Order No. E22-06

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DKT. NO.: BKI 14532-18

COMMISSIONER MARLENE CARIDE, Petitioner, v. GENEVIEVE STEWARD, JAMES MASCOLA, BAIL GROUP MANAGEMENT, LLC AND EAST COAST BAIL BONDS, LLC Respondents.	)	FINAL DECISION AND ORDER

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"), and all powers expressed or implied therein, for the purposes of reviewing the June 25, 2021 Initial Decision ("Initial Decision") of Administrative Law Judge Hon. Jeffrey R. Wilson ("ALJ").

This matter was initiated by the Department of Banking and Insurance ("Department" or ("Petitioner") upon receiving information that Genevieve Steward ("Steward"), James Mascola ("Mascola"), Bail Group Management, LLC ("BGM") and East Coast Bail Bonds, LLC ("ECBB") (collectively the "Respondents") violated various provisions of the insurance laws of the State of New Jersey. In the Initial Decision, the ALJ granted the Department's motion for summary decision. Additionally, the ALJ recommended that the insurance producer licenses of Steward, Mascola, and ECBB be revoked; that civil penalties in the amount of $60,000 be imposed against

the Respondents, jointly and severally; and that restitution be ordered, jointly and severally against the Respondents, in the amount of $30,000, together with prejudgment interest thereon, from May 7, 2013. Further, the ALJ recommended that the Respondents shall reimburse the Department $5,300 for the costs of investigation and prosecution pursuant to N.J.S.A. 17:22A-45(c).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY[1]

On February 7, 2018, the Department issued an Order to Show Cause ("OTSC") against the Respondents. The OTSC contains six Counts as follows:

> Count One – Respondents failed to remit premiums to Financial Casualty pursuant to the Bail Bond Agreement, in violation of N.J.S.A. 17:22A-40a(2) and (8), N.J.A.C. 11:17A-1.6(c), N.J.A.C. 11:17A-4.10 and N.J.A.C. 11:17C-2.2(a); and
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> Count Two – Respondents failed to timely return collateral funds to consumers for the bail bonds of C.R., J.P., and C.N., in violation of N.J.S.A. 17:22A-40(a)(2), (4) and (8) and N.J.A.C. 11: 17A-4.10; and
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> Count Three– Respondents misappropriated the collateral funds for the bail bond of C.R., in violation of N.J.S.A. 17:22A-40(a)(2), (4) and (8) and N.J.A.C. 11:17A-4.10; and
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> Count Four– BGM invoiced a consumer, specifically M.R., for a premium without being licensed to do so, in violation of N.J.S.A. 17:22A-29 and N.J.S.A. 1722A-40(a)(2) and (8); and
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> Count Five– ECBB failed to register the Wildwood office as a second branch office, in violation of N.J.S.A. 17:22A-40(a)(2), and (8) and N.J.A.C. 11:17-2.9(a); and
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> Count Six – Respondents failed to timely reply to the Department's inquiries, in violation of N.J.S.A. 17:22A-40(a)(2) and (8) and N.J.A.C. 11:17A-4.8.

On February 26, 2018, Steward and Mascola jointly responded to the Order to Show Cause, denying all six Counts.

[1] Initials are being substituted for the actual names to protect people's identity.

The matter was filed at the Office of Administrative Law ("OAL") on October 3, 2018, as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13.

On March 9, 2020, the Department filed a motion for summary decision and Steward and Mascola filed their respective oppositions on March 31, 2020. The Department filed a reply brief on April 8, 2020. The record closed on June 15, 2021.

On June 25, 2021, the Initial Decision was issued wherein the ALJ granted Petitioner's Motion for Summary Decision, and recommended that the insurance producer licenses of Steward, Mascola, and ECBB be revoked, civil penalties in the amount of $60,000 be imposed against the Respondents, jointly and severally, and that restitution be ordered, jointly and severally against the Respondents, in the amount of $30,000, together with prejudgment interest thereon, from May 7, 2013. Further the ALJ recommended that the Respondents reimburse the Department $5,300 for the costs of investigation and prosecution.

Neither the Department nor the Respondents filed exceptions.

