STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ABACUS SETTLEMENTS, LLC, A NEW YORK LIMITED LIABILITY COMPANY,

Petitioner,

vs. Case No. 15-6122

OFFICE OF INSURANCE REGULATION,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on March 30 and 31, 2016, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brady J. Cobb, Esquire
Cobb Eddy, PLLC
642 Northeast Third Avenue
Fort Lauderdale, Florida 33304

For Respondent: Clifford Timothy Gray, Esquire
Lacy K. End-Of-Horn, Esquire
Office of Insurance Regulation
200 East Gaines Street
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STATEMENT OF THE ISSUE

Whether the Florida Office of Insurance Regulation (OIR or Respondent) should approve the application submitted by Abacus

Settlements, LLC (Abacus or Petitioner), for a license to operate as a viatical settlement provider in Florida.

PRELIMINARY STATEMENT

Petitioner submitted its application for a license as a viatical settlement provider to OIR on February 26, 2015, application ID No. 935341 (Application), pursuant to section 626.9912, Florida Statutes.[1/] On September 23, 2015, OIR provided Abacus with a letter containing its preliminary decision to deny the Application (the Denial Letter). On October 14, 2015, Abacus timely filed a petition with OIR for an administrative hearing (the Petition) challenging OIR's preliminary decision to deny the Application as stated in the Denial Letter.

On October 29, 2015, OIR forwarded the Petition to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing. The case was assigned to the undersigned and initially scheduled for a hearing to begin on January 12, 2016. The final hearing was thereafter twice continued and ultimately rescheduled for March 30 and 31, 2016.

At the hearing, Abacus called Abacus member-manager, K. Scott Kirby, and OIR employees, Jan Hamilton and Jan Davis, as witnesses. Because of the order of proof, OIR essentially presented its case-in-

chief during the cross-examination of OIR employees, Ms. Hamilton and Ms. Davis. Respondent also called Abacus member-manager, T. Sean McNealy as a witness.

Joint Exhibits 1 through 14 were admitted into evidence, along with the February 26, 2016, deposition of Abacus's director of operations, Samantha Butcher, which was admitted into evidence as Joint Exhibit 15. Petitioner's Exhibits 1 through 12, including 6a and composite 11, were admitted into evidence. In addition, Respondent's Exhibits 1 through 11, 13, 15, and Respondent's demonstrative Exhibits 19 and 20 were admitted into evidence.

The proceedings were recorded and a transcript was ordered. The parties were given 30 days from the date of the filing of the transcript to submit proposed recommended orders. A four-volume Transcript of the proceedings was filed April 21, 2016. The parties were subsequently granted an extension until June 3, 2016, within which to file proposed recommended orders. Thereafter, the parties timely filed their respective Proposed Recommended Orders, both of which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On February 2, 2004, Abacus was formed as a limited liability company under the laws of the State of New York to operate as a viatical settlement provider.

2. A viatical settlement provider is a licensed entity that buys existing life insurance policies from policy owners in a regulated market. The life or viatical market, also known as the secondary market, allows the consumer to sell their policy to investors for a much greater value, often three to five times their surrender value.

3. Presently, Abacus is licensed to do business in 30 states as a viatical settlement provider by each respective state's regulatory insurance agency.

4. Since Abacus's inception in 2004 through the present date, there have never been any consumer complaints filed against Abacus. Since its inception through the present date, Abacus has never had any regulatory complaints or administrative actions taken against it by any of the states where it is licensed to do business. From 2004 through the present date, Abacus has purchased life insurance policies with an aggregate face value of over $2 billion dollars and paid the owners of those policies nearly $250 million dollars in compensation.

5. Of the 1,000 or so policies that Abacus has purchased since its inception in 2004, none of those policies has ever been the subject of any litigation filed by an insurance carrier seeking rescission of the policy for fraud or other malfeasance.

6. Prior to the formation of Abacus, K. Scott Kirby, T. Sean McNealy, and Matthew Ganovsky (the "Principals") owned and

operated Advanced Settlements, LLC (Advanced), which they founded on December 19, 2000. Advanced was a viatical/life settlement broker licensed to do business in 35 states. The Principals have been participants in the viatical settlement/life insurance settlements industry since 1998, and have served as board members of the industry's leading trade association, the Life Insurance Settlement Association.

7. Advanced maintained a valid viatical settlement broker license from OIR from 2000 through its dissolution in 2014. The Principals maintained valid life insurance producer licenses from OIR from 2000 through the present date, and those licenses remain in good standing. The Principals are still licensed as life insurance producers and hold viatical settlement broker appointments with the State of Florida.

8. From Abacus's inception in 2004 through 2011, Abacus was operated on a day-to-day basis by its CEO/COO Craig Seitel, and the Principals were not involved in the day-to-day business of Abacus or in the company's decisions regarding compliance or policy acquisition parameters. Due to health concerns related to Mr. Seitel's wife, Mr. Seitel left the company and the Principals appointed Samantha Butcher in 2011 to manage the day-to-day business of Abacus.

9. Since 2011, Samantha Butcher has operated Abacus as the director of operations from the company's Tennessee office.

10. On February 26, 2015, Abacus filed the Application with OIR for licensure as a viatical settlement provider under section 626.9912. The Application itself was in excess of 550 pages.

