ORDER NO.: E19-87

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-4441-13
AGENCY DOCKET NO.: OTSC #E13-13

MARLENE CARIDE,[1] COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	FINAL DECISION AND ORDER
v.	)	
SENIOR SEMINAR SERVICES, INC. and ANNMARIE O'NEILL	)	
Respondents.	)	

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"), the Indexed Standard Nonforfeiture Law for Individual Deferred Annuities, N.J.S.A. 17B:25-21 to -42 ("Annuities Act"), the provisions governing unfair trade practices in the business of life insurance and annuities, N.J.S.A. 17B:30-1 to -59 ("Trade Practices Act"), the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 to -34 ("Fraud Act"), and all powers expressed or implied therein, for the purposes of reviewing the April 29, 2019, Initial Decision ("Initial Decision") of Administrative Law Judge Susan M. Scarola ("ALJ"). In the Initial Decision, the ALJ found in

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

favor of the Department of Banking and Insurance ("Department") against Respondents Senior Seminar Services, Inc. ("SSS") and Annmarie O'Neill ("O'Neill") (collectively, "Respondents") on Counts One through Three of the Department's Order to Show Cause No. E13-13 ("OTSC") and against O'Neill in Counts Four through Twelve of the OTSC. The ALJ recommended revocation of the Respondents' insurance producer licenses and the imposition of civil monetary penalties in the amount of $55,000[2]. In addition, the ALJ recommended the Respondents be jointly and severally liable for reimbursement to the Department for the costs of investigation and prosecution in the amount of $12,163.64 and restitution in the amount of $32,927.22.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about February 19, 2013, the Department issued the OTSC against the Respondents seeking to revoke their producer licenses and impose civil monetary penalties and costs of the investigation for alleged violations of the Producer Act, the Annuities Act, the Trade Practices Act, and the Fraud Act. The OTSC contained twelve counts alleging that the Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count One – While SSS was unlicensed in the State of New Jersey, the Respondents conducted seminars and meetings in this State where Respondents discussed, sold, solicited, or negotiated insurance products and services in this State, in violation of N.J.S.A. 17:22A-29, N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.7(b)[3] and N.J.A.C. 11:17A-1.6(c);
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> Count Two – O'Neill, as owner and Designated Responsible Licensed Producer ("DRLP") of SSS, is responsible for the violations committed by her employee, Theresa Ferguson ("Ferguson") and that O'Neill failed to properly supervise the

[2] The ALJ recommended a fine of $5,000 against SSS and O'Neill as to Count One of the OTSC. Initial Decision at 27. However, the ALJ did not indicate whether the remaining fines were imposed against both Respondents jointly and severally.

[3] This rule was recodified as N.J.A.C. 11:17-2.8(b) effective July 20, 2015. See 46 N.J.R. 1671(a) (July 21, 2014) and 47 N.J.R. 1872(a) (July 20, 2015).

conduct of insurance business and either directed or knew Ferguson conducted the business of insurance in this State directly with the public on behalf of her and SSS, in violation of N.J.S.A. 17:22A-40(a)(2), (8), (12), and (17), N.J.A.C. 11:17-2.9(b)(4)[4], and N.J.A.C. 11:17A-1.3(d) and (e);

Count Three – Respondents advertised that SSS had a branch office in this State, but never reported or licensed the New Jersey branch office of SSS with the Department, in violation of N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.8(a)[5] and N.J.A.C. 11:17A-1.6(b);

Count Four – O'Neill's use of the designation of Certified Senior Advisor ("CSA") in seminars, in conversations with the Department's investigator, and in advertising literature, after such designation had been revoked, was untrue, deceptive, misleading and false, in violation of N.J.S.A. 17B:25-36(a)(1), N.J.S.A. 17B:30-2, and N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Five – O'Neill induced and persuaded J.M.[6] to liquidate two annuity policies issued by Lincoln Financial Group by misrepresenting the terms and features of the annuity policies and by making misleading, incomplete and/or fraudulent statements regarding the performance of the annuity policies, in violation of N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-2.8, and N.J.A.C. 11:17A-4.10;

Count Six – O'Neill made false, incomplete, or misleading statements on the North American Company annuity applications and disclosure forms, in violation of N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16);

Count Seven – O'Neill failed to make reasonable efforts to obtain relevant information regarding J.M.'s financial status, investment objectives and whether the North American deferred annuity policies were suitable for J.M., in violation of N.J.S.A. 17B:25-

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[4] This rule was recodified as N.J.A.C. 11:17-2.10(b)(4) effective July 20, 2015. See 46 N.J.R. 1671(a) (July 21, 2014) and 47 N.J.R. 1872(a) (July 20, 2015).

[5] This rule was recodified as N.J.A.C. 11:17-2.9(a) effective July 20, 2015. See 46 N.J.R. 1671(a) (July 21, 2014) and 47 N.J.R. 1872(a) (July 20, 2015).

[6] The OTSC refers to this individual as "John M." while the Initial Decision refers to this individual as "J.M." In order to maintain consistency with the Initial Decision, this Final Decision will also refer to this individual as J.M.

38(b)(3), N.J.S.A. 17:22A-40(a)(2), (8), and (16), and N.J.A.C. 11:17A-4.10;

Count Eight – O'Neill made misleading representations or incomplete or fraudulent comparisons of the annuity contracts for the purpose of inducing J.M. to surrender the Lincoln annuity contracts and to purchase the North American annuity contracts, in violation of N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (8), and (16), N.J.A.C. 11:17A-2.8, and N.J.A.C. 11:17A-4.10;

Counts Nine and Ten – Respondents' direction and control over J.M.'s financial affairs, including, but not limited to, writing checks from his checking account, constitutes coercive and/or dishonest business practices and demonstrates unworthiness in the conduct of the insurance business, in violation of N.J.A.C. 11:17A-4.10 and N.J.S.A. 17:22A-40(a)(2), (8), and (16). Respondents paid themselves fees totaling $5,000 using J.M.'s funds, that bore no reasonable relation to services provided without a written agreement with the insured, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), N.J.A.C. 11:17B-3.1(a), (b), (c), and (d), and N.J.A.C. 11:17A-4.10;

Count Eleven – O'Neill's attempt to divert J.M.'s funds to pay her attorney, for her own benefit, constitutes a misappropriation of those funds, was fraudulent, dishonest, and demonstrates untrustworthiness in the conduct of insurance business, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16); and

Count Twelve – Respondents' continued harassment, in a manner causing J.M. annoyance and alarm, in an attempt to gain access to J.M.'s financial information and control over his financial assets, including his two annuity policies, constitutes coercive and/or dishonest business practices and demonstrates unworthiness in the conduct of insurance business, in violation of N.J.S.A. 17:22A-40(a)(2) and (8).

On or about March 12, 2013, the Respondents filed an Answer, wherein they admitted and denied certain allegations set forth in the OTSC and requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") on April 2, 2013, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23.

The hearing was conducted on February 29, 2016, and on May 5, August 5, August 16, and December 13, 2017. Initial Decision at 2. Following the hearing, the record remained open for written closing summations until June 15, 2018. Ibid. On or about January 10, 2018, the Department, through counsel, Assistant Attorney General Joseph E. Snow ("AAG Snow"), submitted a written summation ("Department's Closing Summation"), and a certification of Investigator Albert N. Verdel ("Verdel") as to the costs of investigation. The Respondents submitted a closing summation on or about May 18, 2018. The Department submitted a reply on or about June 15, 2018.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

The ALJ noted that testimony as to the allegations in the OTSC was provided by Judy Suarez ("Suarez"), an investigator with the Department, and Respondent O'Neill. Initial Decision at 2. The ALJ stated that in many instances there was no dispute as to what had occurred but rather the interpretation each gave to the event in question. Ibid. The ALJ found the testimony of Suarez to be credible and to be supported by the documentary evidence. Id. at 3 and 9. The ALJ found that O'Neill's testimony was "evasive and confusing" because she sought to find excuses for her actions and to justify her conduct and her statements were "self-serving." Id. at 3, 16. Accordingly, the ALJ "discount[ed] the testimony and excuses proffered by O'Neill as justification for her actions." Id. at 3.

Count One

As to Count One of the OTSC, the ALJ found that O'Neill was the sole owner and DRLP of SSS and was responsible for ensuring that SSS complied with New Jersey's requirements for licensure. Id. at 3 and 4. On August 5, 2009, SSS offered a seminar presented by O'Neill. Id. at 3. At the time, SSS was not licensed in New Jersey. Ibid. On that date, Suarez advised O'Neill

that SSS had to be licensed in New Jersey to conduct seminars, which it had been doing since 2002. Ibid. On August 7, 2009, O'Neill obtained the license for SSS, after she produced letters of recommendation indicating that she had been selling policies and insurance before the State license was issued. Id. at 3-4. O'Neill testified that that she did not know why SSS had to register in New Jersey, as she had been doing business for 30 years "without a problem" and that when she was told to register SSS, she did so. Id. at 4. The ALJ found that O'Neill was responsible for ensuring that SSS complied with New Jersey's requirements for licensure and failed to do so, in violation of N.J.S.A. 17:22A-29, N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.8(b), and N.J.A.C. 11:17A-1.6(c). Id. at 24.

Count Two

As to Count Two of the OTSC, the ALJ found that Ferguson, an SSS employee, did not have a producer license and admitted that she sold insurance products on behalf of SSS. Id. at 5. The ALJ also found that Respondent O'Neill was aware that Ferguson was not licensed, yet O'Neill did not supervise Ferguson or make certain that Ferguson was not selling insurance products. Ibid. The ALJ concluded that by employing and allowing an unlicensed person to act as an insurance producer, the Respondents violated N.J.S.A. 17:22A-40(a)(2), (8), (12), and (17), N.J.A.C. 11:17-2.10(b)(4), and N.J.A.C. 11:17A-1.3(d). Id. at 24.

Count Three

As to Count Three of the OTSC, the ALJ found that Suarez became aware of SSS's office in Cape May when she attended the seminar on August 5, 2009. Id. at 5. The sign-in sheet and brochures that were given to prospective clients indicated that SSS had two offices. Ibid. The brochure had the addresses of SSS listed as 105 Beach Avenue, Cape May, or 12 Beverly Road, Cape May. Ibid. A lease dated November 15, 2015 for 12 Beverly Road and a cancelled rental

check indicated that SSS paid rent on that property. Ibid. The check's memo line indicated that it was payment for "NJ Office Rental." Ibid. O'Neill told Suarez that she had just opened the office in Cape May and that her attorneys did not consider it to be a branch office. Ibid. O'Neill testified that she did not have an office in New Jersey and had been registered as a non-resident producer since 2010. Id. at 6. She further testified was paid under one Federal Identification Number and did not understand why she had to register an office in New Jersey, because she had been doing business for 30 years without an issue. Ibid. The ALJ found that materials presented to prospective clients of SSS indicated that SSS had an office in New Jersey, and that O'Neill leased office space in Cape May and wrote "NJ office rental" on the memo line of a check. Ibid. The ALJ found that O'Neill did not register this office with the Department. Ibid. The ALJ determined that the Respondents violated N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.9(a) and N.J.A.C. 11:17A-1.6(b), which require licensees to register branch offices with the Department. Id. at 24.

Count Four

As to Count Four, the ALJ found that when Suarez attended the August 5, 2009 seminar, there was a brochure that identified Ferguson as a CSA. Id. at 6. The sign-in sheet indicated that SSS offered free consultations and that all questions would be "answered by CSA's." Ibid. In order to become a CSA, a person must take a three-day intensive curriculum to become certified by the Society of Certified Senior Advisors ("SCSA"). Ibid. The brochure had pictures of O'Neill and Ferguson, and indicated that information could be received by calling a toll-free number. Ibid. Suarez contacted the SCSA and discovered that Ferguson was not a CSA. Id. at 7. Suarez also discovered that O'Neill had been certified as a CSA on July 17, 2001, but that her certification was revoked in 2008 by the SCSA because she had been selling annuities with long-term surrender charges, which is in violation of SCSA's Rules 201 and 203. Ibid. O'Neill testified that the CSA

designation on the sign-in sheet was a mistake and that she had accidentally used outdated materials. Ibid. The other contact sheets and informational materials did not include that designation and only said "free consultation." Ibid. The ALJ found that at a seminar put on by SSS in 2009, Suarez was presented with brochures that incorrectly identified Ferguson and O'Neill as CSAs and that misleading promotional materials were given to prospective clients. Ibid. The ALJ concluded that O'Neill violated N.J.S.A. 17B:25-36(a)(1), N.J.S.A. 17B:30-2, and N.J.S.A. 17:22A-40(a)(2), (8), and (16) which prohibit licensees' use of a certification or designation which is untrue. Id. at 24-25.

Background Related to Counts Five through Twelve

Counts Five through Twelve of the OTSC relate to O'Neill's dealings with J.M. The ALJ found that on January 5, 2011, J.M. attended a seminar held by the Respondents at the adult community center where J.M. owned a trailer. Id. at 9. After the seminar, J.M. signed up to receive further information from the Respondents. Ibid.

On January 24, 2011, J.M. met with O'Neill in his home to discuss his financial and legal affairs. He completed questionnaires and provided information regarding his assets, bank accounts, insurance, annuities,[7] income, and expenses. Ibid. At the time, J.M. had two variable annuities with Lincoln Financial Group ("Lincoln"), which he had purchased from his nephew, a Lincoln agent, after J.M. had sold his home in August 2007. Ibid. Other than his home, savings, and checking accounts, J.M. had limited assets. Ibid. His income consisted of a pension, Social Security, and income from the Lincoln annuities. Ibid. The annuities were linked to the stock market, which declined from 2007-2008, so J.M. felt he was losing principal. Ibid.

