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STATEMENT OF THE ISSUES

I. DID THE SUPERIOR COURT ERR IN NOT FINDING THAT THE DECISION AND ORDER OF THE DIVISION OF INSURANCE VIOLATED THE PROVISIONS OF THE STATUTE OF LIMITATIONS SET FORTH AT G.L. C. 260 §5 WHEN IT IMPOSED A FINE IN AN ACTION THAT WAS COMMENCED MORE THAN TWO YEARS AFTER THE ALLEGED OFFENSE WAS COMMITTED?

II. DID THE SUPERIOR COURT ERR IN NOT FINDING THAT THE DIVISION OF INSURANCE VIOLATED THE PROVISIONS OF THE STATUTE OF LIMITATIONS SET FORTH AT G.L. C. 260 §5A WHEN IT COMMENCED AN ACTION AGAINST THE PLAINTIFFS MORE THAN FOUR YEARS AFTER THE CAUSE OF ACTION ACCRUED?

III. DID THE SUPERIOR COURT ERR IN NOT FINDING THAT THE DECISION AND ORDER OF THE DIVISION OF INSURANCE VIOLATED THE PROVISIONS OF G.L. C. 175 §177 WHEN IT FAILED TO FIND A KNOWING VIOLATION OF THE STATUTE?

IV. DID THE SUPERIOR COURT ERR IN NOT FINDING THAT THE DECISION AND ORDER OF THE DIVISION OF INSURANCE IMPOSED FINES IN EXCESS OF THE STATUTORY LIMITS SET FORTH AT G.L. C. 175 §177?

V. DID THE SUPERIOR COURT ERR IN NOT FINDING THAT THE DECISION AND ORDER OF THE DIVISION OF INSURANCE IMPOSED MONETARY PENALTIES PURSUANT TO G.L. C. 176D WHICH ARE NOT AUTHORIZED BY THAT STATUTE?

VI. DID THE SUPERIOR COURT ERR IN NOT FINDING THAT THE DECISION AND ORDER OF THE DIVISION OF INSURANCE WAS ARBITRARY AND CAPRICIOUS?

Inc., and business being conducted at 76 Shirley Avenue, Revere, MA.

The complaints were referred to Loney F. Bond, a special investigator in the Special Investigations Unit in the Massachusetts Division of Insurance as of September 27, 1999.

Loney F. Bond visited 76 Shirley Ave., on/or about September 1, 2000 and May 6, 2002.

On June 1, 2004, Loney F. Bond sent a request to Stephen G. Michaels of Anawan Insurance Agency, Inc., for information concerning Kuntthy Prum. Anawan responded on June 23, 2004 and provided information regarding Prum.

The Division received Anawan's response on June 28, 2004. The Division had no information prior to that date that Anawan had paid commissions to Kuntthy Prum. All of the facts referred to in paragraphs 1 through 5 are contained in the AFFIDAVIT OF LONEY F. BOND which is included in the Appendix at p. A40[1]

Based solely on information voluntarily provided by Michaels on behalf of Anawan in his response letter of June 23, 2004 the Division of Insurance filed an

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[1] Further citations to the Appendix will refer to the page only (i.e., "See page ")

Order to Show Cause and Request for Notice of Procedure on October 25, 2004 in which the Division of Insurance stated the following facts. See p. A7

According to Michaels, Anawan Agency entered into an agreement with Prum, doing business as Handel Insurance Agency, on or about January 7, 1997 whereby Prum d/b/a Handel Insurance Agency brokered business through Anawan Agency from 1997 through December 31, 2001. Reference to Prum in this Order to Show Cause includes Prum doing business as Handel Insurance Agency.

Handel Insurance Agency never held any Massachusetts insurance licenses.

According to Michaels, Prum's relationship with Anawan Agency was that of an insurance broker. Prum submitted signed applications for Massachusetts motor vehicle policies, together with deposit checks, to Sandra Hauser at Anawan Agency. Sandra Hauser was responsible for forwarding any business that Anawan Agency accepted to the appropriate insurance carrier.

According to Michaels, Anawan Agency paid Prum commissions based on monthly statements provided to Prum at the time a commission was paid. Anawan Agency

made its last commission payment to Prum in early 2002.

According to information Anawan Agency provided, Prum submitted between 250 and 300 Massachusetts automobile policy applications to Anawan Agency between 1998 and December 31, 2002. Prum was not licensed to transact insurance business in Massachusetts during this time. Anawan paid Prum commissions for these policies.

According to records Anawan Agency provided, Anawan Agency made payments to Prum for commissions for Massachusetts policies on at least 1,277 occasions from 1998 through 2000. Prum held no Massachusetts insurance licenses during this period.

The Plaintiffs filed their answer to the Order to Show Cause and raised the following Affirmative Defenses (See P. A15):

FIRST AFFIRMATIVE DEFENSE

> The Respondents did not knowingly violate the provisions of M.G.L. C. 175 §177, which requires that any violation of said statute be a "knowing" violation.

SECOND AFFIRMATIVE DEFENSE

> The Statute of Limitations set forth at M.G.L. c. 260 §5 requires that actions for penalties on behalf of the Commonwealth be

commenced only within two years next after the offense is committed. The Petitioner seeks the imposition of civil penalties against the Respondents for actions which are alleged to have occurred more than two years prior to the commencement of this action.

THIRD AFFIRMATIVE DEFENSE

The Petitioner must prove a violation of M.G.L. c. 175 §177 by the Respondents before any consideration can be given to the provisions of M.G.L. c. 176D §2. If the Petitioner is unable to prove a violation of M.G.L. c. 175 §177 there can be no finding of a violation of M.G.L. c. 176D §2.

FOURTH AFFIRMATIVE DEFENSE

The Petitioner seeks civil penalties in excess of what is permitted pursuant to the specific provisions of M.G.L. c. 175 §177.

FIFTH AFFIRMATIVE DEFENSE

The Petitioner is estopped from obtaining any relief in this action by reason of its failure to take any action against Kuntthy Prum, when as the Petitioner alleges, he continued to operate as an insurance broker after his license had not been renewed and by reason of the Petitioner's failure to notify the Respondents of Kuntthy Prum's failure to renew his license when the Petitioner knew or should have known that Kuntthy Prum had been authorized to act on behalf of Anawan as an insurance agent.

SIXTH AFFIRMATIVE DEFENSE

The Statute of Limitations for violations of M.G.L. c. 176D §2 requires actions to be

> commenced within four years. Any action arising out of allegations of violations of M.G.L. c. 176D §2 more than four years before commencement of the action is barred by law.

The Procedural History set forth in the Decision and Order of the Division of Insurance is as follows:

PROCEDURAL HISTORY

The Order to Show Cause was filed on October 25, 2004. A Notice of Procedure ("Notice") issued on November 2, 2004, advising Anawan and Michaels that a prehearing conference would take place on December 16, 2004 and that an adjudicatory hearing on the OTSC would be held on January 11, 2005, both at the offices of the Division. It notified them that the hearing would be conducted pursuant to G.L. c. 30A and the Standard adjudicatory Rules of Practice and Procedure, 801 Code Mass. Reg. 1.00 et seq. The Notice further advised the Respondents to file their answer(s) pursuant to 901 Code Mss. Reg. 1.01(6)(d) and that, if they failed to do so, that the Division might move for an order of default, summary decision or decision on the pleadings granting it the relief requested in the OTSC. It also notified the Respondents that, if they failed to appear at the prehearing conference or

hearing, an order of default, summary decision or decision on the pleadings might be entered against them. The Commissioner of Insurance ("Commissioner") designated Stephen M. Sumner, Esquire, as presiding officer for this hearing.

On November 18, 2004, Anawan and Michaels filed a joint "Answer of Respondents to Petitioner's Order to Show Cause" ("Answer"). They admitted the jurisdictional allegations in the OTSC, although they stated that they "allege[d] that the authority of the Commissioner does not permit any order which would violate the penalty provisions of the statute which the Respondents are alleged to have violated." They admitted many of the facts alleged in the OTSC, denied some of the allegations and stated that they had no knowledge as to the truth or falsity of other allegations. They denied the Division's allegations that their actions violated the insurance laws. Thereafter, as is authorized by 801 Code Mass. Reg. 1.01(7) (h), the Respondents on January 4, 2005, filed a "Motion for Summary Decision" ("Motion for Summary Decision") with a supporting Memorandum ("Respondents' 2005 Memorandum). In response, the Division filed an opposition with a supporting Memorandum. The

Respondents then submitted a Rebuttal to the Division's Opposition ("Respondents' 2005 Rebuttal"). The Division responded with a Reply to the Respondents' 2005 Rebuttal. On August 23, 2005, a ruling issued denying the Respondents' Motion for Summary Decision.

Thereafter, again invoking 950 Code Mass. Reg. 10.07(f), the Respondents filed on November 18, 2005 a second "Motion for Summary Decision" ("Second Motion"). In response, the Division filed on December 12, 2005, "Division of Insurance's Opposition to Respondents' November 18, 2005 Motion for Summary Decision (with Memorandum)". Oral arguments were heard on the Second Motion on December 20, 2005. Following oral arguments, the Respondents' Second Motion was denied in a Ruling issued on December 20, 2005.

Contemporaneously with the Presiding Officer's ruling on the Respondents' Second Motion, a hearing was scheduled for February 9, 2006. However, due to an illness of the Division's counsel, the hearing was rescheduled to March 28, 2006.

At the hearing on March 28, 2006, the Respondents orally moved that a public stenographer be allowed to

make a stenographic record of the hearing. The Division voiced no objection. The Presiding Officer advised the parties that the motion was granted and that preparation and approval of the transcript would proceed as provided for by 801 Code Mass. Reg. 1.01(10(i). Although references sometimes are made in this Decision and Order to pages in the transcript (Tr.), these references were not meant to be exhaustive or exclusive.

At the hearing on March 28, the Division called one witness. The Respondents called no witnesses. The Respondents proffered sixteen exhibits; the Division objected to a portion of one of them. The Division proffered one exhibit, to which the Respondents objected. The parties agreed that the Presiding Officer could rule on their objections in his Decision and Order. The objections to the exhibits, accordingly, are discussed and adjudicated in Section V of the Decision and Order. See p. A69. At the close of the hearing, the Respondents orally renewed their motions for summary decision ("Renewed Motion for Summary Decision"). Tr. 76. The Respondents also filed written requests for findings

of fact and rulings of law. See 801 Code Mass. Reg. 1.01 (10(j).

The Division filed a Post-Hearing Memorandum within the time specified at the hearing. The Respondents timely responded with "Anawan Insurance Agency, Inc., and Stephen G. Michaels' Post-Hearing Memorandum" ("Respondents' Post-Hearing Memorandum"). The Division also submitted as a chalk "Division of Insurance's Analysis of Exhibit 17." The Respondents filed "Respondent's Response to Division of Insurance's Analysis of Exhibit 17." The Division thereafter filed a Rebuttal, as had been authorized at the hearing. The Respondents had until May 19 to file further argument, if they desired. No further argument was filed by them, and adjudication of the case was undertaken based on the record, including the exhibits that were entered into evidence, the pleadings and motions filed by the parties orally and in writing and the oral and written arguments of counsel.

Based solely on the testimony of the one witness called by the Division of Insurance, namely, Loney F. Bond, and the materials provided by Michaels on behalf of Anawan Insurance in his response letter of June 23,

2004, the Hearing Officer ordered the Plaintiffs to pay fines totaling $30,000.00 and to cease and desist from the conduct that gave rise to the fines. See pA. 78-94

By a Notice of Appeal filed on May 17, 2007, the Plaintiffs appealed the Decision and Order of the Division of Insurance filed on May 15, 2007. The Commissioner of Insurance affirmed the Decision and Order on October 9, 2007.

On November 6,2007 the Plaintiffs filed a Complaint with the Superior Court seeking judicial review of the Decisions and Orders of the Division of Insurance pursuant to G.L.C. 30A §14. See pA 130.

On August 11, 2008, the Plaintiffs filed PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS with the Superior Court. See pA 115.

On October 14, 2008, the Superior Court DENIED Plaintiffs' MOTION FOR JUDGMENT ON THE PLEADINGS, but elected not to specifically address any of the legal issues raised by the Plaintiffs. See pA 113.

The Plaintiffs are appealing the JUDGMENT of the Superior Court affirming the Decision of the Division of Insurance.

SUMMARY OF THE ARGUMENT

The Superior Court incorrectly denied PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS and incorrectly affirmed the decision of the Division of Insurance.

First, the Superior Court incorrectly ignored the Statute of Limitations set forth at G.L. c. 260§5 when it affirmed a fine totaling $30,000.00 for acts which the DIVISION OF INSURANCE acknowledges took place more than two years prior to commencement of its action.

Second, the Superior Court incorrectly ignored the Statute of Limitations set forth at G.L. c. 260 §5A when it affirmed a decision of the DIVISION OF INSURANCE as to violations of G.L. c. 176D when the ADMINISTRATIVE RECORD and DECISION AND ORDER clearly indicate that the cause of action first accrued in September 1999, more than four years prior to the commencement of the Division action.

Third, the Superior Court incorrectly ignored the provisions of G.L. c. 175 §177 when it affirmed a DECISION AND ORDER OF THE DIVISION OF INSURANCE which found a violation of this statute without finding that the violation was "knowing" and which imposed fines clearly in excess of the statutory limit.

Fourth, the Superior Court incorrectly ignored the provisions of G.L. c. 176D when it affirmed a DECISION AND ORDER OF THE DIVISION OF INSURANCE which imposes fines for alleged violation of the statute that is not authorized under any provision of G.L. c. 176D.

Fifth, The Superior Court incorrectly ignored the provisions of G.L. c. 176D when it affirmed a DECISION AND ORDER OF THE DIVISION OF INSURANCE which found that the payment of commissions to an individual who was not licensed without knowledge that the individual was not licensed violates the provisions of G.L. c. 176D.

Sixth, the Superior Court incorrectly failed to find that the DECISION AND ORDER OF THE DIVISION OF INSURANCE was arbitrary and capricious and not supported by the evidence.

ARGUMENT

I. THE DENIAL BY THE SUPERIOR COURT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS VIOLATES THE PROVISIONS OF G.L. C. 260§5.

The Administrative Record submitted by the DIVISION OF INSURANCE clearly indicates that the Presiding Officer made a factual finding that the Plaintiffs violated G.L. c. 176D §2 and G.L. c. 175 §177 when they failed to ascertain whether Prum had renewed his license which was due to expire on May 27, 1009. See p. A93. Based solely on those findings the Division imposed $30,000.00 in fines upon the Plaintiffs. See p. A99.

These fines were imposed despite the fact that the Division of Insurance did not commence its action against the Plaintiffs until October 25, 2004, See pA4, more than two years after the last alleged offense was found to have occurred and in spite of the fact that Prum's license was not canceled by the Division until 11/03/1998. See pA 48.

The fines imposed by the Division of Insurance, which were later upheld by the Superior Court by virtue of denial of Plaintiffs MOTION FOR JUDGMENT ON THE PLEADINGS clearly violate the provisions of G.L. C. 260 §5 which governs any and all actions for

penalties or forfeitures which are to be given in whole or in part to the Commonwealth. This well established legal principle is set forth in the case of *ES Park Shellac Co. v. Harris* (1921) 129 N.E. 617, 237 Mass. 312. See pA 17. For this reason alone, the Plaintiffs were entitled to have their MOTION FOR JUDGMENT ON THE PLEADINGS allowed as a matter of statutory law. The Superior Court has clearly made an error of law.

II. THE DENIAL BY THE SUPERIOR COURT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS VIOLATES THE PROVISIONS OF G.L. C. 260 §5A

The cause of action upon which the DIVISION OF INSURANCE rendered its decision accrued when it received complaints dated September 24, 1999 and October 1, 1999. See pA85.

The Affidavit of Loney F. Bond set forth in the Administrative Record and brought to the attention of the Superior Court leaves no doubt as to when the cause of action accrued. See pA40. The Statute of Limitations set forth at G.L. 260 §5A is equally clear in providing that actions arising on account of violations of any law intended for the protection of

consumers be commenced within four years next after the cause of action accrues.

The Plaintiffs are alleged to have violated the provisions of G.L. C. 175 §177. This statute pre-dates laws intended for the protection of consumers with a statutory history dating back to 1919. It is not referred to in G.L. 260 §5A and on its face appears to be no more or less than a statute providing for a penalty to be given to the Commonwealth if it is violated. The Plaintiffs do not believe it governs the current action, and contend that the provisions of G.L. c. 176D (12) support this belief due to the fact that the powers vested in the Commissioner by 176D are additional to other powers to enforce penalties, fines or forfeitures, but even if it did, there can be no question that the cause of action would have accrued when the Division of Insurance received its complaints in 1999 and assigned an investigator. The Division did not bring any action until five years later. If G.L. 260 §5A did apply to this action, there is no question that the cause of action accrued more than four years prior to the date it was commenced.

III. THE DENIAL BY THE SUPERIOR COURT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS VIOLATES THE PROVISIONS OF G.L. C. 175§177.

The Decision and Order of the DIVISION OF INSURANCE reads as follows:

> "I find that the Respondents violated §2 and §177 when they failed to ascertain whether Prum had renewed his license before soliciting business from, accepting applications from, and paying compensation to Prum after his license expired on May 27, 1997." See pA93.

When this action was commenced, the provisions of G.L. C. 175 §177 clearly stated "Whoever knowingly violates any provision of this statute shall be punished by a fine of not less than $50.00 nor more than $500.00."

The Decision and Order which was later upheld by the Superior Court clearly ignores this statutory provision. There was no finding by the Division that the Plaintiffs had any knowledge that Prum had not renewed his license. In point of fact the decision sought to impose a duty on the Plaintiffs which they clearly could not perform, given the fact that the Administrative Record clearly shows that Prum's license was not cancelled by the Division until November 3, 1998. See pA 48-50. In doing so, the

Division ignored the findings of the United States District Court set forth in *Vigilante v. Phoenix Mutual Life Insurance Company*. 755 F Supp 25 (1991) that there is no such duty to investigate. See pA 32.

The Division clearly ignored the provisions of G.L. C. 175 §177 as to a knowing violation and it then imposed a fine that was clearly in excess of the statutory limit.

The Superior Court never addressed the issues of law concerning G.L. C. 175 §177, when it Denied Plaintiffs' Motion. It simply affirmed the Decisions and Orders of the Division of Insurance.

IV. THE DENIAL BY THE SUPERIOR COURT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS IS INCONSISTENT WITH THE PROVISIONS OF G.L. CH. 176D §2.

The finding by the DIVISION OF INSURANCE found in the Administrative Record at p. 000518, is that the respondents violated G.L. C. 176D §2 by paying commissions to Prum. There is no other factual findings made. If the Plaintiffs did not violate the provisions of G.L. C. 175 §177 there is no provision in G.L. Ch. 176D which would warrant a finding that any provision of that statute had been violated. In fact G.L. c. 176D §12 clearly indicates that the

powers vested in the Commissioner under G.L. c 176D are additional to other powers to enforce penalties, fines or forfeitures. There is no penalty provision contained in any section of G.L. Ch. 176D which would permit imposition of any fine or penalty based on the findings of fact made by the DIVISION OF INSURANCE. The Superior Court never addressed this issue when it Denied Plaintiffs' Motion.

V. THE DENIAL BY THE SUPERIOR COURT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS WAS ITSELF ARBITRARY AND CAPRICIOUS

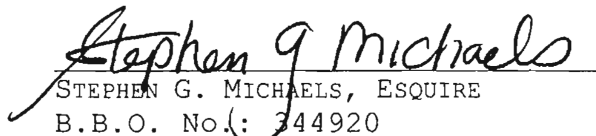
When the Superior Court entered its order, it gave no explanation or reason for its decision even though the portions of the Administrative Record brought to the attention of the Court made it clear that serious issues of law existed. The Superior Court offered no explanation as to why the DIVISION OF INSURANCE proceeding was not barred by applicable statutes of limitation or why a finding made by the DIVISION which was inconsistent with current statutory law should stand or why fines in excess of statutory limits should be permitted. There is no indication that the Superior Court ever took the time to consider the arguments made by the Plaintiffs. The Superior

Court let stand an imposition of a $30,000.00 fine and meaningless cease and desist order without offering any reason for its decision.

CONCLUSION

Based on the foregoing, the DECISIONS AND ORDERS of The DIVISION OF INSURANCE clearly violate all applicable statutes of limitation, are arbitrary and capricious and impose fines not authorized by either G.L. c. 175 §177 or G. L. c. 176D §2. Therefore, this Court should vacate the DENIAL of Plaintiffs' MOTION FOR JUDGMENT ON THE PLEADINGS, and order the trial court to enter JUDGMENT ON THE PLEADINGS for the Plaintiffs.

Respectfully submitted,



STEPHEN G. MICHAELS, ESQUIRE
B.B.O. No.: 344920
4 Anawan Avenue
West Roxbury, Massachusetts 02132
(617) 325-9434

Attorney for Plaintiffs//Appellants, Anawan Insurance Agency Inc., and Stephen G. Michaels

<u>CERTIFICATON UNDER RULE 16 OF MASS.R.A.P.</u>

Now comes Stephen G. Michaels, Esq., counsel for the Plaintiff/Appellant, and hereby certifies that the Appellant's brief submitted herewith complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass.R.A.P. A.P. 16 (a)(6) (pertinent findings or memoranda of decision); Mass.R.A.P. 16(e) (references to the record); Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass.R.A.P. 16(h) (length of brief); Mass.R.A.P. 18 (appendix to the briefs); and Mass.R.A.P. 20 (form of briefs, appendices and other papers).

I further attest, that this brief is being filed under rule 13a, and that the day of mailing is within the time fixed for filing by the court.

Stephen G. Michaels, Esq.