

ORIGINAL

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Department of Insurance  
State of Idaho

BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE  
HEARING OFFICER

IDAHO DEPARTMENT OF INSURANCE,	)	
	)	Docket No. 18-3187-16
Complainant,	)	
	)	FINDINGS OF FACT,
vs.	)	CONCLUSIONS OF LAW AND
	)	PRELIMINARY DECISION
MARK COLE SIMPSON, an individual	)	AND ORDER
holding Idaho Resident Producer License No.	)	
20401,	)	
	)	
Respondent.	)	
	)	
	)	

This is a contested case proceeding conducted pursuant to the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code, the Idaho Insurance Code, Title 41, Idaho Code, and the promulgated regulations adopted under both sets of statutes. The proceeding was commenced by a Verified Complaint and Notification of Rights dated September 9, 2016 ("Complaint") filed by the Idaho Department of Insurance ("DOI") against Respondent Mark Cole Simpson ("Mr. Simpson"). DOI seeks sanctions against Mr. Simpson of license revocation and a \$1,000 administrative penalty for his failure to report to DOI regulatory/administrative actions against him and for conduct which constituted dishonest practices or demonstrated incompetence, untrustworthiness or financial irresponsibility, or was a source of injury and loss to the public or others.

A telephonic scheduling conference was held on January 11, 2017, at which the parties agreed to certain deadlines and to an evidentiary hearing to be held on February 23, 2017. An evidentiary hearing commenced on February 23, 2017. Mr. Simpson appeared in person and through his attorneys Briane Mitchell and Jennifer Hanway. DOI appeared through its attorney John Keenan. The parties entered into a verbal confidentiality agreement to protect the confidentiality of Mr. Simpson's clients' identities.<sup>1</sup> Shortly after commencement of the hearing on February 23, 2017, Mr. Keenan requested and Mr. Mitchell agreed that the hearing be continued. The parties agreed to a date of March 7, 2017, for continuation of the hearing. The evidentiary hearing was further conducted and concluded on March 7, 2017. Exhibits 2, 3, A, B, and E were admitted into evidence.<sup>2</sup> DOI presented the testimony of Lisa Tordjman, Kurt Merritt and Karl Fomm. Mr. Simpson testified on his own behalf but did not present additional testimony. Both parties had an opportunity to present testimony and to cross examine the opposing parties' witnesses. Both parties presented verbal closing argument and the matter was considered fully submitted at the conclusion of the March 7, 2017 hearing.

### **FINDINGS OF FACT**

1. Mr. Simpson holds, and has held since 1988, an Idaho Resident Producer License, No. 20401, which authorizes him to sell certain insurance products in the state of Idaho;
2. Mr. Simpson's place of business is Caldwell, Idaho;
3. Mr. Simpson sells primarily life insurance products;
4. Mr. Simpson has not previously been the subject of a disciplinary action by DOI;

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<sup>1</sup> The confidentiality agreement is referred to in Vol. 2 of the transcript, but the actual agreement is not in the record. The Hearing Officer recollects that the parties discussed confidentiality at some length and that the parties stipulated to protect the identity of Mr. Simpson's clients as much as possible. Mr. Keenan advised that he was unsure that a confidentiality agreement would be effective in the event of a public records request. Consistent with the parties' stipulation, the Hearing Officer ordered that the identities of Mr. Simpson's clients remain confidential insofar as can be accomplished consistent with Idaho law. Also, at p. 32 of transcript, l. 22, the Hearing Officer is identified as the speaker, when it is obvious from the context that the speaker was John Keenan.

