

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL )  
SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-3052PL  
 )  
ROBERT GORDON DEWALD, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held before Daniel M. Kilbride, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on September 29, 2009, in Sarasota, Florida.

APPEARANCES

For Petitioner: Philip M. Payne, Esquire  
Department of Financial Services  
624 Larson Building  
200 East Gaines Street  
Tallahassee, Florida 32399

For Respondent: Robert G. DeWald  
3730 Eagle Hammock Drive  
Sarasota, Florida 34240

STATEMENT OF ISSUE

Whether Respondent committed the acts alleged in Petitioner's ten-count Second Amended Administrative Complaint,

and, if so, what penalty, if any, should be imposed upon Robert Gordon DeWald's (Respondent) insurance agent licenses.

PRELIMINARY STATEMENT

In a ten-count Second Amended Administrative Complaint, filed June 8, 2009, the Department of Financial Regulation (Petitioner) charged Respondent with having violated certain provisions of the Florida Insurance Code, including that: Respondent directly or indirectly represented or aided an unauthorized insurer; Respondent knew or reasonably should have known that the annuity contracts with the unauthorized insurer violated Section 626.901, Florida Statutes (2008), and that Respondent is therefore liable for the losses; Respondent knowingly placed before the public a statement, assertion, or representation with respect to the business of insurance that was untrue, deceptive, or misleading; Respondent knowingly caused to be made, published, disseminated, circulated, delivered, or placed before the public any false material statement; Respondent demonstrated a lack of fitness and trustworthiness to engage in the business of insurance; Respondent engaged in unfair or deceptive practices or otherwise showed himself to be a source of injury or loss to the public; and Respondent otherwise acted in violation of Florida Insurance Code provisions as specifically detailed in Petitioner's Second Amended Administrative Complaint.

Pursuant to his completed Election of Proceedings form, Respondent requested a formal administrative hearing before the Division of Administrative Hearings (DOAH). This matter was referred to DOAH on June 9, 2009, and discovery ensued.

Petitioner deposed Respondent on September 3, 2009, consumer Louis Blevens on September 3, 2009, and consumers Audrey Piel and Edna Bishop on September 10, 2009.

Pursuant to the Notice(s) of Taking Deposition and on the record at Respondent's deposition, which was taken prior to any of the consumers' depositions, Respondent was informed that the consumers' depositions would likely be entered as Petitioner's exhibits at hearing, in lieu of the consumers' live testimony, because of the consumers' age, infirmity, and travel limitations. Respondent declined to be present at any of the depositions of the consumers.

An Order Granting Continuance and Re-Scheduling Hearing was issued on July 8, 2009, and a Notice of Transfer was issued on September 23, 2009, transferring this matter to the undersigned Administrative Law Judge.

At the hearing, Petitioner called two witnesses, Rock Roque and Ronald Lovejoy, to testify. Due to age, infirmity, and travel restrictions, Respondent introduced into evidence the testimony of Louis Blevins, Audrey Piel, and Edna Bishop by way of deposition transcripts without objection.

Petitioner, at hearing and without objection by Respondent, filed the following exhibits, which were admitted into evidence.

Exhibit 1: Respondent's DFS Agent License Printouts and License Application.

Composite Exhibit 2:

A. Tennessee Secretary of State filing for National Foundation of America (NFOA).

B. NFOA corporate resolution dated April 18, 2006.

Exhibit 3: State of Washington Office of Insurance Commissioner Cease and Desist Order against NFOA, Richard Olive, and Susan Olive, dated September 18, 2006.

Composite Exhibit 4:

A. Office of Insurance Regulation IFO against NFOA, Richard Olive, and Susan Olive.

B. 1st DCA dismissal of NFOA appeal dated July 24, 2007.

Composite Exhibit 5:

A. Florida Office of Insurance Regulation certification that NFOA has no Certificate of Authority (COA).

B. Secretary of State Certification that NFOA was not registered with the Division of Corporations.

Composite Exhibit 6:

A. Internal Revenue Service (IRS) letter, dated May 17, 2007, to Texas Department of Insurance that NFOA is not classified as exempt under 501(c)(3) of the Internal Revenue Code (IRC).

B. IRS letter, dated February 6, 2008, to Tennessee Receiver/Paul Eggers that NFOA does not qualify as exempt under 501(c)(3) of the IRC.

Exhibit 7: Verified Petition for Appointment of Receiver for NFOA, from the Tennessee Department

of Commerce and Insurance (DCI), dated May 23, 2007, with exhibits.

Exhibit 8: Verified Petition to Convert Rehabilitation to Liquidation for NFOA, from the DCI, dated August 2, 2007.

Exhibit 9: Final order of Liquidation for NFOA from DCI, dated September 11, 2007.