[7] 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.

Count Five

As to Count Five, the ALJ found that O'Neill convinced J.M. that it would be advantageous for him to have fixed annuities since he was "losing money" in the variable annuities, because his variable annuities were losing principal. Id. at 10. In a telephone call with Lincoln in J.M.'s presence, Lincoln informed O'Neill that J.M. received $1,236.47 per month from his annuity, some of which was from principal. Ibid. On this call, O'Neill repeated phrases, such as "the value has gone down"; "he's paying that much in taxes?"; and "he is losing his principal." Ibid. O'Neill convinced J.M. to cancel his Lincoln policy and purchase a new fixed annuity with North American Company ("NAC"). Ibid. The ALJ found that J.M. consented to the transfers, after he heard statements from O'Neill implying that the variable annuities were not the best investment during the phone conversation with Lincoln. Ibid.

The ALJ further found that O'Neill made more calls to Lincoln in J.M.'s presence to transfer the funds in the annuities to a money-market fund to avoid losing money until these funds could be transferred into fixed annuities with NAC. Ibid. O'Neill continued to make statements about J.M. losing principal, about which she knew he was concerned. Ibid. O'Neill also told the representative from Lincoln that J.M. wanted to terminate the annuity that included the rider with a guarantee of a lifetime income. Ibid. The representative from Lincoln indicated that this termination had to be in writing because it provided a guarantee of income, even if the annuity lost its value. Id. at 11. O'Neill testified that J.M. told her he did not need income for life, and he did not want to pay taxes on it. Id. at 14.

As to Count Five, the ALJ found that O'Neill exaggerated the state of the variable annuities he held with Lincoln, leading J.M. to believe that he has lost more money than he had. Id. at 16. The ALJ found that these statements were designed to mislead J.M. Ibid. O'Neill did not discuss

market forces and the likelihood of the market improving with J.M. Ibid. The ALJ concluded that O'Neill convinced J.M. to liquidate his annuities with Lincoln and invest with NAC so she could receive a commission from NAC, as she was an agent with them. Ibid. The ALJ concluded that O'Neill violated N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-2.8, N.J.A.C. 11:17A-4.10, and N.J.S.A. 17:33A-4(a) and (b).[8] Id. at 25.

Count Six

As to Count Six, the ALJ found that on February 3, 2011, O'Neill filled out J.M.'s applications to NAC for the two new fixed annuities. Id. at 11. O'Neill listed J.M.'s assets as $100,000 in certificates of deposit[9] ("CD"); $50,000 in money market funds; and $100,000 in checking and savings accounts. Ibid. The ALJ found that J.M. denied that he informed O'Neill that he had these assets. Ibid. The ALJ found that O'Neill submitted this false asset listing to NAC to make it appear as though fixed annuities were an appropriate investment for J.M. Ibid. NAC relied upon this information to issue the annuities. Ibid. O'Neill also represented to NAC that J.M. had lost over $130,000 on his two variable annuities, when he had lost approximately $56,000 due to market conditions. Ibid.

Additionally, the ALJ found that O'Neill also understated J.M.'s living expenses on a Client Information Sheet. Ibid. O'Neill represented that he received monthly income from Social Security in the amount of $1,297; a pension in the amount of $500; and $1,200 from his variable

[8] N.J.S.A. 17:33A-4(a) and (b) were not originally alleged in the OTSC, but the ALJ granted a motion to amend the OTSC to include charges of providing false information in violation of these provisions. Initial Decision at 8. However, the Motion to Amend was made as to Count Six and the violation should read N.J.S.A. 17:33A-4(a)(4)(b). Department's Closing Summation at 39.

[9] 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).

annuities, for a total monthly income of approximately $2,900. Ibid. O'Neill represented that J.M. had $900 in monthly expenses for utilities, car insurance, a cell phone, cable, groceries, and trailer park rental fees. Ibid. However, she did not include other basic living expenses, such as medications, other insurance, home repairs, transportation expenses, donations, or other personal expenses or social activities. Ibid. O'Neill testified that J.M. told her that he had $500 per month in extra income and that he did not want to pay extra taxes on income. Id. at 14. The purpose of the investment plan was to take away J.M.'s income for life because he did not need it and did not want to pay taxes on it. Ibid.

The ALJ found that O'Neill provided false information to NAC to induce them to issue fixed annuities to J.M. Id. at 17. O'Neill exaggerated J.M.'s assets to show considerable assets in cash and CDs, which he did not have. Ibid. NAC then relied upon the false information in these annuity applications to issue the annuities. Ibid. The ALJ concluded that O'Neill violated N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). Id. at 25.

Count Seven

As to Count Seven, the ALJ found that O'Neill failed to make reasonable efforts to obtain relevant information regarding J.M.'s financial status, investment objectives, and if the NAC annuities were suitable. Initial Decision at 25.

The ALJ found that O'Neill did not believe that the elderly should own variable annuities, and instead should own fixed annuities to produce income. Id. at 14. The ALJ found that O'Neill is not licensed to sell variable rate annuities. Ibid. O'Neill did not contact J.M.'s nephew to ascertain why he had J.M. invest his assets into a variable annuity, or whether Lincoln had similar products to those O'Neill was recommending with NAC. Id. at 10. O'Neill did not think to ask Lincoln if they had fixed annuities because she was not licensed with Lincoln. Id. at 14. She

testified that she was trying to make up for J.M.'s losses. Ibid. O'Neill would be paid commission from NAC, but not Lincoln, for the sale of annuities. Id. at 10.

The ALJ found that O'Neill did not make reasonable efforts to ascertain J.M.'s financial status. Id. at 17. The ALJ concluded that O'Neill prepared a monthly budget for J.M. that did not reasonably reflect his monthly expenses. Ibid. O'Neill did not contact J.M.'s nephew, who had obtained the original investments from Lincoln and might have had information regarding why the investments were appropriate for J.M., particularly as it relates to the income for life rider. Ibid. The ALJ concluded that O'Neill violated N.J.S.A. 17B:25-38(b)(3), N.J.S.A. 17:22A-40(a)(2), (8), and (16), and N.J.A.C. 11:17A-4.10. Id. at 25.

Count Eight

As noted above, the ALJ found that O'Neill made misleading representations, such as her statements that "the value has gone down" and "he is losing is principal" while on the phone with Lincoln in J.M.'s presence. Id. at 10. Based upon what he heard from O'Neill, J.M. agreed to surrender the two variable annuities with Lincoln and purchase fixed annuities with NAC. Id. at 10, 11. One of the Lincoln annuities had a six percent surrender fee, which J.M. paid. Id. at 10. O'Neill told J.M. that the NAC annuity would make up for the six percent surrender fee by including a ten percent bonus. Ibid. The ALJ found that this was not accurate because the new annuity with NAC included surrender fees of up to eighteen percent if J.M. surrendered the annuity before eleven years had elapsed. Ibid.[10] The ALJ found that J.M. paid a surrender fee of $13,441.04. Id. at 11.

[10] The new annuities with NAC included surrender fees of eighteen percent during the first year and decreased two percent each subsequent year. Ex. P-35, P-36.

The ALJ found that this constituted fraudulent comparisons of the annuity contracts for the purpose of inducing J.M. to surrender his Lincoln annuity contracts and purchase new annuity contracts with NAC. Ibid. The ALJ concluded that O'Neill violated N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (8), and (16), N.J.A.C. 11:17A-2.8, and N.J.A.C. 11:17A-4.10. Ibid.

Count Nine

As to Count Nine, the ALJ found that on or about July 14, 2011, O'Neill met with J.M. again and took control of his checkbook and other financial assets. Id. at 12. From July 15, 2011 through August 15, 2011, O'Neill wrote 35 checks for J.M.'s signature to herself, SSS, her nonprofit, and a repairman and caretakers that she had hired on J.M.'s behalf. Id. at 13. These checks totaled $41,114.11. Ibid. O'Neill admitted to writing numerous checks from J.M.'s account, including to herself, to SSS, to G.T., J.M.'s girlfriend, who was introduced to him by O'Neill, and to B.D., a handyman O'Neill hired. Id. at 12. O'Neill testified that J.M. had fallen, and his house needed appropriate modifications, such as safety bars, and that were installed by the handyman. Id. at 15. O'Neill also testified that J.M. required car services, since he could not drive. Ibid.

While O'Neill claimed that J.M. was unable to manage his financial affairs, the ALJ found that the checkbook register prepared by J.M. prior to O'Neill's involvement, was organized and showed no sign that J.M. had lost the ability to manage his own affairs. Id. at 12. O'Neill testified that she wrote checks on J.M.'s account only when two witnesses were present. Id. at 15. She testified that J.M. required her assistance to write checks because his hands shook, and that the checks were written for appropriate services that were provided to J.M. Ibid. She also testified that she felt it was acceptable for an insurance producer to write checks for a client in certain circumstances. Ibid.

J.M.'s checkbook had an original balance of $11,610.97 and his savings account had approximately $12,000. Id. at 13. O'Neill transferred the funds in J.M.'s savings account to his checking account to cover some of the checks. Ibid. O'Neill also arranged for J.M. to surrender one of his new fixed annuities with NAC. Ibid. Personnel from SSS called NAC on July 14 and 15, 2011 regarding the surrender of an annuity. Ibid. On August 11, 2011, O'Neill sent a partial surrender form to NAC to withdraw $60,000 from the new annuity and to send the funds to J.M.'s checking account, knowing that J.M. would incur a $11,654.88[11] surrender penalty. Ibid. On August 17, 2011, NAC transferred $48,345.12 to J.M.'s checking account. Ibid.

As to Count Nine, the ALJ found that O'Neill took control of J.M.'s financial affairs. Id. at 17. She assumed control of his checkbook and issued checks to herself and SSS which bore no relation to any services rendered. Ibid. She also wrote checks to a handyman and to a friend, G.T., who had become J.M.'s girlfriend. Ibid. The ALJ found that O'Neill's testimony that J.M. approved these expenses was not credible considering his modest lifestyle and his expenditures prior to O'Neill taking control of his finances. Ibid. The ALJ concluded that O'Neill violated N.J.A.C. 11:17A-4.10, N.J.S.A. 17:22A-40(a)(2), (8), and (16).[12] Id. at 26.

Count Ten

As noted above, the ALJ found that as to Count Nine, that O'Neill took control of J.M.'s checkbook and other financial assets. Id. at 12. From July 15, 2011 through August 15, 2011,

[11] The actual amount of the penalty was $13,404.51. Ex. P-43.

[12] The ALJ combined Counts Nine and Ten in the Initial Decision. Initial Decision at 26. The OTSC also combined these two Counts. Counts Nine and Ten will be analyzed separately in this Final Decision.

O'Neill wrote 5 checks for $1,000 to SSS.[13] Id. at 13. O'Neill admitted to writing these checks. Id. at 12. The ALJ concluded that O'Neill violated of N.J.A.C. 11:17A-4.10, N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), and N.J.A.C. 11:17B-3.1(a), (b), (c), and (d). Id. at 26.

Count Eleven

As to Count Eleven of the OTSC, the ALJ found that on August 15, 2011, O'Neill wrote a check on J.M.'s account for $5,000 payable to her personal attorney, whom J.M. had never met or hired. Id. at 13. The ALJ found that J.M. did not know why this check had been written from his account. Ibid. The ALJ concluded that O'Neill violated N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16). Id. at 26.

Count Twelve

As to Count Twelve of the OTSC, the ALJ found that on January 12, 2012, J.M. removed O'Neill as agent of record for the NAC annuities. Ibid. J.M. then received two letters from O'Neill, sent February 28, 2012 and July 23, 2012, requesting access to the NAC annuities and permitting NAC to send information regarding his annuities to her and SSS. Id. at 13-14. O'Neill testified that these letters were not written to gain access to J.M.'s funds or to harass him. Id. at 15. She testified that she wanted to ensure that the required minimum distributions were being taken to avoid tax issues. Ibid. She testified that she routinely did this for her clients to make sure their investment strategies were appropriate. Ibid.

O'Neill testified that one on occasion, J.M.'s daughter came to his home and accused O'Neill of trying to take over J.M.'s finances. Ibid. O'Neill stated that J.M. had previously indicated to O'Neill that his daughter had thrown him out of her house and that she and her husband

[13] Three checks were written to O'Neill. Ex. P-40Y, 40BB, and 40GG. Two checks were written to SSS. Ex. P-40CC and 40EE.

had abused him. Ibid. J.M.'s daughter threatened G.T. and said she would ruin O'Neill. Ibid. J.M. called the police to report his daughter. Ibid. The police spoke with everyone and noted that J.M. was lucid. Ibid. O'Neill reached out to J.M.'s niece to help, but his niece did not want to get involved. Initial Decision at 14.

As to Count Twelve, the ALJ found that in January 2012, J.M. informed NAC that he wished to remove O'Neill as his agent. Id. at 18. In February 2012, O'Neill wrote to J.M. asking that he authorize her to have access to his accounts. Ibid. In July 2012, she wrote again with the same request. Ibid. The ALJ found that O'Neill should have been aware that she was removed as agent and was no longer entitled to have access to J.M.'s accounts. Ibid. The ALJ concluded that O'Neill violated N.J.S.A. 17:22A-40(a)(2) and (8). Id. at 26.[14]

ALJ Recommended Penalty

Based upon the above findings, the ALJ recommended that the Respondents' licenses be revoked. Id. at 27, 28. The ALJ also concluded that a civil monetary penalty be imposed in the amount of $55,000 to be allocated as follows: $5,000 for Count One against SSS and O'Neill; $2,500 for each of Counts Two, Three, and Four; $10,000 for Count Five; $5,000 for each of Counts Six, Seven, Eight, Nine, Ten, and 11; and $2,500 for Count Twelve. Id. at 27, 28.[15] Aside from Count One, it is not clear if the remaining Counts were to be paid jointly and severally by the Respondents.