<sup>2</sup> The transcript Vol.1 does not indicate specifically when Exhibit 3 was admitted into evidence. However, Exhibits 1, 2, 3 and 4 were attached to Vol. 1 of the transcript suggesting that they were admitted into evidence. Based on the Hearing Officer's recollection, Exhibits 1 and 4 were not admitted into evidence, but Exhibits 2 and 3 were admitted. Later in the hearing, the Hearing officer stated that Exhibits 2 and 3 were admitted into evidence, and neither party spoke up to object to that statement. Thus, the Hearing Officer considers that Exhibits 2 and 3 were admitted, but Exhibits 1 and 4 were not admitted. Exhibits 2 and 3 are not to be construed as admissions by Mr. Simpson, but rather were admitted for purposes of showing that the consent order and stipulation were entered into by Mr. Simpson.

5. In 1999, Mr. Simpson became a securities broker-dealer, obtained his series 6, 63 and 65 securities licenses, became registered with the Idaho Department of Finance (“DF”), and began to purchase and sell securities for clients;

6. Mr. Simpson’s securities clients were mostly persons who were also insurance clients of Mr. Simpson;

7. Many of Mr. Simpson’s insurance clients had lost a great deal of money by investing in securities and Mr. Simpson hoped to assist them to rebuild their wealth;

8. Mr. Simpson became interested in “trend analysis” and “position trading” as an investment methodology and a technique to watch for downturns in the market;

9. Mr. Simpson began actively day-trading securities for clients in 2008;

10. In 2009, Mr. Simpson had an “epiphany” about how to help his clients obtain positive returns by buying and selling securities using non-traditional allocation models;

11. In 2010, Mr. Simpson formed a firm, Simpson Hughes Financial, LLC (“SHF”);

12. Mr. Simpson was the sole principal and owner of SHF;

13. From approximately July 1, 2010 to January 1, 2011 (the “Relevant Time Period”) Mr. Simpson regularly and aggressively day-traded securities on behalf of many of his clients;

14. Mr. Simpson also bought and sold securities for SHF during the Relevant Time Period, which he referred to as proprietary accounts;

15. Mr. Simpson’s method of operation during the Relevant Time Period, was to “block trade” or pool funds from his clients together with SHF proprietary accounts, in order to receive lower trading rates which Mr. Simpson referred to as “position trading”;

16. Mr. Simpson made trades early in the trading day and later in the trading day allocated gains and losses to and among specific client and proprietary accounts;

17. Mr. Simpson entered into an agreement with his clients which provided broad discretion to Mr. Simpson with respect to how to invest client funds;

18. Mr. Simpson did not charge a specific commission to clients every time he bought and sold securities on their behalf;

19. Mr. Simpson entered into an Investment Advisory Services Agreement with his securities clients which provided that SHF’s compensation for services would be a “monthly fee

equal to .25% of the market value of the Client's Account on the last trading day of the calendar month in which the services are provided." Exhibit E, pp. 30 and 35;

20. Mr. Simpson's practice was to allocate fifty percent (50%) of all client day-trade gains to SHF, up to \$150,000 per account. Tr. pp. 209-210. It is unclear if this allocation was in addition to or instead of the .25% monthly commission based on account value;

21. Mr. Simpson's rationale for the fifty percent (50%) allocation of client gains to SHF was to pay the advisor who handled the trades and to pay for SHF salaries, overhead, office expenses and secretarial services;

22. The remaining fifty percent (50%) of gains were allocated to client accounts at Mr. Simpson's discretion which he exercised based upon his perception of which clients had the most need to be allocated the gain, and not based on the amounts invested;

23. The allocation method used by Mr. Simpson resulted in some of his clients receiving less return on their investments than they would have received had the return been calculated based on the amount invested;

24. If there was a loss from day-trading activity, the loss would be allocated to SHF if SHF could afford to take the loss, as determined by Mr. Simpson;

25. If SHF could not afford to take the loss as determined by Mr. Simpson, the loss was allocated to client accounts based on which clients could afford to take the loss, as determined by Mr. Simpson;

26. The allocation method used by Mr. Simpson resulted Mr. Simpson disproportionately allocating day-trade gains to SHF proprietary accounts and day-trade losses to some or all client accounts;

27. Mr. Simpson's securities trading methodology resulting in some clients bearing a disproportionate risk of loss, and Mr. Simpson's proprietary accounts and some other clients receiving a disproportionate benefit of the gains;

