ORDER NO. A18-110

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

AGENCY DOCKET NO. OTSC #E16-23
FINAL ORDER NO. E16-56

PROCEEDINGS BY THE COMMISSIONER OF BANKING AND INSURANCE, STATE OF NEW JERSEY TO FINE, SUSPEND AND/OR REVOKE THE INSURANCE PRODUCER LICENSE OF ZIA HASSAN SHAIKH, REFERENCE NO. 9584986	ORDER DENYING MOTION TO DISMISS ORIGINAL COMPLAINT IN FILE #128997 AND FINAL ORDER E16-56 FOR LACK OF STANDING BASED ON NEWLY DISCOVERED EVIDENCE

This matter comes before the Commissioner of the Department of Banking and Insurance ("Commissioner") pursuant to a motion by Respondent, Zia Hassan Shaikh ("Respondent"), titled "Motion to Dismiss Original Complaint[1] in File #128997 and Final Order E16-56 for Lack of Standing Based on Newly Discovered Evidence" (Respondent's Motion" or "Motion"). Specifically, the Respondent alleges that the Department of Banking and Insurance ("Department") had no evidence that the Respondent committed wrongdoing, made material misrepresentations against the Respondent without evidence, denied the Respondent substantive and procedural due process and equal protection under the law, and committed malicious interference with the Respondent's business and economic advantage with frivolous claims. The Respondent's Motion is effectively a renewed motion for reconsideration of and/or to vacate the

[1] It is unclear from the Respondent's Motion what "Original Complaint" the Respondent is requesting to have dismissed, as a "Complaint" was not issued in the present matter.

Department's Final Order No. E16-56 ("Final Order"), which revoked the Respondent's nonresident insurance producer license and imposed civil monetary penalties and fees for violations of the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 ("Producer Act"), certain regulations promulgated thereunder, and N.J.S.A. 17B:30-1 to -59 ("Trade Practices Act") as alleged in the Department's Order to Show Cause No. E16-23 ("OTSC").[2] For the reasons set forth below, the Respondent's Motion is DENIED.

PROCEDURAL HISTORY

On March 30, 2016, the Department issued the OTSC against the Respondent, which alleged that the Respondent violated various provisions of the insurance laws and regulations of this State. Specifically, the OTSC alleged that the Respondent issued or caused to be issued 3,550 postcard advertisements to New Jersey residents that were untrue, deceptive, or misleading. See OTSC at 4-5. In total, the one count OTSC charged the Respondent with 3,550 separate insurance law violations, one for each postcard advertisement. See Final Order at 6.

By letter dated April 4, 2016, the Department served upon the Respondent, via regular and certified mail, return receipt requested, a copy of the OTSC at the Respondent's Buffalo, Wyoming address, which was on file with the Department as the Respondent's last known business, mailing, and residential addresses. See Order No. A17-107 at 2. The Respondent had previously, on April 22, 2015, submitted a change of address form via the National Producer Registry, whereby his business, mailing, and residential addresses were all changed to the Buffalo, Wyoming address.

[2] As noted in the Procedural history below, the Respondent previously submitted a Motion for Reconsideration and/or to Vacate the Final Order in this matter. As such, this is effectively the second motion for reconsideration and/or to Vacate that the Respondent has filed in relation to the Final Order.

Ibid. There were no subsequent change of address forms filed by the Respondent since the April 2015 change of address form. Ibid.

The return receipt card for the certified mailing confirms that the OTSC was received on April 11, 2016, at the Buffalo, Wyoming address and was signed for by Erin Hogan, who was marked as an "agent" of the Respondent. Ibid. The regular mail was returned and marked with a handwritten note that read "Return to Sender-Not at this address" on or about April 18, 2016, seven days after the certified mail return receipt card was signed by the Respondent's agent. Id. at 2-3.

Pursuant to N.J.A.C. 11:17D-2.1(d)1, the Respondent's Answer to the OTSC was due on or before May 2, 2016. The Respondent did not submit an answer to the OTSC prior to this date. Id. at 3.

On June 21, 2016, the Department issued the Final Order, finding that although proper notice of the charges provided the Respondent with an opportunity to oppose the allegations, the Respondent failed to provide a written response to the charges contained in the OTSC within 20 days as provided by N.J.A.C. 11:17D-2.1(d). It further ordered that the Respondent waived his right to a hearing to contest the charges that were alleged in the OTSC and that the charges were then deemed admitted, pursuant to N.J.A.C. 11:17D-2.1(b). It was further ordered that, pursuant to N.J.S.A. 17:22A-40 and N.J.A.C. 11:17D-2.1(b)(2), the nonresident insurance producer license of the Respondent was revoked effective upon the execution of the Final Order. It was further ordered that, pursuant to N.J.S.A. 17:22A-45c, the Respondent is responsible for the payment of civil penalties totaling $71,000 to the Commissioner, which consisted of a separate civil monetary penalty for each of the 3,550 separate postcard advertisements as set forth in the OTSC. Lastly, pursuant to N.J.S.A. 17:22A-45c, it was ordered that the Respondent is responsible for reimbursement to the Commissioner of the costs of investigation totaling $1,388.30.

By letter dated June 24, 2016, the Department served upon the Respondent, via regular and certified mail, return receipt requested, a copy of the Final Order at the Buffalo, Wyoming address, the same address to which the OTSC was previously served. Order No. A17-107 at 3. The return receipt card confirms that the Final Order was received on July 5, 2016 at the Buffalo, Wyoming address and was once again signed for by Erin Hogan, who is marked as an "agent" of the Respondent. Id. at 3-4.

On or about July 24, 2016, the Respondent submitted a Motion for Reconsideration and/or to Vacate the Final Order via letter dated July 21, 2016, in which the Respondent advised that he had only recently learned about the OTSC and Final Order, and that the Department's correspondence had gone to the Buffalo, Wyoming address rather than his address in Freehold, New Jersey ("Respondent's First Motion" or "First Motion").[3] Id. at 4. The Respondent additionally argued that he was represented by legal counsel regarding this matter and said legal counsel was not informed of the OTSC and subsequent Final Order. Ibid.

On August 4, 2016, the Department filed its Opposition to the Respondent's First Motion. Id. at 6. The Department's Opposition asserted that service of the OTSC was lawful. Specifically, the Department explained that: (1) in 2015, the Respondent changed his business and mailing address via the National Insurance Producer Registry to reflect that he lived and worked at the Buffalo, Wyoming address; (2) neither the Department nor any of its agents ever received a letter of representation or any other contact from legal counsel who represented the Respondent in this matter; and (3) both the OTSC and Final Order were received at the Respondent's Buffalo, Wyoming address by a person identifying herself as the Respondent's "agent." Ibid.

[3] The Respondent's First Motion was addressed to Department's Chief of Investigations, Virgil Dowtin. It appears the same letter was also sent to Deputy Attorney General Ryan S. Schaffer ("DAG Schaffer") on or about July 29, 2016.

