

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT OF)
INSURANCE, FINANCIAL INSTITUTIONS)
AND PROFESSIONAL REGISTRATION)
)
Petitioner,)
)
vs.)
)
JAMES C. McCAIN, JR.,)
)
Respondent.)

No. 12-1831 DI

ORDER

We grant the Director of the Department of Insurance, Financial Institutions and Professional Registration’s (“the Director” and “the Department”) motion for partial summary decision to discipline the insurance producer license of James C. McCain, Jr.

Procedure

On October 5, 2012, the Director filed a complaint seeking to discipline McCain. McCain was served with a copy of the complaint and our notice of complaint/notice of hearing by certified mail on October 13, 2012. McCain never filed an answer. On February 20, 2013, the Director filed a motion for partial summary decision as to Counts I, II, III, VII, and IX of the complaint. Our Regulation 1 CSR 15-3.446(6)¹ provides that we may decide any portion of this

¹ References to “CSR” are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

case without a hearing if the Director establishes facts that McCain does not dispute and entitle the Director to a favorable decision. We gave McCain until March 11, 2013, to respond to the motion, but he did not respond.

Findings of Fact for Purposes of the Motion

1. McCain was licensed as an insurance producer in Missouri on June 4, 1981. His license was current and active at all relevant times.
2. At all relevant times, McCain did business under the fictitious name of Underwriters Service Agency (“Underwriters”). Underwriters’ address at all relevant times was 3720 Hampton Ave., St. Louis, Missouri. Some of the actions set out herein as being performed by McCain were done by other employees or agents of Underwriters.
3. At all relevant times, McCain maintained checking accounts at Regions Bank and Southwest Bank.²
4. The Missouri Basic Property Insurance Inspection and Placement Program (“Program”) was created under Missouri law to offer property insurance to consumers who are entitled to insurance but are unable to obtain coverage through ordinary methods.³ The Missouri Property Insurance Placement Facility (“FAIR”) was created to provide insurance pursuant to the statutory provisions of the Program.⁴

McCain’s Basic Scheme

5. When FAIR set the premium for an upcoming year for a particular property, it notified McCain and the property owner of the premium amount and the deadline for payment.

² In the April 8, 2010 subpoena conference, McCain characterized the Regions Bank accounts (there were two) as premium trust accounts, and the Southwest Bank account as an operating account. With regard to premium trust accounts, the Director did not cite to any statute or regulation requiring a producer to maintain such accounts, or regarding the operation and maintenance of the accounts or the funds deposited therein.

³ *Graue v. Missouri Prop. Ins. Placement Facility*, 847 S.W.2d 779, 782 (Mo. banc 1993).

⁴ Section 379.815(1). Statutory references are to RSMo Supp. 2012 unless otherwise indicated.

6. When McCain received the above-referenced notice or otherwise ascertained the premium amount for the upcoming year, he informed the mortgagee, servicer, or other funding source (such as a title insurance company) that the premium due was more than the amount on the notice FAIR sent to him. For instance, as we show in the findings of fact for the Angela Bonnett case below, FAIR set the premium at \$956.00, but McCain informed the mortgagee or servicer that the premium charge would be \$1,016.00.⁵

7. The money in those escrow accounts maintained by the mortgagees or servicers was the consumers' money, and was held by the mortgagee or servicer for, among other things, the payment of insurance premiums for policies covering the mortgaged property.⁶

8. The mortgagee, servicer, or other funding source would remit checks to McCain for the amount stated by McCain.⁷ The checks were made to the order of "Missouri Property Insurance Placement Facility," "Missouri FAIR Plan," or some variation of those names.

9. McCain deposited those checks in an account at either Regions Bank or Southwest Bank.

10. McCain would remit only a portion of the money he received from the funding source. In cases where FAIR had previously informed the consumer and McCain that it would accept installment payments, McCain remitted the amount of the first installment payment

⁵ Exceptions to this general scheme occurred in the Anderson and Jackson fact situations, where McCain only solicited the amount of the premium from the mortgagee, servicer, or other funding source, and in the Botonis, Hard, Kinnie, and Rodgers situations, where McCain solicited less than the annual premium amount, but more than the amount he remitted to FAIR. We set out these facts in subsections bearing the names of each consumer in our findings of fact below.

⁶ See 24 C.F.R. § 3500.17(b) "'Escrow account' means any account that a servicer establishes or controls *on behalf of a borrower* to pay taxes, insurance premiums...or other charges." (Emphasis added.)

⁷ We infer this information from two sources: first, the Director's documentation showing where McCain sent a written request to the funding source to remit the amount in question, followed by a check from the funding source for that amount, and second, if the funding source sent McCain a check for an amount other than the amount of the premium, McCain most likely was the person who told the source that that was the amount due.

indicated by FAIR. If FAIR made no such indication, McCain remitted only a portion of the annual premium due, with a request to change the payment schedule to installments.⁸

11. McCain sometimes characterized the money he received, but did not remit to FAIR, as a “fee” for services performed. He spent this extra money on expenses of his business.

12. Except for one consumer (Djulan Harris), the consumers and McCain did not execute a Missouri Producer Service Agreement in the form set out in Exhibit A to 20 CSR 70-1.100.

13. In some cases, McCain’s retaining of premium funds payable to FAIR resulted in a lapse of insurance coverage for the consumers’ properties.

14. McCain admitted that he asked the funding sources for more money than was needed, yet kept a portion of what the funding sources sent him (and what he, in some instances, was legally obligated to remit to FAIR), because his business was having cash flow problems.

Michelle and Joyce Anderson

15. On December 19, 2008, FAIR issued to Michelle Anderson and Joyce Anderson (“the Andersons”), as owners of property located at 6517 Perry Ct., Uplands Park, Missouri (the “Anderson property”), and to McCain as producer, a notice that the insurance policy on the Anderson property would expire on March 29, 2009 unless payment of a yearly premium in the amount of \$582.00 was received before that date.

16. McCain notified Countrywide Home Loans, Inc. (“Countrywide”) – the mortgagee or servicer on a mortgage encumbering the Anderson property – that a premium payment in the amount of \$657.00 was due and should be remitted to him.

⁸ McCain remitted the entire amount of the annual premium in the Anderson and Williams (policy # 0364839) fact situations. The policy numbers are indicated for Williams because she had two policies at issue here.

17. Countrywide issued a check to the order of “Missouri Prop Ins. Facility” for payment of the above-referenced premium in the amount of \$657.00 for payment of the above-referenced premium and sent it to McCain.

18. McCain characterized the additional \$75.00 he charged Countrywide over the premium amount of \$582.00 as a broker’s fee.

19. There was no written agreement, such as a producer service agreement of the sort described in 20 CSR 70-1.100, between McCain and the Andersons entitling McCain to withhold additional compensation from the money paid to him by Countrywide.

20. McCain deposited Countrywide’s check in his Regions Bank account on March 24, 2009.⁹

21. On March 26, 2009, McCain issued a check in the amount of \$582.00 to “Missouri Prop Ins.” and sent the check to the Missouri FAIR Plan.

22. The \$582.00 check referred to above was returned to FAIR for insufficient funds on or about April 8, 2009.

23. FAIR received the premium funds on April 25, 2009.

24. April 25, 2009 was more than 30 days after March 24, 2009.

25. The premium was not paid within 30 days of receipt of funds by McCain.

26. While McCain’s failure to timely remit the premium resulted in a lapse in coverage of the Andersons’ policy from March 29, 2009 until April 25, 2009, the lapse was not caused by his *retaining* the funds, but by spending a portion of them.

Angela Bonnett

27. On December 2, 2008, FAIR issued to Angela Bonnett, as owner of property located at 3935 Cottage Ave., St. Louis, Missouri (the “Bonnett property”), and to McCain as

⁹ Where possible, we discerned the bank where McCain deposited the checks in question, and the dates of deposit, from the deposit stamps on the backs of the checks.

producer, a notice that the insurance policy on the Bonnett property (“the Bonnett policy”) would expire on March 14, 2009 unless payment of a yearly premium in the amount of \$956.00 was received before that date.

28. FAIR did not notify Bonnett or McCain that the premium could be paid in installments.

29. McCain notified US Bank, the mortgagee or servicer on a mortgage encumbering the Bonnett property, that a premium payment in the amount of \$1,016.00 was due and should be remitted to him.

