IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

GEORGIA DEPARTMENT OF INSURANCE,	:	
Petitioner,	:	**Docket No.: OSAH-INS-SAN-1238062-67-KWS**
v.	:	
THE NATIONAL BETTER LIVING ASSOCIATION, INC., et al.,	:	
Respondents.	:	

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING PETITIONER'S COUNTERMOTIONS FOR SUMMARY DETERMIATION

This matter is before the Court on multiple motions for summary determination filed by Respondents and countermotions for partial summary determination filed by Petitioner Georgia Department of Insurance ("Department"). Respondents have also filed motions to strike the affidavits submitted by the Department. Having considered the multiple motions and all the related pleadings filed by all parties, the Court concludes that Respondents' motions for summary determination should be granted in part and denied in part. The Court further concludes that the Department's countermotions should be denied.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

The Department initiated this case on March 9, 2012, with the filing of a *Notice and Order to Show Cause*. Shortly thereafter, on or about March 12, 2012, the Department issued an *Amended Notice and Order to Show Cause* ("First Amended Show Cause Order"). Initially, this matter was scheduled for a hearing before the Commissioner of the Department. However, on June 6, 2012, the Commissioner referred the matter for hearing before the Office of State Administrative Hearings ("OSAH"). On September 4, 2012, this Court issued an *Order* granting

in part and denying in part Respondents' motions for more definite statement. On September 25, 2012, the Department issued a *Second Amended Notice and Order to Show Cause* against thirty-one respondents in connection with the sale of memberships in the National Better Living Association ("Second Amended Show Cause Order").[1]

A. Second Amended Show Cause Order

The National Better Living Association ("NBLA") is a Georgia non-profit corporation that offers several membership plans for purchase by members of the public. Some of the NBLA membership plans offer limited medical insurance benefits through group insurance policies issued to NBLA by various insurance companies.[2] In the Second Amended Show Cause Order, the Department alleged that Respondents have violated a number of Georgia insurance laws by offering and selling Expanded Memberships in NBLA. Specifically, the Department first alleged that NBLA is not eligible for group insurance under Georgia Code Section33-30-1(a)(2). The Department further alleged that NBLA, which is not licensed as an insurance agency in Georgia, is using its websites to solicit Georgia residents to buy insurance through its websites in violation of Code Section 33-23-4(a)(3). The Department also alleged that several other unlicensed entities, mostly insurance agencies located in other states, have sold insurance to Georgia residents under the guise of selling NBLA Expanded Memberships in contravention of Code Section 33-23-4(a)(4). The Department alleged that Respondent Allied Health Benefits, Inc. ("AHB"), a for-profit Georgia corporation with ties to NBLA, is not licensed as an insurance

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[1] The First Amended Order to Show Cause identified thirty-nine respondents. However, the Department has settled with a number of respondents, and only thirty-one were named in the Second Amended Order to Show Cause.

[2] The parties refer to the NBLA membership plans that include insurance as "Expanded Memberships," as opposed to "Basic Memberships," which do not include insurance. See NBLA Respondents' Motion, Statement of Undisputed Material Facts ("SOF"), at ¶¶ 14-17; Department's Response, at pp. 11-16.

agency in Georgia, but has paid commissions to entities that have sold Expanded Memberships to Georgia residents. Finally, the Department alleged that some of the entities that have sold Expanded Memberships have misrepresented the terms of the insurance available through NBLA Expanded Memberships in violation of Code Section 33-6-4(b)(1) – (2).

Based on these allegations, the Department seeks to issue cease and desist orders against all of the Respondents. Specifically, the Department proposes an order against NBLA and its corporate affiliates, as well as the officers, directors and controlling members of these entities, requiring them to cease and desist procuring group insurance policies for NBLA or offering certificates of insurance to NBLA members. The Department also proposes an order against NBLA requiring it to cease and desist selling, soliciting, or negotiating insurance through its websites. The Department further proposes an order against AHB requiring it to cease and desist paying commissions or other valuable consideration for the sale of NBLA Expanded Memberships. Finally, the Department proposes to order the entities selling Expanded Memberships (i) to cease and desist selling Expanded Memberships and (ii) to cease and desist selling any insurance products or accepting commissions or other valuable consideration for sales of insurance in Georgia without being licensed.

In addition to the cease and desist orders, the Department seeks to impose monetary penalties against some of the Respondents. First, with respect to NBLA, the Department seeks monetary penalties in the amount of $2,000.00 for soliciting the sale of insurance through its websites. Second, with respect to AHB, the Department seeks to impose $1,150,000.00 in penalties for AHB's payment of commissions when it was not licensed in Georgia to other entities that were also not licensed in Georgia. Third, with respect to the entities selling NBLA memberships, the Department seeks to impose penalties of $2,000.00 per violation for selling

insurance in Georgia without a license, $2,000.00 per violation for accepting commissions for such sales without being licensed, and $1,000.00 per violation for alleged misrepresentations made to purchasers of NBLA memberships. Because some of the entities are alleged to have sold and received commissions on sales of hundreds of Expanded Memberships, the penalties proposed against some of the entities exceed $1,000,000.00.

B. Pending Motions

For purposes of defending against the Department's Second Amended Show Cause Order, the respondents have formed three groups,[3] all of which have filed motions for summary determination, as follows:

1) NBLA and five individual directors of NBLA[4] (collectively, "NBLA Respondents") filed a *Motion for Summary Determination and Brief in Support* on November 1, 2012 ("NBLA Respondents' Motion");

2) Corpsavers Insurance Agency, Inc. ("CIA"), AHB, Corpsavers Healthcare, Inc. ("CHI"), and six individual, current or former officers or directors of one or more of these corporations[5] (collectively, the "Corpsavers Respondents") filed a *Motion for Summary Determination and Brief in Support of the Same* on or about November 1, 2012 ("Corpsavers Respondents' Motion");

3) National Healthcare Advisors ("NHA") and thirteen entities that sell or have sold

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[3] Respondents Monica Houston, Ted Harper, and Martin An Associates have not joined with any of these groups and have not filed their own motion for summary determination.

[4] The five individual directors are John Fabbrini, John B. Shaw, Jr., Richard S. Nye, William R. Fink, and Robert J. Wagner (collectively, the "NBLA-Associated Individuals").

[5] The six individual officers or directors are George E. Spalding, Jr., Michael Christopher Siewert, Timothy Patrick Siewert, Angus Morrison, G. Daniel Siewert, III, and Susan Spalding (collectively, the Corpsavers-Associated Individuals").

NBLA memberships[6] (collectively, the "NHA Respondents") filed a *Motion for Summary Determination by NHA Respondents* on November 5, 2012 ("NHA Respondent's Motion").

The Department, after obtaining a one-week extension, filed the Department's *Response and Objections to Respondents' Motions for Summary Determination, Department's Countermotion for Partial Summary Determination and Department's Brief in Support Thereof* on December 7, 2012 ("Department's Response"). After obtaining two extensions, the NBLA Respondents, the Corpsavers Respondents, and the NHA Respondents each filed consolidated reply briefs and responses to the Department's countermotions for summary determination on or about February 1, 2013.[7] On February 1, 2013, the Corpsavers Respondents filed a *Motion to Strike Affidavits and Exhibits* ("Corpsavers Respondents' Motion to Strike"). On February 4, 2013, the NBLA Respondents filed a *Motion to Strike Affidavits and Memorandum of Law in Support* ("NBLA Respondents' Motion to Strike"). The Department filed a *Response and Objections to the NBLA Respondents' Motion to Strike and the Corpsavers Respondents' Motion to Strike* on February 12, 2013 ("Department's Response to Motions to Strike").

II. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by OSAH Rule 15, which provides, in relevant part:

> Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated

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[6] The NHA Respondents refer to these entities as "call centers." They are Health Lead Systems, Prescription Savings, Inc., Jennifer J. Agency, American Health Alliance, Preferred Health Systems, Allied Benefit Consultants, Healthcare Advisors, LLC, Busted Knuckle-Healthcare Resources, CGE Marketing, Inc., American Health Access, LLC, Northstar Health Corp, and Healthcare Savings, Inc. (collectively, "Call Center Respondents").

[7] The Court will refer to these pleadings as the Corpsavers Respondents' Reply, the NBLA Respondents' Reply, and the NHA Respondents' Reply.

on the basis that there is no genuine issue of material fact for determination.

GA. COMP. R. & REGS. r. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication); G.J. v. Muscogee Cnty. Sch. Dist., 2010 U.S. Dist. LEXIS 28764 (N.D. Ga. 2010); A.B. v. Clarke Cnty. Sch. Dist., 2009 U.S. Dist. LEXIS 47701 (N.D. Ga. 2009).

Further, pursuant to OSAH Rule 15:

> When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

GA. COMP. R. & REGS. r. 616-1-2-.15(3). See Guy Lockhart v. Dir., Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

In considering a motion for summary determination, "the court must view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party." Floyd v. Suntrust Banks, Inc., 878 F. Supp. 2d 1316 (N.D. Ga. 2012), *citing* Patton v. Triad Guar. Ins. Corp., 277 F.3d 1294, 1296 (11th Cir. 2002). See also Lau's Corp v. Haskins, 261 Ga. 491 (1991). When a defendant is the moving party, "the plaintiff, as the nonmovant, 'will survive summary judgment by presenting any evidence which establishes a jury issue regarding [an

essential element of plaintiff's claim]. Even slight evidence will be sufficient to satisfy the plaintiff's burden of production of some evidence on a motion for summary judgment; such evidence may include favorable inferences drawn by the court from evidence presented.'" Phillips v. Key Services, Inc., 235 Ga. App. 564, 567 (1998), *quoting* Garrett v. NationsBank, 228 Ga. App. 114, 115-16 (1997). Moreover, the movant in a summary determination motion has the burden to prove that a fact is undisputed "'even as to issues upon which the opposing party would have the trial burden." Whisenhunt v. Allen Parker Co., 119 Ga. App. 813, 820 (1969) (internal citations and citations omitted).[8]

> [T]he moving party's papers are carefully scrutinized, while the opposing party's papers, if any, are treated with considerable indulgence.' [Cit.] 'In order to pierce allegations of material fact contained in the plaintiff's petition, the evidence offered by defendant on motion for summary judgment must unequivocally refute those allegations and must clearly show what is the truth of the matter alleged. It is not sufficient if the evidence merely preponderates toward defendant's theory rather than plaintiff's or if it does no more than disclose circumstances under which satisfactory proof of plaintiff's case on trial will be highly unlikely.'

Whisenhunt, 119 Ga. App. at 820.