[14] Madeline Deleski ("Deleski") testified on O'Neill's behalf. Id. at 15. Deleski testified that she had known O'Neill for ten years and that O'Neill helps people and that they trust her. Ibid. Deleski has referred others to O'Neill and does not believe that O'Neill should lose her license. Id. at 15-16. Deleski testified that she did not know J.M. or his daughter. Id. at 16.

[15] The ALJ did not analyze the factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987).

The ALJ also recommended that the Respondents be jointly and severally responsible for reimbursement to the Department in the amount of $12,163.64 for the costs of investigation and prosecution, including $5,275 for the costs of investigation, $908.29 for travel expenses, $3,480 for transcription and videography, and $2,500.35 for transcription of telephone recordings with NAC and Lincoln. Id. at 27, 28. The ALJ recommended that the Respondents be jointly and severally responsible for $13,441.05 in restitution to J.M. for the Lincoln annuity surrender. Id. at 27. Lastly, the ALJ ordered the restitution of funds drawn from J.M.'s checking account for checks written by O'Neill to herself, SSS, caregivers, a repairman, associated charities, and medical equipment that may have been covered by Medicare in the amount of $19,486.17. Id. at 28. The ALJ did not order restitution in the amount of $13,404.51 for the NAC annuity surrender fee because she found that NAC offered to make J.M. whole and reinstate his annuity if he returned the funds he had been paid. Id. at 27. However, J.M. declined and elected to keep the funds because he wanted to move in with his daughter. Id. at 27-28.

EXCEPTIONS

By e-mail dated May 1, 2019, the Department requested an extension of time to file Exceptions to the Initial Decision until May 21, 2019, which was granted and both parties were given until then to submit their Exceptions. The Department submitted timely Exceptions to the Initial Decision on May 14, 2019 ("Department Exceptions"). Respondent O'Neill submitted late Exceptions to the Initial Decision via e-mail on May 28, 2019 ("Respondent Exceptions"). Neither the Department nor the Respondents filed Replies to the Exceptions pursuant to N.J.A.C. 1:1-18.4(d).

The Department's Exceptions to the Initial Decision

The Department generally agreed with the ALJ's findings that Respondents violated numerous laws and regulations and that the revocation of Respondents' insurance producer licenses was appropriate. Department Exceptions at 1-2. However, the Department sought to clarify the ALJ's findings regarding insurance fraud and its associated surcharges, and requested additional amounts assessed against the Respondents for penalties and restitution. Id. at 2.

First, the Department requested that the Initial Decision be modified to make it clear that the Respondents' conduct of providing false information to an insurance company is contained in Count Six, not Count Five, of the OTSC. Ibid. Further, the Department requested that the Initial Decision be modified to expressly find that the Respondents **knowingly** made and prepared false written statements on an application to an insurance company for the purpose of obtaining an insurance policy or contract, in violation of N.J.S:A. 17:33A-4(a)(4)(b). Id. at 2-3. (Emphasis in original).

The Department also requested that the Initial Decision be modified to include additional fines and fees. The Department requested that each Respondent be charged a $1,000 surcharge pursuant to the Fraud Act, N.J.S.A. 17:33A-5.1. Id. at 3. The Department also requested that the monetary penalty for Counts Nine, Ten, and Eleven be increased to $175,000, or $5,000 for each of the 35 checks that the Respondents wrote from J.M.'s checking account. Id. at 3-4. This would increase the total monetary penalties for all twelve Counts to $215,000. Id. at 4. Lastly, the Department requested that the Initial Decision be modified to order additional restitution in the amount of $13,404.51 for the surrender fees of the partial surrender of the fixed annuity from NAC because were it not for the Respondents' actions, J.M. would not have surrendered this annuity and incurred this penalty. Id. at 4-5.

Respondents' Exceptions to the Initial Decision

In her exceptions, O'Neill many of the same assertions already made in her testimony at the hearing as summarized in the Initial Decision. Those assertions are briefly summarized below.

As to Count One, O'Neill stated that she was working under her own name and not Senior Seminar Services. Respondent Exceptions at 1. Because O'Neill did not receive any commission under SSS, she was unaware that she had to have SSS licensed in New Jersey. Ibid. SSS was registered in Pennsylvania, where O'Neill's office and staff were located, and O'Neill was licensed in New Jersey as a nonresident producer. Ibid. When O'Neill became aware that SSS should be licensed in New Jersey, she took appropriate action and had SSS licensed. Ibid.

As to Count Two, O'Neill stated that Ferguson was not employed to act as an agent. Ibid. Rather, Ferguson was to assist O'Neill by booking seminars and visiting clients who had signed up for a consultation. Ibid. On these visits, Ferguson was to fill out an intake form so that people did not have to wait for an appointment with O'Neill, but Ferguson was never to discuss insurance policies. Ibid. Ferguson told O'Neill that she was frightened and intimidated by the Department's investigators and that she "said anything to simply to get out of there." Ibid.

As to Count Three, O'Neill maintained that SSS did not have an "office space and/or building" in Cape May. Id. at 2. O'Neill admitted that she had a home in Cape May and had an office in her home that included fax and copy machines, phones, filing cabinets, and desks. Ibid. O'Neill indicated that Suarez informed her that for an "official office" there must be a secretary and signage. Ibid. (Emphasis in original). O'Neill stated that this was unnecessary. Ibid.

As to Count Four, O'Neill denied that she used the CSA designation once it was revoked. Ibid. O'Neill provided a letter from John J. Maioriello, Esq. who states that he was present at the

seminar in Hamilton and that he did not hear O'Neill introduce herself as a CSA.[16] Ibid. O'Neill also noted that she had invited Suarez to attend the seminar and was not surprised by her attendance. Ibid.

As to Count Five, O'Neill indicated that J.M. approached her at the seminar at Homestead Run Village. Ibid. J.M. told O'Neill that he was concerned about "HIS loss of money" from two variable annuities that his nephew from Texas had invested his money in. Ibid. (Emphasis in original). He indicated to O'Neill that "his losses were almost $120K between the two accounts." Ibid.

As to Count Six, O'Neill denied that she made false statements on the annuity applications to NAC. Id. at 2-3. J.M. informed her of his checking and savings accounts balances and what he had in CDs. Id. at 3.

As to Count Seven, O'Neill stated that she ensured that J.M.'s two annuities with NAC would "shield him from any and all losses, forever." Ibid. She stated that "NO LOSSES" occurred as a result of transferring J.M.'s money from Lincoln to NAC, and J.M. gained $6,143.75 from the transfer. Ibid. (Emphasis in original), Ex. R-8. She also stated that J.M. did not need the income from his Lincoln annuity and that he was concerned about the taxes he was paying for this extra, unnecessary income. Ibid.

As to Count Eight, O'Neill reiterated that J.M. approached her at the seminar at Homestead Run Village and asked for an appointment to discuss the losses in his variable annuities. Ibid.

[16] This letter was not admitted into evidence at the time of the hearing. Initial Decision at 38. Pursuant to N.J.A.C. 1:1-18.4(c), evidence not presented at the hearing should not be submitted as part of Exceptions to the Initial Decision. The letter is also hearsay. N.J.R.E. 801, N.J.A.C. 1:1-15.5(a) to (b).

As to Count Nine, O'Neill denied seizing control of J.M.'s checkbook. Ibid. She stated that J.M. had fallen in his home and she hired a caretaker, Patricia Smith ("Smith"), to help him. Ibid. Smith cooked, cleaned, did laundry, and took him on walks to build up his strength. Ibid. O'Neill stated that she would go grocery shopping and run errands for J.M. because Smith did not drive. Ibid. She also procured a handyman, B.D., to fix J.M.'s trailer. Id. at 4. She added that B.D. was not her boyfriend, as the ALJ assumed, but had performed work for her previously. Id. at 4. O'Neill indicated that J.M. told her that he no longer talked to his daughter, Kathleen Clayton ("Clayton") who O'Neill stated was in an abusive marriage. Id. at 3-4. O'Neill maintained that J.M. was afraid of his daughter and grateful to O'Neill and the caregivers for help. Id. at 4, Ex. R-2, P-52. J.M. dictated letters to O'Neill, which she had her secretary type, and J.M. signed in front of witnesses. Ibid., Ex. R-2, P-52. J.M. asked her to write checks to pay his bills and she printed the checks and he would sign them in front of witnesses, such as Smith and G.T. Ibid.

As to Count Ten, O'Neill stated that she cleaned his trailer, went grocery shopping and ran other errands. Ibid. J.M. paid her for these services, not for activities related to insurance. Ibid.

As to Count Eleven, O'Neill stated that no fraudulent conduct occurred in relation to J.M. Ibid. She stated that Clayton came to J.M.'s trailer unexpectedly and threatened O'Neill and Smith. Ibid. After Clayton left, J.M. called the police and made a report. Id. at 5, Ex. R-16.

As to Count Twelve, O'Neill denied harassing or deceiving J.M. Ibid. She stated that she was never informed that a new agent was assigned to J.M.'s policies with NAC. Ibid. O'Neill stated that her staff routinely sends letters to clients to discuss allocations and investment strategies, and that was the purpose of these letters. Ibid.

O'Neill also noted additional facts that she maintains were overlooked by the ALJ. She stated that she tried to speak to another one of J.M.'s relatives after the encounter with Clayton. Ibid. However, that relation did not want to get involved in a family dispute. Ibid.

O'Neill also stated that Clayton believed that O'Neill stole her father's money, that J.M. was taxed when he surrendered his Lincoln policies and purchased annuities with NAC, and that he cannot access money in the NAC annuities until he is 100, but all of those assumptions are incorrect. Ibid. She also stated that J.M. wanted O'Neill to serve as his power of attorney, but she refused and suggested an attorney instead. Id. at 6, Ex. R-7.

O'Neill also stated that AAG Snow did not meet with her witnesses, G.T. and Smith, although she had asked him to do so several times. Ibid. Accordingly, O'Neill asserts that AAG Snow did not perform a thorough investigation and was not interested in the truth, and instead engaged in a "seek and destroy mission" against her. Ibid.

O'Neill also stated that having the OTSC posted on the Department website without a hearing damaged her integrity and reputation and is evidence of a "smear campaign." Respondent Exceptions at 7, Ex. R-1.[17] O'Neill also submitted additional papers referenced in the Respondent Exceptions on June 4, 2019.[18]

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[17] The Department is required to post Orders to Show Cause on its website pursuant to N.J.S.A. 52:14B-3(3).

[18] O'Neill had the opportunity to call witnesses to testify at the hearing, by telephone if necessary, with the ALJ's permission pursuant to N.J.A.C. 1:1-15.8(e). Further, letters from associates attesting to her professionalism and good character were not entered into evidence at the time of the hearing. Initial Decision at 38. Pursuant to N.J.A.C. 1:1-18.4(c), evidence not presented at the hearing should not be submitted as part of Exceptions to the Initial Decision. Further, these individuals were not called as witnesses at the hearing and under N.J.A.C. 1:1-15.8, considering their letters would be inappropriate.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the OTSC 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, OAL Dkt. No. BKI 0947-02, Initial Decision, (02/05/04), Final Decision and Order, (06/22/04). 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).

Allegations Against the Respondents

Count One

Count One alleges that the Respondents, while SSS was unlicensed in the State of New Jersey, conducted seminars and meetings where the Respondents discussed, sold, solicited, or negotiated insurance products and services in this State, in violation of N.J.S.A. 17:22A-29, N.J.S.A. 17:22A-40(a)(2), and (8), N.J.A.C. 11:17-2.8(b), and N.J.A.C. 11:17A-1.6(c). The ALJ found that O'Neill was the sole owner of SSS and was responsible for ensuring that SSS complied with New Jersey's requirements for licensure. Initial Decision at 4. The ALJ found that O'Neill did not register SSS and was selling insurance products on its behalf while it was unlicensed. Ibid. The ALJ concluded that this conduct violated N.J.S.A. 17:22A-29, N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.8(b) and N.J.A.C. 11:17A-1.6(c). Id. at 24.

In their Exceptions, the Respondents state that they were unaware that SSS had to be registered in this State. Respondent Exceptions at 1. However, as a producer, O'Neill is

responsible for knowing and understanding the applicable insurance laws that regulate her license and profession. Commissioner v. Vinci, OAL Dkt. No. BKI 7510-16, Initial Decision, (03/30/17), Final Decision and Order, (08/11/17), aff'd 2019 N.J. Super. Unpub. LEXIS 473 (App. Div.), certif. denied, ___ N.J. ___ (2019). Ignorance of the law is not an excuse. Accordingly, O'Neill should have been aware of the requirement to license SSS with the Department when SSS began conducting seminars in New Jersey. Further, O'Neill, a nonresident licensed producer, was conducting business using SSS's name on brochures and other promotional materials. Ex. P-10.

