STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES,

Petitioner,

vs.

NANCY L. EBERHARDT,

Respondent.

Case No. 09-3088PL

DEPARTMENT OF FINANCIAL SERVICES,

Petitioner,

vs.

RICHARD PALMER EBERHARDT,

Respondent.

Case No. 09-3089PL

RECOMMENDED ORDER

These consolidated matters came on for final hearing before Daniel M. Kilbride, the designated Administrative Law Judge of the Division of Administrative Hearings on February 17, 2010, in Ft. Myers, Florida.

APPEARANCES

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

For Respondent: Nicholas J. Taldone, Esquire
2536 Countryside Boulevard,
First Floor East
Clearwater, Florida 33763

STATEMENT OF THE ISSUES

Whether Respondents directly or indirectly represented or aided an unauthorized insurer, an insurance or annuity product; whether Respondents knew or reasonably should have known that the annuity contracts with the unauthorized insurer violated Section 626.901, Florida Statutes; whether Respondents knowingly placed before the public a statement, assertion, or representation with respect to the business of insurance that was untrue, deceptive, or misleading; whether Respondents knowingly caused to be made, published, disseminated, circulated, delivered, or placed before the public any false material statement; whether Respondents demonstrated a lack of fitness and trustworthiness to engage in the business of insurance; whether Respondents engaged in unfair or deceptive practices or otherwise showed themselves to be a source of injury or loss to the public; and whether Respondents otherwise acted in violation of the Florida Insurance Code provisions as specifically detailed in Petitioner's Amended Administrative Complaint, and, if so, what penalty, if any, should be imposed on Richard P. Eberhardt's insurance agent license and/or Nancy L. Eberhardt's license.

PRELIMINARY STATEMENT

In separate two-count Amended Administrative Complaints, forwarded to the Division of Administrative Hearings (DOAH) on June 8, 2009, Petitioner, the Department of Financial Services, charged Respondents, Nancy L. Eberhardt and Richard Palmer Eberhardt, with having violated certain provisions of the Florida Insurance Code (FIC).

Each of the Respondents requested a formal administrative hearing before DOAH, and this matter was referred to DOAH on June 9, 2009. Respondents' respective cases were consolidated for purposes of a final hearing pursuant to DOAH's Order of Consolidation, dated June 30, 2009, and discovery ensued.

This matter was continued twice at the request of the parties. Pursuant to the Order Re-Scheduling Hearing, issued on December 11, 2009, a formal hearing was held on February 17, 2010, in Ft. Myers, Florida.

Petitioner called four witnesses to testify live: Rock Roque, Ronald Lovejoy, Jacob Bisch, and Fay Ann Clark. Affidavits and supporting documents of Petitioner employee witnesses Elizabeth Timin and Lee Wheeler, along with Florida Office of Insurance Regulation (OIR) employee Gary Mills, were stipulated to in lieu of their live testimony. Petitioner offered 21 exhibits, which were admitted in evidence.

PETITIONER'S EXHIBITS

VOLUME I:

EXHIBIT	DESCRIPTION
Exhibit 1:	A. Department's Agent License Printouts and License Applications documents related to Richard Palmer Eberhardt, License ID# E055503.
	B. Department's Agent License Printouts and License Applications documents relative to Nancy L. Eberhardt, License ID# E054669.
	C. Florida Secretary of State corporate filed for LLQ Consulting, LLC.
Exhibit 2:	A. Tennessee Secretary of State filing for National Foundation of America (NFOA).
	B. NFOA corporate resolution dated 4/18/06.
Exhibit 3:	State of Washington Office of Insurance Commissioner Cease and Desist Order against NFOA, Richard Olive, and Susan Olive, dated 9/18/06.
Exhibit 4:	A. OIR IFO against NFOA, Richard Olive, and Susan Olive, dated 4/13/07.
	B. 1st DCA dismissal of NFOA appeal dated 7/24/07.
Exhibit 5:	A. OIR certification that NFOA has no Certificate of Authority ("COA").
	B. Secretary of State certification that NFOA was not registered with the Division of Corporations.
Exhibit 6:	A. IRS letter, dated 5/17/07, 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 2/6/08 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 5/23/07 (excluding exhibits).