However, on August 3, 2016, the Respondent filed a Notice of Appeal of the Final Order with the Superior Court of New Jersey, Appellate Division ("Appellate Division") under Docket No. A-005252-15T1, which, pursuant to R. 2:9-1(a), effectively deprived the Commissioner of jurisdiction to further act on the Respondent's First Motion. See Manalapan Realty v. Township Committee, 140 N.J. 366, 376 (1995). By letter dated August 10, 2016, the Respondent filed a Reply to the Department's Opposition. Order No. A17-107 at 7. As the Respondent's Notice of Appeal deprived the Commissioner of jurisdiction to further act on the Respondent's First Motion, the Commissioner did not review same or any accompanying documentation until after the Respondent's Notice of Appeal was dismissed by the Appellate Division in an Order dated November 10, 2016. Id. at 8-9. In that Order, the Appellate Division stated that the Respondent requested that his Notice of Appeal be withdrawn. Id. at 9.

The Respondent, by letter dated November 21, 2016, to Deputy Attorney General William B. Puskas, Jr., advised that he had withdrawn his appeal in order to be provided with an opportunity for an administrative hearing per the Respondent's First Motion. Ibid. In response, on December 21, 2016, the Department resubmitted its August 4, 2016 Opposition. Ibid. The Respondent then submitted a letter to the Department, dated January 4, 2017, wherein he advised that he voluntarily withdrew his appeal in the Appellate Division and reiterated his request for an administrative hearing. Id. at 9-10.

On March 10, 2017, the Commissioner entered Order No. A17-107, which denied the Respondent's First Motion. The Commissioner found that service was proper, that "the Respondent has failed to demonstrate excusable neglect or that his failure to file an answer to the allegations contained in the OTSC constitutes 'exceptional circumstances' and has failed to set

forth a meritorious defense to warrant relief from the provisions of the default Final Order." Id. at 14.

On or about April 25, 2017, the Respondent filed a second Notice of Appeal with the Appellate Division, under Docket No. A-003611-15T1, in which he appealed the Commissioner's decision contained in Order No. A17-107. See Department's June 13, 2017 letter, attached to the Department's Opposition to the Respondent's Motion ("Department's Opposition"), at Da52-Da53.

On May 31, 2017, the Respondent hand-delivered to the Department a package of documents titled "Order to Show Cause with Preliminary Injunction & Temporary Restraints." Ibid. By letter dated June 13, 2017, the Department informed the Respondent that the Commissioner lacked jurisdiction to act in relation to his request that an "Order to Show Cause with Preliminary Injunction & Temporary Restraints" be issued against the Department's Insurance Division. Ibid. Additionally, the Respondent was informed that pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -31 and the New Jersey Court Rules, his request was procedurally improper and the Department would not take any further action in relation to same. Ibid.

On June 12, 2017, the Respondent filed a "Motion for Limited Remand" with the Appellate Division in order to permit the Commissioner to respond to his previously filed "Order to Show Cause with Preliminary Injunction & Temporary Restraints." See Appellate Division Order on Motion, attached to the Department's Opposition at Da54. On June 21, 2017, the Department opposed the Respondent's motion in order to allow the Appellate Division to resolve the matter. Ibid. On July 5, 2017, the Appellate Division denied the Respondent's Motion. Ibid.

On October 13, 2017, the Respondent filed a Motion for a Conditional Dismissal of his pending appeal with the Appellate Division, in order for his "Order to Show Cause with Preliminary Injunction & Temporary Restraints" to be heard by the Commissioner. See Appellate Division Order on Motion, attached to the Department's Opposition at Da55. The Department, on October 27, 2017, once again opposed the Respondent's motion by stating that the Respondent had already exhausted his administrative remedies. Ibid. On November 8, 2017, the Appellate Division denied the Respondent's Motion. Ibid.

On November 21, 2017, the Appellate Division, on the Respondent's own motion, issued an Order dismissing the Respondent's second appeal. See Appellate Division Order Dismissing Appeal, attached to the Department's Opposition at Da56.

On January 25, 2018, the Respondent filed the within Motion. The Respondent's Motion alleges that in October 2017, he discovered that the original complaint regarding his postcard advertisements was received by the Department through an email communication dated November 23, 2010. Respondent's Affidavit in Support of Respondent's Motion ("Respondent's Affidavit" or "Affidavit") at 1, ¶ 2-3. The Respondent states that this email provides that the complainant's aunt received the Respondent's postcard advertisement in the mail and that "[t]his type of solicitation has the potential to mislead a recipient into thinking that something is wrong with an 'orphaned' annuity and that some communication with the sender is required for 'recovery' of the account." Id. at 1-2, ¶ 3. The Respondent argues that the complainant had no direct harm from the postcard advertisements. Id. at 2, ¶ 4. The Respondent alleges that the complainant acknowledges that his aunt had an orphaned annuity account, but "seems to be agitated by the fact that the caller was placed on a long hold upon calling the phone number" referenced in the postcard advertisement. Ibid.

The Respondent states that he was provided a settlement agreement through a Consent Order with the Department, which required the Respondent to admit wrongdoing and pay a fine to the Department, which the Respondent did not accept. Id. at 2, ¶ 7-9. The Respondent further argues that upon rejection of this Consent Order, he retained an attorney, Brian Thorn, Esq. of White Fleischner & Fino, LLP, to represent him in this matter.[4] Id. at 3, ¶ 10. The Respondent additionally alleges that Mr. Thorn made contact with the Department on the Respondent's behalf and "requested proof on the allegations asserted and names of any victims who may have been harmed by the alleged violations in the original complaint." Id. at 3, ¶ 11. The Respondent further alleges that the Department provided no proofs to Mr. Thorn, and that he was informed by Mr. Thorn that the Department had "internally vacated the matter against [the Respondent] and the law firm then returned the balance of the retainer paid by [the] Respondent." Ibid.

The Respondent additionally alleges that in March 2016, he received a telephone call from DAG Schaffer regarding this matter and the proposed settlement. Id. at 3, ¶ 12. Further, the Respondent alleges that he notified DAG Schaffer that the Respondent was represented by counsel and provided Mr. Thorn's contact information to DAG Schaffer. Id. at 3, ¶ 13-14. The Respondent states that he contacted White Fleischner & Fino, LLP and was advised that Mr. Thorn no longer was employed by the firm. Id. at 3, ¶ 14. However, the Respondent states that another attorney, James P. Ricciardi, Esq., was handling Mr. Thorn's files and would contact Mr. Thorn regarding the present matter. Ibid.

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[4] Although the Respondent states that he retained counsel to represent him in this matter, there is no record of a letter of representation being received by the Department on behalf of the Respondent in relation to the OTSC. See Order No. A17-107 at fn 2. Additionally, there is no record of any telephone calls ever taking place between the Department and counsel for the Respondent. Ibid. The Respondent has not provided any proofs showing that he retained counsel to represent him in this matter, or to support the assertions as to that counsel's interaction with the Department.

