason" test, which requires the court to weigh all the circumstances of a given case to determine whether the disputed practice constitutes an unreasonable restraint on competition. First, there is no anti-trust matter at hand here; rather, this an enforcement proceeding against a professional producer licensee of this Department – our laws hold such licensees and professions to higher standards of conduct. Furthermore, FTC v. Consolidated Foods Corp., 396 F. Supp. at 1353, one of the cases the Respondent relies upon for application of the "rule of reason" test in this matter, specifically states that the rule of reason test should not be applied in consumer protection oriented cases where noncompliance would directly injure the public and is only appropriate in matters that are inherently business or competition oriented. The application of the "rule of reason" test to licensed insurance producers is not appropriate, because producers as licensees are held to a higher standard of conduct. As shown here, producer misconduct - like selling impermissible insurance products

[28] Respondents cite to United States v. Phelps Dodge Indus. Inc., 569 F. Supp. 1362; United States v. Readers Digest Ass'n, Inc., 494 F. Supp. 770, 772 (D. Del. 1980); FTC v. Consolidated Foods Corp., 396 F. Supp. 1353 (1975); United States v. Swingline, Inc., 371 F. Supp. 37 (F.D.N.Y. 1974); United States v. J.B. Williams Co. Inc., 354 F. Supp. 521 (S.D.N.Y. 1973), aff'd in part and rev'd in part, 498 F.2d 414 (2d Cir. 1974).

that cannot provide the benefits promised elderly clients – can directly injure consumers. The current standard, set forth under the Producer Act, and in Dobrek, examines the conduct of a licensed producer as the determinative factor as to whether the violation occurred, and provides that bad faith need not be proven by actual intent or malice because the Act does not require proof of intent. Commissioner v. Dobrek. In this matter, Fisher, Regal or Madden did not conduct sufficient due diligence into the legitimacy or legality of this product or the NFOA as was their duty as licensed insurance producers under the insurance laws of this State. Proof of intent is not taken into consideration. Thus, the Respondents' argument is not compelling.

The argument that search engines were not as powerful then as they are today is not persuasive because producers had other tools at their disposal to conduct appropriate due diligence at that time. The Respondents could have contacted the Department to determine if NFOA or this product was legal here. Further, as the conduct of the producer itself is determinative as to whether the violation occurred, Fisher's actions following the state of Tennessee's regulatory investigation are not relevant to determining his good or bad faith during the commission of the conduct in question. The Respondents are not accused of nefariously offering the NFOA Installment Plan for the purpose of defrauding their clients; they are accused of being recklessly negligent and violating their fiduciary duties as producers in their vetting the NFOA's product prior to presenting it to their clients as a viable investment strategy. Thus, while their cooperation with regulatory bodies and repayment of commissions after the fact is commendable, it does not excuse their reckless behavior, nor does it demonstrate that said actions were not undertaken in bad faith. As such, I MODIFY the Initial Decision and FIND that Fisher and Regal's conduct rose to bad faith and that this factor weighs in favor of a significant monetary penalty.

As to the second Kimmelman factor, I agree with the ALJ that Fisher has provided proof, in the form of his 2015 tax return, that demonstrates a limited ability to pay any fines imposed. Goldman v. Shah, BKI 11903-05, Initial Decision, (04/15/2008), Final Decision and Order, (09/02/2008) (Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity). However, an insurance producer's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Commissioner v. Malek, BKI 4520-05, Final Decision and Order at 6-7, (01/18/2006) (increasing fine recommended by ALJ from $2,500 to $20,000 even though producer argued an inability to pay fines in addition to restitution); Commissioner v. Erwin, BKI 4573-06, Initial Decision, (07/09/2007), Final Decision and Order, (09/17/2007).

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. The Initial Decision maintains that the commissions earned in this case should be used to measure profit for purposes of this analysis and that had Fisher retained the commissions on these sales, profits would amount to $37,489.75, a negligible amount in light of the money earned by Regal. I do not agree with the ALJ's conclusion as to the application of this factor, as Kimmelman does not limit consideration to actual profits, but warrants the consideration of the profits that the Respondents would have likely made if their acts in violation of the insurance laws of this State were successful. Ibid. The ALJ noted that JK/MK invested $209,927.35 and WB also invested approximately $111, 258.05 with the NFOA after the recommendation from Fisher. The total commission resulting from these two transactions was approximately $37,489.75. The ALJ also noted that GB/MB had also signed Installment Plan Agreement,