VOLUME II:

Exhibit 7: Continued Exhibits for Verified Petition for Appointment of Receiver for NFOA.

VOLUME III:

Exhibit 8: Verified Petition to Convert Rehabilitation to Liquidation for NFOA, from the Tennessee DCI, dated 8/2/07.

Exhibit 9: Final Order of Liquidation for NFOA, from the Tennessee DCI, dated 9/11/07.

Exhibit 10:

A. As to Florida consumer Jacob Bisch – NFOA contract and related documents, including Mr. Eberhardt's business card.

B. The Tennessee Receiver's first distribution refund of money to Mr. Bisch, including Mr. Bisch's payment of $45,221.45 to NFOA.

C. The Tennessee Receiver's second distribution refund of money to Mr. Bisch.

D. Mr. Bisch's surrender charges.

E. The Eberhardts' commission check.

Exhibit 11:

A. As to Florida consumer Fay Ann Clark – FNOA contract and related documents.

B. The Tennessee Receiver's first distribution refund of money to Ms. Clark, including Ms. Clarks's payment of $200.000.00 to NFOA.

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

D. Eberhardt’s commission check.

Exhibit 12: A. Nancy Eberhardt/LLQ Consulting, LLC 2/10/06 letter to NFOA regarding payment of commissions.

B. Tennessee Receiver’s 7/6/07 and 1/3/08 letters demanding disgorgement of the Eberhardts’ commission.

Exhibit 13: Respondents’ July 30, 2009, response to Petitioner’s discovery request.

Exhibit 14: Petitioner’s Agent License Printouts for Rock Roque and Ronald Lovejoy.

Exhibit 15: Florida Department of Insurance (“DOI”) and Department of Financial Services (“DFS”) Intercom insurance agent newsletters.

VOLUME IV:

Exhibit 16: Respondent Richard Eberhardt’s deposition taken by Petitioner on 10/27/09.

VOLUME V:

Exhibit 17: Respondent Nancy Eberhardt’s deposition taken by Petitioner on 10/27/09.

Exhibit 18: Deposition of Richard Olive taken by both Petitioner and Respondent on 11/17/09.

Exhibit 19: Florida Department of Agriculture and Consumer Services certified affidavit regarding National Foundation of America, dated 11/20/09.

Exhibit 20: Petitioner’s supplemental investigation, dated 11/18/09, relative to Respondents.

UNBOUND EXHIBIT:

Exhibit 21: Section 627.481, Florida Statutes, donor annuity registration filings with the OIR for New Life Corporation of America, National Community Foundation, and New Life International.

Respondents each testified in their own behalf, and offered seven exhibits into evidence. Respondents' Exhibits marked for identification, 1, 5, 6 and 7 were admitted; Exhibits 2, 3, and 4 were conditionally admitted. Following the hearing, Respondents filed a Consolidated Memorandum in Support of Admission of Respondent's Exhibits 2, 3, and 4. Petitioner did not file a response; upon review, it is found and determined that Respondent's proposed Exhibits 2, 3, and 4 are excluded on the grounds that they are irrelevant and consist of uncorroborated hearsay, which do not fall within an exception to the hearsay rule as found in Chapter 90, Florida Statutes. §§ 120.569(2)(g) and 120.57(1)(c)(d), Fla. Stat; Fla. Admin. Code R. 28-106.213(3).

RESPONDENT'S EXHIBITS

VOLUME 1:

Exhibit 1: 2006 Form 1099 for LLQ Consulting, LLC.

Exhibit 2: February 13 and 14, 2008, e-mail string between and among State of Florida OIR and DFS regarding "NFOA – Tennessee Receivership."

Exhibit 3: February 14, 2008, e-mail from Annette Johnson to Carl Rescke re: "New information on Richard Olive."

Exhibit 4: February 19, 2008, e-mail from Annette Johnson to Ernie Ulrich re: "Information per your request."