The Respondent further states that in July 2016, he received an email from a registered agent from the State of Wyoming, which notified him that the Final Order was entered against him as a result of his failure to respond to the allegations set forth in the OTSC. Id. at 4, ¶ 16. The Respondent argues that his default stemmed from "the mail containing the O[TSC being] sent to Wyoming," which the Respondent alleges "was a ploy and misdirection to not notify [the] Respondent of the pending pleadings against him . . . and [the] Respondent was denied substantive and procedural Due Process Under the Law." Id. at 4, ¶ 17. The Respondent further argues that he subsequently learned that the OTSC was "issued to an address in the State of Wyoming and not to the address of last communication by DAG . . . Schaffer just a couple of months earlier at [the] Respondent's New Jersey address. . . ." Id. 4, at ¶ 18. The Respondent additionally states that in July 2016, he made contact with Department Investigator, Virgil Dowtin, via letter and telephone call, and he subsequently filed his appeal of the Final Order with the Appellate Division. Id. at 4, ¶ 19-20. The Respondent argues that "[b]ased upon newly discovered evidence of the Lack of Standing by the Department to have any claims against [the] Respondent, going back to the original complaint of 2012, the appeal was withdrawn in favor of a motion to dismiss the original complaint for lack of standing and subsequent erroneous [F]inal [O]rder . . . revoking [the] Respondent's licenses." Id. at 4, ¶ 21. The Respondent additionally states that on behalf of himself and on behalf of America's Retirement Planning Partner's LLC, he "[d]enies all of the other substantive inculpatory allegations set forth in the Complaint that relate to [the Respondent] and America's Retirement Planning Partner's LLC."[5] Id. at 5, ¶ 1(c).

[5] It is unclear why the Respondent is referencing America's Retirement Planning Partner's LLC as one of the "named Respondents" in this matter. The OTSC, Final Order, and Order No. A17-107 were issued against the Respondent only. America's Retirement Planning Partner's LLC is not a named party in the present matter.

The Respondent further alleges that the Department has never substantiated its claims that the Respondent committed violations of the Producer Act, as alleged in the OTSC and found in the Final Order. Id. at 5, ¶ 2. Specifically, the Respondent argues that the Department arbitrarily "chose to revoke his licenses without justification or cause—or any evidence whatsoever." Ibid. The Respondent quotes the "Summary" section of the Department's 2006 Notice of Proposal of N.J.A.C. 11:17-1 to -3, and claims that the language contained therein does not "remotely appl[y] to [the Respondent] and thus is a frivolous citation of any alleged violations." Id. at 5-6, ¶ 3.[6]

Moreover, the Respondent argues that the Department's Decision in Commissioner v. Bonnell et al., OAL Dkt. No. BKI 6993-08, Order of Partial Summary Decision (06/26/14), Initial Decision (05/19/14), Final Decision and Order (10/06/14) does not apply to him as the Respondent claims that he is not the "master mind" behind the postcard advertisement "scheme."[7] Respondent's Affidavit at 6, ¶ 3b. The Respondent contends that he became aware of UFS Marketing Company upon hearing a testimonial from a financial advisor while at a conference, and that advisor stated that he received new clients as a result of utilizing the UFS Marketing Company. Id. at 6-7, ¶ 3b. The Respondent further states that he did not receive new clients nor did he receive increased revenue as a result of the postcard advertisements that he utilized. Id. at 7, ¶ 3b. The Respondent alleges that he is a victim of UFS Marketing Company, and that the

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[6] The quoted language contained in the Respondent's Affidavit is the summary of the Department's then proposed amendments to N.J.A.C. 11:17-2.8, which is not the actual language of that regulation. Moreover, the Department's letters to the Respondent, the OTSC, the Final Order, and Order No. A17-107 provide that the Respondent's postcard advertisements were a violation of N.J.A.C. 11:17A-2.8, not N.J.A.C. 11:17-2.8.

[7] It should be noted that the language that the Respondent cites appears to be from the Initial Decision in Commissioner v. Bonnell et al., not from Final Decision and Order E14-113 that was issued by Commissioner and that adopted in part and modified in part the Initial Decision in that matter.

Department and the Department of Consumer Affairs should have protected him from UFS Marketing. Ibid.

The Respondent additionally cites to statutory and regulatory references that are addressed in the Final Order and alleges that the Department has failed to prove that the Respondent violated the statutes and regulations contained therein.[8] Id. at 7-12, ¶ 3ci-ix. The Respondent argues that the Department needs to prove that the New Jersey consumers who received the postcard advertisements did not have an orphaned annuity or life insurance policies. Id. at 10, ¶ 3cvii. The Respondent repeatedly contends that the Department would not have offered a settlement to him or issue the OTSC years after the initial correspondence with the Respondent if it were able to prove the violations in the "complaint." Id. at 8, ¶ 3civ-v. The Respondent alleges that if the postcard advertisements created "such great harm . . . being done to the 'helpless New Jersey residents,'" the Department would not have let him operate during that time. Id. at 9, ¶ 3cv. Moreover, the Respondent argues that the Department failed to provide discovery to his alleged attorney and created a "surprise attack" on him by issuing the OTSC and subsequent Final Order.

[8] The Respondent cited to the following statutes and regulations contained in the Final Order and that he alleges are violations found against him: N.J.S.A. 17:22A-40a(2), (7), (8), and (16), N.J.S.A. 17:22A-45c, N.J.S.A. 17B:30-1 to -59, N.J.S.A. 17B:30-4, N.J.S.A. 17B:30-17b, N.J.A.C. 11:2-23.1 to -23.10 and N.J.A.C. 11:23-4(a). However, while all of these statutory and regulatory citations are addressed in the Final Order, the Respondent was found to have violated N.J.S.A. 17:22A-40a(2), (7), (8), and (16), N.J.S.A. 17B:30-4, and N.J.A.C. 11:23-4(a). N.J.S.A. 17:22A-45c and N.J.S.A. 17B:30-17b were referenced in the Final Order because both relate to the imposition of penalties for violations of the Producer Act and the Trade Practices Act, respectively, but are not separate statutory violations entered against the Respondent. N.J.S.A. 17B:30-1 to -59 was referenced in the Final Order to advise that the Respondent is subject to the provisions of the Trade Practices Act, and is not a separate statutory violation entered against the Respondent. N.J.A.C. 11:2-23.1 to -23.10 was referenced in the Final Order to advise that the Respondent is subject to the regulations governing the advertisements of life insurance and annuities contained therein, and is not a separate regulatory violation entered against the Respondent.

Id. at 9, ¶ 3cvi. The Respondent states that the consumer complaint against him is "laughable," and he that he has been "egregiously harmed . . . by the . . . actions of the Department. . . ." Ibid.