11. On March 6, 2015, OIR transmitted a letter to Abacus detailing purported technical deficiencies in the Application.

12. On March 31, 2015, OIR transmitted a letter to Abacus wherein OIR confirmed that the Application was formally received and complete, and would be routed to the proper unit within OIR for processing.

13. Jan Hamilton from OIR was tasked with reviewing the Application. Ms. Hamilton has reviewed approximately 50 viatical settlement provider applications in her 20 years of experience at OIR, and has never reviewed an application that was approved without additional requirements added through the consent order process.

14. Upon being notified on March 31, 2015, that Abacus had filed the Application, the head of OIR's Life and Health Division communicated with Ms. Hamilton via an email stating "here we go." Ms. Hamilton sent a response noting that a "strategy meeting" would be convened amongst OIR staff regarding the Application.

15. According to Ms. Hamilton's notes, on March 31, 2015, the Application was accepted and assigned to an examiner, and was

"under review." On April 6, 2015, six days after the Application was filed, Ms. Hamilton's notes state that the "Application is being prepared for denial due to lack of trustworthiness of principals/owners of Applicant which cannot be cured."

16. Included within the Application were the following: (a) Abacus's proposed anti-fraud plan; (b) Abacus Plan of Operations; (c) Abacus Organizational (Employee) Chart; (d) Sworn Biographical Affidavits for each Principal and employee required; (e) Management Information Forms; (f) all organization documents and bylaws of Abacus; (g) all forms that were to be used by Abacus in Florida; (h) fingerprint cards for each Principal and key employee; (i) records retention policies for Abacus; and (j) a general description of how Abacus intended to use life-expectancy providers.

17. Abacus also made the required $100,000.00 deposit with the Florida Department of Financial Services, Division of Treasury, Bureau of Collateral Management.

18. Abacus's proposed forms were approved by OIR on May 28, 2015, and Abacus's Anti-Fraud Plan was approved by the Department of Financial Services on May 28, 2015.

19. Subsequent to OIR's acceptance of the Application, and over a month after Ms. Hamilton notes reflecting that the Application was being prepared for denial, OIR issued two clarification letters to Abacus that sought additional

information or documents relative to the Application. The first clarification letter was dated May 28, 2015, and contained 60 additional requests for information or documents. The second clarification letter was dated June 29, 2015, and contained 12 additional requests for information or documents. Abacus responded to both clarification letters in a timely fashion.

20. After Abacus filed its Application, OIR sent out emails to the various states where Abacus was already licensed as a viatical/life settlement provider inquiring as to the standing of Abacus's license, and whether any administrative action had been taken against Abacus, among other things. Those states that responded confirmed that no administrative fines or penalties had been assessed against Abacus, and that Abacus was licensed in good standing.

21. OIR thereafter asked Abacus to produce detailed spreadsheets with information relative to each policy that Abacus had purchased in its entire history of doing business, nationwide, as well as the same information for Advanced, which was no longer in business and was not the applicant for the Application. OIR requested that the spreadsheets include, among other things, the date of viatication, viator information, insured information, and life insurance policy information. Abacus provided the requested spreadsheets to OIR.

22. On June 29, 2015, the Principals of Abacus traveled to Tallahassee, Florida, to meet with key individuals at OIR, including Belinda Miller, Jan Hamilton, Janice Davis, and others to discuss the status and progress of the Application. At this meeting and as part of the Application process, OIR requested that Abacus undergo a pre-licensing examination by OIR's market conduct examiner Janice Davis, who would travel to Abacus's Tennessee offices to examine files. No one from Abacus was aware that Jan Hamilton had noted over two months before that the Application was going to be denied.

23. On June 30, 2015, Ms. Hamilton contacted the Illinois Department of Insurance (the IDOI) to inquire about a market conduct examination that the IDOI had conducted on Abacus in February of 2015. On July 1, 2015, the IDOI contacted Ms. Hamilton and advised her that their market conduct examination had been concluded as to Abacus, and no issues were discovered. Ms. Hamilton did not deem Abacus's positive market conduct examination result to be "at the top of the list of most important factors" relative to the Application. Ms. Hamilton did not disclose or otherwise inform Janice Davis or anyone else at OIR that Abacus had passed the IDOI market conduct examination in February of 2015 without any issues. The first time that Ms. Davis learned that Abacus had passed the IDOI examination was at the final hearing in this case.

24. During the week of August 3-7, 2015, OIR sent Ms. Davis to Abacus's Tennessee office to conduct the pre-licensing examination. During the examination, OIR was granted access to Abacus's and Advanced's database of files and Ms. Davis was able to view the Abacus and Advanced files that were available and in the possession of Abacus or Advanced. Some of the files had been routinely destroyed pursuant to the records retention policies of Abacus and Advanced, respectively, which are governed by the statutes of each state where each company conducted business.

25. In total, during the five-day examination at Abacus's Tennessee offices and an additional seven days of examination that occurred through granting Ms. Davis remote access to the database, OIR was able to review 315 policy transactions from Abacus, and 1,000 policy transactions for Advanced.

26. During the course of the pre-licensure examination, OIR did not adhere or use the recognized National Association of Insurance Commissioners audit methodology standards. Rather, OIR utilized their "own standards." OIR stated that their standards were grounded in sections 624.319 and 626.9922, Florida Statutes. However, neither statutory citation contains audit or examination standards or methodologies.

