DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

In the Matter of: **JAMES R. FRACKOWIAK AND PLAN-IT FINANCIAL, INC.,** Respondents.	Agency Case No. INS-16-0186 OAH Case No. INS-16-0186 FINAL ORDER TO CEASE AND DESIST, FINAL ORDER TO REFUND PREMIUM, FINAL ORDER REVOKING LICENSES AND FINAL ORDER ASSESSING CIVIL PENALTIES **THIS IS A FINAL ORDER**

HISTORY OF THE CASE

On April 25, 2016, the Department of Consumer and Business Services, Division of Financial Regulation (Division) issued an Order to Cease and Desist, Proposed Order to Refund Premium, Proposed Orders to Revoke Licenses, Proposed Orders Assessing Civil Penalties and Notice of Right to an Administrative Hearing (Notice) to James R. Frackowiak and Plan-It Financial, Inc. (Respondents). On May 13, 2016, Respondents requested a hearing.

On May 17, 2016, the Division referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Dove L. Gutman to preside at hearing.

On August 12, 2016, ALJ Gutman convened a prehearing telephone conference. Assistant Attorney General Tyler Anderson represented the Division. Attorney Gary Roberts represented Respondents. During the telephone conference, ALJ Gutman set dates for the Division to file a Motion for Summary Determination (MSD) and Respondents to file their Response. ALJ Gutman also scheduled the contested case hearing for January 31, 2017 through February 2, 2017.

On October 21, 2016, Mr. Anderson filed the Division's MSD and attachments. On November 28, 2016, Mr. Roberts filed Respondents' Response and attachments.[1] On November 29, 2016, ALJ Gutman closed the record and took the matter under advisement.

[1] Mr. Roberts was granted two unopposed extensions of time in which to file Respondents' Response.

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

On December 12, 2016, ALJ Gutman issued a Ruling on Motion for Summary Determination, granting all but one issue in the Division's MSD.[2]

On December 27, 2016, the Division issued an Amended Order to Cease and Desist, Proposed Order to Refund Premium, Proposed Orders Revoking Licenses, Proposed Orders Assessing Civil Penalties and Notice of Right to an Administrative Hearing (Amended Notice), withdrawing the remaining issue for hearing and requesting that a Proposed Order be issued in the case. On December 28, 2016, ALJ Gutman reissued the ruling as a Proposed Order, cancelled the hearing set for January 31, 2017 and affirmed the Division's Amended Notice. ALJ Gutman's Ruling afforded Respondents 30 days to file written exceptions with the Director of the Department of Consumer and Business Service (Director). On January 27, 2017, the Director received written exceptions from Respondents.

Now, therefore, having reviewed the entire record in this matter, and having reviewed and considered the exceptions filed by Respondents, the Director issues the following findings of fact, conclusions of law and final order, consistent with that proposed by ALJ Gutman.

The Director adopts ALJ Gutman's recommended decision and issues this Final Order, without modification of ALJ Gutman's Findings of Fact. The Opinion section has been supplemented for grammatical purposes only.

ISSUES

1. Whether genuine issues of material fact remain to be decided, and if not, whether the Division is entitled to a ruling as a matter of law.

2. Whether Respondents violated ORS 746.120 by collecting from JL a premium for insurance which was not then provided.

3. Whether Respondents violated OAR 836-074-0025 by failing to refund JL her premium payment not later than the 30th day after the receipt of the funds.

4. Whether Respondents violated ORS 746.120 by collecting from PS a premium for insurance which was not then provided.

5. Whether Respondents violated OAR 836-074-0025 by failing to refund PS his premium payment not later than the 30th day after the receipt of the funds.

6. Whether Respondents violated ORS 744.083(1) and (2) by depositing premium funds into business accounts, and not maintaining such funds in a trust account separate from all other business and personal funds.

7. Whether Respondents shall be ordered to cease and desist from violating any

[2] The issue that remained for hearing was the following: Whether Plan-It Financial shall pay a civil penalty of $9,000 per occurrence for two violations of ORS 746.120, for a total of $18,000.

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Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

provision of the Insurance Code or the OARs promulgated thereunder.

8. Whether Respondents shall be ordered to refund PS's premium payment of $4,275 and provide proof of such refund within 30 days after the Order in this case becomes final.

9. Whether Frackowiak's resident insurance producer license shall be revoked.

10. Whether Plan-It Financial's resident insurance producer license shall be revoked.

11. Whether Respondents, jointly and severally, shall pay a civil penalty of $14,000 as follows: $1,000 per occurrence for two violations of ORS 746.120, for a total of $2,000; and $1,000 per occurrence for 12 violations of ORS 744.083, for a total of $12,000.

12. Whether the total civil penalty of $14,000 shall be due and payable within 30 days after the Order in this case becomes final.

DOCUMENTS CONSIDERED

The following documents were reviewed and considered in this matter: The Division's MSD, Exhibits A through W; Respondents' Response, Declaration of James Frackowiak and attachment 1, Declaration of Karen Frackowiak, Declaration of Gary Roberts and attachment 1; and the pleadings.

