ORDER NO.: E20-08

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-14056-17
AGENCY DOCKET NO.: OTSC #E17-57

MARLENE CARIDE,[1] COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	
v.	)	FINAL DECISION AND ORDER
ANDREW TEPEDINO AND MICHAEL TEPEDINO & SONS INSURANCE AGENCY,	)	
Respondent.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner") pursuant to the authority of the New Jersey Insurance Producer Licensing Act at N.J.S.A. 17:22A-26 to -48 ("Producer Act"), the New Jersey Fraud Prevention Act at N.J.S.A. 17:33A-1 to -30 ("Fraud Act"), and the New Jersey Trade Practices Act at N.J.S.A. 17B:30-1 to -59 ("Trade Practices Act"), and all powers expressed or implied therein, for the purposes of reviewing the July 1, 2019 Initial Decision of Administrative Law Judge Tricia M. Caliguire ("ALJ") ("July 1, 2019 Initial Decision"). The July 1, 2019 Initial Decision incorporates the May 23, 2019 Order Granting Partial Summary Decision ("PSD"), (the July 1, 2019 Initial Decision and PSD are

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

collectively referred to as the "Initial Decision"), which granted in part and denied in part a Motion for Summary Decision brought by the Department of Banking and Insurance ("Department").

In the PSD, the ALJ found for the Department and against Andrew Tepedino ("Tepedino") and Michael Tepedino & Sons Insurance Agency ("MTS"), (collectively referred to as the "Respondents") on Counts One, Two, Three, Five, Six, and four of five violations alleged in Count Eight of the First Amended Order to Show Cause No. E17-57 ("AOTSC"). The ALJ concluded that Tepedino's insurance producer license should be revoked, and that the Respondents should be assessed the following: civil monetary penalties as requested by the Department in the total amount of $25,000; a statutory surcharge of $1,000 pursuant to the Fraud Act; and attorneys' fees and costs of investigation and prosecution in the amount of $27,400.

By letter dated June 28, 2019, the Department withdrew Counts Four, Seven, and the violation remaining under Count Eight of the AOTSC.

In the July 1, 2019 Initial Decision, the ALJ concluded that considering the withdrawal of Counts Four, Seven, and the outstanding violation alleged under Count Eight of the AOTSC, no disputed matters remained. The ALJ incorporated the PSD into the July 1, 2019 Initial Decision and affirmed the imposition of monetary penalties and fines against the Respondents.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 13, 2017, the Department issued Order to Show Cause No. E17-23 against Tepedino and Andrew Tepedino Financial Services, LLC, which sought the suspension or revocation of the insurance producer licenses of both Respondents, reimbursement of the costs of investigation and prosecution, attorneys' fees, restitution or repayment of commissions earned, the imposition of civil monetary penalties for alleged violations of the Producer Act and the Fraud Act, and the imposition of a statutory surcharge pursuant to the Fraud Act.

On July 6, 2017, the Department issued the AOTSC, removing Andrew Tepedino Financial Services, LLC as a Respondent and adding MTS as a Respondent to these proceedings. The AOTSC contains the following counts:

> Count One: Respondents made misrepresentations or incomplete or fraudulent comparisons to JS regarding annuity contracts intended to induce JS to surrender his annuity contracts with Pruco Life Insurance Company ("Pruco") and purchase annuity contracts with Midland National Life Insurance Company ("Midland")[2], in violation of N.J.S.A. 17:22A-40(a)(2), (5), and (7); N.J.A.C. 11:17A-2.8; and N.J.S.A. 17B:30-6;
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> Count Two: Respondents made misrepresentations regarding the address, birthday, and phone number of JS, and provided a false certification on Fixed Annuity Application No. 7804 and No. 7805 ("Application 7804" and "Application 7805", collectively "Application Forms"), committing a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(2), (7), (8) and (16); N.J.S.A. 17:22A-40(a)(2) and (5); and N.J.A.C. 11:4-2.8(a)(3);
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> Count Three: Respondents made misrepresentations regarding the financial status of JS on Deferred Annuity Suitability Form No. 7804 ("Suitability Form 7804") and No. 7805 ("Suitability Form 7805", collectively "Suitability Forms"), committing a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16); N.J.S.A. 17B:30-6; and N.J.A.C. 11:4-2.8(a)(3);
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> Count Four: Respondents forged the signature of JS on the Suitability Forms, in violation of N.J.S.A. 17:22A-40(a)(2) and (10);
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> Count Five: Respondents completed and submitted a revised copy of Suitability Form 7805 on September 24, 2012 ("Revised Suitability Form") that misrepresented JS's financial status, committing a fraudulent act in violation N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16); N.J.S.A. 17B:30-6; and N.J.A.C. 11:4-2.8(a)(3);
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> Count Six: Respondents made misrepresentations regarding the issuance date of the Pruco annuity contracts of JS and the size of the surrender charges paid in connection with the surrender of those contracts, committing a fraudulent act in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16); N.J.S.A. 17B:30-6; and N.J.A.C. 11:4-2.8(a)(3);

[2] The Midland annuity contracts sold to JS by Tepedino will be referred to throughout as "Annuity Policy 7804" and "Annuity Policy 7805."

Count Seven: Respondents did not provide JS with a buyer's guide within five days of the receipt of his Application Forms, in violation of N.J.S.A. 17B:25-37(d)(1); N.J.S.A. 17B:25-42(a); N.J.S.A. 17B:30-1 to -59; N.J.A.C. 11:4-59.3 and 59.5; and,

Count Eight: Respondents made misrepresentations on the Application Forms and provided a false certification in the submission of the Application Forms; made misrepresentations on the Suitability Forms related to JS's financial status; made misrepresentations on the September 24, 2012 Submission related to JS's financial status; made misrepresentations regarding the issuance dates of the Pruco annuity contracts and the surrender fees paid; and forged JS's signature on the Suitability Forms, in violation of N.J.S.A. 17:33A-4(a)(4)(b) (five violations).

On August 1, 2017, Michael Tepedino ("M. Tepedino")[3] on behalf of MTS, pro se, filed an Answer to the AOTSC in the form of an email, wherein he denied having any specific knowledge of the allegations made and requested removal from these proceedings. On August 26, 2017, Tepedino, also pro se, filed an Answer to the AOTSC in the form of a letter, wherein he denied the allegations. The Department transmitted the matter as a contested case to the Office of Administrative Law ("OAL") pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23.

On November 1, 2017, Christopher Gillin-Schwartz, Esq. ("Gillian-Schwartz") of Barry, Corrado, Grassi & Gillin-Schwartz, P.C. filed a letter of representation on behalf of MTS. Tepedino continued pro se.

On July 25, 2018, the ALJ issued an Order to Sever Tepedino because he failed to participate in a dial-in phone conference on July 23, 2018. By letter dated August 5, 2018, Tepedino requested interlocutory review of this Order. On August 21, 2018, the Commissioner granted Tepedino's request for interlocutory review and permitted the parties to supplement their motion submissions. On August 29, 2018, the Department filed a submission stating that it did

[3] M. Tepedino is the owner of MTS and the father of A. Tepedino. PSD at 4.

not object to Tepedino's application to participate in this matter. On September 4, 2018, the Commissioner issued Order No. A18-107, which granted Tepedino's request for interlocutory relief and rejoined Tepedino as a party to participate in the proceedings before the OAL.

On October 5, 2018, the Department, represented by Deputy Attorney General Jeffery S. Posta ("DAG Posta"), filed a motion for summary decision on all counts in the AOTSC, claiming that no genuine issue of material fact remained in dispute. On November 15, 2018, MTS filed its opposition to the Department's motion, a cross-motion for summary decision in its favor and requested oral argument. On November 19, 2018, Tepedino filed a letter stating his opposition to all charges brought against him and requested a dismissal on the grounds that the statute of limitations had passed. Given the absence of factual and legal grounds for Tepedino's arguments, the ALJ requested a supplemental brief from Tepedino by November 27, 2018. On December 21, 2018, the Department filed a reply in support of its motion for summary decision and its opposition to MTS's cross-motion for summary decision. On December 24, 2018, Tepedino filed his supplemental brief. On January 8, 2019, MTS filed a reply to the Department's opposition to its cross-motion for summary decision. Oral arguments were scheduled on February 20, 2019. On February 14, 2019, Tepedino submitted a request to appear at oral argument by telephone, as his new job made it difficult for him to appear in person. The ALJ granted Tepedino's request and all parties were directed to participate by phone. Simultaneously, Tepedino requested an adjournment on the grounds that he needed additional time to prepare his defense and obtain counsel. During the February 20, 2019 telephone call, Tepedino informed the parties that he planned to continue without counsel and withdrew his motion to adjourn. The ALJ rescheduled and heard the matter on April 12, 2019, wherein Tepedino gave sworn testimony by telephone. On May 10, 2019, the ALJ requested that the Department submit an allocation of the penalties sought from the

Respondents. By letter dated May 17, 2019, the Department provided the ALJ with the requested information.

On May 23, 2019, the ALJ issued the PSD, wherein the ALJ found for the Department on Counts One, Two, Three, Five, Six, and four of the five violations alleged in Count Eight of the AOTSC. The ALJ concluded that Tepedino's insurance producer license should be revoked and recommended that the Respondents should be assessed the following: civil monetary penalties as requested by the Department in the total amount of $25,000; a statutory surcharge of $1,000 pursuant to the Fraud Act; and attorneys' fees and costs of investigation and prosecution in the amount of $27,400.

On June 28, 2019, the Department withdrew Counts Four, Seven, and the outstanding violation remaining under Count Eight of the AOTSC. On July 1, 2019, the ALJ issued the Initial Decision, which concluded that considering the withdrawal of Counts Four, Seven, and the outstanding violation remaining under Count Eight of the AOTSC, no disputed matters of material fact remained. The record was closed on June 28, 2019. On July 1, 2019, the ALJ incorporated the PSD into the Initial Decision and affirmed the imposition of monetary penalties and fines against the Respondents set forth in the PSD.

On July 2, 2019, MTS submitted Exceptions to the Initial Decision. On July 9, 2019, the Department submitted Exceptions. Tepedino did not submit any Exceptions to the ALJ's Initial Decision. Reply Exceptions were not submitted.

ALJ'S FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS

Summary Decision Standard

The ALJ noted that pursuant to N.J.A.C. 1:1-12.5(b) a motion for summary decision requires analysis of whether "the papers and discovery which have been filed, together with

affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." PSD at 16. Further, the ALJ noted that a motion for summary decision may only be granted where the moving party sustains the burden of proving "the absence of a genuine issue of material fact," and that all inferences of doubt are drawn against the movant. Id. at 15 (citing Judson v. Peoples Bank & Trust Co., 17 N.J. 67 (1954)). In making this determination, a judge must review the proffered evidence guided by the applicable evidentiary standard of proof that would apply at trial on the merits to determine whether to grant the motion. Id. at 15.

In light of this standard, the ALJ issued a Partial Summary Decision on May 23, 2019, wherein the ALJ found the Department prevailed as a matter of law on Counts One, Two, Three, Five, Six, and several violations alleged in Count Eight of the AOTSC. Id. at 16. As to Counts Four, Seven, and the allegation of forgery, in violation of N.J.S.A. 17:33A-4(a)(4)(b), in Count Eight, the ALJ found that the Respondents presented a dispute with respect to the material facts at issue. Ibid.

Findings of Fact Relevant to All Counts

The ALJ found the following relevant facts in her grant of summary decision. Tepedino is the son of M. Tepedino. Id. at 4. M. Tepedino is the principal of MTS. Ibid. Prior to and at the time of the incident in 2012, Tepedino was employed by MTS and was licensed as a resident individual insurance producer in the State of New Jersey. Id. at 4, 5. In 2012, Tepedino and MTS did not have an employment contract in place. Id. at 4. MTS was then, and is currently, licensed as a resident business entity insurance producer in the State of New Jersey. Ibid.

For the duration of his employment at MTS, Tepedino had an office within MTS's offices, where he routinely used the MTS bank account, telephone, reception staff, letterhead, mailing

address, and fax machine to conduct business. Ibid. While employed at MTS, Tepedino sold property and casualty products, which were the primary business of MTS. Ibid. While employed at MTS in 2006, Tepedino also began selling annuity products. Id. at 4-5.

From January 6, 2009 through May 30, 2011, MTS contracted with Midland to sell annuity products. Id. at 5. The ALJ found that other than Tepedino, no other MTS employee sold Midland annuities under the contract between MTS and Midland. Ibid. During this time, the sale of Midland products by Tepedino was governed by the contract between MTS and Midland. Ibid.

From May 31, 2011 through January 24, 2013, Tepedino contracted directly with Midland. Ibid. The ALJ found that neither Tepedino nor MTS was able to provide an adequate explanation as to what changed when Tepedino and Midland began to contract directly. Id. at 22. Tepedino stated that he kept his annuity business, including clients and files, separated from his MTS work product. Id. at 5. However, the ALJ found that Tepedino was unable to provide any evidence of this separation. Id. at 22. Moreover, the ALJ found that upon signing a contract directly with Midland, Tepedino continued to correspond with Midland using MTS letterhead, fax machines and fax numbers; and that Midland sent correspondence to Tepedino at MTS's address. Ibid.

All counts of the AOTSC relate to the Respondents' dealings with a client, JS. The ALJ found that prior to September 25, 2012, Tepedino met with JS to discuss financial matters. Id. at 5. At the time, JS was 81 years old and owned Pruco annuities. Ibid. The ALJ found that when Tepedino solicited JS to purchase Midland products, Tepedino used resources at the MTS office, specifically the MTS fax machine and reference number,[4] to submit both the September 18, 2012

[4] "Reference number" appears to refer to the "Sender's Reference Number" which appears on the fax cover letter submitted by Tepedino to Midland. October 5, 2018 Certification of Eugene Shannon ("October 2018 Shannon Cert.") Ex. B, P031, P032. Tepedino uses the reference number "IHEO" which also appears to be his agent identification number to correspond with Midland. He used this number on MTS fax transmission sheets. Id. at Ex. A, P012, P016, P020, P024.

Suitability Forms and the September 25, 2012 Application Forms on related to Midland. Id. at 5, 6.

On December 20, 2012, JS filed a complaint with the Department regarding Tepedino's sale of Midland Annuity Policy 7804 and Annuity Policy 7805. Id. at 8. On that same day, the Department sent a copy of JS's complaint to Midland. Ibid. Midland forwarded this complaint to Tepedino. Ibid. On January 25, 2013, Midland terminated Tepedino's contract for cause. Ibid. Midland rescinded its annuity contracts with JS, returned all premiums received to Pruco and paid the additional costs associated with the reinstatement of JS's Pruco contracts, in the amount of $15,853.71. Ibid.

The ALJ found that Midland paid Tepedino a commission of $56,419.21 for the sale of Annuity Policy 7804 and $7,070.81 for the sale of Annuity Policy 7805. Ibid. Midland did not require Tepedino to return these commissions. Ibid. M. Tepedino stated that MTS did not share in the commissions paid by Midland to Tepedino and was unaware of Tepedino's dealings with Midland and JS until he was notified of the complaint JS filed with the Department. Ibid.

The ALJ found that while N.J.A.C. 11:17-2.10(b) does not require an employment contract between insurance agencies and individual producer employees, if an employment contract is in place, the parties may specify whether the employment agreement includes some or all of the "license authorities of the parties." Id. at 20-21. The ALJ found that Tepedino and MTS did not have any type of employment contract in place in 2012, including any contract that covered the business Tepedino conducted with Midland. Id. at 21.

The ALJ further determined that MTS's argument that the type of insurance products sold by Tepedino were outside the scope of MTS's business practices was without merit. Ibid. The ALJ noted that Midland products had been sold by MTS when Midland and MTS had a contract

in place, for a period of at least five years. Id. at 22. Therefore, the ALJ found that MTS did sell annuity products and its business was not limited to only property and casualty products as asserted. Ibid. Based on the foregoing, the ALJ found that MTS is vicariously liable for Tepedino's conduct. Ibid.

Count One

Regarding Count One of the AOTSC, based on Tepedino's testimony, the ALJ found that Tepedino represented to JS that the Midland annuities he was offering were exactly what JS wanted when JS expressed dissatisfaction with the Pruco annuities he was then holding. Id. at 23. The ALJ found that at the time of their meeting, Tepedino had been selling Midland products for approximately six years and Tepedino knew or should have known that the Midland annuities he was offering JS were not available to his client, if for no other reason than his age. Id. at 15. Further, the ALJ noted that while Tepedino testified that he knew that the Pruco annuities were not appropriate for JS due to his age, he failed to inform JS of this fact. Id. at 23. The ALJ found that regardless of whether JS was complicit, as Tepedino suggests, Tepedino induced JS to purchase an insurance product for which he was not eligible. Ibid.

The ALJ held that, based on these facts, the Department had proven by a preponderance of the credible evidence presented that the Respondents made misleading representations and/or incomplete or fraudulent comparisons regarding Pruco and Midland annuities to induce JS to surrender his Pruco annuities and purchase the Midland annuities, in violation of N.J.S.A. 17:22A-40(a)(2) (prohibits the violation of an insurance law), (5) (prohibits intentionally misrepresenting the terms of an insurance contract, policy, or application for insurance), and (7) (prohibits unfair

trade practice or fraud). The ALJ held that the Respondents' conduct is also in violation of N.J.A.C. 11:17A-2.8 and N.J.S.A. 17B:30-6 (prohibits "twisting"[5]). Id. at 23.

Count Two & Count Eight (Paragraph One)[6]

Regarding Count Two and paragraph one of Count Eight of the AOTSC, the ALJ found as fact that on or about September 25, 2012, Tepedino submitted Application Forms, dated September 18, 2012, to Midland for JS, that contained several incorrect and false statements. Id. at 6. Furthermore, the ALJ found that on October 2, 2012 and October 7, 2012, Tepedino faxed amendments to the Application Forms to Midland that also contained incorrect and false statements. Id. at 7. The ALJ found as fact that all Application Forms submitted contained false information, including the following: social security numbers, street addresses, phone numbers and birthdates; statements regarding the funding sources for the purchase of the annuities; and, statements regarding existing life insurance and annuities. Id. at 6. In addition Tepedino signed certifications attesting to false statements regarding JS's existing life insurance and annuity contracts; and that Tepedino had "determined that all the questions are answered fully, completely, and accurately as supplied by the applicant." Id. at 6-7. In addition, the ALJ noted Tepedino's testimony that he knew JS owned Pruco annuities at the time of these transmissions but failed to disclose this information on the forms submitted to Midland. Id. at 23. Furthermore, the ALJ

[5] N.J.A.C. 11:17A-2.8 and N.J.S.A. 17B:30-6 prohibit "twisting", that is, no insurance producer shall make any misleading representations or incomplete or fraudulent comparisons of any insurance policies or annuity contracts or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, or convert any insurance policy or annuity contract, or to take out a policy of insurance or annuity contract with another insurer.

[6] Count Eight of the AOTSC alleges Fraud Act violations concerning the same conduct as alleged in Counts Two, Three, Four, Five, and Six of the AOTSC. Because the same facts are the basis of the alleged violations in those Counts, the relevant paragraph in Count Eight is included and discussed with the relevant Count of the AOTSC.

found that had Midland been aware of JS's actual age and financial situation at the time of his application, Midland would not have issued the annuity contracts. Id. at 8.

The ALJ held that, based on these facts, the Department had proven by a preponderance of the credible evidence presented that the Respondents made misrepresentations on the Application Forms submitted to Midland, in violation of N.J.S.A. 17:22A-40(a)(2) (prohibits the violation of any insurance law), (7) (prohibits unfair trade practices or fraud), (8) (prohibits fraudulent or dishonest practices, untrustworthiness or financial irresponsibility) and (16) (prohibits the commission of a fraudulent act). Further, the ALJ held that these same misrepresentations constitute the intentional incorrect recording of an action on an application for insurance, in violation of N.J.S.A. 17:22A-40(a)(5) and N.J.A.C. 11:4-2.8(a)(3) and are a violation of insurance laws pursuant to N.J.S.A. 17:22A-40(a)(2) (Count Two). Id. at 24. In addition, the ALJ found that the Respondents' conduct was in violation of N.J.S.A. 17:33A-4(a)(4)(b) (prohibits making any statement to an insurance company knowing the statement contains false or misleading information concerning material facts on an insurance application or contract) (Count Eight, Paragraph One). Id. at 29.

Count Three & Count Eight (Paragraph Two)

Regarding Count Three and paragraph two of Count Eight, the ALJ found as fact that on or about September 25, 2012, Tepedino submitted JS's Suitability Forms dated September 18, 2012, to Midland. Id. at 5. These forms included several incorrect statements relating to JS's financial situation. Ibid. Furthermore, the ALJ found as fact that Tepedino certified that he had reasonable ground to believe the annuities were suitable for JS and would maintain records of the information provided by JS on which his recommendation was based. Id. at 6. The incorrect statements made by Tepedino on the Suitability Forms submitted for JS include: monthly

household income of $100,000; monthly household expenses of $10,000; monthly disposable income of $90,000; total household net worth was $11,980,000[7], broken down as follows: stocks and bonds valued at $1,000,000, annuities valued at $2,000,000, mutual funds valued at $1,000,000, CDs valued at $1,000,000, money market accounts valued at $3,000,000, checking and savings accounts valued at $1,000,000, pension accounts and a 401(k) valued at $3,000,000, real estate valued at $1,000,000 in non-liquid assets, and household liabilities at $120,000. Id. at 5-6. The ALJ noted that although it is unclear whether JS was complicit in the fabrication of his financial information, as Tepedino suggests, Tepedino certified to statements on the Suitability Forms that he knew or should have known were fraudulent. Id. at 14. Further, the ALJ found that despite Tepedino's knowledge of the compliance process typically conducted by insurance and annuity companies, Tepedino filed JS's Suitability Forms without obtaining, reviewing, and/or maintaining copies of documents to support the statements made on those forms. Ibid. Further, Tepedino certified that he had "viewed and verified" the information. Id. at 14.

The ALJ held that, based on these facts, the Department had proven by a preponderance of the credible evidence presented that the Respondents made misrepresentations related to JS's financial situation on the Suitability Forms submitted to Midland, in violation of N.J.S.A. 17:22A-40(a)(2), (prohibits the violation of any insurance law), (5) (prohibits intentionally misrepresenting the terms of application for insurance), (8) (prohibits fraudulent or dishonest practices, untrustworthiness or financial irresponsibility), and (16) (prohibits the commission of a fraudulent act). The ALJ held that the Respondents' conduct is also in violation of N.J.A.C. 11:4-2.8(a)(3)

[7] The ALJ notes that the sum of JS's liquid assets, as provided on both Suitability Forms, actually amounted to $13,000,000. Therefore, JS's net worth should have totaled $12,880,000. PSD at 6, fn. 4.

and N.J.S.A. 17B:30-6[8] (prohibits the intentional incorrect recording of an answer) (Count Three). Id. at 26. Lastly, the ALJ found that the Respondents' conduct related to the Suitability Forms submitted on behalf of JS was in violation of N.J.S.A. 17:33A-4(a)(4)(b) (prohibits making any statement to an insurance company knowing the statement contains false or misleading information concerning material facts on an insurance application or contract) (Count Eight, Paragraph Two). Id. at 29.

Count Four and Count Eight (Paragraph Three)

Count Four alleges that the Respondents forged the signature of JS on the Suitability Forms, in violation of N.J.S.A. 17:22A-40(a)(2) (prohibits the violation of any insurance law) and (10) (prohibits forgery on an any document related to an insurance transaction). Id. at 24. Paragraph three of Count Eight of the AOTSC alleges that this conduct is also in violation of N.J.S.A. 17:33A-4(a)(4)(b) (prohibits making any statement to an insurance company knowing the statement contains false or misleading information concerning material facts on an insurance application or contract).

The ALJ found as fact that the Suitability Forms submitted by Tepedino showed the signature of JS as "Applicant/Owner." Id. at 6. On January 21, 2013, JS executed a Forgery Affidavit stating that he did not sign the Suitability Forms submitted by Tepedino and that any signature appearing on the forms submitted was not his. Ibid. The ALJ found that genuine issues of material fact remain as to whether Tepedino forged JS's signature on the Suitability Forms. Id. at 25. In addition, the ALJ held that additional evidence, namely the testimony of a handwriting expert who has compared the signature on the Suitability Forms to JS's signature from about 2012,

[8] N.J.A.C. 11:4-2.8(a) provides that any violation of N.J.A.C. 11:4-2 constitutes a violation of N.J.S.A. 17B:30-6.

was essential to resolve the violations alleged under Count Four of the AOTSC, as a dispute exists as to this material fact and JS is not available to testify. Ibid. As the question of who signed the Suitability Forms remained a genuine issue of material fact requiring additional evidence, the ALJ declined to grant summary decision as it relates to paragraph three of Count Eight, which is related to this conduct. Id. at 28.

Count Five and Count Eight (Paragraph Four)

Regarding Count Five and paragraph four of Count Eight of the AOTSC, the ALJ found as fact that on September 24, 2012, Tepedino contacted Midland to correct information provided on the Suitability Forms, stating that JS's driver's license and birth month were incorrect. Id. at 7. The ALJ found that Tepedino was instructed to submit a Revised Suitability Form. Ibid. The ALJ found that Tepedino faxed a Revised Suitability Form to Midland containing false financial information. Ibid. The ALJ found that the Respondents were familiar with Midland's compliance process and the need to verify all personal and financial information with supporting documentation, yet failed to obtain, review and maintain such documentation. Id. at 9. The ALJ found that, alternatively, Tepedino reviewed the documentation and chose to provide incorrect information to ensure JS's eligibility for the Midland products. Id. at 14. The ALJ found that it is impossible to reconcile Tepedino's testimony that he believed JS was in financial straits while simultaneously maintaining that JS had assets of close to $12 million and a monthly income of more than $100,000, in 2012, as Tepedino certified on the Revised Suitability Form. Ibid.

The ALJ held that, based on these facts, the Department had proven by a preponderance of the credible evidence presented that the Respondents made misrepresentations related to JS's financial situation on the Revised Suitability Forms submitted to Midland, in violation of N.J.S.A. 17:22A-40(a)(2), (prohibits the violation of any insurance law), (5) (prohibits the intentional

misrepresentation of the terms of application for insurance), (8) (prohibits fraudulent or dishonest practices, untrustworthiness or financial irresponsibility), and (16) (prohibits the commission of a fraudulent act). The ALJ held that the Respondents' conduct is also in violation of N.J.A.C. 11:4-2.8(a)(3) and N.J.S.A. 17B:30-6[9] (prohibits the intentional incorrect recording of an answer) (Count Five). Id. at 26. Lastly, the ALJ found that the Respondents' conduct related to the Suitability Forms submitted on behalf of JS was in violation of N.J.S.A. 17:33A-4(a)(4)(b) (prohibits making any statement to an insurance company knowing the statement contains false or misleading information concerning material facts on an insurance application or contract) (Count Eight, Paragraph Four). Id. at 29.

Count Six and Count Eight (Paragraph Five)

Regarding Count Six and paragraph five of Count Eight, the ALJ found as fact that on September 26, 2012, during a recorded telephone call, Tepedino was advised by Midland that he needed to revise both sets of submitted Application Forms to show that JS's purchase of Midland annuities was being funded by the surrender of his Pruco annuities. Id. at 7. The ALJ found that during this call, Tepedino falsely stated that there were no surrender charges associated with JS's Pruco annuities. Ibid. The ALJ found that Tepedino knew that JS would incur surrender charges on his Pruco annuities and that the funds JS received when he surrendered those annuities would be used to purchase the Midland annuities. Id. at 14. The ALJ also found that Tepedino knew JS had purchased the Pruco annuities in 2011, not in 1995, as he had represented to Midland. Ibid. The ALJ found that despite this knowledge, Tepedino submitted both the Application and Suitability Forms to Midland, on which this information was not disclosed and was misrepresented, and then certified to its accuracy. Id. at 14-15. Furthermore, the ALJ found that

[9] See p. 14, fn. 8.

Midland discovered that JS's Pruco annuities were only one year old, rather than 17 years old as represented on the forms provided by Tepedino, were variable in nature, and incurred charges on surrender, after a telephone exchange between JS and a Senior Compliance Associate at Midland. Id. at 7. The ALJ found that Midland would have declined to issue annuity contracts to JS had accurate information been supplied regarding his age and financial condition. Id. at 27. Specifically, Midland stated that had JS's birthday been listed on the Application Forms provided, his application would have been declined immediately as JS's age exceeds the maximum age for which the ordered products are available for sale in New Jersey. Id. at 8.

The ALJ held that, based on these facts, the Department had proven by a preponderance of the credible evidence presented that the Respondents made misrepresentations regarding the issuance date of JS's Pruco annuity contracts and the size of the surrender charges paid in connection with the surrender of those contracts to Midland, in violation of N.J.S.A. 17:22A-40(a)(2), (prohibits the violation of any insurance law), (5) (prohibits the intentional misrepresentation of the terms of application for insurance), (8) (prohibits fraudulent or dishonest practices, untrustworthiness or financial irresponsibility), and (16) (prohibits the commission of a fraudulent act). The ALJ held that the Respondents' conduct is also in violation of N.J.A.C. 11:4-2.8(a)(3) and N.J.S.A. 17B:30-6[10] (prohibits the intentional incorrect recording of an answer) (Count Six). Id. at 26. Lastly, the ALJ found that the Respondents' conduct related to the Suitability Forms submitted on behalf of JS was in violation of N.J.S.A. 17:33A-4(a)(4)(b) (prohibits making any statement to an insurance company knowing the statement contains false or misleading information concerning material facts on an insurance application or contract) (Count Eight, Paragraph Five). Id. at 29.

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[10] See p. 14, fn. 8.

Count Seven

Count Seven alleges that the Respondents did not provide JS with a buyer's guide within five business days of the receipt of his applications, in violation of N.J.S.A. 17B:25-37(d)(1) and N.J.A.C. 11:4-59.3 (an insurance producer must provide a consumer who applies for an annuity a copy of the buyer's guide no later than five business days after receipt of the application). In addition, Count Seven alleges the Respondents violated N.J.S.A. 17B:25-42(a) (violations of the Indexed Standard Nonforfeiture Law for Individual Deferred Annuities Act shall be a violation of N.J.S.A. 17B:30-1 to -59, which prohibits unfair methods of competition and unfair or deceptive acts or practices in the business of insurance), and N.J.A.C. 11:4-59.5 (failure to comply with the disclosure requirements of annuities for annuities directly solicited to consumers may result in the imposition of penalties) (Count Seven). Id. at 26.

The ALJ found that genuine issues of material fact remain as to whether the Respondents provided JS with the buyer's guide, noting that Tepedino has maintained that he had provided JS with all required documentation and that there is no specific allegation from JS regarding his failure to receive a buyer's guide within five business days of Midland's receipt of his Application Forms in the complaint filed with the Department. Id. at 15. In conclusion, the ALJ found that additional evidence, such as witness testimony and/or documentary evidence would be necessary to resolve this dispute as to this material fact. Id. at 16.