27. In accordance with section 626.9922, Abacus was required to pay for all costs incurred by OIR for the pre-

licensure examination. Abacus paid OIR approximately $6,000.00 for the pre-licensure examination.

28. Subsequent to the pre-licensure examination, OIR, through Ms. Davis, prepared a summary memorandum (the Memorandum) that outlined the results of the pre-licensure examination. The findings in the Memorandum were also contained within the Denial Letter and the findings in the Memorandum were the basis for OIR's preliminary denial of the Application.

29. On September 23, 2015, OIR denied the Application and issued the Denial Letter which delineated the grounds for denial of the Application.

30. In both the Denial Letter and the Memorandum, two grounds for denial were asserted, as well as additional "areas of concern" and related issues for the principals of Abacus. The two grounds for denial were based on a total of eight of the approximately 1,000 polices that Abacus has transacted since its inception.

31. In its first ground for denial, the Denial Letter states:

> (1) As a result of the pre-licensure examination, OIR finds that the Applicant purchased policies that were obtained fraudulently via either non-disclosure of material facts or misstatements of material facts. OIR further finds that Mr. Kirby, part owner of the Applicant, previous co-President of Advanced, and a licensed life

> agent in Florida, acted as the viatical settlement broker in some of these transactions.

32. As justification for its first ground for denial, OIR relied upon six policies identified in the pre-licensing examination and the provisions of section 626.99275(1)(a), which states:

> It is unlawful for any person: (a) To knowingly enter into, broker, or otherwise deal in a viatical settlement contract the subject of which is a life insurance policy, knowing that the policy was obtained by presenting materially false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where viator or the viator's agent intended to defraud the policy's issuer. (Emphasis added).

33. In support of its first ground for denial, OIR did not apply the "knowingly" or "knowing" standard recited in section 626.99275. Rather, in evaluating the policies in the pre-licensure examination, OIR applied a "knew or should have known" standard. As Ms. Davis conceded at final hearing, section 626.99275 does not contain the language or words "knew or should have known. Ms. Davis's "cheat sheet" that she created to assist in her preparation of the Memorandum and Denial Letter references what Abacus "knew or should have known," instead of relying on facts to support an allegation that Abacus knowingly transacted a fraudulently obtained policy.

34. The policies that were allegedly fraudulently obtained were all transacted by Abacus prior to 2012 and can be found at Respondent's Exhibits 1.3 through 1.8, and the compliance review. The ultimate decision to purchase those policies was not made by the current principals of Abacus, but instead by a former partner in Abacus, Craig Seitel, and the former general counsel of Abacus, Ed Gonzalez. From 2012 through the date of the pre-licensing examination, OIR did not identify any policies purchased by Abacus that were problematic in regards to potential fraudulent activity.

35. Abacus was not involved in the initial application, underwriting, or issuance process for any of the six referenced policies. Abacus only came into contact with the policies as a viatical settlement provider interested in purchasing the policies at least two years after they were issued.

36. During Abacus's transaction of the six policies at issue, Abacus's anti-fraud plan, similar to the one that was approved by OIR as part of the Application, was, and still is, in place to specifically ensure that Abacus does not acquire any policies that were fraudulently obtained.

37. The documents relative to the first policy, the Marignoli policy, can be found at Respondent's Exhibit 1.3. When asked to identify which documents within Respondent's Exhibit 1.3 supported the first ground for denial, OIR responded

by referencing loan documents that were executed after the policy was issued to the insured and that therefore, Abacus "knew or should have known" that the policy was obtained fraudulently. Abacus, however, purchased the policy almost four years after it was initially issued by the insurance carrier. The premium financing was taken out by the insured after the policy was issued and the insurance carrier accepted all premium payments from both the insured and the lender. To date, the insurance carrier has not made any claims that the policy was issued fraudulently.

38. OIR never talked to the insured and could not confirm what the insured was thinking at the time the policy was applied for or issued. While OIR asserts that there was "suspected fraud" regarding the Marignoli policy, it did not provide evidence or testimony that Abacus knowingly transacted the policy knowing it was obtained fraudulently.

39. The documents relative to the second policy, the Bakall policy, which was a part of the first ground for denial, can be found at Respondent's Exhibit 1.4. OIR alleges that because the insured entered into a loan for the payment of premiums on the policy, Abacus transacted a policy that was fraudulently obtained. The Bakall insurance application, however, included a statement by the insured that the trustee had the ability to borrow money if necessary. The premium financing was undertaken

after the policy was issued, and no one from Abacus or Advanced was involved in the issuance or subsequent financing of the policy. The evidence did not establish that Abacus knowingly transacted the policy knowing that it was fraudulently obtained. Instead, at the final hearing, OIR, through Ms. Davis, asserted that Abacus transacted this policy that they "knew or should have known" was fraudulently obtained. During her testimony, Ms. Davis admitted that the Bakall policy was reviewed by other OIR licensed viatical settlement providers and/or brokers, and no one else reported the Bakall policy as being fraudulently obtained.

