ORDER NO.: E17-2

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL DOCKET NO.: BKI-14942-15
AGENCY DOCKET NO.: OTSC #E15-70

RICHARD J. BADOLATO, COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	)	
Petitioner,	)	FINAL DECISION AND ORDER
v.	)	
EDWARD R. CENNENO, JR. AND PHOENIX BAIL BONDS,	)	
Respondents.	)	

This matter comes before the Commissioner of Banking and Insurance ("Commissioner")[1] pursuant to the authority of N.J.S.A. 52:14B-1 et seq., N.J.S.A. 17:1-15, the New Jersey Producer Licensing Act of 2001, N.J.S.A. 17:22A-26 to -57 ("Producer Act"), and all powers expressed or implied therein, for the purposes of reviewing the October 26, 2016 Initial Decision ("Initial Decision") of Acting Director and Chief Administrative Law Judge Laura Sanders ("ALJ"). In the Initial Decision, the ALJ granted summary decision to the Department of Banking and Insurance ("Department") against Respondents Edward R. Cenneno, Jr. ("Cenneno") and Phoenix Bail Bonds[2] ("Phoenix") (collectively, "Respondents"), jointly and severally, on Counts One, Two, Four, Six, Seven, Eight, and Nine and against Respondent

[1] Pursuant to R. 4:34-4, Commissioner Richard J. Badolato has been substituted as the current, and no longer acting, Commissioner in the caption.

[2] The name of Respondent Phoenix Bail Bonds was misspelled in the caption of the Initial Decision and was referred to as "Poenix Bail Bonds."

Cenneno, individually, on Counts Three and Five, as alleged in the Department's Order to Show Cause No. E15-70 ("OTSC"). The ALJ further recommended revocation of the Respondents' producer licenses and the imposition of civil monetary penalties in the amount of $50,000 against the Respondents, jointly and severally, and $20,000 against Respondent Cenneno, individually. Additionally, the ALJ recommended the imposition of costs of investigation in the amount of $1,137.50 and restitution of $171,469.96 against the Respondents, jointly and severally.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 1, 2015, the Department issued the OTSC against the Respondents seeking to revoke the Respondents' insurance producer licenses and impose civil monetary penalties, costs of investigation, and restitution for alleged violations of the Producer Act. In the OTSC, the Department alleges that the Respondents engaged in the following activities in violation of the insurance laws of this State:

> Count One – Respondents Cenneno and Phoenix improperly withheld, misappropriated, and converted bond premiums received in the course of conducting insurance business by failing to remit premiums to United Surety Agents, Inc. ("United"), in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b);
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> Count Two – Respondents Cenneno and Phoenix improperly withheld, misappropriated, and converted payments received in the course of conducting insurance business by failing to pay United for issued and unaccounted for powers of attorney, and failing to remit $600 in premiums, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b);

Count Three – Respondent Cenneno[3] failed to abide by the terms and duties of his agency agreement with United when he failed to remit premiums as instructed and failed to hold the funds in a fiduciary capacity, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a;

Count Four – Respondents Cenneno and Phoenix failed to satisfy judgments entered against them in the course of conducting insurance business, in violation of N.J.S.A.17:22A-40a(2), (4), (8), and (16), N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a) [4], and N.J.A.C. 11:17C-2.2(b);

Count Five – Respondent Cenneno[5] failed to abide by the terms and duties of his agency agreements with American Contractors Indemnity Company ("ACIC"), International Fidelity Insurance Company ("IFIC"), and United when he failed to pay off judgments entered against him and/or Phoenix, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a;

Count Six – Respondents Cenneno and Phoenix failed to respond to the Department's July 7, 2011 and August 22, 2011 inquiries, in violation of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17A-4.8;

Count Seven – Respondents Cenneno and Phoenix improperly withheld, misappropriated, and converted bond premiums received in the course of conducting insurance business by failing to remit $1,455.11 in premiums to Financial Casualty & Surety, Inc. ("FCS"), in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b);

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[3] The contracts at issue in Count Three of the OTSC were entered into between Respondent Cenneno and ACIC, IFIC, and United. Respondent Phoenix was not a party to these contracts. As such, Count Three of the OTSC was issued against Respondent Cenneno only.

[4] The OTSC provides that the Respondents' actions, as alleged in Count Four of the OTSC, are a violation of "N.J.S.A. 11:17C-2.1(a);" however, this appears to be a typographical error as the correct regulatory violation is N.J.A.C. 11:17C-2.1(a).

[5] The contracts at issue in Count Five of the OTSC were entered into between Respondent Cenneno and ACIC, IFIC, and United. Respondent Phoenix was not a party to these contracts. As such, Count Five of the OTSC was issued against Respondent Cenneno only.

> Count Eight – Respondents Cenneno and Phoenix[6] failed to abide by their agency agreement with FCS when they failed to remit premiums as instructed and failed to hold the funds in a fiduciary capacity, in violation of N.J.S.A. 17:22A-40A(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a; and
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> Count Nine – Respondents Cenneno and Phoenix failed to respond to the Department's November 26, 2013 inquiry, in violation of N.J.S.A. 17:22A-40a(2) and (8), and N.J.A.C. 11:17A-4.8.

On July 31, 2015, Respondent Cenneno filed an Answer to the OTSC, wherein he admitted and denied some of the allegations set forth in the OTSC and requested a hearing. On September 17, 2015, Respondent Cenneno filed a second Answer to the OTSC[7], wherein he reiterated the same admissions and denials of the allegations set forth in the OTSC, which was previously submitted on July 31, 2015; however, in this second Answer, Respondent Cenneno requested a hearing on behalf of Respondent Phoenix. The Department filed the matter as a contested case with the Office of Administrative Law ("OAL") on September 21, 2015[8], pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following a conference call on February 3, 2016, the ALJ on February 4, 2016, entered a Letter Order scheduling a discovery end-date of February 19, 2016. In addition, the Letter Order set deadlines for the filing of the Department's Motion for Summary Decision. Specifically, the Letter Order provided that the Department's Motion for Summary Decision was required to be filed by April 22, 2016, the Respondents' Opposition to the Department's Motion for Summary

[6] The contract at issue in Count Eight of the OTSC was entered into between Respondents Cenneno and Phoenix and FCS United. As such, Count Eight of the OTSC was issued against both Respondents.

[7] It is unclear whether the September 17, 2015 Answer to the OTSC was meant to be an Answer for Respondent Phoenix only. Although Respondent Cenneno previously submitted an Answer, he included his name in the signature line of the September 17, 2015 Answer rather than the name of Respondent Phoenix.

[8] The ALJ stated that the matter was filed with the OAL on February 21, 2015; however, the matter was actually filed with the OAL on September 21, 2015.

Decision was required to be filed by May 31, 2016, and the Department Reply to the Respondents' Opposition was required to be filed by June 13, 2016. On April 21, 2016, the Department mailed a copy of the Department's Motion for Summary Decision to the Respondent's attorney of record, Patrick G. Monaghan, Esq. at the Law Offices of George Horiates, 7010 Kaighn Avenue at US Hwy. Rt. 7, Pennsauken, NJ 08109. On April 22, the Department's Motion for Summary Decision was filed with the OAL with the OAL Although the OAL made attempts to contact the Respondents, the Respondents failed to respond to the OAL for at least six months. The Respondents additionally failed to file any Opposition to the Department's Motion for Summary Decision.

On October 24, 2016, the ALJ granted summary decision to the Department of Banking and Insurance ("Department") against Respondents Cenneno and Phoenix, jointly and severally, on Counts One, Two, Four, Six, Seven, Eight, and Nine and against Respondent Cenneno, individually, on Counts Three and Five, as alleged in the OTSC. The ALJ further recommended revocation of both of the Respondents' producer licenses and the imposition of civil monetary penalties in the amount of $50,000 against Respondents Cenneno and Phoenix, jointly and severally, and $20,000 against Respondent Cenneno, individually. Additionally, the ALJ recommended the imposition of costs of investigation in the amount of $1,137.50 and restitution in the amount of $171,469.96 to be paid by Respondent Cenneno and Phoenix, jointly and severally.