Penalties Recommended by the ALJ

As to the appropriate penalty, the ALJ noted that an administrative agency has broad discretion in determining the sanctions to be imposed for a violation of the legislation it is charged with administering. Id. at 29 (citing In re Scioscia, 219 N.J. Super. 644, 660 (App. Div. 1987)). The ALJ noted that precedent is clear that revocation may be necessary to protect the public from

untrustworthy or fraudulent behavior on the part of New Jersey insurance producers. Id. at 30. The ALJ stated that because the Department has shown by a preponderance of credible evidence that Tepedino violated the laws established to protect the public to the detriment of a vulnerable, elderly client, the revocation of Tepedino's insurance producer license is appropriate.[11] Id. at 31.

As to the appropriate monetary penalty, the ALJ noted that the Commissioner may levy penalties against any person violating the Producer Act, including the costs of the investigation and prosecution. N.J.S.A. 17:22A-45(c). In addition, the ALJ noted that the Commissioner may levy penalties against any person violating the Fraud Act, including the attorneys' fees and a $1,000 statutory surcharge. N.J.S.A. 17:33A-5(c), N.J.S.A. 17:33A-5.1.

The ALJ applied the factors for determining monetary penalties set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Id. at 32. These factors include: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Ibid.

As to the first factor in Kimmelman, the good or bad faith of the respondents, the ALJ found that Tepedino's bad faith was evidenced by his choice a victim, an elderly, vulnerable man who was facing financial problems. Ibid. The ALJ found further evidence of Tepedino's bad faith in Tepedino's misrepresentation of several material facts related to JS's age and financial situation to Midland to induce the sale of annuity products to JS when he was not eligible. Id. at 32-33. The ALJ noted that either Tepedino did not review documentary proof of the statements made in the Application and Suitability Forms or ignored documents provided that demonstrated these

[11] The ALJ noted that Tepedino is currently unlicensed but will be eligible to apply for reinstatement five years after the date of revocation, in accordance with N.J.A.C. 11:17D-2.7. PSD at 31.

statements were false but certified to the accuracy of the statements in either situation. Id. at 33. Lastly, the ALJ found Tepedino's statement that "had JS just kept his mouth shut, no one would ever have known" and that Tepedino did not "do something truly illegal" to be demonstrative of Tepedino's bad faith. Ibid. As it relates to the good or bad faith of MTS, the ALJ stated that the absence of knowledge on the part of MTS is a factor for consideration. Ibid. The ALJ contrasts MTS's lack of knowledge with MTS's failure to manage and supervise the actions of Tepedino, its employee. Ibid. The ALJ noted that MTS did nothing to ensure that a reasonable consumer would understand that Tepedino was selling Midland products independently. Ibid. The ALJ concluded that Tepedino's actions and MTS's inaction weigh in favor of a monetary penalty. Ibid.

As to the second factor in Kimmelman, the ability to pay, the ALJ noted that although neither Tepedino nor MTS introduced specific evidence regarding their ability or inability to pay penalties assessed, large fines may be imposed even when respondents argue that they are unable to pay. Id. at 33 (citing Commissioner v. Malek, OAL Dkt. Nos. BKI 04520-05 and BKI 0486-05, Initial Decision (12/06/05), Final Decision (01/18/06)). The ALJ noted MTS's argument that it should not be responsible for any portion of the penalty, stating that MTS is only being included for its ability to pay and not its complicity in the behavior alleged. The ALJ concluded that this factor weighs in favor of a monetary penalty as to both Respondents. Id. at 33.

As to the third factor, the profits obtained, the ALJ found that $63,490.02 in commission was generated by the conduct at issue, none of which was returned to Midland. Id. at 34. The ALJ noted that this factor weighs in favor of a monetary penalty to be imposed on Tepedino. The ALJ also noted that as MTS did not share in this commission, this factor weighs against the imposition of a monetary penalty imposed on MTS. Ibid.

As to the fourth factor, injury to the public, the ALJ noted that 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. Id. at 34 (citing Commissioner v. Andrade, OAL Dkt. No. BKI 09148-19, Initial Decision (01/24/19), Final Decision and Order (04/04/19)). The ALJ found injury to the public in the instant matter resulting from Tepedino's conduct, noting that although JS was made whole by Midland, Midland incurred costs to replace JS's Pruco contracts. Id. at 34. In addition, as it relates to MTS, the ALJ states that while MTS argues that it should not be penalized for the actions of an agent who was working with Midland independently, despite all outward appearances of being an employee of MTS, this argument fails to recognize that deterrence only occurs if MTS is penalized for the actions of its employees. Ibid. The ALJ concluded that the need to maintain public faith in insurance providers weighs in favor of penalizing both Tepedino and MTS for their actions. Ibid.

Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that the illegal activity at issue in the instant matter took place from September 2012 to December 2012, when JS filed his complaint with the Department. Ibid. The ALJ points out that while this is a relatively short duration, Tepedino admitted that his conduct would never have been discovered but for JS's December complaint. Ibid. The ALJ concluded that this weighs in favor of penalizing the Respondents for their conduct. Ibid.

Regarding the sixth factor, the existence of criminal charges related to the matter, the ALJ found that as neither Respondent has been charged with violations of criminal statutes or assessed other penalties related to this matter, this factor weighs in favor of a monetary penalty. Id. at 35.

The ALJ addresses both Tepedino and MTS as it relates to the final factor in Kimmelman, previous relevant regulatory and statutory violations. The ALJ noted Tepedino's statement that

he has been licensed as an insurance producer for 17 years without a complaint being filed against his license. Ibid. The ALJ concluded that there was no evidence of earlier violations by either Tepedino or MTS. Thus, this factor weighs against a monetary penalty. Ibid.

Based upon those factors, the ALJ recommended the following civil monetary penalties as requested by the Department: $2,500 for the submission of the Application and Suitability Forms for Midland Policy No. 7804 for Producer Act violations found under Counts Two and Three and $2,500 for the related Fraud Act violations found under Count Eight; $5,000 for the submission of Application and Suitability Forms for Midland Policy No. 7805 for Producer Act violations found under Counts Two and Three and $5,000 for the related Fraud Act violations found under Count Eight; $5,000 for the submission of Revised Application and Amended Suitability Forms for Midland Policy No. 7804 and 7805 for Producer Act violations found under Counts Five and Six and $5,000 for the related Fraud Act violations found under Count Eight; a $1,000 statutory surcharge permitted under the Fraud Act; reimbursement of attorneys' fees in the amount of $25,000; and reimbursement for the costs of the investigation and prosecution in the amount of $2,400. Id. at 29.

The ALJ found that the Respondents are jointly and severally liable for all the monetary penalties. Id. at 30. The ALJ noted that the imposition of a monetary penalty provides a powerful deterrent to both Respondents Tepedino and MTS. Id. at 31. In addition, the ALJ noted MTS's argument, that M. Tepedino had no knowledge of Tepedino's dealings with Midland or JS and therefore, should not be held liable. Ibid. The ALJ found that this argument underscores the absence of effective oversight by MTS of its employee. Ibid. The ALJ ordered that the Respondents be jointly and severally liable for payment of all fines and fees. Id. at 36.

EXCEPTIONS

By letter dated July 2, 2019, MTS, through counsel, Gillian-Schwartz, filed timely Exceptions to the Initial Decision ("MTS's Exceptions"). By letter dated July 9, 2019, the Department, through counsel, DAG Posta, filed timely Exceptions to the Initial Decision ("Department's Exceptions"). Tepedino did not file Exceptions to the Initial Decision. Neither Tepedino, MTS nor the Department submitted any Reply to the Exceptions.

MTS's Exceptions to the Initial Decision

In its Exceptions, MTS asserts three arguments: 1) the amount of monetary penalties against MTS is excessive; 2) there is no basis in law for the attorneys' fees and costs award; and 3) there are genuine issues of material fact regarding vicarious liability against MTS.

1) The Amount of Monetary Penalties Against MTS

First, MTS argues that the ALJ's imposition of penalties ordered, to be paid jointly and severally by the Respondents, is excessive as it relates to MTS. MTS's Exceptions at 3. MTS maintains that the ALJ's application of the factors delineated in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123 (1987), to be considered in assessing the imposition of civil penalties was improper for the following reasons: the ALJ did not make a finding of bad faith as it relates to the conduct of MTS, MTS's perceived ability to pay was given undue weight by the ALJ, proper weight was not given to MTS's lack of profit from Tepedino's illegal activity, the ALJ failed to distinguish between MTS and Tepedino as it relates to injury to the public, the ALJ failed to address the duration of the conduct at issue as it relates to MTS, and that the lack of prior criminal proceedings may only be considered an aggravating factor when evidence or allegations of criminal activity could be prosecuted under criminal statutes, however, is only subjected to civil penalties. Id. at 3-5. MTS argues that because there is no evidence or allegation of knowledge on

the part of MTS, civil penalties are not a lesser alternative to criminal prosecution in its case and, as such, this factor should not be an aggravating factor against MTS. Ibid. MTS notes that the ALJ came to the correct conclusion as it relates to the seventh Kimmelman factor, that the lack of any prior statutory or regulatory violations as it relates to the business of insurance was a mitigating factor as to both of the Respondents. Id. at 5. MTS argues that this matter requires the application of aggravating and mitigating factors set forth in Kimmelman to each respondent separately, pursuant to Commissioner v. Goncalves, OAL Dk. No. BKI 03301-05, Initial Decision (11/17/15), Final Decision (02/15/06). Ibid. MTS requests that the Commissioner reject the penalties recommended in the Initial Decision and that modifications be made in accordance with Goncalves. Ibid.

2) Attorneys' Fees and Costs

MTS also argues is that there is no basis in the law for the fee award granted by the ALJ. Id. at 6. MTS relies on Rendine v. Pantzer, 141 N.J. 292, 322 (1995), wherein the Court held that in the limited cases where fee-shifting is permitted, the reasonableness of the fees assessed should be determined in accordance with the Rules of Professional Conduct and a lodestar analysis, noting that the analysis requires that billable hours be described in sufficient detail to ascertain the labor involved in the matter. Ibid. Here, MTS argues that the attorneys' fees and costs awarded by the ALJ is not appropriate because the Initial Decision lacks any discussion as it relates to the reasonableness of the fees imposed. Id. at 7. Further, MTS indicates that the records provided by DAG Posta and Investigator Eugene Shannon are incomplete, and therefore, insufficient, pursuant to Rendine. Ibid. MTS requests that the award be rejected on these grounds. Ibid.

