STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| DEPARTMENT OF FINANCIAL SERVICES,<br><br>Petitioner,<br><br>vs.<br><br>MICHAEL CARROLL GAINER,<br><br>Respondent. | ) | Case No. 05-4158PL |

RECOMMENDED ORDER

Notice was provided and on March 13, 2006, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2005). The hearing location was the Jacksonville Regional Service Center, Building D, 921 North Davis Street, Jacksonville, Florida. Charles C. Adams, Administrative Law Judge, conducted the hearing.

APPEARANCES

For Petitioner: David J. Busch, Esquire
Department of Financial Services
200 East Gaines Street, Room 612
Tallahassee, Florida 32399-0333

For Respondent: Christopher A. White, Esquire
105 Solana Road, Suite C
Ponte Vedra Beach, Florida 32082

## STATEMENT OF THE ISSUE

Should Petitioner impose discipline on Respondent's health agent (2-40), life agent (2-16), life and health agent (2-18), life including variable annuity and health agent (2-15), and life including variable annuity agent (2-14), licenses issued by Petitioner ?

## PRELIMINARY STATEMENT

Through an Amended Administrative Complaint dated October 20, 2005, before the Department of Financial Services, Case No. 60585-03-AG, Petitioner accused Respondent of various violations pertaining to his licenses. The Amended Administrative Complaint contained two counts, the second of which was withdrawn at hearing. Count I remains in dispute. It contains allegations concerning Respondent's affiliation with Twenty-first Century Satellite Communications, Inc. (21st Century), as account representative or agent and the claim that Respondent in that capacity offered for sale and sold securities as defined in Section 517.012(18), Florida Statutes (1997) (sic). In particular, Respondent is alleged to have "convinced" S.R. to invest $50,000.00 in 21st Century on or around December 1, 1998, by willfully using his insurance license to circumvent the Florida Insurance Code (the Code) through S.R.'s trust in Respondent as her insurance agent. This allegedly caused S.R. to suffer a loss of $50,000.00 in principal, with an

additional loss of $5,355.00 in interest income. For these acts Respondent allegedly violated Sections 626.611(4), (7), (8) and (13) and 626.621 (6), Florida Statutes (1997).

Respondent was given the opportunity to elect a response to the allegations. He chose to dispute the factual allegations by requesting a hearing pursuant to Section 120.57(1), Florida Statutes (2005), as indicated in a certificate of service of the election of rights made by his attorney dated November 4, 2005, together with a request for formal hearing as contemplated by Florida Administrative Code Rule 28-106.201 served on the same day.

On November 14, 2005, the Division of Administrative Hearings (DOAH) received the Amended Administrative Complaint and request for formal hearing by Respondent. The matter was assigned as DOAH Case No. 05-4158PL and proceeded before the undersigned.

The hearing was originally noticed to be held on February 8 and 9, 2006. Upon Respondent's unopposed motion it was continued to March 13, 2006.

Petitioner moved to allow copies to be used of exhibits previously sealed and certified in DOAH Case No. 03-4664PL, involving the same parties, which had been closed. At the same time, Petitioner indicated its intention not to prosecute Count II to the Amended Administrative Complaint of the present case,

as confirmed at the final hearing. The motion to allow copies noted that Respondent had no objection as to the authenticity of the copies, while reserving the right to object to the admission of those materials based on other grounds. On February 24, 2006, the motion to allow copies was granted as to their authenticity, in accordance with Section 120.569(1)(h), Florida Statutes (2005).

Petitioner requested official recognition, pursuant to Section 90.203, Florida Statutes (2005) of the final order, in In Re: 21st Century Satellite Communications, Inc., DBF No. 0568-I-2/01 before the State of Florida, Office of Financial Regulation; the final judgment in Securities and Exchange Commission, Plaintiff, vs. 21st Century Satellite Communications, Inc., Robert Byrch and Spencer Tyrrell, Defendants, Case No. 8:01-CN-1875-T-30 before the United States District Court, Middle District of Florida (Tampa Division), October 3, 2001, and the final order in State of Florida, Department of Banking and Finance, Petitioner vs. Michael Carroll Gainer, Respondent, DBF No. 0655-I-2/02 before the State of Florida, Office of Financial Regulation entered July 22, 2002; these Exhibits numbered 3 through 5 respectively were attached to the motion. On March 8, 2006, an order was entered officially recognizing those documents.

