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DIVISION OF INSURANCE

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Division of Insurance, Petitioner

v.

Anawan Insurance Agency, Inc.
and Stephen G. Michaels, Respondents

Docket No. E2004-23

Decision and Order

I. Introduction

The Division of Insurance ("Division") in an Order to Show Cause dated October 25, 2004 ("OTSC") alleges that Anawan Insurance Agency, Inc. ("Anawan") and Stephen G. Michaels ("Michaels;" collectively "the Respondents") have violated G.L. c. 175 and G.L. c. 176D. The Division alleges that Anawan violated G.L. c. 175, §177 ("§177") by paying compensation in the form of commissions to Kuntthy Prum ("Prum" or "Kuntthy Prum"), doing business as ("d/b/a") "Handel Insurance Agency" ("Handel Insurance Agency," "Handel Insurance" or "Handel"), for acting in Massachusetts as an insurance broker from 1998 through 2002, during which time Prum was not licensed to transact insurance business in Massachusetts.[1]

[1] Since, as is discussed later in this Decision and Order, the record shows that "Handel Insurance Agency" or "Handel Insurance/Travel Agency" (see copy of a business card in Exhibit 5) was never licensed as a Massachusetts insurance agent, broker or producer, or as a "doing business as" name for a licensed Massachusetts insurance agent, broker or producer, I have used quotation marks around the name in recognition of its unsanctioned status.

The Division also alleges that by soliciting business from, accepting applications from and paying compensation to Prum during this period, Anawan violated G.L. c. 176D, §2 ("§2") by engaging in unfair or deceptive acts or practices in the business of insurance. The OTSC alleges that Prum submitted between 250 and 300 Massachusetts automobile insurance policy applications to Anawan between 1998 and 2002, and that Anawan made commission payments to Prum for these Massachusetts policies on at least 1,277 occasions from 1998 through 2002, during which time Prum was not licensed to transact insurance business in Massachusetts.[2] The Division asserts in the OTSC that Michaels, who was listed as an officer and/or director on Anawan's Massachusetts insurance license, is individually liable pursuant to G.L. c. 175, §174 for Anawan's alleged violations of §177 and §2. The Division seeks fines against the Respondents.

This proceeding has been unusual because of the large number and variety of defenses that have been raised by the Respondents. I found it to be appropriate, therefore, to begin by providing a summary of my adjudication. On occasion I have made references to pleadings, briefs, exhibits and oral testimony. Such references are not meant to be exhaustive or exclusive.

II. Summary of Decision and Order

In a letter dated June 23, 2004 from Stephen G. Michaels, Anawan Insurance Agency, Inc., to Loney F. Bond (*Internal Exhibit F* of Exhibit 16, proffered by the Respondents), the Respondents have admitted that Kuntthy Prum d/b/a "Handel Insurance" brokered insurance business through Anawan from January 7, 1997 through December 31, 2001.[3] Exhibit 17 records insurance business transactions between Anawan and Prum at times after Prum's Massachusetts insurance license expired on May 27, 1997. Anawan received a faxed copy of Prum's Massachusetts insurance license on January 7, 1997, which stated that his license was due to expire on May 27, 1997, less than five months later. Nevertheless, Anawan continued to transact insurance business with Prum for more than three years after this date. However, the Respondents have raised numerous defenses that, they assert, render the Division's OTSC untenable. They have not accepted responsibility for their improper insurance business transactions with Prum; rather they have pointed the finger of blame at the Division for its alleged failures.

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[2] See ¶¶ 19 and 20 of the OTSC.
[3] See also the admissions made in ¶5 of the Respondents' Motion for Summary Decision.

Engaging in the business of insurance with an unlicensed person strikes at the heart of the requirement of insurance licensure and violates a crucial protection provided by the legislature to the consumers of insurance products. See *Deluty v. Commissioner of Insurance*, 7 Mass. App. Ct. 88 (1979) (To prevent conduct that would be hazardous to the public or the broker's customers or creditors, trustworthiness and competence are requirements for the issuance of a broker's license.). Any licensed insurance producer who enables an unlicensed person to perform the functions of an insurance broker acts to the detriment of consumers and thereby engages in unfair and deceptive practices in the business of insurance in violation of G.L. c. 176D, §2.

The Respondents have raised the two-year statute of limitations under G.L. c. 260, §5 ("§5") as a defense to the OTSC. However, they have not provided persuasive arguments that the statute of limitations under §5 should apply rather than the statute of limitations under G.L. c. 260, §5A ("§5A"). Section 5A applies generally to laws intended for the protection of consumers and explicitly includes within its scope actions arising from violations of c. 176D, including §2. I find that the §5A four-year statute of limitations applies to the charges made in the OTSC that the Respondents violated §2. Moreover, I find that actions for violations of G.L. c. 175, §177 also are included within the ambit of §5A, because §177 in its own right is a law intended for the protection of consumers and because, furthermore, violations of §177 can also constitute violations of §2. Therefore, I find that all the charges made in the OTSC are governed by the four-year statute of limitations of §5A rather than by the two-year statute of limitations of §5.

The OTSC charges that Prum submitted between 250 and 300 Massachusetts insurance policy applications to Anawan between 1998 and 2002, for which he was paid commissions. I find that it does not matter if proof of a particular insurance business transaction between Anawan and Prum consists of a recorded payment to Prum by Anawan or of a credit for Anawan in its commission account for Prum; in either case an improper insurance business transaction involving insurance marketing and the payment of commission has been proved. The Division has proved violations of §2 and violations of §177 between 1998 and 2002 in connection with more than 300 insurance policies. However, I have limited the compass of sanctions imposed in this decision to the maximum number of policies in connection with which the Division has

sought sanctions in the OTSC; 300. I have assessed fines for 300 §2 violations in connection with 300 policies. I have imposed no additional fines based on the violations of §177.

The 300 policies that constitute the foundation for the fines assessed in this decision for 300 §2 violations are made up of 278 policies for which evidence of improper business transactions dates from after October 2000 ("post-October 2000 violations") and 22 policies for which such evidence dates from prior to November 2000 ("pre-November 2000 violations"). With respect to the 278 post-October 2000 violations, there can be no §5A statute of limitations defense. All these violations plainly occurred within the time period set by the §5A statute of limitations, *i.e.*, within four years of the filing of the Order to Show Cause dated October 25, 2004. With respect to the 22 pre-November 2000 violations, fines would be barred by the statute of limitations of §5A if the Division did not show that the §5A statute of limitations was tolled. The Division demonstrated that it neither knew nor should have known of these pre-November 2000 violations at the time of their occurrences. Furthermore, the Division has shown that the statute of limitations was tolled as to these pre-November 2000 violations until after October 25, 2000, a date four years prior to the filing of the OTSC. Therefore, the Division has shown that it filed the OTSC timely as to all 300 violations of §2 for which fines are imposed in this decision.

III. Procedural History

The OTSC was filed on October 25, 2004.[4] 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.[5] 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 801 Code Mass. 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 me as presiding officer for this hearing.

[4] See ¶22 of the Respondents' Request for Findings of Fact.
[5] See ¶22 of the Respondents' Request for Findings of Fact.

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").[6] 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").[7] 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 my 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. I advised the parties that the motion was granted and that preparation and approval of

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[6] The Respondents invoked 950 Code Mass. Reg. 10.07 in their Motion for Summary Decision, but this Regulation deals with adjudicatory hearings in the Securities Division of the Office of the Secretary of State. I treated the Respondents' Motion for Summary Decision as filed pursuant to the applicable regulation; 801 Code Mass. Reg. 1.01(7)(h).

[7] I again treated the Respondents' Motion for Summary Decision as filed pursuant to the applicable regulation; 801 Code Mass. Reg. 1.01(7)(h).

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 are 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 I could rule on their objections in my Decision and Order. The objections to the exhibits, accordingly, are discussed and adjudicated in Section V of this decision.

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.

This Decision and Order will proceed as follows. First, the Respondents' Renewed Motion for Summary Decision will be discussed and adjudicated. Next, rulings will be made on the evidentiary objections to two proffered exhibits. Finally, findings of fact and conclusions of law will be set out, followed by appropriate orders. References to the Respondents' requests for findings of fact and rulings of law may be made where appropriate throughout this Decision and Order, most often in footnotes (see, *e.g.*, note 4, *supra*). When I have determined that a request for a finding of fact concerns an irrelevant or unnecessary fact, there may not be any mention of the request.

IV. Renewed Motions for Summary Decision

Since the parties have reiterated many of the arguments made in connection with earlier motions for summary decision, the discussion that follows does not exhaustively restate the arguments that the parties made in the context of the Respondents' two motions for summary decision that were denied prior to the Hearing. A more detailed summary of the arguments of the parties can be found in the Ruling on Motion for Summary Decision that was filed on August 23, 2005, to which reference is hereby made. The Respondents move for summary decision on what can be identified as four primary and two secondary grounds.

(1) They argue that any enforcement action based on alleged violations of §177 that occurred more than two years prior to the commencement of this proceeding in October 2004 is time-barred by G.L. c. 260, §5, which requires that actions for penalties on behalf of the Commonwealth must be commenced within two years after the offense is committed.

(2) They argue that the monetary sanctions provided by §177 cannot be assessed against them because the Division has not alleged that the Respondents "knowingly" acted contrary to the prohibitions set out in that statute.

(3) They argue that the Division is estopped from undertaking the instant enforcement action by reason of its failure to notify the Respondents of Prum's failure to renew his license.

(4) They argue that if a violation by Anawan cannot be proved, a violation by Michaels, being derivative in nature, also cannot be proved and, furthermore, that the provisions of G.L. c. 175, §174 do not apply to Michaels.

In addition to these four primary issues, the Respondents raise two subsidiary issues:

(5) They assert that they cannot be found to have violated §2 since the only basis alleged for liability under §2 is the alleged violation of §177 and the Division, they assert, is time-barred from proving a violation of §177.

(6) They assert that they cannot be found to have violated §2 since the only basis alleged for liability under §2 is the asserted violation of §177, which they cannot be found to have violated, they assert, because the Division has not alleged that the Respondents "knowingly" acted contrary to the prohibitions set out in §177.

Dispositions of the four primary issues raised by the Respondents effectively adjudicates all six issues raised by the Respondents in their Renewed Motion for Summary Decision.

A. Ruling on whether the OTSC is timely filed

1. Arguments of the parties

The Respondents state that the only factual basis alleged in the OTSC for finding that Anawan engaged in any unfair and deceptive practice in violation of §2 is the alleged violation of §177. Respondent's 2005 Memorandum, fourth page. They assert that subsection 12 of c. 176D, §3 ("§3(12)") makes any violation of c. 175 an unfair or deceptive act or practice, and claim that this link between c. 175 and §3(12) means that a violation of c. 175 must occur ***before*** an unfair or deceptive act as defined by §3(12) can be found to have occurred. Thus, they conclude, if actions against them for alleged violations of §177 are time-barred, there is no support for a finding of a violation of §2. *Id*. Since, the Respondents assert, the only sanction for violation of §177 is a fine, the Respondents conclude that the OTSC is an action for civil penalties. As an action for civil penalties, they argue, the OTSC is barred by the statute of limitations set out in G.L. c. 260, §5 ("§5"):

> Actions for penalties or forfeitures under penal statutes, if brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced only within one year next after the offence is committed. But if the penalty or forfeiture is given in whole or in part to the commonwealth, an action therefore by or in behalf of the commonwealth may be commenced only within two years next after the offence is committed. This section shall not apply to any action set forth in section five A.[8]

Because the alleged violations set out in the OTSC occurred more than two years prior to the Division's commencement of the enforcement action against them, the Respondents claim an action based on such violations is barred by §5. The Respondents cite *E. S. Parks Shellac Co. v. Harris*, 237 Mass. 312, 318 (1921), in support of their argument. They argue that the cases cited by the Division are not material to the statute of limitations issue because they all deal with attempts to suspend or revoke professional licenses; not with the imposition of fines.

Based on their argument that the OTSC action against Anawan is barred, the Respondents assert that no action can be maintained against Michaels either, since the allegations against him are based on the actions of Anawan.

The Division argues that the OTSC clearly alleges not only that the Respondents violated §177 but that, furthermore, they engaged in unfair or deceptive acts or practices in the business

[8] The text of G.L. c. 260, §5A is set out at page 10, *infra*.

of insurance, a violation of §2. The Division asserts that *Division of Insurance v. Beier*, Docket No. 2004-12, holds, contrary to the Respondents' argument, that a violation of §2 can be found without a finding that G.L. c. 176D, §3(12) has been violated.

