BEFORE THE DEPARTMENT OF INSURANCE,
FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION
STATE OF MISSOURI

In Re:	)	
	)	
JAMES C. MCCAIN, JR., and	)	**Case No. 10-0407429C**
UNDERWRITERS SERVICE	)	
AGENCY.	)	

INTERIM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Director John M. Huff ("Director") of the Department of Insurance, Financial Institutions and Professional Registration ("Department"), after a hearing, having read the full record, including all the evidence, hereby makes the following interim findings of fact, conclusions of law and order.

I. FINDINGS OF FACT

A. Procedural History

1. On May 27, 2010, the Division of Consumer Affairs ("Division") of the Department filed a Verified Statement of Charges with the Director of the Department, alleging violations of Missouri's insurance laws by James C. McCain, Jr., Underwriters Service Agency, Missouri Automobile Insurance Underwriters Agency, and Carol Herget.

2. Also on May 27, 2010, the Director issued a Summary Cease and Desist Order and an Order to Show Cause against Respondents James C. McCain, Jr., Underwriters Service Agency, Missouri Automobile Insurance Underwriters Agency, and Carol Herget.

3. The Director appointed Kevin Jones as Hearing Officer for this matter.

4. The Division served the Verified Statement of Charges, Summary Cease and Desist Order, and the Order to Show Cause upon Respondents James C. McCain, Jr., Underwriters Service Agency, Missouri Automobile Insurance Underwriters Agency, and Carol Herget by certified mail and by UPS Ground delivery.

5. The Order to Show Cause set this matter for hearing on September 1, 2010.

6. On August 31, 2010, upon motion for continuance filed by the Division on August 23, 2010, the Hearing Officer reset this matter for hearing on November 17, 2010.

7. None of the Respondents filed an answer or any responsive pleading to the Verified Statement of Charges. *See Record of this matter generally.*

8. On October 4, 2010, the Director issued a Consent Order agreed to by the Division and Carol Herget, resolving all issues between such parties in this action. The Division dismissed without prejudice its claims for relief against Herget on October 13, 2010.

9. At the hearing on November 17, 2010, Mary S. Erickson, Chief Counsel, Insurance Divisions, appeared on behalf of the Division and Respondent James C. McCain, Jr., appeared on his own behalf and on behalf of the fictitious names through which he conducts business, Underwriters Service Agency and Missouri Automobile Insurance Underwriters Agency. *November 17, 2010 Hearing Transcript 15.* No attorneys appeared on behalf of any Respondents. The parties made opening statements, presented their evidence, and offered closing arguments. *See generally November 17, 2010, Hearing Transcript ("Tr.").*

10. At the hearing, the parties stipulated to the admission of all exhibits offered by the Division and McCain. The hearing officer admitted all exhibits offered by the parties. *Tr. 31.*

11. The Division introduced into evidence Requests for Admissions which it served upon Respondent McCain. *Ex. 5, Certificate of Service for First, Second, and Third Requests for Admissions to McCain; Ex. 6, First Request for Admissions to McCain; Ex. 7, Second Request for Admissions to McCain; and Ex. 8, Third Request for Admissions to McCain.* McCain admitted that he failed to respond to the Requests for Admissions. *Tr. 33:10-12.* After Exhibits 5 through 8 were introduced into evidence (*Tr. 31*), the Division requested that the matters in the Requests for Admissions be deemed admitted pursuant to Mo.S.Ct.R. 59.01. The Hearing Officer admitted the Requests for Admissions into the record as evidence, overruling McCain's objection. *Tr. 38:3-12.*

12. During the hearing, the Division moved for amendment by interlineation of the Verified Statement of Charges to correct the type of insurance at issue in the action; the Division asked to replace the word "homeowners" with "dwelling fire." McCain had no objection and agreed they are dwelling and fire policies. The Hearing Officer granted the motion. *Tr. 16-17.*

13. At the beginning of the hearing, the Division filed its Amended Notice of Dismissal of Respondent Carol Herget dismissing her from the action with prejudice. The Hearing Officer dismissed Herget with prejudice. *Tr. 12.* At the end of the hearing, the Division filed its Notice of Dismissal of Respondent Missouri Automobile Insurance Underwriters Agency without prejudice, which the Hearing Officer granted. *Tr. 159.*

14. At the hearing, the Division renewed its request for a bifurcated procedure in which an interim order would first be issued regarding whether or not the cease and desist order against respondent should be continued. Thereafter, if the cease and desist order is continued, the parties will be given an opportunity to submit additional evidence, arguments and Final Proposed Findings of Fact, Conclusions of Law and Order regarding the relief requested by the Division. An order to this effect was subsequently issued by the Hearing Officer on December 9, 2010. *Tr. 16, 159-161.* While this Order contained some date-related typographical errors, the parties apparently understood the Order's intent as neither filed an objection or motion to modify the Order.

B. Findings of Fact Regarding the Parties and General Facts Relevant to All Counts

15. The duties of the Director, pursuant to Chapters 374 and 375, RSMo, include the supervision, regulation, and discipline of insurance producers and business entity insurance producers licensed to operate and to do business in the state of Missouri. *See generally Chapters 374 and 375, RSMo; Ex. 6, ¶s 1 &2.*

16. The Department originally issued Respondent James C. McCain an insurance producer license (No. 0287172) on June 4, 1981, which has subsequently been renewed through the years and is currently active. *Tr. 41; Ex. 1, Licensing Records Affidavit for James C. McCain, Jr.*

17. The Department issued Respondent Underwriters Service Agency a business entity producer license (No. 088083) on November 1. 1988, which has subsequently been renewed through the years. *Tr. 41-42.* The Director refused to renew the business entity producer license of Underwriters Service Agency on October 28, 2010. *Id.; Ex. 2, Affidavit of Licensure for Underwriters Service Agency; Exhibit 4, Certified Copy of Refusal to Renew Business Entity Producer License.*