28. By virtue of Mr. Simpson's allocation based on need, some clients incurred more risk of loss than other clients with respect to the same investment. Tr. p. 234;

29. The SHF Investment Advisory Services Agreements authorized day-trading and informed clients that there were risks associated with day trading;

30. The SHF Investment Advisory Services Agreement did not provide Mr. Simpson unfettered discretion to allocate gains and losses to client and proprietary accounts. Exhibit E, pp. 30-35;

31. The SHF Policies and Procedures Guidelines manual purported to provide Mr. Simpson authority to allocate trades by Mr. Simpson but did not clearly state that Mr. Simpson is authorized to allocate trades based on his perception of client needs. Exhibit E, pp. 16-17;

32. Mr. Simpson provided copies of the SHF Investment Services Agreement template and the SHF Policy and Procedures Guidelines manual to DF;

33. For the Relevant Time Period, most of Mr. Simpson's client accounts had a net gain, but at least one client suffered a net loss. Tr. p. 208;

34. A complaint was made to DOI in 2010 related to Mr. Simpson's securities activities, which complaint was referred to DF;

35. DF Securities Analyst Kurt Merritt inspected SHF records in January 2011 but did not at that time communicate to Mr. Simpson or SHF that he questioned SHF allocation methods or fee calculation methods;

36. Mr. Merritt became concerned that Mr. Simpson may be violating securities rules by virtue of high frequency day trading and, as a result, Mr. Merritt, soon after the January 2011 inspection, expanded his inquiry into the securities practices of Mr. Simpson and SHF;

37. Mr. Merritt again in 2014 conducted a DF inspection of SHF records;

38. By 2014, Mr. Simpson was no longer trading securities for clients;

39. Mr. Merritt spent hundreds of hours to analyze SHF records in order to come to an understanding regarding Mr. Simpson's allocation methods and to determine whether securities laws were violated by Mr. Simpson or SHF;

40. Mr. Merritt correctly concluded Mr. Simpson engaged in high frequency day trading;

41. Mr. Merritt correctly concluded Mr. Simpson engaged in unethical activity as an investment advisor and that Mr. Simpson violated the Idaho Securities Act;

42. Mr. Merritt correctly concluded Mr. Simpson violated the Idaho Securities Act by disproportionately allocating gains to SHF and to favored clients, to the detriment of other clients, which Mr. Merritt characterized as "cherry-picking";

43. Mr. Merritt correctly concluded that Mr. Simpson's securities trading methods resulted in a fraud on his securities clients by unfairly and disproportionately allocating gains to Mr. Simpson's proprietary accounts and losses to client accounts;

44. In 2015, DF commenced an administrative action against Mr. Simpson;

45. Mr. Simpson settled the DF administration action by entering into an Agreement and Order dated April 12, 2015 ("DF Settlement") resulting in revocation of Mr. Simpson's securities license. *See* Exhibit 2;

46. The DF Settlement provided that "Simpson and SHF neither admit nor deny the Findings of Fact and Conclusions of Law...";

47. The Securities and Exchange Commission ("SEC") in 2014 investigated the practices of Mr. Simpson and SHF for the Relevant Time Period;

48. The SEC administrative action culminated in an ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND CEASE-AND-DESIST ORDERS dated June 22, 2016, ("Consent Decree") (*see* Exhibit 3) with Mr. Simpson and SHF;

49. In the Consent Decree, Mr. Simpson agreed to the revocation of his federal securities licenses but did not admit to wrongdoing;

50. The Consent Decree provided:

In anticipation of the institution of these proceedings, Respondents have submitted a joint Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, ...

51. Mr. Simpson did not report the DF or SEC administrative actions to DOI;

52. DOI received notification of the DF and SEC administrative actions against Mr. Simpson in August 2016 from a source other than Mr. Simpson;

53. DOI commenced this proceeding against Mr. Simpson by Complaint dated September 9, 2016;

54. Mr. Simpson is not now licensed or registered with the DF or SEC to buy or sell securities and Mr. Simpson has agreed not to reapply for a DF license or registration to buy or sell securities for ten years.