The Division argues that an enforcement action based on an asserted violation of §177 is undertaken not to punish the licensee but to protect the public, and therefore is not penal in nature. In support of this proposition, the Division points to several cases involving enforcement actions undertaken pursuant to other professional licensing statutes: *Gurry v. Board of Public Accountancy*, 394 Mass. 118, 128 (1985); *Levy v. Board of Registration and Discipline in Medicine*, 378 Mass. 519, 528 (1979); *Board of Registration in Medicine*, 383 Mass. 299, 317 (1981). Based on these precedents, the Division argues that the OTSC is not subject to the statute of limitations set out in §5; indeed, the Division asserts that ***no*** statute of limitations applies to enforcement actions that are undertaken based on asserted violations of §177. In response to the Respondent's argument that the cases cited by the Division are not material to the statute of limitations issue because they all deal with attempts to suspend or revoke professional licenses and not with the imposition of fines, the Division observes that it could have sought suspension or revocation of the licenses of the Respondents pursuant to G.L. 175 §162R(a)(2) in addition to the monetary fines that it chose to seek in this OTSC and argues that fines are sanctions just as are suspension and revocation.

2. Analysis and ruling

It is well settled that the business of insurance is subject to a large degree of legislative regulation. *E.g., Attorney General v. Prudential Insurance Co.*, 310 Mass. 762, 765-766 (1942). This power extends to reasonable regulation in the public interest of insurance brokers and agents, and of the compensation paid to agents. *Id*. Furthermore, in the interest of the public welfare, freedom to enter into contracts is subject to reasonable legislative control under the police power. *Id*. The Commissioner has regulatory powers involving insurance licensing in order to prevent conduct that could be hazardous to the general public or to the agent's or broker's customers or creditors. See *Deluty v. Commissioner of Insurance*, 7 Mass. App. Ct. 88 (1979); see also *David v. Commissioner of Insurance*, 53 Mass. App. Ct. 162, 165 (2001). The requirement of licensure by those who engage in the business of insurance is designed to ensure the competence, trustworthiness and suitability of those who deal with the consumers of insurance products. *Deluty, supra; David, supra*.

A special statute of limitations, G.L. c. 260, §5A ("§5A"), applies to actions arising on account of violations of laws intended for the protection of consumers (emphasis added):

> Actions arising on account of violations of any law intended for the protection of consumers, including but not limited to the following: . . . ***chapter one hundred and seventy-six D***; . . . whether for damages, penalties or other relief and brought by any person, including the attorney general shall be commenced only within four years next after the cause of action accrues.

With regard to the charges made in the OTSC that Anawan has violated §2, I find that G.L. c. 176D is ***explicitly included*** within the ambit of §5A. With regard to the charges made in the OTSC that Anawan has violated §177, I note that §5A uses a non-limiting preface to the listing of specific laws intended for the protection of consumers. *Mahoney v Baldwin*, 27 Mass. App. Ct. 778 (1989), *review denied*, 406 Mass. 1101 (1989) (§5A is limited to laws intended for protection of consumers, but is not restricted to causes of action arising out of violations of laws specified in the statute.). I find that §177 is a law intended for the protection of consumers and therefore it is governed by §5A, although not specifically referenced in §5A. Thus, I find that the four-year statute of limitations of §5A applies to the OTSC and its actions for violations of both §2 and §177. See *Commonwealth v. Owens-Corning Fiberglas Corp*., 38 Mass. App. Ct. 600, 603 (1995) (actions by the Commonwealth are subject to G.L. c. 260, §5A). Accordingly, the enforcement actions that are brought in the OTSC seeking fines, regardless of whether they could be viewed as "penal" in nature, are within the ambit of §5A and are ***explicitly excluded*** from §5 by virtue of its final sentence, *viz*.: "This section shall not apply to any action set forth in section five A."[9]

In furtherance of their statute of limitations defense, the Respondents have invoked subsection 12 of c. 176D, §3 ("§3(12)"). Respondents' 2005 Memorandum, fourth page. Although they acknowledge that §3(12) "makes any violation of Chapter One Hundred Seventy-Five an unfair or deceptive act or practice," the Respondents argue (emphasis added) "that any violation of Chapter One Hundred Seventy-Five must occur ***before*** an unfair or deceptive act as defined by M.G.L. c. 176D, Section 3(12) can be found to have occurred." *Id*. In other words, the Respondents assert that a finding of a particular violation of a particular section of c. 175 is a mandatory condition precedent to a finding of a violation of c. 176D. I find that the

[9] I offer no opinion whether §5A, or any statute of limitations whatsoever, applies to an OTSC that seeks suspension, revocation or cancellation of an insurance license.

Respondent's approach ignores the broad scope of §2: "No person shall engage in this commonwealth in any trade practice which is defined in this chapter as, or determined pursuant to section six of this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." The Respondents would limit the scope of c. 176D to only specific violations of specific sections of c. 175. On the contrary, I find that the legislature clearly intended that the scope of c. 176D was not to be circumscribed by specific provisions of c. 175.

To the extent that the OTSC alleges improper insurance business transactions between Anawan and Prum that occurred within four years of the filing of the OTSC on October 25, 2004, the claim for fines for these violations is timely as a matter of law.[10] Thus, there is no §5A statute of limitations issue concerning the alleged improper insurance business transactions that the Division alleges occurred from and after October 25, 2000. The OTSC was plainly timely filed as to these alleged violations of §2 and §177.

With respect to the alleged improper insurance business transactions between Anawan and Prum that occurred prior to October 25, 2000 (*i.e.*, that occurred more that than four years prior to the filing of the OTSC on October 25, 2004), the issue is not as straightforward. Statutes of limitations limit the time in which an action may be brought only after it accrues, and, furthermore, statutes of limitations are subject to tolling. *Commonwealth v. Owens-Corning Fiberglas Corp.*, 38 Mass. App. Ct. 600, 602 (1995). In particular, the so-called "discovery rule" can apply to actions governed by the statute of limitations of §5A. *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 29 Mass. App. Ct. 215, 220-221 (1990). Accordingly, determining whether the Division can seek fines for alleged improper insurance business transactions between Anawan and Prum that occurred prior to October 25, 2000 requires an adjudication whether the four-year statute of limitations of §5A was tolled as to these alleged transactions, and, if so, the time parameters of this tolling. See, *e.g.*, *Patsos v. First Albany Corp.*, 433 Mass. 323 (2001) (The discovery rule operates to toll limitations period until a prospective plaintiff learns or should have learned that he has been injured, and may arise where facts were inherently unknowable to injured party.); *Riley v. Presnell*, 409 Mass. 239

[10] Under Massachusetts law, a statute of limitations time period begins to run one day after the cause of action accrues, with the last day for filing suit being the anniversary date of the event. *Pierce v. Tiernan*, 280 Mass. 180, 182 (1932).

(1991) (An action does not accrue for purposes of statute of limitations until plaintiff knew or reasonably should have known that he may have suffered injury because of the defendant's conduct, which is a question of fact for the trier of fact.). Since the Respondents have timely pleaded the statute of limitations in defense, the Division bears the burden of proving facts that show that the §5A statute of limitations should be tolled as to the alleged improper insurance business transactions that occurred prior to October 25, 2000. See generally *Riley v. Presnell, supra*. This adjudication is addressed later in this Decision and Order since it depends upon determination of the relevant facts.

The Respondents' Renewed Motion for Summary Decision based on the defense of the statute of limitations is denied.

B. Ruling on whether the Division must allege and prove that the Respondents acted "knowingly" as part of proving the violations of §177 that are alleged in the OTSC

1. *Arguments of the parties*

The Respondents argue that scienter is required for a finding that the Respondents violated §177. They maintain that a "***knowing***" violation of the statute always has been required by §177 and that the 2002 amendment to §177 ("2002 amendment") merely "clarified" this fact.[11] The Respondents also contend that it is significant that the 2002 amendment predated the filing of the OTSC by two years. They assert that the Division seeks to have the legislative intent expressed in the 2002 amendment ignored in this proceeding and that the Division cannot satisfy this alleged scienter requirement.

The Division maintains that there was no scienter requirement in §177 as it applied to the Respondents' alleged insurance business transactions with Prum from 1998 to 2002, prior to the 2002 amendment. The Division argues that the 2002 amendment, adding a requirement of knowledge of violation, cannot be used to show a previous legislative intent to require such knowledge. As the Division's counsel orally argued, a merely negligent act in violation of §177 could be actionable prior to the 2002 amendment. In the alternative, the Division contends that the Respondents may be charged with knowledge for purposes of §177 based on their knowledge that Prum's license was set to expire on May 27, 1997, and their subsequent failure to ascertain

[11] 2002 Mass. Acts c. 184, §109, by §247 made effective July 1, 2002.

whether he had renewed his license before continuing to engage in insurance business transactions with him.

2. Analysis and ruling

At the times when the Respondents are charged with engaging in improper insurance business transactions with Prum, 1998-2002, the first sentence and the last (seventh) sentence of §177 provided as follows:

> No company and no officer, agent or employee thereof, and no duly licensed insurance broker, shall, directly or indirectly, pay or allow or offer or agree to pay or allow compensation or anything of value to any person, excepting an officer of a domestic company acting under section one hundred and sixty-five, for acting in this commonwealth as an insurance agent or as an insurance broker, both as defined in section one hundred and sixty-two, who is not then duly licensed as an insurance agent of the company for which he assumes to act or as an insurance broker. . . . Whoever violates any provision of this section shall be punished by a fine of not less than twenty nor more than two hundred dollars.[12]

In 2002, the last (seventh) sentence of §177 was replaced with the following (emphases added): "Whoever ***knowingly*** violates any provision of this section shall be punished by a fine of not less than ***$50*** nor more than ***$500***." 2002 Mass. Acts c. 184, §109. The alleged acts by the Respondents that form the bases of the OTSC all occurred prior to the effective date of this 2002 amendment to the last sentence of §177.[13]

Generally, the amendment of a statute is not presumed to constitute a confirmation of pre-existing law; but, rather, is presumed to intend a ***change*** in the law. *Mari v. Delong*, 62 Mass. App. Ct. 87, 89-90 (2004). The Respondents have not persuaded me that the 2002 amendment to §177, adding a requirement of scienter, merely "clarified" pre-existing law. I find that the 2002 amendment changed the law. Prior to the 2002 Amendment, a person did not need to act "knowingly" to be fined for a violation of §177.

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[12] 2002 Mass. Acts c. 106, §§35-36, by §41 made effective January 1, 2003, amended the first sentence of §177. However, these 2002 changes to the first sentence of §177 did not alter the responsibility of Massachusetts licensed insurance professionals, but merely conformed the language of §177, following amendment, to the new "producer" terminology that uniformly replaced the older "agent" and "broker" terminology in Massachusetts insurance laws at that time.

[13] 2002 Mass. Acts, c. 184, §109, was approved with emergency preamble July 9, 2002, and by §247 was made effective July 1, 2002. However, I note that the Historical and Statutory Notes to Massachusetts General Laws Annotated states that "St. 2002, c. 184, §109, an emergency act, approved July 29, 2002, and by §247 purported to take effect July 1, 2002, but apparently was intended to take effect Jan. 1, 2003 . . .." In either event, the actions complained of in the OTSC all took place prior to the effective date of the 2002 amendment.

The Respondents' arguments may be viewed as raising the issue of whether the 2002 amendment should be applied retroactively. Whether a statute is to be applied retroactively is, in the first instance, a question of the legislature's intent. *Moakley v. Eastwick*, 423 Mass. 52, 57 (1996); *Eastern Casualty Insurance Co. v. Roberts*, 52 Mass. App. Ct. 619, 626 (2001). With respect to the 2002 amendment of the last sentence of §177, the legislature made no explicit statement concerning the effectiveness of the amendment other than providing that the new language was to be effective July 1, 2002, pursuant to the catch-all provision (§247) at the end of 2002 Mass. Acts c. 184. In the absence of an express legislative directive, the Supreme Judicial Court usually has applied the following general rule of interpretation:

> The general rule of interpretation . . . that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. Doubtless all legislation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action.

Fontaine v. Ebtec Corp., 415 Mass. 309, 318 (1993).

In determining the legislature's intent regarding the 2002 amendment, it is important to realize that the change in the last sentence of §177 is two-fold; there is a change in the activity for which a fine can be imposed (only "knowing" violations are henceforth subject to a fine) and there is a change in the financial consequence for the activity (the range of fine is increased from a range of "not less than twenty nor more than two hundred dollars" to a range of "not less than $50 nor more than $500"). I find that this circumstance manifests a link between the two changes, demonstrating a legislative intent to increase the fines under §177 commensurate with the change in the activity newly required for an action to support imposition of a fine under §177. I find that this manifests a legislative intent for both changes to §177 to be applied only prospectively. This conclusion comports with precedent regarding legislation limiting or increasing the measure of liability, which, in the absence of a provision mandating retrospective application, the Supreme Judicial Court has held does not apply to claims arising prior to enactment. See *Fontaine v. Ebtec*, *supra* at 319-320 (In the absence of an express directive that

statutory amendments providing enhanced damages were to apply to cases pending at the time of their enactment or to conduct occurring prior thereto, or any other discernible indication of the legislature's intent, the plaintiff was not entitled to recover increased damages under the new provisions.); *Cudlassi v. MacFarland*, 304 Mass. 612, 613 (1939) (In the absence of legislative directive, the Supreme Judicial Court in a tort case declined to give retrospective effect to statutory amendment eliminating double damages.).