40. The documents relative to the third policy as part of the first ground for denial, the Cord policy, can be found at Respondent's Exhibit 1.5. Again, OIR asserts that because the premiums for the policy were financed, the policy was fraudulently obtained. However, the documents within Respondent's Exhibit 1.5 reveal that the policy application was completed on January 21, 2010, the policy was issued on February 5, 2010, and the loan documents were signed 40 days later on March 22, 2010. OIR was unable to identify any statutes or regulations that prohibit or otherwise make it illegal to have non-recourse premium financing for life insurance policies, or to finance the premiums of a life insurance policy after the policy is issued. When asked for

proof that the insured had an arrangement, a plan, or a conspiracy to sell his policy at the time it was issued, OIR did not produce any evidence to meet the "knowingly" and "knowing" requirements of section 626.99275, and instead stated that there was “reason to suspect.”

41. The documents relative to the fourth policy as part of the first ground for denial, the Mezey policy, can be found at Respondent’s Exhibit 1.6. As it pertains to the Mezey policy, OIR argues that the insured’s use of premium financing after the issuance of the policy demonstrates that the policy was fraudulently obtained. The original application for the Mezey policy was completed in May of 2008, the premium financing at issue was completed in October of 2008, and the insurance carrier issued an endorsement to the policy after the lender had paid the first premium saying the policy was effective. The loan was not secured by the insurance policy. Rather, the insured utilized the value of her securities account to obtain a loan to pay for the premiums of the policy. The evidence did not establish that Abacus knowingly transacted the Mezey policy knowing that it was fraudulently obtained.

42. The documents relative to the fifth and six policies, the Davis policies, which were a part of the first ground for denial, can be found at Respondent's Exhibits 1.7 and 1.8. With regard to the Davis policies, OIR argues that the insured’s use

of premium financing after the issuance of the policy demonstrates that the policy was fraudulently obtained. The Davis policies were issued by the insurance carrier on October 21, 2008, the first premium was paid by the policy owner, and the policy owner decided to obtain premium financing for the policies on November 20, 2009. OIR did not speak to the original policy owner and produced no evidence or proof outside of the documents contained within Respondent's Exhibits 1.7 and 1.8 with regard to the Davis policies. The evidence was insufficient to establish that Abacus knowingly transacted these policies, or any of the other four policies at issue for the first ground for denial, knowing they were fraudulently obtained.

43. As to OIR's second ground for denial, the Denial Letter states:

> (2) As a result of the pre-licensure examination, the Office finds that the Applicant viaticated policies from Florida viators without being licensed as a viatical settlement provider in Florida. Mr. Kirby acted as the viatical settlement broker in some of these transactions.

44. OIR's second ground for denial alleges violations of section 626.9912(1) which provides:

> A person may not perform the functions of a viatical settlement provider as defined in this act or enter into or solicit a viatical settlement contract without first having obtained a license from OIR.

45. OIR alleges that Abacus transacted two viatical settlements with residents of Florida without having obtained a license from OIR. Ms. Davis identified the two policies at issue during her pre-licensure examination, and alleged that "Abacus knew or should have known that each of these policies was owned by a Florida resident, and they continued to process and subsequently purchase the policy in violation of Florida Statute."

46. In making her allegation that Abacus transacted two viatical settlements with Florida residents, Ms. Davis did not review the Florida Statutes for direction as to how to legally determine a viator's residency, nor did she consult with legal counsel from OIR for assistance or a determination as to how to legally determine the residency of a viator.

47. The first policy referenced in the second ground for denial is the Wyatt policy. The Wyatt policy was presented to both Advanced and Abacus over a four-year period of time. Abacus reviewed the file and all documents submitted to it by the viator, and determined, with the assistance of its compliance team and counsel, that the transaction was an Illinois transaction because Ms. Wyatt appeared to reside permanently in Illinois. In support of this conclusion, Abacus relied upon the following information: (a) the viatical settlement application completed by Wyatt in 2014 listed her

address as being in Lake Forest, Illinois; (b) the same Illinois address was listed on related transaction forms; (c) the compliance packet completed by Wyatt's broker/agent who submitted the policy to Abacus listed Wyatt's state of residence as being Illinois; (d) the policy was issued to Wyatt in Illinois on December 15, 1999; (e) although Wyatt maintained a house in Florida, her agent confirmed it was a vacation home and that Wyatt resided in Illinois at the address she listed on the contract forms; (f) the contract forms were notarized by a notary in Illinois and were forms approved by the Illinois Department of Insurance; (g) the majority of the medical records for Ms. Wyatt were located in Illinois; and (h) it was only after the transaction documents were signed that Abacus learned of Wyatt's intent to relocate from Illinois to Florida. The aforementioned information was provided to Abacus during the transaction and Abacus determined, based upon a totality of the circumstances, that Wyatt was a resident of Illinois and not a resident of Florida.

48. In addition to the foregoing, other factors show that Ms. Wyatt's permanent residence was Illinois at the time of the transaction. Ms. Wyatt did not provide, or otherwise have, a Florida driver's license, voter's registration card, or vehicle tag, and, to Abacus's knowledge, had not filed a formal declaration of domicile in Florida.

49. To show Ms. Wyatt was a resident of Florida, OIR pointed to insurance verification forms in Abacus's files filled out by Mr. Kirby while brokering the Wyatt transaction for Advanced. The forms listed Ms. Wyatt's address as Wellington, Florida. It was also evident, however, that, over the course of the transaction, Advanced and Abacus were aware that Ms. Wyatt had a vacation home in Florida and that she was planning to eventually transition to Florida.