Composite Exhibit 10:

A. As to Florida consumer Yvette Potvin - NFOA contract and related documents.

B. The Tennessee Receiver's first distribution refund of money to Ms. Potvin.

C. The Tennessee Receiver's second distribution refund of money to Ms. Potvin.

D. Ms. Potvin's surrender charges.

E. Respondent's commission check.

Composite Exhibit 11:

A. As to Florida consumer Edna Bishop - NFOA contract and related documents.

B. Respondent's commission check.

Composite Exhibit 12:

A. As to Florida consumer Genevieve McCann - NFOA contract and related documents.

B. The Tennessee Receiver's first distribution refund of money to Ms. McCann.

C. The Tennessee Receiver's second distribution refund of money to Ms. McCann.

D. Ms. McCann's surrender charges.

E. Respondent's commission check.

Composite Exhibit 13:

A. As to Florida consumer Lenora Bricker - NFOA contract and related documents.

B. Respondent's commission check.

Composite Exhibit 14:

A. As to Florida consumer Louise Blevins - NFOA contract and related documents.

B. Respondent's commission check.

Composite Exhibit 15:

A. As to Florida consumer Audrey Piel - NFOA contract and related documents.

B. The Tennessee Receiver's first distribution refund of money to Ms. Piel.

C. The Tennessee Receiver's second distribution refund of money to Ms. Piel.

D. Ms. Piel's surrender charges.

E. Respondent's commission check.

Composite Exhibit 16:

A. As to Florida consumer John Bartlett - NFOA contract and related documents.

B. Respondent's commission check.

Composite Exhibit 17:

A. As to Florida consumer Lilla Dama - NFOA contract and related documents.

B. Respondent's commission check.

Composite Exhibit 18:

A. As to Florida consumer Agnes Burns - NFOA contract and related documents.

B. The Tennessee Receiver's first distribution refund of money to Ms. Burns.

C. The Tennessee Receiver's second distribution refund of money to Ms. Burns.

D. Ms. Burns's surrender charges.

E. Respondent's commission check.

Composite Exhibit 19:

A. As to Florida consumer Elizabeth Buchanan - NFOA contract and related documents. The Tennessee Receiver's first distribution refund of money to Ms. Buchanan. The Tennessee Receiver's second distribution refund of money to Ms. Buchanan. Ms. Buchanan's surrender charges. Respondent's commission check.

B. As to Florida consumer Nancy Golus - NFOA contract and related documents. The Tennessee Receiver's first distribution refund of money to Ms. Golus. The Tennessee Receiver's second distribution refund of money to Ms. Golus. Ms. Golus's surrender charges. Respondent's commission check.

C. As to Florida consumer Herbert Owens - NFOA contract and related documents. The Tennessee Receiver's first distribution refund of money to Mr. Owens. The Tennessee Receiver's second distribution refund of money to Mr. Owens. Mr. Owens' surrender charges. Respondent's commission check.

Exhibit 20: Respondent's April 17, 2007, and March 20, 2007, response to Petitioner regarding Florida consumers: Ms. Potvin, Ms. Bishop, Ms. McCann, Ms. Bricker, Ms. Blevins, Ms. Piel, Mr. Bartlett, and Ms. Dama.

Exhibit 21: DCI letter dated July 6, 2007, demanding disgorgement of Respondent's commissions (\$171,328.18).

Composite Exhibit 22:

A. Agent Licensee Profile Information printouts for Rock Roque, Licensee ID# A225557.

B. Agent Licensee Profile Information printouts for Ronald Lovejoy, Licensee ID# A159095.

Exhibit 23: Deposition of Respondent taken by Petitioner with exhibits.

Composite Exhibit 24:

A. Deposition of Louise Blevins.

B. Deposition of Edna Bishop.

C. Deposition of Audrey Piel.

Composite Exhibit 25:

A. DOI Intercom agent newsletter July -  
October 1996.

B. DOI Intercom agent newsletter September -  
December 1997.

C. DOI Intercom agent newsletter January -  
April 1998.

D. DOI Intercom agent newsletter May -  
July 1998.

E. DOI Intercom agent newsletter January -  
March 1999.

F. DOI Intercom agent newsletter February -  
October 2000.

G. DFS Intercom agent newsletter August 2002 -  
May 2003.

Respondent testified in his own behalf and filed the  
following exhibits:

Exhibit 1: Respondent's pre-hearing statement.

Exhibit 2: City of Hope's web site document  
titled "Charitable Gift Annuity", page 1.

Exhibit 3: American Council of Gift Annuities  
web site document titled "Welcome to the Donor's  
Corner", pages 1-3.

Exhibit 4: American Council of Gift Annuities  
web site document titled "Donor's Corner -  
Community Foundation", page 1.

Petitioner raised objections as to the relevancy, lack of  
foundation, and lack of completeness of Respondent's Exhibits



1-4. The Administrative Law Judge admitted Respondent's Exhibits 1-3 as hearsay, subject to corroboration, but denied Respondent's Exhibit 4. However, none of Respondent's exhibits were corroborated by non-hearsay evidence and have not been relied upon to support a finding of fact.

A Transcript of the final hearing was prepared and filed on October 29, 2009. The parties were given 20 days from the receipt of the hearing transcript in order to file their respective proposed recommended orders. Petitioner timely filed its Proposed Recommended Order. Respondent has not filed his proposal as of the date of the Recommended Order.

#### FINDINGS OF FACT

1. Respondent is currently licensed in Florida as a resident Life Including Variable Annuity (2-14), Life Including Variable Annuity & Health (2-15), Life (2016), and Life & Health (2-18) insurance agent.

2. At all times pertinent to the dates and occurrences referred to herein, Respondent was licensed in this state as an insurance agent and has been a licensed insurance agent in Florida for over 21 years. Prior to being licensed in Florida, Respondent was a licensed insurance agent in the state of New York.