On March 6, 2006, Respondent moved for official recognition of the recommended order and final order In the Matter of: Oscar Brown, Jr., Case No. 60582-03-AG before the Department of Financial Services, (DOAH Case No. 05-0765PL). When the final hearing commenced official recognition was made of the recommended order and final order related to the Oscar Brown, Jr. case.

Consistent with the requirements in the prehearing order, the parties prepared a prehearing stipulation. In response to paragraph 3E within the prehearing order, the parties stipulated to certain facts. Those stipulations are set forth in the findings of fact to the Recommended Order.

At hearing, Petitioner presented Linda Ann Davis as its witness. Petitioner's Exhibits numbered 1, and 5 through 14 were admitted.[1/] The video-taped deposition of S.R., and the transcription of that deposition taken on February 20, 2006, were admitted upon Petitioner's request. Ruling was reserved on Petitioner's Exhibits numbered 3 and 4. They correspond to the similar exhibits by reference number that were officially recognized as authentic on March 8, 2006. By contrast, at hearing Petitioner offered these exhibits to support elements of proof, specifically related to the present case. In that connection Petitioner's Exhibits numbered 3 and 4 are denied admission. This ruling takes into consideration the oral and

written arguments of the parties on the subject. Respondent testified in his own behalf and presented John David Theus as his witness.

On April 6, 2006, the hearing transcript was filed. The parties submitted proposed recommended orders within 30 days of that filing as allowed. Those proposed recommended orders have been considered in preparing the Recommended Order.

## FINDINGS OF FACT

### Stipulated Facts

1. Respondent is licensed by Petitioner as a health agent (2-40), a life agent (2-16), life and health agent (2-18), life including variable annuity and health agent (2-15), and life including variable annuity agent (2-14).

### Additional Facts

2. Respondent has been licensed as a Florida insurance agent since 1979 and has worked in the insurance industry in Florida on a full-time basis beginning in 1988. At present, Respondent does business under his life and health license (2-18).

3. While in business, Respondent formed a corporation with Steven Brown sometime in either 1989 or 1990. Mr. Brown was president of the corporation, and Respondent was the vice-president. It was a closely held corporation, an S corporation. Neither individual served as the supervisor for the other

person. At times, they split sales and clients in conducting the business.

4. In the past, Respondent was also licensed under Chapter 517, Florida Statutes, the "Florida Securities and Investor Protection Act" as an "associated person." While acting as an associated person, Respondent was affiliated with Tower Square Securities Inc. (Tower Square) between August 26, 1998, and June 22, 2000. Beyond that affiliation, Respondent was an associated person with Horner, Townsend & Kent (HTK) between June 23, 2000, and July 5, 2001. This license in relation to securities had been issued by the State of Florida, Department of Banking and Finance. The regulatory function for securities has since become the province of the State of Florida, Department of Financial Services, Office of Financial Regulation.

5. Upon the entry of the final order in the case State of Florida, Department of Banking and Finance, Petitioner, vs. Michael Carroll Gainer, Respondent, DBF No. 0655-I-2/02, accepting a stipulation and consent agreement, Respondent's application for registration by the Department of Banking and Finance to become an associated person of High Mark Securities, Inc.(High Mark) was withdrawn by High Mark. As of February 25, 2002, through the stipulation and consent agreement, Respondent agreed that he would not apply for licensure or registration in

any capacity pertaining to the Florida Securities and Investor Protection Act for a period of ten years from the date of the entry of the final order in that cause. The matters contemplated by the case before the Department of Banking and Finance were in relation to 21st Century, the company implicated in the present case, found to be involved with unregistered securities. To resolve the disciplinary action before the Department of Banking and Finance, Respondent, through the stipulation and consent agreement, neither admitted nor denied the allegations concerning the nature of the transactions involved with that prosecution; however, Respondent agreed to cease and desist all present and future violations of Chapter 517, Florida Statutes, and the administrative rules promulgated under that chapter.

