STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

***In re* NICHOLAS E. COSTA, JOSEPH P. CONROY, and COSTACONROY, LLC** **DOCKET NOS. INS-08-302 and INS-09-209**	**DECISION AND ORDER**

The Staff of the Bureau of Insurance has requested that the Superintendent revoke the insurance producer licenses of Nicholas E. Costa and CostaConroy, LLC, and has denied the license application of Joseph P. Conroy. As discussed more fully below, the Superintendent finds that the Respondents have engaged in a pattern of deceptive, untrustworthy, and incompetent conduct. Therefore, the petitions for license revocation are granted, the license denial is upheld, and civil penalties are assessed in the amount of $15,000 against CostaConroy and $1,000 against Mr. Costa individually.

Background and Procedural History

Mr. Costa and Mr. Conroy are the principals of CostaConroy, a Delaware limited liability company that has been licensed in Maine as an insurance producer business entity (License No. AGR149977) since February 6, 2008. *(Stip. ¶ 3; Tr. 22)*[1] Mr. Costa is the majority owner and Mr. Conroy is the CEO. *(Staff Exh. 8 at 3, 5)* Mr. Costa has been a licensed resident insurance producer in Maine (License No. PRR78486; National Insurance Producer Registry No. 4635099) since May 17, 2001. *(Stip. ¶ 1)* He is the only licensed insurance producer who has ever been affiliated with CostaConroy. *(Stip. ¶ 5)*

Mr. Conroy has taken and passed the Maine life insurance producer license examination. *(Stip. ¶ 8)* On October 28, 2008, Mr. Conroy filed an application for licensure as a resident insurance producer. The Superintendent issued a Notice of Pending Denial on June 12, 2009. On the same day, Bureau Staff, through Attorney Arthur G. Hosford, Jr., filed a petition to revoke Mr. Costa's individual insurance producer license, to revoke CostaConroy's producer business entity license, and to deny Mr. Conroy's license application. Also on the same day, the Superintendent issued a notice of hearing in the matter of Mr. Costa and CostaConroy. A

hearing before the Superintendent was scheduled for July 14, with Bureau Staff appearing as a party pursuant to 5 M.R.S.A. § 9054(5).

On June 23, 2009, Mr. Conroy requested a hearing on his license denial, and the three Respondents, represented by the same counsel, jointly requested the consolidation of the proceedings and the postponement of the hearing date. The motion was unopposed, and the Superintendent promptly notified the parties that the motion would be granted, with a formal order to issue as soon as the hearing could be rescheduled. On July 22, the Superintendent issued an order granting the motion and setting the consolidated hearing for August 6, which was held as scheduled.

At the hearing, the Superintendent asked the parties to provide additional materials, as memorialized in a Post-Hearing Procedural Order issued on August 12. Pursuant to the Order, these materials were all filed and admitted into the record. The record closed upon the filing of the parties' written closing arguments on August 28.

Unlicensed Practice as Consultant

In analyzing the charges against the Respondent, this Decision and Order will for the most part follow the classification and organization in the Staff's Closing Argument.

First, the Staff alleges that the Respondents unlawfully held themselves out as consultants, which is a statutory term of art. Unlike an insurance producer, who sells insurance on a commission basis, an insurance consultant sells advice for a fee. A consultant selling annuities is expressly prohibited from being compensated for sales without a written agreement in which both the commissions and fees are disclosed and the dual representation is authorized by the client. 24-A M.R.S.A. § 1466(2).

No Respondent has ever been licensed as a consultant pursuant to 24-A M.R.S.A. § 1462.[2] *(Stip. ¶ 26)* No person without such a license may "act as or purport to be a consultant with respect to insurance risks resident, located or to be performed in this State" 24-A M.R.S.A. § 141 l(2). Nevertheless, it is undisputed that CostaConroy repeatedly advertised itself in several media as "CostaConroy, LLC, Personal Wealth Consultants." *(Stip. ¶¶ 12, 15, 18, 19)*

As the Respondents acknowledge, an insurance producer should know better, and they admit that they violated 24-A M.R.S.A. § 2154 *(Resp. Br. 2)*, which prohibits untrue, deceptive, and misleading advertising. However, they deny having acted as unlicensed consultants, insisting that "they never held themselves out as 'Insurance Consultants,' nor did they ever act as such or refer to themselves as insurance consultants."

Instead, "they were simply trying to distinguish themselves." *(Id)* The statutory standard under Section 1411 is whether they held themselves out as "consultant[s] with respect to insurance risks." Respondents suggest that a violation of this section requires the use of the specific phrase "insurance consultant," while the Staff suggests that any use of the word "consultant" by an unlicensed person is a *per se* violation.

A finding on this legal issue is not necessary for the disposition of this case. The Respondents have admitted violating 24-A M.R.S.A.§ 2154 by engaging in deceptive advertising in their efforts to distinguish themselves from competing sellers of financial products. Whether the use of the term "personal wealth consultants" also violated 24-A M.R.S.A. § 1411 would not change the sanctions. The Respondents' broader pattern of deceptive conduct is discussed further below.