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[8] The NHA Respondents' Motion, which repeatedly argues that the Department has failed to meet its burden of proof, misses the mark. As the Department is the opposing party – it did not assert a countermotion against the NHA Respondents – it is the responsibility of the NHA Respondents in the first instance to refute the Department's allegations and demonstrate that there is no genuine issue of material fact. Moreover, although it is not necessary to resolve this issue for purposes of summary determination, the Court finds the NHA Respondents' arguments with respect to a heightened burden of proof to be unpersuasive. OSAH Rule 21 states that "[u]nless otherwise provided by law, the standard of proof on all issues in a hearing shall be a preponderance of the evidence." GA. COMP. R. & REGS. r. 616-1-2-.21(4). This standard has been applied in other civil penalty cases before OSAH. See, e.g., In re: Drexel Chemical Company, No. OSAH-AQ-97-014, 1998 Ga. ENV LEXIS 6, at *1, *14-15 (March 23, 1998) (preponderance of evidence standard applied to civil penalties for violation of the Georgia Air Quality Act); Ramey v. Reheis, No. OSAH-DNR-ES-00-07976-119-MAD, 2000 Ga. ENV LEXIS 17, at *1-2, *9-10 (May 26, 2000) (preponderance standard applied to consolidated cases involving civil penalties imposed by Department of Natural Resources). See also Ga. Bd. of Dentistry v. Pence, 223 Ga. App. 603, 609 (1996) (preponderance of the evidence standard appropriate in administrative disciplinary hearing).

III. DISCUSSION AND RULINGS

A. Motions to Strike

Both the NBLA Respondents' Motion to Strike and the Corpsavers Respondents' Motion to Strike request that all the affidavits submitted with the Department's Response be stricken on the grounds that each affidavit concludes with a statement that the affidavit "is true and accurate to the best of my knowledge and belief." See Union Carbide Corp. v. Fields, 315 Ga. App. 554, 562 (2012) (sworn verifications made upon "best of plaintiffs' knowledge and belief" are not competent evidence for summary judgment purposes, which requires verification based on personal knowledge). However, all of the Department's affidavits, with the exception of the Affidavit of Alfred J. Charman, III, also begin with the introductory statement that the affidavit "is based on my personal knowledge and accurately reflects the events and occurrences that are hereinafter described."[9] Moreover, it is clear from reviewing the contents of the Department's affidavits – between the introductory statement and the conclusion – that the affiants are, for the most part, describing facts based on their personal knowledge. This Court is mindful that when considering affidavits in support of or in opposition to a motion for summary determination, the general rule[10] is that "only those portions which were made upon personal knowledge of the

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[9] Charman's affidavit begins with the statement that the affidavit is based on "my knowledge, information and belief based on reasonable inquiry as part of my responsibilities as Compliance Manager, as further described in Paragraph 4." See Defendant's Response, Affidavit of Alfred J. Charman, III.

[10] Although it is appropriate for this Court to look to the Civil Practice Act to resolve questions not addressed by the Administrative Practice Act or OSAH's rules, the resolution of such questions are left to the Court's "discretion, as justice requires." OSAH Rule 616-1-2-.02(3). Accordingly, it may not always be appropriate to strictly apply the rules on affidavits and probative evidence set forth in Code Section 9-11-56 and related cases to summary determination motions before OSAH, where traditional discovery is not permitted. See OSAH Rule 6161-1-2-.38. See generally Shipley v. Handicaps Mobility Sys., 222 Ga. App. 101 (1996)

affiant, which were not mere conclusions unsupported by facts, and which would be admissible under the general rules of evidence upon a trial should be considered." Short & Paulk Supply Co. Inc. v. Dykes, 120 Ga. App. 639 (1969).

Accordingly, this Court will look at the content of each affidavit if it is material to the resolution of the motions for summary determination and determine whether "the material parts of it are statements within the personal knowledge of the party." C. Brown Trucking Co., Inc. v. Henderson, 305 Ga. App. 873, 875 (2010) (citations and punctuation omitted), *citing* Moore v. Godome Credit Corp., 187 Ga. App. 594, 596 (1988). A blanket rejection of the Department's affidavits, therefore, is not appropriate.

RULING:

The NBLA Respondents' Motion to Strike and the Corpsavers Respondents' Motion to Strike, to the extent they seek an exclusion of all the Department's affidavits, are hereby **DENIED**. The Court will consider the objections to specific affidavits, to the extent they are material, below.

B. Eligible Association Status Under O.C.G.A. § 33-30-1(a)(2)

1. Whether NBLA "has been organized and is maintained in good faith for purposes other than that of obtaining insurance" is a question of disputed material fact.

Georgia law provides that group accident and sickness insurance may be issued under a policy to "an association, ... which shall have a constitution and bylaws and *which has been organized and is maintained in good faith for purpose other than that of obtaining insurance*, insuring at least ten members, employees, or employees of members of the association . . ." O.C.G.A. § 33-30-1(a)(2) (emphasis added). In the Second Amended Show Cause Order, the

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(the non-moving party on summary judgment is entitled to all favorable inferences and reasonable doubts which may arise from a fully-developed record).

Department asserts that NBLA was not organized and is not maintained in good faith for purposes other than that of obtaining insurance. The NBLA Respondents moved for summary determination on this issue. The Court concludes that, considering the evidence in the light most favorable to the Department, there is some evidence from which to infer that NBLA was organized and is maintained for the purpose of obtaining group insurance and selling it to its members. Therefore, summary determination in favor of the NBLA Respondents is not warranted.

First, as a general rule, the issue of good faith is a question for the finder of fact to decide after weighing all the evidence, including the credibility of the witnesses. Fetz v. Kreiling, 76 Ga. App. 848, 850 (1948). See also Ginn v. C & S Nat. Bank, 145 Ga. App. 175, 177 (1978), *quoting* Hodges v. Youmans, 129 Ga. App. 481 (1973) ("Good faith ... is always a question for the jury. Even though a party may swear he acted in good faith, the jury may decide he acted in bad faith from consideration of facts and circumstances in the case.")(citation omitted); Leachman v. Cobb Dev. Co., 229 Ga. 207 (1972) (questions of fraud and bad faith are ordinarily for a jury, but a party asserting fraud must introduce some evidence from which an inference of fraud may be drawn); Phillips v. Key Servs., Inc., 235 Ga. App. at 567-68 (construing evidence in favor of terminated employee, the court reversed the grant of summary judgment for employer where there was some evidence to support an inference that employer's stated reasons for termination were contrived and employer lacked good faith in firing employee). But see Thomas v. Dekalb Cnty., 227 Ga. App. 186 (1997) ("blind application" of the general rule that good faith must always be determined by a jury is not appropriate); Eason Publications, Inc. v. Nationsbank of Ga., 217 Ga. App. 726, 728 (1995) ("[I]ssues of good faith do not always present jury questions. The facts of a case determine when it is possible to declare as a matter of law whether

good faith can be established.") (citation omitted).

The NBLA Respondents argue that the undisputed material facts support a conclusion as a matter of law that NBLA was organized and maintained in good faith for purposes other than obtaining insurance. First, NBLA points out that the stated purpose in its Articles of Incorporation is not to obtain insurance, but to promote the quality of life of its members by promoting and educating its members on healthy living, alternative medicine, wellness and similar values. Second, NBLA notes that it has a dedicated Director of New Products, who focuses on non-insurance programs and products for NBLA members, including such benefits and services as a nurse hotline, patient advocacy service, roadside assistance, access to online wellness and therapy tools and information, and numerous savings and discount programs for clothing, computers, flowers, car repair, and dental, vision, and other health-related services. Finally, NBLA cites its membership in the National Wellness Institute and its participation in a National Wellness Conference. See NBLA Respondent's Motion, at pp. 19-20.

In general, the Department does not dispute these facts. See Department's Response, at pp. 11-14, 39-40. However, the Department asserts that there are other material facts that when considered in the light most favorable to the Department lead to a reasonable inference that NBLA's actual purpose is not to provide its members with wellness–related products and services, but to obtain group insurance and sell it to members of the public. For purpose of summary determination, this Court agrees. NBLA's corporate mission is not, as a matter of law, conclusive evidence of its actual reason for existence. In addition, although a corporation may originally be organized in good faith for a particular purpose, its purpose for continuing operation may change over time. The statute requires that an eligible association under Code Section33-30-1(a)(2) be both organized and maintained for a purpose other than obtaining

insurance. At the summary determination stage, the Department may defeat a motion for summary determination by coming forward with evidence that tends to show that NBLA's articulated corporate purpose is pretextual.

Moreover, the fact that NBLA offers a number of non-insurance products and services to its members does not, as a matter of law, prove that it is maintained for a purpose other to obtain insurance. For example, just because a bank offers a toaster to customers who open a checking account does not mean that the bank is the business of selling toasters. It is the quality and substance of the non-insurance benefits, not the number, that matters. Similarly, the fact that NBLA offers non-insurance benefits to its members does not determine, as a matter of law, that NBLA has been organized and maintained in good faith for the purpose of offering non-insurance benefits, especially in light of the evidence proffered by the Department that tends to show another purpose. See generally Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780 (3d Cir. 1998) ("Despite its information activities," which included publishing a newsletter on small business issues and holding two association meetings per year on topics of local interest, including "wellness programs," an association of employers with the stated purpose of "fostering and promoting the mutual interests of those . . . engaged in business in the Northwestern Pennsylvania Area" was clearly formed for the purpose of providing health benefits to the employees of its employer-members);[11] Int'l. Ass'n. of Entrepreneurs of Am. Benefit Trust v.

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[11] The *Gruber* case involves a determination of whether a multi-employer association was an employee welfare benefit plan ("EWBP") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The Court finds this and other ERISA cases on this topic to be instructive in determining what factors are relevant in determining the good faith purpose of an association. Under ERISA, an EWBP cannot be established by entrepreneurs for the purpose of marketing insurance to others. Gruber, 15 F.3d at 786. See Int'l Ass'n of Entrepreneurs of Am. Benefit Trust v. Foster, 883 F. Supp. 1050, 1057 (E.D. Va. 1995) (the growth of entrepreneurial ventures masquerading as qualifying EWBPs made it necessary for courts to formulate means to distinguish between plans established by bona fide associations and

Foster, 883 F. Supp. 1050, 1054 (E.D. Va. 1995) (association provided a number of non-insurance services to members, including a "safety engineering program, an auto rental program, discounts on dining and eye wear, emergency cash advances, lost credit card notification, a travelers physicians network, periodic newsletters and various other information material," yet court found that it bore a far greater resemblance to an entrepreneurial insurance venture than a bona fide association).