Moreover, the Respondent alleges that the Department's "jurisdiction is the purpose of American government itself," which he contends is set forth in the Declaration of Independence (US 1776), and is applicable to the State of New Jersey. Id. at 12-13, ¶ 6-7. The Respondent points to other states to support the proposition that governments "are established to protect and maintain individual rights."[9] Id. at 13, ¶ 7. The Respondent alleges that the Department must plead a violation of a legal right and loss or harm to maintain a cause of action. Id. at 13, ¶ 8-9. He alleges that the Department "has not pled any violation of a legal right or harm."[10] Id. at 13, ¶ 9. The Respondent claims that "the complaint is . . . fatally flawed as there is no accusation alleged [and the] Respondent did not violate any one's legal rights." Id. at 14, ¶ 10. Moreover he argues that "[i]f there were a true adversary against [the] alleged Respondent, it would be laughable to even try to discuss causation because [the] Respondent is not accused of causing anything, real or *imagined*." Id. at 14, ¶ 11. The Respondent additionally argues that there is no corpus delicti or "body of the crime," which he states is required in criminal cases. Id. at 12, ¶ 12. The Respondent contends that "[v]irtually every American jurisdiction agrees it's an absolutely essential element of any crime and is consistent with the stated purpose of American government."[11] Ibid.

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[9] While the Respondent refers to the states of Arizona, Washington, and Minnesota, he does not provide any citation as to from where this quoted language was obtained.

[10] In support of this argument, the Respondent cites to multiple cases from Connecticut and Florida, which are not binding in this State.

[11] The Respondent cites to cases from California, Georgia, Illinois, Maryland, Massachusetts, and Pennsylvania, which are not binding on this State. The Respondent does cite to one New Jersey case, State v. Hill, 47 N.J. 490, to support his proposition that corpus delicti is required in all criminal cases.

The Respondent additionally argues that the Department lacks jurisdiction in this matter.[12] Id. at 15, ¶ 15. Further, the Respondent contends that the Department's jurisdiction is limited to protecting rights and this can "not [be] enlarged by alleging [that] the Attorney General has authority to issue summons." Id. at 19, ¶ 29.

The Respondent additionally alleges that the Department lacks standing in this matter. [13] Id. at 15, ¶ 15. Specifically, the Respondent contends that the Department, in its "Complaint," has failed to "show a 'particularized injury in fact' to an 'individual' that affected the Plaintiff in a 'personal' and 'individual' way." Id. at 17, ¶ 21. The Respondent further contends that as the Department "is not a 'person', 'individual', or 'corporation', . . . there can be no 'injury in fact.'" Ibid. The Respondent alleges that the "only complainants [in this matter] are Deputy Attorneys General themselves," who cannot act as fact witnesses. Id. at 17, ¶ 22-23. The Respondent additionally contends that the Department failed to properly serve the OTSC in this matter, and that "[t]he 'legally protected interest' is not actual or imminent, but conjectural and hypothetical." Id. at 18, ¶ 25. Further, the Respondent argues that the "complaint" is "unfit for adjudication," as the Respondent states that this is not an adversary proceeding because there are no allegations that the Respondent violated any legal rights. Id. at 19, ¶ 27-28.

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[12] While the Respondent cites to cases that discuss the need for courts to have jurisdiction to hear a cause of action, he fails to address why he believes the Department lacks subject matter or personal jurisdiction over him in this matter.

[13] While the Respondent alleges that the Department lacks both jurisdiction and standing in this matter, the Respondent appears to be confusing the two legal concepts in his arguments, as his arguments intertwine both of these legal concepts. Specifically, the Respondent alleges that the Department must show that an injury or harm occurred in order for the Department to demonstrate jurisdiction in this matter. See Id. at 18, ¶ 26. However, the showing of harm is one of the three prongs necessary to prove Federal standing, not jurisdiction.

The Respondent additionally alleges that the Department is discriminating against him based upon his national origin, religious beliefs, familial/marital status, gender, and socioeconomic status.[14] Id. at 18, ¶ 24. Moreover, the Respondent contends that the Department "fabricated a fictitious injured party, but no real person exist." Id. at 20. The Respondent further alleges that the Department violated his "substantive and procedural Due Process Rights and Rights under Equal Protection of the Law, through fabricated, phantom and phony claims." Ibid. The Respondent further contends that the Department "defrauded [the] Respondent with false, fraudulent and criminal actions, commissions and omissions [and the Department]'s . . . malicious action and lack of integrity and ethics is punishable by criminal charges, fines and loss of their positions to serve the State of New Jersey." Ibid.

The Respondent requests that the "complaint" in this matter be dismissed against the Respondent, with prejudice, and that his insurance producer license and real estate license be reinstated, and that the Respondent receive compensatory, nominal, and punitive damages "for loss of time without his licenses and his ability to produce income during this time. . . ." Id. at 19, ¶ 31, and 21.

By letter dated February 9, 2018, the Office of the Attorney General, on behalf of the Department, submitted a request for an extension, for a period of 14 days, to file its Opposition to the Respondent's Motion ("Department's Opposition"). By letter dated February 14, 2018, this request was granted, and the parties were advised that the date for submitting the Department's Opposition was February 23, 2018. The February 14, 2018 letter also advised the parties that the Respondent may file a Reply to the Department's Opposition within five days of the receipt of the

[14] While the Respondent alleges that the Department is discriminating against him, he fails to provide any evidence to support this claim other than listing his national origin, religious affiliation, familial/marital status, gender, and socioeconomic status.

Department's Opposition. On February 23, 2018, the Office of the Attorney General, on behalf of the Department, submitted the Department's Opposition.

The Department argues that the Respondent's Motion, which the Respondent claims is based upon "newly discovered evidence," is in reality a renewed motion seeking reconsideration of the Final Order. Department's Opposition at 6. The Department contends that the Respondent does not present any new evidence that would warrant the relief that he is requesting. Ibid. Specifically, the Department argues that the Respondent has reiterated the same arguments which were already rejected in Order No. A17-107 and he continues to fail to meet the standard for reconsideration. Ibid. The Department notes that

> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider or failed to appreciate the significance of probative, competent evidence.

Id. at 6-7 (citing D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

The Department additionally argues that in order for a party to obtain relief from a judgment based on newly discovered evidence, that the party must demonstrate "that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not merely cumulative." Id. at 7 (citing Quick Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 455 (1980)). Moreover, the Department states that "[t]he party seeking a new trial on the basis of newly discovered evidence has the burden of showing diligence and that burden is substantial. Id. at 7 (citing Quick Check Food Stores, 83 N.J. at 446).

The Department contends that the Respondent has not demonstrated that either the Final Order "or Order No. A17-107 were based on a palpably incorrect or irrational basis or how any of

the 'newly discovered evidence' is at all probative." Id. at 7. Specifically, the Department argues that the Respondent has failed to demonstrate how his "new evidence" would have resulted in a different decision from what was contained in Order No. A17-107. Ibid. The Department states that the Respondent additionally did not explain how this "new evidence" could not have been presented in 2016 and nothing in the Respondent's Motion warrants reconsideration. Ibid.