Exhibit 5: 26 page document marked as Exhibit 1 at the deposition of Richard Olive.

Exhibit 6: IRS FORM 1023 Instructions.

Exhibit 7: Exerpt from IRS publication 557.

A Transcript of the final hearing was prepared and filed on March 15, 2010, and both parties were afforded the opportunity to file a proposed recommended order. Each party timely filed its Proposed Recommended Orders, and they have been given careful consideration in the preparation of this Recommended Order.

Respondents raise the issue of Selective Bad Faith Prosecution in its proposal. Such a defense is in equity. This tribunal does not have equitable jurisdiction; it only has such jurisdiction as is conferred by statute. See gererally Florida Department of Revenue v. WHI Ltd Parthership, 754 So. 2d 205 (Fla 1st DCA 2000). However, such a defense is preserved, should an appeal be taken following the issuance of a final order, pursuant to Section 120.68, Florida Statutes.

FINDINGS OF FACT

General facts applicable to both Respondents

1. Respondent, Richard Eberhardt (RE), is currently licensed in the State of Florida as a Life Including Variable Annuity & Health Life, Life & Health, and Health insurance agent. RE was initially licensed by Petitioner as a non-resident insurance agent on May 6, 2004. Previously, RE was a licensed insurance agent in Nebraska, Indiana, and Arizona.

2. Respondent, Nancy Eberhardt (NE), is currently licensed in the State of Florida as a Life Including Variable Annuity, Life Including Variable Annuity & Health, Life, Life & Health, and Health insurance agent. NE was initially licensed by Petitioner as a non-resident insurance agent on January 2, 2003, and then as a resident agent on October 5, 2004. Previously, NE was a licensed insurance agent in Arizona.

3. Petitioner has historically mailed, and subsequently made available on line, the Intercom, an insurance agent newsletter. The heading to the newsletter, reads in part: "Publication for Agents and Adjusters from the State of Florida Department of Financial Services." These newsletters contained warnings regarding unauthorized sales of insurance products, and explanations as how an agent could verify whether or not an insurer was authorized to do business in Florida. Petitioner's records evidence that the newsletters were distributed to insurance agents from the July – October 1996 through December 2006 editions. Respondents became licensed Florida agents in January 2003, and it is a reasonable assumption that they received or had computer access to those publications.

4. Both Respondents are listed in Petitioner's records as being the owners of LLQ Consulting, LLC. Respondent NE is listed as being the insurance agent-in-charge of LLQ Consulting, LLC.

5. Pursuant to records on file with the Florida Secretary of State, LLQ Consulting, LLC, is an Arizona-limited liability company that is authorized to do business in Florida. Respondent RE was originally listed as manager; however, since April 22, 2005, Respondent NE has been listed as the manager.

6. At all times pertinent to the dates and occurrences referred to herein, Respondents were licensed in Florida as insurance agents.

7. Petitioner has jurisdiction over Respondents' insurance agent licenses and appointments, pursuant to statute.

National Foundation of America (NFOA)

8. The NFOA is a registered Tennessee corporation that was formed on January 27, 2006, and headquartered in Franklin, Tennessee.

9. Respondents assert that the difference between a charitable gift annuity and a charitable installment bargain sale is that a charitable gift annuity is under Internal Revenue Code (IRC) Section 501(m) and the payout to the investor is based on a mortality table of the donor's expected life. Therefore, it is a tax free exchange of an asset by a donor at less than the asset's fair market value to a charitable organization in exchange for an annuity issued by the charitable organization.

10. On the other hand, Respondents argue that an installment bargain sale is under Section 453 of the IRC and 26 C.R.F. Sections 1.1011-2 of the IRC regulations. It is an exchange of an asset owned by the donor at less than fair market value to a charitable organization in exchange for an annuity. The IRS allows the donor to deduct the difference between the fair market value of the asset and the amount that the charitable organization pays for the asset. The payout of the annuity is for a specific term and not tied to a mortality table.

11. Therefore, NCF did not consider the Charitable Installment Purchase to be an insurance transaction or the sale of an insurance product under state insurance laws.