ALJ'S FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), the ALJ noted that a motion for summary decision may be granted if "the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact." Initial Decision at 2 and 7. The ALJ

further noted that N.J.A.C. 1:1-12.5(b) also provides that an adverse party must respond to a motion for summary decision by affidavit, which sets forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary hearing. Id. at 2. The ALJ stated that the New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials present, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party.

Id. at 7. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

The ALJ further noted that the Respondents have had a considerable amount of time to reply to the Department's motion for summary decision and have elected not to do so. Id. at 3. Pursuant to the above-referenced standard, the ALJ reviewed the Department's affidavits, certifications, and accompanying exhibits and determined that there is no genuine issue of fact requiring a hearing. Ibid.

The ALJ found the following relevant facts in her grant of summary decision. Respondent Cenneno was first licensed as a resident insurance producer in the State of New Jersey on December 31, 2003, and retained his license through September 30, 2011.[9] Cenneno was also the designated responsible licensed producer ("DRLP") for Respondent Phoenix.[10] Phoenix was active as a resident insurance producer in the State of New Jersey beginning

[9] The ALJ provided that Cenneno retained his resident insurance producer license from the period of November 10, 2009 through September 30, 2011. These dates relate to the last renewal period of Cenneno's resident insurance producer license to sell limited lines insurance, which became effective on November 10, 2009 and expired on September 30, 2011. Cenneno's resident insurance producer license is currently inactive. See Certification of Albert Verdel ("Verdel Cert."), attached to the Department's Motion for Summary Decision, at ¶ 5-6 and Ex. 2.

[10] Cenneno remained the only DRLP for Phoenix until the expiration of his insurance producer license on September 3, 2011.

December 28, 2007, and was licensed as a resident insurance producer between June 1, 2010 and May 31, 2012.[11] Ibid.

> Count One, Two, and Three: Respondents failed to remit premiums to United and failed to pay United for the issued and unaccounted for powers of attorney; and Respondent Cenneno failed to abide by the terms and duties of his agency agreement with United

In regards to Count One of the OTSC, the ALJ noted that on March 7, 2007, Cenneno entered into an agreement with ACIC and United wherein ACIC and United agreed to become a surety for bail bonds solicited by Cenneno. Ibid. Pursuant to this agreement, Cenneno was required to charge, collect, and protect all bond premiums, and to remit to United, within seven days of the execution of each bail bond, three percent of each $1,000 of the principal amount of the bond[12]. Ibid. The agreement additionally required that Cenneno indemnify and hold both ACIC and United harmless from 100 percent of any costs, expenses, and liabilities that may be sustained or incurred as a result of the agreement. Ibid. Thereafter, on March 3, 2010, Cenneno entered an identical agreement with IFIC and United. Ibid.

[11] Phoenix was first licensed as a resident insurance producer, authorized to sell limited lines insurance, in the State of New Jersey on December 28, 2007. The ALJ references that Phoenix was licensed as a resident insurance producer between the dates of June 1, 2010 and May 31, 2012. These dates referenced relate to the last renewal period of Phoenix's resident insurance producer license, which was effective as of June 1, 2010 and expected to expire on May 31, 2012. See Verdel at ¶ 2-3 and Exhibit 1. Although the expected expiration date for the last license renewal of Phoenix's producer license was May 31, 2012, N.J.A.C. 11:17:2.12(d) provides that the "[d]eparture, termination, or deletion of licensee officers, directors, partners, or designated responsible producers, which leaves a business entity insurance producer with no licensed officers, directors, partners, or designated responsible producers, or with officers, directors, partners, or designated responsible producers who do not have like authorities as the business entity producer, shall make the business entity producer license inactive." As Cenneno was the DRLP for Phoenix and his insurance producer license expired on September 30, 2011, and is now inactive, the insurance producer license of Phoenix was cancelled as of that date, pursuant to N.J.A.C.11:17:2.12(d), rather than on the expected expiration date of May 31, 2012. Phoenix's resident insurance producer license is currently inactive.

[12] Cenneno's contracts with United, ACIC, and IFIC provide that "[w]ithout regard to premium credit extended to customers, if any, [Cenneno] shall remit to [United] within seven (7) days of execution of each bond hereunder, such cash sum from premiums collected shall equal 30% ($30.00 per $100.00) of the premium or 3% ($30.00 per $1,000.00) of the principal amount of such bond, whichever is greater, subject to a minimum of $15.00." Verdel Cert. at Ex. 3.

Between December 8, 2010 and May 26, 2010, Cenneno and Phoenix sold several bail bonds for the total amount of $1,455,893.99[13] and for which, Cenneno and Phoenix collected gross premiums in the amount of $145,589.40.[14] Ibid. Pursuant to Respondents' agency contracts discussed above, a total amount of $43,676.82[15] of those bail bond premiums were required to be remitted to United. Id. at 4. However, to date, the amount owed to United has not been remitted. Ibid. In light of the foregoing, the ALJ found as fact that the Respondents[16] executed contracts with ACIC, IFIC, and United, solicited and executed 180 bail bonds totaling $1,455,894, collected premiums in the amount of $145,589, and then failed to turn over the required amount to United as the agent for ACIC and IFIC, as set forth in the two aforementioned agreements. Ibid.

Further and in regards to Count Two of the OTSC,[17] the ALJ noted that the certification of Anthony O. Widgery ("Widgery"), Director of Operations for United from 1998 to 2008, and

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[13] The ALJ stated that the total amount of the 180 solicited and executed bail bonds was $1,455,894. However, this appears to be an approximate amount as the total amount of the 180 solicited and executed bail bonds was $1,455,893.99. See Verdel Cert. at ¶11. For clarification purposes, the specific amount of the executed bail bonds will be referenced throughout this Final Decision and Order rather than the approximate amount set forth by the ALJ in the Initial Decision.

[14] The ALJ stated that the total amount of the gross premiums collected was $145,589. However, this appears to be an approximate amount as the total amount of the gross premiums collected relating to the 180 solicited and executed bail bonds was $145,589.40. See Verdel Cert. at ¶12. For clarification purposes, the specific amount of the gross premiums collected will be referenced throughout this Final Decision and Order rather than the approximate amount set forth by the ALJ in the Initial Decision.

[15] The ALJ stated that the total amount of the premiums that should have been remitted to United was $43,677. However, this appears to be an approximate amount as the total amount of premiums that should have been remitted to United relating to the 180 bail bonds solicited and executed by the Respondents was $43,676.82. See Verdel Cert. at ¶13. For clarification purposes, the specific amount of the premiums that should have been remitted to Untied will be referenced throughout this Final Decision and Order rather than the approximate amount set forth by the ALJ in the Initial Decision.

[16] Although the ALJ stated that the Respondents executed contracts with ACIC, AFIC, and United, the contracts at issue in Counts One, Two, and Three were only entered into between Respondent Cenneno, ACIC, IFIC, and United.

[17] The ALJ set forth the following facts in relation to Counts Two and Three of the OTSC. However, Count Three of the OTSC alleges that Respondent Cenneno failed to abide by the terms and duties of his agency agreement with United when he failed to remit premiums as instructed and failed to hold those funds in a fiduciary capacity. The

now United's Executive Vice President, states that between December 8, 2008 and February 2, 2010, Cenneno issued six powers of attorney valued at $20,000. Id. at 4. Further, Cenneno collected $2,000 in premium funds related to these six powers of attorney and failed to remit the $600 required pursuant to the Respondent's agreement with United. Ibid. The ALJ further noted that in response to the OTSC issued against him, Cenneno admitted that he was not aware that the six powers of attorney had been issued until he was notified by the insurance company. Ibid. Based upon the foregoing, the ALJ found as fact that the Respondents issued the six powers of attorney, collected $2,000 in premiums related to the powers of attorney, and failed to submit the required amounts to United, in violation of the aforementioned agreements with United, ACIC, and IFIC.