30. US Bank issued a check for \$1,016.00 to the order of “Missouri Prop Ins. Placement Facility” for payment of the premium and sent it to McCain.

31. McCain deposited US Bank’s check on February 18, 2009.

32. On March 25, 2009, FAIR received a payment of \$437.00 from McCain, to be applied to the premium for the Bonnett policy.

33. McCain failed to pay the entire \$956.00 premium within 30 days of receipt of the money from US Bank.

34. McCain retained \$619.00 – the difference between the money he received from US Bank and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Bonnett policy.

35. McCain’s failure to timely remit the premium resulted in a 12-day lapse in coverage of the Bonnett policy.

Kathy Botonis

36. On December 2, 2008, FAIR issued to Kathy Botonis, as owner of property located at 3650-3652 Wilmington Ave., St. Louis, Missouri (the “Botonis property”), and to McCain as producer, a notice that the insurance policy on the Botonis property (“the Botonis policy”) would

expire on February 10, 2010 unless payment of an installment premium in the amount of \$274.00 was received before that date. The yearly premium for the policy was \$675.00.

37. McCain notified JP Morgan Chase Bank, the mortgagee or servicer on a mortgage encumbering the Botonis property, that a premium payment in the amount of \$596.00 was due and should be remitted to him.

38. JP Morgan Chase Bank issued a check for \$596.00 to the order of “Missouri FAIR Plan” for payment of the premium and sent it to McCain.

39. McCain deposited JP Morgan Chase Bank’s check on January 28, 2010.

40. On February 12, 2010, FAIR received an installment payment of \$274.00 from McCain, to be applied to the premium for the Botonis policy.

41. McCain retained \$322.00 – the difference between the money he received from JP Morgan Chase Bank and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Botonis policy.

42. The policy in question lapsed for two days, from February 10, 2010 until February 12, 2010, due to McCain’s failure to timely remit the premium.

Ali Burhan

43. On June 3, 2009, FAIR issued to Ali Burhan, as owner of property located at 4321 Lafayette Ave., St. Louis, Missouri (the “Burhan property”), and to McCain as producer, a notice that the insurance policy on the Burhan property (“the Burhan policy”) would expire on September 30, 2009 unless payment of a yearly premium in the amount of \$677.00 was received before that date.

44. FAIR did not notify Burhan or McCain that the premium could be paid in installments.

45. McCain notified Ocwen Loan Servicing, LLC (“Ocwen”), the mortgagee or servicer on a mortgage encumbering the Burhan property, that a premium payment in the amount of \$742.00 was due and should be remitted to him.

46. Ocwen issued a check for \$742.00 to the order of “Missouri Fair Plan” for payment of the premium and sent it to McCain.

47. McCain deposited Ocwen’s check on September 28, 2009.

48. On October 2, 2009, FAIR received a payment of \$275.00 from McCain, to be applied to the premium for the Burhan policy.

49. McCain failed to pay the entire \$677.00 premium within 30 days of receipt of the money from Ocwen.

50. McCain retained \$467.00 – the difference between the money he received from Ocwen and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Burhan policy.

51. McCain’s failure to timely remit the premium resulted in a three-day lapse in coverage of the Burhan policy.

52. On February 11, 2010, FAIR received the balance of the yearly premium from McCain.

Deborah Cothrine

53. On October 13, 2009, Select Portfolio Servicing, Inc.(“Select”), the mortgagee or servicer for a mortgage on certain property owned by Deborah Cothrine located at 15626 95th Ave., Florissant, MO (“the Cothrine property”), issued a check for \$768.00 to the order of “Missouri Property Ins Placement Facility of MO” and sent it to McCain.¹⁰

¹⁰ The Director also included documentation along with his motion for partial summary decision showing that McCain had issued an invoice to US Bank on January 4, 2009 for payment of \$1,031.00 as a yearly premium for an insurance policy on the Bonnet property, but the policy number was shown as 365104. US Bank issued a check for \$1,013.00 on January 6, 2009. We find no explanation for the discrepancy between the two figures. Further, as this policy is not the subject of the Director’s complaint, we only note its presence in the Director’s submission.

54. McCain deposited the check on October 19, 2009.

55. On October 21, 2009, FAIR issued a policy for the Cothrine property (“the Cothrine policy”). The policy stated on its face that the annual premium was \$718.00, and that \$288.00 of the premium had been paid.

56. McCain failed to pay the entire \$768.00 premium within 30 days of receipt of the money from Select.

57. McCain retained \$480.00 – the difference between the money he received from Select and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Cothrine policy.

Lena Elijah

58. On March 4, 2009, FAIR issued to Lena Elijah, as owner of property located at 720 Ruggles Road, Ferguson, Missouri (the “Elijah property”), and to McCain as producer, a notice that the property insurance policy on the Elijah property (“the Elijah policy”) would expire on June 26, 2009 unless payment of an installment on the premium in the amount of \$241.00 was received before that date. The notice stated that the yearly premium for the policy was \$596.00.

59. The above-referenced policy lapsed for nonpayment of premium and was not renewed until July 18, 2009, when a payment of an unknown amount was received.

60. On November 20, 2009, HomEq issued a check to FAIR in the amount of \$725.00 to the order of “MO Prop Ins Placement Facility/FAIR Plan” and sent it to McCain. The check bore a notation, “Lena Elijah/720 Ruggles.”

61. McCain deposited the check. The date of deposit, as shown on the back of HomEq’s check, is illegible.

Bruce Givens

62. On December 2, 2008, FAIR issued to Bruce Givens, as owner of property located at 7510 Carleton Ave., University City, Missouri (the “Givens property”), and to McCain as producer, a notice that the insurance policy on the Givens property (“the Givens policy”) would expire on March 11, 2009 unless payment of a yearly premium in the amount of \$678.00 was received before that date.

63. FAIR did not notify Givens or McCain that the premium could be paid in installments.

64. McCain notified Countrywide Home Loans Servicers LP (“Countrywide Servicers”), the mortgagee or servicer on a mortgage encumbering the Givens property, that a premium payment in the amount of \$753.00 was due and should be remitted to him.

65. Countrywide Servicers issued a check for \$753.00 to the order of “Missouri Prop Ins. Facility” for payment of the premium and sent it to McCain.

66. McCain deposited Countrywide Servicers’ check on February 18, 2009.

67. FAIR subsequently received a payment of \$305.00 from McCain, to be applied to the premium for the Givens policy.

68. McCain failed to pay the entire \$678.00 premium within 30 days of receipt of the money from Countrywide Servicers.

69. McCain retained \$448.00 – the difference between the money he received from Countrywide Servicers and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Givens policy.

70. On September 11, 2009, Bank of America issued a check for \$376.00 to the order of “Missouri Prop Ins Facility.” The check bears a notation, “Bruce Givens/7510 Carleton.”

71. The check was received by FAIR.¹¹

72. McCain's failure to timely remit the premium resulted in a 12-day lapse in coverage of the Givens policy.

Curtis Hard¹²

73. On July 17, 2009, Investors Title Company ("Investors"), issued a check for \$350.00 to the order of "Missouri Property Insurance," and sent it to McCain.

74. McCain deposited the check.

75. On August 4, 2009, FAIR issued a policy ("the Hard policy") for Curtis Hard's property. The policy stated on its face that the annual premium was \$487.00, and that \$195.00 of the premium had been paid.

76. McCain failed to pay the entire \$487.00 premium within 30 days of receipt of the money from Investors, but only paid \$195.00 of the amount due.

77. McCain retained \$155.00 – the difference between the money he received from Investors and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Hard policy.

78. McCain did not pay the remainder of the premium, or any part of it, to FAIR within 30 days of receipt.

79. The Hard policy was canceled on December 13, 2009 because the property was unoccupied.

¹¹ Vicky Byington's affidavit states that FAIR did not receive the Bank of America check. However, unlike most of the other checks, which bear a deposit stamp indicating that they passed through one of McCain's accounts, the Bank of America check bears only one deposit stamp, which states, "FOR DEPOSIT ONLY/Missouri Property Insurance Placement Facility/Missouri FAIR Plan." We believe Byington misspoke when she asserted that FAIR did not receive this check. Further, we believe that the amount of the Bank of America check – \$376.00 – is the balance due for the yearly premium for the Givens policy. While the Director presents no evidence regarding the allocation of the \$305.00 FAIR received from McCain, we discern that where FAIR stated that it would accept installment payments, it charged a \$3.00 fee.