Accordingly, I ADOPT the ALJ's findings and find that the Respondents violated N.J.S.A. 17:22A-29 (selling, soliciting or negotiating insurance without a license), N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), N.J.A.C. 11:17A-1.6(c) (licensed partners, officers and directors, and all owners with an ownership interest of ten percent or more in the organization shall be held responsible for all insurance related conduct of the organization licensee, any of its branch offices, and its employees), and N.J.A.C. 11:17-2.8(b) (no nonresident licensed producer shall conduct business under a name other than its legal or business name in the state where it maintains a resident license).

Count Two

Count Two alleges that the Respondents allowed an unlicensed employee, Ferguson, to conduct the business of insurance in this State in violation of N.J.S.A. 17:22A-40(a)(2), (8), (12), and (17), N.J.A.C. 11:17-2.10(b)(4), and N.J.A.C. 11:17A-1.3(d) and (e). The ALJ found that Ferguson was selling insurance products on behalf of SSS without a license and that O'Neill did not properly supervise Ferguson to make sure she was not selling insurance products. Initial Decision at 5. The ALJ concluded that this conduct violated N.J.S.A. 17:22A-40(a)(2), (8), (12),

and (17), N.J.A.C. 11:17-2.10(b)(4), and N.J.A.C. 11:17A-1.3(d). Id. at 24. The ALJ did not address whether this conduct violated N.J.A.C. 11:17A-1.3(e) as charged in the OTSC.

In her Exceptions, O'Neill argues that Ferguson did not act as an agent. Respondent Exceptions at 1. Rather, Ferguson assisted O'Neill by booking seminars and visiting clients who had signed up for a consultation, but never discussed insurance products. Ibid. Ferguson told O'Neill that she was frightened and intimidated by the Department's investigators and that she "said anything to simply to get out of there." Ibid.

The evidence in the record indicates that Suarez testified that she spoke with Ferguson at the seminar held by SSS and O'Neill on August 5, 2009. Initial Decision at 4. Ferguson told Suarez that she handled consultations, collected financial information, and discussed coverages and annuity terms, and that O'Neill was aware that Ferguson was unlicensed in the State. Ibid., Ex. P-11. On October 25, 2010, Ferguson entered into Consent Order No. E10-67. Ex. P-12. In the Consent Order, Ferguson admitted that between September 2006 and December 3, 2009, she visited New Jersey clients and prospective clients of her employers, the Respondents, and provided information regarding coverages and discussed terms of proposed policies. Ibid. O'Neill countered that Ferguson did not sell insurance products, that Ferguson was too nervous to take the licensing examination, and that O'Neill instructed her not to sell insurance products. Initial Decision at 5. O'Neill also testified that Ferguson told her that when she met with a Deputy Attorney General and Suarez, she was pressured into admitting that she sold insurance, and that she felt so terrorized that she signed the Consent Order. Ibid. The Respondents made similar statements in their Exceptions. Respondent Exceptions at 1. O'Neill's testimony as to Ferguson's feelings of intimidation and being pressured to enter into the Consent Order is uncorroborated hearsay. N.J.R.E. 801, N.J.A.C. 1:1-15.5(a) to (b). There is no evidence in the record to support

O'Neill's assertion that that Ferguson's admissions by entering into the Consent Order were coerced or in any way involuntary.

The ALJ found that Suarez was a credible witness, but O'Neill was not. Initial Decision at 3, 16. I have no basis on which to reject the ALJ's credibility determinations because there was no specific evidence that such findings are not supported by sufficient competent and credible evidence in the record. See N.J.A.C. 1:1-18.6(c). Further, the trial judge's credibility findings are significantly influenced by "'the opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Locurto, 157 N.J. 463, 472 (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Even the best and most accurate transcript "is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried." Ibid. (citation and internal quotation marks omitted).

Accordingly, I ADOPT the ALJ's findings that the Respondents violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), in that the misconduct violated an insurance law and demonstrated incompetence or untrustworthiness in the conduct of insurance business. I also ADOPT the ALJ's findings that the Respondents violated N.J.S.A. 17:22A-40(a)(12) (knowingly accepting insurance business from an unlicensed producer) and (17) (knowingly facilitating another in violating person in violating any insurance laws), in that they were aware that Ferguson was unlicensed in this State and nevertheless allowed her to speak to clients about insurance coverage. I further ADOPT the ALJ's findings that the Respondents violated N.J.A.C. 11:17-2.10(b)(4) (an employer shall be responsible for the insurance-related conduct of an employee) and N.J.A.C. 11:17A-1.3(d) (no licensed insurance producer shall permit or allow any unlicensed person to transact the business of an insurance

producer). I MODIFY the Initial Decision to find that the Respondents also violated N.J.A.C. 11:17-1.3(e) (officers or employees of licensed insurance producers, who solicit, negotiate or sell insurance on behalf of the insurer or the licensed insurance producer, for compensation of any type, shall be licensed as an insurance producer), in that their employee, Ferguson, solicited insurance on their behalf without a license.

Count Three

Count Three of the OTSC alleges that the Respondents advertised that SSS had a branch office in this State, but that O'Neill never reported or licensed SSS's New Jersey branch office with the Department in violation of N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.9(a) and N.J.A.C. 11:17A-1.6(b). The ALJ found that materials presented to SSS's prospective clients indicated that SSS had an office in New Jersey, that O'Neill had leased an office in Cape May, and that O'Neill did not register this office with the Department. Initial Decision at 6. The ALJ determined that the Respondents violated N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.9(a) and N.J.A.C. 11:17A-1.6(b). Id. at 24.

In her Exceptions, Respondent O'Neill admitted that she had a home in Cape May where she had an office that included fax and copy machines, phones, filing cabinets, and desks. Respondent Exceptions at 2. O'Neill stated that it was customary for insurance producers to have offices in their homes and not license them. Ibid.

However, the evidence in the record indicates that brochure of Respondents proclaims, "Now 2 offices!!!" and gives an address of 105 Beach Avenue in Cape May.[19] Ex. P-10. On November 15, 2015, O'Neill entered into a two-year lease for 12 Beverly Road, Cape May. Ex. P-63. A check for $5,500 was made out to Gary Walker from Respondent SSS's account and was

[19] It is unclear from the record if this is the home office to which O'Neill referred in her Exceptions.

signed by Respondent O'Neill. Ex. P-64. The memo line on this check reads, "NJ office rental." Ibid.

New Jersey insurance regulations define "branch office" as "an office in New Jersey other than a principal office where a licensee conducts insurance business." N.J.A.C. 11:17-1.2. Here, O'Neill advertised that she had an office in Cape May and leased space. It is axiomatic that O'Neill would not have advertised an office in Cape May if she did not intend to conduct insurance business there. However, she did not register the Cape May office with the Department.

Based on the foregoing, I ADOPT the ALJ's findings and find that the Respondents violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), N.J.A.C. 11:17-2.9(a) (except in specific, enumerated circumstances, licensees shall file with the Department a branch office registration form within 30 days before business is first conducted there), and N.J.A.C. 11:17A-1.6(b) (any insurance producer who has established a place of business for the purpose of transacting the business of insurance shall register each location as a branch office).

Count Four

Count Four alleges that O'Neill represented herself as a CSA after that designation had been revoked. The ALJ found that misleading promotional materials, incorrectly identifying Ferguson and O'Neill as CSAs, were given to prospective clients. Initial Decision at 7. The ALJ concluded that O'Neill violated N.J.S.A. 17B:25-36(a)(1), N.J.S.A. 17B:30-2, and N.J.S.A. 17:22A-40(a)(2), (8) and (16), as alleged in the OTSC. Id. at 24-25.

In her Exceptions, Respondent O'Neill states that she never used the CSA designation. Respondent Exceptions at 2. She also submits a letter from John J. Maioriello, Esq., wherein he

states that he was present at the information session and that he did not hear O'Neill refer to herself as a CSA. This letter was not admitted into evidence at the time of the hearing. Initial Decision at 38. Pursuant to N.J.A.C. 1:1-18.4(c), evidence not presented at the hearing should not be submitted as part of Exceptions to the Initial Decision. The letter is also hearsay. N.J.R.E. 801, N.J.A.C. 1:1-15.5(a) to (b).

The evidence in the record indicates that Suarez testified that when she attended the August 5, 2009 seminar, there was a sign-in sheet indicating that SSS offered free consultations and all questions would be "answered by CSA's (Certified Senior Advisors)." Initial Decision at 6, Ex. P-17. O'Neill indicated to Suarez that both she and Ferguson were CSAs and they had taken an intensive three-day course to earn the designation. Ex. P-16. On January 29, 2010, Suarez wrote to O'Neill and requested a copy of the certificate reflecting her CSA designation. Ex. P-19. O'Neill faxed a copy of the certificate. Ex. P-20. Suarez contacted the SCSA and discovered that Ferguson was not a CSA. Initial Decision at 7. Suarez also discovered that O'Neill had been certified as a CSA on July 17, 2001, but that her certification was revoked in 2008 by the SCSA because she violated SCSA's Rule 201, which mandates that CSA designees must accurately convey to clients their profession and active professional licenses and credentials, and Rule 203, which prohibits CSA designees from providing financial advice, services, or products through fraud, dishonesty, or misrepresentation. Ibid., Ex. P-21, P-22. O'Neill testified that the use of the CSA designation was a mistake and that she had accidentally used outdated materials. Ibid.

For the reasons set forth above, I FIND that O'Neill represented to the public and to the Department that she and Ferguson were CSAs. However, Ferguson had never been a CSA and O'Neill's CSA designation had been revoked. O'Neill's assertion that she did not state to Suarez that she was a CSA goes to the credibility of the witnesses. There is not sufficient competent and

credible evidence in the record which compels that the ALJ's credibility findings be disturbed. See N.J.A.C. 1:1-18.6(c). Moreover, O'Neill's assertions are belied by the fact that she faxed a copy of her CSA certification to Suarez, as Suarez testified that she requested. Thus, I ADOPT the ALJ's findings that O'Neill's use of an untrue certification or professional designation in advising senior citizens in connection with the solicitation, negotiation, or sale of an annuity, or its value or suitability violates N.J.S.A. 17B:25-36(a)(1) (prohibiting an insurance producer from using a certification or professional designation that is untrue, deceptive, or misleading in advising or servicing senior citizens or retirees in connection with the solicitation, negotiation, or sale of an annuity, or its value or suitability); that O'Neill's representation that she was a CSA when she was not also is an unfair or deceptive trade practice in violation of N.J.S.A. 17B:30-2 (prohibiting unfair or deceptive acts or practices in the business of life insurance or annuity); and that O'Neill's conduct violates N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act).

Count Five

Count Five of the OTSC alleges that O'Neill induced and persuaded J.M. to liquidate the two Lincoln annuity policies by misrepresenting the terms and features of the annuity policies and made misleading, incomplete and/or fraudulent statements regarding the actual performance of the two Lincoln annuity policies. The ALJ found that O'Neill, to mislead J.M., exaggerated the state of the variable annuities he held with Lincoln, leading J.M. to believe that he has lost more money than he had. Initial Decision at 16. The ALJ found that O'Neill made misleading representations, such as her statements that "the value has gone down" and "he is losing is principal" while on the phone with Lincoln in J.M.'s presence. Initial Decision at 25. The ALJ concluded that O'Neill

violated N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-2.8, N.J.A.C. 11:17A-4.10, and N.J.S.A. 17:33A-4(a) and (b). Ibid.

In its Exceptions, the Department noted that the ALJ found that the Respondents made false statements to an insurance company in Count Five. Department Exceptions at 2. However, these violations should have been included in Count Six. Ibid. In O'Neill's Exceptions, she argues that J.M. approached her at the seminar at Homestead Run Village and expressed concerns regarding the losses from his Lincoln annuities. Respondent Exceptions at 2.

The evidence in the record indicates that the Respondents conducted a seminar on January 5, 2011 at Homestead Run, a senior community where J.M. owned a trailer. Ex. P-25, P-54,[20] ("J.M. Dep.") at 17:1 to 18:17. J.M. put his name and number on a sheet of paper to receive more information. Id. at 18:20 to 19:6. O'Neill later called J.M. and they met at his home. Id. at 20:8-23. On January 24, 2011, O'Neill called Lincoln with J.M. to gain information about the annuities. Transcripts of Phone Calls with Lincoln, Ex. P-27A, P-27B.[21] A representative of Lincoln informed O'Neill that J.M. received $1,236.47 a month from one of his annuities. Ex. P-27A, at 4:2. This annuity had a surrender charge of six percent. Id. at 8:8-20. When discussing J.M.'s income for life rider with a different representative, O'Neill stated that "he's paying Uncle Sam taxes when he doesn't even need the income yet." Ex. P-27B at 4:20-22.

On January 25, 2011, O'Neill made more phone calls to Lincoln with J.M. O'Neill transferred J.M.'s funds into a money market account "so it doesn't lose any more money[.]" Ex. P-27C, at 3:23-4:1. She also stopped the monthly withdrawals because J.M. did not need the

[20] Ex. P-54 is a transcript of a *de bene esse* video deposition of J.M. from May 14, 2015. "A *de bene esse* deposition is taken for potential use at trial." Mellwig v. Kebalo, 264 N.J. Super. 168, 171 (App. Div.), certif. denied, 134 N.J. 478 (1993).

[21] Exhibits 27A to 27M are certified transcripts of recorded telephone conversations with Lincoln.

income. Id. at 4:19-23. O'Neill also made other statements to Lincoln's representative, including "he's digging into this principal." Id. at 4:25-5:1. She also stated, "he's lost so much money." Id. at 6:5-6. O'Neill also spoke to a different Lincoln representative to terminate the income for life rider. The Lincoln representative told her that terminating the rider could not be done over the phone and instead had to be done using a specific form because terminating the rider would also terminate "all the guarantees that go with it." Ex. P-27D at 3:12-22. O'Neill replied it was fine because J.M. did not need the income and that "he's dipping into his principal. So it defeats the purpose." Id. at 3:23-25. She did not inquire about the guarantees mentioned by the Lincoln representative.

O'Neill made exaggerated statements while on the phone with Lincoln representatives in the presence of J.M. which led him to cancel his annuities with Lincoln. Accordingly, I ADOPT the ALJ's findings and find that O'Neill violated N.J.S.A. 17B:30-2 (prohibiting unfair or deceptive acts or practices in the business of life insurance or annuity), N.J.S.A. 17B:30-3 (no person shall make a statement misrepresenting the terms of any policy or annuity contract issued or to be issued or the benefits or advantages promised), N.J.S.A. 17B:30-6 (no person shall make any misleading representations or incomplete or fraudulent comparison of any annuity contracts or insurers for the purpose of inducing, or tending to induce, any person to surrender or convert any annuity contract, or to take out an annuity contract in another insurer), N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (5) (intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance) (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act), N.J.A.C. 11:17A-2.8 (no insurance producer shall make any misleading representations or incomplete or fraudulent comparison of

any annuity contracts or insurers for the purpose of inducing, or tending to induce, any person to surrender an annuity contract, or to take out a policy of insurance or annuity contract with another insurer), and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business). However, I REJECT the ALJ's finding that the Respondents violated N.J.S.A. 17:33A-4(a) and (b). During the hearing, the Department made a Motion to Amend the Pleadings to add this violation was made as to Count Six and the violation should read N.J.S.A. 17:33A-4(a)(4)(b). Department's Closing Summation at 39.

Count Six

Count Six alleges that O'Neill made false, incomplete, or misleading statements on the North American annuity applications and disclosure forms, in violation of N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). The ALJ found that O'Neill exaggerated J.M.'s assets to NAC by showing considerable assets in cash and CDs to induce NAC to issue fixed annuities to J.M. Initial Decision at 17. However, J.M. did not have these assets. Ibid. NAC then relied upon the false information in these annuity applications when they issued the annuities. Ibid. The ALJ concluded that this conduct violated N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). Id. at 25.

In its Exceptions, the Department noted that the ALJ found that the Respondents made false statements to an insurance company in Count Five. Department Exceptions at 2. However, these violations should have been included in Count Six. Ibid. The Department requested that the Initial Decision be modified to expressly find that the Respondents knowingly made and prepared false written statements on an application to an insurance company for the purpose of obtaining an insurance policy or contract in violation of N.J.S.A. 17:33A-4(a)(4)(b). Id. at 2-3. I agree and

MODIFY the Initial Decision to state the O'Neill knowingly made and prepared false written statements to an insurance company for the purpose of obtaining an annuity contract.

In her Exceptions, O'Neill denied that she made false statements on the annuity applications to NAC. Respondent Exceptions at 2-3. She stated that J.M. informed her of his checking and savings accounts balances and what he had in CDs. Id. at 3.

The evidence in the record indicates that on January 24, 2011, O'Neill met with J.M. and completed a planning questionnaire, which estimated J.M.'s income and expenses. Ex. P-26. The questionnaire indicated that J.M. had a home valued at approximately $60,000; a checking account with a balance of approximately $8,000; a savings account with a balance of approximately $12,000; an IRA with a balance of approximately $27,000; and a variable annuity with a value of approximately $187,000. Ibid. On February 3, 2011, the Respondents completed two applications for annuities with NAC. Ex. P-35, P-36. These applications indicate that J.M. had liquid assets of $295,000 consisting of annuities in the amount of $45,000; CDs in the amount of $100,000; money market accounts in the amount of $50,000; and $100,000 in checking and savings accounts. Ibid. In his deposition, J.M. testified that these amounts were inaccurate, and that he did not represent to O'Neill that he had these assets. Ex. P-54, J.M. Dep. at 39:1 to 42:22. On one of the applications, Respondents indicated that J.M. had lost over $130,000 in variable annuities. Ex. P-35. J.M. had lost $56,304.14. Ex. P-50.

For the above reasons, I ADOPT the ALJ's findings that O'Neill violated N.J.S.A. 17B:30-2 (prohibiting unfair or deceptive acts or practices in the business of life insurance or annuity), N.J.S.A. 17B:30-3 (no person shall make a statement misrepresenting the terms of any policy or annuity contract issued or to be issued or the benefits or advantages promised), N.J.S.A. 17B:30-6 (no person shall make any misleading representations or incomplete or fraudulent comparison

of any annuity contracts or insurers for the purpose of inducing, or tending to induce, any person to surrender or convert any annuity contract, or to take out an annuity contract in another insurer), N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (5) (intentionally misrepresenting the terms of an actual or proposed insurance contract, policy, or application for insurance), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act). In addition, I MODIFY the ALJ's decision to find that that O'Neill knowingly made false statements to NAC regarding J.M.'s assets. Only one week before she submitted the applications to NAC, she completed a planning questionnaire with him that showed his assets were significantly less than what she wrote on the application to NAC. Accordingly, I FIND that she also violated N.J.S.A. 17:33A-4(a)(4)(b) (preparing or making a statement intended to be presented to any insurance company to obtain an insurance policy, knowing that the statement contains false or misleading information concerning any fact or thing material to an insurance application or contract). This violation was part of the Department's Motion to Amend the Pleadings, which was granted during the hearing. Department's Closing Summation at 39.

Count Seven

Count Seven of the OTSC alleges that O'Neill failed to make reasonable efforts to obtain relevant information regarding J.M.'s financial status, investment objectives, and determine whether the NAC annuity policies were suitable for J.M., in violation of N.J.S.A. 17B:25-38(b)(3), N.J.S.A. 17:22A-40(a)(2), (8), and (16), and N.J.A.C. 11:17A-4.10. The ALJ found that O'Neill did not make reasonable efforts to ascertain J.M.'s financial status and that the planning questionnaire O'Neill prepared for J.M. to show his monthly excess income did not include significant expenses, such as transportation and medical expenses. Initial Decision at 17. The

ALJ also found that O'Neill did not contact J.M.'s nephew, who had obtained the original investments from Lincoln and might have had information regarding why the investments were appropriate for J.M. Ibid. The ALJ determined that O'Neill violated the statutory and regulatory violations as alleged in the OTSC. Id. at 25.

In her Exceptions, O'Neill argues that J.M. did not need the income from his Lincoln annuity and that he was concerned about the taxes he was paying for this extra, unnecessary income. Respondent Exceptions at 3. She also states that J.M. did not lose any income as a result of transferring the annuities from Lincoln to NAC, and J.M. gained money from the transfer. Ibid.

The evidence in the record indicates that O'Neill understated J.M.'s living expenses on a Client Information Sheet. Initial Decision at 11, Ex. P-26. O'Neill represented that he received monthly income from Social Security in the amount of $1,297; a pension in the amount of $500; and $1,200 from his variable annuities, for a total monthly income of approximately $2,900. Ibid., Ex. P-26. O'Neill represented that J.M. had $900 in monthly expenses for utilities, car insurance, a cell phone, cable, groceries, and trailer park rental fees. Ibid., Ex. P-26. However, she did not include other basic living expenses, such as medications, other insurance, home repairs, transportation expenses, donations, or other personal expenses or social activities. Ibid., Ex. P-26. O'Neill testified that J.M. told her that he had $500 per month in extra income. Id. at 14. However, the Client Information Sheet indicates that J.M. had extra income of $2,000 a month. Ex. P-26. O'Neill testified that J.M. also told her that he did not want to pay any taxes on income he did not need. Initial Decision at 14. O'Neill testified that the investment plan's purpose was to take away J.M.'s income for life because he did not need it and did not want to pay taxes on it. Ibid.

Further, O'Neill did not contact J.M.'s nephew to ascertain why he had J.M. invest his assets into a variable annuity, or if Lincoln had similar products to those O'Neill was

recommending with NAC. Id. at 10. O'Neill testified that she did not think to ask Lincoln if they had fixed annuities because she was not licensed with Lincoln. Id. at 14. The new annuities with NAC included surrender fees of eighteen percent during the first year and decreased two percent each subsequent year. Id. at 10, Ex. P-35, P-36. J.M. was 79 years old when the Respondents sold him the annuities with NAC. Ex. P-26. However, J.M. wanted to keep the annuity for 20 years and take penalty-free distributions from the annuity. Ex. P-35. These goals are incompatible with a surrender fee of up to eighteen percent.

I FIND that O'Neill failed to collect all relevant data regarding J.M.'s financial status, goals, and needs. Further, the Client Information Sheet showing a surplus of income of $2,000 is in direct contrast to O'Neill's testimony that J.M. told her he had $500 a month in surplus income. Accordingly, O'Neill should have been on notice that she should gather more information to ensure that the budget she prepared for J.M. was accurate and any investments would meet his needs. The Respondents did not use all relevant information to evaluate J.M.'s needs and ensure the annuity products they sold him were suitable. Accordingly, I ADOPT the ALJ's findings and find that O'Neill violated N.J.S.A. 17B:25-38(b)(3) (grounds for an insurance producer for believing an annuity is suitable for a consumer shall be based on all relevant factors known at the time of the annuity), N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act), and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business).

Count Eight

Count Eight of the OTSC alleges that O'Neill made misleading representations or incomplete or fraudulent statements concerning the Lincoln annuities and the North American

annuity contracts for the purpose of inducing J.M. to surrender the Lincoln annuity contracts and to purchase the North American annuity contracts.

The ALJ found that O'Neill convinced J.M. to transfer his annuity policies from Lincoln to NAC. However, she did not disclose that the NAC policies had surrender penalties as high as eighteen percent. Initial Decision at 10. The ALJ concluded that O'Neill violated N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (8), and (16), N.J.A.C. 11:17A-2.8, and N.J.A.C. 11:17A-4.10. Id. at 25.

As noted above, O'Neill made misleading representations, such as her statements that "the value has gone down" and "he is losing is principal" while on the phone with Lincoln in J.M.'s presence. On January 26, 2011, O'Neill sent Lincoln a form to transfer J.M.'s funds into a money market account. Ex. P-28. On the transfer form she wrote that the transfer was being done "to prevent more heavy losses." Ibid. O'Neill also sent Lincoln a distribution request to transfer money to an annuity with NAC. Ex. P-29. J.M. paid surrender fees of $13,441.04. Ex. P-33, Initial Decision at 11. O'Neill told J.M. that the NAC annuity would make up for the six percent surrender fee by including a ten percent bonus. Initial Decision at 10. However, this was not accurate because while there was an initial ten percent bonus, the new annuities with NAC included surrender fees of eighteen percent during the first year and only decreased by two percent each subsequent year. Ibid., Ex. P-35, P-36.

While there is nothing in the record to suggest that J.M. was not competent to make decisions for himself, he relied upon O'Neill to help him make informed decisions regarding his finances. O'Neill made exaggerated statements regarding his Lincoln annuities and did not disclose the high surrender fees of the NAC annuities to J.M., who was 79 years-old at the time.

For the reasons set forth above, I ADOPT the ALJ's conclusions that O'Neill's statements misrepresenting J.M.'s investments with Lincoln, not disclosing the possible eighteen percent surrender fee of the NAC policy, and failing to discuss other investment possibilities was unfair and deceptive in violation of N.J.S.A. 17B:30-2 (prohibiting unfair or deceptive acts or practices in the business of life insurance or annuity), N.J.S.A. 17B:30-3 (no person shall make a statement misrepresenting the terms of any policy or annuity contract issued or to be issued or the benefits or advantages promised), N.J.S.A. 17B:30-6 (no person shall make any misleading representations or incomplete or fraudulent comparison of any annuity contracts or insurers for the purpose of inducing, or tending to induce, any person to surrender or convert any annuity contract, or to take out an annuity contract in another insurer), N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act), N.J.A.C. 11:17A-2.8 (no insurance producer shall make any misleading representations or incomplete or fraudulent comparison of any annuity contracts or insurers for the purpose of inducing, or tending to induce, any person to surrender an annuity contract, or to take out a policy of insurance or annuity contract with another insurer), and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business).

Count Nine

Count Nine of the OTSC alleges that Respondents' direction and control over J.M.'s financial affairs, including, but not limited to, writing checks from his checking account, constitutes coercive and/or dishonest business practices and demonstrates unworthiness in the conduct of the insurance business, in violation of N.J.A.C. 11:17A-4.10 and N.J.S.A. 17:22A-40(a)(2), (8), and (16). The ALJ found that O'Neill took control of J.M.'s financial accounts,

including his savings and checking accounts, to J.M.'s detriment by writing unauthorized checks totaling more than $40,000 for the benefit of O'Neill, O'Neill's friend who was a handyman, B.D., and O'Neill's friend., G.T., who had become J.M.'s girlfriend. Initial Decision at 17 and 26. The ALJ concluded that O'Neill violated the statutory and regulatory provisions as set forth in the OTSC.[22] Id. at 26.

In her Exceptions, O'Neill indicated that she hired caretakers to help J.M. after he had fallen in his home, for which J.M. was grateful because he was estranged from his daughter. Respondent Exceptions at 3. J.M. asked her to write checks to pay his bills, which she would print he would sign them in front of witnesses, such as Smith and G.T. Ibid.