3. Petitioner has jurisdiction over Respondent's insurance agent licenses and appointments, pursuant to Chapter 626, Florida Statutes (2008).<sup>1</sup>

National Foundation of America

4. The National Foundation of America (NFOA) is a registered Tennessee corporation that was formed on January 27, 2006, and headquartered in Franklin, Tennessee. NFOA Corporate Resolution, dated April 19, 2006, provides for the corporate authority to "liquidate stocks, bonds, and annuities . . . in connection with charitable contributions or transactions. . . ." This same resolution also provides for the corporate ability to "enter into and execute planned giving or charitable contribution transactions with donors, including executing any and all documentation related to the acceptance or acquisition of a donation, . . . given in exchange for a charitable gift annuity. . . ."

5. On September 18, 2006, the State of Washington Office of Insurance Commissioner issued an Order to Cease and Desist: In the Matter of: National Foundation of America, Richard K. Olive, and Susan L. Olive, Order No. D06-245. The Order, among other things, was based on NFOA doing business in the state and not having been granted a certificate of authority as an insurer in the state of Washington and not having been granted tax exempt status under Section 501(c)(3) of the IRC.

6. On April 13, 2007, the Florida Office of Insurance Regulation (OIR) issued an Immediate Final Order (IFO) In the Matter of: National Foundation of America, Richard K. Olive, Susan L. Olive, Breanna McIntyre, and Robert G. DeWald, Case No. 89911-07, finding that the activities of NFOA, et al., constituted an immediate danger to the public health, safety or welfare of Florida consumers. OIR further found that, in concert, NFOA, et al., were "soliciting, misleading, coercing and enticing elderly Florida consumers to transfer and convey legitimate income tax deferred annuities for the benefit of themselves and their heirs to NFOA in exchange for charitable term-certain annuities"; and that NFOA, et al., had violated provisions of the Florida Insurance Code, including Sections 624.401 and 626.901, Florida Statutes.

7. NFOA has never held a license or Certificate of Authority to transact insurance or annuity contracts in Florida, nor has NFOA ever been registered, pursuant to Section 627.481, Florida Statutes, for purposes of donor annuity agreements. NFOA was never a registered corporation with the Florida Department of State, Division of Corporations.

8. On May 11, 2007, NFOA appealed OIR's IFO to the First District Court of Appeal of Florida (1st DCA). The 1st DCA dismissed NFOA's appeal on July 24, 2007. Therefore, NFOA operated as an unauthorized insurer in Florida.

9. On May 17, 2007, the IRS sent a letter to the Texas Department of Insurance stating that NFOA was not classified as an organization exempt from Federal Income Tax as an organization described in Section 501(c)(3) of the IRC.

10. On May 23, 2007, the DCI filed a Verified Petition for Appointment of Receiver for Purposes of Liquidation of National Foundation of America; Immediate and Permanent Injunctive Relief; Request for Expedited Hearing, in the matter of Newman v. National Foundation of America, Richard K. Olive, Susan L. Olive, Breanna McIntyre, Kenny M. Marks, and Hunter Daniel, Chancery Court of the State of Tennessee (Chancery Court), Twentieth Judicial District, Davidson County, Case No. 07-1163-IV. The Verified Petition states, at paragraph 30:

NFOA's contracts reflect an express written term that is recognized by the IRS as a charitable non-profit organization under Section 501(c)(3) of the Internal Revenue Code (Prosser, attachment 4), and the NFOA represents in multiple statements and materials that the contract will entitle the customers to potential generous tax deductions related to that status. The IRS states that it has granted NFOA no such designation. The deceptive underpinning related to NFOA's supposed tax favored treatment of its contracts permeates its entire business model and sales pitch. This misrepresentation has materially and irreparably harmed and has the potential to harm financially all its customers and the intended beneficiaries of the contracts. These harms are as varied in nature and

degree as the circumstances of all those individual's tax conditions, the assets turned into NFOA, and the extent to which they have entrusted their money and keyed their tax status and consequences to reliance on such an organization.

11. On August 2, 2007, the Commissioner for the Tennessee DCI, having determined that NFOA was insolvent with a financial deficiency of at least \$4,300,000, filed a Verified Petition to Convert Rehabilitation by Entry of Final Order of Liquidation, Finding of Insolvency, and Injunction, in the matter of Newman v. National Foundation of America, et al.

12. On September 11, 2007, pursuant to a Final Order of Liquidation and Injunction entered in the matter of Newman v. National Foundation of America et al., the Chancery Court placed NFOA into receivership after finding that the continued rehabilitation of NFOA would be hazardous, financially and otherwise, and would present increased risk of loss to the company's creditors, policy holders, and the general public.

13. On February 6, 2008, the IRS sent a letter to the court appointed Tennessee DCI Receiver (Receiver) for NFOA stating that NFOA does not qualify for exemption from Federal income tax as an organization described in Section 501(c)(3) of the IRC. The IRS, in determining that NFOA did not qualify for tax exempt status, stated that the sale of NFOA annuity plans has a "distinctive commercial hue", and concluded that NFOA was

primarily involved in the sale of annuity plans that "constitute a trade or business without a charitable program commensurate in scope with the business of selling these plans." The IRS letter also provides that consumers may not take deductions on their income tax returns for contributions made to NFOA.

#### Insurance Agent's Duties

14. An insurance agent has a fiduciary duty to his clients to ensure that an insurer is authorized or otherwise approved as an insurer in Florida by OIR prior to the insurance agent selling the insurer's product to his clients.

15. There are several methods by which an insurance agent could verify whether or not an insurer was authorized or otherwise approved (hereinafter: "authorized") as an insurer in Florida by OIR. It is insufficient for an insurance agent to depend on the assurances of his insurance business peers as to whether an insurer needs to be authorized in Florida.