### **ANALYSIS**

This proceeding is **not** about sanctioning Mr. Simpson for past securities trading misconduct. Mr. Simpson has been sanctioned for that conduct by both DF and SEC. Sanctioning Mr. Simpson for securities misconduct is not within the subject matter jurisdiction of DOI. Rather, this proceeding is about whether Mr. Simpson possesses the honesty, competence and trustworthiness to continue to be licensed as an Idaho Resident Producer. As an insurance agent, Mr. Simpson must handle client funds and thus must be honest, competent and trustworthy to handle those funds. DOI became aware of Mr. Simpson's securities trading misconduct in August of 2016, even though the relevant time period of the misconduct was July 2010 to December 2011. DOI's focus must be on whether the past securities conduct taints Mr. Simpson's ability to market insurance products and to process funds for insurance clients.

Also at issue in this proceeding is whether Mr. Simpson failed to timely report to DOI the DF and SEC administrative actions.

### **Significant Rulings**

It was held that:

1. DOI was not barred by the statute of limitations from conducting this proceeding. *See Decision Regarding Motion for Dismissal of the Charges* dated February 3, 2017. Even though Mr. Simpson's conduct at issue occurred more than six years ago, DOI was only made aware of the conduct in mid-2016 and DOI promptly instituted this proceeding against Mr. Simpson in September 2016.

2. The DF Settlement and SEC Consent Decree and (Exhibits 2 and 3) cannot be construed as admissions against Mr. Simpson for purposes of this DOI proceeding. Both documents provided they did not constitute admissions by Mr. Simpson.

3. DOI was allowed to present evidence as to whether Mr. Simpson's past conduct calls into question his honesty, competence and trustworthiness for purposes of continuing to be licensed as an Idaho Resident Producer. *See Idaho Code §41-1016(1)(f)*.

### Credibility Analysis of Key Witnesses

The two witnesses who testified to Mr. Simpson's past securities conduct were Kurt Merritt and Mr. Simpson. Mr. Merritt was credible. He was analytical and answered questions thoughtfully and carefully. His demeanor indicated truthfulness. He had no apparent motive to stretch the facts or color his testimony one way or the other. On cross-examination, he answered questions precisely, even when the answer did not support his conclusion that Mr. Simpson had defrauded his securities clients.

Mr. Simpson's credibility is more difficult to characterize. He was polished, eloquent and facially persuasive. His demeanor did not indicate lack of truthfulness. However, when one analyzes his testimony about his securities practices, his testimony borders on the bizarre. As discussed more fully below, he charged what was in effect a fifty percent commission to his securities clients based upon their gains. Fifty percent of all client day-trade gains went directly to SHF. The remaining fifty percent of client gain was allocated among Mr. Simpson's clients based on Mr. Simpson's sole discretion. Mr. Simpson exercised his discretion based on his perception of client need. The amount placed at risk by each client was not used to allocate gains to individual client accounts. This highly unusual allocation method was not clearly set forth in the Investment Advisory Services Agreement.

These procedures for calculating commissions and allocating gains are so extraordinary as to stretch credulity. Either Mr. Simpson's conduct was outright dishonest or incredibly incompetent. He placed his clients at serious risk of loss and without the potential to fully realize gains based upon how their funds were placed at risk. It is likely that only the substantially appreciating markets during the Relevant Time Period saved his securities clients from significant losses. *See* Footnote 3 below.

Mr. Simpson has now had six years to reflect on his methods of operation and yet continues to defend those methods, asserting that DF and SEC had no basis for their disciplinary actions. Thus, at the hearing, when Mr. Simpson so persuasively and eloquently defended his securities practices, one can only conclude that his testimony was either not truthful, or that he continues to misunderstand that he failed to act in his clients' best interests.