¹² Byington's affidavit, and the Director's motion and supporting papers, identify the owner as Curtis Hurd, but both the check from the title company and the policy state his name as Curtis Hard.

Djulan Harris

80. On April 2, 2009, Djulan Harris and McCain executed a Missouri Producer Service Agreement (“Agreement”), in the form set out in Exhibit A to 20 CSR 70-1.100. The Agreement referenced policy number 365508.

81. In the Agreement, Harris authorized McCain to commit to a maximum premium of not more than \$444.00 for the coverage set out in the Agreement. Harris also agreed to pay, as compensation to McCain, above and in addition to the commission received from the insurer, for McCain’s various services, a fee of not more than zero.

82. McCain notified GMAC, the mortgagee or servicer of a mortgage encumbering Harris’ property, that a premium payment in the amount of \$504.00 was due and should be remitted to him.

83. In a letter to Carrie Couch of the Department dated March 15, 2010 McCain stated that the additional \$60.00 of the amount requested from GMAC was a “processing/application fee” for Underwriters’ services.

Roger Harris

84. On February 4, 2009, FAIR issued to Roger L. Harris, as owner of property located at 11120 Farber Drive, St. Louis, Missouri (“the Roger Harris property”), and to McCain as producer, a notice that the insurance policy on the Roger Harris property (“the Roger Harris policy”) would expire on May 30, 2009 unless payment of a yearly premium in the amount of \$1,209.00 was received before that date.

85. FAIR did not notify Harris or McCain that the premium could be paid in installments.

86. McCain notified American Home Mortgage Servicing, Inc. (“AHMSI”), the mortgagee or servicer on a mortgage encumbering the Roger Harris property, that a premium payment in the amount of \$1,284.00 was due and should be remitted to him.

87. On June 19, 2009, AHMSI issued a check for \$1,284.00 to the order of “Mo Prop Ins Placement Facility” for payment of the premium and sent it to McCain.

88. McCain deposited AHMSI’s check on June 23, 2009.¹³

Byron Hayes

89. On January 26, 2009, Countrywide, the mortgagee or servicer for a mortgage on certain property owned by Byron Hayes at 4881 Lee Ave., St. Louis, MO (“the Hayes property”), issued a check for \$550.00 to the order of “Missouri Prop Ins Facility and sent it to McCain.

90. McCain deposited the check.¹⁴

91. On April 10, 2009, FAIR issued a policy (“the Hayes policy”) for the Hayes property. The policy stated on its face that the annual premium was \$528.00, and that \$212.00 of the premium had been paid.

92. McCain failed to pay the entire \$528.00 premium within 30 days of receipt of the money from Countrywide.

93. McCain retained \$338.00 – the difference between the money he received from Countrywide and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Hayes policy.

¹³ The Director did not indicate how much, if any, of the amount McCain received from AHMSI was forwarded to FAIR or when it was forwarded.

¹⁴ The date included in the deposit stamp on the back of the check is recognizable as the same type of stamp affixed to other checks deposited by McCain in his account at Regions Bank, but the date of deposit is illegible.

Jamil Hoffman

94. On February 4, 2010, FAIR issued a rate quotation to Jamil Hoffman, as owner of property located at 2472 Shannonaire Dr., St. Louis, Missouri (the “Hoffman property”), and to McCain as producer, that it would furnish an insurance policy (“the Hoffman policy”) on the Hoffman property for payment of either a yearly premium of \$492.00 or for payment by installments, the first installment being for \$203.00.

95. On January 28, 2010, Investors Title Company issued two checks, for \$450.00 and \$50.00, payable to “Missouri Property Insurance” and Underwriters respectively, and delivered them to McCain.

96. McCain deposited both checks.

97. FAIR received an installment payment of \$203.00 from McCain, to be applied to the premium for the Hoffman policy.

Angela and Jerell Howard

98. On August 5, 2009, FAIR issued to Angela and Jerell Howard, as owners of property located at 2632 N. Euclid Ave., St. Louis, Missouri (the “Howard property”), and to McCain as producer, a notice that the insurance policy on the Howard property (“the Howard policy”) would expire on November 25, 2009 unless payment of an installment premium in the amount of \$312.00 was received before that date. The yearly premium for the policy was \$773.00.

99. McCain notified Chase Home Finance LLC (“Chase”), the mortgagee or servicer on a mortgage encumbering the Howard property, that a premium payment in the amount of \$980.00 was due and should be remitted to him.

100. Chase issued a check for \$980.00 to the order of “MO FAIR Plan” for payment of the premium and sent it to McCain.

101. McCain deposited Chase's check.

102. On November 25, 2009, FAIR received an installment payment of \$274.00 from McCain, to be applied to the premium for the Howard policy.

103. McCain retained \$668.00 – the difference between the money he received from Chase and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Howard policy.

Keisha Hudson

104. On August 5, 2009, FAIR issued to Keisha Hudson, as owner of property located at 3501 Pennsylvania Ave., St. Louis, Missouri (the "Hudson property"), and to McCain as producer, a notice that the insurance policy on the Hudson property ("the Hudson policy") would expire on November 28, 2009 unless payment of an installment premium in the amount of \$251.00 was received before that date. The yearly premium for the policy was \$620.00.

105. McCain notified Saxon Mortgage Services, Inc. ("Saxon"), the mortgagee or servicer on a mortgage encumbering the Hudson property, that a premium payment in the amount of \$695.00 was due and should be remitted to him.

106. Saxon issued a check for \$695.00 to the order of "Missouri Property Ins" for payment of the premium and sent it to McCain.

107. McCain deposited Saxon's check.

108. On December 17, 2009, FAIR received an installment payment of \$251.00 from McCain, to be applied to the premium for the Hudson policy.

109. McCain retained \$444.00 – the difference between the money he received from JP Morgan Chase Bank and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Hudson policy.

110. The policy in question lapsed for 20 days, from November 28, 2010 until December 17, 2010.

Hunni Hughes

111. On January 8, 2010, FAIR issued to Hunni Hughes, as owner of property located at 1048 Bittner, St. Louis, Missouri (the “Hughes property”), and to McCain as producer, a notice that the insurance policy on the Hughes property (“the Hughes policy”) would expire on January 18, 2010 unless payment of an installment premium in the amount of \$259.00 was received before that date. The yearly premium for the policy was \$636.00.

112. McCain notified Saxon Mortgage Services, Inc. (“Saxon”), the mortgagee or servicer on a mortgage encumbering the Hughes property, that a premium payment in the amount of \$711.00 was due and should be remitted to him.

113. Saxon issued a check for \$711.00 to the order of “Missouri Property Ins” for payment of the premium and sent it to McCain.

114. McCain deposited Saxon’s check.

115. Later, FAIR received an installment payment of \$259.00 from McCain, to be applied to the premium for the Hughes policy.

116. McCain retained \$452.00 – the difference between the money he received from Saxon and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Hughes policy.

Sandra Jackson

117. On January 7, 2010, FAIR issued to Sandra Jackson, as owner of property located at 6209 Mid Rivers Mall Dr., St. Charles, Missouri (the “Jackson property”), and to McCain as producer, a notice that the insurance policy on the Jackson property (“the Jackson policy”) would

expire on January 30, 2010 unless payment of an installment premium in the amount of \$287.00 was received before that date. The yearly premium for the policy was \$702.00.

118. McCain notified Bank of America (“B of A”), the mortgagee or servicer on a mortgage encumbering the Jackson property, that a premium payment in the amount of \$702.00 was due and should be remitted to him.

119. On January 25, 2010, B of A issued a check for \$702.00 to the order of “Missouri Prop Ins Facility” for payment of the premium and sent it to McCain.

120. McCain deposited B of A’s check on February 3, 2010.

121. On February 5, 2010, FAIR received an installment payment of \$287.00 from McCain, to be applied to the premium for the Jackson policy.

122. McCain retained \$415.00 – the difference between the money he received from B of A and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Jackson policy.

123. The policy in question lapsed for seven days, from January 30, 2010 until February 6, 2010.

Arnette Johnson

124. On September 10, 2009, B of A, the mortgagee or servicer for a mortgage on certain property owned by Johnson at 116771 Larimore Rd., St. Louis, MO (“the Johnson property”), issued a check for \$853.00 to the order of “Missouri Prop Ins Facility.”