ALJ'S FINDINGS OF FACT AND LEGAL DISCUSSION

In the Initial Decision, the ALJ noted that N.J.A.C. 1:1-12.5(b) provides that a motion for summary decision may be granted 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. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Initial Decision at 8. The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Id. Failure to do so, entitles the moving party to summary judgment. Id. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary

judgment if the evidence is "so one-sided that [moving party] must prevail as a matter of law." Id. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). Id. However, "the court must grant all the favorable inferences to the non-movant." Brill v. Guardian Life Ins. Co.,142 N.J. at 536. Id.

In light of this standard, the ALJ granted summary decision as to all counts. Initial Decision at 9. The ALJ found that the Respondents failed to meet their burden of demonstrating that there were any material facts at issue. Ibid. Thus, the ALJ concluded that the uncontroverted facts and law contained in the Department's moving papers establish its entitlement to summary decision. Ibid.

The ALJ found the following facts relevant in his grant of summary decision.

Facts Relevant to All Counts

The ALJ found that Steward was licensed as a resident insurance producer in the State of New Jersey, pursuant to N.J.S.A. 17:22A-32(a), until her license expired on June 30, 2014. Initial Decision at 2. Mascola is currently licensed as a resident insurance producer in the State of New Jersey, pursuant to N.J.S.A. 17:22A-32(a). Initial Decision at 3. ECBB was licensed as a resident business entity insurance producer in the State of New Jersey, pursuant to N.J.S.A. 17:22A-32(b), until its license was cancelled on August 26, 2014, for failing to have a Designated Responsible Licensed Producer ("DRLP"). Ibid. At all relevant times, Steward was the DRLP for ECBB. Ibid. BGM was a limited liability company formed pursuant to New Jersey law. Ibid. Steward and Mascola formed BGM in 2005, as a New Jersey limited liability company. Steward and Mascola were the members of BGM. Steward was the managing member. Ibid. BGM was never licensed as a business entity insurance producer in New Jersey. Ibid. On or about December 28, 2006,

Steward and Mascola formed ECBB, a licensed business entity insurance producer, in which they each held a 50 percent ownership interest. Ibid. ECBB acted as a sub-producer for BGM. Ibid.

Count One: Respondents' Failure to Remit Premiums to Financial Casualty & Surety, Co.

The ALJ found that on or about October 10, 2007, Steward, Mascola and BGM entered into a General Agent Bail Bond Agreement ("Agreement") with Financial Casualty & Surety, Co. ("FCS"). Ibid. Under the terms of the Agreement, BGM operated as a bail bonding service and FCS functioned as an authorized surety for such bonds. BGM was authorized to retain producers and sub-producers who could issue bonds with FCS operating as the surety. Id. at 3-4. Agents in the bond business, like BGM and its sub-producers, assume the risk associated with forfeiture of the bond. While FCS pledged liability to the applicable court for the payment of bail bonds they issue, BGM and its sub-producers contractually agreed to indemnify FCS for all losses associated with bond forfeiture. Id. at 4. BGM and its sub-producers assumed full responsibility for processing the bond application, receiving the fee, and arranging for the receipt of collateral from a good and solvent indemnitor to secure payment of the bond should the defendant fail to fulfill his appearance obligations. Ibid. The Agreement and related agreements obligate BGM and its sub-producers to maintain bank accounts to hold on FCS's behalf, collateral received from indemnitors for bonds issued on FCS's power of attorney. Ibid.

On or about May 7, 2009, the parties to the Agreement entered into Addendum Number 1 to the Agreement which provided that; "General Agent [defined as Steward, Mascola and BGM] shall remit to Company [defined as FCS], within 21 days of execution of each bond hereunder, such cash sums for premiums as will equal .9% ($9.00 per $1,000.00) of the total liability for each bond written." Ibid. The Agreement provided that Steward, Mascola, BGM and ECBB owed a fiduciary duty to FCS in relation to the conduct of their business, including in holding collateral

