REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

IN THE MATTER OF

GEORGE MARSHALL SMITH
_____/

CASE NO: 89790-07-AG

FINAL ORDER

THIS CAUSE came on before Alex Sink, as Chief Financial Officer, for consideration of and final agency action on a Recommended Order (attached as Exhibit A) entered by Administrative Law Judge Charles C. Adams (hereinafter referred to as "ALJ"), after a formal hearing conducted pursuant to Section 120.57(1), Florida Statutes. Petitioner and Respondent timely filed exceptions on May 23, 2008 and May 21, 2008, respectively (attached as Composite Exhibit B). Petitioner and Respondent each filed responses to the respective exceptions (attached as Exhibit C). Respondent filed his "Response to Exceptions Submitted by Petitioner" which was served upon the Agency Clerk and Petitioner's counsel on June 6, 2008. On June 8, 2008, Petitioner filed its "Notice of Respondent's Misstatements Contained in Respondent's Response to Department's Exceptions to the Recommended Order." On that date, the Department also filed and served upon Respondent's counsel its "Response to Respondent's Exceptions to the Recommended Order." Thus, both Respondent's response to Petitioner's exceptions and Petitioner's response to Respondent's exceptions are untimely pursuant to Florida Administrative Code Rule 28-106.217(3), which provides that such responses must be filed within ten days from the date the exceptions were filed with the agency. In this case, in order to have been timely filed, the Petitioner's response to Respondent's exceptions were required to have been filed by May 31, 2008. Likewise, Respondent's response to Petitioner's exceptions was required to have

been filed by June 2, 2008. Accordingly, the responses are stricken and shall not be considered by the agency. Each exception filed by Petitioner and Respondent, respectively, is addressed below.

PRELIMINARY STATEMENT

At issue in the instant matter is whether disciplinary action should be imposed against Respondent's license as a life including variable annuity agent, life agent, and health agent in connection with sales of viatical settlement purchase agreements that Respondent sold to various consumers. Based upon the evidence presented and testimony of witnesses, the ALJ entered his Recommended Order on May 8, 2008, recommending a six month suspension of Respondent's license and appointment as a life including variable annuity agent, life agent, and health agent. Petitioner timely filed its exceptions to the Recommended Order and served same upon Respondent's counsel on May 23, 2008. Respondent timely filed his exceptions to the Recommended Order and served same upon Petitioner's counsel on May 21, 2008. On June 6, 2008, Respondent filed his Response to Exceptions submitted by Petitioner claiming he had not received Petitioner's exceptions on May 23, 2008. Based upon the exceptions filed, the Petitioner is requesting entry of a final order revoking Respondent's license. Conversely, the Respondent's exceptions request entry of a final order imposing no discipline and dismissing the Administrative Complaint. The exceptions are addressed below.

RULINGS ON PETITIONER'S EXCEPTIONS

1. Petitioner's First Exception:

   Petitioner excepts to the ALJ's Preliminary Statement providing that:

   > On September 13, 2007, in the course of that petition for administrative hearing, Respondent "admitted" allegations within the Administrative Complaint found at paragraphs 1 through 4, 20, 31 and 42.

[Recommended Order at p. 3]. Petitioner contends that Respondent's petition for hearing also contained admissions with regard to paragraph 6 of the Administrative Complaint, inasmuch as Respondent's denial is alleged to have been a limited denial such that the remainder of the allegations contained in paragraph six ought to be deemed admitted.

In support of its contention, Petitioner compares paragraph 6 of the Administrative Complaint and amendment thereto and notes that both pleadings allege that the viatical settlement purchase agreements offered for sale and sold by Respondent were not registered with the state of Florida Department of Banking and Finance, as required by section 517.07, Florida Statutes, and were not exempt from such registration requirements, either under provisions of sections 517.051 or 517.061, Florida Statutes.[1] Petitioner points out that Respondent's denial is limited with respect to paragraph six, because his petition for hearing merely states: "Denied that the products sold by the Respondents were required to be registered pursuant to section 517.07."

Petitioner's first exception is hereby REJECTED. The Petition for Formal Hearing submitted by Respondent contains a statement identifying disputed issues of material fact which includes, among other things:

- Whether the products sold which were sold were required to be registered as securities pursuant to section 517.07, Florida Statutes; and
- Whether the products which were sold were exempt from registration requirements pursuant to section 517.051 or 517.061, Florida Statutes.

Based upon a reading of the entire Petition for Formal hearing filed by Respondent, it is evident that, at all material times, Respondent disputed that the products sold were securities and whether they were exempt from the applicable provisions of Chapter 517, Florida Statutes. Accordingly, the denial with respect to paragraph six of the Administrative Complaint and amendment thereto is not deemed to be a limited denial resulting in a partial admission.

2. Petitioner's Second Exception:

Petitioner takes exception to the following contained in the ALJ's Preliminary Statement:

> On December 7, 2007, an order was entered addressing that request for official recognition.

[Recommended Order at p.4]. Petitioner states that reference to December 7th is a scrivener's error and that the order referred to by the ALJ was actually entered on December 17, 2007. In support of this contention, Petitioner provided a copy of the DOAH docket evidencing that the Order granting official recognition was entered on December 17, 2007. There is not competent substantial evidence in the record to support the reference to December 7th. Therefore, Petitioner's second exception is hereby ACCEPTED.

3. Petitioner's Third Exception:

Petitioner takes exception to the following paragraph contained in the Preliminary Statement:

> Petitioner's Exhibits numbered 1, 2a, 2b, 4a, 4b, 5 through 14, 16 through 23, 23a, 24, 24a, 25, 25a, 26, 27, 27a, 28, 29, 32 through 39, 39a, 40, 40a, 41 and 41a were admitted as evidence.

[Recommended Order at p.6]. Petitioner states that Exhibit 20a was also offered and admitted into evidence which should be properly noted in the Final Order. A review of the transcript of the final hearing held on February 20, 2008, reveals that Exhibit 20a was admitted into evidence with no objection from the Respondent. [TR p. 105-106]. Accordingly, Petitioner's third exception is hereby ACCEPTED.

4. Petitioner's Fourth Exception:

Petitioner takes exception to the ALJ's denial of admission to Exhibits No. 53 through 56 stating that there is no basis to deny their admission. Petitioner specifically addresses Exhibits 54

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[1] The amended paragraph 6 is identical in substance to the original allegation. The amendment simply corrected the name of the agency involved and identified the applicable Florida Statutes

and 55 consisting of MBC's annual reports for the years 2001 and 2002, claiming they are relevant and admissible. Petitioner avers that these reports were a matter of public record on file with the Office of Insurance Regulation and evidenced the fact that various states had deemed MBC viaticals to be a security and had taken action against MBC for the sale of an unregistered security. Further, Petitioner asserts that these exhibits demonstrate that there were numerous other legal actions taken against MBC.

Petitioner states that these records were available to Respondent in February 2002 and March of 2003. Petitioner further asserts that Respondent had a duty to investigate MBC viaticals pursuant to his securities licenses and that said duty may have included obtaining and reviewing MBC's annual reports. Moreover, Petitioner contends that failure to comply with this duty could be an aggravating factor and should be considered in determining the final penalty to be imposed by the Respondent. Further, Petitioner points out that the existence of these annual reports demonstrates that Respondent should have, or could have known, that the viaticals he sold were unregistered securities such that failure to ascertain whether the securities were registered could be construed as an aggravating factor.