6. At the time Respondent worked with Tower Square as an associated person, the broker-dealer supervising Respondent and the company itself through other personnel made no mention of industry problems related to promissory notes.

7. While employed at HTK in November 2000, Respondent attended a compliance meeting. This activity included the completion of a questionnaire. Among the questions was one concerning "notes." Respondent indicated that he had experience with "notes." This reference to "notes" made by Respondent was also reported to Tower Square. This episode in November 2000

came at a time outside the period contemplated by the present Amended Administrative Complaint involving "notes" related to 21st Century.

8. Respondent first became aware of 21st Century when he received a telephone call sometime in 1997. A couple of people that Respondent knew told Respondent about the 21st Century business. In the beginning, Respondent was not interested in pursuing opportunities with 21st Century. About a year later, he changed his mind. He made an appointment to visit 21st Century offices sometime in 1998.

9. Through his involvement, Respondent learned that the 21st Century program dealt with a note, a collateralized note.

10. When Respondent went to Tampa, Florida, to check out 21st Century, he met with the company vice-president, Spencer Tyrrell. Respondent toured 21st Century facility, looked at equipment, and had an on-site engineer explain the nature of the 21st Century program. Mr. Tyrrell took Respondent and others to installation sites that 21st Century had completed.

11. In his tour of the 21st Century facilities, Respondent also visited the billing department for the company. They appeared busy.

12. During the trip, Respondent found out that 21st Century was engaged in the business of the sale, installation, maintenance, and servicing of what it referred to as Satellite

Master Antenna Television (SMATV) systems to private property owners. To conduct this business, financing was needed for the necessary equipment and installations. As 21st Century put it, the funds loaned for the financing of equipment and installations would be derived from investors, whose investment would be secured by a collateral mortgage on the equipment and the income derived from its installation, as confirmed by a UCC-1 filing and corporate promissory note. It was anticipated that Respondent and others like him would be involved in the promotion and obtaining of funding for 21st Century to pursue its business through the investment vehicle that has been described.

13. In addition to visiting the company and sites where the SMATV systems had been installed, Respondent spoke to an attorney associated with 21st Century. He also spoke with someone whom was responsible for holding investment money, qualified money, in an escrow account. Respondent spoke with someone whom he understood was performing an audit on the business as a member of an accounting firm. Respondent spoke to several other 21st Century company officers, not to include Mr. Tyrrell.

14. The attorney that Respondent spoke to was Byron Nenos, who acted as a disbursement agent for 21st Century. Respondent discussed with Mr. Nenos any difficulties that the attorney was

aware of that had been experienced in the provision of quarterly interest payments to the investors in the SMATV systems. At that time, no problems were revealed by Mr. Nenos on this topic.

15. The escrow company responsible for maintaining the qualified money was Retirement Accounts, Incorporated, who acted as trustee of the investment funds. The trustee would release money to 21st Century to further its purposes. The investor would receive a quarterly statement concerning the investment and would be billed an administrative charge by the escrow firm. Respondent was familiar with Retirement Accounts, Incorporated by reputation, in that he understood that this was a nationwide firm.

16. Respondent also checked with the Better Business Bureau to ascertain any complaints that had been made against 21st Century with that organization. He was told that complaints had not been received.

17. Respondent invested $16,000.00 in the 21st Century SMATV systems for his own purposes under the terms that have been described.

18. Respondent received subsequent memos from the company concerning the subscriber base for the 21st Century product.

19. Respondent was introduced to S.R. around 1998. Respondent sold S.R. mutual funds and a tax sheltered annuity. The application for the tax sheltered annuity was made in

May 1998 with the funds distribution to begin in August 1998. The investment in the mutual funds took place around September 1998.

