ORDER NO.: E23-01

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-02754-19
AGENCY DOCKET NO.: OTSC #E18-33

MARLENE CARIDE, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Petitioner, v. ROBERT LAPINSKI, CUTTING EDGE BAIL BONDS, LLC and DOLLAR BAIL BONDS, INC. d/b/a/ DOLLAR BAIL BONDS, Respondents.	)	FINAL DECISION AND ORDER (CONSOLIDATED)

OAL DOCKET NO.: BKI-05524-20
AGENCY DOCKET NO.: OTSC #E19-112

MARLENE CARIDE, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Petitioner, v. ROBERT LAPINSKI, ROBERT JOHN CARTER, JEFFREY BERNARD NESMITH, STEVEN KRAUSS, CUTTING EDGE BAIL BONDS, LLC and DOLLAR BAIL BONDS, INC. d/b/a/ DOLLAR BAIL BONDS, Respondents.	)	FINAL DECISION AND ORDER (CONSOLIDATED)

This matter comes before the Commissioner of the Department of Banking and Insurance ("Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -48 ("Producer Act"), and all powers expressed or implied therein, for the purposes of reviewing the August 29, 2022 Initial Decision ("Initial Decision") of Administrative Law Judge Hon. Thomas R. Bettencourt ("ALJ"). In the Initial Decision, the ALJ found that the Department of Banking and Insurance ("Department") had not met its burden of proof in its case against Robert Lapinski ("Lapinski"), Cutting Edge Bail Bonds, LLC ("Cutting Edge"), Dollar Bail Bonds, Inc. ("Dollar Bail"), Robert John Carter ("Carter"), Jeffrey Bernard Nesmith ("Nesmith"), and Steven Krauss ("Krauss") (collectively "Respondents") and ordered that the Department's Order to Show Cause No. E18-33 ("OTSC1") and Order to Show Cause No. E19-112 ("OTSC2") (collectively, "OTSCs") be dismissed with prejudice, that no action be taken against the Respondents' licenses, and no monetary fines be imposed.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about April 19, 2018 the Department issued the OTSC1 against Lapinski, Cutting Edge, and Dollar Bail seeking to revoke their insurance producer licenses, and impose civil monetary penalties and costs of investigation for violations of the Producer Act. In the OTSC1, the Department alleged that Lapinski, Cutting Edge, and Dollar Bail engaged in the following activities in violation of the laws of this State:

> Count One: Lapinski, Cutting Edge, and Dollar Bail misrepresented the terms of an insurance agreement to D.G. in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), and N.J.A.C. 11:17A-4.10;
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> Count Two: Lapinski, Cutting Edge, and Dollar Bail forged the signature of D.G. on the Cutting Edge Surety Agreement and back-dated her signature to February 6, 2009, and they forged the signature of D.G. on an additional copy of the Premium Finance Agreement and back-dated her signature to February 6, 2009,

in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16), and N.J.A.C. 11:17A-4.10; and

Count Three: Lapinski, Cutting Edge, and Dollar Bail have refused to satisfy the judgment entered by the Superior Court of California in favor of D.G. and against Cutting Edge in the California Lawsuit in the amount of $28,355.03, in violation of N.J.S.A. 17:22A-40(a)(2), (4), and (8), and N.J.A.C. 11:17A-4.10.

On or about May 25, 2018, Respondents Lapinski and Dollar Bail filed an Answer and requested a hearing.[1] The matter was transmitted as a contested case to the Office of Administrative Law ("OAL") on February 26, 2019, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. Initial Decision at 2.

The Department filed a Motion for Summary Decision as to the allegations in OTSC1 on July 3, 2019, which the ALJ denied on August 26, 2019. Ibid.

On or about December 23, 2019, the Department issued the OTSC2 against Lapinski, Carter, Nesmith, Krauss, Cutting Edge, and Dollar Bail seeking to revoke their insurance producer licenses, and impose civil monetary penalties and costs of investigation for violations of the Producer Act. In the OTSC2, the Department alleged that Lapinski, Carter, Nesmith, Krauss, Cutting Edge, and Dollar Bail engaged in the following activities in violation of the laws of this State:

Count One: Carter, Nesmith, Krauss, Lapinski, Cutting Edge, and Dollar Bail misrepresented or are responsible for the misrepresentation of the terms of an insurance agreement to D.G. by having D.G. post additional collateral for the Bail Bond after it was written, in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10;

Count Two: Carter, Nesmith, Krauss, Lapinski, and Cutting Edge forged or are responsible for forging the signature of D.G. on the Cutting Edge Surety Agreement

[1] It is unclear if Cutting Edge filed an Answer to OTSC1. Investigator Gervasio testified that all the parties named in OTSC1 filed an Answer to OTSC1. T2 60:20-21. However, nothing in the file indicated that Cutting Edge filed an Answer to OTSC1. Further, Counsel for Lapinski and Dollar Bail argued that the parties "have now responded in a consolidated manner. So...it may be a difference but it makes no difference." T2 60:10-14.

and back-dating her signature to February 6, 2009 in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10;

Count Three: Carter, Lapinski, and Dollar Bail forged or are responsible for forging the signature of D.G. on the Dollar Bail Bond Premium Finance Agreement and back-dating her signature to February 6, 2009 in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10;

Count Four: Carter was not licensed as an insurance producer at the time he represented himself to D.G. as an agent of Cutting Edge, explained the Cutting Edge Surety Agreement and Dollar Bail Bond Premium Finance Agreement, and induced her to sign the Promissory Note as collateral for an insurance contract, in violation of N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.S.A. 17:22A-29; and

Count Five: Nesmith, Krauss, Lapinski, and Cutting Edge have failed to satisfy the judgment entered by the Superior Court of California in favor of D.G. and against Cutting Edge in the California Lawsuit in the amount of $28,355.03, in violation of N.J.S.A. 17:22A-40(a)(2), and (8), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10.

On or about January 22, 2020, Respondents Krauss and Cutting Edge filed an Answer and requested a hearing. On or about May 7, 2020, Respondents Lapinski and Dollar Bail filed an Answer and requested a hearing.[2] The matter was transmitted as a contested case to the Office of Administrative Law ("OAL") on June 16, 2020, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. Initial Decision at 2. The ALJ consolidated the two matters sua sponte on July 1, 2020. Ibid.

The hearing was held virtually on January 31, 2022; February 2, 2022; February 4, 2022; February 18, 2022; and February 25, 2022. Id. at 3. After the hearing, the parties submitted post-hearing briefs and the record closed on June 17, 2022. Id. at 3.

THE ALJ'S FINDINGS OF FACT

The ALJ summarized the witnesses' testimony. Id. at 4-14.

[2] Neither Nesmith nor Carter filed an Answer to OTSC2. Nesmith is deceased. Initial Decision at 5. As noted below, Carter was never served with OTSC2.

Jon Webster

The ALJ stated that Jon Webster, Esq. ("Webster") testified that he is licensed to practice law in California. Id. at 4. He represented Deanna Graves[3] in a lawsuit filed against her by Cutting Edge. Ibid. Webster testified that a document produced from "Dollar Premium"[4] and "Finance Company"[5] is addressed to Laredo, California. Ibid. However, Webster is not aware of a city in California called Laredo.[6] Ibid.

The ALJ stated that Deanna Graves informed Webster, and also testified at the trial in California, that Carter had her sign a deed of trust to her home to secure a bond for her grandson, James Graves, and that it was the only way to keep him out of prison. Ibid. Deanna Graves further testified that it was not her signature on a document and stated that Carter may have forged her name. Id. at 5. The document was not identified during the trial in California. Ibid. The bond issued for James Graves was not produced at the trial in California. Id. at 4. Webster testified that he could not obtain a transcript of the trial, because the trial's audio recordings were gone. Ibid. Webster testified that he was aware of Krauss and Lapinski through discovery because they were identified as persons with knowledge. Id. at 5. He could not recall if Krauss was mentioned at the trial, but Lapinski was mentioned several times. Ibid.

[3] The OTSC refers to Deanna Graves as "DG" and the Initial Decision uses her full name. To maintain consistency with the Initial Decision, Deanna Graves's name will be used in the Final Decision and Order. Further, other individuals with the last names of Graves will be referenced. To avoid confusion, individuals will be referred to by their first and last names.

[4] Dollar Premium Finance Company is not a party to this matter. Lapinski was a managing member of Dollar Premium Finance Company. 5T 48:9-18.

[5] The ALJ does not define "Finance Company" and it is assumed the ALJ is referring to Cutting Edge.

[6] Laredo is likely a mistake, and the correct city should be Vallejo, because that is the street address on the February 6, 2009 application for a surety bail bond. Ex. P-3 at DOBI 0022-23.

The ALJ stated that at the end of the trial Deanna Graves was determined to be the prevailing party. Id. at 4. The Court issued a written decision, entered a Judgment in favor of Deanna Graves, and an Order for attorneys' fees against Cutting Edge. Ibid. The written decision stated that the parties acted in apparent good faith. Id. at 5. Webster served the Order for attorneys' fees on Cutting Edge, but was advised by their attorney that Cutting Edge would not pay it. Id. at 4. Webster received $500 after he retained an attorney in Pennsylvania. Ibid.

The ALJ found that on December 13, 2015, Webster wrote to the Department in an attempt to have his attorneys' fees paid and to notify the Department of Cutting Edge's actions. Id. at 5.

The ALJ found that Webster's testimony was based "almost entirely on hearsay." Id. at 15. The ALJ found that although Webster was credible, there was no residuum of legally competent evidence to support his testimony, so "most of this testimony cannot be afforded any weight." Ibid.

Matthew Gervasio

The ALJ stated that Matthew Gervasio ("Gervasio") testified that he is the Supervising Investigator for the Department and was assigned to the investigations that resulted in the issuances of OTSC1 and OTSC2. Id. at 5. Both OTSC1 and OTSC2 reference a bail bond posted for James Graves. Ibid. The investigation was initiated after the Department received Webster's letter, which alleged insurance misconduct by the Respondents.[7] Ibid. As part of its investigation, the Department sent a letter to Cutting Edge, and Cutting Edge's attorney responded. Id. at 5-6. The bond for James Graves was issued on February 7, 2009 in the amount of $150,000. Id. at 6. The bond does not mention collateral, premium information, or balance due information, and lists Rosa

[7] Webster's letter is dated December 13, 2005. Ex. P-6. In the letter, he requests that the Department open an investigation into Cutting Edge and its license be suspended until it satisfies the Attorney Fee Order.

Maxwell and Brandon Graves as indemnitors. Ibid. Deanna Graves's name appears on the bottom of the document written by hand. Ibid. (citing Ex. P-11 at DOBI 0119-0120). The name Shondra is also handwritten. Ibid.

The ALJ stated that Deanna Graves's signature appears on the Surety Bail Bond Agreement. Ibid. The ALJ noted that there are two versions of the agreement, one contains Deanna Graves's signature and contact information, and one just contains her signature. Ibid. (citing Ex. P-11 at DOBI 01122-0123). Gervasio did not have a reason to believe that Deanna Graves had not signed the bonds. Ibid. Gervasio noted that when Deanna Graves signed the deed of trust, which was the subject of the lawsuit in California, she signed her name as "Deanna J. Graves" and the Surety Bail Bond Agreement does not have the letter "J" in Deanna Graves's signature. Ibid. Neither Gervasio, nor the two prior investigators who were assigned to the case before him, Natalie Mintchwarner and "Gasbone Sealy", spoke to Deanna Graves. Ibid. "Gasbone Sealy" did speak to Webster. Ibid.

The ALJ stated that Gervasio reviewed the "Premium Finance Company, Premium Finance Agreement Promissory Note" and stated that Deanna Graves's name does not appear on it. Ibid. The names on the document are Kani Marie Congery, Rosa Maxwell, and Brandon Graves. Ibid. Dollar Bail is the named agent. Ibid. (citing Ex. P-10 at DOBI 0125). A second Premium Finance Agreement Promissory Note has Deanna Graves's name and signature. Id. at 6-7. (citing Ex. P-10 at DOBI 0126). The total premium was $15,030, with a down payment of $5,000 and a principal balance of $10,030. Id. at 7. There is no finance charge listed. Ibid. The deed of trust signed by Deanna Graves is dated April 28, 2009, two months after the bond was issued. Ibid. (citing Ex. P-10 at DOBI 0127).

The ALJ stated that Gervasio testified that the Assignment of Contract was not dated, that Dollar Bail assigned its interest in the Surety Bail Bond Premium Finance Agreement to Cutting Edge, and the names on the document were Annamarie Crumbe, Rosa Maxwell, Brandon Graves, James Graves, and Shondra Dillihunt.[8] Ibid. (citing Ex. P-10 at DOBI 0144). Deanna Graves is not named on this document. Ibid. Lapinski signed the assignment as President of Dollar Bail and the surety company listed was Financial Casualty Surety Insurance Company. Ibid.

The ALJ stated that Gervasio requested documents from the Department of Treasury. Ibid. The documents show that Cutting Edge's registered agent is Krauss and Lapinski is the registered agent of Dollar Bail. Ibid. (citing Exs. P-16 at DOBI 1203, P-20 at DOBI 1204-1206). Lapinski is also the registered agent of Dollar Finance Premium. Ibid. (citing Ex. P-21 at DOBI 1207-1209).

The ALJ found that most of Gervasio's testimony was identifying documents. Id. at 15. The ALJ further found that he never spoke to Deanna Graves, and he "had no reason to believe the documents purported to be signed by Deanna Graves were, in fact, not signed by her." Ibid. The ALJ found that while Gervasio was credible, his testimony "was not particularly useful in determining the theory" of the Department's case. Ibid.

Michael Anthony Falco

Michael Anthony Falco ("Falco") testified that he was an employee of Dollar Bail in 2009, and did not have an ownership interest in it. Id. at 8. He was hired by Carter and Lapinski and his job duties included administrative work, posting bonds, and miscellaneous paperwork. Ibid. Falco testified that he was the agent for James Graves's bail bond and signed it as the agent. Ibid. The bond was issued on February 7, 2009. Ibid. No collateral was taken, and Falco never took

[8] Shondra Dillihunt is James Graves's mother. T2 10:22-23.

collateral for the bonds he posted. Ibid. Joe Bossi ("Bossi"), who worked for Cutting Edge, authorized the bond for James Graves. Ibid. Falco testified that he could not issue a bond as an employee of Dollar Bail without authorization from Bossi. Ibid. Neither Carter nor Lapinski had the authority to approve the Dollar Bail issuing a bond. Ibid. Falco did not believe that Carter was licensed to post bonds, but was not certain. Ibid.

The ALJ stated that Dollar Bail had offices in Hackensack and Union City. Ibid. Falco did not know if Cutting Edge had an office in New Jersey. Ibid. He believed that Bossi worked from his home in Garfield and did not think anyone else worked with Bossi. Ibid.

The ALJ stated that Falco reviewed the Assignment of Contract and noted that it was signed by Lapinski and contained the same Hackensack address as the Certificate of Discharge of Bond from Cutting Edge. Ibid. Falco viewed Dollar Bail as working under Cutting Edge. Ibid.

The ALJ found that Falco was direct, but "shed little light" on the Department' theory of the case. Id. at 15.

Joseph Anthony Bossi

The ALJ stated that Bossi testified that he was a bail bond agent and managing agent for Cutting Edge in New Jersey in 2009. Id. at 9. Bossi testified that he was hired by Krauss, who was the general agent and co-owner of Cutting Edge. Ibid. Bossi testified that he did not work for Dollar Bail, an independent contractor for Cutting Edge. Ibid. Bossi testified that Cutting Edge's office was in Garfield, New Jersey, and it had no other office. Ibid.

Bossi testified that he knew Carter, who worked for both Dollar Bail and as "an independent contractor bail bond agent" for Cutting Edge. Ibid. Bossi testified that he also knows Falco, who worked for Dollar Bail. Ibid.

Bossi reviewed a Power of Attorney and noted it is unusual not to have the company

name and premium listed on the bond. Ibid. (citing Ex. P-11 at DOBI 1201). Bossi also reviewed a document titled Fugitive Recovery and stated that it was not his signature on the form and he did not prepare it. Ibid. (citing Ex. P-31 at DOBI 897). Bossi also testified that an address of Cutting Edge on a document titled Certificate of Discharge of Bond is the same address as Dollar Bail. Ibid. (citing Ex. P-32 at DOBI 896).

Bossi testified that he believed that Nesmith and Krauss were co-owners of Cutting Edge, though he was unsure of the precise ownership. Ibid. Bossi testified that Dollar Bail was authorized to issue bail bonds for Cutting Edge, though he did not recall what amount Dollar Bail was authorized to write. Ibid. He did not recall James Graves, how his bond came to be issued, or how the California lawsuit began. Id. at 9-10.

The ALJ found that Bossi was direct, but "shed little light" on the Department' theory of the case. Id. at 15.

Peter Garass

Peter Garass ("Garass") is a sergeant with the Secaucus Police Department. Id. at 10. In 2009, he was a patrol officer. Ibid. He prepared an investigation report for James Graves that notes that Lapinski and Carter, representatives of Dollar Bail, dropped James Graves off at the police station based on a warrant that was issued on November 25, 2009. Ibid. (citing Ex. P-25). Garass also prepared an arrest report for James Graves, which states that Dollar Bail representatives dropped off James Graves on a warrant.[9] Ibid. (citing Ex. P-26). The ALJ stated that Garass had no independent memory of these events and relied solely upon the investigation and arrest reports in testifying. Ibid.

[9] The ALJ states that Dollar Bail representatives dropped off "Mr. Carter" on a warrant. However, this appears to be typographical error, as it should be James Graves.

Joseph McDougal

Joseph McDougal ("McDougal") testified that he has worked at the Department for approximately thirty years and is the manager of licensing and insurance education within customer protection services at the Department, handling licensing issues. Ibid. As part of his duties he prepares certifications of licensee status. Ibid. The information is kept electronically in a database administered by the National Association of Insurance Commissioners ("NAIC"). Ibid. The information is accessed by logging into the state-based systems database ("SBS"). Ibid.

McDougal testified that a Designated Responsible Licensed Producer ("DRLP") must be named by every business entity for compliance purposes, and is responsible for all transactions. Id. at 10-11. The National Insurance Producer Registry ("NIPR") is used by licensees to make changes to addresses and contact information, but the Department enters the DLRP. Id. at 10.

McDougal testified that he received Webster's letter, prepared certification of license status reports, and referred it to the Department's investigation unit. Id. at 10-11. (citing Ex. P-6). The information in his reports are maintained by the NAIC. Id. at 11. McDougal testified that Lapinski was first licensed on April 4, 2008 and his license was canceled on October 31, 2017. Ibid. Lapinski was designated the DRLP for Dollar Bail on June 27, 2008 and for Cutting Edge on May 20, 2014. Ibid. Cutting Edge was licensed on May 30, 2006 and its license expired on May 31, 2018. Ibid.

McDougal testified that an insurance producer license is needed to sell, solicit, or negotiate a contract of insurance, including obtaining a deed of trust. Ibid.

Lapinski

Lapinski testified that he is employed by FTA Financial as a managing member. Ibid. Formerly, he was President of Dollar Bail from 2007 to 2016, and assumed that he was the DRLP of Dollar Bail from 2008 to 2016. Ibid. He had sole control of Dollar Bail from its inception to 2016. Id. at 12. He did not remember Carter having the authority to make any representation or enter into contracts on behalf of Dollar Bail. Ibid. Falco was not an employee or independent contractor of Dollar Bail. Id. at 12.