125. McCain deposited the check on September 23, 2009.

126. On September 22, 2009, FAIR issued a property insurance policy covering the Johnson property (“the Johnson policy”). The policy stated an annual premium of \$788.00, and that \$316.00 of the premium had been paid.

127. McCain failed to pay the entire \$788.00 premium within 30 days of receipt of the money from B of A.

128. McCain retained \$537.00 – the difference between the money he received from Countrywide and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Johnson policy.

129. On February 2, 2010, B of A issued a check for \$241.00 to the order of FAIR in order to prevent cancellation of the policy.

Clifton and Cena Kinnie

130. On November 30, 2009, FAIR issued a rate quotation to Clifton and Cena Kinnie, as owners of property located at 11315 Bellefontaine Rd., Spanish Lake, Missouri (the “Kinnie property”), and to McCain as producer, that it would furnish an insurance policy (“the Kinnie policy”) on the Kinnie property for payment of either a yearly premium of \$702.00, or for payment by installments, the first installment being for \$285.00.

131. On January 28, 2010, Fifth Third Bank, the mortgagee or servicer of a mortgage on the Kinnie property, issued a check in the amount of \$625.00, payable to the order of FAIR, and sent it to McCain.

132. McCain deposited the check.

133. FAIR received an installment payment of \$285.00 from McCain, to be applied to the premium for the Kinnie policy.

134. McCain failed to make any more payments on the above-described premium.

135. McCain retained \$340.00 – the difference between the money he received from Countrywide and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Kinnie policy.

Johnny Mitchell

136. On November 3, 2009, FAIR issued to Johnny Mitchell, as owner of property located at 2555 Cambridge Dr., Florissant, Missouri (the “Mitchell property”), and to McCain as producer, a notice that the property insurance policy on the Mitchell property (“the Mitchell policy”) would expire on February 3, 2010 unless payment of a premium in the amount of \$763.00 was received before that date.

137. FAIR did not notify Mitchell or McCain that the premium could be paid in installments.

138. McCain notified Loan Care Servicing Center (“Loan Care”), the mortgagee or servicer on a mortgage encumbering the Mitchell property, that a premium payment of \$838.00 was due and should be remitted to him.

139. On January 19, 2010, Loan Care issued a check for \$838.00 to the order of “Missouri FAIR Plan” for payment of the above-referenced premium.

140. The check in question was received by McCain, who deposited it on February 4, 2010.

141. On February 9, 2010, FAIR received a payment of \$350.00 from McCain, to be applied to the premium for the Mitchell policy.

142. McCain failed to pay the entire \$838.00 premium within 30 days of receipt of the money from Loan Care.

143. McCain retained \$488.00 – the difference between the money he received from Loan Care and the amount he remitted to FAIR.

Tracey Robbins

144. On August 31, 2009, FAIR issued to Tracey Robbins, as owner of property located at 5815 Lotus Ave., St. Louis, Missouri (the “Robbins property”), and to McCain as producer, a

notice that the insurance policy on the Robbins property (“the Robbins policy”) would expire on December 17, 2009 unless payment of a yearly premium in the amount of \$566.00¹⁵ was received before that date.

145. FAIR did not notify Robbins or McCain that the premium could be paid in installments.

146. McCain notified Chase Home Finance LLC (“Chase”), the mortgagee or servicer on a mortgage encumbering the Robbins property, that a premium payment in the amount of \$729.00 was due and should be remitted to him.

147. Chase issued a check for \$729.00 to the order of “MO Fair Plan” for payment of the premium and sent it to McCain.

148. McCain deposited Chase’s check on December 21, 2009.¹⁶

149. On December 17, 2009, FAIR received a payment of \$437.00 from McCain, to be applied to the premium for the Robbins policy.

150. McCain failed to pay the entire \$566.00 premium within 30 days of receipt of the money from Chase.

151. McCain retained \$432.00 – the difference between the money he received from Chase and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Robbins policy.

Shatanya Rodgers

152. On December 10, 2009, B of A, the mortgagee or servicer for a mortgage on certain property owned by Shatanya Rodgers located at 10531 Prestwick Dr., St. Louis, Missouri (“the

¹⁵ The Robbins policy as issued showed a premium of \$651.00.

¹⁶ This is the deposit date shown on the check McCain received from Chase, which is four days before the date Byington testified that FAIR received \$297.00 from McCain as a premium for the Robbins policy.

Rodgers property”), issued a check for \$850.00 to the order of “Missouri Property Ins Placement Facility” and sent it to McCain.

153. McCain deposited the check.

154. On December 18, 2009, FAIR issued a policy for the Rodgers property (“the Rodgers policy”). The policy stated on its face that the annual premium was \$1,159.00¹⁷ and that \$465.00 of the premium had been paid.

155. McCain failed to pay all of the premium funds he had received from B of A within 30 days of receipt of the money.

156. McCain retained \$385.00 – the difference between the money he received from B of A and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Rodgers policy.

Tommy Valiant

157. On August 5, 2009, FAIR issued to Tommy Valiant, as owner of property located at 1914 DeSoto Ave., St. Louis, Missouri (the “Valiant property”), and to McCain as producer, a notice that the insurance policy on the Valiant property (“the Valiant policy”) would expire on November 25, 2009 unless payment of an installment premium in the amount of \$190.00 was received before that date. The yearly premium for the policy was \$467.00.

158. McCain notified Balboa Insurance Group/Newport Management Co. (“Balboa”), the mortgagee or servicer on a mortgage encumbering the Valiant property, that a premium payment in the amount of \$542.00 was due and should be remitted to him.

159. On November 17, 2009, Balboa issued a check for \$542.00 to the order of “Missouri Prop Ins Facility/Underwriters Service Agency” for payment of the premium and sent it to McCain.

¹⁷ Byington’s affidavit asserts that the premium on the Rodgers policy was \$850.00. We believe this to be a misstatement.

160. McCain deposited Balboa's check on November 24, 2009.

161. FAIR received an installment payment of \$190.00 from McCain, to be applied to the premium for the Valiant policy.

162. McCain retained \$352.00 – the difference between the money he received from JP Morgan Chase Bank and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Valiant policy.

Tyree Washington

163. On January 4, 2010, Investors Title Company issued a check for \$486.00 to the order of "Missouri Property Insurance" regarding a transaction involving Tyree Washington's property located at 4737 Nebraska Ave., St. Louis, MO ("the Washington property") and sent it to McCain.

164. McCain deposited the check on January 8, 2010.

165. On January 23, 2010, FAIR issued a policy for the Washington property ("the Washington policy"). The policy stated on its face that the annual premium was \$454.00 and that \$182.00 of the premium had been paid.

166. McCain failed to pay the entire \$454.00 premium within 30 days of receipt of the money from Investors.

167. McCain retained \$299.00 – the difference between the money he received from Select and the amount he remitted to FAIR – and spent all or a portion of that amount on items other than the payment of the premium on the Washington policy.

Minnie Williams (policy # 358116)

168. On November 4, 2008, FAIR issued to Minnie Williams, as owner of property located at 6518 Bartmer Ave., St. Louis, Missouri (the "Williams property"), and to McCain as producer, a notice that the insurance policy on the Williams property ("the Williams policy")

would expire on February 27, 2009 unless payment of a yearly premium in the amount of \$444.00 was received before that date.

169. FAIR did not notify Williams or McCain that the premium could be paid in installments.

170. McCain notified AHMSI Servicing (“AHMSI”), the mortgagee or servicer on a mortgage encumbering the Williams property, that a premium payment in the amount of \$504.00 was due and should be remitted to him.

171. On February 24, 2009, AHMSI issued a check for \$504.00 to the order of “Missouri Prop Ins. Placement Facility” for payment of the premium and sent it to McCain.

172. McCain deposited AHMSI’s check on March 11, 2009.

173. McCain failed to pay the entire \$444.00 premium within 30 days of receipt of the money from AHMSI.¹⁸

Minnie Williams (policy # 0364839)

174. On December 4, 2009, FAIR issued a notice to Minnie Williams, as owner of property located at 6518 Bartmer Ave., St. Louis, Missouri (the “Williams property”), and to McCain as producer, a notice that the insurance policy on the Williams property (“the Williams policy”) would expire on March 12, 2010 unless payment of an installment premium in the amount of \$216.00 was received before that date. The yearly premium for the policy was \$533.00.