16. Due to the importance of income tax considerations in a consumer's decision making process as to whether or not to purchase an insurance product, an insurance agent has a fiduciary duty to his clients to verify the validity of any representations that an insurer's product has an IRS 501(c)(3) tax exempt status, prior to the insurance agent selling the product to his clients.

17. There are several methods by which an insurance agent could verify whether or not an insurer has an IRS 501(c)(3) tax exempt status.

18. Respondent admitted, in his testimony, that he had depended on the assurances of others and assumed that NFOA did not need to be authorized as an insurer in Florida. Respondent testified it was his understanding that only insurance companies sell annuities; that NFOA was not an insurer; and therefore, NFOA did not need to be licensed as a Florida insurer. Respondent did not inquire of the Florida OIR whether or not NFOA was authorized to do business in the State of Florida.

19. However, Respondent admitted that the NOFA product he sold "mirrored" an annuity product.

20. Respondent testified that he had verified (by phone, in writing, and the Internet) with the IRS that NFOA had applied for 501(c)(3) tax exempt status. However, Respondent was aware that the tax exempt status had not been granted to NFOA.

21. Respondent knew income tax considerations were materially important to his clients. However, none of the NFOA materials or any Florida consumer contracts signed by Respondent and his clients contain any disclaimer language informing consumers that the 501(c)(3) tax exempt status had been applied for but had yet to be granted by the IRS.

22. Respondent testified that he made use of the Internet to obtain information. However, Respondent failed to use the Internet to find out that the State of Washington Office of Insurance Commissioner entered an Order of Cease and Desist on September 18, 2006, against NFOA based on NFOA not having a certificate of authority as an insurer and because NFOA did not have a 501(c)(3) tax exemption. As is noted below, the filing date of the Washington Order to Cease and Desist, preceded in time all but two of Respondent's NFOA sales to Florida consumers.

23. Respondent received commissions totaling \$171,328.18 for selling NFOA annuities to Florida consumers. Respondent failed to disgorge any of these commissions to the Receiver for NFOA in the state of Tennessee.

Re: Count I: Consumer - Yvette Potvin

24. On November 30, 2006, Respondent solicited and induced Yvette Potvin of Casselberry, Florida, then age 81, to transfer or otherwise surrender ownership of her existing annuity contract with Allianz Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA.



25. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

26. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. Potvin that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew that NFOA had not been approved for tax exempt status by the IRS.

27. Based upon Respondent's transaction of insurance, Ms. Potvin transferred to NFOA and is anticipated to lose approximately \$10,410.42. This amount includes a surrender penalty incurred for transferring her original Allianz annuity to NFOA, and after receiving partial refunds by the Receiver.

28. Based upon Respondent's transaction of insurance with Ms. Potvin, Respondent was paid a commission of \$3,682.89 by NFOA.

Re: Count II: Consumer - Edna Bishop

29. On January 18, 2007, Respondent solicited and induced Edna Bishop of Orlando, Florida, then aged 89, to transfer or otherwise surrender ownership of her existing annuity contract with American Equity Investment Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist

that was filed against NFOA. Ultimately, this transaction did not close.

30. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

31. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. Bishop that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.

32. Based upon Respondent's transaction of insurance with Ms. Bishop, Respondent was paid a commission of \$8,185.35 by NFOA, even though the transaction was not completed.

Re: Count III: Consumer - Genevieve McCann

33. On December 14, 2006, Respondent solicited and induced Genevieve McCann of Fern Park, Florida, then aged 85, to transfer or otherwise surrender ownership of her existing annuity contract with American Equity Investment Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA.

34. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

35. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. McCann that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.

36. Based upon Respondent's transaction of insurance, Ms. McCann is anticipated to lose approximately \$6,100.23. The loss consists of \$20,933.04, the amount transferred to NFOA, less \$1,742.85 (installment payments made by NFOA to Ms. McCann); \$12,473.62 (the first payment sent by Receiver); and \$2,686.63 (the second payment sent by Receiver). Ms. McCann lost \$2,070.29 through surrender charges incurred for transferring her original American Equity annuity to NFOA. If the surrender penalty is excluded from the calculation, Ms. McCann's loss is \$4,029.94.

37. Based upon Respondent's transaction of insurance with Ms. McCann, Respondent was paid a commission of \$1,879.52 by NFOA.

Re: Count IV: Consumer - Lenora Bricker

38. On or about November 30, 2006, Respondent solicited and induced Lenora Bricker of Winter Haven, Florida, then aged 87, to transfer or otherwise surrender ownership of her existing annuity contract with American Equity Investment Life Insurance Company in return for an NFOA annuity. The NFOA agreement that

the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA. Ultimately, this transaction did not close.

39. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

40. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. Bricker that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.

41. Based upon Respondent's transaction of insurance with Ms. Bricker, Respondent was paid a commission of \$1,085.17 by NFOA, even though the transaction was not completed.

Re: Count V: Consumer - Louise Blevins

42. On or about November 30, 2006, Respondent solicited and induced Louise Blevins of Longwood, Florida, then aged 81, to transfer or otherwise surrender ownership of her existing annuity contract with American Equity Investment Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA. Ultimately, this transaction did not close.

43. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

44. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. Blevins that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.

45. Based upon Respondent's transaction of insurance with Ms. Bricker, Respondent was paid a commission of \$5,469.09 by NFOA, even though the transaction did not close.