In this case, the Department argues that the facts cited by NBLA are a smoke-screen for its real purpose, which is revealed by consideration of the following four factors: 1) self-dealing and common control among the association and its corporate affiliates, 2) lack of opportunities for NBLA members to participate in the association's governance, 3) NBLA's focus on the insurance benefits, as opposed to the non-insurance benefits, it offers as part of its memberships, and 4) the fact that NBLA was aware of a pattern and practice of misrepresentations made to consumers during the sale of NBLA Expanded Memberships. See Department's Response, at pp. 40-41; NBLA Respondents' Motion, at pp. 20-25. The Court has considered these four factors, particularly in light of their similarity to the factors used to determine a *bona fide* association in the ERISA context, and concludes that they are relevant in determining NBLA's

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entrepreneurial ventures established for the purpose of making a profit). In order to determine whether an organization is an entrepreneurial venture or a qualifying EWBP, the courts consider two broad factors – whether there is a "bona fide" association "tied by a common economic or representation interest, unrelated to the provision of benefits," and whether the members of the association exercise control, either directly or indirectly, both in form and in substance, over the plan. Id. Courts also considered six factors articulated by the U.S. Department of Labor to determine whether a plan is a "bona fide" association, including "how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program." Id. at 788, n.5, *citing* DOL Op. No. 96-25 A., 1996 WL 634362, at *3. See also Hall v. Maine Mun. Emps. Health Trust, 93 F. Supp. 2d 73 (D. Maine 2000).

eligibility for group insurance under Georgia law. As the Georgia Court of Appeals held in *Fetz v. Kreiling*, "[g]ood faith, like fraud, is hardly capable of exact definition. It is a question of fact, which depends upon many circumstances and conditions." 76 Ga. App. at 850. In this case, a myriad of circumstances and factors must be weighed to determine whether NBLA was organized and has been maintained in good faith for a purpose other than obtaining insurance. Consideration of the four factors identified by the Department, along with all other relevant evidence, will aid in answering this question. Thus, without giving deference to the Department, which is not appropriate in this administrative proceeding,[12] the Court concludes that the four factors cited by the Department are relevant to the Department's claim that NBLA is an ineligible association under Code Section 33-30-1(a)(2). Moreover, the admissible, probative evidence proffered by the Department in response to NBLA Respondents' Motion, when viewed in the light most favorable to the Department, creates an issue of material fact on this issue.

2. The Commissioner Has Authority to Issue a Cease and Desist Order Against an Ineligible Association.

"The business of insurance is one so clothed with public interest, affecting the community at large, as to render it peculiarly subject to proper governmental regulation." Bentley v. Allstate Ins. Co., 227 Ga. 708, 709 (1971), *quoting* Cooper Co. of Gainesville v. State, 187 Ga. 497, 500 (1939). In Georgia, the Commissioner of Insurance is a constitutionally-created executive officer, whose powers and duties are prescribed by the General Assembly. Ga. Const. Art. V, § III, Para. I, III (2012). See O.C.G.A. § 33-2-1 (powers and duties of the Commissioner are those created and vested by the Georgia Insurance Code); GA. COMP. R. & REGS. r. 120-2-1-.01 ("The Commissioner of Insurance of the State of Georgia is charged with

[12] See Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc., 298 Ga. App. 753, 769-70 (2009) (deference to agency not appropriate in impartial, de novo administrative hearing conducted by OSAH).

the administration and enforcement of the Georgia Insurance Code."). Under the Georgia Insurance Code, the General Assembly has given the Commissioner the discretion to issue orders to prohibit acts that violate the insurance statute, rules or regulations. O.C.G.A. § 33-2-24(a).

> Whenever it may appear to the Commissioner, either upon investigation or otherwise, that any person has engaged in, or is about to engage in any act, practice, or transaction which is prohibited by this title or by any rule, regulation, or order of the Commissioner promulgated or issued pursuant to this title or which is declared to be unlawful under this title, the Commissioner may at his discretion issue an order, if he deems it be appropriate in the public interest or for the protection of policy holders or the citizens of this state, prohibiting such person from continuing such act, practice or transaction.

Id.

In Code Section 33-30-1(a), the General Assembly has defined group accident and sickness insurance and identified those groups that may be issued a policy of group insurance. Applying well-established rules of statutory construction, this Court concludes that Code Section 33-30-1(a) establishes an exclusive list of groups eligible for group insurance and that all other groups are prohibited from procuring insurance under a group policy.

> Pursuant to the principle of statutory construction, "Expressum facit cessare tacitum" (if some things are expressly mentioned, the inference is stronger that those omitted were intended to be excluded) and its companion, the venerable principle, "Expressio unius est exclusion alterius ("The express mention of one thing implies the exclusion of another"), the list of actions in [a statute] is presumed to exclude actions not specifically listed ([cit]), and the omission of [additional actions] from [the statute] is regarded by the courts as deliberate. [Cits.]

Alexander Properties Group v. Doe, 280 Ga. 306, 309 (2006), *quoted in* Allen v. Wright, 282 Ga. 9, 11 (2007). Accordingly, the Commissioner, has the authority to issue a cease and desist order to a group that has procured group insurance if they are not eligible to do so under the statute.

3. Even if the Commissioner is subject to equitable estoppel, the NBLA Respondents have not established the requisite elements of estoppel.

The NBLA Respondents assert that the Commissioner is equitably estopped from declaring NBLA an ineligible association because the Department previously "approved" NBLA as eligible. Pretermitting whether the Department's actions constituted prior approval, which is itself a disputed issue of fact, it is doubtful that equitable estoppel is an available defense against the Commissioner in this case. See State Soil & Water Conservation Comm'n v. Stricklett, 252 Ga. App. 430 (2001) ("Strong public policy considerations make the equitable doctrine of estoppel unavailable to preclude the Commission or the District, as state agencies, from seeking to enforce easement rights necessary for the safe operation and maintenance of the dam. In general, equitable defenses are unavailable against the state where their application would thwart a strong public policy.").[13] As the Georgia Supreme Court explained, quoting the United States Supreme Court in *Heckler v. Community Health Services of Crawford County*, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.'" Roberts v. State, 278 Ga. at 613 (quoting Heckler, 467 U.S. 51, 60 (1984). But see Southern Crescent Rehab. and Ret. Center v. Ga. Dept. of Cmty. Health, 290 Ga. App. 863, 868 (2008) ("If the application of the doctrine does not thwart public policy,

[13] See also East Point v. Upchurch Packing Co., 58 Ga. App. 829, 832 (1938) ("'An equitable estoppel may be invoked against the United States, a State, a municipal corporation, or other governmental agency or instrumentality in respect of acts done in its so-called proprietary or private capacity, as distinguished from its so-called governmental or public capacity in the strict scope of which it cannot be estopped.'"); Bibb Cnty. v. Ga. Power Co., 241 Ga. App. 131, 137 ("estoppel alone does not generally apply to the state or county"); Roberts v. State, 263 Ga. App. 472, 474 (2003), aff'd Roberts v. State, 278 Ga. 610, 613 (2004).

equitable estoppel can be applied against [a state agency] as long as its acts were not ultra vires.").

Even assuming *arguendo* that the eligibility of an association for group insurance coverage does not implicate public policy,[14] thus making equitable estoppel an available affirmative defense, the NBLA Respondents have not demonstrated that the requisite elements of estoppel are undisputed. "The constituent elements of estoppel constitute questions of fact." United States v. Walcott, 972 F.2d 323, 325 (11th Cir. 1992). Thus, in order to prevail on a motion for summary determination on the issue of equitable estoppel, the NBLA Respondents must show that there are no material facts in dispute on the essential elements of the defense. However, the NBLA Respondents have not proffered probative evidence of their detrimental reliance, an essential element of equitable estoppel.[15] See Bibb Cnty. v. Ga. Power Co., 241 Ga.

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14 Georgia courts have not considered the statutory eligibility requirement for group insurance in Code Section 33-30-1(a). However, a "leading treatise on insurance," often consulted by Georgia courts in matters of insurance, states that the purpose for placing eligibility restrictions on group insurance "may well and reasonably have been to make certain that the entity purchasing the insurance bore such a close relationship and kinship of interests with the individual insureds that the entity could and would know the insurance needs of the individuals in the group and would use the entity's money (if contributed) to see that those needs were served." 8-89 New Appleman on Insurance Law Library Edition § 89.02, *citing* Bd. of Ins. Comm'rs. of Texas v. Great Southern Life Ins. Co., 150 Tex. 258 (1951). See, e.g. Love v. Money Tree, Inc., 279 Ga. 476, 478 (2005) (citing *Appleman* as a "leading treatise on insurance" and adopting the position in *Appleman* that auto club memberships should be considered insurance). Other courts have held that the reason for the good faith restriction on group insurance is that "[g]roups formed solely to sell health insurance are not actuarially sound, because there is no true affiliation among the group members." Richter v. Aetna Life Ins. & Annuity Co., 2003 Cal. App. Unpub. LEXIS 4104, 3-4 (Cal. App. 2d Dist. Apr. 23, 2003).

15 The Affidavit of Richard S. Nye, states that "[i]n reliance upon the [Department's] approval of the AMLI/NBLA Policy form, NBLA members were enrolled in programs that included eligibility for the AMLI/NBLA Policy." See NBLA Respondent's Motion, Exhibit B. However, this is little more than a conclusory statement. There is no evidence to support this statement, such as when and how NBLA learned of the Department's alleged approval, how NBLA changed its position as a result of its reliance on the approval, and in what way such change was detrimental to the company. As the Department pointed out, NBLA was enrolling members in programs that included group insurance coverage prior to the Department's alleged

App. 131 (1999) ("estoppel requires justifiable reliance on the opposing party's representations or conduct and a change in position to one's detriment. [Cit.]") (citations omitted).[16] In addition, NBLA has also failed to present undisputed evidence to show that the Department's alleged approvals constitute the types of statements that are subject to the defense of equitable estoppel. See Bell v. Studdard, 220 Ga. 760-61 (1965).

> The essential elements of an equitable estoppel, or an estoppel in pais, are as follows as related to the party against whom the estoppel is sought: (1) conduct amounting to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive of the real facts.

See Bell v. Studdard, 220 Ga. at 760-61 (citations omitted). See O.C.G.A. § 24-14-29 ("In order

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approval. It is difficult to discern, without additional evidence, how NBLA's continued enrollment of members in such programs constituted a detrimental change in its position. *See generally* Smith v. Hanna Mfg. Co., 68 Ga. App. 475, 487 (1942) ("The representations or conduct relied on to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced."), *cited by* Gellis v. B.L.I. Construction Co., Inc., 148 Ga. App. 527 (1978).

[16] See also P.C. Gailey Contractors, Inc. v. Exxon Co., 143 Ga. App. 827, 828-29 (1977) ("The doctrine of estoppel by conduct is predicated upon a change of position to the hurt of one of the parties acting on the representation or conduct of the other"); Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 446 (1964) ("Another sound applicable rule of law is that the party claiming estoppel must have relied and acted upon declaration or conduct of the other party and not on his own knowledge or judgment"); Covenant Christian Ministries, Inc. v. City of Marietta, 654 F.3 1231, 1241-42 (11th Cir. 2011); *citing* Cohn Communities, Inc. v. Clayton Cnty, 257 Ga. 357 (1987) ("Under Georgia law, the vested rights doctrine 'is derived from the principle of equitable estoppel in that the landowner, relying in good faith, upon some act or omission of the government, has made a substantial change in position or incurred such extensive obligation and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired."); Union City v. CGP, Inc., 277 Ga. 349 (2003); Meeks v. City of Buford, 275 Ga. 585, 587 (2002) ("[M]ere reliance" without showing "a substantial change in position" does not give rise to equitable relief.); Blackburn v. Blackburn, 168 Ga. App. 66 (1983) (no equitable estoppel arises when no harm or disadvantage is presented, as injury is essential for an equitable estoppel); Bell v. Studdard, 220 Ga. 756, 760-61 (1965) (an essential element, as to the party claiming the estoppel, includes reliance upon the conduct of the party estopped and action based thereon of such a character as to change his position prejudicially).

for an equitable estoppel to arise, there shall generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his or her injury.").