Lapinski did not have any control over Cutting Edge, as he was not an officer, member, or shareholder. Id. at 11. He did not recall being named the DRLP for Cutting Edge in May of 2014. Ibid. He also did not recall Krauss telling him that he was being named the DRLP for Cutting Edge; making any changes to licensee information for Cutting Edge with the Department; changing the e-mail for Cutting Edge to R***ski@*** on June 15, 2010; changing Cutting Edge's address on June 10, 2010; its fax number on July 23, 2010; or the email address on February 25, 2011. Id. at 12. He did not recall changing any information for Robert Carter. Ibid. Lapinski testified that Dollar Bail had an address at 220 Highway 46, Suite 105 in Little Ferry, but not 220 Highway 46, Suite 350 in Little Ferry. Ibid.

Lapinski was unsure if anyone else used the e-mails R***ski@*** or r**@dollarbail.com. Ibid. He was not aware of Dollar Bail and Cutting Edge using the same fax numbers, telephone numbers, or sharing office space between 2009 and 2016. Ibid.

Cutting Edge posted the bail bond for James Graves. Id. at 13. Lapinski executed an assignment of contract on behalf of Dollar Bail before Cutting Edge filed suit against Deanna Graves. Ibid. James Graves skipped bail and Lapinski and Carter apprehended him and brought him to the Secaucus Police Department in December of 2009. Ibid. After he turned James Graves

into the Secaucus Police Department, he wrote to the Secaucus Municipal Court requesting that the bond be discharged. Ibid.

Lapinski never met or communicated with Deanna Graves. Id. at 11, 14. Lapinski signed the Premium Finance Agreement with Deanna Graves's signature. Id. at 13. Lapinski did not recall faxing it to Krauss in 2009, but acknowledged that the fax number was a number that Krauss used. Id. at 13-14.

When the bond was posted for James Graves, the insureds were supposed to post collateral for the bond, but they did not. Id. at 14. Deanna Graves was not an insured. Ibid. Lapinski testified that the bond was executed in good faith and collateral was expected. Ibid. The bondsman stated that it would go to court to revoke the bond because the insureds did not post collateral. Ibid. Deanna Graves was then asked to post collateral. Ibid. Documents were sent to Deanna Graves asking her to post collateral, but the documents were not returned. Ibid. Carter, on behalf of Cutting Edge, flew to California to have Deanna Graves sign documents to post collateral. Ibid.

The ALJ found that Lapinski was a credible witness who was direct and straightforward in his responses, and stated when he could not recall an event. Id. at 16. The ALJ stated that Lapinski "freely, and credibly, set forth why [Deanna Graves] was asked to post collateral after the bond was issued for James Graves" which was "the lynchpin" of the Department's case. Ibid.

The Residuum Rule

The ALJ summarized the residuum rule, which permits hearsay evidence to corroborate or strengthen competent proof, so long as the final administrative decision is not based solely on hearsay evidence and contains "a residuum of legal and competent evidence in the record to support [the decision]." Ibid. (quoting Weston v. State, 60 N.J. 36, 51 (1972)). The ALJ stated that "some legally competent evidence must exist to support each ultimate finding of fact to an

extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." Id. at 17 (quoting N.J.A.C. 1:1-15.5(c)). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." Ibid. (quoting N.J.A.C. 1:1-15.5(a)).

The ALJ stated that one hearsay document, Ex. P-1, an affidavit of Deanna Graves, was not admitted into evidence. Ibid. The ALJ stated that there was "no residuum of competent credible evidence to corroborate" the affidavit. Ibid. Further, there was no reasonable explanation given as to why Deanna Graves could not testify, especially since the hearing was conducted virtually and no travel would be necessary. Ibid. The ALJ stated that Webster testified that the last he spoke to Deanna Graves, two years before he testified in this matter, she was ill. Ibid. The ALJ stated "the obvious, it is not possible to cross examine an affidavit." Ibid. Further, the ALJ stated that had the affidavit been admitted into evidence, "it would be afforded no weight, as there was no legally competent evidence to support it." Ibid.

The ALJ stated that although the transcript of the testimony from the California lawsuit would have been helpful, it was not available because there was a problem with the recording system. Ibid.

Findings of Fact

The ALJ found that James Graves, Deanna Graves's grandson was arrested on February 6, 2009 and bail was set at $150,000. Id. at 18. Dollar Bail, as agent for Cutting Edge, arranged to post the bail on February 7, 2009. Ibid. Lapinski signed the forms setting forth the bail. Ibid. Dollar Bail assigned its rights in the bond to Cutting Edge. Ibid. Lapinski was designated the DRLP for Dollar Bail in June 27, 2008, and for Cutting Edge on May 20, 2014. Ibid.

The ALJ further found that on April 28, 2009, Deanna Graves executed a Promissory Note and Deed of Trust to Cutting Edge for $150,000. Ibid. James Graves failed to appear for court, and was apprehended and surrendered to the Secaucus Police by Lapinski and Carter on December 1, 2009. Ibid. Lapinski sent a letter on Dollar Bail letterhead to Secaucus Municipal Court asking that the bond be discharged on December 1, 2009. Ibid. The bond was discharged on December 21, 2009. Ibid.

The ALJ found that Cutting Edge filed a Complaint against Deanna Graves in the Superior Court of California on November 12, 2013. Ibid. Webster represented Deanna Graves and The Hon. Barry Goode presided over the trial. Id. at 18-19. Judge Goode found in favor of Deanna Graves, found that Cutting Edge failed to carry its burden of proof, and entered a judgment in favor of Deanna Graves, and awarded counsel fees against Cutting Edge in the amount of $28,355.03. Ibid. Judge Goode also found that Carter and Lapinski operated in good faith and made no finding as to whether Deanna Graves's signature was forged on any document. Ibid.

The ALJ found that Webster sent a letter dated December 13, 2015 to Joseph McDougal ("McDougal") at the Department alleging misdeeds by Cutting Edge and Lapinski, and advising the Department of his unpaid legal fees. Id. at 19. The ALJ found that Webster mischaracterized Judge Goode's opinion in that Judge Goode did not find that Cutting Edge or Lapinski acted inappropriately, but only found that they had not met their burden of proof. Ibid. The ALJ also noted that Lapinski was not a party to the lawsuit. Ibid. The ALJ found that the Department issued OTSC1 against Lapinski, Cutting Edge, and Dollar Bail on April 19, 2018 and issued OTSC2 naming additional Respondents Carter, Nesmith, and Krauss on December 23, 2019. Ibid.

The ALJ'S LEGAL ANALYSIS AND CONCLUSIONS

The ALJ stated that the Department has the burden of proving the allegations by a preponderance of the credible evidence. Id. at 20 (citing Atkinson v. Parsekian, 37 N.J. 143 (1962)

and In re Polk, 90 N.J. 550 (1982)). The ALJ noted that the evidence must be such as would lead a reasonably cautious mind to a given conclusion. Ibid. (citing Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958)). The ALJ further stated that "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." Ibid. (citing State v. Lewis, 67 N.J. 47, 49 (1975)).

The ALJ found that the Department had failed to carry its burden as to any of the alleged violations. Id. at 22. The ALJ found that the Department failed to establish that anyone forged Deanna Grave's signature, failed to establish that any Respondent had made any misrepresentation, and failed to establish that Carter acted as an insurance producer in 2009 when he was unlicensed to do so. Ibid. The ALJ found that Judge Goode did not make any finding that the lawsuit filed by Cutting Edge against Deanna Graves in 2009 was frivolous. Ibid. The ALJ further found that N.J.S.A. 17:22A-40(a)(2), (4), (8), and N.J.A.C. 11:17A-4.10 "cannot be reasonably interpreted to find a violation…for failure to satisfy an award of counsel fees" as alleged in Count Three of OTSC1. Ibid.

The ALJ found that the Department only presented unsupported allegations and no evidence "that any of the alleged violations set forth in both OTSC occurred." Ibid. The ALJ stated that the Department wanted the ALJ to "make a leap of faith, without any evidence" and that "inferences are not evidence." Ibid. The ALJ stated that there was no "competent credible evidence" from which to draw inferences. Id. at 22-23.

The ALJ noted that he made no findings as to the Respondents' arguments regarding the of limitations and whether the burden of proof for fraud is clear and convincing evidence rather than preponderance as those issues were moot because the Department failed to prove its case.

Ibid. The ALJ concluded that both OTSC1 and OTSC2 should be dismissed with prejudice. Id. at 23.

EXCEPTIONS

Under N.J.A.C. 1:1-18.4(a), Parties' Exceptions were due on or before September 12, 2022. On August 31, 2022, the Department requested a 30-day extension under N.J.A.C. 1:1-18.8(d), which the Respondents did not consent to. A request for extension, though not the full 30 days, was granted on September 1, 2022 and the parties' exceptions were due by September 28, 2022. The Department submitted its exceptions on September 28, 2022. ("Department Exceptions"). The Respondents requested an extension to file their Replies, which was granted and the Respondents' Replies were due October 12, 2022. Krauss and Cutting Edge filed their reply on October 11, 2022. ("Krauss and Cutting Edge Reply"). Lapinski and Dollar Bail also filed their reply on October 11, 2022. ("Lapinski and Dollar Bail Reply").[10]

Department Exceptions

Statement of the Case and Procedural History

The Department agreed with the ALJ's recitation of the procedural history, but added that Carter and Nesmith never filed Answers to OTSC2. Department Exceptions at 5 (citing T2 59:6-10). The Department also criticized the Initial Decision for failing to analyze the Premium Finance Agreement signed by Deanna Graves ("Deanna Graves PFA"), or the Surety Agreement signed by Deanna Graves ("Deanna Graves Surety Agreement"), which were "critical documents in the

[10] The Department filed a Reply on October 12, 2022. Under, N.J.A.C. 1:1-18.4(d), within five days from receipt of exceptions, any party may file a reply which "may address the issues raised in the exceptions filed by the other party or may include submissions in support of the initial decision." The Respondents did not file exceptions in this matter, the administrative rules do not address sur-replies, and did the Department seek leave to file a sur-reply. See R. 1:6-3(a). The Department's sur-reply was not considered.

whole case…" Ibid. The Department also criticizes the ALJ for misconstruing the Opinion After Trial issued by Judge Goode ("California Opinion") in the lawsuit Cutting Edge filed against Deanna Graves in California ("California Lawsuit"). Id. at 5-6. Specifically, while the ALJ recites that Judge Goode found that "Carter and Lapinski dealt, in apparent good faith, with the 'family'", the Initial Decision left out the remainder of the sentence which read that they also acted "without carefully parsing which particular family members were really prepared to stand up for [James Graves]." Ibid. Judge Goode also found that no evidence was presented that showed that Deanna Graves was contacted by anyone in early February of 2009. Id. at 6 (citing Ex. P-3 at DOBI 27).

Further the Department argues that the Initial Decision omitted factual background regarding how the Deanna Graves PFA and the Deanna Graves Surety Agreement were backdated to February 6, 2009 when Carter traveled to California in April of 2009 to meet with Deanna Graves and present her with insurance documents for her signature. Ibid.

The Deanna Graves PFA was a contract to remit monthly installment payments to Dollar Bail for its role in arranging the financing for the bail bond issued for James Graves ("Bail Bond"). Ibid. (citing Ex. P-31 at DOBI 884). The Deanna Graves Surety Agreement was a contract to indemnify Cutting Edge for any losses it may suffer, or claims that may arise. Id. at 6-7 (citing Ex. P-31 at DOBI 886).

The Department argues that although the ALJ cited the California Opinion and relied on it for certain aspects, it did not incorporate any of the key legal issues determined in that litigation, and therefore the Initial Decision's legal analysis and conclusions were flawed. Id. at 9-10.

Testimony and Credibility Discussion

The Department took exception to the ALJ's determination that all the witnesses were credible because the witnesses' testimony conflicted, and witnesses whose testimony are

"diametrically opposite" cannot both have testified honestly. Id. at 11-12. The Department also argues that Lapinski did not testify credibly. Id. at 12.

Jon Webster

The Department took exception to the ALJ's finding that Webster's testimony was based almost entirely on hearsay. Ibid. (citing Initial Decision at 15). The Department argues that because Webster witnessed the entire trial in California, he has direct knowledge of Carter's testimony, including Carter's testimony that he visited California on April 28, 2009 to have Deanna Graves signed insurance documents, the same day that Deanna Graves signed her home to Cutting Edge. Ibid. (citing T2 13:1-14:11).[11]

The Department argues that Webster's "non-hearsay testimony" confirmed the findings of fact in the California Opinion, which is not hearsay and is subject to judicial notice under N.J.R.E. 201 and 202, and can be admitted under N.J.R.E 803(c)(8) as a public record. Id. at 12-13. The Department argues that Webster's "non-hearsay testimony" corroborates the "non-hearsay judicial opinion" establishes that the Deanna Graves PFA and Deanna Graves Surety Agreement because Carter was the only person to have had contact with Deanna Graves, and he did not meet with her until April of 2009, two months after the bail bond was posted. Id. at 13.

The Department also states that Webster credibly testified regarding the unpaid attorney's fee order resulting from the California Lawsuit ("Attorney Fee Order"), which underpins Count Five of OTSC2. Ibid. The Department argues that that Webster served the Attorney Fee Order on Cutting Edge's attorney, but only recovered $500. Ibid. (citing T2 24:7-25:23). The Department

[11] T1 refers to the transcript of the hearing conducted on January 31, 2022. T2 refers to the transcript of hearing conducted on February 2, 2022. T3 refers to the transcript of hearing conducted on February 4, 2022. T4 refers to the transcript of hearing dated February 18, 2022. T5 refers to the transcript of hearing conducted on February 25, 2022.

requests that the Commissioner order restitution to Webster pursuant to N.J.S.A. 17:22A-45(c) because Cutting Edge lacked cause to sue Deanna Graves, but based its case on "fraudulent backdated documents." Id. at 13-14. The Department argues that filing a suit against an individual based on contracts without consideration "is a fraudulent act itself that must not go unpunished." Id. at 14.

Excluded Evidence

The Department summarized hearsay and the residuum rule. Id. at 14-15. The Department argued that there was "sufficient competent non-hearsay evidence" to admit Deanna Graves's affidavit, Ex. P-1, into evidence. Id. at 15. The Department argues that Ex. P-1 is corroborated by her testimony during the trial of the California Lawsuit, and memorialized in the California Opinion, which is a non-hearsay document. Ibid. The Department argues that Deanna Graves does not need to be produced as a witness to admit her affidavit into evidence because the affidavit, is supported by "the non-hearsay judicially noticeable California Opinion." Ibid.

The Department also took exception to the ALJ's determination that there was no reasonable explanation offered as to why Deanna Graves could not participate in the hearing. Ibid. (citing Initial Decision at 17). The Department argues that Webster testified that when he last spoke to her she was in poor health, unable to travel, and her memory had begun to lapse. Id. at 15-16. (citing T1 20:22-21:1; 21:12-22:15). The Department requested that the Commissioner reject the ALJ's exclusion of Deanna Graves's affidavit and consider it in the Final Decision. Id. at 16.

Matthew Gervasio

The Department summarized the testimony of Gervasio. Id. at 17-19. Gervasio testified about the separate parts of the Bail Bond form, including the collateral receipt, premium charges,

and the power of attorney. Id. at 17 (citing T2 81:2-82:2). Further, Gervasio confirmed that Falco, who worked for Dollar Bail, was listed as the executing agent for the Bail Bond. Id. at 18 (citing T2 110:1-14). He further testified that the Deanna Graves PFA was faxed by Lapinski to Krauss two months before Cutting Edge filed the California Lawsuit. Id. at 18 (citing T2 111:7-114:13, Ex. P-2).

Further, Gervasio testified that Cutting Edge's website advertised Dollar Bail's and Lapinski's phone number and address as the contact information for Cutting Edge; that Dollar Bail advertised itself as a "full risk" bail agency that would assume 100% liability for the bond; and that Dollar Bail was advertising itself as a surety company that could approve a bail bond in 2009, when the Bail Bond for James Graves was posted. Id. at 18-19 (citing T2 135:5-136:19). The Department states that Gervasio's testimony established the "inseparable connection between the two entities that were operating as one entity" with Lapinski in charge of both Cutting Edge and Dollar Bail. Id. at 19.

Excluded Evidence

The Department argued that the ALJ erred in excluding printouts from the Wayback Machine, an internet archive assembled by a non-profit company that is building a digital library of internet sites, notwithstanding a Third Circuit opinion affirming its use as a business record. Id. at 19, citing U.S. v Bansal, 663 F.3d 634, 667-68 (3d Cir. 2011). The Department argued that the ALJ erroneously based its decision to exclude this evidence on F.R.E. 901 and a decision from the Fifth Circuit. Id. at 19-20 (citing Weinhoffer v. David Shoring, Inc., 23 F.4th 579 (5th Cir. 2022); T2 138:1-140:1).

The Department argues that any writing disclosed to the opposing party ten days prior to the hearing is presumed to be authentic. Id. at 20 (citing N.J.A.C. 1:1-15.6). The Department

argued that the Wayback Machine results at Ex. P-22 and P-23 should be admitted and considered in the Final Decision and Order. Ibid. The Department argues that these exhibits corroborate Gervasio's testimony that Cutting Edge and Dollar Bail were inseparably linked and are probative to determining whether Dollar Bail and Cutting Edge were working together to "deceive Deanna Graves by having her post collateral after the Bail Bond was posted and by attempting to recoup its losses using back-dated documents." Ibid.

Michael Falco

The Department agreed with the ALJ that Falco's testimony provided "direct and straightforward" testimony, but took exception to the ALJ's conclusion that that his testimony shed little light on the Department' theory of the case. Id. at 20-21 (citing Initial Decision at 15).

The Department summarized Falco's testimony that he was an employee of Dollar Bail and posted the Bail Bond on which James Graves was released, confirmed that no collateral was posted at that time, and that Lapinski and Carter, as employees of Dollar Bail, hired Falco to work at Dollar Bail. Id. at 21. The Department argued that Falco's testimony conflicted with Lapinski's testimony that did not acknowledge an employment relationship between Falco and Dollar Bail and that Cutting Edge, not Dollar Bail, posted the Bail Bond. Ibid. (citing Initial Decision at 13). The Department argues that because the ALJ did not attempt to reconcile the contradictory testimony of Falco and Lapinski, the Initial Decision is "deficient for failing to dispose of the testimonies that are diametrically opposite." Ibid.

The Department argues that Falco's testimony that there was no collateral when the Bail Bond was posted "makes it clear" that the Deanna Graves PFA and the Deanna Graves Surety Agreement were backdated to make it appear as though she was involved in the original Premium Finance Agreement signed by others in February of 2009. Id. at 22. The Department argues that

Falco's testimony that the Bail Bond was not secured by collateral and Carter's role as an officer who made employment decisions for Dollar Bail support finding that the Deanna Graves PFA and the Deanna Graves Surety Agreement were backdated and that an officer of Dollar Bail, Carter, engaged in unlicensed activity. Ibid.

Joseph Bossi

The Department took exception to the ALJ's conclusion that Bossi's testimony did not support its theory of the case. Id. at 22-23. The Department argued that Bossi's testimony established that that he was hired by Krauss to work for Cutting Edge; that Carter was employed by Dollar Bail, and acted as an independent contractor for Cutting Edge; Falco worked at Dollar Bail; that Bossi left Cutting Edge in 2010; and that and that "a forged, fraudulent fugitive recovery sheet was utilized in the California Lawsuit in order to demand fugitive recovery costs in the amount of $35,000." Id. at 23 (citing T2 185:1-186:8; 186:25-190:5; 194:19-195:9; and Ex. P-31 at DOBI 897).

Sergeant Peter Garass

The Department states that while the ALJ did not give much weight to Garass's testimony because he did recollect the events he testified about, the ALJ did not question the accuracy of the investigation and arrest reports that Garass prepared which identify Carter and Lapinski as representatives of Dollar Bail who turned James Graves into the police. Ibid. (citing Exs. P-25 and 26). These documents support that Carter had an employment relationship with Dollar Bail, which Lapinski denied in his testimony. Id. at 24 (citing initial Decision at 13).