LEGAL STANDARD FOR SUMMARY DETERMINATION

Motions for Summary Determination are governed by OAR 137-003-0580, which provides, in pertinent part:

> (1) Not less than 28 calendar days before the date set for hearing, the agency or a party may file a motion requesting a ruling in favor of the agency or party on any or all legal issues (including claims and defenses) in the contested case. The motion, accompanied by any affidavits or other supporting documents, shall be served on the agency and parties in the manner required by OAR 137-003-0520.
>
> (2) Within 14 calendar days after service of the motion, the agency or a party may file a response to the motion. The response may be accompanied by affidavits or other supporting documents and shall be served on the agency and parties in the manner required by OAR 137-003-0520.

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350 Winter Street NE, Suite 410
Salem, OR 97301-3881
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(3) The administrative law judge may establish longer or shorter periods than those under section (1) and (2) of this rule for the filing of motions and responses.

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(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

(9) A party or the agency may satisfy the burden of producing evidence through affidavits. Affidavits shall be made on personal knowledge, establish that the affiant is competent to testify to the matters stated therein and contain facts that would be admissible at the hearing.

(10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's notice or answer, if any. When a motion for summary determination is made and supported as provided in this rule, the administrative law judge or the agency must explain the requirements for filing a response to any unrepresented party or parties.

(11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case.

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Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with OAR 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

Preliminary Matters

1. Motion to Strike

In his Response, Respondent requested that the Division's Exhibits A through W be stricken on the basis that they have not been authenticated by affidavit as required under OAR 137-003-0580(9). However, as set forth above, OAR 137-003-0580(9) does not require that exhibits (or other supporting documents) be authenticated by affidavit. Moreover, section (1) of the rule permits an MSD to be accompanied by affidavits *or* other supporting documents.

In this case, the Division's MSD was accompanied by other supporting documents commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. OAR 137-003-0610(1). Accordingly, Respondent's Motion to Strike is denied.

2. Motion to exclude

In his Response, Respondent requested that Exhibit I, page 1 (letter dated September 16, 2015, from Sharon Reo with Sentinel Insurance to Tracie Weeder with the Division) be excluded based on a handwritten notation on the letter that states, "Typo, should be 2014." Respondent contends that the notation is hearsay and therefore not reliable.

After reviewing the exhibits in their entirety, ALJ Gutman found that the notation on Exhibit I, page 1 does not detract from the reliability of the contents of that exhibit. Therefore, Respondent's motion to exclude is denied.

FINDINGS OF FACT

Background

1. Respondent Frackowiak has been licensed as an Oregon resident insurance producer since October 31, 1997. Frackowiak's NAIC national producer number is 6253938. (Ex. A.)

2. Respondent Plan-It Financial has been licensed as an Oregon resident insurance producer since May 13, 2005. Plan-It Financial's NAIC national producer number is 8583661. Plan-It Financial is registered to do business under the assumed names of PMER Insurance Services (PMER), Budget Insurance, Safe and Sound Insurance, and Frack Insure. (Ex. B.)

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3. Frackowiak is the president and sole owner of Plan-It Financial. (Exs. C, D.)

4. Frackowiak is the Designated Responsible Licensed Producer for Plan-It Financial. (Ex. C.)

5. On or about February 1, 2013, Respondents purchased Grants Pass Insurance and remained the owners of Grants Pass Insurance until around or after April 2015. (Exs. D, E, F.)

6. On or around April 1, 2014, Respondents purchased Blalock Insurance and remained the owners of Blalock Insurance until on or around December 8, 2014. (Exs. D, F.)

Consumer JL

7. On or around July 23, 2014, Grants Pass Insurance sold Sentinel Policy No. 52 SBA 1M1811 to consumer JL. The policy was to be effective from July 23, 2014 through July 23, 2015. (Ex. F.)

8. On or around July 28, 2014, JL issued a $268 check payable to Grants Pass Insurance for the Sentinel Policy premium. On or around July 31, 2014, the $268 premium check was deposited into Blalock Insurance's Washington Federal client trust account. (Ex. G.)

9. Respondents did not forward JL's premium payment to Sentinel. (Exs. I, J.)

10. On or around September 5, 2014, JL cancelled the Sentinel policy. On or around October 2, 2014, JL made an electronic payment in the amount of $135 for coverage under the Sentinel policy from July 23, 2014 through September 5, 2014. (Ex. I.)

11. Frackowiak admitted that he operated Grants Pass Insurance during the time that JL attempted to purchase the Sentinel policy. (Ex. J.)

12. On or about October 13, 2015, Respondents refunded JL's $268 premium payment. (Ex. K.)

Consumer PS

13. On or about July 10, 2014, PS issued a check in the amount of $4,275 payable to PMER as payment for the renewal of a liability insurance policy that covered PS's charter boat business. The insurance policy was to be issued by United States Fire Insurance Company (US Fire) through Seacoast. Coverage was to be provided from July 24, 2014 through July 27, 2015. (Exs. L, O, P, Q.)