Finally, even assuming that the Department's alleged approvals of NBLA's eligibility created an estoppel, such estoppel would only work to bind the Department to its position as of the time of the approval. Code Section 33-30-1(a)(2) establishes an ongoing good faith requirement for eligible associations. That is, not only must an association be organized for good faith purposes other than obtaining insurance, but it also must be maintained for that purpose. Thus, any alleged finding of eligibility by the Department would necessarily be constrained by time. The NBLA Respondent could not have reasonably believed that once approved as an eligible association, it would be approved forever regardless of changing circumstances. At most, the doctrine of equitable estoppel would prevent the Department from retroactively revoking[17] its alleged prior approvals of NBLA as an eligible association. Thus, the issue of whether NBLA is currently an eligible association is not foreclosed by the application of the doctrine of equitable estoppel.

RULING:

For the foregoing reasons, the Court concludes that summary determination is not appropriate on the issue of whether NBLA is an eligible association under Code Section 33-30-1(a)(2), and the NBLA Respondents' Motion on this issue is hereby **DENIED**.[18]

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[17] The NBLA Respondents argue that the Department is attempting to circumvent the procedural requirements for withdrawing approval of an insurance form in Code Section 33-24-9. That argument is without merit. Even assuming Code Section 33-24-9 is applicable to the Department's proposed actions, the Department has fulfilled its obligation to provide notice and a hearing through these proceedings.

[18] The Corpsavers Respondents adopted this portion of the NBLA Respondents' Motion, which is also **DENIED**. See Corpsavers Respondents' Motion, at p. 6-7. In addition, to the

C. NBLA's Websites

Both the NBLA Respondents and the Department seek summary determination on the issue of whether NBLA's websites constitute a solicitation to purchase insurance for which the Georgia Insurance Code requires a license. For the reasons set forth below and based on the undisputed evidence, the NBLA Respondents are entitled to summary determination on this issue as a matter of law.

1. Undisputed Material Facts

The following facts, viewed in the light most favorable to the Department, are undisputed:

a) NBLA relinquished its Georgia insurance agency license in or around November 15, 2011. (Department's Response, Affidavit Y, Affidavit of Tammy Holmes, ¶13)

b) After relinquishing its license, NBLA continued to maintain a number of publicly-accessible websites, including "my.nbla.com." The websites list the benefits of NBLA memberships, including insurance coverage benefits under Expanded Memberships. A person viewing NBLA's websites can learn specific information about the particular kinds of insurance coverage, as well as the insurance company offering the coverage, by expanding the tabs on the websites. However, a person interested in insurance coverage through NBLA cannot buy an Expanded Membership, exchange information, or otherwise communicate with NBLA or any other entity through the websites. Rather, the websites notify consumers that they can contact NBLA if they want "to inquire about obtaining a membership or simply have questions about the program." (Department's Response, Affidavit of Sherry Mowell, ¶¶ 25, 26; Exhibits 39 & 40; NBLA Respondents' Motion, p. 27; Affidavit of Richard Nye, ¶ 15, 16; NBLA Supp. Appx. Ex.

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extent that the NHA Respondents also argued that they are entitled to summary determination on this issue, the NHA Respondents' Motion on this issue is **DENIED**.

H)

c) NBLA has described its website as its "primary marketing vehicle." (Department's Response, Exhibit 23, at p. 16)

2. NBLA does not solicit insurance through its websites.

Under Code Section 33-23-4(a)(1), "[a] person shall not sell, solicit or negotiate insurance in this state for any class or classes of insurance unless the person is licensed for that line of authority..." In the Department's Response, the Department acknowledged that NBLA was not selling or negotiating insurance through its website, but argued that, based on the undisputed facts, NBLA was "soliciting" insurance through its website. Specifically, the Department argues that a solicitation under Code Section 33-23-4 includes "advertisement" for a particular kind of insurance from a particular insurance company. Department's Response, at p. 64.

This Court does not agree. The General Assembly has used the terms "solicit" and "advertise" in many instances in the Georgia Insurance Code, and solicitation connotes an active urging to purchase a particular insurer's product, as opposed to the wide-spread dissemination of information about an insurance product to the general public, which constitutes advertising. First, Code Section 33-23-4 is part of Chapter 23, Article 1 of the Georgia Insurance Code, which governs the licensing of agents and agencies. For purposes of Article 1, the General Assembly has defined the term "solicit" to mean "attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company." O.C.G.A. § 33-23-1. Based on the undisputed facts, the Court concludes as a matter of law that NBLA's websites, which merely describe the various membership plans and the available benefits, including insurance benefits, do not attempt to sell or ask or urge consumers to apply

for a particular kind of insurance from a particular company. The Court has reviewed the parties' exhibits showing NBLA's expanded website screens and has found no language urging consumers to buy insurance or enroll in a particular NBLA membership plan that includes insurance. There is no direct means to contact NBLA (or any other entity) through the website to seek further information about insurance benefits or to purchase insurance or memberships. As such, the Court concludes that NBLA's websites are informational and do not constitute a solicitation under Code Section 33-23-4(a).

The Department argues that the definition of the term "solicit" should be expanded to include advertising. However, this interpretation is not supported by the statute or other legal authority. Within the Georgia Insurance Code, the General Assembly has distinguished between advertising and solicitation. See, e.g. O.C.G.A. §§ 33-35-2(1), (5);[19] 33-35-12 (establishing standards for advertising and soliciting for prepaid legal services plans); 33-21-5 (providing that a health maintenance organization ("HMO") may not advertise or solicit when its certificate of authority is suspended or revoked); 33-21-26 (HMO may not use advertising or solicitation that is untrue or misleading). If "solicit" also encompasses "advertising" under the Georgia Insurance Code, it would be unnecessary for the General Assembly to use both terms together to define prohibited or permissible conduct. See Hill v. Owens, 2013 Ga. LEXIS 108 (Ga. February 13, 2013) ("'Words, like people, are judged by the company they keep,'" and courts should avoid interpreting statutes in a manner that renders any portion of them surplusage or

[19] Under this Code Section relating to prepaid legal services plans, "advertising" is defined as any communication, "other than a solicitation," to the public, "the apparent purpose or reasonable effect of which would be to convey information..." A "solicitation," on the other hand, is defined as a communication of an offer of coverage, an invitation or request to enroll, or an attempt to obtain consideration for coverage, "the apparent purpose or reasonable effect of which would be to induce the recipient of such communication to enroll in or pay any consideration for the coverage . . ." Id.

meaningless) (citation omitted). See also Spectera, Inc. v. Wilson, 317 Ga. App. 64, 67 (2012).

In addition, courts in other states that have considered the two terms have noted the difference between them. See, e.g., Illinois v. Beaulieu Relators, Inc., 144 Ill. App. 3d 580 (1986) (advertising entails giving general notice in order to attract public attention, and solicitation is addressed to a particular individual to do some particular thing); Hameid v. Nat'l Fire Ins. of Hartford, 31 Cal. 4th 16 (Cal. 2003) (thorough examination of whether "solicitation" of customers from a customer list falls under a commercial general liability insurance policy covering "advertising" injury, finding that advertising means wide-spread distribution or announcements to the public and does not include personal solicitation of individual customers). Finally, in a case involving the Georgia Long Arm Statute, the Georgia Court of Appeals cited with approval a line of decisions developed to recognize the technological revolution ushered in by the Internet. Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 522 (2006), *citing* Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The issue in *Aero Toy Store* was whether a sale of an automobile over an eBay Motors auction website satisfied the minimum contacts requirements of the Long Arm Statute. "As recognized in [Zippo],"

> "[a]t one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the hose computer. In these cases, the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."

Zippo Mfg. Co., 952 F. Supp. at 1124. This Court finds the *Zippo* "sliding scale" analysis used to determine if a non-resident is transacting business in the state to be helpful in

determining whether the General Assembly intended to require a Georgia insurance license for the singular act of advertising on a passive website.[20] The licensing requirements in Code Section 33-23-4 are triggered by conduct that amounts to transacting the business of insurance. "Transacting," as it relates to insurance, is defined in the Georgia Insurance Code to include "(A) solicitation and inducement, (B) preliminary negotiations, (C) effectuation of a contract of insurance, and (D) transaction of matters subsequent to the effectuation of the contract and arising out of it." O.C.G.A. § 33-1-2(6). If the General Assembly had wanted to include advertising in this list of enumerated actions, it could easily have done so.[21] It did not do so, either in defining what it means to "transact" the business of insurance in Georgia or in identifying the conduct that requires a license. Consequently, the Court concludes that because NBLA's websites are advertising insurance benefits, not soliciting consumers to buy insurance, NBLA is not engaged in activity for which a license is required under Code Section 33-23-4.

RULING:

For the foregoing reasons, NBLA Respondents' Motion is hereby **GRANTED** as to the issue of unlicensed solicitation through NBLA websites, and the Department's Countermotion for Partial Summary Determination on this issue is hereby **DENIED**.

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[20] It is questionable whether the General Assembly would require a Georgia license to conduct an activity that does not involve sufficient minimum contacts with Georgia to confer jurisdiction under the Long Arm Statute, which "contemplates the exercise of jurisdiction to the maximum extent permitted by procedural due process." See Aero Toy Store, 279 Ga. App. at 520.

[21] In fact, in this same section, the General Assembly used the word "advertise" in the definition of "health benefit policy," which excludes "limited benefit insurance policies designed, **advertised**, and marketed to supplement major medical insurance..." O.C.G.A. § 33-1-2(1.1) (emphasis added).

C. NBLA-Associated Individuals and Corpsavers-Associated Individuals

Both the NBLA Respondents' Motion and the Corpsavers Respondents' Motion seek the dismissal of the individual officers and directors named as respondents in the Second Amended Show Cause Order (collectively, the "Individual Respondents").[22] The Department argues that the Individual Respondents should not be dismissed because any cease-and-desist orders against NBLA and the affiliated Corpsavers Respondents should also bind the Individual Respondents. However, the Department admits that it is not seeking to hold the Individual Respondents personally liable for the acts of the corporations. See Department's Response, at pp. 69, 89. In fact, the Department clarifies that it only seeks a cease and desist order that can properly be enforced against the Individual Respondents *in their capacity as* officers, directors or controlling members of NBLA or the Corpsavers Respondents. Id. Finally, the Department does not dispute that the Second Amended Show Cause Order does not set forth any factual allegations specifically against any of the Individual Respondents, other than those identifying the Individual Respondents and their relationships with NBLA and the Corpsavers Respondents.