Re: Count VI: Consumer - Audrey Piel

46. On December 14, 2006, Respondent solicited and induced Audrey Piel of Maitland, Florida, then aged 81, to transfer or otherwise surrender ownership of her existing annuity contract with American Equity Investment Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA.

47. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

48. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. Piel that NFOA was a charitable non-profit organization under Section 501(c)(3) of

the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.

49. Based upon Respondent's transaction of insurance, Ms. Piel is anticipated to lose approximately \$5,594.24. The loss consists of \$21,089.17, the amount transferred to NFOA; less \$996.35 (installment payments made by NFOA to Ms. Piel); \$13.645.33 (the first payment sent by Receiver); and \$2,938.99, (the second payment sent by Receiver). Ms. Piel lost \$2,085.74 through surrender charges incurred for transferring her original American Equity annuity to NFOA. If the surrender penalty is excluded from the calculation, Ms. Piel's loss is \$3,508.50.

50. Based upon Respondent's transaction of insurance with Ms. Piel, Respondent was paid a commission of \$1,839.54 by NFOA.  
Re: Count VII: Consumer - John Bartlett

51. On February 13, 2007, Respondent solicited and induced John Bartlett of Orlando, Florida, then age 75, to transfer or otherwise surrender ownership of his existing annuity contract with American Equity Investment Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA. Ultimately, this transaction did not close.

52. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

53. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Mr. Bartlett that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.

54. Based upon Respondent's transaction of insurance with Mr. Bartlett, Respondent was paid a commission of approximately \$16,385.56 by NFOA, even though the transaction was not completed.

Re: Count VIII: Consumer - Lilla Dama

55. On January 18, Respondent solicited and induced Lilla Dama of Orlando, Florida, then aged 86, to transfer or otherwise surrender ownership of her existing annuity contract with American Equity Investment Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA. Ultimately, this transaction did not close.

56. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

57. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. Dama that NFOA was a

charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.

58. Based upon Respondent's transaction of insurance with Ms. Dama, Respondent was paid a commission of approximately \$2,757.52 by NFOA, even though the transaction was not completed.

Re: Count IX: Consumer - Agnes Burns

59. On February 28, 2007, and April 2, 2007, Respondent solicited and induced Agnes Burns of Orlando, Florida, then aged 87, to transfer or otherwise surrender ownership of her existing annuity contract with American Equity Investment Life Insurance Company and New York Life Insurance and Annuity Company, respectively, in return for an NFOA annuity. The NFOA agreement that the consumer entered into, and which was signed by Respondent, is dated subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA.

60. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

61. Respondent, by use of the NFOA installment plan agreement, knowingly misrepresented to Ms. Burns that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondent knew or should have known that NFOA was not a tax exempt corporation.



62. Based upon Respondent's transaction of insurance, Ms. Burns is anticipated to lose approximately \$77,509.17. The loss consists of \$335,070.29, the amount transferred to NFOA; less \$18,363.66 (installment payments sent by NFOA to Ms. Burns); \$205,859.31 (the first payment sent by Receiver); and \$44,338.93 (the second payment sent by Receiver). A surrender penalty of \$11,000.78 was incurred by Ms Burns for transferring her original annuities to NFOA. If the surrender penalty is excluded from the calculation, Ms. Burns' loss is \$66,508.39.

63. Based upon Respondent's transaction of insurance with Ms. Burns, Respondent was paid a commission of \$30,080.00 by NFOA.

Re: Count X: Consumers - Ms. Buchanan; Ms. Golus, and Mr. Owens

64. Respondent solicited and induced Elizabeth Buchanan, aged 42, of Bradenton, Florida; Nancy Golus, aged 59, of Palmetto, Florida; and Herbert Owens, aged 86, of St. Petersburg, Florida, to transfer or otherwise surrender ownership of their existing annuity contracts in return for an NFOA annuities. As to the the NFOA agreement that Mr. Owens entered into, and which was signed by Respondent, the date of the agreement is subsequent to the State of Washington Order to Cease and Desist that was filed against NFOA. The NFOA

agreements that Ms. Buchanan and Ms. Golus entered into were dated prior to the State of Washington's Order to Cease and Desist.

65. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida.

66. Based upon Respondent's transactions of insurance, Ms. Buchanan is anticipated to lose approximately \$89,031.12. The loss consists of \$162,445.60, the amount transferred to NFOA; less \$20,000.00 (installment payments sent by NFOA to Ms. Buchanan); \$92,589.64 (the first payment sent by Receiver); and \$19,942.38 (the second payment sent by Receiver). Ms. Buchanan suffered \$59,117.54 in losses from surrender charges incurred. Even after partial refunds by the DCI Receiver and the surrender penalty are excluded from the calculation, Ms. Buchanan's loss is still \$29,913.58.

67. Ms. Golus is anticipated to lose approximately \$146,027.18, the amount transferred to NFOA. Ms. Golus received \$94,917.67 (the first payment by Receiver) and \$20,443.81 (the second payment by Receiver). However, Ms. Golus suffered \$53,152.47 in surrender charges incurred. Even after partial refunds by the Receiver and the surrender penalty are excluded from the calculation, Ms. Golus' loss is \$30,665.67.

68. Mr. Owens is anticipated to lose approximately \$10,976.33. The loss consists of \$54,743.52, the amount

transferred to NFOA; less \$5,108.40 (installment payments sent by NFOA to Mr. Owens); \$32,262.83 (the first payment by Receiver); and, \$6,948.92 (the second payment sent by Receiver). Mr. Owens incurred \$552.96 in surrender charges. Even after partial refunds by the Receiver and the surrender penalty are excluded from the calculation, Mr. Owens' loss is still \$10,423.37.