175. McCain notified AHMSI Servicing (“AHMSI”), the mortgagee or servicer on a mortgage encumbering the Williams property, that a premium payment in the amount of \$598.00 was due and should be remitted to him.

¹⁸ The Director has produced no evidence showing when FAIR received any payment from McCain or how much. However, Byington’s unchallenged affidavit states that FAIR had not received the full premium amount of \$444.00 within 30 days of McCain’s receipt of funds from AHMSI.

176. On December 16, 2009, AHMSI issued a check for \$598.00 to the order of “MO Prop Ins Placement Facility” for payment of the premium and sent it to McCain.

177. McCain deposited AHMSI’s check on December 21, 2009.

178. On March 10, 2010, FAIR received money orders in the amounts of \$300.00 and \$233.00 respectively from McCain, to be applied to the premium for the Williams policy.

Evidentiary Matters

Affidavits and Documentation

The Director relies in part upon a series of affidavits prepared by FAIR’s Operations Manager, Vicky Byington. Byington executed an affidavit for each of the 24 transactions involved in this case, and each affidavit is accompanied by documentation that usually supports Byington’s affidavits and the Director’s positions. However, in some cases, the documentation either calls into question or contradicts Byington’s sworn statements. We consider these discrepancies to be the result of oversight, and they do not call Byington’s veracity into question. As a result, we accept Byington’s testimony except when directly contradicted by documents presented by the Director and point out those instances as they arise below.

Requests for Admissions

The Director also relies in part upon the first request for admissions it served on McCain. Under Supreme Court Rule 59.01, the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required.¹⁹ Such a deemed admission can establish any fact or any application of law to fact.²⁰ That rule applies to all parties, including

¹⁹*Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985).

²⁰*Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo. App., W.D. 1976).

those acting *pro se*.²¹ Section 536.073²² and our Regulation 1 CSR 15-3.420(1) apply that rule to this case.

In its motion for partial summary decision, the Director asserts that he served his first request for admissions upon McCain on January 15, 2013, and that McCain had not responded. But then, on April 1, 2013, the Director filed McCain's responses to those requests. While McCain admitted many of the requests, he denied some of them. However, Rule 59.01(b) is clear:

Any matter admitted under this Rule 59.01 is conclusively established *unless the court on motion permits withdrawal or amendment of the admission*.

(Emphasis added.) McCain has not moved for withdrawal or amendment of his admissions and, unless such a motion is made (and granted), we must consider the matters sought to be admitted.²³

Official Notice

The Director also asks us to take official notice of our records in *James C. McCain, Jr. v. Director of the Department of Insurance, Financial Institutions and Professional Registration*, No. 10-2265 DI. We take such notice.²⁴

Conclusions of Law

We have jurisdiction to hear the case.²⁵ The Director has the burden of proving that

²¹*Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App., W.D. 1983).

²²RSMo 2000.

²³ It is within a trial court's discretion to allow late responses to requests for admissions. However, the responding party must first move to allow the late responses. *Lichter v. Missouri Bd. of Regis'n for the Healing Arts*, 884 S.W.2d 49, 51 (Mo. App., W.D. 1994); *Lee v. Ofield*, 847 S.W.2d 99, 101 (Mo. App., W.D. 1992). A late response to a request for admissions made without leave of court is ineffective. *Data Comm'l Credit Corp. v. Cukjati*, 880 S.W.2d 612, 615 (Mo. App., S.D. 1994) (citing cases).

²⁴ We make take official notice of all matters of which courts may take judicial notice. Section 536.070(6). Courts may take notice of their own records. *Hall v. Podleski*, 355 S.W.3d 570, 579 n.12 (Mo. App., S.D. 2011).

²⁵Section 621.045.

McCain has committed an act for which the law allows discipline.²⁶ The Director argues that there is cause for discipline under § 375.141:

1. The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

* * *

(2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

* * *

(4) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business;

* * *

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere[.]

Preliminary Issues Affecting All Counts

McCain's Failure to Forward Checks, Made to the Order of FAIR, to FAIR

In all of the fact situations set forth by the Director, the mortgagee, servicer, or other funding source issued a check for the insurance premium that was made payable to FAIR, but sent the check to McCain. Every one of Byington's affidavits alleges that McCain was not authorized to accept or deposit these checks. Further, most if not all of her affidavits assert that McCain had an obligation to forward these checks (not just the money, but the checks themselves), but failed to do so. However true those statements might be as a matter of fact, the Supreme Court sees the matter differently as a matter of law, at least in a closely related context.

²⁶*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

In *Emerson Electric Co. v. Marsh & McLennan Companies*, the Court stated, “[S]ection 375.051 anticipates that a broker will deposit premiums in an account pending their payment to the insurer or refund to the insured.”²⁷ While strictly speaking, McCain was an insurance producer, not a broker, the terms are closely related.²⁸ The principle is the same—a broker or producer, as intermediary, collects premium monies from the insured and remits them to the insurer. We find no authority, and the Director cites none, forbidding a producer from accepting such checks, depositing them into his or her own account, and remitting premium payments as appropriate.

McCain is liable for actions taken by other employees or agents of Underwriters.

A party doing business under a fictitious name is liable for actions taken by the business when acting under its fictitious name.²⁹ Also, the purpose of fictitious name registration is to inform the public of the identity of those with whom they are dealing.³⁰ McCain did business under the fictitious name “Underwriters Service Agency.” Therefore, he is liable for all the actions set out herein that are described as being done by Underwriters or any of its employees or agents.

Elijah’s facts do not establish cause for discipline on any ground raised in the motion.

As set out above, FAIR notified Lena Elijah and McCain that the deadline for payment of the premium for her policy was June 26, 2009. However, unlike Byington’s other affidavits

²⁷ 362 S.W.3d 7, 10 (Mo. banc 2012).

²⁸ See § 375.012.3 (“All statutory references to insurance agent or insurance broker shall mean insurance producer, as that term is defined pursuant to subsection 1 of this section.”). The statute probably intends to refer to subsection 2, not subsection 1. See also 2001 S.B. 193, which amended §§ 375.019, 375.020, 375.106, 375.116, 375.136, 375.141, and 375.158 to substitute “producer” or “insurance producer” for “broker” in multiple places throughout those statutes. Also, see *Emerson Electric Co.*, 362 S.W.3d at 10 n.1, referring to the change in terminology of the 2001 statutory amendments.

²⁹ See *Guess v. Russell Bros. Clothing Co.*, 231 S.W. 1015, 1016 (Mo. App., K.C.D. 1921).

³⁰ *State ex rel. Nixon v. RCT Dev. Ass’n*, 290 S.W.3d 756, 760 (Mo. App., W.D. 2009), citing *Kusnetzky v. Security Ins. Co.*, 281 S.W. 47, 49 (Mo. 1926).

alleging that McCain received more than enough money to pay the annual premium and remitted part of it, her affidavit for Elijah only states, “Ms. Elijah was late paying her renewal and the policy did lapse from a June renewal date until July 18, 2009, when her payment was received.” There is no allegation that McCain was involved in that part of the transaction; therefore, we do not find that he violated 20 CSR 700-1.140(1)(D), as we set out under Count I below.

Byington then states in her affidavit for Elijah that McCain received a check for \$725.00 from Select Portfolio Servicing, Inc., on November 20, 2009, and that he failed to forward the check to FAIR. As we discuss above under “McCain’s Failure to Forward Checks, Made to the Order of FAIR, to FAIR,” we find no grounds for discipline arising from McCain’s mere failure to forward the \$725.00 check to FAIR. Furthermore, we are not told (perhaps because neither Byington nor anyone else knows) the reason for, or the circumstances behind, HomeEq’s sending the check to McCain. There was also no allegation as to what McCain did with the \$725.00. On these facts, therefore, we cannot find cause for disciplining McCain’s license for anything arising from the Elijah transactions.

I. McCain violated 20 CSR 700-1.140(1)(D) by failing to remit premium payments within 30 days of receipt, retaining such payments so as to result in the failure to obtain or continue coverage on behalf of an insured or prospective insured, or both, and his license is therefore subject to discipline under § 375.141.1(2).