A thorough review of the transcript of the final hearing reveals that the purpose for which the Petitioner sought to admit Exhibits 54 and 55 was that, if a violation of the Insurance Code was found by the ALJ, the existence and availability of the documents to Respondent should be considered an aggravating factor by the ALJ, pursuant to Florida Administrative Code Rule 69B-231, when considering the imposition of a penalty. [TR. pgs. 150, 152-154, 157, 223 and 226]. A thorough review of the ALJ's Recommended Order does not specify a reason as to why Exhibits 54 and 55 were denied admission. [Recommended Order, p. 6].

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by the proper year.

Florida Administrative Code Rule 69B-231.160 (the "Rule") provides that the Department shall consider certain aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee. After consideration and application of these factors, the Department shall, if warranted, either decrease or increase the penalty to any penalty authorized by law. The Rule lists a number of factors to be considered as aggravating or mitigating, including a catch-all provision titled "other relevant factors." Rule 69B-231.160(1)(m), F.A.C.

As set forth above, the ALJ's Recommended Order failed to specify any grounds on which he made the determination to exclude the evidence. Petitioner asserts that the evidence excluded, consisting of MBC's annual reports, is the type of evidence that can be considered in the analysis of whether the existence of same constitutes an aggravating factor under the Rule. However, Petitioner failed to cite any authority in support of its contention that Exhibits 54 and 55 should have been admitted even over the relevancy objection of Respondent. Admissibility of evidence is within the province of the ALJ rather than the Department as provided by section 120.569(g), Florida Statutes. Therefore, the Department lacks the authority to, in effect, reweigh the evidence for the purpose of making a determination as to admissibility. For the foregoing reasons, Petitioner's fourth exception is hereby REJECTED.

5. Petitioner's Fifth Exception:

> Petitioner takes exception to the following:
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> As the transcript reflects, Respondent was allowed to preserve constitutional arguments and arguments concerning Petitioner's alleged "non-rule policies" through proffers in the record. Those subjects were not deemed appropriate for consideration on this occasion for reasons explained in the hearing transcript.

[Recommended Order at p. 7]. Petitioner states that while Respondent attempted to preserve three "constitutional" arguments, he has only potentially preserved two of the three arguments because the third, involving whether Petitioner improperly deferred to the Office of Financial

Regulation in regard to whether a security is required to be registered pursuant to Chapter 517, Florida Statutes, has been fully addressed in a separate rule challenge brought by Respondent prior to the final hearing in the instant case. Petitioner advised that the Summary Final Order involving this rule challenge is currently on appeal at the First District Court of Appeal and that the decision rendered by the First District will serve as res judicata or collateral estoppel in relation to this issue.

Petitioner further contends that while Respondent preserved arguments regarding alleged "non-rule policies" through proffers in the record, he has only reserved the right to revisit these issues should this matter, if appealed, be remanded by the appellate court. Specifically, Respondent has not reserved the right to brief the matters before the appellate court. Moreover, Petitioner asserts that Respondent's alleged "non-rule policies" have been fully addressed in the aforementioned rule challenge, and in another rule challenge that Respondent brought prior to the final hearing in the instant case. The Summary Final Orders from both rule challenges are currently on appeal at the First District Court of Appeal. As set forth above, the First District's decisions in those cases will serve as res judicata or collateral estoppel in this matter.

Based upon the foregoing as well as a thorough review of the transcript wherein Respondent sought to preserve the record as to these alleged "non-rule policy" issues, Respondent's preservation of the issue is necessarily limited to a review on remand by the trial court if and when remand is so ordered by the appellate court. However, it is unclear from the Recommended Order whether the ALJ intended to preserve the third constitutional issue (whether the Petitioner improperly deferred to OFR in regard to whether a security is required to be registered), despite the pending appellate court decision. Accordingly, to the extent outlined above, Petitioner's fifth exception is REJECTED.

6. Petitioner's Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Exceptions:

Petitioner's sixth exception excepts to the following language contained in the Recommended Order:

> ...the ultimate determination for punishment is made upon a review of criteria set forth in Florida Administrative Code Rule 69B-231.160, relating to aggravating and mitigating circumstances.

[Recommended Order ¶ 105]. Based upon this language contained in the Recommended Order, Petitioner is concerned that the ALJ may have only used the aggravating and mitigating factors provided in the Rule to determine the recommended penalty. Petitioner properly asserts that the Department, which is ultimately responsible for determining the penalty to be imposed, must, in its Final Order, properly apply its rules to determine the appropriate penalty. However, it does not appear that the ALJ was attempting to discount the fact that the penalty analysis necessarily begins with the computation of penalty attributable to each violation. (The ALJ noted that the violations proven against the Respondent totaled 36 months, and that the "common expectation" was a revocation of the Respondent's licensure.) Consequently, it is deemed that when the ALJ stated that "...the ultimate determination for punishment is made upon a review of criteria set forth in Florida Administrative Code Rule 69B-231.160, relating to aggravating and mitigating circumstances," the ALJ merely intended to indicate that once the total months of penalty are reached, the consideration of aggravating and mitigating factors begins. Accordingly, Petitioner's sixth exception is hereby REJECTED.

As properly stated by the ALJ in his Recommended Order, the violations that have been proven under Counts I through III of the Administrative Complaint, total 36 months, 12 months for each count, pursuant to Florida Administrative Code Rule 69B-231.040(3)(d), derived from Florida Administrative Code Rule 69B-231.080(16). As set forth more fully above, Florida Administrative Code Rule 69B-231.160 provides that the Department shall consider certain aggravating and mitigating factors and apply them to the total penalty in reaching the final

penalty assessed against a licensee. After consideration and application of these factors, the Department shall, if warranted, either decrease or increase the penalty to any penalty authorized by law.

The Department must consider whether to increase or decrease the penalty in accordance with Rule 69B-231.160, F.A.C., based upon the aggravating and mitigating factors of this case. It should be noted that while Rule 69B-231.160, F.A.C. provides for decreasing or increasing the assessed penalty, the Rule does not provide any specific limitation as to the amount of time the Department (or the ALJ) may decrease or increase the penalty. In the instant case, the ALJ considered the following as aggravating/mitigating factors:

1. Respondent's actions in the transactions were not willful;
2. The Murrays, Andrades and Colozzos suffered substantial financial injury;
3. The age and capacity of the Murray, Andrades and Colozzos were not a contributing factor;
4. Restitution has not been made;
5. Respondent had no ill motives in dealing with his customers;
6. The amount of compensation received by Respondent is unknown;
7. Respondent himself entered into a similar transaction;
8. The degree of cooperation between Respondent and Petitioner is unknown;
9. Respondent bears personal responsibility for the losses to his customers but not total responsibility;
10. No related criminal charges are pending against the Respondent;
11. Secondary violations were found in association with Section 626.621(2), Florida Statutes;
12. No previous disciplinary action was taken against Respondent; and
13. Respondent could be expected to have greater insight into the nature of the transactions, given his registration as an associated person pursuant to Chapter 517, Florida Statutes.