I find that at the times involved in the OTSC, 1998 to early 2002, there was no requirement that the Respondents had to know that Prum was not then licensed when they paid commissions to him for fines to be imposed under §177 for their improper insurance business transactions. The Respondents' Renewed Motion for Summary Decision based on this defense denied.

C. Ruling on whether the Division is estopped from pursuing the enforcement actions in the OTSC because it did not notify the Respondents of the expiration of Prum's Massachusetts license

1. Arguments of the parties

Noting that Prum was duly licensed when Anawan began to do business with him in January 1997, the Respondents argue that the Division is estopped from proceeding with the OTSC because the Division never informed Anawan that Prum's license had expired. They maintain that Prum's capacity to act on behalf of Anawan had been disclosed to the Division by Authorizations to Sign Motor Vehicle Registration Certificates ("authorization certificates") allegedly submitted to the Division. Although the Respondents had attached copies of these authorization certificates as Exhibits 2 and 3 to their Motion for Summary Decision, they did not proffer them for entry into evidence at the hearing. (Copies of the authorization certificates were included in Exhibit 17, proffered by the Division at the hearing, which proffered exhibit was objected to by the Respondents.)

The Division asserts that it had no way of knowing of any affiliation between Prum and the Respondents. It notes that the Respondents have not claimed that Anawan itself ever notified the Division that Prum was an individual affiliate of Anawan or was a designated insurance producer of Anawan. The Division argues that authorization certificates are irrelevant to the OTSC because they have nothing to do with licensure.

The Respondents assert that no statutes or regulations require an insurance broker to monitor the licensing status of individuals with whom they do business. On the other hand, in support of the proposition that the Division has a duty to monitor the licensing status of individuals with whom the Respondents do business, they cite *Vigilante v. Phoenix Mutual Life Insurance Co.*, 755 F. Supp. 25 (D. Mass. 1991).

The Division avers that §177 required the Respondents to make certain that Prum was licensed if they were engaging in insurance business transactions with him. It points out that the Respondents had a copy of Prum's Massachusetts insurance broker license issued on May 27, 1994, arguing that this fact shows an acknowledgement by Anawan of its responsibilities in this regard.[14] Furthermore, the Division asserts that possession of a copy of Prum's broker license put Anawan on notice that his broker license was set to expire on May 27, 1997.

As a further defense, the Respondents invoke G.L. c. 175, §163 ("§163"), which they claim "appears to prohibit termination of an agent without one hundred eighty days notice unless such agent's license was revoked." Respondent's 2005 Memorandum, fifth page. The Respondents note that Prum's license was not revoked; he simply failed to renew it. *Id*.

The Division dismisses the Respondents' argument that §163 imposes a duty upon the Division in the circumstances that form the basis of the OTSC. The Division argues that the Respondents cite no statute, regulation, case or other authority that imposes upon the Division a duty to notify insurance agencies that the license of an insurance broker with which the insurance agency is in a business relationship has expired.

The Respondents further argue that they had no obligation to monitor the status of Prum's license because the Division had stated in Bulletin B-2001-02, regarding internet practices, that "It is the nonlicensed producer's responsibility not to sell to a consumer physically present in Massachusetts." Respondent's 2005 Rebuttal, page 5.

The Division asserts that the language quoted by the Respondents from Bulletin B-2001-02 has no relevance to the issue of the statutory duties that the Respondents had with regard to the provisions of §177; specifically that Respondents had an affirmative duty to ensure current licensure of those with whom they engaged in insurance business transactions.

[14] A copy of Prum's Massachusetts insurance license was attached as Exhibit 1 to the Respondents' Motion for Summary Decision. A copy of the license is in the exhibit that was proffered by the Division at the hearing.

2. Analysis and ruling

The Respondents have identified no statute, regulation or case precedent in support of the duty that they allege that the Division had to inform them that Prum's insurance broker license had expired. The Division, on the other hand, has pointed to §177, which obligates a Massachusetts insurance licensee to ensure that insurance business transactions are conducted only with currently licensed individuals and entities.

With respect to the authorization certificates, I make the following observations. The Respondents have not shown that these authorization certificates ever were sent to the Division. None of the copies of the authorization certificates bear a receipt stamp from the Division. Furthermore, the certificates are not signed by the authorized officer of the company that is indicated on each authorization certificate (Robert E. Longo for Commerce Insurance Company, Motion Exhibit 3 and Division's proffered hearing exhibit; Robert Mooney for Citation Insurance, Motion Exhibit 2 and Division's proffered hearing exhibit; "Corporate Secretary" for two authorization certificates for Norfolk & Dedham Mutual Fire, Division's proffered hearing exhibit). Moreover, none of the authorization certificates are dated. These authorization certificates therefore provide no basis for concluding that the Division knew, or had any reason to know, that Prum had a relationship as a broker with Anawan, and the Respondents in their several motions have not pointed to any other way in which the Division knew or should have known of the relationship.[15]

I find that *Vigilante*, *supra*, the case cited by the Respondents in support of their contention that they had "no duty to monitor Prum," is not relevant to the breaches of their duties as insurance agency and agency director or officer that are alleged in the OTSC. I find that *Vigilante* stands for the proposition that there is no duty on the part of insurance companies to investigate the criminal past of proposed agents or to report information received about agents' past convictions to the Commissioner of Insurance or to customers. *Vigilante* says nothing about

[15] Interestingly, the Respondents themselves do not propose that the Division knew that Kuntthy Prum was doing business as "Handel Insurance Agency" until after the alleged last payment of commission to him in early 2002. Thus at page 8 of Respondents' Post-hearing Memorandum, they state that "There is no question that as of May 6, 2002 Petitioner knew Anawan had done business with an individual doing business at Handel and that it knew or should have known the identity of that individual was Prum and that his license had been cancelled by the Division of Insurance on November 3, 1998." In ¶15 of the Respondents' Request for Findings of Fact, they request that I find that on May 13, 2002, the Division knew that Kuntthy Prum was doing business as "Handel Insurance Agency" at 76 Shirley Avenue in Revere and that his license had been cancelled by the Division on November 3, 1998.

the duty agencies have to ensure that they engage in insurance business transactions only with ***currently*** licensed insurance brokers or agents (since 2002, collectively called "producers").

I find the §163 argument of the Respondents to be unsound. That statute provides, *inter alia*, that a company must provide an independent insurance ***agent*** for fire or casualty insurance with at least 180 days prior notice if it intends to cancel such agent or modify a contract with such agent. Prum was an insurance ***broker***; he was not an agent.

I find that the language quoted by the Respondents from Bulletin B-2001-02, regarding internet sales practices, has no relevance to the matter of ***the duties that the Respondents had*** not to violate the provisions of §2 and §177, regardless of what the Bulletin may have stated regarding ***the duties that Prum had*** as someone who did not possess a current Massachusetts insurance license.

I find that the Division is not estopped from pursuing the enforcement actions in this OTSC because it did not notify the Respondents that Prum's Massachusetts license had expired; the Respondents' Renewed Motion for Summary Decision on this ground is denied.

D. Whether the provisions of G.L. c. 175, §174 apply to Michaels

The Respondents argue that the Division's allegations against Michaels are based solely on his asserted individual responsibility pursuant to G.L. c. 175, §174 ("§174") for any violations by Anawan. Michaels asserts that even if Anawan has violated §177, and, as a result, §2, the provisions of §174 would not apply to him.

Michaels has admitted that he has been an officer and director of Anawan at all times relevant to the OTSC and has been listed as an officer and/or director on Anawan's corporate Massachusetts insurance licenses from at least January 1, 1985 to the present. See ¶¶ 12 and 13 of the Respondent's Answer.[16] As an officer and director, the following language in §174 explicitly provides for Michaels' personal liability for any violations by Anawan:

> Every officer or director specified in the license shall be personally liable to the penalties of the insurance laws for any violation thereof, although the act of violation is done in the name and in behalf of the corporation.

Michaels is responsible for any of Anawan's violations of Massachusetts insurance laws, including violations of §177 and §2.

[16] Findings of fact about Michaels' history as a Massachusetts insurance agent, Massachusetts insurance broker and Massachusetts insurance producer appear in Section VI(A), *infra*.

The Respondents' Renewed Motion for Summary Decision on the ground that §174 does not apply to Michaels is denied.

V. Exhibits

Prior to the commencement of the hearing, the parties agreed to the authenticity of seventeen exhibits (Tr. 6). The Respondents proffered sixteen numbered exhibits, including one two-part exhibit (Exhibit 3). The Division did not object to the Respondents' sixteen exhibits except for that portion of Exhibit 10 that contained language concerning an offer of settlement. Proffered Exhibits 1 - 9 and 11 - 16 therefore were entered into evidence without objection:

1. Anonymous letter to James Keilty, Special Investigations, Division of Insurance, date-stamped by the Market Conduct section of the Division on September 24, 1999
2. Anonymous letter to Mr. Keilty, Commonwealth of Massachusetts, Insurance Division, dated September 28, 1999; date-stamped by the Market Conduct section of the Division on October 1, 1999

3A. Division of Insurance Consolidated Licensing and Regulation Information System ("CLARIS") "View Individual At A Glance" information screen for Prum dated May 28, 2004

3B. Division of Insurance CLARIS "Select Individual" information screen dated September 6, 2000, with handwritten comment, and Division of Insurance CLARIS "Select Organization" information screen dated September 6, 2000, with handwritten comment

4. Letter dated July 30, 2001 to Paul F. D'Olimpio from Joseph E. Sullivan, Enforcement Counsel
5. Memorandum to File by Loney F. Bond dated May 6, 2002
6. Letter dated May 13, 2002 from Loney F. Bond to Kevin Prum or Michael Prum, Handel Insurance and Travel Agency
7. Division of Insurance CLARIS "View Individual License" screen for Prum dated May 28, 2004
8. Letter dated June 1, 2004 from Loney F. Bond to Stephen G. Michaels, Anawan Insurance Agency, Inc.
9. Fact and Evidence Summary by Loney F. Bond dated July 14, 2004
11. Letter dated September 2, 2004, from Stephen G. Michaels, Esq., counsel for Anawan Insurance Agency, Inc., to Douglas A. Hale
12. Insurance Bulletin B-2001-02, Re: Internet Practices
13. Letter dated September 10, 2004 from Douglas A. Hale, Esq., Counsel to the Commissioner, to Stephen G. Michaels, Esq.
14. Letter dated September 16, 2004, from Stephen G. Michaels, Esq., counsel for Anawan Insurance Agency, Inc., to Douglas A. Hale
15. Fact and Evidence Summary by Loney F. Bond dated September 24, 2004 for SIU Case # 3149(D)
16. Affidavit of Loney F. Bond dated December 12, 2005, with the following attachments: *Internal Exhibit A*: Anonymous letter to James Keilty, Special Investigations, Division of Insurance, date-stamped by the Market Conduct section of the Division on September 24, 1999; *Internal Exhibit B*: Anonymous letter to Mr. Keilty,

> Commonwealth of Massachusetts, Insurance Division, dated September 28, 1999; date-stamped by the Market Conduct section of the Division on October 1, 1999; *Internal Exhibit C*: Memorandum to File by Loney F. Bond dated May 6, 2002; *Internal Exhibit D*: Letter dated May 13, 2002 from Loney F. Bond to Kevin or Michael Prum, Handel Insurance and Travel Agency, with certified mail paperwork; *Internal Exhibit E*: Letter dated June 1, 2004 from Loney F. Bond to Stephen G. Michaels, Anawan Insurance Agency, Inc.; *Internal Exhibit F*: Letter dated June 23, 2004 from Stephen G. Michaels, Anawan Insurance Agency, Inc., to Loney F. Bond

The Division proffered one exhibit, to which the Respondents objected on the bases that (1) by proffering it, the Division violated the Respondents' rights against self-incrimination and (2) the Division was estopped from proffering the exhibit based on the principle of "entrapment by estoppel."

Both parties agreed that rulings concerning their objections did not need to be made at the time of the hearing, but could wait until a decision issued (Tr. 8, regarding the Division's objection to part of proffered Exhibit 10; Tr. 71-72, regarding the Respondents' objections to the Division's proffered exhibit). The parties were told that they could further argue their objections in their briefs and that I would make rulings on the objections in the decision. Before proceeding to discussion and analysis of the evidence in the record, I therefore make the following rulings.

A. Ruling on Objection to a Portion of Exhibit 10, Proffered by the Respondents

The Division objects to the entry into evidence of that portion of Exhibit 10 that refers to settlement discussions (Tr. 7) and constitutes an offer of settlement (Tr. 8). The Respondents assert that the objected-to matter constitutes a "demand for payment" and was not a part of "settlement discussions" and was not an "offer of settlement," and that it therefore may be entered into evidence (Tr. 7). Counsel for the Respondents stated that he "think[s] the dollar figure contained in that letter may be material to these proceedings under administrative rules" (Tr. 7). Counsel did not identify what administrative rules have this asserted effect. The Respondents argue that the Division's "demand" provides support for their contention that the OTSC was initiated by the Division in order to raise revenue, rather than as part of a revenue-neutral regulatory enforcement of the Massachusetts insurance laws.[17]

[17] "It was more of us -- if I were to put a nicety on it, it constitutes extortion by an administrative agency as both exceeding the bounds of the agency's authority and, as such, is material to these proceedings should they go any further." Tr. 8.

In order to promote open and free settlement discussions without fear that statements made in such discussions will later be held against a party, the general rule is that evidence is not allowed as to either the existence of settlement negotiations; *LePage v. Bumila*, 407 Mass. 163 (1990); or statements made in the context thereof. *Zucco v. Kane*, 439 Mass. 503 (2003). The objection of the Division to that portion of Exhibit 10 that refers to settlement discussions and constitutes an offer of settlement is sustained; the remainder of Exhibit 10 is accepted for entry into evidence in this proceeding:

10. Letter dated August 19, 2004 from Douglas A. Hale, Esq., Counsel to the Commissioner, to Susan J. Michaels, President, Anawan Insurance Agency, Inc., *except for that portion that refers to settlement discussions and constitutes an offer of settlement*

B. Ruling on Objections to the Exhibit Proffered by the Division

The Respondents have admitted the authenticity of the exhibit proffered by the Division (Tr. 6), but they have objected on two grounds to the proffered exhibit. However, I note that two documents contained in the Division's proffered exhibit already are in evidence without objection.

The Division's proffered exhibit consists of two parts: (1) a copy of a letter dated June 23, 2004 from Stephen G. Michaels, Anawan Insurance Agency, Inc., to Loney F. Bond ("Michaels' June letter") and (2) attachments to this letter ("the attachments"). A copy of Michaels' June letter already is in evidence at the Respondents' request. See *Internal Exhibit F* to Exhibit 16 (Affidavit of Loney F. Bond dated December 12, 2005, with *Internal Exhibits A-F* attached). In addition, one of the attachments -- a copy of a letter dated June 1, 2004 from Loney F. Bond to Stephen G. Michaels, Anawan Insurance Agency, Inc. ("Bond's June letter") -- also already is in evidence at the Respondents' request. See Exhibit 8 and also *Internal Exhibit E* of Exhibit 16. Therefore, the Respondents either have waived any objection to Michaels' June letter and Bond's June letter as part of the Division's proffered exhibit or their objection to these letters as part of the Division's proffered exhibit is moot because the Respondents themselves have proffered copies of the letters and the letters thus already are in evidence at their behest.

With respect to the attachments that constitute the remainder of the Division's proffered exhibit, I rule as follows.

1. "Entrapment by estoppel"

The Respondents opposed the entry into evidence of the Division's proffered exhibit on the basis of the principle of "entrapment by estoppel." In *Commonwealth v. Twitchell*, 416 Mass. 114 (1993), the Supreme Judicial Court wrote as follows about the doctrine of "entrapment by estoppel" (citations omitted):

> Although it has long been held that "ignorance of the law is no defence" . . . , there is substantial justification for treating as a defense the belief that conduct is not a violation of law when a defendant has reasonably relied on an official statement of the law, later determined to be wrong, contained in an official interpretation of the public official who is charged by law with the responsibility for the interpretation or enforcement of the law defining the offense. . . . Federal courts have characterized an affirmative defense of this nature as "entrapment by estoppel." . . . "Entrapment by estoppel has been held to apply when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct." . . . The defense rests on principles of fairness grounded in Federal criminal cases in the due process clause of the Fifth Amendment to the United States Constitution. . . . The defense generally involves factual determinations . . . based on the totality of the circumstances attending the prosecution . . ., although the authority of the government official making the announcement is obviously a question of law.

Id. at 128-129.[18]

The Respondents invoke the principle of "entrapment by estoppel" within the context of opposing the entry into evidence of the Division's proffered exhibit; as a basis to suppress what they acknowledge is authentic documentary evidence (see Tr. 6). They apparently argue that they have been misled by the Division and therefore the proffered exhibit should not be allowed into evidence.

As a preliminary matter, the Respondents have not persuaded me that an "entrapment by estoppel" defense is pertinent to civil proceedings, such as this one, rather than criminal proceedings. See discussion in *Twitchell*, *supra*. Furthermore, although raised as an evidentiary objection, I note, as a further threshold matter, that "entrapment by estoppel" has been described

[18] In *Twitchell*, the Supreme Judicial Court reversed the defendants' convictions for involuntary manslaughter. The court held that the jury should have been presented with the following question of fact: whether an opinion of the Massachusetts Attorney General on the effect of the spiritual treatment provision of G.L. c. 273, §1 could have led the defendants to believe that they did not need to obtain medical treatment for their son, based on tenets of their Christian Science faith. The defendants had alleged that given the statutory provision and the Attorney General's opinion, they did not receive fair warning that they could be charged with involuntary manslaughter. The court held that the failure to give the question to the jury could have led to a miscarriage of justice.

by the Supreme Judicial Court as an affirmative defense.[19] The Respondents did not raise this defense in their Answer to the OTSC, although they raised six other matters that they termed affirmative defenses. See 801 Code Mass. Reg. 1.01(6)(d)(2).[20] Furthermore, they never moved to amend their answer to include the affirmative defense of "entrapment by estoppel." See 801 Code Mass. Reg. 1.01(6)(f). Generally, a failure to plead an affirmative defense results in a waiver and exclusion of the defense from the case. See *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 471 (1991). Although the Respondents raised the issue of "entrapment by estoppel" as an evidentiary objection when the Division proffered its exhibit at the hearing, this circumstance should not confuse analysis of the matter; the nature of their "evidentiary objection" really is a substantive defense to the OTSC, which should have been raised as a substantive affirmative defense. Assuming *arguendo* that the Respondents' affirmative defense of "entrapment by estoppel" is even applicable to this proceeding, it is rejected because not timely raised.

Even if I disregard the fact that the Respondent's "entrapment by estoppel" objection is an affirmative defense, rather than an evidentiary objection, and consider the issue of "entrapment by estoppel" on its merits, I find that it provides no basis for evidentiary objection to the Division's proffered exhibit. There is no evidence in this case that either of the Respondents "has reasonably relied on an official statement of the law, later determined to be wrong, contained in an official interpretation of the public official who is charged by law with the responsibility for the interpretation or enforcement of the law defining the offense" (see *Twitchell*, *supra*).

The Respondents contend that they were misled by Insurance Bulletin B-2001-02 ("the Bulletin"), which contains the following statement: "It is the nonlicensed producer's responsibility not to sell to a consumer physically present in Massachusetts." See Exhibit 12. Specifically, they assert that this sentence of the Bulletin is misleading because, in their view, it implies that licensed producers have no responsibility to monitor the licensing status of those with whom they transact insurance business; that the nonlicensed producer is the only person

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[19] In *Twitchell*, the Supreme Judicial Court wrote that "Federal courts have characterized ***an affirmative defense of this nature*** as 'entrapment by estoppel.'" *Twitchell*, *supra* at 128 (emphasis added).

[20] 801 Code Mass. Reg. 1.01(6)(d)(2) provides that a respondent's answer to the initiating pleading for an adjudicatory proceeding "***shall*** also contain ***all*** affirmative defenses which the Respondent claims" (emphases added).

with responsibility. Their argument fails for several reasons. First, the Bulletin was issued on February 9, 2001, years after the OTSC alleges that the Respondents engaged in improper insurance business transactions with Prum. Second, there has been no showing that either of the Respondents relied upon the Bulletin, or even read it or knew of it, before engaging in any of the insurance business transactions that are complained of in the OTSC. Third, even if the Respondents had shown that they relied upon the Bulletin, I find that a reasonable person could not reasonably infer that a statement that a nonlicensed insurance producer has a responsibility not to sell to a consumer physically present in Massachusetts means that a Massachusetts insurance licensee has ***no responsibility*** to ascertain that a person with whom the licensee intends to engage in insurance business transactions is legally authorized to engage in such transactions. The Bulletin addresses a nonlicensed insurance producer's responsibility with regard to a consumer; the Bulletin makes no statement about the law that governs the responsibility of a Massachusetts insurance licensee with regard to engaging in insurance business transactions with a nonlicensed person. In contrast, at the times when the OTSC alleges that Anawan engaged in insurance business transactions with Prum, the first sentence of §177 prohibited any company, officer, agent or employee and any duly licensed insurance broker from directly or indirectly paying compensation or anything of value to any person for acting as an insurance broker who was not then duly licensed as an insurance broker.

Not only have the Respondents not shown any reliance on statements of the ***law*** by the Division, they have not demonstrated that they ever relied upon statements of ***fact*** by the Division either. There is no evidence that either of the Respondents ever contacted the Division or consulted the Division's licensing information system with regard to Prum's licensing status at any time before Anawan's last alleged insurance business transaction with him. Bond credibly testified that no one ever telephoned him asking whether Prum was licensed (Tr. 75-76).

In conclusion, I find that the central element of "entrapment by estoppel" is missing: no reliance by the Respondents on erroneous information, either legal or factual, supplied by the Division or any other public agency or official, has been claimed, or shown, to have predated the acts by the Respondents that form the basis of the OTSC.

The Respondents' objection regarding the Division's proffered exhibit based on alleged "entrapment by estoppel" is denied both because it constitutes an affirmative defense that has not been timely raised and on its merits.

2. Privilege Against Self-incrimination

The Respondents also object to the Division's proffered exhibit on the ground that the use of information supplied by Anawan to the Division in response to an inquiry described as involving an investigation of "Handel Insurance Agency" would violate their protections from self-incrimination under both the state and federal constitutions. The Fifth Amendment to the United States Constitution ("Fifth Amendment") provides that no one "shall be compelled in any criminal case to be a witness against himself." Article XII of the Declaration of Rights of the Massachusetts Constitution ("art. 12") in part provides that "No subject shall . . . be compelled to accuse, or furnish evidence against himself." The language of art. 12 is broader than that of the Fifth Amendment. *Commonwealth v. Burgess*, 426 Mass. 206, 217-218 (1997). The Respondents' self-incrimination objection fails for several reasons.

The materials in the Division's proffered exhibit are records of Anawan, ***a corporation***. It is well settled that the Fifth Amendment right against self-incrimination, being a personal right, cannot be exercised by a corporation. *Bellis v. United States*, 417 U.S. 85, 89-91 (1974) ("privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records'"); *United States v. White*, 322 U.S. 694, 701 (1944); *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) ("right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege" and was not intended to extend to corporations). The Massachusetts Supreme Judicial Court similarly has declined to confer on corporations a personal privilege against self-incrimination under art. 12, holding that the constitutional guaranty of art. 12 also is a personal privilege. *In re John Doe Grand Jury Investigation*, 418 Mass. 549, 552 (1994); citing *Commonwealth v. Wood*, 302 Mass. 265, 269 (1939); *Ross v. Crane*, 291 Mass. 28, 32-33 (1935). Having voluntarily adopted the corporate structure, corporate principals cannot shield the corporation and the corporation's papers and records by seeking to extend their individual rights against self-incrimination to the corporation. *In re John Doe Grand Jury Investigation*, *supra* at 553.

Furthermore, there are three conditions that must exist for the privilege against self-incrimination to be available to those who, unlike Anawan, ***are*** within the ambit of the privilege: (1) the evidence must have a reasonable possibility of incriminating the witness in criminal proceedings, (2) the evidence required must be testimonial in nature and (3) the person claiming

the privilege must be under governmental compulsion to furnish evidence. *Commonwealth v. Conkey,* 714 N.E.2d 343 (1999); M. Brodin and M. Avery, *Handbook of Massachusetts Evidence,* §5.14.2 (8th ed., 2007). It has not been shown that all three of these conditions apply to the Division's proffered exhibit. First, there has been no showing that the information contained in the proffered exhibit has a reasonable possibility of incriminating either Anawan or Michaels ***in criminal proceedings***. This matter is not a criminal proceeding. Second, the materials that constitute the Division's proffered exhibit are records of Anawan that do not reveal the subjective knowledge or thought processes of either Anawan or Michaels. See *Attorney General v. Colleton,* 387 Mass. 790, 796, n. 6 (1982) (Although interpretation of art. 12 demands a broader immunity than does the Fifth Amendment, it does not change the classification of evidence to which the privilege applies: only that genre of evidence having a testimonial or communicative nature is protected under the privilege against self-incrimination, evidence that is "testimonial" or "communicative" being that which reveals the subjective knowledge or thought processes of the subject.). The only portion of the proffered exhibit that conceivably could be viewed as having any testimonial aspect is Michaels' June letter, but a copy of this letter was proffered for entry into evidence by the Respondents themselves as *Internal Exhibit F* to their proffered Exhibit 16. Accordingly, the Respondents have waived any objections to this portion of the Division's proffered exhibit or their objections to it are moot. Since two of the required three elements are missing, I need not address whether governmental compulsion was involved when the records of Anawan that constitute part of the proffered exhibit were provided to the Division in response to Bond's June letter.

The Respondents have complained that Bond's June letter "made no mention that the Division's investigation involved something such as payment of commissions to an unlicensed individual, requested Anawan's assistance with regard to Mr. Prum" (Tr. 63, see also 70) and "did not in any way indicate that it was aimed at investigating any payment of commissions, rightful or wrongful, by Anawan to anybody" (Tr. 64). Bond's June letter stated that the Division had "received a complaint against Anawan Insurance Agency, Inc. ("Anawan") regarding placement of insurance policies through various carriers." I am persuaded that a Division investigator need not identify with greater specificity the exact particulars or parameters of the complaint he is investigating because to do so could impede valid insurance

investigations.[21] See generally *Gruning v. DiPaolo*, 311 F.3d 69 (2002) (The privilege against self-incrimination under the Fifth Amendment does not require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights; a person's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly and intelligently waived his Fifth Amendment privilege against self-incrimination.). Furthermore, I note that Anawan was not without legal advice in deciding to respond to Bond's June letter: Michaels is an attorney and in correspondence refers to Anawan as his client.[22] The Respondents could have asked what Bond's inquiry concerned prior to responding to it, if they so desired. In any event, I find that Bond's June letter put Anawan on sufficient notice that its decision to respond without first requesting more information about the nature of the complaint against it would constitute a waiver of its right against self-incrimination, ***if a corporation even had such a right***. See *Commonwealth v. Fallon*, 38 Mass. App. Ct. 366 (1995) (The right against self-incrimination is not self-executing and, if not timely raised, is deemed to have been waived.), *reversed on other grounds,* 423 Mass. 92 (1996); *Commonwealth v. Beauchamp,* 49 Mass. App. Ct. 591, 603 (2000).

Accordingly, the objection of the Respondents regarding the Division's proffered exhibit based on the state and federal privileges against self-incrimination is overruled.

Having overruled the objections made by the Respondents to the Division's proffered exhibit, it is accepted for entry into evidence as Exhibit 17:

17. Letter dated June 23, 2004 from Stephen G. Michaels, Anawan Insurance Agency, Inc., to Loney F. Bond, with the following attachments: Authorization to Sign Motor Vehicle Registration Certificates for Prum by Commerce Insurance Company; letter dated June 1, 2004 from Loney F. Bond to Stephen G. Michaels, Anawan Insurance Agency, Inc.; Anawan Insurance Agency, Inc. Summary Screen from the Massachusetts Secretary of the Commonwealth's website; Authorization to Sign Motor Vehicle Registration Certificates for Prum by Citation Insurance Company; Authorization to Sign Motor Vehicle Registration Certificates for Prum by Norfolk & Dedham Mutual Fire Insurance Company; [a second] Authorization to Sign Motor Vehicle Registration Certificates for Prum by Norfolk & Dedham Mutual Fire Insurance Company; faxed copies of Prum's Massachusetts and Rhode Island insurance broker licenses with a faxed date from Handel Insurance Agency of January 7, 1997;

[21] As Bond testified (Tr. 21): "Well, again, if there was -- we don't want to disclose our angle. I mean, if we're looking at Anawan, we might try to find out all we can from another source before we contact Anawan."
[22] In his letter dated September 2, 2004 (Exhibit 11), Michaels writes that he has reviewed Attorney Hale's letter dated August 4, 2004 and "consulted with his client." Attorney Michaels signs the letter as counsel for Anawan.

letter dated March 26, 2001 from Tina Miller, Marketing Administrative Assistant, The Commerce Insurance Company, to the Division; letter dated February 1, 2001, from Sandra Hauser, Anawan Insurance Agency, Inc., to Commerce Insurance Company; lists by month of Handel Insurance Agency Commissions

VI. Findings of Fact and Conclusions of Law

A. The Respondents

A review of the OTSC and the Answer and other pleadings of the Respondents reveals that there are no disputes about the licensing history of the Respondents.[23] The parties do not dispute the following.

Anawan was incorporated in the Commonwealth of Massachusetts on or about January 1, 1979 and remains an active corporation, doing business at 4 Anawan Avenue, West Roxbury, Massachusetts. Anawan was first licensed by the Division pursuant to G.L. c. 175, §§ 163 and 174 as a corporate Massachusetts insurance agent on or about March 21, 1979. Anawan was first licensed by the Division pursuant to G.L. c. 175 §§ 166 and 174 as a corporate Massachusetts insurance broker on or about January 17, 1999. Anawan's corporate Massachusetts insurance broker license was converted to a corporate Massachusetts insurance producer license pursuant to G.L. c. 175, §162H *et seq*. on or about May 16, 2003 and all its active Massachusetts insurance agent licenses were cancelled effective that date.

Michaels was first licensed by the Division pursuant to G.L. c. 175, §163 as a Massachusetts insurance agent on or about May 23, 1978. Michaels was first licensed by the Division pursuant to G.L. c. 175, §166 as a Massachusetts insurance broker on or about January 9, 1974. His Massachusetts insurance broker license was converted to a Massachusetts insurance producer license pursuant to G.L. c. 175, §162H *et seq*. on or about May 16, 2003 and all his active Massachusetts insurance agent licenses were cancelled effective that date. Michaels has been an officer and director of Anawan at all times relevant to the OTSC and has been listed as an officer and/or director on Anawan's corporate Massachusetts insurance licenses from at least January 1, 1985 to the present.

[23] See ¶¶ 12 and 13 of the Respondents' Answer.

B. Prum's license status

Prum's original approval date for a Massachusetts broker license was May 27, 1994 (Exhibit 3A).[24] Prum's Massachusetts insurance broker license was issued for a three year period, was due to expire on May 27, 1997, and did expire on that date because he failed to renew it (Tr. 39; Exhibit 9, Exhibit 16, see especially ¶10).[25]

The Division's licensing records have no record that Prum was an affiliate or a designated insurance producer of any business entity, including Anawan or "Handel Insurance" (Exhibit 15).[26] The information contained in Exhibit 7, the Division of Insurance CLARIS "View Individual License" screen for Prum dated May 28, 2004, suggests no link between ***Prum*** and ***Anawan***; between ***Prum*** and "***Handel Insurance;***" between "***Handel Insurance***" and ***Anawan***; or between ***Prum*** and either the ***City of Revere***, the location of "Handel Insurance," or ***West Roxbury***, the location of Anawan.

C. Anawan's insurance business transactions with Prum

Anawan entered into a verbal agreement with Prum on or about January 7, 1997, whereby Prum brokered business through Anawan and Anawan agreed to pay commissions to Prum for insurance business referred by him (Exhibit 11).[27] At Anawan's request, Prum faxed copies of his Massachusetts and Rhode Island insurance broker licenses to Anawan on January 7, 1997 (Exhibit 11). The copies of Prum's Massachusetts and Rhode Island insurance broker licenses that were faxed to Anawan on January 7, 1997 were sent to Anawan from "Handel Insurance Agency" (see the fax masthead on the copies of Prum's licenses contained in Exhibit 17). Anawan's receipt of the faxed copies of Prum's insurance licenses verified that Prum had a valid Massachusetts broker's license when Anawan entered into the verbal agreement to pay him

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[24] See ¶1 of the Respondents' Request for Findings of Fact.
[25] See ¶1 of the Respondents' Request for Findings of Fact.
[26] Exhibit 15, 1st page: "Prum is not an affiliate or a designated producer to any business entity, particularly Anawan Insurance Agency Incorporated ("AIAI") and or Handel Insurance Agency."
[27] See also ¶15 of the Respondents' Answer and ¶2 of the Respondents' Request for Findings of Fact. The Respondents in ¶8 of their Request for Findings of Fact in part ask that I find that "Anawan Insurance Agency, Inc. terminated its verbal agreement to pay commissions to Prum as of February 2001." I decline to make this finding of fact since it is contradicted by the following statement in Michaels' June letter (*Internal Exhibit F* of Exhibit 16): "As of December 31, 2001, we refused to accept any new business from this Producer due to loss experience." See also the admissions made in ¶5 of the Respondents' Motion for Summary Decision. For the same reasons, I decline to make the finding of fact requested by the Respondents in ¶18 of their Request for Findings of Fact: "There is no evidence that Prum placed any business with Anawan Insurance Agency, Inc., after February of 2001."

commissions (Exhibit 14).[28] However, the copy of Prum's Massachusetts insurance broker license that was faxed to Anawan on January 7, 1997 stated that Prum's license was due to expire only slightly more than four months later (see the copy of the Massachusetts insurance license contained in Exhibit 17). Accordingly, Anawan had actual knowledge in January 1997 that Prum's insurance license was due to expire slightly more than four months later, on May 27, 1997.

Based on Michaels' June letter (*Internal Exhibit F* of Exhibit 16), I make the following findings of fact. Kuntthy Prum d/b/a "Handel Insurance" brokered insurance business through Anawan from January 7, 1997 through December 31, 2001.[29] Anawan paid Prum d/b/a "Handel Insurance" commissions based on monthly statements provided at the time a commission was paid, as was its standard practice for paying commissions to brokers.[30] Almost all of the business brokered through Anawan was Massachusetts automobile insurance. Other types of policies brokered through Anawan would be reflected on the monthly statements. Prum's relationship with Anawan was at all times that of a broker. Any business submitted by him and written through Anawan required him to submit signed applications of insurance, together with deposit checks to Sandra Hauser at Anawan. She then was responsible for forwarding any business that Anawan accepted to the insurance carrier. The statements attached to the copy of Michaels' June letter that are included in Exhibit 17 are copies of monthly statements sent to Prum from January 1, 1999 through December 31, 2001, which list the names of clients and the company with which the business was placed. The designation in the list of "CO" refers to Commerce Insurance Company, "AA" refers to the Commerce American Automobile Association program and "ND" refers to Norfolk & Dedham Mutual Insurance Company.

The monthly statements for "Handel Insurance Agency" in Exhibit 17 provide documentary proof of numerous commission transactions between Anawan and Prum d/b/a "Handel Insurance Agency" during the months indicated in these monthly statements. These documented commission transactions are the visible financial signs of improper insurance business transactions between Anawan and Prum. A particular insurance business transaction between Anawan and Prum in violation of §2 or §177 can be proved by the Division either by a

[28] See ¶3 of the Respondents' Request for Findings of Fact.
[29] See also the admissions made in ¶5 of the Respondents' Motion for Summary Decision.
[30] See also the admissions made in ¶18 of the Respondents' Answer.

notation of a commission payment to Prum or by a notation of a commission credit to Anawan.[31] In either case the improper insurance business transaction is related to soliciting insurance business from, accepting insurance applications from and paying compensation to Prum, who was not then licensed. I am not persuaded, however, that it would be proper to focus on each separate occasion on which a commission transaction has been proved to have occurred, as the Division perhaps suggests.[32] Three installment payments connected to one policy should not equal three §2 or §177 violations. The only logical approach to §2 or §177 is to consider "a violation" of §2 or §177 as being equivalent to any insurance business transaction between an insurance licensee and an unlicensed person in connection with one particular policy of insurance, with additional transactions concerning that policy constituting mere surplus proof of the improper insurance business arrangement. Accordingly, I find that the proper manner of viewing how many §2 or §177 improper insurance business transaction "violations" have been proved by the Division is to focus on the number of policies in connection with which Anawan has been proved to have engaged in insurance business transactions with Prum, regardless of how many separate commission payments or credits have been proved to have occurred with regard to one particular policy.

Although the Respondents have argued that the Exhibit 17 monthly statements cannot be understood without additional explication, I find that they are understandable based on Michaels' June letter and because their structure is readily discernable. The columns of figures on the far right side of the lists in Exhibit 17 are periodically totaled, with these totals sometimes denominated as "TOTAL DUE HANDEL." Although there is some variation in the monthly statements, the contents on what the Division has numbered as page 44 of its chalk of Exhibit 17 provides clear guidance about what the statements show: the fifth column from the left is described as listing the premium, the sixth column is described as showing the commission percentage ("%Com") and the seventh column is stated as the net due "Handel Insurance" for

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[31] In this regard, I note that §177 provides in relevant part as follows (emphases added): "No company and no officer, agent or employee thereof, and no duly licensed insurance producer, shall, directly or indirectly, pay or allow ***or offer or agree to pay or allow compensation*** or anything of value to any person, excepting an officer of a domestic company acting under section one hundred and sixty-five, for acting in this commonwealth as an insurance producer, as defined in section 162H ***who is not then duly licensed as an insurance producer***."