12. Nevertheless, an NFOA Corporate Resolution, dated April 16, 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. . . ."

13. 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's having not been granted a Certificate of Authority (COA) as an insurer in Washington and having not been granted tax exempt status under Section 501(c)(3) of the IRC.

14. On April 13, 2007, the 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 FIC, including Sections 624.401 and 626.901, Florida Statutes.

15. NFOA has never held a license or COA 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.

16. New Life Corporation of America ("NLCA") d/b/a National Community Foundation ("NCF") has been registered with OIR as a Section 627.481, Florida Statutes, donor annuity organization, since October 1997. NCLA subsequently changed its name to New Life International ("NLI"), which continued to use the d/b/a/ NCF. NLI is presently registered as a donor annuity organization with OIR.

17. 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.

18. On May 17, 2007, the Internal Revenue Service (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.

19. On May 23, 2007, the Tennessee Department of Commerce and Insurance (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 MyIntyre, Kenny M. Marks, and Hunter Daniel, Chancery Court of the State of Tennessee ("Chancery Court"), 20th 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 it 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 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 it 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 individuals' tax conditions, the assets turned in to NFOA, and the extent to which they have entrusted their money and keyed their tax status and consequences to reliance on such an organization.

20. On August 2, 2007, the Commissioner for the Tennessee DCI, having determined that NFOA was insolvent with a financial deficiency of at least $4,300,000.00, filed a Verified Petition to Convert Rehabilitation by Entry of a Final Order of Liquidation, Finding of Insolvency, and Injunction, in the matter of Newman v. National Foundation of America, et al.

21. 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.

22. 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 to NFOA.

Insurance Agent's Duties

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

24. 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 the insurer itself or his or her insurance business peers as to whether an insurer needs to be authorized in Florida.

25. Respondents asserted that, prior to selling NFOA annuities in 2006, they had performed due diligence in order to determine whether or not NFOA was authorized in Florida. Respondents testified that at the time they performed their due diligence, they viewed a State of Florida website that seemingly indicated that OIR does not regulate donor annuities.

26. Respondents' testimony lacks credibility as to the timing of Respondents' claimed due diligence. The websites that seemingly indicate that OIR does not regulate donor annuities did not come into existence until September 12, 2008, for OIR and January 16, 2009, for Petitioner, which would have been several years after any due diligence that Respondents claim that they performed. As further noted below, the sale of the NFOA annuities to Mr. Bisch and Ms. Clark occurred in 2006, well in advance of the September 2008 and January 2009 creation of any websites that might seemingly indicate a lack of OIR regulation of donor annuity organizations.

27. While the OIR 2008 and DFS 2009 websites may be somewhat confusing, at all times relevant to these matters, donor annuity organizations have been and continue to be regulated by OIR pursuant to Section 627.481, Florida Statutes, and Florida Administrative Code Rules 69O-202.001 and 69O-202.015.

28. 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, insurance agents have a fiduciary duty to their clients to verify the validity of any representations that an insurer's product has an IRC Section 501(c)(3) tax exempt status, prior to the insurance agent's selling the product to his or her clients. There are several methods by which insurance agents could verify whether or not an insurer has an IRS 501(c)(3) tax exempt status.

29. Respondents admitted, in their testimony, that they had depended on the assurances of others and assumed that NFOA did not need to be authorized as an insurer in Florida. Respondents also admitted in their testimony that, but for the different names, the NFOA paperwork was the same as that of NCF.

30. Respondent's testimony is contradictory and lacks credibility in that NCF was qualified and registered with OIR as a donor annuity organization and NFOA was not. Nevertheless,

Respondents claim NFOA was not and did not need to be regulated by OIR.

31. Respondents testified that they had verified with the IRS that NFOA had applied for Section 501(c)(3) tax exempt status. However, Respondents were aware that the tax exempt status had not been granted to NFOA at any time relevant to this proceeding.