investing $108,161 as well as DC, who was slated to invest another $378,000. However, due to the culmination of the investigation by Tennessee regulatory authorities, their funds were not transferred to the NFOA and no commission was paid. Thus, the profits likely to be obtained from these transactions had the Respondents been successful in completing the transfer of funds related to DC and GB/MB's contracts, profits would have been significantly higher than the $37,489.75 cited in the Initial Decision. Further, the Respondents did not cease recommending the NFOA Installment Plan until being notified by Tennessee regulatory authorities that the NFOA was under regulatory scrutiny, which took place in September 2008. Had Tennessee regulatory authorities delayed their investigation, there is no evidence that Fisher and Regal would have stopped recommending this product to their clients, which may have resulted in further damages As such, I MODIFY the Initial Decision to note that this factor weighs in favor of a significant monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. In re Parkwood Co., 98 N.J. Super. at 268. Moreover, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. "When insurance producers breach their fiduciary duties, and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." See Commissioner v. Fonseca. The ALJ noted that this factor is sharply disputed and found that the injury to the public in this matter weighs towards the penalty side, but not heavily. I disagree with this finding, and find that substantial harm did occur due to Fisher and Regal's conduct, to both the clients and to the public at large, warranting a substantial penalty. As the Department points out, Fisher's reckless incompetence put his clients in jeopardy of losing their

life savings and deprived his clients of their ability to use their money as they saw fit. When his clients were repaid, they were not made whole for several years and were repaid without interest. I am charged with the duty to protect the public welfare and instill public confidence in both insurance producers and the industry as a whole. Insurance producers help consumers select essential financial service products for the protection and growth of their financial well-being, and in do so have access to the confidential personal information and funds of their clients. For these reasons, prior Commissioners and the courts of this State have repeatedly held that the public's confidence in a producer's honesty, trustworthiness and integrity is of paramount concern. As the Respondents acted in bad faith by violating their fiduciary duties as insurance producers, their actions harmed, not only their elderly clients, but also harmed the public's confidence in insurance producers and the public's perception of the profession as a whole. As such, I MODIFY the Initial Decision and FIND that this factor weighs in favor of a significant monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. I agree with the ALJ that the Respondents' actions continued for a period of five months in October 2006, November 2006, January 2007, May 2007, and September 2008. Thus, I find that relatively short duration of the time during which these limited number of sales occurred may serve as a mitigating factor.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. The ALJ found that FINRA proceedings, which included penalties of a $15,000 fine, a six-month suspension, and an order of $47,258.90 in restitution, weighed in

favor of mitigation. I disagree with the ALJ's conclusion. While, Fisher and Regal made their clients whole through the restitution ordered by FINRA, I do not find the $15,000 fine imposed by FINRA sufficient to negate against a "substantial" monetary penalty imposed by the Department against it licensees for violations of the applicable New Jersey insurance laws. Thus, I MODIFY the Initial Decision and find that the existence of prior civil penalties is not a mitigating factor against imposing substantial monetary penalties.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act. I concur with the ALJ's finding that because there are no past violations by Fisher or Regal, factor seven weighs in favor of mitigation.

Here, the ALJ recommended that Fisher and Regal be jointly and severally liable for Counts 1 through 12, for a total of $10,900 in penalties, and that Madden be liable for penalties for Count 17 totaling $2,000. In calculating these penalties, the ALJ allocated the penalties for identical underlying conduct based upon the fact that the same conduct violated multiple insurance laws. I agree with the Department that the Kimmelman analysis here - as discussed above - and the nature of the Respondents' violations warrant imposition of substantially higher civil monetary penalties, and thus I MODIFY the recommendations of the ALJ as follows.

Respondent Fisher and Regal shall be jointly and severally liable for a fine of $45,000 for the violations in Counts 1 through 12 of the OTSC, allocated as follows:

Counts 1 – 3: $15,000 for the Sale of Unauthorized NFOA product, Presentation of Untrue, Deceptive and Misleading Information in the Sale of the NFOA product, and Representation of An Unauthorized Insurer to JK/MK;

Counts 4 – 6: $15,000 for the Sale of Unauthorized NFOA product, Presentation of Untrue, Deceptive and Misleading Information in the Sale of the NFOA product, and Representation of An Unauthorized Insurer to WB;

Counts 7 – 9: $15,000 for the Sale of Unauthorized NFOA product, Presentation of Untrue, Deceptive and Misleading Information in the Sale of the NFOA product, and Representation of An Unauthorized Insurer to GB/MB; and

Counts 10 – 12: $15,000 for the Sale of Unauthorized NFOA product, Presentation of Untrue, Deceptive and Misleading Information in the Sale of the NFOA product, and Representation of An Unauthorized Insurer to DC.