Finally, Mr. Simpson had a strong motive to defend his securities practices. As he testified, he has been an Idaho licensed insurance agent for almost thirty years. Should his insurance license be revoked as requested by DOI, such revocation will be the equivalent of a



financial death penalty for him. Mr. Simpson was therefore under great stress to testify in a manner so as to avoid revocation of his insurance license. The message he attempted to convey was that his securities practices were reasonable and promulgated in good faith in the best interest of his clients. There was no hint of an acknowledgment that he made any mistakes. His defense of his securities practices was not credible.

If there is any conflict between the testimony of Mr. Merritt and Mr. Simpson, the testimony of Mr. Merritt is more credible. Additionally, assertions by Mr. Simpson not supported by documentary evidence or independent testimony are suspect.

#### Failure to Report

Idaho Code §41-1021(1) provides

A producer shall report to the director any administrative action taken against the producer in another jurisdiction or by another governmental agency within thirty (30) days of the final disposition of the matter. This report shall include a copy of the order, consent order or other relevant legal documents.

The DF and SEC proceedings were each “administrative actions” taken against Mr. Simpson.

Mr. Simpson admits he did not report either the DF or the SEC administrative actions to DOI. Nor did he provide copies of the DF Settlement or the SEC Consent Decree. His failure to report the DF and SEC actions and provide relevant legal documents to DOI violated Idaho Code §41-1021(1).

Mr. Simpson argues he was not notified of this reporting requirement in DOI licensing literature. Mr. Simpson was a long time DOI licensed agent. He is held to a knowledge of the law governing his profession.

#### Dishonesty, Incompetent or Untrustworthy Conduct

Idaho Code §41-1016(1) provides:

The director may impose an administrative penalty not to exceed one thousand dollars (\$1,000), for deposit in the general fund of the state of Idaho, and may suspend for not more than twelve (12) months or may revoke or refuse to issue or continue any license issued under this chapter, ... if the director finds that as to the licensee or applicant any one (1) or more of the following causes or violations exist:

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(h) Using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility, or being a source of injury and loss to the public or others, in the conduct of business in this state or elsewhere;

The question here is whether Mr. Simpson's 2010 securities misconduct is relevant to his honesty, competency and trustworthiness to sell insurance products today and in the future. Mr. Simpson's prior dishonesty, incompetency or untrustworthiness in his securities business does call into serious question his competence, honesty and trustworthiness to act in the best interests of his insurance clients now and in the future. Mr. Simpson primarily marketed securities to his insurance clients and so there was a nexus between his securities activities and his insurance activities.

Mr. Simpson used fraudulent, coercive or dishonest practices or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state.

Mr. Simpson's securities practices were either dishonest or incompetent. Clearly, he demonstrated untrustworthiness and financial irresponsibility.

Mr. Simpson's method of operation demonstrated dishonesty in how he charged for his services and how he allocated investment returns. Honesty is defined as:

honesty  
*noun* hon·es·ty \ 'ä-nə-stē\

**Definition of honesty \*\*\***

1. **obsolete :** *chastity*
2. : fairness and straightforwardness of conduct *calling for honesty in politics*  
: adherence to the facts : *sincerity doubted the honesty of the witness ...*

Citation: "Honesty." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 20 Mar. 2017.

Honesty [on-uh-stee]

Noun, plural **honesties**.

1. the quality or fact of being honest; uprightness and fairness.
2. truthfulness, sincerity, or frankness.
3. freedom from deceit or fraud.

...  
Citation: "honesty". *Dictionary.com Unabridged*. Random House, Inc. 20 Mar. 2017. <Dictionary.com <http://www.dictionary.com/browse/honesty>>

Mr. Simpson did not act with fairness or straightforwardness of conduct towards his securities clients. His actions were not upright or fair or free from deceit or fraud.