32. Respondents knew income tax considerations were materially important to their clients. However, none of the NFOA materials nor any Florida consumer contracts signed or provided by Respondents to their clients contain any disclaimer language informing consumers that the Section 501(c)(3) tax exempt status had been applied for but had yet to be granted by the IRS.

33. Respondents received commissions totaling $22,062.80 for selling NFOA annuities to Florida consumers. Respondents have failed to return any of these commissions to the Receiver for NFOA in the state of Tennessee.

Count I: Consumer - Jacob Bisch

34. On February 20, 2006, Respondents solicited and induced Jacob Bisch of Cape Coral, Florida, then aged 75, to transfer or otherwise surrender ownership of his existing annuity contract with Allianz Life Insurance Company in return for an NFOA annuity. The NFOA agreement that the consumer

entered into was signed by Respondent RE. Bisch credibly testified as to both Respondents' involvement in the sale of the NFOA annuity. NE wrote a letter asking that the commission for this sale be issued in her name. The commission check was ultimately paid to LLQ Consulting, LLC, a company owned by both Respondents and which NE was registered as the insurance agent-in-charge.

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

36. Respondents, by use of the NFOA donor annuity agreement, knowingly misrepresented to Bisch that NFOA was a charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondents knew or should have known that NFOA did not hold tax exempt status with the IRS.

37. Bisch's testimony was credible that tax considerations were the prime consideration in the purchase of the NFOA annuity from Respondents.

38. Based upon Respondents' transaction of insurance, Bisch presently anticipates losing approximately $26,320.04. This amount includes a surrender penalty of $16,823.04 incurred for transferring his original Allianz annuity to NFOA, and after receiving partial refunds from the NFOA Receiver.

39. Based upon Respondents' transaction of insurance with Bisch, Respondents were paid a commission of $4,062.80 by NFOA.

Count II: Consumer – Fay Ann Clark

40. Culminating on May 8, 2006, Respondents solicitated and induced Fay Ann Clark of Ft. Myers, Florida, then aged 70, to write a check for $200,000.00 in return for an NFOA annuity. The NFOA agreement that Clark entered into, and which was signed by Respondent RE, was entered into less than three weeks after Clark requested rescission of two NCF annuities that Respondents had previously sold Clark. Proceeds from the rescission of the NCF annuities enabled Clark to purchase the NFOA annuity. Prior to the rescission of the NCF annuities, on or about October 21, 2005, Clark had surrendered two Allianz Life Insurance Company annuities. Proceeds from the surrender of the Allianz annuities were used to purchase the NCF annuities. Respondent NE signed the NCF annuities agreement and was the advisor. Respondent NE, by use of a check drawn on Respondents' joint checking account, refunded Respondents' commission for the NCF sales to Clark. Sales documentation and correspondence clearly and convincingly evidence both Respondents' involvement in Clark's Allianz to NCF and NCF to NFOA transactions.

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

42. Respondents, by use of the NFOA donor annuity agreement, knowingly misrepresented to Clark that NFOA was a

charitable non-profit organization under Section 501(c)(3) of the IRC, even though Respondents knew NFOA was not tax exempt.

43. Based upon Respondents' transaction of insurance, Clark paid $200,000.00 for an NFOA annuity, paid $7,971.00 in penalties to the IRS (U.S. Treasury), and presently anticipates losing approximately $42,000.00. Clark has received a partial refund from the NFOA Receiver.

44. Based upon Respondents' transaction of insurance with Clark, Respondents were paid a commission of $18,000.00 by NFOA.

45. Petitioner has proven by clear and convincing evidence that Respondents directly or indirectly represented or aided an unauthorized insurer to do business in Florida.

46. Petitioner has proven by clear and convincing evidence that Respondents knew or reasonably should have known that the annuity contracts they contracted with clients were with an unauthorized insurer.

47. Petitioner has proven by clear and convincing evidence that Respondents knowingly placed before the public a statement, assertion, or representation with respect to the business or insurance that was untrue, deceptive or misleading.

48. Petitioner has proven by clear and convincing evidence that Respondents knowingly caused to be made, published, disseminated, circulated, delivered, or placed before the public a false material statement.