Use of Guaranty Association for Marketing Purposes

The Maine Life and Health Insurance Guaranty Association Act prohibits any person, expressly including an agent of an insurer, from using "the existence of the association for the purpose of sales, solicitation or inducement to purchases of any form of insurance covered by this chapter." 24-A M.R.S.A. § 4620.

This is another law the Respondents admit violating. Their "Investment Guide For Volatile Times" includes the following paragraph:

> Your money is insured by the insurance company, and the only real risk is the insurance company going out of business. In addition there are a number of state and federal regulations which provide monitoring, protection, and safety guidelines for the client's funds. For example, each state determines the amount each insurance company must insure each and every client's account, if they are to do business in that particular state. For the state of Maine, this amount is $300,000. *(Staff Exh. 8 at 10)*

References to the guaranty association also appeared on CostaConroy's website. *(Staff Exh. 9-A at 8 & 10)* In mitigation, the Respondents argue that their intent was merely to provide complete and accurate information to consumers. They assert that this is a poorly understood area, noting that Mr. Conroy took and passed the licensing exam without having any idea that referring to the guaranty association for marketing purposes violated the law. They introduced into evidence the manual from a prelicensing education course Mr. Conroy took, in which this prohibition was never mentioned. *(Resp. Exh. 2)* They observed further that a press release issued by the Superintendent herself and the National Association of Insurance Commissioners (NAIC) have mentioned the guaranty association in a press release discussing the general health of the insurance industry in the context of the financial crisis that faced the AIG holding company last fall. *(Resp. Exh. 1)*

An oversight in a private educator's course materials does not exempt producers from their responsibility to learn the law and comply with it. Furthermore, while Mr. Conroy's inexperience might be grounds for leniency, Mr. Costa should have been there to correct the error. The discussion of the guaranty association by the Superintendent and the NAIC occurred in a different context, and was not done for marketing purposes, which is all that the statute prohibits.

Staff asserts further that referring to the guaranty association for marketing purposes, in addition to violating the specific prohibition in the guaranty association law, also constitutes an unfair and deceptive trade practice in violation of Sections 2152, 2153, and 2154 of the Insurance Code. *(Tr. 4)* However, reference to the guaranty fund, in and of itself, only implicates 24-A M.R.S.A. § 2152, the section that prohibits unfair methods of competition. When other similarly situated producers abide by the restriction on discussing the guaranty fund, it is unfair to skew the playing field by failing to abide by the same limitations in one's own advertising. By contrast, sections 2153 and 2154 prohibit untrue, deceptive, and misleading advertising. A truthful and accurate reference to the guaranty association would not violate either of these sections.

However, even though a truthful and accurate representation would not violate the statutory prohibitions against false or misleading advertising, the Respondents were not accurate in their description of the guaranty association. The $300,000 limit in the quoted paragraph from the "Investment Guide" applies only to life insurance death benefits, 24-A M.R.S.A. § 4603(3)(B)(l). At the time the "Investment Guide" was published, the limit for annuities was only $100,000.[3] 24-A M.R.S.A. § 4603(3)(B)(3). Furthermore, the explanation that "Your money is insured by the insurance company .... each state determines the amount each insurance company must insure each and every client's account" is incomprehensible. The Web materials in Exhibit 9-A provide a more straightforward and direct reference to the "guaranty fund," and state the limit of coverage accurately, but erroneously suggest that protection is provided by a fund to which insurers contribute each year, rather than by a system of post-insolvency assessments with no advance funding.

Exaggerations of Qualifications, Experience, and Scope of Business

CostaConroy's "Investment Guide" boasts twice that "CostaConroy has assisted hundreds of clients in achieving their retirement goals in a SAFE and Pre-Determined manner." *(Staff Exh. 8 at 15, 18)* This is simply a lie, and it is inexcusable. At hearing, when asked "did CostaConroy have hundreds of clients?" Mr. Costa testified "No, sir." "How many clients did they have?" "I believe to date there are ... less than that, significantly less than that." "How many did they have between the inception of the

business and October 2008?" "I believe at that point there were five to seven." The discrepancy is too great to be an innocent mistake, and I find that the statement constitutes untrue, deceptive, and misleading advertising in violation of 24-A M.R.S.A. § 2154.