3) Vicarious Liability of MTS

Lastly, MTS argues that there are genuine issues of material fact regarding the vicarious liability of MTS that remain, arguing that while MTS does not dispute the conduct of Tepedino, MTS disputes whether Tepedino's actions were taken within the scope of his employment with MTS. Ibid. MTS argues that as Tepedino had an independent contract with Midland, Tepedino was selling products outside those customarily offered by MTS and that the conduct at issue occurred outside the supervision and control of MTS. Thus, MTS argues that the ALJ's summary determination of liability against MTS must be rejected. Id. at 7-8.

Department's Exceptions to the ALJ's Initial Decision

In its Exceptions, the Department requests only that the Initial Decision be amended to include language explicitly confirming that Tepedino's individual insurance producer license be revoked, as stated in the PSD. Department's Exceptions at 1-2.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in an Order to Show Cause 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). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

As noted by the ALJ, N.J.A.C. 1:1-12.5(b) provides the standard to determine whether summary decision should be granted in a contested case. Specifically, the provision states that a summary decision may be rendered "if the papers and discovery which have been filed, together

with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. The rule also provides that "when a motion for summary decision is made and supported, an adverse party, in order to prevail must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

In Brill v. Guardian Life Ins. Co. of America, the New Jersey Supreme Court clarified the summary judgment standard. The Court held that a determination as to whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The court said:

> The judge's function is not himself (herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. [citations omitted]. To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose.
>
> [Brill, 142 N.J. at 541].

Motions for summary judgment in civil actions are considered under R. 4:46-2. It provides that the motion sought shall be granted if the evidence adduced shows there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. R. 4:46-2(b). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. R. 4:46-2(c). The Brill Court noted that "by its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come

forward with evidence that creates a genuine issue as to any material fact challenged." Brill, 142 N.J. at 529.

The ALJ found that the Respondents failed to adduce evidence that creates a genuine issue as to any material fact challenged and that summary decision is appropriate as to all violations alleged in Count One; Count Two and the related violation alleged in paragraph one of Count Eight; Count Three and the related violation alleged in paragraph two of Count Eight; Count Five and the related violation alleged in paragraph four of Count Eight; and, Count Six and the related violation alleged in paragraph five of Count Eight of the AOTSC. I concur that summary decision is appropriate. Because the Department withdrew Count Four and the related violation alleged under Count Eight, and Count Seven of the AOTSC no outstanding issues remained and no in-person evidentiary hearing was required.

AOTSC – Allegations Against Respondent Tepedino

For the reasons set forth in the Initial Decision, I find that there exists no genuine issue of material fact challenged as it relates to Tepedino's conduct and I ADOPT the statutory and regulatory violations found by the ALJ under Counts One, Two, Three, Five, Six, and Eight in the PSD, which were incorporated by the Initial Decision.

In addition, I FIND Tepedino's conduct in violation of N.J.S.A. 17B:30-6, under Count Two. N.J.A.C. 1:1-6.2(a) provides that "[u]nless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." Above, the ALJ found the Respondents' conduct was in violation of N.J.A.C. 11:4-2.8(a)(3), which prohibits the intentional recording of an incorrect answer as it relates to annuity replacements. N.J.A.C. 11:4-2.8(a) provides that any violation of

N.J.A.C. 11:4-2 constitutes a violation of N.J.S.A. 17B:30-6. The Respondents were on notice as to the factual basis underlying Count Two of the AOTSC in this matter. Therefore, the allegations under Count Two of the AOTSC should be conformed to reflect the proofs and include a violation of N.J.A.C. 17B:30-6. As such, I MODIFY the pleadings to conform with the proofs and include a violation of N.J.S.A. 17B-30.6 under Count Two, and I FIND the Respondents' conduct in violation of said statute.

Next, in the proceedings before the ALJ, Tepedino argued that this matter should be dismissed because it was barred by the statute of limitations. December 2018 Tepedino Brief at 2. Tepedino relied on N.J.S.A. 2A:14-1, which he argued provides for a six-year statute of limitations governing this action. Ibid. The Initial Decision notes that even if Tepedino were correct regarding the applicable statute of limitations, all incidents involved in this matter took place in 2012 and the OTSC was filed approximately five years later, in July 2017, well within that six-year timeframe. PSD at 19, fn. 10. For further clarification, and as the ALJ properly notes, N.J.S.A. 2A:14-1 is not applicable to the actions in this matter.[12] Rather, these actions are contemplated by N.J.S.A. 2A:14-1.2, which relates to civil actions commenced by the State, providing that "except where a limitation provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action commence by the State shall be commenced within ten years next after the cause of action shall

[12] N.J.S.A. 2A:14-1 provides a six-year statute of limitations for the following: trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in 2A:14-2 and 2A:14-3, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants.

have accrued." See Cumberland Cty. Bd. of Chosen Freeholders v. Vitetta Grp., P.C., 431 N.J. Super. 596, 603 (App. Div. 2013) (N.J.S.A. 2A:14-1.2 "is a statute of limitations governing civil actions commenced by the State"). As this action seeks producer license revocation and statutory penalties for violations of the Producer Act and the Fraud Act, neither of which contain an express limitation provision, the statutory ten-year limitations period governs, pursuant to N.J.S.A. 2A:14-1.2. Furthermore, as it is undisputed that the conduct at issue in this matter took place in 2012 and the AOTSC was issued against Respondents in July 2017. Thus, the Department was well within the ten-year statute of limitations when the AOTSC was filed. Therefore, I FIND that Tepedino's argument that a six-year statute of limitations governs fails, that a ten-year statute of limitations applies, and that this action was brought in a timely manner.

AOTSC – Allegations Against Respondent MTS

For the reasons set forth above, and based on the summary decision standard, I find that there exists no genuine issue of material fact challenged as it relates to MTS's conduct and I ADOPT the statutory and regulatory violations found by the ALJ under Counts One, Two, Three, Five, Six, and Eight in the PSD, which were incorporated by the Initial Decision. In addition, as discussed above, I FIND MTS in violation of N.J.S.A. 17B:30-6, under Count Two. Further, I ADOPT the ALJ's finding that MTS is in violation of these statutory and regulatory regulations because MTS was vicariously liable for the conduct of Tepedino. PSD at 22.

In determining the liability of an insurance producer that employs another insurance producer, the regulations are clear: "An employer shall be responsible for the insurance-related conduct of an employee." N.J.A.C. 11:17-2.10(b)(4). Therefore, an employing producer is liable for the violations committed by their employee.

In this matter, it is undisputed that Tepedino was employed by MTS prior to and at the time of the sale of Midland annuity products to JS, to sell insurance products. PSD at 4. In addition, it is undisputed that Midland and MTS had a contract in place from January 6, 2009 to May 30, 2011 relating to the sale of annuity products, during which time Tepedino was the only MTS employee to sell said products. Id. at 5. Also undisputed is that on May 31, 2011, Midland and Tepedino signed a contract to do business, while Tepedino was employed at MTS. Id. at 5-6. The ALJ found that no evidence was presented to indicate any change of contractual relationship between MTS and Tepedino upon the commencement of Tepedino's May 31, 2011 contract with Midland. Id. at 22. In fact, the record substantiates Tepedino's continued employment with MTS while conducting business with Midland, as the documentary evidence submitted shows that after May 31, 2011, when Tepedino and Midland entered into a contract, Tepedino used (1) MTS's bank account as a pass through for Midland client funds; (2) MTS's fax machines and MTS's cover pages to transmit documentations to Midland for JS's Annuity Applications 7804 and 7505, dated September 25, 2012; (3) the MTS office address to correspond with Midland regarding JS's Annuity Applications, dated December 25, 2012; and, (4) MTS letterhead to communicate with Midland regarding JS's Annuity Applications 7804 and 7805, dated December 14, 2012. October 5, 2018 Certification of Eugene Shannon ("October 2018 Shannon Cert."), Ex. A-D. Considering the documentary evidence presented, no issue of genuine fact remains as to whether Tepedino was an employee of MTS.

It is also undisputed that the conduct at issue was "insurance-related" as the record reflects that Midland products had been sold by MTS when Midland and MTS had a contract in place, for a period of at least five years. PSD at 5. Therefore, MTS did, in fact, sell annuity contracts, and its business was not limited to only property and casualty products. Id. at 22. The argument that

the sale of those same annuity products by Tepedino is not "insurance-related conduct" is not supported by the facts. No genuine issue of fact remains related to this point.

Although N.J.A.C. 11:17-2.10(b)(4) is clear that MTS is liable for the conduct of Tepedino, the vicarious liability of MTS was addressed in Initial Decision and in the Exceptions submitted. In the Initial Decision, the ALJ found that MTS is liable for the same violations as Tepedino described above because vicarious liability exists between an employee and their employer. PSD at 22.

N.J.A.C. 11:17A-1.6(c) states that "licensed partners, officers, directors, and all owners with an ownership interest of 10 percent or more in the organization shall be held responsible for the insurance related conduct of the organizations licensee...and its employees", thus, imposing vicarious liability upon the insurance producer's organization and those with an ownership interest in it. Commissioner v. Prime Insurance Syndicate, 2006 N.J. AGEN LEXIS 509 (May 8, 2006). An employer has vicarious liability for the actions of their employee if, at the time of the occurrence, the employee was acting within the scope of their employment. Carter v. Reynolds, 175 N.J. 402 (2003). To make this determination, the courts have examined whether an employment relationship existed and whether the act occurred within the scope of employment. Ibid. As discussed above, it is clear that an employment relationship existed between Tepedino and MTS and that Tepedino's sale of annuity products to JS was within the scope of his employment at MTS. MTS does not dispute that they had a contract with Midland from 2009 to May 31, 2011. MTS''s Exceptions at 2. In addition, MTS does not provide any evidence of a change in their employment relationship with Tepedino once Tepedino contracted independently with MTS or an office policy, employment provision or other directive was in place directing their employees not to engage in the annuity business. The vicarious liability of a business entity for

the insurance related actions of its employee and agents is well established in Commissioner v. Goncalves, wherein an agency's vicarious liability for the violations of its employees arose not from their direct action, but from the action of its owners, licensees or employees that are legally attributable to it. OAL Dk. No. BKI 03301-05, Initial Decision (11/17/15), Final Decision (02/15/06). MTS argues that Tepedino had an independent contract with Midland when he solicited JS; therefore, MTS is not vicariously liable for his conduct. To bolster this argument, MTS asserts that this matter is distinguishable from Goncalves, where the agent-employee was working under the agency's license. MTS's Exceptions at 5 (citing Goncalves). The evidence presented clearly demonstrates that Tepedino was holding himself out as an employee of MTS when he conducted business with Midland on behalf of JS.

In addition, MTS argues that genuine issues of material fact remain as to whether the conduct occurred outside the supervision and control of MTS, therefore vicarious liability was not established. MTS's Exceptions at 2. This contention is not material to the determination of whether an employer is vicariously liable for the actions of their employee. Furthermore, as discussed above, an insurance agency's liability for the violations of its employees does not result from its direct action, "but from the actions of its owners, licensees or employees that are legally attributable to it." PSD at 21 (citing Goncalves). In Goncalves, while there was no evidence of the agency's and/or owners' bad faith, control or supervision of the agent whose conduct was at issue, however, they were still held liable for the statutory violations found. Ibid.

In conclusion, I concur with the ALJ that no genuine issue of material fact exists as it relates to this issue and FIND that MTS is vicariously liable for the conduct of Tepedino, its employee. In addition, I MODIFY the ALJ's findings and FIND that MTS is also liable for the actions of Tepedino pursuant to N.J.A.C. 11:17-2.10(b)(4).

PENALTY AGAINST RESPONDENTS

Revocation of Respondent Tepedino's Producer License

With respect to the appropriate action to take against Tepedino's insurance producer license, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of Tepedino's producer license. As such, I ADOPT the ALJ's recommendation that the Respondent Tepedino's insurance producer license be revoked.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry. 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 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, 2013 N.J. AGEN LEXIS 459 (March 18, 2013).

As set forth above, it is undisputed that Tepedino made several misleading, incomplete and fraudulent statements to JS, regarding annuity contracts, intended to induce JS to surrender his existing annuity contracts with Pruco to purchase annuity contracts with Midland. Pursuant to N.J.A.C. 11:17A-4.10, a licensed insurance producer acts in a fiduciary capacity. Acting in this fiduciary capacity, Tepedino had an obligation to have knowledge of the products he was selling and to correctly explain them to his client so that they could make educated and informed decisions. As the ALJ found, Tepedino had several years of experience at the time of this sale and should have known that JS's age would disqualify him from the Midland product that Tepedino induced him to purchase. PSD at 15. In addition, Tepedino also submitted the Application, Suitability Forms and Revised Suitability Forms on behalf of JS with an incorrect date of birth, address, phone numbers and financial status, to Midland, causing him to qualify for an annuity for which he otherwise would not have qualified. Furthermore, Tepedino made dishonest and fraudulent misrepresentations to Midland regarding the date of issuance and size of the surrender charges associated with JS's surrender of his Pruco contracts, to induce surrender or conversion of an annuity contract. Lastly, Tepedino made several material misrepresentations in documents submitted for JS's Annuity Policy No. 7804 and 7805 to Midland. As a result of his fraudulent conduct, Tepedino collected a commission of $63.490.02.

Lastly, the ALJ notes that Tepedino does not appear to understand what his "fiduciary duty" requires. Id. at 32. Meeting his fiduciary duty to his client does not mean he should take

whatever means necessary, including engaging in fraudulent conduct, to satisfy his client.[13] Ibid. The duty requires producers to protect the best interests of their client, which he did not do and does not seem to fully grasp. The fact that Tepedino fails to recognize the difference is extremely troubling and further warrants revocation of his license.

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 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 for misrepresenting the material terms of annuity contracts to induce senior citizens to purchase annuities). For these reasons and based upon my review of the record and the Initial Decision, I ADOPT the ALJ's recommendation and ORDER the revocation of Tepedino's insurance producer license.

Monetary Penalties Against the Respondents

The Commissioner may levy penalties against any person violating the Producer Act, not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense. N.J.S.A. 17:22A-45(c). In addition, the Commissioner may order reimbursement of the costs of investigation and prosecution for violations of the Producer Act. Ibid. Furthermore, the

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[13] For example, when asked why Tepedino did not demand corroborating documents from JS before submitting the Suitability Forms, Tepedino blamed JS for pressuring him to move quickly to surrender his Pruco annuities and purchase Midland annuities:

> "[JS] said 'can you submit it without the documentation and see if it goes through?' I was doing the best for my client at the time, I was doing my financial responsibility and trying to help the client as much as I could. So what I said was, 'Sure I'll submit it and I'll see what happens.' So, I submitted the documentation without a driver's license, Social Security Card, birth certificate..."

[PSD at 10, citing Tepedino's testimony at Oral Argument 11:02:48-11:03:30AM].

Commissioner may levy penalties against any person violating the Fraud Act, not exceeding $5,000 for the first offense, not exceeding $10,000 for the second offense, and not exceeding $15,000 for each subsequent offense in addition to restitution. N.J.S.A. 17:33A-5(c). In addition, under the Fraud Act, the Commissioner may order reimbursement of costs and attorneys' fees. Ibid. Lastly, the Commissioner may order the payment of a $1,000 statutory surcharge. N.J.S.A. 17:33A-5.1.

As noted by the ALJ, pursuant to Kimmelman, certain factors are to be examined when assessing administrative monetary penalties such as those that may be imposed under the Producer Act and the Fraud Act.[14] After reviewing the evidence presented and the Kimmelman factors, the ALJ recommended a civil monetary fine of $25,000, a statutory surcharge of $1,000 and the costs of the investigation and prosecution and attorneys' fees of $27,400, pursuant to N.J.S.A. 17:22A-45(c), to be paid jointly and severally by both Respondents.[15] PSD at 35.

In its exceptions, MTS argues that it should not be responsible for any portion of the penalty. MTS's Exceptions at 9. This argument fails because MTS is vicariously liable for the acts of its employees. Furthermore, MTS's argument that it is involved in this matter due only to its ability to pay and not due to its complicity in this matter, is disingenuous. MTS's employee,

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[14] In this matter, the ALJ found that the Respondents' conduct was also in violation of N.J.S.A. 17B:30-6 under the Trade Practices Act. However, no penalties were assessed for these violations by the ALJ, nor requested by the Department. Pursuant to the Trade Practices Act at N.J.S.A. 17B:30-1 to -59, the Commissioner may order payment of a penalty not to exceed $1,000 for each and every act or violation unless the person knew or reasonably should have known he was in violation of this chapter, in which case the penalty shall be not more than $5,000 for every act or violation. N.J.S.A. 17B:30-17.

[15] The ALJ states that based on the documentary evidence provided, the Department's request for attorneys' fees and costs of investigation and prosecution in the amount of $27,400 is appropriate. PSD at 35. Earlier in the analysis, the ALJ cites the Department's request for attorneys' fees in the amount of $25,000 and the reimbursement for costs of the investigation and prosecution in the amount of $2,400. Id. at 30.

Tepedino, perpetrated the acts detailed above; therefore, MTS is not being held liable because it is able to pay the fines imposed but due to its liability for the action of its employee.

MTS also excepts to the joint and several liability of the civil monetary penalties imposed based on the ALJ's application of Kimmelman to each Respondent. MTS argues that a modification of the penalties imposed is required as Goncalves demands a bifurcated Kimmelman analysis. MTS's Exceptions at 5. The Kimmelman factors are discussed below.

The first Kimmelman factor addresses the good faith or bad faith of the respondent. I concur with the ALJ and FIND that Tepedino's bad faith was evidenced by his choice of victim, an elderly, vulnerable man who was facing financial peril and Tepedino's misrepresentations of several material facts related to JS's age and financial situation to Midland to induce the sale of annuity products to JS when he was not eligible. I find the ALJ's recounting of Tepedino's testimony that "had JS just kept his mouth shut, no one would ever have known" and that Tepedino did not "do something truly illegal" to be demonstrative of Tepedino's bad faith. Id. at 33.

As it relates to the good or bad faith of MTS, I concur with the ALJ and FIND that MTS's negligence by its inaction rises to the level of bad faith. The evidence shows that MTS's employee was conducting insurance-related business from MTS's office, using MTS resources, including MTS's bank account, to conduct fraudulent activity. As MTS is vicariously liable for the conduct of its employee, MTS's failure to supervise the conduct of its employee who was submitting fraudulent documentation to secure an inappropriate annuity for an elderly individual to collect a large commission, rises to bad faith in this instance. Therefore, this factor weighs in favor of a monetary penalty against MTS.

The second Kimmelman factor is the ability of the respondent to pay the penalties imposed. 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). I concur with the ALJ and ADOPT the ALJ's finding that this factor favors the imposition of a monetary penalty against both Respondents because neither MTS nor Tepedino introduced specific evidence regarding their financial limitations.

The third Kimmelman factor relates to the profits obtained. I concur and ADOPT the ALJ's findings that this factor weighs in favor of a monetary penalty against Tepedino because his fraudulent actions generated $63,490.02 in commissions, none of which was returned to Midland. PSD at 34.

The fourth factor in Kimmelman examines the resulting injury to the public. As previously noted, 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. Id. at 34 (citing Commissioner v. Andrade, OAL Dkt. No. BKI 09148-19, Initial Decision (01/24/19), Final Decision and Order (04/04/19)). The ALJ found injury to the public in the instant matter resulting from Tepedino's conduct, noting that although JS was made whole by Midland, Midland incurred costs to replace JS's Pruco contracts. Id. at 34. As it relates to MTS, the ALJ noted that MTS argued that it should not be penalized for the actions of an agent who was working with Midland independently. The ALJ found, however, that MTS's argument fails to recognize that deterrence only occurs if the agency is penalized for the actions of its employees. Ibid. I concur with the ALJ and ADOPT the ALJ's findings that the need to maintain faith in insurance providers weighs in favor of penalizing both Tepedino, for his conduct as described above, and MTS, for its inaction in supervising its employee, and warrants the imposition of a monetary penalty.

Regarding the fifth Kimmelman factor, the duration of illegal activity, the ALJ found that the illegal activity at issue took place from September 2012 to December 2012, when JS filed his complaint with the Department. Ibid. The ALJ points out that while this is a relatively short duration, Tepedino admitted that his conduct would never have been discovered but for JS's December 2012 complaint to the Department. Ibid. MTS argues that its lack of knowledge as to the conduct of its employee until JS filed a complaint with the Department relieves them of any liability in this matter. I find MTS's argument unpersuasive. The short duration of the illegal conduct in this matter was due to the diligence of JS and not to any mitigating actions taken by MTS. I concur with the ALJ and ADOPT the ALJ's findings that this factor weighs in favor of penalizing both Respondents for their conduct.