The documentary evidence indicates that O'Neill wrote out checks to pay for J.M.'s expenses without his authorization. Some of the checks O'Neill wrote were for routine payments, such as to Homestead Run for three months' rent in the amount of $1,097.04, and $55.99 to the gas company. Ex. P-40T, P-40MM. The record does not disclose whether these payments were authorized by J.M. However, she also wrote other checks that J.M. did not authorize. J.M. testified about 23 checks that were written from his account. Ex. P-54, J.M. Dep. at 52:8 to 53:24; 61:16-78:5; 186:8 to 187:21. He testified that he did not authorize 22 of those checks. Ex. P-54, J.M. Dep. at 61:16-78:5. One such check was made out to Garden State Medical in the amount of $786.17. Ex. P-U. J.M. testified that he did not authorize this check and that he had health insurance. Ex. P-54, J.M. Dep. at 62:1-24. J.M. testified that he did not authorize seven checks that were made out to Smith, a caregiver hired by O'Neill. Id. at 63:2-22; 66:3-6; 67:10-15; 73:4-11; 75:14 to 76:5; 76:22 to 77:3; 77:13 to 78:5; Ex. P-40V, P-40X, 40-AA, 40-II, 40-PP, 40-RR,

[22] The ALJ combined Counts Nine and Ten in the Initial Decision. Initial Decision at 26. The OTSC also combined these two Counts. Counts Nine and Ten will be analyzed separately in this Final Decision.

and 40-TT. He testified that he did not authorize five checks that were made out to Florence St. Bernard, another caregiver hired by O'Neill. Id. at 66:21 to 67:7; 73:14 to 75:11; 77:6-10; Ex. P-40Z, P-JJ, P-40NN, P-40OO, P-40SS. J.M. testified that he did not believe that he needed 24-hour in-home care, but O'Neill convinced him that he did. Id. at 63:10-18. He further testified that he did not authorize three checks that were made out to B.D., a handyman hired by O'Neill. Id. at 69:23 to 21; 72:13 to 73:1; 76:12-19; Ex. P-40DD, P-40HH, P-40QQ. J.M. also testified that he did not authorize one check that was made out to Amo's Adventures. Id. at 64:7 to 65:25; Ex. P-40W. Amo's Adventures is an animal rescue charity owned by O'Neill. Ex. P-45, P-62. J.M. testified that he did not know why he signed these checks, but he did so at O'Neill's direction. Ex. P-54, J.M. Dep. at 63:19-24; 67:18 to 68:9; 85:23 to 86:1. The total of these checks is $16,426.17.

On July 19, 2011, $12,000 was transferred from J.M.'s savings account to his checking account. Ex. P-40A, P-41, P-42. This was the amount that was reflected in J.M.'s savings account on the Planning Questionnaire that O'Neill completed with J.M. on January 24, 2011. Ex. P-26.

On July 20, 2011, Mary, one of SSS's employees, called NAC and requested a blank surrender form. Ex. P-37I at 2:5-8.[23] The representative from NAC informed Mary that a form would be sent to J.M. Id. at 3:3-10. A representative from NAC called J.M. on July 29, 2011 to confirm that J.M. received the form. Ex. P-37J. J.M. indicated that O'Neill "takes care of all [his] correspondence." Id. at 2:15-16. He also indicated that he did not know what a surrender form was. Id. at 2:17-23. On August 1, 2011, a partial surrender request was sent to NAC in the net amount of $60,000. Ex. P-43. Because the surrender was done within the first year, there was an eighteen percent surrender penalty on the annuity in the amount of $13,404.51. Ex. P-35, P-43.

[23] Ex. P-37A to 37R are certified transcripts of recorded telephone conversations with NAC.

On August 16, 2011, $48,345.12 from NAC was deposited into J.M.'s account. Ex. P-40B. The transaction register notes that a deposit of $60,000 was received from NAC. Ex. P-41.

On September 14, 2011, J.M. called NAC to determine if he could return the money to his annuity. Ex. P-37O. J.M. stated that "the lady that I had taking care of my finances" withdrew "6,000." Id. at 2:9-14. He further indicated that he did not intend for $60,000 to be taken out of his annuity. Id. at 3:4-15. A representative from NAC told him that he could return the $48,345.12 that he received and could have the withdrawal reversed. Id. at 5:19 to 6:22.

I MODIFY the ALJ's determinations and find that the Respondents, rather than O'Neill solely, violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act), and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business). However, I REJECT the ALJ's factual finding that O'Neill wrote a check to G.T. without J.M.'s authorization. Initial Decision at 17. During his deposition, J.M. initially testified that he did not authorize O'Neill to write a check for $3,000 to G.T. Ex. P-54, J.M. Dep at 52:8 to 53:24, Ex. P-40S. However, he later testified that he did authorize O'Neill to write this check to help G.T. pay for veterinary care after her dog became sick and had to be euthanized. Id. at 186:8 to 187:21, Ex. P-40S. Accordingly, the Department did not meet its burden of proof as to that transaction.

Count Ten

Count Ten of the OTSC alleges that the Respondents paid themselves fees totaling $5,000 from J.M.'s funds that bore no reasonable relation to services provided without a written agreement with the insured, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), N.J.A.C. 11:17B-3.1(a), (b), (c), and (d), and N.J.A.C. 11:17A-4.10. The ALJ found that O'Neill took control of

J.M.'s checkbook and issued checks to herself and SSS which bore no relation to any services rendered, in violation of the statutory and regulatory provisions set forth in the OTSC. Id. at 17 and 26.

Pursuant to N.J.A.C. 1:1-6.2(a), in its closing summation, the Department amended the pleadings to conform to the evidence and instead charged the Respondents with violating N.J.A.C. 11:17B-3.2(c) because, even if an agreement existed, the Respondents are prohibited from collecting fees for servicing life and health insurance policies. Department's Closing Summation at 58 n.1. Pursuant to N.J.A.C. 11:17B-3.2(c), insurance producers may not charge a service fee for services rendered in the sale or service of life or health insurance. The ALJ did not address the amending of the pleadings.

In her Exceptions, O'Neill stated that she cleaned his trailer, went grocery shopping, and ran other errands. Respondent Exceptions at 4. J.M. paid her for these services, not for activities related to insurance. Ibid.

The evidence in the record indicates that O'Neill testified that she wrote checks from J.M.'s account to SSS and herself. Initial Decision at 12. J.M. testified that he did not authorize 22 of the checks that were written from his account in July and August 2011. Ex. P-54, J.M. Dep. at 61:16-78:5. Five of these checks, totaling $5,000, were made out to O'Neill and SSS. Ex. P-40Y, P-40BB, P-40GG, P-40CC, P-40EE. J.M. testified that he did not authorize the three checks that were made out to O'Neill. Ex. P-54, J.M. Dep. at 66:9-18; 68:12-24; 71:9-72:10; Ex. P-40Y, P-40BB, P-40GG. He further testified that he did not authorize the two checks that were made out to SSS. Id. at 69:4-20; 70:24 to 71:6; Ex. P-40CC, P-40EE.

For the above reasons, I MODIFY the ALJ's determinations and find that the Respondents, rather than O'Neill solely, wrote checks to themselves from J.M.'s account and violated N.J.S.A.

17:22A-40(a)(2) (violating any insurance law), (4) (improperly misappropriating any money received in the course of business), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act), N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business). However, I REJECT the ALJ's conclusion that O'Neill violated N.J.A.C. 11:17B-3.1(a) (insurance producers acting as agents for an insurance company for personal lines insurance shall not charge or receive any fee on a policy to or from a policyholder or insured for services rendered as an insurance producer), (b) (any insurance producer charging a fee to an insured or prospective insured shall first obtain from the insured or prospective insured a written agreement), (c) (any fee charged by an insurance producer shall bear a reasonable relationship to the services provided and shall not be discriminatory) and (d) (a new written agreement shall be entered into for each fee charged and each time a fee is charged). Further, I MODIFY the Initial Decision to find that the Respondents violated N.J.A.C. 11:17B-3.2(c) in that they collected a fee for their services. Lastly, the Respondents failed to act in a fiduciary capacity in violation of N.J.A.C. 11:17A-4.10.

Count Eleven

Count Eleven of the OTSC alleges that O'Neill attempted to divert J.M.'s funds to pay her attorney for her own benefit, in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16). The ALJ found that O'Neill used J.M.'s money to pay $5,000 to her private attorney in violation of the alleged statutory provisions. Initial Decision at 17 and 26.

The evidence in the record indicates that Respondents wrote a check for $5,000 from J.M.'s account payable to the Respondents' attorney, Carmen Saginario, Esq. Ex. P-44, P-52. Mr. Saginario returned the check to J.M. on or about August 26, 2011.[24] Ibid.

For the above reasons, I ADOPT the ALJ's determinations and find that O'Neill violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (4) (improperly misappropriating any money received in the course of business), (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility), and (16) (committing any fraudulent act).

Count Twelve

Count Twelve of the OTSC alleges that Respondents wrote letters to J.M. in an attempt to gain access to J.M.'s financial information and control over his financial assets, including his two annuity policies, in violation of N.J.S.A. 17:22A-40(a)(2) and (8). The ALJ found that found that in January 2012, J.M. removed O'Neill as the agent on his NAC account. Initial Decision at 18. In February 2012, O'Neill wrote to J.M. asking that he authorize her to have access to his accounts. Ibid. In July 2012, she wrote to J.M. again with the same request. Ibid. The ALJ found that O'Neill should have been aware that she was removed as the agent and was no longer entitled to have access to J.M.'s accounts. Ibid. The ALJ concluded that only O'Neill violated the statutory provisions, and did not include whether Respondent SSS violated those provisions. Id. at 26.

In her Exceptions, O'Neill stated that she was never informed that a new agent was assigned to J.M.'s policies with NAC. Respondent Exceptions at 5. O'Neill stated that her staff

[24] A copy of the check was not provided in evidence and it is unclear when the Respondents wrote this check to Mr. Saginario.

routinely sends letters to clients to discuss allocations and investment strategies, and that was the purpose of these letters. Ibid.

The evidence in the record indicates that on January 19, 2012, J.M. and his son-in-law called NAC to request that O'Neill be removed as agent on J.M.'s accounts. Ex. P-37Q, at 2:5-11, 6:4-7. On January 26, 2012, J.M. spoke to a representative of NAC and confirmed that he "just did not want [O'Neill] with my affairs any longer." Ex. P-37R at 3:22-23.

Respondents sent J.M. a letter dated February 28, 2014.[25] Ex. P-47. The letter, which is for J.M. to sign, and is addressed to NAC, requests that Respondents and their staff have "full access to any/all information regarding my policy." Ibid. The letter also requests that J.M.'s information be sent to the Respondents at their office address in Gilbertsville, PA. Ibid.

Respondents sent J.M. another letter postmarked July 11, 2012. Ex. P-48. This letter is also for J.M. to sign and is addressed to NAC and requests that the Respondents have "full access to any/all information regarding my policy." Ibid. The letter also requests that J.M.'s information be sent to the Respondents at their office address in Gilbertsville, PA. Ibid.

O'Neill testified that these letters were not written with the intent to gain access to J.M.'s funds or to harass him. Initial Decision at 15. She testified that she wanted to make sure that the required minimum distributions were being taken so that J.M. could avoid tax issues and that she routinely did this for her clients to check their investment strategies. Ibid.

For the above reasons, I ADOPT the ALJ's findings that O'Neill wrote two letters to J.M. requesting to gain access to his accounts. I MODIFY the ALJ's determinations and find that the Respondents, rather than O'Neill solely violated N.J.S.A. 17:22A-40(a)(2) (violating any

[25] This letter was likely dated incorrectly and should have been dated 2012, not 2014, since O'Neill answered the OTSC in March 2013.

insurance law) and (8) (using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility).

Penalties Against Respondents

Revocation of Respondents' Insurance Producer License

With respect to the appropriate action to take against the Respondents' insurance producer licenses, I FIND that the record is more than sufficient to support license revocation, and, in fact, compels the revocation of the Respondents' producer licenses. Accordingly, I CONCUR with the ALJ's recommendation that the Respondents' licenses be revoked pursuant to the Producer Act.

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).

In addition, 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 Guaranteed 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). Revocation has consistently been imposed upon insurance producers who misappropriate clients' funds. Grossman and Lee Grossman Insurance Agency, OAL Dkt. No. BKI 7012-12, Initial Decision (04/25/13), Final Decision (09/03/13) (revocation and $105,000 in fines for misappropriation of premium funds).

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).

Revocation has also been imposed on licensed producers who mislead clients to purchase products that do not fit their needs. Commissioner v. Norris, OAL Dkt. BKI-13994-13, Initial Decision (07/23/18), Final Decision and Order (12/18/18) (revoking license and imposing $55,000 in civil monetary penalties for misleading clients to purchase annuities they did not want and misappropriating funds from a client); Commissioner v. Berlin, OAL Dkt. BKI-6983-08, Initial Decision (04/29/15), Final Decision and Order (09/09/15), Amended (09/15/15) (revoking license and imposing $1,480,000 in fines for misrepresenting the material terms of annuity contracts to induce senior citizens to purchase annuities). For these reasons and those that follow, I agree with the ALJ's findings that the Respondents' conduct demands the revocation of their producer licenses.

While the OTSC and evidence in the record details a wide range of misconduct, the most egregious of which are the Respondents' dealings with J.M. The Respondents convinced J.M. to transfer his investments from Lincoln to NAC, incurring thousands of dollars in surrender penalties. They did not try to ascertain if Lincoln had investment products which would have better met J.M.'s needs beforehand. O'Neill did not think to ask Lincoln if they had fixed annuities because she was not licensed with Lincoln. Initial Decision at 14. The Respondents had little idea of J.M.'s needs and did not contact his nephew, his agent with Lincoln. Respondents applied unreasonable pressure to gain J.M.'s permission to transfer his annuities to NAC. The new annuities with NAC had surrender penalties of up to eighteen percent, which decreased by two percent every year. J.M. was 79 years-old at the time, and it was foreseeable that he would have to withdraw funds from these annuities while the surrender penalties would be the steepest.