18. The Department issued Respondent Missouri Automobile Insurance Underwriters Agency a business entity producer license (No. 05928) on August 20, 1986, which was subsequently renewed through the years and remained active until August 20, 2010, when the license was not timely renewed and expired. *Tr. 42-43; Ex. 3, Affidavit of Licensure for Missouri Auto Insurance Underwriters Agency.*

19. Respondent Underwriters Service Agency is a registered fictitious name with the Missouri Secretary of State. *Tr. 43-45; Ex. 70, Certified Corporate Records for Underwriters Service Agency.* Missouri Automobile Insurance Underwriters Agency is also a registered fictitious name with the Missouri Secretary of State. *Tr. 43-45; Exhibit 71, Certified Corporate Records for Missouri Automobile Insurance Underwriters Agency.* McCain does business as an insurance producer under both of these fictitious names. *Tr. 43-45.*

20. The Department issued Carol Herget an insurance producer license on June 26, 2009. The Director revoked her license pursuant to the October 4, 2010 Consent Order. *Consent Order (part of the Record in this matter).*

21. Herget is a former employee of McCain's agency, Underwriters Service Agency. *Tr. 45.*

22. Missouri consumers purchased dwelling fire insurance from the Missouri Basic Property Insurance Inspection and Placement Program, which is also known as the Missouri Property Insurance Placement Facility or the Missouri FAIR Plan ("Missouri FAIR Plan" or "FAIR Plan") through Respondents McCain and Underwriters Service Agency (hereafter, "Respondents"). *Ex. 65, p. 20-21; see generally the Hearing Transcript.*

23. At the hearing, Victoria Byington, Operations Manager, Missouri FAIR Plan, testified on behalf of the Division. *Tr. 86 - 128.* She is also the custodian of records for the Missouri FAIR Plan. *Id.* at 87. Byington has been with Missouri FAIR Plan for 32 years. *Id. at 109.*

24. In anticipation of her testimony, Byington prepared affidavits and business records affidavits regarding consumers who purchased Missouri FAIR Plan policies through Respondents. *Id.* at 97; *see generally Exs. 10 – 63.*

25. The Missouri FAIR Plan is an insurance pool created by statute. All the companies that write property insurance in Missouri are required to participate in the FAIR Plan. Those insurers provide the FAIR Plan with funds through assessments based on their written premiums. *Id. at 87-88; see also Sections 379.810 and 379.835 RSMo 2000 and Sections 379.815 and 379.825 RSMo (Supp. 2009).*

26. The FAIR Plan is for those consumers who, through no fault of their own, have problems obtaining insurance on the standard market. *Tr. 88; see also Section 379.810.* Consumers insured by the Missouri FAIR Plan "are very limited by their means. Most of them live paycheck to paycheck . . . . It's a struggle for them just to pay their insurance." *Tr. 109.*

27. The Missouri FAIR Plan's policies are limited in the type of insurance provided. The policies include insurance for fire, extended coverage, and vandalism, but do not provide liability insurance. *Id. at 109 – 110; Section 379.815(2).*

28. The Missouri FAIR Plan is located at 906 Olive, Suite 1000, St. Louis, Missouri 63101. *Tr. 86.*

29. The Missouri FAIR Plan does not enter into agency contracts with insurance producers or business entity insurance producers. *Tr. 88; 93.* Producers do not represent the Missouri FAIR Plan; "they are the consumers' producer." *Id. at 88.*

30. Respondents were not authorized to accept payments for dwelling fire insurance for the Missouri FAIR Plan. *Id. at 92-93.*

31. The Missouri FAIR Plan has never had a situation, besides the present matter, where a producer deposited a check or checks made payable to the FAIR Plan in the producer's own account. *Id. at 93.*

32. The Missouri FAIR Plan provides two methods for the payment of premium. If an insured's premium is paid by a mortgagee out of an escrow account, the FAIR Plan requires the annual premium to be paid at one time. If an insured is making the payment directly, however, the FAIR Plan will allow the insured to utilize an installment payment plan. *Tr. 90 – 91; Ex. 72.*

33. The Missouri FAIR Plan charged $3 for each installment (allowing up to three installments per policy period) prior to January 1, 2010, and after that time, charged $5 per installment. If the account is escrowed, the charge comes out of the insured's escrow account and the mortgage company charges the insured back for any premiums they submitted. *Tr. 95.*

34. Missouri FAIR Plan writes one-year term policies. If at the end of the year the FAIR Plan has not received the premium for the succeeding policy year, the coverage lapses. *Tr. 96.* Cancellations occur when there is a policy in effect that terminates during the policy period by actions of either the consumer or the FAIR Plan. If there is a missed installment premium payment, and the premium is not paid by the date set in the notice of cancellation, the policy is cancelled for nonpayment of premium. *Id. at 96-97.*

35. "If an insured has a fire during a period when there's no coverage [due to lapse or cancellation], they could lose everything" and it would be catastrophic. *Tr. 109 – 110 (testimony of Victoria Byington, Missouri FAIR Plan).*

36. On March 23, 2010, Carol Herget, testified under oath at a subpoena conference held at the offices of the Department in Jefferson City. *See generally Ex. 69, Subpoena Conference Transcript of Herget.*

37. On April 8, 2010, Respondent McCain testified under oath at a subpoena conference held at the offices of the Department in Jefferson City. *See generally Ex. 65, Subpoena Conference Transcript of McCain.*

38. At the beginning of his testimony at the hearing on November 17, 2010, McCain testified: "I see presented before me the evidence of things that took place and I realize certain things are wrong. I'm not going to say anything against what you're presenting in front of me." *Tr. 136:1-5.*

C. Findings of Fact Regarding the Violations Charged in Counts I and V

39. Respondent McCain and Underwriters Service Agency failed to remit the full premium payments received from the following consumers, or from others on the consumers' behalf, to the Missouri FAIR Plan within 30 days after the date of receipt:

(1) Michelle and Joyce Anderson; *Tr. 98-103; Ex. 7, ¶ 1; Ex. 10; Ex. 65, pp. 62-80 and Ex. 4 attached to Ex. 65*
(2) Angela Bonnett; *Ex. 7, ¶ 2; Ex. 12*
(3) Kathy Botonis; *Ex. 7, ¶ 3; Ex. 14*
(4) Ali Burhan; *Tr. 104-107; Ex. 7, ¶ 4; Ex. 16; Ex. 65, pp. 29-30 and Ex. 1 attached to Ex. 65*
(5) Deborah Cothrine; *Ex. 7, ¶ 5; Ex. 18*
(6) Lena Elijah; *Ex. 7, ¶ 6; Ex. 20*
(7) Bruce Givens; *Ex. 7, ¶ 7; Ex. 22*
(8) Roger Harris; *Ex. 7,¶ 8; Ex. 24*
(9) Byron Hayes; *Ex. 7, ¶ 9; Ex. 26*

(10) Jamil Hoffman; *Ex. 7, ¶ 10; Ex. 28; Ex. 65, p. 54 62 and Ex. 3 attached to Ex. 65*
(11) Angela Howard; *Ex. 7, ¶ 11; Ex. 30; Ex. 65, pp. 86-87, 96-98 and Ex. 6 attached to Ex. 65*
(12) Keisha Hudson; *Ex. 7, ¶ 12; Ex. 32*
(13) Hunni Hughes; *Ex. 7, ¶ 13; Ex. 34*
(14) Curtis Hurd; *Ex. 7, ¶ 14; Ex. 36*
(15) Sandra Jackson; *Tr. 107-111; Ex. 7, ¶ 15; Ex. 38; Ex. 65, p. 40 46 and Ex. 2 attached to Ex. 65*
(16) Arnette Johnson; *Tr. 111-114; Ex. 7, ¶ 16; Ex. 42*
(17) Clifton and Cena Kinnie; *Ex. 7, ¶ 17; Ex. 46*
(18) Johnny Mitchell; *Ex. 7, ¶ 18; Ex. 48; Ex. 65, pp. 99-103 and Ex. 7 attached to Ex. 65*
(19) Tracey Robbins; *Ex. 7, ¶ 19; Ex. 50*
(20) Shatanya Rodgers; *Ex. 7, ¶ 20; Ex. 52*
(21) Tommy Valiant; *Ex. 7, ¶ 21; Ex. 54; Ex. 65, p. 107-108 and Ex. 10 attached to Ex. 65*
(22) Tyree Washington; *Ex. 7, ¶ 22; Ex. 56*
(23) Minnie Williams; *Exs. 58 & 60 (two occasions)*

40. On April 8, 2010, Respondent McCain admitted to the Department that Respondents accepted premium payments from consumers, or from others on their behalf, and failed to remit the full premium to the Missouri FAIR Plan within thirty days after the date of receipt. *Ex. 65, pp. 162-163; 183:22-24.* This admission was also made as a result of Respondent's failure to respond to Petitioner's First Request for Admissions. *Ex. 6, ¶ 15.*

41. On April 8, 2010, McCain admitted that he did not have written agreements with the consumers that allowed Respondents to keep the premium instead of forwarding it to the FAIR Plan. *Ex. 65, pp. 53-54.*

42. On April 8, 2010, McCain admitted that he understands that a regulation, 20 CSR 700-1.140, prohibits collecting the full premium, holding the balance, and paying the remainder upon receipt of invoice. *Ex. 65, p. 35.*

D. Findings of Fact Regarding the Violations Charged in Count II

43. Respondents failed to maintain adequate account levels in their bank accounts to cover premiums due for consumers Michelle and Joyce Andersons' dwelling fire insurance. The check to cover premiums for the Andersons was returned due to insufficient funds. As a result of Respondents' failure to maintain adequate account levels, Michelle and Joyce Andersons' policy was cancelled. *Tr. 98 - 103; Ex. 7, ¶ 23; Ex. 10; Ex. 65, pp. 62 – 63 and Ex. 4 attached to Ex. 65.*

E. Findings of Fact Regarding the Violations Charged in Count III

44. Respondents charged an additional fee for services for the following consumers without a written agreement specifying or clearly defining the amount of compensation actually collected:

(1) Michelle and Joyce Anderson; *Ex. 65, pp. 126-28 and Ex. 4 attached to Ex. 65* (no Agreement to collect fee in 2009)
(2) Djulan Harris; *Ex. 65, pp. 135 – 37 and Exs. 8 and I attached to Ex. 65* (agreement says $0.00 fee, but Respondents collected fee)
(3) Keisha Hudson; *Ex. 66, p. 4* (document in file not signed by insured)
(4) Alashantez Johnson; *Ex. 66, p. 33-38* (no insurance coverage listed and no signatures)
(5) Tracey Robbins; *Ex. 66, p. 11* (the policy number and insured listed are not the same as the policy number and insured for which the fee was collected)
(6) Tyree Washington; *Ex. 7, ¶ 28; Ex. 66, p. 25* (no maximum premium or amount of fee listed)

45. Based on his testimony on April 8, 2010, McCain clearly understood that producer service agreements (f/k/a broker service agreements) with his clients are necessary in order to charge a fee. *See Ex. 65, pp. 31-33.*

F. Findings of Fact Regarding the Violations Charged in Count IV

46. Respondents changed consumers' dwelling fire policies from an annual payment to installment payments without the following consumers' consent and consumers were charged an additional fee for the installment payments from the Missouri FAIR Plan: (*see generally Tr. 95 – 96; Ex. 7, ¶ 30*)