20. The subject of 21st Century as an investment for S.R. was brought up in the fall of 1998. S.R. told Respondent that she had a lot of money in CDs and would like to do something different with that money and wanted to know if Respondent had anything to offer other than mutual funds. Respondent suggested a government securities fund. S.R. remained interested in some other possible alternative investment opportunity. Respondent brought up the 21st Century investment. He provided material to S.R. for her review concerning 21st Century.

21. S.R. made no decision concerning 21st Century until December 1998. In this connection, Respondent arranged for S.R. to visit the 21st Century headquarters and/or talk with persons at 21st Century by telephone. S.R. did not avail herself of those opportunities. To this point, Respondent was unaware of any problems with the 21st Century investment.

22. Ultimately, S.R. decided to invest $50,000.00 in 21st Century and that was arranged by Respondent in December 1998.

23. When S.R. invested her money in 21st Century, Respondent understood that this was extra money coming due from a CD or similar investment. In deciding upon an investment in 21st Century, Respondent and S.R. went through details

concerning her financial position. S.R. was the first person that Respondent sold the 21st Century product.

24. In his dealings with S.R., Respondent explained that the 21st Century investment was not secured. The risk would be that if S.R. needed the money she would invest within the five year period contemplated by the terms of her agreement with 21st Century, she would not be able to get the money. The inability to reacquire the principal within the period of the investment was not a concern to S.R., as she remarked to Respondent.

25. The investment by S.R. was, as Respondent describes it, "collateralized." By this he meant that the investment was in association with one facility or community, in which there were sufficient numbers of investors within a subscriber base for the equipment to make the site profitable. The UCC-1 reference meant that the state-maintained website would allow confirmation that the client's name was listed in relation to the property that was being invested in. S.R.'s name was on the property she invested in, according to the Secretary of State's records under the UCC-1.

26. In connection with the UCC-1 filing, Respondent had financed another business on his own and filed the UCC-1 for equipment. With the experience in mind, Respondent perceived the UCC-1 filing as being associated with collateral related to the equipment involved with 21st Century. Respondent eventually

found out that there was a limit on the value of equipment as collateral, in that it was over-collateralized limiting the return on investment.

27. Respondent understood that he was selling a promissory note to S.R. for 60 months. Respondent proceeded with the assumption that it was exempt from the requirement to be registered as a security based upon conversations with attorney Nenos, the disbursement agent for 21st Century. This was not the true status of the promissory note.

28. Respondent told S.R. that her investment with 21st Century was a relatively low risk. S.R. considered that her investment was a capital investment.

29. As Respondent recalls, problems began with 21st Century when it was late on its interest payment for the third quarter 2000. This was in relation to the five-year loan agreement program that S.R. participated in, calling for a monthly fixed and guaranteed interest payment of 13 percent, plus an additional 25 percent of the annual profits generated by installation of the SMATV systems, both disbursements paid in quarterly installments. When the problems commenced, Respondent told S.R. that he was available if she needed his assistance and committed himself to provide information to her that he received concerning the difficulties experienced by 21st Century. Later Respondent also offered to assist S.R. in relation to bankruptcy

proceedings that had been commenced in relation to 21st Century and its creditors that are ongoing.

30. In a deposition, S.R. explained her understanding of the transaction with 21st Century through Respondent. She understood it as an opportunity in which four times a year she would receive a check, which represented interest payments and at the end of five years the principal investment would be returned. S.R. expected to receive 13 percent annual return on the investment.

31. Respondent told S.R. that he had also invested in 21st Century.

32. S.R. recalls Respondent arranging for an on-site visit at the 21st Century business location which she was unable to meet because of her schedule. Respondent told S.R. about his visit to the facility and that by its appearance it seemed very solid, a growing opportunity. S.R. never spoke directly with anyone in management or otherwise at 21st Century.