As such, the ALJ held that there are no genuine issues of material fact, and the Department has shown that the Respondent[18] wrote bail bonds and bail bond powers of attorney, on which premiums were collected, and the Respondents failed to remit the amounts due under their insurance contracts, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16).[19] Id. at 8. Additionally, the ALJ found that the Respondents' actions also violated of N.J.A.C. 11:17A-

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OTSC does not provide that Count Three relates only to the Respondents' actions, as alleged in Count Two of the OTSC. In fact, Count Three provides that Respondent Cenneno "failed to remit premiums as instructed." Both Counts One and Two of the OTSC relate to the Respondents' failure to remit premium funds, as set forth in Cenneno's agency agreements, to United. As such, the ALJ's findings of fact for both Counts One and Two of the OTSC equally apply to Count Three of the OTSC as well.

[18] While the ALJ stated that "[t]he respondent wrote bail bonds and bail bond powers of attorney," Count One and Two of the OTSC, which allege failures to remit premiums for the issuance of bail bonds and powers of attorney, respectively, relate to the actions of both Respondent Cenneno and Respondent Phoenix, rather than a singular respondent.

[19] The ALJ did not separate her conclusions relating to statutory violations by Count, and instead stated that "[s]ince the Department has carried its burden with regard to showing that respondent wrote bail bonds and bail bond powers of attorney, collected premiums, and never paid the amounts due under their insurance contacts, I CONCLUDE that the Department has proven the violation of all four of these portions of the statute" while referring to violations contained in N.J.S.A. 17:22A-40a(2), (4), (8), and (16). Initial Decision at 8. Counts One, Two, and Three all allege violations of N.J.S.A. 17:22A-40a(2), (4), (8), and (16).

4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b).[20] Ibid. Further, the ALJ concluded that the Department has shown that the Respondents[21] acted in violation of Cenneno's agreement with United, ACIC, and IFIC, and as such, Cenneno acted in violation of N.J.S.A. 17:22A-42a. Ibid. at 8-9. Additionally, the ALJ found that because Cenneno is the DRLP of Phoenix, Phoenix is vicariously liable for Cenneno's actions because he acted on Phoenix's behalf.[22] Id. at 9 (citing Bakke v. Goncalves, OAL Dkt. No. BKI 03301-05, Initial Decision (11/17/2005), Final Decision (02/15/2006)).

> Counts Four and Five: Respondents Cenneno and Phoenix failed to satisfy judgments entered against them in the course of conducting insurance business; and Respondent Cenneno failed to abide by the terms and duties of agency agreements with ACIC, IFIC, and United when he failed to pay off judgments entered against him and/or Phoenix

The ALJ noted that the Department alleges that between 2009 and 2010, 53 bail bonds were executed by Cenneno and Phoenix that were forfeited and as a result, judgments in the amount of $125,738 were entered against the Respondents, which were never paid. Initial Decision at 5. The ALJ further stated that United paid the judgments as a result of the Respondents' failure to do so. Ibid. In Cenneno's responses to the Department's Request for Admissions, Cenneno admitted that he did not pay the judgments for 53 forfeited bonds and these failures constitute breaches of his agreements with ACIC, IFIC, and United. Ibid. As

[20] The ALJ did not separate her conclusions relating to regulatory violations by Count, and stated that because the Respondents wrote bail bonds and bail bond powers of attorney, collected premiums, and never paid the amounts due under their insurance contracts, the Respondents "violated N.J.A.C. 11:17C-2.1(a), N.J.A.C. 11:17A-4.10, and N.J.A.C. 11:17C-2.2(b). Counts One and Two of the OTSC allege regulatory violations of N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b).

[21] The ALJ stated that the Respondents acted in violation of the contracts with United, ACIC, and IFIC. However, only Cenneno was a party to the contracts entered with United, ACIC, and IFIC. Additionally, Count Three of the OTSC was only issued against Cenneno, rather than both of the Respondents.

[22] As it relates to Count Three of the OTSC, vicarious liability on the part of Respondent Phoenix was not alleged by the Department in the OTSC.

such, the ALJ found as fact that the agreements entered between Cenneno, ACIC, IFIC, and United required that the Respondents indemnify ACIC, IFIC, and United against the costs of forfeiture, that bond forfeitures in the amount of $125,738 occurred, and that the Respondents failed to pay the judgments entered on those 53 forfeited bonds, causing United to satisfy judgments in the amount of $125,738, in violation of the contracts entered into by the Respondents.[23] Id. at 5 and 9 Based upon the foregoing, the ALJ concluded that the Respondents' actions, as alleged in Counts Four and Five of the OTSC, violated N.J.S.A. 17:22A-40a(2), (4), (8), and (16) as well as N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C.11:27C-2.2(b).[24] Id. at 9.

Count Six: Respondents Cenneno and Phoenix failed to respond to the Department's July 7, 2011 and August 22, 2011 inquires

The ALJ stated that on July 7, 2011, Albert Verdel ("Verdel"), investigator for the Department, sent Cenneno a letter advising that he was "awaiting a response regarding the current outstanding sum of $86,904.87 due United Surety." Id. at 5. Verdel sent another letter to Cenneno on August 22, 2011, wherein he informed Cenneno that the Department was "still awaiting a response regarding the current outstanding sum of $86,904.87 due United Surety." Ibid. However, neither Cenneno nor anyone representing Phoenix replied to either of Verdel's letters. Ibid. In light of the foregoing, the ALJ found as fact that the Respondents did not reply

[23] The contracts at issue in Counts Four and Five of the OTSC were entered into between ACIC, IFIC, United, and Respondent Cenneno. See Verdel Cert. at Exh. 3. Additionally, it should be noted that Count Five of the OTSC, which alleges a failure to abide by the terms and duties of the agency agreements with ACIC, IFIC, and United, was issued against Respondent Cenneno, individually.

[24] The ALJ did not separate her conclusions relating to statutory and regulatory violations by Count and instead collectively found that the Respondents actions, as alleged in Counts Four and Five of the OTSC, violated N.J.S.A. 17:22A-40a(2), (4), (8), and (16) as well as N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C.11:27C-2.2(b). However, the facts used by the ALJ to support her conclusions relate to facts that were alleged in both Counts Four and Five of the OTSC. Further, Count Four of the OTSC alleges violations of N.J.S.A. 17:22A-40a(2), (4), (8), and (16) and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C.11:27C-2.2(b), and Count Five alleges violations of N.J.S.A. 17:22A-40a(2), (4), (8), and (16) and N.J.S.A. 17:22A-42a.

to the Department's two requests for an explanation regarding the allegation that the Respondents owed $86,904.87 to United. Id. at 5 and 9. The ALJ further concluded that the Respondents' failure to respond to the Department's requests violated N.J.S.A. 17:22A-40a(2) and N.J.A.C. 11:17A-4.8. Id. at 9.

> Counts Seven and Eight: Respondents Cenneno and Phoenix improperly withheld, misappropriated, and converted bond premiums received in the course of conducting insurance business by failing to pay FCS; and Respondents Cenneno and Phoenix failed to abide by their agency agreement with FCS when they failed to remit premiums as instructed and failed to hold the funds in a fiduciary capacity

The ALJ stated the following facts in regards to both Counts Seven and Eight of the OTSC. On July 1, 2010, an agreement, entitled "Sub-Producer Bail Bond Agreement," was entered into between the following parties: "James V. Mascoa and/or Genevieve A. Steward and/or Bail Group Manage[ment] [25], LLC; Edward R. Cenneno (husband) and/or Phoenix Bail Bonds, LLC, and/or Veronica A. Cenneno [(]wife[)]." Id. at 6. The agreement required that the Respondents remit one percent of the total amount of bail bond liability for each bond written, subject to a $10 minimum for each bond that was less than $1,000. Ibid. The ALJ further noted that under the terms of the agreement, "[t]he terms 'bail bond,' 'undertaking,' 'bond,' and 'Power of Attorney' shall be interchangeable unless otherwise indicated." Ibid.

Further, the ALJ noted that from July 19, 2010 through October 26, 2010, the Respondents solicited and executed 26 bail bond powers of attorney. Ibid. On these 26 powers of attorney, the Respondents collected premiums in the amount of $15,300, in relation to the total

[25] The name of Bail Group Management, LLC was misspelled as "Bail Group Managmeent, LLC" in the Initial Decision.

liability of $142,764.99[26], and failed to remit the required share of premiums to FCS[27], per the terms of the aforementioned agreement. Ibid. Further, in his responses to the Department's Request for Admissions, Cenneno admitted that he failed to remit the required share of premium to FCS. Ibid.