The Department argues that the Respondent disregards the fact that he was properly served at the address of record which the Respondent himself provided to the Department. Id. at 8. The Department additionally states that the Respondent has failed to provide a meritorious defense of the charge that he caused 3,550 postcard advertisements to be sent that were untrue, deceptive, or misleading. Ibid. The Department provides that the Respondent's "blanket denials of wrongdoing are inadequate to establish a meritorious defense." Ibid. Without a meritorious defense, the Department argues that "[t]he time of the courts, counsel and litigants should not be taken up by such a futile proceeding." Id. at 8 (quoting US Bank Nat. Ass'n v. Guillaume, 209 N.J 449, 469 (2012) (quoting Schultwitz v. Shuster, 27 N.J. Super. 554, 561 (App. Div. 1953)).

The Department argues that the Respondent's contention that the Department lacks standing to revoke his producer license and impose civil penalties due to a lack of a victim or corpus delicti fails. Id. at 8. Specifically, the Department states that the Producer Act permits the Commissioner to place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license or levy a civil penalty for any violation of the insurance laws. Ibid. (citing N.J.S.A. 17:22A-40a). The Department argues that the Respondent mailed false and misleading advertisements to consumers in violation of N.J.S.A. 17:22A-40a(2), (7), (8), (16), N.J.S.A. 17B:30-4, and N.J.A.C. 11:2-23.4, and there are no requirements in any of these provisions that

require a consumer to have sustained an actual loss as a result of a producer's misconduct. Id. at 8-9.

The Department lastly argues that the Respondent has had two separate opportunities to appeal the Commissioner's sanctions to the Appellate Division when he appealed both the Final Order and Order No. A17-107. Id. at 9. However, for unknown reasons, the Respondent withdrew his appeal both times, leaving him without any recourse. Ibid. The Department argues that the Respondent's Motion is "repetitive, without merit and vexatious [and t]here is nothing further for the Commissioner to consider." Ibid.

The Respondent did not submit a Reply to the Department's Opposition.

LEGAL DISCUSSION

Motions to Dismiss

The Respondent's request to dismiss the "original complaint" contained in the Respondent's Motion is procedurally improper. Although it is unclear from the Respondent's Motion what "original complaint" the Respondent is seeking to be dismissed, as a complaint was not filed against him in this matter, it is assumed that he is referring to the OTSC.

The New Jersey Uniform Administrative Rules, N.J.A.C. 1:1-1 to -24, do not provide standards for dismissing an action. Therefore, an administrative tribunal may proceed in accordance with the New Jersey Court Rules. N.J.A.C. 1:1-1.3(a). Specifically, motions to dismiss are set forth in R. 4:6-2, which provides that the pleader may, by motion,[15] seek to have an action dismissed for the following defenses: "(a) lack of jurisdiction over the subject matter, (b)

[15] R. 4:6-2 provides that [e]very defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except the following defenses [which] may at the option of the pleader be made by motion, with briefs. . . ." R. 4:6-2.

lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, [and] (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1." R. 4:6-2. If a motion is raised based on any of these defenses, "it shall be made before pleading if a further pleading is to be made." Ibid. Moreover, R. 4:6-3 states that defenses (b) (c), and (d) in R. 4:6-2 "shall be raised by motion within 90 days after service of the answer, provided that defense has been asserted therein and provide, further, that no previous motion to which R. 4:6-6[16] is applicable has been made." R. 4:6-3. Additionally, defenses (b), (c), and (d) are waived if not raised by motion pursuant to R. 4:6-3 or if omitted from a previously made motion where R. 4:6-6 is applicable. R. 4:6-7. Defenses (e) and (f) and an objection for failure to state a legal defense to a claim "may be made in any pleading permitted or ordered, or by motion for summary judgment or at trial on the merits." Ibid. However, if the court lacks jurisdiction of the subject matter, the court "shall dismiss the matter except as otherwise provided by R. 1:13-4."

In the present action, the Respondent's Motion to dismiss the OTSC would have been appropriate after service of the OTSC upon him, either filed through a motion or as a defense listed in his Answer. However, the Respondent failed to file an answer in this matter, and the Respondent did not make his present Motion until a year and a half after issuance of the Final Order. As such, a motion to dismiss the OTSC cannot be made without first, successfully seeking to have the Final Decision vacated, which the Respondent previously failed to do with his First Motion that was denied by Order No. A17-017.

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[16] R. 4:6-6 provides that "[a] party making a motion [pursuant to this rule] may join with it the other motions herein provided for and then available. If such motion omits thereform any defense or objections then available which [this rule] permits to be raised by motion, the party shall not thereafter make a motion based on any such omitted defenses or objections, except as provided in R. 4:6-7." R. 4:6-6.

A. Jurisdiction

While the Respondent now raises that the Commissioner lacks jurisdiction in this matter, the Respondent's argument is without merit, and he provides no valid basis to support his contention. While the Respondent cites to the Declaration of Independence (US 1776) and maintains that the Department, as a State entity, is only in existence to protect individual rights, he fails to show how the Declaration of Independence is in anyway applicable to the present matter or how it has any impact on the regulatory authority of the Department and the Commissioner as granted under the insurance laws of this State, including, but not limited to, the Producer Act.

The Department of Banking and Insurance was created in 1891 and is "charged with the execution of all laws relative to insurance. . . ." N.J.S.A. 17:1-1. Moreover, the Commissioner is charged with a variety of powers and duties including formulating, adopting, issuing, and promulgating of rules and regulations, in the name of the Department, that are "authorized by law for the efficient conduct of the work and general administration of the [D]epartment, and the appropriate regulation of the institutions, companies, agents, boards, commissions, and other entities within its jurisdiction, including licensees. . . ." N.J.S.A. 17:1-15e. The Commissioner is also empowered to "[i]nstitute the legal proceedings or processes necessary to enforce properly and give effect to any of the [C]ommissioner's powers or duties." N.J.S.A. 17:1-15g.

Additionally, the Commissioner is empowered to place on probation, suspend, revoke, or refuse to renew an insurance producer's license or may levy a civil penalty for any of specific causes as set forth in the Producer Act. N.J.S.A. 17:22A-40. Further, the Commissioner maintains the power to conduct investigations into the affairs of every person acting as an insurer or engaged in in the business of insurance in this State. Specifically, N.J.S.A. 17B:30-16 provides that

> The [C]ommissioner shall have the power to examine and investigate into the affairs of every person acting as an insurer or

> engaged in the business of insurance in this State in order to determine whether such person has been or is engaged in any unfair method of competition or any unfair or deceptive act or practice prohibited by this chapter.

N.J.S.A. 17B:30-16. The Commissioner also maintains

> the authority to enforce the provisions of and impose any penalty or remedy authorized by [the Producer A]ct and Title 17 of the Revised Statutes or Title 17B of the New Jersey Statutes against any person who is under investigation for or charged with a violation of [the Producer A]ct or Title 17 of the Revised Statutes or Title 17B of the New Jersey Statutes even if the person's license or registration has been surrendered or has lapsed by operation of the law.