Joseph McDougal

The Department summarized McDougal's testimony regarding when Lapinski was DRLP for Cutting Edge and Dollar Bail; the e-mail addresses Lapinski used and how he changed Cutting

Edge's contact information to align with Dollar Bail's or his personal contact information; how he changed Carter's e-mail addresses to his own; and that he changed Carter's business phone number to the number which was also used for Cutting Edge and Dollar Bail. Id. at 24-25 (citing T3 8:1-10; Exs. P-18 at DOBI 368; P-19 at DOBI 352, 356; P-24 at DOBI 218, 223-30, 233, and 245).

The Department posits that these changes reflect the control Lapinski exerted over Cutting Edge and Carter, and shows how after Bossi left Cutting Edge in 2010, Dollar Bail and Cutting Edge acted as one organization with Lapinski in charge. Id. at 25. The Department argues that Lapinski made changes to Carter's and Cutting Edge's contact information to align with Dollar Bail's and his personal information to "streamline the business operations for Cutting Edge and Dollar Bail." Id. at 26.

Robert Lapinski

The Department took exception to the ALJ's finding that the Lapinski was credible, because that was based on an erroneous finding that he was straightforward in his responses. Ibid. The Department argues that Lapinski contradicted himself, and his testimony was debunked by documents and other witnesses. Ibid.

The Department argued that an agency head may reject or modify the findings of credibility of lay witnesses if, from a review of the record, those findings "are arbitrary, capricious, or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." Ibid. (quoting N.J.S.A. 52:14B-10(c)). The Department stated that when an agency head rejects a credibility determination, "the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record." Ibid. (quoting N.J.S.A. 52:14B-10(c) (further citations omitted)).

The Department argued that the ALJ's finding that Lapinski was a credible witness should

be rejected because this finding was not supported by the evidence in the record, and the credible evidence contradicts Lapinski's testimony. Id. at 27.

The Department specifically pointed out that Lapinski's testimony that Carter was not an independent contractor contradicted his answers that he provided in discovery. Ibid. (citing Ex. P-27 and P-28). The Department argues that a witness whose testimony contradicts their prior discovery responses casts doubt on their testimony. Id. at 28-29. The Department also argues that Lapinski contradicted his discovery responses when he identified Falco as an independent contractor for Dollar Bail, but in his testimony denied any employment relationship between Falco and Dollar Bail, but also testified that Falco executed the Bail Bond for the release of James Graves. Id. at 29 (citing T5 41:12-44:5). The Department argues that Lapinski testified that Cutting Edge, not Dollar Bail posted the Bail Bond for James Graves, even after confronted with the Deanna Graves PFA which states that Dollar Bail was to arrange financing for the Bail Bond. Id. at 30 (citing T5 48:19-22; 49:10-52:6; Ex. P-31 at DOBI 884). Further, after apprehending James Graves, Lapinski wrote to the court on Dollar Bail letterhead stating that Dollar Bail "bonded Mr. Graves on a $150,000 bond." Ibid. (citing Ex. P-13 at DOBI 283). The Department also argues that Lapinski's testimony was contradictory because he testified that Dollar Bail was not approved by the Administrative Office of the Courts ("AOC") to post bail bonds, but also testified that Dollar Bail posted the Bail Bond for James Graves in good faith, without collateral. Ibid. (citing Ex. P-12 at DOBI 313-14; Ex. P-28; T5 15:7-10; 20:12-16; 70:20-72:1).

The Department argues that despite Lapinski's contradictions, inconsistencies, and evasiveness, the ALJ did not reconcile the various conflicting testimonies. Id. at 31. The Department argues that the Commissioner should overturn the ALJ's credibility findings with respect to Lapinski. Ibid. Alternatively, the Department posited that the Commissioner can find

that all of the Respondents named in OTSC2 violated Counts Two and Three of OTSC2, which involve backdating the Deanna Graves PFA and the Deanna Graves Surety Agreement, based on Lapinski's testimony without disturbing the ALJ's credibility findings. Ibid.

The Department argues that Lapinski testified that the Bail Bond was posted without collateral and on the representations made by James Graves's family members, but Deanna Graves did not promise collateral at the time the Bail Bond was posted. Id. at 32 (citing Initial Decision at 14). Lapinski further testified that he never spoke to Deanna Graves and Carter flew to California on behalf of Cutting Edge in April of 2009 to have Deanna Graves sign documents because the promised collateral was never provided, which is why "after three months, Deanna Graves was asked to post collateral." Ibid. (quoting Initial Decision at 14). The Department argued that because Deanna Graves was not asked to be an indemnitor when the Bail Bond was posted in February of 2009, and did not promise collateral at the time the Bail Bond was posted, she cannot be a party to the Bail Bond transaction on which James Graves was released. Ibid. The Department argues that the Deanna Graves PFA and the Deanna Graves Surety Agreement nevertheless identify Deanna Graves as part of the February 6, 2009 agreement. Ibid. The Department argues that the only conclusion that can be drawn is that Lapinski is not credible and the documents were backdated to make it appear as though Deanna Graves was part of the original transaction. Ibid.

The Department argues that whether Lapinski is credible or not, the Commissioner should find that the Deanna Graves PFA and the Deanna Graves Surety Agreement were backdated to February of 2009 for the benefit of Dollar Bail and Cutting Edge. Id. at 33. Further, as the DRLP of Dollar Bail and agent of Cutting Edge, this was done at Lapinski's direction and he is responsible for the violations alleged in Counts Two and Three of OTSC2. Ibid.

Proposed Finding of Fact

The Department took exception to all of the ALJ's factual findings. Ibid. The Department argued that the Commission should make the following proposed findings of fact. Id. at 34.

A. Dollar Bail, Cutting Edge, and its Owners and Officers

Dollar Bail was first licensed as an insurance producer with the State of New Jersey on June 27, 2008, until its license expired on May 31, 2018. Ibid. (citing Ex. P-24 at DOBI 216). Lapinski is the registered agent of Dollar Bail for New Jersey, was its president from its inception until 2016, and at all times relevant was the DRLP of Dollar Bail. Ibid. (citing T4 11:20-22; Exs. P-20 at DOBI 1205; P-24 at 220, 228).

Cutting Edge was first licensed as an insurance producer with the State of New Jersey on May 30, 2006, until its license expired on May 31, 2018. Id. at 35 (citing Ex. P-24 at DOBI 231). At all relevant times, Krauss was an owner of Cutting Edge, it its registered agent for New Jersey, and was its president or manager from its inception until November of 2015. Ibid. (citing T2 186:5-8; Exs. P-15 at DOBI 382; P-16 at DOBI 1203; P-17 at DOBI 335, 340, 343; P-27 at Interrogatory no. 26; and P-28 at Interrogatory response no. 26). Krauss made Lapinski the DRLP for Cutting Edge as of May 20, 2014 and no other changes to Cutting Edge's DRLP status were made following Lapinski's appointment as DRLP of Cutting Edge. Ibid. (citing Exs. P-24 at 228 and P-17 at DOBI 336-337).

Dollar Bail was an independent contractor for Cutting Edge and Dollar Bail was exclusively responsible for its own business operations and expenses. Ibid. (citing T2 187:12-188:10). Cutting Edge was an underwriter for the insurance company, and Cutting Edge contracted with Dollar Bail to have Dollar Bail write and post bail bonds. Ibid. (citing T2 188:22-189:13).

B. Bail Bond Posted by Dollar Bail for James Graves

Dollar Bail was a bail bond agency approved by the AOC to post bonds on behalf of individuals in the State of New Jersey. Id. at 36 (citing Ex. P-12 at DOBI 313-314). Financial Casualty and Surety Inc. ("FCS") was the appointing company and surety for all bail bond recognizances posted by Dollar Bail. Ibid. (citing Ex. P-12 at DOBI 313-314). Dollar Bail did not receive any other appointments from any other surety company apart from FCS's appointment to post bail. Ibid. (citing Ex. P-24 at 222).

In February of 2009, James Graves was criminally charged and arrested in Secaucus, New Jersey and was held in custody pursuant to bail set by the court in the amount of $150,000. Ibid. (citing Exs. P-2 at DOBI 727 and P-13 at DOBI 280, 283, 291-307). On or about February 6, 2009, Kania Marie Crumby, Rosia Shemil Maxwell, and Brandon Jamal Graves entered into a Promissory Note/Premium Finance Agreement in the amount of $15,030 to the benefit of Dollar Bail in exchange for Dollar Bail issuing the Bail Bond for the release of James Graves. Ibid. (citing Ex. P-31 at DOBI 883). On or about February 7, 2009, Falco, an employee and bondsman at Dollar Bail, posted the Bail Bond with the power of attorney number FCS500-375788 in the amount of $150,000 to secure James Graves's release. Id. at 36-37 (citing Ex. P-11, T2 148:3-150:21; T2 190:1-5; and T2 146:11-14). Falco was hired at Dollar Bail by Lapinski and Carter. Id. at 37 (citing T2 146:11-147:9). FCS was the underwriting surety company for the Bail Bond issued for Defendant James Graves, and Cutting Edge guaranteed to FCS that it would pay for any bail forfeiture judgments resulting from the bail recognizance by Lapinski and Dollar Bail. Ibid. (citing Exs. P-11 and P-12 at DOBI 308-314).

On February 6, 2009, Rosia Maxwell and Brandon Graves entered into a contingent promissory note with Dollar Bail for any fugitive fee payable to Dollar Bail should James Graves

fail to appear in court, and this document does not name Deanna Graves as an indemnitor or person responsible for the Bail Bond. Id. at 37-38 (citing Ex. P-31 at DOBI 885). On or about February 7, 2009, Cutting Edge entered into a Surety Bail Bond Application and Agreement with Rosia Shemil Maxwell and Brandon Graves for the Bail Bond posted on behalf of James Graves. Id. at 37 (citing Ex. P-31 at 881-82).

Dollar Bail did not take collateral when it posted the bail bond for James Graves, relying on an individual who initially pledged collateral and was never named as an insured or indemnitor for the Bail Bond transaction, and who then failed to follow through by signing the required documents. Id. at 38 (citing T5 70:20-73:21; Ex. P-11). Lapinski never met, nor communicated with, Deanna Graves. Ibid. (citing T4-12:5-10; Ex. P-28 at interrogatory response no. 47).

C. Robert Carter's Unlicensed Activity

In 2009, Carter was an employee of Dollar Bail. Ibid. (citing T2 152:16-21 and T2 186:25-187:4). In April of 2009, Carter was not licensed as an insurance producer by the State of New Jersey, and he first became licensed as a producer on May 14, 2009. Id. at 39 (citing Ex. P-24 at DOBI 243). Because collateral was never received at the time the Bail Bond was posted in February of 2009, in April of 2009, Carter travelled from New Jersey to California to have Deanna Graves provide a deed of trust as collateral for the Bail Bond previously posted for James Graves in February of 2009. Id. at 38-39 (citing T5 70:20-71:5; 71:17-22; 74:4-18; 76:1-9; Exs. P-11; P-13 at DOBI 283; and P-31 at DOBI 887-888). In April of 2009, Carter presented the Deanna Graves PFA and the Deanna Graves Surety Agreement to Deanna Graves and she signed the documents which were then also notarized. Id. at 39 (citing Ex. P-3 at DOBI 23-24; T5 70:20-71:7; 74:4-18). The notarized Promissory Note secured by a Deed of Trust ("Deed of Trust") to Deanna Graves' residence granted on April 28, 2009, indicates that the deed was granted by

Deanna Graves in exchange for a bail bond agreement executed by Deanna Graves "on or about the date thereof in favor of the above detailed defendant [James Graves] and the bond number [FCS500-375788]." Ibid. (citing P-31 at DOBI 887 and T2 15:10-12). However, the AOC's records do not reflect a bail bond agreement or transaction bearing the power number: FCS500-375788, for James Graves on or about April 28, 2009. Ibid. (citing Ex. P-13).

D. Fugitive Recovery of Defendant Graves

On or about November 25, 2009, James Graves failed to appear in court and a warrant was issued for his arrest. Id. at 40 (citing Ex. P-13 at DOBI 283 and 295). On or about December 1, 2009 the warrant was recalled because Carter and Lapinski apprehended James Graves and surrendered him to the Secaucus Police Department, identifying themselves as representatives of Dollar Bail. Ibid. (citing T2 227:11-228:15; T5 31:10-20; Exs. P-13 at DOBI 280, 283; P-25, and P-26). Bossi, the managing agent for Cutting Edge, did not participate in the apprehension of James Graves, and did not complete or sign the fugitive recovery expense sheet produced by Cutting Edge during their lawsuit against Deanna Graves in California. Ibid. (citing T2 194:5-195:9; T5-31:21-23).

E. California Complaint

On or about December of 2009, the individuals owing premium to Dollar Bail failed to remit the monthly installment under the premium finance agreement and a Complaint was filed in the State of California by Cutting Edge naming Deanna Graves and other members of the Graves family for non-payment of the premium finance agreement and cost of recovery for apprehending James Graves ("California Complaint"). Id. at 41 (citing Ex. P-2). Prior to the filing of the California Complaint, Lapinski, as president of Dollar Bail, executed an assignment granting all rights of the premium finance agreement between Dollar Bail and Kania Marie Crumby, Rosia Maxwell, Brandon Graves, James Graves, and Shonda Dillihunt to Cutting Edge ("the

Assignment"), but did not include any contract or agreement with Deanna Graves. Ibid. (citing T5 25:5-8; Exs. P-2 at ¶4; and P-31 at DOBI 891-892).

F. Trial for the California Lawsuit

At the trial for the California Lawsuit, Carter testified that he was both an agent for Cutting Edge and that he was an employee of Dollar Bail. Ibid. (citing Ex. P-3 at DOBI 26). During the trial, the court found that neither Carter nor anyone else was in communication with Deanna Graves as of March 1, 2009. Id. at 42 (citing Ex. P-3 at DOBI 23). At the trial, Cutting Edge introduced into evidence the Deanna Graves PFA and the Deanna Graves Surety Agreement, which both contained signatures for Deanna Graves dated February 6, 2009. Ibid. (citing Exs. P-3 at DOBI 23, P-31 at 881, 884, and 886). Carter testified during the hearing that Deanna Graves signed the Deanna Graves Surety Agreement and the Deanna Graves PFA on April 28, 2009. Ibid. (citing Ex. P-3 at DOBI 23-24; T2 11:22-14:11).

G. Post-Trial Decision and Judgment

On January 14, 2015, Judge Goode entered an Opinion after trial, ruling in favor of Deanna Graves and against Cutting Edge on all counts of the California Complaint based on a lack of consideration. On November 5, 2015, Judge Goode ordered Cutting Edge to pay Deanna Graves's attorney's fees in the amount of $28,355.03. Id. at 41-42 (citing Exs. P-3 at DOBI 29; P-4; and P-5). Apart from $500 received by Webster, Cutting Edge has refused to honor the Attorney Fee Order. Id. at 42 (citing Ex. P-5 and T5 23:3-25:23[12]).

H. Lapinski's Testimony at the OAL Hearing

Lapinski testified at the Final Hearing that he was the only person who performed any work

[12] This appears to be a typographical error, as Webster testifies regarding the $500 that he received at T2 23:3-25:23. There is no testimony relevant to the Attorney Fee Order at T5 23:3-25:23.

at Dollar Bail from 2008 through 2016. Ibid. (citing T5 4:14-16; 5:3-5). Lapinski further testified that Carter was not an independent contractor for Dollar Bail despite providing discovery responses stating that Carter was an independent contractor with Dollar Bail and Cutting Edge. Ibid. (citing T5 7:17-10:7; Exs. P-27 and P-28). When confronted about the contradiction in his discovery responses concerning Carter's employment status, Lapinski asserted that because his understanding of the term independent contractor changed over time, he provided a different answer at the Final Hearing. Ibid. (citing T5 13:5-12).

Although Lapinski maintained at the Final Hearing that no one else worked with him at Dollar Bail, Lapinski had previously provided discovery responses stating that Michael Falco was an independent contractor with Dollar Bail. Id. at 43-44 (citing Exs. P-27 and P-28). At the Final Hearing, and in his discovery response, Lapinski stated that Dollar Bail was not an approved agency by the AOC to post bail bonds in New Jersey and that he was unaware of any registration with AOC, but also testified that Dollar Bail posted the Bail Bond for James Graves in good faith without any collateral taken at the time of posting the bond. Id. at 44 (citing T5 15:7-10; 20:12-16; 70:20-72:1; Exs. P-12 at DOBI 313-314 and P-28).

At the Final Hearing, Lapinski testified that he did not draft the Assignment but confirmed that he signed the Assignment on behalf of Dollar Bail and asserted that he did not recall who could have provided the Assignment to him, despite providing a discovery response to the Petitioner stating that he was asked by Cutting Edge to supply the Assignment because Cutting Edge needed the Assignment for the California Complaint. Ibid. (citing T4 25:10-26:7;[13] T5 30:5-11; Exs. P-10; P-27; and P-28).

[13] This appears to be a typographical error, as Lapinski testifies regarding the Assignment at T5 25:10-26:7. Lapinski's testimony at T4 25:10-26:7 is about changes to Cutting Edge's licensing report at Ex. P-24 at DOBI 233.

At the Final Hearing, Lapinski maintained that Carter travelled to California in April of 2009 to the benefit of Cutting Edge, notwithstanding any bail agreements signed by Deanna Graves executed for the benefit of Dollar Bail. Id. at 45 (citing T5 74:9-18; 76:1-9). Lapinski disputed that Dollar Bail posted the bail bond despite the Deanna Graves PFA clearly stating that Dollar Bail was to "arrange the financing of the Bail Bond being issued by Dollar Bail Bonds Inc. to James Graves…" Ibid. (citing T5 49:10-52:6; Ex. P-31 at DOBI 884).

During his testimony at the Final Hearing, Lapinski admitted that he filled in the blanks on the form for the Deanna Graves PFA and that he signed the document as the agent of record, but could not recall whether Deanna Graves' name was present when he signed the document. Ibid. (citing T5 57:6-19; Ex. P-31 at DOBI 884). Lapinski testified that Deanna Graves "sign[ed] documents" but he could not provide an explanation for why the Deed of Trust identified a bail bond agreement dated on or about April 28, 2009, whereas the Deanna Graves PFA was dated February 6, 2009. Ibid. (citing T5 77:5-79:18; Ex. P-31 at DOBI 884, 887).

Discussion and Analysis

The Department took exception to the ALJ's legal conclusion that the Department failed to sustain its burden of proof by a preponderance of the evidence and failed to substantiate any of the allegations in the OTSC2. Id. at 46. The Department argued that the ALJ erred in not addressing the allegation that the Respondents backdated the Donna Graves Surety Agreement and PFA as charged in Counts Two and Three. Ibid. The Department requested that the Commissioner make the following legal conclusions.

Proposed Conclusions of Law

The Department acknowledged that as the prosecuting party it has the burden of proving the allegations by a preponderance of the evidence. Id. at 47 (additional citations omitted). The

Department then summarized the allegations in the OTSC2 and the violations of the Producer Act. Id. at 47-50.