These penalties are necessary and appropriate under the above Kimmelman analysis and given Respondents' failure to exercise appropriate due diligence in vetting the NFOA and the resultant sales of the unauthorized NFOA product through a company not permitted to do business in this State. These illegal sales to elderly consumers risked their savings and financial well-being, and warrants imposition of significant fines. Moreover, these penalties are in accord with penalties in similar matters, demonstrate the appropriate level of opprobrium for such misconduct and will serve to deter future misconduct by the Respondents and the industry as a whole. See Commissioner v. Uribe. (Respondent Uribe and agency revoked and fined $92,500 jointly and severally for sales of insurance products not authorized here and from unauthorized insurers & issuance of identification cards).

Additionally, as to Counts 13 and 14, I concluded above that the record supports a finding that Respondent Fisher failed to notify the Department of the initiation and settlement of FINRA proceedings against him in a timely manner, therefore I MODIFY the Initial Decision to impose a monetary penalty of $2,500 each for Respondent Fisher's failures to notify the Department of the

FINRA action. Respondent Fisher is therefore individually liable for an additional civil monetary penalty of $5,000 for Counts 13 and 14.

In addition to the monetary penalties imposed upon Fisher and Regal, the ALJ concluded that Respondent Madden was liable for a $2,000 civil monetary penalty for his failure as the DLRP and owner of Regal to properly supervise the Respondents as charged in Count 17. As such, a Kimmelman analysis is warranted.

As to Madden's good or bad faith, Madden failed to supervise Fisher as a DRLP of Regal, and relied entirely on Fisher's representation of the Installment Plan. In addition, Madden admittedly also failed to conduct independent due diligence of the NFOA product and business prior to his direct solicitation to WB. Madden's negligence in supervising his employees demonstrates bad faith and warrants the imposition of a civil monetary penalty.

The second factor addresses the Respondent's ability to pay. Upon review of the record, Madden has not demonstrated either an inability or an ability to pay fines imposed.

As a DRLP of Regal, Madden was directly responsible for the conduct of the business. Bakke v. Gonclaves & Assocs. Inc., BKI 3301-05, Final Decision (02/15/2006). Thus, he is responsible for the profits obtained from Fisher and Regal's illegal activity. As discussed above, Kimmelman does not limit consideration to actual profits, but warrants the consideration of the profits that the Respondents would have likely made if their acts in violation of the insurance laws of this State were successful. 108 N.J. at 138. The record establishes that, but for the investigation of the Tennessee regulatory authorities, profits likely to be obtained from Fisher and Regal's sale of the NFOA Installment Plan product would have been significantly higher than the $37,489.75 commission they were able to clear before the NFOA's fraud was revealed. Furthermore, there is no evidence that Fisher and Regal would have stopped recommending this product to their clients

had the Tennessee regulatory authorities delayed their investigation, and the record reflects that when it came to the NFOA Installment Plan, Madden was fully reliant on Fisher, and was not supervising their activities independently. This factor weighs in favor of a monetary penalty.

The fourth factor of the Kimmelman analysis is the injury to the public. As previously discussed, licensed producers act in a fiduciary capacity. In re Parkwood Co., 98 N.J. Super. at 268. Courts have long recognized that the insurance industry is strongly affected by the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979). As a DRLP of Regal, Madden was responsible for all insurance related conduct of Regal's licensees and employees and is responsible for any injury perpetrated by his business and its employees. Because Madden did not supervise Regal and Fisher's conduct as required under N.J.A.C. 11:17A-1.6(c), Fisher and Regal caused injury to their four clients, and jeopardized their clients' life savings at Fisher's suggestion that the NFOA Installment Plan was a sound investment. Madden's failure to supervise lead to conduct which caused direct harm to Regal's clients as well as to the public's confidence in the insurance industry. In light of these considerations, this factor weighs in favor of a more significant monetary penalty.

In addition, this type of conduct is damaging to the insurance profession as whole, as the public's confidence in a licensee's honesty, trustworthiness and integrity are of paramount concern. In light of these considerations, this factor weighs in favor of a monetary penalty.

As to the fifth factor, the duration of the illegal activity or conspiracy, the evidence demonstrates that Madden failed to supervise Fisher for the duration of Fisher's sale of the Installment Plan product to their clients. As determined by the ALJ, this period of time was approximately five months. This serves as a mitigating factor.

As to the sixth factor, the existence of criminal actions or treble-damages actions, no evidence was submitted to indicate that Madden has previously been party to civil or criminal actions related to this conduct, including the FINRA proceedings brought against his partner, Fisher. As noted in Kimmelman, a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. Thus, this factor weighs in favor a more significant monetary penalty.