69. In each and every count, Petitioner proved by clear and convincing evidence that:

- a. Respondent directly or indirectly represented or aided an unauthorized insurer to do business in Florida.
- b. Respondent knew or reasonably should have known that the annuity contracts he contracted with clients were with an unauthorized insurer.
- c. Respondent knowingly placed before the public a statement, assertion, or representation with respect to the business of insurance that was untrue, deceptive or misleading.
- d. Respondent knowingly caused to be made, published, disseminated, circulated, delivered, or placed before the public a false material statement.
- e. Respondent demonstrated a lack of fitness and trustworthiness to engage in the business of insurance.
- f. Respondent engaged in unfair and deceptive practices or showed himself to be a source of injury or loss to the public.

CONCLUSIONS OF LAW

70. Respondent has held insurance licenses in the state of Florida for over 20 years and has had no prior disciplinary action filed against those licenses.

71. DOAH has jurisdiction over the subject matter of, and the parties to, this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

72. Because Petitioner seeks suspension or revocation of Respondent's licenses, Petitioner has the burden of proving by clear and convincing evidence that Respondent committed the violations alleged in its Second Amended Administrative Complaint. Department of Banking and Finance v. Osborne Stern & Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

73. "Clear and convincing evidence is an intermediate standard of proof, more than the 'preponderance of the evidence' standard used in most civil cases, and less than the 'beyond a reasonable doubt' standard used in criminal cases." Smith v. Department of Health and Rehabilitative Services, 522 So. 2d 956, 958 (Fla. 1st DCA 1988). Clear and convincing evidence requires:

That the evidence must be found to be credible; the fact to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the fact in issue. The evidence must be of

such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Smith, 522 So. 2d at 958 (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

74. At all times material to the instant case, Subsection 626.901(1), Florida Statutes, has provided as follows:

Representing or aiding unauthorized insurer prohibited -

(1) No person shall, from offices or by personnel or facilities located in this state, or any other state or country, directly or indirectly act as agent for, or otherwise represent or aid on behalf of another, any insurer not then authorized to transact such insurance in this state in:

- (a) The solicitation, negotiation, procurement, or effectuation of insurance or annuity contracts, or renewals thereof;
- (b) The discrimination of information as to coverage or rates;
- (c) The forwarding of applications;
- (d) The delivery of policies or contracts;
- (e) The inspection of risks;
- (f) The fixing of rates;
- (g) The investigation or adjustment of claims or losses; or
- (h) The collection or forwarding of premiums;

or in any other manner represent to assist such an insurer in the transaction or insurance with respect to subjects of insurance resident, located, or to be performed in this state.

75. At all times material to the instant case, Subsection 626.901(2), Florida Statutes, has provided as follows:

Representing or aiding unauthorized insurer prohibited -

(2) If an unauthorized insurer fails to pay in full or in part any claim or loss within the provisions of any insurance contract which is entered into in violation of this section, any person who knew or reasonably should have known that such contract was entered into in violation of this section and who solicited, negotiated, took application for, or effectuated such insurance contract is liable to the insured for the full amount of the claim or loss not paid.

Aon Risk Services, Inc. v. Quintec, 887 So. 2d 368, 371 (Fla. 3rd DCA 2004), provides, "the only fair reading of the statute [Subsection 626.901(2), Florida Statutes] is that the broker/agent's liability is limited to coverage 'within the provisions of the insurance contract'." Pursuant to Subsection 626.901(2), Florida Statutes, Respondent's liability for consumers' losses should exclude any surrender penalties incurred in transferring the consumers' original annuities to NFOA. Nevertheless, pursuant to Subsection 626.621(6), Florida Statutes, Respondent is still responsible for the consumers' total losses, which include the amounts of the surrender penalties.

76. At all times material to the instant case, Subsection 626.9541(1)(b)4., Florida Statutes, has provided as follows:

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS. - The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

\* \* \*

(b) False information and advertising generally. - Knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public:

\* \* \*

4. In any other way, an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.

\* \* \*

(e) False statement and entries.

1. Knowingly:

\* \* \*

e. Causing, directly, or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement.

77. At all times material to the instant case, Subsection 626.611(7), Florida Statutes, has provided in pertinent part, as follows:

Grounds for compulsory refusal, suspension, or revocation of agent's, title agency's, adjuster's, customer representative's, service representative's, or managing general agent'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, adjuster, customer representative, service representative, or managing general agent, 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:

\* \* \*

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

78. At all times material to the instant case, Section 626.621, Florida Statutes, has provided as follows:

Grounds for discretionary refusal, suspension or revocation of agent's, title agency's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment.

The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, adjuster, customer representative, service representative, or managing general agent, 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 under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 616.611. . . .

\* \* \*



(2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.

\* \* \*

(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 IX of this chapter, or having otherwise shown himself or herself to be source of injury or loss to the public.

79. Florida Administration Code Rule 69B-231.110, states, in pertinent part:

Penalties for Violation of Other Specific Provisions of the Florida Insurance Code.

If the licensee is found to have violated any of the following provisions of the Insurance Code, the following stated penalty shall apply:

\* \* \*

(35) Section 626.901(1), F.S. - suspension 6 months.

\* \* \*

(36) Section 626.901(2), F.S. - suspension 12 months.