(1) Michelle and Joyce Anderson; *Tr. 98 – 103; Ex. 7, ¶ 31; Ex. 10; Ex. 65, pp. 77-80 and Ex. 4 attached to Ex. 65*
(2) Angela Bonnett; *Ex. 7, ¶ 32; Ex. 12*
(3) Kathy Botonis; *Ex. 7, ¶ 33; Ex. 14*
(4) Ali Burhan; *Tr. 103-107; Ex. 7, ¶ 34; Ex. 16*
(5) Deborah Cothrine; *Ex. 7, ¶ 35; Ex. 18*
(6) Lena Elijah; *Ex. 7, ¶ 36; Ex. 20; Ex. 66, pp. 55-60*
(7) Bruce Givens; *Ex. 7, ¶ 37; Ex. 22*
(8) Roger Harris; *Ex. 7, ¶ 38; Ex. 24*
(9) Byron Hayes; *Ex. 7, ¶ 39; Ex. 26*
(10) Jamil Hoffman; *Ex.7, ¶ 40; Ex. 28*
(11) Angela Howard; *Ex. 7, ¶ 41; Ex. 30*
(12) Hunni Hughes; *Ex. 7, ¶ 42; Ex. 34*
(13) Curtis Hurd; *Ex. 7, ¶ 43, Ex. 36*
(14) Sandra Jackson; *Tr. 107-111; Ex. 7, ¶ 44; Ex. 38*
(15) Arnette Johnson; *Tr. 111-114; Ex. 7, ¶ 45; Ex. 42*

(16) Johnny Mitchell; *Ex. 7, ¶ 46; Ex. 48*
(17) Tracey Robbins; *Ex. 7, ¶ 47; Ex. 50*
(18) Tommy Valiant; *Ex. 7, ¶ 48; Ex. 54*
(19) Minnie Williams; *Ex. 7, ¶ 49; Ex. 58*

47. As evidence that Respondents changed consumers' premium payments from annual to installments, the Division highlighted the example of consumers Michelle and Joyce Anderson. Respondents received and deposited into their account the full premium payment from the Andersons' mortgage company. After Respondents' check for the full premium amount to the FAIR Plan bounced because of insufficient funds, Respondents changed the payments to installments. *Tr. 98 – 103; Ex. 7, ¶ 31; Ex. 10; Ex. 65, pp. 78-80 and Ex. 4 attached to Ex. 65.*

G. Findings of Fact Regarding the Violations Charged in Count VI

48. In regard to the following consumers, Respondents misrepresented the premium amount to mortgage companies by including Respondents' service fee in the premium amount and deposited the checks received from the mortgage companies, which included the premium and Respondents' fee, in the Respondent's business bank accounts:

(1) Michelle and Joyce Anderson; *Ex. 65, pp. 75; Ex. 4 attached to Ex. 65*
(2) Angela Bonnett; *Ex. 7, ¶ 51; Ex. 12*
(3) Ali Burhan; *Ex. 7, ¶53; Ex. 16; Ex. 65, p. 30 and Ex. 1 attached to Ex. 65*
(4) Deborah Cothrine; *Ex. 7, ¶ 54; Ex. 18*
(5) Lena Elijah; *Ex. 7, ¶ 55; Ex. 20*
(6) Bruce Givens; *Ex. 7, ¶ 56; Ex. 22*
(7) Roger Harris; *Ex. 7,¶ 57; Ex. 24; Ex. 65, p. 104 and Ex. 8 attached to Ex. 65*
(8) Byron Hayes; *Ex. 7, ¶ 58; Ex. 26*
(9) Angela Howard; *Ex. 7, ¶ 59; Ex. 30; Ex. 65, p. 90 and Ex. 6 attached to Ex. 65*
(10) Keisha Hudson; *Ex. 32; Ex. 66, pp. 1, 4, and 16*
(11) Hunni Hughes; *Ex. 7, ¶ 60, Ex. 34; Ex. 66, pp. 17-19*
(12) Alashantez Johnson; *Ex. 7, ¶ 63; Ex. 40; Ex. 66, p. 34, 37*
(13) Arnette Johnson; *Ex. 7, ¶ 64; Ex. 42*
(14) Clifton and Cena Kinnie; *Ex. 7, ¶ 65; Ex. 46*
(15) Johnny Mitchell; *Ex. 7, ¶ 66; Ex. 48; Ex. 65, p. 103 and Ex. 7 attached to Ex. 65*
(16) Tracey Robbins; *Ex. 7, ¶ 67; Ex. 50*
(17) Tommy Valiant; *Ex. 7, ¶ 69; Ex. 54; Ex. 65, p. 108 and Ex. 10 attached to Ex. 65*
(18) Tyree Washington; *Ex. 7, ¶ 70; Ex. 56*
(19) Minnie Williams; *Ex. 7, ¶ 71; Exs. 58 & 60 (two occasions)*
(20) Sheridan Yoder; *Ex. 62; Ex. 65, p. 106 and Ex. 9 attached to Ex. 65*

49. Respondents specifically requested that the mortgage company send the checks directly to Respondents rather than the FAIR Plan. *Tr. 54 – 55.*

50. When Respondents contacted the mortgage companies, McCain testified that "[w]e said broker's service, processing is all -- is included in the premium." *Ex. 65, p. 86:6-11.*

H. Findings of Fact Regarding the Violations Charged in Count VII and VIII

51. Respondents deposited premium checks made payable to the Missouri FAIR Plan into its business bank accounts (at Regions Bank and/or Southwest Bank, *Tr. 51*) without authorization from the Missouri FAIR Plan. *Tr. 54.* The checks represented premium payments for dwelling fire policies for the following consumers (with more than one check deposited for some consumers):