Mr. Simpson's Investment Advisory Services Agreement provided he would charge for his services based on .25% of the amount in the client account each month. Exhibit E, pp. 30 and 35. This is a 3% commission per year for clients who remained invested with SHF, which in itself is quite extraordinary. Mr. Simpson charged his day-trade clients a fee based on fifty percent of their gains. This fee was not set forth in the Investment Advisory Services Agreement. Mr. Simpson testified his clients were verbally informed of this fee and provided a copy of the SHF Policies and Procedures Guidelines. It is unclear if this fee was in addition to the .25% per month commission. In any event, this is such an extraordinary way to calculate securities trading fees, it should have been clearly articulated in the client agreement. A reasonable person would not have expected to be charged a fifty percent commission of all gains based on the Investment Advisory Services Agreement. A verbal explanation was not adequate, especially where the explanation contradicts the terms of the signed client agreement. The SHF Policies and Procedures Guidelines, Exhibit E, at p. 14, states that traders are allocated "...one half of his trades, up to a maximum of \$150,000 per trade..." and in the next sentence references "...profits from those trades...". Mr. Simpson did not explain how this could be reconciled with the fee calculation methodology contained in the Investment Services Advisory Agreement. The Policies and Procedure Guidelines was not signed by the client and so there cannot be certainty that Mr. Simpson's clients received or reviewed the document.

Also, at the hearing, Mr. Simpson explained his methodology for allocating losses. He testified he would allocate losses to SHF if SHF could afford to accept the loss. If SHF could not afford to accept the loss, Mr. Simpson testified he would allocate the loss to clients who could afford to accept the loss, in Mr. Simpson's sole discretion. This loss allocation process was not clearly set out in any of the documents admitted into evidence.

Thus, Mr. Simpson's charges for his services were .25% of assets, charged monthly and/or 50% of all gains for his day-trade clients. Plus, the clients potentially bore the risk of losses. Based on Mr. Simpson's testimony, his clients gave him a blank check to allocate gains and losses as Mr. Simpson saw fit. It is not credible that Mr. Simpson's clients would have authorized this blank check allocation methodology. Mr. Merritt's testimony that Mr. Simpson disproportionately allocated gains and losses among proprietary accounts and client accounts

was credible. It is not credible that Mr. Simpson's clients would have agreed to this disproportionate allocation methodology if they had understood it.

Mr. Simpson was the sole principal/owner of SHF. Thus, he personally benefitted from this allocation of gain and loss methodology to the detriment of his clients.

Mr. Merritt persuasively testified that Mr. Simpson's methods were a fraud on his clients. Mr. Simpson did not effectively rebut Mr. Merritt's testimony. Mr. Simpson's clients bore the risk of losing trades but did not reap the benefit of winning trades.

These compensation and allocation methodologies were accomplished with clients who had been long-term insurance clients of Mr. Simpson. He let them down by personally reaping extraordinary benefits at their expense. This conduct was dishonest.

Mr. Simpson's conduct was also incompetent, untrustworthy and financially irresponsible. He subjected his client's money to risk of loss, yet at most they would receive 50% of the gain. This gain potential was not fully realized for some clients since Mr. Simpson had complete discretion as to how to allocate gains among his clients. If Mr. Simpson determined that other clients had more need for the income, a particular client might not be allocated any of the gain, even though that client's money was placed at risk of loss. Such conduct cannot reasonably be characterized as anything other than incompetent, untrustworthy, or financially irresponsible.

Mr. Simpson testified that his methodology was acceptable because none of his thirty or so securities clients suffered a net loss, except one, during the Relevant Time Period. This argument is not persuasive. The financial markets substantially appreciated from July 2010 to December 2010.<sup>3</sup> If, instead of substantially appreciating markets, there had been a sudden and unexpected downturn, it is likely Mr. Simpson's clients would have suffered significant losses. Also, it is likely Mr. Simpson's clients suffered a significant lost opportunity cost. Had his clients not paid Mr. Simpson 50% of their gains, they would likely have been the beneficiaries of significantly higher returns, using traditional investment methods. Thus, Mr. Simpson's clients were harmed by his disproportionate allocation methodology.