50. In addition, in an expanded scope of the pre-licensure examination that gathered information that was not in Abacus's files, OIR obtained evidence that Ms. Wyatt claimed homestead exemption in Florida in tax years 2013 and 2014. There was no evidence showing that Abacus was aware of the claimed homestead exemption.

51. While OIR presented evidence indicative of Florida residency, that evidence, when considered in light of evidence in support of Illinois residency in Abacus's files, does not demonstrate by a preponderance of the evidence that Ms. Wyatt was a resident of Florida at the time of the transaction. Rather, the evidence shows that the Wyatt policy transaction involved an Illinois viator who was "transitioning" to Florida residency.

52. The second policy referenced in the second ground for denial was the Martin policy. When the Martin policy was

presented to Abacus for purchase, the compliance team at Abacus, as well as their legal counsel, determined that the policy was not a Florida transaction. In support of this conclusion, Abacus relied upon the following: (a) Martin's medical records were located in Ohio; (b) the name affidavit executed by Martin listed her address as being in Ravenna, Ohio; (c) while the name affidavit and other related forms were notarized in Florida, that occurred because Martin was on a trip visiting her son who lives in Florida when she signed the documents; (d) all forms utilized for the transaction were on forms approved by the Ohio Department of Insurance; (e) the viatical settlement purchase agreement listed Martin's address as Ravenna, Ohio; (f) transaction documents, including records releases and a durable power of attorney for Martin, listed her address as being in Ravenna, Ohio; (g) Martin's driver's license at the time of the transaction was issued by the State of Ohio; (h) a google search of Martin's name includes a result of her address being in Ravenna, Ohio; (i) in the transaction disbursement form, Martin requested that the proceeds from the sale of the policy be paid to her Key Bank account in Rootstown, Ohio; (j) the voided check provided by Martin along with the transaction disbursement form listed her address as being in Ravenna, Ohio; (k) the funds for the transaction were wired to a Key Bank account in Cleveland, Ohio, in accordance with the bank wiring information provided by

Martin; and (l) the policy was issued and delivered to Martin in Ohio. Abacus relied upon the aforementioned information that it was provided during the transaction to determine that Martin was a resident of Ohio and not a resident of Florida, and completed the transaction with Martin as an Ohio transaction based upon a totality of the circumstances.

53. In further support of the Abacus's determination that Ms. Martin was not a resident of Florida, the evidence showed that Ms. Martin did not provide or otherwise have a Florida driver’s license and instead provided an Ohio driver’s license; she did not have a Florida voter's registration card or vehicle tag; and, to Abacus's knowledge, had not filed a formal declaration of domicile for Florida.

54. In an attempt to show that Ms. Martin was a Florida resident at the time of the transaction, OIR relied on evidence uncovered in an expanded investigation beyond the scope of the audit of Abacus's files. While some evidence uncovered by OIR was suggestive of Florida residency, considering the evidence from Abacus’s files relied upon by Abacus in determining that Ms. Martin was a resident of Ohio, it is found that OIR failed to prove by a preponderance of the evidence that Ms. Martin was a resident of Florida at the time of the transaction.

55. In paragraph 3(a)-(d) of the Denial Letter, OIR alleges that the pre-licensure examination revealed certain

"areas of concern." These "areas of concern" were not listed as the specific grounds for denial and did not reference any statutory or regulatory violations.

56. Section 3(a) does not allege specific misconduct or violations of law or regulations, but recites that Abacus maintained a records retention policy and destroyed records in accordance therewith. In fact, OIR did not find any violations of the policy or state laws by Abacus with regard to records retention.

57. In paragraph 3(b) of the Denial Letter, OIR alleges that the presence of blank signed annuity forms in a policy file invalidated the attestation clause relative to the accuracy of the annuity application. OIR, however, did not allege any specific statutory or regulatory violations. Annuities are often times used by viatical settlement providers to offset premium costs once a policy is purchased, and there is nothing illegal or nefarious about their use.

58. In paragraph 3(c), OIR, without specificity, asserts that it found "inconsistencies between the level of control actually exhibited by the members over the Applicant and representations made to OIR regarding the same." The testimony of Scott Kirby, Sean McNealy, and Samantha Butcher (via deposition) refutes this assertion, and shows that Samantha Butcher operated the day-to-day business of Abacus.

59. Section 3(d) references an Assurance of Discontinuance that was entered into between Advanced and the New York Office of the Attorney General in 2010. While the parent company of Advanced entered into the Assurance of Discontinuance, it contained no admission of liability or wrongdoing, and from 2010 through its dissolution in December of 2014, Advanced and its principals remained licensed and in good standing with OIR and with the New York Department of Insurance as life agents and viatical settlement brokers. Abacus remains licensed and in good standing as a viatical settlement provider in New York, and no state has refused licensure to Abacus on the basis of the Assurance of Discontinuance.

60. In paragraph 4 of the Denial Letter, OIR alleges that a prior review of the history of the three owners of Abacus revealed the following: (a) Letters of Guidance were sent by the Department of Financial Services to Advanced and the principals of Advanced in 2002 regarding possible fraudulent activity that was not reported; (b) an Order to Show Cause was issued in 2007 to another viatical settlement provider that is licensed in Florida by OIR, and Advanced was mentioned; (c) a letter of guidance was issued to Advanced and its principals in 2007; and (d) the Assurance of Discontinuance was entered into in 2010 with the New York Office of the Attorney General.