20 CSR 700-1.140(1)(D) provides:

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

The Director argues that McCain violated this regulation when he received money from the mortgagees, servicers, or other funding sources, then failed to remit the full amount of the premiums to FAIR within 30 days after the date of receipt, when he retained premium payments so as to result in the failure to continue coverage on the consumers' behalf, or both.

When McCain's Failure to Remit the Entire Annual Premium Violated
20 CSR 700-1.140(1)(D) and When it Did Not

The Director alleges that McCain's actions in remitting a portion of the annual premium, instead of the entire amount, violated 20 CSR 700-1.140(1)(D) because the entire amount of the premium was not paid within 30 days of receipt. But the regulation itself only requires producers to remit "all premium payments associated with a personal insurance policy" within 30 days of receipt; it says nothing about requiring the entire *annual* premium to be paid. In examining the facts (including the documentation) as presented, our inquiry focused on whether McCain had remitted all that he was required to remit. If FAIR quoted both a yearly premium amount and payments due under an installment option and if McCain remitted only the installment payment, we conclude that he did not violate 20 CSR 700-1.140(1)(D) because he remitted an amount FAIR had indicated would be acceptable. However, if FAIR offered no installment option but McCain remitted only a portion of the annual premium anyway, then he violated 20 CSR 700-1.140(1)(D) because he remitted less than the amount FAIR indicated was due. In the latter case, McCain invariably asked to be allowed to make installment payments.³¹

In all but two³² of the situations set out here, McCain remitted only a partial payment. McCain either paid the installment FAIR had previously indicated would be acceptable, or sent

³¹ This request was, in every instance, handwritten on the Notice of Policy Expiration and Renewal Application FAIR would send to McCain and the consumer, saying something like "Please change to installments."

³² In the Anderson and Williams (policy # 0364839) cases, McCain remitted a check (or money orders) for the entire annual premium. In the Anderson case, the check was returned for insufficient funds, but the point here is that McCain's actions in those cases differed from his actions in the other cases.

in a partial payment and asked to be able to make the payments in installments. In the first instance (FAIR had stated that installments were acceptable), we conclude that McCain's payment of the installment amount did not violate the regulation because McCain had paid the amount FAIR stated it would accept; but in the second instance, where FAIR had not previously indicated that installments were acceptable, we conclude that McCain's partial payments violated the regulation because there was no evidence that the entire annual premium was not due.

We agree with the Director that where McCain only remitted a portion of what he received, he used the rest of the money to pay other obligations of his business, and we also agree that his actions constituted cause to discipline his license, but that cause is found under Counts VIII and IX, where the Director alleges cause for discipline for withholding, misappropriating, or converting money in the course of doing insurance, or demonstrating untrustworthiness or financial irresponsibility. We also acknowledge that, according to both Byington's testimony and a deemed admission not used by the Director for this motion,³³ FAIR's policy was to allow installment payment of premiums only when the premium was not to be paid for out of an escrow account. However, violation of FAIR's policy is not a ground for discipline of McCain's license, and in any case, we found several instances where McCain wrongly remitted less than the full amount of the premium, but FAIR nonetheless accepted the premium payment³⁴—as it should, given the underlying reason for FAIR's creation, to provide insurance coverage for homeowners who were unable to obtain coverage through ordinary methods.

When McCain Violated 20 CSR 700-1.140(1)(D)
for Causing a Lapse in Coverage Under a
Consumer's Policy and When he Did Not

In some cases, the consumers' policies had lapsed for nonpayment. The last sentence of 20 CSR 700-1.140(1)(D) reads: "In no event...shall a licensee retain premium payments if to do

³³ Director's First Request for Admissions number 20.

³⁴ See, e.g., Cothrine, Hayes, Hard, Johnson, Robbins, Rodgers, Washington, and Williams (policy # 358116).

so will result in the failure to obtain or continue coverage on behalf of an insured or prospective insured.” “Retain” is defined as “to keep in possession or use.”³⁵ Accordingly, if a consumer’s policy had lapsed for nonpayment due to McCain’s retention of money paid to him for the premium, we found a violation for that conduct as well.

Fact Situations Involving Specific Consumers

Anderson

McCain timely remitted a check for sufficient funds to cover the full amount of the annual premium (\$582.00), but the check was returned for insufficient funds. Under Missouri law, an obligation or debt paid by check is not considered paid until the check itself has been paid, and if the check is not paid, it is not considered to be payment.³⁶ Further, because of the dishonored check, 32 days had elapsed from the day McCain received the funds (March 24, 2009) to the day FAIR finally received good funds to pay the premium (April 25, 2009); therefore, McCain violated 20 CSR 700-1.140(1)(D) for his failure to remit funds to pay the premium within 30 days of receipt.

However, while the lapse in coverage of the Andersons’ property was due to McCain’s issuing a bad check to FAIR, that failure did not constitute a violation of 20 CSR 700-1.140(1)(D) because McCain did not *retain* it, as the regulation requires; rather, as evidenced by the dishonored check, he *spent* a portion of it, which caused the check to be returned.

Bonnett

McCain only sent in a portion of the total premium due (\$956.00), and there is no record that FAIR offered an installment option. Instead, McCain only remitted \$437.00. Because he

³⁵ Merriam-Webster’s Collegiate Dictionary 1063 (11th ed. 2004).

³⁶ *Bartleman v. Humphrey*, 441 S.W.2d 335, 342 (Mo.1969); *In re Estate of Nelson v. Missouri Dep’t of Soc. Servs.*, 363 S.W.3d 423, 427 (Mo. App., W.D. 2012).

failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D). Furthermore, his retention of the premium monies from February 18, 2009 until March 25, 2009 resulted in the lapse of coverage on Bonnett's property from March 14, 2009 until March 25, 2009. That action also violated 20 CSR 700-1.140(1)(D).³⁷

Botonis

FAIR's Notice of Policy Expiration and Renewal Application stated an option for the premium to be paid in installments, with the first installment of \$274.00 due by February 10, 2010. McCain remitted \$274.00 on February 12, 2010. Therefore, we find no violation of 20 CSR 700-1.140(1)(D) for paying that amount. However, McCain retained premium monies from January 28, 2010 until February 12, 2010, which resulted in a three-day lapse of coverage. That retention violated 20 CSR 700-1.140(1)(D).

Burhan

McCain only sent in a portion of the total premium due (\$742.00), and there is no record that FAIR offered an installment option. Instead, McCain only remitted \$275.00. Because he failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D). However, although the policy lapsed for three days, we do not ascribe that lapse to McCain's retention of the premium money, as he received it on September 28, 2009, and FAIR received McCain's payment on October 2, 2009.

³⁷ The Director also included documentation pertaining to what could be a different policy than the one described here. On January 4, 2009, McCain sent US Bank a memo for policy # 365104 for the Bonnett property, but this one asked for remittance of \$1,031.00. US Bank remitted \$1,013.00 by check dated January 6, 2010. The Director also included a copy of a policy covering the Bonnett property, bearing policy number 365104, showing a premium amount of \$956.00, the same as the premium shown for policy # 0358093 on FAIR's Notice of Policy Expiration.

Cothrine

McCain only sent in a portion of the total premium due (\$718.00), and there is no record that FAIR offered an installment option. Instead, McCain only remitted \$288.00. Because he failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D).

Elijah

FAIR's Notice of Policy Expiration and Renewal Application stated an option for the premium to be paid in installments, with the first installment of \$241.00 due by June 26, 2009. There is no record showing that McCain received any funds to remit to FAIR for the premium during this time or that he remitted any such funds. Instead, Byington's affidavit merely recites, "Ms. Elijah was late paying her renewal and the policy did lapse from a June renewal date until July 18, 2009, when her payment was received." Thus, there is no showing that McCain was involved, and therefore could not have violated 20 CSR 700-1.140(1)(D) during the period leading to the reinstatement of Elijah's policy on July 18, 2009.

The issue presented by the Director's complaint is McCain's actions regarding Elijah in November 2009. He apparently told the mortgage servicer that it needed to send him \$725 to reinstate the policy on Elijah's property. However, the policy apparently did not need reinstating because, as Byington stated in her affidavit, "Ms. Elijah's policy had been in force since July 2009." Byington's affidavit does not allege that McCain did not remit any of the \$725.00 to FAIR—only that FAIR "did not receive the \$725 check."³⁸ Because no money was apparently due on the policy, McCain did not violate 20 CSR 700-1.140(1)(D) by not remitting those funds or any portion thereof.