33. As she explained, S.R.'s investment came from an inheritance left to her by her mother, who had died in 1998.

34. The $50,000.00 investment by S.R. constituted about 25 percent of her available cash.

35. Petitioner's Exhibit numbered 8 is a copy of the brochure Respondent provided to S.R. explaining 21st Century and the investment opportunity. The brochure describes the nature

of the sale, installation, maintenance and servicing of SMATV systems to private owners and the need for financing of the equipment and installations. The brochure highlights the investment opportunity where it states:

> Real Opportunities in Communications
>
> 21st Century Satellite Communications, Inc. is offering on a limited and selected basis, the following opportunity to participate in its SMATV installation programs. For both qualified and non-qualified funds, the Company is offering a 5 year Loan Agreement program, whereby individuals can receive an attractive income on funds loaned to the Company. Loan repayments consist of a monthly fixed and guaranteed interest payment of 13 percent, plus an additional 25 percent of the annual profits generated by a spread of installations, all payable in quarterly installments. (Important Note: Profits are a direct result of the number of subscribers per installation, hence profits are calculated over a series of installations, rather than any one location).
>
> For qualified monies, accumulations would grow on a tax deferred basis, providing interest on the principal, together with interest on the accumulating interest!
>
> Each Loan Agreement is backed up by the Uniform Commercial Code, which provides a lien on both the equipment and income derived therefrom.
>
> . All Lenders receive a Promissory Note backed by the assets of 21st Century Satellite Communications, Inc.
>
> . Each installation will be subject to an annual accounting.

> . The average installation is between 500 to 600. Companies are currently offering $1,000 to $1,500 to purchase a subscriber. Even a small installation of 400 subscribers could be sold for $400,000 (twice the original investment). It is anticipated that installations will average between 400 to 1,000 subscribers.

36. Consistent with its obligation 21st Century paid S.R. four checks for interest due and then it ceased making payments.

37. On October 12, 2000, through its vice-president and CFO, Gabe Panepinto, 21st Century wrote to S.R. restating the status of the account pertaining to the note and the interest rate. S.R. confirmed by her signature the status of the account on the form at the bottom of the letter for return to the company.

38. On October 12, 2000, a letter was generally written to the men and women who invested with 21st Century by its chairman Robert S. Byrch, explaining the financial problems experienced by that company. It described several options to the investors, to include S.R., where it said:

> As a noteholder, your choices are simple. You may either do nothing and retain your promissory note, or you may tender your note to the Company and request that your note be converted into equity in accordance with the instructions and subject to the conditions set forth in the Exchange Offer Memorandum. The terms of the preferred stock are not yet finalized but will be specified in the Exchange Offer Memorandum.

39. On November 13, 2000, in correspondence from Mr. Byrch as chairman of the board for 21st Satellite, directed to the investors, S.R. among them, the investors were told that the company was in default on its obligation under its note program to make quarterly interest payments. The letter referred to the intent to change the nature of the investment opportunity from one of a noteholder to a stockholder in the company.

40. On November 14, 2000, S.R., among other investors, received a letter from Mr. Nenos pertaining to 21st Century. The correspondence referred to an October 27, 2000, letter sent to 21st Century notifying the company of the default status of the promissory notes held by S.R. and other investors and a demand for payment made by Mr. Nenos. The correspondence from Mr. Nenos told the investors that 21st Century had not paid its obligation and advised the investors that they should seek legal counsel to enforce the terms of the promissory notes and to protect their interest in the collateral.

41. On December 7, 2000, in a letter by Spencer G. Tyrrell, Director, and Robert S. Byrch, Chairman for 21st Century, they asked the investors to communicate:

> 1. Whether you would be willing to convert your note, or a portion of your note, to preferred stock; or
>
> 2. Whether you would be willing to modify the terms of the original note; or

3. Whether you are unwilling to convert your note or modify the terms of the existing note.

42. On September 20, 2001, Respondent wrote S.R. with an enclosure from a Glenn Liberatore that was being submitted to the creditors committee, taken to be in relation to 21st Century. It gave a telephone number for S.R. to call and comment to Mr. Liberatore on this topic. A personal handwritten note was attached to this correspondence which said, "S. please call me or write to let me know you are o.k. - I haven't heard from you in a while."

43. In what appears to be correspondence dated November 30, 2001, Respondent again wrote S.R. on the subject of having received official notice regarding 21st Century's reorganization through Chapter 11, offering to assist S.R. in processing her claim in that proceeding. Respondent indicated that he was filing a claim and encouraged S.R. to do the same. To that end, S.R. has retained counsel to protect her interest in the bankruptcy proceedings.

## CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2005).

45. This is a disciplinary case. Therefore, Petitioner has the burden to prove the allegations in the Amended Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3rd DCA 1998).

46. The meaning of clear and convincing evidence is explained in In re: Davey, 645 So. 2d 398 (Fla. 1994), quoting with approval from Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

47. The factual allegations in the Amended Administrative Complaint that are at issue state:

> 3. At all times pertinent to the dates and occurrences referred to herein, you, MICHAEL C. GAINER, were associated with and acted as 'account representative' or agent for a company known as 21st Century Satellite Communications, Inc. (hereafter '21st Century').
>
> 4. You, MICHAEL C. GAINER, offered for sale and sold to Florida residents, various promissory notes and lease agreements (hereafter collectively referred to as 'investments') in 21st Century through a Florida corporation known as Brown-Gainer & Associates, Inc. (hereafter 'Brown-Gainer'), in which you have served as a Vice-president.

5. The investments issued, offered for sale and sold by you, MICHAEL C. GAINER, as agent for 21st Century, are securities as defined in Section 517.012(18), Florida Statutes.

6. The investments issued, offered for sale and sold by you, MICHAEL C. GAINER, as agent for 21st Century, were not registered with the State of Florida Department of Banking and Finance ('DBF'), as required pursuant to Section 517.07, Florida Statutes, and were not exempt from such registration requirements, either under the provisions of sections 517.051 or 517.061, Florida Statutes.

7. In each count alleged herein, you, MICHAEL C. GAINER, provided the investor with 21st Century sales materials advertising that 'each lease or loan agreement is backed up by the Uniform Commercial Code'; that funds lent by investors to 21st Century are 'secured by collateral mortgage on the equipment and the income derived from it, confirmed by a UCCI and a corporate promissory note'; that lease payments 'would consist of a monthly fixed and guaranteed interest payment of 1 percent, plus an additional 25 percent of the annual profits generated by the installation'; and a table showing that a typical $100,000 investment would result in a net return to the investor of $84,445 over a five year period; and that investors would [sic] entitled to take 100% depreciation on the 'installation equipment' over a five-year period.

8. These advertisement materials were designed to leave all purchasers with the impression that funds invested would be safely held.

9. You, MICHAEL C. GAINER, sold 21st Century promissory notes and lease agreements, earning you substantial commissions. These individual transactions,

more particularly described below, not only resulted in the loss of the invested funds in the sum of $90,000 but also in $3,712.52 in penalty fees or surrender charges due to you, MICHAEL C. GAINER, twisting your insurance clients' annuity and life insurance contracts and retirement accounts, and at least $5,355.00 in lost interest income payments.

10. Pursuant to Chapter 626, Florida Statutes, the Florida Department of financial Services has jurisdiction over your insurance licenses and appointments.

COUNT I

11. The above General Allegations are hereby realleged and fully incorporated by reference.

12. On or around May 1998, you, MICHAEL C. GAINER, sold to S.R. of Tolla, Florida (DOB July 21, 1961) mutual funds as well as a tax-sheltered US&G Annuity & Life Company annuity.

13. On or around December 1, 1998, you MICHAEL C. GAINER, convinced S.R. to invest $50,000.00 in 21st Century. S.R. had confidence in making that investment because of her prior insurance relationship with you, MICHAEL C. GAINER.

14. In conclusion as to this count, you, MICHAEL C. GAINER, willfully used your insurance license to circumvent the Florida Insurance Code by using S.R.'s trust in you, as her insurance agent, to convince her to invest in an unregistered security, at a loss of $50,000. With the same investment, you caused S.R. to suffer a loss of an additional $5,355 of interest income, for a total loss to S.R. of $55,355.00.

48. As a consequence, Respondent is alleged to have violated the following provisions of the Code, which if proven would subject the Respondent to suspension or revocation of his insurance agent licenses. Those grounds for discipline under Chapter 626, Florida Statutes (1997), are:

> 626.611 Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, solicitor's, adjuster's, customer representative's, service representative's, managing general agent's, or claims investigator's license or appointment.--The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, solicitor, adjuster, customer representative, service representative, managing general agent, or claims investigator and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:
>
> * * *
>
> (4) If the license or appointment is willfully used, or to be used, to circumvent any of the requirements or prohibitions of this code.
>
> * * *
>
> (7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.
>
> (8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.

* * *

> (13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

49. In addition, Respondent is alleged to have violated Section 626.621(6), Florida Statutes (1997), that would allow the imposition of discipline at Petitioner's discretion, to include suspension or revocation of the insurance agent licenses held by Respondent:

> (6) In the conduct of business under the license or appointment, engaging in unfair methods of competition or in unfair or deceptive acts or practices, as prohibited under part X of this chapter, or having otherwise shown himself or herself to be a source of injury or loss to the public or detrimental to the public interest.

50. The investment opportunity Respondent marketed for 21st Century to S.R. involving a promissory note issued by 21st Century to S.R., to support loan repayments on a monthly basis at a fixed and guaranteed interest rate of 13 percent, together with 25 percent of annual profits generated, if any, constituted a security as defined in Section 517.021(19), Florida Statutes (1997). See also Securities and Exchange Commission v. W.J. Howey Company, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946); Mehl v. Office of Financial Regulation, 859 So. 2d 1260 (Fla. 1st DCA 2003); Farag v. National Data Bank Subscriptions, Inc., 448 So. 2d 1098 (Fla. 2d DCA 1984); Le Chateau Royal

Corporation v. Pantaleo, 370 So. 2d 1155 (Fla. 4th DCA 1979); Levine v. I.R.E. Properties, Inc., 344 So. 2d 938, 940 (Fla. 3rd DCA 1977). The marketing and sale to S.R. did not involve exempt securities or an exempt transaction as described in Sections 517.051 and 517.061, Florida Statutes (1997), respectively.

51. Recognizing that Respondent was an "associated person" as defined in Section 517.021(2), Florida Statutes (1997), when he marketed and sold the 21st Century investment opportunity to S.R., it is reasonable to assume that Respondent did recognize or should have recognized that the product was a security, defined in Section 517.021(19), Florida Statutes (1997), although he denies knowledge of that fact. See Ganter v. Department of Insurance, 620 So. 2d 202,204 (Fla. 1st DCA 1993). As such, the security did not constitute any form of insurance recognized within the provisions of Chapter 626, Florida Statutes (1997), that Respondent could market and sell under terms of existing insurance agent licenses he held. The issue to be resolved concerns the consequences, if any exist, for selling a product unrelated to the sale of insurance, in this case the sale of unregistered securities.

52. Because this case is penal in nature, the statutes cited as grounds for imposing discipline are strictly construed. See State v. Pattishall, 99 Fla. 296 126 So. 147 (Fla. 1930);

Elmariah v. Department of Business and Professional Regulation, 574 So. 2d 164 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulation, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

53. In resolving this case, it is with an awareness that there is the concept of *stare decisis* in administrative law in Florida. See Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501 (Fla. 4th DCA 1993). Consistent with that legal concept, Respondent has argued the importance of Oscar Brown, Jr., supra, while Petitioner perceives the case as insignificant. This dispute concerns itself with the comparability of the facts found in the Oscar Brown, Jr. case, to the facts found here, and if sufficiently comparable, what pertinence the legal conclusions reached in the final order in the prior case concerning Section 626.611(7), Florida Statutes (1999), would have. The language in Section 626.611(7), Florida Statutes (1999), is the same as Section 626.611(7), Florida Statutes (1997). The final order in Oscar Brown, Jr., supra, established that it was not necessary to find an insurance connection or engagement "in the conduct of business under the license" for the provision to relate. It would be possible to discipline an insurance agent for selling an unregistered security, dependent upon a factual finding that the accused was untrustworthy, that he evidenced "wrongful intent, willfulness

or engaged in fraud," all according to the legal conclusion reached in the final order entered in Oscar Brown, Jr. The factual findings in the recommended order, adopted in the final order in that case, were seen by the agency as not establishing untrustworthiness by the Respondent or as has been more specifically defined earlier in the summary of the final order entered in the prior case.

54. The only meaningful distinction between Oscar Brown, Jr., and his activities in association with 21st Century and that of this Respondent, is the license held by the present Respondent as an associated person pursuant to Chapter 517, Florida Statutes (1997). With the knowledge expected of Respondent Gainer in his capacity as an associated person, did he proceed with wrongful intent, willfulness or engage in fraud in his relationship with S.R., wherein he sold her securities from 21st Century? The standard for addressing the conduct described as "willfulness" is recognized in Hartnett v. Department of Professional Regulation, 406 So. 2d 1480 (Fla. 1st DCA 1981). Respondent Gainer did not proceed with wrongful intent, nor was he engaged in fraud when transacting business for 21st Century with the customer S.R. But his pursuit of that business was willful when considering Section 626.611(7), Florida Statutes (1997). See Dezel v. King, 91 So. 2d 624

(Fla. 1956;, and State Department of Highway Safety and Motor Vehicles v. Taylor, 456 So. 2d 550 (Fla. 3rd DCA 1984).

55. It has been proven that Respondent violated Section 626.611(7), Florida Statutes (1997), that would relate to his lack of fitness or trustworthiness to engage in the business of insurance by virtue of his involvement with 21st Century in the securities sales to S.R.

56. It has not been proven that Respondent willfully used his insurance license to circumvent requirements or prohibitions within the Code, in violation of Section 626.611(4), Florida Statutes (1997). No requirements were stated in the Code in relation to sale of securities, nor were there prohibitions stated against their sale under the law in effect at that time.

57. It has not been proven that Respondent violated Section 626.611(8), Florida Statutes (1997). The sale of securities to S.R. in no manner speaks to Respondent's knowledge and technical competence in engaging in the transactions that are authorized by his license, the sale of insurance.

58. It has been proven that Respondent violated Section 626.611(13), Florida Statutes (1997), by willful violation of Section 621.611(7), Florida Statutes (1997), in association with the sale of securities to S.R. This is a derivative violation.

59. It has not been proven that Respondent violated Sections 626.621(6), Florida Statutes (1997), through the

conduct of business under the terms of his license or appointment as an insurance agent, by engaging in unfair methods of competition or unfair or deceptive acts or practices in relation to insurance sales. Respondent has not otherwise shown himself to be a source of injury or loss to the public or detrimental to the public interest in association with the conduct of insurance business under his insurance license. In effect, Respondent was acting independent of his insurance license involving a product that was not insurance, an activity not addressed in this provision.

60. Beyond the time addressed in this case, an amendment was made to the regulatory chapter to add Section 626.611(16), Florida Statutes (2001), which created grounds for discipline for:

> Sale of an unregistered security that was required to be registered, pursuant to Chapter 517.

Prior to that enactment involvement by an insurance agent with securities was not prohibited conduct, per se, and could only be regarded as grounds for discipline if the facts unique to the case established a violation of Section 626.611(7), Florida Statutes (1997).

61. Pursuant to the guidelines set forth in Florida Administrative Code Rule 69B-231.080, the penalty for the violation should be a six-month suspension of the insurance

licenses held by Respondent. No aggravating or mitigating circumstances warrant increases or decreases in the punishment under criteria found in Florida Administrative Code Rule 69B-231.160.

## RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered finding violations of Section 621.611 (7) and (13), Florida Statutes (1997), dismissing the other alleged violations and suspending Respondent's insurance licenses for six months.

DONE AND ENTERED this 2nd day of June, 2006, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of June, 2006.

## ENDNOTE

1/ Petitioner's Exhibit numbered 2 was withdrawn but was left with the other exhibits and is forwarded with the Recommended Order.

COPIES FURNISHED:

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## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.