The sixth factor contemplated in Kimmelman is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. I agree with the ALJ's conclusion and FIND that as Tepedino has not been charged with violations of criminal statutes or assessed other penalties related to this matter, this factor weighs in favor of a monetary civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. As it relates to MTS, there is no evidence of any criminal proceedings against MTS.

The final factor examined in Kimmelman is the previous relevant regulatory and statutory violations of the respondents. There is no evidence of prior violations by either Tepedino or MTS; thus, I agree with the ALJ and FIND this factor weighs against a significant monetary penalty as it relates to both Respondents. PSD at 35.

No one 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"). In light of the aggravating and mitigating factors present and the violations of the Producer Act, the Trade Practices Act and the Fraud Act 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 $25,000 in civil monetary fines. The nature of the Respondents' violations warrants the imposition of substantially higher civil monetary penalties than those recommended by the ALJ. Tepedino took advantage of his client's trust and sold him an inappropriate annuity product that was not suited to his needs due to the age of his client. He repeatedly submitted several documents in support of this inappropriate annuity product containing false and misleading information in order to collect a commission on the sale that Tepedino was not forced to return. Tepedino's conduct took place while employed by MTS, who is vicariously liable for the conduct of their employee in their insurance-related activity.

In addition, the Producer Act and the Fraud Act serve different remedial purposes and insurance producers who commit insurance fraud will face civil penalties under both the Producer Act and the Fraud Act. Commissioner v. Hohn, 2013 N.J. AGEN LEXIS 459 (March 18, 2013).

"[I]nsurance producers who commit insurance fraud will face civil penalties under both the Fraud Act and the Producer Act." 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, OAL Dk. No. BKI 03301-05, Initial Decision (11/17/15), Final Decision (02/15/06) (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). Accordingly, I MODIFY the ALJ's recommendation as follows.

For the Producer Act violations found under Count One, related to misrepresentations the Respondents made to JS with the intent to induce surrender of his Pruco annuity contracts and the sale of Midland annuity contracts, I MODIFY the Initial Decision, which failed to include any discussion related to fines for this Count, and ORDER the imposition of a $5,000 penalty.

For the Producer Act violations found under Count Two and the associated violation of the Fraud Act (set forth in paragraph one of Count Eight of the AOTSC) related to the Respondents' submission of Application Forms, I MODIFY the ALJ's recommendation[16] and ORDER the imposition of a $5,000 penalty for violations of the Producer Act and $5,000 for violation of the Fraud Act.

For the Producer Act violations found under Count Three and the associated violation of the Fraud Act (set forth in paragraph two of Count Eight of the AOTSC) related to the Respondents' submission of Suitability Forms, I MODIFY the ALJ's recommendation and ORDER a $5,000 penalty for violations of the Producer Act and $5,000 for violation of the Fraud Act.

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[16] In the Partial Summary Decision, the ALJ combined counts and recommended a fine for those combined counts. For example, the ALJ recommended fines of $7,500 for violations of the Producer Act as alleged in Counts 2 and 3, specifying $2,500 to be imposed for the submission of Application Forms (contemplated in Count 2) and Suitability Forms (contemplated in Count 3). PSD at 29.

For Producer Act violations found under Count Five and the associated violation of the Fraud Act (set forth in paragraph four of Count Eight of the AOTSC) related to the Respondents' submission of Revised Suitability Forms, I MODIFY the ALJ's recommendation and ORDER a $5,000 penalty for violations of the Producer Act and $5,000 for violation of the Fraud Act.

For the Producer Act violations found under Count Six and the associated violation of the Fraud Act (set forth in paragraph five of Count Eight of the AOTSC) related to the Respondents' misrepresentations to Midland regarding the issuance dates and surrender charges of JS's Pruco annuity contracts, I MODIFY the ALJ's recommendation and ORDER a $5,000 penalty for violations of the Producer Act and $5,000 for violation of the Fraud Act.

These penalties total $45,000 and are to be paid jointly and severally by the Respondents because as MTS is vicariously liable for the conduct of their employee, Tepedino, it must share in the penalties imposed. "Fines and penalties against licensees, licensed agencies and their owners/licensed officers deter persons from committing illegal acts and, in the case of owners and licensed officers, from neglecting their statutory obligation to oversee the actions of their licensees." Goncalves at 18. An employing producer cannot avoid responsibility by turning a blind eye to the fraudulent conduct of an employee taking place in their offices and through use of the employing producer's resources. I note that these penalties are far less than the maximum that could be imposed. Further, these penalties are consistent with prior decisions. See Commissioner v. Norris, OAL Dkt. No. BKI 13994-13, Initial Decision (07/23/18), Final Decision and Order (12/05/18); Commissioner v. O'Neill, OAL Dkt. No. BKI 4441-13, Initial Decision (04/29/19), Final Decision and Order (09/05/19)).

Pursuant to N.J.S.A. 17:22A-45(c), the Commissioner may also order the reimbursement of costs of investigation and prosecution. In addition, pursuant to N.J.S.A. 17:33A-5(c), the Commissioner may also order attorneys' fees for any person violating the Fraud Act. PSD at 31.

In the instant case, the ALJ recommended the imposition of the costs of investigation and prosecution and attorneys' fees under the authority of N.J.S.A. 17:22A-45(c) in the amount of $27,400. PSD at 35. It is clear from the record that the ALJ intended to recommend both the costs of investigation and prosecution and attorneys' fees in this matter. This is demonstrated by the ALJ's May 10, 2019 request that the Department submit an allocation of the penalties sought, including attorneys' fees and investigatory costs, from the Respondents and the ALJ's subsequent grant of that request.

I ADOPT the ALJ's imposition of costs of the investigation and prosecution under the authority of the Producer Act and MODIFY the ALJ's imposition of attorneys' fees under the authority of the Producer Act and impose attorneys' fees under the authority of the Fraud Act.

As it relates to the reimbursement of costs of the investigation and prosecution under the authority of the Producer Act, wherein the ALJ ordered in the amount of $2,400, a review of the December 19, 2018 Certification of Eugene Shannon ("December 2018 Shannon Cert."), the Department investigator assigned to this matter, provides a detailed accounting of the 48 hours spent prosecuting and investigating this matter, which included time spent interviewing several witnesses and related correspondence in addition to other detailed investigatory activity. December 2018 Shannon Cert., ¶3. Pursuant to N.J.A.C. 11:1-32.4(b)(20), the costs to the Department for the investigation and prosecution for violations of the Producer Act are reimbursable at a rate of $50 per hour, rounded to the nearest quarter hour. Id. at ¶4. Therefore, Shannon requested a total reimbursement of $2,400 for 48 hours of time spent at a rate of $50 per hour. Id. at ¶5.

The Appellate Division in Portiz v. Stang contemplated the issue of costs of investigation awarded to a state agency and concluded that in determining the amount of investigative fees to be assessed, first, a record must be developed as to the actual hours expended on the investigation, keeping in mind that actual time expended does not necessarily equate with reasonable time. 288 N.J. Super. 217, 221 (App. Div. 1996). Second, the judge must determine the reasonableness of the hourly rate employed. This will depend on the rate prevailing in the community for similar work. Ibid. After multiplying the hours by the rate, the judge will have to assess the overall reasonableness of the costs by considering the expected return to the state and the interest to be vindicated. Ibid. Shannon provided timekeeping records that demonstrate a reasonable and accurate reflection of costs incurred in the investigation for Producer Act violations found. The rate charged is $50 per hour, pursuant to N.J.A.C. 11:1-32.4(b)(20). Hourly rates for enforcement activities are based on salaries, overhead and costs of State employees. I find these rates to be reasonable. In their exceptions, MTS asserts that the records provided by Investigator Eugene Shannon are insufficient because the time expended is not broken down into one-tenth of an hour increments. MTS Exceptions at 7. This is not required by statute or by Rendine.

The overall reasonable of the costs in light of the expected return to the state is clear, as the public is adversely affected in a significant way by wrongful conduct by insurance producers and insurance fraud, and 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 at 152 (underscoring "the salutary efforts being made in this State to deter insurance fraud in all contexts"). Deterring insurance fraud by undertaking these types of investigations to ensure compliance with the statutory scheme enacted by our legislature vindicates the State's

interest in protecting the public. Therefore, I ORDER the Respondents jointly and severally liable for $2,400 for costs of investigation and prosecution, pursuant to N.J.S.A. 17:22A-45(c).

Pursuant to R. 4:42-9(a)(8), attorneys' fees may be imposed when permitted by statute. In this matter, attorneys' fees can be imposed under N.J.S.A. 17:33A-5(c), which states that, upon a finding that a violation of the Fraud Act has occurred, the Commissioner may, assess penalties, restitution, and costs of prosecution, including attorneys' fees, for any person violating the Fraud Act. As Department is the prevailing party in this matter, and an award of attorneys' fees under the Fraud Act is appropriate.

The first step in the fee-setting process is to determine the "lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. Rendine v. Pantzer, 141 N.J. 292, 322 (1995). The Department is seeking compensation for the following: 4.3 hours of time spent by Former Section Chief James Carey ("Carey"), 68 hours[17] of time spent by DAG Posta, 2 hours of time spent by Assistant Attorney General Raymond Chance ("AAG Chance"), and 10.5 hours of time spent by Deputy Attorney General Nicholas Kant ("DAG Kant").[18] Cert. DAG Posta, ¶4. True and accurate copies of timekeeping statements for services provided, detailing how time was spent in six-minute increments. Id. at Ex. B. The timekeeping documents provided adequate descriptive detail regarding the amount time each attorney spent to complete specific legal tasks.

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[17] A review of DAG Posta's certification reflects that DAG Posta expended 252 hours of time on this matter but is seeking reimbursement for only 68 hours. It is unclear which 68 hours DAG Posta is seeking, however, each entry on the timekeeping statement provide an activity code (CIV, CRW, CCM, CDR, CMS, CCR, CPR, and CMB) and a description of how time was expended. Cert. DAG Posta., Ex. A, B.

[18] The certification provided details time expended by DAG Gordon Queenan, DAG Jason Silsberg, and DAG Joseph Snow. However, did not request reimbursement for these costs and did not articulate a reason for not doing so. Ibid.

Additional details regarding the specific tasks engaged in are also set forth in the certification provided. Id. at ¶8.