(1) Michelle and Joyce Anderson; *Ex. 7, ¶ 72; Ex. 10; Ex. 65, pp. 75-78 and Ex. 4 attached to Ex. 65*
(2) Angela Bonnett; *Ex. 7, ¶ 72; Ex. 12; Ex. 66, pp. 26-29*
(3) Kathy Botonis; *Ex. 7, ¶ 72; Ex. 14; Ex. 66, p. 31*
(4) Ali Burhan; *Ex. 7, ¶ 72; Ex. 16; Ex. 65, pp. 29-30 and Ex. 1 attached to Ex. 65*
(5) Deborah Cothrine; *Ex. 7, ¶ 72; Ex. 18; Ex. 66, p. 40-42*
(6) Lena Elijah; *Ex. 20; Ex. 66, pp. 56-60*
(7) Bruce Givens; *Ex. 7, ¶ 72; Ex. 22; Ex. 66, p. 78*
(8) Roger Harris; *Ex. 7, ¶ 72; Ex. 24; Ex. 66, p. 21*
(9) Byron Hayes; *Ex. 7, ¶ 72; Ex. 26; Ex. 66, p. 67*
(10) Jamil Hoffman; *Ex. 7, ¶ 72; Ex. 28; Ex. 65, p. 55 and Ex. 3 attached to Ex. 65*
(11) Angela Howard; *Ex. 7, ¶ 72; Ex. 30; Ex. 65, pp. 86-88, 96-98 and Ex. 6 attached to Ex. 65*
(12) Keisha Hudson; *Ex. 7, ¶ 72; Ex. 32; Ex. 66, p. 1, 16*
(13) Hunni Hughes; *Ex. 7, ¶ 72; Ex. 34; Ex. 66, p. 19*
(14) Curtis Hurd; *Ex. 7, ¶ 72; Ex. 36*
(15) Sandra Jackson; *Ex. 7, ¶ 72; Ex. 38; Ex. 65, p. 42 and Ex. 2 attached to Ex. 65*
(16) Alashantez Johnson; *Ex. 7, ¶ 72; Ex. 40; Ex. 66, p. 34-35*
(17) Arnette Johnson; *Ex. 42; Ex. 66, p. 62*
(18) Clifton and Cena Kinnie; *Ex. 7, ¶ 72; Ex. 46; Ex. 66, p. 51*
(19) Johnny Mitchell; *Ex. 7, ¶ 72; Ex. 48; Ex. 65, pp. 100-102 and Ex. 7 attached to Ex. 65*
(20) Tracey Robbins; *Ex. 7, ¶ 72; Ex. 50; Ex. 66, p. 9-10*
(21) Shatanya Rodgers; *Ex. 7, ¶ 72; Ex. 52; Ex. 66, p. 14*
(22) Tommy Valiant; *Ex. 7, ¶ 72; Ex. 54; Ex. 65, p. 108 and Ex. 10 attached to Ex. 65*
(23) Tyree Washington; *Ex. 7, ¶ 72; Ex. 56; Ex. 66, p. 23*
(24) Minnie Williams; *Ex. 7, ¶ 72; Exs. 58 & 60; Ex. 66, p. 7 (two occasions)*
(25) Sheridan Yoder; *Ex. 62; Ex. 65, p. 106 and Ex. 9 attached to Ex. 65*

52. Respondents used the consumers' premiums that had been deposited in Respondents' business accounts for operating expenses and other consumers' premiums instead of remitting those payments to the Missouri FAIR Plan. *Ex. 65, pp. 35-36, 163, 183; Ex. 69, p. 72-73.*

53. On March 23, 2010, Carol Herget admitted to the Department that consumer premium funds for dwelling fire insurance were being used to operate Respondents' business. *Ex. 69,* pp. 72-73.

54. On April 8, 2010, Respondent McCain admitted to using consumers' premium to pay Respondents' operating expenses and other consumers' premiums. *Ex. 65, pp. 35-36, 163, 183.* This admission was also made as a result of Respondent's failure to respond to Petitioner's First Request for Admissions. *Ex. 6, ¶ 14.*

I. Findings of Fact Regarding Consumer Harm

55. Respondents failed to remit the dwelling fire insurance premium payments received from consumers, or from others on consumers' behalf, to the Missouri FAIR Plan in a timely manner, which resulted in the lapse or cancellation of the following consumers' dwelling fire policies:

(1) Michelle and Joyce Anderson (26 day cancellation); *Tr. 98-103; Ex. 10; Ex. 73*
(2) Angela Bonnett (12 day lapse); *Ex. 12*
(3) Ali Burhan (3 day lapse); *Tr. 104-107; Ex. 16; Ex. 65, p. 39:21-p. 40:22; see also Ex. 1 attached to Ex. 65*
(4) Kathy Botonis (3 day lapse); *Ex. 14*
(5) Keisha Hudson (20 day lapse); *Ex. 32*
(6) Sandra Jackson (7 day lapse); *Tr. 108-111; Ex. 38; Ex. 65, p. 40:23-p. 46:19; see also Ex. 2 attached to Ex. 65*
(7) Johnny Mitchell (5 day lapse); *Ex. 48*
(8) Tracey Robbins (1 day lapse); *Ex. 50*
(9) Minnie Williams (13 day lapse); *Ex. 58*

56. Even though Respondents had received the full premium amount from the mortgage company for Arnette Johnson, Respondents only made an initial down payment. When the next payment was due, even though Respondents had been paid the full premium, the mortgage company made another payment from the insured's escrow account to protect the consumer and avoid the cancellation. *Tr. 111-114; Ex. 42; Ex. 74.* Because the money was charged to the consumer's escrow account, the consumer is ultimately responsible for the charge. *Tr. 95-96.* As a result of Respondents' failure to forward the entire premium, consumer Johnson paid twice for a portion of the premium for his dwelling fire insurance.