[32] The Division asserts in the OTSC that Anawan made payments to Prum for commissions for Massachusetts policies on at least 1,277 occasions. The "Division of Insurance's Analysis of Exhibit 17," a chalk, argues that Anawan made 1,137 commission payments to Prum in connection with 802 insurance policies.

each insurance policy listed on that page.[33] The amounts shown in the seventh column are equal to those resulting from multiplying the premiums stated in the fifth column by the commission percentages stated in the sixth column. A review of the arithmetic, for example, contained on what the Division has numbered as page 58 of its chalk of Exhibit 17, confirms that the figures on the monthly statements that are not stated in parentheses are commission amounts being paid by Anawan to Prum in connection with policies brokered by him to Anawan and that the figures stated in parentheses are adjustments, in the nature of credits, being made in connection with the insurance business transactions between Anawan and Prum. The soundness of this understanding of the monthly statements is further confirmed by the practice of showing in parentheses any entry that is described as a "chargeback to Anawan," with the amount of that entry being deducted from what is being paid to "Handel" for that particular statement. See, *e.g.*, the chargeback entries on what the Division has numbered as page 38 of its chalk of Exhibit 17. The correctness of this interpretation of the entries in Exhibit 17 is further confirmed by the picture of a check made payable to the order of "Handel Insurance" on what the Division has numbered as page 37 of its chalk of Exhibit 17, which is for the same amount as what is listed as "TOTAL DUE" on that page.

Consistent with the above, I find that the Division has proved 278 violations of §2 by proving 278 instances of improper insurance business transactions between Anawan and Prum d/b/a/ "Handel Insurance" in connection with 278 policies of insurance from November 1, 2000 through December 31, 2001, *i.e.*, within four years of the filing of the Order to Show Cause dated October 25, 2004.[34] I also find that the Division has proved 278 violations of §177 in connection with 278 policies of insurance from November 1, 2000 through December 31, 2001. All of these 278 policies connected with these 278 §2 violations and 278 §177 violations (collectively the "post-October 2000 proved violations") are identified in the Exhibit 17 monthly statements as being automobile ("auto") policies, which are written on an annual basis.[35] The dates memorialized in Exhibit 17 in connection with the post-October 2000 proved violations

[33] Since Exhibit 17 has no page numbers, for clarity and ease of reference I have followed a practice of referring to the corresponding page in the Division's chalk of Exhibit 17, the pages of which have been numbered using a Bates stamp.

[34] Since the lists in Exhibit 17 do not state the days upon which transactions took place, I cannot tell which of the transactions listed for October 2000 occurred after October 25, 2000. I therefore have treated only November 2000 and more recent commission transactions as occurring after October 25, 2000.

[35] See, *e.g.*, in this regard, what the Division has numbered as page 44 of its chalk of Exhibit 17, where the fourth column from the left is described as listing the type of insurance policy.

begin more than 41 months after Prum's license expired on May 27, 1997. The OTSC was filed timely as to all of these post-October 2000 proved violations under the plain language of §5A.

In addition to these 278 post-October 2000 proved violations, the Division has proved further violations of §2 by proving further instances of improper insurance business transactions between Anawan and Prum d/b/a/ "Handel Insurance" in connection with numerous other policies of insurance from 1998 through October 31, 2000 ("pre-November 2000 proved violations").[36] Although the Division through Exhibit 17 has proved more violations between 1998 and 2002, I find that proof of more than 22 pre-November 2000 proved violations is mere surplusage in light of the maximum number of violations (300) that are alleged in the OTSC. Accordingly, I note that the Division through Exhibit 17 has proved 22 violations of §2 and 22 violations of §177 by proving 22 instances of improper business transactions between Anawan and Prum d/b/a/ "Handel Insurance" in connection with 22 additional different policies of insurance from August 2000 through October 2000 (collectively the "August through October 2000 proved violations"). All of the policies connected with these violations are identified in the Exhibit 17 statements as being automobile policies, which are written on an annual basis. The earliest notations evidencing these 22 improper business transactions date from more than 38 months after Prum's license expired on May 27, 1997. Together with the 278 post-October 2000 proved violations, these 22 August through October 2000 proved violations make up a total of 300 violations of §2 and 300 violations of §177 in connection with 300 discrete policies that have been charged and proved by the Division. The next section adjudicates whether sanctions for the pre-November 2000 proved violations of §2 and §177 are barred by the statute of limitations of §5A.

D. When the Division knew or "should have known" of the improper insurance business transactions between Anawan and Prum d/b/a "Handel Insurance"

With respect to the pre-November 2000 proved violations of §2 and §177, fines will be barred by the four-year statute of limitations of §5A unless the Division proves that the statute of limitations should not act as a bar because it has been tolled. The Division has the burden of proof and must show that it neither knew nor "should have known" of these violations when they

[36] The Respondents were obligated not to pay commissions except to a "duly licensed" person. Prum was not "duly licensed" upon the expiration of his license on May 27, 1997. The Respondents' focus on when Prum's license was cancelled is a diversion from the operative fact of the date of the expiration of his license.

occurred, so that the statute of limitations was tolled until a later date, and that it filed the OTSC within four years of this later date. Since the OTSC was filed on October 25, 2004, the issue may be narrowly stated as whether the statute of limitations as to the pre-November 2000 proved violations was tolled until after October 25, 2000.[37]

In determining whether the Division has met its burden of proof on the §5A statute of limitations issue regarding the pre-November 2000 proved violations, it is helpful to identify what facts the Division would need to be aware of in order to know, or have reason to know, that Anawan was engaging in or had engaged in improper insurance business transactions with Prum. To initiate the charges made in the OTSC, the Division first needed to find out and link together these necessary facts: (1) that "Handel Insurance" was not a second unsupervised location of Anawan, as was alleged in two anonymous letters received by the Division in 1999, (2) that Anawan had engaged in insurance business transactions with "Handel Insurance," (3) that Prum was doing business as "Handel Insurance," (4) that Anawan therefore had engaged in insurance business transactions with Prum doing business as "Handel Insurance," (5) that Prum's insurance license had expired on May 27, 1997 and (6) that Anawan had engaged in insurance business transactions with Prum doing business as "Handel Insurance" after Prum no longer possessed a currently valid insurance license.

Having determined ***what*** the Division needed to know, the second element in the analysis necessarily focuses on ***when*** the Division knew or "should have known" all these necessary facts. If the Division knew or "should have known" all the necessary facts listed above prior to

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[37]Interestingly, the Respondents themselves do not propose that the Division knew that Prum was doing business as "Handel Insurance Agency" until after the alleged last payment of commission to him in early 2002. In their brief and Request for Findings of Fact they do not claim that the Division either knew or should have known about Anawan's transactions with Prum prior to May 2002:

> There is no question that as of May 6, 2002 Petitioner knew Anawan had done business with an individual doing business at Handel and that it knew or should have known the identity of that individual was Prum and that his license had been cancelled by the Division of Insurance on November 3, 1998. [Anawan Insurance Agency, Inc. and Stephen G. Michaels' Post-hearing Memorandum, page 8]
>
> On May 13, 2002, the Division of Insurance knew or should have known that an individual named Prum was doing business at Handel Insurance Agency at 76 Shirley Ave. in Revere and that his license had been cancelled by the Division of insurance on November 3, 1998. [Respondents' Request for Findings of Fact, ¶15]

See also Michaels' re-cross examination of Bond at Tr. 56: "[B]ut you did have knowledge of some sort of relationship between … Kuntthy -- . . . Prum and Anawan from as far back as 2002, correct?" What the Division knew, or should have known, as of May 6 or 13, 2002 regarding the improper insurance business transactions between Anawan and Prum would provide no basis for a statute of limitations defense against fines based on the pre-November 2000 proved violations since the OTSC was filed within four years of 2002.

October 25, 2000 (four years before the OTSC was filed on October 25, 2004), then the Division is barred from seeking sanctions for the pre-November 2000 proved violations. If the Division neither knew nor "should have known" of the necessary facts until after October 25, 2000, then no statute of limitations defense shields the Respondents from being sanctioned for the improper insurance business transactions that occurred between Anawan and Prum prior to November 2000. In adjudicating this issue, a review of the investigation done by the Division and of the facts uncovered during this investigation is necessary. ***The determinative facts will concern what the Division knew or should have known prior to October 25, 2000.***

At the hearing on March 28, 2006, the Division called as a witness Loney Bond ("Bond"), an investigator with the Division of Insurance since 1988 (Tr. 11-12). Based on the credible testimony of Bond and his Affidavit (Exhibit 16), which he wrote, reviewed and signed (Tr. 11, 54), I make the following findings of fact. On or around September 24, 1999, the Division received an unsigned letter (Exhibit 1) wherein it was alleged that agencies were operating illegally (see Tr. 13, lines 1-10). The unsigned letter alleged that Anawan had opened a second location as "Handel Insurance" at 76 Shirley Avenue, Revere, and that such location was illegal.[38] The unsigned letter also complained about Thomas Green Insurance Agency ("Green"), at 191 North Common Street, Lynn; and D'Olimpio Insurance ("D'Olimpio") at 118-122 Shirley Avenue, Revere (Exhibits 1 and 16). On October 1, 1999, the Division received a second unsigned letter (Exhibit 2) wherein the author alleged that Anawan had opened an unauthorized location at 76 Shirley Avenue in Revere (Tr. 13-14).[39] This second letter also complained about Green and D'Olimpio with regard to the same addresses as alleged in the earlier letter (Exhibit 2). Both of these unsigned letters were utilized by Bond during the course of the investigation he was asked to undertake on September 27, 1999 by the Division's Special Investigations Unit ("SIU") to determine whether Anawan and the other two agencies (Green and D'Olimpio) had improperly opened insurance offices in second locations (Tr. 12-14; Exhibits 1 and 2). The Director of the SIU designated the Special Investigation opened in response to these anonymous letters as #3149 (Tr. 14, 29, 57-58; see Exhibit 4). In 2002 and

[38] See ¶9 of the Respondents' Request for Findings of Fact.
[39] See ¶10 of the Respondents' Request for Findings of Fact.

2004 SIU used #3149A or #3149(A) to refer to the part of this inquiry concerning Anawan (compare Exhibits 5, 10, 13 and 14 to Exhibit 9).[40]

The Division has shown that it could not have discovered the insurance business transactions between Anawan and Prum from the contents of the anonymous letters in September and October 1999. Bond looked up both "Anawan" and "Handel Insurance" in the Division's records because he was not sure whether a connection existed between them (Tr. 15-16). Bond determined "immediately" after September 27, 1999, that the name "Handel Insurance" was not to be found in the Division's records of licensed agencies (Tr. 47; Exhibit 15; Exhibit 3B, 2nd page). The Division's records show that "Handel Insurance Agency" was never licensed (Exhibit 15, 1st page). No information could be obtained, therefore, from conducting a search of the Division's licensing records database using "Handel Insurance" as the search term; the name "Handel Insurance" did not appear in the records. Therefore, searching the Division's records for this putative insurance agency was futile; it disclosed no connection between or affiliation of "***Handel Insurance***" and ***Anawan*** and disclosed no connection between or affiliation of "***Handel Insurance***" and ***Prum***. Furthermore, the Division has shown that nothing in the Division's licensing records for ***Anawan*** reflected any affiliation between ***Anawan*** and "***Handel Insurance***" (Exhibit 9, 2nd page: "Michaels is the sole designated producer and affiliate."). The Division also has shown that the Division's licensing records for ***Anawan*** disclosed no connection between ***Anawan*** and ***Prum*** (Exhibit 9, 2nd page; Exhibit 16, ¶12).

Bond commenced an investigation with regard to all three locations named in the 1999 anonymous letters (Tr. 13-15; 16). The gravamen of the complaints that Bond was investigating was whether insurance activity was occurring at sites at which no insurance broker or agent was present to exercise supervision; called by Bond "second locations operations" or "unsupervised activity" (Tr. 58). See G.L. c. 175, §162 (supervision requirements when opening insurance offices in second locations).

At some point, Bond went to 191 North Common Street, Lynn, in connection with investigating the complaints about Green. Seeing nothing at this location that indicated that there was a second office of Green that was operating there without proper supervision, Bond closed this part of the investigation. Tr. 58-59.

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[40] See ¶20(a) of the Respondents' Request for Findings of Fact.