61. As it pertains to the Letter of Guidance referenced in paragraphs 4(a), OIR was made aware of facts via a letter from the reporting company three months prior to the letter of guidance being issued that demonstrated that Advanced and its principals were unaware of the alleged fraudulent activity. The evidence showed that Advanced did not have the documents in their possession that revealed the alleged fraud. Nevertheless, the Department of Financial Services elected to issue the Letter of Guidance. Further, Letters of Guidance are non-probable cause actions, and do not constitute formal regulatory action.

62. The letter of guidance referenced in paragraph 4(c) was guidance from OIR to Advanced and its principals, and subsequent to both letters of guidance, Advanced and its principals remained licensed and in good standing with the state of Florida as life agents.

63. As it pertains to items 4(b) and 4(d), these matters pertain to Coventry First, LLC and not Abacus. OIR offered no evidence of misconduct by Abacus with regards to either of these issues.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See §§ 120.569, 120.57(1), Fla. Stat.

65. Petitioner bears the ultimate burden of proving its entitlement to a license. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner must prove by a preponderance of the evidence that it satisfied relevant statutory criteria to be licensed as a viatical settlement provider in Florida.

66. Chapter 626, Part X, Florida Statutes, and rules promulgated in accordance therewith, prescribe the requirements for licensure and conduct of a viatical settlement provider and the conduct of a viatical settlement broker.

67. In a licensing proceeding such as the instant case, Abacus has the burden of proof to show, by a preponderance of evidence, that it meets the requirements of the Viatical Settlement Act for licensure. See M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 761–62 (Fla. 2d DCA 2008). In turn, if OIR seeks to deny a license application on the basis of a statutory violation, OIR has the burden of proof to show by a preponderance of the evidence that the violation occurred. Id.; accord, Dep't of Child. & Fam. Servs. v. Davis Fam. Day Care Home, 160 So. 3d 854, 855 (Fla. 2015)

68. Mere suspicion or conjecture, absent proof of actual violations, will not allow OIR to meet its burden. In Comprehensive Medical Access, Inc. v. Office of Insurance Regulation, 983 So. 2d 45, 46 (Fla. 1st DCA 2008), OIR posited

that it had no obligation other than to suggest a basis for concern over petitioner's qualifications. The District Court of Appeal refuted OIR's position, stating "[t]he issue at the hearing was not whether OIR had a good faith basis for suspicion, but whether there was a competent substantial basis for denying the application." Id. In that case, OIR's ground for denial was a pending complaint in a federal civil suit that alleged fraud against the applicant's owner, and the Court expressly held that such a complaint or allegation did not rise to the level of competent substantial evidence sufficient to deny the application for licensure. Id. The Court went on to comment "OIR should not have denied [petitioner's] application without something more than a suspicion of wrongdoing or untrustworthiness." Id. at 47.

69. The licensure requirements codified in section 120.60(1) and (3), Florida Statutes, are applicable whenever an entity applies for a viatical settlement provider license under section 626, part X, Florida Statutes. Section 626.9912(3) governs the items that must be included in a viatical settlement provider application filed with OIR. Specifically, section 626.9912(3) requires an applicant to submit an application that includes:

> (a) The applicant's full name, age, residence address, and business address, and all occupations engaged in by the applicant

during the 5 years preceding the date of the application.
(b) A copy of the applicant's basic organizational documents, if any, including the articles of incorporation, articles of association, partnership agreement, trust agreement, or other similar documents, together with all amendments to such documents.
(c) Copies of all bylaws, rules, regulations, or similar documents regulating the conduct of the applicant's internal affairs.
(d) A list showing the name, business and residence addresses, and official position of each individual who is responsible for conduct of the applicant's affairs, including, but not limited to, any member of the applicant's board of directors, board of trustees, executive committee, or other governing board or committee and any other person or entity owning or having the right to acquire 10 percent or more of the voting securities of the applicant.
(e) With respect to each individual identified under paragraph (d):
1. A sworn biographical statement on forms adopted by the commission and supplied by the office.
2. A set of fingerprints on forms prescribed by the commission, certified by a law enforcement officer, and accompanied by the fingerprinting fee specified in s. 624.501.
3. Authority for release of information relating to the investigation of the individual's background.
(f) All applications, viatical settlement contract forms, escrow forms, and other related forms proposed to be used by the applicant.
(g) A general description of the method the viatical settlement provider will use in determining life expectancies, including a description of the applicant's intended receipt of life expectancies, the applicant's intended use of life expectancy

> providers, and the written plan or plans of policies and procedures used to determine life expectancies.
> (h) Such other information as the commission or office deems necessary to determine that the applicant and the individuals identified under paragraph (d) are competent and trustworthy and can lawfully and successfully act as a viatical settlement provider.

70. Considering the above requirements in view of the evidence, including the Application, exhibits, and the credibility of the witnesses, it is found that Abacus met its burden of proof and established by a preponderance of the evidence that its Application satisfied the requirements of section 626.9912.

71. Since Abacus has met its burden, OIR then had the burden to prove by a preponderance of the evidence that the grounds for denial in the Denial Letter (a) in fact occurred, and (b) violated a cited governing statute or regulation. See M.H. v. Dep't of Child. & Fam. Servs., supra.