³⁸ We discuss why McCain's failure to remit the actual checks received does not violate any law governing this case under "McCain's Failure to Forward Checks, Made to the Order of FAIR, to FAIR" above.

Givens

McCain only sent in a portion of the total premium due (\$678.00), and there is no record that FAIR offered an installment option. Instead, McCain only remitted \$305.00. Because he failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D). As to the \$376.00 check sent directly by B of A to FAIR, Byington says that FAIR did not receive that check either, but we believe that to be a misstatement because it bears FAIR's endorsement, as opposed to the Regions Bank or Southwest Bank endorsements associated with McCain's bank accounts.

*Hard*³⁹

McCain only sent in a portion (\$198.00) of the total premium due (\$487.00), and there is no record that FAIR offered an installment option. Because he failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D). However, we saw nothing in the documentation submitted by the Director to indicate that the subsequent lapse of Hard's policy was due to anything McCain did or failed to do. Instead, the policy was canceled because the property was unoccupied.

Harris

FAIR's Notice of Policy Expiration and Renewal Application gave a deadline of May 30, 2009 for payment of an annual premium of \$1,209.00. Byington's affidavit only states that McCain received a check for \$1,284.00 from the mortgagee or servicer. However, Byington's only assertion is that McCain did not forward the \$1,284.00 check to FAIR. As we discuss above under "McCain's Failure to Forward Checks Made to the Order of FAIR," such a failure, by itself, does not violate 20 CSR 700-1.140(1)(D). And, because the Director offers no

³⁹ Referred to as "Hurd" in the Director's motion and suggestions in support.

evidence as to how much, if any, of the \$1,284.00 McCain received was paid over to FAIR (or when it was paid), we find no violation of the regulation.

Hayes

McCain only sent in a portion of the total premium due (\$528.00), and there is no record that FAIR offered an installment option. Instead, McCain only remitted \$212.00. Because he failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D).

Hoffman

FAIR's February 4, 2010 communication to Hoffman and McCain stated an option of paying the premium in installments, with the first installment of \$203.00 due by March 21, 2010. McCain timely remitted the amount of the installment – \$203.00 – to FAIR. We find no violation of 20 CSR 700-1.140(1)(D).

Howard

FAIR's Notice of Policy Expiration and Renewal Application stated an option for the premium to be paid in installments, with the first installment of \$312.00 due by November 25, 2009. McCain remitted \$312.00. Furthermore, when FAIR demanded that McCain pay the balance, McCain did so. Therefore, we find no violation of 20 CSR 700-1.140(1)(D).

Hudson

FAIR's Notice of Policy Expiration and Renewal Application stated an option for the premium to be paid in installments, with the first installment of \$251.00 due by November 28, 2009. McCain remitted \$251.00, but the payment was not received until December 17, 2009. Therefore, Hudson suffered a 20-day lapse in coverage due to the premium payment being late; however, the Director failed to establish that the lapse was due to McCain retaining the payment. The record shows that McCain deposited the check from Saxon on December 10, 2009, and the

funds were received by FAIR on December 17, 2009. Even if McCain had sent the funds to FAIR more quickly than he did, the policy would still have lapsed, as the deadline for payment was November 28, 2009, and McCain did not have the funds in hand until 12 days after that date. Therefore, we find no violation of 20 CSR 700-1.140(1)(D).

Hughes

FAIR's Notice of Policy Expiration and Renewal Application stated an option for the premium to be paid in installments, with the first installment of \$259.00 due by January 18, 2010. McCain remitted \$259.00. Therefore, we find no violation of 20 CSR 700-1.140(1)(D).

Jackson

FAIR's Notice of Policy Expiration and Renewal Application stated an option for the premium to be paid in installments, with the first installment of \$287.00 due by January 30, 2010. McCain remitted \$287.00 on February 5, 2010. Further, while Jackson's policy lapsed for seven days due to nonpayment, the lapse was not McCain's fault, as he did not deposit the check from the mortgagee or servicer until February 3, 2010, three days after the payment deadline. Then he remitted the funds so that they were received by FAIR on February 5, 2010. Therefore, we find no violation of 20 CSR 700-1.140(1)(D).

Johnson

McCain only sent in a portion of the total premium due (\$788.00), and FAIR did not offer an installment option. Instead, McCain only remitted \$316.00. Because McCain failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D).

Kinnie

FAIR's November 30, 2009 communication to the Kinnies and McCain offered the option of paying the premium in installments with the first installment of \$285.00 due by

January 14, 2010. McCain remitted the amount of the installment – \$285.00 – to FAIR. We find no violation of 20 CSR 700-1.140(1)(D).

Mitchell

McCain only sent in a portion of the total premium due (\$768.00), and there is no record that FAIR offered an installment option. Instead, McCain only remitted \$350.00. Because McCain failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D).

Robbins

McCain only sent in a portion of the total premium due (\$566), and there is no record that FAIR offered an installment option. Instead, McCain only remitted \$297.00. Because he failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D).

Rodgers

McCain only sent in a portion of the total premium due (\$1,159.00), and there is no evidence that FAIR offered the option for installment payments for the premium. Instead, McCain only remitted \$468.00. Because he failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D).

Valiant

FAIR's Notice of Policy Expiration and Renewal Application stated an option for the premium to be paid in installments, with the first installment of \$190.00 due by November 25, 2009. McCain remitted \$190.00. Therefore, we find no violation of 20 CSR 700-1.140(1)(D).

Washington

McCain only sent in a portion of the total premium due (\$454.00), and there is no evidence that FAIR offered an installment option. Instead, McCain only remitted \$187.00.

Because McCain failed to forward the entire amount of the premium owed within 30 days of receipt, McCain violated 20 CSR 700-1.140(1)(D).

Williams (policy # 358116)

McCain only sent in a portion of the total premium due (\$444.00), and there is no evidence that FAIR offered an installment option. Byington's affidavit alleges that McCain failed to forward the total premium to FAIR within 30 days of receiving the proceeds, but fails to state how much McCain did send in. But because Byington made that unchallenged assertion under oath, we conclude that McCain violated 20 CSR 700-1.140(1)(D). The Director also alleges that McCain's retention of premium amounts resulted in a lapse of Williams' policy. Because he has not provided us with the date FAIR received funds from McCain, we cannot say that McCain violated the regulation on that ground.

Williams (policy # 0364839)

McCain remitted the full amount of the yearly premium before FAIR's deadline of March 12, 2010, but he failed to remit it within 30 days of receipt. Therefore, there is a violation of 20 CSR 700-1.140(1)(D).

Summary for Count I

McCain violated 20 CSR 700-1.140(1)(D) with regard to the Anderson, Bonnett, Botonis, Burhan, Cothrine, Givens, Hard, Hayes, Johnson, Mitchell, Robbins, Rodgers, Washington, Williams (policy # 358116), and Williams (policy # 0364839) situations. We find no violations of the regulation with regard to the Elijah, Harris, Hoffman, Howard, Hudson, Hughes, Jackson, Kinnie, and Valiant situations.

Count II- McCain violated an insurance statute when he failed to fulfill his trust or fiduciary obligation, cause for discipline under 375.141.1(2) (Andersons).

Section 375.051.2 provides in relevant part:

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

(Emphasis added.) In this context, a “fiduciary” is defined as “One who must exercise a high standard of care in managing another’s money or property.”⁴⁰ McCain deposited a check for \$657.00 from the mortgagee into his account at Regions Bank, then remitted a check for \$582.00 to FAIR to pay the premium on the Andersons’ policy. The check to FAIR was dishonored. He received or collected moneys from a source with regard to the Andersons’ policy, and thus under § 375.051.2 was responsible in a trust or fiduciary capacity to them. McCain did not exercise the high standard of care required of a fiduciary when he spent enough of the funds in his account to cause his check to be dishonored. He therefore violated § 375.051.2, which constitutes grounds to discipline his license under § 375.141.1(2).⁴¹

III- McCain charged an additional fee without a written agreement in violation of § 375.116 and 20 CSR 700-1.100, cause for discipline under § 375.141.1(2) (Andersons, Djulan Harris).