and remitting bond premiums and indemnity funds. Ibid. FCS terminated the Agreement on November 8, 2010. Ibid. Between October 2007 and November 2010, Respondents, through ECBB, solicited and executed at least 131 FCS bail bonds in the approximate amount of $1.8 million. Ibid. Respondents, through ECBB, collected gross premiums in at least the amount of $185,000 from executing the 131 FCS bail bonds. Id. at 5. Respondents, through ECBB, did not remit premiums due to FCS for bail bonds written under the Agreement. Ibid. Under the terms of the Agreement, Steward, Mascola, and BGM assumed liability for all bond forfeiture judgments entered by any court on all bonds posted with bond powers entrusted to them. Steward, Mascola and BGM were liable for all bond forfeitures irrespective of whether they or one of their sub-producers issued the bonds in question. Ibid.

On January 12, 2011, FCS filed a complaint against Respondents in the United States District Court for the Southern District of Texas, which case was transferred to the United States District Court for the District of New Jersey by Order, dated July 22, 2011, Case No. 11-04316. Ibid. By Agreed Final Judgment, dated September 3, 2015, Steward, Mascola and BGM agreed and stipulated in the NJ District Court Action that they owed FCS, jointly and severally, the amount of $720,000 for bail bond forfeiture liability on bail bonds written under the Agreement, and $30,000 for unremitted premiums on bail bonds, for a total judgment of $750,000. Ibid.

The ALJ found that the Respondents do not dispute that they agreed to a $750,000 judgment against them by their surety company in the Unites States District Court for $720,000 in bail bond forfeitures and $30,000 in unremitted premiums on bail bonds. Id. at 9.

Counts Two, Three, & Four: Respondents Failure to Timely Return Collateral Funds & Misappropriation of Collateral Funds; BGM Unlicensed Activity

Hotline Bail Bonds ("HBB") was a licensed New Jersey business insurance producer entity, which acted as a sub-producer for BGM. Id. at 5.

C.R. Transaction

The ALJ found that on or about December 24, 2008, M.R. paid HBB $30,000 as a bail bond collateral for C.R., who was being prosecuted by the Division of Criminal Justice. Id. at 5. On January 8, 2009, BGM deposited the $30,000 bail bond collateral on behalf of C.R. into its bank account with TD Bank as a managing agent for HBB. Id. at 6. When HBB ceased operation in or around November 2010, BGM took over its files. Ibid. Steward sent three invoices to M.R., on behalf of BGM, dated November 23, 2010, December 1, 2012, and July 1, 2013, seeking a "renewal premium" from M.R. Ibid. The ALJ found that the Respondents do not dispute that Steward invoiced a consumer for a bail bond premium through BGM, without it being licensed to do so. Id. at 9.

C.R. was sentenced in the Superior Court of New Jersey on May 7, 2013, but BGM never returned the $30,000 bail bond collateral to M.R. Id. at 6.

C.N. Transaction

The ALJ found that E.H. provided a cashier check to HBB, dated November 20, 2008, in the amount of $10,000 as bail bond collateral on behalf of C.N. Id. at 6. HBB provided the check to BGM. Ibid. Steward endorsed the check and deposited it into BGM's bank account with TD Bank. Ibid. On January 29, 2010, C.N. was sentenced. Ibid. Steward did not return the $10,000 bail bond collateral paid on behalf of C.N. to E.H. until May 23, 2013, following inquiry by the Department. Ibid.

J.P. Transaction

The ALJ found that BBB was a licensed New Jersey business entity insurance producer unaffiliated with BGM. Id. at 7. On January 27, 2009, cash collateral for a bail bond in the amount of $20,000 was tendered to Bails Bails Bails ("BBB") by A.S. and others on behalf of J.P., who was arrested in Passaic County. Ibid. BBB transferred the $20,000 collateral to HBB by check dated March 2, 2009. Ibid. HBB transferred the $20,000 collateral to BGM by check dated March 6, 2009, payable to "BGM", which was deposited into a TD Bank account belonging to ECBB. Ibid. The $20,000 collateral paid by A.S. on behalf of J.P. was not returned by Steward until September 22, 2014, following an inquiry by the Department. Ibid. The ALJ found that the Respondents do not dispute that they did not return collateral funds to consumers for bail bonds for long periods of time, and that $30,000 in collateral funds were not returned. Initial Decision at 9.

Count Five: Failure to Register a Branch Office

The ALJ found that ECBB operated two offices, one in Woodstown, New Jersey and one in Wildwood, New Jersey, where it solicited, negotiated and executed bail bonds and engaged in the business of bail bonds. Id. at 7. The ALJ found that the Respondents do not dispute that ECBB failed to register the Wildwood, New Jersey office as a branch office. Initial Decision at 9.

Count Six: Failure to Respond to Department Inquiries

The ALJ found that on July 1, 2013, the Department sent a letter containing requests for information to Michael Resavage, Esq., Steward, and Mascola. Id. at 7. After Respondents failed to provide the requested information, the Department sent numerous follow-up requests for the information to Respondents and Respondents' counsel, including on September 4, 2013, September 6, 2013, September 23, 2013, October 3, 2013, October 4, 2013, and October 24, 2013.

Id. at 7-8. On November 26, 2013, the Department sent a letter to Respondents listing nine items to which the Department had not received a response. Id. at 8. The Department did not receive a complete response from the Respondents to the items listed in its November 26, 2013, letter. Ibid.

The ALJ found that the Respondents did not provide any specific facts to support their claim that they timely and completely responded to requests for information from the Department. Initial Decision at 9.

Next, the ALJ found the Respondents' argument alleging violation of the statute of limitations was unsupported. Id. The ALJ found that a ten-year period applies, pursuant to N.J.S.A. 2A:14-1.2, not a six-year period as argued by the Respondents. Id. The ALJ noted that the OTSC was issued against the Respondents on February 7, 2018, clearly within the ten-year statute of limitations. Id.

The ALJ found that the Respondents did not provide any specific facts to support their allegations that someone else is responsible for their violations of the insurance laws and regulations. Id. The ALJ found that at all relevant times, the Respondents remained responsible for the insurance-related conduct of their employees and agents. Id.

Finally, based upon foregoing, the ALJ recommended that the insurance producer licenses of Steward, Mascola, and ECBB be revoked; that civil penalties in the amount of $60,000 be imposed against the Respondents, jointly and severally; and that restitution be ordered, jointly and severally against the Respondents, in the amount of $30,000, together with prejudgment interest thereon, from May 7, 2013. Initial Decision at 10. Further, the ALJ recommended that the Respondents shall reimburse the Department $5,300 for the costs of investigation and prosecution pursuant to N.J.S.A. 17:22A-45(c). Id.

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. Initial Decision at 8. 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." Id.

The ALJ found that the Respondents have failed to meet their burden of demonstrating that there are any material facts at issue in Counts One through Six of the OTSC. I concur that summary decision is appropriate.

Allegations Against the Respondents

Count One: Respondents' Failure to Remit Premiums to Financial Casualty

Count One of the OTSC alleges that the Respondents failed to remit premiums to FCS pursuant to the Bail Bond Agreement, in violation of N.J.S.A. 17:22A-40a(2) (violating any insurance law) and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), N.J.A.C. 11:17A-1.6(c) (licensed partners, officers and directors, and all owners with an ownership interest for 10 percent or more shall be held responsible for all

insurance related conduct), N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the conduct of his or her business) and N.J.A.C. 11:17C-2.2(a) (premium funds shall be remitted to the insurer 21 days after receipt of the funds under the Agreement).

Here, the Respondents owed a fiduciary duty to FCS in relation to the conduct of their business, including in holding collateral and remitting bond premiums and indemnity funds. Initial Decision at 4. Between October 2007 and November 2010, the Respondents, through ECBB, solicited and executed at least 131 FCS bail bonds in the approximate amount of $1.8 million. Ibid. As found by the ALJ, the Respondents, through ECBB, did not remit premiums due to FCS for bail bonds written under the Agreement, though they were required to remit premiums within 21 days under the Agreement. Id. at 4, 5.

I concur with the ALJ's findings that the Respondents failed to remit premiums to Financial Casualty pursuant to the Bail Bond Agreement, in violation of N.J.S.A. 17:22A-40a(2) and (8), N.J.A.C. 11:17A-1.6(c), N.J.A.C. 11:17A-4.10 and N.J.A.C. 11:17C-2.2(a).

Count Two: Respondents' Failure to Timely Return Collateral Funds

Count Two of the OTSC alleges that the Respondents failed to timely return collateral funds to consumers for the bail bonds of C.R., J.P., and C.N., in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business) and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and N.J.A.C. 11:17A-4.10 (An insurance producer acts in a fiduciary capacity in the conduct of his or her business).

Here, on or about November 20, 2008, E.H provided a cashier's check to HBB in the amount of $10,000 as bail bond collateral on behalf of C.N. Id. at 6. C.N. was sentenced on

January 29, 2010. Certification of Eugene Shannon in Support of Petitioner's Motion for Summary Decision ("Shannon Cert.") at ¶36. Steward did not return the $10,000 bail bond collateral paid on behalf of C.N. to E.H. until May 23, 2013, following inquiry by the Department. Initial Decision at 6.

On or about December 24, 2008, M.R. paid HBB $30,000 as a bail bond collateral for C.R. Initial Decision at 5. C.R. was sentenced in the Superior Court of New Jersey on May 7, 2013, but BGM never returned the $30,000 bail bond collateral to M.R. Id. at 6.

On or about January 27, 2009, A.S. paid BBB $20,000 as a bail bond collateral for J.P. Id. at 7. The $20,000 collateral paid by A.S. on behalf of J.P. was not returned by Steward until September 22, 2014, following an inquiry by the Department. Ibid.

I concur with the ALJ's findings that the Respondents failed to timely return collateral funds to consumers for the bail bonds of C.R., J.P., and C.N., in violation of N.J.S.A. 17:22A-40(a)(2), (4) and (8), and N.J.A.C. 11:17A-4.10.

Count Three: Respondents' Misappropriation of Bail Bond Collateral Funds

Count Three of the OTSC alleges that the Respondents misappropriated the collateral funds for the bail bond of C.R., in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business) and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and N.J.A.C. 11:17A-4.10 (An insurance producer acts in a fiduciary capacity in the conduct of his or her business).

On January 8, 2009, BGM deposited the $30,000 bail bond collateral M.R. paid on behalf of C.R. into its bank account with TD Bank as a managing agent for HBB. Initial Decision at 6. When HBB ceased operation in or around November 2010, BGM took over its files. Ibid. Steward

sent three invoices to M.R., on behalf of BGM, dated November 23, 2010, December 1, 2012, and July 1, 2013, seeking a "renewal premium" from M.R. Ibid. C.R. was sentenced in the Superior Court of New Jersey on May 7, 2013, but BGM never returned the $30,000 bail bond collateral to M.R. Ibid.

I concur with the ALJ's findings that the Respondents misappropriated the collateral funds for the bail bond of C.R., in violation of N.J.S.A. 17:22A-40(a)(2), (4) and (8) and N.J.A.C. 11:17A-4.10.

Count Four: BGM Unlicensed Activity

Count Four of the OTSC alleges that BGM invoiced a consumer, specifically M.R., for a premium without being licensed to do so, in violation of N.J.S.A. 17:22A-29 (A person shall not sell, solicit or negotiate insurance in this State unless the person is licensed for that line of authority in accordance with this act) and N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility).

Here, BGM was never licensed as a business entity insurance producer in New Jersey. Initial Decision at 3. HBB was a licensed New Jersey business insurance producer entity, which acted as a sub-producer for BGM. Id. at 5. On or about December 24, 2008, M.R. paid HBB $30,000 as a bail bond collateral for C.R., who was being prosecuted by the Division of Criminal Justice. Ibid. On January 8, 2009, BGM deposited the $30,000 bail bond collateral on behalf of C.R. into its bank account with TD Bank as a managing agent for HBB. Id. at 6. When HBB ceased operation in or around November 2010, BGM took over its files. Ibid. Steward sent three invoices to M.R., on behalf of BGM, dated November 23, 2010, December 1, 2012, and July 1, 2013, seeking a "renewal premium" from M.R. Ibid.

I concur with the ALJ's findings that BGM invoiced a consumer, specifically M.R., for a premium without being licensed to do so, in violation of N.J.S.A. 17:22A-29 and N.J.S.A. 17:22A-40(a)(2) and (8).

Count Five: ECBB Failure to Register a Branch Office

Count Five of the OTSC alleges that ECBB failed to register the Wildwood office as a second branch office, in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law), and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility) and N.J.A.C. 11:17-2.9(a) (licensees shall file with the Department by hard copy or electronic means a branch office registration form within 30 days before business is first conducted there).

Here, ECBB operated two offices, in Woodstown, New Jersey and in Wildwood, New Jersey, where it solicited, negotiated and executed bail bonds and engaged in the business of bail bonds. Initial Decision at 7. ECBB failed to register the Wildwood, New Jersey office as a branch office. Ibid.

I concur with the ALJ's findings that ECBB failed to register the Wildwood office as a branch office, in violation of N.J.S.A. 17:22A-40(a)(2), and (8) and N.J.A.C. 11:17-2.9(a).

Count Six: Respondents' Failure to Timely Reply to Department Inquiries

Count Six of the OTSC alleges that the Respondents failed to timely reply to the Department's inquiries, in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law) and (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility) and N.J.A.C. 11:17A-4.8 (an insurance producer shall reply, in writing, to any inquiry of the Department relative to the business of insurance within the time requested in said

inquiry, or no later than 15 calendar days from the date the inquiry was made or mailed in cases where no response time is given).

Here, on July 1, 2013, the Department sent a letter containing requests for information to the Respondents. Initial Decision at 7. After the Respondents failed to provide the requested information, the Department sent numerous requests to the Respondents. Id. at 7-8. On November 26, 2013, the Department sent a letter to the Respondents listing the items to which the Department had not received a response. Id. at 8. The Department did not receive a complete response to the items listed in its November 26, 2013 letter. Ibid.

I concur with the ALJ's findings that the Respondents failed to timely reply to the Department's inquiries, in violation of N.J.S.A. 17:22A-40(a)(2) and (8) and N.J.A.C. 11:17A-4.8.

Having carefully reviewed the Initial Decision and the record herein, I hereby ADOPT the ALJ's conclusion that the Respondents violated various provisions of the Producer Act, the Producer Licensing regulations, N.J.A.C. 11:17-1.1 to -2.17, and the regulations governing Insurance Producer Standards of Conduct, N.J.A.C. 11: 17A-1.1 to 11:17D-2.8 as specifically set forth above.

PENALTIES AGAINST THE RESPONDENTS

License Revocation

N.J.S.A. 17:22A-40(a) establishes that the Commissioner has the power to revoke the license of an insurance producer for violations of the Producer Act. With respect to the appropriate action to take against the Respondents' insurance producer licenses, I FIND that the record is more than sufficient to support license revocation and, in fact, compels the revocation of the insurance producer licenses of Steward, Mascola, and ECBB. Accordingly, for the reasons set forth below,

I ADOPT the recommendation to revoke the insurance producer licenses of Steward, Mascola, and ECBB.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). An insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Id. 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.

Revocation is "appropriate in almost all cases wherein a licensed insurance producer has engaged in misappropriation of premium monies, bad faith, and dishonesty." Commissioner v. Brown and Guaranteed Bail Bonds, OAL Dkt. No. BKI 10377-13, Initial Decision (09/15/15), Final Decision and Order (12/14/15); See also Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); Commissioner v. Stone, OAL Dkt. No. BKI 6301-07, Initial Decision (09/15/08), Final Decision and Order (09/15/08); Shipitofsky v. Commissioner, 95 N.J.A.R.2d(INS) 67, OAL Dkt. No. INS 3722-93, Initial Decision (03/11/94), Final Agency Decision (04/29/94). The typical mitigating factors of restitution, inexperience, lack of prior negative history, motivations and pressures of the

misconduct, and the possibility of reform cannot form a basis to support a sanction other than revocation in cases involving the misappropriation of client funds. Commissioner v. Ladas, OAL Dkt. BKI 0947-02, Initial Decision (02/05/04), Final Decision and Order (06/22/04).