80. Florida Administrative Code Rule 69B-231.100, states in pertinent part:

Penalties for Violation of Section 626.9541(1).

If a licensee is found to have violated Section 626.621(6), F.S., by engaging in unfair methods of competition or in any unfair or deceptive acts or practices as defined in any of the following paragraphs of Section 626.9541(1), F.S., the following stated penalty shall apply:

(5) Section 626.9541(1)(e), F.S. - suspension 6 months; except that the penalty of a violation of Section 626.9541(1)(e)1., F.S., shall be a suspension of 12 months.

82. Florida Administrative Code Rule 69B-231.080, states in pertinent part:

Penalties for Violation of Section 626.611.

If it is found that the licensee has violated any of the following subsections of Section 626.611, F.S., for which compulsory suspension or revocation of license(s) and appointment(s) is required, the following stated penalty shall apply:

\* \* \*

(7) Section 626.611(7), F.S., - suspension 6 months.

83. Florida Administrative Code Rule 69B-231.090, states, in pertinent part:

Penalties for Violation of Section 626.621.

If it is found that the licensee has violated any of the following subsections of Section 626.621, F.S., for which compulsory suspension or revocation of license(s) and appointment(s) is required, the following stated penalty shall apply:

\* \* \*

(2) Section 626.621(2), F.S., - suspension  
3 months.

\* \* \*

(6) Section 626.621(6), F.S., - see Florida  
Administrative Code Rule 69B-231.100.

84. Petitioner has proven by clear and convincing evidence that Respondent violated Subsection 626.901(1), Florida Statutes, as charged in Counts I - X of the Second Amended Administrative Complaint. "The language of the statute [Subsection 626.901(1), Florida Statutes] clearly imposes an absolute bar against representing an unauthorized insurer." Beshore v. Department of Financial Services, 928 So. 2d 411, 412 (Fla. 1st DCA 2006).

85. In addition, Petitioner has proven by clear and convincing evidence that Respondent has violated Subsections 626.901(2), 626.9541(1)(b)4., 626.9541(1)(e)1.e., 626.611(7), 626.621(2), and 626.621(6), Florida Statutes, respectively.

86. Respondent had a fiduciary duty to his clients and to the insurer. See Natelson v. Department of Insurance, 454 So. 2d 31 (Fla. 1st DCA 1984). "Insurance agents enjoy the benefit of public trust and stand in a fiduciary relationship with their customers." Department of Financial Services v. Carl1 and Crain, Case Nos. 86221-06-AG and 86177-06-AG, Department's Final Order (2007) (DOAH January 31, 2007, paragraph 57), citing to Natelson, 454 So. 2d at 31, 32. "Insurance agents enjoy the

benefit of public trust and stand in a fiduciary relationship with their customers." Department of Financial Services v. Carll and Crain (DOAH January 31, 2007, paragraph 57) (citations omitted). "A person acting in a fiduciary capacity generally has a duty to make a full and fair disclosure of material facts to the person reposing confidence in the fiduciary." Department of Financial Services v. Carll and Crain (DOAH January 31, 2007, paragraph 57) (citations omitted).

87. As to each of his Florida clients, Respondent acted "naively, if not irresponsibly" and worse when he aided NFOA, both in NFOA's unauthorized insurer context and in the misrepresentation that NFOA was an IRS approved 501(c)(3) tax exempt entity. See Department of Financial Services v. Keiffer, Case No. 61528-03-AG, Department's Final Order (2004) (DOAH April 2, 2004, paragraph 102). Respondent demonstrated a lack of fitness or trustworthiness to engage in the continued business of insurance in Florida.

88. Respondent knew or reasonably should have known that NFOA was not an authorized insurer in Florida, for purposes of Subsection 626.901(2), Florida Statutes. Respondent is an experienced insurance agent of many years in both Florida and New York. Respondent's professed ignorance regarding how to verify NFOA's authority to conduct the business of insurance in Florida and dependence upon the biased hearsay assurances of

others lacks credibility. Respondent owed a duty to his clients to know that NFOA was an unauthorized insurer and to govern his insurance agent activities accordingly. See Natelson, id.

"Ascertaining the existence or nonexistence of a certificate of authority, constitutes 'due diligence' incumbent upon an agent before engaging in the sale of insurance from a prospective insurance company." Department of Financial Services v.

Keiffer, Case No. 61528-03-AG, Department's Final Order (2004) (DOAH April 2, 2004, paragraphs 89, 90). "A 'representee' [or insurance agent] is charged with knowledge of those facts he could have discovered through ordinary diligence." Department of Financial Services v. Carll and Crain, (DOAH January 31, 2007, paragraph 60) citing to Cf. Ramel v. Chasebrook Construction Company, Inc., 135 So. 2d 876, 881 (Fla. 2d DCA 1961).

89. Respondent knew that NFOA had not been granted tax exempt status by the IRS and nevertheless knowingly misrepresented the 501(c)(3) tax exempt status of NFOA to his clients, in violation of Subsections 616.9541(1)(b)4., and 626.9541(1)(e)1.e., Florida Statutes. Respondent owed a duty to his clients to disclose that NFOA did not have a 501(c)(3) tax exempt status, or to at least qualify his representations with a disclosure that NFOA's tax exempt status had been applied for

but that a determination by the IRS was pending. See Natelson, id.