49. Petitioner has proven by clear and convincing evidence that Respondents demonstrated a lack of fitness and trustworthiness to engage in the business of insurance.

50. Petitioner has proven by clear and convincing evidence that Respondents engaged in unfair and deceptive practices or showed themselves to be a source of injury to the public.

51. Neither Respondent has had prior disciplinary charges filed against them in Florida.

CONCLUSIONS OF LAW

52. DOAH has jurisdiction over the subject matter of, and the parties to, this proceeding. §§ 120.569, and 120.57(1), Fla. Stat., and Chapter 626, Fla. Stat.

53. Petitioner has the authority to license, enforce and discipline insurance agents, pursuant to Section 626.016, Florida Statutes (2005).[1]

54. Because Petitioner seeks the suspension or revocation of some, or all, of Respondents' licenses, Petitioner has the burden of proving by clear and convincing evidence that Respondents committed the violations alleged in Petitioner's Amended Administrative Complaints. Department of Banking and Finance v. Osborne Stern & Company, 670 So. 2d 932 (Fla. 1996).

55. "'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).

56. At all times material to the instant case, Section 626.901, Florida Statutes, provides as follows:

> (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 dissemination 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 or assist such an insurer in the transaction of insurance with respect to subjects of insurance resident, located, or to be performed in this state. . . .

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

> (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 [Section 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 Section 626.901(2), Florida Statutes, Respondents' 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, Respondents are still responsible for the consumers'

total losses, which include the amounts of the surrender penalties.

58. At all times material to the instant case, Subsection 626.9541(1)(b)4., Florida Statutes, provides 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.

59. At all times material to the instant case, Subsection 626.9541(1)(e)1.e., Florida Statutes, provides 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:
>
> * * *
>
> (e) False statements 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.

60. At all times material to the instant case, Subsection 626.611(7), Florida Statutes, provides as follows:

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, 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.

61. At all times material to the instant case, Subsections 626.621(2) and (6), Florida Statutes, provide as follows:

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, adjuster, customer representative, service representative, or managing general agent, and it may 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 appointment 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. 626.611:

* * *

(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 a source of injury or loss to the public.

62. Florida Administrative Code Rule 69B-231.110(35) states, in pertinent part:

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.

63. Florida Administrative Code Rule 69B-231.110(36) states in pertinent part:

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

* * *

(36) Section 626.901(2), F.S. – suspension 6 months.

64. Florida Administrative Code Rule 69B-231.100(2) states in pertinent part:

> If the 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 practice as defined in any of the following paragraph of Section 626.9541(1), F.S., the following stated penalty shall apply:
>
> * * *
>
> (2) Section 626.9541(1)(b), F.S. – suspension 6 months.

65. Florida Administrative Code Rule 69B-231.100(5) states in pertinent part:

> If the 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 practice as defined in any of the following paragraph of Section 626.9541(1), F.S., the following stated penalty shall apply:
>
> * * *
>
> (5) Section 626.9541(1)(b), F.S. – suspension 6 months; except that the penalty for a violation of Section 626.9541(1)(e)1., F.S., shall be a suspension of 12 months.

66. Florida Administrative Code Rule 69B-231.080(7) states in pertinent part:

> 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

67. Florida Administrative Code Rule 69B-231.090(2) states in pertinent part:

> If it is found that the licensee has violated any of the following subsections of Section 626.621, F.S., for which suspension or revocation of license(s) and appointment(s) is discretionary, the following stated penalty shall apply:
>
> * * *
>
> (2) Section 626.621(2) F.S. – suspension 3 months.

68. Florida Administrative Code Rule 69B-231.090(6) states in pertinent part:

> If it is found that the licensee has violated any of the following subsections of Section 626.621, F.S., for which suspension or revocation of license(s) and appointment(s) is discretionary, the following stated penalty shall apply:
>
> * * *
>
> (6) Section 626.621(6) F.S. – see Rule 69B-231.100, F.A.C.