A. Respondents Violated the Producer Act by Having Deanna Graves Post Additional Collateral After the Bail Bond was Written and Posted (Count One)

The Department argues that the Respondents failed to obtain collateral for the Bail Bond for James Graves because someone outside James Graves's family who had pledged the collateral, but was never named as an insured or indemnitor for the Bail Bond, never signed the required forms. Id. at 51 (citing T5 70:20-73:21; Ex. P-11). Carter, an employee of Dollar Bail, travelled from New Jersey to California to have Deanna Graves provide the Deed of Trust as collateral for the Bail Bond which had been posted in February of 2009. Ibid. (citing T2 152:16-21; 186:25-187:4; T5 70:20-71:5; 74:4-18; 76:1-9; 71:17-22; Exs. P-11; P-13 at DOBI 283; and P-31 at DOBI 887-88). In April of 2009, Carter presented the Bail Bond documents to Deanna Graves and she signed the documents which were then notarized. Ibid. (citing T2 11:22-14:11; T5 70:20-71:7; 74:4-18; Ex. P-3 at 23-24). In April of 2009, Deanna Graves signed the Deed of Trust to her personal residence in consideration for a bail bond agreement executed "on or about the date thereof in favor of the above detailed defendant [James Graves] and the bond number [FCS500-375788]." Ibid. (citing T2 15:10-12; Ex. P-31 at DOBI 887). However, the only record that the AOC has of a bail bond issued to James Graves with the bond number FCS500-375788 was the Bail Bond posted in February of 2009. Id. at 51-52 (citing Ex. P-13). The Department argues that Deanna Graves entered into the Deed of Trust benefitting Cutting Edge because of the misrepresentation of a bail bond posted for James Graves on or about April of 2009. Id. at 52.

The Department argues that it is undisputed that that Carter traveled to California in April of 2009 to have Deanna Graves post collateral after the Bail Bond was posted. Ibid. (citing T2-11:22-14:11; T5 70:20-73:21; 74:4-18; 76:1-9; Exs. P-3 at DOBI 23-24; P-11; P-13 at DOBI 283;

P-31 at DOBI 887-888). Therefore, the Deed of Trust which references a bail bond transaction for James Graves on or about April 28, 2009 was a misrepresentation on its face. Ibid. (citing T2-15:10-12; Ex. P-31 at DOBI 887).

The Department argues that Dollar Bail, Cutting Edge, and their owners, partners, officers, and directors are liable for Carter's trip to California and subsequent presentation of insurance documents to Deanna Graves. The Department argues that Carter was an employee and officer of Dollar Bail who was involved in hiring Falco. Ibid. (citing T2 146:11-152:21; 186:25-187:4; 227:11-228:15; Exs. P-3 at DOBI 26; P-25; and P-26). Lapinski was the DRLP, registered agent, and president of Dollar Bail. Ibid. (citing T4 11:20-22; Exs. P-20 at DOBI 1205; P-24 at 220, 228). The Department argues that Lapinski is liable as the "president and/or DRLP" of Dollar Bail because as "an owner and/or officer" he is responsible for the actions by the organization licensee, branch offices, or its partners and employees. Id. at 52-53 (citing N.J.A.C. 11:17A-1.6(c); Commissioner v. Prime Insurance Syndicate, OAL Dkt. No. BKI 1168-05, Initial Partial Summary Decisions (01/31/06 and 03/09/06), Final Decision and Order (05/08/06)). Further, an employer is responsible for the insurance related conduct of an employee. Id. at 53 (citing N.J.A.C. 11:17-2.10(b)(4)). Insurance related conduct includes, selling, negotiating or binding policies, communication with insureds regarding any term or condition of an insurance policy, processing claims, and transmitting funds. Ibid. (citing N.J.A.C. 11:17-1.2).

The Department argues that liability for violations by an insurance agency's agents results from the actions of "its owners, licensees or employees that are legally attributable to it." Ibid. (quoting Commissioner v. Goncalves, OAL Dkt. Nos. BKI 3188-03, BKI 3301-05, Initial Decision (12/3/03), Final Decision and Order (5/24/04), On Remand (2/15/06)). Liability attaches to the agency employing the individual, even if the agency was unaware of its agent's unlawful action.

Id. at 53-54 (citing Commissioner v. Tepedino, OAL Dkt. BKI-14056-17, Initial Decision (07/01/19), Final Decision and Order (01/27/20), aff'd No. A-2797-19, (App. Div. Nov. 18, 2021)).

The Department argues that the promissory note was secured by the Deed of Trust to Deanna Graves's residence was obtained by a false representation that a bail bond agreement was executed for James Graves in April of 2009. Id. at 54. Lapinski was aware that Carter traveled to California in April of 2009 to have Deanna Graves execute the Deanna Graves PFA and Surety Agreement. Ibid. (citing T5 74:9-18; 76:1-9). Accordingly, Lapinski and Dollar Bail are liable for Carter's insurance related conduct as an employee of officer of Dollar Bail who secured the promissory note based on the false representation. Ibid. The Department argues that the ALJ erroneously dismissed Carter's actions by stating that there was no credible evidence to support a finding that Carter acted as a producer. Ibid. (citing Initial Decision at 22).

The Department argues that it is undisputed that Carter communicated with Deanna Graves in April of 2009 and that he had her sign over a deed to her residence based on a false representation of a bail bond issued to James Graves on or about April 28, 2009, which is conduct that constitutes insurance related conduct. Ibid. Accordingly, Lapinski and Dollar Bail are liable for Carter's insurance related conduct. Id. at 54-55.

The Department also argues that Krauss and Cutting Edge are liable for Carter's conduct. Carter was an independent bail bond agent for Cutting Edge. Id. at 55 (citing T2 186:25-187:7; Ex. P-3 at DOBI 26). Carter also obtained the Deed of Trust to the benefit of Cutting Edge. Ibid. (citing Ex. P-31 at DOBI 887). Accordingly, Carter's procurement of the Deed of Trust based on a false representation makes Cutting Edge vicariously liable for its agent's insurance related conduct. Ibid.

The Department argues that Krauss was an owner of Cutting Edge, its registered agent for New Jersey, and was its president or manager from its inception until November of 2015. Ibid. (citing T2 186:5-8; Exs. P-15 at DOBI 382; P-16 at DOBI 1203; P-17 at DOBI 335, 340, 343; P-27 at Interrogatory no. 26; and P-28 at Interrogatory response no. 26). Krauss also exerted control over naming the DRLP for Cutting Edge, thus confirming his status, as only DRLPs, officers, partners, owners, and directors are authorized to make changes to a producer's DRLP status. Ibid. (citing T3 19:3-10; Exs. P-17 at DOBI 336-337 and P-24 at 228). Accordingly, Cutting Edge and Krauss are liable for the conduct of Carter. Ibid. (citing N.J.A.C. 11:17A-1.6).

B. Respondents are Liable Under the Producer Act for Backdating Deanna Graves's signature for February 6, 2009 (Counts Two and Three)

The Department argues that during the trial for the California Lawsuit, Cutting Edge introduced into evidence documents purported to have been signed by Deanna Graves on February 6, 2009. Id. at 56 (citing Exs. P3 at DOBI 22-24 and P-31 at DOBI 881, 884, 886). Prior to the filing of the California Lawsuit, on September 12, 2013, Lapinski faxed the Deanna Graves PFA and the signature page for the Deanna Graves Surety Agreement to Steven Krauss and Cutting Edge. Ibid. (citing T2 111:7-112:12; Exs. P-17 at DOBI 334, 339, 343; P-18 at DOBI 368; and P-31 at DOBI 884 and DOBI 886.) Both the Deanna Graves PFA and the Deanna Graves Surety Agreement were dated for February 6, 2009. Ibid. (citing Ex. P-31 at 884 and 886). However, Carter testified at the trial for the California Lawsuit that both the Deanna Graves PFA and Deanna Graves Surety Agreement were signed on April 28, 2009. Ibid. (citing T2 11:22-14:11; Ex. P-3).

The Department argues that there was no credible evidence presented at the trial on the California Lawsuit to indicate that anyone communicated with Deanna Graves prior to March 1, 2009. Ibid. (citing Ex. P-3 at DOBI 23). Similarly, at this Final Hearing, there was no credible evidence presented, aside from incorrectly dated documents, to support that anyone had contacted

Deanna Graves until Carter flew to California in April of 2009, because Lapinski had been relying in good faith on the promise of an individual who had failed to sign documents to provide collateral for the Bail Bond. Id. at 56-57 (citing T5 70:20-72:1; 73:5-74:18).

The Department posits that it is also undisputed that Lapinski never met, nor communicated with, Deanna Graves to have her sign documents. Id. at 57 (citing T4 12:5-10; Ex. P-28). Since Carter was the only person who was in contact with Deanna Graves in April of 2009, the Deanna Graves PFA and the Deanna Graves Surety Agreement were not signed on February 6, 2009 and were backdated by the Respondents before submitting them into evidence in the trial for the California Lawsuit. Ibid. Respondents are liable for backdating both the Deanna Graves PFA and the Deanna Graves Surety Agreement. Ibid.

The Department argues that Lapinski is responsible for backdating the Deanna Graves Surety Agreement, a Cutting Edge document, because he was the DRLP of Cutting Edge at the time the document was submitted for the California Lawsuit on January 12, 2015. Ibid. (citing Exs. P-3 at DOBI 19; P-17 at DOBI 336-337; and P-24 at 228). The Department posits that although Lapinski did not participate in that trial, he was aware that the backdated documents were necessary for Cutting Edge to file suit against Deanna Graves and faxed the Deanna Graves Surety Agreement two months before the California Lawsuit was filed. Id. at 57-58. (citing Exs. P-28 and P-31). The Department points out that the ALJ did not reference the backdating allegation and the Initial Decision is deficient pursuant to N.J.A.C. 1:1-18.1(d). Ibid. The Department requests that the Commissioner conclude that the Respondents committed the violations in Counts Two and Three "upon the presentment and submission of the back-dated documents at the trial for the California Lawsuit." Ibid.

C. Respondents are Liable for Carter's Unlicensed Insurance Related Conduct (Count Four)

The Department posits that Carter was not licensed as an insurance producer when he travelled to California in April of 2009. Ibid. (citing Ex. P24 at DOBI 243). It is undisputed that during his trip to California in April of 2009, he presented bail bond documents that were signed by Deanna Graves. Ibid. (citing T2 11:22-14:11; T5 70:20-71:7; 74:4-18; Ex. P-3 at DOBI 23-24). The Department states that New Jersey has a strong public policy interest in ensuring that each person who is employed by an agency to conduct insurance related business is properly licensed to do so. Id. at 58-59 (citing N.J.S.A. 17:22A-29). This public policy is codified as an affirmative duty to have a licensed producer at each place of business and places the responsibility for insurance related acts flowing from its office on the agency. Id. at 59 (citing N.J.A.C. 11:17A-1.6(b)).

The Department argues that Dollar Bail and Cutting Edge employed Carter to conduct insurance related business as an employee and independent agent. Ibid. Lapinski and Krauss are liable as officers or owners, and Cutting Edge and Dollar Bail are vicariously liable for its employee or agent's conduct. Ibid.

D. Respondents Krauss and Cutting Edge Have Failed to Satisfy the Judgment Entered for the Costs of Respondent's Failed, Baseless Lawsuit (Count Five)

The Department states that after entering the California Opinion in Deanna Graves's favor, Judge Goode issued the Attorney Fee Order, which Ordered Cutting Edge to pay Deanna Graves's attorney fees of $28,355.03. Ibid. (citing Exs. P-3 at DOBI 29; P-4; and P- 5). Cutting Edge has only paid $500 in satisfaction of that Order. Ibid. (citing T5 23:3-25:23[14] and Ex. P-5). The

[14] This appears to be a typographical error, as Webster testifies regarding the $500 that he received at T2 23:3-25:23. There is no testimony relevant to the Attorney Fee Order at T5 23:3-25:23.

Department argues that the California lawsuit was baseless and engineered to perfect the lien on Deanna Graves's residence. Id. at 59-60.

Cutting Edge sought $45,030 from Deanna Graves and the other defendants, on the theory that Dollar Bail assigned all rights and title to the Premium Finance Agreement to Cutting Edge. Id. at 60 (citing Exs. P-2 and P-31 at DOBI 891-892). However, neither Deanna Graves, nor the Deanna Graves' PFA, were referenced in the Assignment that Lapinski executed. Ibid. (citing Ex. P-31 at DOBI 891-892).

Cutting Edge also demanded 20% of the bail bond, $30,000, from Deanna Graves and the other defendants based on an alleged promise by the Defendants to pay for the fugitive recovery costs associated with a fugitive recovered outside the State of New Jersey. Ibid. (citing Ex. P-2). Neither Deanna Graves's name, nor her signature, appear on the document that granted Dollar Bail the authority to recover the $30,000. Ibid. (citing Ex. P-31 at DOBI 885). To prove its expenses for recovering James Graves, Cutting Edge presented an expense sheet purportedly signed by Bossi. Ibid. (citing Ex. P-31 at DOBI 897). Bossi was not involved in apprehending James Graves and did not complete or sign the fugitive recovery expense sheet produced by Cutting Edge. Ibid. (citing T2 194:5-195:9 and T5 31:21- 23).

The Department states that Cutting Edge had no basis to sue Deanna Graves, but were motivated by greed. Id. at 61. Furthermore, Lapinski was the DRLP for Cutting Edge at the time of the California trial and retained DRLP status when the judgment was entered against Cutting Edge, making Lapinski liable for the Attorney's Fee Order. Ibid. The Department requests that the Commissioner order restitution pursuant to N.J.S.A. 17:22A-45(c) against Lapinski, Krauss, and Cutting Edge to pay the Attorney Fee Order for "the baseless, fraudulent complaint" filed against Deanna Graves. Ibid.

Respondents are Collaterally Estopped from Re-litigating Certain Issues that were Raised, Litigated and Issues that were Essential to the Final Judgment Entered in the California Lawsuit

The Department argues that after the trial, Judge Goode entered the California Opinion, ruling in favor of Deanna Graves on all counts in the California Complaint. Ibid. (citing Exs. P-3 at DOBI 29; P-4; and P- 5). The Department argues that at the trial, Carter testified that Deanna Graves did not sign the Deanna Graves PFA and Deanna Graves Surety Agreement until April 28, 2009. Id. at 62 (citing T2 11:22-14:11; Ex. P-3 at DOBI 23-24). Further, the court found that none of the Respondents were in contact with Deanna Graves as of March 1, 2009. Ibid. (citing Ex. P-3 at DOBI 23). The Department argues that these findings were essential to Judge Goode's conclusion that Deanna Graves was not offered consideration when Carter traveled to California to have her sign the insurance documents, because the Bail Bond had already been issued and the bond posted two months prior to Carter's meeting with Deanna Graves in California. Ibid. (citing Ex. P-3 at DOBI 25, 27-28).

The Department argues that the Respondents are barred from arguing the following issues: (i) none of the Respondents were in communication with Deanna Graves as of March 1, 2009; (ii) Carter only presented the Deanna Graves PFA to Deanna Graves for her signature in April of 2009; and (iii) Carter only presented the Deanna Graves Surety Agreement to Deanna Graves in April of 2009 (collectively, "Precluded Issues"). Ibid. The Department argues that the Respondents are collaterally estopped from disputing these facts, and that the Department is entitled to prevail as a matter of law on the Precluded Issues. Ibid.

The Department states that for collateral estoppel to apply the party asserting the bar must show that:

> (1) the particular issue to be precluded is identical to the issue decided in the previous proceeding; (2) the issue was actually litigated in the prior action, i.e., there was a full and fair opportunity to litigate the issue in the prior action; (3) a

> final judgment on the merits was issued in the prior proceeding; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom preclusion is asserted was a party to or in privity with a party to the earlier proceeding. Id. at 63 (citing Monek v. Borough of S. River , 354 N.J. Super. 442, 454 (App. Div. 2002) (citing In re Dawson, 136 N.J. 1, 20-21 (1994))).

The Department argues that all five of the requirements for collateral estoppel to apply to the Precluded Issues are satisfied against the Respondents. Id. at 64. First, the Precluded Issues are identical to the issues decided in the previous proceeding "concerning the date that Deanna Graves signed and executed" the Deanna Graves PFA and the Deanna Graves Surety Agreement. Ibid.

Second, the Department argues that the Respondents had an opportunity to litigate the Precluded Issues because Dollar Bail and Lapinski executed the Assignment to Cutting Edge before Cutting Edge filed the California Complaint. Ibid. (citing T4 25:10-26:7;[15] T5 25:5-8; 30:5-11; Exs. P-2, P-10 at DOBI 144-145; P-27, P-28, and P-31 at DOBI 891-892). Lapinski also gathered evidence for the California Complaint by faxing the Deanna Graves PFA and the Deanna Graves Surety Agreement to Cutting Edge and Krauss two months before Cutting Edge filed the California Complaint. Ibid. (citing T2 111:7-114:13; Exs. P-14 at DOBI 750, 751; P-15 at DOBI 375; and P-17 at DOBI 334).

The Department argues that the third factor is met because the California Opinion was issued, which was a final judgment on the merits. Id. at 64-65 (citing Exs. P-3 at DOBI 29, P-4, and P-5).

The Department argues the fourth factor is satisfied because the Precluded Issues were essential to the final Judgment. Id. at 65. Judge Goode ruled in favor of Deanna Graves finding

[15] This appears to be a typographical error, as Lapinski testifies regarding the Assignment at T5 25:10-26:7. Lapinski's testimony at T4 25:10-26:7 is about changes to Cutting Edge's licensing report at Ex. P-24 at DOBI 233.

there was no consideration because the Respondents were not in communication with Deanna Graves until April of 2009, when Carter visited her in California and presented her with the Deanna Graves PFA and Deanna Graves Surety Agreement, two months after the Bail Bond had been posted for the release of her grandson, James Graves. Ibid. (citing Ex. P-3 at DOBI 23-27).

Lastly, the Department argues that the fifth factor is satisfied because the Respondents either participated in the prior suit by filing the California Complaint or were in privity to the party of the California Lawsuit. Ibid. The Department states that due process concerns require service of process to bind a nonparty on collateral estoppel grounds. Ibid. (citing Taylor v. Sturgell, 553 U.S. 880, 892-93 (2008)). Non-parties can be bound through pre-existing "substantive legal relationships" including a relationship of an assignee and assignor. Id. at 65-66 (quoting Taylor, 553 at 894). Accordingly, the relationship created when Dollar Bail executed the Assignment to Cutting Edge binds the Respondents together in a qualifying substantive legal relationship, and prevents both of them from re-litigating the Precluded Issues. Id. at 66.

The Department also argues that it is undisputed that both the Deanna Graves PFA and the Deanna Graves Surety Agreement presented during the trial for the California Lawsuit contained a signature for Deanna graves dated February 6, 2009. Ibid. (citing Ex. P-31 at DOBI 884 and 886). The Department argues that the Respondents are prevented from re-litigating the Precluded Issues and requests that the Commissioner find that the Respondents committed the violations in Counts Two and Three of OTSC2 by presenting the back-dated documents, a fraudulent, dishonest practice which demonstrates incompetence and/or untrustworthiness in violation of N.J.S.A. 17:22A-40(a)(2), (8), (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10. Ibid.

Respondents are Subject to Statutory Civil Penalties for the Violations of the Insurance Laws, as Stated in Counts One Through Four of OTSC2, and Respondents Lapinski, Krauss, and Cutting Edge are Required to pay the Attorney's Fee Order as Stated in Count Five of OTSC2.

The Department posits that under the Producer Act, the Commissioner can levy penalties against any person who violated the Producer Act, not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense, and may also order restitution of any moneys owed to any person and the reimbursement of the costs of investigation and prosecution. Id. at 67 (citing N.J.S.A. 17:22A-45(c)).

The Department states that the standard for the determination of appropriate monetary penalties is set forth in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 137-139 (1987). Id. at 68. These factors are: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Ibid.

As to the first factor, the Department argues that the Respondents acted in bad faith when they allowed Carter, who was unlicensed, to conduct insurance related business on their behalf for a Bail Bond that had already been posted. Id. at 69. Further, no consideration was given to Deanna Graves for the Deanna Graves PFA and Deanna Graves Surety Agreement which were presented to her in April of 2009, and the Respondents' actions could have caused her to lose her home. Ibid. The Department argues that Cutting Edge and Krauss also demonstrated bad faith by refusing to pay the Attorney Fee Order, after initiating a baseless lawsuit using back-dated and fraudulent documents as proof of its claims. Ibid. The Department argues that this factor supports a higher penalty. Ibid.