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<sup>3</sup> The DOW 30 appreciated from 10,465.94 on 7-1-10 to 11,891.93 on 1-1-11. The S&P 500 appreciated from 1,101.670 on 7-1-10 to 1,286.12 on 1-1-11. The Nasdaq Composite appreciated from 2,254.70 on 7-1-10 to 2,700.08 on 1-1-2011. Source: Finance yahoo.com searched on 3-14-2017. Thus, the DOW had an 11.36% gain, the S&P had a 16.74% gain, and the Nasdaq had a 19.75% gain during this six-month period.

At the evidentiary hearing, more than six years after the Relevant Time Period, Mr. Simpson continued to maintain that his fees and allocation methodology were in the best interests of his clients. He apparently lacks an understanding that he placed his clients at serious risk and he charged them exorbitant amounts for his services (as compared to standard broker commissions). This lack of understanding of how he disadvantaged his clients makes it particularly problematic for Mr. Simpson to be trusted to manage client funds in the future.

Mr. Simpson demonstrated dishonesty and incompetence, untrustworthiness or financial irresponsibility. DOI is appropriately concerned with Mr. Simpson's ability to handle client funds.

### CONCLUSIONS OF LAW

1. Mr. Simpson violated Idaho Code §41-1021(1) by failure to report to DOI the administrative actions taken against him by DF and SEC and to provide copies of the relevant legal documents.

2. Mr. Simpson engaged in dishonest practices by charging his clients exorbitant commissions and not crediting to client accounts gains that should have been credited to those accounts, in violation of Idaho Code §41-1016(1)(h).

3. Mr. Simpson demonstrated incompetent, untrustworthy and financially irresponsible conduct, in violation of Idaho Code §41-1016(1)(h).

### SANCTIONS ANALYSIS

#### Mitigating Factors:

1. Mr. Simpson's securities conduct at issue was six years ago;
2. Mr. Simpson was previously sanctioned by SEC and DF for the conduct;
3. Mr. Simpson's securities misconduct was not directly related to Mr. Simpson's insurance business;
4. Mr. Simpson has not previously been the subject of a disciplinary action by DOI;
5. No client except one suffered a net loss over the Relevant Time Period, although Mr. Simpson's clients suffered a loss of opportunity for gain they would have been entitled to had Mr. Simpson not charged them in effect, a 50% commission on their gains.

Aggravating Factors:

1. Mr. Simpson failed to report the DF and SEC administrative actions to DOI or to provide relevant legal documents as required by law. In order to protect the public, DOI must insist that licensees follow the statute and inform DOI of administrative actions. Mr. Simpson has no reasonable explanation for his failure to do so here;

2. Mr. Simpson's securities conduct was indirectly related to his insurance business based on his solicitation of his insurance clients to entrust their money to him to invest in securities;

3. Mr. Simpson showed monumentally poor judgment in conducting his securities business. Such poor judgment could be a problem with respect to handling client funds;

4. Mr. Simpson does not acknowledge his mistakes or any wrongful conduct. He asserts he settled with SEC and DF only because he had already decided not to engage in securities trading and he could not afford to continue to contest the SEC and DF regulatory actions. Absent acknowledgment of misconduct, there is a higher risk that Mr. Simpson might engage in future conduct not in his insurance clients' best interests;

5. As a licensed Idaho Resident Producer, Mr. Simpson will handle client funds. The issue for DOI is how to protect the public from a person who engaged in past misconduct in his use of client funds. There is an ongoing risk to his insurance clients of financial improprieties.

The parties were requested to provide post-hearing comment regarding whether some form of supervised probation can be implemented as a DOI sanction against Mr. Simpson. DOI correctly points out that the DOI statute authorizes only the sanctions of administrative penalty, suspension and license revocation. *See* Idaho Code §41-1016. Mr. Simpson points to two prior examples of DOI entering into a consent decree and a stipulation for sanctions other than the statutorily authorized sanctions. Both examples were voluntary agreements where DOI and the other party agreed to sanctions in lieu of conducting an evidentiary hearing.