Lastly, no evidence was submitted that Madden has previously violated any laws and regulations that govern the conduct of insurance producers. This serves as a mitigating factor.

Based upon my review of the record and the Initial Decision, Respondent Madden failed to oversee Fisher and Regal's conduct, even when he was involved in the solicitation of the Installment Plan to WB. His failure to do so resulted in substantial injury to the public and the insurance industry as whole. As Madden violated N.J.A.C. 11:17A-1.6(c) and N.J.S.A. 17:22A-40(a)(2), I MODIFY the Initial Decision to provide that a $5,000 monetary penalty be imposed on Respondent Madden for his violation of Count 17. Commissioner v. Hagaman, BKI-08087-14, Initial Decision (11/02/2015), Final Decision and Order (03/17/2016) (Respondent fined $10,000 for failure to supervise as DRLP).

Revocation of Respondent Regal and Fisher's Insurance Producer License

As to the appropriate action to take against Respondent Fisher's insurance producer license, I find that the record is more than sufficient to support license revocation and, in fact, I believe compels the revocation of Respondent Fisher's license. The OTSC charges Fisher with violations of the Producer Act, which governs the licensure of New Jersey insurance producers and empowers the Commissioner to suspend or revoke the license of, and fine, an insurance producer for

violations of its provisions. N.J.S.A. 17:22A-40(a). Fisher was found to have engaged in a pattern of misrepresentation related to the sales of annuities to senior citizens amounting to just over $800,000 over the course of five months.

A licensee's honesty, trustworthiness and integrity are of paramount concern, since an insurance producer acts as a fiduciary to both the consumers and insurers they represent. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). In addition, a licensed producer is better placed than a member of the public to defraud an insurer. Hence, a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of irresponsible dealing on the industry and on the public.

Our strong public policy is to instill public confidence in both insurance professionals and the industry as a whole. Courts have recognized that the insurance industry is strongly affected with the public interest and the Commissioner is charged with the duty to protect the public welfare. Nationwide Mutual Ins. Co. Inc., 80 N.J. at 559. Only the existence of extraordinary mitigating factors can form a basis for withholding the sanction of license revocation. See Commissioner v. Dobrek. The record establishes that no such factors are present in this matter.

Here, over a five-month period, Fisher induced four separate clients, all senior citizens over the age of 80, to divest their life savings from legitimate financial products and invest that money in a product that Fisher had failed to vet prior to his recommendation. He promoted the sale of a product that touted returns that he should have known, as an experienced insurance producer, were too good to be true, but he was not troubled enough by these enchanted promises to investigate any further. His sale of the insurance product only ceased upon notification by Tennessee that the product's issuer, the NFOA, was under investigation. But for the Tennessee regulatory

investigation, the number of elderly victims who could have lost their life savings to Fisher's poorly conceived investment strategy could have been substantial.

As the Department points out, the ALJ's reliance on Sarris is misplaced, as Sarris dealt with the immediate suspension of a producer's license, which was later revoked by the Commissioner. Further, Commissioner v. Berlin demonstrates that revocation is warranted for this type of producer conduct. As in the Berlin decision, wherein the Commissioner revoked the license of a respondent who induced elderly clients to purchase annuities by misrepresenting the terms of the proposed annuities in a "twisting" scheme, Fisher solicited his clients with an annuity without knowing what it was he was selling to his elderly clients, violating his duty of trust as their fiduciary. Although Fisher's conduct entailed fewer elderly clients, the egregiousness of his misconduct is aggravated by his sale of products that were not permitted for sale in New Jersey and from an unauthorized insurer that was not permitted to do business in New Jersey. See Commissioner v. Uribe. Furthermore, Fisher's testimony indicates that he did not concern himself with the ramifications of recommending elderly clients to invest in a product that could jeopardize their life savings at an elderly age. Initial Decision at 5. Fisher's breach of his fiduciary duties through his gross incompetence breached the trust of his customers and constitutes a gross deviation from the standard of care required of insurance producers in this State. As such, I MODIFY the ALJ's recommendation for suspension in the case of the Respondents failure to remit fines in a timely manner and hereby REVOKE Fisher's insurance producer license.

Furthermore, as the ALJ found Regal was also in violation of Counts 1 through 12 as alleged in the OTSC, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of Regal's producer licenses. For the reasons set forth below, I MODIFY the Initial Decision to provide that Regal's insurance producer license also be revoked.