Here, the undisputed facts show that the Respondents owe their surety company $750,000, consisting of $720,000 in bail bond forfeitures and $30,000 in unremitted premiums on bail bonds. Also, while operating their business, the Respondents, collectively: did not timely return collateral funds to consumers for bail bonds; misappropriated $30,000 in collateral funds; invoiced a consumer for a bail bond premium without being licensed to do so; did not register the Wildwood, New Jersey Office of ECBB; and failed to timely and completely respond to numerous requests for information by the Department.

In summary, given the nature of the Respondents' violations and the harm to surety companies, consumers and the public, the imposition of a substantial civil penalty, in addition to license revocation is warranted.

Imposition of a Civil Penalty

N.J.S.A. 17:22A-40(a) establishes that the Commissioner has the power to levy a civil penalty against insurance producers for violations of the Producer Act. Pursuant to N.J.S.A. 17:22A-45(c), the Commissioner may impose a penalty of not more than $5,000 for the first violation of the Producer Act, and a penalty of not more than $10,000 for each subsequent violation. In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors in order to evaluate the imposition of fines in administrative proceedings and these factors are applicable to this matter, which seeks the imposition of penalties under the Producer Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) any injury to the public; (5)

the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139. Each of these factors is discussed below. No one Kimmelman factor is dispositive for or against fines and penalties. See Id. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case.").

The first factor examines the good or bad faith of the Respondents. Here, the Respondents' numerous violations of the Producer Act demonstrate bad faith. This factor supports the imposition of a higher civil penalty.

The record is devoid of proofs in relation to the second Kimmelman factor, which address the Respondents' ability to pay the fines imposed. The Respondents have presented no evidence of their ability or inability to pay the civil monetary penalties that could be assessed in this matter. Even so, 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). The Respondents have thus not met that burden.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. Here, the Respondents did not dispute that they agreed to a $750,000 judgment by their surety company in the United States District Court for $720,000 in bail bond forfeitures and $30,000 in unremitted premiums on bail bonds. The Respondents do not dispute that they did not return collateral funds to consumers for bail bonds for long periods of time, and that $30,000 in collateral funds were not returned. This factor weighs in favor of a significant monetary penalty.

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

The fifth Kimmelman factor to be examined is the duration of the illegal activity. Here, the Respondents' conduct occurred over several years.[2] This factor supports a higher penalty.

The sixth Kimmelman factor to be examined is the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. In Kimmelman, the Supreme Court explained that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he has already paid a price for his unlawful conduct. Kimmelman, 108 N.J. at 139. Here, there is no evidence in the record

[2] The Respondents' conduct began in October 2007 and lasts to the present, as the Respondents have not returned $30,000 bail bond collateral to M.R. paid on behalf of C.R.

to suggest that the Respondents have been party to criminal proceedings stemming from the conduct at issue. This factor thus supports a higher penalty.

As to the final Kimmelman factor, whether the licensee has violated the Producer Act on prior occasions and if past penalties have been insufficient to deter future violations, there is no evidence of prior violations committed by the Respondents. This factor is thus would mitigate against the imposition of a higher civil penalty.

Weighing all the Kimmelman factors, and based upon the violations as set forth above, I ADOPT the recommendation of the ALJ that the Respondents shall pay civil monetary penalties in the amounts recommended by the ALJ. However, I MODIFY the ALJ's recommendation to incorporate the above analysis under Kimmelman. I also MODIFY the ALJ's recommendations as to which Respondent is responsible for the fines in Counts Four and Five. Pursuant to N.J.S.A. 17:22A-45(c), up to $5,000 for the first violation and up to $10,000 for any subsequent violations of the Producer Act may be imposed. Thus, I MODIFY the recommendations of the ALJ and impose a total monetary penalty of $60,000 to be allocated as follows:

Count One: $20,000, jointly and severally, for failing to remit premiums due to FCS on bail bonds issued;

Count Two: $10,000, jointly and severally, for failing to timely return collateral funds to consumers for the bail bonds of J.P. and C.N.;

Counts Two and Three: $10,000, jointly and severally, for failing to timely return and misappropriating the collateral funds for the bail bond of C.R.;

Count Four: $10,000, against BGM, Mascola, and Steward, jointly and severally, for invoicing a consumer, specifically M.R., for a premium without being licensed to do so;

Count Five: $5,000, against ECBB, Steward, and Mascola, jointly and severally, for failing to register the ECBB Wildwood office as a branch office; and

Count Six: $5,000, jointly and severally, for failing to timely reply to the Department's inquiries.