Based upon the foregoing, the ALJ found as fact the Respondents solicited and executed 26 bail bond powers of attorney pursuant to their agreement with FCS, collected premiums in the amount of $15,300, and failed to submit the required payments to FCS per the terms of their agreement. Id. at 6-7 and 9. As such, the ALJ concluded that the Respondents' actions, as alleged in Counts Seven and Eight of the OTSC, violated N.J.S.A. 17:22A-40a(2), (4), (8), and (16), N.J.S.A. 17:22A-42a, N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b).[28] Id. at 10.

Count Nine: Respondents Cenneno and Phoenix failed to respond to the Department's November 26, 2013 inquiry

The ALJ stated that on November 25, 2013, Eugene Shannon ("Shannon"), investigator for the Department, contacted Cenneno via a telephone call regarding a non-payment complaint from FCS. Ibid. Additionally, on November 25, 2013, Shannon mailed a letter to Cenneno, advising that the Department was investigating a complaint from FCS, provided a list of bail

[26] The ALJ stated that the total amount of liability for the bail bonds issued was $142,765. However, this appears to be an approximate amount, as the total amount of liability for the bail bonds issued was $142,764.99. See Certification of Eugene Shannon ("Shannon Cert."), attached to the Department's Motion for Summary Decision, at ¶ 6 and Exh. 3. For clarification purposes, the specific amount of the total liability for the bail bonds will be referenced throughout this Final Decision and Order rather than the approximate amount set forth by the ALJ in the Initial Decision.

[27] The total amount of the required share of premiums that should have been issued to FCS is $1,455.11.

[28] The ALJ did not separate her conclusions regarding statutory and regulatory violations by Count and instead collectively found that the Respondents actions, as alleged in Counts Seven and Eight of the OTSC, violated N.J.S.A. 17:22A-40a(2), (4), (8), and (16), N.J.S.A. 17:22A-42a, N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b). However, the facts used by the ALJ to support her conclusions regarding violations committed by the Respondents, relate to facts alleged in both Counts Seven and Eight of the OTSC. Further, Count Seven of the OTSC alleges violations of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C.11:17C-2.2(b) and Count Eight of the OTSC alleges violations of N.J.S.A. 17:22A-40A(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a.

bond powers of attorney, for which FCS claims it has not been paid, and sought answers to five questions by "no later than December 9, 2013." Ibid. On November 26, 2013, Shannon also emailed Cenneno a copy of the November 25, 2016 letter, including the bond powers of attorney list, and restated the deadline for his response. Ibid. To date, Cenneno has not responded to the mailed letter or the email. Ibid.

Based upon the foregoing, the ALJ found as fact the Respondents failed to provide a timely responses to the Department's request for information. Id. at 7 and 9. As such, the ALJ concluded that the Respondents actions, as alleged in Count Nine of the OTSC, violated N.J.S.A. 17:22A-40a(2) and N.J.A.C. 11:17A-4.8. Id. at 10.

ALJ'S FINDINGS AS TO THE PENALTY AGAINST RESPONDENTS

In regards to the revocation of the Respondents' producer licenses, the ALJ noted that the Department argued that insurance producers are held to a high standard of conduct. Ibid. (citing In re Parkwood Co., 98 N.J. Super. 263, 268 (App. Div. 1963). In addition, the Department also equated the misappropriation of premium funds to attorneys who mishandle client funds. Id. at 11. The ALJ noted that the Commissioner has previously pointed to how the courts have recognized that the insurance industry is strongly affected by the public interest. Ibid. (citing Sheeran v. Nationwide Mutual Insurance Company, 80 N.J. 548, 559 (1979)). The ALJ further noted that "as evidenced by [the Commissioner's] prior decisions, rarely will mitigating factors override license revocation in cases involving fraud." Id. at 11. Here the ALJ stated that the Respondents' failure to remit appropriate premiums as well as the failure to pay the amounts due on the forfeited bail bonds amounts to fraud. Ibid. As such, the ALJ concluded that revocation of the Respondents' producer licenses is appropriate. Ibid.

With regard to the appropriate civil monetary penalties to be imposed, the ALJ stated that the Producer Act empowers the Commissioner to impose civil penalties for violations listed in N.J.S.A. 17:22A-40a. Id. at 10. The ALJ further noted that the Commissioner may levy monetary penalties not exceeding $5,000 for the first offense and $10,000 for each subsequent offense. Ibid. The ALJ further noted that the standards for determining the appropriateness of civil monetary penalties should be discussed as set forth in Kimmelman v. Henkles & McCoy, Inc., 108 N.J. 123, 137-39 (1987). Specifically, certain factors are to be examined when assessing administrative civil monetary penalties that may be imposed pursuant upon insurance producers. Ibid. These factors include: (1) the good faith or bad faith of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal conduct; (6) existence of criminal or treble damages actions; and (7) past violations. Id. at 10 (citing Kimmelman, supra 108 N.J. at 137-39). Based upon this standard, the ALJ determined that the imposition of civil monetary penalties, costs, and the revocation of the Respondents' insurance producer licenses were appropriate in this matter.

The ALJ set forth the following analysis pursuant to the standard set forth in Kimmelman, supra, 108 N.J. at 137-39. As to the first factor, the ALJ noted that the Respondents' failure to remit premiums and their failure to pay the bail bond judgments entered "were not small acts of negligence, [but] were misappropriations rising to fraud, which is bad faith." Id. at 11.

As to the second factor, the ALJ stated there are no proofs as to the Respondents' ability to pay because the Respondents failed to respond to the Department's Motion for Summary Decision. Ibid. However, the ALJ pointed out that the Department has provided that the Commissioner has previously issued large fines even in the presence of an argument that there

was an inability to pay the civil monetary penalties entered against the respondent. Ibid. (citing Commissioner v. Malek, OAL Dkt. Nos. BKI 04520-05 and BKI 04686-05, Initial Decision (12/06/05), Final Decision and Order (01/18/06) (the Commissioner assessed fines from $2,500 to $20,000, despite evidence that the respondent had a limited ability to pay)).

The ALJ noted that, as to the third factor, the Respondents retained approximately $170,000[29] that is still currently due to United and $1,455.11[30] that is still currently due to FCS. Id. at 11. The ALJ determined that the misappropriation of such a large amount of funds weighed heavily in favor of a substantial fine.

Further, the ALJ stated that injury to the public, the fourth factor, was substantial in this case "and in general[,] fraud tends to erode the public's confidence in the industry as a whole." Id. at 11-12 (citing Commissioner v. Fonseca, OAL Dkt. No. BKI 11979-10, Initial Decision (08/15/11), Final Decision and Order (12/28/11)).

With regard to the fifth factor, the ALJ noted that the Respondent's actions at issue continued for a period of three years, which began in 2007 and ended in 2010. Id. at 12.

The ALJ notes that in relation to factor six, no treble damages or criminal actions were involved, which weighs in favor of higher civil monetary penalties, because the Respondents were not punished for their unlawful conduct. Ibid.

Lastly, the ALJ noted that there were no prior incidents of violations or penalties imposed upon the Respondents. Ibid.

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[29] The total amount owed to United is $170,014.82 ($43,676.82 in relation to the allegations contained in Count One of the OTSC, See Verdel Cert. at ¶13; $600 in relation to the allegations contained in Count Two of the OTSC, See Verdel Cert. at ¶16; and $125,738 in relation to the allegations contained in Counts Four and Five of the OTSC, See Verdel Cert. at ¶19-20).

[30] The ALJ noted that "another $1,455 [is] due to FCS." Initial Decision at 11. However, this appears to be an approximate amount as the total amount owed to FCS is $1,455.11. See Shannon Cert. at ¶8 and Exh. 3. For clarification purposes, the specific amount owed to FCS will be referenced throughout this Final Decision and Order rather than the approximate amount set forth by the ALJ in the Initial Decision.