72. With regard to the first ground for denial contained within the Denial Letter, OIR failed to meet its burden to prove by a preponderance of the evidence that Abacus knowingly purchased policies that were obtained fraudulently via either non-disclosure of material facts or misstatements of material facts in violation of section 626.99275.

73. Section 627.404, Florida Statutes, governs the determination of whether a policy was obtained fraudulently, and requires that an individual purchasing a life insurance policy must have an insurable interest in the individual insured. Specifically, section 627.404(1) provides:

> Any individual of legal capacity may procure or effect an insurance contract on his or her own life or body for the benefit of any person, but no person shall procure or cause to be procured or effect an insurance contract on the life or body of another individual unless the benefits under such contract are payable to the individual insured or his or her personal representative, or to any person having, at the time such contract was made, an insurable interest in the individual insured. The insurable interest need not exist after the inception date of coverage under the contract.

74. In Pruco Life Insurance v. Brasner, 2011 U.S. Dist. LEXIS 156297, at 21 (S.D. Fla. November 14, 2011), the District Court noted: "Florida courts have long held that insurable interest is necessary to the validity of an insurance contract and, if it is lacking, the policy is considered a wagering contract and void ab initio as against public policy." (Citations omitted). The District Court further observed:

> Florida law generally permits a life insurance policy to be assigned to an entity with no insurable interest in the life of the insured, see Fla. Stat. § 627.404(1), but only if such assignments are made 'in good faith, and not [as] sham assignments

> made simply to circumvent the law's prohibition "wagering contracts" . . . . (Citations omitted).

Id. at 22.

75. The District Court in Brasner explained that "[a] policy is procured in bad faith if it is procured with the intention that it will be assigned or otherwise transferred to a person or entity with no insurable interest in the life of the insured." Id. at 23.

76. In explaining that the opinion in Brasner is the majority view, the Eleventh Circuit Court of Appeals in Pruco Life Insurance Company v. Wells Fargo Bank, N.A., 780 F.3d 1327, 1335 (11th Cir. 2015), observed:

> In identifying the applicable standard for determining whether a policy has been procured in bad faith, the [Brasner][2/] court held that bad faith is established if the policy was obtained with the intent that it would later be assigned to an entity or person with no insurable interest in the life of the insured. Such an intent could be proven by evidence of: (1) a preexisting agreement or understanding that the policy would be assigned to one without an insurable interest; (2) the payment of premiums by someone other than the insured, and particularly by the assignee; and (3) the lack of a risk of actual future loss. The [Brasner] court's authority for this test was derived from other federal district court decisions.

77. The Eleventh Circuit also identified the minority view, which rejects the void ab initio concept of the majority view

which would allow validity challenges arising after a policy's contestability period, and postulates that, after the period of contestability has expired, a life insurance policy cannot be challenged. This view would give binding effect to the two-year incontestable provision found in section 627.455, even if is later found that a policy was procured in bad faith. Pruco Life Ins. Co. v. Wells Fargo Bank, 780 F.3d at 1333. Section 627.455 provides:

> Incontestability.—Every insurance contract shall provide that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue except for nonpayment of premiums and except, at the option of the insurer, as to provisions relative to benefits in event of disability and as to provisions which grant additional insurance specifically against death by accident or accidental means.

78. The issue of whether the majority view or minority view will prevail is now before the Florida Supreme Court by way of certified questions posited by the Eleventh Circuit in the Wells Fargo Bank case. See Florida Supreme Court docket number SC15-382.

79. Regardless of the outcome of whether the majority view or minority view should prevail, it is concluded that the factors identified as indicia of bad faith in Brasner court and the Eleventh Circuit in Wells Fargo Bank are useful in analyzing the six policies allegedly procured by fraud. Considering those

factors in light of the evidence and testimony adduced at the final hearing reveals that (a) a pre-existing agreement to assign any of the six referenced policies to someone without an insurable interest did not exist, (b) the premiums in each policy identified by OIR were initially paid by the insured prior to valid placement of premium financing, and (c) each loan arrangement carried the risk of real, actual loss to the insured/debtor.

80. Moreover, the evidence submitted by OIR was insufficient to establish that Abacus entered into the subject transactions knowing that the policies were obtained by presenting materially false information as is required under section 626.99275. In its preliminary determination, OIR applied the incorrect legal standard to this ground for denial by basing its allegations on a "knew or should have known" standard as opposed to the statutorily required "knowingly" standard as is stated in section 626.99275. Further, OIR failed to meet its burden at the final hearing to prove by a preponderance of the evidence that Abacus violated any governing law or regulation. See M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d at 761-62; see also Comp. Med. Access, Inc. v. Off. of Ins. Reg., 983 So. 2d at 47 (OIR should not have denied application without something more than a suspicion of wrongdoing or untrustworthiness).

81. With regard to the second ground for denial, OIR failed to meet its burden to prove by a preponderance of the evidence that Abacus viaticated policies from Florida viators without being licensed as a viatical settlement provider in Florida in violation of sections 626.9911 and 626.9912.

82. Section 626.9911(12) states that:

> "Viatical settlement provider" means a person who, in this state, from this state, or with a resident of this state, effectuates a viatical settlement contract. Fla. Stat 626.9912(1). A person may not perform the functions of a viatical settlement provider as defined in this act or enter into or solicit a viatical settlement contract without first having obtained a license from OIR.