Section 375.116 provides in relevant part:

3. No insurance producer shall have any right to compensation other than commissions deductible from premiums on insurance policies or contracts from any applicant for insurance or insured for or on account of the negotiation or procurement of, or other service in connection with, any contract of insurance made or

⁴⁰ Black’s Law dictionary 702 (9th ed.).

⁴¹ As we discuss above, McCain was deemed to have admitted each of the requests for admissions contained in the Director’s first such request. One of those requests (number 32) was whether to admit or deny the following statement: “When the Missouri FAIR Plan deposited the [Andersons’ premium] check in its account...it was dishonored due to insufficient funds.” McCain’s (tardy) response was, “Yes due to my account was frozen by Missouri Fair Plan.” He also tardily denied request number 33, which reads: “As a result of McCain’s failure to maintain adequate account levels, Joyce and Michelle Anderson’s policy was cancelled.”

negotiated in this state or for any other services on account of insurance policies or contracts, including adjustment of claims arising therefrom, unless the right to compensation is based upon a written agreement between the insurance producer and the insured specifying or clearly defining the amount or extent of the compensation. Nothing contained in this section shall affect the right of any insurance producer to recover from the insured the amount of any premium or premiums for insurance effectuated by or through the insurance producer.

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

20 CSR 700-1.100 provides:

(1) A producer service agreement may be used to establish compensation. The form set forth in Exhibit A is approved for use as specified in section 375.116, RSMo. Substantially equivalent forms may be used where they contain other provisions and do not affect the content as provided in Exhibit A. The producer service agreement, which is included herein, must be a separate document from any other form or contract.

(2) Each producer service agreement may cover multiple contracts of insurance negotiated or procured for the same insured or prospective insured where the insurance producer's compensation falls within the requirements of section 375.116.3, RSMo. Each insurance producer shall retain one (1) copy of the producer service agreement in the producer's office for three (3) years and deliver one (1) copy to the insured.

(3) The producer service agreement shall contain a list of the policies it covers.

The Director alleges in his motion that McCain charged an additional \$60.00 fee for services to the Andersons and to Djulan Harris without there being a separate written agreement specifying or otherwise clearly defining the amount of compensation actually collected. McCain admitted that he “charged an additional fee for services for the consumers without a written

agreement specifying or clearly defining the amount of compensation actually collected.”⁴²

Thus, the Director established that McCain’s license is subject to discipline for his charging the fee for services without obtaining a written agreement.

Regarding the Director’s allegation that McCain charged Djulan Harris a fee for services without a written broker service agreement, the Director’s suggestions in support refer us to pages 134-37 of the transcript of the April 8, 2010 subpoena conference, where McCain was questioned about the matter. Unlike the Andersons, there was a written agreement between him and Harris. However, the agreement stated that he obtain a fee of not more than zero. Because he charged a \$60.00 broker fee in violation of §§ 375.116.3 and 375.116.4, his license is subject to discipline under § 375.141.1(2) for violating the terms of the broker service agreement.

VIII- Grounds for Discipline Under § 375.141.1(4) for Improperly Withholding, Misappropriating, or Converting Money in the Course of Doing Insurance Business

To withhold is “to refrain from granting, giving or allowing[.]”⁴³ The Director asserts that McCain withheld funds on each of the 24 occasions set out above. We agree that he did so in every instance where he sent in a partial payment to FAIR but FAIR had not previously agreed to accept installment payments on that account.⁴⁴ We also agree that McCain committed a separate act of withholding by retaining premium monies on Bonnett’s account from February 18 until March 25, 2009. However, in those instances where FAIR offered an installment option and McCain paid the amount of the installment,⁴⁵ and in the case of Elijah,⁴⁶ we find no withholding.

⁴² Director’s First Request for Admissions number 34. McCain’s (tardy) response was, “Yes the insured knew of the fees charged.” In this case, however, actual knowledge by the consumers would not excuse his noncompliance with the statute and the regulation. See our discussion regarding the requests for admissions above.

⁴³MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1439 (11th ed. 2004).

⁴⁴ Bonnett, Burhan, Cothrine, Givens, Hard, Hayes, Johnson, Mitchell, Robbins, Rodgers, Washington, and Williams (policy # 358116).

⁴⁵ Botonis, Harris, Hoffman, Howard, Hudson, Hughes, Jackson, Kinnie, Valiant, and Williams (policy # 0364839).

⁴⁶ See “Elijah’s Facts Do Not Establish Cause for Discipline on any Ground Raised in the Motion” above.

Misappropriation is “[t]he unauthorized, improper, or unlawful use of funds or other property for [a] purpose other than that for which intended.”⁴⁷ McCain admitted that he had been using funds obtained from mortgagees and servicers to pay obligations of the business. While McCain did not violate 20 CSR 70-1.140(1)(D) by not remitting the full yearly premium to FAIR when FAIR had previously indicated it would accept installment payments, neither was he authorized, insofar as his dealings with the mortgagees and servicers in question were concerned, to tell the mortgagees and servicers that the full year’s premium was due, then remit only the installment payment to FAIR and keep the rest for other purposes. As counsel for the Director put it to McCain in the subpoena conference (and McCain did not deny), McCain was “robbing Peter to pay Paul.” Therefore, in every situation set out above except for Elijah’s, we find that McCain misappropriated money.

Conversion is the diversion of another's funds, by the holder of such funds, to a purpose other than that specified by the owner.⁴⁸ Under § 375.051.2, McCain was responsible in a trust or fiduciary capacity to the insureds for money collected or received by him. Except for the Hoffman transaction, these transactions involved the consumers’ mortgagees or servicers remitting money to McCain from an escrow account of the sort set up to pay property taxes and insurance premiums. While the mortgagees or servicers handled the funds in those accounts and paid them out as necessary, the money in those accounts was paid in by the consumers, and the mortgagees or servicers held the funds in escrow for the payment of tax and insurance obligations. The money in those escrow accounts was the consumers’ money.⁴⁹ In every instance except Anderson, Elijah, and Williams (policy # 0364839), McCain solicited and

⁴⁷ *Monia v. Melahn*, 876 S.W.2d 709, 713 (Mo. App., E.D. 1994).

⁴⁸ *Hall v. W.L. Brady Investments, Inc.*, 684 S.W.2d 379, 384 (Mo. App., W.D. 1984).

⁴⁹ See 24 C.F.R. § 3500.17(b).

obtained more money than was necessary to pay the annual premiums on the policies, diverting money from the escrow funds in a way other than that specified by the consumers.

McCain's license is subject to discipline under § 375.141.1(4).

IX- Grounds for Discipline Under § 375.141.1(8) for Demonstrating Incompetence, Untrustworthiness, or Financial Irresponsibility

Incompetence is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability to perform in an occupation.⁵⁰ We follow the analysis of incompetence in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg'n for the Healing Arts*.⁵¹ Incompetence is a “state of being” showing that a professional is unable or unwilling to function properly in the profession.⁵² McCain's arrangement of padding his premium requests to mortgagees and servicers, then remitting only a portion of the premium amounts due, evidences his unwillingness to function properly in his profession of insurance producer.

Dishonesty is a lack of integrity, a disposition to defraud or deceive.⁵³ The definition of “trustworthy” is “worthy of confidence” or “dependable.”⁵⁴ “Responsibility” means moral, legal, or mental accountability. “Financial” pertains to the money or other liquid resources of a government, business, group, or individual. Therefore, “financial irresponsibility” means a lack of accountability with regard to the money or resources of oneself or another. McCain's scheme was, at its core, a dishonest and irresponsible ploy that betrayed the confidence of the consumers to whom he owed a responsibility of trust and honesty. Except as to the facts set out above regarding Lena Elijah, McCain's license is subject to discipline under § 375.141.1(8) for incompetence, untrustworthiness, and financial irresponsibility.

⁵⁰ *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005).

⁵¹ 293 S.W.3d 423 (Mo. 2009).

⁵² *Id.* at 435.

⁵³ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

⁵⁴ *Id.* at 1344.

Summary

There is cause to discipline James C. McCain Jr.'s insurance producer license under § 375.141.1(2), (4) and (8). The Director shall notify us by May 6, 2013, whether he wishes to pursue the remainder of the complaint. If we receive no response by that date, the remaining charges will be dismissed.

SO ORDERED on April 30, 2013.

/s/ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner