

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-13994-13  
AGENCY DOCKET NO.: OTSC #E13-82

MARLENE CARIDE,<sup>1</sup> )  
COMMISSIONER, NEW JERSEY )  
DEPARTMENT OF BANKING AND )  
INSURANCE, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
ASMA NORRIS )  
 )  
Respondent. )

FINAL DECISION AND ORDER

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) 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, N.J.S.A. 17:22A-26 to -48 (“Producer Act”), and all powers expressed or implied therein, for the purposes of reviewing the July 23, 2018 Initial Decision (“Initial Decision”) of Administrative Law Judge Barry E. Moscovitz (“ALJ”). In the Initial Decision, the ALJ found in favor of the Department of Banking and Insurance (“Department” or “Petitioner”) against Respondent Asma Norris (“Norris” or “Respondent”) as to several violations, though not all, in Counts Three, Four, and Ten. The ALJ found in favor of Norris against the Department as to Counts One, Two, and Five through Nine. The ALJ recommended that Norris’s insurance

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<sup>1</sup> Pursuant to R. 4:34-4, Commissioner Marlene Caride has been substituted in place of former Commissioner Kenneth E. Kobyłowski in the caption.

producer license be suspended for one year and monetary fines in the amount of \$15,000 be imposed.

### STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 30, 2013, the Department issued a four count Order to Show Cause (“OTSC”) against the Respondent, which sought revocation of the Respondent’s producer license, reimbursement of the costs of investigation and prosecution, restitution to her victims, and imposition of civil monetary penalties for alleged violations of the Producer Act and the regulations governing the conduct of insurance producers in this State.

On or about September 25, 2013, Norris, acting pro se, filed an Answer to the OTSC in the form of a letter, wherein she denied the allegations, requested a hearing, and attached several supporting letters from other clients. The Department transmitted the matter as a contested case to the Office of Administrative Law (“OAL”) pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23.

The Department filed a motion to amend the OTSC on or about December 26, 2013. Initial Decision at 2. Norris opposed the motion. The ALJ granted the motion on or about March 10, 2014. Ibid. The Amended OTSC (“AOTSC”) deleted the reference to N.J.A.C. 11:17A-2.8 in Counts One, Two, and Four and added five new counts. Ibid. Respondent also denied the allegations in the AOTSC and supplied additional letters from clients.

On or about October 7, 2016, Joel M. Bacher, Esq., (“Bacher”) filed a letter of representation and began representing Norris.

With Bacher’s consent, the Department filed a Second Amended OTSC (“AOTSC2”) on May 30, 2017. Ibid. The AOTSC2 contains ten Counts as follows:

Count One – Respondent’s misrepresentation of the nature and terms of the policy she sold to M.S. and Respondent’s failure to

conduct a comprehensive policy review with M.S. upon her delivery of the Term Life Policy constituted violations of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16);

Count Two – Respondent’s misrepresentations to J.S. that purchasing a Bankers Life & Casualty Company (“Bankers”) Equity Indexed Annuity (“EIA”) would assist J.S. in qualifying for the Specified Low-Income Beneficiary Program and representations to J.S. that J.S. would have unfettered access without penalty to the funds held in the EIA constituted violations of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16); and Respondent’s forging of J.S.’s signature on the Annuity Suitability Questionnaire (“ASQ”) constituted violations of N.J.S.A. 17:22A-40(a)(2), (5), (8), (10), and (16);

Count Three – Respondent’s misrepresentations to F.B. concerning the nature, terms, and conditions of the Bankers’ Fixed Annuity constituted violations of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), and N.J.A.C. 11:17A-2.8;

Count Four – Respondent’s misrepresentations to B.B. concerning the nature, terms, and conditions of the Bankers’ Fixed Annuity constituted violations of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16);

Count Five – Respondent’s fraudulent representations on R.D.’s annuity application and ASQ constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Six – Respondent’s fraudulent representations on H.H.’s ASQ constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Seven – Respondent’s fraudulent representations on E.G.’s annuity application and ASQ constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Eight – Respondent’s creation of a false application for an annuity that R.B. had not completed or approved constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Nine – Respondent’s forging of C.G.’s signature on at least eight separate forms submitted to Bankers constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (10); and Respondent’s fraudulent representations on C.G.’s ASQ constituted violations of

N.J.S.A. 17:22A-40(a)(2), (8), and (16), and N.J.A.C. 11:17A-2.8; and

Count Ten – Respondent’s fraudulent representations on R.P.’s ASQ constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (16); Respondent’s forging of R.P.’s signature on application forms submitted to Bankers constituted violations of N.J.S.A. 17:22A-40(a)(2), (8), and (10); Respondent’s failure to remit R.P.’s \$60,000 premium and annuity application to Bankers for a period of one-year constituted violations of N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.A.C. 11:17C-2.2(a); and Respondent’s use of R.P.’s \$60,000 in premium funds to pay her own mortgage lender, Rylocat, Inc., constituted violations of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16).

The hearing was conducted on January 19, January 29, and March 26, 2018. Initial Decision at 3. Following the hearing, the record remained open for written closing summations. The Department, through counsel, Deputy Attorney Ryan S. Schaffer (“DAG Schaffer”), submitted a written summation, a certification of Investigator Eugene Shannon (“Shannon”) as to the costs of investigation, and two unpublished Final Decisions and Orders. Respondent submitted a written summation on June 8, 2018.

#### ALJ’S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ issued an Initial Decision on July 23, 2018. The ALJ found that the Department proved the allegations contained in the AOTSC2 in some counts, found that the Department did not prove the allegations in other counts, and recommended that Norris’s license be suspended for one year and that a \$15,000 fine be imposed.

As to Counts One and Two of the AOTSC2, the ALJ found that the Department did not produce any evidence or testimony regarding the factual allegations in those counts. Initial Decision at 15. Accordingly, the ALJ determined that the factual allegations in Counts One and Two were not proven by a preponderance of the evidence. Id. at 16 and 19.

Regarding Count Three, the ALJ found that Norris contacted F.B. in June 2008 about renewing a certificate of deposit (“CD”) that F.B. owned. Id. at 13-14. F.B. did not want to purchase an annuity because he was expecting expensive home repairs and wanted a product he could withdraw from after a year. Id. at 14. Norris told F.B. that she would sell him a version of a CD and F.B. agreed to accompany Jessica Locascio, who worked with Norris, to the bank to cash out his old CD and purchase a new product which was an annuity. Ibid. The ALJ found that Norris explained that the annuity was similar to a CD, and that F.B. purchased an annuity with the understanding that it was like a CD. Id. at 18. The ALJ found that Norris did not represent that the annuity was the equivalent of a CD and that Norris’s explanation regarding the similarities and differences between an annuity and a CD was unintentionally confusing and misleading. Ibid. The ALJ held that this conduct violated N.J.S.A. 17:22A-40(a)(2) and (8) and N.J.A.C. 11:17A-2.8 as alleged in the AOTSC2. Id. at 20. The ALJ did not address the alleged violations of N.J.S.A. 17:22A-40(a)(5) or (16). Id. at 18, 20.

Regarding Count Four, the ALJ found as fact that Norris induced her to purchase an annuity by representing that the annuity was the equivalent of a CD. Id. at 15. B.B. transferred over \$36,000 from another account to purchase the annuity. Ibid. When she realized that the annuity was not the same as a CD, she wrote to the Department. Ibid. B.B. also testified that the assets listed on the ASQ were incorrect.<sup>2</sup> Ibid. The ALJ found that B.B. purchased an annuity based on Norris’s unintentionally confusing and misleading explanation that an annuity was comparable to a CD. Id. at 18. Accordingly, the ALJ determined that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8) for demonstrating incompetence or financial irresponsibility. Id. at 20. The ALJ held that

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<sup>2</sup> The allegation that Norris provided inaccurate assets on B.B.’s ASQ is not alleged in Count Four of the AOTSC2.

the Department did not prove that Norris also violated N.J.S.A. 17:22A-40(a)(5) or (16) by a preponderance of the evidence. Id. at 20-21. The ALJ based this determination on the fact that no policy or procedure was ever introduced that requires the Respondent to check the veracity of the information that her clients gave her, and no reasonable explanation was ever given why the branch manager, who would also benefit from the sale of the annuity, was never investigated or interviewed. Id. at 21.

Regarding Count Five, the ALJ recounted the testimony of Gregory Beriault (“Beriault”), who was an investigator employed by Bankers. In June 2010, Norris submitted an ASQ and application on R.D.’s behalf for an annuity. Id. at 10. R.D. would have to be less than 85 to qualify for this annuity. Id. at 11. Norris represented on the application that R.D. was 77, when he was 87. Ibid. Further, information regarding R.D.’s assets on the ASQ was inaccurate because, when the form was completed in 2010, he did not have \$24,000 in a savings or checking account, \$6,000 in a money market account, or \$40,000 in a CD. Ibid.

R.D.’s daughter, Diane Sloand (“Sloand”) testified that R.D. is currently 95 years-old and lives in an assisted living facility. Ibid. Sloand testified that her father transferred two older annuities into the annuity at issue because Norris told him it would earn more interest. Ibid.

Sloand, R.D., and R.D.’s financial advisor drafted a letter to Bankers to complain about the transaction, including that Norris misrepresented R.D.’s age on the application and that R.D. had to pay a penalty in taxes on the annuities he surrendered. Ibid. Sloand further corroborated that the assets listed on the ASQ were incorrect and her father’s age was wrong on the application. Id. at 12.

The ALJ recounted that Norris testified that it was not her responsibility to verify the information provided to her by clients, including clients' ages and assets, but it was the branch manager's responsibility. Id. at 11.

The ALJ found that Norris submitted an ASQ and application containing inaccurate information for an annuity on behalf of R.D. Id. at 17. However, the ALJ held that the Department did not show by a preponderance of the evidence that Norris intentionally misrepresented assets on the ASQ or information on the application. Ibid. The ALJ emphasized that no policy or procedure was introduced that showed that Norris was responsible for confirming that the information that her clients provided was accurate. Ibid. The ALJ concluded that the Department did not prove the violations contained in Count Five by a preponderance of the evidence. Id. at 17, 20.

Regarding Count Six, the ALJ recounted testimony of Berliaut. He testified that on June 18, 2012, Norris submitted an ASQ and application on behalf of H.H. for a deferred annuity. Id. at 7. Berliaut testified that there were several inaccuracies in the ASQ, including assets, for the annuity. Id. at 8. The ASQ indicated that H.H. had \$45,000 in a checking or savings account, \$60,000 in a CD, and \$65,000 in a money market account. Ibid. H.H. indicated that she had approximately \$2,000 in her checking account and denied having a CD or a money market account. Ibid.

The ALJ recounted that Norris testified that it was not her responsibility to verify the information provided to her by clients, including clients' ages and assets, but it was the branch manager's responsibility. Ibid.

The ALJ found that Norris submitted an ASQ containing inaccurate information for an annuity on behalf of H.H. Id. at 16. However, the ALJ held that the Department did not show by

a preponderance of the evidence that Norris intentionally misrepresented assets on the ASQ. Ibid. The ALJ emphasized that no policy or procedure was introduced that showed that Norris was responsible for confirming the information that her clients provided. Id. at 16-17. The ALJ concluded that the Department did not prove the violations contained in Count Six by a preponderance of the evidence. Id. at 16-17, 20.

Regarding Count Seven, the ALJ recounted the testimony of Beriault, who testified that Norris submitted an ASQ and application on behalf of E.G. for a deferred annuity. Id. at 8. E.G. could not be older than 85 to qualify for this annuity. Ibid. E.G. was 87, but Norris represented on the application that she was 77. Ibid. He also testified that E.G. did not have the assets listed on the ASQ. Id. at 9.

The ALJ recounted that Norris testified that it was not her responsibility to verify the information provided to her by clients, including clients' ages and assets, but it was the branch manager's responsibility. Id. at 9.

The ALJ found that Norris submitted an ASQ and application containing inaccurate information for an annuity on behalf of E.G. Id. at 17. However, the ALJ held that the Department did not show by a preponderance of the evidence that Norris intentionally misrepresented assets on the ASQ or information on the application. Ibid. The ALJ emphasized that no policy or procedure was introduced that showed that Norris was responsible for confirming the information that her clients provided. Ibid. The ALJ concluded that the Department did not prove the violations contained in Count Seven by a preponderance of the evidence. Id. at 17, 20.

Regarding Count Eight, the ALJ recounted the testimony of Beriault, who testified that Norris met with R.B. to sell him a deferred annuity. Id. at 9. R.B. completed the application and gave Norris a check for \$310,000, but Norris did not submit the application to Bankers. Ibid.



Rather, Norris submitted a false application with the wrong name, date of birth, social security number, address, and phone number. Id. at 9, 10. Beriault met with R.B., who had never seen the false application before and provided Beriault with a copy of the application that he completed for the policy. Id. at 10. If R.B. had attempted to access the policy, he would not have been able to because it did not match his name or other identifying information. Ibid.

Norris testified that she did not submit the application with the incorrect information and that she submitted the correct application. Ibid. She testified that another agent at Bankers, Greg Centenary<sup>3</sup>, submitted the false application. Ibid.

The ALJ found that Norris met with R.B. and sold him an annuity. Id. at 17. The ALJ found that R.B. completed an application that Norris submitted and that Norris did not submit a false application for an annuity on behalf of R.B., and the question of who submitted the false application was unresolved. Ibid. The ALJ concluded that the Department did not prove the violations contained in Count Eight by a preponderance of the evidence. Id. at 20.

Regarding Count Nine, the ALJ recounted the testimony of Berilaut, who testified that C.G. was the beneficiary of her father's \$360,000 policy. Id. at 12. C.G. contacted Norris and asked that the policy be transferred into her name. Ibid. Beriault testified that Norris did not meet with C.G., completed forms without her, and forged her signature on them. Ibid.

Berliault testified that Norris represented on the ASQ that C.G. had real estate valued at \$250,000; life insurance in the amount of \$118,000; savings and checking accounts in the amount of \$48,000; a money market account with \$15,000; mutual funds worth \$400,000; CDs worth

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<sup>3</sup> Norris testified that Greg Centenary is another agent at Bankers. T3-35:7-8. She did not provide any other information about Mr. Centenary.

\$60,000; gold coins at bullion in the amount of \$600,000; or other qualified assets worth \$110,000. Id. at 12-13. C.G. did not have any of these assets. Id. at 13.

The ALJ noted that Norris testified that it was not her responsibility to verify the information provided to her by clients, including clients' ages and assets, but it was the branch manager's responsibility. Ibid.

The ALJ found that C.G. contacted Norris after C.G.'s father passed away. Id. at 18. C.G. asked Norris to transfer the funds from her father's annuity to an annuity in C.G.'s name, which Norris did. Ibid. However, while the assets listed on the ASQ were inaccurate, the ALJ held that the Department had not proved by a preponderance of the evidence that Norris intentionally misrepresented assets on the ASQ. Ibid. The ALJ emphasized that no policy or procedure was introduced that showed that Norris was responsible for confirming the information that her clients provided. Ibid. The ALJ concluded that the Department did not prove the violations contained in Count Nine by a preponderance of the evidence. Id. at 20.

Regarding Count Ten, the ALJ recounted the testimony of Berliaut, who testified that in May 2009, Norris advised R.P. to purchase a deferred annuity with Bankers and use the funds from a previous annuity to pay for it. Id. at 4. R.P. withdrew \$60,000 from an annuity and wrote a personal check to "Rylocait, Inc." Id. at 5. He gave that check to Norris, who deposited it. Ibid. Rylocait is the mortgage lender for property that Norris owned with her husband and has no connection to Bankers. Ibid. Norris did not submit an application or the premium for nearly a year. Ibid. Assets listed on the ASQ for R.P. were also inaccurate and R.P.'s signature on the two applications appears to be different. Ibid. Berliaut also testified that local branches generally review and approve applications. Id. at 7. Berliaut testified that he never considered that the

branch manager forged any signatures and that there were no indications that the manager had done so. Ibid.

R.P. testified that he believed it was strange to write a check to Rylocat rather than Bankers, but he trusted Norris. Id. at 6. R.P. further testified that the signatures on the application and associated documents for the 2010<sup>4</sup> annuity were not his. Ibid. He also testified that the assets listed on the ASQ were inaccurate. Ibid.

Norris testified that in 2009, she and her husband were getting divorced and it became contentious. Ibid. Norris testified that R.P. loaned her the \$60,000 to help her buy property and she paid him back the next year. Ibid. Norris also testified that she did not forge R.P.'s signature on the 2010 application, and that her signature is also forged on that document. Ibid. Norris testified that it was not her responsibility to verify the information provided to her by clients, including clients' ages and assets, but it was the branch manager's responsibility. Id. at 6.

The ALJ noted that Norris is the only one who provided testimony regarding who is responsible for making sure the information on ASQs and applications is accurate, and that it is the branch manager's responsibility. Id. at 7.

The ALJ found that Norris advised R.P. to purchase a deferred index annuity with Bankers., that R.P. withdrew \$60,000 from an annuity he acquired in 2006 to pay for the annuity, and that Norris used the money as a personal loan. Id. at 16. Further, the ALJ found that the ASQ was inaccurate and that the application contained forged signatures. Ibid. The ALJ concluded that there was a misunderstanding between R.P. and Norris. Ibid. Specifically, the ALJ found that

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<sup>4</sup> The ALJ indicated that R.P. testified that the signature on the 2009 application was not his. However, R.P. testified that the signature on the 2009 application was his, but the signature on the 2010 application was not. T1-89:14-90:22, 93:25-94:10, Ex. P-8.

Norris mistakenly believed that R.P. meant to loan her the money, which is why she asked to him write the check to Rylocait, Norris's mortgage company. Ibid.

The ALJ found that the Department did not prove by a preponderance of the evidence that Norris intended to deceive R.P. Ibid. Further, the ALJ found that the Department was unable to prove by a preponderance of the evidence that Norris intentionally misrepresented the assets listed on the ASQ or that she forged the signatures on the application. Ibid. The ALJ found that no policy or procedure was introduced that showed that Norris was responsible for confirming the information that her clients provided. Ibid. The ALJ concluded that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8). However, the ALJ held that the Department did not prove by a preponderance of the evidence that Norris violated N.J.S.A. 17:22A-40(a)(4), (10), or (16), or N.J.A.C. 11:17C-2.2(a). Id. at 20.

Based upon the above findings, the ALJ recommended that Norris's license be suspended for one year and a civil monetary penalty be imposed against the Norris in the amount of \$15,000 and that she reimburse the Department \$4,000 for the costs of investigation. Id. at 21. The ALJ did not analyze the factors for determining monetary penalties that are set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Nor did the ALJ explain how the \$15,000 in monetary penalties was to be allocated among the violations.

#### EXCEPTIONS

By letter dated August 6, 2018, the Department, through counsel, DAG Schaffer, filed timely Exceptions to the Initial Decision<sup>5</sup> ("Department Exceptions Brief"). The Department stated that the Initial Decision contained some typographical errors. First, in the Appendix, Exhibit

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<sup>5</sup> The Petitioner titles their letter "Petitioner's Reply to Respondents' Exceptions." However, the Respondent did not file Exceptions to the Initial Decision.

J-1 is incorrectly listed as a stipulation of facts. However, Exhibit J-1 is a fax from Norris to former DAG Jason Silberberg. Secondly, the Department noted that Exhibit P-37 is identified as being not in evidence. However, the Department stated that Exhibit P-37 was moved into evidence during the third day of the hearing. Department Exceptions Brief at 3-4.

Petitioners' Exceptions to the ALJ's Findings and Conclusions

Petitioner argues that the ALJ did not correctly apply the preponderance of the evidence standard. Department Exceptions Brief at 4-5. Petitioner argues that the ultimate findings and conclusions are against the weight of the evidence. Id. at 5.

As to Counts Three and Four of the AOTSC2, the Petitioner argues that the ALJ incorrectly found that Norris "mistakenly" misled F.B. and B.B. Id. at 5-7. First, the Petitioner points out that neither B.B. nor F.B. initially wanted to purchase an annuity. Rather, they both wanted CDs. Id. at 6. Second, Petitioner argues that Norris's intent is irrelevant. Id. at 6-7. Lastly, Petitioner argues that the ALJ ignored Norris's responsibilities as a licensed insurance producer. Id. at 7.

Next, as to Counts Four through Eight and Count Ten of the AOTSC2, the Petitioner argues that the sufficient evidence exists in the record that Norris committed fraud by increasing the amount of assets and/or providing wrong ages on applications to avoid escalation review and ultimately sell an annuity that was not suitable for the client's needs. Id. at 8-9. The Petitioner argues that the branch manager's responsibilities are irrelevant as Norris admitted that the ASQs and applications contained wrong information, which Norris wrote as her clients told her to write it. Id. at 9.

As to Counts Five, Eight, and Ten, the Petitioner argues that the ALJ disregarded witness testimony that applications contained forged signatures.<sup>6</sup> Id. at 11-12. The Petitioner argues that

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<sup>6</sup> Count Nine also contains allegations that application materials contained forged signatures.

Norris's only defense against forged signatures is that someone else did it, including forging her own signature. The Petitioner argues that ALJ accepted this explanation without any corroborating evidence. Ibid.

Lastly, as to Count Ten, the Petitioner argues that the ALJ disregarded witness testimony and evidence in concluding that Norris did not defraud R.P. Id. at 12-13. The Petitioner argues that the ALJ ignored the application from 2009 that R.P. supplied. Id. at 13. The Petitioner argues that Norris's uncorroborated testimony that R.P. loaned her the money is against the weight of the evidence and that her testimony was believed over R.P. and the documents in evidence. Ibid.

#### Petitioners' Exceptions to the ALJ's Civil Penalties

The Department incorporated by reference its argument regarding civil monetary penalties from its closing summation. Id. at 13. In its summation, the Petitioner requested \$125,000 in civil penalties for 13 violations of the Producer Act. Petitioner's Closing Summation at 44-45. Petitioner requested \$5,000 for the first violation and \$10,000 for each additional violation. Id. at 49. Petitioner analyzed the factors in Kimmelman, 108 N.J. at 137-39. These factors are: (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; and (7) past violations.

Regarding the first factor, the Petitioner argues that Norris acted in bad faith by selling clients products they did not want or need, forging signatures, and misrepresenting assets. Id. at 46-47.

As to the second factor, the Petitioner further argues that no proof was presented that Norris was unable to pay a monetary penalty. Id. at 47.

As to the third factor, the Petitioner argues that Norris profited by earning commissions and misappropriating R.P.'s premium. Ibid.

As to the fourth factor, the Petitioner argues that the public confidence is undermined when insurance producers, such as Norris, breach their duty of care. Further, Norris financially harmed her clients by selling them unsuitable products and misappropriating funds. Id. at 47-48.

As to the fifth factor, the Petitioner represents that duration of Norris's activity is four years, from 2008 through 2012. Id. at 48.

As to the sixth factor, the Petitioner indicated that Norris has not been criminally punished for her conduct. Ibid.

As to the final factor, the Petitioner represents that Norris has not previously violated the Producer Act. Ibid.

The Petitioner additionally requested \$4,150 as reimbursement for the costs of investigation. Id. at 49. In total, Petitioner requested a total of \$129,150 in costs and penalties.

Petitioners' Exceptions to the ALJ's Imposition of License Suspension rather than Revocation

The Department incorporated by reference its argument regarding license revocation from its closing summation. Department Exceptions Brief at 13. The Department argued that the revocation of Norris's license was an appropriate penalty. Petitioner's Closing Summation at 49-51. Revocation is the appropriate and necessary remedy when licensed insurance producers commit fraud. The Petitioner argued that great weight should be placed on the ages of those who were financially harmed by Norris, many of whom were in their 70s and 80s. Id. at 50-51. Senior citizens are especially vulnerable to fraudulent schemes because they may be incapable from recovering from losses late in life when they may be unable to rejoin the workforce. Ibid., citing,

Commissioner v. Schifano, BKI 1947-12, Initial Decision, (04/29/2013), Final Decision and Order, (09/11/2013).

The Respondent did not submit exceptions to the Initial Decision.

**Respondent's Reply to Petitioner's Exceptions**

By fax dated August 31, 2018, the Respondent, through counsel, Joel M. Bacher, filed a late Reply to the Department's Exceptions ("Respondent Reply Brief"). Pursuant to N.J.A.C. 1:1-18.4(d), the Respondent's reply was due five days after receipt of the Petitioner's Exceptions, or August 13, 2018. The Respondent did not request an extension of time to file a reply pursuant to N.J.A.C. 1:1-18.8.

As to the counts involving forged applications and false financial information, the Respondent reviewed the testimony and argued that the branch manager, who also stood to gain from submitting inaccurate annuity applications and who was responsible for reviewing and initialing the applications, was never questioned or investigated. Respondent Reply Brief at 1-2, 4-5. Further, no evidence was presented that Norris was responsible for affirming the financial information her clients provided. Id. at 1, 3, 4-5.

As to Counts Three and Four, the Respondent argued that F.B. and B.B. had buyer's remorse after they could not access the money in the annuity without incurring a penalty, which may have happened even if they had purchased a CD. Id. at 2. Further, although Bankers was in receipt of B.B.'s complaint in 2011, they did not act until 2014. Ibid.

As to Count Ten, the Respondent argued that R.P. knew what he was doing when he wrote a check in the amount of \$60,000 to Rylocat. Ibid. R.P. was a retired accountant and a person of his experience would not have written a check to another entity unless he meant to make a personal



loan to Norris. Ibid. The Respondent also argued that the Department did not prove that Norris intended to deceive R.P. Id. at 4.

The Respondent argued that the ALJ applied the correct burden of proof and standards of law and the ALJ recognized “glaring deficiencies” in the Department’s case. Ibid. There was no evidence to prove that Norris was responsible for confirming the information her clients provided regarding their assets. Respondent Reply Brief at 4-5. The branch manager and other Bankers employees, such as Jessica Lacasio, were never investigated. Ibid. There was no evidence that Norris forged any document or signature. Ibid. There was no testimony presented that anyone saw Norris forge a name, nor was there any expert testimony. Ibid. The Respondent argues that the Department’s case is based upon hearsay and conjecture. Id. at 5.

#### LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the AOTSC2 by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). 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). Preponderance has been described as “the greater weight of credible evidence in the case is not necessarily dependent on the number of witnesses, but having the greater convincing power.” State v. Lewis, 678 N.J. 47 (1975).

#### AOTSC2 – Allegations Against Respondent

The AOTSC2 charges Norris with violations of the Producer Act, which governs the licensure and conduct of New Jersey insurance producers and empowers the Commissioner to

suspend or revoke the license of, and to fine, an insurance producer for violations of its provisions. The AOTSC2 contains ten counts, with each count pertaining to a different client. The AOTSC2 alleges that Norris violated the Producer Act by forging documents in violation of N.J.S.A. 17:22A-40(a)(10) (Counts Two, Nine, and Ten); misleading clients about the terms and conditions of annuities in violation of N.J.S.A. 17:22A-40(a)(5) (Counts One through Four); making incomplete or fraudulent comparisons of policies in violation of N.J.A.C. 11:17A-2.8 (Counts Three and Nine); failing to remit premium funds in violation of N.J.A.C. 11:17C-2.2(a) (Count Ten); misappropriating funds in violation of N.J.S.A. 17:22A-40(a)(4) (Count Ten); violating any insurance laws or regulation in violation of N.J.S.A. 17:22A-40(a)(2) (All Counts); demonstrating incompetence or irresponsibility in violation of N.J.S.A. 17:22A-40(a)(8) (All Counts); and committing fraud in violation of N.J.S.A. 17:22A-40(a)(16) (All Counts). The following will evaluate, count by count, the charges of the AOTSC2 under the record created during the OAL proceeding.

#### Count One

Count One of the AOTSC2 alleges that Norris misrepresented the nature and terms of a policy she sold to M.S. and failed to conduct a comprehensive policy review of the Term Life Policy with M.S. in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). I concur with the ALJ that the Department did not present any evidence regarding Count One of the AOTSC2,<sup>7</sup> and thus, I FIND that there is insufficient evidence to find violations as alleged in Count One. I also note that the Department did not take exception to the ALJ's findings regarding Count One.

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<sup>7</sup> During the hearing, DAG Schaffer attempted to move a certification signed by M.S. into evidence. T2-71:15-23. The ALJ sustained Bacher's objection and did not allow the certification to be admitted into evidence. T2-72:24-73:4. Petitioner does not take exception to this evidentiary ruling and thus there is no basis upon which to disturb this ruling.

### Count Two

Count Two of the AOTSC2 alleges that Norris made misrepresentations to J.S. that purchasing a Bankers EIA would assist J.S. in qualifying for the Specified Low-Income Beneficiary Program and that J.S. would have unfettered access without penalty to the funds held in the EIA in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). Further, Count Two alleges that Norris forged J.S.'s signature on the ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), (10), and (16). I concur with the ALJ that the Department did not present any evidence regarding Count Two of the AOTSC2.<sup>8</sup> I FIND that there is insufficient evidence to find violations as alleged in Count Two. I also note that the Department did not take exception to the ALJ's findings regarding Count Two.

### Count Three

Count Three alleges that Norris made misrepresentations to F.B. concerning the nature, terms, and conditions of the Bankers' Fixed Annuity in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), (16), and N.J.A.C. 11:17A-2.8. The ALJ found that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8) for demonstrating incompetence or financial irresponsibility and N.J.A.C. 11:17A-2.8 for having made misleading representations or incomplete comparisons of annuities. Initial Decision at 20. For the following reasons, I MODIFY the ALJ's findings and find that Norris also violated N.J.S.A. 17:22A-40(a)(16).

N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for (5) intentionally misrepresenting the terms

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<sup>8</sup> During the hearing, DAG Schaffer attempted to move a certification signed by J.S. into evidence. T2-71:24-72:3. The ALJ sustained Bacher's objection and did not allow the certification to be admitted into evidence. T2-72:24-73:4. Petitioner does not take exception to this evidentiary ruling and thus there is no basis upon which to disturb this ruling.

of an actual or proposed insurance contract, policy, or application for insurance, and (16) committing any fraudulent act. Under N.J.A.C. 11:17A-2.8, insurance producers cannot make any misleading representations or incomplete or fraudulent comparison of any insurance policies or annuity contracts.

The evidence in the record indicates that F.B. was born in 1931. T2-27:14-15.<sup>9</sup> He wanted to purchase a (Certificate of Deposit) (“CD”)<sup>10</sup> that would have liquidity after one year because he was expecting to make house repairs around that time. T2-30:16-18, 31:23-32:2, 32:22-25, Ex. P-40. Norris informed F.B. that she was selling him a product that was like a CD. T2-29:25-30:18, 31:8-10, Ex. P-40. However, Norris sold F.B. an annuity<sup>11</sup> under which he could not access the funds placed therein for seven years without incurring a penalty. T2-31:16-32:2. Norris drove F.B. to his bank to cash out his existing CD that had a cash value of \$52,284.33, which he then used to purchase the annuity. T2-13:8-14, P-40. The annuity was a Bonus Single Premium Deferred Annuity with a face value of \$53,284.35. T2-12:17-22, Ex. P-40.

F.B.’s wife, B.B.,<sup>12</sup> typed letters for both herself and F.B. regarding Norris’s conduct and sent them to the Department. T2-32:3-25. F.B. signed a certification sent to him by the

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<sup>9</sup> T1 refers to the transcript of the first day of the hearing, January 22, 2018. T2 refers to the transcript of the second day of the hearing, January 29, 2018. T3 refers to the transcript of the third day of the hearing, March 26, 2018.

<sup>10</sup> A Certificate of Deposit is “an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.” N.J.S.A. 12A:3-104(j)

<sup>11</sup> An annuity “is a contract...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.” N.J.S.A. 17B:17-5.

<sup>12</sup> B.B. is also the subject of Count Four of the AOTSC2.

Department regarding Norris's representations that an annuity was similar to a CD. T2-34:18-35:2, Ex. P-40.

Norris testified that F.B. had a non-IRA account with herself and another agent named Jessica Lacasio<sup>13</sup> with whom she split the commission. T3-38:23-39:1. She denied that she told F.B. that an annuity was like a CD and that he could withdraw money without a penalty. T3-39:6-9. However, she testified that a fixed annuity is considered a "CD type annuity." T3-39:12-16. She testified that Bankers' sales materials state there are surrender charges and set forth the length of the annuity term. T3-39:16-18.

Although the ALJ found that Norris's explanations regarding the differences between a CD and an annuity were confusing and misleading, he found that Norris did not violate N.J.S.A. 17:22A-40(a)(5) or (16) because Norris did not intentionally confuse and mislead F.B. Initial Decision at 20. However, whether Norris intended to deceive F.B. is not relevant to whether Norris violated N.J.S.A. 17:22A-40(a)(16).

Fraudulent acts under the Producer Act, including an intentional misrepresentation of policy terms and/or information on an application, do not require intent to deceive. See 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); Commissioner v. Pino, OAL Dkt. No. BKI 8070-02, Initial Decision (09/11/03), Final Decision and Order (10/30/03) (there is no mens rea requirement for violations of N.J.S.A. 17:22A-1 to -25, the predecessor of the Producer Act); Commissioner v. Uribe, OAL Dkt. No. BKI 07363-07,

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<sup>13</sup> Ms. Lacasio was not available to testify. T3-104:7. During the hearing, DAG Schaffer attempted to move a certification signed by Ms. Lacasio into evidence. T3-103:16-17. The ALJ sustained Bacher's objection and did not allow the certification to be admitted into evidence. T3-105:20-25.

Initial Decision, (12/28/10), Final Decision and Order (9/28/11). “A fraudulent act under the Producer Act does not require criminal intent.” Commissioner v. Shih, 94 N.J.A.R. 2d (INS) 34 (March 2, 1994). “Proof of fraud under the [Producer Act], as opposed to common law fraud, does not require proof . . . of an intent to deceive.” Badolato v. Dobrek, citing, Open MRI of Morris & Essex, L.P. v. Frieri, 405 N.J. Super. 576, 583 (App. Div. 2009).

As noted in the cases cited above, whether Norris intended to mislead or defraud F.B. is irrelevant in finding whether she committed fraud under N.J.S.A. 17:22A-40(a)(16). It does not matter whether Norris actually intended to deceive F.B. During her testimony, she described a fixed annuity as a “CD type annuity.” T3-39:14-16. The ALJ found her testimony in this regard unintentionally confusing and misleading. Initial Decision at 14-15. Indeed, her description was confusing and misleading, but it does not matter whether or not it was intentional.

Norris provided a misleading and confusing explanation regarding the similarities and differences between a CD and an annuity. Her confusing explanation during her testimony that a fixed annuity is a “CD type annuity” undermines the Respondent’s argument in her Reply to the Petitioner’s Exceptions that F.B. and B.B. had “buyer’s remorse” when they could not access funds in their annuities without a penalty. Respondent Reply Brief at 2.

Accordingly, I FIND that sufficient evidence exists that Norris made misleading statements to F.B. regarding the annuity and sold him a product that he did not want and that did not suit his needs. It does not matter whether she did so with the intention to deceive him. Accordingly, I concur with the ALJ and FIND that there is sufficient evidence that Norris violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility). Further, I ADOPT the ALJ’s finding that insufficient evidence exists that Norris

violated 17:22A-40(a)(5) (intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance). Also, for the reasons set forth above, I MODIFY the ALJ's decision and FIND that Norris also violated 17:22A-40(a)(16) (committing any fraudulent act), and N.J.A.C. 11:17A-2.8 (making misleading representations or incomplete comparisons of annuities) as alleged in the AOTSC2.

#### Count Four

Count Four alleges that Norris made misrepresentations to B.B. concerning the nature, terms, and conditions of the Bankers' Fixed Annuity in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). The ALJ found that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8) for demonstrating incompetence or financial irresponsibility. Initial Decision at 18, 20-21. The ALJ found that the Department did not prove by a preponderance of the evidence that Norris violated N.J.S.A. 17:22A-40(a)(5) and (16). Id. at 20-21. For the following reasons, I MODIFY the ALJ's findings and find that Norris also violated N.J.S.A. 17:22A-40(a)(16).

As noted above, N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for (5) intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance, and (16) committing any fraudulent act.

The evidence in the record indicates that B.B. was born in 1943. T2-26:24-27:1. Norris sold B.B. an annuity around 2008 when B.B. had sought to obtain a CD. Norris told B.B. that the annuity would not be tied to the stock market and would be beneficial over time. T2-37:22-38:7. B.B. was unhappy with the annuity that Norris had sold to her because it did not earn much interest and she was unable to access the money in the annuity when she desired to do so without paying a penalty. T2-28:6-29:16. B.B. trusted Norris because she had sold F.B. a good health insurance

policy. T2-38:8-21. Norris represented to B.B. that the annuity was like a CD with liquidity after one year. T2-33:1-34:17, Ex. P-41. Norris testified that B.B. did an IRA rollover from another company to Bankers with herself and another agent named Jessica Lacasio with whom she split the commission. T3-39:1-5.

Although the ALJ found that Norris's explanations regarding the differences between a CD and an annuity were confusing and misleading, he found that Norris did not violate N.J.S.A. 17:22A-40(a)(5) or (16) because Norris did not intentionally confuse and mislead F.B. Initial Decision at 20-21. However, as noted above, whether Norris actually intended to deceive B.B. is irrelevant under N.J.S.A. 17:22A-40(a)(16). It is sufficient that she provided a misleading and confusing explanation regarding the similarities and differences between a CD and an annuity.

Therefore, I FIND that there is sufficient evidence that Norris made misleading statements to B.B. and sold her a product that B.B. did not want and did not suit her needs. It does not matter whether she did so with the intention of deceiving B.B. I concur with the ALJ and FIND that there is sufficient evidence that Norris violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility) for demonstrating incompetence or financial irresponsibility. Further, I ADOPT the ALJ's finding that insufficient evidence exists that Norris violated 17:22A-40(a)(5) (intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance). For the reasons set forth above, I also MODIFY the ALJ's decision and FIND that Norris also violated 17:22A-40(a)(16) (committing any fraudulent act) and N.J.A.C. 11:17A-2.8 (making misleading representations or incomplete comparisons of annuities) as alleged in the AOTSC2.



### Count Five

Count Five alleges that Norris made fraudulent representations on R.D.'s annuity application and ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16). The ALJ found that the Department did not prove by a preponderance of the evidence that Norris committed the violations alleged in Count Five. Initial Decision at 17, 20. 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).

For the following reasons, I REJECT the ALJ's findings and find that evidence in the record indicates that Norris submitted an inaccurate application so that R.D. would qualify for an annuity he otherwise would not have otherwise, and thus, violated N.J.S.A. 17:22A-40(a)(2), (8), and (16). I ADOPT the ALJ's findings and find that the evidence in the record does not prove by a preponderance of the evidence that Norris made fraudulent representation on R.D.'s ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16).

N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for violating any insurance law or regulation (2), using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility (8), or committing any fraudulent act (16).

In its exceptions, the Petitioner argues that the Initial Decision did not address that Sloand testified that her father's annuity application contained non-genuine signatures. Department Exceptions Brief at 11. In its closing summation, Petitioner requested that the pleadings be amended to the proofs and that the forgeries be considered an additional violation of N.J.S.A. 17:22A-40(a)(10) (forging another's name to an application for insurance or to any document

related to an insurance transaction). Petitioner's Closing Summation at 29-31. The Initial Decision does not address Petitioner's request.

N.J.A.C. 1:1-6.2(a) provides that "[u]nless 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." Generally, defendants who are aware of the charges against them are not free to "lie in repose but are called upon to prepare and defend." See Lawlor v. CloverLeaf Memorial Park, Inc. 56 N.J. 326, 339 (1970).

Here, I believe that the amending the pleadings would create undue prejudice. As Petitioner states, "[Sloand] raised a previously unidentified allegation" at the hearing. Petitioner's Closing Summation at 29. The new allegation, that Norris forged R.D.'s signature on the ASQ, was not identified or raised at any time prior to the hearing. Accordingly, Norris was not given adequate notice of these allegations or time to prepare a defense. Further, Beriault also testified that R.D. stated to investigators that it was not his signature on the application or supporting documents, including the ASQ. T1-49:16-50:7. The Department should have been aware of these allegations before the hearing and filed a motion to amend the AOTSC2 accordingly. Accordingly, I FIND that the pleadings should not be amended to include additional facts and violations.

The evidence in the record indicates that certain annuities may not be appropriate for seniors that need to access the funds invested therein because it would be unreasonable to defer payment for ten years. T1-39:24-40:10. Bankers' policy was not to sell certain annuities to individuals over the age of 85 and applicants could be rejected based upon their age. T1-39:24-40:22, T2-17:22-19:17. Bankers reviews annuity applications against thresholds that examine clients' financial situations, to ensure that products are suitable for the clients. T2-15:20-16:5. If

any thresholds are not met, the application is referred to an escalation committee that reviews the application and may request additional information and approve or reject the application. T2-16:23-17:9.

Annuities can be qualified or non-qualified. T2-11:10-12. A qualified annuity is funded through a roll-over of funds from another institution. A non-qualified immunity is funded through the clients' own funds. T2-11:10-17. Bankers has a product that is a Bonus Single Premium Deferred Annuity and the application for said annuity is Form 06T. T2-12:17-22. Withdrawals from this annuity during the first nine years would result in a tax penalty. T2-13:12-14. Bankers' policy was not to sell this annuity to an individual over 85 for a qualified applicant, and 90 for a non-qualified applicant. T2-18:7-9.

Bankers also sells a Single Premium Equity Indexed Fixed Deferred Annuity and the application for said annuity is Form 07G. T2-13:18-22. Withdrawals from this annuity during the first ten years would result in a tax penalty. T2-14:11-14. Bankers' policy was not to sell this annuity to individuals over the age of 85 for both qualified and non-qualified applicants. T2-18:20-25.

The testimony of Bankers' representative regarding the following is particularly relevant. Assets are listed on ASQs to determine if certain policies are suitable for individuals. T1-41:2-8. A policy's premium cannot exceed 50 percent of a client's assets because it would not be suitable to put a majority of assets into a policy. T1-41:2-15. As a general guideline, applicants must have at least \$25,000 or more in liquid assets after the initial premium, if the premium is paid with liquid assets. T2-19:12-25. Further, the initial premium must be equal to or less than 50 percent of the total assets excluding the applicant's primary residence. T2-19:12-25. If these financial guidelines

were not met, the application would be referred to the escalation committee for further review. T2-20:3-7.

Bankers' approval process for policies is generally done at the branch office. T1-61:8-20. Generally, branch managers and their supporting managers have authority to review and approve the applications. T1-61:20-25. Branch managers are responsible for initialing the ASQ and would have access to the other supplemental forms submitted with the ASQ. T1-72:11-73:15. It was possible that the branch manager may have provided inaccurate ASQs and applications. T1-62:4-7. However, SIU never investigated the branch manager because they did not have any indications that the branch manager was doing so. T1-62:4-11, T1-73:16-18.

R.D.'s daughter, Diane Sloand ("Sloand") testified that her father is currently 95 years-old and lives in an assisted living facility. T2-52:9-13. Due to problems with his memory, he was unable to testify. T2-52:16-53:1. In 2010, R.D. transferred two annuities totaling a little over \$32,000 into one with Bankers Life. T2-54:18-12. R.D. then received a notice from the IRS that he owed taxes from rolling over one of the annuities. T2-55:18-22. R.D. contacted Norris because he believed that there should not be a tax penalty because the annuity was rolled over into another annuity. T2-55:21-23. Norris charged him \$500 and filed a document with the IRS, promising him that she would take care of the issue. T2-55:23-25, Ex. P-29. However, the IRS contacted R.D. because the document Norris filed was incorrect. T2-56:10-1, Ex. P-29. Sloand contacted Norris about the issue, but believed that Norris was not answering questions satisfactorily, and that instead Norris accused Sloand of not taking care of her father. T2-58:11-22.

Berriault was employed with Bankers in the Special Investigation Unit ("SIU") for four years. T1-15:12-24. Berriault met with R.D. and his daughter when R.D. was 90 years-old.<sup>14</sup> T1-

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<sup>14</sup> Berriault did not indicate what year he met with R.D., only that it was February 6<sup>th</sup>. T1-48:8-9.

48:10-13. In July 2010, Bankers issued R.D. a fixed deferred annuity policy in the amount of \$13,144.62. T1-48:17-19. R.D.'s date of birth listed on the policy was inaccurate. T1-48:20-22. The application indicates that R.D.'s date of birth was July 8, 1932, when the actual date is July 8, 1922. T1-49:5-7. Ex. P-29. If R.D.'s age had been provided accurately on the application, he would not have been suitable for this policy. T1-49:9-10, 52:2-53:5.

Berriault showed R.D. copies of the annuity application, supporting documents, and the ASQ. T1-49:16-20. In total, he showed R.D. seven documents that required a signature, and R.D. stated to investigators that it was not his signature on any of the documents. T1-49:16-50:7. R.D. also told investigators that the information regarding his assets on the ASQ was inaccurate. T1-50:8-21. When the form was completed in 2010, he did not have \$24,000 in a savings or checking account as reflected on the ASQ. T1-50:21-23, T2-61:4-67:5, Ex. P-28. Further, he did not have \$6,000 in a money market account or \$40,000 in a CD. T1-50:23-51:2, T2-61:4-67:5, Ex. P-28. Sloand also testified that the signature on the ASQ was not her father's. T2-61:4-67:5. Sloand did not know who signed the ASQ. T2-68:18-22, Ex. P-28. She was not present when her father met with Norris and completed the application. T2-68:23-25.

R.D. wrote a letter to Bankers regarding Norris with his daughter and financial advisor present. T1-51:3-52:1, T2-56:15-57:17, Ex. P-29. The letter states that "Dr. Norris lied about my age on the application to your company." Ex. P-29. R.D. provided a copy of his driver's license with the letter to document his age. Ex. P-29. He does not indicate that his assets were incorrect on the ASQ. Ex. P-29. Bankers reimbursed R.D. for the taxes and withdrawal penalty after he cashed in his annuity. T2-67:9-15.

Norris testified that R.D. informed her that he was 77 years-old. His daughter, Donna,<sup>15</sup> was also present and she did not correct him and tell Norris that he was 87. T3-45:8-23. Norris testified that when clients told her their ages, she took their word and did not check drivers' licenses or other forms of identification to confirm. T3-46:22-47:17. She also believed her clients when they told her their assets and did not confirm the information. T3-89:1-12. She testified that it is not her responsibility to do so. T3-89:9-14. She testified that it was her supervisor's duty, Eric Scott, to confirm the information on the ASQ and then initial it. T3-90:5-14. Norris further testified that her signature on the application was also forged, though she did not know by whom. T3-45:24-46:7, Ex. P-28.

Norris was the signing agent on R.D.'s policy and she received a commission of approximately \$1,366.15. T1-52:2-53:5, Ex. P-27. Norris received commissions for selling policies and she would generally be paid higher commissions for selling annuities than life or short-term care policies. T1-41:16-42:2. Norris would not have been entitled to commissions if applicants were rejected because they were not suitable for certain types of investments. T1-68:22-24. Bankers only compensated Norris with commissions and did not pay her a base salary. T3-18:11-15, 91:2-7.

The ALJ found that the Department did not prove by a preponderance of the evidence that Norris committed certain violations alleged in Count Five. R.D. wrote a letter to Bankers stating that Norris lied about his age on the application. Ex. P-29. His daughter testified that she was present when he wrote the letter. T2-56:15-57:17. If Norris had correctly completed the forms, R.D.'s application would have been reviewed by the escalation committee and likely rejected because he was 87, and Banker's policy was not to sell this particular annuity applicants over the

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<sup>15</sup> Sloand testified that her sister, Donna, had recently passed away. T2-54:10-11.

age of 85. T1-49:9-10, 52:2-53:5. R.D. was not aware of Bankers' thresholds and policies regarding minimum assets and ages of applicants and would have had no reason to lie about his age. Accordingly, I hereby supplement the record as set forth in the Initial Decision with these additional facts. On this basis, I further REJECT the ALJ's conclusion and I FIND that sufficient evidence exists that Norris supplied the incorrect age for R.D. on his application.

However, the Department did not prove by a preponderance of the evidence that Norris fraudulently provided incorrect assets on R.D.'s ASQ. Sloand testified that her father did not have the assets listed on the ASQ. T2-61:4-67:5. Beriault testified that R.D. also informed him that the assets on the ASQ were incorrect. T1-50:21-51:2. However, no evidence was produced that R.D. told Norris that he had different assets than what is reflected on the ASQ. R.D. did not mention that his assets on the ASQ were incorrect in his letters to Bankers. Ex. P-29.

Accordingly, I FIND that Norris violated N.J.S.A. 17:22A-40(a)(2), (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act) as alleged in the AOTSC2 as to the annuity application only.

#### Count Six

Count Six alleges that Norris made fraudulent representations on H.H.'s ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16). The ALJ found that the Department did not prove by a preponderance of the evidence that Norris committed the violations alleged in Count Six. Initial Decision at 16-17, 20. 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). For the following reasons, I ADOPT the ALJ's findings and find that the evidence does not prove by a preponderance of the

evidence that Norris submitted an ASQ with inaccurate assets in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16).

N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for violating any insurance law or regulation (2), using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility (8), or committing any fraudulent act (16).

The evidence in the record indicates that H.H. asked Norris about buying an annuity because H.H. had a CD that she was unsatisfied with because it was not making her a lot of money. T3-48:7-18. H.H. purchased an annuity for \$35,000 and a life insurance policy for \$5,000. T3-48:21-23.

Bankers investigators began to investigate Norris because they received complaints. T1-32:14-15. Investigators looked at certain policies that were given to elderly clients. T1-32:12-23. Beriault and another investigator, April Benz, met H.H. on February 6, 2013 at her residence as part of Bankers' investigation. T1-33:16-34:1. At the time, H.H. was 85 years old. T1-35:4-9, Ex. P-27. H.H. had five policies with Bankers and one with Colonial Penn,<sup>16</sup> which Norris sold to her. T1-35:10-22. H.H. reported to Bankers' investigators that there were several inaccuracies in the ASQ, including assets, for an annuity policy that was issued in 2012. T1-36:10-13. The ASQ indicated that H.H. had \$45,000 in a checking or savings account, \$60,000 in a CD, and \$65,000 in a money market account. T1-37:7-21, Ex. P-30. H.H. told investigators that she had approximately \$2,000 in her checking account and denied having a CD or a money market account. T1-36:10-37:25. The investigators did not corroborate her statements. T1-37:22-25.

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<sup>16</sup> Bankers, Colonial Penn, and Washington National are all under the same parent company of CNO. T1-15:13-16, T2-11:7-9.



Norris testified that H.H. had \$179,000 in an IRA, which is considered a liquid asset, that H.H. had been withdrawing from. T3-48:10-14, 49:1-5. Norris also testified that H.H. did not have any issues with her annuity contracts. T3-49:5-6. Norris identified her own signature and her supervisor's initials on the application. T3-63:1-5, Ex. P-30. Norris testified that she believed her clients when they told her their assets and did not confirm the information because it is not her responsibility to do so. T3-89:1-14. She testified that her supervisor must have called H.H. to confirm the information on the application because he initialed it. T3-93:2-8, Ex. P-30. Norris received approximately \$538.50 in commission for this transaction. Ex. P-27.

The Department relied solely upon the testimony of Beriault to prove that H.H. did not have the assets listed on the ASQ. H.H. was not called to testify and there was no testimony or other evidence regarding her availability.

Accordingly, I FIND that there is insufficient in the record that Norris fraudulently supplied inaccurate assets on H.H.'s ASQ. No testimony or other documentary evidence, other than hearsay testimony about what the investigator was told by H.H., was provided to demonstrate H.H. told Norris that she had assets other than what is reflected on the ASQ. Accordingly, I ADOPT the ALJ's finding that the Department did not prove by a preponderance of the evidence the allegations in Count Six that Norris violated N.J.S.A. 17:22A-40(a)(2), (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act) as alleged in the AOTSC2.

#### Count Seven

Count Seven alleges that Norris made fraudulent representations on E.G.'s annuity application and ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16). The ALJ found that

the Department did not prove the violations alleged in Count Seven by a preponderance of the evidence. Initial Decision at 17, 20. 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). For the following reasons, I ADOPT the ALJ's findings and find that there is insufficient evidence to prove by a preponderance of the evidence that Norris fraudulently provided an incorrect date of birth for E.G. on an application for an annuity in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16).

N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for violating any insurance law or regulation (2), using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility (8), or committing any fraudulent act (16).

The evidence in the record indicates that Norris completed an annuity application with E.G. in October of 2012. T3-49:12-19. She had difficulty understanding E.G. because E.G. used a voice modulator to speak and she had an accent from the Virgin Islands. T3-49:24-50:4. On the application, E.G.'s age is listed as 77 and her date of birth is given as February 25, 1935. T1-39:1-6. E.G.'s actual date of birth is February 25, 1925, making her 87 years old at the time of the application. T1-39:7-21, Ex. P-31. Sometime after Norris completed the annuity form for E.G., she met with E.G. and her daughter, Maureen Carter, who had power of attorney for E.G., because Maureen also wanted to invest her assets in annuity. T3-49:11-21. Ms. Carter checked E.G.'s policy and told Norris that E.G.'s age was wrong on the application.<sup>17</sup> T3-49:22-23. Ms. Carter,

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<sup>17</sup> It is unclear exactly when the meeting with Norris, E.G. and Ms. Carter took place. Norris testified that she "did one annuity for [E.G.] in the earlier year. Then in October I met with [E.G.]. Maureen was there[.]" T3-49:18-20. The original annuity application is dated October 12, 2012. Ex. P-31. The "Life and Annuity Client Service & Request Form" in Ex. P-37 is also dated

using the power of attorney, changed ownership of her mother's account to her name. T3-50:6-11. Norris gave the ownership change form to Eric Scott, her supervisor. T3-50:12-13.

Berriault and April Benz met with E.G. and her daughter on February 6, 2013 when E.G. was 87 years old. T1-38:1-6. Investigators confirmed E.G.'s date of birth as February 25, 1925. T1-39:13-21. E.G. informed investigators that the ASQ listed assets that she did not have. T1-40:23-41:1. Norris earned approximately \$2,370 in commission for this transaction. Ex. P-27.

Norris positively identified her own signature on the application for E.G.'s annuity. T3-63:17-22, Ex. P-31. A "Life and Annuity Client Service & Request Form" is included in Ex. P-37 as Exhibit 4, which the Department entered into evidence as Norris's Responses to the Department's Request for Admissions and Answers to Interrogatories. T1-13:8-14:3. The form requests that E.G.'s date of birth be changed to February 25, 1925, rather than 1935, as was on the original application, and that Maureen Carter be added as an owner of the annuity. Ex. P-37. The form requesting the change of information and ownership is dated October 12, 2012, which is the same date as the original application. Ex. P-31, Ex. P-37.

I FIND that the record contains insufficient evidence that Norris fraudulently provided E.G.'s incorrect age on the application and ADOPT the ALJ's finding that the allegations in Count Seven were not proven by a preponderance of the evidence. No testimony or other documentary evidence, other than hearsay testimony about what the investigator was told by E.G., was provided to demonstrate E.G. told Norris her correct date of birth. Further, although Norris does not dispute that she submitted a form to Banker's with E.G.'s incorrect date of birth, she corrected her mistake when she found out E.G.'s birthday was wrong, by submitting a form requesting that E.G.'s date

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October 12, 2012. The form requests that E.G.'s date of birth be changed to February 25, 1925 and that Maureen Carter be added as an owner of the annuity. Ex. P-37.

of birth be amended. Accordingly, I ADOPT the ALJ's finding that the Department did not prove the allegations in Count Seven that Norris violated N.J.S.A. 17:22A-40(a)(2), (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act) as alleged in the AOTSC2.

Further, I ADOPT the ALJ's finding that the Department did not prove by a preponderance of the evidence that Norris provided false information regarding E.G.'s assets on the ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16). No testimony or other documentary evidence, other than hearsay testimony about what the investigator was told by E.G., was provided to demonstrate E.G. told Norris that she had assets other than what is reflected on the ASQ. Aside from a blanket statement that E.G. informed investigators that the assets on the ASQ were incorrect, no other testimony or evidence was provided as to the inaccuracy of the assets listed on the ASQ. T1-40:23-41:1. No testimony was provided as to E.G.'s actual assets and how they differed from what was provided on the ASQ. No testimony was provided that E.G. told Norris she had different assets other than what is reflected on the ASQ. This blanket statement is not enough evidence to find that Norris intentionally misrepresented E.G.'s assets on the ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act) as alleged in the AOTSC2.

#### Count Eight

Count Eight alleges that Norris created a false application for an annuity that R.B. had not completed or approved in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16). The ALJ found that the Department did not prove the violations alleged in Count Eight by a preponderance of the

evidence. Initial Decision at 17, 20. 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). For the following reasons, I ADOPT the ALJ's finding and find that there is insufficient evidence in the record to prove by a preponderance of the evidence that Norris submitted a false application for R.B. in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16).

N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for violating any insurance law or regulation (2), using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility (8), or committing any fraudulent act (16).

The evidence in the record establishes that Beriault, April Benz, and Beriault's supervisor, Rick Riser, met with R.B. and R.B.'s attorney as part of Bankers' investigation. T1-42:3-9. R.B. had four Bankers policies. T1-42:18-21. One was an annuity in the amount of \$310,000, which was issued on March 26, 2010, for which Norris was the selling agent. T1-42:22-43:1, 43:22-23. The application submitted with this policy was under the name "R. Vincent Baccarielle," which is not the correct spelling of R.B.'s last name. T1-43:6-21. Other identifying information, such as the date of birth, social security number, address, and phone number were also inaccurate. T1-44:8-22. However, R.B. confirmed to investigators that it was his signature on the application. T1-44:23-45:1, Ex. P-32.

R.B. provided a copy of the application that he completed for the policy to investigators. T1-45:2-21, Ex. P-33. This application had R.B.'s correct name, social security number, date of birth, address, and phone number. T1-45:20-21, Ex. P-32. It appears that the last page in the

application for R. Vincent Baccarielle was photocopied from the application that R.B. completed with Norris and that is why the application had his signature. T1-46:13-23.

R.B. was unaware that he had a policy issued to a different person with different identifying information. T1-45:22-46:4. If R.B. had attempted to access the policy issued to Baccarielle, he would not have been able to because it did not match his name or other identifying information. T1-46:6-12. Only someone who knew about the policy and the identifying information associated with it could have withdrawn funds from this account without R.B.'s knowledge. T1-47:2-18. However, no funds were withdrawn from this policy. T1-47:19-21.

Norris testified that she did not submit the application with the incorrect information and that she would not benefit from hurting a client. T3-37:2-38:9. She confirmed that it was her signature on the Baccarielle application. T3-63:25-66:12, Ex. P-32. She further testified that she could not identify the handwriting on the other pages of the Baccarielle application, but that it was not hers. T3-67:17-69:5, Ex. P-32. She also alleged that she submitted the application that she completed with R.B., but that someone else at Bankers then made the false Baccarielle application. T3-66:18-67:3. Norris did not have any clients by the name of Baccarielle. T3-67:5-6, 68:11-12. She identified her handwriting and signature on the application that R.B. supplied to Bankers during its investigation and confirmed that the information on this application was accurate. T3-70:1-19, Ex. P-33. Norris received approximately \$9,300 in commissions for this transaction. Ex. P-27.

I FIND that the record contains insufficient evidence that Norris submitted an application with an incorrect name, date of birth, address, and telephone number, but with R.B.'s signature. Accordingly, I ADOPT the ALJ's finding that the allegations in Count Eight were not proven by a preponderance of the evidence. The application for Baccarielle used the signature page of R.B.'s

application that Norris completed with R.B. and the remaining pages contained incorrect information. There was no evidence presented that Norris was the person who submitted the false application, only that she completed the application with R.B. As testified by Bankers' representatives, there are other layers of review before approval during which the application could have been changed, and there was no testimony as to those levels and or investigation of same. Accordingly, I ADOPT the ALJ's finding that the Department did not prove by a preponderance of the evidence the allegations in Count Eight that Norris violated N.J.S.A. 17:22A-40(a)(2), (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act) as alleged in the AOTSC2.

#### Count Nine

Count Nine alleges that Norris forged C.G.'s signature on at least eight separate forms submitted to Bankers in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (10) and that Norris made fraudulent representations on C.G.'s ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (8), (16), and N.J.A.C. 11:17A-2.8. The ALJ found that the Department did not prove the violations alleged in Count Nine by a preponderance of the evidence. Initial Decision at 18, 20. For the following reasons, I ADOPT the ALJ's findings that there is insufficient evidence in the record to prove by a preponderance of the evidence that Norris made fraudulent representations on C.G.'s ASQ and forged her signature on forms in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16), or N.J.A.C. 11:17A-2.8.

N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for violating any insurance law or regulation (2), using fraudulent, coercive, or dishonest practices or demonstrating incompetence,

untrustworthiness, or financial irresponsibility (8), forging another's name to an application for insurance or to any document related to an insurance transaction (10), or committing any fraudulent act (16). Under N.J.A.C. 11:17A-2.8, insurance producers cannot make any misleading representations or incomplete or fraudulent comparison of any insurance policies or annuity contracts.

The evidence in the record establishes that Beriault interviewed C.G. by telephone in February 2013. T1-53:6-15, Ex. P-43. C.G. was the beneficiary of her father's \$360,000 policy. T1-54:1-4. During the interview with investigators, C.G. indicated that Norris told her that she would transfer the annuity into C.G.'s name. T1-54:5-11, Ex. P-43. Bankers received an annuity application for \$360,000 for C.G. T1-54:15-18, Ex. P-34. Beriault sent a copy of the application to C.G. via FedEx. T1-54:23-55:3. C.G. stated to Beriault that it was not her signature on the application and that she did not remember completing it with Norris in person or on the telephone. T1-55:4-10. Further, assets listed on the ASQ were inaccurate. T1-55:11-16. C.G. told investigators that she did not have real estate valued at \$250,000; life insurance in the amount of \$118,000; savings and checking accounts in the amount of \$48,000; a money market account with \$15,000; mutual funds worth \$400,000; CDs worth \$60,000; gold coins at bullion in the amount of \$600,000; or other qualified assets worth \$110,000, as reflected in the ASQ. T1-55:11-22, Ex. P-34. Beriault did not verify C.G.'s statements. T1-55:23-25, T1-63:12-64:11.

Norris testified that she did complete documents with C.G., but she did not complete the application entered into evidence and shown to her during her testimony and she did not have a copy of the application she completed with C.G. T3-86:15-20, Ex. P-34. Norris testified that she did not forge any of C.G.'s signatures and that that it was not her signature or handwriting on the application. T3-40:22-24, 64:13-20, 83:14-18, Ex. P-34. She also testified that C.G.'s address on



the application is wrong. T3-83:14-18. Norris testified that she was unaware of the amount of C.G.'s assets. T3-84:17-85:17. Although Norris knew C.G.'s father had gold coins, she did not know the value. T3-85:10-12. She did not know if C.G. had life insurance or other assets. T3-84:17-85:17.

I FIND that the record contains insufficient evidence that Norris forged C.G.'s signatures on eight different documents and fraudulently submitted an ASQ with incorrect assets. No evidence was provided that C.G. told Norris she had assets other than what was reflected on the ASQ. Further, no evidence was presented that Norris forged C.G.'s signatures on eight different documents. Accordingly, I ADOPT the ALJ's finding that the Department did not prove by a preponderance of the evidence the allegations in Count Seven that Norris violated N.J.S.A. 17:22A-4017:22A-40(a)(2), (violating any insurance law or regulation), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), (10) (forging another's name to an application for insurance or to any document related to an insurance transaction), and (16) (committing any fraudulent act) as alleged in the AOTSC2. No evidence was presented that Norris made misleading or incomplete comparisons of annuities to C.G. I also note that the Department did not take exception to this finding in their Exceptions Brief. Accordingly, I also ADOPT the ALJ's determination and FIND that the Department did not prove by a preponderance of the evidence that Norris violated N.J.A.C. 11:17A-2.8 (making misleading representations or incomplete comparisons of annuities) as alleged in the AOTSC2.

#### Count Ten

Count Ten alleges that Norris made fraudulent representations on R.P.'s ASQ in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16); forged R.P.'s signature on application forms submitted

to Bankers in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (10); failed to remit R.P.'s \$60,000 premium and annuity application to Bankers for a period of one year in violation of N.J.S.A. 17:22A-40(a)(2), (8), and N.J.A.C. 11:17C-2.2(a); and used R.P.'s \$60,000 in premium funds to pay her own mortgage lender, Rylocat, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16). The ALJ found that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8) for demonstrating incompetence or financial irresponsibility. Initial Decision at 16, 20. The ALJ found that the Department did not prove by a preponderance of the evidence that Norris violated N.J.S.A. 17:22A-40(a)(4) or (10) or N.J.A.C. 11:17C-2.2(a). *Id.* at 20. For the following reasons, I MODIFY the ALJ's findings and find that Norris also violated N.J.S.A. 17:22A-40(a)(4) and (10) and N.J.A.C. 11:17C-2.2(a).

N.J.S.A. 17:22A-40(a) states that the Commissioner can take action against an insurance producer's license and levy a civil monetary penalty for violating any insurance law or regulation (2), improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business (4), using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility (8), forging another's name to an application for insurance or to any document related to an insurance transaction (10), or committing any fraudulent act (16). Further, pursuant to N.J.A.C. 11:17C-2.2(a), all premium funds shall be remitted to the insurer within five business days after receipt of the funds except as otherwise required.

The evidence in the record indicates that Norris was R.P.'s agent when she sold him a policy for health insurance. T1-75:13-15. She later sold him an annuity in 2006, which he funded with \$309,262.05 in assets from his 401(k) account. T1-75:16-77:24, Ex. P-3. The 2006 annuity was a bonus annuity with a premium of \$310,930. T1-21:5-15, 22:3-9, 23:7-15, Ex. P-7. He

withdrew money from this annuity during 2006-2009. T1-96:7-19 Norris reached out to R.P. in 2009 and advised him to purchase an indexed annuity, which he thought would be a promising investment. T1-78:3-8, 96:7-19. On May 28, 2009, R.P. completed the application wrote a check for \$60,000 to Rylocat, instead of Bankers, at Norris's direction. T1-19:1-4, 82:19-83:3, Ex. P-6, Ex. P-48. While R.P. believed it was strange, he trusted Norris. T1-100:15-23. R.P. did not redact his name and address at the top left corner of the check.<sup>18</sup> T1-83:4-12.

On May 5, 2010, Bankers received an application for a \$60,000 annuity for R.P. T1-25:10-16, Ex. P-4. The application was signed by Norris and contained signatures purported to be those of R.P. Ex. P-4. In 2010, Bankers also received a cashier's check from Sovereign Bank in the amount of \$60,000 payable to Bankers. T1-28:23-29:12, Ex. P-5. The check did not indicate the payor. T1-28:23-29:12, Ex. P-5. Bankers issued R.P. a single premium annuity in May of 2010. T1-19:13-21:1, Ex. P-2.

When R.P. received the annuity a year later, he discovered that the date on the annuity was May 5, 2010 and he was concerned that his policy didn't generate interest for a year. T1-25:3-9, 80:8-23. He was not satisfied with Norris's explanations, so he wrote a letter to Bankers in 2014. T1-80:8-23, P-6.

R.P. testified the signatures on the application and associated documents for the 2010 annuity were not his. T1-89:14-90:22, 93:25-94:10, Ex. P-8. Further, he testified that the assets listed on the ASQ were inaccurate and R.P. did not provide Norris with those figures. T1:91:4-93:19, Ex. P-4, P-8.

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<sup>18</sup>The copy of the check in Ex. P-6 also has R.P.'s bank account redacted. DAG Schaffer indicated that was likely done by his office. T1-83:17-20, 84:2-5. Another copy of the check without R.P.'s bank account redacted was identified as P-48. T1-84:17-20.

Bankers did not receive a premium check from R.P. in 2009. T1-30:4-9. R.P. provided Beriault with a copy of the check he wrote to Rylocat in 2009. T1-23:23-30:15, Ex. P-5, Ex. P-6. Under the terms of a mortgage made out to John and Asma Norris, \$120,000 was due to Rylocat by April 1, 2009. T2-47:14-50:25, Ex. P-12, Ex. P-45.

R.P. denied that he and Norris had a social relationship. T1-99:2-22. Further, R.P. denied that Norris asked him for a loan. T1-101:17-19. R.P. testified that he was employed for 40 years as an accountant before he retired. T1-77:16-17, 99:23-100:6.

Norris testified that R.P. was a client with whom she became friends. T3-24:23-25:7. She testified that he was a widower and lonely. T3-25:2-3. Norris testified that R.P. was aware of issues related to her divorce and loaned her money, so she could purchase land. T3-25:8-26:14. She said that R.P. was aware that she crossed off his name and address on the check because they did not want her husband to know that he had loaned her money. T3-26:7-20. Norris also testified that R.P. did not write a check to her personally because she shared a bank account with her husband at that time. T3-56:13-57:2. Norris testified that they did not memorialize the loan. T3-55:10-15. She testified that R.P. asked her to pay him back in a year, which she did by certified check from her bank. T3-26:7-14, 26:23-27:1. She stated that at that time R.P. requested that the money be used to purchase an annuity, which was mailed to R.P. T3-27:1-23. Norris testified that she did not deliver it personally because she had reconciled with her husband. T3-27:18-23. Norris testified that she witnessed R.P. sign the application in 2010, which she also signed. T3-29:1-5. She also testified that her signature on the application and other documents entered into evidence was forged, and she could not identify who signed her name. T3-29:1-12, 59:16-20, Ex. P-2.

Norris did not feel that it was not ethically wrong to borrow money from a client because he was aware of her situation and she did not force or induce him to loan her money. T3-55:16-56:4. Norris received a commission of \$2,550 for the sale of the policy. T1-26:10-11, Ex. P-4.

The Respondent argues that there is no evidence that Norris forged any document. Respondent Reply Brief at 4. R.P. filled out an annuity application and supporting documents in 2009. T1-19:1-4, 82:19-83:3, Ex. P-2, Ex. P-6, Ex. P-48. However, Norris had him write a check to Rylocat, rather than Bankers. T1-19:1-4, 82:19-83:3, Ex. P-6. In 2010, Norris submitted annuity documents to Bankers along with a cashier's check that did not have her name on it. T1-25:10-16, 28:23-29:12, Ex. P-4, Ex. P-5. R.P. testified that the signature on the documents that were submitted to Bankers in 2010 was not his. T1-89:14-90:22, 93:25-94:10.

For the reasons set forth above, I FIND that sufficient evidence exists in the record that Norris misappropriated funds in order to pay a personal loan. A year later, to hide her actions, Norris submitted annuity application documents and obtained a \$60,000 bank check that did not indicate that she was the payor. Her testimony that R.P. willingly loaned her money is not credible in light of R.P.'s testimony and his possession of annuity documents from 2009, which is not addressed in the Initial Decision. Further, she testified that she completed an annuity application for R.P. in 2010, which R.P. testified was not signed by him and contained incorrect assets on the ASQ. Accordingly, I ADOPT the ALJ's findings that Norris violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility) for demonstrating incompetence or financial irresponsibility. Further, based on these facts as supplemented herein, I REJECT the remainder of the ALJ's conclusions and FIND that the Department proved by a preponderance of the evidence that Norris violated N.J.S.A. 17:22A-

40(a)(4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), (10) (forging another's name to an application for insurance or to any document related to an insurance transaction), (16) (committing any fraudulent act), and N.J.A.C. 11:17C-2.2(a) (all premium funds shall be remitted to the insurer within five business days after receipt of the funds except as otherwise required) as alleged in the AOTSC2.

### PENALTIES AGAINST THE RESPONDENT

#### Revocation of Norris's Insurance Producer License

With respect to the appropriate action to take against Norris's insurance producer license, I FIND that the record is more than sufficient to support license revocation and, in fact, compels the revocation of her license. Accordingly, for the reasons set forth below, I MODIFY the Initial Decision to provide that Norris's insurance producer license be revoked, rather than suspended for one year as recommended by the ALJ.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). An insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Ibid. 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). Additionally, a licensed producer is better placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F. Supp. 824 (1980). A producer is held to a high

standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible conduct on the insurance industry and on the public.

As the public, in general, is adversely affected in a significant way by insurance fraud, New Jersey views insurance fraud as a serious problem to be confronted aggressively and has a particularly strong public policy against the proliferation of insurance fraud. Palisades Safety and Ins. Ass'n v. Bastien, 175 N.J. 144, 150 (2003). Courts have long recognized that the insurance industry is strongly affected with a 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). Because of the strong public interest in regulating insurance producers, revocation has consistently been imposed against the licenses of New Jersey insurance producers that engage in fraudulent acts. Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13).

Revocation is “appropriate in almost all cases wherein a licensed insurance producer has engaged in misappropriation of premium monies, bad faith, and dishonesty.” Commissioner v. Brown and Gauranteed Bail Bonds, OAL Dkt. No. BKI 10377-13, Initial Decision (09/15/15), Final Decision and Order (12/14/15); See also Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (09/15/08), Final Decision and Order (09/15/08); Shipitofsky v. Commissioner, 95 N.J.A.R.2d(INS) 67, OAL Dkt. No. INS 3722-93, Initial Decision (03/11/94), Final Agency Decision (04/29/94). The typical mitigating factors of restitution, inexperience, lack of prior negative history, motivations and pressures of the misconduct, and the possibility of reform cannot form a basis to support a sanction other than revocation in cases involving the misappropriation of client funds. Commissioner v. Ladas, OAL

Dkt. BKI 0947-02, Initial Decision (02/05/04), Final Decision and Order (06/22/04). Norris's conduct regarding R.P. Count Ten of the AOTSC2 alone would support the revocation of her license. Norris misappropriated funds from a client to pay a personal loan. A year later, she submitted forged annuity documents to Bankers hoping to avoid detection.

Further, as set forth above, Norris gave clients misleading and confusing information, which resulted in them purchasing products they did not want. Licensed producers act in a fiduciary capacity. N.J.A.C. 11:17A-4.10. As a fiduciary, Norris had an obligation to have knowledge of the products she was selling and to correctly explain them to clients so that they could make educated and informed decisions.

Norris also submitted an application on behalf of R.D. with an incorrect date of birth, causing him to qualify for an annuity he otherwise would not have qualified for. By doing so, Norris received a commission for selling policies and she would generally be paid higher commissions for selling annuities than life or short-term care policies. T1-41:16-42:2. Norris would not have been entitled to commissions if applicants were rejected because they were not suitable for certain types of investments. T1-68:22-24. Accordingly, based upon my review of the record, the Initial Decision, and the Department's Exceptions thereto, and Respondent's reply, I MODIFY the ALJ's recommendation that Norris's producer license should be suspended for one year and FIND that revocation is the necessary and appropriate penalty in this matter.

#### Monetary Penalty Against the Respondent

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct remedial purpose." Commissioner v. Strandkov, OAL Dkt. No. BKI 03451-07, Initial Decision



(09/25/08), Final Decision and Order (02/04/09). The Producer Act provides that the Commissioner may impose a penalty not exceeding \$5,000 for the first offense and not exceeding \$10,000 for each subsequent offense. N.J.S.A. 17:22A-45.

As discussed above, under Kimmelman, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act. No one Kimmelman factor is dispositive for or against fines and penalties. See 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”). The ALJ imposed \$15,000 in monetary penalties, but did not address the Kimmelman factors or allocate the fines by violation. Initial Decision at 21.

The first Kimmelman factor addresses the good faith or bad faith of the violator. Norris sold her clients products that did not meet their needs in spite of her duty as a fiduciary. She provided inaccurate information regarding R.D.’s age to avoid the application and supporting documents being reviewed and rejected by Bankers’ escalation committee. Further, she misappropriated funds from R.P to pay a personal loan. A year later, she submitted an application to Bankers for an annuity to avoid detection. These actions demonstrate bad faith on the part of the Respondent. This factor weighs in favor of a significant monetary penalty.

As to the second Kimmelman factor, no proofs have been provided regarding Norris’s ability to pay the fines imposed. Norris did not provide evidence that she is unable to pay a penalty. Accordingly, this factor is neutral with regard to analysis of the penalty to be imposed.

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.

Norris's only compensation from Bankers was in the form of commissions and she earned higher commissions from selling annuities. T1-41:16-42:2, T3-18:11-15, 91:2-7. Norris would not have been entitled to commissions if applicants were rejected because they were not suitable for certain types of investments. T1-68:22-24. Norris received approximately \$1,366 in commission for the transaction at the issue of Count 5 and \$2,550.00 in Count Ten for a total of \$3,916.50 in commissions from these transactions.<sup>19</sup> She also misappropriated \$60,000 from R.P., which is at issue in Count Ten.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. N.J.A.C. 11:17A-4.10, In re Parkwood Co., 98 N.J. Super. at 268. The importance of the fiduciary relationship between the professional and the client is no more evident than in the area of insurance coverage because of the complexity of the insurance industry and "the specialized knowledge required to understand all of its intricacies." Aden v. Fortsh, 169 N.J. 64, 78 (2001), quoting Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 260 (App. Div. 1987). 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. The public is significantly harmed when licensed insurance professionals who hold fiduciary positions engage in illegal and dishonest activity. This undermines the public's confidence in insurance producers. The public was undoubtedly harmed by the breach of fiduciary duty to those who were affected by Norris's actions. Norris took significant advantage of her

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<sup>19</sup> The Department did not present evidence regarding any commissions earned related to her sales of annuities to clients as set forth in Counts Three or Four of the AOTSC2.

client's trust in her. Both B.B. and R.P. testified that they trusted Norris, but that she violated that trust. T1-38:8-18, 100:15-23. Accordingly, I find that this factor weighs heavily in favor of a significant monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. The longer the illegal conduct, more significant civil penalties should be assessed. Ibid. Norris engaged in fraudulent and deceptive activity for approximately four years, from 2008 through 2012, which is a significant length of time. Accordingly, this factor then weighs in favor of the imposition of a significant monetary penalty.

The sixth factor is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. 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, Ibid. There is no evidence that Norris was held accountable in a criminal court or paid criminal sanctions. Accordingly, this factor weighs in favor of the imposition of a monetary penalty.

The last Kimmelman factor addresses whether the producer had previously violated the Producer Act, and if past penalties have been insufficient to deter future violations. The OTSC issued by the Department in 2013 was the first action the Department took against Norris. Accordingly, this factor does not weigh in favor of a larger monetary penalty.

Weighing all of the Kimmelman factors, and based upon the violations as set forth above, I ADOPT the recommendations of the ALJ that Norris shall pay civil monetary penalties.

However, I MODIFY the ALJ's recommendation that Norris be fined \$15,000 in civil monetary penalties. Pursuant to N.J.S.A. 17:22A-45(c), up to \$5,000 for the first violation and up to \$10,000 for any subsequent violations of the Producer Act may be imposed. The nature of the Norris's violations warrant imposition of substantially higher civil monetary penalties than recommended by the ALJ. Thus I MODIFY the recommendations of the ALJ and impose a total monetary penalty of \$55,000 to be allocated as follows:

Count Three: \$5,000 for misrepresenting the nature, terms, and conditions of the Bankers' Fixed Annuity to F.B. in violation of N.J.S.A. 17:22A-40(a)(2), (8), (16), and N.J.A.C. 11:17A-2.8;

Count Four: \$10,000 for misrepresenting the nature, terms, and conditions of the Bankers' Fixed Annuity to B.B. in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Five: \$10,000 for misrepresenting R.D.'s age on the annuity application in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Ten: \$10,000 for fraudulent representations on R.P.'s ASQ, in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16); \$10,000 for failing to remit R.P.'s \$60,000 premium and annuity application to Bankers for a year in violation of N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.A.C. 11:17C-2.2(a); and \$10,000 for misappropriating R.P.'s \$60,000 in premium funds to pay her own mortgage lender in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16).

These penalties are necessary and appropriate under the above Kimmelman analysis given Norris's pattern of unethical, untrustworthy, and fraudulent conduct over a four-year period. Further, Norris took advantage of her clients' trust and sold them products that were not suited to their needs and misappropriated premium funds. She also provided inaccurate information to ensure that applications would not be reviewed and rejected by Bankers. As a result, her clients

were left with products that did not suit their needs and risked their savings and financial well-being. One of her clients, R.D., was also left with an adverse consequence on his taxes. In 2010, R.D. transferred two annuities totaling a little over \$32,000 into one with Bankers Life. T2-54:18-12. R.D. then received a notice from the IRS that he owed taxes from rolling over one of the annuities. T2-55:18-22, Ex. P-29. R.D. contacted Norris because he believed that there should not be a tax penalty because the annuity was rolled over into another annuity. T2-55:21-23, Ex. P-29. Norris charged him \$500 and filed a document with the IRS, promising him that she would take care of the issue. T2-55:23-25, Ex. P-29. However, the IRS contacted R.D. because the document Norris filed was incorrect. T2-56:10-1, Ex. P-29. This conduct warrants the imposition of significant fines. Moreover, these penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by Norris and the industry as a whole.

In instances of the misappropriation of monies, significant monetary penalties – including maximum per violation amounts - have been imposed upon insurance producers engaging in such conduct. See Commissioner v. National Western Life Insurance Company and Berlin, OAL Dkt. No. BKI 6983-08, Initial Decision (04/29/15), Final Decision and Order (09/15/15) (\$1,480,000 fine by Respondents, jointly and severally, for changing birth dates of annuitants in order to achieve higher commissions, and misrepresenting or failing to disclose annuity terms and conditions in order to convince mostly elderly annuitants to purchase policies); Commissioner v. Capital Bonding Corp., OAL Dkt. No. BKI 6790-01, Initial Decision, (07/02/04), Final Decision and Order (11/17/04), aff'd No. A-1903-04T3 (App. Div. August 1, 2006) (imposed a \$240,000 fine for failure to satisfy 747 bail forfeiture judgments totaling over \$9.9 million); Commissioner v. Hagaman, et al., OAL Dkt. No. BKI 08087-14, Order for Partial Summary Decision (08/11/15),

Initial Decision (11/02/15), Final Decision and Order (03/17/16) (imposed the maximum civil monetary penalty of \$10,000 for each of five instances where the respondents misappropriated client funds); Commissioner v. Brown, et al., OAL Dkt. No. BKI 10377-13, Initial Decision (09/15/15), Final Decision and Order (12/14/15) (imposed the maximum civil monetary penalty of \$10,000 for each of two instances where the respondents misappropriated client funds).

Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation. The ALJ recommended that the Respondent pay costs of investigation in the amount of \$4,000. However, the costs of the Department's investigation were \$4,150, as set forth in the Certification of Investigator Eugene Shannon. Thus, I MODIFY the amount and ORDER the Respondent to reimburse the Department for the costs of investigation in the amount of \$4,150.00. Certification of Eugene Shannon, ¶¶ 3-6, Ex. A.

#### CONCLUSION

Having carefully reviewed the Initial Decision, the Department's Exceptions and Respondent's 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, as to Counts One and Two, I ADOPT the ALJ's conclusions and hold that the Department did not prove that Norris violated the Producer Act as alleged in Counts One and Two of the AOTSC2. As to Count Three, I ADOPT the ALJ's conclusion and hold that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.A.C. 11:17A-2.8 and I MODIFY the Initial Decision to specifically find that Norris violated N.J.S.A. 17:22A-40(a)(5). As to Count Four, I ADOPT the ALJ's conclusion and hold that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8) and I MODIFY the Initial Decision to specifically find that Norris violated N.J.S.A. 17:22A-40(a)(16). As to Counts Five, Six, Seven, Eight, and Nine, I ADOPT the ALJ's conclusions and hold that the Department did not prove that

Norris violated the Producer Act as alleged in the AOTSC2. As to Count Ten, I ADOPT the ALJ's conclusion and hold that Norris violated N.J.S.A. 17:22A-40(a)(2) and (8) and MODIFY Initial Decision to specifically find that Norris violated N.J.S.A. 17:22A-40(a)(4), (10), (16), and N.J.A.C. 11:17C-2.2(a).

I MODIFY the recommended civil monetary penalty and ORDER the Respondent to pay a total of \$55,000 in civil monetary penalties, \$5,000 for misleading F.B. in Count Three; \$10,000 for misleading B.B. in Count Four; \$10,000 for submitting an application with an incorrect date of birth for R.D. as alleged in Count Five; and as to Count Ten, \$10,000 for fraudulent representations on R.P.'s ASQ, \$10,000 for failing to remit R.P.'s \$60,000 premium and annuity application to Bankers for a year, and \$10,000 for using of R.P.'s \$60,000 in premium funds to pay her own mortgage lender. I further MODIFY the recommended costs of investigation and ORDER the Respondent to pay \$4,150 in costs.

Finally, I MODIFY the ALJ's conclusion that Norris's license be suspended for one-year and hereby ORDER the revocation of Norris's license effective as of the date of this Final Order and Decision.

It is so ORDERED on this 5<sup>th</sup> day of December 2018

  
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Marlene Caride  
Commissioner

JD Norris FO/Final Orders