Along the same lines, CostaConroy's website included a page captioned "What our clients are saying," featuring endorsements by P. McGlaughlin, J. Romboski, A. Mears, H. Goldstein and E. Brown. *(Staff Exh. 13 at 9-10)* Mr. Conroy readily conceded, however, that these were not the names of CostaConroy clients. He testified that he was not familiar with the names, and that "there was communication between Nick and his former wife, Anne,[4] Nick and myself, that the RCM clients were going to become CostaConroy clients," and so "Nick was bringing in some RCM clients, if you will, in quotations into CostaConroy." *(Tr. 116)* However, when Mr. Costa was asked if they were former RCM clients, he testified that he had never heard of them either. *(Tr. 211-12)* Mr. Conroy then testified that "either I got them from him or got them from Veronica. I got them some way here." *(Tr. 240)* "It had to come from the material that I pulled together in order to put together the website." *(Tr. 242)* He admitted, however, that he did not know whether the names and quotations had come from RCM. *(Id.)* He admitted further that the pictures illustrating the quotations "are just abstract photographs. They are not pictures of the people that are being quoted .... I wanted to include something of people that were, you know, relatively happy." *(Tr. 240)* I do not find plausible any suggestion that the mystery clients were clients of Mr. Costa's ex-wife that Mr. Costa did not know about, and that she had obtained the quotations and furnished them to Mr. Conroy. I therefore find that these client testimonials were fictitious. This is another inexcusable act of false advertising in violation of 24-A M.R.S.A. § 2154.

Other violations result from what might have been a genuine confusion between RCM and CostaConroy. CostaConroy's radio advertisement introduces Partner Nick Costa, who "describes a typical client's relief." *(Staff Exh. 12; Resp. Supplemental Audio Submission)*[5] When Staff asked them to identify the client, Mr. Costa identified him as C.T., who was actually a client of Mr. Costa's when he was still with RCM. This is not accurate, and it is materially misleading. A new business with experienced personnel is not the same thing as an established business with a solid track record in its current form. Even if Mr. Costa and Mr. Conroy were truthful in their testimony that Mr. Costa's ex-wife was talking with them about possibly joining CostaConroy *(Tr. 116, 181),*[6] and even if she had ultimately done so, CostaConroy and RCM would still have been two distinct agencies. The proper way to refer to the prior experience of CostaConroy's principals is in describing their individual qualifications, not in exaggerating the experience of CostaConroy as a firm. Another example of such exaggeration is the scenario describing

how much better an investor would have done by buying a "CostaConroy Indexed Annuity" just before the 2000-01 stock market decline. This is impossible, when CostaConroy did not exist until 2008. That is a further instance of false advertising, in violation of 24-A M.R.S.A. §§ 2153 and 2154.

In addition, the use of the title "personal wealth consultant," discussed earlier, was accurately characterized by Staff as "misleading personal puffery," and points to additional instances of such puffery. *(Staff Br. 1-2)* CostaConroy's promotional materials provided glowing résumés for both Mr. Costa and Mr. Conroy, who was allegedly being considered by MIT for an "honorary Ph.D." for an investment forecasting program that was so accurate that it brought Mr. Conroy under surveillance by the SEC. *(Exh. 9-A at 3)* The "Investment Guide" referred to Mr. Costa as a "Retirement Advisor" who "specializes in advising his clients on such subjects as [among others] how to preserve their assets and reduce their taxes." *(Staff Exh. 8 at 3)* At the hearing, Mr. Costa acknowledged that he has "no certification or license with regard to tax matters." *(Tr. 27)* He acknowledged further that he holds no credentials in the area of retirement advice, and said the reason he capitalized the title "Retirement Advisor" was "just because it looked grammatically correct." *(Tr. 30)*

As the Respondents themselves have described it, their use of fancy self-conferred titles was an effort to "distinguish themselves" from their competitors, and make a statement that they were different from other insurance producers selling annuity products that are available from multiple sources. Similarly, their radio advertisement never once mentioned the words "insurance" or "annuity," nor anything else that would let the listener know that CostaConroy sells annuities, let alone that selling annuities is CostaConroy's entire business. *(Staff Exh. 12; Resp. Supplemental Audio Submission)* They admitted that this omission was deliberate, because "it can seem like a dirty word to a lot of people." *(Tr. 69)* Instead, they refer to their "stock market recovery program," and they attribute the performance of the annuities they sell to CostaConroy's own "proprietary software and programs," and they say their investment strategy "sets us apart." *(Staff Exh. 12; Resp. Supplemental Audio Submission)* There are also repeated references in their advertising to funds "invested with CostaConroy," as though they were actively managing clients' funds.[7] *(e.g., Staff Exh. 8 at 7; Staff Exh. 9-A at 12)* This is misleading advertising in violation of 24-A M.R.S.A. § 2154. For additional information, they refer the listener to their "Stock Market Recovery Manual" which they offer to provide. *(Staff Exh. 12; Resp. Supplemental Audio Submission; see also Staff Exh. 8 at 5)* Respondents acknowledge that no such manual was ever completed and made available. *(Tr. 88, 141)*

The "Investment Guide" announces further that Mr. Costa "will be expanding his client base in 2008 to include the entire U.S." *(Staff Exh. 8 at 3)* This is a gross exaggeration of his actual plan, which was to use direct mail marketing and expand "state by state on the basis that we were slowly going to build a nationwide business." *(Tr. 28)* Mr. Costa acknowledged that even this less ambitious version of the plan never came to fruition, and that he never sold any insurance products in any state except Maine. *(Tr. 29)*