57. On April 8, 2010, Respondent McCain admitted to the Department that Respondents' failure to remit premiums paid by consumers, or by others on their behalf, has resulted and may in the future result in failure to obtain or continue insurance coverage on behalf

of an insured or prospective insured. *Ex. 65, p. 54; 150; 154-157.* This admission was also made as a result of Respondent's failure to respond to Petitioner's First Request for Admissions. *Ex. 6, ¶ 16.*

II. CONCLUSIONS OF LAW

A. Jurisdiction, Authority to Issue Cease and Desist and Other Orders, and Relevant Missouri Insurance Laws

58. The jurisdiction of the Director to initiate and administer this proceeding is found in Section 374.046, which provides, in part:

> 1. If the director determines based upon substantial and competent evidence that a person has engaged, is engaging in or has taken a substantial step toward engaging in an act, practice, omission, or course of business constituting a violation of the laws of this state relating to insurance in this chapter, chapter 354, and chapters 375 to 385, or a rule adopted or order issued pursuant thereto or that a person has materially aided or is materially aiding an act, practice, omission, or course of business constituting a violation of the laws of this state relating to insurance in this chapter, chapter 354, and chapters 375 to 385, or a rule adopted or order issued pursuant thereto, the director may order the following relief:
>
> (1) An order directing the person to cease and desist from engaging in the act, practice, omission, or course of business;
>
> (2) A curative order or order directing the person to take other action necessary or appropriate to comply with the insurance laws of this state;
>
> (3) Order a civil penalty or forfeiture as provided in section 374.049; and
>
> (4) Award reasonable costs of the investigation.
>
> * * *
>
> 6. If a hearing is requested or ordered pursuant to subsection 3 or subsection 5 of this section, a hearing before the director or a hearing officer designated by the director must be provided. A final order may not be issued unless the director makes findings of fact and conclusions of law in a record in accordance with the provisions of chapter 536 and procedural rules promulgated by the director. The final order may make final, vacate, or modify the order issued under subsection 5 of this section.
>
> 7. In a final order under subsection 6 of this section, the director may impose a civil penalty or forfeiture as provided in section 374.049. No civil penalty or forfeiture may be imposed against a person unless the person has engaged in the act, practice, omission, or course of business constituting the violation.

8. In a final order under subsection 6 of this section, the director may charge the actual cost of an investigation or proceeding for a violation of the insurance laws of this state or a rule adopted or order issued pursuant thereto. These funds shall be paid to the director to the credit of the insurance dedicated fund.

59. Section 375.145.1 states, in relevant part:

If the director determines that a person has engaged, is engaging in, or has taken a substantial step toward engaging in an act, practice or course of business constituting a violation of sections 375.012 to 375.144 or a rule adopted or order issued pursuant thereto, or that a person has materially aided or is materially aiding an act, practice, omission, or course of business constituting a violation of sections 375.012 to 375.144, or a rule adopted or order issued pursuant thereto, the director may issue such administrative orders as authorized under section 374.046.

60. Section 374.280 authorizes the Director to "after a hearing under section 374.046, order a civil penalty or forfeiture payable to the state of Missouri as authorized by section 374.049, which penalty or forfeiture, if unpaid within ten days, may be recovered by a civil action brought by and in the name of the director under section 374.048."

61. Section 375.144 states:

It is unlawful for any person, in connection with the offer, sale, solicitation or negotiation of insurance, directly or indirectly, to:

(1) Employ any deception, device, scheme, or artifice to defraud;

(2) As to any material fact, make or use any misrepresentation, concealment, or suppression;

(3) Engage in any pattern or practice of making any false statement of material fact; or

(4) Engage in any act, practice, or course of business which operates as a fraud or deceit upon any person.

62. Fraud is an intentional perversion of the truth to induce another, in reliance on it, to part with some valuable thing belonging to him. *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910). Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 794 (11th ed. 2004).

63. Deceit is: "[T]he act or practice of deceiving : DECEPTION 2 : an attempt or device to deceive : TRICK 3 : the quality of being deceitful : DECEITFULNESS. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 321 (11th ed. 2004). Deception is the act of causing someone to accept as true what is not true. *Id* at 322. The Supreme Court has held that deception contemplates an act designed to deceive, to cheat someone by inducing their reliance on clever contrivance or misrepresentation. *State ex rel. Nixon v. Telco Directory Publishing*, 863 S.W.2d 596, 600 (Mo. banc 1993).

64. Title 20 CSR 700-1.140(1)(D) states:

Insurance producers shall remit all premium payments associated with a personal insurance policy to those persons entitled to them as soon as is reasonably possible after their receipt by the licensee, but in no event later than thirty (30) days after the date of receipt, provided, however, that premiums may be remitted at a later point in time if the licensee is so authorized under a written agreement between the licensee and the person legally entitled to the premiums. In no event, however, shall a licensee retain premium payments if to do so will result in the failure to obtain or continue coverage on behalf of an insured or prospective insured.

65. Section 375.051.2 states:

Any insurance producer who shall act on behalf of any applicant for insurance or insured within this state, or who shall, on behalf of any applicant for insurance or insured, seek to place insurance coverage, deliver policies or renewal receipts and collect premiums thereon, or who shall receive or collect moneys from any source or on any account whatsoever, shall be held responsible in a trust or fiduciary capacity to the applicant for insurance or insured for any money so collected or received by him or her.

66. Section 375.116 states, in relevant part:

3. No insurance producer shall have any right to compensation other than commissions deductible from premiums on insurance policies or contracts from any applicant for insurance or insured for or on account of the negotiation or procurement of, or other service in connection with, any contract of insurance made or negotiated in this state or for any other services on account of insurance policies or contracts, including adjustment of claims arising therefrom, unless the right to compensation is based upon a written agreement between the insurance producer and the insured specifying or clearly defining the amount or extent of the compensation. Nothing contained in this section shall affect the right of any insurance producer to recover from the insured the amount of any premium or premiums for insurance effectuated by or through the insurance producer.

4. No insurance producer shall, in connection with the negotiation, procurement, issuance, delivery or transfer in this state of any contract of insurance made or negotiated in this state, directly or indirectly, charge or receive from the applicant for insurance or insured therein any greater sum than the rate of premium fixed therefor and shown on the policy by the insurance company, unless the insurance producer has a right to compensation for services created in the manner specified in subsection 3 of this section.

67. Title 20 CSR 700-1.100 states:

> (1) A producer service agreement may be used to establish compensation. The form set forth in Exhibit A is approved for use as specified in section 375.116, RSMo. Substantially equivalent forms may be used where they contain other provisions and do not affect the content as provided in Exhibit A. The producer service agreement, which is included herein, must be a separate document from any other form or contract.
>
> (2) Each producer service agreement may cover multiple contracts of insurance negotiated or procured for the same insured or prospective insured where the insurance producer's compensation falls within the requirements of section 375.116.3, RSMo. Each insurance producer shall retain one (1) copy of the producer service agreement in the producer's office for three (3) years and deliver one (1) copy to the insured.
>
> (3) The producer service agreement shall contain a list of the policies it covers.

68. Prior to February 28, 2003, 20 CSR 700-1.100 referred to such agreements as "broker service agreements."

69. Section 375.052 states:

> An insurer or insurance producer may charge additional incidental fees for premium installments, late payments, policy reinstatements, or other similar services specifically provided for by law or regulation. Such fees shall be disclosed to the applicant or insured in writing.

B. Conclusions of Law Relating to the Violations Charged in Count I

70. On 24 separate occasions, Respondents accepted annual premium payments intended for the Missouri FAIR Plan from consumers, or from others on their behalf, and failed to remit the entire annual premium payment to the Missouri FAIR Plan within thirty days of receipt. In each instance, no agreement existed between the Respondents and the Missouri FAIR Plan that would allow Respondents to retain any portion of the premium beyond thirty days. By failing to timely remit premium payments to the Missouri FAIR Plan, Respondents committed 24 separate violations of 20 CSR 700-1.140(1)(D).

71. The record reflects that Respondents knew of the requirements of 20 CSR 700-1.140(1)(D) and consciously chose not to comply with these requirements. Accordingly, it is clear that Respondents' 24 violations of 20 CSR 700-1.140(1)(D) were committed knowingly and in conscious disregard of the law.

C. Conclusions of Law Relating to the Violations Charged in Count II

72. On one occasion, Respondents accepted an annual premium payment intended for the Missouri FAIR Plan from Countrywide Home Loans, Inc., that was made on behalf of

consumers Joyce Anderson and Michelle Anderson. This annual premium payment was deposited in Respondents' bank account, and a check for the entire annual premium was subsequently sent to the Missouri FAIR Plan. When the Missouri FAIR Plan deposited the Respondents' check in its bank account, however, the Respondents' check was dishonored due to insufficient funds. By failing to fulfill their trust or fiduciary obligations regarding premiums received on behalf of insureds, Respondents committed one violation of Section 375.051, RSMo Supp 2010

D. Conclusions of Law Relating to the Violations Charged in Count III

73. On six separate occasions, Respondents charged an additional fee for services to applicants for insurance or insureds without a written agreement specifying or clearly defining the amount of compensation actually collected. By asserting a right to compensation in addition to commissions without a written agreement, Respondents committed six violations of Section 375.116, RSMo Supp 2010, and 20 CSR 700-1.100.

74. The record reflects that Respondents knew of the requirements of Section 375.116, RSMo Supp 2010, and 20 CSR 700-1.100 and consciously chose not to comply with these requirements. Accordingly, it is clear that Respondents' six violations of Section 375.116, RSMo Supp 2010, and 20 CSR 700-1.100 were committed knowingly and in conscious disregard of the law.

E. Conclusions of Law Relating to the Violations Charged in Count IV

75. On 19 separate occasions, Respondents represented to the Missouri FAIR Plan that the premium payment plan for dwelling fire insurance policies issued to consumers by the Missouri FAIR Plan should be changed from annual payments to installment payments even though Respondents did not have permission from the insured consumers to make this change. The FAIR Plan charged these consumers with an additional charge for the installment payments. By changing the premium payment plan without the consent of those insured, Respondents engaged in an act, practice, or course of business which operated as a fraud or deceit upon both the insured consumers and the Missouri FAIR Plan in connection with the offer, sale, solicitation or negotiation of insurance and committed 19 violations of Section 375.144(4), RSMo Supp 2010.

76. The record reflects that Respondents were aware that their actions were contrary to Missouri law when they misrepresented to the Missouri FAIR Plan that the premium payment plan for 19 insured consumers should be changed from an annual payment to installment payments even though the 19 insured consumers had not consented to this change. Accordingly, it is clear that Respondents' 19 violations of Section 375.144(4) were committed knowingly and in conscious disregard of the law.

77. Since the record also reflects that consumers ultimately bear the burden of the installment fees charged by the Missouri FAIR Plan, it is clear that Respondents' violations of Section 375.144(4) resulted in actual financial loss to consumers.

F. Conclusions of Law Relating to the Violations Charged in Count V

78. On 24 separate occasions, Respondents accepted annual premium payments intended for the Missouri FAIR Plan from consumers, or from others on their behalf, and failed to remit the entire annual premium payment to the Missouri FAIR Plan within thirty days of receipt. Respondents or their employees requested that mortgage companies, mortgage servicing companies or real estate closing agents send Respondents checks representing the annual premium for Missouri FAIR Plan coverage. Although there was an implicit representation in this request that these checks would fully pay the annual premium, Respondents sent the Missouri FAIR Plan only part of the premium for 22 insured consumers. On two occasions regarding insured consumer Minnie Williams, Respondents failed to pay any part of the premium until more than 30 days after receipt, resulting in a lapse of coverage on one of these occasions. By requesting annual premium payments and failing to forward those annual premium payments to the Missouri FAIR Plan within 30 days of receipt, Respondents employed a deception, device, scheme, or artifice to defraud in connection with the offer, sale, solicitation or negotiation of insurance and committed 24 separate violations of Section 375.144(1), RSMo Supp 2010.

79. The record reflects that the Respondents were aware that their actions were contrary to Missouri law when they requested annual premium payments and failed to forward those annual premium payments to the Missouri FAIR Plan within 30 days of receipt. Accordingly, it is clear that Respondents' 24 violations of Section 375.144(1) were committed knowingly and in conscious disregard of the law.

G. Conclusions of Law Relating to the Violations Charged in Count VI

80. On 21 separate occasions, Respondents misrepresented the premium amount to mortgage companies, mortgage servicing companies or real estate closing agents by including Respondents' service fee in the premium amount and deposited the checks subsequently received from these entities, which included the premium and Respondents' fee, in the Respondent's business bank accounts. By representing their service fee as premium, Respondents have engaged in the use of misrepresentation, concealment or suppression as to a material fact in connection with the offer, sale, solicitation or negotiation of insurance and committed 22 violations of Section 375.144(2), RSMo Supp 2010.

H. Conclusions of Law Relating to the Violations Charged in Count VII

81. On 26 separate occasions, Respondents deposited premium checks made payable to the Missouri FAIR Plan into their business bank accounts without authorization from the Missouri FAIR Plan. By making the checks payable to the Missouri FAIR Plan, it was the clear intent of the drawers of the checks that the checks be transmitted to the Missouri FAIR Plan. By depositing the checks in their business accounts rather than transmitting them to the Missouri FAIR Plan, Respondents engaged in an act, practice, or course of business which operated as a fraud or deceit upon both the drawers of the checks and the Missouri FAIR Plan in connection with the offer, sale, solicitation or negotiation of insurance and committed 26 violations of Section 375.144(4), RSMo Supp 2010.

82. The record reflects that Respondents knew they were not the payees on these checks and were not legally entitled to deposit these checks in their business accounts. Respondents chose to disregard these facts and deposit the checks in their business accounts anyway. Accordingly, it is clear that Respondents' 26 violations of Section 375.144(4) were committed knowingly and in conscious disregard of the law.

I. Conclusions of Law Relating to the Violations Charged in Count VIII

83. On 26 separate occasions, Respondents deposited premium checks made payable to and intended for the Missouri FAIR Plan into their business accounts in order to have these funds available to run their business. By depositing premium checks payable to the Missouri FAIR Plan and using these funds to operate their business, Respondents engaged in an act, practice, or course of business which operated as a fraud or deceit upon both the drawers of the checks and the Missouri FAIR Plan in connection with the offer, sale, solicitation or negotiation of insurance and committed 26 violations of Section 375.144(4), RSMo Supp 2010.

84. The record reflects that Respondents knew they were not the payees on these checks, were not legally entitled to deposit these checks in their business accounts, and were not legally entitled to use the funds for business operating expenses. Respondents chose to disregard these facts, deposit the checks in their business accounts anyway, and use the money to meet business expenses because the business was struggling financially. Accordingly, it is clear that Respondents' 26 violations of Section 375.144(4) were committed knowingly and in conscious disregard of the law.

D. Violations Caused Consumer Harm and Are Likely to Continue or Reoccur

85. The record reflects that Respondents' actions have caused harm to consumers due to lapses in insurance coverage, the imposition of additional fees for installment payments and the payment of duplicate premiums. While Respondent McCain testified at the hearing that he had discontinued the practices that are the subject of this proceeding, the temptation to resume them due to exigent circumstances makes it likely that violations are likely to continue or reoccur. Accordingly, a permanent cease and desist order is necessary to stop further violations of the law and potential harm to consumers and to the Missouri FAIR Plan.

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED that based on all of the evidence, pleadings, and testimony within the whole record of this proceeding, and based upon the foregoing findings of fact and conclusions of law, the Summary Order to Cease and Desist shall remain in effect until final determination of this matter pursuant to Section 374.046, RSMo Supp 2010.

Therefore, it is ordered that Respondents James C. McCain, Jr., and Underwriters Service Agency shall continue to:

(1) Cease and desist accepting premium payments from consumers or from others on their behalf and, without consent or prior authorization, failing to remit the full premium to the insurers within thirty days after the date of receipt;

(2) Cease and desist depositing checks made payable to the Missouri FAIR Plan into its business accounts without authorization from Missouri FAIR Plan;

(3) Cease and desist misrepresenting the amount of dwelling fire insurance premium due to mortgage companies by including Respondents' service contract fee in the premium amount, without disclosing that the amount included the service contract fee; and

(4) Cease and desist depositing consumers' dwelling fire insurance premium payments, which were for payment of the entire policy period, and, without consent or prior authorization from the consumers, only making an installment or down payment on the policy, while retaining the remainder.

ORDER

IT IS FURTHER ORDERED that James C. McCain, Jr., and Underwriters Service Agency will be subject to further orders of relief against them, including but not limited to an order to pay penalties, forfeitures, or costs, after additional briefing and submission of written evidence.

These orders are in the public interest.

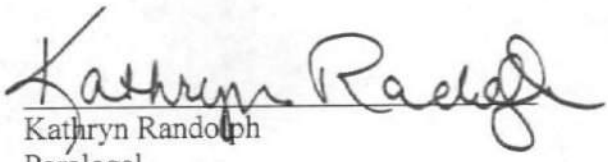
SO ORDERED, SIGNED AND OFFICIAL SEAL AFFIXED THIS 28th DAY OF December, 2011.

John M. Huff, Director

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy the foregoing document was served by certified mail, No. 7008 2810 0000 2014 9073, and U.S. Mail, postage prepaid, this 29th day of December, 2011, to:

James C. McCain, Jr.
Underwriters Service Agency
3720 Hampton Avenue
St. Louis, MO 63109



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