N.J.S.A. 17:22A-40(c) allows the Commissioner to suspend, revoke, or refuse to renew the insurance producer license of a business entity where "an individual licensee's violation was known or should have been known by one or more of the partners, officers or managers acting on behalf of the business entity and the violation was neither reported to the [C]ommissioner nor corrective action taken." Here, Regal was owned by two individuals, both named in this action and each holding a 50% ownership interest in the company. Id. at 2. The ALJ found Fisher in violation of Counts 1 through 12 of the OTSC, wherein Fisher was found to have engaged in a pattern of misrepresentation related to the sales of annuities to senior citizens amounting to just over $800,000 over the course of five months. Similarly, the ALJ found that Madden, as DRLP and 50% owner, failed to supervise the actions of both Fisher and Regal, as alleged in Count 17 of the OTSC. As DRLP and owner, Madden knew or should have known about the products being sold by his employees at his company and his failure to supervise adequately lead to the perpetuation of numerous acts on the part of Fisher that may have jeopardized the life savings of several elderly clients. Therefore, I find that it is appropriate to revoke the insurance producer license of Regal, who is vicariously liable for the actions of Fisher, pursuant to N.J.S.A. 17:22A-40(c). See Commissioner v. Gonclaves.

In light of the foregoing and based upon my review of the record, I am compelled to MODIFY the Initial Decision and FIND that the revocation of the Respondent Regal's insurance producer license is necessary and appropriate.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions, the Reply thereto, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision except as modified herein. Specifically, I ADOPT the ALJ's conclusions and hold that the

Respondents have violated the Producer Act as charged in Counts 1 through 12 and 17 of the OTSC and have failed to present any legally or factually viable defenses to the violations of the Producer Act.

I hereby MODIFY the Initial Decision to specifically find that Respondents Fisher and Regal violated N.J.S.A. 17:22A-40a(2), (8), and N.J.A.C. 11:17A-4:10 as alleged in Count 1; N.J.S.A. 17:22A-40(a)(2), (7), N.J.S.A. 17:29B-3, N.J.S.A. 17:29B-4(2), and N.J.S.A. 17B:30-3 as alleged in Count 2; N.J.S.A. 17:22-6.37 as alleged in Count 3; N.J.S.A. 17:22A-40(a)(2), (7), N.J.S.A. 17:29B-3, N.J.S.A. 17:29B-4(2), N.J.S.A. 17B:30-3, and N.J.S.A. 17B:30-6 as alleged in Count 8; N.J.S.A. 17:22-6.37 as alleged in Count 9; N.J.S.A. 17:22A-40(a)(2), (8), and N.J.A.C. 11:17A-4:10 as alleged in Count 10; N.J.S.A. 17:22A-40(a)(2), (7), and N.J.S.A. 17B:30-3 as alleged in Count 11; and, N.J.S.A. 17:22-6.37 as alleged in Count 12.

I MODIFY the pleadings as it relates to Count 11 to conform with the facts found by the ALJ in the Initial Decision and find that Respondent Fisher also violated N.J.S.A. 17:29B-4(2) and N.J.S.A. 17:29B-3.

I MODIFY the Initial Decision and find that the Respondent Fisher violated N.J.S.A. 17:22A-47(c), N.J.S.A. 17:22A-40(a)(19), and two counts of N.J.S.A. 17:22A-40(a)(2) as set forth in Counts 13 and 14.

I ADOPT the ALJ's conclusion that the facts in the record do not support a finding that Fisher failed to timely respond to the Department's inquiry pertaining to his involvement with the NFOA and to the Department's request for a statement regarding Fisher's annuity solicitation and sales, as alleged in Counts 15 and 16 of the OTSC.

Moreover, I MODIFY the penalty and ORDER that Respondents Fisher and Regal are jointly and severally liable for monetary penalties totaling $45,000 for Counts 1 through 12, as

discussed above. As I have modified the ALJ's findings and MODIFY the Initial Decision to conclude that there is a factual basis to find Respondent Fisher in violation of Count 13 and Count 14 of the OTSC, I ORDER Respondent Fisher to pay an additional monetary penalty imposed of $2,500 for his violation of Count 13 and $2,500 for his violation of Count 14, totaling $5,000 for which he is individually liable. Furthermore, I MODIFY the penalty against Respondent Madden and ORDER that Respondent Madden be individually liable for a civil monetary penalty of $5,000.

Finally, I MODIFY the ALJ's conclusion that suspension of Fisher's insurance producer license be imposed only for his failure to remit the penalties assessed in a timely manner, and hereby ORDER the revocation of said license effective as of the date of this Final Order and Decision. In addition, I MODIFY the Initial Decision and hereby ORDER the revocation of **Regal's license effective as of the date of this Final Order and Decision.**

IT IS SO ORDERED on this 22nd **day of** July, **2018.**

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