There are also sidebars on Page 10 featuring Suze Oman and Jim Cramer, with their pictures and accompanied by quotations from their books in bullet points. *(Staff Exh. 8 at 10)* Mr. Costa admitted that he did not believe CostaConroy had obtained permission from either of them. *(Tr. 35)* These could easily be mistaken for celebrity endorsements of CostaConroy. Even if we give the Respondents the benefit of the doubt and assume that they did not intend that level of deception, there is still a clear intent to convey the impression that superstar financial analysts approve of the same investment strategy the Respondents were promoting, and that the Respondents had permission to use their likenesses. Furthermore, while the Oman quotation does say that equity-indexed annuities can be the right purchase for some consumers, the Cramer quotation says nothing at all about annuities of any kind.

Finally, a second manual entitled "Diversified Fixed Index Annuity Performance & Disclosure Manual" ends with a three-page section, captioned "Disclaimer," which includes a reference to "CostaConroy, LLC (United States) Limited or its subsidiaries (collectively, .CostaConroy.)" *(Staff Exh. 9 at 38, punctuation as in original);* a section implying that CostaConroy is in the business of selling structured securities *(Staff Exh. 39);* and a paragraph *(Staff Exh. 9 at 40)* purporting to explain that:

> The information, tools, and material presented in this Manual are made available in the United States by CostaConroy, LLC (United States) Limited; in the United States by CostaConroy, LLC (USA) LLC; in Canada by CostaConroy, LLC Canada Inc.; in Japan by CostaConroy, LLC (Japan) Limited; in Switzerland by CostaConroy and elsewhere in the world by an authorized affiliate .... CostaConroy, LLC (United States) Limited is authorized and regulated in the United Kingdom by the Financial Services Authority.

Even Mr. Conroy testified that he was "shellshocked" when he finally read what he had written. *(Tr. 113)* The Respondents admit that they do not have any multinational operations or sister companies *(Stip. ¶¶ 16-1 7; Tr. 56),* but explain that as Mr. Conroy testified, he downloaded the disclaimer from another firm's website, "took out whatever name it was, I think it was a Swiss firm, and replaced it with CostaConroy." *(Tr. 115)* They testified that the "Performance & Disclosure Manual," unlike the "Investment Guide," was an unfinished draft that was never distributed to prospective customers or the general public. *(Tr. 27, 52,*

112-13) Mr. Costa testified that it was an assignment he gave Mr. Conroy as a learning experience. *(Tr. 207-08)* Mr. Costa gave inconsistent testimony whether he had read the manual at all. At two points in the hearing, he testified that he had not. *(Tr. 189, 208-09)* Earlier, however, he said he had read the manual but admitted not having read it thoroughly, and that "there were portions of the document that I overlooked, unfortunately, such as the - Switzerland and those mentions of other countries, et cetera." *(Tr. 53)*

Staff argues that Mr. Conroy's explanation of how he wrote the disclaimer is not credible, emphasizing that "If the source document came from some web site, Conroy had to have placed the text "CostaConroy, LLC" in the downloaded document *seven times,* in order to get the text." *(Staff Br. 3; emphasis in original)* That is not evidence that Mr. Conroy actually saw the changes he was making, however, because he testified that he used the Find/Replace word processing command. *(Tr. 239)* The Superintendent takes official notice that the command has a "Replace All" feature that makes it easy to make precisely that sort of substitution without looking.[8] If anything, it is easier to make seven substitutions without seeing what you have done than to make just one, and the reference to such entities as "CostaConroy, LLC (USA) LLC" and "CostaConroy, LLC Canada Inc." strongly suggests that Mr. Conroy made the substitution without looking at what he was doing.

The only evidence offered by Staff that the manual with the disclaimer was ever more than an internal draft is that it was produced in response to a request for promotional materials "that you have offered or provided to clients or prospective clients" *(Staff Exh. 14),* and that Mr. Costa responded to a followup question by saying "The text that you are referring to below is a generic disclaimer that was used for some of our materials. The inclusion of this information was a simple oversite *[sic].* We do not conduct business in any other country." *(Staff Exh. 16; see also Tr. 113-14)* Afterwards, however, Mr. Conroy wrote: "I checked all the email transmissions, printings, and dates, and I have found out that we did not send out a single copy of our manual with the 'Disclaimer' in it. This version was 'in the works' and I was unsure if we had sent any copies out when [Staff's original document] request came in. In his request he asked for the most recent / current marketing materials. However, at the time I was unaware if we had sent this particular version out. After considerable investigation, I am certain we have not sent any of these particular materials out." *(Resp. Exh. 3)*

I find this explanation to be sufficient to overcome any presumption that might have been created by the original document production and Mr. Costa's vague reference to "some of our materials." Although it might seem unusual that Mr. Costa and Mr. Conroy did not know what promotional materials they were actually using, it is consistent with both

the general operating style portrayed by the evidence and Mr. Conroy's testimony that their manuals were in a constant state of revision and that they would only print out a small number at a time. *(Tr. 247-251)* Staff has not been able to find the disclaimer in any final documents, any published documents, or any documents distributed to anyone outside CostaConroy and the Bureau of Insurance. Therefore, I find that Staff has not met its burden of proving that the disclaimer, or any of the other misstatements contained in the "Performance & Disclosure Manual," constitutes a violation of the false advertising law, 24-A M.R.S.A. § 2154.