Based on the foregoing, the Court concludes that the Individual Respondents are not proper parties to the Second Show Cause Order. First, the plain language under which the Department asserts its authority to order a person to cease and desist presumes that the "person has engaged in, is engaging in, or is about to engage in [an] act, practice, or transaction which is prohibited...." O.C.G.A. § 33-2-24(a). In the case of the Individual Respondents, the Department has acknowledged that it does not ascribe any prohibited act, practice or transaction to any of the Individual Respondents. See Global Diagnostic Dev., LLC v. Diagnostic Imaging of Atlanta, 284 Ga. App. 66, 69-70 (2007) ("Georgia still recognizes corporate identity as

[22] The "Individual Respondents" include the five NBLA-Associated Individuals identified in footnote 4 *supra* and the six Corpsavers-Associated Individuals identified in footnote 5 *supra*.

separate from that of its principals or owners, so long as the corporate forms are maintained..."), *citing* Yukon Partners v. Lodge Keeper Group, 258 Ga. App. 1, 5-6 (2002).[23] Further, the Department has not identified any particular Individual Respondent who was either aware or approved of any of the acts giving rise to the requested relief, nor has the Department offered any reason why the Individual Respondents should be included in a cease-and-desist order other than the fact that they are officers. See Barrett Carpet Mills, Inc. v. Consumer Prod. Safety Comm'n, 635 F.2d 299 (4th Cir. 1980), *cited by* U.S. v. Danube Carpet Mills, Inc., 737 F.2d 988 (11th Cir. 1984).[24]

Finally, the Court agrees with the Department that just as an injunction issued under O.C.G.A. § 9-11-65 is binding on parties and their "officers, agents, servants, employees, and

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[23] The Court of Appeals in *Global Diagnostic* considered whether the Department of Community Health ("DCH") erred in granting a certificate of need to a new corporation to operate an imaging center, where the new corporation shared the same owner as another corporation that DCH had previously ordered to cease and desist operating the same imaging center. Id. Quoting *Yukon Partners*, the *Global Diagnostic* court held that "a member of a limited liability company ... is considered separate form the company and *is not a proper party to a proceeding by or against a limited liability company, solely by reason of being a member of the limited liability company*." Id. (emphasis added).

[24] In *Barrett Carpet Mills, Inc. v. Consumer Product Safety Commission*, the Fourth Circuit considered the propriety of including an individual in a cease-and-desist order under the Flammable Fabrics Act ("FFA") when the sole basis for his inclusion was that he was the president of the corporation involved in the violation. Id. Although the court acknowledged that in an appropriate case, an officer of a corporation found to have violated either the Federal Trade Act or the FFA could be included in a cease-and-desist order, the Commission was not permitted to include "a company officer in his individual capacity where the violation complained of was inadvertent and not likely to recur, unless the Commission can show some reason for including an officer other than the mere fact that he is an officer." Barrett Carpet Mills, Inc., 635 F.2d at 304. The types of circumstances where an officer could properly be included were when it was anticipated that the individual respondent would attempt to evade the order, the individual officer had acted as if no corporation existed, the officer was aware of deceptive practices and had approved them, or the practice covered by the order was of an egregious nature, designed to mislead the public. Id. at 303-304. The Department has not presented any evidence from which the Court could infer that any of these circumstances exist with respect to the Individual Respondents in this case.

attorneys" upon proper notice, so too is a properly-issued cease-and-desist order under O.C.G.A. § 33-2-24. See Southport Petroleum Co. v. Nat'l. Labor Relations Bd., 315 U.S. 100, 106-07 (1942) (Board's cease and desist order against a Texas corporation, which ran not only to the corporation, but to its "officers, agents, successors and assigns," was in the usual form of Board orders that had frequently been sustained by the Supreme Court); Regal Knitwear Co. v. Nat'l Labor Relations Bd., 324 U.S. 9, 13 (1945) (Federal Rules of Civil Procedure 65(d) regarding injunctions, like Georgia Code Section 9-11-65, provides that injunctions are binding on parties, "their officers, agents, servants, employees, and attorneys...," and "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.").[25] Thus,

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25 In *Regal Knitwear*, the U.S. Supreme Court considered the district court's order obtained by the NLRB to enforce a cease and desist order against a corporation and "its officers, agents, successors and assigns." Id. at 10. On appeal, the question was not the appropriateness of including officers and agents in the list of persons bound by a cease-and-desist order, but whether it was proper to also bind "successors and assigns." Id. The court noted that many agencies employ the same language in cease-and-desist orders, including the Securities and Exchange Commission, the Federal Trade Commission, and others. Id. at 12. The court further held that "[a]dministrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority...." Regal Knitwear Co., 324 U.S. 9, at 13. See also Golden State Bottling Co. v. Nat'l Labor Relations Bd., 414 U.S. 168, 176 (1973) (Board's remedial powers, despite language in the statute that provides that a cease and desist order be issued against a *person* found to have engaged in an unfair labor practice, "include broad discretion to fashion and issue [an] order ... as relief adequate to achieve the ends and effectuate the policies of the Act," including issuing orders binding "officers, agents, successors, and assigns" of an offending employer); Fed. Trade Comm'n. v. Leshin, 618 F.3d 1221, 1236 (11th Cir. 2010), *quoting* U.S. v. Fleischman, 339 U.S. 349, 357-58 (1985)(emphasis omitted)(internal quotations omitted) ("'A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of a corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt.'"). *Cf.* Barham v. City of Atlanta, 2013 Ga. LEXIS 106 (Ga. February 4,

the Court concludes that it is not necessary or appropriate for the Department to name the Individual Respondents in the Second Amended Show Cause Order simply to assure that they are subject in their official capacities to any cease-and-desist order issued against NBLA or the Corpsavers Respondents.

RULING:

For the foregoing reasons, the NBLA Respondents' Motion and the Corpsavers Respondents' Motion to dismiss the Individual Respondents are hereby **GRANTED**.

D. Payment of Commissions or Other Valuable Consideration by AHB

The Corpsavers Respondents moved for summary determination on the issue of whether AHB, a Corpsavers Respondent that administers the NBLA membership program, violated Code Section 33-23-4. Among other things, Code Section 33-23-4 regulates who may pay or accept commissions or other valuable consideration for the sale, solicitation or negotiation of insurance in Georgia. O.C.G.A. § 33-23-4(b), (c), (d). In the Second Amended Show Cause Order, the Department alleged that when AHB made payments to entities as compensation for selling NBLA Expanded Memberships in Georgia, AHB violated Code Section 33-23-4 in two ways. First, the Department asserted that only licensed persons can pay commissions or other valuable consideration for the sale, solicitation or negotiation of insurance in Georgia, and that AHB does not have a Georgia insurance license. Second, the Department asserted that commissions or other valuable consideration can only be paid to licensed entities, and that AHB violated Code Section 33-23-4 by making payments to unlicensed entities for selling NBLA Expanded Memberships in Georgia.

2013) (trial court may not enjoin non-parties who did not have a full and fair opportunity to litigate).

In their motion, the Corpsavers Respondents admitted that AHB is not licensed in Georgia, and they did not dispute the Department's allegations that AHB made payments to entities that sold NBLA Expanded Memberships.[26] Rather, the Corpsavers Respondents argued that they are entitled to summary determination for three reasons. First, the Corpsavers Respondents argued that selling NBLA Expanded Memberships does not constitute the sale of insurance. Second, the Corpsavers Respondents argued that the payments made by AHB do not constitute "commissions" for the sale of insurance. Finally, even if such payments are considered commissions, the Corpsavers Respondents denied that AHB paid commissions to four of the Call Center Respondents named in the Second Amended Show Cause Order.[27]

The Department filed a countermotion for summary determination on the issue of Section 33-23-4 violations by AHB based on the following facts, which the Department asserted are undisputed: (1) AHB is unlicensed, (2) the Call Center Respondents and Respondent Martin An Associates are unlicensed, (3) NBLA Expanded Memberships include certificates of insurance under a group policy, and (4) AHB made payments to the Call Center Respondents, Respondent

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[26] The Corpsavers Respondents' adopted the NBLA Respondents' Motion, which included as an undisputed material fact that AHB entered into an Administration Agreement with NBLA, whereby AHB was authorized to sell or contract with others to sell NBLA membership to potential members. Corpsavers Respondents' Motion, at pp. 4, 6; NBLA Respondents' Motion, SOF, ¶ 8. In addition, the NBLA Respondents' Motion cites to the Affidavit of Jess Jordan, which was attached to the NHA Respondents' Motion. See NBLA Respondents' Motion, SOF, ¶ 9. In his Affidavit, Jess Jordan averred that AHB paid NHA, as compensation for the sale of NBLA memberships, a percentage of each NBLA member's monthly association dues. Jordan also averred that each Call Center Respondents received from AHB, as compensation for the sale of NBLA memberships, a portion of each new member's enrollment fee, as well as a portion of each member's monthly association dues. NHA Respondents' Motion, Affidavit of Jess Jordan, ¶¶ 5-7.

[27] The Corpsavers Respondents asserted as an undisputed material fact that "[d]uring the years 2010, 2011, and 2012 neither AHB nor Corpsavers made any payments to Health Lead Systems, Prescription Savings, Inc., Jenifer [sic] J Agency, or Allied Benefit Consultants as alleged in paragraphs 315, 316, 317, and 320 of the Second Amended Notice and Show Cause Order." Corpsavers Respondents' Motion, p. 5, SOF ¶ 4; Affidavit of Morrison, ¶ 8.

Martin An Associates, and former Respondent America's Insurance Consultants for the sale or solicitation of NBLA Expanded Memberships to Georgia residents.

As set forth below, the Court concludes that, based on the undisputed, material facts, the sale or solicitation of NBLA Expanded Memberships constitutes the sale or solicitation of insurance under the Georgia Insurance Code. Also, it is undisputed that AHB is unlicensed. Finally, although the Court finds, as a general matter, that it is undisputed that AHB paid "other valuable consideration" as compensation for the sale or solicitation of NBLA Expanded Memberships to entities that are not licensed in Georgia, it is a disputed fact whether such payments were made for sales or solicitations to Georgia residents. Accordingly, neither the Corpsavers Respondents nor the Department is entitled to summary determination on the issue of whether AHB violated Code Section 33-23-4.

1. As a general rule, Code Section 33-23-4 requires that both the person paying an insurance commission and the person receiving the commission be duly licensed.

In order to protect the public, the Commissioner is charged with overseeing the licensing of individuals and business entities that engage in the business of insurance in Georgia. See O.C.G.A. § 33-23-5(a) ("For the protection of the people of this state, the Commissioner shall not issue, continue, or permit to exist any license, except in compliance with this chapter...."). See generally 11-76 Appleman on Insurance Law & Practice § 76.4 ("Since those purchasing insurance must rely on the advice of the agent and purchase insurance from or through him, the legislature sought to protect the public by a licensing procedure which insures that those engaged in the business are qualified."), *quoting* Rizzo v. Price, 162 Conn. 504 (1972). Code Section 33-23-4 identifies those persons that are required to be licensed in Georgia. Essentially, any person who "sells, solicits, or negotiates insurance in this state" must be licensed. O.C.G.A. § 33-23-

4(a). An "individual" who sells, solicits, or negotiates insurance must be licensed as an agent, and a "business entity" that does so must be licensed as an agency.[28] Id.