The ALJ did not distinguish as to which factors he considered aggravating versus mitigating. However, it appears from a plain reading of the Recommended Order that Nos. 2, 9, 11 and 13 were considered as aggravating circumstances; Nos. 1, 3, 5, 7, 10, and 12 were considered as mitigating factors; and Nos. 4, 6, 8 and 11 were not considered as aggravating or mitigating factors because of a lack of sufficient information. Some of the factors considered as

aggravating or mitigating by the ALJ are themselves the subject of further exceptions taken by Petitioner as set forth below.

In exception seven, Petitioner excepts to No. 2 above, an aggravating factor, which provides that the Murrays, Andrades and Colozzos suffered substantial financial injury. A through review of the testimony of the Murrays reveals that they have not suffered financial injury *at this time* because, of the five viaticals they purchased, one has paid off in the manner it was intended and four others have not paid. [TR p. 164-200; *See also* Recommended Order ¶ 33]. Conversely, the Andrades and Colozzos have suffered substantial injury.

Specifically, the record establishes that the Andrades invested approximately $92,000.00 in the purchase of eight viatical settlement agreements through Respondent, of which six have provided no return and in which they have forfeited their rights and lost the investment due to the lack of ability to make premium payments. [TR p. 102-130; *See also* Recommended Order ¶ 48-51]. Likewise, the Colozzos invested $235,000.00 in the purchase of eight viatical settlement agreements through Respondent. [TR p. 32-94; *See also* Recommended Order ¶ 74]. Of the eight viaticals purchased, two have matured and provided a combined $30,000 return on the investment. Additionally, the Colozzos have forfeited their rights and lost $165,000.00 on three others and they continue to hold three viatical settlement agreements. [TR. p. 32-94; *See also* Recommended Order ¶ 79]. Accordingly, where the Andrades and Colozzos continue to hold viaticals which have not yet matured, they may suffer further substantial injury. The degree of *potential* injury to the victims is an aggravating factor pursuant to Florida Administrative Code Rule 69B-231.160(1)(c), which was not addressed by the ALJ in his Recommended Order. Based on the foregoing citations to the record, there is no competent substantial evidence that the Murrays have already suffered substantial financial injury. Rather, the record establishes that, like the Andrades and Colozzos, it remains to be seen what *future* financial injury they may

suffer as the viaticals they hold mature. Therefore, the Department will consider the future potential injury to the consumers/investors in this case as an aggravating factor. As such, Petitioner's seventh exception is hereby ACCEPTED to the extent provided herein.

The language in Conclusion of Law 105 which states:

> "The Murrays, the Andrades and the Colozzos suffered substantial financial injury"

is modified to read:

> "The Adrades and the Colozzos suffered substantial financial injury. The Murrays have a significant risk of potential injury. These facts constitute an aggravating factor in the analysis of penalty."

The above-substituted language in Conclusion of Law 105 is as or more reasonable than the rejected language.

In exception 8, Petitioner excepts to No. 7 above, a mitigating factor, which gives consideration to the fact that Respondent himself entered into a similar transaction involving the viaticals. Petitioner contends that Respondent's transaction should not be considered a mitigating factor, or, at the most, be given very little consideration because Respondent used his transaction as a marketing tool when he informed the Andrades and Colozzos that he owned a viatical himself.

A through review of the transcript of the testimony of George Andrade supports Petitioner's contention that Respondent used his ownership of a viatical as a marketing tool. Specifically, Mr. Andrade testified as follows:

> "Well we needed supplemental income for monthly bills and everything so we seen an ad in the paper for a CD bank, very good rates. So we went to his office. And when we talked to him, we had mentioned that we had a viatical but we stopped it after three days. We had our opinion of it. We were unsure of it. So he started talking to us and he said they were a good investment. He was investing in them. And he kind of convinced us to get viaticals."

[TR p. 104-104]. Based on the foregoing, the ALJ's determination to consider Respondent's ownership of a viatical as a mitigating factor is dubious, but will not be disturbed. Likewise, there is no competent, substantial evidence in the record to suggest that Respondent's revelation to the Andrades and Colozzos that he owned a viatical himself was solely a marketing tool as Petitioner has suggested. The fact that Respondent's ownership of an MBC viatical settlement agreement was a factor that persuaded the Andrades to purchase viaticals from Respondent is insufficient to prove Respondent's state of mind in providing this information to the consumers/investors in this case such that it ought to be deemed an aggravating factor rather than a mitigating factor. Accordingly, Petitioner's eighth exception is hereby REJECTED.

In exception nine, Petitioner excepts to the apparent mitigating effect of factor No. 11 above, which states that secondary violations were found in association with Section 626.621(2), Florida Statutes (2002 and 2003). Petitioner contends that secondary violations do not exist such that section 626.611(16), Florida Statutes, is a stand-alone violation, and is not subsumed into section 616.621(2), Florida Statutes. Section 626.611, Florida Statutes sets forth the grounds for the Department's compulsory refusal, suspension, or revocation of an agent's license or appointment, while section 626.621, Florida Statutes sets forth the grounds for Department's discretionary refusal, suspension, or revocation of an agent's license or appointment. As such, Petitioner is correct in its assertion that a violation established pursuant to section 626.611(2), Florida Statutes is not subsumed into a violation established pursuant to section 626.621(2), Florida Statutes. Rather, they are two separate violations for which the Department may either be compelled to refuse to issue, suspend or revoke an agent's license or may, in its discretion, refuse to do so depending upon the nature of the violation. Based on the foregoing, Petitioner's ninth exception is hereby ACCEPTED.

Accordingly, the language in Conclusion of Law 105 which states:

"Secondary violations were found in association with Section 626.621(2), Florida Statutes (2002 and 2003)."

is modified to read:

"Violations of both section 626.621(2) and 626.611(6) were found."

The above-substituted language in Conclusion of Law 105 is as or more reasonable than the rejected language.

In exception ten, Petitioner excepts to No. 13 above, an aggravating factor, concerning transactions that took place after November 14, 2002, and which provides that the Respondent could be expected to have greater insight, after that date, into the nature of the transactions, given his registration as an associated person pursuant to Chapter 517, Florida Statutes. Petitioner avers that while it does not disagree with the statement, the characterization of this aggravating factor falls short because the Respondent, as a licensed securities agent, is also presumed to know the laws under which he operates. *Florida Board of Pharmacy v. Levin*, 190 So.2d 768, 770 (Fla. 1966); *Wallen v. Florida Department of Professional Regulation*, 568 So.2d 975 (Fla. 3d DCA 1990).

Further, Petitioner asserts that the Respondent knew the viaticals were securities at the time he made the sales to the affected consumers. Petitioner bases this contention upon exhibits admitted into evidence at the final hearing which detail that, prior to the time Respondent sold the viaticals to the consumers, the Department of Banking and Finance and its successors had held that viaticals were unregistered securities that were required to be registered pursuant to Chapter 517, Florida Statutes.

In addition, Petitioner contends that additional facts involving Respondent's knowledge of the characterization, or potential characterization, of the viaticals as securities should be expressly addressed in the Final Order and considered by the Department when determining the final penalty to be imposed. Specifically, Petitioner points to the fact that Respondent informed

the consumers prior to their purchases that the State of Florida was looking into viaticals and that the viaticals he was selling could become securities. This contention is supported by the testimony of the Colozzos and Murrays as set forth in the transcript of the final hearing.

As set forth above, in his Recommended Order, the ALJ did not elaborate on what evidence he considered when considering his list of aggravating and mitigating factors. Considering the plain and ordinary meaning of the phrase contained in the Recommended Order at ¶ 105 wherein the issue of the Respondent's insight into the nature of the transactions is at issue, it is evident that the ALJ only concluded that Respondent could be expected to have greater insight in to the nature of the transaction. The ALJ did not expressly consider what the Respondent knew or should have known based upon his registration as an associated person pursuant to Chapter 517, Florida Statutes and/or based upon the holdings of the Department of Banking and Finance (and its successors) characterizing viaticals as securities. Further, the ALJ did not expressly consider what the Respondent knew or should have known with respect to his statements made to the Colozzos and Mrs. Murray prior to the sales made to them that the State of Florida was looking into viaticals and that they might become securities.

While the Respondent may be presumed to know the law under which he operates as a licensed securities agent, the record in this case lacks sufficient evidence to adequately establish what duty the Respondent had to ascertain that the Department of Banking and Finance and its successors had held, prior to the sales made by the Respondent to the consumers in this case, that viaticals were unregistered securities, such that knowledge that viaticals were securities should be imputed to the Respondent. Rather, the record in this case contains evidence that the Respondent was relying on information from his employer's attorney as to the status of viaticals and, based on that reliance, believed that viaticals were a life insurance product.

Nevertheless, based on the exhibits submitted into evidence by the Petitioner as well as the testimony of the Colozzos and Mrs. Murray, it is clear that at some point prior to the sales made to the consumers, the Respondent became aware that the State of Florida was scrutinizing viaticals and that they could become securities. The record is equally clear that the Respondent disclosed that fact to the consumers prior to their purchases. Thus, under the totality of the circumstances, there is competent, substantial evidence in the record to support the Respondent's averment that he believed viaticals to be a life insurance product at the time the sales were made. Accordingly, the evidence is ultimately unpersuasive that Respondent knew that the products he was selling were securities.

However, the issue remaining for resolution is whether the Respondent *should have known* that the products he sold were securities and what duty he had to affirmatively find out whether what he was selling was a security. To that end, the ALJ's Recommended Order properly identifies the fact that, following the date of his registration as an associated person pursuant to Chapter 517, Florida Statutes, on November 14, 2002, Respondent could be expected to have greater insight into this issue. Whether the Respondent did or did not gain such insight is immaterial because it is deemed that he could be expected to have gained such insight and that fact, in and of itself, is sufficient to set forth an aggravating factor under Florida Administrative Code Rule 69B-231.160. Therefore, to the extent stated above, Petitioner's tenth exception is hereby ACCEPTED.

Accordingly, the language in Conclusion of Law 105 which states:

> "Concerning transactions that took place after November 14, 2002, Respondent could be expected to have greater insight into the nature of the transactions, given his registration as an associated person pursuant to Chapter 517, Florida Statutes."

is modified to read:

> "Concerning transactions that took place after November 14, 2002, Respondent should have possessed and failed to acquire greater insight into the nature of the

transactions, given his registration as an associated person pursuant to Chapter 517, Florida Statutes."

The above-substituted language in Conclusion of Law 105 is as or more reasonable than the rejected language.

In exception eleven, Petitioner excepts to the ALJ's failure to address significant additional aggravating factors, including that Respondent engaged in the unlicensed sale of securities which is a prohibited practice pursuant to section 517.12, Florida Statutes (2002). The exhibits admitted into evidence regarding the Respondent's sale of viaticals to the Murrays prove the fact that that Respondent was not licensed to sell securities at the time of their sale. Additionally, Petitioner asserts that Respondent's portrayal of viaticals as a safe or conservative investment should be considered an aggravating factor.

The testimony of the Murrays and Colozzos establishes that the Respondent improperly characterized the purchase of viaticals as safe prior to the sales to those consumers. Specifically, at the final hearing in this cause held on February 20, 2008, Ms. Colozzo testified that prior to the purchase of viaticals from the Respondent, he emphasized the fact that they were from major companies and were safe because they were life insurance policies. [TR p. 83]. Further, Mrs. Murray testified that the only thing she wanted to know about the purchase of viaticals prior to actually purchasing them was whether they were safe because she did not want to have to go back to work. She further testified that she got the indication that the viaticals were safe because of the confidence that she gained in listening to the Respondent speak about them and because he did not mention at any point that there was a high risk to purchasing them. [TR. p. 197].

It is well settled in Florida that investment in viaticals is extremely unpredictable and risky. *Kozyak v. Levy*, 273 B.R. 706, 709, ft. nt. 1 (S.D. Fla. 2001)("The amount an investor pays for a viatical settlement is based on medical predictions of how long the Viator will survive, the premiums that must be paid, the length of time the investment will be non-producing and several

similar variable factors. Accordingly, the return in a viatical investment is extremely unpredictable and risky.") Based on the foregoing, there is competent and substantial evidence to support the contention that the Respondent was engaging in the unlicensed sale of securities at the time sales were made to the Murrays. Further, based upon the testimony of witnesses set forth above, there is competent and substantial evidence to support the contention that Respondent improperly portrayed the purchase of viaticals as a safe investment to the Colozzos and Murrays prior to their purchase. These are factors that are properly considered by the Department as aggravating factors pursuant to Florida Administrative Code Rule 69B-231.160(1)(m). Accordingly, Petitioner's eleventh exception is hereby ACCEPTED.

Accordingly, the following language is added to Conclusion of Law 105:

> "The Respondent was not licensed to sell securities. Additionally, the Respondent misrepresented to the Colozzos and the Murrays that the purchase of viaticals was a safe investment."

The added language to Conclusion of Law 105 is as or more reasonable than its omission.

7. Petitioner's Twelfth, Thirteenth and Fourteenth Exceptions:

Petitioner's twelfth exception excepts to the ALJ's Recommendation that a final order be entered finding the Respondent also in violation of subsection 626.611(6), Florida Statutes, for the reason that reference to section 626.611(6), Florida Statutes is a scrivener's error. The section referred to by the ALJ should have been section 626.611(16), Florida Statutes. A thorough review of the record, including the Recommended Order wherein the ALJ repeatedly references section 626.611(16), Florida Statutes as the statute under which the Department traveled in this case and under which he found the Respondent in violation, supports Petitioner's contention that reference to section 626.611(6) in the Recommendation section of the Recommended Order is a scrivener's error. Thus, Petitioner's twelfth exception is ACCEPTED. The correct statute is

hereby noted as section 626.611(16), Florida Statutes. The substitution of section 626.611(16) for section 626.611(6), as a proper cite is as or more reasonable that the rejected statutory cite.

Petitioner's thirteenth exception excepts to the ALJ's Recommendation that a final order be entered finding the Respondent to have also violated subsection 626.621(2), Florida Statutes for the reason that reference to this section should be stricken. As discussed more fully above with respect to Petitioner's ninth exception, the ALJ incorrectly determined that a 626.611(16), Florida Statutes, was a secondary violation to 626.621(2), Florida Statutes. For the reasons set forth above in connection with Petitioner's ninth exception, to the extent that the reference to section 626.621(2) infers that section 626.611(16) is a secondary violation to that statutory section, that inference is rejected. Accordingly, and only to the extent described above, Petitioner's thirteenth exception is hereby ACCEPTED. The rejection of any such inference is deemed as or more reasonable that the imputing of any such inference.

Petitioner's fourteenth exception excepts to the ALJ's Recommendation that a final order be entered suspending the Respondent's insurance license for a period of six months. Petitioner asserts that the recommended penalty should be stricken and substituted with the penalty of revocation. An agency is justified in substituting its judgment concerning an appropriate penalty over that of a hearing officer where it has properly rejected, substituted or amended one or more of the hearing officer's findings of fact or conclusions of law. *Bajarangi v. Department of Business and Professional Regulation, Div. of Alcoholic Beverages and Tobacco*, 561 So.2d 410 (1990).

Florida Administrative Code Rule 69B-231.040 states that the Department is authorized to find that multiple grounds exist under section 626.611 and 626.621, Florida Statutes for disciplinary action against the licensee, based upon a single count in an administrative complaint which is, in turn, based upon a single act of misconduct by a licensee. Further, the Rule provides

that only the violation specifying the *highest stated penalty* will be considered for that count. The highest stated penalty thus established for each count is referred to as the "penalty per count."

As set forth above, Florida Administrative Code Rule 69B-231.160 provides that the Department shall consider certain aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee. After consideration and application of these factors, the Department has the express authority to either decrease or increase the penalty to any penalty authorized by law. Section 120.57(1)(l), Florida Statutes, provides in part, that the agency may accept the recommended penalty in a recommended order but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record and justifying the action. *See Cartaya v. Department of Business and Professional Regulation*, 919 So.2d 611 (Fla. 3d DCA 2006), *Lazarus v. Dep't of Prof. Regulation, Bd. Of Med. Exam'rs*, 461 So.2d 1022, 1023 (Fla. 3rd DCA 1985).

Florida Administrative Code Rule 69B-231.080 establishes penalties for violation of section 626.611, Florida Statutes. If it is found that a licensee has violated section 626.611(16), the Rule provides for a twelve month suspension. Based on the foregoing, the highest penalty per count to be considered in disciplinary action against the licensee in the instant case is twelve months. Therefore, the appropriate total penalty (prior to the application of aggravating or mitigating circumstances) in the instant case is 36 months. Florida Administrative Code Rule 231.040(3)(d) provides that in the event that a final penalty exceeds a suspension of twenty-four months, the final penalty shall be revocation. Therefore, with respect to the instant case, the total penalty before consideration of any and all aggravating and mitigating factors exceeds twenty-four months and therefore would mandate revocation in the absence of substantial mitigating

circumstances. (The Department's consideration of the aggravating and mitigating factors is discussed more fully above in response to Petitioner's fourteenth exception.)

Based upon the violations of law at issue and the attendant penalty guidelines relative to those violations set forth in the provisions of Florida Administrative Code Rules 69B-231.040(3)(d) and 69B-231.080(16), the ALJ properly determined that, before consideration of aggravating and mitigating factors, the appropriate penalty to be imposed is a 36 month suspension (that would result in a revocation). The ALJ then determined that mitigating factors present in the case warrant the reduction of 30 months of suspension. The Department, having considered all of the aggravating and mitigating factors considered by the ALJ as well as those additional aggravating factors set forth above, finds little support or rationale for reducing the total penalty of 36 months as provided by the Rule to a six month suspension as recommended by the ALJ. However, the Department will not disturb the ALJ's Recommendation for a six month suspension. Accordingly, Petitioner's fourteenth exception is hereby REJECTED.

RULINGS ON RESPONDENT'S EXCEPTIONS

1. Respondent's First Exception:

Respondent excepts to the ALJ's Finding of Fact No. 17 in which the ALJ found that, during 2002 and 2003, none of the MBC viatical settlement purchase agreements (contracts) or agreements in this case were registered as securities in accordance with Chapter 517, Florida Statutes. Respondent further excepts to the ALJ's corresponding Conclusions of Law Nos. 91-103 and 105 in this regard. In support of his exceptions, Respondent contends that there was no competent, substantial evidence that the Respondent sold securities (i.e., investment contracts). This is premised upon Respondent's contention that the products he sold were not investment contracts as that term is defined in section 517.021(20)(q), Florida Statutes. Respondent further contends, albeit indirectly, that there was no competent, substantial evidence that in 2002 and

2003, MBC viatical settlement contracts were required to be registered as securities pursuant to Chapter 517, Florida Statutes, such that the Respondent's sale of same did not constitute a violation of section 626.611(16), Florida Statutes.

Respondent further claims that Petitioner failed to meet is burden of proof by clear and convincing evidence in connection with the allegations contained in the Administrative Complaint as amended. Respondent claims that the state of the law in Florida in 2002 and 2003 was unclear as to the actual nature of the products sold by Respondent in terms of whether they were to be treated as an insurance product or as a security and that the ALJ failed to strictly construe statutory ambiguities as they pertained to Chapter 517, Florida Statutes 2002 and 2003, in favor of the Respondent when he rendered his factual findings and legal conclusions in his Recommended Order.

Additionally, Respondent asserts that expert testimony was required concerning whether the MBC products sold by Respondent constituted a security or investment contract and that there was no such testimony offered by Petitioner at the final hearing. Instead, Respondent points out that Petitioner's case in chief consisted solely of the live testimony of certain consumers and that, in addition to there being no expert testimony, no testimony was elicited from persons with first- hand knowledge of the MBC viatical sales program.

Finally, Respondent contends that in order to properly find that the products at issue in the instant case were securities at the time they were sold, the ALJ needed to consider the evidence in the case against certain elements of proof set forth in the "Howey" test. Having failed to do so, Respondent asserts that the ALJ lacked the evidentiary foundation from which to make the determination that the products Respondent sold were securities. Respondent further alleges that to the extent that the ALJ took judicial notice or official recognition of the analysis contained in other decisions that led to the conclusion that MBC viaticals were securities, the

ALJ committed reversible error and violated Respondent's due process rights. Accordingly, Respondent contends that the disputed Finding of Fact 17 and corresponding Conclusions of Law Nos. 91-103 and 105, and the resulting recommendation should be rejected by the Department and substituted with a finding that the Administrative Complaint, as amended, should have properly been dismissed.

Respondent's first exception is hereby REJECTED for the following reasons. As a preliminary matter, the Department rejects the contention that expert testimony was necessary in this cause in rendering a determination as to whether the products sold by Respondent were securities at the time of their sale. Respondent cites no authority, nor could he, that dictates that the Department was required to present expert testimony. Expert testimony is generally admitted to assist the court in deciding a case involving scientific or specialized knowledge, or to ascertain the truth in areas beyond common knowledge. *Sidran v. Dupont*, 925 So.2d 1040 (Fla 3d. DCA 2006). In the instant case, the meaning and import of the term "investment contract" neither involves scientific or specialized knowledge, nor involves an area beyond common knowledge of the trier of fact such that expert testimony was needed before the ALJ could determine the issue.

In addition, the Department rejects Respondent's contention that the state of the law in Florida in 2002 and 2003 when the sale occurred was unclear and/or ambiguous. The ALJ's Conclusions of Law 98 through 103 appropriately and adequately detail the state of the law in Florida as it related to investment contracts and viatical settlement agreements. Specifically, the ALJ appropriately found that the more explicit references to "viatical settlement investment" and "viatical settlement contracts" found in Chapters 517 and 626, Florida Statutes (2005), does not lead to the conclusion that Section 626.611(16), Florida Statutes (2002 and 2003), was unenforceable in relation to viatical settlement agreements, including the transactions in the present case, when considering the plain meaning of statutory language found in the preexisting

statute that has application to this case. The ALJ's reasoning and analysis of the state of the law in Florida at all material and relevant times is sound and will not be disturbed by the Department.

Finally, to the extent that Respondent is requesting the Department to overturn the ALJ's Findings of Fact that a violation of section 626.611(16), Florida Statutes has occurred, the Department is without authority to do so. The exhibits admitted into evidence and transcript of proceedings, together with the abundance of case law on the subject of what constitutes an investment contract, discussed more fully below, reveals that there was credible, competent and substantial evidence which provided a sufficient basis for the ALJ's Findings of Fact and Conclusions of Law that Respondent sold unregistered securities required for registration pursuant to Chapter 517, Florida Statutes (2002 and 2003), in relation to the viatical settlement agreements sold to the consumers/investors in this case.

Case law makes clear that a statement that a statutory violation has occurred is a factual finding. *J.J. Taylor Cos., Inc. v. Dep't of Bus. & Professional Regulation, Div. of Alcoholic Beverages & Tobacco*, 724 So.2d 192, 193 n.2 (Fla. 1st DCA 1999). However, in the context of an agency's rendition of a final order, the legitimacy of such a finding often depends on a proper interpretation of the statute at issue. As set forth above, section 120.57(1)(l), Florida Statutes permits agencies to reject or modify conclusions of law under certain circumstances, but it further provides that "[r]ejections or modification of conclusions of law may not form the basis for rejection or modification of findings of fact." Accordingly, if there is competent, substantial evidence in the record to support an ALJ's finding of fact, neither an administrative agency nor a reviewing court may reject an ALJ's findings of fact. *Bejarano v. State, Dept. of Educ., Div. of Vocational Rehabilitation*, 901 So.2d 891 (2005), rehearing denied. The specific evidence within the record which supports the ALJ's findings of fact that the Respondent violated section 626.611(16), Florida Statutes is discussed in further detail below.

With respect to whether the MBC viatical settlement agreements sold by Respondent were investment contracts, it is well settled law that MBC viatical settlement contracts qualify as investment contracts pursuant to The Securities Act of 1933 and The Securities and Exchange Act of 1934 (collectively referred to as the "Securities Acts"), both of which define the term "security" as including the catch-all term "investment contracts".[2] The phrase "investment contract" is not defined in either the Securities Acts or section 517.021, Florida Statutes. Although the term "investment contract" is not defined in either the Securities Acts or Chapter 517, Florida Statutes, the United States Supreme Court, by definition, has established a three pronged flexible test which must be met in order to prove the existence of an investment contract. *Securities & Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293, 299, 66 S.Ct. 1100, 1102, 90 L.Ed. 1244, 1249 (1946). First, there must be an investment of money; second, the investment must be in a common enterprise; and third, there must be an expectation of profits to be derived solely from the efforts of another. *Id.* In *Securities & Exchange Commission v. Mutual Benefits Corp.*, 408 F.3d 737 (11th Cir. 2005), a case cited by the ALJ in the instant matter, the Eleventh Circuit Court of Appeals considered the matter of whether MBC's viatical settlement contracts qualify as investment contracts. Applying the three prong test established in *Howey*, the Eleventh Circuit found that MBC "offered what amounts to a classic investment contract" 408 F.3d at 744. Specifically, the Court found that as to MBC's viatical settlement agreements, there was (1) an investment of money, (2) in a common enterprise, (3) involving an expectation of profits. 408 F.3d at 743-744. The only real dispute in that case involved whether the investor's expectation of profits was based solely on the efforts of the promoter or a third

[2] As properly noted by the ALJ in the instant case, subsection 517.021(20)(q), Florida Statutes (2002 and 2003), provides that the term "'Security' includes any of the following...an investment contract." Accordingly, section 517.021(q), Florida Statutes is identical to the Securities Act of 1933 and the Securities and Exchange Act of 1934 in its treatment of an investment contract as a security.

party in order to satisfy the second prong of the *Howey* test. *Mutual Benefits Corp.*, 408 F.3d at 744.

As does the Respondent in the instant case, MBC argued in *Securities & Exchange Commission v. Mutual Benefits Corp.*, the second prong in *Howey* was not met where there was no evidence that consumers were led to expect profits solely from the efforts of the promoter or a third party. The Eleventh Circuit undertook an analysis of the phrase "solely on the efforts of the promoter or a third party" and found that while it is more easily satisfied by post-purchase activities, there is no basis for excluding pre-purchase managerial activities from the analysis. 408 F.3d at 743. The Court further opined that pre-purchase managerial activities undertaken to insure the success of the investment may also satisfy the *Howey* test. *Id.* Further, the Court found that, while the "solely on the efforts of the promoter of third party" prong of the *Howey* test may not be met where an investment relies predominantly on market speculation, that was not the case under the specific facts of its case. *Id.* at 744.

Specifically, in *Mutual Benefits Corp.*, the Eleventh Circuit found that investors' expectations of profits relied heavily on both pre and post payment efforts of the promoters in making investments in viatical settlement contracts profitable. Specifically, the Court stated that the investors in that case: "selected the term of their investment, and submitted completed agreement forms and money. Thereafter, MBC selected the insurance policies in which the investors' money would be placed. MBC bid on the policies and negotiated purchase prices with the insureds. MBC determined how much money would be placed in escrow to cover payment of future premiums. MBC undertook to evaluate the life expectancy of the insureds-evaluations critical to the success of the venture. If MBC underestimated the insureds' life expectancy, the chances increased that the investors would realize less of a profit, or no profit at all.

Additionally, investors had no ability to assess the accuracy of representations being made to them by MBC or the accuracy of the life expectancy evaluations." *Id.*

Moreover, the Eleventh Circuit found that all investors in its case "relied on the pre and post purchase managerial efforts of MBC to make a profit on the investment in viatical settlement contracts." The investors relied on MBC to identify terminally ill insureds, negotiate purchase prices, pay premiums, and perform life expectancy evaluations critical to the success of the venture. The Court held that the flexible test it was instructed to apply by *Howey* and *Securities & Exchange Commission v. Edwards*, 540 U.S. 389, 124 S.Ct. 892, 157 L.Ed.2d 813 (2004), covers these activities, qualifying MBC's viatical settlement contracts as "investment contracts" under the Securities Acts of 1933 and 1934. *Mutual Benefits Corp.*, 408 F.3d at 745. The facts set forth in the record in the instant case are substantially similar to the facts set forth in *Mutual Benefits Corp.* such that the product sold by Respondent in this case, that being MBC viatical settlement agreements, satisfy the definition of an investment contract pursuant to the *Howey* test.

In the instant case, as set forth more fully above, the consumers unquestionably made an investment of money which satisfies the first prong of the *Howey* test. However, Respondent contends that the second and third prongs of *Howey* have not been met and are not substantiated by the record in this case because there was no common enterprise and the consumers were not led to expect profits solely from the efforts of a promoter or third party. Respondent cites *Le Chateau Royal Corporation v. Pantaleo*, 370 So.2d 1155, 1157 (Fla 4th DCA 1978), for the further proposition that, with respect to the third prong of *Howey*, in particular, the efforts made by those other than the investor must be significant ones in comparison to those made by the investor. Respondent's contentions are meritless.

Aside from the bald allegation that no facts exist from which can be found a common enterprise, Respondent fails to provide either a legal or factual basis in support of his assertion that there is no common enterprise. In *Farag v. National Databank Subscriptions*, 448 So.2d 1098, 1101 (Fla. 2nd DCA 1984), the Second District Court of Appeal, relying on *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974), pointed out that the mere fact that an investor's return is independent of that of other investors in the scheme is not decisive. The *Farag* Court further opined that "[A] common enterprise could be found even though there is no joint participation or dependency among investors, if the success of the enterprise is determined to be dependent on the promoter obtaining a number of investors, so that in truth they are not independent of each other. *Id.* at 1101, citing *Brown v. Rairigh*, 363 So.2d 590 (Fla. 4th DCA 1978).

With respect to MBC viatical settlement agreements, the Eleventh Circuit found in *Mutual Benefits Corp.*, that there was a common enterprise under *Howey.* Specifically, the Court stated that the investment scheme involved both horizontal commonality, as investor money was typically pooled to invest in a viatical settlement and investors shared both the promise of profits and the risk of loss and vertical commonality, in that any profits were tied to the efforts of the promoters. *Mutual Benefits Corp.*, 408 F.3d at 743, citing *Securities & Exchange Commission v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996) and *Sec. & Exch. Comm'n v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1199 (11th Cir. 1999). The facts of the instant case are substantially similar to *Mutual Benefits Corp.* such that there is in fact evidence of a common enterprise where there is horizontal and vertical commonality, as those terms are defined in *Mutual Benefits Corp.*

In the instant case, there is competent, substantial evidence in the record evidencing horizontal commonality, in that like the *Mutual Benefits Corp.* case, investor money was pooled

to invest in MBC viatical settlements and investors shared both the promise of profits and the risk of loss. Additionally, there is vertical commonality in that any profits were tied to the efforts of the promoters or a third party. Specifically, Petitioner's Exhibits 5, 16, 17,18, 19, 32 and 33, admitted into evidence, consist of MBC Viatical Settlement Purchase Agreements together with attachments ("Purchase Agreements") entered into between MBC and the consumers named in the Administrative Complaint that is the subject of these proceedings. The Purchase Agreements speak for themselves detailing the respective rights and obligations of the parties thereto. The Purchase Agreements are identical in all respects except for the names of the purchasers, the amount of their investment and the dates they were entered into between the parties.[3]

The Purchase Agreements inescapably evidence the fact that investor money was pooled to invest in MBC viatical settlements and investors shared both the promise of profits and the risk of loss inasmuch as they specifically provide as follows:

1. The Agreement covers the purchase of an interest in the death benefit of a life insurance policy or policies insuring the life of persons who are either terminally ill or have an estimated life expectancy of 72 months or less;
2. Purchaser has reviewed and approves and adopts the criteria utilized by Mutual benefits Corp. to purchase said benefits;
3. Purchaser agrees to deposit the sum of $_____ with American Express Tax and Business Services, Inc., the Escrow Agent, for the purpose of acquiring the death benefit of a life insurance policy(ies) which will be allocated as set forth herein;[4]
4. The only benefit the Purchaser will receive pursuant to this Agreement will be payment of the agreed portion of the death benefit upon the maturity of the life insurance policy(ies);
5. Policies are priced at a discount of the death benefit which depends on the projected life expectancy of each insured. Mutual Benefits Corp. makes no representation or warranty as to the specific date a policy will mature...;
6. Mutual Benefits Corp shall assist Purchaser in the purchase of the death benefit of life insurance policies of individuals which comply with the following criteria:

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[3] The Purchase Agreements differ in one other respect which is that Exhibits 32 and 33 identify a different escrow agent than the other Purchase Agreements marked as Exhibits 5, 16, 17,18, 19, it appearing that MBC changed the entity it used as its escrow agent.

[4] Id.

c) All life expectancies of insureds will be determined by either an independent reviewing physician or a medical review company taking into account the insured's age, current medical history, and, where applicable insurance industry actuarial guideline;

d) Prior to closing, Purchaser will receive from Mutual Benefits Corp. information regarding specific policy(ies) that may be purchased in accordance with the terms of this Agreement to assist the Purchaser in evaluating whether the policy satisfies his/her requirements;

e) Due to confidentiality and privacy laws, the names of the insureds cannot be disclosed to the Purchasers. Insureds will be given a code number which will be recorded and maintained in Mutual Benefits Corp. and the servicing company's databases…;

After closing, Purchaser will receive from Mutual Benefits Corp a coded copy of the original insurance policy, if applicable, along with a copy of the transfer of ownership documents, if applicable, a copy of the change of beneficiary document(s) acknowledged by the insurance company and a copy of the estimated life expectancy report…;

7. Purchaser authorizes Mutual Benefits Corp. to enter into any agreements or contracts which may be necessary for the purchase of death benefits on behalf of the Purchaser which fall within the agrees underwriting criteria set forth in this Agreement and related documents provided by Mutual Benefits Corp. which more fully describe this criteria;

8. Future premiums, for a minimum of the life expectancy of the insured, or longer at Mutual Benefits Corp.'s discretion, shall be escrowed at the time of closing. For each policy, the Escrow Agent shall transfer these premiums directly to a trustee. The accrued interest on the trustee's account, unused premiums and other funds or property held by the trustee are not property o the Purchaser and the Purchaser has no right to any funds or property held by the trustee. Mutual Benefits Corp. has agreed that the accrued interest and any unused premium may be retained as a reserve for payment of premiums on those policies where the insured outlives his/her projected life expectancy. Such reserves shall be used as needed to timely pay premiums.

9. If more than one death benefit is to be purchased, Mutual Benefits Corp. reserves the right to reallocate and vary the exact purchase price per policy by twenty percent (20%). This will affect the fixed return on the policy…;

10. Mutual Benefits Corp. pays the following costs associatied with closing of the policy:
    a) Reviewing physician's or company's fee;
    b) Attorneys' fees or other legal costs of closing;
    c) Trustee(s) fee;
    d) Viatical Services, Inc. fee;
    e) Premium payments for a minimum of the projected life expectancy of the insured;
    f) IRA establishment and annual administration fee for the first year only;

11. The purchase of the death benefit of one or more life insurance policies should not be considered a liquid purchase. While every attempt is made

> to determine the insureds life expectancy at the time of purchase, it is impossible to predict the exact time of the insureds demise. As a result, the Purchaser's funds will not be available until after the death of the insured. It is entirely possible that the insured could outlive his/her life expectancy which would delay payment of the death benefits under the Viatical Settlement Purchase Agreement.

Thus, the express language of the Purchase Agreements set forth above, evidences that there is vertical commonality in that any profits were tied to the efforts of the promoters or a third party.

This fact is evident because, after supplying the funds for the investment, the Purchaser's obligation ended but for the potential in the future for the payment of additional premium in the event an insured outlived his/her estimated life expectancy. In all other respects, MBC was responsible for directing the pooling of investor funds for the purpose of purchasing life insurance policies, for identifying policies to buy and negotiating the terms thereof, obtaining projected life expectancy evaluations from reviewing physicians, and paying or directing the payment of, among other things, closing fees associated with the sale of the life insurance policies and payment of premiums for the viator's life expectancy.

With respect to the third prong of the *Howey* test, Defendant submits that the third element has been interpreted to require that the efforts made by those other than the investor must be the significant ones in comparison to those made by the investor. *Le Chateau Royal Corp. v. Pantaleo*, 370 So.2d 1155, 1157. Respondent relies on the fact that any return on investment with respect to the viatical contracts sold in this case was based solely on the estimated life expectancy of the insured and not on any efforts of the Respondent or MBC. However, a thorough review of the record in this cause is replete with competent, substantial evidence to substantiate that investors were offered and sold an investment in a common enterprise in which they were led to expect profits solely from the efforts of MBC and its affiliates. [TR p. 32-200]. As stated by the Second District in *Farag*, a precise characterization of

this element of the *Howey* test cannot be accomplished without a thorough examination of the representations made by the defendants and the economic inducements held out to the prospective purchasers. 448 So.2d 1098, 1101, citing *Aldrich v. McCullough Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980).

In support of its contention that ample evidence exists to satisfy the third prong of *Howey* The Department adopts, relies and incorporates by reference herein the express language of the Purchase Agreements set forth above. Moreover, the testimony of the witnesses, including Respondent, supports the assertion that the investors were led to expect a return on their investment based upon the information developed by MBC with respect to sales of its Viatical Settlement Agreements which were marketed by Respondent through his then employer, First Liberty. [TR p. 32-200].

Specifically, Respondent testified that when the consumers at issue in the instant case came to speak with him, they were dissatisfied with the rates of return offered by cds and/or annuities he had available to offer. Based upon the needs and/or desires for a higher rate of return, Respondent crafted a plan whereby the consumer would either purchase an annuity and viaticals or viaticals exclusively in order to meet the expectations of the investors as to their expected rate of return. In marketing this plan, Respondent showed the consumers charts produced by MBC and/or other statistics in his possession detailing significantly higher rates of return than were available through the cds or annuities Liberty offered and which evidenced the fact that MBC viaticals paid out these higher returns on a consistent basis. [TR p. 254-285]. Respondent's testimony to this effect was buttressed by the testimony of the affected consumers.

In sum, like the investors in *Mutual Benefits Corp.*, the investors in the instant case relied on the pre and post purchase managerial efforts of MBC to make a profit on the investment in their viatical settlement contracts. Moreover, like the *Mutual Benefit Corp.* investors, the

consumers/investors in the instant case relied on MBC to identify terminally ill insureds, negotiate purchase prices, pay premiums, and perform life expectancy evaluations critical to the success of the venture. Accordingly, the flexible test required to be applied by *Howey* covers MBC's activities, thus establishing MBC viatical settlement contracts as investment contracts. Accordingly, like the Court in *Mutual Benefits Corp.*, the Department finds that the MBC viatical settlement agreements Respondent sold to the consumers/investors in this cause are classic investment contracts, under the controlling case law.

Finally, to the extent that the Respondent alleges that the ALJ improperly relied upon his taking of judicial notice and/or official recognition of facts contained in various Federal and State civil and administrative cases to arrive at the conclusion that the products sold by Respondent was improper and violative of Respondent's due process rights, his exception is REJECTED. Respondent has failed to establish that the ALJ's findings were in any manner related to facts contained in case law of which he took judicial notice or officially recognized. The foregoing citations to the exhibits admitted into evidence and the testimony of witnesses in this cause, which were available to the ALJ when rendering his Recommended Order, are in and of themselves a sufficient basis for finding that the products sold by Respondent in this case were securities at the time of their sale.

2. Respondent's second exception:

In his second exception, Respondent excepts to the ALJ's Recommendation. In support of his exception, Respondent cites to the arguments set forth in his first exception. The Department expressly adopts and incorporates herein by reference its citations to the record and to authority as well as its arguments in response to Respondent's first exception. Accordingly,

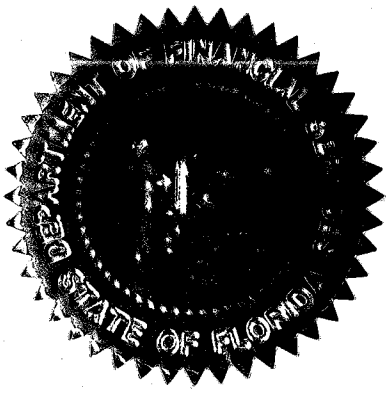
Respondent's second exception is hereby REJECTED for the reasons set forth above in response to Respondent's first exception. [5]

NOW THEREFORE, after careful consideration of the transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders submitted by the parties, the Recommended Order entered by the Administrative Law Judge and the Exceptions filed by Petitioner and Respondent, and being otherwise fully advised in the premises, it is ORDERED that:

1. The Findings of Fact of the Administrative Law Judge are adopted as the Department's Findings of Fact, and the Conclusions of Law reached by the Administrative Law Judge are adopted in part and rejected in part as the Department's Conclusions of Law as set forth in the acceptance and rejection of the Petitioner and Respondent's exceptions set forth above. The Preliminary Statement is modified as stated herein.

2. The Recommendation made by the Administrative Law Judge is ACCEPTED by the Department. Therefore, George Marshall Smith's license and appointment as a life including variable annuity agent, life agent and health agent, license no. D034447, and his eligibility for licensure, are hereby SUSPENDED for six months from the date this Order is executed.

DONE and ORDERED this 6th day of August, 2008.



Tammy Teston
Deputy Chief Financial Officer

[5] To the extent that Respondent's second exception excepts to the scrivenor's error, wherein the ALJ finds the Respondent in violation of subsection 626.611(6), the exception is ACCEPTED. In all other respects, for the reasons stated, the second exception is REJECTED.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

Honorable Charles C. Adams
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

H. Richard Bisbee, Esquire
H. Richard Bisbee, P.A.
1882 Capital Circle, Northeast, Suite 206
Tallahassee, FL 32308

Robert Alan Fox, Esquire
Department of Financial Services
Division of Legal Services
200 East Gaines Street
612 Larson Building
Tallahassee, FL 32399-0333