Restitution

N.J.S.A. 17:22A-45(c) establishes that the Commissioner has the power to order restitution of moneys owed to any person, as appropriate. The ALJ recommended that restitution be ordered, jointly and severally against the Respondents, in the amount of $30,000, together with prejudgment interest thereon, from May 7, 2013, pursuant to N.J.S.A. 17:22A-45(c). I ADOPT the ALJ's recommendation that the Respondents pay restitution in the amount of $30,000, together with prejudgment interest thereon, from May 7, 2013, the day that C.R. was sentenced. However, I MODIFY the ALJ's recommendation to specify that the Respondents are ordered to pay restitution, with prejudgment interest to M.R. This is for the $30,000 bail bond collateral M.R. paid on behalf of C.R., which was never returned by the Respondents. The award of prejudgment interest is appropriate. R. 4:42-11(b). Dep't of Ins. v. Universal Brokerage Corp., 303 N.J. Super. 405, 410 (App. Div. 1997) (The Commissioner has the same power as does a court in providing for interest on an order for the payment of money); See also Bd. Of Educ., City of Newark, Essex Cty. v. Levitt, 197 N.J. Super. 239, 245 (App. Div. 1984).

Reimbursement for Costs of Investigation

N.J.S.A. 17:22A-45(c) establishes that the Commissioner has the power to order the costs of investigation and prosecution, as appropriate. I ADOPT the ALJ's recommendation that the Respondents reimburse the Department in the amount of $5,300 for the costs of investigation and

prosecution. This amount is consistent with the Certification of Investigator Shannon. Shannon Cert at ¶¶49-52 and Ex. R attached thereto.

CONCLUSION

After having carefully reviewed the record, I hereby ADOPT the findings and conclusions as set forth in the Initial Decision, except as modified herein, and hold that the Respondents violated the Producer Act and accompanying regulations as charged in the OTSC, and have failed to present any legally or factually viable defenses to the violations of the Producer Act and the regulations promulgated thereunder. Further, I ADOPT the conclusion that the Department's Motion for Summary Decisions should be granted on all six Counts set forth in the OTSC.

I also ADOPT the ALJ's recommendation and hereby ORDER the revocation of Steward, Mascola, and ECBB's insurance producer licenses. I MODIFY the ALJ's recommendation to incorporate the above analysis under Kimmelman and ORDER that fines totaling $60,000 be imposed against the Respondents, for the violations contained herein. I further MODIFY the Initial Decision as it relates to the allocation of these penalties. Therefore, the civil monetary penalty shall be allocated as follows: Count One: $20,000 against the Respondents jointly and severally; Count Two: $10,000 against the Respondents jointly and severally; Counts Two and Three: $10,000 against the Respondents jointly and severally; Count Four: $10,000 against BGM, Mascola, and Steward jointly and severally; Count Five: $5,000 against ECBB, Mascola and Steward jointly and severally; and Count Six: $5,000 against the Respondents jointly and severally. I MODIFY the ALJ's recommendation as to imposition of restitution, jointly and severally, against the Respondents, in the amount of $30,000, together with prejudgment interest thereon, from May 7, 2013 to clarify that these restitution monies shall be paid to M.R. I ADOPT the ALJ's

recommendation and ORDER the Respondents to pay costs of investigation and prosecution in the amount of $5,300.

It is so ORDERED this __24___ day of _February_____, 2022.

_____
Marlene Caride
Commissioner

jd Steward Mascola Bail Group Management and East Coast Bail Bonds FO /Final Orders