90. The plain meaning of the word "knowingly" does not require knowledge of the unlawfulness of the act, only knowledge of the occurrence of the act. A person acts "with knowledge" when there is an "awareness, as of a fact or circumstance." See Mogavero v. State, 744 So. 2d 1048, 1050 (Fla. 4th DCA 1999). As to "knowing" or "knowingly," "the person committing the act need only have knowledge of the facts; knowledge of the law itself is not required nor is it an element of the offense." BT Professional Services, Inc. v. Dept. of Banking and Finance, Case No. 96-6136 (DOAH December 2, 1998), citing to United States v. International Minerals and Chemical Corporation, 402 U.S. 558, 91 S.Ct. 1697, 29 L. Ed. 2d 178 (1971). Cf. Owens v. Samkle Automotive, Inc., 425 F.3d 1318, 1321 (11th Cir. 2005).

91. "Making a statement that is false when one does not have sufficient information to know whether the statement is either true or false amounts to a knowing misrepresentation that rises to the level of fraudulent conduct. This is so because a person is assumed to know whether he has insufficient knowledge of the facts to assert the statement as true." Jack Eckert Corporation v. Smith, 558 So. 2d 1060 (Fla. 1st DCA 1990), citing to Joiner v. McCullers, 158 Fla. 562, 28 So. 2d 823 (1947). Cf. Parker v. State of Florida Bd. of Regents ex rel.

Florida State University, 724 So. 2d 163, 168 (Fla. 1st DCA 1998).

92. Pursuant to the discussion of highest penalty per count found in Florida Administrative Code Rule 69B-231.040(1)(a), and having concluded that Respondent violated Subsection 626.901(2), Florida Statutes, the stated penalty authorized by Florida Administrative Code Rule 69B-231.110(36), is a suspension of Respondent's licensure for 12 months for each separate violation of Subsection 626.901(2), Florida Statutes. Therefore, Respondent's total penalty calculates to a 120-month suspension, even without further consideration of aggravating factors, including the degree of financial injury to Respondent's clients, the elderly age of Respondent's clients, the financial commissions received by Respondent, and the existence of secondary violations in Counts I-X. In the event the final penalty exceeds a suspension of 24 months, the final penalty shall be revocation. Fla. Admin. Code R. 69B-231.040(3)(d).

93. Florida Administrative Code Rule 69B-231.160(1), states:

Aggravating/Mitigating Factors.

The Department shall consider the following aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee under this rule chapter. After

consideration, and application of these factors, the Department shall, if warranted by the Department's consideration of the factors, either decrease or increase the penalty to any penalty authorized by law.

(1) For penalties other than those assessed under Rule 69B-231.150 F.A.C.:

- (a) Willfulness of licensee's conduct;
- (b) Degree of actual injury to victim;
- (c) Degree of Potential injury to victim;
- (d) Age or capacity of victim;
- (e) Timely restitution;
- (f) Motivation of licensee;
- (g) Financial gain or loss to licensee;
- (h) Cooperation with the Department;
- (i) Vicarious or personal responsibility;
- (j) Related criminal charge, disposition;
- (k) Existence of secondary violations in counts;
- (l) Previous disciplinary order or prior warning by the Department; and
- (m) Other relevant factors.

94. Respondent's mitigation testimony was composed of a summary of his insurance career, his present financial and personal situation, and a request for leniency, based on the fact that he has no prior disciplinary action filed against his licenses in Florida or New York.

95. The aggravating factors of the degree of financial injury to Respondent's clients, the elderly age of Respondent's clients, the financial commissions received by Respondent, and the existence of secondary violations in Counts I-X, far outweigh any mitigation of discipline. Revocation of all of Respondent's licenses is the only reasonable recommendation.



96. Having concluded that Respondent violated Subsections 626.901(1) and 626.901(2), Florida Statutes, if Respondent, subsequent to revocation, makes application to Petitioner for any licensure, Respondent bears the burden of proving that he has otherwise satisfied the financial losses totaling \$283,439.68, if surrender penalties are included and \$152,877.87 if surrender penalties are excluded, as found above, of his clients.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Chief Financial Officer enter a final order finding that:

(1) Respondent violated Subsections 626.901(1), 626.901(2), 626.9541(1)(b)4., 626.9541(1)(e)1.e., 626.611(7), 626.621(2), and 626.621(6), Florida Statutes, as charged in Counts I-X of the Second Amended Administrative Complaint;

(2) Revoking each and every one of Respondent's licenses and appointments issued or granted under or pursuant to the Florida Insurance Code; and

(3) Providing that if Respondent, subsequent to revocation, makes application to Petitioner for any licensure, a new license will not be granted if Respondent fails to prove that he has otherwise satisfied the financial losses of his NFOA

clients, or if Respondent otherwise fails to establish that he is eligible for licensure.

DONE AND ENTERED this 10th day of December, 2009, in Tallahassee, Leon County, Florida.



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DANIEL M. KILBRIDE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of December, 2009.

ENDNOTE

<sup>1/</sup> All references to Florida Statutes are to Florida Statutes (2008), unless otherwise indicated.

COPIES FURNISHED:

Robert G. DeWald  
3730 Eagle Hammock Drive  
Sarasota, Florida 34240

Philip M. Payne, Esquire  
Department of Financial Services  
624 Larson Building  
200 East Gaines Street  
Tallahassee, Florida 32399

Tracy Beal, Agency Clerk  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-0390

Honorable Alex Sink  
Chief Financial Officer  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0300

Benjamin Diamond, General Counsel  
Department of Financial Services  
The Capitol, Plaza Level 11  
Tallahassee, Florida 32399-0307

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.