Misleading Product Comparisons

Next, Staff alleges that the Respondents engaged in a variety of misleading comparisons between the annuities they sell and other financial products. In particular, the website attacks the reputation for safety that banks enjoy by making a misleading analogy between the FDIC and buying a third-party warranty on a car, and a misleading comparison between the capital requirements imposed by banking regulators and insurance regulators. *(Staff Exh. 9-A at 8, 10)* This constitutes deceptive and misleading advertising, in violation of 24-A M.R.S.A. § 2154, in a number of ways. In addition to associating the FDIC by innuendo to an industry that is notorious in some circles for legal and financial difficulties, the third-party warranty analogy ignores the bank placing its own full faith and credit behind its obligations, just as much as the insurer does. The FDIC protection is more appropriately analogized to the insurance guaranty fund,[9] and any honest comparison between the two would have to acknowledge, as the Respondents fail to do, that the FDIC, unlike insurance guaranty associations, has an accumulated cash balance rather than relying exclusively on post-insolvency assessments, and has the federal government as a backstop. The comparison between bank and insurance capital requirements confuses the 16% reserve requirement for banks, which is a liquidity requirement, with the net worth requirement for insurers (which the Respondents erroneously attribute to the Federal government), which as the Respondents describe it, "requires to *[sic]* the insurance to 'back up' every dollar it invests, with a dollar in reserves."[10] *(Staff Exh. 9-A at 7)* Banks, needless to say, are also required to maintain positive net worth. The safety concerns, when they arise, occur because a significant portion of a bank's assets typically consists of its loan portfolio. However, insurance investments are not immune from credit risk either, and they can include securitizations of those same loan portfolios. Insurance regulators do take these risks into account when determining whether insurers are adequately capitalized, but so do bank regulators.

In the draft "Performance & Disclosure Manual," they make a different, but equally misleading, comparison between annuities and certificates of deposit. *(Exh. 9 at 17)* There, they imply, falsely, that provisions allowing

limited penalty-free withdrawals from some annuities make annuity surrender charges less onerous than CD early withdrawal charges as a general rule, and that annuities always have more favorable tax treatment than CDs, which is not the case if the underlying investment is a tax-deferred retirement account.

In addition, in the "Investment Guide," they assert that unlike some types of investments, "The value of the account is always at its high point. Because of this, there's never a bad time to take money from the account." *(Staff Exh. 8 at 6)* It is true that like all fixed-income investments that do not trade on a secondary market, the account value in a non-variable annuity does not fluctuate up and down unless the issuer defaults on its obligations. But that would just as well mean that there is never a good time to withdraw funds. This statement also ignores the significant surrender charges associated with annuities. As American Equity's own disclosure materials for the "Bonus Gold" product explain, the product is for "money you don't anticipate needing in the short term."[11] *(Resp. Supp. Exh. 2 at 60)*

With regard to these surrender charges, Staff asked Mr. Costa at the hearing how American Equity's surrender charges compared to those for other annuity products. He testified that "They were comparable." *(Tr. 32)* When Staff followed up by asking "They were higher, weren't they?" Mr. Conroy's response was: "They may seem higher, but when you factor in bonuses, et cetera, and rates of return, they're actually more liquid and you come out more ahead with the product. We run multiple scenarios. On the face it may appear that way, and it would appear that way to somebody who's just glancing and may not be an expert in the field." *(Id)* He agreed to produce "the calculations that I would go over with the client," describing the scenarios that he has run. *(Id.)*

However, the document he produced pursuant to the Superintendent's Post-Hearing Order *(Resp. Supp. Exh. I)* was not a calculation he had performed himself, nor did it include any information that would allow consumers - or Mr. Costa himself - to compare American Equity's surrender charges to those of other insurers. It was identical to a sheet prepared by the Tucker Advisory Group, a "national marketing organization" that had furnished promotional materials to CostaConroy. *(Tr. 41, 185)* The sheet was captioned "More liquidity than you should ever take!" It purported to describe how one could withdraw 50% in one day and still be left with 1.2% of company's bonus, with a fine-print disclaimer at the bottom: "For illustrative purposes only. Actual performance may vary. Results not guaranteed." *(Resp. Supp. Exh. 2 at 10)* This was one of a number of "More liquidity than you should ever take!" sheets furnished by the Tucker Advisory Group corresponding to different product designs. *(Resp. Supp. Exh. 2 at 16, 24, 32, 50, 52, 70, 72, 82, 92, 94, 104, 106)* It is not clear whether Mr. Costa actually used

these sheets for marketing purposes, which would constitute deceptive advertising in violation of 24-A M.R.S.A. § 2154. If he only used them for his own purposes, as the basis for his understanding of the products and their associated risks, it is evidence of incompetence.