MTS argues that the analysis requires that billable hours be described in sufficient detail to ascertain the labor involved in the matter. MTS's Exceptions at 6. Specifically, MTS argues that the presentation of time expended in this matter are incomplete, citing entries for "review of file" or "review of order to show cause" or entries that may contain no description at all. Id. at 7. However, while Rendine provides that sufficient detail is necessary to ascertain the manner in which billable hours were divided among the various counsel, the Court also found that:

> [I]t is not necessary to know the exact number of minutes spent... But without some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys... the court cannot know the nature of the services for which compensation is sought.
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> [Rendine, 141 N.J. at 337].

The timekeeping statements here meet the requirements set forth in Rendine, as they provide enough detail to ascertain the manner in which billable hours were divided among the various counsel. Each entry is coded with an "activity code" that designates the particular task completed, including conferences call, correspondence, discovery, and supervision. Cert. DAG Posta, ¶3, Ex. B. Thus, the standard set in Rendine is met by the documentary evidence provided here. I am satisfied that the aggregate total of 84.8 hours of time spent on this matter is reasonable and necessary to enable these attorneys to prepare and present this case against the Respondents. MTS's argument is without merit and the ALJ's imposition of costs will not be set aside on this basis.

The second determination is whether the hourly rate contemplates the factors set forth in R.P.C. 1.5(a).[19] As discussed above, here, reasonable attorneys' fees are permitted under the Fraud Act at N.J.S.A. 17:33A-5(b). The request for attorneys' fees is being made by the prevailing government attorneys from the New Jersey, Department of Law and Public Safety, Division of Law ("DOL"). The DOL has established a Schedule of Attorneys' Fees ("DOL Fee Schedule") that provides a uniform hourly rate of compensation for DOL Legal Staff. Cert. DAG Posta, ¶2, Ex. A. The DOL Fee Schedule is based on the years of experience of an attorney to calculate a fixed rate for the services rendered by DOL attorneys. As of September 2015, the hourly rate for attorneys in the Division of Law range from $200 per hour for those with 0-5 years of legal experience to $300 for those attorneys with more than 20 years of experience. Courts have concluded that the hourly rate charged for the time of a government attorney based on the government attorney's experience is reasonable. Naiper v. Thirty or More Unidentified Federal Agents, etc., 855 F.2d 1080 (3d. Cir. 1988).

In the instant matter, Carey, AAG Chance, and DAG Posta each have over 20 years of experience, and pursuant to the DOL Fee Schedule, the 74.3 hours of time expended by them may be charged at a rate of $300 per hour. Cert. DAG Posta, ¶5, Ex. A. The total reimbursement of time expended by these attorneys is $22,290. DAG Kant is an attorney with more than 10 years of experience, and pursuant to the DOL Fee Schedule, the 10.5 hours of time expended by him

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[19] RPC 1.5(a) considers the following factors to determine whether the fee is reasonable: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

may be charged at a rate of $260 per hour. Id. at ¶6, Ex. A. The total reimbursement for time expended prosecuting this matter by DAG Kant is $2,730. The total reimbursement expended by all attorneys requested in this matter is $25,020.[20] Based on this analysis, and in consideration of the factors set forth by RPC 1.5(a), which includes a review of reasonable time spent at a reasonable rate, the total "lodestar" amount or attorneys' fees in this matter is $25,020.

Once the "lodestar" amount has been determined, the lodestar fee may be increased or reduced. After calculation of the presumptively reasonable fee, a court must then consider whether an upward or downward adjustment of the fee is warranted based on factors such as the extent of plaintiff's success in the litigation. Rendine, 141 N.J. 337. If a plaintiff's unsuccessful claims are related to the successful claims, the court must consider the significance of the overall relief obtained to determine whether those hours devoted to the unsuccessful claims should be compensated. Thus, if the results obtained are fully effective in vindicating the plaintiff's rights, counsel should recover for all hours reasonably expended. Stoney v. Maple Shade Tp., 426 N.J. Super. 297, 318 (2012).

In this matter the Department prevailed in their motion for summary decisions as it relates to Counts One, Two, Three, Five, Six and four of the five violations alleged in Count Eight of the AOTSC, finding that the Respondents made misrepresentations to JS and Midland regarding the sale of annuity products in violation of the Producer Act and the Fraud Act. The Department withdrew Count Four and a related violation of the Fraud Act alleged in Count Eight, which alleged that Tepedino forged JS's signature on forms submitted to Midland. The Department also

[20] The Department sought attorneys' fees in the amount in $25,000, which the ALJ granted in the Initial Decision. PSD at 30. However, the documentation provided by DAG Posta supports an award of attorneys' fees in the amount of $25,020. It is unclear why the Department did not seek $25,020.

withdrew Count Seven, which alleged that Tepedino failure to provide JS with a buyer's guide within an allotted time frame. The Department was not granted summary decision as it relates to these allegations and these matters would be ripe for determination at this time. These allegations contained in the withdrawn counts are related to, but are not central to, effectively vindicating the Producer and Fraud Act violations alleged. Thus, the withdrawal of these counts by the Department does not support a reduction in the lodestar fees awarded herein.

Therefore, I ADOPT the ALJ's recommendation of $25,000 for costs for attorneys' fees imposed and ORDER the Respondents jointly and severally liable for $25,000 in attorneys' fees, based on the Department's request. A review the record, including the Certification of DAG Posta, the DOL Fee Schedule, and all supporting timekeeping statements provided support a finding of $25,020 in attorneys' fees, however, as the Department requested $25,000 and the ALJ granted such request, there is no reason to modify the ALJ's recommendation.

Lastly, while MTS does not take exception to the statutory surcharge recommended by the ALJ, pursuant to N.J.S.A. 17:33A-5.1, any person who is found to have committed insurance fraud under the Fraud Act shall be subject to a surcharge in the amount of $1,000. For all the reasons set forth above, the Respondents have committed insurance fraud; therefore, the imposition of the $1,000 statutory surcharge is appropriate. As such, I ADOPT the ALJ's recommendation that the Respondents are jointly and severally liable for the $1,000 statutory surcharge, pursuant to N.J.S.A. 17:33A-5.1.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions submitted by the Respondent MTS and the Department, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision, except as modified herein.

Specifically, I ADOPT the ALJ's conclusion that Respondent MTS is vicariously liable for the conduct of Respondent Tepedino, his employee. As to Counts One, I ADOPT the ALJ's conclusions and hold that Respondents violated N.J.S.A. 17:22A-40(a)(2), (5) and (7), N.J.A.C. 11:17A-2.8, and N.J.S.A. 17B:30-6. As to Count Two and the related violation alleged in Paragraph One of Count Eight, I ADOPT the ALJ's conclusions and hold that Respondents violated N.J.S.A. 17:22A-40(a)(2), (7), (8) and (16), N.J.S.A. 17:22A-40(a)(2) and (5), N.J.A.C. 11:4-2.8(a)(3) and N.J.S.A 17:33A-4(a)(4)(b). In addition, I FIND the Respondents' conduct in violation of N.J.S.A. 17B:30-6. As to Count Three and the related violation alleged in Paragraph Two of Count Eight, I ADOPT the ALJ's conclusions and hold that Respondents violated N.J.S.A. 17:22A-40(a)(2), (5), (8) and (16); N.J.S.A 17:33A-4(a)(4)(b); N.J.S.A. 17B:30-6 and N.J.A.C. 11:4-2.8(a)(3). As to Count Five and the related violation alleged under Count Eight, I ADOPT the ALJ's conclusions and hold that Respondents violated N.J.S.A. 17:22A-40(a)(2), (5), (8) and (16); N.J.S.A 17:33A-4(a)(4)(b); N.J.S.A. 17B:30-6 and N.J.A.C. 11:4-2.8(a)(3). As to Count Six and the related violation alleged in Count Eight, I ADOPT the ALJ's conclusions and hold that Respondents violated N.J.S.A. 17:22A-40(a)(2), (5), (8) and (16); N.J.S.A 17:33A-4(a)(4)(b); N.J.S.A. 17B:30-6 and N.J.A.C. 11:4-2.8(a)(3).

I MODIFY the recommended civil monetary penalty and ORDER the Respondents, jointly and severally, pay a total of $45,000 in civil monetary penalties allocated as follows: Count One, related to misrepresentations Tepedino made to JS with the intent to induce surrender of his Pruco

annuity contracts and the sale of Midland annuity contracts, a penalty of $5,000 is imposed for violations of the Producer Act; Count Two and the associated violation of the Fraud Act alleged in paragraph one of Count Eight, related to the submission of Application Forms, a penalty of $5,000 is imposed for violations of the Producer Act and a penalty of $5,000 is imposed for violation of the Fraud Act; Count Three and the associated violation of the Fraud Act alleged in paragraph two of Count Eight, related to the submission of Suitability Forms, a penalty of $5,000 is imposed for violations of the Producer Act and a $5,000 penalty is imposed for violation of the Fraud Act; Count Five and the associated violation of the Fraud Act alleged in paragraph four of Count Eight, related to the submission of the Revised Suitability Forms, a penalty of $5,000 is imposed for violations of the Producer Act and a $5,000 penalty is imposed for violation of the Fraud Act; and, Count Six and the associated violation of the Fraud Act alleged in paragraph five of Count Eight, related to the misrepresentations Tepedino made to Midland regarding the issuance dates and surrender charges of JS's Pruco annuity contracts, a penalty of $5,000 is imposed for violations of the Producer Act and a $5,000 penalty is imposed for violation of the Fraud Act. I ADOPT the ALJ's recommended imposition of a statutory surcharge and ORDER the Respondents pay a statutory surcharge of $1,000 pursuant to N.J.S.A. 17:33A-5.1 for violation of the Fraud Act. Further, I ADOPT the recommended imposition of the costs of investigation and prosecution for violations of the Producer Act and ORDER the Respondents to pay $2,400. I MODIFY the ALJ's recommendation of $25,000 of attorneys' fees under the authority of the Producer Act and ORDER that pursuant to the Fraud Act, at N.J.S.A. 17:33A-5(c), the Respondents shall be joint and severally liable to pay attorneys' fees totaling $25,000.

Finally, I ADOPT the ALJ's conclusion that Respondent Tepedino's license be revoked and hereby ORDER the revocation of Tepedino's license effective as of the date of this Final Order and Decision.

It is so ORDERED on this 27th day of January, 2020.

Marlene Cande
Commissioner

Final Orders – Insurance/AR Tepedino Order