The Department argues that the Respondents have not provided competent evidence

attesting to their inability to pay a civil penalty amount and the second Kimmelman factor is neutral. Ibid.

The Department argues that the third factor supports a higher penalty because the potential profits from Respondent's misconduct were significant. Id. at 70. The Respondents' profits could have included the unpaid premium on the Deanna Graves PFA and 20% percent of the Bail Bond, which was $30,000. Ibid. The Department states that Cutting Edge demanded $45,030 from Deanna Graves with its "baseless, fraudulent California Complaint." Ibid.

The Department argues that the fourth factor, the injury to the public, also warrants a high penalty. Ibid. The Department alleges that the Respondents allowed Carter, who was not licensed, to obtain the Deed of Trust based on a false representation. Ibid. Further, Carter presented Deanna Graves with the Deanna Graves PFA and Deanna Graves Surety Agreement for her signature. Ibid. Deanna Graves remains injured because Respondents have refused to pay the Attorney Fee Order.

The Department argues that while "the original unlicensed activity occurred in April of 2009, the back-dating of the documents [was] never presented until Cutting Edge filed its California Complaint." Id. at 71. Accordingly, the Department argues, the fifth Kimmelman factor weighs in favor of a moderate penalty. Ibid.

The Department argues that the sixth factor weighs in favor of a higher penalty because there have been no criminal actions, or other civil sanctions, against the Respondents for the unlawful backdating of documents and unlicensed activity. Ibid.

Lastly, the Department states that there are no previous violations of the Producer Act by the Respondents and the seventh Kimmelman factor weighs in favor of a lower penalty. Ibid.

The Department argues that the Commissioner could order a maximum penalty of $35,000

for the four counts that allege specific violations of the Producer Act. Ibid. However, the Department requests $5,000 for Counts One through Four of the OTSC2, for a total of $20,000 to be assessed against the Respondents jointly and severally. Ibid. Although the Department is not seeking a civil penalty from Cutting Edge, Lapinski, and Krauss for failing to satisfy the Attorney Fee Order in Count Five, the Department requests restitution from Cutting Edge, Krauss, and Lapinski in the amount of $27,855.03 for the remaining balance. Id. at 72. The Department further requests $3,584.50 for the costs of investigation, including the costs of transcripts. Id. at 71-72.

License Revocation is Necessary and Appropriate to Protect the Public Welfare

The Department argues that license revocation is necessary because the Respondents deceived a senior citizen into entering into insurance related agreements based on the misrepresentation that a bail bond was posted by Cutting Edge in the amount of $150,000 on or about April 28, 2009. Id. at 73. The Respondents then used these backdated documents as a basis for the California Complaint and instituted a lawsuit against Deanna Graves. Ibid. The Department argues that license revocation is necessary to protect the public from the Respondents' unscrupulous conduct. Id. at 73-74. (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)).

Lapinski and Dollar Bail Reply

Lapinski and Dollar Bail adopted the procedural history and facts in the Initial Decision. Lapinski and Dollar Bail Reply at 2. Lapinski and Dollar Bail note that the ALJ did not rule on the Respondents' arguments regarding the Statute of Limitations, Latches, and the Burden of Proof argued in their Post-Hearing Brief and Reply Memorandum and preserve these issues. Id. at 2-3. Lapinski and Dollar Bail argue that in its Exceptions, the Department makes "conclusory statements totally unsupported by any competent admissible evidence from the record of the hearing below." Id. at 3. Lapinski and Dollar Bail state that the Department's proposed findings

of fact in its Exceptions are identical to its proposed findings of fact submitted in its Post-Hearing Brief. Id. at 3-4. Lapinski and Dollar Bail incorporated their arguments in their Post-Hearing Reply Memorandum ("Lapinski and Dollar Bail Post Hearing Memo") where the Department's proposed factual findings "were dealt with…" Id. at 4.

Lapinski and Dollar Bail argue that the Department's reliance on Deanna Graves's affidavit is improper and denies them due process as there was no opportunity to cross-examine Deanna Graves to test her credibility. Ibid. Lapinski and Dollar Bail argue that the Department did not demonstrate that Deanna Graves was unavailable to testify, especially considering the hearing was held over Zoom, and Deanna Graves would not have had to travel from California to participate. Ibid.

Lapinski and Dollar Bail argue that there is not "even a scintilla of evidence" that either Lapinski or Dollar Bail did anything improper, and the Department's allegations are unsupported by any proofs. Id. at 6.

Lapinski and Dollar Bail argue that the Department's allegations that "Respondents fraudulently backdated both the PFA and Surety Agreements when they first met with Deanna Graves in April 2009…" is nonsensical because corporations are incapable of taking such action. Ibid. (quoting Department Exceptions at 3). They also argue that there is no evidence of when, how, or who performed the alleged backdating. Ibid. They argue that "a careful review of the documents demonstrates that the original dates were left in place on the documents and the date of Graves' signature was entered as the apparent April date on which the documents were signed." Ibid.

Lapinski and Dollar Bail argue that the Department misrepresented the California Opinion. Id. at 7. Lapinski and Dollar Bail summarize the rulings and findings in the California Opinion.

Id. at 7-10. They argue that Judge Goode made no finding regarding fraud, forgery, backdating, or other allegation which the Department seeks to "bootstrap into [its] proofs through this ruling by the court." Id. at 10. Lapinski and Dollar Bail argue that Judge Good found that Cutting Edge, the Plaintiff, had failed to prove there was consideration to support its claim of breach of contract against Deanna Graves and entered judgment for her on that limited basis. Id. at 11. Lapinski and Dollar Bail also argue that it was improper for the Department to rely on Judge Goode's summarization of Carter's testimony when there was no transcript of the hearing. Ibid.

Lapinski and Dollar Bail argue that the California Opinion was a suit for breach of contract decided in Deanna Graves's favor. Id. at 14. They posit that no other issues were decided and there was no need to reach issues regarding whether signatures were forged, or whether documents were backdated. Ibid. Lapinski and Dollar Bail argue that none of those issues were central to Judge Goode's determination in favor of Deanna Graves and against Cutting Edge. Ibid. Further, there was no unity of interest, parties, or issues. Id. at 14-15.

Lapinski and Dollar Bail argue that as to Count One of OTSC2, there were no proofs as to any individual respondent and the Department treats all the Respondents as a single entity and "blithely and breezily dismisses any effort to require [it] to distinguish between or among them." Id. at 12.

Lapinski and Dollar Bail argue that the same issue presents itself in Counts Two and Three. Ibid. There is no proof as to who did what, when they did it, and how they did it. Ibid. They argue that the Department's argument is conclusory and lacks logic or analysis. Ibid.

Lapinski and Dollar Bail argue that as to Count Four, there is no proof that Carter acted as an agent or that he performed any prohibited acts when he met with Deanna Graves. Ibid.

Lapinski and Dollar Bail argue that as to Count Five, the allegations are unsupported and meritless as to themselves. Ibid. They argue that there is nothing in the California Opinion, which found that Cutting Edge failed to prove its case against Deanna Graves, that deals with insurance-related activity. Ibid. They argue that the Attorney Fee Order was entered against Cutting Edge and Department's effort to "twist and stretch and bend the law" is improper. Id. at 12-13.

Lapinski and Dollar Bail argue that the Department's argument that Carter acted as an employee of Dollar Bail is unsupported. Id. at 13. They argue that Lapinski testified that he did not know why or on whose behalf Carter traveled to California to have Deanna Graves sign documents, and that Carter was not an agent or employee of Dollar Bail. Ibid. They argue that the Department does not offer evidence to contradict Lapinski's testimony, but instead, argues that Lapinski is not credible. Ibid. Lapinski and Dollar Bail argue that the Department relies upon an interrogatory answer to support its argument that Lapinski is not credible and since Lapinski's testimony is untruthful, the only other conclusion is that the Department has satisfied its burden of proof. Ibid. Lapinski and Dollar Bail state that Lapinski explained that the reason for the difference between his testimony at the hearing and his answer to the interrogatory was due to his understanding of what an agent is changed since he answered the written discovery. Id. at 14.

Lapinski and Dollar Bail request that the Commissioner adopt the Initial Decision. Id. at 15.

Krauss and Cutting Edge Reply

Krauss and Cutting Edge note that the ALJ did not rule upon the Respondents' motion for summary decision based on the Statute of Limitations because that issue was moot as he found that the Department did not meet its burden of proof. Krauss and Cutting Edge Reply at 1-2. Krauss and Cutting Edge reserve that issue for appeal, along with the propriety of the Office of the

Attorney General representing the Department in both the OAL and "in other numerous legal proceedings." Id. at 2. They argue that in Superior Court, "it would be extraordinary for the trial judge to rule on cases in which she is represented currently by one of the attorneys appearing before her." Id. at 2. While Krauss and Cutting Edge do not allege anything improper, they also preserve that issue in the event appellate review is necessary.[16] Ibid.

Procedural History and Facts

Krauss and Cutting Edge argue that James Graves was arrested on or about February 6, 2009 in New Jersey and his bail was set at $150,000. Ibid. His friends and family members applied for a bail bond. Ibid. (citing DOBI at 882). Dollar Bail, an agent of Cutting Edge, handled the paperwork. Id. at 2-3. The bond was posted on or about February 7, 2009. Id. at 3. The bond financing agreement was signed by "a number of individuals" and provided that the unpaid portion on the premium would be paid in 12 monthly installments. Ibid. (citing DOBI 883).

James Graves was released once his bail was posted. Ibid. He failed to appear and was apprehended and returned to New Jersey. Ibid. (citing DOBI 894). The bond was discharged on December 21, 2009. Ibid. (citing DOBI 896).

Krauss did not become licensed as a non-resident insurance producer in New Jersey until November 19, 2015, "long after the occurrence of the relevant facts as set forth at this trial." Ibid. Krauss did not become the President of Cutting Edge until after the relevant facts occurred. Ibid. Cutting Edge was licensed as a resident business entity insurance producer in New Jersey from May 2006 until its license expired on May 31, 2018. Ibid.

[16] Lapinski and Dollar Bail posit that this "apparent conflict of interest must be noted" and also preserve this issue for any Appellate review. Lapinski and Cutting Edge Reply at 2, n. 1.

The Department first initiated this matter by filing OTSC1 on April 19, 2018, naming Lapinski, a resident insurance producer; Dollar Bail, a resident business entity insurance producer; and Cutting Edge, a current resident business entity insurance producer, as Respondents. Id. at 3-4.

The conduct alleged in OTSC1 occurred between February of 2009, when the Bail Bond was issued, and April of 2009 when Carter went to California to have Deanna Graves, James Graves's grandmother, post additional security for the bail bonds that had been previously posted on behalf of Mr. Graves. Id. at 4. Krauss was not named as a respondent in OTSC1. Ibid.

On December 23, 2019, OTSC2 was entered naming the original Respondents and Carter, Nesmith, and Krauss were added as Respondents. Ibid. Krauss and Cutting Edge state that OTSC2 "essentially repeated the wrongful conduct complained of in [OTSC1]", but added new Respondents, including Krauss, and was filed more than ten years after Krauss is alleged to have engaged in wrongful conduct. Id. at 5.

The matter was assigned to the ALJ and a hearing was held over five days, after which the ALJ rendered his decision finding that the Department failed to meet its burden. Ibid.

Response to the Department's Findings of Fact

Krauss and Cutting Edge objected to the entirety of the Department's proposed findings of fact. Id. at 6. They argue that the ALJ could not make any findings of fact as to the backdating of the Deanna Graves PFA and Deanna Graves Surety Agreement because there was no competent, credible evidence in the record to support any findings as to this issue. Ibid.

Krauss and Cutting Edge argued that the California Opinion contained very few factual findings and the holding was predicated upon the Court's finding that there was no consideration to support Cutting Edge's suit seeking to collect a debt from Deanna Graves. Ibid.

Krauss and Cutting Edge argued that the ALJ was correct in his decision to not allow Deanna Graves's affidavit to be entered into evidence because it is hearsay and was not corroborated by any competent evidence. Id. at 6-7. (citing DOBI 1005). They argue that there was no credible evidence to support any finding of fact that the Deanna Graves PFA and Deanna Graves Surety Agreement were backdated. Id. at 7. The California Opinion did not mention that anyone backdated documents and Carter never testified that he backdated any documents. Ibid. They argue that Webster's testimony was unhelpful because he had no personal knowledge of Carter's actions when he was in California and his recollection of trial testimony was "hearsay upon hearsay." Ibid. Accordingly, the ALJ exercised his discretion and did not use Webster's testimony to support Deanna Graves's affidavit. Ibid.

Krauss and Cutting Edge argue that Webster had not spoken to Deanna Graves for years and was unable to opine about her present mental or physical condition. Id. at 8. They argue that the record is devoid of Deanna Grave's present medical condition or location. Ibid. The Department did not proffer any evidence regarding its efforts to locate Deanna Graves and have her testify at the hearing and the ALJ did not abuse his discretion in excluding Deanna Graves's Affidavit. Ibid. They further note that the Respondents were denied the opportunity to cross-examine Deanna Graves, which added to the ALJ's concerns about the reliability of her testimony. Ibid.

Krauss and Cutting Edge argue that Deanna Graves did not suffer any financial loss because she assigned her rights to the attorney's fees to Webster and she does not owe Webster any fees. Ibid. They note that Webster apparently took the case on a contingent fee arrangement. Ibid. Webster is now the party in interest and the Department's arguments about the taking advantage of a senior citizen are baseless. Ibid.

Krauss and Cutting Edge argue that the Department relies upon information that the ALJ rejected in its proposed findings of fact. Ibid. They argue that the ALJ's findings are supported by the record and where the ALJ's findings are inconsistent with the Department's proposed findings, the Respondents concur with the ALJ. Ibid.

Krauss and Cutting Edge state that Bossi testified that Krauss was the general agent and co-owner of Cutting Edge in 2009-2010. Id. at 9 (citing T2 185:2-186:8). However, he did not testify as to whether Krauss owned 10% or more of Cutting Edge. Ibid. They argue that under the Producer Act, licensed partners, officers and directors and all owners with an ownership of 10% or more in the organization may be vicariously liable for the actions of subordinates. Ibid. However, the Department did not prove that Krauss owned 10% of Cutting Edge or was an officer or director when the alleged violative conduct occurred. Ibid. They also argue that it is irrelevant whether Krauss was the agent for Cutting Edge because his designation to accept service of process does not make him an owner, director, or officer of Cutting Edge. Ibid.

Krauss and Cutting Edge state that Krauss was employed by Cutting Edge from July of 2003 to November of 2015 and he was president of Cutting Edge on November 30, 2015. Ibid. They deny that Krauss held any officer position prior to then and further deny that Ex. P-15 at DOBI 382 indicates that he held any official position during the relevant time period. Ibid.

Krauss and Cutting Edge state that Carter's employment status is unclear. Ibid. (citing Ex. P-3). Further they dispute whether Deanna Graves was ever presented any paperwork to sign. Id. at 10 (citing Ex. P-3). They also argue that Judge Goode found Carter's testimony not credible. Ibid. (citing Ex. P-3).

Response to the Department's Legal Conclusions

Krauss and Cutting Edge first address Carter's license status. Ibid. While they do not

dispute that Carter was not licensed until May 14, 2009, they argue that there was no evidence that he acted as a producer when he met with Deanna Graves. Ibid. They argue that neither Carter nor Deanna Graves testified at the hearing and there is no transcript of the trial in California. Id. at 11. They further argue that even if collateral estoppel applies to the findings of fact made in the California Opinion, a point they do not concede, Judge Goode did not find as a fact that Deanna Graves signed any papers, and stated that she testified that she did not sign anything. Ibid. (citing Ex. P-3). Further, there is no evidence of what Carter may have said to Deanna Graves. Ibid. Judge Goode described Carter's testimony as "vague, confusing and sometimes conflicting" and therefore it is not deserving of collateral estoppel. Ibid. Further, it was unclear who employed Carter and on whose behalf he acted as an independent contractor. Ibid. (citing Ex. P-3). They argue that Judge Goode did not believe that Carter was a credible witness and collateral estoppel does not help the Department prove its case. Ibid.

Krauss and Cutting Edge argue that "a person shall not sell, solicit or negotiate insurance in this State unless the person is licensed for that line of authority…" Id. at 12 (citing N.J.S.A. 11:22A-29). They argue that there is no proof that Carter sold, solicited, or negotiated insurance while in California and the Department failed to prove that Carter acted as a producer. Ibid. They argue that a courier or administrative assistant who delivers papers or answers phones does not need to be licensed under the Producer Act and that Carter's trip to California is not enough to show that he acted as a producer. Ibid.

Krauss and Cutting Edge argue that there is no evidence that the Respondents backdated any documents. Ibid. The Department failed to establish that anyone forged Deanna Graves's signature, she did not testify, and the Department did not have a handwriting expert testify to evaluate whether Deanna Graves's signature was on the Deanna Graves PFA and Deanna Graves

Surety Agreement. Ibid.

Further, Krauss and Cutting Edge argue that Carter did not testify in California that he backdated any forms. Ibid. Judge Goode commented that, "[i]t appears that Messrs. Carter and Lapinski dealt, in apparent good faith with the 'family' without carefully parsing which particular family members were really prepared to stand up for Mr. Graves." Id. at 12-13 (quoting Ex. P-3). No witnesses testified that Cutting Edge or Krauss backdated forms, Deanna Graves may have backdated documents herself, and the burden is on the Department, not the Respondents. Id. at 13.

Krauss and Cutting Edge opine that the only admissible evidence offered by the Department was the California Opinion, which does not mention Krauss. Ibid. The litigation was initiated by Cutting Edge, as the assignee of the bail financing agreement signed by Deanna Graves. Ibid. The California Opinion does not state that any misrepresentation was made to Deanna Graves. Ibid.

Further, Krauss and Cutting Edge argue that Judge Goode stated that he did not have to decide whether Ms. Graves signed the relevant document or whether it was a forgery because the case was decided on other grounds. Ibid. Krauss and Cutting Edge opine that the California Opinion was premised on Cutting Edge failing to produce the actual bail bond that was issued on behalf of James Graves; Cutting Edge's failure to prove that there was a valid assignment of the claim from Dollar Premium Finance Co. or Dollar Bail to Cutting Edge; and the legal principle that past consideration cannot support a contract. Id. at 13-14.

Response to the Department's Legal Issues

Krauss and Cutting Edge argue that the application of res judicata is a question of law "to be determined by a judge in the second proceeding after weighing the appropriate factors bearing

upon the issue." Id. at 14 (quoting Colucci v. Thomas Nicol Asphalt Co., 194 N.J. Super. 510, 518 (App. Div. 1984)). They argue that the doctrine of res judicate does not apply because neither the identities of the parties nor issues warrant its application. Ibid. Neither the Department, Dollar Bail, nor Lapinski were parties to the California Lawsuit. Ibid. "The doctrine of collateral estoppel is a branch of the broader law of res judicata which bars relitigation of any issue actually determined in a prior action generally between the same parties and their privies involving a different claim or cause of action." Ibid. (quoting Figueroa v. Hartford Ins. Co., 241 N.J. Super. 578, 584 (App. Div. 1990)). Collateral Estoppel is distinguished from res judicata in that it bars relitigation of issues in suits that arise from different causes of action. Ibid. (citing United Rental Equip. Co. v. Aetna Life and Cos. Ins. Co., 74 N.J. 92, 101 (1977)). The application of collateral estoppel is an issue of law determined by the judge in the second proceeding. Id. at 14-15 (citing Colucci, 194 N.J. Super at 518)).

Krauss and Cutting Edge recite the five requirements for collateral estoppel. These factors are:

> (1) the particular issue to be precluded is identical to the issue decided in the previous proceeding; (2) the issue was actually litigated in the prior action, i.e., there was a full and fair opportunity to litigate the issue in the prior action; (3) a final judgment on the merits was issued in the prior proceeding; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom preclusion is asserted was a party to or in privity with a party to the earlier proceeding. Id. at 15 (quoting Dawson, 136 N.J. at 20).

Krauss and Cutting Edge argue that collateral estoppel cannot bind any of the parties who did not appear in California. Ibid. Cutting Edge did not represent or stand in for Krauss, Dollar Bail, or Lapinski. Ibid. Further, the only issue that Judge Goode decided was there was no consideration to bind Deanna Graves. Ibid. Lastly, Judge Goode did not make any findings as to Carter's or Deanna Graves's conduct. Ibid. They argue that no decision was required on these issues because

of the lack of consideration. Ibid. Accordingly, collateral estoppel does not apply. Ibid.

Lastly, Krauss and Cutting Edge argue that the ALJ correctly excluded the evidence from the Wayback Machine. Ibid. Krauss and Cutting Edge rely on Weinhoffer, 23 F.4th 579 where the Fifth Circuit held that the district court abused its discretion by improperly admitting archived webpages from the Wayback Machine, ruling that evidence from the Wayback Machine is not self-authenticating. Id. at 15-16. Krauss and Cutting Edge argue that this is the appropriate case to apply to this matter and the documents should be excluded. Id. at 16.

Krauss and Cutting Edge request that the Commissioner affirm the Initial Decision. Ibid.

LEGAL DISCUSSION

As noted by the ALJ, 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 37 N.J. at 143; Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein, 26 N.J. at 263. 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." Lewis, 678 N.J. at 47.

Credibility of Lapinski

The ALJ found that Lapinski was a credible witness who was direct and straightforward in his responses, and stated when he could not recall an event. Initial Decision at 16.

The Department argues that this credibility determination should be overturned because this finding was not supported by the evidence in the record, and the credible evidence contradicts Lapinski's testimony. Department Exceptions at 27. The Department specifically points out that Lapinski's testimony that Carter was not an independent contractor contradicted his answers that he provided in discovery. Ibid. (citing Ex. P-27 and P-28). The Department also points out other

contradictions in Lapinski's testimony and where Lapinski's testimony conflicted with that of other witnesses. Id. at 26-31.

Lapinski and Dollar Bail argue that the Department did not offer evidence to contradict Lapinski's testimony, but instead argues that Lapinski is not credible. Lapinski and Dollar Bail Reply at 13. Lapinski and Dollar Bail argue that the Department relies upon an interrogatory answer to support its argument that Lapinski is not credible, but that Lapinski explained that the reason for the difference between his testimony at the hearing and his answer to the interrogatory was due to his understanding of the definition of an independent contractor had changed since he answered the written discovery. Id. at 13-14.

An "agency head may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record." N.J.A.C. 1:1-18.6(c). The trial judge's credibility findings are significantly influenced by "the opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy." State v. Locurto, 157 N.J. 463, 472, (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Trial courts' credibility findings are "often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Ibid. Even the best and most accurate transcript "is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried." Ibid. (citation and internal quotation marks omitted).

I ADOPT the credibility determinations of the ALJ, who had the opportunity to personally observe the witnesses, including their character and demeanor while testifying.

The Department argues that Lapinski's testimony regarding Carter's role at Dollar Bail and Cutting Edge changed from his discovery response. Department Exceptions at 27 (citing Ex. P-27 and P-28). Lapinski testified that Carter was not an independent contractor for Dollar Bail. T5 17:17-25. Lapinski testified that his understanding of the term "independent contractor" changed between the time he answered interrogatories and when he testified. T5 9:25-10:7; 13:5-12. This does not necessarily mean that Lapinski was untruthful in his testimony, though I do note that he had the duty to amend his Answers to Interrogatories when he discovered that his answer was inaccurate. R. 4:17-7. I further note that Lapinski, and the other witnesses, testified years after most of the events detailed in OTSC2 and memories could have faded over this time.

Hearsay and Residuum

Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. N.J.R.E. 801. Hearsay is admissible in Administrative cases, subject to the judge's discretion. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate considering the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a). Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b).

Hearsay may either be employed to corroborate other evidence, or evidence may be supported or given added probative force by hearsay testimony. The residuum rule does not require that each fact be based on a residuum of legally competent evidence, but rather focuses on the ultimate findings of material fact. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338,

359-60 (2013) (internal citations omitted). Hearsay statements cannot provide the residuum of competent evidence that must support a fact material to the determination of a charge. Id. at 361. A legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. Weston, 60 N.J. at 51 (remanding where applicant for a firearms purchaser card was denied and at both the administrative and judicial level and the decision was based upon information from a third party in an investigative report). The residuum rule "only applies to evidence which is inadmissible under the rules of evidence, but is allowed into evidence in an administrative proceeding in which the strict rules of evidence do not apply." In re Scioscia, 216 N.J. Super. 644, 654 (App. Div.), certif. denied, 107 N.J. 652 (1987).

Applying the residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. Cowan, 224 N.J. Super. 737 at 750. In Cowan, the ultimate finding of fact was whether Cowan engaged in one or more of eleven acts of unbecoming conduct, or whether Cowan was engaged in a course of unbecoming conduct of which the acts charged were examples. Ibid. There did not need to be a residuum of competent evidence to prove each act so long as "the combined probative force of the relevant hearsay and the relevant competent evidence" sustained the ultimate finding of unbecoming conduct. Id. at 751, quoting, Weston, 60 N.J. at 52.

Carter's Testimony

The Department argues that because Webster witnessed the entire trial in California, he has direct knowledge of Carter's testimony, including Carter's testimony that he visited California on April 28, 2009 to have Deanna Graves signed insurance documents, the same day that Deanna Graves signed her home to Cutting Edge. Department Exceptions at 12. (citing T2 13:1-14:11).

The Department further argues that Webster's "non-hearsay testimony" confirmed the findings of fact in the California Opinion, which is not hearsay and is subject to judicial notice and can be admitted as a public record. Id. at 12-13. The Department argues that Webster's "non-hearsay testimony" corroborates the "non-hearsay judicial opinion" and establishes that the Deanna Graves PFA and Deanna Graves Surety Agreement were backdated because Carter was the only person to have had contact with Deanna Graves, and he did not meet with her until April of 2009, two months after the bail bond was posted. Id. at 13.

Lapinski and Dollar Bail argue that it was improper for the Department to rely on Judge Goode's summarization of Carter's testimony when there was no transcript of the hearing. Lapinski and Dollar Bail Reply at 10.

Krauss and Cutting Edge argue that Judge Goode found Carter's testimony not credible and was described as "vague, confusing and sometimes conflicting." Krauss and Cutting Edge Reply at 10, 11 (citing Ex. P-3).

Carter did not testify at the hearing. Webster testified as to Carter's testimony during the trial in the California Lawsuit. T2 11:22-14:11. The California Opinion also summarized Carter's testimony. Ex. P-3. A transcript of the trial in California where Carter testified is not available due to a failure of the recording equipment. T2 20:5-21. The California Opinion containing the summary of Carter's testimony is hearsay, but is subject to judicial notice and is also admissible under an exception to the hearsay rule. N.J.R.E. 201, 202, and 803(c)(8) (public record exception to the hearsay rule). However, Carter's statements in the California Opinion are hearsay and must meet an exception to the hearsay rule. N.J.R.E. 805 (hearsay within hearsay); See also Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 375 n.1 (2010) (statements within reports are "hearsay-within-hearsay" each level of which--the report and then the contents of that report

requires a separate basis for admission into evidence). The admission of a document does not automatically authorize the admission of hearsay statement contained therein.

Webster's testimony regarding what Carter said while testifying is also hearsay. Webster did not have personal knowledge regarding when Carter met with Deanna Graves to have her sign insurance documents. Rather, Webster's knowledge came from what he heard from others who did not testify during the hearing at the OAL, namely Deanna Graves and Carter.

While hearsay statements are admissible in Administrative cases, hearsay statements cannot provide the residuum of competent evidence that must support a fact material to the determination of a charge. Ruroede, 214 N.J. at 361. Evidence that is not hearsay was not presented to corroborate Carter's testimony as summarized in the California Opinion, or Webster's testimony regarding Carter's testimony in the California Lawsuit. There is no residuum of competent evidence to corroborate the summary of Carter's testimony in the California Opinion, or Webster's testimony as to what Carter testified in the California hearing. Rather, Webster's hearsay testimony of Carter's testimony corroborates Carter's hearsay statements in the California Opinion.

Affidavit of Deanna Graves

The Department took exception to the ALJ's determination that there was no reasonable explanation offered as to why Deanna Graves could not participate in the hearing. Department Exceptions at 15 (citing Initial Decision at 17). The Department argues that Webster testified that when he last spoke to her she was in poor health, unable to travel, and her memory had begun to lapse. Id. at 15-16. (citing T1 20:22-21:1; 21:12-22:15).

The Department argued that there was "sufficient competent non-hearsay evidence" to admit Deanna Graves's affidavit into evidence. Department Exceptions at 15 (citing Ex. P-1).

The Department argues that the affidavit is corroborated by Deanna Graves's testimony during the trial of the California Lawsuit, and memorialized in the California Opinion, which is a non-hearsay document. Ibid. The Department argues that Deanna Graves does not need to be produced as a witness to admit her affidavit into evidence because the affidavit is supported by "the non-hearsay judicially noticeable California Opinion." Ibid.

The Respondents argue that the Department's reliance on Deanna Graves's affidavit is improper and denies them due process as there was no opportunity to cross-examine Deanna Graves to test her credibility. Lapinski and Dollar Bail Reply at 4; Krauss and Cutting Edge Reply at 8. They further argue that the Department did not demonstrate its efforts to locate Deanna Graves or that she was unavailable to testify, especially considering the hearing was held over Zoom, and she would not have had to travel from California to participate. Lapinski and Dollar Bail Reply at 4; Krauss and Cutting Edge Reply at 8. Krauss and Cutting Edge argue that Webster had not spoken to Deanna Graves for years and was unable to opine about her present mental or physical condition and that the record is devoid of Deanna Grave's present medical condition or location. Krauss and Cutting Edge Reply at 8.

I agree that it was proper to not admit Deanna Graves's affidavit into evidence. The affidavit is hearsay. See N.J.R.E. 801 (defining "hearsay" as an out-of-court statement offered to prove the truth of the matter asserted in the statement). Although the California Opinion is not hearsay, Judge Goode's summarization of Deanna Graves's testimony in the California Opinion is hearsay. N.J.R.E. 805 (hearsay within hearsay). The admission of a document does not automatically authorize the admission of hearsays statement contained therein.

Further, the Department did not sufficiently demonstrate that Deanna Graves was unavailable. Webster testified that when he spoke to her last, two years ago, she was in poor health

and had memory lapses. T1 19:2-6; 20:22-22:15. There is no information as to if her health improved or worsened. Further, the hearing was held over Zoom, so Deanna Graves would not have had to travel to attend the hearing. The Respondents are also unable to cross-examine the affidavit. Further, even if the affidavit was admitted into evidence, it is still hearsay without a residuum, there is no competent evidence to corroborate Deanna Graves's affidavit, and it should be afforded little weight. N.J.A.C. 1:1-15.5(a). The affidavit, Webster's hearsay testimony regarding what Deanna Graves testified to and what she told him when he was preparing for the hearing, and Judge Goode's hearsay summarization of Deanna Grave's testimony all corroborate each other. However, all these statements are hearsay and hearsay cannot corroborate other hearsay to support an ultimate finding of fact.

Admissibility of Wayback Machine Internet Archives

The Department argued that the ALJ erred in excluding Exs. P-22 and P-23, printouts from the Wayback Machine, an internet archive assembled by a non-profit company that is building a digital library of internet sites, notwithstanding a Third Circuit opinion affirming its use as a business record. Department Exceptions at 19 (citing Bansal, 663 F.3d at 667-68). The Department argued that the ALJ erroneously based its decision to exclude this evidence on F.R.E. 901 and a decision from the Fifth Circuit. Id. at 19-20 (citing Weinhoffer, 23 F.4th 579; T2 138:1-140:1).

The Department argues that any writing disclosed to the opposing party ten days prior to the hearing is presumed to be authentic. Id. at 20 (citing N.J.A.C. 1:1-15.6). The Department argues that the Wayback Machine results should be admitted and considered in the Final Decision and Order. Ibid. The Department argues that these exhibits corroborate Gervasio's testimony that Cutting Edge and Dollar Bail were inseparably linked and are probative to determining whether

Dollar Bail and Cutting Edge were working together to "deceive Deanna Graves by having her post collateral after the Bail Bond was posted and by attempting to recoup its losses using back-dated documents." Ibid.

Krauss and Cutting Edge argue that the ALJ correctly excluded the Wayback Machine evidence. Krauss and Cutting Edge Reply at 15. Krauss and Cutting Edge rely on Weinhoffer, 23 F.4th 579, where the Fifth Circuit held that the district court abused its discretion by improperly admitting archived webpages from the Wayback Machine, ruling that evidence from the Wayback Machine is not self-authenticating. Id. at 15-16.

The Wayback Machine is an online digital archive of web pages run by the Internet Archive, a nonprofit library in San Francisco, California. Mojave Desert Holdings, LLC v. Crocs, Inc., 844 F. App'x 343, 346 n.2 (Fed. Cir. 2021).

Ex. P-22 is the Wayback Machine Results for Dollar Bail webpages. Ex. P-23 is the Wayback Machine Results for Cutting Edge. These exhibits show that the phone number and address of Dollar Bail were on the Cutting Edge website, that Dollar Bail advertised themselves as a full risk bail bond agency that would assume 100 percent of the liability of a bond, and that Dollar Bail's website stated that it could approve a bail. T2 135:5-136:21. The ALJ reviewed Bansal and Weinhoffer and excluded Exs. P-22 and P-23 because the Department did not produce someone with personal knowledge of the reliability of the Wayback Machine. T2 138:1-143:21.

In Bansal the Third Circuit District Court allowed screenshots of the Defendant's website from the Wayback Machine. 663 F.3d at 667. In order to authenticate that the screenshot was what it purported to be, the government called a witness to testify about how the Wayback Machine website works and how reliable its contents are. Ibid. The witness also compared the screenshots with previously authenticated and admitted images from the Defendant's website and concluded,

based on personal knowledge, that the screenshots were authentic. Id. at 667-68. The Court found that this was sufficient to support a finding that the screenshots from the Wayback Machine were what they purported to be and admissible under F.R.E. 901(b)(1) and affirmed the District Court's ruling admitting the screenshots into evidence. Id. at 668.

In Weinhoffer the Fifth Circuit determined that it the District Court erred when it took judicial notice of information from the Wayback Machine under F.R.E. 201. 23 F.4th at 584. Further, the Court determined that information from the Wayback Machine is not self-authenticating under F.R.E. 902. Ibid. In Weinhoffer, there was no testimony to authenticate the archived webpage. Ibid.

Here, under N.J.A.C. 1:1-15.6, the pages from the Wayback Machine are presumed authentic, but the Respondents may challenge that authenticity. The Department's investigator, Gervasio, testified regarding his understanding of how the Wayback Machine works, and that he personally performed searches for Dollar Bail and Cutting Edge's websites using the Wayback Machine. T2 131:11-132:19. This is distinguishable from Weinhoffer where there was no testimony to authenticate the archived webpage from the Wayback Machine. Accordingly, the ALJ erred in not admitting Exs. P-22 and P-23 into evidence.

Collateral Estoppel

Res judicata is a broad common-law doctrine encompassing the modern-day theories of claim preclusion and issue preclusion. Villanueva v. Zimmer, 431 N.J. Super. 301, 311 (App. Div. 2013). "In essence, the doctrine of res judicata provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Ibid. Collateral estoppel, or issue preclusion, is a "branch of the broader law of res judicata which bars relitigation of any issue which was

actually determined in a prior action." Ibid. "When a controversy between parties is once fairly litigated and determined it is no longer open to relitigation." Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989). "[P]rinciples such as res judicata and collateral estoppel . . . apply not only to parties in courts of law, but also in administrative tribunals and agency hearings, particularly as to findings of fact." Hackensack v. Winner, 162 N.J. Super. 1, 24 (App. Div. 1978), modified on other grounds, 82 N.J. 1 (1980). (citations omitted).

> For collateral estoppel to apply, the party asserting the bar must demonstrate that:
>
> (1) the particular issue to be precluded is identical to the issue decided in the previous proceeding; (2) the issue was actually litigated in the prior action, i.e., there was a full and fair opportunity to litigate the issue in the prior action; (3) a final judgment on the merits was issued in the prior proceeding; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom preclusion is asserted was a party to or in privity with a party to the earlier proceeding. Monek, 354 N.J. Super. at 454.

The Department argues that all five requirements are met and the Respondents are barred from arguing the following issues: (i) none of the Respondents were in communication with Deanna Graves as of March 1, 2009; (ii) Carter only presented the Deanna Graves PFA to Deanna Graves for her signature in April of 2009; and (iii) Carter only presented the Deanna Graves Surety Agreement to Deanna Graves in April of 2009. Department Exceptions at 62-66.

Krauss and Cutting Edge argue that collateral estoppel cannot bind any of the parties who did not appear in California. Krauss and Cutting Edge Reply at 15. Cutting Edge did not represent or stand in for Krauss, Dollar Bail, or Lapinski. Ibid. Further, the only issue that Judge Goode decided was that there was no consideration to bind Deanna Graves and Judge Goode did not make any findings as to Carter's or Deanna Graves's conduct. Ibid. They argue that no decision was required on these issues because of the lack of consideration, and therefore collateral estoppel does not apply. Ibid.

I find that collateral estoppel does not apply to these issues. These issues were not essential to the final judgment in California. Judge Goode found that there was no consideration given by Cutting Edge to Deanna Graves in exchange for her promise to make payments to Cutting Edge and past consideration cannot support a contract. Ex. P-3 at DOBI 0025. Further, Judge Goode found that Dollar Bail or Dollar Premium Finance Company did not assign the "Premium Finance Agreement/Promissory Note" to Cutting Edge. Id. at DOBI 0027. Judge Goode stated that there was no evidence that Deanna Graves was contacted by anyone as of March 1, 2009 and, that Carter testified that Deanna Graves did not sign the documents at issue until April 28, 2009. Id. at DOBI 0023-24. However, he did not rely upon that those findings in determining that Deanna Graves should prevail on the four contract claims of the California Complaint and those findings were not essential to Judge Goode finding in Deanna Grave's favor. Rather, he found in Deanna Graves's favor because there was no assignment to Cutting Edge and there was no consideration given to Deanna Graves from Cutting Edge. Id. at 0027-0028.

Allegations Against the Respondents

The allegations contained in OTSC1 and OTSC2 are essentially the same. OTSC2 adds Nesmith, Krauss, and Carter as Respondents and contains an additional Count not alleged in OTSC1.[17] At the hearing, the Department indicated that OTSC2 can be treated as "an Amended

[17] OTSC1 contains three counts. OTSC2 contains five counts, but breaks Count Two of OTSC1 into two separate counts. Count Two of OTSC1 alleges that: the Respondents forged Deanna Grave's signature on the Cutting Edge Surety Agreement and back-dated her signature to February 6, 2009; and that the Respondents forged Deanna Grave's signature on the Dollar Bail Premium Finance Agreement and back dated her signature to February 6, 2009. Count Two of OTSC2 alleges that Carter, Nesmith, Krauss, Lapinski, and Cutting Edge forged Deanna Grave's signature on the Cutting Edge Surety Agreement and back-dated her signature to February 6, 2009. Count Three of OTSC2 alleges that Carter, Lapinski, and Dollar Bail forged Deanna Grave's signature on the Dollar Bail Premium Finance Agreement and back dated her signature to February 6, 2009. While OTSC2 contains two more counts than OTSC1, only one of those Counts, Count Four alleging that Carter engaged in unlicensed activity, contains new allegations.