69. Petitioner has proven by clear and convincing evidence that Respondents violated Subsection 626.901(1), Florida Statutes, as charged in Counts I and II of Petitioner's Amended Administrative Complaints. "The language of the statute [Section 626.901(1), Florida Statutes] clearly imposes an

absolute bar against representing an unauthorized insurer." Department of Financial Services v. DeWald, Case No. 09-3052PL (DOAH 2009), paragraph 84, citing Beshore v. Department of Financial Services, 928 So. 2d 411, 412 (Fla. 1st DCA 2006).

70. In addition, Petitioner has proven by clear and convincing evidence that Respondents have violated Subsections 626.901(2), 626.9541(1)(b)4., 626.9541(e)1.e., 626.611(7), 626.621(2), and 626.621(6), Florida Statutes. Department of Financial Services v. DeWald, supra, Case No. 09-3052 (DOAH 2009), paragraph 85.

71. Respondents have a fiduciary duty to their clients and to the insurer. Department of Financial Services v. DeWald, supra, Case No. 09-3052 (DOAH 2009), paragraph 86, citing 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. Carll and Crain, Case Nos. 06-2096PL and 06-2097PL (DOAH 2007), at paragraph 57, citing Natelson, 454 So. 2d at 31, 32.

72. "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, paragraph 57 (citations omitted).

73. As to each of their Florida clients, Respondents acted "naively, if not irresponsibly" and worse when they aided NFOA, both in NFOA's unauthorized insurer context and in the misrepresentation that NFOA was an IRS approved Section 501(c)(3) tax exempt entity. Department of Financial Services v. DeWald, Case No. 09-3052PL (DOAH 2009), paragraph 87, citing Department of Financial Services v. Keiffer, Case No. 03-2041PL (DOAH 2004), paragraph 102.

74. Even if Respondents' claim that NFOA is not regulated by OIR were to be upheld, the disposition of these cases would not change. "Courts have held that an insurance agent licensee may demonstrate a lack of fitness or trustworthiness to engage in the business of insurance by acts unrelated to the insurance business." Department of Financial Services v. Carll and Crain, Case Nos. 06-2096 and 06-2097 (DOAH 2007), paragraph 65, citing Paisley v. Department of Insurance, 526 So. 2d 167 (Fla. 1st DCA 1988), and Natelson, 454 So. 2d at 32 (lack of fitness demonstrated by felony convictions unrelated to insurance), with Anna Michelle Mack v. Department of Financial Services, 914 So. 2d at 988-989, and Ganter v. Department of Insurance, 620 So. 2d 202 (Fla. 1st DCA 2993) (sale of auto club membership are ancillary products).

75. Respondents knew or reasonably should have known that NFOA was not an authorized insurer in Florida for purposes of

Subsection 626.901(2), Florida Statutes. Respondents were experienced insurance agents of many years in Florida and other states. Respondents professed verification of NFOA's authority to conduct the business of insurance in Florida and dependence upon the biased hearsay assurances of others lacks credibility. Respondents owed a duty to their clients to know whether or not NFOA was an authorized insurer, and to govern their insurance agent activities accordingly. Department of Financial Services v. DeWald, Case No. 09-3052PL (DOAH 2009), paragraph 88, citing Natelson, 454 So. 2d at 31, 32.

76. "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. 03-2041PL (DOAH 2004), paragraphs 89, 99. "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 2007) paragraph 60, citing Ramel v. Chasebrook Construction Company, Inc., 135 So. 2d 876, 881 (Fla. 2nd DCA 1961).

77. Respondents knew that NFOA had not been granted tax exempt status by the IRS and nevertheless knowingly misrepresented the Section 502(c)(3) tax exempt status of NFOA

to their clients, in violation of Subsections 626.9541(1)(b)4., and 626.9541(1)(e)1.e., Florida Statutes. Respondents owed a duty to their clients to disclose that NFOA did not have a Section 501(c)(3) tax exempt status, or to at least qualify their representations with a disclosure that NFOA's tax exempt status had been applied for but that a determination by the IRS was pending. Department of Financial Services v. DeWald, Case No. 09-3052PL (DOAH 2009), paragraph 89, citing Natelson, 424 So. 2d at 31, 32.