At some point, Bond went to Shirley Avenue, Revere, in connection with investigating the complaints about D'Olimpio. Bond determined that D'Olimpio was indeed operating a second office at that address, which resulted in a settlement between the Division and D'Olimpio. Tr. 59. On July 30, 2001, the Division sent a letter to Paul F. D'Olimpio, referencing Special Investigation #3149, wherein it alleged that he had allowed an unlicensed person to conduct insurance business on his behalf at a satellite office without regular supervision of a properly licensed individual.[41] By signing this letter, on or about September 25, 2001, D'Olimpio agreed to settle the unsupervised second location issue by paying a fine (Tr. 15, 75; Exhibit 4).[42]

On September 1, 2000, following the same procedure that he did for the allegations relating to Green and D'Olimpio, Bond went, for the first time, to 76 Shirley Avenue, Revere, the address that had appeared in the two anonymous letters in connection with Anawan, in order to determine whether Anawan was operating a second location there (Tr. 59-60; Tr. 17; Exhibits 5 and 6). Nothing existed at 76 Shirley Avenue that referred to ***Anawan*** (Tr. 60). However, there was an indication on September 1, 2000 that a business called "Handel Insurance/Travel Agency" was operating there (Tr. 59-60; Exhibit 5).[43] Bond knew that "Handel Insurance," the name on the door, was not properly licensed as of 2000 (Tr. 23). Bond went into the "Handel Insurance" office, left a business card and told the individual in the office to have the owners contact him (Tr. 17). Bond spoke to "Michael," who did not provide his last name, and who claimed that "Kevin" was the person in charge of insurance for "Handel Insurance" (Exhibit 5, last paragraph).[44] "Michael" provided a business card for "Handel Insurance/Travel Agency" that had three names on it: "Michael T. Prum," "John Prum" and "Vichiravuth Kret" (see Exhibit 5, upper left hand corner of first page and last paragraph). Michael was asked to have "Kevin" telephone the Division, but "Kevin" never did call the Division (Exhibit 5, last paragraph).

Since the last name of "Kevin" was not known, Bond could not look him up in the Division's licensing records; his licensing status therefore was not known. Bond has never

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[41] See ¶11 of the Respondents' Request for Findings of Fact.
[42] See ¶11 of the Respondents' Request for Findings of Fact.
[43] I make this finding, which differs from ¶20(b) of the Respondents' Request for Findings of Fact (emphasis added): "The Division immediately determined that Handel was an unlicensed agency and further ***determined on May 3, 2002***, that the agency had in fact been set up."
[44] See ¶13(e) of the Respondents' Request for Findings of Fact.

found out who "Kevin" was (Tr. 62). Bond determined that "Vichiravuth Kret," one of the names on the "Handel Insurance/Travel Agency" business card, was not the name of a licensed person (Exhibit 5, last paragraph: "None of the names on the card are licensed.").

In September 2000, Bond searched the Division's records for "Michael Prum" and "John Prum," two of the names that were on the business card that Bond had obtained at "Handel Insurance" on September 1, 2000 (Tr. 19, lines 18-23). No record of a "Michael Prum" or a "John Prum" was returned by the search. Although Bond did not search for "Kuntthy Prum," his name was returned from the search for "Michael Prum" and "John Prum" (Tr. 19). I find that Bond's credible testimony on this point is corroborated by the printed copy of a Division CLARIS "Select Individual" computer information screen that was generated on September 6, 2000. Whereas the name "Prum, Kuntthy" appeared in typeface on the computer screen that was printed, there is only a hand-written notation about Michael Prum and John Prum: "No Michael or John Prum found" (Tr. 19; Exhibit 3B, 1st page).

Bond therefore knew that "Michael Prum" and "John Prum" were not the names of licensed persons since they were not in the Division's database as of September 6, 2000 (Exhibit 5, last paragraph). He also knew that "Kuntthy Prum" was a name within the Division's insurance licensing database at that time (see Tr. 19; Exhibit 3B, 1st page). However, I find that Bond understandably regarded the return of Kuntthy Prum's name from a search for "Michael Prum" and "John Prum" as nothing more than an artifact of the database search process. As Bond put it, Kuntthy Prum's name "just came up out of . . . [the Division's] system" when Bond searched for "Michael Prum" and "John Prum" (Tr. 19). However, even if Bond had conducted an immediate search of the Division's records for ***Kuntthy Prum***, this would not have alerted him of any affiliation between ***Kuntthy Prum*** and ***Anawan*** or between ***Kuntthy Prum*** and "***Handel***." The brokering agreement between Anawan and Kuntthy Prum was ***verbal***. The Division has shown that there were no records at the Division of Insurance from which the Division could have gained knowledge of the verbal agreement between Anawan and Kuntthy Prum; the Division has shown that the licensing records of Anawan and Kuntthy Prum disclosed no connection between them. The Division's licensing records for ***Kuntthy Prum*** had no record that he was an affiliate or a designated insurance producer of "***Handel Insurance***" (Exhibit 15;[45]

[45] Exhibit 15, 1st page: "Prum is not an affiliate or a designated producer to any business entity, particularly Anawan Insurance Agency Incorporated ("AIAI") and or Handel Insurance Agency."

Exhibit 3A, 1st page[46]). ***Kuntthy Prum's*** licensing records did not show a d/b/a for him (Exhibit 15, 1st page). Moreover, the Division's licensing records for ***Kuntthy Prum*** had no record that he was an affiliate or a designated insurance producer of ***Anawan*** (Exhibit 15; Exhibit 3A, 1st page). Nothing in the Division's licensing records for ***Kuntthy Prum*** reflected any affiliation between ***Kuntthy Prum*** and ***Anawan*** (Exhibit 16, ¶12). Kuntthy Prum's address on CLARIS as of September 6, 2000 was ***Jamaica Plain*** (Exhibit 3B); this did not show any connection between him and Anawan in ***West Roxbury*** or between him and "Handel" in ***Revere***. Based on Bond's credible testimony, I find that the Division had no idea who was at the helm of "Handel Insurance" (Tr. 46). I find that at this time Bond and the Division did not have enough information to associate Kuntthy Prum with "Handel Insurance" or to infer that "Kevin" was the same person as Kuntthy Prum, as the Respondents have insinuated.[47] The Division has persuaded me that as of September 6, 2000, it knew of no connection between "Handel" and Kuntthy Prum from the mere return of Kuntthy Prum's name from a search of its licensing database for two names that shared the same last name with him.

Less than two months passed between the first appearance of Kuntthy Prum's name in Bond's investigation and October 25, 2000, a date four years prior to the filing of the OTSC. Based on the record of this proceeding, I find that the Division in September 2000 had no basis for knowing five of the necessary elements for bringing the charges made in the OTSC; they had no basis for knowing: (1) that "Handel Insurance" was not a second unsupervised location of Anawan, as was alleged in two anonymous letters received by the Division in 1999, (2) that Anawan had engaged in insurance business transactions with "Handel Insurance," (3) that Prum was doing business as "Handel Insurance," (4) that Anawan therefore had engaged in insurance business transactions with Prum doing business as "Handel Insurance," . . . and (6) that Anawan had engaged in insurance business transactions with Prum doing business as "Handel Insurance" after Prum no longer possessed a currently valid insurance license.

Bond did not make another visit to the "Handel Insurance" office in Revere until May 3, 2002, two years and five months prior to the filing of the OTSC (Tr. 17-18, 62; Exhibit 5). On that date, Bond still was investigating the second locations/unsupervised activity issue regarding

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[46] Exhibit 3A, 1st page: "No Record Exist" for Business Entity Affiliations for Prum on the "View Individual At A Glance" screen in the Division's CLARIS system.

[47] See Michaels' re-cross examination of Bond at Tr. 56" "but you did have knowledge of some sort of relationship between Kevin -- could be Kuntthy -- . . . Prum and Anawan from as far back as [May of] 2002."

Anawan's alleged second location, SIU #3149A (Tr. 62; Exhibit 5).[48] Subsequent to his visit to "Handel Insurance" on May 3, 2002, Bond consulted the Division's licensing records (Tr. 18). When Bond checked the records following his May 3, 2002 visit to the "Handel Insurance" office in Revere, once again there was no license listed for "Handel Insurance Agency" (Exhibit 16, ¶7). The Division's records show that "Handel Insurance Agency" was never licensed (Exhibit 15).

Since any information obtained by Bond or the Division in connection with his 2002 visit to "Handel Insurance" would be too recent to support the Respondents' statute of limitations defense, I will make no further findings of fact in connection with this part of Bond's investigation. The OTSC was filed within four years of May 2, 2002.

The remainder of Bond's investigation is noteworthy for the ways in which it provides corroboration for his credible testimony that, after his second visit to "Handel Insurance" in Revere, he continued to pursue an investigation of whether Anawan was operating an unsupervised second location and that he did not know of the insurance business transactions between Anawan and Prum until he received the letter dated June 23, 2004 from Michaels that is in evidence as *Internal Exhibit F* of Exhibit 16, as well as part of Exhibit 17.

On June 1, 2004, Bond sent a letter to Anawan ("Bond's June letter").[49] Exhibit 8; *Internal Exhibit E* to Exhibit 16. Bond had not previously contacted Anawan in connection with the unsigned 1999 complaints regarding Anawan and "Handel Insurance" (Tr. 27-28, 32, 49; Exhibit 8).[50] Bond's June letter stated that the Division had "received a complaint against Anawan Insurance Agency, Inc. ("Anawan") regarding placement of insurance policies through various carriers." Among other things, Bond's June letter broadly requested that Anawan (emphasis added):

> 2. List and provide all documents relating to the appointment of Anawan's, past and present, producer(s) or broker(s), to carriers and or to the agency, including, but not limited to ***employment agreements, applications and notices of termination***.

Bond's June letter specifically inquired about Prum within the context of employment by Anawan (emphasis added):

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[48] See ¶12 of the Respondents' Request for Findings of Fact.
[49] Bond testified that it was his letter; that he was not directed by the SIU Director to send the June 1st letter to Anawan (Tr. 32, lines 19-21).
[50] See ¶¶ 16 and 24 of the Respondents' Request for Findings of Fact.

> 5. Have you ever ***employed*** Prum, if so state the dates of employment and provide the above-mentioned information for this producer/broker? Determine the carrier(s) that he/she placed business with type and number of policies written.

Exhibit 3, page two.

Bond's June letter to Anawan specifically inquired about Prum only within the context of ***employment*** by Anawan. I find that this circumstance corroborates Bond's credible testimony that the Division, prior to its receipt of Anawan's reply to Bond's June letter, was investigating only whether Anawan had been operating a second office that was not under the supervision of licensed insurance personnel. Bond's June letter manifests that the Division at that time did not suspect, nor was it investigating, improper insurance business transactions between Anawan and Prum. The gravamen of the instant OTSC is that Anawan had improper insurance business transactions with a person who was not licensed at the times at which the transactions occurred (although he previously had been licensed). This is a violation of the insurance laws that is distinct from the improper operation of a second location that is not being supervised by licensed insurance personnel, which was the nature of the alleged activity that Bond was investigating subsequent to the Division's receipt of the unsigned letters that are in evidence as Exhibits 1 and 2.

On June 23, 2004, Michaels responded to Bond's June letter on behalf of Anawan ("Michaels' June letter") and notified the Division of Anawan's prior insurance business transactions with Prum (*Internal Exhibit F* to Exhibit 16; Exhibit 17).[51] Prior to the receipt of Michaels' June letter, I find, based on Bond's credible testimony, that the Division had no information that Anawan had engaged in insurance business transactions with Prum doing business as "Handel Insurance Agency" (Exhibit 16, ¶15).

The Respondents repeatedly have focused on the Division's failure to contact Anawan prior to June 1, 2004 about "Handel Insurance." If the Division had contacted Anawan earlier, they argue, the Division would have been told about Anawan's verbal agreement with Prum long before October 25, 2000. In this regard, I note that Anawan indeed did disclose its insurance business transactions with Prum promptly after the Division asked Anawan about him (see Michaels' June letter). However, I find that Bond and the Division cannot be faulted for the manner in which they chose to pursue the investigation of the anonymous letters received in

[51] See ¶17 of the Respondents' Request for Findings of Fact.

1999. In any investigation, there is a risk that contacting the alleged violator prior to collecting evidence through other avenues could lead to the destruction of evidence of the suspected violations prior to its discovery. In this case, the record clearly shows that Anawan, in fact, did not act improperly when it was contacted by the Division. Indeed, Anawan cooperated with Bond's investigation by replying promptly to his very first letter of inquiry. But such a general concern on the part of the Division I find to be a valid one. The Division's decision not to promptly confront Anawan with inquiries does not provide the Respondents with a statute of limitations defense, or any other defense, to the OTSC.

The Respondents have asserted that the Division had a responsibility to inform them that Prum was not licensed. They also have focused on the Division's failure to learn earlier that Anawan was improperly engaging in insurance business transactions with Prum. Not only did the Division bear no such responsibility, but the record demonstrates that the Division had no way of knowing of Anawan's verbal agreement with Prum and of Anawan's insurance business transactions with him prior to October 25, 2000. Apparently, the Respondents assert that the Division had a responsibility to protect them from their own improper acts, even though they knew when Prum's license was due to expire based on the faxed copy of his license that Anawan had received. The Respondents had ***actual knowledge*** on or about January 7, 1997 that Prum's license was scheduled to expire only slightly more than four months later, based on Anawan's receipt of the faxed copy of Prum's Massachusetts insurance license, which stated that his license was due to expire on May 27, 1997.[52] 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.