Code Section 33-23-4 also regulates who may pay an insurance commission and to whom they may pay it. Although it is somewhat inartfully worded, Code Section 33-23-4 requires that, as a general rule, both the person paying the commission and the recipient must be licensed:

> (b) No insurer or agent doing business in this state shall pay, directly or indirectly, any commission or any other valuable consideration to any person for services as an agent, subagent, or adjuster within this state, unless such person is duly licensed in accordance with this article.
>
> (c) An insurer may pay a commission or other valuable consideration to a licensed insurance agency in which all employees, stockholders, directors, or officers who sell, solicit, or negotiate insurance contracts are qualified insurance agents, limited subagents, or counselors holding currently valid licenses as required by the laws of this state; and an agent, limited subagent, or counselor may share any commission or valuable consideration with such a licensed insurance agency.
>
> (d) No person other than a duly licensed adjuster, agent, limited subagent, or counselor shall pay or accept any commission or other valuable consideration except as provided in subsections (b) and (c) of this Code section.

Id.

Subsection (h) of Code Section 33-23-4 provides exceptions to these general licensing requirements. For example, under subsection (h)(2)(B), a license as an insurance agent is not required if the person has been excluded from the definition of the term "agent" under Code Section 33-23-1(b)(6), which provides:

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[28] Both an "agent" and an "agency" are also defined to include an "insurance producer," which means "a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance." O.C.G.A. § 33-23-1(a)(2), (3), (10). See also O.C.G.A. § 33-23-3 ("An agency shall be subject to all penalties, fines, criminal sanctions, and other actions authorized for agents under this chapter.").

> (b) The definition of agent, subagent, counselor, and adjuster ... shall not be deemed to include:
>
> ...
>
> (6) A person who makes the salary deductions of premiums for employees or, under a group insurance plan, a person who serves the master policyholder of group insurance in administering the details of such insurance for the employees or debtors of the master policyholder or of a firm or corporation by which the person is employed and who does not receive insurance commissions for such service; provided that an administrative fee not exceeding 5 percent of premiums collected paid by the insurer to the administration office shall not be construed to be an insurance commission.

See also Piedmont S. Life Ins. Co. v Gunter, 108 Ga. App. 236, 239 (1963) (In considering former Georgia Insurance Code Section 56-801a, the court held that "a person who serves the master policyholder in administering the details of group insurance is exempted for the licensing requirements of the chapter [on licensing of agents]."). See generally Bertram Harnett, 2-11 Responsibilities of Insurance Agents and Brokers § 11.05 (LEXIS 2012) (When a service relating to group insurance policy is "manifestly administrative" and unrelated to the selling process, a license is not required; but any activity which involves solicitation, such as recommending or endorsing insurance coverage or encouraging purchase, "is an obvious sales activity, and requires an insurance agency license."); Florida Risk Planning Consultants v. Transport Life Ins., 732 F.2d 593 (7th Cir. 1984).

The Corpsavers Respondents do not argue that AHB meets any of the exceptions to licensure in subsection (h). Accordingly, if AHB paid commissions or other valuable consideration for the sale, solicitation or negotiation of insurance in Georgia, it was required to be licensed and the recipient of the payment must also have been licensed.

2. The sale of NBLA Expanded Memberships constitutes the sale of insurance under the Georgia Insurance Code.

NBLA Expanded Memberships include certificates of insurance, which evidence coverage under NBLA's master group policies.[29] "Group insurance is the coverage of a number of individuals by means of a single or blanket insurance policy. In group insurance employees do not make individual applications, and they receive certificates referring to the master policy which is issued to the employer." McFarland v. Bus. Men's Assurance Co., 105 Ga. App. 209 (1962) (internal citations and citation omitted). See also Cherokee Credit Life Ins. Co. v. Baker, 119 Ga. App. 579, 585-86 (1969) ("The certificate is evidence of coverage under the master policy.") (citations omitted). Georgia courts have found that it takes both the master group policy and the certificate of insurance "to make the contract." Id. at at 582.

> "What relation does the certificate bear to the policy? It cannot be assumed but that the obligation of the certificate was in the contemplation of both of the parties to the contract of insurance. The policy refers to the certificate, and the certificate refers to the policy as the basis of its issuance... The policy and the certificate are interlocked like the Siamese twins. Contemporaneous instruments, each affecting and controlling the same subject matter... the two writings may be considered as essential, indivisible parts of one contract. United it stands, divided it falls."

Id. at 582-83, *quoting* Carruth v. Aetna Life Ins. Co., 157 Ga. 608, 616 (1924). Thus, although the courts have found that the contracting parties in group insurance are "primarily" the insurer and master policy holder, they also acknowledge that there are really "three parties to the contract," the insured, the master policy holder, and the insurer. See Thigpen v. Metropolitan Life Ins. Co., 57 Ga. App. 405, 407 (1939); Morrison Assurance Co., Inc. v. Armstrong, 152 Ga.

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[29] See NBLA Respondents' Motion, SOF, ¶ 26 ("The AMLI/ NBLA Policy consists of a 'master policy' and various insurance certificates. [Cit.] The particular certificate applicable to an NBLA member depends on the membership level purchased."). NBLA also attached a copy of the master policy between AMLI and NBLA, which states that AMLI will provide certificates of coverage to NBLA to deliver to each named insured and that the certificates will describe the insurance coverage and to whom payable). NBLA Respondents' Motion, Ex. 19.

App. 885, 886-87 (1980). Accord Bellamy v. Pacific Mutual Life Ins. Co., 651 S.W.2d 490 (1983) (insurance contract consisted of the insured's application, the master policy, and the official certificate). Cf. Dawes Mining Co., Inc. v. Callahan, 246 Ga. 531, 533 (1980) (finding it unnecessary to resolve disagreement as to whether an insured under a group contract is a party to the contract or a third party beneficiary).

Under Code Section 33-1-2(2), "insurance means a contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specified amount or benefit upon determinable contingencies." See Love v. Money Tree, Inc., 279 Ga. 467, 478 (2005). Based on the foregoing authority, the individual certificates issued as part of NBLA Expanded Memberships are a part of the insurance "contract" between NBLA and the insurers. Moreover, activities that amount to the sale or solicitation of the certificate constitute the sale[30] or solicitation of insurance under Georgia law. The Corpsavers Respondents have cited no authority to support the proposition that a certificate loses its essential nature as insurance when it is bundled with other non-insurance benefits as part of an association membership. Accordingly, the Court concludes, as a matter of law, that the sale or solicitation of NBLA Expanded Memberships, which include certificates of insurance under a group policy, constituted the sale or solicitation of insurance.

3. Although the monies paid by AHB may not be commissions, it is undisputed that AHB made payments that constitute "other valuable consideration" to entities that sold NBLA Expanded Memberships.

With the exception of payments allegedly made to Health Lead Systems, Prescription Savings, Inc., Jennifer J Agency, and Allied Benefit Consultants, the Corpsavers Respondents admitted in general terms that AHB made payments to some of the entities that sold NBLA

[30] To "sell" means "to exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurance company." O.C.G.A. § 33-23-1(14).

memberships. Corpsavers Respondent's Motion, SOF, ¶¶ 1 - 3. However, without admitting to any specific payment to any specific entity, the Corpsavers Respondents argued that payments made to such entities did not constitute "commissions" because they were not calculated based on a percentage of premiums. Corpsavers Respondents Motion, SOF, ¶ 6. As noted by the Court of Appeals in *Seals v. Hygrade Distribution & Delivery Sys., Inc.*, , the Georgia Insurance Code does not define the term "commission." See 249 Ga. App. 574, 576-77 (2001). See also O.C.G.A. § 33-23-1. In *Seals*, the Court of Appeals looked to Black's Law Dictionary's definition of the word "commission" as

> The recompense, compensation or reward of an agent, salesman, executor, trustee, receiver, factor, broker, or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal. [Cit.] Compensation to an administrator or other fiduciary for the faithful discharge of his duties.

Seals v. Hygrade, 249 Ga. App. at 577.

The Corpsavers Respondents argued that because none of the monies paid by AHB to the entities selling NBLA memberships were paid as a percentage of premiums, they were not commissions. Assuming *arguendo* that the Corpsavers Respondents have demonstrated that there is no genuine issue regarding whether a "commissions," thus defined, was paid by AHB in this case,[31] the plain language of the statute also covers a payment that amounts to "other valuable consideration." Although the Georgia Insurance Code does not define "other valuable consideration," the legislature has defined "valuable consideration" in Title 13, which governs contracts. See O.C.G.A. § 13-3-41. "A valuable consideration is founded on money or

[31] The Court notes that the Department's Response includes the Affidavit of Robert Merrill, the President of America's Insurance Consultants ("AIC"), a former Respondent that sold NBLA Memberships. In his Affidavit, Merrill avers that AHB paid AIC "commissions" for AIC's sale of NBLA Expanded Memberships and that AHB provided AIC with documents entitled "NBLA Commission Reports" from October 2011 to March 2012. See Department's Motion, Affidavit of Robert Merrill; Exs. 5, 7.

something convertible into money or having a value in money, except marriage, which is a valuable consideration." Id. See also Black's Law Dictionary 129 (3rd Pocket ed. 2006) (defining "valuable consideration to mean "consideration that is valid under the law; consideration that either confers a pecuniarily measurable benefit on one party or imposes a pecuniarily measurable detriment on the other."). Under this definition, the fact that the Corpsavers Respondents have admitted, even in general terms, that AHB made payments of money to some of the entities selling NBLA Expanded Memberships, demonstrates that AHB, as an unlicensed entity, paid other valuable consideration as compensation for the sale or solicitation of insurance.

4. Whether the payments made by AHB were for services "within the state" is a question of disputed fact.

To recap, the Court finds that the undisputed evidence supports a conclusion that the sale of NBLA Expanded Memberships constitutes the sale of insurance and that AHB paid valuable consideration as compensation for such sales. However, the Commissioner's authority to regulate under the Georgia Insurance Code is tied to activities conducted within the state of Georgia. Notwithstanding the foregoing conclusions, neither party is entitled to summary determination on the issue of a Code Section 33-23-4 violation because there is a genuine issue of fact regarding whether the payments were made "for services ... within this state." O.C.G.A. § 33-23-4(b). In order for the Department to prevail on summary determination, it has to show that it is undisputed that AHB paid valuable consideration for the sale, solicitation or negotiation of NBLA Expanded Memberships in Georgia. On the flip side, in order for the Corpsavers Respondents to prevail on their motion, they must show that the opposite is true.

Although the Corpsavers Respondents admitted in general terms to making payments to some entities that sold NBLA memberships, they did not admit to any specific payments, or otherwise admit to the nature, timing, amount, or circumstances surrounding such payments, particularly whether the payments were for sales made in Georgia. Moreover, with respect to four of the thirteen Call Center Respondents, the Corpsavers Respondents presented evidence that neither AHB nor any of the Corpsavers Respondents made payments to Call Center Respondents Health Lead Systems, Jennifer J Agency, Prescription Savings, Inc., or Allied Benefit Consultants for any sales of NBLA Memberships, whether in or out of Georgia. The Department responded with evidence that, when viewed in the light most favorable to the Department, creates a genuine issue of fact regarding whether the payments made by AHB to the NHA Respondents, including the four named Call Center Respondents above, were for sales of Expanded Memberships in Georgia.[32]

Accordingly, neither party is entitled to summary determination on the issue of whether AHB violated Code Section 33-23-4.