N.J.S.A. 17:22A-40d. As such, the Commissioner and the Department is entrusted with the enforcement of the statutes and regulations that govern the licensing and conduct of the insurance industry in this State, including licensees of this Department, such as the Respondent.

By becoming licensed as an insurance producer in this State, the Respondent agreed to abide by the statutes and regulations that govern that license as well as the business in which he engages. The Respondent thus consented to the Department's authority to regulate his activities as an insurance producer. The Respondent's claim that the Department lacks jurisdiction to enforce the statutes and regulations that govern the insurance business and licensees in this State is completely specious.

B. Standing:

Moreover, the Respondent's argument that the Department lacks standing to pursue an action against him, as he alleges that there is no injury in fact, is also baseless. As noted above, the Commissioner and the Department were granted regulatory authority over the insurance business, and those who engage in the insurance business, in this State. The Commissioner maintains the authority to place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license or levy a civil penalty for any violation of the insurance laws of this

State. N.J.S.A. 17:22A-40a. The Commissioner does not need to demonstrate that an injury in fact occurred in order to bring an administrative action against a licensee, rather the Commissioner need only show that the licensee's conduct was in violation of applicable insurance laws. Here, it was alleged that the Respondent committed certain insurance law violations through his distribution of fraudulent and misleading postcard advertisements, and as the State agency with the statutorily-granted powers to regulate the insurance industry and enforces the insurance laws of this State, the Commissioner and the Department maintain the authority to bring an administrative action against the Respondent through service of the OTSC, if there is evidence of an insurance law violation with or without any evidence of specific injury to any person or insurance consumer.

Additionally, the Respondent's notion that the administrative action in this matter could not proceed without a showing of corpus delicti is misplaced. Corpus delicti is the criminal law principle that a crime must be proven to have occurred before an individual can be convicted of committing that crime, and in this State, the term references the two elements required for proof of a crime. See Hill, 47 N.J. at 496 ("Proof of the corpus delicti is required in all criminal cases." (emphasis added)). The action instituted against the Respondent was administrative in nature, rather than a criminal action. The Department did not institute criminal charges against the Respondent in this matter. The Department instituted an administrative enforcement action based upon the Respondent's violations of the insurance laws and regulations of this State. As such, the principal of corpus delicti is inapplicable to the present matter.

Motions to Reconsider/Vacate

The Respondent has once again failed to satisfy the legal standard necessary to reconsider and/or vacate a judgment and, therefore, the Respondent's request that the Final Order, including

the revocation of his non-residence insurance producer license, civil monetary penalties, and costs, be reconsidered and/or vacated is DENIED. Additionally, the Respondent's request that his real estate salespersons license be reinstated and that he be awarded compensatory, nominal, and punitive damages is also DENIED.

It is well-settled that the Commissioner has the inherent power to reopen and reconsider her decisions as well as correct her own judgments. Duvin v. State, 76 N.J. 203 (1978). While not controlling on administrative agencies, the Rules of Court applicable in Superior Court matters have been used to guide similar issues that arise in administrative proceedings, recognizing that administrative agencies possess the power, comparable to the courts pursuant to R. 4:50-1, to reopen judgments and final decisions in the interests of justice, with good cause shown. Beese v. First National Stores, 52 N.J. 196 (1968); Stone v. Dugan Brothers of N.J., 1 N.J. Super. 13 (App. Div. 1948). The power of an administrative agency head to reopen or modify a Final Order must be exercised reasonably, and the application to do so must be made with reasonable diligence. Duvin, 76 at 207 (citing Skulski v. Nolan, 68 N.J. 179 (1975)).

A. Motions for Reconsideration

Motions for Reconsideration are granted only where: "(1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Fusco v. Bd. of Educ. of the City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2001), certif. denied, 174 N.J. 544 (2002) (citing D'Atria v. D'Atria, 242 N.J. Super. at 401). Moreover R. 4:49-2 provides that motions for reconsideration, which seek "to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the

party obtaining it."[17] R. 4:49-2. Additionally, a motion for reconsideration must "state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which [the party moving for reconsideration] believes the court has overlooked or as to which it has erred." Ibid.

With these rules in mind, I herein find that the Respondent has not established grounds to be relieved from the Final Order. As a threshold matter, the Respondent, pursuant to R. 4:49-2 was required to submit a motion for reconsideration with 20 days after service of the judgment or order upon all of the parties. The Final Order in this matter was issued in June 2016 and Order Number A17-107 was issued in March 2017. The Respondent is well past the time that he may file a motion to reconsider either Order. Even so, the Respondent has failed to demonstrate that the Final Order was based upon a palpably incorrect or irrational basis or that there was a failure to consider, or appreciate the significance of probative, competent evidence.

Specifically, the Respondent, pursuant to N.J.S.A. 17B:30-4[18] and N.J.A.C. 11:2-23.4(a),[19] is required to ensure that his advertisements are truthful and not misleading. The Respondent

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[17] Motions for reconsideration of interlocutory orders are governed by R. 4:42-2 and can be filed at any time before the entry of final judgment. ("[A]ny order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.").

[18] N.J.S.A. 17B:30-4 provides that "[n]o person shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance and annuities or with respect to any person in the conduct of his insurance and annuity business, which is untrue, deceptive or misleading."

[19] N.J.A.C. 11:2-23.4(a) provides that "[a]dvertisements shall be truthful and not misleading in fact or by implication. Words or phrases the meaning of which is clear only by implication or by

reiterates his original argument from his First Motion that he used a "marketing campaign" through UFS Marketing Company in order to create and/or mail the postcard advertisements; however his use of another company to create and/or mail said advertisements does not absolve him of his responsibility to ensure that the postcard advertisements were truthful and not misleading pursuant to the insurance laws of this State. Here, the Respondent hired a company to create and/or mail advertisements to 3,550 New Jersey residents whom he had no reason to suspect held any annuities, which mislead New Jersey residents by advising that the contact was "attempting to reach [the consumer] regarding important annuity information. Our recovery team is now scheduling reviews for orphaned accounts greater than five years." The Respondent, by hiring a firm to send the ads that implied a possible recovery, sent misleading advertisements in violation of the insurance laws of this State. The Department has a duty to protect the public and particularly, insurance consumers, from false and misleading information being circulated to them from licensed insurance producers in this State.

Moreover, the Respondent's argument that the Department lacks jurisdiction and standing to pursue an administrative action against him is baseless, as discussed above. The Commissioner and the Department maintains the authority to regulate those that engage in the insurance business in this State. Through the Respondent's licensure as an insurance producer, he agreed to abide by the statutes and regulations that govern the conduct of an insurance producer licensee and the insurance business as a whole. It was well within the Department's authority to institute the present action against the Respondent for his misconduct under the insurance laws through service

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familiarity with insurance terminology shall not be used. The form and content of an advertisement of a policy shall be sufficiently complete and clear so as to avoid deception. The advertisement shall not have the capacity or tendency to mislead or deceive."

of the OTSC. See N.J.A.C. 11:17D-2.1 to -2.8 (Administrative Procedures and Penalties for actions against insurance producers).