Based on a statutory analysis of Idaho Code §41-1016, the Hearing Officer lacks the ability to go beyond the statutorily prescribed sanctions. However, the parties can voluntarily stipulate to additional sanctions, such as supervised probation.

The Hearing Officer has struggled mightily with how to balance protection of the public with fairness to Mr. Simpson. Mr. Simpson should not handle client funds, or should only do so

with direct oversight from another Idaho Resident Producer. The only way to fully protect the public is license revocation. Yet, this seems too harsh on these facts. Such sanction would be particularly onerous where Mr. Simpson has not had a prior DOI disciplinary proceeding against him after almost thirty years as a licensed insurance agent.

Accordingly, the correct balance, given the limited options available in this proceeding, is a one-year license suspension for violation of Idaho Code §41-1016(1)(h), to run concurrently with a separate failure to report suspension of ninety (90) days and a penalty of five hundred dollars (\$500.00) for violation of Idaho Code §41-1201(i). The suspensions will run concurrently and commence effective fourteen (14) days from the date of this decision. This provides Mr. Simpson time to appeal this decision and/or to make alternative arrangements for his insurance clients and the companies he represents.

### ORDER

Mr. Simpson's Idaho Resident Producer License is suspended for not less than ninety (90) days, together with the imposition of an administrative penalty in the amount of \$500, imposed for failure to report to DOI the DF and SEC administrative actions. Mr. Simpson's suspension shall remain in effect beyond the ninety (90) days until the administrative penalty payment is received by DOI. The suspension will commence fourteen (14) days from the date of this Order.

Mr. Simpson's Idaho Resident Producers License is suspended for one year for Mr. Simpson's past dishonest, incompetent, financially irresponsible and untrustworthy conduct. The suspension will commence fourteen (14) days from the date of this Order and shall run concurrently with the suspension for failure to report.

### APPEAL RIGHTS

**a. This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a motion for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.**

**b. Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency.**

**c. If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on its own motion.**

**d. If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.**

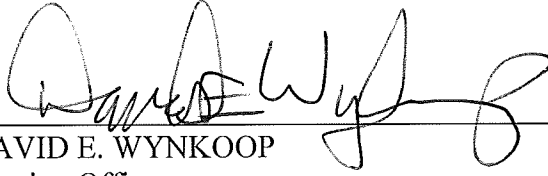
**e. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:**

- i. A hearing was held,**
- ii. The final agency action was taken,**
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or,**
- iv. The real property or personal property what was the subject of the agency action is located.**

**f. This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.**



DATED this 21st day of March, 2017.

A handwritten signature in black ink, appearing to read "David Wynkoop", is written over a horizontal line.

DAVID E. WYNKOOP  
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 21<sup>st</sup> day of March, 2017, I served true and correct copies of the FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY DECISION AND ORDER upon the following, by the methods indicated below:

Briane Nelson Mitchell  
Jennifer Hanway  
FISHER RANEY HUDSON  
950 W. Bannock St., Ste. 630  
Boise, Idaho 83702  
*Attorneys for Respondent*

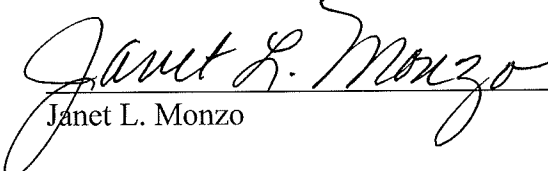
XX via U.S. mail, postage prepaid  
XX via email to [nels@frhtriallawyers.com](mailto:nels@frhtriallawyers.com)  
XX via email to [jennifer@frhtriallawyers.com](mailto:jennifer@frhtriallawyers.com)

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XX original via U.S. mail, postage prepaid

  
\_\_\_\_\_  
Janet L. Monzo