14. On or about July 17, 2014, Plan-It Financial transferred $641.25, the amount representing the agent's commission for PS's insurance policy, from the agency trust

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Labor and Industries Building
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account at Columbia Bank to the agency business account at Columbia Bank. (Ex. M.)

15. On or around July 21, 2014, PS's check of $4,275 was deposited in Plan-It Financial's Columbia Bank trust account as part of a $5,580 total deposit. (Exs. L, N, O.)

16. Respondents did not forward the remaining balance of $3,633.75 to either Seacoast or US Fire. (Exs. O, P, Q.)

17. On or around July 27, 2014, PS's existing liability policy expired and was not renewed due to lack of premium payment. (Ex. P.)

18. On or after July 27, 2014, PS unknowingly operated his charter boat business without liability insurance. (Ex. Q.)

19. In May of 2015, a passenger on PS's boat was injured, and PS became concerned about a possible liability claim. PS contacted Seacoast and was informed that he did not have insurance. (Ex. R.)

20. Seacoast did not receive the premium. (Exs. O, P, Q, R, S.)

21. As of October 21, 2016, Respondents have not refunded the $4,275 premium payment to PS. (Ex. S.)

Depositing premium payments into business accounts

22. On December 9, 2013, WP[3] issued a $435 insurance premium check payable to Safe and Sound Insurance. On December 18, 2013, Respondents deposited the check in Grants Pass Insurance's Wells Fargo business account. (Ex. T.)

23. On March 12, 2014, CE issued a $3,273 insurance premium check payable to PMER. On March 25, 2014, Respondents deposited the check in Plan-It Financial's Columbia Bank business account. (Ex. U.)

24. On March 26, 2014, Respondents deposited the following insurance premiums in Grants Pass Insurance's Wells Fargo business account:

- Check dated March 12, 2014, for $2,153 payable to Progressive Classic Insurance Company issued by RR;
- Check dated March 20, 2014, for $1,079 payable to Grants Pass Insurance issued by TA;
- Check dated March 20, 2014, for $63.97 payable to Grants Pass Insurance issued by LW; and
- A check dated March 21, 2014, for $93.01 payable to Dairyland Auto issued by CS.

(Ex. V.)

[3] The initials of each client are set forth in this Ruling.

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25. On July 14, 2014, Respondents deposited the following insurance premiums in Blalock Insurance's Washington Federal business account:

- Cash in the amount of $43.50 from RP to be paid to Kemper Insurance Company;
- Cash in the amount of $132 from RG to be paid to Progressive Insurance Company;
- Cash in the amount of $135 from HG to be paid to Kemper Insurance Company;
- Cash in the amount of $140.80 from HC to be paid to Progressive Insurance Company;
- Cash in the amount of $120 from CB to be paid to Kemper Insurance Company; and
- A check dated July 20, 2014 for $2,492.23 payable to Blalock Insurance Company issued by TDS.

(Ex. W.)

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact that remain to be decided, and the Division is entitled to a ruling as a matter of law.

2. Respondents violated ORS 746.120 by collecting from JL a premium for insurance which was not then provided.

3. Respondents violated OAR 836-074-0025 by failing to refund JL her premium payment not later than the 30th day after the receipt of the funds.

4. Respondents violated ORS 746.120 by collecting from PS a premium for insurance which was not then provided.

5. Respondents violated OAR 836-074-0025 by failing to refund PS his premium payment not later than the 30th day after the receipt of the funds.

6. Respondents violated ORS 744.083(1) and ORS 744.083(2) by depositing premium funds into business accounts, and not maintaining such funds in a trust account separate from all other business and personal funds.

7. Respondents shall cease and desist from violating any provision of the Insurance Code or the OARs promulgated thereunder.

8. Respondents shall refund PS's premium payment of $4,275 and provide proof of such refund within 30 days after the Order in this case becomes final.

9. Frackowiak's resident insurance producer license shall be revoked.

10. Plan-It Financial's resident insurance producer license shall be revoked.

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350 Winter Street NE, Suite 410
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11. Respondents, jointly and severally, shall pay a civil penalty of $14,000 as follows: $1,000 per occurrence for two violations of ORS 746.120, for a total of $2,000; and $1,000 per occurrence for 12 violations of ORS 744.083, for a total of $12,000.

12. The total civil penalty of $14,000 owed by Respondents jointly and severally shall be due and payable within 30 days after the Order in this case becomes final.

OPINION OF ALJ GUTMAN

The Division contends that its Motion for Summary Determination should be granted. The Division contends that there are no genuine issues of material fact left to be determined, and it is entitled to a favorable ruling as a matter of law. Respondent contends to the contrary.

Violations

1. Whether Respondents violated ORS 746.120 by collecting from JL a premium for insurance which was not then provided.

ORS 746.120 is titled "Illegal dealing in premiums" and provides:

> *No person shall willfully collect any sum as premium or charge for insurance which is not then provided*, or is not in due course to be provided subject to acceptance of the risk by the insurer, under an insurance policy issued by an insurer in conformity to the Insurance Code.

(Emphasis added.)

As indicated above, no person shall willfully collect any sum as premium or charge for insurance which is not then provided. "Willful" is defined as "done deliberately: not accidental or without purpose." *Webster's Third New Int'l Dictionary* 2617 (unabridged ed 2002).

On or around July 23, 2014, Grants Pass Insurance sold Sentinel Policy No. 52 SBA 1M1811 to consumer JL. The policy was to be effective from July 23, 2014 through July 23, 2015. On or around July 28, 2014, JL issued a $268 check payable to Grants Pass Insurance for the Sentinel Policy premium.

On or around July 31, 2014, the $268 premium check was deposited into Blalock Insurance's Washington Federal client trust account. Respondents did not forward JL's premium payment to Sentinel.

The evidence in the record establishes that Respondents deliberately collected from JL a $268 premium for insurance which was not then provided. As such, Respondents violated ORS 746.120.

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350 Winter Street NE, Suite 410
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Respondents contend that they did not willfully violate the statute nor willfully fail to provide insurance to their clients. However, the statute as plainly written by the legislature, warns against the willful or deliberate "collection" of any sum as premium or charge for insurance which is not then provided. The term "willfully" is an adjective of the term "collect." In other words, any person who deliberately collects money as a premium or charge for insurance, but then does not provide the insurance violates the statute. Thus, as stated above, the evidence in the record establishes that Respondents deliberately (or willfully) collected from JL a $268 premium for insurance which, for whatever reason, was not then provided to JL. As such, Respondents' arguments are unpersuasive.

Respondents also contend that they should be allowed to cross-examine JL at hearing regarding her assertion that she spoke with Respondent Frackowiak when in fact she did not. However, JL's assertion is irrelevant to the violation found above. Thus, Respondents' argument is unpersuasive.

2. Whether Respondents violated OAR 836-074-0025 by failing to refund JL her premium payment not later than the 30th day after the receipt of the funds.

OAR 836-074-0025 is titled "Deposit and Payment of Funds" and provides, in part:

> An insurance producer shall deposit and pay premium funds received as provided in this rule. When deposit is required, the insurance producer shall deposit the funds not later than the seventh day after they are received. *When a payment is owed to an insured, the insurance producer shall pay the premium funds not later than the 30th day after the receipt of the funds.* The following provisions also apply to the deposit and payment of premium funds:
>
> (1) A return premium and the insurance producer's share of any premium funds required to be refunded, including unearned commissions, shall be deposited and paid to the insured or other person entitled to the funds. When a return premium is paid in the form of a credit to the account of an insurance producer, the insurance producer shall deposit the equivalent of the credit in money into the account.

(Emphasis added.)

Pursuant to OAR 836-074-0025, when a payment is owed to an insured, the insurance producer shall pay the premium funds not later than the 30th day after receipt of the funds.

As stated previously, on or around July 28, 2014, JL issued a $268 check payable to Grants Pass Insurance for the Sentinel Policy premium. On or around July 31, 2014, the $268 premium check was deposited into Blalock Insurance's Washington Federal client trust account. Respondents did not forward JL's premium payment to Sentinel. Respondents were required to refund JL's premium payment not later than the 30th day

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Labor and Industries Building
350 Winter Street NE, Suite 410
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after receipt of the funds. Respondent did not refund JL's premium payment until on or about October 13, 2015.

The evidence in the record establishes that Respondents failed to refund JL's premium funds not later than the 30th day after receipt of the funds. Therefore, Respondents violated OAR 836-074-0025.

3. Whether Respondents violated ORS 746.120 by collecting from PS a premium for insurance which was not then provided.

ORS 746.120 provides:

> *No person shall willfully collect any sum as premium or charge for insurance which is not then provided*, or is not in due course to be provided subject to acceptance of the risk by the insurer, under an insurance policy issued by an insurer in conformity to the Insurance Code.

(Emphasis added.)

On or about July 10, 2014, PS issued a check in the amount of $4,275 payable to PMER as payment for the renewal of a liability insurance policy that covered PS's charter boat business. The insurance policy was to be issued by US Fire through Seacoast. Coverage was to be provided from July 24, 2014 through July 27, 2015.

On or around July 21, 2014, PS's check of $4,275 was deposited in Plan-It Financial's Columbia Bank trust account. Respondents did not forward PS's premium payment to either Seacoast or US Fire. On or around July 27, 2014, PS's existing liability policy expired and was not renewed due to lack of premium payment.

The evidence in the record establishes that Respondents deliberately (or willfully) collected from PS a $4,275 premium for insurance which was not then provided. Thus, Respondents violated ORS 746.120.

Respondents contend that they did not willfully violate the statute nor willfully fail to provide insurance to their clients. However, as stated above, any person who deliberately collects money as a premium or charge for insurance, but then does not provide the insurance violates the statute. As such, Respondents' argument is unpersuasive.

Respondents also contend that Jeffrey Salo and Bill Park, employees of PMER, were at fault and should be subject to cross-examination at hearing. However, Respondents were the insurance producers who owned and operated PMER. As such, Respondents were responsible for the actions of PMER and its employees, including Salo and Park. Accordingly, Respondents' argument is unpersuasive.

4. Whether Respondents violated OAR 836-074-0025 by failing to refund PS his premium payment not later than the 30th day after the receipt of the funds.

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OAR 836-074-0025 provides, in part:

> An insurance producer shall deposit and pay premium funds received as provided in this rule. When deposit is required, the insurance producer shall deposit the funds not later than the seventh day after they are received. *When a payment is owed to an insured, the insurance producer shall pay the premium funds not later than the 30th day after the receipt of the funds.* The following provisions also apply to the deposit and payment of premium funds:
>
> (1) A return premium and the insurance producer's share of any premium funds required to be refunded, including unearned commissions, shall be deposited and paid to the insured or other person entitled to the funds. When a return premium is paid in the form of a credit to the account of an insurance producer, the insurance producer shall deposit the equivalent of the credit in money into the account.

(Emphasis added.)

As previously indicated, on or about July 10, 2014, PS issued a check in the amount of $4,275 payable to PMER as payment for the renewal of a liability insurance policy that covered PS's charter boat business. On or around July 21, 2014, PS's check of $4,275 was deposited in Plan-It Financial's Columbia Bank trust account. Respondents did not forward PS's premium payment to either Seacoast or US Fire. Respondents were required to refund PS's premium payment not later than the 30th day after receipt of the funds. As of October 21, 2016, the date the Division filed its MSD, Respondents have not refunded the $4,275 premium payment to PS.

The evidence in the record establishes that Respondents failed to refund PS's premium funds not later than the 30th day after receipt of the funds. Consequently, Respondents violated OAR 836-074-0025.

5. Whether Respondents violated ORS 744.083(1) and ORS 744.083(2) by depositing premium funds into business accounts, and not maintaining such funds in a trust account separate from all other business and personal funds.

ORS 744.083 is titled "Trust account for premium funds; commingling; exceptions; rules" and provide, in part:

> (1) All premium funds received by a resident insurance producer shall be accounted for and maintained in a trust account separate from all other business and personal funds.
>
> (2) Except as provided in subsection (3) of this section, a resident insurance producer may not commingle or

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

otherwise combine premiums with any other moneys.

(3) A resident insurance producer may commingle with premium funds in the trust account required by subsection (1) of this section any additional funds the insurance producer deems prudent for the purpose of advancing premiums, establishing reserves for the paying of return premiums, or for any contingencies that may arise in the course of receiving and transmitting premium or return premium funds.

As cited above, all premium funds received by a resident insurance producer shall be accounted for and maintained in a trust account separate from all other business and personal funds. Additionally, except as provided in subsection (3) of ORS 744.083, a resident insurance producer may not commingle or otherwise combine premiums with any other moneys.[4]

On December 9, 2013, WP issued a $435 insurance premium check payable to Safe and Sound Insurance. On December 18, 2013, Respondents deposited the check in Grants Pass Insurance's Wells Fargo business account.

On March 12, 2014, CE issued a $3,273 insurance premium check payable to PMER. On March 25, 2014, Respondents deposited the check in Plan-It Financial's Columbia Bank business account.

On March 26, 2014, Respondents deposited the following insurance premiums in Grants Pass Insurance's Wells Fargo business account:

- Check dated March 12, 2014, for $2,153 payable to Progressive Classic Insurance Company issued by RR;
- Check dated March 20, 2014, for $1,079 payable to Grants Pass Insurance issued by TA;
- Check dated March 20, 2014, for $63.97 payable to Grants Pass Insurance issued by LW; and
- A check dated March 21, 2014, for $93.01 payable to Dairyland Auto issued by CS.

On July 14, 2014, Respondents deposited the following insurance premiums in Blalock Insurance's Washington Federal business account:

- Cash in the amount of $43.50 from RP to be paid to Kemper Insurance Company;
- Cash in the amount of $132 from RG to be paid to Progressive Insurance Company;
- Cash in the amount of $135 from HG to be paid to Kemper Insurance

[4] The exception set forth in section (3) is not applicable in this matter.

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Company;
- Cash in the amount of $140.80 from HC to be paid to Progressive Insurance Company;
- Cash in the amount of $120 from CB to be paid to Kemper Insurance Company; and
- A check dated July 20, 2014 for $2,492.23 payable to Blalock Insurance Company issued by TDS.

The evidence in the record establishes that on 12 occasions, Respondents deposited insurance premiums (whether in the form of check or cash) into their business accounts instead of their trust accounts, thereby failing to maintain the insurance premiums separate from all other business and personal funds. As such, Respondents commingled insurance premiums with other moneys. Therefore, Respondents violated ORS 744.083(1) and (2).

Respondents contend that eleven of the twelve misdirected deposits were caused by either Mr. Andrus, who was in charge of the Grants Pass office, or another employee.

However, Respondents were the insurance producers who owned and operated the Grants Pass office from February 1, 2013 through April 2015. Thus, Respondents were responsible for their employees' actions, including the employee they placed in charge of running the Grants Pass office. Accordingly, Respondents' argument is unpersuasive.

Sanctions

6. Whether Respondents shall be ordered to cease and desist from violating any provision of the Insurance Code or the OARs promulgated thereunder.

ORS 731.252 is titled "Cease and desist orders" and provides, in part:

> (1) Whenever the Director of the Department of Consumer and Business Services has reason to believe that any person has been engaged or is engaging or is about to engage in any violation of the Insurance Code, the director may issue an order, directed to such person, to discontinue or desist from such violation or threatened violation. ***.

As previously determined, Respondents violated ORS 746.120, ORS 744.083(1) and (2), and OAR 836-074-0025. Pursuant to ORS 731.252, the Director has the authority to issue an order directing Respondents to cease and desist from said violations.

Consequently, Respondents shall be ordered to cease and desist from violating any provision of the Insurance Code or the OARs promulgated thereunder.

7. Whether Respondents shall be ordered to refund PS's premium payment of $4,275 and provide proof of such refund within 30 days after the Order in this case becomes final.

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Labor and Industries Building
350 Winter Street NE, Suite 410
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Telephone: (503) 378-4387

ORS 731.256 is titled "Enforcement generally; restitution" and provides, in part:

> (1) The Director of the Department of Consumer and Business Services may institute actions or other lawful proceedings that the director deems necessary to enforce a provision of the Insurance Code or any order or action the director makes or takes in pursuance of law.
>
> (2) As part of or in addition to any action or proceeding the director institutes against an insurer under subsection (1) of this section, the director may:
>
> (a) Seek restitution on a consumer's behalf for actual damages the consumer suffers as a result of the insurer's violation of a provision of the Insurance Code or applicable federal law or the insurer's breach of an insurance contract or policy the insurer has with the consumer; and
>
> (b) Seek other equitable relief the director deems appropriate under the circumstances.

As indicated above, the Director may seek restitution on a consumer's behalf for actual damages that the consumer suffered as a result of the insurer's violation of a provision of the Insurance Code. Additionally, the Director may seek other equitable relief that the Director deems appropriate under the circumstances.

After reviewing the record in this matter, ALJ Gutman found that it is appropriate and within the Director's authority to require Respondents to refund PS's premium payment of $4,275 and provide proof of such refund within 30 days after the order in this case becomes final.

8. Whether Frackowiak's resident insurance producer license shall be revoked.

9. Whether Plan-It Financial's resident insurance producer license shall be revoked.

ORS 744.074 is titled "Authority of director to place licensee on probation or to suspend, revoke or refuse to issue or renew license" and provides, in part:

> (1) The Director of the Department of Consumer and Business Services may place a licensee on probation or suspend, revoke or refuse to issue or renew an insurance producer license and may take other actions authorized by the Insurance Code in lieu thereof or in addition thereto, for any one or more of the following causes:
>
> *****

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> (b) Violating any insurance laws, or violating any rule, subpoena or order of the director or of the insurance commissioner of another state or Mexico or Canada.
>
> *****
>
> (d) Improperly withholding, misappropriating or converting any money's or properties received in the course of doing insurance business.

Pursuant to ORS 744.074, the Director may revoke an insurance producer license for violating any insurance laws or for violating any rule. Additionally, the Director may revoke an insurance producer license for improperly withholding, misappropriating, or converting any money's received in the course of doing insurance business.

As previously determined, Respondents violated ORS 746.120, ORS 744.083(1) and (2), and OAR 836-074-0025. In addition, Respondents improperly withheld, misappropriated, or converted money's received in the course of doing insurance business. Therefore, the Director may revoke Respondents' insurance producer licenses.

Respondents contend that revocation without a hearing violates their due process rights. However, Respondents were provided notice and an opportunity to be heard throughout the contested case and MSD process. Moreover, the MSD process is permitted by rule under the Administrative Procedures Act. Thus, Respondents' argument is unpersuasive.

Respondent Frackowiak also contends that his lack of direct involvement should act as a mitigating circumstance. However, Respondent Frackowiak was the insurance producer, and owner and operator of Plan-It Financial, Grants Pass Insurance, and Blalock Insurance. As such, Respondent Frackowiak was responsible for the actions of his companies and his employees. Consequently, Respondent Frackowiak's argument is unpersuasive.

10. Whether Respondents, jointly and severally, shall pay a civil penalty of $14,000 as follows: $1,000 per occurrence for two violations of ORS 746.120, for a total of $2,000; and $1,000 per occurrence for 12 violations of ORS 744.083, for a total of $12,000.

ORS 731.988 is titled "Civil penalties" and provides, in part:

> (1) A person that violates any provision of the Insurance Code, any lawful rule or final order of the director of the Department of Consumer and Business Services or any judgment that a court makes in response to the director's application, shall forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the director that does not exceed $10,000 for each offense. The civil penalty for individual insurance producers,

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> adjusters or insurance consultants may not exceed $1,000 for each offense. Each violation is a separate offense.

As indicated above, a person that violates any provision of the Insurance Code, any lawful rule or final order of the Director shall forfeit and pay to the General Fund a civil penalty in an amount determined by the Director that does not exceed $10,000 for each offence. Additionally, the civil penalty for individual insurance producers may not exceed $1,000 for each offense. Each violation is a separate offense.

As determined previously, Respondents engaged in two violations of ORS 746.120 and 12 violations of ORS 744.083(1) and (2). A review of the record establishes that a $1,000 civil penalty for each violation is appropriate in this matter. Consequently, Respondents, jointly and severally, shall pay a civil penalty in the amount of $14,000 for the 14 violations.

11. Whether the total civil penalty shall be due and payable within 30 days after this Order becomes final.

ORS 731.988 further provides, in part:

> (7) A civil penalty imposed under this section may be recovered either as provided in subsection (8) of this section or in an action brought in the name of the State of Oregon in any court of appropriate jurisdiction.
>
> (8) Civil penalties under this section must be imposed and enforced in accordance with ORS 183.745.

ORS 183.745 provides, in part:

> (2) A civil penalty imposed under this section shall become due and payable 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal. ***.

Pursuant to the authority cited above, a civil penalty imposed under ORS 183.745 shall become due and payable 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal.

In its MSD, the Division requested that the total civil penalty be due and payable within 30 days after the order becomes final. ALJ Gutman found that the request is reasonable and authorized by the statutes cited above. Therefore, the total civil penalty of $14,000 that is owed by Respondents jointly and severally shall be due and payable within 30 days after this Order becomes final.

RULING

The Division's Motion for Summary Determination is GRANTED. The hearing

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scheduled for January 31, 2017 is cancelled.

EXCEPTIONS

The Director considered Respondents' written exceptions and CONCLUDES the following:

1. Respondents excepted that, since the Agency offered no evidence by affidavit, it was not entitled to summary determination and there is no cognizable evidence supporting any of the proposed findings of fact or conclusions of law.

As set forth above, OAR 137-003-0580(9) does not require that exhibits (or other supporting documents) be authenticated by affidavit. Moreover, section (1) of the rule permits an MSD to be accompanied by affidavits *or* other supporting documents. the Division's MSD was accompanied by other supporting documents commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. OAR 137-003-0610(1). Accordingly, the Director concludes that Respondents' exception is not persuasive.

2. Respondents excepted that, because the Agency did not support its motion by affidavit, Respondents object to all findings of fact, Numbers 1 – 25. Additionally Respondents object to finding of fact number 18, claiming there is no admissible evidence of PS' state of mind about whether or not he knowingly operated his charter boat without liability insurance. Respondents further argue that there is no evidence or that the evidence is conflicting regarding whether PS paid for or asked for liability insurance.

As set forth above, OAR 137-003-0580(9) does not require that exhibits (or other supporting documents) be authenticated by affidavit. Moreover, section (1) of the rule permits an MSD to be accompanied by affidavits *or* other supporting documents. Accordingly, the Director concludes that Respondents' exception is not persuasive.

As set forth above and in Exhibit Q, on or after July 27, 2014, PS unknowingly operated his charter boat business without liability insurance. Accordingly, the Director concludes that Respondents' exception is not persuasive.

As set forth above and in Exhibits L, O, P and Q, on or about July 10, 2014, PS issued a check in the amount of $4,275 payable to PMER as payment for the renewal of a liability insurance policy that covered PS's charter boat business. Accordingly, the Director concludes that Respondents' exception is not persuasive.

3. Respondents excepted to the finding of a violation of ORS 746.120, arguing that there is no evidence supporting a finding of a willful violation.

As set forth above and in Exhibits G, I, J, L, O, P and Q, Respondents deliberately (or willfully) collected from JL and PS premiums for insurance which, for whatever reason, was not then provided. The term "willfully" is an adjective of the term "collect." Accordingly, the Director concludes that Respondents' exception is not persuasive.

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4. Respondents excepted to the finding of a violation of ORS 744.083, arguing that there is no evidence supporting a conclusion of law that Respondents violated ORS 744.083.

As set forth above, the evidence in the record establishes that on 12 occasions, Respondents deposited insurance premiums (whether in the form of check or cash) into their business accounts instead of their trust accounts, thereby failing to maintain the insurance premiums separate from all other business and personal funds. As such, Respondents commingled insurance premiums with other moneys in violation of ORS 744.083(1) and (2). Accordingly, the Director concludes that Respondents' exception is not persuasive.

5. Respondents excepted to conclusion Number 8, arguing that it ignores the evidence in this case and that there is no evidentiary basis for a restitution award.

As set forth above, on or about July 10, 2014, PS issued a check in the amount of $4,275 payable to PMER as payment for the renewal of a liability insurance policy that covered PS's charter boat business. On or around July 21, 2014, PS's check of $4,275 was deposited in Plan-It Financial's Columbia Bank trust account. Respondents did not forward PS's premium payment to either Seacoast or US Fire. Respondents were required to refund PS's premium payment not later than the 30th day after receipt of the funds. As of October 21, 2016, the date the Division filed its MSD, Respondents have not refunded the $4,275 premium payment to PS. Accordingly, the Director concludes that Respondents' exception is not persuasive.

6. Respondents excepted to the conclusion that "PS issued a check in the amount of $4, 275…as payment for the renewal of a liability policy…"

As set forth above and in Exhibits L, O, P and Q, on or about July 10, 2014, PS issued a check in the amount of $4,275 payable to PMER as payment for the renewal of a liability insurance policy that covered PS's charter boat business. Accordingly, the Director concludes that Respondents' exception is not persuasive.

7. Respondents except to the proposed order, arguing that revoking Respondents' licenses is unsupported and violates the due process clause in the 14th Amendment to the U.S. Constitution and that it also violates Section 16 of the Oregon constitution.

As set forth above, Respondents were provided notice and an opportunity to be heard throughout the contested case and MSD process and the MSD process is permitted by rule under the Administrative Procedures Act. Accordingly, the Director concludes that Respondents' exception is not persuasive.

As set forth above, the Director may revoke an insurance producer license for violating any insurance laws or for violating any rule. Additionally, the Director may revoke an insurance producer license for improperly withholding, misappropriating, or converting any money's received in the course of doing insurance business. Accordingly, revocation is within the Director's authority by statute and the Director concludes that Respondents' exception is not persuasive.

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8. Respondents except to the conclusion that they improperly withheld, misappropriated or converted money's received in the course of doing insurance business and that Frackowiak did nothing personally.

As set forth above, Respondents were responsible for their employees' actions and the evidence in the record establishes that on 12 occasions, Respondents deposited insurance premiums (whether in the form of check or cash) into their business accounts instead of their trust accounts, thereby failing to maintain the insurance premiums separate from all other business and personal funds. Accordingly, the Director concludes that Respondents' exception is not persuasive.

9. Respondents excepted to the imposition of the maximum civil penalty for Frackowiak.

As set forth above, the civil penalty for individual insurance producers, adjusters or insurance consultants may not exceed $1,000 for each offense and each violation is a separate offense. Accordingly, the Director concludes that Respondents' exception is not persuasive.

10. Respondents excepted that, because the Division issued an Amended Order to Cease and Desist and Notice of Proposed Order, and gave notice to Respondents, that Respondents had the right to a hearing.

Respondents were provided notice and an opportunity to be heard throughout the contested case and MSD process for OAH Case No. INS-16-0186. Pursuant to the Proposed Order issued by ALJ Gutman on December 28, 2016, the hearing that was scheduled in regard to OAH Case No. INS-16-0186 for January 31, 2017 was cancelled because there were no legal or factual issues in dispute, and therefore no basis for the in person hearing to occur. Accordingly, the Director concludes that Respondents' exception is not persuasive.

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ORDER

The foregoing is incorporated. The Director issues the following Orders:

1. Respondents violated ORS 746.120 by collecting from JL a premium for insurance which was not then provided.

2. Respondents violated OAR 836-074-0025 by failing to refund JL her premium payment not later than the 30th day after the receipt of the funds.

3. Respondents violated ORS 746.120 by collecting from PS a premium for insurance which was not then provided.

4. Respondents violated OAR 836-074-0025 by failing to refund PS his premium payment not later than the 30th day after the receipt of the funds.

5. Respondents violated ORS 744.083(1) and ORS 744.083(2) by depositing premium funds into business accounts, and not maintaining such funds in a trust account separate from all other business and personal funds.

6. Respondents shall cease and desist from violating any provision of the Insurance Code or the OARs promulgated thereunder.

7. Respondents shall refund PS's premium payment of $4,275 and provide proof of such refund within 30 days after the Order in this case becomes final.

8. Frackowiak's resident insurance producer license shall be revoked.

9. Plan-It Financial's resident insurance producer license shall be revoked.

10. Respondents, jointly and severally, shall pay a civil penalty of $14,000 as follows: $1,000 per occurrence for two violations of ORS 746.120, for a total of $2,000; and $1,000 per occurrence for 12 violations of ORS 744.083, for a total of $12,000.

11. The total civil penalty of $14,000 that is owed by Respondents jointly and severally shall be due and payable within 30 days after the Order in this case becomes final.

This Order is a FINAL ORDER under ORS 183.310(6)(b). Subject to that provision, the entry of this Final Order does not limit other remedies that are available to the Director under Oregon law.

SO ORDERED this 10th day of February, 2017.

PATRICK M. ALLEN, Director
Department of Consumer and Business Services

/s/ David Tatman
David Tatman, Chief of Enforcement
Division of Financial Regulation

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Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

NOTICE OF RIGHT TO JUDICIAL APPEAL

You are entitled to judicial review of this order in accordance with ORS 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon, within 60 days from the date this order is served.

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