RULING:

For the foregoing reasons, the Corpsavers Respondents' Motion for summary determination on the issue of AHB's violation of Code Section 33-23-4 is hereby **DENIED**, and the Department's countermotion on this issue is also **DENIED**.

E. Authority to Issue Cease-and-Desist Orders and Impose Monetary Penalties

Code Section 33-2-24 gives the Commissioner the power to enforce the Georgia Insurance Code through a number of different enforcement tools. For example, subsection (a)

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[32] As to whether the Department's Exhibits 19 and 20 are probative and admissible to prove payments for services in Georgia, see Section F *infra*. See also Department's Response, Affidavit of Robert Merrill.

authorizes the Commissioner to issue an order, "if he deems it to be appropriate in the public interest or for the protection of policyholders or the citizens of this state, prohibiting a person from continuing [any] act, practice or transaction" that is prohibited by the Georgia Insurance Code. O.C.G.A. § 33-2-24(a). Thus, the Commissioner may issue a cease-and-desist order against any "person," whether licensed or not, if they are violating an insurance law, including the provisions relating to licensing in Code Section 33-23-4. See O.C.G.A. § 33-1-2(5) ("Person" means "an individual, insurer, company, association, trade association, organization, society, reciprocal or interinsurance exchange, partnerships, syndicate, business trust, corporation, Lloyd's association, and associations, groups, or department of underwriters, and any other legal entity."). Similarly, the Commissioner can refer any "person" to the local prosecuting attorney if he has reason to believe such person is violating an insurance provision for which criminal prosecution is warranted. O.C.G.A. § 33-2-24(d).

In addition, subsection (g) of Section 33-2-24 gives the Commissioner the authority to impose specific sanctions against any "insurer, agent, broker, counselor, solicitor, administrator, or adjuster." First, the Commissioner can place any "insurer, agent, broker, counselor, solicitor, administrator, or adjuster" on probation for acts in violation of the insurance laws. Subsection (g) also authorizes the Commissioner to subject any "insurer, agent, broker, counselor, solicitor, administrator, or adjuster to a monetary penalty of up to $2,000 for each and every act in violation of [Title 33]." In their Reply, the Corpsavers Respondents argued that the Commissioner's ability to impose monetary fines is limited to persons or entities that are licensed by the Department. Because AHB is not licensed, the Corpsavers Respondents requested summary determination on the issue of the Commissioner's authority to impose the proposed monetary penalties against AHB.

At first glance, this argument has some merit, although not because AHB is unlicensed. Rather, AHB does not appear to meet the definition of any of the enumerated persons who are subject to monetary penalty. That is, the list of persons subject to monetary penalties under Code Section 33-2-24(g) does not include an "agency," only an "agent." As noted above, an "agent" is defined as "an individual appointed or employed by an insurer who sells, solicits, or negotiates insurance," and an "agency" is defined as a "business entity which represent one or more insurers and is engaged in the business of selling, soliciting, or negotiating insurance." See O.C.G.A. § 33-23-1(2), (3). AHB, as a corporation, cannot be an "agent." Even taking into consideration that the definition of "agent" includes an "insurance producer," which draws in unlicensed persons if they are "required" to be licensed, the statute limits the term "agent" to an individual insurance producer. Id., see also O.C.G.A. § 33-23-1(10). Moreover, although Code Section 33-23-3(b) provides that "an agency shall be subject to all penalties, fines, criminal sanctions, and other actions authorized for agents," this provision is limited to the penalties and fines in Chapter 23 of the Code, not to Chapter 2.

Thus, although the Commissioner clearly has the authority to order any person to cease and desist violating the insurance laws, it appears that he may not have jurisdiction to impose a monetary penalties against AHB for such alleged violations based on the facts in the record. However, the Court will defer ruling on this issue until the parties have had an opportunity to file a response.[33]

RULING:

For the foregoing reasons, the Court will defer ruling on the Corpsavers Respondents' Motion for summary determination on the issue of whether the Commissioner is authorized to

[33] The Corpsavers Respondents did not raise this argument until they filed their Reply. Therefore, the Department did not address it in its Response.

impose monetary penalties against AHB. The Corpsavers Respondents and the Department will be given leave to file short briefs on this issue pursuant to a briefing schedule included in a separate order.[34]

F. NHA Respondents' Sale of Insurance and Receipt of Commissions

In the NHA Respondents' Motion, the NHA Respondents admitted that the "Call Centers operate to sell NBLA Memberships." NHA Respondents' Motion, p. 10, Affidavit of Jess Jordan, ¶ 5. The NHA Respondents also admitted that NBLA memberships include limited medical insurance benefits through NBLA's group policy. NHA Respondents' Motion, SOF, ¶ 2. Finally, NHA admitted that both NHA and the Call Centers received remuneration for marketing and selling NBLA memberships. NHA Respondents' Motion, p. 12; SOF, at ¶ 11; Affidavit of Jess Jordan, ¶¶ 6, 7. Specifically, both NHA and the Call Centers received a percentage of each NBLA member's monthly association dues. Id. In addition, each Call Center received a portion of each new member's enrollment fee. Id. Based on these undisputed facts, as well as the analysis in Section D above, the Court concludes that the NHA Respondents have sold insurance through their sales of NBLA Expanded Memberships and have received "other valuable consideration" for doing so. Under Georgia law, the NHA Respondents must have Georgia insurance licenses if such sales or solicitations were to Georgia residents. See O.C.G.A. § 33-23-4.

The NHA Respondents dedicated much of their pleadings to arguing that the Department has failed to meet its burden of proof. However, that argument is misguided. The NHA Respondents are reciting the standard applicable to a motion for involuntary dismissal under OSAH Rule 616-1-2-.35. At this stage, the Department has not made a motion for summary

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[34] Because the resolution of this issue affects the proposed monetary penalties against some of the NHA Respondents, they will be granted leave to file a brief on this issue as well.

determination against the NHA Respondents. Instead, it is the NHA Respondents that are seeking summary determination in their favor. As such, it is their burden to "pierce" the allegations of material fact in the Department's Second Amended Show Cause Order and offer evidence that "unequivocally refutes those allegations." See Whisenhunt v. Allen Parker Co., 119 Ga. App. at 820. The Court concludes that the NHA Respondents have failed to do so with respect to the Department's allegation that the NHA Respondents sold NBLA Expanded Memberships to Georgia residents and received compensation from AHB for such sales. Although the NHA Respondents challenged the affidavits and other exhibits presented by the Department in its Response, the Department's obligation to proffer such evidence only arises when a motion for summary determination is itself properly supported by affidavits and other probative evidence. OSAH Rule 616-1-2-.15(3).

The NHA Respondents' Motion failed to present evidence to clearly show that they did not sell or solicit NBLA memberships in Georgia. In fact, some of the NHA Respondents' own evidence tends to support, rather than disprove, the Department's allegation that at least some of the sales made by the Call Center Respondents were to residents in Georgia. See NHA Respondents' Motion, Affidavit of Jess Jordan, ¶ 14; Exhibit D (transcriptions of recorded voice verifications of individuals, "who, upon information and belief, were members of NBLA," who bought NBLA membership through telephone solicitation, and who are Georgia residents). Thus, the NHA Respondents are not entitled to summary determination on the issue of whether they violated Code Section 33-23-4 and are subject to an order prohibiting such violations under Code Section 33-2-24.

Moreover, with respect to individual NHA Respondents and their roles in the sale and solicitation of NBLA memberships in Georgia, the Court has reviewed the evidence and found

that there exist disputed issues of material fact. Specifically, as to Call Center Respondent Jennifer J Agency ("JJA"), the NHA Respondents offer the affidavit of Jennifer Jay Cellmer, the owner of JJA, who denies that JJA ever sold NBLA memberships in the state of Georgia or received any compensation from "Corpsavers, NBLA, NHA or any other entity in connection with the sale of an NBLA membership to a Georgia resident...." NHA Respondents' Motion, Ex. 2. In addition, the NHA Respondents offer the affidavit of Landon Jordan, an employee of Call Center Respondent Prescriptions Savings, Inc. NHA Respondents' Motion, Ex. 3. Landon Jordan avers that he has never been an employee, officer, director, agent, or representative of JJA and has never sold insurance or NBLA memberships on JJA's behalf. Id.

The Department responded to the NHA Respondents' Motion, citing evidence that creates an issue of material fact regarding JJA and its sale of NBLA memberships. First, in response to the Landon Jordan Affidavit, the Department proffered the affidavit of Thomas Wohlbach, who worked as an insurance examiner for the Department during its examination of AMLI. See Department's Response, Affidavit of Thomas Wohlbach. Wohlbach averred that he visited JJA's business office, along with Landon Jordan, Tim Siewert, the Vice-President of AHB, and others. According to Wohlbach's affidavit, while at JJA, he listened to representatives making telephone calls to prospective NBLA members. Wohlbach Affidavit, at ¶ 22. Wohlbach also averred that Landon Jordan held himself out as the co-owner of JJA with Jennifer Cellmer, who was his common law spouse. Wohlbach Affidavit, at ¶ 15. Wohlbach further averred that Landon Jordan stated that JJA sold NBLA Expanded Memberships and received commission payments. Wohlbach Affidavit, at ¶¶ 13-14, 16-18, 21. Finally, Wohlbach averred that Tim Siewert stated that JJA was one of the top call centers selling NBLA memberships. Wohlbach Affidavit, at ¶ 12.

The evidence in the Wohlbach Affidavit relating to the statements made by Landon Jordan are admissible for impeachment purpose under Georgia law, and, may under certain circumstances, be admissible as substantive evidence. See generally Paul Milich, *Georgia's New Evidence Law: An Overview*, 28 Ga. St. U. L. Rev. 379 (2012) (Georgia's new evidence rules, effective January 1, 2013, retains "the *Gibbons* rule that makes all prior inconsistent statements of testifying witnesses admissible as substantive evidence."), *citing* Gibbons v. State, 248 Ga. 858 (1982). It is not the proper function of this Court when considering a summary determination motion to predict whether certain witnesses will testify, thus allowing their prior inconsistent statements to be admitted as substantive evidence. Moreover, given that this Court, under the Administrative Procedures Act, may relax admissibility rules under certain circumstances – namely, necessity and proof of trustworthiness – it is inappropriate at the summary determination stage to pre-judge evidence that is not clearly inadmissible or inherently unreliable. See O.C.G.A. § 50-13-15(1) ("When necessary to ascertain facts not reasonably susceptible of proof under ... [the] rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs...."); OSAH Rule 616-1-2-.18.

Second, the Department proffered evidence in the form of two exhibits – Exhibits 19 and 20 –through the Affidavit of John Humphries, an examiner who assisted the Department in its examination of AMLI. See Department's Response, Affidavit of John B. Humphries. The Department's Exhibit 19, which is a list of "NBLA/AMLI Call Centers," including each Call Center's name, owner, address, and licensed agents/employees, was sent to the Department by John Fabbrini, the President of NBLA, during the examination of AMLI.[35] See Humphries

[35] The Department argued that Exhibit 19 should be admissible because it is a statement of

Affidavit, at ¶ 11. See also Department's Response to Motion to Strike, Affidavit of Debra Pierce, ¶ 11, Ex. 1. Exhibit 20 is a summary of voluminous records submitted to the Department by AMLI during the examination and identifies all Georgia certificate holders under NBLA's master policy, as well as the agent associated with the sale of each certificate. Humphries Affidavit, at ¶ 12.

The NBLA Respondents argue that these documents are hearsay and are inadmissible. See O.C.G.A. § 24-8-801(c). However, the Department has made a colorable argument that the Court should apply OSAH Rule 18 in determining the admissibility of Exhibit 19 and 20. The Department argued that Exhibit 19 was received during the course of an examination of AMLI pursuant to the Commissioner's authority under Code Sections 33-2-11 and 33-2-13. Similarly, Exhibit 20 is a summary of documents received from AMLI during the examination. Code Section 33-2-14 gives the Commissioner broad authority to use any "company work papers or other documents, or any other information discovered or developed during the course of any examination in furtherance of any legal or regulatory action which the Commissioner may, in his or her sole discretion, deem appropriate." O.C.G.A. § 33-2-14(h). The Department also presented evidence that the Department routinely relies upon information and documentation received during the course of an examination in the normal course of its business. Department's Response to Motion to Strike, Affidavit of Debra Pierce, ¶ 9.

Finally, the Court is mindful that a motion for summary determination arises in a different context than a motion for summary judgment under the Civil Practice Act. That is, in a

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NBLA's president, a party to this proceeding. However, for purposes of the NHA Respondents, the Department has not cited any legal authority for the proposition that the admission of one party may be used against any other party in the absence of proof that the person making the statement is a co-conspirator, agent, or employee of the other party. See generally O.C.G.A. § 24-8-801(d)(2).

civil action, the parties are presumed to have before them a "fully-developed record." See Shipley v. Handicaps Mobility Sys., 222 Ga. App. at 102. In fact, the Georgia courts have held that when a plaintiff was denied the opportunity to cross-examine adverse witnesses, who avoided her discovery attempts and then filed affidavits in support of defendants' motion for summary judgment, it was premature to rule on the motion. Id.

> The [trial court's granting of summary] judgment deprived Shipley of an opportunity to develop proof which may well give rise to triable issues of facts... It is simply too soon to tell. And to say otherwise not only ignores that Shipley, as the non-moving party on summary judgment, is entitled to all favorable inferences and reasonable doubts which may arise from a fully developed record, *Padgett v. M & M Super Market*, 195 Ga. App. 799, 800, but also overlooks the rule that, when a party fails to produce evidence, the charge or claim against the party is presumed to be well founded. [Cit.]

Id.

In an administrative proceeding, the record prior to the hearing, especially in more complex cases, is not always fully-developed given the absence of traditional rights to discovery. OSAH Rule 616-1-2-38. Such is the case here. When this case was pending before the Commissioner, the Department attempted to obtain documentation from the NHA Respondents, as well as the Corpsavers Respondents, through the issuance of subpoenas *duces tecum*. The respondents resisted on many grounds, including that the Department was attempting to engage in impermissible discovery. Specifically, the Department filed a number of subpoenas *duces tecum* against the NHA Respondents and the Corpsavers Respondents, seeking (i) documentation relating to monies paid to or received by individuals or entities for the sale, solicitation or negotiation of any NBLA products and (ii) documentation relating to all NBLA memberships sold by Call Center employees, agents, subagents, or subcontractors, including the member's name and address, the name and position of the person making the sale, and the name and

position of the person receiving a payment for the sale.[36] On May 21, 2012, the Corpsavers Respondents filed a motion to quash the subpoenas, arguing, among other things, that that they amounted to a "textbook fishing expedition."[37] The NHA Respondents likewise filed a response and objection to the subpoenas duces tecum, seeking an expedited hearing on their motion before providing any documents in response to the subpoenas.[38] There is no evidence in the record to show that the NHA Respondents or the Corpsavers Respondents ever provided any documents in response to the subpoenas.

Under these specific facts, it appears that both the NHA Respondents and the Corpsavers Respondents are attempting to use the prohibition against discovery in the administrative context as both a shield and a sword. That is, they refused to cooperate with the Department's attempts to obtain relevant documentation, and now seek summary determination because the Department cannot produce such documentation. As the court in *Shipley* found, summary determination is, at a minimum, premature. Moreover, should the Department be unable to develop the record through the limited means available under OSAH Rules – subpoenas and notice to produce under OSAH Rule 616-1-2-19 – it would be entitled to at least make the argument that Exhibits 19 and 20 should be admitted under OSAH Rule 616-1-2-18(1).

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[36] See Subpoena Duces Tecum issued to Jennifer J Agency by Commissioner, dated May 15, 2012, Request Nos. 9, 12, 13; Subpoena Duces Tecum issued to National Healthcare Advisors by Commissioner, dated May 15, 2012, Request Nos. 9, 12, 13; Subpoena Duces Tecum issued to Allied Health Benefits by Commissioner, dated May 15, 2012, Request Nos. 11, 13, 14.

[37] See Corpsavers Respondents' Motion to Quash Subpoenas Issued May 15, 2012, filed by the Corpsavers Respondents on May 21, 2012.

[38] See Response and Objection to the April 11, 2012 Subpoenas to Certain Entities Through Which NBLA Memberships Were Sold and to Nonparties and Demand for Expedited Hearing on Same, filed by NHA Respondents on April 24, 2012; Response and Objection to the May 15, 2012 Subpoenas to Certain Entities Through Which NBLA Memberships Were Sold and to Nonparties and Demand for Expedited Hearing on Same, filed by NHA Respondents on May 21, 2012.

Accordingly, the Court concludes that the NHA Respondents have not demonstrated that there are no genuine issues of material fact for determination on the issue of whether the NHA Respondents sold NBLA Expanded Memberships in Georgia and whether they received valuable consideration as compensation for such sales.

RULING:

For the foregoing reasons, the NHA Respondents' Motion for Summary Determination on the issue of whether they violated Code Section 33-23-4 is hereby **DENIED**.

G. Misrepresentations by NHA Respondents

In the Second Amended Show Cause Order, the Department claims that certain NHA Respondents made misrepresentation about the insurance available through NBLA Expanded Memberships during telephonic sales calls to seven Georgia residents. Second Amended Show Cause Order, pp. 121-135. The following is a list of the Georgia residents, the agents who allegedly made the misrepresentation, and the Call Center Respondents for whom the agent allegedly worked:

Georgia Resident	**Agent**	**Call Center Respondents**
Linda Yancey	Dana Bernard/Landon Jordan	Health Lead Systems ("HLS"), Prescriptions Savings, Inc. ("PSI") or JJA
Cynthia Sims	Landon Jordan	HLS, PSI or JJA
Nancy Brand	Kristine/Landon Jordan	HLS, PSI or JJA
Brenda Carnes	Brenda Harrington	Allied Benefit Consultants
Glenda Neese	Gary Johnson	Healthcare Advisors
Janet Keeler	Kevin Wester	Healthcare Advisors
Dianja McMillan	Melanie Hall	Busted Knuckle-Healthcare Resources

In their Motion, the NHA Respondents argued that the Call Center Respondents identified above are entitled to summary determination on the Department's misrepresentation claims. First, the NHA Respondents argued that the Department has failed to meet the essential elements of a claim for misrepresentation that have been developed in civil cases between an insured and an insurance agent. See Canales v. Wilson Southland Ins. Agency, 261 Ga. App. 529 (2003). However, the Commissioner's authority to regulate trade practices in the business of insurance is not controlled by such cases. Rather, his authority is set forth in the Georgia Insurance Code, which defines "all practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices." O.C.G.A. § 33-6-1. The Georgia Insurance Code enumerates the acts and practices that are deemed unfair and deceptive acts or practices in the business of insurance, and prohibits any person from engaging in such acts. O.C.G.A. §§ 33-6-3, 33-6-4. One enumerated act deemed to be unfair or deceptive is making, or causing to be made, a "statement misrepresenting the terms of any policy issued or to be issued, [or] the benefits or advantages promised thereby...." O.C.G.A. § 33-6-4(b)(2). Another prohibited act is "making, ... or causing directly or indirectly to be made ... [a] statement with respect to the business of insurance ..., which statement is untrue, deceptive or misleading." O.C.G.A. § 33-6-4(b)(1).

Section 33-6-4(b) does not require the Commissioner to determine that a member of the public "reasonably relied" on a misleading or deceptive statement before the Commissioner may take administrative action. Nor is a person who misrepresents the terms or benefits of a policy shielded from regulatory oversight because the insured could have uncovered the misrepresentation by reading the fine print in the policy. Such a narrow reading of the statute is inconsistent with the statute's intent to protect the citizens of Georgia against unfair and

deceptive trade practices. The statute is written broadly, encompassing both direct and indirect actions that cause "in any way" a misleading statement relating to the business of insurance to be placed before the public. O.C.G.A. § 33-6-4(b)(1). In addition, if the Commissioner finds that a person has engaged in an unfair or deceptive act or practice in violation of the statute, Code Section 33-6-8(a) requires that the Commissioner issue a cease and desist order against such person and authorizes the Commissioner, in his discretion, to, among other things, order a monetary penalty of not more than $1,000.00 per violation.

The Department has presented evidence, in the form of the affidavits from the seven individual Georgia residents identified above, that creates issues of material fact regarding violations of Code Section 33-6-4(b) in the sales of NBLA Expanded Memberships. The Department is not obligated to prove "reasonable reliance" by these individuals, or otherwise meet the standards established in *Canales*. In addition, based on the analysis set forth in Section F *supra*, the Department has presented some evidence that the agents and Call Center Respondents identified in the chart above either directly or indirectly made or caused to be made misrepresentations in the telephone solicitation of the seven individual Georgia residents.

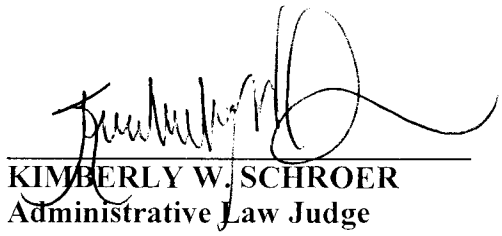
RULING:

For the foregoing reasons, the NHA Respondents' Motion for Summary Determination on the issue of whether they violated Code Section 33-6-4 is hereby **DENIED**.

IV. CONCLUSION

The NBLA Respondents' Motion is **denied in part** and **granted in part**. The Corpsavers Respondents' Motion is **denied in part** and **deferred in part**. The NHA Respondents' Motion is **denied**. The Department's Countermotions are **denied**. The parties shall comply with the briefing and scheduling order issued separately herewith.

SO ORDERED, this 1st day of April, 2013.



KIMBERLY W. SCHROER
Administrative Law Judge