B. Motions to Vacate Default Judgment

R. 4:50-1 provides the following guidance in determining whether to provide relief from a Final Order:

> On motion with briefs, and upon such terms that are just, the court may relieve a party . . . from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

In considering subparagraph (a) in the rule, the New Jersey Supreme Court has noted that: "The four identified categories . . . when read together, as they must be, reveal an intent by the drafters to encompass situations in which a party, through no fault of its own, has engaged in erroneous conduct or reached a mistaken judgment on a material point at issue in the litigation." DEG, LLC v. Township of Fairfield, 198 N.J. 242, 262 (2009). Moreover, the mistakes contemplated under the rule are intended to provide relief to a party from litigation errors that a party could not have protected against. Id. at 263. "A party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes." Ibid. Additionally, "[e]xcusable neglect may be found when the default was attributable to an honest mistake that is compatible with due diligence or reasonable prudence." US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 468 (2012) (citing Mancini v. EDS,

et al, 132 N.J. 330 (1993)). Moreover, R. 4:50-1(f) authorizes relief from judgments "only when truly exceptional circumstances are present." Id. at 395 (quoting Manning Eng'g, Inc. v. Hudson County Park Com'n, 74 N.J. 113, 120 (1997)).

Generally, an application to vacate a default judgment is "viewed with great liberality and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Construction Co., 84 N.J. Super. 313, 319 (App. Div.), aff'd 43 N.J. 508 (1964). See also Morristown Housing Authority v. Little, 135 N.J. 274, 283-284 (1994); Mancini, 132 N.J. at 332. Nevertheless, a default judgment will not be disturbed unless the failure to answer or otherwise appear and defend was excusable under the circumstances and unless the defendant has a meritorious defense; either to the cause of action itself, or, if liability is not disputed, to the quantum of damages assessed. Guillaume, 209 N.J. at 468-69. Specifically, "[a] just, sufficient and valid defense to the original cause of action stated in clear and unmistakable terms is a prerequisite to opening a judgment." Schulwitz v. Shuster, 27 N.J. Super. 554, 561 (App. Div. 1953).

As already addressed in Order No. A17-107, the Respondent has failed to demonstrate excusable neglect or that his failure to file an answer to the allegations contained in the OTSC constitutes "exceptional circumstances" and has failed to set forth a meritorious defense to warrant relief from the provisions of the default Final Order. As the Final Order in this matter was entered based upon the Respondent's failure to respond to the allegations contained in the OTSC, it is necessary to once again address the Respondent's contentions that he was not properly served with the OTSC.

It has been the Respondent's contention, in relation to vacating the Final Order, that the Department erroneously served the OTSC and subsequent Final Order by: (1) serving the OTSC

and Final Order upon him at his Buffalo, Wyoming address rather than at his Freehold, New Jersey address; and (2) that even though the Respondent claims that the Department knew that he was represented by counsel, the Department failed to serve a copy of the OTSC and Final Order upon his counsel.

First, the address to which the Department served the OTSC and subsequent Final Order was the last known address that the Respondent had on file with the Department. In fact, less than one year before the OTSC was served upon the Respondent at his Buffalo, Wyoming address, the Respondent, on April 22, 2015, submitted a change of address form via the National Insurance Producer Registry, whereby his business, mailing, and residential addresses were all changed to the Buffalo, Wyoming address. A review of the Respondent's "Name and Address Change History Report" from the National Association of Insurance Commissioners, which was provided by the Department in relation to the Respondent's First Motion, shows that the Respondent's Freehold, New Jersey address was last reported on or about April 5, 2013, three years prior to the issuance of the OTSC. See Order No. A17-107 at 15. Additionally, the Respondent's Buffalo, Wyoming address was first reported on or about September 9, 2014, with the last address change date of April 22, 2015, when the Respondent submitted a change of address form via the National Insurance Producer Registry. Ibid.

Moreover, pursuant to N.J.A.C. 11:17-2.8(f)1,

> [a]ll licensees shall provide the Department with a complete and current business mailing address, and, if different, a street or location address, phone number and, if applicable, email address. Individual licensees shall also provide the Department with a complete and current residence address, phone number and, if applicable, email address.

Further, N.J.A.C. 11:17-2.8(f)2 provides that:

> [a]ll licensees shall provide . . . any change of business mailing or location address, residence address, phone numbers and email addresses within 30 days of the change and maintain a proof of proper notification for five years or until receipt of a license or other documentation from the Department showing the new address.

Therefore, the Respondent, as a nonresident insurance producer, who is licensed by the Department, was required to provide the Department with his updated business, mailing, and residential addresses. Further, the Respondent was required to advise and report to the Department any change to his business, mailing, and residential address, which is on file with the Department, within 30 days of the date of the change. If the Buffalo, Wyoming address was not the Respondent's business, mailing, and residential address as of the time of service of the OTSC and Final Order, the Respondent failed to keep his addresses current with the Department, in violation of the above-referenced provisions governing the conduct of insurance producers in this State.

Additionally, both the Respondent's First Motion and this Motion provide that the OTSC and Final Order were not forwarded to his Freehold, New Jersey address by the recipient who marked that the mailings were received by the Respondent's agent. However, the Respondent notes in his Affidavit that he received a copy of the Final Order via email from "a registered agent from the State of Wyoming." See Respondent's Affidavit at 4, ¶ 16. The Respondent fails to explain how this agent was able to obtain an email address for him to provide him with service of the Final Order if he is claiming that the Buffalo, Wyoming address was not his business, mailing, or residential address. It is also worthy of note that the Respondent's agent's failure – if any – cannot be attributable to Department, as the Department properly served the Respondent as his last provided address.

Further, the Department correctly served the Respondent directly pursuant to the Uniform Administrative Procedure Rules and the insurance regulations of this State. N.J.A.C. 1:1-7.1(a)

provides that [s]ervice shall be made in person; by certified mail, return receipt requested [or] by ordinary mail. . . ." Further, pursuant to N.J.A.C. 1:1-7.1(b), "[a]ny paper filed shall be served in the manner provided by (a) above upon . . . all parties appearing pro se. . . ." Moreover, N.J.A.C. 11:17-2.8(f)3 provides that "[a]ny legal process issued pursuant to the statutory authority of the Commissioner including, but not limited to, subpoenas, orders and orders to show cause may be served by sending the documents to the business mailing or residence address of the licensee then on file with the Department." Lastly, N.J.A.C. 11:17D-2.1(a)1 provides that "[b]efore an administrative penalty is imposed, the Department shall direct a notice by certified mail or personal delivery to the last known business or mailing address of the alleged violator. . . ." As the Department had no knowledge that the Respondent was allegedly represented by counsel, the Department proceeded properly by serving the OTSC and Final Order upon the Respondent only, pursuant to N.J.A.C. 1:1-7.1(b), N.J.A.C. 11:17-2.8(f)3, and N.J.A.C. 11:17D-2.1(a)1. Additionally, even if it was known that the Respondent was represented by counsel in this matter, N.J.A.C. 11:17D-2.1(a)1 still requires the Department to serve the OTSC directly upon the Respondent.