Complaint in Superior Court." T1 5:14-17. However, the Department did not wish to dismiss OTSC1 to preserve the statute of limitations. T1 5:8-14. The Department also stated in its Exceptions that OTSC2 is controlling, but is preserving the filing date of OTSC1 for the purpose of the Statute of Limitations. Department Exceptions at 47, n.4. Because the Department is not seeking findings and penalties as to OTSC1, this Final Decision and Order will address only the allegations of OTSC2.

OTSC2 alleges that the Respondents misrepresented the terms of an insurance agreement to Deanna Graves by having her post collateral in April 2009 on a bail bond after it was written in February 2009; that the Respondents forged and backdated Deanna Graves's signature on the Deanna Graves Surety Agreement to February 6, 2009 and backdated her signature the Deanna Graves PFA to February 6, 2009; that Carter engaged in unlicensed activity in April 2009; and that the Respondents failed to satisfy the judgment entered on November 5, 2015 by the Superior Court of California against Cutting Edge in the California Lawsuit in the amount of $28,355.03 in violation of the Producer Act and associated regulations.

Factual Findings Common to All Counts

Lapinski was first licensed as a New Jersey insurance producer on April 4, 2008 and his license expired on October 31, 2017. T3 7:7-20; Ex. P-24 at DOBI 0223. Lapinski was the DRLP for Dollar Bail from June 27, 2008 to June 21, 2014. T2 252:24-253:9; T3 11:4-10; Ex. P-24 at DOBI 0221. Lapinski was the President of Dollar Bail from June 27, 2008 to July 1, 2010. T2 249:20-250:14; Ex. P-24 at DOBI 0216. Lapinski had sole control of Dollar Bail from its inception until 2016. T4 14:8-22.

Lapinski was the DRLP for Cutting Edge effective May 20, 2014. T3 11:4-10; Ex. P-24 at DOBI 228. Lapinski did not recall being named as the DRLP of Cutting Edge. T4 19:5-10; 21:18-

21. If someone is named as DRLP by someone else, the Department will reach out to the person named as the DRLP to ensure that they understand the responsibilities and that they can be held responsible if the entity violates any rules or regulations. T2 237:21-238:4; T3 11:23-12:6.

Cutting Edge was licensed as an insurance producer from May 30, 2006 to May 31, 2018. T3 12:7-13:2; Ex. P-24 at DOBI 0231. Krauss was first licensed as a non-resident insurance producer on November 19, 2015. Ex. P-24 at DOBI 0254-0258. Krauss was the co-owner of Cutting Edge in 2009 and 2010, though the Department did not establish Krauss's percentage of ownership. T2 186:5-8. Krauss was the President of Cutting Edge in May 2014 and in November of 2015. Exs. P-15 at DOBI 382-383 and P-17 at DOBI 339-340.

Dollar Bail was licensed as an insurance producer from June 27, 2008 to May 31, 2018. T2 251:25-252:13. Dollar Bail was an independent contractor of Cutting Edge. T2 187:12-188:10. Falco, an employee of Dollar Bail, posted the bail bond for James Graves on February 7, 2009. T2 146:11-14; 148:3-6; 150:9-10; Ex. P-11 at DOBI 1201.

On April 28, 2009 Deanna Graves executed the Deed of Trust to Cutting Edge for $150,000. Ex. P-31 at DOBI 887. On November 12, 2013 Cutting Edge filed a complaint against Deanna Graves. Ex. P-2. The Court found for Deanna Graves on all counts of the complaint and ordered Cutting Edge to pay for Webster's attorneys' fees on November 5, 2015. T2 22:5-11; Exs. P-3, P-4, and P-5. Cutting Edge has refused to satisfy this award and Webster only recovered $500 after he retained an attorney in Pennsylvania who filed a lien. T2 25:7-23.

Carter was first licensed as an insurance producer on May 14, 2009. Ex. P-24 at DOBI 243. Carter worked for Dollar Bail and acted as an independent contractor bail bond agent for Cutting Edge. T2 186:25-187:11. Gervasio testified that Carter did not file an Answer to OTSC2, but did not know why. T2 61:4-8. In their Reply to the Department's Exceptions, Lapinski and

Dollar Bail state that Carter was never served with OTSC2. Lapinski and Dollar Bail Reply at 10, n. 6. They argue that Carter did not participate in the proceedings at all and that the Department did not attempt to obtain a default judgment against Carter, because it would go against the principles of due process because he was never served. Id. The transmittal form sent to the OAL on June 26, 2020 did not include Carter in the list of parties, and did not include his contact information. See N.J.A.C. 1:1-8.2(a)(10). The transmittal form also noted that Carter had not been served.

Carter did not participate in the hearings before the OAL and the Initial Decision is silent as to whether Carter was served with OTSC2. Nevertheless, the Department argues in its Exceptions that Carter, along with Lapinski, Dollar Bail, Krauss, and Cutting Edge, are liable for the violations alleged in Counts One through Four of OTSC2. The Department did not ask permission to present ex parte proofs against Carter. See N.J.A.C. 1:1-14.4(d). Because there is no evidence that Carter was ever served with OTSC2, and the Department was not given permission to present ex parte proofs, no findings can be made against him.

OTSC2 Count One:

Count One of OTSC2 alleges that Carter, Nesmith, Krauss, Lapinski, Cutting Edge, and Dollar Bail misrepresented or are responsible for the misrepresentation of the terms of an insurance agreement to Deanna Graves by having Deanna Graves post additional collateral for the Bail Bond after it was written, in violation of N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10.

The ALJ found that the Department had failed to establish any misrepresentation or fraudulent act by the Respondents. Initial Decision at 22.

In its Exceptions, the Department argues that in April of 2009, Deanna Graves signed a

Deed of Trust to her personal residence in consideration for a bail bond agreement executed "on or about the date thereof in favor of the above detailed defendant [James Graves] and the bond number [FCS500-375788]." Department Exceptions at 51 (citing T2 15:10-12; Ex. P-31 at DOBI 887). However, the only record that the AOC has of a bail bond issued to James Graves with the bond number FCS500-375788 was the Bail Bond posted in February of 2009. Id. at 51-52 (citing Ex. P-13).

In their Reply, Lapinski and Dollar Bail argue that there were no proofs as to any individual respondent and the Department treats all the Respondents as a single entity and "blithely and breezily dismisses any effort to require [it] to distinguish between or among them." Lapinski and Dollar Bail Reply at 12.

In their Reply, Krauss and Cutting Edge argue that there is no evidence of what Carter may have said to Deanna Graves and the Department did not prove that Carter made any misrepresentations. Krauss and Cutting Edge Reply at 11.

There is no non-hearsay evidence of any conversations that Carter and Deanna Graves may have had when Carter traveled to California in April of 2009 to have her sign the Deanna Graves PFA, the Deanna Graves Surety Agreement, and the Deed of Trust. However, the Deed of Trust contains misrepresentations on its face. The Deed of Trust names Deanna Graves as the Trustor and Cutting Edge as the Trustee and Beneficiary. Ex. P-31 at DOBI 887. The Deed of Trust states, "this DEED OF TRUST secured payment of all indebtness, fees and expenses incurred by way of a BAIL BOND AGREEMENT executed by the undersigned on or about the date thereof in favor of the above detailed defendant and bond number." Ibid. The Deed of Trust is dated April 28, 2009; lists James Graves is named as the defendant; and the lists the bond power number as FCS500-375788. Ibid. The AOC does not have a record of a bail bond with power number

FCS500-375788 issued in April of 2009, only in February of 2009. Ex. P-13. The Deed of Trust misrepresents when the bail bond was issued. Accordingly, I REJECT the ALJ's determination that the Department failed to establish that a misrepresentation had been made to Deanna Graves.

Turning to liability, the Deed of Trust names Cutting Edge as the trustee and beneficiary. Ex. P-31 at DOBI 887. Further, Carter acted as a bail bond agent for Cutting Edge and traveled to California on Cutting Edge's behalf. T2 186:25-187:11; T5 75:1-76:9. Cutting Edge is liable for their employee's insurance related conduct. N.J.A.C. 11:17-2.10(b)(4). Insurance related conduct includes selling, soliciting, or negotiating a bail bond, including a deed of trust. N.J.S.A. 11:22A-29; T3 38:13-19. A producer license would also be necessary to discuss what a deed of trust is, what it means, and to answer any questions. T3 39:6-9. Carter acted as a bail bond agent and did not perform administrative tasks for Cutting Edge. T2 186:25-187:11.

Accordingly, I find that Cutting Edge violated N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (5) (intentionally misrepresenting the terms of an insurance contract, policy, or application), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), (16) (any fraudulent act), and N.J.A.C. 11:17A-4.10 (failing to act as a fiduciary). I do not find that Cutting Edge violated N.J.A.C. 11:17A-1.6(c) (licensed partners, officers, directors, and owners with an ownership interest of 10 percent or more in the organization shall be held responsible for all insurance related conduct of the organization).

Turning to the other Respondents, Carter also worked for Dollar Bail. T2 186:25-187:4. However, there is no evidence that Carter was acting on behalf of Dollar Bail when he had Deanna Graves sign the Deed of Trust that contained the misrepresentation. Lapinski was not made DRLP of Cutting Edge until 2014, after Carter presented Deanna Graves with the Deed of Trust. Exs. P-

17 at 336-337, P-24 at 228. Accordingly, I find that Lapinski and Dollar Bail are not liable for this misrepresentation and did not violate N.J.S.A. 17:22A-40(a)(2), (5), (8), and (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10.

The Department did not put forth an argument regarding Nesmith's liability. Accordingly, no findings regarding Nesmith are made.

The Department argues that Krauss was an owner of Cutting Edge, its registered agent for New Jersey, and was its president or manager from its inception until November of 2015. Department Exceptions at 55 (citing T2 186:5-8; Ex. P-15 at DOBI 382; Exs. P-16 at DOBI 1203; P-17 at DOBI 335, 340, 343; P-27 at Interrogatory no. 26; and P-28 at Interrogatory response no. 26). Accordingly, the Department argues, Krauss is also liable for the misrepresentation on the Deed of Trust.

However, a ten-year statute of limitations governs this action. N.J.S.A. 2A:14-1.2(a) (unless otherwise provided by statute, "any civil action commenced by the State shall be commenced within ten years next after the cause of action shall have accrued"); Cumberland Cty. Bd. of Chosen Freeholders v. Vitetta Grp., P.C., 431 N.J. Super. 596, 603, (App. Div. 2013) (N.J.S.A. 2A:14-1.2 "is a statute of limitations governing civil actions commenced by the State or its political subdivisions"). Carter traveled to California in April 2009. OTSC1 was filed on April 19, 2018. However, the allegation that Carter and Krauss violated the Producer Act and its associated regulations was not raised until they were named as Respondents in OTSC2, which was filed on December 23, 2019. This is more than ten years after Carter traveled to California to meet with Deanna Graves and have her sign the Deed of Trust.

The statute of limitations is an affirmative defense that must be pled. R. 4:5-4, See also Bernstein v. Cheslock, 171 N.J. Super. 566, 569 (App. Div. 1979) (statute of limitations is

an affirmative defense which must be pleaded, or otherwise raised by the defendant, as by a motion to dismiss for failure to state a claim upon which relief can be granted, or a motion for judgment on the pleadings or at trial). Krauss raised the defense of statute of limitations and the Department cannot overcome this defense.

The Department did not discover the conduct underlying this Count until it received Webster's letter in 2015. T2 25:24-26:7; 63:1-25. The discovery rule "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272 (1973). "The discovery rule is essentially a rule of equity" that allows a plaintiff relief from a statute of limitations bar. Id. at 272-73. The linchpin of the discovery rule is the unfairness of barring claims of unknowing parties. Mancuso v. Neckles, 163 N.J. 26, 29 (2000). "The essential purpose of the [discovery] rule is to avoid harsh results that otherwise would flow from mechanical application of a statute of limitations." Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 426 (1987). The Department failed to demonstrate "harsh results" if Krauss is not punished for this misrepresentation. See Caride v. Young, No. A-5419-17T4, 2019 N.J. Super. Unpub. LEXIS 2195, at *14 (App. Div. Oct. 25, 2019).

I also find that OTSC2 does not relate back to the OTSC1 as to Krauss. Under R. 4:9-3,

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading[.] An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment.

First, the Department did not seek leave to amend OTSC1 and add additional parties, though at the hearing it indicated that OTSC2 can be treated as "an Amended Complaint in Superior Court." T1 5:14-17. Rather than filing a motion and amending OTSC1, the Department filed OTSC2, a new Order to Show Cause. The ALJ then consolidated the two matters sua sponte on July 1, 2020. Initial Decision at 2.

The second sentence of R. 4:9-3 is intended to address the issue of misidentified parties and authorizes the Court to permit relation back of an amendment changing or correcting a party's name if the party (1) had notice, even if informal, of the action prior to the running of the statute of limitations and that he would not be prejudice in maintaining a defense on the merits, and (2) knew or should have known that but for an error of misidentification the action should have been brought against him. Pressler and Verniero, Current N.J. Court Rules, comment 4 on R. 4:9-3 (2019). Here, the Department did not change or correct a party, but rather added Krauss to OTSC2 as the President and owner of Cutting Edge. Lapinski, the only noncorporate entity named as a Respondent in OTSC1, is named as the DRLP for Cutting Edge and Dollar Bail, not as an owner or officer of Cutting Edge. The Department did not mistakenly name the incorrect party as President or owner of Cutting Edge in OTSC1, but rather did not name one at all.

The Department supports its contention that Krauss was the President of Cutting Edge by citing to several documents that Cutting Edge and Krauss filed with NIPR. Department Exceptions at 35 (citing Exs. P-15 at DOBI 382 and P-17 at DOBI 335, 340, 343). However, these documents were accessible to the Department before it issued OTSC1. Accordingly, OTSC2 does not relate back to OTSC1 for the purpose of preserving the statute of limitations.

OTSC2 Counts Two and Three:

Count Two of OTSC2 alleges that Carter, Nesmith, Krauss, Lapinski, and Cutting Edge forged or are responsible for forging the signature of Deanna Graves on the Cutting Edge Surety Agreement and back-dating her signature to February 6, 2009 in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10.

Count Three of the OTSC2 alleges that Carter, Lapinski, and Dollar Bail forged or are responsible for forging the signature of Deanna Graves on the Dollar Bail Bond Premium Finance Agreement and back-dating her signature to February 6, 2009 in violation of N.J.S.A. 17:22A-40(a)(2), (8), (10), and (16), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10.

The ALJ found that the Department failed to establish any fraudulent act by the Respondents or that anyone forged Deanna Grave's signature. Initial Decision at 22.

In its Exceptions, the Department argues there was no credible evidence presented, aside from incorrectly dated documents, to support that anyone had contacted Deanna Graves until Carter flew to California in April of 2009, because Lapinski had been relying in good faith on the promise of an individual who had failed to sign documents to provide collateral for the Bail Bond. Department Exceptions at 56-57 (citing T5 70:20-72:1; 73:5-74:18). The Department posits that it is also undisputed that Lapinski never met, nor communicated with Deanna Graves to have her sign documents. Id. at 57 (citing T4 12:5-10; Ex. P-28). Since Carter was the only person who was in contact with Deanna Graves in April of 2009, the Deanna Graves PFA and the Deanna Graves Surety Agreement were not signed on February 6, 2009 and were backdated by the Respondents before submitting them into evidence in the trial for the California Lawsuit. Ibid. The Department is no longer contesting the authenticity of Deanna Graves's signatures, but requests a ruling that the Deanna Graves PFA and the Deanna Graves Surety Agreement were

backdated. Id. at 11.

In their Reply, Lapinski and Dollar Bail argue that corporations are incapable of backdating documents. Lapinski and Dollar Bail Reply at 12. They also argue that there is no evidence of when, how, or who performed the alleged backdating. Ibid. They argue that "a careful review of the documents demonstrates that the original dates were left in place on the documents and the date of [Deanna Graves's] signature was entered as the apparent April date on which the documents were signed." Ibid.

In their Reply, Krauss and Cutting Edge argue that there is no evidence that the Respondents backdated any documents. Krauss and Cutting Edge Reply at 12.

The evidence shows that in April 2009, Carter flew to California on behalf of Cutting Edge to have Deanna Graves sign a Deed of Trust as collateral after the Bail Bond was posted. T5 70:20-71:5; 74:4-17; 75:1-76:9; Ex. P-31 at DOBI 887-890. No other representative from Cutting Edge or Dollar Bail met with Deanna Graves in California to obtain her signature. T5 75:22-76:9. The Deanna Graves Surety Agreement is signed and dated February 6, 2009. Ex. P-31 at DOBI 886. The Deanna Graves PFA is also signed and dated February 6, 2009. Ex. P-31 at DOBI 884. If no representative of Dollar Bail or Cutting Edge met with Deanna Graves until April, these documents must have been backdated. However, there is no evidence as to who backdated the documents, or if they did so at anyone's direction. Further, as noted above, although Carter was the person who met Deanna Graves, he was never served with OTSC2 and no findings can be made against him. In addition, the Department did not put forth an argument regarding Nesmith's liability. Accordingly, no findings regarding Nesmith are made.

Accordingly, I ADOPT the ALJ's determination that the Department failed to prove that Krauss, Lapinski, and Cutting Edge back-dated Deanna Grave's signature on the Deanne Graves

Surety Agreement to February 6, 2009 in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), (10) (forging another's name on an application for insurance or any doc related to insurance transaction), (16) (any fraudulent act), N.J.A.C. 11:17A-1.6(c) (licensed partners, officers, directors, and owners with an ownership interest of 10 percent or more in the organization shall be held responsible for all insurance related conduct of the organization), and N.J.A.C. 11:17A-4.10 (failing to act as a fiduciary) as alleged in Count Two of OTSC2.

I also ADOPT the ALJ's determination that the Department failed to prove that Lapinski and Dollar Bail back-dated Deanna Grave's signature on the Deanna Graves PFA to February 6, 2009 in violation of N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), (10) (forging another's name on an application for insurance or any doc related to insurance transaction), (16) (any fraudulent act), N.J.A.C. 11:17A-1.6(c) (licensed partners, officers, directors, and owners with an ownership interest of 10 percent or more in the organization shall be held responsible for all insurance related conduct of the organization), and N.J.A.C. 11:17A-4.10 (failing to act as a fiduciary) as alleged in Count Three of OTSC2.

OTSC2 Count Four:

Count Four of the OTSC2 alleges that Carter was not licensed as an insurance producer at the time he represented himself to Deanna Graves as an agent of Cutting Edge, explained the Cutting Edge Surety Agreement and Dollar Bail Bond Premium Finance Agreement, and induced her to sign the Promissory Note as collateral for an insurance contract, in violation of N.J.S.A. 17:22A-40(a)(2) and (8), and N.J.S.A. 17:22A-29.

The ALJ found that the Department failed to establish that Carter acted as an insurance producer in 2009 when he was unlicensed to do so. Initial Decision at 22.

In its Exceptions, the Department argues that Carter was not licensed as an insurance producer when he travelled to California in April of 2009. Department Exceptions at 58 (citing Ex. P24 at DOBI 243). It is undisputed that during his trip to California in April of 2009, he presented bail bond documents that were signed by Deanna Graves. Ibid. (citing T2 11:22-14:11; T5 70:20-71:7; 74:4-18; Ex. P-3 at DOBI 23-24).