Misleading Descriptions of the American Equity Product

CostaConroy advertised that what it was selling was a "risk-free option. *(Staff Exh. 12; Resp. Supplemental Audio Submission),* and that there is "no loss of Principle *[sic]* ever!"*(Staff Exh. 13 at 2)* All investments and all investment strategies have risks. Many of the risks are different for different types of investments, but that is not the same as saying that any approach is risk - free. CostaConroy's advertising also makes repeated references to annual returns of 13% or 13.56% *(e.g., Staff Exh. 8 at 12; Staff Exh. 12).*This is a misleading combination of the American Equity Bonus Gold minimum annual interest rate, which was 3.56% *(Staff Exh. 8 at 12),* with the product's 10% bonus credit. The 10% bonus is not like a "teaser rate" that is only available for one year, but fully available during that time. Because of the surrender charges, the bonus can only be fully realized if most of the initial premium is left in the account over a much longer period of time. It is thus seriously misleading, in violation of 24-A M.R.S.A. § 2154, to describe this as the amount that will be realized in a single year through CostaConroy's proprietary investment strategy.[12] *(Staff Exh. 12; Resp. Supplemental Audio Submission)* It is still more misleading to consider a hypothetical 10% loss that the consumer might have incurred by investing in a mutual fund instead of buying an annuity, and add the two figures together to get a supposed 23% return in the first year. *(Staff Exh. 9 at 9)*

CostaConroy creates further confusion by describing these exaggerated yields as a percentage of the consumer's stock market losses that CostaConroy can recover for them.*(Staff Exh. 12; Resp. Supplemental Audio Submission)* These are completely different concepts, as the percentage of losses recovered by a successful reinvestment strategy will depend on the amount of money lost and the amount of money available for reinvestment. Often, the percentage of losses recovered will be significantly higher. To the extent that they are selling themselves short, it is to some degree a sign of incompetence rather than deception, but the deceptive intent is also present, through distracting the consumer with large numbers and presenting their services as a "recovery strategy" rather than the sale of annuities.

Another mischaracterization of equity-indexed annuities is the Respondents' explanation that customers can "choose if you want to have your money in the stock market or the bonds market." *(Exh. 13 at 5)* One important characteristic of equity indexed annuities, which distinguishes them from variable annuities, is that 100% of the customer's funds are

invested at all times in the general account of the insurance company. Although interest rate credits are tied in part to the performance of one or more securities market indices, there is no dedicated customer account that is actually invested in any of those markets.

Deceptive Statement to Regulators

Finally, after Mr. Costa explained that C.T. was the "typical client" to whom he was referring in the radio advertisement *(Staff Exh. 15),* Staff asked CostaConroy to provide its complete customer files. *(Staff Exh. 19)* These files did not include C.T.'s file. Staff notified Mr. Costa of this omission, and Mr. Costa replied that the reason was that C.T. (as discussed earlier) was not actually a client of CostaConroy, but rather a client of Mr. Costa's when he was still with his prior firm. *(Id.)* Mr. Costa added that "To further clarify, I could just have easily been speaking of any one of the client's whom files you have as to their relief. ... To be more specific, [C.T.]'s reaction, while not a CC client, is certainly typical of a CC client" *(Id., sic)* Staff then made clear that they wanted "a full understanding of your marketing and sales activities." Because of the "blurring of the lines going on with regard to your personal clients versus Costa Conroy's," Staff wrote, "we need to request that you provide copies of **all** your client files ... for the period from January 2007 to the present." *(Id., sic, emphasis in original)*

In response, Mr. Costa did provide a portion of the C.T. file. *(Staff Exh. 20)* Those documents would suggest - as does the satisfied client reference in the radio advertisement - that the product that C.T. finds so satisfying is the same product that CostaConroy was selling at the time: the American Equity Bonus Gold Annuity. To the contrary, Staff learned - from American Equity rather than from any of the Respondents - that the annuity C.T. had applied for was never issued, because the company had declined the application as unsuitable. *(Staff Exh. 21)* C.T. would have incurred a 15% surrender charge on the annuity he had purchased from Allianz barely a year earlier. Furthermore, the Allianz product was sold to C.T. by Mr. Costa himself. Mr. Costa explained the reason for the replacement by saying he had misunderstood some important product features at the time of the prior sale. *(Id.)* Nevertheless, Mr. Costa insists that after all of this, C.T. remains a highly satisfied customer, now that he has once again persuaded C.T. to be content with the annuity that was originally sold due to a lack of understanding of the product's features, which Mr. Costa and C.T. went to such efforts to try to replace. *(Tr. 83-84)*

It was not even an evasive half-truth for Mr. Costa to provide what appeared on its face to be a self-contained customer file, and to leave out all reference to the rejection of the 2006 application, Mr. Costa's role in the 2005 transaction and the supporting file documents, and Mr. Costa's

admission that he did not understand what he was selling the first time. He did not comply with the letter of Staff's request while violating the spirit, providing only documents from 2007 while conveniently ignoring the rest of the file, because the entire file predated 2007. The only possible bases for the manner in which he picked and chose what to submit and what to withhold would therefore be disorganization or deception, and the coincidence between what he withheld and what would reflect most poorly on him was too precise to admit any innocent explanation. I therefore find that Mr. Costa intentionally provided deceptive information to regulators, in violation of 24-A M.R.S.A. §§ 1420-K(l)(H), 1447, and 2186(1)(A)(2)(a) & (2).

The additional documentation obtained by Staff also raises a strong inference that Mr. Costa was churning C.T.'s account to obtain multiple first-year commissions. However, because that was not one of the allegations of misconduct in the petition for revocation, and the issue was not fully explored at the hearing, I find only that in general, Mr. Costa's conduct with regard to the C.T. account corroborates the other evidence that Mr. Costa lacks the competence and trustworthiness required to be an insurance producer.

Incompetence and Untrustworthiness Generally

As discussed above, the record is replete with inaccuracies and outright deceptions on the part of all the Respondents. Even though the evidence indicates that the multinational operations "disclaimer," more likely than not, was never released to the public, Staff asserts that it was nevertheless "a characteristic part of Respondents' scheme of self-aggrandizement." *(Staff Br. 3)* I find this to be an accurate description of the disclaimer. It is a sign of incompetence to copy a three-page document prepared by a multinational Swiss securities firm without considering all the ways in which the language was unsuitable to the scope and nature of CostaConroy's operations. If the Respondents did not really understand the document they were copying, they must have been aware that consumers would not understand it either. It is likely that this was due to an intentional effort to dazzle the consumers with complexity.

I therefore find compelling evidence that the Respondents have used dishonest practices and demonstrated incompetence and untrustworthiness, in violation of 24-A M.R.S.A. § 1420-K(l)(H).

Allocation of Responsibility

Up to this point, the Decision and Order has largely referred to CostaConroy or to the Respondents collectively. For most purposes, this is appropriate. Nearly all the wrongful acts discussed above were committed on behalf of CostaConroy. In most cases, the Respondents were working

together, and knew or had the obligation to know what each other was saying on behalf of their common enterprise. In some cases, there was clear malfeasance on the part of CostaConroy but the Respondents pointed the finger at each other as to who was responsible. It is unnecessary to make definitive determinations as to the details, because there is compelling evidence sufficient to hold each of the individual Respondents responsible for a significant proportion of the false advertising disseminated by CostaConroy, and to determine that Mr. Costa and Mr. Conroy have each personally demonstrated a degree of dishonesty, incompetence, and untrustworthiness to make them unfit to serve as insurance producers.

There are two areas, however, where Mr. Costa is solely liable. One is for his conduct before the formation of CostaConroy, and for his misrepresentations to regulators with regard to that conduct. The other is his conduct under his individual producer license, including improper delegation of responsibilities to Mr. Conroy with inadequate supervision.

Sanctions

The Respondents argue that their violations were relatively minor and that the penalties should be minimal because they have acknowledged their responsibility and are willing to accept reasonable penalties, because they never intended to violate the law, and because they did not steal funds, commit fraud, or harm any clients. *(Resp. Br. 1, 6)*

The Respondents' forthright acknowledgement of responsibility, however, is limited to their least serious violations. With regard to their pattern of deceptive conduct, they have been both defensive and evasive. As discussed earlier, they have demonstrated a lack of fitness to be insurance producers, and therefore, the licenses of Mr. Costa and CostaConroy must be revoked, and Mr. Conroy's license application must be denied.[13]

Their proposal to perform public service by preparing an educational video at significant personal expense is intriguing. Their desire to turn their punishment into something positive is admirable. However, they have demonstrated repeatedly that they are unfit to serve as an educational resource for other producers, so their offer must be declined.

Furthermore, it is not accurate to characterize their misconduct as harmless. There was an ongoing pattern of deceptive sales tactics directed at the public, and if few or no consumers actually suffered loss as a result, it was only because CostaConroy made so few sales. A significant civil penalty against CostaConroy is therefore in order. Pursuant to 24-A M.R.S.A. § 12-A, the maximum penalty that the Superintendent may assess against a business entity such as CostaConroy, LLC is $10,000 for

each offense. Although CostaConroy has committed multiple separate offenses that could warrant this level of punishment, as discussed above, I find that it is appropriate to limit the penalty to $15,000 in light of the totality of the circumstances, giving due regard to the financial impact of license revocation and the limited amount of business CostaConroy transacted. In the event that CostaConroy turns out to be judgment-proof, Mr. Costa and Mr. Conroy as its owners, and as individuals who are personally responsible for those violations, shall be jointly responsible for this penalty.