Based upon the above analysis, the ALJ recommended the following fines for each count of the OTSC: Count One - $5,000 against Cenneno and Phoenix, jointly and severally; Count Two - $5,000 against Cenneno and Phoenix, jointly and severally; Count Three - $10,000 against Cenneno, individually; Count Four - $10,000 against Cenneno and Phoenix, jointly and severally; Count Five - $10,000 against Cenneno, individually; Count Six - $5,000 against Cenneno and Phoenix, jointly and severally; Count Seven - $10,000 against Cenneno and Phoenix, jointly and severally; Count Eight[31] - $10,000 against Cenneno and Phoenix, jointly and severally; and Count Nine - $5,000 against Cenneno and Phoenix, jointly and severally. Ibid.

Thus, the ALJ recommended total fines of $70,000 allocated as follows: $50,000 against Respondents Cenneno and Phoenix, jointly and severally; and $20,000 against Respondent Cenneno, individually. Id. at 12-13. The ALJ also concluded that an award of costs of investigation to the Department in the amount of $1,137.50, restitution to United in the amount of $170,014.82, and restitution to FCS in the amount of $1,455.11 against the Respondents Cenneno and Phoenix, jointly and severally, was appropriate. Ibid.

EXCEPTIONS

By letter dated November 7, 2016, the Office of the Attorney General, on behalf of the Department, submitted timely Exceptions to the Initial Decision. The Respondents did not submit any Exceptions.

In its Exceptions, the Department concurs with the overall conclusions contained in the Initial Decision, the findings that Respondents Cenneno and Phoenix violated the Producer Act

[31] The ALJ stated that "the second-step penalty of $10,000 for each violation is appropriate for Counts Three, Four, Five, Seven, and Ten." Ibid. However, there are only Nine Counts alleged in the OTSC and the ALJ further stated that the Respondents are "to pay penalties of $50,000 for which they are jointly and severally liable to Counts One, Two, Four, Six, Seven, Eight, and Nine." Id. at 13. As such, the ALJ's inclusion of a Count Ten appears to be a typographical error and a conclusion as to the allegations contained in Count Eight of the OTSC was intended.

as alleged in OTSC, the ALJ's findings as to the appropriate penalties to be imposed, and the recommendation that both of the Respondents' insurance producer licenses should be revoked. However, the Department wished to modify and clarify certain issues as follows.

First, the Department requests that the following typographical errors be corrected: (1) the Respondent's name in the caption on page 1 of the Initial Decision should read "Phoenix Bail Bonds," rather than "Poenix Bail Bonds;" (2) the filing date referred to on page 2 of the Initial Decision should read "September 21, 2015," rather than "February 21, 2015;" (3) the ALJ's conclusion on page 12 that a penalty of $10,000 "is appropriate for Counts Three, Four, Five, Seven and Ten" should read "is appropriate for Counts Three, Four, Five, Seven and Eight."

Further, the Department requests that a violation of N.J.S.A. 17:22A-42a be found against Cenneno as it relates to his actions alleged in Count Five of the OTSC. Specifically, the Department states that pursuant to N.J.S.A. 17:22A-42a, an agent shall abide by the terms of its written agency contract with an insurer. However, as alleged in Count Five of the OTSC, the Department proved that Cenneno failed to abide by the terms of his agency agreement when he failed to satisfy judgments entered against him. Additionally, the Department argues that on page 9 of the Initial Decision, the ALJ finds that the Respondents "failed to pay judgments for fifty-three bail bonds, causing the insurer to have to pay the judgments [in the amount] of $125,738.00, in violation of its contracts." As the ALJ found that Cenneno failed to abide by the terms of his agency contract, the Department avers that his actions also violated N.J.S.A. 17:22A-42a, in addition to the other violations found by the ALJ in relation to Count Five of the OTSC.

LEGAL DISCUSSION

The Department bears the burden of proving the allegations in an Order to Show Cause by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 678 N.J. 47 (1975).

OTSC—Allegations Against the Respondents

For all of the reasons set forth in the Initial Decision, I concur that summary decision is appropriate as to all Counts of the OTSC issued against the Respondents. As found by the ALJ, the Respondents failed to respond to the Department's Motion for Summary Decision and failed adduce evidence that creates a genuine issue as to any material fact and their defenses to the OTSC, as pleaded, fail as a matter of law.

> Count One: Respondents Cenneno and Phoenix improperly withheld, misappropriated, and converted bond premiums by failing to remit premiums to United

Count One of the OTSC alleges that Cenneno and Phoenix improperly withheld, misappropriated, and converted bail bond premiums by failing to remit $43,676.82 in bail bond premiums owed to United pursuant to Cenneno's agreement with United, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b). The ALJ found as fact that the Respondents[32] executed contracts with ACIC, IFIC, and United, solicited and executed 180 bail bonds in the amount of $1,455,893.99,

[32] As noted above, although the ALJ stated that the Respondents entered into the contracts at issue in Counts One, Two, and Three of the OTSC, only Respondent Cenneno entered into the contracts.

collected premiums of $145,589.40, and then failed to remit the contractually required amount of $43,676.82 to United. Initial Decision at 4. The ALJ further concluded that the Department proved the allegations in Count One of the OTSC by stating that "the Department has carried its burden with regard to showing that respondent wrote bail bonds . . . collected premiums, and never paid the amounts due under their insurance contracts." Id. at 8. I concur with the ALJ that the Department proved the allegations in Count One of the OTSC; however, the ALJ grouped Counts One, Two, and Three of the OTSC together when issuing her findings regarding violations committed and failed to separate the violations by Count. As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY[33] the Initial Decision to specifically set forth the violations committed by the Respondents as it relates to Count One of the OTSC. Therefore, I FIND that the Respondents' actions, as alleged in Count One of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act) and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the course of conducting insurance business), N.J.A.C. 11:17C-2.1(a) (premium funds shall be held by an insurance producer in a fiduciary capacity and shall not be misappropriated), and N.J.A.C. 11:17C-2.2(b) (premiums due shall be remitted to the insurer within five days after receipt of the funds).

[33] Pursuant to N.J.A.C.1:1-18.6(b), the Commissioner "may reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to issues of credibility of lay witness testimony, but shall clearly state the reasons for so doing."

Count Two: Respondents Cenneno and Phoenix improperly withheld, misappropriated, and converted payments by failing to pay United for the issued and unaccounted for powers of attorney

Count Two of the OTSC alleges that Cenneno and Phoenix failed to report or return to United six bail bond powers of attorney, and improperly withheld, misappropriated, and converted payments by failing to remit $600 in premiums that is owed to United pursuant to Cenneno's agreement with United, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b). The ALJ found as fact that the Respondents issued six powers of attorney, collected $2,000 in premiums related to them, and failed to submit the required amounts to United, in violation of the contract with United, ACIC, and IFIC. Initial Decision at 4-5. The ALJ further concluded that the Department proved the allegations in Count Two of the OTSC by stating that "the Department has carried its burden with regard to showing that respond wrote . . . bail bond powers of attorney, collected premiums, and never paid the amounts due under their insurance contracts." Id. at 8. I concur with the ALJ that the Department proved the allegations in Count Two of the OTSC; however, as stated above, the ALJ grouped Counts One, Two, and Three of the OTSC together when issuing her findings regarding violations committed and failed to separate the violations by Count. As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth the violations committed by the Respondents as it relates to Count Two of the OTSC. Therefore, I FIND that the Respondents' actions, as alleged in Count Two of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16)

(commit a fraudulent act) and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the course of conducting insurance business), N.J.A.C. 11:17C-2.1(a) (premium funds shall be held by an insurance producer in a fiduciary capacity and shall not be misappropriated), and N.J.A.C. 11:17C-2.2(b) (premiums due shall be remitted to the insurer within five days after receipt of the funds).

Count Three: Respondent Cenneno failed to abide by the terms and duties of his agency agreement with United

Count Three of the OTSC alleges that Respondent Cenneno failed to abide by the terms and duties of his agency agreement with United when he failed to remit premiums as instructed and when he failed to hold the funds received in a fiduciary capacity, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16) and N.J.S.A. 17:22A-42a. The ALJ concluded that the Department proved the allegations in Count Three of the OTSC by stating that "the Department has carried its burden with regard to showing that respond wrote bail bonds and bail bond powers of attorney, collected premiums, and never paid the amounts due under their insurance contracts." Id. at 8. The ALJ further concluded that the Department demonstrated that the Respondents acted in violation of the contracts with United, ACIC, IFIC and therefore, Cenneno violated N.J.S.A. 17:22A-42a. I concur with the ALJ that the Department proved the allegations in Count Three of the OTSC; however, as stated above, the ALJ grouped Counts One, Two, and Three of the OTSC together when issuing her findings regarding violations committed and failed to separate the violations by Count. As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth the violations committed by Cenneno as it relates to Count Three of the OTSC. Therefore, I FIND that the Cenneno's actions, as alleged in Count Three of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding,

misappropriating or converting any monies or properties received in the course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act) and N.J.S.A. 17:22A-42a (requiring an agent to abide by the terms of its written agency contract with an insurer).

Additionally, I MODIFY the Initial Decision to provide that the violations committed in Count Three of the OTSC relate to Cenneno's actions only, rather than to both Respondents, as the agreements, which are the subject of Count Three, were only entered into by Cenneno. Further, I disagree with the ALJ's determination that Phoenix is vicariously liable for Cenneno's actions, as it relates to Count Three of the OTSC. The ALJ noted that Phoenix is vicariously liable for Cenneno's actions because Cenneno was the DRLP of Phoenix and acted on Phoenix's behalf. Initial Decision at 9. However, while Cenneno was the DRLP of Phoenix under the duration of his contracts with United, ACIC, and IFIC, the Department only issued Count Three of the OTSC against Cenneno, as the contracts at issue in Count Three were entered into by Cenneno only. As such, I MODIFY the Initial Decision and FIND that Respondent Phoenix is not vicariously liable for Cenneno's actions, as they relate to Count Three of the OTSC.

> Count Four: Respondents Cenneno and Phoenix failed to satisfy judgments entered against them in the course of conducting insurance business

Count Four of the OTSC alleges that Respondents Cenneno and Phoenix failed to satisfy judgments in the amount of $125,738 that were entered against them relating to 53 forfeited bail bonds, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b). The ALJ concluded that the Department proved the allegations in Count Four of the OTSC by stating that "[t]he Department has shown that Cenneno and Phoenix . . . failed to pay judgments for fifty-three forfeited bail bonds,

causing the insurer to have to pay the judgments [in the amount] of $125,738, in violation of its contracts." Initial Decision at 9. I concur with the ALJ that the Department proved the allegations in Count Four of the OTSC; however, the ALJ grouped Counts Four and Five of the OTSC together when issuing her findings regarding violations committed and failed to separate the violations by Count. As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth the violations committed by the Respondents as it relates to Count Four of the OTSC. Therefore, I FIND that the Respondents' actions, as alleged in Count Four of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act), and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the course of conducting insurance business),

However, I disagree with the ALJ's conclusion that the Respondents' actions, as alleged in Count Four of the OTSC, constitute violations of N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C- 2.2(b). The facts underlying Count Four of the OTSC are that the Respondents failed to satisfy 53 bail bond judgments totaling $125,738. Initial Decision at 5. However, United satisfied the judgments entered against the Respondents, even though the agency agreements entered into between Cenneno and United, ACIC, and IFIC provided that Cenneno would indemnify United, ACIC, and IFIC against the costs of forfeiture. Ibid. While the Respondents' failure to satisfy the bail bond judgments resulted in United having to satisfy those judgments on their behalf and the Respondents still have not repaid the $125,738 owed to United, this amount is not "premium" or "premium funds" paid to the Respondents for the purchase of a bail bond.

See N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C-2.2(b). Specifically, N.J.A.C. 11:17C-2.1(a) provides that premium funds shall be held by an insurance producer in a fiduciary capacity and shall not be misappropriated and N.J.A.C. 11:17C-2.2(b) provides that premiums due shall be remitted to the insurer within five days after receipt of the funds. As the funds owed to United are not premium funds, I MODIFY the Initial Decision and FIND that the Respondents' actions, as alleged in Count Four of the OTSC, do not constitute violations of N.J.A.C. 11:17C-2.1(a) and N.J.A.C. 11:17C-2.2(b).

> Count Five: Respondent Cenneno failed to abide by the terms and duties of his agency agreement with ACIC, IFIC, and United

Count Five of the OTSC alleges that Respondent Cenneno failed to abide by the terms and duties of his agency agreement with United, ACIC, and IFIC when he failed to pay off Judgments entered against him and/or Phoenix, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a. As noted above, the ALJ concluded that the Department proved the allegations in Count Five of the OTSC by stating that "[t]he Department has shown that Cenneno and Phoenix . . . failed to pay judgments for fifty-three forfeited bail bonds, causing the insurer to have to pay the judgments [in the amount] of $125,738, in violation of its contracts." Initial Decision at 9. I concur with the ALJ that the Department proved the allegations in Count Five of the OTSC; however, as previously mentioned, the ALJ grouped Counts Four and Five of the OTSC together when issuing her findings regarding violations committed and failed to separate the violations by Count. As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth the violations committed by Cenneno as it relates to Count Five of the OTSC. Therefore, I FIND that Cenneno's actions, as alleged in Count Five of the OTSC,

constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business, (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act).

I further I MODIFY the Initial Decision to provide that the violations committed in Count Five of the OTSC relate to Cenneno's actions only, rather than to both Respondents because the agreements in Count Five were only entered into by Cenneno. Further, the ALJ failed to make a determination regarding whether Cenneno's actions in Count Five of the OTSC also constitute a violation of N.J.S.A. 17:22A-42a, which requires an agent to abide by the terms of its written agency contract with an insurer. Here, the ALJ concluded that the Cenneno failed to satisfy judgments entered against him and/or Phoenix pursuant to the agreements entered into between Cenneno, United, ACIC, and IFIC. Initial Decision at 9. Specifically, the ALJ found that the agreements required that Cenneno indemnify United, ACIC, and IFIC against the costs of forfeiture, that a forfeiture in the amount of $125,738 occurred, that Cenneno and Phoenix failed to satisfy the judgments on the forfeited bail bonds, and United, in turn, satisfied the judgments entered. Id. at 5. As such, and in light of the Department's Exceptions to the Initial Decision, I MODIFY the Initial Decision and FIND that Cenneno's actions as alleged in Count Five of the OTSC were also a violation of N.J.S.A. 17:22A-42a.

Count Six: Respondents Cenneno and Phoenix failed to respond to the Department's July 7, 2011 and August 22, 2011 inquiries

Count Six of the OTSC alleges that Respondents Cenneno and Phoenix failed to respond to the Department's inquiries dated July 7, 2011 and August 22, 2011, wherein the Department requested a written response from the Respondents regarding the United bail bond transactions, in violation of N.J.S.A. 17:22A-40a(2) and (8) and N.J.A.C. 11:17A-4.8. I concur with the ALJ

that the Department proved the allegations in Counts Six of the OTSC, and I FIND that the Respondents' actions, as alleged in Count Six of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law) and N.J.A.C. 11:17A-4.8 ("An insurance producer shall reply, in writing, to any inquiry of the Department relative to the business of insurance within the time requested in said inquiry. . . .").

The ALJ failed to make a determination regarding whether the Respondents' actions as alleged in Count Six of the OTSC constitute a violation of N.J.S.A. 17:22A-40a(8), which prohibits "[u]sing fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere." Previous decisions have found that a respondent's failure to respond to an inquiry from the Department violates N.J.S.A. 17:22A-40a(8). See Commissioner v. Tuite and Rapid Release Bail Bonds, OAL Dkt. No. BKI 663-14, Initial Decision (03/17/16), Final Decision and Order (06/16/16) (finding that the Respondents' failure to respond to the Department's May 1, 2013 inquiry in writing constituted a violation of N.J.S.A. 17:22A-40a(8)). Here, the ALJ found that the Respondents failed to respond to the Department's July 7, 2011 and August 22, 2011 inquiries in the time requested by the Department. Consistent with prior decisions, this failure to respond to the inquiries that were issued by the Department displays incompetency and bad faith in the conduct of insurance business because the Respondents purposely failed to respond to two Department inquiries and such failure attempt to obscure the extent of their wrongdoing from the Department. As such, I MODIFY the Initial Decision and FIND that the Respondents' actions, as alleged in Count Six of the OTSC, also constitute a violation of N.J.S.A. 17:22A-40a(8).

Count Seven: Respondents Cenneno and Phoenix improperly withheld and converted bond premiums by failing to remit premiums to FCS

Count Seven of the OTSC alleges that Respondents Cenneno and Phoenix improperly withheld, misappropriated, and converted premiums by failing to remit $1,455.11 to FCS relating to 26 bail bond powers of attorney pursuant to the terms of Sub-Producer Bail Bond Agency Agreement with FCS, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.A.C. 11:17A-4.10, N.J.A.C. 11:17C-2.1(a), and N.J.A.C. 11:17C-2.2(b). The ALJ concluded that the Department proved the allegations in Count Seven of the OTSC by stating that "[t]he Department has prove[n] that Cenneno and Phoenix solicited and executed twenty-six bail bond powers of attorney pursuant to a contract with FCS, that they collected $15,300 in premiums related to those activities and that they failed to remit the required share of premiums to [FCS]." Initial Decision at 9. I concur with the ALJ that the Department proved the allegations in Count Seven of the OTSC; however, the ALJ grouped Counts Seven and Eight of the OTSC together when issuing her findings regarding violations committed and failed to separate the violations by Count. As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth the violations committed by the Respondents as it relates to Count Seven of the OTSC. Therefore, I FIND that the Respondents' actions, as alleged in Count Seven of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act) and N.J.A.C. 11:17A-4.10 (an insurance producer acts in a fiduciary capacity in the course of conducting insurance business), N.J.A.C. 11:17C-2.1(a) (premium

funds shall be held by an insurance producer in a fiduciary capacity and shall not be misappropriated), and N.J.A.C. 11:17C-2.2(b) (premiums due shall be remitted to the insurer within five days after receipt of the funds).

Count Eight: Respondents Cenneno and Phoenix failed to abide by the terms and duties of their agency agreement with FCS

Count Eight of the OTSC alleges that Respondents Cenneno and Phoenix failed to abide by the terms and duties of their Sub-Producer Bail Bond Agency Agreement with FCS when they failed to remit premiums as instructed and failed to hold the premium funds in a fiduciary capacity, in violation of N.J.S.A. 17:22A-40a(2), (4), (8), and (16), and N.J.S.A. 17:22A-42a. The ALJ concluded that the Department proved the allegations in Count Eight of the OTSC by stating that "[t]he Department has prove[n] that Cenneno and Phoenix . . . failed to remit the required share of premiums to [FCS]." Initial Decision at 9. I concur with the ALJ that the Department proved the allegations in Count Eight of the OTSC; however, as previously mentioned, the ALJ grouped Counts Seven and Eight of the OTSC together when issuing her findings regarding violations committed and failed to separate the violations by Count. As such, and in light of the ALJ's findings of fact and conclusions of law, as set forth above, I MODIFY the Initial Decision to specifically set forth the violations committed by the Respondents as it relates to Count Eight of the OTSC. Therefore, I FIND that the Respondents' actions, as alleged in Count Eight of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law), (4) (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), (8) (fraudulent or dishonest practices, or demonstrate untrustworthiness or financial irresponsibility), and (16) (commit a fraudulent act) and N.J.S.A. 17:22A-42a (requiring an agent to abide by the terms of its written agency contract with an insurer).

Count Nine: Respondents Cenneno and Phoenix failed to responded to the Department's November 26, 2013 inquiry

Count Nine of the OTSC alleges that Respondents Cenneno and Phoenix failed to respond to the Department's November 26, 2013 inquiry, wherein the Department requested a written response from the Respondents regarding the FCS bail bonds transactions, in violation of N.J.S.A. 17:22A-40a(2) and (8) and N.J.A.C. 11:17A-4.8. I concur with the ALJ that the Department proved the allegations in Counts Nine of the OTSC, and I FIND that the Respondents' actions, as alleged in Count Nine of the OTSC, constitute violations of N.J.S.A. 17:22A-40a(2) (violating any insurance law) and N.J.A.C. 11:17A-4.8 ("An insurance producer shall reply, in writing, to any inquiry of the Department relative to the business of insurance within the time requested in said inquiry. . . .").

Similar to Count 6 above, the ALJ failed to make a determination regarding whether the Respondents' actions as alleged in Count Nine of the OTSC constitute a violation of N.J.S.A. 17:22A-40a(8) ("[u]sing fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of insurance business in this State or elsewhere"). For same reasoning provided in Count 6 above, I MODIFY the Initial Decision and FIND that the Respondents' actions as alleged in Count Nine of the OTSC also constitute a violation of N.J.S.A. 17:22A-40a(8).

Penalty against Respondents Cenneno and Phoenix

Pursuant to N.J.S.A.17:22A-40d, the Commissioner "retain[s] the authority to enforce the provisions of and impose any penalty or remedy authorized by [the Producer Act] even if the person's license or registration has been surrendered or has lapsed by operation of law." Therefore, although both of the Respondents' insurance producer licenses are currently inactive,

the Commissioner may still take action against the Respondents, regardless of their current license status.

Revocation of Respondents' Producer Licenses

With respect to the appropriate action to take against the Respondents' insurance producer licenses, I find that the record is more than sufficient to support license revocation and, in fact, compels the revocation of both of the Respondents' producer licenses. As such, I concur with the ALJ's recommendation that Respondents Cenneno and Phoenix's insurance producer licenses be revoked.

A licensee's honesty, trustworthiness, and integrity are of paramount concern, since an insurance producer acts as a fiduciary to both the consumers and insurers they represent. The nature and duty of an insurance producer "calls for precision, accuracy and forthrightness." Fortunato v. Thomas, 95 N.J.A.R. (INS) 73 (1993). Additionally, a licensed producer is better placed than a member of the public to defraud an insurer. Strawbridge v. New York Life Ins. Co., 504 F.Supp. 824 (1980). As such, a producer is held to a high standard of conduct, and should fully understand and appreciate the effect of fraudulent or irresponsible dealing on the industry and on the public.

In decisions by prior Commissioners in similar cases, revocation has consistently been imposed upon licensees who have personally engaged in fraudulent acts, as both insureds and insurers must place their trust in the information insurance producers convey to them. See Commissioner v. Hohn, OAL Dkt. No. BKI 12444-11, Initial Decision (11/01/12), Final Decision and Order (03/18/13). Our strong policy is to instill public confidence in both insurance professionals and the industry as a whole. Courts have long recognized that the

insurance industry is strongly affected by the public interest and the Commissioner is charged with the duty to protect the public welfare. See Sheeran, supra, 80 N.J. at 559.

Moreover, the Commissioner has consistently held that misconduct involving "misappropriation of premium monies, bad faith and dishonestly compels license revocation." Commissioner v. Strandskov, OAL Dkt. No. BKI 03451-07, Initial Decision (09/25/08), Final Decision and Order (02/04/09); See also Commissioner v. Feliz, OAL Dkt. No. BKI 85-05, Initial Decision (12/16/05), Final Decision and Order on Remand (03/13/06) (license revocation, restitution, and fines imposed for failure to remit payment to the insurer or return premiums to insureds); Shipitofsky v. Commissioner, 95 N.J.A.R.2d. (INS) 67; 1994 N.J. AGEN LEXIS 505 (license revocation and fines imposed for withholding premiums and misappropriation of funds); Commissioner v. Erwin, OAL Dkt. No. BKI 4573-06, Initial Decision, (07/09/07), Final Decision and Order (09/17/07) (license revocation and fines imposed for, among other things, failure to remit premiums and failure to maintain a trust account). Only the existence of extraordinary mitigating factors can form a basis for withholding the sanction of license revocation in cases involving misappropriation, and none exist here.

I agree with the ALJ's findings that Respondents' activities were clear and demand the revocation of their insurance producer licenses. As the decisions cited above demonstrate, revocation is appropriate in almost all cases wherein a licensed insurance producer has engaged in misappropriation of premium monies, fraud, bad faith, and dishonesty. Here, on multiple occasions, the Respondents violated the terms of their agency agreements and misappropriated bail bond premiums and power of attorney premiums when they failed to remit said premium funds to United and FCS. Initial Decision at 3-6. Additionally, the Respondents violated Cenneno's agency agreements with United when they failed to indemnify United regarding

forfeitures on bail bond premiums in the amount of $125,738. Id. The forfeitures ultimately became judgments against the Respondents, and when the Respondents failed to satisfy the judgments, United paid the judgments in the total amount of $125,738. Id. Then, in an attempt to gather information regarding the Respondents' activities, the Department issued several inquiries to the Respondents' attention to which the Respondents unscrupulously failed to respond. Id. at 5-6. Additionally, there is no evidence in the record to support that any of the premium funds that were misappropriated by the Respondents have ever been remitted to United or FCS. Thus, in light of the foregoing and based upon my review of the record, I am compelled to FIND to find that that the revocation of the Respondent Cenneno and Respondent Phoenix's producer licenses is both necessary and appropriate.

Civil Monetary Penalties against Respondents

As discussed by the ALJ, under Kimmelman, supra, 108 N.J. at 137-39. certain factors must be examined when assessing administrative monetary penalties that may be imposed upon insurance producers pursuant to the Producer Act (up to $5,000 for the first violation and up to $10,000 for any subsequent violations). See discussion above at p. 14-17and Kimmelman, supra, 108 N.J. at 137-39.

I agree with the ALJ's findings related to the Kimmelman factors, and supplement those findings as follows. As to the first factor, the Respondents' actions "were not small acts of negligence[, but] were misappropriations rising to fraud, which is bad faith." Initial Decision at 11. The Respondents, on several occasions, failed to remit bail bond premiums and bail bond powers of attorney premiums while also failing to return or report the powers of attorney to United. Cenneno was aware that under the terms of his agency agreements, he was required to remit specific portions of the gross premiums the Respondents collected to United and/or FCS.

However, instead of abiding by the terms of his agreements, he misappropriated the funds and this constitutes egregious conduct. Further, the Respondents permitted 53 issued bail bonds to be forfeited and they failed to satisfy the judgments entered against them in relation to same. Their failure forced United to bear the costs of satisfying the judgments, even though Cenneno's agency agreement required that he indemnify United relating to bail bond forfeitures. Further, the Respondents purposely failed to respond to the Departments inquiries relating to their wrongful conduct, in an attempt to mask the extent of their wrongful conduct. Additionally, to date, the Respondents have not paid the monies owed to United or FCS. This factor weighs in favor of a significant monetary penalty.

As to the second Kimmelman factor, as noted by the ALJ, Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity and the Respondents have not provided any indication that they have a limited ability to pay a civil monetary penalty. See Goldman v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision (04/15/08), Final Decision and Order (09/02/08); see also discussion above at p. 15.

The third Kimmelman factor addresses the amount of profits obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, supra, 108 N.J. at 138. In the present action, the Respondents retained at least $170,014.82 from United relating to misappropriated premiums and bond forfeiture judgments, and $1,455.11 to FCS relating to bail misappropriated premiums. The Respondents admitted that they misappropriated the premiums from United and FSC. To date, there is no evidence to indicate that the misappropriated funds have been remitted to either United or FCS. This factor weighs in favor of a significant monetary penalty.

The fourth Kimmelman factor addresses the injury to the public. Licensed producers act in a fiduciary capacity. In re Parkwood Co., supra, 98 N.J. Super. at 268. Moreover, the Commissioner is charged with the duty to protect the public welfare and to instill public confidence in both insurance producers and the insurance industry. "When insurance producers breach their fiduciary duties and engage in fraudulent practices and unfair trade practices, the affected insurance consumers are financially harmed and the public's confidence in the insurance industry as a whole is eroded." Commissioner v. Fonseca, supra. Here, the Respondents' actions resulted in them misappropriating over $171,000 from United and FCS. When a licensed insurance producer commits fraudulent or dishonest acts, it destroys the public's trust in insurance producers and the insurance industry as a whole. The public is harmed when licensed professionals fail to maintain the level of honesty and trustworthiness demanded under the laws of this State.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. The Respondents' actions were not a single, isolated incident but were a series of frauds, which occurred over a period of several years from at least 2007 through 2010. Additionally, their misconduct continues today as the Respondents have failed to remit the monies owed to both United and FCS. This factor weighs in favor of a significant monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. 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. Kimmelmen, supra, 108 N.J. at 139. Here, the Respondents have not faced any criminal

punishment for their actions. As such, this factor weighs in favor of a significant monetary penalty.

The last Kimmelman factor deals with whether the producer had previously violated the Producer Act and if past penalties have been insufficient to deter future violations. Here, there has been no evidence presented that the Respondents have committed a previous violation.

In light of the above Kimmelman analysis and based upon the violations I have concluded that the Respondents committed, I ADOPT the recommendations of the ALJ that Respondents Cenneno and Phoenix shall jointly and severally pay civil monetary penalties for Count One in the amount of $5,000, Count Two in the amount of $5,000, Count Four in the amount of $10,000, Count Six in the amount of $5,000, Count Seven in the amount of $10,000, Count Eight in the amount of $10,000, and Count Nine in the amount of $5,000 for a total monetary penalty of $50,000 and Respondent Cenneno shall individually pay civil monetary penalties for Count Three in the amount of $10,000 and Count Five in the amount of $10,000, for a total monetary penalty of $20,000. These penalties are reasonable and justified and less than what the Department is entitled to seek under the Producer Act.

Pursuant to N.J.S.A. 17:22A-45c, it also is appropriate to impose reimbursement of the costs of investigation. As such, I ADOPT the ALJ's recommendations that the Respondents pay costs of investigation in the amount of $1,137.50, jointly and severally.

Additionally, I ADOPT the ALJ's recommendations that the Respondents shall make restitution in the amount of $170,014.82 to United related to premiums and judgments owed as well as restitution in the amount of $1,455.11 to FCS related to premiums owed, jointly and severally.

CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions, and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in Initial Decision except as modified herein. Specifically, I ADOPT the ALJ's conclusions and hold that the Respondents have violated the Producer Act as charged in the OTSC and have failed to present any legally or factually viable defenses to the violations of the Producer Act. Further, I ADOPT the conclusion that the Department's Motion for Summary Decision should be granted on all Counts as charged in the OTSC with the amplification contained herein. I further ADOPT the ALJ's recommendations as to the monetary penalties allocated for all Counts of the OTSC and FIND that the following fines be imposed: Count One: $5,000 against Respondents Cenneno and Phoenix, jointly and severally; Count Two: $5,000 against Respondents Cenneno and Phoenix, jointly and severally; Count Three: $10,000 against Respondent Cenneno, individually; Count Four: $10,000 against Respondents Cenneno and Phoenix, jointly and severally; Count Five: $10,000 against Respondent Cenneno, individually; Count Six: $5,000 against Respondents Cenneno and Phoenix, jointly and severally; Count Seven: $10,000 against Respondents Cenneno and Phoenix, jointly and severally; Count Eight: $10,000 against Respondents Cenneno and Phoenix, jointly and severally; and Count Nine: $5,000 against Respondents Cenneno and Phoenix, jointly and severally; for a total civil monetary penalty against Respondents Cenneno and Phoenix, jointly and severally of $50,000 and Respondent Cenneno, individually of $20,000. I additionally ADOPT the ALJ's recommendations and ORDER the Respondents to pay costs of investigation to the Department in the amount of $1,137.50 and restitution to United in the amount of $170,014.82 and to FCS in the amount of $1,455.11, jointly and severally. Lastly, I MODIFY the Initial Decision to correct the typographical errors contained in the Initial Decision, as set forth in the Department's Exceptions.

It is so ORDERED on this 26th day of January, 2017

Richard J. Bacolato
Commissioner

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