With respect to a connection between "Handel Insurance" and Prum, one further aspect of Bond's investigation may be addressed. Bond at some point "during the course of . . . [his]

[52] The Respondents have requested (¶7 of the Respondents' Request for Findings of Fact) that I find that "There is no evidence that Anawan Insurance Agency, Inc., was informed of the cancellation of Prum's license until on/or about August 19, 2004, when Susan J. Michaels, President of Anawan Insurance Agency, Inc., received a letter from Douglas A. Hale, Counsel to the Commissioner." The Respondents' focus on when Prum's license was cancelled is a diversion from the operative fact of the date of the expiration of his license. Based on the information that had been provided to Anawan by means of the faxed copy of Prum's Massachusetts insurance license that was in its possession on or about January 7, 1997, the Respondents knew that Prum's license ***was due to expire*** on May 27, 1997. After May 27, 1997, Prum was no longer "duly licensed," and the Respondents violated §2 and §177 when they engaged in insurance business transactions with him thereafter.

investigation" contacted the Revere City Clerk and was informed that Kuntthy Prum had filed a Business Certificate in the City of Revere, pursuant to G.L. c. 110, §5, in which he stated that he was doing business at 78 Shirley Avenue, Revere, under the name "Handel Insurance Agency" (Exhibit 16, ¶9). On page two of Bond's Fact and Evidence Summary dated September 24, 2004 (Exhibit 15), Bond wrote that:

> According to the city [*sic*.] of Revere's clerk's office, Prum had last registered his d/b/a, Handel Insurance Agency, certificate on January 3, 2002 (. . . also note the Division attempted to determine, through Revere's City Hall, if Prum filed any earlier d/b/a certificates, but they have failed to respond).

Based on this sentence, it is clear that the information from the Revere City Clerk must have been obtained sometime after January 3, 2002, since Prum had "***last registered***" the d/b/a on that date. Thus, Bond and the Division have shown that they did not find out from the Revere City Clerk's Office that Prum had registered a d/b/a certificate for "Handel Insurance" until sometime after January 3, 2002, *i.e*., no more than 21 months prior to the filing of the OTSC and well within the four year time limit set by G.L. c. 250, §5A. Exactly when after January 3, 2002, Bond first learned about the Business Certificate is not discernable in the record that has been developed by the parties; he plainly knew as of December 12, 2005, the date of his affidavit (Exhibit 16).[53] But since Bond found out only sometime after January 3, 2002 about Prum's Business Certificate, this link of Prum to "Handel" was not known more than four years before the filing of the OTSC and therefore is not significant for statute of limitations purposes. Furthermore, a link between "Handel Insurance" and Prum would not establish that Anawan and Prum were engaging in improper insurance business transactions, in any event.

Based on the above, I find that the Division has proved that it did not know of the improper insurance business transactions between Anawan and Prum until June 23, 2004 and that the earliest date upon which any argument ***possibly*** can be made that the Division "should have known" of the improper insurance business transactions between Anawan and Prum was not until sometime long after October 25, 2000. Under either set of facts, the Division has proved that fines for the pre-November 2000 proved violations are not barred by the statute of limitations set out in §5A.

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[53] I find no persuasive basis in the record of this proceeding to support a finding, such as is requested by ¶15 of the Respondents' Request for Findings of Fact, that ***on May 13, 2002***, the Division knew that Prum was doing business as "Handel Insurance Agency" at 76 Shirley Avenue in Revere. I note that the OTSC was filed within four years of May 13, 2002, in any event.

VII. Immunity

A. Arguments of the parties

In Respondents' Post-Hearing Memorandum, they claim immunity from fines by reason of the first sentence of G.L. c. 176D, §13 ("§13"), which provides in pertinent part as follows:

> If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must nonetheless comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this commonwealth.

The Respondents claim that Anawan is within the ambit of §13 because a corporation is a "person" pursuant to the definition contained in G.L. c. 176D, §1 ("§1"). They allege that a timely objection was made to the introduction of Michaels' June letter; that the attachments to this letter, business records of Anawan, were provided in response to a misleading request from the Division; and that if they are admitted into evidence, the Respondents are "immune from prosecution or any fine or forfeiture." Respondents' Post-Hearing Memorandum, page 11. The Respondents argue that the Division may not introduce information at a hearing, over the objection of a party, when such information "was obtained by false pretense." Respondents' Post-Hearing Memorandum, pages 11-12. They also assert that the Division should be precluded from introducing any documents that were obtained in violation of G.L. c. 176D, §6 ("§6"), which requires service of a statement of all charges. They further contend that Bond's June letter (Exhibit 8; *Internal Exhibit E* of Exhibit 16) misrepresented the nature of the complaints made to the Division about Anawan as well as Prum's licensing status. Respondents' Post-Hearing Memorandum, page 14. Moreover, the Respondents assert that if Bond had been truthful about these matters, that Anawan would have known of the charge against it and would have been

entitled to avail itself of the protection offered by §13. The Respondents claim that Bond's June letter rises to the level of entrapment. Respondents' Post-Hearing Memorandum, pages 14-15.

In response, the Division argues that the Respondents should be precluded from raising the issue of §13 immunity in Respondents' Post-Hearing Memorandum when they have not raised the issue before. In any event, however, the Division asserts that the Respondents are not entitled to immunity based upon the plain language of §13. It argues that Anawan was never asked to produce at hearing the documents that the Division proffered as Exhibit 17; the exhibit was produced by the Division. Furthermore, it asserts that Anawan never asked to be excused from producing the documents contained in Exhibit 17. Moreover, the Division contends that the context of §13 demonstrates that the statute is directed at individuals and therefore the definition of "person" in §1 is not applicable. The Division argues that §6 did not require Bond to serve a statement of charges in connection with Bond's June letter, because there were no charges against Anawan at that time; Bond at that point was conducting an investigation. The Division states that it complied with §6 when it stated the charges against the Respondents in the OTSC.

B. Analysis and ruling

The Respondents have raised the issue of §13 immunity for the first time in Respondent's Post-Hearing Memorandum. Their claim of immunity is therefore denied as being made untimely.

Further, even if they were not foreclosed from raising the issue, I find that the Respondents would not be entitled to immunity pursuant to §13 in any event, since this provision applies only to a criminal prosecution, which this proceeding is not. Moreover, even if §13 did apply to this proceeding, the record of this proceeding contains no documentation of a request by either Anawan[54] or Michaels to be excused from attending and testifying at the hearing and, furthermore, the Division called neither Anawan nor Michaels at the hearing. Also, the record of this proceeding contains no documentation of a request by either Anawan or Michaels to be excused from producing any books, papers, records, correspondence or other documents at the hearing. Anawan produced the materials contained in Exhibit 17, proffered by the Division, in response to a letter from the Division, which occurred outside of the hearing. Having supplied

[54] The definition of "person" in G.L. 176D, §1 includes "any individual, corporation, association, partnership . . .."

these materials outside of the ambit of a hearing, Anawan was not "directed," as this term is used in §13, to testify or to produce documents, as is required to obtain the immunity provided by §13.

Regarding the Respondents' claim that Bond's letter rises to the level of entrapment, I note that the Respondents failed to raise the affirmative defense of "entrapment" prior to Respondent's Post-Hearing Memorandum. Generally, a failure to plead an affirmative defense results in a waiver and exclusion of the defense from the case. See *Anthony's Pier Four, Inc. v. HBC Associates*, *supra*. Moreover, Bond's letter did not induce the Respondents to engage in any conduct that was criminal; therefore the letter cannot constitute "entrapment." See *U. S. v. Gifford*, 17 F.3d 462 (1st Cir. 1994) (Affirmative defense of "entrapment" is comprised of two elements: government inducement of the accused to engage in criminal conduct and accused's lack of predisposition to engage in such conduct.). The alleged misrepresentations in Bond's letter about the nature of the complaints made to the Division about Anawan and about Prum's licensing status provide no basis for immunity. Cf. *Commonwealth v. Harvard*, 356 Mass. 452 (1969) (Artifice and stratagem may be employed by the state to bring to book those engaged in crime and such does not constitute "entrapment."). The Division complied with §6 when it stated the charges against the Respondents in the OTSC.

VIII. Fines

The OTSC charges that the Respondents have violated G.L. c. 176D, §2, which at all times relevant to this matter has provided as follows:

> No person shall engage in this commonwealth in any trade practice which is defined in this chapter as, or determined pursuant to section six of this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

I find that by engaging in insurance business transactions with an unlicensed person Anawan engaged in unfair methods of competition and unfair acts and practices in the business of insurance, detrimental to consumers.

The Respondents assert that there is no provision for fines for violation of c. 176D, but they are mistaken. G.L. c. 176D, §7 ("§7") provides in relevant part as follows (emphasis added):

> If after such hearing, the commissioner shall determine that the person charged has engaged in an unfair or deceptive act or practice he shall reduce his findings to writing and shall issue and cause to be served upon the person charged

> with the violation a copy of such findings and an order requiring such person to cease and desist from engaging in such method of competition, act or practice and if the act or practice is a violation of sections three or four, the commissioner may suspend or in the case of repeated violations revoke the license of such a party and impose conditions for the reinstatement thereof. ***In addition whoever commits such an act or practice shall be punished by a fine of not more than one thousand dollars for each and every act or practice.***

While it could be argued that the first sentence of §7 limits the sanctions of suspension or revocation of license to violations of G.L. c. 176D, §§ 3 and 4 ("§§ 3 and 4"), there is no such stated limit on the imposition of the fine set out in the second sentence of §7. Furthermore, the scope of c. 176D unfair methods of competition or unfair or deceptive acts or practices in the business of insurance is not circumscribed by §§ 3 and 4. On the contrary, §2 provides that "No person shall engage in this commonwealth in any trade practice which is defined in this chapter as, or [is] ***determined pursuant to section six of this chapter to be***, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." This hearing has been exactly the type of proceeding that is contemplated by G.L. c. 176D, §6, and therefore fines are available in this proceeding pursuant to c. 176D.

Although the Respondents violated §2 and §177 when they failed to ascertain whether Prum possessed a valid Massachusetts insurance license before soliciting business from him, accepting applications from him and paying compensation to him after the date upon which they had notice that his license was due to expire, they have not acted with a complete disregard for their responsibilities. Rather, at the outset of their relationship, Anawan had Prum fax a copy of his Massachusetts license to it before commencing doing insurance business with him, thereby implicitly acknowledging through this action its responsibility to ascertain that it was planning to engage in insurance business transactions with someone who was indeed licensed. Furthermore, the Respondents informed the Division of their insurance business transactions with Prum promptly after they were asked about their connection with him. On the other hand, they have not accepted responsibility for their violations and have sought to shift the blame elsewhere. In the interest of protecting the public, it is appropriate, therefore, to bring home to the Respondents their responsibilities.

The Respondents argue that Exhibit 10 is evidence of a desire by the Division to obtain revenue through enforcement actions (see, *e.g.*, the cross-examination of Bond at Tr. 30-38;

Exhibit 14, ¶4).[55] The Respondents' argument is not persuasive. The Commissioner and the Division are obligated to enforce the insurance laws that are enacted by the legislature. I am persuaded that the OTSC was filed to enforce a statutory requirement of licensure for those who engage in transactions in connection with the business of insurance, a requirement that is intended by the legislature to ensure that those who deal with the consumers of insurance products are competent, trustworthy and suitable. *Deluty, supra; David, supra*.

I find that it is appropriate to assess a fine of $100.00 pursuant to §2 for each of the 300 violations that the OTSC has charged and the Division has proved. I assess no additional fines pursuant to §177.

IX. Orders

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: that the Respondents shall pay fines totaling thirty thousand dollars ($30,000.00): twenty-seven thousand eight hundred dollars ($27,800.00) for 278 violations of G.L. c. 176D,[56] §2 that occurred between November 1, 2000 and December 31, 2001, and two thousand two hundred dollars ($2,200.00) for 22 violations of G.L. c. 176D, §2 that occurred between August 1, 2000 and October 31, 2000.

FURTHER ORDERED: that the Respondents shall cease and desist from the conduct that gave rise to these sanctions.

FURTHER ORDERED: that the total of $30,000 in fines imposed herein shall be paid within sixty (60) days of the filing date of this Decision and Order, and if such fines are not paid in full by this date, that the insurance producer licenses of the Respondents shall be forthwith suspended until such time as such fines are paid in full.

This decision has been filed this 15th day of May, 2007, in the office of the Commissioner of Insurance.

Filed: May 15, 2007

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Stephen M. Sumner, Esq.
Presiding Officer

This decision may be appealed to the Commissioner of Insurance pursuant to G.L. c. 26, §7.

[55] See ¶21 of the Respondents' Request for Findings of Fact.
[56] The typographical errors ("276D") were corrected *nunc pro tunc* on May 17, 2007, and copies of this correction page were sent to both parties by letter dated May 17, 2007.

[The Appendices may be viewed at the Division of Insurance]