Finally, for his failure to supervise his unlicensed employee, and for his intentionally misleading submission of documents to regulators, Mr. Costa is personally liable for a civil penalty of $500 for each count, the maximum that may be imposed upon an individual under 24-A M.R.S.A. § 12-A, for a total of $1000.

Order and Notice of Appeal Rights

It is therefore *ORDERED:*

1. The resident producer license of Nicholas E. Costa is *REVOKED.*
2. The resident producer license of CostaConroy, LLC is *REVOKED.*
3. The resident producer license application of Joseph P. Conroy is *DENIED.*
4. CostaConroy, LLC shall pay a civil penalty of $15,000. If, for any reason, CostaConroy fails to pay the full amount, Nicholas E. Costa and Joseph P. Conroy are jointly and severally liable for the unpaid balance.
5. Nicholas E. Costa shall pay a civil penalty of $1,000.
6. Payment of the civil penalties, or entry into a payment agreement satisfactory to the Attorney General, is due on or before November 1, 2009. The Respondents are*ORDERED* not to waste or transfer assets to avoid payment of the civil penalties. Payment shall be made by check payable to the Treasurer of the State of Maine.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before November 9, 2009. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

[1] Citations to the record, abbreviated as follows, are to the parties' joint stipulations *(Stip.),* to the hearing transcript *(Tr.),* to the exhibits

admitted at hearing *(Staff Exh.* and*Resp. Exh.),* to the supplemental exhibits admitted pursuant to the Superintendent's Post-Hearing Order *(Staff Supp. Exh.* and *Resp. Supp. Exh.),* and to the written arguments filed by the parties *(Staff Br.* and *Resp. Br.)*

[2] Mr. Conroy has never been licensed as a producer either. However, Staff has not alleged that he engaged in any insurance sales activities that went beyond the bounds of permissible support services for Mr. Costa's licensed sales activities.

[3] As of May 4,2009, the limit was increased to $250,000. P.L. 2009, ch. 77.

[4] Also known as Veronica. *(Tr. 121, 240, 242)*

[5] Although the Respondents attempt to distance themselves from the content of the advertisement, explaining that they had expressed dissatisfaction to the broadcaster and tried to get the advertisement modified or withdrawn *(Resp. Br. 4; Tr. 131; Resp. Supp. Exh. 3),* the misrepresentations cited in this Decision and Order were not the source of that dissatisfaction and were never disavowed in their communications with the broadcaster. In that regard, it should also be noted that contrary to Mr. Conroy's implication that they struggled to get the purported 22% return quoted in Mr. Conroy's original interview toned down to 13% because "Nick and I both felt that, you know, 22 percent just sounded just too high. It was a red flag to us" *(Tr. 134),* the real reason they asked for the change was that the product they were overpraising was no longer available. As Mr. Conroy wrote to Nassau Broadcasting, "the program we have which can recover up to 22% of the stock market losses is going away this July 1st." *(Resp. Supp. Exh. 3)*

[6] Or alternatively, that she might have agreed to let CostaConroy take over servicing existing RCM accounts. *(Tr. 121)*

[7] The history of the C.T. account indicates that in some cases they might actually be actively managing their clients' funds, but not in an approptiate way, because annuities are designed to be long-term investments, as the companies' own disclosure materials acknowledge. *(Resp. Supp. Exh. 2 at 20, 60) (page numbering for Supplemental Exhibit 2 follows the PDF version in the Bureau of Insurance electronic docketfiles)*

[8] It appears as though two different substitutions were actually done - "CostaConroy, LLC" for the other firm's full name, and "CostaConroy" for the short form.

[9] Which means that the comparison should not have been raised at all, because as discussed earlier, insurers, unlike banks, are not permitted to

discuss guaranty fund protection when advertising their products. 24-A M.R.S.A. § 4620.

[10] A more meaningful comparison would consider the surplus requirements for insurers, because they (like banks) are actually required to hold assets in an amount significantly exceeding 100% of their liabilities, but the Respondents do not mention this.

[11] This is the product Mr. Costa attempted to sell to C.T. There is no record in the C.T. account files *(Staff Exh. 20 & 21; Resp. Supp. Exh. 3)* that he ever provided any disclosure to C.T. that included a reference to this general investment objective.

[12] As discussed, an earlier version of the advertisement refers to a 22% return. This was based on a different product with a higher bonus percentage, and of course, a correspondingly longer vesting period.

[13] The Respondents argue that the Superintendent should consider the time Mr. Conroy's application remained pending while this proceeding was ongoing, because it is the functional equivalent of a ten-month license suspension. *(Resp. Br. 7 n. 14)* This would be a valid consideration if a temporary suspension of Mr. Conroy's privilege to act as a producer were the appropriate penalty, but his misconduct rises to the level warranting revocation.

SEPTEMBER 28, 2009

MILA KOFMAN
SUPERINTENDENT OF INSURANCE