83. Section 626.9912(4) provides that:

> OIR may not issue a license to an entity other than a natural person if it is not satisfied that all officers, directors, employees, stockholders, partners, and any other persons who exercise or have the ability to exercise effective control of the entity or who have the ability to influence the transaction of business by the entity meet the standards of this act and have not violated any provision of this act or rules of the commission related to the business of viatical settlement contracts.

84. Section 626.99245 states that:

> (1) A viatical settlement provider who from this state enters into a viatical settlement contract with a viator who is a resident of another state that has enacted statutes or adopted regulations governing viatical settlement contracts shall be governed in the effectuation of that viatical settlement

> contract by the statutes and regulations of the viator's state of residence. If the state in which the viator is a resident has not enacted statutes or regulations governing viatical settlement agreements, the provider shall give the viator notice that neither Florida nor his or her state regulates the transaction upon which he or she is entering. For transactions in those states, however, the viatical settlement provider is to maintain all records required as if the transactions were executed in Florida. The forms used in those states need not be approved by OIR.
> (2) This section does not affect the requirement of ss. 626.9911(12) and 626.9912(1) that a viatical settlement provider doing business from this state must obtain a viatical settlement license from OIR. As used in this subsection, the term "doing business from this state" includes effectuating viatical settlement contracts from offices in this state, regardless of the state of residence of the viator.

85. Section 196.015, Florida Statutes, provides some additional guidance with regard to standards applicable to the determination of a person's residency in the state of Florida. As previously noted, Ms. Davis did not reference or utilize this section in her review of the two policies at issue. Section 196.015 states as follows:

> Intention to establish a permanent residence in this state is a factual determination to be made . . . although any one factor is not conclusive of the establishment or nonestablishment of permanent resident, the following are relevant factors that may be considered . . . in the determination as to the intent of a person a homestead exemption to establish permanent residence in this state:

> (1) A formal declaration of domicile by the applicant recorded in the public records of the county in which the exemption is being sought.
> (2) Evidence of the location where the applicant's dependent children are registered for school.
> (3) The place of employment of the applicant.
> (4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.
> (5) Proof of voter registration in this state with the voter information card address of the applicant, or other official correspondence from the supervisor of elections providing proof of voter registration, matching the address of the physical location where the exemption is being sought.
> (6) A valid Florida driver license issued under s. 322.18 or a valid Florida identification card issued under s. 322.051 and evidence of relinquishment of driver licenses from any other states.
> (7) Issuance of a Florida license tag on any motor vehicle owned by the applicant.
> (8) The address as listed on federal income tax returns filed by the applicant.
> (9) The location where the applicant's bank statements and checking accounts are registered.
> (10) Proof of payment for utilities at the property for which permanent residency is being claimed.

86. The Florida Viatical Settlements Act (including section 626.9912) only applies to viatical transactions with residents of the state of Florida under section 626.99245(2). Am. United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1058 (11th Cir. 2007).

87. OIR failed to prove by a preponderance of the evidence that either Wyatt or Martin were residents of the state of Florida when they entered into a viatical settlement transaction with Abacus. Therefore, OIR may not rely on section 626.9912(4) to deny the Application. Further, without such proof, it is also concluded that, in accordance with section 626.99245(1), the viatical settlement statutes of Illinois govern the Wyattt transaction, and the viatical settlement statutes of Ohio govern the Martin transaction, and that OIR failed to prove the violations alleged in its second ground for denial in the Denial Letter.

88. As it pertains to the "areas of concern" denoted in sections 3 and 4 of the Denial Letter, OIR failed to meet its burden to prove by a preponderance of the evidence that the alleged conduct or actions either occurred or violated a governing law or statute. See M.H. v. Dep't of Child. & Fam. Servs., supra. In Comprehensive Medical Access, Inc., the First District Court of Appeal squarely addressed OIR's attempt to use similar conclusory concerns over the applicant's qualifications and history and a pending civil complaint alleging fraud against the applicant's owner. Id. In ruling that OIR's denial was improper, the First District expressly held that a fraud complaint or allegations regarding the applicant's qualifications did not rise to the level of evidence that was sufficient to

deny the application for licensure. Id. Similarly, here, it is concluded that OIR has failed to meet its burden to prove allegations 3 and 4 of the Denial Letter.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that, consistent with the foregoing Findings of Fact and Conclusions of Law, the Office of Insurance Regulation enter a final order approving the Application and granting Abacus Settlements, LLC, a viatical settlement provider's license under section 626.9912. Jurisdiction to adjudicate Abacus Settlements, LLC's, pending Motion for Attorney's Fees pursuant to section 57.015, Florida Statutes, is hereby retained.

DONE AND ENTERED this 25th day of July, 2016, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2016.

ENDNOTES

[1/] All references to the Florida Statutes are to the current versions because the law for determining applications is the statute in effect at the time of final determination, as opposed to the time of application. See Lavernia v. Dep't of Prof'l Reg., Bd. of Med., 616 So. 2d 53 (Fla. 1st DCA 1993).

[2/] In its opinion, the Eleventh Circuit refers to the Brasner court as the "Berger court" because the case involved a policy issued on the life of Arlene Berger. Pruco Life Ins. Co. v. Wells Fargo Bank, N.A., 780 F.3d at 1332.

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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.