Further, the Respondents gained control of J.M.'s checkbook and wrote checks to themselves totaling $5,000. They also wrote checks to caretakers and a handyman they had hired for J.M. The Respondents then transferred $12,000 from his savings to cover these expenses. When that still would not be sufficient to meet these expenditures, Respondents partially surrendered one of J.M.'s annuities with NAC, incurring an eighteen percent penalty.

Accordingly, based upon my review of the record, the Initial Decision, and the parties' Exceptions thereto, I ADOPT the ALJ's recommendation that revocation of the Respondents' insurance producer licenses is necessary and appropriate in this matter.

Monetary Penalty Against the Respondents

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering.[26] 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. Strandskov, 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 noted above, the ALJ recommended a total of $55,000 in monetary penalties under the Producer Act to be allocated as follows: $5,000 for Count One against SSS and O'Neill; $2,500

[26] Under the Trade Practices Act, N.J.S.A. 17B:30-17(b), after a hearing, an insurance producer who engaged in any unfair method of competition can be fined up to $1,000, unless she knew or reasonably should have known she was in violation of the Act, in which case the penalty cannot exceed $5,000. The Department did not request any additional penalties under the Trade Practices Act. Under the Annuities Act, the Commissioner may take appropriate corrective action regarding any consumer harmed by a violation relating to an annuity issued by the insurer. N.J.S.A. 17B:25-42(b). A violation of the Annuities Act is also a violation of the Trade Practices Act. N.J.S.A. 17B:25-42(a).

for each of Counts Two, Three, and Four; $10,000 for Count Five; $5,000 for each of Counts Six, Seven, Eight, Nine, Ten, and Eleven; and $2,500 for Count Twelve. Id. at 27, 28.

Under Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 137-139 (1987), certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act and imposed pursuant to the Fraud Act. 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. 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 first Kimmelman factor addresses the good faith or bad faith of the violator. Here, O'Neill presented herself as a CSA, when that designation had been revoked (Count Four). Further, the Respondents pressured and misled J.M. into surrendering his annuities with Lincoln, incurring a six percent penalty fee (Count Five). O'Neill convinced J.M. to purchase annuities with NAC that could incur as high as an eighteen percent surrender fee (Count Eight). Later, O'Neill assumed control of J.M.'s finances. O'Neill wrote checks to herself, her company, and those she had hired to care for J.M. (Counts Nine and Ten). When it was clear that J.M. could not afford these expenses on his limited income, she transferred $12,000 from his savings account and then partially surrendered an annuity with NAC, incurring an eighteen percent surrender fee. These actions demonstrate bad faith on the part of the Respondents. This factor weighs in favor of a significant monetary penalty.

The second Kimmelman factor is the Respondent's ability to pay. The Respondents have not provided any information regarding their inability to pay penalties. Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08). Moreover, an insurance producer's ability to pay is only a single factor to be considered in determining an appropriate fine and does not obviate the need for the imposition of an otherwise appropriate monetary penalty. Substantial fines have been imposed against insurance producers despite their arguments regarding their inability to pay. See Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (issuing a $100,500 civil penalty despite the producer arguing that he was unable to pay); See also Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (fine of $100,000 imposed despite evidence of the Respondent's inability to pay); Commissioner v. Malek, OAL Dkt. Nos. BKI 4520-05 and BKI 486-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (fine increased from $2,500 to $20,000 even though the producer argued an inability to pay fines in addition to restitution); and Commissioner v. Andrade, OAL Dkt. No. BKI 09148-18, Initial Decision (01/24/19), Final Decision and Order (04/04/19) (fine increased from $16,000 to $26,000 even though the producer argued an inability to pay).

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. Here, the Respondents earned commissions by convincing J.M. to surrender his annuities with Lincoln and instead purchase annuities with NAC, a company with

which the Respondents were licensed. Initial Decision at 10. However, no evidence was presented regarding the amount of commissions the Respondents earned. Further, the Respondents wrote checks totaling $5,000 to themselves from J.M.'s account (Count Ten). Accordingly, this factor weighs in favor of a significant monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11). The public was undoubtedly harmed by the breach of fiduciary duty to those who were affected by O'Neill's actions. As noted above, O'Neill represented herself as a CSA to senior citizens, when that designation had been revoked (Count Four). She also took advantage of J.M. for her own gain. 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, the more significant civil penalties should be assessed. Ibid. Here, SSS had been holding seminars in New Jersey since early 2008, over a year before it was licensed. Ex. P-9. Further, the Respondents gained control of J.M.'s finances and wrote checks to themselves and their associates for one month (Counts Nine and Ten). The Respondents' misdeeds were not isolated incidents, but rather

a pattern of misconduct over a significant period of time. Accordingly, this factor weighs in favor of a 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. Ibid. Here, there is no evidence that O'Neill 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 or Fraud 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 the Respondents. Accordingly, this factor does not weigh in favor of a larger monetary penalty.

Weighing all of the Kimmelman factors, and based upon the violations of the Producer Act, the Trade Practices Act, the Annuities Act, and the Fraud Act as set forth above, I ADOPT the recommendations of the ALJ that the Respondents shall pay civil monetary penalties. However, I MODIFY the ALJ's recommendation that the Respondents be fined $55,000 in civil monetary penalties. The nature of the Respondents' violations warrants the imposition of substantially higher civil monetary penalties than those recommended by the ALJ. Accordingly, I MODIFY the recommendations of the ALJ and find the Respondents liable for a total monetary penalty of $166,000 to be allocated as follows.

Count One

As to Count One of the OTSC, I ADOPT the ALJ's recommendation of $5,000 to the Respondents jointly and severally, for failing to license SSS in the State of New Jersey while conducting insurance business in this State in violation of N.J.S.A. 17:22A-29, N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.A.C. 11:17A-1.6(c);

Count Two

As to Count Two, I ADOPT the ALJ's recommendation of the amount of $2,500, but I MODIFY to make clear that this is to be paid by the Respondents jointly and severally, for failing to supervise their employee, Ferguson, who was conducting insurance business without a license in violation of N.J.S.A. 17:22A-40(a)(2), (8), (12), and (17), N.J.A.C. 11:17-2.10(b)(4), and N.J.A.C. 11:17A-1.3(d) and (e);

Count Three

As to Count Three, I ADOPT the ALJ's recommendation of the amount of $2,500, but I MODIFY to make clear that this is to be paid by the Respondents jointly and severally for failing to register a branch office with the Department in violation of N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.9(a) and N.J.A.C. 11:17A-1.6(b);

Count Four

As to Count Four, I ADOPT the ALJ's recommendation of the amount of $2,500, but I MODIFY to make clear that this is to be paid by O'Neill individually for using the term "Certified Senior Advisor" when her certification had been revoked in violation of N.J.S.A. 17B:25-36(a)(1), N.J.S.A. 17B:30-2, and N.J.S.A. 17:22A-40(a)(2), (8), and (16);

Count Five

As to Count Five, I ADOPT the ALJ's recommendation of the amount of $10,000 but I MODIFY to make clear that this is to be paid by O'Neill individually for misrepresenting the terms of annuity policies, making misleading statements regarding the performance of annuities, and exerting undue pressure on J.M. to act quickly to prevent more losses in violation of N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-2.8, N.J.A.C. 11:17A-4.10;

Count Six

As to Count Six, I ADOPT the ALJ's recommendation of $5,000 as to violations of the Producer Act, but I MODIFY to make clear that this is to be paid by O'Neill individually for knowingly making false statements on two annuity applications in violation of N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16). Additionally, because O'Neill knowingly made false statements on two annuity applications, this conduct also constitutes two violations of the Fraud Act, N.J.S.A. 17:33A-4(a)(4)(b).

The Fraud Act provides that a penalty of not more than $5,000 for the first violation, $10,000 for the second violation and $15,000 for each subsequent violation may be imposed. N.J.S.A. 17:33A-5(b). The New Jersey Supreme Court held that when it comes to penalties under the Fraud Act "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas such as reasonable liquidated damages . . . without being deemed to have imposed a second penalty for the purpose of double jeopardy analysis." Merin v. Maglaki, 126 N.J. 430, 445 (1992) (citing United States v. Halper, 490 U.S. 435 (1989), and United States ex rel Marcus v. Hess, 317 U.S. 537, 548-49 (1943)).

Under both the Fraud Act and the Producer Act, the Commissioner may impose larger subsequent fines when multiple offenses have been found in a single civil action. State v. Nasir, 355 N.J. Super. 96, 107 (App. Div. 2002) (citing Merin, 126 N.J. 430 (1992)); see also Commissioner v. Prime Insurance Syndicate, OAL Dkt. No. BKI 1168-05, First Initial Decision (01/31/06), Second Initial Decision (03/09/06), Final Decision and Order (05/24/06) (ordering additional civil penalties, for among other reasons, for each policy involving the solicitation of insurance from an unauthorized carrier); Commissioner v. Uribe, 2013 N.J. Super. Unpub. Lexis 519 (App. Div. 2013) (assessing separate penalties for each of thirteen violations of the Producer Act).

"[I]nsurance producers who commit insurance fraud will face civil penalties under both the Fraud Act and the Producer Act." Commissioner v. Hohn; See also Commissioner v. Furman, OAL Dkt. No. BKI 3891-06, Initial Decision (6/21/07), Final Decision and Order (9/17/07) (fining the producer $5,000, plus $1,200 in costs, and revoking the producer's license where the producer previously settled an insurance fraud lawsuit, paid a $5,000 civil penalty and admitted that he committed fraud by making false statements in connection with a life insurance application); Commissioner v. Goncalves (issuing a $5,000 civil penalty under the Producer Act, plus $312.50 in costs, against each producer where they had previously paid civil penalties under the Fraud Act); Commissioner v. Nasir, OAL Dkt. No BKI 2335-03, Order on Motion for Reconsideration of Penalties (9/9/08) (issuing a penalty of $14,000 plus $700 in costs, and revoking the producer's license where the producer had already been assessed $43,710 in penalties and attorneys' fees in a separate action under the Fraud Act where the producer made misrepresentations on his disability application).

Because O'Neill violated both the Producer Act and the Fraud Act, and consistent with the above decisions, it is appropriate to impose penalties pursuant to both the Producer Act and the Fraud Act. Accordingly, an additional penalty of $5,000 for each false annuity application under the Fraud Act is appropriate. N.J.S.A. 17:33A-5(b).

In its Exceptions, the Department requested that each Respondent be assessed a $1,000 surcharge. Department Exceptions at 3. The Fraud Act provides that a person who is found in any legal proceeding to have committed insurance fraud shall be subject to a surcharge in the amount of $1,000. N.J.S.A. 17: 33A-5.1. This surcharge is in addition to any other fines and penalties. Ibid. O'Neill knowingly made false statements to NAC regarding J.M.'s assets in violation of N.J.S.A. 17:33A-4(a)(4)(b). I agree with the Department that a fraud surcharge is appropriate. However, only O'Neill shall be responsible for a $1,000 fraud surcharge, as the conduct in Count Six is alleged against only O'Neill in the OTSC and attributable to only her, not to Respondent SSS. Accordingly, I MODIFY the Initial Decision and find that O'Neill shall be responsible for an additional fraud surcharge of $1,000. Accordingly, the total penalties for this count are $16,000.

Count Seven

As to Count Seven, I ADOPT the ALJ's recommendation of the amount of $5,000 but I MODIFY to make clear that this is to be paid by O'Neill individually for failing to ascertain if the annuity products were suitable for J.M. in violation of N.J.S.A. 17B:25-38(b)(3), N.J.S.A. 17:22A-40(a)(2), (8), and (16), and N.J.A.C. 11:17A-4.10.

Count Eight

As to Count Eight, I ADOPT the ALJ's recommendation of the amount of $5,000 but I MODIFY to make clear that this is to be paid by O'Neill individually for making misleading

representations or incomplete or fraudulent comparisons of annuity contracts for the purpose of inducing J.M. to surrender the Lincoln annuity contracts and to purchase the North American annuity contracts in violation of N.J.S.A. 17B:30-2, -3, and -6, N.J.S.A. 17:22A-40(a)(2), (8), and (16), N.J.A.C. 11:17A-2.8, N.J.A.C. 11:17A-4.10;

Counts Nine and Ten

As to Counts Nine and Ten, the Department requested that the monetary penalty for these Counts be increased to $175,000, which is $5,000 for each of the 35 checks that the Respondents wrote from J.M.'s checking account. Department Exceptions at 3-4. I agree and I MODIFY the ALJ's recommendation of penalties in the amount of $5,000 to the Respondents jointly and severally for each of the 22 unauthorized checks that were written from J.M.'s account, including checks to herself and her company, in violation of N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17B-3.2(c), N.J.S.A. 17:22A-40(a)(2),(4), (8), and (16). Accordingly, the total penalties for these counts are $110,000.

Each of the checks are a separate misappropriation; and thus, a separate violation of the Producer Act. Separate civil penalties should be assessed for each act, namely each of the 22 separate acts of misappropriation in violation of the Producer Act. Commissioner v. Young, OAL Dkt. No. BKI 07444-2015, Initial Decision (12/12/17), Final Decision and Order (06/11/18) (fining Respondent $255,000 for 102 misappropriations that violated the Producer Act); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (6/16/08); Final Decision and Order No. E08-82 (9/15/08) (Respondent criminally convicted of theft of insurance premiums totaling approximately $20,000, and each individual misappropriation of the eighteen insurance premiums were held to constitute a violation of the Producer Act); Nasir, 355 N.J. Super. at 107-

08; see also State v. Fleischman, 189 N.J. 539 (2007); Maglaki, 126 N.J. at 439 (imposition of a penalty for each false statement submitted by the defendant was appropriate).

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 2006 N.J. Super. Unpub. LEXIS 1747 (App. Div. 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).

Accordingly, the total penalties for these counts are $110,000.

Count Eleven

As to Count Eleven, I ADOPT the ALJ's recommendation of the amount of $5,000 but I MODIFY to make clear that this is to be paid by O'Neill individually for writing a check to her

personal attorney from J.M.'s checking account in violation of N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16).

Count Twelve

As to Count Twelve, I ADOPT the ALJ's recommendation of the amount of $2,500, but I MODIFY to make clear that this is to be paid by the Respondents jointly and severally for sending J.M. two letters in an attempt to be reappointed as agents on his NAC annuities after they were removed for fraudulent conduct in violation of N.J.S.A. 17:22A-40(a)(2) and (8).

These penalties are necessary and appropriate given Respondents' misconduct. O'Neill took advantage of senior citizens by misrepresenting her credentials during presentations. She also took advantage of J.M. and convinced him to surrender annuities with Lincoln, and purchase annuities with NAC, a company where she could earn commission. She did not ascertain whether the new annuities with NAC were appropriate to meet J.M.'s financial needs and goals. She likely believed these annuities were unsuitable because she made false statements on the annuity applications to NAC. She then assumed control of J.M.'s finances and wrote checks from his account, transferred money from his savings, and partially surrendered one of his new annuities from NAC, incurring eighteen percent in surrender charges. After she was removed as agent on his NAC annuities, she wrote J.M. two letters in an attempt to be reappointed as his agent.

These penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by the Respondents and the industry as a whole. I also note it is far less than the Department could have requested under N.J.S.A. 17:22A-45, which allows the imposition of up to a $5,000 fine for the first violation and up to a $10,000 fine for any subsequent violations of the Producer Act.

Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to require reimbursement of the costs of investigation. The ALJ recommended that the Respondents be jointly and severally responsible for reimbursement to the Department in the amount of $12,163.64 for the costs of investigation and prosecution, including $5,275 for the costs of investigation, $908.29 for travel expenses, $3,480 for transcription and videography, and $2,500.35 for transcription of telephone recordings from NAC and Lincoln. Initial Decision at 27, 28. The charges are accurately reflected in Investigator Verdel's Certification and appropriate under N.J.S.A. 17:22A-45(c). Accordingly, I ADOPT the ALJ's recommendation that Respondents be jointly and severally responsible for these costs.

As to restitution, the ALJ recommended that the Respondents be jointly and severally responsible for $13,441.05 in restitution to J.M. for the Lincoln annuity surrender at issue in Count Five. Initial Decision at 27. I agree and ADOPT the amount of $13,441.05 in restitution to J.M. for the Lincoln annuity surrender. However, I MODIFY and hold that O'Neill solely is responsible for this restitution. O'Neill put undue pressure on J.M. to surrender with annuity with Lincoln in order to purchase an annuity with NAC. She did not check to see if Lincoln had any fixed annuities or another way to avoid this surrender fee. Accordingly, I find that restitution is appropriate, and O'Neill shall be individually responsible for $13,441.05.

The ALJ did not order restitution in the amount of $13,404.51 for the NAC annuity surrender because the ALJ found that NAC offered to make J.M. whole and reinstate his annuity if he returned the funds that he had been paid. Id. at 27-28. However, J.M. declined and elected to keep the funds because he wanted to move in with his daughter. Ibid. The Department asked for this restitution in its Exceptions, arguing that if not for the Respondents' actions of writing checks from J.M.'s account and surrendering the annuity so they could continue doing so, J.M.

would not have incurred this surrender fee. Department Exceptions at 4-5. J.M. initially intended to return the surrender on his annuity. On September 14, 2011, J.M. called NAC to determine if he could return the money to his annuity. Ex. P-37O. A representative from NAC told him that if he returned the $48,345.12 that he received, he could have the withdrawal, including the surrender penalty, reversed. Id. at 5:19 to 6:22. On September 20, 2011, J.M. called NAC and stated to a representative that he decided to keep the funds. Ex. P-37P at 4:4-9. J.M. indicated that he was moving in with his daughter and son-in-law and he wanted to help them buy a home because they were going to lose money on the home that they were selling. Id. at 6:20 to 7:10. On January 26, 2012, J.M. spoke to a NAC representative and reiterated his desire to keep this money and use it to move to Alabama with his daughter and son-in-law, who had lost money when they sold another home. Ex. P-37R at 9:13 to 10:2; 11:7-14. I agree with the ALJ that restitution should not be ordered as to the $13,404.51 surrender fee. NAC offered to make J.M. whole and to have the surrender of his NAC policy reversed, including the surrender fee of $13,404.51. However, J.M. elected to keep the funds to help his daughter and son-in-law purchase a home in Alabama where he could live with them.

The ALJ also ordered the restitution of funds drawn from J.M.'s checking account for checks written by O'Neill to herself, SSS, caregivers and a repairman, an associated charity, and medical equipment that may have been covered by Medicare in the total amount of $19,486.17. Initial Decision at 28. I ADOPT the finding that Respondents shall pay restitution, but I MODIFY the amount of restitution as to the funds drawn from J.M.'s checking account. The ALJ states Suarez testified that From July 15, 2011 through August 15, 2011, O'Neill wrote 35 checks for J.M.'s signature to herself, repairmen, caretakers, SSS, and her nonprofit totaling $41,114.11. Initial Decision at 13. However, this testimony is not consistent with the documentary evidence

where only 28 checks from this time period were entered into evidence. Ex. P-40S to P-40TT.[27] As noted above, J.M. was questioned about 23 checks that were written from his account. Ex. P-54, J.M. Dep. at 52:8 to 53:24; 61:16-78:5; 186:8 to 187:21. He testified that he did not authorize 22 of those checks. Ex. P-54, J.M. Dep. at 61:16-78:5. J.M. was not asked about five of the checks written to entities such as ShopRite, the New Jersey Motor Vehicle Commission, and New Jersey Natural Gas. Ex. P-40T, P-40FF, P-40KK, P-40LL, P-40MM. Further, J.M. initially testified that he did not authorize O'Neill to write a check for $3,000 to G.T. Ex. P-54, J.M. Dep. at 52:8 to 53:24, Ex. P-40S. However, he later testified that he did authorize O'Neill to write this check to help G.T. pay for veterinary care after her dog became sick and had to be euthanized. Id. at 186:8 to 187:21, Ex. P-40S. Accordingly, the Department did not meet their burden of proof as to this transaction. During his deposition, J.M. testified that he did not authorize checks totaling $16,426.17. Ex. P-54, J.M. Dep. at 61:16-78:5. Accordingly, I find that the Respondents shall be jointly and severally liable for $16,426.17 as to the funds taken from J.M.'s account.[28]

Based on the above, Respondents shall pay fines in the amount of $122,500 jointly and severally for violations in Counts One, Two, Three, Nine, Ten, and Twelve. Further, O'Neill is individually responsible for $43,500 for violations in Counts Four, Five, Six, Seven, Eight, and Eleven. Respondents are also jointly and severally liable as to the costs of investigation and prosecution in the amount of $12,163.64. O'Neill is individually responsible for $13,441.05 in

[27] Ex. P-40F to P-40R and P-40UU to P-40XX are outside the scope of the time when the Department alleges that the Respondents controlled J.M.'s checking account. These checks are for basic expenses, such as water and gas, and total $2,878.51. Further, J.M. was not asked about these checks at his deposition.

[28] This is $3,060 less than the restitution that the ALJ recommended. While $3,000 of the difference is from Ex. P-40S, the check to G.T., it is unclear why there is still a discrepancy of $60.

restitution as to the surrender penalty of J.M.'s Lincoln annuity. Lastly, Respondents are jointly and severally liable for $16,426.17 for the funds taken from J.M.'s account.

CONCLUSION

Having carefully reviewed the Initial Decision, the parties' Exceptions 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 Count One, I ADOPT the ALJ's conclusion that the Respondents violated N.J.S.A. 17:22A-29, N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17-2.8(b). As to Count Two, I ADOPT the ALJ's conclusion that the Respondents violated N.J.S.A. 17:22A-40(a)(2), (8), (12), and (17), N.J.A.C. 11:17-2.10(b)(4) and N.J.A.C. 11:17A-1.3(d). I MODIFY the Initial Decision and find that the Respondents also violated N.J.A.C. 11:17A-1.3(e). As to Count Three, I ADOPT the ALJ's conclusion that the Respondents violated N.J.S.A. 17:22A-40(a)(2) and (8), N.J.A.C. 11:17-2.9(a) and N.J.A.C. 11:17A-1.6(b). As to Count Four, I ADOPT the ALJ's conclusion that O'Neill violated N.J.S.A. 17B:25-36(a)(1), N.J.S.A. 17B:30-2, N.J.S.A. 17:22A-40(a)(2), (8), and (16). As to Count Five, I ADOPT the ALJ's conclusion that O'Neill violated N.J.S.A. 17B:30-2, -3 and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-2.8, and N.J.A.C. 11:17A-4.10 and I MODIFY the Initial Decision and find that the Respondents did not violate N.J.S.A. 17:33A-4(a) and (b) as found by the ALJ. As to Count Six, I ADOPT the ALJ's conclusion that O'Neill violated N.J.S.A. 17B:30-2, -3 -6 N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16) and I MODIFY the Initial Decision to specifically find that O'Neill also violated N.J.S.A. 17:33A-4(a)(4)(b). As to Count Seven, I ADOPT the ALJ's conclusion that O'Neill violated N.J.S.A. 17B:25-38(b)(3), N.J.S.A. 17:22A-40(a)(2), (8), and (16) and N.J.A.C. 11:17A-4.10. As to Count Eight, I ADOPT the ALJ's conclusion that O'Neill violated N.J.S.A. 17B:30-2, -3 and -6, N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-2.8, and N.J.A.C. 11:17A-4.10. As to Count Nine, I MODIFY the

ALJ's conclusion and find that the Respondents, rather than O'Neill solely, violated N.J.S.A. 17:22A-40(a)(2), (8), and (16), and N.J.A.C. 11:17A-4.10. As to Count Ten, I MODIFY the ALJ's conclusion and find that the Respondents, rather than O'Neill solely violated N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10. I further MODIFY the Initial Decision and find that the Respondents did not violate N.J.A.C. 11:17B-3.1(a), (b), (c), and (d), and instead violated N.J.A.C. 11:17B-3.2(c). As to Count Eleven, I ADOPT the ALJ's conclusion that O'Neill violated N.J.S.A. 17:22A-40(a)(2), (4), (8), and (16). As to Count Twelve, I MODIFY the ALJ's conclusion and find that the Respondents, rather than O'Neill solely, violated N.J.S.A. 17:22A-40(a)(2) and (8).

I MODIFY the recommended civil monetary penalty and ORDER the Respondents to pay a total of $166,000 allocated as follows: $5,000 as to both Respondents jointly and severally for failing to license SSS in the State of New Jersey while conducting insurance business in this State in Count One; $2,500 as to both Respondents jointly and severally for failing to supervise their employee, Ferguson, who was conducting insurance business without a license in Count Two; $2,500 as to both Respondents jointly and severally for failing to register a branch office with the Department in Count Three; $2,500 as to O'Neill individually for using the term "Certified Senior Advisor" when O'Neill's certification had been revoked in Count Four; $10,000 as to O'Neill individually for misrepresenting the terms of annuity policies and making misleading statements regarding the performance of annuities in Count Five; $15,000 as to O'Neill individually for knowingly making false statements on two annuity applications in Count Six; $5,000 as to O'Neill individually for failing to ascertain if the annuity products were suitable for J.M. in Count Seven; $5,000 as to O'Neill solely for misrepresenting J.M.'s investments with Lincoln and exerting undue pressure on J.M. to act quickly to prevent more losses in Count Eight; $110,000 as to both

Respondents jointly and severally for writing unauthorized checks from J.M.'s account, in Counts Nine and Ten; $5,000 as to O'Neill individually for writing a check to O'Neill's personal attorney from J.M.'s checking account in Count Eleven; and $2,500 as to both Respondents jointly and severally for sending J.M. two letters in an attempt to be reappointed as agents on his NAC annuities after they were removed for fraudulent conduct in Count Twelve. I also MODIFY the Initial Decision and ORDER O'Neill to pay $1,000 in fraud surcharges.

I further ADOPT the costs of investigation and prosecution in the amount of $12,163.64 as to both Respondents jointly and severally. I MODIFY the amount of restitution and ORDER that O'Neill is responsible for $13,441.05 in restitution as to the surrender penalty of J.M.'s Lincoln annuity. Further, both Respondents jointly and severally responsible for $16,426.17 as to the funds taken from J.M.'s account.

Lastly, I ADOPT the conclusion in the Initial Decision that revocation of the Respondents' insurance producer licenses is the appropriate and necessary sanction and hereby ORDER the revocation of O'Neill and SSS's licenses effective as of the date of this Final Order and Decision.

It is so ORDERED on this 5th day of September 2019.

Marlene Caride
Commissioner

JD SSS and O'Neill FO/Final Orders