The Department further argues that Dollar Bail, Cutting Edge, Krauss, and Lapinski are liable for Carter's trip to California and subsequent presentation of insurance documents to Deanna Graves. Id. at 52. The Department argues that Carter was an employee and officer of Dollar Bail. Ibid. (citing T2 146:11-152:21; 186:25-187:4; 227:11-228:15; Exs. P-3 at DOBI 26; P-25; and P-26). Lapinski was the DRLP, registered agent, and president of Dollar Bail. Ibid. (citing T4 11:20-22; Exs. P-20 at DOBI 1205; P-24 at 220, 228). The Department argues that Lapinski is liable as the "president and/or DRLP" of Dollar Bail because as "an owner and/or officer" he is responsible for the actions by the organization licensee, branch offices, or its partners and employees. Id. at 52-53. The Department further argues that Carter was an independent bail bond agent for Cutting Edge and obtained the Deed of Trust to the benefit of Cutting Edge. Id. at 55 (citing T2 186:25-187:7; Exs. P-3 at DOBI 26; P-31 at DOBI 887). Krauss was an owner of Cutting Edge, its registered agent for New Jersey, and was its president or manager from its inception until November of 2015. Ibid. (citing T2 186:5-8; Exs. P-15 at DOBI 382; P-16 at DOBI 1203; P-17 at DOBI 335, 340, 343; P-27 at Interrogatory no. 26; and P-28 at Interrogatory response no. 26).

In their Reply, Lapinski and Dollar Bail argue that there is no proof that Carter acted as an agent or that he performed any prohibited acts when he met with Deanna Graves. Lapinski and Dollar Bail Reply at 12.

In their Reply, Krauss and Cutting Edge do not dispute that Carter was not licensed until May 14, 2009, but they argue that there was no evidence that he acted as a producer when he met with Deanna Graves. Krauss and Cutting Edge Reply at 10. They argue that there is no proof that Carter sold, solicited, or negotiated insurance while in California and the Department failed to prove that Carter acted as a producer. Id. at 12. They argue that a courier or administrative assistant who delivers papers or answers phones does not need to be licensed under the Producer Act and that Carter's trip to California is not enough to show that he acted as a producer. Ibid.

As noted above, Carter was never served with OTSC2 and therefore no findings can be made against him. I further make no findings against Dollar Bail, Cutting Edge, Lapinski, and Krauss. Accordingly, I MODIFY the ALJ's determination and make no findings related to this Count.

OTSC2 Count Five:

Count Five of OTSC2 alleges that Nesmith, Krauss, Lapinski, and Cutting Edge have failed to satisfy the judgment entered by the Superior Court of California in favor of Deanna Graves and against Cutting Edge in the California Lawsuit in the amount of $28,355.03, in violation of N.J.S.A. 17:22A-40(a)(2), and (8), N.J.A.C. 11:17A-1.6(c), and N.J.A.C. 11:17A-4.10.

The ALJ found that N.J.S.A. 17:22A-40(a)(2), (8), and N.J.A.C. 11:17A-4.10 "cannot be reasonably interpreted to find a violation…for failure to satisfy an award of counsel fees…" Initial Decision at 22.

In its Exceptions, the Department argues that after entering the California Opinion in

Deanna Graves's favor, Judge Goode issued the Attorney Fee Order, which Ordered Cutting Edge to pay Deanna Graves's attorney fees of $28,355.03. Department Exceptions at 59 (citing Exs. P-3 at DOBI 29; P-4; and P- 5). Cutting Edge has only paid $500 in satisfaction of that Order. Ibid. (citing T2 23:3-25:23 and Ex. P-5).

In their Reply, Lapinski and Dollar Bail argue that the allegations are unsupported and meritless as to themselves. Lapinski and Dollar Bail Reply at 12. They argue that the Attorney Fee Order was entered against Cutting Edge and the Department's effort to "twist and stretch and bend the law" is improper. Id. at 12-13.

In their Reply, Krauss and Cutting Edge argue that Deanna Graves did not suffer any financial loss because she assigned her rights to attorney's fees to Webster and she does not owe Webster any fees. Krauss and Cutting Edge Reply at 8.

On November 12, 2013, Cutting Edge filed a suit in California against Deanna Graves and others for failing to pay the Premium Finance Agreement and for the costs of apprehending James Graves. Ex. P-2. At trial, Deanna Graves was represented by Webster. T1 24:20-25:5. After the hearing, the Court issued a written decision and found in favor of Deanna Graves. T2 22:5-11; Ex. P-3. The Court entered a judgment in favor of Deanna Graves. T2 23:3-5; Ex. P-4. On November 5, 2015, the Court also entered an award of attorney's fees of $28,355.03 for Deanna Graves prevailing in her defense against Cutting Edge. T2 23:18-21; Ex. P-5. California Civil Code § 1717 allows for fee shifting for the prevailing party in a breach of contract action. T2 33:18-34:4; Ex. P-5. The attorney fees were not awarded based on the whether the case was filed in good faith, or was frivolous. Webster served the Attorney Fee Order on counsel for Cutting Edge. T2 24:9-18. Cutting Edge only paid $500 after Webster retained an attorney in Pennsylvania who was able to collect funds after he filed a lien. T2 25:21-23.

I REJECT the ALJ's determination that the failure to pay the award of attorneys' fees owed to Webster does not violate N.J.S.A. 17:22A-40(a)(2) (violating any insurance law or regulation), and (8) (fraudulent coercive or dishonest practices, demonstrating incompetence, unworthiness, or financial irresponsibility), and N.J.A.C. 11:17A-1.6(c) (licensed partners, officers, directors, and owners with an ownership interest of 10 percent or more in the organization shall be held responsible for all insurance related conduct of the organization). The Respondents are derelict in ignoring a Court ordered attorney fee award in a lawsuit pursued in the conduct of their insurance business. If Cutting Edge disagreed with the outcome of the lawsuit, they had other recourse, such as filing an appeal. Rather, Cutting Edge chose to simply ignore the Attorney Fee Order. This shows financial irresponsibility under N.J.A.C. 17:22A-40(a)(8). Lapinski is also responsible for this conduct because he was the DRLP of Cutting Edge at the time the Attorney Fee Award was entered. T3 11:4-10; Ex. P-24 at DOBI 228. Krauss is also liable because he was the president of Cutting Edge at the time the Attorney Fee Award was entered. Exs. P-15 at DOBI 382-383 and P-17 at DOBI 339-340. The Attorney Fee Order was entered on November 5, 2015, which is within the ten year statute of limitations under N.J.S.A. 2A:14-1.2(a). Failing to pay the Attorney Fee Award is insurance related because the award stemmed from a lawsuit that Cutting Edge filed against Deanna Graves to perfect a lien on her home. Accordingly, I find that Cutting Edge Lapinski, and Krauss demonstrated financial irresponsibility under N.J.S.A. 17:22A-40(a)(8). By doing so, they also violated N.J.S.A. 17:22A-40(a)(2). I agree with the ALJ that Cutting Edge, Lapinski, and Krauss did not violate N.J.A.C. 11:17A-4.10 (failing to act as a fiduciary) because they do not owe a fiduciary duty to Webster because he was not their client.

PENALTY AGAINST THE RESPONDENTS

Revocation of Cutting Edge's, Lapinski's, and Krauss's Insurance Producer Licenses

The ALJ recommended that both OTSC1 and OTSC2 be dismissed with prejudice, and did not recommend any action be taken against the Respondents' licenses. Initial Decision at 23. The Department argues in its Exceptions that all the Respondents should have their licenses revoked. Department Exceptions at 72-74. With respect to the appropriate action to take against Cutting Edge's insurance producer license, I FIND that the record supports the revocation of its license.

The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the industry as a whole. Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11) (citing In re Parkwood, 98 N.J. Super. 263 (App. Div. 1967)). An insurance producer collects money from insureds and acts as a fiduciary to both the consumers and the insurers they represent. Accordingly, the public's confidence in a licensee's honesty, trustworthiness, and integrity are of paramount concern. Ibid. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). A producer is held to a high standard of conduct and should fully understand and appreciate the effect of irresponsible conduct on the insurance industry and on the public.

Here, Cutting Edge sent an unlicensed agent to California to have Deanna Graves, an elderly woman, sign a Deed of Trust to her home. The Deed of Trust named Cutting Edge as the beneficiary and trustee. Ex. P-31 at DOBI 887. The Deed of Trust contained a misrepresentation that a bail bond agreement had been executed for Deanna Graves's grandson, James Graves, on April 28, 2009. However, the Bail Bond had been posted two months prior, in February of 2009. The Deed of Trust misrepresents when the bail bond was issued. Cutting Edge's use of a Deed of

Trust with false information could have caused Deanna Graves to lose her home. Cutting Edge then instituted a lawsuit against Deanna Graves, and after losing because it did not provide her with any consideration at the time of the contract, chose to ignore an Attorney Fee Order. I find that revocation of Cutting Edge's insurance producer license is necessary to protect the public welfare from this type of unscrupulous conduct.

I also find that revocation of Krauss's and Lapinski's insurance producer licenses is appropriate. They are responsible for Cutting Edge ignoring the Attorney Fee Order because they were the president and DRLP of Cutting Edge when the order was entered. Rather than filing an appeal if they didn't agree with the outcome of the case, they instead chose to simply ignore the Attorney Fee Order and have refused to accept the consequences of losing the lawsuit they filed against Deanna Graves.

Monetary Penalty Against the Respondents

The Commissioner has broad discretion in determining sanctions for violations of the laws she is charged with administering. In re Scioscia, 216 N.J. Super. 644, 660 (App. Div. 1987). The penalties set forth in the Producer Act "are expressions by the Legislature that serve a distinct remedial purpose." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09). The Commissioner may levy penalties against any person violating the Producer Act, not exceeding $5,000 for the first offense and not exceeding $10,000 for each subsequent offense. N.J.S.A. 17:22A-45(c). In addition, the Commissioner may order reimbursement of the costs of investigation and prosecution for violations of the Producer Act. Ibid.

Under Kimmelman, 108 N.J. at 137-139, certain factors must be examined when assessing administrative monetary penalties that may be imposed pursuant to the Producer Act. These

factors are: (1) the good faith or bad faith of the producer; (2) the producer's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139 ("[t]he weight to be given to each of these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case").

Because the ALJ found that the Department did not meet its burden of proof that the Respondent violated any statutes or regulations, the ALJ declined to recommend a monetary penalty and did not analyze these factors.

The first Kimmelman factor addresses the good faith or bad faith of the Respondent. As to the first factor, the Department argues that the Respondents acted in bad faith when they allowed Carter, who was unlicensed, to conduct insurance related business on its behalf for a Bail Bond that had already been posted and this factor weighs in favor of a higher penalty. Department Exceptions at 69. I agree that Cutting Edge acted in bad faith in sending an unlicensed agent to present a Deed of Trust containing a misrepresentation regarding when a Bail Bond to free her grandson was posted to an elderly woman and this factor weighs in favor of a higher monetary penalty. I also find that Cutting Edge, Krauss, and Lapinski acted in bad faith in ignoring the Attorney Fee Order.

The second Kimmelman factor is the ability of the Respondent to pay the penalties imposed. 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 Department argues that the Respondents have not provided competent evidence attesting to their inability to pay a civil penalty amount and the

second Kimmelman factor is neutral. Department Exceptions at 69. I agree that there is no evidence regarding Cutting Edge's, Krauss's, and Lapinski's ability to pay a fine and this factor is neutral.

The third Kimmelman factor relates to the profits obtained. 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. Kimmelman does not limit consideration to actual profits, but warrants the consideration of the profits that the Respondents would have likely made if their acts in violation of the insurance laws of this State were successful. Kimmelman, 108 N.J. at 138. The Department argues that the third factor supports a higher penalty because the potential profits from Cutting Edge's misconduct were significant. Department Exceptions at 70. I agree that Cutting Edge stood to gain a significant profit by having Deanna Graves sign a Deed of Trust with a misrepresentation because they could have acquired Deanna Graves's home and this factor weighs in favor of a higher penalty. Cutting Edge, Krauss, and Lapinski have also continued to profit by ignoring the Attorney Fee Order.

The fourth Kimmelman factor addresses the injury to the public. The Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. The Department argues that this factor supports a higher penalty because Cutting Edge allowed Carter, who was not licensed, to obtain the Deed of Trust based on a false representation. Department Exceptions at 70. I agree that Cutting Edge injured Deanna Graves in presenting a Deed of Trust that contained a misrepresentation. Cutting Edge's illegal conduct also harmed the public generally because unscrupulous behavior undermines the public trust. Cutting Edge, Krauss, and Lapinski have also harmed the public, and Webster who

represented Deanna Graves after Cutting Edge filed suit, by flagrantly ignoring the Attorney Fee Order. I agree that this factor weighs in favor of a higher penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Court in Kimmelman found that greater penalties are necessary to incentivize wrongdoers to cease their illegal conduct. Kimmelman, 108 N.J. at 139. The longer the illegal conduct, the more significant civil penalties should be assessed. Ibid. The Department argues that this factor weighs in favor of a higher penalty because Cutting Edge used the Deanna Graves PFA and Surety Agreement in its lawsuit against Deanna Graves years later. Department Exceptions at 71. I note that Cutting Edge also presented the Deed of Trust in that lawsuit as Exhibit 8. Ex. P-3 at DOBI 0025. There was also no consideration for the execution of the Deed of Trust. Ibid. Further, Cutting Edge, Lapinski, and Krauss have ignored the Attorney Fee Order for over five years. Accordingly, I find that this factor also weighs in favor of a higher penality.

The existence of criminal punishment and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor under the Kimmelman analysis. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. The Department argues that the sixth factor weighs in favor of a higher penalty because there has not been criminal actions, or other civil sanctions, against Respondents for the unlicensed activity. Department Exceptions at 71. Although Cutting Edge was ordered to pay Webster's attorney's fees of $28,355.03, that award was for Deanna Graves prevailing in her defense against Cutting Edge, and California Civil Code § 1717 allows for fee shifting for the prevailing party in a breach of contract action. Ex. P-5. This

penalty was not for the misrepresentation contained in the Deed of Trust. Further, Cutting Edge never paid this fee. I agree that this factor weighs in favor of a higher penalty.

The final factor examined in Kimmelman is previous relevant regulatory and statutory violations of the Respondent, and if past penalties have been insufficient to deter future violations. The Department states that there are no previous violations of the Producer Act by Respondents and the seventh Kimmelman factor weighs in favor of a lower penalty. Department Exceptions at 71. I agree that there is no evidence of past violations and this factor weighs in favor of a lower penalty.

In light of the above Kimmelman analysis and based on the violations I have concluded that Cutting Edge committed, I REJECT the ALJ's recommendation that Cutting Edge not be assessed any monetary penalty and instead impose a monetary penalty of $5,000 to Cutting Edge for the misrepresentation on the Deed of Trust (Count One). I also impose a monetary penalty of $5,000 against Cutting Edge, Lapinski, and Krauss jointly and severally for demonstrating financial irresponsibility by not paying the Attorney Fee Order (Count Five).

These penalties are necessary and appropriate given Cutting Edge's misconduct. In April of 2009, Cutting Edge sent an unlicensed agent to California to obtain a Deed of Trust to an elderly woman's home. That Deed of Trust contained the misrepresentation that a bail bond had been issued for her grandson in April when the document was signed and notarized. However, the bail bond had been issued two months prior to Carter meeting with her. These penalties demonstrate the appropriate level of opprobrium for such misconduct, and will serve to deter future misconduct by the Respondents and the industry as a whole. This penalty is also commensurate with prior precedent. See Tepedino ($5,000 for misrepresentations or incomplete or fraudulent comparisons to a client regarding annuity contracts intended to induce the client to surrender his annuity

contracts in violation of N.J.S.A. 17:22A-40(a)(5)). A penalty of $5,000 is also appropriate for demonstrating financial irresponsibility by blatantly ignoring the Attorney Fee Order.

The Department requests restitution from Cutting Edge, Krauss, and Lapinski in the amount of $27,855.03 for the remaining balance of the Attorney Fee Order. Id. at 72. Under N.J.S.A. 17:22A-45(c), the Commissioner has specific authority to order "restitution of moneys owed any person" as appropriate. Id. at 13.

The distinction between fines and restitution is that fines are payments demanded by the State to punish the wrongdoer and to deter conduct that causes social harm, while restitution serves to rehabilitate the wrongdoer and to compensate the victim of the wrongdoer's conduct. State v. Newman, 132 N.J. 159, 169 (1993). Restitution "extends beyond the concept of simple justice to one aggrieved and entitled to restitution of that unlawfully taken or reparation for loss unlawfully inflicted." State v. Harris, 70 N.J. 586, 592 (1976). Compensatory payments can have correctional worth, "regardless of whether the offender is required only to disgorge the fruits of his offense or to compensate persons for the injuries and losses suffered as a result of his crime." In re Parole Application of Trantino, 89 N.J. 347, 358 (1982). A restitution order is distinct from a civil judgment, which is intended to make the victim whole. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 476 (2018); See also State v. DeAngelis 329 N.J. Super. 178, 189 (App. Div. 2000) (holding that a settlement agreement and release signed by the victim of a crime did not release a defendant from his obligations under the restitution order because it would frustrate society's expectation that defendant would realize the enormity of his conduct, and would permit a defendant to enjoy pecuniary gain from his conduct, which would conflict with the purposes of restitution).

I decline to order restitution to Webster under N.J.S.A. 17:22A-45(c) as the Department requests. Rather, I find that a penalty of $5,000 is appropriate. There is already an Attorney Fee Order in place to compensate Webster for his time and effort defending Deanna Graves in Cutting Edge's lawsuit against her. The purpose of restitution is not to make Webster whole, but to offer Cutting Edge, Krauss, and Lapinski the opportunity to help rehabilitate themselves.

Pursuant to N.J.S.A. 17:22A-45(c), it also is appropriate to impose reimbursement of the costs of investigation. I REJECT the ALJ's determination that Respondents are not responsible for this cost and find that Cutting Edge, Krauss, and Lapinski are jointly and severally liable for the costs of investigation in the amount of $3,584.50, which is consistent with the amount in the Certification of Investigator Gervasio. Certification of Matthew Gervasio and Ex. A attached thereto.

CONCLUSION

Having carefully reviewed the Initial Decision, the Department's Exceptions, the Respondents' Replies, and the entire record herein, I hereby I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision, except as modified herein. Specifically, I MODIFY the ALJ's recommendation and make no findings as to Carter and Nesmith. Furthermore, as to Counts Two and Three, I ADOPT the ALJ's recommendation that the Department did not prove the violations in OTSC2. As to Count One, I REJECT the ALJ's finding that the Department did not prove the violations in OTSC2 and find that Cutting Edge violated N.J.S.A. 17:22A-40(a)(2), (5), (8), (16), and N.J.A.C. 11:17A-4.10. I ADOPT the ALJ's finding that the Department did not prove a violation of N.J.A.C. 11:17A-1.6(c). As to Count Four, I MODIFY the ALJ's determination and make no findings. As to Count Five, I REJECT the ALJ's finding that the Department did not prove the violations in OTSC2 and find that Cutting Edge, Krauss, and Lapinski violated N.J.S.A. 17:22A-40(a)(2), (8), and N.J.A.C. 11:17A-1.6(c). I ADOPT the ALJ's

finding that the Department did not prove a violation of N.J.A.C. 11:17A-4.10. I also REJECT the ALJ's recommendation that no action against the Respondents' insurance licenses be taken and hereby ORDER the revocation of Cutting Edge's, Lapinski's, and Krauss's insurance producer licenses. I also REJECT the ALJ's recommendation that the Respondents not be assessed monetary penalties and hereby ORDER the imposition of $5,000 in monetary penalties to Cutting Edge solely for the violations in Count One of OTSC2. I also ORDER the imposition of $5,000 in monetary penalties to Cutting Edge, Lapinski, and Krauss jointly and severally for the violations in Count Five of OTSC2. I also ORDER that Cutting Edge, Krauss, and Lapinski are jointly and severally liable for $3,584.50 in costs of the investigation.

It is so ORDERED on this _4_____ day of _January_____ 20_23__.

Marlene Caride
Commissioner

Jd Lapinski FO/ Final Orders-Insurance