78. 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." Department of Financial Services v. DeWald, Case No. 09-3052PL (DOAH 2009), paragraph 90, citing 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 1998) LEXIS 6266, citing 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)]; Boyce Motor Lines v. United States, 342

U.S. 337, 72 S. Ct. 329, 96 L. Ed. 2d 367 (1952), [Cf. Hutchinson Brothers Excavation Co., Inc. v. District of Columbia, 278 A.2d 318, 322 (D.C. Cir. 1971)]; United States v. Illinois Central Railroad Company, 303 U.S. 239, 58 S. Ct. 533, 82 L. Ed. 2d 773 (1938). "[E]ven in some criminal matters, scienter is not always a requirement." Beshore, 928 So. 2d, at 413.

79. "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 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." Department of Financial Services v. DeWald, Case No. 09-3052PL (DOAH 2009), paragraph 90, citing Jack Eckerd Corporation v. Smith, 558 So. 2d 1060, 1065 (Fla. 1st DCA 1990), citing 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)]; Sauders Leasing System, Inc. v. Gulf Cent. Distribution Center, Inc., 513 So. 2d 1303 (Fla. 2nd DCA 1987), review denied, 520 So. 2d 584 (Fla. 1988) [Cf. Gilchrist Timber Co. v. Natural Resource Planning Services, Inc., 127 F.3d 1390, 1395 (11th Cir. 1997)]; Miller v. Sullivan, 475 So. 2d 1010 (Fla. 1st DCA 1985); Winn & Lovett Grocery Co.

v. Archer, 126 Fla. 308, 171 So. 214 (1936); Walsh v. Alfidi, 448 So. 2d 1084 (Fla. 1st DCA), reh'g denied (1984).

80. Pursuant to the discussion of highest penalty per count at Florida Administrative Code Rule 69B-231.040(1)(a), for a violation of Subsection 626.901(2), Florida Statutes, the stated penalty authorized by Florida Administrative Code Rule 69B-231.110(36) is a suspension of each individual Respondent's licensure for 12 months for each separate violation of Subsection 626.901(2), Florida Statutes. Therefore, each individual Respondent's total penalty calculates to a 24-month suspension even without further consideration of aggravating factors, including the degree of financial injury to Respondent's clients; the elderly age of Respondents' clients; the financial commissions received by Respondents; and the existence of secondary violations in Counts I and II of the Amended Administrative Complaints. Fla. Admin. Code R. 69B-231.040. 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).

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

> 69B-231.106 – 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 of 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.

82. As to the potential mitigation of discipline, Respondents testified as to Respondent NE's limited involvement in the NFOA transactions. As found above, this testimony is clearly and convincingly refuted by the evidence. RE and NE were both very much involved in the NFOA transactions involving Bisch and Clark.

83. The aggravating factors are the degree of financial injury to Respondents' clients, the elderly age of Respondents' clients, the financial commissions received by Respondent, and the existence of secondary violations in Counts I and II of the

Amended Administrative Complaints; they far outweigh any mitigation of discipline.

RECOMMENDATION

Based upon the foregoing Finds of Facts and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Financial Services:

(1) Finding that Respondents 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 and II of Petitioner's Amended Administrative Complaints;

(2) Revoking Respondent Richard Eberhardt's, licenses and appointments issued or granted under or pursuant to the Florida Insurance Code;

(3) Revoking Respondent Nancy Eberhardt's, licenses and appointments issued or granted under or pursuant to the Florida Insurance Code;

4. Providing that if either of the Respondents, subsequent to revocation, makes an application to Petitioner for any licensure, a new license will not be granted if the applicant Respondent fails to prove that he or she has otherwise satisfied the financial losses of his or her NFOA clients or if the

applicant Respondent otherwise fails to establish that he or she is eligible for licensure.

DONE AND ENTERED this 27th day of April, 2010, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of April, 2010.

ENDNOTE

1/ All references to Florida Statutes are to Florida Statutes (2005), unless otherwise indicated.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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