Further, N.J.A.C. 11:17-2.8(f)3 requires the service of an OTSC on the Respondent directly to his last known business, mailing, or residential address, which in this case was the Buffalo, Wyoming address. The Department therefore fully complied with N.J.A.C. 1:1-7.1(a), N.J.A.C. 1:1-7.1(b), N.J.A.C. 11:17-2.8(f)3, and N.J.A.C. 11:17D-2.1(a)1, by serving the OTSC and the Final Order via regular and certified mail, return receipt requested, upon the Respondent at his last known business, mailing, and residential address, all of which listed the Buffalo, Wyoming address per the Respondent's 2015 address update to the Department. There is no dispute that those mailings were received because the Department has provided return receipt cards that show that

the certified mail receipts in relation to both the OTSC and Final Order were signed by Erin Hogan, who indicated she is the agent of the Respondent. In totality, these facts constitute good service of both the OTSC and the Final Order.

It was not the Department's responsibility to forward the mailings to the Freehold, New Jersey address because the Respondent affirmatively reported the Buffalo, Wyoming address for receipt of his business mail. Any failure by the Respondent's agent or the Respondent to update his business, mailing, and residential addresses in accordance with N.J.A.C. 11:17-2.8(f)2, and Respondent's failure to assure that his mail - especially relating to his insurance business - is forwarded to him for his review, do not demonstrate excusable neglect. As a nonresident insurance producer, licensed by the Department, the Respondent was required to be aware of the insurance laws and regulations of this State, which includes his responsibly to update and maintain current business, mailing, and residential addresses with the Department, and he failed to do so. [20] For the reasons set forth above, the Respondent fails to satisfy the standard set forth in R. 4:50-1(a) and (f). See Baumann v. Marinaro, 95 N.J. 380, 394 (1984). (citing In re T, 95 N.J. Super. 228, 235 (App. Div. 1967)). Ultimately, the Respondent has not demonstrated that his failure to answer the OTSC was excusable under the circumstances.

Additionally, the Respondent has not established a meritorious defense to the allegations contained in the OTSC. The Respondent admits that he engaged in a "marketing campaign" through the services of UFS Marketing in relation to the postcard advertisements, which are the subject of the OTSC and Final Decision. See Respondent's Motion at 1. Thus, the Respondent

[20] As noted in Order No. A17-107, if the Freehold, New Jersey address is actually the Respondent's business and/or mailing address, there is a strong basis upon which to conclude that the Respondent should actually have changed his licensure status to "resident insurance producer," and any failure to do so could constitute additional insurance law violations.

admits that he engaged in the conduct – namely contracting with the marketing firm to mail the advertisements on his behalf to generate business. The Respondent additionally offers only a general denial as to his wrongdoing, and attempts to skirt around the issue of his wrongdoing by blaming the Department for "allowing" UFS Marketing Company to defraud insurance producers. The Department does not regulate the conduct of marketing companies. Rather, pursuant to N.J.S.A. 17:22A-40a(7), (8), (16), N.J.S,A. 17B:30-4, and N.J.A.C. 11:2-23.4(a), the Respondent, as a licensee engaged in the business of insurance, is required to ensure that his advertisements are truthful and not misleading. His use of another company to create and/or mail the postcard advisements in this matter does not absolve him of his responsibility to ensure that the advertisements circulated on his behalf comply with State law. In the present matter, the Respondent had no reason to suspect that the New Jersey Residents that received one of the 3,550 postcard advertisements held any annuities, including orphaned annuities as referenced in the ads. The Respondent failed to ensure that the advertisements created and/or mailed by UFS Marketing were truthful and not misleading, in violation of his obligations under both N.J.S.A. 17B:30-4 and N.J.A.C. 11:2-23.4(a), and his actions thus constituted false and misleading advertisements by a licensed producer to New Jersey residents. Overall, the Respondent fails to set forth "[a] just, sufficient and valid defense to the original cause of action stated in clear and unmistakable terms." Shuster, supra, 24 N.J. Super. at 561.

Moreover, the Respondent does not meet the standards set forth in R. 4:50-1(b). In order to obtain relief from a judgment based upon newly discovered evidence, the party seeking relief must demonstrate "that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not

merely cumulative." Quick Check Food Stores, 83 N.J. at 445. Moreover, the party seeking relief "has the burden of showing diligence and that burden is substantial." Id. at 446.

The Respondent argues that he has obtained

> newly discovered evidence that the Department had no evidence that [the] Respondent did any wrongdoing, made material misrepresentations against [the] Respondent without evidence, denied [the] Respondent substantive and procedural Due Process and Equal Protection Under the Law and committed Malicious Interference with the Respondent's business and economic advantage with the frivolous claims."

See Respondent's Notice of Motion. However, the Respondent fails to provide any evidence to support his claims or how any of these claims would constitute "newly discovered evidence." The Respondent does not establish how any of this "newly discovered evidence" is probative in this matter or how it would have resulted in a different decision than the one reached in either the Final Order or Order No. A17-107. Further, the Respondent does not provide any assertions or evidence that could not have been provided in 2016 or anytime thereafter. Additionally, many the Respondent's assertions of "newly discovered evidence" were previously asserted by the Respondent in his First Motion, which was already addressed in Order No. A17-107.

The Final Order was issued against the Respondent as a result of his failure to file an answer to the allegations contained in the OTSC. Pursuant to N.J.A.C. 11:17D-2.1(b),

> [t]he alleged violator's failure to respond, as required by the notice, within the time provided in the notice, shall be deemed to be an admission to all of the allegations, charges and conclusions contained in the notice, and no further proceeding shall be required prior to the execution of a final order that imposes the administrative penalty or penalties described in the notice.

N.J.A.C. 11:17D-2.1(b). As the Respondent failed to respond to the OTSC properly served upon him, the allegations contained in the OTSC were admitted. The Department is not required to further prove the allegations contained in the OTSC. It is the Respondent's burden to show cause

as to why the Final Order should be vacated, and he again failed to meet the standard to vacate the Final Order. Especially here, where the conduct charged – causing the mailing of over 3,000 misleading advertisements – is admitted by the Respondent, and the only inkling of a defense is his arguments that the Department should have protected the Respondent from the marketing company. The Respondent's position is untenable. It fails to recognize the obligations of insurance producers to act as professionals and to conduct themselves with "precision, accuracy and forthrightness," and it equally fails to constitute a meritorious defense. Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993).

CONCLUSION

As set forth above, the Respondent has not demonstrated good cause to support the entry of an order reconsidering and/or vacating Final Order No. E16-56 and/or Order No. A17-107. Accordingly, the Respondent's Motion is DENIED with prejudice.

10/13/18
Date

Marlene Caride
Commissioner

AV Shaikh FO/Final Orders - Insurance